Nos. 16-74, 16-86, 16-258

In the Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL., *Petitioners,*
v.
MARIA STAPLETON, ET AL., *Respondents.*

ST. PETER'S HEALTHCARE SYSTEM, ET AL., *Petitioners,*
v.
LAURENCE KAPLAN, *Respondent.*

DIGNITY HEALTH, ET AL., *Petitioners*,
v.
STARLA ROLLINS, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEAL FOR THE THIRD, SEVENTH, AND NINTH CIRCUITS

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

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QUESTION PRESENTED

Should the word "church," for purposes of the ERISA church plan exemption, be construed to reach all nonprofit religious groups engaged in sincere religious exercise?

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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit law firm that protects the free expression of all faiths. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae* in cases seeking to protect religious exercise from undue government interference. See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012) (counsel for petitioner); *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015) (same).

The Becket Fund has long supported laws that provide accommodations for people of all faiths who engage in individual or collective religious exercise. The Becket Fund is concerned that reading the word "church" too narrowly will have negative effects on some religious groups, particularly those associated with minority faiths.

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[1] No party's counsel authored any part of this brief. No person other than *Amicus Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent are on file with the Clerk. *Amicus* thanks law student Caleb Wolanek for his contribution to this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Although the question presented is one of statutory interpretation, beneath the surface of this case lurks a more fundamental question: What is a church?

Respondents' answer to the question is easily dismissed. In their view, a religious organization must own and operate one or more houses of worship to qualify as a "church" or part of a "church." Venture outside the four walls of a religious sanctuary, and one has ceased to be part of a church. Yet this Court has long recognized that what churches do is not limited to worship and prayer, but often includes serving and teaching others as well.[2]

Another answer to the question "What is a church?" is provided by the agency interpretations at issue in this case. The IRS, the Department of Labor, and the Pension Benefit Guaranty Corporation have for decades interpreted 29 U.S.C. 1002(33) to allow "church agencies" to take advantage of the ERISA "church plan" exemption. And as Petitioners demonstrate conclusively, that definitive government agency interpretation should put an end to this case. Pet. Br. 47-53.

Yet the government agencies' longstanding answer is also ultimately unsatisfying as a matter of statutory interpretation because the regulatory distinction between a "church" and a "church agency" remains. That distinction creates artificial statutory line-

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[2] See, *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694 (2012) (parochial school run by Lutheran congregation).

drawing problems that do not track the nature and activities of religious groups in American society. For example, the IRS still does not treat Catholic religious orders as "churches," even though in Catholic theology nuns are just as much a part of the broader Catholic Church as bishops, and religious orders are organized as religious non-profits just as dioceses are. Cf. Pet. Br. 57.

In *Amicus*'s view, the only way to answer the question of "What is a church?" without inviting a host of constitutional questions—not to mention treating many minority religious organizations worse than other religious organizations—is to give the word "church" the broadest possible construction. Specifically, the term should apply to any non-profit religious group that engages in sincere religious exercise, regardless of the group's particular faith tradition, regardless of whether the religious group is organized in the same way as a traditional Christian church congregation, and regardless of whether the group is primarily engaged in service activities rather than worship and prayer. And under this construction of the word "church," each of the Petitioners *is* a church, their church plans have been "established by a church" under 29 U.S.C. 1002(33)(A), and their plans therefore qualify for the ERISA church plan exemption.

To be sure, the Court need not provide a definitive answer to the question "What is a church?" to do justice to the parties before it. But it should at the very least make space for a broad reading of the word "church" in ERISA and the Internal Revenue Code. Just as Justices Alito and Kagan signaled in their *Hosanna-Tabor* concurrence that the legal term of art

"minister" was not entirely unproblematic—especially as applied to minority religions—so too the Court should indicate here that "church" is to be interpreted to cover *all* non-profit religious bodies, including both non-Christian religious groups and those that serve and teach as well as worship.

ARGUMENT

I. The term "church" should be given the broadest possible construction.

For purposes of the ERISA church plan exemption, the term "church" should be given the broadest possible construction. First, the only way to properly accommodate the diverse array of religious groups in the United States is to provide a broad construction of the term. Second, denying the church plan exemption to religious groups engaged in social service activities runs afoul of the Religion Clauses of the First Amendment.

A. The word "church" should properly be construed to include religious groups of all religions and polities.

The word "church" should be construed broadly in order to accommodate the broadest set of sincere religious groups, regardless of their particular religious beliefs, the particular form of religious polity they adopt, or the particular type of religious activities that they engage in.

"[V]irtually every religion in the world is represented in the population of the United States[.]" *Hosanna-Tabor*, 132 S. Ct. at 715 (Alito, J., concurring). That diversity plays out across several dimensions. First, there is a diversity of the beliefs themselves. Buddhism, Islam, Judaism, Sikhism, and

every possible variant of Christianity exist in the United States, along with many other less well-known religions, such as Yazidism, Mandaeism, Santería, and Zoroastrianism.

Second, there is a great diversity of religious polities in the United States. These polities can be congregational, hierarchical, episcopal, connectional, or presbyterial, as in many Christian, Jewish, and Muslim groups, or they can be oriented around the protection and use of a shrine maintained by a group of adherents, as with many Buddhist and Hindu groups. Some religions have many ranks of clergy, such as the Catholic Church, while other groups, such as the Quakers and the Sikhs, eschew clergy-laity distinctions altogether. And many religious traditions have parallel structures within their polities. Thus religious orders within the United States have a separate existence from the diocesan hierarchy. Buddhist monasteries exist in parallel to Buddhist temples.

The word "church" is not necessarily the best umbrella term for this diverse array of religious groups. First and foremost, the term is ineluctably Christian.[3] Most non-Christian religious groups do not call their congregations or denominations churches. Indeed, the word smuggles some Christian presuppositions into the United States Code, just as the word "minister" smuggled Protestant presuppositions into First Amendment jurisprudence.

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[3] Indeed, as in many other Germanic languages, the English word "church" is ultimately derived from the Greek κυριακόν (kuriakon), "the Lord's House," a reference to Jesus Christ.

See *Hosanna-Tabor*, 132 S. Ct. at 711 (Alito, J., concurring). The term is not a good fit for groups like Hindu temples, where there is often no congregation or membership, but only a board of trustees that maintains a shrine for all those who would come to worship.

Second, and very relevant to these cases, the word "church" is fundamentally ambiguous because it carries many different meanings. "Church" can mean a single building (*e.g.*, "Old North Church"), a single congregation (*e.g.*, "First Presbyterian Church"), an entire denomination (*e.g.*, "The Church of Jesus Christ of Latter-day Saints"), or a universal idea (*e.g.*, the "Christian Church"). Each of these meanings is valid, but they are not coextensive.

It is in the difference between congregation-as-church, denomination-as-church, and universal-idea-as-church where the ambiguity becomes most relevant to this litigation. Many religious groups, such as religious colleges or social service organizations like homeless shelters, may consider themselves legally separate from an individual congregation, or even any denomination, but would still consider themselves to be a core part of "the Church" writ large. But ERISA and the Internal Revenue Code do little to address this reality.[4]

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[4] The IRS does not define "church" but instead lists 14 non-exclusive factors in making this determination. See Internal Revenue Service, Pub. No. 1828, *Tax Guide for Churches and Religious Organizations* 33 (2015), https://www.irs.gov/pub/irs-pdf/p1828.pdf

To properly capture the many varieties of religious experience within the United States, the term "church" should be given its most capacious meaning. Under this approach, "church" should apply to religious groups of all faith traditions, and of all religious polities, even when they are quite different from the typical Christian church.

Moreover, the term should also apply not just to houses of worship or denominational bodies, but also to all other sincere non-profit religious groups: the soup kitchens, the homeless shelters, the seminaries, the colleges, the schools, the summer camps, the nursing homes, the orphanages, and the hospitals. These legal entities can be just as much part of a far broader "church" even when they do not remain within the four walls of a church sanctuary. Similarly, their chosen corporate form should make no difference—how the Diocese of Metuchen controls St. Peter's should not matter, just whether it does. The upshot of this broad construction is that the service of others will be treated as no less a true activity of the church than conducting a religious ceremony or singing a hymn.

B. Respondents' attempt to deny ERISA church plan exemptions to service-focused non-profit religious groups violates the First Amendment.

The broad construction of the word "church" in Section 1002 is also mandated by the Religion Clauses of the First Amendment.

Petitioners accurately explain that Respondents' interpretation of the statute raises grave constitutional doubts regarding the application of the Establishment Clause, because denominational preferences would result. Pet. Br. 55-62. But the

problem goes even deeper: denying ERISA church plan exemptions to religious groups because they are engaged primarily in teaching or service as opposed to worship alone violates both of the Religion Clauses of the First Amendment.

Establishment Clause. Denying ERISA church plan exemptions to religious groups that engage in service and teaching violates the Establishment Clause.

First, such a denial would subject Petitioners to millions of dollars in penalties because they do not have the government's favored polity or because they do not engage in the government's favored category of religious exercise. That penalty constitutes one of the forbidden features of an historical establishment of religion: government coercion of religious exercise.

Under the Court's most recent Establishment Clause decision in *Town of Greece* v. *Galloway*, "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1819 (2014) (quoting *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part)). And "[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Ibid.*

At the time of the founding, the "essential * * * ingredients" of an establishment took one of four forms: (1) government financial support of the church, (2) government control of the doctrine and personnel of the church, (3) government coercion of religious beliefs and practices, and (4) government assignment

of important civil functions to church authorities. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2118, 2131 (2003).[5]

Here, denying the church plan exemption to religious groups engaged in sincere religious exercise would constitute a form of government coercion to conform their religious practices to the government's preferred forms. Petitioners would stand to lose millions of dollars—a significant portion of their respective budgets—because they do not have the proper polity or because they do not engage in the right sort of religious exercise. That is inherently coercive. Cf. *National Fed'n of Indep. Bus.* v. *Sebelius*, 132 S. Ct. 2566, 2606 (2012) (finding federal government coercion where states had the prospect of losing significant percentage of their annual budgets).

Indeed, deciding what sort of religious exercise to engage in, and whether to be directly controlled by a denomination or not, are precisely the sorts of "ecclesiastical decisions" that government is prohibited from being involved in. *Hosanna-Tabor*, 132 S. Ct. at 706. Forcing those decisions to go one way or the other is a forbidden "gun to the head" and would

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[5] Professor McConnell lists six elements of establishment. We refer to three of those categories—"compulsory church attendance," "prohibitions on worship in dissenting churches," and "restriction of political participation," *ibid.*—using the shorthand "government coercion of religious beliefs and practices."

therefore violate the Establishment Clause. *NFIB*, 132 S. Ct. at 2604.

Free Exercise Clause. Denying church plan exemptions to non-profit religious groups engaged primarily in social service also violates the Free Exercise Clause. Under *Hosanna-Tabor*, the Free Exercise Clause absolutely forbids "government interference with an internal church decision that affects the faith and mission of the church itself[,]" while "government regulation of only outward physical acts" is instead governed by the rule of *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990). *Hosanna-Tabor*, 132 S. Ct. at 707.

Here, Respondents would deny entities like Petitioners church plan exemptions solely because of an "internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 707. More precisely, these religious groups would be treated differently and worse because they decided to provide services to others in addition to worship and prayer and because they were not directly controlled by a house of worship or denomination. That penalty violates the Free Exercise Clause.

The violation would also be present even if the *Smith* rule were applied. Under *Smith*, religious individuals must comply with a "valid and neutral law of general applicability" even if it interferes with religious exercise. *Smith*, 494 U.S. at 879. However, a law is not "generally applicable" if it is substantially "underinclusive"—that is, if it fails to prohibit "conduct that endangers [the government's] interests in a similar or greater degree than [the sought-after religious conduct] does." *Church of the Lukumi Babalu*

Aye, Inc. v. *City of Hialeah*, 508 U.S. 520, 543 (1993). Similarly, a law is not neutral if government "devalues religious reasons" by "judging them to be of lesser import" than other reasons. *Lukumi*, 508 U.S. at 537-38.

In this case, Respondents' effort to force the IRS, the Department of Labor, and the Pension Benefit Guaranty Corporation to deny ERISA church plan exemptions to social service organizations like Petitioners would "devalue[ ]" these hospitals' religious reasons for seeking to serve others, triggering strict scrutiny under *Lukumi*. *Lukumi*, 508 U.S. at 537-38. And applying strict scrutiny makes it clear that there would not be a viable affirmative defense. The government agencies have no compelling governmental interest in making the "church"/"church agency" distinction, nor would denying them the church plan exemption be the least restrictive means available to achieve their goals.

II. Petitioners are churches for purposes of the ERISA church plan exemption.

Section 1002(33)(A) of ERISA provides that:

> The term "church plan" means a plan established and maintained * * * by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26.

29 U.S.C. 1002(33)(A).

Applying the principles above, it is clear that the church plans in question were "established * * * by a church" because Petitioner church agencies *are* churches. Each of the Petitioners are non-profit

religious groups engaged in the sincere religious exercise of providing healthcare to others.

To be sure, much of the medical assistance they provide to their patients is mirrored in the medical assistance that other, secular, non-profit organizations provide to other patients. But the existence of secular analogues to religious behavior does not make the religious activity any less religious. Cf. *Hosanna-Tabor*, 132 S. Ct. at 706 (churches must be treated differently than labor unions and social clubs because of the Religion Clauses).

Similarly, there is no serious argument that Petitioners are insincere in their religious exercise. As Petitioners describe, Pet. Br. 10-16, they all engage in religious exercise as part of their respective medical ministries.

* * *

As noted above, the Court need not decide the "What is a church?" question in order to decide this appeal. But whether it does answer the question or not, the Court should make sure to leave ample room in its decision for a broad interpretation of the word "church" in ERISA and the Internal Revenue Code—one that accommodates nonprofit religious groups of all faith traditions, of all religious polities, and engaged in all kinds of sincere religious exercise.

CONCLUSION

The Court should reverse the decisions below.

Respectfully submitted.

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