

No. 16-910

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**In the Supreme Court of the United States**

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BOARD OF PENSIONS OF THE EVANGELICAL  
LUTHERAN CHURCH IN AMERICA (D/B/A PORTICO  
BENEFIT SERVICES), PETITIONER

*v.*

PASTOR DAVID BACON, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE MINNESOTA COURT OF APPEALS*

---

**BRIEF FOR THE STATES OF TEXAS, ARKANSAS,  
LOUISIANA, OKLAHOMA, AND UTAH, AND THE  
COMMONWEALTH OF KENTUCKY BY AND  
THROUGH GOVERNOR MATTHEW G. BEVIN AS  
AMICI CURIAE IN SUPPORT OF PETITIONER**

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AMICI CURIAE IN SUPPORT OF PETITIONER**

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**INTEREST OF AMICI CURIAE**

Amici are the States of Texas, Arkansas, Louisiana, Oklahoma, and Utah, and the Commonwealth of Kentucky by and through Governor Matthew G. Bevin.<sup>1</sup> All

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<sup>1</sup> Counsel of record for the parties received timely notice of intent to file this amicus brief, *see* Sup. Ct. R. 37.2(a), and all parties consented to the filing of this brief, *see* Sup. Ct. R. 37.3. Counsel for amici authored this brief; no party or any party's counsel authored any part of this brief, and no person or entity, other than amici, made a monetary contribution for the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

of the amici have adopted, at least in part, the Uniform Prudent Investor Act (“UPIA”), which respondents seek to apply to church retirement plans for pastors. Respondent Pastor David Bacon and his class action seek to prevent churches from exercising control over their ministries by interfering with churches’ ability to provide retirement options for pastors that abide by their deeply held religious beliefs. Amici have an interest in protecting the liberty of churches and pastors to resolve religious disputes on their own. That interest is demonstrated by the fact that not one of the amici has applied the UPIA or fiduciary duties to church retirement plans. Thus, amici have an interest in the correct application (or non-application) of the UPIA and common law to intra-church disputes.

#### SUMMARY OF ARGUMENT

Religious freedom has always depended upon churches and religious bodies possessing the legal space necessary to carry out their religious missions. To this end, courts avoid passing upon questions central to the beliefs of religious bodies. *See, e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 185-86 (2012). This principle extends to the financial dealings of religious bodies. Congress in ERISA also noted that government should not influence religious financial decisions. 29 U.S.C. §§ 1002(33), 1003(b)(2).

Until the Minnesota Court of Appeals’ ruling below, no State had applied the UPIA in an effort to interfere with how religious bodies compensate their pastors or

invest their money. Yet, because the UPIA exists in nearly every State, the need for uniformity in this area is great. The Court should therefore grant the petition and provide needed guidance about how the First Amendment applies to the financial dealings of religious bodies.

#### ARGUMENT

### **I. The Widespread Adoption of the Uniform Prudent Investor Act Heightens the National Importance of the Questions Presented.**

The nationwide importance of the questions presented is confirmed by the fact that all but three States have adopted the Uniform Prudent Investor Act (UPIA), at least in part. Before the Minnesota Court of Appeals' ruling below, no State had ever applied the UPIA to an intra-church dispute over pastoral compensation. If the lower court's decision is left to stand, similar class-action lawsuits could threaten churches, other religious organizations, and the modest, theologically-based retirement security they try to provide their leaders. The First Amendment, however, bars courts from adjudicating intra-church disputes like this. *E.g.*, *Hosanna-Tabor*, 565 U.S. at 185-86; *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 114-15 (1952) (citing *Watson v. Jones*, 80 U.S. 679, 729 (1871)).

The issues presented in this case are not unique to Minnesota; they are ones that most States confront given the widespread adoption of the UPIA and common-law fiduciary duties. In 1994, the National Conference

of Commissioners on Uniform State Laws approved the UPIA and recommended it for enactment in all jurisdictions.<sup>2</sup> The American Bar Association approved the UPIA the next year.<sup>3</sup>

Since then, 47 States, the District of Columbia, and the U.S. Virgin Islands have adopted some variation of the UPIA, either in whole or part. *See infra* Appendix (43 States, the District of Columbia, and the Virgin Islands).<sup>4</sup> This nearly uniform adoption of the UPIA means that the implications of this case are far-reaching. As petitioner notes, if this case is allowed to proceed in the lower courts, it will inspire others to file similar class-action lawsuits against churches and religious organizations. Thus, the lower court's conclusion that the case may proceed to trial under the Minnesota UPIA means that other civil courts throughout the country may now face the task of adjudicating whether a church's investment policies conform to its theological beliefs—a task forbidden by the First Amendment.

This risk is not hypothetical, as churches for quite some time have made investment and business deci-

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<sup>2</sup> Nat'l Conference of Comm'rs on Uniform State Laws, Uniform Prudent Investor Act (Apr. 1995), [http://www.uniformlaws.org/shared/docs/prudent%20investor/upia\\_final\\_94.pdf](http://www.uniformlaws.org/shared/docs/prudent%20investor/upia_final_94.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> Four other States—Florida, Kentucky, Louisiana, and Washington—have adopted portions or principles of the UPIA. *See* Fla. Stat. § 518.11; Ky. Rev. Stat. Ann. § 386B.9-010; La. Stat. § 9:2127; Wash. Rev. Code § 11.100.020.

sions based on religious factors beyond pure economics. For example, the Episcopal Church manages \$8 billion in retirement funds and has made socially responsible investments at least since the 1960s. *See* The Episcopal Church, *Socially Responsible Investing*, <http://www.episcopalchurch.org/page/socially-responsible-investing>. The United States Conference of Catholic Bishops maintains detailed guidelines and policies for financial investments based on scripture and church teaching. *See* U.S. Conference of Catholic Bishops, *Principles for USCCB Investments* (Nov. 12, 2003), <http://www.usccb.org/about/financial-reporting/socially-responsible-investment-guidelines.cfm>. The Reformed Church in America also invests its funds based on scripture. *See* Reformed Church in Am., *Gen. Synod Statements: Socially Responsible Investing*, <https://www.rca.org/sociallyresponsibleinvesting>.

The petition therefore raises an issue of national importance similar to the issues currently before the Court in *Advocate Health Care Network v. Stapleton*, 817 F.3d 517 (7th Cir.), *cert. granted*, 137 S. Ct. 546 (2016) (No. 16-74); *Saint Peter's Healthcare Sys. v. Kaplan*, 810 F.3d 175 (3d Cir. 2015), *cert. granted*, 137 S. Ct. 546 (2016) (No. 16-86); and *Dignity Health v. Rollins*, 830 F.3d 900 (9th Cir.), *cert. granted*, 137 S. Ct. 547 (2016) (No. 16-258). In those cases, the Court has granted certiorari to consider whether ERISA's church-plan exemption should apply not only to churches but also to church-affiliated organizations. Here, the questions presented ask whether state civil courts may apply the UPIA and common-law fiduciary duties to

*churches themselves*—not just church-affiliated organizations—and their decisions about retirement investments of pastors. The Court should grant the petition here to address these similarly important issues regarding the liability that can be imposed on religious organizations.

## **II. The Court Below Erred by Refusing to Apply the First Amendment and Abstain from Second-Guessing Religious Financial Decisions.**

Despite the widespread adoption of the UPIA, courts abstain from applying its duties to interfere with compensation and benefits negotiated between clergy and churches. Amici are aware of no case—except the decision below—that applies the UPIA to a church’s pension, retirement, or compensation decisions for clergy.

More broadly, courts avoid interfering with church decisions on how to compensate pastors because that necessarily interferes with the administration of a religious organization. Not only are courts ill-equipped to second-guess those church decisions, but the First Amendment prohibits this: “[T]he Establishment Clause . . . prohibits government involvement in such ecclesiastical decisions,” *Hosanna-Tabor*, 565 U.S. at 189, including “who can act as [church] ministers,” *id.* at 185.

And decisions about how to provide compensation and benefits for those that devote themselves to ministry are closely related to personnel choices—like the personnel decision in *Hosanna-Tabor*. The manner in

which churches decide to compensate their pastors, whether through salary, retirement benefits, or health insurance, is an “employment decision” based on “internal governance of the church.” *Id.* at 188.

Likewise, the First Amendment “severely circumscribes the role that civil courts may play in resolving church property disputes.” *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449 (1969). Courts may not inquire into matters concerning “theological controversy, church discipline, ecclesiastical government, or the conformity of the members of a church to the standard of morals required of them.” *Serbian E. Orthodox Diocese for U.S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 713-14 (1976); see *Presbyterian Church*, 393 U.S. at 449 (“First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice”). When religious questions are at issue—such as a church’s decisions about which companies to invest in based upon the church’s religious beliefs—courts must abstain from second-guessing those decisions. See, e.g., *Hosanna-Tabor*, 565 U.S. at 185-86. But when the decisions are not religious, then courts may resolve the dispute on neutral principles. *Jones v. Wolf*, 443 U.S. 595, 604 (1979). So unless decisions about church compensation of pastors involve undeniably non-sectarian considerations (e.g., the identity of the person listed as a beneficiary on an insurance policy), the First Amendment prohibits courts from interfering with these church decisions.

In accordance with this Court’s precedent preventing judicial intrusion into church-property disputes, many courts have also declined to intervene in fraud, breach-of-fiduciary-duty, and conspiracy cases when parishioners accuse church leaders of using funds for improper purposes—because those decisions involve religious matters. *See, e.g., Rosenberger v. Jamison*, 72 So. 3d 199 (Fla. Dist. Ct. App. 2011); *In re Goodwin*, 293 S.W.3d 742, 749-50 (Tex. App.—San Antonio 2009); *Hawthorne v. Couch*, 946 So. 2d 288 (La. Ct. App. 2006); *Mount Olive Primitive Baptist Church v. Patrick*, 42 So. 2d 617 (Ala. 1949).

For example, in *Harris v. Matthews*, 643 S.E.2d 566, 571 (N.C. 2007), the North Carolina Supreme Court held that when “no neutral principles of law exist to resolve plaintiffs’ [breach of fiduciary duty, conversion, and conspiracy] claims, the courts must defer to the church’s internal governing body” to avoid “becoming impermissibly entangled in the dispute.” The court reasoned that examining “whether actions, including expenditures, by a church’s pastor, secretary, and chairman of the Board of Trustees were proper requires an examination of the church’s view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management.” *Id.* “Because a church’s religious doctrine” informs those considerations, the plaintiffs’ claims were “no different than asking a court to determine . . . whether a church’s charitable pursuits accord with the congregation’s beliefs.” *Id.*

In contrast, the court below here held that respondent’s lawsuit against a religious organization may go to

trial because it found the case can be resolved under neutral principles of law. Pet. App. 13-14. But the church's investment decisions are governed by a Social Statement and an Issue Paper on Human Rights. Pet. 7-8. These documents are inherently religious, and the investment decisions they motivate cannot be adjudicated on neutral principles. They are religious matters that courts cannot review under the First Amendment.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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## APPENDIX

### State Uniform Prudent Investor Acts

- Alabama: Ala. Code §§ 19-3B-901 *et seq.*
- Alaska: Alaska Stat. § 13.36.275
- Arkansas: Ark. Code §§ 28-73-901 *et seq.*
- California: Cal. Prob. Code §§ 16045 *et seq.*
- Colorado: Colo. Rev. Stat. §§ 15-1.1-101 *et seq.*
- Connecticut: Conn. Ge. Stat. §§ 45a-541 *et seq.*
- District of Columbia: D.C. Code §§ 19-1309.01 *et seq.*
- Hawaii: Haw. Rev. Stat. § 554C-1
- Idaho: Idaho Code §§ 68-501 *et seq.*
- Illinois: 760 Ill. Comp. Stat. 5/5
- Indiana: Ind. Code §§ 30-4-3.5-1 *et seq.*
- Iowa: Iowa Code § 633A.4309
- Kansas: Kan. Stat. Ann. §§ 58-24a01 *et seq.*
- Maine: Me. Stat. tit. 18-B, §§ 901 *et seq.*
- Maryland: Md. Code Ann., Est. & Trusts § 15.114
- Massachusetts: Mass. Gen. Laws ch. 203C, §§ 1-11
- Michigan: Mich. Comp. Laws §§ 700.1501 *et seq.*
- Minnesota: Minn. Stat. § 501C.0101
- Mississippi: Miss. Code Ann. §§ 91-9-601 *et seq.*

- Missouri: Mo. Rev. Stat. §§ 469.900 *et seq.*
- Montana: Mont. Code Ann. §§ 72-38-901 *et seq.*
- Nebraska: Neb. Rev. Stat. §§ 30-3883 *et seq.*
- Nevada: Nev. Rev. Stat. §§ 164.705 *et seq.*
- New Hampshire: N.H. Rev. Stat. Ann. § 564-B:9-906
- New Jersey: N.J. Stat. Ann. §§ 3B:20-11.1 *et seq.*
- New Mexico: N.M. Stat. Ann. §§ 45-7-601 *et seq.*
- New York: N.Y. Est. Powers & Trusts Law § 11-2.3
- North Carolina: N.C. Gen. Stat. §§ 36C-9-901 *et seq.*
- North Dakota: N.D. Cent. Code §§ 59-17-01 *et seq.*
- Ohio: Ohio Rev. Code §§ 5809.01 *et seq.*
- Oklahoma: Okla. Stat. §§ 175.60 *et seq.*
- Oregon: Or. Rev. Stat. §§ 130.750 *et seq.*
- Pennsylvania: 20 Pa. Cons. Stat. §§ 7201 *et seq.*
- Rhode Island: 18 R.I. Gen. Laws § 18-15-13
- South Carolina: S.C. Code Ann. § 62-7-933
- South Dakota: S.D. Codified Laws §§ 55-5-6 *et seq.*
- Tennessee: Tenn. Code Ann. §§ 35-14-101 *et seq.*
- Texas: Tex. Prop. Code §§ 117.001 *et seq.*
- Utah: Utah Code Ann. §§ 75-7-901 *et seq.*

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- Vermont: Vt. Stat. Ann. tit. 14A, § 901 *et seq.*
- Virgin Islands: V.I. Code Ann. tit. 9, §§ 701 *et seq.*
- Virginia: Va. Code Ann. §§ 64.2-780 *et seq.*
- West Virginia: W. Va. Code §§ 44-6C-1 *et seq.*
- Wisconsin: Wis. Stat. § 881.01
- Wyoming: Wyo. Stat. Ann. §§ 4-10-901 *et seq.*