**No. 18-3325**

# United States Court of Appeals
*for the*
# Seventh Circuit

SHEILAR SMITH, et al.,
Plaintiffs – Appellants,
v.
OSF HEALTHCARE SYSTEM, et al.,
Defendants – Appellees

**Appeal from the United States District Court**
**for the Southern District of Illinois, No. 3:16-cv-00467-SMY-RJD**
**The Honorable Staci M. Yandle, Presiding**

## *AMICUS CURIAE* BRIEF OF THE PENSION RIGHTS CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS

**Mark D. DeBofsky**
*Counsel of Record*
DeBofsky Sherman & Casciari, P.C.
200 W. Madison St., Suite 2670
Chicago, Illinois 60606
mdebofsky@debofsky.com
(312) 561-4040

**Karen W. Ferguson**
**Norman P. Stein**
*Pension Rights Center*
1730 M Street, NW, Suite 1000
Washington, DC 20036
kferguson@pensionrights.org
nps32@drexel.edu
(202) 296-3776

**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 18-3325

Short Caption: Smith v. OSF Healthcare System, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[X] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Pension Rights Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

N/A

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/Mark D. DeBofsky Date: 12/17/2018

Attorney's Printed Name: Mark D. Debofsky

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ______ No X

Address: 200 W. Madison St., Suite 2670, Chicago, IL, 60606

Phone Number: 312-561-4040 Fax Number: 312-929-0309

E-Mail Address: mdebofsky@debofsky.com

rev. 01/15 GA

**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 18-3325

Short Caption: Smith v. OSF Healthcare System, et al.

---

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[X] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Pension Rights Center

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

N/A

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/Karen W. Ferguson Date: 12/17/2018

Attorney's Printed Name: Karen W. Ferguson

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X

Address: 1730 M Street NW, Suite 1000, Washington, DC 20036

Phone Number: 202-296-3776 Fax Number: 202-833-2472

E-Mail Address: kferguson@pensionrights.org

rev. 01/15 GA

# TABLE OF CONTENTS

I. INTEREST OF AMICUS CURIAE....................................................1

II. INTRODUCTION....................................................5

III. SUMMARY OF ARGUMENT....................................................8

III. ARGUMENT....................................................10

A. An internal committee created by an employer to administer its pension plan is not a Section 3(33)(C)(i) organization……………..10

B. The legislative history of the 1980 church plan amendments demonstrates that Congress drafted Section 3(33)(C)(i) for the sole purpose of permitting "church pension boards" to maintain a church plan....................................................13

C. The district court's opinion fails to effectuate ERISA's broad remedial purpose....................................................23

IV. CONCLUSION……………………………………………………30

# TABLE OF AUTHORITIES

## Cases

*Abuelhawa v. United States*, 556 U.S. 816, 819-20 (2009)....................................11

*Advocate Health Care Network v Stapleton*, 817 F.3d 517 (7th Cir. 2016)… .. …...7

*Advocate Health Care Network v. Stapleton,* 137 S. Ct. 1652 (2017)……………..8

*Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945)…......................................11

*State v. Eckhardt*, 133 S.W. 321, 322 (Mo. 1910)………………………………...12

*Swanson v. Department of Health & Social Services*,
312 N.W.2d (Wis. App. 1981)……………………………………………………12

## Statutes

26 CFR 1.414(e)-1(f)……………………………………………………...………13

29 U.S.C. § 3(33)…………………………………………………………………...6

29 U.S.C. § 1001……………………………………………………………….....1

29 U.S.C. § 1002(33)(C)………………...……………………...…………....5, 15

29 U.S.C. §1002(33)(C)(i)………….……………6, 8, 9, 10, 12, 13, 14, 19, 20, 29

## Other Authorities

124 CONG REC. 12107 ………………………………...………………………20

124 CONG REC. 16522……………………………………………….........21

125 CONG REC. 100052-58..................................................................16, 17, 18

126 CONG REC. 20245…………………...............................................................22

Committee on Labor and Public Welfare, *Legislative History of the Employee Retirement Income Security Act of 1974*, vol. III, April 1976, p. 4747…………...30

James Comtois*, Judge conditionally approves proposed settlement to resolve St. Joseph Health lawsuits.* Pensions & Investments, October 30, 2018......................25

John Cropley, *St. Clare's retirees share anger, anxiety at pension crisis*, Daily Gazette, November 11, 2018……………………………………………...…..28

*Form 1023, Application for Recognition of Exemption Under Section 501(c) of the Internal Revenue Code,* p.7………………………9, 12

Peter Feuerherd, *Wisconsin diocese calls off plan to rescind employees' pensions*, National Catholic Reporter, April 19, 2018………………………………………25

Adam Geller, *Law Shields Churches, Leaves Pensions Unprotected*, Associated Press, October 5, 2013…………………………………..…….......3, 26

Nathan Guttman, *Loophole Puts Pension Plans at Risk*, Jewish Daily Forward, February13, 2012……………………………………………………………......28

Tom Haydon, *N.J. Workers at Religious Institutions Fear Change Threatens Pensions*, New Jersey Star Ledger, January 12, 2012…………………………….…29

*Hearing Before the Subcomm. On Private Pension Plans and Employee Fringe Benefits*, Senate 96th Cong. 366 (Dec 4, 1979)......................................................16

*Hearing Before the Subcomm. On Private Pension Plans and Employee Fringe Benefits*, *Committee on Finance, United States Senate,* 96th Cong. 387 (Dec. 4, 1979)……………………………………………………………………...…18

H.R. REP. No 96-364, at 1 (1980) (A.&P.L.H.),WL 355760...........................19, 22

IRS Gen. Couns. Mem. 39007, 1983 WL 197946 (Nov. 1, 1982)………………....7

Mary Jo Layton, *Retirees from St. Mary's Hospital in Passaic may Lose Their Pensions in Sale*, Bergen Record, April 26, 2013……………………...…………26

Richard L. Madden, *Pensions Reform Passed by Senate and Sent to Ford*, , New York Times, August 23, 1974, p. 1………………………………………...…..29

Beth Miller*, Diocese of Wilmington lay workers say deal struck on Pension Fund*, News Journal, June 22, 2011…………………...…24

Karin Price Mueller, *Bamboozled: How Catholic hospitals get away with letting pensions go broke*, New Jersey Star-Ledger, November 28, 2016………………..27

Alicia H. Munnell, *A Deed Well Done: Pensions Protected*, MarketWatch, June 26, 2013……………………………………………………………………………2

Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364 sec. 407(a), § 3(33)(C), 94 Stat. 1208 (1980)............................................6, 19, 21

Pension Benefit Guaranty Corporation documents showing refunds of premiums, obtained under the Freedom of Information Act
http://www.pensionrights.org/sites/default/files/docs/listing_of_pbgc_church_plan_refunds_1991_-_2005.pdf......................................................................3
http://www.pensionrights.org/sites/default/files/docs/church_plan_refunds_1992-1998_2013.pdf..........................................................................................3
http://www.pensionrights.org/sites/default/files/docs/church_plan_refunds_1999-2007_list_of_85.pdf..................................................................................3

Pension Rights Center, *News articles about church plan "conversions"*…………4

Rev. Proc. 2011-44, 26 CFR 601.201 ……………………………………………..4

Ellen E. Schultz, *IRS Nears Action on Church Pensions*, Wall Street Journal, June 5, 2010. ……………………………………………………………………… 2, 3

SUTHERLAND STATUTORY CONSTRUCTION § 47:18 (7th ed. 2018).........................12

Mike Tighe*, LaCrosse diocese puts lay pension termination on hold pending review*, La Crosse Tribune, April 19, 2018……………………………………….25

Mary Williams Walsh, *IRS Reversal on 'Church Plan' Rescues a Fund*, New York Times, April 1, 2013…………………………………………………………………2

## STATEMENT OF AUTHORITY TO FILE AS *AMICUS CURIAE*

All parties have consented to this filing

## STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(C) (5)

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 more than four decades to protect and promote the retirement security of American workers, retirees, and their families. The Center provides legal and strategic advice on retirement income issues, and helps individuals communicate their concerns about these issues to policymakers, the public, and the courts. Numerous laws, regulations and court cases are traceable to the Center's research and advocacy initiatives. The Center also serves as legal advisor to six federally-funded regional pension counseling projects.

The issue presented by this case is whether a pension plan of a religiously-affiliated nonprofit organization is transformed into a church plan, exempt from the requirements of the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406; see 29 U.S.C. § 1001, because the plan's administrative functions are performed by an internal pension committee whose members are selected by the nonprofit. This issue affects hundreds of thousands of pension plan participants around the country. These are current and former employees of Catholic hospitals, Jewish social services agencies, and Protestant schools, among

others. Many of these individuals have contacted the Pension Rights Center to ask for our help in preserving the pensions they earned over a lifetime of work.[1]

The situations brought to our attention conform to a pattern. Religiously-affiliated employers that had brought their plans into full compliance with ERISA as of its January 1, 1974 effective date and had paid premiums to the federal pension insurance program, the Pension Benefit Guaranty Corporation (PBGC), for decades were advised by consulting firms that they could save significant sums of money by obtaining private letter rulings from the Internal Revenue Service conferring "church plan" status on their plans.[2] This would exempt the plans from all federal requirements, including minimum funding requirements,[3] and enable the

---

[1] Examples of individuals the Center has helped include participants in the Hospital Center at Orange Retirement Plan, who were able to persuade government agencies to restore pension insurance protection to their plan, and participants in the Jewish Community Center of Greater Washington's pension plan, who convinced their former employer to withdraw its request for an IRS church plan ruling. *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. The Hospital Center at Orange victory was the result of a 10-year effort by the participants and unique circumstances. The JCC situation was also unusual. For countless others, favorable decisions by this Court and others offer their only hope for financial security in retirement.

[2] *See* Ellen E. Schultz, *IRS Nears Action on Church Pensions*, Wall Street Journal, June 5, 2010. http://www.wsj.com/articles/SB10001424052748704080104575286960632243300

[3] 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

plan sponsor to claim refunds of pension insurance premiums from the PBGC,[4] exposing the participants to catastrophic risk in the event of the pension plan's insolvency.

To achieve this result, plans merely had to obtain a private letter ruling from the IRS that their sponsor was associated with a church and (sometimes retroactively) establish an internal committee to administer the plan. There was no requirement of church involvement. In fact, as we discuss below, when some of these plans subsequently experienced severe funding shortfalls, the churches with whom the employers had claimed association to obtain the IRS letters have disclaimed any responsibility for ensuring the continuation of pension payments to

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. E. *Id.* 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." Adam Geller, *Law Shields Churches, Leaves Pensions Unprotected*, Associated Press, October 5, 2013. http://bigstory.ap.org/article/law-shields-churches-leaves-pensions-unprotected

[4] These premium refunds could be substantial. Partial listings of refunds received under the Freedom of Information Act can be found on the Pension Rights Center's website at:
http://www.pensionrights.org/sites/default/files/docs/listing_of_pbgc_church_plan_refunds_1991_-_2005.pdf;
http://www.pensionrights.org/sites/default/files/docs/church_plan_refunds_1992-1998_2013.pdf; and
http://www.pensionrights.org/sites/default/files/docs/church_plan_refunds_1999-2007_list_of_85.pdf.

retirees. In several cases, elderly retirees have seen their plans simply stop paying their pensions.

The affected plan participants, whose employers had repeatedly assured them in plan booklets, benefit statements, and other communications that their benefits were fully protected by federal law, had no way of knowing that a church plan ruling had been issued and that their benefits were no longer protected. It was not until September 2011, after extensive media attention to "church plan conversions,"[5] that the IRS issued a Revenue Procedure requiring employers to tell plan participants that they had applied for a church plan ruling, and that the participants would lose all ERISA protections if the ruling were to be issued.[6]

Eight years ago, concerned about the devastating impact of church plan conversions on the retirement security of so many current and future retirees, the Center began researching the legislative history of the 1980 "church plan amendments" and the evolution of the subsequent IRS church plan private letter ruling policy. We file this brief to share with the Court our understanding of the scope of the church plan exemption and the perspectives of the individuals whose future financial well-being will be affected by the outcome of this case.

---

[5] For a partial list of church plan conversion articles, see http://www.pensionrights.org/publications/fact-sheet/news-articles-about-church-plan-%E2%80%9Cconversions%E2%80%9D

[6] Rev. Proc. 2011-44, 26 CFR 601.201, September 11, 2011.

## II. INTRODUCTION

Before ERISA, employers who sponsored pension plans were not required to fund them adequately, to stand behind them if they failed, or to provide insurance to make sure that participants would receive their benefits. As a result, some pension plans failed, leaving employees without the pensions they had spent their careers building. To remedy this very real social and economic issue, Congress enacted ERISA, which required that pension plans be soundly funded and that pension benefits be insured by a new federal insurance agency, the Pension Benefit Guaranty Corporation.

Congress provided a few exceptions from ERISA's coverage. One exception was for plans established and maintained by churches or conventions or associations of churches for their employees. The legislation provided that such plans could not cover the employees of church-affiliated agencies, except for a limited grandfather provision that allowed plans that had been established by a church to continue covering employees of affiliated nonprofit hospitals and other agencies who were already participating in the plan on the enactment date of ERISA, but only until 1982. 29 U.S.C. Section 1002(33)(C). Freestanding agency plans, such as the predecessors of the OSF plans, that had been established by the agencies rather than by a church were immediately subject to the new statute and complied with it by incorporating ERISA-mandated participation, vesting,

disclosure, fiduciary and funding requirements, and paying pension insurance premiums to the PBGC to insure the benefits of participants in the event of plan failure.

Congress amended the church plan exemption in 1980 as a miscellaneous provision in the Multiemployer Pension Plan Amendments Act of 1980. Multiemployer Pension Plan Amendments Act of 1980. (MPPAA) Pub. L. No. 96-364 sec. 407(a), 29 U.S.C. § 3(33), 94 Stat. 1208 (1980). Under the amendments, Congress made permanent the grandfather provision permitting plans established by churches to continue to cover employees of affiliated agencies. Relevant to this case, the amendments also included a provision that clarified that a church plan could be maintained by a "church pension board," a nonprofit entity created by a church congregation or convention to run its pension and health plans, an issue about which some religious denominations were concerned.

The language employed to clarify the exempt status of plans maintained by such church pension boards is the language at issue in this case. It says that a church plan included a plan "maintained by an organization, whether a civil law corporation *or otherwise*," whose principal purpose was the administration or funding of a plan and which organization was controlled or associated with a church. (emphasis added). 29 U.S.C. Section 1002(33)(C)(i).

In 1982, the Internal Revenue Service issued a General Counsel's Memorandum that interpreted this language to allow a plan that was neither established by a church nor maintained by a church pension board to claim church exempt status if the plans established an internal employee benefits committee that had at least one member with ties to a church. IRS Gen. Couns. Mem. 39007, 1983 WL 197946 (Nov. 1, 1982).

Based on this ruling, hospitals, schools, and other religiously-affiliated agencies began requesting IRS private letter rulings conferring church plan status for plans that they, rather than a church or church pension board maintained, contending that the organizations' employees who administered the plan, the internal pension committee, constituted the "'or otherwise' organization" contemplated by the statute.

In *Stapleton v. Advocate Health Care Network*, this Court considered a separate issue, whether a plan maintained by such an organization nevertheless had to be established by an actual church to be a church plan. *Advocate Health Care Network v Stapleton*, 817 F.3d 517 (7th Cir. 2016). A panel of this Court agreed with the participants that for a plan to be exempt from ERISA as a church plan "a church must establish the plan in the first place," regardless of whether an "otherwise organization" maintained it. *Id.* at 530.

The Supreme Court reversed on June 5, 2017 in *Advocate Health Care Network v. Stapleton*, finding that a plan of a religiously-affiliated hospital could be exempt from ERISA even if it had not been established by a church, as long as the plan was "maintained by an organization, whether a civil law corporation or otherwise," whose principal purpose is the administration or funding of a plan. *Advocate Health Care Network v. Stapleton,* 137 S. Ct. 1652.

Justice Elana Kagan, writing for the Court, stated that the opinion reserved for a later day the issue presented by this case, namely whether internal benefits committees are "principal-purpose organizations" that satisfy the language of Section 3(33)(C)(i). In footnote 2 she stated that "this issue is not before the court, and nothing we say in this opinion expresses a view of how [it] should be resolved." In footnote 3 she wrote that "the scope of that term – and whether it comprehends the hospitals' internal benefits committees – is not at issue here." *Id.* at 1657-1658, nn.2-3 (June 5, 2017). That issue is the issue we focus on in this brief.

## III. SUMMARY OF ARGUMENT

Under ordinary principles of statutory interpretation, the term "organization" under ERISA § 3(33)(C)(i) (29 USC § 1002(33)(C)(i)) must be an actual organization legally independent of the employer and not merely an internal committee appointed by the employer. This definition is consistent with the

"dictionary" definition relied upon by the district court in its contrary holding and is the only interpretation consistent with statements by the sponsors of the legislation and the organizations advocating its adoption, which incontrovertibly demonstrate that Section 3(33)(C)(i) was aimed at church pension boards. These financial entities, established by church conventions or congregations to administer their pension and health plans, were independent of both the church and the agencies whose plans they administered; they were capable of suing and being sued; and they were generally but not always incorporated under civil law. However, some also were structured as trusts and unincorporated associations, the two other permissible forms for tax exempt nonprofits."[7] To interpret the Section 3(33)(C)(i) language to include internal committees of the employer distorts the language and reaches a result that is inconsistent with what the sponsors of the legislation intended or contemplated. It rewrites rather than interprets the statute.

---

[7] *See Instructions for Form 1023, Application for Recognition of Exemption Under Section 501(c) of the Internal Revenue Code*. "Only trusts, unincorporated associations or corporations… are eligible for tax-exempt status under section 501(c)(3)." p.7 https://www.irs.gov/pub/irs-pdf/i1023.pdf

## IV. ARGUMENT

### A. An internal committee created by an employer to administer its pension plan is not a Section 3(33)(C)(i) organization.

Section 3(33)(C)(i) of ERISA, 29 U.S.C. 1102 (33)(C)(i), provides that a church plan is a plan that is 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 or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or churches."

The district court devoted a single paragraph to the question of whether a few employees could qualify as an "organization, whether a civil law corporation or otherwise," under Section 33(C)(i). Its answer, "yes," was based on two definitions, one from *Black's Law Dictionary* that says an organization is "a body of persons (such as a union or corporation) formed for a common purpose," and one from the *Oxford English Dictionary* that says an organization is an "organized body of people with a particular purpose, as a business, government department, charity, etc." The district court concluded, without any further analysis, that "neither of these definitions lead one to conclude that an organization must be legally separate from any other entity." But by the same reasoning, neither of these definitions would lead one to conclude that an internal committee can be an

organization even though the committee is legally inseparable from a larger organization. And each definition provides illustrations of organizations: union, corporation, business, government department, charity.

Similarly, the *Merriam-Webster Dictionary*, which the district court does not reference, defines "organization" as an "association, society" or "an administrative and functional structure (such as a business or a political party)."

An internal pension committee, with no separate identity from a hospital's human resources department of which it is a part, is unlike any of the examples provided in any of the dictionary definitions. Moreover, even if the district court were correct in holding that an internal committee fits the dictionary definition of organization, a "word in a statute may or may not extend to the outer limits of its definitional possibilities." *Abuelhawa v. United States*, 556 U.S. 816, 819-20 (2009) (quoting *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006)). It must conform to the statutory context in which it appears and be consistent with the statute's purposes. *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) ("it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish").

The term "civil law corporation or otherwise," would have been unnecessary to the meaning of the statute if, as the district court held, the ordinary dictionary

meaning of "organization" included an internal committee of another entity, since the words would not have clarified anything. The principle undergirding the doctrine of *ejusdem generis,* is applicable here: "if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes" *State v. Eckhardt*, 133 S.W. 321, 322 (Mo. 1910). *See also* Sutherland, *Statutory Construction* § 47:18. *See also Swanson v. Department of Health & Social Services*, 312 N.W.2d 833 (Wis. App. 1981). The term "or otherwise" in Section 3(33)(C)(i) should thus be understood as referring to entities that are similar to the specific term "civil law corporation," that is, an entity such as a trust or an association,[8] which, like corporations, are distinct juridical persons, regardless of whether the entity exists under civil law or religious law.

Moreover, if Congress had intended to provide that an internal committee of an independent church-affiliated agency could be a Section 3(33)(C)(i) organization, it would have modified Section 3(33)(A) to provide that a church plan is a "plan maintained by a church or convention of churches, or by a nonprofit agency controlled by or associated with a church."

---

[8] As noted above, *Instructions for Form 1023, Application for Recognition of Exemption Under Section 501(c) of the Internal Revenue Code supra* note 7, associations and trusts are the two other organizational forms that can be used by IRC section 501(c)(3) nonprofits such as church pension boards.

It should also be said that a possible reason that the statute included the term "organization or otherwise" was that eight months before the enactment of the amendments the IRS had issued a regulation on church plans that provided that a pension plan "shall not lose its status as a church plan because of the fact that it is administered by a separately incorporated fiduciary such as a pension board or a bank." 26 CFR 1.414(e)-1(f) (March 30, 1980). The statutory term "civil corporation or otherwise" ensured that the IRS would not be able to take the position, as it did in the regulation, that the term organization would be limited to entities that are incorporated. As discussed below, church pension boards were usually incorporated, but some were structured as trusts or associations, two other permissible vehicles for tax exempt nonprofit organizations.

**B. The legislative history of the 1980 church plan amendments demonstrates that Congress drafted Section 3(33)(C)(i) for the sole purpose of permitting "church pension boards" to maintain a church plan.**

As noted above, the language of Section 3(33)(C)(i) is properly read to limit the term "organization" to corporations, trusts, and associations and does not extend to internal committees of a nonprofit hospital, school or social services agency with ties to a church or convention of churches. But even if the term were ambiguous – and the fact that courts have differed on the meaning of the term itself suggests some measure of ambiguity – the legislative history of the statute, entirely

ignored by the district court, uncontrovertibly demonstrates that Section 3(33)(C)(i) was crafted for the express purpose of treating a plan as a church plan if it was "maintained" by a church pension board, a term used during the legislative gestational period and for which Section 3(33)(C)(i) provided a statutory definition. As to this issue, the legislative history tells a consistent story, from the religious groups that first advocated amendments to the definition, from floor statements from the amendment's sponsors, and committee reports.

In ERISA, as initially enacted in 1974, Congress defined a church plan as a plan "established and maintained for its 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 original ERISA definition of church plan prohibited church plans from covering employees of aligned nonprofit organizations such as hospitals, schools, and social services agencies; church plans could only cover actual church employees. However, the law provided for a six-year transition period during which plans established and maintained by churches as of the date of ERISA's enactment could continue to include both their own employees and the employees

if their affiliated agencies until 1982.[9] All other plans were immediately subject to ERISA.

The legislative history of the 1980 amendments to the church plan definition establishes beyond doubt that they were designed primarily to address two separate problems, neither of which involved the authority of church-affiliated nonprofit hospitals, schools, or social services 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, the one directly germane to the issue before this Court, was that the exemption of a church plan might be jeopardized in cases where the plan was maintained by a separate nonprofit organization created by a church congregation or convention rather than maintained directly by the church, which was a common practice among protestant churches that did not have a hierarchical structure.

---

[9] This "grandfather" provision stated "a plan in existence in 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…" 29 U.S.C. § 1002(33)(C)(1974).

We discuss each of these concerns, and how they provided the blueprint for the legislative effort, below.

1. The 1980 church-plan amendments were intended primarily to make the grandfather rule permanent.

The original ERISA definition of church plan was unambiguous in providing that church plans had to be established and maintained by churches. A hospital or other agency, even though connected to 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 OSF predecessor plans had to comply with ERISA requirements unless they were part of a plan established and maintained by a church.

Approximately 27 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 1980 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 the Lutheran Church Missouri-Synod 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. . .
> *Id*.

Several of the letters suggested that the performance by churches in their pension plans had been exemplary and that churches would not permit their plans to fail. *Id.* at 10057.

Not a single letter addressed concern about plans sponsored directly by church-affiliated hospitals, schools, or social services agencies. 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 actually 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):

> 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. .
>
> * * *
>
> 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.

*Id.* 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-affiliated hospitals, schools, or other 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 nonprofit hospitals and other 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.

The Senate Finance Committee Report describing the provisions of the Multiemployer Pension Plan Amendments Act of 1980, describes the pension plan provisions in that Act as follows:

> Church Pension plans— The Committee agreed that the current definition of church plan would be continued without reference to dates.[10]

The report does not mention extending church plan status to plans that had not been established by churches. It is inconceivable that Congress intended to do so but forgot to mention it in its description of its legislation.

> 2. Section 3(33)(C)(i) was drafted to clarify that a plan maintained by a church pension board qualified as a church plan.

In addition to concern about church plans being able to continue to cover employees of their affiliated agencies, Congress was also concerned that some church plans might not technically comply with ERISA, because they were maintained by "church pension boards," which were organizations that maintained plans for churches and their affiliates but were separate from the churches whose

[10] H.R. REP. No 96-364, at 1 (1980) (A.&P.L.H.),WL 355760.

plans they maintained. Section 3(33)(C)(i) was intended to clarify that plans maintained by such pension boards were nevertheless church plans.

When Representative Barber Conable introduced the first bill amending the church plan provisions on May 2, 1978, he explained the need for clarification of the definition of church plan to reflect the fact that, "the large majority of church plans of the congregational denominations are administered by a pension board, a unit separate from, but controlled by, the denomination." He went on to explain that 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."

In describing his bill, H.R. 12172, he said it "recognizes pension boards as acceptable funding media for church plans. A plan or program funded or administered through a pension board, whether a civil law corporation or otherwise, will be considered a church plan, provided the principal purpose or function of this organization is the administration or funding of a plan or program for the provision of retirement or welfare benefits for the employees of a church. It is not clear whether a plan administered by a pension board of a congregational church is a plan established and maintained for its employees by a church. 124 CONG. REC. 12107 (May 2, 1978).

Almost identical language was used when the Senate version of the bill, S. 3172, was introduced by Senator Talmadge a month later, on June 7, 1978. He noted that, "Most church plans of congressional denominations are administered by a pension board. This is *usually* an organization separately incorporated from but controlled by, the denomination." (emphasis added) 124 CONG. REC. 16522, June 7, 1978. He used almost identical language when he reintroduced the bill a year later, on May 7, 1979. In each version of the bill, and in the final legislation, the phrase to describe a pension board was "a civil law corporation or otherwise."

Similarly, the floor debate on the final Senate bill included in the July 29, 1980 *Congressional Record* makes plain that the objective of the "civil law corporation or otherwise" phrase was included solely for church pension boards, whether they were incorporated or not.

> 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)

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]

Had Congress intended the "or otherwise" language to encompass a hospital's internal administrative committee, it surely would have been mentioned. More likely this phrase was used 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. Other church pension boards described themselves as associations. As noted in footnote 7 above, trusts and unincorporated associations are the two forms of nonprofits, other than nonprofit corporations, that can receive exemptions under Section 501(c)(3) of the Internal Revenue Code.

In short, the legislative history of the 1980 amendments does not support the idea that Congress intended to permit church-affiliated hospitals and other agencies to sponsor their own pension plans; rather the intent was merely to allow these agencies to continue to participate in plans sponsored by churches or conventions

---

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

or association of churches, and to clarify that church plans did not lose their status as such because a church pension board maintained the plan.

**C. The district court's opinion fails to effectuate ERISA's broad remedial purpose**

The district court's interpretation of the statutory requirement that a church plan must be "maintained by an organization, whether a civil law corporation or otherwise" is not only inconsistent with the text of the law and its legislative history, it undermines Congress's goal in ERISA of assuring working men and women that they can rely on the security of the pensions they earn in private-sector charitable employment.

As noted above, the 1980 Congress was willing, over the objections of ERISA's principal co-sponsor, Senator Jacob Javits, and the Department of the Treasury, to allow plans established by churches to be able to continue to cover the employees of church schools and hospitals.[13] The unstated assumption was that a church that had established a plan would recognize, or would be persuaded to

[13] Senate Finance Committee Markup Session of June 12, 1980. Assistant Secretary of the Treasury, Daniel Halperin opposed the provision allowing church-established plans to cover employees of their affiliated hospitals and schools saying that it "would mean that if somebody 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." p.2. *Stenographic Transcript of Hearings Before the Comm. On Fin., U.S. S., Exec. Sess.*, 96th Cong. 40 (June 12, 1980).

recognize, a moral responsibility to back it financially. In the situations that have been brought to our attention, this has, in fact, proven to be the case.

Although there have been instances where churches that established plans have resisted backing them financially – because of bankruptcy filings relating to priest sex abuse litigation, stock market reversals, or the terms of a merger – media attention and the resulting public outcry have resulted in churches ultimately acknowledging that they have a moral obligation to pay the retirees' promised pensions.

For example, lay teachers working under a pension plan established by the Catholic Diocese of Wilmington, Delaware were told that the Diocese could no longer afford to fund their plan because of a bankruptcy proceeding resulting from priest sex abuse litigation. Articles in the *Wilmington News Journal* and a segment on National Public Radio's *Morning Edition*, focused public attention on the teachers' plight. As a result of this moral suasion and help from a volunteer bankruptcy lawyer, the Diocese reconsidered and agreed to fully fund the teachers' plan.[14]

Similarly, when the Diocese of La Crosse, Wisconsin announced that it was terminating its plan for lay employees because of "market conditions" and that

[14] *Diocese of Wilmington lay workers say deal struck on Pension Fund*, Beth Miller, News Journal, June 22, 2011. http://www.bishop-accountability.org/news2011/05_06/2011_06_22_Miller_DioceseOf.htm

employees and retirees would receive lump sums equal to only a portion of their pensions, the participants' protests were highlighted in articles by the *Eau Claire Leader-Telegram,* the *La Crosse Tribune*, and the *National Catholic Reporter*. The result was that the Bishop announced that he was reviewing his decision to terminate the plan.[15]

Most recently, media attention in the *Providence Journal* and on Rhode Island Public Radio to the decision by the Roman Catholic Diocese of Providence not to stand behind the St. Joseph Health Services of Rhode Island pension plan, a plan it had established, after the plan was declared to be insolvent, resulted in a legislative resolution, involvement of a bankruptcy receiver, and lawsuits. The Diocese has now agreed to a proposed settlement of the lawsuits.[16]

By contrast, when a pension plan has not been established by a church, it is all too easy for a church to disclaim financial responsibility even though it is

---

[15] *Wisconsin diocese calls off plan to rescind employees' pensions*. Peter Feuerherd, National Catholic Reporter, April 19, 2018; *LaCrosse diocese puts lay pension termination on hold pending review*, Mike Tighe, La Crosse Tribune, April 19, 2018. https://lacrossetribune.com/news/local/la-crosse-diocese-puts-lay-pension-termination-on-hold-pending/article_a93611d8-f45c-5ee7-8917-95416e355dd5.html

[16] *Judge conditionally approves proposed settlement to resolve St. Joseph Health lawsuits.* Pensions & Investments, James Comtois, October 30, 2018. https://www.pionline.com/article/20181030/ONLINE/181039980/judge-conditionally-approves-proposed-settlement-to-resolve-st-joseph-health-lawsuits

undisputed that its association with the hospital, school, or social services agency was used by the church and the plan sponsor as the rationale for obtaining the IRS private letter ruling.

The consequences of the rulings, including most importantly, the loss of federal pension insurance, are human tragedies for individuals who did nothing wrong, other than choosing to work for a religiously-affiliated nonprofit entity rather than a secular nonprofit entity.

These individuals include the orderlies and nurses from St. Mary's Hospital in Passaic, New Jersey, who contacted the Pension Rights Center five years ago. Their hospital had established a pension plan that became covered by ERISA in 1974, but claiming the plan was a "church plan," it received an IRS church plan ruling and a refund of PBGC premiums in 2001. It then stopped complying with ERISA's funding requirements. When the hospital was sold the employees were told that their plan would be terminated and that they would receive lump sum payments equaling only 40 percent of the pensions they had earned. They were shocked to learn that the religious order that sponsored the hospital had "no legal obligation to fund the plan."[17]

---

[17] Mary Jo Layton, *Retirees from St. Mary's Hospital in Passaic may Lose Their Pensions in Sale*, Bergen Record, April 26, 2013, *available at* http://www.northjersey.com/news/health-news/retirees-from-st-mary-s-hospital-in-passaic-may-lose-their-pensions-in-sale-1.624917; *See also* Geller *supra* note 3.

Currently, the Center is working with retirees from St. James Hospital in Newark, New Jersey, who came to the Center seeking help to restore their pensions. Their checks stopped last year, in November 2017, because their plan ran out of money. As in so many instances, affiliation with a church, in this case, an Archdiocese, had been used to obtain a church plan ruling that exempted the plan from all ERISA requirements – and the protections of the PBGC which had guaranteed their pensions starting in 1974. The ruling was issued in 1990. When the St. James Hospital plan was terminated six years later, money was given to an asset manager to pay their pensions. Now elderly retirees, who spent their entire careers at the hospital, are struggling to pay their day-to-day bills with their meager Social Security payments. A spokesperson for the Archdiocese told the Star Ledger "The Archdiocese did not sponsor or administer that plan, nor were we responsible for the plan."18

A similar scenario is playing out in Upstate New York. Retirees of St. Clare's Hospital in Schenectady recently received letters telling them that their pension checks would stop after next month. They were told the money given to an insurance company when their plan terminated had run out. As in the St.

[18] *Bamboozled: How Catholic hospitals get away with letting pensions go broke*, Karin Price Mueller, November 28, 2016, New Jersey Star-Ledger.

James' situation, affiliation with a church had been used to obtain the church plan ruling and the church has disclaimed all responsibility for paying the pensions.[19]

Other employees and retirees have reached out the Center because they are fearful that they will also lose their pensions. Employees at the United Jewish Communities of MetroWest, New Jersey, one of the largest Jewish Federations, contacted the Center when they received letters saying that "because of extraordinary financial pressure" their employer was seeking a church plan ruling.[20]

Many other employees and retirees are also worried that their pensions could be reduced or eliminated. Among them are retirees from Saint Peter's University Hospital, including a former CEO, who contacted us when they learned that after paying premiums to the PBGC as an ERISA plan for more than 30 years, their underfunded plan had requested an IRS church plan ruling. The Center introduced

---

[19] *St. Clare's retirees share anger, anxiety at pension crisis,* John Cropley, Daily Gazette, November 11, 2018. https://dailygazette.com/article/2018/11/11/st-clare-s-retirees-share-anger-anxiety-at-pension-crisis.

[20] *Loophole Puts Pension Plans at Risk*, Nathan Guttman, Jewish Daily Forward, February13, 2012. http://forward.com/opinion/editorial/151523/the-pension-promise/

them to the attorneys representing the Appellants in this case. They are currently in litigation in the Third Circuit.[21]

The reality is that employers can terminate pension plans at any time. If OSF were to end its pension plans now, participants on average would receive roughly one-half of their pensions, and many would receive far less. If OSF continues to maintain the plans and does not fund them adequately, the retirees could lose all of their hard-earned benefits. This is not what the 1980 Congress intended, and it is not what the church plan amendments, objectively read, permit.

To suggest, as some have, that a future Congress may correct this injustice is unrealistic. It is also unnecessary. The law is clear that the internal administrative committees involved in this case, are not organizations within the meaning of Section 3(33)(C)(i) and that they do not "maintain" the pension plans. Only this Court, and the other courts now addressing this critical issue, can fulfill the broad remedial purpose of ERISA to "safeguard the pension expectations of American workers."[22]

---

[21] Tom Haydon, *N.J. Workers at Religious Institutions Fear Change Threatens Pensions*, New Jersey Star Ledger, January 12, 2012 https://www.nj.com/news/index.ssf/2012/01/nj_workers_at_religious_instit.html

[22] Statement by Senator Harrison Williams, one of the law's two principal co-sponsors. *Pensions Reform Passed by Senate and Sent to Ford*, Richard L. Madden, New York Times, August 23, 1974, p. 1. Senator Jacob Javits, the other principal sponsor, described ERISA as "the greatest development in the life of the American worker since Social Security." Subcommittee on Labor, Senate

## V. CONCLUSION

For the reasons stated above, the Pension Rights Center respectfully asks the Court to reverse the District Court's decision and remand for further proceedings.

RESPECTFULLY SUBMITTED this 20th day of December, 2018.

By: */s/ Mark D. DeBofsky*

**Mark D. DeBofsky**
*Counsel of Record*
DeBofsky Sherman & Casciari, P.C.
200 W. Madison St., Suite 2670
Chicago, Illinois 60606
mdebofsky@debofsky.com
(312) 561-4040

**Karen W. Ferguson**
**Norman P. Stein**
*Pension Rights Center*
1730 M Street, NW, Suite 1000
Washington, DC 20036
kferguson@pensionrights.org
nps32@drexel.edu
(202) 296-3776

---

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

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 7th Cir. R. 32, the undersigned attorney for Appellant the Pension Rights Center hereby declares:

1. This document contains 6,779 words.

2. This document was prepared using Microsoft Word from Office 365.

3. The font type used throughout this document is "Times New Roman," and the font size used throughout this document is 14 point and 14 point for footnotes.

4. I relied on the word count feature of Microsoft Word in preparing this certificate.

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

Executed on: December 20, 2018

/s/ Mark D. DeBofsky

__________________________

Mark D. DeBofsky

**CERTIFICATE OF SERVICE**

Pursuant to Fed. R. App. P. 31(b), the undersigned attorney for Appellant the Pension Rights Center hereby certifies that he caused two copies of the *Amicus Curiae* Brief of the Pension Rights Center in Support of Plaintiffs-Appellants to be served on all counsel of record electronically by CM/ECF and by First Class Mail on December 20, 2018.

Executed on: December 20, 2018

/s/ Mark D. DeBofsky

Mark D. DeBofsky