No. 15-1172

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LAURENCE KAPLAN, on behalf of himself, individually, and on behalf of all others similarly situated,

Plaintiff – Appellee,

v.

SAINT PETER'S HEALTHCARE SYSTEM; RONALD C. RAK; SUSAN BALLESTERO, an individual; GARRICK STOLDT, an individual; and JOHN and JANE DOES 1 – 20,

Defendants—Appellants.

On Appeal From The United States District Court
For The District of New Jersey, Civil No. 3:13-CV-02941,
The Honorable Michael A. Shipp, U.S.D.J.

BRIEF *AMICUS CURIAE* OF THE PENSION RIGHTS CENTER IN SUPPORT OF APPELLEES AND AFFIRMANCE

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United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 15-1172

Laurence Kaplan, on behalf of himself, individually, and on behalf of all others similarly situated, Plaintiff-Appellee

v.

Saint Peter's Healthcare System; Ronald C. Rak, an individual; Susan Ballastero, an individual; Garrick Stoldt, an individual; and John and Jane Does 1-20, Defendants-Appellants

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Pension Rights Center makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s/ Richard H. Frankel
(Signature of Counsel or Party)

Dated: 5/11/2015

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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. Many impacted individuals have contacted the Pension Rights Center, concerned that the pensions they had earned over a lifetime of work for church-affiliated hospitals, schools, and social services agencies were in jeopardy.

The sponsors of these plans had for decades regarded their plans as subject to the Employee Retirement Income Security Act of 1974 (ERISA) and had paid premiums to the Pension Benefit Guaranty Corporation (PBGC), something that non-ERISA plans are not eligible to do. The sponsors repeatedly represented to their participants over several decades that their plans were covered by ERISA and that their pensions were insured by the Pension Benefit Guaranty Corporation

(PBGC). Until the issuance of a September 2011 IRS Revenue Procedure,[1] they were not required to tell their employees that they had decided to obtain an IRS "church-plan" ruling, even though the ruling would deny the employees the protection of the federal pension insurance program and other ERISA provisions.

Current and former employees of Saint Peter's University Hospital were among the individuals who contacted the Center about their concerns. They contacted the Center after reading a June 5, 2010 *Wall Street Journal* article by Ellen E. Schultz. Schultz reported that the St. Peter's plan was only 64 percent funded and that Saint Peter's had sought a ruling from the Internal Revenue Service that its plan was a "church plan" exempt from all ERISA protections.[2] All were long-service employees who had been assured throughout their work lives that their pensions were protected by the federal private pension laws. Over the years, they had received summary plan booklets, benefit statements, funding reports, letters and memoranda, assuring them that their pension plan conformed in

[1] Rev. Proc. 2011-44, 26 CFR 601.201.

[2] The principal focus of the *Wall Street Journal* article was the conversion of the Hospital Center at Orange to church plan status which had converted to a "church plan" after affiliating with a with a Catholic health system. The Hospital went into bankruptcy a year after receiving the ruling, and at the time of the article was 30 percent funded and projected to run out of money in three years. With help from the Center and many others the HCO plan ultimately had its ERISA status affirmed only eight months before the plan would have run completely out of money.

all respects to the requirements of federal law, and that their benefits were insured by the federal pension insurance program, the Pension Benefit Guaranty Corporation. Those who contacted us – including nurses and orderlies, a bookkeeper, a former CEO, and the plaintiff in this case – were terrified that they would not be able to pay their day-to-day expenses in retirement if the IRS were to rule that their plan was a church plan.

Center staff worked with the Saint Peter's participants, first to try to persuade the Hospital to withdraw its church plan ruling request, and then to urge the Internal Revenue Service to deny the request. These efforts were unsuccessful. Now litigation is the only hope that they have for ensuring their pensions – and those of current and future retirees in hundreds of other plans sponsored by church-related hospitals, nursing homes, schools, and community centers that now claim church plan status.

The Center has extensively researched 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 exemption, and the experiences and perspectives of the hundreds of thousands of individuals whose pensions are at stake.

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 Saint Peter's plan, were immediately subject to the new statute and complied (in Saint Peter's case for the next 32 years).

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 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 large congregational churches, would not lose its church exemption as a result of this structural 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 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 itself, 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.[3] 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. As Dr. Gary Nash, Secretary and General Counsel for the Church Alliance for the Clarification of ERISA explained, the legislation would "define a church plan to include a plan established by a church pension board," a term that had a well-understood meaning (that would not have extended to internal pension committees).[4] Statement of Gary

[3] 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).

[4] 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. Nearly 50 churches with church pension boards, often now called church benefits boards to reflect that they also maintain health and other benefit plans are listed on the Church Benefits Association

Nash, *Hearing Before the Subcomm. On Private Pension Plans and Employee Fringe Benefits*, Senate 96th Cong. 380 (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,[5] the Internal Revenue Service, in a 1983 General Counsel's Memorandum followed by a series of private letter rulings, expanded the scope of the church plan exemption to include any employee benefit plan sponsored by any nonprofit organization that has any

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website.
http://churchbenefitsassociation.org/Membership/member_organizations.htm

[5] *See e.g., Bridewell v. Cincinnati Reds,* 155 F.3d 828, 831 (6th Cir. 1998) *citing Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed.2d 393 (1960) ("Moreover, the Supreme Court has held, in no uncertain terms, that the FLSA is to be construed liberally to further its broad remedial purpose and that "exemptions are to be narrowly construed against the employers."); *see also* 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.").

affiliation, formal or otherwise, with a church as long as the plan is administered by an internal employee benefits committee.[6] 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 held, the IRS's ruling 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. *Kaplan v. Saint Peter's Healthcare Sys.* ("*St. Peter's*"), No. 13-2941, 2014 WL 1284854, at *5 (D.N.J. Mar. 31, 2014) ("if a church does not establish the plan, the inquiry ends there"). 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"); *Stapleton v. Advocate Health Care Ntwk.,* No. 1:14-cv-01873, 2015 U.S. Dist.LEXIS, *10824 (N.D. Ill.Dec.31, 2014).

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

The 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 in 2001, received a refund of its PBGC premiums, 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.[7] This is only the most recent situation to have come to our attention.

[7] *See* 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; Adam Geller, *Law Shields Churches, Leaves Pensions Unprotected*, Associated Press, October 5, 2013, *available at* http://bigstory.ap.org/article/law-shields-churches-leaves-pensions-unprotected

In its brief Saint Peter's Healthcare System asserts that the 1980 church plan amendments include "a plan maintained or administered by an entity, like a retirement committee, 'controlled by or associated with a church.'" *See* Brief For Appellant at 24. Aside from conflating two separate statutory requirements—that an organization *maintain* ***and*** *administer* (or fund) a plan, the Appellant's argument ignores the primary church plan definition and the structure and language of the "pension board" modification of that definition. It should also be said that Saint Peters' candidly admits that its decision to seek "church plan" status" was monetarily and not theologically driven. *Id.* at 53. Below we analyze the entire statute rather than offering a piecemeal construction of one of its subsections.

Section 3(33)(A), the fulcrum of the definition of church plan, 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 ERISA's enactment). 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), § 3(33)(C), 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 allows 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 Saint Peter's plan, which was not established by a church, plainly does not come within Section

33(A). And we reject Saint Peter's speculation that the failure to say this was simply a lapse in the legislative drafter's craft.

However, another provision was also added to the law in 1980. This is the provision relied on by the IRS in the private letter ruling that it issued to Saint Peter's Healthcare System on August 14, 2013, two days after Saint Peter's filed its Motion to Dismiss in the District Court. 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 Saint Peter's plan was the plan's Retirement Committee since it includes members appointed by the church.[8]

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."

[8] The members of the Retirement Committee were appointed by the Hospital and not the Bishop until 2010, when the Bishop of Metuchen began appointing the committee members.

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 association. As we have already noted, Dr. Gary Nash, testifying on behalf of the Church Alliance in favor of the 1980 amendment, noted that the organization language would "define a church plan to include a plan established by a church pension board. "In contrast, an administrative pension committee is

merely the unit of the plan sponsor that administers the plan for the plan sponsor. It is not a separate organization, either a civil corporation or otherwise.[9]

Saint Peter'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 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, Saint Peter'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?

[9] It seems 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.

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

As documented by Appellee Laurence Kaplan, the legislative history establishes beyond doubt that the 1980 amendments 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 Saint Peter's plan 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 Boards 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.

Saint Peter's finds support for its view by isolating a few sentences from context and attributing 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, and is located on pages 20 and 21in its entirety. 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.[10]

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

[10] 125 CONG REC. 100052 (May 7, 1979) (statement of Sen. Herman Talmadge introducing church plan amendments).

Senator Talmadge was referring, were subject to and survived ERISA. Appellant's Brief at 53 n.21. Indeed, Saint Peter's complied with ERISA from ERISA's for three decades.

Appellants also cite a comment by Senator Javits, 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.

Finally, Saint Peter's cites a hearing before the Senate Finance Committee, in which the Department of the Treasury expressed its concern that the amendment would permit the employees of agencies to be excluded from the protections of ERISA. As with the case of Senator Javits' comments, the comments of the Department reflect the concern that agency employees who participate in actual church plans should be entitled to ERISA protections.

These stray and inapposite remarks comments do not support Saint Peter'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 1980 permanent. Indeed, 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.[11]

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

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

captures this concern in the floor debates of the amendments to the definition of church plan:

> Mr. Talmadge. Mr. President, I understand that many church plans are maintained by separate incorporated organizations called pension boards. These boards have historically been considered by church denominations as part of their church. May I ask whether the bill would enable a church pension board to maintain a church plan?
>
> Mr. Long. Yes. I concur that a pension board that provides pension or welfare benefits for persons carrying out the work of the church and without whom the church could not function is an integral part of the church and is engaged in the function of the church even though separately incorporated. The bill recognizes the status of a church plan maintained by a pension board by providing that a plan maintained by an organization, ***whether separately incorporated or not,*** the principal purpose of which is the administration or funding of a plan or program for the provision of retirement or welfare benefits for the employees of a church, is a church plan provided that such organization is controlled by or associated with the church.[12] (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.[13]

This is also captured by testimony given by members of the Church Alliance at 1979 hearing of the Senate Finance Committee on miscellaneous pension issues,

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

including church plan issues. Reverend Gordon E. Smith appeared on behalf of the American Baptist Churches in the U.S.A. stating:

> The present statute fails to recognize the fact that the American Baptist employee benefit plans, as well as ***most church plans of congregational denominations, have historically been administered by a corporate entity that is separate from, but controlled by, the denomination.*** The statute is not clear as to whether such a plan may qualify as an exempt church plan under ERISA. This question would be resolved by the proposed bills.[14] (emphasis added)

And as noted, Dr. Gary Nash explained, the legislation would "define a church plan to include a plan established by a church pension board." Significantly, there is no mention anywhere in the legislative history of an exemption for plans non-church plans administered by "pension committees."

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.

[14] *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).

Saint Peter's also contends that Congress, when it referred to church plans in other laws, was aware of the IRS ruling position and thus ratified it. Here we note that Saint Peter's admits that even though it is a large and sophisticated hospital, presumably with knowledgeable counsel, it was "unaware it qualified as a church plan." Indeed, one of the saddest aspects of the IRS's misguided church-plan ruling policy is that few individuals—outside the executive suites of religiously-affiliated hospitals and other agencies seeking refuge in the exemption and their consultants —were aware of the plan until relatively recent press coverage. The nature of the IRS private letter ruling process ensured that the issue remained hidden from Congress, as well as 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 15th day of May, 2015.

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CERTIFICATION OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A) AND LOCAL RULE 31.1

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 6,479 words, excluding the parts of the brief exempted by Federal Rule 32(a)(7)(B)(iii) and by Local Rule 29.1(b).
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 brief complies with the electronic filing requirements of Local Rule 31.1(c). The text of this electronic brief is identical to the text of the paper copies, and Trend Micro Deep Security, version 9.0.6500 has been run on the file containing the electronic version of this brief and no virus has been detected.

Executed this 15th day of May 2015.

/s/ *Richard H. Frankel*
Richard H. Frankel

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: May 15, 2015

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I re-filed the corrected 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 15th day of May 2015.

/s/ *Richard H. Frankel*
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