

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CATHOLIC CHARITIES BUREAU, INC.,     )  
ET AL.,     )  
                    Petitioners,     )  
                    v.     ) No. 24-154  
WISCONSIN LABOR & INDUSTRY REVIEW     )  
COMMISSION, ET AL.,     )  
                    Respondents.     )  
- - - - -

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12                               Washington, D.C.  
13                               Monday, March 31, 2025  
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15               The above-entitled matter came on for  
16       oral argument before the Supreme Court of the  
17       United States at 10:05 a.m.  
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1 APPEARANCES:  
2 ERIC C. RASSBACH, Washington, D.C.; on behalf of the  
3 Petitioners.  
4 CURTIS E. GANNON, Deputy Solicitor General, Department  
5 of Justice, Washington, D.C.; for the United  
6 States, as amicus curiae, supporting the  
7 Petitioners.  
8 COLIN T. ROTH, Assistant Attorney General, Madison,  
9 Wisconsin; on behalf of the Respondents.  
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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	ERIC C. RASSBACH, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF:	
6	CURTIS E. GANNON, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioners	45
9	ORAL ARGUMENT OF:	
10	COLIN T. ROTH, ESQ.	
11	On behalf of the Respondents	72
12	REBUTTAL ARGUMENT OF:	
13	ERIC C. RASSBACH, ESQ.	
14	On behalf of the Petitioners	117
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 24-154,  
5 Catholic Charities Bureau versus the Wisconsin  
6 Labor & Industry Review Commission.

7 Mr. Rassbach.

8 ORAL ARGUMENT OF ERIC C. RASSBACH

9 ON BEHALF OF THE PETITIONERS

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

12 This case is not complicated. The  
13 Wisconsin Supreme Court got it wrong when it  
14 interpreted a state-law religious exemption to  
15 favor what it called "typical" religious  
16 activity and when it held that helping the poor  
17 can't be religious, because secular people help  
18 the poor too. To resolve this case this Court  
19 need do nothing more than say that the  
20 Constitution doesn't allow courts to do that.

21 That conclusion breaks no new  
22 doctrinal ground, and most courts have no  
23 difficulty applying religious exemptions  
24 constitutionally. The problem here is that  
25 Wisconsin draws distinctions along theological

1 lines, something that this Court has repeatedly  
2 forbidden.

3 Wisconsin compares its rule to the  
4 ministerial exception. But Wisconsin's rule  
5 would be equally unconstitutional in a  
6 ministerial exception context. No court would  
7 hold that clergy who preach on Saturday are not  
8 ministers because preaching on Sunday is more  
9 typical. Nor would any court hold that a  
10 religious leader who helps the poor isn't a  
11 minister because secular leaders help the poor  
12 too. By that measure, Mother Teresa might not  
13 qualify.

14 In short, there is nothing wrong with  
15 the statutory text here or with how most  
16 legislatures and courts deal with religious  
17 accommodations. The problem is how the  
18 Wisconsin Supreme Court applied the religious  
19 purposes exemption.

20 I welcome the Court's questions.

21 JUSTICE THOMAS: Can the state impose  
22 any limits on the exemptions for religious  
23 organizations?

24 MR. RASSBACH: Absolutely, Your Honor.  
25 We're asking only here that -- that they not

1 be -- discriminate along theological lines. So  
2 we're not saying that, you know, if you have a  
3 religious motivation, you get a -- a religious  
4 exemption no matter what the issue is.

5 What we're saying is once you have an  
6 exemption in place, that then you have to -- the  
7 Constitution requires you to apply it  
8 evenhandedly.

9 JUSTICE THOMAS: Well, wouldn't that  
10 be problematic if various religious groups set  
11 themselves up differently? Some incorporate,  
12 some don't, some are -- I mean, you make a point  
13 that you are required canonically to not -- to  
14 have a different organization from the Diocese  
15 itself.

16 Some organization or religious  
17 organizations may not have that requirement. So  
18 can it -- can the state make any distinctions  
19 between different organizations, religious  
20 organizations?

21 MR. RASSBACH: I -- I think -- I think  
22 that they can. I do think that there are  
23 constitutional guardrails to that. I don't  
24 think this case presents those, because this is  
25 a case about an existing religious exemption and

1     whether that is applied evenhandedly or  
2     selectively.

3                 And in our view, the -- both the  
4     Larson case and the Lukumi case say that  
5     selective enforcement or application of a  
6     religious exemption is a problem.  Larson, in  
7     particular, says that --

8                 JUSTICE KAGAN:  Well, maybe the same  
9     kind of question that Justice Thomas raised, but  
10    even within this given religious exemption, are  
11    you saying that there can be absolutely no  
12    distinctions; in other words, that any group  
13    that comes in and says we are a religious group  
14    doing religious activities for religious  
15    purposes qualifies, sort of no matter what, that  
16    there's no looking behind that at all?

17                MR. RASSBACH:  No, I -- I think, for  
18    example, the -- this particular exemption is  
19    also -- there's a separate requirement, which  
20    isn't disputed among the parties, about whether  
21    Catholic Charities is controlled by a church.  
22    So that's sort of another condition precedent to  
23    getting this exemption.

24                And we don't see a problem with --  
25    with that particular kind of limitation.  So



1 I -- I think -- I want to be very clear, we're  
2 not here to say, you know, limitless exemptions.  
3 What we're saying is that, once you have --

4 JUSTICE KAGAN: Totally. But I think  
5 what Justice Thomas's questions, my questions  
6 are just -- you know, is there a line someplace  
7 even if you fall on a side of the line that you  
8 want to fall on?

9 MR. RASSBACH: Right. I think once  
10 you're inside the exemption, there's obviously  
11 a -- a requirement that it be sincere. And I  
12 think also there's a requirement that it be,  
13 say, religious not philosophical. But other  
14 than that, I do think that there has to -- you  
15 know, at that point, you probably do need to  
16 start treating the different groups equally.

17 CHIEF JUSTICE ROBERTS: What if you  
18 have a religion that thinks it's a sin to eat --  
19 eat meat, and they -- to promote eating of  
20 non-meat dinners they open a restaurant, but  
21 it's only vegetables and, you know, non-meat?  
22 Could -- do they have a claim to be exempt from  
23 state taxes, food taxes, everything else,  
24 because that's a --

25 MR. RASSBACH: Well --

1 CHIEF JUSTICE ROBERTS: So, assuming  
2 it's a sincerely held belief and it's important  
3 to them, and you're going to be taxing them --  
4 you're going to be taxing the exercise of their  
5 beliefs?

6 MR. RASSBACH: So I think it depends  
7 on whether the statute that's, you know,  
8 imposing the tax says, you know, this applies to  
9 meat-eating people or not to meat-eating people.  
10 That's -- that's what we have to --

11 CHIEF JUSTICE ROBERTS: It just  
12 applies -- applies across the board. And they  
13 claim an exemption from it because this is a  
14 part of their religious exercise.

15 MR. RASSBACH: I -- I don't think  
16 that's -- I -- I don't think that that would  
17 be -- they would necessarily have a claim there  
18 because it's not something where the religious  
19 organization is being discriminated against  
20 along theological lines. That is, there's a --  
21 a rule across the board.

22 Now, I do think -- with respect to the  
23 claims that we've may in this particular case.  
24 Now, of course, let's say it's like Lukumi,  
25 where very similar issues came up with respect

1 to ritual slaughter by Santeria priests, and the  
2 Court found no, you don't actually get to make  
3 these kinds -- you know, you don't get to  
4 gerrymander it so that only certain groups are  
5 not allowed to, you know, do animal slaughter.

6 In that -- and in Lukumi, of course,  
7 there was both secular, allowed slaughter but  
8 also religious. So there was a carveout for  
9 kosher slaughter, as well as slaughter for other  
10 reasons in Lukumi. So that's -- that's what  
11 we're talking about with the selectivity in  
12 this -- in this case.

13 JUSTICE JACKSON: So can I just be  
14 clear on your argument? Because I'm just  
15 wanting to understand it.

16 It sounds like you are saying that to  
17 the extent the state has chosen to exempt  
18 religious groups, the line that they are drawing  
19 divides Catholic Charities, which don't perform  
20 certain, quote/unquote, "typical" religious  
21 activities with respect to their charity and  
22 other kinds of religions which may evangelize,  
23 proselytize, or whatever. Is that -- so it's  
24 the discrimination between Catholic Charities  
25 and charities run by other kinds of churches

1     that you are focused on?

2                 MR. RASSBACH:  That's right.  Because  
3     this is just within a religious exemption that  
4     already exists.  And they are disfavoring  
5     Catholic Charities because they serve  
6     non-Catholics because they hire non-Catholics  
7     and because they have -- they don't proselytize.

8                 JUSTICE JACKSON:  Yeah.  So let me  
9     just ask you -- I mean, I -- I totally see that,  
10    and I do think that it -- it raises at least the  
11    neutrality problem that you're talking about.

12                I'm wondering if the exemption was  
13    actually designed to work that way and whether  
14    Wisconsin may be at least -- I mean, obviously,  
15    they have the right to say whatever they want  
16    about their state statute, but to the extent  
17    that they're following the federal law, I wonder  
18    whether "for religious purposes" isn't really  
19    about the motivation, that instead it is about  
20    the kinds of activities that the organization  
21    undertakes.

22                And so when we look, for example, at  
23    the legislative history of the federal  
24    provision, they're very clear in terms of making  
25    the line be between a college devoted to

1 preparing students for the -- ministry  
2 novitiate, which I understand is sort of a place  
3 for people, nuns and -- and the like, to decide  
4 whether or not they are meant for the faith, or  
5 a house -- quote -- a quote, "a house of study  
6 training candidates to become members of  
7 religious orders." They put that on one side of  
8 the line, Congress does. And then it says, on  
9 the other hand, "a church-related (separately  
10 incorporated) charitable organization (such as  
11 ... an orphanage or home for the aged) would not  
12 be considered."

13 So it seems to me that the line, at  
14 least in the federal statute, is not between  
15 charitable organizations that proselytize versus  
16 charitable organizations that don't. Instead,  
17 it's all charitable organizations on one side  
18 that are run by the church and organizations run  
19 by the church that are like training programs  
20 for priests, that are like religious in that  
21 way.

22 Now, for you that would be a little  
23 unfortunate because it would take you outside of  
24 the exemption, but I'm just trying to understand  
25 whether "for religious purposes" is really about

1 the motivation or are they trying to get at  
2 those organizations that are inculcating or  
3 training religious doctrine.

4 MR. RASSBACH: So I -- I think that  
5 "operated primarily for religious purposes," the  
6 best reading of that is to say, you know, are --  
7 are you the -- you know, is it the meat-free  
8 restaurant that's just sort of run out of the  
9 temple basement or is it sort of a separate  
10 business.

11 So there is a separate part of the  
12 Internal Revenue Code, Section 513 of the  
13 Revenue -- Internal Revenue Code that talks  
14 about unrelated business income. And there's a  
15 carveout for all charitable organizations, if  
16 they have a sort of separate thing.

17 I think that the "operated primarily  
18 for religious purposes" means that you're not  
19 operated -- you know, you're not operated  
20 outside of that. You're not operated as a sort  
21 of for-profit business that is owned by a  
22 church, which -- of which there are many around  
23 the country.

24 Those entities don't get the  
25 exemption, even if they are controlled by a

1 church. Because, remember, there is also that  
2 other condition that it be controlled -- that  
3 the entities that enjoy this exemption are  
4 controlled by a church.

5 JUSTICE SOTOMAYOR: Could you --

6 MR. RASSBACH: If I could also --

7 JUSTICE SOTOMAYOR: -- focus --

8 MR. RASSBACH: Oh.

9 JUSTICE SOTOMAYOR: -- on Justice  
10 Jackson's question? Is there a difference in  
11 your mind -- and Justice Jackson, you can  
12 correct me.

13 JUSTICE JACKSON: Mm-hmm.

14 JUSTICE SOTOMAYOR: Is there a  
15 difference in your mind between this law and the  
16 IRS law that she identified?

17 MR. RASSBACH: Sure.

18 JUSTICE SOTOMAYOR: And -- and what is  
19 that difference? I think that's what she was  
20 getting at. She thinks the two laws might be  
21 the same. You -- are you seeing a difference?  
22 And, if you are, how do you articulate it?

23 MR. RASSBACH: Well, I think that the  
24 way -- so I -- I -- the -- the laws that she is  
25 talking about is the FUTA, which the -- we would

1 say that that language is not -- the text is not  
2 really problematic there, but the way that the  
3 Wisconsin Supreme Court interpreted it here --

4 JUSTICE SOTOMAYOR: That -- that --

5 MR. RASSBACH: -- to have that list --

6 JUSTICE SOTOMAYOR: That tells me --  
7 yes, I see that language.

8 MR. RASSBACH: Right.

9 JUSTICE SOTOMAYOR: She was talking  
10 about the laws in the IRS --

11 JUSTICE JACKSON: No, no.

12 JUSTICE SOTOMAYOR: -- that say --

13 JUSTICE JACKSON: I was -- I was  
14 talking about the FUT --

15 JUSTICE SOTOMAYOR: Oh, I'm sorry.

16 JUSTICE JACKSON: Yes. But -- but --  
17 but what I'm really kind of focused on is the  
18 example in the legislative history that puts  
19 church-run charitable organizations like an  
20 orphanage or a home for the aged -- aged outside  
21 of the exemption.

22 MR. RASSBACH: I -- I --

23 JUSTICE JACKSON: And I -- and that  
24 troubles me because it seems as though you're  
25 saying that should be in, and it shouldn't be



1 distinguished between orphanages that  
2 proselytize versus orphanages that don't. And I  
3 guess I'm just wondering whether any orphan --  
4 orphanages are in --

5 MR. RASSBACH: I see.

6 JUSTICE JACKSON: -- given the way  
7 this statute is written.

8 MR. RASSBACH: Yeah, I -- I don't -- I  
9 don't think that that's the -- the -- the right  
10 reading of it. I mean, to the extent that, you  
11 know, legislative history does control the way  
12 that you interpret the text, I -- I would say  
13 that you would really need to have a sort of  
14 constitutional avoidance approach to it.

15 I don't think that Larson, for  
16 example, says that you need to have a broad  
17 reading of statutory religious exemptions. And  
18 so I think you would need to have --  
19 constitutionally, read FUTA to be pretty broad  
20 and cover things like orphanages -- you know,  
21 let's say Catholic Charities owned an orphanage.  
22 They don't, but they also --

23 JUSTICE JACKSON: You're saying the --

24 JUSTICE BARRETT: Counsel --

25 JUSTICE JACKSON: -- Constitution

1 requires an exception here?

2 MR. RASSBACH: No. I'm -- I'm -- I'm  
3 saying that where -- where it's excluding --  
4 where it's excluding it on -- on the basis of,  
5 you know, religious exercise or theological  
6 lines, then that would be a problem.

7 Here -- there, I think the -- the  
8 difference is that you're trying to alleviate --  
9 most of these exemptions you are trying to  
10 alleviate burdens on -- on religious exercise.

11 And this Court has repeatedly said in  
12 cases like Amos and Cutter that that does not  
13 constitute discrimination.

14 JUSTICE BARRETT: Counsel, can I ask  
15 you a question about the church autonomy  
16 doctrine. So it seems to me that there's a  
17 difference between telling a church what to do  
18 or interfering in its internal affairs and  
19 incentivizing the church to do certain things.

20 Do you see a distinction between those  
21 things?

22 MR. RASSBACH: Well, I think -- I  
23 think that there is a distinction between the  
24 two things, but I think this Court has said, for  
25 example, in the Kedroff case that it's -- it's

1 control or manipulation.

2 So that -- that the incentivization  
3 part of it, I think, would also be covered. To  
4 the extent that, you know, the power to tax is  
5 the power to destroy or -- or things like that,  
6 I -- I think it really matters what the  
7 incentives are.

8 JUSTICE BARRETT: Okay. Well, you  
9 know, you talk about the organizational choices  
10 that the Catholic Church has made in treating  
11 Catholic Charities as a distinct corporation, a  
12 distinct entity from the diocese itself, while a  
13 nonprofit corporation is distinct from a  
14 for-profit corporation.

15 And the Chief Justice asked you about  
16 a restaurant, you know, that's an outreach that  
17 serves vegetables.

18 Well, what about a profit --  
19 for-profit versus a not-for-profit? What if a  
20 church believes that raising money, either for  
21 the benefit of members or to give away or  
22 whatever, is essential to its religious mission  
23 and wants to be a for-profit organization?  
24 Would it violate the church autonomy doctrine  
25 for an exemption to be offered only to

1 non-profits?

2 MR. RASSBACH: I -- I think that's --  
3 I don't think so, Your Honor. I think that -- I  
4 think that the -- the difference here is that  
5 we've got different parts of the same church  
6 body that are either exempt or not exempt. So  
7 we have a sort of patchwork, where the parent,  
8 so to speak, the Diocese of Superior, is exempt,  
9 then one of the sub-entities of Catholic  
10 Charities, which is sort of two layers down, is  
11 also exempt --

12 JUSTICE BARRETT: But for purposes of  
13 the church autonomy doctrine, I guess you were  
14 focused on the organizational structure of the  
15 Catholic Church and the diocese and its  
16 outreaches. And I'm wondering why your theory  
17 of the church autonomy doctrine and how it  
18 applies here would not extend pretty broadly.

19 MR. RASSBACH: I -- I think you can --  
20 you can limit it to situations where, you know,  
21 it's -- it's part of the -- the long-term  
22 governance, and there's a sort of discrimination  
23 among different kinds of governance. This is  
24 sort of explicated in the --

25 JUSTICE BARRETT: But what about my

1 for-profit, nonprofit example?

2 MR. RASSBACH: I -- I guess I just  
3 don't -- maybe I'm misunderstanding the  
4 question, but I'm not -- I'm not seeing how that  
5 is the same as the -- the church governance  
6 itself and how the different organizations are  
7 set up.

8 JUSTICE BARRETT: Okay. Let me ask  
9 you another question.

10 One of the problems here is figuring  
11 out what the line is, you know, if -- if a  
12 legislature wants to, like Justice Jackson is  
13 saying, exempt certain kinds of religious  
14 activities, but not others. And you point out  
15 that it's excessive entanglement, in your view,  
16 to try to distinguish between -- to get involved  
17 in the enterprise of figuring out what you're up  
18 to.

19 What about the ministerial exemption  
20 itself? It requires that kind of distinct --  
21 distinguishing. I mean, is it excessive  
22 entanglement for a court to figure out who is a  
23 minister?

24 MR. RASSBACH: No -- no, not at all.  
25 I -- I think the -- the difference is the way

1     that the Wisconsin Supreme Court decided this  
2     case and said, you know, we're -- if you're a  
3     minister -- sorry, if you're -- if you're doing  
4     something in -- in one -- with one kind of  
5     theological set of presuppositions, you get  
6     better treatment, you're favored, and if you're  
7     not, then you are disfavored.

8             And I think if you have something  
9     that's across the board, you're just looking at  
10    is this religious, is this not religious, that's  
11    the kind of thing that courts decide every day.  
12    They decide all -- all the time whether  
13    particular activity is religious or a particular  
14    person is acting on religious bounds.

15            So I -- I want to be very clear, we're  
16    not saying there's any problem with trying to  
17    decide if something's religious or not. What  
18    we're saying is that there are limits on -- on  
19    what you can do within that -- that question.  
20    And one of the things that you can't do is  
21    discriminate along theological lines.

22            CHIEF JUSTICE ROBERTS: Thank you,  
23    counsel.

24            Justice Thomas, anything further?

25            Justice Alito?

1 JUSTICE ALITO: When you say that  
2 Catholic Charities does not proselytize, are you  
3 using that term in the ordinary sense or are you  
4 using it as a term of art?

5 MR. RASSBACH: I -- I -- I would say  
6 it's used as a term of art for the Catholic  
7 Church, that you don't proselytize.

8 JUSTICE ALITO: And what does it mean?  
9 What -- what does that term of art mean?

10 MR. RASSBACH: Well, what it -- what  
11 it means in the Catholic Church is that you're,  
12 for example, saying here's your food, but if  
13 you -- if you want the food, you have to come to  
14 mass, or I need you to come pray with me or  
15 something like that, or you need to convert at  
16 the sort of most extreme end of that.

17 JUSTICE ALITO: It doesn't mean that  
18 you can't -- Catholic Charities can't  
19 evangelize; is that right?

20 MR. RASSBACH: That's right. In  
21 Catholic teaching there is a distinction between  
22 evangelization and proselytization.  
23 Evangelization is okay, proselytization is not  
24 okay.

25 JUSTICE ALITO: And what is the

1 difference?

2 MR. RASSBACH: The -- the difference  
3 is the -- the sort of almost coercive effect or  
4 the -- the sort of, you know, using it to  
5 influence people and kind of take advantage of  
6 them, exploit them.

7 And -- and that's proselytization.  
8 Evangelization is really the idea of sharing  
9 one's faith, sharing the Catholic faith with  
10 someone else to -- to help them understand what  
11 someone believes.

12 JUSTICE ALITO: Does it -- does it  
13 mean that Catholic Charities could not say to  
14 participants in its services, if you would like  
15 to pray, here's an opportunity? If you would  
16 like to go to mass, here's an opportunity? If  
17 you would like some religious reading, here is  
18 something that we have available?

19 MR. RASSBACH: So within the Catholic  
20 church, that's not a problem. Now, I think the  
21 record in this case --

22 JUSTICE ALITO: Okay. Well, I'm --  
23 I'm not -- I don't want to get into a  
24 theological discussion.

25 MR. RASSBACH: Sure.



1 JUSTICE ALITO: But I'm asking these  
2 questions because if you're making a religious  
3 discrimination claim, you've got to have a  
4 comparator. So what's your best comparator,  
5 with this in mind?

6 MR. RASSBACH: With -- comparator  
7 to -- sorry. I'm --

8 JUSTICE ALITO: You're saying here  
9 that the -- the Wisconsin Supreme Court is  
10 discriminating against Catholic Charities. It  
11 would treat other religious charities  
12 differently, right?

13 MR. RASSBACH: Yes. Sorry.

14 JUSTICE ALITO: Okay. So what is your  
15 best comparator of a religious charity that  
16 would be treated favorably by the Wisconsin  
17 Supreme Court?

18 MR. RASSBACH: Well, let's say you had  
19 a -- a -- a -- you know, I don't want to -- pick  
20 on any particular denomination, but let's say  
21 you had a -- a Baptist church that said, you  
22 know, we're going to, you know, give you food  
23 but we would like -- you know, before that, we  
24 would like you to attend this church service.  
25 Or, you know, said, well -- another group might

1 say we're only going to serve our particular  
2 group.

3 Now, I think it's really important  
4 that -- that it has to go both ways; that is, I  
5 don't think that Wisconsin should discriminate  
6 against people that -- that do proselytize  
7 either. The point is that they made the  
8 distinction along that theological line that  
9 has -- that has nothing to do with it. So  
10 that -- that, to me, is the -- the difference.

11 JUSTICE ALITO: And the decision to  
12 organize Catholic Charities as a nonprofit  
13 corporation was done for religious reasons and  
14 not for practical reasons?

15 MR. RASSBACH: Well, I -- I guess I  
16 would say that the two kind of coincide. That  
17 is, how can you be a more effective mission?  
18 And, definitely, you can be a more effective  
19 mission if you're both incorporated and are  
20 organized as a nonprofit.

21 But there's not a teaching of the  
22 Catholic Church that says that you must or  
23 always and everywhere organize as a nonprofit.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: Two questions.

3 One, the government asked us to reverse not on a  
4 constitutional ground but on the Wisconsin  
5 church's -- the Wisconsin court's  
6 misinterpretation of its own statute. Do you  
7 have a position on that?

8 And then, number two, it seems to me  
9 that all your arguments, both on autonomy and  
10 entanglement, all come down to the  
11 discrimination claim, but if Larson and City of  
12 Hialeah -- that doesn't end the inquiry, meaning  
13 you might -- if a state discriminates, it might  
14 be entitled to, and you have to apply strict  
15 scrutiny. In both -- in those two cases, we  
16 affirmed because there was evidence of invidious  
17 discrimination.

18 There's no evidence of that here. So  
19 what do we do? Vacate and remand?

20 MR. RASSBACH: Okay. So --

21 JUSTICE SOTOMAYOR: And if -- if we  
22 find that there's discrimination and -- and --  
23 what guidance do we give? So answer the first  
24 and then the second.

25 MR. RASSBACH: Sure. Yes. And I

1 apologize if I -- I -- I -- I hope I get all the  
2 subparts there.

3 I -- on the Solicitor General's  
4 argument, I think, you know, we -- we obviously  
5 will take a win on any basis. We're -- we're  
6 not going to reject that. But it doesn't seem  
7 apparent from the face of the opinion below that  
8 they were feeling bound by -- by the federal law  
9 in this case. And that really is the standard  
10 under Three Affiliated Tribes and the other  
11 ones.

12 I guess the second issue that we see  
13 is that this could just result in sort of a  
14 do-over, where it goes back down to the  
15 Wisconsin Supreme Court, Wisconsin Supreme Court  
16 says, okay, you know, we're eliminating all  
17 mention of the federal law; we're just  
18 interpreting Wisconsin law here. And, you know,  
19 we're back here in a couple of years.

20 Obviously, my clients wouldn't like,  
21 that but also I don't think that's --

22 JUSTICE SOTOMAYOR: Why don't you go  
23 on to the second question.

24 MR. RASSBACH: Okay. Then the second  
25 question, I would say, is just that the -- on

1 strict scrutiny, I think it's just very hard  
2 for -- I -- I don't think you -- you have to  
3 remand for that. I don't think that they put on  
4 much of a strict scrutiny case. The only  
5 interest that they put forward below was whether  
6 it -- you know, broad access to getting  
7 unemployment compensation -- unemployment  
8 benefits.

9           And there's so many different  
10 exceptions to that, just like in Lukumi, just  
11 like in Larson. And I think that there's also  
12 no risk to the fisc of the -- of the -- of  
13 Wisconsin because only 0.6 percent, as is put in  
14 one of the bottom-side amicus briefs, of workers  
15 are with religious organizations. So it's just  
16 they don't have the interest and they don't --  
17 they're very under-inclusive and have lots of  
18 exemptions and that defeats strict scrutiny.

19           JUSTICE SOTOMAYOR: I agree with you,  
20 but what do we do with -- it is a compelling  
21 state interest not to be entangled in church, in  
22 a church. So that itself is a compelling state  
23 interest.

24           Do -- do we say it fails strict  
25 scrutiny, not on the interest prong but on the

1 narrow tailoring prong? Is that --

2 MR. RASSBACH: I -- I --

3 JUSTICE SOTOMAYOR: -- you said  
4 there's so many exceptions, et cetera.

5 MR. RASSBACH: Right. I think --

6 JUSTICE SOTOMAYOR: So it sounds more  
7 like a narrow tailoring.

8 MR. RASSBACH: I -- I think you could  
9 definitely do it on -- on that basis, and this  
10 Court has done that in many religion cases where  
11 it said we're just going to skip over the  
12 compelling interest part and just get straight  
13 to the narrow tailoring.

14 JUSTICE SOTOMAYOR: Okay.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: Mr. Rassbach, I had  
17 understood your autonomy argument as different  
18 from your discrimination argument. In other  
19 words, that your autonomy argument is  
20 essentially that the way this statute, as  
21 understood by the Wisconsin Supreme Court, works  
22 is it puts pressure on the church to organize  
23 its charitable activities at the diocese level,  
24 rather than the way it's done now, because at  
25 the diocese level they surely would be entitled

1 to the exemption.

2 So it's not the most obvious thing  
3 that stands out about what the Wisconsin court  
4 has done here, you know, and I'm just wondering  
5 why you led with that argument, I mean, why you  
6 think it's your strongest one or why you --  
7 why -- you know, I -- I-- I take it if you lead  
8 with it, that's the one you most want us to rule  
9 on.

10 Maybe I'm wrong about that. If -- if  
11 I'm right, why?

12 MR. RASSBACH: So I -- I -- I don't --  
13 I don't think that we wrote the brief saying  
14 that all three -- that their -- their ranking it  
15 that way. So I -- I definitely -- I think all  
16 three arguments are valid. You can rule on one.  
17 You can rule on two. I'd be very surprised if  
18 you ruled on all three, but -- but I -- we were  
19 not meaning to -- to rank them by the order that  
20 we put them in the brief.

21 JUSTICE KAGAN: Okay. Why do you  
22 think that, you know, that would be a good  
23 choice?

24 MR. RASSBACH: Well, I think, you  
25 know, in some ways, the church autonomy argument

1 would be sort of a very simple thing, to just  
2 say, look, your -- your -- you know, this is a  
3 single church body and they're all controlled by  
4 a single bishop. It's -- it doesn't make any  
5 sense to try to force them to reorganize. And  
6 it's sort of senseless to say that, you know,  
7 both the sort of top organization and one of  
8 the, you know, two ranks down, subentities is --  
9 are exempt while excluding everybody else.

10 So that -- you know, it -- it would be  
11 a kind of very simple decision and I think one  
12 that you could limit to this particular context.  
13 But I -- but that's really, you know, what we  
14 would be -- what the argument would be with  
15 respect to church autonomy.

16 JUSTICE KAGAN: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Gorsuch?

19 JUSTICE GORSUCH: Mr. Rassbach, I  
20 guess I have a similar question to Justice  
21 Kagan. I would have thought the simplest  
22 argument of the three you chose was the  
23 discrimination argument. On the face of the  
24 decision below, the court distinguished between  
25 religions that proselytize and those that don't



1 and between those who serve co-religionists and  
2 those who serve others as well.

3 Why isn't that the simplest basis on  
4 which to rule?

5 MR. RASSBACH: Oh, I -- I -- sorry if  
6 I misspoke when I was having the colloquy with  
7 Justice Kagan. What -- what I -- I'd meant to  
8 say it's a relatively simple kind of decision,  
9 but I don't think it's the simplest. I do think  
10 the simplest is probably the discrimination  
11 argument. And, you know, the Court can just  
12 hold that the Wisconsin Supreme Court's  
13 interpretation of the -- the -- of the religious  
14 exemption violated Larson and Lukumi by  
15 discriminating along religious lines. And I --  
16 I think that would be enough to decide the case.

17 JUSTICE GORSUCH: That would break no  
18 new ground in our case law.

19 MR. RASSBACH: Correct.

20 JUSTICE GORSUCH: And then when it  
21 comes to the compelling interest, what  
22 compelling interest might a state have in  
23 distinguishing between religions on that ground?

24 MR. RASSBACH: I do think it would be  
25 difficult. I think this Court had a footnote in

1 Trinity Lutheran -- I -- I'm -- I may be getting  
2 that wrong -- that referred to McDaniel against  
3 Paty, an earlier case that talked about the fact  
4 that there may not be a strict scrutiny defense  
5 to sort of a -- a pure discrimination among  
6 religions.

7 JUSTICE GORSUCH: Right. And --  
8 and -- and is it further complicated by the  
9 fact -- an effort to survive a compelling  
10 interest complicated by the fact that the  
11 Catholic Charities apparently has an  
12 unemployment benefit system that is comparable  
13 to the state's?

14 MR. RASSBACH: The -- that's exactly  
15 right. I -- I -- you know, we think actually,  
16 for the workers at Catholic Charities, it'll be  
17 better for them to be on the church plan.  
18 Certainly, they'd get their benefits much more  
19 quickly from the church than they do from the  
20 state, if -- when they ask for unemployment  
21 benefits.

22 But also it enables us to show  
23 solidarity with our other dioceses in the state.

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1       Kavanaugh?

2                   JUSTICE KAVANAUGH:  I wasn't quite  
3       sure of your answer to Justice Jackson.  If  
4       Catholic Charities ran a -- an orphanage or a  
5       home for the aged, what -- what result?

6                   MR. RASSBACH:  I -- I think it would  
7       be treated like their current ministries, like a  
8       housing ministry or -- or other things.

9                   So I -- I think that that language in  
10      the legislative history, to the extent that it  
11      then got transposed into Wisconsin law and was  
12      seen to say, you know, orphanages are out, I  
13      think that -- that would be -- that would be a  
14      problem, because there's nothing in the law  
15      itself that says that -- you know, the text of  
16      the law that says that you can't have an  
17      orphanage.

18                  JUSTICE KAVANAUGH:  So the -- to the  
19      extent that reflected an understanding at the  
20      time, that understanding is -- is simply  
21      inconsistent with the statutory language, is  
22      that the answer?

23                  MR. RASSBACH:  Yeah, I think the  
24      answer is just that statutorily I think that  
25      would be very hard to do.  And I think, as I was

1     trying to make out earlier, that there is a  
2     constitutional avoidance problem there too.

3             If you have -- if you create these  
4     sets of approved religious -- you know,  
5     judicially approved religious activities, that's  
6     a real problem.

7             You know, this Court has identified  
8     them in cases like Hosanna-Tabor or Our Lady of  
9     Guadalupe. But it -- it was very clear not to  
10    say that that's -- that's a closed set, it's an  
11    open set, and that other kinds of activities or  
12    things might be -- might be in there.

13            Obviously, you know, ministerial  
14    exception's a little bit different because it's  
15    talking about these important religious  
16    functions within the -- the body. But -- but  
17    religious -- you know, the -- the set should not  
18    be closed by the judges. The judges should not  
19    close it.

20            JUSTICE KAVANAUGH: And I think your  
21    answer is getting at another question I have, is  
22    the other side relies on the phrase  
23    "distinctively religious activities." And I  
24    just want to make sure you can respond to the  
25    use of that phrase.

1                   MR. RASSBACH: Yeah, I just -- I -- I  
2     think it's, you know, six of one, half dozen of  
3     the other.

4                   You know, if you look at the opinion  
5     below, they consistently talk about, you know,  
6     it's wholly secular endeavor, it's not religious  
7     in nature, it's secular in nature. And then  
8     they rely repeatedly on the list from the Dykema  
9     case from the Seventh Circuit in the '80s.

10                  And, you know, they're -- they've come  
11     up with a little list, and they're saying that  
12     this is the closed list. And we're outside the  
13     list. Whatever -- you know, they -- they say  
14     it's just an illustrative -- illustrative list  
15     in the opinion, but we're still out.

16                  You know, we're -- what we're doing  
17     clearly is not on the list. Whatever other  
18     things might go on the Wisconsin Supreme Court's  
19     list, we're not on that list. You know, helping  
20     the poor, helping the elderly is not on the  
21     list.

22                  JUSTICE KAVANAUGH: And the limit on  
23     that, to go to the other side, is what, again?  
24     Sincerity is one limit --

25                  MR. RASSBACH: I -- I would say --

1 JUSTICE KAVANAUGH: -- but what else?  
2 Is there any other limit to the Chief Justice's  
3 question --

4 MR. RASSBACH: I would say that's  
5 probably the main limit, is is it sincere.

6 JUSTICE KAVANAUGH: Is it the only  
7 limit?

8 MR. RASSBACH: Well, I would say also  
9 religiosity, but in the sense of religion versus  
10 philosophy.

11 So this is the thing that actually  
12 comes up in the Yoder case, where the Court  
13 makes a big distinction between what the Amish  
14 were doing and what Henry David Thoreau was  
15 doing. And it said, well, you know, there is  
16 special solicitude under the First Amendment for  
17 religion, and the Amish get that, but Thoreau  
18 doesn't, even though he felt very strongly about  
19 his opinions.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Barrett?

23 JUSTICE BARRETT: I want to pick up on  
24 Justice Kavanaugh's question. So you agree that  
25 there has to be some way of separating out

1     religiosity from non-religiosity?

2                   MR. RASSBACH:  That's right.

3                   JUSTICE BARRETT:  Okay.  And is your  
4     answer to Justice Kavanaugh that if we  
5     articulated a test for that, it's sincerity of  
6     belief primarily, and then this Thoreau  
7     distinction between religiosity and someone who  
8     simply says this is just a philosophy?

9                   MR. RASSBACH:  Sure.  And I think you  
10    can kind of put a little bit more meat on the  
11    bones there by thinking about, you know, what --  
12    what is religion.  I don't think you have to  
13    answer the question --

14                  JUSTICE BARRETT:  It's kind of a big  
15    question, right?

16                  MR. RASSBACH:  It's a -- it is a big  
17    question.  It's -- and it's a fascinating one.

18                  I think if you go back even to the  
19    Virginia Declaration of Rights, you know, it  
20    says "the duty which we owe to our Creator and  
21    the means of discharging it."

22                  And then Judge -- just -- Professor  
23    McConnell, you know, sort of extended that a  
24    little bit more broadly to just this idea of  
25    transcendent binding truth.  Because the problem

1     that comes up in these issues for the religion  
2     and the law and why it is important what  
3     religion is for the law, is conflicting  
4     obligations.

5             So if you go to Madison's Memorial and  
6     Remonstrance, you see there's this conflicting  
7     between the obligations of the -- of God and the  
8     obligations of the -- the -- the government.  
9     And, you know, Madison says, you know, you have  
10    to -- you have to navigate that.

11            So I think that -- I think you have to  
12    be able to see that things are religious or not  
13    because you look at whether there's a -- a  
14    transcendent truth added.

15            JUSTICE BARRETT: Well, does all  
16    religion have to have a transcendent truth? And  
17    it's not always about a clash of obligations,  
18    right? I mean, because here there's not a clash  
19    between what Wisconsin is demanding and what  
20    Catholic Charities is giving.

21            Wisconsin's not requiring Catholic  
22    Charities to do anything. So it's not like a  
23    conscience exemption kind of case.

24            This isn't like the Catholic hospital  
25    being told that it has to provide abortions.



1 This is -- this is distinct. This is a -- a  
2 benefits case.

3 So I -- I guess -- let's see. Let me  
4 just backtrack from the philosophical question.

5 MR. RASSBACH: Sure. Sure.

6 JUSTICE BARRETT: Can you give me,  
7 like, what would an opinion say? I mean, we're  
8 not going to talk about philosophy in an  
9 opinion, right? So if we had to articulate a  
10 test to distinguish religion from non-religion,  
11 can you concisely tell me what the test would  
12 say?

13 MR. RASSBACH: I -- I -- I think I  
14 would -- I would say that it's -- it's a --  
15 it's -- you know, it's a duty that is owed and  
16 the means of discharging it.

17 Here, we do have a duty that we owe as  
18 Catholic Charities. We -- we are -- are  
19 obligated --

20 JUSTICE BARRETT: And that's a uniform  
21 test? Not just for Catholic Charities, but a  
22 uniform test.

23 MR. RASSBACH: I think you can really  
24 apply it across a lot of different situations.

25 Now, what a lot of people have --

1 scholars and others have commentated is that  
2 99 percent of the time it's going to relate to  
3 what you think God or gods is telling you to do.  
4 There are some non-theistic religions, forms of  
5 Zen Buddhism. But -- but the overall thing is  
6 that there is something transcendent or  
7 supernatural that you are feeling obligated by.

8 JUSTICE BARRETT: Okay.

9 MR. RASSBACH: And that's the  
10 distinction.

11 JUSTICE BARRETT: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice  
13 Jackson?

14 JUSTICE JACKSON: Can I just give you  
15 a hypothetical, so I can -- I'm trying to  
16 understand your constitutional point.

17 So suppose we have this federal  
18 exemption from the unemployment scheme -- and  
19 I'm just reading the text of the exemption --  
20 "in the employ" -- this is -- you don't get --  
21 you don't have to pay the -- the tax if you are  
22 "in the employ of ... an organization operated  
23 primarily for religious purposes and ...  
24 operated, supervised, controlled, or principally  
25 supported by a church," et cetera. That's

1 the -- the text of the statute.

2 Suppose the Wisconsin legislature  
3 said, you know, we really don't want to get into  
4 the business of trying to figure out who is  
5 religious versus theory versus whatever. We  
6 think that that's problematic from our  
7 perspective.

8 So what we want to do -- this is the  
9 legislature -- is define "in the employ of ...  
10 an organization ... operated primarily for  
11 religious purposes," we're going to say an  
12 organization that is operated for primarily  
13 religious purposes is a college devoted to  
14 preparing students for the ministry, a  
15 novitiate, a house of study training candidates  
16 to become members of religious orders.

17 That's what we mean when we say --  
18 when -- when the statute says, you know, "for  
19 religious purposes."

20 So no orphanages, no soup kitchens, no  
21 any of that. Whether you proselytize or not, we  
22 don't care. We're not getting into that. We  
23 just have a very, very narrow exemption for  
24 certain kinds of religious organizations as  
25 we've defined them.

1                   Is that constitutional or not?

2                   MR. RASSBACH: I think two -- two  
3 parts to that. One is it does depend a little  
4 bit on -- on the history before. So if -- like,  
5 let's say this went back and the Wisconsin  
6 legislature changed it, then you would be in a  
7 situation where --

8                   JUSTICE JACKSON: No, I understand.  
9 But even -- even our current exemption, I  
10 understand for years that Catholic Charities  
11 didn't seek this exemption. So this is like a  
12 new thing.

13                   So now the legislature is saying,  
14 okay, what we'd like to do is only give this  
15 exemption to the novitiate, the ministry,  
16 college, that's it. No restaurants run by  
17 vegan -- vegan ministers, none of that.

18                   MR. RASSBACH: Yeah, I -- I think  
19 that --

20                   JUSTICE JACKSON: Can they do that  
21 consistent with the Constitution?

22                   MR. RASSBACH: I think -- I think that  
23 would probably go too far. I think that some --  
24 if -- if it's designed to alleviate a specific  
25 burden, sure. If it's just designed to --

1 JUSTICE JACKSON: It's designed to  
2 keep the legislature and the state from, kind of  
3 like the ministerial exemption, adjudicating  
4 unemployment tax claims with respect to those  
5 kinds of institutions.

6 Because if we get into it with those  
7 kinds of institutions, we might have the same  
8 kinds of problems that the Supreme Court has  
9 identified for the ministerial exception. But  
10 we don't get into those problems if we're  
11 talking about unemployment for a restaurant  
12 owned by a -- you know, a vegan minister,  
13 like -- so we just want to focus in on those  
14 kinds of institutions.

15 Can they do that?

16 MR. RASSBACH: I -- I just don't think  
17 that you can decide -- I -- I -- I just -- I  
18 don't buy the premise that you would say, first  
19 of all, that it would be less entangling. I  
20 would see that as much more entangling, because  
21 then you would have about 15 cases about what's  
22 a novitiate, is this thing --

23 JUSTICE JACKSON: I understand.

24 MR. RASSBACH: -- closer to a  
25 novitiate, et cetera.

1 JUSTICE JACKSON: Okay.

2 MR. RASSBACH: So I think that would  
3 be very entangling rather than de-entangling.

4 JUSTICE JACKSON: Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Mr. Gannon.

8 ORAL ARGUMENT OF CURTIS E. GANNON

9 FOR THE UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING THE PETITIONERS

11 MR. GANNON: Mr. Chief Justice, and  
12 may it please the Court:

13 Wisconsin has opted into the  
14 cooperative framework of the Federal  
15 Unemployment Tax Act and has enacted the federal  
16 statutes exemption for religious employers,  
17 which applies to certain church-controlled  
18 organizations that are, quote, "operated  
19 primarily for religious purposes."

20 Petitioner serves as the social  
21 ministry arm of a diocese of the Catholic  
22 Church. They correctly told the Wisconsin  
23 Supreme Court that they qualify for the  
24 exemption under the statute. That court erred  
25 in its reading of the statutory text, and

1     because it explains that the Wisconsin statute  
2     conforms with the federal one, this Court should  
3     correct its mistake. That would avoid serious  
4     constitutional questions, just as this Court did  
5     when it construed FUTA's religious employer  
6     exception in *St. Martin* in 1981.

7             If the Court reaches the  
8     constitutional question, it should reject the  
9     Wisconsin Supreme Court's analysis, which  
10    second-guesses the religious nature of sincerely  
11    held expressions of faith and, worse, risks  
12    discrimination among various faiths by singling  
13    out certain activities that are deemed  
14    inherently secular.

15            I welcome the Court's questions.

16            JUSTICE THOMAS: You seem to prefer  
17    the statutory argument. What would be the  
18    problem with deciding this on a constitutional  
19    basis?

20            MR. GANNON: Well, I think that we do  
21    agree that the statute would be unconstitutional  
22    as applied. I would prefer not to have what I  
23    think is the sensible reading of a federal  
24    statute be declared unconstitutional by this  
25    Court. We think the better reading of the

1 statute is the one that the Wisconsin Supreme  
2 Court rejected, and we think that there's no  
3 doubt here, there's no -- there hasn't been any  
4 debate here of that.

5 If it were construed our way, nobody  
6 is alleging that that would be unconstitutional.  
7 And so I -- I would prefer that sort of saving  
8 construction that would avoid the need for the  
9 Court even to say that, assuming the Wisconsin  
10 Supreme Court were correct about construing this  
11 verbatim language that comes straight from a  
12 federal statute, that you're going to grant  
13 them, you're going to spot them their  
14 interpretation, which we think is  
15 counterintuitive, and -- and then go on to  
16 decide constitutional questions.

17 We don't -- we don't think that it --  
18 the constitutional decision would need to be  
19 incredibly complicated. Multiple particular  
20 grounds have already been discussed today.

21 JUSTICE THOMAS: But what would  
22 happen --

23 MR. GANNON: Some are easier than  
24 others.

25 JUSTICE THOMAS: What would happen if



1 the Wisconsin Supreme Court stood by its reading  
2 of its statute?

3 MR. GANNON: If it stood by its  
4 reading of the statute, it would have to back  
5 away from the parts of its opinion where it said  
6 that the Wisconsin legislature was intending to  
7 conform the statute with the federal statute.  
8 And so -- and it would also perhaps be  
9 dismissing the suggestion from this Court that  
10 that actually raises serious constitutional  
11 questions. It would have to sort of double-down  
12 on --

13 JUSTICE THOMAS: So, in other words,  
14 we'd be where we are now?

15 MR. GANNON: You could be where you  
16 are now, but I do think that the Wisconsin  
17 Supreme Court deserves to know that it was  
18 incorrect about the fact that it thought that it  
19 was conforming the state law with the federal  
20 law. And that's exactly what this Court said in  
21 St. Martin, when it -- a very similar question  
22 was presented about whether schools were covered  
23 by this exemption --

24 JUSTICE KAGAN: Well, I appreciate,  
25 Mr. -- Mr. Gannon, you're supposed to, as

1 Solicitor General, sort of protect federal  
2 statutes. And, you know, if you think this one  
3 is okay, I get the point, but I -- I -- is there  
4 nothing in addition to that?

5 I mean, are you worried about certain  
6 kinds of constitutional questions, about the  
7 difficulty that they might raise? If you think  
8 they're easy, your argument to do it on a  
9 statutory basis becomes less forceful. So -- so  
10 are they easy? Are they hard? What -- what --

11 MR. GANNON: You know, frankly, I  
12 think the bottom line is easy. I think, like,  
13 deciding what the ultimate limit on any of these  
14 particular theories here could get complicated.  
15 And so I do think that there are serious  
16 constitutional questions about each of the  
17 arguments that have been raised.

18 JUSTICE KAGAN: Which is your -- which  
19 is your preference of those arguments?

20 MR. GANNON: I mean --

21 JUSTICE KAGAN: Which do you think is  
22 the easiest --

23 MR. GANNON: I --

24 JUSTICE KAGAN: -- the simplest, the  
25 least likely to lead to complications?

1                   MR. GANNON: I -- I mean, I think that  
2     probably the discrimination argument is the --  
3     is -- is -- but also, I mean, frankly, I think  
4     that the second-guessing what counts as  
5     inherently religious is just something that  
6     courts shouldn't be in the business of doing.

7                   And so that's a problem for a court to  
8     be defining what is inherently religious, what  
9     types of activities are inherently religious.  
10    And we think that it flies in the face of the  
11    statute. The statute clearly says you should be  
12    looking at what is the primary purpose of this  
13    organization. And we think that certain  
14    activities -- it makes all the difference why  
15    you are doing them. That determines whether  
16    they are being done for religious purposes or  
17    not.

18                  As this Court has said you can grow a  
19    beard or refrain from eating certain foods or  
20    drink tea for a different reason. It makes all  
21    the difference about whether it's religious or  
22    not. And one of the things --

23                  JUSTICE KAGAN: How would you answer  
24    Justice Barrett's question? You know -- you  
25    know, if we go this -- this route, you know,

1     what counts as religious? I mean, nobody  
2     likes -- no judge likes to say I'm sorry, you're  
3     not sincere here.

4                 MR. GANNON: That's --

5                 JUSTICE KAGAN: So sincerity is, you  
6     know, a pretty high bar.

7                 MR. GANNON: Yeah. And that is -- we  
8     think that there hasn't been any doubt here. I  
9     mean, first of all, I think that the statutory  
10    reading, I think, does -- makes that a much  
11    easier argument because nobody is disputing here  
12    the court below. And my -- I understand my  
13    friend on the other side do not disagree that  
14    Catholic Charities Bureau is motivated by a  
15    religious purpose.

16                The question is just whether that is  
17    so outweighed by the nature of their activities  
18    here that they can't be considered to be their  
19    principal purpose, that they -- they -- that's  
20    not why they're being operated, why these -- why  
21    these activities are being carried out. And --

22                JUSTICE KAGAN: Yeah. I guess I was  
23    asking you a little bit less about this case and  
24    a little bit more about, like, the test we would  
25    have to formulate or the principles that we

1 would have to use in -- in -- in deciding this  
2 case.

3 MR. GANNON: Yeah. And I think that  
4 the things that we think you would be looking to  
5 is the sincerity and principality of the -- of  
6 the religious beliefs. And so somebody asserts  
7 that this -- that -- that -- that our beliefs  
8 are religious, and this Court has repeatedly  
9 says -- that it's -- it is okay to determine  
10 whether those are sincerely held. You're right,  
11 courts don't want to say that's not sincerely  
12 held. But sometimes they have to get into that.

13 And this Court looked at that in  
14 Ramirez, the case about the -- the prisoner on  
15 death row who wanted to be able to have a -- a  
16 pastor in the execution chamber being able to  
17 lay hands on him. And the Court recognized  
18 that -- that you -- it was okay to analyze  
19 whether that was a sincere religious belief.  
20 And -- and we think that the test here, the  
21 statutory test that we would apply, is similar  
22 to the one that the -- the IRS has applied in  
23 the 501(c)(3) context.

24 And so I think that the Wisconsin  
25 Supreme Court was correct to recognize that

1 analogy, but we think that it misapplied those  
2 cases that it was drawing from in --

3 JUSTICE KAVANAUGH: I --

4 MR. GANNON: -- the 501(c)(3) context.

5 JUSTICE KAVANAUGH: -- think you just  
6 said just sincerity and principality of the  
7 religious belief?

8 MR. GANNON: What -- the -- in here,  
9 that's because it has to be operated --

10 JUSTICE KAVANAUGH: What's the --  
11 what's the second? Explain what you mean,  
12 because that sounds a little --

13 MR. GANNON: Well, here that's -- that  
14 comes straight from the statute because they're  
15 operated primarily for religious purposes. The  
16 question is whether this is the -- the principal  
17 reason, the fundamental reason, the first of all  
18 reasons for why the -- the organization is being  
19 operated.

20 And so here we -- we get that from the  
21 statutory test. A lot of religious exemptions  
22 in statutes are -- are defined in those terms.  
23 And that is what is happening in the 501(c)(3)  
24 cases where the IRS has been looking into  
25 whether you are principally motivated by

1 religious purposes or you're running -- one of  
2 the cases that's discussed is actually a  
3 vegetarian restaurant, to go back to the Chief  
4 Justice's hypo.

5 And the -- and the -- the Court  
6 concluded there that from the entire  
7 situation --

8 JUSTICE KAVANAUGH: And if it's -- if  
9 it's -- if it --

10 MR. GANNON: -- and all of the --

11 JUSTICE KAVANAUGH: Sorry to  
12 interrupt. But if it's sincerely motivated in  
13 part by religious belief, that's going to be a  
14 tough -- a really tough inquiry, right?

15 MR. GANNON: Yeah, but that question  
16 is -- is -- is whether the operations are --  
17 whether they are primarily for religious  
18 purposes. And so there the ultimate decision  
19 was that there was too much commercial flavor.

20 And so if all of these are  
21 non-profits. That's one answer to your  
22 question, Mr. Chief Justice, is that the fact  
23 that you just opened a restaurant and say this  
24 is consistent with our religious beliefs, if you  
25 are making a lot of money as a restaurant,

1     you're not going to --

2                   JUSTICE GORSUCH:   Mr. Gannon --

3                   MR. GANNON:   -- qualify as a nonprofit  
4     organization and get --

5                   JUSTICE GORSUCH:   -- on the -- on the  
6     discrimination grounds, why would we have to get  
7     into any of that?  There's no dispute that  
8     Catholic Charities exists primarily for  
9     religious purposes.  There's no dispute about  
10    the sincerity of their religious belief.

11                   And the only question is whether it's  
12    treating different religions differently because  
13    some proselytize when they provide services and  
14    others don't.  Wouldn't -- wouldn't it just be  
15    that simple?

16                   MR. GANNON:   I agree with all of that.  
17    I -- I think that the biggest problem with it is  
18    that it grants what we think is a wrong reading  
19    of the --

20                   JUSTICE GORSUCH:   You say we --

21                   MR. GANNON:   -- verbatim text of a  
22    federal statute.

23                   JUSTICE GORSUCH:   You say we can get  
24    there under the statute as well, with -- but it  
25    doesn't seem to me we have to engage with any of



1     these other difficult questions. I mean, I -- I  
2     had on a circuit court a difficult question  
3     about sincerity, whether somebody sincerely  
4     believed that marijuana was a God or whether he  
5     was a drug trafficker.

6                     (Laughter.)

7                     MR. GANNON: And -- and I -- I --

8                     JUSTICE GORSUCH: And, you know, that  
9     one turned out to be easy to decide, but --

10                    MR. GANNON: Well, and I was going to  
11     say, Justice Gorsuch, that, you know, that's --  
12     that's part of the inquiry in -- in looking into  
13     sincerity, is --

14                    JUSTICE GORSUCH: But -- but it's not  
15     at issue here. No one disputes --

16                    MR. GANNON: That's -- that's correct  
17     because --

18                    JUSTICE GORSUCH: -- that Catholic  
19     Charities was primarily created for religious  
20     purposes, and no one disputes the sincerity of  
21     their religious beliefs. It's just not -- not  
22     on the table, right?

23                    MR. GANNON: That -- that is correct,  
24     but we also think that there shouldn't be a  
25     dispute that it is operated primarily for

1 religious purposes because what the Court should  
2 not be doing is looking at particular activities  
3 and defining them as inherently secular or  
4 inherently religious.

5 JUSTICE GORSUCH: No -- that's the  
6 discrimination problem.

7 MR. GANNON: Yes. That is a similar  
8 problem even for purposes of -- of construing  
9 the statute.

10 JUSTICE GORSUCH: Got you.

11 JUSTICE BARRETT: Mr. -- Mr. Gannon,  
12 can I return you to the construing the statute  
13 problem? I guess -- I understand that you're  
14 worried that because the federal statute is  
15 worded exactly in the same way, that a  
16 constitutional holding here might call that into  
17 question. But why is -- may I finish, Chief?

18 CHIEF JUSTICE ROBERTS: Sure.

19 JUSTICE BARRETT: But why would that  
20 be so? Couldn't we say in an opinion -- I mean,  
21 because it's -- it's hard for me to say,  
22 frankly, in the Wisconsin Supreme Court's  
23 opinion that it thought its reading was  
24 compelled by the federal statute. It kind of  
25 looked to it, you know, it -- it observed that

1     there was similarities, but it -- it's hard for  
2     me to see how it wasn't interpreting its own  
3     statute.

4             So just -- just grant me that.

5             MR. GANNON:   I --

6             JUSTICE BARRETT:  If we did that, why  
7     would it necessarily call the federal statute  
8     into question?  Because couldn't we just say  
9     Wisconsin has interpreted its statute this way,  
10    drop a footnote, you know, the Solicitor General  
11    of the United States has represented that the  
12    federal government statute is interpreted  
13    differently?

14            MR. GANNON:  I -- I think you could do  
15    that.  The Wisconsin Supreme Court thought that  
16    the Wisconsin legislature was conforming to the  
17    federal law because everyone wants --

18            JUSTICE BARRETT:  No, no, no.

19            MR. GANNON:  -- to be part of the same  
20    scheme.

21            JUSTICE BARRETT:  Spot me -- spot --  
22    spot me that I disagree.

23            MR. GANNON:  And --

24            JUSTICE BARRETT:  And if I did, why  
25    would it necessarily call the constitutionality

1 of the federal statute into question --

2 MR. GANNON: Well --

3 JUSTICE BARRETT: -- assuming that we  
4 held that there was a problem with this one?

5 MR. GANNON: I -- I think if you made  
6 that type of reservation, then we would -- we  
7 would surely insist that you had not decided  
8 that the federal statute was unconstitutional if  
9 it -- if -- because it wouldn't need to be  
10 construed that way. I agree with that.

11 JUSTICE BARRETT: Okay. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 You want us to focus on -- on the  
15 federal statute. How -- how would the -- the  
16 statute apply to things like  
17 religiously-operated hospitals, a Catholic  
18 hospital, Presbyterian hospital?

19 MR. GANNON: It's -- it's -- it's the  
20 same analysis, where -- where you would be  
21 asking whether the organization -- whether its  
22 operations are -- are primarily for religious  
23 reasons.

24 And so you would be asking -- and  
25 the -- the hypothetical about orphanages that's

1 in the legislative history, we think, is not  
2 clearly carved out of the federal statute,  
3 because there's a debate about whether that is  
4 actually controlled by the church.

5 So if -- if you are talking about a --  
6 a hospital that is actually controlled and  
7 supervised by a church and it is -- it is doing  
8 its activities principally for religious  
9 reasons, then we think that it would be able to  
10 qualify.

11 CHIEF JUSTICE ROBERTS: And -- and  
12 would it be a sufficient religious reason to say  
13 that the principles of the church require care  
14 for the sick?

15 MR. GANNON: I -- I -- I think that --  
16 that --

17 CHIEF JUSTICE ROBERTS: As -- as in --  
18 well, as in this case, where the -- the position  
19 of the church is that caring for the poor was  
20 part of their religious mission.

21 MR. GANNON: The -- that that is the  
22 purpose of the activities, is in service of  
23 those religious goals, and that is the principal  
24 reason for what -- for -- for which they are  
25 operated, yes.

1 CHIEF JUSTICE ROBERTS: Thank you.

2 Justice Thomas?

3 JUSTICE THOMAS: But wouldn't that be  
4 a bit more complicated if it -- it's one thing  
5 if the church -- if the diocese controlled the  
6 hospital, right? It's another thing if it's set  
7 up as -- as an entirely different organization  
8 run, again, by religious people, say nuns, but  
9 it's its own entity and it doesn't report  
10 directly to the chancery.

11 MR. GANNON: Yes. And -- and  
12 that's what -- that's what I said was in the  
13 legislative history that Justice Jackson was  
14 bringing up under the statute, potentially the  
15 distinction for the orphanages that are  
16 discussed in the committee report, is if they  
17 are not actually directly controlled and  
18 operated by the church, then that would be the  
19 reason why they fell out.

20 And Justice Jackson was -- was  
21 referring to that -- that phrase which talked  
22 about church-related charitable organizations,  
23 but that doesn't necessarily mean that they are  
24 in the sense of the text of the statute  
25 supervised, controlled, or principally supported

1 by the church that's in -- at issue.

2 JUSTICE THOMAS: So how is that  
3 different from Catholic Charities here?

4 MR. GANNON: The -- the difference  
5 here is that there's no dispute that they are  
6 supervised, controlled, or -- and they're not  
7 direct -- or -- or operated. The first three  
8 verbs directly apply here.

9 Everybody understands that the  
10 Catholic Charities Bureau supervises the  
11 subentities that are at issue here, that they --  
12 that the bishop is -- is in -- is two levels up,  
13 that he appoints the membership, and that the  
14 principles the -- that the -- control Catholic  
15 Charities Bureau subentities are -- that their  
16 employees follow Catholic social teaching, that  
17 they are providing services for poor and  
18 disadvantaged to be an effective sign of the  
19 charity of cross -- of Christ.

20 All of that is part of the religious  
21 purposes that flow all the way down to the  
22 subentities.

23 CHIEF JUSTICE ROBERTS: Justice Alito?  
24 Justice Sotomayor?  
25 Kagan?

1 Justice Gorsuch, anything further?

2 JUSTICE GORSUCH: You'd have us  
3 reverse, correct, not just vacate and remand?

4 MR. GANNON: I -- I think -- yes.  
5 If -- if you wanted to do it on the statutory  
6 ground, I think that you would tell the  
7 Wisconsin Supreme Court that it was wrong to  
8 think that it was conforming the state statute  
9 to the federal statute.

10 It would then be free to make a  
11 different decision on statutory construction on  
12 remand. If you agree with us on the -- and  
13 you -- you could call that a reverse and remand  
14 for further proceedings, consistent with your  
15 opinion.

16 JUSTICE GORSUCH: That's the boomerang  
17 problem Justice Thomas talked about.

18 MR. GANNON: That -- that --

19 JUSTICE GORSUCH: How about on the  
20 constitutional side?

21 MR. GANNON: On the constitutional  
22 side, then reverse, yes.

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Kavanaugh?



1 JUSTICE KAVANAUGH: I think your  
2 answer to the Chief Justice on the hospital  
3 question, I think you answered it, I might be  
4 wrong, by just saying if, if it were operated  
5 primarily for religious purposes, then it would  
6 qualify.

7 But that's the -- I think the hypo was  
8 assume that the hospital is operated for  
9 religious purposes.

10 MR. GANNON: Yeah. I -- and -- and --

11 JUSTICE KAVANAUGH: And you said:  
12 Well, if it is, then it would qualify. Well --

13 MR. GANNON: Yeah. I -- and I was --  
14 I was -- I was trying to say that the --  
15 there -- there are two different categories of  
16 analysis that I have seen that -- that seem to  
17 read on that.

18 And one is the -- the committee report  
19 issue that Justice Jackson was talking about,  
20 where I was trying to draw a distinction between  
21 church-related and church-controlled supervised,  
22 et cetera, as reflected in the text of the  
23 statute.

24 And you -- you asked my friend whether  
25 the committee report really just isn't

1 consistent with the text of the statute. I  
2 think that the committee report is ambiguous in  
3 that regard. And we wouldn't read it as saying  
4 that something like an orphanage would be  
5 categorically incapable of -- of being covered  
6 by the exemption.

7 And then --

8 JUSTICE KAVANAUGH: Assume we're past  
9 that point.

10 MR. GANNON: And then -- then the --  
11 the other cases that I've seen, I -- I've  
12 just -- I'm -- I'm not aware of -- of what the  
13 IRS has done with respect to hospitals in -- in  
14 the nonprofit context, and applying the same  
15 type of analysis that we have here.

16 And so I -- I -- I think that the --  
17 that in -- in a case like this, it -- it looks  
18 to me like it's easy to apply, but I -- but  
19 I'm -- I'm -- I'm not sure of that.

20 JUSTICE KAVANAUGH: When you say "a  
21 case like this," a case involving --

22 MR. GANNON: These -- these sorts  
23 of --

24 JUSTICE KAVANAUGH: -- this -- the --  
25 the services that are actually provided here?

1           MR. GANNON: Yes, with the type of --  
2     with -- with the type of agreement about what  
3     the religious purposes are that are underlying  
4     this. And as I said, we think that --

5           JUSTICE KAVANAUGH: Then -- then  
6     you're in a world -- and we don't have to get  
7     into this, as Justice Gorsuch rightly says, but  
8     then we're in a world where we're distinguishing  
9     the services that are provided, which I thought  
10    is something we shy away from --

11          MR. GANNON: Well, I think there's a  
12    lot else in the context of, you know, what else  
13    the hospital is doing, who it's competing with,  
14    how it provides the services.

15          If it is actually, you know, in -- in  
16    competition with commercial hospitals, then --  
17    then -- then that is one of the things that was  
18    considered in the -- the Living Faith Seventh  
19    Circuit decision about the vegetarian  
20    restaurant, to say that there is an aspect of  
21    commercialness to the activity that -- that ends  
22    up overwhelming the fundamentally religious  
23    purpose here.

24          JUSTICE KAVANAUGH: Thank you.

25          CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 JUSTICE BARRETT: No.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Jackson?

5 JUSTICE JACKSON: So I guess -- I  
6 guess I thought this case was about the meaning  
7 of "primarily for religious purposes" and was  
8 not about the other part of the exemption which  
9 relates to the operation and control of a  
10 church.

11 And so that's why I looked at the  
12 committee report, which is very clear that it  
13 was suggesting that the orphanage, separately  
14 incorporated, would not be considered to be  
15 primarily for religious purposes. It does not  
16 say it would not be considered to be operated  
17 and controlled by a church, which was your  
18 answer.

19 But setting that aside, can I just  
20 focus you for a second on -- I just have a  
21 couple quick points on the statute and your  
22 reading.

23 You say that we should read the  
24 statute as "purpose" being religious motivation.  
25 And as far as I can tell, "purpose" doesn't

1 always mean that. So, I mean, "purpose" can  
2 mean any -- many things. It doesn't necessarily  
3 mean motive, not necessarily -- certainly not  
4 unambiguously so. It could mean the ends to be  
5 accomplished. It could be fulfilling a  
6 particular need.

7 You know, my pen serves a purpose; it  
8 allows me to write notes. And that has nothing  
9 to do with motivation.

10 And so I guess I'm wondering whether  
11 the ambiguity in what the statute means when it  
12 says "for religious purposes" doesn't invite us  
13 to consider what Congress was actually trying to  
14 do when it was drawing this exemption.

15 MR. GANNON: Well, I -- I certainly  
16 don't disagree that a purpose includes  
17 something -- you know, the -- the end to which  
18 something is -- is -- is directed.

19 And if you look at the dictionary  
20 definitions that we quote on page 15 of our  
21 brief, we include a definition for "purpose"  
22 that is like that.

23 JUSTICE JACKSON: Right, but your --

24 MR. GANNON: And I think it dovetails  
25 well with the definitions for "operation," which

1 ask what -- what is -- we are carrying out a  
2 principle or an undertaking to an end.

3 And so the end is the purpose. And  
4 the end here, according to Catholic Charities  
5 Bureau, is to be an effective sign of the  
6 charity of Christ, by --

7 JUSTICE JACKSON: No, I understand. I  
8 understand that that is a version of "purpose"  
9 that is relating to their motivation, which is  
10 to be an effective sign of the charity of  
11 Christ.

12 But there's another idea of purpose  
13 that would be: What is this organization's  
14 activities about? What -- what is -- what --  
15 what are they offering? And I guess my -- my  
16 concern is that that view of "purpose" seems to  
17 make more sense of the exemption in this case.

18 I mean, if the entities, if the two  
19 hospitals, the Catholic hospital and the secular  
20 hospital are performing the same services, I  
21 don't understand why one would be exempt just  
22 because they have religious motivation versus  
23 the other. I don't know what -- what -- what  
24 the statute is doing to make that kind of  
25 distinction.

1                   MR. GANNON: And -- and this gets back  
2     to -- I think, to the beard-growing,  
3     tea-drinking example that I was talking about,  
4     to say that -- that we don't think courts should  
5     be in the business of saying that a particular  
6     activity is inherently religious or inherently  
7     secular.

8                   JUSTICE JACKSON: No, no, no. I'm --  
9     it doesn't at all. What I --

10                  MR. GANNON: Because --

11                  JUSTICE JACKSON: But -- the -- no,  
12     what I'm saying is if you are right that the --  
13     the -- the line that's being drawn here is about  
14     motivation, I don't understand how the exemption  
15     works. There must be some rational reason why  
16     Congress would want to exempt the exact same  
17     kinds of services being provided just because  
18     they are being provided by somebody who's  
19     religiously motivated versus, you know, the  
20     restaurant that -- you know, we have two  
21     identical vegan restaurants. One is being run  
22     by people who say this is a tenet of our faith  
23     and we're doing it in order to -- to be a  
24     ministry for our religion. And the other is run  
25     by a person who has no such motivation. Why

1 would one, rationally, be under the -- an  
2 employment exemption and the other one doesn't?

3 MR. GANNON: If you --

4 JUSTICE JACKSON: If you -- if you  
5 instead think of purpose as not motivation, if  
6 you think of it as the actual services that are  
7 being provided and the distinction is in that,  
8 then Wisconsin says the reason why we're  
9 exempting novitiates is because if we don't,  
10 we're going to get entangled in religion as we  
11 try to adjudicate those kinds of claims.

12 That -- it -- it -- it only makes  
13 sense if purpose is, like, focused on the  
14 activities, rather than the motivation.

15 MR. GANNON: Yeah. And -- and I think  
16 that the fact that it is a religious exemption  
17 means that it makes sense to focus on what is  
18 the motivation for the acts that you're doing --

19 JUSTICE JACKSON: Even though we have  
20 another prong that says it's church-related and  
21 that seems to care of this is being motivated  
22 because a church is doing it.

23 MR. GANNON: But this is in addition  
24 to that. It not only has to be supervised--  
25 operated, supervised, or controlled by the



1 church, but it has to be done for -- primarily  
2 for religious purposes. And my friend --

3 JUSTICE JACKSON: I think -- I  
4 understand. Thank you.

5 MR. GANNON: -- mentioned the --

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Mr. Roth.

9 ORAL ARGUMENT OF COLIN T. ROTH  
10 ON BEHALF OF THE RESPONDENTS

11 MR. ROTH: Mr. Chief Justice, and may  
12 it please the Court:

13 This religious accommodation solves a  
14 particular problem posed by the unemployment  
15 insurance system. When determining benefit  
16 eligibility, the state must often resolve  
17 disputes over whether an employee was discharged  
18 for misconduct. If so, no benefits. Now  
19 consider churches and their affiliates whose  
20 employees express and inculcate religious  
21 doctrine through worship, proselytization, and  
22 religious education. For those employers,  
23 misconduct disputes could often force the state  
24 to decide whether employees complied with  
25 religious doctrine.

1           So Wisconsin gives those kinds of  
2   employers a wide berth by prophylactically  
3   exempting them. But because exemption means  
4   employees lose state unemployment insurance  
5   coverage altogether, exemption is limited to the  
6   employers most likely to draw the state into  
7   doctrinal disputes.

8           So Wisconsin's search for worship,  
9   proselytization, and religious education, much  
10   like the ministerial exception, thus does not  
11   decide what is religious in the abstract, nor  
12   does it discriminate among denominations.  
13   Instead, these activities are what reasonably  
14   limit the exemption to the employers most likely  
15   to pose entanglement problems.

16           Petitioners' motive-only test has no  
17   such limits. It would leave potentially over 1  
18   million employees nationwide without  
19   unemployment coverage, like nurses and janitors  
20   at religiously affiliated hospitals, even though  
21   the state can virtually always determine their  
22   benefit eligibility without confronting  
23   religious doctrine.

24           And Petitioners' view that the First  
25   Amendment requires a motive-only test would

1 radically expand similar exemptions like  
2 501(c)(3), Title VII, Section 702, and property  
3 tax exemptions, all of which examine what  
4 organizations do, not simply their motives for  
5 acting.

6           Petitioners' theory ultimately leads  
7 to an all-or-nothing rule, exempt all religious  
8 groups or none. Such a rule could incentivize  
9 legislatures to cut back on religious  
10 accommodations altogether.

11           I welcome your questions.

12           JUSTICE THOMAS: If Catholic Charities  
13 reported directly to the bishop without being a  
14 separate corporate entity, would we -- would you  
15 be here?

16           MR. ROTH: If they're incorporated as  
17 part of the church, they would qualify for the  
18 church exemption.

19           JUSTICE THOMAS: What's the  
20 difference? If it -- if -- if the function is  
21 exactly the same, but it's a separate entity,  
22 what's the difference? Religiously?

23           MR. ROTH: Well, the functions  
24 obviously are the same. What we are recognizing  
25 here is that sometimes the state makes

1 accommodations, especially for churches, because  
2 we want to give churches a very wide berth. I  
3 think that's entirely appropriate for states and  
4 legislatures to do. That's in the Internal  
5 Revenue Code, in many places, churches receive  
6 special exemptions. And so, yes, in certain  
7 circumstances, you will have differential  
8 results based on how a religious organization --

9 JUSTICE KAGAN: But if that's true, it  
10 puts a lot of pressure on a church's  
11 organizational choices, you know? And why isn't  
12 that in real tension with our church autonomy  
13 cases?

14 MR. ROTH: Well, I think the church  
15 autonomy doctrine until this point has been very  
16 narrow. As we argue in our brief, it's limited  
17 to instances of state compulsion. You see  
18 Kedroff and Serbian, and that was about the  
19 state telling the church who should run it, how  
20 it should be organized, through a state statute  
21 or judicial review of an ecclesiastical judicial  
22 body's decision. That's compulsion.

23 None of this Court's cases -- and then  
24 I'd also point to Our Lady and Hosanna-Tabor,  
25 where Title VII remedies could include

1     reinstatement of the terminated employee. So  
2     that's the state telling the organization what  
3     it must do.

4             JUSTICE KAGAN: Yeah, I get the idea  
5     that, like, there's compulsion and there's an  
6     incentive structure. But the incentive  
7     structure can be set up so that it becomes, you  
8     know, an extremely pressured choice, which  
9     basically -- you know, basically, even, although  
10    not facially, forces the religious organization  
11    into a certain choice.

12            MR. ROTH: Understood, Your Honor. I  
13    think we're nowhere near that here. As we point  
14    out in our brief -- and this is precisely  
15    because Catholic Charities relies so heavily on  
16    their backup CUPP private system. Because  
17    they're a reimbursable employer for the state,  
18    we think that the -- the fiscal impact they face  
19    here is essentially net neutral. Either they're  
20    paying for benefits through the state system in  
21    a one-to-one reimbursable ratio, or they're  
22    going to pay for the benefits through their  
23    private system.

24            JUSTICE GORSUCH: Well, but doesn't  
25    that cut the other way too? Because one of the

1 arguments your friends make on the other side is  
2 the benefits that individuals receive will be  
3 just as good or better than what the state  
4 provides.

5 So that kind of goes to the compelling  
6 interest. What compelling interest does -- does  
7 Wisconsin have in insisting on, effectively,  
8 Catholic Charities to be incorporated  
9 differently than it is?

10 MR. ROTH: Well, I would note that the  
11 compelling interest analysis only comes in when  
12 we get to strict scrutiny under -- under free  
13 exercise.

14 JUSTICE GORSUCH: I'm well aware of  
15 that, and I know you are too counsel, but --

16 MR. ROTH: Right.

17 JUSTICE GORSUCH: But what -- what  
18 interest does the state have in --

19 MR. ROTH: Well what --

20 JUSTICE GORSUCH: -- in -- in  
21 effectively saying you should be incorporated  
22 together with the church rather than not?

23 MR. ROTH: Absolutely. So the -- the  
24 first one is --

25 JUSTICE GORSUCH: I'm struggling.

1                   MR. ROTH:  -- of course, is the state  
2     has a strong compelling interest in as broad of  
3     uninsurance -- unemployment insurance coverage  
4     as possible.  Now, it's true Catholic Charities  
5     has a private backup system, but there's nothing  
6     in their argument --

7                   JUSTICE GORSUCH:  And -- and you agree  
8     that it's --

9                   MR. ROTH:  -- that would require  
10    them --

11                  JUSTICE GORSUCH:  -- just as good as  
12    what you -- you'd have in Wisconsin.

13                  MR. ROTH:  I -- I would -- I would  
14    disagree with that, respectfully, Your Honor.  I  
15    think the most important point is that it's  
16    essentially a self-insurance program.

17                  JUSTICE GORSUCH:  Right.

18                  MR. ROTH:  And so, when you have  
19    layoffs, you know, self-insurance is a risk in  
20    that situation --

21                  JUSTICE GORSUCH:  Well, all  
22    self-insurance -- governments are at risk too,  
23    but okay.  Anything other than that?

24                  MR. ROTH:  There's also no due process  
25    protections.  And so, obviously, if the employee

1 is denied coverage in the private system,  
2 there's no judicial review, which you have in  
3 the -- in the state system.

4 JUSTICE GORSUCH: Okay.

5 JUSTICE KAVANAUGH: You said in your  
6 opening that we should look at what the  
7 organizations do --

8 MR. ROTH: Mm-hmm.

9 JUSTICE KAVANAUGH: -- and not why  
10 they do it.

11 MR. ROTH: Correct.

12 JUSTICE KAVANAUGH: But how do you  
13 square that with the language of the statute,  
14 "operated primarily for religious purposes" --

15 MR. ROTH: Right.

16 JUSTICE KAVANAUGH: -- which seems to  
17 go to the why they do it, not what they do.

18 MR. ROTH: So just with the brief  
19 premise that we don't think this is a Michigan  
20 v. Long situation where the state court's  
21 interpretation is properly before this Court,  
22 "operated primarily for religious purposes" is a  
23 term of art. It's borrowed from the tax law  
24 context. This is not something that Wisconsin  
25 pulled out of the ether. This is a term that's



1 long been used in 501(c)(3). And we think under  
2 501(c)(3) case law, it's long been understood  
3 that "operated" looks at activity.

4 So 501(c)(3) has an organizational  
5 test and an operational test. And the  
6 operational test is always used to check what  
7 the organizational purpose is. And so we think  
8 the only way that operational test has any  
9 effect is if you're looking at the activities.

10 And I'd point to the Living Faith case  
11 because this goes to the Chief's question. I  
12 see no way in which Living Faith came out the  
13 way it did, which it denied the exemption to the  
14 Seventh-Day Adventist restaurant, if a religious  
15 motive is enough, because the Seventh-Day  
16 Adventist and -- and Living Faith said, for us,  
17 promoting health is an -- is an element of the  
18 gospel. Health leads to salvation. I think  
19 that's practically indistinguishable from what  
20 Catholic Charities is saying here. And Living  
21 Faith said no, I'm sorry, the commercial --  
22 simply because you have a -- a religious  
23 motivation for the non-exempt purpose --

24 JUSTICE KAVANAUGH: Well --

25 MR. ROTH: -- does not render you

1 eligible for the exemption.

2 JUSTICE KAVANAUGH: I think there --

3 CHIEF JUSTICE ROBERTS: I'm sorry, go  
4 ahead.

5 JUSTICE KAVANAUGH: Go ahead.

6 CHIEF JUSTICE ROBERTS: What is the  
7 simplest thing that the Catholic Charities would  
8 have to do to qualify for the religious  
9 exemption in Wisconsin?

10 MR. ROTH: I think --

11 CHIEF JUSTICE ROBERTS: Would they --  
12 should they have one sign in the dining hall  
13 saying: This meal provided by Catholic  
14 Charities. If you want to find out about the  
15 church, here's a brochure?

16 MR. ROTH: No, Your Honor. I think  
17 what we're looking for is precisely what this  
18 Court looks for in -- in adjudicating the  
19 ministerial exception. We're looking for  
20 activities that express and inculcate religious  
21 doctrine: worship, proselytization, religious  
22 education.

23 And it's precisely because it's those  
24 activities that create the entangling problem in  
25 the state --

1 JUSTICE GORSUCH: What -- what is --

2 CHIEF JUSTICE ROBERTS: Well --

3 JUSTICE GORSUCH: -- what is

4 proselytization?

5 MR. ROTH: "Proselytization" would  
6 mean when the -- if Catholic Charities, when  
7 it's delivering services, says, you know, please  
8 repent, essentially. You know --

9 JUSTICE GORSUCH: Repent. They have  
10 to say "repent"?

11 MR. ROTH: Anything like, you know,  
12 please join our religion. We would like you to  
13 become Catholic if you're going to receive this  
14 service.

15 JUSTICE GORSUCH: So --

16 MR. ROTH: Because when -- I'm sorry,  
17 Your Honor.

18 JUSTICE GORSUCH: So -- so they --  
19 they have to say -- I just want to know what the  
20 test is. So repent your sins. You get the  
21 exemption. Not requiring you to repent your  
22 sins, you -- you don't -- I guess you don't get  
23 the exception.

24 MR. ROTH: No, the -- the --

25 JUSTICE GORSUCH: Or -- or --

1 MR. ROTH: Sorry.

2 JUSTICE GORSUCH: -- what was the  
3 other one? What was your other test for  
4 proselytization? Join their church? You  
5 become -- you know, become a member, as opposed  
6 to we welcome you to attend our services if you  
7 want, here is some information about them?

8 What's the line there? Because  
9 they -- they say they do. They say you're  
10 always welcome. I mean, the Catholic church,  
11 we'd love to have you, but we're not -- we're  
12 not saying you have to -- show up.

13 So is mandatory church attendance  
14 versus optional church attendance, that's the  
15 line?

16 MR. ROTH: No, Your Honor. I think  
17 what -- what we're looking for is -- is  
18 analogous to what this Court looks for in  
19 applying the ministerial exception. What it  
20 wants to know when it -- when it seeks to --

21 JUSTICE GORSUCH: No, I'm asking you  
22 how to apply your exception. Because the  
23 Wisconsin Supreme Court says proselytization is  
24 really important. And it says, oh, also, if you  
25 serve non-co-religionists, that's a problem.

1                   So I guess you only serve those who  
2           are co-religionists. That -- that's one  
3           solution, I guess, for -- for the church. Don't  
4           help anybody else in need. And the other is to  
5           proselytize. And I'm just trying to get my  
6           hands around what that means --

7                   MR. ROTH: So I -- I will say --

8                   JUSTICE GORSUCH: -- in Wisconsin.

9                   MR. ROTH: -- the -- the serving of  
10          co-religionists is a marginal factor at best.

11                  JUSTICE GORSUCH: It's a marginal  
12          factor?

13                  MR. ROTH: If this -- if this Court  
14          wants to discard it, we have no problem with  
15          that.

16                  JUSTICE GORSUCH: Well, it's in the --  
17          it's -- it's in the Court's opinion.

18                  MR. ROTH: I understand.

19                  JUSTICE GORSUCH: So -- so you're  
20          running away from the Court's opinion. So this  
21          all comes down to proselytization. How much is  
22          enough?

23                  MR. ROTH: No, Your Honor. What it  
24          comes down to is whether the employees of the  
25          organization are expressing and inculcating

1 religious doctrine.

2 JUSTICE GORSUCH: Okay.

3 JUSTICE KAGAN: Do you think that  
4 Wisconsin could pass a statute that says we'll  
5 give a religious tax exemption to religious  
6 groups that proselytize, but to no others?

7 MR. ROTH: I don't think so, Your  
8 Honor. Because I think that would not be  
9 serving any particular purpose. And we have to  
10 keep in mind --

11 JUSTICE KAGAN: I don't understand why  
12 it's not the exact same thing. I mean, the way  
13 the statute has been interpreted by the  
14 Wisconsin courts, it's basically saying we're  
15 giving a tax exemption to religious -- to  
16 religious organizations that proselytize, but  
17 not to religious organizations that don't.

18 MR. ROTH: So I would like to step  
19 back for a moment to the principle that  
20 accommodations are meant to solve particular  
21 problems. And we think the world is -- is  
22 roughly divided into two groups. It's religious  
23 organizations that -- that are there --

24 JUSTICE KAGAN: I mean, some  
25 religious -- I'm just -- Mr. Roth, some

1 religious organizations proselytize.

2 MR. ROTH: That's right.

3 JUSTICE KAGAN: And some religious  
4 organizations are allergic to proselytizing.  
5 And -- and for the Wisconsin -- I posed the hypo  
6 where it was a Wisconsin legislature. This is,  
7 instead, the Wisconsin court.

8 But, instead, saying: The tax  
9 exemption goes to religious people who think of  
10 proselytizing as part and parcel of their  
11 religion, and not to the religious people who  
12 think: We don't proselytize, even when we do  
13 all these charitable works. It's actually not  
14 what we do. And that's part of our religion.

15 MR. ROTH: So what Your Honor is  
16 driving at, I -- I think, is essentially this is  
17 an arbitrary distinction between religions that  
18 proselytize and those that don't. And there is  
19 no reason --

20 JUSTICE KAGAN: And the those that  
21 don't, sometimes it's a religious principle not  
22 to.

23 MR. ROTH: But -- but -- I would  
24 dispute that premise that this is not an  
25 arbitrary distinction. I think it -- it serves

1 a functional purpose when employees are  
2 expressing and inculcating religious doctrine.  
3 We have to step back.

4 The unemployment insurance system's  
5 going to turn on misconduct disputes. And if  
6 you're out there expressing and inculcating  
7 religious doctrine through those three things  
8 that I mentioned, it's going to be very  
9 difficult for the state to resolve an  
10 unemployment dispute.

11 JUSTICE BARRETT: Counsel --

12 JUSTICE GORSUCH: Well, but, no,  
13 you -- you gave that away, though, when you said  
14 all -- all they have to do is turn this into the  
15 Catholic Church, Inc., and it -- and -- and it  
16 all goes away.

17 So you could adjudicate those  
18 disputes, but you -- and you would say it would  
19 be very important for -- for you to do so  
20 because they don't involve proselytizing, but  
21 the minute it goes into the Catholic Church,  
22 Inc., rather than a separate incorporation.

23 So I'm not sure that argument works,  
24 counsel.

25 MR. ROTH: So -- so -- well, Your



1 Honor, the legislature here, yes, has -- has  
2 created this exemption to function on an  
3 organizational level, rather than an individual  
4 level like the ministerial exemption does.

5 But I think that's for a -- a  
6 prophylactic reason. We don't want to have to  
7 go through sort of one by one, activity by  
8 activity to look at it. So, yes, Your Honor,  
9 there is an element of over-inclusivity when  
10 someone's inside the church, we're going to let  
11 them out.

12 But, again, I think that's -- that's a  
13 virtue. States should be very careful about  
14 churches, and stay away from them. And so  
15 that's what we've done here.

16 CHIEF JUSTICE ROBERTS: I -- it seems  
17 to me -- and you've -- it's repeatedly in your  
18 brief and in your opening and in all these  
19 answers. You want a test that is the easiest  
20 one for you to apply.

21 You're saying this will make it easy  
22 for us. And it -- well, it -- it is easy here.  
23 And that's why you say I don't want to get into  
24 the particular doctrine. We want -- we don't  
25 want to be dragged into trying to consider a

1     number of nuances or whatever, whether this  
2     qualifies or not.

3             You want the test to be whatever is  
4     easiest for you.

5             MR. ROTH: I don't think that's quite  
6     right, Your Honor. I want the test to be the  
7     one that accurately identifies the kinds of  
8     organizations that are going to cause those  
9     entangling problems.

10            I happen to think that it's a  
11     relatively easy-to-administer test if it focuses  
12     on those big three things. I think that's  
13     exactly what the ministerial exception looks  
14     for. It looks for those same three things to  
15     identify the employees whose employment  
16     decisions we want to stay out of in the  
17     antidiscrimination context.

18            JUSTICE JACKSON: But it does it --

19            MR. ROTH: So it's not just --

20            JUSTICE BARRETT: Counsel, is it  
21     possible --

22            JUSTICE JACKSON: -- at the level of  
23     employees --

24            JUSTICE BARRETT: Go ahead.

25            CHIEF JUSTICE ROBERTS: Justice

1 Barrett.

2 JUSTICE BARRETT: Counsel, if -- if  
3 proselytization or evangelization or whatever we  
4 want to call it is as a necessary component in  
5 Wisconsin's view -- I mean, as I understand it,  
6 Judaism does not have that as part of its  
7 religion. So does that mean that Judaism is  
8 completely disqualified from --

9 MR. ROTH: No --

10 JUSTICE BARRETT: -- getting the  
11 exemption --

12 MR. ROTH: Absolutely not --

13 JUSTICE BARRETT: -- if they're  
14 running these sorts of organizations?

15 MR. ROTH: My apologies, Your Honor.

16 If I was not clear, these are or's;  
17 these are not and's. So proselytization is  
18 absolutely not a required component to receive  
19 this accommodation. These are or's.

20 If your -- if your organization  
21 involve -- again, engages, I think, in any of  
22 these three things: worship, proselytization,  
23 religious education, you're going to be doing  
24 the kinds of things the State needs to stay away  
25 from, whether it's in the antidiscrimination

1 context or whether it's in the unemployment  
2 context.

3 So to Justice Gorsuch's question, if  
4 they don't proselytize, that's fine. They may  
5 still get this accommodation, if they do other  
6 kinds of things --

7 JUSTICE BARRETT: Like --

8 MR. ROTH: -- that are going to create  
9 these entangling forces --

10 JUSTICE GORSUCH: Like force --

11 JUSTICE BARRETT: -- like serve  
12 co-religionists? I'm just trying to figure out  
13 what. I mean, let -- let's say that, you know,  
14 you -- you want to serve people that aren't  
15 co-religionists. You're still defining it in a  
16 way that will inevitably exclude certain  
17 religions.

18 MR. ROTH: Sure. So the -- the  
19 co-religionist piece of the decision, I'm -- I'm  
20 not going to stand and die on that hill. If  
21 this Court wants to say that's not a proper  
22 consideration, I think it's still sufficient to  
23 affirm the decision below.

24 The core of the state supreme court's  
25 decision was a motive alone is not enough to

1     qualify for this exemption.

2                 Catholic Charities here relied  
3     entirely on their motive. We think that  
4     affirming that core of the decision suffices to  
5     deny them the exemption.

6                 JUSTICE GORSUCH: I -- I think it has  
7     to come down to proselytization for you.  
8     Because worship, you know, you're not force --  
9     you either -- some faiths will force you to sit  
10    through the worship before they give you the  
11    soup. Other -- others just give you the soup  
12    and invite you to worship.

13                But -- so, again, you're -- that's  
14    proselytization in another way of looking at it;  
15    isn't that right?

16                MR. ROTH: If I may, Your Honor?

17                JUSTICE GORSUCH: Are you going to  
18    go -- is Wisconsin going to go around and -- and  
19    this soup kitchen, you know, you have to go --  
20    you have to go to the service before you get  
21    your soup, they're good to go. But that one,  
22    they just invite you to the service after the  
23    soup, and they're bad.

24                I mean, is it really that's the -- I  
25    would have thought this would entangle the state

1 in -- in religion a whole lot more than --  
2 than -- than a non-discrimination rule between  
3 religions.

4 MR. ROTH: So I would like to revisit  
5 just very brief, because I think it's directly  
6 responsive to Your Honor's question. It's a  
7 hypothetical we gave in -- in our brief. I  
8 think it illustrates this point.

9 Ministerial exception. Imagine  
10 Catholic Charities on one hand, and we'll call  
11 it evangelical charities on the other. The  
12 evangelical charities worships, proselytizes,  
13 educates its service recipients. It's -- it's  
14 chock full of employees who have received the  
15 ministerial exception precisely because they  
16 perform those functions of expressing and  
17 inculcating doctrine that the state needs to  
18 stay away from.

19 Catholic Charities, however, is not  
20 going to have employees who receive the  
21 ministerial exception. So we -- we have the  
22 same exact disparate impact --

23 JUSTICE GORSUCH: Really, there are no  
24 nuns and priests and deacons at the soup  
25 kitchen?

1                   MR. ROTH: I'm not saying that at all,  
2     Your Honor. But if they are not -- when they --  
3     when they are --

4                   JUSTICE GORSUCH: The -- the bishop,  
5     you know, who is overseeing it? I mean, come  
6     on.

7                   MR. ROTH: It's -- right. Your Honor,  
8     it's not about who are -- who the employees are.  
9     It's about what --

10                  JUSTICE GORSUCH: You're going to go  
11     tally up --

12                  JUSTICE BARRETT: You just said they  
13     were.

14                  JUSTICE GORSUCH: Yeah, you just --

15                  MR. ROTH: It's about what they do.

16                  JUSTICE BARRETT: You said ministerial  
17     exception, it was about who they are.

18                  MR. ROTH: Well, sure, yeah, but -- I  
19     apologize. What I meant is it's not their  
20     status as a minister, a deacon, or a bishop. It  
21     is about what -- what they do.

22                  And so if the minister or the deacon  
23     or the bishop at the soup kitchen is -- is --  
24     is -- when he delivers the soup, is doing the  
25     thing --

1 JUSTICE BARRETT: So the nun doesn't  
2 get the ministerial exception --

3 MR. ROTH: Excuse me?

4 JUSTICE BARRETT: -- and neither does  
5 the priest?

6 MR. ROTH: Sorry?

7 JUSTICE BARRETT: The nun and the  
8 priest don't get the ministerial exception?

9 MR. ROTH: I -- so they -- I -- I  
10 suppose they -- they would, because in other  
11 contexts they would be there to express and  
12 inculcate religious doctrine.

13 But if in the context of -- of this,  
14 if they're employed by Catholic Charities, in --  
15 in the course of their employment with Catholic  
16 Charities, they're not there to express and  
17 inculcate the faith. While, you know, it --  
18 when they're --

19 JUSTICE BARRETT: So you're not  
20 entangled if you have to go in and interview  
21 the -- the nun and the priest who go in and do a  
22 shift at the soup kitchen that Catholic  
23 Charities is running to see what they're doing  
24 or if you have to listen -- I mean, are they  
25 playing, like, hymns on the radio or, like,



1 Christian rock at the evangelical soup kitchen  
2 on the radio? You know, is that -- is that  
3 proselytization or not because you're forced to  
4 sit there and listen to it?

5 MR. ROTH: Your Honor, I -- I -- I --  
6 I understand the -- the -- the thrust of the  
7 question. I mean, I don't think it's any more  
8 entangling than the kinds of questions courts  
9 have to answer all the time when applying the  
10 ministerial exception.

11 JUSTICE JACKSON: Well, Mr. Roth, why  
12 don't you just apply the ministerial -- I -- I  
13 mean, this goes back to the -- to the Chief  
14 Justice's question. It just seems as though  
15 Wisconsin says we're going to set up this system  
16 that is operating in a discriminatory fashion  
17 based on whether or not you proselytize, to  
18 avoid having to address the ministerial question  
19 if it should arise in these situations.

20 But, I mean, if -- if it's creating a  
21 constitutionally problematic, discriminatory  
22 front-end issue, why don't you just deal with it  
23 as the ministerial exception in the back end?

24 MR. ROTH: Well --

25 JUSTICE JACKSON: It's not as easy,

1       says the Chief Justice --

2               MR. ROTH:  Mm-hmm.

3               JUSTICE JACKSON:  -- but so be it.

4               MR. ROTH:  Well, I -- of course  
5       disputing the premise that this is a, you know,  
6       setting a discriminatory exemption, I think  
7       the -- the point is this is a prophylactic, and  
8       the -- the legislature has said rather than  
9       force these kinds of organizations in individual  
10      cases to assert something analogous to the  
11      ministerial exception, which -- you know, it  
12      can -- it can be challenging to predict who's --  
13      who's going to have to -- who's going to get  
14      this, we want us to get these people out on the  
15      front end.

16              I think that's very similar to what  
17      Congress did when it expanded Section 702.  
18      Pre-1972, it only applied to religious  
19      activities, but then Congress said, well, that's  
20      going to require religious organizations to sort  
21      of predict on a one-by-one basis who's going to  
22      get this 702 exemption, so we're going to expand  
23      it to religious organizations as a whole.

24              And Amos said that is entirely  
25      appropriate.  It's good to have these

1 prophylactic measures to give space to the  
2 organizations that do these things, rather than  
3 force them, sort of on a one-by-one basis, to  
4 have to adjudicate these sort of ministerial  
5 exception-type defenses, which are affirmative  
6 defenses in these -- you know, for instance, in  
7 a Title VII case. And --

8 JUSTICE KAVANAUGH: I think your  
9 overarching argument, again, is that we  
10 shouldn't look at the motives; we should look at  
11 what they do.

12 And the other side says, no, you have  
13 to, by the statutory language and -- and the  
14 constitutional principles look at why they're  
15 doing the activity. And they say the limit on  
16 that is to present -- prevent some of the absurd  
17 hypotheticals or -- or extended hypotheticals is  
18 sincerity, and sincerity will weed out the cases  
19 that you're worried about.

20 What is your response to why  
21 sincerity -- you should look at beliefs, look at  
22 purpose, motive, but sincerity will weed out the  
23 marginal cases?

24 MR. ROTH: Well, sincerity -- I -- so  
25 I took two hypotheticals given to the other side

1 as examples of the edge cases that maybe we  
2 don't want to be exempting here. One was the --  
3 the hospital and one was the vegan restaurant.

4 I think in both those cases, you're  
5 not going to weed those out on sincerity  
6 grounds. The -- there's testimony in the record  
7 here -- this is record 99 of the lower court  
8 record. The archbishop of Milwaukee testified  
9 that he oversees multiple Catholic hospitals in  
10 the Milwaukee area. And so, that's clearly --  
11 they're clearly operated for a religious motive.  
12 We would never dispute the sincerity of that  
13 religious motive. They're going to be out.  
14 Seventh-Day Adventists similarly. It -- maybe  
15 it's commercial activity they're engaging in --

16 JUSTICE KAVANAUGH: And they're going  
17 to be out, why? Just explain that.

18 MR. ROTH: They're going to be out  
19 because when they run their vegan restaurants,  
20 what -- again, what they're saying --

21 JUSTICE KAVANAUGH: Is that a  
22 hospital -- I think you were on the hospital  
23 one.

24 MR. ROTH: Oh, the hospital?

25 JUSTICE KAVANAUGH: Yeah.

1           MR. ROTH: Well, they're -- they're  
2 out because what the hospital is saying if it's  
3 supervised by the bishop, which is all this  
4 statute requires, the bishop will say the reason  
5 we run these hospitals is to serve -- I mean,  
6 Christ healed the sick, and we're doing the  
7 same. And so how can you tell us that that's  
8 not a religious purpose?

9           They'll be out, even though  
10 99.9 percent of what goes on at that hospital is  
11 healthcare.

12           JUSTICE KAVANAUGH: And what's your  
13 response to that? That they should be in?

14           MR. ROTH: That -- well, we think  
15 they're properly --

16           JUSTICE KAVANAUGH: I mean, I'm just  
17 trying to get at the analysis --

18           MR. ROTH: We think -- right.

19           JUSTICE KAVANAUGH: -- you would use  
20 on the other side of that argument.

21           MR. ROTH: Well, my analysis would be  
22 you're looking at the activities, and as Seventh  
23 Circuit said in Dykema, we want to look at  
24 whether the kinds of things that Catholic  
25 hospital is doing is going to entangle the state

1 in unemployment benefit disputes.

2 And I think the answer is clearly no.

3 So -- and I can -- I would like to illustrate --  
4 two very brief hypothetical -- hypotheticals to  
5 illustrate this sort of entanglement point.  
6 I'll just stick with one, actually.

7 So the nurse at the hospital. She's  
8 not charged with inculcating religious doctrine.  
9 She is fired for malpractice. There's a  
10 misconduct dispute. The state can very easily  
11 resolve whether she engaged in misconduct  
12 without answering doctrinal questions, but if  
13 they're right, she's out of the system  
14 altogether and she loses benefits.

15 JUSTICE ALITO: Mr. --

16 MR. ROTH: And that's a -- that's a  
17 needless loss of benefits.

18 JUSTICE ALITO: I mean, Mr. Roth,  
19 let's suppose we affirm and then Catholic  
20 Charities comes to the state and says, okay,  
21 fine, we don't like the decision, but what -- we  
22 want to comply. Tell us the minimum change we  
23 need to make in order to comply.

24 What's your answer?

25 MR. ROTH: I think if when they

1 deliver, say, the soup to the -- the recipient,  
2 they say: Recipient, you know, we're both going  
3 to say the Lord's prayer, that could be one  
4 thing. I mean, when they're engaging in --

5 JUSTICE ALITO: That would be  
6 sufficient?

7 MR. ROTH: I think that would --

8 JUSTICE ALITO: You don't get the --  
9 you don't get the soup unless you pray first?

10 MR. ROTH: And, again, I think it's  
11 because that type of job function is tethered to  
12 religious doctrine. And so that's exactly what  
13 creates the problem. If there's a -- if there's  
14 a termination decision, if -- if the soup  
15 kitchen person says the Lord's prayer, say, the  
16 wrong way, he omits a line, and he's terminated  
17 for that, however unlikely that may be, but if  
18 it were -- come -- to come to pass, the state  
19 agency would now have to decide did he omit too  
20 much of the Lord's prayer, did he say it the  
21 wrong way?

22 JUSTICE KAGAN: But it might be --

23 MR. ROTH: We want --

24 JUSTICE KAGAN: -- a matter of  
25 religious doctrine that we don't require people

1 to say the Lord's prayer with us before we give  
2 them soup. I mean, what's -- what's --

3 MR. ROTH: That --

4 JUSTICE KAGAN: -- what's -- what's  
5 problematic about this -- I mean, there are lots  
6 of hard questions in this area. Vegan  
7 restaurants, hospitals, lots of hard questions.  
8 But I thought it was pretty fundamental that we  
9 don't treat some religions better than other  
10 religions. And we certainly don't do it based  
11 on the content of the religious doctrine that  
12 those religions preach.

13 And if you -- this opinion sets up two  
14 things. One is the co-religionist service.  
15 You've run away from that. And the other is the  
16 proselytization. Some religions proselytize.  
17 Other religions don't. Why are we treating some  
18 religions better than others based on that  
19 element of religious doctrine?

20 MR. ROTH: Because -- precisely  
21 because I think when an employee has to  
22 proselytize, that's what creates the problem.

23 I'd draw just a brief comparison --

24 JUSTICE KAGAN: The problem must be --  
25 you must be able to address this problem, which



1 is -- you know, entanglement is an issue. If --  
2 if I say to you, you know -- you have to figure  
3 out a way to do this that does not discriminate  
4 among religions based on the content of their  
5 doctrines.

6 MR. ROTH: So I would draw an analogy.

7 JUSTICE KAGAN: The reason why we're  
8 so worried about entanglement is because it gets  
9 us enmeshed in the content of religious  
10 doctrine. But your way of doing it, you know,  
11 basically puts the state on the side of some  
12 religions with some doctrine versus other  
13 religions with a different doctrine.

14 MR. ROTH: Sure. So, Your Honor, I  
15 would draw -- I think a very apt analogy on this  
16 point are the FICA and ACA exemptions. The --  
17 these are very valuable exemptions to the FICA  
18 taxes and the ACA individual mandate that are  
19 exemptions for those who have religious  
20 objection to participating in public insurance.

21 Not all denominations have that  
22 religious objection. And so it does fall in  
23 denominational lines who gets the FICA  
24 exception. This is a very valuable exemption.  
25 Only certain denominations that have these kinds

1 of objections to public insurance are going to  
2 receive this.

3 JUSTICE GORSUCH: Yes, but all can.  
4 And here the difference is all cannot. Right?

5 MR. ROTH: Well --

6 JUSTICE GORSUCH: There are going to  
7 be some exemptions that as a matter -- Catholic  
8 Charities does more soup kitchens than -- than  
9 some -- some other faiths. It's true. It's --  
10 it's true. That's true. So they're going to  
11 get -- more likely to get the exemption.

12 But I think what Justice Kagan is  
13 getting at is, isn't it a fundamental premise of  
14 our First Amendment that the state shouldn't be  
15 picking and choosing between religions, between  
16 certain evangelical sects, and Judaism and  
17 Catholicism in -- on the other, for example?  
18 And doesn't it entangle the state tremendously  
19 when it has to go into a soup kitchen, send an  
20 inspector in, to see how much prayer is going  
21 on?

22 MR. ROTH: On the discrimination  
23 point, the -- my -- my fundamental premise is  
24 there are certain circumstances in which  
25 Religion A faces a problem based on its

1 doctrinal content or its practices that Religion  
2 B may not face. And so when the state  
3 legislature -- Congress or state legislatures  
4 set out to exempt Religious Group A but not  
5 Religious Group B, precisely because B does not  
6 face the problem, that cannot be discriminatory.

7 We're in a world, then, where there's  
8 no line-drawing available to legislatures to  
9 accommodate specific problems that only specific  
10 religious groups face, because the principle is  
11 if that ever falls on denominational lines, it's  
12 unconstitutional.

13 And, Justice Gorsuch, I -- I -- I  
14 actually dispute the premise of your question,  
15 that it's just -- it's easy for a religious  
16 group to adopt a new principle to obtain the ACA  
17 or FICA exemption.

18 JUSTICE GORSUCH: Well, all they have  
19 to do is -- reincorporate, according to you.

20 MR. ROTH: No. I'm -- on the FICA and  
21 ACA example, the -- the -- the premise would  
22 have to be the denomination that is left out --  
23 very valuable exemption, all it has to do is  
24 adopt a new tenet of religious doctrine that I  
25 don't like to participate in public insurance,

1     and it gets the exemption. But that's obviously  
2     not so simple.

3             We don't go around telling religions  
4     you should adopt new tenets in order to get, you  
5     know, a -- a -- a new benefit. And so I -- I  
6     really think it's -- it's basically the same  
7     dynamic that we face here. It's certain groups  
8     face the problem. Certain groups have  
9     conscientious objections; other groups don't.  
10    That may fall on denominational lines, but  
11    that's something we have also done.

12            I would encourage you to go back --  
13    the history on this. Professor McConnell, his  
14    canonical article on the Free Exercise Clause,  
15    recognizes that at the founding of this country,  
16    we had multiple targeted religious  
17    accommodations for oath-taking, for religious  
18    assessments, for -- for conscription, and those  
19    often were limited to religious groups known to  
20    be opposed to those things, especially the oath  
21    taking and the Quakers.

22            JUSTICE BARRETT: Counsel, can I shift  
23    you to what I hope will be an easier question  
24    for you?

25            MR. ROTH: Please.

1 JUSTICE BARRETT: Do you want to  
2 address your disagreement with the Solicitor  
3 General about whether the Wisconsin Supreme  
4 Court's decision tracked the interpretation of  
5 the federal statute?

6 MR. ROTH: So you want me to address  
7 the Michigan v. Long question or --

8 JUSTICE BARRETT: Well -- well, yeah,  
9 Michigan. You say we should not --

10 MR. ROTH: Sure.

11 JUSTICE BARRETT: -- decide it on that  
12 basis. So, you know, you're -- you're  
13 distancing yourself from the position taken by  
14 the federal government.

15 Can you talk about that?

16 MR. ROTH: Right. So on the Michigan  
17 v. Long question, the -- I think it's a very  
18 simple distinction. So in St. Martin, what was  
19 going on is the South Dakota state court thought  
20 it was required to bring its coverage up above  
21 the floor that -- FUTA sets. So FUTA sets a  
22 floor. If you fall below it, you don't qualify  
23 for the federal state tax sharing.

24 So South Dakota thought it had --  
25 we're trying to get up to this floor, so we can

1 get the credits. So that's why the -- the --  
2 the South Dakota court said: I'm required to do  
3 what I'm doing by FUTA. That is not what is  
4 happening here.

5 The state court did not think it was  
6 required to meet -- meet a floor. And so that's  
7 why Michigan v. Long doesn't apply. There's a  
8 sufficient independent state grounds. This is  
9 an optional exemption. I think the -- the  
10 Solicitor General recognizes that. States don't  
11 have to have this.

12 I believe the state of Oregon does not  
13 have any part of this exemption at all for  
14 churches or religious purpose organizations.

15 And so precisely because it's an  
16 optional exemption, Wisconsin go -- can go above  
17 the floor of FUTA. It's not a compelled  
18 reading. And so Michigan v. Long doesn't apply.

19 I see my red light's on, but I am  
20 happy to continue if you like.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 Rebuttal, Mr. Rassbach?

24 JUSTICE ALITO: Chief --

25 CHIEF JUSTICE ROBERTS: Oh, I'm sorry.

1     You're -- you're -- yes, yes. I tell -- no,  
2     no --

3                     (Laughter.)

4                     MR. ROTH: I -- I'm happy to stand up  
5     or sit down, you know, Chief, whatever you want  
6     me to do.

7                     CHIEF JUSTICE ROBERTS: Well, I didn't  
8     have anymore, so I figured -- Justice Thomas?

9                     JUSTICE THOMAS: What would we do,  
10    you -- you seem to focus on the proselytizing  
11    aspect of the exemption that you could get the  
12    exemption if you proselytize, but, I -- you  
13    know, it leads me to wonder why you don't have  
14    the same attitude towards someone who posts  
15    outside, we believe deeply in the corporal works  
16    of mercy.

17                    What is -- why would you have -- why  
18    is there a difference from your standpoint  
19    from -- in -- in one and not the other  
20    proselytizing --

21                    MR. ROTH: Right.

22                    JUSTICE THOMAS: -- over the corporal  
23    works of mercy?

24                    MR. ROTH: Right. And it's because  
25    the Catholic Charities employees, when they

1 perform the corporal works of mercy, which I  
2 want to be unequivocal, the -- the state  
3 recognizes -- recognizes that charity is an  
4 essential aspect of the Catholic religion.

5 We are not disputing that. But when  
6 the employee is simply performing the corporal  
7 work of mercy without expressing and inculcating  
8 religious doctrine, this is the point. This is  
9 an an anti-entanglement statute. And so if  
10 they're not expressing and inculcating religious  
11 doctrine, they are not going to create the  
12 entangling problems.

13 And so that's why we say they should  
14 still be covered because we're not going to face  
15 the misconduct disputes that are very difficult  
16 for the state agency to resolve.

17 JUSTICE THOMAS: So what do you mean  
18 by an "anti-entanglement statute"?

19 MR. ROTH: It's an anti-entanglement  
20 statute precisely because when the state has to  
21 resolve misconduct disputes over benefit  
22 eligibility, we don't want our -- our  
23 hardworking public servants to have to answer  
24 questions of religious doctrine.

25 I want to return to my Lord's prayer



1     example, whether they, you know, said it  
2     correctly. We want to keep them out of that  
3     type of decision-making. And that's why that  
4     kind of activity triggers this exemption.

5             JUSTICE THOMAS: Where does this  
6     standalone entanglement issue come from?

7             MR. ROTH: Well, it's -- it's -- it's  
8     what's driving this statute, Your Honor. It's  
9     what's -- it's what's led to the types of  
10    activities the state heard --

11            JUSTICE THOMAS: I know. But when I  
12    think of entanglement, I think of the, hopefully  
13    defunct, Lemon test. Where does it come from as  
14    a --

15            MR. ROTH: Oh.

16            JUSTICE THOMAS: -- standalone  
17    consideration?

18            MR. ROTH: Well, I think Lemon built  
19    in -- entanglement predated Lemon. I believe  
20    Walz is one of the first cases where it really  
21    was discussed as a factor in First Amendment  
22    doctrine, trying to avoid --

23            JUSTICE THOMAS: An Establishment  
24    Clause context?

25            MR. ROTH: That's right.

1 CHIEF JUSTICE ROBERTS: Justice Alito?

2 JUSTICE ALITO: Are you aware that  
3 this entanglement problem has arisen in the  
4 states that follow federal law?

5 MR. ROTH: And by "follow federal law"  
6 you mean?

7 JUSTICE ALITO: That interpret the  
8 federal and have statutes similar to the federal  
9 statutes, similar to your statutes.

10 MR. ROTH: Well --

11 JUSTICE ALITO: So they have a -- have  
12 they had a lot of entanglement problems?

13 MR. ROTH: So we're talking about  
14 states who would take a motive-only approach?

15 JUSTICE ALITO: Yeah.

16 MR. ROTH: Well, they would be  
17 exempting much more broadly so I think no, they  
18 would -- they would not have the -- the  
19 enforcement entanglement that we're concerned  
20 about here because -- precisely because many  
21 more organizations are exempted.

22 JUSTICE ALITO: So you don't actually  
23 have any -- you -- you think there would be an  
24 entanglement problem if you -- if the Wisconsin  
25 Supreme Court interpreted Wisconsin law the way

1 the Solicitor General tells us federal law  
2 should be interpreted, but you have no examples  
3 of actual entanglement cases coming up?

4 MR. ROTH: Well, no, Your Honor. I --  
5 I do think that if the Wisconsin statute were  
6 interpreted as the Solicitor General requests  
7 and it was simply a -- a motive-only test, there  
8 is less entanglement absolutely, but we think  
9 that goes far beyond the anti- -- the -- the  
10 purpose of this statute, which is to get the  
11 state out of entangling employment benefits  
12 disputes.

13 You're going to exempt the hospitals  
14 with all the nurses, all the janitors who aren't  
15 going to pose these problems, so it's just -- it  
16 simply takes us far beyond what it's meant to  
17 do.

18 JUSTICE ALITO: All right. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Sotomayor?

21 JUSTICE SOTOMAYOR: How much problem  
22 is there in Oregon that doesn't give this  
23 exemption at all?

24 MR. ROTH: I'm not aware, Your Honor.  
25 I'm not aware. It's a relatively recent --

1 JUSTICE SOTOMAYOR: Isn't it because  
2 if you have an as-applied challenge to the  
3 janitor being fired, if the janitor is not  
4 exempt, the state is not going to fight it if it  
5 doesn't have a religious reason for firing him  
6 or her, correct?

7 MR. ROTH: Well, that's true, but if  
8 there is a religious -- you know, a -- a  
9 religious doctrinal issue --

10 JUSTICE SOTOMAYOR: But it's not going  
11 to be more most people. The proselytizing is  
12 usually not -- if the proselytizing causes a  
13 problem, then the state is not going to get  
14 involved, correct?

15 MR. ROTH: Well, I -- I -- that's the  
16 million dollar question. I mean, that's what  
17 this exemption is meant to do.

18 JUSTICE SOTOMAYOR: I know you don't  
19 like this question, but accept it. If we find  
20 that your refusal is -- and it constitutes  
21 denominational discrimination because the motive  
22 is being judged -- the motive is being judged on  
23 religious grounds, do you survive strict  
24 scrutiny?

25 MR. ROTH: I think so, Your Honor.

1 JUSTICE SOTOMAYOR: How?

2 MR. ROTH: I do think this --

3 JUSTICE SOTOMAYOR: We -- we found  
4 denominational discrimination on the 50 percent  
5 rule in Larson. This seems very similar to  
6 that. And next we applied strict scrutiny.

7 So how are you different? I know  
8 there was invidious discrimination, but I  
9 don't -- I for one don't think that was the  
10 reason. How do you survive?

11 MR. ROTH: Well, Larson, when we  
12 looked at the 50 percent rule, I think what this  
13 Court said is that's essentially inexplicable  
14 for any other reason than an -- an intent to  
15 disadvantage up and coming new religions.

16 And we think that's nothing like the  
17 rule -- the line the state court has drawn here.  
18 We think it's an effective line that has divided  
19 the world into groups most likely to pose  
20 entangling problems and those that are not.

21 And so unlike Larson, our line does  
22 something secular, something positive from  
23 the -- the religion clause perspective, avoiding  
24 entanglement. That's what differentiates us  
25 from Larson.

1 JUSTICE SOTOMAYOR: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 Justice Barrett?

6 Justice Jackson? Okay. Thank you,

7 counsel.

8 Rebuttal, Mr. Rassbach?

9 REBUTTAL ARGUMENT OF ERIC C. RASSBACH

10 ON BEHALF OF THE PETITIONERS

11 MR. RASSBACH: Thank you, Mr. Chief

12 Justice. A couple of quick points:

13 First, I think my friend's argument  
14 showed that Wisconsin can't defend the decision  
15 below, which said -- and I quote -- that the  
16 subentities, if they quote, "partook in  
17 activities such as those cited by the Dykema  
18 court" -- that's at Petitioners' Appendix 46A --  
19 that they -- they would have been in a better  
20 position than they are now. So they are running  
21 away from that.

22 And you heard that in the -- in the  
23 argument earlier. Their new interest in  
24 anti-entanglement is itself incredibly  
25 entangling, as I think the Court's questioning

1     amply demonstrated.

2             The reality is what they want to do is  
3     make what -- what the Larson court called at  
4     footnote 23, "explicit and deliberate  
5     distinctions between ... religious [groups],"  
6     and that's just not allowed by the -- the  
7     Constitution.

8             You know, I'd also say that a lot of  
9     the -- the -- my friend's argument was a little  
10    confused because it really focused a lot on  
11    individuals versus institutions. This is --  
12    this is about an institutional plaintiff. It's  
13    not about different individuals that are coming  
14    forward with -- you know, the -- the nurse or  
15    the nun, et cetera. This -- this is about you  
16    get the exemption as an institution, not  
17    individual by individual.

18            You know, I'd say that the easiest  
19    way, I think, to decide this case is on the  
20    Larson and Lukumi's ground of -- of ensuring  
21    that different -- states do not discriminate  
22    along theological lines.

23            You know, in the end, this is a  
24    religiously pluralistic society. And that calls  
25    for a generous approach to religious exemptions,

1 not a stingy one. And, you know, Catholic  
2 Charities is an integral part of the Catholic  
3 Church. It's carrying out the mission of the  
4 Catholic Church when it helps all people. And  
5 penalizing them for helping all people without  
6 proselytization cannot be reconciled with the  
7 pluralism of American society or the religion  
8 clauses.

9 We respectfully request that the Court  
10 reverse.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 The case is submitted.

14 (Whereupon, at 11:45 a.m., the case  
15 was submitted.)  
16  
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## Official

<p><b>0</b></p> <p><b>0.6</b> <sup>[1]</sup> 28:13</p> <hr/> <p><b>1</b></p> <p><b>1</b> <sup>[1]</sup> 73:17</p> <p><b>10:05</b> <sup>[2]</sup> 1:17 4:2</p> <p><b>11:45</b> <sup>[1]</sup> 119:14</p> <p><b>117</b> <sup>[1]</sup> 3:14</p> <p><b>15</b> <sup>[2]</sup> 44:21 68:20</p> <p><b>1981</b> <sup>[1]</sup> 46:6</p> <hr/> <p><b>2</b></p> <p><b>2025</b> <sup>[1]</sup> 1:13</p> <p><b>23</b> <sup>[1]</sup> 118:4</p> <p><b>24-154</b> <sup>[1]</sup> 4:4</p> <hr/> <p><b>3</b></p> <p><b>31</b> <sup>[1]</sup> 1:13</p> <hr/> <p><b>4</b></p> <p><b>4</b> <sup>[1]</sup> 3:4</p> <p><b>45</b> <sup>[1]</sup> 3:8</p> <p><b>46A</b> <sup>[1]</sup> 117:18</p> <hr/> <p><b>5</b></p> <p><b>50</b> <sup>[2]</sup> 116:4,12</p> <p><b>501(c)(3)</b> <sup>[7]</sup> 52:23 53:4,23</p> <p><b>74:2</b> 80:1,2,4</p> <p><b>513</b> <sup>[1]</sup> 13:12</p> <hr/> <p><b>7</b></p> <p><b>702</b> <sup>[3]</sup> 74:2 97:17,22</p> <p><b>72</b> <sup>[1]</sup> 3:11</p> <hr/> <p><b>8</b></p> <p><b>80s</b> <sup>[1]</sup> 36:9</p> <hr/> <p><b>9</b></p> <p><b>99</b> <sup>[2]</sup> 41:2 99:7</p> <p><b>99.9</b> <sup>[1]</sup> 100:10</p> <hr/> <p><b>A</b></p> <p><b>a.m</b> <sup>[3]</sup> 1:17 4:2 119:14</p> <p><b>able</b> <sup>[5]</sup> 39:12 52:15,16 60:9 103:25</p> <p><b>abortions</b> <sup>[1]</sup> 39:25</p> <p><b>above</b> <sup>[2]</sup> 108:20 109:16</p> <p><b>above-entitled</b> <sup>[1]</sup> 1:15</p> <p><b>Absolutely</b> <sup>[6]</sup> 5:24 7:11</p> <p><b>77:23</b> 90:12,18 114:8</p> <p><b>abstract</b> <sup>[1]</sup> 73:11</p> <p><b>absurd</b> <sup>[1]</sup> 98:16</p> <p><b>ACA</b> <sup>[4]</sup> 104:16,18 106:16,21</p> <p><b>accept</b> <sup>[1]</sup> 115:19</p> <p><b>access</b> <sup>[1]</sup> 28:6</p> <p><b>accommodate</b> <sup>[1]</sup> 106:9</p> <p><b>accommodation</b> <sup>[3]</sup> 72:13 90:19 91:5</p> <p><b>accommodations</b> <sup>[5]</sup> 5:17 74:10 75:1 85:20 107:17</p> <p><b>accomplished</b> <sup>[1]</sup> 68:5</p> <p><b>according</b> <sup>[2]</sup> 69:4 106:19</p> <p><b>accurately</b> <sup>[1]</sup> 89:7</p> <p><b>across</b> <sup>[4]</sup> 9:12,21 21:9 40:</p>	<p>24</p> <p><b>Act</b> <sup>[1]</sup> 45:15</p> <p><b>acting</b> <sup>[2]</sup> 21:14 74:5</p> <p><b>activities</b> <sup>[26]</sup> 7:14 10:21</p> <p><b>11:20</b> 20:14 29:23 35:5,11,23 46:13 50:9,14 51:17,21</p> <p><b>57:2</b> 60:8,22 69:14 71:14</p> <p><b>73:13</b> 80:9 81:20,24 97:19</p> <p><b>100:22</b> 112:10 117:17</p> <p><b>activity</b> <sup>[10]</sup> 4:16 21:13 66:21 70:6 80:3 88:7,8 98:15</p> <p><b>99:15</b> 112:4</p> <p><b>acts</b> <sup>[1]</sup> 71:18</p> <p><b>actual</b> <sup>[2]</sup> 71:6 114:3</p> <p><b>actually</b> <sup>[16]</sup> 10:2 11:13 33:15 37:11 48:10 54:2 60:4,6 61:17 65:25 66:15 68:13</p> <p><b>86:13</b> 101:6 106:14 113:22</p> <p><b>added</b> <sup>[1]</sup> 39:14</p> <p><b>addition</b> <sup>[2]</sup> 49:4 71:23</p> <p><b>address</b> <sup>[4]</sup> 96:18 103:25</p> <p><b>108:2,6</b></p> <p><b>adjudicate</b> <sup>[3]</sup> 71:11 87:17</p> <p><b>98:4</b></p> <p><b>adjudicating</b> <sup>[2]</sup> 44:3 81:18</p> <p><b>adopt</b> <sup>[3]</sup> 106:16,24 107:4</p> <p><b>advantage</b> <sup>[1]</sup> 23:5</p> <p><b>Adventist</b> <sup>[2]</sup> 80:14,16</p> <p><b>Adventists</b> <sup>[1]</sup> 99:14</p> <p><b>affairs</b> <sup>[1]</sup> 17:18</p> <p><b>Affiliated</b> <sup>[2]</sup> 27:10 73:20</p> <p><b>affiliates</b> <sup>[1]</sup> 72:19</p> <p><b>affirm</b> <sup>[2]</sup> 91:23 101:19</p> <p><b>affirmative</b> <sup>[1]</sup> 98:5</p> <p><b>affirmed</b> <sup>[1]</sup> 26:16</p> <p><b>affirming</b> <sup>[1]</sup> 92:4</p> <p><b>aged</b> <sup>[4]</sup> 12:11 15:20,20 34:5</p> <p><b>agency</b> <sup>[2]</sup> 102:19 111:16</p> <p><b>agree</b> <sup>[7]</sup> 28:19 37:24 46:21 55:16 59:10 63:12 78:7</p> <p><b>agreement</b> <sup>[1]</sup> 66:2</p> <p><b>ahead</b> <sup>[3]</sup> 81:4,5 89:24</p> <p><b>AL</b> <sup>[2]</sup> 1:4,8</p> <p><b>Alito</b> <sup>[25]</sup> 21:25 22:1,8,17,25 23:12,22 24:1,8,14 25:11,24 62:23 101:15,18 102:5,8 109:24 113:1,2,7,11,15,22 114:18</p> <p><b>all-or-nothing</b> <sup>[1]</sup> 74:7</p> <p><b>alleging</b> <sup>[1]</sup> 47:6</p> <p><b>allergic</b> <sup>[1]</sup> 86:4</p> <p><b>alleviate</b> <sup>[3]</sup> 17:8,10 43:24</p> <p><b>allow</b> <sup>[1]</sup> 4:20</p> <p><b>allowed</b> <sup>[3]</sup> 10:5,7 118:6</p> <p><b>allows</b> <sup>[1]</sup> 68:8</p> <p><b>almost</b> <sup>[1]</sup> 23:3</p> <p><b>alone</b> <sup>[1]</sup> 91:25</p> <p><b>already</b> <sup>[2]</sup> 11:4 47:20</p> <p><b>although</b> <sup>[1]</sup> 76:9</p> <p><b>altogether</b> <sup>[3]</sup> 73:5 74:10</p> <p><b>101:14</b></p>	<p><b>ambiguity</b> <sup>[1]</sup> 68:11</p> <p><b>ambiguous</b> <sup>[1]</sup> 65:2</p> <p><b>Amendment</b> <sup>[4]</sup> 37:16 73:25 105:14 112:21</p> <p><b>American</b> <sup>[1]</sup> 119:7</p> <p><b>amicus</b> <sup>[4]</sup> 2:6 3:7 28:14</p> <p><b>45:9</b></p> <p><b>Amish</b> <sup>[2]</sup> 37:13,17</p> <p><b>among</b> <sup>[6]</sup> 7:20 19:23 33:5</p> <p><b>46:12</b> 73:12 104:4</p> <p><b>Amos</b> <sup>[2]</sup> 17:12 97:24</p> <p><b>amply</b> <sup>[1]</sup> 118:1</p> <p><b>analogous</b> <sup>[2]</sup> 83:18 97:10</p> <p><b>analogy</b> <sup>[3]</sup> 53:1 104:6,15</p> <p><b>analysis</b> <sup>[7]</sup> 46:9 59:20 64:16 65:15 77:11 100:17,21</p> <p><b>analyze</b> <sup>[1]</sup> 52:18</p> <p><b>and's</b> <sup>[1]</sup> 90:17</p> <p><b>animal</b> <sup>[1]</sup> 10:5</p> <p><b>another</b> <sup>[8]</sup> 7:22 20:9 24:25 35:21 61:6 69:12 71:20</p> <p><b>92:14</b></p> <p><b>answer</b> <sup>[15]</sup> 26:23 34:3,22,24 35:21 38:4,13 50:23 54:21 64:2 67:18 96:9 101:2,24 111:23</p> <p><b>answered</b> <sup>[1]</sup> 64:3</p> <p><b>answering</b> <sup>[1]</sup> 101:12</p> <p><b>answers</b> <sup>[1]</sup> 88:19</p> <p><b>anti</b> <sup>[1]</sup> 114:9</p> <p><b>anti-entanglement</b> <sup>[4]</sup> 111:9,18,19 117:24</p> <p><b>antidiscrimination</b> <sup>[2]</sup> 89:17 90:25</p> <p><b>anybody</b> <sup>[1]</sup> 84:4</p> <p><b>apologies</b> <sup>[1]</sup> 90:15</p> <p><b>apologize</b> <sup>[2]</sup> 27:1 94:19</p> <p><b>apparent</b> <sup>[1]</sup> 27:7</p> <p><b>apparently</b> <sup>[1]</sup> 33:11</p> <p><b>APPEARANCES</b> <sup>[1]</sup> 2:1</p> <p><b>Appendix</b> <sup>[1]</sup> 117:18</p> <p><b>application</b> <sup>[1]</sup> 7:5</p> <p><b>applied</b> <sup>[6]</sup> 5:18 7:1 46:22</p> <p><b>52:22</b> 97:18 116:6</p> <p><b>applies</b> <sup>[5]</sup> 9:8,12,12 19:18</p> <p><b>45:17</b></p> <p><b>apply</b> <sup>[12]</sup> 6:7 26:14 40:24</p> <p><b>52:21</b> 59:16 62:8 65:18 83:22 88:20 96:12 109:7,18</p> <p><b>applying</b> <sup>[4]</sup> 4:23 65:14 83:19 96:9</p> <p><b>appoints</b> <sup>[1]</sup> 62:13</p> <p><b>appreciate</b> <sup>[1]</sup> 48:24</p> <p><b>approach</b> <sup>[3]</sup> 16:14 113:14</p> <p><b>118:25</b></p> <p><b>appropriate</b> <sup>[2]</sup> 75:3 97:25</p> <p><b>approved</b> <sup>[2]</sup> 35:4,5</p> <p><b>apt</b> <sup>[1]</sup> 104:15</p> <p><b>arbitrary</b> <sup>[2]</sup> 86:17,25</p> <p><b>archbishop</b> <sup>[1]</sup> 99:8</p> <p><b>area</b> <sup>[2]</sup> 99:10 103:6</p> <p><b>aren't</b> <sup>[2]</sup> 91:14 114:14</p> <p><b>argue</b> <sup>[1]</sup> 75:16</p> <p><b>argument</b> <sup>[32]</sup> 1:16 3:2,5,9,</p>	<p>12 4:4,8 10:14 27:4 29:17,18,19 30:5,25 31:14,22,23</p> <p><b>32:11</b> 45:8 46:17 49:8 50:2 51:11 72:9 78:6 87:23</p> <p><b>98:9</b> 100:20 117:9,13,23</p> <p><b>118:9</b></p> <p><b>arguments</b> <sup>[5]</sup> 26:9 30:16</p> <p><b>49:17,19</b> 77:1</p> <p><b>arise</b> <sup>[1]</sup> 96:19</p> <p><b>arisen</b> <sup>[1]</sup> 113:3</p> <p><b>arm</b> <sup>[1]</sup> 45:21</p> <p><b>around</b> <sup>[4]</sup> 13:22 84:6 92:18 107:3</p> <p><b>art</b> <sup>[4]</sup> 22:4,6,9 79:23</p> <p><b>article</b> <sup>[1]</sup> 107:14</p> <p><b>articulate</b> <sup>[2]</sup> 14:22 40:9</p> <p><b>articulated</b> <sup>[1]</sup> 38:5</p> <p><b>as-applied</b> <sup>[1]</sup> 115:2</p> <p><b>aside</b> <sup>[1]</sup> 67:19</p> <p><b>aspect</b> <sup>[3]</sup> 66:20 110:11</p> <p><b>111:4</b></p> <p><b>assert</b> <sup>[1]</sup> 97:10</p> <p><b>asserts</b> <sup>[1]</sup> 52:6</p> <p><b>assessments</b> <sup>[1]</sup> 107:18</p> <p><b>Assistant</b> <sup>[1]</sup> 2:8</p> <p><b>assume</b> <sup>[2]</sup> 64:8 65:8</p> <p><b>assuming</b> <sup>[3]</sup> 9:1 47:9 59:3</p> <p><b>attend</b> <sup>[2]</sup> 24:24 83:6</p> <p><b>attendance</b> <sup>[2]</sup> 83:13,14</p> <p><b>attitude</b> <sup>[1]</sup> 110:14</p> <p><b>Attorney</b> <sup>[1]</sup> 2:8</p> <p><b>autonomy</b> <sup>[11]</sup> 17:15 18:24</p> <p><b>19:13,17</b> 26:9 29:17,19 30:25 31:15 75:12,15</p> <p><b>available</b> <sup>[2]</sup> 23:18 106:8</p> <p><b>avoid</b> <sup>[4]</sup> 46:3 47:8 96:18</p> <p><b>112:22</b></p> <p><b>avoidance</b> <sup>[2]</sup> 16:14 35:2</p> <p><b>avoiding</b> <sup>[1]</sup> 116:23</p> <p><b>aware</b> <sup>[5]</sup> 65:12 77:14 113:2 114:24,25</p> <p><b>away</b> <sup>[11]</sup> 18:21 48:5 66:10</p> <p><b>84:20</b> 87:13,16 88:14 90:24 93:18 103:15 117:21</p> <hr/> <p><b>B</b></p> <p><b>back</b> <sup>[13]</sup> 27:14,19 38:18</p> <p><b>43:5</b> 48:4 54:3 70:1 74:9</p> <p><b>85:19</b> 87:3 96:13,23 107:12</p> <p><b>backtrack</b> <sup>[1]</sup> 40:4</p> <p><b>backup</b> <sup>[2]</sup> 76:16 78:5</p> <p><b>bad</b> <sup>[1]</sup> 92:23</p> <p><b>Baptist</b> <sup>[1]</sup> 24:21</p> <p><b>bar</b> <sup>[1]</sup> 51:6</p> <p><b>BARRETT</b> <sup>[45]</sup> 16:24 17:14 18:8 19:12,25 20:8 37:22,23 38:3,14 39:15 40:6,20 41:8,11 57:11,19 58:6,18,21,24 59:3,11 67:1,2 87:11 89:20,24 90:1,2,10,13</p> <p><b>91:7,11</b> 94:12,16 95:1,4,7,19 107:22 108:1,8,11 117:</p>	<p>5</p> <p><b>Barrett's</b> <sup>[1]</sup> 50:24</p> <p><b>based</b> <sup>[6]</sup> 75:8 96:17 103:10,18 104:4 105:25</p> <p><b>basement</b> <sup>[1]</sup> 13:9</p> <p><b>basically</b> <sup>[5]</sup> 76:9,9 85:14</p> <p><b>104:11</b> 107:6</p> <p><b>basis</b> <sup>[9]</sup> 17:4 27:5 29:9 32:3 46:19 49:9 97:21 98:3</p> <p><b>108:12</b></p> <p><b>beard</b> <sup>[1]</sup> 50:19</p> <p><b>beard-growing</b> <sup>[1]</sup> 70:2</p> <p><b>become</b> <sup>[5]</sup> 12:6 42:16 82:13 83:5,5</p> <p><b>becomes</b> <sup>[2]</sup> 49:9 76:7</p> <p><b>behalf</b> <sup>[8]</sup> 2:2,9 3:4,11,14 4:9 72:10 117:10</p> <p><b>behind</b> <sup>[1]</sup> 7:16</p> <p><b>belief</b> <sup>[6]</sup> 9:2 38:6 52:19 53:7 54:13 55:10</p> <p><b>beliefs</b> <sup>[6]</sup> 9:5 52:6,7 54:24</p> <p><b>56:21</b> 98:21</p> <p><b>believe</b> <sup>[3]</sup> 109:12 110:15</p> <p><b>112:19</b></p> <p><b>believed</b> <sup>[1]</sup> 56:4</p> <p><b>believes</b> <sup>[2]</sup> 18:20 23:11</p> <p><b>below</b> <sup>[8]</sup> 27:7 28:5 31:24</p> <p><b>36:5</b> 51:12 91:23 108:22</p> <p><b>117:15</b></p> <p><b>benefit</b> <sup>[7]</sup> 18:21 33:12 72:15 73:22 101:1 107:5 111:21</p> <p><b>benefits</b> <sup>[11]</sup> 28:8 33:18,21</p> <p><b>40:2</b> 72:18 76:20,22 77:2</p> <p><b>101:14,17</b> 114:11</p> <p><b>berth</b> <sup>[2]</sup> 73:2 75:2</p> <p><b>best</b> <sup>[4]</sup> 13:6 24:4,15 84:10</p> <p><b>better</b> <sup>[7]</sup> 21:6 33:17 46:25</p> <p><b>77:3</b> 103:9,18 117:19</p> <p><b>between</b> <sup>[24]</sup> 6:19 10:24</p> <p><b>11:25</b> 12:14 14:15 16:1 17:17,20,23 20:16 22:21 31:24 32:1,23 37:13 38:7 39:7,19 64:20 86:17 93:2 105:15,15 118:5</p> <p><b>beyond</b> <sup>[2]</sup> 114:9,16</p> <p><b>big</b> <sup>[4]</sup> 37:13 38:14,16 89:12</p> <p><b>biggest</b> <sup>[1]</sup> 55:17</p> <p><b>binding</b> <sup>[1]</sup> 38:25</p> <p><b>bishop</b> <sup>[8]</sup> 31:4 62:12 74:13 94:4,20,23 100:3,4</p> <p><b>bit</b> <sup>[7]</sup> 35:14 38:10,24 43:4</p> <p><b>51:23,24</b> 61:4</p> <p><b>board</b> <sup>[3]</sup> 9:12,21 21:9</p> <p><b>body</b> <sup>[3]</sup> 19:6 31:3 35:16</p> <p><b>body's</b> <sup>[1]</sup> 75:22</p> <p><b>bones</b> <sup>[1]</sup> 38:11</p> <p><b>boomerang</b> <sup>[1]</sup> 63:16</p> <p><b>borrowed</b> <sup>[1]</sup> 79:23</p> <p><b>both</b> <sup>[9]</sup> 7:3 10:7 25:4,19</p> <p><b>26:9,15</b> 31:7 99:4 102:2</p> <p><b>bottom</b> <sup>[1]</sup> 49:12</p> <p><b>bottom-side</b> <sup>[1]</sup> 28:14</p>
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## Official

<b>bound</b> <sup>[1]</sup> 27:8 <b>bounds</b> <sup>[1]</sup> 21:14 <b>break</b> <sup>[1]</sup> 32:17 <b>breaks</b> <sup>[1]</sup> 4:21 <b>brief</b> <sup>[11]</sup> 30:13,20 68:21 75:16 76:14 79:18 88:18 93:5,7 101:4 103:23 <b>briefs</b> <sup>[1]</sup> 28:14 <b>bring</b> <sup>[1]</sup> 108:20 <b>bringing</b> <sup>[1]</sup> 61:14 <b>broad</b> <sup>[4]</sup> 16:16,19 28:6 78:2 <b>broadly</b> <sup>[3]</sup> 19:18 38:24 113:17 <b>brochure</b> <sup>[1]</sup> 81:15 <b>Buddhism</b> <sup>[1]</sup> 41:5 <b>built</b> <sup>[1]</sup> 112:18 <b>burden</b> <sup>[1]</sup> 43:25 <b>burdens</b> <sup>[1]</sup> 17:10 <b>BUREAU</b> <sup>[6]</sup> 1:3 4:5 51:14 62:10,15 69:5 <b>business</b> <sup>[6]</sup> 13:10,14,21 42:4 50:6 70:5 <b>buy</b> <sup>[1]</sup> 44:18 <hr/> <b>C</b> <hr/> <b>call</b> <sup>[6]</sup> 57:16 58:7,25 63:13 90:4 93:10 <b>called</b> <sup>[2]</sup> 4:15 118:3 <b>calls</b> <sup>[1]</sup> 118:24 <b>came</b> <sup>[3]</sup> 1:15 9:25 80:12 <b>candidates</b> <sup>[2]</sup> 12:6 42:15 <b>cannot</b> <sup>[3]</sup> 105:4 106:6 119:6 <b>canonical</b> <sup>[1]</sup> 107:14 <b>canonically</b> <sup>[1]</sup> 6:13 <b>care</b> <sup>[3]</sup> 42:22 60:13 71:21 <b>careful</b> <sup>[1]</sup> 88:13 <b>caring</b> <sup>[1]</sup> 60:19 <b>carried</b> <sup>[1]</sup> 51:21 <b>carrying</b> <sup>[2]</sup> 69:1 119:3 <b>carved</b> <sup>[1]</sup> 60:2 <b>carveout</b> <sup>[2]</sup> 10:8 13:15 <b>Case</b> <sup>[36]</sup> 4:4,12,18 6:24,25 7:4,4 9:23 10:12 17:25 21:2 23:21 27:9 28:4 32:16,18 33:3 36:9 37:12 39:23 40:2 51:23 52:2,14 60:18 65:17,21,21 67:6 69:17 80:2,10 98:7 118:19 119:13,14 <b>cases</b> <sup>[18]</sup> 17:12 26:15 29:10 35:8 44:21 53:2,24 54:2 65:11 75:13,23 97:10 98:18,23 99:1,4 112:20 114:3 <b>categorically</b> <sup>[1]</sup> 65:5 <b>categories</b> <sup>[1]</sup> 64:15 <b>CATHOLIC</b> <sup>[69]</sup> 1:3 4:5 7:21 10:19,24 11:5 16:21 18:10,11 19:9,15 22:2,6,11,18,21 23:9,13,19 24:10 25:12,22 33:11,16 34:4 39:20,21,24 40:18,21 43:10 45:21 51:14 55:8 56:18 59:17 62:3,10,14,16 69:4,19 74:12 76:15 77:8 78:4 80:20 81:7,13 82:6,13 83:10 87:15,21 92:2 93:10,19 95:14,15,22 99:9 100:24 101:19 105:7 110:25 111:4 119:1,2,4 <b>Catholicism</b> <sup>[1]</sup> 105:17 <b>cause</b> <sup>[1]</sup> 89:8 <b>causes</b> <sup>[1]</sup> 115:12 <b>certain</b> <sup>[18]</sup> 10:4,20 17:19 20:13 42:24 45:17 46:13 49:5 50:13,19 75:6 76:11 91:16 104:25 105:16,24 107:7,8 <b>Certainly</b> <sup>[4]</sup> 33:18 68:3,15 103:10 <b>cetera</b> <sup>[5]</sup> 29:4 41:25 44:25 64:22 118:15 <b>challenge</b> <sup>[1]</sup> 115:2 <b>challenging</b> <sup>[1]</sup> 97:12 <b>chamber</b> <sup>[1]</sup> 52:16 <b>chancery</b> <sup>[1]</sup> 61:10 <b>change</b> <sup>[1]</sup> 101:22 <b>changed</b> <sup>[1]</sup> 43:6 <b>charged</b> <sup>[1]</sup> 101:8 <b>charitable</b> <sup>[9]</sup> 12:10,15,16,17 13:15 15:19 29:23 61:22 86:13 <b>CHARITIES</b> <sup>[51]</sup> 1:3 4:5 7:21 10:19,24,25 11:5 16:21 18:11 19:10 22:2,18 23:13 24:10,11 25:12 33:11,16 34:4 39:20,22 40:18,21 43:10 51:14 55:8 56:19 62:3,10,15 69:4 74:12 76:15 77:8 78:4 80:20 81:7,14 82:6 92:2 93:10,11,12,19 95:14,16,23 101:20 105:8 110:25 119:2 <b>charity</b> <sup>[6]</sup> 10:21 24:15 62:19 69:6,10 111:3 <b>check</b> <sup>[1]</sup> 80:6 <b>CHIEF</b> <sup>[49]</sup> 4:3,10 8:17 9:1,11 18:15 21:22 25:25 29:15 31:17 33:25 37:2,21 41:12 45:5,11 54:3,22 57:17,18 59:12 60:11,17 61:1 62:23 63:24 64:2 66:25 67:3 72:6,11 81:3,6,11 82:2 88:16 89:25 96:13 97:1 109:21,24,25 110:5,7 113:1 114:19 117:2,11 119:11 <b>Chief's</b> <sup>[1]</sup> 80:11 <b>chock</b> <sup>[1]</sup> 93:14 <b>choice</b> <sup>[3]</sup> 30:23 76:8,11 <b>choices</b> <sup>[2]</sup> 18:9 75:11 <b>choosing</b> <sup>[1]</sup> 105:15 <b>chose</b> <sup>[1]</sup> 31:22 <b>chosen</b> <sup>[1]</sup> 10:17 <b>Christ</b> <sup>[4]</sup> 62:19 69:6,11 100:6 <b>Christian</b> <sup>[1]</sup> 96:1 <b>church</b> <sup>[61]</sup> 7:21 12:18,19	13:22 14:1,4 17:15,17,19 18:10,20,24 19:5,13,15,17 20:5 22:7,11 23:20 24:21,24 25:22 28:21,22 29:22 30:25 31:3,15 33:17,19 41:25 45:22 60:4,7,13,19 61:5,18 62:1 67:10,17 71:22 72:1 74:17,18 75:12,14,19 77:22 81:15 83:4,10,13,14 84:3 87:15,21 88:10 119:3,4 <b>church's</b> <sup>[2]</sup> 26:5 75:10 <b>church-controlled</b> <sup>[2]</sup> 45:17 64:21 <b>church-related</b> <sup>[4]</sup> 12:9 61:22 64:21 71:20 <b>church-run</b> <sup>[1]</sup> 15:19 <b>churches</b> <sup>[7]</sup> 10:25 72:19 75:1,2,5 88:14 109:14 <b>Circuit</b> <sup>[4]</sup> 36:9 56:2 66:19 100:23 <b>circumstances</b> <sup>[2]</sup> 75:7 105:24 <b>cited</b> <sup>[1]</sup> 117:17 <b>City</b> <sup>[1]</sup> 26:11 <b>claim</b> <sup>[5]</sup> 8:22 9:13,17 24:3 26:11 <b>claims</b> <sup>[3]</sup> 9:23 44:4 71:11 <b>clash</b> <sup>[2]</sup> 39:17,18 <b>Clause</b> <sup>[3]</sup> 107:14 112:24 116:23 <b>clauses</b> <sup>[1]</sup> 119:8 <b>clear</b> <sup>[7]</sup> 8:1 10:14 11:24 21:15 35:9 67:12 90:16 <b>clearly</b> <sup>[6]</sup> 36:17 50:11 60:2 99:10,11 101:2 <b>clergy</b> <sup>[1]</sup> 5:7 <b>clients</b> <sup>[1]</sup> 27:20 <b>close</b> <sup>[1]</sup> 35:19 <b>closed</b> <sup>[3]</sup> 35:10,18 36:12 <b>closer</b> <sup>[1]</sup> 44:24 <b>co-religionist</b> <sup>[2]</sup> 91:19 103:14 <b>co-religionists</b> <sup>[5]</sup> 32:1 84:2,10 91:12,15 <b>Code</b> <sup>[3]</sup> 13:12,13 75:5 <b>coercive</b> <sup>[1]</sup> 23:3 <b>coincide</b> <sup>[1]</sup> 25:16 <b>COLIN</b> <sup>[3]</sup> 2:8 3:10 72:9 <b>college</b> <sup>[3]</sup> 11:25 42:13 43:16 <b>colloquy</b> <sup>[1]</sup> 32:6 <b>come</b> <sup>[10]</sup> 22:13,14 26:10 36:10 92:7 94:5 102:18,18 112:6,13 <b>comes</b> <sup>[10]</sup> 7:13 32:21 37:12 39:1 47:11 53:14 77:11 84:21,24 101:20 <b>coming</b> <sup>[3]</sup> 114:3 116:15 118:13 <b>commentated</b> <sup>[1]</sup> 41:1 <b>commercial</b> <sup>[4]</sup> 54:19 66:16 80:21 99:15 <b>commercialness</b> <sup>[1]</sup> 66:21	<b>COMMISSION</b> <sup>[2]</sup> 1:8 4:6 <b>committee</b> <sup>[5]</sup> 61:16 64:18,25 65:2 67:12 <b>comparable</b> <sup>[1]</sup> 33:12 <b>comparator</b> <sup>[4]</sup> 24:4,4,6,15 <b>compares</b> <sup>[1]</sup> 5:3 <b>comparison</b> <sup>[1]</sup> 103:23 <b>compelled</b> <sup>[2]</sup> 57:24 109:17 <b>compelling</b> <sup>[10]</sup> 28:20,22 29:12 32:21,22 33:9 77:5,6,11 78:2 <b>compensation</b> <sup>[1]</sup> 28:7 <b>competing</b> <sup>[1]</sup> 66:13 <b>competition</b> <sup>[1]</sup> 66:16 <b>completely</b> <sup>[1]</sup> 90:8 <b>complicated</b> <sup>[6]</sup> 4:12 33:8,10 47:19 49:14 61:4 <b>complications</b> <sup>[1]</sup> 49:25 <b>complied</b> <sup>[1]</sup> 72:24 <b>comply</b> <sup>[2]</sup> 101:22,23 <b>component</b> <sup>[2]</sup> 90:4,18 <b>compulsion</b> <sup>[3]</sup> 75:17,22 76:5 <b>concern</b> <sup>[1]</sup> 69:16 <b>concerned</b> <sup>[1]</sup> 113:19 <b>concisely</b> <sup>[1]</sup> 40:11 <b>concluded</b> <sup>[1]</sup> 54:6 <b>conclusion</b> <sup>[1]</sup> 4:21 <b>condition</b> <sup>[2]</sup> 7:22 14:2 <b>conflicting</b> <sup>[2]</sup> 39:3,6 <b>conform</b> <sup>[1]</sup> 48:7 <b>conforming</b> <sup>[3]</sup> 48:19 58:16 63:8 <b>conforms</b> <sup>[1]</sup> 46:2 <b>confronting</b> <sup>[1]</sup> 73:22 <b>confused</b> <sup>[1]</sup> 118:10 <b>Congress</b> <sup>[6]</sup> 12:8 68:13 70:16 97:17,19 106:3 <b>conscience</b> <sup>[1]</sup> 39:23 <b>conscientious</b> <sup>[1]</sup> 107:9 <b>conscription</b> <sup>[1]</sup> 107:18 <b>consider</b> <sup>[3]</sup> 68:13 72:19 88:25 <b>consideration</b> <sup>[2]</sup> 91:22 112:17 <b>considered</b> <sup>[5]</sup> 12:12 51:18 66:18 67:14,16 <b>consistent</b> <sup>[4]</sup> 43:21 54:24 63:14 65:1 <b>consistently</b> <sup>[1]</sup> 36:5 <b>constitute</b> <sup>[1]</sup> 17:13 <b>constitutes</b> <sup>[1]</sup> 115:20 <b>Constitution</b> <sup>[5]</sup> 4:20 6:7 16:25 43:21 118:7 <b>constitutional</b> <sup>[18]</sup> 6:23 16:14 26:4 35:2 41:16 43:1 46:4,8,18 47:16,18 48:10 49:6,16 57:16 63:20,21 98:14 <b>constitutionality</b> <sup>[1]</sup> 58:25 <b>constitutionally</b> <sup>[3]</sup> 4:24	16:19 96:21 <b>construction</b> <sup>[2]</sup> 47:8 63:11 <b>construed</b> <sup>[3]</sup> 46:5 47:5 59:10 <b>construing</b> <sup>[3]</sup> 47:10 57:8,12 <b>content</b> <sup>[4]</sup> 103:11 104:4,9 106:1 <b>context</b> <sup>[12]</sup> 5:6 31:12 52:23 53:4 65:14 66:12 79:24 89:17 91:1,2 95:13 112:24 <b>contexts</b> <sup>[1]</sup> 95:11 <b>continue</b> <sup>[1]</sup> 109:20 <b>control</b> <sup>[4]</sup> 16:11 18:1 62:14 67:9 <b>controlled</b> <sup>[14]</sup> 7:21 13:25 14:2,4 31:3 41:24 60:4,6 61:5,17,25 62:6 67:17 71:25 <b>convert</b> <sup>[1]</sup> 22:15 <b>cooperative</b> <sup>[1]</sup> 45:14 <b>core</b> <sup>[2]</sup> 91:24 92:4 <b>corporal</b> <sup>[4]</sup> 110:15,22 111:1,6 <b>corporate</b> <sup>[1]</sup> 74:14 <b>corporation</b> <sup>[4]</sup> 18:11,13,14 25:13 <b>correct</b> <sup>[11]</sup> 14:12 32:19 46:3 47:10 52:25 56:16,23 63:3 79:11 115:6,14 <b>correctly</b> <sup>[2]</sup> 45:22 112:2 <b>Couldn't</b> <sup>[2]</sup> 57:20 58:8 <b>Counsel</b> <sup>[15]</sup> 16:24 17:14 21:23 45:6 59:13 72:7 77:15 87:11,24 89:20 90:2 107:22 109:22 117:7 119:12 <b>counterintuitive</b> <sup>[1]</sup> 47:15 <b>country</b> <sup>[2]</sup> 13:23 107:15 <b>counts</b> <sup>[2]</sup> 50:4 51:1 <b>couple</b> <sup>[3]</sup> 27:19 67:21 117:12 <b>course</b> <sup>[5]</sup> 9:24 10:6 78:1 95:15 97:4 <b>COURT</b> <sup>[72]</sup> 1:1,16 4:11,13,18 5:1,6,9,18 10:2 15:3 17:11,24 20:22 21:1 24:9,17 27:15,15 29:10,21 30:3 31:24 32:11,25 35:7 37:12 44:8 45:12,23,24 46:2,4,7,25 47:2,9,10 48:1,9,17,20 50:7,18 51:12 52:8,13,17,25 54:5 56:2 57:1 58:15 63:7 72:12 79:21 81:18 83:18,23 84:13 86:7 91:21 99:7 108:19 109:2,5 113:25 116:13,17 117:18 118:3 119:9 <b>Court's</b> <sup>[14]</sup> 5:20 26:5 32:12 36:18 46:9,15 57:22 75:23 79:20 84:17,20 91:24 108:4 117:25 <b>courts</b> <sup>[9]</sup> 4:20,22 5:16 21:
---	---	---	---

## Official

<p>11 50:6 52:11 70:4 85:14 96:8</p> <p><b>cover</b> <sup>[1]</sup> 16:20</p> <p><b>coverage</b> <sup>[5]</sup> 73:5,19 78:3 79:1 108:20</p> <p><b>covered</b> <sup>[4]</sup> 18:3 48:22 65:5 111:14</p> <p><b>create</b> <sup>[4]</sup> 35:3 81:24 91:8 111:11</p> <p><b>created</b> <sup>[2]</sup> 56:19 88:2</p> <p><b>creates</b> <sup>[2]</sup> 102:13 103:22</p> <p><b>creating</b> <sup>[1]</sup> 96:20</p> <p><b>Creator</b> <sup>[1]</sup> 38:20</p> <p><b>credits</b> <sup>[1]</sup> 109:1</p> <p><b>cross</b> <sup>[1]</sup> 62:19</p> <p><b>CUPP</b> <sup>[1]</sup> 76:16</p> <p><b>curiae</b> <sup>[3]</sup> 2:6 3:8 45:9</p> <p><b>current</b> <sup>[2]</sup> 34:7 43:9</p> <p><b>CURTIS</b> <sup>[3]</sup> 2:4 3:6 45:8</p> <p><b>cut</b> <sup>[2]</sup> 74:9 76:25</p> <p><b>Cutter</b> <sup>[1]</sup> 17:12</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D.C</b> <sup>[3]</sup> 1:12 2:2,5</p> <p><b>Dakota</b> <sup>[3]</sup> 108:19,24 109:2</p> <p><b>David</b> <sup>[1]</sup> 37:14</p> <p><b>day</b> <sup>[1]</sup> 21:11</p> <p><b>de-entangling</b> <sup>[1]</sup> 45:3</p> <p><b>deacon</b> <sup>[2]</sup> 94:20,22</p> <p><b>deacons</b> <sup>[1]</sup> 93:24</p> <p><b>deal</b> <sup>[2]</sup> 5:16 96:22</p> <p><b>death</b> <sup>[1]</sup> 52:15</p> <p><b>debate</b> <sup>[2]</sup> 47:4 60:3</p> <p><b>decide</b> <sup>[13]</sup> 12:3 21:11,12,17 32:16 44:17 47:16 56:9 72:24 73:11 102:19 108:11 118:19</p> <p><b>decided</b> <sup>[2]</sup> 21:1 59:7</p> <p><b>deciding</b> <sup>[3]</sup> 46:18 49:13 52:1</p> <p><b>decision</b> <sup>[17]</sup> 25:11 31:11,24 32:8 47:18 54:18 63:11 66:19 75:22 91:19,23,25 92:4 101:21 102:14 108:4 117:14</p> <p><b>decision-making</b> <sup>[1]</sup> 112:3</p> <p><b>decisions</b> <sup>[1]</sup> 89:16</p> <p><b>Declaration</b> <sup>[1]</sup> 38:19</p> <p><b>declared</b> <sup>[1]</sup> 46:24</p> <p><b>deemed</b> <sup>[1]</sup> 46:13</p> <p><b>deeply</b> <sup>[1]</sup> 110:15</p> <p><b>defeats</b> <sup>[1]</sup> 28:18</p> <p><b>defend</b> <sup>[1]</sup> 117:14</p> <p><b>defense</b> <sup>[1]</sup> 33:4</p> <p><b>defenses</b> <sup>[2]</sup> 98:5,6</p> <p><b>define</b> <sup>[1]</sup> 42:9</p> <p><b>defined</b> <sup>[2]</sup> 42:25 53:22</p> <p><b>defining</b> <sup>[3]</sup> 50:8 57:3 91:15</p> <p><b>definitely</b> <sup>[3]</sup> 25:18 29:9 30:15</p> <p><b>definition</b> <sup>[1]</sup> 68:21</p> <p><b>definitions</b> <sup>[2]</sup> 68:20,25</p>	<p><b>defunct</b> <sup>[1]</sup> 112:13</p> <p><b>deliberate</b> <sup>[1]</sup> 118:4</p> <p><b>deliver</b> <sup>[1]</sup> 102:1</p> <p><b>delivering</b> <sup>[1]</sup> 82:7</p> <p><b>delivers</b> <sup>[1]</sup> 94:24</p> <p><b>demanding</b> <sup>[1]</sup> 39:19</p> <p><b>demonstrated</b> <sup>[1]</sup> 118:1</p> <p><b>denied</b> <sup>[2]</sup> 79:1 80:13</p> <p><b>denomination</b> <sup>[2]</sup> 24:20 106:22</p> <p><b>denominational</b> <sup>[5]</sup> 104:23 106:11 107:10 115:21 116:4</p> <p><b>denominations</b> <sup>[3]</sup> 73:12 104:21,25</p> <p><b>deny</b> <sup>[1]</sup> 92:5</p> <p><b>Department</b> <sup>[1]</sup> 2:4</p> <p><b>depend</b> <sup>[1]</sup> 43:3</p> <p><b>depends</b> <sup>[1]</sup> 9:6</p> <p><b>Deputy</b> <sup>[1]</sup> 2:4</p> <p><b>deserves</b> <sup>[1]</sup> 48:17</p> <p><b>designed</b> <sup>[4]</sup> 11:13 43:24,25 44:1</p> <p><b>destroy</b> <sup>[1]</sup> 18:5</p> <p><b>determine</b> <sup>[2]</sup> 52:9 73:21</p> <p><b>determines</b> <sup>[1]</sup> 50:15</p> <p><b>determining</b> <sup>[1]</sup> 72:15</p> <p><b>devoted</b> <sup>[2]</sup> 11:25 42:13</p> <p><b>dictionary</b> <sup>[1]</sup> 68:19</p> <p><b>die</b> <sup>[1]</sup> 91:20</p> <p><b>difference</b> <sup>[18]</sup> 14:10,15,19,21 17:8,17 19:4 20:25 23:1,2 25:10 50:14,21 62:4 74:20,22 105:4 110:18</p> <p><b>different</b> <sup>[20]</sup> 6:14,19 8:16 19:5,23 20:6 28:9 29:17 35:14 40:24 50:20 55:12 61:7 62:3 63:11 64:15 104:13 116:7 118:13,21</p> <p><b>differential</b> <sup>[1]</sup> 75:7</p> <p><b>differentiates</b> <sup>[1]</sup> 116:24</p> <p><b>differently</b> <sup>[5]</sup> 6:11 24:12 55:12 58:13 77:9</p> <p><b>difficult</b> <sup>[5]</sup> 32:25 56:1,2 87:9 111:15</p> <p><b>difficulty</b> <sup>[2]</sup> 4:23 49:7</p> <p><b>dining</b> <sup>[1]</sup> 81:12</p> <p><b>dinners</b> <sup>[1]</sup> 8:20</p> <p><b>Diocese</b> <sup>[8]</sup> 6:14 18:12 19:8,15 29:23,25 45:21 61:5</p> <p><b>dioceses</b> <sup>[1]</sup> 33:23</p> <p><b>direct</b> <sup>[1]</sup> 62:7</p> <p><b>directed</b> <sup>[1]</sup> 68:18</p> <p><b>directly</b> <sup>[5]</sup> 61:10,17 62:8 74:13 93:5</p> <p><b>disadvantage</b> <sup>[1]</sup> 116:15</p> <p><b>disadvantaged</b> <sup>[1]</sup> 62:18</p> <p><b>disagree</b> <sup>[4]</sup> 51:13 58:22 68:16 78:14</p> <p><b>disagreement</b> <sup>[1]</sup> 108:2</p> <p><b>discard</b> <sup>[1]</sup> 84:14</p> <p><b>discharged</b> <sup>[1]</sup> 72:17</p> <p><b>discharging</b> <sup>[2]</sup> 38:21 40:16</p>	<p><b>discriminate</b> <sup>[6]</sup> 6:1 21:21 25:5 73:12 104:3 118:21</p> <p><b>discriminated</b> <sup>[1]</sup> 9:19</p> <p><b>discriminates</b> <sup>[1]</sup> 26:13</p> <p><b>discriminating</b> <sup>[2]</sup> 24:10 32:15</p> <p><b>discrimination</b> <sup>[19]</sup> 10:24 17:13 19:22 24:3 26:11,17,22 29:18 31:23 32:10 33:5 46:12 50:2 55:6 57:6 105:22 115:21 116:4,8</p> <p><b>discriminatory</b> <sup>[4]</sup> 96:16,21 97:6 106:6</p> <p><b>discussed</b> <sup>[4]</sup> 47:20 54:2 61:16 112:21</p> <p><b>discussion</b> <sup>[1]</sup> 23:24</p> <p><b>disfavored</b> <sup>[1]</sup> 21:7</p> <p><b>disfavoring</b> <sup>[1]</sup> 11:4</p> <p><b>dismissing</b> <sup>[1]</sup> 48:9</p> <p><b>disparate</b> <sup>[1]</sup> 93:22</p> <p><b>dispute</b> <sup>[9]</sup> 55:7,9 56:25 62:5 86:24 87:10 99:12 101:10 106:14</p> <p><b>disputed</b> <sup>[1]</sup> 7:20</p> <p><b>disputes</b> <sup>[11]</sup> 56:15,20 72:17,23 73:7 87:5,18 101:1 111:15,21 114:12</p> <p><b>disputing</b> <sup>[3]</sup> 51:11 97:5 111:5</p> <p><b>disqualified</b> <sup>[1]</sup> 90:8</p> <p><b>distancing</b> <sup>[1]</sup> 108:13</p> <p><b>distinct</b> <sup>[5]</sup> 18:11,12,13 20:20 40:1</p> <p><b>distinction</b> <sup>[14]</sup> 17:20,23 22:21 25:8 37:13 38:7 41:10 61:15 64:20 69:25 71:7 86:17,25 108:18</p> <p><b>distinctions</b> <sup>[4]</sup> 4:25 6:18 7:12 118:5</p> <p><b>distinctively</b> <sup>[1]</sup> 35:23</p> <p><b>distinguish</b> <sup>[2]</sup> 20:16 40:10</p> <p><b>distinguished</b> <sup>[2]</sup> 16:1 31:24</p> <p><b>distinguishing</b> <sup>[3]</sup> 20:21 32:23 66:8</p> <p><b>divided</b> <sup>[2]</sup> 85:22 116:18</p> <p><b>divides</b> <sup>[1]</sup> 10:19</p> <p><b>do-over</b> <sup>[1]</sup> 27:14</p> <p><b>doctrinal</b> <sup>[5]</sup> 4:22 73:7 101:12 106:1 115:9</p> <p><b>doctrine</b> <sup>[29]</sup> 13:3 17:16 18:24 19:13,17 72:21,25 73:23 75:15 81:21 85:1 87:2,7 88:24 93:17 95:12 101:8 102:12,25 103:11,19 104:10,12,13 106:24 111:8,11,24 112:22</p> <p><b>doctrines</b> <sup>[1]</sup> 104:5</p> <p><b>doing</b> <sup>[22]</sup> 7:14 21:3 36:16 37:14,15 50:6,15 57:2 60:7 66:13 69:24 70:23 71:18,22 90:23 94:24 95:23 98:15 100:6,25 104:10 109:3</p>	<p><b>dollar</b> <sup>[1]</sup> 115:16</p> <p><b>done</b> <sup>[9]</sup> 25:13 29:10,24 30:4 50:16 65:13 72:1 88:15 107:11</p> <p><b>double-down</b> <sup>[1]</sup> 48:11</p> <p><b>doubt</b> <sup>[2]</sup> 47:3 51:8</p> <p><b>dovetails</b> <sup>[1]</sup> 68:24</p> <p><b>down</b> <sup>[9]</sup> 19:10 26:10 27:14 31:8 62:21 84:21,24 92:7 110:5</p> <p><b>dozen</b> <sup>[1]</sup> 36:2</p> <p><b>dragged</b> <sup>[1]</sup> 88:25</p> <p><b>draw</b> <sup>[5]</sup> 64:20 73:6 103:23 104:6,15</p> <p><b>drawing</b> <sup>[3]</sup> 10:18 53:2 68:14</p> <p><b>drawn</b> <sup>[2]</sup> 70:13 116:17</p> <p><b>draws</b> <sup>[1]</sup> 4:25</p> <p><b>drink</b> <sup>[1]</sup> 50:20</p> <p><b>driving</b> <sup>[2]</sup> 86:16 112:8</p> <p><b>drop</b> <sup>[1]</sup> 58:10</p> <p><b>drug</b> <sup>[1]</sup> 56:5</p> <p><b>due</b> <sup>[1]</sup> 78:24</p> <p><b>duty</b> <sup>[3]</sup> 38:20 40:15,17</p> <p><b>Dykema</b> <sup>[3]</sup> 36:8 100:23 117:17</p> <p><b>dynamic</b> <sup>[1]</sup> 107:7</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> <sup>[1]</sup> 49:16</p> <p><b>earlier</b> <sup>[3]</sup> 33:3 35:1 117:23</p> <p><b>easier</b> <sup>[3]</sup> 47:23 51:11 107:23</p> <p><b>easiest</b> <sup>[4]</sup> 49:22 88:19 89:4 118:18</p> <p><b>easily</b> <sup>[1]</sup> 101:10</p> <p><b>easy</b> <sup>[9]</sup> 49:8,10,12 56:9 65:18 88:21,22 96:25 106:15</p> <p><b>easy-to-administer</b> <sup>[1]</sup> 89:11</p> <p><b>eat</b> <sup>[2]</sup> 8:18,19</p> <p><b>eating</b> <sup>[2]</sup> 8:19 50:19</p> <p><b>ecclesiastical</b> <sup>[1]</sup> 75:21</p> <p><b>edge</b> <sup>[1]</sup> 99:1</p> <p><b>educates</b> <sup>[1]</sup> 93:13</p> <p><b>education</b> <sup>[4]</sup> 72:22 73:9 81:22 90:23</p> <p><b>effect</b> <sup>[2]</sup> 23:3 80:9</p> <p><b>effective</b> <sup>[6]</sup> 25:17,18 62:18 69:5,10 116:18</p> <p><b>effectively</b> <sup>[2]</sup> 77:7,21</p> <p><b>effort</b> <sup>[1]</sup> 33:9</p> <p><b>either</b> <sup>[5]</sup> 18:20 19:6 25:7 76:19 92:9</p> <p><b>elderly</b> <sup>[1]</sup> 36:20</p> <p><b>element</b> <sup>[3]</sup> 80:17 88:9 103:19</p> <p><b>eligibility</b> <sup>[3]</sup> 72:16 73:22 111:22</p> <p><b>eligible</b> <sup>[1]</sup> 81:1</p> <p><b>eliminating</b> <sup>[1]</sup> 27:16</p> <p><b>employ</b> <sup>[3]</sup> 41:20,22 42:9</p> <p><b>employed</b> <sup>[1]</sup> 95:14</p> <p><b>employee</b> <sup>[5]</sup> 72:17 76:1</p>	<p>78:25 103:21 111:6</p> <p><b>employees</b> <sup>[13]</sup> 62:16 72:20,24 73:4,18 84:24 87:1 89:15,23 93:14,20 94:8 110:25</p> <p><b>employer</b> <sup>[2]</sup> 46:5 76:17</p> <p><b>employers</b> <sup>[5]</sup> 45:16 72:22 73:2,6,14</p> <p><b>employment</b> <sup>[4]</sup> 71:2 89:15 95:15 114:11</p> <p><b>enables</b> <sup>[1]</sup> 33:22</p> <p><b>enacted</b> <sup>[1]</sup> 45:15</p> <p><b>encourage</b> <sup>[1]</sup> 107:12</p> <p><b>end</b> <sup>[9]</sup> 22:16 26:12 68:17 69:2,3,4 96:23 97:15 118:23</p> <p><b>endeavor</b> <sup>[1]</sup> 36:6</p> <p><b>ends</b> <sup>[2]</sup> 66:21 68:4</p> <p><b>enforcement</b> <sup>[2]</sup> 7:5 113:19</p> <p><b>engage</b> <sup>[1]</sup> 55:25</p> <p><b>engaged</b> <sup>[1]</sup> 101:11</p> <p><b>engages</b> <sup>[1]</sup> 90:21</p> <p><b>engaging</b> <sup>[2]</sup> 99:15 102:4</p> <p><b>enjoy</b> <sup>[1]</sup> 14:3</p> <p><b>enmeshed</b> <sup>[1]</sup> 104:9</p> <p><b>enough</b> <sup>[4]</sup> 32:16 80:15 84:22 91:25</p> <p><b>ensuring</b> <sup>[1]</sup> 118:20</p> <p><b>entangle</b> <sup>[3]</sup> 92:25 100:25 105:18</p> <p><b>entangled</b> <sup>[3]</sup> 28:21 71:10 95:20</p> <p><b>entanglement</b> <sup>[17]</sup> 20:15,22 26:10 73:15 101:5 104:1,8 112:6,12,19 113:3,12,19,24 114:3,8 116:24</p> <p><b>entangling</b> <sup>[11]</sup> 44:19,20 45:3 81:24 89:9 91:9 96:8 111:12 114:11 116:20 117:25</p> <p><b>enterprise</b> <sup>[1]</sup> 20:17</p> <p><b>entire</b> <sup>[1]</sup> 54:6</p> <p><b>entirely</b> <sup>[4]</sup> 61:7 75:3 92:3 97:24</p> <p><b>entities</b> <sup>[3]</sup> 13:24 14:3 69:18</p> <p><b>entitled</b> <sup>[2]</sup> 26:14 29:25</p> <p><b>entity</b> <sup>[4]</sup> 18:12 61:9 74:14,21</p> <p><b>equally</b> <sup>[2]</sup> 5:5 8:16</p> <p><b>ERIC</b> <sup>[5]</sup> 2:2 3:3,13 4:8 117:9</p> <p><b>erred</b> <sup>[1]</sup> 45:24</p> <p><b>especially</b> <sup>[2]</sup> 75:1 107:20</p> <p><b>ESQ</b> <sup>[4]</sup> 3:3,6,10,13</p> <p><b>essential</b> <sup>[2]</sup> 18:22 111:4</p> <p><b>essentially</b> <sup>[6]</sup> 29:20 76:19 78:16 82:8 86:16 116:13</p> <p><b>Establishment</b> <sup>[1]</sup> 112:23</p> <p><b>ET</b> <sup>[7]</sup> 1:4,8 29:4 41:25 44:25 64:22 118:15</p> <p><b>ether</b> <sup>[1]</sup> 79:25</p> <p><b>evangelical</b> <sup>[4]</sup> 93:11,12</p>
---	--	--	--	--

## Official

<p>96:1 105:16  <b>evangelization</b> <sup>[4]</sup> 22:22, 23 23:8 90:3  <b>evangelize</b> <sup>[2]</sup> 10:22 22:19  <b>even</b> <sup>[14]</sup> 7:10 8:7 13:25 37:18 38:18 43:9,9 47:9 57:8 71:19 73:20 76:9 86:12 100:9  <b>evenhandedly</b> <sup>[2]</sup> 6:8 7:1  <b>everybody</b> <sup>[2]</sup> 31:9 62:9  <b>everyone</b> <sup>[1]</sup> 58:17  <b>everything</b> <sup>[1]</sup> 8:23  <b>everywhere</b> <sup>[1]</sup> 25:23  <b>evidence</b> <sup>[2]</sup> 26:16,18  <b>exact</b> <sup>[3]</sup> 70:16 85:12 93:22  <b>exactly</b> <sup>[6]</sup> 33:14 48:20 57:15 74:21 89:13 102:12  <b>examine</b> <sup>[1]</sup> 74:3  <b>example</b> <sup>[11]</sup> 7:18 11:22 15:18 16:16 17:25 20:1 22:12 70:3 105:17 106:21 112:1  <b>examples</b> <sup>[2]</sup> 99:1 114:2  <b>exception</b> <sup>[21]</sup> 5:4,6 17:1 44:9 46:6 73:10 81:19 82:23 83:19,22 89:13 93:9,15, 21 94:17 95:2,8 96:10,23 97:11 104:24  <b>exception's</b> <sup>[1]</sup> 35:14  <b>exception-type</b> <sup>[1]</sup> 98:5  <b>exceptions</b> <sup>[2]</sup> 28:10 29:4  <b>excessive</b> <sup>[2]</sup> 20:15,21  <b>exclude</b> <sup>[1]</sup> 91:16  <b>excluding</b> <sup>[3]</sup> 17:3,4 31:9  <b>Excuse</b> <sup>[1]</sup> 95:3  <b>execution</b> <sup>[1]</sup> 52:16  <b>exempt</b> <sup>[14]</sup> 8:22 10:17 19:6,6,8,11 20:13 31:9 69:21 70:16 74:7 106:4 114:13 115:4  <b>exempted</b> <sup>[1]</sup> 113:21  <b>exempting</b> <sup>[4]</sup> 71:9 73:3 99:2 113:17  <b>exemption</b> <sup>[71]</sup> 4:14 5:19 6:4,6,25 7:6,10,18,23 8:10 9:13 11:3,12 12:24 13:25 14:3 15:21 18:25 20:19 30:1 32:14 39:23 41:18,19 42:23 43:9,11,15 44:3 45:16, 24 48:23 65:6 67:8 68:14 69:17 70:14 71:2,16 73:3, 5,14 74:18 80:13 81:1,9 82:21 85:5,15 86:9 88:2,4 90:11 92:1,5 97:6,22 104:24 105:11 106:17,23 107:1 109:9,13,16 110:11,12 112:4 114:23 115:17 118:16  <b>exemptions</b> <sup>[15]</sup> 4:23 5:22 8:2 16:17 17:9 28:18 53:21 74:1,3 75:6 104:16,17, 19 105:7 118:25  <b>exercise</b> <sup>[6]</sup> 9:4,14 17:5,10 77:13 107:14  <b>existing</b> <sup>[1]</sup> 6:25</p>	<p><b>exists</b> <sup>[2]</sup> 11:4 55:8  <b>expand</b> <sup>[2]</sup> 74:1 97:22  <b>expanded</b> <sup>[1]</sup> 97:17  <b>Explain</b> <sup>[2]</sup> 53:11 99:17  <b>explains</b> <sup>[1]</sup> 46:1  <b>explicated</b> <sup>[1]</sup> 19:24  <b>explicit</b> <sup>[1]</sup> 118:4  <b>exploit</b> <sup>[1]</sup> 23:6  <b>express</b> <sup>[4]</sup> 72:20 81:20 95:11,16  <b>expressing</b> <sup>[6]</sup> 84:25 87:2, 6 93:16 111:7,10  <b>expressions</b> <sup>[1]</sup> 46:11  <b>extend</b> <sup>[1]</sup> 19:18  <b>extended</b> <sup>[2]</sup> 38:23 98:17  <b>extent</b> <sup>[6]</sup> 10:17 11:16 16:10 18:4 34:10,19  <b>extreme</b> <sup>[1]</sup> 22:16  <b>extremely</b> <sup>[1]</sup> 76:8</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>face</b> <sup>[10]</sup> 27:7 31:23 50:10 76:18 106:2,6,10 107:7,8 111:14  <b>faces</b> <sup>[1]</sup> 105:25  <b>facially</b> <sup>[1]</sup> 76:10  <b>fact</b> <sup>[6]</sup> 33:3,9,10 48:18 54:22 71:16  <b>factor</b> <sup>[3]</sup> 84:10,12 112:21  <b>fails</b> <sup>[1]</sup> 28:24  <b>faith</b> <sup>[11]</sup> 12:4 23:9,9 46:11 66:18 70:22 80:10,12,16, 21 95:17  <b>faiths</b> <sup>[3]</sup> 46:12 92:9 105:9  <b>fall</b> <sup>[5]</sup> 8:7,8 104:22 107:10 108:22  <b>falls</b> <sup>[1]</sup> 106:11  <b>far</b> <sup>[4]</sup> 43:23 67:25 114:9,16  <b>fascinating</b> <sup>[1]</sup> 38:17  <b>fashion</b> <sup>[1]</sup> 96:16  <b>favor</b> <sup>[1]</sup> 4:15  <b>favorably</b> <sup>[1]</sup> 24:16  <b>favor'd</b> <sup>[1]</sup> 21:6  <b>federal</b> <sup>[33]</sup> 11:17,23 12:14 27:8,17 41:17 45:14,15 46:2,23 47:12 48:7,19 49:1 55:22 57:14,24 58:7,12,17 59:1,8,15 60:2 63:9 108:5, 14,23 113:4,5,8,8 114:1  <b>feeling</b> <sup>[2]</sup> 27:8 41:7  <b>fell</b> <sup>[1]</sup> 61:19  <b>felt</b> <sup>[1]</sup> 37:18  <b>FICA</b> <sup>[5]</sup> 104:16,17,23 106:17,20  <b>fight</b> <sup>[1]</sup> 115:4  <b>figure</b> <sup>[4]</sup> 20:22 42:4 91:12 104:2  <b>figured</b> <sup>[1]</sup> 110:8  <b>figuring</b> <sup>[2]</sup> 20:10,17  <b>find</b> <sup>[3]</sup> 26:22 81:14 115:19  <b>fine</b> <sup>[2]</sup> 91:4 101:21  <b>finish</b> <sup>[1]</sup> 57:17  <b>fired</b> <sup>[2]</sup> 101:9 115:3  <b>firing</b> <sup>[1]</sup> 115:5</p>	<p><b>first</b> <sup>[14]</sup> 4:4 26:23 37:16 44:18 51:9 53:17 62:7 73:24 77:24 102:9 105:14 112:20,21 117:13  <b>fisc</b> <sup>[1]</sup> 28:12  <b>fiscal</b> <sup>[1]</sup> 76:18  <b>flavor</b> <sup>[1]</sup> 54:19  <b>flies</b> <sup>[1]</sup> 50:10  <b>floor</b> <sup>[5]</sup> 108:21,22,25 109:6,17  <b>flow</b> <sup>[1]</sup> 62:21  <b>focus</b> <sup>[6]</sup> 14:7 44:13 59:14 67:20 71:17 110:10  <b>focused</b> <sup>[5]</sup> 11:1 15:17 19:14 71:13 118:10  <b>focuses</b> <sup>[1]</sup> 89:11  <b>follow</b> <sup>[3]</sup> 62:16 113:4,5  <b>following</b> <sup>[1]</sup> 11:17  <b>food</b> <sup>[4]</sup> 8:23 22:12,13 24:22  <b>foods</b> <sup>[1]</sup> 50:19  <b>footnote</b> <sup>[3]</sup> 32:25 58:10 118:4  <b>for-profit</b> <sup>[5]</sup> 13:21 18:14, 19,23 20:1  <b>forbidden</b> <sup>[1]</sup> 5:2  <b>force</b> <sup>[7]</sup> 31:5 72:23 91:10 92:8,9 97:9 98:3  <b>forced</b> <sup>[1]</sup> 96:3  <b>forceful</b> <sup>[1]</sup> 49:9  <b>forces</b> <sup>[2]</sup> 76:10 91:9  <b>forms</b> <sup>[1]</sup> 41:4  <b>formulate</b> <sup>[1]</sup> 51:25  <b>forward</b> <sup>[2]</sup> 28:5 118:14  <b>found</b> <sup>[2]</sup> 10:2 116:3  <b>found'ing</b> <sup>[1]</sup> 107:15  <b>framework</b> <sup>[1]</sup> 45:14  <b>frankly</b> <sup>[3]</sup> 49:11 50:3 57:22  <b>free</b> <sup>[3]</sup> 63:10 77:12 107:14  <b>friend</b> <sup>[3]</sup> 51:13 64:24 72:2  <b>friend's</b> <sup>[2]</sup> 117:13 118:9  <b>friends</b> <sup>[1]</sup> 77:1  <b>front</b> <sup>[1]</sup> 97:15  <b>front-end</b> <sup>[1]</sup> 96:22  <b>fulfilling</b> <sup>[1]</sup> 68:5  <b>full</b> <sup>[1]</sup> 93:14  <b>function</b> <sup>[3]</sup> 74:20 88:2 102:11  <b>functional</b> <sup>[1]</sup> 87:1  <b>functions</b> <sup>[3]</sup> 35:16 74:23 93:16  <b>fundamental</b> <sup>[4]</sup> 53:17 103:8 105:13,23  <b>fundamentally</b> <sup>[1]</sup> 66:22  <b>further</b> <sup>[4]</sup> 21:24 33:8 63:1, 14  <b>FUT</b> <sup>[1]</sup> 15:14  <b>FUTA</b> <sup>[6]</sup> 14:25 16:19 108:21,21 109:3,17  <b>FUTA's</b> <sup>[1]</sup> 46:5</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>GANNON</b> <sup>[60]</sup> 2:4 3:6 45:7,</p>	<p>8,11 46:20 47:23 48:3,15, 25 49:11,20,23 50:1 51:4,7 52:3 53:4,8,13 54:10,15 55:2,3,16,21 56:7,10,16,23 57:7,11 58:5,14,19,23 59:2, 5,19 60:15,21 61:11 62:4 63:4,18,21 64:10,13 65:10, 22 66:1,11 68:15,24 70:1, 10 71:3,15,23 72:5  <b>gave</b> <sup>[2]</sup> 87:13 93:7  <b>General</b> <sup>[8]</sup> 2:4,8 49:1 58:10 108:3 109:10 114:1,6  <b>General's</b> <sup>[1]</sup> 27:3  <b>generous</b> <sup>[1]</sup> 118:25  <b>gerrymander</b> <sup>[1]</sup> 10:4  <b>gets</b> <sup>[4]</sup> 70:1 104:8,23 107:1  <b>getting</b> <sup>[8]</sup> 7:23 14:20 28:6 33:1 35:21 42:22 90:10 105:13  <b>give</b> <sup>[13]</sup> 18:21 24:22 26:23 40:6 41:14 43:14 75:2 85:5 92:10,11 98:1 103:1 114:22  <b>given</b> <sup>[3]</sup> 7:10 16:6 98:25  <b>gives</b> <sup>[1]</sup> 73:1  <b>giving</b> <sup>[2]</sup> 39:20 85:15  <b>goals</b> <sup>[1]</sup> 60:23  <b>God</b> <sup>[3]</sup> 39:7 41:3 56:4  <b>gods</b> <sup>[1]</sup> 41:3  <b>Gorsuch</b> <sup>[58]</sup> 31:18,19 32:17,20 33:7,24 55:2,5,20,23 56:8,11,14,18 57:5,10 63:1, 2,16,19,23 66:7 76:24 77:14,17,20,25 78:7,11,17,21 79:4 82:1,3,9,15,18,25 83:2,21 84:8,11,16,19 85:2 87:12 91:10 92:6,17 93:23 94:4,10,14 105:3,6 106:13,18 117:3  <b>Gorsuch's</b> <sup>[1]</sup> 91:3  <b>gospel</b> <sup>[1]</sup> 80:18  <b>got</b> <sup>[5]</sup> 4:13 19:5 24:3 34:11 57:10  <b>governance</b> <sup>[3]</sup> 19:22,23 20:5  <b>government</b> <sup>[4]</sup> 26:3 39:8 58:12 108:14  <b>governments</b> <sup>[1]</sup> 78:22  <b>grant</b> <sup>[2]</sup> 47:12 58:4  <b>grants</b> <sup>[1]</sup> 55:18  <b>ground</b> <sup>[6]</sup> 4:22 26:4 32:18, 23 63:6 118:20  <b>grounds</b> <sup>[5]</sup> 47:20 55:6 99:6 109:8 115:23  <b>group</b> <sup>[7]</sup> 7:12,13 24:25 25:2 106:4,5,16  <b>groups</b> <sup>[14]</sup> 6:10 8:16 10:4, 18 74:8 85:6,22 106:10 107:7,8,9,19 116:19 118:5  <b>grow</b> <sup>[1]</sup> 50:18  <b>Guadalupe</b> <sup>[1]</sup> 35:9  <b>guardrails</b> <sup>[1]</sup> 6:23  <b>guess</b> <sup>[16]</sup> 16:3 19:13 20:2</p>	<p>25:15 27:12 31:20 40:3 51:22 57:13 67:5,6 68:10 69:15 82:22 84:1,3  <b>guidance</b> <sup>[1]</sup> 26:23</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>half</b> <sup>[1]</sup> 36:2  <b>hall</b> <sup>[1]</sup> 81:12  <b>hand</b> <sup>[2]</sup> 12:9 93:10  <b>hands</b> <sup>[2]</sup> 52:17 84:6  <b>happen</b> <sup>[3]</sup> 47:22,25 89:10  <b>happening</b> <sup>[2]</sup> 53:23 109:4  <b>happy</b> <sup>[2]</sup> 109:20 110:4  <b>hard</b> <sup>[7]</sup> 28:1 34:25 49:10 57:21 58:1 103:6,7  <b>hardworking</b> <sup>[1]</sup> 111:23  <b>healed</b> <sup>[1]</sup> 100:6  <b>health</b> <sup>[2]</sup> 80:17,18  <b>healthcare</b> <sup>[1]</sup> 100:11  <b>hear</b> <sup>[1]</sup> 4:3  <b>heard</b> <sup>[2]</sup> 112:10 117:22  <b>heavily</b> <sup>[1]</sup> 76:15  <b>held</b> <sup>[6]</sup> 4:16 9:2 46:11 52:10,12 59:4  <b>help</b> <sup>[4]</sup> 4:17 5:11 23:10 84:4  <b>helping</b> <sup>[4]</sup> 4:16 36:19,20 119:5  <b>helps</b> <sup>[2]</sup> 5:10 119:4  <b>Henry</b> <sup>[1]</sup> 37:14  <b>Hialeah</b> <sup>[1]</sup> 26:12  <b>high</b> <sup>[1]</sup> 51:6  <b>hill</b> <sup>[1]</sup> 91:20  <b>hire</b> <sup>[1]</sup> 11:6  <b>history</b> <sup>[8]</sup> 11:23 15:18 16:11 34:10 43:4 60:1 61:13 107:13  <b>hold</b> <sup>[3]</sup> 5:7,9 32:12  <b>holding</b> <sup>[1]</sup> 57:16  <b>home</b> <sup>[3]</sup> 12:11 15:20 34:5  <b>Honor</b> <sup>[23]</sup> 5:24 19:3 76:12 78:14 81:16 82:17 83:16 84:23 85:8 86:15 88:1,8 89:6 90:15 92:16 94:2,7 96:5 104:14 112:8 114:4, 24 115:25  <b>Honor's</b> <sup>[1]</sup> 93:6  <b>hope</b> <sup>[2]</sup> 27:1 107:23  <b>hopefully</b> <sup>[1]</sup> 112:12  <b>Hosanna-Tabor</b> <sup>[2]</sup> 35:8 75:24  <b>hospital</b> <sup>[18]</sup> 39:24 59:18, 18 60:6 61:6 64:2,8 66:13 69:19,20 99:3,22,22,24 100:2,10,25 101:7  <b>hospitals</b> <sup>[9]</sup> 59:17 65:13 66:16 69:19 73:20 99:9 100:5 103:7 114:13  <b>house</b> <sup>[3]</sup> 12:5,5 42:15  <b>housing</b> <sup>[1]</sup> 34:8  <b>however</b> <sup>[2]</sup> 93:19 102:17  <b>hymns</b> <sup>[1]</sup> 95:25  <b>hypo</b> <sup>[3]</sup> 54:4 64:7 86:5  <b>hypothetical</b> <sup>[4]</sup> 41:15 59:</p>
--	---	---	--	---

## Official

<p>25 93:7 101:4  <b>hypotheticals</b> [4] 98:17, 17,25 101:4</p> <hr/> <p><b>I</b></p> <p><b>idea</b> [4] 23:8 38:24 69:12 76:4  <b>identical</b> [1] 70:21  <b>identified</b> [3] 14:16 35:7 44:9  <b>identifies</b> [1] 89:7  <b>identify</b> [1] 89:15  <b>illustrate</b> [2] 101:3,5  <b>illustrates</b> [1] 93:8  <b>illustrative</b> [2] 36:14,14  <b>Imagine</b> [1] 93:9  <b>impact</b> [2] 76:18 93:22  <b>important</b> [7] 9:2 25:3 35:15 39:2 78:15 83:24 87:19  <b>impose</b> [1] 5:21  <b>imposing</b> [1] 9:8  <b>INC</b> [3] 1:3 87:15,22  <b>incapable</b> [1] 65:5  <b>incentive</b> [2] 76:6,6  <b>incentives</b> [1] 18:7  <b>incentiving</b> [1] 17:19  <b>incentivization</b> [1] 18:2  <b>incentivize</b> [1] 74:8  <b>include</b> [2] 68:21 75:25  <b>includes</b> [1] 68:16  <b>income</b> [1] 13:14  <b>inconsistent</b> [1] 34:21  <b>incorporate</b> [1] 6:11  <b>incorporated</b> [6] 12:10 25:19 67:14 74:16 77:8,21  <b>incorporation</b> [1] 87:22  <b>incorrect</b> [1] 48:18  <b>incredibly</b> [2] 47:19 117:24  <b>inculcate</b> [4] 72:20 81:20 95:12,17  <b>inculcating</b> [8] 13:2 84:25 87:2,6 93:17 101:8 111:7, 10  <b>independent</b> [1] 109:8  <b>indistinguishable</b> [1] 80:19  <b>individual</b> [5] 88:3 97:9 104:18 118:17,17  <b>individuals</b> [3] 77:2 118:11,13  <b>INDUSTRY</b> [2] 1:7 4:6  <b>inevitably</b> [1] 91:16  <b>inexplicable</b> [1] 116:13  <b>influence</b> [1] 23:5  <b>information</b> [1] 83:7  <b>inherently</b> [8] 46:14 50:5,8, 9 57:3,4 70:6,6  <b>inquiry</b> [3] 26:12 54:14 56:12  <b>inside</b> [2] 8:10 88:10  <b>insist</b> [1] 59:7  <b>insisting</b> [1] 77:7  <b>inspector</b> [1] 105:20</p>	<p><b>instance</b> [1] 98:6  <b>instances</b> [1] 75:17  <b>instead</b> [6] 11:19 12:16 71:5 73:13 86:7,8  <b>institution</b> [1] 118:16  <b>institutional</b> [1] 118:12  <b>institutions</b> [4] 44:5,7,14 118:11  <b>insurance</b> [7] 72:15 73:4 78:3 87:4 104:20 105:1 106:25  <b>integral</b> [1] 119:2  <b>intending</b> [1] 48:6  <b>intent</b> [1] 116:14  <b>interest</b> [15] 28:5,16,21,23, 25 29:12 32:21,22 33:10 77:6,6,11,18 78:2 117:23  <b>interfering</b> [1] 17:18  <b>Internal</b> [4] 13:12,13 17:18 75:4  <b>interpret</b> [2] 16:12 113:7  <b>interpretation</b> [4] 32:13 47:14 79:21 108:4  <b>interpreted</b> [8] 4:14 15:3 58:9,12 85:13 113:25 114:2,6  <b>interpreting</b> [2] 27:18 58:2  <b>interrupt</b> [1] 54:12  <b>interview</b> [1] 95:20  <b>invidious</b> [2] 26:16 116:8  <b>invite</b> [3] 68:12 92:12,22  <b>involve</b> [2] 87:20 90:21  <b>involved</b> [2] 20:16 115:14  <b>involving</b> [1] 65:21  <b>IRS</b> [5] 14:16 15:10 52:22 53:24 65:13  <b>isn't</b> [10] 5:10 7:20 11:18 32:3 39:24 64:25 75:11 92:15 105:13 115:1  <b>issue</b> [10] 6:4 27:12 56:15 62:1,11 64:19 96:22 104:1 112:6 115:9  <b>issues</b> [2] 9:25 39:1  <b>it'll</b> [1] 33:16  <b>itself</b> [7] 6:15 18:12 20:6, 20 28:22 34:15 117:24</p> <hr/> <p><b>J</b></p> <p><b>JACKSON</b> [39] 10:13 11:8 14:11,13 15:11,13,16,23 16:6,23,25 20:12 34:3 41:13,14 43:8,20 44:1,23 45:1, 4 61:13,20 64:19 67:4,5 68:23 69:7 70:8,11 71:4, 19 72:3 89:18,22 96:11,25 97:3 117:6  <b>Jackson's</b> [1] 14:10  <b>janitor</b> [2] 115:3,3  <b>janitors</b> [2] 73:19 114:14  <b>job</b> [1] 102:11  <b>join</b> [2] 82:12 83:4  <b>Judaism</b> [3] 90:6,7 105:16  <b>Judge</b> [2] 38:22 51:2  <b>judged</b> [2] 115:22,22</p>	<p><b>judges</b> [2] 35:18,18  <b>judicial</b> [3] 75:21,21 79:2  <b>judicially</b> [1] 35:5  <b>Justice</b> [331] 2:5 4:3,10 5:21 6:9 7:8,9 8:4,5,17 9:1, 11 10:13 11:8 14:5,7,9,9, 11,13,14,18 15:4,6,9,11,12, 13,15,16,23 16:6,23,24,25 17:14 18:8,15 19:12,25 20:8,12 21:22,24,25 22:1,8,17, 25 23:12,22 24:1,8,14 25:11,24,25,25 26:2,21 27:22 28:19 29:3,6,14,15,15,16 30:21 31:16,17,17,19,20 32:7,17,20 33:7,24,25,25 34:2,3,18 35:20 36:22 37:1,6,20,21,21,23,24 38:3,4, 14 39:15 40:6,20 41:8,11, 12,12,14 43:8,20 44:1,23 45:1,4,5,11 46:16 47:21,25 48:13,24 49:18,21,24 50:23,24 51:5,22 53:3,5,10 54:8,11,22 55:2,5,20,23 56:8, 11,14,18 57:5,10,11,18,19 58:6,18,21,24 59:3,11,12 60:11,17 61:1,2,3,13,20 62:2,23,23,24 63:1,2,16,17,19, 23,24,24 64:1,2,11,19 65:8, 20,24 66:5,7,24,25,25 67:2, 3,3,5 68:23 69:7 70:8,11 71:4,19 72:3,6,11 74:12,19 75:9 76:4,24 77:14,17,20, 25 78:7,11,17,21 79:4,5,9, 12,16 80:24 81:2,3,5,6,11 82:1,2,3,9,15,18,25 83:2, 21 84:8,11,16,19 85:2,3,11, 24 86:3,20 87:11,12 88:16 89:18,20,22,24,25,25 90:2, 10,13 91:3,7,10,11 92:6,17 93:23 94:4,10,12,14,16 95:1,4,7,19 96:11,25 97:1,3 98:8 99:16,21,25 100:12, 16,19 101:15,18 102:5,8, 22,24 103:4,24 104:7 105:3,6,12 106:13,18 107:22 108:1,8,11 109:21,24,25 110:7,8,9,22 111:17 112:5, 11,16,23 113:1,1,2,7,11,15, 22 114:18,19,19,21 115:1, 10,18 116:1,3 117:1,2,2,3, 4,5,6,12 119:11  <b>Justice's</b> [3] 37:2 54:4 96:14</p> <hr/> <p><b>K</b></p> <p><b>KAGAN</b> [30] 7:8 8:4 29:15, 16 30:21 31:16,21 32:7 48:24 49:18,21,24 50:23 51:5, 22 62:25 75:9 76:4 85:3, 11,24 86:3,20 102:22,24 103:4,24 104:7 105:12 117:2  <b>Kavanaugh</b> [37] 34:1,2,18 35:20 36:22 37:1,6,20 38:</p>	<p>4 53:3,5,10 54:8,11 63:25 64:1,11 65:8,20,24 66:5,24 79:5,9,12,16 80:24 81:2,5 98:8 99:16,21,25 100:12, 16,19 117:4  <b>Kavanaugh's</b> [1] 37:24  <b>Kedroff</b> [2] 17:25 75:18  <b>keep</b> [3] 44:2 85:10 112:2  <b>kind</b> [18] 7:9,25 15:17 20:20 21:4,11 23:5 25:16 31:11 32:8 38:10,14 39:23 44:2 57:24 69:24 77:5 112:4  <b>kinds</b> [23] 10:3,22,25 11:20 19:23 20:13 35:11 42:24 44:5,7,8,14 49:6 70:17 71:11 73:1 89:7 90:24 91:6 96:8 97:9 100:24 104:25  <b>kitchen</b> [7] 92:19 93:25 94:23 95:22 96:1 102:15 105:19  <b>kitchens</b> [2] 42:20 105:8  <b>known</b> [1] 107:19  <b>kosher</b> [1] 10:9</p> <hr/> <p><b>L</b></p> <p><b>LABOR</b> [2] 1:7 4:6  <b>Lady</b> [2] 35:8 75:24  <b>language</b> [7] 15:1,7 34:9, 21 47:11 79:13 98:13  <b>Larson</b> [12] 7:4,6 16:15 26:11 28:11 32:14 116:5,11, 21,25 118:3,20  <b>Laughter</b> [2] 56:6 110:3  <b>law</b> [21] 11:17 14:15,16 27:8,17,18 32:18 34:11,14,16 39:2,3 48:19,20 58:17 79:23 80:2 113:4,5,25 114:1  <b>laws</b> [3] 14:20,24 15:10  <b>lay</b> [1] 52:17  <b>layers</b> [1] 19:10  <b>layoffs</b> [1] 78:19  <b>lead</b> [2] 30:7 49:25  <b>leader</b> [1] 5:10  <b>leaders</b> [1] 5:11  <b>leads</b> [3] 74:6 80:18 110:13  <b>least</b> [4] 11:10,14 12:14 49:25  <b>leave</b> [1] 73:17  <b>led</b> [2] 30:5 112:9  <b>left</b> [1] 106:22  <b>legislative</b> [6] 11:23 15:18 16:11 34:10 60:1 61:13  <b>legislature</b> [12] 20:12 42:2, 9 43:6,13 44:2 48:6 58:16 86:6 88:1 97:8 106:3  <b>legislatures</b> [5] 5:16 74:9 75:4 106:3,8  <b>Lemon</b> [3] 112:13,18,19  <b>less</b> [4] 44:19 49:9 51:23 114:8  <b>level</b> [5] 29:23,25 88:3,4 89:22  <b>levels</b> [1] 62:12  <b>light's</b> [1] 109:19</p>	<p><b>likely</b> [5] 49:25 73:6,14 105:11 116:19  <b>likes</b> [2] 51:2,2  <b>limit</b> [10] 19:20 31:12 36:22, 24 37:2,5,7 49:13 73:14 98:15  <b>limitation</b> [1] 7:25  <b>limited</b> [3] 73:5 75:16 107:19  <b>limitless</b> [1] 8:2  <b>limits</b> [3] 5:22 21:18 73:17  <b>line</b> [16] 8:6,7 10:18 11:25 12:8,13 20:11 25:8 49:12 70:13 83:8,15 102:16 116:17,18,21  <b>line-drawing</b> [1] 106:8  <b>lines</b> [10] 5:1 6:1 9:20 17:6 21:21 32:15 104:23 106:11 107:10 118:22  <b>list</b> [10] 15:5 36:8,11,12,13, 14,17,19,19,21  <b>listen</b> [2] 95:24 96:4  <b>little</b> [10] 12:22 35:14 36:11 38:10,24 43:3 51:23,24 53:12 118:9  <b>Living</b> [5] 66:18 80:10,12, 16,20  <b>Long</b> [7] 79:20 80:1,2 108:7,17 109:7,18  <b>long-term</b> [1] 19:21  <b>look</b> [13] 11:22 31:2 36:4 39:13 68:19 79:6 88:8 98:10,10,14,21,21 100:23  <b>looked</b> [4] 52:13 57:25 67:11 116:12  <b>looking</b> [13] 7:16 21:9 50:12 52:4 53:24 56:12 57:2 80:9 81:17,19 83:17 92:14 100:22  <b>looks</b> [6] 65:17 80:3 81:18 83:18 89:13,14  <b>Lord's</b> [5] 102:3,15,20 103:1 111:25  <b>lose</b> [1] 73:4  <b>loses</b> [1] 101:14  <b>loss</b> [1] 101:17  <b>lot</b> [10] 40:24,25 53:21 54:25 66:12 75:10 93:1 113:12 118:8,10  <b>lots</b> [3] 28:17 103:5,7  <b>love</b> [1] 83:11  <b>lower</b> [1] 99:7  <b>Lukumi</b> [6] 7:4 9:24 10:6, 10 28:10 32:14  <b>Lukumi's</b> [1] 118:20  <b>Lutheran</b> [1] 33:1</p> <hr/> <p><b>M</b></p> <p><b>made</b> [3] 18:10 25:7 59:5  <b>Madison</b> [2] 2:8 39:9  <b>Madison's</b> [1] 39:5  <b>main</b> [1] 37:5  <b>malpractice</b> [1] 101:9  <b>mandate</b> [1] 104:18</p>
--	--	---	--	--

## Official

<p><b>mandatory</b> <sup>[1]</sup> 83:13  <b>manipulation</b> <sup>[1]</sup> 18:1  <b>many</b> <sup>[7]</sup> 13:22 28:9 29:4, 10 68:2 75:5 113:20  <b>March</b> <sup>[1]</sup> 1:13  <b>marginal</b> <sup>[3]</sup> 84:10,11 98:23  <b>marijuana</b> <sup>[1]</sup> 56:4  <b>Martin</b> <sup>[3]</sup> 46:6 48:21 108:18  <b>mass</b> <sup>[2]</sup> 22:14 23:16  <b>matter</b> <sup>[5]</sup> 1:15 6:4 7:15 102:24 105:7  <b>matters</b> <sup>[1]</sup> 18:6  <b>McConnell</b> <sup>[2]</sup> 38:23 107:13  <b>McDaniel</b> <sup>[1]</sup> 33:2  <b>meal</b> <sup>[1]</sup> 81:13  <b>mean</b> <sup>[51]</sup> 6:12 11:9,14 16:10 20:21 22:8,9,17 23:13 30:5 39:18 40:7 42:17 49:5,20 50:1,3 51:1,9 53:11 56:1 57:20 61:23 68:1,1,2,3,4 69:18 82:6 83:10 85:12,24 90:5,7 91:13 92:24 94:5 95:24 96:7,13,20 100:5,16 101:18 102:4 103:2,5 111:17 113:6 115:16  <b>meaning</b> <sup>[3]</sup> 26:12 30:19 67:6  <b>means</b> <sup>[8]</sup> 13:18 22:11 38:21 40:16 68:11 71:17 73:3 84:6  <b>meant</b> <sup>[6]</sup> 12:4 32:7 85:20 94:19 114:16 115:17  <b>measure</b> <sup>[1]</sup> 5:12  <b>measures</b> <sup>[1]</sup> 98:1  <b>meat</b> <sup>[2]</sup> 8:19 38:10  <b>meat-eating</b> <sup>[2]</sup> 9:9,9  <b>meat-free</b> <sup>[1]</sup> 13:7  <b>meet</b> <sup>[2]</sup> 109:6,6  <b>member</b> <sup>[1]</sup> 83:5  <b>members</b> <sup>[3]</sup> 12:6 18:21 42:16  <b>membership</b> <sup>[1]</sup> 62:13  <b>Memorial</b> <sup>[1]</sup> 39:5  <b>mention</b> <sup>[1]</sup> 27:17  <b>mentioned</b> <sup>[2]</sup> 72:5 87:8  <b>mercy</b> <sup>[4]</sup> 110:16,23 111:1,7  <b>Michigan</b> <sup>[6]</sup> 79:19 108:7,9,16 109:7,18  <b>might</b> <sup>[14]</sup> 5:12 14:20 24:25 26:13,13 32:22 35:12,12 36:18 44:7 49:7 57:16 64:3 102:22  <b>million</b> <sup>[2]</sup> 73:18 115:16  <b>Milwaukee</b> <sup>[2]</sup> 99:8,10  <b>mind</b> <sup>[4]</sup> 14:11,15 24:5 85:10  <b>minimum</b> <sup>[1]</sup> 101:22  <b>minister</b> <sup>[6]</sup> 5:11 20:23 21:3 44:12 94:20,22  <b>ministerial</b> <sup>[23]</sup> 5:4,6 20:</p>	<p>19 35:13 44:3,9 73:10 81:19 83:19 88:4 89:13 93:9,15,21 94:16 95:2,8 96:10,12,18,23 97:11 98:4  <b>ministers</b> <sup>[2]</sup> 5:8 43:17  <b>ministries</b> <sup>[1]</sup> 34:7  <b>ministry</b> <sup>[6]</sup> 12:1 34:8 42:14 43:15 45:21 70:24  <b>minute</b> <sup>[1]</sup> 87:21  <b>misapplied</b> <sup>[1]</sup> 53:1  <b>misconduct</b> <sup>[7]</sup> 72:18,23 87:5 101:10,11 111:15,21  <b>misinterpretation</b> <sup>[1]</sup> 26:6  <b>mission</b> <sup>[5]</sup> 18:22 25:17,19 60:20 119:3  <b>misspoke</b> <sup>[1]</sup> 32:6  <b>mistake</b> <sup>[1]</sup> 46:3  <b>misunderstanding</b> <sup>[1]</sup> 20:3  <b>Mm-hmm</b> <sup>[3]</sup> 14:13 79:8 97:2  <b>moment</b> <sup>[1]</sup> 85:19  <b>Monday</b> <sup>[1]</sup> 1:13  <b>money</b> <sup>[2]</sup> 18:20 54:25  <b>morning</b> <sup>[1]</sup> 4:4  <b>most</b> <sup>[11]</sup> 4:22 5:15 17:9 22:16 30:2,8 73:6,14 78:15 115:11 116:19  <b>Mother</b> <sup>[1]</sup> 5:12  <b>motivated</b> <sup>[5]</sup> 51:14 53:25 54:12 70:19 71:21  <b>motivation</b> <sup>[13]</sup> 6:3 11:19 13:1 67:24 68:9 69:9,22 70:14,25 71:5,14,18 80:23  <b>motive</b> <sup>[9]</sup> 68:3 80:15 91:25 92:3 98:22 99:11,13 115:21,22  <b>motive-only</b> <sup>[4]</sup> 73:16,25 113:14 114:7  <b>motives</b> <sup>[2]</sup> 74:4 98:10  <b>much</b> <sup>[11]</sup> 28:4 33:18 44:20 51:10 54:19 73:9 84:21 102:20 105:20 113:17 114:21  <b>Multiple</b> <sup>[3]</sup> 47:19 99:9 107:16  <b>must</b> <sup>[6]</sup> 25:22 70:15 72:16 76:3 103:24,25</p>	<p><b>needless</b> <sup>[1]</sup> 101:17  <b>needs</b> <sup>[2]</sup> 90:24 93:17  <b>neither</b> <sup>[1]</sup> 95:4  <b>net</b> <sup>[1]</sup> 76:19  <b>neutral</b> <sup>[1]</sup> 76:19  <b>neutrality</b> <sup>[1]</sup> 11:11  <b>never</b> <sup>[1]</sup> 99:12  <b>new</b> <sup>[9]</sup> 4:21 32:18 43:12 106:16,24 107:4,5 116:15 117:23  <b>next</b> <sup>[1]</sup> 116:6  <b>nobody</b> <sup>[3]</sup> 47:5 51:1,11  <b>non-Catholics</b> <sup>[2]</sup> 11:6,6  <b>non-co-religionists</b> <sup>[1]</sup> 83:25  <b>non-discrimination</b> <sup>[1]</sup> 93:2  <b>non-exempt</b> <sup>[1]</sup> 80:23  <b>non-meat</b> <sup>[2]</sup> 8:20,21  <b>non-profits</b> <sup>[2]</sup> 19:1 54:21  <b>non-religion</b> <sup>[1]</sup> 40:10  <b>non-religiosity</b> <sup>[1]</sup> 38:1  <b>non-theistic</b> <sup>[1]</sup> 41:4  <b>none</b> <sup>[3]</sup> 43:17 74:8 75:23  <b>nonprofit</b> <sup>[7]</sup> 18:13 20:1 25:12,20,23 55:3 65:14  <b>Nor</b> <sup>[2]</sup> 5:9 73:11  <b>not-for-profit</b> <sup>[1]</sup> 18:19  <b>note</b> <sup>[1]</sup> 77:10  <b>notes</b> <sup>[1]</sup> 68:8  <b>nothing</b> <sup>[8]</sup> 4:19 5:14 25:9 34:14 49:4 68:8 78:5 116:16  <b>novitiate</b> <sup>[5]</sup> 12:2 42:15 43:15 44:22,25  <b>novitiates</b> <sup>[1]</sup> 71:9  <b>nowhere</b> <sup>[1]</sup> 76:13  <b>nuances</b> <sup>[1]</sup> 89:1  <b>number</b> <sup>[2]</sup> 26:8 89:1  <b>nun</b> <sup>[4]</sup> 95:1,7,21 118:15  <b>nuns</b> <sup>[3]</sup> 12:3 61:8 93:24  <b>nurse</b> <sup>[2]</sup> 101:7 118:14  <b>nurses</b> <sup>[2]</sup> 73:19 114:14</p>	<p>59:11 78:23 79:4 85:2 101:20 117:6  <b>omit</b> <sup>[1]</sup> 102:19  <b>omits</b> <sup>[1]</sup> 102:16  <b>once</b> <sup>[3]</sup> 6:5 8:3,9  <b>one</b> <sup>[57]</sup> 12:7,17 19:9 20:10 21:4,4,20 26:3 28:14 30:6,8,16 31:7,11 36:2,24 38:17 43:3 46:2 47:1 49:2 50:22 52:22 54:1,21 56:9,15,20 59:4 61:4 64:18 66:17 69:21 70:21 71:1,2 76:25 77:24 81:12 83:3 84:2 88:7,7,20 89:7 92:21 93:10 99:2,3,23 101:6 102:3 103:14 110:19 112:20 116:9 119:1  <b>one's</b> <sup>[1]</sup> 23:9  <b>one-by-one</b> <sup>[2]</sup> 97:21 98:3  <b>one-to-one</b> <sup>[1]</sup> 76:21  <b>ones</b> <sup>[1]</sup> 27:11  <b>only</b> <sup>[18]</sup> 5:25 8:21 10:4 18:25 25:1 28:4,13 37:6 43:14 55:11 71:12,24 77:11 80:8 84:1 97:18 104:25 106:9  <b>open</b> <sup>[2]</sup> 8:20 35:11  <b>opened</b> <sup>[1]</sup> 54:23  <b>opening</b> <sup>[2]</sup> 79:6 88:18  <b>operated</b> <sup>[26]</sup> 13:5,17,19,19,20 41:22,24 42:10,12 45:18 51:20 53:9,15,19 56:25 60:25 61:18 62:7 64:4,8 67:16 71:25 79:14,22 80:3 99:11  <b>operating</b> <sup>[1]</sup> 96:16  <b>operation</b> <sup>[2]</sup> 67:9 68:25  <b>operational</b> <sup>[3]</sup> 80:5,6,8  <b>operations</b> <sup>[2]</sup> 54:16 59:22  <b>opinion</b> <sup>[12]</sup> 27:7 36:4,15 40:7,9 48:5 57:20,23 63:15 84:17,20 103:13  <b>opinions</b> <sup>[1]</sup> 37:19  <b>opportunity</b> <sup>[2]</sup> 23:15,16  <b>opposed</b> <sup>[2]</sup> 83:5 107:20  <b>opted</b> <sup>[1]</sup> 45:13  <b>optional</b> <sup>[3]</sup> 83:14 109:9,16  <b>or's</b> <sup>[2]</sup> 90:16,19  <b>oral</b> <sup>[7]</sup> 1:16 3:2,5,9 4:8 45:8 72:9  <b>order</b> <sup>[4]</sup> 30:19 70:23 101:23 107:4  <b>orders</b> <sup>[2]</sup> 12:7 42:16  <b>ordinary</b> <sup>[1]</sup> 22:3  <b>Oregon</b> <sup>[2]</sup> 109:12 114:22  <b>organization</b> <sup>[20]</sup> 6:14,16 9:19 11:20 12:10 18:23 31:7 41:22 42:10,12 50:13 53:18 55:4 59:21 61:7 75:8 76:2,10 84:25 90:20  <b>organization's</b> <sup>[1]</sup> 69:13  <b>organizational</b> <sup>[6]</sup> 18:9 19:</p>	<p>14 75:11 80:4,7 88:3  <b>organizations</b> <sup>[31]</sup> 5:23 6:17,19,20 12:15,16,17,18 13:2,15 15:19 20:6 28:15 42:24 45:18 61:22 74:4 79:7 85:16,17,23 86:1,4 89:8 90:14 97:9,20,23 98:2 109:14 113:21  <b>organize</b> <sup>[3]</sup> 25:12,23 29:22  <b>organized</b> <sup>[2]</sup> 25:20 75:20  <b>orphan</b> <sup>[1]</sup> 16:3  <b>orphanage</b> <sup>[7]</sup> 12:11 15:20 16:21 34:4,17 65:4 67:13  <b>orphanages</b> <sup>[8]</sup> 16:1,2,4,20 34:12 42:20 59:25 61:15  <b>other</b> <sup>[48]</sup> 7:12 8:13 10:9,22,25 12:9 14:2 24:11 27:10 29:18 33:23 34:8 35:11,22 36:3,17,23 37:2 48:13 51:13 56:1 65:11 67:8 69:23 70:24 71:2 76:25 77:1 78:23 83:3,3 84:4 91:5 92:11 93:11 95:10 98:12,25 100:20 103:9,15,17 104:12 105:9,17 107:9 110:19 116:14  <b>others</b> <sup>[8]</sup> 20:14 32:2 41:1 47:24 55:14 85:6 92:11 103:18  <b>out</b> <sup>[41]</sup> 13:8 20:11,14,17,22 30:3 34:12 35:1 36:15 37:25 42:4 46:13 51:21 56:9 60:2 61:19 69:1 76:14 79:25 80:12 81:14 87:6 88:11 89:16 91:12 97:14 98:18,22 99:5,13,17,18 100:2,9 101:13 104:3 106:4,22 112:2 114:11 119:3  <b>outreach</b> <sup>[1]</sup> 18:16  <b>outreaches</b> <sup>[1]</sup> 19:16  <b>outside</b> <sup>[5]</sup> 12:23 13:20 15:20 36:12 110:15  <b>outweighed</b> <sup>[1]</sup> 51:17  <b>over</b> <sup>[5]</sup> 29:11 72:17 73:17 110:22 111:21  <b>over-inclusivity</b> <sup>[1]</sup> 88:9  <b>overall</b> <sup>[1]</sup> 41:5  <b>overarching</b> <sup>[1]</sup> 98:9  <b>overseeing</b> <sup>[1]</sup> 94:5  <b>oversees</b> <sup>[1]</sup> 99:9  <b>overwhelming</b> <sup>[1]</sup> 66:22  <b>owe</b> <sup>[2]</sup> 38:20 40:17  <b>owed</b> <sup>[1]</sup> 40:15  <b>own</b> <sup>[3]</sup> 26:6 58:2 61:9  <b>owned</b> <sup>[3]</sup> 13:21 16:21 44:12</p>
---	---	---	---	--

## O

**oath** <sup>[1]</sup> 107:20  
**oath-taking** <sup>[1]</sup> 107:17  
**objection** <sup>[2]</sup> 104:20,22  
**objections** <sup>[2]</sup> 105:1 107:9  
**obligated** <sup>[2]</sup> 40:19 41:7  
**obligations** <sup>[4]</sup> 39:4,7,8,17  
**observed** <sup>[1]</sup> 57:25  
**obtain** <sup>[1]</sup> 106:16  
**obvious** <sup>[1]</sup> 30:2  
**obviously** <sup>[8]</sup> 8:10 11:14 27:4,20 35:13 74:24 78:25 107:1  
**offered** <sup>[1]</sup> 18:25  
**offering** <sup>[1]</sup> 69:15  
**often** <sup>[3]</sup> 72:16,23 107:19  
**Okay** <sup>[24]</sup> 18:8 20:8 22:23,24 23:22 24:14 26:20 27:16,24 29:14 30:21 38:3 41:8 43:14 45:1 49:3 52:9,18

## N

**narrow** <sup>[5]</sup> 29:1,7,13 42:23 75:16  
**nationwide** <sup>[1]</sup> 73:18  
**nature** <sup>[4]</sup> 36:7,7 46:10 51:17  
**navigate** <sup>[1]</sup> 39:10  
**near** <sup>[1]</sup> 76:13  
**necessarily** <sup>[6]</sup> 9:17 58:7,25 61:23 68:2,3  
**necessary** <sup>[1]</sup> 90:4  
**need** <sup>[13]</sup> 4:19 8:15 16:13,16,18 22:14,15 47:8,18 59:9 68:6 84:4 101:23

## P

**PAGE** <sup>[2]</sup> 3:2 68:20  
**parcel** <sup>[1]</sup> 86:10  
**parent** <sup>[1]</sup> 19:7

## Official

<p><b>part</b> <sup>[17]</sup> 9:14 13:11 18:3 19:21 29:12 54:13 56:12 58:19 60:20 62:20 67:8 74:17 86:10,14 90:6 109:13 119:2</p> <p><b>participants</b> <sup>[1]</sup> 23:14</p> <p><b>participate</b> <sup>[1]</sup> 106:25</p> <p><b>participating</b> <sup>[1]</sup> 104:20</p> <p><b>particular</b> <sup>[18]</sup> 7:7,18,25 9:23 21:13,13 24:20 25:1 31:12 47:19 49:14 57:2 68:6 70:5 72:14 85:9,20 88:24</p> <p><b>parties</b> <sup>[1]</sup> 7:20</p> <p><b>partook</b> <sup>[1]</sup> 117:16</p> <p><b>parts</b> <sup>[3]</sup> 19:5 43:3 48:5</p> <p><b>pass</b> <sup>[2]</sup> 85:4 102:18</p> <p><b>past</b> <sup>[1]</sup> 65:8</p> <p><b>pastor</b> <sup>[1]</sup> 52:16</p> <p><b>patchwork</b> <sup>[1]</sup> 19:7</p> <p><b>Paty</b> <sup>[1]</sup> 33:3</p> <p><b>pay</b> <sup>[2]</sup> 41:21 76:22</p> <p><b>paying</b> <sup>[1]</sup> 76:20</p> <p><b>pen</b> <sup>[1]</sup> 68:7</p> <p><b>penalizing</b> <sup>[1]</sup> 119:5</p> <p><b>people</b> <sup>[17]</sup> 4:17 9:9,9 12:3 23:5 25:6 40:25 61:8 70:22 86:9,11 91:14 97:14 102:25 115:11 119:4,5</p> <p><b>percent</b> <sup>[5]</sup> 28:13 41:2 100:10 116:4,12</p> <p><b>perform</b> <sup>[3]</sup> 10:19 93:16 111:1</p> <p><b>performing</b> <sup>[2]</sup> 69:20 111:6</p> <p><b>perhaps</b> <sup>[1]</sup> 48:8</p> <p><b>person</b> <sup>[3]</sup> 21:14 70:25 102:15</p> <p><b>perspective</b> <sup>[2]</sup> 42:7 116:23</p> <p><b>Petitioner</b> <sup>[1]</sup> 45:20</p> <p><b>Petitioners</b> <sup>[9]</sup> 1:5 2:3,7 3:4,8,14 4:9 45:10 117:10</p> <p><b>Petitioners'</b> <sup>[4]</sup> 73:16,24 74:6 117:18</p> <p><b>philosophical</b> <sup>[2]</sup> 8:13 40:4</p> <p><b>philosophy</b> <sup>[3]</sup> 37:10 38:8 40:8</p> <p><b>phrase</b> <sup>[3]</sup> 35:22,25 61:21</p> <p><b>pick</b> <sup>[2]</sup> 24:19 37:23</p> <p><b>picking</b> <sup>[1]</sup> 105:15</p> <p><b>piece</b> <sup>[1]</sup> 91:19</p> <p><b>place</b> <sup>[2]</sup> 6:6 12:2</p> <p><b>places</b> <sup>[1]</sup> 75:5</p> <p><b>plaintiff</b> <sup>[1]</sup> 118:12</p> <p><b>plan</b> <sup>[1]</sup> 33:17</p> <p><b>playing</b> <sup>[1]</sup> 95:25</p> <p><b>please</b> <sup>[6]</sup> 4:11 45:12 72:12 82:7,12 107:25</p> <p><b>pluralism</b> <sup>[1]</sup> 119:7</p> <p><b>pluralistic</b> <sup>[1]</sup> 118:24</p> <p><b>point</b> <sup>[18]</sup> 6:12 8:15 20:14 25:7 41:16 49:3 65:9 75:15,24 76:13 78:15 80:10</p>	<p>93:8 97:7 101:5 104:16 105:23 111:8</p> <p><b>points</b> <sup>[2]</sup> 67:21 117:12</p> <p><b>poor</b> <sup>[7]</sup> 4:16,18 5:10,11 36:20 60:19 62:17</p> <p><b>pose</b> <sup>[3]</sup> 73:15 114:15 116:19</p> <p><b>posed</b> <sup>[2]</sup> 72:14 86:5</p> <p><b>position</b> <sup>[4]</sup> 26:7 60:18 108:13 117:20</p> <p><b>positive</b> <sup>[1]</sup> 116:22</p> <p><b>possible</b> <sup>[2]</sup> 78:4 89:21</p> <p><b>posts</b> <sup>[1]</sup> 110:14</p> <p><b>potentially</b> <sup>[2]</sup> 61:14 73:17</p> <p><b>power</b> <sup>[2]</sup> 18:4,5</p> <p><b>practical</b> <sup>[1]</sup> 25:14</p> <p><b>practically</b> <sup>[1]</sup> 80:19</p> <p><b>practices</b> <sup>[1]</sup> 106:1</p> <p><b>pray</b> <sup>[3]</sup> 22:14 23:15 102:9</p> <p><b>prayer</b> <sup>[6]</sup> 102:3,15,20 103:1 105:20 111:25</p> <p><b>Pre-1972</b> <sup>[1]</sup> 97:18</p> <p><b>preach</b> <sup>[2]</sup> 5:7 103:12</p> <p><b>preaching</b> <sup>[1]</sup> 5:8</p> <p><b>precedent</b> <sup>[1]</sup> 7:22</p> <p><b>precisely</b> <sup>[9]</sup> 76:14 81:17,23 93:15 103:20 106:5 109:15 111:20 113:20</p> <p><b>predated</b> <sup>[1]</sup> 112:19</p> <p><b>predict</b> <sup>[2]</sup> 97:12,21</p> <p><b>prefer</b> <sup>[3]</sup> 46:16,22 47:7</p> <p><b>preference</b> <sup>[1]</sup> 49:19</p> <p><b>premise</b> <sup>[8]</sup> 44:18 79:19 86:24 97:5 105:13,23 106:14,21</p> <p><b>preparing</b> <sup>[2]</sup> 12:1 42:14</p> <p><b>Presbyterian</b> <sup>[1]</sup> 59:18</p> <p><b>present</b> <sup>[1]</sup> 98:16</p> <p><b>presented</b> <sup>[1]</sup> 48:22</p> <p><b>presents</b> <sup>[1]</sup> 6:24</p> <p><b>pressure</b> <sup>[2]</sup> 29:22 75:10</p> <p><b>pressured</b> <sup>[1]</sup> 76:8</p> <p><b>presuppositions</b> <sup>[1]</sup> 21:5</p> <p><b>pretty</b> <sup>[4]</sup> 16:19 19:18 51:6 103:8</p> <p><b>prevent</b> <sup>[1]</sup> 98:16</p> <p><b>priest</b> <sup>[3]</sup> 95:5,8,21</p> <p><b>priests</b> <sup>[3]</sup> 10:1 12:20 93:24</p> <p><b>primarily</b> <sup>[19]</sup> 13:5,17 38:6 41:23 42:10,12 45:19 53:15 54:17 55:8 56:19,25 59:22 64:5 67:7,15 72:1 79:14,22</p> <p><b>primary</b> <sup>[1]</sup> 50:12</p> <p><b>principal</b> <sup>[3]</sup> 51:19 53:16 60:23</p> <p><b>principality</b> <sup>[2]</sup> 52:5 53:6</p> <p><b>principally</b> <sup>[4]</sup> 41:24 53:25 60:8 61:25</p> <p><b>principle</b> <sup>[5]</sup> 69:2 85:19 86:21 106:10,16</p> <p><b>principles</b> <sup>[4]</sup> 51:25 60:13 62:14 98:14</p>	<p><b>prisoner</b> <sup>[1]</sup> 52:14</p> <p><b>private</b> <sup>[4]</sup> 76:16,23 78:5 79:1</p> <p><b>probably</b> <sup>[5]</sup> 8:15 32:10 37:5 43:23 50:2</p> <p><b>problem</b> <sup>[35]</sup> 4:24 5:17 7:6,24 11:11 17:6 21:16 23:20 34:14 35:2,6 38:25 46:18 50:7 55:17 57:6,8,13 59:4 63:17 72:14 81:24 83:25 84:14 102:13 103:22,24,25 105:25 106:6 107:8 113:3,24 114:21 115:13</p> <p><b>problematic</b> <sup>[5]</sup> 6:10 15:2 42:6 96:21 103:5</p> <p><b>problems</b> <sup>[11]</sup> 20:10 44:8,10 73:15 85:21 89:9 106:9 111:12 113:12 114:15 116:20</p> <p><b>proceedings</b> <sup>[1]</sup> 63:14</p> <p><b>process</b> <sup>[1]</sup> 78:24</p> <p><b>Professor</b> <sup>[2]</sup> 38:22 107:13</p> <p><b>profit</b> <sup>[1]</sup> 18:18</p> <p><b>program</b> <sup>[1]</sup> 78:16</p> <p><b>programs</b> <sup>[1]</sup> 12:19</p> <p><b>promote</b> <sup>[1]</sup> 8:19</p> <p><b>promoting</b> <sup>[1]</sup> 80:17</p> <p><b>prong</b> <sup>[3]</sup> 28:25 29:1 71:20</p> <p><b>proper</b> <sup>[1]</sup> 91:21</p> <p><b>properly</b> <sup>[2]</sup> 79:21 100:15</p> <p><b>property</b> <sup>[1]</sup> 74:2</p> <p><b>prophylactic</b> <sup>[3]</sup> 88:6 97:7 98:1</p> <p><b>prophylactically</b> <sup>[1]</sup> 73:2</p> <p><b>proselytization</b> <sup>[19]</sup> 22:22,23 23:7 72:21 73:9 81:21 82:4,5 83:4,23 84:21 90:3,17,22 92:7,14 96:3 103:16 119:6</p> <p><b>proselytize</b> <sup>[21]</sup> 10:23 11:7 12:15 16:2 22:2,7 25:6 31:25 42:21 55:13 84:5 85:6,16 86:1,12,18 91:4 96:17 103:16,22 110:12</p> <p><b>proselytizes</b> <sup>[1]</sup> 93:12</p> <p><b>proselytizing</b> <sup>[7]</sup> 86:4,10 87:20 110:10,20 115:11,12</p> <p><b>protect</b> <sup>[1]</sup> 49:1</p> <p><b>protections</b> <sup>[1]</sup> 78:25</p> <p><b>provide</b> <sup>[2]</sup> 39:25 55:13</p> <p><b>provided</b> <sup>[6]</sup> 65:25 66:9 70:17,18 71:7 81:13</p> <p><b>provides</b> <sup>[2]</sup> 66:14 77:4</p> <p><b>providing</b> <sup>[1]</sup> 62:17</p> <p><b>provision</b> <sup>[1]</sup> 11:24</p> <p><b>public</b> <sup>[4]</sup> 104:20 105:1 106:25 111:23</p> <p><b>pulled</b> <sup>[1]</sup> 79:25</p> <p><b>pure</b> <sup>[1]</sup> 33:5</p> <p><b>purpose</b> <sup>[25]</sup> 50:12 51:15,19 60:22 66:23 67:24,25 68:1,7,16,21 69:3,8,12,16 71:5,13 80:7,23 85:9 87:1</p>	<p>98:22 100:8 109:14 114:10</p> <p><b>purposes</b> <sup>[30]</sup> 5:19 7:15 11:18 12:25 13:5,18 19:12 41:23 42:11,13,19 45:19 50:16 53:15 54:1,18 55:9 56:20 57:1,8 62:21 64:5,9 66:3 67:7,15 68:12 72:2 79:14,22</p> <p><b>put</b> <sup>[6]</sup> 12:7 28:3,5,13 30:20 38:10</p> <p><b>puts</b> <sup>[4]</sup> 15:18 29:22 75:10 104:11</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>Quakers</b> <sup>[1]</sup> 107:21</p> <p><b>qualifies</b> <sup>[2]</sup> 7:15 89:2</p> <p><b>qualify</b> <sup>[10]</sup> 5:13 45:23 55:3 60:10 64:6,12 74:17 81:8 92:1 108:22</p> <p><b>question</b> <sup>[41]</sup> 7:9 14:10 17:15 20:4,9 21:19 27:23,25 31:20 35:21 37:3,24 38:13,15,17 40:4 46:8 48:21 50:24 51:16 53:16 54:15,22 55:11 56:2 57:17 58:8 59:1 64:3 80:11 91:3 93:6 96:7,14,18 106:14 107:23 108:7,17 115:16,19</p> <p><b>questioning</b> <sup>[1]</sup> 117:25</p> <p><b>questions</b> <sup>[18]</sup> 5:20 8:5,5 24:2 26:2 46:4,15 47:16 48:11 49:6,16 56:1 74:11 96:8 101:12 103:6,7 111:24</p> <p><b>quick</b> <sup>[2]</sup> 67:21 117:12</p> <p><b>quickly</b> <sup>[1]</sup> 33:19</p> <p><b>quite</b> <sup>[2]</sup> 34:2 89:5</p> <p><b>quote</b> <sup>[6]</sup> 12:5,5 45:18 68:20 117:15,16</p> <p><b>quote/unquote</b> <sup>[1]</sup> 10:20</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>radically</b> <sup>[1]</sup> 74:1</p> <p><b>radio</b> <sup>[2]</sup> 95:25 96:2</p> <p><b>raise</b> <sup>[1]</sup> 49:7</p> <p><b>raised</b> <sup>[2]</sup> 7:9 49:17</p> <p><b>raises</b> <sup>[2]</sup> 11:10 48:10</p> <p><b>raising</b> <sup>[1]</sup> 18:20</p> <p><b>Ramirez</b> <sup>[1]</sup> 52:14</p> <p><b>ran</b> <sup>[1]</sup> 34:4</p> <p><b>rank</b> <sup>[1]</sup> 30:19</p> <p><b>ranking</b> <sup>[1]</sup> 30:14</p> <p><b>ranks</b> <sup>[1]</sup> 31:8</p> <p><b>RASSBACH</b> <sup>[77]</sup> 2:2 3:3,13 4:7,8,10 5:24 6:21 7:17 8:9,25 9:6,15 11:2 13:4 14:6,8,17,23 15:5,8,22 16:5,8 17:2,22 19:2,19 20:2,24 22:5,10,20 23:2,19,25 24:6,13,18 25:15 26:20,25 27:24 29:2,5,8,16 30:12,24 31:19 32:5,19,24 33:14 34:6,23 36:1,25 37:4,8 38:2,9,</p>	<p>16 40:5,13,23 41:9 43:2,18,22 44:16,24 45:2 109:23 117:8,9,11</p> <p><b>rather</b> <sup>[8]</sup> 29:24 45:3 71:14 77:22 87:22 88:3 97:8 98:2</p> <p><b>ratio</b> <sup>[1]</sup> 76:21</p> <p><b>rational</b> <sup>[1]</sup> 70:15</p> <p><b>rationality</b> <sup>[1]</sup> 71:1</p> <p><b>reaches</b> <sup>[1]</sup> 46:7</p> <p><b>read</b> <sup>[4]</sup> 16:19 64:17 65:3 67:23</p> <p><b>reading</b> <sup>[15]</sup> 13:6 16:10,17 23:17 41:19 45:25 46:23,25 48:1,4 51:10 55:18 57:23 67:22 109:18</p> <p><b>real</b> <sup>[2]</sup> 35:6 75:12</p> <p><b>reality</b> <sup>[1]</sup> 118:2</p> <p><b>really</b> <sup>[20]</sup> 11:18 12:25 15:2,17 16:13 18:6 23:8 25:3 27:9 31:13 40:23 42:3 54:14 64:25 83:24 92:24 93:23 107:6 112:20 118:10</p> <p><b>reason</b> <sup>[15]</sup> 50:20 53:17,17 60:12,24 61:19 70:15 71:8 86:19 88:6 100:4 104:7 115:5 116:10,14</p> <p><b>reasonably</b> <sup>[1]</sup> 73:13</p> <p><b>reasons</b> <sup>[6]</sup> 10:10 25:13,14 53:18 59:23 60:9</p> <p><b>REBUTTAL</b> <sup>[4]</sup> 3:12 109:23 117:8,9</p> <p><b>receive</b> <sup>[6]</sup> 75:5 77:2 82:13 90:18 93:20 105:2</p> <p><b>received</b> <sup>[1]</sup> 93:14</p> <p><b>recent</b> <sup>[1]</sup> 114:25</p> <p><b>recipient</b> <sup>[2]</sup> 102:1,2</p> <p><b>recipients</b> <sup>[1]</sup> 93:13</p> <p><b>recognize</b> <sup>[1]</sup> 52:25</p> <p><b>recognized</b> <sup>[1]</sup> 52:17</p> <p><b>recognizes</b> <sup>[4]</sup> 107:15 109:10 111:3,3</p> <p><b>recognizing</b> <sup>[1]</sup> 74:24</p> <p><b>reconciled</b> <sup>[1]</sup> 119:6</p> <p><b>record</b> <sup>[4]</sup> 23:21 99:6,7,8</p> <p><b>red</b> <sup>[1]</sup> 109:19</p> <p><b>referred</b> <sup>[1]</sup> 33:2</p> <p><b>referring</b> <sup>[1]</sup> 61:21</p> <p><b>reflected</b> <sup>[2]</sup> 34:19 64:22</p> <p><b>refrain</b> <sup>[1]</sup> 50:19</p> <p><b>refusal</b> <sup>[1]</sup> 115:20</p> <p><b>regard</b> <sup>[1]</sup> 65:3</p> <p><b>reimbursable</b> <sup>[2]</sup> 76:17,21</p> <p><b>reincorporate</b> <sup>[1]</sup> 106:19</p> <p><b>reinstatement</b> <sup>[1]</sup> 76:1</p> <p><b>reject</b> <sup>[2]</sup> 27:6 46:8</p> <p><b>rejected</b> <sup>[1]</sup> 47:2</p> <p><b>relate</b> <sup>[1]</sup> 41:2</p> <p><b>relates</b> <sup>[1]</sup> 67:9</p> <p><b>relating</b> <sup>[1]</sup> 69:9</p> <p><b>relatively</b> <sup>[3]</sup> 32:8 89:11 114:25</p> <p><b>relied</b> <sup>[1]</sup> 92:2</p> <p><b>relies</b> <sup>[2]</sup> 35:22 76:15</p>
---	---	---	--	---

## Official

<b>religion</b> <sup>[21]</sup> 8:18 29:10 37:9,17 38:12 39:1,3,16 40:10 70:24 71:10 82:12 86:11,14 90:7 93:1 105:25 106:1 111:4 116:23 119:7 <b>religions</b> <sup>[21]</sup> 10:22 31:25 32:23 33:6 41:4 55:12 86:17 91:17 93:3 103:9,10,12,16,17,18 104:4,12,13 105:15 107:3 116:15 <b>religiosity</b> <sup>[3]</sup> 37:9 38:1,7 <b>religious</b> <sup>[178]</sup> 4:14,15,17,23 5:10,16,18,22 6:3,3,10,16,19,25 7:6,10,13,14,14 8:13 9:14,18 10:8,18,20 11:3,18 12:7,20,25 13:3,5,18 16:17 17:5,10 18:22 20:13 21:10,10,13,14,17 23:17 24:2,11,15 25:13 28:15 32:13,15 35:4,5,15,17,23 36:6 39:12 41:23 42:5,11,13,16,19,24 45:16,19 46:5,10 50:5,8,9,16,21 51:1,15 52:6,8,19 53:7,15,21 54:1,13,17,24 55:9,10 56:19,21 57:1,4 59:22 60:8,12,20,23 61:8 62:20 64:5,9 66:3,22 67:7,15,24 68:12 69:22 70:6 71:16 72:2,13,20,22,25 73:9,11,23 74:7,9 75:8 76:10 79:14,22 80:14,22 81:8,20,21 85:1,5,5,15,16,17,22,25 86:1,3,9,11,21 87:2,7 90:23 95:12 97:18,20,23 99:11,13 100:8 101:8 102:12,25 103:11,19 104:9,19,22 106:4,5,10,15,24 107:16,17,19 109:14 111:8,10,24 115:5,8,9,23 118:5,25 <b>religiously</b> <sup>[4]</sup> 70:19 73:20 74:22 118:24 <b>religiously-operated</b> <sup>[1]</sup> 59:17 <b>rely</b> <sup>[1]</sup> 36:8 <b>remand</b> <sup>[5]</sup> 26:19 28:3 63:3,12,13 <b>remedies</b> <sup>[1]</sup> 75:25 <b>remember</b> <sup>[1]</sup> 14:1 <b>Remonstrance</b> <sup>[1]</sup> 39:6 <b>render</b> <sup>[1]</sup> 80:25 <b>reorganize</b> <sup>[1]</sup> 31:5 <b>repeatedly</b> <sup>[5]</sup> 5:1 17:11 36:8 52:8 88:17 <b>repent</b> <sup>[5]</sup> 82:8,9,10,20,21 <b>report</b> <sup>[6]</sup> 61:9,16 64:18,25 65:2 67:12 <b>reported</b> <sup>[1]</sup> 74:13 <b>represented</b> <sup>[1]</sup> 58:11 <b>request</b> <sup>[1]</sup> 119:9 <b>requests</b> <sup>[1]</sup> 114:6 <b>require</b> <sup>[4]</sup> 60:13 78:9 97:20 102:25 <b>required</b> <sup>[5]</sup> 6:13 90:18 108:20 109:2,6	<b>requirement</b> <sup>[4]</sup> 6:17 7:19 8:11,12 <b>requires</b> <sup>[5]</sup> 6:7 17:1 20:20 73:25 100:4 <b>requiring</b> <sup>[2]</sup> 39:21 82:21 <b>reservation</b> <sup>[1]</sup> 59:6 <b>resolve</b> <sup>[6]</sup> 4:18 72:16 87:9 101:11 111:16,21 <b>respect</b> <sup>[6]</sup> 9:22,25 10:21 31:15 44:4 65:13 <b>respectfully</b> <sup>[2]</sup> 78:14 119:9 <b>respond</b> <sup>[1]</sup> 35:24 <b>Respondents</b> <sup>[4]</sup> 1:9 2:9 3:11 72:10 <b>response</b> <sup>[2]</sup> 98:20 100:13 <b>responsive</b> <sup>[1]</sup> 93:6 <b>restaurant</b> <sup>[11]</sup> 8:20 13:8 18:16 44:11 54:3,23,25 66:20 70:20 80:14 99:3 <b>restaurants</b> <sup>[4]</sup> 43:16 70:21 99:19 103:7 <b>result</b> <sup>[2]</sup> 27:13 34:5 <b>results</b> <sup>[1]</sup> 75:8 <b>return</b> <sup>[2]</sup> 57:12 111:25 <b>Revenue</b> <sup>[4]</sup> 13:12,13,13 75:5 <b>reverse</b> <sup>[5]</sup> 26:3 63:3,13,22 119:10 <b>REVIEW</b> <sup>[4]</sup> 1:7 4:6 75:21 79:2 <b>revisit</b> <sup>[1]</sup> 93:4 <b>rightly</b> <sup>[1]</sup> 66:7 <b>Rights</b> <sup>[1]</sup> 38:19 <b>risk</b> <sup>[3]</sup> 28:12 78:19,22 <b>risks</b> <sup>[1]</sup> 46:11 <b>ritual</b> <sup>[1]</sup> 10:1 <b>ROBERTS</b> <sup>[35]</sup> 4:3 8:17 9:1,11 21:22 25:25 29:15 31:17 33:25 37:21 41:12 45:5 57:18 59:12 60:11,17 61:1 62:23 63:24 66:25 67:3 72:6 81:3,6,11 82:2 88:16 89:25 109:21,25 110:7 113:1 114:19 117:2 119:11 <b>rock</b> <sup>[1]</sup> 96:1 <b>ROTH</b> <sup>[107]</sup> 2:8 3:10 72:8,9,11 74:16,23 75:14 76:12 77:10,16,19,23 78:1,9,13,18,24 79:8,11,15,18 80:25 81:10,16 82:5,11,16,24 83:1,16 84:7,9,13,18,23 85:7,18,25 86:2,15,23 87:25 89:5,19 90:9,12,15 91:8,18 92:16 93:4 94:1,7,15,18 95:3,6,9 96:5,11,24 97:2,4 98:24 99:18,24 100:1,14,18,21 101:16,18,25 102:7,10,23 103:3,20 104:6,14 105:5,22 106:20 107:25 108:6,10,16 110:4,21,24 111:19 112:7,15,18,25 113:5,10,13,16 114:4,24 115:7,15,25 116:2,11	<b>roughly</b> <sup>[1]</sup> 85:22 <b>route</b> <sup>[1]</sup> 50:25 <b>row</b> <sup>[1]</sup> 52:15 <b>rule</b> <sup>[13]</sup> 5:3,4 9:21 30:8,16,17 32:4 74:7,8 93:2 116:5,12,17 <b>ruled</b> <sup>[1]</sup> 30:18 <b>run</b> <sup>[12]</sup> 10:25 12:18,18 13:8 43:16 61:8 70:21,24 75:19 99:19 100:5 103:15 <b>running</b> <sup>[5]</sup> 54:1 84:20 90:14 95:23 117:20 <hr/> <b>S</b> <hr/> <b>salvation</b> <sup>[1]</sup> 80:18 <b>same</b> <sup>[19]</sup> 7:8 14:21 19:5 20:5 44:7 57:15 58:19 59:20 65:14 69:20 70:16 74:21,24 85:12 89:14 93:22 100:7 107:6 110:14 <b>Santeria</b> <sup>[1]</sup> 10:1 <b>Saturday</b> <sup>[1]</sup> 5:7 <b>saving</b> <sup>[1]</sup> 47:7 <b>saying</b> <sup>[30]</sup> 6:2,5 7:11 8:3 10:16 15:25 16:23 17:3 20:13 21:16,18 22:12 24:8 30:13 36:11 43:13 64:4 65:3 70:5,12 77:21 80:20 81:13 83:12 85:14 86:8 88:21 94:1 99:20 100:2 <b>says</b> <sup>[28]</sup> 7:7,13 9:8 12:8 16:16 25:22 27:16 34:15,16 38:8,20 39:9 42:18 50:11 52:9 66:7 68:12 71:8,20 82:7 83:23,24 85:4 96:15 97:1 98:12 101:20 102:15 <b>scheme</b> <sup>[2]</sup> 41:18 58:20 <b>scholars</b> <sup>[1]</sup> 41:1 <b>schools</b> <sup>[1]</sup> 48:22 <b>scrutiny</b> <sup>[9]</sup> 26:15 28:1,4,18,25 33:4 77:12 115:24 116:6 <b>search</b> <sup>[1]</sup> 73:8 <b>second</b> <sup>[6]</sup> 26:24 27:12,23,24 53:11 67:20 <b>second-guesses</b> <sup>[1]</sup> 46:10 <b>second-guessing</b> <sup>[1]</sup> 50:4 <b>Section</b> <sup>[3]</sup> 13:12 74:2 97:17 <b>sects</b> <sup>[1]</sup> 105:16 <b>secular</b> <sup>[10]</sup> 4:17 5:11 10:7 36:6,7 46:14 57:3 69:19 70:7 116:22 <b>see</b> <sup>[16]</sup> 7:24 11:9 15:7 16:5 17:20 27:12 39:6,12 40:3 44:20 58:2 75:17 80:12 95:23 105:20 109:19 <b>seeing</b> <sup>[2]</sup> 14:21 20:4 <b>seek</b> <sup>[1]</sup> 43:11 <b>seeks</b> <sup>[1]</sup> 83:20 <b>seem</b> <sup>[5]</sup> 27:6 46:16 55:25	<b>64:16 110:10</b> <b>seems</b> <sup>[10]</sup> 12:13 15:24 17:16 26:8 69:16 71:21 79:16 88:16 96:14 116:5 <b>seen</b> <sup>[3]</sup> 34:12 64:16 65:11 <b>selective</b> <sup>[1]</sup> 7:5 <b>selectively</b> <sup>[1]</sup> 7:2 <b>selectivity</b> <sup>[1]</sup> 10:11 <b>self-insurance</b> <sup>[3]</sup> 78:16,19,22 <b>send</b> <sup>[1]</sup> 105:19 <b>sense</b> <sup>[7]</sup> 22:3 31:5 37:9 61:24 69:17 71:13,17 <b>senseless</b> <sup>[1]</sup> 31:6 <b>sensible</b> <sup>[1]</sup> 46:23 <b>separate</b> <sup>[7]</sup> 7:19 13:9,11,16 74:14,21 87:22 <b>separately</b> <sup>[2]</sup> 12:9 67:13 <b>separating</b> <sup>[1]</sup> 37:25 <b>Serbian</b> <sup>[1]</sup> 75:18 <b>serious</b> <sup>[3]</sup> 46:3 48:10 49:15 <b>servants</b> <sup>[1]</sup> 111:23 <b>serve</b> <sup>[9]</sup> 11:5 25:1 32:1,2 83:25 84:1 91:11,14 100:5 <b>serves</b> <sup>[4]</sup> 18:17 45:20 68:7 86:25 <b>service</b> <sup>[7]</sup> 24:24 60:22 82:14 92:20,22 93:13 103:14 <b>services</b> <sup>[11]</sup> 23:14 55:13 62:17 65:25 66:9,14 69:20 70:17 71:6 82:7 83:6 <b>serving</b> <sup>[2]</sup> 84:9 85:9 <b>set</b> <sup>[10]</sup> 6:10 20:7 21:5 35:10,11,17 61:6 76:7 96:15 106:4 <b>sets</b> <sup>[4]</sup> 35:4 103:13 108:21,21 <b>setting</b> <sup>[2]</sup> 67:19 97:6 <b>Seventh</b> <sup>[3]</sup> 36:9 66:18 100:22 <b>Seventh-Day</b> <sup>[3]</sup> 80:14,15 99:14 <b>sharing</b> <sup>[3]</sup> 23:8,9 108:23 <b>She's</b> <sup>[2]</sup> 101:7,13 <b>shift</b> <sup>[2]</sup> 95:22 107:22 <b>short</b> <sup>[1]</sup> 5:14 <b>shouldn't</b> <sup>[5]</sup> 15:25 50:6 56:24 98:10 105:14 <b>show</b> <sup>[2]</sup> 33:22 83:12 <b>showed</b> <sup>[1]</sup> 117:14 <b>shy</b> <sup>[1]</sup> 66:10 <b>sick</b> <sup>[2]</sup> 60:14 100:6 <b>side</b> <sup>[13]</sup> 8:7 12:7,17 35:22 36:23 51:13 63:20,22 77:1 98:12,25 100:20 104:11 <b>sign</b> <sup>[4]</sup> 62:18 69:5,10 81:12 <b>similar</b> <sup>[10]</sup> 9:25 31:20 48:21 52:21 57:7 74:1 97:16 113:8,9 116:5 <b>similarities</b> <sup>[1]</sup> 58:1 <b>similarly</b> <sup>[1]</sup> 99:14 <b>simple</b> <sup>[6]</sup> 31:1,11 32:8 55:	<b>15 107:2 108:18</b> <b>simplest</b> <sup>[6]</sup> 31:21 32:3,9,10 49:24 81:7 <b>simply</b> <sup>[7]</sup> 34:20 38:8 74:4 80:22 111:6 114:7,16 <b>sin</b> <sup>[1]</sup> 8:18 <b>sincere</b> <sup>[4]</sup> 8:11 37:5 51:3 52:19 <b>sincerely</b> <sup>[6]</sup> 9:2 46:10 52:10,11 54:12 56:3 <b>Sincerity</b> <sup>[16]</sup> 36:24 38:5 51:5 52:5 53:6 55:10 56:3,13,20 98:18,18,21,22,24 99:5,12 <b>single</b> <sup>[2]</sup> 31:3,4 <b>singling</b> <sup>[1]</sup> 46:12 <b>sins</b> <sup>[2]</sup> 82:20,22 <b>sit</b> <sup>[3]</sup> 92:9 96:4 110:5 <b>situation</b> <sup>[4]</sup> 43:7 54:7 78:20 79:20 <b>situations</b> <sup>[3]</sup> 19:20 40:24 96:19 <b>six</b> <sup>[1]</sup> 36:2 <b>skip</b> <sup>[1]</sup> 29:11 <b>slaughter</b> <sup>[5]</sup> 10:1,5,7,9,9 <b>social</b> <sup>[2]</sup> 45:20 62:16 <b>society</b> <sup>[2]</sup> 118:24 119:7 <b>Solicitor</b> <sup>[8]</sup> 2:4 27:3 49:1 58:10 108:2 109:10 114:1,6 <b>solicitude</b> <sup>[1]</sup> 37:16 <b>solidarity</b> <sup>[1]</sup> 33:23 <b>solution</b> <sup>[1]</sup> 84:3 <b>solve</b> <sup>[1]</sup> 85:20 <b>solves</b> <sup>[1]</sup> 72:13 <b>somebody</b> <sup>[3]</sup> 52:6 56:3 70:18 <b>someone</b> <sup>[4]</sup> 23:10,11 38:7 110:14 <b>someone's</b> <sup>[1]</sup> 88:10 <b>someplace</b> <sup>[1]</sup> 8:6 <b>something's</b> <sup>[1]</sup> 21:17 <b>sometimes</b> <sup>[3]</sup> 52:12 74:25 86:21 <b>sorry</b> <sup>[13]</sup> 15:15 21:3 24:7,13 32:5 51:2 54:11 80:21 81:3 82:16 83:1 95:6 109:25 <b>sort</b> <sup>[29]</sup> 7:15,22 12:2 13:8,9,16,20 16:13 19:7,10,22,24 22:16 23:3,4 27:13 31:1,6,7 33:5 38:23 47:7 48:11 49:1 88:7 97:20 98:3,4 101:5 <b>sorts</b> <sup>[2]</sup> 65:22 90:14 <b>SOTOMAYOR</b> <sup>[27]</sup> 14:5,7,9,14,18 15:4,6,9,12,15 26:1,2,21 27:22 28:19 29:3,6,14 62:24 114:20,21 115:1,10,18 116:1,3 117:1 <b>sounds</b> <sup>[3]</sup> 10:16 29:6 53:12 <b>soup</b> <sup>[17]</sup> 42:20 92:11,11,19,21,23 93:24 94:23,24
--	--	--	--	---



## Official

<p>95:22 96:1 102:1,9,14 103:2 105:8,19</p> <p><b>South</b> [3] 108:19,24 109:2</p> <p><b>space</b> [1] 98:1</p> <p><b>special</b> [2] 37:16 75:6</p> <p><b>specific</b> [3] 43:24 106:9,9</p> <p><b>spot</b> [4] 47:13 58:21,21,22</p> <p><b>square</b> [1] 79:13</p> <p><b>St</b> [3] 46:6 48:21 108:18</p> <p><b>stand</b> [2] 91:20 110:4</p> <p><b>standalone</b> [2] 112:6,16</p> <p><b>standard</b> [1] 27:9</p> <p><b>standpoint</b> [1] 110:18</p> <p><b>stands</b> [1] 30:3</p> <p><b>start</b> [1] 8:16</p> <p><b>state</b> [59] 5:21 6:18 8:23 10:17 11:16 26:13 28:21,22 32:22 33:20,23 44:2 48:19 63:8 72:16,23 73:4,6,21 74:25 75:17,19,20 76:2,17,20 77:3,18 78:1 79:3,20 81:25 87:9 90:24 91:24 92:25 93:17 100:25 101:10,20 102:18 104:11 105:14,18 106:2,3 108:19,23 109:5,8,12 111:2,16,20 112:10 114:11 115:4,13 116:17</p> <p><b>state's</b> [1] 33:13</p> <p><b>state-law</b> [1] 4:14</p> <p><b>STATES</b> [12] 1:1,17 2:6 3:7 45:9 58:11 75:3 88:13 109:10 113:4,14 118:21</p> <p><b>status</b> [1] 94:20</p> <p><b>statute</b> [58] 9:7 11:16 12:14 16:7 26:6 29:20 42:1,18 45:24 46:1,21,24 47:1,12 48:2,4,7,7 50:11,11 53:14 55:22,24 57:9,12,14,24 58:3,7,9,12 59:1,8,15,16 60:2 61:14,24 63:8,9 64:23 65:1 67:21,24 68:11 69:24 75:20 79:13 85:4,13 100:4 108:5 111:9,18,20 112:8 114:5,10</p> <p><b>statutes</b> [6] 45:16 49:2 53:22 113:8,9,9</p> <p><b>statutorily</b> [1] 34:24</p> <p><b>statutory</b> [12] 5:15 16:17 34:21 45:25 46:17 49:9 51:9 52:21 53:21 63:5,11 98:13</p> <p><b>stay</b> [4] 88:14 89:16 90:24 93:18</p> <p><b>step</b> [2] 85:18 87:3</p> <p><b>stick</b> [1] 101:6</p> <p><b>still</b> [5] 36:15 91:5,15,22 111:14</p> <p><b>stingy</b> [1] 119:1</p> <p><b>stood</b> [2] 48:1,3</p> <p><b>straight</b> [3] 29:12 47:11 53:14</p> <p><b>strict</b> [9] 26:14 28:1,4,18,24 33:4 77:12 115:23 116:6</p>	<p><b>strong</b> [1] 78:2</p> <p><b>strongest</b> [1] 30:6</p> <p><b>strongly</b> [1] 37:18</p> <p><b>structure</b> [3] 19:14 76:6,7</p> <p><b>struggling</b> [1] 77:25</p> <p><b>students</b> [2] 12:1 42:14</p> <p><b>study</b> [2] 12:5 42:15</p> <p><b>sub-entities</b> [1] 19:9</p> <p><b>subentities</b> [5] 31:8 62:11,15,22 117:16</p> <p><b>submitted</b> [2] 119:13,15</p> <p><b>subparts</b> [1] 27:2</p> <p><b>suffices</b> [1] 92:4</p> <p><b>sufficient</b> [4] 60:12 91:22 102:6 109:8</p> <p><b>suggesting</b> [1] 67:13</p> <p><b>suggestion</b> [1] 48:9</p> <p><b>Sunday</b> [1] 5:8</p> <p><b>Superior</b> [1] 19:8</p> <p><b>supernatural</b> [1] 41:7</p> <p><b>supervised</b> [8] 41:24 60:7 61:25 62:6 64:21 71:24,25 100:3</p> <p><b>supervises</b> [1] 62:10</p> <p><b>supported</b> [2] 41:25 61:25</p> <p><b>supporting</b> [3] 2:6 3:8 45:10</p> <p><b>suppose</b> [4] 41:17 42:2 95:10 101:19</p> <p><b>supposed</b> [1] 48:25</p> <p><b>SUPREME</b> [28] 1:1,16 4:13 5:18 15:3 21:1 24:9,17 27:15,15 29:21 32:12 36:18 44:8 45:23 46:9 47:1,10 48:1,17 52:25 57:22 58:15 63:7 83:23 91:24 108:3 113:25</p> <p><b>surely</b> [2] 29:25 59:7</p> <p><b>surprised</b> [1] 30:17</p> <p><b>survive</b> [3] 33:9 115:23 116:10</p> <p><b>system</b> [10] 33:12 72:15 76:16,20,23 78:5 79:1,3 96:15 101:13</p> <p><b>system's</b> [1] 87:4</p>	<p><b>tenet</b> [2] 70:22 106:24</p> <p><b>tenets</b> [1] 107:4</p> <p><b>tension</b> [1] 75:12</p> <p><b>Teresa</b> [1] 5:12</p> <p><b>term</b> [6] 22:3,4,6,9 79:23,25</p> <p><b>terminated</b> [2] 76:1 102:16</p> <p><b>termination</b> [1] 102:14</p> <p><b>terms</b> [2] 11:24 53:22</p> <p><b>test</b> [23] 38:5 40:10,11,21,22 51:24 52:20,21 53:21 73:16,25 80:5,5,6,8 82:20 83:3 88:19 89:3,6,11 112:13 114:7</p> <p><b>testified</b> [1] 99:8</p> <p><b>testimony</b> [1] 99:6</p> <p><b>tethered</b> [1] 102:11</p> <p><b>text</b> [11] 5:15 15:1 16:12 34:15 41:19 42:1 45:25 55:21 61:24 64:22 65:1</p> <p><b>themselves</b> [1] 6:11</p> <p><b>theological</b> [9] 4:25 6:1 9:20 17:5 21:5,21 23:24 25:8 118:22</p> <p><b>theories</b> [1] 49:14</p> <p><b>theory</b> [3] 19:16 42:5 74:6</p> <p><b>there's</b> [38] 7:16,19 8:10,12 9:20 13:14 17:16 19:22 21:16 25:21 26:18,22 28:9,11 29:4 34:14 39:6,13,18 47:2,3 55:7,9 60:3 62:5 66:11 69:12 76:5,5 78:5,24 79:2 99:6 101:9 102:13,13 106:7 109:7</p> <p><b>They'll</b> [1] 100:9</p> <p><b>they've</b> [1] 36:10</p> <p><b>thinking</b> [1] 38:11</p> <p><b>thinks</b> [2] 8:18 14:20</p> <p><b>THOMAS</b> [22] 5:21 6:9 7:9 21:24 46:16 47:21,25 48:13 61:2,3 62:2 63:17 74:12,19 110:8,9,22 111:17 112:5,11,16,23</p> <p><b>Thomas's</b> [1] 8:5</p> <p><b>Thoreau</b> [3] 37:14,17 38:6</p> <p><b>though</b> [7] 15:24 37:18 71:19 73:20 87:13 96:14 100:9</p> <p><b>Three</b> [10] 27:10 30:14,16,18 31:22 62:7 87:7 89:12,14 90:22</p> <p><b>thrust</b> [1] 96:6</p> <p><b>Title</b> [3] 74:2 75:25 98:7</p> <p><b>today</b> [1] 47:20</p> <p><b>together</b> [1] 77:22</p> <p><b>took</b> [1] 98:25</p> <p><b>top</b> [1] 31:7</p> <p><b>Totally</b> [2] 8:4 11:9</p> <p><b>tough</b> [2] 54:14,14</p> <p><b>towards</b> [1] 110:14</p> <p><b>tracked</b> [1] 108:4</p> <p><b>trafficker</b> [1] 56:5</p> <p><b>training</b> [4] 12:6,19 13:3</p>	<p>42:15</p> <p><b>transcendent</b> [4] 38:25 39:14,16 41:6</p> <p><b>transposed</b> [1] 34:11</p> <p><b>treat</b> [2] 24:11 103:9</p> <p><b>treated</b> [2] 24:16 34:7</p> <p><b>treating</b> [4] 8:16 18:10 55:12 103:17</p> <p><b>treatment</b> [1] 21:6</p> <p><b>tremendously</b> [1] 105:18</p> <p><b>Tribes</b> [1] 27:10</p> <p><b>triggers</b> [1] 112:4</p> <p><b>Trinity</b> [1] 33:1</p> <p><b>troubles</b> [1] 15:24</p> <p><b>true</b> [6] 75:9 78:4 105:9,10,10 115:7</p> <p><b>truth</b> [3] 38:25 39:14,16</p> <p><b>try</b> [3] 20:16 31:5 71:11</p> <p><b>trying</b> [17] 12:24 13:1 17:8,9 21:16 35:1 41:15 42:4 64:14,20 68:13 84:5 88:25 91:12 100:17 108:25 112:22</p> <p><b>turn</b> [2] 87:5,14</p> <p><b>turned</b> [1] 56:9</p> <p><b>two</b> [19] 14:20 17:24 19:10 25:16 26:2,8,15 30:17 31:8 43:2,2 62:12 64:15 69:18 70:20 85:22 98:25 101:4 103:13</p> <p><b>type</b> [6] 59:6 65:15 66:1,2 102:11 112:3</p> <p><b>types</b> [2] 50:9 112:9</p> <p><b>typical</b> [3] 4:15 5:9 10:20</p>	<p><b>uniform</b> [2] 40:20,22</p> <p><b>uninsurance</b> [1] 78:3</p> <p><b>UNITED</b> [6] 1:1,17 2:5 3:7 45:9 58:11</p> <p><b>unless</b> [1] 102:9</p> <p><b>unlike</b> [1] 116:21</p> <p><b>unlikely</b> [1] 102:17</p> <p><b>unrelated</b> [1] 13:14</p> <p><b>until</b> [1] 75:15</p> <p><b>up</b> [22] 6:11 9:25 20:7,17 36:11 37:12,23 39:1 61:7,14 62:12 66:22 76:7 83:12 94:11 96:15 103:13 108:20,25 110:4 114:3 116:15</p> <p><b>using</b> [3] 22:3,4 23:4</p>
<b>V</b>				
<p><b>Vacate</b> [2] 26:19 63:3</p> <p><b>valid</b> [1] 30:16</p> <p><b>valuable</b> [3] 104:17,24 106:23</p> <p><b>various</b> [2] 6:10 46:12</p> <p><b>vegan</b> [7] 43:17,17 44:12 70:21 99:3,19 103:6</p> <p><b>vegetables</b> [2] 8:21 18:17</p> <p><b>vegetarian</b> [2] 54:3 66:19</p> <p><b>verbatim</b> [2] 47:11 55:21</p> <p><b>verbs</b> [1] 62:8</p> <p><b>version</b> [1] 69:8</p> <p><b>versus</b> [12] 4:5 12:15 16:2 18:19 37:9 42:5,5 69:22 70:19 83:14 104:12 118:11</p> <p><b>view</b> [5] 7:3 20:15 69:16 73:24 90:5</p> <p><b>VII</b> [3] 74:2 75:25 98:7</p> <p><b>violate</b> [1] 18:24</p> <p><b>violated</b> [1] 32:14</p> <p><b>Virginia</b> [1] 38:19</p> <p><b>virtually</b> [1] 73:21</p> <p><b>virtue</b> [1] 88:13</p>				
<b>W</b>				
<p><b>Walz</b> [1] 112:20</p> <p><b>wanted</b> [2] 52:15 63:5</p> <p><b>wanting</b> [1] 10:15</p> <p><b>wants</b> [6] 18:23 20:12 58:17 83:20 84:14 91:21</p> <p><b>Washington</b> [3] 1:12 2:2,5</p> <p><b>way</b> [29] 11:13 12:21 14:24 15:2 16:6,11 20:25 29:20,24 30:15 37:25 47:5 57:15 58:9 59:10 62:21 76:25 80:8,12,13 85:12 91:16 92:14 102:16,21 104:3,10 113:25 118:19</p> <p><b>ways</b> [2] 25:4 30:25</p> <p><b>weed</b> [3] 98:18,22 99:5</p> <p><b>welcome</b> [5] 5:20 46:15 74:11 83:6,10</p> <p><b>whatever</b> [10] 10:23 11:15 18:22 36:13,17 42:5 89:1,3 90:3 110:5</p> <p><b>Whereupon</b> [1] 119:14</p>				

## Official

**whether** <sup>[41]</sup> 7:1,20 9:7 11:13,18 12:4,25 16:3 21:12 28:5 39:13 42:21 48:22 50:15,21 51:16 52:10,19 53:16,25 54:16,17 55:11 56:3,4 59:21,21 60:3 64:24 68:10 72:17,24 84:24 89:1 90:25 91:1 96:17 100:24 101:11 108:3 112:1  
**who's** <sup>[5]</sup> 70:18 97:12,13,13,21  
**whole** <sup>[2]</sup> 93:1 97:23  
**wholly** <sup>[1]</sup> 36:6  
**wide** <sup>[2]</sup> 73:2 75:2  
**will** <sup>[12]</sup> 4:3 27:5 75:7 77:2 84:7 88:21 91:16 92:9 98:18,22 100:4 107:23  
**win** <sup>[1]</sup> 27:5  
**WISCONSIN** <sup>[63]</sup> 1:7 2:9 4:5,13,25 5:3,18 11:14 15:3 21:1 24:9,16 25:5 26:4,5 27:15,15,18 28:13 29:21 30:3 32:12 34:11 36:18 39:19 42:2 43:5 45:13,22 46:1,9 47:1,9 48:1,6,16 52:24 57:22 58:9,15,16 63:7 71:8 73:1 77:7 78:12 79:24 81:9 83:23 84:8 85:4,14 86:5,6,7 92:18 96:15 108:3 109:16 113:24,25 114:5 117:14  
**Wisconsin's** <sup>[4]</sup> 5:4 39:21 73:8 90:5  
**within** <sup>[5]</sup> 7:10 11:3 21:19 23:19 35:16  
**without** <sup>[6]</sup> 73:18,22 74:13 101:12 111:7 119:5  
**wonder** <sup>[2]</sup> 11:17 110:13  
**wondering** <sup>[5]</sup> 11:12 16:3 19:16 30:4 68:10  
**worded** <sup>[1]</sup> 57:15  
**words** <sup>[3]</sup> 7:12 29:19 48:13  
**work** <sup>[2]</sup> 11:13 111:7  
**workers** <sup>[2]</sup> 28:14 33:16  
**works** <sup>[7]</sup> 29:21 70:15 86:13 87:23 110:15,23 111:1  
**world** <sup>[5]</sup> 66:6,8 85:21 106:7 116:19  
**worried** <sup>[4]</sup> 49:5 57:14 98:19 104:8  
**worse** <sup>[1]</sup> 46:11  
**worship** <sup>[7]</sup> 72:21 73:8 81:21 90:22 92:8,10,12  
**worships** <sup>[1]</sup> 93:12  
**write** <sup>[1]</sup> 68:8  
**written** <sup>[1]</sup> 16:7  
**wrote** <sup>[1]</sup> 30:13

---

**Y**


---

**years** <sup>[2]</sup> 27:19 43:10  
**Yoder** <sup>[1]</sup> 37:12  
**yourself** <sup>[1]</sup> 108:13

---

**Z**


---

**Zen** <sup>[1]</sup> 41:5