No. 15-15351

United States Court of Appeals for the Ninth Circuit

STARLA ROLLINS, on behalf of herself, individually, and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

DIGNITY HEALTH, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of California

Brief of the Becket Fund for Religious Liberty as Amicus Curiae in Support of Defendants-Appellants and Reversal of the District Court

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CORPORATE DISCLOSURE STATEMENT

The Becket Fund for Religious Liberty does not have any parent corporation. Nor does any publicly held corporation own 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The Becket Fund for Religious Liberty is a non-profit law firm dedicated to protecting the legal rights of all religious traditions. To that end, it has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

The Becket Fund has often advocated as counsel or amicus curiae to ensure religious liberty by promoting exceptions to generally applicable laws, both to ensure the autonomy of religious organizations and to limit government entanglement with religion. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). It is presently concerned that adopting Plaintiff's novel construction of the ERISA church-plan exemption would unconstitutionally coerce religious organizations into altering their practices and structures, and unduly entangle the state in religious matters. The Becket Fund therefore files this amicus brief, and filed similar ones in *Overall v. Ascension Health*, No. 14-1735 (6th Cir. June 11, 2014); and *Kaplan v. St. Peter's HealthCare Sys.*, No. 15-1172 (3d Cir. Jan. 20, 2015).

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than Amicus or its counsel, contribute money to its preparation or submission. Appellants and appellee consent to the filing of this brief.

SUMMARY OF ARGUMENT

When Congress enacted ERISA to address widespread abuses in private pension plan offerings, it expressly exempted retirement plans of churches.[2] Six years later, Congress voted overwhelmingly to clarify that this exemption extends to the plans of church affiliates.

This abiding respect for the right and ability of religious organizations to manage worker retirement not only reflects their successful track record—churches were among the first in this country to offer retirement benefits and they have done so for three centuries—it also honors the text and purpose of the First Amendment. Unfortunately, Plaintiff's counsel's campaign to conscript the IRS into regulating church-affiliated plans ignores this history and threatens the constitutional balance Congress struck in limiting ERISA's "comprehensive and reticulated" regime to private-sector businesses for whom that statute was warranted. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980).

The First Amendment affords "special solicitude" to religious groups, including their affiliated organizations, to structure themselves without government interference. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132

[2] Like the IRS, Amicus uses the term "church" in this brief to refer to houses of worship for all faiths. *See* Internal Revenue Serv., "Churches Defined," http://www.irs.gov/Charities-&-Non-Profits/Churches-&-Religious-Organizations/Church—Defined (last visited June 2, 2015).

S. Ct. 694, 706 (2012). The First Amendment likewise forbids government from unduly entangling itself with religion when assessing a religious group's activities. *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). Congress has thus chosen not to meddle with the pension plans of churches or their affiliates, and the IRS has understood such non-interference to apply whether those plans start in the church or affiliate. Religious groups and their workers—and presumably their unions, too—have arranged their affairs accordingly.

But Plaintiff's contention that the church-plan exemption should be limited to pension plans arising only from churches—and not their affiliates—would upset this constitutional arrangement. A church-only test would, for example, interfere with a church's decision whether it or its affiliate is in the best position to (voluntarily) provide a pension to affiliated workers. It would also encourage church-state entanglement by requiring church affiliates seeking plan exemptions not just to show affiliation—a practicable and secular inquiry for courts and the IRS—but also to prove their religious bona fides as part of the church itself. Defendant's approach, to the contrary, accords with congressional intent, honors religious autonomy, and avoids such entanglements.

BACKGROUND

When Congress passed ERISA in 1974, it exempted church plans for the stated purpose of avoiding excessive government entanglement with religion. 125 Cong. Rec. 10052 (May 7, 1979) (Sen. Talmadge); 124 Cong. Rec. 12106 (May 2, 1979) (Rep. Conable). In 1980, Congress amended ERISA to clarify that the church-plan exemption, and its non-entanglement policy, should include the plans of church-affiliated entities, such as hospitals and schools. *See* 125 Cong. Rec. 10052 (May 7, 1979) (Sen. Talmadge) ("Church agencies are essential to the churches' mission."). In adopting this broad exemption, Congress also recognized church plans had been operating responsibly in providing retirement coverage for both religious and lay employees for almost three centuries. 124 Cong. Rec. 12106 (May 2, 1979) (Rep. Conable).

Congress insisted on the 1980 clarification for church affiliates because it found the church-only rule had forced the IRS to engage in constitutionally suspect determinations as to whether church-related entities were "religious" enough to be part of the "church." *See, e.g.*, IRS Gen. Counsel Mem. 37,266, 1977 WL 46200, at *1, *3-6 (Sept. 22, 1977). And plainly religious entities were deemed foreign to the church if they performed "secular" activities—even if those activities were central to the church's beliefs and purposes. *See, e.g.*, *id.* at *5 (ruling two orders of nuns were outside the Catholic Church because their charitable work was not

religious enough). This narrow approach was particularly harsh to faith-based hospitals, which were refused exemption for inadequately engaging "sacerdotal" functions—even though their work for "the sick, poor, aged, and infirm" directly carried out church beliefs. *Id.* at *1, *5.

The reaction to the IRS's approach was overwhelming; dozens of groups representing diverse faiths joined together to form the Church Alliance for Clarification of ERISA and brought their concerns to Congress. *See* 125 Cong. Rec. 10052-58 (May 7, 1979). The American Lutheran Church also expressed concern over the intrusion of the IRS into the affairs of church groups and their agencies, finding the IRS should not define "what is and what is not an integral part of these religious groups' mission." *Id.* at 10055 (Letter to Sen. Talmadge). Other groups feared church agencies might be unable to fund their retirement plans if the plans were subject to ERISA. *See id.* at 10052-58.

In response, Congress expanded the church-plan exemption to cover plans of organizations that are "controlled by or associated with a church." Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 407 (codified at 29 U.S.C. § 1002(33)(C)(i)). And the IRS quickly adjusted, finding plans established by religious non-profits can qualify by mere virtue of their "affiliation with [a] church." IRS Gen. Counsel Mem. 39,007, 1983 WL 197946, at *4 (Nov. 2, 1982). Now, instead of asking if a non-profit is religious enough to qualify as part of a

church, the IRS asks only if the non-profit shares "common religious bonds and convictions" with its church. 29 U.S.C. § 1002(33)(C)(iv).

This case concerns respective references in the 1980 affiliated-plan amendment to plans "established and maintained by a church" and ones "maintained by an organization . . . controlled by or associated with a church." 29 U.S.C. § 1002(33)(A) & (C)(i). Despite any supposed ambiguity in the text, however, the IRS has since exempted plans maintained by church affiliates without distinguishing whether they were established by the affiliate or church in the first instance.[3] And the IRS has made these rulings without the intrusive inquiries into religious affairs that marked its pre-amendment approach. Plaintiff's belated argument that the church-established language is a gatekeeper for all plans would, on the other hand, augur a return by the IRS and courts to the thorny inquiry over religiosity the 1980 Amendment sought to forbid.

[3] *See, e.g.*, I.R.S. P.L.R. 9429025 (July 22, 1994) (exempting plans established by health system associated with a church); I.R.S. P.L.R. 9427031 (July 8, 1994) (exempting plan established by a hospital associated with a church); *see also* I.R.S. P.L.R. 201224042 (June 15, 2012) (lobbying; educational programs); I.R.S. P.L.R. 9719042 (May 9, 1997) (college preparatory school for girls); I.R.S. P.L.R. 9011006 (Mar. 16, 1990) (health-care system); I.R.S. P.L.R. 8902044 (Jan. 13, 1989) (nationwide network of health-care institutions); I.R.S. P.L.R. 8625082 (Mar. 28, 1986) (home health-care organization); I.R.S. P.L.R. 8441055 (July 12, 1984) (nursing home).

ARGUMENT

I. AN INCLUSIVE INTERPRETATION OF THE CHURCH-PLAN EXEMPTION SAFEGUARDS CHURCH AUTONOMY IN ACCORDANCE WITH THE FIRST AMENDMENT.

A. Government should not coerce churches into deciding whether and how to provide pension plans to employees.

At bottom, Defendant's argument for an inclusive interpretation of the ERISA church-plan exemption enables churches to make internal decisions about how to structure themselves, in harmony with the enduring principle of religious autonomy Congress stressed in adopting and extending the exemption. Plaintiff's approach does the opposite.

James Madison famously observed in vetoing the incorporation of the Episcopal Church in Virginia that rules governing church polity and organization exceed "the rightful authority to which Governments are limited" and the Constitution's "scrupulous policy . . . against political interference with religious affairs." *Hosanna-Tabor*, 132 S. Ct. at 703-04 (*quoting* 22 Annals of Cong., 982-83 (1811)). Accordingly, the Supreme Court has read the First Amendment to afford religious organizations broad autonomy in matters of faith, doctrine, and governance. *Serbian E. Orthodox Diocese for U.S. & Can. v. Milivojevich*, 426 U.S. 696, 722 (1976); *see also Hosanna-Tabor*, 132 S. Ct. at 704-05.

Congress has honored this "scrupulous policy" in the context of church pension plans, respecting the right of churches to be free from political meddling. *See* Exec. Sess. of S. Comm. on Fin. (June 12, 1980), 96th Cong., 2d Sess. at 41 (Sen. Talmadge) ("I think we have got a question of separation of church and state here, number one, gentlemen, and, number two, I don't believe we ought to get a row with every religious faith in the country."). And because a church's choice to have an affiliate—e.g., hospital—establish and maintain such a plan for its workers is a decision that "affects the faith and mission of the church itself," it should be made uncoerced. *Hosanna-Tabor*, 132 S. Ct. at 707.

Plaintiff's approach—allowing only churches to establish exempt plans—would override Congress's recognition of the constitutional authority of churches to decide whether they or their affiliates are in the best position to offer a pension plan to the affiliate's employees. *See Schleicher v. Salvation Army*, 518 F.3d 472, 475 (7th Cir. 2008) ("Congress does not want courts to interfere in the internal management of churches"). Whereas Defendant's approach—allowing either churches or church affiliates to establish exempt plans—would not require a "searching and therefore impermissible inquiry" into internal church affairs. *Milivojevich*, 426 U.S. at 722-23.

Indeed, allowing church affiliates to establish exempt pension plans respects the constitutionally recognized authority of churches to carry out their religious

missions in the way they see fit, whether directly or indirectly. *See Hosanna-Tabor*, 132 S. Ct. at 707 (recognizing the First Amendment right of religious organizations to make mission-related decisions.) For as Congress recognized when it amended the original church-plan exemption, "[c]hurch agencies are essential to the churches' mission[s]." 125 Cong. Rec. 10052 (May 7, 1979) (Sen. Talmadge). And, for many reasons, not all such agencies can—or should—be directly controlled by their affiliated house of worship.

Classically congregational denominations, for instance, are not necessarily organized in a way that would allow them to require their agencies to maintain only ERISA-compliant plans. *Id.* Unlike strictly hierarchical churches, in many congregational denominations each congregation autonomously and independently runs its own financial, theological, and administrative affairs. 1 W. Cole Durham & Robert Smith, Religious Organizations and the Law § 3:13 (2013). Under a narrow interpretation, therefore, these churches would face the choice Congress sought to remove: change how your church is organized or imperil the ability of your agencies to offer retirement benefits. *Id*; *see also* 125 Cong. Rec. 10052 (May 7, 1979) (Sen. Talmadge) ("Church agencies . . . are, in fact, part of the churches.

As a practical matter, it is doubtful that the agency plans would survive subjection to ERISA.")[4]

Even hierarchical churches that might be able to exert more direct control over their agencies have other sound reasons to establish their agencies as separate entities. The Catholic Church, for instance, views hospitals and healing the sick as central to its religious mission. *See Catechism of the Catholic Church*, ¶¶ 1506-09 (2d ed. 1994). But Catholic healthcare entities are often set up as public juridic persons under Catholic canon law;[5] these entities are therefore not necessarily controlled by or directly part of a Catholic diocese, even though they are undoubtedly considered to be integral parts of the Church as a whole. *See* 1983 Code c. 116, § 1 (explaining how public juridic persons fulfill their missions in the name of the church).

In addition, limiting the exemption to pension plans established by churches could threaten the ability of churches to carry out their religious missions and to invest retirement funds morally. Any type of church could prudently choose to set

[4] Of course, religious polities do not fall into two neat categories of "congregational" and "hierarchical," but instead exist along a spectrum, from strictly hierarchical, to presbyterial, to connectional, to strictly congregational, with variations in between. In addition, many religious polities—especially non-Judeo-Christian ones—exist completely outside any such spectrum.

[5] Under Canon Law, a "public juridic person" is an aggregate of persons or things that oversees a Catholic establishment to ensure it is complying with Catholic teachings. 1983 Code c. 114, § 1.

up hospitals as separate non-profit entities to guard against professional liabilities that might impede the church's ability to perform other religious functions. *See* 1 Durham & Smith, *supra*, § 3:13. Moreover, applying ERISA's diversification requirements to church plans might prevent religious groups from investments that, in the religion's view, would promote social justice or avoid supporting evils. *See* 29 C.F.R. 2550.404c-1(b)(3)(i)(C); *see also* Lindsay Gellman, *Investing as a Religious Practice*, Wall St. J. (Nov. 3, 2013, 4:16 PM), http://tinyurl.com/ppdk94u. Defendant's understanding of the exemption would allow churches to make such decisions without risking their ability to provide employee retirement plans.

An inclusive interpretation of the church-plan exemption also respects organizational flexibility. 1 Durham & Smith, *supra*, § 3:13. If a church wanted to restructure its relationship with its agencies, for example, it could do so without worrying about how that might affect agency benefit plans. Specifically, a church could more freely cede control of an agency because the agency would still be "associated with" it. It follows that a broad interpretation also minimizes the risk a religious organization will change its doctrine or structure to avoid regulation. Either way, Defendant's approach respects churches' autonomous decision-making regarding doctrine and polity. *See Hosanna-Tabor*, 132 S. Ct. at 707.

Finally, an inclusive interpretation avoids the practical issue of deciding whether a plan established by a church for an affiliate is still a church plan after merging with plans of other affiliates. Determining the nature and scope of church plans in the merger context is a frequent problem. Nancy S. Gerrie & Jeffrey M. Holdvogt, *View from McDermott: Top IRS and DOL Audit Issues for Retirement Plans*, Pension and Benefits Daily (BNA) No. 156, at 2 (Aug. 13, 2014), *available at* http://tinyurl.com/n6mct4m (improper exclusion of a merged-in group of employees is a matter the IRS regularly audits). For example, plans established by a church and an affiliate, respectively, would continue to be exempt after a merger. Plaintiff's approach, on the other hand, would require a determination whether the church-established plan's exemption is retained, shared, or destroyed. That inquiry would force courts to delve frequently into matters of church polity—again, one of the very concerns the exemption was designed to avoid. Rep. of S. Comm. on Fin. (Aug. 21, 1973), 93rd Cong., 1st Sess. at 81.

In sum, an inclusive interpretation of the church-plan exemption honors the right of churches to make autonomous decisions about whether and how to provide pension plans to their employees, as Congress intended when it enacted and amended the exemption.

B. ERISA is not an entitlement scheme; church autonomy thus causes no unconstitutional burden in that context.

Plaintiffs'-side amici in related cases have argued that exempting pension plans established by church affiliates harms third parties, such as hospital employees, because such affiliates would thus be free to underfund the plans, abandon federal pension insurance, and withhold financial data. *See, e.g.*, Brief of *Amici Curiae* Americans United for Separation of Church and State, et al. at 5-23, *Kaplan v. St. Peter's HealthCare Sys.*, No. 15-1172 (May 11, 2015), 2015 WL 2265282 ("AU Brief"). These amici seek to distinguish the religious accommodation in *Hobby Lobby* from the church-plan exemption, claiming the third-party effect there was "precisely zero," because "women would still be entitled to all FDA-approved contraceptives without cost sharing." 134 S. Ct. at 2760. In contrast, if a church agency "were deemed eligible for the ERISA church plan exemption, its employees would simply be out of luck." (AU Brief at 9.)

But unlike in *Hobby Lobby*—where agencies had interpreted the Affordable Care Act to require private employers to provide their workers with access to contraceptives, 134 S. Ct. at 2762—ERISA provides no such entitlement. Indeed, employers are not required to provide a pension plan for their workers in the first place. U.S. Dept. of Labor, *FAQs About Retirement Plans and ERISA*, http://www.dol.gov/ebsa/faqs/faq_consumer_pension.html (last visited June 5, 2015). Because there is no baseline entitlement to retirement benefits, therefore,

removing the plans of church affiliates from ERISA's purview cannot violate the Establishment Clause. *See* Brief of Constitutional Law Scholars as *Amici Curiae* in Support of Hobby Lobby and Conestoga, et al. at 18, *Sebelius v. Hobby Lobby Stores, Inc.* (2014) (Nos. 13-354, 13-356), 2014 WL 356639 (arguing an Establishment Clause limit on religious accommodation must involve a baseline entitlement question).

Moreover, even if the church-plan exemption did burden third parties, the lack of third-party burdens is not a condition for religious exemptions under the Establishment Clause in any event. *See, e.g.*, *Gillette v. United States*, 401 U.S. 437 (1971) (upholding the selective-service exemption for conscientious objectors basing their objections on belief in a "Supreme Being"); *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997) (describing universally recognized priest-penitent privilege against obtaining relevant testimony).[6] In the employment context, for example, the Court has upheld Title VII religious exemptions for employers, even if those accommodations mean that employees cannot sue for wrongful termination. *See Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 343 (1987). According to the Court, the purpose and effect of exempting employers

[6] Constitutionally respected religious exemptions "*often* leave nonbeneficiaries worse off than they would have been but for the exemption." Eugene Volokh, *Would Granting an Exemption from the Employer Mandate Violate the Establishment Clause?*, Volokh Conspiracy (Dec. 4, 2013, 5:11 PM), http://tinyurl.com/pnkc4km (emphasis added).

from Title VII's prohibition against discrimination on the basis of religion is not to advance a particular religion; instead, the government is merely lifting a regulation that might burden religious exercise. *Id.* at 329-30, 338. For the employee, losing one's job is surely an injury, but religious accommodation statutes allow it. Here, where there is no direct harm to the employee, the "third-party injury" argument is especially misplaced.

II. A BROAD CHURCH-PLAN EXEMPTION LIMITS CHURCH-STATE ENTANGLEMENT.

A. Plaintiff's approach invites undue government scrutiny.

A church-only interpretation of the ERISA exemption would also squarely entangle courts and agencies in church-state inquiries the Constitution requires them to avoid: (1) judging the religious meaning of a particular belief or activity; (2) resolving religious controversies; and (3) evaluating the religiosity or orthodoxy of a person or group.

The First Amendment disfavors deciding legal rights based on whether the party in question was performing primarily "religious" or "secular" activities. *See, e.g.*, *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."). Of course, courts or agencies must sometimes decide whether something is religiously motivated—e.g., whether an inmate's accommodation

request is based on a sincerely held religious belief. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). But governments risk unconstitutional entanglement when they attempt to categorize religious organizations' actions as "secular" or "religious." *Amos*, 483 U.S. at 343-44 (Brennan, J., concurring) (emphasizing the ability of religious groups to define their religious commitments); *see also Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (forbidding civil courts from resolving controversies over religious doctrine or practice).

Allowing only a church to establish an affiliated plan would require, for an exemption, that the government decide whether the affiliate is in fact part of that church. In some claims for exemption, the answer would be undisputed: a pension plan established by the Roman Catholic Church or a local synagogue is clearly a plan established by a church. But what about a plan established by a religious order? Or a church advocacy group? Or a missionary organization? Under Plaintiff's view, such cases would turn on whether the organization in question is part of a "church." And for the government to make that determination, an entangling assessment of the religious group's activities is necessary. Indeed, the Sixth Circuit recently rejected just such an approach. *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829, 833-34 (6th Cir. 2015) (extending ministerial exception to group dedicated to "Christian ministry and teaching").

In pushing a narrow approach, plaintiff's-side amici in related cases have claimed "no theology degree is necessary to distinguish a house of worship from a hospital," because "[t]he inquiry turns on the type of activity performed, not the type or intensity of religious belief." (AU Brief at 24.) These groups cite as qualifying factors those used by the IRS to define a church—e.g., established congregation served by the ministry, regular religious services and education, dissemination of doctrine. (*Id.* at 26.) But this "sacerdotal" inquiry is precisely what Congress sought to prevent when it expanded the church-plan exemption to affiliates. *Ante*, p. 5; *see also Amos*, 483 U.S. at 336 ("Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious.").

The First Amendment similarly disfavors inquiries into internal religious controversies. *See Milivojevich*, 426 U.S. at 713 ("Religious controversies are not the proper subject of civil court inquiry.") The Supreme Court has stressed repeatedly that the Religion Clauses may be impinged not only by court decisions, but also by the very process of inquiry that leads to courts' findings and conclusions. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979). In effect, secular courts' inquiries into internal church matters are an unconstitutional "'resolution of quintessentially religious controversies.'" *Hosanna-Tabor*, 132 S. Ct. at 705 (*quoting Milivojevich*, 426 U.S. at 720). By requiring affiliates to

demonstrate they are part of the church itself, Plaintiff's test contemplates secular courts taking sides in ecclesiastical disputes.

Finally, Plaintiff's view encourages impermissible evaluations of religiosity or orthodoxy—i.e., whether a party is religious enough, either in general or in relation to a group. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretation of those creeds."); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1263 (10th Cir. 2008) (McConnell, J.) ("[T]he state may take no position" on what "Catholic—or evangelical, or Jewish—polic[y] is" without "entangling itself in an intrafaith dispute."). "Courts are not arbiters of scriptural interpretation," *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981), and should accordingly avoid delving into theological disputes, church discipline, ecclesiastical government, or church-members' conformance to required moral standards. *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733 (1871).

Under any approach, the IRS must determine whether a church is in fact a church. But because under Plaintiff's test *all* entities seeking to establish exempt pension plans must prove they are churches, the entangling inquiry necessary in some cases would become the rule in all cases—including those involving a clearly established church. Plaintiff's position—which is that Defendant's plan does not

qualify for the church-plan exemption because the entity that established it was not religious enough to be a church—requires precisely that inquiry.

B. Defendants' approach focuses on religiously neutral questions.

On the other hand, Defendants' inclusive interpretation of the exemption avoids unnecessary government entanglement. Asking whether a group establishing a plan is controlled by or associated with a church—rather than whether that group is a church—involves asking *about* a church and therefore focuses (permissibly) on religiously neutral questions. *See, e.g.*, *Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar*, 179 F.3d 1244, 1249 (9th Cir. 1999) (courts may properly resolve church-property disputes by applying secular legal principles). It is much more likely—and has been the case so far—that religious organizations asking for their plans to be recognized as exempt will argue for a connection to something generally recognized as a church. (Every case Plaintiff's counsel has filed involves organizations that are indisputably churches: the Roman Catholic Church, the United Church of Christ, and the Evangelical Lutheran Church in America.)[7] Once again, an interpretation that includes affiliate-

[7] *Chavies v. Catholic Health E.*, No. 13-cv-1645 (E.D. Penn.) (Catholic Church); *Griffith v. Providence Health & Servs.*, No. 14-cv-1720 (W.D. Wash.) (Catholic Church); *Kaplan v. St. Peter's Healthcare Sys.*, No. 13-cv-2941 (D.N.J.) (Catholic Church); *Lann v. Trinity Health Corp.*, No. 14-cv-2237 (D. Md.) (Catholic Church); *Medina v. Catholic Health Initiatives*, No. 13-cv-1249 (D. Colo.) (Catholic Church); *Overall v. Ascension Health*, No. 13-cv-11396 (E.D. Mich.) (Catholic Church); *Owens v. St. Anthony's Med. Care Ctr., Inc.*, No. 14-cv-4068

established plans minimizes entanglement by limiting governmental determinations as to who, precisely, qualifies as part of a church. *Cf. Catholic Bishop*, 440 U.S. at 500 ("[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available.").

III. EXAMINING CHURCH AFFILIATION IS A PRACTICABLE AND CONSTITUTIONALLY APPROPRIATE INQUIRY.

A. Agencies and courts already make determinations about church control of and association with religious groups.

The risk of coercion or entangling inquiries into religious groups' activities, internal affairs, or religiosity warrants an approach limiting their number. Fortunately, in the church-affiliate context, agencies and courts have constitutional mechanisms to determine whether an affiliate is "controlled by or associated with" its church—the operative test in the ERISA church-plan context. 29 U.S.C. § 1002(33)(C)(i). These established methods highlight the practicability and desirability of including both churches and church-related entities among those able to establish pension plans exempt from ERISA.

Two Courts of Appeal, for example, have already considered whether an entity is "controlled by or associated with" a church under 29 U.S.C. § 1002(33)(C). *See Chronister v. Baptist Health*, 442 F.3d 648, 652-53 (8th Cir.

(N.D. Ill.) (Catholic Church); *Stapleton v. Advocate Health Care Network*, No. 14-cv-0187 (N.D. Ill.) (United Church of Christ and Evangelical Lutheran Church in America).

2006); *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 547-48 (4th Cir. 2001). Determining what constitutes "control" or "association" are distinct inquiries. To determine "control," the Fourth Circuit looks to the traditional corporate criteria—e.g., director appointment power. *Lown*, 238 F.3d at 547 (*citing* Treas. Reg. § 1.414(e)-1(d)(2)).[8]

Regarding association, the Fourth Circuit holds that a religious organization must share "common religious bonds and convictions" with its church. *Id.* at 548. Going further, the *Lown* court considered three factors to determine such bonds and convictions: (1) whether the church plays any official role in governing the organization; (2) whether the organization receives assistance from the church; and (3) whether the organization imposes a denominational requirement for employees or customers. *Id.* The Eighth Circuit subsequently adopted the *Lown* court's analysis for association. *Chronister*, 442 F.3d at 653.

The *Lown* test is no panacea. For instance, the inquiry on funding might unconstitutionally exclude religions that rely on external support. *See Larson v. Valente*, 456 U.S. 228, 255 (1982) (striking down a state law treating religious

[8] In interpreting "control" under the Federal Unemployment Tax Act, I.R.C. § 3309(b)(1), state courts have likewise looked to traditional indicators of corporate control. *See, e.g., Kendall v. Dir. of Div. of Emp't Servs.*, 473 N.E.2d 196, 200 (Mass. 1985) (religious sisters approved appointment of directors and all amendments to the bylaws); *Emp't Div. v. Nw. Christian Coll.*, 570 P.2d 100, 101 (Or. 1977) (majority of board members were secretaries in the church hierarchy or ministers).

organizations differently if they received majority external funding). Or the denominational criterion might encourage religious organizations to discriminate against non-believers in employment. *See Spencer v. World Vision*, 633 F.3d 723, 730 (9th Cir. 2010) (per curiam) (finding that a denominational requirement might encourage religious groups to discriminate in employment). But *Lown* at least shows that courts can make inquiries about the relationship between a church and a purported affiliate without making a constitutionally problematic assessment of religious orthodoxy.

Agencies also have practicable mechanisms for determining whether a religious organization is associated with a church. Pertinently, in the context of determining the tax-exempt status of churches and related religious entities, the Treasury Department and IRS have crafted regulations for deciding, on a religiously neutral basis, what organizations are "affiliated with a church." I.R.C. § 6033(a)(3)(A)(i); Treas. Reg. § 6033-2(h). An organization is affiliated with a church, for example, if it is included in the church's IRS group exemption letter. Treas. Reg. § 1.6033-2(h)(2)(i). Alternatively, an organization is affiliated with a church if it is "operated, supervised or controlled by or in connection with" a church. Treas. Reg. § 1.6033-2(h)(2)(ii). A third option is whether "relevant facts and circumstances" show the requisite affiliation. Treas. Reg. § 1.6033-2(h)(2)(iii). These circumstances might include references in a group's bylaws; a group's

reporting its finances or operations to a church; a related corporate name; whether a church affirms the affiliation; or whether assets would be distributed to a church upon dissolution. Treas. Reg. § 1.6033-2(h)(3).

B. Organizations with ulterior motives can be screened through modified sincerity testing.

The exemption from ERISA for organizations controlled by or associated with a church should apply only to those organizations that sincerely believe they are associated with a church. Organizations should not be able to insincerely claim a religious association in order to take advantage of the church-plan exemption. As with claims under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*, sincerity can be used in the ERISA context to ensure that the exemption is provided only to those groups associated with a church. *See, e.g.*, *United States v. Quaintance*, 608 F.3d 717, 721-23 (10th Cir. 2010) (finding a manufactured religious belief about marijuana was not sincere and thus not entitled to protection under RFRA).

Free exercise claims inherently contemplate sincerity testing.[9] *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853 (allowing sincerity testing for prisoner religious accommodations); *Sherbert v. Verner*, 374 U.S. 398, 402 n.1 (1963) (raising sincerity in the context of the First Amendment). For such inquiries do not

[9] Determining the religious beliefs of an organization, rather than of a natural person, does not eliminate the ability of courts to test for sincerity. *Hobby Lobby*, 134 S. Ct. at 2774.

question the soundness of a particular religious belief; they determine only the sincerity with which that belief is held. *See United States v. Seeger*, 380 U.S. 163, 185 (1965) ("[W]e hasten to emphasize that, while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case.").

In the context of this appeal, sincerity testing could determine whether an organization sincerely believes itself to be associated with a church. This would enable courts to exclude from the exemption those allegedly affiliated organizations with ulterior motives.

CONCLUSION

Plaintiff's view of the ERISA church-plan exemption would intrude on church autonomy and increase governmental scrutiny of religious organizations in violation of congressional intent and the First Amendment. In contrast, Defendants' inclusive interpretation would allow courts and agencies to use existing tools that satisfy the requirements of the statute.[10]

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[10] Amicus thanks Stanford Law School students Claire L. Chapla and Sean P. McElroy, who assisted in the preparation of this brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

I hereby certify the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B). It contains 5,371 words, excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii).
2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and (a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman font.

Executed this 13th day of July, 2015.

s/ *James A. Sonne*
James A. Sonne

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 the date indicated below. 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.

Executed this 13th day of July 2015.

s/ *James A. Sonne*
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