Nos. 16-74, 16-86, 16-258

In The

Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL., *Petitioners,*

v.

MARIA STAPLETON, ET AL., *Respondents.*

SAINT PETER'S HEALTHCARE SYSTEM, ET AL., *Petitioners,*

v.

LAURENCE KAPLAN, *Respondent.*

DIGNITY HEALTH, ET AL., *Petitioners,*

v.

STARLA ROLLINS, *Respondent.*

On Writs of Certiorari to the Third, Seventh, and Ninth Circuits

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA") governs employers that offer pensions and other benefits to their employees. "Church plans" are exempt from ERISA's coverage. 29 U.S.C. §§ 1002(33), 1003(b)(2). For over thirty years, the three federal agencies that administer and enforce ERISA—the Internal Revenue Service, the Department of Labor, and the Pension Benefit Guaranty Corporation—have interpreted the church plan exemption to include pension plans maintained by otherwise qualifying organizations that are associated with or controlled by a church, whether or not a church itself established the plan.

The question presented is whether ERISA's church plan exemption applies so long as a pension plan is maintained by an otherwise qualifying church-affiliated organization, or whether the exemption applies only if, in addition, a church initially established the plan.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In No. 16-74, petitioners Advocate Health Care Network, the Benefit Plan Administrative Committee for Church Plans of Advocate Health Care Network, the Compensation and Benefits Committee of the Board of Directors of Advocate Health Care Network, and Kevin R. Brady were the defendants in the district court and the appellants in the Seventh Circuit. Respondents Maria Stapleton, Judith Lukas, Sharon Roberts, and Antoine Fox were the plaintiffs in the district court and the appellees in the Seventh Circuit.

In No. 16-86, petitioners Saint Peter's Health-care System, Ronald C. Rak, Susan Ballestero, and Garrick Stoldt were the defendants in the district court and the appellants in the Third Circuit. Respondent Laurence Kaplan was the plaintiff in the district court and the appellee in the Third Circuit.

In No. 16-258, petitioners Dignity Health and Herbert J. Vallier were the defendants in the district court and the appellants in the Ninth Circuit. Respondent Starla Rollins was the plaintiff in the district court and the appellee in the Ninth Circuit.

No petitioner has a parent corporation, and no publicly held company owns 10% or more of any petitioner's stock.

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In No. 16-74, the Seventh Circuit's opinion (Pet. App. 1a-29a) is reported at 817 F.3d 517. The district court's opinion (Pet. App. 30a-50a) is reported at 76 F. Supp. 3d 796.

In No. 16-86, the Third Circuit's opinion (Pet. App. 1a-26a) is reported at 810 F.3d 175. The district court's opinion (Pet. App. 29a-53a) is unreported and is available at 2014 WL 1284854.

In No. 16-258, the Ninth Circuit's opinion (Pet. App. 1a-25a) is reported at 830 F.3d 900. The district court's opinions (Pet. App. 26a-60a) are reported at 19 F. Supp. 3d 909 and 59 F. Supp. 3d 965.

JURISDICTION

In No. 16-74, the Seventh Circuit entered judgment on March 17, 2016. On May 24, 2016, Justice Kagan extended the time for filing a petition to July 15, 2016. A timely petition was filed on that date.

In No. 16-86, the Third Circuit entered judgment on December 29, 2015, and denied rehearing en banc on March 18, 2016. On May 25, 2016, Justice Alito extended the time for filing a petition to July 18, 2016. A timely petition was filed on that date.

In No. 16-258, the Ninth Circuit entered judgment on July 26, 2016. A timely petition was filed on August 29, 2016.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved include § 3(33) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(33); § 414(e) of the Internal Revenue Code, 26 U.S.C. § 414(e); and the First Amendment, U.S. Const. amend. I. These provisions are reproduced in Appendix E to the Petition in No. 16-74.

INTRODUCTION

Religious organizations have offered pension plans to their clergy and lay employees for centuries, since before our nation's founding. Providing for the financial security of the individuals who carry out a denomination's ministerial and charitable operations expresses religious and moral values, and religious pension plans have a long history of operating responsibly. Congress has always exempted "church plans" from ERISA.

This case concerns the scope of that exemption. As originally enacted in 1974, ERISA defined a "church plan" as "a plan established and maintained … by a church." 29 U.S.C. § 1002(33)(A). In 1980, Congress expanded the definition to state that "[a] plan established and maintained … by a church … includes a plan maintained by an organization [that is] controlled by or associated with a church." § 1002(33)(C)(i). In other words, Congress lifted verbatim the original 1974 definition of church plan and then stated that the definition "includes" plans maintained by church-affiliated organizations. Congress separately clarified that church plans may cover the employees of church-affiliated organizations,

which include religious hospitals and schools and are also called "church agencies." § 1002(33)(C)(ii).

The question presented is whether the exemption requires church-agency plans covering church-agency employees to separately enlist a "church" to first "establish" the plan. If this sounds like an odd requirement, it is. Nothing in the statute requires "churches" to establish pension plans for affiliated organizations; to the contrary, the text is incompatible with such a requirement. Since 1982, the three federal agencies that administer ERISA—the Internal Revenue Service, Department of Labor, and Pension Benefit Guaranty Corporation—have treated church-agency plans as exempt, whether or not a church established them. Three statutes elsewhere in the United States Code presuppose the absence of a church-establishment requirement. Nothing in ERISA's history supports such a requirement. And such a requirement would serve no apparent purpose, beyond arbitrarily excluding certain plans maintained by religious organizations. It is entirely unclear what church establishment even means and if it is anything more than an empty formalism.

A church-establishment requirement is also fraught with constitutional peril. Churches themselves see no sharp line between the "church" and affiliated organizations, and Congress expanded the exemption in 1980 precisely to end the IRS's efforts to draw that line—a regime the decisions below would resurrect. And as Congress well understood in 1980, a church-establishment requirement would create pernicious denominational discrimination. Few religions have a central "church" that can establish pension plans for the employees of church-affiliated schools, hospitals, soup kitchens, and the

like. That is especially so for decentralized religions. Baptist or Jewish schools, charities, children's homes, or summer camps, for example, cannot readily recruit an individual church or synagogue to "establish" their plans.

For over three decades, it has been universally understood that ERISA's church plan exemption covers plans both established and maintained by church-affiliated organizations. The federal government has issued more than 550 rulings approving the exempt status of church-agency plans—including all three plans here—without imposing any additional "church-establishment" requirement. Between 1980 and 2013, every court to consider the issue rejected a church-establishment requirement. Countless church-affiliated organizations across the country have openly and responsibly operated church plans for decades. Many of these plans are generous defined-benefit plans that would be prohibitively expensive to operate under ERISA.

In 2013, a coalition of class action lawyers began suing religious nonprofit hospitals around the country, alleging that a purported "church-establishment" requirement meant the hospitals' pension plans did not qualify as church plans. In the decisions below, the Third, Seventh, and Ninth Circuits agreed, upending decades of settled law. These decisions are thinly reasoned and incorrect. The notion that three federal agencies over three decades have been grossly misreading and misapplying ERISA, or that religious entities throughout the country have been openly flouting federal law, without anyone noticing until now, is improbable indeed. The universal, decades-long understanding is correct. The exemption permits

church-affiliated organizations to establish their own church plans.

STATEMENT

A. Statutory Background

1. Congress enacted ERISA in 1974 to regulate employee pension and welfare benefit plans. Pub. L. 93-406 (1974). ERISA compliance is "enormously complex" and costly, *Mertens v. Hewitt Associates*, 508 U.S. 248, 262-63 (1993), and church plans have always been exempt. 29 U.S.C. § 1003(b)(2). As originally enacted, ERISA defined a "church plan" as "(i) 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 of title 26, or (ii) a plan described in subparagraph (C)." 29 U.S.C. § 1002(33)(A) (1974).[1] Subparagraph C conferred church plan status on existing plans "established and maintained by a church … for its employees and employees of one or more agencies of such church"—but expired in 1982. § 1002(33)(C) (1974). A parallel provision of the Internal Revenue Code defined the term "church plan" for tax and PBGC insurance purposes. 26 U.S.C. § 414(e) (1974); *see* 29 U.S.C. § 1321(b)(3) (1974).

In 1977, the IRS determined that subparagraph A's exemption did not cover a pension plan established by two orders of Catholic sisters for employees of their hospitals. IRS Gen. Couns. Mem. 37,266, 1977 WL 46200 (Sept. 22, 1977). The IRS reasoned that,

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[1] Hereinafter, the term "church" includes a convention or association of churches. The term also encompasses all religious faiths.

under then-proposed regulations, a religious order is not a "church" unless it is engaged in the "ministration of sacerdotal functions and the conduct of religious worship." *Id.* at *4-5 (quotation marks omitted). The IRS concluded that the sisters' services to the sick "are not 'church functions' … since they are not religious." *Id.* at *5; *but cf., e.g.*, Matthew 25:34-40; 1 John 3:17.

In response, religious groups of all denominations objected to the "intrusion of the [IRS] into the affairs of church groups and their agencies by presuming to define what is and what is not an integral part of these religious groups' mission." 125 Cong. Rec. 10,054-58 (1979). The groups explained that the IRS's view would prohibit plans covering the employees of affiliated organizations from qualifying as church plans, when in fact churches and affiliated organizations were inseparable. *Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits of the Senate Committee on Finance*, 96th Cong., 1st Sess., 384 (1979) (hereinafter, "*Hearings*"); 125 Cong. Rec. 10,057-58. Multiple denominations explained that church-affiliated pension boards, rather than churches, "established," "create[d]," and "sponsor[ed]" pension plans for the employees of church-affiliated organizations, including hospitals. *Hearings* at 379, 400, 401, 416, 471-72, 481.

2. In 1980, Congress responded with the Multiemployer Pension Plan Amendments Act ("MPPAA"), Pub. L. No. 96-364, § 407 (1980). Congress recognized that it is "doubtful that the agency plans would survive subjection to ERISA," and that the original definition not only failed to recognize that "[c]hurch agencies are essential to the churches' mission" but

also "is so narrowly drawn that it does not in many ways even approximate the way church plans are organized or operated." 125 Cong. Rec. 10,051-52.

Congress accordingly both expanded subparagraph C's church-agency provision and made it permanent. Subparagraph C(i) now states:

> A plan *established and maintained for its employees (or their beneficiaries) 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 or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church …, *if such organization is controlled by or associated with a church* ….

29 U.S.C. § 1002(33)(C)(i) (emphases added). Congress made simultaneous, identical changes to the parallel tax provision, and entitled the provision "Treatment as church plan." 26 U.S.C. § 414(e)(3)(A). Thus, while subparagraph A continues to define a "church plan" as "a plan established and maintained … by a church," § 1002(33)(A), the statute now states that this category "includes a plan maintained by an [otherwise qualifying] organization [that] is controlled by or associated with a church." § 1002(33)(C)(i). Hereinafter, this brief refers to such organizations as "church-affiliated organizations" or "church agencies."

Congress also added subparagraph C(ii), which states that the term "employee of a church" "includes" "an employee of an organization, whether a

civil law corporation or otherwise, which is [tax-exempt] and which is controlled by or associated with a church." 29 U.S.C. § 1002(33)(C)(ii); *see* 26 U.S.C. § 414(e)(3)(B) (parallel tax provision). And Congress added subparagraph C(iii), which states that a "church … shall be deemed the employer of any individual included as an employee under clause (ii)." § 1002(33)(C)(iii); *see* 26 U.S.C. § 414(e)(3)(C). These provisions ensure that, when § 1002(33)(C) refers to "employees of a church," the term includes employees of church-affiliated organizations. The amendments are retroactive to ERISA's enactment. Pub. L. No. 96-364, § 407(c).

3. In 1982, the IRS concluded in a General Counsel Memorandum that the very plan reviewed in 1977—a plan established by orders of Catholic sisters for Catholic hospital employees, and maintained by an internal retirement committee—was a church plan even though it was not established by a church (under the IRS's conception of "church"). IRS Gen. Couns. Mem. 39,007, 1983 WL 197946, at *1-2, *5 (Nov. 2, 1982). "[B]ecause of the passage of the MPPA[A]," the IRS explained, "church plan status no longer hinges on whether an order is a church." *Id.* at *6. Rather, a plan is a church plan if it is "maintained" by a qualifying church-affiliated organization and covers the employees of a church-affiliated organization. *Id.* at *5.

In the 35 years since, the IRS has issued more than 500 private letter rulings confirming that plans maintained by church-affiliated organizations—including petitioners' plans—are exempt regardless of whether a church separately established them. No.16-74 Pet. App. 70a-111a. The agency issued its

most recent such ruling while these cases were pending. *Id.* at 111a. The DOL has issued nearly 70 opinions to the same effect. *Id.* at 64a-69a. And the PBGC does not insure plans maintained by church-affiliated organizations, regardless of whether they were established by churches. PBGC Op. Ltr. 78-1 (Jan. 5, 1978); PBGC, Questions to the PBGC and Summary of Their Responses 25 (Mar. 2011), http://www.pbgc.gov/documents/2011bluebook.pdf.

The judicial understanding was the same. Between 1980 and 2013, every court to consider the issue concluded that a church-affiliated organization could establish an exempt church plan for its employees. *E.g.*, *Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 547 (4th Cir. 2001); *Chronister v. Baptist Health*, 442 F.3d 648, 653-54 (8th Cir. 2006); *Thorkelson v. Publ'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1127 (D. Minn. 2011); *Hall v. USAble Life*, 774 F. Supp. 2d 953, 957-61 (E.D. Ark. 2011); *Ward v. Unum Life Ins. Co. of Am.*, No. 09-cv-431, 2010 WL 4337821, at *2 (E.D. Wis. Oct. 25, 2010); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 84-85 (D. Me. 2004); *Friend v. Ancilla Sys. Inc.*, 68 F. Supp. 2d 969, 972-73 (N.D. Ill. 1999).

B. Proceedings Below

Petitioners are three religious nonprofits that operate hospitals and other healthcare facilities. Petitioners offer their employees generous defined-benefit pension plans, to which employees contribute nothing. Such plans are rare. Only 16 percent of private hospital employees have access to a defined-

benefit plan at all.[2] Petitioners operate their plans as ERISA-exempt church plans.

In 2013, plaintiffs' firms began suing religious nonprofit hospitals across the nation, contending that their pension plans were not church plans because they were not established by churches. These firms have filed 39 class actions demanding that the nonprofit hospitals pay tens of billions of dollars in retroactive penalties. Respondents in these three cases sought declarations that petitioners' pension plans were subject to ERISA, along with injunctive relief, damages, disgorgement, penalties of $110 per class member per day for three separate claims, prejudgment interest, costs, and attorneys' fees. Respondents alleged that petitioners' plans were underfunded, but petitioners' plans are all funded at a level above the IRS's 80% minimum for ERISA plans. Respondents have not alleged that petitioners have denied any plan participant any benefit payment.

1. No. 16-74

Petitioner Advocate Health Care Network is a nonprofit hospital network that is a recognized social ministry of the Evangelical Lutheran Church in America ("ELCA") and the United Church of Christ ("UCC"). Advocate operates 12 hospitals and more than 250 other healthcare locations across Illinois in furtherance of the UCC and ELCA missions. Pet. App. 5a. Through covenantal agreements, the Metropolitan Chicago Synod of the ELCA and the Illinois

[2] Bureau of Labor Statistics, Employee Benefits Survey, Retirement Benefits: Access, Participation, and Take-Up Rates Tbl. 2 (2015), https://goo.gl/quPQlq.

Conference of the UCC publicly affirm that Advocate is "integral to the ministry of the" churches. JA43, 50. And as a ministry within the ELCA and UCC, Advocate appears in both churches' annual church directories. JA54-55. Representatives of the two churches sit on Advocate's Board of Directors and may veto any decision by the Board. JA8, 14. Board meetings begin with prayer.

Advocate's plan has operated as an ERISA-exempt church plan since at least 1980, and the government has twice affirmed that Advocate's plan is a church plan. In 1991, the IRS issued a private letter ruling to Advocate's predecessor, Evangelical Health Systems, affirming that its plan was a church plan because the plan's participants are "employees of a church," and the plan was maintained by an internal church-affiliated administrative committee under § 1002(33)(C)(i). JA57-69. In 1998, after a merger between Evangelical Health Systems and Lutheran General Health System, the IRS issued a second ruling determining that Lutheran General's plan was a church plan for the same reasons. JA70-109. Advocate merged the Lutheran General plan into the Advocate plan later that year.

In 2013, respondents Marie Stapleton, Judith Lukas, Sharon Roberts, and Antoine Fox filed a putative class action suit in the Northern District of Illinois against Advocate, one of its officers, and two of its benefits-related committees. JA237. The district court denied Advocate's motion to dismiss, concluding that Advocate's plan was not a church plan because neither "a church [n]or an association of churches initially established" it. Pet. App. 36a-37a.

On interlocutory review, the Seventh Circuit affirmed. The court concluded that § 1002(33)(C)(i) "merely adds an alternative meaning to one of sub[paragraph] (33)(A)'s two elements—[the] 'maintain' element—but does not change the fact that a plan must still be established by a church." Pet. App. 11a. The Seventh Circuit also stated that "no part" of the legislative history suggested that Congress intended to alter the church-establishment requirement, *id.* at 23a; that the 1982 General Counsel Memorandum and the hundreds of letter rulings to "plans established by church-affiliated organizations" were unworthy of deference, *id.* at 24a-26a; and that a church-establishment requirement raised no constitutional doubts, *id.* at 26a-28a.

2. No. 16-86

Petitioner Saint Peter's Healthcare System is a nonprofit corporation owned and controlled by the Roman Catholic Diocese of Metuchen, New Jersey. JA473-74. Saint Peter's operates a single teaching hospital in New Brunswick, New Jersey, and certain other nonprofit healthcare facilities, such as a facility for child victims of sexual abuse. The Bishop of Metuchen is the sole member of Saint Peter's and exercises total control over its operations. JA484-88. Other than two medical representatives required by state law, the Bishop appoints every member of the Saint Peter's Board and can remove any member at will. JA487. The Bishop may veto any action by the Board. JA487.

The Catholic Church lists Saint Peter's in The Official Catholic Directory. JA388. Mass is said daily, and daily morning prayers are broadcast over the public address system. Board meetings begin with prayer. Saint Peter's provides healthcare ser-

vices in accord with the Ethical and Religious Directives for Catholic Health Care Services, directives promulgated by the U.S. Conference of Catholic Bishops that the Bishop of Metuchen established as "particular law" for the Diocese. JA474.

In 1974, Saint Peter's established a defined-benefit retirement plan, which covers employees hired through June 2010. Saint Peter's never made an election under 26 U.S.C. § 410(d)—a statutory provision that permits church plans to voluntarily but irrevocably give up church plan status—but for many years voluntarily complied with ERISA standards.

In 2005, the IRS announced new ERISA funding requirements that would have mandated an immediate, one-time plan contribution of $28 million—nearly the entire amount that Saint Peter's allocates for charitable care each year. JA490, 511. Accordingly, Saint Peter's asked the IRS to confirm that its plan was an ERISA-exempt "church plan." JA379-80. In 2013, the IRS issued a private letter ruling concluding that Saint Peter's plan is and "has been a church plan … retroactive to January 1, 1974." JA386. Saint Peter's made the $28 million contribution over a period of three years. JA512.

Also in 2013, respondent Laurence Kaplan filed a putative class action against Saint Peter's and several of its officers in the District of New Jersey, alleging that Saint Peter's plan is not a church plan because it was not established by a church. The district court agreed and denied Saint Peter's motion to dismiss. Pet. App. 29a-53a.

On interlocutory appeal, the Third Circuit affirmed, holding that church plans may be established only by churches. Textually, the court concluded that "only the [church-maintenance requirement] is expanded by the use of 'includes.'" *Id.* at 14a. The Third Circuit also relied on the purported absence of a "single statement showing that Congress … was also focused on plans *established* by [church] agencies." *Id.* at 22a. The court declined to defer to the 1982 IRS memorandum, and concluded that its interpretation raised no constitutional doubts. *Id.* at 24a-26a.

3. No. 16-258

Dignity Health is a nonprofit corporation formed in 1986 through the combination of hospitals sponsored by two congregations of Catholic women religious—the Sisters of Mercy Congregations in Auburn and Burlingame, California. JA549, 647-48. Hospitals sponsored by additional congregations of Catholic women religious have joined Dignity Health over the years, as have non-Catholic community hospitals. JA549-51. A Catholic bishop approved each new affiliation. JA550-51. Dignity Health's Catholic hospitals comply with the Ethical and Religious Directives for Catholic Health Care Services, and its community hospitals commit to a Statement of Common Values that is substantially similar to the Directives. JA550-51, 560-61.

Sisters from the sponsoring congregations hold guaranteed seats on Dignity Health's board of directors and the board's executive committee, and must approve any changes to the Statement of Common Values. JA575, 597-98. A Mission Integrity Committee monitors Dignity Health's adherence to its Catholic mission. JA595-98. Crucifixes and pictures

of the Pope and the Archbishop of San Francisco hang in Dignity Health's offices. JA732-33. Meetings begin with a prayer or inspirational reflection.

Dignity Health sponsors a generous defined-benefit pension plan. Dignity Health's plan was established in 1989 and has operated as a church plan since 1992. The IRS confirmed this status four separate times. In 1993, the IRS ruled that Dignity Health's plan qualified as a church plan from inception. JA668-84. In 1995, the PBGC agreed that the plan was an exempt church plan, refunded certain insurance premiums, and required Dignity Health to certify it would never seek ERISA coverage. JA815-24. The IRS has issued three additional letter rulings confirming that the plan and related plans were church plans. JA685-715.[3]

In 2013, respondent Starla Rollins filed a putative class action in the Northern District of California against Dignity Health, one of its officers, and unnamed members of its retirement committee. The district court denied Dignity Health's motion to dismiss, concluding that the exemption contains a church-establishment requirement. Pet. App. 37a. On cross-motions for partial summary judgment, the court rejected Dignity Health's alternative argument that Dignity Health's plan was in fact established or

[3] Dignity Health sought a fifth ruling in light of a 2012 restructuring, in which Dignity Health changed its name from Catholic Healthcare West and made other organizational changes that were approved by the Archbishop of San Francisco. JA557-64. The IRS declined to act on that request because of this litigation. The question presented does not turn on anything that occurred in the restructuring.

co-established by congregations of Catholic women religious, who constitute the church. *Id.* at 51a-59a.

The Ninth Circuit affirmed on interlocutory review, holding that church plans must be established by churches. The court stated that "[t]here are two possible readings" of § 1002(33)(C)(i). Pet. App. 10a. But the Ninth Circuit concluded that "the more natural reading … is that the phrase preceded by the word 'includes' [in § 1002(33)(C)(i)] serves only to broaden the definition of organizations that may maintain a church plan." The court found the legislative history "clear" that § 1002(3)(C)(i) "addressed only the problem of maintenance by church-controlled or church-affiliated pension boards." Pet. App. 14a. The court accorded no deference to the views of the federal agencies, and concluded that its interpretation raised no constitutional doubts. *Id.* at 18a-20a. And the court declined to decide whether Dignity Health's sponsoring congregations had established or co-established the plan. *Id.* at 25a.

This Court stayed the Ninth Circuit's mandate pending the disposition of this case.

SUMMARY OF ARGUMENT

Basic tools of statutory interpretation confirm that ERISA exempts plans maintained by church-affiliated organizations, regardless of whether they were established by a church.

A. The statutory text unambiguously states that plans maintained by qualifying church-affiliated organizations are church plans. Subparagraph A of § 1002(33) states: "The term 'church plan' means a plan established and maintained ... by a church." Subparagraph C(i) expands that definition: "For

purposes of" § 1002(33), "a plan established and maintained … by a church … includes a plan maintained by an organization [that is] controlled by or associated with a church." § 1002(33)(C)(i). A plan established and maintained by a church is exempt from ERISA; a plan established and maintained by a church includes a plan maintained by a church-affiliated organization; thus a plan maintained by a church-affiliated organization is also exempt. This is the literal meaning of the text.

This is also the only interpretation that avoids surplusage. Had Congress intended to permit church-affiliated organizations to maintain but not establish church plans, Congress would have omitted "established and" from subparagraph C(i) and written, "A plan ~~established and~~ maintained ... by a church ... includes a plan maintained by a [church-affiliated] organization." Each court of appeals failed to address this surplusage problem.

Textual differences between the original and current exemption further demonstrate that church-affiliated organizations may establish their own plans. Before 1980, subparagraph C expressly required church establishment, and applied only to plans covering employees of both churches *and* affiliated organizations. Current subparagraph C undisputedly exempts stand-alone church-agency plans that cover *no* church employees, and thus, unsurprisingly, does not require church establishment. Finally, the interpretations below render subparagraph C ungrammatical.

B. Three subsequent federal statutes presume that church-affiliated organizations may establish their own church plans. For example, Congress confirmed that the YMCA pension plan is a church plan

because it is maintained by a church-affiliated organization, even though it was not established by a church.

C. The historical evidence confirms that Congress intended to eliminate any distinctions between churches and their affiliated organizations. *First,* the 1980 amendment responded to intrusive IRS assessments of which religious organizations constitute the "church" and which charitable work counts as "religious." A church-establishment requirement would revive this regime by making the distinction between churches and church-affiliated organizations determinative of church plan status.

Second, overwhelming evidence reflects Congress's understanding that church-affiliated organizations, in particular separately-incorporated church pension boards, have long established pension plans for church employees, church-agency employees, or both. The amendment's co-sponsor stated that the amendment exempted plans established by pension boards; yet under the decisions below, it would not.

Third, the legislation's supporters and opponents repeatedly stated that the amendment exempted church-agency plans covering church-agency employees, without mentioning any church-establishment limitation.

Fourth, distinguishing between churches and their agencies would result in pernicious denominational discrimination. In decentralized denominations, as opposed to hierarchical denominations, church-affiliated organizations are more likely to establish and maintain plans for employees of the church and affiliated organizations alike. The history unequivocally shows that Congress intended to

eliminate denominational discrimination; the decisions below reinstate it.

D. A church-establishment requirement serves no apparent purpose, other than to undermine the exemption's goals. All agree that church plans may cover church-agency employees and that church agencies may maintain such plans. Congress could not plausibly have intended to discourage church agencies from establishing plans for their own employees. Nor is it clear what church establishment even entails; ERISA does not define the term "establish." Church establishment is either an empty formalism, in which case Congress is unlikely to have required it; or it is not, in which case Congress would not have required it without specifying what it means.

E. The text is clear, but any ambiguity requires deference to the three agencies responsible for administering a complicated regulatory scheme like ERISA. The IRS, DOL, and PBGC have concluded for three decades that church-affiliated organizations may establish and maintain ERISA-exempt church plans. This conclusion is thorough and well-reasoned, consistent and longstanding, and was issued contemporaneous with the amendment's passage. Countless religious organizations have relied on and structured their benefits programs around this interpretation for decades. Rejecting the settled agency construction would sow utter chaos. It is hard to imagine a more compelling case for deference.

F. Congress has ratified the settled agency interpretation. Congress has incorporated § 1002(33)'s or § 414(e)'s definition of "church plan" into numerous other statutes, and it has amended ERISA's def-

inition section dozens of times, without altering subparagraph C(i).

G. The canon of constitutional avoidance compels the conclusion that church-affiliated organizations may establish exempt church plans. A contrary interpretation would require the government to decide whether particular religious organizations constitute the "church"—reintroducing precisely the impermissible religious entanglement that the 1980 amendment sought to avoid. And a church-establishment requirement would impermissibly favor hierarchical denominations over congregational denominations. The Establishment Clause forbids such denominational preferences.

ARGUMENT

ERISA'S CHURCH PLAN EXEMPTION DOES NOT CONTAIN A CHURCH-ESTABLISHMENT REQUIREMENT

As amended in 1980, ERISA provides two ways for pension plans to qualify as exempt "church plans." Subparagraph A of § 1002(33) provides that the "term 'church plan' means a plan established and maintained ... by a church … which is exempt from tax under section 501 of title 26." Alternatively, subparagraph C(i) provides that subparagraph A's reference to "[a] plan established and maintained … by a church … includes a plan maintained by an organization [that] is controlled by or associated with a church."

It is common ground that, under the 1980 amendment, exempt church plans may be maintained by church-affiliated organizations. § 1002(33)(A), (C)(i). All likewise agree that exempt church plans may cover the employees of church-

affiliated organizations. § 1002(33)(C)(ii). The sole question is whether § 1002(33) nonetheless requires plans "maintained" by church-affiliated organizations for the employees of church-affiliated organizations to have been first "established" by a church.

It does not. Traditional interpretive tools—text and structure, history and purpose, agency deference, congressional ratification, and avoidance of constitutional doubt—compel that conclusion. So does common sense. The national understanding for 37 years has been that church-agency plans like petitioners' are exempt; countless religious entities have openly operated free from ERISA's requirements for decades. "[W]hile it may be possible for an entire industry to be in violation of [ERISA] for a long time without [anyone] noticing, the more plausible hypothesis is that … the industry's practice was [lawful]." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (quotation marks omitted).

A. Statutory Text

1. "In a statutory construction case, the beginning point must be the language of the statute." *FAA v. Cooper*, 132 S. Ct. 1441, 1457 (2012). Here that language is clear and unambiguous: plans maintained by church-affiliated organizations are exempt church plans, full stop. Subparagraph A states that a "church plan" "means" a "plan established and maintained ... by a church" that is tax-exempt. § 1002(33)(A). Subparagraph C(i) in turn expands that legal category by stating that, "[f]or purposes of" § 1002(33), a "plan established and maintained ... by a church … includes a plan maintained by an organization ... controlled by or

associated with a church" that meets certain other requirements. § 1002(33)(C)(i).[4]

As one district court explained in rejecting a church-establishment requirement, "'if A is exempt and A includes C, then C is also exempt.'" *Overall v. Ascension*, 23 F. Supp. 3d. 816, 828 (E.D. Mich. 2014); *see Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 200 (D.C. Cir. 2001). Plans established and maintained by churches are exempt, §§ 1002(33)(A), 1003(b)(2); plans established and maintained by churches include plans maintained by church-affiliated organizations, § 1002(33)(C)(i); thus plans maintained by church-affiliated organizations are also exempt. *Lown*, 238 F.3d at 547; *Medina v. Catholic Health Initiatives*, 2014 WL 4244012, at *3 (D. Colo. Aug. 26, 2014). In short, subparagraph C(i) defines the phrase "a plan established and maintained by a church" to include a plan maintained by a church-affiliated organization, whether or not actually established by a church.

Section 1002(33) reflects a standard drafting approach: using a term in a compound definition,

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[4] The entity directly maintaining the plan must be a "civil law corporation or otherwise" that has as its "principal purpose or function … the administration or funding of [a pension or welfare] plan." § 1002(33)(C)(i). Respondents have argued that this provision excludes a church-affiliated organization's internal retirement committee, but that issue is not within the scope of the question presented. We note, however, that consistent with § 1002(33)(C)(i)'s "civil law corporation *or otherwise*" language, the government has always extended the exemption to internal retirement committees, *see* 1983 WL 197946, at *5-6, and respondents' reading would impose a meaningless requirement for church-affiliated organizations to separately incorporate their retirement committees.

and then repeating and redefining that term to signal that the redefinition can substitute for that term in the compound definition. "Congress has often used that drafting technique—*i.e.,* repeating a discretely defined word—when it intends to incorporate the definition of a particular word into the definition of a compound expression." *Burgess v. United States*, 553 U.S. 124, 130-31 (2008) (offering several examples involving both words and phrases). For instance, in interpreting a provision declaring that "[t]he term 'taxable year' includes" certain fractional periods of a year, this Court explained that Congress "adopt[ed] a familiar device in aid of statutory construction, by providing that wherever other sections refer to a 'taxable year' that phrase may, if the context requires, be taken also to refer to or to 'include' a fractional part of that taxable year." *Helvering v. Morgan's, Inc.*, 293 U.S. 121, 124-25 (1934). This technique reflects the broader principle that "identical words and phrases within the same statute should normally be given the same meaning." *Hall v. United States*, 132 S. Ct. 1882, 1891 (2012) (quotation marks omitted).

Subparagraph A creates a compound definition: "The term 'church plan' means [1] a plan established and maintained … by a church [2] which is exempt from tax under section 501 of title 26." 29 U.S.C. § 1002(33)(A). Subparagraph C(i) then repeats the phrase "a plan established and maintained … by a church" to signal that the expanded definition that follows, namely, "a plan maintained by [a church-affiliated] organization," can replace the phrase "a plan established and maintained … by a church" in subparagraph A. The combined alternative definition of the term "church plan," simplified to exclude language not at issue here, reads: "The term

'church plan' means [1] a plan maintained by a [church-affiliated] organization [2] which is exempt from tax."

Section 1002(33) uses this same approach elsewhere. Subparagraph C(ii) states: "The term employee of a church ... includes ... an employee of an organization ... which is controlled by or associated with a church." § 1002(33)(C)(ii). The phrase "employee of [a church-affiliated] organization" thus can replace the term "employee of a church" in provisions using that term. So too can the term "a plan maintained by [a church-affiliated] organization" replace the term "a plan established and maintained by a church."

Were there any ambiguity, it "is resolved against respondents by the title of" the companion tax-code definition. *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *accord Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998). The tax-code parallel to subparagraph C is titled "Treatment as church plan," 26 U.S.C. § 414(e)(3)(A), indicating that Congress intended to "treat" the plans described in § 414(e)(3)(A) and § 1002(33)(C)(i) as church plans.

2. Petitioners' interpretation is the only one that avoids surplusage. "It is ... a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (quotation marks omitted). Had Congress wanted to preserve subparagraph A's establishment requirement, Congress would have left the words "established and" out of subparagraph C(i) and said simply: "A plan ~~established and~~ maintained ... by a church ... includes a plan maintained by a [church-affiliated] organization." There is no explanation for

Congress's inclusion of the words "established and" in subparagraph C(i) other than to eliminate a church-establishment requirement. And there is no way to give effect to the words "established and" other than to allow church-affiliated organizations to establish their own plans. None of the courts below addressed the surplusage problem or explained why Congress said "established and" in subparagraph C(i) if it intended to retain a church-establishment requirement for church-affiliated organizations.

Relatedly, when Congress forgoes an "obvious" method of achieving a particular objective, this Court is reluctant to infer the intent to achieve that objective. *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1235 (2014) (when "drafters did not adopt" the "obvious alternative" language, the "natural implication is that they did not intend" the alternative); *Abbott v. United States*, 562 U.S. 8, 24 (2010) (similar). For example, this Court refused to interpret a statute to bar recovery for personal injuries because inserting the word "property" would have been "an obvious method of imposing the limitation for which the petitioner here contends." *Am. Stevedores v. Porello*, 330 U.S. 446, 450 (1947). Likewise, dropping "established and" from subparagraph C(i) was the "obvious" way to impose the limitation for which respondents contend.

Conversely, there was no more efficient way to eliminate a church-establishment requirement than the text Congress wrote. The drafters could not have said that a "plan established and maintained by a church includes a plan established and maintained by a church-affiliated organization." *Cf.* No.16-74 Pet. App. 20a; No.16-86 Pet. App. 15a. That language would exclude plans established by

churches but maintained by church-affiliated organizations—the very plans that everyone agrees Congress intended to cover and that respondents and the courts below considered the principal purpose of the amendment. *Id.*; *infra* p.40 & n.9.

The Third and Seventh Circuits suggested that subparagraph A's "established by a church" requirement "would become meaningless" on petitioners' reading. No.16-74 Pet. App. 11a; *accord* No.16-86 Pet. App. 14a-15a. That is not correct. Subparagraph C(i) allows qualifying church-affiliated organizations to establish and maintain church plans for their employees or for a church's employees. Subparagraph A sets forth the requirements if churches want to maintain church plans on their own, namely, that the church must establish and maintain the plan. Subparagraphs A and C(i) thus each reach "cases that the other ... does not." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). This does not mean Congress accorded less favorable treatment to churches: Churches too can use church-affiliated organizations, including pension boards, to either establish and maintain church plans, or simply to maintain them. And Congress presumably thought that if a church maintained its plan directly, it would also have established it.

Beyond that, the word "established" in subparagraph A plays an indispensable structural role. As discussed, subparagraph A defines the term "church plan" as "a plan established and maintained by a church," and the latter phrase is then repeated at the beginning of subparagraph C(i), so that the entire phrase provides the essential link between the

plans described in subparagraph C(i) and the statutory term "church plan."

3. Textual differences between the original version of subparagraph C and the current version also demonstrate the absence of a church-establishment requirement. Old paragraph C's sunset provision covered a plan that "is established and maintained by a church … for the employees of such church … *and* employees of one or more agencies of such church." § 1002(33)(C) (1974) (emphasis added). In other words, old subparagraph C temporarily exempted a *single* plan "established and maintained by a church" that included employees of *both* the church and church agencies.

New paragraph C indisputably contains no explicit church-establishment requirement; instead, the decisions below imposed a church-establishment requirement on the theory that new paragraph C fails to eliminate *subparagraph A*'s church-establishment requirement. *See, e.g.*, No.16-74 Pet. App. 10a-12a. But Congress's omission of old subparagraph C's express church-establishment requirement for church-agency plans is compelling evidence that Congress did not intend to retain such a requirement. *United States v. Wells*, 519 U.S. 482, 492-93 (1997).

Further, new subparagraph C now allows exempt plans to cover *only* employees of church-affiliated organizations. § 1002(33)(C)(i), (ii). Old subparagraph C required plans covering church-agency employees to cover church employees too. § 1002(33)(C) (1974). It is improbable that Congress authorized stand-alone church-agency plans for church-agency employees while simultaneously retaining a church-establishment requirement.

4. The decisions below held that § 1002(33) contains "two requirements—establishment and maintenance—and only the latter is expanded by the use of 'includes.'" No.16-86 Pet. App. 14a; *see* No.16-74 Pet. App. 10a-11a; No.16-258 Pet. App. 10a. But as explained, that is not what the text says, and this interpretation renders the words "established and" in subparagraph C(i) surplusage.

Beyond that, simple rules of grammar preclude the courts of appeals' interpretation. Subparagraph C(i) contains two parallel noun phrases linked by the verb "includes"—(1) "*a plan* established and maintained by a church," and (2) "*a plan* maintained by [a church-affiliated] organization." The entire first noun phrase—"a plan established and maintained by a church"—is the subject that performs the action of the sentence, *i.e.,* that "includes a plan maintained by [a church-affiliated] organization."

Reading the second noun phrase to simply expand the "maintenance" requirement creates two related grammatical problems. First, the second noun phrase would impermissibly no longer refer to the first noun phrase, but to a participle clause—"maintained by a church." *Cf. Seders v. Powell*, 259 S.E.2d 544, 548 (N.C. 1979) (in sentence with two noun phrases, the second "noun phrase" must "refer[] to the singular antecedent noun phrase").

And second, that same participle clause would effectively perform the action of the sentence—it would do the "including." But a participle clause cannot serve as the subject of a sentence—only a noun, pronoun, or noun phrase can. John Eastwood, *Oxford Guide to English Grammar* 4 (1994). To render the courts' reading grammatical, one would need to create a new noun phrase—for instance,

"maintenance by a church," "the term 'maintained by a church,'" or "a plan maintained by a church."[5] Put differently, under the appellate courts' interpretation, the second noun phrase—a plan maintained by a church-affiliated organization—"modifies a[n] [antecedent] noun phrase that doesn't appear in the statute." *Mansaray v. Ohio*, 6 N.E.3d 35, 37 (Ohio 2014).

In concluding that subparagraph C modified only the maintenance requirement, all three courts relied on a hypothetical statute conceived by the Third Circuit during oral argument: "Congress passes a law that any person who is disabled and a veteran is entitled to free insurance," and then amends the statute to provide that "a person who is disabled and a veteran includes a person who served in the National Guard." No.16-86 Pet. App. 14a. The Third Circuit stated that Saint Peter's agreed that hypothetical non-disabled Guardsmen would not qualify, *id.*, and all three circuits concluded that, if hypothetical non-disabled Guardsmen would not qualify, the same "must be true" of plans established by church-affiliated organizations. No.16-74 Pet. App. 12a; *accord* No.16-258 Pet. App. 10a-11a.

But the hypothetical is slanted to support a departure from the plain text. It relies on an unstated premise that Congress could not plausibly have intended to offer disability benefits to non-disabled individuals. And it relies on a stated premise that the hypothetical Congress wanted solely to "clarify" that Guardsmen "are veterans." No.16-86 Pet. App. 14a; Oral Arg. at 12:05-12:45, https://goo.gl/AJq5A4. The

[5] The first two approaches would require further corresponding alterations to the object of the verb "includes."

Ninth Circuit acknowledged that the hypothetical statute's "context," not its text, drove the analysis. No.16-258 Pet. App. 10a-11a.

Under the hypothetical statute's plain text, non-disabled Guardsmen are entitled to benefits. And that result would be unsurprising if the context were analogous to the context here: the government had extended benefits to non-disabled Guardsmen for over 30 years; three other federal statutes assumed they were eligible; there was no reason to distinguish between healthy and disabled Guardsmen; and such a construction comported with the hypothetical law's history and purposes and was essential to avoid constitutional difficulties. *See infra*.[6]

B. Related Provisions

Three subsequent laws presuppose that church-affiliated organizations may establish church plans. Subsequent laws that "assume the existence" of a particular interpretation constitute a "convincing confirmation" of that interpretation. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2520 (2015). "[A] later act can be regarded as a legislative interpretation of an earlier act … and is therefore entitled to great weight in resolving any ambiguities and doubts.'" *Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972) (quotation marks and alterations omitted).

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[6] Saint Peter's had seconds to consider the hypothetical and withdraws any "concession." No.16-86 Pet. App. 14a. And Saint Peter's did not state that healthy Guardsman were ineligible "because only the second of the two conditions was satisfied." *Id.*; *cf.* Oral Arg. at 12:45-58.

In 2004, Congress passed a law relating to the YMCA's pension plans that presumes that church plans need not be established by churches. The law states that a pension plan "maintained by the YMCA Retirement Fund ... shall be treated as a church plan ... which is maintained by an organization described in section 414(e)(3)(A)," *i.e.*, § 1002(33)(C)(i). Pub. L. No. 108-476, § 1 (2004). Congress wanted to clarify that the YMCA's plan qualified even though the YMCA associates with Christianity generally rather than "one specific church." 149 Cong. Rec. 7380 (2003). But for that uncertainty about church-association, the plan was in "full compliance" with the exemption, even though it obviously was not established by a church. *Id.*

The Ninth Circuit dismissed this statute on the theory that Congress intended to "treat[]" the YMCA plans as exempt "even though they are not, in fact, church plans." No.16-258 Pet. App. 16a. But Congress presumably used the phrase "treated as a church plan" because that is § 414(e)(3)(A)'s title. The YMCA law expressly defines the YMCA plan as a church plan because it is "maintained" by a church-affiliated organization; maintenance is all that matters. Pub. L. No. 108-476, § 1.

Nor is it plausible that Congress rendered the YMCA the only religious organization in America that may establish its own church plan, while simultaneously excluding, for example, hospitals like Saint Peter's that are controlled by Roman Catholic bishops. Congress intended to put the YMCA *on par* with other religious organizations. Indeed, under the Ninth Circuit's reading, the statute unconstitutionally favors one particular Christian organization over every other Christian organization

and favors Christianity over every other denomination.[7]

Two tax and securities provisions likewise treat churches and church-affiliated organizations as equal under the church plan exemption, and assume that church-affiliated organizations can establish exempt plans. In 1982, Congress exempted from taxation certain income from pension plans "established or maintained by a church …, including an organization described in § 414(e)(3)(A)." 26 U.S.C. § 403(b)(9)(B); Pub. L. No. 97-248, § 251(b) (1982). Again, § 414(e)(3)(A) parallels § 1002(33)(C)(i). And when Congress in 2012 expanded an investment exception to cover church plans—in the "*Church Plan* Investment Clarification Act"—Congress covered "retirement income account[s]" "establish[ed] or maintain[ed]" by "a church … or an organization described in section 414(e)(3)(A)." 15 U.S.C. § 77c(a)(2); Pub. L. No. 112-142, § 2 (2012).

It is doubtful that Congress deemed petitioners' plans church plans under these tax and securities provisions, but not under ERISA. But respondents' reading assumes just that. It treats plans established by church-affiliated organizations as "governed by two disparate sets of legal obligations," a result that is highly "anomalous," "generate[s] administrative difficulties," "and is hardly consistent with [ERISA's] national uniformity goal." *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 17, 22 (2004) (quotation marks omitted).

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[7] This statute also refutes respondents' atextual implication that large religious organizations should not qualify for the exemption. The YMCA's plan has over 90,000 participants. 149 Cong. Rec. 7380.

The Ninth Circuit agreed that these statutes conferred exemptions on plans "not … established by a church." No.16-258 Pet. App. 17a. But the court said the statutes "prove[] too much," because they would exempt plans maintained but not established by churches, even though § 1002(33)(A) requires churches that maintain plans to have established them. *Id.* That anomaly does not matter in practice; as far as petitioners are aware, there *are* no pension plans that are maintained by a church but established by someone else. The anomalies created by the decisions below are exponentially greater.

C. Statutory History

The historical evidence confirms that Congress intended the 1980 amendment to eliminate governmental inquiry into what constitutes a "church," to put churches and their affiliated organizations on equal footing, and to avoid denominational discrimination. A church-establishment requirement utterly defeats these objectives.

1. In 1977, the IRS shocked the religious community by interpreting the original, 1974 exemption to exclude pension plans established by orders of Catholic sisters for employees of their hospitals. 1977 WL 46200, at *1-2. These orders were themselves "established by the Roman Catholic Church." *Id.* at *1. Nonetheless, and consistent with a then-proposed Treasury regulation, the IRS declared that a religious order is not a "church" unless it is "an integral part of a church" and is engaged in "carrying out the *religious* functions of the church," which the IRS limited to the "ministration of sacerdotal functions and conduct of religious worship." *Id.* at *4-5 (quotation marks omitted). The IRS announced that the sisters' efforts to care for the sick and needy are

"not 'church functions' ... since they are not religious." *Id.* at *5.

A firestorm ensued. Religious groups of all denominations objected to the "intrusion of the Internal Revenue Service into the affairs of church groups and their agencies, by presuming to define what is and what is not an integral part of these religious groups' mission," in "violation of the principle of separation of church and state." 125 Cong. Rec. 10,054-58 (1979) (letters entered in Congressional Record from 20 denominations). For example, the Lutheran Church-Missouri Synod criticized the IRS for "attempting to define what is and what is not 'church' and how the mission of the church is to be carried out." *Id.* at 10,054.

Denominational representatives testified extensively on the subject. The United Church of Christ explained that it is made up of "small work units, some of which might be agencies under ERISA and others may be classified as churches by ERISA[,] [b]ut all of which are a part of the church as far as our own determination is concerned." *Hearings* at 375. The Southern Baptist Convention shared its "concern over what the Internal Revenue Service and the Department of Labor are going to decide are 'agencies' which cannot participate in church plans after December 31, 1982." *Id.* at 401.

To address that impending sunset and the IRS's interpretation of the term "church," a group of 27 religious denominations representing more than 50 million church members formed the Church Alliance for Clarification of ERISA. *Hearings* at 363, 374. In a report submitted to Congress, the Church Alliance protested that the government had improperly "taken upon itself the role of defining and limiting church

ministries through the ERISA church plan definition," in violation of "fundamental principles of separation of church and state." *Id.* at 384.

Congress intended the 1980 amendment to respond to these concerns. The Senate co-sponsor, Senator Talmadge, recognized that "[c]hurch agencies are essential to the churches' mission" and "are, in fact, part of the churches." 125 Cong. Rec. 10,052. The House co-sponsor, Representative Conable, explained that "[p]resent law fails to recognize that the church agencies are parts of the church in its work of disseminating religious instruction and caring for the sick, needy, and underprivileged." 124 Cong. Rec. 12,107 (1978).

The decisions below would thus resurrect one of the principal problems Congress intended to solve. If a "church" must establish a church plan, the distinction between a church and a church agency is of controlling significance. The IRS would be back in the business of deciding when and whether Catholic religious orders—and all church-affiliated organizations—are "part" of the church and perform "religious functions."

2. Well before 1980, church-affiliated organizations, including separately incorporated pension boards, established pension plans for church employees, church-agency employees, or both. Since 1914, the United Church of Christ's denominational pension board, for example, has administered plans established by "both local houses of worship and church-associated organizations." Brief for GuideStone et al. as *Amici Curiae* at 3-4, No. 15-15351 (9th Cir. July 13, 2015). Since 1916, the Episcopal Church has used a separately-incorporated pension

board to "*establish* and administer the clergy pension system."[8]

Likewise, the separately-incorporated Ministers and Missionaries Benefit Board "established" pension plans for American Baptist denomination employees, including agency employees. *Hearings* at 415-17. The Southern Baptist Convention's separately-incorporated Annuity Board established pension plans for employees of Southern Baptist churches and church agencies. *Hearings* at 400. That church thus needed the amendment to cover "denominational annuity programs established and maintained through church pension boards." *Hearings* at 401. The Board of Annuities and Relief of the Presbyterian Church testified that, absent an exemption covering church-agency employees, "this Board will have no alternative but to create new Plans for these employees and make these Plans subject to ERISA"—meaning that the Board, not the church, "created" the plans the Board administered. *Hearings* at 471-72.

Legislators thus fully understood that church-affiliated organizations, including "pension boards," established and maintained pension plans for churches and their agencies alike. In introducing the 1980 amendment, Senator Talmadge confirmed that it would cover plans established by entities other than "churches." He explained that the exempt status of plans administered by a pension board was in doubt because of "a question whether the plan is es-

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[8] Constitution & Canons, Episcopal Church, at 41 (2015) (emphasis added), https://goo.gl/AiUJSw; Annotated Constitution & Canons, Episcopal Church, at 315-16 (1981), https://goo.gl/01bdwc.

tablished by a church, as it must be [under the 1974 language], or by a pension board." 125 Cong. Rec. 10,052. The amendment, Senator Talmadge explained, pretermitted that question by declaring that, under the amendment, "[a] plan or program funded or administered through a pension board ... *will be considered a church plan*." *Id.* at 10,053 (emphasis added). A statement by Senator Talmadge, who was "one of the legislation's sponsor's," "deserves to be accorded substantial weight in interpreting the statute." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). And echoing Senator Talmadge, both Representative Conable and Senate Finance Committee Chairman Long stated that, under the bill, a plan "maintained by an organization [described in § 1002(33)(C)(i)] *is* a church plan," 126 Cong. Rec. 20,245 (emphasis added), or "will be considered a church plan," 124 Cong. Rec. 12,107.

Under the decisions below, however, a plan maintained by a church-affiliated organization is *not* a church plan, unless it was first established by a church. And despite Senator Talmadge's statement that the 1974 statute's "established by a church" requirement was incompatible with the existence of pension boards, under the decisions below Congress inexplicably left out countless pension plans established by pension boards—even plans exclusively covering ministers or rabbis.

All three courts of appeals thus profoundly erred in stating that nothing in the history indicated that Congress intended to allow church-affiliated organizations to establish their own plans. No.16-74 Pet. App. 23a; No.16-86 Pet. App. 22a; No. 16-258 Pet. App. 14a-15a. Senator Talmadge's statement expresses that intent directly. 125 Cong. Rec. 10,052.

And it is implausible that Congress ignored substantial evidence that organizations other than churches regularly established plans for churches and church agencies. Congress recognized that the 1974 definition "is so narrowly drawn that it does not in many ways even approximate the way church plans are organized or operated," and wanted to ameliorate, not perpetuate, that problem. *Id.*

3. A church-establishment requirement also conflicts with a more general understanding, shared by all participants in the legislative process, that the amendment placed church agencies and churches on equal footing and accommodated plans that were the agencies' alone.

This was "unmistakably the understanding of … opponents of the legislation." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 811 (1976). Daniel Halperin testified on behalf of the Treasury Department that the bill "would expand this exemption from [ERISA's] minimum standards to agencies or organizations which are controlled by, or associated with, churches." *Hearings* at 190. "[W]e see no justification for expansion of the *complete* exemption from ERISA from churches to church-related agencies." *Id.* (emphasis added). Treasury had no objection to permitting "a program of a church pension board to be considered a church plan," but opposed the amendment because it "substantially expand[s] the concept of church plan" and "prevent[s] the full requirements of ERISA from applying to church agency plans." *Id.* at 222-23 (written statement).

At a June 12, 1980, executive session of the Senate Finance Committee, Halperin reiterated Treasury's view that the bill exempted church-agency

plans: "[T]he bill … would exclude church agencies from the protection of ERISA, and that would mean that if somebody works for a hospital or a school that happens to be affiliated with a church it would be permissible for *that plan* to provide no retirement benefits unless they work until age 65, for example." JA347 (emphasis added). Senator Talmadge responded that the issue was "a question of separation of church and state," and "I don't believe we ought to get [into] a row with every religious faith in the country." JA347. The Committee unanimously approved the amendment. JA348. Senator Javits, the floor manager of the entire MPPAA, later stated that he was "not too happy" about the church plan amendment because it "exempts those who work for schools and similar institutions which are church-related," but had agreed to secure passage of the broader bill. 126 Cong. Rec. 20,180.

Similarly, congressional supporters and religious organizations indicated that the newly-exempted plans were the agency's *own* plans, not simply plans established by churches that also covered agency employees. Specifically referring to agencies that provide "for the sick and needy and disseminate religious instruction," Senator Talmadge noted that "it is doubtful that the *agency plans* would survive subjection to ERISA" and its "expensive and demanding" regulations. 125 Cong. Rec. 10,052 (emphasis added). Without the amendment, "[t]he churches fear that many of the agencies would abandon *their* plans." *Id.* (emphasis added). The Church Alliance warned that, absent the amendment, "agencies will have … to terminate *their* plans" and a pension board may not be able to "administer annuity programs *of church agencies*." *Hearings* at 387 (emphases added). The Southern Baptist Convention Annu-

ity Board testified that the amendment should ensure "the inclusion of *agency plans*." *Hearings* at 374 (emphasis added).

Nothing in the history suggests a church-establishment requirement for such plans, or any reason for such a requirement. "If this amendment had been intended to place the important limitation" suggested by the decisions below, this Court "would expect to find some expression of that intent in the legislative history." *American Hosp. Ass'n v. NLRB.*, 499 U.S. 606, 613-14 (1991).[9]

4. The courts below concluded that the history reflects only two goals: ensuring that (1) churches could establish and administer single plans for both church and church-agency employees, and that (2) pension boards could maintain such plans, so long as a church first established them. No.16-74 Pet. App. 19a-22a; No.16-258 Pet. App. 13a-15a; No.16-86 Pet. App. 18a-19a. The foregoing definitively refutes those conclusions.

But there is more. Overwhelming evidence indicates that Congress understood that distinguishing between churches and their agencies in the context of pensions resulted in denominational discrimina-

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[9] The Third and Seventh Circuits surmised that, had Congress intended to exempt plans established by church agencies, Congress would have enacted a prior version of the amendment, which defined plans "established and maintained by a church" to "include[]" plans "established and maintained" by church-affiliated organizations. No.16-74 Pet. App. 20a; No.16-86 Pet. App. 15a. But that language would have excluded plans established by churches and maintained by church-affiliated organizations. *Supra* pp.25-26.

tion. Decentralized congregational religions, like Judaism and many forms of Protestantism, were far more likely to rely on associated organizations outside the church hierarchy to establish and maintain pension plans. 125 Cong. Rec. 10,052; 124 Cong. Rec. 12,107. In congregational denominations, individual churches and church agencies are local and autonomous, and no centralized church exercises direct control. 125 Cong. Rec. 10,052. "[T]he technical employer is the immediate employer, the local church or church agency, not the denomination." *Hearings* at 446 (Church Alliance); *see* 124 Cong. Rec. 12,107. There is often no such thing as an umbrella "church" that can readily establish plans for the employees of local churches or church ministries. *Hearings* at 446 (Church Alliance); *Hearings* at 364 (Sen. Talmadge); 124 Cong. Rec. 12,107. Hierarchical churches like the Seventh-Day Adventists, in contrast, were better positioned to directly establish a pension plan for the employees of their agencies. *See* 125 Cong. Rec. 10,057.

A church-establishment requirement thus favors hierarchical denominations. Referring expressly to the 1974 exemption's church-establishment requirement, Senator Talmadge stated that "[t]his requirement also points up the inapplicability of the church plan definition to congregational churches." 125 Cong. Rec. 10,052.

Congress intended to eliminate such discrimination. "The combined effect of [the amendments to § 1002(33)(C)] is to treat both hierarchical and congregational denominations in the same manner for purposes of the church plan definition." 124 Cong. Rec. 12,107 (Rep. Conable). "The bill, thus, accommodates the differences in beliefs, structures, and

practices among our religious denominations." *Id.* Yet under the decisions below, the 1980 amendment required countless church-affiliated organizations to choose between complying with ERISA or restructuring themselves in ways incompatible with their religious preferences.

D. Statutory Purpose

A church-establishment requirement is incompatible with the overall goals of the amendment and would serve no apparent purpose.

1. Again, all agree that church plans may cover employees of church-affiliated organizations and that church-affiliated organizations may maintain church plans. § 1002(33)(C)(i), (ii). Congress had no reason to insist that a "church" itself "establish" a plan that a church-affiliated organization maintains for church-affiliated organization employees. "[T]he status of the entity which currently maintains a particular pension plan bears more relation to Congress' goals in enacting ERISA and its various exemptions, than does the status of the entity which established the plan." *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 920 (2d Cir. 1987).

Moreover, it is a foundational principle under ERISA that an "employer" establishes a plan for its employees. 29 U.S.C. § 1002(1), (2)(A), (16)(B); 26 U.S.C. § 401(a)(1). "Establish[ment]" is "designed to ensure that the plan is part of an employment relationship." *Gaylor v. John Hancock Mut. Life Ins. Co.*, 112 F.3d 460, 464 (10th Cir. 1997). Had Congress imposed a church-establishment requirement, church-affiliated organizations would be the only employers in the nation that are *discouraged* from establishing plans for their employees.

Congress's expressed intent to reach employees of organizations that are merely "associated" with a church is also fundamentally incompatible with a church-establishment requirement. § 1002(33)(C)(ii). Congress could not possibly have expected that churches that neither hire an agency's employees nor negotiate their benefits would be nonetheless *required* to establish pension plans for such employees.

More broadly, it is doubtful that in an amendment designed to expand the church plan exemption and accommodate different denominational structures, Congress incorporated an inexplicable roadblock that would make it more difficult for both church-affiliated organizations and churches to qualify (because churches could not use pension boards). On respondents' interpretation, the statute "would give with one hand what it takes away with the other." *Greenlaw v. United States*, 554 U.S. 237, 251 (2008). This Court "resist[s] attributing to Congress an intention to render a statute so internally inconsistent." *Id.*

2. Respondents suggest that a church-establishment requirement would impose upon churches "a legal (and certainly a moral) obligation to" fund benefits for church-agency employees. *E.g.*, No.16-74 BIO at 22. The Seventh Circuit likewise thought church establishment means there is a "church to accept responsibility for the fate of the participants' retirement benefits." No.16-74 Pet. App. 18a.

These statements are puzzling at best. Where, as here, the actual employer funds the plan, we know of no general authority making the entity that "established" the plan liable for any subsequent

underfunding. Indeed, subparagraph C(i) conclusively refutes any such notion in this context. The provision states that the organization that *maintains* the plan—the church-affiliated organization—is responsible for "administration or funding … or both." § 1002(33)(C)(i). Congress could not possibly have expected churches to fund plans that Congress expressly permitted church agencies to fund. To the contrary, the amendment's co-sponsor saw "serious Constitutional objections to subjecting the churches, through their plans, to the … possible levy on church property to satisfy plan liabilities." *Hearings* at 364. Nor are churches even necessarily financially able to back-stop the plans of affiliated organizations.

Respondents likewise fail to explain why a religious organization's "moral obligation" would be any less demanding than a church's or why "establishment" creates a moral obligation. For example, a Catholic Diocese founded and fully controls Saint Peter's and always has; its moral obligation to Saint Peter's employees does not depend on whether the Diocese "established" the Saint Peter's pension plan.

The courts below stated that ERISA is a "remedial statute" that should be "liberally construed" in favor of employees. No.16-74 Pet. App. 17a; No.16-86 Pet. App. 16a. That hoary canon is "th[e] last redoubt of losing cases," *OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995), and does not apply here, where the text, history, and purposes are clear. Moreover, the rule is not that ERISA should be randomly construed in favor of employees. While fewer plans might be exempt under respondents' interpretation, no *principled* justification would determine which ones those were. The restriction that respondents propose

would simply grant or deny ERISA protection to employees based on the historical fortuity of whether the church affiliated with their employer "established" the plan—and often, based on denominational discrimination. *Supra* pp.40-42.

And subjecting more church plans to ERISA is as likely to hurt employees as to help them. ERISA's burdens and costs are the "single most important reason" for the well-documented decline in defined-benefit plans and rise in defined-contribution plans, which shift risks to employees.[10] The exemption has enabled petitioners and other religious organizations to offer rare and generous defined-benefit plans; no beneficiary of petitioners' plans has been denied a benefit payment; church plans in general have operated responsibly for years; and there is no evidence that a church-establishment requirement would increase a plan's financial security. It surely would not help employees if the great dislocation urged by respondents results in the loss or diminution of defined-benefit plans.

3. Finally, it is not even clear what a church-establishment requirement would mean. ERISA does not define the term. If church establishment is something substantive, surely the statutory text or the extensive history would indicate what that substance is. But they do not. And if church establishment is merely an empty formalism, then Congress had no reason to require it.

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[10] R. Jefferson, *Rethinking the Risk of Defined Contribution Plans*, 4 Fla. Tax Rev. 607, 614-15, 626-27 (2000); *accord, e.g.*, Barbara A. Butrica et al., *The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers*, 69 Soc. Security Bull. No. 3, 1 (2009).

It bears emphasis that since the 1980 amendment, no court until the current wave of litigation had ever imposed a church-establishment requirement, and the government has disavowed such a requirement from the get-go. No law has developed on "church establishment" in the church-agency plan context. Dignity Health exemplifies the difficulties: Congregations of Catholic sisters fully controlled Dignity Health when its plan was established in 1989, JA550, 649-51, and they *co-signed* the document creating the plan, JA859-60, yet respondents argue that the congregations did not establish the plan. Affirmance guarantees that courts will spend years struggling to decide when a "church" has established a plan.

Respondents' reading also creates bizarre anomalies that Congress could not possibly have intended. For example, the plan covering Saint Peter's hospital employees would be a church plan if it were established by the Bishop of Metuchen, but not if it were established by Saint Peter's Healthcare System on behalf of the Bishop—Saint Peter's sole member.

More generally, consider a church that runs a religious school and maintains a plan for church and school employees through an associated pension board. Under the decisions below, if the church establishes the plan, it is a church plan. But if the school operates through a separate non-profit organization and establishes the plan, even if the church maintains complete control over the school, then the plan is not a church plan. And if the church's pension board establishes the plan, it is not a church plan. Congress surely did not intend these arbitrary distinctions.

E. Agency Deference

1. Although the statutory text is clear (*supra* pp.21-30), any ambiguity requires deference to the longstanding views of the IRS, DOL, and the PBGC, the three agencies responsible for administering the statute. Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), deference "'will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.'" *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *see Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 403 (2008).

Agency deference is particularly warranted in the context of complicated, technical regulatory regimes like ERISA. *Tilley*, 490 U.S. at 726. "ERISA is a comprehensive and reticulated statute," *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 447 (1999) (quotation marks omitted), and the agencies possess "specialized experience … on the subtle questions" in this "highly detailed" regulatory scheme, *Mead*, 533 U.S. at 235.

This Court regards agency interpretations as so critical under ERISA that it applied *Chevron*-like deference to a PBGC interpretation advanced in a PBGC *amicus brief*. The "PBGC's policy [was] based upon a permissible construction of the statute," the Court explained, and ERISA did not speak with "the clarity necessary to disregard the PBGC's considered views." *Beck v. Pace Int'l Union*, 551 U.S. 96, 104, 106 (2007). The Court has given lesser forms of deference to precisely the types of administrative interpretations present here. *Yates*, 541 U.S. at 17-18 (deferring to DOL opinion letters); *Glass City Bank of Jeanette, Pa., v. United States*, 326 U.S. 265, 268

(1945) (IRS general counsel memorandum); *Hanover Bank v. C.I.R.*, 369 U.S. 672, 686-87 (1962) (IRS private letter rulings constitute "[p]ersuasive evidence"); *PBGC v. LTV Corp.*, 496 U.S. 633, 648, 651 (1990) (PBGC opinion letters).

2. If there ever were a case for *Skidmore* deference, this is it. Three separate agencies brought their collective expertise to bear on a complicated statute, adopted the same interpretation starting shortly after the passage of the amendment, and applied it hundreds of times in Democratic and Republican administrations alike for more than 30 years. In short, "[e]very agency to consider the issue" has concluded in a "consistent course of agency interpretation" that the church plan exemption extends to plans established by church-affiliated organizations. *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998).

First, the IRS's 1982 general counsel memorandum is thorough and well-reasoned. IRS Gen. Couns. Mem. 39,007, 1983 WL 197946 (Nov. 2, 1982). The agency first explained that a religious organization must establish that its employees are "employee[s] of a church" under § 414(e)(3)(B), *i.e.*, § 1002(33)(C)(ii), by establishing that the organization is controlled by or associated with a church. *Id.* at *4. The agency then concluded that, under the 1980 amendment, a plan could qualify as a church plan in two ways. A church plan may "be established and maintained by a church" under § 414(e)(1), *i.e.*, § 1002(33)(A). *Id.* at *5. But "because of the passage of the MPPA[A]," "nonchurch status is not fatal." *Id.* at *4-6. A plan may also qualify if it is "maintained … by an organization described in section 414(e)(3)(A)"—*i.e.*, by a § 1002(33)(C)(i) church-affiliated principal-purpose organization, such as a

religious organization's retirement committee. *Id.* The IRS observed that the legislative history confirmed its reading. *Id.* at *6 n.1.

Second, this Court "normally accord[s] particular deference to an agency interpretation of 'longstanding' duration." *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (quoting *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 522 n.12 (1982)); *accord, e.g.*, *Alaska Dept. of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 487 (2004); *Davis v. United States*, 495 U.S. 472, 484 (1990); *CFTC v. Schor*, 478 U.S. 833, 846 (1986). Three federal agencies over three decades have consistently applied the same construction to a broad spectrum of religious organizations, including as recently as December 2015, while these cases were pending in the courts of appeals. No.16-74 Pet. App. 111a.

The IRS has issued more than 500 private letter rulings applying this interpretation. *Id.* at 70a-111a. The rulings exempt plans established not just by hospitals but by religious universities, schools, old-age homes, youth programs, a charitable day care center, mental health facilities, homes for "poor, destitute and homeless children," an organization serving people who are developmentally disabled, and many others. *Id.*

The DOL has issued nearly 70 advisory opinions applying the same interpretation to a similarly broad spectrum of religious ministries. *Id.* at 64a-69a (listing opinions issued to plans established by hospitals, schools, elder care organizations, theological seminaries, and nursing homes, among others). The PBGC too has adopted the IRS's view. *Supra* p.9; *see Owens v. St. Anthony Med. Ctr., Inc.,* No. 14-cv-

4068, 2015 WL 3819086, at *4 (N.D. Ill. June 18, 2015); JA815-24.

Third, courts "give [IRS] interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use." *Davis*, 495 U.S. at 484; *see White v. Winchester Country Club*, 315 U.S. 32, 41 (1942) (IRS's "substantially contemporaneous expressions of opinion are highly relevant and material evidence"); *Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979) ("contemporaneous" regulation has "particular force").

The IRS issued its general counsel memorandum on November 2, 1982, just two years after Congress expanded the exemption. And this was not just any contemporaneous interpretation. The IRS *opposed* the 1980 amendment precisely because it exempted plans of church-affiliated organizations like petitioners. *Supra* pp.38-39. Having lost this policy debate, the IRS promptly acknowledged that the amendment repudiated the IRS's 1977 memorandum, which had concluded that Catholic religious orders could not establish church plans for Catholic hospitals, because the orders were not the "church." 1983 WL 197946, at *1-2, *6. "[B]ecause of the passage of the MPPA[A]," the IRS concluded, "church plan status no longer hinges on whether an order is a church." *Id.* at *6. Religious organizations at the hearing on the amendment and in letters in the Congressional Record repeatedly referenced the IRS's earlier conclusion. *Supra* pp.34-35. Congress was "fully aware" of and "amended the statute specifically to overcome [the IRS] interpretation," *Davis*, 495 U.S. at 483, by eliminating a distinction between churches and church-affiliated organizations. The IRS's contempo-

raneous reinterpretation in response to the amendment is entitled to "considerable weight." *Id.* at 484.

Finally, the government's interpretation has generated enormous reliance by hundreds if not thousands of religious organizations. "In light of these substantial reliance interests, the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons.'" *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978); *see Nat'l Muffler*, 440 U.S. at 477; *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 134 (1977); *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 87 (1975); *Udall v. Tallman*, 380 U.S. 1, 17-18 (1965).

"Public and analytic reliance are among the soundest reasons to sustain long-standing contemporaneous interpretations." 2B N. Singer, Sutherland Statutes and Statutory Construction § 49:6 (rev. 7th ed. 2016). This Court thus should "not lightly overturn administrative practices as longstanding as the ones challenged in this action"—"particularly … where, as here, an immense … industry has developed in reliance on that consistent interpretation." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 312 (1988) (Brennan, J., concurring in relevant part); *cf. Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016) (agency cannot reverse interpretation without accounting for "serious reliance interests" engendered by its longstanding informal interpretation).

Countless religious employers in a wide variety of contexts have established generous pension plans for millions of employees on the understanding that the plans were exempt under ERISA. Advocate has operated its pension plan as an exempt church plan since at least 1980, and the IRS expressly confirmed

that status twice, in 1991 and 1998. JA57-109. The IRS informed petitioner Dignity Health four separate times beginning in 1993 that its pension plans were exempt. JA668-715. Respondents nonetheless assert that petitioners and other similarly-situated religious entities—all of which are nonprofits with missions like serving the sick and needy—owe tens of billions of dollars in retroactive penalties, based on daily, $110 per-class-member statutory penalties for failing to provide the benefit statements and funding notices that the IRS told petitioners they were not required to provide. JA303, 463-64, 803-04.

Rejecting the longstanding agency interpretation would create chaos for the nonprofit religious groups that have structured their benefits programs around the longstanding interpretation. A change in the status quo would require plans that have been in existence for decades to radically reorganize to comply with ERISA's participation, vesting, and accrual rules, among many others. A change would force church pension boards to drop church ministry employers from the pension board's church plan. A change would have cascading effects across tax and securities laws that incorporate the church-plan definition and would impose substantial adverse tax consequences on *employees*. Brief of Church Alliance as *Amicus Curiae* in Support of Petition for Certiorari 5-11.[11] And a change would inevitably force many organizations to stop offering defined-benefit plans entirely. *Supra* p.45. Preventing this chaos and un-

[11] Unlike the two provisions described above, *supra* pp.32-33, many other tax and securities provisions simply cross-reference § 1002(33) or § 414(e).

fair surprise is a compelling reason to defer to the longstanding interpretations.

3. The Third and Seventh Circuits stated that the IRS "fail[ed] to consider the relationship between" subparagraphs A and C. No.16-74 Pet. App. 24a-26a; *see* No.16-86 Pet. App. 23a (similar). The IRS did consider that relationship. The IRS read subparagraph C(i) to permit substitution of the phrase "maintained by [a church-affiliated] organization" for the phrase "established and maintained … by a church" in subparagraph A. 1983 WL 197946, at *2-3, *5. What more did the IRS need to say?

The Ninth Circuit faulted the IRS for failing to consider the "legislative history indicating that, in adopting subparagraph (C)(i), Congress did not intend to alter ERISA's [church-establishment] requirement." No.16-258 Pet. App. 19a-20a. But no such legislative history exists. And the Ninth Circuit ignored the history that the agency cited. *Supra* p.49. The Ninth Circuit also stated that the agency had incorrectly opined that the Catholic Church may maintain a church plan even if someone else established it. No.16-258 Pet. App. 19a. The general counsel memorandum says nothing of the sort.

F. Congressional Ratification

"Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law." *Cottage Sav. Ass'n v. C.I.R.*, 499 U.S. 554, 561 (1991) (quotation marks omitted); *see Barnhart*, 535 U.S. at 220. Congress has revisited § 1002(33) and § 414(e) dozens of times without

disturbing the longstanding, uniform agency interpretation.

For example, in 2000 Congress expanded the circumstances in which ERISA preempts state insurance laws that would otherwise apply to church plans, incorporating without change § 1002(33)'s definition. 29 U.S.C. § 1144a(a), (b), (c)(1); *see* Pub. L. No. 106-244, § 2 (2000). The settled administrative interpretation of § 1002(33) "was a part of the 'contemporary legal context' in which Congress legislated," and "the fact that a ... significant amendment" of the church plan exemption "left intact the statutory provisions" at issue here "is itself evidence that Congress affirmatively intended to preserve" the existing interpretation. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381-82 (1982).

Congress has incorporated § 1002(33)'s or § 414(e)'s definition of "church plan" into a dozen more provisions across the U.S. Code.[12] "[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it

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[12] Pub. L. 104-290, § 508 (1996) (exempting church plans from securities regulations); Pub. L. 108-359, § 1 (2004) (same); Pub. L. 108-203, § 422 (2004) (tax exemption); Pub. L. 99-272, § 10001(b)(2) (1986) (exemption from continuation coverage requirement); Pub. L. 99-514, § 1151 (1986) (tax exemption); Pub. L. 100-647, § 3011 (1988) (same); Pub. L. 104-188, §§ 1456, 1461, 1462 (1996) (same); Pub. L. 105-34, §§ 1522, 1532 (1997) (same); Pub. L. 107-16, § 659 (2001) (exemption from notification); Pub. L. 109-280, § 865 (2006) (grandfather rule for church plans that self-annuitize); Pub. L. 105-200, § 401 (1998) (church group health plans); Pub. L. 104-191, §§ 102, 402 (1996) (Public Health Service Act).

affects the new statute." *Lorillard v. Pons*, 434 U.S. 575, 581 (1978).

Congress has also amended ERISA's definition section, 29 U.S.C. § 1002, twelve times since 1983, without altering § 1002(33)(C)(i).[13] One of those bills, in 1989, amended neighboring § 1002(33)(D) to transfer authority over certain church-plan procedures from DOL to Treasury, yet left Treasury's interpretation of § 1002(33)(C)(i) intact. Pub. L. No. 101-239, § 7894(a)(1)(A). "[W]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Schor*, 478 U.S. at 846 (quotation marks omitted).

G. Constitutional Avoidance

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres*, 523 U.S. at 237 (quotation marks omitted). Allowing church-affiliated organizations to establish church plans avoids grave constitutional doubts.

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[13] Pub. L. 99-272, § 11016(c)(1) (1986); Pub. L. 99-509, § 9203(b)(1) (1986); Pub. L. 99-514, § 1879(u)(3) (1986); Pub. L. 100-202, § 136(a) (1987); Pub. L. 101-239, §§ 7871(b)(2), 7881(m)(2)(D), 7891(a)(1), 7893(a), 7894(a)(1)(A), (2)(A), (3), (4) (1989); Pub. L. 101-508, § 12002(b)(2)(C) (1990); Pub. L. 102-89, § 2 (1991); Pub. L. 104-290, § 308(b)(1) (1996); Pub. L. 105-72, § 1(a) (1997); Pub. L. 109-280, §§ 611(f), 905(a), 906 (a)(2)(A), 1104(c), 1106 (a) (2006); Pub. L. 110-28, § 6611(a)(1), (b)(1) (2007); Pub. L. 110-458, § 111(c) (2008).

1. A church-establishment requirement would resurrect the pre-1980, constitutionally-dubious morass in which the government decided on a case-by-case basis whether a particular religious organization was the "church." Under the 1977 regime, the IRS asked whether the organization performed "religious functions," and determined that caring for the sick was not "religious," such that Catholic nuns were not the "church." 1977 WL 46200, at *4-6.[14]

This Court explained that same year that "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment." *New York v. Cathedral Acad.*, 434 U.S. 125, 133 (1977). "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one …." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos,* 483 U.S. 327, 336 (1987). And "[i]t is not only the conclusions that may be reached by the [government] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *N.L.R.B. v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 (1979). "It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's

[14] The proposed regulation on which the 1977 general counsel memorandum relied was finalized in 1980 before the MPPAA's passage and remains effective, 26 C.F.R. § 1.414(e)-1(e), though it is currently dormant in light of the IRS's rejection of a church-establishment requirement.

religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality).

A church-establishment requirement would create impermissible and unnecessary government entanglement with religion. Petitioner Dignity Health, for example, contends that if there is a church-establishment requirement, Catholic orders established its plan by signing the original plan formation document, JA859-60, and that they constitute the church. Respondents argued below that these Catholic orders are not the church. Many other religious organizations have contended or will contend that they are the "church," or that a church established their pension plans. Affirmance would require civil authorities to adjudicate these questions going forward, "dangerously undermin[ing] … religious autonomy." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 715 (2012) (Alito, J., concurring).

The courts below noted that other statutes distinguish between churches and non-church religious organizations. *E.g.*, No.16-74 Pet. App. 27a. Many of the cited statutes actually exempt religious organizations too. *E.g.*, *Walz v. Tax Comm'n of City of N.Y.*, 397 U.S. 664, 666-67 (1970). But the point is not that Congress may *never* distinguish between "churches" and other religious organizations. It suffices that the distinction raises constitutional doubts and the Court should interpret a statute to avoid it where possible, as it is here. *Spencer v. WorldVision, Inc.*, 633 F.3d 723, 728-29, 741 (9th Cir. 2011) (O'Scannlain, J., joined by Kleinfeld, J.); *see generally Amos*, 483 U.S. at 343-46 (Brennan, J., concurring). After all, the First Amendment protects "religion," not simply "churches." U.S. Const. amend.

I. And the avoidance canon is particularly apt here, where the religious entanglement inherent in defining "church" motivated Congress to pass the 1980 amendment. *Supra* pp.33-35.

Nor does it matter that, even under petitioners' interpretation, courts must decide whether the entity with which a religious organization claims affiliation is a "church." *See, e.g.*, No.16-258 Pet. App. 23a. This is a red herring. The likelihood of any dispute is slim to nonexistent. No one disputes, for example, that the Catholic Church, the UCC, or the ELCA are "churches."

2. The decisions below also discriminate against decentralized religions. The "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). Congress recognized in 1980 that the original exemption discriminated against decentralized "congregational" denominations, in which local churches are independent and autonomous. 125 Cong. Rec. 10,052; 124 Cong. Rec. 12,107. As discussed, decentralized denominations typically form independent organizations to establish, fund, and administer pension plans for churches and affiliated agencies. *Supra* pp.40-42. The amendment removed the "statutory cloud" over these plans. 125 Cong. Rec. 10,052. Congress thus avoided "effect-[ing] the *selective* legislative imposition of burdens and advantages upon particular denominations." *Larson*, 456 U.S. at 254.

Under respondents' interpretation, many decentralized denominations would be forced either to radically reorganize their pension programs, or to forgo their exemption from ERISA. But "religious

freedom encompasses the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Serbian E. Orthodox Diocese for U. S. of Am. & Can. v. Milivojevich*, 426 U.S. 696, 721-22 (1976) (quotation marks and brackets omitted). This policy prevents "interference with … internal church decision[s] that affect[] the faith and mission of the church itself." *Hosanna-Tabor*, 132 S. Ct. at 707. "The connection between church governance and the free dissemination of religious doctrine has deep roots in our legal tradition." *Id.* at 713 (Alito, J., concurring).

The Seventh Circuit dismissed these concerns because "[t]he church plan definition is available to all churches of all religious denominations and structures," so long as a church establishes the plan. No.16-74 Pet. App. 28a. That misses the point. In decentralized denominations, no single "church" can readily "establish" a plan for the employees of myriad independent local congregations and affiliated organizations. *Supra* pp.40-42. Further, many church plans were established long before ERISA was enacted. Under respondents' view, if these plans were established by a church-affiliated organization, they are out of luck.

The Ninth Circuit, for its part, stated that the Constitution only prohibits "lines drawn based on denomination [directly], rather than organizational form or purpose." No.16-258 Pet. App. 23a. *Larson* is to the contrary. It invalidated a rule that distinguished between religious organizations based on the percentage of contributions they received from members, because the consequence was "denominational preference." 456 U.S. at 246-27 & n.23, 255.

3. The foregoing refutes respondents' assertion that exempting petitioners' plans from ERISA raises concerns under the Establishment Clause. *E.g.*, No.16-74 BIO at 34-36. Congress permissibly included church agencies to avoid denominational discrimination and entanglement, and to prevent church agencies that were unable to afford compliance with ERISA from "abandon[ing]" their pension plans. 125 Cong. Rec. 10,052.

Congress also recognized that church plans are "extremely old, dating back to the 1700's," and that "[f]or many years our church plans have been operating responsibly and providing retirement coverage and benefits for the clergymen and lay employees of the churches and their agencies." 124 Cong. Rec. 12,106 (Rep. Conable). Exempting petitioners' plans from ERISA serves the "permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335. ERISA regulation is deeply entangling; exempting church agency plans neither advances nor inhibits religion, but merely relieves religious organizations from burdensome regulations. *Id.* at 336-37. Thus, for example, the exemption avoids conflicts between ERISA's rule requiring fiduciaries to choose the most profitable investment and a religious organization's socially responsible investment criteria, such as those promulgated by the U.S. Conference of Catholic Bishops. JA491, 513.

This Court has repeatedly upheld statutes exempting religious organizations from regulatory or tax burdens. *Amos*, 483 U.S. at 334; *Walz*, 397 U.S. at 673. Exemptions differ fundamentally from

subsidies, because they "assist[] the exempted enterprise only passively." *Id.* at 690 (Brennan, J., concurring). And Congress may extend the same exemption to a church ministry that it extends to "churches." "[T]he public welfare activities and the sectarian activities of religious institutions are intertwined." *Id.* at 688. *Amos* itself approved an exemption for a religious gymnasium. 483 U.S. at 330-40.

Nor does an exemption impermissibly burden third parties. Any third-party burden cannot "be fairly attributed to the Government," which has given employees no fewer rights "than [they had] prior to [ERISA's] passage." *Amos*, 483 U.S. at 337. Further, there is no evidence of widespread failures of church plans. Rather the exemption enables employees of church-affiliated organizations to receive generous defined-benefit pension plans that their counterparts at secular nonprofits lack. *Supra* pp.9-10, 45. Congress permissibly exempted church agency plans in light of their long history of responsible operation and the danger that "agency plans would [not] survive subjection to ERISA." 125 Cong. Rec. 10,052; *see* 124 Cong. Rec. 12,107.[15]

Finally, respondents concede that § 1002(33) exempts plans that cover the employees of church-affiliated organizations and that are maintained by church-affiliated organizations. None of the constitutional concerns respondents perceive turn on the presence or absence of church-establishment, and

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[15] Some parts of the tax code still apply to church plans, including the bar on discrimination in favor of highly-compensated employees. State fiduciary duty laws also apply to church plans.

their avoidance argument fails for that reason as well.

CONCLUSION

The judgments below should be reversed.

Respectfully submitted,

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