

Supreme Court of the United States

CALIFORNIA ET AL.,

Appellants,

v.

No. 81-31

GRACE BRETHREN CHURCH ET AL.;

UNITED STATES ET AL.,

Appellants,

v.

No. 81-228

GRACE BRETHREN CHURCH ET AL.,; and

GRACE BRETHREN CHURCH ET AL.,

Appellants,

v.

No. 81-455

UNITED STATES, ET AL.

Washington, D. C.

Tuesday, March 30, 1982

Pages 1 - 58

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6 WILLIAM B. BALL, ESQ., Harrisburg, Pa.;

7 on behalf of Grace Brethren Church.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
MRS. HARRIET S. SHAPIRO, ESQ.,	
on behalf of the United States	4
JEFFREY M. VESELY, ESQ.,	
on behalf of the State of California	16
WILLIAM B. BALL, ESQ.,	
on behalf of Grace Brethren Church	31
MRS. HARRIET S. SHAPIRO, ESQ.,	
on behalf of the United States - rebuttal	55

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mrs. Shapiro, you may proceed whenever you're ready.

ORAL ARGUMENT OF HARRIET S. SHAPIRO, ESQ.
ON BEHALF OF THE UNITED STATES

MS. SHAPIRO: Mr. Chief Justice and may it please the Court:

This case is here by the United States and the State of California from a decision of the District Court for the Central District of California holding that the Federal Unemployment Tax Act and its state counterpart may not constitutionally protect the employees of certain religiously oriented schools.

Last term this Court decided in St. Martin Evangelical Lutheran Church versus South Dakota that 26 U.S.C. 3309(b) exempted the employees of schools operated by a church or organization of churches from coverage under the federal-state unemployment tax system. The district court decided this case before St. Martin was handed down.

Our case originally involved three kinds of schools. The district court identified them as: category one schools, those operated directly by a church or organization of churches -- and category one schools are the only kind that were involved in St.

1 Martin; category two schools are separately
2 incorporated, but controlled or operated by a church or
3 organization of churches, primarily for religious
4 purposes; category three schools are religiously
5 oriented schools that are independent of any specific
6 church or organization of churches.

7 The district court found that Section 3309(b)
8 and the counterpart state statute exempted category one
9 and category two schools, but not category three
10 schools. None of the parties here contest that ruling,
11 so there's no statutory issue before this Court.

12 QUESTION: Although the Missouri Synod
13 Lutherans are here, with a brief, anyway, aren't they?

14 MS. SHAPIRO: They filed a brief, yes.

15 The district court also held that the category
16 three schools have a First Amendment right to exemption
17 from the Act, because the state could not make benefit
18 determinations for employees of these statements without
19 becoming unconstitutionally entangled in matters of
20 religious doctrine.

21 The schools also make a free exercise claim in
22 their cross-appeal.

23 The First Amendment claims of the category
24 three schools, that is those not associated with any
25 church, are the only issues before this Court in this

1 case.

2 This Court's recent --

3 QUESTION: Was the free exercise claim
4 presented below?

5 MS. SHAPIRO: Yes, it was.

6 QUESTION: Not ruled on?

7 MS. SHAPIRO: Yes, it was ruled on and the
8 district court rejected it.

9 QUESTION: Rejected it?

10 MS. SHAPIRO: Yes.

11 QUESTION: Well, there is a cross-appeal on
12 that issue?

13 MS. SHAPIRO: There is a cross-appeal, yes.

14 This Court's recent decision in United States
15 v. Lee substantially answers the First Amendment claim.
16 Indeed, this case follows a fortiori from Lee, because
17 in Lee payment of the tax was itself a sin. There's no
18 such claim here.

19 QUESTION: Do we get to this issue until we
20 decide whether the Tax Injunction Act bars
21 jurisdiction?

22 MS. SHAPIRO: That's a jurisdictional
23 question.

24 QUESTION: Well, shouldn't we address that
25 before we get to the merits?

1 MS. SHAPIRO: Well, yes, there is that
2 question in the case, and we've certainly discussed it
3 in our brief, and also --

4 QUESTION: Well, aren't you going to discuss
5 it here?

6 MS. SHAPIRO: I hadn't planned to unless --

7 QUESTION: Well, let me ask you a question.

8 MS. SHAPIRO: Certainly.

9 QUESTION: As I understand your position, and
10 I guess that of the State as well, it is that the
11 declaratory judgment action was barred by the Tax
12 Injunction Act, and yet for some reason we can
13 nevertheless reach the merits of the religious clause
14 question. How do we do that? How do we get that jump?

15 MS. SHAPIRO: Well, the argument basically is
16 --

17 QUESTION: First of all, am I right that you
18 do say the Tax Injunction Act bars a declaratory
19 judgment action?

20 MS. SHAPIRO: Yes.

21 QUESTION: That is the Government's position?

22 MS. SHAPIRO: Yes, that's the Government's
23 position.

24 QUESTION: And yet we should reach the --

25 MS. SHAPIRO: That's right.

1 QUESTION: How?

2 MS. SHAPIRO: Our argument is that this
3 Court's -- this Court's jurisdiction does not depend on
4 the district court having had jurisdiction. We rely on
5 cases like McLucas and Weinberger versus Salfi, in which
6 this Court said, although there is questions, there may
7 be questions about the district court's jurisdiction,
8 they don't have to reach those questions because under
9 Section 1252 this Court has direct appeal jurisdiction
10 whenever a statute -- whenever there's a constitutional
11 question about a federal statute.

12 QUESTION: Even though the district court had
13 no jurisdiction?

14 MS. SHAPIRO: Even though the district court
15 had no jurisdiction.

16 QUESTION: Even if we have jurisdiction,
17 doesn't the Tax Injunction Act apply to us as well as to
18 the district court, and we would in effect be giving a
19 declaratory judgment, which is prohibited by that
20 statute?

21 MS. SHAPIRO: The Tax Injunction Act prohibits
22 the district court from enjoining or suspending or
23 restraining. So I don't believe that it applies to this
24 Court.

25 QUESTION: Do you think this Court could

1 freely exercise its equitable powers and grant
2 injunctions as if the Tax Injunction Act didn't exist,
3 on a review of a district court proceeding?

4 MS. SHAPIRO: Well, this is -- we're not
5 asking that you grant an injunction. All we're asking
6 is that under Section 1252 you remove the cloud that the
7 district court's opinion here has placed on the --

8 QUESTION: Yes, but Mrs. Shapiro, I gather the
9 district court certainly is barred from granting any
10 kind of relief, is it not, by the Tax Injunction Act?

11 MS. SHAPIRO: That's our --

12 QUESTION: Well then, how can we grant any?

13 MS. SHAPIRO: Well --

14 QUESTION: And we can't send it back to them
15 to grant it, because they have no jurisdiction to grant
16 it.

17 MS. SHAPIRO: Well, we're not -- we don't
18 think that you should grant an injunction. But in
19 *McLucas* --

20 QUESTION: Well, even a declaratory judgment,
21 since you do agree that the Tax Injunction Act bars a
22 declaratory judgment.

23 MS. SHAPIRO: By the district court.

24 QUESTION: Yes.

25 QUESTION: Well, we might have jurisdiction on

1 the appeal, that's right. But what is open on the
2 appeal? The first question that's open on the appeal is
3 whether the district court had jurisdiction, and if it
4 did -- and if it did, why, we get to the merits; if it
5 didn't, I don't know why you wouldn't just vacate the
6 district court's judgment.

7 MS. SHAPIRO: Well --

8 QUESTION: That'll get rid of what worries
9 you, anyway.

10 MS. SHAPIRO: Well, in one sense it will,
11 meaning that this, the opinion of the district court, is
12 not a precedent. On the other hand, this issue has been
13 raised and it's going to be here on review of the state
14 court decision, as in St. Martin's.

15 QUESTION: Well, but if the district court had
16 no jurisdiction then there isn't any injunction.

17 MS. SHAPIRO: Well, but the issue has been
18 raised and it's --

19 QUESTION: Well, that sounds to me -- really,
20 Mrs. Shapiro, so often we get lawyers standing where you
21 are who tell us, well, maybe there isn't any
22 jurisdiction, but we really want to have you decide it
23 anyway. And that sounds like the same kind of argument
24 to me, if I may say so.

25 MS. SHAPIRO: Well, except that in McLucas and

1 in Salfi, both cases which came here under Section 1252,
2 on a direct appeal because a statute of the United
3 States has been drawn in question as contrary to the
4 Constitution, this Court said that there was substantial
5 question about the jurisdiction of the district court.

6 QUESTION: On what basis was that?

7 MS. SHAPIRO: Well, in Salfi the question was
8 whether or not the district court had jurisdiction to
9 issue an injunction under Section 405(g). And the Court
10 said, regardless of that we have direct appeal
11 jurisdiction under 1252 and so we don't have to decide
12 that.

13 In McLucas the question was whether the
14 decision below was properly decided by a single court --
15 single judge instead of a three-judge court. And
16 similarly, the Court said, we don't have to decide
17 whether there was jurisdiction in the single-judge
18 district court --

19 QUESTION: Well, there certainly was
20 jurisdiction in one district court or the other there,
21 one kind of a district court or the other. There wasn't
22 any question. But here the question is whether district
23 courts in general have any authority to do what this
24 court did.

25 MS. SHAPIRO: But it was also -- well,

1 similarly in Weinberger versus Salfi, the question was
2 whether any district court had jurisdiction to issue an
3 injunction. And in McLucas it was whether that single
4 judge had jurisdiction to do what he had done.

5 QUESTION: What particularly do you want us to
6 do? What order do you want us to give?

7 MS. SHAPIRO: To vacate the decision below.

8 QUESTION: And you don't reach the merits?

9 QUESTION: To reverse the incorrect judgment.

10 MS. SHAPIRO: Yes, certainly, we want you to
11 just reverse the judgment --

12 QUESTION: And tell the district court to do
13 what?

14 MS. SHAPIRO: To dismiss.

15 QUESTION: Tell them to dismiss?

16 MS. SHAPIRO: Yes, yes.

17 QUESTION: On the merits?

18 MS. SHAPIRO: On the merits, absolutely, yes.

19 QUESTION: On the merits?

20 MS. SHAPIRO: Yes.

21 QUESTION: Even though it has no district
22 court to decide the merits?

23 MS. SHAPIRO: The principle, the reason for
24 the Tax Injunction Act is to --

25 QUESTION: We tell the district court, you

1 don't have jurisdiction, but dismiss?

2 MS. SHAPIRO: Uh-hmm.

3 QUESTION: Is that right?

4 MS. SHAPIRO: Yes.

5 QUESTION: It wouldn't satisfy your purposes
6 if we directed them to dismiss on the grounds that they
7 had no jurisdiction?

8 MS. SHAPIRO: No, because that would not
9 resolve the cloud that's cast on --

10 QUESTION: Well, you don't always resolve
11 every question as soon as it arises, as you know.
12 Sometimes we wait until we have jurisdiction.

13 MS. SHAPIRO: That's right. But the question
14 is not whether you have jurisdiction; it's whether the
15 district court had jurisdiction. And it's not a
16 situation in which there was any Article III problem
17 with the district court's jurisdiction. There's no
18 question that there's a case or controversy here.
19 There's no question that we're not asking you for an
20 advisory opinion.

21 QUESTION: Well, shouldn't we decide both
22 questions, though, or at least -- I don't know. Would
23 you say it would be all right with you if we said, well,
24 they were wrong on the merits, but also they didn't have
25 jurisdiction?

1 MS. SHAPIRO: Well, you can certainly do what
2 you did in McLucas and Salfi and say, passing the
3 question of jurisdiction, on the merits --

4 QUESTION: Do you suppose, would you make the
5 same argument if the question was case or controversy?

6 MS. SHAPIRO: No.

7 QUESTION: Why not?

8 MS. SHAPIRO: Because there there is a
9 jurisdictional bar -- I mean, a constitutional bar not
10 only to the district court but to this Court, too.

11 QUESTION: Well, but that would be one thing
12 if we hadn't construed the Tax Injunction Act to extend
13 to declaratory judgments as well as injunctions. But
14 here the district court had -- the only thing the
15 district court could do was issue one or the other. It
16 couldn't get away from home base, under the Tax
17 Injunction Act. It just couldn't, couldn't do a thing,
18 the way we've construed the Tax Injunction Act; right or
19 not?

20 MS. SHAPIRO: That's correct as far as the
21 district court's concerned, but not as far as this
22 Court's concerned.

23 QUESTION: All right.

24 MS. SHAPIRO: Well, my argument on the merits
25 basically is that this case really follows from Lee and

1 that Lee stands for the principle that once you enter
2 the marketplace and hire employees to provide goods or
3 services, you cannot deny those employees the benefit of
4 generally applicable statutory protections. There's no
5 First Amendment right to deny one's employees the
6 economic security of social security and unemployment
7 insurance coverage, any more than there is a First
8 Amendment right to deny them a safe workplace or the
9 protection of child labor laws.

10 The further question is whether or not there
11 is a reasonable basis for distinguishing between
12 category one and two schools and category three
13 schools. And we submit that this is a reasonable,
14 bright-line test, and once you -- if that bright-line
15 test does not apply, then that the question of
16 determining when -- what schools are so religious in
17 orientation that they should be treated as category two
18 schools involves very serious problems of distinguishing
19 between schools that are going to be of various types.

20 You really can't make a distinction based on
21 the degree of the school's religious orientation,
22 because religious orientation is not a readily
23 identifiable characteristic by which various schools can
24 be compared. In sum, we don't believe there's any
25 constitutional reason to deny the employees of these

1 independent schools of the unemployment benefits that
2 Congress decided they should enjoy. Congress properly
3 determined that they should be treated the same as their
4 counterparts in private sector schools and this Court
5 should not overturn that determination.

6 I'd like to reserve the remainder of my time.

7 CHIEF JUSTICE BURGER: Mr. Vesely.

8 ORAL ARGUMENT OF JEFFREY M. VESELY, ESQ.

9 ON BEHALF OF THE STATE OF CALIFORNIA

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

12 I wish to clarify first the State of
13 California's position with respect to the 1341 issue
14 that was raised by the Court here. What must be kept in
15 mind is that a plain, speedy and adequate remedy must be
16 available at state law and state court before the Tax
17 Injunction Act arises here.

18 Now, the State's position is very simply this,
19 is that the Federal Government -- there was relief
20 sought against the Federal Government directly in this
21 case. There was injunctive relief sought, declaratory
22 relief sought. A federal statute was being challenged.

23 The Federal Government could not be compelled
24 to litigate any kind of these issues in state court if
25 it didn't wish to. In fact, the Federal Government did

1 remove one of these two cases, the Lutheran case, from
2 state court to federal court.

3 So basically what it comes down to is that,
4 like was noted in your Java decision of, I think, 402
5 U.S., where in a footnote towards the end of the
6 decision at page 135 it was noted that to accord
7 complete relief to the plaintiffs in that particular
8 case the question was raised whether or not the Federal
9 Government should have been a party in the action as
10 well.

11 And the State would submit that as a, for
12 better use of a term, as an exception to this case so
13 that the Court could reach the merits, which everybody
14 wishes --

15 QUESTION: An exception to the Tax Injunction
16 Act?

17 MR. VESELY: To the Tax Injunction Act. Is
18 basically on the terms of the Tax Injunction Act --

19 QUESTION: Well now, would you say an
20 exception or that there is no adequate state --

21 MR. VESELY: Well, I would say that the
22 exception --

23 QUESTION: Within the meaning of the statute.

24 MR. VESELY: -- is probably an improper word.
25 I think, Justice Brennan, that it's probably that it

1 just doesn't meet the terms of the statute.

2 QUESTION: And this I gather -- well, which?
3 Because what's available in the state courts is not an
4 adequate remedy?

5 MR. VESELY: In this particular case. This
6 case was unique for a number of reasons.

7 QUESTION: Well, I gather primarily it's
8 because what's being challenged here as violative of the
9 federal Constitution is not a state statute, but it's a
10 federal statute.

11 MR. VESELY: Both the federal and state
12 statutes were challenged.

13 QUESTION: I know, but basically it's the
14 FUTA, isn't it, the federal statute?

15 MR. VESELY: This is true.

16 QUESTION: And I gather your argument is that
17 it's rather strange that you be remitted, litigants be
18 remitted, to a state court to decide the federal
19 question of the constitutionality of a federal statute
20 under the statute Constitution, is that it?

21 MR. VESELY: This is the position we're
22 taking, and especially in this particular case. In the
23 position -- excuse me -- that the State of California
24 took in this case, the conformity process that's
25 inherent in FUTA came into play --

1 QUESTION: Is there anything unique about a
2 state court deciding a federal constitutional question?

3 MR. VESELY: Well, I don't think there's
4 anything unique about that, other than the fact when you
5 have the Federal Government having to be a party in the
6 action, because there was relief sought against them. I
7 believe at that point there, that's when the Tax
8 Injunction Act becomes inapplicable.

9 And I think that as a -- to maintain the
10 integrity of the Tax Injunction Act, I think that's the
11 only reasonable way to look at this case. I think an
12 exception, because of the importance of the case --

13 QUESTION: I want to get this clear. You're
14 not asking really for an exception?

15 MR. VESELY: No, I am not.

16 QUESTION: You want to say that it's not an
17 adequate remedy in the circumstances.

18 MR. VESELY: That's right.

19 QUESTION: Was there any -- was there a
20 jurisdictional issue raised below?

21 MR. VESELY: Yes, it was raised. The Federal
22 Government filed a motion to dismiss.

23 QUESTION: I know, and now it supports it --
24 no, it doesn't. No, it doesn't.

25 But what did the district court say, though?

1 MR. VESELY: The district court found a --
2 QUESTION: It didn't go on your grounds?
3 MR. VESELY: No. What we argued below, we
4 asked --
5 QUESTION: They disagreed with your ground.
6 MR. VESELY: Well, our ground was actually
7 raised that we wished for them to reach the merits of
8 the case as well. I think the ground that we're raising
9 right now is just looking at the statute, and actually
10 --
11 QUESTION: So you never presented that to the
12 district court?
13 MR. VESELY: Not exactly this ground, that's
14 true.
15 QUESTION: But you're -- excuse me.
16 QUESTION: I was going to say, you cite the
17 St. Martin's case in your brief.
18 MR. VESELY: Yes, Your Honor.
19 QUESTION: Was the Government a party there?
20 MR. VESELY: The Government was not a party in
21 the St. Martin's case, and I think that the point raised
22 by the Federal Government in their reply brief of
23 speaking of why St. Martin's was quite appropriate to go
24 up and have federal questions decided in that case is
25 quite distinguishable from our case, because of the

1 relief that was sought, as I said, against the Federal
2 Government.

3 The Federal Government was not a party in St.
4 Martin's. Strictly a tax issue was not exactly the
5 point of St. Martin's. It is the question of, to accord
6 complete relief to the plaintiffs, if it's proper, the
7 only way the plaintiffs could have gotten complete
8 relief would have been to stay in federal court.

9 We submit that they should not get the
10 relief. We make it very clear, though, but on the
11 merits.

12 QUESTION: Are you taking the position that
13 the St. Martin's decision is a nullity, then, because
14 the Government was not a party?

15 MR. VESELY: No, I do not. The state statute
16 was being challenged there, South Dakota statute, Your
17 Honor.

18 QUESTION: Well, the plaintiffs in this case
19 were the church related schools.

20 MR. VESELY: In our case here?

21 QUESTION: Yes.

22 MR. VESELY: Church related and also just
23 merely religiously related.

24 QUESTION: Well, so far as determining the
25 constitutionality of the California statute, which I

1 take it is what you're interested in, why was the
2 Federal Government a necessary party?

3 MR. VESELY: Because the federal statute was
4 being challenged as well, and the state, because of the
5 conformity process that the federal unemployment tax
6 program has, where the state has to comply with what the
7 Federal Government says or be held out of conformity and
8 therefore forfeit millions of dollars per year,
9 perhaps, in various moneys that they get from the
10 Federal Government.

11 The State initial position in this case -- and
12 it actually is not really different, except that part of
13 the case has been resolved, the category one and
14 category two schools -- the State was aligned
15 essentially with the church related schools in that
16 instance.

17 And we filed a motion for a cross-claim
18 against the Federal Government seeking declaratory
19 relief on that particular issue, saying we disagree with
20 your interpretation, the statutory interpretation that
21 this Court has resolved in St. Martin's, yet on the
22 constitutional issues of whether we get to a category
23 three situation here, we agree with the Federal
24 Government.

25 And that's where we are before the Court right

1 now, with just the category three. So the uniqueness of
2 this case was that the Federal Government had to be a
3 party of this.

4 QUESTION: You say it had to be, but I still
5 don't see why an action by the plaintiffs to enjoin
6 enforcement of the California statute required anybody
7 but California and the plaintiffs. It would have been
8 more convenient, certainly, for the state to have the
9 Federal Government a party.

10 MR. VESELY: It was also sought to --

11 QUESTION: I don't see why they're
12 indispensable.

13 MR. VESELY: Justice Rehnquist, if I may, they
14 also did seek relief against the Federal Government,
15 though.

16 QUESTION: Well, they may have to be tossed
17 out.

18 MR. VESELY: Tossed out of what, federal
19 court? Part of the case was removed from --

20 QUESTION: The Anti-Injunction Act, as I
21 understand, applies to injunction against a federal
22 statute as well as a state tax statute.

23 MR. VESELY: I don't think it does, Your
24 Honor. I wish to disagree.

25 QUESTION: Isn't there a provision in some of

1 the --

2 MR. VESELY: I think that any injunction
3 against federal taxes would be handled under 7421 of the
4 Internal Revenue Code. This is having to do with state
5 taxes only.

6 So therefore, because of the posture of this
7 case, I think that the only really relief that would
8 accord -- possible for the plaintiffs in this matter was
9 to be in federal court, have the Federal Government in
10 there, because the state was stuck in a position of
11 having to try to figure out whether they should comply
12 with what the Federal Government was mandating -- excuse
13 me -- or decide to follow what the court was telling
14 them to do.

15 Now, the court enjoined the state and the
16 state was stuck into a position of either -- of doing
17 exactly that. In fact, there is evidence in our case
18 about how conformity proceedings were taken, were begun
19 with respect to the state. And so the situation of this
20 case, the Federal Government was absolutely essential to
21 be in the case.

22 If I may get to some of the merits of this, I
23 believe that we've handled basically all of the issues
24 that we wish to raise in our main brief and also our
25 reply brief. But I wish to put the case in proper

1 perspective, is that if we get to the merits in this
2 matter -- and we wish you do -- the employees are
3 basically the forgotten people in this whole system.

4 There's evidence, there are discussions
5 completely throughout, about the employer's rights, the
6 employer's religious beliefs, the employer's burdens,
7 alleged burdens or whatever they may be. Yet what it
8 comes down to, if the tax exemption here is extended to
9 cover these non-church affiliated religious employers,
10 what will happen directly is that these employees then
11 are denied benefits. They cannot get any unemployment
12 benefits.

13 So quite consistent with your decision in U.S.
14 versus Lee is that the employer's beliefs will be
15 basically being imposed upon these employees. And we
16 have a situation here that we don't have church
17 affiliated schools involved, we have independent
18 religious schools.

19 And these independent religious schools, one
20 of the main reasons they're independent is they don't
21 want to be church affiliated. They want to draw from as
22 broad a base of students as possible. And although they
23 may have a requirement of born-again Christians for
24 their teachers or whatever the case may be, there's
25 nothing in the record that says that every one of their

1 employees agrees with their position about the
2 unemployment compensation program. So to basically deny
3 these employees the right to get unemployment benefits
4 would be a denial of their own beliefs, in fact, if you
5 will.

6 I think that the situation here is actually
7 closely analogous, if not virtually identical, to what
8 Sherbert, Sherbert versus Verner and the Thomas case
9 discussed. We're talking about a situation there where
10 there was the state action prohibiting the -- well, the
11 state action in denial of an employee's benefits was
12 prohibited because of the employee's lack of faith or
13 because of their own faith. You, this Court, held that
14 that was just not permissible.

15 By the same token here, we have those same
16 benefits being denied to the employees if the exemption
17 is extended, and this time it's because of the
18 employer's beliefs. And I would submit that it's no
19 more permissible in the second instance than it was in
20 the first instance.

21 QUESTION: Well, what if an employer in a type
22 three or category three school says, we want only
23 teachers who will speak with enthusiasm and sincerity
24 about our, the employer's, religious beliefs. Certainly
25 the employer has a right to do that?

1 MR. VESELY: Well, I think the employer has
2 the right to put down however they wish whatever work
3 rules they wish.

4 QUESTION: Suppose that's a work rule. Now,
5 if the employee doesn't measure up to it he would be
6 discharged for misconduct, I presume, under California
7 law.

8 MR. VESELY: Well, the employer, if the --
9 under California law, the employer must show in a
10 benefit eligibility hearing that there was an
11 established work rule and that work rule was knowingly
12 violated.

13 QUESTION: Well, assume that the employer had
14 done that.

15 MR. VESELY: If the employer does do that,
16 then that employee will be denied any kind of
17 unemployment benefits.

18 QUESTION: And that's contrary to his beliefs,
19 isn't it?

20 MR. VESELY: Pardon, Your Honor?

21 QUESTION: That's contrary to the employee's
22 beliefs, isn't it?

23 MR. VESELY: Well, I think that the point of
24 it is is that this whole system is a balancing. I mean,
25 the employer obviously has certain beliefs, and this has

1 been an accommodation all throughout the entire program,
2 that the employer has certain beliefs, has certain
3 interests that have been accommodated in three
4 fashions: it's been accommodated by extension of the
5 FUTA exemption for all religious employers, the
6 extension of the California exemption to church related
7 employers, and finally, that the employer itself has the
8 reimburseable method of contribution.

9 So there has been an accommodation of the
10 religious employer's beliefs. There is an accommodation
11 of the religious employee's beliefs as well, but it's
12 under a situation that if the employer changes the work
13 rules after the fact, like a Thomas or a Sherbert case,
14 the employee, if that is then against his religious
15 beliefs and he wishes not -- that he just cannot comply
16 with this, well then that employee cannot be denied
17 benefits.

18 So basically what we come to is really a
19 balancing. I mean, it's an attempt to take in
20 everybody's beliefs as possible, but still maintain a
21 comprehensive nationwide program, which is the public's
22 interest in this entire thing, as well as the point of
23 protection against wage loss for the employees.

24 There's -- yes, Your Honor?

25 QUESTION: Do you make any point of the

1 distinction here? Church affiliated schools, as I
2 understand, get the exemption --

3 MR. VESELY: That's right, Your Honor.

4 QUESTION: -- that's right, isn't it?

5 But a group that's not so affiliated is denied
6 the exemption?

7 MR. VESELY: That's true, Your Honor.

8 QUESTION: What's your position about that
9 difference in classification?

10 MR. VESELY: Well, I believe that it follows
11 very directly from U.S. versus Lee. What has happened
12 here is that there is a narrow, readily identifiable
13 category that has been drawn. I think that if you don't
14 draw the line there with respect to church schools or
15 organizations that are operated by churches, we have a
16 problem of potentially getting into, as Judge Stevens
17 said in his concurrence in Lee, of evaluating the merits
18 of each religious belief.

19 I think that the problem that arises there is
20 that you are getting right involved with potential
21 entanglement.

22 QUESTION: Well, nevertheless, what level of
23 scrutiny do you apply to that distinction? Rationality
24 or --

25 MR. VESELY: I believe it should be a rational

1 basis on this matter, Your Honor. The point of it is is
2 that under the unemployment tax there has been
3 classification done since the program began. The
4 Carmichael case, the initial case on this matter, talked
5 about classification between seven and eight employers;
6 what was the rational basis there?

7 QUESTION: Well, we didn't have a religious
8 classification.

9 MR. VESELY: That's true. But we're talking
10 about here trying to stay out of evaluating the merits
11 of each religious belief. It does not matter that that
12 church that is exempt opposes, is neutral, or is
13 unopposed to unemployment. Unlike the 1402(g) statute
14 in Lee, which talks about being opposed to social
15 security benefits, this is a very neutral statute that
16 says -- it doesn't say a recognized religious sect, like
17 in 1402(g). It talks about a church.

18 So what we have here is a very easily
19 identifiable category --

20 QUESTION: Nevertheless, it does grant
21 benefits to certain kinds of religious organizations and
22 deny them to others, doesn't it?

23 MR. VESELY: This is true. You cannot
24 accommodate --

25 QUESTION: Well, isn't that sort of abuse the

1 kind of thing that has led us to suggest strict
2 scrutiny?

3 MR. VESELY: Well, I think, Mr. Justice
4 Brennan, I think the situation is very analogous to the
5 Lee case again. What difference under the First
6 Amendment does it make whether you have a self-employed
7 Amish or a non-self-employed Amish? They have got to
8 have the same beliefs, you would have to come to the
9 conclusion.

10 So why can you draw a line there and not draw
11 a line there? I think there may be a question of
12 whether there's a wiser line or a better line or
13 whatever. That's not for this Court to decide.

14 The same thing like in the Braunfeld case.
15 You said that it didn't have to decide that there was a
16 better solution than having a one day off.

17 I think that it's completely proper here and I
18 would ask you to reverse insofar as we challenge. Thank
19 you.

20 CHIEF JUSTICE BURGER: Mr. Ball.

21 ORAL ARGUMENT OF WILLIAM B. BALL, ESQ.

22 ON BEHALF OF GRACE BRETHREN CHURCH

23 MR. BALL: Mr. Chief Justice and may it please
24 the Court:

25 To the Redwood Christian Schools and Christian

1 Unified Schools of San Diego, this litigation poses the
2 following question: May a pervasively religious school
3 which in no wise differs from the characteristics of the
4 religious schools examined by this Court in Lemon, in
5 Catholic Bishop of Chicago, except for the matter of
6 legal connection with a church, which is in no sense a
7 commercial enterprise, and which virtually accepts no
8 kind of direct or indirect public subsidy, may such a
9 school be compelled to be involved in a governmental
10 program of which excessive entanglement between
11 government and religion is absolutely a necessary part?

12 QUESTION: May I ask, Mr. Ball, are you going
13 to address the jurisdictional argument?

14 MR. BALL: I am indeed, Mr. Justice Brennan.
15 I thought that my division of argument would necessarily
16 deal with the entanglement problem as a precedent to
17 discussing the jurisdictional problem, and then I would
18 go on to free exercise, and finally, if time permitted,
19 the equal protection question.

20 This Act involves two kinds of entanglements.
21 First of all, in the benefit eligibility determination
22 process --

23 QUESTION: Well, of course, if there is no
24 jurisdiction, if there was no jurisdiction in the
25 district court you don't get to entanglements, do you?

1 MR. BALL: Well, I tell you, Mr. Chief
2 Justice, I think we get to the jurisdictional problem
3 through the entanglement problem. May I explain that to
4 the Court?

5 The second kind of an entanglement is
6 entanglement relating to the ordinary administration of
7 the Act apart from the benefit eligibility determination
8 process. Now, to come to that.

9 In the benefit determination process, a
10 process which can arise at the very outset of
11 employment, because the employee may already have picked
12 up four quarters of work through another employer, the
13 governmental parties, as Mr. Vesely just made clear,
14 they say that religious ministries can avoid any
15 entanglement problem simply by establishing work rules,
16 requiring a teacher to conform to, as the reply brief of
17 the Government said, the principal's interpretation of
18 doctrinal and moral matters.

19 At the trial, the United States through its
20 own expert witnesses attempted then to provide a
21 showcase demonstration of how the work rule works. But
22 as the testimony turned out, it became crystal-clear
23 that whether the kind of blank check agreement was used
24 which the Government had recommended in its reply brief,
25 namely the employee agrees that whatever the employer

1 says is doctrine and a proper code of conduct, that the
2 employee agrees to conform to, or whether it's a long,
3 spelled-out statement of faith with all manner of rules
4 of conduct and all the essential doctrines of faith
5 spelled out, either way, as Justice -- Judge Mariana
6 Feltzer below said so accurately, the complexities of
7 religious faith are not reduceible to work rules.

8 Note here that it's perfectly clear that the
9 Government witnesses were completely correct in saying,
10 this is how a benefit eligibility determination process
11 has to work in any kind of employment, in any kind of
12 institution. But these witnesses also conclusively
13 demonstrated that when that process is applied to a
14 religious ministry, it veritably explodes with potential
15 for entanglement.

16 We had example after example where Government
17 expert Ernest Carter, for example, was called to the
18 stand by the Government and he was asked, suppose this
19 teacher entered into an understanding with the school
20 that he or she was to observe a document called a
21 statement of faith, and that school discharges her on
22 the ground that she breached the statement of faith,
23 taught something contrary to it. Would the hearing
24 examiner examine what that agreement was?

25 Answer: He would. Well, the questioning

1 pursued, what if they disagree about what the doctrine
2 was? The employer says, you breached it, and the
3 employee says, no, I didn't. What does the hearing
4 examiner do in that case, the Government was asked?

5 Answer: Well, he, the state, has to weigh the
6 evidence from both parties and decide in favor of one or
7 the other, weigh the doctrine.

8 Government experts were asked about cases
9 where an employee is discharged for a decline in
10 religious fervor relating to the students, a very
11 important element in a religious school. The witness
12 said: I would have great difficulty in measuring zeal
13 and what that meant. But I would ask what harm that
14 does, what harm that loss of zeal does to the employer.

15 Then the witness was asked, well, who would
16 judge that, the claims examiner? Answer: Yes.

17 The implied work rule also came very much into
18 scope through the testimony of the Government
19 witnesses. They were asked, does the hearing examiner
20 ever get into the question of whether a particular
21 implied work rule, a doctrine, a piece of the statement
22 of faith, for example, is reasonable or unreasonable?

23 Answer: Yes, and whether it's enforced or
24 not, thus taking the state examiner into the whole life
25 of the institution in order to find out what is

1 enforced, and with whom, and when, and how often, and to
2 what degree, into the faith community with that kind of
3 examination.

4 Claims examiners will determine whether a
5 particular doctrine or rule of the religious body is a
6 major one or a minor one, as the testimony --

7 QUESTION: That's a very skillful argument
8 about entanglement, but --

9 MR. BALL: Yes, all right.

10 QUESTION: -- you're -- sooner or later you
11 can get around to jurisdiction.

12 MR. BALL: That's the foundation that I hope
13 that I have laid. And now, Justice White, let me relate
14 this to the question that you're asking about district
15 court jurisdiction.

16 California courts cannot provide a plain,
17 speedy or efficient remedy. They can't provide any
18 remedy in this case. The entanglement will already have
19 occurred in the benefit determination process, the very
20 process of inquiry, to pick up this Court's words in
21 Catholic Bishop.

22 And by the way, the very --

23 QUESTION: Well, if the case turned on that,
24 turned on that, wouldn't the district judge really be
25 the place to present that? The district court knows

1 more about local law and the adequacy of remedies than
2 we do.

3 MR. BALL: We presented this case in the
4 district court, if that's what you're referring to.
5 We're saying --

6 QUESTION: There was a challenge to the
7 district court's jurisdiction there.

8 MR. BALL: We did not.

9 QUESTION: I know. There was one, though.

10 MR. BALL: There was one.

11 QUESTION: And this argument was never
12 presented.

13 MR. BALL: Well, this argument was presented
14 in detail.

15 QUESTION: I mean this argument about the
16 adequacy of remedy.

17 MR. BALL: Oh, no, we presented that argument
18 in detail, I beg your pardon, Justice White.

19 QUESTION: Well, then the district court must
20 have rejected it.

21 MR. BALL: No, the district court agreed that
22 it did have jurisdiction.

23 QUESTION: Well, I know. I know. But I
24 thought there was a -- I thought I heard from one of the
25 people speaking before that this particular reason for

1 sustaining jurisdiction was never presented to the
2 district court, that there was no adequacy remedy under
3 state law?

4 MR. BALL: We alleged that in our complaint.
5 We argued it in the district court. We said that we
6 would not have a plain, speedy and efficient remedy
7 under state law.

8 QUESTION: Did he agree with that?

9 MR. BALL: Judge Feltzer agreed with that,
10 yes. She agreed with that position. She said you would
11 not have a plain, speedy and adequate remedy under state
12 law.

13 QUESTION: And therefore the Injunction Act's
14 no bar.

15 MR. BALL: Therefore the district court
16 assumed jurisdiction.

17 QUESTION: Mr. Ball, you could have, I
18 suppose, obtained some form of relief in California, for
19 instance paying some portion of the tax and suing to
20 recover it, or following administrative remedies, could
21 you not, seeking a declaratory judgment?

22 MR. BALL: Judge O'Connor --

23 QUESTION: At least paying the tax and then
24 litigating the validity?

25 MR. BALL: Well, the reason that we did not

1 was because the schools in California -- and there are
2 about 700 of them all told, of Christian schools of this
3 kind -- were promptly set upon by the -- by the
4 California unemployment compensation authorities in 1978
5 and they were told, you must now come under this program
6 and comply with it, a program to which they had not been
7 subject.

8 They had vigorous constitutional objections to
9 this on free exercise grounds and on entanglement
10 grounds, which they very strongly raised. And the
11 question became then one of whether they must go under
12 the program and start to pay under protest for something
13 that they had very little money to pay for to begin
14 with, use stewardship funds on a program that they
15 believed was flatly unconstitutional, or whether they
16 could go into a federal district court and have federal
17 constitutional claims aired under the First Amendment
18 against the State of California and the Federal
19 Government.

20 And they chose that route.

21 QUESTION: Yes, but you do concede there was a
22 way to get the California courts to rule upon the
23 question?

24 MR. BALL: No, I don't, Justice O'Connor, and
25 the reason that I don't is partially the reason I have

1 stated here, that the potential of entanglement was
2 immediate, that the benefit determination eligibility
3 process could be promptly upon the school. They could
4 be thrust into that almost immediately.

5 There was another reason that was back of the
6 move into federal court, and that was the fact that the
7 Secretary of Labor had laid down a rule that only those
8 schools which were totally religious, in his view, would
9 be considered exempt under the statute, whose plain
10 wording was that church schools were exempt. He said
11 that if they were not strictly religious then they would
12 not be exempt, and therefore investigators from the
13 State of California went to religious schools throughout
14 the state with a tabular list, trying to figure out
15 which of their functions were secular and which were
16 religious.

17 And this occurred to these religious schools
18 we represent here today on this appeal, as well as the
19 church schools.

20 So for all these reasons, the very imminence
21 --

22 QUESTION: I can't see how that inquiry would
23 be relevant in the category three schools.

24 MR. BALL: How the inquiry with respect --

25 QUESTION: Whether you're totally religious or

1 only partially religious, under the state and Federal
2 Government's view, you have to pay the tax.

3 MR. BALL: No. The inquiry is relevant for
4 this reason, Justice Stevens: The -- under Secretary --
5 if you're referring now to Secretary Marshall's initial
6 pronouncement that his people were to determine what was
7 strictly religious and what was not in all schools which
8 claimed to be religious --

9 QUESTION: That included category one and
10 category two schools?

11 MR. BALL: It would definitely include
12 category three schools.

13 QUESTION: Yes, but the only problem, as I can
14 see it anyway, would be with respect to category one and
15 category two schools. If you're in category three, you
16 must pay the tax whether you're entirely religious or
17 only partially religious.

18 MR. BALL: You would be, except for the fact
19 -- that's correct, in determining whether you come under
20 the statute. But the category three schools were
21 especially interested in all of the problem of religious
22 entanglement and imposition on free exercise that they
23 felt the program embraced.

24 And so, when I was referring to why all the
25 plaintiffs went into court to seek the declaratory and

1 injunctive relief, I was referring to all of them, and
2 the category three schools, not with respect to the --

3 QUESTION: But as of now we're only concerned
4 with category three.

5 MR. BALL: That's correct, Your Honor.

6 QUESTION: Mr. Ball, may I get back just a
7 moment to this jurisdictional question. I gather you
8 and the Government have a different position about
9 that. As I understood Mrs. Shapiro, the Federal
10 Government's position is that, no, the district court
11 had no jurisdiction, it was barred by 1341, but that
12 this Court had jurisdiction under 1252.

13 Your position, I gather, is that, no, 1341 was
14 inapplicable because there was no plain, speedy, and
15 efficient remedy under state law; is that it?

16 MR. BALL: Precisely.

17 QUESTION: You have that difference with the
18 Federal Government?

19 MR. BALL: We have that --

20 QUESTION: Yes.

21 MR. BALL: -- absolutely difference with the
22 Federal Government.

23 QUESTION: Could you tell me where in the
24 district court's several opinions the matter of
25 jurisdiction is addressed?

1 MR. BALL: Justice White, page 65 of the
2 jurisdictional statement.

3 QUESTION: I've got it, I've got it.

4 (Pause.)

5 QUESTION: Actually, I suppose it's the top of
6 67 applies to your particular argument. But I still
7 don't quite understand, in the response to the question
8 of Justice O'Connor, why you could not have done what
9 the Amish did in the Lee case, have paid a small amount
10 of tax and then gone into a California court and said,
11 we want a refund of that.

12 I don't know why you had to fight out any
13 particular discharge issue in a refund suit.

14 MR. BALL: The reason was that we felt our
15 constitutional liberties were being violated at the very
16 outset.

17 QUESTION: But don't you think the Amish felt
18 the same way in their case, Mr. Ball?

19 MR. BALL: I don't know, Justice O'Connor, how
20 the Amish felt in their case.

21 QUESTION: Oh, but you've read the opinion.

22 MR. BALL: I indeed have.

23 QUESTION: You know that the argument was
24 based on constitutional grounds. And that's often true
25 of statutes involving taxes that are attacked on

1 constitutional grounds.

2 How is your problem any different?

3 MR. BALL: Our problem is simply this: We
4 don't dispute the fact that Mr. Lee could have gone the
5 administrative route, paid the tax, and eventually gone
6 through the state court system, and then come here. He
7 went actually through the federal courts.

8 In our own case, we believed that the federal
9 courts were open to this kind of case. Here is a case
10 in which the federal courts plainly have jurisdiction,
11 unless, unless the Tax Injunction Act should bar that.
12 That Tax Injunction Act said if you have a plain, speedy
13 and adequate remedy, then you're not barred. You're
14 free, you're home free if you have -- if you do not have
15 a plain, speedy and adequate remedy. And it's clear
16 that our clients did not have a plain, speedy and
17 adequate remedy.

18 I think Judge Feltzer was correct also in view
19 of the fact that she was aware of the California
20 constitution, which bars an injunction action, and the
21 fact that the administrative body, under the California
22 statute also, an administrative body cannot declare a
23 state statute unconstitutional. And here was the very
24 thing they were trying to do --

25 QUESTION: But a state court could. Could you

1 have sought declaratory relief in California?

2 MR. BALL: I did not hear.

3 QUESTION: Could you have sought declaratory
4 relief in the California state courts?

5 MR. BALL: We could have sought declaratory
6 relief in the California state courts.

7 QUESTION: And ask them to declare it
8 unconstitutional?

9 MR. BALL: Yes, this could have been done.

10 QUESTION: Why isn't that as plain and speedy
11 and adequate as having the federal court --

12 MR. BALL: Because we needed we needed
13 injunctive relief.

14 QUESTION: Pardon me?

15 MR. BALL: Because we needed injunctive
16 relief.

17 QUESTION: Well, that's contrary to Rosewell
18 last year, Rosewell versus LaSalle National Bank, that
19 you may not be entitled to injunctive relief if there's
20 an otherwise adequate state remedy that will ultimately
21 determine the claims you want to make?

22 MR. BALL: I distinguish Rosewell very, very
23 greatly from the case that we're involved in, because
24 here we have substantial First Amendment claims under
25 the religion clauses.

1 QUESTION: Well, in Rosewell they thought they
2 had substantial constitutional claims.

3 MR. BALL: Constitutional claims of a
4 different sort, Mr. Justice --

5 QUESTION: Is there some gradation of
6 constitutional claims?

7 MR. BALL: Well, I had thought there was. I
8 thought there were fundamental freedoms and preferred
9 freedoms under the First Amendment.

10 QUESTION: What's your authority for that?

11 MR. BALL: Oh, Cantwell versus Connecticut,
12 virtually every free exercise case speaks of fundamental
13 liberties protected by the First Amendment which are not
14 in the same class as property rights or business rights
15 or commercial rights, et cetera.

16 QUESTION: Well, you think that due process of
17 law guaranteed by the Fourteenth Amendment is
18 subordinate to these rights you're talking about?

19 MR. BALL: Not subordinate. I think these
20 rights are a part of due process, but they're a part of
21 due process in its most vital and sensitive area, namely
22 freedom of the mind, freedom of religion, freedom of
23 speech and press. Those liberties I had thought the
24 Court had long since said were preferred freedoms and
25 not at all to be classified with property rights.

1 QUESTION: Well, do you think, then, that for
2 some constitutional claims the 1341 does not require
3 anything more than the usual statement state remedy, but
4 for others it does?

5 MR. BALL: I think that Section 1341, where
6 religious liberty is actively threatened, yes, I think
7 that it --

8 QUESTION: Or speech, or speech.

9 MR. BALL: Or speech, indeed, indeed.

10 QUESTION: Do you have any authority for that,
11 cases from this Court construing 1341?

12 MR. BALL: No, and I think that argues in our
13 behalf, that the Court has not said that a case under
14 the religion clauses of the First Amendment is barred,
15 that district court jurisdiction is barred, where such
16 liberties are advanced and where there are substantial
17 and bona fide claims, where there can be no doubt about
18 the reality of those claims.

19 QUESTION: Counsel, if First Amendment rights
20 have priorities, what is number two? Which one of the
21 amendments is number two?

22 MR. BALL: I can't make any such distinction,
23 Mr. Justice Marshall.

24 QUESTION: Well, how can you make one if you
25 can't make two?

1 MR. BALL: I think --

2 QUESTION: I mean, if you're grading them, how

3 can you grade one when you can't grade the others?

4 MR. BALL: The grading, Justice Marshall, was

5 not of my own. The grading was the grading that the

6 Court has long since given to First Amendment freedoms.

7 QUESTION: Well, read me where this Court said

8 that First Amendment rights have priority over

9 everything else.

10 MR. BALL: Well, I think the -- if we take

11 Cantwell versus Connecticut --

12 QUESTION: What in Cantwell versus Connecticut

13 said that?

14 MR. BALL: That they had priority over the

15 action of the local commissioner who was going to issue

16 a license for exercising rights of speech.

17 QUESTION: You said over everything.

18 QUESTION: Well, that's true of all

19 constitutional provisions.

20 MR. BALL: If the question is whether the --

21 whether there is a constitutional liberty that is prior

22 to the Tax Injunction Act, if that's the question, then

23 I think that the -- our only position is that we don't

24 believe that a plain, speedy and adequate remedy under

25 the Tax Injunction Act is found in recourse to a

1 declaratory judgment action in the state court or the
2 paying of taxes while one awaits disposition in the
3 state court.

4 QUESTION: Mr. Ball, I think your view that
5 the establishment clause is entitled to special value in
6 the hierarchy of constitutional values was strongly
7 supported by the dissent in the Valley Forge case, but
8 unfortunately the majority went the other way.

9 MR. BALL: I thought that this view was
10 strongly supported by the majority in a great number of
11 cases --

12 QUESTION: I did, too.

13 MR. BALL: -- such as Wisconsin versus Yoder,
14 ever so many cases in which the Court has declared for
15 religious liberty.

16 We took quite literally what the Court had had
17 to say about the enormous dangers of the potential for
18 entanglement between religious activity and Government,
19 and we think that here the record is very clear that in
20 the administrative proceedings which are inevitable in
21 this case, in those administrative proceedings, in the
22 benefit eligibility determination process, serious
23 constitutional damage would result to the religious
24 institution which we represent.

25 And this would be continued if the

1 administrative proceeding were continued. You say you
2 have an appeal process. Well, you go through the appeal
3 process and these same inquiries, the whole religious
4 issues we've been talking about, the statement of faith,
5 et cetera, are recycled in the administrative level.

6 And then when you get to the state court level
7 finally, you really get a sort of posthumous result.

8 The state court can simply say, well, yes, the
9 administrative body was wrong, the hearing examiner was
10 wrong, he ought not to have gone into those issues. So
11 you really have suffered constitutional damage in the
12 meantime, only to be told at the end that it's too bad,
13 it shouldn't have happened. You've suffered major
14 needless surgery and then told, well, at least you don't
15 have to pay for it.

16 This constitutional damage goes far beyond
17 entanglement. If an employee knows that he can take a
18 case of discharge for religious reasons, he can take
19 that into an administrative body which will then
20 entertain the religious question, and he knows then that
21 they will do that and that he can get compensated, this
22 certainly must have an effect within the religious
23 institution itself.

24 And again, the same thing applies to the
25 administrators of the religious institution, who know

1 that their employees know this.

2 QUESTION: An argument much like yours was
3 made in Henderson against Wallace and someone else, that
4 is, that the very inquiry in the pretrial discovery as
5 to what information the media had which they didn't
6 disclose was a "entanglement" type of thing, which
7 couldn't be made. But this Court rejected that
8 argument.

9 The courts must always make the initial
10 inquiry, even if it involves some entanglement.
11 Otherwise, the claim of entanglement would be a barrier
12 to any inquiry under the true facts.

13 MR. BALL: The kind of entanglement, Mr. Chief
14 Justice, that we're speaking of here is the entanglement
15 by a claims examiner who is not empowered to deal with
16 constitutional issues and who, as the record so
17 abundantly shows, will be taking upon himself
18 examination into matters of doctrine, faith, moral
19 conduct, religious fervor, and all of those things.

20 That I think is quite different from the
21 situation that you pose.

22 QUESTION: Not so different from Henderson
23 against Landow and Wallace -- is the title of the case.

24 MR. BALL: Then I'm puzzled where we are, say,
25 in Catholic Bishop, where the Court said that the very

1 process of inquiry bring us into the area of --

2 QUESTION: It's in quite a different setting.
3 That's in labor relations.

4 MR. BALL: It is with respect to labor
5 relations, and there, is not the problem the same? It
6 seems to me the Court in Catholic Bishop attached an
7 appendix to its opinion in which it showed that a
8 certain Monsignor O'Donnell had been discussing liturgy
9 and asking questions about Catholic liturgy. And these
10 were, I thought, shown by the Court to be an example of
11 an area into which the state ought not be going,
12 irrespective of whether it is in a labor situation or
13 whatever situation it might be.

14 We also dealt with the problem of free
15 exercise, and I'll touch briefly upon that, only to say
16 that we believe that there is a marked contrast here to
17 Lee, to Braunfeld, and to Murdoch and Fallett.

18 In contrast to Lee, here a religious activity
19 is being taxed, and indeed a prime religious activity,
20 namely a ministry of teaching. Mr. Lee never claimed
21 that making a profit by hiring six or seven employees to
22 produce rough lumber or commercial housing was a
23 religious activity.

24 In contrast to Braunfeld, we have here a tax.
25 In contrast to inferences in Murdoch and Fallett that a

1 preacher is not entitled to be free from taxes, here the
2 tax is not on anybody's personal income, but on the most
3 sensitive aspect, the most sensitive aspect of a school
4 ministry, namely the employment relationship between
5 teachers and the school administration itself.

6 The Government has put squarely to the Court,
7 it seems to me, the proposition that religious activity
8 may be taxed. And no Aesopian language about relatively
9 small amounts or indirect burdens changes that very
10 stark reality, and no compelling state interest
11 certainly exists for imposing this tax on Redwood
12 Christian Schools and the Christian Schools of San
13 Diego.

14 A broad exception already substantially exists
15 in the statutes as they are, a very, very broad
16 exception, not a narrow exception, to which the
17 exception of the church -- of the non-church schools
18 adds but very, very slightly. All schools until 1978
19 were exempt, and therefore one must inquire, what's the
20 compelling state interest now in saying that these
21 non-church schools are subject to the tax.

22 QUESTION: Mr. Ball, is this an equal
23 protection argument?

24 MR. BALL: It is in part an equal protection
25 argument.

1 QUESTION: And you suggest the level of
2 scrutiny is compelling, not rationality?

3 MR. BALL: Yes, indeed, indeed, Justice
4 Brennan.

5 Similar -- this case I think in this respect
6 is very similar to Sherbert, where the exact same
7 arguments were made, that the unemployment compensation
8 program was threatened if Adele Sherbert was let out
9 from under. The Court in Sherbert said that the state
10 must demonstrate that no alternative will protect the
11 integrity of the unemployment compensation program
12 without infringing First Amendment rights.

13 As to equal protection, perhaps I should
14 mention here just briefly the statements that have been
15 made about employees by the California Attorney
16 General. First of all, no employee is a party to this
17 case. No beliefs here have been imposed upon anybody's
18 rights that were not, for example, imposed on rights of
19 employees in Catholic Bishop.

20 The churches have not -- the churches there,
21 in cases such as Catholic Bishop, were not thought to be
22 denying their employees' rights. Here the testimony of
23 Mr. Enderland at page 89, to which I commend the Court,
24 is very, very clear that all personnel, whether it's a
25 bus driver, a janitor, an accountant or whomever, are

1 felt to be and believe themselves to be part of the
2 religious mission of the school.

3 We come then down finally to the equal
4 protection considerations, and feel that Redwood
5 Christian Schools ought not to be treated differently
6 from the church schools. There are three bases for that
7 statements:

8 One is the argument of the court below, the
9 rationale of the court below, on the issue of
10 entanglement itself. We have raised an equal protection
11 claim with strict scrutiny basis, as Justice Brennan had
12 mentioned.

13 And then I refer you to the American Jewish
14 Congress' brief, which simply says that disparate
15 treatment of church versus non-church schools violates
16 the very core of the unitary protection of the religion
17 clauses. I think that too is a most significant
18 consideration in connection with this case.

19 I thank the Court.

20 CHIEF JUSTICE BURGER: Thank you.

21 Do you have anything further? You have three
22 minutes remaining, Mrs. Shapiro. Do you want to address
23 the jurisdictional question any more?

24 REBUTTAL ARGUMENT OF HARRIET S. SHAPIRO, ESQ.

25 ON BEHALF OF THE UNITED STATES

1 MS. SHAPIRO: Well, only to state that the
2 adequacy of the state remedy issue is essentially the
3 argument that you can't trust a state court to pass on
4 federal constitutional issues, which we think is quite
5 incorrect.

6 QUESTION: Well, isn't there another problem,
7 just to get your view on it. What about when the
8 Government is made a party and then removes the case to
9 the federal court? How can the state remedy be adequate
10 then?

11 MS. SHAPIRO: Well, the state remedy is
12 certainly entirely adequate as far as the plaintiffs
13 here, the schools, are concerned, because they can get
14 -- I mean, the only tax that's involved in this case,
15 because in this particular --

16 QUESTION: But unless you take the view that
17 the court necessarily decided the federal constitutional
18 question, which would make you a proper party, we don't
19 have jurisdiction as a matter of statutory law.

20 MS. SHAPIRO: They decided the federal
21 constitutional question, because the state statute
22 tracks the federal statute.

23 QUESTION: Then wasn't the United States an
24 appropriate party and unable to remove?

25 MS. SHAPIRO: They certainly were an

1 appropriate party, but they were not a necessary party,
2 because there's no federal tax here, because there isn't
3 any federal tax on these non-profit schools. There's
4 only a state tax here, and in the state courts you could
5 get -- the schools could get a complete remedy as far as
6 that issue is concerned.

7 The only other point I wanted to make is on
8 the entanglement issue. The record does indicate that
9 the state -- the federal witnesses were asked a lot of
10 hypotheticals. But the point is that in those
11 hypotheticals the question assumed that there was not an
12 appropriate work rule. What we're talking about is not
13 a discharge for religious reasons, but a discharge for a
14 violation of the work rule, and the work rule -- you
15 don't have to have any inquiry into the religious
16 doctrine of the school, of the church.

17 What the work rule would require would be that
18 the teacher would follow the directions of the principal
19 or whoever was in charge in teaching, similar to any
20 secular schools. The teachers are supposed to follow
21 the directions of those in charge of the curriculum.
22 And if they did not, then that would be misconduct.

23 You don't get into questions of what's the
24 correct doctrine or any real religious questions.

25 QUESTION: I suppose, however, Mrs. Shapiro,

1 there may be some state requirement that work rules be
2 reasonable, and to that extent might not you have to get
3 into --

4 MS. SHAPIRO: Well, the state requirement that
5 the work rules be reasonable means reasonable on the
6 context of the employment. The witness explained that
7 it wouldn't be reasonable to have a work rule that
8 required, the example was a mechanic who was required
9 not to drink off the job.

10 QUESTION: Yes, but to the extent that they
11 dealt with religious requirements, to that limited
12 extent, it seems to me that it might put the thing in
13 the posture of an examination of doctrine.

14 MS. SHAPIRO: I believe that, given a
15 secondary, a primary or secondary school with a strong
16 religious orientation, if the schools says our work
17 rules require you to lead a Christian life as that is
18 defined by the principal, and the teacher accepted the
19 job on that understanding, then that would be a
20 reasonable work rule.

21 CHIEF JUSTICE BURGER: Thank you, counsel.

22 The case is submitted.

23 (Whereupon, at 2:03 p.m., the case in the
24 above-entitled matter was submitted.)

25 * * *

CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

California ET AL., Appellants, v. Grace Brethren Church, Et Al.

No. 81-31 et al

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BY Deane Hammond

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