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IN THE SUPREME COURT OF THE UNITED STATES

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HOSANNA-TABOR EVANGELICAL LUTHERAN:
CHURCH AND SCHOOL, :
Petitioner :

v. : No. 10-553

EQUAL EMPLOYMENT OPPORTUNITY :
COMMISSION, ET AL. :

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Washington, D.C.

Wednesday, October 5, 2011

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

APPEARANCES:

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behalf of the Petitioner.

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behalf of the Federal Respondent.

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the Private Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

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

Mr. Laycock.

ORAL ARGUMENT OF DOUGLAS LAYCOCK
ON BEHALF OF THE PETITIONER

MR. LAYCOCK: Mr. Chief Justice and play it please the Court:

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

JUSTICE GINSBURG: Mr. Laycock, could you clarify one point? You say the church decides who's qualified to be a minister, but, as I understand the 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 is 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 is excellent, commendable,
13 proficient, and in ministry qualities she gets
14 proficient. We all know if there is 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 --
19 and the problems they had were most severe at
20 Hosanna-Tabor. In another congregation that didn't know
21 this history, she might have been able to be effective
22 again. That was for them to decide. They make their
23 own calls.

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

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

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

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

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

1 penalize people who don't report, but a discharge claim
2 by a minister presents the question why she was
3 discharged and the court should stay out of that.

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

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

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

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

23 If the government's interest is something
24 quite different from that, like protecting the children,
25 then you can assess whether that government interest is

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

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

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

25 There is a cert petition pending in which a

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

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

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

1 governance of their officers. The churches --

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

5 MR. LAYCOCK: Well it's an argument we make
6 in the hearing on whether the ministerial exception
7 applies.

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

10 MR. LAYCOCK: Well, we are asking to apply
11 the exemption --

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

14 MR. LAYCOCK: It was precisely a motion for
15 --

16 JUSTICE KENNEDY: That's the analogy, I
17 think.

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

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

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.

5 JUSTICE KENNEDY: I'm saying if there are
6 some substantial issues the church has that can be
7 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 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. Universe of Dodd.

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

1 your position extends beyond ministers. How do we, how
2 do we decide who's covered by the ministerial exception
3 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'm taking -- the Chief is
21 asking for somebody in this, 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 is 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 MR. LAYCOCK: Well, I -- I certainly meant
13 something different from a pretext. A sham is more
14 extreme, and it goes to a different point in the
15 analysis. You can decide whether she is really a
16 minister. That's a threshold question the courts must
17 decide. And if we have a person with a ministerial
18 title who is doing nothing at all religious or
19 ministerial, if we have a church who tries to say
20 everyone who ever worked for us or ever may is a
21 minister, the courts can deal with those cases if
22 they --

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

1 right? But once it is determined that the person is a
2 minister, you would not allow the government to decide
3 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 is 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, you know, I think courts
13 have some capacity to look at what this employee is
14 actually doing, and if he is not performing any of the
15 functions of a religious leader, if he is not teaching
16 the faith, 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, so
23 --

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

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

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

24 MR. LAYCOCK: That is correct.

25 JUSTICE SCALIA: Okay.

1 MR. LAYCOCK: That is correct.

2 JUSTICE KAGAN: Is that correct?

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

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

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

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

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

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

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

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

25 JUSTICE GINSBURG: But you're isolating one

1 parish, but there was something in one of these briefs
2 that said the majority of the teachers in the Lutheran
3 schools -- let's see where it was. I think it was --

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

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

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

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

20 JUSTICE SOTOMAYOR: I'm sorry. Going back
21 to the question Justice Kagan asked you, if one of these
22 Protestant teachers that's not Lutheran led the
23 cafeteria prayer, as they are required to, you're now
24 saying that the law must recognize that lay teacher as a
25 minister and apply the ministerial exception, even

1 though the religion doesn't consider her a minister?

2 MR. LAYCOCK: I didn't say that.

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

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

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

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

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

18 MR. LAYCOCK: That's correct.

19 JUSTICE BREYER: What is your -- take, what
20 is your reaction to a less dramatic kind of holding?
21 Suppose we were to say the truth is that the particular
22 individual here does have some religious obligations in
23 teaching and quite a lot that aren't. So she is sort of
24 on the edge. At the same time, there is a statute
25 which, whether it applies or not, you could take the

1 principle, and it says a religious organization like
2 your client may require that she conform to the
3 religious tenets of the organization.

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

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

19 What are your objections to that?

20 MR. LAYCOCK: Well, my first objection is I
21 don't think those are remotely the facts here. You
22 know, this teaching is clearly stated, embodied in an
23 elaborate dispute resolution process. You don't ask for
24 --

25 JUSTICE BREYER: Did anyone mention that to

1 her?

2 MR. LAYCOCK: Indeed.

3 JUSTICE BREYER: Really? My law clerk
4 couldn't find it. Can you tell me where, where someone
5 did say the reason we are dismissing you is because of
6 our religious doctrine that you cannot bring civil
7 suits?

8 MR. LAYCOCK: Page 55 of the joint appendix,
9 which is the letter that -- where they tell her that
10 they are going to recommend rescission of her call, they
11 say because -- because of insubordination, and because
12 you threatened to sue us.

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

18 Of course they wanted to fire her because
19 she threatened to sue them. But what I'm wondering is,
20 is there anywhere before the motion for summary judgment
21 where someone explains to her, our motivation here is
22 due to our religious tenet?

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

25 JUSTICE BREYER: No, no. I understand that.

1 But I would argue a different piece of matter, that the
2 people who were involved in this were doing it for
3 religious rather than civil reasons. I'm just wondering
4 what the evidence is that they knew there was such a
5 doctrine, that they were motivated by the religious
6 doctrine, and that they expressed that to her. I
7 just -- I'll look at page 55. Is there anything else I
8 should look at?

9 JUSTICE GINSBURG: Is it -- is it in the
10 handbook? I mean, one of the objections -- if this --
11 if this is a rule that's going to bind a teacher, then
12 you would expect to find it in the handbook. But the
13 handbook doesn't tell her, if you complain to the EEOC
14 about discrimination then you will be fired.

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

19 JUSTICE BREYER: Well, Mr. Laycock, we're
20 looking for a citation in the record. I just wonder, is
21 there anything you want me to read other than page 55?

22 MR. LAYCOCK: Yes. The principal in her
23 deposition says: The minute she said she might sue, I
24 said: You can't do that; you're a called teacher. The
25 testimony is the board talked about it at their meeting

1 on February 22nd. I think that's also in the
2 principal's deposition.

3 The president of the congregation, who did
4 not deal directly with Perich, said -- said it was one
5 of the first things that he thought about. Perich was a
6 lifelong Lutheran. She worked 11 years in Lutheran
7 schools. She had these eight theology courses. Simply
8 not credible that she didn't know about this doctrine.

9 JUSTICE ALITO: Mr. Laycock, didn't this
10 inquiry illustrate the problems that will necessarily
11 occur if you get into a pretext analysis -- the question
12 of was she told that she had violated the church's
13 teaching about suing in a civil tribunal. Well, that
14 depends. The significance of -- let's assume she wasn't
15 told. The significance of that depends on how central a
16 teaching of Lutheranism this is.

17 It's like, suppose a Catholic priest got
18 married and the bishop said: I'm removing you from your
19 parish because of your conduct. Now, there wouldn't be
20 much question about why that was done. So you'd have to
21 get in -- what did Martin Luther actually say about,
22 about suing the church where other Christians in a civil
23 tribunal. Is this really a central tenet of
24 Lutheranism? Isn't that the problem with going into
25 this pretext analysis.

1 MR. LAYCOCK: That's just part of the
2 problem. You've got to figure, how does this doctrine
3 work? How important is it? How does it apply to the
4 facts of this case? How does it interact with other
5 doctrines?

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

15 But you say torts arising from unsafe
16 working conditions. Suppose one of these commissioned
17 workers said: I think that there are unsafe working
18 conditions and I'm going to complain to the Occupational
19 Health and Safety Agency. And wouldn't she get the same
20 answer: This has to be solved in-house. You don't go
21 to an agency of the State.

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

25 MR. LAYCOCK: Well, it may or it may not.

1 The -- the rule on internal dispute resolution is most
2 emphatically and clearly stated as applying to disputes
3 over fitness for ministry, and a tort claim may not be a
4 dispute over fitness for ministry.

5 JUSTICE GINSBURG: But I thought the reason
6 that she was unfit for the ministry was that she went
7 outside the house.

8 MR. LAYCOCK: That's right.

9 JUDGE GINSBURG: So in all of these cases,
10 you go outside the church, you go to the government,
11 then you have a --

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

18 JUSTICE GINSBURG: But she could be, for any
19 of these things, she could be disciplined, fired because
20 she complained outside the house?

21 MR. LAYCOCK: She could be. And her tort,
22 the tort claim would proceed. We think the retaliation
23 claim should not proceed.

24 JUSTICE GINSBURG: The tort claim could
25 proceed, and then she would get damages and that would

1 be all right?

2 MR. LAYCOCK: She would get damages for the
3 tort. She would not get damages for the loss of her
4 position.

5 JUSTICE GINSBURG: Did you say -- did I
6 understand you before, in response to Justice Sotomayor
7 and Justice Scalia, that even if she were merely a
8 contract teacher, the fact that she teaches religion
9 classes would be enough for her to qualify for the
10 ministerial exception?

11 MR. LAYCOCK: Yes. And the fact that she's
12 a commissioned minister is the clincher in this case.
13 Teaching --

14 JUSTICE GINSBURG: Is the clincher in this
15 case, but even -- I think you answered if she were not a
16 commissioned minister, she's teaching the faith,
17 therefore she can be fired, and it doesn't matter
18 whether she's commissioned, so the commission is
19 irrelevant. It's -- it's her job duties that count?

20 MR. LAYCOCK: Job duties are enough.
21 Commission is not irrelevant. It is the clincher.

22 JUSTICE GINSBURG: Well, it was certainly
23 for some purposes, I mean, if every teacher who teaches
24 religion and math and a lot of other things said, I'm a
25 minister and I'm entitled to the parsonage allowance on

1 my income tax return, certainly that's something that a
2 government agent would review.

3 MR. LAYCOCK: Well, they do review it there.
4 I think they -- I don't think the Lutherans have any
5 problems with the IRS on that. But yes, that is a
6 context where they review these questions.

7 If I could reserve a few minutes for
8 rebuttal, I would be grateful.

9 CHIEF JUSTICE ROBERTS: You may.

10 Ms. Kruger.

11 ORAL ARGUMENT OF LEONDRA R. KRUGER

12 ON BEHALF OF THE FEDERAL RESPONDENT

13 MS. KRUGER: Mr. Chief Justice and play it
14 please the Court:

15 The freedom of religious communities to come
16 together to express and share religious belief is a
17 fundamental constitutional right. But it's a right that
18 must also accommodate important governmental interests
19 in securing the public welfare. Congress has not
20 unconstitutionally infringed Petitioner's freedom in
21 this case by making it illegal for it to fire a fourth
22 grade teacher in retaliation for asserting her statutory
23 rights.

24 CHIEF JUSTICE ROBERTS: Is the position of
25 the United States that there is a ministerial exception

1 or that there is not a ministerial exception?

2 MS. KRUGER: Mr. Chief Justice, if the
3 ministerial exception is understood as a First Amendment
4 doctrine that governs the adjudication of disputes
5 between certain employees and their employers, we agree
6 that that First Amendment doctrine exists.

7 CHIEF JUSTICE ROBERTS: Nothing to do with
8 respect to the ministers. In other words, is there a
9 ministerial exception distinct from the right of
10 association under the First Amendment?

11 MS. KRUGER: We think that the ministerial
12 exception is one that incorporates the right of
13 association as well as the rights under the religion
14 clauses.

15 CHIEF JUSTICE ROBERTS: Is there anything
16 special about the fact that the people involved in this
17 case are part of a religious organization?

18 MS. KRUGER: We think that the -- the
19 analysis is one that the Court has -- has elaborated in
20 other cases involving similar claims to autonomy,
21 noninterference.

22 CHIEF JUSTICE ROBERTS: Is that a no? You
23 say it's similar to other cases. Expressive
24 associations, a group of people who are interested in
25 labor rights have expressive associations. Is the issue

1 we are talking about here in the view of the United
2 States any different than any other group of people who
3 get together for an expressive right?

4 MS. KRUGER: We think the basic contours of
5 the inquiry are not different. We think how the inquiry
6 plays out in particular cases may be.

7 JUSTICE SCALIA: That's extraordinary. That
8 is extraordinary. We are talking here about the Free
9 Exercise Clause and about the Establishment Clause, and
10 you say they have no special application?

11 MS. KRUGER: The contours -- the inquiry
12 that the Court has set out as to expressive associations
13 we think translate quite well to analyzing the claim
14 that Petitioner has made here. And for this reason, we
15 don't think that the job duties of a particular
16 religious employee in an organization are relevant to
17 the inquiry.

18 JUSTICE SCALIA: There is nothing in the
19 Constitution that explicitly prohibits the government
20 from mucking around in a labor organization. Now, yes,
21 you -- you can by an extension of First Amendment rights
22 derive such a -- but there, black on white in the text
23 of the Constitution are special protections for
24 religion. And you say that makes no difference?

25 MS. KRUGER: Well, Justice Scalia, if I may,

1 I don't understand Petitioner from the first half of his
2 argument to have disputed this basic point, which is
3 that the contours of the First Amendment doctrine at
4 issue here will depend on a balancing of interests.
5 That is the only way, I think, that Petitioner can
6 differentiate a generally neutrally applicable
7 application of anti-discrimination law with respect to
8 a church's choice of those who would govern it and a
9 church's retaliation against a teacher who would report
10 child abuse to the authorities.

11 JUSTICE SCALIA: I think that the balancing
12 of interests is different, according to the Petitioner,
13 when one of the interests is religion. And you're just
14 denying that. You're saying: We balance religion the
15 way we balance labor organizations.

16 MS. KRUGER: Well, Justice Scalia --

17 JUSTICE SCALIA: That's certainly not what
18 the Petitioner is saying.

19 MS. KRUGER: Here is where I think was the
20 core of the insight of the ministerial exception as it
21 was originally conceived is, which is that there are
22 certain relationships within a religious community that
23 are so fundamental, so private and ecclesiastical in
24 nature, that it will take an extraordinarily compelling
25 governmental interest to justify interference. Concerns

1 with health or safety, for example. But the
2 government's general interest in eradicating
3 discrimination in the workplace will not be sufficient
4 to justify the burden --

5 JUSTICE ALITO: Well, do you accept the
6 proposition that one of the central concerns of the
7 Establishment Clause was preventing the government from
8 choosing ministers? When there was an established
9 church, the government chose the ministers or had a say
10 in choosing the ministers. And the Establishment Clause
11 many argue was centrally focused on eliminating that
12 governmental power. Now, do you dispute that?

13 MS. KRUGER: No, Justice Alito, we don't
14 dispute it. What we do dispute is that what is
15 happening when the government applies generally
16 applicable anti-retaliation law to a religious employer
17 is that it is choosing a minister on behalf of the
18 church. What it is instead doing is preventing
19 religious employers, like any other employers, from
20 punishing their employees for threatening to bring
21 illegal conduct to the attention of --

22 JUSTICE BREYER: Well, suppose that that's a
23 central tenet. Suppose you have a religion and the
24 central tenet is: You have a problem with what we do,
25 go to the synod; don't go to court. And that applies to

1 civil actions of all kinds. All right? So would that
2 not be protected by the First Amendment?

3 MS. KRUGER: Justice Breyer --

4 JUSTICE BREYER: Your view is it's not
5 protected?

6 MS. KRUGER: It's not protected. I'd like
7 to -- I think there are two responses that are relevant
8 to how this Court would resolve that question in this
9 case.

10 First of all, if the Court were to accept
11 the rule that Petitioner would ask it to adopt, we would
12 never ask the question whether or not the church has a
13 reason for firing an employee that's rooted in religious
14 doctrine. Their submission is that the hiring and
15 firing decisions with respect to parochial school
16 teachers and with respect to priests is categorically
17 off limits. And we think that that is a rule that is
18 insufficiently attentive to the relative public and
19 private interests at stake, interests that this Court
20 has repeatedly recognized are important in
21 determining freedom of association claims.

22 JUSTICE BREYER: So the fact if they want to
23 choose to the priest, you could go to the Catholic
24 Church and say they have to be women. I mean, you
25 couldn't say that. That's obvious. So how are you

1 distinguishing this?

2 MS. KRUGER: Right. We think that the --
3 both the private and public interests are very different
4 in the two scenarios. The government's general interest
5 in eradicating discrimination in the workplace is simply
6 not sufficient to justify changing the way that the
7 Catholic Church chooses its priests, based on gender
8 roles that are rooted in religious doctrine. But the
9 interests in this case are quite different. The
10 government has a compelling and indeed overriding
11 interest in ensuring that individuals are not prevented
12 from coming to the government with information about
13 illegal conduct.

14 JUSTICE ALITO: When you say that, are you
15 not implicitly making a judgment about the relative
16 importance of the Catholic doctrine that only males can
17 be ordained as priests and the Lutheran doctrine that a
18 Lutheran should not sue the church in civil courts? I
19 don't see any distinction between -- I can't reconcile
20 your position on those two issues without coming to the
21 conclusion that you think that the Catholic doctrine is
22 older, stronger and entitled to more respect than the
23 Lutheran doctrine.

24 MS. KRUGER: No, we are not -- We are not
25 drawing distinctions between the importance of a

1 particular religious tenet in a system of religious
2 belief. But the difference is that the government has a
3 indeed foundational interest in ensuring, as a matter of
4 preserving the integrity of the rule of law, that
5 individuals are not punished for coming --

6 JUSTICE BREYER: You are saying that going
7 to church -- sorry -- that going to court is a more
8 fundamental interest than a woman obtaining the job that
9 she wants, which happens in this case to be a Catholic
10 priest. But that's the distinction you're making.

11 MS. KRUGER: I am drawing a distinction
12 between --

13 JUSTICE BREYER: Well, I don't know why that
14 doesn't -- I mean, you may be right, but it isn't
15 obvious to me that the one is the more important than
16 the other.

17 MS. KRUGER: The government's interest in
18 preventing retaliation against those who would go to
19 civil authorities with civil wrongs is foundational to
20 the rule of law.

21 JUSTICE KAGAN: Miss Kruger, if I could just
22 clarify for a second there, because you're now sounding
23 as though you want to draw a sharp line between
24 retaliation claims and substantive discrimination
25 claims, and I didn't get that from your brief. So is

1 that, in fact, what you're saying?

2 MS. KRUGER: I think that there is an
3 important distinction to be made between the
4 government's general interest in eradicating
5 discrimination from the workplace and the government's
6 interest in ensuring that individuals are not chilled
7 from coming to civil authorities with reports about
8 civil wrongs.

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

10 JUSTICE KAGAN: So are you willing to accept
11 the ministerial exception for substantive discrimination
12 claims, just not for retaliation claims?

13 MS. KRUGER: I don't think that those are
14 the only two sets of inquiries that are important in the
15 balancing. And if I could continue, I think the
16 government --

17 CHIEF JUSTICE ROBERTS: I think that
18 question can be answered yes or no.

19 MS. KRUGER: I think that that doesn't -- I
20 think the answer is no, in part because that doesn't
21 fully account for all of the public and private
22 interests at stake. The government's interest extends
23 in this case beyond the fact that this is a retaliation
24 to the fact that this is not a church operating
25 internally to promulgate and express religious belief

1 internally. It is a church that has decided to open its
2 doors to the public to provide the service, socially
3 beneficial service, of educating children for a fee, in
4 compliance with State compulsory education laws. And
5 this Court has recognized in cases like Bob Jones that
6 church- operated schools sit in a different position
7 with respect to the -- the permissible scope of
8 governmental regulations, the churches themselves do.

9 JUSTICE SCALIA: Even with respect to their
10 religion classes and their theology classes? It's
11 extraordinary.

12 MS. KRUGER: Well, the government --

13 JUSTICE SCALIA: Just because -- just
14 because you have to comply with State education
15 requirements on secular subjects, your -- who you pick
16 to -- to teach theology or to teach religion has to
17 be -- has to be subject to State control?

18 MS. KRUGER: Justice Scalia, to be clear,
19 the government's interest in this case is not in
20 dictating to the church-operated school who it may
21 choose to teach religion classes and who it may not. It
22 is one thing and one thing only, which is to tell the
23 school that it may not punish its employees for
24 threatening to report civil wrongs to civil authorities.
25 That is an interest that we think overrides the burden

1 on the association's religious message about the virtues
2 of internal dispute resolution as opposed to court
3 resolution.

4 CHIEF JUSTICE ROBERTS: You're making --
5 you're making a judgment about how important a
6 particular religious belief is to a church. You're
7 saying -- this may just be the same question Justice
8 Alito asked -- but you're saying: We don't believe the
9 Lutheran Church when it says that this is an important
10 and central tenet of our faith.

11 MS. KRUGER: No, absolutely not, Mr. Chief
12 Justice. We do not dispute -- when they assert that
13 it's an important tenet, we assume its validity, we
14 assume that they are sincere in that religious belief.
15 But just as in *United States v. Lee* a sincere religious
16 belief was not sufficient to warrant an exemption from
17 generally applicable tax laws, as in *Bob Jones*, or --

18 CHIEF JUSTICE ROBERTS: On the other hand,
19 the -- the belief of the Catholic Church that priests
20 should be male only, you do defer to that, even if the
21 Lutherans say, look, our dispute resolution belief is
22 just as important to a Lutheran as the all-male clergy
23 is to a Catholic.

24 MS. KRUGER: Yes. But that's because the
25 balance of relative public and private interests is

1 different in each case.

2 JUSTICE KAGAN: Do you believe, Miss Kruger,
3 that a church has a right that's grounded in the Free
4 Exercise Clause and-or the Establishment Clause to
5 institutional autonomy with respect to its employees?

6 MS. KRUGER: We don't see that line of
7 church autonomy principles in the religion clause
8 jurisprudence as such. We see it as a question of
9 freedom of association. We think that this case is
10 perhaps one of the cases --

11 JUSTICE KAGAN: So this is to go back to
12 Justice Scalia's question, because I too find that
13 amazing, that you think that the Free -- neither the
14 Free Exercise Clause nor the Establishment Clause has
15 anything to say about a church's relationship with its
16 own employees.

17 MS. KRUGER: We think that this is one of
18 the cases that Employment Division v. Smith may have
19 been referring to when it referred to free association
20 claims that are reinforced by free exercise concerns.
21 It's certainly true that the association's claim to
22 autonomy in this case is one that is deeply rooted; and
23 concerns about how it exercises its religion, those two
24 things merge in some ways in that respect. But --

25 JUSTICE SCALIA: I don't think they -- they

1 merge at all. Smith didn't involve employment by a
2 church. It had nothing to do with who -- who the church
3 could employ. I don't -- I don't see how that has any
4 relevance to this. I would -- I didn't understand your
5 answer to the Chief Justice's question. You -- you say
6 that there were different institutional values or
7 government values involved with respect to a -- to a
8 Catholic priest than there is with respect to this
9 Lutheran minister. Let's assume that a Catholic priest
10 is -- is removed from his duties because he married,
11 okay? And, and he claims: No, that's not the real
12 reason; the real reason is because I threatened to sue
13 the church. Okay? So that reason is just pretextual.

14 Would you -- would you allow the government
15 to go -- go into the -- into the dismissal of the
16 Catholic priest to see whether indeed it -- it was
17 pretextual?

18 MS. KRUGER: I think the answer is no,
19 Justice Scalia --

20 JUSTICE SCALIA: Why?

21 MS. KRUGER: -- but that is --

22 JUSTICE SCALIA: Why is that any different
23 from the Lutheran minister?

24 MS. KRUGER: I would begin with looking at
25 the burdens on association under the balancing test. I

1 think that the core of the understanding of the
2 ministerial exception as it was elaborated in the lower
3 courts is that there is a fundamental difference between
4 governmental regulation that operates to interfere with
5 the relationship between a church and those who would
6 govern it, those who would preach the word to the
7 congregation, those who would administer its sacraments,
8 on the one hand, and the more public relationship
9 between a church and a school teacher and others that
10 provide services to the public at large.

11 JUSTICE SCALIA: I think that's saying
12 nothing different than what the Chief Justice suggests,
13 that you think the one is more -- is more important to
14 -- to Catholics than the other is to Lutherans.

15 MS. KRUGER: I don't think it's a question
16 of the importance of either function to the -- the
17 religious association. It's a question of the realm
18 of permissible governmental regulation.

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

24 And since -- since I'm really -- this is
25 tough and I'm stuck on this, I don't see how you can

1 avoid going into religion to some degree. You have to
2 decide if this is really a minister, for example, and
3 what kind of minister. That gets you right involved.
4 Or if you're not going to do that, you're going to go
5 look to see what are their religious tenets? And that
6 gets you right involved.

7 I just can't see a way of getting out of
8 something -- of getting out of the whole thing. I don't
9 see how to do it. So suppose you said in case of doubt
10 like that, we'll try what Congress suggested. And now
11 we have here a borderline case of ministry, not the
12 heartland case. So you say, all right, where you have a
13 borderline case the constitutional issue goes away and
14 what Congress said is okay, so now what you have to
15 prove is you have to prove that the church has to show
16 that the applicant was disciplined or whatever because
17 she didn't conform to the religious tenets. All right?
18 That's what they have to show.

19 And I'm sorry; they maybe only make a prima
20 facie case, but they got to show it, and if they don't
21 show that there was at least some evidence to that
22 effect and that somebody knew about the religious tenet
23 and there was something like that -- maybe it's in the
24 air, as is obvious with Justice Alito's question. But
25 where it isn't in the air, you'd have to make a showing.

1 Now I -- I see that's an interference, but
2 -- but I don't see how you avoid an interference
3 someplace or the other. Otherwise you're going to get
4 into who is a minister.

5 So what's the answer to this dilemma? At
6 the moment I'm making an argument for following what
7 Congress said, go back and try it that way, and if they
8 can show in this case and she shows in this case nobody
9 ever thought of this religious tenet, nobody told me,
10 they didn't read it, then she's going to win. And if
11 they come in and show that they really did this because
12 of their religious tenet, they will win. What about
13 that?

14 MS. KRUGER: Justice Breyer, I think that
15 that is a perfectly appropriate way to come at this
16 case, although it skips over sort of the initial
17 inquiry, which is into whether or not the application of
18 the regulations to the particular employment
19 relationship results in an unwarranted interference.

20 JUSTICE BREYER: Well, it does have the
21 virtue of deciding a statutory question before a tough
22 constitutional question. And I agree, with what we
23 sometimes do, that seems bizarre, but I thought that was
24 the basic rule.

25 MS. KRUGER: I think that that's absolutely

1 right, Justice Breyer. And I think the next question
2 becomes, with respect to adjudicating a particular case,
3 whether deciding the case would require the court to
4 decide disputed matters of religious doctrine or to
5 second-guess essentially subjective --

6 JUSTICE ALITO: Well, if -- if the plaintiff
7 proceeded that way, would she be entitled to -- I assume
8 she would -- introduce testimony by experts on
9 Lutheranism, theologians, professors of religion about
10 how the -- about this -- this tenet, and it isn't
11 really -- they might say, well, it's really not that
12 strong and it once was, but it's faded, and it's not --
13 it's not widely enforced.

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

18 MS. KRUGER: No, it's not how it would play
19 out.

20 JUSTICE ALITO: How are we going to avoid
21 that? I just don't see it.

22 MS. KRUGER: Any inquiry into the validity
23 of a particular religious doctrine is simply irrelevant
24 to the adjudication of the dispute, which is designed to
25 find out just one thing, which is whether the --

1 JUSTICE ALITO: No. It's not just
2 irrelevant. I've dozens and dozens and dozens of
3 pretext cases, and in practically every pretext case
4 that I've seen one of the central issues is whether the
5 reason that was proffered by the employer is the real
6 reason, is an important reason for that, for that
7 employer, and whether they really think it's important
8 and whether they apply it across the board. That's
9 almost always a big part of the case.

10 And once you get into that, you're going to
11 get into questions of -- of religious doctrine. I just
12 don't see it.

13 Let me give you an example of a real case.
14 A nun wanted to be -- wanted a tenured position teaching
15 canon law at Catholic University and she claimed that
16 she was denied tenure because of her -- because of her
17 gender.

18 Now, there the university might argue, no,
19 she's -- and did argue -- she's denied tenure because of
20 the quality of her, of her scholarship. And okay, now,
21 if you just try that pretext issue, the issue is going
22 to be what is the real quality of her canon law
23 scholarship? And you're going to have the judge and the
24 jury decide whether this particular writings on canon
25 law are -- make a contribution to canon law scholarship.

1 How can something like that be tried, without getting
2 into religious issues?

3 MS. KRUGER: If the only way that the
4 Plaintiff has to show that that may not have been the
5 employer's real reason was a subjective judgment about
6 the quality of canon law scholarship, then judgment has
7 to be entered for the employer, because the plaintiff
8 has no viable way, consistent with the Establishment
9 Cause, of demonstrating that wasn't the employer's real
10 reason.

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

24 CHIEF JUSTICE ROBERTS: Thank you,
25 Ms. Kruger.

1 ORAL ARGUMENT OF WALTER DELLINGER
2 ON BEHALF OF THE PRIVATE RESPONDENT

3 MR. DELLINGER: Mr. Chief Justice, and may it please the
4 Court --

5 JUSTICE KAGAN: Mr. Dellinger -- could you
6 assume -- could you assume for me that -- is it --

7 CHIEF JUSTICE ROBERTS: Mr. -- Justice
8 Kagan --

9 (Laughter.)

10 JUSTICE KAGAN: I feel like I missed
11 something.

12 Mr. Dellinger, could you assume for me that
13 there is a ministerial exception that's founded in the
14 religion clauses, and tell me who counts as a minister,
15 and why this commissioned minister does not count as a
16 minister?

17 MR. DELLINGER: I believe that there is an
18 exemption grounded in the religion clauses. It means
19 that religious organizations will win, will prevail in
20 many cases in which a comparable civil organization
21 would not prevail. I don't think that it makes sense to
22 approach it in a categorical way of asking --

23 JUSTICE KAGAN: I'm just asking you to
24 assume with me for a moment that there is a categorical
25 exception, and to tell me who you think counts as a

1 minister, and why the woman in this case does not.

2 MR. DELLINGER: Well, in our view, if that
3 was the test, then we would say that the court of
4 appeals was correct in holding that she was not a
5 minister, and the reason -- the principal reason is she
6 carries out such important secular functions in addition
7 to her religious duties --

8 CHIEF JUSTICE ROBERTS: I'm sorry to
9 interrupt you, but that can't be the test. The Pope is
10 a head of state carrying out secular functions; right.
11 Those are important. So he is not a minister?

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

19 JUSTICE SCALIA: Which if we adopt your test
20 -- why isn't it a perfectly reasonable test whether the
21 person -- although the person may have a lot of secular
22 duties -- whether the person has substantial religious
23 responsibilities?

24 MR. DELLINGER: And the reason that is not a
25 satisfactory test is that it fails to take account of

1 the important governmental interests -- for example in
2 this case, in having everyone have access to the -- to
3 the courts --

4 JUSTICE BREYER: That isn't -- that isn't
5 the problem. The problem, it seems to me, is I don't
6 know how substantial these interests are religiously. I
7 don't know how substantial the religion itself considers
8 what they do from a religious perspective. So let's go
9 back to Justice Alito's problem. And now on the
10 ministerial issue, we call the synods, we call the how
11 certain was it -- how central is it to the heart of the
12 religion what they're actually doing, and we replicate
13 exactly what he said -- in respect to the problem of
14 religious tenet -- now in respect to the problem of
15 religious minister.

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

23 MR. DELLINGER: Well --

24 JUSTICE BREYER: Now, what do you, that's --
25 that's the state of the argument that you're walking

1 into, I think.

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

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

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

17 I mean, I don't --

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

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

23 Assume for me that that's so.

24 MR. DELLINGER: It is still the case it is a
25 constitutional matter -- the State's interest in

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

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

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

10 JUSTICE SCALIA: Why not?

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

18 JUSTICE SCALIA: But he can sue for money;
19 right?

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

23 JUSTICE SCALIA: He can sue for money. He
24 can sue for, you know, the loss of --

25 MR. DELLINGER: I think in that case that

1 that is very likely to fail because you're going to run
2 into a -- issues of religious doctrine, or evaluations
3 of distinctly religious matters like EEOC v. Catholic
4 University. Those doctrines still stand.

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

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

1 inconsistent it is with church doctrine, you could see
2 that that's the real reason for it. So you just cannot
3 get away from evaluating religious issues.

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

18 We know that under U.S. v. Lee, an Amish
19 employer has to comply with the Social Security laws,
20 but under their submission, the employer could fire
21 without recourse any employee who called noncompliance
22 to the attention of the EEOC. We believe that you can
23 trust Congress on these hard areas where there needs to
24 be additional accommodations; Congress could make them,
25 just as Justice Scalia suggested. The ministerial

1 exception has a long history, Justice Alito, but in
2 almost every circuit, it did not apply to teachers, so,
3 I mean --

4 JUSTICE ALITO: It's antedated. Did it not
5 antedate the enactment of the Americans with
6 Disabilities Act?

7 MR. DELLINGER: That is correct. When that
8 was enacted --

9 JUSTICE ALITO: Then shouldn't we assume
10 that Congress -- that Congress -- assumed that it would
11 continue to apply to the ADA, just as it applied to
12 Title VII.

13 MR. DELLINGER: In the lower courts, it did
14 not apply as sweepingly as to teachers. And I think we
15 had this debate with Justice Breyer about whether you
16 can say that Congress specifically excluded retaliation
17 cases. But remember that that doctrine emerged at a
18 time when this Court had a position that religious
19 organizations could not participate in getting public
20 funding, even when they are provided with menial
21 services to low income students. We repudiated that
22 doctrine in *Agostini v. Felton* and where the Court said
23 that you're entitled to participate in providing public
24 services on the same basis as all other organizations.
25 That means that you should comply, in some instances,

1 with the same rules. When you leave the cloister and go
2 into the public arena and provide public services.

3 JUSTICE SCALIA: Do Lutheran schools and
4 Catholic parochial schools share public funds the same
5 way public schools do?

6 MR. DELLINGER: No, they don't --

7 JUSTICE BREYER: You bet they don't.

8 MR. DELLINGER: But they are entitled to.

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

11 MR. DELLINGER: Because we are no longer --
12 We are no longer of the of the Agostini v. Felton era,
13 the Employment Division v. Smith where we believe that
14 no governmental rules or involvement can be had with
15 these public institutions.

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

18 MR. DELLINGER: No --

19 JUSTICE SCALIA: Just like everybody else.
20 That's not true.

21 MR. DELLINGER: It's that we have recognized
22 in your opinion in Smith and in Justice Kennedy's
23 opinion in Rosenberger the value of neutrality where you
24 have doctrines -- If we recognize -- You do not
25 second-guess religious doctrine. You do not under the

1 Establishment Clause introduce someone into an
2 ecclesiastical office, and you do a balancing test to
3 make sure that there is a sufficient governmental
4 interest, if you're going to undercut an organization's
5 ability to convey its views. Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.
7 Dellinger.

8 Mr. Laycock, two minutes.

9 REBUTTAL ARGUMENT OF DOUGLAS LAYCOCK
10 ON BEHALF OF THE PETITIONER

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

19 JUSTICE SOTOMAYOR: Mr. Laycock, I'm not
20 sure why the status of the individual matters under your
21 theory. It seems to me what you're saying is, so long
22 as a religious organization gives a religious reason of
23 any kind, genuine or not, for firing someone that's
24 associated with it, whether minister or not, that that
25 invokes the exception. Am I hearing your argument

1 right?

2 MR. LAYCOCK: No.

3 JUSTICE SOTOMAYOR: All right. So why is
4 there a difference?

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

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

13 MR. LAYCOCK: Janitor can litigate his
14 pretext question. Yes.

15 JUSTICE SOTOMAYOR: So you're limiting your
16 test to whether that person is minister. So define
17 minister for me again.

18 MR. LAYCOCK: A minister is a person who
19 holds ecclesiastical office in the church or who
20 exercises important religious functions, most obviously,
21 including teaching of the faith.

22 JUSTICE KAGAN: Mr. Laycock, Mr. Dellinger
23 has some points here about the way in which the
24 ministerial exception relates or doesn't relate to
25 Employment Division v. Smith. And it seems to me that

1 in order to make an argument of the ministerial
2 exception, you in some sense have to say that
3 institutional autonomy is different from individual
4 conscience; that we have said in Smith that state
5 interests can trump individual conscience. And you want
6 us to say that they can't trump institutional autonomy.
7 So why is that?

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

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

18 MR. LAYCOCK: The Establishment Clause --

19 JUSTICE SCALIA: -- which applies to
20 institutions?

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

22 JUSTICE SCALIA: Where the Free Exercise
23 Clause applies to individuals.

24 MR. LAYCOCK: This score has relied on both
25 Free Exercise and Establishment. Serbian, Kedreff,

1 Kreshik, Gonzalez. There's a long line of cases all the
2 way back to Watson distinguishing this problem from the
3 problem that culminates in Smith.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 The case is submitted.

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

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