No. 15-15351

In the United States Court of Appeals for the Ninth Circuit

STARLA ROLLINS,

Plaintiff-Appellee,

v.

DIGNITY HEALTH, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California, No. 3:13-cv-1450
The Honorable **Thelton E. Henderson**, Chief Judge Presiding.

AMICI CURIAE BRIEF OF GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, THE PENSION BOARDS-UNITED CHURCH OF CHRIST, INC., and THE CHURCH ALLIANCE IN SUPPORT OF THE DEFENDANT-APPELLANT DIGNITY HEALTH AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

In accordance with F.R.A.P. 26.1, GuideStone Financial Resources of the Southern Baptist Convention, The Pension Boards-United Church of Christ, Inc. and the Church Alliance state that:

(i) none of them issues stock; and

(ii) none of them is a subsidiary or affiliate of any public corporation.

STATEMENT OF AUTHORSHIP

In accordance with F.R.A.P. 29(c)(5), amici state that no party's counsel authored this *amicus curiae* brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than the amici, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

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I. IDENTITY AND INTERESTS OF AMICI / SOURCE OF AUTHORITY TO FILE

A. Congregational Benefit Boards

The Southern Baptist Convention ("SBC") and the United Church of Christ ("UCC") are Protestant religious denominations.

The SBC, a Georgia non-profit corporation, was organized in 1845 by "messengers from missionary societies, churches, and other religious bodies of the Baptist denomination."[1] The SBC is the nation's largest Protestant denomination, with about 16 million members in over 45,000 churches.

The UCC, an unincorporated association, was formed in 1957 by the union of the Evangelical and Reformed Church and The General Council of the Congregational Christian Churches of the United States to express more fully the oneness in Christ of the churches composing it, to make effective their common witness in Christ, and to serve God's people in the world. The UCC is composed of approximately 980,000 members worshiping in over 5,100 Local Churches around the United States.

[1] Southern Baptists are a "denomination" only in the most general sense—a general name for a category of similar things. Churches that practice believers' baptisms by immersion have been "denominated" by others and by themselves as *Baptists* for centuries. When the SBC was formed in 1845, it used the term in this general way.

The SBC and the UCC, unlike some other religious groups, are not organized under a hierarchy, but are strictly congregational. Thus, for example, there is no universal "Baptist Church." There are only Baptist churches and Baptist conventions and associations of churches.[2] The SBC maintains a fraternal, cooperative relationship with 42 state and regional Baptist conventions in the United States and its territories. These state conventions, sometimes referred to as "associations," provide multiple services for, with and among cooperating churches in their respective states or regions. The SBC also cooperates closely with more than 1,000 associations of Baptist churches on the local level. Local associations provide the most grass-roots organizational structure in Baptist life, promoting regular opportunities for fellowship, cooperative ministries and partnership missions.

Similarly, the basic unit within the UCC is the local church. According to the UCC's Constitution, the "autonomy of the Local Church is inherent and modifiable only by its own action."

Thus, each local Southern Baptist or UCC church or other ministry organization makes its own decisions regarding the benefit plans and programs it provides for its employees. As is typical among congregationally-governed

[2] *See generally* Charles J. Whelan, *"Church" in the Code: the Definitional Problems*, 45 Fordham L. Rev. 885, 902–03 & n.80 (1977).

churches and conventions and associations of churches, many of the church-related organizations establish their own employee benefit plans.

The SBC and UCC each has formed a ministry organization to help provide retirement, medical and other benefits for its active and retired ministers, as well as for employees of churches and church-affiliated organizations. The SBC formed GuideStone Financial Resources of the Southern Baptist Convention in 1918, while the benefit board for the UCC, The Pension Boards-United Church of Christ, Inc., was formed in 1914. Both benefits boards—collectively referred to as the "Congregational Benefit Boards"—are non-profit tax-exempt organizations under section 501(c)(3) of the Internal Revenue Code (the "Code").

Congress modified section 3(33) of the Employee Retirement Income Security Act of 1974[3] ("ERISA") in 1980, principally to preserve the "church plan" status of the benefit plans established by ministry organizations that are controlled by or associated with churches or their conventions or associations. The Congregational Benefit Boards submit this amicus brief to explain why ERISA section 3(33) allows a ministry organization associated with a church or a convention or association of churches, like the SBC or UCC, to provide employee benefits under a church plan. Limiting the kinds of organizations that can offer

[3] 29 U.S.C. § 1002(33). A virtually identical definition appears in Code section 414(e), 26 U.S.C. § 414(e).

employee benefits under a church plan is inconsistent with the legislative policies and objectives underlying numerous federal statutes and potentially violates the Establishment Clause of the First Amendment of the Constitution.

B. Church Alliance

The Church Alliance is a coalition of the chief executive officers of more than 35 denominational benefit programs, including the Congregational Benefit Boards. Some of these benefit programs are church plans even under the district court's view that "a church plan may only be established by a church"[4]— because they *were* established by a church or a convention or association of churches. Other programs are like those of the Congregational Benefit Boards, in that their participating employers—both local houses of worship and church-associated organizations—establish their own retirement plans. However, regardless of their polity or the effect of the district court's interpretation of ERISA section 3(33) on their operations, *all* Church Alliance members have a substantial interest in preserving the "church plan" exemption under ERISA against attacks that it violates the Establishment Clause, and the Church Alliance joins this brief to protect that interest.

All parties have consented to the filing of this amicus brief.

[4] ER-22. Amici will cite to Defendants' Excerpts of Record using the format "ER" followed by a page number.

II. SUMMARY OF ARGUMENT

Churches and church conventions or associations are governed and structured in two principal ways: either hierarchically, through top-to-bottom control, or congregationally, through the voluntary cooperation and association of churches and associated ministry organizations. In both the original version of the ERISA church plan definition[5] and as amended by the Multiemployer Pension Plan Amendments Act of 1980[6] ("MPPAA"), Congress was careful to accommodate both types of church polity—thereby avoiding Constitutional challenges based on the government favoring one form of religious practice over another. The district court's reading of the ERISA church plan definition, if upheld, would impermissibly and unconstitutionally favor one form of church structure (hierarchical) over another (congregational), thus violating the Establishment Clause.[7] It would also disrupt the meaning of numerous other federal laws and

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[5] Pub. L. No. 93-406, 88 Stat. 829 (1974).

[6] Pub. L. No. 96-364, § 407(a), 94 Stat. 1208 (1980).

[7] See *Lutheran Social Service of Minn. v. U.S.*, 758 F.2d 1283, 1288 n.5 (8th Cir. 1985):

> We necessarily construe the word "church" in [Code] section 6033 to include both organizational forms of churches with respect to "churches and their integrated auxiliaries." Any other construction of the phrase--i.e., if "church" were construed as meaning only hierarchical churches such as the Catholic Church--would result in an unconstitutional construction of the statute because favorable tax treatment would be accorded to hierarchical churches while being denied to congregational churches, in violation of the first

create significant uncertainty as to the meaning and effect of these laws in the day-to-day operation of church benefits programs. The better reading, urged by the Defendants and amici, will avoid these problems—and at the same time properly reflect the solution to the church agency problem that the MPPAA church plan changes were designed to correct.

Amici also explain why the application of ERISA's church plan exemption to the Defendants' plan does not violate the Establishment Clause.

For these reasons, the amici urge the Court to reverse the district court's orders to the extent that they hold that only a church can establish a church plan under ERISA.

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amendment. Courts should avoid construing statutes in ways that would render them unconstitutional, particularly in cases such as this where Congress clearly sought to equalize tax treatment among religions. …

III. ARGUMENT

A. MPPAA's Changes to the ERISA Church Plan Definition Were Intended to Permit the Employee Benefit Plans of a Church-Associated Employer to Have Church Plan Status, Even if Established by a Church-Associated Employer and Not by a Church.

1. The Original Church Plan Definition in ERISA Recognized the Different Ways in Which Churches are Structured or Voluntarily Cooperate.

In adopting ERISA in 1974, Congress was careful to treat congregational denominations the same as hierarchical ones. Thus, in exempting church plans, it exempted plans established by churches, along with plans established by conventions or association of churches. Congress first used the term "convention or association of churches" in 1950 when it imposed a tax on unrelated business income ("UBIT") upon certain classes of organizations that were otherwise exempt from federal income tax under Code section 501(a). Congress generally made all section 501(c)(3) organizations subject to the tax except churches or conventions or associations of churches.

The phrase "conventions or associations of churches" was added to the UBIT legislation by the Senate at the urging of Baptist leaders who feared the unmodified word "church" used in the House's version of the bill would be interpreted to include only hierarchical organizations and exclude congregational churches (like the SBC) in which each local church is autonomous and there is no

canonical structure uniting them into one organization.[8] A Baptist spokesman proposed an exemption for "autonomous individual churches alone or cooperating together by means of a convention or other form of cooperative religious organization controlled by or principally supported by such independent churches."[9] The Senate Finance Committee amended the legislation with the addition of the phrase "convention or association of churches," thereby including congregational churches and their cooperative endeavors (such as the SBC and the UCC) in the UBIT exemption. Since then, Congress has frequently used the phrase "church or convention or association of churches" in various contexts to provide equal treatment for congregational and hierarchical churches.

2. MPPAA's Changes to the Church Plan Definition Ensured that Benefit Plans of Church-Associated Employers Would Continue to Have Church Plan Status, Even if the Plans Were Established by the Church-Associated Employer and Not by a Church.

Although the church plan definition originally included in ERISA took into account the different polities adopted by churches and church conventions or associations, another aspect of the definition created significant problems for the religious community. The original church plan definition (contained in ERISA section 3(33) and in Code section 414(e)) provided that, for any plan year

[8] *See* Whelan, *supra* at note 4 at 925–6.

[9] Senate Finance Committee, Hearings on H.R. 8920, 81st Cong., 2d Sess. 216 (1950).

beginning after December 31, 1982, the employee benefit plans in which church "agencies" participated or that were established and adopted by church "agencies" could no longer be church plans.[10] Although the term "agencies" was not defined in the statute, the religious community was concerned that the term covered any church-affiliated organization that was not a local house of worship, or "steeple," and thus meant that, effective with the 1983 plan year, the retirement and welfare benefit plans established by churches[11] and in which agencies participated, and the

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[10] The operative language in the original church plan definition creating this problem read as follows:

> (C) Notwithstanding the provisions of paragraph (B)(ii), a plan in existence on January 1, 1974, shall be treated as a "church plan" if it is established and maintained by a church or a convention or association of churches for its employees and employees of one or more agencies of such church (or convention or association) for the employees of such church (or convention or association) and the employees of one or more agencies of such church (or convention or association), and if such church (or convention or association) and each such agency is exempt from tax under section 501 of the Internal Revenue Code of 1954. *The first sentence of this subparagraph shall not apply to any plan maintained for employees of an agency with respect to which the plan was not maintained on January 1, 1974. The first sentence of this subparagraph shall not apply with respect to any plan for any plan year beginning after December 31, 1982.* (Emphasis supplied)

ERISA § 3(33)(C), Pub. L. No. 93-406, 88 Stat. 829, 837–38 (1974).

[11] The term "church" as used throughout the remainder of this brief includes a convention or association of churches.

benefit plans established by these "agency" employers, would no longer have church plan status.[12]

To understand the significance of the MPPAA changes to the church plan definition, it is important to understand the two primary ways in which church benefit plans and programs were then (and still are) structured.

In the case of a church whose polity was hierarchical, the church itself typically established the employee benefit plans in which "steeples" and agencies participated for the benefit of their workers. In these cases the churches typically required all "steeples" and some if not all agencies to participate in such plans—going elsewhere for employee benefits was not an option.

In the case of churches with congregationally-governed polities,[13] however, agency employers (and usually even the "steeples") were generally free to establish their employee benefit plans with any benefit plan provider of their choosing, with one provider option typically being a benefit board or program established by the church. Even in instances where an agency employer was served by a denominationally-created benefits board or program, the agency established its

[12] A variety of church-affiliated organizations are not houses of worship, or "steeples," including colleges, universities, secondary schools, hospitals, nursing homes, children's homes, summer camps, and child-care centers. The various churches have always considered these employers to be within the bounds of their respective church governing structures, or polities.

[13] The theology of most Protestant and Jewish denominations or movements is congregational in nature.

own benefit plans. This was true in 1974 when ERISA was enacted, was true in 1980 when MPPAA was passed, and remains true today.

Faced with the agency problem, a coalition of the chief executive officers and program directors of a number of Protestant and Jewish denominational benefit programs (then known as the Church Alliance for Clarification of ERISA ("CACE")) set about to revise ERISA section 3(33)[14] and address its problems, primarily to preserve church plan status for the benefit plans of church agencies. Achieving this goal was critical for two reasons.

First, the religious community felt that this division of church employers into churches and agencies ignored the historic boundaries established by churches and created two classes of church employers—those that could be in a church plan and those that could not.

Second, there was a concern about whether the assets of retirement plans of "steeples" would, after 1982, be able to be commingled for investment purposes with the assets of retirement plans sponsored by church agencies. Retirement plan

[14] The CACE drafters also revised Code section 414(e), 26 U.S.C. § 414(e). Code section 414(e) contains the identical church plan definition found in ERISA section 3(33). There are a number of special rules and exemptions for church retirement plans in the Code. Compliance with the Code and the rules and regulations adopted by the IRS is important because the failure to do so could result in disqualification of the benefit plan, potentially resulting in significant tax liability for the sponsoring employer and plan participants. As a result, the IRS has issued hundreds of private letter rulings to plan sponsors confirming the church plan status of their plans.

assets of all church-affiliated employers within a particular denomination—both "steeples" and church agencies—were often invested in a common investment pool or pools. CACE was concerned that in this situation all of the assets of a commingled fund might be subject to ERISA's restrictions on plan investments—including those of non-ERISA plans.[15] An inability to commingle would have dramatically affected the ability to provide clergy and church lay workers with a meaningful retirement program, because the retirement plan assets of the agencies and the revenue they generated were essential to creating the economies of scale needed to achieve this result.

After petitioning Congress for relief from the agency problem, the legislative efforts of CACE finally bore fruit in MPPAA when the church plan definition was broadly revised. The breadth of the changes was purposeful. CACE representatives knew, as did the members of Congress and their staff, that the relief provided could not discriminate among different church plans and programs and the employers participating in such programs—or the legislation would be Constitutionally

[15] The concern was well-founded. Department of Labor regulations issued in 1986 provide that all of the assets in a commingled investment entity other than a mutual fund are subject to ERISA's fiduciary and prohibited transactions if 25% or more of the entity's equity interests are held by ERISA plans and plans described in Code section 4975(e)(1). 29 C.F.R. § 2510.3-101(a)(2) and (f), published 51 Fed. Reg. 1937 (Nov. 13, 1986).

problematic.[16] As is explained below, the district court's restrictive reading of the church plan definition would result in different outcomes on church plan status, depending on whether the employer is part of a hierarchically-governed church or a congregationally-cooperating convention or association of churches and church ministry organizations[17]—the very thing Congress properly sought to avoid in amending the church plan definition in MPPAA.

B. The Plain Text of ERISA Permits Church Ministries to Establish Church Plans.

By providing in ERISA section 3(33)(C)(i) that a "plan established and maintained by . . . a church"—essentially, a "church plan" described in section 3(33)(A)—"includes" a plan described in section 3(33)(C)(i), Congress *extended* the church plan exemption to plans described in section 3(33)(C)(i). As noted in *Overall v. Ascension*:

> Section (C) says that "A plan established and maintained…by a church **includes** a plan [meeting the requirements of section (C)(i)]." As Ascension puts it "under the rules of grammar and logic, A is not a

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[16] A thumbprint of Constitutional concern is found in the provision in the church plan definition that deems the employees of church-controlled or associated employers to be church employees. The reference to organizations "controlled by or associated with" ensured that the employees of employers within both hierarchically-governed churches and congregationally-associated church conventions or associations would be treated as church employees—for the Constitution demands as much. ERISA section 3(33)(C)(ii)(II). See *supra* note 7.

[17] For purposes of this brief, a "church ministry organization" or "church ministry" means an organization or other entity controlled by or associated with a church or a convention or association of churches within the meaning of ERISA section 3(33).

> 'gatekeeper' to C; rather if A is exempt and A includes C, then C is also exempt." (Doc. 71 at p. 2). This is how the Court interprets section (C).

23 F.Supp.3d 816, 828 (E.D. Mich. 2014) (emphasis in the original).

If Congress intended that subsection (A) have the "gatekeeper" effect the district court gave it, it could have said in subsection (C) that "a plan maintained by a church involves …." However, it did not—it said that "a plan established and maintained includes …."—a distinction that cannot be ignored.

C. Congress' Use of the Word "Includes" Elsewhere in ERISA Confirms It Intended that Church Ministries be Able to Establish Church Plans.

Under the rule of consistent usage, Congress is presumed to have used the same term consistently within a statute. A similar provision regarding the ERISA exemption for "governmental plans" makes clear that when Congress "includes" additional plans within an ERISA exemption provision, it intends such additional plans to be covered by the exemption.

ERISA does not apply to "governmental plans."[18] ERISA section 3(32) defines a governmental plan as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing." Section 3(32) goes on to "include" as governmental plans:

[18] ERISA § 4(b)(1), 29 U.S.C. § 1003(b)(1).

- plans to which the Railroad Retirement Act of 1935 or 1937 applies and which are financed by contributions required under that Act; and
- plans of international organizations exempt from taxation under the provisions of the International Organizations Immunities Act.[19]

In 2006 Congress amended section 3(32) to also "include[]" as "governmental plans" certain plans "established or maintained" by Indian tribal governments or subdivisions, agencies or subdivisions thereof by merely adding a sentence to that effect to the end of section 3(32).[20]

The initial text in section 3(32) regarding plans "established or maintained" cannot serve as a gatekeeper for the three types of plans noted above because none of the sponsors of those plans could establish or maintain a plan that would qualify as a governmental plan without the special inclusion provision.[21] Thus, Congress clearly intended these three types of plans to be "governmental plans" exempt from ERISA. Similarly, when Congress provided in ERISA section 3(33)(C)(i) that a "church plan" includes plans "maintained" by certain church-affiliated organizations, it intended to extend the church plan exemption to such plans.

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[19] 29 U.S.C. § 1002(32). For a list of such organizations, see http://www.state.gov/documents/organization/87183.pdf (last visited July 6, 2015).

[20] Pension Protection Act of 1986, P.L. 109-280, § 906(a).

[21] Before the 2006 amendment, the Seventh and Ninth Circuits held that ERISA applies to plans established and maintained by Indian tribes. *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989).

Congress also used the term "includes" elsewhere in ERISA to cover items that otherwise would not or might not be encompassed by a definition. For example, ERISA section 514(c)(2), 29 U.S.C. § 1144(c)(2), provides that for purposes of ERISA's preemption provision:

> The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

The Supreme Court has construed this provision as expanding the definition of "State" for preemption purposes to include state agencies and instrumentalities "whose actions might not otherwise be considered state law" using ERISA's general definition of "State" in 29 U.S.C. §1002(10). *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 141 (1990).

D. The Legislative History of MPPAA Confirms That Congress Intended that Church Ministries be Able to Establish Church Plans.

The district court justified its view of the limited scope of ERISA section 3(33)(C)(i) in part by noting that ERISA section 3(33)(C)(i), as amended by MPPAA, provides that a church plan includes a plan "maintained" by a religiously affiliated organization, not a plan "established and maintained" by such an organization.[22]

[22] ER-31.

However, the elimination of the word "established" from what was to become ERISA section 3(33)(C)(i) was intended to *expand* the original proposal. On June 12, 1980, the Senate Finance Committee held a hearing in which Treasury reiterated its "most serious concern" that the bill would exempt plans of church-affiliated hospitals and schools from ERISA's coverage:

> What that bill would permit, it would exclude church agencies from the protection of ERISA, and that would mean that if somebody works for a hospital or a school that happens to be affiliated with a church it would be permissible for that plan to provide no retirement benefits unless they work until age 65, for example.

Exec. Sess. of S. Comm. on Fin., 96th Cong. 41 (June 12, 1980).

Finally, like Treasury, Senator Jacob Javits (the key legislative "father" of ERISA) was "not too happy" about the expansion of the "church plan" exemption to "exempt[] those who work for schools and similar institutions which are church-related." 126 Cong. Rec. 20,180 (1980) (Sen. Javits). However, he noted that to get a bill passed he reluctantly had to concede on some things, this being one. *Id*.

This change in the proposed legislation put congregational churches on the same footing as hierarchical ones. While hierarchical churches could establish church plans at the church level, the polity of many congregational churches precluded such centralization. In such congregational churches the plans would typically be established by affiliated organizations that were either "controlled by or associated with the church." In response to Treasury's objections to the revised

church plan exemption, Senator Talmadge stated that this raised questions of separation of church and state and called for a vote on the expanded exemption. The reaction was a "chorus of ayes" with no opposition. Exec. Sess. of S. Comm. on Fin., 96th Cong. 41 (June 12, 1980).

After Treasury participated in this legislative process and Congress overruled its objections, the IRS revisited its pre-MPPAA guidance regarding church plans in a General Counsel Memorandum issued in 1983.[23] The IRS examined in detail the text of the expanded "church plan" exemption resulting from MPPAA and reversed its pre-MPPAA ruling, concluding that plans of organizations controlled by or associated with churches, in this instance plans for employees of hospitals of religious orders, could be "church plans." *Id*. at *2–6.

The IRS based its guidance on the newly added exemption in Code section 414(e)(3)(A)—the identical Code counterpart to ERISA section 3(33)(C)(i)—which provided that the definition of "church plan" includes plans maintained by organizations that are "controlled by or associated with a church or a convention or association of churches". *Id*. at *7. The IRS also cited Senator Javits' floor statement to note that, as amended, the "church plan" exemption is no longer limited to plans of churches. *Id*. at *6, n.1. Since then, the IRS has continued to interpret the church plan definition as it interpreted it in the General Counsel

[23] IRS Gen. Couns. Mem. 39,007, 1983 WL 197946 (Nov. 2, 1982).

Memorandum, in literally hundreds of private letter rulings issued to organizations seeking an IRS determination on the church plan status of their benefit plans.

E. Since 1983 Congress Has Ratified the Longstanding IRS and Department of Labor Interpretation of the Church Plan Definition by Continuing to Use and Refer to that Definition—Without Change—in a Variety of Other Laws.

As the Supreme Court noted in *Lorillard v. Pons*:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. . . . So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.[24]

Congress has revised the definition of "church plan" in Code section 414(e), the counterpart to ERISA section 3(33), twice since the passage of MPPAA in 1980, and in neither case did it counter the then long-standing and consistent determinations by the IRS and the Department of Labor that church plans could include plans established by church-affiliated organizations described in ERISA section 3(33)(C)(i) and Code section 414(e)(3)(A).[25]

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[24] 434 U.S. 575, 580–81 (1978).

[25] The Small Business Job Protection Act of 1996, P.L. 104-188, § 1461(a), added section 414(e)(5)(E) to the Code to provide a special provision for contributions to tax-qualified retirement plans on behalf of ministers. Congress subsequently amended that provision with the passage of the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 1601(d)(6)(A) and 1522(a)(1)–(2).

Additionally, since the passage of MPPAA in 1980, Congress has enacted the following legislation, all of which reference the church plan definition in ERISA section 3(33) or its counterpart, Code section 414(e). In view of the legislative history cited above, Congress' continued incorporation of the statute demonstrates its original intent and concurrence with agency interpretation and implementation of the provision. In each of the following statutes, Congress continued to employ the same language without changing the IRS's interpretation of the term "church plan":

1990	Excluded church plans from the requirement to provide health continuation coverage under 26 U.S.C. § 4980B. *See* 26 U.S.C. § 4980B(d)(3).
1996	Added § 3(c)(14) to the Investment Company Act of 1940 to exclude from the definition of "investment companies" under that Act church plans and certain accounts that consist substantially of church and church plan assets. See 15 U.S.C. § 80a-3(c)(14). Added § 3(a)(13) to the Securities Act of 1933 to exclude any security issued by or any interest or participation in any church plan from regulation under that Act. See 15 U.S.C. § 77c(a)(13). Added § 3(g) to the Securities Exchange Act of 1934 to exclude church plans from the broker-dealer provisions of that Act. See 15 U.S.C. § 78c(g). Amended § 304(a)(4)(A) of the Trust Indenture Act of 1939 to exclude church plans from the requirements of that Act. See 15 U.S.C. § 77ddd(a)(4)(A).

	Added § 203(b)(5) to the Investment Advisers Act of 1940 to exclude from the requirements of that Act church plans, organizations that establish and maintain church plans, and trustees, directors, officers, employees or volunteers of such plans or organizations. See 15 U.S.C. § 80b-3(b)(5).
	Excluded church plans from the minimum excise tax that otherwise applies to health benefit plans that do not meet certain general requirements. See 26 U.S.C. § 4980D(b)(3)(C).
	Adopted a special rule for church plans in complying with provisions prohibiting discrimination by group health plans based on health status. See 26 U.S.C. § 9802(f).
2000	Enacted the "Church Plan Parity and Entanglement Prevention Act" to amend ERISA to preempt certain state insurance requirements from applying to "church plans." See 29 U.S.C. § 1144a.
2001	Excluded defined benefit church plans from the requirements to notify participants in advance of benefit accrual reductions. See 26 U.S.C. § 4980F(f)(2).

F. Permitting Church Ministries to Establish Church Plans is Consistent with Interpretations by the Internal Revenue Service and Department of Labor and Avoids Constitutional Concerns.

While ERISA's church plan definition clearly permits church ministries to establish church plans, should this Court find it ambiguous, this Court should defer to the interpretation applied by the IRS in hundreds of advisory opinions and by the Department of Labor in numerous advisory opinions.[26] This interpretation

[26] The Supreme Court in *Chevron USA v. National Resources Defense Council*, 467 U.S. 837 (1984) established that, when a statute does not compel a particular disposition of an issue, a court can review an agency's formal interpretation of a

would have the additional benefit of avoiding rendering the definition unconstitutional because it would treat plans established for employees of hierarchical churches and their affiliates the same as plans established for employees of congregational churches and their affiliates. Of course, a court must avoid construing statutes in a manner that would create constitutional problems::

> [W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. . . . "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution.[27]

Of more direct application to the facts here, in *NLRB v. Catholic Bishop of Chicago*,[28] the National Labor Relations Board argued that schools operated by churches had violated the National Labor Relations Act ("NLRA") by refusing to recognize or bargain with unions representing lay faculty members. In interpreting the NLRA, the Supreme Court determined that, where an otherwise acceptable

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statute that it administers and defer to any reasonable interpretation of that statute. In addition, the Court has ruled that agency interpretations that are not the result of a formal and public process can be reviewed under the pre-*Chevron* principles in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Skidmore* stands for the proposition that agency determinations not entitled to *Chevron* deference are nonetheless "entitled to respect."

[27] *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

[28] 440 U.S. 490 (1979).

construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.[29] The Court held that, absent clear Congressional intent to the contrary, the Act should be interpreted in a manner that does not violate the First Amendment.[30]

G. Interpreting ERISA to Permit Church Ministries to Establish Church Plans Avoids Having to Determine When a Church Ministry is Part of a "Church" for Purposes of the Exemption.

If the district court is correct that a plan must be established by a "church" in order to be a "church plan," then when is an agency of a church part of the "church" for this purpose?

Having to answer this question puts this Court on a slippery slope. As mentioned above, one of the problems the religious community had with the original, pre-MPPAA church plan definition was that it created two classes of "church citizens"— "steeples," whose benefit plans (or a multiple employer plan in which they participated) were entitled to church plan status, and church "agencies," whose plans were not. Treasury Regulation section 1.414(e)-1(e) avoids this problem for some hierarchical churches. It provides that the term "church" includes a "religious order or a religious organization if such order or organization

[29] *Id.* at 499–501.

[30] *Id.* at 507.

(1) is an integral part of a church, and (2) is engaged in carrying out the functions of a church, whether as a civil law corporation or otherwise."[31]

The church plan definition as revised by MPPAA and the manner in which it has been interpreted by the IRS for 30-plus years solves this problem for non-hierarchical denominations.[32] The constitutional avoidance rule of statutory construction, discussed above, may again prove useful to this Court because the long-standing interpretation placed on the church plan definition by the IRS, and by the Defendants, amici and the religious community, is a reasonable way to interpret the definition without having to go down the slippery slope of answering the question: "When is an organization part of a 'church'?"

H. ERISA's Church Plan Exemption Does Not Violate the Establishment Clause

Count VIII of Plaintiff's Complaint alleges that ERISA's church plan exemption as applied to the Defendants violates the Establishment Clause.

The Supreme Court has never interpreted the Establishment Clause as preventing legislatures from enacting laws with special reference to religion.

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[31] This exemption was proposed at the time of MPPAA's final passage. Prop. Treas. Reg. §1.414(e)-1, 42 Fed. Red. 18621, 18623 (Apr. 8, 1977).

[32] This was accomplished in the MPPAA revisions by providing that the employees of church-affiliated organizations that were not "steeples" but were either controlled by or associated with a church would be deemed to be church employees. For this purpose, the term "associated with" was broadly drafted to mean the sharing of religious bonds and convictions. ERISA § 3(33)(C)(iv), 29 U.S.C. § 1002(33)(C)(iv).

Indeed, such an interpretation is belied by the very language of the First Amendment, which singles out "religion" for special treatment under both the Free Exercise and Establishment Clauses. See *Thomas v. Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 713 (1981). It often is legitimate (and sometimes is constitutionally required) for legislatures to take the special needs and circumstances of religion into account in drafting laws. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334 (1987); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987); *Gillette v. United States*, 401 U.S. 437, 453 (1971). Thousands of state and federal laws "single out" religion for special treatment. James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 Va. L. Rev. 1407, 1445-49 (1992) (citing more than 2,000 legislative accommodations of religion in federal and state law).

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court articulated a three-prong test for determining whether a legislative act can withstand an Establishment Clause challenge: (1) it must have a secular purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with religion. *Id.* at 612-13. This Court has reaffirmed the continuing vitality of the *Lemon* test in this Circuit. *Newdow v. Rio Linda Union Sch. Dist.* 597 F.3d 1007, 1017 (9th Cir. 2010).

1. ERISA's Church Plan Exemption Has a Secular Purpose

The "secular purpose" test "aims at preventing the relevant governmental decisionmaker...from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335. See Andrew Koppelman, *Secular Purpose*, 88 Va. L. Rev. 87, 89 (2002) (interpreting the secular-purpose requirement as meaning "that government may not declare religious truth"). A statute is not unconstitutional under this test merely because it provides a "benefit" to religion (even intentionally), but "only when…there was no question that the statute or activity was motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

There can be no doubt that Congress intended the MPPAA amendments to ERISA's "church plan" to alleviate a burden on religious institutions, both by overruling the IRS policy of deciding whether hospitals and schools were connected closely enough to the central function of religious worship, and by relieving such institutions of the burden of ERISA compliance. 125 Cong. Rec. 10,052-58 (1979) (Sen. Talmadge).

2. ERISA's Church Plan Exemption Does Not Have the Primary Effect of Advancing Religion

This Nation has a long history of exempting certain religious activities from regulation. These exemptions are best understood as a way of leaving churches alone—of neither advancing nor inhibiting their activities. Such exemptions do

not violate the Establishment Clause. See, e.g., *Amos* (exemption for religious organizations in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1 from Title VII's general prohibition against religious discrimination did not violate the Establishment Clause.)

ERISA's church plan exemption is not like the Texas statute struck down in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) that exempted from state sales and use taxes "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teachings of the faith and books that consist wholly of writings sacred to a religious faith," *id.* at 5. Rather, it is comparable to the property tax exemption upheld in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), that exempted property used for religious purposes together with property used for charitable, educational and other purposes. ERISA section 4(a) excludes four other types of plans in addition to church plans: (i) governmental plans; (ii) plans maintained to comply with workmen's compensation, unemployment or disability insurance laws; (iii) certain foreign plans; and (iv) unfunded excess benefit plans.

3. ERISA's Church Plan Exemption Does Not Foster Excessive Government Entanglement with Religion

Congress originally exempted church plans from ERISA apparently to avoid First Amendment challenges based on entangling governmental regulations. Peter J. Weidenbeck, *ERISA's Curious Coverage*, 26 Wash. U.L.Q. 311, 348 (1998).

The legislative history of MPPAA indicates that the many changes to the definition of "church plan" made by that Act were intended to make the definition more inclusive of all churches. 125 Cong. Rec. 10,052 (statement of co-sponsor Sen. Talmadge) (criticizing the original definition as "so narrow that it almost completely fails to consider the way our church plans have for decades operated."). As amended, the definition *reduces* government entanglement because it eliminates the need to determine when an organization is part of a church or an association or convention of churches.

IV. CONCLUSION

The church plan definition was intentionally designed by Congress to be applied broadly and flexibly to account for the many and varied types of religious organizations pursuing their respective religious convictions and beliefs in the United States. The hallmark of congregationally-governed church conventions and associations, like the SBC and the UCC, is that each organization that voluntarily associates with it is an autonomous decision-making entity. For example, except for a few historic entities formed by the SBC or the UCC, like the Congregational Benefit Boards, neither the SBC nor the UCC exercises control over associated churches or ministry organizations. Amici believe that construing the church plan definition in a way that would treat plans established by employers within a congregationally-governed convention differently than plans established by a

hierarchically-governed church would violate the Establishment Clause and unnecessarily entangle the government with religion.

If upheld, the district court's decision will disrupt the meaning of numerous other federal laws referencing "church plans", thus creating significant uncertainty as to the meaning and effect of these laws in the day-to-day operation of church benefits programs. For example, church ministries could find themselves in violation of various federal securities laws for not having registered interests in church retirement plans as securities or themselves as investment advisers.

In addition, although many employee medical plans sponsored by church ministries provide for some level of continuation coverage for employees following termination of employment, such coverage may not meet all the requirements for continuation coverage under ERISA and the Code. 29 U.S.C. §§ 1161–69 and 26 U.S. C. § 4980B. Church plans are exempt from these requirements unless they have elected to be covered by ERISA. 29 U.S.C. §1003(b)(2), 26 U.S.C. § 4980B(d)(3). If upheld, the district court's decision could also expose church ministries sponsoring such plans to a $100 per day penalty for "each individual to whom such failure relates." 26 U.S.C. § 4980D.

For these reasons, amici urge the Court to reverse the district court's orders to the extent that they hold that only a church can establish a church plan under ERISA.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) and Circ.R. 29-2(c) because this brief contains 6,823 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

In addition, this brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010, typeface of 14 points and type style of Times New Roman.

/s/ Laurence A. Hansen

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2015, the *Amici Curiae* Brief of Guidestone Financial Resources of the Southern Baptist Convention, The Pension Boards-United Church of Christ, Inc., and the Church Alliance is Support of the Defendant-Appellant Dignity Health and Reversal was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Laurence A. Hansen