No. 15-1172

In the United States Court of Appeals for the Third Circuit

Laurence Kaplan,

Plaintiff-Appellee,

v.

St. Peter's Healthcare System, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of New Jersey, Judge Michael A. Shipp

Brief of *Amici Curiae* Americans United for Separation of Church and State, American Civil Liberties Union, and ACLU of New Jersey in Support of Appellees and Affirmance

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 15-1172

Laurence Kaplan

v.

St. Peter's Healthcare System et al.

Instructions

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N/A

s/ Gregory M. Lipper
(Signature of Counsel or Party)

Dated: 5/11/2015

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N/A

s/ Gregory M. Lipper
(Signature of Counsel or Party)

Dated: 5/11/2015

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Identity and Interests of *Amici Curiae*

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that was founded in 1947 and has more than 120,000 members and supporters. Its mission is to advance the free-exercise rights of individuals and religious communities to worship as they see fit, and to preserve the separation of church and state as a vital component of democratic government.

Americans United has long supported legal exemptions that reasonably accommodate religious practice. *See, e.g.*, Brief of Americans United for Separation of Church and State as *Amicus Curiae* in Support of Petitioner, *Holt v. Hobbs*, 135 S. Ct. 853 (2015) (No. 13-6827), 2014 WL 2361896 (supporting religious exemption from prison rules prohibiting facial hair). Consistent with its support for the separation of church and state, however, Americans United opposes religious exemptions that would impose harm on innocent third parties.

The American Civil Liberties Union Foundation is a nationwide, nonprofit, non-partisan public-interest organization of more than 500,000 members dedicated to defending the civil liberties guaranteed by the Constitution and the nation's civil-rights laws. The American

Civil Liberties Union of New Jersey is a state affiliate of the ACLU, was founded in 1960, and has tens of thousands of supporters throughout the state. The ACLU has a long history of defending the fundamental right to religious liberty, and routinely brings cases designed to protect the right to religious exercise and expression. At the same time, the ACLU is deeply committed to safeguarding the rights of employees to be free from discrimination and other deprivations.

This brief is filed with the consent of Appellants and Appellee. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state the following: (1) no party's counsel authored this brief in whole or in part, and (2) no party, party's counsel, or person other than *amici*, their members, or their counsel, contributed money intended to fund the brief's preparation or submission.

Summary of Argument

The Employee Retirement Income Security Act (ERISA) was enacted to "protect … the interests of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b). The Act exempts plans established by churches, 29 U.S.C. § 1002(33), because Congress sought to protect churches from government intrusion into their

records. But St. Peter's Healthcare System asks the Court to expand this narrow exemption to cover any employee-benefits plan established by any entity (hospital, university, social services agency, TV station, or otherwise) that happens to be affiliated with a church. This result would not only contradict ERISA's text, structure, and purpose, *see* Appellees' Br. at 8–38, but would also violate the Establishment Clause by imposing serious burdens on the employees of affiliated entities such as St. Peter's Healthcare System.

If the plan operated by St. Peter's Healthcare System were categorized as a church plan, the hospital's employees would suffer significant harms, losing a variety of ERISA protections aimed at preserving their retirement security. Among other things, St. Peter's Healthcare System would be free to underfund its employee pension plan, could stop paying premiums necessary for federal pension insurance, and would have no obligation to provide disclosures to employees about the state of their pension plans. Moreover, these harms would affect significant numbers of employees who do not share the religious beliefs of St. Peter's Healthcare System and who perform purely secular duties.

Nothing in the First Amendment requires the government to extend the church-plan exemption beyond churches. St. Peter's Healthcare System and its *amici* argue that the entanglement doctrine requires the government to extend the church-plan exception to entities affiliated with churches, lest the government be forced to make judgments about these entities' belief systems. But assessing whether or not an entity is a church requires no religious judgment. Instead, it involves the application of neutral criteria related to the functions performed by the entity, not the type or depth of the entity's religious beliefs. This type of inquiry has long been part of the tax code, and has long been performed by courts.

If, on the other hand, the arguments of St. Peter's Healthcare System and its *amici* were accepted, a host of other exemptions, which have long been limited to actual houses of worship, might need to be extended to all religiously affiliated nonprofits. The result would be a nonprofit caste system—religious nonprofits would be exempt from most regulations, while secular nonprofits would be forced to comply with them—that would itself violate the Establishment Clause.

By declining to interpret the statute in a manner that could undermine the retirement security of those who work for religiously affiliated employers, the Court would vindicate not only congressional intent, but the concerns of the Framers, who themselves recognized the need to cabin religious exemptions that would harm third parties. In the words of James Madison, "I observe with particular pleasure the view you have taken of the immunity of Religion from civil jurisdiction, *in every case where it does not trespass on private rights* or the public peace." Letter from James Madison to Edward Livingston (July 10, 1822), *in* 9 *The Writings of James Madison (1819–1836)* 98, 100 (Gaillard Hunt ed. 1910), *available at* http://tinyurl.com/madison-livingston (emphasis added). Defendants' employees are entitled to no less protection.

I. Extending the Church Plan Exemption to St. Peter's Healthcare System Would Burden Its Employees in Violation of the Establishment Clause.

Extending the church-plan exemption beyond houses of worship—to affiliated entities like St. Peter's Healthcare System—would violate the Establishment Clause. If St. Peter's Healthcare System's plan were categorized as a church plan, the hospital's employees would suffer

significant burdens, losing the protection of ERISA regulations that protect employees' retirement security.

First, St. Peter's Healthcare System would be free to underfund its pension plan, exposing the hospital's employees to the loss of their pension benefits. Second, the employees of St. Peter's Healthcare System would forfeit the protection of federal pension insurance, which would be especially dangerous when combined with the risk of pension underfunding. Third, St. Peter's Healthcare System would be able to withhold important financial data from its employees, depriving them of information that they need to plan for their retirement. Allowing any of these harms would violate the Establishment Clause; collectively, the Establishment Clause harms are unmistakable.

Moreover, these harms could affect significant numbers of employees who do not share the religious beliefs of St. Peter's Healthcare System. Unlike houses of worship, religiously affiliated entities regularly employ people of other faiths, and many if not most of these employees perform functions that are secular. Under the Establishment Clause, these employees are entitled to the same protection for their employment benefits as everyone else.

A. The Establishment Clause prohibits religious accommodations that burden third parties.

Although the government may in some circumstances offer religious accommodations that are not required by the Free Exercise Clause, courts have long refused to authorize religious accommodations that would burden third parties, including employees. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court granted the requested accommodation because it would not "abridge any other person's religious liberties." *Id.* at 409. In the context of Title VII of the Civil Rights Act, the Court held that the statute's reasonable-accommodation requirement did not authorize an exemption that would have burdened other employees, including "the senior employee [who] would … have been deprived of his contractual rights under the collective-bargaining agreement." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80 (1977). And in *United States v. Lee*, 455 U.S. 252 (1982), the Court rejected an employer's request for a religious exemption from paying social-security taxes, because the requested exemption would "operate[ ] to impose the employer's religious faith on the employees." *Id.* at 261.

Indeed, religious accommodations that burden third parties violate the Establishment Clause. In *Estate of Thornton v. Caldor, Inc.*,

472 U.S. 703 (1985), for example, the Supreme Court invalidated a statute that gave employees an unqualified right to time off on the Sabbath day of their choosing. *Id.* at 705–08. The Court held that the statute violated the Establishment Clause because it "would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers." *Id.* at 710. The Court reiterated this limitation in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), when it considered an Establishment Clause challenge to the Religious Land Use and Institutionalized Persons Act (RLUIPA). RLUIPA complied with the Establishment Clause only because, in applying the statute, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Id.* at 720 (citing *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)).

The Supreme Court acknowledged this principle yet again in its recent decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which held that the Religious Freedom Restoration Act exempted certain companies from having to comply with federal contraception-coverage requirements. In holding that closely held for-profit companies were entitled to withhold contraception coverage from

their employees, the Court pointed to a work-around that the government had already created to protect employees of nonprofit organizations. The Court explained that "[t]he effect of the [government]-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero," and that "these women would still be entitled to all FDA-approved contraceptives without cost sharing." *Id.* at 2760. Justice Kennedy, who supplied the fifth vote in *Hobby Lobby*, wrote separately to emphasize that one entity's religious exercise may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling." *Id.* at 2786–87 (Kennedy, J., concurring). Here, if St. Peter's Healthcare System were deemed eligible for the ERISA church plan exemption, its employees would simply be out of luck.

The only exception to these constitutional rules protecting third parties' interests has arisen in the context of laws affecting a church's core associational interests. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (selection of ministers); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-*

Day Saints v. Amos, 483 U.S. 327 (1987) (selection of employees). But this concern for associational interests is not implicated in this case, which affects whether and how an employer must comply with rules governing compensation of employees that it does choose to associate with. Indeed, far from invoking any purpose related to the free exercise of religion, St. Peter's Health System is claiming the church-plan exemption for purely financial reasons. *See* A1368 (oral argument transcript). And its former CEO has testified that "there is no way in which operating the Plan in compliance with ERISA interfered with any [of St. Peter's Healthcare System's religious beliefs or practices." A751 ¶ 12 (Matuska Declaration).

As Justice Kennedy has explained, "[a] religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 722 (1994) (Kennedy, J., concurring). For the reasons detailed below, extending the church-plan exemption to religiously affiliated organizations such as St. Peter's Healthcare System cannot survive this scrutiny.

B. Extending the church-plan exemption to religiously affiliated entities such as St. Peter's Healthcare System would jeopardize their employees' retirement security.

ERISA sets forth a variety of requirements in order to "protect … participants in employee benefit plans and their beneficiaries." 29 U.S.C § 1001(b). Exempting entities like St. Peter's Healthcare System from these obligations would burden their employees by vitiating "protect[ions for] contractually defined benefits" that employees rely on for retirement planning and financial stability. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985). Employees would suffer at least three distinct burdens: (1) underfunding of the pension plan, (2) loss of pension insurance, and (3) lack of information necessary for responsible financial planning.

1. Underfunding of pension plans.

ERISA mandates minimum funding for defined-benefit pension plans to ensure that employers will have sufficient funds to honor their commitments to employees. *See* 29 U.S.C. § 1082. Congress imposed these requirements to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually

will receive it." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980). Purporting to operate as a church plan, St. Peter's Healthcare System is not complying with these requirements, and currently underfunds its employee pension plan by more than $30 million. *See* A1586 (valuation of St. Peter's pension plan as of January 1, 2014).

St. Peter's Healthcare System had previously promised its employees that it possessed an ERISA-compliant defined-benefit pension plan, and its employees reasonably relied on receiving this retirement benefit. *See* A564–A577 (St. Peter's plan booklet); A540 ¶ 6 (Plaintiff Kaplan received booklet stating that the pension plan complied with ERISA); A547 ¶ 8, A551 ¶¶ 4–6, A750 ¶¶ 6–7 (declarations of other employees who were told that the retirement plan was ERISA compliant). When they began working at St. Peter's Healthcare System, these employees believed that their pension benefits would be secure and that they would receive the pension benefits that they were promised.

Unsurprisingly, employees rely on their employers' pension benefit promises when they plan for retirement. *See, e.g.*, Zvi Bodie &

Robert C. Merton, *Pension Benefit Guarantees in the United States: A Functional Analysis*, *in The Future of Pensions in the United States* 203–05 (Ray Schmitt ed., 1993). But their deferred compensation is now imperiled, and the plans they made in reliance on this compensation are now disrupted.

Employees at other non-compliant hospitals have already suffered the effects of underfunded pensions. For example, The Hospital Center at Orange, New Jersey, ran an ERISA-compliant defined-benefits plan until 1998, when it merged with Cathedral Healthcare System. *Workers Covered by Church Plans Tell Their Stories*, Pension Rights Center, http://tinyurl.com/hospitalcenter (all websites last visited May 8, 2015) ("*Workers Covered by Church Plans*"). Claiming that it was an exempt church plan, Cathedral stopped contributing to Hospital Center's pension fund, drained the hospital's funds, and closed the hospital a few years later. *Id.* Employees, many of whom had accepted lower wages in exchange for the security of deferred compensation, lost their pensions. *Id.*

The same result affected the employees of a Minneapolis publishing house affiliated with the Evangelical Lutheran Church. *See*

Adam Geller, *Law Shields Churches, Leaves Pensions Unprotected*, Associated Press (Oct. 5, 2013), http://tinyurl.com/unprotectedpensions. Because of plan underfunding, the publisher's roughly five-hundred employees ultimately received less than a third of their expected retirement benefits. *Id.* Likewise, underfunding caused employees at St. Mary's Hospital in Passaic, New Jersey, to lose tens of thousands of dollars in retirement funds. *See* Mary Jo Layton, *Retirees from St. Mary's Hospital in Passaic May Lose Their Pensions in Sale*, NorthJersey.com (Apr. 26, 2013), http://tinyurl.com/stmaryshospital.

When employees lose access to stable pension benefits, the consequences can be severe. Nearly half of all people born between 1946 and 1954 who have a defined-contribution plan—which does not guarantee a particular level of post-retirement income—risk falling short of the savings they need to maintain a pre-retirement standard of living. Alicia H. Munnell, et al., *Retirements at Risk: A New National Retirement Risk Index*, Center for Retirement Research at Boston College, Table 9 (June 2006), *available at* http://tinyurl.com/retirementsatrisk. In contrast, only 15% of the people in this age group who have a traditional, defined-benefit pension plan—which offers a

fixed level of post-retirement income—risk falling short of the savings they need to maintain a pre-retirement standard of living. *Id.* Similarly, retired married couples with a pre-retirement income of $75,000 have a 90% chance of outliving their retirement assets if they do not have a pension plan. Ernst & Young LLP, *Retirement Vulnerability of New Retirees: The Likelihood of Outliving Their Assets*, Table 2 (July 2008) (study written on behalf of Americans for Secure Retirement). But similarly situated couples with a defined-benefit plan have only a 31% chance of outliving their retirement funds. *Id.*

Indeed, pension plans drastically decrease poverty rates among retirees across the board. In 2010, pension plans were associated with 4.7 million fewer poor and near-poor households, and 1.2 million fewer households receiving means-tested public assistance. Frank Porell & Diane Oakley, *The Pension Factor*, National Institute on Retirement Security, 1 (July 2012). Pensions are especially important in reducing poverty gaps between retired white men and retired women and people of color. *See id.* at Table 5. And pension plans can protect the spouse of a retired employee: should the employee die, his or her spouse may receive the deceased employee's pension for the remainder of the

spouse's life. 29 U.S.C. § 1055. Applying the church-plan exemption to St. Peter's Healthcare System would allow the continued underfunding of the pension plan, causing its employees to lose these protections and to face a greater threat of poverty and financial insecurity.

More generally, pensions are compensation, just like salary and benefits. Employees accept lower wages upfront in exchange for the security of a pension later on. *See* Richard A. Ippolito, *Pension Plans and Employee Performance: Evidence, Analysis, and Policy* 10 (1997). Just as St. Peter's Healthcare System could not claim an exemption from paying minimum wage or overtime, it cannot claim an exemption from laws securing its employees' deferred compensation. As the Supreme Court observed, in rejecting a free-exercise challenge to the minimum wage and overtime requirements of the Fair Labor Standards Act, "[l]ike other employees covered by the Act, [the religious foundation's employees] are entitled to its full protection." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303–05, 306 (1985).

2. No federal pension insurance.

ERISA-compliant plans are insured by the Pension Benefit Guaranty Corporation. If it were exempt from ERISA's requirements, the retirement plan operated by St. Peter's Healthcare System would likely be uninsured. As a result, if the hospital were to run out of funds before satisfying its pension obligations, employees would be left empty-handed.

Employers who provide ERISA-compliant plans must pay a premium to the Guaranty Corporation. *See* 29 U.S.C. § 1307(a). With the revenue raised from these premiums, the Guaranty Corporation insures a portion of covered plans' pension benefits. *Id.* §§ 1305(2)(A), 1322(a), 1322(b)(3). As a result, if a corporation is unable to provide the promised pension benefits, the Guaranty Corporation provides the money that employees relied on for their retirement.

Without the protection of federal pension insurance, employees can lose substantial portions of their benefits. After St. Mary's hospital's plan ran out of funds, its employees lost tens of thousands of dollars in retirement savings. Layton, *supra*. The employees could not recover from these losses, because St. Mary's Hospital claimed that its

plan was a church plan and did not pay premiums to the Pension Benefit Guaranty Corporation. *Id.*

3. No disclosure to employees.

If exempt from ERISA's requirements, St. Peter's Healthcare System would not be required to notify its employees about the financial health of its pension plan. As a result, employees would lack the information they need to plan their retirement.

Under ERISA, employers must provide plan beneficiaries with a range of information, including summary plan descriptions, notices of the plan's failure to meet minimum funding standards, and yearly funding notices. *See* 29 U.S.C. § 1021. Funding notices give employees important information about the financial health and reliability of their pension plans. They inform beneficiaries about: whether the plan is fully funded—and if not, what percentage is funded; the value of the plan assets, and in some cases, the total assets and liabilities; the number of participants receiving benefits, the number entitled to future benefits, and the total number of active participants; the funding policy of the plan and asset allocation of investments; plan amendments; and

a description of the benefits insured by the Guaranty Corporation. *See* 29 U.S.C. § 1021(f).

This information enables employees to make intelligent decisions about their retirement savings. If an employee knows that her pension is stable, she may reasonably rely on her pension to cover a portion of her retirement savings. Conversely, if an employee learns that her pension benefits are at risk, she may boost her retirement savings to ensure that she can retire with sufficient funds even if her employer reneges on its promise. *See generally* Sylvester J. Schieber, *Retirement Income Adequacy at Risk: Baby Boomers' Prospects in the New Millennium*, *in Public Policy Toward Pensions* (Sylvester J. Schieber & John B. Shoven eds., 1997) (examining required personal savings rates, dependent on income and type of retirement plan, for individuals to retire without a decreased standard of living).

There is cause for concern that St. Peter's Healthcare System will not voluntarily inform its employees if and when their pension funds are in jeopardy. The organization operated an ERISA-compliant plan for more than thirty years, and did not purport to shift to a church plan until 2006. Appellee's Br. at 3 (citing A61 ¶ 56, A750 ¶ 6). But St.

Peter's Healthcare System waited until 2011 to notify its employees that their plan was converted to a church plan that was no longer bound by ERISA's requirements. *See* A532 (IRS letter stating that St. Peter's informed its employees of the plan's purported church plan status on November 21, 2011). As a result, employees lacked notice of the possibility their pension plan was underfunded, uninsured, and unlikely to deliver to employees the pension benefits they were promised.

Again, the experiences of other hospitals confirm the risks arising from insufficient disclosure to employees by entities claiming to run church plans. One employee at The Hospital Center in Orange agreed to receive reduced benefits in order to ensure that his wife would benefit from his deferred compensation. *See Workers Covered by Church Plans*, *supra*. Had he known about the risks to his pension benefits, he would have selected a different option and received more benefits upfront. Now, without his promised deferred compensation, he has had to come out of retirement to help provide for his family. *See id.* Similarly, the employees in St. Mary's Hospital knew that their hospital faced financial difficulties, but believed that their pensions were guaranteed.

Layton, *supra*. Because St. Mary's purported to be a church plan, however, it did not notify its employees that the plan was underfunded by as much as $25 million, or that its pension plan was not insured by the government. *Id.* Its employees were blindsided when they discovered that their promised pension benefits had disappeared.

* * *

Employees at religiously affiliated institutions depend on their pension benefits, and they often accept lower salary upfront in exchange for those benefits down the line. Like an exemption from requirements governing wages, overtime pay, or other compensation, the church-plan exemption puts these employees' compensation at risk: pension plans get underfunded and uninsured, and employees do not receive even the disclosures necessary to know what's going on and plan accordingly. These burdens may be acceptable for those who choose to work at a house of worship, but the Establishment Clause does not allow the church-plan exemption to extend more broadly.

C. These burdens will affect large numbers of employees.

An exemption for religiously affiliated entities would affect a wide swath of employees, many of whom perform purely secular

responsibilities and do not share their employers' religious beliefs. Indeed, St. Peter's Healthcare System hires employees who are not Catholic, and its management includes lay individuals. *See* A683 ¶ 7 (Answer); A688 ¶ 48 (same). Thus, St. Peter's Healthcare System functions not like a contained, cohesive religious community, but like a hospital that happens to be affiliated with a religious institution.

More generally, religious healthcare systems now constitute a substantial proportion of the nation's healthcare providers. In 2012, religiously affiliated hospitals made up seven of the ten largest non-profit healthcare of systems in the nation. Molly Gamble, *25 Largest Non-Profit Hospital Systems*, Becker's Hospital Review (Jul. 24, 2012), http://tinyurl.com/nonprofithospitals. Together, these hospitals owned 77% of the ten largest non-profit systems' acute-care hospitals. *Id.* Catholic hospitals care for one out of every six patients in the nation. *See Facts & Statistics*, Catholic Health Association of the United States, http://tinyurl.com/hospitalstatistics (last updated Jan. 2015). And they host more than one in seven hospital beds. *See* Sarah Kliff, *Catholic Hospitals Are Growing. What Will That Mean For Reproductive Health?*, Washington Post (Dec. 2, 2013), http://tinyurl.com/hospitalgrowth.

In some cases, religiously affiliated hospitals are the only hospitals in their communities. The Center for Medicare and Medicaid Services classifies certain hospitals as "sole community hospitals." 42 C.F.R. § 412.92. As of 1996, forty-six Catholic hospitals were the sole provider in their community. *See* Lisa C. Ikemoto, *When a Hospital Becomes Catholic*, 47 Mercer L. Rev. 1087, 1092 (1996).

These numbers are growing. Catholic hospitals have aggressively merged, both with each other and with secular hospitals. *See id.* at 1093–96; *see also* American Civil Liberties Union & MergerWatch, *Miscarriage of Medicine: The Growth of Catholic Hospitals and the Threat to Reproductive Health Care*, 7–9 (Dec. 2013). Because of these mergers, many employees who did not seek out a religiously affiliated employer are now working for one, and there may be few or no secular alternatives. These employees should not be forced to jeopardize their retirement savings as a result.

II. The First Amendment Does Not Require the Government to Treat St. Peter's Healthcare System Like a Church.

St. Peter's Healthcare System and its *amici* argue that if the government exempts churches from ERISA requirements, Establishment Clause principles of non-entanglement require the

government to extend this exemption to non-church affiliates such as hospitals, universities, and other service providers. *See* Appellants' Br. at 28 (requiring church plans to be established by churches "would raise Free Exercise Clause issues"); Becket Fund Br. at 2 (determining whether an entity is part of a church hits "constitutional pitfalls"). They claim that, by distinguishing between churches and their affiliates, the government is forced into deciding what functions are "essential part[s]" of the church's "religious mission." Appellants' Br. at 50. The Becket Fund even maintains that determining whether an entity is a church involves "potentially unconstitutional church-state entanglement." Becket Fund Br. at 16.

But no theology degree is necessary to distinguish a house of worship from a hospital. The inquiry turns on the type of activity performed, not the type or intensity of religious belief. Moreover, if Defendants' argument were accepted, the government could be required to extend a range of accommodations—currently limited to houses of worship—to any and all religiously affiliated nonprofits, an extension that would itself likely violate the Establishment Clause.

First, in determining whether or not an entity is a "church" for tax purposes, the Internal Revenue Service looks at secular criteria, including the composition of its membership, whether it has regular congregations, and whether it holds regular religious services. *See Found. of Human Understanding v. United States*, 614 F.3d 1383, 1387 n.2 (Fed. Cir. 2010) (describing IRS's determination of which organizations are churches). This approach mirrors Section 501(c)(3) of the Internal Revenue Code, which distinguishes between houses of worship and other nonprofits, religiously affiliated or otherwise. *See* 26 U.S.C. § 501(c)(3); *see also Spiritual Outreach Soc'y v. Commissioner*, 927 F.2d 335, 339 (8th Cir.1991) (organization operated exclusively for religious purposes did not meet secular criteria for church status under § 501(c)(3)). Thus, the government need not entangle itself in religion or evaluate religiosity when requiring that an ERISA church plan actually be "established by a church."

Second, the distinction between churches and other affiliated entities has long been recognized by the courts. These courts have recognized that "*[t]he means by which an avowedly religious purpose is accomplished* separates a 'church' from other forms of religious

enterprise." *Lutheran Soc. Serv. of Minn. v. United States*, 758 F.2d 1283, 1287 (8th Cir. 1985) (emphasis added, citation omitted).

For instance, in *Living Faith, Inc. v. Commissioner*, 950 F.2d 365 (7th Cir.1991), the Seventh Circuit rejected the argument that a religious restaurant needed to be treated like a house of worship. The court explained that the IRS examined conduct rather than motivations, "cast no aspersions on the sincerely held beliefs of Living Faith," and properly denied the exemption "without entering into any subjective inquiry with respect to religious truth." *Id.* at 376 (citation omitted). Similarly, in *Spiritual Outreach Society*, the court upheld an IRS determination that a religious gospel music organization was not a church, again focusing on behaviors such as the "existence of an established congregation served by an organized ministry, the provision of regular religious services and religious education for the young, and the dissemination of a doctrinal code." 927 F.2d at 339. The court explained that "there is no doubt that [the organization] is engaged in sincere religious activity," but "the IRS has certain requirements which a religious organization, no matter how sincere, must meet before it can receive certain preferential tax treatment." *Id.* Many other decisions

have reaffirmed that the government can determine whether or not an organization is a church on grounds unrelated to the intensity of religious belief or the content of religious doctrine.[1]

In light of these religiously neutral factors, it matters not that St. Peter's Healthcare System engages in its "healing mission" as a "form of service to Christ." Appellants' Br. at 7. In a Catholic church, the religious mission is accomplished by worship—led by Catholic priests trained in Catholic seminaries and ordained by the Catholic Church. For St. Peter's Healthcare System, the religious mission is accomplished

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[1] *See, e.g.*, *Lutheran Soc. Serv. of Minn.*, 758 F.2d at 1286–87 (religious charity was not a church due to its "primary activities"); *Parker v. Commissioner,* 365 F.2d 792, 795 (8th Cir.1966) ("Since the government may constitutionally tax the income of religious organizations, it follows that the government may decide not to exercise this power and grant reasonable exemptions to qualifying organizations, while continuing to tax those who fail to meet these qualifications."); *Church of the Visible Intelligence that Governs the Universe v. United States,* 4 Cl. Ct. 55, 64–65 (Cl. Ct. 1983) (plaintiff was "not a church" but was a tax-exempt "religious foundation"); *Williams Home, Inc. v. United States,* 540 F. Supp. 310, 317 (W.D. Va. 1982) (religious organization not a "church" for tax purposes); *Basic Unit Ministry of Alma Karl Schurig v. United States,* 511 F. Supp. 166, 167–69 (D.D.C. 1981) (organization that allegedly engaged in religious education not entitled to be treated as a church because organization's earnings inured to private individual), *aff'd,* 670 F.2d 1210 (D.C. Cir. 1982); *Amer. Guidance Found., Inc. v. United States,* 490 F. Supp. 304, 306 (D.D.C. 1980) (religious organization not a "church" for tax purposes).

by medical procedures—performed by often non-Catholic doctors trained in secular medical schools and licensed by government medical boards. Indeed, St. Peter's Health Center is audited by the government, receives government funding, and must comply with government hospital regulations. *See* A1387–1405 (government audits); A1552–54 (government funding); A1387–1405, 1553 (government regulations).

Third, a rule prohibiting the government from distinguishing between churches and non-churches could imperil many provisions of the tax code, which offers a variety of exemptions to houses of worship but not to all entities affiliated with those houses of worship. For example, although tax-exempt organizations are generally required to file a Form 990 (Return of Organization Exempt From Income Tax), churches are not. 26 U.S.C. § 6033(a)(3)(A)(i). Churches are exempt from registering as nonprofit organizations with the IRS. 26 U.S.C. § 501(c)(1)(A). The Lobbying Disclosure Act does not apply to churches. 2 U.S.C. § 1602(8)(B)(xviii). Churches also have enhanced protection against audits. 26 U.S.C § 7611.

If all of these exemptions were required to be extended to any entity affiliated with a church, the result would be a two-tiered system

of nonprofit organizations. Religiously affiliated nonprofits, no matter what their function, would be exempt from a range of regulations; secular nonprofits would still have to comply with all of them. This unjustified preference for religious nonprofits would collide with *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), which held that the Establishment Clause prohibited the state from exempting religious periodicals from sales tax because it "direct[ed] a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burden[ed] nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Id.* at 15.

Finally, the entanglement argument presented by St. Peter's Healthcare System and its *amici* contradicts the Supreme Court's holding in *United States v. Lee*, 455 U.S. 252 (1982). In *Lee*, Congress had crafted a religious exemption to the Social Security Act, but the exemption was limited to self-employed members of religious sects that opposed the social-security system (primarily the Amish). *Id.* at 254–56. An Amish employer sued, claiming the First Amendment required that the exemption be extended to employers and employees. *Id.* at 256. The

Court acknowledged that the employer's religious beliefs were just as intense and sincere as those of self-employed Amish, *id.* at 257, but concluded that "[c]onfining the … exemption to the self-employed provided for a narrow category which was readily identifiable." *Id.* at 260–61.

As with the social-security system at issue in *Lee*, ERISA serves to protect the retirement security of employees. As in *Lee*, the exemption is reserved for a narrow, easily identifiable group of entities. And as in *Lee*, expanding the exemption beyond the narrow circumstances contemplated by Congress would "operate[] to impose the employer's religious faith on the employees." *Id.* at 261. Far from requiring that result, the Establishment Clause prohibits it.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

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/s/ Gregory M. Lipper

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I certify that on May 11, 2015, I electronically filed this brief of *amici curiae* with the Clerk of this Court through the appellate CM/ECF system and will send seven paper copies of the brief to the Court by Federal Express.

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