No. 14-1735

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARILYN OVERALL,
on behalf of herself, individually, and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

ASCENSION HEALTH, a non-profit corporation; ASCENSION HEALTH ALLIANCE, a non-profit corporation; CATHOLIC HEALTH INVESTMENT MANAGEMENT COMPANY, a non-profit corporation; DEREK BEECHER; JEAN DEBLOIS; ERIC FEINSTEIN; WILLIAM FINLAYSON; TIMOTHY FLESCH; TRENNIS JONES; KATHLEEN KELLY; ELLEN KRON; TOM LANGSTON; LAURA LENTENBRINK; PATRICK MCGUIRE; JOSEPH O. MURDOCK; THERESA PECK; BARBARA POTTS; LARRY SMITH; ANTHONY TERSIGNI; HERBERT VALLIER; DOUGLAS WAITE; FRANK WARNING; CAROL WHITTINGTON; UNITED STATES OF AMERICA; and JOHN and JANE DOES 1-20,

Defendants-Appellees.

On Appeal from the
United States District Court Eastern District of Michigan
No. 13-cv-11396-AC-LJM
Honorable Avern Cohn

AMICUS CURIAE BRIEF OF THE PENSION RIGHTS CENTER IN SUPPORT OF APPELLANTS

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 14-1735 Case Name: Marilyn Overall v Ascension Health,et al

Name of counsel: Karen W. Ferguson

Pursuant to 6th Cir. R. 26.1, Pension Rights Center
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on September 29, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Karen W. Ferguson

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF AUTHORITY TO FILE AS AMICUS CURIAE

Appellant has consented to the filing of this brief, however Appellee has not consented. Accordingly, the Pension Rights Center has filed an accompanying Motion for Leave to File as Amicus Curiae.

STATEMENT REQUIRED BY FRAP RULE 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 person other than the amicus curiae has contributed money intended to fund the preparation or submission of this brief..

I. INTEREST OF AMICUS CURIAE

The Pension Rights Center, a Washington, D.C. nonprofit consumer organization, was established in 1976 to educate the public about their rights under the Employee Retirement Income Security Act of 1974 (ERISA), and to ensure that government agency regulations interpreting the new law accurately reflected congressional intent.[1]

Over the past 38 years the Center has helped hundreds of pension plan participants communicate their concerns about federal agency actions to policymakers, the public, and the courts.

The Center's interest in the issues raised by this case arose four years ago when we were contacted by participants in pension plans of several religiously-affiliated hospitals, social services agencies, and educational organizations. The situations of each group were different, but all had learned that their pension plans were seriously underfunded, and that if their plans were terminated, they would receive very little – and in one case, none – of the pension benefits they had earned

[1] The Center's activities subsequently expanded to ending inequities in the law, assisting individuals to enforce their legal rights, and working for expansion and improvement of private and public retirement income programs. Seven major pension reform laws, six regulations, and several landmark lawsuits are directly traceable to Center initiatives. In addition, since 1993, the Center has served as the legal backup center for the U.S. Administration on Aging's Pension Counseling and Information Program. The Center's mission is to protect and promote the retirement security of workers, retirees and their families.

after 20, 30, and even 40, years of work. In each case, and others that subsequently came to our attention, the plan participants – nurses, orderlies, cafeteria workers, teachers, and social workers employed by Catholic hospitals, Jewish federations, and Protestant educational organizations – had been told that their pensions were in jeopardy because their plans were "church plans" exempt from the pension insurance and other protections of federal law. They were advised that Internal Revenue Service private letter rulings authorized (or would authorize) the exemption.

In most of the cases brought to our attention the participants' plans had been covered by ERISA immediately following its enactment in 1974. They had learned that they had lost (or stood to lose) ERISA protections because consulting firms had advised their employers to seek IRS "church plan rulings" in order to reduce the costs of funding their plans and save money that would otherwise be paid in federal pension insurance premiums.

The participants were concerned that their plans were not financially (or morally) backed by a church, and noted that there was nothing religious about earning benefits under a pension plan. They did not understand why they should be treated differently from employees in nonprofit hospitals, schools, and social services agencies that were not affiliated with religious institutions, and pointed

out that, like those employees, they were covered by other federal worker protection laws and Social Security.

Concerned that the retirement security of these participants, and countless other current and future retirees, could be at risk as the result of the IRS's church plan rulings (and similar U.S. Department of Labor Advisory Opinions), we undertook to research the rulings, the law and its legislative history. We have shared the results of our research with the participants who have contacted us, as well as with government officials, Members of Congress, and the media.[2] Since a determination of the legality of IRS church plan rulings is central to the disposition of the issues in this case, we believe that our findings will be helpful to the Court.

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

[2] Links to Pension Rights Center fact sheets and a listing of news articles about church plans can be found at http://www.pensionrights.org/publications/fact-sheet/facts-about-church-pension-plans

pension benefits be insured by a new federal insurance agency, the Pension Benefit Guaranty Corporation. Congress provided few exceptions from ERISA's coverage, one of which was for plans established and maintained by churches or conventions or associations of churches. 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.

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, which 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, was interpreted by the IRS to allow religiously-affiliated agencies to claim church

plan status for plans that they rather than a church established and maintained. The IRS interpretation was based on a finding that the agency's internal pension committee was the "organization, whether civil corporation or otherwise" contemplated by the statute.

This interpretation, upheld by the district court, is at odds with the statutory language, which requires that a church establish a church plan, that the organization "maintain" the plan, and that the organization be an actual organization and not merely an internal committee of the employer. 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 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*, President's commission on Corporate Pension Funds and Other Private

Retirement and Welfare Programs, Public Policy and Private Pension Plans, A Report to the President on Private Employee Retirement Plans (1965); Merton C. Bernstein, The Future of Private Pensions (1964); 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. 29 U.S.C. §§ 1001, et. seq. 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." ERISA § 2(c), 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 one of two exemptions from ERISA for private sector plans, an exemption for "church plans."[3] ERISA § 3(33), 29 U.S.C. § 1002(33). A "church plan was defined by the 1974 Congress 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 …" ERISA § 3(33)(A), 29 U.S.C. § 1002(33)(A) (1974).

The original ERISA definition of church plan did not permit plans established and maintained by churches for their own employees to also cover employees of nonprofit organizations affiliated with churches, such as hospitals, schools, and social services agencies. 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.[4] All other plans were

[3] The second exemption for private sector plans was a partial exemption for so-called "top hat" plans and "excess benefit plans" covering certain executives highly paid employees. Congress also exempted government plans from ERISA.

[4] 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

immediately subject to ERISA, and were required to begin complying with the law in 1974.

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.[5] An additional change was a provision allowing ministerial employees to receive pension credit for periods when they were not employees of the church, such as when they were engaged in missionary work. ERISA § 3(33)(C)(ii), 29 U.S.C. § 1002(33)(C)(ii).

As described below, the legislative history unambiguously indicates that these were the only reasons advanced for the1980 legislation and that the language of the amendment was intended to implement these narrow purposes and no other.

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agencies of such church…. for the employees of such church… and the employees of one or more agencies of such church…" ERISA § 3(33)(C)(1974), 29 U.S.C. § 1002(33)(C)(1974).

[5] A church pension board is typically a separately incorporated financial institution established by church conventions and congregations for the primary purpose of maintaining their employee benefit plans. 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, now called church benefit boards, are listed on the Church Benefits Association website. http://churchbenefitsassociation.org/Membership/member_organizations.htm

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,[6] the Internal Revenue Service, in 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 affiliation, formal or otherwise, with a church as long as the plan is administered by an internal employee benefits committee.[7] It is the IRS's position in these rulings that these plans do not have to be sponsored by churches or congregations of churches at all, but, instead, can be sponsored directly by church-affiliated hospitals, schools, and social services agencies that are virtually indistinguishable from other nonprofit organizations whose employee

[6] *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.").

[7] As noted below, virtually all single-employer pension plans are administered by an internal committee.

benefit plans are covered by ERISA. The district court found that the IRS position was a reasonable construction of the statute that finds support in the legislative language and history of the 1980 amendments. *Overall v. Ascension*, No. 13-11396, 2014 WL 2448492, at *1 (E.D. Mich. May 13, 2014).

The IRS's ruling position and the decision below, however, are inconsistent with the 1974 and 1980 legislative history of the definition of church plan and are based on a semantically implausible reading of the statute's words. Indeed, two district courts have held that the statute unambiguously provides that a church plan is a plan established by a church or a convention or association of churches. *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, 2014 WL 1284854, at *5 (D.N.J. Mar. 31, 2014) ("if a church does not establish the plan, the inquiry ends there"). And in light of the legislative history, the purpose, and the structure of the statute, the IRS interpretation endorsed by the court below 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 employment.

The district court, in an unusual coda to its opinion, wrote "The church exemption is a congressional choice of historic proportion. And while it may appear to be an irrational distinction, it is a distinction mandated by law." *Overall v. Ascension*, 2014 WL 2448492, at *16. However, neither the language of the exemption, nor its legislative history, support the court's holding that the church exemption applies to plans sponsored by non-church nonprofit organizations solely because they claim to share common religious bonds with a church. The court's holding is a choice of "historic proportion," but it is not Congress's choice. It is, in fact, an agency and judicial usurpation of the legislative function, an amendment to rather than an interpretation of ERISA.[8]

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, followed by a refund of pension insurance premiums, and stopped complying with ERISA's funding requirements.

[8] The district court also noted that church plans are governed by state law. However, state law does not provide the pension insurance that is so critical to the protection of pension benefits. Nor does it require that plans meet minimum funding requirements or the all-important minimum standards and disclosure protections of ERISA.

Now the hospital is being sold and the orderlies and nurses have been told that the new company intends to terminate their plan, and that they will receive only 40 percent of the pensions they had earned.[9] This is only the most recent situation to have come to our attention. Since the typical retiree gets a yearly income from Social Security that is only slightly more than the annual federal minimum wage of $15,000, and half of all retirees have less than $2,000 in personal savings, a significant reduction in expected pension income can be devastating.[10]

[9] As discussed in I. above, the Pension Rights Center has been particularly alarmed that a large number of religiously affiliated hospital that for decades sponsored ERISA plans – that is, plans that honored all ERISA requirements, paid PBGC premiums, complied with ERISAs funding requirements, filed ERISA plan annual returns, and told participants that their benefits were protected by ERISA and federal pension insurance – have gone to the IRS (often urged to do so by consulting firms) and claimed that their plans had in fact been "church" plans all along. When the IRS sends such plans private letter rulings endorsing this position, the sponsor is not only free to stop funding the plan, but can also file for a return of previously paid PBGC premiums. Until September 2011, the IRS did not even require the plan sponsor or plan to notify employees that their benefits were no longer insured by the PBGC and that their employer was no longer required to fund their benefits. The Pension Rights Center learned through a Freedom of Information Act request that 79 faith-based hospitals, schools, and social services agencies filed for PBGC refunds between 1999 and 2007. Ascension received its private letter rulings in 1991 and 1993, before the date of our FOIA request. The record does not indicate whether some or all of the pension plans that were consolidated in Ascension's current plan were ever operated as ERISA plans.

[10] *See generally* U.S. Social Security Administration, Office of Policy, "Monthly Statistical Snapshot, August 2014," Table 2 (the average monthly Social Security benefit paid to retired workers in 2014 is $1,301.84, or $15,622.08 a year) *available at* http://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/index.html#table2; U.S.

B. The District Court's Holding is Inconsistent with the Language of ERISA § 3(33).

The district court's application of ERISA section 3(33) to Ascension can be read in either of two ways: first, the language of section 3(33) is unambiguous and exempts Ascension's plan from ERISA requirements; or second, the statute's language is ambiguous with respect to whether Ascension's plan is exempted but the legislative history supports the IRS position. In this section, we show that the district court's holding that a church plan is one that is "established by an organization that is controlled by or associated with a church" is not supported by the language of the statute.

Section 3(33)(A) 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

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Department of Labor, Employment Standards Administration, Wage and Hour Division, "Compliance Assistance – Fair Labor Standards Act (FLSA)(the federal minimum wage is $7.25 an hour. Assuming that there are 2080 work hours in a year (40 hours per week x 52 weeks per year) a worker making federal minimum wage would make$15,080 in one year) *available at* http://www.dol.gov/whd/flsa/index.htm; March 2014 Current Population Survey, PINC – 08 (in 2013 half of Americans age 65 and over who had income from financial assets received less than $1,962 a year from those assets. Further, 48 percent of Americans age 65 and over received no income from financial assets.) *available at* http://www.census.gov/hhes/www/cpstables/032014/perinc/pinc08_000.htm

virtually identical to the original 1974 language which made plain that a church plan was a plan only for church employees (except for the limited transition rule provision permitting a church plan to continue covering agency employees that were included in the plan as of ERISA's enactment). However, an important change was made by the 1980 amendments. A new provision was added 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 in Section 3(33)(C)(ii)(I), 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 Ascension 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 private letter rulings issued in 1991 and 1993 to Ascension, and by 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 district court held that under this section a plan sponsored by a church-affiliated organization, regardless of who establishes it, is a church plan as long as it is administered by a pension committee whose principal function is to administer the plan.

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 acknowledge that pension committees are not "organizations… civil corporations or otherwise," which were organizations that were separate from the church, not administrative committees within the church.

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.[11] Pension committees administer plans, but they do not "maintain" them as that term has been defined in an ERISA context. Pension committees have no control over the terms of the plan, and no ability to fund them. They also have no authority to amend or terminate plans.

A pension committees is also not an "organization, civil 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, typically a separately incorporated entity or an association. In contrast, an administrative pension committee is invariably the unit of the plan sponsor that administers the plan for the plan sponsor. It is not a separate organization in any legal or realistic sense.

[11] Today they might be outsourced to a third-party administrator.

The district court's approach to the statute, apart from interpreting an exemption from a reform statute in the broadest rather than narrowest possible terms, is difficult to reconcile with the language and structure of the statute. As noted above, if Congress wished to allow all faith-based nonprofit organizations to establish their own exempt 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 indirect and opaque language of Section 33(C)(i).

Moreover, the district court'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 maintained by a separate organization?

C. The District Court's Holding Below is Inconsistent with the Legislative History of the 1980 Church Plan Amendments

The district court, relying on two snippets of legislative history lifted out of context, found that its interpretation is supported rather than contradicted by the legislative history. That history, though, 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. Instead, the legislative history shows that the amendments were to address two separate issues that had been raised by large denominational church organizations. 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 separately incorporated 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.[12]

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

[12] The many requests for premium refunds from the PBGC show that even after 1999 there were still many church-affiliated agencies that regarded their own pension plans as non-exempt ERISA plans. *See* note 9, *supra.*

own church plan, although its employees could participate in a plan established by a church until 1982. An agency-sponsored plan had to comply with ERISA requirements unless it was part of a plan established and maintained by a church. At the time of the 1980 amendments, a church plan was a plan sponsored by a church, plain and simple. There was no record of any interpretative dissent.

Approximately 27 large churches and church organizations formed an organization called the "Church Alliance for the 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 the 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" as same is 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 Churches 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 regulation since the moment of ERISA's passage. 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 of which moment on the plans of other organizations.
>
> 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 issue of plans maintained 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 the plan of a church should be able to include the employees of such an agency. *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.

Somewhat remarkably, the district court found support for the IRS private letter ruling position in two separate sentences in the legislative history, which it lifted out of context. *Overall v. Ascension*, 2014 WL 2448492 at *8. The court wrote that:

> The change in the statutory language in 1980 broadened the exemption to include organizations that were affiliated with churches, such as hospitals and schools. In other words, it moved beyond just permitting a church to establish a church plan.[13]

Senator Talmadge's comments were made as part of the church-plan amendment's introduction, which is quoted above, and are entirely consistent with his only stated objective: to allow agencies and their employees to receive benefits under a plan established by a church. 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

[13] *See*, *e.g.*, 125 Cong. Rec. 10052 (May 7, 1979) (co-sponsor Sen. Herman Talmadge) (noting that organizations that care for the sick and needy or provide instruction can be essential to a church's mission and should fall under the exemption); *see also* 126 Cong. Rec. 20180 July 29, 1980) (Sen. Jacob K. Javits) (noting exemption is being expanded to schools and other church-related institutions).

> and maintained for its employees by a church or by a convention or association of churches.[14]

Senator Javits' comments, which expressed disapproval of the legislation, were addressed to the provision allowing plans sponsored by churches to continue to cover employees of agencies with associated with a church after 1982. His comments say nothing about whether such agencies could sponsor their own "church" plans rather than participate in plans sponsored by actual churches.

These two comments simply do not support the district court's assertion that the IRS position is consistent with the legislative history of the 1980 amendments. 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.[15]

[14] 125 CONG REC. 100052 (May 7, 1979) (statement of Sen. Herman Talmadge introducing church plan amendments).
[15] H.R. REP. No 96-364, at 1 (1980) (A.&P.L.H.),WL 355760.

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?
>
> 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.[16]

Again, the Senate Report on the Multiemployer 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.[17]

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

> The present statute fails to recognize the fact that the American Baptist employee benefit plans, as well as most church plans of congregational denominations, have historically been administered by a corporate entity that is separate from, but controlled by, the denomination. The statute is not clear as to whether such a plan may qualify as an exempt church plan under ERISA. This question would be resolved by the proposed bills.[18]

Significantly, there is no mention anywhere in the legislative history of an exemption for plans non-church plans maintained by "pension committees."

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[16] 126 CONG. REC 20245 (July 29, 1980) (statement of Sen. Herman Talmadge).
[17] H.R. REP. No 96-364, at 1 (1980) (A.&P.L.H.),WL 355760.
[18] *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).

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.

IV. CONCLUSION

For the reasons stated above, the Pension Rights Center respectfully asks the Court to reverse the district court below and remand for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of October, 2014.

By: */s/Karen W. Ferguson*

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CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies the following:

1. The foregoing brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,813 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii)

2. The foregoing brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times Roman.

Dated this October 3, 2014.

KAREN W. FERGUSON

/s/ Karen W. Ferguson

ADDENDUM

REPRODUCTION OF RELEVANT PORTIONS OF STATUTE

ERISA section 3(33), 29 U.S.C. § 1002(33):

(A) The term 'church plan' means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26.

(B) The term 'church plan' does not include a plan—

> . . .
>
> (ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph—

> (i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches 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 or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.
>
> (ii) The term employee of a church or a convention or association of churches includes—
>
> > . . .
> >
> > (II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches; and

. . .

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of Title 26 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

. . .