

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HOSANNA-TABOR EVANGELICAL LUTHERAN:

4 CHURCH AND SCHOOL, :

5 Petitioner :

6 v. : No. 10-553

7 EQUAL EMPLOYMENT OPPORTUNITY :

8 COMMISSION, ET AL. :

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10 Washington, D.C.

11 Wednesday, October 5, 2011

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13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 10:02 a.m.

16 APPEARANCES:

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18 Petitioner.

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22 WALTER DELLINGER, ESQ., Washington, D.C.; for private
23 Respondent.

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25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DOUGLAS LAYCOCK, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	LEONDRA R. KRUGER, ESQ.	
7	On behalf of the Federal Respondent	26
8	ORAL ARGUMENT OF	
9	WALTER DELLINGER, ESQ.	
10	On behalf of the private Respondent	45
11	REBUTTAL ARGUMENT OF	
12	DOUGLAS LAYCOCK, ESQ.	
13	On behalf of the Petitioner	55
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case 10-553, Hosanna-Tabor
5 Evangelical Lutheran Church and School v. The Equal
6 Employment Opportunity Commission.

7 Mr. Laycock.

8 ORAL ARGUMENT OF DOUGLAS LAYCOCK

9 ON BEHALF OF THE PETITIONER

10 MR. LAYCOCK: Mr. Chief Justice, and may it
11 please the Court:

12 The churches do not set the criteria for
13 selecting or removing the officers of government, and
14 government does not set the criteria for selecting or
15 removing officers of the church. That's a bedrock
16 principle, and these Respondents would repudiate it.
17 They no longer seriously argue that Cheryl Perich was
18 not a minister. Instead, they argue that even people
19 who are indisputably ministers can sue their churches on
20 claims that turn on their qualifications, their job
21 performance, and the rules of ministry. They would --

22 JUSTICE GINSBURG: Mr. Laycock, would you
23 clarify one point? You say the church decides who's
24 qualified to be a minister, but, as I understand the
25 facts here, she was never decommissioned as a minister,

1 and, beyond that, she was even recommended by the
2 officials to other parishes to be a commissioned
3 minister. So, it's -- it's odd to say there's any
4 interferences with who is qualified to be a minister,
5 because the church was holding her out as being
6 qualified.

7 MR. LAYCOCK: Well, she was removed from her
8 ministry at Hosanna-Tabor. They do not have to indulge
9 in a vendetta against her and file charges with the
10 synod. And if you look at that recommendation -- it's
11 in the joint appendix -- it is not much of a
12 recommendation. There's excellent, commendable,
13 proficient, and in ministry qualities, she gets
14 proficient. We all know if there's a 5, a 4, and a 3, a
15 3 isn't very good.

16 So, they were not recommending her; they
17 simply weren't pursuing formal charges against her
18 before the -- before the Missouri Synod. And -- and the
19 problems they had were most severe at Hosanna-Tabor. In
20 another congregation that didn't know this history, she
21 might have been able to be effective again. That was
22 for them to decide. They make their own calls.

23 But she was removed at Hosanna-Tabor, which
24 was where the problem was.

25 JUSTICE SOTOMAYOR: Counsel, most of the

1 circuits have recognized a ministerial exception. But
2 they've, in one form or another, created a pretext
3 exception. The reason for that is the situation that
4 troubles me. How about a teacher who reports sexual
5 abuse to the government and is fired because of that
6 reporting?

7 Now, we know from the news recently that
8 there was a church whose religious beliefs centered
9 around sexually exploiting women and, I believe,
10 children. Regardless of whether it's a religious belief
11 or not, doesn't society have a right at some point to
12 say certain conduct is unacceptable, even if religious
13 -- smoking peyote? And once we say that's unacceptable,
14 can and why shouldn't we protect the people who are
15 doing what the law requires, i.e., reporting it?

16 So, how do we deal with that situation under
17 your theory? Under your theory, nothing survives if the
18 individual is a minister, no claim, private claim.

19 MR. LAYCOCK: I think if you look at the
20 court of appeals cases, they have not indulged in
21 pretext inquiries for ministers. The case you present
22 is obviously a difficult case, and I would say two
23 things: We think the appropriate rule should be the
24 government could do many things to force reporting, to
25 penalize people who don't report, but a discharge claim

1 by a minister presents the question why she was
2 discharged, and the court should stay out of that.

3 JUSTICE SOTOMAYOR: The problem with that is
4 that it doesn't take account of the societal interest in
5 encouraging the reporting. And, in fact, if we -- if we
6 define the ministerial exception in the way you want, we
7 take away the incentive for reporting; we actually do
8 the opposite of what society needs.

9 MR. LAYCOCK: I understand that concern, and
10 that was my second point, that if you want to carve out
11 an exception for cases like child abuse where the
12 government's interest is in protecting the child, not an
13 interest in protecting the minister, when you get such a
14 case, we think you could carve out that exception.

15 JUSTICE SOTOMAYOR: How? Give me a
16 theoretical framework for this.

17 MR. LAYCOCK: The -- first you have to
18 identify the government's interest in regulation. If
19 the government's interest is in protecting ministers
20 from discrimination, we are squarely within the heart of
21 the ministerial exception.

22 If the government's interest is something
23 quite different from that, like protecting the children,
24 then you can assess whether that government interest is
25 sufficiently compelling to justify interfering with the

1 relationship between the church and its ministers. But
2 the government's interest is at its nadir when the claim
3 is: We want to protect these ministers as such. We
4 want to tell the churches what criteria they should
5 apply for -- for selecting and removing ministers.

6 JUSTICE ALITO: Mr. Laycock, the ministerial
7 exception is not something new. It has been widely
8 recognized, as Justice Sotomayor mentioned, by the
9 courts of appeals going back 40 years. So, we can see
10 how the recognition of this exception within -- with
11 certain contours has worked out. And how has it worked
12 out over those past 40 years? Have there been a great
13 many cases, a significant number of cases, involving the
14 kinds of things that Justice Sotomayor is certainly
15 rightly concerned about, instances in which ministers
16 have been fired for reporting criminal violations and
17 that sort of thing?

18 MR. LAYCOCK: The only -- I'm not aware of
19 any such case. The one case I am aware of cuts the
20 other way. A minister, a priest accused of sexually
21 abusing children who was fired, sued to get his job
22 back, and the church invoked the ministerial exception,
23 and that case ended. They were able to get rid of him.

24 There is a cert petition pending in which a
25 teacher with a long series of problems in her school

1 called the police about an allegation of sexual abuse
2 that did not happen at the school, did not involve a
3 student of the school, did not involve a parent at the
4 school, someplace else; and -- and called the police and
5 had them come interview a student without any
6 communication with -- with her principal. And the
7 respondents tried to spin that as a case of discharge
8 for reporting sexual abuse. But if you look at the
9 facts, it's really quite different. And those are the
10 only two cases I'm aware of that even approach touching
11 on this problem.

12 JUSTICE KENNEDY: But here what we have is a
13 claim of retaliation, so that she can't even get a
14 hearing. So, we can look at the various tests that are
15 proposed here, and I think it's difficult to formulate
16 the tests, but this can't even be -- be litigated
17 because she is discharged. The allegation is that
18 there's a retaliation for even asking for a hearing
19 where these tests could -- could be applied.

20 MR. LAYCOCK: Well, she can't get a hearing
21 in civil court. She could have had a hearing in the
22 synod before decisionmakers who would have been
23 independent of the local church. This Court has
24 repeatedly said churches can create tribunals for the
25 governance of their officers. The churches --

1 JUSTICE KENNEDY: Again, that -- that could
2 be an argument you could make in the -- in the pretext
3 hearing.

4 MR. LAYCOCK: Well, it's an argument we make
5 in the hearing on whether the ministerial exception
6 applies. You know --

7 JUSTICE KENNEDY: But you're asking for an
8 exemption so these issues can't even be tried.

9 MR. LAYCOCK: Well, we're asking to apply
10 the exemption --

11 JUSTICE KENNEDY: It's almost like a summary
12 -- like a summary judgment argument.

13 MR. LAYCOCK: It was precisely a motion
14 for --

15 JUSTICE KENNEDY: And that's the -- that's
16 the analogy, I think.

17 MR. LAYCOCK: It was a motion for summary
18 judgment.

19 JUSTICE KENNEDY: No, no, no. What she is
20 saying is that you basically gave me summary judgment;
21 you didn't allow me to go to the agency to have a proper
22 test applied. The summary judgment was just an analogy.
23 Forget it.

24 (Laughter.)

25 MR. LAYCOCK: I'm not entirely sure I

1 understand the question. We agree she couldn't go to
2 civil court if she's a minister. She could have gone to
3 the synod. She wasn't cut off from that. She decided
4 not to do it.

5 JUSTICE KENNEDY: But I'm saying if there
6 are some substantial interests the church has that can
7 be litigated in EEOC hearing. She was fired simply for
8 asking for a hearing.

9 MR. LAYCOCK: I understand that. But once
10 you start to litigate these cases --

11 JUSTICE SCALIA: I think your point is that
12 it's -- it's none of the business of the government to
13 decide what the substantial interest of the church is.

14 MR. LAYCOCK: That's one of my points, maybe
15 the most important of my points. These -- these
16 decisions are committed to the churches by separation of
17 church and state, but -- but beyond that, once the --
18 this process of trying to identify, we can decide some
19 issues in this case and we won't get to other issues in
20 this case doesn't work. As Justice Breyer said in a
21 First Circuit opinion, that requires more and more
22 finely spun distinctions that create entanglement rather
23 than avoid it, Universidad de Bayamon.

24 CHIEF JUSTICE ROBERTS: Counsel, you
25 referred to the ministerial exception, but, of course,

1 your position extends beyond ministers. How do we --
2 how do we decide who's covered by the ministerial
3 exception and who is not?

4 MR. LAYCOCK: Right. Here I think it's very
5 easy. She's a commissioned minister in the church. She
6 holds ecclesiastical office. She teaches the religion
7 class.

8 CHIEF JUSTICE ROBERTS: Well, let's say it's
9 a teacher who teaches only purely secular subjects but
10 leads the class in grace before lunch. Is that somebody
11 who would be covered by the ministerial exception?

12 MR. LAYCOCK: The lower courts have said
13 that person is not covered. And we are not challenging
14 that rule. Obviously, there has to be some kind of
15 quantitative threshold. There will be line-drawing
16 problems. But --

17 JUSTICE GINSBURG: But I thought your
18 position would be if she's a commissioned minister, as
19 distinguished from a teacher who conducts grace or takes
20 the class to chapel. I'm -- I take it the Chief is
21 asking for somebody in this -- that you categorize as a
22 minister, although mostly she's a math teacher. You
23 would say the extent of her religious duties don't
24 matter; what counts is that she is commissioned as a
25 minister.

1 MR. LAYCOCK: If she's commissioned as a
2 minister and if that is not a sham, then we think that
3 makes her a minister. If you have a Jesuit teaching
4 physics, we think he is still a priest. And he's still
5 controlled by the ministerial exception.

6 JUSTICE SCALIA: Can we try whether it's a
7 sham? I thought you said we couldn't try whether it's a
8 sham.

9 MR. LAYCOCK: Well --

10 JUSTICE SCALIA: Is a sham different from a
11 pretext?

12 (Laughter.)

13 MR. LAYCOCK: Well, I -- I certainly meant
14 something different from a pretext. A sham is more
15 extreme, and it goes to a different point in the
16 analysis. You can decide whether she's really a
17 minister. That's the threshold question that courts
18 must decide. And if we have a person with a ministerial
19 title who is doing nothing at all religious or
20 ministerial, we have a church that tries to say everyone
21 who ever worked for us or ever may is a minister, the
22 courts can deal with those cases if they --

23 JUSTICE SCALIA: So, you would allow the --
24 the government courts to probe behind the church's
25 assertion that this person is a minister? You would

1 allow that, right? But once it is determined that the
2 person is a minister, you would not allow the government
3 to decide whether the firing was a pretext?

4 MR. LAYCOCK: That's right.

5 CHIEF JUSTICE ROBERTS: Well, different
6 churches have different ideas about who's a minister.
7 There are some churches who think all of our adherents
8 are ministers of our faith. Now, does that mean that
9 everybody who's a member of that church qualifies as a
10 minister because that is part of the church's belief?

11 MR. LAYCOCK: I don't -- I don't think it
12 means that. And, again, I -- I think courts have some
13 capacity to look at what this employee is actually
14 doing, and if he's not performing any of the functions
15 of a religious leader, if he's not teaching the faith,
16 then --

17 CHIEF JUSTICE ROBERTS: Every one of our
18 adherents stands as a witness to our beliefs. And
19 that -- you know, not every church is hierarchical in
20 terms of different offices.

21 MR. LAYCOCK: I understand that. And lay
22 people in many churches are expected to be witnesses,
23 right. So --

24 JUSTICE KENNEDY: Lay people in many --

25 MR. LAYCOCK: Lay people have to be

1 witnesses. The fact that you're expected to witness to
2 the faith when the occasion arises doesn't make you --
3 doesn't make you a minister.

4 JUSTICE KENNEDY: But the answer you gave to
5 the Chief Justice seems to me to be this case. I was
6 interested. I didn't know about this -- this minister
7 capacity in this particular church. And as the Chief
8 Justice indicates, many churches don't have -- some
9 churches don't have what we think of as professional or
10 full-time ministers at all. They're all ministers.

11 MR. LAYCOCK: Right.

12 JUSTICE KENNEDY: And you said, well, that
13 -- that can be litigated, that can be investigated. And
14 I suppose when we do that we say, how many secular
15 functions do you perform? And that's what this case is.
16 But you don't -- you don't even want that issue to be
17 tried. You say that issue can't even be explored.

18 MR. LAYCOCK: How -- you know, how many
19 religious functions you perform can be explored. The
20 issue that can be explored is whether she's a minister.
21 We think she clearly is. The issue --

22 JUSTICE SCALIA: And that term is a legal
23 term. What constitutes a minister is -- is decided by
24 the law, not by the church, right?

25 MR. LAYCOCK: That is correct.

1 JUSTICE SCALIA: Okay.

2 MR. LAYCOCK: That is correct.

3 JUSTICE KAGAN: Is that correct?

4 JUSTICE ALITO: But I thought with a lot of
5 deference to the church's understanding of whether
6 someone is a minister.

7 MR. LAYCOCK: We think there should be
8 deference to good-faith understandings, but we are not
9 arguing for a rule that would enable an organization to
10 fraudulently declare that everyone is a minister when
11 it's not true. You decided the Tony Alamo case 20 years
12 ago. We're not defending that.

13 JUSTICE SCALIA: What makes it not true?
14 What is the legal definition of "minister"? What is it?
15 That you have to lead the congregation in their
16 religious services or what? What is it?

17 MR. LAYCOCK: We think -- we think you -- if
18 you teach the doctrines of the faith, if that is part of
19 your job responsibilities, to teach the doctrines of the
20 faith, we think you're a minister.

21 JUSTICE KAGAN: Well, does that mean that
22 any religious teacher is a minister under your theory?
23 So, you know, there may be teachers in religious schools
24 who teach religious subjects, not mathematics, but are
25 not ordained or commissioned in any way as ministers.

1 Are they ministers?

2 MR. LAYCOCK: If you're ordained or
3 commissioned, that makes it very easy. If you teach the
4 religion class, you teach an entire class on religion,
5 we think you ought to be within this rule.

6 JUSTICE GINSBURG: I thought that it was
7 part of -- it was agreed that there was no fact dispute
8 that what she did, her duties at the school, did not
9 change from when she was a contract teacher, and
10 therefore not a minister, and then she takes courses and
11 is qualified to become a minister, but what she's doing
12 at the school is the very same thing. And I thought
13 that was the basis for the -- the decision that we're
14 reviewing, that there was no difference at all in what
15 she did before she was commissioned and after she was
16 commissioned.

17 MR. LAYCOCK: That -- that's what the Sixth
18 Circuit said. What they -- what -- you know, I don't
19 think that changes the nature of the functions that were
20 being performed. But what's relevant to that, that they
21 neglected was these noncommissioned -- these teachers
22 who were not commissioned ministers, the lay and
23 contract teachers, were fill-ins only when no called
24 teacher was available, and Perich identifies only one
25 person for 1 year.

1 JUSTICE GINSBURG: But you're isolating one
2 parish, but there was something in one of these briefs
3 that said the majority of the teachers in the Lutheran
4 schools -- let's see where it was. I think it was --

5 JUSTICE KENNEDY: While Justice Ginsburg is
6 looking, I had -- I had the same impression, that
7 whether you're commissioned or not commissioned doesn't
8 necessarily mean you can't teach a religious class.

9 MR. LAYCOCK: Well, it doesn't --

10 JUSTICE KENNEDY: And again, that's
11 something that -- that can be heard. You don't even
12 want to hear it.

13 MR. LAYCOCK: That's -- it is not uncommon,
14 even with ordained ministers, it's not uncommon among
15 Protestants, to recognize an ordination from a different
16 denomination that has similar teachings. So, when --
17 when they can't find a called minister to cover a class
18 and they hire another Christian from another
19 conservative Protestant denomination, they say: While
20 you teach here, you're required to teach Lutheran
21 doctrine.

22 JUSTICE SOTOMAYOR: I'm sorry. Going back
23 to the question Justice Kagan asked you, if one of these
24 Protestant teachers that's not Lutheran led the
25 cafeteria prayer, as they are required to, you're now

1 saying that the law must recognize that lay teacher as a
2 minister and apply the ministerial exception, even
3 though the religion doesn't consider her a minister?

4 MR. LAYCOCK: I -- I didn't say that. I
5 said --

6 JUSTICE SOTOMAYOR: Well, but that was the
7 answer you gave. If she taught a religious class --

8 MR. LAYCOCK: If she teaches a religion
9 class, not if she merely leads a prayer.

10 JUSTICE SOTOMAYOR: So, what is your
11 definition of "minister"? Maybe we need to find out.
12 So, it's not a title. It's really -- the only
13 function -- you're saying anyone who teaches religion?

14 MR. LAYCOCK: I think if you teach the
15 religion class, you're clearly a minister. But if you
16 are -- if you hold an ecclesiastical office, that makes
17 this a very easy --

18 JUSTICE SCALIA: Okay, but this is -- you're
19 saying a fortiori, but basically you'd be here anyway
20 even if she hadn't been ordained; right?

21 MR. LAYCOCK: That's correct.

22 JUSTICE SCALIA: Okay.

23 JUSTICE BREYER: What is your take -- what
24 is your reaction to a less dramatic kind of holding?
25 Suppose we were to say the truth is that the particular

1 individual here does have some religious obligations in
2 teaching and quite a lot that aren't. So, she's sort of
3 on the edge. At the same time, there is a statute
4 which, whether it applies or not, you could take the
5 principle, and it says a religious organization like
6 your client may require that she conform to the
7 religious tenets of the organization.

8 So, Congress focused on this. And the
9 district court looks at it, and suppose it were to
10 decide: That's true, but there's no evidence here at
11 all that religious tenets had anything to do with her
12 being dismissed. No one mentioned them. She didn't
13 know about them. I didn't until I read the very
14 excellent brief filed by the Lutherans that explained
15 the nature of taking civil suits. No one said that to
16 her, whether it was in someone's mind or not. She found
17 out on motion for summary judgment. So, therefore, this
18 wasn't an effort by the religious organization to
19 express its tenets. She was dismissed.

20 She could have -- they could have had a
21 defense, but it doesn't apply, and, therefore, even
22 though she's sort of like a minister, she loses.

23 What are your objections to that?

24 MR. LAYCOCK: Well, my first objection is I
25 don't think those are remotely the facts here. You

1 know, this teaching is clearly stated, embodied in an
2 elaborate dispute resolution process. You don't ask
3 for --

4 JUSTICE BREYER: Did anyone mention that to
5 her?

6 MR. LAYCOCK: Indeed.

7 JUSTICE BREYER: Really? My law clerk
8 couldn't find it. Can you tell me where -- where
9 someone did say the reason we're dismissing you is
10 because of our religious doctrine that you cannot bring
11 civil suits?

12 MR. LAYCOCK: Page 55 of the joint appendix,
13 which is the letter that -- where they tell her that
14 they're going to recommend rescission of her call, they
15 say, because -- because of insubordination and because
16 you threatened to sue us.

17 JUSTICE BREYER: I mean, does anyone explain
18 to her, which she might not have known, that this is a
19 religious doctrine that you are supposed to go to the
20 synod or whatever, and you're not supposed to go to
21 court?

22 MR. LAYCOCK: She --

23 JUSTICE BREYER: Of course, they wanted to
24 fire her because she threatened to sue them. But what
25 I'm wondering is, is there anywhere before the motion

1 for summary judgment where someone explains to her, our
2 motivation here is due to our religious tenet?

3 MR. LAYCOCK: You don't assess the
4 importance of a doctrine by asking the person --

5 JUSTICE BREYER: No, no. I understand that.
6 But I went on a different piece of -- matter, that the
7 people who were involved in this were doing it for
8 religious rather than civil reasons. I'm just wondering
9 what the evidence is that they knew there was such a
10 doctrine, that they were motivated by the religious
11 doctrine, and that they expressed that to her. I
12 just -- I'll look at page 55. Is there anything else I
13 should look at?

14 MR. LAYCOCK: The principal --

15 JUSTICE GINSBURG: Is it -- is it in the
16 handbook? I mean, one of the objections -- if this --
17 if this is a rule that's going to bind the teachers,
18 then you would expect to find it in the handbook. But
19 the handbook doesn't tell her, if you complain to the
20 EEOC about discrimination, then you will be fired.

21 MR. LAYCOCK: Well, I don't know if it does
22 or it doesn't, because the handbook is not in the record
23 except for a short excerpt. But she knew about this
24 rule.

25 JUSTICE ALITO: Well, Mr. Laycock, could

1 you --

2 JUSTICE BREYER: I'm looking for a citation
3 in the record? I just wonder, is there anything you
4 want me to read other than page 55?

5 MR. LAYCOCK: Yes. The principal in her
6 deposition says: The minute she said she might sue, I
7 said you can't do that; you're a called teacher.

8 The testimony is the board talked about it
9 at their meeting on February 22nd. I think that's also
10 in the principal's deposition. The president of the
11 congregation, who did not deal directly with Perich,
12 said -- said it was one of the first things that he
13 thought about. Perich was a lifelong Lutheran. She
14 worked 11 years in Lutheran schools. She had these
15 eight theology courses. It's simply not credible that
16 she didn't know about this doctrine.

17 JUSTICE ALITO: Mr. Laycock, doesn't this
18 inquiry illustrate the problems that will necessarily
19 occur if you get into a pretext analysis? The question
20 of was she told that she had violated the church's
21 teaching about suing in a civil tribunal? Well, that
22 depends. The significance of -- let's assume she wasn't
23 told. The significance of that depends on how central a
24 teaching of Lutheranism this is.

25 It's like -- suppose a Catholic priest got

1 married and the bishop said, I'm removing you from your
2 parish because of your conduct. Now, there wouldn't be
3 much question about why that was done. So, you'd have
4 to get in, what did Martin Luther actually say about --
5 about suing the church or other Christians in a civil
6 tribunal? Is this really a central tenet of
7 Lutheranism? Isn't that the problem with going into
8 this pretext analysis?

9 MR. LAYCOCK: That's just part of the
10 problem. You've got to figure, how does this doctrine
11 work? How important is it? How does it apply to the
12 facts of this case? How does it interact with other
13 doctrines?

14 JUSTICE GINSBURG: Mr. Laycock, you, in
15 order, I think, to dispel the notion that nothing is
16 permitted, in your reply brief you say there are many
17 suits that could be brought that would not be
18 inappropriate. And I think it's on page 20 of your
19 reply brief. But I don't understand how those would
20 work if the policy is you're a minister; if you have
21 quarrels with the church or a co-worker, we have our own
22 dispute resolution, and you don't go outside.

23 But you say tort arising from unsafe working
24 conditions. Suppose one of these commissioned workers
25 said, I think that there are unsafe working conditions

1 and I'm going to complain to the Occupational Health and
2 Safety Agency. And wouldn't she get the same answer:
3 This has to be solved in-house. You don't go to an
4 agency of the state.

5 Why -- I don't follow why the tort claim
6 based on unsafe working conditions would not fall under
7 the same ban on -- keeping disputes in-house?

8 MR. LAYCOCK: Well, it may or it may not.
9 The rule on internal dispute resolution is most
10 emphatically and clearly stated as applying to disputes
11 over fitness for ministry, and a tort claim may not be a
12 dispute over fitness for ministry, but what --

13 JUSTICE GINSBURG: But I thought the reason
14 that she was unfit for the ministry was that she went
15 outside the house.

16 MR. LAYCOCK: That's right. Yes.

17 JUDGE GINSBURG: So, in all of these cases,
18 you go outside the church, you go to the government,
19 then you have a --

20 MR. LAYCOCK: What we say in the passages in
21 the reply brief that you're looking at is the legal
22 doctrine, the ministerial exception as a matter of law,
23 does not apply unless the dispute is over whether I get
24 the job back, job qualifications, job performance, or
25 rules of ministry. The church's rule --

1 JUSTICE GINSBURG: But she could -- she
2 could be -- for any of these things, she could be
3 disciplined, fired because she complained outside the
4 house.

5 MR. LAYCOCK: She could be. And her tort --
6 the tort claim would proceed. We think the retaliation
7 claim should not proceed.

8 JUSTICE GINSBURG: The tort claim could
9 proceed, and then she would get damages, and that would
10 be all right?

11 MR. LAYCOCK: She would get damages for the
12 tort. She would not get damages for the loss of her
13 position.

14 JUSTICE GINSBURG: Did you say -- did I
15 understand you before, in response to Justice Sotomayor
16 and Justice Scalia, that even if she were merely a
17 contract teacher, the fact that she teaches religion
18 classes would be enough for her to qualify for the
19 ministerial exception?

20 MR. LAYCOCK: Yes. And the fact that she's
21 a commissioned minister is the clincher in this case.
22 Teaching --

23 JUSTICE GINSBURG: Is the clincher in this
24 case, but even -- I think you answered if she were not a
25 commissioned minister, she's teaching the faith;

1 therefore, she can be fired, and it doesn't matter
2 whether she's commissioned. So, the commission is
3 irrelevant. It's -- it's her job duties that count.

4 MR. LAYCOCK: Job duties are enough. The
5 commission is not irrelevant. It is the clincher.

6 JUSTICE GINSBURG: Now, it was certainly for
7 some purposes. I mean, if every teacher who teaches
8 religion and math and a lot of other things said, I'm a
9 minister and I'm entitled to the parsonage allowance on
10 my income tax return, certainly that's something that a
11 government agent would review.

12 MR. LAYCOCK: Well, they do review it there.
13 I think there's a -- I don't think the Lutherans have
14 any problems with the IRS on that. But, yes, that is a
15 context where they review these questions.

16 If I could reserve a few minutes for
17 rebuttal, I would be grateful.

18 CHIEF JUSTICE ROBERTS: You may.

19 Ms. Kruger.

20 ORAL ARGUMENT OF LEONDRA R. KRUGER

21 ON BEHALF OF THE FEDERAL RESPONDENT

22 MS. KRUGER: Mr. Chief Justice, and may it
23 please the Court:

24 The freedom of religious communities to come
25 together to express and share religious belief is a

1 fundamental constitutional right. But it's a right that
2 must also accommodate important governmental interests
3 in securing the public welfare. Congress has not
4 unconstitutionally infringed Petitioner's freedom in
5 this case by making it illegal for it to fire a fourth
6 grade teacher in retaliation for asserting her statutory
7 rights.

8 CHIEF JUSTICE ROBERTS: Is the position of
9 the United States that there is a ministerial exception
10 or that there is not a ministerial exception?

11 MS. KRUGER: Mr. Chief Justice, if the
12 ministerial exception is understood as a First Amendment
13 doctrine that governs the adjudication of disputes
14 between certain employees and their employers, we agree
15 that that First Amendment doctrine exists.

16 CHIEF JUSTICE ROBERTS: Nothing to do with
17 respect to the ministers. In other words, is there a
18 ministerial exception distinct from the right of
19 association under the First Amendment?

20 MS. KRUGER: We think that the ministerial
21 exception is one that incorporates the right of
22 association as well as the rights under the religion
23 clauses.

24 CHIEF JUSTICE ROBERTS: Is there anything
25 special about the fact that the people involved in this

1 case are part of a religious organization?

2 MS. KRUGER: We think that the -- the
3 analysis is one that the Court has -- has elaborated in
4 other cases involving similar claims to autonomy,
5 noninterference --

6 CHIEF JUSTICE ROBERTS: Is that a "no"? You
7 say it's similar to other cases. Expressive
8 associations -- a group of people who are interested in
9 labor rights have expressive associations. Is the issue
10 we are talking about here in the view of the United
11 States any different than any other group of people who
12 get together for an expressive right?

13 MS. KRUGER: We think the basic contours of
14 the inquiry are not different. We think how the inquiry
15 plays out in particular cases may be --

16 JUSTICE SCALIA: That's extraordinary.

17 MS. KRUGER: I --

18 JUSTICE SCALIA: That's extraordinary.

19 MS. KRUGER: Well, I --

20 JUSTICE SCALIA: We're talking here about
21 the Free Exercise Clause and about the Establishment
22 Clause, and you say they have no special application
23 to --

24 MS. KRUGER: The contours -- but the inquiry
25 that the Court has set out as to expressive associations

1 we think translate quite well to analyzing the claim
2 that Petitioner has made here. And for this reason, we
3 don't think that the job duties of a particular
4 religious employee in an organization are relevant to
5 the inquiry.

6 JUSTICE SCALIA: There's nothing in the
7 Constitution that explicitly prohibits the government
8 from mucking around in a labor organization. Now, yes,
9 you -- you can by an extension of First Amendment rights
10 derive such a -- but there, black on white in the text
11 of the Constitution are special protections for
12 religion. And you say that makes no difference?

13 MS. KRUGER: Well, Justice Scalia, if I may,
14 I don't understand Petitioner from the first half of his
15 argument to have disputed this basic point, which is
16 that the contours of the First Amendment doctrine at
17 issue here will depend on a balancing of interests.
18 That is the only way, I think, that Petitioner can
19 differentiate a generally neutrally applicable
20 application of anti-discrimination law with respect to a
21 church's choice of those who would govern it and a
22 church's retaliation against a teacher who would report
23 child abuse to the authorities.

24 JUSTICE SCALIA: I think that the balancing
25 of interests is different, according to the Petitioner,

1 when one of the interests is religion. And you're just
2 denying that. You say: We balance religion the way we
3 balance labor organizations.

4 MS. KRUGER: Well, Justice Scalia --

5 JUSTICE SCALIA: That's certainly not what
6 the Petitioner is saying.

7 MS. KRUGER: Here is where I think what the
8 core of the insight of the ministerial exception as it
9 was originally conceived is, which is that there are
10 certain relationships within a religious community that
11 are so fundamental, so private and ecclesiastical in
12 nature, that it will take an extraordinarily compelling
13 governmental interest to justify interference. Concerns
14 with health or safety, for example. But the
15 government's general interest in eradicating
16 discrimination in the workplace will not be sufficient
17 to justify the burden.

18 JUSTICE ALITO: Well, do you dispute the
19 proposition that one of the central concerns of the
20 Establishment Clause was preventing the government from
21 choosing ministers? When there was an established
22 church, the government chose the ministers or had a say
23 in choosing the ministers. And the Establishment
24 Clause, many argue, was centrally focused on eliminating
25 that governmental power. Now, do you dispute that?

1 MS. KRUGER: No, Justice Alito, we don't
2 dispute it. What we do dispute is that what is
3 happening when the government applies generally
4 applicable anti-retaliation law to a religious employer
5 is that it is choosing a minister on behalf of the
6 church. What it is instead doing is preventing
7 religious employers, like any other employers, from
8 punishing their employees for threatening to bring
9 illegal conduct to the attention of --

10 JUSTICE BREYER: Suppose that's the central
11 tenet. Suppose you have a religion and the central
12 tenet is: You have a problem with what we do, go to the
13 synod; don't go to court. And that applies to civil
14 actions of all kinds. All right? So, would that not be
15 protected by the First Amendment?

16 MS. KRUGER: Justice Breyer, two points --

17 JUSTICE BREYER: Your view is it's not
18 protected?

19 MS. KRUGER: It's not protected. But I'd
20 like -- I think there are two responses that are
21 relevant to how this Court will resolve that question in
22 this case.

23 First of all, if the Court were to accept
24 the rule that Petitioner would ask it to adopt, we would
25 never ask the question whether or not the church has a

1 reason for firing an employee that's rooted in religious
2 doctrine. Their submission is that the hiring and
3 firing decisions with respect to parochial school
4 teachers and with respect to priests is categorically
5 off limits. And we think that that is a rule that is
6 insufficiently attentive to the relative public and
7 private interests at stake, interests that this Court
8 has repeatedly recognized are important in
9 determining freedom of association claims.

10 JUSTICE BREYER: So that, in fact, if they
11 want to choose to the priest, you could go to the
12 Catholic Church and say they have to be women. I mean,
13 you couldn't say that. That's obvious. So, how are you
14 distinguishing this?

15 MS. KRUGER: Right. We think that the --
16 both the private and public interests are very different
17 in the two scenarios. The government's general interest
18 in eradicating discrimination in the workplace is simply
19 not sufficient to justify changing the way that the
20 Catholic Church chooses its priests based on gender
21 roles that are rooted in religious doctrine.

22 But the interests in this case are quite
23 different. The government has a compelling and indeed
24 overriding interest in ensuring that individuals are not
25 prevented from coming to the government with information

1 about illegal conduct.

2 JUSTICE ALITO: When you say that, are you
3 not implicitly making a judgment about the relative
4 importance of the Catholic doctrine that only males can
5 be ordained as priests and the Lutheran doctrine that a
6 Lutheran should not sue the church in civil courts? I
7 don't see any distinction between -- I can't reconcile
8 your position on those two issues without coming to the
9 conclusion that you think that the Catholic doctrine is
10 older, stronger, and entitled to more respect than the
11 Lutheran doctrine.

12 MS. KRUGER: No, we're not -- we're not
13 drawing distinctions between the importance of a
14 particular religious tenet in a system of religious
15 belief. But the difference is that the government has
16 a, indeed, foundational interest in ensuring, as a
17 matter of preserving the integrity of the rule of law,
18 that individuals are not punished for coming --

19 JUSTICE BREYER: You're saying that going to
20 church -- sorry -- that going to court is a more
21 fundamental interest than a woman obtaining the job that
22 she wants, which happens in this case to be a Catholic
23 priest. But that's the distinction you're making.

24 MS. KRUGER: I am drawing a distinction
25 between --

1 JUSTICE BREYER: Well, why? I don't know
2 why that doesn't -- I mean, you may be right, but it
3 isn't obvious to me that the one is the more important
4 than the other.

5 MS. KRUGER: The government's interest in
6 preventing retaliation against those who would go to
7 civil authorities with civil wrongs is foundational to
8 the rule of law.

9 JUSTICE KAGAN: Ms. Kruger, if I could just
10 clarify for a second there, because you're now sounding
11 as though you want to draw a sharp line between
12 retaliation claims and substantive discrimination
13 claims, and I didn't get that from your brief. So, is
14 that, in fact, what you're saying?

15 MS. KRUGER: I think that there is an
16 important distinction to be made between the
17 government's general interest in eradicating
18 discrimination from the workplace and the government's
19 interest in ensuring that individuals are not chilled
20 from coming to civil authorities with reports about
21 civil wrongs.

22 But if I could continue, I think that the --

23 JUSTICE KAGAN: So, are you willing to
24 accept the ministerial exception for substantive
25 discrimination claims, just not for retaliation claims?

1 MS. KRUGER: I don't think that those are
2 the only two sets of inquiries that are important in the
3 balancing. And if I could continue, I think the
4 government --

5 CHIEF JUSTICE ROBERTS: I'm sorry. That was
6 a yes -- I think that question can be answered yes or
7 no.

8 MS. KRUGER: I think that that doesn't -- I
9 think the answer is no, in part because that doesn't
10 fully account for all of the public and private
11 interests at stake. The government's interest extends
12 in this case beyond the fact that this is a retaliation
13 to the fact that this is not a church operating
14 internally to promulgate and express religious belief
15 internally. It is a church that has decided to open its
16 doors to the public to provide the service, socially
17 beneficial service, of educating children for a fee, in
18 compliance with State compulsory education laws.

19 And this Court has recognized in cases like
20 Bob Jones that church-operated schools sit in a
21 different position with respect to the -- the
22 permissible scope of governmental regulations than
23 churches themselves do.

24 JUSTICE SCALIA: Even with respect to their
25 religion classes and their theology classes? It's

1 extraordinary.

2 MS. KRUGER: Well, the government's --

3 JUSTICE SCALIA: Just because -- just
4 because you have to comply with State education
5 requirements on secular subjects, your -- who you pick
6 to -- to teach theology or to teach religion has to
7 be -- has to be subject to State control?

8 MS. KRUGER: Justice Scalia, to be clear,
9 the government's interest in this case is not in
10 dictating to the church-operated school who it may
11 choose to teach religion classes and who it may not. It
12 is one thing and one thing only, which is to tell the
13 school that it may not punish its employees for
14 threatening to report civil wrongs to civil authorities.
15 That is an interest that we think overrides the burden
16 on the association's religious message about the virtues
17 of internal dispute resolution as opposed to court
18 resolution.

19 CHIEF JUSTICE ROBERTS: So, you're making --
20 you're making a judgment about how important a
21 particular religious belief is to a church. You're
22 saying -- this may just be the same question Justice
23 Alito asked -- but you're saying: We don't believe the
24 Lutheran Church when it says that this is an important
25 and central tenet of our faith.

1 MS. KRUGER: No, absolutely not, Mr. Chief
2 Justice. We do not dispute -- when they assert that
3 it's an important tenet, we assume its validity, we
4 assume that they are sincere in that religious belief.
5 But just as in United States v. Lee, that sincere
6 religious belief was not sufficient to warrant an
7 exemption from generally applicable tax laws, as in Bob
8 Jones, or --

9 CHIEF JUSTICE ROBERTS: On the other hand,
10 the -- the belief of the Catholic Church that priests
11 should be male only -- you do defer to that, even if the
12 Lutherans say, look, our dispute resolution belief is
13 just as important to a Lutheran as the all-male clergy
14 is to a Catholic.

15 MS. KRUGER: Yes. But that's because the
16 balance of relative public and private interests is
17 different in each case.

18 JUSTICE KAGAN: Do you believe, Ms. Kruger,
19 that a church has a right that's grounded in the Free
20 Exercise Clause and/or the Establishment Clause to
21 institutional autonomy with respect to its employees?

22 MS. KRUGER: We don't see that line of
23 church autonomy principles in the Religion Clause
24 jurisprudence as such. We see it as a question of
25 freedom of association. We think that this case is

1 perhaps one of the cases --

2 JUSTICE KAGAN: So, this is to go back to
3 Justice Scalia's question, because I too find that
4 amazing, that you think that the Free -- neither the
5 Free Exercise Clause nor the Establishment Clause has
6 anything to say about a church's relationship with its
7 own employees.

8 MS. KRUGER: We think that this is one of
9 the cases that Employment Division v. Smith may have
10 been referring to when it referred to free association
11 claims that are reinforced by free exercise concerns.
12 It's certainly true that the association's claim to
13 autonomy in this case is one that is deeply rooted. And
14 concerns about how it exercises its religion -- those
15 two things merge in some ways in that respect. But --

16 JUSTICE SCALIA: I don't think they merge at
17 all. Smith didn't involve employment by a church. It
18 had nothing to do with who the church could employ. I
19 don't -- I don't see how that has any relevance to this.

20 I would -- I didn't understand your answer
21 to the Chief Justice's question. You -- you say that
22 there were different institutional values or government
23 values involved with respect to a -- to a Catholic
24 priest than there is with respect to this Lutheran
25 minister. Let's assume that a Catholic priest is -- is

1 removed from his duties because he married, okay?
2 And -- and he claims: No, that's not the real reason;
3 the real reason is because I threatened to sue the
4 church. Okay? So, that reason is just pretextual.

5 Would you -- would you allow the government
6 to go -- go into the -- into the dismissal of the
7 Catholic priest to see whether indeed it -- it was
8 pretextual?

9 MS. KRUGER: I think the answer is no,
10 Justice Scalia --

11 JUSTICE SCALIA: Why?

12 MS. KRUGER: -- but that is the --

13 JUSTICE SCALIA: Why is that any different
14 from the Lutheran minister?

15 MS. KRUGER: I would begin with looking at
16 the burdens on association under the balancing test. I
17 think that the core of the understanding of the
18 ministerial exception, as it was elaborated in the lower
19 courts, is that there is a fundamental difference
20 between governmental regulation that operates to
21 interfere with the relationship between a church and
22 those who would govern it, those who would preach the
23 word to the congregations, those who would administer
24 its sacraments, on the one hand, and the more public
25 relationship between a church and a school teacher and

1 others that provide services to the public at large.

2 JUSTICE SCALIA: I think that's saying
3 nothing different than what the Chief Justice suggests,
4 that you think the one is more -- is more important to
5 -- to Catholics than the other is to Lutherans.

6 MS. KRUGER: I don't think it's a question
7 of the importance of either function to the -- the
8 religious association. It's a question of the realm
9 of permissible governmental regulation.

10 JUSTICE BREYER: Yes, but then you have to
11 say that it's more important to let people go to court
12 to sue about sex discrimination than it is for a woman
13 to get a job. I can't say that one way or the other.
14 So -- so, I'm stuck.

15 And since I'm really -- this is tough and
16 I'm stuck on this, I don't see how you can avoid going
17 into religion to some degree. You have to decide if
18 this is really a minister, for example, and what kind of
19 minister. That gets you right involved. Or if you're
20 not going to do that, you're going to go look to see
21 what are their religious tenets? And that gets you
22 right involved.

23 I just can't see a way of getting out of
24 something -- of getting out of the whole thing. I don't
25 see how to do it. So, suppose you said in case of doubt

1 like that, we'll try what Congress suggested. And now
2 we have here a borderline case of ministry, not the
3 heartland case. So, you say, all right, where you have
4 a borderline case the constitutional issue goes away,
5 and what Congress said is okay. So, now what you have
6 to prove is you have to prove that -- the church has to
7 show that the applicant was disciplined, or whatever,
8 because she didn't conform to the religious tenets. All
9 right? That's what they have to show.

10 And I'm sorry; they maybe only make a prima
11 facie case, but they got to show it, and if they don't
12 show that there was at least some evidence to that
13 effect and that somebody knew about the religious tenet
14 and there was something like that -- maybe it's in the
15 air, as is obvious with Justice Alito's question, but
16 where it isn't in the air, you'd have to make a showing.

17 Now -- now, I see that's an interference,
18 but I don't see how you avoid an interference someplace
19 or the other. Otherwise, you're going to get into who
20 is a minister.

21 So, what's the answer to this dilemma? At
22 the moment I'm making an argument for following what
23 Congress said, go back and try it that way, and if they
24 can show in this case and she shows in this case nobody
25 ever thought of the religious tenet, nobody told me,

1 they didn't read it, then she's going to win. And if
2 they come in and show that they really did this because
3 of their religious tenet, they'll win. What about that?

4 MS. KRUGER: Justice Breyer, I think that
5 that is a perfectly appropriate way to come at this
6 case, although it skips over sort of the initial
7 inquiry, which is into whether or not the application of
8 the regulation to the particular employment relationship
9 results in an unwarranted interference.

10 JUSTICE BREYER: Well, it does have the
11 virtue of deciding a statutory question before a tough
12 constitutional question. And I agree, with what we
13 sometimes do, that seems bizarre, but I thought that was
14 the basic rule.

15 MS. KRUGER: I think that that's absolutely
16 right, Justice Breyer. And I think the next question
17 becomes, with respect to adjudicating a particular case,
18 whether deciding the case would require the court to
19 decide disputed matters of religious doctrine or to
20 second-guess essentially subjective --

21 JUSTICE ALITO: Well, if -- if the plaintiff
22 proceeded that way, would she be entitled to -- I assume
23 she would -- introduce testimony by experts on
24 Lutheranism, theologians, professors of religion about
25 how the -- about this -- this tenet, and it isn't

1 really -- they might say, well, it's really not that
2 strong, and it once was, but it's faded, and it's not --
3 it's not widely enforced.

4 And then you'd have experts on the other
5 side, and you'd have a court and a lay jury deciding how
6 important this really is to Lutherans. Is that how that
7 would play out?

8 MS. KRUGER: No, it's not how it would play
9 out.

10 JUSTICE ALITO: How are you going to avoid
11 that? I just don't see it.

12 MS. KRUGER: Any inquiry into the validity
13 of a particular religious doctrine is simply irrelevant
14 to the adjudication of the dispute, which is designed to
15 find out just one thing, which is whether the --

16 JUSTICE ALITO: No, it's not irrelevant.
17 I've seen dozens and dozens and dozens of pretext cases,
18 and in practically every pretext case that I've seen,
19 one of the central issues is whether the reason that was
20 proffered by the employer is the real reason, is an
21 important reason for that, for that employer, and
22 whether they really think it's important and whether
23 they apply it across the board. That's almost always a
24 big part of the case.

25 And once you get into that, you're going to

1 get into questions of -- of religious doctrine. I just
2 don't see it.

3 Let me give you an example of a real case.
4 A nun wanted to be -- wanted a tenured position teaching
5 canon law at Catholic University, and she claimed that
6 she was denied tenure because of her -- because of her
7 gender.

8 Now, there the university might argue, no,
9 she was -- and did argue -- she's denied tenure because
10 of the quality of her -- of her scholarship. And, okay,
11 now, if you try that pretext issue, the issue is going
12 to be what is the real quality of her canon law
13 scholarship? And you're going to have the judge and the
14 jury decide whether the particular writings on canon law
15 are -- make a contribution to canon law scholarship.
16 How can something like that be tried, without getting
17 into religious issues?

18 MS. KRUGER: If the only way that the
19 plaintiff has to show that that may not have been the
20 employer's real reason was a subjective judgment about
21 the quality of canon law scholarship, then judgment has
22 to be entered for the employer, because the plaintiff
23 has no viable way, consistent with the Establishment
24 Clause, of demonstrating that wasn't the employer's real
25 reason.

1 If, on the other hand, the plaintiff has
2 evidence that no one ever raised any objections to the
3 quality of her scholarship, but they raised objections
4 to women serving in certain roles in the school, and
5 those roles were not ones that were required to be
6 filled by persons of a particular gender, consistent
7 with religious beliefs, then that's a case in which a
8 judge can instruct a jury that it's job is not to
9 inquire into the validity of the subjective judgment,
10 just as juries are often instructed that their job is
11 not to determine whether an employer's business judgment
12 was fair or correct, but only whether the employer was
13 motivated by discrimination or retaliation.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 Ms. Kruger.

16 ORAL ARGUMENT OF WALTER DELLINGER
17 ON BEHALF OF THE PRIVATE RESPONDENT

18 MR. DELLINGER: Mr. Chief Justice, and may
19 it --

20 CHIEF JUSTICE ROBERTS: Mr. Dellinger.

21 JUSTICE KAGAN: Mr. Dellinger?

22 MR. DELLINGER: Yes.

23 JUSTICE KAGAN: Could you assume for --

24 (Laughter.)

25 JUSTICE KAGAN: I'm sorry. Could you assume

1 for me that -- is it --

2 CHIEF JUSTICE ROBERTS: Justice Kagan.

3 (Laughter.)

4 JUSTICE KAGAN: I feel like I missed
5 something.

6 (Laughter.)

7 JUSTICE KAGAN: Mr. Dellinger, could you
8 assume for me that there is a ministerial exception
9 that's founded in the Religion Clauses, and tell me who
10 counts as a minister, and why this commissioned minister
11 does not count as a minister?

12 MR. DELLINGER: I believe that there is an
13 exemption grounded in the Religion Clauses. It means
14 that religious organizations will win -- will prevail in
15 many cases in which a comparable civil organization
16 would not prevail. I don't think that it makes sense to
17 approach it in a categorical way of asking --

18 JUSTICE KAGAN: I'm just asking you to
19 assume with me for a moment that there is a categorical
20 exception and to tell me who you think counts as a
21 minister, and why the woman in this case does not.

22 MR. DELLINGER: Well, in our view, if that
23 was the test, then we would say that the court of
24 appeals was correct in holding that she was not a
25 minister, and the reason -- the principal reason is she

1 carries out such important secular functions in addition
2 to her religious duties in --

3 CHIEF JUSTICE ROBERTS: That can't -- I'm
4 sorry to interrupt you, but that can't be the test. The
5 Pope is a head of state carrying out secular functions;
6 right?

7 (Laughter.)

8 CHIEF JUSTICE ROBERTS: Those are important.
9 So, he is not a minister?

10 MR. DELLINGER: Chief Justice Roberts, I do
11 not want to suggest that it's a very good approach to
12 try to decide who's a minister and who's not a minister.
13 That's what's wrong with Professor Laycock's categorical
14 approach, because it's -- it's both over- and
15 under-inclusive. It sweeps in cases where there is, in
16 fact, no religious reason offered --

17 JUSTICE SCALIA: It's only a bad approach if
18 we adopt your test. Why isn't it a perfectly reasonable
19 test whether the person -- although the person may have
20 a lot of secular duties, whether the person has
21 substantial religious responsibilities?

22 MR. DELLINGER: And the reason that is not a
23 satisfactory test is that it fails to take account of
24 the important governmental interests -- for example, in
25 this case -- in having everyone have access to the -- to

1 the courts.

2 JUSTICE BREYER: No, but that isn't -- but
3 that isn't the problem. The problem, it seems to me, is
4 I don't know how substantial these interests are
5 religiously. I don't know how substantial the religion
6 itself considers what they do from a religious
7 perspective.

8 So, let's go back to Justice Alito's
9 problem. And now on the ministerial issue, we call the
10 synods, we call the how certain was it, how central is
11 it to the heart of the religion, what they're actually
12 doing, and we replicate exactly what he said, in respect
13 to the problem of religious tenet, now in respect to the
14 problem of religious minister.

15 And maybe you can tell me we don't have to
16 go into the one or the other, but I've had enough of
17 these cases in the lower court to know they are really
18 hard. People believe really different things, and I see
19 no way to avoid going into one or the other, and,
20 therefore, I think, rather than try this constitutional
21 matter, let's go to the one Congress suggested.

22 MR. DELLINGER: Well --

23 JUSTICE BREYER: Now, what do you --
24 that's --

25 MR. DELLINGER: If --

1 JUSTICE BREYER: That's the state of the
2 argument that you're walking into, I think.

3 MR. DELLINGER: If we go to Congress,
4 Congress made it quite clear how this case should be
5 resolved, because Congress expressly did not apply the
6 religious exemptions of the ADA to retaliation.

7 JUSTICE BREYER: No. I don't agree with
8 that. I think -- I think what it says is a religious
9 organization may require that all applicants and
10 employees conform to the religious tenets. It put that
11 in the section defining defenses. The defenses are part
12 of the right, and when it forbids retaliation, it says
13 forbids retaliation against an individual for the
14 exercise of any right granted.

15 And, therefore, I don't believe that a
16 person who has failed to violate the substantive section
17 could be held up normally.

18 I mean, I don't --

19 MR. DELLINGER: Well, we differ on that,
20 but --

21 JUSTICE BREYER: I can think it's pretty
22 easy to read that exception, even though it's in a
23 different subchapter, into the retaliation exception.

24 And assume for me that that's so.

25 MR. DELLINGER: It is still the case that it

1 is a constitutional matter. The state's interest in
2 allowing citizens to have access to its courts and to
3 its agencies is paramount in cases like child abuse,
4 reporting of school safety problems, and others. In
5 this case, it's -- we are mindful --

6 JUSTICE SCALIA: But it's not paramount.
7 Would you -- take the firing of the Catholic priest
8 example. Does that get into the courts?

9 MR. DELLINGER: No, it doesn't and the
10 reason is --

11 JUSTICE SCALIA: Why not?

12 MR. DELLINGER: -- that there is -- and that
13 points out, Justice Scalia, that there are ample
14 doctrines to protect church autonomy. One is that under
15 the Establishment Clause, there can be no reinstatement
16 ordered by a court of someone to an ecclesiastical
17 position. Another mentioned by General Kruger is
18 that --

19 JUSTICE SCALIA: But he can sue for money,
20 right?

21 MR. DELLINGER: I -- I do not believe that
22 he can be reinstated or get damages for removal from
23 the -- from the priesthood.

24 JUSTICE SCALIA: Not reinstated. He can sue
25 for money. He can sue for, you know, the loss of --

1 MR. DELLINGER: I think, in that case, that
2 that is very likely to fail because you're going to run
3 into (a) issues of religious doctrine or evaluations of
4 distinctly religious matters, like EEOC v. Catholic
5 University. Those doctrines still stand.

6 The problem with the -- this categorical
7 exception is it sweeps in cases like this one, where the
8 well-pleaded complaint in this case simply says, I was
9 dismissed from my employment because I said I was going
10 to make a report to the EEOC. And she's not seeking
11 reinstatement. She just wants the economic loss.
12 There's no need --

13 JUSTICE ALITO: Well, if I could just come
14 back to the example of the canon law professor, because
15 I still don't see how the -- the approach that the
16 Solicitor General is recognizing -- is recommending
17 could -- can eliminate the problems involved in pretext.
18 So, the -- as I understood her -- her answer, it was
19 that you couldn't look into the question of whether the
20 professor's canon law scholarship was really good canon
21 law scholarship, but you could try the issue of sex
22 discrimination based on other evidence. So, maybe
23 there's some stray remarks here and there about a woman
24 teaching canon law.

25 Now, a response to that might be that wasn't

1 the real reason, and if you just look at the scholarship
2 and you see how miserable it is and how inconsistent it
3 is with church doctrine, you can see that that's the
4 real reason.

5 So, you just cannot get away from evaluating
6 religious issues.

7 MR. DELLINGER: This is not a problem that
8 is unique to ministerial employees, which is why this is
9 both over- and under-inclusive. When you -- this is a
10 circumstance in which an organization is going into the
11 public arena providing a public service, and in that
12 situation, it ought to be governed by the same rules --
13 Justice Scalia, you said this case is not like
14 Employment Division v. Smith, but under Employment
15 Division v. Smith, we know that the State could forbid a
16 school from -- a religious school from using peyote in
17 its ceremonies, but under Petitioner's submission, they
18 could fire any employee who reported that use of peyote
19 to civil authorities, and that employee would have no
20 recourse.

21 We know that under U.S. v. Lee, an Amish
22 employer has to comply with the Social Security laws,
23 but under their submission, the employer could fire
24 without recourse any employee who called noncompliance
25 to the attention of the EEOC. We believe that -- that

1 you can trust to Congress on these hard areas where
2 there needs to be additional accommodations; Congress
3 could make them, just as Justice Scalia suggested. The
4 ministerial exemption has a long history, Justice Alito,
5 but in almost every circuit, it did not apply to
6 teachers. So, I mean --

7 JUSTICE ALITO: It antedated -- did it not
8 antedate the enactment of the Americans with
9 Disabilities Act?

10 MR. DELLINGER: That is correct. When that
11 was enacted --

12 JUSTICE ALITO: So, wouldn't -- shouldn't we
13 assume that Congress -- that Congress assumed that it
14 would continue to apply to the ADA, just as it applied
15 to Title VII.

16 MR. DELLINGER: It -- in the lower courts
17 did not apply it as sweepingly as to teachers. And I --
18 I think we have this debate with Justice Breyer about
19 whether -- whether you can say that Congress
20 specifically excluded retaliation -- retaliation cases.

21 But remember that that doctrine emerged at a
22 time when this Court had a position that religious
23 organizations could not participate in getting public
24 funding, even when they were providing remedial services
25 to low-income students. We repudiated that doctrine in

1 Agostini v. Felton and where the Court said that you're
2 entitled to participate in providing public services on
3 the same basis as all other organizations. That means
4 that you should comply, in some instances, with the same
5 rules, when you leave the cloister and go into the
6 public arena and provide public services.

7 JUSTICE SCALIA: Gee whiz. Do -- do
8 Lutheran schools and Catholic parochial schools share
9 public funds the same way public schools do?

10 MR. DELLINGER: No, they don't, Justice --

11 JUSTICE SCALIA: You bet you they don't.

12 MR. DELLINGER: But they are entitled to.

13 JUSTICE SCALIA: What is this argument
14 you're making? I don't understand.

15 MR. DELLINGER: Because we are no longer --
16 we are no longer of the -- of the Aguilar v. Felton era,
17 the pre-Employment Division v. Smith where we believe
18 that no governmental rules or involvement can be had
19 with these public institutions.

20 JUSTICE SCALIA: Don't tell me that fair is
21 fair, that now, you know --

22 MR. DELLINGER: No --

23 JUSTICE SCALIA: -- we're just like
24 everybody else. That's not true.

25 MR. DELLINGER: It's that we have recognized

1 in your opinion in Smith and in Justice Kennedy's
2 opinion in Rosenberger the value of neutrality where you
3 have doctrines, as we recognize you do not second-guess
4 religious doctrine. You do not under the Establishment
5 Clause introduce someone into an ecclesiastical office,
6 and you do a balancing test to make sure that there's a
7 sufficient governmental interest, if you're going to
8 undercut an organization's ability to convey its views.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you, Mr.
11 Dellinger.

12 Mr. Laycock, 2 minutes.

13 REBUTTAL ARGUMENT OF DOUGLAS LAYCOCK

14 ON BEHALF OF THE PETITIONER

15 MR. LAYCOCK: Two or three points very
16 briefly: The many distinctions and balancing tests in
17 their argument show the mess you will be in if you try
18 to decide these cases. And we may have a line-drawing
19 problem at the margin, but many, many cases are easy.
20 The priest, the rabbi, the bishop, the pastor of the
21 congregation cannot sue. Under their rule, they can
22 sue --

23 JUSTICE SOTOMAYOR: Mr. Laycock, I'm not
24 sure why the status of the individual matters under your
25 theory. It seems to me what you're saying is, so long

1 as a religious organization gives a religious reason of
2 any kind, genuine or not, for firing someone that's
3 associated with it, whether minister or not, that that
4 invokes the exception. Am I hearing your argument
5 right?

6 MR. LAYCOCK: No.

7 JUSTICE SOTOMAYOR: All right. So, why is
8 there a difference?

9 MR. LAYCOCK: The position of minister is
10 categorically special because that is committed to the
11 church in the system of separation of church and state.
12 You may have religious questions when they dismiss the
13 janitor, but the level of sensitivity is not remotely
14 the same. And -- and --

15 JUSTICE SOTOMAYOR: So, you would say with
16 janitors, you can get into the pretext question.

17 MR. LAYCOCK: The janitor can litigate his
18 pretext question. Yes.

19 JUSTICE SOTOMAYOR: So, you're limiting your
20 test to whether that person is a minister. So, define
21 "minister" for me again.

22 MR. LAYCOCK: A minister is a person who
23 holds ecclesiastical office in the church or who
24 exercises important religious functions, most obviously
25 including teaching of the faith.

1 JUSTICE KAGAN: Mr. Laycock, Mr. Dellinger
2 has some -- some points here about the way in which the
3 ministerial exception relates or doesn't relate to
4 Employment Division v. Smith. And it seems to me that
5 in order to make an argument for the ministerial
6 exception, you in some sense have to say that
7 institutional autonomy is different from individual
8 conscience, that we've said in Smith that state
9 interests can trump individual conscience. And you want
10 us to say that they can't trump institutional autonomy.
11 So, why is that?

12 MR. LAYCOCK: It's not that institutions are
13 different from individuals. It is that the
14 institutional governance of the church is at a prior
15 step. Smith is about whether people can act on their
16 religious teachings after they're formulated. The
17 selection of ministers is about the process by which
18 those religious teachings will be formulated.
19 Smith distinguishes those cases --

20 JUSTICE SCALIA: Might not the Establishment
21 Clause have something to do with that question --

22 MR. LAYCOCK: The Establishment Clause --
23 well, that --

24 JUSTICE SCALIA: -- which applies to
25 institutions?

1 MR. LAYCOCK: That's the second answer --

2 JUSTICE SCALIA: Whereas the Free Exercise
3 Clause applies to individuals, right?

4 MR. LAYCOCK: This Court has relied on both
5 Free Exercise and Establishment: Serbian, Kedroff,
6 Kreshik, Gonzalez. There's a long line of cases all the
7 way back to Watson distinguishing this problem from the
8 problem that culminates in Smith.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Counsel.

11 The case is submitted.

12 (Whereupon, at 11:05 a.m., the case in the
13 above-entitled matter was submitted.)

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20:17,23 21:5 22:2 31:10,16 31:17 32:10 33:19 34:1 40:10 42:4,10 42:16 48:2,23 49:1,7,21 53:18 brief 19:14 23:16,19 24:21 34:13 briefly 55:16 briefs 17:2 bring 20:10 31:8 brought 23:17 burden 30:17 36:15 burdens 39:16 business 10:12 45:11	37:17,25 38:13 40:25 41:2,3,4 41:11,24,24 42:6,17,18 43:18,24 44:3 45:7 46:21 47:25 49:4,25 50:5 51:1,8 52:13 58:11,12 cases 5:20 6:11 7:13,13 8:10 10:10 12:22 24:17 28:4,7 28:15 35:19 38:1,9 43:17 46:15 47:15 48:17 50:3 51:7 53:20 55:18,19 57:19 58:6 categorical 46:17,19 47:13 51:6 categorically 32:4 56:10 categorize 11:21 Catholic 22:25 32:12,20 33:4 33:9,22 37:10 37:14 38:23,25 39:7 44:5 50:7 51:4 54:8 Catholics 40:5 centered 5:8 central 22:23 23:6 30:19 31:10,11 36:25 43:19 48:10 centrally 30:24 ceremonies 52:17 cert 7:24 certain 5:12 7:11 27:14 30:10 45:4 48:10 certainly 7:14	12:13 26:6,10 30:5 38:12 challenging 11:13 change 16:9 changes 16:19 changing 32:19 chapel 11:20 charges 4:9,17 Charlottesville 1:17 Cheryl 3:17 Chief 3:3,10 10:24 11:8,20 13:5,17 14:5,7 26:18,22 27:8 27:11,16,24 28:6 35:5 36:19 37:1,9 38:21 40:3 45:14,18,20 46:2 47:3,8,10 55:10 58:9 child 6:11,12 29:23 50:3 children 5:10 6:23 7:21 35:17 chilled 34:19 choice 29:21 choose 32:11 36:11 chooses 32:20 choosing 30:21 30:23 31:5 chose 30:22 Christian 17:18 Christians 23:5 church 1:4 3:5 3:15,23 4:5 5:8 7:1,22 8:23 10:6,13,17 11:5 12:20 13:9,19 14:7 14:24 23:5,21 24:18 30:22 31:6,25 32:12	32:20 33:6,20 35:13,15 36:21 36:24 37:10,19 37:23 38:17,18 39:4,21,25 41:6 50:14 52:3 56:11,11 56:23 57:14 churches 3:12 3:19 7:4 8:24 8:25 10:16 13:6,7,22 14:8 14:9 35:23 church's 12:24 13:10 15:5 22:20 24:25 29:21,22 38:6 church-operat... 35:20 36:10 circuit 10:21 16:18 53:5 circuits 5:1 circumstance 52:10 citation 22:2 citizens 50:2 civil 8:21 10:2 19:15 20:11 21:8 22:21 23:5 31:13 33:6 34:7,7,20 34:21 36:14,14 46:15 52:19 claim 5:18,18,25 7:2 8:13 24:5 24:11 25:6,7,8 29:1 38:12 claimed 44:5 claims 3:20 28:4 32:9 34:12,13 34:25,25 38:11 39:2 clarify 3:23 34:10 class 11:7,10,20 16:4,4 17:8,17 18:7,9,15	classes 25:18 35:25,25 36:11 Clause 28:21,22 30:20,24 37:20 37:20,23 38:5 38:5 44:24 50:15 55:5 57:21,22 58:3 clauses 27:23 46:9,13 clear 36:8 49:4 clearly 14:21 18:15 20:1 24:10 clergy 37:13 clerk 20:7 client 19:6 clincher 25:21 25:23 26:5 cloister 54:5 come 8:5 26:24 42:2,5 51:13 coming 32:25 33:8,18 34:20 commendable 4:12 commission 1:8 3:6 26:2,5 commissioned 4:2 11:5,18,24 12:1 15:25 16:3,15,16,22 17:7,7 23:24 25:21,25 26:2 46:10 committed 10:16 56:10 communication 8:6 communities 26:24 community 30:10 comparable 46:15 compelling 6:25 30:12 32:23
---	--	---	---	--

complain 21:19 24:1	27:1 41:4 42:12 48:20 50:1	cover 17:17 covered 11:2,11 11:13	49:11 defer 37:11 deference 15:5,8	13:20 17:15 21:6 28:11,14 29:25 32:16,23
complained 25:3	context 26:15	co-worker 23:21	define 6:6 56:20	35:21 37:17
complaint 51:8	continue 34:22	create 8:24	defining 49:11	38:22 39:13
compliance 35:18	35:3 53:14	10:22	definition 15:14 18:11	40:3 48:18 49:23 57:7,13
comply 36:4 52:22 54:4	contours 7:11 28:13,24 29:16	created 5:2	degree 40:17	differentiate 29:19
compulsory 35:18	contract 16:9,23 25:17	credible 22:15	Dellinger 1:22 2:9 45:16,18 45:20,21,22 46:7,12,22 47:10,22 48:22 48:25 49:3,19 49:25 50:9,12 50:21 51:1 52:7 53:10,16 54:10,12,15,22 54:25 55:11 57:1	difficult 5:22 8:15
conceived 30:9	contribution 44:15	criteria 3:12,14 7:4	demonstrating 44:24	dilemma 41:21
concern 6:9	control 36:7	culminates 58:8	denied 44:6,9	directly 22:11
concerned 7:15	controlled 12:5	cut 10:3	denomination 17:16,19	Disabilities 53:9
concerns 30:13 30:19 38:11,14	convey 55:8	cuts 7:19	denying 30:2	discharge 5:25 8:7
conclusion 33:9	core 30:8 39:17	D	Department 1:20	discharged 6:2 8:17
conditions 23:24 23:25 24:6	correct 14:25 15:2,3 18:21 45:12 46:24 53:10	D 3:1	depend 29:17	disciplined 25:3 41:7
conduct 5:12 23:2 31:9 33:1	counsel 4:25 10:24 58:9,10	damages 25:9 25:11,12 50:22	depends 22:22 22:23	discrimination 6:20 21:20 30:16 32:18 34:12,18,25 40:12 45:13 51:22
conducts 11:19	count 26:3 46:11	de 10:23	deposition 22:6 22:10	dismiss 56:12
conform 19:6 41:8 49:10	counts 11:24 46:10,20	deal 5:16 12:22 22:11	derive 29:10	dismissal 39:6
congregation 4:20 15:15 22:11 55:21	course 10:25 20:23	debate 53:18	designed 43:14	dismissed 19:12 19:19 51:9
congregations 39:23	courses 16:10 22:15	decide 4:22 10:13,18 11:2 12:16,18 13:3 19:10 40:17 42:19 44:14 47:12 55:18	determined 13:1	dismissing 20:9
Congress 19:8 27:3 41:1,5,23 48:21 49:3,4,5 53:1,2,13,13 53:19	court 1:1,14 3:11 5:20 6:2 8:21,23 10:2 19:9 20:21 26:23 28:3,25 31:13,21,23 32:7 33:20 35:19 36:17 40:11 42:18 43:5 46:23 48:17 50:16 53:22 54:1 58:4	decided 10:3 14:23 15:11 35:15	determining 32:9	dispel 23:15
conscience 57:8 57:9	courts 7:9 11:12 12:17,22,24 13:12 33:6 39:19 48:1 50:2,8 53:16	decides 3:23	dictating 36:10	dispute 16:7 20:2 23:22 24:9,12,23 30:18,25 31:2 31:2 36:17 37:2,12 43:14
conservative 17:19		deciding 42:11 42:18 43:5	differ 49:19	disputed 29:15 42:19
consider 18:3		decision 16:13	difference 16:14 29:12 33:15 39:19 56:8	disputes 24:7,10 27:13
considers 48:6		decisionmakers 8:22	different 6:23 8:9 12:10,14 12:15 13:5,6	distinct 27:18
consistent 44:23 45:6		decisions 10:16 32:3		distinction 33:7 33:23,24 34:16
constitutes 14:23		declare 15:10		distinctions 10:22 33:13
Constitution 29:7,11		decommission... 3:25		
constitutional		deeply 38:13		
		defending 15:12		
		defense 19:21		
		defenses 49:11		

55:16 distinctly 51:4 distinguished 11:19 distinguishes 57:19 distinguishing 32:14 58:7 district 19:9 Division 38:9 52:14,15 54:17 57:4 doctrine 17:21 20:10,19 21:4 21:10,11 22:16 23:10 24:22 27:13,15 29:16 32:2,21 33:4,5 33:9,11 42:19 43:13 44:1 51:3 52:3 53:21,25 55:4 doctrines 15:18 15:19 23:13 50:14 51:5 55:3 doing 5:15 12:19 13:14 16:11 21:7 31:6 48:12 doors 35:16 doubt 40:25 DOUGLAS 1:17 2:3,12 3:8 55:13 dozens 43:17,17 43:17 dramatic 18:24 draw 34:11 drawing 33:13 33:24 due 21:2 duties 11:23 16:8 26:3,4 29:3 39:1 47:2 47:20 D.C 1:10,20,22	E E 2:1 3:1,1 easy 11:5 16:3 18:17 49:22 55:19 ecclesiastical 11:6 18:16 30:11 50:16 55:5 56:23 economic 51:11 edge 19:3 educating 35:17 education 35:18 36:4 EEOC 10:7 21:20 51:4,10 52:25 effect 41:13 effective 4:21 effort 19:18 eight 22:15 either 40:7 elaborate 20:2 elaborated 28:3 39:18 eliminate 51:17 eliminating 30:24 embodied 20:1 emerged 53:21 emphatically 24:10 employ 38:18 employee 13:13 29:4 32:1 52:18,19,24 employees 27:14 31:8 36:13 37:21 38:7 49:10 52:8 employer 31:4 43:20,21 44:22 45:12 52:22,23 employers 27:14 31:7,7 employer's 44:20,24 45:11	employment 1:7 3:6 38:9,17 42:8 51:9 52:14,14 57:4 enable 15:9 enacted 53:11 enactment 53:8 encouraging 6:5 ended 7:23 enforced 43:3 ensuring 32:24 33:16 34:19 entanglement 10:22 entered 44:22 entire 16:4 entirely 9:25 entitled 26:9 33:10 42:22 54:2,12 Equal 1:7 3:5 era 54:16 eradicating 30:15 32:18 34:17 ESQ 1:17,19,22 2:3,6,9,12 essentially 42:20 established 30:21 Establishment 28:21 30:20,23 37:20 38:5 44:23 50:15 55:4 57:20,22 58:5 ET 1:8 evaluating 52:5 evaluations 51:3 Evangelical 1:3 3:5 everybody 13:9 54:24 evidence 19:10 21:9 41:12 45:2 51:22 exactly 48:12	example 30:14 40:18 44:3 47:24 50:8 51:14 excellent 4:12 19:14 exception 5:1,3 6:6,11,14,21 7:7,10,22 9:5 10:25 11:3,11 12:5 18:2 24:22 25:19 27:9,10,12,18 27:21 30:8 34:24 39:18 46:8,20 49:22 49:23 51:7 56:4 57:3,6 excerpt 21:23 excluded 53:20 exemption 9:8 9:10 37:7 46:13 53:4 exemptions 49:6 exercise 28:21 37:20 38:5,11 49:14 58:2,5 exercises 38:14 56:24 exists 27:15 expect 21:18 expected 13:22 14:1 experts 42:23 43:4 explain 20:17 explained 19:14 explains 21:1 explicitly 29:7 exploiting 5:9 explored 14:17 14:19,20 express 19:19 26:25 35:14 expressed 21:11 expressive 28:7 28:9,12,25	expressly 49:5 extends 11:1 35:11 extension 29:9 extent 11:23 extraordinarily 30:12 extraordinary 28:16,18 36:1 extreme 12:15 F facie 41:11 fact 6:5 14:1 16:7 25:17,20 27:25 32:10 34:14 35:12,13 47:16 facts 3:25 8:9 19:25 23:12 faded 43:2 fail 51:2 failed 49:16 fails 47:23 fair 45:12 54:20 54:21 faith 13:8,15 14:2 15:18,20 25:25 36:25 56:25 fall 24:6 February 22:9 Federal 1:21 2:7 26:21 fee 35:17 feel 46:4 Felton 54:1,16 figure 23:10 file 4:9 filed 19:14 filled 45:6 fill-ins 16:23 find 17:17 18:11 20:8 21:18 38:3 43:15 finely 10:22 fire 20:24 27:5
--	---	--	--	---

<p>52:18,23 fired 5:5 7:16,21 10:7 21:20 25:3 26:1 firing 13:3 32:1 32:3 50:7 56:2 first 3:4 6:17 10:21 19:24 22:12 27:12,15 27:19 29:9,14 29:16 31:15,23 fitness 24:11,12 focused 19:8 30:24 follow 24:5 following 41:22 forbid 52:15 forbids 49:12,13 force 5:24 Forget 9:23 form 5:2 formal 4:17 formulate 8:15 formulated 57:16,18 fortiori 18:19 found 19:16 foundational 33:16 34:7 founded 46:9 fourth 27:5 framework 6:16 fraudulently 15:10 free 28:21 37:19 38:4,5,10,11 58:2,5 freedom 26:24 27:4 32:9 37:25 fully 35:10 full-time 14:10 function 18:13 40:7 functions 13:14 14:15,19 16:19 47:1,5 56:24</p>	<p>fundamental 27:1 30:11 33:21 39:19 funding 53:24 funds 54:9</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 Gee 54:7 gender 32:20 44:7 45:6 general 1:20 30:15 32:17 34:17 50:17 51:16 generally 29:19 31:3 37:7 genuine 56:2 getting 40:23,24 44:16 53:23 Ginsburg 3:22 11:17 16:6 17:1,5 21:15 23:14 24:13,17 25:1,8,14,23 26:6 give 6:15 44:3 gives 56:1 go 9:21 10:1 20:19,20 23:22 24:3,18,18 31:12,13 32:11 34:6 38:2 39:6 39:6 40:11,20 41:23 48:8,16 48:21 49:3 54:5 goes 12:15 41:4 going 7:9 17:22 20:14 21:17 23:7 24:1 33:19,20 40:16 40:20,20 41:19 42:1 43:10,25 44:11,13 48:19 51:2,9 52:10 55:7</p>	<p>Gonzalez 58:6 good 4:15 47:11 51:20 good-faith 15:8 govern 29:21 39:22 governance 8:25 57:14 governed 52:12 government 3:13,14 5:5,24 6:24 10:12 12:24 13:2 24:18 26:11 29:7 30:20,22 31:3 32:23,25 33:15 35:4 38:22 39:5 governmental 27:2 30:13,25 35:22 39:20 40:9 47:24 54:18 55:7 government's 6:12,18,19,22 7:2 30:15 32:17 34:5,17 34:18 35:11 36:2,9 governs 27:13 grace 11:10,19 grade 27:6 granted 49:14 grateful 26:17 great 7:12 grounded 37:19 46:13 group 28:8,11</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half 29:14 hand 37:9 39:24 45:1 handbook 21:16 21:18,19,22 happen 8:2 happening 31:3</p>	<p>happens 33:22 hard 48:18 53:1 head 47:5 health 24:1 30:14 hear 3:3 17:12 heard 17:11 hearing 8:14,18 8:20,21 9:3,5 10:7,8 56:4 heart 6:20 48:11 heartland 41:3 held 49:17 hierarchical 13:19 hire 17:18 hiring 32:2 history 4:20 53:4 hold 18:16 holding 4:5 18:24 46:24 holds 11:6 56:23 Hosanna-Tabor 1:3 3:4 4:8,19 4:23 house 24:15 25:4</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>ideas 13:6 identifies 16:24 identify 6:18 10:18 illegal 27:5 31:9 33:1 illustrate 22:18 implicitly 33:3 importance 21:4 33:4,13 40:7 important 10:15 23:11 27:2 32:8 34:3,16 35:2 36:20,24 37:3,13 40:4 40:11 43:6,21 43:22 47:1,8</p>	<p>47:24 56:24 impression 17:6 inappropriate 23:18 incentive 6:7 including 56:25 income 26:10 inconsistent 52:2 incorporates 27:21 independent 8:23 indicates 14:8 indisputably 3:19 individual 5:18 19:1 49:13 55:24 57:7,9 individuals 32:24 33:18 34:19 57:13 58:3 indulge 4:8 indulged 5:20 information 32:25 infringed 27:4 initial 42:6 inquire 45:9 inquiries 5:21 35:2 inquiry 22:18 28:14,14,24 29:5 42:7 43:12 insight 30:8 instances 7:15 54:4 institutional 37:21 38:22 57:7,10,14 institutions 54:19 57:12,25 instruct 45:8 instructed 45:10 insubordination</p>
---	--	---	---	--

20:15	involving 7:13	10:11,20,24	justify 6:25	42:4,15 43:8
insufficiently	28:4	11:8,17 12:6	30:13,17 32:19	43:12 44:18
32:6	in-house 24:3,7	12:10,23 13:5		45:15 50:17
integrity 33:17	irrelevant 26:3	13:17,24 14:4	K	
interact 23:12	26:5 43:13,16	14:5,8,12,22	Kagan 15:3,21	L
interest 6:4,12	IRS 26:14	15:1,3,4,13,21	17:23 34:9,23	labor 28:9 29:8
6:13,18,19,22	isolating 17:1	16:6 17:1,5,5	37:18 38:2	30:3
6:24 7:2 10:13	issue 14:16,17	17:10,22,23	45:21,23,25	large 40:1
30:13,15 32:17	14:20,21 28:9	18:6,10,18,22	46:2,4,7,18	Laughter 9:24
32:24 33:16,21	29:17 41:4	18:23 20:4,7	57:1	12:12 45:24
34:5,17,19	44:11,11 48:9	20:17,23 21:5	Kedroff 58:5	46:3,6 47:7
35:11 36:9,15	51:21	21:15,25 22:2	keeping 24:7	law 5:15 14:24
50:1 55:7	issues 9:8 10:19	22:17 23:14	KENNEDY	18:1 20:7
interested 14:6	10:19 33:8	24:13 25:1,8	8:12 9:1,7,11	24:22 29:20
28:8	43:19 44:17	25:14,15,16,23	9:15,19 10:5	31:4 33:17
interests 10:6	51:3 52:6	26:6,18,22	13:24 14:4,12	34:8 44:5,12
27:2 29:17,25	i.e 5:15	27:8,11,16,24	17:5,10	44:14,15,21
30:1 32:7,7,16	J	28:6,16,18,20	Kennedy's 55:1	51:14,20,21,24
32:22 35:11	janitor 56:13,17	29:6,13,24	kind 11:14	laws 35:18 37:7
37:16 47:24	janitors 56:16	30:4,5,18 31:1	18:24 40:18	52:22
48:4 57:9	Jesuit 12:3	31:10,16,17	56:2	lay 13:21,24,25
interfere 39:21	job 3:20 7:21	32:10 33:2,19	kinds 7:14 31:14	16:22 18:1
interference	15:19 24:24,24	34:1,9,23 35:5	knew 21:9,23	43:5
30:13 41:17,18	24:24 26:3,4	35:24 36:3,8	41:13	Laycock 1:17
42:9	29:3 33:21	36:19,22 37:2	know 4:14,20	2:3,12 3:7,8,10
interferences	40:13 45:8,10	37:9,18 38:2,3	5:7 9:6 13:19	3:22 4:7 5:19
4:4	joint 4:11 20:12	38:16 39:10,11	14:6,18 15:23	6:9,17 7:6,18
interfering 6:25	Jones 35:20 37:8	39:13 40:2,3	16:18 19:13	8:20 9:4,9,13
internal 24:9	judge 24:17	40:10 41:15	20:1 21:21	9:17,25 10:9
36:17	44:13 45:8	42:4,10,16,21	22:16 34:1	10:14 11:4,12
internally 35:14	judgment 9:12	43:10,16 45:14	48:4,5,17	12:1,9,13 13:4
35:15	9:18,20,22	45:18,20,21,23	50:25 52:15,21	13:11,21,25
interrupt 47:4	19:17 21:1	45:25 46:2,2,4	54:21	14:11,18,25
interview 8:5	33:3 36:20	46:7,18 47:3,8	known 20:18	15:2,7,17 16:2
introduce 42:23	44:20,21 45:9	47:10,17 48:2	Kreshik 58:6	16:17 17:9,13
55:5	45:11	48:8,23 49:1,7	Kruger 1:19 2:6	18:4,8,14,21
investigated	juries 45:10	49:21 50:6,11	26:19,20,22	19:24 20:6,12
14:13	jurisprudence	50:13,19,24	27:11,20 28:2	20:22 21:3,14
invoked 7:22	37:24	51:13 52:13	28:13,17,19,24	21:21,25 22:5
invokes 56:4	jury 43:5 44:14	53:3,4,7,12,18	29:13 30:4,7	22:17 23:9,14
involve 8:2,3	45:8	54:7,10,11,13	31:1,16,19	24:8,16,20
38:17	Justice 1:20 3:3	54:20,23 55:1	32:15 33:12,24	25:5,11,20
involved 21:7	3:10,22 4:25	55:10,23 56:7	34:5,9,15 35:1	26:4,12 55:12
27:25 38:23	6:3,15 7:6,8,14	56:15,19 57:1	35:8 36:2,8	55:13,15,23
40:19,22 51:17	8:12 9:1,7,11	57:20,24 58:2	37:1,15,18,22	56:6,9,17,22
involvement	9:15,19 10:5	58:9	38:8 39:9,12	57:1,12,22
54:18		Justice's 38:21	39:15 40:6	58:1,4

lead 15:15	53:16	46:13 54:3	5:21 6:19 7:1,3	noncompliance
leader 13:15	low-income	meant 12:13	7:5,15 11:1	52:24
leads 11:10 18:9	53:25	meeting 22:9	13:8 14:10,10	noninterference
leave 54:5	lunch 11:10	member 13:9	15:25 16:1,22	28:5
led 17:24	Luther 23:4	mention 20:4	17:14 27:17	normally 49:17
Lee 37:5 52:21	Lutheran 1:3	mentioned 7:8	30:21,22,23	notion 23:15
legal 14:22	3:5 17:3,20,24	19:12 50:17	57:17	number 7:13
15:14 24:21	22:13,14 33:5	merely 18:9	ministry 3:21	nun 44:4
LEONDR	33:6,11 36:24	25:16	4:8,13 24:11	
1:19 2:6 26:20	37:13 38:24	merge 38:15,16	24:12,14,25	O
letter 20:13	39:14 54:8	mess 55:17	41:2	O 2:1 3:1
let's 11:8 17:4	Lutheranism	message 36:16	minute 22:6	objection 19:24
22:22 38:25	22:24 23:7	mind 19:16	minutes 26:16	objections 19:23
48:8,21	42:24	mindful 50:5	55:12	21:16 45:2,3
level 56:13	Lutherans	minister 3:18,24	miserable 52:2	obligations 19:1
lifelong 22:13	19:14 26:13	3:25 4:3,4 5:18	missed 46:4	obtaining 33:21
limiting 56:19	37:12 40:5	6:1,13 7:20	Missouri 4:18	obvious 32:13
limits 32:5	43:6	10:2 11:5,18	moment 41:22	34:3 41:15
line 34:11 37:22		11:22,25 12:2	46:19	obviously 5:22
58:6	M	12:3,17,21,25	money 50:19,25	11:14 56:24
line-drawing	majority 17:3	13:2,6,10 14:3	morning 3:4	occasion 14:2
11:15 55:18	making 27:5	14:6,20,23	motion 9:13,17	Occupational
litigate 10:10	33:3,23 36:19	15:6,10,14,20	19:17 20:25	24:1
56:17	36:20 41:22	15:22 16:10,11	motivated 21:10	occur 22:19
litigated 8:16	54:14	17:17 18:2,3	45:13	October 1:11
10:7 14:13	male 37:11	18:11,15 19:22	motivation 21:2	odd 4:3
local 8:23	males 33:4	23:20 25:21,25	mucking 29:8	offered 47:16
long 7:25 53:4	margin 55:19	26:9 31:5		office 11:6 18:16
55:25 58:6	married 23:1	38:25 39:14	N	55:5 56:23
longer 3:17	39:1	40:18,19 41:20	N 2:1,1 3:1	officers 3:13,15
54:15,16	Martin 23:4	46:10,10,11,21	nadir 7:2	8:25
look 4:10 5:19	math 11:22 26:8	46:25 47:9,12	nature 16:19	offices 13:20
8:8,14 13:13	mathematics	47:12 48:14	19:15 30:12	officials 4:2
21:12,13 37:12	15:24	56:3,9,20,21	necessarily 17:8	okay 15:1 18:18
40:20 51:19	matter 1:13	56:22	22:18	18:22 39:1,4
52:1	11:24 21:6	ministerial 5:1	need 18:11	41:5 44:10
looking 17:6	24:22 26:1	6:6,21 7:6,22	51:12	older 33:10
22:2 24:21	33:17 48:21	9:5 10:25 11:2	needs 6:8 53:2	once 5:13 10:9
39:15	50:1 58:13	11:11 12:5,18	neglected 16:21	10:17 13:1
looks 19:9	matters 42:19	12:20 18:2	neither 38:4	43:2,25
loses 19:22	51:4 55:24	24:22 25:19	neutrality 55:2	ones 45:5
loss 25:12 50:25	mean 13:8 15:21	27:9,10,12,18	neutrally 29:19	open 35:15
51:11	17:8 20:17	27:20 30:8	never 3:25 31:25	operates 39:20
lot 15:4 19:2	21:16 26:7	34:24 39:18	new 7:7	operating 35:13
26:8 47:20	32:12 34:2	46:8 48:9 52:8	news 5:7	opinion 10:21
lower 11:12	49:18 53:6	53:4 57:3,5	noncommissio...	55:1,2
39:18 48:17	means 13:12	ministers 3:19	16:21	Opportunity 1:7

3:6 opposed 36:17 opposite 6:8 oral 1:13 2:2,5,8 3:8 26:20 45:16 ordained 15:25 16:2 17:14 18:20 33:5 order 23:15 57:5 ordered 50:16 ordination 17:15 organization 15:9 19:5,7,18 28:1 29:4,8 46:15 49:9 52:10 56:1 organizations 30:3 46:14 53:23 54:3 organization's 55:8 originally 30:9 ought 16:5 52:12 outside 23:22 24:15,18 25:3 overrides 36:15 overriding 32:24	35:9 43:24 49:11 participate 53:23 54:2 particular 14:7 18:25 28:15 29:3 33:14 36:21 42:8,17 43:13 44:14 45:6 passages 24:20 pastor 55:20 penalize 5:25 pending 7:24 people 3:18 5:14 5:25 13:22,24 13:25 21:7 27:25 28:8,11 40:11 48:18 57:15 perfectly 42:5 47:18 perform 14:15 14:19 performance 3:21 24:24 performed 16:20 performing 13:14 Perich 3:17 16:24 22:11,13 permissible 35:22 40:9 permitted 23:16 person 11:13 12:18,25 13:2 16:25 21:4 47:19,19,20 49:16 56:20,22 persons 45:6 perspective 48:7 petition 7:24 Petitioner 1:5 1:18 2:4,13 3:9 29:2,14,18,25 30:6 31:24	55:14 Petitioner's 27:4 52:17 peyote 5:13 52:16,18 physics 12:4 pick 36:5 piece 21:6 plaintiff 42:21 44:19,22 45:1 play 43:7,8 plays 28:15 please 3:11 26:23 point 3:23 5:11 6:10 10:11 12:15 29:15 points 10:14,15 31:16 50:13 55:15 57:2 police 8:1,4 policy 23:20 Pope 47:5 position 11:1,18 25:13 27:8 33:8 35:21 44:4 50:17 53:22 56:9 power 30:25 practically 43:18 prayer 17:25 18:9 preach 39:22 precisely 9:13 present 5:21 presents 6:1 preserving 33:17 president 22:10 pretext 5:2,21 9:2 12:11,14 13:3 22:19 23:8 43:17,18 44:11 51:17 56:16,18 pretextual 39:4	39:8 pretty 49:21 prevail 46:14,16 prevented 32:25 preventing 30:20 31:6 34:6 pre-Employm... 54:17 priest 7:20 12:4 22:25 32:11 33:23 38:24,25 39:7 50:7 55:20 priesthood 50:23 priests 32:4,20 33:5 37:10 prima 41:10 principal 8:6 21:14 22:5 46:25 principal's 22:10 principle 3:16 19:5 principles 37:23 prior 57:14 private 1:22 2:10 5:18 30:11 32:7,16 35:10 37:16 45:17 probe 12:24 problem 4:24 6:3 8:11 23:7 23:10 31:12 48:3,3,9,13,14 51:6 52:7 55:19 58:7,8 problems 4:19 7:25 11:16 22:18 26:14 50:4 51:17 proceed 25:6,7,9 proceeded 42:22 process 10:18	20:2 57:17 professional 14:9 professor 47:13 51:14 professors 42:24 professor's 51:20 proffered 43:20 proficient 4:13 4:14 prohibits 29:7 promulgate 35:14 proper 9:21 proposed 8:15 proposition 30:19 protect 5:14 7:3 50:14 protected 31:15 31:18,19 protecting 6:12 6:13,19,23 protections 29:11 Protestant 17:19,24 Protestants 17:15 prove 41:6,6 provide 35:16 40:1 54:6 providing 52:11 53:24 54:2 public 27:3 32:6 32:16 35:10,16 37:16 39:24 40:1 52:11,11 53:23 54:2,6,6 54:9,9,19 punish 36:13 punished 33:18 punishing 31:8 purely 11:9 purposes 26:7 pursuing 4:17
<hr/>				
P				
P 3:1 page 2:2 20:12 21:12 22:4 23:18 paramount 50:3 50:6 parent 8:3 parish 17:2 23:2 parishes 4:2 parochial 32:3 54:8 parsonage 26:9 part 13:10 15:18 16:7 23:9 28:1				

put 49:10	43:22 48:17,18 51:20	reinforced 38:11	46:14 47:2,16 47:21 48:6,13 48:14 49:6,8 49:10 51:3,4 52:6,16 53:22 55:4 56:1,1,12 56:24 57:16,18	36:17,18 37:12
Q	realm 40:8	reinstated 50:22 50:24	religiously 48:5	resolve 31:21
qualifications 3:20 24:24	reason 5:3 20:9 24:13 29:2 32:1 39:2,3,4 43:19,20,21 44:20,25 46:25 46:25 47:16,22 50:10 52:1,4 56:1	reinstatement 50:15 51:11	remarks 51:23	resolved 49:5
qualified 3:24 4:4,6 16:11	reasonable 47:18	relate 57:3	remedial 53:24	respect 27:17 29:20 32:3,4 33:10 35:21,24 37:21 38:15,23 38:24 42:17 48:12,13
qualifies 13:9	reasons 21:8	relates 57:3	remember 53:21	Respondent 1:21,23 2:7,10 26:21 45:17
qualify 25:18	rebuttal 2:11 26:17 55:13	relationship 7:1 38:6 39:21,25 42:8	remotely 19:25 56:13	respondents 3:16 8:7
qualities 4:13	recission 20:14	relationships 30:10	removal 50:22	response 25:15 51:25
quality 44:10,12 44:21 45:3	recognition 7:10	relative 32:6 33:3 37:16	removed 4:7,23 39:1	responses 31:20
quantitative 11:15	recognize 17:15 18:1 55:3	relevant 16:20 29:4 31:21	removing 3:13 3:15 7:5 23:1	responsibilities 15:19 47:21
quarrels 23:21	recognized 5:1 7:8 32:8 35:19 54:25	relied 58:4	repeatedly 8:24 32:8	results 42:9
question 6:1 10:1 12:17 17:23 22:19 23:3 31:21,25 35:6 36:22 37:24 38:3,21 40:6,8 41:15 42:11,12,16 51:19 56:16,18 57:21	recognizing 51:16	religion 11:6 16:4,4 18:3,8 18:13,15 25:17 26:8 27:22 29:12 30:1,2 31:11 35:25 36:6,11 37:23 38:14 40:17 42:24 46:9,13 48:5,11	reply 23:16,19 24:21	retaliation 8:13 8:18 25:6 27:6 29:22 34:6,12 34:25 35:12 45:13 49:6,12 49:13,23 53:20 53:20
questions 26:15 44:1 56:12	recommend 20:14	religious 5:8,10 5:12 11:23 12:19 13:15 14:19 15:16,22 15:23,24 17:8 18:7 19:1,5,7 19:11,18 20:10 20:19 21:2,8 21:10 26:24,25 28:1 29:4 30:10 31:4,7 32:1,21 33:14 33:14 35:14 36:16,21 37:4 37:6 40:8,21 41:8,13,25 42:3,19 43:13 44:1,17 45:7	report 5:25 29:22 36:14 51:10	return 26:10
quite 6:23 8:9 19:2 29:1 32:22 49:4	recommendat... 4:10,12		reported 52:18	review 26:11,12 26:15
R	recommended 4:1		reporting 5:6,15 5:24 6:5,7 7:16 8:8 50:4	reviewing 16:14
R 1:19 2:6 3:1 26:20	recommending 4:16 51:16		reports 5:4 34:20	rid 7:23
rabbi 55:20	reconcile 33:7		repudiate 3:16	right 5:11 11:4 13:1,4,23 14:11,24 18:20 24:16 25:10 27:1,1,18,21 28:12 31:14 32:15 34:2 37:19 40:19,22 41:3,9 42:16 47:6 49:12,14 50:20 56:5,7 58:3
raised 45:2,3	record 21:22 22:3		repudiated 53:25	
reaction 18:24	recourse 52:20 52:24		require 19:6 42:18 49:9	
read 19:13 22:4 42:1 49:22	referred 10:25 38:10		required 17:20 17:25 45:5	
real 39:2,3 43:20 44:3,12 44:20,24 52:1 52:4	referring 38:10		requirements 36:5	
really 8:9 12:16 18:12 20:7 23:6 40:15,18 42:2 43:1,1,6	Regardless 5:10		requires 5:15 10:21	
	regulation 6:18 39:20 40:9 42:8		reserve 26:16	rightly 7:15
	regulations 35:22		resolution 20:2 23:22 24:9	rights 27:7,22 28:9 29:9

Roberts 3:3 10:24 11:8 13:5,17 26:18 27:8,16,24 28:6 35:5 36:19 37:9 45:14,20 46:2 47:3,8,10 55:10 58:9 roles 32:21 45:4 45:5 rooted 32:1,21 38:13 Rosenberger 55:2 rule 5:23 11:14 15:9 16:5 21:17,24 24:9 24:25 31:24 32:5 33:17 34:8 42:14 55:21 rules 3:21 24:25 52:12 54:5,18 run 51:2	29:6,13,24 30:4,5 35:24 36:3,8 38:16 39:10,11,13 40:2 47:17 50:6,11,13,19 50:24 52:13 53:3 54:7,11 54:13,20,23 57:20,24 58:2 Scalia's 38:3 scenarios 32:17 scholarship 44:10,13,15,21 45:3 51:20,21 52:1 school 1:4 3:5 7:25 8:2,3,4 16:8,12 32:3 36:10,13 39:25 45:4 50:4 52:16,16 schools 15:23 17:4 22:14 35:20 54:8,8,9 scope 35:22 second 6:10 34:10 58:1 second-guess 42:20 55:3 section 49:11,16 secular 11:9 14:14 36:5 47:1,5,20 securing 27:3 Security 52:22 see 7:9 17:4 33:7 37:22,24 38:19 39:7 40:16,20 40:23,25 41:17 41:18 43:11 44:2 48:18 51:15 52:2,3 seeking 51:10 seen 43:17,18 selecting 3:13,14 7:5	selection 57:17 sense 46:16 57:6 sensitivity 56:13 separation 10:16 56:11 Serbian 58:5 series 7:25 seriously 3:17 service 35:16,17 52:11 services 15:16 40:1 53:24 54:2,6 serving 45:4 set 3:12,14 28:25 sets 35:2 severe 4:19 sex 40:12 51:21 sexual 5:4 8:1,8 sexually 5:9 7:20 sham 12:2,7,8 12:10,14 share 26:25 54:8 sharp 34:11 short 21:23 show 41:7,9,11 41:12,24 42:2 44:19 55:17 showing 41:16 shows 41:24 side 43:5 significance 22:22,23 significant 7:13 similar 17:16 28:4,7 simply 4:17 10:7 22:15 32:18 43:13 51:8 sincere 37:4,5 sit 35:20 situation 5:3,16 52:12 Sixth 16:17 skips 42:6	Smith 38:9,17 52:14,15 54:17 55:1 57:4,8,15 57:19 58:8 smoking 5:13 Social 52:22 socially 35:16 societal 6:4 society 5:11 6:8 Solicitor 1:19 51:16 solved 24:3 somebody 11:10 11:21 41:13 someone's 19:16 someplace 8:4 41:18 sorry 17:22 33:20 35:5 41:10 45:25 47:4 sort 7:17 19:2 19:22 42:6 Sotomayor 4:25 6:3,15 7:8,14 17:22 18:6,10 25:15 55:23 56:7,15,19 sounding 34:10 special 27:25 28:22 29:11 56:10 specifically 53:20 spin 8:7 spun 10:22 squarely 6:20 stake 32:7 35:11 stand 51:5 stands 13:18 start 10:10 state 10:17 24:4 35:18 36:4,7 47:5 49:1 52:15 56:11 57:8 stated 20:1	24:10 States 1:1,14 27:9 28:11 37:5 state's 50:1 status 55:24 statute 19:3 statutory 27:6 42:11 stay 6:2 step 57:15 stray 51:23 strong 43:2 stronger 33:10 stuck 40:14,16 student 8:3,5 students 53:25 subchapter 49:23 subject 36:7 subjective 42:20 44:20 45:9 subjects 11:9 15:24 36:5 submission 32:2 52:17,23 submitted 58:11 58:13 substantial 10:6 10:13 47:21 48:4,5 substantive 34:12,24 49:16 sue 3:19 20:16 20:24 22:6 33:6 39:3 40:12 50:19,24 50:25 55:21,22 sued 7:21 sufficient 30:16 32:19 37:6 55:7 sufficiently 6:25 suggest 47:11 suggested 41:1 48:21 53:3 suggests 40:3
--	--	--	---	--

suing 22:21 23:5	18:1 22:7	theology 22:15	threshold 11:15	understand 3:24
suits 19:15	25:17 26:7	35:25 36:6	12:17	6:9 10:1,9
20:11 23:17	27:6 29:22	theoretical 6:16	time 19:3 53:22	13:21 21:5
summary 9:11	39:25	theory 5:17,17	title 12:19 18:12	23:19 25:15
9:12,17,20,22	teachers 15:23	15:22 55:25	53:15	29:14 38:20
19:17 21:1	16:21,23 17:3	thing 7:17 16:12	told 22:20,23	54:14
suppose 14:14	17:24 21:17	36:12,12 40:24	41:25	understanding
18:25 19:9	32:4 53:6,17	43:15	Tony 15:11	15:5 39:17
22:25 23:24	teaches 11:6,9	things 5:23,24	tort 23:23 24:5	understandings
31:10,11 40:25	18:8,13 25:17	7:14 22:12	24:11 25:5,6,8	15:8
supposed 20:19	26:7	25:2 26:8	25:12	understood
20:20	teaching 12:3	38:15 48:18	touching 8:10	27:12 51:18
Supreme 1:1,14	13:15 19:2	think 5:19,23	tough 40:15	under-inclusive
sure 9:25 55:6	20:1 22:21,24	6:14 8:15 9:16	42:11	47:15 52:9
55:24	25:22,25 44:4	10:11 11:4	translate 29:1	unfit 24:14
survives 5:17	51:24 56:25	12:2,4 13:7,11	tribunal 22:21	unique 52:8
sweepingly	teachings 17:16	13:12 14:9,21	23:6	United 1:1,14
53:17	57:16,18	15:7,17,17,20	tribunals 8:24	27:9 28:10
sweeps 47:15	tell 7:4 20:8,13	16:5,19 17:4	tried 8:7 9:8	37:5
51:7	21:19 36:12	18:14 19:25	14:17 44:16	Universidad
synod 4:10,18	46:9,20 48:15	22:9 23:15,18	tries 12:20	10:23
8:22 10:3	54:20	23:25 25:6,24	troubles 5:4	university 44:5
20:20 31:13	tenet 21:2 23:6	26:13,13 27:20	true 15:11,13	44:8 51:5
synods 48:10	31:11,12 33:14	28:2,13,14	19:10 38:12	unsafe 23:23,25
system 33:14	36:25 37:3	29:1,3,18,24	54:24	24:6
56:11	41:13,25 42:3	30:7 31:20	trump 57:9,10	unwarranted
	42:25 48:13	32:5,15 33:9	trust 53:1	42:9
T	tenets 19:7,11	34:15,22 35:1	truth 18:25	use 52:18
T 2:1,1	19:19 40:21	35:3,6,8,9	try 12:6,7 41:1	U.S 52:21
take 6:4,7 11:20	41:8 49:10	36:15 37:25	41:23 44:11	
18:23 19:4	tenure 44:6,9	38:4,8,16 39:9	47:12 48:20	V
30:12 47:23	tenured 44:4	39:17 40:2,4,6	51:21 55:17	v 1:6 3:5 37:5
50:7	term 14:22,23	42:4,15,16	trying 10:18	38:9 51:4
takes 11:19	terms 13:20	43:22 46:16,20	turn 3:20	52:14,15,21
16:10	test 9:22 39:16	48:20 49:2,8,8	two 5:22 8:10	54:1,16,17
talked 22:8	46:23 47:4,18	49:21 51:1	31:16,20 32:17	57:4
talking 28:10,20	47:19,23 55:6	53:18	33:8 35:2	validity 37:3
taught 18:7	56:20	thought 11:17	38:15 55:15	43:12 45:9
tax 26:10 37:7	testimony 22:8	12:7 15:4 16:6		value 55:2
teach 15:18,19	42:23	16:12 22:13	U	values 38:22,23
15:24 16:3,4	tests 8:14,16,19	24:13 41:25	unacceptable	various 8:14
17:8,20,20	55:16	42:13	5:12,13	vendetta 4:9
18:14 36:6,6	text 29:10	threatened	uncommon	viable 44:23
36:11	Thank 45:14	20:16,24 39:3	17:13,14	view 28:10
teacher 5:4 7:25	55:9,10 58:9	threatening	unconstitutio...	31:17 46:22
11:9,19,22	theologians	31:8 36:14	27:4	views 55:8
15:22 16:9,24	42:24	three 55:15	undercut 55:8	VII 53:15

violate 49:16	54:23	10-553 1:6 3:4		
violated 22:20	we've 57:8	10:02 1:15 3:2		
violations 7:16	white 29:10	11 22:14		
Virginia 1:17	whiz 54:7	11:05 58:12		
virtue 42:11	widely 7:7 43:3			
virtues 36:16	willing 34:23	2		
W	win 42:1,3 46:14	2 55:12		
walking 49:2	witness 13:18	20 15:11 23:18		
WALTER 1:22	14:1	2011 1:11		
2:9 45:16	witnesses 13:22	22nd 22:9		
want 6:6,10 7:3	14:1	26 2:7		
7:4 14:16	woman 33:21	3		
17:12 22:4	40:12 46:21	3 2:4 4:14,15		
32:11 34:11	51:23	4		
47:11 57:9	women 5:9	4 4:14		
wanted 20:23	32:12 45:4	40 7:9,12		
44:4,4	wonder 22:3	45 2:10		
wants 33:22	wondering	5		
51:11	20:25 21:8	5 1:11 4:14		
warrant 37:6	word 39:23	55 2:13 20:12		
Washington	words 27:17	21:12 22:4		
1:10,20,22	work 10:20			
wasn't 10:3	23:11,20			
19:18 22:22	worked 7:11,11			
44:24 51:25	12:21 22:14			
Watson 58:7	workers 23:24			
way 6:6 7:20	working 23:23			
15:25 29:18	23:25 24:6			
30:2 32:19	workplace			
40:13,23 41:23	30:16 32:18			
42:5,22 44:18	34:18			
44:23 46:17	wouldn't 23:2			
48:19 54:9	24:2 53:12			
57:2 58:7	writings 44:14			
ways 38:15	wrong 47:13			
Wednesday	wrongs 34:7,21			
1:11	36:14			
welfare 27:3	X			
well-pleaded	x 1:2,9			
51:8	Y			
went 21:6 24:14	year 16:25			
weren't 4:17	years 7:9,12			
we'll 3:3 41:1	15:11 22:14			
we're 9:9 15:12	1			
16:13 20:9	1 16:25			
28:20 33:12,12				