No. 14-1735

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARILYN OVERALL,

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

Plaintiff-Appellant,

v.

ASCENSION HEALTH, a non-profit corporation; ASCENSION HEALTH ALLIANCE, a non-profit corporation; CATHOLIC HEALTH INVESTMENT MANAGEMENT COMPANY, a non-profit corporation; DEREK BEECHER; JEAN DEBLOIS; ERIC FEINSTEIN; WILLIAM FINLAYSON; TIMOTHY FLESCH; TRENNIS JONES; KATHLEEN KELLY; ELLEN KRON; TOM LANGSTON; LAURA LENTENBRINK; PATRICK MCGUIRE; JOSEPH O. MURDOCK; THERESA PECK; BARBARA POTTS; LARRY SMITH; ANTHONY TERSIGNI; HERBERT VALLIER; DOUGLAS WAITE; FRANK WARNING; CAROL WHITTINGTON; UNITED STATES OF AMERICA; and JOHN and JANE DOES 1-20,

Defendants-Appellees.

On Appeal from the
United States District Court Eastern District of Michigan
No. 13-cv-11396-AC-LJM
Honorable Avern Cohn

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1735 Case Name: Overall v. Ascension Health, et al.

Name of counsel: Helgi Walker

Pursuant to 6th Cir. R. 26.1, The Becket Fund for Religious Liberty
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on November 12, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Helgi Walker

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF *AMICUS CURIAE*[1]

The Becket Fund for Religious Liberty is a non-profit law firm dedicated to the free expression of all religious traditions. The Becket Fund 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 both as counsel and as *amicus curiae* to ensure religious freedom by defending religious accommodations. *See*, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (ministerial exception applied to Lutheran religion teacher); *Holt v. Hobbs*, No. 13-6827 (S. Ct., argued Oct. 7, 2014) (federal statutory accommodation for Muslim prisoner). The Becket Fund is concerned that adopting Plaintiff's theory of the Establishment Clause in this case would undermine the validity of thousands of religious accommodations enacted by Congress and the States to protect religious exercise and expression.

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[1] No party has authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief, and no person other than *amicus curiae* or its counsel has contributed money to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Churches in this country have been providing pension benefits to their workers for almost 300 years. Until ERISA's enactment in 1974, these pension plans were largely free from federal regulation. Recognizing the responsible way in which churches and their agencies had managed these plans, and cognizant of the religious burdens and entanglement that federal regulation would impose, Congress exempted church plans from ERISA—and then, a few years later, retroactively expanded that exemption. Since that time, churches and their agencies have relied upon the church-plan exemption and continued to provide retirement benefits to their clergy and other employees.

Counsel for the Plaintiff seeks to overturn this long tradition. Plaintiff's counsel has recently embarked on a nation-wide campaign to dramatically narrow the historically-accepted scope of the church-plan exemption.[2] In particular, Plaintiff here has invoked the Establishment Clause to backstop her statutory claim. Plaintiff would have this Court adopt a novel and dangerous test for determining

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[2] Plaintiff's counsel has challenged the church-plan exemption across the country. *See Medina v. Catholic Health Initiatives*, No. 13-01249 (D. Colo.); *Rollins v. Dignity Health*, No. 13-1450 (N.D. Cal.); *Kaplan v. St. Peter's Healthcare Sys.*, No. 13-2941 (D.N.J.); *Chavies v. Catholic Health East*, No. 13-1645 (E.D. Pa); *Owens v. St. Anthony Med. Ctr., Inc.*, No. 14-4068 (N.D. Ill.); *Stapleton v. Advocate Health Care Network*, No. 14-01873 (N.D. Ill.); and *Lann v. Trinity Health Corp.*, No. 14-2237 (D. Md.).

the constitutionality of legislatively-enacted religious exemptions. Specifically, Plaintiff urges this Court to hold that a religious accommodation that is not compelled by the Free Exercise Clause *violates the Establishment Clause* if it results in the denial of benefits to third parties. That rule ignores our nation's long history of accommodating religious exercise through legislative exemptions and flies in the face of decades of Supreme Court precedent.

Plaintiff's view is that the Establishment Clause *forbids* Congress from extending the church-plan exemption to religious hospitals such as Ascension. The rule Plaintiff proposes would sweep well beyond ERISA's church-plan exemption, rendering thousands of religious accommodations unconstitutional. Irrespective of how this Court resolves the statutory claim at issue, it should reject wholesale Plaintiff's radical constitutional claim.

Moreover, in deciding the statutory claim, the Court should firmly reject Plaintiff's view that courts must decide whether a church entity is religious enough to qualify for the exemption. *Answering that religious question* would itself violate the Establishment Clause by deeply entangling courts in religious questions they are ill-equipped and constitutionally forbidden to answer, while at the same time privileging those entities courts conclude are especially devout.

Given the long and successful history of church plans in this country and the entanglement that would result from injecting courts into the relationship between a church body and its employees, Plaintiff should leave well enough alone.

ARGUMENT

I. The church-plan exemption does not violate the Establishment Clause either on its face or as applied.

A. The Supreme Court's recent decision in *Town of Greece* requires courts to use a historical-practice test.

On May 5, 2014—four days prior to the lower court's decision—the Supreme Court issued its most recent Establishment Clause decision, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Under *Town of Greece*—which Plaintiff fails to cite, much less analyze—courts must apply the Establishment Clause "by reference to historical practices and understandings." *Id.* at 1819 (internal citation and quotation marks omitted). In this case, the history of the church-plan exemption supports the constitutionality of the practice.

1. *Town of Greece* requires courts to decide first whether a challenged government action is a historically-accepted practice.

In *Town of Greece*, the Court considered whether a municipality in upstate New York had violated the Establishment Clause by opening its monthly board meeting with prayer. In rejecting that challenge, the Court both clarified and amplified the role of history in Establishment Clause cases.

Town of Greece applied and expanded the test of *Marsh v. Chambers*, 463 U.S. 783 (1983), which involved an Establishment Clause challenge to the Nebraska legislature's practice of opening its sessions with prayer. *Marsh* upheld the practice because legislative prayer was an accepted practice at the time of the Founding. *Id.* at 790-92. The Court proceeded from the premise that history is an important guide to interpreting the Establishment Clause. *Id.* at 790 ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress."). But *Marsh* did not explain how its historically-accepted practice test fit with the rest of Establishment Clause jurisprudence, or how courts should apply that test beyond the discrete context of legislative prayer. Thus, Justice Brennan, writing for the dissent, claimed that the decision had simply "carv[ed] out an exception" to the Court's Establishment Clause jurisprudence. *Id.* at 796 (Brennan, J., dissenting).

The *Town of Greece* plaintiffs asked the Court to cabin *Marsh* to its facts. *See* Br. for Respondents, *Town of Greece v. Galloway*, No. 12-696, at 20, 41-42. The Court did just the opposite. Writing for the majority, Justice Kennedy roundly rejected Justice Brennan's assertion that *Marsh* was a mere "exception." *Town of Greece*, 134 S. Ct. at 1818-19. Instead, the Court left no doubt that "the Establishment Clause must be interpreted by reference to historical practices and

understandings." *Id.* at 1819 (internal citation and quotation marks omitted). In particular, the Court held that:

> *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. *Any* test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.

Id. (emphasis added). *Town of Greece* thus clarifies the relationship between *Marsh*'s historically-accepted practice test and the Court's much-maligned *Lemon*/endorsement test: *Marsh* trumps.[3]

The historically-accepted practice test is echoed in the concurring opinions filed by Justice Thomas and Justice Alito, as well as in the principal dissent by Justice Kagan. *See id.* at 1837 (Thomas, J., concurring in part and concurring in the judgment) ("the municipal prayers at issue in this case bear no resemblance to the coercive state establishments that existed at the founding"); *id.* at 1834 (Alito, J., concurring) ("if there is any inconsistency between any of those [Establishment Clause] tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice"); *id.* at 1849 (Kagan, J., dissenting) (discussing "the protective ambit of *Marsh* and the history on which

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[3] Many Courts of Appeals, including this one, have complained of the *Lemon*/endorsement test's inadequacy. *See*, *e.g.*, *ACLU of Ohio Found., Inc. v. DeWeese*, 633 F.3d 424, 431 (6th Cir. 2011) ("Both this Court and the Supreme Court have questioned the *Lemon* test's utility in Establishment Clause cases.").

it relied"). Of the five opinions filed in *Town of Greece*, the only opinion that does not mention history is Justice Breyer's short, standalone dissent.[4]

The Court's examination of history in *Town of Greece* was not, of course, an innovation. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702-04 (2012) (describing historical problems with English governmental control of church bodies and noting that "[i]t was against this background that the First Amendment was adopted"). In fact, *Town of Greece* is entirely in keeping with the historical method routinely applied by the Court in other areas of constitutional law, particularly with respect to the Bill of Rights. But *Town of Greece* defines the relationship between history and the Establishment Clause, making clear that judicial examination of "historical practices and understandings" is now mandatory in Establishment Clause cases—regardless of whether *Lemon*, the endorsement test, or "[a]ny" other test may apply. 134 S. Ct. at 1819.

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[4] Notwithstanding the Second Circuit's reliance on the endorsement test, neither the majority opinion nor the principal dissent purported to apply *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or its endorsement test corollary. The only citation to *Lemon* appears in Justice Breyer's solo dissent—and even that makes no mention of *Lemon*'s three-prong test.

2. Government has not interfered with church plans since the early 1700s.

In light of the historically-accepted practice test set forth in *Town of Greece*, the Court must first examine the origins of the church-plan exemption and the history of church pension programs generally.

Church pension programs have operated in America since the early 1700s. As early as 1717, the Presbyterian Church in Philadelphia established the "Fund for Pious Uses," a charitable venture intended to provide financial assistance to colonial ministers and their families. *See* R. Douglas Brackenridge & Lois A. Boyd, *Presbyterians and Pensions: The Roots and Growth of Pensions in the Presbyterian Church (U.S.A.)* 7 (1989). The first recorded disbursement from the Fund for Pious Uses was in 1719, to the widow of a deceased minister. *Id.* at 9. In 1763, the Methodist Church established the "Preachers' Fund" to make provision "first for the old or sickly preachers, and their families (if they have any); then for the widows and children of those that are dead." Luke Tyerman, *The Life and Times of the Rev. John Wesley, M.A., Founder of the Methodists* 479 (1872); *see* Abel Stevens, *The History of the Religious Movement of the Eighteenth Century Called Methodism*, vol. III, at 132 (1861). By contrast, the first non-religious employer to provide a retirement plan was the American Express Company—in 1875. *See* Patrick W. Seburn, "Evolution of Employer-Provided Defined Benefit Pensions," *in Employee Benefits Survey: A BLS Reader* (1995).

By the time ERISA was enacted in 1974, church pension plans had been operating free from colonial and then federal regulation for more than 250 years. Acting in response to a series of pension failures in the private sector—most notably, the shutdown of the Studebaker automobile plant in South Bend, Indiana, resulting in a default on the company's pension plan—Congress devised a comprehensive regulatory regime designed to mitigate default risk. *See* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 Buff. L. Rev. 683, 726-36 (2001). Governmental plans, church plans, and certain deferred compensation plans for senior executives were exempted from ERISA's coverage. *See Employee Benefits Law* 1-10, 2-12 to 2-18 (Jeffrey Lewis et al. eds., 3d ed. 2012).

More relevant here, however, is what followed the passage of ERISA. As enacted in 1974, the definition of "church plan" was limited. Under the original exemption, a church plan could cover only individuals employed by the church itself. *See* Pub. L. No. 93-406, 88 Stat. 829, 838 (1974). This definition immediately proved problematic for benefit programs that covered church agency employees. *See generally* G. Daniel Miller, *"The Church Plan Definition—A Reply to Norm Stein,"* ABA Section of Labor and Employment Law, Employee Benefits Committee Newsletter (Fall 2004). In 1975, a coalition of chief executive officers and program directors of several dozen church benefit programs formed an

organization then known as the Church Alliance for Clarification of ERISA (CACE) to advocate for a legislative amendment. *Id.* In 1980, Congress amended ERISA, consistent with the CACE proposal, to provide that organizations "controlled by" or "associated with" a church may qualify for the church plan exemption. *See* Pub. L. No. 96-364, § 407, 94 Stat. 1208, 1304 (1980) (codified at ERISA §3(33)(C), 29 U.S.C. §1002(33)(C)). The amendment had a retroactive effective date of January 1, 1974—one year prior to the effective date of ERISA itself. *See id.*, 94 Stat. 1307.

The import of this history for the statutory question in this appeal is treated exhaustively in Defendants' brief. Defs.' Br. at 10-13, 29-30. For purposes of the Establishment Clause, however, one feature of the legislative history bears particular emphasis: The sponsors of the church plan amendment in both the House and Senate explicitly acknowledged the long history of church plans in the United States. When the bill was first introduced on the House floor, Representative Conable prefaced his remarks as follows:

> For many years our church plans have been operating responsibly and providing retirement coverage and benefits for the clergymen and lay employees of the churches and their agencies. Some of the church plans are extremely old, dating back to the 1700's. The median age of church plans is at least 40 years. Churches are among the first organizations to found retirement plans in the United States.

124 Cong. Rec. 12106 (1978) (Statement of Rep. Conable). Senator Talmadge, introducing companion legislation on the Senate floor, similarly observed: "The

church plans in this country have historically covered both ministers and lay employees of churches and church agencies. These plans are some of the oldest retirement plans in the country." 124 Cong. Rec. 16522 (1978) (Statement of Sen. Talmadge); *see also* 125 Cong. Rec. 10052 (Statement of Sen. Talmadge) (similar). Thus, the legislative history of the 1980 amendment reflects both awareness of and respect for the longstanding role of church pension plans in this country.

In sum, church plans were conceived, established, and dispensing employee benefits before the time of the Founding—more than 200 years before ERISA came on the scene. With the exception of an aberrant six-year period following the enactment of ERISA, church plans have operated free from colonial and then federal regulation from 1717 until the present. Congress swiftly recognized and corrected the problem caused by ERISA with a retroactive amendment, so that the initial, restrictive definition of "church plan" never took effect. As a result, the specific statutory religious accommodation at issue has been the law for more than 40 years, and the practice of non-interference has been the law for almost 300. Under *Town of Greece*, this long history of non-interference with the relationship between a church body and its employees trumps any doctrinal "test" that might lead a court to strike down the accommodation. *Cf. Hosanna-Tabor*, 132 S. Ct. at 705 (government could not interfere with "employment relationship between a

religious institution and its ministers"). Given the "historical practic[e]" that undergirds and informs the church plan exemption, 134 S. Ct. at 1819, Plaintiff's novel Establishment Clause challenge must fail.

B. Religious accommodations like the church-plan exemption do not violate the Establishment Clause.

The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-45 (1987); *see also Hosanna-Tabor*, 132 S. Ct. at 706 ("ministerial exception [is] grounded in the Religion Clauses" of the First Amendment). In rejecting a challenge to a religious exemption similar to the one at issue here, the Court explained that "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987). This view accords with the history of our Republic, which is laden with examples of religious exemptions. *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1837 (2006) ("From the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions."); *see also* James E. Ryan, Note, Smith *and the Religious Freedom*

Restoration Act: An Iconoclastic Assessment, 78 Va. L. Rev. 1407, 1445 & n.215 (1992) (identifying more than 2,000 state and federal statutes exempting religious groups from their coverage). Indeed, sometimes the Establishment Clause requires a religious exemption. The church-plan exemption falls squarely within this "unbroken tradition" and is thus constitutional both on its face and as applied.

Ignoring both history and precedent, Plaintiff centers her argument on an egregious misstatement of law: Plaintiff claims that any religious accommodation provided exclusively to religious organizations that is not required by the Free Exercise Clause and that burdens third parties violates the Establishment Clause. Pl.'s Br. at 51. Plaintiff premises this wholly inaccurate proposition on Justice Brennan's plurality opinion in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), which held that tax exemptions directed exclusively at religious organizations are often unconstitutional. But Justice Brennan's opinion commanded only three votes. Concurring in the judgment, Justice Blackmun, joined by Justice O'Connor, favored a "narrow resolution" of the case on the grounds that the Establishment Clause does not permit "a statutory preference for the dissemination of religious ideas." *Id.* at 28 (Blackmun, J., concurring in the judgment). Under *Marks v. United States*, 430 U.S. 188 (1977), it is Justice Blackmun's opinion that controls. Thus, the only binding precedent to be derived from *Texas Monthly* is that the

government may not selectively subsidize religious evangelization—a far more modest proposition than Plaintiff's claim.

1. Religious accommodations may give special consideration to religious groups, alleviate state-imposed religious burdens, and deny benefits to third parties.

The Supreme Court "has never indicated that statutes that give special consideration to religious groups are *per se* invalid." *Amos*, 483 U.S. at 338. To the contrary, the Court has stated that "[w]here . . . government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption comes packaged with benefits to secular entities." *Id.* The Court has thus upheld many exemptions that provide benefits exclusively to religious groups. *See*, *e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), which presumptively requires federal prisons to accommodate federal inmates' religious practices); *Amos*, 483 U.S. at 329 (Congress may exempt churches from Title VII's antidiscrimination provisions); *Zorach v. Clauson*, 343 U.S. 306 (1952) (cities may permit public school children to leave school daily for religious observance and instruction). Thus, the fact that Congress limited the church-plan exemption to religious organizations is not constitutionally problematic.

It is also "well established . . . that the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334 (internal quotation marks omitted). In other words, "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Locke v. Davey*, 540 U.S. 712, 718-19 (2004); *see also Cutter*, 544 U.S. at 713 ("[T]here is room for play in the joints between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause." (citation and internal quotation marks omitted)); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1483 (6th Cir. 1995) (upholding a statutory accommodation that was not required by the Free Exercise Clause on the grounds that, "[t]he statute at issue in this litigation does not evidence governmental advancement of religion merely because special consideration is given to religious groups"). *Cf. Hosanna-Tabor*, 132 S. Ct. at 702 (religious exemption required by Free Exercise Clause *and* Establishment Clause). Accordingly, this Court does not need to decide whether the church-plan exemption is *required* by the Free Exercise Clause.

Finally, the Supreme Court has upheld religious exemptions that imposed burdens—such as the denial of statutorily created benefits—on third parties. For example, in *Amos* the Court upheld a religious exemption to Title VII that allows

religious organizations to terminate employees for religious reasons. 483 U.S. at 338-39. Even though in *Amos* the exemption had the effect of *costing the plaintiff his job*, the Court did not find an Establishment Clause violation. Similarly, in *Cutter*, the Court upheld RLUIPA against an Establishment Clause challenge, even though accommodating prisoners' religious practices imposes obvious burdens on prison administrators, prison guards, and, to a lesser degree, on other institutionalized persons. 544 U.S. at 725-26. And conscientious objection to military service has a cost to others—someone must fight in the place of the conscientious objector. *See Gillette v. United States*, 401 U.S. 437 (1971) (upholding religious exemption from the draft). Plaintiff's theory would also invalidate existing exemptions protecting doctors with religious objections from being required to perform abortions. *See, e.g.*, 42 U.S.C. § 238n(a). The fact that the church-plan exemption denies employees of churches and church agencies the "benefit" of ERISA-compliant pension plans simply does not indicate a constitutional problem.

2. The church-plan exemption does not trigger *Texas Monthly*, *Thornton*, or *Kiryas Joel*.

Religious exemptions are not, of course, completely immune from constitutional challenge. The Supreme Court has explained that a legislative accommodation of religion may run afoul of the Establishment Clause when it "devolve[s] into an unlawful fostering of religion"—that is, when "the *Government*

itself" has sponsored religion through "its own activities and influence." *Amos*, 483 U.S. at 334-35, 337 (internal quotation marks and citation omitted). For example, as noted above, *Texas Monthly* prohibits the government from providing a preferential subsidy for the dissemination of religious ideas. 489 U.S. at 28 (Blackmun, J. concurring in the judgment) (exemption unconstitutional because Texas had "engaged in preferential support for the communication of religious messages").

Religious accommodations also may violate the Establishment Clause by imposing *religious* obligations on third parties. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). In *Thornton*, the Court struck down a Connecticut law that required employers to allow an employee to not work on his chosen Sabbath day. The Court held that the law "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath," and thus "impose[d] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates." *Id.* at 709.

Finally, the Court has held that a religious accommodation may violate the Establishment Clause if it confers a "privileged status on any particular sect," or "singles out" one "faith for disadvantageous treatment." *Cutter*, 544 U.S. at 724.

For example, in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), the Court struck down a New York law that custom-designed a separate school district to serve exclusively a community of Hasidic Jews in part because the law "single[d] out a particular religious sect for special treatment." *Id.* at 706.

The church-plan exemption "does not founder on [these] shoals." *Cutter*, 544 U.S. at 720. It does not subsidize religious evangelization, impose religious obligations on third parties, or favor any one religious group over another. Plaintiff does not claim otherwise. Rather, the church-plan exemption relieves churches and their associated entities from regulations that would stifle religious practice and expression. The stated purpose of the initial church-plan exemption was to avoid the "unjustified invasion" of church confidentiality that would result if churches were forced to open their books to the scrutiny of government regulators. S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965. The same concern writ large animated the 1980 amendment, which was designed to prevent the government from dictating or curtailing the bounds of a church's mission or polity. *See* 124 Cong. Rec. 12107 (1978) (Conable) ("Present law fails to recognize that the church agencies are parts of the church in its work of disseminating religious instruction and caring for the sick, needy, and underprivileged. . . . The churches consider their agencies as an extension of their mission."); 124 Cong. Rec. 16522

(1978) (Talmadge) ("Church agencies are essential to the churches' mission. They care for the sick and needy and disseminate religious instruction. They are, in fact, part of the churches.").

The 1980 amendment also had a second, more concrete effect of preserving mobility for church employees. Absent the amendment, the original church plan definition would have prevented churches from offering continuous coverage to ministers or lay employees who transferred between church and church agency work. As Representative Conable explained:

> A significant number of ministers and lay employees move frequently from church to agency and back in pursuance of their careers. A church may ask a rabbi to serve in an agency where his services are most needed. The rabbi may then return to pulpit work. The present definition of church plan does not satisfy the unique need of our churches to cover continuously their employees in one plan. If ministers and lay persons cannot be continuously covered by one plan, gaps in coverage will result, and they will not be free to pursue their work for the denomination as they should.

124 Cong. Rec. 12107 (1978); *see also* 124 Cong. Rec. 16522 (1978) (Talmadge) ("Employment is extremely fluid within our denominations. A minister will frequently move from church to agency, or wherever his services are most needed. . . . If the church plan definition is allowed to remain, ministers and lay employees will not be able to pursue their missions nearly as freely as they have in the past."). The amended church plan definition eliminated this problem, thereby preserving the free flow of personnel between churches and their agencies.

Because the church-plan exemption simply relieves churches and their agencies from burdens imposed by ERISA, it "fits within the corridor between the Religion Clauses: On its face, the [exemption] qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause." *Cutter*, 544 U.S. at 720.

C. Plaintiff's as-applied challenge squarely contradicts Supreme Court precedent and would result in entanglement.

Although the church-plan exemption undoubtedly passes constitutional muster, Plaintiff nevertheless contends that the exemption *would be* unconstitutional if extended to Ascension. Pl.'s Br. at 46, 51; *see also* No. 13-cv-11396 (E.D. Mich.), Dkt. 1 ("Complaint") ¶206 ("Plaintiff seeks a declaration by the Court that the Church Plan exemption, as claimed by Ascension Health, is an unconstitutional accommodation under the Establishment Clause of the First Amendment, and is therefore void and ineffective."). Plaintiff does not point to *a single case* in which an otherwise facially valid religious accommodation was held unconstitutional as applied to an exempted organization. Instead, Plaintiff offers erroneous statements of law "supported" by citations to inapposite cases. By raising the specter of a constitutional problem, Plaintiff apparently hopes to scare the Court into adopting her interpretation of the statute. But Plaintiff is crying wolf.

1. Plaintiff first argues that applying the church-plan exemption to Ascension would "not comport with any valid secular purpose for which the exemption was

enacted." Pl.'s Br. at 51; *id.* at 52 ("Congressional purpose of avoiding government examination of church books and records has no application to Ascension."). Plaintiff thus urges this Court to decide whether the exemption's admittedly secular purpose is *in fact accomplished* when applied to defendant. But that supposed test finds no support in the case law. Indeed, the single case Plaintiff cites, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), is completely inapposite. *Santa Fe* was not even about religious exemptions from government regulation. Rather, the question in *Santa Fe* was whether the defendant public school district's "policy permitting student-led, student-initiated prayer at football games violate[e]d the Establishment Clause." *Id*. at 301. Moreover, the plaintiffs in *Santa Fe* brought a *facial* challenge—not an as-applied challenge—to the policy. *Id*. Finally, in *Santa Fe* the Court *rejected* the defendant's "professe[d] secular purpose" and concluded that "the specific purpose of the policy was to preserve a popular 'state-sponsored religious practice.'" *Id.* at 308-09 (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1991)); *see also id.* at 314 ("[T]he text of the October policy alone reveals that it has an unconstitutional purpose."). Here, by contrast, Plaintiff has admitted that the statute has a secular purpose. Pl.'s Br. at 52. In fact, it is hard to discern any relation between the facts in *Santa Fe* and the facts here. *Santa Fe* provides no support for Plaintiff's notion that a court must examine

whether a given application of a facially valid religious exemption "comports" with the secular purpose for which it was enacted.

2. Plaintiff next contends that the exemption is unconstitutional as applied to Ascension because it "harm[s] Ascension workers and put[s] Ascension's competitors at an economic disadvantage." Pl.'s Br. at 51. As an initial matter, Plaintiff lacks standing to vindicate alleged harms to competitors, and none of Ascension's competitors have intervened in this case or are members of the putative class. *See* Complaint ¶115; Defs.' Br. at 56 n.50 (collecting authorities). The Supreme Court's decision in *Texas Monthly*, a case brought by a secular competitor who did not qualify for the religious sales tax exemption, thus has no application here.

More relevant to this case, there is nothing at all "as-applied" about Plaintiff's harm-to-employees argument. After all, church ministers are "denied the protection of ERISA" every bit as much as Plaintiff. Pl.'s Br. at 52. Thus, Plaintiff's third-party harm argument is really a facial attack on the church-plan exemption. More than that, under Plaintiff's view *all* religious exemptions from remedial regulations such as Title VII or ERISA would be unconstitutional. But that has never been the law. By definition, religious exemptions from remedial statutes allow exempted entities to deny third parties the very benefits those statutes otherwise confer. The Court has never held an exemption unconstitutional for that reason. It has focused

instead on whether the challenged exemption impermissibly *advances* religion. *Amos*, 483 U.S. at 337. The church-plan exemption clearly does not. Like the Title VII exemption upheld in *Amos*, the church-plan exemption simply leaves the parties in the same position they were in pre-ERISA. *See id.* ("[W]e find no persuasive evidence in the record before us that the Church's ability to propagate its religious doctrine through the Gymnasium is any greater now than it was prior to the passage of the Civil Rights Act in 1964."). Thus, notwithstanding the denial of ERISA benefits to Plaintiff and those similarly situated, the church-plan exemption does not have the effect of advancing religion.

Plaintiff cites *Thornton* and *Cutter* in support of her third-party harm argument, but those cases provide no support. In *Thornton*, the Connecticut law imposed a new burden on employers that did not exist prior to the law's enactment. 472 U.S. at 705 n.2 (describing history of Connecticut's Sunday-closing laws). And, more significantly, the Court held that the burden on employers and other employees was religious in nature. 472 U.S. at 709 ("[T]he Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by *enforcing observance of the Sabbath* the employee unilaterally designates.") (emphasis added). The religious accommodation in *Thornton* therefore "ha[d] a primary effect [of] impermissibly advanc[ing] a particular religious practice." *Id.* at 710. Here, Plaintiff has not

alleged that the church-plan exemption imposes *any* religious burden on her or other class members.[5] Nor could she.

In *Cutter*, the Court did note that an "accommodation must be measured so that it does not override other significant interests." 544 U.S. at 722. But the only case the Court cited for this proposition was *Thornton*. *Id.* ("We held the law [in *Thornton*] invalid under the Establishment Clause because it 'unyielding[ly] weigh[ted]' the interests of Sabbatarians 'over all other interests.'") (quoting *Thornton*, 472 U.S. at 710). The church-plan exemption does not override any interest, significant or otherwise, aside from that created by ERISA itself. Plaintiff's argument is thus without merit.

3. Plaintiff next argues that the church-plan exemption is unconstitutional as applied to Ascension because the exemption does "not relieve Ascension of any religious burden created by ERISA." Pl.'s Br. at 51. This argument is both wrong

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[5] In fact, Plaintiff claims that Ascension is not eligible for the church-plan exemption in part *because* it does not discriminate against non-Catholic employees such as herself. *See* Pl.'s Br. at 42 ("Ascension employees and patients are not required to be Catholic."); Complaint ¶107 ("Ascension touts its non-denominational employment policies to prospective employees, informing them that Catholic faith is not a factor in the hiring process. Instead, Ascension recruits and hires from the greatest employment pool possible—one not restricted by any faith—in an attempt to hire the most qualified healthcare workers."). It is ironic that Plaintiff's favored interpretation of the statute would give religious associations an incentive to rigidly enforce religious orthodoxy requirements on their employees—a result that might cause real (though not unconstitutional) harm to non-Catholic employees.

and dangerous. It is wrong because *Texas Monthly*—the only case Plaintiff cites—does not support the point. And it is dangerous because it would require courts to make case-by-case determinations regarding the specific religious burdens imposed by regulatory statutes on various religious entities.

Plaintiff relies on Justice Brennan's non-controlling opinion in *Texas Monthly* rather than Justice Blackmun's controlling opinion. But even Justice Brennan's opinion provides no support for her position. On its own terms, Justice Brennan's opinion applies only to state *subsidies* paid for by "nonqualifying taxpayers." 489 U.S. at 14 (Brennan, J.) ("Every tax exemption constitutes a subsidy that affects nonqualifying taxpayers"). The church-plan exemption does not subsidize religious organizations on the backs of nonqualifying taxpayers. Employees of exempt organizations are entitled to whatever benefits the church or church agency provides, and neither taxpayers nor the Pension Benefit Guaranty Corporation are on hook if the church is unable to meet those obligations.

Now to the dangerous aspect of Plaintiff's theory. If adopted, Plaintiff's legal rule would require courts to examine the nature and extent of the burden ERISA imposes on church agencies that otherwise qualify for the exemption. This inquiry would necessarily require courts to decide which aspects of a church or church agency's operations count as "religious." After all, a burden is only "religious" in nature if it impinges upon religious functions. But "determining whether an

activity is religious or secular requires a searching case-by-case analysis," resulting in "considerable ongoing governmental entanglement in religious affairs." *Amos*, 483 U.S. at 343 (Brennan, J. concurring in the judgment). "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." *New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977). Indeed, the 1980 Amendments were enacted *precisely to avoid* this sort of fine-grained inquiry. *See supra*.[6] In short, Plaintiff's proposed Establishment Clause test—requiring case-by-case assessments of the particular religious burdens imposed on qualifying religious entities—creates more constitutional problems than it solves.

4. Finally, Plaintiff argues that applying the church-plan exemption to Ascension "create[s] more government entanglement with alleged religious beliefs than would ERISA compliance." Pl.'s Br. at 51-52. This is a remarkable assertion, given that Plaintiff's lawsuit is the source of any entanglement here. For nearly 40 years, church agencies such as Ascension have availed themselves of the church-plan exemption without entanglement. The Internal Revenue Service has issued

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[6] *See also Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality op.) ("courts should refrain from trolling through a person's or institution's religious beliefs"); *Hosanna-Tabor*, 132 S. Ct. at 709 (issue of dividing religious activity from non-religious activity is "not one that can be resolved by a stopwatch").

opinion letters stating that such entities qualify for the church-plan exemption without "government embroilment in controversies over religious doctrine." *Texas Monthly*, 489 U.S. at 20 (Brennan, J.). In fact, it is *Plaintiff*'s interpretation of the church-plan exemption, not Ascension's, that would violate the Establishment Clause. *See* Part II, *infra.*

* * *

Plaintiff's argument that the Establishment Clause *prohibits* Congress from exempting Ascension from the burdens imposed under ERISA is unsupported by history, precedent, or logic. This religious accommodation, like countless others, fits comfortably within "the unbroken tradition of legislatively enacted regulatory exemptions"—even when extended to Ascension. Laycock, 81 Notre Dame L. Rev. at 1837.

II. Plaintiff's interpretation of the statute—not Ascension's—would violate the Establishment Clause.

As *amicus* has shown, the longstanding IRS interpretation of the church-plan exemption does not violate the Establishment Clause. The same cannot be said of Plaintiff's newly-minted interpretation. Plaintiff claims that Ascension does not "share[] common religious bonds and convictions with [the Roman Catholic] [C]hurch" and is therefore not "associated with" the Church. 29 U.S.C. § 1002(33)(C)(iv). This is so, Plaintiff contends, because "Ascension deliberately abrogates Catholic convictions when doing so is in its economic interest." Pl.'s Br.

at 41. Ascension's worst sins allegedly include "perform[ing] or authoriz[ing] medical procedures forbidden by the Catholic Church, prioritiz[ing] its obligations to bondholders over its charitable mission, invest[ing] in a medical debt collection firm that was banned from the state of Minnesota for engaging in heavy-handed debt collection practices, and clos[ing] the only hospital in one of Detroit's poorest neighborhoods to serve its own financial interests." *Id.* at 41 n.42. In short, Plaintiff is asking the Court to hold that Ascension is *not Catholic enough* to qualify for the exemption based on a judicial finding that Ascension is not sufficiently following Catholic doctrine to be considered part of the Catholic Church. There can be no clearer violation of the Establishment Clause than to have government bodies decide these types of doctrinal issues. Not only that; it would also increase entanglement and discriminate against those groups courts decide are less devout in favor of those they decide are more devout.[7]

The First Amendment prohibits courts from analyzing whether a religious organization has correctly interpreted or followed the doctrines of its faith. *Amos*,

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[7] Plaintiff argues that the Court can avoid determining "whether Ascension is *religious*" by conducting a "*factual* determination" into whether "Ascension and the Roman Catholic Church share common bonds and convictions." Pl.'s Br. at 44 (emphasis in original). That circular reasoning simply leads back to the question of *how* courts should determine whether church agencies share common bonds and convictions. Plaintiff's answer is that courts should evaluate whether defendants faithfully adhere to their church's religious doctrine, which federal courts cannot constitutionally do.

483 U.S. at 336 ("[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."). But that is precisely what Plaintiff asks this Court to do. Plaintiff's interpretation of the exemption would "call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979). Plaintiff's interpretation would thus lead to greater entanglement between church and state, not less. *See Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1263 (10th Cir. 2008) ("[T]he state may take no position" on what "Catholic—or evangelical, or Jewish—polic[y] is" "without entangling itself in an intrafaith dispute.") Accordingly, the Court should "decline to construe the Act in [that] manner[.]" *Catholic Bishop of Chicago*, 440 U.S. at 500 ("[A]n Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.") (citing *Murray v. The Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C.J.)). *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) ("our 'narrow function . . . in this context is to determine' whether the line drawn reflects 'an honest conviction,' and there is no dispute that it does.") (quoting *Thomas v. Review Board of Indiana Employment Sec. Division*, 450 U.S. 707, 716 (1981)). The question of whether Ascension has apostatized should be answered by the Catholic Church, not this Court.

Moreover, Plaintiff's rule would privilege overtly devout religious organizations over those that may appear less orthodox, thus violating "[t]he clearest command of the Establishment Clause": non-discrimination among religions. *Larson v. Valente*, 456 U.S. 228, 244 (1982). The statute would express a clear religious preference if Catholic hospitals that restrict employment to baptized Catholics are allowed to claim the exemption while Catholic hospitals that employ atheists, Baptists, and Jews are not. But the fact that a religious organization "is ecumenical and open-minded . . . does not make it any less religious, nor [government] interference any less a potential infringement of religious liberty." *University of Great Falls v. NLRB*, 278 F.3d 1335, 1346 (D.C. Cir. 2002). Furthermore, privileging overtly devout religious organizations would pressure organizations to change their religious practices in order to avoid governmental interference. *See Amos*, 483 U.S. at 336 ("Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission."). The legal system should not pressure religious institutions to play up their religiosity or change their beliefs in order to avoid burdensome governmental regulation.

CONCLUSION

The church-plan exemption does not violate the Establishment Clause either on its face or as applied. And interpreting the church-plan exemption as Plaintiff

suggests would require civil courts to become arbiters of orthodoxy. The Court should affirm the judgment below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), that this brief is proportionately spaced, has a typeface of 14 points, and contains 6,991 words in compliance with Fed. R. App. P. 29(d).

Dated this November 12, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 12th day of November, 2014, I electronically filed the foregoing Brief on the electronic docketing system for the Court of Appeals for the Sixth Circuit, thereby effectuating service on counsel of record. 6th Cir. R. 25(f)(2).

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