No. 15-1368

United States Court of Appeals

for the

Seventh Circuit

MARIA STAPLETON, on behalf of herself,
individually, and on behalf of all others similarly situated,
Plaintiff – Appellee,
v.
ADVOCATE HEALTH CARE NETWORK AND SUBSIDIARIES ET AL
Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:14-cv-01873
The Honorable Edmond E. Chang, Chief Judge Presiding

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

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Appellate Court No: 15-1368

Short Caption: Maria Stapleton et al v. Advocate Health Care Network and Subsidiaries et al

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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 nearly 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.

The issue presented by this case, whether a pension plan established by a religiously-affiliated nonprofit organization is a "church plan," is of concern to 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]

[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 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

The situations brought to our attention conform to a pattern. Religiously-affiliated employers that had brought their plans into full compliance with the Employee Income Security Act of 1974 (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 and enable the plan sponsor to claim refunds of pension insurance premiums from the PBGC.[3]

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unusual. For hundreds of thousands of 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] These premium refunds could be substantial. For example, Lutheran General Healthcare System, an Advocate predecessor plan received a refund of $1,160,759.62 in PBGC premiums on July 12, 1999. See #215 on p. 24 of a listing of refunds received from the PBGC under a Freedom of Information Request. http://www.pensionrights.org/sites/default/files/docs/listing_of_pbgc_church_plan_refunds_1991_-_2005.pdf Other listings of PBGC refunds are at 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. In a February 18, 2015 response to our FOIA request, PBGC General Counsel Judith R. Starr denied our request for documents relating

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,"[4] 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.[5]

Five 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 rulings (and similar U.S. Department of Labor Advisory Opinions). We file this brief to share with the Court our understanding of the purpose of ERISA, the scope of the church plan

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to refunds between 1983-1991, because "PBGC's search did not locate any responsive documents with information relating to church plans in that date range." This may explain why a premium refund to the Evangelical Hospital Association Employees Pension Plan based on its March 7, 1991 IRS church plan ruling not appear in the documents.

[4] For a 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

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

exemption, and the perspectives of the individuals whose future retirement security will be affected by the decision in this case.

II. SUMMARY OF ARGUMENT

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 them to continue covering agency employees who were already participating in the plan on the enactment date of ERISA, but only until 1982. Thus, stand-alone agency plans, such as the predecessors of the Advocate Health System plan, were immediately subject to the new statute and complied by incorporating ERISA-mandated

participation, vesting, disclosure, fiduciary, and funding requirements, and paying pension insurance premiums for all participants.

Congress amended the church plan exemption in 1980 as a miscellaneous provision in the Multiemployer Pension Plan Amendments Act of 1980. Under the amendments, the grandfather provision was made permanent, so that a plan established by a church could continue to cover employees of affiliated agencies if the church so chose. The amendments also clarified that a church plan that was maintained by an entity separate and legally distinct from the church but controlled by the church (a structural arrangement common in congregational churches) would not lose its church exemption as a result of this arrangement.

The language employed to do the latter provided 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. Based on an erroneous IRS ruling policy, hospitals and other religiously-affiliated agencies began claiming church plan status for plans that they—rather than a church—established and maintained, contending that the organizations' employees who administered the plan, the internal pension committee, constituted a separate organization.

The IRS interpretation is at odds with the statutory language, which requires that a church establish a church plan, that the organization be an actual

organization and not merely an internal committee of the employer, and that the organization "maintain" the plan. The interpretation is also inconsistent with the legislative history of the church plan exemption, which incontrovertibly demonstrates that Congress amended the church plan provisions for two principal purposes: to allow church plans, i.e., plans actually sponsored by churches, to include agency employees among the plan's participants; and to make plain that a church plan does not lose its exempt status because it is maintained by a church pension board that is formally independent of but controlled by the church.

III. ARGUMENT

A. Introduction.

Before ERISA, employers who sponsored private 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. *See generally*, Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, in U.S. Senate, Special Committee on 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.*

In 1974, after more than a decade of debate, discussion, and deliberation, 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.

This case concerns the scope of an exemption from ERISA for "church plans." 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 of their affiliated agencies until 1982.[6] All other plans were immediately subject to ERISA.

In 1980, Congress amended the definition of "church plan" primarily to make permanent the "grandfather" provision that allowed plans established and maintained by churches to continue to cover both their employees and the employees of their affiliated nonprofit agencies. 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.[7] As described by the Church

[6] 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).

[7] A church pension board is a separate tax-exempt, nonprofit organization established by church conventions and congregations for the primary purpose of maintaining their employee benefit plans. Most are incorporated, but they can also be structured as trusts or unincorporated nonprofit associations. They have long been used by the major denominational congregations and conventions to maintain their employee benefit plans. The website of the Church Benefits Association lists nearly 50 churches with church pension boards (often now called church benefits boards to reflect that they also maintain health and other benefit

Alliance for Clarification of ERISA 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).

As described below, the legislative history unambiguously indicates that these were the only reasons advanced for the 1980 legislation and that the language of the amendment was intended to implement these narrow purposes and no other.

Despite the limited purpose of the 1980 amendments and despite the noncontroversial principle of statutory construction that exemptions to reform legislation such as ERISA should be narrowly construed,[8] the Internal Revenue Service, in a 1983 General Counsel's Memorandum followed by a series of private

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plans). http://churchbenefitsassociation.org/Membership/member_organizations.htm

[8] 3 SUTHERLAND STATUTORY CONSTRUCTION § 60:1 (7th ed. 2013)("Remedial statutes are liberally construed to suppress the evil and advance the remedy.")*; cf. United States v. Dickson*, 40 U.S. 141, 165, 10 L. Ed. 689 (1841)("we are led to the general rule of law, which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reasons thereof.").

letter rulings, expanded the scope of the church plan exemption to include any employee benefit plan sponsored by any nonprofit organization that has any affiliation, formal or otherwise, with a church as long as the plan is administered by an internal employee benefits committee.[9] The effect of the rulings is to render meaningless the requirement that an organization separate from the plan sponsor maintain the plan and to permit any church-affiliated hospital, schools, and social services agency to sponsor a church plan, even though they are virtually indistinguishable from other nonprofit organizations whose employee benefit plans are covered by ERISA.

B. Appellants Misconstrue the Language of ERISA § 3(33)

As the District Court ruled, the IRS position is inconsistent with the plain language of the statute, which unambiguously provides that a church plan is a plan established by a church or a convention or association of churches. *Stapleton v. Advocate Health Care Ntwk.*, No. 1:14-cv-01873, 2015 U.S. Dist.LEXIS, *10824 (N.D. Ill.Dec.31, 2014). Two other district courts have also found that the statute is unambiguous. *Rollins v. Dignity Health*, No. C13-1450 TEH, 2013 WL 6512682, at *7 (N.D. Cal. Dec. 12, 2013) ("both the [statutory] text and the [legislative] history confirm that a church plan must still be established by a church"); *Kaplan v. Saint Peter's Healthcare Sys.* ("*St. Peter's*"), No. 13-2941,

[9] We note that virtually all single-employer pension plans are administered by an internal committee of the plan sponsor.

2014 WL 1284854, at *5 (D.N.J. Mar. 31, 2014) ("if a church does not establish the plan, the inquiry ends there").

These decisions are also supported by the legislative history, the purpose, and the structure of the amendment. The IRS interpretation is unreasonable and 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.

The IRS position has already resulted in human tragedies for men and women who have done nothing wrong other than choosing to work for a religiously-affiliated nonprofit entity rather than a secular nonprofit entity. For example, St. Mary's Hospital in Passaic, New Jersey, sponsored 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, and stopped complying with ERISA's funding requirements. Now the hospital has been sold and the orderlies and nurses have been told that the new company is terminating their plan and that they will receive only 40 percent of the pensions they had earned.[10] This is only the most recent situation to have come to our attention.

[10] *See* Adam Geller, *Law Shields Churches, Leaves Pensions Unprotected*, Associated Press, October 5, 2013, *available at* http://bigstory.ap.org/article/law-

In its brief Advocate ignores the primary church plan definition in the 1980 church plan amendments, ERISA Section 3(33)(A) and asserts that it is exempt under the structure and language of the "church pension board" modification of that definition. It contends that the language of Section (C)(i) "broadly describes 'an organization whether a civil law corporation or otherwise' and, therefore, includes plans administered by pension administrative committees, such as the Administrative Committee of the Plan." (Appellant's brief at p. 22).

In fact, Section 3(33)(A) is the fulcrum of the definition of church plan. It provides 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) . . ." This language is virtually identical to the original 1974 language which made plain that a church plan was a plan only for church employees (except for limited transition rule provision permitting a church plan to continue covering agency employees that were included in the plan as of

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shields-churches-leaves-pensions-unprotected; 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. It was only when their plan was about to be terminated that the St. Mary's participants learned that, although it was the Hospital's affiliation with the Catholic Church that was the basis for the IRS ruling that had ended their pension insurance and other ERISA protections, the Church had no financial (or moral) obligation to back their plan.

ERISA's enactment). However, the 1980 amendments made an important change, adding a provision expanding the definition of "employees." Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364 sec. 407(a), 29 U.S.C. § 3(33), 94 Stat. 1208 (1980).

This new definition is codified in 29 USC § 1002(33)(C)(ii)(I), which provides 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 possible for the plans that had been grandfathered by ERISA to continue to be exempt from the requirements of the law.

Had the 1980 Congress intended to extend the church plan exemption to plans that had not been established by 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. The Advocate plan,

which was not established by a church, plainly does not come within Section 33(A).

However, another provision was also added to the law in 1980. This is the provision relied on by the IRS in the private letter rulings that it issued to Advocate and its predecessor plans. ERISA section (33)(C)(i) 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). The IRS found that the statutorily required "organization, whether a civil law corporation or otherwise" that maintains the Advocate plan and its predecessor plan was the plan's Administrative Committee.

This interpretation fails to take account of the fact that 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 a pension plan requires that employer contributions are made in a timely fashion, money is invested prudently, and benefits are paid out at retirement. In 1980, these functions were typically

performed by a pension committee consisting of human resources or other employees appointed by the employer. Pension committees administer plans, but they do not "maintain" them in any meaningful sense. Pension committees have no control over the terms of the plan, and no ability to fund them. They have no authority to amend or terminate plans or to bring actions to seek delinquent contributions.

A pension committee is also not an "organization, civil law corporation or otherwise." As appears in the discussion of the legislative history below, the term "organization" was intended to apply to church pension boards, which are legally distinct organizations from the church, separately incorporated entities, trusts, or unincorporated associations. In contrast, an administrative 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 corporation or otherwise.[11]

Advocate's approach to the statute, apart from interpreting an exemption from a reform statute in the broadest rather than narrowest possible terms, cannot be reconciled with the language and structure of the statute. As noted above, if Congress wished to allow all religiously affiliated nonprofit organizations to

[11] It seems highly probable that Congress included 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, and it is likely that other church pension boards were trusts or unincorporated nonprofit associations.

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, Advocate'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?

C. Appellants' Construction of the 1980 Church Plan Amendments is Inconsistent with their Legislative History

The legislative history of the 1980 amendments establishes beyond doubt that they were 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.

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. An 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. An agency-sponsored plan such as the Advocate predecessor plans had to comply with ERISA requirements unless it was 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 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 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 Board of the United Church of Christ 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.

Several of the letters noted that the performance by churches in their pension plans has 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 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 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.

Advocate finds support for its view by taking sentences out of context and attributing to them a meaning that the context belies. It notes, for example, that Senator Talmadge stated that "church agencies are essential to the churches' mission. They care for the sick and needy and disseminate religious instruction. They are in fact, part of the church. As a practical matter, it is doubtful that agency plans would survive subjection to ERISA."

Senator Talmadge's comments were made as part of his comments describing the church-plan amendment's introduction. The comments identify only one unified objective: to allow agencies and their employees to receive benefits under a plan established by a church. His comments make plain that he is discussing agency employees that were currently covered by a church-established plan and which would have to be separated into an agency plan after the 1982 grandfather provision sunsetted. Nowhere is there any indication that such

agencies could claim an exemption for a plan that they, rather than a church, established or maintained. To again quote Senator Talmadge:

> 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.[12]

In fact, at the time of Senator Talmadge's comments, stand-alone agency plans, as opposed to the grandfathered church plans covering agency employees to which Senator Talmadge was referring, were all subject to ERISA, including Advocate's predecessor plans.

Advocate also cites a comment by Senator Jacob Javits (R-NY), which expressed disapproval of the legislation. There is nothing, however, in Senator Javits' comments that suggest he thought the legislation would do anything more than what its sponsors said it would do: allow plans actually established by churches to continue to cover employees of agencies with associated with a church after 1982. His comments do not discuss whether such agencies could sponsor their own "church" plans, rather than participate in plans sponsored by actual churches, because the legislation and the various statements supporting it did not discuss or raise such a possibility.

[12] 125 CONG REC. 100052 (May 7, 1979) (statement of Sen. Herman Talmadge introducing church plan amendments).

Finally, Advocate cites a hearing before a Senate Finance Subcommittee, in which Daniel Halperin, Deputy Assistant Secretary of the Treasury for Tax Policy, expressed the Department of the Treasury's concern that the amendment would permit the employees of agencies to be excluded from the protections of ERISA. As in the case of Senator Javits' comments, the Deputy Assistant Secretary's comments were focused solely on agency employees who were participating in plans established by churches and were temporarily protected by the grandfather provision. The Treasury did not think they should continue to be denied ERISA protections after 1982.[13]

None of these remarks support Advocate's assertion that the IRS ruling position is consistent with the legislative history of the 1980 amendments. Rather, they are entirely consistent with what Congress said it was doing, making the ERISA grandfather clause that permitted church plans to cover agency employees only until 1983 permanent. Indeed, the Senate Finance Committee Report

[13] On April 20, 2015, an Expert Report written by Daniel Halperin about his Senate Finance Subcommittee testimony was filed 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 Center's website at http://www.pensionrights.org/sites/default/files/docs/chi_halperin_declaration_with_exhibits_signed.pdf Daniel Halperin is a professor at Harvard Law School and a nationally recognized expert in pension plan tax policy. He is also Vice Chairman of the Pension Rights Center's Board of Directors.

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.[14]

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

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?

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

> 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.[15] (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.[16]

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

[15] 126 CONG. REC 20245 (July 29, 1980) (statement of Sen. Herman Talmadge).
[16] H.R. REP. No 96-364, at 1 (1980) (A.&P.L.H.),WL 355760.

> qualify as an exempt church plan under ERISA. This question would be resolved by the proposed bills.[17] (emphasis added)

Significantly, there is no mention anywhere in the legislative history of an exemption for plans non-church plans administered by an "Administrative Committee."

In short, neither the statute nor the legislative history of the 1980 amendments support the idea that Congress intended to permit church-affiliated 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 or association of churches. The 33(C)(i) language was intended to clarify that church plans did not lose their status as such because a church pension board maintained the plan.

Advocate also 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

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[17] *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 noted by Senator Russell Long (D-LA), in the colloquy quoted above, the following year, some church pension boards were unincorporated. Their inclusion in the statutory phrase "or otherwise" may have been the source of much of the confusion over the years. Senator Long noted that "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… of a plan…*"* See FN 17 *supra*

nothing to support this contention. Until recent press coverage and 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 and the IRS were aware either that a church plan ruling had been requested or that one had been issued. The IRS ruling position was hidden from Congress, as well as from the affected participants.

IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 13th day of May, 2015.

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CERTIFICATION OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate Procedure 26(d) and 32(a)(7)(B). It contains 6,568 words, excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface and typestyle requirements of Federal Rule 32(a)(5) and 32(a)(6). It has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman font.

3. The text of this electronic brief is identical to the text of the paper copies, and McAfee Virus Scan has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 13th day of May 2015.

/s/ *Karen W. Ferguson*
Karen W. Ferguson

CERTIFICATE OF SERVICE

I certify that on the date indicated below, I filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send notification and a copy of the brief to the counsel of record for the parties. I further certify that all parties to this case are represented by counsel of record who are CM/ECF participants.

Executed this 13th day of May 2015.

/s/ Karen W. Ferguson
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