No. 15-15351

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STARLA ROLLINS, on behalf of herself, individually,
and on behalf of all others similarly situated,

Plaintiff-Appellee,

v.

DIGNITY HEALTH, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
Northern District of California
No. 13-cv-1450 (Hon. Thelton E. Henderson)

BRIEF OF AMICUS CURIAE PENSION RIGHTS CENTER IN SUPPORT OF PLANTIFF-APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 7.1 and 26.1 of the Federal Rules of Civil Procedure, the Pension Rights Center is a nonprofit organization and indicates that there is no parent corporation and no publicly held corporation which owns 10% or more of its stock.

Dated on this 14th day of September, 2015.

s/ Karen W. Ferguson.
Karen W. Ferguson

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No party has authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief, and no other person, other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

I. INTEREST OF AMICUS CURIAE

The Pension Rights Center is a Washington, D.C., nonprofit consumer organization that has been working for nearly 40 years to protect and promote the retirement security of American workers, retirees, and their families.

Five years ago, the Center was contacted by several groups of current and former employees of religiously-affiliated nonprofit organizations who had learned that their employer had received or had applied for a private letter ruling from the Internal Revenue Service declaring that their pension plans are "church plans," exempt from the Employee Retirement Income Security Act of 1974. (ERISA) Pub. L. No. 93-406; see 29 U.S.C. § 1001.

These groups and others who contacted us later included participants in the pension plans of Catholic hospitals, Jewish social services agencies, and Protestant schools. They were devastated to learn that an IRS "church plan" ruling meant that the pensions they had earned throughout their work lives were no longer protected by federal law.[1]

[1] In one instance involving a hospital in New Jersey affiliated with the Catholic Church, information provided by the Center made it possible for the individuals to persuade their former employer to ask the Internal Revenue Service to withdraw a private letter ruling issued ten years earlier. In response to the request, the IRS withdrew the ruling and declared the plan an ERISA plan. This made it possible for the Pension Benefit Guaranty Corporation to restore pension insurance protection to approximately 800 plan participants eight months before the plan would have run completely out of money. In another situation involving a Jewish community center in Maryland, the employees and retirees convinced

Concerned about the impact of church plan conversions on these current and future retirees, the Center researched the history of the 1974 ERISA church plan provisions, the 1980 church plan amendments, and IRS rulings interpreting the 1980 amendments.

The Center is filing this *amicus* brief to share the results of our research.[2] As we show below, the pension plans established by Dignity Health and its predecessors are and always have been ERISA plans. The Center urges affirmance of the District Court's ruling that only a pension plan established by a church is exempt from ERISA.

The parties have consented to the filing of this *amicus* brief.

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the employer to withdraw its ruling request. *See* Mary Williams Walsh, *IRS Reversal on 'Church Plan' Rescues a Fund*, New York Times, April 1, 2013; http://www.nytimes.com/2013/04/02/business/an-irs-reversal-rescues-a-pension-fund.html?_r=0. *See also* Alicia H. Munnell, *A Deed Well Done: Pensions Protected*, MarketWatch, June 26, 2013. http://blogs.marketwatch.com/encore/2013/06/26/a-deed-well-done-pensions-protected/ Other employers have been unwilling to forego the considerable financial benefits conferred by church plan status. The retirement security of the participants in those plans will depend on the outcome of this and other pending lawsuits. *See* Nathan Gutman, *Loophole Puts Pension Plans at Risk*, Jewish Daily Forward, February 13, 2012. http://forward.com/opinion/editorial/151523/the-pension-promise/ Tom Haydon, *N.J. Workers at Religious Institutions Fear Change Threatens Pensions*, New Jersey Star Ledger, January 12, 2012 http://www.nj.com/news/index.ssf/2012/01/nj_workers_at_religious_instit.html

[2] For an in-depth discussion of the results of the Center's research see Norman P. Stein, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, Employee Benefits Committee Newsletter (ABA Summer 2014). http://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_sum_ebc_news/faith.html

II. INTRODUCTION

This case presents facts similar to those of other church plan conversions. According to the Pension Benefit Guaranty Corporation's (PBGC) October 25, 1995, Settlement Agreement with Dignity Health (then Catholic Healthcare West), Dignity's predecessor plans existed prior to the enactment of ERISA. (Each of the predecessor plans that merged to form Catholic Health West in 1989 was "established effective before 1974 by one or more of its contributing sponsors.") (ER-441). Since these plans had not been established by churches for their own employees, they became subject to ERISA on January 1, 1974. They were required to conform to all of the new law's reporting, disclosure, participation, vesting, accrual, fiduciary, and funding requirements, and to pay pension insurance premiums to the PBGC.

These requirements remained unchanged when Congress enacted the so-called "Talmadge church plan amendments" six years later as part of the Multiemployer Pension Plan Amendments Act of 1980. (MPPA) Pub. L. No. 96-364 sec. 407(a), 29 U.S.C. § 3(33), 94 Stat. 1208 (1980). Those amendments did not change the legal status of Dignity's predecessor plans, which remained subject to federal law.

As discussed more fully below, the 1980 amendments were designed to achieve two objectives. The first and most important was to allow plans

established and maintained by churches to continue to cover the employees of church-affiliated nonprofits, such as hospitals, schools, and social services agencies. Since the Dignity predecessor plans had not been established by churches, they were unaffected by this provision.

A second objective was to clarify that "church pension boards" could continue to maintain retirement and health plans established by congregationally structured churches. This also did not affect the legal status of the Dignity predecessor plans since they were not maintained by church pension boards.

On April 23, 1993, thirteen years after the enactment of the MPPA church plan amendments, Dignity (Catholic Healthcare West) requested a private letter ruling from the IRS declaring that its current pension plan and seven predecessor plans were church plans. (ER-307-323) In the ruling request, counsel for Dignity claimed that the Catholic Healthcare West plan and its seven predecessor plans had been "mistakenly" operated as though they were not church plans." The plans "mistakenly filed annual reports (Form 5500) and mistakenly paid PBGC premiums." (ER-312-313). In other words, the plans' compliance with ERISA for nearly two decades had been a mistake.

In its letter requesting the ruling, Dignity noted that plans of church-affiliated nonprofit organizations that had not been established by churches had to

qualify as "organizations described in Section 414(e)(3)(A) of the Code."[3] Omitting key phrases in the provision, Dignity's counsel summarized the Section as follows: "To be described in said section, an organization must have as its principal purpose the administration of the plan and must also be controlled by or associated with the church." The letter claimed that the Retirement Plan Committees of the Dignity predecessor plans satisfied these tests.

On December 8, 1993, the IRS issued a private letter ruling to Dignity stating that the Dignity predecessor plans were administered by retirement plan committees, which had as their principal purposes the administration and funding of the plans, and were therefore "plans administered by an organization described in section 414(e)(3)(A) of the Code." (ER-450-459)

Relying on the IRS ruling, the PBGC entered into the October 25, 1995, Settlement Agreement referred to above and agreed to refund $1.425 million in pension insurance premiums that Dignity's predecessor plans had paid to the PBGC. (ER-444)

The participants in the Dignity plan – nurses, orderlies, technicians, cafeteria workers, and billing clerks, many of whom had worked their entire careers counting on receiving a secure lifetime pension – had no way of knowing that they

[3] Section 414(e) of the Internal Revenue Code is virtually identical to Section 33(3) of ERISA. 26 U.S.C. § 414(e).

had just been denied all federal pension protections, including disclosure, reporting, funding, and pension insurance.

In fact, until September 2011,[4] the only people who knew that church plan rulings had been requested were the requesting employers, IRS officials, and the consulting firms that had persuaded the employers that applying for church plan rulings was a "too good to be true" opportunity for saving money for their institutions.[5]

III. ARGUMENT

The 1993 private letter ruling issued to Dignity can be traced to an IRS General Counsel's Memorandum issued 10 years earlier that misinterpreted two words in the statute and a floor statement made by a Senator. The GCM's 1983

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[4] In Rev. Proc. 2011-44, 26 CFR 601.201, September 11, 2011, the IRS lifted a five-year moratorium on church plan rulings and required that applicants for future rulings notify participants that the issuance of a church plan ruling would result in the loss of all ERISA protections.

[5] The chief financial officer of a religiously-affiliated hospital explained to the *Wall Street Journal* that the hospital had accepted the advice of KPMG, a large consulting firm, to seek a church plan ruling "for the cost savings and flexibility in funding." At the time of the article, the plan was only 70 percent funded. *See* Ellen E. Schultz, *IRS Nears Action on Church Pensions*, Wall Street Journal, June 5, 2010. http://www.wsj.com/articles/SB10001424052748704080104575286960632243300 Similarly, the Associated Press reported on a PowerPoint presentation to a religiously-affiliated hospital that included the statement, "Deloitte and Touche identified opportunity to designate plan as a 'church plan' Allows greater freedom in funding requirements." *See* Adam Geller, *Law Shields Churches, Leaves Pensions Unprotected*, Associated Press, October 5, 2013. http://bigstory.ap.org/article/law-shields-churches-leaves-pensions-unprotected

misreading of the statute and the legislative history has been reflected in 500 IRS "church plan rulings" over the past 32 years. The result has been tragic losses of pension benefits by thousands of current and future retirees.[6]

The following review of the statute, its legislative history, and the 1983 General Counsel's memorandum explains how these two mistakes were made.

A. The statute

1. ERISA's original church plan provisions enacted in 1974

Before the enactment of ERISA on September 2, 1974, employers who sponsored private pension plans were not required to fund them adequately, to back them financially if they failed, or to provide insurance to make sure that participants would receive their benefits. *See generally*, Michael S. Gordon, *Overview: Why Was ERISA Enacted?* in U.S. Senate, Special Committee on

[6] The most recent example that has come to our attention is St. Mary's Hospital in Passaic, New Jersey, which sponsored a pension plan that became covered by ERISA in 1974, but then received an IRS church plan ruling and a refund of PBGC premiums in 2001. It then stopped complying with ERISA's funding requirements. The hospital's orderlies, nurses, and other employees only learned about the church plan ruling 12 years later when the hospital was being sold and they were told that their severely underfunded plan would be able to pay them only a small fraction of the benefits they had earned. They were shocked to learn that he religious order that sponsored the hospital had "no legal obligation to fund the plan." Mary Jo Layton, *Retirees from St. Mary's Hospital in Passaic May Lose Their Pensions in Sale*, New Jersey Record, April 26, 2013. http://www.northjersey.com/news/health-news/retirees-from-st-mary-s-hospital-in-passaic-may-lose-their-pensions-in-sale-1.624917

Aging, The Employee Retirement Income Security Act of 1974: The First Decade, at 6-25 (1984). Employers could amend plans to reduce already-earned benefits and could condition benefits on unreasonably long periods of unbroken service. *Id.* Not surprisingly, some pre-ERISA plans were poorly funded and some pre-ERISA plans became insolvent and failed to pay employees the benefits they had earned. *Id.* These problems were well known and well documented and were of deep concern to policymakers. *Id.*

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA) to address these problems. The purpose of ERISA was expressed in the statute as "improving the equitable character and soundness of [pension] plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." 29 U.S.C. §1002(c). The primary vision that drove ERISA's legislative sponsors was this: that participants in private pension plans should be able to count on the pension benefits that their employers promised to them in exchange for their labor.

When ERISA was enacted, Senator Jacob K. Javits (R-NY), the law's principal co-sponsor, hailed the legislation as "the greatest development in the life

of the American worker since Social Security."[7] The law covered all private-sector pension plans with only two exceptions: "top hat" plans covering executives and plans established and maintained by churches.

The original exemption for church plans had three key provisions. The first limited the exemption to plans "established and maintained for [their] employees by a church or by a convention or association of churches which is exempt from tax under Section 501(c)(3) of the Internal Revenue Code of 1954 …" 29 U.S.C. § 1002(33)(A) (1974).

The second provision stated that plans established by churches that were "maintained by more than one employer" were not church plans "if one or more of the employers in the plan is not a church (or convention or association of churches) which is exempt from tax under section 501 of the Internal Revenue Code of 1954." 29 U.S.C. § 1002(33)(B)(ii).

The third provision provided a temporary exception to subsection (B)(ii). It permitted a nine-year transition period to allow multiple-employer plans established and maintained by churches as of the date of ERISA's enactment to continue to include both their own employees and the employees of their affiliated

[7] Subcommittee on Labor, Senate Committee on Labor and Public Welfare, *Legislative History of the Employee Retirement Income Security Act of 1974*, vol. III, April 1976, p. 4747.

nonprofit organizations.[8] All other religiously-affiliated plans were immediately subject to ERISA.

2. ERISA's church plan provisions as amended in 1980

On September 26, 1980, Congress amended the definition of "church plan" primarily to make permanent the "grandfather" provision that had temporarily allowed plans established and maintained by churches to continue to cover both their employees and the employees of their affiliated nonprofit agencies. This new definition is codified in 29 USC § 1002(33)(C)(ii)(I) and 26 USC § 414(e)(3)(A), which provide that the "term employee of a church" includes the employees of "a civil law corporation or otherwise, which is exempt from tax under section 501(c)(3) of the Internal Revenue Code, and which is controlled by or associated with a church or convention or association of churches." This change allowed plans established and maintained by churches for their own employees to also include the employees of church-affiliated nonprofit agencies, such as hospitals, schools, and social services agencies. In other words, this provision made it

[8] Subsection (33)(C) stated, "Notwithstanding the provisions of subparagraph (B)(ii), a plan in existence on January 1, 1974, shall be treated as a 'church plan' if it is established and maintained by a church or convention or association of churches for its employees and the employees of one or more agencies of such church…. for the employees of such church… and the employees of one or more agencies of such church…" Subsection (C) then stated that this provision "shall not apply with respect to any plan for any plan year beginning after December 31, 1982." 29 U.S.C. § 1002(33)(C)(1974).

possible for the plans that had been grandfathered by ERISA to continue to be exempt from the requirements of the law.

The amendments also clarified that a church plan did not lose its exempt status simply because it was maintained by a "church pension board" rather than directly by a church. The term church pension board had a well understood meaning.[9] Then, as now, church pension boards are separate, tax-exempt, nonprofit organizations established by church conventions and congregations for the primary purpose of maintaining their employee benefit plans. As discussed below, most are incorporated, but they can also be structured as trusts or unincorporated nonprofit associations.

As described by the Church Alliance for Clarification of ERISA in 1979, church pension boards are the "arms of churches carrying out the religious function of compensating denominational workers." Statement of the Church Alliance for the Clarification of ERISA "On the Need for Clarification of the ERISA Church Plan Definition," *Hearings Before the Subcomm. On Private Pension Plans and Employee Fringe Benefits*, Senate 96th Cong. 389 (December 4 and 5, 1979).

[9] The website of the Church Benefits Association lists nearly 50 churches and church conventions and associations that use church pension boards (now often called church benefits boards) to maintain their retirement, health and disability plans. http://churchbenefitsassociation.org/Membership/member_organizations.htm

The language used to describe church pension boards was included in a new subsection (33)(C)(i) which provides that (i) A plan established and maintained for its employees…by a church …includes a plan ***maintained by an organization, whether a civil law corporation or otherwise***, the principal purpose or function of which is the administration or funding of a plan… for the employees of a church… if such organization is controlled by or associated with a church…" (emphasis added). 29 U.S.C. § 1002(33)(C)(i).

As noted below, the legislative history of this subsection makes plain that, although the phrase "church pension board" was not used in the legislation, the sole purpose of including the language "maintained by an organization, whether a civil law corporation or otherwise" that has the administration of a plan as its principal purpose was to ensure that church pension boards could continue to maintain plans established by churches.

Had the 1980 Congress intended to extend the church plan exemption to plans that had been established by religiously-affiliated organizations, rather than churches, it could easily have amended Section 33(A) to provide that the term 'church plan' means a plan . . . for its employees established and maintained by a church or convention or association of churches for its employees (or their beneficiaries) . . . ***or by an organization controlled or associated by with a church***…" It did not do so.

B. The 1983 IRS General Counsel's Memorandum

On July 1, 1983, the IRS issued a General Counsel's Memorandum interpreting the 1980 church plan provisions. (IRS Gen. Couns. Mem. 39,007, 1983 WL 197946 (July 1, 1983). The memorandum found that two religious orders of nuns that ran several hospitals and a home for the aged were not churches and that, therefore, the retirement plans established by the hospitals were not church plans within the meaning of IRC Section 414(e)(1) (the tax code equivalent of ERISA Section (33(A)). However, it granted church plan status to the plans established by the orders on the ground that the plans satisfied the requirements of Section 414(e)(3)(A) (ERISA Section 33(C)(i)) because the "pension trust agreement provides, in effect, that the plan is to be administered by a three-member Administrative Committee appointed by the order."

The memorandum did not parse the language of the statute other than to say that a 414(e)(3)(A) organization "must have as its principal purpose administering the fund and must also be controlled by or associated with a church." But since the three-member Administrative Committee was not a "civil law corporation" the IRS must have determined that the Committee was the "or otherwise" organization contemplated by the statute.[10] To support its conclusion that the plans

[10] A 1977 GCM had concluded that religious orders that operated hospitals could not establish church plans because they were not churches. (IRS Gen. Couns. Mem. 37266, 1977 WL 46200 (Sept. 22, 1977). The GCM defined churches as

administered by the Administrative Committee were church plans," the memorandum added the following footnote:

> That organizations other than churches are now eligible to have their employees covered by church plans is evidenced by the floor statement of Senator Jacob Javits.
> "As to the church pension plans, I might say that I am not too happy about those as it exempts those who work for schools and similar institutions which are church-related but, nonetheless, if we want a bill there were some things we had to give and that was one of them and I was very unhappy with it." Cong. Rec. S10101 (daily ed. July 29, 1980.)

This was a reference to a statement made by Senator Javits shortly after the amendments passed the Senate.

The 1983 GCM became the basis for hundreds of church plan rulings over the next three decades. Each followed the same pattern. The IRS found that plans that had not been established by churches nonetheless qualified as church plans under 414(e)(3)(A) (ERISA 33(3)(C)(i)) if they were administered by a retirement committee that had an affiliation with a church. In those instances where there was no retirement committee, the IRS required employers to agree that they would establish a retirement committee retroactively.

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religious organizations carrying out the religious or sacerdotal functions of a church. This caused considerable consternation among churches, which claimed that by undertaking to define what was and was not a religious function, the IRS was interfering in the internal affairs of the church. By characterizing an Administrative Committee as an "or otherwise" organization," the IRS was able to avoid this controversy.

C. The legislative history

The legislative history of the 1980 amendments establishes beyond doubt that they were primarily designed to address two separate problems, neither of which involved the authority of church-affiliated nonprofit organizations to establish their own stand-alone church plans. The first concern was that, when the grandfather provision reached its sunset date in 1982, churches would have to divide their plans into two separate plans (one exempt church plan for a church's direct employees and a separate ERISA plan for employees of church-affiliated agencies). The second concern was that the exemption of a church plan might be jeopardized in cases where the plan was maintained by a separate nonprofit organization rather than maintained directly by the church, which was a common practice among churches with a congregational rather than hierarchical structure. No advocate of the 1980 legislation argued that church-affiliated hospitals, schools, and social services agencies should also be able to establish their own exempt church plans.

1. The first problem addressed by the 1980 amendments: Expiration of the "grandfather clause."

The legislative history of the 1980 amendments actually starts in 1974, with the passage of ERISA. The original ERISA definition of church plan was unambiguous in providing that church plans had to be established and maintained by churches. A nonprofit organization affiliated with a church could not sponsor

its own church plan, although its employees could participate in a plan established by a church until 1982. Agency-sponsored plans, such as the Dignity predecessor plans, had to comply with ERISA requirements unless they were part of a plan established and maintained by a church.

Approximately 27 large churches and church organizations formed an organization called the "Church Alliance for Clarification of ERISA," which advocated that Congress amend the definition of church plan to permit church plans to continue to cover employees of their affiliated agencies after 1982. *Hearing Before the Subcomm. on Private Pension Plans and Employee Fringe Benefits, Committee on Finance, United States Senate,* 96th Cong. 366 (Dec 4, 1979) (listing the Members of the Church Alliance for Clarification of ERISA). Senator Herman Talmadge (D-GA) placed in the *Congressional Record* 20 letters to him from members of the Alliance supporting the legislation. 125 CONG REC. 100052-58 (May 7, 1979) (statement of Sen. Herman Talmadge and letters from the Church Alliance). About half of the letters discussed the pending problems that would occur in 1982, when church plans could no longer cover employees of religiously affiliated entities. *Id.* at 10054. The following letter from Lutheran Church Missouri-Synod's was typical:

> If the present definition of "church plan" contained in the Employee Retirement Income Security Act of 1974 ("ERISA') is not changed as was outlined in the legislation you introduced last year, the pension program of the Lutheran Church Missouri Synod will have to be

> divided into two programs, one for ministers who are serving church agencies and another for those ministers serving what the present definitions call "church." This splitting up of our programs is going to be a costly procedure and can only be borne out of program monies. . .

The Pension Boards United Church of Christ (one of Dignity's *amici*) asked that the provisions of ERISA be modified "to provide for the coverage of church agencies and ministers, wherever carrying out their ministry, within the church plan." *Id.* at 10056. The General Conference of the Seventh-day Adventists wrote that

> The possibility of having to separate the employees of the so-called church agencies from our retirement plan is another of our major concerns. . . . To separate these workers for the church plan will create a problem of portability as there is considerable movement of employees from one type of organization to another. . . . If the church can be trusted to administer pension benefits for its ministers and other employees working directly for the church, it would seem that the church could also be trusted to provide retirement benefits for employees of its agencies without being regulated by the government.

The letter also noted that "The entire assets of the church are back of the retirement plan and it has always lived up to its obligations in this regard." Several other letters also stated that churches would not permit their plans to fail. *Id.* at 10057.

Not a single letter addressed concern about plans established directly by church-affiliated nonprofit organizations. This was not surprising since they had been subject to ERISA since the law's effective date, January 1, 1974. The letters were concerned with continuing to permit agencies to participate in plans established and maintained by churches.

Senator Talmadge's remarks on the floor introducing what became the 1980 amendments to the church plan definition were similar. *Id.* at 100052 (statement of Sen. Herman Talmadge introducing church plan amendments). He indicates:

> When we enacted ERISA in 1984, we set 1982 as the date beyond which a church plan could no longer provide retirement and welfare benefits for employees of church agencies. We also forbade the church plans to provide for any new agency coverage after 1974....The church plans in this country have historically covered both ministers and lay employees of churches and church agencies. These plans are some of the oldest retirement plans in the country. Several date back to the 1700s. The average age of a church plan is at least 40 years. To comply with ERISA by 1982, the churches must divide their plans into two so that one will cover church employees and the other, agency employees. It is no small task to break a plan that has been in existence for decades, even centuries.
>
> The estimated legal, actuarial, and accounting costs of the initial division of church plans and the additional continuing costs of maintaining two separate plans are so significant that reduced retirement and other benefits may result unless they can be assimilated. To offset these additional costs, the churches are confronted with a very large, and possibly not absorbable, economic burden to provide pre-ERISA level of benefits. There is no imposition by ERISA on the plans of other organizations. It is doubtful that agency plans would survive subjection to ERISA.
>
> Under the provisions of our proposals, effective as of January 1, 1974, a church plan shall be able to continue to cover the employees of church-associated organizations. There will be no need to separate the employees of church organizations from the church plan. Our legislation retains the definition of church plan as a plan established and maintained for its employees by a church or by a convention or association of churches. However, to accommodate the differences in belief, structures, and practices among our religious denominations, all employees are deemed to be employed by the denomination.

Senator Talmadge's comments, like the letters from the members of the Church Alliance, did not raise any concerns about stand-alone plans established directly by church agencies rather than churches. As already mentioned, these plans were already in compliance with ERISA.

The Church Alliance itself produced a lengthy statement, which nowhere advocated that agencies should be able to establish their own church plans, but only that plans established by churches should be allowed to continue to include the employees of the churches' agencies. *Hearing Before the Subcomm. On Private Pension Plans and Employee Fringe Benefits, Committee on Finance, United States Senate*, 96th Cong. 387 (Dec. 4, 1979). The statement indicates:

> The problem that is of the greatest concern to a number of the denominations is the so-called church agency problem. As previously mentioned, under present law a church plan cannot retain its ERISA exemption after December 31, 1982 if it continues to cover employees of church agencies. . . .The Church Alliance has taken the position that because of the close relationship that exists between churches and their affiliated agencies, it is essential that the employees of the agencies be eligible for coverage under the benefit plans of the church.

2. The second problem addressed by the 1980 amendments: Plans maintained by church pension boards rather than churches.

In addition to his concern about church plans being able to continue to cover employees of their affiliated agencies, Senator Talmadge was also concerned that some church plans might not technically comply with ERISA, because they were maintained by what Senator Talmadge termed "church pension boards," which

were organizations separate from the churches whose plans they maintained. Section 33(C)(i) was intended to clarify that plans maintained by such pension boards were nevertheless church plans. The *Congressional Record* clearly captures this concern in the floor debates of the amendments to the definition of church plan:

> Mr. Talmadge. Mr. President, I understand that many church plans are maintained by separate incorporated organizations called pension boards. These boards have historically been considered by church denominations as part of their church. May I ask whether the bill would enable a church pension board to maintain a church plan?
>
> Mr. Long. Yes. I concur that a pension board that provides pension or welfare benefits for persons carrying out the work of the church and without whom the church could not function is an integral part of the church and is engaged in the function of the church even though separately incorporated. The bill recognizes the status of a church plan maintained by a pension board by providing that a plan maintained by **an organization, *whether separately incorporated or not,*** the principal purpose of which is the administration or funding of a plan or program for the provision of retirement or welfare benefits for the employees of a church, is a church plan provided that such organization is controlled by or associated with the church.[11] (emphasis added)

Again, the Senate Report on the Multiemployer Pension Plan Amendments Act described the purpose of (C)(i) as follows:

> Church pension plans— . . . The definition would be clarified to include plans maintained by a pension board maintained by a church.[12]

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[11]126 CONG. REC 20245 (July 29, 1980) (statement of Sen. Herman Talmadge).
[12]H.R. REP. No 96-364, at 1 (1980),WL 355760.

This is also captured by testimony given by members of the Church Alliance at a 1979 hearing of the Senate Finance Committee on miscellaneous pension issues, including church plan issues. Reverend Gordon E. Smith appeared on behalf of the American Baptist Churches in the U.S.A., stating:

> The present statute fails to recognize the fact that the American Baptist employee benefit plans, as well as ***most church plans of congregational denominations, have historically been administered by a corporate entity that is separate from, but controlled by, the denomination.*** The statute is not clear as to whether such a plan may qualify as an exempt church plan under ERISA. This question would be resolved by the proposed bills.[13] (emphasis added)

Significantly, there is no mention anywhere in the legislative history of an exemption for non-church-established plans administered by a retirement or other administrative committee.

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[13] *Hearing Before the Subcomm. on Private Pension Plans and Employee Fringe Benefits, Committee on Finance, United States Senate,* 96th Cong. 481 (Dec. 4, 1979)(statement of Rev. Gordon E. Smith). As Representative Barber Conable noted in introducing the first version of the church plan amendments, "A pension board is usually incorporated because the church does not want the funds set aside for retirement purposes to be subject to the general creditors of the church." 124 Cong. Rec 12108, May 2, 1978. But, as noted by Senator Russell Long (D-LA), in the colloquy quoted above, some church pension boards were unincorporated.

D. Dignity has misconstrued the statute and the legislative history

Contrary to Dignity's statement at page 24 of its brief, there is nothing in the statutory history to suggest that "Congress intended to treat all plans maintained by church-associated organizations as "church plans." Rather the principal congressional intent was to allow employees of those church-affiliated nonprofit hospitals, schools, and social services agencies already participating in multiple employer plans established by churches to continue to participate in those plans. As noted above, this was accomplished by adding a new subsection to the law that expanded the definition of "employee of a church" to include employees of church associated nonprofits.

The statement by Senator Javits referenced by the 1983 General Counsel's Memorandum merely expressed his unhappiness with the fact that the expanded definition of "employee" would mean that employees of church-associated nonprofits participating in church-established plans would continue to be denied the all-important protections that his landmark legislation, ERISA, had conferred on virtually every other private-sector employee. His concerns were shared by the Treasury Department, which had also opposed extension of the grandfather clause beyond 1982.[14] Nothing in their statements warranted the conclusion in the 1983

[14]As noted by Daniel I. Halperin, Deputy Assistant Secretary of the Treasury for Tax Policy at the June 12, 1980, Senate Finance Committee markup session on the legislation, the Treasury was concerned that "it would mean that if somebody

General Counsel's Memorandum that Senator Javits expression of disappointment meant that he understood Congress to have said that "organizations other than churches are now eligible to have their employees covered by church plans."

Additionally, Dignity's assertion that the "maintained by an organization (whether a civil law corporation or otherwise) language of Section 33(3)(C)(i) was intended to refer to pension or retirement committees fails to take account of the fact that virtually all pension plans (except possibly the very smallest) are administered by committees. It also does not recognize that pension committees do not "maintain" plans or that pension committees are not "organizations" civil law corporations "or otherwise."

The day-to-day running of all pension plans, whether affiliated with a religious organization or otherwise, requires that employer contributions are made

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works for a hospital or a school that happens to be affiliated with a church it would be permissible for that plan to provide no retirement benefits unless they work until age 65…" (Exc. Sess. Of S. Comm. On Fin., 96th Cong., 2d Sess. 41 (June 12, 1980). An Expert Report written by Daniel Halperin, about the Treasury's views on the church plan amendments referenced on page 27 of the Dignity brief was filed on April 20, 2015 by the Plaintiff in *Medina v. Catholic Health Initiatives*, Civil Action No. 1:13-cv-01249-REB-KLM in the U.S. District Court for the District of Colorado. The Report is posted on the Pension Rights Center's website at http://www.pensionrights.org/sites/default/files/docs/chi_halperin_declaration_with_exhibits_signed.pdf Daniel Halperin recently retired as a professor at Harvard Law School where he taught courses on pensions and tax policy. He is also Vice Chairman of the Pension Rights Center's Board of Directors.

in a timely fashion, money is invested prudently, and benefits are paid out at retirement. In plans that were not maintained by pension boards in 1980, these functions were typically performed by a pension committee consisting of human resources or other employees appointed by the employer. Then as now, pension committees administered plans but did not "maintain" them. That is because pension committees have no control over the terms of plans and no ability to fund them. They also have no authority to amend or terminate plans or to bring actions to seek delinquent contributions.

Most important, a pension committee is not an "organization, civil law corporation or otherwise." As explained above, the term "organization" was intended to apply to church pension boards, which are legally distinct organizations from the church. They are separately incorporated or other nonprofit entities that are often indistinguishable from large financial institutions. In contrast, a pension committee is merely the unit of the plan sponsor that administers the plan for the plan sponsor. It is not a separate organization, either a civil law corporation "or otherwise."[15]

[15]It is reasonable to assume that Congress used the phrase "or otherwise" in order to encompass unincorporated church pension board structures. For example, the Rabbinical Pension Board (now the Reform Pension Board) was, and still is, a trust. The Catholic Mutual Life Association (now Catholic Mutual Group), described itself as an association. Likely other church pension boards were (and are) trusts or unincorporated nonprofit associations since these are common

As noted above, if Congress had wished to allow all religiously-affiliated nonprofit organizations to establish their own stand-alone church plans (rather than simply providing that a plan established by a church can cover employees of its affiliated agencies), it would have said so straightforwardly rather than using the language of Section 33(C)(i).

Moreover, Dignity's interpretation of the statute leads to this anomalous result: a plan maintained by a church must also be established by a church, but a plan administered by a church-affiliated pension committee is exempt from the law regardless of who establishes it. What conceivable purpose could Congress have had in requiring more of a plan maintained by a church than of a plan administered by a plan committee?

Dignity and its *amici* also suggest that Congress intended that church pension boards should be able to establish their own plans. (Dignity Br. pp. 26 - 27) Although the first versions of both the Senate and House bills provided that pension boards could establish plans,[16] the term "establish" was dropped from the final legislation. There are several possible explanations for this change, but none

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nonprofit charitable and educational organizations that are exempt from income tax under Section 501(c)(3) of the Internal Revenue Code.

[16]H.R. 12172, 125 Cong. Rec. 12108 (May 2, 1978), S. 3172, 3182, 125 Cong. Rec. 16523, 16524 (June 7, 1978)

are relevant to this case since Dignity does not claim to be a church pension board.[17]

Additionally, Dignity contends that Congress, when it referred to church plans in other laws, was aware of the IRS ruling position and thus ratified it. There is nothing to support this contention. Until the issuance of the September 2011 IRS Revenue Procedure, the "private" nature of private letter rulings ensured that no one other than the plan sponsor, its consultants, and the IRS were aware either that a church plan ruling had been requested or that one had been issued.[18] The IRS ruling position was hidden from Congress, as well as from the affected participants – until the plans terminated without enough money to pay promised benefits. It was only then that the employees and retirees learned that they had lost the federal law protections they had been promised over the years, and that there was no church standing behind their pensions.

[17]Inclusion of "established" may have been deemed to have been unnecessary. No church pension board had asked Congress for independent authority to establish plans. Pension boards were viewed as agents of the church conventions and associations. Typically, the convention or association passed a resolution authorizing the establishment of a plan, and delegated the actual implementation (setting up or establishment) of the plan, (as well as its maintenance) to the church pension board, it had created.

[18]Although private letter rulings are published 90 days after they are issued and can be found on Westlaw and Lexis, they are so heavily redacted that it is impossible to discern the names of the plan sponsor, the plan, or any other identifying information.

Finally, Dignity states that "If a church plan may cover employees of a church-associated organization, and a church associated organization may maintain the plan, Congress had no reason to insist that the "church" itself must 'establish' the plan." (Dignity Br., p. 20) As the experience of so many former employees of church-affiliated nonprofits has demonstrated, there was every reason for Congress to insist that a church establish an exempt church plan. Unlike plans established by churches and maintained by church pension boards, no church stands behind Dignity or other stand-alone plans financially or morally.[19]

The reality is that there are no religious reasons for stand-alone religiously-affiliated hospitals, schools, or social services agencies to seek an exemption from ERISA for their pension plans. The only reasons employers have to request church plan rulings are to save large sums of money at the expense of the retirement security of their hard-working, loyal current and former employees.

[19]Dignity states that its pension plan is financially "healthy" since, as of September 2012, it held $3.1 billion in assets and was 85 percent funded on an ongoing basis. (Dignity Br. p. 8). However, that could change at any time, particularly as, according to its 2014 financial statement, it projects that its investments will earn 8 percent a year. The Associated Press reported that at the end of 2012, Dignity's financial statements showed that "Dignity's pensions were underfunded by $1.28 billion, or about 34 percent." Adam Geller, *Law Shields Churches Leaves Pensions Unprotected*, Associated Press, October 5, 2013. http://bigstory.ap.org/article/law-shields-churches-leaves-pensions-unprotected

IV. CONCLUSION

The 1993 IRS private letter ruling issued to Dignity was based on an erroneous interpretations of the statute and its legislative history that were first incorporated in a 1983 General Counsel's Memorandum. Neither the "or otherwise" language in Section (C)(i) nor the statement by Senator Javits support the idea that Congress intended to permit church-affiliated agencies to establish their own pension plans. Rather, the intent was merely to allow these agencies to continue to participate in plans sponsored by churches or conventions or association of churches, and to clarify that these plans would not lose their exempt status because they were maintained by church pension boards, which were usually structured as corporations but could also take the form of other tax exempt entities such as trusts and nonprofit associations

For the foregoing reasons, we request that the decision of the District Court be affirmed.

Respectfully submitted this 14th day of September, 2015

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,914 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I relied on the word count of Microsoft Word 2010 in preparing this certificate.

2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because the brief—in both its text and its footnotes—has been prepared in 14-point Times Roman font.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Karen W. Ferguson .
Karen W. Ferguson

CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2015, I electronically filed the foregoing with the U.S. Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I certify that all appellate counsel of record to the parties to this appeal are registered with the Court's CM/ECF system. Pursuant to FRAP 25(d)(1)(B), the names of counsel, mailing address and electronic addresses are listed below:

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