

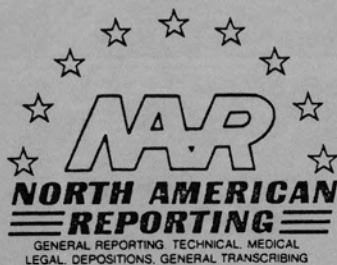
In the
Supreme Court of the United States

ST. MARTIN EVANGELICAL LUTHERAN)
CHURCH AND NORTHWESTERN)
LUTHERAN ACADEMY,)
)
PETITIONERS,) No. 80-120
)
V.)
)
SOUTH DAKOTA)

Washington, D.C.
March 3, 1981

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ORIGINAL



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 ST. MARTIN EVANGELICAL LUTHERAN :
 CHURCH AND NORTHWESTERN :
 LUTHERAN ACADEMY, :
 :
 Petitioners, : No. 80-120
 :
 v. :
 :
 SOUTH DAKOTA :
 :
 ----- :

Washington, D. C.
Tuesday, March 3, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:11 o'clock a.m.

APPEARANCES:

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BARRY SULLIVAN, ESQ., Office of the Solicitor General, U.S. Department of Justice, Washington, D.C. 20530; on behalf of the United States as amicus curiae.

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MILLERS FALLS
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COTTON CONTENT

1 It should be noted that all teachers are regarded as
2 ministers of the Wisconsin Synod. This was found by the
3 appeals referee in the original administrative hearing.
4 They have equal status with their preaching minister counter-
5 parts and voting rights on doctrinal matters in the church.
6 Now, neither of these schools that we're talking about are
7 separately incorporated.

8 Prior to 1970 the Federal Unemployment Tax Act
9 did not cover nonprofit or tax-exempt organizations. In
10 1970, however, Congress required the states to cover non-
11 profit corporations and when it did this it created a
12 Section 3309(b) which specifically exempted from coverage
13 certain nonprofit employers or services. Now, the first
14 section, 3309(b)(1) has two parts, the subsection (a) which
15 exempts those in the employ of a church, convention, or
16 association of churches; and subsection (b) exempts those
17 in the employ of an organization which is operated primarily
18 for religious purposes and, which is not an issue here,
19 which organization is operated, supervised, controlled, or
20 principally supported by a church, convention, or association
21 of churches.

22 Subsection (2) deals with their ministers and mem-
23 bers of religious orders. Subsection (3) exempted those in
24 the employ of elementary and secondary schools. The other
25 exemptions are not pertinent to our case.

1 In 1976 Congress again amended FUTA effective in
2 1978, requiring primarily coverage of state and local em-
3 ployees, agricultural workers, and domestic workers. And when
4 Congress did this it eliminated that elementary and secondary
5 school exclusion, and this is where the controversy begins.

6 QUESTION: Suppose there had never been that third
7 exception?

8 MR. SCHILLING: I think that third exception was --

9 QUESTION: Do you think it is just superfluous or
10 not?

11 MR. SCHILLING: I think it had no effect on paro-
12 chial schools.

13 QUESTION: It did on nonparochial?

14 MR. SCHILLING: It did on other nonprofit schools,
15 and perhaps it had an effect on public schools.

16 QUESTION: But it was never needed to exempt the
17 kinds of schools involved in this case?

18 MR. SCHILLING: That's our position, yes,
19 Mr. Justice.

20 QUESTION: Although that was never the view of the
21 Service, I guess?

22 MR. SCHILLING: That was not the view of the Labor
23 Department after repeal.

24 QUESTION: Or before.

25 MR. SCHILLING: Well, I think, before, Mr. Justice,

1 it never had occasion to arise, and I don't think the Secre-
2 tary of Labor --

3 QUESTION: Didn't they issue exemptions?

4 MR. SCHILLING: No, you don't get an exemption, the
5 exemption is automatic, Mr. Justice. I mean, if --

6 QUESTION: So you never have to --

7 MR. SCHILLING: You don't apply or do anything
8 to get it. It's there and you use it.

9 QUESTION: So you never knew why the tax wasn't
10 collected from religious schools? You didn't know which
11 ones of the exemptions was being applied?

12 MR. SCHILLING: That's correct. Well, after this
13 exemption, this elementary and secondary school exemption
14 was removed; it seems that the State bases its argument on
15 repeal of this subsection (3). We maintain that the statute
16 as it remains is clear, and that the statute controls, and
17 that legislative history or intent is really not an issue.

18 QUESTION: Are you talking about the South Dakota
19 statute?

20 MR. SCHILLING: I'm talking about the South Dakota
21 statute, which is a mirror image of the federal statute.

22 QUESTION: But if the South Dakota Supreme Court
23 has construed the South Dakota statute, aren't we bound by
24 that?

25 MR. SCHILLING: I don't think so, Mr. Justice,

1 because the South Dakota statute is so closely interwoven
2 with the federal statute, and --

3 QUESTION: That question bothered me, in reading
4 the briefs in this case, and the only discussion of it I found
5 was in Footnote 2 of the Government's amicus brief which is
6 rather short; it may be correct. But you don't -- none of the
7 parties -- don't discuss that question, whether or not
8 this doesn't involve purely a question of state law.

9 MR. SCHILLING: Well, I suggest, Mr. Justice, that
10 it does not because the penalties to the states, if they don't
11 comply, are so severe --

12 QUESTION: But the State Supreme Court seemed to be
13 talking about the South Dakota law, didn't it?

14 MR. SCHILLING: Mr. Justice, I think --

15 QUESTION: It sets it out on page A-3 of its
16 opinion, and that's the one it discusses.

17 QUESTION: Are you suggesting that because of the
18 interaction with the federal law and the question in the
19 case, that that alters the usual rule that we won't reexamine
20 a state court's interpretation of its own statutes?

21 MR. SCHILLING: That's correct, Your Honor. I
22 think that the jurisdiction of course is there with the con-
23 stitutional question we've raised, but I think the Court also,
24 without the constitutional question, has jurisdiction to
25 decide this question, because of the interrelationship

1 between the state statute and the federal statute.

2 QUESTION: You're saying, then, it's like the
3 Zacchini v. Scripps case we decided two or three years ago
4 where we felt that the state court might have decided this
5 case differently had they not been under a misapprehension as
6 to federal law?

7 MR. SCHILLING: I think that's correct, yes;
8 Mr. Justice.

9 QUESTION: Well, suppose we ruled that the federal
10 law didn't intend to subject religious schools to this tax?
11 Suppose we just ruled that? You would still be subject to
12 them in South Dakota, until the Legislature acted.

13 MR. SCHILLING: We think this Court has power,
14 Mr. Justice, to overrule and reverse the South Dakota
15 Supreme Court --

16 QUESTION: Well, not as to the meaning of a South
17 Dakota statute. This Court lacks the power to do that.

18 QUESTION: Until the Supreme Court changed its mind,
19 the South Dakota statute would continue to mean exactly what
20 it meant.

21 QUESTION: Well, unless, under cases like Zacchini
22 or Benguet Consolidated Mines, we were to vacate and remand
23 for reconsideration free of any misapprehension the state
24 court might have had about the federal law question involved.

25 MR. SCHILLING: If you did not want to get to the

1 constitutional question, yes, Mr. Justice. And we don't
2 really think you have to get to the constitutional question.

3 QUESTION: Well, the point of it is that if your
4 state supreme court construed the state statute in reliance
5 on an understanding of federal law that we say was erroneous,
6 and we send it back, we couldn't change it from your state
7 supreme court; but we could send it back to them, that's the
8 suggestion, and let them reconsider their interpretation of
9 the state statute in light of what we've said about the
10 federal question.

11 MR. SCHILLING: That might be correct, Mr. Justice
12 Brennan. And I think we'd have to come back if they would
13 not follow or wish --

14 QUESTION: Well, we might have another case.

15 MR. SCHILLING: And we'd have another case. Because
16 we do have the constitutional issue. I think that the South
17 Dakota Supreme Court's interpretation was so heavily reliant
18 on what the Secretary of Labor suggests and so heavily
19 reliant on what the federal statute said, because they kept
20 using the 3309 provisions, that I still think that that would
21 be our position, that this Court does have jurisdiction aside
22 from the constitutional question.

23 But our position under the statute, whether it be
24 South Dakota or the federal statute, is that these churches
25 are exempt either under subsection (a) because the services

1 performed are in the employ of a church, convention, or asso-
2 ciation of churches. We also think they might be exempt under
3 subsection (b) because the services are for an organization
4 which is operated primarily for religious purposes. Our ar-
5 gument primarily is based on the statute.

6 I will first discuss (a). I think under subsection
7 (a) we have to define the simple language, "service performed
8 in the employ of a church." And I think we have to define
9 what the word "church" means. Now, the South Dakota appeals
10 referee defined the word "church" very narrowly. He said
11 that the word "church" meant an individual house of worship,
12 as has been interpreted to him to mean by the Secretary of
13 Labor.

14 We think the appeals referee is wrong --

15 QUESTION: And the Department of Labor.

16 MR. SCHILLING: -- and the Department of Labor is
17 wrong, because a building can't employ somebody. I think
18 that the facts show that the school operated by St. Martin
19 church is not separately incorporated, it's not a legal enti-
20 ty, the members of the church congregation control its opera-
21 tion; and, number three, the school is completely financed by
22 the church. If the tax is going to be paid, it's going to be
23 paid by the church.

24 Likewise Northwestern Lutheran Academy is not
25 separately incorporated. Its control is by the Synod, and

1 its principal source of support is from the Synod. If you
2 look at the common dictionary meaning of the word "church"
3 it refers to a body or organization of religious believers,
4 and that's, I think, the definition that we should use.

5 I think it's interesting that when Congress recodified the
6 Internal Revenue Code in 1954, it stated that the term should
7 be all-inclusive, and should be interpreted to include other
8 organizations which as integral parts of the church are en-
9 gaged in carrying out the church's functions, whether indi-
10 vidually incorporated or not.

11 I think there are two excellent briefs by the
12 Catholic Conference and by the Lutheran Church-Missouri
13 Synod that trace some of the legislative history. From time
14 to time Congress has used these same words, "church, conven-
15 tion, or association of churches," and of course it's our
16 position that when Congress did this it kept the same meaning.
17 We think Congress intended a broad and a general meaning.

18 Now, when Congress recodified the Code in 1954, the
19 words "or religious order" were also in the statute they were
20 talking about. And those words "or religious order" were
21 deleted, because I think Congress thought that that would
22 limit and confuse this broad definition that they intended.

23 The United States as amicus curiae implies that
24 church schools are not exempt under this section because
25 they're not a church. Well, I don't think that's the issue.

1 I think the issue is whether these church schools,
2 or the services performed in these church schools which are
3 not separately incorporated, are performing services in the
4 employ of the church.

5 QUESTION: Are you saying that they are essentially
6 the same, substantially the same as the Sunday School classes
7 or summer school classes held traditionally at Lutheran
8 churches and others?

9 MR. SCHILLING: Yes, Mr. Chief Justice, I think
10 that the school is a basic part of the church's mission.

11 QUESTION: In other words, it's an implement of the
12 faith of that church?

13 MR. SCHILLING: That's correct, Mr. Chief Justice.

14 QUESTION: Is it governed by state rules? Does it
15 follow the state rules for education?

16 MR. SCHILLING: The state rules of education?

17 QUESTION: Do they supervise those schools? Do
18 they enforce the attendance laws? Does the state enforce
19 the attendance laws?

20 MR. SCHILLING: Mr. Justice, the state heretofore
21 has not really enforced their certification requirements,
22 their attendance requirements. They do submit attendance
23 information.

24 QUESTION: Well, do you do that for your church
25 school?

1 MR. SCHILLING: Yes, they do.

2 QUESTION: The Sunday School? Do that for your
3 Sunday School?

4 MR. SCHILLING: Not Sunday School.

5 QUESTION: Of course you don't, so they're differ-
6 ent, aren't they? Aren't they different?

7 MR. SCHILLING: Well, Sunday Schools are not a re-
8 quirement of compulsory school attendance. A preschool --

9 QUESTION: Well, I mean, you said in answer to the
10 Chief Justice that it was just the same as the Sunday School.
11 You didn't really mean that, did you?

12 MR. SCHILLING: I meant, insofar as the inculca-
13 tion of religious doctrine goes, I did. Insofar as state re-
14 quirements of education, I did not. I think this question of
15 state requirements and certification is one that might very
16 well get to this Court some day.

17 QUESTION: The state has police power to require
18 attendance at primary school, does it not?

19 MR. SCHILLING: Yes, it does.

20 QUESTION: It could not, under the religion clauses,
21 compel attendance at a Sunday School. The State of South
22 Dakota couldn't compel people to go to Sunday School, could
23 they?

24 MR. SCHILLING: No, they could not. I think that
25 would violate the Establishment Clause. In this question of

1 This question of certification has been before
2 three states, these requirements. And I understand that Ohio,
3 Vermont, and Kentucky courts have restrained the states from
4 enforcing their certification requirements on parochial
5 schools. I understand --

6 QUESTION: You referred to the Synod, and according
7 to your brief the membership of the Synod is the churches
8 themselves rather than church officials, is that correct?

9 MR. SCHILLING: That is correct.

10 QUESTION: In the Lutheran organization?

11 MR. SCHILLING: That is correct.

12 QUESTION: The dictionary meaning includes both.

13 MR. SCHILLING: That's correct, Mr. Justice.

14 QUESTION: So the Synod is an assembly or a
15 group of Lutheran churches, not of people?

16 MR. SCHILLING: That's correct. The membership
17 are the churches.

18 QUESTION: Mr. Schilling, maybe I'm laboring the
19 point, but the referee found, as I remember, that the primary
20 purpose of the school was education rather than religious
21 training. Do you dispute that finding?

22 MR. SCHILLING: Yes, I do dispute that finding.
23 The referee found that religion is inculcated in everything
24 they teach, but then he said that the primary purpose was
25 education. The word "primary" means fundamentally, in the

1 first place, or of first importance. And it's our position
2 that the reason that churches provide a school system
3 that's contiguous with that which the state provides is
4 strictly to inculcate religious beliefs. Insofar as the Wisconsin
5 Synod goes, its constitution provides for conserving its
6 doctrine and for extending its doctrine, and its constitution
7 specifically provides for schools. I think the purpose of
8 schools insofar as --

9 QUESTION: These schools do perform the same educa-
10 tional function that public schools do insofar as the general
11 education that is needed by a child, doesn't it?

12 MR. SCHILLING: They do; yes, Mr. Justice.

13 QUESTION: But, certainly, logically, they wouldn't
14 even exist if they didn't have some function beyond that.

15 MR. SCHILLING: That is correct. Their function
16 beyond that is to inculcate the religious doctrine into every-
17 thing they teach, and I think that was recognized by this
18 Court in the establishment cases in the early '70s.

19 QUESTION: Well, is it any different in this situa-
20 tion from the schools of the Roman Catholic churches and
21 others that we have dealt with?

22 MR. SCHILLING: I think the situation insofar as
23 Roman Catholic schools or Baptist schools is all the same.
24 I think the statute that we're talking about, if we're talking
25 about the federal statute, is so broad that no matter what the

1 organizational structure of the church, it's covered under
2 this exemption. I don't think there's anything peculiar about
3 the Wisconsin Synod.

4 QUESTION: Are these schools restricted to Lutheran
5 children, or can other children attend?

6 MR. SCHILLING: They're not restricted. Primarily
7 attendance is for those who are Lutheran. I think they would
8 take --

9 QUESTION: That's not true in the Catholic parochial
10 schools, is it?

11 MR. SCHILLING: I can't speak for the Catholic
12 parochial schools.

13 QUESTION: Well, you just a minute ago, you did
14 say they were similar, though.

15 MR. SCHILLING: Well, I think they're pretty simi-
16 lar, insofar as their -- similar insofar as their inculcating
17 of religious doctrine.

18 QUESTION: And I gather from what you've just said,
19 or said a few moments ago, that you don't think that the
20 question of whether the church is a separate corporation is a
21 dispositive question?

22 MR. SCHILLING: I don't, Your Honor.

23 QUESTION: In this case they are not.

24 MR. SCHILLING: I don't think the fact --

25 QUESTION: I say, in this case they are not, and

1 you rather emphasized that in your statement of the facts.

2 MR. SCHILLING: We emphasized the fact that they
3 are not, because in our case, of course, we have that fact.
4 But I think, if you read Congress's statement, which also
5 appears in the conferee statement when they recodified the
6 Code, they used the term, that whether they're carrying out
7 the function of the church, where there are separate corpo-
8 rations "or otherwise." So I think under this broad defini-
9 tion of church, convention, or association of churches, they
10 were all-inclusive, no matter what the organizational struc-
11 ture of a particular religious body is.

12 QUESTION: So even though something were incorpo-
13 rated separately as a school, albeit a parochial school,
14 that would not be a dispositive question in your submission?

15 MR. SCHILLING: I don't think that would be a dis-
16 positive question.

17 QUESTION: Why are the institutions of higher
18 learning that are religious covered?

19 MR. SCHILLING: Why are they covered? I think
20 there's a difference between elementary schools and secondary
21 schools.

22 QUESTION: Well, how about for purposes of the
23 statute? Why wouldn't an institution of higher learning that
24 is controlled by a church, why wouldn't it fall within sub-
25 section (a) or (b)?

1 MR. SCHILLING: I think their freedom's --

2 QUESTION: Because it's being, it's still part of
3 the church?

4 MR. SCHILLING: But I don't think their purpose in
5 college is primarily religious, that is for most church
6 colleges. Some, that may be true, but I think for most church
7 colleges --

8 QUESTION: Well, none of them -- I mean, all of
9 them are covered.

10 MR. SCHILLING: They're included.

11 QUESTION: All of them are included.

12 MR. SCHILLING: They're not exempt.

13 QUESTION: That's right. None of them are exempt.
14 And nobody goes through this routine of seeing whether they
15 are performing a church function or not.

16 MR. SCHILLING: Insofar as colleges, that's correct.

17 QUESTION: How long has that been true?

18 MR. SCHILLING: I think, since 1970.

19 QUESTION: Were they not covered before?

20 MR. SCHILLING: They were not covered before.

21 QUESTION: Because why?

22 MR. SCHILLING: Because they were a nonprofit
23 corporation. Nonprofit corporations were not included within
24 the provisions.

25 QUESTION: And that was repealed?

1 MR. SCHILLING: Then that was repealed in 1970.
2 At which time they created this subsection (3).

3 QUESTION: How did you know that colleges were
4 exempt under that section rather than under the church sec-
5 tion?

6 MR. SCHILLING: They were never exempt. Because
7 Congress did not provide an exemption for them unless they
8 could come in under (1); they could come in as primarily
9 religious. I think Congress, when it spoke -- when Congress
10 came out in the '69-'70, when they brought these various non-
11 profit organizations in, specifically said in its reports
12 that a separately incorporated organization like an orphanage
13 or a home for the aged would not be covered. And it specifi-
14 cally said that, in these reports, that institutions of higher
15 education were meant to be covered unless they were seminaries
16 or novitiates or something like that.

17 QUESTION: Would your argument be different if the
18 exemption that was repealed had exempted the employees of
19 church-related and other private schools?

20 MR. SCHILLING: I think our exemption would still
21 come back under 3309(b)(1), either -(a) or -(b).

22 QUESTION: Even though Congress had thought that it
23 was repealing the exemption for those people?

24 MR. SCHILLING: Yes, Mr. Justice.

25 QUESTION: Well, it seems to me that under the

1 plain language of (1)(a) at least, to be exempt, the employ-
2 ment has to be of the church, or convention, or association of
3 churches, not of a separate corporation.

4 MR. SCHILLING: Under subsection (a)?

5 QUESTION: Right. Now, (b) is something else again.

6 MR. SCHILLING: Except for Congress's definition?

7 QUESTION: Well, I'm talking about the statutory
8 definition: "in the employ of (a) a church or convention or
9 association of churches." This is not a school.

10 MR. SCHILLING: But they're in the employ of a church.

11 QUESTION: Of a church, and your clients are, you
12 tell us.

13 MR. SCHILLING: That's right.

14 QUESTION: But it would be dispositive of whether
15 or not there were a separate corporation, wouldn't it?
16 And if the employment were by a school, then (1)(a) wouldn't
17 cover it.

18 MR. SCHILLING: It might then come under (1)(b).

19 QUESTION: It might or might not come under (1)(b).

20 MR. SCHILLING: That's right, Mr. Justice.

21 QUESTION: So the corporate organization is disposi-
22 tive, at least with respect to (1)(a). Isn't it?

23 MR. SCHILLING: I don't think so, because when
24 Congress defined the words "church, convention, or association
25 of churches," it used that language, "separate corporation

1 or otherwise" in its definition.

2 QUESTION: Well, I'm looking at the statute, which
3 is what Congress enacted. And the exemption is for somebody
4 in the employ of a church or a convention or association of
5 churches.

6 MR. SCHILLING: If you'd look strictly at the stat-
7 ute, then it would appear that separate incorporated schools
8 would not come under the subsection (a). They would have to
9 find their way into subsection (b).

10 QUESTION: And that's what you stand on?

11 QUESTION: He stands on both --

12 MR. SCHILLING: I stand on both.

13 QUESTION: But you're standing on (b)?

14 MR. SCHILLING: We're standing primarily on (a).

15 QUESTION: But you are --

16 MR. SCHILLING: And (b).

17 QUESTION: Standing on (b). That's my -- ?

18 MR. SCHILLING: Yes, sir.

19 QUESTION: If you can't come under (a), then you'll
20 take (b)?

21 MR. SCHILLING: Then we'll take (b).

22 QUESTION: Mr. Schilling, insofar as you rely on (b),
23 and of course I understand you disagree with the referee's charac-
24 terization as to "operated primarily for educational purposes,"
25 but would it not be necessary in every case involving a

1 church-affiliated school, for the taxing authorities to make
2 it an ad hoc decision as to whether that particular school was
3 primarily for religious purposes or primarily for educational
4 purposes, rather than having a general rule that would cover
5 all schools. I meant, all nonpublic schools; yes.

6 MR. SCHILLING: Aside from this constitutional
7 question, that might be the answer, Mr. Justice.

8 QUESTION: There might be a large number of individ-
9 ual determinations that would have to be made in order to
10 determine the scope of (1)(b).

11 MR. SCHILLING: That's quite possible, Mr. Justice.

12 QUESTION: Then you'd have to decide what "religion"
13 was, too.

14 MR. SCHILLING: That might be, but we might have
15 the establishment problem.

16 QUESTION: Well, your problems were certainly non-
17 existent before they repealed (3).

18 MR. SCHILLING: That's right; we had no problem.

19 QUESTION: It fell right under (3) and now you say,
20 you also fall under (1)(a) and (1)(b) if you can't get under
21 (1)(a)?

22 MR. SCHILLING: And (1)(b). Or we have a
23 constitutional problem.

24 QUESTION: Would you comment just on one thing
25 that's mentioned in the opinion below. It's the number of

1 employees that Congress thought it was subjecting to the
2 statute. They used a figure that your opponents argue demon-
3 strates they must have been intending to include the employees
4 of parochial schools generally.

5 MR. SCHILLING: Well, with respect to those numbers,
6 all I can say is, in a footnote in that report, there was a
7 bigger number of 261,000, instead of the 242,000. That re-
8 ferred to teachers, that 261,000. And if we would then bring
9 in our cafeteria workers and our bus drivers and our janitors
10 and the other school people, that number would grow. So I
11 have trouble relating this 242,000 figure. The only thing
12 I have to go on is what happened in the Alabama v. Marshall
13 conformity hearing where the Administrative Law Judge rejected
14 reliance on it based on testimony that had taken place in
15 that matter, that there was no record that Congress understood
16 that figure and there was no supporting data with the figure,
17 and then of course he refused to go along with it because
18 the issues involved -- what he said -- were integral church
19 functions.

20 QUESTIONS: Were there any hearings on this exemp-
21 tion? When it was repealed, when it was revoked?

22 MR. SCHILLING: Yes, but the primary hearings were,
23 all involved the public or the state and local employees.

24 QUESTION: But there's nothing in the hearings,
25 no data in the hearings as to what kind of employees, how
many employees were being affected?

1 MR. SCHILLING: Mr. Justice, never in the Congres-
2 sional Record or debates does the word "church" or "church
3 employees" appear.

4 QUESTION: Where did those figures come from, those
5 242 and 261?

6 QUESTION: The figure was 242,000 employees of pri-
7 vate schools. That's what the figure is.

8 MR. SCHILLING: That's correct, Mr. Justice.

9 QUESTION: Well, where did that come from? Is there
10 any evidence in the hearings as to where it came from?

11 MR. SCHILLING: I don't know. I think there was
12 examination of people in that Alabama -- I'm not familiar
13 with the Alabama case.

14 QUESTION: I know, but in the congressional hearings?

15 MR. SCHILLING: No. There was no discussion on
16 that figure.

17 QUESTION: Nothing in the hearings, nothing in the
18 testimony taken, none of the correspondence?

19 MR. SCHILLING: None that I found, Mr. Justice.
20 I would like to reserve some time.

21 MR. CHIEF JUSTICE BURGER: I'm afraid your time has
22 expired. Mr. Snyder.

23 ORAL ARGUMENT OF ALLEN R. SNYDER, ESQ.,

24 ON BEHALF OF ALABAMA AND NEVADA AS AMICI CURIAE

25 MR. SNYDER: Mr. Chief Justice; may it please the
Court:

1 Amici curiae, the States of Alabama and Nevada,
2 submit that in order to resolve this case the Court need look
3 no further than the plain language of 26 U.S.C. Section
4 3309(b)(1), Subsection (a).

5 The uncontradicted facts before this Court demon-
6 strate that employees of church schools such as petitioners
7 are "in the employ of a church, or convention, or association
8 of churches," and thus fit squarely within the statutory
9 exemption provided by Congress.

10 The question that was raised earlier concerning the
11 basis for federal jurisdiction, or this Court's jurisdiction
12 over the statutory interpretation here, I think is answered
13 by two factors. Number one, a review of the South Dakota
14 Supreme Court decision makes it clear they are relying solely
15 on their understanding of congressional intent and the meaning
16 of the federal statute. They state at page A-5 of the
17 petitioner's appendix, in the opinion there, "the threshold
18 issue is congressional intent." And I think the language of
19 that opinion is clear, that they are relying on their under-
20 standing of the Secretary of Labor's interpretation and of the
21 interpretation of the federal statute.

22 Under those circumstances, there are a number of
23 cases from this Court that stand for the proposition that
24 an erroneous understanding of federal law which is introduced
25 into a state court decision is properly the subject of federal

1 review even though the state court could choose voluntarily
2 to read its own statute differently; where it states that it
3 is relying on its understanding of federal law, this Court
4 can correct such a misapprehension.

5 I think one of the best cases for that proposition
6 is Standard Oil Company v. Johnson, which is cited at
7 316 US 481. At page 483 the Court makes it quite clear
8 that it will review an interpretation of the California high-
9 way tax, because the California Court interpreted that tax
10 by reference to its understanding of federal law concerning
11 the definition of an agency or a part of the United States
12 Government.

13 We think, equally here, the State Supreme Court
14 has interpreted the federal law, and it has interpreted it
15 incorrectly. In considering whether church school employees
16 are employed by a church as required for the (b)(1)(a)
17 exemption, it is important to bear in mind that the statute
18 and the implementing regulations expressly define the
19 words "employer" and "employee," and they define them so as
20 to incorporate into the unemployment compensation law the
21 common law rules for determining whether an employer-employee
22 relationship exists. They set forth such factors as the
23 right to control and direct the individual's work, the fur-
24 nishing of the place or tools of the work, and the right to
25 discharge the individual.

1 In this case, as counsel for petitioners has already
2 indicated, the church schools involved are run directly by
3 the church or the Synod. They have no separate corporate or
4 legal existence, and therefore these schools are typical of
5 the great variety of schools that are described in the stipu-
6 lated record which is before this Court in Marshall v. Alabama
7 and Nevada, No. 8922.

8 While those stipulations by the Secretary of Labor
9 are not binding on the parties here, we believe they are help-
10 ful in understanding the position of the Department of Labor,
11 which position was then adopted by the South Dakota Supreme
12 Court in the decision that's under review. The Secretary has
13 stipulated as a matter of fact that in our states all of the
14 Catholic, Lutheran, and fundamental Baptist church schools
15 have no legal existence separate from their respective churches.
16 In those schools church officials such as the pastor or the
17 priest hire and fire all the employees of the school. Church
18 officials discipline and control the work of the employees.
19 The church owns the building in which the school operates.
20 The employees' salaries are paid directly from the church
21 bank account. Therefore we believe it is uncontradicted that
22 every key element of the common law definition of employment
23 as incorporated into this statutory scheme is present here.

24 Nevertheless, the Secretary of Labor and the South
25 Dakota Supreme Court suggest that the word "church" should be

1 confined to mean the physical house of worship rather than
2 the legal entity that owns the building and hires the
3 employees. As is set forth at some length in the briefs in
4 this case, Congress has consistently provided for a broader
5 definition of "church" in the Internal Revenue Code.

6 QUESTION: Well, you normally, though -- you
7 wouldn't suggest that normally, when you use the word "church"
8 you think about a church school at the same time?

9 MR. SNYDER: No, sir, I think you'd normally --

10 QUESTION: In ordinary language you'd talk about
11 those things as different entities.

12 MR. SNYDER: Mr. Justice White, I think normally --

13 QUESTION: And, legally, you're quite right. But
14 most people would say, where are you going today? You'd
15 usually say, I'm going to school, not to church.

16 MR. SNYDER: Mr. Justice White, I think it does
17 depend --

18 QUESTION: Ask anybody where he works, he says, I
19 work at the Baptist school. He doesn't say I work for a
20 church.

21 MR. SNYDER: I think it is correct, Mr. Justice
22 White, that it depends somewhat on the context in which you're
23 speaking. If someone says on Sunday, I'm going to church,
24 they may perhaps be talking about the building or they may
25 be talking about the worship service. But Congress used the

1 word "in the employ of the church." And we submit that a
2 church building cannot employ anyone, that in the context of
3 who is the employer, when Congress is setting out a statute
4 about the payment of wages, about the withholding of taxes,
5 that the phrase, "in the employ of the church" in that con-
6 text, we submit, had to refer to the definition as petitioners'
7 counsel has stated. That is also a common definition of
8 "church," which is the body of believers, the legal entity.

9 QUESTION: Of course, in this case, the employees
10 in question were in the employ of a church, in one case, or
11 an association of churches in the other, were they not?

12 MR. SNYDER: Yes, Mr. Justice Stewart, that's cor-
13 rect.

14 QUESTION: However defined.

15 MR. SNYDER: Well, the Secretary defines the word to
16 mean the building. And I don't know how you can define the
17 statute with that definition.

18 QUESTION: Well, you could be employed by a church
19 and work in some other building, I suppose.

20 MR. SNYDER: Well, perhaps that's their point.

21 QUESTION: Or you could work in a church building
22 and be employed by somebody else.

23 MR. SNYDER: We submit that in this context the
24 word "church" must include the legal entity that controls the
25 building and that hires and fires the employees.

1 QUESTION: If the building is relevant at all to
2 the legal issues in this case, is it not a fact that in many
3 cases churches and parochial schools are all one structure,
4 a city block, one part of it assigned for worship services,
5 and one part assigned for teaching? But all in the same
6 building.

7 MR. SNYDER: That is exactly --

8 QUESTION: The building isn't really very important
9 to the legal issue, is it?

10 MR. SNYDER: I don't believe it is. I think even
11 under the Secretary's interpretation many of these schools
12 since they are in the same building perhaps would be exempt.
13 But we submit that reliance upon what building the school is
14 in is not what Congress had in mind, and we think that were
15 Congress to find "employer" in this statute as a person who
16 pays wages, then in the same statute, when they use the phrase,
17 "in the employ of a church," we submit they must have meant
18 "church" to mean the legal entity that pays wages, the asso-
19 ciation, the corporation. Petitioners in this case are the
20 employing entities within the meaning of that legislative
21 language.

22 We urge this Court to reject the strained and con-
23 torted reading of the statutory language --

24 QUESTION: Would this also apply to a church hos-
25 pital?

1 MR. SHYDER: Mr. Justice Marshall, I believe that
2 all church hospitals are separately incorporated. And under
3 our reading of the statute --

4 QUESTION: Well, if there possibly would be one
5 that wasn't incorporated?

6 MR. SNYDER: If, Mr. Justice Marshall, if the hospi-
7 tal were part of the church itself, were not separately in-
8 corporated --

9 QUESTION: I'm not talking about the church, I'm
10 talking about St. Isaac's Hospital that's three blocks away
11 from the church but it's owned by the church.

12 MR. SNYDER: If it is part of the church, not a
13 separate corporation, then the literal language --

14 QUESTION: I didn't say -- you charged on; I told
15 you the facts. Is it a part or not a part?

16 MR. SNYDER: What I mean to suggest, Mr. Justice,
17 is that if the employees of that hospital are employed by the
18 church entity, as in this case, their salaries paid --

19 QUESTION: They are paid by the --

20 MR. SNYDER: -- from the church account.

21 QUESTION: They are paid by the hospital but the
22 money comes from the church?

23 MR. SNYDER: If the hospital has a separate legal
24 identity, in other words, a separate bank account, a separate
25 association, corporation, or structure, then we think that it

1 would not fit within the language of (b)(1)(a).

2 QUESTION: And if the school does, likewise?

3 MR. SNYDER: Yes, Mr. Justice Stewart. We think
4 that a separately incorporated school would in most instances
5 be exempt under (b)(1)(b), but would not fit (b)(1)(a) lan-
6 guage, as petitioners do here.

7 QUESTION: May I ask just one question? With re-
8 gard to the legislative history, in the House report that the
9 Government quotes on page 10 in their brief, it's stated that
10 Section 115(b) also has the effect of requiring the state to
11 pay unemployment compensation on the basis of services per-
12 formed, for all educational institutions. Do you think they
13 really didn't mean that? 86 percent, as I understand it, of
14 the schools involved are church-affiliated.

15 MR. SNYDER: That's only true, Mr. Justice Stevens,
16 if you focus on private schools. And in fact, that language
17 which you just quoted was directly in the context of a lengthy
18 discussion of state and public schools, which was the primary
19 purpose of this statute. There was no reference in that whole
20 discussion from which the quotation is taken about private
21 schools at all, much less church schools. In fact, the
22 words "church school," "religious school," "parochial school,"
23 are nowhere in the statute and the 242,000 figure that was
24 referred to earlier is simply a figure in a table, in a
25 report, opposite the phrase, "nonprofit organizations."

1 There is no discussion of that figure as to what is
2 included within that number, what type of nonprofit organiza-
3 tions, and the record in the Alabama-Nevada case --

4 QUESTION: Is it not true that normally when one,
5 just as you say, when you work for a school or a church, the
6 same sort of question, when you talk about private schools,
7 private secondary schools, for the most part you are encom-
8 passing within that concept a very large number of parochial
9 schools, aren't you? Do you think that when one just talks
10 about private schools, he intends to refer to nonreligious
11 private schools? Just in terms of ordinary meaning, as used
12 in everyday parlance?

13 MR. SNYDER: I agree, the great majority of nonpro-
14 fit private schools are parochial schools but the phrase,
15 nonprofit schools, was not in the language that you quoted,
16 Mr. Justice Stevens. It simply said, "all educational insti-
17 tutions." The public schools, of course, are the vast pre-
18 ponderance of those, and were being discussed in that section
19 of the legislative history. Thank you very much.

20 MR. CHIEF JUSTICE BURGER: Very well.

21 Mr. Meierhenry.

22 ORAL ARGUMENT OF MARK V. MEIERHENRY, ESQ.,

23 ON BEHALF OF THE RESPONDENT

24 MR. MEIERHENRY: Mr. Chief Justice, and may it
25 please the Court:

1 This morning in Watertown, South Dakota, where
2 St. Martin's Lutheran Academy is located -- I think it's impor-
3 tant to note, because the State believes the second part of
4 petitioners' claims are most appropriate, whether or not it
5 violates the First Amendment -- this morning when the children
6 went to school they all went on public school transportation.
7 Some of those children went to a public school, some of them
8 got off at St. Martin's Academy. And throughout the day these
9 children who went on different tracks were constantly involved
10 in numerous entanglements, if you would. They both ate food
11 prepared by private citizens, but the food probably came
12 under Government programs. Both children in both schools
13 could have had speech and hearing diagnostic services provid-
14 ed for them, which is approved, they most probably used
15 library books furnished by either state or federal funds at
16 St. Martin's Academy --

17 QUESTION: Well, I take it your point is that if
18 they share some of these things, this dilutes the church or
19 religious aspect. Is that it?

20 MR. MEIERHENRY: No, not so much that as to the
21 point made by my colleague that there will be entanglement,
22 should this one small portion of the operation of these paro-
23 chial schools be subject to some taxation. In other words,
24 some extraction, of coming under the unemployment compensation
25 laws, whether that will so entangle the state with the

1 operation of these parochial schools as to violate the First
2 Amendment.

3 My example mainly goes to point out, if it will, to
4 the Court, that this is really not an issue, because this en-
5 tanglement, by the acceptance of these benefits by church
6 schools, has eliminated that. And here in this instance
7 -- and I argue on behalf of the State for what you will call
8 the people employed by the schools, in other words, the cooks
9 and the janitors. We recognized by our referee below and in
10 our Supreme Court, that those teachers who are on call, who
11 are part of a religious order or part of their particular
12 religious following, that they are exempted under Section (b)
13 of the exemptions. So, if they are ministers, they are not
14 covered by unemployment insurance, and we don't make the
15 claim that they are.

16 What we're worried about, and Congress was worried
17 about it from the beginning of the unemployment law, what
18 about the janitor who is laid off? What about --

19 QUESTION: What about the teachers? Are they
20 covered?

21 MR. MEIERHENRY: Well, I think that some would be
22 and some would not be, depending on a factual determination.
23 As brought before this Court, those members of the Wisconsin
24 Evangelical Lutheran Church who were called -- in other words,
25 their contractual relationship with the school is such that

1 they are considered ministers of the Church, teaching --

2 QUESTION: In any event, all of them are in the
3 employ, either of St. Martin Evangelical Lutheran Church, on
4 the one hand, in the one case, or by the Synod in the other
5 case. Isn't that correct?

6 MR. MEIERHENRY: That's correct, Your Honor.

7 QUESTION: Whether they're cafeteria employees or
8 janitors or lay teachers or whatever?

9 MR. MEIERHENRY: That's correct. I think, though,
10 that if you look at the exemptions and how they occurred,
11 from '70 to 1976 to the present, there would have been abso-
12 lutely no need for the exemption of ministers and those people
13 who belong to a religious order, for the first exemption.
14 You would have no need for that for pastors and members of
15 the order. And the third exemption prior to the change,
16 which we're arguing about, had to do with schools. And every-
17 where in their briefs it is always, "church schools."

18 QUESTION: It's always what?

19 MR. MEIERHENRY: It's always "church school."
20 There's always an adjective. We're talking about private
21 schools, church schools, and public schools. But we're always
22 talking about schools, and that's what the referee, operating
23 on behalf of the State of South Dakota, found, is it was a
24 school and not a church, and not subject to the first exemp-
25 tion. Because if that's carried to a logical end, a religious

1 order or a religious society could declare most anything to
2 be in the furtherance of their religion.

3 QUESTION: General, that's the point I want. In de-
4 claring these teachers as ministers, does the State consider
5 that they're ministers for income tax purposes?

6 MR. MEIERHENRY: Well, we don't have an income tax
7 in our state, but I would say this, that --

8 QUESTION: Are they considered that for federal
9 income taxes?

10 MR. MEIERHENRY: No. The second part of the
11 exemption we recognize. It says, "ministers." And we have in
12 this case given to them this exemption as to ministers. But
13 you don't have to be a minister --

14 QUESTION: If that applied, of course that'd apply
15 to this too.

16 MR. MEIERHENRY: That's right. But you don't have
17 to be a minister to be a cook, or a minister to be a janitor.
18 And that's what the unemployment law is talking about. Be-
19 cause if they closed down the school, those people who are in
20 the teaching ministry are called to another place. They're
21 not unemployed.

22 QUESTION: But you would concede, I gather, that a
23 cook in a church, which everybody agreed was a church,
24 a church building, would be exempt under (1)(a), wouldn't it?

25 MR. MEIERHENRY: No, I did not agree under (1)(a).

1 What I said was, I think that the State can make the determi-
2 nation regardless of what the legal or the paper trail of
3 the legal entity is.

4 QUESTION: Well, then, you do not concede that when
5 the statute exempts people in the employ of a church, that it
6 exempts janitors in the employ of the church?

7 MR. MEIERHENRY: I did, sir, but the State can make
8 the determination of what is a church purpose, and in this
9 case --

10 QUESTION: In my hypothetical case, he sweeps up
11 the church building.

12 MR. MEIERHENRY: Well, I guess it's a matter of
13 interpretation of the statute.

14 QUESTION: And he's employed by the church, and
15 only by the church. And he knows it and there's no argument
16 otherwise.

17 QUESTION: Let's take a concrete example. The
18 Cardinal of the Archdiocese of Washington has a residence
19 and a cook and a housekeeper. Under (a) is that person
20 exempt, in your view?

21 MR. MEIERHENRY: Yes. I would think that we would
22 not argue that those individuals --

23 MR. CHIEF JUSTICE BURGER: We'll resume there
24 at 1 o'clock.

25 (Recess)

1 MR. CHIEF JUSTICE BURGER: You may continue,
2 Mr. Attorney General.

3 MR. MEIERHENRY: Thank you, Mr. Chief Justice.

4 In response to a question of the Chief Justice, when we broke
5 for lunch, we would point out, and would like the Court to be
6 aware, that these petitioners, and in fact all of the
7 Lutheran schools in the State of South Dakota have submitted
8 themselves to the State and are accredited schools. But I
9 want to point that we're perhaps a unique state. We require
10 education in South Dakota. We do not require attendance at
11 schools. Therefore, you could educate your children in your
12 own home and you have to be tested to show that you're making
13 academic progress. But you are not required by compulsory
14 school attendance to attend a school in South Dakota.

15 However, these petitioners, in both instances,
16 have submitted, and I've lodged with the Court the documents,
17 a copious filing, making them an accredited school in the
18 State of South Dakota. And that is the only time in our
19 legal jargon that you can be called a school is if you are
20 accredited. You are either a school and accredited under the
21 State auspices, or you're not. But you don't have to be a
22 school and you comply with our law of educating your children
23 either by doing it in your home or with a group of others.

24 QUESTION: How do you suggest that differs from
25 the states which require attendance, so far as the issues

1 here are concerned?

2 MR. MEIERHENRY: Well, I think it goes to the defi-
3 nition and the exemptions, and I think that we recognize, as
4 the Court does, that this does have to be applied across the
5 land. And when one is in the employ, as an exception, of
6 a church or convention or association of churches, I think
7 our Supreme Court narrowly interprets that in answer to the
8 Chief Justice's question. That would probably refer to the
9 cook for the bishop in those things that are obviously only
10 religious. There is not an educational purpose in being a
11 cook for the bishop. What there goes on which is probably
12 closer in (b) of 3309, it says: "Or organization which is
13 operated primarily for religious purposes and which is
14 operated, supervised, controlled, or principally supported
15 by a church or convention or association of churches."

16 That's close, but we have to remember, when all of
17 these exemptions were entered, number (3) was, in the employ
18 of a school; which has now been eliminated. And so, in
19 answer to the Chief Justice's question, these people in our
20 opinion, as the documents we lodged show, which were lodged
21 for accreditation purposes, they were filed by the principal
22 of the school, and they were done in the name of the school.

23 QUESTION: Might they not have been both a school
24 and also an organization which is operated primarily for
25 religious purposes before (3) was repealed?

1 MR. MEIERHENRY: They might have been. But in
2 South Dakota they could not have been a school without meet-
3 ing accreditation purposes; in other words, making certain
4 statements and complying with certain academic standards, and
5 employing certain types of teachers, and open a certain num-
6 ber of days, which would reduce that being operated primarily
7 for religious purposes. They were operated primarily as an
8 educational institution.

9 QUESTION: All you're saying is that by qualifying
10 as a school they would have come under (3) if it were still in
11 existence. But that doesn't really go to the (1)(b) question,
12 does it?

13 MR. MEIERHENRY: Well, I believe it does, because
14 what our appeals referee decided and our Supreme Court de-
15 cided is that this school, St. Martin's Academy, which is
16 still going on, was not primarily for religious purposes but
17 was primarily for educational purposes, and to be taught with
18 religious overtones, you might say, or in the way that they
19 wish to do it. But it was primarily for education.

20 QUESTION: But narrowly, narrowly, the church's em-
21 barking in this enterprise is for strictly religious purposes,
22 is it not?

23 MR. MEIERHENRY: It could be, but there is a desire
24 wherein I believe --

25 QUESTION: They don't want the public school system,

1 or some of the people don't? They don't want the public
2 school system, they want their system with its heavy emphasis
3 on training in faith and morals?

4 MR. MEIERHENRY: That's correct, Mr. Chief Justice.
5 But then we are told --

6 QUESTION: Mr. Attorney General, may I ask, I gather
7 that (a), obviously, is limited; (b) can't include a church,
8 because (a) is the exemption for a church. What is an organ-
9 ization operated primarily for religious purposes, et cetera,
10 if it's neither church nor parochial school?

11 MR. MEIERHENRY: I think it would be those in-
12 stances where it was an institution to train ministers and
13 only --

14 QUESTION: Seminaries, you mean?

15 MR. MEIERHENRY: Seminaries? It could be.

16 QUESTION: Why couldn't they say, seminaries?
17 Everyone knows what a seminary is.

18 MR. MEIERHENRY: Well, it's not for me to -- but I
19 think that it also goes to this extent, Mr. Justice, that
20 certain publishing duties, perhaps certain insurance duties,
21 that would only have something to do with perhaps the
22 churches themselves, not a true free marketplace-type company.
23 And I think here what they're saying is it's limiting it be-
24 cause they're not going to allow, or Congress is not going to
25 allow for the purposes of covering employees of a company

1 church-related organization; if they go into tuna fishing,
2 or lumbering, a lumber company or mining. So it's going to be
3 a test --

4 QUESTION: If they have a diocesan paper, for
5 example, and they have their own print shop, would the prin-
6 ters, do you think, fall under (b) as exempt under (b)?

7 MR. MEIERHENRY: I would think not because of the
8 Pilgrim Holiness case which applied the minimum wage require-
9 ments of the Fair Labor Act, because in that case, which
10 this Court denied cert.; it was a lower court case, but --

11 QUESTION: What if all they printed in that print
12 shop were Bibles?

13 MR. MEIERHENRY: I think it would be much closer
14 and it would stand the test, this Court having read --

15 QUESTION: Well, a diocesan paper is a purly reli-
16 gious paper, isn't it? Newspaper? At least it is in the
17 Roman Catholic church.

18 MR. MEIERHENRY: I'm sorry. I misunderstood the
19 terms. That could well be, then, if it were only to print a
20 paper for dissemination to the church.

21 QUESTION: My hypothetical was to remove from all
22 doubts the factual question about whether it was or was
23 not a religious document.

24 MR. MEIERHENRY: I think in that case that repre-
25 senting a state I would say, yes; if it was organized

1 primarily for religious purposes.

2 QUESTION: Well, would an elementary school operated
3 by the church ever be operated primarily for religious pur-
4 poses in your view?

5 MR. MEIERHENRY: I think not, especially in this
6 case where --

7 QUESTION: That's something, if the exemption is
8 available, the authorities would have to decide. They would
9 have to decide between schools that were operated primarily
10 for religious purposes and the ones that were not.

11 MR. MEIERHENRY: I think that that would be a duty
12 of whatever government to decide that.

13 QUESTION: General, how come is it impossible for
14 a school to be an "organization"? Why can't it be an organi-
15 zation?

16 MR. MEIERHENRY: Well, I think because at the time
17 it was passed in 1970, the paragraph (3) directly approached
18 schools. It says, "in the employ of a school which is not an
19 institution of higher education." And I think Congress at
20 that time definitely looked at schools, as some of the under-
21 lying congressional language reveals, that they were talking
22 about schools --

23 QUESTION: But is there any other "organization" of
24 a church that would have to comply?

25 MR. MEIERHENRY: Yes, I think there probably would

1 be a great number of them.

2 QUESTION: Like what?

3 MR. MEIERHENRY: Well, I can't speak and I don't
4 know but I would say that if a church were to have a fleet of
5 school buses that were organized as a corporation, only to
6 bring children to Bible classes or Sunday School classes, that
7 that organization could be organized for the purposes of
8 religion, and if the buses were not used in general commerce.

9 QUESTION: Well, then the school is the only one
10 that wouldn't be, is the only organization that wouldn't be
11 included.

12 MR. MEIERHENRY: I think there could be a great --

13 QUESTION: I'm in trouble with school not being an
14 organization. I think it could be an organization.

15 MR. MEIERHENRY: But I think, as you watch the
16 legislative history of 1970, they specifically approach
17 schools, and then in 1978 they specifically said that schools,
18 whether they're public, private, or parochial schools, would
19 not have an exemption. Because we have to remember that this
20 Act was passed for the benefit of employees, of people who
21 are hired by others, whether they're hired by schools, or
22 whatever, and that these were exemptions. And I think it was
23 in the intent of Congress, as they have consistently broadened
24 unemployment coverage, was to narrow the scope of exceptions.
25 And when they looked at the schools, they said, if we just

1 exempt private schools, and we just exempt public schools,
2 then are we not approaching the establishment of religion if
3 we just overlook those religious schools and just those
4 employees will be without protection. And I think that's a
5 logical argument as to why that each employee, whether he's
6 working in a private school that may be started by environ-
7 mentalists to promote an environmentalist cause, and still
8 teach, but the primary purpose is education. And so, when
9 these schools, in our states --

10 QUESTION: The primary purpose of a school is education.

11 MR. MEIERHENRY: And that's why we believe that --

12 QUESTION: But they say there's another one; it's
13 religion. If they wanted just education, they'd send them to
14 public schools.

15 MR. MEIERHENRY: Then there would have to be a deci-
16 sion made, as there was in this case, by the appeals referee,
17 that these two institutions were not primarily for educa-
18 tional purposes. Because these schools, these parochial
19 schools in our state --

20 QUESTION: We can't escape that. We're going to
21 have to decide that.

22 MR. MEIERHENRY: That's right, and I think great
23 weight has to be given to the appeals referee who did deter-
24 mine these issues.

25 QUESTION: Well, am I right in reading the statute

1 in this way, that exemption No. (1), both (a) and (b),
2 depends upon the identity of the employer, by contrast
3 with exemption No. (2), which depends entirely upon the
4 identity of the employee?

5 MR. MEIERHENRY: Yes.

6 QUESTION: And am I further correct in my under-
7 standing that in this case the employer is in the one case a
8 church and in the other an association of churches?

9 MR. MEIERHENRY: I guess that is in my mind one of
10 the issues. I say the employer is the school, it is the
11 school, for the following reason.

12 QUESTION: Well, the school itself is not an
13 entity, is it? It's not a corporation? Isn't the employer
14 who pays the wages the church, in the one case, and an asso-
15 ciation of churches, i.e., the synod, in the other?

16 MR. MEIERHENRY: But the fact remains --

17 QUESTION: Am I correct in that, factually?

18 MR. MEIERHENRY: I think factually that's correct.
19 The legal effect of that is what I would like to bring to
20 your attention, is the fact that also their description of a
21 church, their description of a church is again not an entity,
22 it's an organization of believers or followers, and what
23 we're talking about here is simply the trail of the dollar
24 that ultimately pays for this. It does pass through the
25 church.

1 QUESTION: But that isn't just their description
2 of the church. It's a tracking of (1)(b), isn't it, where it
3 says, an organization which is operated primarily for reli-
4 gious purposes?

5 MR. MEIERHENRY: Yes, I believe that if they fall
6 under any exception, it's not (a), it's (b), which is an
7 organization --

8 QUESTION: Don't they literally fall within (1)(a)?

9 MR. MEIERHENRY: I would say not.

10 QUESTION: Literally?

11 MR. MEIERHENRY: No, I would say, not. Because the
12 individual, as the records show here, the individual is paid
13 by the church, but they're employed by the school with their
14 separate board to oversee -- which is within the church, but
15 it's a separate board which hires a principal and eventually
16 runs the school, the entity.

17 QUESTION: Maybe we differ as to our understanding
18 of the word "employment" but it seems to me that your employer
19 is the person who pays your salary or wages.

20 MR. MEIERHENRY: Well, but I think there has to be
21 a discrimination--

22 QUESTION: Doesn't "wages" refer to the employer?

23 QUESTION: "In the employ of." So it's the identity
24 of the employer, isn't it?

25 QUESTION: "Services performed in the employ of."

QUESTION: "In the employ of." And the test in

1 (1) is the identify of the employer, by contrast with the
2 test in (2), which is the identity of the employee.

3 MR. MEIERHENRY: Well, again, this is an instance,
4 which is the only case before it, but our determination by
5 our Supreme Court was that this instance fell under (b) and
6 that it was not primarily for religious purposes.

7 QUESTION: So it doesn't fall under (b), because
8 it's not operated primarily for religious purposes.

9 MR. MEIERHENRY: That's right; there is no exemp-
10 tion. But they approached from that standpoint, that it was
11 not primarily for religious purposes, but also --

12 QUESTION: It seems to me that you can't read it
13 the way you're doing it now. And a church is certainly an
14 organization which is operated primarily for religious pur-
15 poses, is it not?

16 MR. MEIERHENRY: Yes.

17 QUESTION: And if you say they're in the employ of
18 a church, they also are in the employ of an organization which
19 is operated primarily for religious purposes.

20 MR. MEIERHENRY: I don't think that necessarily
21 follows. I don't think that we could deny a church the oppor-
22 tunity -- as a wild example -- to buy a professional baseball
23 team. I think they could do that, and I think they could set
24 up their accounting practices in such a way that the money
25 flowed from the church, but that's certainly not an

1 organization, although it's operated by a church and it's
2 supervised by a church and owned, but it's not primarily for
3 religious purposes.

4 QUESTION: But that would be the employer, in your
5 hypothetical case. And isn't that the statutory test? The
6 identity of the employer, whatever the nature of the employee's
7 duties, under (1)?

8 MR. MEIERHENRY: Well, I'm not here arguing the
9 intent of the Congress.

10 QUESTION: Except that (1) does not refer to the
11 employer, it refers to the nature of the services.

12 MR. MEIERHENRY: Pardon me, sir?

13 QUESTION: (1) doesn't refer to the employer. It
14 refers to the nature of the services.

15 QUESTION: Well, any services that include services
16 performed in the employ of.

17 MR. MEIERHENRY: In interpreting the language of
18 Congress when they set out the three exemptions, I think it
19 was clear that they separated. It's for this Court obviously
20 to decide what Congress intended and what Congress wanted.
21 But I'm not going to concede that they are employed by the
22 church. They're employed by the school, for the simple rea-
23 son -- and this Court on many occasions has pierced
24 corporate veils.

25 QUESTION: But you seem to place great emphasis,

1 Mr. Attorney General, on the fact that there is a committee,
2 a board, designated; but the minister of the church can't be
3 expected to run everything. Can't he appropriately delegate
4 the detailed management of the school to the subcommittee of
5 the church? Isn't that what he does here? They're certainly
6 bound to be church members, aren't they?

7 MR. MEIERHENRY: I would think so; yes.

8 QUESTION: Just as you'd have a committee of the
9 church on visitation of parishioners and a whole lot of
10 other things. So there's no corporate veil to pierce here,
11 is there, really?

12 MR. MEIERHENRY: Well, I think there is, because
13 this is an organization which Congress recognized, that there
14 were going to be organizations, spinoffs from churches, of
15 other duties. And so I think that's why it comes under (b);
16 and then the test, is it primarily, primarily for educational
17 purposes? And we would submit that it isn't.

18 The one final issue, should the Court --

19 QUESTION: If, as I understood you to agree with
20 me, the test under (1) is the identity of the employer, then
21 the employer is the church, which is operated primarily for
22 religious purposes, isn't it, and as in any church --

23 MR. MEIERHENRY: No, I did -- the employer is the
24 school, which is a subsidiary, if you will, of the church,
25 perhaps, but it is a separate entity, and it is intended,

1 as these schools, and they're being organized, two, three a
2 day, with the resultant work force, and they're operated for
3 different reasons, never once questioning the petitioners in
4 this case. But private schools with religious overtones are
5 being created two a day all over the country. And I suggest
6 that that's going to require a huge labor force. Our citizens
7 do not go to their parochial school and bring coal to start
8 the fire. They hire a janitor. They do not take turns
9 sweeping out the hallways. They hire a janitor.

10 QUESTION: No, but there's no one compels them to
11 work for one of these institutions?

12 MR. MEIERHENRY: No, but the intent of Congress is
13 for one reason, under the unemployment law, those people who
14 are thrown out of work -- and we're talking about a very few
15 people here, as I think we recognize -- those people who are
16 thrown out of work by the discontinuance of this operation
17 should be covered by unemployment.

18 I want to cover one thing and and submit the rest
19 of my time --

20 QUESTION: Let me just ask one more question, if I
21 may. You refer to the janitor. I think very frequently in
22 these establishments the same janitor will sweep out the
23 church and the school. Is he covered?

24 MR. MEIERHENRY: I think that the Secretary of
25 Labor has directed us -- and I might say, I'm like two

1 bookends here, because the State's in between having our
2 funds cut off by the Federal Government, and be attacked on
3 this side -- I would say that then it's a test, like so
4 many other employment tests, where are his duties lodged?
5 And in that regard, I want to talk about the monetary effect --
6 because it's very vast, and it's very important to our state,
7 which is, according to the Census Bureau, the poorest state
8 in the Union -- is the fact that money will flow back and
9 forth, no matter what this Court decides. And secondly --
10 and it's important to note -- these schools need not, in our
11 state, under our system, pay any tax dollars, none whatso-
12 ever. They can go under the reimbursible method, which is
13 allowed for these schools, and they are not required to pay
14 into the fund any dollars unless they lay someone off, and
15 then they must agree to reimburse the person that's laid off.

16 So one of the things that should be recognized by
17 this Court, although we have talked a lot of words and been
18 in a lot of courts, it may not ever result in anyone drawing
19 unemployment insurance in South Dakota. Because if they are
20 a minister, and they're on call, they'll move; they won't
21 submit to unemployment insurance. And if those other indi-
22 viduals truly work for the church, they'll still be working
23 for the church when the schools close. And so --

24 QUESTION: How about a teacher in a parochial school
25 who's fired for teaching doctrinally wrong religion?

1 MR. MEIERHENRY: I think first of all that that is
2 an issue that probably will not come up except in very limited
3 circumstances. But I would say this that that test is one
4 like every other employment test, and I think that a hearing
5 referee can very easily recognize that there is a different
6 standard of conduct for that teacher compared to a public
7 school teacher or a private school teacher.

8 I thank the Court for its time and indulgence.

9 MR. CHIEF JUSTICE BURGER: Very well, Mr. Attorney
10 General.

11 MR. MEIERHENRY: I submit my time, if I have any
12 left, to my colleague.

13 MR. CHIEF JUSTICE BURGER: Very well.
14 Mr. Sullivan.

15 ORAL ARGUMENT OF BARRY SULLIVAN, ESQ.,

16 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

17 MR. SULLIVAN: Mr. Chief Justice, and may it please
18 the Court:

19 Until the Attorney General of the State of South
20 Dakota arose and addressed the question of the coverage of the
21 statute that's involved here, I had not heard a word today
22 about the purposes for which the statute that is being con-
23 strued, the Federal Unemployment Tax Act, was enacted by
24 Congress. I would like to point out that this is a remedial
25 statute. And that's perhaps the beginning of any statutory

1 construction. But it's not simply a remedial statute --

2 QUESTION: Well, aren't most statutes remedial?
3 Aren't they intended to remedy something?

4 MR. SULLIVAN: I think that's right, Mr. Justice
5 Rehnquist, and that's always bothered me, about how you dis-
6 tinguish among remedial statutes.

7 QUESTION: And beneficent ones?

8 MR. SULLIVAN: Well, it seems to me that here, as
9 this Court has said in California Department of Human
10 Resources v. Java, we have a very special kind of remedial
11 statute. We have a statute that goes to the very subsistence
12 of individual citizens. This statute was informed by the
13 experience of the Great Depression and has played a vital role
14 in our society since that time.

15 It was understood by Congress that people in the
16 time of the Great Depression suffered unemployment, and the
17 result of this unemployment, after a protracted time, was that
18 they were forced to accept charity. This statute represents
19 a judgment of our society that people should not have to
20 accept charity, that they should be able to participate in an
21 insurance scheme whereby they can work and earn benefits for
22 the day when they may become unemployed.

23 QUESTION: Well, if we accept that broad a thing,
24 then there wouldn't be any exceptions at all.

25 MR. SULLIVAN: That's true, Mr. Chief Justice.

1 QUESTION: Even the ministers of churches will
2 sometimes become unemployed.

3 MR. SULLIVAN: And, in fact, 98 percent of the
4 work force is now covered by this statute as a result of the
5 amendments --

6 QUESTION: Well, what percentage is covered by
7 it is the issue in this case, isn't it?

8 MR. SULLIVAN: Well, I think that the number of
9 workers that are involved in --

10 QUESTION: Whether it's 98 or 97.

11 MR. SULLIVAN: That's right. I'm not sure that
12 it's between 97 or 98 or 98-99, which is why --

13 QUESTION: But the decision in this case will bear
14 on what percentage is covered by it.

15 MR. SULLIVAN: That's right. And the people who are
16 exempted are exempted for specific reasons. Ministers are
17 exempted because of the problems that may arise in the case
18 of ministers, also for the reason that ministers generally
19 aren't laid off but belong to a church who continue to employ
20 them and may not suffer the same --

21 QUESTION: Well, that's true about section (2),
22 that is, what is your -- what are you? Are you a minister of
23 a church? But the inquiry in number (1) is, who are you
24 employed by? Isn't it?

25 MR. SULLIVAN: That's right, Mr. Justice. And I'm

1 reaching and I will reach that.

2 QUESTION: Number (1) doesn't ask at all, what are
3 your duties? But who are you employed by? And Number (2),
4 on the other hand, asks exclusively, what do you do?

5 MR. SULLIVAN: Well, I think I might subscribe to
6 Mr. Justice Stevens' slight differentiation in the way he
7 has put that, because I have the sense that it would be
8 helpful to me, but I'm not quite sure I understand the dis-
9 tinction. However, I think in construing this particular
10 statute, something has been overlooked here.

11 QUESTION: If you'd read the laundry case of a few
12 days ago you'd find that it's a very dangerous thing on which
13 to rely.

14 MR. SULLIVAN: I think what needs to be pointed out
15 here is that this construction of "church," first of all, is
16 not as irrational as it sounds on its face when put in the
17 argument that a building can employ anybody. The construction
18 the Secretary has given to it is as a house of worship,
19 meaning the core religious establishment, and in that sense --

20 QUESTION: According to the Secretary, does a per-
21 son, in order to be exempt from the Unemployment Tax Act,
22 have to be not only employed by that house of worship but
23 carry out his duties in that house of worship, his employment
24 duties?

25 MR. SULLIVAN: Well, I would think that in most

1 cases --

2 QUESTION: No, in most cases that question perhaps
3 needn't be asked, but I'm asking it. Not for most cases, but
4 what's the Secretary's point of view?

5 MR. SULLIVAN: Well, I think that it would be,
6 that the person --

7 QUESTION: Well, he both has to be employed by --
8 that is his salary has to be paid by the house of worship,
9 and his employment duties have to be within the house of
10 worship, is that it?

11 MR. SULLIVAN: No, that's not it. Because that
12 would exclude, obviously --

13 QUESTION: It seems to me it would exclude people
14 who are literally covered by the statute.

15 MR. SULLIVAN: That's correct, and I would say
16 that the source, the analogy on which the Secretary is
17 relying here, is the similar problem that's been worked out
18 in the Fair Labor Standards Act cases, where we have, the
19 statutory language says, employed by an establishment.

20 QUESTION: Right.

21 MR. SULLIVAN: The establishment, in that case,
22 refers to a physical or geographical location from which a
23 person may go out to work in some other place, but where he
24 is based. And in that case, the establishment may be the
25 local office of General Motors and his employer may be

1 General Motors, but he is employed by the establishment for
2 the purposes of the Act, and employed by the church, we sub-
3 mit, has a similar meaning in this statute.

4 QUESTION: Don't get too carried away with this
5 building, please. Because I know of a church in Washington
6 that up to a few years ago met in Hogate's restaurant.
7 So don't get too hooked up on that building.

8 MR. SULLIVAN: Well, I would assume in that case,
9 Mr. Justice Marshall, that Hogate's Restaurant paid the
10 janitor, and that consequently we wouldn't have a problem
11 for purposes of this statute.

12 QUESTION: Except in our church we called him a
13 sexton, and you'd better not call him a janitor.

14 MR. SULLIVAN: The other point that I would make
15 about the Secretary's construction of the first exemption is
16 that this exemption is not something, that this construction
17 is not something that the Secretary has dreamed up out of
18 whole cloth as a result of these amendments. This is an
19 exemption, this exemption as construed, was construed by the
20 Secretary in 1970 at the time that nonprofit organizations
21 became subject to the Act and it's not a recent development.

22 Congress amended the Act in 1976 knowing that this
23 is the way the Secretary of Labor had construed the Act.

24 QUESTION: Does the Secretary take the position
25 that an employee of a seminary, religious seminary, is not

1 within (b), (1)(b)?

2 MR. SULLIVAN: The Secretary's position is that any
3 employee of a religious seminary would not be subject to
4 coverage of the Act.

5 QUESTION: Because of (1)(b)?

6 MR. SULLIVAN: That's correct. And that is, I
7 think, based in the legislative history of the 1970 amend-
8 ments. I would also point out that in 1974 Congress provided
9 in another statute for the coverage of the same people who
10 are being covered here, and consequently petitioners' argu-
11 ment asked the Court to believe not only that Congress was
12 unaware of what the Secretary's construction of the exemptions
13 had been, but also that Congress, without saying a word,
14 intended to withdraw coverage that it had already provided.
15 And it seems to me that's quite an assumption, given the
16 remedial purposes of the statute.

17 And third, petitioners' argument asks that the Court
18 believe that Congress was simply in error as to the number of
19 people who would be covered by this statute. I think it's
20 important to note that before lunch the statement was made
21 that in this chart that the Senate Finance Committee, I be-
22 lieve, staff prepared, that it simply said, "242,000
23 employees" against the category, "nonprofit organizations."
24 The fact of the matter is that that makes perfect sense be-
25 cause of all nonprofit organizations, and the various ways

1 that they could have their coverage changed. It was only
2 schools that were in issue at that time, and so that all of
3 those employees had to be school employees. And if that
4 figure did not cover parochial school employees, it would
5 naturally be much, much lower.

6 QUESTION: Did this staff committee presentation,
7 occur at a hearing considering the bill?

8 MR. SULLIVAN: I don't believe that there is any
9 testimony. It's part of the -- it's cited in our brief, and
10 it's a report of the Senate committee.

11 QUESTION: Is there any indication whether the
12 report was ever made known to the Congress before the law was
13 enacted?

14 MR. SULLIVAN: I'm not sure that I know the answer
15 to that, although I have no reason to assume that it wasn't made
16 available to Congress. It's not something that was published
17 after the fact.

18 I would finally like to point out that both Congress
19 and the Secretary have seen the need here for a bright line
20 test. I think the need has been pointed out adequately, that
21 a very subjective inquiry would be necessitated by reading
22 the (b) exemption of the statute as applicable to parochial
23 schools.

24 QUESTION: The (1)(a) and -(b) simply inquires,
25 who are you employed by? I thought you had agreed with that.

1 MR. SULLIVAN: I think that --

2 QUESTION: And I think it's self-explanatory.

3 MR. SULLIVAN: I think the problem is this. There's
4 been a lot of --

5 QUESTION: And that's a very bright line.

6 MR. SULLIVAN: I think there's been a lot of talk
7 about parochial schools as if they were marbles, and that
8 they were all alike. And the question was asked this morning,
9 are all church schools organized in the same way? And the
10 answer was, yes. Well, I defy anybody to produce evidence
11 for me that all denominations organize their church schools
12 in the same way. To make an organization's exemption depend
13 on whether the particular doctrines which the organization
14 espouses allow it to incorporate is ludicrous. And that's
15 one of the problems that Congress was concerned with, it's
16 one of the reasons that the Secretary has adopted the con-
17 struction that he has, to say that schools are schools, and
18 they're going to be subject to coverage of the Act.

19 QUESTION: But seminaries are schools, and yet
20 they were not subject to the coverage of the Act.

21 MR. SULLIVAN: And Sunday Schools are schools, and
22 they're not subject to the Act. And we would say that that
23 is the proper analogy.

24 QUESTION: You don't have any paid teachers in
25 Sunday Schools, do you?

1 MR. SULLIVAN: Again, I cannot speak authoritatively
2 to that. I wouldn't know the answer to that.

3 QUESTION: If you can't answer that I think I can
4 take judicial notice of the fact that generally speaking in
5 this country, in all faiths, Sunday School teachers are
6 volunteers.

7 MR. SULLIVAN: I would just close with one example
8 that follows up on something that the Chief Justice said this
9 morning. And that is, suppose that we have an archdiocesan,
10 a school owned by the Archbishop of Washington in the City
11 of Washington, and he decides that he will close all arch-
12 diocesan schools where the enrollment falls below 200 students
13 for three years running. The parents in this parish decide
14 that they want to maintain a parochial school for their
15 children and they go to the Archbishop and they say, if you
16 give us the building we will run the school. They incorporate,
17 they run the school, they continue to have the same teachers --

18 QUESTION: Then you're taking yourself out of this
19 statute, though, I suggest. And your time has expired now,
20 Mr. Sullivan.

21 QUESTION: Well, Mr. Sullivan -- except for one
22 thing. Suppose you lose this case, that the exemption is
23 not available, or that it is available. What do you -- do
24 you think there is any constitutional question?

25 MR. SULLIVAN: No, I don't think there's any

1 constitutional question. I think that the type of legisla-
2 tion that we have here is of the same order of requiring
3 schools to have fire alarm systems. I think that under the
4 guidelines, the dicta in Pierce v. Society of Sisters, this
5 is the kind of concern that the state can rightly have about
6 religious schools. Thank you.

7 MR. CHIEF JUSTICE BURGER: Do you have anything
8 further? No, I think your time has expired also. Thank you,
9 gentlemen. The case is submitted.

10 (Whereupon, at 1:37 o'clock p.m., the case in the
11 above-entitled matter was submitted.)

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North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 80-120

ST. MARTIN EVANGELICAL LUTHERAN CHURCH AND
AND NORTHWESTERN LUTHERAN ACADEMY

V.

SOUTH DAKOTA

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: Will J. Guba

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