No. 10-553

In The Supreme Court of the United States

HOSANNA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENTS

IAN SCHARFMAN, ESQ.
(*Counsel of Record*)
THE SCHARFMAN LAW FIRM, PLLC
3120 Southwest Freeway, Suite 450
Houston, TX 77098
(713) 255-2267
ian@scharfmanlawfirm.com

STEVEN M. FREEMAN, ESQ.
STEVEN C. SHEINBERG, ESQ.
DAVID L. BARKEY, ESQ.
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158
(212) 885-7700

Counsel for Amicus Curiae Anti-Defamation League

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the ministerial exception, which prohibits most employment-related lawsuits against religious organizations by employees performing religious functions, applies to a teacher at a sectarian school who teaches a secular curriculum, but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship.

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INTEREST OF *AMICUS*[1]

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. This case requires a balance between two of ADL's core beliefs: preserving religious freedom and eradicating discrimination.

While ADL counts among its core beliefs strict adherence to the separation of Church and State embodied in the Establishment Clause, it also believes that a zealous defense of the Free Exercise Clause is essential to the health of our religiously diverse society and to the preservation of our Republic. To advance another core belief, ADL is a fervent advocate of the enforcement of anti-discrimination laws that aim to eradicate discrimination. In furtherance of these core beliefs, ADL has participated in the major

[1] Pursuant to Rule 37.3(a) of the Rules of this Court, *amicus* files this brief with the consent of all parties, as they have filed consent letters with the Clerk of this Court. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, made a monetary contribution to its preparation or submission.

Church-State and discrimination cases of the last half-century.[2]

ADL is opposed to any infringement on the protections afforded to both individuals and religious organizations under the First Amendment, as such protections are fundamental to the ideals upon which this country was founded. However, discrimination against individuals is a corrosive element in society that Congress and the states have sought to combat through the passage of anti-discrimination laws. It is at the intersection of these two ideals where this Court is asked to render an opinion that is at the heart of this action.

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[2] *See, e.g.*, ADL briefs *amicus curiae* filed in *Ricci v. DeStefano*, 129 S.Ct. 2658 (2009); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442 (2008); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *The Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Runyon v. McCrary*, 427 U.S. 160 (1976); *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Engel v. Vitale*, 370 U.S. 421 (1962); and *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

Requiring religious institutions to clearly demonstrate that an employee falls within the ministerial exception strikes an appropriate balance that does not offend the First Amendment and works toward realizing the compelling interest of eradicating workplace discrimination.

SUMMARY OF THE ARGUMENT

A presumptively deferential view of the ministerial exception allows the exception to swallow the rights of countless individuals to be free from discrimination. The proper means of assessing the ministerial exception is to accord it the status of an affirmative defense. In that way, courts can strike a proper balance between the compelling interest of eradicating discrimination and guaranteeing First Amendment protections.

Surely, the wall of separation between Church and State and freedom to exercise one's own religion must remain strong. However, a commitment to the eradication of discrimination is also of the "highest order." The two interests of prohibiting discrimination and maintaining First Amendment guarantees can co-exist, as district courts may review such claims on the merits with certain sensitivity to First Amendment concerns. With co-existence achieved, a factual inquiry is needed as to the merits of the claims so as to preserve such balance. This factual inquiry should

take place within the context of an affirmative defense. If such factual analysis is viewed under a Rule 12(b)(1) motion, the plaintiff lacks adequate legal safeguards. Therefore, a Rule 12(b)(6)/Rule 56 approach to the application of the ministerial exception is warranted. Moreover, a Rule 12(b)(1) approach fails because the district court does not lack subject matter jurisdiction relative to anti-discrimination claims under statutes that confer such jurisdiction on it. That approach unduly shuts the door to meritorious claims, without the appropriate factual development needed.

The First Amendment cannot be used to provide religious institutions with blanket immunity. Rather, plaintiffs must have the opportunity to be heard on the merits of their claim. Treating the ministerial exception as an affirmative defense promotes a consistent application of comparable exceptions to discrimination laws.

ARGUMENT

I. TREATING THE MINISTERIAL EXCEPTION AS AN AFFIRMATIVE DEFENSE IS THE BEST WAY TO STRIKE A BALANCE BETWEEN ERADICATING DISCRIMINATION AND PROTECTING FIRST AMENDMENT GUARANTEES TO RELIGIOUS ORGANIZATIONS.

A. Treating the Ministerial Exception As An Affirmative Defense Would Advance the Compelling State Interest of Eradicating Discrimination Without Offending First Amendment Guarantees.

It cannot be overstated that the government has a compelling interest in eradicating discrimination. Indeed, this compelling interest is one of the "highest order" where "Congress has clearly targeted the elimination of all forms of discrimination as a 'highest priority.'" *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *E.E.O.C. v. Pac. Press Publ'g Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982); *See E.E.O.C. v. Miss. Coll.*, 626 F.2d 477, 488 (5th Cir. 1980). As government has a compelling state interest in its anti-discrimination laws, plaintiffs are allowed to bring claims against religious organizations relative to secular employment decisions. Thus, the district court should be free (and indeed, must be free) to delve into the merits of a plaintiff's

claim of discrimination in order to ascertain whether the ministerial exception applies in each such case.[3]

Moreover, this approach to the ministerial exception would in no way infringe upon First Amendment religious freedom guarantees that rightly protect America's religious institutions. Indeed, various courts have found that an examination of the merits of discrimination claims may proceed without interference or entanglement into religious institutions' religious or ecclesiastical governance or doctrine. Rather, an examination on the merits is the best way to guarantee the proper balance between the eradication of discrimination and the protections afforded under the First Amendment.

Indeed, the Second Circuit opined that First Amendment issues need not form the basis for rejecting a discrimination claim if the district court proceeds in a manner that is sensitive to First Amendment concerns. *See DeMarco v. Holy Cross High*

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[3] The Ninth Circuit cited this Court's opinion in *U.S. v. Lee*, 455 U.S. 252 (1982) as an example of how a compelling interest can override a religious belief. *Pac. Press*, 676 F.2d at 1280. In *Pac. Press*, the Ninth Circuit opined how "[a]lthough compulsory participation in the social security system interferes with the free exercise of Amish beliefs, the [Supreme] Court held that the state may justify a limitation on religious freedom by showing that it is essential to accomplish an overriding governmental interest." *Id*. Since Title VII of the Civil Rights Act of 1964 ("Title VII") and other anti-discrimination laws present such a similar compelling interest, the court can explore the merits of a plaintiff's claim while viewing the ministerial exception as an affirmative defense. *See id.* at 1281.

Sch., 4 F.3d 166, 170-171 (2d Cir. 1993). A presumption that a religious motive asserted by a religious organization is plausible "in the sense that it is reasonably held or validly held" allows the fact-finder to avoid the entanglement issue in most cases.[4] *Id.* at 171. When such precautions are put into place and in situations where such duties are "easily isolated and defined," "the able district judge will be able to focus the trial upon whether (the plaintiff) was fired because of the (plaintiff's protected class) or because of failure to perform religious duties, and that this can be done without putting into issue the validity or truthfulness of (such religion's) religious teaching." *Id.* at 172.

Similarly, the Third Circuit has found that where a plaintiff does not challenge the validity or good faith of the religious doctrine in question, then the First Amendment issue of entanglement does not appear. *Geary v. Visitation of Blessed Virgin Mary Parish Sch.*, 7 F.3d 324, 329-330 (3d Cir. 1993). According to *Geary*:

> . . . when the pretext inquiry neither traverses questions of the validity of religious beliefs

[4] "Without doubt there are circumstances where a government official's involvement in matters of religious doctrine constitutes excessive government entanglement. But it does not follow . . . that the mere act of inspection of religious conduct is an excessive entanglement. The Constitution, far from forbidding government examination of assertedly religious conduct, at times *compels* government officials to undertake such inquiry in order to draw necessary distinctions." (citations omitted). *Bronx Household v. Bd. of Educ.*, 2011 WL 2150974 at *14 (2d Cir. 2011).

> nor forces a court to choose between parties' competing religious visions, that inquiry does not present a significant risk of entanglement. However, the First Amendment dictates that a plaintiff may not challenge the validity, existence or 'plausibility' of a proffered religious doctrine.

Geary, 7 F.3d at 330.

Thus, the employee may still be able to contend that the asserted religious rationale did not motivate the adverse employment action. Such a view is consistent with this Court's prior holding in *Jones v. Wolf* relative to the fact that there is no impingement on the Free Exercise Clause either. *Jones v. Wolf*, 443 U.S. 595, 606 (1979) ("The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods.") (emphasis added).

B. The Presumptive Deferential Approach to the Ministerial Exception Advocated By Petitioner Would Strike an Inequitable Balance Between Eradication Of Discrimination and First Amendment Protections That Would Deny Anti-Discrimination Protections to A Large Portion of The Workforce.

Petitioner advocates a presumptively deferential ministerial exception standard grounded in the

First Amendment's Free Exercise and Establishment Clauses. This is the wrong approach, as it would deprive employees of anti-discrimination protections. In the context of employment, the First Amendment should not be used offensively, but only defensively – as a legal mechanism afforded to religious organizations through the ministerial exception. In other words, a "tolerant First Amendment is wary of the power of churches to oppress individuals and therefore insists that the First Amendment allows no 'citizen [or church] to become a law unto himself.'" (citation omitted). Leslie C. Griffin, *Fighting the New Wars of Religion: The Need for a Tolerant First Amendment*, 62 Me. L. Rev. 23, 46 (2010). An overly deferential application of the ministerial exception, however, can enable a religious organization to offensively classify a large category or class of employees as "ministers" in an attempt to cloak itself in a veil of immunity. Thus, a robust review of a factual record on the merits of the plaintiff's claims is necessary as employees would be deprived of their right to be free from discrimination if courts defer to a religious organization's classification under such deferential approach.

> The exception is supposed to serve the valid tolerant goals of keeping the state from interpreting religious dogma, intruding on church autonomy, and imposing clergy on the churches. In practice, however, the ministerial exception has extended far beyond that point and become a grant of immunity blocking lawsuits against churches and allowing them to become a law unto themselves. Despite the name of the exception, the cases

> have not been limited to ministers and priests. Female or gay high school teachers, secretaries, university professors, organists, and choir directors, among others, have had their discrimination lawsuits dismissed because of the churches' religious freedom to hire as they wish without court interference. In other words, antidiscrimination law is not the same for religious as it is for secular organizations. (citations omitted).

62 Me. L. Rev. at 53.

"Employment discrimination unconnected to religious belief, religious doctrine, or the internal regulations of a church is simply the exercise of intolerance, not the free exercise of religion that the Constitution protects." *Id.*

Since the ministerial exception has been held to apply to a multitude of religious organizations outside houses of worship which encompass a variety of entities, such as those involved with investments, schools, medical facilities, assisted care, and other operations, it would then follow that a large portion of the workforce could be subject to such exemption if the deferential standard espoused by Hosanna-Tabor and its *Amici* was applied.[5] In fact, "[t]he

[5] For example, such approach would strip employees of such anti-discrimination protections in various occupations, whether it be "businesses which process food, sell insurance, invest in stocks and bonds, and run schools, hospitals, laboratories, rest homes and sanitariums" as was noted relative to the hundreds of businesses affiliated with just the Adventist Church. *See Pac.*

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exclusion of a large class of lay employees from Title VII's coverage . . . would undermine the effectiveness of Title VII," which likewise applies to the other anti-discrimination laws, such as the ADA. (citation omitted). Green, *supra* note 5, 30 Hastings Const. L.Q. at 25. Furthermore, it is more likely that there would be abuse or overreach in the application of the

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Press, 676 F.2d at 1280. The scope of such exemption not only touches upon a multitude of businesses, but of positions as well which require a factual determination in order to assess the application of the ministerial exception. "Radiating out from such core activities and relationships (of an internal spiritual activity or relationship), however, are layers of activities and relationships that are less inwardly directed, have more indicia of secularity, and frequently involve individuals who have not voluntarily assented to the spiritual authority of the church: church run soup kitchens and food pantries serving local poor and homeless; interactions with vendors who supply both religious and non-religious commodities; contracts with repairmen who make improvements on church structures. Government regulation of such outward relationships, while indirectly impacting a church's operations, has less effect on its spiritual character." (citation omitted). Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values,* 30 Hastings Const. L.Q. 1, 19-20 (2002). "Thus, even though a church operated business may provide an environment for the spiritual growth of its employees and the income derived from the business may finance the church's spiritual ministries, involvement in the commercial market will expectantly involve greater governmental regulation of employment relationships, particularly where the church business operates with secular counterparts." (citation omitted). *Id.* at 20-21. Since the intrusion into a religious organization's governance and affairs in secular functions is minimal, it is appropriate to create a factual record on the merits so as to ascertain the secular nature of the positions in question. *See Pac. Press*, 676 F.2d at 1279-1283.

ministerial exception to this wide swath of employees if the Court adopts such a deferential standard.[6]

C. Under Legal Precedent and Procedure, the Correct Approach is Treatment of The Ministerial Exception As An Affirmative Defense.

Treatment of the ministerial exception as an affirmative defense in the context of discrimination claims is consistent with the treatment of other related exceptions by various courts. Indeed, " . . . courts have consistently held that statutory exemptions, particularly from remedial statutes, must be pled as affirmative defenses."[7]

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[6] A case in point may be found in *E.E.O.C. v. Sw. Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981). The Fifth Circuit recognized that "bestowal of such a designation (as a minister) does not control their extra-religious legal status." *Sw. Baptist*, 651 F.2d at 283. In *Southwestern Baptist*, three categories of employees were identified – faculty, administrative staff, and support staff. *Id.* The Seminary designated *all* of those employees as serving a "ministerial function." *Id.* The district court reviewed the factual underpinnings of such designation and the nature of such positions. In doing so, the district court found that the administrative staff and support staff were not performing duties that were ecclesiastical or religious in nature, and were, therefore, not subject to the ministerial exception. *Id.* at 284-285.

[7] *Spann ex rel. Hopkins v. Word of Faith Christian Ctr. Church*, 589 F.Supp.2d 759, 763 (S.D.Miss. 2008) ("*See Oden v. Oktibbeha County, Miss.*, 246 F.3d 458, 467 (5th Cir. 2001) (holding that defendants waived defense of 'personal staff' exception to Title VII by failing to plead same); *Suiter v. Mitchell Motor*

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Thus, the ministerial exception is an affirmative defense to the claim. It is fundamentally unfair to require that the plaintiff disprove such affirmative defense, which is the standard that Hosanna-Tabor and its *Amici* advocate. More specifically, a determination of the ministerial exception should allow for a determination as to whether such exception has been met within the context of weighing the facts accordingly, with due sensitivity to First Amendment concerns. In this way, courts can properly balance an individual's right to be free from discrimination with First Amendment protections for the religious organizations.

From a First Amendment perspective, it would similarly seem justified to maintain the exception as an affirmative defense. While proper constitutional concern for religion may have led to the ministerial exception, it does not follow that the First Amendment should be used to essentially immunize religious

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Coach Sales, Inc., 151 F.3d 1275, 1279-1280 (10th Cir. 1998) (holding that '[a] claim of exemption is an affirmative defense, which must be specifically pleaded.'); *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1013 (11th Cir. 1982) (recognizing that cases 'have generally treated statutory exceptions from remedial statutes as affirmative defenses'); *Schwind v. EW & Assoc., Inc.*, 357 F.Supp.2d 691, 697 (S.D.N.Y. 2005) (defense of exemption under a remedial statute must be specifically pled or will be waived); *see also Vore v. Colonial Manor Nursing Ctr.*, No. 3-03-CV-1660-BD(P), 2004 WL 2348229, at 3 (N.D.Tex. Oct. 19, 2004) (recognizing that '[c]onsistent with the remedial purposes of the ADA, a charge of employment discrimination must be construed with the 'utmost liberality'')").

institutions from employment discrimination suits. Without a full development of the record and treatment with an eye toward having a district court scrutinize it as an affirmative defense, a religious institution may be able to attempt to wrap itself in the cloak of ministerial exception without any presumption on behalf of the plaintiff or factual analysis as to the merits of its actions in order to insulate itself from unlawful conduct.

Moreover, Hosanna-Tabor and its *Amici* seek to have a self-enforcement rule put into place whereby they are the sole arbiters of classifying an individual as a "minister." If successful, religious organizations could be given free reign to characterize an employee's duties or tasks as religious in order to invoke the exception without having the burden of proving that such exception would apply.

In essence, the plaintiff would have the burden of overcoming inferences in favor of the religious organization by having to refute such exception in a Rule 12(b) or Rule 56 proceeding, which is contrary to federal civil procedure and can result in a large class of employees being stripped of their rights under discrimination laws relative to such daunting challenge. *See Sections B & D herein*. Scrutiny of this exception as an affirmative defense would then best serve the interests of individuals and religious organizations as to striking a balance between discrimination laws and First Amendment guarantees.

Contrary to the argument espoused by Hosanna-Tabor and proponents of a deferential standard, a factual inquiry can be perfectly consistent with the protections guaranteed under the First Amendment while allowing for a merits-based review of the plaintiff's claims. For example, this Court has found that "routine and factual inquiries (under the Fair Labor Standards Act) bear no resemblance to the kind of government surveillance the court has previously held to pose an intolerable risk of government entanglement with religion." *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 304 (1985). This Court also recognized that the application of the FLSA in that instance applied to the Foundation's commercial activities which were consistent with First Amendment requirements. *Id.* at 305. Indeed, when viewed with the cited case law for the proposition that the courts may delve into factual inquiries relative to pretext when reviewing the ministerial exception, the path is clear for the ministerial exception to be treated as an affirmative defense.

The need for a robust factual development goes hand-in-hand with the need to review such claims on the merits, while viewing the ministerial exception as an affirmative defense. The benefit of this fact-intensive approach is illustrated by cases involving two similar job titles that yielded different outcomes under the application of the ministerial exception. In *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. Ct. App. 1988), the Court of Appeals of Michigan found that an organist at a Catholic institution

fell within the ministerial exception, but in *Archdiocese of Wash. v. Moersen*, 925 A.2d 659 (Md. 2007), the Court of Appeals of Maryland held that an organist also working at a Catholic Institution was a secular employee outside the scope of the exception.[8, 9]

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[8] The Court of Appeals of Michigan issued its holding after full discovery and a review on the merits as to whether the plaintiff was a non-secular employee. *Assemany*, 434 N.W.2d at 238. The plaintiff contended that he was simply an organist "who supported defendant's religious activities but did not engage in the propagation of religious doctrine or faith." *Id.* The Court of Appeals found the plaintiff was responsible for selecting and teaching all liturgical music within the parish and that his primary responsibility was to enable and encourage the parish choir and congregation to participate in the liturgy through song. *Id.* Additionally, the Court of Appeals noted that the plaintiff had assumed a pastoral-liturgical leadership role in the parish and was required to have a working knowledge of the Catholic religion and liturgy. *Id.* For the foregoing reasons, the Court of Appeals concluded that the plaintiff was not merely an organist but the head of the musical branch of the Catholic liturgy and engaged in the propagation of Catholic doctrine, as well as the observance and conduct of Catholic liturgy in the congregation. *Id.*

[9] The *Moersen* Court reasoned that a case involving the ministerial exception requires an examination of the role the plaintiff played in the church. *Moersen*, 925 A.2d at 665. Through its examination, the Court of Appeals found that the plaintiff was not prevented from doing his job as an organist by his lack of knowledge of the Catholic faith. *Id.* at 674. The Court of Appeals also noted that it was significant that plaintiff's job did not require a particular human being, as opposed to a CD player, with specific religious-based qualifications. *Id.* at 670. The *Moersen* Court concluded that the plaintiff's position as an organist did not require the plaintiff "to plan worship liturgy, coordinate church and worship activities relating to the church's Music Ministry, rehearse with and conduct choirs, hire

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And in *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, 166 F.3d 1208 (4th Cir. 1998), the Fourth Circuit found that a school teacher at a Seventh-Day Adventist Institution fell within the ministerial exception.[10] However, in *Redhead v. Conference of Seventh-Day Adventists*, 440 F.Supp.2d 211 (E.D.N.Y. 2006), the district court found that a school teacher at a similar institution did not fall within the exception.[11]

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musicians and lower level Music Ministry directors, and write articles about the church's Music Ministry for the weekly church bulletin." *Id.* at 668 & 676. It distinguished the plaintiff in that case from the plaintiff in *Assemany*, because Moersen's basic duties were simply to play the organ at religious services. *Id.* at 674.

[10] The court concluded that the primary duties of full-time teachers at the defendant's school consisted of "teaching and spreading the Seventh-Day Adventist faith and supervising and participating in religious ritual and worship." *Clapper*, 166 F.3d at *7. In arriving at that conclusion, the Fourth Circuit looked to the defendant's Education Code which makes clear that the primary purpose of the school system is the propagation of the Seventh-Day Adventist faith. *Id.* The Fourth Circuit also noted that the school required all full-time teachers to embody the teachings of the Seventh-Day Adventist faith in their professional as well as their personal lives. *Id.* It also found that teachers formally instructed their students on a daily basis in teachings of the Bible, whenever possible, which included teachings of the church in traditional academic curriculum, leading students in prayer and worship at various times throughout the day, and leading students in witnessing activities. *Id.*

[11] In reviewing such facts, the *Redhead* Court found that the plaintiff's teaching duties were primarily secular and did not incorporate Seventh-Day Adventist teachings into secular subjects. *Redhead*, 440 F.Supp.2d at 221. Additionally, the

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The very fact that there are different outcomes in these cases proves that the balance between the eradication of discrimination and ensuring First Amendment protections can be achieved while allowing both values to flourish and co-exist. Indeed, depriving a plaintiff of a fact-intensive review of her claims on the merits would fundamentally undermine her right to be free from discrimination.

D. Rule 12(b)(6) and Rule 56 Are The Appropriate Legal Procedural Mechanisms By Which to Challenge The Ministerial Exception As An Affirmative Defense.

Hosanna-Tabor and proponents of a deferential ministerial exception and disposition at an early stage advocate requiring district courts to dismiss such matters on the face of the complaint or as a jurisdictional bar, with a limited factual record, if any. However, such an approach diminishes the role of the district court in evaluating the facts and places the plaintiff (who has the burden of proof) in the unenviable and daunting task of establishing facts that might not have been discovered or developed at the

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teaching of secular subjects took up the majority of the plaintiff's work day. *Id.* The district court found that religious duties were limited to only one hour a day of Bible instruction and attending religious ceremonies once a year. *Id*. It opined that even through the unpublished *Clapper* case also involved a teacher at a Seventh-Day Adventist school, it did not mean an identical result must be reached. *Id*.

time of such motion being filed, most likely at the outset of the case, and to also challenge such deferential presumption.

The Third, Ninth and Tenth Circuits have instructively ruled that a Rule 12(b)(6) motion is appropriate as applied to the ministerial exception. *See Petruska v. Gannon Univ.*, 462 F.3d 294 (3d Cir. 2006); *Bollard v. Cal. Province of the Soc'y of Jesus*, 196 F.3d 940 (9th Cir. 1999); *Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648 (10th Cir. 2002).[12, 13, 14]

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[12] In finding that Rule 12(b)(6), not Rule 12(b)(1) was the appropriate means of challenging the claims, the Third Circuit in *Petruska* reasoned that "the question does not concern the court's power to hear the case – it is beyond cavil that a federal district court has the authority to review claims arising under federal law – but rather whether the First Amendment bars (plaintiff's) claims." *Petruska*, 462 F.3d at 302. In essence, the ministerial exception "may serve as a barrier to the success of the plaintiff's claims but it does not affect the court's authority to consider them." *Id.* at 303.

[13] In *Bollard*, the Ninth Circuit expressly stated that the ministerial exception should be viewed within the prism of a Rule 12(b)(6) motion, not one brought under Rule 12(b)(1). *Bollard*, 196 F.3d at 950-951. The *Bollard* Court reasoned that "[f]ailure to state a claim under federal law is not the same thing as failure to establish federal question jurisdiction under 28 U.S.C. §1331." *Id.* at 951. The Ninth Circuit relied on this Court's opinion in *Bell* in finding that "[a]ny non-frivolous assertion of a federal claim suffices to establish federal question jurisdiction, even if that claim is later dismissed on the merits under Rule 12(b)(6)." *Id.* at 951.

[14] In *Bryce*, the Tenth Circuit held that the substance of the motion relative to the church autonomy doctrine was correctly a challenge to the sufficiency of the plaintiff's claim for relief and,

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Consistent within these three well-reasoned opinions is the theme that the underlying discrimination law confers jurisdiction on the court so as to reject the use of a 12(b)(1) motion as a means of securing dismissal through a ministerial exception challenge. In other words, the ministerial exception does not function as a jurisdictional bar, but rather as a defense.

Outside of these Circuits, the Fifth Circuit, for example, has held that the district court would be required to view the case in one of three ways under a Rule 12(b)(1) analysis. "Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts."

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thus more properly subject to a Rule 12(b)(6) motion. *Bryce*, 289 F.3d at 654-655; *See also Skrzypczak v. Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1242 (10th Cir. 2010) (Motion to dismiss based on the ministerial exception is more properly brought as a Rule 12(b)(6) motion or Rule 56 motion. The Tenth Circuit opined that "[t]he essential question then, when considering the ministerial exception, is not whether the district court has the power to consider a plaintiff's claims but rather whether the First Amendment bars [that plaintiff's] claims."). The *Bryce* Court inferred that the ministerial exception was more properly considered to be challenging the legitimacy of the plaintiff's claims for relief, not subject matter jurisdiction. *Id.* at 654-655. The Tenth Circuit also compared the First Amendment's bar of a sexual harassment suit to a government official's defense of qualified immunity, which is often raised in a Rule 12(b)(6) or Rule 56 motion, and concluded that they are similar. *Id.* at 654.

(citation omitted). *Ramming v. U.S.*, 281 F.3d 158, 161 (5th Cir. 2001).

Although some extrinsic evidence may be allowed, an outcome determinative approach or expedience should not outweigh thoroughness in an issue that requires a factual interpretation of an exception as it necessarily requires a review of the context of the merits of the case itself. For practical purposes, once extrinsic evidence is allowed, the issue of jurisdiction is really rooted in a decision as to whether or not to involve a more well-balanced record and whether or not a jury should decide the issue. For example, in a 12(b)(1) motion, the plaintiff does not have the same procedural safeguards as she would in a Rule 12(b)(6)/Rule 56 motion.

It is fundamentally unfair to place the burden on the plaintiff to have to prove her case and also prove that she is not subject to the ministerial exception as Hosanna-Tabor and proponents of a deferential presumption would have this Court find. Hosanna-Tabor and its *Amici* espouse a highly deferential presumption in applying the ministerial exception and suggest that their classification of a "minister" be subject to a rebuttable presumption which must be challenged by the plaintiff under only limited circumstances. Then, their argument goes, the matter would be ripe for early summary disposition based on limited facts as to the narrow enumerated criterion they have created. However, such summary disposition would require unnecessary and unprecedented deference to the religious organization and would thereby eviscerate the

plaintiff's procedural rights under Rule 12(b)(6) and Rule 56 to have all inferences viewed in a light most favorable to the plaintiff. In short, it would turn federal civil procedure on its head.

The instructive guidance of the Courts of Appeals, discussed above, recognizes this critical distinction as applied to the ministerial exception. As the Fifth Circuit has also opined:

> A motion to dismiss for lack of subject matter jurisdiction, Rule 12(b)(1), can be based on the lack of jurisdiction on the face of the complaint. If so, the plaintiff is left with safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised – the court must consider the allegations in the plaintiff's complaint as true. But the two motions are treated quite differently when matter outside the complaint is the basis of the attack. Rule 12(b) provides that a motion to dismiss for failure to state a claim will be automatically converted into a motion for summary judgment (Rule 56) if the court considers matters outside the pleadings. This provides an additional safeguard for the plaintiff, for, in addition to having all his allegations taken as true, the trial court cannot grant the motion unless there is no genuine issue of material fact. This protection is not, however, provided the plaintiff who faces dismissal for lack of subject matter jurisdiction. (citations omitted).

Williamson v. Tucker, 645 F.2d 404, 412-13 (5th Cir. 1981); *See also Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) (Recognizing the critical distinction between Rule 12(b)(1) and Rule 12(b)(6)/Rule 56).

The loss of certain safeguards as noted by the Fifth and Third Circuits above is of critical importance in this context, and cannot be dispensed with summarily.

1. The Legal Precedent In *Bell* And Its Progeny Dictate Against Applying a Rule 12(b)(1) Standard and Favors A Rule 12(b)(6)/Rule 56 Approach.

Hosanna-Tabor and proponents of a deferential ministerial exception favor the approach of barring a discrimination claim at an early stage of litigation by wielding the sword of a Rule 12(b)(1) defense to such claim or by a limited factual review. However, this Court has rejected the use of a subject matter jurisdiction bar when the federal claim giving rise to such cause of action could confer subject matter jurisdiction.

Significantly, this Court found, in *Bell v. Hood*, 327 U.S. 678 (1946), that because the plaintiffs' complaint alleged that the defendants violated the Fourth and Fifth Amendments, that "it cannot be doubted therefore that it was the pleaders' purpose to make violation of these Constitutional provisions the basis

of this suit" and "before deciding that there was no jurisdiction, the district court must look to the way that the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States." *Bell*, 327 U.S. at 681. This Court further opined,

> Jurisdiction, therefore, is not defeated as (defendants) seem to contend, by the possibility that the averments might fail to state a cause of action on which (plaintiffs) could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issue of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then the dismissal of the case would be on the merits, not for want of jurisdiction.

Id. at 682.

The *Bell* Court continued its analysis by identifying certain instances that constitute exceptions where the claim should be dismissed for want of jurisdiction. These exceptions are suits "where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is

wholly insubstantial and frivolous." *Id.* at 682-683. This Court found that, "the right of the (plaintiffs) to recover under the complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Id.* at 685; *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89-90 (1998). The Tenth and Eleventh Circuits followed this Court's holding in *Bell*.[15] [16] Moreover, the Fifth Circuit specifically

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[15] The Tenth Circuit, in *Peoples v. CCA Detention Ctrs.*, 422 F.3d 1090 (10th Cir. 2005), opinion vacated in part on reh'g en banc, 449 F.3d 1097 (10th Cir. 2006), relied on *Bell* in finding that, "the Supreme Court explained that 'where the complaint . . . is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions[,] . . . *must* entertain the suit'." *Peoples*, 422 F.3d at 1095, *citing Bell*, 327 U.S. at 681-682. The *Peoples* Court further stated that, "the 'two possible' exceptions are claims that 'clearly appear[ ] to be immaterial and made solely for the purpose of obtaining jurisdiction' or claims that are 'wholly insubstantial and frivolous'." *Id., citing Bell*, 327 U.S. at 682-683; *accord Meason v. Bank of Miami*, 652 F.2d 542, 546 (5th Cir. 1981) (Relying on *Bell* in holding that "the district court's dismissal cannot be reconciled with the standard established in *Bell v. Hood*, that a complaint should not be dismissed for lack of subject matter jurisdiction unless the federal claim is 'immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous'.").

[16] The Eleventh Circuit in *Blue Cross & Blue Shield v. Sanders*, 138 F.3d 1347 (11th Cir. 1998) opined that "under the reasoning in *Bell* and its progeny, federal subject matter exists in this case as long as Blue Cross plausibly is a fiduciary seeking equitable relief" relative to the asserted ERISA claims. *Sanders*, 138 F.3d at 1352. It relied on *Bell's* logic by assuming subject matter jurisdiction unless one of the *Bell* exceptions applied. *Id.* In essence, if a claim presents a plausible basis in federal law,

(Continued on following page)

applied the *Bell* decision's strict standard for dismissal in a Title VII action.[17]

This Court's analysis and strict standard of dismissal dictate that the appropriate procedural approach is to apply a Rule 12(b)(6) motion (or its conversion to a Rule 56 motion) to the ministerial exception, as followed by the Third, Ninth and Tenth Circuits, in order to treat the exception as an affirmative defense. Whether it is under the ADA or any other law, any determination as to whether the

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subject matter jurisdiction must be assumed. *Id.*; *see also Barnes v. City of Gray*, 2010 WL 797265 at *2 (M.D.Ga. 2010) ("the Supreme Court (in *Bell*) has provided guidance on differentiating between Rules 12(b)(1) and 12(b)(6) in the face of threadbare pleadings . . . lower federal courts should generally assume subject matter jurisdiction and proceed to determine whether the liberally construed complaint states a claim upon which the court could grant relief.").

[17] In *Clark v. Tarrant County, Tex.*, 798 F.2d 736 (5th Cir. 1986), the Fifth Circuit opined that "in cases where the basis of the federal jurisdiction is also an element of the plaintiff's federal cause of action, the United States Supreme Court has set forth a *strict standard for dismissal* for lack of subject matter jurisdiction." *Clark*, 798 F.2d at 741, *citing Bell v. Hood* (emphasis added). The Fifth Circuit logically found that Title VII "both conveys jurisdiction and creates a cause of action." *Id.* It held that "[w]here the challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, and assuming that the plaintiffs' federal claim is neither insubstantial, frivolous, nor made solely for the purpose of obtaining jurisdiction, the district court should find that it has jurisdiction over the case and deal with the defendant's challenge *as an attack on the merits*." *Id.* (emphasis added).

ministerial exception applies to an individual plaintiff must be viewed as being inextricably linked to a merits-based factual determination. Therefore, assuming that the plaintiff's claim is not "insubstantial, frivolous, nor made solely for the purpose of jurisdiction," the district court must have jurisdiction over the case and must deal with any ministerial demurrer as an attack on the merits. Accordingly, under a *Bell* analysis, a ministerial exception defense is best analyzed as an affirmative defense.[18]

II. WITH THE BENEFIT OF A FACTUAL RECORD ON THE MERITS, THE SIXTH CIRCUIT WAS ABLE TO MAKE AN INFORMED DETERMINATION AS TO WHETHER THE MINISTERIAL EXCEPTION APPLIED.

Applying a Rule 56 standard of review, the district court allowed full discovery of the factual issues as to Perich's position with Hosanna-Tabor, and on the merits of the case. Without such factual development, Perich's claims may have been bereft

[18] A somewhat analogous argument can also be made in a review of this Court's opinion in *Arbaugh*. This Court held that the threshold number of employees under Title VII is not jurisdictional under federal law. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006). Title VII's "employee-numerosity requirement," which limits potential defendants to those maintaining at least fifteen employees, is not a limit on a court's jurisdiction to hear Title VII claims. The requirement is instead a substantive element of a Title VII claim, which means that a defendant must raise the issue prior to verdict or the requirement will be waived.

of pertinent facts essential to determine whether or not the ministerial exception applied to her – thus giving the Sixth Circuit the benefit of a full factual record on the merits upon which to render its decision. With the benefit of such factual record on the merits, the Sixth Circuit was able to make an informed determination as to whether the ministerial exception applied.

CONCLUSION

There is no question that courts must be guardians of the First Amendment guarantees to religious organizations and individuals, and of our anti-discrimination laws. Statutory exemptions and the ministerial exception, properly applied, ensure that a religious organization is protected from undue interference with its ecclesiastical functioning where there is truly a spiritual or ecclesiastical connection between the activities of an employee engaged in clerical activities and the religious organization. However, to adopt a presumptive deferential exception and curtail review of the essential facts in this fact-intensive context deprives countless individuals of their right to be free from invidious forms of discrimination, and threatens to unravel the very fabric of the anti-discrimination tapestry woven into state and federal laws. This Court can properly balance our highest ideals by recognizing the ministerial exception as an

affirmative defense within certain parameters that are sensitive to First Amendment concerns.

Respectfully submitted,

IAN SCHARFMAN, ESQ.
(*Counsel of Record*)
THE SCHARFMAN LAW FIRM, PLLC
3120 Southwest Freeway, Suite 450
Houston, TX 77098
(713) 255-2267
ian@scharfmanlawfirm.com

STEVEN M. FREEMAN, ESQ.
STEVEN C. SHEINBERG, ESQ.
DAVID L. BARKEY, ESQ.
ANTI-DEFAMATION LEAGUE
605 Third Avenue
New York, NY 10158
(212) 885-7700

Counsel for Amicus Curiae