

No. 09-1134 and No. 09-1135

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant (09-1134),

and

CHERYL PERICH,
Intervenor Plaintiff-Appellant (09-1135)

v.

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan, NO. 07-14124
The Hon. Patrick J. Duggan

**BRIEF OF AMICUS CURIAE
ALLIANCE DEFENSE FUND
IN SUPPORT OF THE PETITION
FOR REHEARING OR REHEARING *EN BANC***

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 09-1134/1135

Case Name: EEOC v. Hosanna-Tabor

Name of counsel: Kevin Theriot

Pursuant to 6th Cir. R. 26.1, Alliance Defense Fund
Name of Party

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1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

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No.

CERTIFICATE OF SERVICE

I certify that on April 30, 2010 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Kevin H. Theriot

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICUS CURIAE*

The Alliance Defense Fund (“ADF”) is a not-for-profit public interest legal organization providing strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, ADF has played a role—as counsel, amici, or through case funding—in obtaining 37 favorable decisions before the Supreme Court of the United States, many involving the rights of religious groups, such as *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), and *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001). ADF has represented clients in hundreds more cases in the lower courts, many concerning the rights of religious organizations, such as *American Atheists v. Downtown Development Agency*, 567 F.3d 278 (6th Cir. 2009), and *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009).

As both a religious organization and one that represents and advises religious organizations, ADF has a significant interest in cases like this one where religious autonomy is at stake. Governmental entities have a profound effect on religious organizations whenever they subject them to rules and regulations designed for secular businesses. This is particularly true here, where the Panel has not just interpreted a religious exemption in the ADA, but rather construed the vital

First Amendment principle of the ministerial exception, which has application in a wide variety of cases and legal issues. It is vital that the judiciary carefully enforce the First Amendment provisions that protect religious entities from the state. ADF submits this brief to assist this Court in fulfilling its responsibilities in this regard. ADF has filed a motion under Fed. R. App. P. 29(a) for leave to submit this brief.

ARGUMENT

The Panel's decision threatens religious autonomy by inserting the state into the sensitive and important relationship of a church school and its teachers. The Panel's chief error was applying the "primary duties" test to determine whether a church teacher, who was commissioned as a minister by the church, was a minister of the church within the meaning of the First Amendment's ministerial exception. This test has been recently rejected by courts as fundamentally flawed in its analysis and constitutionally suspect in its application. This Court should reject the test and adopt a bright-line test that both respects the First Amendment and allows courts to determine jurisdiction without intrusive fact-finding.

I. MINISTERS AND TEACHERS ARE THE LIFEblood OF RELIGIOUS ORGANIZATIONS.

Courts have recognized that religious organizations have a unique relationship with their spiritual leaders, the protection of which is vital to the special freedom guaranteed to these groups by the First Amendment. This is particularly true of churches.

The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose....Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

McClure v. Salvation Army, 460 F.2d 553, 558-59 (5th Cir. 1972).

And, as courts have recognized,¹ this is also true of other religious organizations, including schools like Hosanna-Tabor. Its teachers—many of which are commissioned ministers—fulfill much the same purpose of a minister at a church. They are the chief instruments by which the school fulfills its purpose of providing a religiously based education to children. And make no mistake: educating children is truly a religious exercise for Christians,² especially for Lutherans. Martin Luther's Larger Catechism on the Fourth Commandment states:

For if we wish to have excellent and apt persons for both civil and ecclesiastical government, we must spare no diligence, time, or cost in teaching and educating our children, that they may serve God and the world.... Here consider now what deadly injury you are doing if you be negligent and fail on your part to bring up your child to usefulness and piety.³

¹ See, e.g., *Coulee Catholic Schools v. Labor and Industry Review Comm'n*, 768 N.W.2d 868 (Wis. 2009); *Clapper v. Chesapeake Conference of Seventh Day Adventists*, 166 F.3d 1208 (4th Cir. 1998).

² See, e.g., Ephesians 6:4 (“Fathers...bring [your children] up in the discipline and instruction of the Lord.” *Accord* Deuteronomy 6:7, Proverbs 22:6, 15.

³ MARTIN LUTHER, *The Large Catechism*, in TRIGLOT CONCORDIA: THE SYMBOLIC BOOKS OF THE EVANGELICAL LUTHERAN CHURCH (Concordia Publ. 1921) (1580).

And in his Preface to the Small Catechism, Luther emphasizes that failure of the church and parents to provide children an education is gravely sinful:

You should particularly urge those in authority and parents to govern the young well and to send them to school. Show them why it is their duty to do this and explain what a damnable sin it is if they fail to do so. For by such neglect they ruin and destroy both the kingdom of God and that of this world and prove themselves to be the worst enemies of both God and man.⁴

Thus, the teachers in Christian schools are agents of the church and Christian parents in fulfilling the religiously-mandated role of providing a comprehensive religious education.

II. THE “PRIMARY DUTIES” TEST IS FUNDAMENTALLY FLAWED.

A. Christian education cannot be analyzed by determining whether a subject of study is sacred or secular.

The Panel, adopting the “primary duties” test from other circuits, relied heavily on comparing the daily amount of time spent on “religious” activities with the amount of time spent on “secular” subjects of study to determine that Perich, the commissioned minister teaching at Hosanna-Tabor, was not a ministerial employee. *EEOC v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769, 780 (6th Cir. 2010). Inherent in this comparison, though, are two assumptions: first, that there is delineation between what a Christian school deems

⁴ MARTIN LUTHER, *The Small Catechism*, in TRIGLOT CONCORDIA: THE SYMBOLIC BOOKS OF THE EVANGELICAL LUTHERAN CHURCH (Concordia Publ. 1921) (1580)

sacred or secular, and second, that such delineation can neatly be broken down based on subject matter. Neither of these assumptions is accurate, and both require a court to impermissibly determine what constitutes a religious education.

Christianity has always rejected cabining its reach to mere pious belief and religious observances. Rather, it requires faithful observance to necessarily include acts that are—at least superficially—unrelated to worship, prayer, or theology. “Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress...” James 1:27 (NIV). In fact, Christianity teaches that actions that may not appear inherently religious are a direct and required act of service to God. “[T]he King...[said]...I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me.’ Then the righteous will answer him, ‘Lord, when did we [do these things for you]?’ The King will reply, ‘I tell you the truth, whatever you did for one of the least of these brothers of mine, you did for me.’” Matthew 25:34-40 (NIV).⁵

Many pastors and missionaries—the quintessential examples of ministers of a church who fall within the ministerial exception—have recognized this bridge between the “sacred” and the “secular.” Pastors often spend a large percentage of

⁵ See, e.g., Deuteronomy 15:11, Proverbs 19:17; Isaiah 58:5-7.

their time in administrative tasks and charitable work that contains little if any teaching of religious doctrine. Missionaries can spend years meeting the needs of the people they've been called to serve, like running an orphanage or providing healthcare, with little time left for saving souls. One famous Christian missionary, Amy Carmichael, actually felt conflicted by how the need to save children from forced prostitution caused her to give up a flourishing career as a traveling evangelist. She later realized that God had called her to serve in a way “which the undiscerning consider ‘not spiritual work.’”⁶ Her realization tracks the Scriptural admonition that “whatever you do, whether in word or deed, do it all in the name of the Lord Jesus.” Colossians 3:17 (NIV).

In fact, the church office of deacon was created in the early church solely to “serve tables” and thereby free up apostles to continue in “prayer and...ministry of the word.” Acts 6:2-4 (NIV). Far from a “non-religious” position, though, deacons must meet several religious prerequisites, like being “of good reputation, full of the Holy Spirit and wisdom.” *Id.* Thus, while an act of service or church office may not include explicitly religious components, it retains a fundamentally religious character for Christians because of the purpose for which it is done.

Courts have recognized this principle and, in turn, have rejected a quantitative or “primary duties” approach to determining whether the ministerial

⁶ ELIZABETH ELLIOT, A CHANCE TO DIE: THE LIFE AND LEGACY OF AMY CARMICHAEL 183 (Revell 2005) (1987).

exception applies. A seminarian who spent his time “mostly cleaning sinks” fell within the ministerial exception because “secular duties are often important to a ministry.” *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 676 (9th Cir. 2010). And in *Coulee Catholic Schools v. Labor and Industry Review Comm’n*, 768 N.W.2d 868, 882 (Wis. 2009), the Wisconsin Supreme Court rejected the sacred/secular distinction because it “serves to minimize or privatize religion” by calling a subject of study “‘secular’ because it does not involve worship and prayer.”

What the quantitative approach means as a practical matter is that the state can interfere with the hiring and firing of leaders of religious organizations so long as the leaders are spending (presumably) 49 percent or less of their time or tasks on whatever court determines to be “religious” activities. This redounds in an intrusiveness inconsistent with the free exercise of religion.

Id., accord *Alcazar*, 598 F.3d at 676 (rejecting the “arbitrary 51% requirement implicit in the ‘primary duties’ test” as “creat[ing] the very government entanglement into the church-minister relationship that the ministerial exception seeks to prevent.”).⁷

If a distinction between sacred and secular exists, though, it certainly cannot be broken down simply by looking at the academic subject of study. Religion is not just a subject matter, it is a viewpoint—and one that permeates every subject.

⁷ Significantly, neither *Alcazar* nor *Coulee Catholic Schools* were cases construing ADA provisions, showing the ministerial exception’s breadth of application.

Rosenberger, 515 U.S. at 831 (“Religion [is] a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.”).

Christian leaders have long recognized this pervasive influence of Christian belief on every area of study and inquiry. The Christian apologist and Oxford literature professor C.S. Lewis said, “Christian theology [explains] science, art, morality, and the sub-Christian religions...I believe in Christianity as I believe that the Sun has risen, not only because I see it, but because by it I see everything else.”⁸ Similarly, the Catholic writer Flannery O’Connor, explaining how her short stories of the American South were all about redemption, said, “I see from the standpoint of Christian orthodoxy. This means that for me the meaning of life is centered on our Redemption by Christ and that what I see in the world I see in its relation to that. I don’t think that this is a position that can be taken halfway...”⁹

Notably, Christian viewpoint need not be taught in explicitly Christian terms. Often, in fact, it is transmitted through moral or ethical principles that, while normative for Christians, are not exclusive to Christianity and therefore need not be taught in a purely religious manner. Similarly, a teacher imparting a Christian viewpoint on a subject need not flip open a Bible or request students to bow their heads. Instead, she can convey that viewpoint in a number of different

⁸ C.S. LEWIS, *Is Theology Poetry?*, in *THE WEIGHT OF GLORY AND OTHER ADDRESSES* 106 (Walter Hooper, ed., Simon and Schuster 1980) (1949).

⁹ FLANNERY O’CONNOR, *The Fiction Writer and His Country*, in *MYSTERY AND MANNERS* 32 (Robert Fitzgerald, ed., Noonday Press 1957) (1997).

ways: by setting an example of charity, honesty, and discipline in the way she manages herself and her class (which reflect Christianity's emphasis on these virtues being a part of daily life); by teaching science or math with a sense of both wonder and order (which reflect the Christian perspective on God's active role in creation and the way the orderliness of that creation has created fixed natural laws upon which scientific and mathematical discovery can take place);¹⁰ by teaching art, writing, and music with purpose and meaning (which reflects the Christian view that life has inherent and intelligible meaning and that every aspect of a Christian's life should be pointed toward glorifying God).¹¹

Also, the presence of a Christian viewpoint necessarily means the absence of certain teachings that are incompatible with that viewpoint. For example, the Christian perspective that life has significance and purpose not only means that Christian teaching will emphasize the gentle magnificence of Bach in their study of music, it means it will likely reject as flawed the intentionally meaningless compositions of John Cage. Similarly, a Christian study of literature can affirm the

¹⁰ See, e.g., Dr. Francis S. Collins, *Why This Scientist Believes in God*, <http://www.cnn.com/2007/US/04/03/collins.commentary/index.html> (“As a believer, I see DNA, the information molecule of all living things, as God's language, and the elegance and complexity of our own bodies and the rest of nature as a reflection of God's plan.”).

¹¹ See, e.g., CHARLES COLSON and NANCY PEARCEY, *HOW NOW SHALL WE LIVE?* 15 (Judith Markham, ed., Tyndale 1999 (“Genuine Christianity is a way of seeing and comprehending *all* reality).

redemptive treatment of a murderer in Dostoyevsky's *Crime and Punishment* while critiquing Camus' absurdist study of the same character in *The Stranger*.¹² In all these examples, the subject of study remains the same, but the ultimate lesson is quite different because of the viewpoint from which the subject is considered.

This is why parents send their children to Christian schools and why churches emphasize the need for Christian education. Regardless of the subject being taught, the Christian viewpoint is a key component of fully understanding that subject. Failure to teach a Christian viewpoint, then, both fails to provide a complete education and to meet the educational duties that Christian (and particularly Lutheran) belief requires of parents and churches. Thus, the need for a Christian school to retain control over its religious mission includes control over personnel decisions for teachers of all subjects without government interference. It is no consolation to a church running a Christian school or a parent sending their child to the school that all teachers who instruct solely (or primarily) religious classes will be free from government entanglement. If that was all that mattered, then the church or parent could much more easily and inexpensively send children to free public schools and simply set up an hour a day of religious instruction at the church. But the goal is not simply to teach religion, but to teach a Christian

¹² Notably, a Christian school can use the same texts or curriculum to study these artists as other schools, but the Christian school—through its teachers—could measure the artists by how closely they conform to a Christian viewpoint.

viewpoint on all subjects through teachers who are in harmony¹³ with that viewpoint and model it for their students.

Thus, the Court’s decision should be revisited because “the underlying premise of the primary duties test—that a minister must ‘primarily’ perform religious duties—is suspect.” *Alcazar*, 598 F.3d at 675. Religion is too rich to be restricted to rites, and guarding the free exercise of religion requires protecting inculcation of a religious viewpoint in all subject matters.

B. The ‘primary duties’ test requires an unconstitutionally and impractically detailed factual examination of religious beliefs.

The Panel’s adoption and application of the primary duties test will require courts of this circuit to engage in extensive factual investigation to determine whether a church employee is sufficiently ministerial. This requirement is both unconstitutional and impractical.

The “procedural entanglement of a detailed factual determination about ‘primary duties’” can create an Establishment Clause violation since the “very process of civil court inquiry into the clergy-church relationship” implicates First Amendment rights. *Alcazar*, 598 F.3d at 673, 676. “It is not only the conclusion that may be reached by [the court] which may impinge on the rights guaranteed by

¹³ This does not mean that a teacher must to share a school’s denominational faith. *See, e.g., Coulee Catholic Schools*, 768 N.W.2d at 891 (finding that, even though teachers were not required to be Catholic, they still fit the ministerial exception because they were “required to live, embody, and teach Catholicism in [their] role as...teacher[s] consistent with the mission of the school.”).

the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.” *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979).

This procedural limitation has led courts to reject attempts by government entities to evaluate a religious school’s spiritual mission and how well it accomplishes that mission as constitutionally problematic. *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009). Government cannot go “trolling through the beliefs of [schools], making determinations about [their] religious mission, and that mission’s centrality to the ‘primary purpose’ of the [school].” *Id.*, quoting *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341-42 (D.C. Cir. 2002); accord *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (holding the Establishment Clause bans “trolling through...an institution’s religious beliefs.”).

Trolling through religious belief is a central feature of the fact-intensive primary duties test. For instance, *Alcazar* condemned “examin[ing] the number of hours [a minister spent on non-religious conduct] and the number of hours he performed on religious duties” as creating “the very government entanglement into the church-minister relationship that the ministerial exception seeks to prevent.” 598 F.3d at 675. But in applying the primary duties test, the Panel engaged in exactly the sort of intrusive hourly counting that *Alcazar* rejected. *Hosanna-Tabor*, 597 F.3d at 780 (counting time down to the minute).

The specter of courts examining the sincerity or centrality of religious belief has also been rejected as unconstitutional. *Carroll College*, 558 F.3d at 573. When a religious school posits that religion is a necessary element of every class its teachers provide, courts cannot sift this position without making themselves arbiters of religious belief and education—which is something courts are neither qualified nor allowed to do. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (stating that “government is...entirely excluded from the area of religious education.”); *HEB Ministries v. Texas Higher Educ. Coordinating Board*, 235 S.W.3d 627, 643 (Tex. 2007) (holding that “setting standards for a religious education is a religious exercise for which the State lacks not only authority but also competence”).

Further, as a practical matter, making a jurisdictional issue hinge on a detailed factual question requires district courts and parties to expend tremendous time and effort simply determining whether or not the court can hear the case. *Alcazar*, 598 F.3d at 676. A bright-line rule would be a much more efficient way to determine such a threshold issue.

III. THE COURT SHOULD ADOPT A BRIGHT-LINE RULE THAT PROTECTS RELIGIOUS LIBERTY AND EFFICIENCY.

The Panel’s substitution of its judgment for *Hosanna-Tabor*’s to determine what a religious education consists of and how important teachers are to that religious education demonstrates the need for this Circuit to adopt a clear test for these types of cases. In *Carroll College*, the D.C. Circuit concluded that the only

way to avoid unconstitutional intrusion into religious affairs is “to create a bright-line rule for determining jurisdiction without delving in to matters of religious doctrine.” 558 F.3d at 572 (citations and quotation marks omitted). The court adopted the following test: The school is not subject to jurisdiction if it: “(1) holds itself out to students, faculty and the community as providing a religious educational environment; (2) is organized as a nonprofit; and (3) is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.” *Id.* (citations and quotation marks omitted).

While the D.C. Circuit’s approach would best protect religious rights, the Ninth Circuit’s test in *Alcazar* would also be a substantial improvement over the Panel’s use of the “primary duties” test. In the Ninth Circuit, “if a person is (1) employed by a religious institution, (2) was chosen for the position based largely on religious criteria, and (3) performs some religious duties and responsibilities, that person is a ‘minister’ for purposes of the ministerial exception.” *Alcazar*, 598 F.3d at 679 (edits and quotation marks omitted). Notably, this test was formulated in reference to, and is similar to, the Fifth Circuit’s test in *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999).

Under both the D.C. Circuit and the Ninth Circuit tests, courts would not need to make a sacred/secular distinction on religious educational programs nor

conduct intrusive, detailed factual inquiries into a religious school's beliefs. This would solve the constitutional concerns of entanglement and burdens on free exercise while also giving a better standard for a bright-line, threshold ruling on jurisdiction. *Alcazar*, 598 F.3d at 676. Courts would remain free to test the *bona fides* of religious schools, but would otherwise avoid inserting themselves between churches, parents, and students. *Id.*

CONCLUSION

The Court should grant the petition for rehearing and reverse the Panel's decision to cabin church's First Amendment autonomy protections to only "sacred" activities. Christian belief is too vibrant and fundamental in believers' lives to be restricted to Sunday mornings and daily one-hour religion classes. Forcing Christian education out of all but purely religious subjects is like trying to make bread without the yeast—most of the ingredients may still be present, but without yeast, the effort falls flat. And teachers in a Christian school are the ministers who mix in—and sometimes are themselves—the essential ingredient that is the Christian worldview.

Respectfully submitted this 30th day of April, 2010

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