

Resolving ERISA's "Church Plan" Problem

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Introduction

The Employee Retirement and Income Security Act of 1974 (ERISA)¹ governs almost all benefit plans sponsored by private employers. "Church plans," however, are expressly excluded from ERISA.² While some plans wish to fit within the exemption, others do not. Many pension plans, for example, have argued they are not subject to ERISA's funding requirements because they are exempt church plans.³ Conversely, many employee welfare plans—providing, for example, life, health, and disability benefits—have sought to prove they are not church plans so they can enjoy ERISA's benefits, such as state law preemption and favorable judicial review of claim denials.⁴

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1. 29 U.S.C. §§ 1001–1461 (2012).

2. *Id.* §§ 1002(33) (church plan definition), 1003(b)(2) (church plan exemption). The term "church" encompasses worship centers that are not called churches, such as synagogues and mosques.

3. *See, e.g., Stapleton v. Advocate Health Care Network (Stapleton I)*, 76 F. Supp. 3d 796, 797 (N.D. Ill. 2014), *aff'd*, No. 15-1368, 2016 WL 1055784 (7th Cir. Mar. 17, 2016) ("Plaintiffs allege that Advocate has not maintained its pension plan according to [ERISA] . . . Advocate has moved to dismiss the complaint . . . arguing that its plan falls within the church plan exemption. . . ."); *Overall v. Ascension*, 23 F. Supp. 3d 816, 827–29 (E.D. Mich. 2014); *Medina v. Catholic Health Initiatives (Medina I)*, No. 13-cv-01249-REB-KLM, 2014 WL 3408690, at *1–3 (D. Colo. July 9), *report and recommendation rejected* by No. 13-cv-01249-REB-KLM, 2014 WL 4244012, at *1–3 (D. Colo. Aug. 26, 2014); *Kaplan v. Saint Peters Healthcare Sys. (Kaplan I)*, No. 13-2941 (MAS) (TJB), 2014 WL 1284854, at *4–5 (D.N.J. Mar. 31, 2014), *aff'd*, No. 15-1172, 2015 WL 9487719 (3d Cir. Dec. 29, 2015); *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 911–12 (N.D. Cal. 2013); *Thorkelson v. Publ'g House of the Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1124–29 (D. Minn. 2011); *Torres v. Bella Vista Hosp., Inc.*, 523 F. Supp. 2d 123, 141–45 (D.P.R. 2007); *Friend v. Ancillia Sys. Inc.*, 68 F. Supp. 2d 969, 971–73 (N.D. Ill. 1999); *Humphrey v. Sisters of Saint Francis Health Servs., Inc.*, 979 F. Supp. 781, 785–86 (N.D. Ind. 1997); *Harclerode v. Sisters of Mercy of Indep.*, No. 79-4022, 1981 WL 394149, at *1–3 (D. Kan. Nov. 3, 1981).

4. *See, e.g., Chronister v. Baptist Health*, 442 F.3d 648, 651–54 (8th Cir. 2006) (disability benefit plan not a church plan because organization was not "controlled by or associated with" church); *Hall v. USABLE Life*, 774 F. Supp. 2d 953, 957–61 (E.D. Ark. 2011); *Rinehart v. Life Ins. Co. of N. Am.*, No. Co8-5486 RBL, 2009 WL 995715, at *1–5 (W.D. Wash. Apr. 14, 2009); *Welsh v. Ascension Health*, No. 3:08cv348/MCR/EMT, 2009 WL

Faced with disputes over church-plan status, federal courts have not been a beacon of uniformity. Five federal courts—now including the U.S. Courts of Appeals for both the Third and Seventh Circuits—have arrived at a “narrow interpretation,” holding that ERISA requires church plans to be “established” by churches, regardless of how the plans are later “maintained.”⁵ In contrast, at least eight lower federal courts have followed a “broad interpretation,” holding that church plans do not have to be established by churches as long as the plans are properly maintained by a church-affiliated organization.⁶ The Ninth Circuit will soon come down on one side or the

144431, at *2–7 (N.D. Fla. May 21, 2009); *Goetz v. Greater Ga. Life Ins. Co.*, 554 F. Supp. 2d 831, 834–37 (E.D. Tenn. 2008); *Lown v. Cont’l Cas. Co.*, 238 F.3d 543, 547–48 (4th Cir. 2001); *Duckett v. Blue Cross & Blue Shield of Ala.*, 75 F. Supp. 2d 1310, 1315–17 (M.D. Ala. 1999); *see also* 29 U.S.C. § 1144 (2012) (broad ERISA state law preemption); *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 110–12 (2008) (abuse of discretion standard of review applies to plans that provide administrators or fiduciaries discretionary authority to decide benefit claims).

5. *Stapleton v. Advocate Health Care Network (Stapleton II)*, No. 15-1368, 2016 WL 1055784, at *3–11 (7th Cir. Mar. 17, 2016); *Kaplan v. Saint Peter’s Healthcare Sys. (Kaplan II)*, No. 15-1172, 2015 WL 9487719, at *4–5 (3d Cir. Dec. 29, 2015); *Rollins*, 19 F. Supp. 3d at 911–18; *Stapleton I*, 76 F. Supp. 3d at 796–97; *Kaplan I*, 2014 WL 1284854, at *4–5 (a church plan can be “established and maintained by a church, or . . . established by a church and maintained by a tax-exempt organization, the principal purpose or function of which is the administration or funding of the plan, that is either controlled by or associated with a church”); *see also* Norman Stein, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, EMP. BENEFITS COMMITTEE NEWSL. (Am. Bar Ass’n Section of Labor & Emp’t Law, Chicago, IL), Summer 2014, http://www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_sum_ebc_news/faith.html (favoring the narrow interpretation); *cf. Medina I*, 2014 WL 3408690, at *7.

6. *See Lann v. Trinity Health Corp.*, No. PJM 14-2237, 2015 WL 6468197, at *1 (D. Md. Feb. 24, 2015) (“29 U.S.C. § 1002(33) permits an organization that is ‘controlled by or associated with a church or convention of churches’ to establish a ‘church plan. . . .’”); *Overall*, 23 F. Supp. 3d at 827–29; *Medina v. Catholic Health Initiatives (Medina II)*, No. 13-cv-01249-REB-KLM, 2014 WL 4244012, at *2 (D. Colo. Aug. 26, 2014) (“[T]he magistrate judge concluded that subsection (C)(i) modifies subsection (A) only as to the requirement regarding who may maintain the plan, but that the statute still requires that the plan first be established by a church. . . . I must respectfully reject this conclusion.”); *Thorkelson*, 764 F. Supp. 2d at 1124–29 (plan established by nonprofit church organization and maintained by pension committee is a church plan); *Hall*, 774 F. Supp. 2d at 955–61 (plan established and maintained by nonprofit organization controlled by or associated with church is a church plan); *Welsh*, 2009 WL 144431, at *7 (“[T]he plan was established and is maintained for Ascension’s workers, and Ascension is a tax exempt organization that admittedly is controlled by or associated with the Catholic Church.”); *Lown*, 238 F.3d at 547–48 (“[A] plan established by a corporation associated with a church can still qualify as a church plan.”); *Friend*, 68 F. Supp. 2d at 971–73 (plan established and maintained by a nonprofit organization controlled by or associated with a church is a church plan. It is not required to be administered by an organization under subsection § 1002(33)(C)(i)); *see also Goetz*, 554 F. Supp. 2d at 834–37 (seemingly approving of broad interpretation, but finding lack of church association or control); *Torres*, 523 F. Supp. 2d at 141–45 (seemingly approving of broad interpretation, but finding lack of church association or control, and plan elected for ERISA to apply); G. Daniel Miller, *The Church Plan Definition—A Reply to Norm Stein*, EMP. BENEFITS COMMITTEE NEWSL. (Am. Bar Ass’n Section of Labor & Emp’t Law, Chicago, IL), Fall 2014, <http://www>.

other, while the remaining circuits may be in limbo until the Supreme Court rules on the issue.

Resolution of this judicial conflict will affect millions of employees across the country who work for nonprofit religious organizations, such as schools and hospitals.⁷ Frequently, churches do not establish religious nonprofits' employee benefit plans. A church would only be considered to "establish" a plan if it created the plan and defined its benefits, its eligible employees, and its procedure for receiving benefits.⁸ Yet, if benefit plans qualify as church plans simply by showing they are maintained by certain church-affiliated organizations,⁹ then nonprofits qualify without having to show who established their plans. Broad construction of the ERISA church plan definition thus exempts more religious nonprofit plans than the narrow construction.¹⁰

Whether a plan is a church plan exempt from ERISA greatly affects participants, beneficiaries, and plan sponsors. Church plans have more freedom in their design, structure, and operation. For example, church plans are not subject to summary plan description and disclosure requirements, civil penalties, broad fiduciary duties, mandatory claim procedures, the requirement that a pension plan's assets at least equal its liabilities, and—perhaps most importantly—that premiums be paid to the Pension Benefit Guaranty Corporation to protect those benefits.¹¹ However, since church plans are not protected from state law by ERISA preemption, they may be subject to state causes of action, such as breach of contract, negligence, and statutory claims. Additionally, church plans may be liable under state law for extra-contractual damages such as punitive damages. Whether a plan is a church plan fundamentally alters the parties' rights and responsibilities.

Although the stakes are high and the courts split, the question of church-plan status involves fairly straightforward statutory interpreta-

americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_fall_ebc_news/church.html (favoring the broad interpretation).

7. In 2013, Catholic nonprofit hospitals alone employed 521,821 full-time employees and 223,800 part-time employees nationally. *Catholic Health Care in the United States*, CATH. HEALTH ASS'N OF THE U.S. (Jan. 2015), https://www.chausa.org/docs/default-source/general-files/cha-us-health-care-at-a-glance_january-2015.pdf?sfvrsn=0.

8. *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) ("[A] 'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.")

9. Courts have not expressly defined what it means to maintain a plan, instead finding the meaning self-evident. The word "maintain" used throughout ERISA conforms with its basic dictionary definition: to cause something to continue to exist. *See, e.g., Maintain*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/maintain> (last visited Feb. 7, 2016) ("to cause (something) to exist or continue without changing").

10. *See infra* Part II.D. (discussing Department of Labor (DOL) and Internal Revenue Service (IRS) administrative rulings).

11. *See, e.g.*, 29 U.S.C. §§ 1021–1025, 1081–1086, 1101–1109, 1132(c), 1133, 1302 (2012); 29 C.F.R. § 2560.503–1 (2014) (claims procedures).

tion.¹² ERISA, together with the Internal Revenue Code (IRC), heavily favors the broad interpretation. Part I of this Article explains the legal arguments supporting each of the conflicting judicial interpretations of the church plan definition. Part II uses basic statutory interpretation techniques to find much more support for the broad interpretation.

I. The Split

ERISA “shall not apply” to a church plan unless the plan elects otherwise.¹³ Instead, other federal, state, and local laws govern church plans. Congress initially exempted church plans to prevent government intrusion into churches’ private records.¹⁴

Courts have had difficulty discerning the specific requirements and scope of 29 U.S.C. § 1002(33), ERISA’s church plan definition. There are two important subsections within the definition:

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

(C) For purposes of this paragraph—

(i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.¹⁵

12. This Article does not address the argument, raised by some parties, that the church plan exemption is unconstitutional as a violation of the Establishment Clause of the First Amendment. *See, e.g.,* Overall v. Ascension, 23 F. Supp. 3d 816, 832–33 (E.D. Mich. 2014) (dismissing claim for lack of standing). Only one court has addressed the merits of this argument, finding that the church plan exemption is constitutional. *See* Medina v. Catholic Health Initiatives (*Medina III*), No. 13-cv-01249-REB-KLM, 2015 WL 8146404, at *1 (D. Colo. Dec. 8, 2015).

13. 29 U.S.C. § 1003(b).

14. *See* S. REP. No. 93-383, at 81 (1973) (Committee on Finance Report on Private Pension Plan Reform). One author, however, identified another possible congressional motivation. *See* Stein, *supra* note 5 (arguing the exemption was based on a belief that churches would fulfill a moral commitment adequately to protect employees).

15. 29 U.S.C. § 1002(33). The original version of the definition was as follows:

(33) (A) The term church plan means (i) a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954, or (ii) a plan described in subparagraph (C).

Subsection (A) states the basic church plan definition, which requires a church or a convention or association of churches to establish, as well as maintain, a plan. Subsection (C)(i), in contrast, seems to state that church plans, by definition, include plans maintained by certain church-affiliated organizations. Is a plan a church plan if it is maintained by such an organization, regardless of whether it was established by a church? Or, conversely, to be a church plan, must it also have been established by a church as reading subsection (A) alone would suggest? The former is a broad interpretation, and the latter is a narrow interpretation.

Courts adopting the broad interpretation primarily rely on the plain language of subsection (C)(i).¹⁶ One court explained:

[S]ubsection (C) clearly evinces an intent to broaden the availability of the exemption such that churches themselves need not be involved directly in the administration of their employee benefit plans in

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

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 3(33), 88 Stat. 829, 838. Many of the statutory changes were borrowed—or at least inspired—by the IRS regulation defining a church plan. See 26 C.F.R. § 1.414(e)-1 (2015). Although Congress amended the statutory definition several months after the IRS created this regulation, the IRS never amended the regulation.

16. See, e.g., *Overall*, 23 F. Supp. 3d at 827–29 (“Under the plain language the plan ‘is established and maintained by a church’ if it meets the other requirements of Section (C)(I).”); *Medina II*, 2014 WL 4244012, at *2–8 (“[T]he plain language clearly supports the conclusion that a plan that meets the requirements of subsection (C)(i) putatively qualifies for the exemption—without further, separate proof of establishment by a church—if the remaining requirements of the statute are otherwise met.”); *Thorkelson v. Publ’g House of the Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1124–29 (D. Minn. 2011) (“The applicable case law and agency decisions of the IRS and the DOL support this straightforward interpretation of the relevant ERISA language—that the analysis should focus on whether the Plan is sponsored by a tax-exempt entity, and whether such entity is controlled by or associated with a church.”); *Rinehart v. Life Ins. Co. of N. Am.*, No. Co8-5486 RBL, 2009 WL 995715, at *4–20 (W.D. Wash. Apr. 14, 2009) (“The term ‘church plan’ is somewhat misleading because even a plan established by a corporation *controlled by or associated with* a church can also qualify as a church plan.” Thus, nonprofit organizations controlled by or associated with a church can both establish and maintain church plans.); *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 84–86 (D. Me. 2004) (“For ERISA purposes, therefore, I conclude that Catholic Charities employees are considered employees of the Roman Catholic Church and the health benefit plans are treated as established and maintained by the Church for its employees.”).

order to qualify. To that end, subsection (C) describes a particular way in which a church plan may meet the requirement that it be “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. This interpretation is driven by the language of the subsection itself, which states that a plan “established and maintained” as a church plan “includes” such a plan. In other words, “under the rules of grammar and logic, . . . if A is exempt and A includes C, then C is also exempt.”¹⁷

“To find otherwise would render section (C) meaningless.”¹⁸ The Internal Revenue Service (IRS) and the Department of Labor (DOL) have consistently followed this construction for decades.¹⁹

In contrast, courts adopting the narrow interpretation read subsection (C)(i) as merely clarifying the maintenance requirement in subsection (A).²⁰ One court explained:

The key to this interpretation is to recognize that subsection A is the gatekeeper to the church plan exemption: although the church plan definition, as defined in subsection A, is expanded by subsection C to include plans *maintained* by a tax-exempt organization, it nevertheless requires that the plan be *established* by a church or a convention or association of churches. In other words, if a church does not establish the plan, the inquiry ends there. If, on the other hand, a church establishes the plan, the remaining sections of the church plan definition are triggered.²¹

These courts believe that broad interpretation of subsection (C) renders subsection (A) “meaningless,” an exception that “swallows the rule.”²² The Seventh Circuit, for example, believed that churches may

17. *Medina II*, 2014 WL 4244012, at *2–3 (first quoting 29 U.S.C. § 1002(33)(C)(i); then quoting *Overall*, 23 F. Supp. 3d at 828).

18. *Overall*, 23 F. Supp. 3d at 829.

19. See discussion *infra* Part II.D.

20. See, e.g., *Kaplan v. Saint Peter’s Healthcare Sys. (Kaplan II)*, No. 15-1172, 2015 WL 9487719, at *4 (3d Cir. Dec. 29, 2015) (“[H]ere we have two requirements—establishment and maintenance—and only the latter is expanded by the use of ‘includes.’”). *Kaplan v. Saint Peter’s Healthcare Sys. (Kaplan I)*, No. 13-2941 (MAS)(TJB), 2014 WL 1284854, at *7 (D.N.J. Mar. 31, 2014), *aff’d*, No. 15-1172, 2015 WL 9487719 (3d Cir. Dec. 29, 2015) (“The term ‘includes’ merely provides an alternative to the maintenance requirement but does not eliminate the establishment requirement.”); *Stapleton v. Advocate Health Care Network (Stapleton I)*, 76 F. Supp. 3d 796, 801 (N.D. Ill. 2014), *aff’d*, No. 15-1368, 2016 WL 1055784 (7th Cir. Mar. 17, 2016). *Stapleton I* explained:

Subsection 33(C)(i)’s use of the word “includes” (as in, “includes a plan maintained by an organization”) means that it identifies a *subset* of plans that qualify for the church plan exemption as defined by subsection 33(A)—specifically, plans need not be maintained by a church, and instead may be maintained by a church-affiliated corporation.

Id.

21. *Kaplan I*, 2014 WL 1284854, at *5.

22. See *Kaplan II*, 2015 WL 9487719, at *5 (argument that a plan need only be maintained and not established by a church would render superfluous “the church establishment requirement in § 3(33)(A) . . . because any plan, regardless of who established

include the employees of church-affiliated organizations in the church's plan, but that those entities may not maintain a separate plan.²³ These courts also find that the legislative history indicates Congress intended the church plan exemption to be narrow.²⁴ To the extent they find

it, would be eligible for an exemption as long as it is maintained by an entity that meets the requirements of § 3(33)(C)(i)"); *Kaplan I*, 2014 WL 1284854, at *6–7 (the broad interpretation "ignores—and renders superfluous—Section A which requires a church to establish a church plan. . . . Defendants' interpretation would expand the church plan definition to untenable bounds and, in the process, change the plain text of the statute."); *Medina v. Catholic Health Initiatives (Medina I)*, No. 13-cv-01249-REB-KLM, 2014 WL 3408690, at *7 (D. Colo. July 9, 2014) ("If Defendants' argument that the CHI Plan is a church plan because it is *maintained* by a [church]-associated organization is correct, section A's requirement that a church plan be *established* by a church or a church-affiliated organization would be rendered meaningless." (In an apparent typographical error, the opinion says "court-associated" rather than church-associated.)); *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 911–18 (N.D. Cal. 2013):

If, as Dignity argues, all that is required for a plan to qualify as a church plan is that it meet section C's requirement that it be maintained by a church-associated organization, then there would be no purpose for section A, which defines a church plan as one established and maintained by a church. . . . Dignity's suggested interpretation would reflect a perfect example of an exception swallowing the rule. . . . The Court cannot agree with the notion that Congress could have intended the narrow permission in section C(i) to—by implication—entirely consume the rule it clearly stated in section A.

Id.; *Thorkelson v. Publ'g House of the Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1124–29 (D. Minn. 2011):

Plaintiffs thus argue that the Plan is not a church plan. If a single-employer plan of a church-related agency is deemed a church plan under ERISA, Plaintiffs argue that any stand alone plan of a church-related school, hospital or publisher is a church plan and the whole structure of ERISA, with its elaborate cross references and definitions, is nonsensical. Congress could have easily modified the statute in 1980 to define a church plan as a plan established by a church or tax exempt entity associated with a church.

Id.; see also *Stapleton I*, 76 F. Supp. 3d at 803 ("If Congress had intended for the church plan exemption to apply to plans never actually set up by churches (and merely run by organizations claiming a later religious association . . .), it would not have evinced that intent in such a roundabout way.")

23. *Stapleton v. Advocate Health Care Network (Stapleton II)*, No. 15-1368, 2016 WL 1055784, at *10–11 (7th Cir. Mar. 17, 2016) ("[A]n established church plan may include employees of a church-affiliated organization."); *id.* at *23 ("[T]he legislative record clearly supports an intent to continue to allow employees of church-affiliated organizations to be included in church plans."); *id.* at *24 ("The ERISA exemption does not hinder a church's ability to include its affiliated-organization employees in its plan in any regard.")

24. See *id.* at *18–23; *Stapleton I*, 76 F. Supp. 3d at 803–05; see also *Kaplan I*, 2014 WL 1284854, at *9:

Both Parties seek refuge in the legislative history by pointing particularly to comments made on the congressional floor that purportedly support their reading of the statute. However, "where the text of a statute is unambiguous, the statute should be enforced as written and '[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.'"

Id. (alteration in original) (citations omitted) (quoting *In re Phila. Newspapers, LLC*, 599 F.3d 298, 314 (3d Cir. 2010)).

ambiguity, these courts rely on the rule of statutory construction that remedial exemptions should be construed narrowly.²⁵

II. Statutory Construction Supports the Broad Interpretation

The plain language of ERISA's subsection (C)(i)²⁶ and persuasive agency interpretations support broad interpretation of the church plan exemption. Courts should exempt from ERISA benefit plans maintained by religious nonprofit organizations, such as religious hospitals and schools, satisfying subsection (C)(i)'s requirements.

A. Plain Language of Subsection (C)(i)

Three reasons explain why the plain text of subsection (C)(i) supports broad interpretation of the church plan exemption. First, the narrow interpretation renders two words—"established and"—completely meaningless. If the subject and purpose of this statutory paragraph were limited only to clarifying how a plan can be maintained, there would be no reason for Congress to say: established *and* maintained. Instead, it would state: "A plan *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."²⁷ This would expressly and unambiguously limit subsection (C)(i) to the maintenance requirement in subsection (A) and would leave untouched subsection (A)'s establishment requirement. However, Congress included both established *and* maintained in subsection (C)(i). *Both* words must be given effect. That is, the statutory language directs that a plan satisfying subsection (C)(i) should be treated as a plan "established and maintained by a church," even though the plan was not actually established and is not actually maintained by a church. No court has directly addressed this argument before, and thus no court adopting the narrow interpretation has explained why its construction does not render the two words—"established and"—meaningless.

Some courts, however, have indirectly addressed this issue by pretending it does not exist. Rather than acknowledging that almost the entirety of subsection (A) is repeated in the beginning of subsection (C)(i), and analyzing the implications thereof, the courts supporting the narrow

25. See *Kaplan II*, 2015 WL 9487719, at *6 ("[C]onstruing plans established by church hospitals to be exempt 'would achieve quite the opposite' result of the canon directing us to construe exemptions narrowly."); *Stapleton I*, 76 F. Supp. 3d at 803 (citing *Kaplan I*, 2014 WL 1284854, at *6; *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 614 n.33 (1981)); *Kaplan I*, 2014 WL 1284854, at *6–7 ("What must be kept in mind is that ERISA is a remedial statute, so any exemptions included thereunder should be construed narrowly. . . . Defendants' interpretation would achieve quite the opposite.") (citing *Rodriguez*, 451 U.S. at 614 n.33).

26. Set forth *supra* in text accompanying note 15.

27. *But see* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 407(a), 94 Stat. 1208, 1304 ("established and maintained").

interpretation oversimplify the statute and completely ignore the key language. As the Seventh Circuit stated: "If we use the linguistic simplifications . . . leaving intact the controverted language, the whole subsection reads as follows: 'A church plan includes a plan maintained by a church-affiliated organization.'"²⁸ But again, that is not what the statute says, and courts should not interpret a convenient rewording of the statute, but only the actual language Congress enacted.

Second, subsection (C)(i) uses the word "includes" to describe a plan established and maintained by a church.²⁹ Congress uses the word "include" when it intends to expand a general definition or rule by bringing something outside of the definitional boundaries within them. This is not unusual. Congress frequently employs this basic principle of statutory drafting, including in the IRC,³⁰ ERISA,³¹ and

28. *Stapleton II*, 2016 WL 1055784, at *4 (emphasis added).

29. 29 U.S.C. § 1002(33)(C)(i) (2012).

30. *See, e.g.*, 26 U.S.C. § 48(c)(2)(C) (2012) ("Such term also *includes* all secondary components located between the existing infrastructure for fuel delivery and the existing infrastructure for power distribution, *including* equipment and controls for meeting relevant power standards, such as voltage, frequency, and power factors.") (emphasis added); *id.* § 72(l) ("For purposes of this section, the term 'endowment contract' *includes* a face-amount certificate . . . issued after December 31, 1954.") (emphasis added) (internal citation omitted); *id.* § 142(d)(4)(C)(ii) ("The term 'gross rent' *includes* . . . (I) any payment under section 8 of the United States Housing Act of 1937, and (II) any utility allowance determined by the Secretary. . .") (emphasis added); *id.* § 142(f)(4)(C) ("[T]he term 'person' *includes* a group of related persons. . .") (emphasis added); *id.* § 142(g)(2)(B) ("For purposes of this paragraph, a local system *includes* facilities furnishing heating and cooling to an area consisting of a city and 1 contiguous county.") (emphasis added); *id.* § 162(c)(2) ("For purposes of this paragraph, a kickback *includes* a payment in consideration of the referral of a client, patient, or customer.") (emphasis added); *id.* § 219(f)(1) ("For purposes of this section, the term 'compensation' *includes* earned income. . . . The term compensation *includes* any differential wage payment. . .") (emphasis added); *id.* § 401(c)(2)(C) ("[T]he term 'earned income' *includes* gains . . . and net earnings derived from the sale or other disposition of, the transfer of any interest in, or the licensing of the use of property (other than good will) by an individual whose personal efforts created such property.") (emphasis added); *id.* § 402(e)(4)(E)(ii) ("The term 'securities of the employer corporation' *includes* securities of a parent or subsidiary corporation. . .") (emphasis added); *id.* § 457(f)(3)(A) ("The term 'plan' *includes* any agreement or arrangement.") (emphasis added); *id.* § 856(c)(5)(C) ("The term interests in real property *includes* fee ownership and co-ownership of land or improvements thereon, leaseholds of land or improvements thereon, options to acquire land or improvements thereon, and options to acquire leaseholds of land or improvements thereon, but does not include mineral, oil, or gas royalty interests.") (emphasis added); *id.* § 7701(a)(3) ("The term 'corporation' *includes* associations, joint-stock companies, and insurance companies.") (emphasis added).

31. 29 U.S.C. § 1002(5) (2012) ("The term 'employer' means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and *includes* a group or association of employers acting for an employer in such capacity.") (emphasis added); *id.* § 1002(10) ("The term 'State' *includes* any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone.") (emphasis added); *id.* § 1002(12) ("The term 'industry or activity affecting commerce' . . . *includes* any activity or industry 'affecting commerce' within the meaning of the Labor Management Relations Act, 1947 or the Railway Labor Act.") (emphasis added) (citations omitted); *id.* § 1002(32) ("The term 'governmental plan' . . . *includes* any plan to which the Railroad Retirement

even in statutes where the object being “included” seems directly to contradict the defined term under which it is being “included” (likely because there is a good policy reason for expanding the defined term to include those situations).³² A prime example is subsections (C)(ii) and (C)(iii) of the ERISA church plan provision, which include under the “church employee” definition former employees and employees of other organizations—people who are clearly not employed by the church.³³ Similarly, the word “includes” in subsection (C)(i) expresses Congress’s intent to bring a specific type of plan under the church plan definition, even though such plan would otherwise lie outside the definition’s boundaries.

Third, Congress did not include language conditioning subsection (C)(i) on establishment by a church. If Congress intended the provision only to clarify how a plan can be maintained, it would have included language conditioning church plan status on meeting the requirements of subsections (C)(i) *and* (A). There are numerous ways Con-

Act of 1935, or 1937, applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act.”) (emphasis added) (citations omitted); *id.* § 1101(b)(2)(B) (“The term ‘guaranteed benefit policy’ means an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer. Such term *includes* any surplus in a separate account, but excludes any other portion of a separate account.”) (emphasis added); *id.* § 1101(c)(7) (“For purposes of this subsection, the term ‘policy’ *includes* a contract.”) (emphasis added).

32. *See, e.g.*, 26 U.S.C. § 168(h)(1)(E) (2012) (“[T]he term ‘nonresidential real property’ *includes* residential rental property.”) (emphasis added). Section 3306(m) states:

[T]he term “American vessel” means any vessel documented or numbered under the laws of the United States; and *includes* any vessel which is neither documented or numbered under the laws of the United States nor documented under the laws of any foreign country, if its crew is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State. . . .

Id. § 3306(m) (emphasis added).

33. 29 U.S.C. § 1002(33)(C)(ii) states:

The term employee of a church or a convention or association of churches *includes* . . . (II) an employee of an organization . . . which is exempt from tax . . . and which is controlled by or associated with a church or a convention of churches; and (III) an individual described in clause (v).

Id. (emphasis added); *id.* § 1002(33)(C)(iii) (“A church or a convention or association of churches which is exempt from tax under section 501 of title 26 shall be deemed the employer of any individual included as an employee under clause (ii).”). Section 1002(33)(C)(v) provides:

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

Id. § 1002(33)(C)(v).

gress might have expressed this intention. For example, Congress could have (1) used only the word "maintained" instead of the full phrase "established and maintained" in subsection (C)(i);³⁴ (2) used the phrase "may include" instead of "includes";³⁵ (3) expressly specified that subsection (C)(i) is "subject to" establishment by a church under subsection (A);³⁶ or (4) stated that a plan maintained by an organization meeting the subsection (C)(i) requirements is exempted "only if such plan is established by a church."³⁷ These are all common statutory

34. See *supra* note 29 and accompanying text.

35. See, e.g., 26 U.S.C. § 48D(d)(2)(C) ("An application for certification under subsection (A) may include a request for an allocation of credits for more than 1 of the years described in paragraph (1)(B).") (emphasis added); *id.* § 401(k)(4)(B)(i) ("Except as provided in clause (ii), any organization exempt from tax under this subtitle may include a qualified cash or deferred arrangement as part of a plan maintained by it.") (emphasis added); *id.* § 408(c) ("A trust created or organized in the United States by an employer for the exclusive benefit of his employees or their beneficiaries, or by an association of employees (which may include employees within the meaning of section 401(c)(1)) . . . shall be treated as an individual retirement account. . . .") (emphasis added) (citation omitted); *id.* § 415(n)(3)(A)(iii) ("Such term may include service credit for periods for which there is no performance of service, and, notwithstanding clause (ii), may include service credited in order to provide an increased benefit for service credit which a participant is receiving under the plan.") (emphasis added); *id.* § 419A(c)(2) ("The account limit for any taxable year may include a reserve funded over the working lives of the covered employees and actuarially determined on a level basis. . . .") (emphasis added); *id.* § 419A(c)(6)(A) ("An applicable account limit for any taxable year may include a reserve in an amount not to exceed 35 percent of the sum of. . . .") (emphasis added); *id.* § 432(e)(3)(A)(i) ("A rehabilitation plan is a plan which consists of . . . actions, . . . [which] may include reductions in plan expenditures (including plan mergers and consolidations), reductions in future benefit accruals or increases in contributions, if agreed to by the bargaining parties.") (emphasis added); *id.* § 432(e)(9)(D)(vi) ("Any suspensions of benefits shall be equitably distributed across the participant and beneficiary population, taking into account factors . . . that may include one or more of the following. . . .") (emphasis added); *id.* § 7526(c)(5) ("Matching funds may include") (emphasis added); *id.* § 9712(c)(2) ("Major elements of such rules may include, but are not limited to, elements described in paragraph (3).") (emphasis added); 29 U.S.C. § 1002(37)(F)(i)(II) ("[A] qualified football coaches plan . . . may include a qualified cash and deferred arrangement.") (emphasis added); *id.* § 1147(b) ("Such assistance may include the assignment of personnel.") (emphasis added).

36. See, e.g., 26 U.S.C. § 404(g)(3)(A) ("Except as otherwise provided in this paragraph, any payment described in paragraph (1) shall (subject to the last sentence of subsection (a)(1)(A)) be deductible under this section when paid.") (emphasis added); *id.* § 432(b)(4) ("Notwithstanding paragraph (2) and subject to paragraph (3)(B)(iv)") (emphasis added); *id.* § 856(d)(1) ("[T]he term 'rents from real property' includes (subject to paragraph (2))") (emphasis added); *id.* § 1402(e)(1) ("Subject to paragraph (2), any individual who is (A) a duly ordained, commissioned, or licensed minister of a church or a member of a religious order") (emphasis added); *id.* § 3304(a)(15)(A) ("[S]ubject to subparagraph (B), the amount of compensation payable to an individual") (emphasis added); *id.* § 6402(a) ("In the case of any overpayment, the Secretary . . . may credit the amount of such overpayment, . . . and shall, subject to subsections (c), (d), (e), and (f) refund any balance to such person.") (emphasis added) (footnote omitted).

37. See, e.g., 26 U.S.C. § 30D(f)(3), amended by Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242, 1372-43 (2015) ("the person who sold such vehicle to the person or entity using such vehicle shall be treated as the taxpayer that placed such vehicle in service, but only if") (emphasis added); *id.* § 139E(b) ("the term 'Indian general welfare benefit' includes any payment made or services provided to or on behalf of a

approaches Congress has used before and could have used in ERISA. But subsection (C)(i) uses the phrase “established and maintained.” It does not say “*may include*” nor does it contain a “subject to” clause.³⁸ It does, however, expressly state a condition: it applies only “*if such organization is controlled by or associated with a church or a convention or association of churches.*”³⁹ Noticeably absent from the conditional clause is the requirement that a plan be established by a church, supporting the argument that Congress did not intend to impose such a condition. In short, the plain language of subsection (C)(i) supports

member of an Indian tribe (or any spouse or dependent of such a member) pursuant to an Indian tribal government program, *but only if*)” (emphasis added); *id.* § 143(l)(3)(C)(i) (“the term ‘qualified veterans’ mortgage bond’ *shall not include* any bond issued to refund another bond *but only if*)” (emphasis added); *id.* § 408(c) (“A trust created . . . in the United States by an employer for the exclusive benefit of his employees or their beneficiaries, . . . *shall be treated as* an individual retirement account . . . , *but only if* the written governing instrument creating the trust meets the following requirements”) (emphasis added); *id.* § 448(d)(3) (“An S corporation *shall not be treated as* a tax shelter for purposes of this section merely by reason of being required to file a notice of exemption from registration with a State agency described in section 461(i)(3)(A), *but only if* there is a requirement applicable to all corporations”) (emphasis added); *id.* § 501(c)(25)(F) (“For purposes of subparagraph (A), the term ‘real property’ *includes* any personal property which is leased under, or in connection with, a lease of real property, *but only if* the rent attributable to such personal property”) (emphasis added); *id.* § 856(c)(5)(B) (“Such term also *includes* any property (not otherwise a real estate asset) attributable to the temporary investment of new capital, *but only if* such property is stock or a debt instrument”) (emphasis added); *id.* § 897(h)(5)(B)(iv) (“A transaction *shall not be treated as* an applicable wash sales transaction if it involves the disposition of any class of stock in a qualified investment entity which is regularly traded on an established securities market within the United States *but only if*”) (emphasis added); *id.* § 3306(m), *amended* by National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (2015) (“[T]he term ‘American vessel’ means any vessel documented or numbered under the laws of the United States . . . *if* its crew is employed solely by one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any State”) (emphasis added); *id.* § 4082(e) (“For purposes of this subsection, any removal described in section 4081(a)(3)(A) *shall be treated as* a removal from a terminal *but only if* such terminal is located within a secure area of an airport.”) (emphasis added); *id.* § 4942(j)(5) (“[T]he term ‘operating foundation’ *includes* any organization . . . operated and maintained as its principal functional purpose facilities for the long-term care, comfort, maintenance, or education of permanently and totally disabled persons, elderly persons, needy widows, or children *but only if* such organization”) (emphasis added); *id.* § 4958(c)(4) (“[T]he term ‘excess benefit transaction’ *includes* any transaction in which the amount of any economic benefit provided to or for the use of a disqualified person is determined in whole or in part by the revenues of 1 or more activities of the organization *but only if*”) (emphasis added); *id.* § 6416(a)(3) (“[T]he term ‘ultimate purchaser’ . . . *includes* a wholesaler, jobber, distributor, or retailer who, on the [fifteenth] day after the date of such determination, holds such article for sale; *but only if*”) (emphasis added); *id.* § 6416(a)(4)(A) (“[S]uch ultimate vendor *shall be treated as* the person (and the only person) who paid such tax, *but only if*”).

38. Overall v. Ascension, 23 F. Supp. 3d 816, 828 (E.D. Mich. 2014) (“[Some] courts [have] concluded that section (A) sets the standard—only a church can establish a church plan—and section (C) only describes how a plan under section (A) can be maintained. The problem with this interpretation is that section (C) uses the word ‘includes’ not ‘subject to.’”).

39. 29 U.S.C. § 1002(33)(C)(i) (2012) (emphasis added).

the broad interpretation. Congress intended to treat any plan properly maintained as a church plan, as one "established and maintained for its employees . . . by a church."⁴⁰

This broad interpretation does not "eviscerate"⁴¹ subsection (A) or create an "exception" that swallows the rule. Subsections (A) and (C)(i) are simply different ways a plan can qualify for church-plan status. A plan can still be a church plan if it is established and maintained by a church under subsection (A). The broad interpretation does not change this. Consequently, subsection (A) still has meaning. However, a church plan need not be established by a church if it is properly maintained under subsection (C)(i) by a church-affiliated organization for the benefit of church employees. That does not "swallow the rule" in subsection (A); it is a rational *extension* of the rule in subsection (A) for the purpose of protecting all "church employees," broadly defined by the statute to include the employees of nonprofit religious organizations. Without that extension, the plans benefiting particular "church employees" would be left with no reasonable means of satisfying the church plan exemption.⁴²

Moreover, subsection (C)(i) is not an exception to anything. The standard for church-plan status in subsection (C)(i) is the exact same as the standard in subsection (A): "a plan established and maintained for its employees . . . by a church."⁴³ Subsection (C)(i) simply treats certain plans as meeting that standard.⁴⁴ To refer to it as an exception that swallows the rule is inaccurate, both legally and factually.

B. *The IRC's Contribution*

Congress has assigned both the DOL and IRS with implementation of parts of ERISA. The DOL enforces the non-tax requirements, such as plan creation, summary plan descriptions, disclosure requirements, and claim denials.⁴⁵ The IRS enforces ERISA's tax implications.⁴⁶ Accordingly, ERISA created two church plan definitions: one in Chapter 29 of the U.S. Code (Chapter 29 definition)—the subject of this Article—and one in the IRC (IRC definition). Under the IRC, church plans must satisfy certain requirements to receive favorable tax treatment and be exempt from some IRC provisions.⁴⁷ The IRC and Chapter 29

40. *Id.*

41. *Stapleton v. Advocate Health Care Network (Stapleton II)*, No. 15-1368, 2016 WL 1055784, at *8 (7th Cir. Mar. 17, 2016) (characterizing the *Overall* decision).

42. See discussion *infra* Part II.C.

43. See 29 U.S.C. § 1002(33) (2012).

44. This logic may seem odd, but as discussed above, it is a very common practice in Congress. See *supra* text accompanying notes 29–33.

45. See *History of EBSA and ERISA*, U.S. DEP'T OF LAB., <http://www.dol.gov/ebsa/aboutebsa/history.html> (last visited Feb. 8, 2016).

46. *Id.*

47. See generally Gail Jones, *Church Plans, Government and Single-Employer Collectively Bargained Plans*, INTERNAL REVENUE SERVICE TAX EXEMPT AND GOVERNMENT ENTI-

church plan definitions are practically identical.⁴⁸ The current versions of the definitions were enacted in 1980 in section 407 of the Multi-employer Pension Plan Amendments Act (Amendments Act).⁴⁹

No court analyzing Chapter 29’s church plan definition has relied on the IRC definition for guidance. Instead, every court addressing this issue has construed the Chapter 29 definition in isolation. This is somewhat odd and especially problematic for the narrow interpretation. The IRC definition is as follows:

(3) Definitions and other provisions.

For purposes of this subsection—

(A) *Treatment as church plan.*

A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.⁵⁰

ties 4-6 to 4-25, <https://www.irs.gov/pub/irs-tege/epchd403.pdf> (last visited Feb. 8, 2016) (advantages and disadvantages of church-plan status under IRC).

48. Compare 29 U.S.C. § 1002(33) (2012) (DOL definition), with 26 U.S.C. § 414(e) (2012) (IRS definition).

49. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 407, 94 Stat. 1208, 1303–06. The original exemptions for church-affiliated organizations, see *supra* note 15 and *infra* note 50, were set to expire on December 31, 1982. The 1980 amendments both broadened the exemptions and made them permanent.

50. 26 U.S.C. § 414(e) (emphasis added). The original version of the IRC definition was as follows:

(e) Church plan.—

(1) IN GENERAL.—For purposes of this part the term “church plan” means—

(A) a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501, or

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

...

(3) SPECIAL TEMPORARY RULE FOR CERTAIN CHURCH AGENCIES UNDER CHURCH PLAN.—

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

The only difference between the Chapter 29 definition and the IRC definition is that Congress used paragraph headings in the IRC, a standard practice in the Tax Code. The Government Printing Office did not insert these headings after enactment; rather, Congress enacted the headings as part of the Amendments Act itself.⁵¹ The headings' clear purpose is to describe the content of each paragraph. On many occasions, the Supreme Court and other federal courts have used statutory headings to resolve statutory ambiguities, including headings in the IRC and ERISA.⁵² As one court recognized, when IRC definitions parrot definitions in other sections of the U.S. Code, "it is reasonable to use the heading from the Internal Revenue Code as a clue to the meaning of all [of them]."⁵³

It is reasonable, here, too. First, it cannot reasonably be argued the church plan definition unambiguously requires a (C)(i) plan to always be established by a church, thus allowing courts to conveniently

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

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

Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 1015, 88 Stat. 829, 926-27.

51. Multiemployer Pension Plan Amendments Act of 1980 § 407(b).

52. See, e.g., *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute."); *Immigration and Naturalization Serv. v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."); *Fed. Trade Comm'n v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989) ("[A]ny possible ambiguity is resolved against respondents by the title of [ERISA] § 4044(a)—'[a]llocation of assets.'"); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812, 826-27 (S.D. Ind. 2000).

[T]he headings in OBRA 1986 lend support to this view. . . . Section 9202 of OBRA 1986 includes both the ERISA and Internal Revenue Code provisions, and it is entitled "Benefit Accrual Beyond Normal Retirement Age." . . . Those headings referring to accrual "beyond normal retirement age" certainly seem to indicate that the provisions were not intended to apply to employees who have not yet reached normal retirement age.

Statutory headings are not necessarily overwhelming or controlling indications of the meaning of statutes, of course. Nevertheless, they may provide helpful indications of meaning. . . . Because the three provisions were all enacted together, though, it is reasonable to use the heading from the Internal Revenue Code as a clue to the meaning of all three.

Id. (citations omitted).

53. *Eaton*, 117 F. Supp. 2d at 827; see also *Humphrey v. Sisters of Saint Francis Health Servs.*, 979 F. Supp. 781, 785-86 (N.D. Ind. 1997) ("The definition of 'church plan' contained in ERISA § 1002(33) is identical to the definition set forth in § 414(e) of the Internal Revenue Code. . . . [T]his is 'specific' evidence of the court's lack of jurisdiction.")

skip over the one place where Congress specifically stated the intended scope of subsection (C)(i). That conclusion is not supported by the structure or language of the church plan definition. Moreover, multiple federal judges have disagreed with the narrow interpretation. At the very least, courts adopting a narrow interpretation should acknowledge that reasonable minds can disagree.

Second, Congress clearly intended the two church plan definitions to have the same scope so that the law would treat church plans uniformly. The two definitions use identical language, serve nearly identical purposes, and are the only two provisions included in the particular section of the Amendments Act.⁵⁴ Moreover, in one provision of ERISA, Congress expressly equated the two definitions, stating that “[t]he term ‘church plan’ has the meaning given such term by section 414(e) of title 26 and section 1002(33) of this title.”⁵⁵ In other words, Congress expressly declared its intention that the two definitions mean the exact same thing.

Congress’s intention with respect to subsection (3)(A) is explicit in the IRC, as “*Treatment as church plan*” is the heading.⁵⁶ Thus, even though a plan might not satisfy the church plan definition set forth in subsection (3)(A), the law nonetheless is going to *treat* it as one.⁵⁷ Tellingly, subsection (3)(C), defining when a church is an employer, uses an almost identical heading—“*Church treated as employer*.”⁵⁸ Under (3)(C), a church is an employer of people who are not actually the church’s employees. Similarly, Congress determined in subsection (3)(A) that some plans deserve to be *treated as* church plans, even though they are not otherwise church plans. Examining other IRC provisions—including other paragraphs of section 414—confirms that the phrases “treatment as” and “treated as” in both paragraph headings and text are extremely common.⁵⁹ Congress uses these phrases to expand definitional or rule

54. Multiemployer Pension Plan Amendments Act § 407(b).

55. 29 U.S.C. § 1144a(c)(1) (2012).

56. 26 U.S.C. § 414(e)(3)(A) (2012).

57. When inclusion of something is conditional and not mandatory, statutes do not use phrases such as “treatment as” or “treated as.” Rather, they use more permissive language, such as “treatment of.” See, e.g., 26 U.S.C. § 167(g)(7) (“Treatment of participations and residuals . . . For purposes of determining the depreciation deduction allowable with respect to a property under this subsection, the taxpayer *may include* participations and residuals with respect to such property . . . but only to the extent that . . .”) (emphasis added); see also 29 U.S.C. § 1107(d)(5) (“The term ‘qualifying employer security’ means an employer security which is . . . an interest in a publicly traded partnership . . . *but only if* such partnership is an existing partnership . . .”) (emphasis added); *id.* § 1108(b)(7) (“The prohibitions provided in section 1106 of this title shall not apply to . . . [t]he exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, *but only if* the plan receives no less than adequate consideration pursuant to such conversion.”) (emphasis added).

58. 26 U.S.C. § 414(e)(3)(C).

59. See, e.g., *Id.* § 72(e)(4)(A) (“Loans *treated as* distributions.”) (emphasis added); *id.* § 72(p)(1) (“*Treatment as* distributions.”) (emphasis added); *id.* § 165(k) (“*Treatment*

boundaries, similar to its use of the word "includes" in statutory definitions.⁶⁰ The heading in the IRC definition thus confirms what the text of the Chapter 29 definition already revealed—plans properly maintained by certain church-affiliated organizations under subsection (C)(i) are to be "treated as church plans."

Equally telling is the language Congress could have used, but did not, in the IRC definition heading. If Congress intended subsection (3)(A) of the IRC to clarify only how a church plan can be maintained, the paragraph heading simply would have said "Maintenance of church plan," "Maintenance defined," "Maintenance clarified," or something similar. That would have been consistent with the headings in subsections (3)(D) ("Association with church")⁶¹ and (3)(B) ("Employee defined"), each of which addresses only one particular aspect of the church plan definition.⁶²

as disaster loss where taxpayer ordered to demolish or relocate residence in disaster area because of disaster.") (emphasis added); *id.* § 170(m)(1) ("Treatment as additional contribution.") (emphasis added); *id.* § 216(c) ("Treatment as property subject to depreciation.") (emphasis added); *id.* § 338(h)(8) ("Acquisitions by affiliated group treated as made by 1 corporation.") (emphasis added); *id.* § 406(a) ("Treatment as employees of American employer. . . . an individual who is a citizen or resident of the United States and who is an employee of a foreign affiliate . . . shall be treated as an employee of such American employer. . . .") (emphasis added); *id.* § 406(e) ("Treatment as employee under related provisions. An individual who is treated as an employee of an American employer under subsection (a) shall also be treated as an employee of such American employer.") (emphasis added); *id.* § 414(a)(1) ("[S]ervice for such predecessor shall be treated as service for the employer.") (emphasis added); *id.* § 414(b) ("[A]ll employees of all corporations which are members of a controlled group of corporations . . . shall be treated as employed by a single employer.") (emphasis added); *id.* § 414(c) ("[A]ll employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer.") (emphasis added); *id.* § 414(f)(6)(F) ("[A] plan making an election under this paragraph shall be treated as maintained pursuant to a collective bargaining agreement. . . .") (emphasis added); *id.* § 414(h)(1)(B) ("[F]or purposes of this title, any amount contributed . . . under a plan described in section 403(a), shall not be treated as having been made by the employer if it is designated as an employee contribution.") (emphasis added); *id.* § 414(l)(2)(D)(v) ("For purposes of this subparagraph, the term 'controlled group' means any group treated as a single employer under subsection (b), (c), (m), or (o).") (emphasis added); *id.* § 414(n)(1)(A) ("[T]he leased employee shall be treated as an employee of the recipient. . . .") (emphasis added); *id.* § 414(p)(11) ("[A] distribution or payment from a governmental plan . . . or an eligible deferred compensation plan . . . shall be treated as made pursuant to a qualified domestic relations order if it is made pursuant to a domestic relations order. . . .") (emphasis added); *id.* § 414(q)(8) ("[E]mployees who are non-resident aliens and who receive no earned income . . . shall not be treated as employees") (emphasis added); *id.* § 414(v)(2)(D) ("For purposes of this paragraph, plans . . . maintained by the same employer . . . shall be treated as a single plan, and plans . . . maintained by the same employer shall be treated as a single plan.") (emphasis added); *id.* § 453(l)(3)(C) ("Treatment as interest.") (emphasis added); *id.* § 1361(c)(2)(B) ("Treatment as shareholders.") (emphasis added); *id.* § 6432(c)(1) ("Treatment as payment of payroll taxes.") (emphasis added); *id.* § 7704(a) ("[A] publicly traded partnership shall be treated as a corporation.") (emphasis added); *id.* § 7871(a) ("An Indian tribal government shall be treated as a State. . . .") (emphasis added); *id.* § 7871(f)(2) ("Bonds treated as exempt from tax.") (emphasis added).

60. See *supra* notes 29–33 and accompanying text.

61. 26 U.S.C. § 414(e)(3)(D).

62. *Id.* § 414(e)(3)(B).

But Congress did not use similar language in subsection (3)(A), indicating Congress never intended the provision to have such a narrow effect.

In addition, a recent amendment of the IRC clearly refutes the Seventh Circuit's theory that the church plan definition was only intended to permit employees of church-affiliated organizations to be included in a *church's* plan. Section 414(c)(2)(D), addressing entities under "common control" with respect to church plans, states as follows:

(D) Permissive disaggregation of church-related organizations. For purposes of subparagraph (A), in the case of a church plan, an employer may elect to treat churches (as defined in section 403(b)(12)(B)) separately from entities that are not churches (as so defined), *without regard to whether such entities maintain separate church plans*. Such election, once made, shall apply to all succeeding plan years unless revoked with notice provided to the Secretary in such manner as the Secretary shall prescribe.⁶³

The "entities that are not churches," but which are allowed to maintain "church plans," are obviously church-controlled organizations under section 414(e)(3)(A) since they are the only non-churches able to maintain church plans.⁶⁴ The italicized phrase in the above passage assumes that such entities can maintain church plans that are "*separate*" from church plans maintained by the churches themselves. Thus, affiliated organizations are not limited to being enrolled in a church's plan, but can have their own, separate benefit plans. The provision does not address, however, who can or must establish the separate plans.

Thus, based on clear congressional intent in the IRC and Chapter 29 definitions, plans maintained by administrators controlled by or associated with a church are to be treated as church plans. These plans can be established by a church, a religious administrator, or a nonprofit controlled by or associated with a church. The statute is indifferent as to which.⁶⁵ As long as the administrator maintains the

63. *Id.* § 414(c)(2)(D).

64. *See also id.* §§ 403(b)(12)(B) (adopting the definitions of church and church-controlled organizations found in section 3121(w)(3)), 3121(w)(3)(A) ("[T]he term 'church' means a church, a convention or association of churches, or an elementary or secondary school which is controlled, operated, or principally supported by a church or by a convention or association of churches."), 3121(w)(3)(B) ("[T]he term 'qualified church-controlled organization' means any church-controlled tax-exempt organization described in section 501(c)(3). . . .").

65. The Seventh Circuit confusingly mischaracterized this aspect of the argument, believing the defendants were reading the words "established and" *into* the statute so that it would read: "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 *established and* maintained by an organization." *Stapleton v. Advocate Health Care Network (Stapleton II)*, No. 15-1368, 2016 WL 1055784, at *4, *10 (7th Cir. Mar. 17, 2016). The court noted that a draft of subsection (C)(i) included "established and" before the second "maintained." *Id.* at *10. The court believed the omission of those two words in the final language meant that church-affiliated organizations could not establish church plans, only churches could. *Id.* But again, subsection (C)(i) does not state who

plan for the benefit of church employees (broadly defined by the statute), it qualifies as a church plan.

C. *Absurdities of the Narrow Interpretation*

Although the plain language of subsection (C)(i) is sufficient reason to adopt the broad interpretation, there are also policy reasons to reject the narrow interpretation. First, as discussed above, the narrow interpretation renders meaningless the words "established and" in subsection (C)(i).⁶⁶ The broad interpretation, in contrast, gives effect to those words.

Second, the narrow interpretation is inconsistent with the rest of the exemption. Congress intended the church plan exemption to cover broadly employees of any religious nonprofit organization. That is clear because the exemption expressly defines church employees to include the employees of religious nonprofits (and the church is "deemed" to be their employer).⁶⁷ Moreover, as just discussed, Congress assumed that church-controlled organizations can "maintain *separate* church plans."⁶⁸ At the same time, the narrow interpretation makes it unreasonably difficult for nonprofit "church employees" to actually be enrolled in separate church plans because the nonprofit must somehow first convince a church to create its plan. For many religious nonprofits, that would literally be impossible (at least without time travel) because their plans predate ERISA and the church plan definition. It is doubtful Congress intended to categorically exclude such separate plans from the exemption.

Moreover, it is not clear why Congress would want churches to be in the business of creating separate pension and welfare plans for numerous affiliated organizations. That would require a church to divert a substantial portion of its resources from religious activities to creating benefit plans for other organizations. Congress would not have intended such a strange result or to erect such a difficult procedural hurdle to church-plan status for church-affiliated organizations. That is inconsistent with extending the exemption to their employees in the first place.

Third, the difficult barrier that the narrow interpretation erects against religious nonprofit organizations serves no clear purpose. Other parts of subsection (C)(i)—the requirement that the organiza-

must establish the plan and includes no language conditioning such plans on establishment by a church. Rather, subsection (C)(i) was intentionally left *open* to allow for alternative arrangements, given the need to allow church-affiliated organizations to satisfy the church plan exemption.

66. See *supra* text accompanying note 27.

67. 29 U.S.C. § 1002(33)(C)(III)(iii) ("A church or a convention or association of churches which is exempt . . . shall be deemed the employer of any individual included as an employee under clause (ii).").

68. 26 U.S.C. § 414(c)(2)(D).

tion maintaining the plan be “controlled by or associated with a church” and the requirement that such plan be maintained “for the employees of a church”—ensure that a strong relationship exists between a (C)(i) plan and its church and that it always benefits the exact same population as an (A) plan, i.e., church employees. As a result, if church establishment were still required for such benefit plans to meet the exemption, the church’s role would be reduced to a mostly symbolic act: the church only would have to create the plan and then immediately relinquish its authority and responsibility under the plan to the affiliated organization to “maintain” the plan. Imposition of such a symbolic requirement would have no meaningful impact on the plan or its participants as it is maintained today (other than arbitrarily denying church-plan status to many plans).

Fourth, the narrow interpretation is less consistent with the rest of ERISA. Church plans are the only type of exempt plans given the right to voluntarily *elect* ERISA coverage.⁶⁹ This suggests Congress intended to permit all church organizations’ benefit plans to have church-plan status, but to allow the organizations to decide for themselves if they want ERISA to govern their benefits. The narrow interpretation would force many nonprofit church organizations under ERISA, depriving them of their right to elect ERISA coverage.

Fifth, it is doubtful Congress intended to create two classes of religious nonprofits: those governed by ERISA (and having no right to opt-in) because they were not established by churches and those exempt from ERISA (and having the right to opt-in) because they were church-established. Religious nonprofits all have substantially the same relationships with their affiliated churches. Although all employees of religious nonprofits are deemed church employees,⁷⁰ only church employees directly employed by a church can realistically be enrolled in church plans under the narrow interpretation. It is unlikely that Congress intended to create two classes of church employees: those whose benefits are governed by ERISA, and those whose benefits are not. The more reasonable construction is that Congress intended the statute to encompass all employees of the same employer.

Finally, legislative history—principally, stray comments in the *Congressional Record* and Congress’s retention of subsection (A)’s basic standard in the 1980 Amendments Act⁷¹—does not support the narrow interpretation or undermine the broad interpretation. No com-

69. 29 U.S.C. § 1003(b)(2).

70. *Id.* § 1002(33)(C)(ii)–(iii).

71. *See, e.g., Stapleton v. Advocate Health Care Network (Stapleton I)*, 76 F. Supp. 3d 796, 803–05 (N.D. Ill. 2014), *aff’d*, No. 15–1368, 2016 WL 1055784 (7th Cir. Mar. 17, 2016).

ment in the legislative history specifically addresses whether (C)(i) plans must still be established by churches. The comments are completely innocuous.⁷² Courts simply read meanings into those comments to support whichever conclusion they decide to reach.⁷³ Ultimately, the best evidence of congressional intent is the statutory text, specifically including the subsection heading in the IRC, which is clear and unambiguous.

D. Deference to the IRS and the DOL

Since at least 1983, the IRS has consistently issued private letter rulings supporting the broad interpretation of subsection (3)(A) of the IRC.⁷⁴ Likewise, since at least 1985, under subsection (C)(i) of the Chapter 29 definition, the DOL has issued advisory opinions supporting the IRS broad interpretation.⁷⁵ The significance of these agency

72. See, e.g., *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 911–18 (N.D. Cal. 2013); Stein, *supra* note 5 (discussing legislative history).

73. See, e.g., *Stapleton v. Advocate Health Care Network (Stapleton II)*, No. 15-1368, 2016 WL 1055784, at *9–11 (7th Cir. Mar. 17, 2016).

74. See, e.g., I.R.S. Priv. Ltr. Rul. 200816031 (Jan. 25, 2008), 2008 PLR LEXIS 101:

In addition, a church plan must be established and maintained for its employees by a church or convention or association of churches which is exempt from tax under section 501 as provided in section 414(e)(1), or *must be administered by an organization of the type described in section 414(e)(3)(A) of the Code.*

Id. at *13–14 (emphasis added). The private letter ruling continues:

Plan X satisfies the requirements regarding church plan administration under section 414(e)(3)(A) of the Code. Accordingly, Plan X is maintained by an organization that is controlled by or associated with a church or convention or association of churches, and the principal purpose or function of which is the administration of Plan X for the provision of retirement benefits for the deemed employees of a church or convention or association of churches.

Id. at *17–18; I.R.S. Priv. Ltr. Rul. 8318082 (Feb. 3, 1983), 1983 PLR LEXIS 5413, at *5 (pension plan established by nonprofit corporation affiliated with a church and maintained by a pension board is a church plan); I.R.S. Priv. Ltr. Rul. 8315054 (Jan. 13, 1983), 1983 PLR LEXIS 5801, at *8 (retirement plan established by nonprofit corporation affiliated with the Catholic Church “is maintained by an organization described in section 414(e)(3)(A) of the Code, [and] it qualifies as a church plan as described in section 414(e)”).

75. See, e.g., U.S. Dep’t of Labor, Opinion Letter 2004-11A (Dec. 30, 2004) (plans established and maintained by church-controlled nonprofit corporation was a church plan); U.S. Dep’t of Labor, Opinion Letter 95-08A (June 16, 1995):

In accordance with section 3(33)(C)(iii) of Title I of ERISA, the Church is deemed the employer of these individuals for purposes of the church plan definition in ERISA section 3(33); and the Church, as employer, is deemed to have established and to maintain the Plans that are the subject of this opinion. In addition to the above reason for concluding that the Plans meet the church plan definition in section 3(33), the Plans may be considered church plans by operation of section 3(33)(C)(i) of Title I of ERISA because the Committees, whose principal purpose in each case is the administration of the Plan for which the Committee is responsible, administer the Plans and thus further assure that the Church is deemed to maintain the Plans.

views, however, is limited because neither the private letter rulings nor the advisory opinions have the force of law.⁷⁶ Courts have appropriately not afforded these interpretations *Chevron* deference—under which courts defer to reasonable agency interpretations of ambiguous statutory language.⁷⁷ Agency interpretations may nevertheless be entitled to *Skidmore* deference—under which courts may follow persuasive interpretations of complex, ambiguous statutes by agencies with vast experience in the area.⁷⁸

Courts consider various factors in determining whether to grant *Skidmore* deference: “the thoroughness evident in [an agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁷⁹ Applying these factors to the IRS and DOL interpretations suggests they deserve some deference. Both the DOL and the IRS have arrived at and enforced the broad interpretation for at least thirty years. By consistently granting church-plan status to religious nonprofits they have given the law uniformity. Some courts have disagreed, however, believing the opinions are “conclusory” and contrary to the statute’s plain language.⁸⁰ But,

Id.; U.S. Dep’t of Labor, Opinion Letter 94-15A (Apr. 20, 1994) (welfare plan established and maintained by church-controlled corporation is a church plan); U.S. Dep’t of Labor, Opinion Letter 85-14A (Mar. 26, 1985) (plans established and maintained by nonprofit hospital associated with Catholic Church are church plans); U.S. Dep’t of Labor, Opinion Letter 85-01A (Jan. 9, 1985) (plans “adopted or maintained” by church-controlled nonprofit organizations are church plans, consistent with IRS private letter rulings).

76. See 26 U.S.C. § 6110(k)(3) (2012) (“Unless the Secretary otherwise establishes by regulations, a written determination may not be used or cited as precedent. The preceding sentence shall not apply to change the precedential status (if any) of written determinations with regard to taxes imposed by subtitle D of this title.”); U.S. Dep’t of Labor, ERISA Procedure 76-1 for ERISA Advisory Opinions § 10 (Aug. 24, 1976), https://www.dol.gov/ebsa/regs/aos/ao_requests.html (last visited Feb. 8, 2016).

77. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

78. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

79. *Id.*

80. *Stapleton v. Advocate Health Care Network (Stapleton I)*, 76 F. Supp. 3d 796, 805 (N.D. Ill. 2014), *aff’d*, No. 15-1368, 2016 WL 1055784 (7th Cir. Mar. 17, 2016) (“Because the opinion relies on the same reasoning rejected above—a mistaken focus only on whether a church affiliated organization maintains, rather than also established, the plan—it is not persuasive and is owed no deference.”); *Kaplan v. Saint Peters Healthcare Sys. (Kaplan I)*, No. 13-2941 (MAS) (TJB), 2014 WL 1284854, at *10 (D.N.J. Mar. 31, 2014), *aff’d*, No. 15-1172, 2015 WL 9487719 (3d Cir. Dec. 29, 2015). The district court in *Kaplan I* explained:

As an initial matter, the ruling conflicts with the plain text of the statute and is therefore unreasonable. . . . Furthermore, the IRS private letter ruling is conclusory, lacking any statutory analysis, and cannot be used as precedent because the ruling was issued in a non-adversarial setting based on information supplied by SPHS. . . . In addition, courts have long held that congressional silence, alone, in the wake of administrative rulings does not give the rulings the force of law. . . . The church plan definition has not been amended since 1980 and Defendants cannot now use congressional silence to turn agency rulings into law.

as discussed above, the plain language of ERISA and the IRC's subsection headings support the agencies' interpretations.⁸¹ And, certainly in other cases, IRS private letter rulings and similar revenue rulings have received *Skidmore* deference.⁸²

Moreover, in light of these agency rulings, Congress's failure to amend the church plan definition for nearly thirty-five years is telling. Since the passage of the Amendments Act in 1980,⁸³ Congress has amended the law many times.⁸⁴ Similarly, Congress has amended section 414 of the IRC many times.⁸⁵ Congress has amended other ERISA and IRC provisions countless other times. If Congress thought that the IRS and the DOL had fundamentally misconstrued and misapplied the

Kaplan I, 2014 WL 1284854, at *8.

81. See *supra* Parts II.A, II.B.

82. *Aeroquip-Vickers, Inc. v. Comm'r*, 347 F.3d 173, 180–82 (6th Cir. 2003) (“[W]e conclude that the underlying rationale of Revenue Ruling 82-20 is valid, ‘reflect[s] the agency’s longstanding interpretation of its own regulations,’ and thus deserves ‘substantial judicial deference.’” (second alteration in original) (quoting *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001)); *Webber v. Comm’r*, No. 14336-11, 144 T.C. No. 17, WL 2015 WL 3958163, at *22–23 (June 30, 2015). *Webber* stated:

We believe that the IRS rulings enunciating these principles deserve deference. The rulings are grounded in long-settled jurisprudence holding that formalities of title must yield to a practical assessment of whether “control over investment remained”. . . These revenue rulings span a 38-year period and reflect a consistent and well-considered process of development. After stating bedrock principles in Revenue Ruling 7785, the IRS examined more complex scenarios corresponding to newer products being offered in the financial markets. The Commissioner’s consideration of these scenarios appears nuanced and reasonable, resolving particular fact patterns favorably or unfavorably to taxpayers in light of the bedrock principles initially set forth.

The “investor control” doctrine reflects a “body of experience and informed judgment” that the IRS has developed over four decades. As evidenced by the absence of litigation in this area during the past 30 years, these rulings have engendered stability and longterm reliance through the private ruling process and otherwise. The relative expertise of the IRS in administering a complex statutory scheme and its longstanding, unchanging policy regarding these issues amply justify deference to the IRS under *Skidmore*.

Id. (first quoting *Helvering v. Clifford*, 309 U.S. 331, 335 (1940); then quoting *Skidmore*, 323 U.S. at 140) (citations omitted). *But see* *Rollins v. Dignity Health*, 19 F. Supp. 3d 909, 913 (N.D. Cal. 2013) (“The letters do not analyze the statute closely or evaluate how its language applies to Dignity. Because the IRS’s letters are conclusory, even under the *Skidmore* framework, they are not entitled to deference.”); *Fortis, Inc. v. United States*, 420 F. Supp. 2d 166, 178–81 (S.D.N.Y. 2004), *aff’d*, 447 F.3d 190 (2d Cir. 2006) (“In any event, even under the more deferential standard, Revenue Ruling 79-404 is not entitled to deference because it is inconsistent with the unambiguous definition of toll telephone service in § 4252(b)(1).”).

83. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208; see also 29 U.S.C. § 1002 (2012).

84. See 29 U.S.C.A. § 1002 (West 2012) (identifying amendments in 1983, 1986, 1987, 1989, 1990, 1991, 1996, 1997, 2006, 2007, and 2008).

85. See 26 U.S.C.A. § 414 (West 2012) (identifying amendments in 1982, 1986, 1987, 1988, 1989, 1990, 1992, 1996, 1997, 1998, 2000, 2001, 2002, 2004, 2006, 2007, 2008, and 2014).

church plan definition—affecting the rights of potentially millions of employees across the county—it could have amended the definitions and corrected the agencies’ mistake. Congress never did so. This suggests that the IRS’s and the DOL’s broad interpretations of the church plan definition are correct.⁸⁶

The Seventh Circuit thought Congress’s silence did not amount to congressional “acquiescence,” however, because “[t]here is no evidence that Congress was aware of the agency’s interpretation.”⁸⁷ That is not exactly true. There is evidence Congress is aware of the issue concerning (C)(i) plans and has deliberately decided to not change the law. Specifically, with respect to the Church Plan Clarification Act (section 336 of the Consolidated Appropriations Act of 2016), Representative Richard E. Neal of Massachusetts stated:

While the corrections contained in PATH Act would be of tremendous help to church plans, I want to make clear that the bill does not affect the definition of “church plan” under the Internal Revenue Code or Employee Retirement Income Security Act of 1974, ERISA. In particular, no inference is intended by this legislation regarding the statutory requirements a pension plan must meet to be considered or treated as a “church plan” under IRC section 414(e) of the Internal Revenue Code and section 3(33) of ERISA, and the bill has no bearing on the interpretation of those sections. Rather, the Church Plan Clarification Act is simply about fixing the rules that govern how church plans operate and serve their participants.⁸⁸

This statement was made (and the Church Plan Clarification Act was enacted) while interpretations by the IRS and the DOL were the prevailing standard, most courts agreed with the standard, and no appellate court had found differently.

E. A Hypothetical Statute

Both the Third and Seventh Circuits supported their arguments with a straw man hypothetical:

The Third Circuit provided an illuminating hypothetical to demonstrate why this must be so. In its hypothetical, the Third Circuit supposed that Congress passed a law that any person who is disabled and a veteran was entitled to free insurance. The court then imagined that in the ensuing years, questions arose as to whether people who served in the National Guard are veterans for purposes of the

86. *But see* Kaplan v. Saint Peters Healthcare Sys. (*Kaplan I*), No. 13-2941 (MAS) (TJB), 2014 WL 1284854, at *10 (D.N.J. Mar. 31, 2014), *aff’d*, No. 15-1172, 2015 WL 9487719 (3d Cir. Dec. 29, 2015) (“In addition, courts have long held that congressional silence, alone, in the wake of administrative rulings does not give the rulings the force of law. . . . The church plan definition has not been amended since 1980 and Defendants cannot now use congressional silence to turn agency rulings into law.”).

87. *Stapleton v. Advocate Health Care Network* (*Stapleton II*), No. 15-1368, 2016 WL 1055784, at *12 (7th Cir. Mar. 17, 2016).

88. 161 CONG. REC. E1831-01 (daily ed. Dec. 18, 2015).

statute. To clarify the provision, Congress passed an amendment saying that "for purposes of the provision, a person who is disabled and a veteran includes a person in the National Guard." All parties conceded that a person who served in the National Guard but who was not disabled could not qualify for free insurance in this hypothetical because only the second of the two original conditions was satisfied. For the same reason, it must be true that both conditions of the original definition of a church plan must be satisfied here.⁸⁹

In addition to presuming to know Congress's exact intentions in making the amendment (which unfairly dictates the result), this hypothetical gets completely wrong the relationship between the two requirements in the church plan definition. The difference between "established" and "maintained" is the same as the difference between "creation" and "existence." The 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. In contrast, the requirements of being "disabled" and a "veteran" are separate, otherwise unrelated requirements, neither of which must by definition precede the other. As a result, neither one can be eliminated without fundamentally changing the eligible population. It would be like a statute defining an "eligible resident" as "a resident who is a human being with legs," but "a resident who is a human being with legs *includes* a resident with prosthetic legs." Has the "human being" requirement been eliminated? Could a dog with prosthetic legs be eligible? That would be an enormous and absurd expansion of the eligible group under the statute. The same is not true of the church plan definition since any plan being properly "maintained" under subsection (C)(i) is, by definition, still benefiting the exact same population, i.e., "church employees."

A hypothetical accurately recreating both the structure and language of the church plan definition leads to the opposite conclusion. Suppose Congress enacts a new tax on durable medical equipment to finance an expansion of health care coverage. One of the exemptions is for "eligible equipment":

(A) "Eligible equipment" is any equipment purchased and maintained by a nonprofit hospital for its patients. . . .

(C)(i) *Treatment as eligible equipment.* Equipment purchased and maintained by a nonprofit hospital includes equipment maintained by an organization, the principal purpose or function of which is the provision of home health services in association with a nonprofit hospital.

(C)(ii) *Patient defined.* Nonprofit hospital patients include the patients of an organization exempt from tax under section 501 of title 26 and which provides services in association with a nonprofit hospital.

89. *Stapleton II*, 2016 WL 1055784, at *12 (quoting *Kaplan II*, 810 F.3d at 181).

Does eligible equipment *always* have to be purchased by the hospital? If so, nonprofit home health agencies working with the hospital will be unable to meet the exemption unless they first convince the associated hospital to buy all of their equipment. As with the expectation that church-affiliated organizations must first convince churches to establish their plans, that seems unlikely. Additionally, just as with plans established by a non-church prior to ERISA's enactment, it would be impossible for equipment purchased by the home health agency (or another entity) prior to the tax enactment to qualify for the exemption. As a result, the ability to satisfy subsection (C)(i) would be virtually destroyed.

A narrow interpretation of the eligible equipment exemption would also be inconsistent with the intent behind (C)(ii), which expands the definition of nonprofit hospital patients to include the patients of nonprofit organizations providing services in association with the hospital. Moreover, the heading to (C)(i)—“Treatment as eligible equipment”—could not be more clear that (C)(i) equipment is to be “treated as eligible equipment.” Now further suppose that, soon after the statute's passage, and for thirty years thereafter, the IRS came to the same conclusion in ruling after ruling. In light of all these factors, it cannot reasonably be said the “eligible equipment” definition always requires purchase by the hospital under subsection (A). The better interpretation clearly favors the IRS. It is more consistent with the structure, language, and purpose of the exemption. The same is true with the church plan definition.

Conclusion

Despite the decisions of the Third and Seventh Circuits, the Supreme Court may very well agree with the broad interpretation of the church plan definition, 29 U.S.C. § 1002(33)(C)(i). The IRC's subsection heading—“Treatment as church plan”—is an important and overlooked resource in the construction of subsection (C)(i). As a result, benefit plans of religious nonprofits controlled by or associated with churches should qualify as church plans if a church-affiliated administrator, also controlled by or associated with the church, maintains the plans. These plans are properly exempt from ERISA's requirements, unless they elect ERISA coverage.