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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-179 & 86-401

TITLE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, ET AL., Appellants V. CHRISTINE J. AMOS, ET AL.; and UNITED STATES, Appellant V. CHRISTINE J. AMOS, ET AL.

PLACE Washington, D. C.

DATE March 31, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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CORPORATION OF THE PRESIDING : :
BISHOP OF THE CHURCH OF JESUS : :
CHRIST OF LATTER-DAY SAINTS, : :
ET AL., : No. 86-179
Appellants :
v. :
CHRISTINE J. AMOS, ET AL.; and :

UNITED STATES, :
Appellant :
v. : No. 86-401
CHRISTINE J. AMOS, ET AL. :

- x

Washington, D. C.

Tuesday, March 31, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

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APPEARANCES:

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DAVID B. WATKISS, ESQ., Salt Lake City, Utah; on behalf of Appellees.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments this morning in No. 86-179, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints against Christine J. Amos; and in No. 86-401, United States against Christine J. Amos.

You may begin whenever you're ready, Mr. Lee.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE APPELLANTS IN NO. 86-179

MR. LEE: Thank you, Mr. Chief Justice, and may it please the Court:

This case involves the constitutionality of Congress' 1972 Amendment to Section 702 of Title VII. It is an amendment which restored to religious employers a right that they had enjoyed for 175 years before there was a Title VII: the right to prefer their own members for their own employment without running afoul of Title VII's prohibition against employment discrimination based on religion.

When originally enacted in 1964, Section 702 permitted religious preference hiring, but restricted it to the church's religious activities. The undisputed purpose of the 1972 amendment was to free the courts and the EEOC from entangling themselves in deciding which of a church's activities are and which are not sufficiently

religious to qualify for the exemption.

Section 702 has none of the traditional indicia of an establishment of religion. It involves no endorsement, no subsidy, no preference for one sect over another.

The statute simply does not promote religion. All that it does is to permit churches to promote religion in the same way that they have done for all but eight years of our national existence.

There is nothing in the establishment clause that prohibits churches from promoting religion. Indeed, that is the very reason for their existence.

And neither does the establishment clause prohibit government from permitting churches to promote religion.

Neither the Appellees nor the District Court has ever really faced up to the nature of the problem that Congress faced, and the limited range of available solutions to Congress, given the other decisions that Congress made.

Congress could have simply made Title VII applicable only to race, sex and national origin. But once it decided to include religion as one of its criteria, it had to provide some kind of exemption from that criterion for religious employers, lest, in

violation of the free exercise clause, they be prevented from hiring their own members for purely ecclesiastical positions.

Once it is recognized then, as I gather it is by everyone in this courtroom, that the Constitution required Congress to pick some exemption, the only real issue is whether the Constitution precluded the choice that Congress made.

In other words, Congress having opted for an anti-employment discrimination package that is not quite as large as the one the Appellees would have chosen, is Congress constitutionally obligated to make it larger?

The answer to that question has to be no. Surely the establishment clause is not violated every time government regulates churches to a lesser degree than it might have, or every time that it lifts a governmental burden that would otherwise be imposed.

That means that the real objection to this statute finds its roots not in constitutional law, but in public policy. It boils down to the fact that the Appellees wish that Congress had gone further and prohibited more than Congress chose to prohibit.

The only serious --

QUESTION: Mr. Lee, if I may inquire about one matter. I guess this case involves nonprofit entities

operated by the LDS Church?

MR. LEE: That is correct.

QUESTION: Now, what about the application of the statute to profit-making businesses of churches? Do you think that there is a legitimate secular reason for the government to allow religious entities to operate profit-making businesses and be exempted from Title VII?

MR. LEE: I do, Justice O'Connor, for this reason. I stress that it is not this case, as you indicated.

The first reason that I give that answer is that as is stressed by most of the amicus briefs that have been filed in this case, the distinction between what is secular and what is sectarian is a very difficult one to draw.

And, indeed, that intrudes. And that's why Congress drew the line where it did.

And as a consequence, we think that at any point along the employment spectrum, you're going to have some line-drawing problems. Therefore, the best place to draw the line is the place where Congress drew it.

Moreover, this Court has said many times -- beginning at least as early as Walz versus the Tax Commission -- that Congress does have a certain degree

of line-drawing capacity in this area; that there is a channel between what the establishment clause prohibits on the one hand and the free exercise requires on the other, and that within that channel Congress may safely legislate.

If that means anything at all, we think it gives Congress the right to draw the kind of distinction that it drew in this case.

QUESTION: Well, I think it's a much more difficult choice, if applied to a profit-making business.

MR. LEE: There is no question; there is no question that it is a more difficult choice.

But two points: One, I think that at the end of the day you're going to be better off observing the dividing line that Congress drew and giving that deference that the Court has said since Walz that we give to Congress in the area. But, in any event, it does not apply to this case.

So the only serious First Amendment issue in this case is presented not by what Congress did in 1972, but by the District Court's own test, which by its terms requires federal courts to decide what a church really believes and whether its practices are true to its beliefs.

The Court's opinion, for example, quotes the

Book of Mormon, the Doctrine Covenants, a theological treatise entitled "Mormon Doctrine," and then draws its own conclusions as to what the church's tenets really are and whether there is an adequate fit between what the church believes and what it does.

We submit that the First Amendment reserves those kinds of issues: what are a church's beliefs, and are its practices the best way to achieve them to the churches themselves.

But the Court need not reach that issue, because if the principle that has been so often stated that there is some room between the floor and the ceiling, between the free exercise and the establishment clause, then it must mean at a very minimum that Congress can constitutionally choose between two exemptions where those were its only options, where either one is going to have a differential effect on religion.

But the one that Congress chooses is the one that does not put the courts and the EEOC into the business of deciding what are religious beliefs and how they can best be achieved.

Finally, the Appellees have never really faced up to the fact that this is not a religious benefit case. This is not a case in which Congress, starting

from ground zero, gave to religious organizations something that they would not have had absent any action by Congress at all.

It is a religious exemption case, and the religious exemption cases make very clear that the rule has to be different for those cases.

The Appellees and the District Court's position is very simple. It is that the statute is unconstitutional because its effect is to give religious employers something that non-religious employers do not enjoy and that it, therefore, fails the effects prong of Lemon.

But if that's the rule, then it's hard to see how any religious exemption can ever survive, because by their very definition, religious exemptions always affect religious groups and always affect them differently than other groups.

If that were enough to invalidate it, then Walz and Gillette would have to be overruled; Bob Jones would have been decided differently.

And in United States versus Lee, the Amish social security exemption case, Congress could not constitutionally have exempted the Amish from social security taxes, even if it had wanted to; and the exemption that it did give, which is an exemption that

is still on the books to self-employed Amish, is unconstitutional.

The analysis is really no different, if it is expressed in terms of the traditional Lemon test, because if you assume the applicability of Lemon, then the analysis is basically the same.

You look first to see whether there was a proper purpose, and the District Court held that there was.

But Lemon's second prong inquires into primary effect. In an exemption case, in determining primaryness, you have to consider not just the effect if Congress had done -- if Congress acted, but you have to make a comparison between the effect of Congress doing nothing and Congress doing what it did.

The Appellees' case could not survive a comparative analysis, as even they appear to concede on page 22 of their brief. They have not attempted to make it, and under those circumstances, this statute clearly survives.

Mr. Chief Justice, unless the Court has questions, I'd like to reserve the rest of my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee. We'll hear now from you, Mr. Reynolds.

ORAL ARGUMENT OF WILLIAM BRADFORD REYNOLDS, ESQ.,

ON BEHALF OF THE APPELLANT IN CASE NO. 86-401

MR. REYNOLDS: Mr. Chief Justice, may it please the Court:

This is, it seems to me, a case that brings to the Court a First Amendment religious clause challenge to legislative action in perhaps its cleanest and simplest form.

Congress has barred religious discrimination in employment decisions under Title VII, but in so doing it has elected in Section 702 to exempt from that prohibition religious organizations, associations, institutions and corporations.

Rather than imposing certain obligations on employers in order to accommodate a particular religious view which was the case with the Connecticut statutes struck down in Thornton and Caldor, what Congress here has done is imposed no obligation on religious employers in the interest of religious accommodation.

In essence, it has adopted a hands-off policy with regard to religious-based employment decisions of religious organizations.

As stated, and indeed the uniformly recognized purpose for leaving religious institutions alone, was Congress' desire to avoid governmental control over and entanglement with the affairs and activities of

religious organizations.

As the court below correctly found, this satisfies the secular purpose requirement of Walz and Gillette and the like cases of this Court.

Section 702 exemption removes the prospect of intrusive and likely constitutionally-offensive inquiry, investigation and probing by government into the religious or the secular nature of church-related activities.

On another level, the exemption eliminates the prospect of secular control over and entanglement with the church's ability to fulfill its religious mission.

There is thus no tension here between the religious accommodation requirement that's incorporated in the free exercise clause and the establishment clause's prohibition against state endorsement or advancement of religion.

Rather, Congress' hands-off approach brings the values of both the free exercise clause and the establishment clause into perfect harmony.

The exemption from an intrusive government regulation furthers the free exercise interest by preserving the liberty of religious organizations to create and exert authority over self-defining religious communities, and for much the same reason, it furthers

the establishment clause's interest in avoiding undue secular control and entanglement.

It cannot be, as Appellants argue, that disharmonization fails in First Amendment terms, because Congress' accommodation of religion is broader in this instance than might be required or compelled by the free exercise clause.

Any narrower exemption, whether defined along the lines suggested by the court below or in some other fashion, would of necessity bring into play the kind of line drawing on secular terms that would exacerbate the very tension between the two religious clauses that Congress effectively avoided in Section 702.

Indeed, it's precisely for this reason that this Court in Walz and other decisions has acknowledged that there is considerable room between the floor set by the free exercise clause and the ceiling that's erected by the establishment clause in which legislatures may chart their own course of benevolent neutrality.

That Congress safely navigated a neutral course in Section 702 is quite clear. The exemption applies to all religions even handedly, not to a particular sect or to select religions.

It involves no endorsement of, financial support for, or active involvement in religious affairs

by government. In this regard, the wall between church and state has not been breached. Religion is neither enhanced nor inhibited by the Section 702 exemption.

Now, Appellees have argued that the statute effectively grants religious employers a benefit, that is, to discriminate on account of religion, which is unavailable to non-religious employers but this is the inevitable consequence of a hands-off policy by the Governemnt in First Amendment matters.

It allows religious institutions to advance their own religious mission on their own terms and through their own membership. To the extent such autonomy is regarded as a beneficial effect of religious exemption, it is precisely the sort of benefit that is protected, not condemned, by the religious liberty interest in the Free Exercise clause.

Nor is there any reason to fault the exemption because it might well open the door to uneven treatment of employees, either as between or among various religions or as between religious organizations and those that are non-religious.

Whatever the particular employment decisions and the religious reasons on which they are based are from one religion to another. That is not State action that determines different individual treatment but

unregulated private action by religious groups of the sort constitutionally protected by the Free Exercise clause.

Here, Congress acted to preserve the autonomy of religious institutions to manage their own affairs with respect to matters of religious employment.

In fashioning a broad exemption, Congress emphatically removed from the judicial agenda precisely this sort of intrusive secular probing of the operations, activities and beliefs of religious institutions that preoccupied the Court below.

QUESTION: Mr. Reynolds, as I understand your argument, it would support a total exemption from Title 7, not just from the religious prohibition; would it not? Exempt it from the racial discrimination and all other kinds of discrimination? That kind of an exemption would have all of the benefits you describe here?

I just wondered if you really intended the argument to carry that far? Of course, it isn't presented.

MR. REYNOLDS: I think that would certainly implicate different considerations. Congress here made the determination that the compelling interest in the furtherance of race discrimination and sex

discrimination under the statute were such as to warrant the intrusion that would be necessary in order to apply to religious organizations.

QUESTION: I understand that but what I'm saying is, as I understand the argument you're making, Congress could have granted religious organizations a complete exemption from Title 7's other prohibitions and accomplished all the purposes you are describing now

MR. REYNOLDS: Congress could have done that.

QUESTION: And therefore, it would have been a perfectly permissable exemption.

MR. REYNOLDS: Under the First Amendment.

QUESTION: Under the reasoning that you advanced.

MR. REYNOLDS: Right, under the religious clauses.

I think that the legislative judgment that Congress made is one that comfortably safeguards the non-interference interests implicated in the establishment clause, while fully serving the religious liberty interests of religious institutions that are protected by the Free Exercise clause.

Perhaps it is a case that Congress could have drawn the exemption line elsewhere, indeed even in a manner that produced more secular entanglement and

intrusion by the Courts but nothing suggests that it must do so and whereas here Congress believes that religious freedom concerns outweight its own interests in imposing the regulations at issue, it should be free to strike the balance in favor of religious freedom. Far from raising any First Amendment problems, such enlightened self-restraint serves to further the religious pluralism and peaceful coexistence between church and state that lies at the heart of the religion clauses.

Accordingly, Section 702, Religious Exemption in Title 7 of the Civil Rights Act of '64, suffers no constitutional infirmity, in our view, and the United States, therefore, urges reversal of the District Court's judgment.

Mr. Chief Justice, there are no questions.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Reynlds.

We will hear now from you, Mr. Watkiss.

ORAL ARGUMENT OF DAVID B. WATKISS, ESQ.

ON BEHALF OF APPELLEES

MR. WATKISS: Mr. Chief Justice, and may it please the Court.

After sixteen (16) years of good and loyal service as a building maintenance engineer in a public

gymnasium, Frank Mason was fired solely because he failed to satisfy his employer's newly imposed and inconsistenly applied religious condition.

QUESTION: This is the first time the facts have been mentioned.

MR. WATKISS: It's quite true, the Government and the Church want nothing to do with the facts, Justice Blackmun. In essence what Mr. Lee's clients tried to do was to advance their religious interests through the use of the economic coercion an employer enjoys over an employee, to coerce Mr. Mason's religious beliefs and practices.

QUESTION: That would have been perfectly okay until what year?

MR. WATKISS: That would have been perfectly okay -- well, it would have been lawful under Federal law until 1964 and, Justice Scalia, what we did in 1964, what the Civil Rights Act of 1964 represents is a repudiation of a lot of the past.

QUESTION: Do you say that once Congress has enacted a law such as the Civil Rights Act of 1964, it can never retreat? Is it kind of a ratchet?

MR. WATKISS: I don't make that broad a statement, Mr. Chief Justice. I think it can retreat in some areas.

What we're dealing with here is, we're dealing with the religion clauses and those religion clauses impose certain unique restrictions, particularly on the power of Congress. So, whether or not Congress could tomorrow abolish Title 7 in its entirety is not the question before this Court.

QUESTION: It wasn't Congress that fired this man; was it?

MR. WATKISS: That, essentially, is the Government's argument. It says, "We didn't fire Mason.", so there are no cognizable effects under the establishment clause, as I understand Mr. Reynolds' argument.

That just won't work, Justice Scalia.

There are plenty of effects. There's lots of benefits that flow from being exempted and there's lots of burdens that are visited on third parties and the sad thing about the Government's and the Church's view of this case is, they do not once tell you about the cost that this exemption visits on the religious liberty of third parties, of people like Mr. Mason. They want to talk about economy and hands-off. They refuse to concede that the central value protected by both the Free Exercise and the Establishment clauses is individual religious liberty and this exemption visits a

very heavy direct burden on the religious burden on the religious liberty of people like Mason.

QUESTION: Now, wait a minute. It seems to me that has nothing to do with this case. The burden on him. If there's anything wrong with this, it's not the burden on him because you acknowledge, don't you, that the Civil Rights Act of 1964, with respect to discrimination on the basis of religion, could be repealed in its entirety; correct? Whereupon, the burden on him would be just what it is here and there would be no unlawfulness about that.

If there is anything wrong here, it has nothing to do with the burden on him. It has to do with the benefit to the Mormon Church.

MR. WATKISS: Justice Scalia, I do not accept that view. I think it has a lot to do with the burdens on third parties.

The issue here is a combination. Can Congress accomodate the interests and preferences, the inconsistently applied preferences of this religious employer by visiting so direct a burden on the religious liberty of other people?

QUESTION: Could discrimination on the basis of religion be eliminated from the Civil Rights Act? Could everybody be permitted to discriminate?

MR. WATKISS: I'm not sure at this day and age that it could, Justice Scalia. I really am not, whether Congress could just really take the word "religion" out of Section 703. I don't know.

QUESTION: Congress cannot allow private individuals to discriminate on the basis of it at all, even if they do it uniformly for everybody.

MR. WATKISS: I think it's a much tougher case. I think --

QUESTION: What would make it so difficult? What constitutional principle is it that prevents Congress from going back to where the country was for 170 years before it wound up in 1964.

MR. WATKISS: I think you have the sort of a problem this Court dealt with the Reitman versus Mulkey case and that the Minnesota Supreme Court recently dealt with in --

QUESTION: That's a ratchet.

MR. WATKINS: It's not a ratchet. It's the problem that people have come to recognize, the nation has come to accept as a value to equal employment opportunity principle.

QUESTION: But then if Congress changes its mind, that's a far better judge of what the nation accepts than what a Court says. Congress says, "The

nation has simply changed its mind."

MR. WATKISS: We are not dealing with whether Congress could eliminate Title 7 tomorrow. Whether Congress could eliminate the prohibition against religious discrimination tomorrow.

What we are dealing with is whether Congress can draw the sort of line that it drew in Section 702. That's the issue before this Court. I do not frankly now. I think the considerations are complicated as to whether Congress could eliminate Title 7. I have my doubts but that issue is not before you.

What is before you is a statute that singles out religious employers, as such, for absolute and sweeping accomodation and that accomodation visits substantial burdens on third parties and it provides substantial benefits to the religious employer.

It obviously provides substantial benefits to Mr. Lee's clients here. They were essentially using that power to force people into their church houses and to force people to pay tithing and they were doing that at the exact same time they were exempting from this new rule the non-Mormons who were employed at these entities.

For example, at the Deseret Gymnasium. the Catholic squash pro wasn't threatened. Mr. Mason was fired because he wasn't going to church and he wasn't

paying his tithing. So they could make exceptions to this policy.

It is quite clear that what was going on here was merely a heavy handed attempt to coerce people into line.

QUESTION: I don't think the Catholic squash pro has tenure; does he? He could be fired tomorrow, as I understand it, if they found a good Mormon squash player.

(Laughter.)

MR. WATKINS: Your Honor, I don't think he could.

QUESTION: A good enough one, I should say.

MR. WATKINS: I honestly do not think he could and the notion or --

QUESTION: Or even a bad one.

(Laughter)

MR. WATKISS: No, no. The squash player is very significant because it points out, really, the lack of any religious belief in operation here.

The Morman church, plainly, among its six million members can find somebody competent to teach squash at their gymnasium. It's not the lack of --

UQESTION: No, but all I'm suggesting is, it seems to me the legal issue is precisely the same,

whether you look at the Catholic and say he could be fired to be replaced by a Mormon, or look at the Mormon and say he could be fired because he doesn't tithe.

Either way, it's --

MR. WATKISS: I fully agree, Justice Stevens. It's precisely the same issue. They can't -- our position is they can't impose a religious condition on people at that secular gymnasium. You're quite right.

QUESTION: Mr. Watkiss, may I put it very simply? Are you arguing that under Section 702 no church may employ people solely on the basis of their religious convictions? In other words, limit employees. Take the Baptists, Methodists, Presbyterians, Catholic, Jewish synagogues, are you saying that they could not limit employees to persons who share their faith?

This is not your position?.

MR. WATKISS: I need to know what kind of activity we're talking about here.

QUESTION: We're talking about employees from the janitor to the --

MR. WATKISS: I know but in what sort of capacity? What the District Court attempted to do below, what Congress did in 1964 and what we believe is, in fact, constitutionally required, is some sort of line drawing between the religious and the secular.

Now, it's important to remember --

QUESTION: Could you just take a simple example? Let's take an Episcopal Church.

MR. WATKISS: Yes, sir.

QUESTION: Somewhere here in Washington. It has a janitor; it has a policy of employing only Episcopalians.

MR. WATKISS: Right.

QUESTION: Let's say it discovers a janitor who is not an Episcopalian. Would it be unlawful to replace him with one who did believe in the faith of the Episcopalians?

MR WATKISS: In the church?

QUESTION: In the church.

MR. WATKISS: I don't think it would.

QUESTION: Well, what's the difference?

MR. WATKISS: The difference is that the activities of the house of worship itself and the activities of religious schools are both, in common understanding and in the precedents of this Court and, indeed, in Title 7, recognized for what they are. They are quite close to the core functions of religious practice, and, indeed, the Courts themselves have carved out an exemption that Congress forgot to give them and that is, for minister-like employees who are totally

exempt under judicial construction from Title 7, similarly, Congress has created a more narrow and, I submit, constitutionally more justifiable exemption for religious schools in Section 703(e).

Now, we are not challenging that exemption here. It's not at issue here.

But obviously, religious schools are much more at the heart of the religious mission than a gymnasium, a department store.

Mr. Lee says that there should be no --

QUESTION: Well, now, Mr. Watkiss, you're dealing here, though, with a -- the production of religious clothing for members of the LDS Church. And you're dealing with the operation of a nonprofit -- on a nonprofit basis of a gymnasium to carry out at least some aspect of the LDS beliefs and physical wellbeing.

So you don't have in this case a purely profit-making secular operation at all. You have something that at least is marginally related to the function of the Church itself, don't you?

MR. WATKISS: I think marginally is correct, Justice O'Connor.

Your question is complicated, and respond to all of the parts will take me a minute.

But I think the first thing I'd like to focus on is the gynamnasium. The district court found a number of facts which plainly are not clearly erroneous, and indeed, on the record we've got here, they're clearly compelled.

The district court found that there's nothing in the running or the purpose of that gymnasium to

suggest that it was intended to spread or teach religious beliefs, doctrine or the practice of sacred ritual.

Its primary purpose is to provide facilities for physical exercise and athletic games.

Now that gymnasium is open to the public. It advertises to the public. Those advertisements contain no religious message.

Throughout all the time that Mr. Mayson was employed there, the Mormon Church found it satisfactory to employ non-Mormons as well.

And indeed, there are still some non-Mormons there.

Your question also adverted to the profit/nonprofit distinction. The first problem is, there's nothing in 702 that draws that line. So Mr. Lee is quite right at least in his suggestion that the Mormon Church's string of department stores could start imposing these sorts of tests --

QUESTION: Well, we have an as applied challenge here.

MR. WATKISS: Absolutely. The other thing, though --

QUESTION: Don't you think it's reasonale to -- or it's a reasonable judgment to make that whatever a

religious organization is doing not for profit but gratis is somehow in furtherance of its reason for being?

Whereas, things that it's doing for profit, it's making money that it can use for its reason for being. But the things that it's doing just gratis, it must view as somehow being related to its primary purpose.

MR. WATKISS: Well, it's not --

QUESTION: However -- you know -- and that's their judgment rather than mine, isn't it?

MR. WATKISS: It's not gratis. If you or I wanted to go there an work out, Justice Scalia, we'd pay. The fact that they subsidize it, the fact that it's tax exempt because it's a charitable donation of its facilities to a wide number of social groups, is their choice, and it's a laudable choice.

But I don't think you can merely say that profit/nonprofit draws a line responsive to the First Amendment concerns here.

It's too crude a device, and it doesn't exist in the statute.

QUESTION: (Inaudible.) It's a pretty good generalization, isn't it? And it avoids your getting into examining the creed of the faith and deciding

whether indeed physical culture is an essential part of the Mormon religion or not. And then it'll maybe be, you know, accurate 90 percent of the time.

MR. WATKISS: There is no contention -- the district court found as a matter of fact, and he was right -- there's no contention that there's a sincerely held religious belief requiring the running of the gym; there's no sincerely held religious belief requiring that Mormons take exercise in a church run gym; and there's no sincerely held religious belief requiring that the employees of that gym be Mormons.

Those are the facts.

QUESTION: Is that right or wrong? Is that right or wrong?

MR. WATKISS: That is clearly compelled on this record. That is clearly right.

QUESTION: Well, to figure that out, I have to study the Book of Mormon, I suppose, and --

MR. WATKISS: No, absolutely not. The fallacy of this -- of this entanglement business is that -- you've got to remember the opinion an which Judge *Winder rendered his judgment as to the constitutionality of the statute as applied to Mr. Mayson was made on the basis of the Church's motion to dismiss.

The only evidentiary materials before the Judge were a few affidavits by my clients, and anything that they wanted to put in the record.

They took their best shot on the gymnasium. And the Judge was clearly right in finding what he did.

Those findings are not clearly erroneous. They're clearly compelled on this record.

So what --

QUESTION: (Inaudible) motion for summary judgment that the case went off on?

MR. WATKISS: They filed a document, Mr. Chief Justice, that was styled, motion to dismiss or in the alternative for summary judgment. And they attached a number of affidavits to their moving papers.

And we responded with some affidavits of our own. And I think the court treated it as a motion under rule 56, but it was prior to any discovery.

QUESTION: Well, where did the findings that he made come in, then? I mean, was it findings that were undisputed, basically?

MR. WATKISS: Absolutely. He took what they said about that gymnasium in their own papers. We merely put in some of the objectively ascertainable facts about how the gym is being run. Those weren't disputed either.

QUESTION: Well, but then we don't have any clearly -- clearly erroneous standard of review here. If it's undisputed, presumably no one is going to challege --

MR. WATKISS: I think that's right.

QUESTION: On a motion for summary judgment you don't ordinarily have fact finding that's reviewed on the clearly erroneous --

MR. WATKISS: Well, to the extent -- Justice Scalia was asking me whether those findings were correct. They're plainly correct. They're undisputed.

But to the extent Mr. Lee wants to try to interject a dispute about them now, those findings were based on his affidavits.

QUESTION: But those findings merely went to the proposition of whether the operation of the gym was a religious activity. And it's admittedly not.

But it doesn't go to the question whether the operation of the gym somehow furthered the objectives of the Mormon Church to set a good example to their congregation and all the rest.

MR. WATKISS: Justice Stevens, I think that everything the Mormon Church does is consistent with its beliefs. I think you would say that about the activities of any religious organization.

They're not going to do something --

QUESTION: No, all I'm suggesting is, I think you're overstating the character of the judge's findings.

All he found, as I remember it was, that the operation of the gym is not a religious activity.

MR. WATKISS: Well, he made a number of subsidiary findings that back that up, yes.

QUESTION: Right, but they're all for that ultimate proposition, as I read it.

MR. WATKISS: Well, I think that's correct. Well, he made two findings. He made finding one, that the gymnasium is not a religious activity; and that Mayson didn't have any religious responsibilities at the gym.

QUESTION: Right. But it doesn't mean that the operation of the gym is totally unrelated to what the Church regards as its mission?

MR. WATKISS: No. Indeed, I concede as much. As I say, their department stores are consistent with their mission. Their television stations are consistent with their mission.

QUESTION: It's different, in other words, from the case we often talk about, running a spaghetti factory or something like that where you get -- claim

tax exemption for it.

In other words, it has some connection with the religion?

MR. WATKISS: I think -- well, the problem is, I think, that most religions would say that everything they engage in has some connection with their religion.

That's not a line that gives you any meaningful differentiations. And it seems to me it essentially permits religions to set up little enclaves throughout the economy if they so choose, and use those enclaves to both advance their religious mission through the requirements they can impose on their employees, and also advance their economic power in the secular realm.

QUESTION: Well, you can draw a line very easily if the only connection to their religion asserted is that this activity enables us to make money which we can spend for the purposes of our religion.

Surely, that's a very easy line to draw, and quite sensible.

MR. WATKISS: Well --

QUESTION: And you say that anything that's not engaged in for the purpose of making money must be immediately engaged in for some purpose that you think that -- that the religion itself thinks, at least, is in furtherance of its religion.

MR. WATKISS: Justice Scalia, maybe that line can be drawn. Maybe it can't. My guess is, it'll get murkier. Because my guess is that Mr. Lee's clients, for example, would say that they own a number of broadcast stations not just to make money but because it is a vehicle for promulgating views and interests and perspectives that are consistent with their beliefs.

So I don't think you're even going to get -- I don't think you're going to get any religious employer merely to say that something they do is only to make money. Rarely will you. I won't yield a meaningful line.

Let's look at why the statute is unconstitutional as applied to Mr. Mayson. This statute grants absolute and unyielding accommodation to the interests of religious employers by imposing a direct and a substantial burden, both secular and religious, on third parties, principally the employees.

Now in the Thornton v. Calder case, decided in 1985, this Court held that the state may not accommodate the religious interests of some by imposing substantial secular burdens on others.

Here, it seems to me, we have a much stronger case of unconstitutionality. Because not only are serious secular burdens being imposed, but serious

burdens on religious liberty of other people are being imposed.

QUESTION: What was the burden being imposed in Calder?

MR. WATKISS: The burden I think was that the employer, when the employee invoked the power of that statute -- and I think it's important to remember that under both of these statutes, it was an individual who invoked the power of them -- but in the Calder case, when the employee told the employer that he wanted a day off for his religious reasons, then the employer had the duty to try to accommodate him taking that day off.

QUESTION: But that was a duty imposed -- that was a duty imposed by the state, right?

MR. WATKISS: That's correct. Once an individual invoked the right.

QUESTION: And what -- what duty is imposed by the state here? By the United States?

MR. WATKISS: Mayson's given -- Mayson is told that his interest in not having his religious beliefs coerced after 16 years of employment has to be subordinated to the Mormon Church's right to do it.

QUESTION: That's right. But it's not the state doing anything to him, as it was in Calder. In Calder, the State was saying to the employer, you must

accommodate this person. The state moving directly against an individual.

Here, what does the state compel an individual to do?

MR. WATKISS: The state is telling Mr. Mayson, you must accommodate your employer?

QUESTION: Telling him he must accommodate his employer?

MR. WATKISS: That's right. Mr. Mayson either pays his tithe and goes to church or loses his job.

Section 702's second serious defect is its glaring lack of neutrality. Now whether one characterizes th constitutional requirement as benevolent neutrality or as complete neutrality, Section 702 is obviously not benevolent, and it's obviously not neutral.

QUESTION: Well, no accommodation of the free exercise clause by government is ever neutral; it can't be. I don't think that's the test, is it?

MR. WATKISS: Well, Justice O'Connor, people and particularly in your Wallace v. Jaffree and Wallace v. Jaffree concurrence, you were considering a type of accommodation that is very, very different than what we've got here.

QUESTION: The fact of the matter is that

government cannot accommodate the free exercise of religion and be regarded as neutral in doing it.

It's a non sequitar.

MR. WATKISS: I think that's probably right. And we're not arguing that every accommodation is just because of a lack of neutrality, unconstitutional.

The lack of neutrality is very important, though, as an indicia for suspicion. This statute is nonneutral in a couple of ways.

It obviously treats religion better than nonreligion. It says, the interests of Mr. Lee's clients get absolute deference. Other employees don't get the benefit, and Mr. Mayson's secular interests don't get the benefit.

But it discriminates among religious interests too. Mr. Mayson's religious liberty is given absolutely no weight. The interests of Mr. Lee's clients to impose religious qualifications is given absolute weight.

You have nonneutrality going both ways. Religion, nonreligion, and it discriminates among religious interests.

QUESTION: But Mr. Watkiss, your opponent says that the statute allows churches to promote religion. Isn't that what you're complaining about?

MR. WATKISS: I beg your pardon, Justice

Stevens?

QUESTION: The statute allows churches to promote religion. Isn't that the neutrality -- lack of neutrality you're complaining about? That the Mormon Church is insisting that this man do certain things that are required by the Mormon faith.

MR. WATKISS: Right. The fundamental --

QUESTION: And the statute doesn't require that. The statute permits that.

MR. WATKISS: The statute permits it.

QUESTION: It permits the church to promote -- to promote its own religious beliefs.

MR. WATKISS: That's right, at the expense of individual religious liberty.

QUESTION: That's always true.

MR. WATKISS: Well, it seems to me that this statute turns First Amendment values on their head. The establishment clause, just as much as the free exercise clause, has as its principal concern the protection of individual religious liberty.

Now to be sure, we give religious organizations some degree of autonomy. But individual religious liberty is the primary goal of both religion clauses of the Constitution.

This statute turns those values right on their

head. They say that we will accommodate a religious organization just as such; let it do whatever it wants to in this area, regardless of the cost that that imposes on individual religious liberty.

Sure, it gives Mr. Lee's clients a very powerful tool to advance religion. But that tool is economic coercion. The value that the First Amendment --

QUESTION: You mean the religion guarantees don't go to churches, they don't go to organized churches? They just go to individuals, so that there -a-

MR. WATKISS: No, not true. And that's not what I'm saying, Justice Scalia. I'm saying that the reason we protect -- the reason we give churches some degree of autonomy is because individuals fulfill their religious needs through groups.

Now, the church and the government try to get some mileage out of a couple of significant cases of this Court, beginning in the 19th Century opinion in Watson v. Jones and continuing through the Kedroff opinion, and most recently, through the Serbian Eastern Diocese opinion.

I think it's very, very important to reflect upon what those cases mean, and what they were based on.

The cases essentially hold that there is a

degree of autonomy afforded to religious organizations in resolving internal disputes; and that civil courts won't interfere.

There's a very important passage from Watson v. Jones that gets repeated in variably by the Court's later opinions. And I'd like to read it, because I think it focuses on the problem with 702.

In Watson, this Court wrote: The right to organize voluntary religious organizations to assist in the expression and dissemination of religious doctrine, and to create tribunals for controverted questions of faith within the association -- and I'll skip some of it -- is unquestioned.

All who unite themeselves to such a body do so with an implied consent to this government, and are bound to submit by it.

Now the emphasis on religious voluntarism in that passage, and in all those cases, is very clear. Because individuals voluntary join churches, we give churches some deference.

This statute makes Mayson join a church to keep his job, his secular job. It subverts the very notion of voluntariness wich is fundamental -- which is a fundamental peg of the reasons that we give churches some autonomy.

But you take that away, your churches are allowed to grow not because of the appeal of their dogma, as Justice Douglass put it, but because they can use economic muscle over employees in secular activities.

We have -- we have fundamentally distorted First Amendment values. You've given churches a vehicle to grow through coercion. Not zeal, not appeal of dogma; but economic coercion.

That's fundamentally at odds with what the values of the First Amendment -- the First Amendment protects.

QUESTION: Counsel, does the -- does this record show whether your client at any time was a member of the Mormon Church.

MR. WATKISS: Yes, he's been a nominal Mormon on and off throughout his life. When he was hired --

QUESTION: He just doesn't have a Temple recommend?

MR. WATKISS: That's correct. He never has had one. And it never was a condition of employment prior to 1980.

QUESTION: (Inaudible) what you just described is one way to look at it. I suppose another way to look at is the Mormon Church saying, or any other church

saying, look it, we collect all this money out of the basket or tithing or whatever, and we'd like that money to be used for -- for the members of our own church, for our faithful.

That's what we're for. We're to serve them. And we're adopting as a matter of policy the principle that we're going to spend this money in all of our enterprises on our own people. We're going to hire our own people and so forth.

What's so terrible about that?

MR. WATKISS: I think it doesn't justify the burden that it imposes on employees. But Justice Scalia, you don't have that case here.

Mr. Lee's clients are perfectly happy to keep paying the squash pro with the same proceeds. If they had a real consistent belief in that sort of thing we'd have a different case.

I don't think it would make a difference to the outcome, but it would be a different case.

QUESTION: It just really shows the burden's not a one-way street. They're willing to pay the cost of getting a second rate engineer but not a second rate squash pro.

MR. WATKISS: That's right.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.

Watkiss.

MR. WATKISS: Thank you.

CHIEF JUSTICE REHNQUIST: Mr. Lee, you have 12 minutes remaining.

REBUTTAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. LEE: The real question, Mr. Chief Justice and Members of the Court, is who is going to draw the line at that point that Mr. Watkiss has defined as, at the margin?

Who is going to draw the distinctions between whether the Church is really following an underinclusive policy, and whether it is more inimical to the Church's interests to have the best squash player in Salt Lake, notwithstanding that he's a Catholic but does keep the Mormon Church's standards?

Who is the draw the line between the janitor in the Episcopalian Church and the building supervisor in the Desseret gym, or the person who is in charge of obtaining visas for missionaries for the Mormon Church?

QUESTION: Mr. Lee, I hope this is at least a nonsmoking, nondrinking Catholic?

MR. LEE: That is definitely -- a nonsmoking, nondrinking Catholic; better in that respect than some other Catholics that I know.

I think that the best answer -- the best answer to that question of who is to draw the line at the margin is simply that you don't draw it.

That was Congress' judgment. It was Congress' judgment after it had had eight years experience of Ceasar potentially having his hands on the things of God.

And then Congress simply said, let's draw it nice and clean.

I think Mr. Watkiss has effectively conceded that that's the best place to draw the line. He's conceded that even though my clients do not assert Section 702 for their purely commercial activities, that there is difficult drawing the line there; and that if the courts' statements really mean anything, that there is some room between Scylla and Charybdis, then it has to mean that Congress can choose between the only two available exemptions to it, the 1964 and the 1972 version, particularly when you consider that all of the impacts that Mr. Watkiss was talking about would have been identical under the 1964 version, if you accept our view of the Desseret gym.

And that brings me to my next point. Assume that you disagree, and that there is to be some line -- there is to be some line that's drawn, that there is

some minimum threshold, in order to cross what Thomas v. the Unemployment Commission said, you have to get past a practice that is just bizarre, that is just purely not religious, this is -- that has clearly been satisfied in this case, and there are no findings in the district court to the contrary.

The district court did not make what we would call findings of fact. It drew conclusions of law. And what it said was, that there is nothing in the Mormon faith that requires employment discrimination; and there is nothing that requires exercise in a gym that -- that practices discrimination.

But that takes entirely too narrow a view, and gets the courts far too deeply into what Mormonism is really all about, and the amount of leeway, administrative, implementing leeway that the church really has to have in order to carry out its objectives.

Because the fact of the matter is that the court -- the church has concluded that its purposes can be furthered by providing a place where physical health, which according to Mormon belief is intimately linked to spiritual health, can be pursued in an environment where church standards are understood, respected and maintained.

It's further concluded that this can best be

accomplished by people who understand those standards and are committed to them.

Other churches might reach different conclusions, but this is the conclusion that this church has made, and this is a conclusion that Congress vouchsafes to it.

Now, finally, there has been nothing said, either in the briefs or in this courtroom this morning, about the fact that if you rule against my clients in this case, that all exemptions are unconstitutional, including, I submit, the 1964 version, if you really apply the standards that Mr. Watkiss has expressed here.

Congress has to have the authority, when it perceives dangers to First Amendment values that have been raised by Congress' own statutes, to eliminate -- to eliminate its own lawmaking as the cause of those problems.

For this reason, the judgment of the district court should be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

(Whereupon, at 11:55 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#86-179 - CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINST, ET AL., Appellants V. CHRISTINE J. AMOS, ET

and

6-401 UNITED STATES, Appellant V. CHRISTINE J. AMOS, ET AL.

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BY Paul A. Richardson

(REPORTER)