

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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ORIGINAL

DKT/CASE NO. 83-1935

TITLE TONY AND SUSAN ALAMO FOUNDATION, ET AL., Petitioners
V. SECRETARY OF LABOR

PLACE Washington, D. C.

DATE March 25, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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TONY AND SUSAN ALAMO :
FOUNDATION, ET AL., :
Petitioners, : No. 83-1935
V. :
SECRETARY OF LABOR :
- - - - -x

Washington, D.C.

Monday, March 25, 1985

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

APPEARANCES:

ROY R. GEAN, JR., ESQ., Fort Smith, Arkansas;
on behalf of the Petitioners.
CHARLES FRIED, Deputy Solicitor General,
Department of Justice; on behalf of the Respondent.

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

2 CHIEF JUSTICE BURGER: The Court will hear
3 arguments first this morning in the Tony and Susan Alamo
4 Foundation v. the Secretary of Labor.

5 Mr. Gean, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF ROY R. GEAN, JR., ESQ.

8 ON BEHALF OF THE PETITIONERS

9 MR. GEAN: Mr. Chief Justice and may it please
10 the Court, the Alamo Foundation was an outgrowth of the
11 activities of Tony and Susan Alama in the Los Angeles
12 area of California.

13 These two persons were street workers. They
14 went about the streets of Los Angeles and the
15 surrounding suburbs during the '60s for the purpose of
16 reaching those people who had become derelicts or were
17 down-and-outers, with the gospel of Christ.

18 It was their intention to be evangelists, and
19 in fact they were, and later they became pastors. As
20 evangelists, they met many young people who were at that
21 stage in our nation's history when the hippies were
22 quite active, and they had some very definite ideas
23 about dress, codes of conduct, and general activities.
24 They had definite ideas about the attention to the laws
25 of the United States and concern for others, which was

1 contrary to the best interest of society and their
2 neighbors.

3 Tony and Susan Alamo in their evangelistic
4 activities reached many of these young people. On one
5 occasion which led to the organization of the Foundation
6 -- and these people, many testified -- three of the
7 people testified in regard to these matters. As
8 representatives of the entire group, these young people
9 were contacted by the foundation and experienced the
10 salvation that came from the gospel of Christ.

11 On one occasion, a young man who had been a
12 dope peddler had been converted, and he was living with
13 a group of young people, 20 or 30 of them, that were
14 involved in the same activities. He asked Tony and
15 Susan Alamo if they would come home with him, a place
16 that he had rented, and from which he was selling dope
17 in the Los Angeles area to the young people and the
18 other persons of that community who would buy from this
19 sort of a peddler.

20 QUESTION: Mr. Gean, how many persons are
21 affected by the holding in this case in the Court of
22 Appeals?

23 MR. GEAN: Directly, Your Honor, with the
24 Foundation, there are approximately 300 persons who are
25 called associates. I would term them, and they have

1 been termed throughout many pages of the transcript and
2 in the briefs, as pastors and evangelists.

3 QUESTION: How many in the whole pattern, the
4 whole program?

5 MR. GEAN: Your Honor, this is a pentacostal
6 group and it is quite common among pentacostal groups to
7 not keep records of membership. They have many
8 churches.

9 QUESTION: I'm not speaking of members. I'm
10 speaking of employees, the people employed who are
11 directly affected.

12 MR. GEAN: Those would be, Your Honor, the
13 some 300 that are pastors and evangelists, and that is
14 all that would be affected directly. Of course,
15 indirectly in other churches, or other religious
16 activities throughout the United States, your decision
17 here will have a far-reaching effect upon the activities
18 of those people who are associated with like or similar
19 foundations or like or similar religious churches.

20 QUESTION: Well, in round numbers, how many
21 people? Several thousand?

22 MR. GEAN: I would say hundreds of thousands
23 of people, Your Honor. I would say those people that
24 are associated with the church to which I belong, which
25 has some 12 to 15 million in the United States. Many of

1 them are similar to my situation. I think my church
2 will be affected by your decision in this particular
3 matter and the type of activities to which I am allowed
4 to participate on a volunteer basis without the
5 necessity of being required to take a wage or to have
6 some benefit given to me because of my activities.

7 So I hope I am answering your question,
8 Your Honor, by --

9 QUESTION: I had the impression there were a
10 great many more people directly involved than 300.

11 MR. GEAN: Well, also it swings, Your Honor,
12 around the 300 associates who are pastors and
13 evangelists. Those people who are in training or those
14 people who are actually involved as pastors and
15 evangelists in churches that are affiliated with a
16 foundation across the United States, from New York to
17 Washington, to Miami, to Omaha, to Dallas, to Nashville,
18 to Los Angeles, for the churches of this particular
19 religious organization.

20 And they are manned and staffed by these
21 pastors and evangelists who are involved in training and
22 teaching primarily in Alma, Arkansas where there are
23 some 37 different activities that the Secretary of Labor
24 claims are activities of such a nature that it is
25 demanding upon this Court that they decide that they are

1 so commercial in nature, these activities that are
2 performed by the pastors and evangelists, that they are
3 so commercial in nature that they must come under the
4 Fair Labor Standards Act.

5 I hope I've answered your question,
6 Your Honor. There are many people that will be affected
7 by this decision indirectly. Those that are directly
8 affected are some approximate 300 associates, which are
9 termed pastors and evangelists.

10 QUESTION: Well, are they engaged in the
11 production of goods, or are they engaged in evangelistic
12 missionary type of work?

13 MR. GEAN: Your Honor, their activities are
14 religious. The District Court found that all of their
15 activities were religious, that these activities were
16 religious and they were carried on for religious
17 purposes. That's what the District Court found.

18 And the Circuit Court of Appeals of the Eighth
19 Circuit also found the same thing. Now, I think that
20 there is a difference in their opinion. There are
21 discrepancies in the opinion of both the courts because
22 of the fact that they allege that the activities of
23 these people, these some 300 associates, pastors and
24 evangelists, are solely -- all of their activities are
25 solely for religious purposes. And then they decide

1 that the activities are of such a nature that they are
2 commercial and therefore they should come within the
3 confines of the Fair Labor Standards Act.

4 QUESTION: Mr. Gean, does the Act apply to
5 other employees of churches who are paid salaries?
6 Secretaries or clerical employees?

7 MR. GEAN: I think that's a well-established
8 law, Your Honor, and I think it does, and I think
9 rightfully so. The difference in this particular case
10 is that these people have found that it is --

11 QUESTION: Has the Act been applied to the
12 salaries of ministers, do you know?

13 MR. GEAN: Well, it certainly has been applied
14 to many people who are involved in church-related
15 activities, such as schools, nurseries, where they are
16 paid a wage.

17 QUESTION: How about a minister who's paid a
18 wage to serve his particular --

19 MR. GEAN: Your Honor, I cannot tell you
20 offhand that there is such an application of the Act to
21 ministers.

22 QUESTION: If there were, is it invalid in
23 your view?

24 MR. GEAN: Yes, I think it is.

25 QUESTION: How about the income tax? Would it

1 be invalid to apply a federal income tax to salaries
2 paid ministers in your view?

3 MR. GEAN: Your Honor, if it was a salary, I
4 wouldn't think so, if it is in truth and in fact a
5 salary.

6 QUESTION: Well, does this case come down then
7 to a question of whether the board and room and other
8 benefits is the equivalent of a salary? Is that what we
9 really have to decide here?

10 MR. GEAN: Your Honor, I believe that that
11 would be one of the aspects. And certainly it should be
12 of great importance to the Court, and I see it is
13 because of your questions, and I think it's an excellent
14 question.

15 In my opinion, in the facts in this particular
16 case, the "receiving of benefits" -- and I put those in
17 quotation marks -- whatever they might be, through some
18 37 agencies or activities or, as the Secretary of Labor
19 says, commercial activities, commercial business
20 activities, that these are not received solely for the
21 purpose of their entire support.

22 I think one of the things that the Secretary
23 of labor misses in this particular case --

24 QUESTION: I don't think I understand your
25 point. Do you believe that if board and lodging is

1 received by someone with the expectation and
2 understanding that it's compensation, that the Federal
3 Fair Labor Standards Act may properly apply to them?

4 MR. GEAN: If it's received with the
5 expectation that that is compensation, I think it
6 probably would apply.

7 QUESTION: Even though they were working for a
8 church?

9 MR. GEAN: Yes, unless it is clear that this
10 is part of their religious practices. And I think this
11 Court should go a long ways in protecting religious
12 practices, unless there is some reason -- now, the
13 beliefs -- this Court religious beliefs protects --
14 practices -- there are some limitations in regard to the
15 application of the constitutional restriction, and
16 there's a constitutional restriction in regard to
17 practices, practices that are involving health or safety
18 certainly have been regulated, and the regulation has
19 been approved by this Court.

20 QUESTION: Is that because of the free
21 exercise clause that you make this argument?

22 MR. GEAN: Yes, Your Honor, that's one of the
23 reasons.

24 QUESTION: And then how do you distinguish
25 United States v. Lee, where this Court held that the

1 Amish employers were not entitled to the exemption for
2 the Social Security Act payments, even though it was a
3 direct conflict with their religious practices and
4 beliefs to pay it?

5 MR. GEAN: Your Honor, I am not for certain
6 about that particular case, and I don't recall all of
7 the facts that's in that particular case. I can say
8 that in reference to, I believe, what you're pointing
9 out there, in this particular case the Alamo Foundation
10 does not have to pay Social Security taxes. That's part
11 of the Internal Revenue exemption.

12 And their determination in their exemption,
13 which is a part of the Appendix, sets forth that they do
14 not have to pay Social Security taxes, and it's so set
15 forth in their determination that they are a religious
16 organization, organized under 501(c)(3) of the Internal
17 Revenue Code. They are exempted from the collection and
18 the payment of Social Security taxes by virtue of that
19 determination. It so sets forth in their
20 determination.

21 Now --

22 QUESTION: Mr. Gean, before you go on, the
23 associates operated several businesses. That's agreed,
24 isn't it?

25 MR. GEAN: Well, Your Honor, we call them

1 activities. And I think --

2 QUESTION: Well, they were gasoline stations,
3 clothing stores, grocery stores. They were activities
4 but --

5 MR. GEAN: Cafes or restaurants.

6 QUESTION: Restaurant.

7 MR. GEAN: Yes, sir.

8 QUESTION: Did they compete with other
9 businesses engaged in the same activity?

10 MR. GEAN: Yes, there was some competition,
11 but primarily those organizations, those entities which
12 I call activities and which you might refer to, commonly
13 known as business or commercial activities, they are
14 conducted primarily to provide for the clothing, the
15 housing, the food, the transportation and communication
16 of the members. That's the basic purpose of it.

17 QUESTION: If a member of the public generally
18 walked into the restaurant, would he or she be served?

19 MR. GEAN: Yes.

20 QUESTION: Or in any of the other stores or
21 business I suppose?

22 MR. GEAN: Not any of the others; no, sir.

23 QUESTION: Which would not serve the public?

24 MR. GEAN: Uh -- the --

25 QUESTION: Well, you said some are never in

1 the business of serving the public. I don't want to
2 detain you.

3 MR. GEAN: Yes, sir. The record keeping
4 business.

5 QUESTION: The record keeping business?

6 MR. GEAN: Yes, sir. It's primarily -- and I
7 think that Tony Alamo did testify that there was some
8 assistance in record keeping of other people.

9 QUESTION: Yes.

10 MR. GEAN: So I would say I'll have to change
11 that statement, Your Honor; that there was some activity
12 on the part of that particular Southwest Business
13 Management which was for record keeping, but ordinarily
14 it was for the church members or for these associates.

15 Now, bear in mind there are other church
16 members, other than the 300 associates, Your Honor.

17 QUESTION: Yes.

18 So were these businesses operated entirely by
19 associates or were there other people who were not
20 characterized --

21 MR. GEAN: At first, Your Honor, there was
22 some eight employees that are called outside employees
23 by the District Court.

24 QUESTION: Are they covered by the Act?

25 MR. GEAN: Yes, sir. They were covered by the

1 Act. And they were involved at the beginning of their
2 activities of this nature, but after a short period of
3 time they were no longer involved.

4 QUESTION: Not a single outside non-associate
5 person?

6 MR. GEAN: Other than at the very beginning of
7 their utilizing these activities, primarily for the
8 purpose of providing shelter, food, transportation,
9 clothing, for the associates.

10 QUESTION: Are we to understand that these 300
11 people you described earlier are the people who run all
12 these business enterprises?

13 MR. GEAN: Yes, sir. There is not anyone at
14 the present time, and has not been, and was not when the
15 District Court sat and had its first hearing in April of
16 1982. There was not any at that particular time,
17 persons who are referred to as outside employees.

18 QUESTION: I notice a motel is included. Is
19 the public admitted to the motel?

20 MR. GEAN: The motel, Your Honor, is one in
21 Tippi, Arizona. And that is the only motel operation
22 that was under the auspices of the Alama Foundation. It
23 was open to the public. But, Your Honor, the primary
24 emphasis and the thrust of their activities, all of
25 these activities, was evangelistic.

1 QUESTION: What about the company that lays
2 concrete foundations?

3 MR. GEAN: Your Honor, that particular
4 organization, the Alamo Quarries, the Alamo Ready-Mix
5 which I believe you have reference to, and those other
6 similar type building activities, or as might be
7 referred to as business practices, were conducted for
8 the purpose of providing the housing, the schools, the
9 training places, the churches of the Foundation.

10 QUESTION: And took no outside business?

11 MR. GEAN: I cannot tell you that, Your Honor,
12 that they did not take some. But I --

13 QUESTION: Well, was it in competition with
14 other construction companies?

15 MR. GEAN: Your Honor, if a church member
16 wanted some activity on the part of the Alamo Concrete,
17 I believe that they did some. And the same thing with
18 the roofing company. But other than that, it was very,
19 very limited.

20 QUESTION: I think you answered the Chief
21 Justice that all these businesses -- there seem to be
22 almost a dozen of them -- were carried on by these 300
23 associates?

24 MR. GEAN: Yes, sir. By the time the District
25 Court met and had its first hearing in April of 1982,

1 there were not any what is termed as "outside personnel"
2 involved in the activities.

3 QUESTION: But now, these ventures were over
4 four states, weren't they?

5 MR. GEAN: Your Honor, they are in -- I
6 believe there is four states. There is California,
7 Arizona, Arkansas, and Tennessee.

8 QUESTION: And all of this by 300?

9 MR. GEAN: Sir?

10 QUESTION: All of this work done by just 300
11 associates?

12 MR. GEAN: Yes. Do not get the idea,
13 Your Honor, that these were huge undertakings. Perhaps
14 Mr. Alamo was mistaken in proceeding to itemize his
15 activities. But for bookkeeping and record activities,
16 he did this.

17 QUESTION: Incidentally, what was the
18 advertising that Hartford Advertising provided for those
19 ventures? Advertising for whom? To attract business
20 from other places besides --

21 MR. GEAN: That was one that was done for
22 other persons. I can say that the Alamo Foundation --
23 and I believe it came out in the testimony of Mr. Alamo
24 -- that they were contacted by a commercial group to do
25 some sort of sewing for them, and that was done.

1 QUESTION: Mr. Gean, to what extent were these
2 people paid cash compensation? Did they get some cash
3 compensation?

4 MR. GEAN: No, sir.

5 QUESTION: Well, what about -- I'm just
6 looking at the District Court's finding -- Gerald Rich,
7 the payroll ledger indicates that Mr. Rich was paid \$8
8 an hour for all hours worked and so forth. I just
9 noticed a few of these.

10 MR. GEAN: Your Honor, those were the eight
11 employees that were involved at the beginning of the
12 Foundation's activities that were ceased prior to the
13 time that the District Court heard this matter, and it
14 was agreed that those parties were employees. And for
15 example, the record in bookkeeping activity, Mr. Alamo
16 provided that there was some overtime wage that had to
17 be paid to those people, and it amounts to approximately
18 \$14,000.

19 For example, one of the gentlemen was earning
20 \$600 a week and he worked sometimes more than 40 hours.
21 And the Secretary of Labor came and said look, you're
22 receiving \$600 a week, and at 40 hours you're getting
23 \$15 an hour, but when you work for 42 hours for that
24 particular week, why you're entitled to the overtime
25 pay.

1 QUESTION: Those people aren't involved in
2 this case? Is that it?

3 MR. GEAN: Not at this time, Your Honor. The
4 District Court did find that those particular employees,
5 those outside personnel that were involved in these
6 activities, were entitled to some overtime pay, and I've
7 rounded off -- it comes to approximately \$14,000.

8 QUESTION: Just so I understand, the District
9 Court described 16, I think, different people at 31 to
10 34 of the Appendix for these services. Were they --
11 other than the cash payments -- or 18, rather -- not 16
12 -- would they have been associates had they not gotten
13 some cash?

14 MR. GEAN: No. No, they were not associates
15 of the Foundation in the term that I have been using.

16 QUESTION: I see. How do you define an
17 associate? Just --

18 MR. GEAN: The associate, Your Honor, is a
19 synonym for those persons associated with the Foundation
20 as pastors and evangelists.

21 QUESTION: But what portion of their work was
22 devoted to economic ventures and what portion to
23 religious activities?

24 MR. GEAN: It is their statement. And the
25 District Court so found that their activities were

1 solely of a religious nature.

2 QUESTION: Even running the restaurant is
3 solely of a religious nature?

4 MR. GEAN: Yes, sir. Now, to explain that.
5 They have 300 people that are associates. There are
6 some wives or husbands, as the case may be. These
7 people are basically pentecostal. That is their
8 doctrine -- pentecostal. Have the charismatic approach
9 to the gospel, they believe in the teachings of Jesus,
10 and the commands and directions that were given to the
11 apostles are for this particular day.

12 The healing and sign gifts, they claim, is
13 part of their religious activity. And they believe that
14 that's the instruction. And there are thousands,
15 millions of people across the United States in the
16 pentecostal movements that have exactly the same
17 doctrinal teachings and understandings of the gospel.

18 QUESTION: Mr. Gean, those 18 people who are
19 employees, did any of them subsequently become
20 associates?

21 MR. GEAN: Your Honor, not that I know of.

22 QUESTION: But if they did, then they wouldn't
23 be covered, according to you.

24 MR. GEAN: They wouldn't what?

25 QUESTION: They wouldn't be covered, according

1 to you, if they were associates.

2 MR. GEAN: Your Honor, they were paid a wage.
3 These people were paid a wage, and there is a
4 difference.

5 QUESTION: But if they became associates, they
6 wouldn't be paid wage --

7 MR. GEAN: Well, that would have to be seen.
8 I do not know of any instance, Your Honor, where these
9 people that were receiving a wage ever became an
10 associate. Certainly it's not in the record and I want
11 to be fair with you, Your Honor; I don't recall any and
12 don't know of any, and we've been representing the
13 Foundation now for approximately five years.

14 I don't know of any former paid employee that
15 is now an associate.

16 QUESTION: Who decides whether A, B, and C are
17 employees or associates?

18 MR. GEAN: Well, I think the attitude, the
19 desire, and the belief of the individual has a great
20 deal of control over it. I think that that's the main
21 thrust. And if these people are not paid a wage or
22 derive some compensation in the form of a salary, then I
23 do not believe that they're covered by the Act.

24 If what they say -- and, Your Honor, there
25 were three people that testified as representative of

1 all of these -- this was agreed upon, to be done in this
2 fashion for the purpose of having a concise record and a
3 brief record for the Court or any appellate court to
4 which this case might be taken.

5 These three people testified as
6 representatives. At the pretrial conference before the
7 hearing that was held in April of 1982, it was agreed by
8 the attorney, the general counsel from -- or the trial
9 counsel from Dallas, Texas -- that this would be
10 agreeable with him that these three people who
11 testified -- and there were Bill Levy, Ann Elmore, and
12 Edward Mick -- that these three people would be
13 representatives of all of those that would testify.

14 There were 155 affidavits given by more than
15 half of those people that were associates of the
16 Foundation to the Secretary of Labor's attorney. And
17 the court said now, if you find in these affidavits or
18 in your own investigation that these people are not
19 representative, and you want others to testify, you
20 certainly have that right to do so.

21 There was not any of the others called. These
22 three people that testified, Your Honor, in regard to
23 this very thing about which you're questioning me said
24 that it would be repugnant to them to claim that what
25 they were doing was for a wage. Yes, some of them

1 worked at various times within these various activities,
2 or as the Secretary of Labor calls common business
3 activities.

4 But also these three people, every one of
5 them, testified that they worked outside the
6 Foundation. Every one of them testified to that, or
7 that they had income upon which they could live. Every
8 one of them. Ann Elmore testified that she had outside
9 income coming to her. She testified, when she was asked
10 by the Secretary of Labor, well, suppose that you needed
11 some assistance; what would you do for the benefits that
12 you need to live? And she said, well, we'd go out and
13 get them.

14 Now, the Secretary of Labor interpreted that
15 as meaning that they would go out into the Foundation
16 and in the Foundation's activities and work and get
17 these benefits. She didn't mean that at all. If you
18 would read all of her testimony, what she was saying
19 was, if they did not have the benefit, they would go
20 outside the Foundation and work, which many of them
21 did. Some -- completely all of their time was devoted
22 outside the Foundation, even though they were
23 associates.

24 They worked in none of these related -- as the
25 Internal Revenue declared, these are related activities

1 under the Internal Revenue Agency of the United States.

2 QUESTION: Mr. Gean, does the record show with
3 respect to these 300 people a typical number of hours
4 per week --

5 MR. GEAN: No, sir; it does not.

6 QUESTION: -- that any of them put in on the
7 Foundation activities?

8 MR. GEAN: No, sir; it does not.

9 QUESTION: Mr. Gean, everyone has to have some
10 cash. Where did the associates get the cash that
11 everyone must have for just incidentals -- riding the
12 subway or --

13 MR. GEAN: Well, in Alma, Arkansas, Your Honor
14 -- we have buses.

15 QUESTION: You're not suggesting that the
16 associates never had any cash?

17 MR. GEAN: No, sir. No, they did have cash.

18 QUESTION: Where did it come from?

19 Mr. Graff: It comes from the Foundation and
20 from the other members of the Foundation who work, or
21 the church members who contribute to the pastors and
22 evangelists who go out for the purpose of spreading the
23 gospel.

24 QUESTION: So the church did pay some cash to
25 associates.

1 MR. GEAN: Your Honor, it was not pay.

2 QUESTION: Well, it was given.

3 MR. GEAN: It was for the purpose of paying
4 for their expenses and conducting the religious
5 activities of the Foundation.

6 Your Honor, these people are extremely
7 dedicated to the purpose with which they have aligned
8 themselves and congregated themselves together. It's
9 unbelievable, the dedication that these people have.

10 QUESTION: Does the record show the amount of
11 cash paid to associates?

12 MR. GEAN: No, sir; it does not. But it's
13 very small.

14 QUESTION: May I ask you one question about
15 the remedy? What will happen if you lose? Do these
16 people have to take the money?

17 MR. GEAN: Your Honor, if this Court decides
18 that these people, these associates, must be paid the
19 sum of \$19 million which the Secretary of Labor says is
20 due --

21 QUESTION: I didn't read the decree to require
22 that. Does it require payment?

23 MR. GEAN: No, sir; the decree does not
24 require that.

25 QUESTION: It requires they give notice to

1 them of the amount that they would have a right to
2 claim.

3 MR. GEAN: Yes, sir. But the Secretary of
4 Labor --

5 QUESTION: If your description of them is
6 correct, I would assume none of them would really claim
7 the money.

8 MR. GEAN: I believe that's true. Now, why
9 require it? Why have an exercise in futility? Why make
10 these people take the money and then give it back to the
11 Foundation, when at the very beginning -- and we have
12 three cases that we have been arguing to the District
13 Court and to the Circuit Court of Appeals that addresses
14 this very question, and the District Court and the
15 Circuit Court of Appeals never commented on those three
16 cases. That's the Turner v. Unification, Rogers v.
17 Schenkel, and this Court's decision in Rawlings v.
18 Portland Terminal, where these people worked in business
19 activities, agreed-upon were common business activities
20 and were common businesses, and these people did not
21 want a wage, they did not expect a wage, they so stated,
22 and this Court in Rawlings v. Portland Terminal, said
23 that they didn't have to receive it and they were not
24 covered by the Act.

25 The same thing is true in the First Circuit in

1 regard to the Turner v. Unification Church, which is
2 almost identical to this particular case. Very little
3 difference.

4 Now, the Secretary of Labor is trying to point
5 out that difference, but I would like to reserve that on
6 rebuttal, if I may.

7 CHIEF JUSTICE BURGER: Very well.

8 Mr. Fried.

9 ORAL ARGUMENT OF CHARLES FRIED, ESQ.

10 ON BEHALF OF THE RESPONDENT

11 MR. FRIED: Mr. Chief Justice and may it
12 please the Court, first if I may, just to clear up a
13 number of questions that were raised, the Congress quite
14 specifically stated -- and I referred in note 10 of our
15 brief -- that wages includes the cost of board, food,
16 lodging, and similar benefits.

17 Moreover, a number of the associates testified
18 that they received allowances, cash allowances of \$5 and
19 \$10 a week, and one of the former associates testified
20 that there would be penalties assessed against those
21 payments for failure to report to work and other alleged
22 violations of the regulations of the organization.

23 In respect to Justice O'Connor's question,
24 ministers are professionals and therefore not within the
25 scope of the Fair Labor Standards Act.

1 And as to the testimony, there was --

2 QUESTION: Well, if the associates are, as
3 alleged, professionals, why are they not within the
4 scope of the exemption? That's the allegation.

5 MR. FRIED: They may be professional
6 ministers. The question would be in their activities in
7 the gas stations, in the restaurants and so on, are they
8 working as professional ministers? And it is our
9 contention, of course, that they are not.

10 As to the testimony, I must point out that in
11 addition to the three representative present associates,
12 there was testimony from a number of former associates,
13 which is also in the record and which we have
14 summarized, which of course is in many respects
15 contradictory to the testimony of the present
16 associates.

17 In 1961, the Congress amended the Fair Labor
18 Standards Act for the stated purpose of extending wages
19 and hours protection to persons working in the ordinary
20 commercial enterprises of churches and other charities.

21 Now, this was accomplished by applying the Act
22 to an enterprise engaged in commerce, and then defining
23 an enterprise as "related activities performed for a
24 common business purpose."

25 The court below found as a fact that the

1 petitioner operated a number of ordinary businesses
2 serving the public in competition with other
3 businesses. And it should be quite clear -- and I refer
4 now to pages 9 and 10 and 38 and 39 of the Appendix to
5 the Petitioner for Certiorari -- that the District Court
6 limited the application of the Fair Labor Standards Act
7 only to those associates who were working in these
8 commercial businesses and only insofar as they were
9 working in those commercial businesses.

10 Now, it's important that we distinguish --

11 QUESTION: Mr. Fried, do you know what the
12 situation is with respect to the commercial businesses
13 operated by the Mormon Church in Salt Lake City?

14 MR. FRIED: I do not. I do not. I'm unable
15 to enlighten Your Honor on that.

16 QUESTION: How about, Mr. Fried, the monks who
17 run the Christian Brothers winery, an order of monks --

18 MR. FRIED: Well, that's a complicated matter
19 which I would be glad to --

20 QUESTION: And how about the Trappists? Are
21 they --

22 MR. FRIED: Who make jams and jellies.

23 QUESTION: Make jams and jellies.

24 MR. FRIED: The Internal Revenue Service has
25 taken the position that those activities constitute

1 unrelated business activities. They are in fact in the
2 Tax Court at this very moment in --

3 QUESTION: Which one? The monks or the --

4 MR. FRIED: The monks, monks who are engaged
5 in extensive farming enterprises. And in the Tax Court,
6 the Internal Revenue Service is taking the position that
7 those services are not contributed services because the
8 monks receive room and board.

9 I think that's an important point to know,
10 since the --

11 QUESTION: May I ask you also -- I should know
12 the answer to this, but I don't -- Roman Catholic
13 sisters who are nursing nuns, are they exempt because
14 they are professionals or are they taxable?

15 MR. FRIED: In 1968, the Act was extended
16 further to cover specifically schools and hospitals.
17 And Congress did in the debate indicate an assumption
18 that nuns would not be covered when they worked in the
19 ministry of healing the sick, but that must be on the
20 assumption that they were in fact operating as nurses,
21 and nurses are, of course, professionals.

22 QUESTION: Well, here, what about income tax
23 in this case?

24 MR. FRIED: Do you mean income tax of the
25 business, Your Honor, or income tax of the associates?

1 QUESTION: Either. Or both, I would like to
2 know.

3 MR. FRIED: The Petitioners state, and for the
4 first time in their reply brief cite Section 512,
5 stating that this was determined to be unrelated
6 business income. There is nothing in the record to
7 support that conclusion, and indeed the letter which
8 Petitioners cite in their Appendix says specifically --
9 and I refer to page 14 of that Appendix: "In this
10 letter we are not determining whether any of your
11 present or proposed activities are unrelated trade or
12 business as defined in Section 513."

13 Now, we were quite disturbed to find this
14 reference to the Act in the reply brief for the first
15 time, and were told by the Internal Revenue Service
16 first that they are unable to give us any information
17 regarding the specific tax status of the Petitioners,
18 unless the Petitioners were willing to waive their
19 protections under the Privacy Act; and second, that the
20 Service has regularly taken the position on facts
21 similar to these -- and I have the citation for
22 Your Honor if you wish them -- that such facts would
23 constitute the businesses -- unrelated business income
24 and the services would not be considered contributed
25 services, since they were rendered in return for board

1 and lodging.

2 QUESTION: Mr. Fried, I didn't understand your
3 response to Justice Blackmun's question about the nuns.
4 Are they or are they not covered by the Fair Labor
5 Standards Act in rendering services in hospitals?

6 MR. FRIED: As professionals, they surely are
7 not.

8 QUESTION: You mean no nurse is subject to the
9 Fair Labor Standards Act?

10 MR. FRIED: No, Your Honor. They are subject,
11 however, to National Labor Relations Act.

12 QUESTION: You mean any -- no hospital paying
13 a nurse need to observe the minimum wage laws?

14 MR. FRIED: Because nurses are professionals,
15 Your Honor.

16 QUESTION: Just as a class, they are exempt?

17 MR. FRIED: Yes, Your Honor.

18 QUESTION: Does that extend not only to
19 registered nurse, but licensed practical nurses and some
20 of the subcategories?

21 MR. FRIED: I would have to conjecture. I
22 could not give you a firm assurance on that.

23 QUESTION: Orderlies?

24 MR. FRIED: Orderlies surely are not
25 professionals. That's pushing the point further than I

1 would wish to push it.

2 QUESTION: How about employees of Salvation
3 Army thrift stores that are undergoing rehabilitation
4 and who receive room and board?

5 MR. FRIED: I think the question of
6 rehabilitative services is a difficult one, and the
7 Portland Terminal case is very important in this regard
8 because if the employees are working for their own
9 benefits -- and the Portland Terminal case spoke, if I
10 may quote from that case, accepting the unchallenged
11 findings here that the railroads -- which was the
12 putative employer -- received no "immediate advantage
13 from any work done by the trainees, we hold that they
14 are not employees within the meaning of the Act."

15 Now, in the thrift store example, there is of
16 course the receipt of an immediate advantage, and so the
17 question of coverage would be posed in a way it surely
18 was not posed in the Portland Terminal case and is not
19 posed by candy stripers working in a hospital gift shop
20 or museum gift shop.

21 QUESTION: Well, in this case, in your view,
22 does it turn on whether the associates had the
23 expectation of compensation in the form of room and
24 board? Is that the crux of the case for our purposes?

25 MR. FRIED: I believe so, Your Honor. The

1 District Court found as a fact -- and there was
2 substantial testimony to the effect that they -- and I
3 am now quoting from the District Court -- "contemplated
4 that they would be fed, clothed, sheltered, as a result"
5 -- and I would like to emphasize those words.

6 QUESTION: What testimony supports that in
7 your view? The word "substantial" troubles me because I
8 didn't see much that I thought was supportive of that
9 finding.

10 MR. FRIED: Well, there is considerable
11 testimony from the former associates and of particular
12 importance is Ann Elmore who's a present associate,
13 chosen by Petitioners as a representative associate, who
14 said, and I quote: "If you want to eat, you've got to
15 work." That's on page 76 of the Joint Appendix.

16 And on page 78 of the Joint Appendix Ann
17 Elmore, who is a chosen representative by the
18 Petitioners, says: "And, of course, you do expect the
19 benefits?" Question.

20 Answer: "Well, the benefits are just a matter
21 of -- of course, we went out and we worked for them."

22 Now, the former associates are a good bit
23 clearer on this point. For instance, I believe that it
24 is Judy Shapiro who says on page 218 that when she was
25 ill or when she was prevented from working because of

1 inclement weather, and she sent to the restaurant for
2 food, she was admonished that that food she should have
3 procured out of her own funds because while she was not
4 working, she was not entitled to get these in kind
5 benefits.

6 So there was ample testimony in the record to
7 substantiate the court's finding that they contemplated
8 that they would be fed, clothed, and sheltered as a
9 result of their work at the Foundation's commercial
10 businesses, quid pro quo.

11 QUESTION: So in your view, then, the monks
12 making wine or jams and jellies would be equally subject
13 to federal Fair Labor Standards Act.

14 MR. FRIED: To the extent -- to the extent
15 that they are not professionals, administrators, or
16 managers, they would indeed. That is correct.

17 And of course --

18 QUESTION: What makes one a professional?

19 MR. FRIED: The exercise of a recognized
20 profession.

21 QUESTION: Like making jelly?

22 MR. FRIED: I would not, myself, extend it to
23 that extent, but I'm not --

24 QUESTION: Or like operating a retail store?

25 MR. FRIED: Operating a retail store would

1 surely not be a case of being a professional, but it
2 might render a person a manager.

3 QUESTION: Well, somebody who -- one of these
4 people were -- that's what they working in, a retail
5 store.

6 MR. FRIED: Well, if they were sales persons,
7 then they would clearly be covered. If they were
8 managers of the store, the managers, bona fide managers,
9 are excluded by the terms of the statute.

10 We also have waitresses, persons who work
11 pumping gas, people working on labor crews for
12 construction companies, women sewing clothing in
13 clothing factories who could not be viewed as managers
14 or professionals in any sense.

15 Now, petitioners do urge that the associates
16 -- and we do not question -- work out of a sense of
17 devotion, and that they would have volunteered their
18 efforts even if they hadn't received these benefits.
19 And again, we don't question that because that's not
20 truly relevant. I suppose there are many people, many
21 people in this courtroom today, who do work which they
22 consider valuable enough and interesting enough that
23 they would, if they could afford it, carry it on even if
24 not compensated. But that hardly constitutes any of us
25 not employees for that reason.

1 QUESTION: Well, Mr. Fried, how about
2 youngsters, young people who go to summer camps for the
3 handicapped in the summer, and they expect to get room
4 and board for volunteering their services at the camps
5 to help handicapped children?

6 I guess they're subject to the Act under your
7 view?

8 MR. FRIED: There are specific exemptions for
9 summer recreational works.

10 QUESTION: In the Act, or in your --

11 MR. FRIED: In the Act. In the Act. And
12 specific exemptions subject to the discretion of the
13 Secretary to make regulations for young people's work as
14 well. So those particular cases would be taken care of
15 under the Act.

16 QUESTION: And what section do we look to for
17 that?

18 MR. FRIED: That I believe is Section 213. I
19 believe it's Section 213, Your Honor.

20 QUESTION: And that's in the Appendix
21 someplace, is it, or not? Don't take time from your
22 argument.

23 MR. FRIED: I believe so, Your Honor.

24 QUESTION: Mr. Fried, the YMCA runs boys'
25 camps all over the United States. The key people who

1 are the permanent professional staff, of course, are
2 paid salaries. And my question doesn't address that.

3 They have volunteers who are sometimes school
4 teachers, sometimes lawyers or whatever, who will take
5 two weeks or a month and act as group leaders.

6 It's not without -- it isn't a religious
7 activity, but it's not without its religious
8 connotations. How would you classify this group leader
9 who is a volunteer who comes in for two or four weeks in
10 charge of eight, ten, or twelve boys?

11 MR. FRIED: I think that's a very difficult --

12 QUESTION: He doesn't get paid, by the way. I
13 should have -- he doesn't get paid, but he gets his room
14 and his board.

15 MR. FRIED: It's a difficult question, and
16 what distinguishes it and distinguishes it most
17 importantly from the case we have here is that group
18 leader, first, does not work in a commercial enterprise
19 in competition with other commercial enterprises which
20 are forced to pay the minimum wage, and it is one of the
21 specific purposes of the Fair Labor Standards Act to --
22 and I quote here: "prevent an unfair method of
23 competition."

24 The second distinction is the finding of the
25 District Court here that many of these associates -- and

1 I quote again from the record -- "were wholly dependent
2 on the Foundation for long periods of time."

3 Both of these factors would distinguish the
4 case you mentioned, Your Honor, from the case before us
5 today.

6 QUESTION: Mr. Fried, do you agree with Mr.
7 Gean that the record simply doesn't speak as to what the
8 typical number of hours per week put in in Foundation
9 activities was by these 300 people?

10 MR. FRIED: The record certainly does speak.
11 There is certain testimony, principally testimony
12 adduced by the Secretary of Labor from former employees,
13 from former associates, which speaks at some length
14 about those hours and speaks in terms of very, very long
15 working days indeed, 12 and 14-hour working days, six
16 and seven days a week.

17 But the actual calculation of those hours is a
18 matter for the District Court on remand and does not
19 concern us.

20 QUESTION: You don't think it makes any
21 difference to the legal outcome of this case whether the
22 typical member of the 300 put in four or five hours a
23 week and had a full-time outside job as opposed to being
24 employed only by the Foundation?

25 MR. FRIED: It would in at the extremes,

1 Your Honor, but I think it's very important to recognize
2 in this case that though Petitioners repeat that their
3 businesses did not run at a profit -- and they say this
4 again and again, even though that statement is
5 unsubstantiated by anything but Mr. Alamo's testimony --
6 they also say that the extensive non-commercial
7 missionary work of the Foundation had as a principal
8 source of support these commercial businesses.

9 Now, I think those two statements are simply
10 contradictory. And businesses which are able to support
11 such extensive missionary activities could hardly be
12 carried on on a merely casual basis.

13 Furthermore, there is testimony from Ann
14 Wiley, for instance, to the effect that persons were
15 assigned to their work in the businesses. To be sure,
16 Mr. Levy who testified for the Association, testified t
17 the contrary; that he did work in the restaurant when
18 the spirit moved him. But the contradictory testimony
19 is that that work was done pursuant to rather careful
20 scheduling under the direct supervision of Mr. Alamo.

21 What we contend and what this Court has
22 consistently held under the Fair Labor Standards Act and
23 the analogous provisions of the Social Security Act and
24 the National Labor Relations Act, that who is an
25 employee does not depend on self-designation. In fact,

1 the whole history of these acts is a history of various
2 arrangements sought to be designated cooperative, sought
3 to be designated independent contractors, and this Court
4 has consistently said that what controls is the economic
5 reality.

6 And here the court found as a fact that the
7 economic reality was one of a quid pro quo; that the
8 persons received shelter and housing -- and I quote
9 again -- "as a result of their work." That finding was
10 confirmed by the Court of Appeals and, with respect, I
11 don't believe is a matter for review in this Court.

12 QUESTION: Wait. Does that \$19 million figure
13 reflect the Secretary's computation of the number of
14 hours put in by these 300 that were not compensated as
15 required by the Act?

16 MR. FRIED: That is a computation which is
17 still in dispute and is not final. Indeed, there is a
18 proceeding --

19 QUESTION: Is it in the record here?

20 MR. FRIED: That statement is in the record
21 and is based on a computation by the Secretary which the
22 Court of Appeals has directed the District Court to
23 recompute and not to take as binding in any sense.

24 So that matter is still very open.

25 QUESTION: Mr. Fried, can I ask you -- do you

1 think the Portland Terminal case would have been decided
2 differently if the trainees were given room and board
3 during the week of training?

4 MR. FRIED: I think that would not lead to a
5 different outcome necessarily, because of the language
6 which I have already quoted, "accepting the unchallenged
7 findings" -- I am quoting from the case here -- that the
8 railroads receive no immediate advantage from any work
9 done by the trainees."

10 In this case, it can hardly be said that the
11 Foundation received no immediate benefit from the work
12 done by the associates of these businesses.

13 QUESTION: But the benefit, if you accept your
14 opponent's view of the case, the benefit was entirely a
15 benefit to this religious mission that they carried out;
16 was it not? I mean in the long run, because he
17 testified -- and I understand you did not contradict his
18 testimony -- that the net result of all this was not any
19 profit, but whatever they earned they poured into their
20 religious mission.

21 MR. FRIED: We would vigorously contest the
22 conclusion that there was no profit here. To be sure,
23 to be sure that the revenues, the profits from these
24 businesses went to no place else than the Foundation,
25 but that is not a test for profit. Indeed, we fail to

1 understand simply as a matter of accounting logic, how
2 the Foundation could have been supported out of the
3 revenues from these businesses if they did not produce a
4 profit.

5 QUESTION: Well, didn't he testify the whole
6 enterprise was not profitable?

7 MR. FRIED: He so testified, but he also
8 testified --

9 QUESTION: And you didn't contradict that with
10 any evidence, even though his records are available to
11 you.

12 MR. FRIED: Your Honor --

13 QUESTION: As I understand the record. So it
14 would only have to accept that testimony.

15 MR. FRIED: The testimony I believe
16 contradicts itself because if what happens is the
17 non-commercial enterprises -- and they were extensive --
18 supported in part from the revenues of the businesses,
19 then it must follow that the businesses produce
20 revenues, produce revenues in excess of their expenses,
21 because otherwise I fail to understand how they could
22 have served to support the non-commercial enterprises
23 which were, as we said, extensive.

24 QUESTION: Do you dispute the position that
25 these associates were engaged in their own

1 rehabilitation?

2 MR. FRIED: We don't dispute that. We
3 consider it irrelevant. There are many reasons why
4 people work. And I hope that the getting of a wage is
5 not the only reason. But that they were working only
6 for rehabilitation is what we would dispute in the face
7 of the District Court's finding.

8 Moreover, rehabilitation does suggest
9 rehabilitation for something else, and these associates
10 worked many years within the Foundation. It's not as if
11 they were rehabilitated and then went on for work
12 elsewhere in the economy, as was the case --

13 QUESTION: You think that supports your
14 position?

15 MR. FRIED: I beg your pardon?

16 QUESTION: You think that fact supports your
17 position, rather than the other side, I take it.

18 MR. FRIED: I think it's a factor that helps,
19 Your Honor.

20 QUESTION: And your position also doesn't
21 really depend on whether these businesses made a
22 profit. Even if they didn't, you would be taking the
23 same --

24 MR. FRIED: If they didn't make a profit,
25 which we think is inconsistent with the Petitioner's own

1 claims, it would be irrelevant, because we don't know
2 why they didn't make a profit.

3 QUESTION: Yes. Well, anyway, your position
4 would be the same.

5 MR. FRIED: It would indeed. They may not
6 have made a profit because of poor management or because
7 some or all of the persons were receiving excessive
8 compensation. No way of knowing that, Your Honor.

9 QUESTION: And do you think your position as
10 you've expressed it here and in your brief defends the
11 rationale of the Court of Appeals in all respect?

12 MR. FRIED: We have no substantial quarrel
13 with the rationale in the Court of Appeals, Your Honor.
14 I can think of no point where we would differ with the
15 Court of Appeals.

16 I would like to pass, if I may, to the
17 Petitioner's claim that the application to the
18 associates of the Fair Labor Standards Act violates the
19 religion clauses.

20 It's rather difficult in respect to the
21 associates to understand precisely what the burden upon
22 them is. They claim at one point that it would prevent
23 them from being free to contribute their labor, but of
24 course that's not so. They are free to contribute to
25 their labor; what they are not free to do is to exchange

1 their labor for material benefits at less than the
2 minimum wage; nor, it should be said, is there anything
3 akin to a vow of poverty. Indeed, a number of the
4 associates testified that they were rather proud of the
5 prosperity of the Foundation and of the prosperity in
6 which they shared.

7 I refer to the testimony of Mr. Mick who
8 spoke at some length about the three bedroom house and
9 washer and dryer that he enjoyed. This was not a
10 monastic arrangement.

11 So perhaps what we have here is some kind of
12 an entanglement argument, but in either event, this is a
13 case where this Court's rationale in United States v.
14 Lee applies and applies with considerable force. Here
15 we have a compelling state interest to protect against
16 substandard wages and to protect against "an unfair
17 method of competition" and a purpose which could
18 scarcely be pursued without the comprehensiveness of the
19 statute, more so than in Lee, because it is not merely
20 an administrative or actuarial comprehensiveness that's
21 necessary. What is necessary is to protect third
22 parties, competing businesses, from the effect of
23 substandard wages paid by a competitor.

24 So it's hard to see how in the holdings of
25 this Court, from the Jacobson case through United States

1 v. Lee, we would not see a compelling state purpose in
2 this case which could not readily be served other than
3 by applying the Fair Labor Standards Act to the
4 Foundation and the associates.

5 I thank the Court for its attention.

6 CHIEF JUSTICE BURGER: Do you have anything
7 further, Mr. Gean? You have only one minute remaining.

8 MR. GEAN: Yes, Your Honor.

9 ORAL ARGUMENT OF ROY R. GEAN, JR., ESQ.

10 ON BEHALF OF THE PETITIONERS - REBUTTAL

11 MR. GEAN: Your Honor, in my concluding
12 remarks in this last minute, I would like to point out
13 to the Court that this is a far-reaching matter that has
14 been presented to this particular Court.

15 The question is whether or not the state does
16 have a compelling interest to govern these activities
17 and to say these activities on the part of these pastors
18 and evangelists are such that they should be covered by
19 the Fair Labor Standards Act.

20 It is our position that if these activities
21 are covered by the Fair Labor Standards Act and the
22 position that everybody knows, that these people are
23 going to take the money that they receive from the
24 Foundation and give it back to the Foundation, what is
25 the state's compelling interest to govern and to rule

1 under the Fair Labor Standards Act as to the activities,
2 the benefits, the wages, the salaries that they may
3 receive?

4 In Walling --

5 CHIEF JUSTICE BURGER: Your time has expired,
6 Mr. Gean.

7 MR. GEAN: Thank you, Your Honor.

8 CHIEF JUSTICE BURGER: Thank you, counsel.
9 The case is submitted.

10 We'll hear arguments next in Massachusetts
11 Correctional Institution v. Hill.

12 (Whereupon, at 11:01 o'clock a.m., the case in
13 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1935 - TONY AND SUSAN ALAMO FOUNDATION, ET AL., Petitioners V.
SECRETARY OF LABOR

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

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