

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 AMICI CURIAE
NATIONAL ASSOCIATION OF EVANGELICALS,
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, AND
INTERNATIONAL MISSION BOARD, SBC
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: Andrew Soukup

Pursuant to 6th Cir. R. 26.1, National Association of Evangelicals

Name of Party

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UNITED STATES COURT OF APPEALS
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Disclosure of Corporate Affiliations and Financial Interest

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Case Number: 09-1134 & -1135

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Pursuant to 6th Cir. R. 26.1, Union of Orthodox Jewish Congregations of America
Name of Party

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Case Number: 09-1134 & -1135

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Name of counsel: Andrew Soukup

Pursuant to 6th Cir. R. 26.1, International Mission Board, SBC

Name of Party

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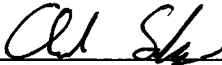
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INTEREST OF THE AMICI CURIAE

Amici represent tens of thousands of religious institutions. Many of these institutions operate religiously affiliated schools, and the panel's decision in this case directly affects the freedom of these institutions to select or retain employees who advance the schools' religious missions. More broadly, the panel's decision significantly impacts the First Amendment rights of these religious institutions to freely select the employees who shape or implement their spiritual missions. Detailed descriptions of amici are attached in the Appendix to this brief. Pursuant to Fed. R. App. P. 29(a), amici filed a motion seeking leave to file this amicus brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment's ministerial exception protects the freedom of a religious institution to select its "ministers," the term courts use to describe employees who shape or implement an institution's religious mission. The panel in this case relied upon the "primary duties" test to determine whether Ms. Perich is a minister. However, the panel's analysis was based upon the mistaken belief that a prior decision from this circuit had adopted that test. To the contrary, this Court has never analyzed the propriety of the primary duties test, addressed its deficiencies, or considered alternative approaches.

This Court should grant the petition for rehearing or rehearing *en banc* because the primary duties test undermines the autonomy of religious institutions to select the employees who shape and carry out their religious missions. This proceeding involves a question of exceptional importance because the primary duties test has been rejected by numerous courts, including the Ninth Circuit in an opinion issued one week after the panel’s decision. These other courts correctly recognize that the primary duties test suffers from several flaws. *First*, the test undermines religious freedom because it fails to protect an institution’s freedom to select employees who promote its spiritual mission. *Second*, courts are incapable of applying the primary duties test without running afoul of well-established principles that protect churches against government entanglement and interference. *Finally*, the fact-intensive nature of the primary duties test makes it impossible for religious institutions to determine *ex ante* whether an employee is a “minister,” and therefore they cannot predict with reasonable certainty which of their employment decisions are entitled to constitutional protection and which are not.

ARGUMENT

I. THE PRIMARY DUTIES TEST UNDERMINES THE FIRST AMENDMENT RIGHT OF A RELIGIOUS INSTITUTION TO FREELY SELECT EMPLOYEES WHO ADVANCE ITS SPIRITUAL MISSION.

The First Amendment protects the freedom of a religious institution to select its ministers. *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-

20 (1976); *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16-18 (1929). As the panel properly recognized, “the relationship between an organized church and its ministers is its lifeblood” because “[t]he minister is the chief instrument by which the church seeks to fulfill its purpose.” *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & School*, 597 F.3d 769, 777 (6th Cir. 2010) (quoting *McClure v. Salvation Army*, 460 F.2d 553, 558-59 (5th Cir. 1972)). In the employment context, this “ministerial exception” generally means that a religious institution may not be held liable for its decision to select, discipline, or dismiss its ministers. *Id.* at 777-78 & n.6.

To determine if the ministerial exception applies, a court must initially determine whether an employee is a “minister.” In answering this question, some courts have mistakenly relied upon the “primary duties” test, which classifies an employee as a minister only if her “primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship.” *E.g.*, *Rayburn v. Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985) (internal quotation marks omitted). The panel applied this “primary duties” test to conclude that Ms. Perich was not a minister. *Hosanna-Tabor*, 597 F.3d at 778.

There are three reasons why the primary duties test cannot be applied without upsetting well-established First Amendment principles. *First*, the primary

duties test undermines the freedom of religious organizations to select employees who carry out their spiritual missions. Employees who perform *any* religious duties, no matter how small, help shape and implement an institution’s religious mission. Yet the primary duties test gives institutions the autonomy to select only those employees who perform *primarily* religious duties. As a result, religious institutions lose the freedom to select employees who perform *some* spiritual functions—and who therefore advance an institution’s religious mission—even if those functions are not their *primary* responsibilities. This “arbitrary” focus upon whether an employee’s primary duties are religious or secular fails to “acknowledg[e] that 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); accord *Schleicher v. Salvation Army*, 518 F.3d 472, 477-78 (7th Cir. 2008). For example, a part-time teacher hired to teach a religious class at a parochial school would be considered a minister under the primary duties test. See *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 463-64 (D.C. Cir. 1996). Yet if the school makes that same teacher a full-time employee by asking her to also teach several mathematics classes, under the panel’s approach that teacher loses her “minister” status even though she has the same impact on the school’s spiritual mission. There is no First Amendment-based reason why a religious organization enjoys autonomy to select the former employee but not the latter.

Second, courts cannot apply the primary duties test without simultaneously violating well-established First Amendment principles designed to protect churches against government entanglement and interference. Before determining whether an employee's duties are primarily religious, a court must first determine which duties are "religious" and which are "secular." Yet the Supreme Court has consistently observed that the line between religious and secular duties "is hardly a bright one," and there is reason to "understandably be concerned that a judge would not understand [an institution's] religious tenets and sense of mission." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987). Furthermore, "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977).

Even if a court can identify which duties advance the spiritual mission of a religious institution and which do not, the "primary duties" test requires a court to make further impermissible judgments before it can label an employee a "minister." For example, a court might look at a timesheet and tally how much time an employee spends on religious matters. Under this approach, employees who do not spend a majority of their time on "spiritual" as opposed to "secular" matters are not "ministers." Unfortunately, this quantitative analysis of an

employee's timesheet cannot capture the qualitative significance of an employee's role. *See, e.g., Clapper v. Chesapeake Conference of Seventh-day Adventists*, No. 97-2648, 1998 WL 904528, at *7 (4th Cir. Dec. 29, 1998) (per curiam).

To circumvent this obstacle, a court might instead try to determine which duties of the employee are more "important." Under this analysis, a court might be tempted to think that employees whose "important" duties are not religious must not play a primary role in implementing the institution's religious mission and are therefore not "ministers." Yet this inquiry is simply another way of asking which employees are "central" to an institution's religious mission. And the Supreme Court has emphatically declared that centrality inquiries violate the First Amendment. *See, e.g., Employment Div. v. Smith*, 494 U.S. 872, 887 (1990); *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 715-16 (1981) ("[T]he guarantee of free exercise is not limited to beliefs which are shared by all the members of a religious sect. . . . Courts are not arbiters of scriptural interpretation."); *see also NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979) (observing that the "very process of inquiry" into "the good faith of the position asserted by the clergy administrators and its relationship to the school's religious mission" "may impinge on rights guaranteed by the Religion Clauses").

Finally, the primary duties test makes it difficult for religious institutions to determine *ex ante* which employees are ministers and which are not. Because the

First Amendment protects the right of a religious organization to select only “ministers,” an organization needs the ability to predict with reasonable certainty which of its employees courts consider “ministers.” By conducting a fact-intensive inquiry into an employee’s duties and responsibilities, the primary duties test falls far short of providing such guidance. Even when employees have virtually identical job responsibilities, courts have reached opposite conclusions as to whether an employee is a “minister.” Compare *Weishuhn v. Catholic Diocese of Lansing*, __ N.W. 2d __, No. 287174, 2010 WL 290516 (Mich. Ct. App. 2010) (teacher who taught four math classes, two religious classes, and who helped plan liturgies was a minister), with *Hosanna-Tabor*, 597 F.3d at 779-80 (teacher who taught a variety of subjects including religion and who led prayer sessions was not a minister).

This uncertain legal landscape understandably leaves organizations reluctant to make employment decisions regarding individuals who play significant roles in their spiritual missions. As the Supreme Court recognized, “it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.” *Amos*, 483 U.S. at 336. The lack of clarity created by the primary duties test forces religious institutions to hesitate about—and in some cases, refrain from—replacing employees who perform important spiritual functions. *Id.* (“Fear of potential

liability might affect the way an organization carried out what it understood to be its religious mission.”). By forcing organizations to make employment decisions based on secular principles, the primary duties test chills the exercise of religious freedom.

For these reasons, the panel was wrong to apply the primary duties test.

II. AFTER THE PANEL’S DECISION, ANOTHER CIRCUIT JOINED THE NUMEROUS COURTS THAT HAVE REJECTED THE PRIMARY DUTIES TEST.

As decisions from other federal and state courts—including a recent Ninth Circuit decision issued after the panel decision in this case—indicate, there are alternative ways of determining whether an employee is a “minister.”

For example, one week after the panel decision, the Ninth Circuit rejected the primary duties test. *See Alcazar*, 598 F.3d at 674-77. Under the Ninth Circuit’s approach, an employee is a “minister” if she “was chosen for the position based ‘largely on religious criteria’” and if she “performs *some* religious duties and responsibilities.” *Id.* at 676 (emphasis added). The Ninth Circuit’s test avoids the pitfalls of the primary duties test in four important respects. *First*, it acknowledges that an employee can play a pivotal role in an institution’s spiritual mission even if only some of her responsibilities are religiously oriented. *Second*, it recognizes the entanglement problems created by asking courts to identify the “spiritual” and “secular” significance of an employee, and therefore it explicitly incorporates the

institution's perspective by taking into account the reasons a religious institution gives for hiring an employee. *Third*, the test is easier for courts to apply because it "enables a district court to determine who is a 'minister' earlier in the proceedings" and "minimizes the procedural entanglement of a detailed factual determination about 'primary duties.'" *Id. Finally*, because the test does not depend upon a court's assessment of an employee's "primary" and "minor" duties, religious organizations are better able to predict which employees are "ministers."

Other circuits have also abandoned the primary duties test. *See Rweyemamu v. Cote*, 520 F.3d 198, 208 (2d Cir. 2008) (calling the primary duties test "too rigid" and adopting an approach that takes into account the nature of the dispute); *Alicea-Hernandez v. Catholic Bishop of Chi.*, 320 F.3d 698, 704 (7th Cir. 2003) (focusing on the role an employee plays in "shaping the message" of a religious institution); *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999) (avoiding mention of an employee's "primary" duties).

The panel's decision also departed from the approaches followed by several state courts in this circuit. No state court in this circuit has adopted the primary duties test as the sole basis for determining whether an employee is a "minister." *See Weishuhn*, 2010 WL 290516 (applying multi-factor test to conclude that a teacher at a parochial school who taught mostly math classes was a "minister"); *Horine v. Vineyard Cmty. Church*, No. C-060097, 2006 WL 3690309, at *2 (Ohio

Ct. App. Dec. 15, 2006) (church employees who had religious components to their jobs were ministers).

The panel all but ignored these alternative approaches. While the panel opinion mentioned the Second Circuit's approach in a footnote, *see Hosanna-Tabor*, 597 F.3d at 778 n.7, it did not discuss the approaches of other federal and state courts. Furthermore, the panel did not have the benefit of the Ninth Circuit's recent analysis in *Alcazar*. As a result, the panel overlooked the substantial problems created by the primary duties test.

III. THE PANEL MISTAKENLY BELIEVED IT WAS BOUND BY A PRIOR SIXTH CIRCUIT DECISION, AND THUS REHEARING IS NECESSARY TO CONSIDER THE MERITS OF THE PRIMARY DUTIES TEST FOR THE FIRST TIME.

Contrary to the panel opinion, this Court has never decided that the primary duties test is the best way to determine who is a “minister” for purposes of the ministerial exception. The panel mistakenly thought a prior decision had settled the question of how to determine when employees are “ministers.” *Hosanna-Tabor*, 597 F.3d at 778 n.7. True, the primary duties test was mentioned by this Court three years ago. *See Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 226 (6th Cir. 2007). Yet *Hollins* made only a cursory reference to the primary duties test; it never considered the constitutional problems created by the primary duties approach or the alternative approaches. *Hollins* did not need to discuss how courts should identify “ministers” because the employee had forfeited any

argument that she was not a minister by failing to raise it before the district court.

Id. The panel decision here marks the first time that the Sixth Circuit has ever applied the primary duties test. Given that *Hollins* never actually applied the primary duties test or considered its propriety, the panel was not bound by *Hollins*'s summary reference to that standard.

Accordingly, rehearing is warranted so that this Court may consider for the first time whether the primary duties test best protects religious freedom.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing to determine whether the primary duties test undermines the freedom of religious institutions to select or retain employees who shape and implement their spiritual missions.

Respectfully submitted by,

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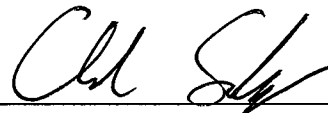
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APPENDIX

The National Association of Evangelicals (“NAE”) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and more than 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that religious freedom is a gift from God that the government does not create but is charged to protect. NAE is grateful for the American constitutional tradition safeguarding religious freedom, and believes that jurisprudential heritage should be maintained in this case.

The Union of Orthodox Jewish Congregations of America is the largest Orthodox Jewish umbrella organization in the United States, representing nearly 1,000 synagogues. Since its founding more than 100 years ago, the Union has served as the central coordinating agency for American and Canadian Orthodox Jewish congregations. Through its Institute for Public Affairs, the Union regularly participates in court cases, typically through amicus briefs, to protect the interests and values of the Orthodox community.

The International Mission Board, SBC (“IMB”) is an entity of the Southern Baptist Convention, the nation’s largest evangelical denomination with more than 40,000 churches and nearly 16 million members. The IMB employs more than

5,000 Christian workers to achieve its vision of seeing a multitude of every people, tribe, and tongue from around the world come to worship and exalt Jesus Christ as Lord and Savior.