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.

(Caption continued on inside cover)

On Writs of Certiorari to the
United States Courts of Appeals
for the Seventh, Third, and Ninth Circuits

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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No. 16-86

SAINT PETER'S HEALTHCARE SYSTEM, ET AL.,
Petitioners,

v.

LAURENCE KAPLAN,
Respondent.

No. 16-258

DIGNITY HEALTH, ET AL.,
Petitioners,

v.

STARLA ROLLINS,
Respondent.

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to religious liberty. In this brief, the ACLJ responds preemptively to arguments that the church plan exemption in ERISA is unconstitutional under the Establishment Clause.

SUMMARY OF ARGUMENT

The religious protection embodied in the First Amendment leaves ample room for exemptions that accommodate religious persons, practices, and institutions beyond the bare minimum which the Free Exercise Clause requires. Offering a buffer of protection to religion in this way is not unconstitutional favoritism. Rather, it is the American way. Hence, there is no Establishment Clause violation that might provide an alternative basis for affirmance in these cases. This Court should reverse

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[1] The parties in these consolidated cases have consented to the filing of this brief. Copies of the blanket consent letters of the parties are on file with this Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

the judgments of the Third, Seventh, and Ninth Circuits.

ARGUMENT

"'Neutrality' in matters of religion is not inconsistent with 'benevolence' by way of exemptions from onerous duties," *Gillette v. United States*, 401 U.S. 437, 454 (1971). The ERISA church plan exemption spares religious employers from massive financial and other burdens, falling squarely within the *Gillette* statement. Nevertheless, some amici have argued that this exemption is unconstitutional. In appellate-level amicus briefs (in particular, recently in the Tenth Circuit[2]), Americans United for Separation of Church and State (AU), joined by the American Civil Liberties Unions (ACLU) [hereafter jointly "AU"], and separately the Freedom From Religion Foundation (FFRF), each argue that the ERISA church plan exemption violates the Establishment Clause. Both AU and the FFRF are incorrect.

I. CONTRA FFRF, RELIGIOUS EXEMPTIONS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The FFRF argument can be dismissed out of hand. FFRF contends that the Establishment Clause flatly "prohibits the government from treating religious organizations preferentially," FFRF 10th Br. at 2, or at

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[2] *See* Br. of Americans United for Separation of Church and State & ACLU, *Medina v. Catholic Health Initiatives*, No. 16-1005 (10th Cir. June 29, 2016) [hereafter "AU 10th Br."]; Br. of FFRF, *Catholic Health Initiatives v. Medina* [sic], No. 16-1005 (10th Cir. June 29, 2016) [hereafter "FFRF 10th Br."].

least when not necessary to avoid a substantial Free Exercise burden or excessive government entanglement with sacred matters," *id*. at 4. In short, the FFRF rule is, in effect, "No more protection for religion than necessary."

This Court has repeatedly rejected FFRF's contention. Instead, this Court has recognized that there is "play in the joints" in the First Amendment: "room" exists between what the Free Exercise Clause requires and what the Establishment Clause forbids. *Locke v. Davey*, 540 U.S. 712, 718 (2004) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970)).[3] And thus, this Court has again and again upheld various exemptions that protect – or "benefit," in FFRF's loaded phrasing – religious entities: tax exemptions (as in *Walz*); exemptions from employment discrimination laws (as in *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), and *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, 565 U.S. 171 (2012)); and entitlement to "strict scrutiny" review of substantial burdens on religious exercise (as in the federal RFRA and RLUIPA statutes and their state counterparts, *see generally Cutter v. Wilkinson*, 544 U.S. 709 (2005)). Not every one of these exemptions or protections are "necessary," strictly speaking, to prevent Free Exercise or entanglement violations. *Amos*, for example, dealt with "the *secular*, nonprofit activities" of a religious employer, 483 U.S. at 329 (emphasis added). RFRA

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[3]The "play in the joints" also includes considerable legislative flexibility in deciding *how far* to protect religious exercise beyond the basic constitutional requirements. *See Gillette*, 401 U.S. at 448-60 (upholding exemption protecting, but limited to, those religious objectors who hold a belief forbidding participation in *all* wars).

and RLUIPA, meanwhile, followed a declaration from this Court that the Free Exercise Clause did *not* generally require strict scrutiny, *Employment Div. v. Smith*, 494 U.S. 872, 878-82 (1990); hence, both RFRA and RLUIPA necessarily represent *extensions* of legal protection beyond the Free Exercise minimum. Yet this Court perceived no Establishment Clause obstacle to such protections.

Indeed, this Court itself created a protective exemption for religious entities by means of statutory construction in *NRLB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (National Labor Relations Act construed not to apply to church-operated schools). This Court did so under the rubric of avoiding serious constitutional questions. *Id.* at 500-07. If exemptions for religious entities were themselves constitutionally problematic, it would have made no sense to read precisely such an exemption into a statute in order to *avoid* serious constitutional questions. In short, FFRF's reading of the Establishment Clause is not just erroneous, but exactly backwards from the approach this Court took in *Catholic Bishop*.

II. CONTRA AU, THE ERISA CHURCH PLAN EXEMPTION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BY BURDENING THIRD PARTIES.

Unlike FFRF, AU makes a more nuanced constitutional argument, namely that exemptions for religious entities violate the Establishment Clause only if they "unduly burden" third parties. AU 10th Br. at 4. This argument, however, also fails.

First of all, an *exemption* does not *require* anything. Hence, any impact on third parties will not

be a government-imposed impact, but rather the result of the discretionary choices of private actors. That distinction can be decisive. *Amos*, 483 U.S. at 337 n.15 ("it was the Church . . ., and not the Government," that "impinged" upon the employee's choice). *See generally* Br. of Amici Christian Legal Soc'y et al. (distinguishing "exemptions" from "preferences").[4]

Second, even to the extent the Court does take into account the effects an exemption will have on third parties, *Cutter*, 544 U.S. at 720 (applying statutory exemption); *Board of Educ. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring in judgment), the standard for what burdens are "too much" is quite high. Suffering religious discrimination is not "too much." *Amos*. Even being required to serve (in place of a conscientious objector) in the military in wartime, at risk of life and limb, is not "too much." *Gillette*. *See also Grumet*, 512 U.S. at 724-25 (Kennedy, J., concurring in judgment) (citing *Amos* and *Gillette* as upholding laws under the Establishment Clause despite these "substantial" burdens on third parties).

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[4]The Free Exercise Clause, RFRA, RLUIPA, the church autonomy doctrine, etc., like the church plan exemption under ERISA, all protect religious practice from *governmental* burdens. These situations are therefore quite unlike the case of *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), in which the government empowered all employees with an absolute right (viz., to take off work on the Sabbath of their choosing) enforceable against *private* actors. *Id*. at 710 (noting that the First Amendment does not confer a right to insist that all others, including private parties, conform their practices to one's own religious practices).

Having an arguably less favorable[5] retirement plan is therefore not even close to being constitutionally problematic, as the financial impact, while certainly significant, falls well below the burdens at issue – and tolerated – in those other cases.

Third, the burden on employees of church plan employers is no different than that faced by the millions of government employees whose employers are also exempt under ERISA. ERISA contains an exception for "a governmental plan," 29 U.S.C. § 1003(b)(1), the definition of which includes plans covering federal, state, and local government employees, 29 U.S.C. § 1002(32). Moreover, the "governmental plan" exemption extends still further:

> The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act (59 Stat. 669).

29 U.S.C. § 1002(32). The exemption for "international organizations" covers a wide range of additional employers such as the International Coffee Organization, the International Committee of the Red

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[5] *But see Gobielle v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) ("ERISA does not guarantee substantive benefits"). Moreover, to the extent the imposition of ERISA obligations induce employers to resort to alternative retirement benefits – or a reduction in force – the net result need not be a benefit to any given employee.

Cross, the United Nations, the World Health Organization, the Israel-United States Binational Industrial Research and Development Foundation, and a host of other employers.[6] It is hard to see how a burden on all these employees could be perfectly acceptable as a policy matter, yet somehow become a constitutional crisis when applied to religious healthcare.

Fourth, the concerns AU identifies must be placed in their proper context, namely, that inconveniences and burdens to employees are part and parcel of the employment context. A dress code denies the freedom to dress as one chooses. *E.g.*, *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282 (1977) (employee criticizing workplace dress code). Finite salaries deny employees money beyond their agreed pay. *E.g.*, *Comm'r of Internal Revenue v. Kowalski*, 434 U.S. 77, 81 (1977) (amount of salary subject to labor negotiation). Fixed work shifts deny employees the freedom to work the hours they choose. *E.g.*, *Bhd. of Locomotive Engineers v. Atchison, Topeka & Santa Fe R.R.*, 516 U.S. 152, 158 (1996) (noting fatigue likely to result from 12-hour shift). The physical layout of an office will deny employees the space, window views, or furniture arrangements they might prefer. *E.g.*, *Kilby v. CVS Pharm., Inc.*, 739 F.3d 1192, 1194 (9th Cir. 2013) (noting role of "business judgment" in determining the "physical layout of the workplace"). That employees do not always get what they deem to

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[6]The list of these organizations is at 22 U.S.C. § 288. *See* https://www.gpo.gov/fdsys/pkg/USCODE-2014-title22/pdf/USCODE-2014-title22-chap7-subchapXVIII.pdf.

be optimum benefits and conditions is not remarkable, but rather a fact of life.

Fifth, the mischaracterization (*see Amos*, 483 U.S. at 337 n.15) of religious exemptions as imposing burdens upon third parties is a charge that knows no limits. The employee who refuses a Sabbath shift imposes upon his employer or, perhaps, co-workers who need to fill in. *But see Sherbert v. Verner*, 374 U.S. 398 (1963). The parents who remove their Amish child from formal high school education deny that child the instruction that would otherwise be given. *But see Wisconsin v. Yoder*, 406 U.S. 205 (1972). The owners of a kosher deli who refuse to sell pork deny their patrons the option of a ham sandwich. *But see* Jonathan D. Sarna, "Constitutional Dilemma on Birth Control," *Forward.com* (Mar. 16, 2012) ("We all might agree that kosher delis should not be coerced into selling ham"). And the physician who refuses to perform a "female circumcision," *see* Female Genital Mutilation, WHO media centre fact sheet (Feb. 2014), or an unnecessary amputation, *see* David Brang *et al.*, "Apotemnophilia: a neurological disorder," 19 *NeuroReport* 1305 (2008) (disorder characterized by intense desire for amputation of healthy limb), each "impose" upon the would-be recipients of those procedures (or their parents).

Accommodating religious beliefs always entails some measure of sacrifice. But respect for conscience is a first principle of our civil society, not a negotiable perk. If what Thomas Jefferson wrote in 1809 is to remain true – that "no provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority," Thomas Jefferson, "Reply to Address to the Society of the Methodist Episcopal Church at New

London, Connecticut," Feb. 4, 1809, in *The Complete Jefferson* (S.K. Padover, ed. 1943) – then the Establishment Clause must tolerate inconveniences to third parties in the name of respecting protections for religious freedom.

Sixth and finally, the AU's proposed "unduly harm" test is a label for a result, not a standard for adjudication. All of the analytical force is packed into the term "unduly," which is essentially a judgment call about competing values. In a representative democracy, weighing the balance of such value judgments is not the task of the judiciary, under the guise of constitutional interpretation, absent clear textual authorization, *compare* U.S. Const. amend. IV ("unreasonable" searches and seizures); U.S. Const. amend. VIII ("excessive" fines). Rather, such value judgments are the responsibility of the representative, legislative branches of government. *Branzburg v. Hayes*, 408 U.S. 665, 705-06 (1972).

CONCLUSION

This Court should reverse the judgments of the Third, Seventh, and Ninth Circuits.

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