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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF CALIFORNIA**
**SAN FRANCISCO DIVISION**

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| STARLA ROLLINS, on behalf of herself, individually, and on behalf of all others similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>DIGNITY HEALTH, *et al.*,<br><br>Defendants. | Case No. 3:13-cv-1450-JST<br><br>**MEMORANDUM IN SUPPORT OF THE CONSTITUTIONALITY OF THE ERISA CHURCH PLAN EXEMPTION** |

# MEMORANDUM IN SUPPORT OF THE CONSTITUTIONALITY OF THE ERISA CHURCH PLAN EXEMPTION

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## INTRODUCTION

This is a putative class action brought by participants in an employee pension plan. Plaintiffs claim that Defendants, Dignity Health, Inc., and its affiliates (collectively "Dignity Health"), have operated a pension plan in violation of the requirements set out in the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. No. 93-406, 88 Stat. 829, codified at 29 U.S.C. §§ 1001-1461. Defendants maintain that their pension plan is a church plan within the meaning of the statute, and is therefore exempt from ERISA's requirements. *See* 29 U.S.C. § 1002(33). Plaintiffs seek a declaratory judgment that Defendants' pension plan is not exempt and injunctive relief requiring Defendants to operate their plan in accordance with ERISA. Alternatively, *if* the Court determines that Defendants' plan qualifies for ERISA's "church plan" exemption, Plaintiffs ask this Court to find that the extension of that accommodation to Dignity Health violates the Establishment Clause of the First Amendment of the U.S. Constitution. Amended Class Action Complaint ("Compl."), ECF No. 243.

Because the constitutionality of an act of Congress was called into question in Plaintiffs' Complaint, Plaintiffs notified the United States of this challenge so that it could decide whether to intervene. *See* Notice of Constitutional Question, ECF No. 6; *see also* 28 U.S.C. § 2403(a) (providing that courts "shall permit the United States to intervene . . . for argument on the question of constitutionality"); 28 U.S.C. § 517 ("[A]ny officer of the Department of Justice[] may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States.").[1] In October 2013, the United

[1] On November 14, 2017, the United States informed the Court that to the extent it chose to file a brief addressing the constitutional claim, it intended do so within 30 days after the close of the parties' briefing on any motion seeking a ruling on the Establishment Clause question, unless a

States exercised its statutory right to intervene, *see* ECF No. 76, and now files this memorandum to defend the constitutionality of the "church plan" exemption as a permissible accommodation of religion under well-established Establishment Clause jurisprudence. The United States takes no position in this case on the antecedent, statutory question raised by Plaintiffs here whether Defendants' plan qualifies for the "church plan" exemption.[2]

The "church plan" exemption has a secular legislative purpose, neither advances nor hinders religion, and avoids excessive government entanglement with religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In this respect, it is similar to Title VII's exemption for religious employers, which the Supreme Court has held does not violate the Establishment Clause. *See Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). And based on these principles (in the context of another as-applied First Amendment challenge brought by employees of another Catholic Church-affiliated hospital system), the Tenth Circuit Court of Appeals has now held that exempting the hospital's pension plan from the requirements of ERISA does not run afoul of the Establishment Clause. *See Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1231-34 (10th Cir. 2017). If it reaches Plaintiffs' constitutional claim, this Court should come to the same conclusion.

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different date were set by the Court. *See* Notice of Potential Filing, ECF No. 245. According to that schedule, the Government's brief would be due March 26. The Government is filing in advance of that date, however, to allow the Court to consider the Government's arguments in advance of the hearing on Defendants' motion to dismiss, which was scheduled for March 22, 2018. ECF No. 256. Counsel for the Government intends to appear for the March 22 hearing.

[2] Nor does the United States take a position on the remainder of the claims and defenses in this case, including Plaintiffs' state law claims.

## STATUTORY BACKGROUND

The Employee Retirement Income Security Act of 1974 ("ERISA") was enacted to, *inter alia*, protect Americans' anticipated retirement benefits. 29 U.S.C. § 1001. Congress sought to achieve this goal by setting minimum standards for the administration of pension plans—standards, for example, regarding the amount of time a plan may require a person to work before becoming eligible to participate in the plan, to accumulate benefits, and to have those benefits vest, as well as creating a set of rules that plan sponsors must follow to ensure adequate funding of pension plans. *See, e.g., id.* §§ 1051-1054, 1081-1085.[3] Furthermore, ERISA requires that beneficiaries receive information and regular financial disclosures concerning the pension plan, 29 U.S.C. §§ 1021-1023, imposes fiduciary standards that plan trustees and other fiduciaries must follow, *id.* §§ 1101-1111, and creates a federal cause of action to sue for breaches of fiduciary duty. *See id.* § 1132. The statutory provisions at issue here, 29 U.S.C. §§ 1002(33), 1003(b)(2), expressly exempt "church plans" from these requirements. Through the Pension Benefit Guaranty Corporation ("PBGC"),[4] ERISA also guarantees payment of certain benefits if a defined benefit

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[3] The Internal Revenue Code ("IRC") contains provisions that parallel ERISA's pension plan rules. *See, e.g.*, 26 U.S.C. §§ 401, 410-411 and 430-433.

[4] PBGC is a wholly owned United States Government corporation and federal agency funded by premiums paid by plan sponsors, assets from terminated pension plans for which PBGC is the statutory trustee, recoveries from the sponsors, and income from those assets.

pension plan is terminated. Another ERISA provision, 29 U.S.C. § 1321(b)(3), exempts church plans from PBGC's benefit guarantee.[5]

ERISA and the IRC define a "church plan" as "a plan established and maintained . . . for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under [26 U.S.C. § 501]." 29 U.S.C. § 1002(33)(A); 26 U.S.C. § 414(e). The statute provides that the definition of "church plan" includes plans maintained by organizations whose principal purpose is administering retirement plans for employees of churches (even if such organizations themselves are not churches), so long as such organizations are themselves "controlled by or associated with" churches. 29 U.S.C. § 1002(33)(C)(i); 26 U.S.C. § § 414(e)(3)(A) (hereinafter "principal purpose organizations"). The statute also defines an "employee of a church," in reference to the word "employee" in section 1002(33), as including an "employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under [26 U.S.C. § 501] and which is controlled by or associated with a church or a convention or association of churches." 29 U.S.C § 1002(33)(C)(ii)(II); *see also* 26 U.S.C. § 414(e)(3)(B).

## PROCEDURAL HISTORY

Plaintiff Starla Rollins filed her initial complaint in this case on April 1, 2013. ECF No. 1. In that pleading, Plaintiff took the position, *inter alia*, that the Dignity Health Plans did not

[5] The sponsor of a church plan is permitted to elect that the plan be covered by ERISA, including coverage under the PBGC benefit guarantee program described in ERISA Title IV, by making an election under 26 U.S.C. § 410(d). *See* 29 U.S.C. § 1321(b)(3). Similarly, the IRC exempts church plans from several (but not all) of the tax-qualification and funding rules, unless the sponsor of the church plan elects otherwise through such an election under 26 U.S.C. § 410(d). *See, e.g.*, 26 U.S.C. §§ 410(d), 411(e)(1)(B), and 412(e)(2)(D).

meet the definition of a Church Plan under ERISA "because [they] were not 'established' by a church or a convention or association of churches." *Id.* ¶ 75. The Supreme Court granted certiorari on this question. In *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), the Supreme Court rejected the position that Plaintiff had taken in her initial complaint, holding that a plan maintained by a principal purpose organization may qualify for ERISA's church plan exemption even if it was not originally established by a church. *Id.* at 1656.

Following the Supreme Court's decision, on October 1, 2017, Plaintiffs filed an Amended Class Action Complaint. According to their Amended Complaint, Plaintiffs are current participants in the pension plan maintained by Dignity Health ("Dignity Plan"). Plaintiffs' putative class action alleges that the Dignity Plan does not qualify as an exempt "church plan" and that the plan has not been operated in accordance with ERISA's requirements. Plaintiffs allege in the alternative that, if the "church plan" exemption is interpreted to cover the Dignity Plan, this would make the exemption unconstitutional in its application to the Dignity Plan. *See generally* Compl., ECF No. 243.

On December 22, 2017, Defendants moved to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). *See* Defs.' Notice of Mot. and Mot. to Dismiss, ECF No. 249. Defendants argue that the Dignity Plan is an exempt "church plan" and that the application of such exemption does not violate the Establishment Clause. Plaintiffs filed their brief in opposition on February 9, 2018, ECF No. 257 ("Pls.' Opp'n"), and Defendants filed their reply brief on February 23, 2018, ECF No. 258.

## ARGUMENT

The United States is permitted by statute to intervene as of right in any litigation to which the United States is not a party and in which the constitutionality of an act of Congress is questioned "for argument on the question of constitutionality." 28 U.S.C. § 2403(a); *see also* Fed. R. Civ. P. 5.1(c); 28 U.S.C. § 517. Plaintiffs allege first that the Dignity Plan does not satisfy the criteria of a "church plan" within the meaning of the statutory exemption, and second that, if the court were to conclude that the plan does qualify for that exemption, the exemption is unconstitutional as applied. While Plaintiffs' first allegation does not call into question the constitutionality of any statute, their second allegation does. The United States, pursuant to the authorization of the Solicitor General, *see* 28 C.F.R. § 0.21, intervenes in this matter solely "for argument on the question of constitutionality," 28 U.S.C. § 2403(a). As noted above, the United States takes no position here on the question of whether the Dignity Plan does or does not qualify for the "church plan" exemption.

If the Court were to conclude that the challenged Dignity Plan is not a church plan, it would not need to reach Plaintiffs' constitutional claim. Therefore, the Court should consider this statutory question first. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (noting the "well-established principle" that courts normally "will not decide a constitutional question if there is some other ground upon which to dispose of the case" (citation omitted)). In the event the Court concludes that the Dignity Plan qualifies for the exemption as a statutory matter, the Court should, for the following reasons, also conclude that the church plan exemption, as operative in this case, meets the requirements of the Establishment Clause of the First Amendment.

## I. ERISA's Church Plan Exemption Does Not Violate the Establishment Clause.

The religion clauses of the First Amendment command that Congress "shall make no law respecting establishment of religion, or prohibiting the free exercise thereof." The Supreme Court has thus read the Constitution as forbidding "governmentally established religion or governmental interference with religion." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 669 (1970); *see also Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (describing the Clauses as simultaneously "command[ing] a separation of church and state," but also requiring "government respect for, and noninterference with, . . . religious belief and practices"). But, in promoting this First Amendment value, it has also permitted Congress to carve out exceptions excusing religious bodies from coverage of generally applicable laws even where the Free Exercise Clause would not mandate an exemption. *See Amos*, 483 U.S. at 335-36 (Congress may enact statutory exemptions "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions," in part because "it is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious."). Thus, "[s]hort of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz*, 397 U.S. at 669. In assessing whether a law violates the Establishment Clause, a court must ascertain whether the statute has a "secular legislative purpose;" whether its principal or primary effect "neither advances nor inhibits

religion;" and finally whether it "fosters an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. at 612-13 (internal citations omitted).

The ERISA church plan exemption falls within this play in the joints between what the Establishment Clause permits and what the Free Exercise Clause demands. The exemption was enacted as part of the original statute, and retroactively extended by amendment in 1980, with the stated purpose of avoiding excessive government entanglement with religion. In the over forty years since ERISA's enactment, no court has held that the church plan exemption violates the Establishment Clause. Instead, courts have repeatedly applied the exemption to a variety of "church plans" without doubting the exception's constitutionality, *see, e.g.*, *Fischbach v. Cmty. Mercy Health Partners*, 3:11cv00016, 2012 WL 4483220, at *15-16 (S.D. Ohio Sept. 27, 2012); *Welsh v. Ascension Health*, 3:08cv348, 2009 WL 1444431, at *3-7 (N.D. Fla. May 21, 2009),[6] and most recently, the Tenth Circuit Court of Appeals addressed an almost-identical Establishment Clause challenge, holding that the exemption has a plausible secular purpose, does not have the principal or primary effect of advancing religion, and "far from entangling the government in the affairs of religious institutions, the church-plan exemption avoids the entanglement that would likely occur in its absence." *Medina*, 877 F.3d at 1231-34.

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[6] Similarly, in *Advocate*, Respondents, who included participants in the pension plans of non-profit organizations that operated hospitals and other health care facilities, argued that the canon of constitutional avoidance compelled their construction of the church plan exemption because the alternative—interpreting the church plan exemption to extend to plans that were not "established …by" a church—"would run afoul of the Establishment Clause." Brief for Respondents, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (Nos. 16-74, 16-86, 16-258), 2017 WL 656675 at *56. In rejecting Respondents' argument and holding that the church plan exemption extends to a plan maintained by a principal purpose organization even if it was not originally established by a church, *see Advocate*, 137 S. Ct. at 1663, the Supreme Court gave no indication that doing so would raise constitutional concerns.

The Supreme Court has concluded that comparable exemptions for religious institutions from similarly complex and detailed regulatory schemes are constitutional, applying the above-mentioned three-part test identified in *Lemon*. In *Amos*, 483 U.S. at 340, for example, the Supreme Court upheld an amendment to Title VII of the Civil Rights Act of 1964, which provides an exemption for religious organizations regarding discrimination in employment on the basis of religion, even in their secular non-profit activities. *See* 42 U.S.C. § 2000e-1. *Amos*, among other Supreme Court authority, stands for the general principle that the government does not violate the Establishment Clause when it exempts religious institutions from burdens imposed by generally applicable laws that could cause the government to intrude into the religious practices or affairs of individuals, churches, and affiliated non-profit entities. *See, e.g.*, *Amos*, 483 U.S. at 334-40; *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188-196 (2012) (recognizing a "ministerial exception" from anti-discrimination laws to accommodate religious employers' ability to select who will convey the church's message and carry out its mission); *Cutter*, 544 U.S. at 720 (upholding Section 3 of the Religious Land Use and Institutionalized Persons Act that limits the government's ability to impose burdens on prisoners' religious practices as a "permissible legislative accommodation of religion that is not barred by the Establishment Clause"); *Walz*, 397 U.S. at 675-76, 679-80 (upholding a New York statute exempting real property owned by associations organized exclusively for religious purposes from property taxes).

As challenged in this case (and, indeed, more generally), the church plan exemption does not favor or endorse one particular religious group over another. In fact, the church plan exemption does not promote religion at all, but rather is designed to ensure that the government

does not become excessively entangled in the internal affairs or decision-making of religious groups. The exemption balances well the concerns animating the religion clauses, putting it squarely within the scope of the "play in the joints" recognized repeatedly by the Supreme Court as a key element of how the government may permissibly interact with religiously oriented entities. The church plan exemption has a valid secular legislative purpose (*i.e.*, to accommodate the exercise of religion and ensure that the government does not become enmeshed in churches' internal affairs); it has the effect of neither advancing nor inhibiting religion; and it does not require the government to become excessively entangled in the internal affairs of religious groups or doctrinal disputes. Because, as explained more fully below, it satisfies the three-part test set forth in *Lemon*, 403 U.S. at 612-13, the church plan exemption as applied to Defendants is constitutional.

**A. The Exemption Has a Secular Legislative Purpose.**

The *Amos* Court held that the legislative purpose of "minimiz[ing] governmental interference with the decision-making process in religions" is a valid secular legislative purpose within the meaning of the first prong of *Lemon*. 483 U.S. at 335-36 (internal citation omitted). The Court has confirmed that the doctrine requires that churches and religious entities be afforded "independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Hosanna-Tabor*, 565 U.S. at 186 (quoting *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952)); *see also Serbian E. Orthodox Diocese for U.S.A. & Canada v. Milivojevich*, 426 U.S. 696, 724 (1976) (holding that the First Amendment "permit[s] hierarchical religious organizations to establish their own rules and regulations for internal

discipline and government"). In certain circumstances, such exemptions for religious institutions might also be required by the Free Exercise Clause. *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 194-95. But in many others, "[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz*, 397 U.S. at 673; *cf. Amos*, 483 U.S. at 339 n.17 (holding exemption constitutional while declining to pass judgment on whether it was required by Free Exercise Clause). Thus, a general exemption "simply sparing the exercise of religion" from a regulatory burden is not a "foot in the door" leading to an established church in violation of the Constitution. *Walz*, 397 U.S. at 673-74, 678; *see Amos*, 483 U.S. at 335-36 (recognizing purpose of statutory exemption as reducing governmental interference with religious organization's effort to carry out its religious mission); *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979) (interpreting the National Labor Relations Act to contain an implicit exemption for church-operated schools where exercise of the National Labor Relations Board's jurisdiction over such schools would "present[] a significant risk that the First Amendment will be infringed"); *cf. Cohen v. City of Des Plaines*, 8 F.3d 484, 489-494 (7th Cir. 1993) (exemption from special use permit requirements for nursery schools operated in church buildings does not run afoul of the Establishment Clause).

Here, Congress exempted church plans from federal regulation under ERISA with the legislative purpose of alleviating burdens on decision-making in matters of religion. Originally, the church plan exemption applied to plans established and maintained by a church or by a convention or association of churches and permitted participation in church plans by employees of "agencies" of such churches. *See* ERISA, Pub. L. No. 93-406, § 3, 88 Stat. 829 (1974). However, the scope of this exemption was amended in 1980 to extend the definition of a "church

plan" to include plans maintained by organizations whose principal purpose is administering retirement plans for employees of churches (even if such organizations themselves are not churches), so long as such organizations are themselves "controlled by or associated with" churches. It was further amended to define an "employee of a church" as including an "employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under [26 U.S.C. § 501] and which is controlled by or associated with a church or a convention or association of churches." *See* Multi-Employer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 407, 94 Stat. 1208 (1980). In amending the exemption, Congress was attempting to avoid constitutional problems, not to create them. The amendment's backers acknowledged that without such an exemption, subjecting church plans to ERISA would create a serious possibility of excessive interference with religious governance and decision-making. *See* 124 Cong. Rec. H12106, 12108 (1978) (statement of Rep. Conable) (stating desire to clarify statutory definition because original definition of church plan was never intended to ignore how church plans operate or to be disruptive of church affairs); *see also* 125 Cong. Rec. S10051, 10054 (1979) (statement of Sen. Talmadge) (letter from Rabbinical Pension Board read into Congressional Record noting the concern about the IRS intrusion into trying to define what is or what is not an integral part of these religious groups).

Furthermore, Congress had an additional valid secular purpose of avoiding disparities in the treatment of churches with a hierarchical corporate structure (such as the Catholic Church) and congregational denominations that do not have such a hierarchical structure. Senator Talmadge noted that "[i]n a corporate structure lines of authority are clear," whereas "[t]he inability of a congregational denomination to control its agencies makes it difficult to see how the

church agency plan could meet the requirements of ERISA." 125 Cong. Rec. 10052 (May 7, 1979). He explained that "[m]ost church plans of congregational denominations are administered by a pension board," *id.*, and that under the proposed amendments, "a plan or program funded or administered through a pension board, whether a civil law corporation or otherwise, will be considered a church plan," provided that the principal purpose of the board is the administration or funding of a plan for church employees and that the board is controlled by or associated with a church, *id.* at 10053.

Congress thus enacted this exemption for the legitimate secular purposes of avoiding entangling the government in the affairs of churches, church employees, or those non-profit entities controlled by or associated with churches that would otherwise be required to open up to increased government scrutiny their internal affairs, including decisions regarding their religious activities, and to avoid creating disparities in the treatment of hierarchical versus congregational denominations.

**B. The Exemption Neither Advances Nor Hinders Religion.**

ERISA's church plan exemption does not have the principal or primary effect of advancing or hindering religion, thus satisfying the second prong of the *Lemon* test. Although an exemption for religious employers, such as Title VII of the Civil Rights Act addressed in *Amos*, might permit religious groups to better advance their purposes without state interference, a statute "is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose." 483 U.S. at 337. Rather, in order to run afoul of the "effects" test of *Lemon*, the government itself must be responsible for the advancing of religion through "its own activities

and influence." *Id.* That was not the case with the Title VII exemption in *Amos*, and it is not the case with the ERISA exemption here.

Accordingly, if the Court determines that the church plan exemption applies to Defendants, the application of the exemption does not impermissibly advance religion because it simply spares the Dignity Plan from ERISA coverage. In *Walz*, the Court explained that the "establishment" of religion, as understood by the drafters of the Establishment Clause, "connote[s] sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. In fact, in *Walz*, the Court held that a tax exemption for churches did not constitute the sort of financial support or sponsorship that runs afoul of the Establishment Clause. *Id.* at 674-76. The exemption here, which simply spares church plans from regulatory requirements, is even more removed from the kind of financial support that the Establishment Clause was meant to avoid, and none of the factors addressed in *Walz* is present here. Although the law in question excludes plans fitting within the definition of "church plan" from its coverage, 29 U.S.C. § 1002(33), ERISA's church plan exemption contains no indication of government sponsorship for such plans, and certainly no government effort to be actively involved in the religious activities of groups using these plans. In permitting Dignity Health to maintain a church plan (which must be assumed if the Court is addressing Plaintiffs' constitutional claim), rather than requiring it to abide by all of ERISA's retirement plan requirements, the government is not impermissibly endorsing Dignity Health's religious activities. It is merely providing an exemption from a regulatory requirement to a non-profit religious institution. In such circumstances, the Court would have no basis to conclude that "any advancement of religion achieved by" Dignity Health can be fairly attributed to the government, as opposed to the church

with which it is affiliated. *Amos*, 483 U.S. at 337; *see also Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 291-92 (6th Cir. 2009) (although three religious groups that received downtown revitalization grants arguably engage in what could be termed "religious indoctrination," there was no basis upon which their religious activities "could reasonably be attributed to governmental action").

**C. The Exemption Avoids Excessive Government Entanglement with Religion.**

Finally, under *Lemon*, a statute must not foster "an excessive government entanglement with religion," 403 U.S. at 613. Exempting a religious organization from a statutory burden satisfies this requirement because it "effectuates a more complete separation" of church and state and limits "the kind of intrusive inquiry into religious belief" that courts should avoid. *Amos*, 483 U.S. at 339; *see also id.* at 336 (noting that "it is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious").

Plaintiffs' view would require precisely such an inquiry—asking the Court to determine the extent to which this exemption would apply only to commercial activities undertaken with a business purpose. *See* Pls.' Opp'n at 32. But the line between secular and religious activities "is hardly a bright one," *Amos*, 483 U.S. at 336, and this exemption from ERISA's requirements, like the tax exemption upheld in *Walz*, accommodates both the interests of the church and the regulatory goals of the state and therefore "tends to complement and reinforce the desired separation insulating each from the other." 397 U.S. at 676. Accordingly, the church plan exemption also meets the requirement of *Lemon*'s third prong, and Plaintiffs' constitutional challenge must fail.

## II. Plaintiffs' Arguments To The Contrary Are Unpersuasive.

In light of the foregoing, the "church plan" exemption is permissible under well-established Establishment Clause jurisprudence. Plaintiffs have not demonstrated why this conclusion should be rejected in this case. At the outset, Plaintiffs propose an alternative analysis from the *Lemon* test, *see generally* Pls.' Opp'n at 27-18, but *Lemon* is the law in this circuit. *See, e.g.*, *Gardner v. Comm'r of Internal Revenue*, 845 F.3d 971, 976 (9th Cir. 2017) (applying *Lemon* test), *cert. denied* 138 S. Ct. 699 (2018); *Williams v. California*, 764 F.3d 1002, 1013-14 (9th Cir. 2014) ("Establishment Clause violations are determined according to the three-pronged test articulated in *Lemon v. Kurtzman*".). Any suggestion by Plaintiffs' brief that *Lemon* does not apply in this case can thus be set aside.

Plaintiffs' proposed alternative test is simply not the law as articulated by the Supreme Court. Plaintiffs argue that Congress "may exempt religious entities from laws" only where the laws would "create excessive government entanglement in religion" or "impose substantial burdens on religious exercise." Pls.' Opp'n at 27 (internal citations omitted). As set forth above, neither factor is a necessary prerequisite to exempt religious organizations from generally applicable laws. Instead, Congress is permitted "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions," and "it is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious." *Amos*, 483 U.S. at 335-36.

Moreover, the entire premise of Plaintiffs' argument—that the church plan exemption does not relieve Dignity Health of substantial religious burdens or eliminate government entanglement in religion—is based on Plaintiffs' position that, as applied to Dignity Health,

ERISA would "'apply only to commercial activities undertaken with a 'business purpose.'" Pls.' Opp'n at 28 (internal citations omitted). But the Court in *Amos* rejected the precise argument that Plaintiffs make. There, the plaintiff employees argued, and the lower court agreed, that the particular relevant activities of the religious employer—operating a gymnasium open to the general public—were not themselves religious in nature and therefore Title VII's exemption for religious organizations was unconstitutional as applied to such secular activities. *Amos*, 483 U.S. at 331-32 & n.7. The Court reversed, recognizing that "an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission" and that "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Id.* at 336.

The Supreme Court has thus recognized that the government may prophylactically exempt religious entities—and courts may uphold such exemptions—without inquiring into whether, absent the exemption, each and every entity would in fact experience an interference with its religious practices.[7] Not only do such exemptions fall into the "play in the joints" recognized in *Walz*, but in some circumstances, for the government or courts to conduct such an inquiry could itself trigger the sort of entanglement that *Lemon*'s third prong forbids. *See Amos*, 483 U.S. at 339 (upholding the sweep of the Title VII exemption and noting that it "avoids the kind of intrusive inquiry into religious belief" that *Lemon* forbids); *Walz*, 397 U.S. at 674 ("To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards [and] . . . could conceivably give rise to confrontations

[7] This is so even in an as-applied challenge like this one, as *Amos*, for example, was also an as-applied challenge. *See* 483 U.S. at 339.

that could escalate to constitutional dimensions."). An exemption therefore is not unconstitutional merely because it is broadly framed to avoid impermissible entanglement with religion.

In addition, insofar as Plaintiffs do address the elements of the *Lemon* test, their arguments miss the mark. With regard to *Lemon*'s first prong, Plaintiffs argue that while the church plan exemption may have a legitimate secular purpose as applied to a church, no such purpose is animated by its application to Dignity Health because the hospital system "is not a church." Pls.' Opp'n at 28. But to reach the Establishment Clause question, this Court necessarily will have decided that Dignity Health is controlled by or associated with a church, meaning that it "shares common religious bonds and convictions with that church." 29 U.S.C. § 1002(33)(C)(iv). And the government is not limited to exempting only houses of worship, but can also exempt their affiliated entities, in order to act consistently with the Establishment Clause. *See, e.g.*, *Amos*, 483 U.S. at 330 (permissible to exempt "the secular nonprofit activities of religious organizations" like the operation of a gymnasium); *Cohen*, 8 F.3d at 490 ("[I]t is clear that the legitimate purpose of minimizing governmental interference with the decision making processes of a religious organization can extend to seemingly secular activities of the organization.").[8] Plaintiffs' circular reasoning therefore does not undermine the validity of Congress's stated purpose of avoiding government interference into the affairs of non-profit entities controlled by or associated with

[8] *Cf. LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 229-30 (3d Cir. 2007) (finding that Jewish community center was a "religious organization" exempt from anti-discrimination provisions of Title VII and noting that a religiously affiliated organization can retain its character as such even if it engages in some secular activities and even if it welcomes members of other faiths).

churches that would otherwise be required to open up to increased government scrutiny.[9] And determining whether an exemption meets *Lemon*'s secular purpose requirement does not—and should not—ride on a legislative or judicial attempt at parsing whether exempted church-affiliated activities (in that case, nursery school and day care centers) are sufficiently "religious." *Cohen*, 8 F.3d at 490.

Plaintiffs' approach, by contrast, invites that very interference. Plaintiffs contend that the exemption relieves no genuine burden when applied to Dignity Health's "commercial activities" as opposed to the church's ability to carry out its religious mission. *See* Pls.' Opp'n at 33 & n.45. But it is that sort of inquiry which "requir[es] the Government to distinguish between 'secular' and 'religious' benefits or services, [and] which may be 'fraught with the sort of entanglement that the Constitution forbids.'" *Hernandez v. Comm'r of Internal Revenue*, 490 U.S. 680, 697

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[9] Relatedly, Plaintiffs observe that Congress' purpose in enacting the church plan exemption was to "avoid 'examination[] of books and records' that 'might be regarded as an unjustified invasion of the confidential relationship . . . with regard to churches and their religious activities,'" Pls.' Opp'n at 28 (citing S. Rep. No. 93-383, *reprinted in* 1974 U.S.C.C.A.N. 4889, 4965 (1973)). Plaintiffs claim that this purpose has no application here because Dignity Health is a hospital system that "already discloses its financial records and relationships in detail.". *Id.* at 28. But Plaintiffs' argument unduly narrows Congress's purposes in enacting the church plan exemption, which, as noted, include avoiding excessive governmental interference with religious governance and decision-making. And Plaintiffs have not shown that any financial disclosures Dignity Health may currently make are identical to the disclosures that would be required under ERISA nor that they would raise any of the same confidentiality and entanglement concerns. For example, Title I of ERISA sets forth specific reporting requirements (compliance with which could result in audits), requiring the disclosure of particular transactions with other church-affiliated entities, and with resulting penalties for failure to comply. 29 U.S.C. §§ 1023(b), 1024(a), 1132(c)(2). ERISA also authorizes the government to take action if the reports fail to satisfy the specific statutory and regulatory requirements, including the retention of an independent accountant to perform an audit. *Id.* § 1024(a)(5). Such requirements may well result in the type of invasion into confidential relationships and interference with religious decision-making that the church plan exemption was meant to avoid.

(1989) (quoting *Lemon*, 403 U.S. at 620) (emphasis added)); *see Amos*, 483 U.S. at 339 ("It cannot be seriously contended that [the exemption] impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.").

Furthermore, as explained above, the principal purpose organization provision also serves the valid secular purpose of avoiding disparities among denominations. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over the other." *Larson v. Valente*, 456 U.S. 228, 244 (1982). A rule limiting the exemptions to churches alone would disfavor denominations that perform charitable services through separately incorporated organizations. Moreover, a rule requiring that a plan covering the employees of affiliated organizations be established by a church would favor hierarchical denominations, which could more easily have their churches establish such umbrella plans. That approach would have posed greater practical difficulties for congregational churches, which lack the corporate structure through which to establish an umbrella plan. *See, e.g.*, *Thorkelson v. Publ'g House of the Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1122 (D. Minn. 2011) (noting that the Evangelical Lutheran Church has approximately 10,500 congregations). The 1980 amendments to ERISA thus ensured that the church plan exemption did not favor one religious sect over another, a permissible accommodation of religion under the Establishment Clause. *See, e.g.*, *Children's Healthcare is a Legal Duty, Inc. v. Min De Parle*, 212 F.3d 1084, 1099-1100 (8th Cir. 2000) (rejecting both facial and as-applied challenges to expanded exemption from Medicare and Medicaid Acts covering all patients who choose a religious method of healing, rather than just Christian Scientist patients).

With regard to *Lemon*'s second prong, Plaintiffs argue that the exemption as applied here "impermissibly advances religion" because it burdens Dignity's employees and competitor hospitals. Pls.' Opp'n at 30. But the case law, including that cited by Plaintiffs, speaks of exemptions that impose "*unjustified* burdens on other . . . persons." *Cutter*, 544 U.S. at 726 (emphasis added); *see also Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (speaking in terms of "*unjustifiable* awards of assistance to religious organizations") (same).[10] Plaintiffs' argument thus begs the question of whether the exemption—and any consequential burdens on others—is justified. And as shown above, the exemption is justified by the room left in the Establishment Clause for "benevolent neutrality" towards religion. *Walz*, 397 U.S. at 669; *see supra* at 6-7.

Plaintiffs nonetheless point to the alleged harms to employees participating in Dignity Health's pension plan and to its competitors, but the doctrine makes clear that an exemption given to a non-profit religious institution does not constitute an establishment of religion just because it may have an adverse effect on someone in some application. For example, the Title VII exemption upheld in *Amos* permits a non-profit religious employer to hire (and to refuse to hire) and to fire for religious reasons, regardless of whether a person affected by the employment

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[10] Plaintiffs also cite *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), a case involving a Connecticut statute which granted employees an unqualified right not to work on a particular day based on Sabbath observance. But the concern expressed there, of "the unyielding weighting in favor of Sabbath observers," *i.e.* advancement of a particular religious practice, is inapplicable here, where the ERISA church plan exemption does not address the scope or type of religious practice, but rather exempts religiously-affiliated organizations from ERISA requirements so as to avoid governmental interference with internal church decision-making. Such an exemption of an organization controlled by or associated with a church from a regulatory scheme does not convey an impermissible message that religion is favored or preferred. *See Medina*, 877 F.3d at 1232-33.

decision performs a religious job or shares the employer's religious beliefs. *Amos*, 483 U.S. at 331 (the Title VII exemption permits "religious employers to discriminate on religious grounds in hiring for nonreligious jobs"). Yet the Court rejected the Establishment Clause challenge to the exemption. *Id.* at 334-340; *cf. id.* at 340 (Brennan, J., concurring in the judgment) (emphasizing that *Amos* involved only "the activities of a *nonprofit* organization"); *id.* at 349 (O'Connor, J., concurring in the judgment) (same).

*Texas Monthly* is not to the contrary. There, a plurality of the Court said that a state violates the Establishment Clause when it "directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." *Texas Monthly*, 489 U.S. at 15.[11] But whereas the *Texas Monthly* Court repeatedly described the tax exemption at issue as "a subsidy that affects nonqualifying taxpayers, forcing them to 'become indirect and vicarious 'donors,'" *id.* at 14, the church plan exemption does not operate as a subsidy, either in purpose or in effect, and it would not be legally accurate to suggest that entities that are not exempt from ERISA subsidize, support, or are harmed by the exemption

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[11] Only three justices joined that plurality opinion; the creation of a majority required Justices Blackmun and O'Connor. In cases such as *Texas Monthly*, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). In *Texas Monthly*, the narrowest grounds for the decision are that, as the concurring opinion would have held, "a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause." *Texas Monthly*, 489 U.S. at 28 (Blackmun, J., concurring); *see also id.* (noting that "[a]lthough some forms of accommodating religion are constitutionally permissible," "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable"). Of course, the church plan exemption at issue here is not a statutory preference for the dissemination of religious *ideas*, and Plaintiffs do not appear to disagree.

of other entities. Exempt church plans are not required to pay pension insurance premiums to PBGC,[12] but this does not result in any loss to PBGC's insurance funds because PBGC does not guarantee the benefits provided by the exempt church plans. And the fact that exempt plans do not have to pay premiums to PBGC is not a subsidy. *Compare Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) (explaining that, in context of ordinary, broad-based taxation, "[w]hen the Government grants exemptions or allows deductions all taxpayers are affected" because "other taxpayers can be said to be indirect and vicarious 'donors'"); *see Boyajian v. Gatzunis*, 212 F.3d 1, 7-9 (1st Cir. 2000) (upholding RLUIPA and distinguishing *Texas Monthly*, explaining that "even a special status granted exclusively to religious organizations is not always impermissible").

In addition to the fact that *Texas Monthly* dealt with an effective subsidy, that case is of little help to Plaintiffs because it explicitly approved of *Amos*. 489 U.S. at 18 n.8. In fact, the Court in *Texas Monthly* employed the *Lemon* test, *see id.* at 9, 14-15 (setting out *Lemon* factors and referring to "the secular purpose and primary effect mandated by the Establishment Clause"), which was the basis of the reasoning in *Amos* and which, as the above analysis illustrates, supports the constitutionality of the church plan exemption here. Moreover, the Court emphasized in *Texas Monthly* that its decision "in no way suggest[s] that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause." *Id.* at 18 n.8. The

[12] *See* 29 U.S.C. § 1321(b)(3).

church plan exemption and its application to entities like Dignity Health fall neatly within this body of doctrine.

Finally, with regard to *Lemon*'s third prong, Plaintiffs argue that application of the exemption actually "produce[s] greater state entanglement with religion than the denial of an exemption." Pls.' Opp'n at 30 (internal citation omitted). The Tenth Circuit rejected Plaintiffs' contention that an agency's or court's examination of whether an organization is associated with a church constitutes an impermissible entanglement. *See Medina*, 877 F.3d at 1233 (noting that a one-time analysis of a claim of exemption is less intrusive than long-term continuing monitoring of ERISA compliance). By contrast, Plaintiffs reach their conclusion—that application of the exemption produces greater government entanglement with religion than application of ERISA's requirements—based on their contention that "ERISA compliance requires *zero* entanglement with religion." Pls.' Opp'n at 30. But that contention, again, appears to be based upon the premise that Dignity is "not a church" or the mistaken premise that ERISA compliance will not entail the turning over of confidential books or records. Moreover, it is the nature of any exemption that someone will have to determine whether a given entity qualifies for it, but such an inquiry does not necessarily result in impermissible government entanglement. *See, e.g., Walz*, 397 U.S. at 674 (explaining that "[e]ither course, taxation of churches or exemption, occasions some degree of involvement with religion," but that the test for determining excessive government entanglement "is inescapably one of degree"). While determining whether an entity qualifies for the church plan exemption may include consideration of a religious entity's organizational structure, such an inquiry plainly does not involve the sort of "comprehensive, discriminating,

and continuing state surveillance" that the *Lemon* Court said would constitute excessive entanglement. 403 U.S. at 619; *see also Mueller v. Allen*, 463 U.S. 388, 403 (1983).

Furthermore, as the *Medina* court noted, compliance with ERISA's fiduciary rules could stand in tension with Dignity Health's interest in engaging in religiously-driven decisions regarding appropriate investments. *See* 877 F.3d at 1233.[13] In addition, ERISA's prohibited transaction provisions require fiduciaries to avoid certain transactions that involve conflicts-of-interest, including transactions with the plan sponsor or other entities represented by the fiduciary. *See* 29 U.S.C. § 1106; 26 U.S.C. § 4975. Those restrictions could limit church plans' flexibility to allocate funds across plans and between church-affiliated organizations. As these examples show, the exemption—adopted expressly to avoid government entanglement in religion—easily satisfies *Lemon*'s third prong.

[13] Plaintiffs cite Department of Labor Interpretive Bulletin 2015-01 (80 Fed. Reg. 65135) for the proposition that "ERISA does not prohibit screening morally objectionable investments as long as alternative investments are expected to perform on par with screened investments." *See* Pls. Opp'n at 29. The Interpretive Bulletin, however, reiterates Labor's longstanding view that in general, "the plan trustee or other investing fiduciary may not use plan assets to promote social, environmental, or other public policy causes at the expense of the financial interests of the plan's participants and beneficiaries," 80 Fed. Reg. at 65135, while acknowledging that in limited circumstances, fiduciaries may consider such collateral goals as tie-breakers when choosing between investment alternatives that are otherwise equal with respect to return and risk over the appropriate time horizon. *Id.* at 65136. Investing plan assets in service of social goals could run afoul of ERISA's requirements that plan assets be diversified and be held for the exclusive purpose of providing benefits and defraying reasonable plan expenses. *Medina*, 877 F.3d at 1233.

## CONCLUSION

Because the decades-old church plan exemption is well-justified under prevailing Establishment Clause jurisprudence, the Court should reject Plaintiffs' as-applied challenge to its constitutionality.

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Respectfully Submitted,

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