No. A15-1999

STATE OF MINNESOTA
IN THE COURT OF APPEALS

PASTOR DAVID BACON, PASTOR TIMOTHY HEPNER, RUTH DOLD, AND SHARON HVAM, individually and as representatives of a class of similarly situated persons, and on behalf of the Evangelical Lutheran Church in America Retirement Plan and the ELCA Retirement Plan for the Evangelical Lutheran Good Samaritan Society,

Plaintiffs-Appellants,

v.

BOARD OF PENSIONS OF THE EVANGELICAL LUTHERAN CHURCH IN AMERICA (d/b/a/ PORTICO BENEFIT SERVICES),

Defendant-Respondent.

BRIEF *AMICUS CURIAE* OF THE CHURCH ALLIANCE IN SUPPORT OF DEFENDANT-RESPONDENT

Deborah S. Davidson (*pro hac vice*)
Charles C. Jackson
Rita Srivastava
Morgan, Lewis & Bockius LLP
77 West Wacker Drive, Fifth Floor
Chicago, IL 60601
(312) 324-1000

Brian W. Thomson, #0322416
Liz Kramer, #0325089
Kadee J. Anderson, #0389902
Stinson Leonard Street LLP
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
(612) 335-1500

Attorneys for Defendant-Respondent

Eric D. McArthur (*pro hac vice*)
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

Steven L. Severson, #152857
Aaron D. Van Oort, #315539
Blake J. Lindevig, #0392324
Faegre Baker Daniels LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 766-7000

Attorneys for Amicus Curiae

(Additional Counsel Listed on Inside Cover)

Michael A. Wolff (*pro hac vice*)
Schlichter, Bogard & Denton LLP
100 South Fourth Street
St. Louis, MO 63102
(314) 621-6115

Charles N. Nauen (#121216)
Lockridge Grindal Nauen PLLP
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
(612) 339-6900

Attorneys for Plaintiffs-Appellants

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INTERESTS OF *AMICUS CURIAE*

The Church Alliance is a coalition of the chief executive officers of more than 35 denominational benefit programs. The Church Alliance includes member churches with a wide array of beliefs, structures, and practices mirroring the diversity in American religious life. Each member's distinct structure and practice are outgrowths of deeply held religious beliefs. Some members are hierarchical, with a single office or body tending to all the faithful. Other members reflect a congregational polity, with each individual church body exercising authority over all decisions. Still others have a "connectional" or "councilor" polity falling in between, with regional bodies serving as the church's primary decision-making bodies.

The Church Alliance submits this brief to explain how adjudicating claims challenging the reasonableness of a church plan's investment strategies and fees would entangle the courts in religious questions in violation of the First Amendment. As explained below, church plans' governance models, investment strategies, and operational and administrative requirements are influenced by their religious beliefs. For these very reasons, Congress exempted church plans from regulation under ERISA and other laws. The district court correctly held that adjudicating plaintiffs' claims would necessarily create the church-state entanglement that Congress sought to avoid and the First Amendment forbids.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

Plaintiffs ask this Court to decide what a church's doctrine should be regarding its care for its ministers and to determine the reasonableness of the church's views about what its doctrine requires. Plaintiffs' request violates the religious questions doctrine, which springs from the First Amendment's command against the "establishment of religion" or "prohibiting the free exercise thereof." U.S. Const. amend. I. That doctrine, a mainstay of First Amendment jurisprudence, prevents civil authorities such as courts from deciding questions of religious doctrine and church administration. The doctrine, which was has been applied by federal and state courts in a wide variety of contexts for more than a century, protects the free exercise of religion, prevents courts from entangling themselves with churches, and relieves courts from addressing theological questions which they have no competence to decide.

This is a quintessential case for the religious questions doctrine. Unlike their secular counterparts, church plans have a "double bottom line": they provide for the care of their ministers and lay workers and govern their investments through church plans and church benefit boards not only to maximize financial returns, but also to express the plan's religious beliefs. Those beliefs often include commitments to avoid supporting industries they view as morally wrong; to support companies with attributes their faiths value; to push for changes consistent with their religious values through shareholder activism; and to provide certain benefits to their members that their secular counterparts do not (*e.g.*, some churches provide greater benefits to lower paid clergy). These faith-driven decisions significantly affect the administration of church plans, making it

impossible for courts to compare them to commercially available alternatives without addressing religious questions.

Reviewing a church plan's investment strategies and costs for "reasonableness," as plaintiffs demand, would require a court to decide what a church believes and whether its plan chose the "right" investment strategies and incurred the "right" expenses to further its religious goals. Furthermore, church plan structure and benefits, which are driven by church doctrine, can affect costs; a court cannot review those costs for reasonableness without pronouncing on what structures and benefits the church's beliefs require. Indeed, such review would not only entangle the courts in religious questions, but would also risk improperly favoring one type of church polity over another by pronouncing one church plan's polity-driven costs to be more "reasonable" than another's.

Plaintiffs argue this lawsuit falls into a narrow exception to the religious questions doctrine for cases that can be decided based on "neutral principles of law." But that exception applies only when the asserted "neutral principles" incorporate no religious concepts. Here, resolution necessarily depends on religious concepts. To resolve this case, a court would have to sort the plans' "religious" investment and fee decisions from its "non-religious" ones—a task that would invariably entangle the court with religion. Indeed, Congress itself recognized the entanglement that undue government supervision of church plans would create by granting church plans a wholesale exemption from coverage under the Employee Retirement Income Security Act of 1974 (ERISA).

Courts cannot resolve plaintiffs' suit without pronouncing on religious questions and entangling themselves with religion. The district court's decision dismissing the case for lack of subject-matter jurisdiction should be affirmed.

ARGUMENT

I. The First Amendment Precludes Courts From Deciding Religious Questions.

A. The religious questions doctrine is a longstanding, critical component of First Amendment jurisprudence.

The doctrine that courts may not adjudicate religious questions is older than the Nation. As Roger Williams, the founder of the colony that became Rhode Island, explained, "civil states, with their officers of justice … are … not judges, governors, or defenders of the Spiritual, or Christian, State and worship." Roger Williams, *The Bloody Tenant, Of Persecution for Cause of Conscience* 1 (1644).

The Founders embraced this understanding. In Virginia's *Bill for Establishing Religious Freedom*, Thomas Jefferson inveighed against "the impious presumption of legislators and rulers … who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others."[2] James Madison, the First Amendment's author, agreed. In his *Memorial and Remonstrance* against a Virginia bill that would have afforded taxpayer support to churches, Madison explained that

> the Bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages,

[2] http://founders.archives.gov/documents/Jefferson/01-02-02-0132-0004-0082.

> and throughout the world; the second an unhallowed perversion of the means of salvation.[3]

Consistent with the Founders' views, the Supreme Court has imposed strict limits on the civil magistrate's power to adjudicate religious questions. The Court first recognized such a principle in *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872), a dispute between two church factions over control of the church's property. The church's highest authority sided with one faction, and the Supreme Court accepted that decision as dispositive, holding that "whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest [church authority], the legal tribunals must accept such decisions as final." *Id.* at 727. The contrary position, the Court explained, would require "the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination [to] be examined into with minuteness and care." *Id.* at 733. Because the civil courts have no business pronouncing on church doctrine and administration, they must accept the interpretation rendered by the church itself. *Id.* at 733–34.

Watson, resolved before the First Amendment's application to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), was decided under federal common law. But *Watson*'s "spirit of freedom for religious organizations[and] independence from secular control or manipulation" is embodied in the First Amendment. *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). This was made clear when the Court confronted a New York law wresting authority over

[3] http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

Russian Orthodox churches in the United States away from a Soviet-controlled central religious hierarchy in Moscow. *Id.* at 106 & n.10. The Supreme Court struck down the law, holding that "[l]egislation that regulates church administration, the operation of the churches, [and] the appointment of clergy … prohibits the free exercise of religion" in violation of the First Amendment. *Id.* at 107–08. Legislatures—like courts—may not pronounce on religious questions. *Id.*

The religious questions doctrine continues to play a key role in the Supreme Court's First Amendment jurisprudence. Drawing on its religious questions jurisprudence, the Supreme Court recently confirmed the existence of a "ministerial exception" to Title VII's prohibition on employment discrimination, thus barring judicial review of a church's decision to terminate a minister. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704–05, 710 (2012). Recognizing the "special solicitude" afforded "the rights of religious organizations" under the First Amendment, the Court explained that subjecting religious appointments to judicial scrutiny would infringe both "the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission," and "the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions." *Id.* at 706.

Courts regularly apply the religious questions doctrine in all areas of law. For instance, this Court and others have refused to entertain suits about pension benefits when the suit requires interpreting contractual terms with religious content. *See, e.g.*, *Basich v. Bd. of Pensions, Evangelical Lutheran Church in Am.*, 540 N.W.2d 82, 85–86 (Minn. Ct. App. 1995); *Pearson v. Church of God*, 458 S.E.2d 68, 70 (S.C. Ct. App. 1995) (court

was "constitutionally barred from inquiring into" whether plaintiff had maintained a "ministry" within pension agreement's meaning). The same is true for claims for breach of contract generally. *See, e.g.*, *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 611–12 (Minn. Ct. App. 1996).

Courts apply the religious questions doctrine in the tort context as well. Courts have "uniformly rejected claims for clergy malpractice under the First Amendment," because "determination of such claims would necessarily entangle the courts in the examination of religious doctrine, practice, or church polity." *Franco v. Church of Jesus Christ of Latter-day Saints*, 21 P.3d 198, 204 (Utah 2001). This Court and others have dismissed defamation actions by ministers against their churches on a similar rationale. *See Black v. Snyder*, 471 N.W.2d 715, 720 (Minn. Ct. App. 1991); *Farley v. Wis. Evangelical Lutheran Synod*, 821 F. Supp. 1286, 1290 (D. Minn. 1993).

The religious questions doctrine has been applied in countless other areas. A few of these include tax, *Hernandez v. Comm'r*, 490 U.S. 680, 694 (1989); unemployment benefits, *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715–16 (1981); educational services, *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971); mail fraud, *United States v. Ballard*, 322 U.S. 78, 79, 86 (1944); consumer protection, *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425–30 (2d Cir. 2002); labor relations, *Pielech v. Massasoit Greyhound, Inc.*, 668 N.E.2d 1298, 1303–04 (Mass. 1996); and child custody, *Zummo v. Zummo*, 574 A.2d 1130, 1146 (Pa. Super. Ct. 1990). The claims differ, but the basic principle is the same—if the claim would require the court to pass upon religious questions, the court must stay its hand.

B. Civil authorities are barred from resolving religious questions.

The religious questions doctrine erects robust barriers precluding civil resolution of religious questions wherever they may arise. It forecloses adjudication of "the truth or verity of … religious doctrines or beliefs." *Ballard*, 322 U.S. at 86. It also prevents courts from defining what a church's doctrine is and from assessing a particular doctrine's importance. *See, e.g.*, *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969). Because "the 'exercise of religion' often involves not only belief and profession but the performance of … physical acts," *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877 (1990), the religious questions doctrine also forecloses courts from interfering with church administration and management of church property, *see, e.g.*, *Kedroff*, 344 U.S. at 107–08, 120–21. Nor may courts assess whether churches have complied with their internal procedures. *See Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 713 (1975).

The religious questions doctrine operates prophylactically to forestall any potential civil interference with church doctrine. It extends to any church action that is "strictly … ecclesiastical"—that is to say, pertaining to church governance, *see Kedroff*, 344 U.S. at 115; *Hosanna-Tabor*, 132 S. Ct. at 709. That is because "the mere *adjudication* of" whether an action is based on religious belief "would pose grave problems for religious autonomy" by placing a "civil factfinder … in ultimate judgment of what the accused church really believes" en route to deciding whether the action was taken for religious reasons. *Id.* at 715 (Alito, J., concurring) (emphasis added). In short, the First

Amendment recognizes a zone of autonomy for religious exercise that is protected against government interference.

Similarly, courts may not sift through a church's conduct to separate out "religious" activities from "non-religious" ones, because "litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 132–33 (1977). Forcing a court to undertake the "comprehensive, discriminating, and continuing" examination needed to quarantine religious activities would entangle the courts in religious matters. *Lemon*, 403 U.S. at 619; *see also Hernandez*, 490 U.S. at 694. Indeed, the very prospect of a court's conducting such an analysis "is a significant burden," because the church may be unable "to predict which of its activities a secular court will consider religious," thus prompting the church to abstain from religious conduct. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336 (1987).

The religious questions doctrine does not prohibit courts from adjudicating any case involving a church, nor does it preclude all government regulation of church plans, to the extent such regulation does not entangle the government with religion or infringe free exercise. A court may adjudicate a dispute if it can be resolved on "neutral principles of law." *Jones v. Wolf*, 443 U.S. 595, 603 (1979). "Neutral principles of law" are legal doctrines "completely secular in operation" that do not require a court to "rely on religious precepts." *Id.* at 603–04. Thus, a court may adjudicate a claim for negligent provision of mental health services against a minister when a statute provides standards

that "describe conduct" for all mental health practitioners "without reference to a religious aspect." *Odenthal v. Minn. Conf. of Seventh-Day Adventists*, 649 N.W.2d 426, 440 (Minn. 2002). But a court may not resolve a dispute when doing so would require it to apply terms that "incorporat[e] religious concepts," *Jones*, 443 U.S. at 604, or to "parse out secular and religious" conduct, *Odenthal*, 649 N.W.2d at 438.

C. The religious questions doctrine protects important values.

Courts have unequivocally endorsed the religious questions doctrine because it carves out a sphere of autonomy for the free exercise of religion, prohibits entanglement, and limits courts to their sphere of competence.

First, the doctrine protects the free exercise of religion by guaranteeing churches "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff*, 344 U.S. at 116. As the Supreme Court recently explained, "the Free Exercise Clause … protects a religious group's right to shape its own faith and mission." *Hosanna-Tabor*, 132 S. Ct. at 706. To do so, each group must control not just its doctrine, but also practical matters of church administration that are necessary to the church's community life. *See id.*; *Presbyterian Church*, 393 U.S. at 449; *Kedroff*, 344 U.S. at 116. The First Amendment secures control of such matters to churches, not the state.

Second, the religious questions doctrine prevents the establishment of religion. *See, e.g.*, *Lemon*, 403 U.S. at 619–20. "The law knows no heresy," *Watson*, 80 U.S. at 728, but when a court declares that a particular set of beliefs constitutes a church's official creed or "intervene[s] on behalf of groups espousing particular doctrinal beliefs,"

the court risks violating the Establishment Clause by "inhibiting the free development of religious doctrine," *Milivojevich*, 426 U.S. at 709–10. Likewise, the Establishment Clause is violated when courts engage in a "comprehensive, discriminating, and continuing … surveillance" of a church. *Lemon*, 403 U.S. at 619. The religious questions doctrine avoids Establishment Clause concerns by minimizing judicial involvement in the doctrinal and practical affairs of churches.

Third, the religious questions doctrine precludes courts from addressing theological questions beyond their institutional competence. "Courts are not arbiters of scriptural interpretation," and "it is not within the judicial function and judicial competence" to pronounce on doctrinal issues that are often the subject of heated controversy within a church. *Thomas*, 450 U.S. at 716. Nor do "[c]ivil judges … have the competence of ecclesiastical tribunals in applying the 'law' that governs" internal church disputes as to polity or administration. *Milivojevich*, 426 U.S. at 714 n.8. In the same way, it is not "within the judicial ken to question the centrality of particular … practices to a faith," *Hernandez*, 490 U.S. at 699, or to assess whether a church or individual correctly interprets its creed to require particular conduct, *United States v. Lee*, 455 U.S. 252, 257 (1982); *see also, e.g.*, *Thomas*, 450 U.S. at 715. By leaving such matters to the churches themselves, the religious questions doctrine removes the need for courts to adjudicate issues in which they have no authority or expertise.

II. Church Plans Are Influenced By Religious Beliefs.

A. Congress recognized the religious nature of church plans by exempting them from ERISA and other laws.

"Churches are among the first organizations to found retirement plans in the United States." 124 Cong. Rec. 12,106, 12,106 (1978) (remarks of Rep. Conable). One of the earliest plans in what would become the United States was the "Fund for Pious Uses" established by the Presbyterian Synod of Philadelphia in 1717 to provide financial assistance to ministers and their families and to support other charitable activities. *See* R. Douglas Brackenridge & Lois A. Boyd, *Presbyterians and Pensions* 9 (1988). In 1796, the Methodist Episcopal Church chartered a fund to provide "for the distressed travelling preachers, for the families of travelling preachers, and for the superannuated and worn-out preachers, and the widows and orphans of preachers." Robert Emory, *History of the Discipline of the Methodist Episcopal Church* 294–95 (1856). In short, "[f]or many years our church plans have been operating responsibly and providing retirement coverage and benefits for the clergymen and lay employees of the churches and their agencies." 124 Cong. Rec. 12,106 (remarks of Rep. Conable).

Congress has long understood that undue government supervision of church plans, or subjecting them to the same rules as corporate employee benefit plans or commercial providers, would raise precisely the entanglement concerns the religious questions doctrine is designed to avoid. Thus, when Congress enacted ERISA, it "exempted church plans from the provisions of the act to avoid excessive Government entanglement with religion in violation of the first amendment to the Constitution." *Id.*; *see also* 29 U.S.C.

§ 1003(b)(2); S. Rep. No. 93-383, at 4965 (1973) ("examinations of [church plan] books and records … might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities"). The same concerns drove Congress to amend the church plan exemption in 1980. *See* 125 Cong. Rec. 10,051, 10,052 (1979) (remarks of Sen. Talmadge) ("[i]f we have enacted a statute that may require the church plans to … file reports[and] be subject to the examination of books and records …, it must be changed because we have clearly created an excessive Government entanglement with religion").

Similarly, the securities laws exempt church plans from registering interests or participations, *see* 15 U.S.C. § 77c(a)(2)(D), (a)(13), thus sparing church plans intrusive monitoring from the federal securities regulators. Congress even preempted state blue sky laws as they apply to church plans. *See id.* § 77r(a), (b)(4). And in 2000, Congress enacted the Church Plan Parity and Entanglement Prevention Act "to provide for the preemption of State law … relating to certain church plans." Pub. L. 106-244, 114 Stat. 499, 499. These exemptions work with the ERISA exemption to prevent entanglement between church plans and federal and state regulators, reflecting Congress's longstanding reluctance to permit regulators to examine church financial affairs.

B. Religious beliefs affect church plans' investment decisions and costs.

The statutory exemptions for church plans recognize a critical distinction between these plans and their secular counterparts: for church plans, investing and providing benefits are often an extension of their churches' religious missions, and suits such as this one would both impede that mission and entangle the courts with religion.

The investment strategies of many church plans are influenced in part by their doctrinal beliefs. Avoiding so-called "sin stocks" dates from the early days of the Republic, when Methodists and Quakers began screening their investments to avoid supporting enterprises that promoted slavery or war. Jennifer Goodman, *Religious Organizations as Shareholders: Salience and Empowerment, in Shareholder Empowerment: A New Era in Corporate Governance* 201, 203 (Maria Goranova & Lori Verstegen Ryan eds., 2015). Today, many church plans continue to reflect their religious beliefs by screening out companies whose activities violate their religious conscience.

For instance, The United Methodist Church's *Book of Discipline* instructs its pension plan to avoid investments "that appear likely, directly or indirectly, to support racial discrimination, violation of human rights, sweatshop or forced labor, gambling, or the production of nuclear armaments, alcoholic beverages or tobacco, or companies dealing in pornography." United Methodist Church, *Book of Discipline* ¶ 717 (2012). This instruction springs from the church's commitment to a set of "Social Principles," *id.*, which are in turn "a prayerful and thoughtful effort … to speak to the issues in the contemporary world from a sound biblical and theological foundation," United Methodist Church, *Social Principles & Social Creed*.[4]

The investment policies set by various religious groups and investors in the United States are as diverse as those groups' beliefs. For instance, the United States Conference of Catholic Bishops avoids companies that provide abortions, that manufacture

[4] www.umc.org/what-we-believe/social-principles-social-creed/.

contraceptives, or that discriminate against the underprivileged. *See* U.S. Conference of Catholic Bishops, *Socially Responsible Investment Guidelines* (2003).[5] Amana Mutual Funds Trust, which provides investment services consistent with Islamic principles, screens out companies in the liquor and pork industries, as well as companies that make interest-bearing loans or that are highly leveraged. *See* Saturna Capital, *Halal Investing*.[6] And Friends Fiduciary, a financial management firm for Quaker churches and related organizations, screens out companies that manufacture weapons, that mine coal, or that operate for-profit prisons. Friends Fiduciary, *Socially Responsible Investing*.[7]

Additionally, some religious investors engage in social-purpose investing by focusing their investments on companies with attributes their faiths consider important. For instance, Epiphany Funds' "screening process, based on Roman Catholic beliefs, takes note of companies with strong employee retirement or pension plans." Kelsey Dallas, *The faith-based investor: Making financial decisions based on religious beliefs*, Deseret News, Aug. 25, 2014.[8] The Presbyterian Church (USA) has set a screen that channels a designated portion of its investment capital into community investing, such as

[5] http://www.usccb.org/about/financial-reporting/socially-responsible-investment-guidelines.cfm.

[6] http://www.saturna.com/amana/halal_investing.shtml.

[7] http://www.friendsfiduciary.org/socially-responsible-investing/.

[8] http://national.deseretnews.com/article/2200/the-faith-based-investor-making-financial-decisions-based-on-religious-beliefs.html.

community banks and development projects in poor countries. Presbyterian Mission Agency, *What is faith-based investing?*[9]

Setting screens may entail short-term costs. They often require research to identify which companies engage in behaviors that are inconsistent with the church's religious tenets. *See* Saturna Capital, *supra*. Depending on the beliefs of the denomination, faith-based screens also may limit an investor's range of options. *See, e.g., id.* ("among the securities researched monthly by Saturna Capital for the Amana Funds, less than half pass the initial screens necessary to be considered"). At the same time, social-purpose investments can outperform commercial alternatives and serve as sound diversification. Thus, screening may cause church plans' returns to diverge from commercial alternatives, and can make comparison to commonly used investment benchmarks erroneous or misleading. *See* Walid Mansour & Mouna Jlassi, *The Effect of Religion on Financial and Investing Decisions*, *in Investor Behavior: The Psychology of Financial Planning and Investing* 135, 144 (H. Kent Baker & Victor Ricciardi, eds., 2014).

Many church plans also engage in shareholder advocacy as part of their religious commitments. For instance, the United Methodist Church's pension plan must "give careful consideration to shareholder advocacy" in pursuit of the religious positions outlined in the Social Principles. *Book of Discipline*, *supra*, ¶ 717. Wespath, a division of the United Methodist Church's General Board of Pension and Health Benefits, has concluded that shareholder advocacy "is one of the most important ways in which [to]

[9] https://www.presbyterianmission.org/ministries/mrti/what-faith-based-investing/.

take action to achieve" both its financial goals and the Social Principles. Wespath, *Philosophy on Advocacy*.[10] Accordingly, Wespath engages shareholders, proposes shareholder resolutions, and participates in proxy voting. Wespath, *Environmental, Social and Corporate Governance*.[11] Many religious groups engage in shareholder advocacy of some form; indeed, religious organizations "are the most active filers of social issue [shareholder] resolutions in the United States, consistently filing around 25 percent of all shareholder proposals." Goodman, *supra*, at 201 (citation omitted). Many church plans view this as improving the long-term value of their investments, but also believe it reflects their denomination's values. As with investment screens, while shareholder advocacy often delivers long-term gains, it also sometimes imposes short-term costs. For instance, shareholder advocacy, like screening, requires research and may impose administrative costs and legal expenses.

C. Religious doctrine affects church plan structures, operations and, costs.

Church plans are often creatures of church polity or canon law, and both their method of operation and structure are set, at least in part, by their religious doctrine. For instance, some churches believe the appropriate structure for a church is hierarchical—that is, local bodies "are subordinate parts of larger church organizations." *Milivojevich*, 426 U.S. at 716 n.9. Hierarchical churches often adopt a single plan for the entire denomination, allowing the church to ensure that uniform plan terms apply to all church

[10] http://www.wespath.com/investment_philosophy/shareholder_advocacy/advocacy_concerns/.

[11] http://www.wespath.com/investment_philosophy/governance/.

employees and entrusting one organization with monitoring compliance and plan administration.

By contrast, other denominations believe that "authority over questions of church doctrine, practice, and administration rests entirely in the local congregation or some body within it." *Jones*, 443 U.S. at 619 (Powell, J., dissenting). Such churches often select pension plans congregation by congregation. For instance, each church associated with the Southern Baptist Convention is entirely autonomous and makes its own decisions regarding benefit plans. Church plans for these churches must therefore negotiate unique plan terms and payment arrangements with each individual congregation, and also must often carry on extensive recruiting campaigns to enroll the employees of individual churches in the plan. Without a centralized payroll system, some of these church pension boards must gather data and negotiate payment systems with thousands of small churches across the country to administer the plan.

Religious doctrine can also influence plan oversight and operation in a variety of ways. For instance, some churches believe representatives from across the denomination should be included in the church plan's governing body as a sign of religious unity. The United Methodist Church's General Board of Pension and Health Benefits consists of 32 members drawn from across the denomination, including some members from overseas. *Book of Discipline*, *supra*, ¶ 1502. The church believes this large and geographically diverse board helps foster church unity by ensuring all constituencies are represented, but the size of the board can also increase operating expenses. In particular, the plan must arrange and pay for travel to board meetings for each board member (including flights

from foreign countries) and provide each board member with liability insurance, training, and administrative support. Religious doctrine can also affect the way plan disputes must be resolved, which in turn affects costs. For example, the detailed Concordia Plans' dispute resolution procedure coordinates with the dispute resolution process of The Lutheran Church—Missouri Synod, which traces its origins to 1 Corinthians 6 and Matthew 18. *See generally* Comm'n on Theology & Church Relations, The Lutheran Church—Missouri Synod, *1 Corinthians 6:1-11: An Exegetical Study* (1991).

Finally, many church plans view caring for their members' financial well-being as itself a fulfillment of their religious commitments, and as a result offer services that many secular plans do not. For instance, some church plans include a complimentary outreach program in which staff contact individual church employees to discuss pension plan details and planning for retirement. Other plans offer free enrollment in a widows-and-orphans fund (which pays benefits in the event the covered employee is survived by a spouse and/or minor children) or special disability benefits rarely offered by secular plans. Some plans make contributions to each minister's account based on the average salary of the church's ministers, to avoid penalizing ministers who serve poorer communities and have lower salaries. And, unlike secular plans, church plans do not reject coverage of employees of small churches because of the administrative costs of dealing with such small entities. The plans see all these choices as fulfilling scriptural commands to care for the needs of religious workers, *see 1 Timothy* 5:17–18; to provide for widows and orphans, *Deuteronomy* 10:18; and to care for the poor as if they were

Christ Himself, *Matthew* 25:40; as well as a way to reduce financial stress on their members, thus freeing them to devote themselves entirely to their ministry.

III. Lawsuits Challenging The Reasonableness Of Church Plans' Investment Strategies And Fees Would Require Courts To Assess Religious Beliefs And Practices.

This case and cases like it are not subject to judicial review because they turn on the reasonableness of the investment and fee decisions of church plans—a question that cannot be assessed without examining and ruling on the church's religious doctrine. The First Amendment forbids courts to decide a church plan's beliefs or whether it reasonably carried out the commands of those beliefs.

Plaintiffs allege that the strategies Portico implemented and the fees it charged were unreasonable. *See, e.g.*, Compl. ¶¶ 2, 59. Specifically, the complaint claims Portico "failed to exercise reasonable care, skill, and diligence in managing the assets of the Plans," thus selecting and retaining "imprudent" investments when "other alternatives would have better served participants' interests," and also failed to ensure that the fees charged by both Portico and outside personnel were "appropriate and reasonable." *Id.* ¶¶ 76, 78; *see also id.* ¶¶ 82–95 (counts II and III based on same conduct). For damages, the complaint seeks the money the plans allegedly lost as a result of Portico's breach of duty—in other words, the difference between the returns and fees plaintiffs claim would have been reasonable and the plans' actual returns and fees. *See, e.g.*, *id.* ¶ 98.

Determining whether a church plan's investments and fees are reasonable will necessarily call on a court to resolve religious questions, and to make inapposite comparisons of a church plan's investments and fees to those of a similarly sized

corporate benefit plan. As this Court has recognized, church plans are not required simply to maximize return on investment, but also may fulfill their churches' religious commitments through their investment activity. *See Basich*, 540 N.W.2d at 86. Thus, the question is whether a church plan's decisions were reasonable in light of the mandates the plan's faith imposes on its investment strategy and activities. Under the religious questions doctrine, civil courts may not assess whether a church plan used the "right" investment strategies and paid fees for the "right" services to further its religious goals.

To decide whether a church plan has adopted reasonable investment strategies and fees to achieve its doctrinal goals, a court must first determine what the church's doctrine *is*. *See id.* ("the district court would be required to examine the ELCA's 'aims' before it could determine" whether Portico "discharge[d] its duties with the care that a prudent person would use in the conduct of an enterprise … with like aims"). But the First Amendment prohibits courts from deciding for a church what its doctrine is. *See, e.g.*, *Presbyterian Church*, 393 U.S. at 450 ("the First Amendment forbids civil courts" to "make [their] own interpretation[s] of the meaning of church doctrines"). Just as the court in *Presbyterian Church* was forbidden to define the church's doctrine in determining whether it had "substantial[ly] depart[ed]" from that doctrine, *id.*, so too here: a court may not define a church's doctrine in determining whether the church's plan chose investment strategies and expenses reasonably designed to advance that doctrine.

Further, to resolve this case a court would have to determine what investment choices and expenses were required by church doctrine. But what actions a particular belief demands are beyond a court's competence to determine. *See, e.g., Thomas*, 450

U.S. at 715–16 ("it is not within the judicial function and judicial competence to inquire whether the petitioner … correctly perceived the commands of [his] faith"). The practical implications of any belief, like the belief itself, are left solely within the province of each church. That is why the religious questions doctrine applies, not simply to questions of doctrine, but "with equal force" to practical matters such as "church disputes over church polity and church administration." *Milivojevich*, 426 U.S. at 710.

These principles dispose of this case. As this Court has recognized, church plans may, consistent with their fiduciary obligations, screen out investments in companies whose activities violate their religious conscience. *Basich*, 540 N.W.2d at 86. Setting such screens may cause returns to diverge from returns of secular funds. *See supra* at 13–17. To decide whether a church plan adopted reasonable investment strategies, a court would have to determine the church's doctrine, assess what screens this doctrine necessitates, and calculate the return that might be expected in light of these screens. A court would also have to opine on the existence of alternative investment strategies with better returns that the church's "doctrine should find to be morally acceptable." 540 N.W.2d at 86. Thus, "any review of [a church plan's investment] policies would entangle the court in reviewing church doctrine and policy." *Id.*

The same is true for deciding whether the fees charged by a church plan were reasonable. To answer this question, a court would have to decide which, if any, of the expenses incurred by the plan were unreasonable. For example, the court would have to inquire into the justification for research and trading undertaken to implement screens (and even though that activity may be justifiable as a prudent fiduciary decision, it may

nonetheless entangle a court in religious beliefs); for shareholder resolutions and other shareholder advocacy; for monitoring church-wide compliance with a denomination's pension plan mandate; and for complimentary services, such as free enrollment in a widows-and-orphans fund, that the plan offers—all of which may result in fees assessed against the plan. Because church plans often undertake such activities in fulfillment of their religious commitments, a court cannot determine whether a plan's fees are reasonable without first determining what a church's doctrine is and what activities that doctrine requires. The court would also have to inquire whether alternative services would have achieved the church plan's religious objectives and, in some cases, question the denomination's decision to mandate participation in a pension plan sponsored and administered by the church's pension board. This would require the court to dictate to the church plan what expenses are "morally acceptable." *Basich*, 540 N.W.2d at 86.

Furthermore, deciding whether a church plan's fees are reasonable would require a court to undertake "a searching and therefore impermissible inquiry into church polity" and other beliefs that affect church plan operations. *Jones*, 443 U.S. at 605. As explained, a church's doctrine can significantly affect a church plan's structure and operations. A court cannot determine whether a church plan's fees were reasonable without pronouncing on the church's beliefs about church structure and aspects of doctrine that affect plan operations. This a court may not do. *Id.*; *see also Presbyterian Church*, 393 U.S. at 450. Indeed, the judicial review plaintiffs seek raises the prospect of courts "interven[ing] on behalf of groups espousing particular doctrinal beliefs" by setting a

standard for reasonableness that, for a church plan associated with a church of a different polity, is not reasonable at all. *Milivojevich*, 426 U.S. at 709.

For all these reasons, no "neutral principles of law," *Jones*, 443 U.S. at 603, exist for courts to apply to suits challenging the reasonableness of church plan investment and fee decisions. The reasonableness standard the courts would apply "rel[ies] on" and "incorporates religious concepts," *id.* at 604—the religious aims of the church affiliated with the church plan. Because deciding the case "in purely secular terms" is impossible, *id.*, the religious questions doctrine precludes adjudication.

Plaintiffs suggest the "neutral principles" inquiry is satisfied when a statute is a "neutral law of general applicability"—*i.e.*, it does not unfavorably single out religion. Br. 13, 19 (citing *Smith*, 494 U.S. 872). But the Supreme Court has rejected applying *Smith* to cases, like this one, involving "government interference with an internal church decision that affects the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 707. For good reason: unlike the *Smith* test, which applies only in the free exercise context, the religious questions doctrine protects a wide variety of values, including preventing establishment of religion and foreclosing courts from deciding questions in which they have no competence. Indeed, the *Smith* Court itself cited the need to avoid "determin[ing] the place of a particular belief in a religion" in support of the rule it adopted. 494 U.S. at 887.

Plaintiffs contend courts may resolve lawsuits challenging the reasonableness of church plans' investment and fee decisions unless the plan affirmatively "identifie[s] any particular ELCA doctrine or policy" motivating those decisions. Br. 10. But the Supreme

Court has considered and rejected this argument, too. In *Hosanna-Tabor*, as here, the plaintiff claimed the basis for the church's contested action was not doctrinal, but the Court explained that the religious questions doctrine precludes judicial review of a church's decision anytime a decision is "strictly … ecclesiastical"—that is to say, pertaining to church governance, *see Kedroff*, 344 U.S. at 115—not just when the decision "is made for a religious reason." 132 S. Ct. at 709. That is because "the mere *adjudication* of" whether an action is based on religious belief "would pose grave problems for religious autonomy" by placing a "civil factfinder … in ultimate judgment of what the accused church really believes" en route to deciding whether the action was taken for religious reasons. *Id.* at 715 (Alito, J., concurring) (emphasis added).

Plaintiffs' position that judicial review is appropriate whenever a church plan's investment or fee decision is not suitably "religious" would hopelessly entangle the courts with religion by forcing courts to sort the "religious" decisions from the "non-religious" ones. "The prospect of … litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment …." *Cathedral Acad.*, 434 U.S. at 132–33. Attempting to isolate "religious" decisions would require the "comprehensive, discriminating, and continuing state surveillance" that violates the First Amendment. *Lemon*, 403 U.S. at 619. Indeed, the Supreme Court has warned against precisely this "kind of state inspection and evaluation of the religious content of a religious organization," and in particular against permitting government to "determine how much of the total expenditures is attributable to secular [activity] and how much to religious activity." *Id.* at 620; *see also Hernandez*,

490 U.S. at 694 (potential for entanglement raised by requiring "IRS and reviewing courts to differentiate 'religious' benefits from 'secular' ones"); *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979) (entanglement arises where NLRB would have to resolve whether religious reasons motivated action).[12] Furthermore, forcing a church plan "to predict which of its activities a secular court will consider religious" is itself "a significant burden." *Amos*, 483 U.S. at 336; *see also Basich*, 540 N.W.2d at 87. The plan, "understandably … concerned that a judge would not understand its religious tenets and sense of mission," may forgo investment decisions dictated by its religious convictions out of "[f]ear of potential liability." *Amos*, 483 U.S. at 336.

Congress, too, has rejected plaintiffs' approach. As noted above, recognizing the potential for entanglement in government supervision of church plans, 124 Cong. Rec. 12,106, Congress exempted church plans from ERISA coverage *entirely*—not simply when the church plan makes a decision that is expressly based on its religious principles. *See* 29 U.S.C. § 1003(b)(2); *see also* 15 U.S.C. § 77c(a)(2)(D), (a)(13) (same for registration of interests and participations); *id.* § 77r(a), (b)(4) (same for preemption of state blue sky laws). Congress thus avoided both requiring courts to separate "religious" decisions from "non-religious" ones and trespassing on legitimate church confidentiality

[12] Courts may assess whether something is "of a religious or spiritual nature" when the question involves merely "a narrow fact issue that courts can decide without excessive entanglement," *State v. Wenthe*, 839 N.W.2d 83, 91 (Minn. 2013), but "inquir[ing] into church motives," such as the reason for investments, is not such a narrow factual issue, *Basich*, 540 N.W.2d at 86; *see also Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. Ct. App. 1993) (religious questions doctrine precludes adjudication of claim that statement was made with non-religious motives).

concerns. *See* S. Rep. No. 93-383, at 4965 ("examinations of [church plan] books and records … might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities"). Furthermore, Congress amended the church plan exemption in 1980 precisely to prevent the IRS from deciding "what is and what is not an integral part of … religious groups' mission." 125 Cong. Rec. 10,055 (letter to Sen. Talmadge).

CONCLUSION

In the case of church plans, investment and fee decisions directly reflect faith. Inquiry into the reasonableness of these decisions would inevitably require examination of a church's doctrine, as reflected in its polity, administration, and investment policies. Such an inquiry would not and cannot rely on neutral principles of law. The district court correctly dismissed this case, and this Court should affirm.

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Respectfully submitted,

/s/ Aaron D. Van Oort

Eric D. McArthur (*pro hac vice*)
Sidley Austin LLP
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

Steven L. Severson, #152857
Aaron D. Van Oort, #315539
Blake J. Lindevig, #0392324
Faegre Baker Daniels LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word count and typeface limitations of Minn. R. App. P. 132.01. As calculated using Microsoft Word 2007, the brief contains 6,986 words.

__*/s/* Aaron D. Van Oort_____