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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 may 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 or 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. They would --

JUSTICE GINSBURG: Mr. Laycock, would 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'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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