

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - x

3   ADVOCATE HEALTH CARE NETWORK, ET AL., :

4                   Petitioners                   :   No. 16-74

5                   v.                               :

6   MARIA STAPLETON, ET AL.,                   :

7                   Respondents.                   :

8   - - - - - x

9   and

10   - - - - - x

11   SAINT PETER'S HEALTHCARE SYSTEM,                   :

12   ET AL.,                                       :

13                   Petitioners                   :   No. 16-86

14                   v.                               :

15   LAURENCE KAPLAN,                               :

16                   Respondent.                   :

17   - - - - - x

18   and

19   - - - - - x

20   DIGNITY HEALTH, ET AL.,                   :

21                   Petitioners                   :   No. 16-258

22                   v.                               :

23   STARLA ROLLINS,                               :

24                   Respondent.                   :

25   - - - - - x

1 Washington, D.C.

2 Monday, March 27, 2017

3

4 The above-entitled matter came on for oral  
5 argument before the Supreme Court of the United States  
6 at 10:05 a.m.

7 APPEARANCES:

8 LISA S. BLATT, ESQ., Washington, D.C.; on behalf of  
9 the Petitioners.

10 MALCOLM L. STEWART, ESQ., Deputy Solicitor General,  
11 Department of Justice, Washington, D.C.; for  
12 United States, as amicus curiae, supporting the  
13 Petitioners.

14 JAMES A. FELDMAN, ESQ., Washington, D.C.; on behalf  
15 of the Respondents.

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first -- first this morning in Case 16-74,  
5 Advocate Health Care Network v. Stapleton and the  
6 consolidated case.

7 Ms. Blatt.

8 ORAL ARGUMENT OF LISA S. BLATT

9 ON BEHALF OF THE PETITIONERS

10 MS. BLATT: Thank you, Mr. Chief Justice,  
11 and may it please the Court:

12 Pension plans for religious non-profits have  
13 been exempt from ERISA for over 30 years, whether or not  
14 a church established the plan. And the contrary holding  
15 of the three courts below should be reversed for three  
16 reasons.

17 First, the text does not require a church to  
18 establish benefit plans for someone else's employees.  
19 Second, the government's consistent view, over three  
20 decades, has generated enormous reliance interest and  
21 warrants deference. And third, affirmance would  
22 resurrect the precise problems that everyone understood  
23 the 1980 amendment would fix.

24 I could start with the text. And the main  
25 text at issue here is subparagraph C(i) of section

1 1002(33). And if you -- the government's brief actually  
2 has all the relevant provisions, so I think that's the  
3 easiest, if you want to look at their appendix. And  
4 C(i) is -- is reprinted on -- on pages 11A.

5 So again, we're looking at paragraph --  
6 subparagraph C(i) of paragraph (33), which everyone in  
7 this case agrees expands the original church plan  
8 definition in subparagraph A.

9 Now, the only plausible reason that C(i)  
10 repeats the entire phrase "a plan established and  
11 maintained by a church" is Congress intended that C(i)  
12 redefine and modify that entire phrase.

13 JUSTICE SOTOMAYOR: Why? There was a  
14 provision that was proposed that would have done very  
15 clearly what you think this provision does now. And  
16 Congress didn't pass it. So an earlier version did  
17 exactly what you wanted. It said you can -- a plan that  
18 establishes and/or maintained by a church.

19 MS. BLATT: It -- it said established and --  
20 and maintained. And the problem, Justice Sotomayor, is  
21 that it -- the -- the assumption is incorrect that that  
22 provision did everything that folks wanted. It actually  
23 didn't. It -- it excluded the very plans that everyone  
24 concedes was intended to be --

25 JUSTICE SOTOMAYOR: The pension plans.

1 MS. BLATT: -- covered.

2 Well, plans established by churches and  
3 maintained by somebody else.

4 JUSTICE SOTOMAYOR: A plan established and  
5 maintained by a church includes a plan established and  
6 maintained by a church-affiliated organization.

7 MS. BLATT: Right. And that would have  
8 excluded --

9 JUSTICE SOTOMAYOR: Who?

10 MS. BLATT: It would have excluded plans  
11 that -- where the church established and the -- the  
12 pension board maintained. And the other side --

13 JUSTICE SOTOMAYOR: I'm sorry. A plan  
14 established and maintained by a church, so that's any  
15 plan established by -- this is the old language, by the  
16 way, so --

17 MS. BLATT: Right. So here --

18 JUSTICE SOTOMAYOR: But that's any church  
19 plan. Plus it defined includes a plan established and  
20 maintained by a church-affiliated organization.

21 Why is not a pension plan?

22 MS. BLATT: Because the problem is that  
23 provision, the way it read, required the pension board  
24 to not only maintain it, but it would have had to  
25 establish it. And so that excluded -- but -- but

1 JUSTICE SOTOMAYOR: A plan established and  
2 maintained by a church-affiliated organization. So --

3 MS. BLATT: Right. But it said "and." And  
4 so if -- if the church established it, then it wouldn't  
5 have been a church plan established and maintained by a  
6 church, and it wouldn't have been a plan established and  
7 maintained by a pension board.

8 So -- and I think the clear thing in terms  
9 of this uninterrupted -- I mean unpassed piece of  
10 legislation is it came out in the last couple of days of  
11 this several-year process, and it -- the change went  
12 unmentioned, Justice Sotomayor, and it is -- it's just  
13 implausible that that change went unnoticed when it  
14 would have excluded all the plans that the religious  
15 community was up in arms about, and all the plans that  
16 prompted the amendment in the first place.

17 JUSTICE KAGAN: Well, still, Ms. Blatt,  
18 there is a -- you know, there would be a simple way of  
19 accomplishing what you think this provision  
20 accomplishes. You know, something along the lines of  
21 just saying any plan maintained by a church-affiliated  
22 organization is a church plan or something like that.

23 It's -- it's very odd language, this  
24 statutory language, and I'm wondering why you think that  
25 Congress chose to do what you think it chose to do in

1     this perplexing way rather than in a straightforward  
2     way?

3                   MS. BLATT:   Sure.   I don't -- I don't find  
4     it that -- that perplexing.   When your -- your version  
5     would have messed up -- when you tried to -- tried to  
6     put it all in 33(A), it would have -- by saying just a  
7     church plan, it would have redefined all of (A), which  
8     had a second compound definition it -- of it had to be a  
9     tax exempt under Section 501.

10                   But, Justice Kagan, let me cut to the chase  
11     here.   If I had started from scratch, I don't know if I  
12     could have done this better.   I doubt it, because it's  
13     so complicated.   But let's look at what actually  
14     happened in 1974 and how -- just how different (C)  
15     itself looks.   Because, remember, they started in 1974,  
16     and there was an (A) and there was a subparagraph C.  
17     And now we still have subparagraph C.   So they were  
18     working with an existing apparatus.

19                   Now, old subparagraph C, itself, expressly  
20     required the church to establish C plans.   And these C  
21     plans had to include the church's own actual employees.  
22     And Congress did two huge things in paragraph C now.   It  
23     eliminated not only the express church establishment  
24     requirement, but the very reason for that requirement in  
25     the first place; namely, that these plans include the



1 church's own employees.

2 So what we have now today, and I don't think  
3 this is disputed, we know -- the one thing we do know is  
4 that (C)(i) plans can be maintained wholly and  
5 completely and absolutely outside the church and can  
6 include solely, completely, and wholly outside the  
7 church all the employees of any tax-exempt, religiously  
8 affiliated employer.

9 So it just defies both common sense and our  
10 background understanding under ERISA to require the  
11 church to establish someone else's benefit plans when we  
12 know employers are usually the ones who set the  
13 employment benefits for their own employees.

14 JUSTICE GINSBURG: It's not the problem with  
15 your reading. This (C)(i) seems to be predominantly  
16 about principal-purpose organizations. And I think the  
17 Respondent suggests that you would like it to read -- as  
18 reproduced on page 27 of their brief, you would like it  
19 to say includes a plan maintained by an organization  
20 controlled by or associated with a church. But this  
21 provision seems to be giving authority to  
22 principal-purpose organizations and not to entities  
23 controlled by or associated.

24 MS. BLATT: Right. Well, you're absolutely  
25 right except for the point about how I would like it to

1 read, because we like the way it reads now. What this  
2 does is it -- and there's no question that our reading  
3 gives independent meaning to principal-purposes  
4 organization. We concede that an absolute full  
5 requirement is that the plan must be maintained by an  
6 organization, whether external or internal, that has its  
7 principal purpose the administration or funding of a  
8 plan.

9 But, Justice Ginsburg, the definition of a  
10 principal-purpose organization includes a plan for any  
11 employee of a church. An employee of a church is  
12 defined expressly in (C)(ii) to mean any employee not of  
13 a church; namely, any church-affiliated, tax-exempt  
14 organization. So whether it's a pension board that's  
15 either sitting in the hospital or religious charity or  
16 it's a pension board that's externally incorporated,  
17 Congress made sure that the maintaining organization,  
18 the one with control over the funds and the  
19 administration itself, has to be religiously affiliated.

20 JUSTICE ALITO: Well, this is a tricky  
21 question, but is this the question that was decided by  
22 the courts of appeals and is it the question that we  
23 agreed to review?

24 MS. BLATT: No. No. So on remand, they  
25 have an argument that, assuming we win, and that there's

1 no formal requirement that the church establish the  
2 plan, that the maintaining organization in this case,  
3 these retirement committees, don't qualify.

4 But I do think it's -- it's quite important  
5 to understand that, Justice Ginsburg, when Congress was  
6 drafting this maintaining by a PPO, or principal-purpose  
7 organization, it was merely defining exactly what before  
8 and after 1980 and, regardless of the church plan  
9 context, what every employment pension plan in America  
10 looks like. They're being maintained by either a  
11 separate retirement committee or a separately  
12 incorporated retirement committee.

13 Now, the other -- what I think, Justice  
14 Alito, they were trying to say, it's anomalous that a  
15 plan could be established by the hospital, but it has to  
16 be run by a -- you know, an internal committee that's  
17 either controlled or affiliated with a church. But the  
18 anomalies are exponentially, you know, monstrous on the  
19 other side. Justice Ginsburg, in their view, Congress  
20 entrusted a pension board to have control over all the  
21 administration and the funding, but didn't allow it to  
22 establish the plan, which is absurd given the historical  
23 context that pension boards were both establishing and  
24 maintaining.

25 The other thing that's anomalous about

1     their -- their proposal is it leaves out in the cold the  
2     nuns and it assumes that Congress rebuffed every  
3     religious denomination in America who complained to  
4     Congress about how the IRS had been interpreting this  
5     provision. And so what the IRS had done in 1977 is it  
6     looked at a -- it was attempting to define what  
7     constitutes a church. And the IRS ruled that because  
8     nuns were not -- two orders of Catholic nuns were not  
9     the church when they were caring for the sick, their  
10    hospital plan could not be covered.

11                 JUSTICE SOTOMAYOR: Ms. Blatt, I -- putting  
12    aside that purpose, do you think Congress had in mind  
13    a -- corporations that are essentially like every other  
14    corporation except they're not for profit? I mean,  
15    these hospitals, some of them, like Dignity, the  
16    Catholic church has disavowed any formal affiliation  
17    with it.

18                 MS. BLATT: Well, let me just -- sorry. Go  
19    ahead.

20                 JUSTICE SOTOMAYOR: Is that -- is that -- do  
21    you think that -- I understand the nuns, but you're  
22    talking now about an extreme.

23                 MS. BLATT: Well, the nuns established  
24    Dignity, and a priest established St. Peter's, or a  
25    bishop, rather. So -- but let me just get back to the

1 plan at issue.

2 In 1977 --

3 JUSTICE SOTOMAYOR: The nuns may have, but  
4 they're -- no longer are affiliated with the church.

5 MS. BLATT: I'm happy to argue the facts of  
6 Dignity and we can -- I mean, that is an argument the  
7 other side on remand.

8 But the place where Congress dealt with your  
9 concern about the institution that's not religious  
10 enough was not with establishment, but (C)(iv) requires  
11 any church plan that's -- that's being maintained by  
12 these affiliated organizations to have common bonds  
13 and -- common religious bonds and convictions.

14 Now, Dignity itself has that in spades. It  
15 has six orders, not one, not two, not three, not four,  
16 not five, six orders of women religious running its  
17 mission integrity committee --

18 JUSTICE SOTOMAYOR: I'm not going to fight  
19 over --

20 MS. BLATT: Okay. Well, Dignity --

21 JUSTICE SOTOMAYOR: -- that. I -- but let's  
22 go back to my basic question. They're not doing  
23 anything different than any other hospital.

24 MS. BLATT: Well, that -- that --

25 JUSTICE SOTOMAYOR: Or -- or -- or care

1 center. They are competing. They're the fifth largest  
2 healthcare provider in the nation. They have 60,000  
3 employees. Do you believe that Congress's vision was to  
4 let, what is essentially, a corporate entity opt out of  
5 protecting all of those employees?

6 MS. BLATT: I mean, the Roman Catholic  
7 church is itself, I assume, some sort of corporate  
8 entity. But let me get to the bottom line here.

9 If you read Paul Clement's brief filed by  
10 the Catholic church itself and the brief filed by the  
11 United Church of Christ and the Evangelical Lutheran  
12 Church of America and the Seventh-Day Adventists, that's  
13 four churches, your decision applies to big and small,  
14 medium, extra-religious, nonreligious. So whatever you  
15 think of Dignity -- and I have no doubt that it's --  
16 it's both -- it has both Catholic bonds and Catholic  
17 affiliations. But there's nothing about the size of  
18 this. We know Congress had in mind a hospital plan.  
19 The word "hospital" appears on every page of the  
20 legislative history.

21 CHIEF JUSTICE ROBERTS: Ms. Blatt, I'd like  
22 to get to your question about -- the point you raised  
23 earlier on about the significance of the interpretation  
24 of the IRS, the pension benefit board, and who -- what's  
25 the other one? The IRS --

1 MS. BLATT: The Department of Labor, IRS,  
2 and benefit --

3 CHIEF JUSTICE ROBERTS: Yeah.

4 MS. BLATT: -- pension benefit.

5 CHIEF JUSTICE ROBERTS: What are the limits  
6 of that proposition? I mean, I don't quite understand,  
7 you're saying because these three government agencies  
8 interpreted the statute one way, we shouldn't be more --  
9 we should be inclined to interpret it that way?

10 MS. BLATT: Yes. I think that reliance is  
11 an important -- important reason why you should defer  
12 under Skidmore. And --

13 CHIEF JUSTICE ROBERTS: Right. It's just --  
14 maybe it's that I've never understood Skidmore. To me,  
15 anyway, as it's been articulated, it seems to be the  
16 principle as you should defer to agencies when you agree  
17 with their interpretation.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: And -- and I don't  
20 see --

21 MS. BLATT: Yeah. Well, Skidmore actually  
22 says --

23 CHIEF JUSTICE ROBERTS: I mean, the statute  
24 means -- the statute means what it means, and it's nice  
25 that these agencies have interpreted it your way. But I

1 think we have to go back and interpret the statute  
2 ourselves.

3 MS. BLATT: Of course. But, I mean,  
4 Skidmore is still a decision, and it says what you said.  
5 But it says anything you find persuasive.

6 But the IRS --

7 JUSTICE GINSBURG: Why should it be  
8 persuasive? I mean, you faulted, I think, the courts of  
9 appeals. You -- you described their opinions as thinly  
10 reasoned. But that DCM that started it all from the IRS  
11 is certainly thinly reasoned.

12 MS. BLATT: So let me go back to what our  
13 argument is under the IRS. They prompted the amendment  
14 by trying to say what a church was. Congress responded  
15 not by telling the IRS what the church was or that the  
16 nuns for the church, but by making that question  
17 irrelevant. The IRS objected and immediately after the  
18 law was passed, started reverse course on the very  
19 non-plan at issue here.

20 But let me get to the reason about Skidmore  
21 what this case is about. In just two of these cases,  
22 Mr. Chief Justice, the Respondents seek 11 billion; I am  
23 not kidding, 11 billion per year. That's \$66 billion in  
24 two cases if ERISA's six-year statute of limitations  
25 applies. The risk that the other side could recover,



1 even any fraction of that amount, is reason enough for  
2 you to make sure that the IRS's decision is somehow  
3 unreasonable, that would jettison 30 years of settled  
4 expectations.

5 JUSTICE GINSBURG: Well, back to the --

6 JUSTICE KENNEDY: Well, quite -- quite apart  
7 from the IRS reasonable. The response says -- know that  
8 there were, I assume, hundreds of IRS letters, and it  
9 was because of -- of -- of this problem that Congress  
10 acted. Without getting into the legislative history,  
11 which I found totally uninformative, is -- is there --  
12 why is it that we can give so much weight to these  
13 letters when there was no notice and comment regulation?  
14 And tell me a little bit about how widespread and  
15 well-understood the DOL position was.

16 MS. BLATT: Well, they're all --

17 JUSTICE KENNEDY: And then -- and --

18 MS. BLATT: Sure.

19 JUSTICE KENNEDY: And the -- and the  
20 Respondent says, oh -- oh, the Congress never even knew  
21 about these letters, which sounds odd --

22 MS. BLATT: Well --

23 JUSTICE KENNEDY: -- to me, but --

24 MS. BLATT: Congress -- I mean, every --  
25 every religious faith in America complained to Congress.

1 Congress introduced the bills in response to the  
2 religious community, and immediately after -- and the  
3 Pension Rights Center that's an amicus was testifying,  
4 it's -- it's just -- it's silly to think that they  
5 didn't know how to use the Internet, at least by  
6 whenever the Internet came around, and couldn't figure  
7 out -- or go to the library and didn't -- couldn't read  
8 a private letter ruling.

9 But I -- I think the significance is -- it's  
10 not just even the retroactive penalties. Countless  
11 plans have been structured around the IRS, the  
12 Department of Labor, and the PBGC's view, and if you  
13 affirm, just for all the existing plans that were not  
14 established, you're unleashing a torrent of undesirable  
15 and unintended consequences, not just for the -- the --  
16 the hospital --

17 JUSTICE KENNEDY: My question is: What can  
18 you point to, to tell us that the IRS letters were an  
19 important part of the motivation for Congress to make  
20 this change?

21 MS. BLATT: Okay. So it was the IRS's  
22 ruling under -- for the 1977 Catholic nun plan, and  
23 20 -- I think 20 letters and the Church Alliance  
24 representing over 27 denominations, 50 million people,  
25 complained bitterly to Congress. The entire -- I know

1    you don't want to look at legislative history, but every  
2    single thing is about how hospitals and church agencies  
3    are part of and essential to the church. And the only  
4    way, Justice Kennedy, to interpret that is that they  
5    were talking about the IRS's definition that because  
6    nuns were not performing priestly functions, they  
7    weren't the church. And I just think -- so the IRS was  
8    at the table. The IRS is objecting. The IRS goes home  
9    and starts immediately reversing course. And you have  
10   the fact that the -- I mean, we've talked about the IRS.

11               The other side concedes that another major  
12   purpose was to put congregational religions on parity  
13   with hierarchical congregations. And we know that the  
14   1974 Act excluded these pension board-established  
15   and maintained plans. And under Repondents'  
16   interpretations, these plans too were left out in the  
17   cold.

18               We know that since the 1900s, these  
19   Protestant pension boards were not only maintaining  
20   plans they established, but plans that their church  
21   agencies had established.

22               If I could reserve the rest of my time.

23               CHIEF JUSTICE ROBERTS: Thank you, counsel.

24               Mr Stewart.

25               ORAL ARGUMENT OF MALCOLM L. STEWART

1                   FOR UNITED STATES, AS AMICUS CURIAE,  
2                   SUPPORTING THE PETITIONERS

3                   MR. STEWART: Mr. Chief Justice, and may it  
4 please the Court:

5                   I'd like to first to pick up on a point that  
6 Ms. Blatt alluded to when she was describing the -- the  
7 history of the statute and its amendment. I think the  
8 statute in its current form is probably not the type of  
9 provision that Congress would draft if it were doing the  
10 whole thing in one fell swoop. But it's important to  
11 understand that the text of the -- the current provision  
12 is the combination of things that were done in 1974 and  
13 things that were done in 1980.

14                  Congress enacted the original church plan  
15 provision. Presumably, it had in mind particular plans  
16 that were established and maintained by churches and it  
17 covered those; and pretty quickly, problems came to  
18 light. Other types of plans were found not to be  
19 covered by the administrative agency that Congress  
20 evidently believed should be covered. And so when  
21 Congress amended the provision in 1980, it chose to work  
22 within the existing framework. We're not quite sure  
23 why, but at least one plausible explanation would be  
24 there were some church plans that had been found to be  
25 covered under the old "established and maintained by a

1 church" language. Congress may have wanted to avoid any  
2 possible inference that those plans were no longer  
3 covered, and so it retained the original language, but  
4 defined it to include something else.

5           And when Congress passed the -- the  
6 provision that Ms. Blatt was discussing earlier, (C)(i),  
7 that refers to a plan established and maintained for its  
8 employees includes a plan maintained by a principal  
9 purpose organization, I -- I think it's -- it's helpful  
10 to recognize that there are two different sorts of  
11 definitional provisions that Congress sometimes enacts.

12           Sometimes when Congress enacts a definition,  
13 it's trying to clarify what the defined term really  
14 means. And when Congress acts in that way, we tend to  
15 strain to read the definition in a way that makes it  
16 consistent with ordinary understandings of a defined  
17 term. But sometimes Congress will enact a provision  
18 that says something like the -- for purposes of this  
19 statute, the term "State" includes the District of  
20 Columbia and Puerto Rico. When Congress does that, it's  
21 not trying to explain what State really means; it's  
22 simply using a shorthand formulation to say, for  
23 purposes of this statute, we want D.C. and Puerto Rico  
24 to be treated the same way that the 50 States would be  
25 treated. And that's really what Congress was doing in

1 the 1980 amendment.

2 When it defined the term "plan established  
3 and maintained by a church" to include plans that  
4 satisfied the prerequisites in the amendments, it -- it  
5 was not saying this is what a plan established and  
6 maintained by a church really is. It was saying, for  
7 purposes of the exempt -- of the church plan exemption,  
8 we want these to be treated the same.

9 JUSTICE KAGAN: Mr. Stewart, can I ask you  
10 about some of the Respondents' hypotheticals where they  
11 offer hypothetical statutes that are very similar in  
12 structure to this one? And it's pretty clear that you  
13 would read, you know, the one about disabled veterans  
14 and the one about the two presidential criteria, and  
15 it's pretty clear that you would read those sentences  
16 their way rather than your way; in other words, as just  
17 going to one of the criteria. And I'm wondering why you  
18 think that's true, that they can come up with these  
19 hypotheticals that so clearly should be interpreted  
20 their way rather than your way.

21 MR. STEWART: I guess I would say about  
22 the -- the hypothetical that is used most often -- most  
23 often, person disabled and a veteran includes a member  
24 of the National Guard. I think if you read it  
25 absolutely literally, you would still say a National

1 Guard member who is not disabled is covered. Now, I  
2 think the --

3 JUSTICE KAGAN: I mean, that would seem  
4 ridiculous, right?

5 MR. STEWART: I think the instinct -- the --  
6 the context would be such that courts would assume, I  
7 believe, that Congress had simply made a -- a sort of  
8 scrivener's error, that Congress had used language  
9 sloppily.

10 Part -- part of that has to do with the  
11 instinct that I -- I alluded to earlier. That is, we  
12 would tend to regard a provision like that as one in  
13 which Congress was really trying to explain what the  
14 term "person who is disabled and a veteran" means, and  
15 so we would strain to read the definition in a way that  
16 made it consistent. If Congress passed a statute that  
17 said something like: Person who is disabled and a  
18 veteran shall include any Federal employee with 30 years  
19 or more of service, at -- at that point, we would  
20 understand Congress has just abandoned the effort to  
21 explain what person who is disabled and a veteran  
22 actually means. It has decided for whatever reason that  
23 it wants employees with -- Federal employees with  
24 unusually long service to get the same benefits as a  
25 disabled veteran would get under a particular statute

1 and has used shorthand to -- to accomplish that.

2 JUSTICE KAGAN: See, I -- I would think that  
3 the way that hypothetical works, it's sort of -- we're  
4 setting these two criteria, you have to be a veteran and  
5 you have to be disabled, and then we're going to say  
6 there's a special case of veterans. We also mean to  
7 include National Guard folks, and that's not  
8 disqualifying, the fact that it's a National Guard  
9 folks. But the two criteria are still the two criteria.  
10 All we're suggesting is that it's not disqualifying that  
11 you are a National Guard. And you could read this  
12 language similarly. It's not disqualifying that it's  
13 maintained by a different kind of organization.

14 MR. STEWART: I guess I -- all I would  
15 concede based on these hypotheticals is that sometimes a  
16 provision that is structured in this way will give rise  
17 to the natural inference that Congress wanted to do  
18 something other than simply deem a particular thing to  
19 fall within the whole defined term and that it had in  
20 mind a part.

21 But I think, in construing this provision,  
22 it may be helpful to look at page 24 of the government's  
23 brief which explains -- which kind of clarifies  
24 something that Ms. Blatt was referring to earlier,  
25 that -- that on page 24 of the -- the government's



1     brief, we lay out the way in which this amendment  
2     changed from the time it was first introduced in 1979 to  
3     when it was enacted in 1980.

4                     And as the questioning in the first part of  
5     your argument explained, the original introduced  
6     provision said a plan established and maintained by a  
7     church shall include a plan established and maintained  
8     by a principal-purpose organization. And so the -- the  
9     words "established and" appeared two places in that  
10    introduced provision. And as -- we agree with Ms. Blatt  
11    that the most likely explanation for what -- why  
12    Congress took out the -- the second "established and"  
13    was that it was worried about plans that would fall  
14    between two stools, a plan that was established by a  
15    church, but maintained by a principal-purpose  
16    organization. That the --

17                    JUSTICE ALITO: The -- the -- the  
18    hypothetical would be like this case, or this case would  
19    be like the hypothetical. If the requirement that the  
20    plan be established by the church was absolutely  
21    critical, as the requirement that the -- the individual  
22    have a disability is absolutely critical in the  
23    hypothetical, which gets to the question: What is the  
24    significance, in practical terms, of a plan's being  
25    established by a church?

1                   Now, Mr. Feldman says that an entity that  
2     establishes a plan is financially responsible for paying  
3     benefits under the plan if the plan is unable to do that  
4     with its assets. But you say that's not correct; is  
5     that right?

6                   MR. STEWART: That's not correct. I mean,  
7     in -- in the typical ERISA case, you will have a plan  
8     established and maintained by a single employer, and  
9     that employer will be responsible for making good on the  
10    promises, and -- and that employer may be a defendant in  
11    a suit if the promises are breached. But that doesn't  
12    mean that the entity that established as the plan qua  
13    "establisher" is always going to be on the hook.

14                  It -- it in --

15                  JUSTICE GINSBURG: Sometimes on the hook?

16                  MR. STEWART: Sometimes on the hook, if the  
17    establisher maintains ongoing responsibility. But  
18    there's -- first, there's no reason to think, even if  
19    you applied ERISA standards, that a church that  
20    established the plan, but then left the administration  
21    of the plan entirely in the hands of somebody else,  
22    could be held liable under ERISA.

23                  Second, the whole point of the church plan  
24    exemption is that plans that qualify will not be  
25    regulated under ERISA at all. They will be regulated

1 under State law. So if a church, in order to satisfy  
2 this requirement, established the plan and then left its  
3 maintenance to somebody else, whether the church would  
4 have any ongoing liability would depend on State laws  
5 that might vary around the country. So --

6 JUSTICE ALITO: Can you -- can you tell me  
7 what provision of ERISA -- and I'll ask Mr. Feldman the  
8 same thing if I have the chance -- what provision of  
9 ERISA explains which entity, if any, is responsible for  
10 paying benefits if, for example, a defined benefit plan  
11 is unable to do that with the assets in the plan?

12 MR. STEWART: I -- I don't believe there is  
13 a provision of ERISA that spells that out. My  
14 understanding -- and I'm -- I'm sorry, I don't have the  
15 statutory cite -- is that there is a provision of ERISA  
16 that authorizes the plan beneficiaries to sue, but it  
17 doesn't specify who the defendant should be. And so  
18 the courts have devised tests and approaches to  
19 determine in particular cases who the proper defendant  
20 is. And to some extent, that will depend upon the way  
21 the plan itself is constructed; that is, the plan may  
22 say that the responsibility for doing certain things is  
23 that of the employer, for doing other things, it may be  
24 that of the insurer. And so the proper defendant may  
25 determine on where responsibility is allocated under the

1 terms of the plan.

2 And -- but so I agree that one big  
3 difference between this case and the hypotheticals is  
4 the -- the hypothetical is constructed in a way that  
5 suggests disability has to be crucial to entitlement to  
6 benefits, whereas here, there's no reason to think that  
7 Congress, in 1980, regarded church establishment as  
8 crucial to the exemption.

9 And -- and the point I was trying to  
10 make about -- was going to make about --

11 JUSTICE KAGAN: Well, but I guess that's the  
12 question, right?

13 MR. STEWART: But -- but --

14 JUSTICE KAGAN: And the structure is the  
15 same.

16 MR. STEWART: I -- I guess the point I was  
17 going to make about -- if I -- if I could finish this?

18 CHIEF JUSTICE ROBERTS: Sure.

19 MR. STEWART: -- about the way in which the  
20 statute changed from introduction to final passage is  
21 that everyone agrees that Congress could have more  
22 clearly achieved the objective that Respondent says they  
23 were trying to achieve if it had said a plan maintained  
24 by a church includes a plan maintained by a  
25 principal-purpose organization. And so the idea seems

1 to be Congress was just a little bit careless in leaving  
2 in "established and maintained" at the beginning.

3 That seems particularly implausible given  
4 the care they took to knock out the second iteration of  
5 "established and" in the same provision.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
7 Mr. Feldman.

8 ORAL ARGUMENT OF JAMES A. FELDMAN

9 ON BEHALF OF THE RESPONDENTS

10 MR. FELDMAN: Mr. Chief --

11 JUSTICE SOTOMAYOR: Mr. Feldman, I have a  
12 starting question, which is I'm torn. This could be  
13 read either way in my mind. If I believe that, what do  
14 I go to, to break the tie?

15 MR. FELDMAN: I think if you look at what  
16 Congress was -- this is what I would say. If you accept  
17 their view, what you end up with is a statute that  
18 doesn't fit what Congress enacted at all and creates  
19 anomalies that are impossible to explain. And for those  
20 reasons at least, as well as the fact that Congress was  
21 very jealous about creating exemptions to ERISA, ERISA  
22 covers every private employer, every non-profit, every  
23 hospital in the country, and there's only one -- except  
24 there is only one category excluded, and that's church  
25 plans. And Congress actually defined church plans

1 carefully. They wanted a close tie between the church  
2 and the plan because their purpose was they didn't want  
3 to go involved in -- get involved in church affairs.

4 And so they said church plan has to be  
5 established and -- established and maintained by a  
6 church. It needs to fit both criteria because we  
7 want -- if there's church involvement here, we want  
8 hands off. If there's no church involvement, though,  
9 there's no reason why these hospitals, like any other  
10 hospital in the country, and like many other -- every  
11 other firm in the country shouldn't have to provide the  
12 employees with the pension insurance to protect them  
13 against the possibility that when the plan goes bust,  
14 they end up with nothing --

15 CHIEF JUSTICE ROBERTS: Well, isn't there --  
16 didn't Congress provide for church involvement by making  
17 the employees covered by the principal-purpose entity  
18 church employees?

19 MR. FELDMAN: No, it's actually -- well,  
20 just -- no, it didn't, actually. The -- the -- that  
21 statute actually doesn't say anything about the  
22 principal-purpose entity.

23 So there's three different kinds of things  
24 we are talking about here. There are churches  
25 themselves, there's principal-purpose organizations,

1     which are organizations that are in -- in the business  
2     of just giving --

3                 CHIEF JUSTICE ROBERTS: I mean, the -- the  
4     church agency employees.

5                 MR. FELDMAN: Right. And the church --  
6     it -- it -- what it said was, yes, it's -- it's -- was  
7     facing a problem in 1980, which was the original statute  
8     said if you're a church, you can cover not only your own  
9     employees, but you can also cover the employees of your  
10    church agencies. That's what the original statute said,  
11    but only until 1982. And that is what everybody was  
12    objecting to, and that's why people was -- people were  
13    objecting to the withdrawal of that sunset provision  
14    that was going to happen in 1982.

15                And the reason why they were talking about  
16    agencies are very closely related to churches, that was  
17    not a -- it was not to say -- their view is Congress  
18    wanted to allow fishing. They wanted these agencies to  
19    split up -- these plans to split apart, and the agency  
20    to have their own plan and the church to have their own  
21    plan, and that's what they wanted. But it's exactly the  
22    opposite. They wanted to allow churches to continue, as  
23    they had been, to provide -- to have a plan that would  
24    cover both the churches' employees and the agencies'  
25    employees. And they -- they were interested in

1 continued fusion. They weren't interested in fishing.  
2 And actually, there's nobody anywhere who talked about  
3 this statute who said, well, what we really need is to  
4 allow another whole class of private entities to  
5 establish their own plans.

6 So in the provision that Your Honor referred  
7 to, where they -- they say, well, the employees of the  
8 church-associated agency will be deemed to be employees  
9 of the churches, Congress passed that provision to solve  
10 exactly the 1982 problem. Okay? The -- a church plan  
11 has to be established and maintained by a church -- this  
12 is in (A), which was left unchanged -- established and  
13 maintained by a church for its employees. And then in  
14 the original statute they said: Well, we don't really  
15 care whose employees they are, but you also can cover  
16 the church agency --

17 CHIEF JUSTICE ROBERTS: If that -- if that  
18 were so evident, why do the three government agencies  
19 responsible in this area -- the IRS, the Department of  
20 Labor, the PBGC -- why for 30 years did they take the  
21 opposite view?

22 MR. FELDMAN: Well, it's -- they took this  
23 view in the early 1980s at a time when they were facing  
24 one or two -- I -- I'm not sure they knew at the time  
25 when they started down this road what it was going to



1 lead to in terms of the hundreds of hospitals and other  
2 businesses that were going to be able to just deprive  
3 their employees of ERISA benefits.

4 JUSTICE KENNEDY: But it -- but it led to --  
5 but it led to hundreds of letters from the IRS. Is  
6 there -- is that an exaggeration or is that -- aren't  
7 there hundreds of IRS letters approving --

8 MR. FELDMAN: That's true. And actually,  
9 the first -- the mother of them all, which was the  
10 general counsel memorandum from '82, '83, it says this  
11 may not be relied upon or cited as precedent. And the  
12 statute that authorized all these private letter  
13 rulings, which were all done on an ex parte basis and  
14 without the opportunity --

15 JUSTICE KENNEDY: But -- but nevertheless,  
16 it shows that an entity that had one of these plans that  
17 -- where there was some doubt was proceeding in good  
18 faith with the -- with the assurance of the IRS that  
19 what they were doing was lawful.

20 MR. FELDMAN: Yes. And that entitled them  
21 to exactly what it was supposed to -- the government had  
22 that "this may not be relied upon" language because it  
23 didn't want to be bound to this.

24 CHIEF JUSTICE ROBERTS: That -- that's  
25 standard language in a private letter ruling, isn't it?

1 MR. FELDMAN: Yes.

2 CHIEF JUSTICE ROBERTS: Okay.

3 MR. FELDMAN: There's nothing --

4 CHIEF JUSTICE ROBERTS: So there is nothing  
5 special about this.

6 JUSTICE KENNEDY: When this goes on and on  
7 quite without reference to the legislative history to  
8 which senator said what, which I think is unhelpful. We  
9 do know that the climate, the culture, the economic  
10 problem after 30 years was that many of these  
11 associations, which are preceded in good faith based on  
12 the IRS, were at risk of tremendous liability. And  
13 that's a -- certainly a reason for -- for understanding,  
14 A, why Congress acted, and B, the problem it wanted to  
15 solve in the way the Petitioner said it did.

16 MR. FELDMAN: I -- I -- Your Honor, I don't  
17 think that that's right. So these cases are about  
18 primarily overwhelmingly forward-looking remedies.  
19 They're about bringing these plans into accord with  
20 ERISA to get an insurance for these plans so that their  
21 employees can be sure that they get their benefits when  
22 they're supposed to get them.

23 JUSTICE ALITO: Well, wasn't Ms. Blatt  
24 incorrect when she said that the complaints seek  
25 billions of dollars in penalties?

1                   MR. FELDMAN: Right. The complaint -- we  
2 don't know all the facts of these cases. But I --  
3 what --

4                   JUSTICE ALITO: What is the answer to my  
5 question?

6                   MR. FELDMAN: Yes. They -- well, they --  
7 they don't actually name -- I don't believe they name a  
8 dollar figure for the penalty.

9                   JUSTICE ALITO: Well, they -- if you figured  
10 out the penalties, would they be billions of dollars?

11                  MR. FELDMAN: No one has ever --

12                  JUSTICE ALITO: Then how can you say that  
13 this is primarily about forward-looking things?

14                  MR. FELDMAN: Because I think that everybody  
15 admit -- admits in this case -- not everybody admits.  
16 The statute -- the authority to issue penalties is in  
17 the district court's discretion. And the -- the --  
18 nobody has ever -- no court has ever, I don't think,  
19 issued -- had an ERISA penalty close to that. And this  
20 Court has repeatedly emphasized that when you're  
21 addressing a remedy under -- under 502(a)(3) or  
22 502(c)(3), you're supposed to take into account the  
23 equities of the situation. So the --

24                  JUSTICE GINSBURG: And one equity would be  
25 the reliance. One court might well say: Well, we read

1 the statute the way the courts of appeals have, but  
2 we're not going to give you any retrospective relief  
3 because you legitimately, in good faith, relied.

4 MR. FELDMAN: I -- I completely agree. And  
5 I think the good faith of the party is actually --

6 JUSTICE ALITO: I understand that. But, I  
7 mean, you said that this is primarily -- oh, don't worry  
8 about the penalties; this is primarily about  
9 forward-looking things. And yet the complaints asked  
10 for the penalties. Are you willing on behalf of your  
11 clients to disavow any requests for penalties?

12 MR. FELDMAN: No, I'm not.

13 JUSTICE ALITO: Then how can you say that  
14 it's primarily about forward-looking.

15 MR. FELDMAN: Because --

16 JUSTICE ALITO: -- remedies.

17 MR. FELDMAN: I can say that because we  
18 don't know the facts of this case. I'm willing to say  
19 that if all the facts suggested that they acted in good  
20 faith throughout and just made a mistake and they  
21 couldn't have been expected to do anything else, then  
22 I -- I would think they wouldn't be awarded --

23 JUSTICE ALITO: Well, they had to --

24 MR. FELDMAN: -- the penalty --

25 JUSTICE ALITO: -- whatever -- whatever

1 reliance was reasonable based on these hundreds of  
2 letters, that's one thing. How about relying on the  
3 literal meaning of the central statutory provision?

4 MR. FELDMAN: Yes. And then I think that  
5 the literal meaning of that, as all three courts of  
6 appeals unanimously agreed, the literal meaning of that  
7 was -- this is not a -- a standalone statute that  
8 says -- there are statutes in the U.S. code that say --  
9 that don't define a term, and then they say, but a  
10 felony includes something or other. Okay? They don't  
11 define "felony," they just say a felony includes  
12 something or other. That's one kind of statute. And  
13 then courts are supposed to figure out what else a  
14 felony includes.

15 But this statute doesn't do that. And in  
16 fact, the language at the beginning of (C)(i), a plan  
17 established and maintained by a church, ties it to --  
18 this -- you actually can't read (C)(i) as a standalone  
19 statute, because it wouldn't make any sense.

20 JUSTICE ALITO: Well, I'm talking about --

21 MR. FELDMAN: It ties it to a --

22 JUSTICE ALITO: -- the literal language of  
23 (C)(i), and you're now talking about everything else.  
24 The literal language of (C)(i) says: A plan established  
25 and maintained by a church includes a plan that is

1 maintained by a principal-purpose organization.

2 MR. FELDMAN: Yeah.

3 JUSTICE ALITO: And it's as simple as that,  
4 that read literally, it is not required that it be  
5 established --

6 MR. FELDMAN: And --

7 JUSTICE ALITO: -- by a church. Now, you  
8 have other arguments, but --

9 MR. FELDMAN: I -- I -- Your Honor, I  
10 respectfully disagree. The Court -- if the Court has  
11 said one thing more often than anything else in the  
12 context of statutory interpretation, it's that you have  
13 to read things in context and you have to read statutes  
14 as a whole. And this (C) (i) has language that ties it  
15 directly back to A, which Congress said in 1980, we are  
16 retaining A the way it is. And I think you have to read  
17 them both together.

18 If you read them both together, what you  
19 say -- the basic form is whether it's the example of the  
20 disabled veterans, the present or the examples that they  
21 give in the reply brief, the basic form of this is if  
22 you have a statute that says here's a rule that applies  
23 to A and B, and then it says A and B includes a  
24 particular kind of B -- which is what this says,  
25 right? -- established and maintained includes a

1 particular kind of maintenance, then that is naturally  
2 taken to mean, well, we're -- we're --

3 JUSTICE KAGAN: Well, why would you --

4 MR. FELDMAN: -- we're qualifying the B, but  
5 we're not doing anything to the A.

6 JUSTICE KAGAN: Why would you repeat the  
7 requirement of the A? In other words, Congress could  
8 have just said a plan maintained by a church includes a  
9 plan maintained by one of these organizations.

10 MR. FELDMAN: And --

11 JUSTICE KENNEDY: Right. And that -- so  
12 another way of asking the question is, under your  
13 interpretation, established and have no -- have no  
14 function.

15 MR. FELDMAN: I -- I actually don't think  
16 that that's quite right. They could have worded this  
17 other ways. They certainly could have worded the  
18 statute in many other ways to accomplish Respondents'  
19 position -- Petitioners' position -- positioning.

20 But this -- the point of repeating that  
21 language was directly to tie it -- it was one way to  
22 directly tie it back into A and say: Okay, now we're  
23 talking about these things. We want to include a  
24 particular kind of B. Now, that is one thing to  
25 notice -- it's not B -- it doesn't say -- I mean, and

1     Petitioners have no answer for this at all, why Congress  
2     wanted to have -- require them to have a  
3     principal-purpose organization at all. Churches don't  
4     have to have that. And why did Congress trust them to  
5     establish their own plans and then say, but we  
6     actually -- you can establish your plans, Dignity  
7     Hospital, but you don't have to maintain the plan -- you  
8     can't maintain. We are prohibiting you from maintaining  
9     your plan. You have to go to a principal -- an agency  
10    that's principally involved in dealing with employee  
11    benefits that otherwise satisfies the requirements, and  
12    you have to have them maintain it.

13                 CHIEF JUSTICE ROBERTS: From your --

14                 MR. FELDMAN: And there's no --

15                 CHIEF JUSTICE ROBERTS: -- your perspective,  
16    what is the practical significance of requiring that  
17    the -- excuse me -- plans be established by a church?

18                 MR. FELDMAN: I think the practical  
19    significance is Congress's purpose here -- and, again, I  
20    don't think this is in dispute, and there's no other  
21    purpose that's been suggested, was hands off the church.  
22    If a church is involved with a plan, we don't -- we  
23    don't -- we want to have -- leave them the freedom to be  
24    outside of ERISA. But there's no church involved. When  
25    there's no church involved, as there is in this case,



1 the church has --

2 CHIEF JUSTICE ROBERTS: No. But --

3 MR. FELDMAN: -- no direct involvement --

4 CHIEF JUSTICE ROBERTS: -- well, but you --

5 I guess you began with that, and the church is involved  
6 to the extent the law says that the principal purpose  
7 is -- agency is maintaining that fund for people who are  
8 defined to be church employees.

9 MR. FELDMAN: Right. But the --

10 CHIEF JUSTICE ROBERTS: So you can't say the  
11 church is not involved in that -- in the situation  
12 before us.

13 MR. FELDMAN: No. Actually -- I think you  
14 can. But what I'm saying is the church itself, these  
15 employees who are so defined are actually employees of  
16 the church agency. But the church itself has no --

17 CHIEF JUSTICE ROBERTS: But the church --  
18 the church --

19 MR. FELDMAN: -- zero involvement with this  
20 plan. There's nothing that says the church shall be  
21 deemed to have established the plan or the church --  
22 that these -- these plans have zero involvement with any  
23 church.

24 CHIEF JUSTICE ROBERTS: But they have  
25 involvement with the church agency, right?

1 MR. FELDMAN: They do. And --

2 CHIEF JUSTICE ROBERTS: So I thought the  
3 whole concern with the original IRS problem was that the  
4 IRS was treating church agencies as if they were not  
5 engaged in a church function.

6 MR. FELDMAN: No. I --

7 CHIEF JUSTICE ROBERTS: They were saying --  
8 they were saying, okay, the -- the church has an agency  
9 whose mission is to, you know, feed the hungry, clothe  
10 the naked, all of that, and the IRS was saying, well,  
11 that's not a church; it's got nothing to do with it.  
12 And now it's changed and those -- those individuals that  
13 are engaged in that social mission are treated as  
14 members of the church agency.

15 MR. FELDMAN: They are treated that way so  
16 that the --

17 CHIEF JUSTICE ROBERTS: The church agency.

18 MR. FELDMAN: They are doing that so that  
19 the church can include them in its plan if they wanted.  
20 And that -- if the church wants to do that, that's fine  
21 and they can do that. But -- but they're not -- the  
22 point of that provision was to eliminate the 1982 cutoff  
23 that wouldn't have allowed the churches -- the churches  
24 to continue to do that.

25 JUSTICE SOTOMAYOR: Mr. Feldman --

1 MR. FELDMAN: And the churches --

2 JUSTICE SOTOMAYOR: Let's go to that 1982.

3 Tell me how your reading of the statute includes the  
4 organizations that were clamoring and for whom the IRS  
5 had said were covered by this provision: The pension  
6 boards that were separate from the church, and Ms. Blatt  
7 pointed to the sisters, the nuns, who were also seeking  
8 coverage. How does your reading take care of those two  
9 situations facing Congress?

10 MR. FELDMAN: I think it actually perfectly  
11 matches with those two situations. The (C)(ii) and  
12 (C)(iii) provisions, as I said, they allow churches to  
13 continue if they wanted to cover church agencies and  
14 eliminate the 1982 cutoff that people were concerned  
15 about. The (C)(i) provision said that was not a  
16 provision about let's drastically expand the types of  
17 entities that are -- and by millions of employees, the  
18 types of employees who don't have ERISA protection.  
19 This was what Representative Conable termed a  
20 technical --

21 JUSTICE KAGAN: But I would have thought  
22 that the -- the one thing that seems most clear from a  
23 pretty murky legislative history is the church pension  
24 boards were supposed to be included in this. And the  
25 church pension boards, some of them were established --

1 their plans were established by the church, some of them  
2 not. So you would be taking out some of these church  
3 pension boards that I thought are the sort of  
4 quintessential group that this was designed to include.

5 MR. FELDMAN: I -- I really -- I disagree  
6 with the premise of that. If you look back, you know,  
7 no -- there is nothing in the legislative history that  
8 said, you know, anybody -- there's -- let me say this  
9 correctly. You know, there's a few stray references in  
10 letters from pension boards saying yeah, we established  
11 a plan. But we actually go over each of the ones in our  
12 brief, and these are the ones that they cite, and  
13 they're actually -- Congress had no -- that was not the  
14 way they operated then. It's actually not the way they  
15 operate now.

16 The way they operate is, these are for  
17 congregational churches primarily, and in a  
18 congregational type of set up, you have an assembly or  
19 synod of the church itself, and this is just an assembly  
20 of all the local churches and they -- they will  
21 establish the plans. But if they don't have the --

22 JUSTICE GINSBURG: What does it mean to --

23 MR. FELDMAN: Beg your pardon.

24 JUSTICE GINSBURG: What does it mean to  
25 establish a plan? Is -- is -- establishing is all

1 important in your view of it. So and -- I didn't see  
2 any statutory definition of what it takes to establish a  
3 plan.

4 MR. FELDMAN: And as -- as this Court -- the  
5 Halifax case, I think, establishes it. It means making  
6 a commitment to provide some kind of a reasonably  
7 definite benefits over -- to -- in under -- to some  
8 employees, you know, reasonably well defined. That's  
9 what it means.

10 If you don't make that commitment, if you  
11 say the church said we want somebody else to have a plan  
12 and lay out what the terms would be, actually the church  
13 would definitely not have established the plan. It  
14 would be somebody else who if they took them up on it  
15 would.

16 But for the church to establish a plan, and  
17 this case is actually -- the Dignity case is a perfect  
18 example. The district court here -- and it's usually  
19 not a difficult inquiry. The district court here found,  
20 and if you look around page 56A of the cert petition  
21 appendix, in the Dignity case, the district court said  
22 well, who established this plan, well, Dignity, the  
23 hospital, they passed a corporate resolution and they  
24 adopted a summary -- the appropriate corporate officers  
25 adopted a summary plan description, and they established

1 the plan and that committed Dignity to doing certain  
2 things, and it wasn't somebody else who did it. And  
3 that's usually what that inquiry is. You need some kind  
4 of commitment.

5 Now, Congress -- Congress, when that kind of  
6 commitment was made by a church, Congress said we want  
7 hands off, and they had good reasons for doing it. It's  
8 very much like in the tax code, there's numerous other  
9 places where you have to distinguish between churches  
10 and church agencies.

11 In Section 26 U.S.C. 7611, gives churches  
12 quite extraordinary protection against audits, against  
13 the circumstances under which they can be audited, the  
14 types of things that can be looked at and the rights  
15 they have during the audit. It applies only to churches  
16 and not to agencies, and the principle is the same  
17 principle here. We don't want the government looking  
18 into the books and records of churches, and I think  
19 that --

20 JUSTICE ALITO: Well, in the situation where  
21 the church establishes the plan and then turns over the  
22 maintenance of the plan to a principal-purpose  
23 organization, the audits would be the books of the  
24 principal-purpose organization. There wouldn't be very  
25 much to look for in the records of the church.

1                   So if that's the -- if that was the purpose  
2   of it, I don't see what the establishment requirement --

3                   MR. FELDMAN: I -- I would think that it's  
4   more than just looking at the books and records at that  
5   particular time. There being -- when the church is --  
6   is establishing a plan, it's making some kind of  
7   commitment of what kind of benefits who's going to get  
8   and when. That's what it means to establish a -- a  
9   plan, and how it's going to be funded. And it might --

10                  JUSTICE ALITO: But you say -- where --  
11   where do I look to find that? And where do I look to  
12   find the provision that says what you say, which is that  
13   the entity that establishes the plan is financially  
14   responsible?

15                  MR. FELDMAN: The -- the financially -- it's  
16   financially responsible to the extent that what it says  
17   when it established the plan. I mean, I suppose,  
18   especially if it's not --

19                  JUSTICE ALITO: It's -- it's responsible --  
20   it's responsible to the extent the plan makes it  
21   responsible? Is that the answer?

22                  MR. FELDMAN: It -- it's -- it's -- under  
23   ERISA, plans can't limit their liability. But, I mean,  
24   I -- the -- the person -- parties establishing plans  
25   can't.

1                   But under -- if it's not an ERISA plan, they  
2                   probably can have provisions that say we're only going  
3                   to give you what's -- the money that's in the plan --

4                   JUSTICE ALITO: But where is the  
5                   provision that --

6                   MR. FELDMAN: But they still have to make a  
7                   commitment and that would be governed by, presumably, in  
8                   the case of non-ERISA plan, by state law. But --

9                   JUSTICE ALITO: But where is the provision  
10                  of ERISA that supports what you said, which is -- it  
11                  seems to me to be a significant point, that the entity  
12                  that establishes the plan is financially responsible for  
13                  the plan. What is the provision of ERISA --

14                  MR. FELDMAN: It makes --

15                  JUSTICE ALITO: -- that says that?

16                  MR. FELDMAN: It -- I think it's -- I can't  
17                  cite it to you right now, the -- the number, but it's  
18                  the provision that says you have to carry out the terms  
19                  of a plan and what it --

20                  CHIEF JUSTICE ROBERTS: I thought  
21                  Mr. Stewart suggested the opposite.

22                  MR. FELDMAN: No. He -- I don't think so.  
23                  I believe he -- he said the employees can sue -- if it's  
24                  an ERISA you can sue under 502 for what -- whatever the  
25                  benefits are that you're -- you've been promised. So --



1 CHIEF JUSTICE ROBERTS: Sue the entity  
2 establishing it or the person -- or the entity  
3 maintaining the plan?

4 MR. FELDMAN: You could -- you -- first of  
5 all, frequently they are the same. But if they are  
6 different, it certainly would defer --

7 CHIEF JUSTICE ROBERTS: Well, in this case  
8 they are not, right?

9 MR. FELDMAN: In this case I think they are,  
10 actually.

11 CHIEF JUSTICE ROBERTS: Well, you're talking  
12 about -- I thought the principal-purpose agency is the  
13 one that --

14 MR. FELDMAN: The -- the principal --

15 CHIEF JUSTICE ROBERTS: -- is the one that's  
16 maintaining --

17 MR. FELDMAN: Right, and the  
18 principal-purpose agency in these cases is an internal  
19 committee of -- of Petitioners, so I don't think there  
20 would be any difference in suing -- I think you would  
21 sue Petitioners. That is all that -- there wouldn't --  
22 there is nobody else to sue.

23 But I -- I guess you would sue both of them,  
24 actually. But effective --

25 JUSTICE GINSBURG: Is it -- can an internal

1 committee of a church-affiliated organization qualify as  
2 a principal purpose organization?

3 MR. FELDMAN: We believe that it can't.

4 And, in fact, there would be no reason at all for  
5 Congress to have -- we -- a part -- according to my  
6 friend, Congress wanted to be sure that whoever is  
7 maintaining the plan is somebody who is associated with  
8 the church.

9 But there was no reason to talk about  
10 principal-purpose, employee benefit organizations that  
11 are primarily involved in employee benefits if that's  
12 what you wanted to accomplish. The only -- the --  
13 the -- this makes sense if you look at it as something  
14 that congregational denominations were doing as of 1980,  
15 which is they found it convenient to have the  
16 maintenance of the plan done by an organization that was  
17 an employee benefits organization and nobody objected to  
18 that. They said that's fine. Mr. Halperin didn't  
19 object to it; nobody did. That's fine if you want to --  
20 if that's a convenient way to -- they were talking about  
21 how to run a plan, not opening up the plan to a broad  
22 range -- not opening up the exemption to a broad range  
23 of plans and probably millions of employees.

24 And just back to --

25 JUSTICE BREYER: Why -- how many -- how

1 many -- how many employees did come in under the IRS  
2 interpretation for 30 years that wouldn't have come in  
3 had the IRS followed yours, if you know? About, just  
4 rough hand.

5 MR. FELDMAN: I would assume all of them.

6 JUSTICE BREYER: I mean, I would like to get  
7 a rough idea of what you are talk -- we're talking  
8 about, because your argument practically depends on if  
9 we keep following the IRS interpretation there will be  
10 vast numbers of plans that come in that wouldn't  
11 otherwise. They followed it for 30 years.

12 I'd like to get a rough, empirical idea of  
13 how many have come in because they didn't accept your  
14 interpretation, how many employees are -- are exempt  
15 that wouldn't have otherwise been.

16 MR. FELDMAN: Right. They say that there  
17 are a million employees that have been in these plans.  
18 Actually, though, there's probably millions or more  
19 employees in the future, once this Court reaches a  
20 decision that --

21 JUSTICE BREYER: Why? Why won't they be  
22 kept out by the principal purpose definition unless they  
23 really are the Little Sisters of the Poor?

24 MR. FELDMAN: They wouldn't be kept out any  
25 more than -- than Petitioners in this case, would they?

1 I mean, it would be the same --

2 JUSTICE BREYER: Well, that may be, but  
3 there's an issue as to whether Petitioners in this case,  
4 which ones come in and which ones don't.

5 MR. FELDMAN: Right. But I -- I think  
6 really the point is that there's a --

7 JUSTICE BREYER: The answer is you don't  
8 know. Okay. So -- so the -- that's -- I get it.

9 MR. FELDMAN: No, I -- I --

10 JUSTICE BREYER: I -- I wanted to get a  
11 rough idea of the scope of the practical extent of the  
12 two interpretations.

13 MR. FELDMAN: And -- and I -- I --

14 JUSTICE BREYER: And I think the answer is  
15 you don't know.

16 MR. FELDMAN: Well, I -- I don't -- you  
17 haven't --

18 JUSTICE BREYER: You don't have to know.

19 MR. FELDMAN: -- all these cases haven't  
20 been litigated and I can't say how they're all going to  
21 come out --

22 JUSTICE BREYER: Fine. But I have  
23 another -- I have another thing I want to know.

24 The Catholic church establishes the plan,  
25 the Little Sister of the Poor maintain it. On your

1 definition is it in or out? In the exemption, are they  
2 exempt or not?

3 MR. FELDMAN: If they're Little Sister of  
4 the Poor under the --

5 JUSTICE BREYER: I'm assuming they are a  
6 principal-purpose organization.

7 MR. FELDMAN: Yes, then it would be --

8 JUSTICE BREYER: Okay. Second --

9 MR. FELDMAN: -- they're a principal-purpose  
10 organization.

11 JUSTICE BREYER: -- the Little Sisters of  
12 the Poor establish it, and the Little Sisters of the  
13 Poor maintain it.

14 On your definition, are they in or out?

15 MR. FELDMAN: They are out, because --

16 JUSTICE BREYER: Okay. Third, in -- it is  
17 established by a municipality and it goes broke, and the  
18 Little Sisters of the Poor say we will run the hospital.

19 In or out? In or out of the exemption?

20 MR. FELDMAN: I -- I believe that would be  
21 out.

22 JUSTICE BREYER: Out. Okay.

23 MR. FELDMAN: Because --

24 JUSTICE BREYER: So you -- you actually have  
25 to have the Catholic church establishing itself. If

1     it's established by the Little Sisters of the Poor, it's  
2     out?

3                   MR. FELDMAN:   That's -- that's right, and  
4     the reason is because Congress --

5                   JUSTICE BREYER:   Okay.

6                   MR. FELDMAN:   -- what Congress was most  
7     concerned about here was not going into the church's  
8     books and records.   These agencies like the Petitioners,  
9     these -- their books and records are open to the public,  
10    they're open to --

11                  JUSTICE BREYER:   That is true.   But, I mean,  
12    if it's a legitimate organization like, let's say the  
13    Little Sisters of the Poor, really affiliated with the  
14    church, you know, really affiliated with the church,  
15    they do have a lot of involvement --

16                  MR. FELDMAN:   And if they really are part of  
17    the church, I would add one other thing.   If they really  
18    are --

19                  JUSTICE BREYER:   Yes, they really are the  
20    church, and they retained a -- purpose.

21                  MR. FELDMAN:   -- part of the church and they  
22    can qualify as a church, that's fine.   They can't --  
23    this line between churches and church agencies is one  
24    that gets drawn throughout the law.   It gets drawn in  
25    seven or eight provisions of the U.S. Code --

1 CHIEF JUSTICE ROBERTS: I thought the whole  
2 purpose was to avoid that inquiry. I mean, that was the  
3 mistake that the IRS made, is that it was saying these  
4 church agencies were actually not part of the church --

5 MR. FELDMAN: I thought --

6 CHIEF JUSTICE ROBERTS: -- because they  
7 weren't engaged in sacerdotal or whatever activities  
8 that the IRS thought characterized what a church should  
9 be.

10 MR. FELDMAN: I just don't think that that's  
11 what the problem was. The problem was that they were  
12 facing a 1982 deadline after which church agencies would  
13 not have been able to be in a -- in a plan, no matter  
14 who did what for anything, and the --

15 CHIEF JUSTICE ROBERTS: What the -- what was  
16 the tenor --

17 MR. FELDMAN: -- of that.

18 CHIEF JUSTICE ROBERTS: What was the tenor  
19 of the hundreds and hundreds of letters that -- that  
20 Congress received about what the IRS was doing? What  
21 did they understand the IRS to be doing?

22 MR. FELDMAN: So, if you look at the 20 --  
23 on page, I think, 10,054 or so of the congressional  
24 record -- I don't remember the volume number -- but it's  
25 cited by Petitioners and by us. They -- there are 20

1 letters that Senator Talmadge put in the record. I  
 2 looked at them. Of those, six of them used the term  
 3 "Internal Revenue Service." But the Internal Revenue  
 4 Service, at that time, was promulgating regulations.  
 5 This is not about the Little Sisters of the Poor. None  
 6 of them mentioned that. In fact, there's no mention of  
 7 the Little Sisters -- or the sisters who had the plan in  
 8 New Jersey. There's no mention of that at all.

9 JUSTICE ALITO: Are you saying that the only  
 10 purpose of the amendment was to avoid the sunset  
 11 provision?

12 MR. FELDMAN: I think there were two  
 13 purposes. There's C(ii) and C(iii) --

14 JUSTICE ALITO: All right. So the --  
 15 that avoiding the sunset provision was not the only  
 16 purpose. I think that's what you just said a couple  
 17 minutes ago.

18 MR. FELDMAN: That -- well, okay. Excuse  
 19 me. I didn't mean to say that. What I meant to say is  
 20 the purpose of the C(ii) and C(iii) provisions, which  
 21 was completely accomplished, was to get rid of the  
 22 sunset provision. And these letters are overwhelmingly  
 23 about the sunset provision.

24 And every time Senator Talmadge or anybody  
 25 else said, well, we were -- you know, the churches



1 are -- the church agencies are very closely tied to the  
2 church, that really it's part of the church --

3 JUSTICE ALITO: Because they honestly would  
4 have to do something else, right? And that's what C(i)  
5 --

6 MR. FELDMAN: Right.

7 JUSTICE ALITO: -- what --

8 MR. FELDMAN: And the other thing they  
9 wanted to do was what Representative Conable called a  
10 technical problem, which is they wanted to enable  
11 church -- these congregational churches to maintain  
12 plans in a different way than they had been -- to  
13 maintain plans through this separate agency because that  
14 was the way they found it most convenient to do.

15 And that actually explains this language of  
16 why they're talking in the first place about principal  
17 purpose agencies and why that doesn't apply to -- the  
18 churches can establish and maintain a plan, and that's  
19 fine.

20 JUSTICE SOTOMAYOR: Mr. Feldman, why do you  
21 think -- I mean, I've -- I have read all your arguments  
22 about why the IRS letters are not entitled to deference.  
23 But I come at it from a different point, which is it was  
24 in part these private organizations, religious  
25 organizations, but the IRS, too, who was lobbying

1 Congress to express itself on this issue and take care  
2 of what the IRS knew was a problem for all these people.  
3 And then all of a sudden, almost immediately after the  
4 legislation is passed, the IRS is believing and stating  
5 that it's done more than you claim.

6 Isn't that, in itself, evidence -- not the  
7 Skidmore deference -- but evidence that the agency  
8 believed that the answer was different than you're  
9 promoting right now?

10 MR. FELDMAN: I -- I -- you know, the agency  
11 did believe the answer was different, that that is in  
12 the letters. There is no reasoning, actually, in those  
13 letters at all. And insofar as there is any, it's  
14 wrong.

15 JUSTICE SOTOMAYOR: Except they knew there  
16 was a problem.

17 MR. FELDMAN: They -- they --

18 JUSTICE SOTOMAYOR: They thought or they  
19 assumed --

20 MR. FELDMAN: And they were --

21 JUSTICE SOTOMAYOR: Rightly or wrongly, they  
22 assumed that this language fixed it and fixed it how  
23 they were describing it in these letters.

24 MR. FELDMAN: They -- they did interpret it  
25 the way they did. I wouldn't deny that they did that.

1 But they -- they give no reason for doing that. These  
2 were ex parte letters. Every one of them, up until the  
3 last couple of years, was done on an ex parte basis.  
4 The competitors had no chance to say this is what we  
5 think. The employees had no chance to say this is what  
6 we think. They didn't analyze the importance of ERISA  
7 provisions. They didn't analyze what would --  
8 inevitably did happen, which is there are six or seven  
9 church plans already that have failed and left the  
10 employees with nothing; but had they been covered by  
11 ERISA, they would have had PBGC insurance. The IRS  
12 didn't take any of that into account at all. And to --  
13 you know, they were just wrong in 1982.

14 And in fact, it's hard to -- it's clear in  
15 one part that they're wrong that we talk about in the  
16 brief. But it's hard to see what other reasoning they  
17 have about why they didn't take -- they didn't consider  
18 the practical consequences of this, they didn't consider  
19 the history of it, they didn't consider the -- the  
20 relationships between the A and the C(i) provision.  
21 They just didn't consider what any of the particular  
22 words of the statute meant. They really didn't do any  
23 of that.

24 I would like to make one other point on --  
25 on reliance, which is, you know, this is about bringing

1 these plans into compliance with ERISA. That shouldn't  
 2 be a hard thing to do, and a district court should be  
 3 able to do it, giving them whatever period of time is  
 4 reasonable. That's the overwhelming thing that's at  
 5 issue here. And in fact, if, as they say, they haven't  
 6 departed from ERISA that much, which we don't agree or  
 7 believe, then it should be particularly easy to bring  
 8 them into compliance with ERISA.

9 The only two things that are  
 10 backward-looking at all are the civil damages, which I  
 11 mentioned, and the fact that you may have to adjust some  
 12 vesting schedules between three and five years, which is  
 13 likely to be a minor problem.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Two minutes, Ms. Blatt.

16 REBUTTAL ARGUMENT OF LISA S. BLATT

17 ON BEHALF OF THE PETITIONERS

18 MS. BLATT: So I'm just going to start with  
 19 the funding issue.

20 The one thing that's pellucid about C is  
 21 that the church does not have to fund C(i) plans because  
 22 the statute explicitly allows the maintaining  
 23 organization to fund it. And C(i) moves maintenance  
 24 outside the church, which means the church are  
 25 absolutely off the hook.

1                   They also -- you know, they -- they raise  
2   the dignity plan. The sponsoring congregations did  
3   establish those plans, and the other side argues the  
4   sponsoring congregations are not the church. And I  
5   guess that's because they're not priests.

6                   The other thing I would ask you to read is  
7   the brief by the United Church of Christ and the  
8   Evangelical Lutheran Church of America. They explain  
9   that the centralization that an establishment  
10   requirement would impose is anathema to their religious  
11   beliefs. And it's the same reason that the maintenance  
12   is. It's the continuum, establishment and maintenance.  
13   Establishment turns on day one. And then day two,  
14   throughout time immemorial, there being -- the other  
15   side concedes you can maintain them. But the notion  
16   that there is some umbrella church for -- for the Jews  
17   and the Protestants is just -- it's fantastical that  
18   could possibly establish these plans.

19                  The other thing I wanted to mention, the  
20   other side keeps talking about these closely-tied joint  
21   plans. But the only other thing we know that is  
22   pellucid about C is that an exempt plan can cover every  
23   single employee in this country for a religious  
24   non-profit institution and not a single church employee  
25   needs to be in that plan.

1           The other side is asking you to engage in a  
2 counterintuitive kind of weird thing that a church would  
3 set the dental plans and vesting requirements for  
4 employees of an affiliated organization, especially in a  
5 place like the Jewish and Protestant religions. And  
6 that -- that just is not credible.

7           And finally, on the anomalies. I mean, they  
8 have the anomalies that the pension board would want to  
9 divorce the establishment from the maintenance. They  
10 have the anomaly that -- that the nuns are left out in  
11 the cold. They have the anomaly of the YMCA -- and I  
12 see my time is up. I don't want to --

13           CHIEF JUSTICE ROBERTS: Do finish your  
14 sentence.

15           MS. BLATT: Oh. That the YMCA is the only,  
16 you know, religious organization in America that got  
17 this exemption, and they have this sort of silliness  
18 that a church would establish plans for someone else's  
19 employees.

20           CHIEF JUSTICE ROBERTS: Thank you, counsel.  
21 Case is submitted.

22           (Whereupon, at 11:07 a.m., the case in the  
23 above-entitled matter was submitted.)

24

25

A	<b>adopted</b> 45:24 45:25 <b>Adventists</b> 14:12 <b>Advocate</b> 1:3 4:5 <b>affairs</b> 30:3 <b>affiliated</b> 9:8 10:19 11:17 13:4,12 54:13 54:14 62:4 <b>affiliation</b> 12:16 <b>affiliations</b> 14:17 <b>affirm</b> 18:13 <b>affirmance</b> 4:21 <b>agencies</b> 15:7,16 15:25 19:2,21 31:10,16,18 32:18 42:4 43:13 46:10,16 54:8,23 55:4 55:12 57:1,17 <b>agencies'</b> 31:24 <b>agency</b> 20:19 31:4,19 32:8 32:16 40:9 41:7,16,25 42:8,14,17 49:12,18 57:13 58:7,10 <b>ago</b> 56:17 <b>agree</b> 15:16 25:10 28:2 36:4 60:6 <b>agreed</b> 10:23 37:6 <b>agrees</b> 5:7 28:21 <b>ahead</b> 12:19 <b>AL</b> 1:3,6,12,20 <b>Alito</b> 10:20 11:14 25:17 27:6 34:23 35:4,9,12 36:6 36:13,16,23,25 37:20,22 38:3 38:7 46:20	47:10,19 48:4 48:9,15 56:9 56:14 57:3,7 <b>Alliance</b> 18:23 <b>allocated</b> 27:25 <b>allow</b> 11:21 31:18,22 32:4 43:12 <b>allowed</b> 42:23 <b>allows</b> 60:22 <b>alluded</b> 20:6 23:11 <b>amended</b> 20:21 <b>amendment</b> 4:23 7:16 16:13 20:7 22:1 25:1 56:10 <b>amendments</b> 22:4 <b>America</b> 11:9 12:3 14:12 17:25 61:8 62:16 <b>amicus</b> 2:12 3:7 18:3 20:1 <b>amount</b> 17:1 <b>analyze</b> 59:6,7 <b>anathema</b> 61:10 <b>and/or</b> 5:18 <b>anomalies</b> 11:18 29:19 62:7,8 <b>anomalous</b> 11:14,25 <b>anomaly</b> 62:10 62:11 <b>answer</b> 35:4 40:1 47:21 52:7,14 58:8 58:11 <b>anybody</b> 44:8 56:24 <b>anyway</b> 15:15 <b>apart</b> 17:6 31:19 <b>apparatus</b> 8:18 <b>appeals</b> 10:22 16:9 36:1 37:6	<b>APPEARAN...</b> 2:7 <b>appeared</b> 25:9 <b>appears</b> 14:19 <b>appendix</b> 5:3 45:21 <b>applied</b> 26:19 <b>applies</b> 14:13 16:25 38:22 46:15 <b>apply</b> 57:17 <b>approaches</b> 27:18 <b>appropriate</b> 45:24 <b>approving</b> 33:7 <b>area</b> 32:19 <b>argue</b> 13:5 <b>argues</b> 61:3 <b>argument</b> 2:5 3:2,5,9,12 4:4 4:8 10:25 13:6 16:13 19:25 25:5 29:8 51:8 60:16 <b>arguments</b> 38:8 57:21 <b>arms</b> 7:15 <b>articulated</b> 15:15 <b>aside</b> 12:12 <b>asked</b> 36:9 <b>asking</b> 39:12 62:1 <b>assembly</b> 44:18 44:19 <b>assets</b> 26:4 27:11 <b>associated</b> 9:20 9:23 50:7 <b>associations</b> 34:11 <b>assume</b> 14:7 17:8 23:6 51:5 <b>assumed</b> 58:19 58:22 <b>assumes</b> 12:2	<b>assuming</b> 10:25 53:5 <b>assumption</b> 5:21 <b>assurance</b> 33:18 <b>attempting</b> 12:6 <b>audit</b> 46:15 <b>audited</b> 46:13 <b>audits</b> 46:12,23 <b>authority</b> 9:21 35:16 <b>authorized</b> 33:12 <b>authorizes</b> 27:16 <b>avoid</b> 21:1 55:2 56:10 <b>avoiding</b> 56:15 <b>awarded</b> 36:22
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