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

In the Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL., PETITIONERS
v.
MARIA STAPLETON, ET AL.

SAINT PETER'S HEALTHCARE SYSTEM, ET AL., PETITIONERS
v.
LAURENCE KAPLAN

DIGNITY HEALTH, ET AL., PETITIONERS
v.
STARLA ROLLINS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD, SEVENTH, AND NINTH CIRCUITS

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

EDWIN S. KNEEDLER
Deputy Solicitor General
Counsel of Record
JOYCE R. BRANDA
Acting Assistant Attorney General
BRIAN H. FLETCHER
Assistant to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
NICOLAS Y. RILEY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Additional Counsel Listed on Inside Cover

ROBERT J. NEIS
Benefits Tax Counsel
Department of the Treasury
Washington, D.C. 20220

DEBRA K. MOE
Deputy Chief Counsel
(Operations)
Internal Revenue Service
Washington, D.C. 20224

KATHERINE E. BISSELL
Deputy Solicitor for
Regional Enforcement
Department of Labor
Washington, D.C. 20210

JUDITH R. STARR
General Counsel
Pension Benefit Guaranty
Corporation
Washington, D.C. 20005

QUESTION PRESENTED

Whether an employee benefit plan must be initially established by a church in order to qualify for the "church plan" exemption to the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(33).

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INTEREST OF THE UNITED STATES

These cases concern the "church plan" exemption to the Employee Retirement Income Security Act of

1974 (ERISA), 29 U.S.C. 1001 *et seq.* The Internal Revenue Service (IRS), the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation (PBGC) administer the relevant provisions of ERISA. 26 U.S.C. 7801(a); 29 U.S.C. 1132-1135, 1302(b)(3). The decisions below rejected an interpretation those agencies have applied for more than three decades. The United States therefore has a substantial interest in this Court's resolution of the question presented.

STATUTORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-24a.

STATEMENT

ERISA generally exempts "church plans," a term defined broadly to encompass a plan covering the employees of a religious hospital or other tax-exempt organization associated with a church. The question presented is whether such a plan must be initially "established" by the church itself (as the decisions below held) or whether it is sufficient if the plan is "maintained" by a church-affiliated organization described in the statute (as the IRS, DOL, and PBGC have long concluded).

A. ERISA's Original Church-Plan Exemption

1. Enacted in 1974, ERISA is a "comprehensive and reticulated statute" regulating employee benefit plans. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (citation omitted). ERISA governs both pension plans and welfare plans providing health, disability, and other benefits. *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 91-92 (1983); see 29 U.S.C. 1002(1)-(3).

ERISA has four titles. Title I imposes reporting and disclosure requirements, standards of fiduciary conduct, vesting and funding schedules, and other substantive rules for pension and welfare plans. 29 U.S.C. 1001 *et seq.* Title II, which is codified in the Internal Revenue Code, conditions preferential tax treatment for pension plans on compliance with certain Title I requirements. Title III governs administration and enforcement. 29 U.S.C. 1201 *et seq.* And Title IV establishes the PBGC, which administers an insurance program that protects employees against the loss of benefits if an employer's pension plan terminates with insufficient funds. 29 U.S.C. 1301 *et seq.*; see *Yates* v. *Hendon*, 541 U.S. 1, 6 (2004).

2. ERISA generally applies to any benefit plan "established or maintained" by a private employer. 29 U.S.C. 1003(a). But Congress exempted "church plans," in part because "the examinations of books and records" required under ERISA "might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. No. 383, 93d Cong., 1st Sess. 81 (1973). Unless a church plan elects to be covered under 26 U.S.C. 410(d), it is exempt from Title I of ERISA, from certain related tax provisions, and from the PBGC's insurance program. 29 U.S.C. 1003(b)(2), 1321(b)(3); see, *e.g.*, 26 U.S.C. 410(c)(1)(B), 411(e)(1)(B), 412(e)(2)(D).

The term "church plan" is defined in 29 U.S.C. 1002(33) and a materially identical provision of the Internal Revenue Code, 26 U.S.C. 414(e). As originally enacted in 1974, that definition was narrow, including only a plan "established and maintained for its employees by a church." 29 U.S.C. 1002(33)(A)

(1976).[1] Congress also adopted a temporary rule specifying that an existing plan covering church employees could be "treated as a church plan" even if it also covered the employees of "one or more agencies" of the church. 29 U.S.C. 1002(33)(C) (1976); see 26 U.S.C. 414(e)(3)(A) (1976). That rule allowing the employees of church agencies to be included in exempt plans was set to expire in 1982. *Ibid.*

3. In 1977, the IRS issued a General Counsel Memorandum (GCM) applying the church-plan definition to pension plans established by two orders of Catholic sisters for the employees of their hospitals. IRS GCM 37,266, 1977 WL 46200, at *1-*2 (Sept. 22, 1977) (1977 GCM). The IRS concluded that the plans were not church plans because the orders were not themselves "churches." *Id.* at *6. The IRS reasoned that a religious order qualifies as a "church" only if it is "principally engaged in religious activities." *Id.* at *3, *6. And the IRS determined that the Catholic orders at issue were not churches because "operating hospitals * * * is not a religious function." *Id.* at *5.

B. The MPPAA's Expansion Of The Church-Plan Exemption

1. A broad coalition of religious organizations formed the Church Alliance for the Clarification of ERISA (Church Alliance) to seek changes to the original church-plan exemption. *Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the*

[1] Like the courts below and the parties, we generally cite the church-plan definition in ERISA rather than the materially identical definition in the Internal Revenue Code. For brevity, we generally use the term "church" as a shorthand for the statutory phrase "church or convention or association of churches."

Senate Comm. on Finance, 96th Cong., 1st Sess. 363-364, 366 (1979) (*Senate Hearing*) (Sen. Talmadge). Among other things, the Church Alliance opposed the sunset of the temporary rule allowing church plans to cover the employees of church agencies. *Id.* at 384, 387-388 (Church Alliance). It also argued that the original definition's focus on plans established and maintained by "churches" favored hierarchical denominations over congregational denominations, which typically relied on separate pension boards to administer the plans covering the employees of local churches and church agencies. *Id.* at 383, 388. And the Church Alliance opposed government inquiries aimed at determining whether particular entities were sufficiently religious to qualify as "churches" entitled to establish and maintain exempt plans. *Id.* at 384.

Congress responded to those concerns by substantially expanding ERISA's church-plan exemption in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, § 407, 94 Stat. 1303. The MPPAA amendments preserved the core of the original definition, continuing to provide that "[t]he term 'church plan' means a plan established and maintained * * * for its employees (or their beneficiaries) by a church." 29 U.S.C. 1002(33)(A). That approach made clear that any plan that met the original definition remained exempt. But Congress broadened the exemption by adopting provisions deeming additional plans to satisfy that definition even though they did not fall within its literal terms. Two of those provisions are relevant here.

First, Congress specified that, for purposes of the church-plan definition, "[t]he term employee of a church * * * includes * * * an employee of an

organization, whether a civil law corporation or otherwise, which is exempt from tax under [26 U.S.C. 501] and which is controlled by or associated with a church." 29 U.S.C. 1002(33)(C)(ii)(II). A separate provision provides that "[a] church * * * shall be deemed the employer of any individual included as an employee" under that rule. 29 U.S.C. 1002(33)(C)(iii). Those provisions allow "a church plan to cover employees of a tax-exempt agency controlled by or affiliated with a church," such as a religious hospital. 126 Cong. Rec. 20,208 (July 29, 1980) (Joint Explanation of S. 1076, 96th Cong., 1st Sess. (1979)).

Second, Congress addressed the concerns of congregational denominations by specifying that "[a] plan established and maintained for its employees (or their beneficiaries) by a church"—that is, a church plan—"includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan * * * for the employees of a church * * * if such organization is controlled by or associated with a church." 29 U.S.C. 1002(33)(C)(i). Under that provision, a plan maintained by a church-affiliated pension board or other "principal-purpose" organization is deemed to be a church plan.

Congress made the MPPAA amendments retroactive to January 1, 1974, ensuring that plans previously excluded from the church-plan exemption would not be liable for any failure to comply with ERISA. MPPAA § 407(c), 94 Stat. 1307.

2. The IRS first addressed the amended church-plan definition in a GCM prepared in 1982 and released to the public in 1983. IRS GCM 39,007, 1983 WL 197946 (Nov. 2, 1982) (1982 GCM). Like the 1977

GCM, the 1982 GCM addressed pension plans established by Catholic religious orders for the employees of their hospitals. *Id.* at *1-*2. The IRS explained that, under the approach adopted in the 1977 GCM, the orders were not themselves "churches." *Id.* at *4. But the IRS concluded that the MPPAA amendments meant that "nonchurch status is not fatal." *Ibid.* After parsing the amended definition, the IRS explained that the orders' plans would qualify as church plans so long as (a) "their employees are deemed employees of the Catholic Church," and (b) their plans are "administered by one of the organizations described in the statute." *Ibid.*

The IRS found both requirements satisfied. It explained that the religious orders' employees were deemed to be employees of the Catholic Church because the orders were associated with the Church. 1982 GCM at *5; see 26 U.S.C. 414(e)(3)(B)(ii) and (C); 29 U.S.C. 1002(33)(C)(ii)(II) and (iii). And it concluded that a plan may qualify as a church plan under the MPPAA amendments if it is *either* "established and maintained * * * by a church," 26 U.S.C. 414(e)(1); see 29 U.S.C. 1002(33)(A), *or* "maintained" by a principal-purpose organization, 26 U.S.C. 414(e)(3)(A); see 29 U.S.C. 1002(33)(C)(i). 1982 GCM at *5. The IRS therefore determined that, although the orders' plans had not been established by a church, they would qualify as church plans so long as they were maintained by principal-purpose organizations. *Id.* at *5-*6.

3. In the decades since the 1982 GCM, the IRS has issued hundreds of private letter rulings confirming the exempt status of particular plans based on its conclusion that a plan maintained by a principal-purpose organization need not be "established" by a

church to qualify as a church plan. See No. 16-74 (*Advocate*) Pet. App. 70a-111a (collecting citations); see also IRS GCM 39,793, 1989 WL 592761, at *5-*7 (July 6, 1989) (reaffirming this interpretation).[2]

DOL has likewise concluded that the identical definition in Title I of ERISA does not require a church to establish a church plan in the first instance. That interpretation is reflected in dozens of DOL opinion letters finding particular plans exempt. See, *e.g.*, DOL Advisory Op. No. 2000-05A, 2000 WL 744359, at *1 (May 17, 2000); see also *Advocate* Pet. App. 64a-69a (collecting citations). The PBGC has similarly adopted the IRS's interpretation, relying on the IRS to determine whether particular plans qualify as church plans. PBGC, *2011 Enrolled Actuaries Meeting, Questions to the PBGC and Summary of Their Responses* 25 (Mar. 2011), http://www.pbgc.gov/documents/2011 bluebook.pdf; see 29 U.S.C. 1321(b)(3) (incorporating 26 U.S.C. 414(e)).

C. The Present Controversy

1. Until recently, no court had questioned the agencies' longstanding interpretation of the church-plan exemption. Since 2013, however, that interpretation has been challenged in dozens of class-action suits filed by employees of religious hospitals and healthcare providers. Petitioners are the defendants in three of those suits. Respondents are current and former employees at petitioners' healthcare facilities who allege that petitioners' pension plans are subject

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[2] The IRS and the Department of the Treasury issued a regulation interpreting the original church-plan definition, but that regulation has not been updated to address the MPPAA amendments. 26 C.F.R. 1.414(e)-1; see 45 Fed. Reg. 20,796 (Mar. 31, 1980).

to ERISA and that those plans do not satisfy ERISA's funding, vesting, disclosure, and other requirements. As relevant here, respondents contend that petitioners' plans do not qualify as church plans because the plans were not established by a church. *Advocate* Pet. App. 4a-5a; No. 16-86 (*St. Peter's*) Pet. App. 6a-7a; No. 16-258 (*Dignity*) Pet. App. 4a-6a.

The district courts denied petitioners' motions to dismiss, agreeing with respondents that a plan must be established by a church to be a church plan. *Advocate* Pet. App. 30a-50a; *St. Peter's* Pet. App. 29a-51a; *Dignity* Pet. App. 26a-42a. All three courts then certified the issue for interlocutory appeal, recognizing that other district courts had reached the opposite conclusion. *Advocate* Pet. App. 51a-53a; *St. Peter's* Pet. App. 54a-63a; *Dignity* Pet. App. 61a-72a; see *Overall* v. *Ascension*, 23 F. Supp. 3d 816, 826-829 (E.D. Mich. 2014); *Medina* v. *Catholic Health Initiatives*, No. 13-cv-1249, 2014 WL 4244012, at *2-*3 (D. Colo. Aug. 26, 2014).

2. The courts of appeals affirmed. *Advocate* Pet. App. 1a-29a; *St. Peter's* Pet. App. 1a-26a; *Dignity* Pet. App. 1a-25a.

The first appellate decision was issued by the Third Circuit, which concluded that, under the "plain text" of the church-plan definition, "only a church can establish a plan that qualifies for an exemption." *St. Peter's* Pet. App. 6a. The court emphasized that the statute defines a "church plan" as "a plan established and maintained * * * by a church." *Id.* at 9a-10a (quoting 29 U.S.C. 1002(33)(A)). The court recognized that the MPPAA expanded that definition by specifying that a plan "established and maintained * * * by a church * * * includes a plan maintained by" a principal-purpose organization. *Id.* at 11a (quoting 29

U.S.C. 1002(33)(C)(i)). The court concluded that this amendment "provided an alternate way of meeting the maintenance requirement," allowing a principal-purpose organization, rather than a church, to *maintain* an exempt church plan. *Id.* at 13a. But the court held that the MPPAA "did not do away with the requirement that a church *establish* a plan in the first instance." *Ibid.* (emphasis added). The court stated that it found support for that reading in several canons of construction, *id.* at 14a-18a, and in the MPPAA's legislative history, *id.* at 18a-22a. And because the court believed that the agencies' interpretation "is at odds with the statutory text," it gave "no deference" to their longstanding view. *Id.* at 23a.

The subsequent decisions by the Seventh and Ninth Circuits relied on similar reasoning, likewise concluding that the statutory text and legislative history demonstrate that a church plan must be "established" by a church, and likewise declining to defer to the agencies' contrary view. *Advocate* Pet. App. 6a-29a; *Dignity* Pet. App. 7a-24a.

SUMMARY OF ARGUMENT

In 1980, Congress amended ERISA to allow the employees of a religious hospital or other church-affiliated nonprofit organization to be covered by an exempt church plan. Ever since, the agencies responsible for administering ERISA's complex regulatory scheme have consistently concluded that such a plan need not be initially established by a church to qualify as exempt. That longstanding interpretation is correct.

A. The agencies' interpretation is the natural reading of the statutory text. In the MPPAA, Congress preserved ERISA's basic definition of a church plan as a plan "established and maintained * * * by a

church." 29 U.S.C. 1002(33)(A). But Congress expanded that definition by specifying that "[a] plan established and maintained * * * by a church * * * includes a plan maintained by [a principal-purpose organization]." 29 U.S.C. 1002(33)(C)(i). Section 1002(33)(C)(i) is most naturally read to provide that a plan "maintained" by a principal-purpose organization is deemed to be both "established" *and* "maintained" by a church. Any other reading would render the words "established and" superfluous, violating the "cardinal principle of statutory construction" that requires courts to "'give effect, if possible, to every clause and word of a statute.'" *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (citation omitted).

B. The context, history, and purpose of the MPPAA amendments reinforce the natural reading of the text. One of Congress's fundamental goals was to accommodate congregational denominations, which typically relied on pension boards to administer plans covering the employees of local churches and church agencies. That goal could not have been achieved merely by allowing pension boards to maintain plans established by churches. Some pension boards for congregational denominations established their own plans, and in other cases it was unclear which entities had "established" plans that long pre-dated ERISA.

The MPPAA amendments thus sought to eliminate any uncertainty stemming from questions about "whether [a] plan is *established* by a church * * * or by a pension board." 125 Cong. Rec. 10,052 (May 7, 1979) (Sen. Talmadge) (emphasis added). And the drafting history confirms that Congress achieved that objective by deeming a plan maintained by a pension board or other principal-purpose organization to satis-

fy the requirement of church *establishment*, not merely the requirement of church maintenance.

C. If there were any doubt about the best interpretation of the church-plan definition, it would be resolved by the position adopted and consistently applied by the IRS, DOL, and PBGC. Those agencies have been charged by Congress with administering ERISA, and their implementation of the church-plan exemption "constitute[s] a body of experience and informed judgment" entitled to a measure of deference. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Such an administrative interpretation carries special force where, as here, it reflects a contemporaneous and longstanding construction of a complex statutory scheme. And the agencies' oft-applied interpretation of the church-plan definition is entitled to even greater weight because Congress has left it undisturbed even as it has repeatedly refined the treatment of church plans under ERISA, the Internal Revenue Code, and related laws.

D. Neither respondents nor the courts of appeals identified any sound reason to upset decades of reliance interests by imposing a requirement that a church plan be initially "established" by a church. The courts appeared to assume that such a requirement would ensure that a church retained control of or responsibility for the plan, but that is mistaken. Those powers and responsibilities may fall on the entity that *maintains* a plan, not the entity that established it in the first instance.

Respondents have also suggested that Congress did not intend to exclude the employees of large healthcare providers like petitioners from ERISA's protections. But the MPPAA amendments unambigu-

ously allow the employees of any tax-exempt organization controlled by or associated with a church to be covered under an exempt church plan—indeed, Congress expressly deemed such employees to be employees of a church. There is thus no dispute that the employees of a church-affiliated nonprofit organization can be covered under an exempt plan—the only question is the mechanism by which that result may be achieved. As the administering agencies have long concluded, Congress did not require a church to establish such a plan in the first instance.

ARGUMENT

THE IRS, DOL, AND PBGC HAVE CORRECTLY CONCLUDED THAT A PLAN NEED NOT BE ESTABLISHED BY A CHURCH TO QUALIFY AS A CHURCH PLAN

There is no dispute that the employees of a religious hospital or other nonprofit organization associated with a church may be covered under an ERISA-exempt church plan. There is also no dispute that a church plan need not be "maintained" by a church, and may instead be maintained by an organization the principal purpose of which is the administration or funding of a church plan. The only question before the Court is whether an otherwise-qualifying plan maintained by a principal-purpose organization must be "established" by a church in the first instance. As the agencies responsible for administering ERISA have concluded for more than three decades, the answer to that question is no.[3]

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[3] The courts of appeals held that petitioners' plans are not church plans because they were not "established" by a church. Respondents have separately argued that petitioners' plans are not church plans because petitioners are not controlled by or

A. The Agencies' Longstanding Interpretation Reflects The Natural Reading Of The Statutory Text

Like any inquiry into the meaning of a federal statute, the interpretation of ERISA's church-plan exemption "begins with the text." *Ross* v. *Blake*, 136 S. Ct. 1850, 1856 (2016). That text is most naturally read to provide that a plan maintained by a principal-purpose organization described in Section 1002(33)(C)(i) qualifies as a church plan whether or not it was initially established by a church.

1. Since its enactment in 1974, ERISA has defined a "church plan" as a plan "established and maintained * * * for its employees * * * by a church." 29 U.S.C. 1002(33)(A); see 29 U.S.C. 1002(33)(A) (1976). In the MPPAA, however, Congress enacted amendments that expanded the reach of that definition beyond its literal terms. Two of those amendments combine to allow a plan covering the employees of a religious hospital or other church-affiliated organization to qualify as a church plan even if the plan was not established by a church.

First, Congress specified that "[t]he term employee of a church" includes "an employee of an organization * * * which is exempt from tax under [26 U.S.C. 501] and which is controlled by or associated with a church." 29 U.S.C. 1002(33)(C)(ii)(II). Congress further provided that, for purposes of the church-plan

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associated with a church and because the entities that maintain petitioners' plans do not qualify as principal-purpose organizations under Section 1002(33)(C)(i). *Advocate* Br. in Opp. 36-37; *St. Peter's* Br. in Opp. 28-30; *Dignity* Br. in Opp. 36-38. We do not address those separate issues because they were not passed upon by the courts of appeals and are not encompassed within the question presented.

definition, "[a] church * * * shall be deemed the employer" of such employees. 29 U.S.C. 1002(33)(C)(iii). Thus, a plan providing benefits for the employees of a tax-exempt organization controlled by or associated with a church qualifies as a plan providing benefits for the employees of a "church."

Second, Congress enacted Section 1002(33)(C)(i) to address plans maintained by pension boards or other principal-purpose organizations. That provision specifies that "[a] plan established and maintained for its employees * * * by a church * * * includes a plan maintained by [a principal-purpose organization]." 29 U.S.C. 1002(33)(C)(i). That provision is naturally read to provide that a plan "maintained" for church employees by a principal-purpose organization is deemed to be a plan "established and maintained for its employees * * * by a church"—that is, a church plan. *Ibid.* As one court put the point, "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) (citation omitted). Applying that logic here: Because a plan "established and maintained for its employees * * * by a church" is exempt, 29 U.S.C. 1002(33)(A)—and because such a plan "includes a plan maintained by [a principal-purpose organization]," 29 U.S.C. 1002(33)(C)(i)—it follows that a plan maintained by a principal-purpose organization is also exempt.[4]

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[4] The same point can be made in a slightly different way. Section 1002(33)(C)(i) states that a phrase in Section 1002(33)(A)'s definition of "church plan" "includes" additional plans described in Section 1002(33)(C)(i). The relevant phrase in Section 1002(33)(A) can therefore be replaced with the text from Section 1002(33)(C)(i), with this result:

That natural reading of Section 1002(33)(C)(i)'s text is reinforced by the title of the materially identical provision of the Internal Revenue Code, 26 U.S.C. 414(e)(3)(A). Cf. *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) (observing that "the heading of a section" may resolve doubt over its meaning) (citation omitted). The Internal Revenue Code provision is entitled "[t]reatment as church plan," 26 U.S.C. 414(e)(3)(A), which confirms that the plans described in Section 1002(33)(C)(i) and its Internal Revenue Code counterpart are deemed to be church plans.

2. The courts of appeals adopted a different reading of Section 1002(33)(C)(i). In their view, that provision "provided an alternate way of meeting the *maintenance* requirement" in Section 1002(33)(A)'s original church-plan definition, but "did not do away with the requirement that a church *establish* a plan in the first instance." *St. Peter's* Pet. App. 13a (emphasis added); see *Advocate* Pet. App. 11a-12a; *Dignity* Pet. App. 10a-11a. That reading is unpersuasive.

If Congress had intended to eliminate the "maintenance" requirement alone, it would have provided that

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> The term "church plan" means [a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches] which is exempt from tax under section 501 of title 26.

29 U.S.C. 1002(33)(A) (text from Section 1002(33)(C)(i) bracketed). The two provisions thus combine to define a "church plan" to include a plan maintained by a principal-purpose organization, whether or not that plan was established by a church.

"a plan *maintained* by a church includes a plan maintained by a principal-purpose organization." But Congress did not do that. Instead, it specified that "[a] plan *established and maintained* * * * by a church * * * includes a plan maintained by [a principal-purpose organization]." 29 U.S.C. 1002(33)(C)(i) (emphasis added). The natural implication is that a plan "maintained" by a principal-purpose organization is deemed to be both "established" and "maintained" by a church. In fact, any other reading would render the words "established and" superfluous, violating "the 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) (quoting *United States* v. *Menasche*, 348 U.S. 528, 538-539 (1955)). The courts of appeals failed even to acknowledge this superfluity, much less to identify any textual consideration sufficient to overcome this Court's "reluctan[ce] to treat statutory terms as surplusage in any setting." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citation omitted).[5]

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[5] The Third and Seventh Circuits erroneously assumed that their reading avoided a different surplusage problem. Those courts believed that, under the agencies' interpretation, the "church establishment requirement" in Section 1002(33)(A) "would be superfluous" because even a plan that was not established by a church "would be eligible for an exemption as long as it is maintained by [a principal-purpose organization]." *St. Peter's* Pet. App. 14a; see *Advocate* Pet. App. 11a-12a. But that consequence does not render Section 1002(33)(A) "superfluous." Just as before the MPPAA, Section 1002(33)(A) exempts plans that are both established *and* maintained by a church. Section 1002(33)(C)(i), in contrast, exempts only plans maintained by principal-purpose organizations; it does not address plans maintained by churches.

B. The Agencies' Longstanding Interpretation Is Supported By The Context, History, And Purpose Of The MPPAA Amendments

The natural reading of Section 1002(33)(C)(i)'s text is reinforced by the "context," "history," and "purpose" of the MPPAA amendments. *Abramski* v. *United States*, 134 S. Ct. 2259, 2267 (2014) (citation omitted).

1. Under ERISA's original definition of "church plan," the employees of church agencies could be covered under an exempt plan only until 1982, and only if the plan also covered employees of the church. 29 U.S.C. 1002(33)(C) (1976). One central purpose of the MPPAA's church-plan amendments was to replace that temporary rule with a permanent provision allowing the employees of church agencies to be covered under exempt plans. See, *e.g.*, 126 Cong. Rec. 20,208 (July 29, 1980) (Joint Explanation of S. 1076, 96th Cong., 1st Sess. (1979)).

Both proponents and opponents of the MPPAA amendments recognized that the amended definition would exempt plans covering the employees of church agencies. Proponents advocated that result on the ground that "[c]hurch agencies are essential to the churches' mission" and "are, in fact, part of the churches." 125 Cong. Rec. 10,052 (May 7, 1979) (Sen. Talmadge). Opponents, including the Department of the Treasury, objected to the fact that the amendments would "exclude church agencies from the protection of ERISA." Exec. Sess. of the Senate Comm. on Finance, 96th Cong., 2d Sess. 41 (June 12, 1980) (*Executive Session*) (Daniel Halperin, Deputy Assistant Secretary, Dep't of Treasury); see 126 Cong. Rec. at 20,180 (Sen. Javits) ("As to the church pension plans, I might say that I am not too happy about [the

amendment] as it exempts those who work for schools and similar institutions which are church-related.").

2. The courts of appeals acknowledged that Congress sought to allow exempt church plans to cover the employees of church agencies, but concluded that Congress intended to exempt such plans only if they were initially established by a church. *Advocate* Pet. App. 18a-22a; *St. Peter's* Pet. App. 18a-22a; *Dignity* Pet. App. 11a-15a. That conclusion rests on a misunderstanding of another fundamental purpose of the MPPAA amendments: to make the church-plan exemption available on equal terms to the local churches and church agencies of decentralized congregational denominations.

One of the central criticisms of ERISA's original church-plan definition was that it failed to account for "the structural differences" between religious denominations and thereby disadvantaged "congregational denominations." 124 Cong. Rec. 12,107 (May 2, 1978) (Rep. Conable). In "hierarchical churches such as the Roman Catholic Church," there are "clear lines of responsibility, control and authority" through which the national church controls local churches and church agencies. *Senate Hearing* 399 (Gary Nash, Annuity Bd. of the Southern Baptist Convention). In congregational denominations, by contrast, "the national or regional bodies do not control the local congregations." *Id.* at 405 (John Ordway, Pension Bds. of the United Church of Christ); see 124 Cong. Rec. at 12,107 (Rep. Conable) ("In the congregational type of denomination, the local churches and agencies are self-governing.").

In a hierarchical denomination, the bodies administering benefit plans for the employees of churches and

church agencies could be integrated into the national church structure. *Senate Hearing* 405 (John Ordway, Pension Bds. of the United Church of Christ). Congregational denominations, however, typically relied on pension boards that were "separately incorporated from, but controlled by, the denomination." 125 Cong. Rec. at 10,052. Those separate boards administered pension and benefit plans for ministers and lay employees working in local churches and in church agencies, including hospitals, schools, and charities.[6]

After ERISA was enacted, congregational denominations argued to the IRS that plans administered by their pension boards satisfied the requirements of the original church-plan definition (at least so long as the temporary rule allowing coverage of church agencies remained in effect) because the pension boards themselves qualified as "churches" that could establish and maintain exempt church plans. See, *e.g.*, *Senate Hearing* 394 (Church Alliance); *id.* at 420 (Dean Wright, Ministers and Missionaries Bd. of the Am. Baptist Churches). But, as the Senate sponsor of the MPPAA's church-plan amendments explained, "there [wa]s a question whether" a plan administered by a pension board "is established by a church, as it must be, or by a pension board." 125 Cong. Rec. at 10,052 (Sen. Talmadge). The House sponsor of a predecessor bill made the same point, observing that "[i]t is not clear whether a plan administered by a pension board of a

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[6] See, *e.g.*, *Senate Hearing* 376-377, 468-469 (Charles Cowsert, Bd. of Annuities and Relief, Presbyterian Church in the U.S.) (describing plans administered by a pension board for a congregational denomination); *id.* at 379 (Leo Landes, Retirement Bd. of United Synagogue of Am.) (same); *id.* at 413-417 (Dean Wright, Ministers and Missionaries Benefit Bd. of the Am. Baptist Churches) (same).

congregational church is a plan established and maintained for its employees by a church." 124 Cong. Rec. at 12,107 (Rep. Conable).

The sponsors emphasized that the MPPAA amendments resolved this uncertainty by making clear that "[a] plan or program funded or administered through a pension board * * * will be considered a church plan" if the board meets the requirements for a principal-purpose organization in Section 1002(33)(C)(i). 125 Cong. Rec. at 10,053 (Sen. Talmadge); see 124 Cong. Rec. at 12,107 (Rep. Conable) (same). Nothing in those statements indicated that a plan maintained by a pension board had to be "established" by a church to be exempt.

3. The lack of support for a church-establishment requirement in the legislative record is not surprising, because such a requirement would have excluded plans that Congress sought to treat as church plans. Some congregational denominations took the position that their plans were "established" by churches and merely "maintained" by pension boards, while recognizing that such boards might not be regarded as part of the church for purposes of the original exemption. *Senate Hearing* 461 (John Ordway, Pension Bds. of the United Church of Christ). But other denominations believed that their plans were both "*established and* maintained through church pension boards." *Id.* at 400-401 (Gary Nash, Annuity Bd. of the Southern Baptist Convention) (emphasis added); see Pet. Br. 35-36 (collecting additional examples). And even for denominations that could argue that their plans were "established" by churches and merely "maintained" by pension boards, a church-establishment requirement would have perpetuated the "question whether [such

a] plan is established by a church * * * or by a pension board"—an uncertainty the MPPAA amendments were designed to eliminate. 125 Cong. Rec. at 10,052 (Sen. Talmadge); see 124 Cong. Rec. at 12,107 (Rep. Conable).

Furthermore, Congress was aware that many plans administered by pension boards had been created long before ERISA was enacted. See 125 Cong. Rec. at 10,052 (Sen. Talmadge) ("The average age of a church plan is at least 40 years."); *Senate Hearing* 411 (Dean Wright, Ministers and Missionaries Benefit Bd. of the Am. Baptist Churches) ("Virtually all of these pension boards were established and in operation many years prior to the enactment of ERISA."). It is implausible to think that Congress intended the MPPAA's amended church-plan definition to turn on an uncertain inquiry into the identity of the organization that had "established" a plan decades earlier.

Preserving a church-establishment requirement would, moreover, have perpetuated problems that the MPPAA amendments were crafted to avoid. Such a requirement would have been more easily satisfied by hierarchical denominations than by their congregational counterparts, which lacked centralized governing bodies that could readily "establish" plans for the employees of church agencies. See 124 Cong. Rec. at 12,107 (Rep. Conable); *Senate Hearing* 399 (Gary Nash, Annuity Bd. of the Southern Baptist Convention); *Senate Hearing* 405 (John Ordway, Pension Bds. of the United Church of Christ). And a church-establishment requirement would have placed far greater significance on the question whether a particular religious entity qualified as a "church" entitled to establish an exempt plan, requiring inquiries like the

one reflected in the 1977 GCM. See IRS GCM 37,266, 1977 WL 46200, at *1-*2 (Sept. 22, 1977). The need for such inquiries had prompted criticism of ERISA's original definition, and supporters of the changes that were enacted by the MPPAA amendments emphasized that those changes would "eliminate[] the need to determine what organizations may be considered as parts of a church." *Senate Hearing* 458 (John Ordway, Pension Bds. of the United Church of Christ); see *id.* at 375, 463; *id.* at 471 (Charles Cowsert, Bd. of Annuities and Relief of the Presbyterian Church in the U.S.).

4. The drafting history of the MPPAA amendments confirms that a plan maintained by a principal-purpose organization under Section 1002(33)(C)(i) need not be established by a church. The language that became the MPPAA amendments was originally introduced in stand-alone bills in 1978 and 1979. See *Senate Hearing* 101 (quoting S. 1090, 96th Cong., 1st Sess. (1979)); 124 Cong. Rec. at 12,108 (quoting H.R. 12,172, 95th Cong., 2d Sess. (1978)). The initial draft of Section 1002(33)(C)(i) in those bills expressly contemplated that pension boards and other principal-purpose organizations would "establish" exempt plans. It provided that "[a] plan established and maintained by a church * * * shall include a plan *established* and maintained by [a principal-purpose organization]." *Senate Hearing* 102 (quoting S. 1090) (emphasis added); see 124 Cong. Rec. at 12,108 (quoting H.R. 12,172) (same).

As the Third and Seventh Circuits acknowledged, that original language made it "quite clear that church establishment of a plan would no longer be a prerequisite for the exemption." *St. Peter's* Pet. App. 15a; see

Advocate Pet. App. 20a. But those courts erroneously assumed that the sponsors reintroduced a church-establishment requirement in the version that was ultimately enacted into law. As relevant here, the final version reflected the following change from the initial proposal:

> A plan established and maintained * * * by a church * * * ~~shall~~ includes a plan ~~established and~~ maintained by [a principal-purpose organization].

29 U.S.C. 1002(33)(C)(i). That change actually *broadened* the exemption: Whereas the original language limited Section 1002(33)(C)(i) to plans that were both established *and* maintained by a principal-purpose organization, the final version encompassed any plan maintained by such an organization. Such a modification was necessary to achieve the MPPAA amendments' purpose, because the original draft would have excluded plans that were "established" by churches but then "maintained by a separate corporation" or pension board. *Senate Hearing* 461 (John Ordway, Pension Bds. of the United Church of Christ). It would thus be anomalous to treat that change in language as *narrowing* the exemption and re-imposing the church-establishment requirement that the original version of the amendments would have abolished.

C. The Agencies' Longstanding Interpretation Warrants Deference Under *Skidmore*

If there were any doubt about the best reading of the church-plan exemption, it would be resolved by the longstanding interpretation applied by the IRS, DOL, and PBGC, the expert agencies charged by Congress with administering ERISA's complex statu-

tory scheme. That construction should carry particular weight because Congress has repeatedly revisited the treatment of church plans under ERISA and related statutes without disturbing the agencies' interpretation.

1. Congress assigned responsibility for administering and enforcing the relevant provisions of ERISA to the IRS, DOL, and PBGC. 26 U.S.C. 7801(a); 29 U.S.C. 1132-1135, 1302(b)(3). For more than three decades, those agencies have consistently concluded that a plan maintained by a principal-purpose organization described in Section 1002(33)(C)(i) need not be established by a church to qualify as a church plan. See, *e.g.*, DOL Advisory Op. No. 2000-05A, 2000 WL 744359, at *1 (May 17, 2000); IRS GCM 39,793, 1989 WL 592761, at *5-*7 (July 6, 1989); IRS GCM 39,007, 1983 WL 197946, at *4-*5 (Nov. 2, 1982). That interpretation is reflected in hundreds of private letter rulings and opinion letters confirming the exempt status of particular plans. *Advocate* Pet. App. 64a-111a (citing 568 examples).

Although the agencies' interpretation is not embodied in notice-and-comment regulations, the agencies' implementation of the statute "constitute[s] a body of experience and informed judgment" that, under the circumstances present here, should be accorded considerable deference. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Under *Skidmore*, the weight due to such an administrative construction "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Ibid.*

The agencies' interpretation of the church-plan exemption originated in the IRS's 1982 GCM, which recognized that "because of the passage of the MPPA[A]" two years earlier, "church plan status no longer hinges on whether [a religious] order is a church." 1982 GCM at *6. The IRS explained that the absence of a church-establishment requirement followed from the text of the amended statute, which had superseded the IRS's own prior approach reflected in the 1977 GCM. *Id.* at *4-*6. Deference to an agency's interpretation is "[p]articularly" appropriate where, as here, "the administrative practice at stake involves a contemporaneous construction of a statute." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965) (quoting *Power Reactor Dev. Co.* v. *International Union of Elec.*, 367 U.S. 396, 408 (1961)).

The agencies have, moreover, consistently adhered to that construction for more than three decades. This Court "normally accord[s] particular deference to an agency interpretation of 'longstanding' duration," *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 487 (2004) (*ADEC*) (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002)), and to agency positions applied "with consistency," *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008). And there are particularly strong reasons not to disturb a long-settled administrative interpretation where, as here, it has generated "substantial reliance" by parties who have structured their affairs based on a position consistently and frequently reaffirmed by the responsible agencies. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457 (1978).

Deference is also appropriate "where [a] regulatory scheme is highly detailed." *United States* v. *Mead*

Corp., 533 U.S. 218, 235 (2001). That principle applies with special force to ERISA, "an enormously complex and detailed statute." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993). This Court has thus traditionally deferred to the IRS, DOL, and PBGC when interpreting ERISA because "to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embark upon a voyage without a compass." *Mead Corp.* v. *Tilley*, 490 U.S. 714, 726 (1989) (brackets and citation omitted); see *Beck* v. *Pace Int'l Union*, 551 U.S. 96, 104 (2007) (same). And the Court has extended such deference even where, as here, the relevant administrative interpretation was reflected in opinion letters rather than notice-and-comment regulations. See, *e.g.*, *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon*, 541 U.S. 1, 17-18 (2004) (DOL advisory opinion); *Mead*, 490 U.S. at 722-725 (PBGC opinion letters).

2. Congress's subsequent treatment of church plans confirms that the Court should not "reject as impermissible [the agencies'] longstanding, consistently maintained interpretation." *ADEC*, 540 U.S. at 488. In the decades since enacting the MPPAA, Congress has repeatedly revisited the legal status of church plans to refine their treatment under ERISA, the Internal Revenue Code, and related laws. In 2015, for example, Congress enacted a detailed provision modifying the application of a variety of tax provisions to church plans. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 336, 129 Stat. 3109-3113. Congress has also preempted the application of certain state laws to church plans. See *id.* § 336(c), 129 Stat. 3111; see also Act of July 10, 2000, Pub. L. No.

106-244, 114 Stat. 499 (enacting 29 U.S.C. 1144a). And Congress has incorporated the MPPAA definition into a variety of other statutes affording exemptions or special treatment to church plans.[7]

The fact that Congress has repeatedly refined the legal treatment of church plans and extended the church-plan exemption to other contexts without disturbing the agencies' longstanding interpretation further confirms that the agencies' interpretation is correct. "It is well established that when 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 inter-

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[7] See, *e.g.*, Social Security Protection Act of 2004, Pub. L. No. 108-203, § 422, 118 Stat. 536 (amending 42 U.S.C. 411(a)(7) to exempt certain benefits paid by church plans); Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 659, 115 Stat. 139 (enacting 26 U.S.C. 4980F(f)(2), which excludes defined-benefit church plans from the requirement to notify participants of benefit accrual reductions in advance); Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1532, 111 Stat. 1085 (adopting 26 U.S.C. 9802(c) (now codified as 26 U.S.C. 9802(f)), which partially exempts church plans from a prohibition against discrimination based on health status); National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 508, 110 Stat. 3447-3449 (enacting various provisions exempting church plans from securities laws); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 402, 110 Stat. 2084-2085 (enacting 26 U.S.C. 4980D(b)(3)(C), which exempts church plans from an excise tax imposed on health plans that do not meet certain requirements); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 10001(b), 100 Stat. 223 (exempting church plans from a tax provision related to continuation health coverage).

pretation is the one intended by Congress.'" *CFTC* v. *Schor*, 478 U.S. 833, 846 (1986) (citation omitted); see, *e.g.*, *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-828 (2013).

In 2004, moreover, Congress enacted a statute premised on the understanding that a church plan need not be established by a church. The statute addressed the pension plan of the Young Men's Christian Association (YMCA). That plan had not been established by a church, but the IRS—relying on the agencies' longstanding interpretation—had concluded that the plan was "in full compliance" with the church-plan exemption, with the "possible exception" that the YMCA was not "affiliated with any one church." 149 Cong. Rec. 7380 (Mar. 25, 2003) (Sen. Bunning); see 150 Cong. Rec. 24,328-24,331 (Nov. 19, 2004) (similar).

To resolve that uncertainty about the YMCA plan's status, Congress enacted a statute providing that, for specified purposes, the plan "shall be treated as a church plan (within the meaning of section 414(e) of [the Internal Revenue] Code) *which is maintained by an organization described in section 414(e)(3)(A) of such Code*." Act of Dec. 21, 2004, Pub. L. No. 108-476, § 1(a), 118 Stat. 3901 (emphasis added). That provision reflects congressional ratification of the agencies' view that a plan need not be established by a church to qualify for church-plan treatment. And the specific reference to 26 U.S.C. 414(e)(3)(A)—the Internal Revenue Code counterpart to Section 1002(33)(C)(i)—shows that Congress understood that being "maintained" by a principal-purpose organization described in those provisions is sufficient to confer church-plan status.

D. There Is No Sound Reason To Reject The Agencies' Longstanding Interpretation And Impose A Church-Establishment Requirement

The courts of appeals identified no sound reason to upset decades of reliance on the agencies' longstanding interpretation by imposing a church-establishment requirement.

1. The courts of appeals appeared to believe that requiring a church to "establish" a church plan would ensure that the church retained control of or financial responsibility for the plan. See, *e.g.*, *Advocate* Pet. App. 17a-18a. Even if that were correct, the courts' apparent view that an ERISA exemption should be conditioned on continuing church involvement would not justify the imposition of a requirement that Congress omitted from the statute. And in any event, requiring a church to establish a plan in the first instance would not guarantee such an ongoing role.

The question whether an employer or other entity "established" an ERISA plan typically arises when there is a dispute about whether a benefit plan triggering ERISA obligations exists at all. In that context, the courts of appeals have concluded that the establishment of a plan does not require a formal written document and instead turns on a practical inquiry into the surrounding circumstances. The leading decision held that an ERISA plan is "established" if "a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *Donovan* v. *Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc); see *Williams* v. *WCI Steel Co.*, 170 F.3d 598, 603 n.3 (6th Cir. 1999).

By analogy, requiring a church to "establish" an ERISA-exempt plan for the employees of a church agency would require the church to play some role in the plan's creation. But even for plans subject to ERISA, the employer or other entity that establishes a plan in the first instance does not necessarily retain ongoing responsibility. ERISA defines the "sponsor" responsible for a plan as the employer or other entity that "establishe[s] *or maintain*[*s*]" the plan. 29 U.S.C. 1002(16)(B) (emphasis added). And it is not uncommon for an ERISA plan to be initially established by one entity and later transferred to a different entity, which assumes responsibility for maintaining it. See, *e.g.*, 29 U.S.C. 1058 (regulating plan mergers and transfers); see also 26 U.S.C. 414(*l*) (same). In such circumstances, the entity that established the plan need not retain any continuing financial liability or other involvement.

Limiting the church-plan exemption to plans initially "established" by churches thus would not guarantee that the churches would play an ongoing role in the exempt plans. To the contrary, Section 1002(33)(C)(i) expressly contemplates that the principal-purpose organization that "maintain[s]" such a plan may have responsibility for the plan's "administration" and "funding." 29 U.S.C. 1002(33)(C)(i). The courts of appeals identified no reason why Congress would have wanted to condition an exemption for plans funded and controlled by church-affiliated principal-purpose organizations on a requirement that those plans be "established" in the first instance by churches. To the contrary, as the Second Circuit observed in a different context, "the status of the entity which currently maintains a particular pension plan bears more rela-

tion 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 (1987), cert. denied, 485 U.S. 936 (1988).

2. Respondents have also argued that Congress would not have intended to exclude the employees of large healthcare providers like petitioners from ERISA. But the MPPAA amendments unambiguously allow the employees of any tax-exempt organization "controlled by or associated with a church" to be covered under an exempt church plan; indeed, Congress expressly deemed such employees to be "employee[s] of a church." 29 U.S.C. 1002(33)(C)(ii)(II). It was understood at the time that those amendments would allow the exemption of plans covering the employees of church agencies, including "hospital[s]." *Executive Session* 41 (Daniel Halperin, Deputy Assistant Secretary, Dep't of Treasury); see, *e.g.*, 126 Cong. Rec. at 20,208 (Joint Explanation of S. 1076); 125 Cong. Reg. at 10,052 (Sen. Talmadge).

There is thus no dispute that the employees of a church-affiliated hospital that otherwise satisfies the statutory requirements can be covered under an ERISA-exempt church plan. Indeed, the Third Circuit emphasized that its interpretation "by no means eliminated" the "ability of church agencies to have their employees covered by exempt plans." *St. Peter's* Pet. App. 25a. Instead, the only question is the mechanism by which that result may be achieved. As the administering agencies have long concluded—and as the statutory text, context, history, and purpose confirm—Congress did not condition the church-plan

exemption on a church establishing the plan in the first instance.[8]

[8] Respondents have argued that the canon of constitutional avoidance supports their position because exempting petitioners' plans from ERISA would violate the Establishment Clause. *Advocate* Br. in Opp. 34-35; *St. Peter's* Br. in Opp. 26-27; *Dignity* Br. in Opp. 34-35. The courts of appeals correctly declined to rely on the avoidance canon. In other circumstances, this Court has recognized that Congress may, consistent with the Establishment Clause, respect religious autonomy and avoid entanglement with religion by exempting religious nonprofit organizations from generally applicable employment regulations. See *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 338 (1987); cf. *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 501-507 (1979). In addition, the church-establishment requirement that respondents seek to impose would not cure the purported constitutional defect they identify because it would not narrow the range of employees who could potentially be covered under ERISA-exempt plans—instead, it would merely condition that exemption on the additional procedural step of church establishment.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted.

ROBERT J. NEIS
Benefits Tax Counsel
Department of the Treasury

DEBRA K. MOE
Deputy Chief Counsel (Operations)
Internal Revenue Service

KATHERINE E. BISSELL
Deputy Solicitor for Regional Enforcement
Department of Labor

JUDITH R. STARR
General Counsel
Pension Benefit Guaranty Corporation

EDWIN S. KNEEDLER
Deputy Solicitor General[*]
JOYCE R. BRANDA
Acting Assistant Attorney General
BRIAN H. FLETCHER
Assistant to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
NICOLAS Y. RILEY
Attorneys

JANUARY 2017

[*] The Acting Solicitor General is recused in this case.

APPENDIX

1. 26 U.S.C. 414(e) provides:

Definitions and special rules

(e) Church plan

(1) In general

For purposes of this part, the term "church plan" means a plan established and maintained (to the extent required in paragraph (2)(B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501.

(2) Certain plans excluded

The term "church plan" does not include a plan—

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513); or

(B) if less than substantially all of the individuals included in the plan are individuals described in paragraph (1) or (3)(B) (or their beneficiaries).

(3) Definitions and other provisions

For purposes of this subsection—

(A) Treatment as church plan

A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(B) Employee defined

The term employee of a church or a convention or association of churches shall include—

(i) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(ii) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 and which is controlled by or associated with a church or a convention or association of churches; and

(iii) an individual described in subparagraph (E).

(C) Church treated as employer

A church or a convention or association of churches which is exempt from tax under section

501 shall be deemed the employer of any individual included as an employee under subparagraph (B).

(D) Association with church

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

(E) Special rule in case of separation from plan

If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization described in clause (ii) of paragraph (3)(B), the church plan shall not fail to meet the requirements of this subsection merely because the plan—

(i) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(ii) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7)) at the time of such separation from service.

(4) Correction of failure to meet church plan requirements

(A) In general

If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 fails to meet one or more of the requirements of this subsection and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this subsection for the year in which the correction was made and for all prior years.

(B) Failure to correct

If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this subsection beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(C) Correction period defined

The term "correction period" means—

(i) the period, ending 270 days after the date of mailing by the Secretary of a notice of default with respect to the plan's failure to meet one or more of the requirements of this subsection;

(ii) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secre-

tary on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(iii) any additional period which the Secretary determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(5) Special rules for chaplains and self-employed ministers

(A) Certain ministers may participate

For purposes of this part—

(i) In general

A duly ordained, commissioned, or licensed minister of a church is described in paragraph (3)(B) if, in connection with the exercise of their ministry, the minister—

(I) is a self-employed individual (within the meaning of section 401(c)(1)(B), or

(II) is employed by an organization other than an organization which is described in section 501(c)(3) and with respect to which the minister shares common religious bonds.

(ii) Treatment as employer and employee

For purposes of sections 403(b)(1)(A) and 404(a)(10), a minister described in clause (i)(I) shall be treated as employed by the minister's own employer which is an organization de-

scribed in section 501(c)(3) and exempt from tax under section 501(a).

(B) Special rules for applying section 403(b) to self-employed ministers

In the case of a minister described in subparagraph (A)(i)(I)—

(i) the minister's includible compensation under section 403(b)(3) shall be determined by reference to the minister's earned income (within the meaning of section 401(c)(2)) from such ministry rather than the amount of compensation which is received from an employer, and

(ii) the years (and portions of years) in which such minister was a self-employed individual (within the meaning of section 401(c)(1)(B)) with respect to such ministry shall be included for purposes of section 403(b)(4).

(C) Effect on non-denominational plans

If a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry participates in a church plan (within the meaning of this section) and in the exercise of such ministry is employed by an employer not otherwise participating in such church plan, then such employer may exclude such minister from being treated as an employee of such employer for purposes of applying sections 401(a)(3), 401(a)(4), and 401(a)(5), as in effect on September 1, 1974, and sections 401(a)(4), 401(a)(5), 401(a)(26), 401(k)(3), 401(m), 403(b)(1)(D) (in-

cluding section 403(b)(12)), and 410 to any stock bonus, pension, profit-sharing, or annuity plan (including an annuity described in section 403(b) or a retirement income account described in section 403(b)(9)). The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purpose of, and prevent the abuse of, this subparagraph.

(D) Compensation taken into account only once

If any compensation is taken into account in determining the amount of any contributions made to, or benefits to be provided under, any church plan, such compensation shall not also be taken into account in determining the amount of any contributions made to, or benefits to be provided under, any other stock bonus, pension, profit-sharing, or annuity plan which is not a church plan.

(E) Exclusion

In the case of a contribution to a church plan made on behalf of a minister described in subparagraph (A)(i)(II), such contribution shall not be included in the gross income of the minister to the extent that such contribution would not be so included if the minister was an employee of a church.

2. 29 U.S.C. 1002 provides in pertinent part:

Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan. A distribution from a plan, fund, or program shall not be treated as made in a form other than retirement income or as a distribution prior to termination of covered employment solely because such distribution is made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.

* * * * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * * * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

* * * * *

(16)(A) The term "administrator" means—

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

* * * * *

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

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

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with

one or more unrelated trades or businesses (within the meaning of section 513 of title 26), or

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

(C) For purposes of this paragraph—

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(ii) The term employee of a church or a convention or association of churches includes—

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of title 26 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

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

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

(v) If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of title 26 and which is controlled by or associated with a church or a convention or association of churches, the church plan shall not fail to meet the requirements of this paragraph merely because the plan—

(I) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or

(II) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7) of title 26) at the time of such separation from service.

(D)(i) If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26 fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years.

(ii) If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this paragraph beginning with the date on which the earliest failure to meet one or more of such requirements occurred.

(iii) For purposes of this subparagraph, the term "correction period" means—

(I) the period ending 270 days after the date of mailing by the Secretary of the Treasury of a notice of default with respect to the plan's failure to meet one or more of the requirements of this paragraph; or

(II) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary of the Treasury on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or

(III) any additional period which the Secretary of the Treasury determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

* * * * *

3. 26 U.S.C. 414(e) (1976) provides:

Definitions and special rules

(e) Church plan

(1) In general

For purposes of this part the term "church plan" means—

(A) 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, or

(B) a plan described in paragraph (3).

(2) Certain unrelated business or multiemployer plans

The term "church plan" does not include a plan—

(A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513), or

(B) which is a plan maintained by more than one employer, if one or more of the employers in

the plan is not a church (or a convention or association of churches) which is exempt from tax under section 501.

(3) Special temporary rule for certain church agencies under church plan

(A) Notwithstanding the provisions of paragraph (2)(B), a plan in existence on January 1, 1974, shall be treated as a church plan if it is established and maintained by a church or convention or association of churches and one or more agencies of such church (or convention or association) for the employees of such church (or convention or association) and the employees of one or more agencies of such church (or convention or association), and if such church (or convention or association) and each such agency is exempt from tax under section 501.

(B) Subparagraph (A) shall not apply to any plan maintained for employees of an agency with respect to which the plan was not maintained on January 1, 1974.

(C) Subparagraph (A) shall not apply with respect to any plan for any plan year beginning after December 31, 1982.

4. 29 U.S.C. 1002(33) (1976) provides:

Definitions

(33)(A) The term "church plan" means (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).

(B) The term "church plan" (notwithstanding the provisions of subparagraph (A)) does not include a plan—

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of title 26), or

(ii) which is a plan maintained by more than one employer, if one or more of the employers in the plan is not a church (or a convention or association of churches) which is exempt from tax under section 501 of title 26.

(C) Notwithstanding the provisions of subparagraph (B)(ii), a plan in existence on January 1, 1974, shall be treated as a "church plan" if it is established and maintained by a church or convention or association of churches for its employees and employees of one or more agencies of such church (or convention or association) for the employees of such church (or convention or association) and the employees of one or more agencies of such church (or convention or association), and if such church (or convention or association) and each such agency is exempt from tax under section 501 of title 26. The first sentence of this subparagraph shall not apply to any plan maintained for employees of an agency with respect to which the plan was not maintained on January 1, 1974. The first sentence of

this subparagraph shall not apply with respect to any plan for any plan year beginning December 31, 1982.

5. Pub. L. No. 108-476, 118 Stat. 3901 provides:

SECTION 1. CERTAIN ARRANGEMENTS MAINTAINED BY THE YMCA RETIREMENT FUND TREATED AS CHURCH PLANS.

(a) RETIREMENT PLANS.—

(1) IN GENERAL.—For purposes of sections 401(a) and 403(b) of the Internal Revenue Code of 1986, any retirement plan maintained by the YMCA Retirement Fund as of January 1, 2003, shall be treated as a church plan (within the meaning of section 414(e) of such Code) which is maintained by an organization described in section 414(e)(3)(A) of such Code.

(2) TAX-DEFERRED RETIREMENT PLAN.—In the case of a retirement plan described in paragraph (1) which allows contributions to be made under a salary reduction agreement—

(A) such treatment shall not apply for purposes of section 415(c)(7) of such Code, and

(B) any account maintained for a participant or beneficiary of such plan shall be treated for purposes of such Code as a retirement income account described in section 403(b)(9) of such Code, except that such account shall not, for purposes of section 403(b)(12) of such Code, be treated as a contract purchased by a church for purposes of section 403(b)(1)(D) of such Code.

(3) MONEY PURCHASE PENSION PLAN.—In the case of a retirement plan described in paragraph (1) which is subject to the requirements of section 401(a) of such Code—

(A) such plan (but not any reserves held by the YMCA Retirement Fund)—

(i) shall be treated for purposes of such Code as a defined contribution plan which is a money purchase pension plan, and

(ii) shall be treated as having made an election under section 410(d) of such Code for plan years beginning after December 31, 2005, except that notwithstanding the election—

(I) nothing in the Employee Retirement Income Security Act of 1974 or such Code shall prohibit the YMCA Retirement Fund from commingling for investment purposes the assets of the electing plan with the assets of such Fund and with the assets of any employee benefit plan maintained by such Fund, and

(II) nothing in this section shall be construed as subjecting any assets described in subclause (I), other than the assets of the electing plan, to any provision of such Act,

(B) notwithstanding section 401(a)(11) or 417 of such Code or section 205 of such Act, such plan may offer a lump-sum distribution option to participants who have not attained age 55 without offering such participants an annuity option, and

(C) any account maintained for a participant or beneficiary of such plan shall, for purposes of section 401(a)(9) of such Code, be treated as a retirement income account described in section 403(b)(9) of such Code.

(4) SELF-FUNDED DEATH BENEFIT PLAN.—For purposes of section 7702(j) of such Code, a retirement plan described in paragraph (1) shall be treated as an arrangement described in section 7702(j)(2).

(b) YMCA RETIREMENT FUND.—For purposes of this section, the term "YMCA Retirement Fund" means the Young Men's Christian Association Retirement Fund, a corporation created by an Act of the State of New York which became law on April 30, 1921.

(c) EFFECTIVE DATE.—This section shall apply to plan years beginning after December 31, 2003.

6. 26 C.F.R. 1.414(e)-1 provides:

Definition of church plan.

(a) *General rule.* For the purposes of part I of subchapter D of chapter 1 of the Code and the regulations thereunder, the term "church plan" means a plan established and at all times maintained for its employees by a church or by a convention or association of churches (hereinafter included within the term "church") which is exempt from tax under section 501(a), provided that such plan meets the requirements of paragraphs (b) and (if applicable) (c) of this section. If at any time during its existence a plan is not a church plan because of a failure to meet the requirements set

forth in this section, it cannot thereafter become a church plan.

(b) *Unrelated businesses*—(1) *In general.* A plan is not a church plan unless it is established and maintained primarily for the benefit of employees (or their beneficiaries) who are not employed in connection with one or more unrelated trades or businesses (within the meaning of section 513).

(2) *Establishment or maintenance of a plan primarily for persons not employed in connection with one or more unrelated trades or businesses.* (i) (A) A plan, other than a plan in existence on September 2, 1974, is established primarily for the benefit of employees (or their beneficiaries) who are not employed in connection with one or more unrelated trades or businesses if on the date the plan is established the number of employees employed in connection with the unrelated trades or businesses eligible to participate in the plan is less than 50 percent of the total number of employees of the church eligible to participate in the plan.

(B) A plan in existence on September 2, 1974, is to be considered established as a plan primarily for the benefit of employees (or their beneficiaries) who are not employed in connection with one or more unrelated trades or businesses if it meets the requirements of both paragraphs (b)(2)(ii) (A) and (B) (if applicable) in either of its first 2 plan years ending after September 2, 1974.

(ii) For plan years ending after September 2, 1974, a plan will be considered maintained primarily for the benefit of employees of a church who are not employed

in connection with one or more unrelated trades or businesses if in 4 out of 5 of its most recently completed plan years—

(A) Less than 50 percent of the persons participating in the plan (at any time during the plan year) consist of and in the same year

(B) Less than 50 percent of the total compensation paid by the employer during the plan year (if benefits or contributions are a function of compensation) to employees participating in the plan is paid to, employees employed in connection with an unrelated trade or business. The determination that the plan is not a church plan will apply to the second year (within a 5 year period) for which the plan fails to meet paragraph (b)(2)(ii) (A) or (B) (if applicable) and to all plan years thereafter unless, taking into consideration all of the facts and circumstances as described in paragraph (b)(2)(iii) of this section, the plan is still considered to be a church plan. A plan that has not completed 5 plan years ending after September 2, 1974, shall be considered maintained primarily for the benefit of employees not employed in connection with an unrelated trade or business unless it fails to meet paragraphs (b)(2)(ii) (A) and (B) in at least 2 such plan years.

(iii) Even though a plan does not meet the provisions of paragraph (b)(2)(ii) of this section, it nonetheless will be considered maintained primarily for the benefit of employees who are not employed in connection with one or more unrelated trades or businesses if the church maintaining the plan can demonstrate that based on all of the facts and circumstances such is the case. Among the facts and circumstances to be considered in evaluating each case are:

(A) The margin by which the plan fails to meet the provisions of paragraph (b)(2)(ii) of this section, and

(B) Whether the failure to meet such provisions was due to a reasonable mistake as to what constituted an unrelated trade or business or whether a particular person or group of persons were employed in connection with one or more unrelated trades or businesses.

(iv) For purposes of this section, an employee will be considered eligible to participate in a plan if such employee is a participant in the plan or could be a participant in the plan upon making mandatory employee contributions to the plan.

(3) *Employment in connection with one or more unrelated trades or businesses.* An employee is employed in connection with one or more unrelated trades or businesses of a church if a majority of such employee's duties and responsibilities in the employ of the church are directly or indirectly related to the carrying on of such trades or businesses. Although an employee's duties and responsibilities may be insignificant with respect to any one unrelated trade or business, such employee will nonetheless be considered as employed in connection with one or more unrelated trades or businesses if such employee's duties and responsibilities with respect to all of the unrelated trades or businesses of the church represent a majority of the total of such person's duties and responsibilities in the employ of the church.

(c) *Plans of two or more employers.* The term "church plan" does not include a plan which, during the plan year, is maintained by two or more employers unless—

(1) Each of the employers is a church that is exempt from tax under section 501(a), and

(2) With respect to the employees of each employer, the plan meets the provisions of paragraph (b)(2)(ii) of this section or would be determined to be a church plan based on all the facts and circumstances described in paragraph (b)(2)(iii) of this section.

Thus, if with respect to a single employer the plan fails to meet any provision of this paragraph, the entire plan ceases to be a church plan unless that employer ceases maintaining the plan for all plan years beginning after the plan year in which it receives a final notification from the Internal Revenue Service that it does not meet the provisions of this paragraph. If the employer does cease maintaining the plan in accordance with this paragraph, the fact that the employer formerly did maintain the plan will not prevent the plan from being a church plan for prior years.

(d) *Special rule.* (1) Notwithstanding paragraph (c)(1) of this section, a plan maintained by a church and one or more agencies of such church for the employees of such church and of such agency or agencies, that is in existence on January 1, 1974, shall be treated as a church plan for plan years ending after September 2, 1974, and beginning before January 1, 1983, provided that the plan is described in paragraph (c) of this section without regard to paragraph (c)(1) of this section, and the plan is not maintained by an agency which did not maintain the plan on January 1, 1974.

(2) For the purposes of section 414(e) and this section, an agency of a church means an organization which is exempt from tax under section 501 and which

is either controlled by, or associated with, a church. For example, an organization, a majority of whose officers or directors are appointed by a church's governing board or by officials of a church, is controlled by a church within the meaning of this paragraph. An organization is associated with a church if it shares common religious bonds and convictions with that church.

(e) *Religious orders and religious organizations.* For the purpose of this section the term "church" includes a religious order or a religious organization if such order or organization (1) is an integral part of a church, and (2) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise.

(f) *Separately incorporated fiduciaries.* A plan which otherwise meets the provisions of this section shall not lose its status as a church plan because of the fact that it is administered by a separately incorporated fiduciary such as a pension board or a bank.

(g) *Cross reference.* (1) For rules relating to treatment of church plans, see section 410(c), 411(e), 412(h), 4975(g), and the regulations thereunder.

(2) For rules relating to church plan elections, see section 410(d) and the regulations thereunder.