

explained this meant there was no guarantee that the plan's pension benefits would be paid.⁵ This announcement came much to the surprise of Mary, who "felt that [her] pension was safe" and considered herself an employee of a secular hospital.⁶ The hospital sold off its equipment and real estate, and officially closed in 2004, leaving its pension fund with just fifty-one cents for every dollar it had promised.⁷

To understand why church plan status matters, it is important to understand why ERISA exists in the first place. ERISA was enacted, in part, to provide stronger protections and security for the pensions of American workers when faced with the unfortunate situation of their current or former employers going out of business and taking with them any funds to pay for promised pensions.⁸ For this reason, ERISA, which multiple federal agencies oversee, sets extensive federal requirements that apply broadly to most private retirement and welfare plans. Pension plans must meet reporting and disclosure requirements enforced by the Department of Labor (DOL); follow vesting, benefit accrual, and funding requirements administered by the Internal Revenue Service (IRS); and pay premiums to the Pension Benefit Guaranty Corporation (PBGC), a federal insurance program that guarantees a certain level of benefits to participants and beneficiaries when their pension plans fail.⁹

The congressional authors of ERISA carved out a few exceptions from these extensive requirements, with the church plan exemption among them.¹⁰ For the most part, the language of the church plan definition today looks relatively similar to its original 1974 form, as Congress has only enacted one round of statutory clarification, which took place in 1980.¹¹ Likewise, the interpretation and application of the church plan definition by the IRS, as well as other federal agencies, has remained relatively

⁵ Walsh, *supra* note 1.

⁶ *Id.*

⁷ *Id.*; Mary Williams Walsh, *I.R.S. Reversal on 'Church' Pension Plan Rescues a Fund*, N.Y. TIMES (Apr. 1, 2013), http://www.nytimes.com/2013/04/02/business/an-irs-reversal-rescues-a-pension-fund.html?_r=0 [<https://perma.cc/5G8J-WSUF>].

⁸ See 29 U.S.C. § 1001(a). Congressional findings included that "many employees with long years of employment are losing . . . retirement benefits," "the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered," and because plans were being terminated "before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits." *Id.*

⁹ COLLEEN E. MEDILL, INTRODUCTION TO EMPLOYEE BENEFITS LAW: POLICY AND PRACTICE 31–32 (4th ed. 2015).

¹⁰ ERISA § 4, 29 U.S.C. § 1003(b)(2). Although church plans are exempt from ERISA, they remain subject to certain Tax Code provisions that preexisted ERISA. See 26 U.S.C. § 414(e) (2012).

¹¹ Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 407, 94 Stat. 1208, 1303–04 (1980).

consistent over time. The IRS has disseminated its longstanding interpretation of what constitutes a church plan through a series of administrative rulings, including a 1982 General Counsel Memorandum¹² and a string of private letter rulings (PLRs), which are determinations issued to taxpayers upon request. Through this process and over several decades, a variety of religiously affiliated entities, including hospitals with religious ties, have sought and obtained PLRs from the IRS to affirm their operation of church plans.

For much of the last forty years, ERISA's church plan exemption has existed quietly without much fanfare. However, increased litigation over the last five years concerning what it means to establish a church plan has dragged the exemption into the spotlight, ultimately landing the issue before the U.S. Supreme Court in *Advocate Health Care Network v. Stapleton*. The litigation focuses on religiously affiliated hospital systems like the Hospital Center of Orange and whether their pension plans have been correctly classified as church plans exempt from ERISA.

With the benefit of hindsight, it seems apparent that the IRS's longstanding interpretation of the statute and issuance of church plan PLRs under that interpretation created room for tension as to what it means to establish a church plan. This tension is illustrated by religiously affiliated entities that have been relying—some acting in good faith and others perhaps less so¹³—on obtaining these rulings to operate their plans as ERISA-exempt church plans. As a consequence of these entities being able to operate their plans outside the bounds of ERISA, the plans' pension participants have not received the same protections afforded to secular, private sector pension participants by ERISA.

The IRS's unwavering interpretation, disseminated through non-precedential PLRs and augmented by similar interpretations and confirmations by the DOL and PBGC, bears some of the responsibility for the current wave of litigation. Other factors may also be responsible for exacerbating the tension, such as increasing consolidation within the hospital industry over the last twenty years¹⁴ and allegations around the

¹² I.R.S. Gen. Couns. Mem. 39,007, 1983 WL 197946, at *6 (July 1, 1983).

¹³ See, e.g., Walsh, *supra* note 7.

¹⁴ See, e.g., Alison Evans Cuellar & Paul J. Gertler, *Trends in Hospital Consolidation: The Formation of Local Systems*, 22 HEALTH AFF. 77, 77 (2003) (noting “profound changes in how the hospital industry organizes itself” including the “extensive consolidation of hospitals through merger and the rising importance of hospital systems”). Many hospitals, including religiously affiliated ones, have expanded or consolidated into larger hospital systems that employ thousands of employees and earn “multibillion-dollar annual revenues that rival some Fortune 500 companies.” Melanie Evans, *Consolidation Creating Giant Hospital Systems*, MOD. HEALTHCARE (June 21, 2014),

motivations of entities pursuing church plan status, particularly when church plan status is sought after a long history of operating as an ERISA plan or where the religious affiliations are loose-fitting.¹⁵

This Note examines the issues that have sprung up in this series of litigation and where the IRS position aligns or does not align with judicial interpretations of the statute. Unlike the other literature covering this church plan litigation series, which focuses mainly on the judicial outcomes, this Note proposes a solution outside the courts. Because the Supreme Court was constrained by the boundaries of statutory interpretation and could only go so far in devising a creative solution, the church plan litigation resulted in the reinforcement of the status quo. Instead, this Note suggests that a balanced legislative approach should be implemented to allow the church plan exemption to continue to exist for good faith church plan operators while addressing the concerns voiced by pension plan participants.

Part I of this Note provides a brief history of the origins of ERISA's church plan exemption and the 1980 amendments, which "clarified" the definition of church plan but created some confusion as to what entities could establish a church plan. Next, Part I examines the IRS's private letter ruling process and explores how it functions with regard to ERISA's church plan exemption, specifically discussing the history of the issuance of more than 500 church plan PLRs.

Part II of this Note explores the recent wave of class action litigation against religiously affiliated nonprofit hospital systems that operate their pension plans as church plans, and the role PLRs play in the litigation. It then examines the Supreme Court decision in *Advocate Health Care Network v. Stapleton*, which endorsed a broad interpretation of the church plan exemption.

Part III explores some alternative solutions that could be implemented to resolve the disputes between church plans and the participants seeking more protections. Part III also explains the importance of revisiting the church plan exemption and evaluating church plan applicants on a case-by-case basis.

<http://www.modernhealthcare.com/article/20140621/MAGAZINE/306219980> [<https://perma.cc/T3PB-T39Z>].

¹⁵ See, e.g., Oral Argument at 25:45–28:53, *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016) (No. 15-1368) [hereinafter *Stapleton* Oral Argument], http://media.ca7.uscourts.gov/sound/2015/nr.15-1368.15-1368_09_18_2015.mp3 [<https://perma.cc/C6SH-JEBV>] (plaintiff's counsel, when questioned about hospitals' motivations to seek church plan status, discussing his opinion that many large commercial hospital chains were persuaded by benefits consultants to seek church plan status to skirt ERISA).

Finally, Part IV argues that Congress should take a more balanced approach to granting and evaluating church plan status by implementing a more robust evaluation of church plan applicants, including a closer examination of the funding aspects of the plans, the strength of their religious ties, and their rationales for seeking church plan status. A multifactor approach such as this will help serve as a gatekeeper to prevent those plans acting in bad faith (e.g., entities with very attenuated religious connections looking to skirt ERISA compliance) from obtaining church plan status, while protecting those religious entities that simply may not have realized their eligibility for church plan status.

I. ERISA'S CHURCH PLAN EXEMPTION AND THE ROLE OF THE IRS

A. *The Roots of the Church Plan Exemption*

When it enacted ERISA in 1974, Congress carved the expansive law into four Titles and assigned three different federal agencies responsibility for enforcing and administering them.¹⁶ Title I covers a number of areas, including reporting and disclosure requirements for all employee benefit plans; minimum participation, vesting, benefit accrual, and funding rules for pension plans; fiduciary requirements; ERISA's civil litigation enforcement mechanism; and state law preemption.¹⁷ Title II amended the Internal Revenue Code (the Tax Code) to align its requirements for participation, vesting, benefit accrual, and funding of qualified retirement plans with the requirements established in Title I.¹⁸ Title III established the dual authority of the Departments of Labor and Treasury to enforce Titles I and II.¹⁹ Title IV created a federal pension insurance program to serve as a safety net when pension plans terminate and the PBGC, a new agency, to operate it.²⁰

Due to conflicting interpretations of ERISA by the DOL and Treasury, a 1978 reorganization plan clarified the division of jurisdiction between the two agencies.²¹ The reorganization assigned the DOL primary jurisdiction over certain Title I areas, including reporting and disclosure, fiduciary

¹⁶ MEDILL, *supra* note 9, at 31.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 31–32.

²¹ U.S. DEP'T OF LABOR, EXECUTIVE ORDER: REORGANIZATION PLAN NO. 4 OF 1978 (1978), <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/executive-orders/4> [<https://perma.cc/KSK2-M2JY>]; *see also* MEDILL, *supra* note 9, at 32.

responsibility, and administration and enforcement of Title I.²² The Treasury Department and IRS have primary responsibility for the Title I standards for pension plans and the Tax Code's qualified plan requirements.²³

The congressional authors of ERISA carved out a few exceptions from these extensive requirements, with the church plan exemption among them. Congress originally defined a church plan as one "established and maintained for its employees by a church or by a convention or association of churches."²⁴ The statute also allowed church plans to provide coverage to employees of church agencies²⁵ under a sunset provision.²⁶ In shielding religious entities from ERISA's requirements, Congress intended to avoid government entanglement with church business.²⁷ In addition, while the legislative history sheds no light on this, some have speculated the

²² MEDILL, *supra* note 9, at 32.

²³ *Id.*

²⁴ Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 3(33)(A), 88 Stat. 829, 838 (1974). After the 1980 amendments, this part of the definition, 29 U.S.C. § 1002(33)(A), now reads: "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." 29 U.S.C. § 1002(33)(A) (2012); *see also* 26 U.S.C. § 414(e)(1) (2012) (providing a parallel provision in the Tax Code). The versions of the church plan provisions in Chapter 29 (DOL version) and Chapter 26 (Tax Code version) of the U.S. Code are, in most respects, nearly identical; however, one difference between them are headings that Congress inserted in the Tax Code provisions. *See* Jeffrey A. Herman, *Resolving ERISA's "Church Plan" Problem*, 31 A.B.A. J. LAB. & EMP. L. 231, 243-48 (2016) (arguing that the existence of these headings supports a broad interpretation of the church plan exemption).

²⁵ Common examples of church agencies are church-affiliated hospitals, nursing homes, and parochial schools. The term "agency of a church" is defined as "an organization . . . exempt from tax . . . which is either controlled by, or associated with, a church." 26 C.F.R. § 1.414(e)-1(d)(2) (2015). An organization is "controlled by a church" if "a majority of [its] officers or directors are appointed by a church's governing board or by officials of a church," and "[a]n organization is associated with a church if it shares common religious bonds and convictions with that church." *Id.* Senator Herman Talmadge described church agencies' function as "essential to the churches' mission. They are for the sick and needy and disseminate religious instruction. They are, in fact, part of the churches." 125 CONG. REC. 10,052 (1979).

²⁶ *See* 29 U.S.C. § 1002(33)(C) (repealed 1980) ("[A] plan in existence on January 1, 1974, shall be treated as a 'church plan' if it is established and maintained by a church . . . for its employees and employees of one or more agencies of such church . . . for the employees of such church . . . and the employees of one or more agencies of such church . . . and if such church . . . and each such agency is exempt from tax . . . [expiring after] December 31, 1982.").

²⁷ *See* 124 CONG. REC. 12,106 (1978) (statement of Rep. Conable) (explaining that Congress "exempted church plans from the provisions of [ERISA] to avoid excessive Government entanglement with religion in violation of the first amendment to the Constitution"); *see also* S. REP. No. 93-383, at 81 (1973) (discussing the committee's concerns "that the examinations of books and records" conducted in the "administration of the [PBGC] insurance system" could be considered "an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities").

exemption was provided based on Congress's "belief that churches have a particularly strong moral commitment to their employees and are likely to keep the pension promises they make to their employees."²⁸

Due to how the responsibility for ERISA has been split among the three agencies, the IRS bears much of the responsibility for overseeing church pension plans; however, the DOL and PBGC do encounter church plan issues as well, as the rest of this Part further explains. There are two types of church plans: nonelecting church plans and electing church plans. Nonelecting church plans do not have to meet the funding, vesting, reporting and disclosure requirements under ERISA Title I.²⁹ They are also exempt from paying premiums into the PBGC insurance system as required under ERISA Title IV,³⁰ which means participants and beneficiaries of nonelecting church plans do not have the protections of the PBGC safety net insurance system. These nonelecting church plans, however, remain subject to the Tax Code's qualified plan provisions that preexisted ERISA, which require a plan to satisfy certain participation, vesting, and funding requirements in order to receive qualified tax treatment.³¹ Electing church plans, on the other hand, are those that qualify for church plan status, but nonetheless opt into ERISA under Section 410(d) of the Tax Code.³² If a church or convention or association of churches that maintains any church plan makes such an election, certain provisions of the Tax Code and Title I of ERISA apply to the church plan as if the plan were not a church plan.³³ Once made, such an election is irrevocable.³⁴

In 1977, the Department of Treasury and the IRS issued proposed regulations under Section 414(e) of the Tax Code to implement ERISA's

²⁸ Norman Stein, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, A.B.A. EMP. BENEFITS COMMITTEE NEWSL. (Am. Bar Ass'n, Chi., Ill.), Summer 2014, http://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_sum_ebc_news/fai.html [<https://perma.cc/G5DR-P7UY>].

²⁹ ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2) (2012).

³⁰ ERISA § 4021(b)(3), § 1321(b)(3).

³¹ 26 U.S.C. § 401(a) (2012); *see also* Rev. Proc. 2011-44, § 2, 2011-39 I.R.B. 446, 446.

³² 26 U.S.C. § 410(d).

³³ 26 C.F.R. § 1.410(d)-1 (2015). Electing church plans are subject to Tax Code

section 410 (relating to minimum participation standards), section 411 (relating to minimum vesting standards), section 412 (relating to minimum funding standards), section 4975 (relating to prohibited transactions), and paragraphs (11), (12), (13), (14), (15), and (19) of section 401(a) (relating to joint and survivor annuities, mergers and consolidations, assignment or alienation of benefits, time of benefit commencement, certain social security increases, and withdrawals of employee contributions, respectively).

Id.

³⁴ 26 U.S.C. § 410(d)(2).

statutory church plan requirements.³⁵ The regulations provided that religious orders or organizations would only be captured in the definition of “church” where such an order or organization is an integral part of a church and is engaged in carrying out the function of a church.³⁶ In one of its initial interpretations of the church plan definition and the proposed Treasury regulations, the IRS found that pension plans established and maintained by religious orders that operated hospitals as part of their missions were not church plans because the orders were not performing “church functions” as defined in the statute and proposed regulations.³⁷

The proposed regulations and the upcoming expiration of the sunset provision troubled many churches that would have had to divide their pension plans into two by 1982, one covering church employees and one covering employees of other affiliated agencies.³⁸ These churches and other religious organizations lobbied Congress to encourage it to broaden the church plan definition.³⁹ In response to these concerns, Congress amended the ERISA church plan definition in 1980 to clarify its scope.⁴⁰ This amendment retained the original definition in 29 U.S.C. § 1002(33)(A) but replaced Subsection (33)(C) to address the expiration of the sunset provision on coverage of church agency employees and whether the definition included plans maintained by church pension boards.⁴¹ The amended 29 U.S.C. § 1002(33)(C),⁴² which has remained unchanged since 1980, reads in relevant part:

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

³⁵ See Prop. Treas. Reg. § 1.414(e)-1, 42 Fed. Reg. 18,621, 18,621 (Apr. 8, 1977).

³⁶ See *id.* at 18,623.

³⁷ See I.R.S. Gen. Couns. Mem. 37,266, 1977 WL 46200, at *1 (Sept. 22, 1977). The IRS later changed course and revoked this General Counsel Memorandum in a subsequent General Counsel Memorandum in 1982. See I.R.S. Gen. Couns. Mem. 39,007, 1983 WL 197946, at *6 (July 1, 1983).

³⁸ See 125 CONG. REC. 10,052 (1979) (statement of Sen. Talmadge) (describing the legal, actuarial, and accounting hurdles church plans will undergo to initially divide existing church plans and then continue operating multiple plans for different segments of employees).

³⁹ See *e.g.*, 125 CONG. REC. 10,054–58 (statement of Sen. Talmadge) (publishing letters from a variety of religious organizations and churches urging changes to ERISA’s church plan exemption).

⁴⁰ Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 407, 94 Stat. 1208, 1303–04 (1980).

⁴¹ See 125 CONG. REC. 10,052–53 (statement of Sen. Talmadge) (explaining that when Congress set the 1982 sunset expiration, it “did not recognize the unique character and needs of . . . church plans” and that the legislation would clarify that plans administered by pension boards meeting certain requirements would be considered church plans).

⁴² The parallel provision in the Tax Code is 26 U.S.C. § 414(e)(3)(A) (2012).

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.⁴³

At issue in the current church plan litigation series are the meaning of the terms “established and maintained” and “includes,” and the interaction between Subsection C and Subsection A of the statute.

Based on the Multiemployer Pension Plan Amendments Act modifications, in 1982 the IRS changed course and revoked its 1977 General Counsel Memorandum⁴⁴ in a subsequent General Counsel Memorandum.⁴⁵ This reversal, of course, laid the foundation for the IRS’s longstanding interpretation of what constitutes a church plan, which recognizes the possibility for establishment of church plans by entities affiliated with churches, not just establishment solely by churches. The IRS has espoused this interpretation through a series of PLRs, which are discussed in the next two Sections of Part I. Since amending ERISA’s church plan definition in 1980, Congress has since made occasional adjustments to it.⁴⁶ However, none of the legislative tweaks have been significant enough to cause the IRS to shift its longstanding interpretation. The most recent legislative development related to church plans was the Church Plan Clarification Act of 2015, enacted in December 2015.⁴⁷ While the legislation did address the application of certain technical retirement plan rules to church plans,⁴⁸ the Senate bill’s co-sponsor, Senator Ben Cardin of Maryland, made clear in his floor statement that the bill’s

⁴³ 29 U.S.C. § 1002(33)(C)(i) (2012). The amendment also added that the term “employee of a church” includes “an employee of an organization . . . which is exempt from tax . . . and which is controlled by or associated with a church.” *Id.* § 1002(33)(C)(ii)(II). In addition, it provided that “[a]n organization . . . is associated with a church . . . if it shares common religious bonds and convictions with that church.” *Id.* § 1002(33)(C)(iv).

⁴⁴ See I.R.S. Gen. Couns. Mem. 39,007, 1983 WL 197946, at *6 (July 1, 1983) (revoking the 1977 General Counsel Memorandum).

⁴⁵ See *id.* (finding a retirement plan covering the lay employees of a religious order whose main activity is operating nursing homes or hospitals may be a church plan if the requirements of § 414(e) are met).

⁴⁶ See, e.g., Church Plan Parity and Entanglement Prevention Act, Pub. L. No. 106-244, § 2, 114 Stat. 499, 499–500 (2000) (codified at 29 U.S.C. § 1144a (2012)) (clarifying the church plan definition as related to church welfare plans, which are church plans that provide health and welfare benefits as opposed to church pension plans that provide retirement benefits).

⁴⁷ Church Plan Clarification Act of 2015, enacted as part of Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 336, 129 Stat. 2242, 3109–10 (2015).

⁴⁸ The legislation provides certain technical fixes for church plans, including the application of IRS controlled group rules, the participation of church plans in automatic enrollment schemes, church plan transfers and mergers, and investments by church plans in collective trusts. *Id.*

purpose was *not* to provide commentary on the church plan definition.⁴⁹ The following two Sections will trace the history of the PLR and how the IRS has espoused this interpretation through a series of church plan PLRs.

B. IRS Private Letter Ruling Process

IRS administrative guidance comes in a variety of forms, including letter rulings, closing agreements, compliance statements, determination letters, opinion letters, advisory letters, information letters, revenue rulings, and oral advice.⁵⁰ A PLR is a written statement issued to a taxpayer that interprets and applies the tax laws to that taxpayer's specific set of facts.⁵¹ PLRs are an outgrowth of the IRS's initial plans during the early stages of modern income tax law to answer any question it received from taxpayers.⁵² In the 1930s, Congress gave the agency the authority to enter into "closing agreements"—legally binding agreements reviewed and approved by high-level officials—with taxpayers regarding prospective transactions.⁵³ From this, the agency sought to develop a less formal procedure that was not binding, and the PLR was born.⁵⁴ A PLR is applicable only to the specific taxpayer to whom it is issued⁵⁵ and may not be used or cited as precedent.⁵⁶

The IRS's current process for issuing a PLR has some basic review mechanisms but could certainly be more rigorous. Letter rulings are typically issued under the Chief Counsel's Office by various Associate

⁴⁹ See 161 CONG. REC. S8302 (daily ed. Dec. 2, 2015) (statement of Sen. Cardin) (“[N]o inference is intended by this legislation regarding the statutory requirements a pension plan must meet to be considered or treated as a ‘church plan’ Rather, the Church Plan Clarification Act is simply about fixing the rules that govern how church plans operate and serve their participants.”); see also Hazel Bradford, *Senate Passes Church Pension Plan Clarifications*, PENSIONS & INV. (Dec. 14, 2015, 4:15 PM), <http://www.pionline.com/article/20151214/ONLINE/151219939/senate-passes-church-pension-plan-clarifications> [https://perma.cc/45QZ-VTUG].

⁵⁰ Rev. Proc. 2015-4, § 3.01, 2015-1 I.R.B. 144, 149.

⁵¹ 26 C.F.R. § 601.201(a)(2) (2015); see also Rev. Proc. 2015-4, § 3.02, 2015-1 I.R.B. 144, 149.

⁵² Dale Rubin, *Private Letter and Revenue Rulings: Remedy or Ruse?*, 28 N. KY. L. REV. 50, 51 (2001).

⁵³ *Id.*

⁵⁴ *Id.* at 51–52.

⁵⁵ Rev. Proc. 2015-4, § 13.02, 2015-1 I.R.B. 144, 173.

⁵⁶ 26 U.S.C. § 6110(k)(3) (2012) (“Unless . . . otherwise establish[ed] by regulations, a written determination may not be used or cited as precedent.”). *But see* Judy Kwok, *The Perils of Bright Lines: Section 6110(k)(3) and the Ambiguous Precedential Status of Written Determinations*, 24 VA. TAX REV. 863, 867 (2005) (discussing the confusion surrounding the ambiguities of § 6110(k)(3)); Lisa Marie Starczewski, *IRS National Office Procedures — Rulings, Closing Agreements*, 621-3d Tax Mgmt. (BNA) § II(F)(5) (2016) (“Despite . . . clear expression of congressional intent, both taxpayers and courts have often disregarded § 6110(k)(3) in whole or in part and have given precedential value to written determinations.”).

Chief Counsel departments.⁵⁷ Staff attorneys at an IRS branch office provide the initial review of the facts stated in a taxpayer's request, conduct research on issues raised by the facts, and create a draft ruling.⁵⁸ The branch chief provides review and final sign-off on the ruling, although it may receive an additional random review by the Assistant Chief Counsel.⁵⁹ The PLR is then provided to the taxpayer,⁶⁰ and after identifying details and other confidential data are removed from the ruling, it, like any other written determination, is available for public inspection.⁶¹

C. *IRS Church Plan PLR History*

A church plan can take advantage of the ERISA exemption without a PLR from the IRS; nonetheless, in practice most hospitals and other religiously affiliated entities request PLRs because they offer confirmation of their plans' status for tax purposes, and because other agencies may require a plan to obtain one.⁶² The analysis provided in the church plan PLRs is arguably formulaic, evidenced by the similarities of the content across rulings⁶³ and the volume of rulings issued.⁶⁴ The significance of the volume of these types of determinations being issued and relied upon by church plans is further magnified by the fact that other federal agencies predominantly rely on the IRS's issuance of a PLR as the basis for their recognition of church plans. For example, because of the DOL's and IRS's overlapping administrative jurisdiction over ERISA provisions, the DOL

⁵⁷ MICHAEL I. SALTZMAN & LESLIE BOOK, *IRS PRACTICE AND PROCEDURE* ¶ 3.05, Westlaw (database updated 2016).

⁵⁸ *Id.* ¶ 3.05[5].

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 26 U.S.C. § 6110(a) (2012).

⁶² Rev. Proc. 2011-44, § 2, 2011-39 I.R.B. 446, 446.

⁶³ See Brief for Appellee at 46, *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016) (No. 15-1368) (“The PLRs . . . merely follow the conclusion of the [General Counsel Memorandum issued in 1982], without analysis.” (citation omitted)). *But see* G. Daniel Miller, *The Church Plan Definition—A Reply to Norm Stein*, A.B.A. EMP. BENEFITS COMMITTEE NEWSL. (Am. Bar Ass’n, Chi., Ill.), Fall 2014, at n.67, http://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_fall_ebc_news/church.html [<https://perma.cc/V38M-J6V6>] (arguing that IRS church plan PLRs are well-reasoned because “[t]hey all contain a comprehensive listing of the facts underlying each ruling request, followed by a recitation of the applicable statutory language and agency guidance, and then they apply that language and guidance to the facts presented”).

⁶⁴ See Petition for Writ of Certiorari at 16, *Dignity Health v. Rollins*, 137 S. Ct. 547 (2016) (No. 16-258) [hereinafter *Rollins* Petition for Writ of Certiorari] (estimating 500 church plan PLRs issued since the 1980s); Kristen Ricaurte Knebel, *IRS Mum as Hospital Church Plan Lawsuits Continue*, BLOOMBERG BNA (July 14, 2016), <http://www.bna.com/irs-mum-hospital-n73014444689/> [<https://perma.cc/3Z8Y-TZKE>] (“Approximately 300 religiously affiliated hospitals have received these PLRs.”).

has also analyzed church plan status and issued similar administrative rulings; however, the decisions rendered in DOL advisory opinions often rely in part on whether the IRS has issued the entity a PLR.⁶⁵ The PBGC is similarly deferential to the IRS's determinations, noting that it "typically does not make church plan determinations, [and] rel[ies] instead upon IRS church plan determinations."⁶⁶

The IRS issued church plan PLRs on a relatively systematic basis starting in the 1980s. Events over the next two decades, however, raised questions about their issuance, culminating in a moratorium on church plan PLRs lasting from 2007 until 2011.⁶⁷ First, in 1993, the PBGC announced that it would impose a six-year limitation on refunds of PBGC premiums.⁶⁸ In other words, plan sponsors who had previously operated their pension plans as ERISA plans and had accordingly paid annual premiums to the PBGC, but who subsequently determined their plans were not subject to ERISA (i.e., that they qualified as a church plan), now had only a six-year window to seek refunds of those premiums. This motivated plan sponsors to confirm their church plan status with the IRS in order to pursue refunds within the new statute of limitations.⁶⁹ From 2000 to 2010, more than one hundred religiously affiliated employers with pension plans took this path and made the switch from ERISA-compliant plans to church plans.⁷⁰ This shift caused enough concern that the IRS in 2007 instituted a moratorium to pause any new church plan PLRs.⁷¹ In relinquishing their ERISA plan status for church plan status, these employers also relinquished the pension

⁶⁵ See, e.g., U.S. Dep't of Labor, Advisory Opinion Letter 2004-11A, Re: Diversity of Coverage, Reporting and Disclosure (Dec. 30, 2004) ("Section 3(33) of ERISA defines the term 'church plan' using language virtually identical to Code section 414(e). Conditioned on the accuracy on your representation concerning the current structure and operation of the [entities], and the Plans not being materially different from facts on which the IRS based its . . . private letter ruling, the [DOL] sees no reason to disagree with the IRS's conclusion. Accordingly, . . . it is the view of the [DOL] that the Plans constitute 'church plans' within the meaning of section 3(33) of Title I of ERISA.")

⁶⁶ PENSION BENEFIT GUAR. CORP., QUESTIONS TO THE PBGC AND SUMMARY OF THEIR RESPONSES 25 (2011).

⁶⁷ See Walsh, *supra* note 7.

⁶⁸ Refunds of Premium Notice, 58 Fed. Reg. 63,407 (Dec. 1, 1993).

⁶⁹ According to one media report, from 1999–2007, the PBGC refunded nearly \$18 million in premiums to eighty-six employers claiming the church plan exemption. See Ellen Schultz, *IRS Nears Action on Church Pensions*, WALL ST. J. (June 5, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748704080104575286960632243300> [<https://perma.cc/4FYW-NCJV>].

⁷⁰ See *id.*

⁷¹ See Walsh, *supra* note 7.

safety net the PBGC provides under ERISA, which proved to have detrimental effects for some pension participants.⁷²

One example where participants faced detrimental effects is the Hospital Center at Orange, where Mary Petti worked, which garnered significant media attention.⁷³ The hospital originally operated its pension plan as an ERISA plan, which afforded its participants and beneficiaries PBGC coverage in the case of plan failure.⁷⁴ In 1998, the hospital became affiliated with Cathedral Healthcare System Inc., which was a corporation of the Archdiocese of Newark.⁷⁵ In 2003, the hospital sought and received an IRS PLR confirming its pension plan's church plan status, which eliminated its ERISA obligations along with its participants' PBGC protection.⁷⁶ One year later, the hospital closed down its operations and laid off its employees, leaving behind an estimated \$20–\$30 million pension shortfall.⁷⁷ Plan participants and beneficiaries sued the PBGC, the IRS, and the Hospital Center at Orange, among others, challenging the legality of the church plan classification.⁷⁸ The court found the suit was premature: no injury had occurred because the IRS was in the midst of reconsidering its church plan ruling and no PBGC benefits had yet been denied.⁷⁹ After nearly a decade in limbo, in 2013, the IRS ultimately revoked the Hospital at Orange's church plan PLR, and the PBGC subsequently reversed course to reinstate PBGC coverage for the hospital's pension plan beneficiaries.⁸⁰

Meanwhile, the IRS lifted its moratorium on church plan PLRs in 2011⁸¹ when it issued Revenue Procedure 2011-44, which created more transparency in the church plan PLR application process.⁸² The Revenue Procedure created a new requirement for nonelecting church plan PLR

⁷² See, e.g., Schultz, *supra* note 69 (discussing a religiously affiliated publishing house that terminated its church plan that was only 36% funded, leaving employees with only 40–60% of their promised benefits).

⁷³ See Walsh, *supra* note 1; see also *Workers Covered by Church Plans Tell Their Stories*, PENSION RIGHTS CTR., http://www.pensionrights.org/sites/default/files/docs/workers_covered_by_church_plans_tell_their_stories.pdf [https://perma.cc/V49U-QK8P].

⁷⁴ Press Release, Pension Benefit Guar. Corp., In Reversal, PBGC Covers Pension of Hospital Center at Orange (May 10, 2013), <http://www.pbgc.gov/news/press/releases/pr13-10.html> [https://perma.cc/GBY5-5TKL].

⁷⁵ *Id.*; Walsh, *supra* note 1.

⁷⁶ Walsh, *supra* note 1.

⁷⁷ *Id.*; *Tynes v. Pension Benefit Guar. Corp.*, No. Civ.A.04-2725 (JAP), 2005 WL 1828578, at *1 (D.N.J. Aug. 2, 2005).

⁷⁸ *Tynes*, 2005 WL 1828578, at *1.

⁷⁹ *Id.*

⁸⁰ See Press Release, Pension Benefit Guar. Corp., *supra* note 74.

⁸¹ Knebel, *supra* note 64.

⁸² See Rev. Proc. 2011-44, § 1, 2011-39 I.R.B. 446, 446.

applicants to provide a model notice to plan participants and beneficiaries that informs them of the potential ramifications of church plan status⁸³ and offers them an opportunity to comment on the application.⁸⁴ The IRS will not issue a PLR to nonelecting church plans unless these notice requirements are met.⁸⁵ These new requirements certainly improved the IRS's church plan PLR process to some extent by increasing plan participants' awareness of their plan's changing status and the corresponding implications. But the IRS made no other modifications to its PLR request approval process. It continued issuing rulings according to its longstanding interpretation, which recognizes the possibility that church plans may be established by entities affiliated with churches, not just solely by churches.⁸⁶ By failing to further improve its PLR request approval process, the IRS allowed the tension surrounding its interpretation of the statute to percolate and created the opportunity for the church plan litigation discussed in Part II.

II. LITIGATION CHALLENGING WHO CAN ESTABLISH A CHURCH PLAN

A. *Wave of Litigation Leading Up to Advocate Health Care Network v. Stapleton*

Recent years have seen a significant uptick in class action litigation against religiously affiliated nonprofit hospital systems that operate their pension plans as church plans. This litigation has cast a spotlight on the church plan exemption and its definition. In particular, the litigation puts Subsections A and C of 29 U.S.C. § 1002(33), and how they work in conjunction, under the microscope. Subsection A provides that “[a] ‘church

⁸³ See *id.* § 3. The model language provides answers to these questions: “Why are you receiving this notice?”; “Why does church plan status matter?”; “What is the effect of an election to be subject to ERISA?”; and “What is the scope of a letter ruling?” *Id.* at Appendix.

⁸⁴ See, e.g., Letter from John Matuska to Internal Revenue Service (Dec. 30, 2011) [hereinafter Matuska Letter], <http://dl.dropbox.com/u/21179812/spuh/Matuska%20Letter%20to%20IRS.pdf> [<https://perma.cc/574H-CHBV>]; Letter from Bruce Pardo to Internal Revenue Service (Dec. 21, 2011) [hereinafter Pardo Letter], <http://dl.dropbox.com/u/21179812/spuh/Pardo%20letter.pdf> [<https://perma.cc/4MLM-Z76W>] (letters from former St. Peter's employees to IRS requesting IRS not to award church plan status to St. Peter's).

⁸⁵ Rev. Proc. 2011-44, § 2, 2011-39 I.R.B. 446, 447.

⁸⁶ See, e.g., I.R.S. Priv. Ltr. Rul. 84-44-065 (July 31, 1984), 1984 WL 268070; I.R.S. Priv. Ltr. Rul. 91-14-026 (Apr. 5, 1991), 1991 WL 777892; I.R.S. Priv. Ltr. Rul. 1999-01-033 (Oct. 15, 1998), <https://www.irs.gov/pub/irs-wd/9901033.pdf> [<https://perma.cc/8QBP-PS86>]; I.R.S. Priv. Ltr. Rul. 2004-01-022 (Oct. 8, 2003), <https://www.irs.gov/pub/irs-wd/0401022.pdf> [<https://perma.cc/7LRZ-QNDB>]; I.R.S. Priv. Ltr. Rul. 2013-18-030 (Feb. 6, 2013), <https://www.irs.gov/pub/irs-wd/1318030.pdf> [<https://perma.cc/SC8B-MKUQ>].

plan’ means a plan established and maintained . . . for its employees . . . by a church.”⁸⁷ Subsection C clarifies that:

A plan established and maintained for its employees . . . by a church . . . includes a plan maintained by an organization . . . 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 . . . if such organization is controlled by or associated with a church⁸⁸

Since 2013, more than thirty lawsuits have challenged the church plan status of religiously affiliated hospital systems’ pension plans.⁸⁹ This Part examines how the courts have addressed the church plan dispute, which in most cases has resulted in either broad or narrow categorical outcomes that may well lead to arbitrary distinctions and unfair results. It also analyzes the Supreme Court’s recent decision in *Advocate Health Care Network v. Stapleton*, which endorsed a broad interpretation of exemption status. Examining the reasoning and scope of these court decisions unveils that a balanced, multifactor extrajudicial solution, as opposed to these bright-line approaches, might be a better solution to address the concerns on both sides of the issue. The components of this type of balanced solution are further fleshed out in Parts III and IV.

Generally, plaintiffs in these cases are plan beneficiaries or participants seeking ERISA protections because they are concerned that their pension plans are underfunded.⁹⁰ They generally allege that the hospital systems fail to meet the establishment prong of the definition of a church plan because the plans are not established by a church and therefore not entitled to the exemption.⁹¹ A common secondary argument raises

⁸⁷ 29 U.S.C. § 1002(33)(A) (2012); *see also* 26 U.S.C. § 414(e)(1) (2012) (providing a parallel provision in the Tax Code).

⁸⁸ 29 U.S.C. § 1002(33)(C); *see also* 26 U.S.C. § 414(e)(3)(A) (providing a parallel provision in the Tax Code).

⁸⁹ *See* Petition for Writ of Certiorari at 13–14 n.8, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 546 (2016) (No. 16-74) [hereinafter *Stapleton* Petition for Writ of Certiorari] (listing thirty-six cases).

⁹⁰ *See, e.g.*, *Stapleton v. Advocate Health Care Network*, 76 F. Supp. 3d 796, 797 (N.D. Ill. 2014) (“Plaintiffs allege that by unlawfully operating the plan outside the scope of ERISA, Advocate breached its fiduciary duties and harmed the plan’s participants by . . . funding the plan at insufficient levels”), *aff’d*, 817 F.3d 517 (7th Cir. 2016), *rev’d*, No. 16-258, slip op. at 15 (U.S. June 5, 2017); *Kaplan v. Saint Peter’s Healthcare Sys.*, No. 13-2941 (MAS)(TJB), 2014 WL 1284854, at *2 (D.N.J. Mar. 31, 2014) (“Plaintiff’s principal grievance is that [St. Peter’s] is improperly maintaining its Plan to the detriment of its employees . . . [and] he alleges that [St. Peter’s] is employing church-plan status to evade ERISA’s various requirements including underfunding the Plan by over \$70 million.”), *motion to certify appeal granted*, No. 13-2941 (MAS)(TJB), 2014 WL 4678059 (D.N.J. Sept. 19, 2014), *aff’d*, 810 F.3d 175 (3d Cir. 2015), *rev’d sub nom. Stapleton*, slip op. at 15.

⁹¹ *See, e.g.*, *Rollins v. Dignity Health*, 59 F. Supp. 3d 965, 967 (N.D. Cal. 2014) (“Rollins argues that . . . the Plan was established by Dignity’s predecessor, Catholic Healthcare West . . . , [which] was

questions around the maintenance prong of the church plan definition as to whether the religiously affiliated hospital systems are sufficiently controlled by or associated with a church to meet the “principal purpose” definition of Subsection C.⁹² The hospital systems generally contend that church plans can be established by hospitals if those entities are controlled by or associated with a church.⁹³ As part of their defense, most defendants present evidence of their religious affiliations and point to PLRs they received from the IRS or the IRS General Counsel Memoranda, as well as urge the courts to take into consideration the IRS’s longstanding interpretation that non-churches could establish church plans.

Federal courts across the country “have not been a beacon of uniformity” when “[f]aced with disputes over church-plan status” related to the interplay between Subsections A and C of 29 U.S.C. § 1002(33).⁹⁴ The Third, Seventh, and Ninth Circuits affirmed district court rulings in favor of plaintiffs that interpreted the exemption narrowly, holding that the two statutory provisions dictate that the religiously affiliated hospital systems’ pension plans do not qualify as church plans because they were not established by a church.⁹⁵ In contrast, other recent district court decisions embraced a broader interpretation,⁹⁶ finding that “church plans do not have to be established by churches as long as the plans are properly maintained

not a church, and that therefore the Plan is not an exempt church plan under the statute.”), *motion to certify appeal granted*, No. 13-cv-01450-TEH, 2014 WL 6693891 (N.D. Cal. Nov. 26, 2014), *aff’d and remanded*, 830 F.3d 900 (9th Cir. 2016), *rev’d sub nom. Stapleton*, slip op. at 15.

⁹² *Medina v. Catholic Health Initiatives*, 147 F. Supp. 3d 1190, 1194 (D. Colo. 2015) (“Plaintiff argues that CHI is neither a church nor controlled by or associated with a church.”). Some plaintiffs also make constitutional arguments. *See, e.g., id.* at 1203 (making the constitutional argument that recognizing this particular church plan exemption violated the First Amendment’s Establishment Clause).

⁹³ Some defendants also offer constitutional arguments. *See, e.g., Kaplan*, 810 F.3d at 186 (arguing that constitutional issues under the First Amendment’s Free Exercise Clause may arise if the IRS is forced when evaluating church plan exemption requests to inquire into whether church agencies are serving sufficiently religious functions such that they themselves could qualify as a church).

⁹⁴ *Herman, supra* note 24, at 232.

⁹⁵ *Stapleton*, 817 F.3d at 519, 530; *Rollins*, 830 F.3d at 903; *Kaplan*, 810 F.3d at 177.

⁹⁶ *See Medina*, 147 F. Supp. 3d at 1193–94 (finding a plan qualifies for the exemption where it is “‘established and maintained’ by a church—that is, if it is maintained by an organization controlled by or associated with a church or convention of churches”); *Lann v. Trinity Health Corp.*, No. PJM 14-2237, 2015 WL 6468197, at *1 (D. Md. Feb. 24, 2015) (holding “an organization that is ‘controlled by or associated with a church or convention of churches’ [can] establish a ‘church plan’”); *Overall v. Ascension*, 23 F. Supp. 3d 816, 829 (E.D. Mich. 2014) (“[T]he church plan exemption includes plans sponsored by church-affiliated organizations, such as hospitals or schools, if these plans are administered by plan committees (1) whose principal function is to administer the plan, (2) if the plan committee is controlled by or associated with a church.”). According to Jeffrey A. Herman, at least eight federal courts have adopted this broader interpretation. *See Herman, supra* note 24, at 232 n.6.

by a church-affiliated organization.”⁹⁷ The Tenth Circuit was poised to hear an appeal of one of these broad interpretation cases, but a postponement was granted⁹⁸ after the Supreme Court granted certiorari in December 2016 in the three narrow exemption cases from the Third, Seventh, and Ninth Circuits and consolidated them.⁹⁹

As this recent wave of litigation has unfolded,¹⁰⁰ many in the employee benefits industry have been closely watching, with some arguing in support of a broad application of the exemption and others arguing it should be construed narrowly.¹⁰¹ The remainder of this Section will outline the relevant aspects of how the narrow application cases and broad application cases played out in the appellate courts to reveal the need for a more balanced solution between the two positions. The next Section analyzes the Supreme Court’s decision in *Advocate Health Care Network v. Stapleton*, which ultimately endorsed a broad application and further underscores the need for a balanced solution.

The first narrow application case in this series of litigation against religiously affiliated hospitals to be addressed on appeal, *Kaplan v. Saint Peter’s Healthcare System*, involved a suit filed by current and former employees of St. Peter’s Healthcare System, which operated St. Peter’s University Hospital and St. Peter’s Health and Management Services Corporation, among other companies.¹⁰² St. Peter’s established its defined

⁹⁷ Herman, *supra* note 24, at 232.

⁹⁸ See Brief of Plaintiff-Appellant, *Medina v. Catholic Health Initiatives*, No. 16-1005 (10th Cir. June 22, 2016); Order, *Medina*, No. 16-1005 (10th Cir. Dec. 13, 2016).

⁹⁹ *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 546 (2016); *Saint Peter’s Healthcare Sys. v. Kaplan*, 137 S. Ct. 546 (2016); *Dignity Health v. Rollins*, 137 S. Ct. 546 (2016).

¹⁰⁰ One case that is at times lumped in with this recent wave of lawsuits filed against religiously affiliated hospital systems is the 2011 class action case of *Thorkelson v. Publishing House of Evangelical Lutheran Church in America*, which involved a terminated pension plan of a nonprofit publishing house affiliated with a Lutheran congregation. See 764 F. Supp. 2d 1119, 1122 (D. Minn. 2011) (dismissing plaintiffs’ ERISA claims after finding the plan is a church plan exempt from the provisions of ERISA). Prior to *Thorkelson*, litigation around the church plan definition arose in the context of long-term disability plans. See, e.g., *Chronister v. Baptist Health*, 442 F.3d 648, 651–52 (8th Cir. 2006) (finding a long-term disability plan was not church plan exempted from ERISA, given lack of denominational financing and other factors); *Lown v. Cont’l Cas. Co.*, 238 F.3d 543, 545–46 (4th Cir. 2001) (finding a long-term disability plan maintained by Baptist Healthcare was not a church plan and was subject to ERISA).

¹⁰¹ Compare Stein, *supra* note 28 (arguing that the ERISA church plan exemption was originally conceived as a narrow exemption for only church employees, not employees of church-affiliated agencies), with Miller, *supra* note 63 (rebuttal to Norman Stein explaining that allowing church-affiliated employers to establish church plans was an intended result under the church plan definition as it was amended by the Multiemployer Pension Plan Amendments Act of 1980).

¹⁰² No. 13-2941 (MAS)(TJB), 2014 WL 1284854, at *1–2 (D.N.J. Mar. 31, 2014), *motion to certify appeal granted*, No. 13-2941 (MAS)(TJB), 2014 WL 4678059 (D.N.J. Sept. 19, 2014), *aff’d*, 810 F.3d

benefit pension plan in 1974 and operated it as an ERISA plan for more than thirty years before reconsidering its plan's status and seeking a church plan PLR in 2006.¹⁰³ The district court held that St. Peter's pension plan was not a church plan because the plain language of the statute requires that a "church plan must, from the outset, be established by a church and can be maintained by an organization controlled by or associated with a church."¹⁰⁴ The district court declined to give deference to the PLR that St. Peter's had received from the IRS.¹⁰⁵

On appeal of the district court ruling in *Kaplan*, the Third Circuit judges dedicated a sizeable amount of time during oral arguments to discussion of the IRS's longstanding position that church-affiliated entities can establish church plans.¹⁰⁶ They questioned plaintiffs' counsel asking how, if they ruled in plaintiffs' favor, such a longstanding, multi-agency position, which they noted was remarkable, could just be wiped away.¹⁰⁷ Plaintiffs' counsel suggested the IRS interpretation should only be afforded deference under *Skidmore v. Swift & Co.*¹⁰⁸ She argued that the PLRs, on their face, are not precedential and provide no statutory analysis, meaning they only warrant deference to the extent they have power to persuade.¹⁰⁹ In its opinion, the Third Circuit agreed with plaintiffs' counsel on the deference point¹¹⁰ and affirmed the district court's plain text reading that a church plan must be established by a church.¹¹¹ The court noted a "fatal

175 (3d Cir. 2015), *rev'd sub nom.* Advocate Health Care Network v. Stapleton, No. 16-258, slip op. at 15 (U.S. June 5, 2017).

¹⁰³ *Kaplan*, 810 F.3d at 177–78.

¹⁰⁴ *Kaplan*, 2014 WL 1284854, at *6.

¹⁰⁵ *Id.* at *9–10. The court gave three reasons for not affording deference: (1) the IRS ruling conflicts with the statute's plain text, whereby giving it deference would be unreasonable, (2) the PLR is merely conclusory, lacks statutory analysis, and cannot be used as precedent because it was issued based on information supplied by St. Peter's, and (3) precedent has provided that congressional silence cannot be used to turn administrative rulings into law. *Id.*

¹⁰⁶ Oral Argument at 39:30, *Kaplan*, 810 F.3d 175 (No. 15-1172) [hereinafter *Kaplan* Oral Argument], <http://www2.ca3.uscourts.gov/oralargument/audio/15-1172Kaplanv.SaintPeter's.mp3> [<https://perma.cc/J9W7-XMY4>].

¹⁰⁷ *Id.* at 39:43.

¹⁰⁸ 323 U.S. 134, 140 (1944) (finding "[administrative agency] rulings, interpretations and opinions . . . while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" dependent "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").

¹⁰⁹ *Kaplan* Oral Argument, *supra* note 106, at 39:55.

¹¹⁰ *Kaplan*, 810 F.3d 175.

¹¹¹ *Id.* at 177. The Third Circuit noted that after the 1980 amendment to the definition, past district courts had "assumed" that non-church entities with "sufficiently strong ties to churches" could establish church plans, noting that the only appellate decision to come to that conclusion reached it in a dictum.

flaw” in the statutory construction St. Peter’s advanced—that the church plan definition could be read to conclude that any plan maintained, even if not established, by a church agency is exempt.¹¹² The court pointed out that St. Peter’s explicitly conceded this flaw when pressed with a hypothetical question in oral argument.¹¹³ The hypothetical scenario presented was:

Congress passes a law that any person who is disabled and a veteran is entitled to free insurance. In the ensuing years, there is a question about whether people who served in the National Guard are veterans for purposes of the statute. To clarify, Congress passes an amendment saying that, for purposes of the provision, “a person who is disabled and a veteran includes a person who served in the National Guard.”¹¹⁴

After presenting the scenario, the judge asked whether “a person who served in the National Guard but is not disabled qualifies to collect free insurance,” to which St. Peter’s counsel replied that the person did not qualify because “only the second of the two conditions was satisfied.”¹¹⁵ This hypothetical made repeat appearances in both of the other narrow application cases in the Seventh and Ninth Circuits and in oral argument before the Supreme Court.¹¹⁶ Commentators also have questioned its value to the analysis of the church plan definition.¹¹⁷

Id. at 178 (citing *Lown v. Cont’l Cas. Co.*, 238 F.3d 543, 547 (4th Cir. 2001)). The court distinguished the new wave of litigation from these past cases, indicating they “presented an argument not previously considered by courts—that the actual words of the church plan definition preclude th[e] result.” *Id.*

¹¹² *Id.* at 181.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* In their Supreme Court brief, the religiously affiliated hospital defendants withdrew this “concession,” noting “Saint Peter’s had seconds to consider the hypothetical” and clarifying that:

Under the hypothetical statute’s plain text, nondisabled 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.

Brief for Petitioners at 30 & n.6, *Advocate Health Care Network v. Stapleton*, No.16-74, slip op. (U.S. June 5, 2017).

¹¹⁶ See *Rollins v. Dignity Health*, 830 F.3d 900, 906 (9th Cir. 2016) (calling it a “helpful illustration”); *Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 524 (7th Cir. 2016) (calling it an “illuminating hypothetical”); see also Transcript of Oral Argument at 22, 25, *Stapleton*, slip op. (Justice Kagan discussing how “it’s pretty clear that you would read . . . the [hypothetical] about disabled veterans . . . as just going to one of the criteria” and Justice Alito asking “[w]hat is the significance, in practical terms, of a plan’s being established by a church” if “the requirement that the plan be established by the church was absolutely critical, as the requirement that the . . . individual have a disability is absolutely critical in the hypothetical”).

¹¹⁷ See Herman, *supra* note 24, at 254–56. Herman argues that the “hypothetical gets completely wrong the relationship between the two requirements in the church plan definition” because “[t]he

The second narrow interpretation case heard on appeal was the Seventh Circuit case of *Stapleton v. Advocate Health Care Network*. Former and current employees of Advocate Health Care Network brought the case against the Advocate hospital system, which operates twelve hospitals across Illinois and employs more than 33,000 employees.¹¹⁸ Advocate was formed in 1995 through the merger of two health systems, one associated with the Evangelical Lutheran Church in America and one associated with the United Church of Christ.¹¹⁹ The district court held Advocate’s pension plan failed to meet the criteria for the church plan exemption and found that Advocate’s contention that a plan could qualify for the exemption solely on the basis of being maintained by a non-church entity would hollow the “established by” requirement.¹²⁰

On appeal, Advocate again advanced the IRS’s longstanding interpretation, arguing it was “contemporaneous, thorough, [and] well-reasoned, and [has been] consistently applied for more than 30 years.”¹²¹ However, the Seventh Circuit adopted the statutory interpretation logic embraced by the Third Circuit, finding Advocate’s plan was not a church plan because it had not been established by a church.¹²² In its opinion, the court boiled down the language of 29 U.S.C. § 1002(33)(C) and succinctly summarized each side’s position:

The statute simplified: A church plan includes a plan maintained by a church affiliated organization.

Advocate’s position on what this means: A plan established and maintained by a church includes a plan established by a church-affiliated organization (and maintained by either a church or a church affiliated organization).

difference between ‘established’ and ‘maintained’ is the same as the difference between ‘creation’ and ‘existence’” where “[t]he first requirement is the birth of the thing, which happens at a single point in time, and the second requirement is how the thing continues to exist thereafter.” *Id.* at 255. This is in contrast to the separation of the requirements of being “disabled” and a “veteran,” which are “otherwise unrelated” and have no sequencing requirements. *Id.* But see Thomas E. Clark, Jr., *3rd Circuit Grants Victory to Participants Challenging Church Plan Status*, FIDUCIARY MATTERS BLOG (Dec. 30, 2015), <http://blog.fraplantools.com/3rd-circuit-grants-victory-to-participants-challenging-church-plan-status/> [<https://perma.cc/5HK9-9JFT>] (noting the hypothetical “clarifies the issue and is worth repeating”).

¹¹⁸ 817 F.3d at 520.

¹¹⁹ *Id.*

¹²⁰ *Stapleton*, 76 F. Supp. 3d 796, 800–01 (N.D. Ill. 2014), *aff’d*, 817 F.3d at 519, *rev’d*, slip op. at 15.

¹²¹ Brief for the Appellant at 23, *Stapleton*, 817 F.3d 517 (No. 15-1368).

¹²² *Stapleton*, 817 F.3d at 519–20.

The plaintiffs' position: A plan established and maintained by a church also includes a plan established by a church but maintained by a church-affiliated organization.¹²³

While the court agreed with Advocate that the word "includes" in the statute was expansive in nature, it disagreed with Advocate about the extent of the expansion, finding the word was expansive only as to who could *maintain* a church plan, not as to who could *establish* a church plan.¹²⁴

The Ninth Circuit followed in the footsteps of the Third and Seventh Circuits when it handed down the third narrow application opinion in *Rollins v. Dignity Health*.¹²⁵ *Rollins* involves a class action suit, brought by lead plaintiff Starla Rollins who worked as a billing coordinator for more than twenty years for a hospital under the Dignity Health umbrella, which includes hospitals in more than sixteen states.¹²⁶ Similar to Advocate, Dignity Health was formed through a merger of two religiously affiliated health systems.¹²⁷ Rollins alleged the pension plan operated by Dignity Health, from which she will be eligible for benefits upon retirement age, should not qualify for the church plan exemption under the "must be established by a church" reasoning.¹²⁸ The district court ruled in Rollins' favor based on a plain text reading of the statute as well as the legislative history,¹²⁹ giving no deference to Dignity's PLR from the IRS.¹³⁰

On appeal, less than two minutes into oral argument before the Ninth Circuit panel, Judge William Fletcher posed the Third Circuit's hypothetical to Dignity Health's counsel.¹³¹ Dignity Health's counsel referred to it as the "trick hypo" and answered that "guardsman are covered

¹²³ *Id.* at 523.

¹²⁴ *Id.* at 524.

¹²⁵ 830 F.3d 900 (9th Cir. 2016).

¹²⁶ 19 F. Supp. 3d 909, 910 (N.D. Cal. 2013).

¹²⁷ The merger of two nonprofit health systems run by two different Sisters of Mercy congregations created Dignity Health's predecessor, Catholic Healthcare West, in 1986. *Rollins*, 830 F.3d at 903. Initially, employees of the newly merged system received pension benefits through seven different plans, separately maintained either by a Sponsoring Congregation, by an individual hospital, or by the newly merged system. *Id.* But in 1989, the seven plans were rolled into one plan, and three years later, the Board of Directors adopted a retroactive resolution to treat that plan as a church plan. *Id.*

¹²⁸ *Rollins*, 19 F. Supp. 3d. at 912.

¹²⁹ *Id.* at 917.

¹³⁰ *Id.* at 912–13 ("[A] written determination may not be used or cited as precedent." (citation omitted)).

¹³¹ Oral Argument at 1:40, *Rollins*, 830 F.3d 900 (No. 15-15351), http://www.ca9.uscourts.gov/media/view.php?pk_id=0000015360 [<https://perma.cc/ETJ5-W877>].

without regard to disability.”¹³² Judge Fletcher challenged this reading, calling it “nonsensical.”¹³³ Dignity Health’s counsel’s response was that their opinions differed as to which words in both the hypothetical and the actual church plan definition statute were doing the work, arguing that “veteran” and “maintenance” are doing the work in the hypothetical and statute, respectively, not “disability” and “establish.”¹³⁴ Dignity Health urged the court to take account of the well-settled IRS interpretation and to consider the implications of overturning it.¹³⁵ However, like the Third and Seventh Circuits before it, the Ninth Circuit was not swayed by Dignity Health’s arguments. In his opinion, Judge Fletcher utilized the Third Circuit hypothetical in his analysis of the statutory text, finding it “reasonably clear from context” that an individual “who served in the National Guard satisfies the requirement that he or she be a veteran, but that this person qualifies for free insurance only if he or she is also disabled.”¹³⁶ Similarly, the opinion stated that context made it reasonably clear that “a plan maintained by a principal-purpose organization satisfies the requirement that it be maintained by a church, but that the plan qualifies as a church plan only if it was also established by a church.”¹³⁷ Again, the IRS’s longstanding interpretation as outlined in the 1982 General Counsel Memorandum proved unpersuasive to the court under *Skidmore*.¹³⁸

In contrast to these narrow application decisions, some district courts have agreed with defendants’ contentions that church plans can be established by church-affiliated organizations, not just churches. These broader applications are akin to the IRS’s longstanding interpretation that recognizes non-churches can establish a church plan, provided they are sufficiently controlled by the church. The reasoning of these broader interpretations has not yet been tested at the appellate level in this litigation series. An appeal of *Medina v. Catholic Health Initiatives* was progressing in the Tenth Circuit, but has since been postponed pending the Supreme

¹³² *Id.* at 2:28. In their briefing before the Supreme Court, the religiously affiliated hospital defendants maintained this response to the hypothetical and clarified the answer given during the oral arguments in the Third Circuit. *See supra* note 115 and accompanying text.

¹³³ *Id.* at 2:33.

¹³⁴ *Id.* at 2:35.

¹³⁵ *Id.* at 5:20 (“[I]t defies . . . common sense and all sense of deference that three agencies in a statute like this with so much complexity and interrelationship with other statutes, were just asleep at the switch and missed the boat for thirty-two years, and erroneously issued 500 determinations, each of which had massive financial, legal, and religious consequences.”).

¹³⁶ *Rollins*, 830 F.3d at 906, *cert. granted*, 137 S. Ct. 546 (2016).

¹³⁷ *Id.*

¹³⁸ *Id.* at 910.

Court proceedings.¹³⁹ *Medina* involved a class action suit filed against Catholic Health Initiatives and the members of its Board of Stewardship Trustees and Human Resources Committee by a former employee on behalf of similarly situated individuals.¹⁴⁰ Like Advocate and Dignity Health, Catholic Health Initiatives was also formed through a consolidation of multiple Catholic health systems.¹⁴¹ Its ties to the Roman Catholic Church run deep, with Catholic Health Initiatives serving as the civil law counterpart for operational purposes to the canon law entity, which must have Vatican approval.¹⁴²

In *Medina*, the district court granted summary judgment to the defendants, holding that a plan may constitute a church plan in two ways: the “must be established by a church” route in 29 U.S.C. § 1002(33)(A) and an alternative route through 29 U.S.C. § 1002(33)(C).¹⁴³ This alternative creation of a church plan occurs where it is maintained by an organization meeting two criteria:

- (1) the principal purpose or function of the organization 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; and (2) the organization is controlled by or associated with a church or a convention or association of churches.¹⁴⁴

Furthermore, while the court was not forced to reach the question of whether Catholic Health Initiatives was a church for purposes of the “must be established by a church” route in Subsection A, the order seemed to suggest it contemplated that question, finding it “ha[d] little trouble in concluding that [Catholic Health Initiatives] is, at the very least, a constituent part of the Catholic Church.”¹⁴⁵

In two other cases that demonstrate the broader application of the church plan exemption, the district courts similarly followed the *Medina* conclusion at the motion-to-dismiss stage. In *Lann v. Trinity Health Corp.*, the district court held that an organization that is controlled or associated with a church is permitted to establish a church plan.¹⁴⁶ In *Overall v. Ascension*, the district court ruled that church plans need not be established

¹³⁹ See Order, *Medina v. Catholic Health Initiatives*, No. 16-1005 (10th Cir. Dec. 13, 2016).

¹⁴⁰ *Medina v. Catholic Health Initiatives*, 147 F. Supp. 3d 1190, 1192–93 (D. Colo. 2015).

¹⁴¹ *Id.* at 1196.

¹⁴² See *id.* at 1196–97.

¹⁴³ *Id.* at 1192–94.

¹⁴⁴ *Id.* at 1194 (citation omitted).

¹⁴⁵ *Id.* at 1199 (providing ample discussion of the structure and history of Catholic Health Initiatives and its intertwining connection with the Roman Catholic Church).

¹⁴⁶ No. PJM 14-2237, 2015 WL 6468197, at *1 (D. Md. Feb. 24, 2015).

by a church where they are “sponsored by church-affiliated organizations, such as hospitals or schools, if these plans are administered by plan committees (1) whose principal function is to administer the plan, [and] (2) if the plan committee is controlled by or associated with a church.”¹⁴⁷ The court concluded that Ascension’s plans qualified as church plans due to the hospital’s control and association with the Roman Catholic Church.¹⁴⁸

The parties in both *Overall* and *Lann* ultimately reached settlement agreements. Before much progress was made in the Sixth Circuit appellate proceedings in *Overall*, Ascension agreed to adopt certain ERISA-like protections and infuse its plans with a one-time \$8 million payment to assure benefits through 2022 in exchange for continued church plan exemption status.¹⁴⁹ Similarly, in the *Lann* case,¹⁵⁰ Trinity Health agreed to adopt certain ERISA-like protections for the next fifteen years and infuse its church plans with \$75 million over three years.¹⁵¹

With the *Stapleton* and *Rollins* decisions providing the second and third appellate wins for church plan-status challengers, the litigation series launched into overdrive. One report estimated that almost two dozen additional class action suits were filed since March 2016,¹⁵² and litigants

¹⁴⁷ 23 F. Supp. 3d 816, 829 (E.D. Mich. 2014).

¹⁴⁸ *Id.* at 829–33.

¹⁴⁹ Order and Final Judgment, *Overall v. Ascension Health*, No. 13-cv-11396-AC-LJM (E.D. Mich. Sept. 17, 2015) (order approving class action settlement); *see also* Samantha Liss, *Ascension Pension Settlement Highlights Vulnerability of ‘Church Plans,’* ST. LOUIS POST-DISPATCH (Aug. 7, 2015), http://www.stltoday.com/business/local/ascension-pension-settlement-highlights-vulnerability-of-church-plans/article_3beaf4c0-375e-58e8-a1b4-a02cfd68dfec.html [https://perma.cc/YQ7H-PZQD].

¹⁵⁰ *Lann* was consolidated with another church plan case, *Chavies v. Catholic Health East*, due to a July 2014 merger of Catholic Health East with Trinity Health Corporation, which brought the church plans at issue in both cases under the same Trinity umbrella. Memorandum in Support of Plaintiffs’ Motion for Preliminary Approval of the Class Action Settlement Agreement at 3, 5, *Lann v. Trinity Health Corp.*, No. 14-cv-2237 (PJM) (D. Md. Aug. 1, 2016).

¹⁵¹ *Id.* at 5–6.

¹⁵² Knebel, *supra* note 64 (“Since March, nearly two dozen lawsuits have targeted major hospital systems taking this approach.”); *see, e.g.*, Complaint, *Allen v. Iowa Health Sys. d/b/a Unitypoint Health*, No. 1:16-cv-01132 (C.D. Ill. Apr. 29, 2016); Class Action Complaint, *Jewett v. Franciscan All., Inc.*, No. 1:16-cv-04589 (N.D. Ill. Apr. 22, 2016); Complaint, *Nicholson v. Franciscan Missionaries of Our Lady Health Sys.*, No. 3:16-cv-00258 (M.D. La. Apr. 21, 2016); Class Action Complaint, *Miller v. Bon Secours Health Sys., Inc.*, No. 1:16-cv-01150 (D. Md. Apr. 18, 2016); Class Action Complaint, *Hodges v. Bon Secours Health Sys., Inc.*, No. 1:16-cv-01079 (D. Md. Apr. 11, 2016); Complaint, *Curtis v. Wheaton Franciscan*, No. 1:16-cv-04232 (N.D. Ill. Apr. 11, 2016); Class Action Complaint, *Feather v. SSM Health*, No. 3:16-cv-00393 (S.D. Ill. Apr. 8, 2016); Complaint, *Beiermann v. SSM Health Care Corp.*, No. 4:16-cv-00460 (E.D. Mo. Apr. 4, 2016); Complaint, *Lupp v. Mercy Health*, No. 16-00441 (S.D. Ohio Mar. 30, 2016); Complaint, *Boden v. St. Elizabeth Med. Ctr., Inc.*, No. 2:16-cv-00049 (E.D. Ky. Mar. 17, 2016). The challenges to church plan status have also expanded beyond the category of religiously affiliated hospital systems. *See, e.g.*, Complaint, *Martinez-Gonzalez v. Catholic Sch. of the Archdiocese of San Juan Pension Plan*, No. 3:16-cv-02077 (D.P.R. June 13, 2016) (school employees challenging church plan status of Catholic school system in Puerto Rico).

increasingly began exploring settlement options.¹⁵³ Even without a clear-cut circuit split, the hospitals in *Advocate*, *Kaplan*, and *Rollins* argued Supreme Court review of the church plan dispute was warranted because of the “explosion of litigation of this magnitude in such an important and recurring area of ERISA, where national uniformity is paramount” and the possibility of “billions of dollars in retroactive liability and a wholesale upheaval in the administration of pension plans affecting religious employers and employees across the country.”¹⁵⁴ The first indication of the Court’s interest in the dispute came in September 2016 when Justice Anthony Kennedy granted a stay of the Ninth Circuit decision.¹⁵⁵ This was followed in December 2016, when the Court granted certiorari in the three cases.¹⁵⁶ The Court heard oral arguments in March 2017 and handed down their decision in *Advocate Health Care Network v. Stapleton* in June, which is analyzed in the next Section.

B. The Supreme Court Endorses a Broad Interpretation of the Church Plan Exemption in Advocate Health Care Network v. Stapleton

On June 5, 2017, the Supreme Court sided with the religiously affiliated hospitals in *Advocate Health Care Network v. Stapleton*, reinforcing the status quo and reversing the judgments of the Third, Seventh, and Ninth Circuits.¹⁵⁷ Justice Elena Kagan authored the 8–0 opinion, with Justice Sonia Sotomayor filing a concurring opinion and Justice Neil Gorsuch taking no part in consideration of the cases or the decision.

¹⁵³ See, e.g., Plaintiffs’ Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement at 1, *Kemp-DeLisser v. St. Francis Hosp. & Med. Ctr.*, No. 3:15-cv-01113 (D. Conn. May 20, 2016) (St. Francis Hospital agreeing to a \$107 million settlement agreement spread over ten years but making no promise of additional ERISA-like provisions); Plaintiffs’ Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement at 7, 12–13, *Tucker v. Baptist Health Sys., Inc.*, No. 2:15-cv-00382-SLB (N.D. Ala. Aug. 26, 2016) (Baptist Health agreeing to contribute \$11 million to its church plan over ten years after already infusing it with \$88.9 million pre-settlement and agreeing not to terminate the plan unless it has sufficient assets to cover liabilities for eight years post-termination).

¹⁵⁴ *Stapleton* Petition for Writ of Certiorari, *supra* note 89, at 15; Petition for Writ of Certiorari at 15, *Saint Peter’s Healthcare Sys. v. Kaplan*, 137 S. Ct. 546 (2016) (No. 16-86); *Rollins* Petition for Writ of Certiorari, *supra* note 64, at 15–16.

¹⁵⁵ *Dignity Health v. Rollins*, 137 S. Ct. 28 (2016).

¹⁵⁶ *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 546 (2016); *Kaplan*, 137 S. Ct. 546; *Rollins*, 137 S. Ct. 546.

¹⁵⁷ *Advocate Health Care Network v. Stapleton*, No. 16-74, slip op. at 6 (U.S. June 5, 2017) (“[T]he parties differ as to whether a plan maintained by [a principal purpose] organization must still have been established by a church to qualify for the church-plan exemption. The hospitals say no. . . . The employees say yes. . . . We conclude that the hospitals have the better of the argument.”).

The Supreme Court held that based on the text of the statutory language, a “plan maintained by a principal-purpose organization therefore qualifies as a ‘church plan,’ regardless of who established it.”¹⁵⁸ Justice Kagan explained that the use of the word “includes” in the exemption definition is not literal and rather signals to readers of the statute that a “*different* type of plan should receive the same treatment (i.e., an exemption) as the type described in the old definition.”¹⁵⁹ Justice Kagan leaned on the simplified analysis offered by the *Overall* court: “as one court put the point without any of the ERISA terminology: ‘[I]f A is exempt, and A includes C, then C is exempt.’ Just so.”¹⁶⁰ The Court also noted other statutory interpretation tools supported its conclusion, including the surplusage canon and the notion that when legislators do not adopt “obvious alternative” language, the “natural implication” is that the alternative was not intended.¹⁶¹ As for legislative history, the Court gave little weight to the “bits and pieces” and “scattered floor statements of individual lawmakers,” but did find that what little there was pointed in the direction of finding that plans maintained by the religiously affiliated hospitals were eligible church plans, no matter what entity established them.¹⁶²

The Third Circuit’s disabled veterans hypothetical¹⁶³ had a farewell appearance in the opinion.¹⁶⁴ The Court identified two features of the hypothetical that it found enhanced its persuasiveness: first, the criteria used (veteran status and disability) were relatively distinct and designed to have stand-alone relevance; and second, the hypothetical “trades on our background understanding that a given interpretation is simply

¹⁵⁸ *Id.* at 15.

¹⁵⁹ *Id.* at 6–7.

¹⁶⁰ *Id.* at 7 (quoting *Overall v. Ascension*, 23 F. Supp. 3d 816, 828 (E.D. Mich. 2014)).

¹⁶¹ *Id.* at 8–9 (quoting *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1235 (2014)).

¹⁶² *Id.* at 12 (noting “everything we can tell from extra-statutory sources about Congress’s purpose . . . supports our reading,” while making clear that “everything we can tell” was meager at best).

¹⁶³ See *supra* notes 113–17, 131–37 and accompanying text.

¹⁶⁴ While the Supreme Court described the Third Circuit hypothetical as “thought-provoking,” it declined to embrace the plaintiffs’ proposed rule of construction, noting “one good example does not a general rule make.” *Stapleton*, slip op. at 9. Instead, the Court offered its own variant to counter the Third Circuit hypothetical:

A statute offers free insurance to a “person who enlisted and served in the active Armed Forces,” with a later amendment providing that “a person who enlisted and served in the active Armed Forces includes a person who served in the National Guard.” Would a person who served in the National Guard be ineligible for benefits unless she had also enlisted in the active Armed Forces—say, the regular Army or Navy? Of course not.

Id. at 9–10 (footnote omitted).

implausible . . . and could not possibly have been what Congress wanted.”¹⁶⁵ However, in contrast, the Court pointed out the church plan exemption presents neither of these features.¹⁶⁶ Instead, the Court noted there is a sequencing aspect to the establishment and maintenance criteria, with one serving as a precondition to the other, such that an amendment altering one naturally alters the other.¹⁶⁷ Further, the Court explained that unlike disability in the Third Circuit’s hypothetical, which was a critical component of the imagined statutory scheme, the establishment condition is a one-time event with little functional significance.¹⁶⁸ Removing the establishment condition does not present the contextual implausibility on which the Third Circuit’s hypothetical relied so heavily.¹⁶⁹ Lastly, while the Supreme Court ultimately never had to reach the issue of whether the IRS PLRs and other administrative guidance on church plans deserved any deference, Justice Kagan did reserve a few words in her opinion for their discussion. She acknowledged that “[t]he three federal agencies responsible for administering ERISA have long read those provisions, when taken together, to exempt plans like the hospitals’ from the statute’s mandates” and that the IRS’s interpretation from the General Counsel memorandum has been disseminated in “hundreds of private letter rulings and opinion letters issued since 1982, including several provided to the hospitals” before the Court.¹⁷⁰

Justice Sotomayor joined the majority opinion because she agreed the statutory text compelled that conclusion, but filed a separate concurrence to express why the outcome still troubled her. Justice Sotomayor pointed to two areas she found unsettling: the silence of the legislative history on the question before the Court,¹⁷¹ and glaring differences between the church plans of 1980 and the church plans before the Court in 2017.¹⁷² However, while she noted “[t]hese organizations . . . bear little resemblance to those

¹⁶⁵ *Id.* at 10–11.

¹⁶⁶ *Id.* at 11.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 11–12.

¹⁶⁹ *Id.* at 12.

¹⁷⁰ *Id.* at 4.

¹⁷¹ *Id.* at 2 (Sotomayor, J., concurring) (“[T]he available legislative history does not clearly endorse this result. That silence gives me pause: The decision to exempt plans neither established nor maintained by a church could have the kind of broad effect that is usually thoroughly debated during the legislative process and thus recorded in the legislative record.”).

¹⁷² *Id.* at 2–3 (noting that “it is not at all clear that Congress would take the same action today with respect to some of the largest health-care providers in the country” who despite their religious affiliations “operate for-profit subsidiaries,” “employ thousands of employees,” “earn billions of dollars in revenue,” and “compete in the secular market with companies that must bear the cost of complying with ERISA” (citations omitted)).

Congress considered when enacting the 1980 amendment to the church plan definition,” any shift based on this evolution was not in the wheelhouse of the judiciary.¹⁷³ Instead, she suggested that perhaps the “current reality might prompt Congress to take a different path.”¹⁷⁴

The previous two Sections discussed how courts, including the Supreme Court most recently, have reached either narrow or broad conclusions on the church plan dispute and how some cases have ended up in varying types of settlement arrangements. This lays the foundation for this Note’s prescriptive claim because it demonstrates that balanced solutions achieved on a case-by-case basis, such as the settlement agreements, may be better outcomes than categorically narrow or broad solutions. The next Section discusses alternative solutions to achieve this balance and utilize case-by-case analysis.

III. INDIVIDUAL CASE-BY-CASE ANALYSIS OF CHURCH PLANS IS A BETTER FIT THAN A BRIGHT-LINE RULE

While the Supreme Court ultimately endorsed a broad scope for the church plan exemption in *Advocate Health Care Network v. Stapleton*, it is important to discuss other possible approaches for resolution outside the judicial branch to fully address the concerns of both sides. Due to the constraints of statutory interpretation, the courts alone cannot achieve this more balanced approach. This point was underscored by Justice Sotomayor in her concurrence in *Advocate Health Care Network v. Stapleton*.¹⁷⁵

The church plan dispute is best understood on a continuum. Opponents on either end of the continuum may argue the best approach would be a congressional act that enshrines either a very narrow interpretation (potentially eliminating the exemption altogether)¹⁷⁶ or a very broad interpretation of what a church plan can be. The former would likely allow establishment of church plans by churches in the brick-and-mortar

¹⁷³ *Id.* at 3.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (suggesting that a legislative solution may be a better fit but ultimately agreeing “with the majority that the statutory text compels [the majority’s] result”).

¹⁷⁶ If the basis for eliminating the church plan exemption altogether is that *all* pension plan participants deserve ERISA protections, this premise would likely require the elimination of the governmental plan exemption as well, because government pension plans are similarly exempt from ERISA and public employees covered under those plans would similarly deserve the protections of ERISA. Furthermore, plaintiffs do not appear to be advocating strongly for a total elimination theory. For example, in the *Stapleton* oral arguments before the Seventh Circuit, plaintiffs’ counsel referred to “true church plans” such as the Evangelical Church of American church plan for priests and the Episcopal Church in the United States of America church plan for priests. *Stapleton* Oral Argument, *supra* note 15, at 22:12.

sense only, which would greatly diminish the use of the church plan exemption. It could also disproportionately affect congregationally structured church systems (e.g., Baptist denominations), which often rely on associated organizations outside the church hierarchy, as compared to hierarchically structured church systems (e.g., Catholic denominations), where everything flows from the church at the top of the hierarchy down.¹⁷⁷ The latter may permit establishment of church plans by entities with only very attenuated connections to religious entities.¹⁷⁸ By drawing bright-line rules, both of these categorical approaches in fact result in arbitrary distinctions and unfair results. Lumping together *all* religiously affiliated entities, including hospitals, schools, nursing homes, publishing houses, and the myriad others, as able to or not able to establish a church plan fails to appreciate the unique circumstances of the entity and why it seeks church plan status. The following Sections explain why the church plan exemption is worth revisiting and outlines the importance of case-by-case analysis of church plans. Part IV then identifies how Congress can achieve the desired balance for the church plan exemption.

A. *Why Revisiting the Church Plan Exemption Is Important*

Having Congress revisit the church plan exemption is important for a few reasons. First, the roots of the church plan exemption demonstrate that Congress intended to prevent government entanglement with religion.¹⁷⁹ For constitutional and other purposes, the government often handles religion delicately in certain arenas, such as public health and taxes. We should not chip away at something Congress intended if it can be improved through reform. Second, religiously affiliated organizations make up a large segment of the U.S. economy and many act in good faith in

¹⁷⁷ See, e.g., Jaclyn Wille, *As Church Plan Debate Hits Next Level, 3rd Cir. Receives Competing Amicus Briefs*, BLOOMBERG BNA: PENSION & BENEFITS REP. (May 19, 2015), http://www.pensionrights.org/sites/default/files/docs/news/150519_bna_pension_benefits_reporter_-_church_plan_debate_hits_next_level_-_prc_and_k1_mentioned.pdf [https://perma.cc/5GE2-MQ2M] (discussing how a narrow interpretation “would impermissibly favor hierarchical church governments over congregational ones” even though “the history of ERISA’s church plan exemption makes clear that Congress intended to accommodate both churches that are organized hierarchically, or ‘top-to-bottom,’ and those organized congregationally, such as through ‘voluntary cooperation and association’”); cf. Brief for Becket Fund for Religious Liberty as Amicus Curiae Supporting Petitioners at 9–10, *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 547 (2016) (No. 16-74) [hereinafter *Becket Fund Amicus*] (“Under the lower courts’ narrow interpretation . . . both hierarchical and congregational churches would face the choice Congress sought to remove: change their church organizational structure or imperil the ability of their agencies to offer retirement benefits.”).

¹⁷⁸ See, e.g., Brief for Pension Rights Center as Amicus Curiae Supporting Plaintiff-Appellee and Affirmance, *Advocate Healthcare Network v. Stapleton*, 817 F.3d 517 (3d Cir. 2015) (No. 15-1368), *rev’d*, No. 16-258, slip op. at 15 (U.S. June 5, 2017).

¹⁷⁹ See *supra* Section I.A.

maintaining their obligations to their employees, such as the good faith church plan operators who operated their plans for decades in reliance on the IRS's longstanding interpretation.¹⁸⁰ Third, there are potential ripple effects that the categorical solutions do not contemplate. For example, there could be unexpected effects on retirement plan investments in private equity, where private equity funds may rely on church plan investments to count as non-ERISA assets to avoid onerous requirements.¹⁸¹ In addition, many church plans make "moral" investment choices with their pension dollars that align with their religious faiths, which could be upset by ERISA's investment diversification requirements.¹⁸² Reforming the church plan exemption legislatively would ensure these types of consequences that are often overlooked by courts are given meaningful consideration. For these reasons, a legislative solution built on case-by-case analysis of specific factors of church plan applicants should be explored. The next Section explores these case-specific factors, and then Part IV explores what this balanced approach might look like.

B. *Why Case-by-Case Analysis of Church Plans Is Important*

The importance of case-by-case analysis is illustrated by delving into the individual characteristics of some of the entities involved in the recent litigation, including how their plans have been operated historically, the funding levels of the plans, and the types of religious connections the entities have. For example, St. Peter's, the defendant in *Kaplan*, previously operated its pension plan as an ERISA plan for more than thirty years and

¹⁸⁰ For example, the *Stapleton* petition for certiorari notes that this dispute implicates hundreds, if not thousands, of religious employers that employ millions of employees. *Stapleton* Petition for Writ of Certiorari, *supra* note 89, at 2. Removing the church plan exemption as an option for these employers would have potentially forced renegotiation of many union contracts, required a redesign of benefit plan structures to come into ERISA compliance, and required changes to pension funding methods and budgets to account for paying annual PBGC premiums. *Id.* at 3. Furthermore, an amici warned this could also have created pressure on churches to make changes to their organizational structure. See Becket Fund Amicus, *supra* note 177, at 8–10.

¹⁸¹ In private equity, onerous ERISA fiduciary and other requirements apply to a private equity fund when the fund has substantial benefit plan investors. JACK S. LEVIN & DONALD E. ROCAP, STRUCTURING VENTURE CAPITAL, PRIVATE EQUITY, AND ENTREPRENEURIAL TRANSACTIONS 10–42 (Martin D. Ginsburg & Russell S. Light eds., 2014). A private equity fund is not treated as holding ERISA plan assets under the DOL rules if it has less than 25% benefit plan investors. *Id.* Church plan assets are not considered benefit plan investors for these purposes. See Joseph K. Urwitz, *What Private Equity Funds Should Know About ERISA*, FOCUS ON PRIV. EQUITY (McDermott Will & Emery), July 2015, at 3, <https://www.mwe.com/en/thought-leadership/newsletters/2015/07/focus-on-private-equity-july-2015> [<https://perma.cc/Q45N-5TP5>].

¹⁸² Becket Fund Amicus, *supra* note 177, at 11 (“[A]pplying ERISA’s diversification requirements to church plans might prevent religious groups from investments that, in the religion’s view, would promote social justice or avoid supporting evils.”).

sought a church plan PLR after reconsidering its plan's status in 2006.¹⁸³ In oral arguments, when questioned about why St. Peter's treated its plan as an ERISA plan for such a long period before seeking church plan status, St. Peter's counsel indicated the entity was uninformed and had not realized it could operate a church plan until it received better advice.¹⁸⁴ When St. Peter's sought church plan status from the IRS, some former employees, including John Matuska, the former CFO, COO, and CEO and a former longstanding member of the St. Peter's Retirement Plan Committee, and Bruce Pardo, the former Vice President of Human Resources, voiced their opposition to the change in status.¹⁸⁵

While the church plan status of St. Peter's plan was relatively recent, Advocate, the defendant in *Stapleton*, and its predecessors have long been operating their pension plans as church plans. Advocate was formed in 1995 from the merger of two health systems: Lutheran General HealthSystem and Evangelical Health Systems.¹⁸⁶ A predecessor of Evangelical Health Systems established its defined benefit pension plan in January 1973 and received an IRS PLR in March 1991 affirming its church plan status.¹⁸⁷ Lutheran General HealthSystem also maintained a pension plan. Following the merger, Advocate received an IRS PLR in November 1998, finding that the Lutheran General HealthSystem Plan was also a church plan.¹⁸⁸ The two plans were then merged into one.¹⁸⁹ A balanced multifactor approach could take into account nuances such as how a plan has been historically operated. The fact that St. Peter's long operated its plan as an ERISA plan and Advocate had long operated its plans as church plans could be taken into consideration in awarding them church plan status and weighed against the other relevant factors.

Funding of the plans is also an important factor in this inquiry, particularly because this aspect is a significant concern for church plan participants who seek confirmation that their pension dollars will be available when they retire. Furthermore, ensuring retirement security was a

¹⁸³ *Kaplan v. Saint Peter's Healthcare Sys.*, 810 F.3d 175, 177–78 (3d Cir. 2015). The plan at issue in the case was established in 1974 and was operated as an ERISA plan until St. Peter's applied for a PLR in 2006. *Id.* St. Peter's continued paying PBGC premiums as required by ERISA during the IRS application stage until it received a PLR in 2013. *Id.*

¹⁸⁴ *Kaplan* Oral Argument, *supra* note 106, at 15:35.

¹⁸⁵ See Matuska Letter, *supra* note 84; Pardo Letter, *supra* note 84.

¹⁸⁶ Brief and Short Appendix of Defendants-Appellants at 14, *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016) (No. 15-1368) [hereinafter *Stapleton* Brief and Short Appendix of Defendants-Appellants].

¹⁸⁷ I.R.S. Priv. Ltr. Rul. 91-22-078 (May 31, 1991), 1991 WL 778797.

¹⁸⁸ I.R.S. Priv. Ltr. Rul. 1999-04-041 (Jan. 29, 1999), 1999 WL 36831.

¹⁸⁹ *Stapleton* Brief and Short Appendix of Defendants-Appellants, *supra* note 186, at 14.

primary driver for the enactment of ERISA and drove the creation of the PBGC.¹⁹⁰ When creating ERISA, Congress offered the church plan exemption to prevent entanglement with church business, not to give church plans license to break pension promises. Reported funding levels of the plans involved in the litigation vary across the cases and exact downfall calculations are often in dispute. For example, Dignity Health reports its plan is “healthy” and exceeds ERISA’s 80% funding ratio, noting as of September 2012 the plan held over \$3.1 billion in assets, which was sufficient to cover 85% of projected benefit obligations and 88% of accumulated benefit obligations.¹⁹¹ On the other side of that litigation, however, the complaint alleged the plan was underfunded by more than \$1.2 billion.¹⁹² These disputed funding levels illustrate how important the issue is to both sides, and why funding must be some part of a middle ground approach. Furthermore, the Hospital at Orange situation, where the pension fund nearly ran out of funds to pay benefits until the IRS and PBGC came to the rescue and agreed to reverse course to allow for PBGC protection reinstatement, also underscores how critical it is to reach some sort of agreement on the funding issues.¹⁹³

Religious ties are also an important inquiry for the case-by-case analysis because they are relevant as to why the church plan exemption exists in the first place. Because of Advocate’s formation through the merging of two entities from different religious faiths, both the Evangelical Lutheran Church in America and the United Church of Christ include Advocate in their annual yearbooks, which serve as directories of the churches.¹⁹⁴ In addition, Advocate has contractual relationships referred to as “Covenantal Agreements” with branches of both denominations in which they “affirm their ministry in health care and the covenantal relationship they share with one another.”¹⁹⁵ However, the district court noted that neither church owns or financially supports Advocate.¹⁹⁶ The strength of religious ties and whether the denomination provides financial backing should be relevant factors to consider. For example, more scrutiny will need to be given to an entity that has gone through multiple rounds of

¹⁹⁰ See 29 U.S.C. §§ 1001(a), 1302(a) (2012).

¹⁹¹ *Rollins* Reply Brief of Defendants-Appellants, *supra* note 64, at 8.

¹⁹² Class Action Complaint at 5–6, *Rollins v. Dignity Health*, 59 F. Supp. 3d 965 (N.D. Cal. 2016) (No. 13-1450).

¹⁹³ See *supra* notes 73–80 and accompanying text.

¹⁹⁴ *Stapleton* Brief and Short Appendix of Defendants-Appellants, *supra* note 186, at 15.

¹⁹⁵ *Id.* at 15 (citation omitted).

¹⁹⁶ *Stapleton v. Advocate Health Care Network*, 76 F. Supp. 3d 796, 797 (N.D. Ill. 2014), *aff’d*, 817 F.3d 517 (7th Cir. 2016), *rev’d*, No. 16-258, slip op. at 15 (U.S. June 5, 2017).

mergers and is now affiliated with, for example, five different denominations and where those religious denominations provide no financial backing to the entity.

In the *Medina* case, the opinion went into great detail describing how intertwined Catholic Health Initiatives is with the Roman Catholic Church.¹⁹⁷ It included a laundry list of connections, including the process by which the Vatican approves a canon law entity¹⁹⁸ which does not have the ability to act or own property in the United States and thus requires the existence of a “civil law counterpart”—in this case Catholic Health Initiatives.¹⁹⁹ Catholic Health Initiatives’ governing body consists of at least nine of the same individuals who are members of the canon law entity.²⁰⁰ Like Advocate, Catholic Health Initiatives was formed through the consolidation of three health care systems that represented ten congregations of Catholic sisters, and is listed in the Catholic Church’s “official” directory of Roman Catholic institutions.²⁰¹ Its Articles of Incorporation require its operation be “exclusively in furtherance of these [religious] purposes and in conformity with the ethical and moral teachings of the Roman Catholic Church and the Ethical and Religious Directives for Catholic Health Care Services.”²⁰² So, these types of religious ties should weigh in favor of church plan status.

The narrow and broad outcomes discussed previously box all religiously affiliated entities seeking church plan status into one category without taking into consideration the individual circumstances of each case. The courts are not equipped to provide this type of case-by-case multifactor analysis of church plans. Therefore, instead Part IV argues that Congress should seek a multifactor approach that will balance the needs of church plan sponsors acting in good faith with the concerns of church plan participants in terms of plan funding status and other ERISA-like protections. The church plan exemption does provide common sense political and economic merits worth revisiting to achieve a more balanced approach.

¹⁹⁷ *Medina v. Catholic Health Initiatives*, 147 F. Supp. 3d 1190, 1192–96 (D. Colo. 2015).

¹⁹⁸ These canon law entities are called “[p]ublic juridic persons,” which are the “official constitutive parts of the Catholic Church and the primary means through which the Church acts in the world.” *Id.* at 1195.

¹⁹⁹ *Id.* at 1196.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 1196–97.

²⁰² *Id.* at 1197.

IV. PROPOSAL FOR IMPLEMENTING A BALANCED APPROACH TO CHURCH PLAN DETERMINATION

A more robust church plan-determination process is necessary to balance the needs of church plan sponsors acting in good faith with the concerns of church plan participants in terms of plan funding status and other ERISA-like protections. A multifactor balancing approach will help serve as a gatekeeper to prevent those plans acting in bad faith (e.g., entities with very attenuated religious connections looking to skirt ERISA compliance) from obtaining church plan status, while protecting those religious entities that may simply not have realized their eligibility for church plan status. This Part first addresses procedural problems with the IRS's existing church plan approval process that will require changes for a balanced approach to succeed. Following that, it explores which evaluative criteria are most critical to this new robust evaluation of church plans. Lastly, this Part argues that Congress should amend the statutory church plan exemption to implement this robust determination process.

A. Process Improvements

For a balanced approach to be successful, changes to the existing process are essential. First and foremost, the government approval process would need to be changed from optional to required. Currently, church plans have the option to seek a PLR. Even though most do, this lax standard creates room for ambiguity and opportunities for misbehavior. While the new notice requirements for plan participants and beneficiaries implemented in the church plan PLR process after the end of the moratorium did increase transparency of church plan status to some extent, only plan participants and beneficiaries are notified. The IRS does post church plan PLRs for public viewing, but it redacts the identity of the entity seeking church plan status.²⁰³ Having either the IRS, or alternatively some other federal agency, affirmatively approving or denying *all* church plan applicants and further enhancing the transparency of this process would increase how visible church plans are to the public and prevent fewer “bad apple” church plans from going undetected until it is too late. Second, because the balanced approach requires a deeper and more holistic review of the church plan applicants, the level of authority of federal agency personnel evaluating the applications will likely need to be elevated from the current staff attorney level.²⁰⁴ The team reviewing the applications may also need to be expanded to include individuals with actuarial or other

²⁰³ See *supra* Section I.B.

²⁰⁴ See *supra* Section I.B.

technical expertise for purposes of evaluating plan funding levels. Third, government involvement should not only be required at the church plan initial request stage, but also throughout the duration of the plan's life. One way to accomplish increased oversight is to limit the length of church plan status. For example, the church plans could be required to either reapply or undergo a renewal process after a five-year period to ensure the church plan is meeting its representations around funding, and still sufficiently connected to a church.

While church plans may argue this level of oversight goes too far and cuts against the whole purpose of the exemption, which was to prevent government entanglement in church business, it is far less oversight than what is required under ERISA.²⁰⁵ *Advocate Health Care Network v. Stapleton* does not mark the end of all church plan litigation. The issue of whether the religiously affiliated hospitals were sufficiently associated with churches to meet the principle purpose requirements was not before the Court, and the Justices expressed no opinion on how those types of issues should be resolved.²⁰⁶ Furthermore, because church plans are not shielded by ERISA preemption, they could be subject to state law claims, including breach of contract, negligence, and statutory claims.²⁰⁷ One employee benefits lawyer speculated that “states could enact legislation that could permit participants in church plans to bring suit based on nonpayment or underfunding.”²⁰⁸ Moving toward a balanced approach that provides a moderate level of oversight may help church plans avoid other types of litigation exposure in the state courts. Of course, all of these expansions to the existing process and heightened agency review and oversight will add more complexity and require additional manpower, which could be problematic for an agency such as the IRS that is already overstretched in terms of personnel.²⁰⁹

²⁰⁵ ERISA requires pension plans to comply with a host of annual reporting requirements to both the DOL and PBGC, as well as participant and beneficiary disclosures, among other obligations. *See, e.g.*, U.S. DEP'T OF LABOR, REPORTING AND DISCLOSURE GUIDE FOR EMPLOYEE BENEFIT PLANS (2014), <http://www.dol.gov/ebsa/pdf/rdguide.pdf> [<https://perma.cc/A5WU-XUDP>].

²⁰⁶ *Advocate Health Care Network v. Stapleton*, No. 16-74, slip op. at 5 n.2 (U.S. June 5, 2017).

²⁰⁷ Herman, *supra* note 24, at 233.

²⁰⁸ Jeannie O'Sullivan, *4 Takeaways from High Court's ERISA Exemption Ruling*, LAW360 (June 5, 2017, 8:59 PM), https://www.law360.com/employment/articles/931350/4-takeaways-from-high-court-s-erisa-exemption-ruling?nl_pk=73f04523-8fa4-4634-862b-c01a8fca8676&utm_source=newsletter&utm_medium=email&utm_campaign=employment [<https://perma.cc/FDCJ-4WCJ>].

²⁰⁹ *See* Lisa Rein, *A Standard Dejection in the IRS Help Line*, WASH. POST (Apr. 7, 2015), https://www.washingtonpost.com/politics/a-standard-dejection-in-the-irs-help-line/2015/04/07/333594d6-d7f0-11e4-8103-fa84725dbf9d_story.html [<https://perma.cc/UCA8-GTJ5>] (“Five years of budget cuts by Congress have left the agency so cash-strapped that Commissioner John Koskinen doesn't bother sugarcoating the state of customer service. ‘It's abysmal,’ he said.”).

B. Evaluative Criteria

The balanced approach should allow for a holistic case-by-case evaluation of church plans. Key to this balanced approach is determining what types of evaluative criteria should be included and what benchmarks should be used for evaluation. While Congress would ultimately determine the parameters of the evaluation, this Note suggests that the evaluation should focus on finding benchmarks that represent a middle ground for church plans and pension plan participants.

The settlement agreement reached in *Overall* offers a glimpse into what a compromise between the two sides could look like, and provides a starting point for the types of criteria or representations that could be required in a more robust evaluation of church plans. In terms of funding concerns, Ascension committed to contribute a one-time \$8 million infusion in the church plan and guaranteed “sufficient funds to pay participants the level of benefit stated in the Plans” through June 2022.²¹⁰ Furthermore, Ascension promised to maintain participants’ benefit levels should the plan undergo any merger into another plan.²¹¹ In addition, it agreed to comply with certain ERISA-like standards, including meeting fiduciary obligations, distributing a summary plan description that includes information about the church plan and alerts participants about the lack of PBGC coverage, providing annual funding summaries, issuing pension benefit statements every three years, promptly responding to participant requests for current benefit values, and outlining claim review procedures.²¹² In return, Ascension got to maintain its church plan status—shielding it from paying PBGC premiums, having to comply with federal agency audit requests, and providing annual Form 5500 reporting—and prevent future litigation costs related to plaintiffs’ claims in that case.²¹³

Of the ERISA-like protections offered in the Ascension settlement agreement, the immediate funding infusion and future funding commitment are obviously very important concerns for the plaintiffs involved in this series of litigation and are likely the thorniest issues for church plan sponsors as well. However, given that the intent behind the church plan exemption was not to allow church plans to sidestep funding their plans, but rather to avoid government entanglement with church business, it is not so unrealistic to require church plan sponsors to make some meaningful

²¹⁰ Class Action Settlement at 11, *Overall v. Ascension Health*, 23 F. Supp. 3d 816 (E.D. Mich. 2014) (No. 13-cv-11396-AC-LJM).

²¹¹ *Id.*

²¹² *Id.* at 12.

²¹³ *Id.* at 4.

commitments in terms of funding. Congress could outline an improved church plan determination process that would allow the IRS to give church plan status affirmation only where a plan proves a sufficient level of funding and makes representations to maintain these levels for a certain period of time, based on actuarial assumptions about the plan's future liabilities. Furthermore, it could be optional to allow the IRS to provide church plan status on a trial or temporary basis (e.g., one year) for plans that fall below the sufficient level of funding within a certain range, so long as they commit to future funding infusions. Again, building in evaluation of funding levels into the IRS's church plan approval process will likely require more specialized personnel.

Another significant concern in terms of funding representations is what happens in the case of plan failure. ERISA has built in the PBGC insurance mechanism to deal with plan failures, whereas participants in church plans do not have that type of assurance for a minimum guaranteed level of pension payout. However, even the act of formalizing the church plan approval process sets up some additional oversight in terms of funding. If the church plan status is limited in duration and requires a re-application or renewal requirement, this extra level of oversight will hopefully flag potential funding issues for the IRS. If plans fail to meet objectives after the trial period, their church plan status would lapse and they would be forced to become ERISA compliant, including potentially requiring them to retroactively pay PBGC premiums to fund their portion of the PBGC safety net during their trial period. Furthermore, in terms of plan failure, pension plan participants in the church plans could seek remedies in contract against the plans under state law.

In addition to funding commitments, a more balanced approach may attempt to incorporate other ERISA-like protections for church plan participants. Similar to their expected response to stronger funding commitments, church plan sponsors are likely to oppose an obligation to provide total or near total ERISA compliance due to the associated financial and personnel burdens. In particular, church plan sponsors will be most strongly opposed to complying with fiduciary obligations, which would give participants stronger leverage in litigation against the plans. However, church plan sponsors may be more willing to meet in the middle on some of the other more minimally burdensome disclosure requirements. This is illustrated in the *Overall* settlement, where Ascension agreed to provide participants and beneficiaries with summary plan descriptions and annual funding summaries.

An important piece of a balanced approach will be an evaluation of a church plan's reasons for seeking church plan status. While the way the

plan was operated prior to application for church plan status should not be dispositive as to whether church plan status should be granted, it should be considered. In particular, if the IRS reviews a plan and finds the sole motivation is to get around ERISA compliance,²¹⁴ the IRS should apply heightened scrutiny in its consideration of other factors such as the stability of plan funding levels and the strength of the religious ties. A multifactor balancing approach such as this will help serve as a gatekeeper to prevent those plans acting in bad faith (e.g., entities with very attenuated religious connections looking to skirt ERISA compliance) from obtaining church plan status, while protecting those religious entities that may simply not have realized their eligibility for church plan status.

The last important criterion that should be incorporated into a balanced approach is the extent of the religious ties of the church plan applicant to a church or churches. As with many aspects of other regulatory schemes,²¹⁵ Congress felt compelled to shield religious entities from ERISA's requirements to avoid government entanglement with church business.²¹⁶ While some may argue for discarding this antiquated rationale or worry that delving into the extent of a religious connection is entering dangerous territory, religious ties remain an important area for evaluation. One would similarly want to examine the strength of the ties of a quasi-public entity to a government entity to determine its eligibility for a similar type of exemption.

Furthermore, the IRS is already in the business of evaluating churches for other tax purposes and has developed criteria to do so.²¹⁷ While “[t]he

²¹⁴ This is not to say that escaping ERISA compliance is not a valid reason to seek church plan status. ERISA compliance costs can be enormous and require substantial company resources and personnel. However, if avoidance of ERISA compliance is the sole reason, the IRS will want to make sure the other factors are sufficiently met (i.e., that the entity has a sufficiently funded plan or is willing to commit to certain funding requirements and that the entity is sufficiently connected to a church). Some may question the IRS's ability to detect whether avoidance is the sole motivation. However, there may be some signals to alert the IRS such as a very recent affiliation with a church occurring in close proximity to a church plan PLR application, *see supra* notes 75–77 and accompanying text, or strong opposition by former employees when provided with the church plan application notice required under Revenue Procedure 2011-44, *see supra* notes 82–85 and accompanying text.

²¹⁵ *See, e.g.*, 45 C.F.R. § 147.131 (2015) (establishing an exemption for religious employers and an accommodation for certain other eligible employers from the contraceptive mandate requirement in the Patient Protection and Affordable Care Act).

²¹⁶ *See* 124 CONG. REC. 12,106 (1978) (statement of Rep. Conable) (explaining that Congress “exempted church plans from the provisions of [ERISA] to avoid excessive Government entanglement with religion in violation of the first amendment to the Constitution”).

²¹⁷ “Churches” Defined, IRS, <https://www.irs.gov/Charities-&-Non-Profits/Churches-&-Religious-Organizations/Churches—Defined> [<https://perma.cc/YRM3-E7F6>]; *see also* IRS, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 33 (2015), <https://www.irs.gov/pub/irs-pdf/p1828.pdf> [<https://perma.cc/2LJ4-SADJ>].

term *church* is found, but not specifically defined, in the Internal Revenue Code,” the agency relies on attributes it has developed, as well as characteristics identified in case law, and “generally uses a combination of these characteristics, together with other facts and circumstances, to determine whether an organization is considered a church for federal tax purposes.”²¹⁸ The IRS could borrow some of these criteria for examining religious connections between church plan applicants and churches. Specific to church plans, the IRS also already makes evaluative determinations for the maintenance prong of the church plan definition as to whether an entity is a “principal purpose” entity that is sufficiently controlled or associated with a church.²¹⁹ Some of the PLRs the IRS has issued have sets of facts where the agency has determined this control or association element is not sufficiently met, finding “merely incidental” connections to be inadequate.²²⁰ The evaluation of this religious tie criterion could build off of this already existing “principal purpose entity” assessment.

C. Legislative Solution

The ideal channel for implementing a balanced approach to the church plan-determination process would be through Congress, particularly now that the Supreme Court has weighed in on the church plan definition. A legislative solution would provide refreshed insight for courts into congressional intent around the church plan exemption. If Congress revisits the issue, it would also provide the opportunity for congressional hearings and stakeholder feedback on what the balanced, more robust approach should look like.²²¹ This is particularly important, given the large-scale consolidation and other changes that have occurred for some religiously

²¹⁸ “Churches” Defined, IRS, *supra* note 217.

²¹⁹ See 29 U.S.C. § 1002(33)(C) (2012).

²²⁰ See, e.g., I.R.S. Priv. Ltr. Rul. 14-20-028 (Feb. 18, 2014), <https://www.irs.gov/pub/irs-wd/1420028.pdf> [<https://perma.cc/5855-FBMU>] (“[The plan] will not be a church plan merely because the entities sponsoring [the plan] are associated with the same religious denomination. . . . The connections must show an ongoing active relationship between each entity and the designated church. In this case, you have not demonstrated that a church . . . [sufficiently] controls [the entities].”).

²²¹ THE LEGISLATIVE PROCESS: COMMITTEE CONSIDERATION, CONGRESS.GOV, <https://www.congress.gov/legislative-process/committee-consideration> [<https://perma.cc/KQ8Q-2GSH>] (“The first formal committee action on a bill or issue might be a hearing, which provides a forum at which committee members and the public can hear about the strengths and weaknesses of a proposal from selected parties—like key executive branch agencies, relevant industries, and groups representing interested citizens.”).

affiliated entities over the last few decades, such as in the hospital industry.²²²

Another advantage to Congress completely redrawing the statutory church plan definition is that it would allow for more sweeping changes. The IRS—and the Supreme Court—could only operate within the statutory quagmire left by the 1980 amendments, but if Congress revisits and revamps the language, it could outline the structure of a more robust evaluation process and offer guidance to the IRS as to how it expects the agency to roll out this evaluation process and oversee church plans. As opposed to non-precedential administrative guidance like PLRs, Congress could require that the IRS implement the process through regulation, which would require compliance with the Administrative Procedures Act²²³ and offer notice-and-comment opportunities to solicit stakeholder feedback. This type of regulatory implementation would provide a much stronger foundation for the IRS’s interpretation to withstand future judicial review.²²⁴ A legislative solution accompanied by implementation via regulation would serve both sides well, as it would provide consistency and reliability for plan sponsors as well as stronger assurances to participants.

Of course, political realities could make it more challenging to find a common middle ground, as both sides have active lobbyists and trade organizations.²²⁵ In addition, the Trump Administration has signaled it favors less regulation, not more,²²⁶ so even if a legislative solution of this nature were to pass Congress, it is unclear whether President Trump would sign it. Furthermore, Congress has had multiple opportunities in the past to “fix” the church plan definition and has abstained.²²⁷ Most recently, in December 2015, Congress enacted the Church Plan Clarification Act of 2015, and the bill’s co-sponsor specifically commented that the bill was not

²²² See *supra* note 14 and accompanying text. See also *Advocate Health Care Network v. Stapleton*, No.16-74, slip op. at 2–3 (U.S. June 5, 2017) (Sotomayor, J., concurring).

²²³ 5 U.S.C. §§ 551–559 (2012).

²²⁴ *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (“[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”).

²²⁵ The Catholic Health Association of the United States, the Church Alliance, and the Pension Rights Center are all seasoned players on Capitol Hill.

²²⁶ See Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017) (“[I]t is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations. Toward that end, it is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”).

²²⁷ See *supra* notes 45–48 and accompanying text.

intended to address the church plan definition.²²⁸ This could be a strong signal that Congress may not be open to making further changes to the church plan definition. Nonetheless, the commentary and legislation also indicates that church plans are very much on Congress's radar.

While a legislative solution could be quite ambitious to undertake, this avenue would allow each side to shape the balanced solution and influence where benchmarks are set, as well as provide opportunity for meaningful and expansive reforms to the church plan approval process.

CONCLUSION

While the Supreme Court has recently weighed in on the wave of church plan litigation and endorsed a broad interpretation of the church plan exemption in *Advocate Health Care Network v. Stapleton*, concerns remain and the church plan exemption is worth revisiting. Congress should take action to implement a balanced approach for evaluating church plan applicants. This balanced approach should investigate an applicant's religious ties, purposes for seeking church plan status, and funding levels of its plan. Doing so not only would benefit church plans by providing them with a stable and more reliable framework for operating their plans, but also would provide necessary assurances for church plan participants.

²²⁸ See *supra* note 49.