An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans

The age of employer-sponsored pension plans began in this country during the last quarter of the 19th century, when American Express and other industrial firms adopted pension programs for their employees. For a good part of the next century, the prevailing legal theory concerning these programs was that the pension promise was an unenforceable promise to make a future a gift, a mere gratuity. No amount of work by an employee could ensure him the payment of a pension and many pension plans were largely unfunded. A pension was no better than the aggregate of an employer's decency and solvency.

The idea of pension as gratuity as a legal theory, however, began a process of gradual erosion in the 1930s, and ERISA—with its funding and vesting and fiduciary requirements—was generally considered the coup de grace to the gratuity theory of pensions. An employer did not have to promise workers a pension, but if it did, it had to fund its promise in advance, it had to guarantee its promise through the Pension Benefit Guarantee Corporation, and it had to respect its promise as a contract subject to Federal minimum standards.

Except, that is, for plans exempted from ERISA coverage. And ERISA included exemptions for governmental plans, for certain executive deferred compensation plans, and for church plans. This paper is about the exemption for church plans, which originally was conceived as a narrow exemption for clergy and other actual employees of a church (but not church-affiliated agencies).

As enacted in 1974, ERISA, ERISA exempted plans that were "established and maintained by a church." (A church plan, however, was given an election to forgo the exemption and accept ERISA coverage.) Moreover, a church plan could only cover employees employed by the church itself; a plan could not cover employees of church-affiliated agencies, such as hospitals, nursing homes and schools. (ERISA included a grandfather provision allowing church plans that covered employees of church-affiliated agencies to continue covering them until 1982, when the plan would no longer be able to cover them and remain exempt from ERISA.) A stand-alone plan adopted by a church-affiliated agency was not a church plan under the exemption and a church plan could not after 1982 include non-church employees in a plan it sponsored.

In 1980, however, Congress amended the statute in two ways pertinent to the issue of this paper. First, Congress provided that a church plan—that is a plan established and maintained by a church—could cover the employees of affiliated agencies. And second, Congress provided the term church plan included plans that were maintained by church-affiliated or controlled organizations whose principal purpose was the administration or funding of the plan.

The Internal Revenue Service, however, in a 1983 general counsel memoranda and a long string of private rulings that followed interpreted the 1980 amendments as authorizing a church related agency to maintain a church plan, so long the agency's plan

had an administrative committee a majority whose members are of the same faith of the church affiliated with the agency or " controlled" by a church. (The statute does not define the term "control.") This article suggests that this ruling policy was, and is, inconsistent with the statutory language, the statutory structure, and the relevant legislative history.

The ruling policy has potentially devastating consequence to the millions of lay individuals whose pension benefits have been put in jeopardy as a result. At least some agencies have seemingly regarded church plan status as license to underfund their pension plan and the plans, having opted out of PBGC coverage, offer no insurance protection to the participants. The agency position has thus more or less restored the theory of "pension as gratuity" as the governing legal doctrine for plans of agencies that have some affiliation with a church—for example, enormous hospital corporations employing thousands of nurses, janitors, secretaries, accountants, doctors and others in exactly the same way that non-church affiliated hospitals employ thousands of such employees. In the view of the IRS, the church affiliation allows such hospitals (and schools and nursing homes and other agencies with some connection to a church) to break promises to their employees that non-religiously affiliated entities—including secular charitable agencies that compete with the church agencies—would have to fund, honor and insure.

Even more disturbing, the IRS has also ruled that plans are church plans even if the plan sponsor had for decades paid PBGC premiums and represented to the plan's participants, and to the IRS, Department of Labor, and the PBGC, that the plan was subject to ERISA.[1] And when these plans get their IRS ruling, the plan sponsor invariably applies for a refund of premiums paid to the PBGC for the prior six years. (We have heard reports that some consulting firms advising plans to obtain such rulings agree to take their fees from the PBGC refund.)

This paper considers whether the IRS position is faithful to the statutory text, as amended in 1980, and the related question of whether the IRS position is consistent with the legislation history of the 1980 amendments. The latter question is particularly important if the statute's text is ambiguous, for courts will consider legislative history to help determine meaning in the face of textual ambiguity.

The paper, consistent with two well-reasoned opinions, concludes that the IRS position is inconsistent with the statute's unambiguous text and that the legislative history establishes that the 1980 amendments were designed only to allow plans established by churches to continue to cover employees of church-affiliated agencies and to clarify that a church plan did not lose its status as such if a plan established by a church was maintained by an organization controlled or affiliated with a church whose purpose was to fund or administer the plan. (The concern here was that some churches delegated the plan's maintenance to a separate organization and that such plans could be viewed as not

1 In at least a few cases, secular hospitals have attempted to covert their plans into church plans by affiliating with a church.

maintained by a church.) There are, however, two district court opinions taking the opposite position. At present, it seems possible if not probable that the Supreme Court will have to resolve the issue.

The paper proceeds in four parts (other than this introduction): the first part provides a history of ERISA's church plan exemption; the second section analyzes the IRS position in more detail and also summarizes the response of courts to that position; the third section takes a closer look at the legislative history and constructions of the statutory language that bear fidelity to that history; the fourth section concludes. The paper does not delve into issues involving church plans other than the basic definition of church plan, although there are many such issues.[2]

I. The History of the Church Plan Exemption—from Legislation to Agency Interpretation

The 1974 original version of ERISA defined the term church plan as a "plan established and maintained for its employees by a church or by a convention or association of churches.[3]" The statute further provided that a plan "maintained by more than one employer" is not a church plan if one or more employers in the plan is not a church." This provision meant that a church plan could not cover employees of an agency. But the statute included a temporary grandfather clause that provided that a plan "established and maintained by a church for its employees *and* employees of one or more agencies of such church" would be "treated" as a church plan until 1982. In 1982, the grandfather provision sunset and a church plan could no longer include employees of church agencies. Thus, there is little room to debate that church-affiliated agencies could sponsor a church plan (except as a component of a plan established and maintained by a church, and then only until 1982).

Why did Congress decide to exempt even true church plans from ERISA? ERISA's labor-law predecessor, the largely ineffective Pension and Welfare Disclosure Act, had exempted all tax-exempt organizations from its coverage. In ERISA, however, Congress extended coverage to tax-exempt employers with the exception of church plans (and governmental plans). Why exclude a single species of tax-exempt employers, churches?

[2] Among the issues are how a plan makes an election to be treated as an ERISA plan; the estoppel effects of representing to employees that a plan is an ERISA plan; the insurance treatment of a plan that paid premiums to the PBGC believing it to be a church plan and whether there is an obligation for the PBGC to refund premiums to plans that claimed ERISA status at one time; state law and church plans; tax requirements for church plans; welfare benefit plans and church plan status; the deference courts should give to the agency positions on church plans; and First Amendment issues concerning the validity of the church exemption to lay employees of a church-related agency.

[3] In contrast, ERISA defines an employee pension plan, and an employee welfare plan, as a plan "established *or* maintained by an employer or an employee organization, or both," and a government plan as a plan "established *or* maintained" by a governmental body. The only types of plan that must be both "established *and* maintained" by an entity are church plans and plans maintained by tribal governments. The article picks up on this point in the text.

The only clue in ERISA's voluminous legislative history comes from a 1973 Senate report, which exempted church plans from a PBGC insurance program, which a committee report indicated could regarded as "an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches their religious activities." So part of the reason for the exemption might have been that Congress did not want to force churches to open up their books to the scrutiny of government regulators. And part of the reason might have been the view that a church plan was an integral part of the relationship between a church and its clergy and that it was inappropriate for the government to regulate that relationship through ERISA.

Although the legislative history never says this explicitly, part of the reason for the exemption was almost certainly a belief that churches have a particularly strong moral commitment to their employees and are likely to keep the pension promises they make to their employees.[4] And the passage of time since ERISA has provided some evidence that this idea is true of plans sponsored by churches, but some church-affiliated agencies, including church-affiliated hospitals that compete with private hospitals and whose finances are much like that of a non-church charitable hospital or even a for-profit hospital, have let their plans fail or have failed to provide adequate funding for their plans.

Churches whose plans covered employees of church-affiliated agencies were not happy with the temporary grandfather rule. And almost immediately after ERISA's enactment, churches began to lobby Congress to provide that church plans could continue after 1982 to cover employees of church-affiliated agencies. To present this argument, 25 churches formed an alliance, originally known as The Church Alliance for Clarification of ERISA, and today just known as The Church Alliance. Their argument for amending the church plan definition was essentially this: churches would by 1982 have to divide their pension plans into two separate plans, one covering clerical employees and one covering agency employees. This would be cumbersome, it would be expensive, it would be unfair to the secular employees who might lose benefits, and unnecessary, since churches would keep their commitments and not permit their plans to fail. Churches are, after all, in theory at least, exemplars of moral behavior (and I don't mean this in a snarky sense at all.) Moreover, if the statute barred a church plan from covering an employee of a church-affiliated agency, churches would have a problem with providing continuous coverage for a clerical employee who worked for a church for several years, then was transferred to a church-affiliated agency, and then transferred back to the church. And on a more abstract level, the Alliance argued that the government should not be prohibiting churches from providing pension benefits for individuals who contributed to the church's social, service, and missionary goals through church-affiliated agencies.

These arguments—combined with the collective lobbying muscle of churches—influenced Congress. Senator Herman Talmadge introduced legislation in 1978, and with

[4] Some of the secondary literature on church plans speculates that this was a motivating reason for Congress. And in 1980, some churches in letters inserted in the Congressional Record by Senator Talmadge, who was the primary sponsor of the 1980 amendments, noted this

Senator Lloyd Bentsen as a co-sponsor in 1979. Barber Conable introduced parallel bills in the house.

The amendments to the definition of church plan were included in MPPA, the 1980 legislation dealing with multi-employer pension plans generally. In MPPA, Congress amended the church plan exemption to provide that employees of church-affiliated agencies would be considered employees of the church and thus could be covered by a church plan. The amendments did this by providing that the "term employee of a church includes . . . an employee of an organization, whether a civil law corporation or otherwise, . . . which is controlled by a church or associated with a church." Thus a plan established and maintained by a church could now retain church-plan status even though it covered employees of affiliated agencies. Churches would not need to create separate plans for such employees.

Congress also answered another concern that had been raised by some churches in the run-up to the 1980 amendments. As noted, the original ERISA version of the church exemption required that a plan be "established and maintained" by a church. Some churches, however, had set up church pension boards to maintain their plans. In some cases, these pension boards were legally separate entities from the church. There was thus at least a measure of doubt of whether such plans would qualify as being maintained by a church under the statutory criteria for church plans. The legislation clarified that a plan could be a "church plan" even though maintained by such a pension board.

Congress thus amended the statute to provide 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 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."

The Internal Revenue Service in a 1983 general counsel memoranda—which notably included no discussion of the history of the 1980 amendments—and a long string of private rulings and additional general counsel memoranda that followed, has interpreted the 1980 language to treat a church-related entity's stand-alone pension plan as a church plan, so long as the entity set up a committee to handle some of the plan's administration if the committee had some "association" with a church or is controlled by a church.

The IRS ruling policy permitted church-affiliated agencies to request letters without informing the participants in the plan, even when the plan had long been represented to the participants as being subject to ERISA and insured by the PBGC. And once a letter was issued, the plan, no longer subject to ERISA, did not need to inform participants that the plan no longer was subject to ERISA's minimum funding rules, no longer subject to ERISA's consumer protection rules, and no longer insured by the PBGC. Thus, participants were sometimes unaware that their plans might be on a road to serious funding deficiencies and that their benefits were in jeopardy. The IRS practice,

then, was largely invisible to those it most affected and it remained invisible until recently, when some agency plans began to fail and participants in other agency plans began inquiring about the status of their plans as newspaper stories began reporting on the issue.

In 2009, the IRS apparently began having some concerns at least as to the transparency of the process announced a moratorium on new church plan letters. The moratorium ended with the release of a revenue ruling, which now requires plans seeking a church-plan letter to inform its participants, who are given a chance to provide comments to the IRS. There has not been a noticeable change in IRS ruling policy since the end of the moratorium, although interestingly, the only ruling (at least of which I am aware) that has been issued since the district court decision holding that the IRS position was an improper construction of the statute did not find church plan status in a situation where church "control" of an administrative committee was not clear.

II. The IRS Position Up Close and the Response of the Courts

A. IRS Ruling Policy

An understanding of the IRS ruling policy requires an exploration of five provisions of the statute, four added by the 1980 amendments. The first provision is the original 1974 definition of church plan in ERISA section 3((33)(A), which was not changed in 1980:

"A plan established and maintained for its employees (or its beneficiaries) by a church or by a convention of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function 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."

The second provision, section (3)(33)(c)(i), was one of the 1980 amendments:

"A plan established and maintained for its employees by a church or by a convention of churches includes 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 of churches, if such organization is controlled by or associated with a church or convention of churches."

The third provision, also added n 1980, is section 3(33)(c)(1)(ii)(II) provides that "the term employee of a church or convention or association of churches includes "an employee of an organization, civil or otherwise, which is exempt from tax under section 501 of the Internal Revenue Code 1986 and which is controlled by or associated with a church or a convention of churches."

The fourth provision, section 3(33)(c)(1)(iii) provides that "a church or association of churches which is exempt from tax under section 501 of the Internal Revenue Code shall be deemed the employer of any individual included as an employee under clause (ii)," the provision just described.

Finally, the fifth provision described the meaning of "organization associated with a church or convention of churches," which is used in both 3(33)(c)(1)(i) and (ii)(II), as an organization that "shares common religious bonds and convictions with that church or convention of association of churches."

The IRS private letter rulings have held that a plan established by a hospital or other agency associated with or controlled by a church is a church plan—even though not established by a church—if it is administered by a "committee" that is "controlled by or associated with a church or association of churches, because the committee is a civil law organization that administers the plan."[5] The rulings have held that the "association" test, in turn, is met if at least some of the members of the committee are members of the church with which the agency itself is affiliated. Alternatively, some rulings hold that the church controls the committee if the church has a role in appointing the directors of the plan sponsor, since the plan sponsor appoints the members of the administrative committee.

The basis for the IRS ruling position is that under the 1980 amendments there are two paths to church plan status: a plan *established and maintained* by a church under 3(33)(A), or a plan that is *maintained* by a civil organization that is associated with or controlled by a church and whose principal purpose is funding or administering the plan.

The key features of the ruling policy, then is that a church plan does not have to be established by a church and that an administrative committee rather than the actual employer maintains the plan.

B. Judicial Construction of the Statute

Most early litigation involving an agency plan's status under ERISA involved welfare benefit plans, where the agency typically wanted a plan to be subject to ERISA to take advantage of ERISA's broad preemption and limited remedies and the participants typically wanted the plan to be treated as a church plan. This article does not regard these cases as relevant, as they were thinly reasoned, did not explore the church plan definition's legislative history, and often focused on the issue of how and whether a welfare benefit "church" plan could elect or be structured to achieve ERISA status. There have, however, been four recent district court cases that have focused on the definition of church plan, including the language, structure and in some cases legislative history of the statute, and of course on the IRS view. At this point, the scorecard is tied,

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[5] Under the IRS view, the organization could also be a church plan if its primary purpose is funding the plan, but the private rulings have only considered committee that administer the plan.

with two district courts agreeing with the IRS position and two courts disagreeing with the IRS position.[6] Interestingly, three cases found the statute clear and unambiguous; in the fourth case, there was some discussion of the legislative history, although it was not clear to what extent the court's treatment of the legislative history was critical to its decision.

The first decision in the church quartet was a 2011 decision involving a church-agency that published liturgical and other materials for the Lutheran Church, Thorkelson v Augsburg Fortress Publishers. The publishing house amended the plan, which was severely unfunded, to terminate it, effectively reducing vested and accrued benefits. (The publishing house also changed the plan provisions for winding up an underfunded plan—the plan originally provided that assets would first be allocated to participants in pay status; it was changed to allocate assets on a present-value basis to all participants, which incidentally improved the status of the current management). The district court found, without any real statutory analysis, simply concluded that an agency plan could be a church plan and that "the analysis should focus on whether the plan is sponsored by a tax-exempt entity, and whether that entity is controlled or associated with a church." Other than quoting the statutory provision, the court court's discussion of section 3(33)(c)(3)(i) was simply a conclusion that a pension committee maintained the plan. The court did not examine the legislative history of the church plan exemption because "legislative history is irrelevant to the interpretation of an unambiguous statute."

The other three cases engaged in more considered analysis of the language of (c) 1). Both courts coordinated the language of (a)—which provides that a plan is a church if it is both established and maintained by a church—with (c)(1)—which provides that the "a plan established and maintained by a church . . . includes 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 of churches, if such organization is controlled by or associated with a church or convention of churches."

In one of the cases, Overall v. Ascension, the court endorsed the IRS position that the two sections created two separate paths to church plan status: under (a)(1), a plan was a church plan if it were established and maintained by a church and under (c)(1) a plan was a church plan if it was maintained by section 3(33)(c)(i) organization. In doing so, it partly relied on two out of-context remarks in the legislative record, partly relied on deference to the IRS position on church plans, and partly relied on the language of the statute. As to the language of (c)(1), the court held that the "plan established and

[6] One of the cases settled on state-law grounds before an appeal was argued and three of the cases presumably will be appealed. (Only one of the cases is currently ripe for appeal, since two of the decisions were rejections of motions to dismiss.) There is a potential circuit split in the making and the issue, affecting millions of employees of church-related agencies may ultimately find itself on the Supreme Court docket.

maintained by a church" includes a plan that is maintained by a (c)(i) organization, without regard to who established the organization.

In two of the cases, Kaplan v Saint Peters Healthcare Systems and Rollins v. Dignity Health, the courts held in similar opinions that section (a)(1) was the requirement for the definition of church plan and that (c)(i) merely modified the maintenance requirement, permitting a plan established by a church to remain a church plan even though it was maintained by a (c)(1) organization rather than the church. The judge in the Saint Peters case wrote:

> . . . The interpretative question here is whether a non-profit entity, purportedly controlled by or associated with a church, may both establish and maintain a church plan. Base on the plain text of the statute, the simple answer is no. Starting with subsection A, it is clear that Congress intended for a church plan—first and foremost—to be established by a church. Once the church establishes the plan, the church must also *maintain* it. Hence, a church plan means a plan established and maintained by a church or convention of churches.

The court then turned to the language in subsection (c), which provides that the term "church plan" includes a plan maintained by an organization whose principal function is the administration or funding of a benefits plan if the organization is controlled by or associated with a church or association of convention of churches. The Court found that the language simply "expanded" the maintain requirement but did not overrule the establish requirement. The Court wrote that

> The Court's interpretation expands the definition of church plan for the limited purpose of allowing a plan that is first established by a church to include a plan that is maintained by a tax-exempt organization. The term "includes" merely provides an alternative to the maintenance requirement but does not eliminate the establishment requirement.

In reaching its decision, the court noted that the section (a)(1) church plan definition would be superfluous if the (c)(3) language provided an alternative definition of church plan, since the "establishment" requirement would be meaningless. Here the court observed that Congress had no problem defining a type of plan (government plan) as a plan established *or* maintained by an entity (a governmental unit). The basic language in (a)(1) indicated that Congress intended church plans to be both established by a church and maintained by a church or a (c)(3) organization. The court additionally noted that exemptions to reform statutes should be construed narrowly and that the IRS position expanded rather than limited the church plan exemption.

Finally, the court refused to give deference to the IRS private ruling position, first finding the statute clear and in opposition to the IRS ruling position, but also because private letter rulings are not entitled to "Chevron" deference because they were issue without "formal adjudication or notice-and-comment rulemaking." The court also found

that the ruling given to the defendant should not be given deference because the rulings were "conclusory" and "lacking in statutory analysis," and were issued in a non-adversarial setting."

To me, the court's opinion in the St. Peter's Healthcare System is persuasive in its analysis of the statute, particularly given its observation that section (a)(1), the initial paragraph of the statute, would have been rendered superfluous if (a)(3) was an alternative to (a)(1) rather than merely expanding the maintenance requirement. If Congress meant to allow non-church entities to establish church plans it could have said so without any ambiguity simply be amending (a)(1) to provide that a church plan is a plan established or maintained by a church or an organization controlled by or associated with a church. The fact that it did not do so suggests that (a)(3) had a more limited goal—to allow denominational churches to turn the maintenance of their plans to a church pension board.

But in the next section of this paper I assume that the language of the 1980 church plan amendments is ambiguous and that the legislative history can guide us in interpreting the definition of church plan, particularly the scope of (c)(3).

IV. Legislative History

In this section, I consider first consider the legislative history of the church plan definition, second several reasonable constructions of the statutory language that comport with the legislative history, including the construction that the the Saint Peter's Health Systems and Dignity Health opinions gave to section (c)(i).

The legislative history dhows that Congress was not authorizing agency-established "church" plans, but rather that it was addressing two separate issues that had been raised: first, that churches should be able to continue to sponsor plans that covered employees of church-related agencies after 1982, when the grandfather provision permitting that would sunset, rather than having to divide their plans into two separate plans (one church for a church's direct employees and one ERISA for employees of agencies) and (2) that church plan status should not be jeopardized because a church plan was maintained by a separate organization, which was a common practice among denominational churches. No advocate of the 1980 legislation argued that agencies should also be able to establish church plans for their employees.

We start our journey into the legislative history in 1974, with passage of ERISA. The original ERISA definition of church plan under ERISA was unambiguous in providing that church plans had to be established and maintained by churches. An agency, even though connected to a church, could not sponsor its own church plan, although its employees could participate in a church plan—which may have had a separate benefit structure within the church plan—until 1982. An agency-sponsored plan had to comply with ERISA requirements—like most other private sector plans—generally in 1976, unless it was part of a plan established and maintained by a church. At the time of the 1980 amendments, these plans should already have been complying with

ERISA (and presumably were complying with ERISA). A church plan was a plan sponsored by a church, plain and simple and with no record of any interpretative dissent.

As already noted, an alliance of approximately 25 large churches pushed for amendments to the church plan provisions to permit church plans to continue to cover employees of their affiliated agencies after 1982. Senator Talmadge placed in the Congressional Record 20 letters to him from members of the alliance supporting the 1980 legislation. 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. 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." 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 from 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.

Not a single letter addressed concern about plans sponsored directly by agencies and, indeed, had already been subject to ERISA regulation since the statute'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:

> 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.
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> 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.
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> Church agencies are essential to the church's mission. . . .
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> 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 Talmdage's comments, like the letters from the church alliance, did not raise any issue of plans sponsored by church agencies rather than churches; as already mentioned, these plans were presumably already in compliance with ERISA.

Somewhat remarkably, the Ascension court found support in the legislative history for the IRS ruling position in two stray sentences, which it lifted out of context:

> The change in the statutory language in 19809 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. See, e.g., 125 Cong. Rec. 10052 (May 7, 1979)(co-sponsor Senator Talmdage) (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) and

> 126 Cong. Rec. 20180 July 29, 1980) (Senator Javits) (noting exemption is being expanded to schools and other church-related institutions)

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. To again quote Senator Talmadge:

> Under the provisions of our proposals, effective as of January 1, 1974, a church plan shall be able to continue to cover the employees of church-associated organizations. There will be no need to separate the employees of church organizations from the church plan. Our legislation retains the definition of church plan as a plan established and maintained for its employees by a church or by a convention or association of churches.

Senator Javit's comments, which expressed disapproval of church plans covering employees of hospitals, schools and other agencies, are fully consistent with legislation permitting plans sponsored by churches to cover employees of agencies with associated with a church. 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 Ascension court's assertion that the IRS position is consistent with the legislative history of the 1980 amendments.

In addition to his concern about church plans being able 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, at least formally, separate organizations from the churches whose plans they maintained. Section (c)(1) 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?
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> 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.

In short, the legislative history nowhere supports the idea that Congress intended to permit church agencies to sponsor their own pension plans, but merely to participate in plans sponsored by churches or conventions or association of churches. The (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.

There are four provision in the statute, which if read naturally and in light of the legislative history, confine church plans to plans sponsored by churches rather than agencies. Any one of these four approaches to the statutory language is as or more plausible than the IRS ruling policy and, unlike the IRS ruling policy, is consistent with the legislative history or the 1980 amendments. The approaches are as follows:

1. Meaning of the term "includes a plan maintained by an organization." ERISA's primary definition of church plan is a plan "established and maintained by a church." As held by the St. Peters and Dignity courts, the 1980 (c)(i) language that "a plan established and maintained for its employees . . . by a church . . . includes a plan maintained by an organization," can be read as modifying only the requirement that a church plan be "maintained" by a church and not replacing the requirement that a church plan has to be "established" by a church. Thus, a plan established by a church could remain a church plan even though maintained by an "organization" rather than the church itself. But the language does not mean that a non-church organization can establish a church plan. (Indeed, the St. Peters and Dignity decisions found that this was the plain meaning of the statute's unambiguous text.)

2. Meaning of the word "maintained." The statute requires that an organization (whose principal purpose is the administration or funding of a plan) "maintain" the church plan. The term "maintain" under the statute has a meaning independent of the terms "administer" or "fund," or the statute would have said that a "plan established and maintained by a church for its employees shall include a plan administered or funded by an organization, whether a civil law corporation or otherwise, . . ." To what does "maintain" a plan refer? Courts that have interpreted the word "maintain" in the context of ERISA have made clear that it involves control over the terms and existence of the plan, which is a separate requirement from funding or administering the plan. And courts have held that an entity controls the terms and existence of the plan if it has the power to amend or terminate the plan either pursuant to plan terms or by simply cutting off the

funding.[7] Thus, a pension board must both "maintain" and either fund or administer it. The ruling policy adopted by the IRS makes the word "maintain" superfluous.

3. Meaning of word "organization." The statute provides that a plan will be treated by a church plan if it is maintained by "an organization" whose principal purpose is the administration or funding of the plan. The term organization is not defined in the statute and the word implies more than a simple committee set up by a non-profit entity, especially given that virtually every employee benefits plan is run by a "committee." The legislative history consistently refers to "church pension boards" as the type of entity that the language in (c)(i) was intended to cover. The term church pension board meant a formal organization that ran a church's benefit plan or benefit plans. Section (a)(i) could interpret the term "organization" in a manner that confined it to the type of formal organizations that the sponsors of the 1980 amendments referred to: church pension boards, which were formal organizations set up to run the plans of a church, even though they had an independent legal existence from church. Virtually every pension plan has an administrative committee and (c)(1) certainly was referring to something different and more formal than this when it referred to an "organization."

4. Meaning of "controlled by or associated with a church." Section (c)(1) requires that the "organization" either be controlled by or associated with a church. Section (c)(iv) in turn provides "that an organization . . . is associated with a church . . . if it shares common religious bonds and convictions with that church . . .." This latter provision also is applicable to (c)(ii)(II), which determines whether an agency is a church agency whose employees are considered employees of the church and thus able to participate in the church's pension plan.

The IRS rulings have found that a pension administrative committee shares common bond between a pension and administrative committee by looking to see whether a majority of its members share the same religious faith as the church with which the hospital is affiliated. But this misreads the statute: the statute refers to the organization, not the organization's members. And unlike a hospital or religious school, it is hard to conceptualize how a committee administering a hospital pension plan can share common religious bonds and convictions with a church. A Catholic or Methodist hospital might differ from a secular hospital, but how does a Catholic or Methodist pension committee differ from a secular pension committee (unless it were established to run employee benefit plans established by the church itself)? The statute also does not define control, a term that has different meanings throughout the Internal Revenue Code. The term "control" here can be read to require a more active degree of involvement than merely appointing the committee's membership (or appointing members of a hospital's board who in turn appoint the committee's members).

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[7] *See Anderson*, 369 F.3d at 1268 (finding that an employer "maintained" a plan when it was "active in constructing and controlling the terms and administration" of the plan and funded the benefits); *Hightower v. Texas Hospital Ass'n*, 65 F.3d 443, 449 (5th Cir. 1995) (employer "maintained" plan when it assumed control over the plan and terminated it); *Anderson v. UNUM Provident Corporation,* 369 F.3d 1257, 1267 (11th Cir. 2004) (employer maintained plan when it maintained funds to pay benefits and exercised the power to modify the plan).

Any of these reasonable interpretations of the 1980 church plan amendments would confine the church plan exemption to the situation that animated Congress to expand its scope—a plan sponsored by a church that covered employees of a church-related agency. Instead, the IRS adopted an interpretation that expanded the scope of the exemption to cover the plans of virtually every non-profit organization that claimed some religious orientation.

IV. Conclusion

In 1983, apparently without review of the statute's legislative history, the IRS issued a general counsel memorandum that held that a non-profit agency could sponsor a church plan and avoid ERISA requirements, including funding and insurance requirements for defined benefit plans. The IRS has over the last three decades issued hundreds of private rulings based on the reasoning of the General Counsel Memorandum.

Unfortunately, the IRS position is almost certainly wrong. The position is based on a barely credible construction of the statutory language and statutory structure, rendering the primary definition of church plan superfluous. Moreover, the IRS position implements a major policy decision—exempting non-church plans from ERISA—that Congress never considered. What is worse, the IRS has allowed plans that long represented to its participants that they were covered by IRS and, for participants in defined benefit plans, had PBGC insurance coverage, to in effect change their minds and become church plans. Until 2012, the IRS did not even require such plans to inform participants of the plan's changed status.

Things are now in the hands of the courts. Two courts have displayed judicial courage and refused to defer to an IRS position adopted three decades ago. We will have to wait to see whether other courts will have similar courage and apply the statute rather than sanctioning what is, in effect, an IRS usurpation, even if accidental, of Congress's power to legislate. There is no question that enforcing the actual law will create a messy situation, which may call for some Congressional remediation. But the situation will be still messier as more and more faux church plans decline responsible funding and break promises that Congress, in ERISA, said must be kept.