

No. 16-1005

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

JANEEN MEDINA, individually and on behalf of
all others similarly situated, and on behalf of the CHI Plans,
Plaintiff-Appellant,

v.

CATHOLIC HEALTH INITIATIVES, a Colorado Corporation, et al.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Colorado
No. 1:13-cv-01249-REB-KLM (Hon. Robert E. Blackburn)

**BRIEF FOR AARP AS AMICUS CURIAE
IN SUPPORT OF APPELLANT URGING REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a nonprofit corporation under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., and Legal Counsel for the Elderly.

AARP has no parent corporation, nor has it issued shares or securities.

Dated: June 28, 2016

/s/ Mary Ellen Signorille
Mary Ellen Signorille

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Other Authorities

<i>2015 Financial Report, CATHOLIC HEALTH INITIATIVES 1, http:// chiannualreport.net/2015Pdfs/Financials.pdf</i>	10, 14, 15
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Catholic Health Initiatives, Return of Organization Exempt from Income Tax (Form 990) FOUNDATION CENTER (2013), http://990s.foundationcenter.org/990_pdf_archive/470/470617373/470617373_201406_990.pdf?_ga=1.161158207.341367125.1455837642	13, 14, 15
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<i>Fast Facts</i> , PARTNERS HEALTHCARE, http://www.partners.org/Newsroom/default.aspx	2
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<i>Information Concerning Catholic Health Initiatives and the CHI Reporting Group as of and for the Fiscal Year Ended June 30, 2015</i> CATHOLIC HEALTH INITIATIVES (2015), http://catholichealthinitiatives.org/documents/Financial_Information/CHI%20Reporting%20Group%20Annual%20Report%20June%2030%2C%202015.pdf	2, 11, 12, 13, 14, 15, 18
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Norman Stein et al., <i>An Article of Faith: The Gratuuity Theory of Pensions and Faux Church Plans</i> , EMP. BENEFITS COMM. NEWSLETTER (ABA Section of Labor and Emp't Law, Chicago, Ill.), Summer 2014, www.americanbar.org/content/newsletter/groups/labor_law/ebc_newsletter/14_sum_ebc_news/faith.html	3, 6
<i>Top Not-for-Profit Hospital Systems, 2013</i> , MODERN HEALTHCARE (Dec. 2, 2014)	2
Treasury Inspector General for Tax Administration, No. 2010-10-097, <i>Statistical Trends in Retirement Plans</i> (Aug. 9, 2010), http://www.treas.gov/tigta/auditreports/2010reports/201010097fr.pdf	6
James A. Wooten, <i>ERISA: A Political History</i> (2004)	17, 21

STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

INTEREST OF AMICUS CURIAE¹

AARP is a nonpartisan, nonprofit membership organization dedicated to addressing the needs and interests of people age 50 and older. In its efforts to foster the economic security of individuals as they age and to ensure that they do not fall into poverty during retirement, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits that countless members and older individuals receive or may be eligible to receive.²

The core issue in this case is retirement security, an interest of direct and immediate concern to AARP and its members. Multimillion dollar health care systems have exploited ERISA's church plan exemption, denying ERISA's protections to individuals. Absent reversal of the district court's decision, the

¹ Pursuant to Fed. R. App. P. 29(c)(5), AARP states that no party's counsel authored this brief either in whole or in part, and further, that no party or party's counsel, or any person or entity other than AARP, its charitable Foundation, members, and counsel, contributed money intended to fund preparing or submitting this brief. Both parties have consented to the filing of AARP's brief.

² Through its charitable affiliate AARP Foundation, AARP has 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*, 563 U.S. 421 (2011); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); *Stapleton v. Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016); *Kaplan v. St. Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015).

retirement security of over 70,000 individuals in this plan, and millions of others in similar pension plans, will be at risk.³

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

³ Many of the top not-for-profit hospital systems, *see Top Not-for-Profit Hospital Systems, 2013*, MODERN HEALTHCARE (Dec. 2, 2014), have been sued over whether ERISA’s church plan exemption applies to their retirement plans. More than a half million employees would be deprived of ERISA’s protections if the retirement plans of the following hospital systems are found to be church plans. *See About*, ASCENSION HEALTH, <http://www.ascension.org/about> (last visited May 25, 2016) (160,000 employees); *About Providence*, PROVIDENCE HEALTH AND SERVICES, <http://www2.providence.org/phs/Pages/default.aspx> (last visited May 25, 2016) (82,000 employees); *Information Concerning Catholic Health Initiatives and the CHI Reporting Group as of and for the Fiscal Year Ended June 30, 2015 (CHI 2015 Annual Report)*, CATHOLIC HEALTH INITIATIVES 32 (2015), http://catholichealthinitiatives.org/documents/Financial_Information/CHI%20Reporting%20Group%20Annual%20Report%20June%2030%2C%202015.pdf (100,200 employees); *About Us*, DIGNITY HEALTH, <https://www.dignityhealth.org/cm/content/pages/about-us.asp> (last visited May 25, 2016) (more than 60,000 employees); *Fast Facts*, PARTNERS HEALTHCARE, <http://www.partners.org/Newsroom/default.aspx> (last visited May 25, 2016) (64,000 employees); *About Us*, TRINITY HEALTH, <http://www.trinity-health.org/about-us> (last visited May 25, 2016) (95,000 employees); *see also Kaplan*, 810 F.3d at 182.

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.⁴

Participants and beneficiaries in private employer-sponsored employee benefit plans should be able to rely on promised pension benefits because the quality of the lives of these workers in retirement depends substantially on their ability to obtain those benefits that they have been promised. 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. *See, e.g., Danica Coto, Puerto Rico church strips teachers of pension amid crisis*, ASSOCIATED PRESS, Apr. 12, 2016, <http://bigstory.ap.org/article/d6c5bcd340a94e06858c6fd230bb5ec1/puerto-rico-church-strips-teachers-pension-amid-crisis>. Absent reversal, the district court's decision will have a significant adverse 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

⁴ *See generally* Norman Stein et al., *An Article of Faith: The Gratitude Theory of Pensions and Faux Church Plans*, EMP. BENEFITS COMM. NEWSLETTER (ABA Section of Labor and Emp't Law, Chicago, Ill.), 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).

ERISA's coverage and protections have a direct bearing on the economic security of millions of Americans, including AARP members, AARP respectfully submits this brief amicus curiae.

ARGUMENT

I. THE COURT SHOULD NARROWLY CONSTRUE ERISA'S CHURCH PLAN EXEMPTION SO THAT IT IS CONSISTENT WITH THE LANGUAGE, LEGISLATIVE HISTORY AND REMEDIAL PURPOSE OF ERISA AND HOLD THAT CHI'S RETIREMENT PLAN DOES NOT FIT WITHIN THE EXEMPTION.

A. ERISA-Protected Retirement Benefits Are Promised To Employees As Deferred Compensation And Thus Are A Critical Element Of An Employee's Compensation Package.

When promised, ERISA-protected pension benefits have significant value to the employees who receive them. Congress recognized that forfeited pensions were unfair, because employers may have promised pensions in lieu of additional compensation or some other benefit that the employees would have received. S. Rep. No. 93-383, at 17, 25-26 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4890, 4903, 4910-11. 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, 213 (1990). These employees perceive that their retirement benefits are worth more than their

immediate compensation because ERISA protects those benefits. *See id.* at 206, 213-14.

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.⁵

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.⁶ Retirement typically occurs at an age when employees no longer

⁵ 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 annuities are the second-most important source of income for most older households).

⁶ 120 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 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 4838, 4838-44.

have the option or the time to start all over again in hopes of obtaining a new pension.⁷ For those already retired, it is just too late.

Congress enacted ERISA over 40 years ago 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 retirement security. Thus, in constructing this remedial statute, Congress permitted only the most limited exemptions to ERISA’s protections.⁸ *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 Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 105-06 (1993) (exemption limited to the precise words of the statute).

⁷ *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>.

⁸ *See* Stein, *supra* n.4.

B. ERISA’s Statutory Language And Legislative History Require A Finding That ERISA’s Church Plan Exemption Applies Only To Plans Established By Churches.

To qualify as a church plan, ERISA requires that a plan be “established and maintained . . . by a church or by a convention or association of churches. . . .” 29 U.S.C. § 1002(33)(A). ERISA does not define church, but its ordinary meaning is a place where people gather to worship or a congregation. AMERICAN HERITAGE DICTIONARY 333, 338 (4th ed. 2000); *see First Nat’l Bank v. Woods*, 743 F.3d 689, 698 (10th Cir. 2014) (quoting *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014)) (“It is a ‘fundamental canon of statutory construction’ that, ‘unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.’”).

Congress enacted the church plan exemption to ensure that the government did not encroach into the religious activities of a church, indicating that Congress intended that the term “church” should be given its ordinary meaning. As explained in ERISA’s 1974 legislative history:

The committee is concerned that the examinations of books and records that may be required in any particular case as part of the careful and responsible administration of the insurance system might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities.

S. Rep. No. 93-383, at 81, 1974 U.S.C.C.A.N. at 4965. *Accord, Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits of the S. Comm. on Finance*, 96th Cong. 364 (Comm. Print Dec. 4, 1979) (statement of Sen. Herman E. Talmadge, Member, S. Comm. on Finance) (“Congress recognized that there were serious Constitutional objections to subjecting the churches, through their plans, to the examination of books and records and possible levy on church property to satisfy plan liabilities.”)

When Congress was considering the 1980 amendments to expand the church plan exemption, Congress had four main concerns about the retirement security of ministers and laypersons employed by a church. First, Congress wanted to ensure that ERISA’s compliance costs did not cause the termination of these church plans. In particular, because tithes and offerings make up the major part of church income, churches are less able to absorb increases in plan maintenance costs than businesses that can pass these cost to consumers. *See* 125 Cong. Rec. 10,052 (1979) (statement of Sen. Herman E. Talmadge). If these plans were terminated, ministers and laypersons employed by a church potentially would have no retirement income. *See Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits of the S. Comm. on Finance*, 96th Cong. 365 (Comm. Print Dec. 4, 1979) (statement of Sen. Herman E. Talmadge, Member, S. Comm. on Finance). Second, because the annual starting

salary in 1979 for these ministers was only \$5,000 to \$10,000, with laypersons employed by a church earning even less, having a pension provided additional compensation and savings for these employees. *Id.* Third, the amendment to the church plan exemption permitted ministers and laypersons to move between churches and related entities “without gaps in plan coverage and with coverage by one retirement system.” *Id.* Finally, because “[m]any ministers serve their faith outside the denominational structure – as chaplains in prisons, hospitals, universities and elsewhere,” these ministers could still be covered by a church plan even though they were not directly employed by a church. 125 Cong. Rec. 10,052 (1979) (statement of Sen. Herman E. Talmadge).

Perhaps most crucially, Congress trusted churches to operate their plans responsibly because of their moral imperative, and thus these plans needed less oversight.

The retirement plans of the Church Alliance have been in existence in their present form on an average of at least forty years. Most provide retirement benefits in the form of fully-vested and fully-funded annuities. They are professionally managed and have been operated responsibly, and have provided benefits to the ministers and lay employees of the churches, including the agencies carrying out their religious missions for a long period of time.

See Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits of the S. Comm. on Finance, 96th Cong.

364 (Comm. Print Dec. 4, 1979) (statement of Sen. Herman E. Talmadge, Member, S. Comm. on Finance).

Quite simply, Congress designed ERISA's church plan exemption and its amendment, ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2), to apply narrowly. *See Stapleton v. Advocate Health Care Network*, 817 F.3d 517, 526 (7th Cir. 2016); *Kaplan v. St. Peter's Healthcare Sys.*, 810 F.3d 175, 182 (3d Cir. 2015). Congress intended the exemption to apply only to plans established by actual churches, not multibillion dollar health care systems. Nothing indicates that Congress intended to trust these large businesses to operate outside the scope of ERISA. Congress constructed ERISA's statutory language to evince its intent shown in the legislative history.

C. The Court Should Find That CHI Is Not A Church, But A Big Business, And Thus Is Not Entitled To Take Advantage Of The Church Plan Exemption.

Catholic Health Initiatives (CHI) is the second-largest nonprofit health system in the nation with its principal purpose to provide healthcare, albeit in a faith-based manner.⁹ CHI employs more than 100,200 physicians, caregivers and

⁹ *About Us*, CATHOLIC HEALTH INITIATIVES, <http://catholichealthinitiatives.org/about-us-39752> (last visited May 25, 2016); *2015 Financial Report*, CATHOLIC HEALTH INITIATIVES 1, <http://chiannualreport.net/2015Pdfs/Financials.pdf> (last visited Feb. 19, 2016) (detailing types and amounts of health care provided).

staff.¹⁰ It is comprised of both profit and nonprofit corporations – some religiously affiliated, others not – operating in 19 states covering 54 million people.¹¹

CHI operates 105 acute care hospitals, of which four are academic health centers and major teaching hospitals; 30 critical-access facilities; physician practices; long-term care facilities; assisted and residential living facilities; research and development; telemedicine services; managed care programs and other insurance products; community health services organizations; accredited nursing colleges; home health agencies, and other facilities and services within the continuum of inpatient and outpatient care.¹² Patients pay for these services as they would pay any health care provider including one that does not assert that its retirement plan is a church plan – through, among other means, insurance, self-payment, Medicare and Medicaid.¹³

¹⁰ See *Information Concerning Catholic Health Initiatives and the CHI Reporting Group as of and for the Fiscal Year Ended June 30, 2015 (CHI 2015 Annual Report)*, CATHOLIC HEALTH INITIATIVES 32 (2015), http://catholicealthinitiatives.org/documents/Financial_Information/CHI%20Reporting%20Group%20Annual%20Report%20June%2030%2C%202015.pdf.

¹¹ See *id.* at 1.

¹² See *id.* at 1, app. at 8 (Consolidated Financial Statements); *About Us*, CATHOLIC HEALTH INITIATIVES, <http://catholicealthinitiatives.org/about-us-39752> (last visited May 25, 2016).

¹³ See *CHI 2015 Annual Report* at 31-32.

Similar to many other corporate entities, CHI has achieved its position through numerous corporate transactions – mergers, affiliations, and divestitures;¹⁴ some of the involved entities were religiously affiliated and others were not.¹⁵ CHI has sought “to develop greater depth” and “to expand into new markets” through an aggressive strategy of mergers and acquisitions.¹⁶ This strategy has provided efficiencies in specific markets and increased its operating revenues.¹⁷ During 2015, CHI acquired or affiliated with seven health care systems and hospitals, while divesting two health care systems.¹⁸ It has sought to diversify its revenue sources and assets by venturing into non-hospital relationships. For example, CHI has a substantial minority position in a revenue cycle management company (providing processes to ensure payment to health care providers for their services), to which it outsources its own operations.¹⁹ It formed its own company to provide

¹⁴ See *id.* at 2, 4-9; see also History at Company Profile, Catholic Health Initiatives MarketLine (*CHI MarketLine*), at 5-7 (Aug. 12, 2015), <https://web.a.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=3&sid=7d11a76d-ec34-49b5-843e-f00254af9e64%40sessionmgr4003&hid=4112> (on file with counsel).

¹⁵ *CHI 2015 Annual Report* at 2, 4-9.

¹⁶ See *id.*

¹⁷ See *CHI MarketLine* at 15.

¹⁸ See *CHI 2015 Annual Report* at 9-10, app. at 25-30.

¹⁹ See *id.* at 4, 7.

physician practice management services.²⁰ It also formed a wholly owned subsidiary to oversee its “growing portfolio of commercial and Medicare Advantage health insurance plans.”²¹ Through this subsidiary, CHI has also branched into third-party administration services, health data analytics, corporate wellness programs, occupational health, and other disease management services, among other operations.²² CHI wholly owns an offshore captive insurance company incorporated in the Cayman Islands.²³ CHI participates in joint ventures for various purposes including clinically integrated networks to provide coordinated health care across the entire health care continuum.²⁴ In addition, CHI spent just under \$70 million for various activities throughout the world including Europe, North and Central America, the Caribbean, South East Asia and the Pacific, the Middle East, North Africa and Sub-Sahara Africa.²⁵

²⁰ *See id.* at 4.

²¹ *Id.* at 6.

²² *See id.*

²³ *See id.* app. at 8, 55-56.

²⁴ *See id.* at 5, app. at 22-25.

²⁵ *See* Catholic Health Initiatives, Return of Organization Exempt from Income Tax (Form 990, Schedule F) (2013 *CHI Form 990*), FOUNDATION CENTER (2013), at 30, 39-43, http://990s.foundationcenter.org/990_pdf_archive/470/470617373/470617373_201406_990.pdf?_ga=1.161158207.341367125.1455837642.

CHI's corporate transactions have resulted in a complex corporate structure. On its 2013 IRS Form 990, CHI reported 158 entities as related tax-exempt organizations, 41 related organizations as taxable partnerships, and 59 organizations that were taxable as a corporation or trust.²⁶ Many of the primary activities of these organizations are, unsurprisingly, health related – long-term care facilities, physician groups, ambulatory surgery, radiation/oncology, diagnostic imaging, physical therapy, and endoscopy centers; home health care providers, medical clinics, administrative and billing services, and fitness clubs. In contrast, the primary activities of the other related organizations range from education, shelters, property management, title holding, condominium associations, housing, holding company, real estate, research, retail sales, parking, fundraising, investment management, management services, and insurance.²⁷

In fiscal 2015, CHI's total operating revenue was approximately \$15.2 billion.²⁸ In order to finance its strategy of acquisitions as well as other improvements such as IT infrastructure upgrades, CHI issued significant amounts

²⁶ *See id.* at 171-90 (Schedule R, Parts II-IV).

²⁷ *See id.*

²⁸ *See CHI 2015 Annual Report* app. at 5; *2015 Financial Report* at 2.

of taxable and tax-exempt bonds,²⁹ and currently holds long-term debt obligations of over \$7 billion.³⁰ CHI has assets of \$23 billion.³¹

Like other chief executive officers in large non-profit health care systems, the CEO of CHI is well compensated. In 2014, he received compensation of over \$3.13 million.³² See Ed Sealover, *Coloradans among 75 most powerful health care leaders*, DENVER BUSINESS JOURNAL (Aug. 24, 2015), <http://www.bizjournals.com/denver/news/2015/08/24/3coloradans-among-75-most-powerful-health-care.html>, ranking him number 34 in earnings for the health care industry.

²⁹ See 2015 CHI Annual Report app. at 3, 4, 7; see also 2013 CHI Form 990 at 102-49 (Schedule K).

³⁰ 2015 CHI Annual Report app. at 39-43; see also 2013 CHI Form 990 at 11 (Part X); 2015 Financial Report at 2. Compare with 125 Cong. Rec. 10,052 (1979) (statement of Sen. Herman E. Talmadge) (churches receive their income from tithes and offerings).

³¹ See 2013 CHI Form 990 at 11 (Part X); 2015 CHI Annual Report app. at 3; 2015 Financial Report at 2.

³² See 2013 CHI Form 990 at 98-99 (Schedule J, Parts II-III) (compensation of key and highly compensated employees and an explanation of CHI's non-qualified deferred compensation plan, "parachute" policy and incentive compensation program). Compare with the median annual Pastor salary of \$89,736. *Pastor Salaries*, <http://www1.salary.com/Pastor-salary.html> (last visited May 25, 2016). See also *Miscellaneous Pension Bills: Hearings Before the Subcomm. on Private Pension Plans and Emp. Fringe Benefits of the S. Comm. on Finance*, 96th Cong. 365 (Comm. Print Dec. 4, 1979) (statement of Sen. Herman E. Talmadge, Member, S. Comm. on Finance) (noting low salaries of ministers and laypersons employed by a church).

Using any of the gauges discussed above – CEO salary, revenue, corporate structure, CHI is a big business organized to supply healthcare services. CHI is not organized to deliver religion and is not a church. *See* Section I.B., *supra* at 7-10.

D. The Court Should Narrowly Construe ERISA’s Church Plan Exemption In Order To Achieve ERISA’s Purpose That Employees, Including CHI’s, Receive Their Promised Pension Benefits.

ERISA’s main purpose is to ensure that employees receive their promised pension benefits. ERISA § 2(a)-(b), 29 U.S.C. § 1001(a)-(b). Congress sought to achieve that purpose by providing various 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. By erroneously treating its pension plan as an exempt church plan, CHI has deprived its participants of each carefully crafted ERISA requirement. *See Stapleton*, 817 F.3d at 526-527 (recognizing the perils of unregulated pension plans); *Kaplan*, 810 F.3d at 182 (“[E]xempt church plans lack many of the protections associated with ERISA.”).

1. Approving CHI’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), *as reprinted in* 1974 U.S.C.C.A.N. 5038, 5064. 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, ERISA § 4(b), 29 U.S.C. § 1003(b), *see also Kaplan*, 810 F.3d at 182 (“These plans need not comply with a host of ERISA provisions, including fiduciary obligations and minimum-funding rules.”), there is no guarantee that the employer will appropriately fund the plan. Indeed, as of June 30, 2015, CHI’s defined benefit plan was underfunded by \$732.58 million.³³ Moreover, because CHI asserts that ERISA does not apply,³⁴ it has not paid PBGC premiums. Thus, CHI retirement plan participants currently are not eligible for PBGC protection if the plan terminates with insufficient assets.³⁵ This would leave the CHI retirement plan

³³ *See CHI 2015 Annual Report* at 45.

³⁴ Defs.’ Answer to Pl.’s Am. Compl. (“Am. Answer”) ¶ 89, ECF No. 239 (“Defendants deny the allegations in paragraph 89 of the Amended Complaint, except that Defendants admit that CHI has plans, including the CHI Plan, that qualify as Church Plans and are exempt from ERISA”); *see also* Introduction, II of the CHI Retirement Plan at 6.

³⁵ The current CHI Plan contains a “fund specific promise.” See Sections 6.6 & 15.4 of the CHI Retirement Plan at app. 1127 & 1154. Under such a “fund specific promise,” only money in a fund designated by the employer is available to pay plan benefits. Here, at termination, CHI will pay pension benefits in a certain order until there are no more funds. ERISA bans these fund-specific promises for ERISA-covered retirement plans because they limit the money available for pensions to whatever the employer chooses to provide – which could be nothing. *See* John H. Langbein, Susan J. Stabile, & Bruce A. Wolk, *Pension and Employee*

participants in the same dire predicament as Studebaker employees over forty-five years ago – with broken promises, instead of their benefits.³⁶

2. Approving CHI’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.³⁷ 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 employees participating in a pension plan after they met the plan’s eligibility requirements. *See Nachman Corp.*, 446 U.S. at 375.

Benefit Law 230-31 (4th ed. 2006). Indeed, without ERISA protections, an employer could just as easily write that promise out of the plan

³⁶ See statement of Sen. Herman E. Talmadge, *supra* at 9.

³⁷ See *Private Pension Plans, 1966: Hearings Before the Subcomm. on Fiscal Policy of the J. Economic Comm.*, 89th Cong., 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).

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)(1). 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 a plan amendment cannot reduce or eliminate an earned benefit. ERISA § 204(g), 29 U.S.C. § 1054(g); *see also Heinz*, 541 U.S. at 743 (recognizing the "centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promise them.").

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, CHI can design its pension plan, in any way it desires, including, among other possibilities, allowing for the elimination or reduction of benefits, requiring 30 years of service to achieve a non-forfeitable benefit (rather than ERISA’s three years of vesting), stopping accrual of a participant’s benefits at age 65, or not providing for a joint and survivor annuity. The participants in the CHI retirement plan would certainly lose significant protections and suffer great injury if the Court upholds CHI’s asserted eligibility as a church plan.

3. Approving CHI’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,”³⁸ Congress concluded

³⁸ *See* John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 Sup. Ct. Rev. 207, 210 (1991); Wooten at 118 (among other examples, a union officer and “trustee for life” diverted several million dollars to Liberia and Puerto Rico).

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). 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 any of ERISA’s fiduciary requirements. The managers of the CHI pension 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 potential abuses and mismanagement.

4. Approving CHI’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 Subcomm. on Labor of the S. Comm. on Lab. and Pub. Welfare, Legislative History of the Employee Retirement Income Security Act of 1974*: Pub. L. No. 93-406, Vol. III, 4668 (U.S. Gov’t. Printing 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.*, 446 U.S. at 374-75; 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 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 CHI has no obligation to inform participants of the plan's funding status as required under ERISA. Indeed, CHI has admitted that they have not provided CHI plan participants with ERISA-compliant disclosures.³⁹ 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.

³⁹ Defs.' Am. Objections & Resp. to Pl.'s 2nd Interrogs. & 1st Req. for Admiss. ("RFA Resp.") (July 15, 2014), Resp. to RFA Nos. 1-5, app. 1030-41.

CONCLUSION

Blessing CHI pension plan's exemption as a church plan, even though CHI is not a church, risks leaving its employees empty-handed after years of employment—notwithstanding that CHI promised its employees certain retirement benefits. *See 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 appellants below should be reversed.

Dated: June 28, 2016

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 the brief contains 5,666 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated: June 28, 2016

/s/ Mary Ellen Signorille
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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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/s/ Mary Ellen Signorille
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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2016, I electronically filed the foregoing with the United States Court of Appeals for the Tenth Circuit by using the Court's CM/ECF system. I certify that all appellant counsel of record to the parties to this appeal are registered with the Court's CM/ECF system. Pursuant to FRAP 25(d)(1)(B), the names of counsel, mailing addresses and electronic addresses are listed below:

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