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.

SAINT 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 Third, Seventh, And Ninth Circuit Courts Of Appeals

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS, AND THE NATIONAL LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1961, the **Christian Legal Society** (CLS) is an association of Christian attorneys, law students, and law professors, with attorney chapters nationwide and law student chapters at approximately 90 law schools. CLS's advocacy arm, the Center for Law and Religious Freedom, works to defend religious liberty in the courts, legislatures, and the public square. Since 1981, CLS has filed *amicus curiae* briefs in most Religion Clause cases heard by this Court. CLS twice has represented religious organizations before this Court when they have been excluded from a broadly available governmental program.

CLS understands that religious exemptions are essential in a religiously diverse society to protect religious citizens of all faiths from government action that would diminish their free religious exercise. For that reason, CLS was instrumental in passage of two landmark federal laws that provide religious exemptions: the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4, which protects all Americans' religious freedom,[2] and the Religious Land

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[1] The parties have consented to the filing of this brief through their blanket consents that are on file with the Clerk. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 Vill. L. Rev. 1, 1 n.a (1994) (describing Christian Legal Society's Center

Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5, which protects religious liberty for prisoners and for congregations of all faiths.[3] CLS believes that pluralism is essential to a free society and prospers only when all Americans' speech and religious exercise are protected regardless of the current popularity of their speech or religious beliefs. By requiring religious exemptions, RFRA and RLUIPA protect all Americans' religious freedom and safeguard our Nation's commitment to pluralism.

The **National Association of Evangelicals** (NAE) is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, social-service providers, colleges, seminaries, religious publishers, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. It believes that religious freedom is both a God-given right and a limitation on civil government, all as recognized in the First Amendment and other federal laws, and that church-state separation is

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for Law and Religious Freedom as "one of the prime proponents of the Religious Freedom Restoration Act").

[3] *See, e.g.*, *Religious Liberty:* Hearing Before the Senate Committee on the Judiciary on Issues Relating to Religious Liberty Protection, and Focusing on the Constitutionality of a Religious Protection Measure 4-18 (June 23 and Sept. 9, 1999) (testimony of Steven McFarland, Director, Center for Law and Religious Freedom of the Christian Legal Society).

a part of our nation's constitutional structure designed to restrain government and consequently safeguard the autonomy of religion and religious organizations.

The **National Legal Foundation** (NLF) is a public interest law firm that has litigated a number of cases before this Court. *Lefemine v. Wideman*, 133 S. Ct. 9 (2012) (per curiam); *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996) (mem.); *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). The NLF is dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF is vitally concerned with the outcome of this case because of the impact it will have on Establishment Clause jurisprudence, particularly with regard to religious exemptions, which the Framers considered to be a permissible practice under the Religion Clauses.

SUMMARY OF ARGUMENT

To buttress their statutory interpretation, Respondents suggest that, if ERISA exempts all churches and other religious organizations, it violates the Establishment Clause because the exemption is "a forbidden raw preference." Opp. to Cert. Pet., No. 16-74, at 35. This argument, which is what *Amici* will address, rests on conflating cases permitting religious exemptions with cases that often prohibit religious preferences and is contrary to a consistent line of seven decisions

of this Court. If accepted, the Respondents' proposition would become an engine to strike down nearly every statutory religious exemption – that number in the thousands – from labor and employment law exclusions, to tax carve-outs, to conscientious objector waivers. This Court's precedent, however, rightly distinguishes statutes that provide religious exemptions from those promulgating religious preferences. Only the latter are sometimes problematic.

From its inception, the United States has legislated accommodations for persons holding certain religious beliefs and faith-based organizations by exempting them from otherwise applicable regulatory burdens. Such exemptions are within the sound discretion of legislative bodies, whether the object is to protect adherents whose beliefs are out of step with the prevailing legal culture or to avoid governmental entanglement with religious organizations.

1. The Establishment Clause is not violated when the government enacts general regulatory legislation but provides an exemption for religious organizations, as ERISA does here. Over the last 100 years, this Court has seven times rejected the argument that a religious exemption to a larger regulatory framework is a violation of the Establishment Clause.

2. A naked religious *preference* can indeed be problematic under the Establishment Clause, and preferences have been struck down when they are "unyielding" and thus fail to take into account potential harm to third parties. However, ERISA has a

religious *exemption*, not a religious *preference*, and thus any putative harm to third parties is not attributable to the statutory accommodation.

3. The Respondents and their supporting *amici* below confuse two lines of cases: when an exemption is *required* as a constitutional right with instances when a legislature grants an exemption as a matter of *discretion*. ERISA is of the latter sort. Exemptions from regulatory burdens for all churches and other religious organizations, like the exemption in ERISA, further the purpose of religious freedom, as well as avoiding regulatory entanglement between church and state that reinforces that desirable separation.

ARGUMENT

I. ERISA Provides A Discretionary Religious Exemption That Does Not Violate The Establishment Clause.

Religious exemptions in general regulatory statutes are consistent with the text of the Establishment Clause, which proscribes establishing a religion, not leaving religion alone. In the face of Establishment Clause challenges, this Court has consistently upheld discretionary religious exemptions. Respondents below confused a religious exemption with a religious preference, whereas only the latter call for closer scrutiny under the Establishment Clause.

A. The Establishment Clause's Negation of Congressional Power to Legislate Does Not Prohibit Religious Exemptions.

The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The text does not deny Congress power to "make . . . law" about religion. Rather, it more narrowly denies Congress the power to "make . . . law" about "an establishment" of religion. To illustrate, assume that soon after 1791 Congress enacted a comprehensive law regulating conscription into the Army and Navy, but provided an exemption for religious pacifists. Nothing in the Establishment Clause prohibits such an exemption, as this Court found in the *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918). Congress's adoption of an exemption for religious pacifists was certainly to "make [a] law respecting" religion, but it did not make a law about "an establishment" of religion. The exemption is not an establishment; it merely allows pacifists to follow practices derived from their own religious beliefs. The government elects not to be an obstruction to these voluntary acts of faith. The object of the exemption is not to advance religion, but to advance religious freedom.

As a second example, it is fully consistent with the scope of the Establishment Clause for Congress to enact comprehensive legislation requiring large employers in interstate commerce to provide unemployment compensation to their employees, but then to exempt religious organizations. To enact such an exemption is certainly to "make [a] law respecting" religion, but it is

not a law "respecting an establishment" of religion. *See Rojas v. Fitch*, 127 F.3d 184 (1st Cir. 1997) (holding religious exemption in Federal Unemployment Compensation Act is not a violation of Establishment Clause). Once again, the statutory exemption is designed to allow religious employers to follow privately held religious beliefs to which they are already so inclined.

It is a categorical mistake to presume that a statutory religious exemption is a form of unconstitutional religious favoritism. Looking again at the text of the Establishment Clause, although the government cannot "make [a] law" in support of "an establishment" of religion, it may "make [a] law" in support of religious freedom. Indeed, that has to be so, because the Free Exercise Clause is itself a law in support of religious freedom. Even before the First Amendment was adopted, the 1787 Constitution expressly protected against official obstruction of particular acts of religious belief or observance in the Religious Test Clause (art. VI, cl. 3), and in the three clauses permitting an affirmation in lieu of an oath to accommodate minority sects.[4] The First Amendment would be nonsensical if the Establishment Clause contradicted the Free Exercise Clause, or if the Establishment Clause overrode or nullified these explicit exemptions for religious

[4] U.S. Const. art. I, § 3, cl. 6; *id*. art. II, § 1, cl. 8; *id*. art. VI, cl. 3. The provisions accommodated Quakers and Anabaptists who refused to swear an oath based on Matthew 5:34-37. The President's veto authority also anticipates Sunday as a day when the President refrains from work. U.S. Const. art. I, § 7, cl. 2.

exercise in the Constitution itself. There is no sliding scale of constitutional rights, some superseding others.

This plain reading of the text is also the logical one. All agree that the First Amendment is pro-freedom of speech and pro-freedom of the press. By the same token, the First Amendment is pro-religious freedom. This is as true of the Establishment Clause as it is of the Free Exercise Clause. The government by choosing not to waylay voluntary, private acts of religion does not "establish" a religion.

B. For Government to Leave Private Religious Exercise Alone Is Not to Establish a Religion.

The government does not establish religion by leaving its private exercise alone – which is what a religious exemption does. Exemptions also reinforce the desired separation of church and state, minimizing the potential for governmental entanglement and interference with the church's administration or her polity. *See Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970). Hence, it is entirely unsurprising that, over the past 100 years, this Court has held in seven religious exemption cases that the legislature did not violate the Establishment Clause.

The result does not change when there is some alleged "harm to third parties," as the Respondents and their supporting *amici* argued below. It is always possible to aver or hypothesize some harm to third parties. But in an exemption case, the causal agent of any such

harm is not the government, but some private actor or circumstances. Only in a religious preference case is there the possibility of government-induced harm to others.

1. In seven cases spanning a century, this Court has rejected the claim that religious exemptions violate the Establishment Clause.

This Court has consistently held that, when regulatory legislation imposes a burden on religious belief or a religious organization, a legislature is free to forestall such a burden by providing an exemption. The statutory "refraining from imposition" of a burden is what is termed a discretionary religious exemption. This is what Congress did in adopting, for example, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (RFRA), and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (RLUIPA). And it is what Congress did in ERISA. To exempt churches and other religious organizations from regulation is to leave voluntary religious activity alone. To leave religion alone is not to establish religion.

The leading case is *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), upholding a statutory exemption in Title VII of the Civil Rights Act of 1964 § 702(a), 42 U.S.C. § 2000e-1(a). The Title VII exemption excuses religious employers from the prohibition on employment discrimination when the

decision that is adverse to an employee is rooted in the employer's religion. 483 U.S. at 331-33. Mr. Mayson, a custodian employed at a gymnasium of the Church of Jesus Christ of Latter-day Saints, was discharged because he ceased to be a church member in good standing. *Id.* at 327. The *Amos* Court began by reaffirming that the Establishment Clause did not mean that government must be indifferent to religion, but instead aims at government not "act[ing] with the intent of promoting a particular point of view in religious matters." *Id.* at 335. The Title VII exemption, however, was not an instance of government "abandoning neutrality," for "it is a permissible legislative purpose to alleviate" a regulatory burden, thereby leaving religious organizations free "to define and carry out their religious missions" as they see fit. *Id.* Although Mr. Mayson claimed that the government's exemption caused him harm, that was simply not true: "[I]t was the Church . . . , not the Government, who put him to the choice of changing his religious practices or losing his job." *Id.* at 337 n.15. With religious exemptions, the government-enacted exemption is not the causal agent of the harm.

In addition to *Amos*, this Court has on six other occasions turned back an Establishment Clause challenge to a discretionary religious exemption. In *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005), the Court held that RLUIPA's religious exemption for prisoners did not violate the Establishment Clause. In *Gillette v. United States*, 401 U.S. 437, 448-60 (1971), the Court ruled that a religious exemption from the military

draft for those opposed to all war did not violate the Establishment Clause. In *Walz*, 397 U.S. at 667-80, this Court upheld a property tax exemption for all religious organizations against an Establishment Clause challenge. In *Zorach v. Clauson*, 343 U.S. 306, 308-15 (1952), the Court said that a public school policy of releasing pupils from the state's compulsory education law to voluntarily attend private religion classes off school grounds did not violate the Establishment Clause. In the *Selective Draft Law Cases*, 245 U.S. 366, 389-90 (1918), this Court rejected an Establishment Clause challenge to a military draft exemption for clergy, seminarians, and pacifists. In *Goldman v. United States*, 245 U.S. 474, 476 (1918), the Court summarily rejected constitutional claims to the same draft exemption, relying on the just decided *Selective Draft Law Cases*.[5]

Respondents and their *amici* below extensively relied on two other cases involving religious exemptions: *Board of Education of Kiryas Joel Village School District v. Grumet*, 494 U.S. 872 (1990) (plurality opinion in part), and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (plurality opinion). However, both of these cases were decided on grounds other than the Establishment Clause and alleged third-party harm. All nine Justices

[5] In addition to these seven decisions, individual Justices have stated that a discretionary religious exemption does not violate the Establishment Clause. *See Welsh v. United States*, 398 U.S. 333, 371-72 (1970) (White, J., dissenting); *Sherbert v. Verner*, 374 U.S. 398, 422-23 (1963) (Harlan, J., dissenting); *McGowan v. Maryland*, 366 U.S. 420, 511 (1961) (Frankfurter, J., separate opinion).

in *Grumet* took care to say that religious exemptions are constitutional,[6] as did all the Justices in *Employment Division v. Smith*.[7] And in *Texas Monthly*, a case that struck down, on other grounds, a sales tax exclusion on purchases of sacred literature promulgating a religious faith, eight Justices explicitly reaffirmed the rule in *Amos*, and the ninth (Justice White) wrote the opinion in *Amos*.[8]

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[6] 512 U.S. at 705 (1994) (plurality in part) ("the Constitution allows the state to accommodate religious needs by alleviating special burdens" and reaffirming *Amos*); *id.* at 711-12 (Stevens, J., concurring) (distinguishing the facts of *Grumet* from "a decision to grant an exemption from a burdensome general rule"); *id.* at 716 (O'Connor, J., concurring) ("The Constitution permits '*nondiscriminatory* religious-practice exemption[s],'" (quoting *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (emphasis by Justice O'Connor, meaning that exemptions cannot discriminate among faiths)); *id.* at 723-24 (Kennedy, J., concurring) (approving *Amos* and similar cases); *id.* at 744 (Scalia, J., dissenting) ("The Court has . . . long acknowledged the permissibility of legislative accommodation.").

[7] 494 U.S. 872, 890 (1990) ("a nondiscriminatory religious-practice exemption is permitted"); *id.* at 893-97 (O'Connor, J., concurring in the judgment) (regulatory exemptions are not only permitted, but sometimes constitutionally required).

[8] 489 U.S. at 18 n.8 (1989) (plurality opinion) (approving *Amos*); *id.* at 28 (Blackmun, J., concurring) (approving *Amos*); *id.* at 38-40 (Scalia, J., dissenting) (arguing that regulatory and tax exemptions are generally permitted and sometimes required). Justice White's concurrence said nothing about the exemption and third parties, but would have struck down the tax exemption as a discriminatory speech regulation in violation of the Free Press Clause. *See id.* at 25-26 (White, J., concurring). No opinion in *Texas Monthly* commanded the vote of more than three Justices, so it is unsuitable as binding precedent.

2. Respondents misread *Estate of Thornton v. Caldor*, which illustrates the difference between an exemption and a preference.

The Respondents and their *amici* below relied heavily on *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). The statute in *Caldor* did not involve a religious exemption but, instead, a naked religious preference. Moreover, the *Caldor* statute created an "unyielding" preference for religious observance, totally disregarding the competing interests of others, such as the claimant's employer and fellow workers. A combination of the two factors brought down the statute in *Caldor*.

A religious preference occurs when a dispute has arisen in the private sector that involves a religious claimant. The state legislature elects to intervene and resolve the dispute in favor of the religious claimant. For the government to take the side of religion over the secular quite naturally raises concerns addressed by the Establishment Clause. When a preference then fails to take account of the interests of all disputants, the statute may fall.

In *Caldor*, Connecticut's legislature sought to remedy a labor dispute created by private market forces as a consequence of legalizing retail on Sunday. Anticipating that repeal of the Sunday-closing law would generate conflict between employers and employees, the legislature took sides, specifically that of the religious employee over the retail employer. Donald

Thornton was an employee of Caldor, a retail department store. He was a Presbyterian who observed Sunday as his Sabbath. When the store opened on Sundays, Thornton invoked the Connecticut statute, seeking Sundays off. The store resisted, arguing that the Connecticut statute violated the Establishment Clause, and this Court agreed. *Id*. at 707, 710-11.

The Connecticut law forced some in the private sector to assist the religious observance of a fellow citizen. That is what a preference does: the government compels one private citizen to work helping another private citizen better practice his or her religion. The harm was government-induced. In contrast, a government-enacted exemption is not the cause of harm, as *Amos* shows. 483 U.S. at 337 n.15 ("Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job.").

In summary, a religious exemption is when government "lifts" a burden on religious belief that was of the government's own making in the first place. By providing the exemption, the government elects not to obstruct religion. By government leaving religion alone, adherents can themselves choose to exercise their faith or not. *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1842 (2006) (hereinafter "Laycock"). In contrast, a religious preference is where government reaches out to intervene in a private dispute

and confers on religion a naked advantage that the religious claimant would not have had without the legislature's assistance. The ERISA provision at issue here is an exemption like that involved in *Amos*, not a preference of the type involved in *Caldor*. Hence, ERISA's exemption was not the cause of any third-party harm. If there was a loss by Respondents, the causal agent was the religious employer and its failure to contribute adequately to the pension fund or invest funds wisely. The Establishment Clause restrains the government, not the private sector.

3. This Court distinguished *Caldor* in *Hobbie* and again in *Amos*.

The Court in *Caldor* said "a fundamental principle of the Religion Clauses" is that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id*. at 710 (internal citations and quotations omitted). That passing remark could, if taken out of context, be used to put at risk all religious accommodations. But this Court soon clarified and cabined the "fundamental principle" as expressed in *Caldor*.

The first case to do so was *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987). *Hobbie* ruled on the application of the Free Exercise Clause to a religious employee seeking benefits under a state's unemployment compensation law. The State of Florida had refused unemployment

compensation because an employee, having adopted a different religion, was discharged for refusing to continue to work on Saturday, her new Sabbath.

Seeking to invoke *Caldor*'s "fundamental principle," Florida claimed that to compel the accommodation of an employee's Sabbath entailed having the employer conform its secular conduct to meet the employee's religious needs. 480 U.S. at 145. Rejecting Florida's argument, this Court explained the contours of *Caldor*'s "fundamental principle":

> In *Thornton* [*v. Caldor*], we . . . determined that the State's "unyielding weighting in favor of Sabbath observers over all other interests . . . ha[d] a primary effect that impermissibly advance[d] a particular religious practice," . . . and placed an unacceptable burden on employers and co-workers because it provided no exceptions for special circumstances regardless of the hardship resulting from the mandatory accommodation.

Id. at 145 n.11 (internal citations omitted; brackets in original). The preference in *Caldor* favored the religious claimant "unyieldingly." That did not occur with the relief compelled by the Free Exercise Clause in *Hobbie* because, as with all Free Exercise Clause cases, the claimant's demand can be refused upon the state meeting a balancing test: compelling interest achieved by the least restrictive means.

A few months later, in *Amos*, this Court again addressed the proper understanding of *Caldor*. Tracking *Caldor's* "fundamental principle" passage, Mr. Mayson,

the employee-claimant, argued that the Title VII exemption caused him to be pressured to conform his conduct to the religious necessities of the LDS Church, claiming that this "taking sides" in favor of religion was a violation of the Establishment Clause. This Court disagreed:

> Undoubtedly, Mayson's freedom of choice in religious matters was impinged upon, but it was the Church . . . and not the Government, who put him to the choice of changing his religious practices or losing his job. This is a very different case than *Estate of Thornton v. Caldor, Inc.* . . . . In *Caldor,* . . . Connecticut had 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. *See Hobbie* . . . , 480 U.S. [at] 145 n.11. In the present case, appellee Mayson was not legally obligated to take the steps necessary to qualify for a temple recommend, and his discharge was not required by statute.

483 U.S. at 337 n.15.

The Court thus distinguished *Caldor* from *Amos*, and, concomitantly, a *preference* from an *exemption*. The Connecticut statute was not a mere shield from a larger regulatory burden imposed by the state, but a sword forcing others in the private sector to facilitate the religious practices of Mr. Thornton. Unlike *Caldor*'s naked preference where the state statute had government intervening in a private-sector dispute on the

side of religion, in *Amos*, Congress did not vest religious employers with new powers but left them with the same powers as they had before the passage of Title VII. *Id*. at 337. Thus, it was the action of the Church and not the operation of the Title VII exemption that was the cause of Mr. Mayson losing his job.

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), is another example of a religious preference. *Larkin* struck down an ordinance creating a veto right vested in churches over the issuance of liquor licenses within a 500-foot radius of a church. In this private dispute, religious interests were preferred over the secular, and the preference was unyielding. That combination violated the Establishment Clause. The Court pointed out, however, that a city may consider the desire of churches to not have noisy and rowdy neighbors. The latter would be permissible if balanced with other factors. But the ordinance cannot go so far as to grant an absolute veto in favor of religion. *Id.* at 124 nn.7-8.

Compare *Caldor* and *Larkin* with *Cutter v. Wilkinson*, 544 U.S. 709 (2005). *Cutter* considered a religious *exemption* by operation of RLUIPA at a state correctional facility. A substantial burden on an inmate's religious belief would, in most RLUIPA cases, require correctional authorities to provide an exemption, even as other nonreligious inmates would have to comply with the prison rule in question. Justice Ginsburg, writing for the Court, said that the "foremost" reason RLUIPA did not violate the Establishment Clause was that "it alleviates exceptional *government-created* burdens on private religious exercise." *Id*. at

720 (emphasis added). That is always the case with an exemption. While the Court noted that, in *Caldor* and like cases, accommodations had fallen before constitutional challenges because they failed to "take adequate account of the burdens [that] a requested accommodation may impose on nonbeneficiaries," *id*., that observation was not, and was not said to be, essential to the *Cutter* holding, as RLUIPA was a true statutory exemption.

From *Caldor*, *Hobbie*, *Amos, Larkin*, and *Cutter* two rules emerge. First, religious *exemptions* do not violate the Establishment Clause. The government is simply not the causal agent for any third-party harm, and only government-induced injury can violate the Establishment Clause. Second, religious *preferences* may violate the Establishment Clause if they also create an "unyielding" preference for a religious observance to the harm of third parties. Because the ERISA provision challenged here is a religious *exemption*, rather than a *preference*, it is constitutional.

C. The Juridical Category of "Third-Party Harms" Is Undefined and Impossibly Expansive.

The Respondents and their *amici* argued below that the ERISA exemption violates the Establishment Clause because it harms third parties, namely the employees themselves. As discussed above, third-party harm is not cognizable in *exemption* cases because government is not the causal agent. Moreover, third-party

harm was recently rejected as too attenuated a consideration in a parallel situation involving RFRA.

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), the Solicitor General did *not* argue that RFRA, because it imposed a third-party harm on Hobby Lobby employees, violated the Establishment Clause. However, he made an analogous argument that such a burden on third parties categorically tipped RFRA's prescribed "compelling interest" test against the employer. This Court rejected the argument:

> [I]t could not reasonably be maintained that any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.

Id. at 2781 n.37. Thus, while RFRA does require taking into account any harm to third parties as part of the "compelling interest" test, it does so by a balancing test, not a categorical rule. The Court went on to point out how easily a putative third-party harm can be concocted and thus – under the Solicitor General's theory – would effectively repeal RFRA: "By framing any Government regulation as benefitting a third party, the Government could turn all regulations into [third-party] entitlements to which nobody could object on religious grounds, rendering RFRA meaningless." *Id.*

That lesson squarely applies to the present challenge to ERISA. It is all too easy for Respondents to frame the operation of ERISA's religious exemption as causing harm to third parties. But *Hobby Lobby* repudiates the conversion of "lost entitlements" into "harms" that then violate the Establishment Clause. In military draft exemption cases, could it count as a disqualifying "harm to third parties" when some do not serve yet others are drafted in their stead? *Gillette* and other draft cases have already answered in the negative.[9] In the instance of property tax exemptions for religious organizations, could it count as unconstitutional "harm to third parties" when other taxpayers make up the budget deficit that religious organizations otherwise would have paid in taxes? *Walz* has already answered in the negative.[10]

Creative framing by Respondents of supposed third-party injuries would render all exemptions a nullity. Under such an expansive theory, "the Government could turn all regulations into [third-party] entitlements to which nobody could object on religious grounds." *Hobby Lobby*, 134 S. Ct. at 2781 n.37. Because there is no logical stopping point to such framing

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[9] *Gillette*, 401 U.S. at 448-60 (religious exemption from military draft for those opposed to all war does not violate Establishment Clause); *see also Selective Draft Law Cases*, 245 U.S. at 389-90 (military draft exemption for clergy, seminarians, and pacifists does not violate Establishment Clause); *Goldman v. United States*, 245 U.S. 474 (1918) (same).

[10] *Walz*, 397 U.S. at 667-80 (property tax exemption for religious organizations does not violate Establishment Clause).

of "third-party harm," all religious exemptions would be upended.

At the time of the American founding, people did not regard statutory religious exemptions as "an establishment." Laycock at 1795-98, 1808-30. A survey done twenty-five years ago showed that there were approximately 2,000 statutory religious exemptions in federal and state codes. James E. Ryan, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407 (1992). Hundreds have been added since as a result of the explosive growth in regulatory government and increased religious pluralism. Historically, religious exemptions were enacted as a safeguard to protect religious minorities against an oppressive established church: "The established church had no need for exemptions, because its teachings were in accord with government policy. Exemptions protect minority religions, and they emerged only in the wake of toleration of dissenting worship." Laycock at 1801; *see also id.* at 1842. If all or most religious exemptions were to fall today, it is religious minorities that would suffer the most.

II. Congress Has Discretion To Legislate Exemptions For Religion Even When Not Required To Do So.

In proceedings below, Respondents and their *amici* advanced arguments claiming that the ERISA exemption, if interpreted as the IRS has for years, would be unconstitutional because it distinguishes between the

religious and the non-religious.[11] They further maintain that, because ERISA deals with "financial" and "accounting" matters, this Court's precedent does not require an exception under the Religion Clauses. *See, e.g.*, Opp. to Cert. Pet., No. 16-74, at 34-35; Brief *Amicus Curiae* of the Freedom from Religion Found., *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016) (No. 15-15351). These arguments disclose a basic misunderstanding of the Religion Clauses and confuse cases in which legislatures have exercised their *discretion* to exempt religion from regulatory burdens with cases in which legislators are *required* to do so.

The Respondents conceded below that some religious exemptions are *required* by the Religion Clauses. *See* Opp. to Cert. Pet., No. 16-74, at 34; *e.g.*, *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Wisconsin v. Yoder*, 406 U.S. 205, 234 n.22 (1972); *Sherbert v. Verner*, 374 U.S. 398, 409-10 (1963). They then argued, citing cases in which this Court has held that accommodations were *not* constitutionally required, that Congress had acted unconstitutionally with ERISA in providing an exemption because ERISA's subject matter is more like that of the latter type of cases.[12]

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[11] *Amici* here do not address the separate issue discussed in other briefs *amicus curiae* that Respondents' interpretation would violate the Establishment Clause because it would require the government to distinguish *among* religious entities.

[12] Respondents and their *amici*, for instance, relied on *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290

The conclusion does not follow from the premise. Just because Congress was not required to carve out a religious exemption in ERISA does not mean that Congress did not have the discretion to do so. Congress's principal object in ERISA was to avoid encroachment into the inner workings of religious organizations. This object is wholly consistent with the Religion Clauses; they were adopted to permit and encourage religious exercise, not to express antagonism toward religion or to favor the secular over the religious.

Thus, contrary to Respondents and their *amici*, the exemption in ERISA does not violate the Establishment Clause simply because it favors religious adherents and organizations over the non-religious. If that were true, no religious exemption would ever be permitted because they all distinguish between religion and non-religion.

When the First Congress debated the text of what we now know as the Free Exercise and Establishment Clauses, from May to September 1789, the members expressly took religion into account.[13] By its scope the

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(1985) (finding that Free Exercise Clause did not require exemption from operation of Fair Labor Standards Act), and *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990) (finding Religion Clauses did not require exemption from operation of state sales and use taxes). *See* Brief *Amicus Curiae* of the Freedom from Religion Found., *Rollins v. Dignity Health*, 830 F.3d 900 (9th Cir. 2016) (No. 15-15351).

[13] *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 527-67 (2011) (reviewing every proposal and amendment touching on religion that over four months eventually

Free Exercise Clause is only for the religious who exercise religion. A claimant must first have a religion. One does not "exercise" a leg by amputating it. Similarly, by the terms of the Establishment Clause, it is only "religion" that can wrongly be established. So it is beyond cavil that the First Congress specifically protected "religion." A syntax that uses the category "religion" necessarily contemplates the category of "non-religion." The distinction between religion and non-religion is inherent in the Religion Clauses; it does not violate them. In adopting these two clauses, members of the First Congress recognized the unique nature of religion and religious organizations in the new national polity,[14] a relationship that colloquially is now referred to as religious liberty and the separation of church and state.

To be sure, the Establishment Clause does have a rule against religious favoritism,[15] but the rule is not implicated here. The clause prohibits a legislature from intentionally discriminating[16] between or among

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yielded the Religion Clauses as reported out by the House and Senate).

[14] *Id.* at 583-612.

[15] The leading cases are *Larson v. Valente*, 456 U.S. 228, 230-32, 244, 246 n.23, 246-247, 253-55 (1982), and *Grumet*, 512 U.S. at 702-708.

[16] The rule of no-denominational-favoritism requires a showing of governmental intent. It is well-settled that a statutory classification which has a disparate impact on some sects but not others does not rise to a violation of the Establishment Clause. *See Hernandez v. Comm'r of Int. Rev.*, 490 U.S. 680, 696 (1989); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 n.30 (1982); *Larson*, 456 U.S. at 246 n.23.

types of religions (for example, between or among Jewish, Christian, and Buddhist citizens), as well as between religious groups or denominations (for example, Catholic and Protestant churches). But ERISA does not do that, as Respondents admit. Opp. to Cert. Pet., No. 16-74, at 33-34.

Never has this Court applied the no-favoritism rule derived from this discrete line of cases decided under the Establishment Clause to prohibit Congress from distinguishing between religion and non-religion, and to thereby favor the secular over the religious. It should not start now.

CONCLUSION

ERISA's exemption, like thousands of other regulatory and statutory exemptions applying broadly to religious observance and organizations, is constitutional. As with all true exemptions, ERISA merely leaves religion alone to be privately exercised, and government does not establish religion by leaving it alone. Finally, Congress acts wholly consistently with the Religion Clauses when it grants religious exemptions

from generally applicable regulatory burdens, even when it is not constitutionally required to do so.

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