

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-488 -

TITLE OHIO CIVIL RIGHTS COMMISSION, ET AL., Appellants
V. DAYTON CHRISTIAN SCHOOLS, INC., ET AL.

PLACE Washington, D. C.

DATE March 26, 1986

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 OHIO CIVIL RIGHTS COMMISSION, :
4 ET AL., :
5 Appellants, :
6 V. : No. 85-488
7 DAYTON CHRISTIAN SCHOOLS, :
8 INC., ET AL. :

9 -----x

10 Washington, D.C.

11 Wednesday, March 26, 1986

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 1:58 o'clock p.m.

15 APPEARANCES:

16 KATHLEEN MC MANUS, ESQ., Deputy Chief Counsel of Chic,
17 Columbus, Ohio; on behalf of the appellants.

18 WILLIAM BENTLEY BALL, ESQ., Harrisburg, Pennsylvania;
19 on behalf of the appellees.

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P R O C E E D I N G S

1
2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Ohio Civil Rights Commission against Dayton
4 Christian Schools.

5 Ms. McManus, I think you may proceed whenever
6 you are ready.

7 CRAL ARGUMENT OF KATHLEEN MC MANUS, ESQ.,

8 ON BEHALF OF THE APPELLANTS

9 MS. MC MANUS: Mr. Chief Justice, and may it
10 please the Court, this case presents the very delicate
11 matter of resolving a direct conflict between two very
12 fundamental values, civil rights and religious
13 liberties. The question presented is whether the state
14 may extend the protections of its civil rights laws to
15 teachers in religious schools.

16 The state contends the civil rights laws are
17 properly applied in this setting. What we are dealing
18 here with are schools that provide secular education as
19 well as religious indoctrination. The schools are
20 teaching reading, writing, arithmetic, science, history,
21 and geography.

22 Perhaps the schools are best described in
23 their own words. The constitution of Dayton Christian
24 Schools provides that the purpose of the institution is
25 to provide a program of education in a positive

1 Christian atmosphere offering regular courses of study
2 in compliance with the laws and regulations of the state
3 of Ohio and the State Board of Education.

4 The practices --

5 QUESTION: Your reference to history as one of
6 the subjects, do you mean to suggest to us that
7 religious background has no connection with history,
8 religious belief has nothing to do with history as it is
9 taught?

10 MS. MC MANUS: No, certainly we are not
11 suggesting that, Your Honor. That is part of this
12 country's history, as is -- part of this country's
13 history is the contribution of people of all sexes and
14 of all races. This is part of what is being taught in
15 these schools. Both are very important.

16 The practices of these schools, however,
17 because they are providing secular education, are not a
18 matter of purely religious concerns. These schools very
19 much affect a fundamental state interest and are
20 therefore properly subject to state legislation enacted
21 to protect the public order and the general welfare.

22 QUESTION: Ms. McManus --

23 MS. MC MANUS: Yes, Justice O'Connor.

24 QUESTION: -- I notice that the Ohio law has a
25 bona fide occupational qualification provision, a BFOQ

1 clause. Under that provision, could the Dayton
2 Christian School have obtained prior permission from the
3 state to hire and retain only those who agreed to hold
4 and observe the particular religious beliefs at issue
5 here?

6 MS. MC MANUS: Yes, that provision would be
7 available. That provision would --

8 QUESTION: A BFOQ could have been obtained, in
9 which case we wouldn't be here. Is that it?

10 MS. MC MANUS: That doesn't necessarily mean
11 we wouldn't be here. They would be able, for example,
12 to seek a BFOQ that would recognize their right to
13 discriminate in terms of people -- in terms of hiring
14 only persons of their same faith.

15 A BFOQ granted on the basis of religion,
16 however, would not necessarily give them an unfettered
17 right to discriminate as well on the basis of sex, or,
18 as the facts we have in this case, to discriminate by
19 taking a retaliatory action against an employee.

20 QUESTION: Well, that is my question, whether
21 they can get a BFOQ on the basis that they want to hire
22 and retain only people who agree that if they have young
23 children they will stay home, or if they have a dispute,
24 they will take it first to the authorities within the
25 school.

1 MS. MC MANUS: No, Justice O'Connor, I don't
2 believe the BFOQ would be able to extend it that far,
3 because in that situation they wouldn't be seeking an
4 exemption in the narrow sense. They would be seeking to
5 use the religious exemption in order to take conduct
6 directly prescribed by state law.

7 QUESTION: Does Ohio take the position that it
8 has the right in this particular situation to compel the
9 school to take back on the teaching staff the
10 complaining teacher?

11 MS. MC MANUS: Justice O'Connor, I think that
12 question is a question we have not yet dealt with. The
13 situation we have before the Court --

14 QUESTION: Well, I am asking you as a matter
15 of Ohio state law in your view can the Commission
16 require that?

17 MS. MC MANUS: Yes, the Commission does have
18 the power to order reinstatement. However, whether or
19 not the Commission would exercise that power in any
20 particular case is a matter of the Commission's
21 discretion. We simply don't know based upon the record
22 in this case whether that is what the Commission would
23 do. They do have other remedies available to them that
24 would affect the purposes of the Act, but that would not
25 include reinstatement, for example, front pay.

1 QUESTION: Did anyone suggest that the
2 District Court abstain in this case so that we could
3 have found out what the Commission would have done?

4 MS. MC MANUS: Yes, Justice Rehnquist, we did
5 raise the absence argument to the District Court,
6 particularly on the basis of Younger versus Harris that
7 they should abstain and let this proceed to hearing.
8 The District Court in its opinion never addressed the
9 absence issue.

10 QUESTION: But it didn't abstain.

11 MS. MC MANUS: It did not abstain either.
12 However, what the District Court did, I suppose it comes
13 somewhat close to that, is, it considered the issue to
14 be very narrow. It narrowed the issue only to the
15 question of whether or not the Commission would be able
16 to proceed to hold a hearing, and expressly reserved
17 that that was the only issue before it. However, it
18 didn't do that simply on the basis of abstention. It
19 did use the analysis of the constitutional issue.

20 QUESTION: Is it your position that cases of
21 this Court would support abstention in this case pending
22 the conduct of an administrative hearing at the state
23 level?

24 MS. MC MANUS: Yes, we do believe abstention
25 would have been a proper remedy for the District Court

1 to have followed. The state courts in Ohio, of course,
2 have the same ability to deal with these constitutional
3 issues. Had the matter proceeded through the
4 administrative hearing, I think we would be in a much
5 better position, and that we would have a full record.

6 At this point, we don't even know if the
7 Commission will find that there was unlawful
8 discrimination, and we can only speculate as to what the
9 Commission might do if they would find it. This, of
10 course, is a very, very difficult question for the
11 Commission, and in this area I think they would proceed
12 in a very sensitive manner. Any decision they would
13 reach would be reviewed by the state courts. And I
14 think the advantage of having a full record would have
15 been a very great advantage, dealing with issues of this
16 great importance.

17 There are really two provisions of the Ohio
18 civil rights law that are at issue in this case, and I
19 think it is important to note the distinction. The
20 first is the statute that makes it unlawful for an
21 employer to discriminate against an employee on the
22 basis of sex. The second issue that is involved in the
23 case is the Ohio statute that does make it an unlawful
24 employment practice for an employer to retaliate against
25 an employee for having -- their statutory rights.

1 The facts that brought these two issues into
2 this case I think can be briefly summarized. Linda
3 Hoskinson was an elementary school teacher at Dayton
4 Christian Schools. She, like every other teacher, was a
5 born again Christian.

6 Each year during her employment with the
7 school she signed a contract in which she affirmed her
8 belief in the school's statement of faith. Also
9 included in that contract was a place for her to sign
10 that she did agree with the school's biblical chain of
11 command. It is the biblical chain of command that does
12 interface with the retaliation issue.

13 The school superintendent explained the
14 biblical chain of command at the hearing before the
15 District Court in this way. He testified in the school
16 setting the biblical chain of command or the good report
17 policy means that employees must go only to the school
18 administrators, and ultimately to the board of directors
19 for any type of dispute resolution. They may never take
20 any concerns or disputes beyond the school's own
21 authority structure.

22 QUESTION: Ms. McManus, in order for the
23 Dayton Christian School to qualify under Ohio law as a
24 recognized school for the education of the students for
25 accreditation purposes, I suppose, the school had to

1 sign some kind of an agreement with the state?

2 MS. MC MANUS: Yes, the school did have to
3 submit an application to the state and did receive a
4 charter from the state of Ohio.

5 QUESTION: And does the agreement entered into
6 with the state cover in your view an agreement to abide
7 by these procedures of the state with regard to
8 examination of employment discrimination problems?

9 MS. MC MANUS: The actual procedures for
10 filing a charter I don't believe specifically cross
11 referenced the civil rights laws, but as a condition for
12 the charter, it would be an agreement with all the
13 regulations enacted by the State Department of
14 Education, and there is a parallel regulation in the
15 State Department of Education's own rules for regulating
16 chartered schools.

17 I don't believe, however, there is a direct
18 cross-reference to the civil rights laws.

19 The state is not contending or not questioning
20 that the school's decision to terminate Mrs. Hoskinson
21 was based upon its sincerely held religious beliefs.
22 The reason the school ultimately fired Mrs. Hoskinson
23 was because she had gone to see an attorney. After she
24 had been working at the school for five years, Mrs.
25 Hoskinson became pregnant.

1 When she advised the school administrators of
2 her pregnancy, they told her they would not renew her
3 contract for the following year solely for the reason
4 that her continued teaching would be contrary to the
5 school's philosophy concerning the importance of the
6 mother staying at home with the young children.

7 Although Mrs. Hoskinson had taught at the
8 school for five years, she had never before heard of
9 that policy. After learning that her contract would not
10 be renewed, Mrs. Hoskinson and her husband consulted an
11 attorney to find out if that decision was proper. The
12 attorney wrote a letter to the school on Mrs.
13 Hoskinson's behalf, and as a result of that she was
14 fired.

15 The school terminated her contract for what it
16 stated to be serious philosophical differences. The
17 school interpreted her consulting with an attorney in
18 this matter to be a violation of the school's biblical
19 chain of command. The state is not questioning whether
20 or not that decision was founded on the school's
21 sincerely held religious beliefs, but the state does
22 contend that the constitution does not require the state
23 to accommodate the practice of a religious belief where
24 to do so would require the state to abdicate its own
25 compelling interest.

1 The point on which both the courts below
2 agreed was that the state did indeed have a compelling
3 interest in this case. Both courts found that the state
4 of Ohio does have a compelling interest in eradicating
5 discrimination in employment. Both courts likewise
6 agreed that the state has a compelling interest in
7 seeking to protect employees who want to question
8 employer practices.

9 QUESTION: What if this case had arisen in the
10 context of an employment dispute in a church as such
11 instead of a school?

12 MS. MC MANUS: An employment dispute in a
13 church as the employer, I think it would depend upon
14 perhaps the position we would be talking about, whether
15 the church is employing a gardner or a secretary. If
16 you are talking about a situation where the church is
17 employing the priest or the spiritual ministers, there,
18 no, the Act would not apply in that instance.

19 QUESTION: Is there an express exclusion?

20 MS. MC MANUS: No, the Ohio statute does not
21 have an express exclusion for religious institutions.

22 QUESTION: And so why do you say it does not
23 apply in that situation?

24 MS. MC MANUS: I believe in the situation
25 where you are talking about the church as an employer

1 and an ecclesiastical position, a religious position, in
2 that situation I think the Constitution would protect
3 that decision.

4 QUESTION: And what provision of the
5 Constitution, the free exercise clause?

6 MS. MC MANUS: The First Amendment. Yes, Your
7 Honor. I think under the line of cases, however, it has
8 never gone beyond that point. I think the Court has
9 made clear that churches do have a right to
10 self-governments in the area of purely ecclesiastical
11 matters. However, that line of cases has never been
12 extended this far where we are talking about a situation
13 there there is a very definite secular state interest as
14 well.

15 QUESTION: Ms. McManus, supposing that instead
16 of an antidiscrimination statute this were a state wages
17 and hours statute, which came up under the same
18 circumstances. In other words, the school says it is
19 our policy to pay people only, it is part of our
20 religion to pay people only ten cents an hour, and that
21 is a religious belief, no one questions the sincerity.
22 Any different result, in your view?

23 MS. MC MANUS: I think you would have to go
24 through the same balancing analysis to determine --

25 QUESTION: You say this is a compelling -- how

1 do you tell a compelling state interest when you say
2 that?

3 MS. MC MANUS: In one way, we look at the
4 decisions of this Court. I think that --

5 QUESTION: How does this Court tell?

6 MS. MC MANUS: By looking at the importance of
7 that to what the state is attempting to achieve.

8 QUESTION: How does the Court know how
9 important it is what the state is attempting to
10 achieve?

11 MS. MC MANUS: Well, in part it is what the
12 state is saying. It is also a situation here where you
13 are -- the state is acting to protect the personal
14 rights of Mrs. Hoskinson and other teachers. We have in
15 support of this a long history --

16 QUESTION: How is it any different from a
17 wages and hours claim?

18 MS. MC MANUS: It may not be. Wages and hours
19 may well be also a compelling state interest.

20 QUESTION: And it would just depend on whether
21 a particular court said whether or not it was a
22 compelling state interest?

23 MS. MC MANUS: Well, and on the record that
24 had been developed for it. Here we have a situation
25 where Congress and the Court has recognized that we have

1 a strong history of trying to eliminate discrimination
2 against women that parallels --

3 QUESTION: We have a strong history of trying
4 to raise wages and hours, too.

5 MS. MC MANUS: Yes, there may well be, Justice
6 Rehnquist. And that, too, may also be a compelling
7 state interest that would be applicable in the setting
8 because of the nature of the setting.

9 In a situation where you do have a compelling
10 state interest, then an exception or an accommodation is
11 not required unless that state's interest can otherwise
12 be served. Another way to state the test is that, as
13 this Court has stated in United States versus Lee,
14 whether or not the burden on the practice of the
15 religious belief is essential to accomplish the
16 overriding governmental interest.

17 Here, I believe, is where the Court of Appeals
18 most seriously erred in its holding that the state's
19 interest could otherwise be accommodated. The Court of
20 Appeals believed that granting an exception to Dayton
21 Christian School would not seriously interfere with the
22 state's interest. The sole reason it gave for this
23 conclusion was that the state would still be able to
24 regulat the employment practices of non-religious
25 institutions and of religious institutions except where

1 religious belief is implicated.

2 I think the flaw in the Court's reasoning is
3 apparent. The limits it believed it was placing on its
4 decision are simply illusory when you look at the
5 context of this case. As a very practical matter, the
6 state will have no ability to learn of discriminatory
7 practices in the religious schools if an employee cannot
8 safely come and question a discriminatory practice.

9 QUESTION: But of course you have conceded
10 that within the church employment context that may well
11 be the case, and that the free exercise clause would
12 have the effect of keeping the state out of the
13 picture.

14 MS. MC MANUS: It may, in the church case
15 where we are talking purely --

16 QUESTION: That is precisely the allegation
17 being made here, that teaching of young students is such
18 an integral part of conveying the religious values held
19 by this particular faith that it comes closer to the
20 church context, so how do you respond to that?

21 MS. MC MANUS: I do believe that is the
22 school's argument. They are attempting to say they are
23 entitled to the same exemption that would have to be
24 given to a church, and I think the fact that makes this
25 an entirely different case is the fact that cannot be

1 ignored that the school is also providing secular
2 education.

3 QUESTION: Yes, but isn't that really your
4 only handle on this school, is that in order to -- they
5 would like to have children come there to satisfy their
6 compulsory educational requirements, and they have to
7 get accreditation from the state, and you don't contend,
8 do you that these religious tenets in this school
9 interfere with the school's performance of its secular
10 educational functions, do you?

11 MS. MC MANUS: We believe the practice of
12 these religious tenets in the form of discrimination
13 seriously interferes. This Court has always
14 recognized --

15 QUESTION: Well, then you want to just
16 terminate the -- you want to terminate the
17 accreditation. You want to say, you cannot do that.
18 You are not prepared to do that, are you?

19 MS. MC MANUS: No, because I don't think that
20 would achieve the state's interest. The state's
21 interest here is in protecting the employees. We have a
22 compelling interest in seeing that the employees
23 themselves receive the benefit of the act. It is not --

24 QUESTION: What about the interest of the
25 parents to have their children taught according to their

1 own faith by people who are believers in the faith?

2 MS. MC MANUS: Your Honor, I am not
3 questioning that. The parents do have a right --

4 QUESTION: You do question it by the very act
5 of the -- or the state questions it.

6 MS. MC MANUS: We are questioning it only to
7 the extent that the practices of the schools are either
8 sexually discriminatory or discriminatory on the basis
9 of race or one of the other protected classes under the
10 Act. We don't question their right to send the children
11 to these schools or their right to have these beliefs.

12 QUESTION: Going back to the question I put to
13 you near the outset, I suppose there is only one way to
14 teach arithmetic. I suppose so. I don't declare it as
15 a fact.

16 (General laughter.)

17 QUESTION: But if you are teaching history,
18 and literature, isn't the choice of what they are
19 teaching and the way in which it is taught influenced by
20 the religious faith of the institution?

21 MS. MC MANUS: Certainly, Your Honor, and we
22 had --

23 QUESTION: Then why aren't they entitled to
24 have people whose belief is consistent?

25 MS. MC MANUS: Your Honor, I believe they are

1 entitled to that extent, that the state does accommodate
2 the need to employ only people of the same religious
3 faith. This situation, however, is not a situation
4 where we are talking purely religious discrimination.
5 The decisions also implicated the state statutes in
6 terms of sex discrimination and the retaliation
7 provision. That makes us a different case than simply a
8 case where there is only discrimination on the basis of
9 a religious belief.

10 QUESTION: It seems to me you start with a
11 conclusion that there is discrimination, and then
12 proceed from the conclusion back to the premises.

13 MS. MC MANUS: We have not made that
14 determination. There is -- in the findings in the
15 District Court we do know the reasons for the employment
16 actions against Mrs. Hoskinson were discriminatory, were
17 based upon her sex, were based upon her consulting an
18 attorney. We don't at this point have a determination
19 from the Commission whether or not that was unlawful
20 discrimination, but --

21 QUESTION: Well, did the -- go ahead.

22 MS. MC MANUS: I think that the point that is
23 different in this situation where we are talking, we are
24 not trying to interfere with the school's right to have
25 these beliefs or with the school's right to teach, but

1 where the processes, whether administrative employment
2 practices take the form of discrimination, we do believe
3 in this setting the state --

4 QUESTION: But the school says that is an
5 element of our faith, in a way, and you say they are
6 entitled to have only people of the faith teaching, and
7 yet one of the elements of their faith is that they will
8 not go outside the biblical command. It seems to me
9 that you are in a bit of a contradiction there.

10 MS. MC MANUS: Maybe it should be qualified
11 and I misspoke in this sense, to the extent we are
12 talking about religious beliefs that are inherently
13 sexually discriminatory or retaliatory or would be used
14 in a manner that would be contrary to state law, it is
15 the state's position that the practice of those beliefs
16 may be limited because of the state's compelling
17 interest.

18 QUESTION: So then the church -- a religious
19 school cannot insist that only people of its own faith
20 be employed.

21 MS. MC MANUS: Not if it also implicates one
22 of the other provisions of the Act. Yes, that is our
23 position.

24 QUESTION: Well, one of the provisions of the
25 Act I suppose is that you don't discriminate on the

1 basis of religion, isn't it?

2 MS. MC MANUS: That is one of the provisions
3 of the Act. However, in that situation where it is
4 strictly religious discrimination, the preference to
5 hire only those of your faith, the state does
6 accomodate.

7 QUESTION: Well, I know, but as Justice
8 Rehnquist says, one of the articles of faith is staying
9 home with your kids, and another is following the chain
10 of command, and yet you think they must keep teachers on
11 who refuse to abide by those two tenets.

12 MS. MC MANUS: It is the state's position, no,
13 that the Act would apply in that situation.

14 QUESTION: So it is. They must keep teachers
15 on even though they do not share the faith of the
16 church.

17 MS. MC MANUS: Yes, and we believe that burden
18 on the practice of those religious beliefs is a
19 permissible one under the Constitution.

20 QUESTION: Tell me, suppose the argument
21 between this teacher and the school was just a
22 contractual dispute, they were going to fire her because
23 they didn't think that she was performing correctly, or
24 some other reason, and she said, I think you are
25 mistaken. I am going to consult an attorney. And she

1 does. And they fire her. Now what?

2 MS. MC MANUS: We have no problem in that
3 situation.

4 QUESTION: Why?

5 MS. MC MANUS: There is no state interest.
6 That firing is --

7 QUESTION: What, in the enforcing contractual
8 rights? She wants to sue the church for breaching its
9 contract with her.

10 MS. MC MANUS: But the state would not come in
11 and act. I mean, she would still have access to the
12 state court, certainly.

13 QUESTION: Could she win or not?

14 MS. MC MANUS: That would be -- could she win -
15 but for the basis of --

16 QUESTION: Well, the church's defense is,
17 look, this is an article of faith. This is an article
18 of faith. You have consulted an attorney, contrary to
19 our church doctrine.

20 MS. MC MANUS: That may go in terms of the
21 tenor of the parties or the binding nature of the
22 contract. I don't think that would deny the person the
23 right to invoke protections or access to the state
24 courts on that contractual right.

25 QUESTION: So you think that the court then

1 could say -- could give her a contractual remedy in face
2 of the church tenet?

3 MS. MC MANUS: No, I don't say that she could
4 win. I think she would have access to the courts in
5 that situation.

6 QUESTION: Let me try another hypothetical on
7 you. Suppose with this religious sponsored school they
8 dismissed the teacher because she had an illegitimate
9 baby. Do you think that would be a violation of her
10 civil rights? Is that discrimination?

11 MS. MC MANUS: If the policy was phrased in
12 that way, it may well be sexually discriminatory. If
13 the school on the other hand had a moral code under
14 which they would dismiss a person, man or woman, for
15 what they believed was immoral conduct, then it may not
16 well be sex discrimination at all. It's the policy
17 that's phrased in the sexually discriminatory manner
18 that is contrary to state law. We have no disagreement
19 with the general moral codes that would be evenhandedly
20 applied.

21 QUESTION: Would you say that a teacher in the
22 public schools could be dismissed on the same ground?

23 MS. MC MANUS: Probably not. I think there
24 would be a different standard in the public schools.

25 QUESTION: So you concede there is a different

1 standard in the religious sponsored church.

2 MS. MC MANUS: But there there is not the same
3 degree of state action that would bring in the other
4 protections of the Fourteenth Amendment. We do believe,
5 however, that the protections of the Act are properly
6 applied in this setting, and I think we are dealing here
7 with a situation where we have discrimination in the
8 education setting heightens the state's interest in this
9 matter.

10 This Court in a number of cases has recognized
11 that discrimination particularly in the educational
12 setting does not have constitutional protection. It was
13 recognized in *Norwood versus Harrison*, where the Court
14 held the state could not constitutionally aid private
15 schools that practiced race discrimination. It was held
16 in *Runyan versus McCrary*, where the Court held that the
17 right to prohibit the practice of race discrimination in
18 private schools could survive a challenge based upon the
19 parents' First Amendment freedom of association rights.
20 And most recently in *Bob Jones University* the Court held
21 that the Constitution does not give affirmative
22 protection to discrimination in the educational setting.

23 In this setting, because we are dealing with a
24 situation where it is not purely religious, we don't
25 question the parents' rights to have the alternative of

1 these schools. The state supports these schools in
2 their right to flourish. However, it has always been
3 recognized as a necessary corollary of that right that
4 they would be subject to reasonable state regulation,
5 and the state civil rights laws regulating the
6 employment decisions we feel is a reasonable state
7 regulation. It is also an area, an interest that cannot
8 otherwise be served. The state's interest is in
9 protecting Mrs. Hoskinson and other teachers.

10 There has never been suggested any alternative
11 by which the state could achieve these objectives and
12 not have the Act applied in this instance. The fact
13 that the exemption that may be carved out is a limited
14 exemption has never been a basis for saying that the
15 state must accommodate. For example, in United States
16 versus Lee, the Court did not hold that the Amish
17 employers were entitled to an exemption from the Social
18 Security law simply because there were only a few Amish
19 farmers. The Court held that the Act could be applied
20 even though it required conduct directly contrary to
21 their religious belief, because the state's, the
22 government's interest in social security was so
23 compelling. We feel in this instance the state's
24 interest in the eradication of discrimination and in the
25 protection of employees who seek to assert their civil

rights is likewise a compelling state interest.

I would like to reserve the rest of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. BALL

ORAL ARGUMENT OF WILLIAM BENTLEY BALL, ESQ.,

ON BEHALF OF THE APPELLEES

MR. BALL: Mr. Chief Justice, and may it please the Court, I should like to touch upon jurisdiction just for a moment, because the question of Younger abstention has been raised. The facts of the case were that the state initially did raise a question of abstention, and then it gave up its point. It consented to federal jurisdiction. This appears very clearly in this record.

QUESTION: There is federal jurisdiction when a court abstains.

MR. BALL: I beg your pardon, Your Honor.

QUESTION: I said there remains federal jurisdiction when a court abstains.

MR. BALL: Yes, that's correct, Your Honor. I am only saying that what the state did was consent to place itself under the jurisdiction of the court, and under United States versus -- the Hodory case, rather, Ohio versus Hodory, where the state, this Court has held, where the state voluntarily surrenders to the

1 jurisdiction of the federal court the principle of
2 comity doesn't require federal court jurisdiction --

3 QUESTION: Is there some place in the record
4 we can find that?

5 MR. BALL: Yes, there is. I will give it to
6 you now. It is in the joint appendix, Justice
7 Rehnquist, at Page 127. The pretrial order of the
8 federal court notes the jurisdiction of this Court is
9 not disputed.

10 QUESTION: Of course, that says nothing to me
11 about abstention.

12 MR. BALL: All we can say is that this case
13 has now been five years in the courts, in two federal
14 courts, up to here, and in all of those cases the
15 jurisdiction of the court has been assumed, and the
16 state has insisted upon jurisdiction. In its
17 jurisdictional statement it told the court that it
18 believed there was no jurisdictional problem.

19 QUESTION: But your typical abstention case,
20 as I understand it, Mr. Ball, is that the jurisdiction
21 of the federal court is conceded. The case stays on the
22 docket of the District Court, and the proceedings are
23 run through the state courts to solve all the state law
24 questions. Then the party is entitled to come back and
25 adjudicate their federal right in the federal court.

1 MR. BALL: We could not have even begun, we
2 could not have proceeded in the state courts at all
3 because of the fact that the Ohio Civil Rights Act was
4 absolutely preclusive of permitting us to have raised
5 any religious liberty objection at the very outset. At
6 the beginning we were closed out by the effect of the
7 statute. The statute does not allow any religious
8 defenses whatever.

9 QUESTION: Yes, but as a matter of practice,
10 is it not true that in Ohio the Commission has granted a
11 number of exemptions and has recognized in the process
12 of some of these very sensitive cases that it shouldn't
13 interevne? Wouldn't you concede that?

14 MR. BALL: This is based, I think, Justice
15 O'Connor, what you are saying is based on
16 representations made in the reply brief, which is the
17 first time --

18 QUESTION: Well, having pulled some of those
19 specific cases out and looked at them, it appears that
20 the Commission has been giving rather sensitive
21 treatment to these first amendment claims in the course
22 of its actual adjudiations process.

23 MR. BALL: Well, we would like to have been a
24 beneficiary of such treatment.

25 QUESTION: That doesn't mean that they

1 wouldn't look into it in the first instance to see if
2 the claim is pretextual.

3 MR. BALL: We know of no such case, Your
4 Honor. Looking at the reply brief, which is the first
5 we had ever heard of any liberality under the Act,
6 looking at the reply brief, we see cited two items that
7 are called complaints. The state graciously sent us
8 those, and we find one is an interoffice memorandum and
9 the other is an examiner's -- hearing examiner's report.

10 These aren't decisions of courts. They are
11 not even decisions of administrative bodies. The state
12 does not allow any -- the state statute does not allow
13 any relief whatever under BFOQ, for example, where the
14 BFOQ under this Act does not pertain to hiring or
15 firing. It pertains to inquiring, recordkeeping, and
16 advertising, nothing else.

17 QUESTION: Of course, the NLRB didn't have any
18 religious exemption, but in the Catholic Bishop case, we
19 found one was implied, but we were construing the
20 federal statute.

21 MR. BALL: Up against a constitutional
22 problem, yes.

23 QUESTION: Well, don't you think the Ohio
24 courts might have looked at it that way, too?

25 MR. BALL: We couldn't have gotten there. The

1 problem there, Justice Rehnquist, is that we couldn't
2 have gotten into court with any record of the religious
3 -- any evidence in the administrative proceedings of our
4 religious problem. The Mobil versus Rocky River case,
5 which we cited, rules out any consideration of
6 constitutional issues by the Ohio Civil Rights
7 Commission.

8 So, we couldn't place anything in evidence in
9 the administrative proceedings, but when we got to the
10 court level there are further provisions under the Ohio
11 Civil Rights Act that are again preclusive, but the only
12 thing the court upon an appeal, the Court of Common
13 Pleas upon an appeal from the Ohio Civil Rights
14 Commission can go on is whether the evidence was
15 probative and substantial, and with that, there being no
16 religious issue possible to be raised, we were closed
17 cut.

18 There is absolutely no record of any lenience
19 or any meets and bounds and clear standards of lenience
20 which the Commission is given by the statute, and the
21 Dayton Christian Schools have not sought some kind of a
22 break under the law. They don't want to corrupt
23 bargain. The Act itself simply says that it is unlawful
24 for any employer to discharge any person on account of
25 that person's race, religion, et cetera, et cetera,

1 without just cause.

2 Now, the just cause wording of this statute
3 does not give any allowance to the raising of religious
4 issues because the Ohio Supreme Court in the Plumbers
5 and Steamfitters Committee case held definitively, as in
6 other cases, that just cause is never an issue where
7 discrimination is charged. So this Dayton Christian
8 Schools has indeed under the terms of the statute
9 committed an act of religious discrimination.

10 QUESTION: Well, the counsel for the state who
11 is here concedes that in some circumstances the state
12 would not attempt to apply the statute, and would
13 recognize a free exercise claim. Unfortunately, the
14 case comes to us in a posture of not knowing whether the
15 state would do so in this circumstance.

16 MR. BALL: At the outset, when the charge was
17 first brought, it was the position of Dayton Christian
18 Schools that the Act as applied to this school would
19 absolutely find the necessary application of the Act
20 would result in this school's conduct being considered
21 unlawful.

22 The state at that point, not at the reply
23 brief stage, at the end of this case before the Supreme
24 Court, at that point makes no mention of an liberality.
25 Its very point, and we heard it argued here today, is

1 that if you discriminate on account of sex, you can have
2 no religious justification whatever, so therefore it was
3 perfectly futile for Dayton Christian Schools to attempt
4 to proceed through the administrative proceedings.

5 It was clear to us that the Act did find us
6 guilty at the outset since no religious defense could
7 conceivably be raised under the terms of the statute.

8 QUESTION: You mean guilty by definition.
9 Guilty by definition --

10 MR. BALL: Guilty by definition would put it
11 perfectly.

12 QUESTION: Do you have any cases where the
13 Commission passed on religious discrimination?

14 MR. BALL: No, we do not, Justice Marshall.

15 QUESTION: So how are you precluded from going
16 there?

17 MR. BALL: We believe --

18 QUESTION: You say it wouldn't work. How do
19 we know it wouldn't work? How do you know it wouldn't
20 work?

21 MR. BALL: We have to -- we know that it
22 wouldn't --

23 QUESTION: How do you know that the Commission
24 wouldn't consider it?

25 MR. BALL: Well, then, I think we are in a

1 position simply of doing, of asking the Commission for a
2 break under a perfectly clear statute. There is no
3 Pullman problem here. This is a very clear statute that
4 says these acts of discrimination are unlawful, and that
5 to discharge a person under these circumstances was
6 unlawful. Now, had the Commission at that stage felt
7 that it had some legal power, which it does not, to come
8 to us and say, we would like to consider this business
9 of this unlawful discharge, and we might because of
10 religious reasons relieve you of any burden. The
11 state's attorney general has told this Court this very
12 hour that this could never be done. The Commission, I
13 think, is being spoken for when it said here that
14 absolutely there cannot be any religious justification
15 for what the Commission calls sex discrimination. So I
16 think we are in a classic case of futility.

17 Why should the board of this religious
18 organization have said, yes, we will go into those
19 proceedings and through them? They face immediately
20 very exhaustive discovery, and yet in producing all
21 those minutes of their meetings, all those personnel
22 records, they could give them all their Bibles and they
23 still couldn't use one word, one item of that evidence
24 to make a religious liberty defense.

25 So it seems to me they certainly subjected

1 themselves to an immediate charge of certainty that they
2 would be found to be unlawful.

3 QUESTION: That is essentially what I
4 understood the state's representative to be telling us
5 here just a few minutes ago.

6 MR. BALL: I would certainly agree with you,
7 Mr. Chief Justice. At any rate, the Court has before it
8 an entirely religious, classically religious
9 non-state-aided religious entity which would not exist
10 except to carry out its religious mission to children.
11 I fully agree with the sense of questions which were
12 asked of opposing counsel moments ago concerning the
13 religious nature of the institution. Of course, they
14 are subject to state regulation. But that no more
15 converts them into a secular institution than any
16 regulation could.

17 They are very much like the schools in Lemon
18 versus Kurtzman, which were found not to have separable
19 secular and religious compartments.

20 QUESTION: Mr. Ball, can I ask you the
21 question that Justice Rehnquist asked of your opponent?
22 Suppose this were a wage and hour case. Would the
23 religious defense prevail, do you suppose, if there was a
24 religious dogma about paying more than a certain amount
25 of money per day? And then take the second question.

1 Even assuming one answer to that, what about the chain
2 of command? What if a person with a wage and hour claim
3 went to a lawyer? Would discharge be justified for that
4 ground in a wage and hour case?

5 MR. BALL: I would suppose, Justice Stevens,
6 that if we could imagine the religious doctrine of
7 that --

8 QUESTION: Well, you have it here. You have
9 the religious doctrine of the chain of command. I am
10 talking about on the --

11 MR. BALL: Yes, I know that. I am saying that
12 religious doctrine relating to wage and hour -- that is
13 your proposition, right?

14 QUESTION: Well, that is the first question,
15 yes.

16 MR. BALL: Yes. That is the first question.
17 It would seem to me that if it is a part of the
18 institution's religion, a certain strained logic might
19 say, well, then, that institution would be cut from
20 under also, according to our position. This is so
21 different a case, this is certainly not this case, but I
22 think the Court has to look at this case without
23 presuming that from a decision in favor of Dayton
24 Christian Schools, all those sorts of horrors would
25 occur.

1 QUESTION: Mr. Ball, what if we had a
2 situation of a state law in Ohio requiring teachers to
3 report to the state instances of suspected child abuse,
4 and yet the school has its biblical chain of command
5 doctrine that would tell the teacher the teacher had to
6 report that to the school authority instead?

7 MR. BALL: Well, I think --

8 QUESTION: Do you think the state law would
9 override the religious claim in that instance or not?

10 MR. BALL: Well, I think to apply it to Dayton
11 Christian Schools, if a situation of that kind arose
12 where a teacher in the school noticed a situation of
13 child abuse, she would then follow the scriptural chain
14 of command. She would go to the person, first of all,
15 and say, is this really true. That is part of Matthew
16 18. And finding no satisfaction there, she would move
17 it into the larger faith community to have reported it
18 there, and conceivably soon.

19 QUESTION: And if instead the state law --

20 MR. BALL: Then the school would report it.

21 QUESTION: -- required her not to do that, but
22 to report it first to the state authority, that could
23 not be followed in your view? The state couldn't
24 require that of her?

25 MR. BALL: That's correct. However, however,

1 in this -- following the ordinary chain of command
2 situation, the teacher would report it to the school,
3 the school would feel certainly a civic obligation to
4 report it promptly to the state. I just don't think it
5 is a real problem. I think that the chain of command
6 principle, however, is a basically religiously grounded
7 principle which would have to be respected
8 constitutionally. I think it is a fairly far out
9 example, if I may suggest that, Justice O'Connor.

10 QUESTION: I am not sure whether the question
11 assumed that the child abuse would be a criminal act or
12 not, but suppose a teacher became aware that drugs were
13 being sold by one of the teachers to the pupils. Is
14 there any conflict between promptly reporting that to
15 the chain of command, as it were, and promptly reporting
16 it to the criminal enforcement authorities?

17 MR. BALL: I think such an instance of child
18 abuse or of drug abuse if we can --

19 QUESTION: I am assuming a criminal -- a
20 felony there.

21 MR. BALL: Yes. You are assuming, Your Honor,
22 that if the teacher was bound by chain of command and
23 refused then on that ground to report it. Is that your
24 proposition?

25 QUESTION: You mean to the state --

1 MR. BALL: To the authorities.

2 QUESTION: -- to the authorities.

3 MR. BALL: Yes.

4 QUESTION: It would not excuse the teacher
5 from reporting it to the authorities.

6 MR. BALL: No, it would not.

7 QUESTION: I wonder what your answer is to my
8 question about the wage and hour problem.

9 (General laughter.)

10 QUESTION: If a teacher reported what she
11 thought was an underpayment of minimum wages, went to a
12 lawyer about that and then got fired, would the First
13 Amendment protect the school on that discharge, in your
14 view?

15 MR. BALL: Well, in that event, the chain of
16 command would apply, of course.

17 QUESTION: I understand.

18 MR. BALL: And the state could proceed against
19 the school if it wanted to --

20 QUESTION: I am assuming it does. My question
21 is whether the school would have a good defense or not.

22 MR. BALL: On the reporting point it would,
23 yes.

24 QUESTION: And so that even as to a federal
25 statute, the same point that you make about the state

1 statute here, it would be invalid.

2 MR. BALL: Yes, that's correct. Yes, that's
3 correct.

4 QUESTION: And then tell me, and you started
5 to, what is the difference in terms of the substantive
6 violation between the discrimination on the basis of sex
7 on the one hand and the wage and hour claim on the
8 other? Why is one stronger than the other, or are they
9 the same?

10 MR. BALL: You have presupposed that they are
11 each a doctrine profoundly held.

12 QUESTION: Correct. Yes.

13 MR. BALL: I can only say that if that is the
14 supposition, then we have to protect the religious right
15 to maintain its chain of command posture. I must --

16 QUESTION: Putting aside for a moment the
17 chain of command. I understand. But as to the
18 substantive violation itself, the school could claim a
19 religious -- First Amendment protected right to pay
20 subminimum wages?

21 MR. BALL: That would involve, of course, a
22 very different question than you have here.

23 QUESTION: I am asking you why they are
24 different.

25 MR. BALL: Well, you might have a different

1 kind of compelling state interest. You might have a
2 different kind of religious claim. If you are saying
3 that the -- not to pay minimum wages was a profoundly
4 religious belief --

5 QUESTION: Correct.

6 MR. BALL: -- of the institution, then that
7 belief should be protected unless it can be shown that
8 it creates a severe hazard to the public interest. In
9 this case, you don't have that. In this case you have
10 the profound religious belief about the role of the
11 mother, and an innocent belief in the role of the
12 mother, in which there is nothing of the kind of
13 discrimination we think of in the ordinary marketplace
14 sex discrimination.

15 QUESTION: Well, except I suppose the father
16 wouldn't have been fired.

17 MR. BALL: And then the -- to say then that
18 the state can call that unlawful on the basis of its
19 hindering the eradication of sex discrimination
20 throughout the country is simply -- simply poses a
21 totally different question than you have. I think you
22 have to bring in then what is the compelling state
23 interest. We don't believe that the upholding of the
24 position of Mrs. Hoskinson in this case or the Ohio
25 Civil Rights Commission in any way impinges upon the

1 realization of the eradication of sex discrimination
2 generally speaking. It is a very much limited area, a
3 very limited effect, that people of these beliefs --

4 QUESTION: It does get the message to the
5 children that the rules for women are different from the
6 rules for men.

7 MR. BALL: No, I don't think so.

8 QUESTION: As to the teaching profession, if
9 they've got small children at home.

10 MR. BALL: Whether or not that is so --

11 QUESTION: Fathers don't stay home with
12 children?

13 MR. BALL: This is a matter of religious
14 belief.

15 QUESTION: I understand.

16 MR. BALL: And religions do -- if you will
17 look at, Justice Stevens, the amicus curiae briefs in
18 this case of the National Conference of Seventh Day
19 Adventists, American Jewish Committee, the Orthodox
20 Jews, the United States Catholic Conference, they all
21 seem to believe profoundly not that the outcome of this
22 case in our favor is going to be scandalous to children,
23 but that a basic religious belief in sexual
24 differentiation traditional in Jewish and in Christian
25 teaching has the right to be protected in our court

1 system, which is why we are here.

2 QUESTION: Suppose a teacher in this school is
3 raped and goes to see a lawyer. Would she be fired?

4 MR. BALL: If she broke the chain of command,
5 other things being equal, yes. That is correct. She
6 could be. I must mention this thing, however. In all
7 of these questions concerning firing, the process under
8 One Corinthians is one of reconciliation. You will note
9 that in 1974, when Mrs. Hoskinson first broke the
10 procedure set up under the school's laws, and under
11 Scripture, the school had a reconciliation meeting with
12 her.

13 QUESTION: What is there in the Scriptures
14 that says you don't go to a lawyer?

15 MR. BALL: It is in I Corinthians, and it is
16 in this record, extensively in the record. I will quote
17 it to you if you desire me to. It is in I Corinthians,
18 Chapter 6.

19 QUESTION: Don't a lot of Christians violate
20 that every day?

21 MR. BALL: Pardon me?

22 QUESTION: Don't a lot of Christians violate
23 that every day?

24 (General laughter.)

25 MR. BALL: If they do --

1 QUESTION: You would be out of business if
2 they didn't, wouldn't you?

3 (General laughter.)

4 MR. BALL: I think that is a conciliation
5 procedure which was used here, was used then repeatedly
6 in the present circumstances, and she was not fired
7 because she was pregnant. She was not fired because she
8 went to a lawyer. In each case the school said, come
9 back and let's talk about this. Let's see if we can't
10 become reconciled. And it is only at the end of that
11 process, when on the advice of her attorney she refuses
12 to participate in that proceeding, that she is finally
13 told, as the school told her, we can no longer walk
14 together. In other words, at that point, she is
15 terminated.

16 I think that another aspect of her commitment
17 is the fact that she signed a contract in which she
18 pledged her adherence to all the beliefs of the school,
19 and she was hired on the basis of that commitment. Her
20 religious representations caused her to get the job.
21 Those are very extensive religious requirements of which
22 she was aware.

23 CHIEF JUSTICE BURGER: You have only six
24 minutes remaining now. You had better get to the rest
25 of your substantive argument, Mr. Ball.

1 MR. BALL: Thank you, Your Honor.

2 I think there are three questions that have to
3 be faced. First of all, may the state bar Dayton
4 Christian Schools from observance of its doctrines
5 regarding mothers, the role of the mother in relation to
6 the infant, and with respect to I Corinthians and
7 Matthew 18, and more broadly, is government free to
8 impose, contrary to the First Amendment, requirements
9 upon a religious school such as this which would forbid
10 it to differentiate sexually and forbid it to choose
11 those who are going to be carrying out its ministry?

12 And finally, we have to examine the question
13 here of the statute in question which precludes the
14 raising of any constitutional defenses under the
15 religion clauses. The court has said in Serbian that it
16 is of the essence of these religious unions and of
17 religious faith that religious decisions of the body are
18 to be accepted as matters of faith, which may not be
19 conformable to secular notions, may not be conformable
20 to secular notions of fundamental fairness or
21 impermissible objectives.

22 You have a statute here which is very unlike
23 Title 7, wherein it would be possible to have raised
24 religious defenses. We could go into that at quite some
25 length, but clearly if we were under a Title 7 type

1 statute or a statute such as Pennsylvania has, it would
2 then be possible for us to have said, we have a
3 religious reason for this so-called sexual
4 discrimination for sexual differentiation with respect
5 to the mother.

6 QUESTION: Mr. Ball, does it make any
7 difference at all if this is a state chartered school,
8 and that Dayton School applied to the state for a
9 charter, and agreed to abide by state laws, and so
10 forth? Does that matter in our balancing of the free
11 exercise claim?

12 MR. BALL: I think it doesn't, first of all,
13 impart secularity to the school. This is a pervasively
14 religious institution, so it is like the schools that
15 are considered in cases such as Lemon, Catholic Bishop,
16 and so on. Then as to the commitment --

17 QUESTION: Well, and Bob Jones, in a sense. I
18 just wonder whether it matters at all that the state has
19 given a charter to qualify the school to graduate
20 students that meet state requirements.

21 MR. BALL: I think not. Again, this school
22 constitutionally speaking is precisely in the slot of
23 the schools which were considered in Catholic Bishop.
24 And they are state regulated schools. In Pennsylvania,
25 Rhode Island, the schools considered in Lemon versus

1 Kurtzman, and so on.

2 But in addition to that is the fact that
3 certainly the school by signing an agreement under its
4 charter to be conformable to state laws, which it would
5 be anyhow, certainly wasn't making a commitment to abide
6 by any unconstitutional law which would be imposed upon
7 the school, for example, a law which says that you may
8 not follow your mother doctrine, or follow your doctrine
9 with respect to going to the law, taking a believer to
10 the outside.

11 It certainly is true that great harm will be
12 visited upon the school if it is made to come under the
13 jurisdiction of the Ohio Civil Rights Commission. It
14 will cause a religious body to have to cease and desist
15 from observing a traditional, very central doctrine
16 voluntarily embraced by its members. It makes the
17 religious group an active agent in breach of its own
18 doctrine, even causing it to -- the state having power
19 to make it take back someone who is unfaithful to its
20 doctrine, and to pay for that.

21 Not only does it sanction the role of the
22 state as an actor in supporting of dissidence, which is
23 a marked feature of this case, and to take sides in what
24 is a religious controversy, but it would also support
25 the bad example before the parents and the children of

1 state support, official support of someone who has torn
2 up her contract and violated the religious teachings
3 that she had agreed to pursue.

4 The compelling state interest issue simply
5 leaves us having to look at race discrimination and sex
6 discrimination very, very different. There is no
7 general principle in our society that public policy has
8 stated which recognizes no exceptions in the matter of
9 sex discrimination. We have the openings. We have
10 exceptions in the BFOQ provisions of Title 7. We have
11 situations, decisions in courts in which it has been
12 recognized that there may be a right of privacy which
13 requires that a nursing home for old women, for example,
14 would hire only women, and certainly we have as much
15 involved here from a constitutional point of view, an
16 interest involved here of religious liberty which would
17 seem equal at least to that right of privacy.

18 I think the Court is being asked to say that
19 it will rule as follows. Either send this case back
20 after going on six years in the courts after the state
21 pursued the jurisdiction which is being argued before
22 this Court today, consented the jurisdiction, when there
23 can be no relief under the statute, and when these late
24 matters referred to in the reply brief which are totally
25 irrelevant to any possibility of the state saying, yes,

1 we will give you a break, when the state in fact says
2 that if it is sex discrimination, there can be no break,
3 and the second thing that can be done is, the Court to
4 uphold the position on the merits of the Ohio Civil
5 Rights Commission and thus say that the teaching and the
6 practice, the practice of this religious body with
7 respect to the role of the mother shall be suppressed,
8 and that likewise shall be suppressed. It is the
9 practice of its doctrine founded in Matthew 18, founded
10 in Scripture, that would prohibit a member of the church
11 going to -- going outside the church for relief.

12 QUESTION: In your view, is that fundamentally
13 any different from a union contract or any other private
14 contract by which the parties pledge themselves to go to
15 final and binding arbitration without resort to the
16 courts?

17 MR. BALL: Yes, the District --

18 QUESTION: Is it fundamentally any different
19 here?

20 MR. BALL: The District Court noted the
21 similarities, speaking of this as, in a sense, a
22 grievance procedure.

23 CHIEF JUSTICE BURGER: Thank you.

24 MR. BALL: Thank you.

25 CHIEF JUSTICE BURGER: Do you have anything

1 further, Ms. McManus?

2 ORAL ARGUMENT OF KATHLEEN MC MANUS, ESQ.,
3 ON BEHALF OF THE APPELLANTS - REBUTTAL

4 MS. MC MANUS: Very briefly.

5 QUESTION: How would you distinguish this from
6 a contract to go to arbitration either as a required
7 preliminary before bringing any litigation or an
8 agreement to have final and binding arbitration,
9 foregoing all resort to the courts?

10 MS. MC MANUS: I think that in this area of
11 the civil rights law would be an impermissible and
12 unbinding type of agreement if it would constitute a
13 prospective waiver of the civil rights that the state
14 has affirmatively conferred on these people. A prior
15 agreement cannot constitute a valid waiver of statutory
16 rights. I think that also would very much affect the
17 state's interest, because here the state's interest is
18 dependent upon having people who are willing to come
19 forward and ask questions and to assert their rights
20 seriously interfere with the fulfillment of the state's
21 interest in this case.

22 I would like to point out in partial response
23 to Justice Steven's question that I think it is true
24 that the issue we are dealing with here is not limited
25 just to the civil rights area, particularly with respect

1 to the biblical chain of command policy which the school
2 recognizes is prevalent among many religions. If such
3 policies can effectively shroud the institution from
4 the application of any secular law they feel to be
5 onerous or burdensome, I think there is a real risk that
6 there will be other institutions who will seek to claim
7 similar exemptions regardless of whether or not it is
8 based upon genuinely held religious belief.

9 I think in a situation like this, if the civil
10 rights law which was found by both courts below to be a
11 compelling state interest, and whose findings are
12 supported by this Court's holding in Roberts versus
13 United States Jaycees, that the civil rights law is not
14 a sufficiently compelling interest to permit the state
15 to protect an employee who merely seeks to ask a
16 question, I think it is very unlikely any law ever will
17 be able to prevail in this instance.

18 Thank you.

19 CHIEF JUSTICE BURGER: Thank you, counsel.
20 The case is submitted.

21 (Whereupon, at 2:59 c'clock p.m., the case in
22 the above-entitled matter was submitted.)
23
24
25

CERTIFICATION

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#85-488 - OHIO CIVIL RIGHTS COMMISSION, ET AL., Appellants V.

DAYTON CHRISTIAN SCHOOLS, INC., ET AL.

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BY Paul A. Richardson

(REPORTER)

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