No. 16-1005

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JANEEN MEDINA,
individually and on behalf of all others similarly situated,
and on behalf of the CHI Plans

Plaintiff-Appellant,

v.

CATHOLIC HEALTH INITIATIVES,
a Colorado Corporation, et al.

Defendants-Appellees.

On Appeal from the
United States District Court for the District of Colorado
1:13-CV-01249-REB-KLM
Honorable Robert E. Blackburn

BRIEF OF AMICUS CURIAE PENSION RIGHTS CENTER IN SUPPORT OF PLANTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

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

Dated on this 29th day of June 2016.

s/ Karen W. Ferguson
Karen W. Ferguson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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 four decades to protect and promote the retirement security of American workers, retirees, and their families. The Center provides legal and strategic advice on retirement income issues, and helps individuals communicate their concerns about these issues to policymakers, the public, and the courts.

The issue presented by this case, whether a pension plan established by a religiously-affiliated nonprofit organization is a "church plan," is of concern to hundreds of thousands of pension plan participants around the country. These are current and former employees of Catholic hospitals, Jewish social services agencies, and Protestant schools, among others. Many such individuals have contacted the Pension Rights Center to ask for our help after learning that their pensions were at risk as the result of Internal Revenue Service "church plan" rulings denying them pension insurance and other protections of federal law.[1]

[1] Examples of individuals the Center has helped include participants in the Hospital Center at Orange Retirement Plan who were able to persuade government agencies to restore pension insurance protection to their plan, and participants in the Jewish Community Center of Greater Washington's pension plan who convinced their former employer to withdraw its request for an IRS church plan ruling. See Mary Williams Walsh, "IRS Reversal on 'Church Plan' Rescues a Fund, *New York Times*, April 1, 2013. http://www.nytimes.com/2013/04/02/business/an-irs-reversal-rescues-a-pension-fund.html?_r=0 The Hospital Center at Orange victory was the result of a ten-year

In all of the situations that individuals have brought to our attention, religiously-affiliated employers who had administered their plans in compliance with the Employee Income Security Act of 1974 (ERISA) as of its January 1, 1974 effective date (and had paid premiums to the federal pension insurance program, the Pension Benefit Guaranty Corporation (PBGC), for decades), were advised by consulting firms that they could save significant sums of money by obtaining private letter rulings from the Internal Revenue Service, which would allow them to claim "church plan" status exempting the plans from all federal requirements.[2] In addition, church plan status enabled these plans to claim refunds of pension insurance premiums from the PBGC.[3]

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effort by the participants and unique circumstances. The JCC situation was also unusual. *See also* Alicia H. Munnell, *A Deed Well Done: Pensions Protected*, MarketWatch, June 26, 2013. http://blogs.marketwatch.com/encore/2013/06/26/a-deed-well-done-pensions-protected/ For others, favorable decisions by this and other courts offer their only hope for financial security in retirement. *See* Nathan Gutman, *Loophole Puts Pension Plans at Risk*, Jewish Daily Forward, February 13, 2012. http://forward.com/opinion/editorial/151523/the-pension-promise/

[2] See Ellen E. Schultz, "IRS Nears Action on Church Pensions," *Wall Street Journal*, June 5, 2010 quoting the chief financial officer of a religiously-affiliated hospital who explained that the hospital had accepted the advice of KPMG, a large consulting firm, to seek a church plan ruling "for the cost savings and flexibility in funding."

[3] The Catholic Health Initiatives pension plan was created by a 1997 merger of three health systems and the combination of assets of 16 pension plans. (APP-1107-1200) The record does not show whether the predecessor plans were operated as ERISA plans or whether they received premium refunds from the

Concerned that IRS "church plan" rulings were jeopardizing the retirement security of so many employees and retirees, the Center began researching the legislative history of the 1980 "church plan amendments" and the evolution of the subsequent IRS rulings. 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 perspectives of the individuals whose future retirement security will be adversely affected if the district court's decision in this case is not reversed.

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

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PBGC as the result of IRS private letter rulings. However, since, as noted below, all plans that were not established by churches for their own employees operated as ERISA plans starting on January 1, 1974, it seems likely that the predecessor plans had previously operated as ERISA-covered plans and employees participating in those plans had been protected by ERISA for at least part of their work lives. The record shows that CHI hospitals currently sponsor 26 ERISA-covered health, disability, and retirement savings plans. (APP-1071-72) It is not uncommon for sponsors claiming church plan status for their defined benefit pension plans to sponsor ERISA-covered health and disability plans. This may be because ERISA provides few protections and minimal remedies to welfare plan participants who are improperly denied benefits.

careers building. To remedy this very real social and economic issue, Congress enacted ERISA, which required that private-sector pension plans be soundly funded and that pension benefits be insured by a new federal insurance agency, the Pension Benefit Guaranty Corporation. Congress provided only two exceptions from ERISA's coverage of private-sector plans. One exception affected certain executives in so-called "top-hat" plans. The only other exception was for plans established and maintained by churches or conventions or associations of churches for their own 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 those of their employees who were already participating in the plan on the enactment date of ERISA, but only until 1982. Thus, stand-alone plans of religiously-affiliated agencies were immediately subject to the new statute and had to comply with its participation, vesting, disclosure, fiduciary, and funding requirements, and in the case of defined benefit plans also had to pay insurance premiums to the Pension Benefit Guaranty Corporation to protect participants against the risk of plan insolvency.

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 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 and that the organization maintaining the plan (if not a church) be an actual organization and not merely an internal committee of the employer, and that the organization actually "maintain" the plan. The interpretation is also inconsistent with the legislative history of the church plan exemption, which incontrovertibly demonstrates that Congress amended these church plan provisions for two principal purposes: to allow church plans, i.e., plans actually sponsored by churches, to include employees of affiliated agencies 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 or associated with the church.

The IRS position has already resulted in human tragedies for men and women who have done nothing wrong other than choosing to work for a religiously-affiliated nonprofit entity rather than a secular nonprofit entity. For example, St. Mary's Hospital in Passaic, New Jersey, sponsored a pension plan that became covered by ERISA in 1974, but, claiming the plan was a "church plan," it received an IRS church plan ruling and a refund of PBGC premiums in 2001, and stopped complying with ERISA's funding requirements. When the hospital was sold the orderlies and nurses learned that the new company was terminating their plan and that they would receive only 40 percent of the pensions they had earned.[4] In this instance, as in other equally tragic situations, the employees and retirees learned that although their employer's association with a church is the reason they were denied the benefits they had earned, the church itself did not sponsor the plan or have any legal (or moral) obligation to financially back it.

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[4] *See* 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; 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

III. ARGUMENT

A. Introduction.

Before ERISA, employers who sponsored private pension plans were not required to fund them adequately, to stand behind them if they failed, or to provide insurance to make sure that participants would receive their benefits. *See generally*, Michael S. Gordon, *Overview: Why Was ERISA Enacted?*, in U.S. Senate, Special Committee on Aging, The Employee Retirement Income Security Act of 1974: The First Decade, at 6-25 (1984). Employers could amend plans to reduce already earned benefits and could condition benefits on unreasonably long periods of unbroken service. *Id.* Not surprisingly, some pre-ERISA plans were poorly funded and some pre-ERISA plans became insolvent and failed to pay employees the benefits they had earned. *Id.* These problems were well known and well documented and were of deep concern to policymakers. *Id.*

In 1974, after more than a decade of debate, discussion, and deliberation, Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), to address these problems. The purpose of ERISA was expressed in the statute as "improving the equitable character and soundness of [pension] plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." 29 U.S.C. §1002(c). The primary vision that drove ERISA's

legislative sponsors was this: that participants in private pension plans should be able to count on the pension benefits that their employers promised to them in exchange for their labor.

This case concerns the scope of an exemption from ERISA for "church plans." Congress defined a church plan as a plan "established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under Section 501(c)(3) of the Internal Revenue Code of 1954 …" 29 U.S.C. § 1002(33)(A) (1974).

The original ERISA definition of church plan prohibited church plans from covering employees of aligned nonprofit organizations such as hospitals, schools, and social services agencies; church plans could only cover actual church employees. However, the law provided for a six-year transition period during which plans established and maintained by churches as of the date of ERISA's enactment could continue to include both their own employees and the employees of their affiliated agencies until 1982.[5] All other plans were immediately subject to ERISA.

[5] 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).

In 1980, Congress amended the definition of "church plan" primarily to make permanent the "grandfather" provision that allowed plans established and maintained by churches to continue to cover both their employees and the employees of their affiliated nonprofit agencies. The amendments also clarified that a church plan did not lose its exempt status simply because it was maintained by a "church pension board" rather than directly by a church. The term church pension board had a well-established meaning. 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. They have long been used by major Protestant and other congregations and conventions to maintain their employee benefit plans. The language Congress used to give effect to this idea provided that a plan would be treated as a church plan if it were "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 convention or association of churches." ERISA § 1002(33)(c)(1) (This language, drafted to cover plans established by a church but maintained by a church pension board, will hereinafter be referred to as a "(33)(c)(1) organization.")

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

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 1983 General Counsel Memorandum followed by a series of private letter rulings, expanded the scope of the church plan exemption beyond its statutory limits 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. The theory of the ruling is that such a committee is a (33)(c)(1) organization. The effect of the rulings is to render meaningless the requirement that a a church plan be established by a church and to permit any church-affiliated hospital, schools, and social

[6] 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.").

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 and even though a church does not stand behind the plan.

B. The District Court Misconstrued the Language of ERISA § 3(33)

The district court, reversing the finding of its magistrate and rejecting the views of the only two circuit courts that have to date addressed the issue, see *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016), *Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015), held that the Catholic Health Initiatives pension plan was a church plan, even though it was not established by a church. The district court, although suggesting (without holding) that the hospital was itself a "church" ("I ultimately need not determine whether CHI is itself a church . . ." (ADD-88-89), held that the plan was a church plan because it was administered by the "DB Plan Subcommittee" of its human resources committee.

The district court's holding, and the private-ruling position of the IRS on which the court relies, 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 *and* maintained by the church or a section (33)(c)(1) organization. As noted, the only two circuit courts that have addressed the issue have ruled that the IRS misconstrued a statute that is clear on its face and

that recognizes as church plans only plans that an actual church actually establishes. See also *Rollins v. Dignity Health*, 19 F. Supp. 3d 909 (N.D. Cal. 2013) ("both the [statutory] text and the [legislative] history confirm that a church plan must still be established by a church"). (The *Rollins* decision is currently on appeal in the Court of Appeals for the Ninth Circuit, where it has been briefed and argued).

These decisions are supported by the legislative history, the purpose, and the structure of the amendment. The IRS and district court position is unreasonable, distorts the words of the statute, 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 non-governmental employment.

In its opinion, the district court ignores the primary church plan definition in the 1980 church plan amendments, ERISA Section 3(33)(A), and asserts that the plan is exempt under the structure and language of the "church pension board" modification of that definition.

In fact, Section 3(33)(A) (and not Section 3(33)(c)(1))is the fulcrum of the definition of church plan. It provides that "the term 'church plan' means a plan . . . for its employees established and maintained by a church or convention or association of churches for its employees (or their beneficiaries) . . ." This language is virtually identical to ERISA's original 1974 language, which made

plain that a church plan was a plan only for church employees (except for a limited transition 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 by or associated with a church***…" It did not do so. The CHI plan, which was not established by a church, plainly does not come within Section 33(A).

However, another provision was also added to the law in 1980. This is the provision relied on by the IRS in the CHI private letter ruling 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 the statutorily required "organization, whether a civil law corporation or otherwise" that maintains the CHI plan was the DB Plan Subcommittee of CHI's human resources committee.

This interpretation fails to take account of the fact that all pension plans (except possibly the very smallest) are administered by committees. It also does not recognize that such pension committees do not "maintain" plans nor that such administrative committees are not organizations… civil law corporations or otherwise.

The day-to-day running of a pension plan requires that employer contributions are made in a timely fashion, money is invested prudently, and benefits are paid out at retirement. In 1980, as now, these functions were typically performed by a pension committee consisting of human resources and/or management employees or other agents appointed by the employer. Pension committees administer plans, but they seldom "maintain" them in any meaningful sense. Pension committees ordinarily have no independent control over the terms of the plan, and no ability to fund or terminate them.

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 nonprofit entities, trusts, or unincorporated associations. In contrast, an administrative pension committee is merely an administrative sub-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.[7]

[7] It seems highly probable that Congress included the phrase "or otherwise" in order to encompass unincorporated church pension board structures For example, the Rabbinical Pension Board (now the Reform Pension Board) was, and still is, a trust. It is likely that other church pension boards were trusts or unincorporated nonprofit associations since these are common nonprofit charitable and educational organizations that are exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

The district court's approach to the statute, even 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. If Congress had wished to allow all religiously affiliated nonprofit organizations to establish their own stand-alone church plans (rather than simply providing that a plan established by a church can cover employees of its affiliated agencies), it would have said so straightforwardly rather than using the convoluted language of Section 33(C)(i).

Moreover, the court's interpretation of the statute leads to this anomalous result: a plan maintained by a church must also be established by a church to be a church plan, but a plan administered by a church-affiliated pension committee is a church plan without regard to how or by whom it was established. 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 or subcommittee?

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

The legislative history of the relevant 1980 amendments establishes beyond doubt that they were designed to address two separate problems, neither of which involved the authority of church-affiliated nonprofit organizations to establish their own stand-alone church plans. The first concern was that when the grandfather

provision reached its sunset date in 1982, churches would have to divide their plans into two separate plans (one exempt church plan for a church's direct employees and a separate ERISA plan for employees of church-affiliated agencies). The second concern was that the exemption of a church plan might be jeopardized in cases where the plan was maintained by a separate nonprofit organization rather than maintained directly by the church, which was a common practice among churches with a congregational rather than hierarchical structure. No advocate of the 1980 legislation argued that church-affiliated hospitals, schools, and social services agencies should also be able to establish their own exempt church plans.

The legislative history of the 1980 amendments actually starts in 1974, with the passage of ERISA. The original ERISA definition of church plan was unambiguous in providing that church plans had to be established and maintained by churches.[8] A church-affiliated agency, even though connected to a church,

[8] A 1973 Senate report stated that the reason for the exemption for a plan established by a church for its own employees was based on a concern that examination by the PBGC of a church's "books and records" could be regarded as "an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. No. 93-383, at 81 (1973). See Norman P. Stein, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, Employee Benefits Committee Newsletter (ABA Summer 2014). http://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_sum_ebc_news/faith.html

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 plan in this case 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 after 1982, when church plans could no longer cover employees of religiously affiliated entities. *Id.* at 10054. The following letter from Lutheran Church Missouri-Synod's was typical:

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

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

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

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

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

Not a single letter addressed concern about plans sponsored directly by church-affiliated agencies. This was not surprising since they had been subject to ERISA since the law's effective date, January 1, 1974. The letters were concerned with continuing to permit agencies to participate in plans established and maintained by churches beyond 1982 when church-affiliated agencies would have had to be removed from the church plan.

Senator Herman 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, per the statute's express language, already required to be 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.

Significantly, there was opposition to the elimination of the 1982 grandfather limitation. Senator Jacob Javits (R-NY), the primary sponsor of ERISA, and the Department of the Treasury both opposed allowing plans that had been established by churches to continue to cover employees of affiliated nonprofit

hospitals, schools, and social services agencies. They felt that the employees of these agencies should not be denied the all-important protections of ERISA.[9] There was nothing in their comments to suggest any views on whether religiously-affiliated agencies should be able to establish their own stand-alone "church" plans rather than participate in plans sponsored by actual churches. That is because the legislation and the various statements supporting it did not discuss or raise such a possibility.

In short, there is nothing in the legislative history to support the idea that the 1980 amendments were intended to allow any church affiliated agency to claim an exemption from ERISA minimum funding and vesting standards or from participating in the pension benefit guaranty program that Congress believed essential to a meaningful pension promise. 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.[10]

[9] See Declaration of Daniel I Halperin, Assistant Secretary of the Treasury for Tax Policy. (APP-1791–1813)

[10] 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.[11] (emphasis added)

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

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

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

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

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

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[11] 126 CONG. REC 20245 (July 29, 1980) (statement of Sen. Herman Talmadge).
[12] H.R. REP. No 96-364, at 1 (1980) (A.&P.L.H.),WL 355760.
[13] *Hearing Before the Subcomm. On Private Pension Plans and Employee Fringe Benefits, Committee on Finance, United States Senate*, 96th Cong. 481 (Dec. 4, 1979)(statement of Rev. Gordon E. Smith).

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 decision of the district court.

Respectfully submitted this 29th day of June, 2016.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,212 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). I relied on the word count of Microsoft Word 2010 in preparing this certificate.

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

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

s/ Karen W. Ferguson
Karen W. Ferguson

CERTIFICATE OF DIGITAL SUBMISSION
AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing AMICUS BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Endpoint Protection Small Business Edition: NIS-22.5.4.24, updated 6/28/2016 at 9:11 AM and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

By: */s/ Karen W Ferguson*
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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2016, I electronically filed the foregoing with the U.S. Court of Appeals for the Tenth Circuit by using the Court's CM/ECF system. I certify that all appellate counsel of record to the parties to this appeal are registered with the Court's CM/ECF system. Pursuant to FRAP 25(d)(1)(B), the names of counsel, mailing address and electronic addresses are listed below:

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