UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MARIA STAPLETON, et al. on behalf of themselves, individually, and on behalf of all others similarly situated, and on behalf of the Advocate Plan,	)	Civil Action No. 1:14-cv-01873
Plaintiffs,	)	
v.	)	Hon. Edmond E. Chang
ADVOCATE HEALTH CARE NETWORK AND SUBSIDIARIES, et al.,	)	
Defendants.	)	

BRIEF *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF DEFENDANTS

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INTEREST OF THE *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 promoting exceptions to generally applicable laws that prevent government entanglement with religion. *See, e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012); *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245 (10th Cir. 2008). The Becket Fund is concerned that adopting plaintiffôs theory in this case would impermissibly entangle the state in religious decision-making, and pressure religious institutions to change their religious practices. The Becket Fund expresses no opinion here on whether Advocates is statutorily entitled to the ñchurch planò exemption. It argues only that such an exemption is constitutionally valid on its face and would be constitutionally valid as applied.[2]

SUMMARY OF ARGUMENT

Out of respect for religious freedom, legislatures have long provided religious groups with exemptions from generally applicable laws. This tradition continues to this day, with a vast range of state and federal statutes providing various exemptions for religious institutions or believers.

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation or submission of this brief.

Amicus acknowledges the assistance of Julie Cayemberg, a third-year student at the University of St. Thomas School of Law, in drafting and preparing this brief.

[2] This brief uses the term ñchurch,ò as the IRS does, to refer to religious organizations of all faiths.

Plaintiffsô Establishment Clause logic puts such exemptions in jeopardy unless they are offered to secular claimants as well, a result that would conflict with the Supreme Courtôs Establishment Clause jurisprudence. Far from viewing exemptions of religious institutions as a way of impermissibly expanding religionôs power, the Court has celebrated such exemptions as a way to protect religious freedom and diversity and healthy separation between church and state.

Moreover, when a statutory religious exemption is facially permissible and a religious institution otherwise qualifies for it, a court should not then disqualify the institution on the ground that it is supposedly too ecumenical (or too parochial). Plaintiffs ask this Court, inappropriately, to disqualify Advocate from exemption because of its various practicesð openness to other faiths and to secular partnersð that reflect its ecumenical religious mission.

Accordingly, this Court should dismiss plaintiffsô count alleging that applying the church plan exemption would violate the Establishment Clause; moreover, the Court should reject, as a matter of law, several allegations the plaintiffs use to try to show that Advocate lacks sufficient religious convictions to qualify for the exemption. To hold otherwise would conflict with the Nationôs tradition of accommodation and would invite judicial inquiries that produce religious discrimination, government intrusion into religious life, and chilling effects on religious practice.

DISCUSSION

I. The Establishment Clause lets Congress exempt religious organizations from generally applicable laws, except when an exemption would constitute selective government sponsorship of religious evangelization or would fail to remove a genuine government-imposed burden from religion.

ñFrom the late seventeenth century to the present, there is an unbroken tradition of legislatively enacted regulatory exemptions.ò Douglas Laycock, *Regulatory Exemptions of*

Religious Behavior and the Original Understanding of the Establishment Clause, 81 NOTRE DAME L. REV. 1793, 1837 (2006). This tradition of choosing not to burden religious practice played a vital role in developing the modern understanding that government should remain neutral in religious affairs. *Id.* at 1839.

This historical practice continues today. ñThere is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.ò *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (internal quotation marks omitted). The Court ñhas long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.ò *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-45 (1987). Government abstention from regulating religious institutions is thus the antithesis of ñestablishmentò of religion. Accordingly, it is unsurprising that currently more than 2,000 state and federal statutes exempt religious groups from their coverage. Laycock, *supra*, at 1837.

By contrast, plaintiffsô theory in this case would make many exemptions of religious organizations constitutionally suspect. As to religious organizations other than churches, the complaint asserts not just that they may, but that they ñmust,ò be subjected to ñneutral regulations, such as ERISA, imposedò to protect employees. Compl. ¶ 215(B); see *id.* at ¶¶ 96-97. Plaintiffsô theory cannot be, and is not, an accurate interpretation of the Establishment Clause.

A. A religious exemption does not violate the Establishment Clause simply by exempting religious institutions but not secular institutions.

ñA law is not unconstitutional simply because it *allows* churches to advance religion.ò *Amos*, 483 U.S. at 337 (emphasis in original). Rather, for an exemption to violate the

Establishment Clause, ñit must be fair to say that the *government itself* has advanced religion through its own activities and influence.ò *Id.* (emphasis in original).

Consequently, the Supreme Court has upheld many exemptions freeing religious practices from regulation. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding requirement of Religious Land Use and Institutionalized Persons Act (RLUIPA) that federal prisons accommodate inmatesô religious practices); *Amos*, 483 U.S. at 329 (upholding exemption of religious organizations from antidiscrimination laws, even as to employees such as building engineers); *Zorach v. Clauson*, 343 U.S. 306 (1952). The Court ñhas never indicated that statutes that give special consideration to religious groups are per se invalidò; rather, ñthere is ample room for accommodation of religion under the Establishment Clause.ò *Amos*, 483 U.S. at 338. Moreover, ñ[i]t is well establishedò that permissible legislative accommodations ñare by no meansò limited to situations where accommodation is ñmandated by the Free Exercise Clause.ò *Id.* at 334 (internal quotation marks omitted).

B. A religious exemption only violates the Establishment Clause when it would constitute government sponsorship of religious evangelization or when it removes no genuine government-imposed burden on religious practice.

This is not to say that the Supreme Court would permit every exemption enjoyed by a religious institution. ñAt some point, accommodation may devolve into an unlawful fostering of religion,ò *Amos*, 483 U.S. at 334-35, when ñthe *government itself*ô has sponsored religion through ñits own activities and influence.ò *Id.* at 337 (emphasis in original).

But the Supreme Court has found such unlawful fostering only when an exemption directly and preferentially subsidizes religious communication. In *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), six Justices invalidated a Texas sales tax exemption for periodicals ñpublished or distributed by a religious faithò that consisted wholly of writings that were sacred to or

promulgated the faith. *Id.* at 5. Justice Brennanôs lead opinion, which only two other justices joined, embraced a broad theory that tax exemptions directed exclusively at religious organizations are unconstitutional in many cases. *Id.* at 14-15. But Justice Blackmunôs concurrence, which Justice OôConnor joined, rejected the lead opinionôs ñsubordinati[on of] the Free Exercise valueò; instead it adopted the more ñnarrow resolutionò that the statute, by exempting the sale of religious literature, gave ñpreferential support for the communication of religious messages.ò *Id.* at 27, 28 (Blackmun, J., concurring in the judgment); *see also id.* at 26 (White, J., concurring in the judgment) (exemptionôs preference for publications with religious content violated Free Press Clause). Because the lead opinion agreed with this narrower ground, *id.* at 15, the only binding precedent *Texas Monthly* set is that government may not selectively subsidize religious communication or evangelization.

The Supreme Court has also invalidated a state law requiring that private employers give Sabbatarians their preferred day off no matter the cost to the employer. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708 (1985). But such an across-the-board legal obligation imposed on private third parties is the opposite of laws exempting private religious organizations from legal obligations. The Court explained in *Amos* how the situation there was ñvery differentò from that in *Thornton*. 483 U.S. at 337 n.15. The *Thornton* statute ñhad given the force of lawò to the employeeôs religious practice by requiring the private employer to follow it. But in *Amos*ð as in other true cases of government accommodationð the exemption simply refrained from imposing a legal burden on the Church, and ñit was the Church[,] . . . and not the government, who put [the employee] to the choice of changing his religious practices or losing his job.ò *Id.*; *see also Charles v. Verhagen*, 348 F.3d 601, 611 (7th Cir. 2003) (removing substantial burdens from religion ñcannot fairly be said to amount to government advancement

of religion through the government's own activities or influenceò). Justice OôConnor likewise distinguished between the statute in *Thornton* and exemptions from government burdens: the *Thornton* statute ñattempts to lift a burden on religious practice that is imposed by *private* employers, and hence it is not the sort of accommodation statute specifically contemplated by the Free Exercise Clause.ò *Thornton*, 472 U.S. at 712 (OôConnor, J., concurring) (emphasis in original).

The Court has indicated that an accommodation ñmust take adequate account of the burdens [it] may impose on nonbeneficiaries.ò *Cutter*, 544 U.S. at 720. But since that statement rested on the authority of *Thornton*, see *id.* at 720, 722, it must be read in the light of *Thornton*. As just noted, the Court has made clear that giving the religious adherentôs practice ñthe force of lawò (as in *Thornton*) is ñvery differentò than exempting a practice from a burdensome legal duty: the latter merely ñ*allows* churches to advance religionò and does not impose religion by law. *Amos*, 483 U.S. at 337 & n.15 (emphasis in original). When regulation includes an exemption, employees are simply in the same place they would have been had the government not regulated at all; ñit [is] the Church[,] . . . and not the government,ò who affects the employeesô interests.

Thus, when an exemption has removed a genuine government-imposed burden on religion, the Court has *never* disapproved it on the ground that it left nonbeneficiaries worse off than they would be absent the exemption. To the contrary: *Amos* unanimously upheld Title VIIôs religious-organizations exemption even ñthough it had some adverse effect on those holding or seeking employment with those organizations,ò because it ñprevented potentially serious encroachments on protected religious freedoms.ò *Texas Monthly*, 489 U.S. at 18 n.8 (Brennan, J.).

The Court just recently rejected the assertion that an exemption is improper simply because it would allow an organization to decline ñto confer benefits on third partiesò such as employees. *Burwell v. Hobby Lobby Stores, Inc.*, 2014 WL 2921709, at *24 n.37 (U.S. 2014). If that assertion were accepted under the Religious Freedom Restoration Act (RFRA), the Court said, government could ñfram[e] any . . . regulation as benefiting a third partyò and ñturn all regulations into entitlements to which nobody could object on religious grounds, rendering RFRA meaningless.ò *Id.* Likewise, if an exemption from regulation were deemed an unconstitutional establishment simply because it left third parties without a benefit, challengers could frame virtually every regulation as an entitlementð rendering meaningless the Courtôs teaching that ñthere is ample room for accommodation of religionò (*Amos*, 483 U.S. at 338).[3]

C. The ERISA "church plan" exemption does not violate the Establishment Clause.

Applying these principles, ERISAôs church plan exemption is a permissible example of ñbenevolent neutralityò because it removes a genuine government-imposed burden from religious organizations and does not directly sponsor religious evangelization.

First, the exemption unquestionably removes significant burdens from religious organizations and prevents significant government entanglement with them. ERISA imposes strict and pervasive requirements on plan sponsors that are covered by the statute. For instance, under ERISA sponsors have a fiduciary duty to invest the funds in the financial interests of the beneficiaries, and may thus be constrained in making what they see as socially responsible investmentsð the kind that tend particularly to fit religious organizationsô missions. *See, e.g.*,

[3] Among the many accommodations that could be said to affect third-party benefits are the Title VII provision, unanimously upheld in *Amos*, allowing religious organizations to deny employment based on religious affiliation, 42 U.S.C. § 2000e-1; and provisions allowing religious groups to give preference to prospective tenants of the same religion, *id.* § 3607, and exempting them from the requirements of the Americans with Disabilities with Act, *id.* § 12187. The Establishment Clause cannot be read to forbid these accommodations.

29 C.F.R. § 2509.08-1 (fiduciary ñmay not select investments on the basis of any factor outside the economic interest of the plan except in very limited circumstancesò; examples of impermissible investments include affordable housing or ñgreenò companies that do not offer ñequal or better returns at the same or lower risksò than alternatives); *see also* LEE T. POLK, 1 ERISA PRACTICE & LITIGATION § 3:40 (2013).

Moreover, absent the exemption, sponsors would be subject to ERISAôs pension plan participation and coverage requirements, under which sponsors must determine the rate at which pension benefits accrue without reference to an employeeôs age. Sponsors would likewise have to provide postretirement survivor annuities to married employees, with ñmarriageò defined by the state from which the beneficiary received a marriage license.[4] Sponsors would have to vest pension benefits, even when members leave the organization. *See* 29 U.S.C. §§ 1001-1011, 1054(b)(1)(H), 1055. Employees who are discharged, demoted, or not promoted would be able to sue, claiming that the real reason for the employment action was a desire to prevent them from exercising rights under the benefit plan. *Id.* § 1140.

Applying these requirements would pose multiple risks of government interference and entanglement with religion. Religious groups would be restricted from making investments that are less financially remunerative but, in the religionôs view, promote social justice or avoid supporting evils. Taoists, whose religious practices include especially honoring the elderly, could not give any preference to the elderly. Christians, Muslims, or Jews with religious objections to same-sex marriage would have to provide benefits to same-sex spouses. All religious groups would have to provide benefits once they vested, even to those the organization regards as apostates or schismatics. More church decisions about the firing,

[4] U.S. Depôt of Labor, Guidance to Employee Benefit Plans on the Definition of ñSpouseò and ñMarriageò under ERISA and the Supreme Courtôs Decision in United States v. Windsor, Technical Release No. 2013-04, http://www.dol.gov/ebsa/newsroom/tr13-04.html.

demotion, and non-promotion of employees would be second-guessed, with judges and juries being asked to determine the true reason for an employment action. *Cf. Hosanna-Tabor*, 132 S. Ct. at 706 (noting that, for some jobs, such second-guessing violates the Establishment Clause); *Amos*, 483 U.S. at 335-36 (noting permissible, even if not constitutionally required, purpose of abstaining from regulating religious organizationsô employment decisions). Federal courts would inevitably become arenas for intra-faith civil disputes between churches and disgruntled members. 29 U.S.C. §§ 1132(a).

In short, plaintiffs utterly ignore reality when they claim that ERISA compliance imposes no burden and ñrequires *zero* entanglement with religion.ò Compl. ¶ 215(D), (E) (emphasis in original). Just as Congress was entitled to conclude that state and local governments should be spared the burden and intrusion of federal regulation of benefit plans, see 29 U.S.C. § 1003(b)(1) (exempting government plans), it was entitled to conclude the same as to church plans.

Nor does the ERISA church-plan exemption provide any preferential support for the communication of religious messages or ideas. The exemption may free up resources for Advocate, which may indirectly let it do many other things, including spread its message. But, as *Amos* made clear, such effects of religious exemptions do not amount to unconstitutional government sponsorship of religion. *Amos*, 483 U.S. at 336; *Charles*, 348 F.3d at 611 (RLUIPAôs removal of burdens on prisonersô religious exercise ñdoes not promote religious indoctrinationò).

Plaintiffs alleges that the church plan exemption is invalid because it imposes burdens on employees who are non-adherents. Compl. ¶215(B). But the exemption does not impose any legal obligations on other parties; and as we have discussed (*supra* pp. 6-7), that is the kind of

imposition that the Court invalidated in *Thornton v. Caldor*. Church plan beneficiaries do not get various legal benefits associated with ERISA, but that simply leaves them in the same position that everyone was in before ERISA was enacted, and the same position that members of state and local government plans are in today. Plaintiffsô argument would call into question numerous exemptions that could be characterized as affecting third parties, see *supra* p. 7 & n.3ð a result irreconcilable with the ñample room for accommodationò affirmed in *Amos* (483 U.S. at 338).

II. A religious institution that is otherwise eligible for a facially valid exemption should not lose exemption on the ground that the institution is too ecumenical (or too parochial).

Because Congress permissibly exempted church plans from ERISA, the question is whether the exemption extends to Advocate. Amicus takes no position on the statutory question whether an exempt plan must be ñestablishedò as well as ñmaintainedò by a church. See Dfs.ô Mem. In Support of MTD at 12-23 (hereinafter ñAdvocate Mem.ò). But if Advocateôs plan is eligible on that score, then there is certainly evidence that Advocate qualifies for the exemption because it is ñcontrolled by or associated with,ò and ñshares common religious bonds and convictions with,ò the United Church of Christ (UCC) and the Evangelical Lutheran Church in America (ELCA). 29 U.S.C. § 1002(33)(c)(ii), (iv). *See* Advocate Mem. at 23 (describing church connections).

Despite these connections with the UCC and ELCA, plaintiffs assert that various features of Advocate disqualify it from the exemption. Plaintiffs rely on these features to allege that Advocate is not ñcontrolled by or associated withò the denominations under the exemptionôs terms, Compl. ¶¶ 95-99, and that extending the exemption to Advocate would violate the Establishment Clause, *id.* ¶ 215. Either way, plaintiffs seek to disqualify Advocate on the basis

that it is too ñecumenicalò in its practices to warrant protection. But disqualifying Advocate on these groundsð under either the statute or the Establishment Clauseð would be impermissible, because it would discriminate against ecumenical or ñopenò religious groups, entangle this Court in evaluating religious beliefs, and pressure religious groups to change their practices.

A. Excluding an organization from exemption based on restrictive understandings of what is sufficiently "religious" leads to impermissible religious discrimination and entanglement.

Courts are constitutionally prohibited from interfering with a religious institutionôs definition of its own community and mission and involving themselves in ecclesiastical or theological decisions. See *Hosanna-Tabor*, 132 S. Ct. at 705-06. However, courts will wade into precisely such ecclesiastical debates if they apply narrow or selective understandings of what is sufficiently ñreligiousò to qualify for an exemption. Plaintiffs should not be permitted to argue that an otherwise eligible religious group is too ecumenical (or exclusive) to qualify.

First, excluding a group on such grounds would prefer one religious organizationôs mission over another, violating ñ[t]he clearest command of the Establishment Clauseò: non-discrimination among religions. *Larson v. Valente*, 456 U.S. 228, 244 (1982). *See also Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (holding that consideration of whether an organization was ñpervasively sectarianò and thus too religious to qualify for a benefit likewise constituted impermissible ñdiscrimination [among institutions] ón the basis of religious views or religious statusôò) (quotation omitted).

Here, several grounds plaintiffs assert for denying the ERISA exemption would discriminate against Advocateôs choice of its religious mission. Plaintiffs argue Advocate is not associated with the UCC or ELCA because it does not recruit or hire employees on the basis of religious affiliation, it partners with hospitals that claim no religious affiliation, and ñit provides

non-denominational chapels and encourages its clients to seek the faith of their own choosing.ò Compl. ¶¶ 96-99. But these features simply reflect the very bonds and convictions that Advocate shares with the UCC and ELCA. *See* Advocate Mem. at 23-24; *see also* UCC, Ecumenism and Interfaith Partners, http://www.ucc.org/ecumenical/ (UCC is ñactively engaged in ecumenical relationships,ò including with ECLA and other faiths, that ñhelp us to serve the world more effectively in Godôs nameò); ECLA, The Vision of the ELCA, at 7, http://download.elca.org/ELCA Resource Repository/The_Vision_Of_The_ELCA.pdf

(committing ECLA to ñcommon actionò with others that ñwill provide true witness to Christian faith and effective expression to Godôs love in Christò).

As the D.C. Circuit has recognized, ñif [an organization] is ecumenical and open-minded, that does not make it any less religious, nor [government] interference any less a potential infringement of religious liberty.ò *University of Great Falls v. NLRB*, 278 F.3d 1335, 1346 (D.C. Cir. 2002). The court there held that a Catholic university was eligible for a religious exemption from laws requiring collective bargaining with workers, even though it welcomed many non-Catholics as students and faculty, did not require attendance at mass, and ñtolerated, even respected,ò other religious views. *Id.* at 1345, 1346 (holding that denying exemption might violate ñthe most basic command of the Establishment Clauseð not to prefer some religions . . . to others.ò). Just as in the NLRB context, a religious organization should not lose eligibility for an exemption from burdensome employment regulation merely because it reaches out to other faiths.

Second, disqualifying Advocate based on the features plaintiffs describe would also impermissibly entangle this Court in questioning the faith, doctrine, and missions of Advocate and its founder churches. Plaintiffs, remarkably, allege that Advocateôs openness to employing

and partnering with people of other faiths show that it merely ñpurport[s] to share common religious bonds and convictions with the UCC and the ELCAòðð that it ñselectively choosesò which convictions to share (Compl. ¶ 99). Plaintiffs thus call on this Court to rule that the structure and practices of Advocate are inconsistent with UCC/ELCA missions and doctrines.

But as the Supreme Court recently reaffirmed, secular courts are forbidden to analyze whether a religious organization correctly interpreted the doctrines of its faith. *Hobby Lobby*, 2014 WL 2921709, at *21 (ñ[f]or good reason, we have repeatedly refusedò to ñtell [religious adherents] that their beliefs are flawedò); *accord Thomas v. Review Bd.,* 450 U.S. 707, 715 (1981). Likewise, the Court in *Amos* recognized that ñit 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 religiousò; the organization ñmight understandably be concerned that a judge would not understand its religious tenets and sense of mission.ò 483 U.S. at 336. Plaintiffs propose just such a misunderstanding here by arguing that features of Advocateôs ecumenical religion show that Advocate is only ñselectivelyò religious (Compl. ¶ 99). This misreading confirms that the inquiry the plaintiffs propose is impermissible.

Repeatedly, in different contexts, the Supreme Court and lower courts have recognized the improper entanglement that would follow from investigating, case by case, the particular practices of statutory religious exemption beneficiaries. *See, e.g.*, *Amos*, 483 U.S. at 336; *id.* at 343 (Brennan, J., concurring) (religious organizationsô exemption may extend to organizationsô ñsecularò activities because ñdetermining whether an activity is religious or secular requires a searching case-by-case analysisò that ñresults in considerable ongoing government entanglement religious affairsò). In *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970), the Court refused to justify property tax exemptions for religious institutions ñon the social welfare

services or ógood worksô that some churches performò because this would introduce ñgovernmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimizeò). In *University of Great Falls*, *supra*, the court held that the NLRB improperly excluded an ecumenically oriented Catholic university from exemption by ñtrolling through the beliefs of the University, making determinations about its religious mission,ò and asking ñ[I]s it *sufficiently* religious?ôò 278 F.3d at 1342-43 (emphasis in original). Similarly, in *Colorado Christian University*, *supra*, the court invalidated a statute excluding students at ñpervasively sectarianò colleges from state-funded scholarships, on the ground that the statute required ñintrusive judgments regarding contested questions of religious belief or practice,ò for example, whether the policies of the schoolôs governing board ñreflect[ed a] particular religion.ò 534 F.3d at 1261, 1263; *id.* at 1263 (ñfor the state to decide what Catholicð or evangelical, or Jewishð ópolic[y]ô isò would ñentangl[e the state] in an intrafaith disputeò) (first alteration in original).

Yet plaintiffs call for this very sort of investigation into how religious Advocate is, by arguing that its openness to other faiths and to secular partners shows it is ñselectiveò in its religious convictions and ñignores or abandonsò them. Compl. ¶ 99. Plaintiffs ask this Court to use this assessment to disqualify Advocate from the church plan exemption even if it is otherwise eligible. Any such inquiry into the quality and breadth of Advocateôs religiosity is not constitutionally permitted, much less constitutionally required.

B. Disqualifying organizations like Advocate based on such understandings would also pressure religious organizations to change their religious practices.

Finally, if plaintiffôs arguments were accepted, Advocate and other similarly situated systems would be pressured to change their religious practices. These systems may wish to be

ecumenical in their policies, governance, and employment decisions; but under the plaintiffsô theory, they must become far more restrictive in order to maintain the church plan exemption that Congress intended to apply to them. In short, only those institutions that the plaintiffs deem sufficiently ñorthodoxò would enjoy any protection. As a result, precisely as the Supreme Court has warned, ñ[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission.ò *Amos*, 483 U.S. at 336.

Different religious institutions and religious traditions have different views on how ecumenical or ñopenò they wish to be in their ministries. Congress deliberately exempted all church plans from ERISA, thus preventing any government entanglement and pressure concerning such decisions. But plaintiffsô approach, if adopted, would require ecumenical-minded institutions to make their practices less open than their faith would indicate, if they wish to avoid extensive government interference. The legal system should not pressure religious institutions to close themselves to others in this manner.

CONCLUSION

This Court should dismiss Count IX, the Establishment Clause count, of the complaint; and it should reject as a matter of law plaintiffsô arguments, identified above, that Advocate is too ecumenical to qualify under the statutory exemption.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief Amicus Curiae was served on July 28, 2014 upon all counsel of record, by means of the Courtôs electronic case filing system.

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