No. 09-35003

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESUS ALCAZAR,

Plaintiff,

and

CESAR ROSAS,

Plaintiff-Appellant,

v.

THE CORPORATION OF THE CATHOLIC ARCHBISHOP OF SEATTLE; HORATIO YANEZ,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Washington,
Case No. 2:06-cv-00281-RSM

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus* states that it does not have a parent corporation, nor does it issue any stock.

s/ Eric C. Rassbach

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INTEREST OF THE *AMICUS*

Pursuant to Federal Rule of Appellate Procedure 29, The Becket Fund for Religious Liberty respectfully submits this brief *amicus curiae* in support of Appellants and affirmance. The parties on appeal have consented to the filing of this brief.

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions, and the equal participation of religious people and institutions in public life and public benefits. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund has participated in a number of lawsuits supporting the free exercise rights of religious groups to make employment decisions free from undue government interference.[1] Most recently, the Becket Fund was retained to file a petition for a writ of certiorari from the Court of Appeals for the Sixth Circuit in a case with facts analogous to those at issue here. In *Hosanna-Tabor Evangelical Lutheran Church and School* v. *EEOC*, the Becket Fund represents a Lutheran school against a minister and teacher who filed a discrimination suit in contradiction to the school's Christian dispute resolution policy. 597 F.3d 769 (6th Cir. 2010).

[1] *E.g.*, *Curay-Cramer* v. *Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130 (3d Cir. 2006) (Becket Fund represented defendant); *Petruska* v. *Gannon Univ.,* 462 F.3d 294 (3d Cir. 2006) (Becket Fund advised counsel for defendant).

Amicus submits this brief to provide the Court with a perspective based on this experience. In particular, *Amicus* believes that the Panel in this case came down on the right side of the acknowledged and deepening Circuit split over the test for ministers. A ministerial exception test that attempts to cordon off the sacred from everyday life ignores the fact that the most mundane activities can be occasions for religious experience and religious service. Rather than ask what activities a particular employee does during different parts of the day, courts should instead ask who the employee is, and in what role she has been called to serve.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Panel was right to adopt the "functional" approach to the ministerial exception rather than the "primary duties" approach. The functional approach rightly looks to the role and identity of the employee as the touchstone for deciding whether she is a minister. The functional approach also recognizes that the sacred or transcendent cannot be walled off from everyday existence.

The Panel was also right to reject the judges-with-stopwatches approach required by the primary duties test. Not only is this approach limited in the evidence it considers and difficult to apply, it also needlessly entangles courts in religious questions they are ill-equipped to answer.

ARGUMENT

I. The Panel was right to use the "functional" approach

Circuit courts generally agree that the ministerial exception applies to employees who are "important to the spiritual and pastoral mission of the church." *Rayburn* v. *Gen. Conference of Seventh-day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985). The question is how to determine which employees fit that role. There are two main competing standards: the "primary duties" test and the less rigid, more inclusive "functional" approach, which the Panel describes as: "if a person (1) is employed by a religious institution, (2) was chosen for the position based 'largely on religious criteria,' and (3) performs some religious duties and responsibilities, that person is a 'minister' for purposes of the ministerial exception." *Alcazar* v. *Corp. of the Catholic Archbishop of Seattle*, 598 F.3d 668, 676 (9th Cir. March 16, 2010) (citing *Starkman* v. *Evans*, 198 F.3d 173, 176 (5th Cir. 1999)).

The functional approach is more sensible because, unlike the primary duties test (1) it takes into account all of the factors that are relevant to determine ministerial status instead of limiting the analysis to the nature and predominance of certain activities; and (2) it does a better job of keeping courts out of the sort of religious decision making they are singularly ill-equipped to handle.

A. The "functional" approach takes more of the evidence about an employee's role into account

The Panel rightly held that while "ministers" perform religious functions, placing undue focus on how much time ministers spend on religious versus secular duties cannot account for the full complexity of their religious role. *Alcazar*, 598 F.3d at 675. Even duties that do not seem "religious," such as "volunteering in urban areas" or "clean[ing] sinks," may take on religious significance depending on the relationship between the employee and the religious group. *Id.* at 675-76. This nuance is best addressed by an approach that considers all of the evidence, which includes not only job duties but "objective employment indicators" as well. *Coulee Catholic Sch.* v. *Labor and Indus. Review Comm'n*, 768 N.W.2d 868, 883 (Wis. 2009). Such indicators include "hiring criteria, the job application, the employment contract, . . . performance evaluations, and the understanding or characterization of a position by the organization." *Id*. All of these factors go to the identity of the employee and the role she inhabits within the religious organization.

Other Courts of Appeals have routinely considered evidence beyond mere stated job duties. In *Alicea-Hernandez* v. *Catholic Bishop of Chicago*, for example, the Seventh Circuit looked beyond the secular duties of a press secretary and instead recognized that her role "as a liaison between the Church and the community to whom it directed its message . . . was integral in shaping the message that the

Church presented to the . . . community." 320 F.3d 698, 704 (7th Cir. 2003). The Fifth Circuit has also recognized the importance of deferring to the religious organization's job criteria as a strong indicator that the employee's role is that of a minister. *Starkman*, 198 F.3d at 176. In *Starkman*, the court considered religious course work required for the position of music director in its determination that the ministerial exception applied. *Id. See also Skrzypczak* v. *Roman Catholic Diocese of Tulsa*, 611 F.3d 1238, 1243-44 (10th Cir. 2010) (considering the spiritual nature of organization's mission and the appellant's religious goals in carrying out her work); *Scharon* v. *St. Luke's Episcopal Presbyterian Hosps.*, 929 F.2d 360, 362 (8th Cir. 1991) (considering requirement of religious training and supervision by an ordained priest); *Pardue* v. *Ctr. City Consortium Sch. of Archdiocese of Washington, Inc*., 875 A.2d 669, 677 (D.C. 2005) (Catholic school principal "was answerable to the religious authorities for providing, in myriad ways not reducible to a listing of tasks, 'spiritual leadership in and for the school community'").

The functional approach also reflects the underlying reality of a minister's position within a religious community. Since religious experience can be part of almost any human activity, ministers can serve their communities through almost any human activity. To be sure, some ministers may be ministers of the altar, or ministers of the word, but there are other kinds of ministers too. Some minister to the poor, the hungry, or the homeless. And some minister to the sick. Thus, although some

religious traditions may limit a particular ministerial role to carrying out solely ceremonial functions, many if not most of the varieties of religious practice are not so limited. The functional approach allows courts to take this reality into account.

B. The "functional" approach disentangles courts from religious questions

As the Panel notes, the functional approach relieves courts of the difficult burden of classifying every duty as "secular" or "religious." *Alcazar*, 598 F.3d at 675. It also precludes the factual determination of whether religious duties are primary or secondary to the employee's role, and respects the fact that non-ceremonial duties are often important to a ministry. *Id.* This approach recognizes that the "very process of inquiry" can embroil the courts in religious questions, thus impinging on the free exercise rights of the religious employers that the ministerial exception is designed to protect. *Id.* at 673 (quoting *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979)). The functional approach protects these rights because it limits intrusive judicial or administrative inquiries into religious questions.

Moreover, by not having to engage in these inquiries, courts can determine earlier on in proceedings whether a given employee is a "minister" or not. *Id.* at 676. The simpler, less intrusive nature of the functional approach also minimizes the likelihood of appeals as religious organizations will likely disagree with court determinations of religious questions. *See, e.g.*, *EEOC* v. *Hosanna-Tabor Evangelical Lutheran Church and Sch.*, 597 F.3d 769 (6th Cir. 2010) (holding, over Lu-

theran school's objection, that ordained teacher who taught daily religion class, led students in prayer and devotionals, occasionally led school-wide chapel service, and was hired and fired on decision of church congregation was not ministerial employee), *reh'g denied*, June 24, 2010, *petition for cert. due* Oct. 22, 2010.

II. The Panel was right to reject the "primary duties" test

The Panel was hardly alone in rejecting the "primary duties" test. Four other Courts of Appeals have criticized the test or otherwise looked beyond primary duties.[2] And rightly so. The primary duties test suffers from two critical flaws: (1) By overemphasizing job duties, it gives inadequate attention to additional evidence of an employee's religious role; and (2) it entangles courts in religious questions by inviting them to second-guess religious authorities on which duties are "secular" or "religious."

A. The "primary duties" test downplays vital evidence

The primary duties test focuses on *one* category of relevant evidence: the employee's duties. However, as discussed above, an employee's duties are not the *only* evidence of religious significance. In rejecting the primary duties test, the Panel rightly holds that "the underlying premise of the primary duties test—that a

[2] *Skrzypczak* v. *Roman Catholic Diocese of Tulsa*, 611 F.3d 1238 (10th Cir. 2010); *Schleicher* v. *Salvation Army*, 518 F.3d 472 (7th Cir. 2008); *Rweyemamu* v. *Cote*, 520 F.3d 198 (2d Cir. 2008); *Starkman* v. *Evans*, 198 F.3d 173 (5th Cir. 1999). *See also Elvig* v. *Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (adopting the functional test rather than a test based on ordination or duties).

minister must 'primarily' perform religious duties—is suspect." *Alcazar*, 598 F.3d at 675. As the Panel notes, such an inquiry "would require the district court to examine the number of hours Rosas spent on maintenance and the number of hours he performed religious duties." *Id.* It also requires that duties be classified as either religious or secular—a question courts are ill-equipped to answer. As such, the primary duties test involves the courts in an intricate mathematical calculation intrusive of religious autonomy instead of allowing the courts to rely on the decisions of religious organizations to determine who is a "minister."

Other Courts of Appeals have rejected the primary duties inquiry. *Rweyemamu*, 520 F.3d 198 (Second Circuit); *Starkman*, 198 F.3d 173 (Fifth Circuit); *Schleicher*, 518 F.3d 472 (Seventh Circuit); *Skrzypczak*, 611 F.3d 1238 (Tenth Circuit). In their view, the primary duties approach is absurd and much "too rigid," as it "fails to consider the nature of the [employment] dispute" and the "employee's relationship to his employer." *Rweyemamu*, 520 F.3d at 208 ("The more 'pervasively religious' the relationship between an employee and his employer, the more salient the free exercise concern becomes.") As discussed above, a more accurate understanding of the employee's role can be determined by looking beyond job duties to the hiring criteria, the employment contract, disciplinary rules, performance evaluations, and the employee's place within the religious hierarchy. *See Coulee*, 768 N.W.2d at 882-83. The Panel accounts for precisely these sorts of factors when it

notes that "Rosas was participating in a 'training/pastoral ministry program' at a religious institution . . . Rosas's position was largely based on religious criteria—it was a ministerial placement open only to seminarians . . . [and] he performed *some* religious duties by assisting in Mass." *Alcazar*, 598 F.3d at 676 (emphasis added)

B. The "primary duties" test entangles courts in religious questions

The second problem with the primary duties test is that it invites courts to second-guess religious authorities on religious questions. Many religious groups view mundane duties as laden with religious significance. But in order to apply the primary duties test, a court must necessarily make its own free-standing judgments about which duties are "secular" and which are "religious." And inevitably those judgments will sometimes differ from those of the religious organization.

The Supreme Court has warned against just this type of second-guessing:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict ***which of its activities a secular court will consider religious***. The line is hardly a bright one, and ***an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission.***

Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 336 (1987) (emphasis added). Several courts have rejected the primary duties test based on this concern. *See supra* Section II.A; *cf. Spencer* v. *World Vision*, *Inc.*, — F.3d —, 2010 WL 3293706, at *19 (9th Cir. Aug. 23, 2010)

(Kleinfeld, J., concurring) ("When the Pope washes feet on the Thursday before Easter, that is not secular hygiene, and the Pope is not a pedicurist.").

The Panel "rejects the arbitrary 51% requirement implicit in the 'primary duties' test," noting that such a requirement "could create the very government entanglement into the church-minister relationship that the ministerial exception seeks to prevent." *Alcazar*, 598 F.3d at 676, 675. Instead, the Panel asks simply whether "some" duties were religious. *Id*. at 676. Similarly, in *Schleicher*, the Seventh Circuit held that the "administrators" of a Salvation Army rehabilitation center were ministers. Although they spent much of their time supervising Salvation Army thrift shops, the court rejected an invitation to second-guess the religious significance of that work:

> [S]alvation through work is a religious tenet of the Salvation Army. The sale of the goods in the thrift shop is a commercial activity, on which the customers pay sales tax. But the selling has a spiritual dimension, and so, likewise, has the supervision of the thrift shops by ministers.

518 F.3d at 477 (Posner, J.). Rather than applying the primary duties test, the court adopted "a presumption that clerical personnel are [covered by the ministerial exception]," subject to "proof that the church is a fake . . . [or] the minister's function [is] entirely rather than incidentally commercial." *Id.* at 478.

These cases (and many others) recognize that courts are ill-equipped to decide whether particular job duties are religious or secular.[3] The ministerial exception is premised on keeping the state out of the religious sphere, as the imposition of general laws on religious bodies produces results that are not only constitutionally problematic but also unworkable. The primary duties test requires precisely the sort of intrusion the ministerial exception seeks to preclude, and is thus a poor standard for courts to use.

CONCLUSION

For the foregoing reasons, this Court should affirm the Panel decision's application of the functional test for determining ministerial employees.

Respectfully submitted,

s/ Eric C. Rassbach

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[3] *See, e.g.*, *Alicea-Hernandez*, 320 F.3d at 703-04 ("press secretary" with typical secular duties was still a minister); *Pardue*, 875 A.2d at 677 (Catholic school principal's duties were "basically no different from those performed by her counterparts in public schools," but she was still a minister).

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 9, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Eric C. Rassbach

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Eric C. Rassbach
Counsel for Amicus Curiae
September 9, 2010

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003, size 14 Times New Roman font.

s/ Eric C. Rassbach

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Eric C. Rassbach
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September 9, 2010

CERTIFICATE FOR BRIEF IN PAPER FORMAT

9th Circuit Case Number(s): 09-35003

I, Eric C. Rassbach, certify that this brief is identical to the version submitted electronically on September 9, 2010.

Date: September 15, 2010

s/ Eric C. Rassbach

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