No. 15-1368

IN THE UNITED STATES COURTS OF APPEALS
FOR THE SEVENTH CIRCUIT

MARIA STAPLETON, et al.,
Plaintiffs-Appellees,

v.

ADVOCATE HEALTH CARE NETWORK,
an Illinois Non-Profit Corporation, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:14-cv-01873
The Honorable Edmond E. Chang, Chief Judge Presiding.

BRIEF AMICI CURIAE OF AARP AND THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA) IN SUPPORT OF APPELLEES URGING AFFIRMANCE

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-1368

Short Caption: Maria Stapleton, et al., v. Advocate Health Care Network, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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Attorney's Signature: /s/ Mary Ellen Signorille Date: May 13, 2015

Attorney's Printed Name: Mary Ellen Signorille

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National Employment Lawyers Association (NELA)

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

None

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None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Roberta L. Steele Date: May 13, 2015

Attorney's Printed Name: Roberta L. Steele

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X

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INTEREST OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization, with a membership that helps people turn their goals and dreams into real possibilities, seeks to strengthen communities, and fights for the issues that matter most to families such as healthcare, employment and income security, retirement planning, affordable utilities, and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits which countless members and older individuals receive or may be eligible to receive.

The National Employment Lawyers Association (NELA) is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; with the exception of the fact that the parties' counsel may be members of AARP and/or the National Employment Lawyers Association, and, as such, pay general membership dues. No person other than amici, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.[2]

The core issue in this case is retirement security, an interest of direct and immediate concern to AARP members and the clients of NELA members. Congress enacted the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (2012), after assembling a record that showed a history and pattern of employers failing to provide promised employee benefits, a lack of disclosure and transparency, and varied and numerous financial abuses. As Congress declared, ERISA is intended to ensure that "the interests of participants in employee benefit plans and their beneficiaries" are protected. 29 U.S.C. § 1001(b); *see also, e.g.*, *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361-62 (1980). Although Congress did not require that every pension plan be

[2] AARP and NELA have, jointly and singly, participated as amicus curiae in numerous cases to protect the rights of workers and their beneficiaries under ERISA. *See, e.g.*, *Heimeshoff v. Hartford Life & Accident Ins. Co*., 134 S. Ct. 604 (2013); *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); *Abbott v. Lockheed Martin Corp*., 725 F.3d 803 (7th Cir. 2013); *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir. 2003).

covered by ERISA, Congress did limit the exemptions to ERISA's coverage due to the abuses it uncovered and the remedial nature of the legislation.[3]

Participants and beneficiaries in private employer-sponsored employee benefit plans should be able to rely on promised pension benefits because the quality of their lives in retirement depends heavily on their eligibility for and the amount of their benefits. Mid-career and older participants have the most to lose if exempt church plans have insufficient funds to pay benefits because these individuals have little time to make up any potential benefit shortfall. Resolution of the issues in this case will have a significant impact on the funding and integrity of employee benefit plans, the ability of individual participants to obtain accurate information to make informed decisions concerning their benefits, and the ability of individual participants to obtain all promised retirement benefits. Because exemptions to ERISA's coverage and protections have a direct bearing on the economic security of millions of Americans, including AARP members and NELA's members' clients, AARP and NELA respectfully submit this brief amici curiae.

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[3] *See generally* Norman Stein, *An Article of Faith: The Gratuity Theory of Pensions and Faux Church Plans*, ABA Section of Labor and Employment Law Employee Benefits Committee Newsletter (Summer 2014), www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_sum_ebc_news/faith.html (noting that ERISA's predecessor, the Welfare and Pension Plan Disclosure Act, exempted all tax-exempt organizations from its coverage, whereas ERISA only exempts church and governmental plans).

ARGUMENT

I. ERISA-PROTECTED RETIREMENT BENEFITS ARE A CRITICAL ELEMENT OF AN EMPLOYEE'S COMPENSATION PACKAGE.

When provided, ERISA-protected pension benefits have significant value to the employees who receive them. Congress recognized that forfeited pensions were unfair, because pension promises may have been made in lieu of additional compensation or some other benefit that the employees would have received. S. Rep. No. 93-383, at 17, 25 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4930. When employers promise employees, at the time of hiring, a pension plan protected by ERISA, employees may accept a lower salary or hourly rate from that employer. *See* Teresa Ghilarducci, *Pensions and the Uses of Ignorance by Unions and Firms*, 11(2) J. Labor Res. 203, 203-04, 206 (1990). These employees perceive that their retirement benefits are worth more than their immediate compensation because those benefits are protected by ERISA. *See id.*

As longevity and, as a result, the amount of assets needed to live comfortably in retirement increases, retirement plans become more crucial to individuals' retirement security. Indeed, for many people, outside of Social Security, employee benefit plans are their main source of retirement income.[4]

[4] *See* Sudipto Banerjee, *Income Composition, Income Trends, and Income Shortfalls of Older Households*, EBRI Issue Brief No. 383, Feb. 2013, at 5, http://www.ebri.org/pdf/briefspdf/ebri_ib_02-13.no383.incmeld.pdf (pensions and

Not surprisingly, older workers are particularly vulnerable to the effects of benefit elimination and reductions from their retirement plans. When an employer reneges on its pension promises, it wreaks financial havoc upon older employees and their families by destroying a lifetime of working and planning for their retirement years.[5] Retirement typically occurs at an age where employees no longer have the option or the time to start all over again in hopes of obtaining a new pension.[6] For those already retired, it is just too late.

Enacted over 40 years ago, ERISA was created to protect retirement benefits and plan assets through a "comprehensive and reticulated" system designed to assure that pension plans actually pay the benefits they promise. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361, 374-75 (1980) (purpose of ERISA was to prevent the "great personal tragedy" suffered by employees whose retirement benefits were not paid). Ensuring ERISA's protections remain in place throughout an employee's work life and retirement is crucial to an individual's

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annuities are the second-most important source of income for most older households).

[5] 120 Cong. Rec. 29928 (1974) (statement of Senator Williams) ("[T]oo many workers, rather than being able to retire in dignity and security after a lifetime of labor rendered on the promise of a future pension, find that their earned expectations are not to be realized."); *see* S. Rep. No. 93-127, at 1-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4838-44.

[6] *See* Treasury Inspector General for Tax Administration, No. 2010-10-097, *Statistical Trends in Retirement Plans*, at 14 (Aug. 9, 2010), http://www.treas.gov/tigta/auditreports/2010reports/201010097fr.pdf.

retirement security. Thus, in constructing this remedial statute, Congress permitted only the most limited exemptions to ERISA's protections.[7] *See* ERISA § 4(b), 29 U.S.C. § 1003(b). A plan must meet all of ERISA's requirements if it does not meet the precise conditions of an exemption. *Cf. John Hancock v. Harris Trust*, 510 U.S. 86, 105-06 (1993) (exemption limited to the precise words of the statute).

II. MANY ORGANIZATIONS THAT TAKE ADVANTAGE OF THE THE CHURCH PLAN EXEMPTION ARE BIG BUSINESSES, NOT CHURCHES.

Congress designed ERISA's church plan exemption to apply narrowly.[8] As its label implies, it was intended only to apply to actual churches. However, like the defendant health system in this case, many of the organizations taking advantage of the church plan exemption are big businesses. They are organized to supply healthcare services, to compete with similar institutions which do not claim the church plan exemption for their pension plans, and to operate with primarily laypersons—including the CEO—to achieve their goals. Indeed, they are not organized to deliver religion and are not churches at all.

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[7] *See supra* note 3.

[8] *Id.*

Advocate Health Care Network ("Advocate") is a not-for-profit hospital conglomerate with 250 care sites and 12 hospitals.[9] "Advocate maintains the leading position within its Chicago metropolitan service area that is more than double its nearest competitor, and remains the largest provider in the state." Emily Wadhwani, *Fitch Rates Advocate Health Care's (IL) Series 2014 Bonds 'AA'; Outlook Stable*, Business Wire, Nov. 21, 2014, http://www.businesswire.com/news/home/20141121005951/en/Fitch-Rates-Advocate-Health-Cares-IL-Series#.VTpcgGMXNsI. Like many other corporate entities, it has achieved its position through mergers and affiliations.[10] For example, if the proposed merger between Advocate and NorthShore University HealthSystem (a healthcare system not affiliated with any religious group) is approved, it will create the eleventh largest nonprofit health system in the country, with over 45,000 employees. Peter Frost, *Advocate Health Care and NorthShore to Merge*, Chicago Tribune, Sept. 12, 2014,

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[9] *See Overview of Advocate Health Care*, AdvocateHealthcare.com (last visited May 6, 2015), http://www.advocatehealth.com/overview-of-advocate; *Advocate Health Care Network*, Hoovers.com (last visited May 6, 2015), http://www.hoovers.com/company-information/cs/company-profile.ADVOCATE_HEALTH_CARE_NETWORK.0f2420b0ff1b2733.html.

[10] *See, e.g.*, Defs.' Mot. to Dismiss Ex. D, at 8, 24-25, 34-36, June 2, 2014, ECF. No. 35-4 (Advocate's 2013 Financial Statement discussing affiliation agreement with Sherman Hospital and Condell Pension Plan); *see also* Defs.' Mot. to Dismiss Ex. J, at 21-23, 27, June 6, 2014, ECF. No. 35-10 (Summary Plan Description).

http://www.chicagotribune.com/business/ct-advocate-north-shore-0912-biz-20140912-story.html#page=1.

Advocate's 2013 revenues were $4.9 billion, and it receives significant financing from tax-exempt debt issued by the Illinois Finance Authority.[11] It also has significant debt, equity, hedge fund and private equity investments.[12] It employs more than 27,000 individuals, with the state's largest physician network of physicians.[13] Advocate has academic and teaching affiliations with all the major universities in the Chicago area including four teaching hospitals.[14] Advocate owns and operates numerous subsidiary corporations.[15] These subsidiaries include two captive insurance companies incorporated in the Cayman Islands;[16] various fundraising foundations;[17] a property management corporation;[18] and ambulatory

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[11] *See* Defs.' Mot. to Dismiss Ex. D, *supra* note 9, at 5, 26-29.

[12] *See id.* at 10.

[13] Advocate Health Care Networks, Form 990 at 1(2013).

[14] *About Advocate Health Care*, AdvocateHealthcare.com (last visited May 7, 2015), http://www.advocatehealth.com/aboutadvocatehealthcare.

[15] Advocate Health Care Networks, Form 990, Schedule D at 3, Schedule R (2013).

[16] Advocate Health Care Networks, Form 990, Schedule R, Part IV (2013).

[17] Advocate Health Care Networks, Form 990, Schedule R, Part II (2013).

[18] Advocate Health Care Networks, Form 990, Schedule R, Part IV (2013).

surgery, hospice and physician service organizations, among others.[19] Like other chief executive officers in large non-profit health care systems, the CEO of Advocate is well compensated. In 2012, he received compensation of approximately $4 million. *See Chart: Hospital CEO Pay and Incentives*, Kaiser Health News (June 16, 2013), http://kaiserhealthnews.org/news/hospital-ceo-compensation-chart/. In 2011 that $4 million compensation was on par with the $4.6 million earned by the CEO of Northwestern Memorial HealthCare and nearly double the $2.1 million paid to the CEO of Edward Hospital & Health Service. *See* Kristen Schorsch, *Chicago's Nonprofit Hospital CEOs are Among the Nation's Highest Paid*, Crain's (Apr. 20, 2013), http://www.chicagobusiness.com/article/20130420/ISSUE02/304209996/chicagos-nonprofit-hospital-ceos-are-among-the-nations-highest-paid. Neither Northwestern Memorial nor Edward Hospital—health systems that, like Advocate, generously compensate their CEO—claim that their pension plans are exempted as church plans. Advocate is not a church.

Many of the largest health care conglomerates in the country claim that their pension plans are exempt church plans. For example, five of the nation's ten largest multi-million dollar healthcare systems fail to operate their pension plans in

[19] *See id.*

compliance with ERISA, citing the church plan exemption.[20] These include Ascension Health, with 102 hospitals in 23 states; CHE Trinity Health, with 135 hospitals in 20 states; Dignity Health, with 39 hospitals in 20 states; Catholic Health Initiatives, with 87 hospitals in 18 states; and Providence Health & Services, with 32 hospitals in five states.[21] Collectively, these systems had 2013 revenues of over 46.3 billion dollars.[22] Their competitors are likewise well-known and powerful businesses, including HCA, Community Health Systems, Tenet Healthcare Corp., and the Mayo Clinic. These for-profit systems and large not-for-profits do not claim that their pension plans are exempt from ERISA.

All these large health systems are big businesses, not churches. It is not surprising, therefore, that plan participants around the country have filed lawsuits seeking declaratory and injunctive relief that their pension plans are governed by the protections of ERISA, and are not exempt church plans. *See, e.g.*, *Griffith v.*

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[20] Modern Healthcare, *Healthcare Systems Ranked by 2013 Net Patient Revenue* (2014) (ranking top ten healthcare systems by patient revenues); *see also* Compl. at 47-67, *Griffith v. Providence Health & Servs.*, No. 2:14-cv-01720 (W.D. Wash. Nov. 7, 2014), ECF No.1; Compl. at 32-48, *Medina v. Catholic Health Initiatives*, No. 1:13-cv-01249-REB-KLM (D. Colo. May 10, 2013), ECF No. 1; Compl. at 36-48, *Rollins v. Dignity Health*, No. 3:13-cv-01450-TEH (N.D. Cal. Apr. 1, 2013), ECF No. 1; *Chavies v. Catholic Health E.*, No. 2:13-cv-01645-CDJ (E.D. Pa. Mar. 28, 2013), ECF No. 1; Compl. at 49-66, *Overall v. Ascension Health*, No. 2:13-cv-11396-AC-LJM (E.D. Mich. Mar. 28, 2013), ECF No. 1.

[21] *See id*.

[22] Modern Healthcare, *Healthcare Systems Ranked by 2013 Net Patient Revenue* (2014).

Providence Health & Servs., No. 2:14-cv-01720 (W.D. Wash. filed Nov. 7, 2014); *Medina v. Catholic Health Initiatives*, No. 1:13-cv-01249-REB-KLM (D. Colo. filed May 10, 2013); *Kaplan v. St. Peter's HealthCare System*, NO. 3:13-CV--MAS-TJB (D.N.J filed May 7, 2013); *Rollins v. Dignity Health*, No. 3:13-cv-01450-TEH (N.D. Cal. filed Apr. 1, 2013); *Chavies v. Catholic Health E.*, No. 2:13-cv-01645-CDJ (E.D. Pa. filed Mar. 28, 2013); *Overall v. Ascension Health*, No. 2:13-cv-11396-AC-LJM (E.D. Mich. filed Mar. 28, 2013).

III. CONGRESS ENACTED ERISA TO ENSURE THAT EMPLOYERS WOULD KEEP THEIR PENSION PROMISES, SO EMPLOYEES WOULD GET THE BENEFIT OF THEIR BARGAINS.

Like the other business entities discussed above, Advocate has undermined participants' retirement security by treating its pension plan as an exempt church plan. Thwarting Congress's deliberate, protective design, it has stripped away each carefully-crafted ERISA requirement. As discussed below, participants in church plans lose multiple ERISA protections, including the law's minimum funding protections and insurance guarantees, limitations on reducing or eliminating pension benefits, mandated fiduciary responsibilities, and comprehensive disclosure scheme.

A. Approving Advocate's Claimed Church Plan Exemption Leaves Participants Without ERISA's Minimum Plan Funding Protections and Insurance Guarantees, Both of Which Ensure Participants Will Receive Their Benefits.

ERISA arose in the wake of the failure of Studebaker Motor Company and its pension, a watershed moment in pension history. Studebaker had agreed in collective bargaining to pension increases, but was not required to fund these pension promises for thirty years. When the company failed, the pension was underfunded by over $15 million. Thousands of employees, including some who had worked their whole life for the company, lost all or most of their pensions. *See* James A. Wooten, *ERISA: A Political History* 51 (2004).

In response to these losses and the hardships it caused workers, Congress established minimum funding requirements for pension plans to ensure that they "will accumulate sufficient assets within a reasonable period of time to pay benefits to covered employees when they retire." H.R. Conf. Rep. No. 93-1280, at 283 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038. Plan sponsors must make periodic contributions as participants accrue benefits and must certify that these contributions comply with ERISA's established standards. ERISA §§ 302, 303, 29 U.S.C. §§ 1082, 1083.

As a safeguard, Congress established a system of plan termination insurance under ERISA to protect individuals against the loss of pension benefits in the event

that a defined benefit pension plan terminates with insufficient assets or the employer becomes insolvent. This program guarantees the payment of pension benefits for individuals in these plans up to certain statutory limits. The Pension Benefit Guaranty Corporation ("PBGC") administers the program, which is financed exclusively through employer premiums, investment income, the assets of terminated plans, and recoveries on claims for termination liability. ERISA §§ 4002, 4005-4007, 29 U.S.C. §§ 1302, 1305-1307.

Because these minimum funding requirements do not apply to church plans, there is no guarantee that the employer will appropriately fund the plan. Indeed, the plan itself states that only Advocate shall determine the method of valuation to calculate the plan costs and employer contribution. *See* Defs.' Mot. to Dismiss Ex. B § 14.1, ECF. No. 35-2. Moreover, because Advocate asserts that ERISA does not apply, it also asserts it has no obligation to pay PBGC premiums. Thus, Advocate retirement plan participants are not eligible for PBGC protection if the plan terminates with insufficient assets.

Indeed, the current Advocate Pension Plan contains a "fund-specific defined benefit promise." *See* Defs.' Mot. to Dismiss Ex. B §§ 13.5, 17.4, EFC. No. 35-2; *see also* John H. Langbein, Susan J. Stabile & Bruce A. Wolk, *Pension and Employee Benefit Law* 230-31 (4th ed. 2006) (explaining the term, "fund-specific defined benefit promise"). The result of a "fund-specific defined benefit promise"

is that only money in a fund designated by the employer is available to pay benefits under the plan. ERISA bans these fund-specific promises because they limit the money available for pensions to whatever the employer chooses to provide—which could be nothing. *See* Langbein, *supra*, at 230-31. Indeed, without ERISA protections, Advocate could just as easily write that promise out of the plan. This fund-specific promise would leave the participants of Advocate in the same dire predicament as Studebaker employees over forty-five years ago.

B. Approving Advocate's Claimed Church Plan Exemption Leaves Participants Without Protection from Reductions to, or Elimination of, their Pension Benefits.

Congress became extremely cognizant of the widespread damage that the loss of promised and earned pension benefits caused to workers' lives and their retirement security.[23] Congress believed that unless employees' rights to their accrued pension benefits are non-forfeitable, they have no assurances that they will ultimately receive a pension. *See Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004) (recognizing the "centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them"). Congress sought to prevent employers from pulling the rug out from under

[23] *See Private Pension Plans, 1966: Hearings Before the Subcomm. on Fiscal Policy of the J. Economic Comm.*, 89th Cong., 2d Sess. 104-28 (1966) (statement of Clifford M. MacMillan, Vice-President, Studebaker Corp.) (describing the closing of the Studebaker automobile plant where approximately 7,000 employees lost some or all of their promised pension benefits).

employees participating in a pension plan after they met the plan's eligibility requirements. *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

In constructing ERISA, the main protections for employees' benefits reside in the statute's participation, vesting, accrual, and benefit payment provisions. The participation standards impose a minimum age and service requirement on all covered plans. The minimum vesting standards establish the time at which a participant's accrued benefits must become non-forfeitable and non-revocable after satisfying specific age and/or service requirements under the plan terms. ERISA § 203(a)(1), 29 U.S.C. § 1053(a). ERISA also imposes minimum standards regarding the manner in which participants accrue benefits. Benefits must accrue relatively consistently on an annual basis and cannot accrue disproportionately at the end of a participant's career. ERISA § 204(a), (b)(1), 29 U.S.C. § 1054(a), (b)(1). Importantly, a plan cannot stop a participant's accrual of benefits, or lower the rate at which those benefits accrue, based on the participant's age. ERISA § 204(b)(1)(H), 29 U.S.C. § 1054(b)(1)(H). Finally, ERISA requires that benefits, once earned, cannot be reduced or taken away by a plan amendment. ERISA § 204(g), 29 U.S.C. § 1054(g); *see Heinz*, 541 U.S. at 743.

To ensure that retirement benefits are available at retirement, ERISA § 2(a), 29 U.S.C. § 1001(a), Congress established rules regulating the form and payment

of benefits. For example, to protect the spouses of plan participants, certain plans are required to provide benefit payments in the form of qualified joint and survivor annuities, ERISA § 205(a), 29 U.S.C. § 1055(a); *see also Boggs v. Boggs*, 520 U.S. 833, 842-44 (1997), unless the spouse consents to an alternative form of payment. ERISA § 205(c)(2), 29 U.S.C. § 1055(c)(2). ERISA also prohibits the assignment or alienation of benefits, except in the case of a qualified domestic relations order. ERISA § 206(d), 29 U.S.C. § 1056(d).

None of these fundamental standards applies to church plans. Thus, Advocate can design its pension plan, the Advocate Retirement Plan, in any way it desires, including, among other possibilities, allowing for the elimination or reduction of benefits, requiring thirty years of service to achieve a non-forfeitable benefit (rather than ERISA's five years of vesting), stopping accrual a participant's benefits at the age of sixty-five, or not providing for a joint and survivor annuity. The participants in the Advocate Retirement Plan would certainly lose significant protections and suffer great injury if Advocate's asserted eligibility as a church plan is upheld.

C. Approving Advocate's Claimed Church Plan Exemption Leaves Participants Without ERISA's Fiduciary Protections Against Mismanagement and Abuses.

"[I]n the wake of more than a decade of Congressional investigation into looting and other abuses of plans by some union leaders,"[24] Congress concluded that it would safeguard employee benefits "by establishing standards of conduct, responsibility, and obligation of fiduciaries of employee benefit plans." ERISA § 2(b), 29 U.S.C. § 1001(b). Thus, Congress imposed a federal fiduciary regime in order to eliminate abuses.

ERISA requires fiduciaries to manage and administer the plan and its assets. That means that these fiduciaries must act solely in the best interests of the participants. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1). Likewise, they must act for the exclusive purpose of providing benefits and defraying reasonable expenses incurred in the administration of the plans. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A). In addition, fiduciaries must discharge their duties with the highest level of loyalty and care known under the law and manage plan assets prudently. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Plan assets must be held in trust, ERISA § 403, 29 U.S.C. § 1103, and investments must be diversified to avoid large losses to the plan. ERISA § 404(a)(1)(C), 29 U.S.C. § 1104(a)(1)(C).

[24] *See* John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 Sup. Ct. Rev. 207, 210 (1991); James A. Wooten, *ERISA: A Political History* 118 (2004) (among other examples, a union officer and "trustee for life" diverted several million dollars to Liberia and Puerto Rico).

Finally, fiduciaries must act in accordance with the provisions of the plan document and other instruments governing the plan to the extent they are consistent with Titles I and IV of ERISA. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

In its review of pension plan abuses, Congress determined that certain types of transactions frequently gave rise to misconduct. Supplementing the general fiduciary duty requirements, Congress categorically prohibited plan fiduciaries from engaging in specific transactions that were "likely to injure the pension plan." *Comm'r of Internal Revenue v. Keystone Consol. Indus., Inc*., 508 U.S. 152, 160 (1993). Therefore, Congress barred fiduciary self-dealing in plan assets and other conflict of interest transactions involving plan assets, and limited the types of assets a plan may hold. ERISA § 406, 29 U.S.C. § 1106.

Church plans are not subject to ERISA's fiduciary requirements. The managers of the Advocate Retirement Plan do not have to live up to the highest standards of conduct. Instead, they can act merely as any other entity in the marketplace, leaving participants unprotected from abuses and mismanagement.

D. Approving Advocate's Claimed Church Plan Exemption Leaves Participants Without the Assurance of ERISA's Disclosure Scheme.

Congress also sought to safeguard employee pensions by mandating "disclosure and reporting to participants and beneficiaries of financial and other information" and by requiring that "disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans." ERISA § 2, 29 U.S.C. § 1001; *see also* S. Subcomm. on Labor of the Comm. on Labor and Public Welfare, Legislative History of the Employee Retirement Income Security Act of 1974: Public Law 93-406, Vol. III, 4668 (U.S. Govt. Print. Off. 1976) (stating that the "availability of this information will enable both participants and the Federal Government to monitor the plans' operations…"). In enacting ERISA, Congress sought to hold employers accountable for the benefits they promised employees by requiring accurate, understandable, and timely disclosures. *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374-75 (1980); ERISA § 2, 29 U.S.C. § 1001.

ERISA requires that pension plans make certain disclosures to their participants, including: providing them access to the terms of the plan; financial, actuarial and investment information; and other information relating to the management and operation of the plan. *See e.g.*, ERISA §§ 101-102, 104, 204(h), 29 U.S.C. §§ 1021-1022, 1024, 1054(h). Plan administrators must furnish certain

periodic reports to participants. *See, e.g.*, ERISA § 102(b), 29 U.S.C. § 1022(b). In addition, a participant may request certain documents from the plan administrator in writing at any time. ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4). No such requirements apply to church plans.

Similarly, ERISA requires that pension plans make certain disclosures concerning the financial condition and operation of the plan to the Internal Revenue Service, the Department of Labor, and the PBGC. These disclosures are designed to provide government agencies sufficient information to meet their enforcement and oversight obligations under ERISA. *See, e.g.*, ERISA §§ 101(f), 103-104, 204(h), 29 U.S.C. §§ 1021, 1023-1024, 1054(h). No such oversight occurs for church plans.

If its plan is a church plan, then Advocate has no obligation to inform participants of the plan's funding status as required under ERISA. Thus, without disclosures that are accurate and understandable in accord with ERISA's statutory requirements, participants are not equipped with the information they need to make informed decisions concerning their benefits and employment, including looking for new employment, saving more, and working longer. Significantly, participants do not receive the advantages of government oversight and protection that required disclosures to the government provide.

CONCLUSION

Blessing Advocate Retirement Plan's exemption as a church plan, even though Advocate is not a church, risks leaving its employees empty-handed after years of employment and deferred compensation—notwithstanding that Advocate guaranteed its employees certain retirement benefits. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *accord Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980). This result would clearly repudiate Congress' intent in enacting ERISA.

For the foregoing reasons, the ruling in favor of the appellees below should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 proportionally spaced typeface using Microsoft Word 2010 in 14 point font in Times New Roman.

Dated: May 13, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2015, I electronically filed the foregoing Brief Amici Curiae of AARP and The National Employment Lawyers Association (NELA) with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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