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IN THE SUPREME COURT OF THE UNITED STATES

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ADVOCATE HEALTH CARE NETWORK, ET AL., :

Petitioners : No. 16-74

v. :

MARIA STAPLETON, ET AL., :

Respondents. :

- - - - - x

and

- - - - - x

SAINT PETER'S HEALTHCARE SYSTEM, :

ET AL., :

Petitioners : No. 16-86

v. :

LAURENCE KAPLAN, :

Respondent. :

- - - - - x

and

- - - - - x

DIGNITY HEALTH, ET AL., :

Petitioners : No. 16-258

v. :

STARLA ROLLINS, :

Respondent. :

- - - - - x

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Washington, D.C.

Monday, March 27, 2017

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

APPEARANCES:

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

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

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

	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	LISA S. BLATT, ESQ.	
4	On behalf of the Petitioners	4
5	ORAL ARGUMENT OF	
6	MALCOLM L. STEWART, ESQ.	
7	For United States, as amicus curiae,	
8	supporting the Petitioners	19
9	ORAL ARGUMENT OF	
10	JAMES A. FELDMAN, ESQ.	
11	On behalf of the Respondents	29
12	REBUTTAL ARGUMENT OF	
13	LISA S. BLATT, ESQ.	
14	On behalf of the Petitioners	60
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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P R O C E E D I N G S

(10:05 a.m.)

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

Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT
ON BEHALF OF THE PETITIONERS

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

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

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

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

<p>29:13 35:7 48:23 50:3 53:20 58:11 60:7 believed 20:20 58:8 believing 58:4 beneficiaries 27:16 benefit 4:18 9:11 14:24 15:2,4 27:10 50:10 benefits 9:13 23:24 26:3 27:10 28:6 33:3 34:21 40:11 45:7 47:7 48:25 50:11,17 better 8:12 big 14:13 28:2 billion 16:22,23 16:23 billions 34:25 35:10 bills 18:1 bishop 12:25 bit 17:14 29:1 bitterly 18:25 Blatt 2:8 3:3,13 4:7,8,10 5:19 6:1,7,10,17,22 7:3,17 8:3 9:24 10:24 12:11,18 12:23 13:5,20 13:24 14:6,21 15:1,4,10,21 16:3,12 17:16 17:18,22,24 18:21 20:6 21:6 24:24 25:10 34:23 43:6 60:15,16 60:18 62:15 board 6:12,23 7:7 10:14,16</p>	<p>11:20 14:24 62:8 board-establis... 19:14 boards 11:23 19:19 43:6,24 43:25 44:3,10 bonds 13:12,13 14:16 books 46:18,23 47:4 54:8,9 bottom 14:8 bound 33:23 breached 26:11 break 29:14 BREYER 50:25 51:6,21 52:2,7 52:10,14,18,22 53:5,8,11,16 53:22,24 54:5 54:11,19 brief 5:1 9:18 14:9,10 24:23 25:1 38:21 44:12 59:16 61:7 bring 60:7 bringing 34:19 59:25 broad 50:21,22 broke 53:17 business 31:1 businesses 33:2 bust 30:13</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 3:1 4:1 8:14 8:16,17,19,20 8:20,22 9:4,15 10:12 13:10 21:6 37:16,18 37:23,24 38:14 43:11,12,15 60:20 61:22 C(i) 4:25 5:4,6,9 5:11 57:4 59:20 60:21,23</p>	<p>C(ii) 56:13,20 C(iii) 56:13,20 called 57:9 care 1:3 4:5 13:25 29:4 32:15 43:8 58:1 carefully 30:1 careless 29:1 caring 12:9 carry 48:18 case 4:4,6 5:7 11:2 16:21 24:6 25:18,18 26:7 28:3 35:15 36:18 40:25 45:5,17 45:17,21 48:8 49:7,9 51:25 52:3 62:21,22 cases 16:21,24 27:19 34:17 35:2 49:18 52:19 category 29:24 Catholic 12:8,16 14:6,10,16,16 18:22 52:24 53:25 center 14:1 18:3 central 37:3 centralization 61:9 cert 45:20 certain 27:22 46:1 certainly 16:11 34:13 39:17 49:6 chance 27:8 59:4,5 change 7:11,13 18:20 changed 25:2 28:20 42:12 characterized 55:8</p>	<p>charity 10:15 chase 8:10 Chief 4:3,10 14:21 15:3,5 15:13,19,23 16:22 19:23 20:3 28:18 29:6,10 30:15 31:3 32:17 33:24 34:2,4 40:13,15 41:2 41:4,10,17,24 42:2,7,17 48:20 49:1,7 49:11,15 55:1 55:6,15,18 60:14 62:13,20 chose 7:25,25 20:21 Christ 14:11 61:7 church 4:14,17 5:7,11,18 6:5 6:11,14,18 7:4 7:5,6,22 8:7,20 8:23 9:5,7,11 9:20 10:11,11 10:13 11:1,8 11:17 12:7,9 12:16 13:4,11 14:7,10,11,12 16:14,15,16 18:23 19:2,3,7 19:20 20:14,24 21:1 22:3,6,7 25:7,15,20,25 26:19,23 27:1 27:3 28:7,24 29:24,25 30:1 30:3,4,6,7,8,16 30:18 31:4,5,8 31:10,20 32:10 32:11,13,16 37:17,25 38:7 39:8 40:17,21 40:22,24,25 41:1,5,8,11,14</p>	<p>41:16,16,17,18 41:20,21,23,25 42:4,5,8,11,14 42:17,19,20 43:6,13,23,25 44:1,2,19 45:11,12,16 46:6,10,21,25 47:5 50:8 52:24 53:25 54:14,14,17,20 54:21,22,23 55:4,4,8,12 57:1,2,2,11 59:9 60:21,24 60:24 61:4,7,8 61:16,24 62:2 62:18 church's 8:21 9:1 54:7 church-affilia... 6:6,20 7:2,21 10:13 50:1 church-associ... 32:8 churches 6:2 14:13 20:16 30:24 31:16,22 32:9 40:3 42:23,23 43:1 43:12 44:17,20 46:9,11,15,18 54:23 56:25 57:11,18 churches' 31:24 circumstances 46:13 cite 27:15 44:12 48:17 cited 33:11 55:25 civil 60:10 claim 58:5 clamoring 43:4 clarifies 24:23 clarify 21:13 class 32:4</p>
--	---	--	---	---

clear 7:8 22:12 22:15 43:22 59:14	compliance 60:1 60:8	18:15 59:18	19:9	dealt 13:8
clearly 5:15 22:19 28:22	complicated 8:13	consider 59:17 59:18,19,21	court 1:1 2:5 4:11 20:4 35:18,20,25 38:10,10 45:4 45:18,19,21 51:19 60:2	decades 4:20
Clement's 14:9	compound 8:8	consistent 4:19 21:16 23:16	court's 35:17	decided 10:21 23:22
clients 36:11	Conable 43:19 57:9	consolidated 4:6	courts 4:15 10:22 16:8 23:6 27:18 36:1 37:5,13	decision 14:13 16:4 17:2 51:20
climate 34:9	concede 10:4 24:15	constitutes 12:7	covered 6:1 12:10 20:17,19 20:20,25 21:3 23:1 30:17 43:5 59:10	deem 24:18
close 30:1 35:19	concedes 5:24 19:11 61:15	constructed 27:21 28:4	covers 29:22	deemed 32:8 41:21
closely 31:16 57:1	concern 13:9 42:3	construing 24:21	creates 29:18	defendant 26:10 27:17,19,24
closely-tied 61:20	concerned 43:14 54:7	context 11:9,23 23:6 38:12,13	creating 29:21	defer 15:11,16 49:6
clothe 42:9	congregational 19:12 44:17,18 50:14 57:11	continue 31:22 42:24 43:13	credible 62:6	deference 4:21 57:22 58:7
code 37:8 46:8 54:25	congregations 19:13 61:2,4	continued 32:1	criteria 22:14,17 24:4,9,9 30:6	define 12:6 37:9 37:11
cold 12:1 19:17 62:11	Congress 5:11 5:16 7:25 8:22 10:17 11:5,19 12:2,4,12 13:8 14:18 16:14 17:9,20,24,25 18:1,19,25 20:9,14,19,21 21:1,5,11,12 21:14,17,20,25 23:7,8,13,16 23:20 24:17 25:12 28:7,21 29:1,16,18,20 29:25 30:16 31:17 32:9 34:14 38:15 39:7 40:1,4 43:9 44:13 46:5,5,6 50:5,6 54:4,6 55:20 58:1	continuum 61:12	critical 25:21,22	defined 6:19 10:12 21:4,13 21:16 22:2 24:19 27:10 29:25 41:8,15 45:8
Columbia 21:20	Congress's 14:3 40:19	contrary 4:14	crucial 28:5,8	defining 11:7
combination 20:12	congressional 55:23	control 10:18 11:20	culture 34:9	definite 45:7
come 22:18 51:1 51:2,10,13 52:4,21 57:23	consequences	controlled 9:20 9:23 11:17	curiae 2:12 3:7 20:1	definitely 45:13
comment 17:13		convenient 50:15,20 57:14	current 20:8,11	definition 5:8 8:8 10:9 19:5 21:12,15 23:15 45:2 51:22 53:1,14
commitment 45:6,10 46:4,6 47:7 48:7		convictions 13:13	cut 8:10	definitional 21:11
committed 46:1		corporate 14:4,7 45:23,24	cutoff 42:22 43:14	denomination 12:3
committee 11:11 11:12,16 13:17 49:19 50:1		corporation 12:14	D	denominations 18:24 50:14
committees 11:3		corporations 12:13	D 4:1	dental 62:3
common 9:9 13:12,13		correct 26:4,6	D.C 2:1,8,11,14 21:23	deny 58:25
community 7:15 18:2		correctly 44:9	damages 60:10	departed 60:6
competing 14:1		counsel 19:23 29:6 33:10 60:14 62:20	day 61:13,13	Department 2:11 15:1 18:12 32:19
competitors 59:4		counterintuitive 62:2	days 7:10	depend 27:4,20
complained 12:3 17:25 18:25		Countless 18:10	DCM 16:10	depends 51:8
complaint 35:1		country 27:5 29:23 30:10,11 61:23	deadline 55:12	
complaints 34:24 36:9		couple 7:10 56:16 59:3	dealing 40:10	
completely 9:5,6 36:4 56:21		course 16:3,18		

deprive 33:2	35:17 45:18,19	employees 4:18	26:22,25 27:7	26:2 45:5
Deputy 2:10	45:21 60:2	8:21 9:1,7,13	27:9,13,15	46:21 47:13
described 16:9	divorce 62:9	14:3,5 21:8	29:21,21 33:3	48:12 52:24
describing 20:6	doing 13:22 20:9	23:23,23 30:12	34:20 35:19	establishing
58:23	21:25 27:22,23	30:17,18 31:4	40:24 43:18	11:23 44:25
description	33:19 39:5	31:9,9,24,25	47:23 48:1,10	47:6,24 49:2
45:25	42:18 46:1,7	32:7,8,13,15	48:13,24 59:6	53:25
designed 44:4	50:14 55:20,21	33:3 34:21	59:11 60:1,6,8	establishment
determine 27:19	59:1	41:8,15,15	ERISA's 16:24	8:23 13:10
27:25	DOL 17:15	43:17,18 45:8	error 23:8	28:7 47:2 61:9
devised 27:18	dollar 35:8	48:23 50:23	especially 47:18	61:12,13 62:9
difference 28:3	dollars 34:25	51:1,14,17,19	62:4	ET 1:3,6,12,20
49:20	35:10	59:5,10 62:4	ESQ 2:8,10,14	Evangelical
different 8:14	doubt 8:12	62:19	3:3,6,10,13	14:11 61:8
13:23 21:10	14:15 33:17	employer 9:8	essential 19:3	everybody 31:11
24:13 30:23	draft 20:9	26:8,9,10	essentially 12:13	35:14,15
49:6 57:12,23	drafting 11:6	27:23 29:22	14:4	evidence 58:6,7
58:8,11	drastically	employers 9:12	establish 4:18	evident 32:18
difficult 45:19	43:16	employment	6:25 8:20 9:11	evidently 20:20
dignity 1:20	drawn 54:24,24	9:13 11:9	11:1,22 32:5	ex 33:13 59:2,3
12:15,24 13:6		enable 57:10	40:5,6 44:21	exactly 5:17
13:14,20 14:15	E	enact 21:17	44:25 45:2,16	11:7 31:21
40:6 45:17,21	E 3:1 4:1,1	enacted 20:14	47:8 53:12	32:10 33:21
45:22 46:1	earlier 5:16	25:3 29:18	57:18 61:3,18	exaggeration
61:2	14:23 21:6	enacts 21:11,12	62:18	33:6
direct 41:3	23:11 24:24	engage 62:1	established 4:14	example 27:10
directly 38:15	early 32:23	engaged 42:5,13	5:10,19 6:2,4,5	38:19 45:18
39:21,22	easiest 5:3	55:7	6:11,14,15,19	examples 38:20
disability 25:22	easy 60:7	enormous 4:20	7:1,4,5,6 11:15	excluded 5:23
28:5	economic 34:9	entire 5:10,12	12:23,24 18:14	6:8,10,25 7:14
disabled 22:13	effective 49:24	18:25	19:20,21 20:16	19:14 29:24
22:23 23:1,14	effort 23:20	entirely 26:21	20:25 21:7	excuse 40:17
23:17,21,25	eight 54:25	entities 9:22	22:2,5 25:6,7,9	56:18
24:5 38:20	either 10:15	32:4 43:17	25:12,14,20,25	exempt 4:13 8:9
disagree 38:10	11:10,17 29:13	entitled 33:20	26:8,12,20	22:7 51:14
44:5	eliminate 42:22	57:22	27:2 29:2,5	53:2 61:22
disavow 36:11	43:14	entitlement 28:5	30:5,5 32:11	exemption 22:7
disavowed	eliminated 8:23	entity 14:4,8	32:12 37:17,24	26:24 28:8
12:16	else's 4:18 9:11	26:1,12 27:9	38:5,25 39:13	50:22 53:1,19
discretion 35:17	62:18	30:17,22 33:16	40:17 41:21	62:17
discussing 21:6	emphasized	47:13 48:11	43:25 44:1,10	exemptions
dispute 40:20	35:20	49:1,2	45:13,22,25	29:21
disputed 9:3	empirical 51:12	entrusted 11:20	47:17 53:17	existing 8:18
disqualifying	employee 10:11	equities 35:23	54:1	18:13 20:22
24:8,10,12	10:11,12 23:18	equity 35:24	establisher	expand 43:16
distinguish 46:9	40:10 50:10,11	ERISA 4:13	26:13,17	expands 5:7
district 21:19	50:17 61:23,24	9:10 26:7,19	establishes 5:18	expectations

<p>17:4 expected 36:21 explain 21:21 23:13,21 29:19 61:8 explained 25:5 explains 24:23 27:9 57:15 explanation 20:23 25:11 explicitly 60:22 exponentially 11:18 express 8:23 58:1 expressly 8:19 10:12 extent 27:20 41:6 47:16,20 52:11 external 10:6 externally 10:16 extra-religious 14:14 extraordinary 46:12 extreme 12:22</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facing 31:7 32:23 43:9 55:12 fact 19:10 24:8 29:20 37:16 50:4 56:6 59:14 60:5,11 facts 13:5 35:2 36:18,19 failed 59:9 faith 17:25 33:18 34:11 36:3,5,20 fall 24:19 25:13 fantastical 61:17 faulted 16:8 Federal 23:18 23:23</p>	<p>feed 42:9 Feldman 2:14 3:10 26:1 27:7 29:7,8,10,11 29:15 30:19 31:5 32:22 33:8,20 34:1,3 34:16 35:1,6 35:11,14 36:4 36:12,15,17,24 37:4,21 38:2,6 38:9 39:4,10 39:15 40:14,18 41:3,9,13,19 42:1,6,15,18 42:25 43:1,10 44:5,23 45:4 47:3,15,22 48:6,14,16,22 49:4,9,14,17 50:3 51:5,16 51:24 52:5,9 52:13,16,19 53:3,7,9,15,20 53:23 54:3,6 54:16,21 55:5 55:10,17,22 56:12,18 57:6 57:8,20 58:10 58:17,20,24 fell 20:10 felony 37:10,11 37:11,14 fifth 14:1 fight 13:18 figure 18:6 35:8 37:13 figured 35:9 filed 14:9,10 final 28:20 finally 62:7 financially 26:2 47:13,15,16 48:12 find 8:3 16:5 47:11,12 fine 42:20 50:18</p>	<p>50:19 52:22 54:22 57:19 finish 28:17 62:13 firm 30:11 first 4:4,4,17 7:16 8:25 20:5 25:2,4 26:18 33:9 49:4 57:16 fishing 31:18 32:1 fit 29:18 30:6 five 13:16 60:12 fix 4:23 fixed 58:22,22 folks 5:22 24:7,9 followed 51:3,11 following 51:9 form 20:8 38:19 38:21 formal 11:1 12:16 formulation 21:22 forward-looki... 34:18 35:13 36:9,14 found 17:11 20:18,24 45:19 50:15 57:14 four 13:15 14:13 fraction 17:1 framework 20:22 freedom 40:23 frequently 49:5 friend 50:6 full 10:4 function 39:14 42:5 functions 19:6 fund 41:7 60:21 60:23 funded 47:9 funding 10:7 11:21 60:19</p>	<p>funds 10:18 fusion 32:1 future 51:19</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 4:1 general 2:10 33:10 generated 4:20 getting 17:10 Ginsburg 9:14 10:9 11:5,19 16:7 17:5 26:15 35:24 44:22,24 49:25 give 17:12 24:16 36:2 38:21 48:3 59:1 given 11:22 29:3 gives 10:3 46:11 giving 9:21 31:2 60:3 go 12:18 13:22 16:1,12 18:7 29:14 30:3 40:9 43:2 44:11 goes 19:8 30:13 34:6 53:17 going 13:18 22:17 24:5 26:13 28:10,17 31:14 32:25 33:2 36:2 47:7 47:9 48:2 52:20 54:7 60:18 good 26:9 33:17 34:11 36:3,5 36:19 46:7 governed 48:7 government 15:7 32:18 33:21 46:17 government's 4:19 5:1 24:22 24:25</p>	<p>group 44:4 Guard 22:24 23:1 24:7,8,11 guess 22:21 24:14 28:11,16 41:5 49:23 61:5</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>Halifax 45:5 Halperin 50:18 hand 51:4 hands 26:21 30:8 40:21 46:7 happen 31:14 59:8 happened 8:14 happy 13:5 hard 59:14,16 60:2 Health 1:3,20 4:5 healthcare 1:11 14:2 hear 4:3 held 26:22 helpful 21:9 24:22 hierarchical 19:13 historical 11:22 history 14:20 17:10 19:1 20:7 34:7 43:23 44:7 59:19 holding 4:14 home 19:8 honestly 57:3 Honor 32:6 34:16 38:9 hook 26:13,15 26:16 60:25 hospital 10:15 11:15 12:10 13:23 14:18,19</p>
---	--	---	--	---

<p>18:16 29:23 30:10 40:7 45:23 53:18 hospitals 12:15 19:2 30:9 33:1 huge 8:22 hundreds 17:8 33:1,5,7 37:1 55:19,19 hungry 42:9 hypothetical 22:11,22 24:3 25:18,19,23 28:4 hypotheticals 22:10,19 24:15 28:3</p> <hr/> <p style="text-align: center;">I</p> <p>idea 28:25 51:7 51:12 52:11 ii 10:12 43:11 iii 43:12 immediately 16:17 18:2 19:9 58:3 immemorial 61:14 implausible 7:13 29:3 importance 59:6 important 11:4 15:11,11 18:19 20:10 45:1 impose 61:10 impossible 29:19 inclined 15:9 include 8:21,25 9:6 21:4 22:3 23:18 24:7 25:7 39:23 42:19 44:4 included 43:24 includes 6:5,19 9:19 10:10 21:8,19 22:23</p>	<p>28:24 37:10,11 37:14,25 38:23 38:25 39:8 43:3 incorporated 10:16 11:12 incorrect 5:21 34:24 independent 10:3 individual 25:21 individuals 42:12 inevitably 59:8 inference 21:2 24:17 inquiry 45:19 46:3 55:2 insofar 58:13 instinct 23:5,11 institution 13:9 61:24 insurance 30:12 34:20 59:11 insurer 27:24 integrity 13:17 intended 5:11 5:24 interest 4:20 interested 31:25 32:1 internal 10:6 11:16 49:18,25 56:3,3 Internet 18:5,6 interpret 15:9 16:1 19:4 58:24 interpretation 14:23 15:17 38:12 39:13 51:2,9,14 interpretations 19:16 52:12 interpreted 15:8 15:25 22:19 interpreting</p>	<p>12:4 introduced 18:1 25:2,5,10 introduction 28:20 involved 30:3,3 40:10,22,24,25 41:5,11 50:11 involvement 30:7,8,16 41:3 41:19,22,25 54:15 irrelevant 16:17 IRS 12:4,5,7 14:24,25 15:1 16:6,10,13,15 16:17 17:7,8 18:11,18 19:7 19:8,8,10 32:19 33:5,7 33:18 34:12 42:3,4,10 43:4 51:1,3,9 55:3,8 55:20,21 57:22 57:25 58:2,4 59:11 IRS's 17:2 18:21 19:5 issue 4:25 13:1 16:19 35:16 52:3 58:1 60:5 60:19 issued 35:19 iteration 29:4 iv 13:10</p> <hr/> <p style="text-align: center;">J</p> <p>JAMES 2:14 3:10 29:8 jealous 29:21 Jersey 56:8 jettison 17:3 Jewish 62:5 Jews 61:16 joint 61:20 Justice 2:11 4:3 4:10 5:13,20</p>	<p>5:25 6:4,9,13 6:18 7:1,12,17 8:10 9:14 10:9 10:20 11:5,13 11:19 12:11,20 13:3,18,21,25 14:21 15:3,5 15:13,19,23 16:7,22 17:5,6 17:17,19,23 18:17 19:4,23 20:3 22:9 23:3 24:2 25:17 26:15 27:6 28:11,14,18 29:6,11 30:15 31:3 32:17 33:4,15,24 34:2,4,6,23 35:4,9,12,24 36:6,13,16,23 36:25 37:20,22 38:3,7 39:3,6 39:11 40:13,15 41:2,4,10,17 41:24 42:2,7 42:17,25 43:2 43:21 44:22,24 46:20 47:10,19 48:4,9,15,20 49:1,7,11,15 49:25 50:25 51:6,21 52:2,7 52:10,14,18,22 53:5,8,11,16 53:22,24 54:5 54:11,19 55:1 55:6,15,18 56:9,14 57:3,7 57:20 58:15,18 58:21 60:14 62:13,20</p> <hr/> <p style="text-align: center;">K</p> <p>Kagan 7:17 8:10 22:9 23:3 24:2 28:11,14 39:3</p>	<p>39:6 43:21 KAPLAN 1:15 keep 51:9 keeps 61:20 Kennedy 17:6 17:17,19,23 18:17 19:4 33:4,15 34:6 39:11 kept 51:22,24 kidding 16:23 kind 24:13,23 37:12 38:24 39:1,24 45:6 46:3,5 47:6,7 62:2 kinds 30:23 knew 17:20 32:24 58:2,15 knock 29:4 know 7:18,20 8:11 9:3,3,12 11:16,18 14:18 17:7 18:5,25 19:13,18 22:13 34:9 35:2 36:18 42:9 44:6,8,9 45:8 51:3 52:8,15 52:18,23 54:14 56:25 58:10 59:13,25 61:1 61:21 62:16</p> <hr/> <p style="text-align: center;">L</p> <p>L 2:10 3:6 19:25 Labor 15:1 18:12 32:20 language 6:15 7:23,24 21:1,3 23:8 24:12 33:22,25 37:16 37:22,24 38:14 39:21 57:15 58:22 largest 14:1 Laughter 15:18</p>
---	--	---	---	--

<p>LAURENCE 1:15 law 16:18 27:1 41:6 48:8 54:24 lawful 33:19 laws 27:4 lay 25:1 45:12 lead 33:1 leave 40:23 leaves 12:1 leaving 29:1 led 33:4,5 left 19:16 26:20 27:2 32:12 59:9 62:10 legislation 7:10 58:4 legislative 14:20 17:10 19:1 34:7 43:23 44:7 legitimate 54:12 legitimately 36:3 let's 8:13 13:21 43:2,16 54:12 letter 18:8 33:12 33:25 letters 17:8,13 17:21 18:18,23 33:5,7 37:2 44:10 55:19 56:1,22 57:22 58:12,13,23 59:2 liability 27:4 34:12 47:23 liable 26:22 library 18:7 light 20:18 limit 47:23 limitations 16:24 limits 15:5 line 14:8 54:23 lines 7:20</p>	<p>LISA 2:8 3:3,13 4:8 60:16 literal 37:3,5,6 37:22,24 literally 22:25 38:4 litigated 52:20 little 17:14 29:1 51:23 52:25 53:3,11,12,18 54:1,13 56:5,7 lobbying 57:25 local 44:20 long 23:24 longer 13:4 21:2 look 5:3 8:13 19:1 24:22 29:15 44:6 45:20 46:25 47:11,11 50:13 55:22 looked 12:6 46:14 56:2 looking 5:5 46:17 47:4 looks 8:15 11:10 lot 54:15 Lutheran 14:11 61:8</p> <hr/> <p style="text-align: center;">M</p> <p>main 4:24 maintain 6:24 40:7,8,12 52:25 53:13 57:11,13,18 61:15 maintained 5:11 5:18,20 6:3,5,6 6:12,14,20 7:2 7:5,7,21 9:4,19 10:5 11:10 13:11 19:15 20:16,25 21:7 21:8 22:3,6 24:13 25:6,7 25:15 26:8</p>	<p>28:23,24 29:2 30:5 32:11,13 37:17,25 38:1 38:25 39:8,9 maintaining 10:17 11:2,6 11:24 19:19 40:8 41:7 49:3 49:16 50:7 60:22 maintains 26:17 maintenance 27:3 39:1 46:22 50:16 60:23 61:11,12 62:9 major 19:11 making 16:16 26:9 30:16 45:5 47:6 MALCOLM 2:10 3:6 19:25 March 2:2 MARIA 1:6 matches 43:11 matter 2:4 55:13 62:23 mean 7:9 10:12 12:14 13:6 14:6 15:6,23 16:3,8 17:24 19:10 23:3 24:6 26:6,12 31:3 36:7 39:2 39:25 44:22,24 47:17,23 51:6 52:1 54:11 55:2 56:19 57:21 62:7 meaning 10:3 37:3,5,6 means 15:24,24 15:24 21:14,21 23:14,22 45:5 45:9 47:8 60:24 meant 56:19</p>	<p>59:22 medium 14:14 member 22:23 23:1 members 42:14 memorandum 33:10 mention 56:6,8 61:19 mentioned 56:6 60:11 merely 11:7 messed 8:5 million 18:24 51:17 millions 43:17 50:23 51:18 mind 12:12 14:18 20:15 24:20 29:13 minor 60:13 minutes 56:17 60:15 mission 13:17 42:9,13 mistake 36:20 55:3 modify 5:12 Monday 2:2 money 48:3 monstrous 11:18 morning 4:4 mother 33:9 motivation 18:19 moves 60:23 municipality 53:17 murky 43:23</p> <hr/> <p style="text-align: center;">N</p> <p>N 3:1,1 4:1 naked 42:10 name 35:7,7 nation 14:2 National 22:24</p>	<p>22:25 24:7,8 24:11 natural 24:17 naturally 39:1 need 32:3 46:3 needs 30:6 61:25 Network 1:3 4:5 never 15:14 17:20 nevertheless 33:15 New 56:8 nice 15:24 non-ERISA 48:8 non-plan 16:19 non-profit 29:22 61:24 non-profits 4:12 nonreligious 14:14 notice 17:13 39:25 notion 61:15 number 48:17 55:24 numbers 51:10 numerous 46:8 nun 18:22 nuns 12:2,8,8,21 12:23 13:3 16:16 19:6 43:7 62:10</p> <hr/> <p style="text-align: center;">O</p> <p>O 3:1 4:1 object 50:19 objected 16:17 50:17 objecting 19:8 31:12,13 objective 28:22 odd 7:23 17:21 offer 22:11 officers 45:24 oh 17:20,20 36:7 62:15</p>
--	--	---	--	---

<p>okay 13:20 18:21 32:10 34:2 37:10 39:22 42:8 52:8 53:8,16 53:22 54:5 56:18 old 6:15 8:19 20:25 once 51:19 ones 9:12 44:11 44:12 52:4,4 ongoing 26:17 27:4 open 54:9,10 opening 50:21 50:22 operate 44:15 44:16 operated 44:14 opinions 16:9 opportunity 33:14 opposite 31:22 32:21 48:21 opt 14:4 oral 2:4 3:2,5,9 4:8 19:25 29:8 order 27:1 orders 12:8 13:15,16 ordinary 21:16 organization 6:6 6:20 7:2,22 9:19 10:4,6,10 10:14,17 11:2 11:7 21:9 24:13 25:8,16 28:25 38:1 40:3 46:23,24 50:1,2,16,17 53:6,10 54:12 60:23 62:4,16 organizations 9:16,22 13:12 30:25 31:1 39:9 43:4</p>	<p>50:10 57:24,25 original 5:7 20:14 21:3 25:5 31:7,10 32:14 42:3 outside 9:5,6 40:24 60:24 overwhelming 60:4 overwhelmingly 34:18 56:22</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 4:1 page 3:2 9:18 14:19 24:22,25 45:20 55:23 pages 5:4 paragraph 5:5,6 8:22 pardon 44:23 parity 19:12 part 18:19 19:3 23:10,10 24:20 25:4 50:5 54:16,21 55:4 57:2,24 59:15 parte 33:13 59:2 59:3 particular 20:15 23:25 24:18 27:19 38:24 39:1,24 47:5 59:21 particularly 29:3 60:7 parties 47:24 party 36:5 pass 5:16 passage 28:20 passed 16:18 21:5 23:16 32:9 45:23 58:4 Paul 14:9 paying 26:2 27:10</p>	<p>PBGC 32:20 59:11 PBGC's 18:12 pellucid 60:20 61:22 penalties 18:10 34:25 35:10,16 36:8,10,11 penalty 35:8,19 36:24 pension 4:12 5:25 6:12,21 6:23 7:7 10:14 10:16 11:9,20 11:23 14:24 15:4 18:3 19:14,19 30:12 43:5,23,25 44:3,10 62:8 people 18:24 31:12,12 41:7 43:14 58:2 perfect 45:17 perfectly 43:10 performing 19:6 period 60:3 perplexing 8:1,4 person 22:23 23:14,17,21 47:24 49:2 perspective 40:15 persuasive 16:5 16:8 Peter's 12:24 PETER'S 1:11 petition 45:20 Petitioner 34:15 Petitioners 1:4 1:13,21 2:9,13 3:4,8,14 4:9 20:2 40:1 49:19,21 51:25 52:3 54:8 55:25 60:17 Petitioners' 39:19</p>	<p>phrase 5:10,12 pick 20:5 piece 7:9 place 7:16 8:25 13:8 57:16 62:5 places 25:9 46:9 plan 4:14 5:7,10 5:17 6:4,5,13 6:15,19,19,21 7:1,5,6,21,22 8:7 9:19 10:5,8 10:10 11:2,8,9 11:15,22 12:10 13:1,11 14:18 18:22 20:14 21:7,8 22:2,5,7 25:6,7,14,20 26:2,3,3,7,12 26:20,21,23 27:2,10,11,16 27:21,21 28:1 28:23,24 30:2 30:4,13 31:20 31:21,23 32:10 37:16,24,25 39:8,9 40:7,9 40:22 41:20,21 42:19 44:11,25 45:3,11,13,16 45:22,25 46:1 46:21,22 47:6 47:9,13,17,20 48:1,3,8,12,13 48:19 49:3 50:7,16,21,21 52:24 55:13 56:7 57:18 61:2,22,25 plan's 25:24 plans 4:12,18 5:23,25 6:2,10 7:14,15 8:20 8:21,25 9:4,11 18:11,13 19:15 19:16,20,20 20:15,18,24</p>	<p>21:2 22:3 25:13 26:24 29:25,25 31:19 32:5 33:16 34:19,20 40:5 40:6,17 41:22 44:1,21 47:23 47:24 50:23 51:10,17 57:12 57:13 59:9 60:1,21 61:3 61:18,21 62:3 62:18 plausible 5:9 20:23 please 4:11 20:4 Plus 6:19 point 9:25 14:22 18:18 20:5 23:19 26:23 28:9,16 39:20 42:22 48:11 52:6 57:23 59:24 pointed 43:7 Poor 51:23 52:25 53:4,12 53:13,18 54:1 54:13 56:5 position 17:15 39:19,19 positioning 39:19 possibility 30:13 possible 21:2 possibly 61:18 PPO 11:6 practical 25:24 40:16,18 52:11 59:18 practically 51:8 preceded 34:11 precedent 33:11 precise 4:22 predominantly 9:15 premise 44:6</p>
---	---	---	--	---

<p>prerequisites 22:4 present 38:20 presidential 22:14 presumably 20:15 48:7 pretty 20:17 22:12,15 43:23 priest 12:24 priestly 19:6 priests 61:5 primarily 34:18 35:13 36:7,8 36:14 44:17 50:11 principal 10:7 21:8 40:9 41:6 49:14 50:2 51:22 57:16 principal-pur... 9:16,22 10:10 11:6 25:8,15 28:25 30:17,22 30:25 38:1 40:3 46:22,24 49:12,18 50:10 53:6,9 principal-pur... 10:3 principally 40:10 principle 15:16 46:16,17 private 18:8 29:22 32:4 33:12,25 57:24 probably 20:8 48:2 50:23 51:18 problem 5:20 6:22 9:14 17:9 31:7 32:10 34:10,14 42:3 55:11,11 57:10 58:2,16 60:13 problems 4:22</p>	<p>20:17 proceeding 33:17 process 7:11 profit 12:14 prohibiting 40:8 promised 48:25 promises 26:10 26:11 promoting 58:9 prompted 7:16 16:13 promulgating 56:4 proper 27:19,24 proposal 12:1 proposed 5:14 proposition 15:6 protect 30:12 protecting 14:5 protection 43:18 46:12 Protestant 19:19 62:5 Protestants 61:17 provide 30:11 30:16 31:23 45:6 provider 14:2 provision 5:14 5:15,22 6:23 7:19 9:21 12:5 20:9,11,15,21 21:6,17 23:12 24:16,21 25:6 25:10 27:7,8 27:13,15 29:5 31:13 32:6,9 37:3 42:22 43:5,15,16 47:12 48:5,9 48:13,18 56:11 56:15,22,23 59:20 provisions 5:2 21:11 43:12</p>	<p>48:2 54:25 56:20 59:7 public 54:9 Puerto 21:20,23 purpose 10:7 12:12 19:12 21:9 30:2 40:19,21 41:6 47:1 50:2 51:22 54:20 55:2 56:10,16 56:20 57:17 purposes 21:18 21:23 22:7 56:13 put 8:6 19:12 56:1 putting 12:11</p> <hr/> <p style="text-align: center;">Q</p> <p>qua 26:12 qualify 11:3 26:24 50:1 54:22 qualifying 39:4 question 10:2,21 10:21,22 13:22 14:22 16:16 18:17 25:23 28:12 29:12 35:5 39:12 questioning 25:4 quickly 20:17 quintessential 44:4 quite 11:4 15:6 17:6,6 20:22 34:7 39:16 46:12</p> <hr/> <p style="text-align: center;">R</p> <p>R 4:1 raise 61:1 raised 14:22 range 50:22,22 reaches 51:19</p>	<p>read 6:23 9:17 10:1 14:9 18:7 21:15 22:13,15 22:24 23:15 24:11 29:13 35:25 37:18 38:4,13,13,16 38:18 57:21 61:6 reading 9:15 10:2 43:3,8 reads 10:1 really 21:13,21 21:25 22:6 23:13 32:3,14 44:5 51:23 52:6 54:13,14 54:16,17,19 57:2 59:22 reason 5:9 8:24 15:11 16:20 17:1 23:22 26:18 28:6 30:9 31:15 34:13 50:4,9 54:4 59:1 61:11 reasonable 17:7 37:1 60:4 reasonably 45:6 45:8 reasoned 16:10 16:11 reasoning 58:12 59:16 reasons 4:16 29:20 46:7 rebuffed 12:2 REBUTTAL 3:12 60:16 received 55:20 recognize 21:10 record 55:24 56:1 records 46:18 46:25 47:4 54:8,9</p>	<p>recover 16:25 redefine 5:12 redefined 8:7 reference 34:7 references 44:9 referred 32:6 referring 24:24 refers 21:7 regard 23:12 regarded 28:7 regardless 11:8 regulated 26:25 26:25 regulation 17:13 regulations 56:4 related 31:16 relationships 59:20 relevant 5:2 reliance 4:20 15:10 35:25 37:1 59:25 relied 33:11,22 36:3 relief 36:2 religions 19:12 62:5 religious 4:12 7:14 10:15 12:3 13:9,13 13:16 17:25 18:2 57:24 61:10,23 62:16 religiously 9:7 10:19 relying 37:2 remand 10:24 13:7 remedies 34:18 36:16 remedy 35:21 remember 8:15 55:24 repeat 39:6 repeatedly 35:20 repeating 39:20</p>
--	--	---	---	--

<p>repeats 5:10 reply 38:21 Repondents' 19:15 Representative 43:19 57:9 representing 18:24 reprinted 5:4 reproduced 9:18 requests 36:11 require 4:17 9:10 40:2 required 6:23 8:20 38:4 requirement 8:24,24 10:5 11:1 25:19,21 27:2 39:7 47:2 61:10 requirements 40:11 62:3 requires 13:10 requiring 40:16 reserve 19:22 resolution 45:23 respectfully 38:10 responded 16:14 Respondent 1:16,24 9:17 17:20 28:22 Respondents 1:7 2:15 3:11 16:22 29:9 Respondents' 22:10 39:18 response 17:7 18:1 responsibility 26:17 27:22,25 responsible 26:2 26:9 27:9 32:19 47:14,16 47:19,20,21 48:12 rest 19:22</p>	<p>resurrect 4:22 retained 21:3 54:20 retaining 38:16 retirement 11:3 11:11,12 retroactive 18:10 retrospective 36:2 Revenue 56:3,3 reverse 16:18 reversed 4:15 reversing 19:9 review 10:23 Rico 21:20,23 rid 56:21 ridiculous 23:4 right 6:7,17 7:3 9:24,25 15:13 23:4 26:5 28:12 31:5 34:17 35:1 38:25 39:11,16 41:9,25 48:17 49:8,17 51:16 52:5 54:3 56:14 57:4,6 58:9 Rightly 58:21 rights 18:3 46:14 rise 24:16 risk 16:25 34:12 road 32:25 ROBERTS 4:3 14:21 15:3,5 15:13,19,23 19:23 28:18 29:6 30:15 31:3 32:17 33:24 34:2,4 40:13,15 41:2 41:4,10,17,24 42:2,7,17 48:20 49:1,7 49:11,15 55:1</p>	<p>55:6,15,18 60:14 62:13,20 ROLLINS 1:23 Roman 14:6 rough 51:4,7,12 52:11 rule 38:22 ruled 12:7 ruling 18:8,22 33:25 rulings 33:13 run 11:16 50:21 53:18 running 13:16</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:8 3:1,3,13 4:1,8 60:16 sacerdotal 55:7 SAINT 1:11 satisfied 22:4 satisfies 40:11 satisfy 27:1 saying 7:21 8:6 15:7 22:5,6 41:14 42:7,8 42:10 44:10 55:3 56:9 says 15:22 16:4 16:5 17:7,20 21:18 26:1 28:22 33:10 37:8,24 38:22 38:23,24 41:6 41:20 47:12,16 48:15,18 schedules 60:12 scope 52:11 scratch 8:11 scrivener's 23:8 second 4:19 8:8 25:12 26:23 29:4 53:8 section 4:25 8:9 46:11 see 15:20 24:2 45:1 47:2</p>	<p>59:16 62:12 seek 16:22 34:24 seeking 43:7 senator 34:8 56:1,24 sense 9:9 37:19 50:13 sentence 62:14 sentences 22:15 separate 11:11 43:6 57:13 separately 11:11 service 23:19,24 56:3,4 set 9:12 44:18 62:3 setting 24:4 settled 17:3 seven 54:25 59:8 Seventh-Day 14:12 several-year 7:11 shorthand 21:22 24:1 shows 33:16 sick 12:9 side 6:12 11:19 13:7 16:25 19:11 61:3,15 61:20 62:1 significance 14:23 18:9 25:24 40:16,19 significant 48:11 silliness 62:17 silly 18:4 similar 22:11 similarly 24:12 simple 7:18 38:3 simply 21:22 23:7 24:18 single 19:2 26:8 61:23,24 Sister 52:25 53:3</p>	<p>sisters 43:7 51:23 53:11,12 53:18 54:1,13 56:5,7,7 sitting 10:15 situation 35:23 41:11 46:20 situations 43:9 43:11 six 13:15,16 56:2 59:8 six-year 16:24 size 14:17 Skidmore 15:12 15:14,21 16:4 16:20 58:7 sloppily 23:9 small 14:13 social 42:13 solely 9:6 Solicitor 2:10 solve 32:9 34:15 somebody 6:3 26:21 27:3 45:11,14 46:2 50:7 sorry 6:13 12:18 27:14 sort 14:7 23:7 24:3 44:3 62:17 sorts 21:10 Sotomayor 5:13 5:20,25 6:4,9 6:13,18 7:1,12 12:11,20 13:3 13:18,21,25 29:11 42:25 43:2 57:20 58:15,18,21 sounds 17:21 spades 13:14 special 24:6 34:5 specify 27:17 spells 27:13 split 31:19,19 sponsoring 61:2</p>
--	---	--	---	--

<p>61:4 St 12:24 standalone 37:7 37:18 standard 33:25 standards 26:19 Stapleton 1:6 4:5 STARLA 1:23 start 4:24 60:18 started 8:11,15 16:10,18 32:25 starting 29:12 starts 19:9 state 21:19,21 27:1,4 48:8 States 1:1 2:5,12 3:7 20:1 21:24 stating 58:4 statute 15:8,23 15:24 16:1,24 20:7,8 21:19 21:23 23:16,25 28:20 29:17 30:21 31:7,10 32:3,14 33:12 35:16 36:1 37:7,12,15,19 38:22 39:18 43:3 59:22 60:22 statutes 22:11 37:8 38:13 statutory 7:24 27:15 37:3 38:12 45:2 Stewart 2:10 3:6 19:24,25 20:3 22:9,21 23:5 24:14 26:6,16 27:12 28:13,16 28:19 48:21 stools 25:14 straightforward 8:1 strain 21:15 23:15</p>	<p>stray 44:9 structure 22:12 28:14 structured 18:11 24:16 submitted 62:21 62:23 subparagraph 4:25 5:6,8 8:16 8:17,19 sudden 58:3 sue 27:16 48:23 48:24 49:1,21 49:22,23 suggested 36:19 40:21 48:21 suggesting 24:10 suggests 9:17 28:5 suing 49:20 suit 26:11 summary 45:24 45:25 sunset 31:13 56:10,15,22,23 supporting 2:12 3:8 20:2 supports 48:10 suppose 47:17 supposed 33:21 34:22 35:22 37:13 43:24 Supreme 1:1 2:5 sure 8:3 10:17 17:2,18 20:22 28:18 32:24 34:21 50:6 swoop 20:10 synod 44:19 SYSTEM 1:11</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 3:1,1 table 19:8 take 32:20 35:22 43:8 58:1 59:12,17</p>	<p>taken 39:2 takes 45:2 talk 50:9 51:7 59:15 talked 19:10 32:2 talking 12:22 19:5 30:24 31:15 37:20,23 39:23 49:11 50:20 51:7 57:16 61:20 Talmadge 56:1 56:24 tax 8:9 46:8 tax-exempt 9:7 10:13 technical 43:20 57:10 tell 17:14 18:18 27:6 43:3 telling 16:15 tend 21:14 23:12 tenor 55:16,18 term 21:13,17 21:19 22:2 23:14 24:19 37:9 56:2 termed 43:19 terms 7:8 25:24 28:1 33:1 45:12 48:18 testifying 18:3 tests 27:18 text 4:17,24,25 20:11 Thank 4:10 19:23 29:6 60:14 62:20 thing 7:8 9:3 11:25 19:2 20:10 24:18 27:8 37:2 38:11 39:24 43:22 52:23 54:17 57:8 60:2,4,20 61:6</p>	<p>61:19,21 62:2 things 8:22 20:12,13 27:22 27:23 30:23 35:13 36:9 38:13 39:23 46:2,14 60:9 think 5:2,15 7:8 7:19,24,25 9:2 9:16 11:4,13 12:12,21 14:15 15:10 16:1,8 18:4,9,23 19:7 20:7 21:9 22:18,24 23:2 23:5 24:2,21 26:18 28:6 29:15 34:8,17 35:14,18 36:5 36:22 37:4 38:16 39:15 40:18,20 41:13 43:10 45:5 46:18 47:3 48:16,22 49:9 49:19,20 52:5 52:14 55:10,23 56:12,16 57:21 59:5,6 thinly 16:9,11 third 4:21 53:16 thought 42:2 43:21 44:3 48:20 49:12 55:1,5,8 58:18 three 4:15,15,19 13:15 15:7 30:23 32:18 37:5 60:12 tie 29:14 30:1 39:21,22 tied 57:1 ties 37:17,21 38:14 time 19:22 25:2 32:23,24 47:5 56:4,24 60:3</p>	<p>61:14 62:12 today 9:2 torn 29:12 torrent 18:14 totally 17:11 treated 21:24,25 22:8 42:13,15 treating 42:4 tremendous 34:12 tricky 10:20 tried 8:5,5 true 22:18 33:8 54:11 trust 40:4 trying 11:14 16:14 21:13,21 23:13 28:9,23 turns 46:21 61:13 two 8:22 12:8 13:15 16:21,24 21:10 22:14 24:4,9,9 25:9 25:14 32:24 43:8,11 52:12 56:12 60:9,15 61:13 type 20:8 44:18 types 20:18 43:16,18 46:14 typical 26:7</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S 37:8 54:25 U.S.C 46:11 umbrella 61:16 unable 26:3 27:11 unanimously 37:6 unchanged 32:12 understand 11:5 12:21 15:6 20:11 23:20 36:6 55:21</p>
---	---	---	---	---

understanding 9:10 27:14 34:13	vision 14:3 volume 55:24	well-understood 17:15	YMCA 62:11,15	33 5:6
understandings 21:16	<hr/> W <hr/>	went 7:11,13	<hr/> Z <hr/>	33(A) 8:6
understood 4:22 15:14	want 5:3 19:1 21:23 22:8	weren't 19:7 32:1 55:7	zero 41:19,22	<hr/> 4 <hr/>
undesirable 18:14	30:2,7,7 33:23	wholly 9:4,6	<hr/> 0 <hr/>	4 3:4
unhelpful 34:8	39:23 40:23	widespread 17:14	<hr/> 1 <hr/>	<hr/> 5 <hr/>
uninformative 17:11	45:11 46:6,17	willing 36:10,18	10,054 55:23	50 18:24 21:24
unintended 18:15	50:19 52:23	win 10:25	10:05 2:6 4:2	501 8:9
uninterrupt 7:9	62:8,12	withdrawal 31:13	1002(33) 5:1	502 48:24
United 1:1 2:5	wanted 5:17,22 21:1 24:17	women 13:16	11 16:22,23	502(a)(3) 35:21
2:12 3:7 14:11	30:1 31:18,18	wondering 7:24 22:17	11:07 62:22	502(c)(3) 35:22
20:1 61:7	31:21,22 34:14	word 14:19	11A 5:4	56A 45:20
unleashing 18:14	40:2 42:19	worded 39:16 39:17	16-258 1:21	<hr/> 6 <hr/>
unmentioned 7:12	43:13 50:6,12	words 22:16	16-74 1:4 4:4	60 3:14
unnoticed 7:13	52:10 57:9,10 61:19	25:9 39:7	16-86 1:13	60,000 14:2
unpassed 7:9	wants 23:23 42:20	59:22	19 3:8	66 16:23
unreasonable 17:3	warrants 4:21	work 20:21	1900s 19:18	<hr/> 7 <hr/>
unusually 23:24	washington 2:1 2:8,11,14	working 8:18	1974 8:14,15 19:14 20:12	7611 46:11
use 18:5	wasn't 34:23 46:2	works 24:3	1977 12:5 13:2 18:22	<hr/> 8 <hr/>
usually 9:12 45:18 46:3	way 6:16,23 7:18 8:1,2 10:1	worried 25:13	1979 25:2	82 33:10
<hr/> V <hr/>	15:8,9,25 19:4	worry 36:7	1980 4:23 11:8	83 33:10
v 1:5,14,22 4:5	21:14,15,24	wouldn't 7:4,6 36:22 37:19	20:13,21 22:1	<hr/> 9 <hr/>
vary 27:5	22:16,16,20,20	42:23 46:24	25:3 28:7 31:7	
vast 51:10	23:15 24:3,16	49:21 51:2,10	38:15 50:14	
version 5:16 8:4	25:1 27:20	51:15,24 58:25	1980s 32:23	
vesting 60:12 62:3	28:4,19 29:13	wrong 58:14 59:13,15	1982 31:11,14	
veteran 22:23 23:14,18,21,25	34:15 36:1	wrongly 58:21	32:10 42:22	
24:4	38:16 39:12,21	<hr/> X <hr/>	43:2,14 55:12	
veterans 22:13 24:6 38:20	42:15 44:14,14	x 1:2,8,10,17,19 1:25	59:13	
view 4:19 11:19 18:12 29:17	44:16 50:20	<hr/> Y <hr/>	<hr/> 2 <hr/>	
31:17 32:21,23	57:12,14 58:25	yeah 15:3,21 38:2 44:10	20 18:23,23 55:22,25	
45:1	ways 39:17,18	year 16:23	2017 2:2	
	we're 5:5 20:22 24:3,5,10 36:2	years 4:13 17:3 23:18 32:20	24 24:22,25	
	39:2,2,4,5,22	34:10 51:2,11	26 46:11	
	48:2 51:7	59:3 60:12	27 2:2 9:18 18:24	
	we've 19:10		29 3:11	
	weight 17:12		<hr/> 3 <hr/>	
	weird 62:2		30 4:13 17:3 23:18 32:20 34:10 51:2,11	