86-179 and 86-401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *et al* ,

Appellants,

v

CHRISTINE J AMOS, *et al* ,

Appellees

UNITED STATES OF AMERICA,

Appellant,

v

CHRISTINE J AMOS, *et al* ,

Appellees

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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QUESTIONS PRESENTED

1 Whether § 702, which allows religious employers to discriminate on the basis of religion in completely non-religious businesses and among employees whose duties are purely secular, impermissibly advances religion in violation of the establishment clause?

2 Whether, in the absence of § 702, the Mormon Church violated Title VII by firing Appellee Mayson because he failed to comply with purely religious conditions imposed upon him after sixteen years of satisfactory employment, even though his continued employment as a building engineer in a public gymnasium entailed only secular activities?

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Appellants,

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BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court

INTEREST OF THE *AMICUS CURIAE*

B'nai B'rith, founded in 1843, is the oldest civic service organization of American Jews The Anti-Defamation League ("ADL") was organized in 1913 as a section of the B'nai B'rith to advance good will and mutual understanding among Americans of all races and creeds and to combat racial and religious prejudice in the United States

Among its other activities directed to these ends, ADL has filed briefs *amicus curiae* opposing practices and policies which threaten to undermine the separation in this country between church and state Briefs have been filed in such cases as *Lynch v Donnelly*, 465 U S 668 (1984), *Widmar v Vincent*, 454 U S 263 (1981), *Lemon v Kurtzman*, 403 U S 602 (1971) and *School Dist of Abington v Schempp*, 374 U S 203 (1963)

ADL also supports the rights of all groups to practice their religion free from unjustified governmental interference ADL has filed briefs in *Wallace v Jaffree*, 472 U S 38 (1985), *Sherbert v Verner*, 374 U S 398 (1963), and *Torcaso v Watkins*, 367 U S 488 (1961)

In the case now before it, the Court is asked to decide whether § 702 of Title VII of the Civil Rights Act of 1964, 42 U S C § 2000e-1, allows the Mormon Church to fire a building engineer responsible for maintaining a public gymnasium owned by the Mormon Church, because he failed to fulfill religious requirements it imposed As an organization committed to the right of all citizens to enjoy civil rights under law, ADL believes that such religious discrimination may not be tolerated ADL believes that the exemption relied upon by the Church, which applies to wholly secular activities, is a patent violation of the establishment clause While ADL believes that governmental regulations such as Title VII should not be applied so as to interfere with religious activities, it is of the view that existing statutory and constitutional doctrines adequately protect against this possibility

SUMMARY OF ARGUMENT

I Section 702 violates the establishment clause because it has the primary effect of advancing religion and thereby fails the second prong of the test defined by this Court in *Lemon v Kurtzman*, 403 U S 602 (1971) The statute advances religion in the following three ways it benefits religious employers at the direct expense of their employees, it permits coercion of religious fidelity from employees, and it authorizes government-sanctioned religious discrimination Moreover, § 702 is not required to spare Title VII from constitutional infirmity because courts can readily apply Title VII to religious institutions without creating excessive entanglement problems

II Because § 702 is invalid, Title VII must be applied to the Mormon Church as to all other employers Firing a building engineer for failure to adhere to religious conditions imposed by the Church is a plain case of religious discrimination and is unlawful Any legitimate interest the Church has in preserving its religious integrity by hiring only co-religionists is already well protected by a statutory provision barring government interference with religiously-based hiring decisions by religious schools, by rulings that Title VII does not apply to hiring ministers or minister-like employees, and by constitutional prohibitions against government interference with religious doctrine and internal church affairs The free exercise clause prevents Title VII from being applied in a manner which unduly interferes with the religious rights of the employer Because no religious practice of the Morman Church is burdened by applying Title VII to the firing of a building engineer at a public gymnasium, the Church is not exempt from Title VII on the facts of this case

ARGUMENT

POINT I

SECTION 702 IS UNCONSTITUTIONAL BECAUSE ITS BROAD EXEMPTION OF RELIGIOUS ORGANIZATIONS FROM TITLE VII'S PROHIBITIONS AGAINST RELIGIOUS DISCRIMINATION VIOLATES THE ESTABLISHMENT CLAUSE

At issue in this case is whether § 702 of Title VII of the Civil

Rights Act violates the establishment clause [1] This Court has repeatedly reaffirmed the three part analysis it employs in evaluating an establishment clause challenge To survive, the statute must have a secular purpose, its primary effect must be neither to advance nor to inhibit religion, and it may not excessively entangle government in the affairs of religion *Lemon v Kurtzman,* 403 U S 602, 612-13 (1971) *See Grand Rapids School Dist v Ball,* 473 U S 373, 105 S Ct 3216 (1985) The failure to satisfy any one of these criteria will render a statute constitutionally infirm

Appellees assert that § 702 violates all three prongs of the *Lemon* test In this brief we focus on the second prong—which Appellants, Presiding Bishop of the Church of Jesus Christ of Latter-day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints, have simply ignored—and we demonstrate that § 702 violates the establishment clause because it has the primary effect of advancing religion [2] We then respond to Appellants' argument that, notwithstanding the clear failure to comply with the *Lemon* test, § 702 should be upheld because it is required to save the rest of Title VII from violating the free exercise clause

A Section 702 Impermissibly Advances Religion

Section 702 of Title VII of the Civil Rights Act has the primary effect of advancing religion and, therefore, clearly violates the establishment clause *See Estate of Thornton v Caldor,* 472 U S 703, 105 S Ct 2914 (1985)

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[1] Section 702 states in relevant part

> This subchapter shall not apply to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities

[2] Appellants argue that the three part *Lemon* test does not apply They instead contrive a novel test which omits the most critical inquiry—whether the statute has the primary effect of advancing religion *See* Brief for the Appellants at p 23 While Appellants' reluctance to grapple with this issue is understandable, their suggestion that the Court should ignore the central issue of whether a statute promotes the establishment of religion and their insistence that the Court should depart from its precedents are without foundation or merit

Section 702 specifically exempts religious employers from the requirements of Title VII and allows them to discriminate on the basis of religion This special privilege extends to all businesses owned by religious organizations, even those without any demonstrable religious orientation and those which are dedicated solely to making money

By granting religious employers a privilege denied to all others, § 702 impermissibly advances religion in at least three distinct ways 1) it confers a benefit to religious employers at the direct expense of others, 2) it provides religious employers with a powerful weapon for imposing their religious faith on employees, and 3) it creates a symbolic link between the government and religion

1 Section 702 Confers Special Benefits On Religious Employers at the Expense of Others

The statutory exemption of § 702 impermissibly advances religion because it provides a special benefit to religious employers at the direct expense of the employees of those religious organizations and at the expense of competing employers

In *Estate of Thornton v Caldor*, 472 U S 703, 105 S Ct 2914 (1985), this Court struck down, as violative of the establishment clause, a Connecticut law which guaranteed all employees the right to take their Sabbath off from work The Court found the law invalid because it dictated that Sabbath observance automatically overrides secular interests in the workplace, because it took no account of the convenience or interests of the employer or of the other employees who did not observe the Sabbath, and because the employer and others were therefore required to adjust their affairs whenever the statute was invoked by an employee No exception was provided for situations where honoring the dictates of the Sabbath observer would cause the employer substantial economic burdens or where the employer's compliance would significantly burden other employees required to work in place of the Sabbath observers 472 U S at ——, 105 S Ct at 2918 The Court found that

> This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the religion clauses, so well articulated by Judge Learned Hand

> "the First Amendment gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities "

Id (citation omitted)

Section 702 creates the same "unyielding weighting" in favor of religious employers with complete disregard for the rights of their employees While the statute struck down by the Court in *Caldor* merely imposed substantial economic burdens on non-religious employees and co-workers, the statute at issue here can deprive non-religious employees of their livelihood A religious employer need only invoke the protection of the exemption, and the rights of secular employees are automatically abrogated The statute allows a qualified, competent employee such as Mayson to be arbitrarily fired after sixteen years of faithful service merely because he does not attend church with regularity

Section 702 also provides religious employers with a significant benefit—an exemption from employment regulations—at the expense of competing secular employers By granting religious employers a broad exemption, the government, in effect, is sponsoring religion-owned businesses Government sponsorship of religion is one of the primary evils against which the establishment clause is designed to defend *Committee for Public Educ v Nyquist,* 413 U S 756, 772 (1972) Sponsorship of religion through an exemption from statutory requirements "is a sure formula for concentrating and vastly extending the worldly influence of those religious sects having the wealth and inclination to buy up pieces of the secular economy " *King's Garden Inc v FCC,* 498 F 2d 51 at 55 (D C Cir 1974) (footnote omitted) *See* Opinion of the District Court, Appendix to Jurisdictional Statement *("App"),* at 69

This benefit is especially obvious for those religious groups, like the Mormon Church, that require their members to pay a tithe on their income An employee of a Church-owned business who does not give back ten percent of his pre-tax salary is not a Mormon in good standing Firing him, therefore, is religious discrimination but is exempted from Title VII by § 702 In effect, then, the exemption permits Mormon employers to require employees to return ten percent of their salaries to the Church, an economic advantage not available to competing employers who are not protected by § 702

The economic benefit conferred on religious entities by § 702 extends to all business ventures, including those businesses that are totally nonreligious As the Court of Appeals for the District of Columbia has stated,

> the exemption immunizes virtually every endeavor undertaken by a religious organization If a religious sect should own and operate a trucking firm, a chain of motels, a racetrack, a telephone company, a railroad, a fried chicken franchise, or professional football team, the enterprise could limit employment to members of the sect without infringing the Civil Rights Act

King's Garden Inc v FCC, 498 F 2d 51, 54 (D C Cir 1974) (Wright, J) (footnote omitted) [3]

The Mormon-owned business involved in the instant case serves as an excellent example of the competitive advantage § 702 provides religious employers One of the Appellees in this case, Frank Mayson, was employed at a public gymnasium located in downtown Salt Lake City that is owned by the Mormon Church The gym contains the same facilities found at any commercial gymnasium or health club, including a swimming pool, saunas, steam rooms and whirlpools, basketball, volleyball, racquet ball and squash courts, exercise and weight lifting facilities and a running track It contains barber and beauty shops, men's and women's massage salons and a snack bar, which are run for profit as private concessions The gym is open to all members of the public for annual or daily membership fees It places radio, television, and print media advertisements, none of which contain any reference to the relationship between the gym and the Mormon Church *App* at 13-16

In short, the Deseret gymnasium is a public facility indistinguishable from any other gym or health club, except that it is owned by the Mormon Church Nonetheless, § 702 allows the gym to require all of its employees to return ten percent of their income to

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[3] In *King's Garden*, 498 F 2d 51, the Court of Appeals for the District of Columbia found, in *dictum*, that § 702 obviously violated the establishment clause *See also Feldstein v Christian Science Monitor*, 555 F Supp 974 (D Mass 1983)

their employer, something no competing health club can do The economic advantage to the Church and to the secular businesses it owns could not be more clear

2. Section 702 Provides Religious Employers With a Means of Imposing Their Faith Upon Employees

Section 702 further advances religion by conferring upon religious organizations a means of coercing religious obedience from their employees Granting an employer an exemption to a regulatory scheme in order to accommodate that employer's religious beliefs violates the establishment clause if it "operates to impose the employer's religious faith on the employees " *United States v Lee*, 455 U S 252, 261 (1982)

Because of § 702, thousands of employees of businesses owned by religious organizations may be faced with a choice complying with the religious beliefs of their employers or losing their means of livelihood "[T]he exemption invites religious groups, and them alone, to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion " *King's Garden*, 498 F 2d at 55

The § 702 exemption is so broad and lacking in standards that religious employers may use it overtly to foist their religious views on all employees A religious employer need not even devise a pretense, he may threaten to fire employees as a device for spreading religious faith And such threats of dismissal may occur in the context of businesses that happen to be owned by a religion but which otherwise have nothing to do with religion [4]

In *Larkin v Grendel's Den, Inc* , 459 U S 116 (1982), this Court struck down a similar law as violative of the establishment clause The statute at issue in that case conferred upon churches the ability to veto a liquor license application from any restaurant within

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[4] Section 702 may thus create a climate in which it is easier for members of majority religions to find employment than it is for members of minority religions or for the non-religious This is another way in which § 702 impermissibly advances religion

a prescribed distance of a house of worship This Court found that the statute impermissibly advanced religion because

> The churches' power under the statute is standardless, calling for no reasons, findings, or reasoned conclusions That power may therefore be used by churches to promote goals beyond insulating the church from undesirable neighbors, it could be employed for explicitly religious goals, for example, favoring liquor licenses for members of that congregation or adherents of that faith

Id at 125

As in *Larkin*, the statute at issue here confers a privilege which requires no reasons, findings, or conclusions from the religious employer and which totally lacks any governing standards It can obviously be used to pursue the kind of "explicitly religious goals' that this Court found impermissible in *Larkin* Section 702 allows a religion to take advantage of its position as employer and use the exemption from Title VII as a tool to proselytize thousands of secular employees That is a prospect even more daunting than that which concerned the Court in the *Larkin* case

3 Section 702 Creates a Symbolic Link Between Government and Religion

Section 702 impermissibly advances religion by creating a symbolic link between government and religion As this Court recently stated

> Government promotes religion when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the establishment clause is violated

Grand Rapids School Dist v Ball, 473 U S 373, ——, 105 S Ct 3216, 3226 (1985)

The § 702 exemption creates a gross distinction between businesses owned by religious groups and businesses not owned by religious groups Religious employers are granted the ability, denied

all others, to fire employees who do not conform to their religious beliefs The exemption conveys the impression that government is lending its support to the employer's demands of religious fidelity

There is a strong national commitment to fight discrimination in the workplace A broad exemption exclusive to religious employers—one which includes secular activities—can only be perceived as a complete rejection of equal employment principles This perception will be especially acute among employees in church-owned businesses who learn, after being fired on religious grounds, that a special provision of the anti-discrimination law denies them any relief

B. Section 702 Is Not Required to Save Title VII From Excessive Entanglement Problems

As noted earlier, Appellants have by and large circumvented the question of whether § 702 has the primary effect of advancing religion In addition to avoiding the three prong *Lemon* test, Appellants have relied upon the argument that § 702 must be found constitutional because it is required to save the balance of Title VII from entanglement problems As we show below, however, application of Title VII to the secular activities of religious institutions creates no entanglement problems whatsoever

Title VII and other laws concerning the workplace are routinely applied by the courts to religious employers in the context of sexual and racial discrimination without creating entanglement problems Most recently, this Court in *Tony & Susan Alamo Found v Secretary of Labor,* 471 U S 290, 105 S Ct 1953 (1985), ruled that the Fair Labor Standards Act applies to employees of a religious enterprise, over objections that such application would violate the employees' free exercise rights and would excessively entangle the state in religion The Court found that the inquiries required by the law did not resemble "the kind of government surveillance this Court has previously held to pose an intolerable risk of government entanglement with religion " 471 U S at ——, 105 S Ct at 1964 (footnote omitted) *See also EEOC v Pacific Press Publishing Ass'n,* 676 F 2d 1272 (9th Cir 1982)

Application of Title VII to unlawful religious discrimination by a religious organization is no more entangling than its application to other kinds of discriminatory conduct *See App* at 44-48 Entanglement has only been found in cases involving ongoing government surveillance of religious institutions Illustrative is *Lemon v Kurtzman*, 403 U S 602 (1971), in which this Court held that the supervision necessary to ensure that teachers in parochial schools do not convey religious messages to their students would constitute excessive entanglement of church and state

> Comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected These prophylactic contacts will involve excessive and enduring entanglement between state and church

Id at 619

This sort of ongoing, close and continuous surveillance of religious personnel has been involved in cases where this Court has found excessive entanglement *See Aguilar v Felton*, 473 U S 402, ——, 105 S Ct 3232, 3237-38 (1985) ("[B]ecause assistance is provided in the form of teachers, ongoing inspection is required to insure the absence of a religious message ") Conversely, in situations where ongoing and continuous supervision of a religious entity has not been required, this Court has declined to find excessive entanglement *Id See Lynch v Donnelly*, 465 U S 668, 684 (1983) (excessive entanglement requires ongoing, day-to-day interaction between church and state), *Mueller v Allen*, 463 U S 388, 403 n 11 (1993)

In applying Title VII to religious institutions, absolutely no ongoing surveillance of, or intrusion into, the religious entity by the state is required At most, to insure it does not tread on a church's free exercise rights, a court may determine the extent to which religious doctrine demands religious discrimination This type of analysis bears none of the hallmarks of entanglement, is completely inoffensive to the Constitution, and is routinely performed *See Alamo Foundation*, 471 U S at ——, 105 S Ct at 1963-64, *Wisconsin v Yoder*, 406 U S 205, 219 (1971), *Walz v Tax Comm'n of New York*, 397 U S 664 (1970) (State can determine without entanglement whether purported church is entitled to tax exemption)

In this case, the district court inquired whether religious doctrine demanded that all employees at Deseret Gymnasium be Mormons *See App* at 13-18 Such an inquiry, undertaken to determine whether or not the Mormon Church has violated Title VII, is unexceptional and in no way constitutes excessive entanglement of government with religion Even if Appellants' basic proposition were correct—that a statute which would otherwise violate the establishment clause is not unconstitutional if found to be necessary to avoid excessive entanglement—the basis for such an argument is nowhere present in this case Section 702 is not required to save Title VII from entanglement problems and is unconstitutional for violating the establishment clause

POINT II

THE COURT SHOULD AFFIRM THE DISTRICT COURT'S FINDING THAT THE FIRING OF MAYSON BY THE MORMON CHURCH VIOLATED TITLE VII NOT BY REFERENCE TO THAT COURT'S COMPLEX TEST BUT BY APPLYING ESTABLISHED CONSTITUTIONAL PRINCIPLES TO THE UNDISPUTED FACTS OF THIS CASE

The district court in this case properly found that the broad exemption provided by § 702 is unconstitutional as applied to non-religious activities of religious organizations The court further held that the firing of a building engineer by the Mormon Church violated Title VII The district court arrived at that result by employing an elaborate three part test to distinguish between the Church's religious activities, properly protected by the exemption, and its non-religious activities, which the court held to be subject to Title VII [5] Judge Winder held the § 702 exemption unconstitutional only

[5] The test devised by the district court required it to make three inquiries First, a court must decide if there are close ties between the religious organization and the activity at issue with regard to financial affairs, day-to-day operations, and management Second, it must determine if there is a nexus between the primary function of the activity in question and the religious rituals or tenets of the religious organization If both queries are answered in the affirmative, then the activity at issue is religious and exempt from Title VII coverage Where the nexus between the activity in question and the religious tenets of the religious organization is tenuous or non-existent, the court must examine the relationship between the specific job performed by the employee and the religious rituals or tenets of the religious organization *App* at 10-11

"as applied" to non-religious activities in an attempt to follow this Court's mandate that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available " *NLRB v Catholic Bishop of Chicago*, 440 U S 490, 500 (1979)

The district court's goal—to protect the free exercise rights of religious organizations within the constitutional reach of § 702—was commendable, and it arrived at the correct result However, we believe the court employed an overly complex approach In the face of unavoidable unconstitutionality, a court should hesitate before undertaking the quasi-legislative task of surgically altering an infirm statute The better approach here would have been to strike § 702 in its entirety, leaving to Congress the delicate job of drafting a more narrowly-crafted exemption that would provide necessary protection for religious autonomy while avoiding establishment problems [6] This approach is particularly appropriate where striking down the offending provision would leave intact a fully operative regulatory scheme, such as Title VII *See Immigration & Naturalization Service v Chadha*, 462 U S 919, 939-42 (1983), *Buckley v Valeo*, 424 U S 1, 108 (1976)

We believe that the Mormon Church, like all other religious groups, is entitled to assurances that government regulation will not interfere with its truly religious beliefs and activities As we will show below in Part A, long-established First Amendment principles, as well as Title VII itself, provide protection for the Mormon Church and other religious groups comparable to the limited exemption

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[6] As Judge Wright wrote in *King s Garden, Inc v FCC*, 498 F 2d 51, 54-55 n 7 (D C Cir 1974), discussing the § 702 exemption

> While it is not uncommon for courts to come very close to rewriting statutes so as to save their constitutionality, the 1972 exemption is a poor candidate for such a salvage operation The scope of a religious exemption is an issue raising very delicate questions of public policy While it is reasonably clear that the 1972 exemption violates the Establishment Clause, it is far less clear exactly how much, or in what way, the exemption should be narrowed to avoid First Amendment objections There may well be a considerable range of permissible alternatives As a matter of institutional competence and constitutional authority, it is for the Congress, not the courts, to choose among these

applied by the district court, fully adequate to protect religious liberty, and more firmly rooted in this Court's jurisprudence We will then show, in Part B, that this Court should affirm the judgment below by applying these basic principles—many of which figured in the district court's analysis—to the undisputed facts of this case

A This Case is Governed By Long-Settled First Amendment Principles, Which Adequately Protect the Religious Liberty of the Mormon Church and Other Religious Groups.

Congress and the courts have recognized the importance of preserving the free exercise rights of all religious organizations, and have shaped the law of employment discrimination with sensitivity to possible infringement on religious liberty While Title VII applies to religious organizations,[7] the statute itself recognizes that religious considerations are often, quite legitimately, a key factor in hiring by religious groups For example, apart from the unconstitutional blanket exemption of § 702, Title VII contains a separate, more narrowly-drawn bar against government interference with a sensitive and central area of activity by religious organizations—religious education 42 U S C § 2000e-2(e)(2) *Cf NLRB v Catholic Bishop of Chicago,* 440 U S 490, 502-04 (1979) (construing NLRB jurisdiction not to reach church schools, which serve key religious function)

The exemption for religious schools augments the statute's general provision that religious discrimination is lawful "where religion is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise " 42 U S C § 2000e-2(e)(1) *See Kern v Dynalectron,* 577 F Supp 1196, 1198-99 (N D Tex 1983), *aff'd mem* , 746 F 2d 810 (5th Cir 1984)

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[7] It has long been settled that, as a general matter, Title VII may be applied to prevent religious organizations from discriminating against employees on the basis of race, sex, or national origin *See, e g , EEOC v Pacific Press Publishing Ass'n,* 676 F 2d 1272, 1277 (9th Cir 1982), *EEOC v Southwestern Baptist Theological Seminary,* 651 F 2d 277, 286 (5th Cir 1981)

The courts have also held that Congress did not intend that any of the prohibitions in Title VII apply to the relationship between a church and its ministers or minister-like personnel By statutory construction, the case law has thus carved out another crucial area where government-dictated employment prohibitions might otherwise interfere with the fundamental right of a religious organization to determine its own matters of ecclesiastic policy and internal administration *See, e g , Pacific Press,* 676 F 2d at 1277-78, *McClure v Salvation Army,* 460 F 2d 553, 560-61 (5th Cir 1972) These cases dealing with racial and sexual discrimination would apply *a fortiori* to religious discrimination, which by definition is permitted in the hiring of clergy

Therefore, by its own language and as construed by the courts, Title VII does not apply to discrimination by a religious organization within two of its most important spheres of religious activity—the hiring and supervision of ministers and minister-like employees, and the operation of religious schools—or in any setting where the religion of an employee is a *bona fide* occupational qualification

Further protection for a religious organization seeking to avoid the application of Title VII is provided by well-established First Amendment principles This Court has long barred governmental attempts to interfere with religious doctrine or internal church affairs *See, e g , Jones v Wolf,* 443 U S 595, 602 (1979), *Presbyterian Church v Hull Memorial Presbyterian Church,* 393 U S 440, 449 (1969), *Kedroff v St Nicholas Cathedral,* 344 U S 94, 107-08 (1952) A related line of cases grounded on the free speech and free press clauses, in addition to the free exercise guarantee, protects the right of a religious group to choose who will speak for it and interpret its doctrine *See, e g , Murdock v Pennsylvania,* 319 U S 105 (1943), *Cantwell v Connecticut,* 310 U S 296 (1940) *See also King's Garden, Inc v FCC,* 498 F 2d 51, 56 (D C Cir 1974) Together, these two lines of cases provide a potent defense for any religious organization when a Title VII claim threatens to interfere with its fundamental religious liberty to establish doctrine, provide religious education, choose its ministers, or manage its internal religious affairs

Most importantly here, the jurisprudence of the free exercise clause provides well-defined standards for the granting of an exemption from across-the-board application of government regulation, if that regulation threatens to create a burden upon the conscientious exercise of religious duty [8] In order to make out a claim for a free exercise exemption, a party must demonstrate at the outset that government action creates a burden on the free exercise of a sincerely held religious belief, and, if the government can show that the challenged regulation serves a compelling interest, that the consequences of the requested exemption are outweighed by the religious claim *See United States v Lee*, 455 U S 252 (1982), *Thomas v Review Board*, 450 U S 707 (1981)

This Court has held that in order to pass this threshold inquiry, the burden alleged must have more than a mere "impact" on a religious organization claiming an exemption, it must actually prevent the organization from observing its religious tenets *Bob Jones Univ v United States*, 461 U S 574 at 603-04 (1983) This Court has distinguished between claims based upon "merely a matter of personal preference" and those flowing from "deep religious conviction " *Wisconsin v Yoder*, 406 U S 205, 216 (1972)

In evaluating an alleged burden upon a religious organization's religious liberty, a court will of necessity inquire whether the claim is sincere and rooted in religious belief *See id* Because "[c]ourts are not arbiters of scriptural interpretation," *Thomas*, 450 U S at 716, this inquiry must stop short of second-guessing the *validity* of religious beliefs Nevertheless, an objection interposed on religious grounds must be evaluated to determine whether it truly involves the compulsion of religious conscience *See Bowen v Roy*, —— U S ——, 106 S Ct 2147, 2153-54 (1986) "Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of

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[8] A religious organization may assert a claim for a free exercise exemption on behalf of its individual members, *Tony & Susan Alamo Foundation v Secretary of Labor*, 471 U S 290, ——, 105 S Ct 1953, 1963 n 26 (1985), or on the basis of its own rights *See e g , Bob Jones Univ v United States* 461 U S 574, 603 (1983), *Pacific Press*, 676 F 2d at 1279, *Southwestern Baptist* 651 F 2d at 286

ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interest " *Yoder*, 406 U S at 215-16

These principles are hardly novel They represent black letter rules that have emerged from this Court's many religion clause cases to shield any religious entity from governmental intrusion into its ecclesiastical hierarchy, its determination of religious doctrine, and its decisions regarding who shall speak for the group and disseminate its message to the world These cherished principles also provide ample protection for the religious liberty of the Morman Church and any religious entity asserting a free exercise right to hire only co-religionists

B. The District Court's Rejection of the Mormon Church's First Amendment Claims was Compelled by Settled Precedent.

Under the doctrines described above, and the undisputed facts found below, the district court's decision in this case was not only correct, it was compelled Although the Court's analysis may have proceeded along unconventional lines, no other result can be justified

At the outset, it is clear that the firing of a gymnasium building engineer implicates neither Title VII's exemption for religious schools nor the judicial interpretation of Title VII barring interference in the relationship between a church and its ministers or minister-like employees No claim has been made that religion is a *bona fide* occupational qualification for employment at a gymnasium Therefore, as an initial matter, Title VII applies to the situation at hand

The uncontroverted facts described in the district court's opinion also defeat any First Amendment defense that could be asserted by the Church The application of Title VII to the firing of Frank Mayson raises no danger of interference with the internal religious affairs of the Mormon Church, and creates no impermissible burden on the conscientious exercise of the Mormon faith

As the district court found and as we noted earlier, the Deseret gymnasium, at which Mayson was employed, is open to the public and provides ordinary athletic facilities and services *App* at 14-15 More importantly, as the district court found

> [T]here is no evidence or a contention that the religious tenets of the Mormon Church involve or require religious discrimination in employment To the contrary, the Mormon Church, through one of its wholly owned subsidiaries, has stated that "it is 'morally evil' to deny anyone the right to employment " *In re Application of Chronicle Broadcasting Co* , 59 F C C 2d 335, 377 (1976) Furthermore, [defendants] do not contend and there is no evidence that engaging in physical exercise is a religious ritual of the Mormon Church, or that Deseret is used as a means of teaching or spreading the Mormon Church's religious beliefs or practices

Id at 15-16

After reviewing the purely secular duties assigned to Mayson, the court concluded that "[n]one of those duties is even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration Furthermore, none of those duties can potentially further any alleged religious activity in which Deseret may engage " *App* at 17-18

In applying its newly devised test, the district court on these facts found no nexus between either the primary function of the Deseret gymnasium or Mayson's particular job and the rituals or tenets of the Mormon Church The court was not compelled to and did not in fact inquire into the validity or truth of any religious belief, nor did it inject itself into the Church's internal affairs, in violation of *Kedroff v St Nicholas Cathedral,* 344 U S 94 (1952), and its progeny [9] Under the more traditional analysis outlined above in Part A, these same undisputed facts irrefutably bar any claim by Appellants that

[9] Appellants' claim that the district court engaged in an evaluation of the validity of the Church's religious beliefs is utterly baseless Appellants' characterization of the court's inquiry is also ironic in view of their accompanying suggestion that the judgment of the district court be reversed on the basis of the free exercise clause—a suggestion which invites the same entirely proper inquiry into the *nature* but not the *validity,* of its allegedly burdened beliefs Brief of Appellants at 18

application of Title VII to Frank Mayson's firing interferes in any way with the religious doctrine or internal affairs of the Church [10]

The undisputed facts of this case as found by the district court fall far short of stating a claim for a free exercise exemption No burden has been shown on the Church's ability to provide religious education, to inculcate religious values or precepts, to observe religious practices, or to conduct internal Church affairs, the Mormon Church's desire to fire Frank Mayson on religious grounds is simply an arbitrary preference Application of statutory equal opportunity requirements to the employment of a building engineer "does not in any degree impair [the Church's] freedom to believe, express, and exercise" its religion *Bowen v Roy*, 106 S Ct at 2152 As this Court observed in upholding the denial of tax-exempt status to a private religious university that discriminated on the basis of race, "denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not *prevent* those schools from observing their religious tenets " *Bob Jones Univ v United States*, 461 U S 574, 603-04 (1983) (emphasis added) [11]

The circuit courts have similarly held that where discriminatory hiring practices are not compelled by any religious tenet, a free exercise burden cannot be demonstrated *See, e g , EEOC v Pacific Press Pub Ass'n*, 676 F 2d 1272, 1279 (9th Cir 1982) ("[E]nforcement of Title VII's equal pay provision does not and could not conflict with Adventist religious doctrines, nor does it

[10] By contrast, activities implicating religious belief are amply protected by the well-settled doctrine articulated above in Part A In a ruling not challenged on this appeal, the district court held that the Title VII religious exemption could constitutionally be applied to the firing of a truck driver employed by Deseret Industries, a branch of the Mormon Church's Welfare Services Department The court found that Deseret Industries, in contrast to the gymnasium, is a religious activity with "intimate" ties to the tenets and beliefs of the Church *App* at 116 This holding demonstrates that the district court's approach provided adequate protection for the Church's religious activities The more traditional approach that we advocate here provides no less protection

[11] Even where a religious tenet is implicated, an indirect economic burden may not be sufficient to sustain a claim *See Braunfeld v Brown*, 366 U S 599, 605 (1961) Where, as here, no tenet is burdened even indirectly, a free exercise claim must fail

prohibit an activity 'rooted in religious belief' *Wisconsin v Yoder* "), *EEOC v Southwestern Baptist Theological Seminary,* 651 F 2d 277, 286 (5th Cir 1981) ("Since the Seminary does not hold any religious tenet that requires discrimination on the basis of sex, race, color, or national origin, the application of Title VII reporting requirements to it does not directly burden the exercise of any sincerely held religious belief ") As the Fifth Circuit noted in *EEOC v Mississippi College,* 626 F 2d 477, 488 (5th Cir 1980) "[T]he relevant inquiry is not the impact of the statute upon the [religious] institution, but the impact of the statute upon the institution's exercise of its sincerely held religious beliefs "

It is thus insufficient to allege, as Appellants do in their brief, that the challenged employment practices "are consistent with the Church's religious beliefs " Appellants' Brief at 20 The district court found, and Appellants do not contradict, that the operation of the Deseret gymnasium simply does not implicate any religious tenets of the Mormon Church, it is a voluntary commercial activity that may or may not be "consistent with"—but is certainly not *compelled by*—Mormon doctrine

As this Court has held

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity

United States v Lee, 455 U S 252, 261 (1982)

In choosing to open a gymnasium, the Mormon Church subjected itself to normal regulation of commercial enterprises Only in limited circumstances—where it can demonstrate that a particular practice is compelled by conscience and is substantially burdened by governmental regulation—can a religious organization successfully allege that its free exercise rights in connection with such commercial activity are violated

In light of the Mormon Church's failure to demonstrate any significant burden on a sincerely held religious belief, it is unnecessary to make any inquiry regarding the compelling governmental

interests served by Title VII or the inevitable weakening of these interests which would result from providing an exception for religiously-based hiring in connection with secular activities *See Tony & Susan Alamo Found v Secretary of Labor*, 471 U S 290, ___, 105 S Ct 1953, 1963 (1985) *See also* Point I, A, 1, *supra* In this connection, however, this Court may take judicial notice of the overwhelming national interest in the vigorous and evenhanded enforcement of the civil rights laws

In addition to undermining compelling public policy, an exemption for religious discrimination in these circumstances would itself run afoul of the establishment clause of the First Amendment Religious exemptions are permitted when necessary to prevent a burden to conscientious religious observance created by "evenhanded" government regulation, and to allow the religiously observant to achieve equal footing with the non-observant *See Thomas*, 450 U S at 719-20 To permit a broad-based exemption for religious discrimination in secular employment, as in this case, would give an unfair commercial advantage to religious entities in their conduct of ordinary commercial enterprises *See Alamo Foundation*, 471 U S at ___, 105 S Ct at 1960-61

The district court's conclusion that the application of Title VII would not cause a burden on any religious tenet of the Mormon Church was fully adequate under well-settled doctrine to defeat the Church's First Amendment claim at the threshold Having correctly found that Congress could not constitutionally enact a wholesale exemption for religious organizations from prohibitions against religious discrimination in employment, and that the application of Title VII to the Mormon Church's operation of a public gymnasium in no way infringes upon the religious liberty of the Church or its members, the court appropriately entered summary judgment for Mayson

CONCLUSION

The district court was correct in finding that the § 702 exemption has the primary effect of advancing religion, and therefore violates the establishment clause, because it provides to religious institutions doing business in the secular world substantial benefits that amount

to government sponsorship of religion Appellants' attempt to avoid the consequent application of Title VII on the basis of a claim for a free exercise exemption fails because Mayson's continued employment as a building engineer in no way interferes with the Church's religious liberty

Accordingly, *Amicus* urges that the judgment of the district court be affirmed

Respectfully submitted,

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