No. 15-15351

In the United States Court of Appeals for the Ninth Circuit

Starla Rollins, et al.,

Plaintiffs-Appellees,

v.

Dignity Health, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of California, No. 13-cv-01450-TEH
The Honorable Thelton E. Henderson, Presiding

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

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Corporate Disclosure Statement

Amici Americans United for Separation of Church and State, American Civil Liberties Union Foundation, and ACLU of Northern California do not have any parent corporations and no publicly-held corporation owns 10% or more of their stock.

Table of Contents

Table of Authorities

Cases

Statutes and Regulations

Other Authorities

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, Americans United opposes religious exemptions that would impose harm on innocent third parties.

The American Civil Liberties Union 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 ACLU of Northern

California is the largest of its state affiliates. 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 Appellees. 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, *id.* § 1002(33), because Congress sought to protect churches from government intrusion into their records. Dignity Health 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 not only would contradict ERISA's text, structure, and purpose, *see* Rollins Br. at 14–40, but would also violate the Establishment Clause by imposing serious burdens on the employees of entities such as Dignity Health.

If the plan operated by Dignity Health were categorized as a church plan, the corporation's over 60,000 employees would suffer significant harms, losing a variety of ERISA protections aimed at preserving their retirement security. Among other things, Dignity Health would be free to underfund its employee pension plan and stop paying premiums necessary for federal pension insurance, could delay the vesting of pension benefits, and would have no obligation to inform employees about the state of their pension plans. Moreover, these harms would affect Dignity Health's employees, many of whom do not share Dignity Health's religious beliefs and most of whom perform secular duties.

Nothing in the First Amendment requires the government to extend the church-plan exemption beyond churches or precludes the courts from assessing whether an entity is a church. No religious judgment is required to determine whether an entity is a church. Rather, the determination involves the application of neutral criteria related to the entity's functions, not an inquiry into the type or depth of the entity's religious beliefs. This type of inquiry has long been part of the federal tax code, and has long been performed by courts.

If, on the other hand, the arguments of Dignity Health 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—with religious nonprofits exempt from most regulations, and secular nonprofits forced to comply with them—that would itself violate the Establishment Clause.

By interpreting the statute in a manner that preserves 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), http://tinyurl.com/madison-livingston (emphasis added). Defendants' employees are entitled to no less protection.

Argument

I. Extending the Church-Plan Exemption to Dignity Health Would Burden Its Employees in Violation of the Establishment Clause.

Extending the church-plan exemption beyond houses of worship—to affiliated entities like Dignity Health—would violate the Establishment Clause. If Dignity Health's plan were categorized as a church plan, the company's more than 60,000 employees would suffer significant burdens, losing the protection of ERISA regulations that protect their retirement security.

First, Dignity Health would be free to underfund its pension plan, exposing Defendants' employees to the loss of their pension benefits.

Second, Dignity Health's employees would forfeit the protection of federal pension insurance, which would be especially dangerous when combined with the risk of pension underfunding. Third, Dignity Health would be free to delay the vesting of employees' pension benefits, potentially depriving employees of mobility or stripping them of benefits when they change jobs. Fourth, Dignity Health would be able to withhold important financial data from its employees, denying them information necessary to plan for their retirement. Allowing any of these harms would violate the Establishment Clause; collectively, the Establishment Clause harms are unmistakable.

Given the size of Dignity Health, these harms would likely affect significant numbers of employees who do not share Defendants' religious beliefs. Unlike houses of worship, religiously affiliated entities often employ people of other faiths, and many if not most of these employees perform functions that are secular. And under the Establishment Clause, Dignity Health's 60,000 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, the Supreme Court has long observed that religious accommodations must not come at the expense of identifiable third parties. Thus, in *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court granted an exemption from regulations governing unemployment compensation because the accommodation did not "abridge any other person's religious liberties." *Id.* at 409. Similarly, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the Court held that Title VII'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." *Id.* at 80. 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; the requested exemption would "operate[ ] to impose the employer's religious faith on the employees." *Id.* at 261.

When religious accommodations would harm identifiable third parties, the Court has recognized that those accommodations violate the Establishment Clause. For example, in *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Supreme Court invalidated a statute that gave employees an unqualified right to take 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. The Act 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 *Caldor*, 472 U.S. 703).

The Supreme Court acknowledged this principle yet again in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which held that the Religious Freedom Restoration Act exempted certain companies from compliance 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," because "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).

In supporting Dignity Health, *amicus* Becket Fund for Religious Liberty resists this settled principle. But the cases that it cites, Becket Fund Br. at 14–15, involved accommodations that could burden only a diffuse, indeterminate class. For example, a conscientious-objector exemption from selective service only minimally increased the probability that any particular nonexempt person would be drafted in

the objector's place. *See Gillette v. United States*, 401 U.S. 437 (1971). Likewise, the evidentiary clergy-penitent privilege only minimally decreases the probability that a party litigating against the one asserting privilege may acquire legal relief. *See, e.g.*, *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1531–33 (9th Cir. 1997) (describing background of clergy-penitent privilege). Neither of these exemptions imposes direct burdens on discrete, identifiable parties.

The only exception to these constitutional rules protecting third parties' interests arises 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 with whom it does choose to associate.

Nor is the Becket Fund correct that the Establishment Clause prohibits only accommodations that burden a "legal entitlement." *See*

Becket Fund Br. at 13–14. The accommodation at issue in *Estate of Thornton v. Caldor* violated the Establishment Clause even though neither employers nor other employees had a legal entitlement to any particular work schedule. *See* 472 U.S. at 709. Similarly, although not all job applicants are entitled to jobs, the Fair Labor Standards Act provides minimum wage and overtime protections to employees once they have those jobs; the Supreme Court thus recognized that exempting religious employers from those protections would unduly and impermissibly burden employees. *See Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303–06 (1985). These cases undermine the Becket Fund's attempt to elevate the form of a "legal entitlement" over the substance of direct harm to employees.

Even if the Becket Fund were correct that the Establishment Clause applies only when legal entitlements are at stake, legal entitlements are in fact at stake in this case. Although employees are not entitled to a pension plan, employees who receive pension plans are legally entitled to ERISA's protections. *See, e.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (ERISA drafters had "expectations that a federal common law of *rights and obligations* under ERISA-regulated

plans would develop." (emphasis added)). Loss of these protections—to which they are entitled under ERISA—would unconstitutionally burden Defendants' employees. The burden would be especially serious because employees rely on the existence of their plan. *See, e.g.*, *United Paperworkers Intern. Union, AFL-CIO, CLC v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1386 (8th Cir. 1992) (ERISA's requirements for written contracts ensured that "employees could rely on the terms of the formal written plan provided to them without fear that unwritten, contrary terms would later surface."). Stripping employees of their statutory retirement protections would thus interfere with their legal rights and burden them in violation of the Establishment Clause.

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 exemption to entities such as Dignity Health cannot survive this scrutiny.

B. Extending the church-plan exemption to Dignity Health would unduly burden employees by jeopardizing their 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). Entities operating "church plans," however, are exempt from ERISA's funding, vesting, and administrative requirements. *See id.* § 1003(b)(2). Exempting entities like Dignity Health from these obligations would burden 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 be exposed to at least four distinct burdens: (1) underfunding of the pension plan, (2) loss of pension insurance, (3) potential delayed vesting of pension benefits, and (4) 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 ERISA's funding 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, Dignity Health may not be complying with these requirements: in 2012, Dignity Health was underfunding its employee pension plans by as much as $1.2 billion. ER-836 (Class Action Complaint) ¶ 55.

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). When a plan is underfunded, employees' deferred compensation is imperiled, and the plans they made in reliance on this compensation are disrupted.

Employees at other noncompliant entities 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 ("*Workers Covered by Church Plans*"). Claiming that it was an exempt church plan, Cathedral stopped contributing to Hospital Center's pension, drained the hospital's funds, and closed the hospital a few years later. *Id.* Employees, many of whom accepted lower wages in exchange for the security of deferred compensation, lost their pensions. *Id.*

The same result afflicted 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 500 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. Given Dignity Health's size and scope, the harm to employees here could be even more extensive.

And 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 that 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), http://tinyurl.com/RetAtRisk. 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 that they need to maintain a pre-retirement standard of living. *Id.* In addition, 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 spouses of retired employees: should an employee die, his or her spouse may receive some or all of the decedent's pension for the remainder of the spouse's life. 29 U.S.C. § 1055. When an employer is permitted to violate ERISA and underfund its plan, its employees 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 Dignity Health 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, [a religious foundation's employees] are entitled to its full protection." *Tony & Susan Alamo Found.*, 471 U.S. at 303–05, 306.

2. No federal pension insurance.

ERISA-compliant plans are insured by the Pension Benefit Guaranty Corporation. But Dignity Health's pension plan is uninsured. *See, e.g.*, ER-443–444. As a result, if the corporation 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. *See id.* §§ 1305(2)(A), 1322(a), 1322(b)(3). If an employer is unable to provide the promised benefits, the Guaranty Corporation provides part of the money that employees rely on for their retirement.

Without the protection of federal pension insurance, employees may 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 these losses because St. Mary's Hospital had claimed that its plan was a church plan and had not paid premiums to the Guaranty Corporation. *Id.*

3. Potential delayed vesting of pension benefits.

ERISA caps the amount of time that employers may require employees to wait until their pension benefits vest. *See* 29 U.S.C. § 1053. Without limits on vesting periods, employers can trap their workers: an employee would be unable to change jobs without forfeiting her existing pension benefits. Before ERISA was enacted, employers could go so far as to delay the vesting of benefits until the employee's actual retirement. Robert L. Clark & Ann A. McDermed, *Pension Wealth and Job Changes: The Effects of Vesting, Portability and Lump-Sum Distributions*, 28 Gerontologist 524, 525 (1988). These practices constrained employees' ability to switch jobs or forced employees to walk away from valuable pension benefits in order to make a change.

See Laurence J. Kotlikoff & David A. Wise, *The Wage Carrot and the Pension Stick: Retirement Benefits and Labor Force Participation* 1–2 (1989).

If Dignity Health were exempt from ERISA's requirements, it could choose to delay the vesting of its employees' pension benefits for years. Employees who left the company before retirement age could be entirely deprived of their pension benefits. To avoid losing those benefits, they would have to stay with Dignity Health for longer than ERISA requires. Employees would thus suffer from the harmful "lock in"—and its accompanying economic and professional consequences—that ERISA was designed to prevent. *See* Kotlikoff & Wise, *supra*, at 1–2.

4. No disclosure to employees.

If exempt from ERISA's requirements, Dignity Health also would not be required to notify its employees about the financial health of the pension plan. As a result, employees would lack the information necessary to plan for 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 the plan. 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 that pension to cover a portion of her retirement needs. 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 Dignity Health will not inform its employees if and when their pension funds are jeopardized. The corporation's employees do not receive a summary plan description, summary annual report, pension-benefit statement, or minimum-funding notice providing the information that ERISA requires. *See* Rollins Br. at 7. As a result, employees lack notice of the possibility that their pension plan is underfunded, uninsured, and unlikely to deliver the pension benefits that 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 name his wife as the plan beneficiary. *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 higher benefit payments. The Guaranty

Corporation ultimately chose to insure his employer's pension plan in 2013. *In Reversal, PBGC Covers Pension of Hospital Center at Orange*, Pension Benefit Guaranty Corporation (May 10, 2013), http://tinyurl.com/pbgcrelease. But during the ten-year interim while the plan was uninsured and underfunded, *id.*, the employee had to come out of retirement to help provide for his family. *See Workers Covered by Church Plans*, *supra*. Similarly, the employees of St. Mary's Hospital knew that their hospital faced financial difficulties, but believed that their pensions were guaranteed. *See* 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 and was not insured by the government. *Id.* Its employees were blindsided when they discovered that their promised pension benefits had disappeared. *See id.*

* * *

Employees at religiously affiliated institutions depend on their pension benefits, and they often accept lower salaries upfront in exchange for pension benefits down the road. 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 go uninsured, vesting periods are delayed, and employees do not receive 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 like Dignity Health would affect an enormous number of employees, many of whom do not share their employers' religious beliefs and most of whom perform purely secular responsibilities. Dignity Health has over 60,000 employees; it does not require them to be religious, let alone to share the entity's religious beliefs; and the company's management consists mostly of laypeople. *See* SR-101, 103 (Answer) ¶¶ 39, 45, 48. Thus, Dignity Health functions not like a contained, cohesive religious community but instead like "one of the largest hospital systems in the nation...." *Next Generation of Health Care*, Dignity Health, http://tinyurl.com/DHdoctors (last visited Sept. 10, 2015).

More generally, religious healthcare systems now constitute a substantial portion of the nation's healthcare providers.

In 2012, religiously affiliated hospitals made up seven of the ten largest nonprofit healthcare 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 nonprofit systems' acute-care hospitals. *Id.* For example, 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?*, Wash. 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. In 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. Religious 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 they may have few or no secular alternatives. They should not be forced to jeopardize their retirement savings as well.

II. The First Amendment Does Not Require the Government to Treat Defendants Like a Church.

Defendants and their *amici* argue that because the government exempts houses of worship from ERISA requirements, the Establishment Clause requires the government to extend this exemption to non-church affiliates such as hospitals, universities, and other service providers. For instance, *amicus* Becket Fund argues that courts cannot distinguish between churches and non-churches without wading "into internal religious controversies" or determining "whether a party is religious enough." Becket Fund Br. at 17, 18. But the Becket

Fund conflates resolution of internal church issues with an initial determination of whether or not an organization is a church.

The Establishment Clause does not prohibit treating these two types of entities differently. Courts have long distinguished between churches and affiliated entities, with the former receiving special solicitude. If Dignity Health's 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 organizations—an extension that would itself likely violate the Establishment Clause.

First, no entanglement results from the routine determination whether a religious organization is a church. For instance, in determining whether an entity is a church for tax purposes, the Internal Revenue Service looks at secular criteria, including the composition of the organization's 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 process for deciding 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 section 501(c)(3)).

This distinction between churches and other affiliated entities has long been recognized by the courts, which have explained 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 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. Many other decisions have reaffirmed that the government has the lawful authority to determine whether an organization is a church on grounds unrelated to the intensity of religious belief or the content of religious doctrine.[1]

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[1] *See, e.g.*, *Lutheran Soc. Serv. of Minn.*, 758 F.2d at 1286–87 (religious charity not a church based on 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 (1983) (plaintiff was "not a church" but 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 went 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).

In light of these religiously neutral factors, it matters not that Dignity Health's mission is "furthering the healing ministry of Jesus." *See* ER-110 (Dignity Health Mission Statement). In a church, the religious mission is accomplished by worship—led by clergy trained in religious seminaries and ordained by the church. But for Dignity Health, the religious mission is accomplished by medical procedures—performed primarily by lay doctors and other healthcare providers who are trained in secular schools and licensed by the government. Indeed, Dignity Health is regulated by the government, investigated by the government, and receives billions of dollars is funding from the government. *See Dignity Health and Subordinate Corporations: Consolidated Financial Statements as of and for the Years Ended June 30, 2014 and 2013 and Independent Auditors' Report*, 18, 19, 48 (Sept. 23, 2014), http://tinyurl.com/DHFinancialStatements (government regulation, investigations, and funding through Medicare); *Form 990*, Dignity Health (2012), at 9, 32, 426–27, http://tinyurl.com/DH990Form. The Court need not entangle itself in religion or evaluate religiosity when applying the statutory requirement that an ERISA church plan actually be established by a church.

Second, if courts were forbidden from distinguishing between churches and other religiously affiliated entities, a host of other statutory and regulatory distinctions between churches and affiliated entities would be imperiled. Many provisions of the tax code offer 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 with the IRS as nonprofit organizations. 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 or how tenuous their affiliation, would be exempt from a range of regulations; secular nonprofits would still have to comply with 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 a state from exempting religious periodicals from its sales tax because the state's tax law "direct[ed] a subsidy exclusively to religious organizations that [was] not required by the Free Exercise Clause and that either burden[ed] nonbeneficiaries markedly or [could not] reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Id.* at 15.

Congress has limited the church-plan exemption to churches, and churches alone. Expanding this exemption beyond the narrow circumstances contemplated by Congress would "operate[] to impose the employer's religious faith on the employees" of affiliated entities. *Lee*, 455 U.S. at 261. Far from requiring that result, the Establishment Clause forbids it.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

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This brief complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6), because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font, using Microsoft Word for Mac version 14.5.4.

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