No. 18-3325

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SHEILAR SMITH, *et al.*,

Plaintiffs-Appellants,

v.

OSF HEALTHCARE SYSTEM, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Illinois

BRIEF FOR INTERVENOR THE UNITED STATES

JOSEPH H. HUNT
Assistant Attorney General

STEVEN WEINHOEFT
United States Attorney

SHARON SWINGLE
(202) 353-2689
LOWELL V. STURGILL JR.
(202) 514-3427
Attorneys, Appellate Staff
Civil Division, Room 7241
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

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INTRODUCTION

This is a putative class action brought by participants in two employee pension plans. Plaintiffs claim that defendants, OSF Healthcare System and its affiliates (collectively "OSF"), have operated these pension plans in violation of the requirements set out in the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829, codified at 29 U.S.C. §§ 1001-1461.[1] Defendants maintain that these pension plans qualify as church plans within the meaning of the statute, and are therefore exempt from ERISA's requirements. *See* 29 U.S.C. § 1002(33). Plaintiffs assert that defendants' pension plans do not qualify for ERISA's "church-plan" exemption, and further that extending that accommodation to OSF violates the Establishment Clause of the U.S. Constitution. The United States has intervened in this litigation to defend the constitutionality of the church-plan exemption. *See generally* 28 U.S.C. § 2403(a).

The district court granted summary judgment for defendants, holding that the church-plan exemption applies to the plans at issue here, and that applying the exemption to those plans is consistent with the Establishment Clause. The district court reasoned that ERISA's church-plan exemption relieves religious organizations and their associated entities from government mandates about how they "conduct

[1] The Internal Revenue Code ("IRC") contains provisions that parallel ERISA's pension plan rules. *See, e.g.*, 26 U.S.C. §§ 401, 410-411, 430-433.

their affairs, structure their finances and pursue their missions." Short Appendix (SA) 16. Accordingly, and as the Tenth Circuit held in *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017), the church-plan exemption lawfully alleviates "significant governmental interference with the ability of religious organizations to define and carry out their religious missions," SA 15, and reduces government entanglement with religion, rather than creating it. *See* SA 16. *See also Gaylor v. Mnuchin*, 2019 WL 1217647, *7 (7th Cir. Mar. 15, 2019) (rejecting Establishment Clause challenge to extension of parsonage tax exemption to include cash allowances because it had the valid secular purpose and effect of eliminating discrimination between ministers and avoiding entanglement with religion).

The United States takes no position in this appeal on whether defendants' plans qualify for the church-plan exemption. If the Court concludes that the plans do qualify for that exemption, however, the Court should uphold the exemption, as applied to defendants, as a lawful, permissive accommodation of religion.

STATEMENT OF JURISDICTION

The jurisdictional statement in the brief for appellants is complete and correct.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The United States argues that the ERISA church-plan exemption is consistent with the Establishment Clause. The United States takes no position on whether defendants' plans qualify for the church-plan exemption.

STATEMENT OF THE CASE

A. Statutory Background

1. Enacted in 1974 to protect Americans' anticipated retirement benefits, *see* 29 U.S.C. § 1001, *inter alia*, ERISA generally obligates private employers offering pension plans to adhere to an array of rules designed to ensure plan solvency and protect plan participants. *See Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1656 (2017).

ERISA seeks to achieve this goal by setting minimum standards for the administration of pension plans, including standards regarding the amount of time a plan may require a person to work before becoming eligible to participate in the plan, to accumulate benefits, and to have those benefits vest; and by creating a set of rules that plan sponsors must follow to ensure adequate funding of pension plans. *See*, *e.g.*, 29 U.S.C. §§ 1051-1054, 1081-1085. ERISA also requires that beneficiaries receive information and regular financial disclosures concerning the pension plan, *id.* §§ 1021-1023; imposes fiduciary standards that plan trustees and other fiduciaries must follow, *id.* §§ 1101-1111; and creates a federal cause of action to sue for breaches of fiduciary duty, *id.* § 1132. *See Advocate Health Care*, 137 S. Ct. at 1656. Another ERISA provision, 29 U.S.C. § 1321(b)(3), also exempts church plans from

the Pension Benefit Guaranty Corporation's ("PBGC")[2] guarantee of payment of certain benefits if a defined-benefit pension plan is terminated.[3]

Among other statutory exceptions, "'[c]hurch plans' have never had to comply with ERISA's requirements." *Advocate Health Care*, 137 S. Ct. at 1656 (citing 29 U.S.C. § 1003(b)(2)).[4] Congress exempted "church plans" from ERISA because, *inter alia*, "the examinations of books and records" required under ERISA "might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. No. 93-383, at 81 (1973).

[2] PBGC is a wholly owned United States Government corporation and federal agency funded by premiums paid by plan sponsors, assets from terminated pension plans for which PBGC is the statutory trustee, recoveries from the sponsors, and income from those assets.

[3] The sponsor of a church plan is permitted to elect that the plan be covered by ERISA, including coverage under the PBGC benefit-guarantee program described in ERISA Title IV, by making an election under 26 U.S.C. § 410(d). *See* 29 U.S.C. § 1321(b)(3). Similarly, the Internal Revenue Code (IRC) exempts church plans from several (but not all) of the tax-qualification and funding rules, unless the sponsor of the church plan elects otherwise under 26 U.S.C. § 410(d). *See, e.g.*, 26 U.S.C. §§ 410(d), 411(e)(1)(B), 412(e)(2)(D).

[4] ERISA also contains exemptions for governmental plans, *see* 29 U.S.C. § 1002(32); plans maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws, *id.* § 1003(b); plans maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens, *id.*; and excess benefit plans that are unfunded, *id.*

2. As originally enacted, ERISA defined the term "church plan" to mean "a plan established and maintained for its employees [or their beneficiaries] by a church or by a convention or association of churches which is exempt from tax under [26 U.S.C. § 501]." 29 U.S.C. § 1002(33)(A) (1976). Congress also adopted a temporary rule, which was set to expire in 1982, specifying that an existing plan covering church employees could be "treated as a 'church plan'" even if it also covered the employees of "one or more agencies" of the church, *id.* § 1002(33)(C) (1976); *see* 26 U.S.C. § 414(e)(3)(A) (1976).

In 1977, the Internal Revenue Service (IRS) issued a General Counsel Memorandum applying the church-plan definition to pension plans established by two orders of Catholic sisters for the employees of their hospitals. *See* I.R.S. Gen. Couns. Mem. 37,266 (Sept. 22, 1977) (1977 WL 46200), at *1-2. The IRS concluded that the plans were not church plans because the orders were not themselves "churches," *id.* at *6, reasoning that a religious order qualifies as a "church" only if it is "principally engaged in religious activities." *Id.* at *3, *6. The IRS determined that the Catholic orders at issue were not churches because "operating hospitals . . . is not a religious function." *Id.* at *5.

That development led a broad coalition of religious organizations to seek changes to the original church-plan exemption. Those organizations argued that exempting only plans established and maintained by "churches" favored hierarchical

denominations over congregational denominations, which typically rely on separate pension boards to administer plans covering the employees of local churches and church agencies. *See Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the S. Comm. on Finance, Pt. I*, 96th Cong. 363, 383, 388 (1979).

Congress responded to those concerns in 1980 by expanding the definition of a "church plan." *See* Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, § 407, 94 Stat. 1208, 1303. The MPPAA amendments retained the core of the original definition, continuing to provide that "[t]he term 'church plan' means a plan established and maintained * * * for its employees (or their beneficiaries) by a church." 29 U.S.C. § 1002(33)(A). That approach made clear that any plan that met the original definition remained exempt. But Congress broadened the exemption by adopting provisions deeming additional plans to satisfy that definition even though they did not fall within its literal terms. Two of those provisions are relevant here.

First, Congress specified that, for purposes of the church-plan definition, "[t]he term employee of a church * * * includes an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under [26 U.S.C. § 501] and which is controlled by or associated with a church." 29 U.S.C. § 1002(33)(C)(ii)(II). A separate provision provides that "[a] church * * * shall be

deemed the employer of any individual included as an employee" under that rule. *Id.* § 1002(33)(C)(iii). Those provisions allow "a church plan to cover employees of a tax-exempt agency controlled by or affiliated with a church," such as a religious hospital. 126 Cong. Rec. 20,208 (1980) (Joint Explanation of S. 1076, 96th Cong., 1st Sess. (1979)).

Second, Congress also specified that "[a] plan established and maintained for its employees (or their beneficiaries) by a church"—that is, a church plan—"includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan * * * for the employees of a church * * * if such organization is controlled by or associated with a church." 29 U.S.C. § 1002(33)(C)(i). Under that provision, a plan maintained by a "principal-purpose" organization, including a church-affiliated board, is deemed to be a church plan.

Subsequently, in *Advocate Health Care*, the Supreme Court further clarified that a plan maintained by a principal-purpose organization qualifies as a "church plan" regardless of whether a church originally established the plan. *See* 137 S. Ct. at 1663. In so ruling, the Court noted that its conclusion was consistent with both (1) the hospitals' understanding of the 1980 amendments' purpose ("to eliminate any distinction between churches and church-affiliated organizations under ERISA"), *id.* at 1661, and (2) the employees' argument that the amendments' main goal was "to

ensure that congregational and hierarchical churches would receive the same treatment." *Id.* at 1662 (noting that "plans run by church-affiliated pension boards came in different varieties: Some were created by church congregations, but others were established by the boards themselves").

B. Procedural History

Defendant OSF Healthcare System ("OSF") is an Illinois 501(c)(3) non-profit corporation, founded by The Sisters of the Third Order of St. Francis. *See* D. Ct. Mem. & Order (SA 1-16). OSF operates eleven acute-care hospitals, home health care services, and other health-care facilities in Illinois and Michigan. *See* SA1. OSF has defined-benefit pension plans covering its own direct employees and employees of the recently acquired St. Anthony's Health Center. *See id.* Defendant Retirement Committee for the Retirement Plan for Employees of Saint Anthony's Health Center is the administrator of the St. Anthony plan. *See* SA 1-2. Defendant Sisters of the Third Order of St. Francis Employees Pension Plan Administrative Committee is the administrator of the St. Francis plan. *See* SA2.

Plaintiffs are current and former employees of OSF or St. Anthony's who are vested participants in either OSF's or St. Anthony's defined-benefit pension plans. *See* Mem. & Order, SA2. The operative complaint alleges that the OSF and St. Anthony plans do not qualify as exempt "church plans" and have not been operated in accordance with ERISA's requirements. Plaintiffs allege in the alternative that, if

the "church plan" exemption is interpreted to cover the OSF Plans, the exemption violates the Establishment Clause as applied to the plans. *See id.*

Defendants moved for summary judgment, arguing that the OSF Plans are exempt "church plans" and that the application of the ERISA church-plan exemption to those plans is consistent with the Establishment Clause. The United States intervened and defended the constitutionality of the statute. *See* Dkt. No. 183.

The district court granted summary judgment for defendants, holding that the church-plan exemption applies to the plans at issue here, and that application of the exemption to those plans is consistent with the Establishment Clause. *See* SA7-16. On the latter point, the district court noted that "by exempting eligible plans from ERISA requirements," the church plan exemption relieves religious organizations and their associated entities from government mandates about how they "conduct their affairs, structure their finances, and pursue their missions." SA16. Accordingly, the court held that the church-plan exemption has the valid secular purpose and effect of alleviating "significant governmental interference with the ability of religious organizations to define and carry out their religious missions," SA15, and avoids entangling government with religion, rather than fostering entanglement. *See* SA16.

The court subsequently entered final judgment. *See* SA18.[5]

[5] As the court's summary-judgment opinion noted, the court had previously dismissed plaintiffs only other claims in this case, plaintiffs' state-law claims. *See* SA2 n.1.

SUMMARY OF ARGUMENT

The United States has intervened in this action to defend the constitutionality of the ERISA church-plan exemption. Pursuant to principles of constitutional avoidance, the Court should address that issue only if it finds that defendants' plans qualify for the exemption. If the Court does reach that question, it should hold that the exemption is a lawful, permissive accommodation of religion under the Establishment Clause, as the Tenth Circuit recently held in *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017). The church-plan exemption, as applied here and otherwise (although plaintiffs challenge only its application to the OSF plans), serves the valid secular purposes of (1) alleviating significant government interference with the ability of religious organizations to define and carry out their religious missions, and (2) avoiding entangling government with religion and discriminating among denominations.

Plaintiffs' arguments to the contrary have no basis in law or the record, misconstrue settled law concerning permissive accommodation of religion, and would effectively call into question other special accommodations Congress has enacted to protect religious liberty, such as the religious accommodations in Title VII, the Age Discrimination Act, the Social Security Act—and the income tax exemption for parsonages, as extended to cash allowances, which this Court recently upheld in *Gaylor v. Mnuchin*, 2019 WL 1217647 (7th Cir. Mar. 15, 2019).

Plaintiffs also confuse what is necessary to support a *permissive* religious accommodation with what is necessary to support a *mandatory* accommodation, ignoring the fact that there is "room for play in the joints" between what the Free Exercise Clause requires and the Establishment Clause forbids. *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 668-69 (1970). The church-plan exemption fits neatly within that sphere, and neither delegates any governmental function to religion, nor unduly burdens third parties.

The ERISA church-plan exemption also is constitutional under the historical test the Supreme Court sometimes applies to resolve Establishment Clause issues and this Court applied (along with the *Lemon* test) in upholding the income tax parsonage exclusion in *Gaylor*. Plaintiffs have made no argument that the exemption, as originally enacted or as applied here, resembles anything that was historically viewed as an establishment of religion, and we are aware of no such evidence. In addition, the ERISA church-plan exemption shares one of the main purposes of the parsonage exclusion upheld in *Gaylor*—to limit entanglement between government and religion—which *Gaylor* held fits within the longstanding historical tradition of exempting church-owned properties from taxation. *See* 2019 WL 1217647, at *11. Thus, for both reasons, this Court should conclude that the Supreme Court's historical test also supports the constitutionality of the ERISA church-plan exemption, if the Court applies that test here.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo. Summary judgment is appropriate when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *See Moore v. Wells Fargo Bank, N.A.*, 908 F.3d 1050, 1054 (7th Cir. 2018).

ARGUMENT

I. The Application of ERISA's Church-Plan Exemption to Religiously-Affiliated Hospital Systems Is Consistent with the Establishment Clause.

Plaintiffs allege that defendants' retirement plans do not satisfy the statutory criteria for an ERISA church plan, and that if the Court were to conclude otherwise, the exemption is unconstitutional as applied. The United States takes no position on whether defendants' plans qualify for the church-plan exemption. The Court should consider that statutory question first, since if it were to conclude that the challenged plans are not church plans, it would not need to reach plaintiffs' constitutional argument. *See Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (noting the "well-established principle" that courts normally "will not decide a constitutional question if there is some other ground upon which to dispose of the case" (citation omitted)). If the Court concludes that defendants' plans qualify for the exemption, however, the Court should hold that the exemption as applied meets the requirements of the Establishment Clause.

A. The Government May Accommodate the Free Exercise of Religion Consistent with the Establishment Clause, Except in Narrow Circumstances—Not Present Here—Where Accommodation Amounts to Government Advancement of Religion.

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I, cl. 1. Generally speaking, the First Amendment's Free Exercise Clause prohibits Congress from targeting religious activity for disfavored treatment, *see Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521-32 (1993), while the Establishment Clause forbids "governmentally established religion or governmental interference with religion." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 669 (1970).

Between the "two Religion Clauses," there is a middle ground—"room for play in the joints"—within which Congress may accommodate religion "without sponsorship and without interference," and thereby achieve "benevolent neutrality" toward religion. *Walz*, 397 U.S. at 668-69. Thus, 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." *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987) (citation omitted). This settled principle reflects the fact that there is "ample room for accommodation of religion under the Establishment Clause." *Id.* at 338.

In *Amos*, for example, the Supreme Court upheld an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1, providing an exemption for religious organizations allowing discrimination in employment on the basis of religion, even with respect to secular activities. *See* 483 U.S. at 340. *Amos* applied the framework for evaluating Establishment Clause issues set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which held that in order to comply with the Establishment Clause, government action must (1) have a secular purpose; (2) not have the principal or primary effect of either advancing or inhibiting religion; and (3) not foster an excessive entanglement with religion. *Id.* at 612-13.

Amos concluded that Title VII's exemption permitting religious organizations to discriminate in employment on the basis of religion did not violate the Establishment Clause under the *Lemon* framework. The Court reasoned that "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions," 483 U.S. at 335; that an accommodation does not have the impermissible effect of advancing religion merely because it "allows" those organizations to better advance their purposes, *id.* at 337; and that where the government "acts with the proper purpose of lifting a regulation that burdens the exercise of religion," there is "no reason to require that the exemption comes packaged with benefits to secular entities." *Id.* at 338.

The Supreme Court also has upheld, as permissive religious accommodations, the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc, which permits government action in the context of state or local prisons and land-use regulations that substantially burdens the free exercise of religion only if that is the least restrictive means of accomplishing a compelling government interest, *Cutter v. Wilkinson*, 544 U.S. 709, 719-20 (2005); the religious exemption from the military draft, *see Gillette v. United States*, 401 U.S. 437, 450 (1971); and a local school's program of releasing students during the school day for off-campus private religious instruction, *see Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

The courts of appeals, including this Court, have upheld numerous other laws as permissive accommodations of religion. Just one week ago, for example, this Court upheld Congress's extension of the income tax exclusion for church-owned parsonages to cover cash allowances, which served the valid secular purpose of eliminating "discrimination among ministers." *Gaylor v. Mnuchin*, 2019 WL 1217647, at *7 (7th Cir. Mar. 15, 2019). Similarly, in *Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993), this Court upheld a special-use permit exemption for religious day-care centers because it "minimiz[ed] governmental interference with the decision making processes of a religious organization." *Id.* at 489-90. *See also Fields v. City of Tulsa*, 753 F.3d 1000, 1010-11 (10th Cir. 2014) (upholding order

requiring attendance at a community police-appreciation event held at an Islamic Society that was intended to avoid potential claims of "disparate treatment" among religious groups); *Kong v. Scully*, 341 F.3d 1132, 1139-40 (9th Cir. 2003) (upholding constitutionality of an accommodation that allows Medicare reimbursement of health-care expenses provided in religious nonmedical health-care institutions).

And in a case directly on point, *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017), the Tenth Circuit held that the ERISA church-plan exemption is a lawful permissive accommodation of religion, as applied to a religious hospital. Rejecting arguments similar to those plaintiffs raise here, the Tenth Circuit held that the exemption, as applied to religious hospitals, has the valid secular purpose, and serves the valid primary effect, of avoiding unnecessary entanglement with religion, *id.* at 1231-34. The Tenth Circuit's ruling in *Medina* is correct and should be followed here, if the Court reaches the constitutional issue.

The church-plan exemption properly balances the concerns animating the Religion Clauses, putting it squarely within the "play in the joints" the Supreme Court has repeatedly emphasized exists between what the Free Exercise Clause requires and the Establishment Clause forbids. Courts have held permissive religious accommodations unconstitutional only where they are unnecessary to eliminate a significant governmental burden on the free exercise of religion, *see Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), or delegate government decision-making to

private religious entities, *see Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), and the ERISA church-plan exemption has neither effect.

B. The ERISA Church-Plan Exemption, As Applied to Religious Hospitals and Otherwise, Satisfies Each of the *Lemon v. Kurtzman* Factors.

1. The Exemption Has a Secular Legislative Purpose.

a. "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Cohen*, 8 F.3d at 489 (internal quotation and citation omitted). *Accord Mayle v. United States*, 891 F.3d 680, 685 (7th Cir. 2018) (purpose inquiry asks whether the government's action was "for a religious purpose," or, "put differently," whether it "lacks a secular objective"). "[H]aving just one secular purpose is sufficient to pass the *Lemon* test," *Mayle*, 891 F.3d at 686, and courts "defer to [the government's] sincere articulation of a secular purpose," *id.*, "in keeping with the well settled maxim that courts are 'reluctan[t] to attribute unconstitutional motives to [the government,] particularly when a plausible secular purpose for [the government's] program may be discerned from the face of the statute.'" *Id.* (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)). Thus, "[a] statute is unconstitutional [under the *Lemon* purpose prong] 'only when . . . there [is] no question that the statute . . . was motivated wholly by religious considerations.'" *Gaylor*, 2019 WL 1217647, at *4 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)).

In *Amos*, the Supreme Court held that "minimiz[ing] governmental interference with the decision-making process in religions" is a valid secular legislative purpose within the meaning of the first prong of *Lemon*. 483 U.S. at 335-36 (quotation marks and alteration omitted). As the Tenth Circuit correctly held in *Medina*, the ERISA church-plan exemption, as originally enacted and as later amended to apply to entities such as religious hospitals, represents an effort to fulfill exactly that purpose. *See* 877 F.3d at 1230-31.

Congress exempted church plans from federal regulation under ERISA with the legislative purpose of alleviating burdens on decision-making in matters of religion. As originally enacted, the church-plan exemption applied to plans established and maintained by a church or by a convention or association of churches, and temporarily permitted participation in church plans by employees of "agencies" of such churches. *See supra* pp. 4-5. Congress enacted that exemption—which plaintiffs do not challenge except as applied here—to prevent ERISA's many requirements, from intruding on the religious autonomy of churches. *See supra* pp. 4-5.

Congress amended the exemption in 1980 by extending the definition of a "church plan" to include plans maintained by principal-purpose organizations described in 29 U.S.C. § 3(33)(C)(i) that cover employees of a church. The 1980 amendments also defined an "employee of a church" as including an "employee of

an organization, whether a civil law corporation or otherwise, which is exempt from tax under [26 U.S.C. § 501] and which is controlled by or associated with a church or a convention or association of churches." *See supra* pp. 5-7.

As the Tenth Circuit correctly concluded in *Medina*, Congress lawfully enacted these statutory changes "to avoid unnecessary entanglement with religion." 877 F.3d at 1231.

Those changes reflect the fact, presented to Congress, that ERISA impaired the religious autonomy of religious organizations that, while not churches, were "controlled by or associated with churches," in the same way Congress sought to preclude when it enacted the church-plan exemption originally. *See Medina*, 877 F.3d at 1231 (quoting 125 Cong. Rec. 10,052 (1979) (statement of Sen. Talmadge) ("If we have enacted a statute that may require the church plans to come under ERISA, file reports, be subject to the examination of books and records and possible foreclosure of church property to satisfy plan liabilities, it must be changed because we have clearly created an excessive Government entanglement with religion.").

In addition, the original statute's failure to define how closely related to a church an "agenc[y]" of a church was required to be in order to qualify for the exemption (under the temporary rule set to expire in 1982, *see supra* p.5) had led to intrusive government inquiries regarding church structure and polity. *See* 125 Cong. Rec. at 10,054 (letter from Rabbinical Pension Board read into Congressional

Record noting concern about IRS intrusion into trying to define what is or what is not an integral part of these religious groups). The 1980 amendments addressed that problem by making clear that the church-plan exemption protects not only churches, but also tax-exempt entities that are "controlled by or associated with" a church. *See supra* pp. 5-7.

As this Court has recognized, "religious line drawing [is] incredibly difficult" and "entangles government with religion." *Grussgott v. Milwaukee Jewish Day Sch.*, 882 F.3d 665, 660 (7th Cir. 2018). Accordingly, "[u]nder the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335.

The 1980 amendments also serve the valid secular goal of avoiding disparities in the treatment of churches with a hierarchical corporate structure (such as the Catholic Church), and churches that do not have such a hierarchical structure (such as congregational denominations). As Senator Talmadge explained, "[i]n a corporate structure lines of authority are clear," whereas "[t]he inability of a congregational denomination to control its agencies makes it difficult to see how the church agency plan could meet the requirements of ERISA." 125 Cong. Rec. at 10,052 (noting that "[m]ost church plans of congregational denominations are administered by a pension board," which is not itself a church). *See also* 124 Cong. Rec. 12,106, 12,108 (1978)

(statement of Rep. Conable) (stating desire to clarify statutory definition because original definition of church plan was never intended to ignore how church plans operate or to be disruptive of church affairs).

The amendments prevent discrimination against those plans by making clear that "[a] plan or program funded or administered through a pension board, whether a civil law corporation or otherwise, will be considered a church plan" (provided that the principal purpose of the board is the administration or funding of a plan for church employees and that the board is controlled by or associated with a church). 125 Cong. Rec. at 10,053.

In sum, as the Tenth Circuit correctly ruled in *Medina*, 877 F.3d at 1230-32, the ERISA church-plan exemption (as originally enacted and as amended in 1980) serves the legitimate secular purposes of avoiding entangling the government in the affairs of churches and tax-exempt organizations controlled by or associated with churches—which would otherwise be required to open up their internal affairs to increased government scrutiny regarding their religious activities—and avoiding the creation of disparities in the treatment of hierarchical versus congregational denominations.

Similarly, in *Gaylor*, this Court recently noted that "[a]voidance of discrimination against certain religions in favor of others is a permissible secular legislative purpose." 2019 WL 1217647, at *7. *Gaylor* invoked that principle to

uphold a statute that extended the federal income tax exclusion for church-provided parsonages to pastors who receive housing allowances. The government argued that this extension served the secular legislative purpose of eliminating discrimination among ministers, as "providing the tax exemption only to ministers given in-kind housing tended to exclude ministers of smaller or poorer denominations." *Id.* This Court agreed, and as explained, the ERISA church-plan exemption, as challenged here, serves the same valid, secular purpose. *See also Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2021 (2017) (reaffirming that the Free Exercise Clause also "protects against laws that 'impose[] special disabilities on the basis of . . . religious status'") (quoting *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 533, 520 (1993)); *Larson v. Valente*, 456 U.S. 228, 255 (1982) (holding a state charitable solicitation law unconstitutional because it unlawfully discriminated against religious sects that solicit more than 50% of their funds from non-members).[6]

b. Plaintiffs argue that application of the church exemption to church-affiliated hospitals such as OSF lacks a valid secular purpose for several reasons, but none of those arguments has merit.

[6] While the government is not arguing here that the Free Exercise Clause requires the ERISA church-plan exemption, *Trinity Lutheran*, *Lukumi*, and *Larson* all confirm that eliminating discrimination among religious sects qualifies as a valid, secular purpose.

i. Plaintiffs argue that ERISA "is indistinguishable from an array of neutral laws that do not burden religious exercise when applied to commercial activities." Appellants' Br. 64. To support that assertion, plaintiffs cite Supreme Court cases holding that "'administrative and recordkeeping burdens'" do not substantially burden the free exercise of religion for purposes of assessing claims under the Free Exercise Clause. *Id.* (citing *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 391-94 (1990), and *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305 (1985)).

Those cases are plainly inapposite. The Free Exercise Clause concerns whether the government is *required* to make an accommodation of religion, and the "substantial" burden on religion that is necessary to support a Free Exercise Clause claim for a mandatory accommodation is markedly higher than the "significant" burden that can support a *permissive* religious accommodation under the Establishment Clause. *Amos*, 483 U.S. at 335. "The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." *Walz*, 397 U.S. at 673. *See also Cutter*, 544 U.S. at 713 ("the government [may] accommodate religion beyond free exercise requirements, without offense to the Establishment Clause").

For example, in *Amos*, the Supreme Court held that "it is a significant burden on a religious organization"—sufficient to justify a *permissive* religious accommodation—"to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious." 483 U.S. at 336. If there were no ERISA church-plan exception for church-affiliated hospitals, those hospitals also would face "substantial liability" for noncompliance with ERISA. *See, e.g.*, 29 U.S.C. §§ 1132(c)(1), (c)(2).

By contrast, in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), the Supreme Court held that a government logging project did not substantially burden Native Americans' rights sufficient to support a mandatory Free Exercise Clause accommodation, even though the Court assumed that the project would "'virtually destroy [their] ability to practice their religion.'" *Id.* at 451. *Lyng* thus starkly illustrates the difference in kind between a Free Exercise Clause "substantial" burden and a permissive accommodation "significant" burden.

In addition, *Lyng* emphasized that the absence of a Free Exercise Clause "substantial" burden "need not and should not discourage [the government] from accommodating religious practices like those engaged in by the [Native American] respondents." 485 U.S. at 454. Plaintiffs' opposition to Congress's *permissive* accommodation of religious hospitals and similar institutions, on the ground that

ERISA imposes nothing that would constitute a Free Exercise Clause "substantial" burden, runs headlong into that pronouncement.

Plaintiffs also wrongly suggest that the church-plan exemption violates the Establishment Clause, even if the application of ERISA requirements to the pension plans of employees of church-affiliated hospitals would impose a "substantial" burden on the free exercise of religion, because a church-affiliated hospital could obtain relief from that burden by invoking the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb. *See* Appellants' Br. 72. (RFRA provides that the government can justify substantially burdening the free exercise of religion only where the burden is the least restrictive means to accomplish a compelling government interest. *See* 42 U.S.C. § 2000bb-1(b).) To accept plaintiffs' argument would effectively nullify all religious accommodations that do not require proof of a RFRA "substantial" burden, such as those described above. *See supra* pp. 15-16. But "a unanimous Supreme Court has cautioned that courts of appeals misconstrue Supreme Court precedent if they read it so that 'all manner of religious accommodations would fall.'" *Medina*, 877 F.3d at 1232 (quoting *Cutter*, 544 U.S. at 724).

Moreover, RFRA provides that "[n]othing in this chapter shall be construed to authorize any government to burden any religious belief," 42 U.S.C. § 2000bb-3(c), and in enacting RFRA, Congress made clear that "[n]othing in this bill shall be

construed as affecting Title VII of the Civil Rights Act of 1964." H.R. No. 103-88, p. 9 (1993). *Accord* S. Rep. No. 103-111, at 13 (1993). Because Title VII's religious accommodation does not require proof of a "substantial" burden to invoke its protections, plaintiffs' argument would effectively, and wrongly, read RFRA as abrogating Title VII in that respect.

ii. In addition, the ERISA church-plan exemption involves much more than merely alleviating "administrative and recordkeeping burdens." As the Tenth Circuit correctly observed in *Medina*, the legislative history indicates that Congress sought to protect against not only the examination of books and records, but also the "possible foreclosure of church property to satisfy plan liabilities." 877 F.3d at 1231 (quoting Sen. Talmadge). Plaintiffs noticeably overlook that burden, which is sufficiently "significant" to support a permissive religious accommodation under the Supreme Court's cases—both with respect to church-affiliated hospitals (plaintiffs' focus in this case), and also with respect to ERISA's application to churches (which plaintiffs do not challenge).[7]

[7] As noted, a church-affiliated hospital can qualify for the church-plan exception only if it is controlled by or associated with a church. *See* 29 U.S.C. § 1002(33)(C)(ii)(II). An organization is "associated with" a church only if it "shares common religious bonds and convictions with that church," *id.* § 1002(33)(C)(iv), and courts have interpreted what it means to be "controlled by" a church as "referring to corporate control, such as church control over appointment of a majority of the non-church organization's officers of Board or Directors," *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85 (D. Me. 2004). Accordingly, a qualifying church-related hospital has free exercise interests that would be burdened by foreclosure of

Likewise, ERISA also "requires diversification of plan assets, 29 U.S.C. § 1104(a)(1)(C), and that plan assets be held for the exclusive purpose of providing benefits and defraying reasonable plan expenses. 29 U.S.C. § 1103(c)." *Medina*, 877 F.3d at 1233. As the Tenth Circuit noted in *Medina*, "[a] Catholic church, or entity associated with one, might want to invest its plan assets in service of social goals" in a manner that could run afoul of those requirements, and there would, moreover, "be pervasive monitoring to determine whether the church or church-associated entity was complying with ERISA." *Id*.

Plaintiffs argue this is not a problem because the Department of Labor "has made clear that ERISA does not prohibit screening morally objectionable investments as long as alternative investments are expected to perform on par with screened investments." Appellants' Br. 65 (citing Department of Labor ("DOL") Interpretive Bulletin 2015-01 (80 Fed. Reg. 65,135 (Oct. 26, 2015)). The Interpretive Bulletin plaintiffs cite, however, reiterates DOL's longstanding view that, in general, "the plan trustee or other investing fiduciary may not use plan assets to promote social, environmental, or other public policy causes at the expense of the financial interests of the plan's participants and beneficiaries," 80 Fed. Reg. at 65,135, while

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its property, *cf. Amos*, 483 U.S. at 329 (finding a nonprofit gymnasium associated with a church entitled to the Title VII religious accommodation regarding hiring), and such foreclosure also would impact the religious mission of the church by which it is controlled, or with which it is associated.

acknowledging that fiduciaries may consider such collateral goals as tie-breakers when choosing between investment alternatives that are otherwise equal with respect to return and risk over the appropriate time horizon. *Id.* at 65,136; *see also* DOL Field Assistance Bulletin 2018-01 (Apr. 23, 2018); DOL Interpretive Bulletins 2016-01 and 2015-01 (Dec. 28, 2016).

Plaintiffs assert it is "implausible that OSF would be unable to locate investment alternatives that perform at least as well as the stock of individual companies that manufacture abortifacients, alcohol, tobacco, or defense weapons." Appellant's Br. 65 (citing OSF's "Socially Responsible Guidelines"). Plaintiffs, however, cite no record evidence to support that assertion, which is speculative at best. As the Tenth Circuit concluded in *Medina*, without the benefit of the ERISA church plan exception, religious organizations (including both church-affiliated hospitals *and* churches) could reasonably be concerned that investing plan assets in service of social goals could indeed run afoul of ERISA's requirements that plan assets be diversified and be held for the exclusive purpose of providing benefits and defraying reasonable plan expenses. *See* 877 F.3d at 1233. Avoiding that kind of interference is well within Congress's discretion under the Establishment Clause. *See Amos*, 483 U.S. at 336 (Title VII religious accommodation permissibly removed the "[f]ear of potential liability [that] might affect the way an organization carried out what it understood to be its religious mission."); *Gaylor*, 2019 WL 1217647, at

*9 (noting that "[t]he categorical nature of [26 U.S.C.] § 107(2) also avoids excessive entanglement by providing ministers and their churches certainty as to whether their housing allowances will be exempt from tax").

Plaintiffs also suggest that ERISA imposes no additional burden on OSF because Illinois law and OSF's plan documents independently require OSF to act solely in the interest of the plan's participants. *See* Appellants' Br. 65-66. Even assuming that Illinois law and OSF's plan documents have the effect plaintiffs assert—and impose a duty of loyalty identical to that in ERISA—that does not constitutionally disqualify Congress from ensuring that ERISA *itself* imposes no such burden. Plaintiffs have cited no case standing for the opposite view, and to the contrary, the Supreme Court has recognized that the government may prophylactically exempt religious entities without inquiring into whether—absent the exemption—each and every entity would in fact experience an interference with its religious practices. *See Amos*, 483 U.S. at 339 (upholding the sweep of the Title VII exemption and noting that it "avoids the kind of intrusive inquiry into religious belief" that *Lemon* forbids); *Walz*, 397 U.S. at 674 (rejecting argument that tax exemption for churches should be conditioned on the extent to which they provide social welfare services, reasoning that this "would introduce an element of governmental evaluation and standards [and] . . . could conceivably give rise to confrontations that could escalate to constitutional dimensions").

This Court recently made a similar point in *Gaylor*. The plaintiffs there argued that extending the income-tax exclusion available to church-provided parsonages to cash allowances for ministers who do not receive in-kind religious housing is "overinclusive" because the cash allowances would be available to ministers even if they did not use their residences for religious purposes. *See* 2019 WL 1217647, at *6. This Court rejected that argument because "[n]o rule will perfectly address the concerns to which it is addressed," *id.*, and because the parsonage exemption, as it applies to in-kind housing and cash allowances, serves the same valid, secular purpose—"excluding from taxable income certain employment-related expenses." *Id.* at *7. Similarly, Congress's extension of the ERISA church-plan exemption as challenged here also serves the same purpose as the exemption as it was originally enacted—to avoid excessive entanglement between government and religious institutions. *See also Hosanna-Tabor Evang. Luth. Ch. & Sch. v. EEOC*, 565 U.S. 171, 193-94 (2012) (applying the ministerial exception even though it was not a perfect fit and covered individuals who had a mix of both religious and secular duties).

Plaintiffs also assert that "OSF has effectively conceded that ERISA compliance does not impose substantial burdens on its religious exercise, as OSF chooses to comply with ERISA with respect to its other benefit plans." Appellants' Br. 66. It is irrelevant to the constitutional analysis, however, whether OSF chooses

to comply with ERISA with respect to *other* benefit plans. The question here is whether Congress had discretion under the Establishment Clause to exempt churches—and tax-exempt organizations that are "controlled by or associated with churches"—from ERISA's requirements, as it clearly does.

iii. Plaintiffs contend that applying the ERISA church-plan exemption to OSF would not eliminate government entanglement with religion because OSF is "a multi-billion-dollar hospital system that competes in a heavily-regulated healthcare marketplace and already voluntarily discloses its financial records and relationships in detail." Appellants' Br. 67-68 (citations omitted). Again, however, even if this were so, the point would not constitutionally disable Congress from ensuring that ERISA *itself* does not cause that kind of entanglement. In addition, plaintiffs have not shown that any financial disclosures defendants may currently make are identical to the disclosures that would be required under ERISA, or that they would raise any of the same confidentiality and entanglement concerns. For example, Title I of ERISA sets forth specific reporting requirements (compliance with which could result in audits), requiring the disclosure of particular transactions with other church-affiliated entities, and with resulting penalties for failure to comply. 29 U.S.C. §§ 1023(b), 1024(a), 1132(c)(2). ERISA also authorizes the government to take action if the reports fail to satisfy the specific statutory and regulatory requirements, including the retention of an independent accountant to perform an audit. *Id.* §

1024(a)(5). Such requirements may well result in the type of invasion into confidential relationships and interference with religious decision-making that the church plan exemption was meant to avoid.

Moreover, plaintiffs' argument unduly narrows Congress's purposes in enacting the church-plan exemption, which go far beyond protecting religious organizations from having to make disclosures, *see supra* pp. 3-4 (noting, *e.g.*, ERISA's plan-funding requirements, fiduciary standards, and rules concerning PBGC insurance), and the expanded exemption also serves the valid secular purpose of avoiding disparities among denominations. Limiting the exemption to churches alone would disfavor denominations that perform charitable services through separately incorporated organizations. *See supra* pp. 5-7. In addition, requiring that a plan covering the employees of affiliated organizations be established by a church would favor hierarchical denominations (which could more easily have their churches establish such umbrella plans), and pose greater practical difficulties for congregational churches (which lack the corporate structure through which to establish an umbrella plan). *See supra* pp. 5-7. Eliminating such disparate effects is a permissible secular purpose. *See*, *e.g.*, *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 658 (7th Cir. 2018) (per curiam) (holding that a religious institution need not employ "ordained clergy" at the head of an "ecclesiastical hierarchy" to invoke the First Amendment's "ministerial exception," because

"[s]uch a constraint would impermissibly favor religions that have formal ordination processes over those that do not").

2. The Church-Plan Exemption, As Applied to Church-Affiliated Hospitals or Otherwise, Neither Advances Nor Hinders Religion.

ERISA's church-plan exemption also does not have the principal or primary effect of advancing or hindering religion.

a. The second prong of the *Lemon* test requires that a statute have a "principal or primary effect . . . that neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612. As this Court observed in *Gaylor*, "[f]or a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." 2019 WL 1217647, at *9.

In *Amos*, the Supreme Court made clear that even where an exemption for religious employers, such as Title VII of the Civil Rights Act, permits religious groups to better advance their purposes without state interference, that kind of religious accommodation "is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." 483 U.S. at 337. *See also Gillette*, 401 U.S. at 454 ("'Neutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties"). Rather, in order to run afoul of the "effects" test of *Lemon*, the government itself must be responsible for the advancing of religion through "its own activities and influence." *Id.* That was not

the case with the Title VII exemption in *Amos*, and it is not the case with ERISA's church-plan exemption, which does nothing more than "allow" religious organizations (including tax-exempt church-affiliated hospitals) to advance their religion.

In *Walz*, for example, the Supreme Court held that a tax exemption for churches did not constitute the sort of financial support or sponsorship that runs afoul of the Establishment Clause. 397 U.S. at 668, 674-76. *See also Gaylor*, 2019 WL 1217647, at *10 (concluding that the primary effect of 26 U.S.C. § 107(2), which authorizes the IRS to exclude cash housing allowances from ministers' taxable income, "is not to advance religion on behalf of the government, but to '*allow*[] churches to advance religion, which is their very purpose" (quoting *Amos*, 483 U.S. at 337)). The ERISA church-plan exemption, which simply spares church plans from regulatory requirements, is, if anything, even more removed from the kind of financial support or active involvement in religious activities that the Establishment Clause was meant to avoid.

For the same reasons, as the Tenth Circuit correctly ruled in *Medina*, ERISA's church-plan exception also does not impermissibly endorse defendants' religious activities. *See* 877 F.3d at 1232. To conclude that "accommodation equals favoritism," *id.*, would doom numerous other religious accommodations, such as those provided for in the Internal Revenue Code, Title VII, and the Americans With

Disabilities Act, *see id.*, ignoring the Supreme Court's warning that courts should not misconstrue the law in a way such that "all manner of religious accommodations would fall." *Id.* (quoting *Cutter*, 544 U.S. at 724).

b. Plaintiffs argue that applying the church-plan exemption to OSF "burdens OSF's secular competitors, who must make ERISA contributions and pay PBGC insurance premiums." Appellants' Br. 72. In *Cohen*, however, this Court held that anti-competitive effects do not impermissibly advance religion as long as the accommodation is limited to non-profit organizations. *See* 8 F.3d at 493. OSF is a non-profit organization, see SA1, as are all the church-affiliated hospitals and hospital systems of which we are aware that have invoked the ERISA church-plan exemption. Moreover, the church-plan exemption is limited to organizations that are tax-exempt under 26 U.S.C. § 501, *see* 29 U.S.C. § 1002(33). Organizations described in 26 U.S.C. § 501(c)(3)—such as OSF, *see* SA8; Dkt. 148, p. 20—are prohibited from distributing earnings, *see* 26 U.S.C. § 501(c)(3), which also is the hallmark of a non-profit institution. *See Amos*, 483 U.S. at 344.

Moreover, plaintiffs' brief cites no record evidence showing that OSF's invocation of the church-plan exemption in fact commercially harms any secular hospital systems. Thus, plaintiffs' argument in this respect is both legally flawed and factually groundless. *Cf. Amos*, 483 U.S. at 337 (noting that there was "no persuasive evidence in the record" to support the assertion that Title VII's religious exemption

"would permit churches with financial resources impermissibly to extend their influence and propagate their faith by entering the commercial, profit-making world").

Plaintiffs also argue that the exemption as applied impermissibly burdens OSF's employees, "who receive no benefit from the exemption and instead are denied all ERISA protections, including minimum funding protections and PBGC insurance of their benefits." Appellants' Br. 71-72. In *Amos*, however, the Supreme Court upheld Title VII's religious accommodation even though it permits "religious employers to discriminate on religious grounds in hiring for nonreligious jobs." 483 U.S. at 331. Accordingly, the Court upheld that accommodation as applied in that case, despite that it resulted in the plaintiff's loss of his job as a gymnasium building engineer, which he had held for sixteen years prior to his discharge for failing to qualify for a "temple recommend." *Id.* at 330. *See also Gillette v. United States*, 401 U.S. 437, 449-50 (1971) (upholding military draft exemption for individuals who are religiously opposed to all wars as valid accommodation, even though individuals who objected to war for secular reasons, or who had religious objections only to particular wars, remained subject to the draft). Any burden the ERISA church-plan exemption imposes on OSF's employees does not exceed the impact of the Title VII accommodation on the plaintiff in *Amos*, a point plaintiffs' opening brief fails to address.

More broadly, under *Amos*, third-party burdens of the type plaintiffs assert here are not the types of "unjustified burdens" that could foreclose an accommodation under the Establishment Clause. *Cutter*, 544 U.S. at 726. As the Supreme Court explained in *Amos*, "[a] law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." *Id.* at 337. The Title VII accommodation at issue there did nothing more than that, as it was the plaintiff's church, and not the government, "who put him to the choice of changing his religious practices or losing his job." *Id.* at 337 n.15. "For a law to have forbidden 'effects,'" *Amos* explained, "it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Id.* at 337. Rather than burdening the Church's employees, *Amos* held, the exemption simply left them in the same place they were before Title VII's general prohibition and exemption were enacted. *See id.* (noting that the plaintiff employee "was not legally obligated" to take the steps necessary to save his job, and that his discharge "was not required by statute"). For the same reasons, the ERISA church-plan exemption also does not impose any "unjustified" burden on OSF's employees. *Cf. Cohen*, 8 F.3d at 492 (noting that because the "religious component of child care and education activities" in the religious day-care centers that received a special zoning accommodation there "will come from church members or leaders, not from government officials," any

advancement of religion resulting from the accommodation could not be "fairly attributed to the [g]overnment").

Plaintiffs rely on *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), for the proposition that the ERISA church-plan exemption improperly favors religious adherents over nonadherents, *see* Appellants' Br. 62, but that case involved a local sales-tax exemption on periodicals that applied only to religious periodicals, and unduly "'burden[ed] nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications.'" *Texas Monthly*, 489 U.S. at 18 n.8. The ERISA church-plan exemption, in contrast, does not effectively require secular hospital systems to subsidize religious hospitals or systems that choose to invoke the exception. While exempt church plans are not required to pay pension insurance premiums to PBGC, *see* 29 U.S.C. § 1321(b)(3), that does not result in any loss to PBGC's insurance funds, because PBGC does not guarantee the benefits provided by the exempt church plans. Thus, this case is more like *Cohen*, in which this Court distinguished *Texas Monthly* on the ground that "[t]he costs that would otherwise be borne by churches in obtaining the special use permit are not transferred to the public at large by virtue of the [religious] exemption" at issue there. 8 F.3d at 492. *See also Gaylor*, 2019 WL 1217647, at *9 (concluding that nothing in *Texas Monthly* supersedes the principles applied in *Amos* and *Walz*).

Plaintiffs also rely on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), which struck down a Connecticut statute that granted employees an unqualified right not to work on a particular day based on Sabbath observance, but that decision also is inapposite. As the Supreme Court explained in *Amos*, the Connecticut statute had, "[i]n effect," "given the force of law to the employee's designation of a Sabbath day and required accommodation by the employer regardless of the burden which that constituted for the employer or other employees." 483 U.S. at 337 n.15. On those grounds, the Court distinguished the Title VII religious exemption at issue in *Amos*, which did not "legally obligate[]" the plaintiff there "to take the steps necessary to qualify for a temple recommend," or require his discharge "by statute." *Id.* Similarly, ERISA's church-plan exemption does not "obligate" the employees or secular competitors of religious organizations that choose to invoke the exception—including tax-exempt church-affiliated hospitals and hospital systems—to take any action, or suffer any statutory penalty. Rather, as in *Amos*, the exemption merely refrains from imposing government burdens on those religious organizations, leaving their employees in the same position they would have been, considered apart from any involvement by the government. *See id.* at 337-38 & n.15. As *Amos* makes clear, such exemptions do not involve the government "*itself* . . . advanc[ing] religion through its own activities and influence." *Id.* at 337 (emphasis in original).

United States v. Lee, 455 U.S. 252 (1982), also does not call into question the ERISA church-plan exception, as applied to church-affiliated hospitals or otherwise. In *Lee*, the Supreme Court held that there is no right under the Free Exercise Clause to a mandatory exemption from paying social security taxes because, among other reasons, such an exemption would "impose the employer's religious faith on the employees." *Id.* at 261. Significantly, *Lee* endorsed the legality of a more limited exemption Congress provided for an individual who is a member of, and adheres to the tenets of, a religious sect the practice of which is to make provision for its own dependent members. *See id.* at 260-61 (discussing 26 U.S.C. § 1402(g)). That endorsement precludes reading the Court's language about "impos[ing] the employer's religious faith on the employees" as calling into question permissive religious accommodations such as those provided in section 1402(g), Title VII, and the Age Discrimination Act—and the ERISA church-plan exemption.

Nor does *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869 (7th Cir. 2014), undermine the conclusion that the ERISA church-plan exemption is constitutional. There, this Court struck down a state statute that allowed religious officials, but not equivalent officials of secular groups, to perform the final steps that unite persons who hold marriage licenses. *See id.* at 875. That statute, similar to the one at issue in *Thornton v. Caldor*, did not lift a government burden on the free exercise of religion, but improperly delegated to religious organizations (and not

secular organizations) power to solemnize marriages. By contrast, as explained, the ERISA church-plan exemption does lift significant government burdens on religion, and does not improperly and selectively delegate government functions to religious entities.[8]

3. The Exemption, as Applied to OSF and Otherwise, Avoids Excessive Government Entanglement with Religion.

The ERISA church-plan exemption does not excessively entangle government with religion. To the contrary, as the Tenth Circuit in *Medina* correctly concluded, subjecting religious organizations to ERISA would foster "even greater entanglement," as "[e]nsuring ongoing ERISA compliance by church-associated entities undoubtedly would require long-term, continuing monitoring not involved in the relatively time-delimited analysis of a claim of entitlement to the exemption." 877 F.3d at 1233. *See also Amos*, 483 U.S. at 339 (noting that exempting a religious organization from a statutory burden "effectuates a more complete separation" of church and state and limits "the kind of intrusive inquiry into religious belief" that courts should avoid.); *Gaylor*, 2019 WL 1217647, at *10 (deferring to Congress's

[8] *Center for Inquiry* should not be read to suggest that special accommodations for religion are per se unconstitutional. Although there is language in the opinion that could be read to question the idea that special accommodations for religion should be permissible, that would be contrary to *Amos*, where the Supreme Court held that an otherwise permissible religious accommodation need not "come[] packaged with benefits to secular entities." 483 U.S. at 338. Consistent with *Amos*, in *Cohen*, this Court upheld an accommodation that provided benefits to religion that were not equally available to secular entities. 8 F.3d at 492-93.

judgment that extending the income tax parsonage exclusion to cash housing allowances would involve less government entanglement with religion than not making that extension).

Holding the church-plan exemption inapplicable to "commercial activities undertaken with a 'business purpose,'" Appellants' Br. 64, also would entangle the government with religion. As the Supreme Court noted in *Amos*, the line between secular and religious activities "is hardly a bright one," 483 U.S. at 336, and "an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission;" thus, "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Id*. Accordingly, the Court upheld Title VII's religious accommodation as applied to a religious organization's secular non-profit activities. *See id.*

Moreover, plaintiffs' Establishment Clause arguments would raise serious constitutional questions under the Free Exercise Clause, which guarantees religious entities "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186; *see also Serbian E. Orthodox Diocese for U.S.A. & Canada v. Milivojevich*, 426 U.S. 696, 724 (1976) (holding that the First Amendment "permit[s] hierarchical religious organizations to establish their own rules and regulations for internal discipline and government"). Thus, at the very least, the Court should hold that the

church-plan exception is a lawful permissive accommodation of religion, to avoid those questions. *Cf. NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (interpreting the National Labor Relations Act to contain an implicit exemption for church-operated schools where exercise of the National Labor Relations Board's jurisdiction over such schools would "present[] a significant risk that the First Amendment will be infringed").

II. The ERISA Church-Plan Exemption Also is Constitutional Under an Historical Approach to Interpreting the Establishment Clause.

In *Gaylor*, this Court evaluated the constitutionality of the income-tax parsonage exemption at issue there under both the *Lemon v. Kurtzman* test and under the historical test the Supreme Court applied in *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion); *Hosanna-Tabor*, 565 U.S. at 182; and *Town of Greece v. Galloway*, 572 U.S. 565 (2014). *See Gaylor*, 2019 WL 1217647, at *4 (noting that the Supreme Court "has not clarified which [test] should take precedence"). For similar reasons as expressed in *Gaylor*, the ERISA church-plan exemption also satisfies that historical test.

In *Van Orden*, as this Court observed in *Gaylor*, the plurality concluded that a monument inscribed with the Ten Commandments on Texas government property did not violate the Establishment Clause, citing "a number of historical examples of governments referencing God and displaying the Ten Commandments without issue." *Gaylor*, 2019 WL 1217647, at *11 (citing *Van Orden*, 545 U.S. at 692). In

Hosanna-Tabor, the Court recognized the existence of a "ministerial exception" to Title VII's prohibition against religious discrimination in employment because history showed that the First Amendment was adopted in part "to prevent 'the new Federal Government—unlike the English Crown—[from a] role in filling ecclesiastical offices." *Gaylor*, 2019 WL 1217647, at *11 (quoting *Hosanna-Tabor*, 565 U.S. at 184). And in *Town of Greece*, the Court "applied the historical significance test when it held legislative prayer does not violate the Establishment Clause." *Gaylor*, 2019 WL 1217647, at *11 (citing *Town of Greece*, 572 U.S. at 577).

Applying the historical test to the federal income-tax parsonage exemption, *Gaylor* began by noting that the plaintiff in that case "offer[ed] no evidence that provisions like [the parsonage exemption] were historically viewed as an establishment of religion." 2019 WL 1217647, at *11. The same is true here with respect to the ERISA church-plan exemption; plaintiffs have made no argument that the church-plan exemption, or anything resembling it, was historically viewed as an establishment of religion, and we are aware of no such evidence.[9]

[9] *Gaylor* did not address whether the absence of such evidence is sufficient by itself to render a government law or practice consistent with the Establishment Clause. At least two federal courts of appeals judges have endorsed that conclusion. *See Felix v. City of Bloomfield*, 847 F.3d 1214, 1221 (10th Cir. 2017) (Kelly, J., & Tymkovich, C.J., dissenting from the denial of rehearing en banc) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003)).

In *Gaylor*, this Court also noted the existence of "substantial evidence of a lengthy tradition of tax exemptions for religion, particularly for church-owned properties." 2019 WL 1217647, at *11. *Gaylor* held that this evidence satisfied the Supreme Court's Establishment Clause historical test, even though "[b]efore 1913, Congress could not constitutionally tax housing provided to ministers as part of their income." *Id.* at *12. The Court considered that "too fine a distinction," in part because both the two-centuries-old history of property tax exemptions, and the more recent history of parsonage income-tax exemptions, share the same purpose—to "limit[] entanglement between church and state." *Id.* As explained, the ERISA church-plan exemption, as originally enacted and as amended in 1980, shares the same purpose. Accordingly, *Gaylor* supports concluding that the ERISA church-plan exemption also satisfies the Supreme Court's historical test for this reason. *See also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1472 (1990) (noting that "[t]he history of oath requirements, military conscription, religious assessments, and other sources of conflict between religious convictions and general legislation demonstrates that religion-specific exemptions were familiar and accepted means of accommodating these conflicts" at the time of the framing of the Constitution and Bill of Rights).

CONCLUSION

For the foregoing reasons, if the Court concludes that the plans at issue satisfy the statutory criteria for ERISA's church-plan exemption, the Court should reject plaintiffs' contention that the exemption violates the Establishment Clause as applied to those plans.

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

STEVEN WEINHOEFT
United States Attorney

SHARON SWINGLE
(202) 353-2689
S/LOWELL V. STURGILL JR.
LOWELL V. STURGILL JR.
(202) 514-3427
Attorneys, Appellate Staff
Civil Division, Room 7241
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

CERTIFICATE OF COMPLIANCE WITH
FRAP RULE 32(a)(7), FRAP RULE 32(g) and CR 32(c)

I hereby certify that this brief conforms to the rules contained in Federal rule of Appellate Procedure 32(a)(7) for a brief produced with a proportionally spaced font. The length of the brief is 10,627 words.

s/Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 22d day of March, 2019, I filed the foregoing brief by use of this Court's CM/ECF system. Service of the brief will be made on all parties by that system.

s/Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.