No. 15-1368

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MARIA STAPLETON, et al.,
Plaintiffs—Appellees,

v.

ADVOCATE HEALTHCARE NETWORK, An Illinois Non-profit Corporation, et al.,

Defendants—Appellants.

On appeal from the United States District Court
for the Northern District of Illinois,
Eastern division, NO. 1:14-CV-01873
The Honorable Edmond E. Chang, Presiding

BRIEF *AMICUS CURIAE* OF THE FREEDOM FROM RELIGION FOUNDATION IN SUPPORT OF APPELLEES AND AFFIRMANCE

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Appellate Court No: 15-1368

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Attorney's Signature: s/ Patrick C. Elliott Date: May 13, 2015

Attorney's Printed Name: Patrick C. Elliott

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation ("Foundation"),[1] a national non-profit based in Madison, Wisconsin, is currently the largest national association of freethinkers, representing atheists, agnostics, and others who form their opinion about religion based on reason, rather than faith, tradition, or authority. The Foundation has members in every state in the United States and in the District of Columbia and Puerto Rico. The Foundation's two purposes are to educate the public about nontheism and to defend the constitutional principle of separation between state and church.

The Foundation's interest in this case arises from that second purpose and because the Establishment Clause of the First Amendment to the United States Constitution prohibits the government from treating religious organizations preferentially.

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[1] Counsel for either party has not authored this brief, in whole or in part. No monetary contribution has been made to the preparation or submission of this brief other than the amicus curiae, its members or its counsel. Consent to this brief has been given by all parties.

For this reason, the Foundation has been challenging government actions that advance religion throughout its history. Most recently, the Foundation sued the IRS in 2011 over its "parsonage exemption," which allowed clergy to exclude from their taxable income any part of their salary used for housing. *Freedom From Religion Found., Inc. v. Lew*, 983 F. Supp. 2d 1051 (W.D. Wis. 2013), *vacated and remanded,* 773 F.3d 815 (7th Cir. 2014) (decision based on standing; not merits).

The Foundation and its members not only view preferential treatment as impermissible under the Establishment Clause, but also as divisive. Giving benefits to religious organizations—that are not available to secular organizations—alienates and excludes the Foundation's members, other nonbelievers, and all nonreligious organizations.

SUMMARY OF THE ARGUMENT

Congress's exemption to the Employee Retirement Income Security Act (ERISA) for churches, 29 U.S.C. § 1003(b)(2), puts an unnecessary question before the Court because Congress drew a line where it ought not to have been drawn in the first place.

Congress granted religion an exclusive exemption to a generally applicable statute without a legitimate excuse for doing so. Rather than attempt to draw a black line in a black sea, this Court can take a clearer path, one that follows the line between black and white. To do so the Court must take a step back and look at the entire picture: the church plan exemption, 29 U.S.C. § 1003(b)(2), is unconstitutional.

The church plan exemption advances religion in violation of the Establishment Clause. Other than government plans, only churches are granted an exemption from the financial and administrative requirements contained in ERISA. These requirements include: the payment of insurance premiums, minimum funding standards, and a duty to disclose funding levels to plan participants. Simply put, churches have an exclusive benefit denied to their secular counterparts.

The Supreme Court has only upheld exclusive government benefits to religion, like those churches enjoy under section 1003(b)(2), in two circumstances: (1) when the benefit is necessary to avoid excessive government entanglement with sacred matters,

or (2) when the benefit is necessary to avoid a substantial government imposed burden on free exercise.

Neither rationale can rescue the church plan exemption. The exemption is not necessary to avoid excessive entanglement because ERISA's provisions are entirely financial and administrative in nature; i.e., they do not touch upon sacred matters. The exemption is not necessary to alleviate a substantial burden on free exercise for the same reason—the Supreme Court has consistently held that financial and administrative burdens, like those contained in ERISA, do not impermissibly interfere with religious exercise.

Every time the Supreme Court has been faced with a unique benefit given to religion that is not necessary to protect free exercise or avoid excessive entanglement it has struck it down as an unconstitutional advancement of religion that violates the Establishment Clause.

The constitutional rules here are black and white: the government may benefit secular and religious organizations alike, without running afoul of the First Amendment; or, the

government can burden all organizations, secular and religious alike, with administrative and financial burdens that are unrelated to sacred functions or theological questions. But the government cannot constitutionally exempt only religious organizations from wholly secular financial and administrative burdens.

ARGUMENT

In the debate over the textual interpretation of 29 U.S.C. § 1002(33) one important point has been lost: the exemption itself is unconstitutional.

This Court has the power to consider the statute's constitutionality *sua sponte* if doing so is necessary to decide the case correctly. *See, e.g., U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 445-48 (1993) (stating that a court may raise *sua sponte* an issue that is "antecedent to...and ultimately dispositive of" the dispute before it because litigants cannot "extract the opinion of a court on hypothetical Acts of Congress or dubious constitutional principles" simply by stipulating as to matters of law that are not in fact certain);

Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 99 (1991) ("[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."); *United States v. Leon,* 468 U.S. 897, 905 (1984) (noting that even though the United States had not asked the Court to review the lower court's determination that probable cause was absent, it nonetheless had the "power" to decide the case on this ground if it wished to do so); *Elder v. Holloway,* 510 U.S. 510, 511-12 (1994) (holding that an appellate court should take notice of relevant legal precedent overlooked by the parties). This Court cannot correctly decide that Advocate Healthcare Network is entitled to a statutory exemption if that statute is unconstitutional in the first place. Thus, the threshold question must be: "is the church plan exemption constitutional?"

It is not.

The government violates the Establishment Clause when it advances religion. The church plan exemption, 29 U.S.C. §

1003(b)(2), advances religion by giving churches financial and regulatory freedoms not available to similarly situated secular organizations. The Supreme Court has allowed special treatment of religion in only two circumstances: (1) to avoid excessive entanglement, or (2) to relieve a substantial government-imposed burden on free exercise. The church plan exemption cannot be saved under either rationale because ERISA imposes purely financial and regulatory burdens – burdens the Supreme Court has already held do not pose a risk to the principles of entanglement or free exercise. Accordingly, the church plan exemption violates the First Amendment to the United States Constitution.

I. Advancing religion violates the Establishment Clause.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

It is a fundamental principle of Establishment Clause jurisprudence that the government is prohibited from advancing

religion. *McDaniel v. Paty*, 435 U.S. 618, 636, n.9 (1978) (Brennan, J., joined by Marshall, J., concurring in the judgment) ("under the Religion Clauses government is generally prohibited from seeking to advance or inhibit religion"); *Wolman v. Walter,* 433 U.S. 229, 236 (1977) (to pass Establishment Clause scrutiny, a law "must have a principal or primary effect that neither advances nor inhibits religion"); *Meek v. Pittenger,* 421 U.S. 349, 358 (1975) (same); *Hunt v. McNair*, 413 U.S. 734, 744 (1973) ("we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion"); *Tilton v. Richardson,* 403 U.S. 672, 678 (1971) ("we consider... [whether] the primary effect of the Act [is] to advance or inhibit religion"); *Lemon v. Kurtzman,* 403 U.S. 602, 612 (1971) (holding that one of the Establishment Clause tests is that "a law's principal or primary effect must be one that neither advances nor inhibits religion"); *Epperson v. Arkansas*, 393 U.S. 97, 107 (1968) ("If

either [the purpose or the primary effect of an enactment] is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution"); *Board of Educ. v. Allen,* 392 U.S. 236, 243 (1968) ("to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion"); *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963) (same).

II. The church plan exemption advances religion in violation of the Establishment Clause because it is a benefit extended only to religious organizations.

Religion can be "advanced" in many ways, but only one merits discussion in this case: the Supreme Court has long held that religion is advanced when the government offers religion a benefit that isn't available to other similarly situated secular organizations. *See Texas Monthly, Inc. v. Bullock,* 489 U.S. 1, 18 (1989) (finding a Texas statute that offered religious publications an exclusive tax benefit to be an unconstitutional advancement of religion); *cf. Walz v. Tax Comm'n of New York City,* 397 U.S. 664 (1970) (finding a property tax exemption not to be an

advancement because it was extended to a large number of nonreligious organizations as well as religious groups).

The church plan exemption, as its name suggests, is exclusive to religion. The plain language states that ERISA shall not apply "to any employee benefit plan if … such plan is a church plan." 29 U.S.C. § 1003(b)(2). Congress defined a church plan as "a plan established and maintained … by a church or …convention or association of churches." 29 U.S.C. § 1002(33). Plans created by similarly situated *secular* organizations like the FFRF, a 501(c)(3) non-profit organization, could not claim an exemption from ERISA as a church plan.

Furthermore, the benefit given exclusively to churches is substantial. The exemption allows churches, and churches alone, to avoid all of the financial and regulatory burdens imposed by ERISA, effectively allowing churches to entice employees with promises of retirement protection, with no obligation to keep them. Under section 1003(b)(2) churches are not required to pay for Pension Benefits Guarantee Corporation (PBGC) insurance. Churches are not subject to rules governing joint and survivor

annuities, mergers and transfers of assets and liabilities, assignment or alienation of benefits, commencement of benefits, reductions in benefits due to Social Security increases, and forfeiture of mandatory contributions. Churches are not subject to the reporting, disclosure, participation, vesting or funding requirements imposed on every other secular organization. Churches are not required to file Form 5500's with the government or to provide summary plan descriptions, summaries of material modifications, or summary annual reports to plan participants. Churches are not subject to excise taxes should they fail to properly fund pension plans; are not at risk of fiduciary liability for misappropriating pension funds and don't have the added expense of having to hire an actuary to organize disclosure documents. As one ministry put it, "[c]hurch plans sound too good to be true …."[2]

Churches are able to spend dollars that should be earmarked as pension funds on any number of things, including new steeples,

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[2] James T. Herod, *Church Plan: Questions and Answers*, Council for Health and Human Service Ministries (n.d), http://www.chhsm.org/pdfs/Church-Plans-QAs.pdf .

mahogany pulpits, or to settle unbecoming lawsuits—all without the risk of fiduciary liability. Their secular counterparts, however, are required to earmark funds every month to pay for PBGC insurance and to maintain minimum funding levels.

This financial and regulatory exemption does *not* benefit church employees whose retirement coffers have been emptied, but it does benefit the religious organizations who empty them.

The pernicious nature of this benefit is not just theoretical. One study looking at Roman Catholic dioceses in the U.S. found that the vast majority of diocesan pension plans were severely underfunded, with 90% of those plans in critical status and subject to failure as they mature.[3] This means that when the thousands of diocesan priests active in the U.S. today realize their retirement accounts are empty, churches will have the additional benefit of being able to pass the care of their priests on to taxpayers while still passing around their collection plate. The colossal shortfall and upcoming failure—which would not have

[3] Jack Ruhl, *Survey finds serious flaws in diocesan financial management*, National Catholic Reporter (Feb. 24, 2015), http://ncronline.org/news/faith-parish/survey-finds-serious-flaws-diocesan-financial-management.

happened but for the church plan exemption—means American taxpayers will be subsidizing religion. As the Supreme Court stated in *Texas Monthly*, granting special financial benefits to religion "affects nonqualifying taxpayers, [by] forcing them to become 'indirect and vicarious 'donors.'" 489 U.S. at 14 (citations omitted). By exempting churches from PBGC premiums, excise tax, and minimum funding requirements the government has subsidized the church's freedom to spend retirement dollars irresponsibly. Like the Court found in *Texas Monthly*, such exemptions "burden[] nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on" religion. *See,* 489 U.S. at 18, n.8. "The fact that such exemptions are of long standing cannot shield them from the strictures of the Establishment Clause. As [the Court] said in *Walz…*'no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.'" *Id.* (quoting *Waltz v. Tax Comm'n of New York City*, 379 U.S. 664 (1970)).

Beyond financial freedom, it should not be overlooked that,

under the church plan exemption, churches are also able to dodge a plethora of regulatory standards, most of which necessitate even more expenditures. For instance, while ERISA requires secular organizations to make nearly fifty disclosures annually[4] (which imply buried costs such as wages for time spent compiling, drafting, printing and mailing documents), churches are free to disclose as much or as little as they like. Not surprisingly, most churches do not volunteer much financial information at all. [5]

Sunlight is the best of disinfectants, but the vast majority of churches are avoiding the light because the disclosure requirements are costly, and the minimum funding and insurance requirements tie up money the church might rather spend on expanding its parking lot. As the Council for Health and Human Service Ministries put it, the "cost savings and flexibility"

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[4] U.S. Department of Labor, *Reporting and Disclosure Guide for Employee Benefit Plans*, (n.d), http://www.dol.gov/ebsa/pdf/rdguide.pdf (last visited May 5, 2015).

[5] Of the 178 Latin-rite dioceses that belong to the U.S. Conference of Catholic Bishops, only 61 provide information useful for determining a pension plan's health. National Catholic Reporter, *Survey on Diocesan Financial Management*, *supra* at n.4.

provided by the exemption are almost "too good to be true."[6]

The Supreme Court has found time and time again that financial and regulatory benefits, like those contained in the church plan exemption, which are not extended to similarly situated secular organizations, advance religion. *See, e.g., Texas Monthly,* 489 U.S. at 18 (finding a Texas statute that offered religious publications an exclusive exemption from sales tax to be an unconstitutional advancement of religion); *Estate of Thornton v. Caldor, Inc.,* 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) (finding a Connecticut statute which provided Sabbath observers an exclusive right not to work on their Sabbath "without according similar accommodation to ethical and religious beliefs and practices of other private employees…conveyed [a message] of endorsement of a particular religious belief…[and]… therefore has the effect of advancing religion, and cannot withstand Establishment Clause scrutiny); *see also Welsh v. United States,* 398 U.S. 333, 356-361 (1970) (Harlan, J., concurring in result) (explaining that a conscientious objector exemption could not be

[6] *Church Plan: Questions and Answers*, *supra* at n.3.

limited to those whose opposition to war has religious roots, but must also extend to those whose convictions are grounded in purely moral or philosophical sources).

III. Exclusive benefits, like the church plan exemption, have only been upheld in two circumstances: (1) to avoid excessive entanglement, or (2) to relieve a substantial government imposed burden on free exercise.

Where a benefit is shared among the secular and religious alike,[7] the Supreme Court has employed the test established in *Lemon v. Kurtzman* to determine whether a statute has a secular legislative purpose; whether its principal or primary effect is one that neither advances nor inhibits religion; and finally, whether the statute fosters "excessive government entanglement with religion." 403 U.S. at 612. Generally speaking, the Supreme Court has upheld *shared* benefits[8] so long as they do not discriminate on the basis of religious affiliation. *See, e.g., Board of Educ. v.*

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[7] Such benefits have taken the form of direct cash grants, reduced postal rates, vouchers, tax credits, and in-kind transfers such as textbooks, surplus food or the use of public facilities.

[8] I.e., those that are extended to religious and non-religious organizations alike.

Mergens, 496 U.S. 226 (1990) (equal access to speech forum at high school); *Witters v. Washington Dept. of Servis. for the Blind*, 474 U.S. 481 (1986) (vocational rehabilitation program to study at college of choice); *Mueller v. Allen*, 463 U.S. 388 (1983) (state income tuition tax deduction for parents of school-aged children); *Larson v. Valente*, 456 U.S. 228 (1982) (charitable solicitation law struck down, *inter alia*, because of evidence that legislature motivated by animus toward new religious movements).

But where benefits are given exclusively to religious organizations, the Supreme Court's analysis focuses on whether the benefit is necessary to either avoid excessive entanglement or avoid prohibiting free exercise. *See, e.g., Texas Monthly,* 489 U.S. at 15-18 (finding statute unconstitutional because, *inter alia*, it did not remove "a significant state-imposed deterrent to the free exercise of religion").

Courts have held that exclusive benefits that avoided excessive entanglement or prohibiting free exercise are constitutional. *See, e.g., NLRB v. Catholic Bishop*, 440 U.S. 490, 490, 496 (1979) (upholding a unique exemption from the National

Labor Relations Act (NLRA) for certain parochial school teachers, finding that without it, the NLRA would "interfere… with the religious mission of the schools" and create an "impermissible risk of excessive governmental entanglement"); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (exempting parochial schools from the Civil Rights Act of 1964's prohibition against religious discrimination because the exemption "alleviate[d] [a] significant governmental interference with the ability of religious organizations to define and carry out their religious missions"); *Cutter v. Wilkinson,* 544 U.S. 709 (2005) (finding RLUIPA constitutional because "foremost…it alleviate[d] exceptional government created…burdens on private religious exercise"). But exclusive benefits that avoided neither have all been found to violate the Establishment Clause. *See, e.g., Texas Monthly,* 489 U.S. 1; *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) (finding a state statute giving churches the unique power to veto liquor license applications unconstitutional because the statute encouraged, rather than avoided excessive entanglement); *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v.*

Grumet, 512 U.S. 687 (1994) (finding a state law creating a distinct religious school district unconstitutional because the law "neither presuppose[d] nor require[d] governmental impartiality toward religion…."); *Troy and Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290, 305 (1985) (upholding the application of the Fair Labor Standards Act to certain religious non-profit organizations because it did not "pose an intolerable risk of government entanglement with religion"); *see also e.g., United States v. Indianapolis Baptist Temple*, 224 F.3d 627, 631 (7th Cir. 2000) (finding certain federal employment tax provisions constitutional because they did not encourage excessive entanglement and did not impinge on free exercise).

Murky as the Establishment Clause waters may be, one thing is clear: Congress may not give an exclusive benefit to religion where there is no risk of government entanglement with religious matters and where the government is not prohibiting the free exercise of religion. Doing so impermissibly advances religion in violation of the First Amendment.

Because the church plan exemption is a benefit, offered exclusively to religion it is presumptively an unconstitutional advancement of religion unless it (1) avoids excessive entanglement or (2) avoids prohibiting free exercise.

A. The church plan exemption does not avoid excessive entanglement.

The church plan exemption does not avoid excessive entanglement because the routine financial and regulatory obligations ERISA imposes do not touch upon sacred matters.

The excessive entanglement prohibition does not mean the government is prohibited from regulating *any* aspects of a religious organization. The mere presence of an interaction between church and state alone is not enough. *See Lemon*, 403 U.S. at 612. Entanglement "must be 'excessive' before it runs afoul of the Establishment Clause." *Agostini v. Felton*, 521 U.S. 203, 232 (1997).

The Supreme Court first articulated the "excessive entanglement" prong in *Lemon v. Kurtzman* and held that it is the government's interaction, or interference, with religious matters

that creates an entanglement danger, not the mere presence of any relationship at all. *See Lemon*, 403 U.S. 602. The statute at issue in *Lemon* required, *inter alia*, the examination of "[a] school's records in order to determine how much of the total expenditures [were] attributable to secular education and how much to religious activity." *Id.* at 620. In finding the statute unconstitutional, the Court pointed to the fact that "the inspection and evaluation of the *religious content*" was "fraught with the sort of entanglement that the Constitution forbids." *Id.* (emphasis added). It was not record inspection that entangled church with state, but rather the government deciding what was religious enough to constitute "religious activity" that excessively entangled church and state. *See id.*

Excessive entanglement analysis focuses on the extent of governmental oversight of *religious matters,* not the administrative or financial aspects of a church. For instance, in *Bowen v. Kendrick,* the Court considered whether the Adolescent Family Life Act (AFLA) violated the Establishment Clause by mandating government oversight of religious organizations

accepting federal grants for research into premarital sex. 487 U.S. 589, 615-17 (1988). AFLA forbade qualifying religious organizations from using federal funds for family planning services or promoting abortion. *Id.* To this end, AFLA required governmental review of the materials used by grantees and monitoring of the programs with periodic visits. *Id.* There was no requirement that religious grantees follow any federal guidelines concerning the content of the advice given to teenagers, not discriminate as to the clientele they served, or otherwise to modify their values or program. *See id.* Accordingly, the Court found that AFLA did "not create … excessive entanglement" because there was "no reason to fear that the … monitoring involved …[would] cause the Government to intrude *unduly* in the … operations of the religiously affiliated grantees." *Id.* (emphasis added). The Supreme Court has found that mere "administrative cooperation," between church and state, is "insufficient to create … 'excessive entanglement'…. " *Agostini,* 521 U.S. at 206. The prohibition on excessive entanglement is rooted, *inter alia*, in the duty to safeguard religious organizations from "being limited by …

governmental intrusion into *sacred matters*." *See Aguilar v. Felton*, 473 U.S. 402, 410 (1985) (emphasis added); *cf. Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976) ("resolution of a church property dispute created a substantial danger that the State [would] become entangled in … religious controversies").

The "sacred matters" contemplated by the Supreme Court simply do not encompass financial obligations or other mundane, fact-based, non-sacred regulatory inquiries, like those in ERISA. Government regulation of the purely non-religious aspects of a religious organization has *never* been held to violate the excessive entanglement prong of the *Lemon* test. For instance, in *Troy and Susan Alamo Found. v. Secretary of Labor,* the Court considered whether the Fair Labor Standards Act (FLSA) – which required religious organizations to keep and disclose records "of … persons employed…[along with] their wages, [and] hours" constituted excessive entanglement. 471 U.S. at 305. Such requirements, the Court found, "do not pose an intolerable risk of government entanglement with religion" *Id.* The Establishment Clause, they

continued, "does not exempt religious organizations from such secular governmental activity as fire inspections and building and zoning regulations…and the recordkeeping requirements of the [FLSA], while perhaps more burdensome in terms of paperwork, are not significantly more intrusive into religious affairs." *Id.*

Again in *National Labor Relations Board v. Catholic Bishop of the City of Chicago,* the Court considered the National Labor Relations Act's (NLRA) application to parochial schools. *See* 440 U.S. at 497. The NLRA required the government to determine whether the positions asserted by clergy were in line with the schools' "religious mission" – and the Court held that such a determination would impermissibly require the government to delve into sacred doctrine. *See id.*

The kind of minimal regulation contained in ERISA is exactly the type this Court held not to be excessive in *United States v. Indianapolis Baptist Temple,* 224 F.3d 627 (7th Cir. 2000). *Indianapolis Baptist Temple* considered the constitutionality of federal employment tax provisions compelling church and other nonprofit participation. *See Indianapolis Baptist*

Temple, at 627. This Court held that "there is no basis under either the Free Exercise Clause or the Establishment Clause for the argument that neutral, generally applicable, minimally intrusive tax laws (like the ones at issue here) cannot be applied to religious organizations." *Id.* at 631. The tax payment and withholding obligations imposed by federal laws, as well as the enforcement proceedings that could result from non-compliance do not "require a constitutionally impermissible amount of government involvement in church affairs." *Id.* at 630. This is because any governmental inquiry under the statute would relate solely to the employment taxes owed and those paid. No governmental agency would be forced to attempt to influence activity by the church or to ensure that certain church activities were secular rather than religious. Rather, the statute only required "the sorts of generally applicable administrative and record keeping requirements" traditionally "imposed on religious organizations without violating the Establishment Clause." *Id.* at 631; *see also Jimmy Swaggart Ministries*, 493 U.S. 378, 394–97 (state sales and use tax); *Hernandez v. C.I.R.*, 490 U.S. 680, 695–

98 (1994) (federal income tax); *South Ridge Baptist Church v. Industrial Com'n of Ohio,* 911 F.2d 1203, 1210 (6th Cir. 1990) (workers' compensation program); *Bethel Baptist Church v. United States*, 822 F.2d 1334, 1340–41 (3rd Cir. 1987) (social security tax).

Simply put, even "substantial administrative burdens . . . do not rise to a constitutionally significant level. *See, e.g., Jimmy Swaggart Ministries v. Board of Equalization of Ca.,* 493 U.S. 378, 392-97 (1990) (no excessive entanglement where State imposes sales and use tax liability on religious organizations); *see also Roemer v. Board of Public Works of Md.,* 426 U.S. 736, 764-65 (1976) (no excessive entanglement where State conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion).

ERISA's requirements are precisely the type of routine, factual and non-doctrinal inquiries the Supreme Court, and this Court, have held to be constitutional as applied to religious organizations. None of ERISA's requirements touch, let alone intrude, "into *sacred matters*." *See Aguilar*, 473 U.S. at 410

(emphasis added).

B. The church plan exemption does not relieve a substantial government imposed burden on free exercise.

The ERISA exemption does not implicate the Free Exercise Clause of the First Amendment because financial and regulatory burdens have never been held to violate free exercise.

The Supreme Court has held that the government may also advance religion by giving it an exclusive benefit so long as doing so lifts a substantial government imposed burden on the practice of religion. An interference with an institution's free exercise, however, only occurs when the government prevents the institution from carrying out its *religious function*. *See Employment Division, Department of Human Resources v. Smith,* 494 U.S. 872, 876 (1990) (holding that Oregon State could, consistent with the Free Exercise Clause, deny claimants unemployment compensation for work-related misconduct based on the religious use of peyote). The First Amendment precludes "governmental regulation of religious *beliefs* as such." *Sherbert v. Verner,* 374 U.S. 398, 402, (1963). However, limited governmental

regulation of purely secular aspects of a religious organization does not violate the Free Exercise Clause. As Justice O'Connor stated plainly, what constitutes an "unconstitutional prohibition… on the free exercise of religion … cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng v. Nw. Indian Cemetery Protective Ass'n,* 485 U.S. 439, 451(1988).

The First Amendment allows churches to decide issues of religious doctrine free from government intrusion, but this is limited to:

(1) a church's law and doctrine, *see e.g., Milivojevich,* 426 U.S. at 713;

(2) a church's religious mission, *see e.g., Hernandez v. Comm'r Inter. Rev.,* 490 U.S. 680, 699 (1989); *Amos,* 483 U.S. at 336, n.14,

(3) and a church's internal hierarchy. *See e.g., Milivojevich* at 709-14.

Pension insurance payments, annuity calculations, and funding disclosures, like those contained in ERISA, are not within the protected areas of any sincerely held church doctrine.

As a matter of law, the Supreme Court has never held that

financial obligations or administrative requirements, like those required by ERISA, violate religious free exercise. *See, e.g., Troy and Susan Alamo Found.*, 471 U.S. at 305 (the application of federal wage and hour law to the foundation's commercial businesses did not implicate the Free Exercise Clause because the required payments in cash to the workers, which they could voluntarily return to the foundation, did not in any way interfere with their religious beliefs). The application of general laws to the activities of religious organizations only raises a free exercise concern if that application significantly interfered with the ability of the religious organization to carry out its religious function. Under the Supreme Court's free exercise doctrine, that showing would be very difficult to make, especially in ERISA's case, as the Supreme Court has, for the most part, rejected the notion of a "free-exercise required exemption" from generally applicable laws. *See, e.g., Trans World Airlines v. Hardison,* 432 U.S. 63 (1977) (employer not required to accommodate a Sabbatarian's effort to avoid Saturday work where this would require the employer to disregard the seniority system established by a collective

bargaining agreement); *Estate of Thornton,* 472 U.S. at 708-10 (finding unconstitutional a state law allowing employees to take off work on the day that they observed as their Sabbath on the grounds that it could impose substantial costs on other employees who would have to work on weekends in their stead).

In fact, the Supreme Court has already specifically held that administrative and financial regulations do not violate the free exercise clause in the context of retirement plans. In *United States v. Lee,* the Supreme Court held that the imposition of social security taxes on an Amish employer who had failed to pay his own taxes and failed to withhold the taxes from the wages of his Amish employees did not violate the Free Exercise Clause. 455 U.S. 252 (1982). The Amish employer argued that his religion believed it "sinful not to provide for their own elderly and needy" and thus that he was "religiously opposed to the national social security system." *Id.* at 255. The court flatly rejected this argument, and ultimately found the statutory scheme constitutional, despite its financial and administrative burdens. *Id.* at 257; *see also Indianapolis Baptist Temple*, 224 F.3d at 632

("applying neutral, generally applicable, minimally intrusive tax laws to religious entities does not unconstitutionally abridge the religious liberty guaranteed by the First Amendment").

The Court in *Lee* went on to explain:

> "There is no principled way…. to distinguish between general taxes and those imposed under the Social Security Act. If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief….Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax." *Lee,* 455 U.S at 260 (citations omitted).

A requirement that churches contribute to their own pension plans under ERISA in a responsible way would be no different. Not only is the "public interest in maintaining" retirement security "of a high order," the methods imposed under ERISA are

identical in kind and degree to those the Court already held to be constitutional in *Lee*.

Moreover, religious organizations would only be affected if they have already chosen, *voluntarily*, to offer employees pension benefits in the first place. This fact guts any notion (like the appellee suggested in *Lee*) that the very concept of "social security" offends religious freedom. Churches would have to mount a Free Exercise objection against specific provisions in the statute, such as "determining…shortfall amortization installments use[ing] segment rates." 26 U.S.C. §430(c)(2)(c).

Factually, applying ERISA to churches makes sense. Contrary to what some would have the Court believe, in seemingly every other conceivable arena of regulation, churches have always been subject to government imposed administrative and financial burdens–especially when the church voluntarily chooses to enter secular arenas. Churches have the freedom to choose whether or not to enter a particular market place, but once they are there, they cannot constitutionally be allowed to duck the rules simply because they are administratively or financially inconvenient.

That inconvenience must rise to the level of excessive entanglement or must infringe substantially upon the practice of religious belief in order to warrant constitutional protection. ERISA's requirements simply do not meet that standard.

Applying ERISA to religious organizations would be consistent with modern practice and Supreme Court jurisprudence, and would be in the organization's employee's best interest. Like stocks, aviation, zoning, public safety and political contributions, retirement plans are subject to government regulation. In the same way that a church cannot pull the free exercise alarm to avoid paying tax on unrelated business income, a church must not be able to use the same empty argument to gut their employees' retirement coffers.

CONCLUSION

Any statutory interpretation depends on the validity of the statute. As this brief has shown, the ERISA exemption for religious organizations is unconstitutional. Congress drew a line where it ought not to have been drawn in the first place: granting religion an exclusive, and constitutionally indefensible, benefit.

This Court ought not wade through the swamp Congress unnecessarily created. A clearer path exists: strike down the ERISA exemption for religious groups altogether.

Respectfully Submitted,

Dated: May 13, 2015

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CERTIFICATE OF COMPLIANCE

I, Patrick C. Elliott, certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,866 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2011 in 14-point Century.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May. 13, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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