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IN THE SUPREME COURT OF THE UNITED STATES

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KENDRA ESPINOZA, ET AL.,)

Petitioners,)

v.) No. 18-1195

MONTANA DEPARTMENT OF REVENUE, ET AL.,)

Respondents.)

- - - - -

Washington, D.C.

Wednesday, January 22, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

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on behalf of the Petitioners.

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ADAM G. UNIKOWSKY, Washington, D.C.;

on behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	RICHARD D. KOMER, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	JEFFREY B. WALL, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioners	18
9	ORAL ARGUMENT OF:	
10	ADAM G. UNIKOWSKY, ESQ.	
11	On behalf of the Respondents	30
12	REBUTTAL ARGUMENT OF:	
13	RICHARD D. KOMER, ESQ.	
14	On behalf of the Petitioners	68
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 18-1195, Espinoza
5 versus the Montana Department of Revenue.

6 Mr. Komer.

7 ORAL ARGUMENT OF RICHARD D. KOMER

8 ON BEHALF OF THE PETITIONERS

9 MR. KOMER: Mr. Chief Justice, and may
10 it please the Court:

11 This case asks whether the Federal
12 Constitution allows the wholesale exclusion of
13 religious schools from scholarship programs. It
14 does not.

15 Yet, Montana's Blaine Amendment
16 requires that exclusion. As a result, the
17 Blaine Amendment discriminates against religious
18 conduct, beliefs, and status in violation of the
19 free-exercise clause under Trinity Lutheran.
20 The Montana Supreme Court disagreed. That court
21 held that barring religious schools from the
22 program did not violate the Federal
23 Constitution.

24 This Court should reverse that
25 judgment. Even Respondents now concede that

1 excluding religious schools from the program is
2 unconstitutional, but they argue that the court
3 avoided this discrimination by invalidating the
4 entire program. This is wrong. The only reason
5 the court invalidated the program was because it
6 included religious schools.

7 And the court's remedy did not cure
8 its discriminatory judgment, nor should the
9 remedy shield the judgment from review.

10 Petitioners brought this lawsuit
11 because they were denied scholarships based on
12 religion, and they are still being denied
13 scholarships based on religion. If the court
14 had shut down the program because it included
15 Muslim schools or African-American schools,
16 there's no question that would be
17 unconstitutional. We ask you to reverse.

18 Respondents argue in the alternative
19 that Locke allows them to exclude the religious
20 schools and that this case falls within the play
21 in the joints. But that would allow the
22 exception to swallow the rule. As Trinity
23 Lutheran made clear, the rule is religious
24 neutrality and Locke only a narrow exception.
25 We argue that Locke is the exception that proves

1 the rule.

2 In Trinity Lutheran --

3 JUSTICE GINSBURG: May -- may I ask
4 you some threshold questions about Article III
5 standing? Under the Montana judgment, these
6 parents are treated no differently than parents
7 of children who are going to secular private
8 schools, so where is the harm?

9 When a differential is challenged, the
10 court inspecting the state law can level up or
11 level down. And here it leveled down. So these
12 would be parents of children going to secular
13 private schools. How are you harmed?

14 MR. KOMER: Your Honor, the Montana
15 Supreme Court lacked the necessary predicate for
16 leveling up or for leveling down because they
17 got the federal Supreme Court question wrong.

18 But for getting that question wrong,
19 we would never have moved on to the issue of
20 remedying that problem because it isn't a
21 constitutional problem.

22 JUSTICE GINSBURG: But there's another
23 serious problem, and that's the parents are not
24 taxpayers. Taxpayers are the people who
25 contribute to these student scholarship

1 organizations.

2 And this Court has held that there is
3 no standing to challenge somebody else's tax
4 status. It seems to me that the Court's
5 decision in Eastern Kentucky is very close to
6 this one, and the Court said you say you're
7 injured because these hospitals are not
8 providing -- providing services to you, but you
9 are not the taxpayer and you can't complain
10 about the tax treatment of someone else.

11 So how do you distinguish Eastern
12 Kentucky?

13 MR. KOMER: Well, Your Honor, here
14 what's involved is a scholarship program, and
15 the scholarship program's intended beneficiaries
16 are the parents, like our clients, who are
17 enabled to exercise their constitutional right
18 to choose --

19 JUSTICE GINSBURG: They're challenging
20 the tax status of someone else, not themselves.

21 MR. KOMER: No -- no, Your Honor, it's
22 because the Montana Supreme Court has extended
23 their Blaine Amendment to include scholarships
24 that are generated by the giving of tax
25 credits --

1 JUSTICE SOTOMAYOR: I'm sorry. Is
2 there any case we've ever had where we've
3 recognized a tax -- a -- a party who wasn't
4 either the taxpayer or the direct recipient of
5 the taxes, benefits of the taxes? So here the
6 parents not just aren't the taxpayer; they're
7 not the schools that receive the money. Neither
8 are they guaranteed receipt of the money. We're
9 told that there's less money than applicants.
10 So they're like three levels removed.

11 In what other case can you cite for me
12 have we permitted such a removed party to have
13 standing?

14 MR. KOMER: I -- Your Honor, I don't
15 think that we've had a state constitutional
16 provision ever be applied in such a --

17 JUSTICE SOTOMAYOR: It doesn't matter
18 that --

19 MR. KOMER: -- extended fashion.

20 JUSTICE SOTOMAYOR: -- we've had --
21 we've had a case involving schools that
22 discriminate, and we've said that those schools
23 -- that taxpayers -- not taxpayers -- that
24 individuals who feel affected by that
25 discrimination don't have standing because

1 they're not the people -- they're not the
2 taxpayer and they're not the recipient of the
3 discrimination directly, so -- and I'm -- I'm
4 having a problem understanding how you have
5 standing either for the taxpayer or for the
6 school who receives the money.

7 MR. KOMER: Well --

8 JUSTICE SOTOMAYOR: And why -- you
9 have a lot of contingencies. Other -- that
10 taxpayers won't give the \$150 without the tax
11 credit, that the school will actually pick them,
12 and that even if picked in the past, that
13 they'll be picked in the future.

14 It seems a high level of
15 contingencies. So mention one case that comes
16 close to that.

17 MR. KOMER: Any case that involves
18 Article III standing where the intended
19 beneficiaries of the program are --

20 JUSTICE SOTOMAYOR: The school's the
21 intended beneficiary.

22 MR. KOMER: I -- I -- respectfully,
23 Your Honor, I disagree. The financial benefit
24 from a scholarship program is to the families.
25 The families receive the benefit of the

1 scholarship. The scholarship is used by the
2 families to buy the education --

3 JUSTICE SOTOMAYOR: Counsel --

4 MR. KOMER: -- at the school.

5 JUSTICE SOTOMAYOR: -- the financial
6 benefit is to the taxpayer who gets a tax
7 credit.

8 MR. KOMER: Actually --

9 JUSTICE SOTOMAYOR: That's the intent.
10 It's an incentive for the taxpayer to give
11 money, but there are many incentives that
12 incentivize people to give money.

13 MR. KOMER: Yes, Your Honor, it does
14 incentivize donations. That's its purpose. And
15 it actually succeeded, while the program was
16 going, in awarding scholarships to two of our
17 three client families. And --

18 JUSTICE GINSBURG: How do you know
19 that they wouldn't have been in the same
20 situation? After all this is a small credit.
21 It's \$150. And if they don't get the credit, if
22 the donors to the organizations don't get the
23 credit, they still get a tax deduction. And
24 that tax deduction is uncapped.

25 So how can we even assume that there's

1 going to be less money in the kitty if the
2 credit is removed but the tax deduction remains
3 untouched? And I'm looking at Wright against
4 Allen in Eastern Kentucky and I just don't
5 understand how this case passes the standing bar
6 when those didn't.

7 MR. KOMER: Well, Your Honor, the
8 simple fact of the matter is that our clients
9 received scholarships under this program, which
10 was a financial benefit to them. The -- the --
11 the tax deductions are not a financial benefit
12 to the taxpayer because they are out \$150,
13 whether they pay their tax to the state or they
14 donate \$150 to the scholarship organization.

15 There's no financial benefit to them.
16 It's kind of a psychic benefit. But it creates
17 scholarships. It really created scholarships.

18 JUSTICE KAGAN: Mr. Komer, can I go
19 back to Justice Ginsburg's first question? And
20 I don't know whether to call it standing or
21 mootness or anything else, but I guess I am
22 having trouble seeing where the harm in this
23 case is at this point. It's a strange kind of
24 posture wherein, but if you would describe to me
25 what is the harm that the parents are suffering

1 right now currently?

2 MR. KOMER: Well, right now, their
3 students -- two of the families' students are on
4 scholarships and next year they won't be --

5 JUSTICE KAGAN: Right. But I guess --

6 MR. KOMER: -- generated by the
7 program.

8 JUSTICE KAGAN: I'm sorry to
9 interrupt. I guess what I'm -- I'm saying is
10 that because of the supreme court's ruling,
11 whether you go to a religious school or you go
12 to a secular private school, you're in the same
13 boat at this point.

14 So I've always understood in these
15 kinds of cases that the harm is the perceived or
16 alleged or actual -- whatever you want to call
17 it -- discrimination.

18 But there is no discrimination at this
19 point going on, is there?

20 MR. KOMER: Yes, there is. Because
21 the discrimination occurred in the judgment of
22 the Montana Supreme Court which considered a
23 federal question, which led to the invalidation
24 of the program. And they --

25 JUSTICE KAGAN: But it led to the

1 invalidation of the entire program as it related
2 both to private secular schools and private
3 religious schools.

4 So a -- a -- a -- a -- the parents of
5 both are affected in the exact same way.

6 MR. KOMER: That's because the remedy
7 -- you can't let the remedy shield the
8 discriminatory judgment. The discriminatory
9 judgment is in mistakenly believing that this
10 Blaine Amendment and the application of it did
11 not violate the Federal Constitution.

12 If they got that question right, we
13 wouldn't be here. Because the program would
14 still be going on and our parents would be --

15 JUSTICE SOTOMAYOR: I'm sorry, how
16 could that be? Meaning, do you -- are you
17 taking the position that as a matter of
18 constitutional law, the Montana Supreme Court
19 constitutional provision is unconstitutional?
20 That -- that states are forced to give money,
21 tax credits, to religious institutions and
22 secular institutions? Are they required always
23 to give money out, scholarships?

24 MR. KOMER: No. No, Your Honor.

25 JUSTICE SOTOMAYOR: All right. So

1 let's start there. Are you saying that the
2 constitutional -- the constitution is
3 unconstitutional? Meaning that the
4 constitutional -- Montana's constitutional
5 provision is unconstitutional.

6 MR. KOMER: Montana's constitutional
7 provision violates the free-exercise clause on
8 its face.

9 JUSTICE SOTOMAYOR: On its face.

10 MR. KOMER: And as applied to this
11 program.

12 JUSTICE SOTOMAYOR: So you are saying
13 that states are forced to give money both to
14 secular and religious schools?

15 MR. KOMER: It -- not to the schools.
16 This is a case about giving the money to the
17 families. It's not a case about --

18 JUSTICE SOTOMAYOR: I don't --

19 MR. KOMER: -- giving money to the
20 schools.

21 JUSTICE SOTOMAYOR: Secular and
22 religious families.

23 MR. KOMER: Yes, if they give to one,
24 they must give to the other.

25 JUSTICE SOTOMAYOR: But can the state

1 choose not to give at all?

2 MR. KOMER: Yes.

3 JUSTICE SOTOMAYOR: All right. So
4 let's -- if you start from that proposition, the
5 Montana court said we don't have a law now,
6 don't give to any.

7 So let's assume that the Montana court
8 did what you wanted it to do and said: This is
9 unconstitutional under the Federal Constitution,
10 and it's unconstitutional under the Montana
11 Constitution, which is what I think it did, by
12 the way. It said it's unconstitutional under
13 both, even if it didn't say it, but let's assume
14 it.

15 Let's assume it says it's
16 unconstitutional under the federal constitution.
17 You're saying they can't say separately it's
18 unconstitutional under the Montana Constitution?

19 MR. KOMER: Um --

20 JUSTICE SOTOMAYOR: They have to keep
21 the program alive?

22 MR. KOMER: In the circumstances we're
23 dealing with, Your Honor, they terminated the
24 program.

25 JUSTICE SOTOMAYOR: I'm not talking

1 about the circumstances. Let's assume their
2 opinion was written exactly the way you want it
3 to be, and they had said, this violates the
4 Federal Constitution, but it also violates the
5 Montana Constitution.

6 So instead of leveling up the way
7 Justice Ginsburg said, we're going to level
8 down. That way it doesn't violate either of
9 them. It -- we stopped the federal violation
10 because we're not discriminating against the
11 school -- any school. And we've now -- not
12 violating the Colorado Constitution.

13 Can they do that?

14 MR. KOMER: Are we talking about the
15 court doing this or --

16 JUSTICE SOTOMAYOR: To the court doing
17 this.

18 MR. KOMER: Can the court do it, no?

19 JUSTICE SOTOMAYOR: Why?

20 MR. KOMER: Because when you have a
21 constitutional conflict between the two
22 constitutions, the Federal Constitution trumps
23 --

24 JUSTICE SOTOMAYOR: But you just told
25 me the Federal Constitution doesn't stop the

1 state from choosing not to give aid.

2 MR. KOMER: That's right. But here
3 the state chose to give aid and it has been
4 stopped from giving aid to our clients.

5 JUSTICE KAGAN: Well, it chose to give
6 aid consistent with the constitutional
7 amendment. And -- and -- and the constitutional
8 amendment sets restrictions on funds.

9 And, as a result of the restrictions
10 on funds that the constitutional amendment set,
11 in this case, which I have always understood to
12 be a challenge to the way that the
13 constitutional amendment operated on a
14 particular program, as a result of this
15 challenge, what has happened is that neither the
16 parents who want to send their children to
17 religious schools nor the parents who want to
18 send their children to secular schools get what
19 they would like to get.

20 So they're both being treated the same
21 way.

22 MR. KOMER: Only as a result of a
23 mistaken understanding of the free-exercise
24 clause, Your Honor.

25 JUSTICE ALITO: Under --

1 JUSTICE KAGAN: But we don't usually

2 --

3 JUSTICE ALITO: -- under -- go ahead.

4 JUSTICE KAGAN: I mean, we don't
5 usually sort of grade every line of an opinion.

6 Usually we look to an opinion, and -- and --

7 and -- and there's a decision below, and it's

8 had a consequence in the world.

9 And the consequence of this decision
10 is that there is no discrimination, that neither
11 -- that neither set of parents is getting what
12 it -- they want.

13 Now, you might say, well, both should
14 get what they want, and maybe that would be a
15 better world. Maybe. But the constitutional
16 harm that it seems that you have to allege here
17 is the discrimination. And there is no
18 discrimination.

19 MR. KOMER: Your Honor, there is no
20 discrimination because the Montana
21 constitutional provision requires discrimination
22 on its face and as applied to our clients. And,
23 if I can point out, this isn't a decision about
24 harmonizing the two constitutions because the
25 Montana Supreme Court did not recognize there

1 was any conflict between them that had to be
2 harmonized at all.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: Yeah, I just wanted to
5 ask this simple question: Under our decision in
6 Village of Arlington Heights, is it
7 constitutional for a unit of state government to
8 do something that it could do, but if it does it
9 for an unconstitutional discriminatory reason,
10 is it then unconstitutional?

11 MR. KOMER: Yes, it is, Your Honor. I
12 see the light is on.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Wall.

16 ORAL ARGUMENT OF JEFFREY B. WALL
17 FOR THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING THE PETITIONERS

19 MR. WALL: Mr. Chief Justice and may
20 it please the Court:

21 The Montana Supreme Court held that
22 the Montana constitution requires religious
23 discrimination that the federal constitution
24 forbids. Parents may not direct scholarships to
25 schools solely because those schools are

1 religiously affiliated.

2 Now, the state doesn't defend that
3 error of federal law, but says it was washed
4 away when the court invalidated the entire
5 program and left everyone empty-handed.

6 The Montana Supreme Court had no power
7 under federal law to invalidate anything. It
8 relied on a state constitutional provision that
9 is inconsistent with and preempted by the
10 federal free-exercise clause, and, crucially,
11 Petitioners continue to suffer from that federal
12 free exercise violation regardless of whether
13 any parents received scholarships or also suffer
14 as collateral damage.

15 If the Montana Supreme Court had
16 invalidated this program because it included
17 historically African-American schools or
18 all-girl schools, that would be a
19 straightforward equal protection violation.
20 Nothing about it would be cured by the fact that
21 other parents had been denied funding as well.

22 CHIEF JUSTICE ROBERTS: So your --
23 your -- I'm sorry. Oh, you're good.

24 The injury flows through the schools,
25 right? I mean, the money would go to the

1 schools, not to the parents. And we don't have
2 a school in this case.

3 MR. WALL: Well, but I think that's
4 really getting at the standing issue, Mr. Chief
5 Justice. And they're losing their scholarships
6 at the end of the school year, as I understand
7 it. They've had them for years, and under the
8 court's decision, they lose them at the end of
9 this school year. So even I don't take the
10 state to be challenging Article III injury.

11 And so then it's just a question of
12 whether they're raising their own rights and
13 they are because the reason they're being
14 excluded from the program, everybody would say,
15 the answer to the question, why don't these
16 parents get their scholarships, because they
17 want to direct the scholarships to religious
18 schools.

19 Their free exercise is being
20 penalized. They're not raising a right on
21 behalf of the state. Everybody concedes that if
22 all the parents in this program had wanted to
23 choose secular schools, there'd be no basis for
24 the state's court ruling. The scholarship
25 program would still exist. It's only because

1 some parents said I want to send my kids to
2 schools like Stillwater, and at that point, at
3 page 30 of the petition appendix, the state
4 supreme court says we have a state
5 constitutional guarantee, no state funds to
6 religious schools. That's what it says.

7 And that's a straightforward violation
8 of --

9 JUSTICE SOTOMAYOR: Mr. Wall --

10 MR. WALL: -- federal law.

11 JUSTICE SOTOMAYOR: -- are you
12 claiming that what you're calling Blaine
13 amendments, but that the Montana provision and
14 all the other states that have one, that as a
15 matter of federal constitutional law, all of
16 those constitutional -- state constitutional
17 provisions must be struck?

18 MR. WALL: Well, not the entire
19 category because I actually think it's a little
20 more nuanced than that, but I am saying what the
21 Court said in Trinity Lutheran. Seven members
22 of the Court said the free-exercise clause there
23 compelled what two members of the Court said in
24 your dissent, Justice Sotomayor, the
25 Establishment Clause forbade.

1 Yes, we think the same is true here.

2 There are 37 --

3 JUSTICE SOTOMAYOR: That's a radical
4 decision.

5 MR. WALL: I --

6 JUSTICE SOTOMAYOR: We have -- we have
7 a founding father, Madison, lobbying heavily for
8 the free-exercise clause and equally to stop
9 states from both establishing religions or using
10 public funds to support them.

11 There's been over -- since the
12 founding fathers, a long history of people who
13 for non-discriminatory reasons, but for reasons
14 related to their belief in the separation of
15 church and state, that have taken the position
16 that the state should not give money to
17 religious institutions.

18 You are suggesting now that Montana in
19 1972 went through an empty exercise, they looked
20 at the history of this amendment or one like it,
21 said it was odious, admitted -- some of its
22 people who voted for this bill in '72 said it
23 was a despicable history, but they then looked
24 at the founding fathers' writings, they looked
25 at the State of Montana's religious tolerance,

1 which had changed dramatically from the Blaine
2 Amendment era, and decided that they were going
3 to side with James Madison, one of the fathers
4 of our Constitution, and continue to say we
5 don't want aid to churches.

6 MR. WALL: So --

7 JUSTICE SOTOMAYOR: Now --

8 CHIEF JUSTICE ROBERTS: Perhaps you
9 could comment, counsel.

10 MR. WALL: So, Justice Sotomayor, that
11 was one of two points I was hoping to make on
12 the merits before I sat down. Every time that
13 the state points to that in its brief, and I
14 think most notably at pages 30 and 31, and what
15 Madison was talking about in the Remonstrance
16 were compelled support laws, preferential aid to
17 the church.

18 Even the state admits at page 30 of
19 their brief, and these are the state's words:
20 There is zero founding era evidence that there
21 -- that you could have a generally available
22 benefit and deny it to an institution based on
23 its religious character --

24 JUSTICE BREYER: What about -- what
25 about --

1 MR. WALL -- and Justice Thomas, I
2 think, walks through the history of the opposite
3 in his Rosenberger concurrence, that at the time
4 of the founding, when they gave out land in the
5 Northwest Territory and other statutes for -- to
6 schools, they included religiously affiliated
7 schools.

8 I think actually the tradition that
9 dates to the founding is -- is sort of the
10 opposite, that you can't disqualify them just
11 based on their religious character, but you can
12 have no compelled support, no preferential aid
13 to the church. And that's very different from
14 what -- what's going on here.

15 JUSTICE BREYER: But what -- what did
16 you think of this? I -- I'm having trouble, and
17 I want you to tell me what you really think
18 about this problem which has probably an answer
19 that you will have thought about. Okay.

20 Say in San Francisco or Boston or take
21 any city or state, and they give many, many,
22 many millions of dollars to the public school
23 system. And a lot of them give a lot of money
24 to charter schools.

25 Now, they don't give money to Catholic

1 schools. All right? Now, if -- if we decide
2 you're right, does that all change?

3 MR. WALL: Well, no, in certain
4 respects it doesn't change, Justice Breyer.
5 They don't -- if they want to open up the
6 funding, they can put limits, secular limits, on
7 the program. We're going to give math
8 scholarships or engineering scholarships --

9 JUSTICE BREYER: Not -- I'm not
10 talking about scholarships.

11 MR. WALL: But if --

12 JUSTICE BREYER: I'm talking about the
13 X billion dollars that the State of New York
14 spends on the public school system, and I don't
15 know how much, but I suspect they might spend
16 money on charter schools.

17 MR. WALL: Yes.

18 JUSTICE BREYER: Let's call it another
19 500 million. They do not -- I'm just repeating
20 myself --

21 MR. WALL: Yes.

22 JUSTICE BREYER: -- spend money on the
23 Catholic school system. Now, there's nothing
24 immoral about that. That's just the -- the --
25 what they do. And -- and that's -- comes from

1 the Constitution. All right.

2 If I decide -- it's the same question.
3 If I decide for you, am I saying that they have
4 to give money to the -- same amounts
5 proportionate to -- to the parochial school?

6 MR. WALL: I think if they structure
7 the benefit program the way they did here or the
8 way they in Trinity Lutheran --

9 JUSTICE BREYER: No, no. I'm saying
10 the way --

11 MR. WALL: If --

12 JUSTICE BREYER: -- they do do it, not
13 the way that they did it here and so forth.

14 MR. WALL: If they are giving out
15 generally available public benefits for people
16 to go to private schools --

17 JUSTICE BREYER: Oh, oh, what's in
18 private? Why is it that they have to be equal
19 with private but they don't have to be equal
20 with public?

21 MR. WALL: No, when you said charter
22 schools, I took those to be private schools.

23 JUSTICE BREYER: Forget the charter
24 schools. Same -- same question.

25 MR. WALL: If -- if a city or state

1 gives out funds for private education, which
2 it's not required to do, it can limit its
3 funding to public schools, but if it gives it
4 out and it gives it out just for scholarships
5 for private schools --

6 JUSTICE BREYER: My hypothetical was
7 they give it out and it's called the public
8 school system of the United States. I'm saying
9 that's what I'm talking about. Now, what's your
10 response? What's the difference between this
11 case, you win, and the same with the public
12 schools, they have to give it to parochial
13 schools too. What's the difference?

14 MR. WALL: Justice Breyer, what I'm
15 saying in the last paragraph of Trinity
16 Lutheran, when the Court said you can't deny a
17 generally available public benefit to an entity
18 that's otherwise qualified based solely on its
19 religious character or nature --

20 JUSTICE KAGAN: So Mr. Wall, don't you
21 --

22 MR. WALL: -- that rule applies
23 equally to schools as to playgrounds.

24 JUSTICE KAGAN: Mr. Wall, I mean,
25 there seems -- I was one of the seven in Trinity

1 Lutheran, but there seems to me a real
2 difference in this case. In Trinity Lutheran,
3 the -- a state was using the religious status of
4 various people or entities to limit access to a
5 unrelated public benefit, to a completely
6 secular public benefit.

7 Now, here, it seems to me, that what
8 the state is doing with respect to these
9 educational programs is to say: We don't want
10 to subsidize religious activity. We don't want
11 to subsidize religious education. And, further,
12 because of the way that the supreme court issued
13 its decision, that will mean that we don't want
14 to subsidize any private education.

15 So you have both the
16 non-discrimination as to that, but even put that
17 aside, what this is is essentially a state
18 saying, for many reasons that have been viewed
19 as legitimate, even though not shared by
20 everybody, but have been viewed as legitimate
21 for many years, we don't want to subsidize
22 religious activity, in particular religious
23 education. That's a far cry from Trinity
24 Lutheran.

25 MR. WALL: So your question gets at

1 the two things I was hoping to say before I sat
2 down.

3 The -- the first is all we're asking
4 and the Petitioners are asking is that you do
5 what you normally do when you review a state
6 supreme court decision. At page 32 of the Pet.
7 App., it said no problem with federal law. It
8 got federal law wrong. If it had come out
9 correctly on the federal law question, nothing
10 else in the decision would have flowed. The
11 trial court would have been affirmed and
12 everybody would have gotten the scholarships.

13 That -- with the application of the
14 state constitutional provision, which was
15 preempted under Trinity Lutheran, was the only
16 basis to impugn the state law. So you should
17 reverse the federal error and send it back.

18 On the merits of your question, look,
19 I get that you can say it's a harder case
20 because it's -- it's education and it's not a
21 playground. And in that sense, it may be a
22 harder question, but the Montana Supreme Court
23 didn't take it as a case about use, didn't try
24 to say this was covered by Davey or any of the
25 rest.

1 It said religiously-affiliated
2 schools. That's a status-based distinction.
3 And I don't think we can distinguish that from
4 Trinity Lutheran.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Mr. Unikowsky.

8 ORAL ARGUMENT OF ADAM G. UNIKOWSKY
9 ON BEHALF OF THE RESPONDENTS

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

12 The Constitution does not bar the
13 State of Montana from enacting and applying a
14 state constitutional provision that keeps its
15 own state legislature out of the business of
16 funding of religious schools.

17 The no-aid clause does not prohibit
18 anyone's free exercise of religion. To the
19 contrary, it protects religious freedom by
20 protecting religious schools from government
21 influence and ensuring that government cannot
22 use aid as leverage to influence the content of
23 religious education.

24 Petitioners attempt to analogize this
25 case to Trinity Lutheran but the analogy is

1 inapt for two reasons:

2 The first reason is that the coercion
3 aspect of Trinity Lutheran, which was crucial to
4 the Court's decision, was absent here. In
5 Trinity Lutheran, the church put to a stark
6 choice: Either abandon your religious faith and
7 become a nice secular stone building with a
8 daycare facility and you're going to get the
9 money or stick to your religious faith and you
10 won't get -- you won't get the money.

11 And that coercion was the premise of
12 the Court's decision that there is a penalty on
13 free exercise. That's not happening in this
14 case where the state court held that Montana
15 wasn't even capable of knowing whether a
16 particular parent would use money for a
17 religious and non-religious school, and it
18 therefore held that regardless of how the money
19 was spent, there wouldn't be a tax credit.

20 The second distinction from Trinity
21 Lutheran is that Trinity Lutheran involved the
22 refusal to give money to a church for a
23 completely non-religious purpose, merely because
24 it was a church. This case is different in that
25 the state is simply declining to fund religious

1 education.

2 The state court did not hold that
3 under the no-aid clause, religious schools would
4 be denied funding for non-religious purposes.

5 So let me start with the standing
6 point which came up during the first half hour.
7 So we didn't, as the Court knows, it's in an
8 amicus brief, but we didn't make the argument in
9 our brief because we concluded that the
10 arguments really went more to the merits rather
11 than standing.

12 We -- I -- I mean, we believe there's
13 an attenuated connection between the state
14 action here and Petitioners' free exercise of
15 religion but Petitioners are alleging in their
16 brief that they personally are the victims of
17 status discrimination because they are
18 Christians.

19 We think that's wrong based on what
20 the state court actually did, but historically
21 the courthouse doors have been open to make that
22 kind of argument. But we think on the merits,
23 there simply isn't a prohibition on the free
24 exercise.

25 CHIEF JUSTICE ROBERTS: I'd like to

1 get back to Justice Breyer's question and get
2 your view you on it which I understand it to be
3 that why doesn't -- do you think the other
4 side's theory leads to a situation where the
5 funding that goes to public schools, a -- a --
6 if -- if they prevail, wouldn't have to go to
7 religious schools?

8 MR. UNIKOWSKY: Well, I mean, I'm not
9 sure of the breadth of their theory. I mean,
10 there's a number of amicus briefs that -- that
11 make that exact point. I mean --

12 CHIEF JUSTICE ROBERTS: Well, let's
13 take it to be just that, I mean, this is a case
14 about money and the question whether or not it
15 must go to religious schools. And I am
16 wondering if the public -- the funding of public
17 schools is the same as the situation involved
18 here in your -- in your view?

19 MR. UNIKOWSKY: I guess I don't
20 understand Petitioners to be making that
21 argument in this particular case.

22 JUSTICE BREYER: They're not, but
23 that's what's -- but it still can bother me.
24 I'd like to know if in deciding it for them, if
25 I do, that I have made a major change in the

1 public school system.

2 I understand one's private and the
3 other's public. And what I'm asking for, you or
4 them, why would that matter?

5 MR. UNIKOWSKY: Well --

6 JUSTICE BREYER: That is, why -- why
7 would it make a difference, if you have to give
8 -- I mean, now don't jump on to my argument and
9 say, great, it supports you. I'm not making an
10 argument to support you.

11 (Laughter.)

12 JUSTICE BREYER: I'm asking a question
13 to find out the answer.

14 MR. UNIKOWSKY: Well, I -- I -- I'm
15 not sure exactly how far Petitioners' argument
16 would lead, but I -- I do think that one
17 important point of this -- in this case is that
18 states generally have had power over education,
19 and to decide that they're only going to fund
20 the public school system, and that is the
21 ultimate effect of the state court's judgment in
22 this case.

23 CHIEF JUSTICE ROBERTS: But, I wonder
24 if -- if there's a difference in the sense
25 that -- that -- between general funding of the

1 public schools and the decision to provide aid
2 to private schools, except not religious
3 schools.

4 MR. UNIKOWSKY: Well, so I think that,
5 you know, the question in this case ultimately
6 boils down to, whether the striking down of the
7 program because of the no-aid clause just in and
8 of itself is a violation of the free exercise
9 right of Petitioners.

10 And, you know, the first half of the
11 argument involved a number of questions about
12 how Petitioners are really harmed if the program
13 as a whole is struck down.

14 And I think I heard two sets of
15 arguments from the other side, from Petitioners,
16 both of which I would like to address. One
17 argument is the sort of broader argument that
18 just, the no-aid clause is just constitutionally
19 defective like, by its very nature, because it
20 is discriminatory, is not capable of being
21 applied, and, therefore, the court should just
22 remand and tell the court you just can't apply
23 this illegal rule.

24 And the second argument I heard is
25 this somewhat narrower argument that as applied,

1 the problem here is that the court excluded
2 religious schools from a general program as in
3 Trinity Lutheran.

4 So if I could just address those --
5 those two theories of the case by Petitioners.
6 So I think the first argument really is
7 tantamount to an argument that the no-aid clause
8 is facially unconstitutional, because like every
9 single time you applied the no-aid clause, the
10 rule it recites is that religious schools don't
11 get money because --

12 JUSTICE ALITO: Well, I thought they
13 were quite clear, that they were not arguing --
14 they were not making a facial challenge.

15 MR. UNIKOWSKY: Right.

16 JUSTICE ALITO: It was a challenge as
17 applied to the particular situation here.

18 MR. UNIKOWSKY: Right. So if -- if
19 that's the case, and I -- I agree that that's
20 the tenor of Petitioners' argument. I think the
21 government was making a broader argument but I
22 think Petitioners' argument is more limited.

23 So if -- if it is the case that in
24 general the Court -- the state court can apply
25 the no-aid clause, in other words, it's not just

1 facially discriminatory to say because something
2 is religious we're not --

3 JUSTICE ALITO: Well, they're not
4 conceding that. They're just saying you have to
5 consider it as applied here. Look, I -- I -- I
6 like your reaction to this way of looking at the
7 case. Maybe it's right; maybe it's wrong. It
8 is a violation of the Federal Constitution if a
9 state Supreme Court bases a decision on a ground
10 that discriminates in violation of the
11 constitution.

12 Do you agree with that?

13 MR. UNIKOWSKY: I would agree with
14 that, but obviously the question is whether it
15 discriminates in violation of the Constitution,
16 the last part of that. Look --

17 JUSTICE ALITO: Okay. All right.

18 MR. UNIKOWSKY: -- I'm not -- I'm not
19 objecting --

20 JUSTICE ALITO: The argument is if
21 they -- they don't have to fund private
22 education at all, but if they choose to provide
23 scholarships that are available to students who
24 attend private schools, they can't discriminate
25 against parents who want to send their children

1 to schools that are affiliated in some way with
2 a church.

3 MR. UNIKOWSKY: So I --

4 JUSTICE ALITO: That's the simple
5 argument. And it's hard to see that that's much
6 different from Trinity Lutheran.

7 MR. UNIKOWSKY: No, I think it is
8 completely different from Trinity Lutheran. So
9 look, I'm not going to object to the general
10 premise that Your Honor offered, that if there's
11 like a -- a -- a legal rule, just the very
12 application of the rule is constitutionally
13 defective, then you can reverse the state court
14 decision. I'm -- I'm not going to fight that
15 proposition as a general matter. But that's not
16 the question here.

17 I think the question here is whether
18 the state may apply a no-aid clause. And I
19 think that the answer is yes. Because if you
20 accept the premise that the --

21 JUSTICE GORSUCH: Counsel, wouldn't
22 you --

23 MR. UNIKOWSKY: Yes.

24 JUSTICE GORSUCH: In terms of what
25 you're agreeing with Justice Alito, I just want

1 to press you a little bit further. Let's say a
2 state court decision could be consistent with
3 the constitution or not consistent with the
4 constitution, right? The outcome may or may not
5 be.

6 If the -- if -- if the decision rests
7 on an erroneous interpretation of federal law
8 and remedying that error could provide relief,
9 we have a case, don't we?

10 MR. UNIKOWSKY: I mean, in principle,
11 if we assume there's an error of federal law in
12 --

13 JUSTICE GORSUCH: Yes.

14 MR. UNIKOWSKY: -- the federal court's
15 decision.

16 JUSTICE GORSUCH: Assuming there's an
17 error of federal -- in federal law and that
18 remedying it here might provide relief to
19 plaintiffs, we have a case.

20 MR. UNIKOWSKY: I -- I -- so, I think
21 that, yes, as a general matter, at a high level
22 of generality, if Petitioners identify an error
23 of federal law in a lower court decision, I
24 think the Court can adjudicate the error
25 federally.

1 JUSTICE GORSUCH: Okay. So the
2 question really becomes do we have an error of
3 federal law here?

4 MR. UNIKOWSKY: Right. But the
5 question is what becomes an error of federal
6 law.

7 JUSTICE KAVANAUGH: Suppose -- suppose
8 the state said we're going to allow the
9 scholarship funds to be used for secular schools
10 or protestant schools but not for Jewish schools
11 or Catholic schools. Unconstitutional?

12 MR. UNIKOWSKY: Yes, so I think that
13 --

14 JUSTICE KAVANAUGH: Is that a yes?

15 MR. UNIKOWSKY: Yes.

16 JUSTICE KAVANAUGH: Okay. So what's
17 different when you say the scholarship funds can
18 be used for secular schools but not for
19 Protestant, Jewish, Catholic or other religious
20 schools because of the religious status?

21 MR. UNIKOWSKY: So, I think the right
22 lens to look at that hypothetical is the
23 Establishment Clause, which prohibits the state,
24 regardless of whether there's an infringement on
25 any individual liberty, I think the

1 Establishment Clause prohibits the state from
2 distinguishing between one religion versus a
3 different religion. And I think that's an
4 example --

5 JUSTICE KAVANAUGH: But a lot of the
6 free-exercise equal-treatment cases, going back
7 to Everson, McDaniel, say you can't exclude
8 religious people, religious institutions,
9 religious speech because it's religious from a
10 generally applicable program --

11 MR. UNIKOWSKY: Right. So --

12 JUSTICE KAVANAUGH: -- the fact that
13 it's odious to the Constitution to quote the
14 words of Trinity Lutheran.

15 So why isn't this excluding religious
16 people, telling them that they're not entitled
17 to equal treatment under the Constitution, why
18 isn't that a violation of -- a straight
19 violation of the Trinity Lutheran principle
20 which goes back to Everson --

21 MR. UNIKOWSKY: Because I think --

22 JUSTICE KAVANAUGH: And why is it
23 different from other hypothetical?

24 MR. UNIKOWSKY: I think the state has
25 a choice, right? It's not allowed to tell

1 people we are going to penalize you for
2 exercising your religion. That's a prohibition.

3 I think that the core insight of a
4 case like Trinity Lutheran is that there's no
5 difference between the denial of a benefit and a
6 fine. That's a prohibition because you're
7 actually penalizing the decision to exercise
8 religion.

9 That doesn't mean that the state has
10 to fund religious schools and it also doesn't
11 mean the state can't just apply a principled
12 view that it doesn't want --

13 JUSTICE KAVANAUGH: But if you're a --

14 MR. UNIKOWSKY: -- to get involved in
15 religious education.

16 JUSTICE KAVANAUGH: If you're running
17 a scholarship fund and there's a group of people
18 lining up for the scholarships, are you secular?
19 Okay, you can get it? Are you Catholic? No,
20 you're out because you're Catholic.

21 MR. UNIKOWSKY: Yeah, that's exactly
22 what the state --

23 JUSTICE KAVANAUGH: How is that --

24 MR. UNIKOWSKY: -- court is not doing
25 in this case.

1 JUSTICE KAVANAUGH: How is that -- how
2 is that consistent with the principle set forth
3 in Trinity Lutheran or McDaniel, Justice
4 Brennan's concurrence in McDaniel?

5 MR. UNIKOWSKY: I think that's exactly
6 what the state court ensured wouldn't happen.
7 It's not just a matter of like --

8 JUSTICE KAVANAUGH: The predicate --
9 the predicate was that that kind of
10 discrimination is -- does not violate the
11 Federal Constitution.

12 MR. UNIKOWSKY: No, I -- I -- I think
13 that the state court can say, look, as a state,
14 we have a no-aid clause clause. We have a
15 principled objection to funding of religious
16 institutions, but we understand that this sort
17 of classification of coercing people on to being
18 secular is a penalty on religion. So to balance
19 those two interests, we're going to simply level
20 down.

21 And I just want to be clear, we're not
22 defending religious bigotry here, okay? I think
23 no-aid clauses have a principal justification,
24 especially in Montana.

25 JUSTICE KAVANAUGH: Well, they're --

1 they're certainly rooted in -- in grotesque
2 religious bigotry against Catholics. You agree
3 with that?

4 MR. UNIKOWSKY: I mean, I think that
5 in the 1880s, there was undoubtedly grotesque
6 religious bigotry against -- against Catholics.
7 I don't think that's --

8 JUSTICE KAVANAUGH: That was the clear
9 motivation for this.

10 MR. UNIKOWSKY: No, not -- that's not
11 true. In the 1972 Constitution, which is where
12 this provision was enacted, I don't think
13 there's any evidence whatsoever of any
14 anti-religious bigotry. I think that -- yes,
15 Your Honor, I'm sorry.

16 JUSTICE ALITO: No, I -- I want to --
17 to see if there's any real difference between
18 this and Trinity Lutheran. So what the --
19 excuse me -- what Article X, Section 6 of the
20 Montana Constitution says that there can't be
21 any aid, indirect or direct, to any institution,
22 school, or other institution controlled in whole
23 or in part by any church, sect, or denomination.

24 So if you have a school that has a
25 board of trustees and one or more of the board

1 -- members of the board of trustees ex officio
2 are members of a religious body, that would seem
3 to provide control, in part. Would that be
4 sufficient under the Montana constitution,
5 without looking at all at the nature of the
6 education provided by the school?

7 MR. UNIKOWSKY: No, I don't think so.
8 That's not how the state court has construed the
9 Constitution --

10 JUSTICE ALITO: Where has it said --
11 where has it said that that's not how it's
12 construed? That's control in -- in part.

13 MR. UNIKOWSKY: So if you read the
14 lower court opinion, there's all this language
15 about how the real problem here is that the
16 money is going to the school, which is going to
17 spend it on religious education. The language
18 --

19 JUSTICE ALITO: Well, they're talking
20 about schools in general. How do they know what
21 schools they're talking about?

22 MR. UNIKOWSKY: No, they saying --
23 they're not talking about schools in general.
24 There's all this language saying that money is
25 going to go to a school and, therefore, the

1 money -- the school is going to spend that money
2 on explicitly religious education.

3 If I could just step back, look, I'm
4 agreeing -- I agree that the -- the lower court
5 opinion is not completely clear on this. I
6 mean, part of the problem is I think that this
7 -- this challenge has really changed in this
8 Court. In the lower court, it wasn't the no-aid
9 clause that was really being challenged; it was
10 the rule.

11 And so I don't think -- I mean, I
12 think the state courts in general should be
13 entitled to adopt limiting constructions of
14 their own state constitutions. I just don't
15 think the state court had the chance to do that
16 here because the argument wasn't really raised.

17 And I think it would be a little
18 unfair in this Court to sort of assume the
19 broadest possible interpretation of the state
20 constitution just for purposes of like
21 invalidating it. At minimum --

22 JUSTICE SOTOMAYOR: May I ask you a
23 question? Let's go back to the basic, okay?

24 Let's take the proposition here that
25 the law as written giving aid discriminated. I

1 know you're challenge that, okay? But that it
2 violates the U.S. Constitution --

3 MR. UNIKOWSKY: Yes.

4 JUSTICE SOTOMAYOR: -- because -- Rule
5 1 does because it permits secular schools but
6 not religious schools from receiving the
7 scholarship. I know you take as a defense
8 position that they can do that. Putting that
9 aside, you're wrong. Assume that. Okay?

10 MR. UNIKOWSKY: I accept I'm wrong,
11 yes.

12 JUSTICE SOTOMAYOR: All right. Now,
13 there was a suggestion in an earlier question
14 that if you were wrong, and the Montana Supreme
15 Court in turn uses the Montana constitution to
16 level down, that it is unconstitutionally
17 acting, that it is using religion to level down.

18 How do you answer that argument?

19 MR. UNIKOWSKY: Because --

20 JUSTICE SOTOMAYOR: Because that's
21 exactly what we were told in a question, which
22 is they are basing the leveling down on the
23 basis of discriminating against religion.

24 MR. UNIKOWSKY: So I think that the
25 answering of that question requires a kind of

1 focused analysis of exactly what the
2 constitution allows and doesn't allow, all
3 right?

4 So if you accept the premise that Rule
5 1 is unconstitutional because it discriminates,
6 it says secular schools in and religious schools
7 out, that doesn't answer the question of whether
8 the mere application of a no-aid clause that
9 does not lead to a judgment with that effect is
10 also unconstitutional.

11 So I think the crucial point in this
12 case is to look at what the state court did when
13 it applied the no-aid clause.

14 JUSTICE ALITO: No, isn't the crucial
15 question why the state court did what it did?
16 If it did what it did for an unconstitutionally
17 discriminatory reason, then there's a problem
18 under Village of Arlington Heights.

19 So I'll give you an example. The
20 state legislature sets up a scholarship fund,
21 and after a while, people look at the -- the
22 recipients of the scholarships, and some people
23 say: Wow, these are mostly going to blacks and
24 we don't like that and that's contrary to state
25 law. So the state supreme court says: Okay,

1 that discrimination is -- we're going to strike
2 down the whole thing.

3 Is that constitutional?

4 MR. UNIKOWSKY: No, so we don't think
5 the race analogy is apt. I don't think that's
6 constitutional, and we just don't think that
7 race and religion are identical for all
8 constitutional reasons.

9 JUSTICE BREYER: What they're -- what
10 he's saying is that, look, the court took the
11 case in the Prince Edward County thing --

12 MR. UNIKOWSKY: Yes.

13 JUSTICE BREYER: -- or the equivalent
14 and said they couldn't do that. They can't shut
15 down all the schools, even though the
16 Constitution they didn't say had a right and so
17 that's the similarity.

18 MR. UNIKOWSKY: So I -- I assume the
19 --

20 JUSTICE BREYER: I think Justice --

21 MR. UNIKOWSKY: I have an answer --

22 JUSTICE BREYER: But I have -- I'd
23 like you to think about that --

24 MR. UNIKOWSKY: Look --

25 JUSTICE BREYER: -- but I have a more

1 direct question on the merits. Sorry.

2 Look, the state says Catholic schools
3 get some money; Jewish schools don't.

4 MR. UNIKOWSKY: Yeah.

5 JUSTICE BREYER: All right? No
6 problem, unconstitutional, free exercise, right?

7 MR. UNIKOWSKY: And establishment,
8 yes.

9 JUSTICE BREYER: Okay. The -- the
10 state says: We'll give police protection to all
11 schools, all people, but no religious
12 institution. That's unconstitutional? Clearly.

13 MR. UNIKOWSKY: That's Trinity
14 Lutheran.

15 JUSTICE BREYER: Okay. Yeah.
16 Correct.

17 MR. UNIKOWSKY: Yeah.

18 JUSTICE BREYER: Now, why is it
19 different? And I'm not saying it isn't. I want
20 to know your reason why is it different? Oh,
21 try it the opposite extreme.

22 The state says: We will pay for the
23 salaries of priests if they're Mohammedan but
24 not if they're Buddhist. Unconstitutional,
25 right?

1 MR. UNIKOWSKY: Yeah.

2 JUSTICE BREYER: Okay. So why doesn't
3 it also violate the Constitution were the state
4 to say we won't pay the salaries of any priests
5 but we will pay the head of every other
6 organization?

7 MR. UNIKOWSKY: Well, I think that --

8 JUSTICE BREYER: I mean, you see where
9 I'm -- you see --

10 MR. UNIKOWSKY: Yes.

11 JUSTICE BREYER: -- how I'm doing
12 that? You see the point?

13 MR. UNIKOWSKY: So let me -- let me
14 answer that question and then go back to the
15 race question I would like to address.

16 JUSTICE BREYER: Okay. You don't have
17 to answer if you don't want to.

18 (Laughter.)

19 MR. UNIKOWSKY: Well, I'll -- I'll
20 give a --

21 CHIEF JUSTICE ROBERTS: I recommend
22 it, though.

23 (Laughter.)

24 MR. UNIKOWSKY: I'll give a brief
25 answer.

1 JUSTICE BREYER: Yeah.

2 MR. UNIKOWSKY: So I think that
3 there's a constitutional difference between
4 distinguishing among religions and saying the
5 Court is -- the government is just going to stay
6 out of religion altogether.

7 JUSTICE BREYER: That's correct.

8 MR. UNIKOWSKY: There's many
9 Establishment Clause cases saying that
10 regardless of whether there's a civil liberties
11 violation, it's just contrary to -- to
12 disestablishment principles to say that we're
13 going to treat one religion --

14 JUSTICE BREYER: Okay, I got that.

15 MR. UNIKOWSKY: -- totally different
16 than another religion.

17 JUSTICE BREYER: So what about the
18 other part, where we said, look, you can't
19 discriminate against all religions by not giving
20 them playgrounds or you can't discriminate
21 against all religions by refusing to give them
22 police protection or fire protection? What
23 about that part?

24 MR. UNIKOWSKY: All right. So there
25 -- there's two differences between that case and

1 this one. One is the striking down of the whole
2 program, which we've talked about throughout the
3 argument today, and then there's a second point
4 which hasn't really come up, which is sort of
5 the Locke v. Davey distinction between a
6 declination to fund religious education and
7 refusing funding merely because someone happens
8 to be religious for a completely non-religious
9 purpose.

10 JUSTICE KAVANAUGH: Does --

11 MR. UNIKOWSKY: And I think that --

12 JUSTICE KAVANAUGH: Does --

13 JUSTICE KAGAN: Can I take you back,
14 Mr. Unikowsky, to the striking down the whole
15 program?

16 MR. UNIKOWSKY: Yes.

17 JUSTICE KAGAN: Because a number of
18 people have suggested that that must be
19 motivated by animus towards religion.

20 MR. UNIKOWSKY: Right.

21 JUSTICE KAGAN: And I can think of
22 many reasons why you would strike down the whole
23 program that have nothing to do with animus
24 toward religion. You might actually think that
25 funding religion imposes costs and burdens on

1 religious institutions themselves. You might
2 think that taxpayers have conscientious
3 objections to funding religion. You might think
4 that funding religion creates divisiveness and
5 conflict within a society, and that for all
6 those reasons, funding religious activity is not
7 a good idea and that you would rather level down
8 and fund no comparable activity, whether
9 religious or otherwise, than fund both.

10 Now, none of those things have
11 anything to do with animus towards religion, and
12 I -- I --

13 MR. UNIKOWSKY: So I think that's
14 right, and I think that's why we don't think the
15 race analogy is apt. And I think it's useful to
16 talk about why the no-aid clause was enacted
17 based on the convention's discussions in 1972
18 and why it makes sense that those justifications
19 would result in --

20 CHIEF JUSTICE ROBERTS: Why -- why
21 does that explain why the race analogy is inapt?
22 I mean, the legislature may say they built parks
23 and pools, and they say funding those, but if a
24 higher percentage of African Americans come and
25 use the pools, then we're going to shut down the

1 whole program.

2 And you wouldn't defend that on saying
3 they could have a judgment that it decreases
4 tensions among the different races to keep them
5 -- no, you would just look at the facial
6 discrimination, right, and conclude the fact
7 that -- that wouldn't be good under your view,
8 would it?

9 MR. UNIKOWSKY: Of course not --

10 CHIEF JUSTICE ROBERTS: Because
11 they're shutting down the whole --

12 MR. UNIKOWSKY: No.

13 CHIEF JUSTICE ROBERTS: -- program?

14 MR. UNIKOWSKY: No. Of course not.

15 CHIEF JUSTICE ROBERTS: How is that
16 different than religion, which is also protected
17 under -- under the First Amendment?

18 MR. UNIKOWSKY: Because I don't think
19 that race and religion are identical for all
20 constitutional purposes, right?

21 Look -- look, if a state constitution
22 had a provision saying that like historically
23 black colleges aren't entitled to any aid at
24 all, that would obviously be facially
25 unconstitutional. You wouldn't even need to get

1 to these as-applied challenges at all because I
2 think the equal protection clause embodies a
3 judgment that race is never, ever a permissible
4 criterion in any government decision making at
5 all, regardless -- unless strict scrutiny is
6 satisfied, which is very, very difficult.

7 And -- and I don't think the rule is
8 the same in religion. But later this term, this
9 Court's about to hear a case involving
10 exemptions of religious schools from anti-
11 discrimination laws. That distinguishes between
12 -- that -- that creates a sort of religious
13 classification but that does -- that's not
14 intrinsically unconstitutional.

15 CHIEF JUSTICE ROBERTS: Was that --
16 was that your answer to Justice Kagan's
17 question?

18 MR. UNIKOWSKY: So -- well --

19 CHIEF JUSTICE ROBERTS: Well, I -- go
20 ahead. I'd like to give you the chance to do
21 that.

22 MR. UNIKOWSKY: The answer is, I think
23 if you accept that no-aid clauses are not
24 facially unconstitutional, and I think it's a
25 hard argument to make for all the historical

1 reasons, they've existed for such a long time,
2 then you have to accept that it's at least
3 permissible for a state to say, for principled
4 reasons deeply rooted in national tradition
5 dating back to Madison, we have a preference to
6 not fund religious activities, not prohibit it
7 but not fund it.

8 JUSTICE ALITO: But there's a
9 difference between saying we're not going to
10 fund religious activities and saying we're going
11 to discriminate based on religion. That's the
12 point. They -- the state -- nobody's claiming
13 the state has an obligation to make particular
14 grants to religious institutions or to provide
15 any funding for private education at all.

16 The question is, can they -- if -- if
17 -- if there is a program that is -- that is
18 designed to serve certain purposes, can they
19 discriminate in the application of the -- in the
20 -- in the -- deciding who's going to get the
21 benefit of it on the basis of religious
22 affiliation?

23 MR. UNIKOWSKY: I think what -- so
24 that sounds more like the Trinity Lutheran
25 hypothetical. I think what state -- there are

1 certain things a state can't do and certain
2 things a state can do.

3 What I think a state can do is say,
4 look, we have a no-aid clause which has existed
5 for a very long time and that says on its face
6 that we prefer not to fund religious activities
7 for good reasons I'd like to explain in just a
8 second, okay?

9 Now, we're constrained by
10 anti-discrimination principles from coercing
11 people into abandoning their religion. So if we
12 have these two principles, these principled
13 non-bigoted and historically rooted views that
14 we don't want to fund religious activity on the
15 one hand, and the First Amendment, which clearly
16 guards against coercion and penalizing religious
17 faith on the other, the way we're going to
18 balance it is to do what the state court did.

19 And I just want to say one thing about
20 that.

21 JUSTICE KAGAN: To do what the state
22 court did, meaning?

23 MR. UNIKOWSKY: Yes, invalidate the
24 program. And I just -- I mean, if you look at
25 the reasons the no-aid clause was enacted which

1 I think are similar to the reasons James Madison
2 gave, it's just hard to say that James Madison
3 disabled future states from enacting no-aid
4 clauses based on essentially similar arguments
5 to the ones he made.

6 And in 1972, what the delegates
7 basically said was that they conceived of the
8 no-aid clause as a mechanism of protecting
9 religious schools from political influence. So
10 to prevent government from using its leverage to
11 -- to influence the content of religious
12 education.

13 There's like a lot of leaders of
14 religious denominations who came forward and
15 testified in favor of the no-aid clause for that
16 exact reason. And I think it's very clear why
17 that justification applies with complete force
18 with respect to this program, right?

19 Because it's --

20 JUSTICE ALITO: Basically what you're
21 saying is, the difference between this and race
22 is, it's permissible to discriminate on the
23 basis of religion. It's not permissible, ever,
24 to discriminate on the basis of -- of race.
25 That's what you're saying.

1 MR. UNIKOWSKY: I mean, look, it -- it
2 seems to me that when you talk about
3 discrimination, we can mean two different
4 things, all right? One way of looking at
5 discrimination is to say that just -- you can't
6 have a rule that treats religion differently
7 from other subjects, which is I think is the
8 core of Petitioners' argument.

9 And they say, look at the no-aid
10 clause. It says religious schools are
11 ineligible and it imposes no comparable
12 restriction on anyone else, and therefore that's
13 just discrimination and it should be wiped out
14 of the state constitution.

15 So if -- if -- if you buy that
16 argument, then you're basically saying that like
17 every no-aid clause since 1835 is
18 unconstitutional, even at the founding. Look,
19 all the state constitutions said things like, a
20 tax won't be levied to build a church. That is
21 a form of discrimination, right? Like you can
22 levy a tax to build a bridge but not a church.

23 JUSTICE ALITO: Well, I -- I mean, I
24 don't know about every -- every no-aid clause in
25 the country. They'd all have to be examined

1 separately if in -- if, in fact, they are
2 challenged.

3 A lot of them -- look, you -- I'm not
4 going to get into an argument with you about
5 what happened in 1972, but do you really want to
6 argue that the reason why a lot of this popped
7 up beginning, coincidentally, in the 1840s, at
8 the time of the Irish potato famine, that had
9 nothing to do with discrimination based on
10 religion?

11 MR. UNIKOWSKY: I'm not saying that
12 they -- no, I'm not saying that at all. I think
13 that the history in the 19th century is very
14 complex, like there's a Professor Green, who is
15 a leading scholar on this, wrote a book that
16 both parties cite which basically says it's a
17 complex history and there's good reasons and
18 there's bad reasons and it depends on the state.

19 And, look, I -- I don't see how
20 Montana could --

21 JUSTICE BREYER: But aren't you saying
22 -- are you -- I don't know, can we -- can you or
23 could I say this: Yes, race is different from
24 religion. Why? There is no Establishment
25 Clause in regard to race.

1 What is the Establishment Clause?

2 Well, it has something to do with not supporting
3 religion. And there is nothing more religious
4 except perhaps for the service in the church
5 itself than religious education. That's how we
6 create a future for our religion.

7 Now, there's some line there, and that
8 line may be what I have just suggested,
9 impermissible under case law of this Court or it
10 may be permissible but unwise. You'd like to
11 draw the line. Explain it.

12 MR. UNIKOWSKY: Okay. So I think
13 that, you know, we haven't talked about the
14 analogies to Locke at all. I'd just like to say
15 a few words about that, with I -- which I think
16 are consistent to your question.

17 So it's true that there are factual
18 distinctions between this case and Locke, right?
19 Locke involved training for the ministry and
20 this case involves secondary education.

21 So I'm -- I'm not denying -- I'm not
22 saying they're on all fours with each other, but
23 the question is whether that distinction can be
24 located in the free-exercise clause.

25 Because, really, you know, it's true

1 that Locke involved funding of the ministry but
2 I think this case does too, right, the ministry
3 of teachers towards their students. And I think
4 Petitioners have a somewhat revealing statement
5 --

6 JUSTICE KAVANAUGH: But this is a --
7 this is a school, in education, there satisfies
8 the compulsory education laws of the state,
9 correct?

10 MR. UNIKOWSKY: That's true.

11 JUSTICE KAVANAUGH: And so that's
12 different from Locke, as Professor Laycock's
13 amicus brief points out in a very narrow
14 decision about training of the clergy.

15 And it seems to me there are two
16 different things going on here, it seems to me.

17 One is to Justice Breyer's question,
18 just funding religion, funding religious schools
19 generally or training of clergy is -- is an
20 establishment clause concern, but this -- it's a
21 separate issue when you set up a neutral benefit
22 program -- police, fire, or scholarships -- and
23 allow people to use those things, allow
24 religious institutions to obtain the benefits of
25 those things on a non-discriminatory basis.

1 And the question in this case, it
2 seems to me, is which side of that line this
3 comes on. Is that the -- a proper way to look
4 at it? And if so, why does it come on the
5 funding side?

6 MR. UNIKOWSKY: I -- I guess I'm not
7 sure that's the right way to look at it. I
8 think that it's important to just look at the
9 interest the no-aid clause protects, understand
10 whether those are just unconstitutional and
11 whether they apply to this case.

12 So as I said, the no-aid clause was
13 concerned about using government leverage to
14 influence religious education. And it's very
15 easy how -- to see how that can happen in the
16 context of even a neutral program like this one.

17 The state can just have a condition --

18 JUSTICE KAVANAUGH: You think that was
19 the design of the no-aid clause, to -- to help
20 religious institutions?

21 MR. UNIKOWSKY: Yeah. If you look at
22 the transcripts of 1972, that's what it is all
23 about. There is numerous religious leaders who
24 came forward and testified that that's the
25 reason they wanted it. On the floor of the

1 convention in 1972, the strongest proponent was
2 Delegate Harper who was not an anti-religious
3 bigot. He was the pastor of a church in Helena
4 and he told his colleagues, drawing on his own
5 religious faith, that the no-aid clause was
6 necessary to ensure that religious schools were
7 independent from government.

8 So I just don't -- and there's a
9 committee report --

10 JUSTICE KAVANAUGH: Well, no one's
11 compelling the religious schools to participate
12 in a program in order to accept funds from the
13 program, correct?

14 MR. UNIKOWSKY: That is certainly
15 true. But --

16 JUSTICE KAVANAUGH: So a religious
17 school that doesn't want to be part of a neutral
18 program doesn't have to be.

19 MR. UNIKOWSKY: Yeah, that's true.
20 But I mean, there's still a concern that
21 ultimately the inevitable effect of these
22 programs is that the government would exercise
23 its leverage over schools.

24 And, look, this is what people were
25 saying at the hearing, and I think that may be a

1 little paternalistic, but I think the state is
2 allowed to have a structural provision being
3 arguably paternalistic in its own state
4 constitution.

5 There's no bigotry whatsoever in
6 evidence from the actual convention at which
7 this is enacted. I just don't understand how
8 Montana could have done any better than it did,
9 to wipe out its entire state constitution, start
10 all over again, have committee hearings --

11 JUSTICE KAVANAUGH: I think the other
12 side's argument is the way you can do better is
13 to say: If we're going to give benefits to
14 private schools, which you don't have to do --
15 to Justice Breyer's question, you do not have to
16 give benefits to private schools or funds or tax
17 credits, but if you do, don't tell someone they
18 can't participate because they're Jewish or
19 Protestant or Catholic.

20 MR. UNIKOWSKY: I guess the -- the
21 concern of the delegates was that if you have
22 money going to religious schools, that's going
23 to lead to entanglement problems. And the way
24 to solve that problem is to have a structural
25 provision saying, we're not going to do it.

1 And that's not prohibiting anyone from
2 exercising their religion. It's simply
3 separating the church from the state without,
4 again, preventing anyone from going to any of
5 these schools if they don't want to.

6 And it's true that there's a
7 constraint in the federal constitution that says
8 that you can't coerce people, you can't tell
9 people we're going to penalize you for being
10 religious. But if a state has two principles,
11 it wants to stick to at the same time, then we
12 think that it should be able to balance those
13 principles by invalidating the program.

14 JUSTICE GINSBURG: Mr. Unikowsky, if
15 we can just go back to the standing question.
16 You are not at liberty to waive Article III, so
17 why do you think this case doesn't fit under
18 Eastern Kentucky?

19 MR. UNIKOWSKY: So I'll -- I'll just
20 answer briefly, Your Honor.

21 CHIEF JUSTICE ROBERTS: Sure.

22 MR. UNIKOWSKY: So Petitioners are
23 claiming they personally are the victims of
24 status discrimination, which is the argument
25 that wasn't made in that case. So we think that

1 they are allowed to make that argument, it is
2 just incorrect on its merits.

3 But, of course, this argument is made
4 in amicus brief. And, as you say, we're not
5 able to waive it.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Komer, two minutes remaining.

9 REBUTTAL ARGUMENT RICHARD D. KOMER

10 ON BEHALF OF THE PETITIONERS

11 MR. KOMER: Thank you.

12 What we're saying here is that Trinity
13 -- what Trinity Lutheran says, the state can't
14 discriminate on the basis of religion. The
15 decision is crystal clear when you read it that
16 that is what they are doing in this case.

17 They focus on the religious
18 affiliation or religious nature of the schools.
19 They are not talking about what the schools do.
20 They are talking about what the schools are.

21 Second, Zelman has already answered
22 the question about who this program is aiding.
23 It's not aiding the schools. It is aiding the
24 parents.

25 You have a choice to make about the

1 parents here. You can either view them as mere
2 inconsequential conduits through which public
3 funds flow to the religious schools they choose
4 or you can regard them, as you did in *Zelman*, as
5 free and independent decision-makers who are
6 being given the power to choose a religious
7 education or a secular education in private
8 schools.

9 We are not arguing that the state
10 couldn't just fund public schools. We are
11 saying that when the legislature, when the state
12 makes the decision to empower parents to
13 exercise their right to choose and direct their
14 children's education, that the state cannot
15 distinguish between parents who want a religious
16 education for their children and parents who
17 want a secular private education for their
18 parents.

19 We are only in that area because the
20 state legislature has made, like Montana did,
21 the decision to open it up beyond the public
22 schools. We don't question that the public
23 schools must be secular. This Court recognized
24 that in *Schempp*. And, as a result, the public
25 schools now must be secular.

1 But at the time these provisions were
2 passed, the public schools were not secular.

3 JUSTICE SOTOMAYOR: It's almost --

4 MR. KOMER: That is why --

5 JUSTICE SOTOMAYOR: It's almost sort
6 of a illusory state, isn't it? The legislatures
7 can choose to give money or not. If they
8 choose, they have to do it this way.

9 But the court system is out of it
10 because it can't force the legislatures to act
11 constitutionally under their own constitution.

12 CHIEF JUSTICE ROBERTS: You may --

13 JUSTICE SOTOMAYOR: That's basically
14 what you're saying, isn't it?

15 CHIEF JUSTICE ROBERTS: You may answer
16 briefly.

17 JUSTICE SOTOMAYOR: And not fund.

18 MR. KOMER: We're saying the
19 legislature ab initio might be able to do more
20 than what the court should have done here. They
21 should have answered the federal question. They
22 should have recognized that Trinity Lutheran is
23 applicable. They should have recognized they
24 were applying Locke exactly the way Missouri
25 tried to.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel. The case is submitted.
3 (Whereupon, at 11:08 a.m., the case
4 was submitted.)

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Official - Subject to Final Review

\$			
\$150 [4] 8:10 9:21 10:12,14	affirmed [1] 29:11	area [1] 69:19	better [3] 17:15 66:8,12
1	African [1] 54:24	aren't [3] 7:6 55:23 61:21	between [16] 15:21 18:1 27:10 32:13 34:25 41:2 42:5 44:17 52:3,25 53:5 56:11 57:9 59:21 62:18 69:15
1 [2] 47:5 48:5	African-American [2] 4:15 19:17	arguably [1] 66:3	beyond [1] 69:21
10:05 [2] 1:14 3:2	agree [5] 36:19 37:12,13 44:2 46:4	argue [4] 4:2,18,25 61:6	bigot [1] 65:3
11:08 [1] 71:3	agreeing [2] 38:25 46:4	arguing [2] 36:13 69:9	bigotry [5] 43:22 44:2,6,14 66:5
18 [1] 2:8	ahead [2] 17:3 56:20	argument [39] 1:13 2:2,5,9,12 3:4,7 18:16 30:8 32:8,22 33:21 34:8,10,15 35:11,17,17,24,25 36:6,7,20,21,22 37:20 38:5 46:16 47:18 53:3 56:25 60:8,16 61:4 66:12 67:24 68:1,3,9	bill [1] 22:22
18-1195 [1] 3:4	aid [12] 16:1,3,4,6 23:5,16 24:12 30:22 35:1 44:21 46:25 55:23	arguments [3] 32:10 35:15 59:4	billion [1] 25:13
1835 [1] 60:17	aiding [3] 68:22,23,23	Arlington [3] 1:17 18:6 48:18	bit [1] 39:1
1840s [1] 61:7	AL [2] 1:3,6	Article [5] 5:4 8:18 20:10 44:19 67:16	black [1] 55:23
1880s [1] 44:5	ALITO [18] 16:25 17:3 18:3,4 36:12,16 37:3,17,20 38:4,25 44:16 45:10,19 48:14 57:8 59:20 60:23	as-applied [1] 56:1	blacks [1] 48:23
1972 [7] 22:19 44:11 54:17 59:6 61:5 64:22 65:1	alive [1] 14:21	aside [2] 28:17 47:9	Blaine [6] 3:15,17 6:23 12:10 21:12 23:1
19th [1] 61:13	all-girl [1] 19:18	asks [1] 3:11	board [3] 44:25,25 45:1
2	allege [1] 17:16	aspect [1] 31:3	boat [1] 11:13
2020 [1] 1:10	alleged [1] 11:16	assume [9] 9:25 14:7,13,15 15:139:11 46:18 47:9 49:18	body [1] 45:2
22 [1] 1:10	alleging [1] 32:15	Assuming [1] 39:16	boils [1] 35:6
3	Allen [1] 10:4	attempt [1] 30:24	book [1] 61:15
3 [1] 2:4	allow [5] 4:21 40:8 48:2 63:23,23	attend [1] 37:24	Boston [1] 24:20
30 [4] 2:11 21:3 23:14,18	allowed [3] 41:25 66:2 68:1	attenuated [1] 32:13	both [11] 12:2,5 13:13 14:13 16:20 17:13 22:9 28:15 35:16 54:9 61:16
31 [1] 23:14	allows [3] 3:12 4:19 48:2	available [4] 23:21 26:15 27:17 37:23	bother [1] 33:23
32 [1] 29:6	almost [2] 70:3,5	avoided [1] 4:3	breadth [1] 33:9
37 [1] 22:2	already [1] 68:21	awarding [1] 9:16	Brennan's [1] 43:4
5	alternative [1] 4:18	away [1] 19:4	BREYER [34] 23:24 24:15 25:4,9,12,18,22 26:9,12,17,23 27:6,14 33:22 34:6,12 49:9,13,20,22,25 50:5,9,15,18 51:2,8,11,16 52:1,7,14,17 61:21
500 [1] 25:19	altogether [1] 52:6	B	Breyer's [3] 33:1 63:17 66:15
6	Amendment [12] 3:15,17 6:23 12:10 16:7,8,10,13 22:20 23:2 55:17 58:15	back [11] 10:19 29:17 33:1 41:6,20 46:3,23 51:14 53:13 57:5 67:15	bridge [1] 60:22
6 [1] 44:19	amendments [1] 21:13	bad [1] 61:18	brief [8] 23:13,19 32:8,9,16 51:24 63:13 68:4
68 [1] 2:14	Americans [1] 54:24	balance [3] 43:18 58:18 67:12	briefly [2] 67:20 70:16
7	amicus [7] 1:21 2:7 18:17 32:8 33:10 63:13 68:4	bar [2] 10:5 30:12	briefs [1] 33:10
72 [1] 22:22	among [2] 52:4 55:4	barring [1] 3:21	broader [2] 35:17 36:21
A	amounts [1] 26:4	based [10] 4:11,13 23:22 24:11 27:18 32:19 54:17 57:11 59:4 61:9	broadest [1] 46:19
a.m [3] 1:14 3:2 71:3	analogies [1] 62:14	bases [1] 37:9	brought [1] 4:10
ab [1] 70:19	analogize [1] 30:24	basic [1] 46:23	Buddhist [1] 50:24
abandon [1] 31:6	analogy [4] 30:25 49:5 54:15,21	basically [5] 59:7,20 60:16 61:16 70:13	build [2] 60:20,22
abandoning [1] 58:11	analysis [1] 48:1	basing [1] 47:22	building [1] 31:7
able [3] 67:12 68:5 70:19	animus [3] 53:19,23 54:11	basis [8] 20:23 29:16 47:23 57:21 59:23,24 63:25 68:14	built [1] 54:22
above-entitled [1] 1:12	another [3] 5:22 25:18 52:16	become [1] 31:7	burdens [1] 53:25
absent [1] 31:4	answer [14] 20:15 24:18 34:13 38:19 47:18 48:7 49:21 51:14,17,25 56:16,22 67:20 70:15	becomes [2] 40:2,5	business [1] 30:15
accept [6] 38:20 47:10 48:4 56:23 57:2 65:12	answered [2] 68:21 70:21	beginning [1] 61:7	buy [2] 9:2 60:15
access [1] 28:4	answering [1] 47:25	behalf [9] 1:18,24 2:4,11,14 3:8 20:21 30:9 68:10	C
act [1] 70:10	anti [1] 56:10	belief [1] 22:14	call [3] 10:20 11:16 25:18
acting [1] 47:17	anti-discrimination [1] 58:10	beliefs [1] 3:18	called [1] 27:7
action [1] 32:14	anti-religious [2] 44:14 65:2	believe [1] 32:12	calling [1] 21:12
activities [3] 57:6,10 58:6	anyone's [1] 30:18	believing [1] 12:9	came [4] 1:12 32:6 59:14 64:24
activity [5] 28:10,22 54:6,8 58:14	App [1] 29:7	below [1] 17:7	cannot [2] 30:21 69:14
actual [2] 11:16 66:6	APPEARANCES [1] 1:16	beneficiaries [2] 6:15 8:19	capable [2] 31:15 35:20
actually [8] 8:11 9:8,15 21:19 24:8 32:20 42:7 53:24	appendix [1] 21:3	beneficiary [1] 8:21	Case [49] 3:4,11 4:20 7:2,11,21 8:15,17 10:5,23 13:16,17 16:11 20:2 27:11 28:2 29:19,23 30:25 31:14,24 33:13,21 34:17,22 35:5 36:5,19,23 37:7 39:9,19 42:4,25 48:12 49:11 52:25 56:9 62:9,18,20 63:2 64:1,11 67:17,25 68:16 71:2,3
ADAM [3] 1:23 2:10 30:8	applicable [2] 41:10 70:23	benefit [15] 8:23,25 9:6 10:10,11,15,16 23:22 26:7 27:17 28:5,6 42:5 57:21 63:21	
address [3] 35:16 36:4 51:15	applicants [1] 7:9	benefits [5] 7:5 26:15 63:24 66:13,16	
adjudicate [1] 39:24	application [5] 12:10 29:13 38:12 48:8 57:19		
admits [1] 23:18	applied [9] 7:16 13:10 17:22 35:21,25 36:9,17 37:5 48:13		
admitted [1] 22:21	applies [2] 27:22 59:17		
adopt [1] 46:13	apply [5] 35:22 36:24 38:18 42:11 64:11		
affected [2] 7:24 12:5	applying [2] 30:13 70:24		
affiliated [3] 19:1 24:6 38:1	apt [2] 49:5 54:15		
affiliation [2] 57:22 68:18			

Official - Subject to Final Review

<p>cases [3] 11:15 41:6 52:9 category [1] 21:19 Catholic [8] 24:25 25:23 40:11,19 42:19,20 50:2 66:19 Catholics [2] 44:2,6 century [1] 61:13 certain [4] 25:3 57:18 58:1,1 certainly [2] 44:1 65:14 challenge [7] 6:3 16:12,15 36:14, 16 46:7 47:1 challenged [3] 5:9 46:9 61:2 challenges [1] 56:1 challenging [2] 6:19 20:10 chance [2] 46:15 56:20 change [3] 25:2,4 33:25 changed [2] 23:1 46:7 character [3] 23:23 24:11 27:19 charter [4] 24:24 25:16 26:21,23 CHIEF [25] 3:3,9 18:3,13,19 19:22 20:4 23:8 30:5,10 32:25 33:12 34:23 51:21 54:20 55:10,13,15 56:15, 19 67:21 68:6 70:12,15 71:1 children [6] 5:7,12 16:16,18 37:25 69:16 children's [1] 69:14 choice [3] 31:6 41:25 68:25 choose [9] 6:18 14:1 20:23 37:22 69:3,6,13 70:7,8 choosing [1] 16:1 chose [2] 16:3,5 Christians [1] 32:18 church [13] 22:15 23:17 24:13 31:5,22,24 38:2 44:23 60:20,22 62:4 65:3 67:3 churches [1] 23:5 circumstances [2] 14:22 15:1 cite [2] 7:11 61:16 city [2] 24:21 26:25 civil [1] 52:10 claiming [3] 21:12 57:12 67:23 classification [2] 43:17 56:13 clause [40] 3:19 13:7 16:24 19:10 21:22,25 22:8 30:17 32:3 35:7,18 36:7,9,25 38:18 40:23 41:1 43:14, 14 46:9 48:8,13 52:9 54:16 56:2 58:4,25 59:8,15 60:10,17,24 61:25 62:1,24 63:20 64:9,12,19 65:5 clauses [3] 43:23 56:23 59:4 clear [7] 4:23 36:13 43:21 44:8 46:5 59:16 68:15 Clearly [2] 50:12 58:15 clergy [2] 63:14,19 client [1] 9:17 clients [4] 6:16 10:8 16:4 17:22 close [2] 6:5 8:16 coerce [1] 67:8 coercing [2] 43:17 58:10 coercion [3] 31:2,11 58:16 coincidentally [1] 61:7 collateral [1] 19:14 colleagues [1] 65:4 colleges [1] 55:23 Colorado [1] 15:12 come [4] 29:8 53:4 54:24 64:4</p>	<p>comes [3] 8:15 25:25 64:3 comment [1] 23:9 committee [2] 65:9 66:10 comparable [2] 54:8 60:11 compelled [3] 21:23 23:16 24:12 compelling [1] 65:11 complain [1] 6:9 complete [1] 59:17 completely [5] 28:5 31:23 38:8 46:5 53:8 complex [2] 61:14,17 compulsory [1] 63:8 concede [1] 3:25 concedes [1] 20:21 conceding [1] 37:4 conceived [1] 59:7 concern [3] 63:20 65:20 66:21 concerned [1] 64:13 conclude [1] 55:6 concluded [1] 32:9 concurrence [2] 24:3 43:4 condition [1] 64:17 conduct [1] 3:18 conduits [1] 69:2 conflict [3] 15:21 18:1 54:5 connection [1] 32:13 conscientious [1] 54:2 consequence [2] 17:8,9 consider [1] 37:5 considered [1] 11:22 consistent [5] 16:6 39:2,3 43:2 62:16 Constitution [42] 3:12,23 12:11 13:2 14:9,11,16,18 15:4,5,12,22, 25 18:22,23 23:4 26:1 30:12 37:8, 11,15 39:3,4 41:13,17 43:11 44:11,20 45:4,9 46:20 47:2,15 48:2 49:16 51:3 55:21 60:14 66:4,9 67:7 70:11 constitutional [29] 5:21 6:17 7:15 12:18,19 13:2,4,4,6 15:21 16:6,7, 10,13 17:15,21 18:7 19:8 21:5,15, 16,16 29:14 30:14 49:3,6,8 52:3 55:20 constitutionally [3] 35:18 38:12 70:11 constitutions [4] 15:22 17:24 46:14 60:19 constrained [1] 58:9 constraint [1] 67:7 constructions [1] 46:13 construed [2] 45:8,12 content [2] 30:22 59:11 context [1] 64:16 contingencies [2] 8:9,15 continue [2] 19:11 23:4 contrary [3] 30:19 48:24 52:11 contribute [1] 5:25 control [2] 45:3,12 controlled [1] 44:22 convention [2] 65:1 66:6 convention's [1] 54:17 core [2] 42:3 60:8 Correct [4] 50:16 52:7 63:9 65:13</p>	<p>correctly [1] 29:9 costs [1] 53:25 couldn't [2] 49:14 69:10 Counsel [7] 9:3 18:14 23:9 30:6 38:21 68:7 71:2 country [1] 60:25 County [1] 49:11 course [3] 55:9,14 68:3 COURT [75] 1:1,13 3:10,20,20,24 4:2,5,13 5:10,15,17 6:2,6,22 11:22 12:18 14:5,7 15:15,16,18 17:25 18:20,21 19:4,6,15 20:24 21:4, 21,22,23 27:16 28:12 29:6,11,22 30:11 31:14 32:2,7,20 35:21,22 36:1,24,24 37:9 38:13 39:2,23,24 42:24 43:6,13 45:8,14 46:4,8,8,15, 18 47:15 48:12,15,25 49:10 52:5 58:18,22 62:9 69:23 70:9,20 court's [9] 4:7 6:4 11:10 20:8 31:4, 12 34:21 39:14 56:9 courthouse [1] 32:21 courts [1] 46:12 covered [1] 29:24 create [1] 62:6 created [1] 10:17 creates [3] 10:16 54:4 56:12 credit [7] 8:11 9:7,20,21,23 10:2 31:19 credits [3] 6:25 12:21 66:17 criterion [1] 56:4 crucial [3] 31:3 48:11,14 crucially [1] 19:10 cry [1] 28:23 crystal [1] 68:15 cure [1] 4:7 cured [1] 19:20 curiae [3] 1:21 2:8 18:17 currently [1] 11:1</p>	<p>defense [1] 47:7 Delegate [1] 65:2 delegates [2] 59:6 66:21 denial [1] 42:5 denied [4] 4:11,12 19:21 32:4 denomination [1] 44:23 denominations [1] 59:14 deny [2] 23:22 27:16 denying [1] 62:21 DEPARTMENT [3] 1:6,20 3:5 depends [1] 61:18 Deputy [1] 1:19 describe [1] 10:24 design [1] 64:19 designed [1] 57:18 despicable [1] 22:23 difference [10] 27:10,13 28:2 34:7, 24 42:5 44:17 52:3 57:9 59:21 differences [1] 52:25 different [16] 24:13 31:24 38:6,8 40:17 41:3,23 50:19,20 52:15 55:4,16 60:3 61:23 63:12,16 differential [1] 5:9 differently [2] 5:6 60:6 difficult [1] 56:6 direct [6] 7:4 18:24 20:17 44:21 50:1 69:13 directly [1] 8:3 disabled [1] 59:3 disagree [1] 8:23 disagreed [1] 3:20 discriminate [9] 7:22 37:24 52:19, 20 57:11,19 59:22,24 68:14 discriminated [1] 46:25 discriminates [4] 3:17 37:10,15 48:5 discriminating [2] 15:10 47:23 discrimination [23] 4:3 7:25 8:3 11:17,18,21 17:10,17,18,20,21 18:23 32:17 43:10 49:1 55:6 56:11 60:3,5,13,21 61:9 67:24 discriminatory [7] 4:8 12:8,8 18:9 35:20 37:1 48:17 discussions [1] 54:17 disestablishment [1] 52:12 disqualify [1] 24:10 dissent [1] 21:24 distinction [4] 30:2 31:20 53:5 62:23 distinctions [1] 62:18 distinguish [3] 6:11 30:3 69:15 distinguishes [1] 56:11 distinguishing [2] 41:2 52:4 divisiveness [1] 54:4 doing [6] 15:15,16 28:8 42:24 51:11 68:16 dollars [2] 24:22 25:13 donate [1] 10:14 donations [1] 9:14 done [2] 66:8 70:20 donors [1] 9:22 doors [1] 32:21 down [22] 4:14 5:11,11,16 15:8 23:12 29:2 35:6,6,13 43:20 47:16,17,</p>
--	---	--	--

D

D.C [3] 1:9,20,23
damage [1] 19:14
dates [1] 24:9
dating [1] 57:5
Davey [2] 29:24 53:5
daycare [1] 31:8
dealing [1] 14:23
decide [4] 25:1 26:2,3 34:19
decided [1] 23:2
deciding [2] 33:24 57:20
decision [25] 6:5 17:7,9,23 18:5 20:8 22:4 28:13 29:6,10 31:4,12 35:1 37:9 38:14 39:2,6,15,23 42:7 56:4 63:14 68:15 69:12,21
decision-makers [1] 69:5
declination [1] 53:6
declining [1] 31:25
decreases [1] 55:3
deduction [3] 9:23,24 10:2
deductions [1] 10:11
deeply [1] 57:4
defective [2] 35:19 38:13
defend [2] 19:2 55:2
defending [1] 43:22

Official - Subject to Final Review

<p>22 49:2,15 53:1,14,22 54:7,25 55:11</p> <p>dramatically [1] 23:1</p> <p>draw [1] 62:11</p> <p>drawing [1] 65:4</p> <p>during [1] 32:6</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [1] 62:22</p> <p>earlier [1] 47:13</p> <p>Eastern [4] 6:5,11 10:4 67:18</p> <p>easy [1] 64:15</p> <p>education [27] 9:2 27:1 28:11,14, 23 29:20 30:23 32:1 34:18 37:22 42:15 45:6,17 46:2 53:6 57:15 59:12 62:5,20 63:7,8 64:14 69:7,7,14, 16,17</p> <p>educational [1] 28:9</p> <p>Edward [1] 49:11</p> <p>effect [3] 34:21 48:9 65:21</p> <p>either [5] 7:4 8:5 15:8 31:6 69:1</p> <p>else's [1] 6:3</p> <p>embodies [1] 56:2</p> <p>empower [1] 69:12</p> <p>empty [1] 22:19</p> <p>empty-handed [1] 19:5</p> <p>enabled [1] 6:17</p> <p>enacted [4] 44:12 54:16 58:25 66:7</p> <p>enacting [2] 30:13 59:3</p> <p>end [2] 20:6,8</p> <p>engineering [1] 25:8</p> <p>ensure [1] 65:6</p> <p>ensured [1] 43:6</p> <p>ensuring [1] 30:21</p> <p>entanglement [1] 66:23</p> <p>entire [5] 4:4 12:1 19:4 21:18 66:9</p> <p>entities [1] 28:4</p> <p>entitled [3] 41:16 46:13 55:23</p> <p>entity [1] 27:17</p> <p>equal [5] 19:19 26:18,19 41:17 56:2</p> <p>equal-treatment [1] 41:6</p> <p>equally [2] 22:8 27:23</p> <p>equivalent [1] 49:13</p> <p>era [2] 23:2,20</p> <p>erroneous [1] 39:7</p> <p>error [9] 19:3 29:17 39:8,11,17,22, 24 40:2,5</p> <p>especially [1] 43:24</p> <p>ESPINOZA [2] 1:3 3:4</p> <p>ESQ [4] 2:3,6,10,13</p> <p>essentially [2] 28:17 59:4</p> <p>establishing [1] 22:9</p> <p>Establishment [8] 21:25 40:23 41:1 50:7 52:9 61:24 62:1 63:20</p> <p>ET [2] 1:3,6</p> <p>Even [13] 3:25 8:12 9:25 14:13 20:9 23:18 28:16,19 31:15 49:15 55:25 60:18 64:16</p> <p>Everson [2] 41:7,20</p> <p>everybody [4] 20:14,21 28:20 29:12</p> <p>everyone [1] 19:5</p>	<p>evidence [3] 23:20 44:13 66:6</p> <p>ex [1] 45:1</p> <p>exact [3] 12:5 33:11 59:16</p> <p>exactly [7] 15:2 34:15 42:21 43:5 47:21 48:1 70:24</p> <p>examined [1] 60:25</p> <p>example [2] 41:4 48:19</p> <p>except [2] 35:2 62:4</p> <p>exception [3] 4:22,24,25</p> <p>exclude [2] 4:19 41:7</p> <p>excluded [2] 20:14 36:1</p> <p>excluding [2] 4:1 41:15</p> <p>exclusion [2] 3:12,16</p> <p>excuse [1] 44:19</p> <p>exemptions [1] 56:10</p> <p>exercise [13] 6:17 19:12 20:19 22:19 30:18 31:13 32:14,24 35:8 42:7 50:6 65:22 69:13</p> <p>exercising [2] 42:2 67:2</p> <p>exist [1] 20:25</p> <p>existed [2] 57:1 58:4</p> <p>explain [3] 54:21 58:7 62:11</p> <p>explicitly [1] 46:2</p> <p>extended [2] 6:22 7:19</p> <p>extreme [1] 50:21</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>face [4] 13:8,9 17:22 58:5</p> <p>facial [2] 36:14 55:5</p> <p>facially [4] 36:8 37:1 55:24 56:24</p> <p>facility [1] 31:8</p> <p>fact [5] 10:8 19:20 41:12 55:6 61:1</p> <p>factual [1] 62:17</p> <p>faith [4] 31:6,9 58:17 65:5</p> <p>falls [1] 4:20</p> <p>families [6] 8:24,25 9:2,17 13:17, 22</p> <p>families' [1] 11:3</p> <p>famine [1] 61:8</p> <p>far [2] 28:23 34:15</p> <p>fashion [1] 7:19</p> <p>father [1] 22:7</p> <p>fathers [2] 22:12 23:3</p> <p>fathers' [1] 22:24</p> <p>favor [1] 59:15</p> <p>Federal [34] 3:11,22 5:17 11:23 12:11 14:9,16 15:4,9,22,25 18:23 19:3,7,10,11 21:10,15 29:7,8,9,17 37:8 39:7,11,14,17,17,23 40:3,5 43:11 67:7 70:21</p> <p>federally [1] 39:25</p> <p>feel [1] 7:24</p> <p>few [1] 62:15</p> <p>fight [1] 38:14</p> <p>financial [5] 8:23 9:5 10:10,11,15</p> <p>find [1] 34:13</p> <p>fine [1] 42:6</p> <p>fire [2] 52:22 63:22</p> <p>first [8] 10:19 29:3 31:2 32:6 35:10 36:6 55:17 58:15</p> <p>fit [1] 67:17</p> <p>floor [1] 64:25</p> <p>flow [1] 69:3</p> <p>flowed [1] 29:10</p>	<p>flows [1] 19:24</p> <p>focus [1] 68:17</p> <p>focused [1] 48:1</p> <p>forbade [1] 21:25</p> <p>forbids [1] 18:24</p> <p>force [2] 59:17 70:10</p> <p>forced [2] 12:20 13:13</p> <p>Forget [1] 26:23</p> <p>form [1] 60:21</p> <p>forth [2] 26:13 43:2</p> <p>forward [2] 59:14 64:24</p> <p>founding [7] 22:7,12,24 23:20 24:4,9 60:18</p> <p>fours [1] 62:22</p> <p>Francisco [1] 24:20</p> <p>free [9] 19:12 20:19 30:18 31:13 32:14,23 35:8 50:6 69:5</p> <p>free-exercise [8] 3:19 13:7 16:23 19:10 21:22 22:8 41:6 62:24</p> <p>freedom [1] 30:19</p> <p>fund [16] 31:25 34:19 37:21 42:10, 17 48:20 53:6 54:8,9 57:6,7,10 58:6,14 69:10 70:17</p> <p>funding [20] 19:21 25:6 27:3 30:16 32:4 33:5,16 34:25 43:15 53:7, 25 54:3,4,6,23 57:15 63:1,18,18 64:5</p> <p>funds [10] 16:8,10 21:5 22:10 27:1 40:9,17 65:12 66:16 69:3</p> <p>further [2] 28:11 39:1</p> <p>future [3] 8:13 59:3 62:6</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gave [2] 24:4 59:2</p> <p>General [10] 1:20 34:25 36:2,24 38:9,15 39:21 45:20,23 46:12</p> <p>generality [1] 39:22</p> <p>generally [6] 23:21 26:15 27:17 34:18 41:10 63:19</p> <p>generated [2] 6:24 11:6</p> <p>gets [2] 9:6 28:25</p> <p>getting [3] 5:18 17:11 20:4</p> <p>GINSBURG [6] 5:3,22 6:19 9:18 15:7 67:14</p> <p>Ginsburg's [1] 10:19</p> <p>give [32] 8:10 9:10,12 12:20,23 13:13,23,24 14:1,6 16:1,3,5 22:16 24:21,23,25 25:7 26:4 27:7,12 31:22 34:7 48:19 50:10 51:20,24 52:21 56:20 66:13,16 70:7</p> <p>given [1] 69:6</p> <p>gives [3] 27:1,3,4</p> <p>giving [7] 6:24 13:16,19 16:4 26:14 46:25 52:19</p> <p>GORSUCH [5] 38:21,24 39:13,16 40:1</p> <p>got [4] 5:17 12:12 29:8 52:14</p> <p>gotten [1] 29:12</p> <p>government [10] 18:7 30:20,21 36:21 52:5 56:4 59:10 64:13 65:7, 22</p> <p>grade [1] 17:5</p> <p>grants [1] 57:14</p> <p>great [1] 34:9</p>	<p>Green [1] 61:14</p> <p>grotesque [2] 44:1,5</p> <p>ground [1] 37:9</p> <p>group [1] 42:17</p> <p>guarantee [1] 21:5</p> <p>guaranteed [1] 7:8</p> <p>guards [1] 58:16</p> <p>guess [6] 10:21 11:5,9 33:19 64:6 66:20</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half [2] 32:6 35:10</p> <p>hand [1] 58:15</p> <p>happen [2] 43:6 64:15</p> <p>happened [2] 16:15 61:5</p> <p>happening [1] 31:13</p> <p>happens [1] 53:7</p> <p>hard [3] 38:5 56:25 59:2</p> <p>harder [2] 29:19,22</p> <p>harm [5] 5:8 10:22,25 11:15 17:16</p> <p>harmed [2] 5:13 35:12</p> <p>harmonizing [1] 18:2</p> <p>harmonizing [1] 17:24</p> <p>Harper [1] 65:2</p> <p>head [1] 51:5</p> <p>hear [2] 3:3 56:9</p> <p>heard [2] 35:14,24</p> <p>hearing [1] 65:25</p> <p>hearings [1] 66:10</p> <p>heavily [1] 22:7</p> <p>Heights [2] 18:6 48:18</p> <p>held [5] 3:21 6:2 18:21 31:14,18</p> <p>Helena [1] 65:3</p> <p>help [1] 64:19</p> <p>high [2] 8:14 39:21</p> <p>higher [1] 54:24</p> <p>historical [1] 56:25</p> <p>historically [4] 19:17 32:20 55:22 58:13</p> <p>history [6] 22:12,20,23 24:2 61:13, 17</p> <p>hold [1] 32:2</p> <p>Honor [15] 5:14 6:13,21 7:14 8:23 9:13 10:7 12:24 14:23 16:24 17:19 18:11 38:10 44:15 67:20</p> <p>hoping [2] 23:11 29:1</p> <p>hospitals [1] 6:7</p> <p>hour [1] 32:6</p> <p>hypothetical [4] 27:6 40:22 41:23 57:25</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea [1] 54:7</p> <p>identical [2] 49:7 55:19</p> <p>identify [1] 39:22</p> <p>Ill [4] 5:4 8:18 20:10 67:16</p> <p>illegal [1] 35:23</p> <p>illusory [1] 70:6</p> <p>immoral [1] 25:24</p> <p>impermissible [1] 62:9</p> <p>important [2] 34:17 64:8</p> <p>imposes [2] 53:25 60:11</p> <p>impugn [1] 29:16</p> <p>inapt [2] 31:1 54:21</p>
--	--	--	--

Official - Subject to Final Review

<p>incentive ^[1] 9:10 incentives ^[1] 9:11 incentivize ^[2] 9:12,14 include ^[1] 6:23 included ^[4] 4:6,14 19:16 24:6 inconsequential ^[1] 69:2 inconsistent ^[1] 19:9 incorrect ^[1] 68:2 independent ^[2] 65:7 69:5 indirect ^[1] 44:21 individual ^[1] 40:25 individuals ^[1] 7:24 ineligible ^[1] 60:11 inevitable ^[1] 65:21 influence ^[5] 30:21,22 59:9,11 64:14 infringement ^[1] 40:24 initio ^[1] 70:19 injured ^[1] 6:7 injury ^[2] 19:24 20:10 insight ^[1] 42:3 inspecting ^[1] 5:10 instead ^[1] 15:6 institution ^[4] 23:22 44:21,22 50:12 institutions ^[9] 12:21,22 22:17 41:8 43:16 54:1 57:14 63:24 64:20 intended ^[3] 6:15 8:18,21 intent ^[1] 9:9 interest ^[1] 64:9 interests ^[1] 43:19 interpretation ^[2] 39:7 46:19 interrupt ^[1] 11:9 intrinsically ^[1] 56:14 invalidate ^[2] 19:7 58:23 invalidated ^[3] 4:5 19:4,16 invalidating ^[3] 4:3 46:21 67:13 invalidation ^[2] 11:23 12:1 involved ^[7] 6:14 31:21 33:17 35:11 42:14 62:19 63:1 involves ^[2] 8:17 62:20 involving ^[2] 7:21 56:9 Irish ^[1] 61:8 isn't ^[9] 5:20 17:23 32:23 41:15,18 48:14 50:19 70:6,14 issue ^[3] 5:19 20:4 63:21 issued ^[1] 28:12 itself ^[2] 35:8 62:5</p> <hr/> <p style="text-align: center;">J</p> <p>James ^[3] 23:3 59:1,2 January ^[1] 1:10 JEFFREY ^[3] 1:19 2:6 18:16 Jewish ^[4] 40:10,19 50:3 66:18 joints ^[1] 4:21 judgment ^[1] 3:25 4:8,9 5:5 11:21 12:8,9 34:21 48:9 55:3 56:3 jump ^[1] 34:8 Justice ^[167] 1:20 3:3,9 5:3,22 6:19 7:1,17,20 8:8,20 9:3,5,9,18 10:18,19 11:5,8,25 12:15,25 13:9,12,18,21,25 14:3,20,25 15:7,16,19,24 16:5,25 17:1,3,4 18:3,3,4,13,19 19:22 20:5 21:9,11,24 22:3,6 23:7,</p>	<p>8,10,24 24:1,15 25:4,9,12,18,22 26:9,12,17,23 27:6,14,20,24 30:5,10 32:25 33:1,12,22 34:6,12,23 36:12,16 37:3,17,20 38:4,21,24,25 39:13,16 40:1,7,14,16 41:5,12,22 42:13,16,23 43:1,3,8,25 44:8,16 45:10,19 46:22 47:4,12,20 48:14 49:9,13,20,20,22,25 50:5,9,15,18 51:2,8,11,16,21 52:1,7,14,17 53:10,12,13,17,21 54:20 55:10,13,15 56:15,16,19 57:8 58:21 59:20 60:23 61:21 63:6,11,17 64:18 65:10,16 66:11,15 67:14,21 68:6 70:3,5,12,13,15,17 71:1 justification ^[4] 23:23 59:17 justifications ^[1] 54:18</p> <hr/> <p style="text-align: center;">K</p> <p>KAGAN ^[13] 10:18 11:5,8,25 16:5 17:1,4 27:20,24 53:13,17,21 58:21 Kagan's ^[1] 56:16 KAVANAUGH ^[21] 40:7,14,16 41:5,12,22 42:13,16,23 43:1,8,25 44:8 53:10,12 63:6,11 64:18 65:10,16 66:11 keep ^[2] 14:20 55:4 keeps ^[1] 30:14 KENDRA ^[1] 1:3 Kentucky ^[4] 6:5,12 10:4 67:18 kids ^[1] 21:1 kind ^[5] 10:16,23 32:22 43:9 47:25 kinds ^[1] 11:15 kitty ^[1] 10:1 knowing ^[1] 31:15 knows ^[1] 32:7 KOMER ^[44] 1:17 2:3,13 3:6,7,9 5:14 6:13,21 7:14,19 8:7,17,22 9:4,8,13 10:7,18 11:2,6,20 12:6,24 13:6,10,15,19,23 14:2,19,22 15:14,18,20 16:2,22 17:19 18:11 68:8,9,11 70:4,18</p> <hr/> <p style="text-align: center;">L</p> <p>lacked ^[1] 5:15 land ^[1] 24:4 language ^[3] 45:14,17,24 last ^[2] 27:15 37:16 later ^[1] 56:8 Laughter ^[3] 34:11 51:18,23 law ^[20] 5:10 12:18 14:5 19:3,7 21:10,15 29:7,8,9,16 39:7,11,17,23 40:3,6 46:25 48:25 62:9 laws ^[3] 23:16 56:11 63:8 lawsuit ^[1] 4:10 Laycock's ^[1] 63:12 lead ^[3] 34:16 48:9 66:23 leaders ^[2] 59:13 64:23 leading ^[1] 61:15 leads ^[1] 33:4 least ^[1] 57:2 led ^[2] 11:23,25 left ^[1] 19:5 legal ^[1] 38:11</p>	<p>legislature ^[6] 30:15 48:20 54:22 69:11,20 70:19 legislatures ^[2] 70:6,10 legitimate ^[2] 28:19,20 lens ^[1] 40:22 less ^[2] 7:9 10:1 level ^[9] 5:10,11 8:14 15:7 39:21 43:19 47:16,17 54:7 leveled ^[1] 5:11 leveling ^[4] 5:16,16 15:6 47:22 levels ^[1] 7:10 leverage ^[4] 30:22 59:10 64:13 65:23 levied ^[1] 60:20 levy ^[1] 60:22 liberties ^[1] 52:10 liberty ^[2] 40:25 67:16 light ^[1] 18:12 limit ^[2] 27:2 28:4 limited ^[1] 36:22 limiting ^[1] 46:13 limits ^[2] 25:6,6 line ^[5] 17:5 62:7,8,11 64:2 lining ^[1] 42:18 litter ^[4] 21:19 39:1 46:17 66:1 lobbying ^[1] 22:7 located ^[1] 62:24 Locke ^[10] 4:19,24,25 53:5 62:14,18,19 63:1,12 70:24 long ^[3] 22:12 57:1 58:5 look ^[29] 17:6 29:18 37:5,16 38:9 40:22 43:13 46:3 48:12,21 49:10,24 50:2 52:18 55:5,21,21 58:4,24 60:1,9,18 61:3,19 64:3,7,8,21 65:24 looked ^[3] 22:19,23,24 looking ^[4] 10:3 37:6 45:5 60:4 lose ^[1] 20:8 losing ^[1] 20:5 lot ^[7] 8:9 24:23,23 41:5 59:13 61:3,6 lower ^[4] 39:23 45:14 46:4,8 Lutheran ^[28] 3:19 4:23 5:2 21:21 26:8 27:16 28:1,2,24 29:15 30:4,25 31:3,5,21,21 36:3 38:6,8 41:14,19 42:4 43:3 44:18 50:14 57:24 68:13 70:22</p> <hr/> <p style="text-align: center;">M</p> <p>made ^[6] 4:23 33:25 59:5 67:25 68:3 69:20 Madison ^[6] 22:7 23:3,15 57:5 59:1,2 major ^[1] 33:25 many ^[8] 9:11 24:21,21,22 28:18,21 52:8 53:22 math ^[1] 25:7 matter ^[9] 1:12 7:17 10:8 12:17 21:15 34:4 38:15 39:21 43:7 McDaniel ^[3] 41:7 43:3,4 mean ^[23] 17:4 19:25 27:24 28:13 32:12 33:8,9,11,13 34:8 39:10 42:9,11 44:4 46:6,11 51:8 54:22 58:24 60:1,3,23 65:20</p>	<p>Meaning ^[3] 12:16 13:3 58:22 mechanism ^[1] 59:8 members ^[4] 21:21,23 45:1,2 mention ^[1] 8:15 mere ^[2] 48:8 69:1 merely ^[2] 31:23 53:7 merits ^[6] 23:12 29:18 32:10,22 50:1 68:2 might ^[7] 17:13 25:15 39:18 53:24 54:1,3 70:19 million ^[1] 25:19 millions ^[1] 24:22 minimum ^[1] 46:21 ministry ^[3] 62:19 63:1,2 minutes ^[1] 68:8 Missouri ^[1] 70:24 mistaken ^[1] 16:23 mistakenly ^[1] 12:9 Mohammedan ^[1] 50:23 money ^[33] 7:7,8,9 8:6 9:11,12 10:1 12:20,23 13:13,16,19 19:25 22:16 24:23,25 25:16,22 26:4 31:9,10,16,18,22 33:14 36:11 45:16,24 46:1,1 50:3 66:22 70:7 MONTANA ^[32] 1:6 3:5,20 5:5,14 6:22 11:22 12:18 14:5,7,10,18 15:5 17:20,25 18:21,22 19:6,15 21:13 22:18 29:22 30:13 31:14 43:24 44:20 45:4 47:14,15 61:20 66:8 69:20 Montana's ^[4] 3:15 13:4,6 22:25 mootness ^[1] 10:21 morning ^[1] 3:4 most ^[1] 23:14 mostly ^[1] 48:23 motivated ^[1] 53:19 motivation ^[1] 44:9 moved ^[1] 5:19 much ^[2] 25:15 38:5 Muslim ^[1] 4:15 must ^[6] 13:24 21:17 33:15 53:18 69:23,25 myself ^[1] 25:20</p> <hr/> <p style="text-align: center;">N</p> <p>narrow ^[2] 4:24 63:13 narrower ^[1] 35:25 national ^[1] 57:4 nature ^[4] 27:19 35:19 45:5 68:18 necessary ^[2] 5:15 65:6 need ^[1] 55:25 Neither ^[4] 7:7 16:15 17:10,11 neutral ^[3] 63:21 64:16 65:17 neutrality ^[1] 4:24 never ^[2] 5:19 56:3 New ^[1] 25:13 next ^[1] 11:4 nice ^[1] 31:7 no-aid ^[27] 30:17 32:3 35:7,18 36:7,9,25 38:18 43:14,23 46:8 48:8,13 54:16 56:23 58:4,25 59:3,8,15 60:9,17,24 64:9,12,19 65:5 nobody's ^[1] 57:12 non-bigoted ^[1] 58:13</p>
---	--	--	---

Official - Subject to Final Review

<p>non-discrimination ^[1] 28:16 non-discriminatory ^[2] 22:13 63:25 non-religious ^[4] 31:17,23 32:4 53:8 none ^[1] 54:10 nor ^[2] 4:8 16:17 normally ^[1] 29:5 Northwest ^[1] 24:5 notably ^[1] 23:14 Nothing ^[6] 19:20 25:23 29:9 53:23 61:9 62:3 nuanced ^[1] 21:20 number ^[3] 33:10 35:11 53:17 numerous ^[1] 64:23</p>	<p>pages ^[1] 23:14 paragraph ^[1] 27:15 parent ^[1] 31:16 parents ^[26] 5:6,6,12,23 6:16 7:6 10:25 12:4,14 16:16,17 17:11 18:24 19:13,21 20:1,16,22 21:1 37:25 68:24 69:1,12,15,16,18 parks ^[1] 54:22 parochial ^[2] 26:5 27:12 part ^[8] 37:16 44:23 45:3,12 46:6 52:18,23 65:17 participate ^[2] 65:11 66:18 particular ^[6] 16:14 28:22 31:16 33:21 36:17 57:13 parties ^[1] 61:16 party ^[2] 7:3,12 passed ^[1] 70:2 passes ^[1] 10:5 past ^[1] 8:12 pastor ^[1] 65:3 paternalistic ^[2] 66:1,3 pay ^[4] 10:13 50:22 51:4,5 penalize ^[2] 42:1 67:9 penalized ^[1] 20:20 penalizing ^[2] 42:7 58:16 penalty ^[2] 31:12 43:18 people ^[21] 5:24 8:1 9:12 22:12,22 26:15 28:4 41:8,16 42:1,17 43:17 48:21,22 50:11 53:18 58:11 63:23 65:24 67:8,9 perceived ^[1] 11:15 percentage ^[1] 54:24 Perhaps ^[2] 23:8 62:4 permissible ^[5] 56:3 57:3 59:22, 23 62:10 permits ^[1] 47:5 permitted ^[1] 7:12 personally ^[2] 32:16 67:23 Pet ^[1] 29:6 petition ^[1] 21:3 Petitioners ^[22] 1:4,18,22 2:4,8,14 3:8 4:10 18:18 19:11 29:4 30:24 32:15 33:20 35:9,12,15 36:5 39:22 63:4 67:22 68:10 Petitioners' ^[5] 32:14 34:15 36:20, 22 60:8 pick ^[1] 8:11 picked ^[2] 8:12,13 plaintiffs ^[1] 39:19 play ^[1] 4:20 playground ^[1] 29:21 playgrounds ^[2] 27:23 52:20 please ^[3] 3:10 18:20 30:11 point ^[12] 10:23 11:13,19 17:23 21:2 32:6 33:11 34:17 48:11 51:12 53:3 57:12 points ^[3] 23:11,13 63:13 police ^[3] 50:10 52:22 63:22 political ^[1] 59:9 pools ^[2] 54:23,25 popped ^[1] 61:6 position ^[3] 12:17 22:15 47:8 possible ^[1] 46:19 posture ^[1] 10:24</p>	<p>potato ^[1] 61:8 power ^[3] 19:6 34:18 69:6 predicate ^[3] 5:15 43:8,9 preempted ^[2] 19:9 29:15 prefer ^[1] 58:6 preference ^[1] 57:5 preferential ^[2] 23:16 24:12 premise ^[4] 31:11 38:10,20 48:4 press ^[1] 39:1 prevail ^[1] 33:6 prevent ^[1] 59:10 preventing ^[1] 67:4 priests ^[2] 50:23 51:4 Prince ^[1] 49:11 Principal ^[2] 1:19 43:23 principle ^[3] 39:10 41:19 43:2 principled ^[4] 42:11 43:15 57:3 58:12 principles ^[5] 52:12 58:10,12 67:10,13 private ^[21] 5:7,13 11:12 12:2,2 26:16,18,19,22 27:1,5 28:14 34:2 35:2 37:21,24 57:15 66:14,16 69:7, 17 probably ^[1] 24:18 problem ^[12] 5:20,21,23 8:4 24:18 29:7 36:1 45:15 46:6 48:17 50:6 66:24 problems ^[1] 66:23 Professor ^[2] 61:14 63:12 program ^[44] 3:22 4:1,4,5,14 6:14 8:19,24 9:15 10:9 11:7,24 12:1,13 13:11 14:21,24 16:14 19:5,16 20:14,22,25 25:7 26:7 35:7,12 36:2 41:10 53:2,15,23 55:1,13 57:17 58:24 59:18 63:22 64:16 65:12,13, 18 67:13 68:22 program's ^[1] 6:15 programs ^[3] 3:13 28:9 65:22 prohibit ^[2] 30:17 57:6 prohibiting ^[1] 67:1 prohibition ^[3] 32:23 42:2,6 prohibits ^[2] 40:23 41:1 proper ^[1] 64:3 proponent ^[1] 65:1 proportionate ^[1] 26:5 proposition ^[3] 14:4 38:15 46:24 protected ^[1] 55:16 protecting ^[2] 30:20 59:8 protection ^[5] 19:19 50:10 52:22, 22 56:2 protects ^[2] 30:19 64:9 protestant ^[3] 40:10,19 66:19 proves ^[1] 4:25 provide ^[6] 35:1 37:22 39:8,18 45:3 57:14 provided ^[1] 45:6 providing ^[2] 6:8,8 provision ^[13] 7:16 12:19 13:5,7 17:21 19:8 21:13 29:14 30:14 44:12 55:22 66:2,25 provisions ^[2] 21:17 70:1 psychic ^[1] 10:16 public ^[24] 22:10 24:22 25:14 26:</p>	<p>15,20 27:3,7,11,17 28:5,6 33:5,16, 16 34:1,3,20 35:1 69:2,10,21,22, 24 70:2 purpose ^[3] 9:14 31:23 53:9 purposes ^[4] 32:4 46:20 55:20 57:18 put ^[3] 25:6 28:16 31:5 Putting ^[1] 47:8</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualified ^[1] 27:18 question ^[44] 4:16 5:17,18 10:19 11:23 12:12 18:5 20:11,15 26:2, 24 28:25 29:9,18,22 33:1,14 34:12 35:5 37:14 38:16,17 40:2,5 46:23 47:13,21,25 48:7,15 50:1 51:14,15 56:17 57:16 62:16,23 63:17 64:1 66:15 67:15 68:22 69:22 70:21 questions ^[2] 5:4 35:11 quite ^[1] 36:13 quote ^[1] 41:13</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>race ^[11] 49:5,7 51:15 54:15,21 55:19 56:3 59:21,24 61:23,25 races ^[1] 55:4 radical ^[1] 22:3 raised ^[1] 46:16 raising ^[2] 20:12,20 rather ^[2] 32:10 54:7 reaction ^[1] 37:6 read ^[2] 45:13 68:15 real ^[3] 28:1 44:17 45:15 really ^[13] 10:17 20:4 24:17 32:10 35:12 36:6 40:2 46:7,9,16 53:4 61:5 62:25 reason ^[9] 4:4 18:9 20:13 31:2 48:17 50:20 59:16 61:6 64:25 reasons ^[14] 22:13,13 28:18 31:1 49:8 53:22 54:6 57:1,4 58:7,25 59:1 61:17,18 REBUTTAL ^[2] 2:12 68:9 receipt ^[1] 7:8 receive ^[2] 7:7 8:25 received ^[2] 10:9 19:13 receives ^[1] 8:6 receiving ^[1] 47:6 recipient ^[2] 7:4 8:2 recipients ^[1] 48:22 recites ^[1] 36:10 recognize ^[1] 17:25 recognized ^[4] 7:3 69:23 70:22,23 recommend ^[1] 51:21 refusal ^[1] 31:22 refusing ^[2] 52:21 53:7 regard ^[2] 61:25 69:4 regardless ^[5] 19:12 31:18 40:24 52:10 56:5 related ^[2] 12:1 22:14 relied ^[1] 19:8 relief ^[2] 39:8,18 religion ^[35] 4:12,13 30:18 32:15 41:2,3 42:2,8 43:18 47:17,23 49:7</p>
<p style="text-align: center;">O</p> <hr/> <p>object ^[1] 38:9 objecting ^[1] 37:19 objection ^[1] 43:15 objections ^[1] 54:3 obligation ^[1] 57:13 obtain ^[1] 63:24 obviously ^[2] 37:14 55:24 occurred ^[1] 11:21 odious ^[2] 22:21 41:13 offered ^[1] 38:10 officio ^[1] 45:1 Okay ^[17] 24:19 37:17 40:1,16 42:19 43:22 46:23 47:1,9 48:25 50:9, 15 51:2,16 52:14 58:8 62:12 one ^[20] 6:6 8:15 13:23 21:14 22:20 23:3,11 27:25 34:16 35:16 41:2 44:25 52:13 53:1,1 58:15,19 60:4 63:17 64:16 one's ^[2] 34:2 65:10 ones ^[1] 59:5 only ^[7] 4:4,24 16:22 20:25 29:15 34:19 69:19 open ^[3] 25:5 32:21 69:21 operated ^[1] 16:13 opinion ^[5] 15:2 17:5,6 45:14 46:5 opposite ^[3] 24:2,10 50:21 oral ^[7] 1:13 2:2,5,9 3:7 18:16 30:8 order ^[1] 65:12 organization ^[2] 10:14 51:6 organizations ^[2] 6:1 9:22 other ^[18] 7:11 8:9 13:24 19:21 21:14 24:5 33:3 35:15 36:25 40:19 41:23 44:22 51:5 52:18 58:17 60:7 62:22 66:11 other's ^[1] 34:3 otherwise ^[2] 27:18 54:9 out ^[19] 10:12 12:23 17:23 24:4 26:14 27:1,4,4,7 29:8 30:15 34:13 42:20 48:7 52:6 60:13 63:13 66:9 70:9 outcome ^[1] 39:4 over ^[4] 22:11 34:18 65:23 66:10 own ^[6] 20:12 30:15 46:14 65:4 66:3 70:11</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>PAGE ^[4] 2:2 21:3 23:18 29:6</p>			

Official - Subject to Final Review

<p>52:6,13,16 53:19,24,25 54:3,4,11 55:16,19 56:8 57:11 58:11 59:23 60:6 61:10,24 62:3,6 63:18 67:2 68:14</p> <p>religions ^[4] 22:9 52:4,19,21</p> <p>religious ^[96] 3:13,17,21 4:1,6,19, 23 11:11 12:3,21 13:14,22 16:17 18:22 20:17 21:6 22:17,25 23:23 24:11 27:19 28:3,10,11,22,22 30:16,19,20,23 31:6,9,17,25 32:3 33:7,15 35:2 36:2,10 37:2 40:19,20 41:8,8,9,9,15 42:10,15 43:15,22 44:2,6 45:2,17 46:2 47:6 48:6 50:11 53:6,8 54:1,6,9 56:10,12 57:6, 10,14,21 58:6,14,16 59:9,11,14 60:10 62:3,5 63:18,24 64:14,20,23 65:5,6,11,16 66:22 67:10 68:17, 18 69:3,6,15</p> <p>religiously ^[2] 19:1 24:6</p> <p>religiously-affiliated ^[1] 30:1</p> <p>remaining ^[1] 68:8</p> <p>remains ^[1] 10:2</p> <p>remand ^[1] 35:22</p> <p>remedy ^[4] 4:7,9 12:6,7</p> <p>remedying ^[3] 5:20 39:8,18</p> <p>Remonstrance ^[1] 23:15</p> <p>removed ^[3] 7:10,12 10:2</p> <p>repeating ^[1] 25:19</p> <p>report ^[1] 65:9</p> <p>required ^[2] 12:22 27:2</p> <p>requires ^[4] 3:16 17:21 18:22 47:25</p> <p>respect ^[2] 28:8 59:18</p> <p>respectfully ^[1] 8:22</p> <p>respects ^[1] 25:4</p> <p>Respondents ^[6] 1:7,24 2:11 3:25 4:18 30:9</p> <p>response ^[1] 27:10</p> <p>rest ^[1] 29:25</p> <p>restriction ^[1] 60:12</p> <p>restrictions ^[2] 16:8,9</p> <p>rests ^[1] 39:6</p> <p>result ^[6] 3:16 16:9,14,22 54:19 69:24</p> <p>revealing ^[1] 63:4</p> <p>REVENUE ^[2] 1:6 3:5</p> <p>reverse ^[4] 3:24 4:17 29:17 38:13</p> <p>review ^[2] 4:9 29:5</p> <p>RICHARD ^[5] 1:17 2:3,13 3:7 68:9</p> <p>rights ^[1] 20:12</p> <p>ROBERTS ^[2] 3:3 18:3,13 19:22 23:8 30:5 32:25 33:12 34:23 51:21 54:20 55:10,13,15 56:15,19 67:21 68:6 70:12,15 71:1</p> <p>rooted ^[3] 44:1 57:4 58:13</p> <p>Rosenberger ^[1] 24:3</p> <p>rule ^[13] 4:22,23 5:1 27:22 35:23 36:10 38:11,12 46:10 47:4 48:4 56:7 60:6</p> <p>ruling ^[2] 11:10 20:24</p> <p>running ^[1] 42:16</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>salaries ^[2] 50:23 51:4</p>	<p>same ^[13] 9:19 11:12 12:5 16:20 22:1 26:2,4,24,24 27:11 33:17 56:8 67:11</p> <p>San ^[1] 24:20</p> <p>sat ^[2] 23:12 29:1</p> <p>satisfied ^[1] 56:6</p> <p>satisfies ^[1] 63:7</p> <p>saying ^[34] 11:9 13:1,12 14:17 21:20 26:3,9 27:8,15 28:18 37:4 45:22,24 49:10 50:19 52:4,9 55:2,22 57:9,10 59:21,25 60:16 61:11,12, 21 62:22 65:25 66:25 68:12 69:11 70:14,18</p> <p>says ^[15] 14:15 19:3 21:4,6 44:20 48:6,25 50:2,10,22 58:5 60:10 61:16 67:7 68:13</p> <p>Schempp ^[1] 69:24</p> <p>scholar ^[1] 61:15</p> <p>scholarship ^[14] 3:13 5:25 6:14, 15 8:24 9:1,1 10:14 20:24 40:9,17 42:17 47:7 48:20</p> <p>scholarships ^[23] 4:11,13 6:23 9:16 10:9,17,17 11:4 12:23 18:24 19:13 20:5,16,17 25:8,8,10 27:4 29:12 37:23 42:18 48:22 63:22</p> <p>school ^[26] 8:6,11 9:4 11:11,12 15:11,11 20:2,6,9 24:22 25:14,23 26:5 27:8 31:17 34:1,20 44:22,24 45:6,16,25 46:1 63:7 65:17</p> <p>school's ^[1] 8:20</p> <p>schools ^[98] 3:13,21 4:1,6,15,15, 20 5:8,13 7:7,21,22 12:2,3 13:14, 15,20 16:17,18 18:25,25 19:17,18, 24 20:1,18,23 21:2,6 24:6,7,24 25:1,16 26:16,22,22,24 27:3,5,12,13, 23 30:2,16,20 32:3 33:5,7,15,17 35:1,2,3 36:2,10 37:24 38:1 40:9, 10,10,11,18,20 42:10 45:20,21,23 47:5,6 48:6,6 49:15 50:2,3,11 56:10 59:9 60:10 63:18 65:6,11,23 66:14,16,22 67:5 68:18,19,20,23 69:3,8,10,22,23,25 70:2</p> <p>scrutiny ^[1] 56:5</p> <p>second ^[5] 31:20 35:24 53:3 58:8 68:21</p> <p>secondary ^[1] 62:20</p> <p>sect ^[1] 44:23</p> <p>Section ^[1] 44:19</p> <p>secular ^[23] 5:7,12 11:12 12:2,22 13:14,21 16:18 20:23 25:6 28:6 31:7 40:9,18 42:18 43:18 47:5 48:6 69:7,17,23,25 70:2</p> <p>see ^[8] 18:12 38:5 44:17 51:8,9,12 61:19 64:15</p> <p>seeing ^[1] 10:22</p> <p>seem ^[1] 45:2</p> <p>seems ^[10] 6:4 8:14 17:16 27:25 28:1,7 60:2 63:15,16 64:2</p> <p>send ^[5] 16:16,18 21:1 29:17 37:25</p> <p>sense ^[3] 29:21 34:24 54:18</p> <p>separate ^[1] 63:21</p> <p>separately ^[2] 14:17 61:1</p> <p>separating ^[1] 67:3</p>	<p>separation ^[1] 22:14</p> <p>serious ^[1] 5:23</p> <p>serve ^[1] 57:18</p> <p>service ^[1] 62:4</p> <p>services ^[1] 6:8</p> <p>set ^[4] 16:10 17:11 43:2 63:21</p> <p>sets ^[3] 16:8 35:14 48:20</p> <p>Seven ^[2] 21:21 27:25</p> <p>shared ^[1] 28:19</p> <p>shield ^[2] 4:9 12:7</p> <p>shut ^[3] 4:14 49:14 54:25</p> <p>shutting ^[1] 55:11</p> <p>side ^[4] 23:3 35:15 64:2,5</p> <p>side's ^[2] 33:4 66:12</p> <p>similar ^[2] 59:1,4</p> <p>similarity ^[1] 49:17</p> <p>simple ^[3] 10:8 18:5 38:4</p> <p>simply ^[4] 31:25 32:23 43:19 67:2</p> <p>since ^[2] 22:11 60:17</p> <p>single ^[1] 36:9</p> <p>situation ^[4] 9:20 33:4,17 36:17</p> <p>small ^[1] 9:20</p> <p>society ^[1] 54:5</p> <p>solely ^[2] 18:25 27:18</p> <p>Solicitor ^[1] 1:19</p> <p>solve ^[1] 66:24</p> <p>somebody ^[1] 6:3</p> <p>someone ^[4] 6:10,20 53:7 66:17</p> <p>somewhat ^[2] 35:25 63:4</p> <p>sorry ^[6] 7:1 11:8 12:15 19:23 44:15 50:1</p> <p>sort ^[8] 17:5 24:9 35:17 43:16 46:18 53:4 56:12 70:5</p> <p>SOTOMAYOR ^[36] 7:1,17,20 8:8, 20 9:3,5,9 12:15,25 13:9,12,18,21, 25 14:3,20,25 15:16,19,24 21:9,11, 24 22:3,6 23:7,10 46:22 47:4,12, 20 70:3,5,13,17</p> <p>sounds ^[1] 57:24</p> <p>speech ^[1] 41:9</p> <p>spend ^[4] 25:15,22 45:17 46:1</p> <p>spends ^[1] 25:14</p> <p>spent ^[1] 31:19</p> <p>standing ^[12] 5:5 6:3 7:13,25 8:5, 18 10:5,20 20:4 32:5,11 67:15</p> <p>stark ^[1] 31:5</p> <p>start ^[4] 13:1 14:4 32:5 66:9</p> <p>state ^[93] 5:10 7:15 10:13 13:25 16:1,3 18:7 19:2,8 20:10,21 21:3,4,5, 16 22:15,16,25 23:13,18 24:21 25:13 26:25 28:3,8,17 29:5,14,16 30:13,14,15 31:14,25 32:2,13,20 34:21 36:24 37:9 38:13,18 39:2 40:8, 23 41:1,24 42:9,11,22 43:6,13,13 45:8 46:12,14,15,19 48:12,15,20, 24,25 50:2,10,22 51:3 55:21 57:3, 12,13,25 58:1,2,3,18,21 60:14,19 61:18 63:8 64:17 66:1,3,9 67:3,10 68:13 69:9,11,14,20 70:6</p> <p>state's ^[2] 20:24 23:19</p> <p>statement ^[1] 63:4</p> <p>STATES ^[12] 1:1,14,21 2:7 12:20 13:13 18:17 21:14 22:9 27:8 34:18 59:3</p>	<p>status ^[7] 3:18 6:4,20 28:3 32:17 40:20 67:24</p> <p>status-based ^[1] 30:2</p> <p>statutes ^[1] 24:5</p> <p>stay ^[1] 52:5</p> <p>step ^[1] 46:3</p> <p>stick ^[2] 31:9 67:11</p> <p>still ^[6] 4:12 9:23 12:14 20:25 33:23 65:20</p> <p>Stillwater ^[1] 21:2</p> <p>stone ^[1] 31:7</p> <p>stop ^[2] 15:25 22:8</p> <p>stopped ^[2] 15:9 16:4</p> <p>straight ^[1] 41:18</p> <p>straightforward ^[2] 19:19 21:7</p> <p>strange ^[1] 10:23</p> <p>strict ^[1] 56:5</p> <p>strike ^[2] 49:1 53:22</p> <p>striking ^[3] 35:6 53:1,14</p> <p>strongest ^[1] 65:1</p> <p>struck ^[2] 21:17 35:13</p> <p>structural ^[2] 66:2,24</p> <p>structure ^[1] 26:6</p> <p>student ^[1] 5:25</p> <p>students ^[4] 11:3,3 37:23 63:3</p> <p>subjects ^[1] 60:7</p> <p>submitted ^[2] 71:2,4</p> <p>subsidize ^[4] 28:10,11,14,21</p> <p>succeeded ^[1] 9:15</p> <p>suffer ^[2] 19:11,13</p> <p>suffering ^[1] 10:25</p> <p>sufficient ^[1] 45:4</p> <p>suggested ^[2] 53:18 62:8</p> <p>suggesting ^[1] 22:18</p> <p>suggestion ^[1] 47:13</p> <p>support ^[4] 22:10 23:16 24:12 34:10</p> <p>supporting ^[4] 1:22 2:8 18:18 62:2</p> <p>supports ^[1] 34:9</p> <p>Suppose ^[2] 40:7,7</p> <p>SUPREME ^[20] 1:1,13 3:20 5:15, 17 6:22 11:10,22 12:18 17:25 18:21 19:6,15 21:4 28:12 29:6,22 37:9 47:14 48:25</p> <p>suspect ^[1] 25:15</p> <p>swallow ^[1] 4:22</p> <p>system ^[7] 24:23 25:14,23 27:8 34:1,20 70:9</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talked ^[2] 53:2 62:13</p> <p>tantamount ^[1] 36:7</p> <p>tax ^[17] 6:3,10,20,24 7:3 8:10 9:6, 23,24 10:2,11,13 12:21 31:19 60:20,22 66:16</p> <p>taxes ^[2] 7:5,5</p> <p>taxpayer ^[8] 6:9 7:4,6 8:2,5 9:6,10 10:12</p> <p>taxpayers ^[6] 5:24,24 7:23,23 8:10 54:2</p> <p>teachers ^[1] 63:3</p> <p>tenor ^[1] 36:20</p> <p>tensions ^[1] 55:4</p>
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Official - Subject to Final Review

<p>term ^[1] 56:8 terminated ^[1] 14:23 terms ^[1] 38:24 Territory ^[1] 24:5 testified ^[2] 59:15 64:24 themselves ^[2] 6:20 54:1 theories ^[1] 36:5 theory ^[2] 33:4,9 there'd ^[1] 20:23 there's ^[37] 4:16 5:22 7:9 9:25 10:15 17:7 22:11 25:23 32:12 33:10 34:24 38:10 39:11,16 40:24 42:4,17 44:13,17 45:14,24 48:17 52:3,8,10,25 53:3 57:8 59:13 61:14,17,18 62:7 65:8,20 66:5 67:6 therefore ^[4] 31:18 35:21 45:25 60:12 they'll ^[1] 8:13 They've ^[2] 20:7 57:1 Thomas ^[1] 24:1 though ^[3] 28:19 49:15 51:22 three ^[2] 7:10 9:17 threshold ^[1] 5:4 throughout ^[1] 53:2 today ^[1] 53:3 tolerance ^[1] 22:25 took ^[2] 26:22 49:10 totally ^[1] 52:15 toward ^[1] 53:24 towards ^[3] 53:19 54:11 63:3 tradition ^[2] 24:8 57:4 training ^[3] 62:19 63:14,19 transcripts ^[1] 64:22 treat ^[1] 52:13 treated ^[2] 5:6 16:20 treatment ^[2] 6:10 41:17 treats ^[1] 60:6 trial ^[1] 29:11 tried ^[1] 70:25 Trinity ^[29] 3:19 4:22 5:2 21:21 26:8 27:15,25 28:2,23 29:15 30:4,25 31:3,5,20,21 36:3 38:6,8 41:14,19 42:4 43:3 44:18 50:13 57:24 68:12,13 70:22 trouble ^[2] 10:22 24:16 true ^[8] 22:1 44:11 62:17,25 63:10 65:15,19 67:6 trumps ^[1] 15:22 trustees ^[2] 44:25 45:1 try ^[2] 29:23 50:21 turn ^[1] 47:15 two ^[17] 9:16 11:3 15:21 17:24 21:23 23:11 29:1 31:1 35:14 36:5 43:19 52:25 58:12 60:3 63:15 67:10 68:8</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S ^[1] 47:2 ultimate ^[1] 34:21 ultimately ^[2] 35:5 65:21 uncapped ^[1] 9:24 unconstitutional ^[24] 4:2,17 12:19 13:3,5 14:9,10,12,16,18 18:9,10 36:8 40:11 48:5,10 50:6,12,24</p>	<p>55:25 56:14,24 60:18 64:10 unconstitutionally ^[2] 47:16 48:16 under ^[24] 3:19 5:5 10:9 14:9,10,12,16,18 16:25 17:3 18:5 19:7 20:7 29:15 32:3 41:17 45:4 48:18 55:7,17,17 62:9 67:17 70:11 understand ^[8] 10:5 20:6 33:2,20 34:2 43:16 64:9 66:7 understanding ^[2] 8:4 16:23 understood ^[2] 11:14 16:11 undoubtedly ^[1] 44:5 unfair ^[1] 46:18 UNIKOWSKY ^[85] 1:23 2:10 30:7,8,10 33:8,19 34:5,14 35:4 36:15,18 37:13,18 38:3,7,23 39:10,14,20 40:4,12,15,21 41:11,21,24 42:14,21,24 43:5,12 44:4,10 45:7,13,22 47:3,10,19,24 49:4,12,18,21,24 50:4,7,13,17 51:1,7,10,13,19,24 52:2,8,15,24 53:11,14,16,20 54:13 55:9,12,14,18 56:18,22 57:23 58:23 60:1 61:11 62:12 63:10 64:6,21 65:14,19 66:20 67:14,19,22 unit ^[1] 18:7 UNITED ^[6] 1:1,14,21 2:7 18:17 27:8 unless ^[1] 56:5 unrelated ^[1] 28:5 untouched ^[1] 10:3 unwise ^[1] 62:10 up ^[11] 5:10,16 15:6 25:5 32:6 42:18 48:20 53:4 61:7 63:21 69:21 useful ^[1] 54:15 uses ^[1] 47:15 using ^[5] 22:9 28:3 47:17 59:10 64:13</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>various ^[1] 28:4 versus ^[2] 3:5 41:2 victims ^[2] 32:16 67:23 view ^[5] 33:2,18 42:12 55:7 69:1 viewed ^[2] 28:18,20 views ^[1] 58:13 Village ^[2] 18:6 48:18 violate ^[5] 3:22 12:11 15:8 43:10 51:3 violates ^[4] 13:7 15:3,4 47:2 violating ^[1] 15:12 violation ^[12] 3:18 15:9 19:12,19 21:7 35:8 37:8,10,15 41:18,19 52:11 Virginia ^[1] 1:17 voted ^[1] 22:22</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waive ^[2] 67:16 68:5 walks ^[1] 24:2 WALL ^[27] 1:19 2:6 18:15,16,19 20:3 21:9,10,18 22:5 23:6,10 24:1 25:3,11,17,21 26:6,11,14,21,25 27:14,20,22,24 28:25 wanted ^[4] 14:8 18:4 20:22 64:25</p>	<p>wants ^[1] 67:11 washed ^[1] 19:3 Washington ^[3] 1:9,20,23 way ^[22] 12:5 14:12 15:2,6,8 16:12,21 26:7,8,10,13 28:12 37:6 38:1 58:17 60:4 64:3,7 66:12,23 70:8,24 Wednesday ^[1] 1:10 whatever ^[1] 11:16 whatsoever ^[2] 44:13 66:5 wherein ^[1] 10:24 Whereupon ^[1] 71:3 whether ^[18] 3:11 10:13,20 11:11 19:12 20:12 31:15 33:14 35:6 37:14 38:17 40:24 48:7 52:10 54:8 62:23 64:10,11 who's ^[1] 57:20 whole ^[8] 35:13 44:22 49:2 53:1,14,22 55:1,11 wholesale ^[1] 3:12 will ^[5] 8:11 24:19 28:13 50:22 51:5 win ^[1] 27:11 wipe ^[1] 66:9 wiped ^[1] 60:13 within ^[2] 4:20 54:5 without ^[3] 8:10 45:5 67:3 wonder ^[1] 34:23 wondering ^[1] 33:16 words ^[4] 23:19 36:25 41:14 62:15 world ^[2] 17:8,15 Wow ^[1] 48:23 Wright ^[1] 10:3 writings ^[1] 22:24 written ^[2] 15:2 46:25 wrote ^[1] 61:15</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year ^[3] 11:4 20:6,9 years ^[2] 20:7 28:21 York ^[1] 25:13</p> <hr/> <p style="text-align: center;">Z</p> <hr/> <p>Zelman ^[2] 68:21 69:4 zero ^[1] 23:20</p>
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