UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(BALTIMORE DIVISION)

ARLENE HODGES, *et al*, Plaintiffs, v. BON SECOURS HEALTH SYSTEM, INC., *et al*, Defendants.	Civil No. 1:16-cv-01079-RDB **ORAL ARGUMENT REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS

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The mission of Bon Secours Health System and its affiliates is to carry out the healing ministry of the Catholic Church by bringing compassion to healthcare and by being "Good Help to Those in Need," especially the poor and vulnerable.[1] This mission is carried out in acute care hospitals, long-term care facilities, clinics, and parishes in both rural and urban areas.

The Catholic healing mission of Bon Secours dates back to 1824, when the Congregation of the Sisters of Bon Secours was founded with the assistance of the Archbishop of Paris. Twelve Catholic sisters came together to create a new and innovative work for the Church, bringing the good news of Jesus Christ to all who suffer. Upon learning of the Sisters' healing work in Paris, the Archbishop of Baltimore, Maryland, invited the Sisters of Bon Secours to the United States in 1881, and their good works mission began to flourish in the United States.

In 1919, the Sisters opened the Bon Secours Hospital in Baltimore. Over the years, the Sisters established or assumed responsibility for several other Catholic healthcare facilities, and the need grew for a skilled, unified resource center for all Bon Secours healthcare operations. Thus, in 1983, Bon Secours Health System, Inc. was born: a headquarters for Bon Secours' healthcare operations that would preserve its Catholic tradition of providing quality care to all. In Fiscal Year 2015, the health system provided more than $260 million in community benefit services and community building activities, including nearly $120 million worth of charity healthcare.

Now, Bon Secours Health System finds itself before this Court, not because it has failed to pay a single dollar of the promised retirement benefits, but because it is simply the next target in a string of cases criticizing church-affiliated hospitals for operating ERISA-exempt church

[1] This introduction is submitted solely for the purpose of providing the Court relevant background information. It is not included as argument or authority in support of this Motion, and the Motion is not dependent on any statement contained in this section.

plans. Since the Plaintiffs here have not suffered any injury from their participation in Bon Secours Health System's church plans, this Court lacks jurisdiction. Even if they had somehow been harmed, their Consolidated Amended Complaint ("Complaint") is simply wrong on the law and fails to state a claim upon which relief may be granted.

I. STATUTORY FRAMEWORK

When first enacted, the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), defined "church plan" as "a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954." *See* ERISA, Pub. L. No. 93-406, § 3(33); 29 U.S.C. § 1002(33). In 1980, the statute was amended to add language that appears today. Section 3(33)(A) of ERISA (similar to the original language) provides that "[t]he term 'church plan' means a plan established and maintained . . . for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of Title 26." The amendment added a further explanation of what it means to be "a plan established and maintained . . . for its employees (or their beneficiaries) by a church or by a convention or association of churches[.]" Repeating that language verbatim, the statute provides:

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

ERISA § 3(33)(C)(i); 29 U.S.C. § 1002(33)(C)(i) (emphases added).[2] Under ERISA subsection

[2] For the sake of simplicity, the Defendants generally cite only to relevant sections of ERISA rather than to the parallel sections of the Internal Revenue Code ("IRC").

3(33)(C)(ii)(II), the phrase "employees of a church or a convention or association of churches" includes "an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax and which is controlled by or associated with a church or a convention or association of churches." 29 U.S.C. § 1002(33)(C)(ii)(II).

II. PLAINTIFFS' CLAIMS

Against this backdrop, Plaintiffs assert that seven pension plans sponsored by Bon Secours Health System, Inc. (the "Plans") do not qualify for ERISA's "church plan" exemption. On behalf of themselves, certain unidentified plans, and a putative class of participants and beneficiaries in those unnamed plans, Plaintiffs maintain that Defendants are liable for failing to comply with various requirements of ERISA. Specifically, Plaintiffs seek a declaratory judgment that the Plans "are not Church Plans within the meaning of ERISA . . . and thus are subject to the provisions of Title I and Title IV of ERISA." (Compl. ¶ 132.) Ten of Plaintiffs' eleven claims seek relief for various ERISA violations, including alleged failures to provide required notices, failures to fund the Plans to required levels, and breaches of fiduciary duties. (Compl. ¶¶ 136-213.) These claims thus hinge on whether the Plans are ERISA plans subject to the statute's requirements. Plaintiffs' final claim under Count XI is an alternative claim for declaratory relief that the church plan exemption violates the Establishment Clause of the First Amendment. (Compl. ¶¶ 214-217.)

III. STANDARD OF REVIEW

A motion to dismiss for lack of standing implicates a court's subject matter jurisdiction and therefore is brought under Rule 12(b)(1). *See Long Term Care Partners, LLC v. United States*, 516 F.3d 225, 239 (4th Cir. 2008); Fed. R. Civ. P. 12(b)(1). A court may dismiss an action at any time for lack of subject matter jurisdiction. *See Dash v. FirstPlus Home Loan*

Owner Trust 1996-2, 248 F. Supp. 2d 489, 501 (M.D.N.C. 2003) ("[S]tanding necessarily takes precedence over the question of whether plaintiffs have stated a claim upon which relief can be granted, that is, without jurisdiction, the court has no power to rule on the validity of a claim.").

A court must also dismiss any complaint that "fail[s] to state a claim upon which relief can be granted." *See* Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).[3] Although a court must accept as true all factual allegations contained in a complaint, such deference is not accorded to legal conclusions. *Walters*, 684 F.3d at 439. The mere recital of elements of a cause of action is not sufficient to survive a motion under Rule 12(b)(6). *Id.* Instead, "a complaint must state a 'plausible claim for relief' . . . [and each] factual allegation must be examined to assess whether they are sufficient to raise a right to relief above the speculative level." *Id.* (citations omitted). Legal questions, such as the proper construction of a federal statute, are particularly appropriate for resolution in a motion to dismiss under Rule 12(b)(6). *See, e.g.*, *In re Total Realty Mgmt., LLC*, 706 F.3d 245, 250 (4th Cir. 2013).

IV. ARGUMENT

A. Plaintiffs Lack Constitutional Standing.

1. The Irreducible Constitutional Minimum Requirements.

Because Plaintiffs are the party invoking the jurisdiction of this Court, they bear the burden of pleading and demonstrating subject matter jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 556 (1992); *see also David v. Alphin*, 704 F.3d 327, 333 (4th Cir. 2013) (finding that statutory and constitutional standing are distinct, and both must be established). Here, because they have suffered no injury, Plaintiffs have no standing to call upon this Court's time and resources.

[3] *See also Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012).

The U.S. Constitution limits the Court's jurisdiction to cases and controversies. Art. III, Section 2, Clause 1. To establish Article III standing, first, "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 555 (citations and quotations omitted). A particularized injury is one that affects the plaintiff in a personal and individual way. *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). An injury is concrete if it "actually exists," and a mere statutory violation, without more, does not amount to a concrete injury. *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 530 (5th Cir. 2016) ("We . . . decline to conflat[e] the concepts of statutory and constitutional standing by holding that incursion on a statutorily-conferred interest in proper plan management is sufficient in itself to establish Article III standing.") (citations and quotations omitted). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant . . . ." *Lujan*, 504 U.S. at 560 (citations and quotations omitted). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id*. at 561 (citations and quotations omitted). The Supreme Court has declared these elements of standing to be an "irreducible constitutional minimum." *Id*. at 560.

2. Plaintiffs' Claims Fail to Meet the Constitutional Minimum for Standing.

Plaintiffs Hodges and Miller do not allege that they have suffered any injury at all—let alone one that is concrete and particularized, and actual or imminent. The Complaint is devoid of any allegation that *any* participant in *any* pension plan sponsored by Bon Secours Health System, Inc. ("Bon Secours") has failed to receive a single penny of benefits due. At best, Plaintiffs speculate that, because the Plans are church plans, their benefits are *at risk* because,

they say, the Plans are underfunded. This mere allegation does not constitute a cognizable Constitutional injury for several reasons.

First, the Fourth Circuit has rejected this risk-based theory of standing because "[a] participant in a defined benefit pension plan has an interest in his fixed future payments only, not the assets of the pension fund." *David*, 704 F.3d at 338 (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40 (1999)); *see also Lee*, 837 F.3d at 530. In a defined benefit pension plan, the risk of underfunding falls on the company that sponsors the plan, not on the participants. *David*, 704 F.3d at 338 (recognizing that any funding shortfall in a defined benefit pension plan must be made up by the plan sponsor). Whether the pension plan is underfunded or not at a given moment—particularly without any allegation that the plan sponsor lacks the resources to pay benefits—does not constitute an "actual or imminent" injury to the participants. *See id.* Therefore, in the context of defined benefit pension plans, "these risk-based theories of standing [are] unpersuasive, not least because they rest on a highly speculative foundation lacking any discernible limiting principle." *Id.* at 338.

Even if underfunding alone could be a cognizable Constitutional injury, Plaintiffs here have not alleged that they are participants in a plan that is less funded than it would be under ERISA. To begin with, ERISA does not require that defined benefit plans maintain full funding, *see* ERISA § 303(c); 29 U.S.C. § 1082(c), so the bare allegation of "underfunding" is insufficient to constitute a redressable injury. Moreover, Plaintiffs' allegation of supposed "underfunding" is based solely on a public consolidated financial statement for Bon Secours and its subsidiaries. (Compl. ¶ 68 ("Upon information and belief, the Bon Secours Plans are currently underfunded by about $390 million.").); (Compl. ¶ 68, n.7 ("This number is obtained from Bon Secours's consolidated financial statements for 2014 and 2015 . . .").) Plaintiffs' supposed underfunding

number tells nothing about the extent to which any Plan is funded on an ERISA basis. That is because the pension liability set forth in a company's financial statements reflect what the company would owe if it had to fulfill the pension plan's *entire* future obligation today—it is not intended to reflect an ongoing plan's ability to pay benefits into the future. *See* Financial Accounting Standards Board ("FASB"), Accounting Standards Codification 715-30-35-43. ERISA's funding rules permit plans to fund their pension liabilities over time, so ERISA prescribes standards for determining whether plan sponsors have made adequate contributions to the plans to meet their promised benefit *over the prescribed period*. These standards differ significantly from those that govern financial statements.[4] It is therefore erroneous to conclude that Bon Secours has failed to comply with ERISA's funding requirements solely on the basis of the company's consolidated financial statements. In fact, a plan could be overfunded, and the plan sponsor could be 100 percent compliant with ERISA's contribution requirements, but the company's financial statements could, and often do, reflect a liability for its pension plans.[5]

Finally, Plaintiffs concede that their "underfunding" figure covers eight different pension plans, but they purport to sue on behalf of only seven church plans. (Compl. ¶ 3; Compl. n.7 ("Because of the nature of the consolidated statement, the underfunding likely applies to all eight pension plans.").) Thus, Plaintiffs have not even alleged that any of the church plans is underfunded—just that, when combined with some *other* plan not at issue, there exists some combined level of underfunding (again, not on an ERISA basis but on a financial reporting

[4] *Compare* ERISA § 303, 29 U.S.C. § 1082, *with* FASB, Accounting Standards Codification 715.
[5] *See, e.g.*, Soc'y of Actuaries, *Contribution Indices U.S. Single Employer Pension Plans*, (March 2016), http://tinyurl.com/jzr57ah. This study found that, across the single-employer defined benefit plan system, the aggregate unfunded liability was approximately $20 billion in 2013 on an ERISA "funding target" basis. In contrast, on an "unsmoothed high-quality corporate bond" basis, which is akin to the financial statement figures, the unfunded liability was more than ten times greater at approximately $290 billion.

basis). Even if Plaintiffs' cited underfunding number encompassed only church plans, however, it is an aggregate number, meaning that some plans may be overfunded and some plans may be underfunded. This pleading deficiency leaves Defendants—and the Court—guessing as to which specific Plans Plaintiffs maintain are underfunded. Moreover, neither Plaintiff anywhere alleges that she personally participated in a church plan that is underfunded. Without an injury in fact to their own personal interests, Plaintiff Hodges and Plaintiff Miller fail to meet the Constitutional minimum standard. *See Spokeo*, 136 S. Ct. at 1547, n.6.[6] In short, Plaintiffs have not alleged that they have been individually affected in any way. They have failed to meet the "irreducible Constitutional minimum" requirement to proceed in this Court. *See Harley v. Minn. Min. & Mfg. Co.*, 284 F.3d 901, 907 (8th Cir. 2002) (holding that plaintiffs did not suffer an injury-in-fact where there was no evidence the plan would terminate in the foreseeable future, and the plans had a financially sound settlor responsible for making up any future underfunding).

B. The Complaint Fails to Meet Basic Minimum Pleading Standards.

Although Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," that statement must be sufficient to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Bell Atl. Corp.*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)); Fed. R. Civ. P. 8. Plaintiffs' Complaint fails to achieve this bare minimum of giving Defendants fair notice of the claims against them.

Most fundamentally, Plaintiffs fail to identify the plans at issue in this case. They purport

[6] The fact that they seek to bring a class action on behalf of others who may have been injured does not remedy that problem. *See Brown v. Sibley*, 650 F.2d 760, 771 (5th Cir. 1981) ("Standing cannot be acquired through the back door of a class action.") (quoting *Allee v. Medrano*, 416 U.S. 802, 828-29 (1974)); *see also Hastings v. Wilson*, 516 F.3d 1055, 1061 (8th Cir. 2008); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 694 (E.D. Pa. 1973) ("[A] plaintiff may not use the procedural device of a class action to bootstrap himself into the standing he lacks under the express terms of substantive law.").

to bring suit on behalf of "the Bon Secours Plans" (Compl. ¶¶ 1, 3) but nowhere identify a single one of those plans by name. Bon Secours sponsors numerous benefit plans for its employees, and it has a right to fair notice as to which plans are alleged to have violated the law.

In addition, each Plaintiff fails to specify the plan or plans in which she participates. This failure also deprives the Defendants of fair notice of the claims against them—in part because it prevents Defendants from determining whether the Plaintiffs have statutory standing to bring this case. Plaintiffs rely on section 502 of ERISA as the source of their authority to bring suit on behalf on an ERISA plan (Compl. ¶¶ 16, 17), but section 502 plainly authorizes a participant to bring suit on behalf of her *own* plan. *See* ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B) (empowering participant to bring suit "to recover benefits due him under the terms of *his* plan") (emphasis added), ERISA § 502(a)(3); 29 U.S.C. § 1132(a)(3) (authorizing participant to bring suit to enjoin any act or practice which violates "the plan"). Here, however, each Plaintiff alleges only that she "is a participant in *a pension plan* maintained by Bon Secours" and that she "has a colorable claim to benefits under *a pension plan* maintained by Bon Secours[.]" (Compl. ¶¶ 16, 17 (emphasis added).) Plaintiffs have not identified any particular pension plan that is treated as a church plan, declared themselves to be participants in that plan, or alleged that they have suffered harm due to their participation in that plan. By failing to fulfill this most minimum level of pleading, Plaintiffs have failed to give Defendants fair notice of the claims against them. The Complaint should be dismissed on this basis alone.

C. Plaintiffs Incorrectly Allege That Only a Church Can Establish a Church Plan.

The heart of Plaintiffs' case lies in their erroneous legal position that every church plan must be established by a church. (Compl. ¶ 5.) In particular, Plaintiffs allege that:

> [T]he Bon Secours Plans do not meet the definition of a Church Plan under ERISA [because] [f]irst, a Church Plan must be established and maintained by a

> church or a convention or association of churches. The Bon Secours Plans were established by Bon Secours, which is a healthcare system, not a church (or a convention or association of churches).

(Compl. ¶ 5; *see also* Compl. ¶¶ 64-67.) The settled law in the Fourth Circuit, however, is to the contrary. And even if this Court were writing on a fresh slate, the Complaint must be dismissed.

1. The Fourth Circuit Has Concluded That Church Plans May Be Established by Organizations Controlled by or Associated With a Church.

Plaintiffs' argument that only a church can establish a church plan might be viable in some other jurisdictions, but this Court is duty-bound to follow the Fourth Circuit, and its position on church plans is clearly to the contrary. In *Lown v. Continental Casualty Co.*, 238 F.3d 543, 547 (4th Cir. 2001), the Court declared that "a plan established by a corporation associated with a church can still qualify as a church plan." In that case, plaintiff Lown had brought suit against the insurer of her disability plan alleging a wrongful denial of benefits. *Id.* at 546. She filed suit in state court, but the defendant insurer removed to federal court, arguing that the plan was governed by ERISA. *Id*. at 547. The District Court upheld the benefit denial, and Lown appealed, arguing that the disability plan was a church plan not governed by ERISA. *Id*. In its statutory analysis, the Court interpreted ERISA's church plan definition as follows:

> Despite th[e] exception to the definition of a church plan [for those plans established for the benefit of those who are employed in connection with one or more unrelated trades or business], ***a plan established by a corporation associated with a church can still qualify as a church plan***. The statute defines church plans to include plans "maintained by an organization, whether a civil law corporation or otherwise, . . . if such organization is controlled by or associated with a church or a convention or association of churches."

Id. (quoting ERISA § 3(33)(C)(iv); 29 U.S.C. § 1002(33)(C)(iv)) (emphasis added).

If Plaintiffs were correct that ERISA limits church plans to those plans established by a church, the Fourth Circuit could have easily dispensed with the jurisdictional issue by so holding. Instead, the Court declared that "a plan established by a corporation associated with a church can

qualify as a church plan" and went on to analyze whether Lown's employer, Baptist Healthcare, was controlled by or associated with a church under section 3(33)(C)(i). *Id*. at 547-48.[7]

The controlling force of the Fourth Circuit's decision in *Lown* has been recognized by this Court in the only other church plan case to be brought in the Fourth Circuit in the recent wave of litigation. In *Lann v. Trinity Healthcare Corp.*, just as in this case, the plaintiffs attacked the defendants' church plan status on the grounds that only a church can establish a church plan. No. 8:14-CV-02237 (D. Md. 2014). After briefing and oral argument on that threshold statutory interpretation issue, Judge Messite concluded that "the Fourth Circuit has pretty much put that to rest at this point." Transcript of Oral Argument at 40, *Lann v. Trinity Healthcare Corp.*, (D. Md. Feb. 23, 2015) (No. CV PJM 14-2237). Accordingly, Judge Messite granted the defendants' partial motion to dismiss, "holding that 29 U.S.C. § 1002(33) permits an organization that is 'controlled by or associated with a church or convention of churches' to establish a 'church plan,' under ERISA § 3(33)." *Lann*, 2015 WL 6468197 (Feb. 24, 2015).

Judge Messite rejected the plaintiff's argument that the Fourth Circuit's statement in *Lown* could be disregarded as unnecessary to the decision. Transcript of Oral Argument at 38, *Lann v. Trinity Healthcare Corp.*, (D. Md. Fed. 23, 2015) (No. CV PJM 14-2237). He recognized that, before the Fourth Circuit could reach the benefit denial issue, it had to determine whether it even had the authority to do so: unless the plan was an ERISA plan, the Fourth Circuit did not have jurisdiction. *Lown* 238 F.3d at 547.[8] *See also Ledley v. St. Agnes*

[7] The Court ultimately determined that Baptist Healthcare was not affiliated with a church, an unsurprising conclusion given that Baptist Healthcare had formally disassociated from the South Carolina Baptist Convention years prior to the events giving rise to the lawsuit. 238 F.3d at 546.

[8] In fact, the plaintiff participant in *Lown* eventually conceded that the plan was not a church plan, but because subject matter jurisdiction cannot be waived by the parties, "the court really did have to make a decision as to whether it had jurisdiction in the case by looking at whether the plan of the defendant was a church plan as opposed to an ERISA plan." Transcript of Oral

Healthcare, No. 05-CV-01975, slip op. at 9-10 (D. Md. Jan. 1, 2006) (stating that, after *Lown*, the church plan exemption "includes plans maintained by organizations controlled by or associated with a church").[9] Any argument that *Lown*'s statements were dicta is incorrect.

Regardless of how *Lown*'s conclusions are characterized, however, this Court must follow them. District courts are prohibited from disregarding precedent from their courts of appeals (whether dicta or clear holdings) so long as the precedent remains good law, unless the district court is *convinced* that the court of appeals was incorrect. *See Lexington Market, Inc. v. Desman Assocs.*, 598 F. Supp. 2d 707, 713 (D. Md. 2009) (following the Fourth Circuit's ruling where the Court of Appeals had strongly intimated its position on a jurisdictional issue).[10]

The Fourth Circuit's ruling in *Lown* remains good law. In addition, as explained fully in sections IV.C.2., IV.C.3., and IV.C. 4, *infra*, the *Lown* decision is substantively correct because it is consistent with and confirmed by the plain language of the statute, the legislative history, and decades' worth of consistent agency interpretation. In the absence of a convincing reason to disregard precedent from the Fourth Circuit, this Court must follow *Lown*.

2. ERISA Defines "Church Plan" to Include Plans Maintained by Certain Organizations Controlled by or Associated With a Church.

Argument at 38, *Lann v. Trinity Healthcare Corp.*, (D. Md. Feb. 23, 2015) (No. CV PJM 14-2237).

[9] Numerous other courts outside the Fourth Circuit have recognized the Fourth Circuit's interpretation of the exemption to include plans established by church-affiliated organizations, including the Eighth and Eleventh Circuits. *See, e.g., Chronister v. Baptist Health*, 442 F.3d 648, 652 (8th Cir. 2006) (relying on *Lown* to determine whether the plan at issue was a church plan); *Welsh v. Ascension*, 2009 WL 1444431, at *5; *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85-86 (D. Me. 2004).

[10] *See also Ford v. Baltimore City Dept. of Soc. Servs*, No. CV CCB 06-2134, 2006 WL 3324896, at *2 (D. Md. Nov. 13, 2006) (following the Fourth Circuit's opinion as it remained good law) (citing *Branch v. Coca-Cola Bottling Co.*, 83 F. Supp. 2d 631, 635 (D.S.C. 2000) (holding that dictum from the court of appeals should be considered presumptively correct, and a district court should not disregard it unless it is convinced that the court of appeals was incorrect)).

When interpreting a statute, a court must begin with the plain language. *U.S. Dept. of Labor v. N.C. Growers Ass'n*, 377 F.3d 345, 350 (4th Cir. 2004). As the Fourth Circuit has instructed, "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." *Crespo v. Holder*, 631 F.3d 130, 136 (4th Cir. 2011).

The statutory language of the church plan exemption confirms that the Fourth Circuit's decision in *Lown* was correct. In relevant part, ERISA section 3(33)(A) provides:

> The term "church plan" means a plan established and maintained . . . for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26.

ERISA § 3(33)(A); 29 U.S.C. § 1002 (33)(A). Section 3(33)(C)(i) then expands upon section 3(33)(A) by describing a specific type of plan held to satisfy the definition of "established and maintained . . . by a church." In doing so, it mirrors the language of subsection (A):

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

ERISA § 3(33)(C)(i); 29 U.S.C. § 1002(33)(C)(i) (emphasis added). Mapping the language of subsection (C) onto the matching language of subsection (A)—as a plain reading of the statute requires—results in the following statutory structure:

> The term "church plan" . . . includes a plan **[1]** maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both,[11] **[2]** for the employees of (a) a church or a convention or association of churches, or (b) for the employees of an

[11] As explained in section IV.E, *infra*, this church plan amendment was expanded to expressly include plans maintained by committees, like the Administrative Committee responsible for maintaining the Plans at issue here, as "principal purpose organizations."

> entity controlled by or associated with a church or a convention or association of churches,[12] **[3]** if such organization is controlled by or associated with a church or a convention or association of churches **[4]** which is exempt from tax under section 501 of title 26.

The plain language of the statute reveals that a plan is "included" in the term "church plan" if it meets the four requirements identified above. Therefore, the definition of church plan *expressly includes* plans maintained by non-profit organizations controlled by or associated with a church.

This reading is hardly a novel one. In addition to the ruling issued by this Court in *Lann*, two other district courts have recently rejected Plaintiffs' theory, relying on the congruence of the language in subsections (A) and (C) of the statute. In *Overall v. Ascension Health*, the Eastern District of Michigan concluded that church plans need not always be established by churches, explaining:

> [A] church plan may include a plan that meets the requirements of section (C). Section (C) requires that the plan [be] maintained by an organization that is either (1) controlled by or (2) associated with a church or convention of churches. To find otherwise would render section (C) meaningless.

23 F. Supp. 3d 816, 829 (E.D. Mich. 2014). Put another way, under Congress's statute, (A) describes an exempt "church plan," and (A) includes (C)(i), so (C)(i) is also an exempt "church plan." *Id.* at 828. The "rules of grammar and logic" compel this conclusion. *Id.*

The District of Colorado echoed *Overall*'s analysis in *Medina v. Catholic Health Initiatives*, No. 13-CV-01249, 2014 WL 4244012, at *2-3 (D. Colo. Aug. 26, 2014). The court there concluded that the

> plain language [of section 3(33)] clearly supports the conclusion that a plan that meets the requirements of subsection (C)(i) putatively qualifies for the exemption—without further, separate proof of establishment by a church—if the remaining requirements of the statute are otherwise met.

[12] Section 3(33)(C) makes clear that an employee of a church includes an employee of a tax-exempt organization that "is controlled by or associated with" a church. ERISA § 3(33)(C)(ii)(II); 29 U.S.C. § 1002(33)(C)(ii)(II).

Id. at *2.

These recent opinions confirming Bon Secours' reading of the statute join a long line of cases interpreting ERISA's church plan exemption to include plans established and maintained by non-profit church affiliated organizations. *See, e.g.*, *Thorkelson v. Pub'g House of Evangelical Lutheran Church in Am.*, 764 F. Supp. 2d 1119, 1129 (D. Minn. 2011); *Welsh v. Ascension Health*, 3:08-cv-348-MCR/EMT, 2009 WL 1444431, at *6 (N.D. Fla. 2009); *Catholic Charities of Me., Inc. v. City of Portland*, 304 F. Supp. 2d 77, 86, n.4 (D. Me. 2004).[13]

Against the weight of these decades of authority, three district courts have recently concluded otherwise. *Rollins v. Dignity Health*, 19 F. Supp. 3d 909 (N.D. Cal. 2013); *Kaplan v. Saint Peter's Healthcare Sys.*, No. 13-2941, 2014 WL 1284854 (D.N.J. Mar. 31, 2014); *Stapleton v. Advocate Health Care Network*, 76 F. Supp. 3d 796 (N.D. Ill. 2014). These decisions rely on the flawed and freshly-minted notion that there is an unstated term in subsection (A) that makes it a "gatekeeper" for subsection (C)(i), such that only plans established by a church under subsection (A) can be "church plans." The decisions reason that this must be so because subsection (A) refers to establishing and maintaining of a plan, while subsection (C)(i) refers only to maintaining a plan. These three rulings were followed by interlocutory appeals to their respective courts of appeal, where the rulings were upheld.[14] The "gatekeeper"

[13] *See also Chronister*, 442 F.3d at 652 ("[We] must determine whether Baptist Health is controlled by or associated with the Baptist church[], giving rise to an exception from ERISA's governance."); *Rinehart v. Life Ins. Co. of N. Am.*, 2009 WL 995715, at *3 (W.D. Wash. April 14, 2009 ("ERISA brings a plan established or maintained by a non-church organization within the general definition of a 'church plan' if that organization is '*controlled by*' or '*associated with*' a church") (citation omitted).

[14] The Supreme Court granted *certiorari* and consolidated all three cases on December 2, 2016. *See* Order List, 580 U.S. __ (U.S. Dec. 2, 2016); *Rollins*, 830 F.3d 900 (9th Cir. 2016), *cert. granted*, 580 U.S. __ (U.S. Dec. 2, 2016) (No. 16-258); *Kaplan*, 810 F.3d 175 (3d Cir. 2015),

requirement has no support in the law, and it fails to comport with the language and structure of the church plan exemption as a whole. Thus, even if this Court were not bound to follow *Lown*, these contrary cases must be rejected.

3. The Legislative History Confirms the Fourth Circuit's Interpretation.

The relevant legislative history provides further support that the Fourth Circuit's holding in *Lown* was correct, as it confirms that Congress intended nonprofit organizations controlled by or associated with churches to be able to establish and maintain church plans.

As first enacted in 1974, ERISA narrowly defined "church plan" as, similar to subsection (A) of the current statute, "a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954." *See* Pub. L. No. 93-406, ERISA § 3(33) (1974) (amended 1980). The original drafters adopted this exception out of concern that government inspection of a church's books and activities could constitute "an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. No. 93-383, at 81 (1973). Nonetheless, in the years after ERISA's enactment, the "church plan" definition as written caused intrusions into church religious matters much like ERISA's drafters had hoped to avoid. Tasked with applying the original definition, the Internal Revenue Service ("IRS") determined whether organizations were "religious" enough to be considered part of a "church." *See* I.R.S. G.C.M. 37266 (Sept. 22, 1977).

The IRS's practice of evaluating the religious nature of church-affiliated organizations led to strong opposition by the religious community. *See* 125 Cong. Rec. 10,054 (1979) (statement of Sen. Talmadge). These religious organizations urged Congress to amend the

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cert. granted, 580 U.S. __ (U.S. Dec. 2, 2016) (No. 16-68); *Stapleton*, 817 F.3d 517 (7th Cir. 2016), *cert. granted*, 580 U.S. __ (U.S. Dec. 2, 2016) (No. 16-74).

church plan definition to address their concern that plans administered by "pension boards" set up by churches, rather than administered directly by churches, would not be covered by the existing church plan definition. *See* 124 Cong. Rec. 16,522 (1978). In 1978, Senator Herman Talmadge introduced legislation expanding the church plan definition to address those concerns. He explained that, under his proposed amendment:

> A plan or program funded or administered through a pension board, whether a civil law corporation or otherwise, ***will*** be considered a church plan, provided the principal purpose or function of the pension board is the administration or funding of a plan or program for the provision of retirement or welfare benefits for the employees of a church. The pension board must also be controlled by or associated with a church exempt from tax under section 501.

Id. at 16,523 (emphasis added). Significantly, the sponsoring senator indicated no requirement that the plan also be established by a church—rather, a plan "will be" considered a church plan based solely on administration by a qualifying pension board.

Although the legislative amendment was initially motivated at least in part by the need to address the pension board issue, the statutory revisions do not pertain only to plans established by churches and administered by church pension boards. The statute's drafters—and its critics—understood the proposed legislation to substantially broaden the definition of church plan beyond just those plans. Senator Talmadge himself recognized that "[c]hurch agencies are essential to the churches' mission. They care for the sick and needy and disseminate religious instruction. They are, in fact, part of the churches, as a practical matter, it is doubtful that the agency plans would survive subject to ERISA." *Id.* at 16,522.

Senator Talmadge's amendment was eventually included in the Multiemployer Pension Protection Amendments Act ("MPPAA"). Shortly before the passage of MPPAA, Daniel Halperin, an official from the policy arm of the Treasury, which oversees the IRS, expressed his concerns over expansion of the church plan exemption:

> Mr. Chairman, we have objected to certain provisions of that bill, and let me just point out what we see as the most serious concern. What the bill would permit, it would exclude church agencies from the protection of ERISA, and that would mean that if somebody works for a hospital or a school that happens to be affiliated with a church it would be permissible for that plan to [provide retirement benefits that do not comply with ERISA].

Senate Comm. on Finance, Executive Session Minutes (June 12, 1980) at 40-41. In response, Senator Talmadge did not attempt to allay Mr. Halperin's concerns by suggesting that the proposed language was not as broad as Halperin expressed. Instead, he implicitly acknowledged that the broad reading was correct but explained: "I think we have got a question of separation of church and state here, number one, gentlemen, and number two, I don't believe we ought to get [in] a row with every religious faith in the country—Jewish, Catholic, Protestant, and otherwise." *Id*. at 41. The Committee then unanimously approved the amendment. *Id*. at 42.

Combined with the absence of any indication in the legislative history that the amendment was intended to be read as narrowly as Plaintiffs suggest, these statements confirm the reading of the statute advanced by Bon Secours and adopted by the numerous courts, including the Fourth Circuit, and agencies cited herein.

4. Decades' Worth of Consistent Agency Interpretation and Congressional Ratification Confirm the Plain Meaning of the Statute.

Bon Secours respectfully urges the Court to consider the contemporaneous and consistent views of the federal agencies charged with interpreting ERISA and its corresponding IRC provisions. Federal courts have long recognized that, "[w]hen faced with a problem of statutory construction, [the courts] show[] great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *see also Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As the Supreme Court has explained, an administrative practice "has peculiar weight when it involves a contemporaneous construction

of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933); *see also Nat'l Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 477 (1979) ("A regulation may have particular force if it is a substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent.").

Since MPPAA was enacted, the IRS and the Department of Labor ("DOL"), the two agencies charged with applying the church plan exemption, have, without exception, applied the same interpretation of the exemption that Bon Secours advocates here. In 1983, the IRS issued General Counsel Memorandum 39007, finding "because of the passage of the [MPPAA], church plan status no longer hinges on whether an order is a church," and the plan sponsor's "nonchurch status is not fatal." I.R.S. G.C.M. 39,007 (July 1, 1983) (the "1983 GCM"). Today, the IRS has issued more than 500 private letter rulings ("PLRs") confirming that plans maintained by qualifying church-affiliated organizations—including certain church plans sponsored by Bon Secours—are exempt regardless of whether they were established by churches. *See* Exhibit A (listing every relevant IRS PLR). The IRS has consistently interpreted the statute this way, even after dozens of cases had been filed challenging the church plan definition. *See* I.R.S. P.L.R. 201551004 (Dec. 18, 2015). DOL has also consistently interpreted section 3(33) not to require establishment by a church.[15] The Fourth Circuit has recognized that such guidance should be given "substantial weight." *See Flood v. New Hanover Cnty.*, 125 F.3d 249, 253 (4th Cir. 1997)

[15] *See, e.g.*, DOL Adv. Op. No. 94-04A (Feb. 17, 1994) (finding a church plan where the plan was sponsored by tax-exempt hospital organization controlled by or associated with the Roman Catholic Church); DOL Adv. Op. No. 94-05A (Mar. 8, 1994) (same); DOL Adv. Op. No. 94-09A (Mar. 17, 1994) (same); DOL Adv. Op. No. 95-13A (June 19, 1995) (same).

(recognizing that DOL letter rulings provide "a body of experienced and informed judgment").[16] This Court, too, should give substantial weight to the interpretation of the agencies involved in the enactment of the statute who have interpreted it consistently for more than three decades.

If that were not enough, as the court in *Overall* noted, "Congress has amended ERISA many times over the last 30 years without changing [or] seeking to change this construction." 23 F. Supp. 3d at 826; *see also Cottage Savs. Ass'n v. Comm'r*, 499 U.S. 554, 561 (1991) ("Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.") (citation omitted). Since 1980, Congress has twice revised the definition of "church plan" in IRC section 414(e), the counterpart to ERISA section 3(33), and neither revision contradicted the IRS and DOL's consistent determinations that church plans include plans established by church-affiliated organizations. Congress later built on this established IRS construction by providing for preemption of certain state laws for "church plans."[17] In doing so, Congress did not narrow the type of religious organization qualifying for the exemption. Thus, the Court can properly presume that Congress approves of the prevailing agency interpretation that church-controlled or associated organizations like Bon Secours may establish and maintain church plans. *See Cottage Savings Ass'n*, 499 U.S. at 561.

D. Plaintiffs' Allegations That the Plans Were Not Established by a Church Are Insufficient as a Matter of Law.

Even if the Court were to decide that a church must establish a plan in order for the plan

[16] *See also United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001) (noting that IRS ruling reflecting agency's longstanding reasonable interpretation "attracts substantial judicial deference")

[17] By enacting the "Church Plan Parity and Entanglement Prevention Act" in 2000, Congress enhanced the "church plan" exemption for church and church-affiliated organizations by preempting certain state laws interfering with the operation of "church plan" welfare plans. *See* Pub. L. 106-244, 114 Stat. 499 (codified as amended at 29 U.S.C. § 1144a).

to be a church plan, Plaintiffs' allegations that the Bon Secours Plans were not established by a church are insufficient as a matter of law.

First, Plaintiffs declare that "Bon Secours is not a church." (Compl. ¶ 39.) The *only* factual allegation in support of this conclusory statement is that Bon Secours files annual tax forms and does not select the box for "church or convention or association of churches." (Compl. ¶ 88-91.) However, Schedule A to the Form 990 requires Bon Secours to check "only one box" to select a reason why it qualifies as a public charity rather than a private foundation for tax purposes.[18] The fact that Bon Secours selected the box indicating that it is a hospital provides *no information whatsoever* regarding whether it may also be qualified to check another box. And while the term "church" may be open to interpretation, surely the answer of what constitutes a "church" cannot rest on whether an entity checks a box on a generic IRS form, as Plaintiffs suggest.

Moreover, Plaintiffs offer no definition of "church" under which this Court could determine whether they have alleged facts sufficient to show that Bon Secours fails to meet that definition. As the court in *Medina* explained, the term "church" includes a house of worship, but it cannot be limited to that, "since it refers quite literally to a physical building, which as such cannot establish or maintain anything." *Medina v. Catholic Health Initiatives*, 147 F. Supp. 3d 1190, 1198 (D. Colo. Dec. 8, 2015). Because Plaintiffs made no serious attempt to allege that Bon Secours is not a church based on any plausible interpretation of the word, the Complaint fails as a matter of law even if the Court were to conclude that a "church" must establish the

[18] *See* 2015 Instructions for Schedule A, Form 990 or 990-EZ, http://www.irs.gov/pub/irs-pdf/i990sa.pdf (instructing that, "[i]f an organization believes there is more than one reason why it is a public charity, it should check only one box").

plan.[19]

E. Plaintiffs Fail to Sufficiently Allege That the Bon Secours Plans Are Not Maintained by a Church or by a Principal Purpose Organization That Is Controlled by or Associated With a Church.

Plaintiffs maintain in the alternative that the Bon Secours Plans are not maintained by a principal purpose organization that is controlled by or associated with a church under section 3(33)(C)(i), but Plaintiffs fail to sufficiently allege facts to support this conclusion.

1. Plaintiffs' Allegations That the Plans Are Maintained by Bon Secours Are Insufficient as a Matter of Law.

Plaintiffs misunderstand the church plan exemption, which was amended to include plans operated in the manner at issue here. The plain language of the church plan exemption makes it clear that to administer a plan is to "maintain" the plan as that term is used in subsection (C)(i) of the exemption. Subsection (C)(i) provides:

> A plan established and maintained for its employees (or their beneficiaries) by a church . . . includes a plan ***maintained*** by an organization, . . . the principal purpose or function of which is the ***administration or funding of a plan*** or program for the provision of retirement benefits or welfare benefits . . . .

ERISA § 3(33)(C)(i); 29 U.S.C. § 1002(33)(C)(i) (emphasis added). Thus, in describing the type of entity that can "maintain" a church plan, Congress included "administration" as an integral

[19] Moreover, even if this Court were ultimately to conclude that church plans must be established by a church and that the Bon Secours Plans were not, Bon Secours has the right under ERISA to correct any such failure retroactively. The church plan exemption provides that, if a plan "fails to meet one or more of the requirements of this paragraph and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this paragraph for the year in which the correction was made and for all prior years." ERISA § 3(33)(D)(i). For example, the Bon Secours Plans could be retroactively re-established directly by a religious order of the Catholic Church or by an entity recognized by the Church as constituting part of the Church. After taking such action, the Bon Secours Plans would be deemed to comply with the church plan definition "for all prior years."

part of "maintained."[20]

This is consistent with the legislative history of the statute, in which principal purpose organizations are described as administering (or funding) church plans, as opposed to amending, modifying, or terminating them. *See, e.g.*, 124 Cong. Rec. 16522 (June 7, 1978) (Sen. Talmadge) ("Most church plans of congregational denominations are *administered* by a pension board[.]") (emphasis added); 124 Cong. Rec. 12,107 (May 2, 1978) (Rep. Conable) ("The large majority of church plans of the congregational denominations are *administered* by a pension board . . . It is not clear [under the pre-MPPAA church plan definition] whether a plan *administered* by a pension board of a congregational church is a plan established and maintained for its employees by a church.") (emphasis added). Nowhere in the statute or legislative history is there any suggestion that a plan is maintained only by an entity that has the authority to amend, modify, or terminate the plan. In fact, consistent with the statute's text, the IRS equated maintaining with administering, ruling that the committee appointed by the religious order to operate the sisters' pension plan was a principal purpose organization where the committee "*appear[ed] to have no other function than the administration of the plan*." 1983 GCM.[21]

In spite of this expansion of the church plan definition, Plaintiffs claim that the Plans fail to qualify as church plans because Bon Secours, rather than the Benefits Plan Administrative

[20] The statutory language indicates that an organization maintains a plan if it administers *or* funds the plan. Because the statute uses the disjunctive ("or"), the Plaintiffs' assertion that Bon Secours, as opposed to the Administrative Committee, funds the Plans is irrelevant so long as the Committee administers the Plans. (Compl. ¶ 95.)

[21] The IRS explained: "To be [a principal purpose organization], an organization must have as its principal purpose *administering the fund* and must also be controlled by or associated with a church." 1983 GCM. In that instance, "the powers and duties of the Administrative Committee include[d] the 'power to construe the Plan and to determine all questions arising thereunder, including questions submitted by the Trustee on matters pertaining to the proper discharge of its duties; to determine the status of employees and Participants with respect to the Plan; and to set forth policies and rules of interpretation and administration.'" *Id.*

Committee (the "Administrative Committee"), "maintains" the Plans and Bon Secours' principal purpose or function is not the administration or funding of the Plans. (Compl. ¶¶ 93-95.) They reach this conclusion based on their understanding that Bon Secours has the authority to continue, amend, and/or terminate the Plans. (Compl. ¶¶ 96.) Plaintiffs' argument is inconsistent with both the text of the statute and well-established judicial and agency precedent.

2. Plaintiffs' Allegations That the Administrative Committee Is Not a Principal Purpose Organization Are Insufficient as a Matter of Law.

Perhaps recognizing that the statutory language does not support their interpretation of the word "maintained," Plaintiffs assert that an unincorporated committee of the type that commonly administers pension plans cannot qualify as "an organization, whether a civil law corporation or otherwise." (Compl. ¶ 97.) Plaintiffs also assert that the Administrative Committee here is not "controlled by or associated with a church," but fail to allege a single fact in support. (Compl. ¶ 97.) Plaintiffs' argument ignores the weight of authority on this issue, which holds that plans maintained by administrative committees meet ERISA's principal purpose requirement if the employer is "controlled by or associated with a church."

The statute defines "organization" broadly as "a civil law corporation *or otherwise*" (emphasis added), indicating that Congress intended to include unincorporated entities such as the committees that typically administer pension plans. Crucially, MPPAA replaced Senator Talmadge's original proposed term "pension board" with the generic term "organization." ERISA § 3(33)(C)(i); 29 U.S.C. §1002(33)(C)(i). It retained the provision that the organization may be a "civil law corporation *or otherwise*," which would include a committee, which is nothing more than a pension board by another name. *Id*. (emphasis added). Consistent with the plain language of the church plan exemption, both courts and agencies have, since the revised statute was enacted, found that the "principal purpose organization" element is satisfied where a

plan is administered by the retirement plan committee of a non-profit organization that is controlled by or associated with a church. In *Overall*, the court held that "the church plan exemption includes plans sponsored by church-affiliated organizations, such as hospitals or schools, if these plans are administered by plan committees (1) whose principal function is to administer the plan, (2) if the plan committee is controlled by or associated with a church." 23 F. Supp. 3d at 829. The court concluded that a plan administered by the plan committee of a non-profit Catholic health care system qualified as a church plan. *Id.* at 829-31. The *Medina* court concluded the same, finding that "there is no serious dispute that the principal purpose of the [plan administrator committee] is to administer the Plan." 147 F. Supp. 3d at 1200. The court found that the Catholic employer's "obvious affinities with the Catholic Church[] necessarily flow downward to animate the [plan administrator committee]." *Id*. at 1201; *see also Thorkelson*, 764 F. Supp. 2d at 1126. The court in *Thorkelson* "thoroughly reviewed the applicable law and the arguments of counsel, and [found] no support for Plaintiffs' position [that a plan maintained by a retirement plan committee cannot qualify as a church plan.]" *Id*. These judicial decisions comport with the longstanding, consistent statutory interpretations of the principal purpose organization requirement by the IRS and the DOL. Following the revision of the church plan definition, the IRS reversed its ruling in the 1977 GCM against the Catholic sisters whose plan was maintained by an administrative committee and issued the 1983 GCM in their favor. *See* 1983 GCM. Since that day and up to present day,[22] the IRS has consistently

[22] Like the 1983 GCM, the earliest private letter rulings concerning the church plan status of Catholic hospital plans after MPPAA involved retirement committees directly appointed by the religious orders that had established the hospitals. *See, e.g.*, I.R.S. P.L.R. 8315054 (Jan. 13, 1983); I.R.S. P.L.R. 8326165 (April 1, 1983). In the following years, the IRS issued numerous rulings that retirement committees appointed by the boards of directors of hospitals, rather than by religious orders, also constituted principal purpose organizations if the hospitals were controlled by or associated with a church. *See, e.g.*, I.R.S. P.L.R. 8612068 (Dec. 26, 1985)

applied this analysis to hundreds of church plans, concluding that retirement plan committees constitute principal purpose organizations,[23] including when it ruled that certain of Bon Secours' plans administered by a committee are church plans.[24] No IRS ruling or DOL opinion has ever found that a plan committee appointed by a hospital's board of directors, which was in turn controlled by or associated with a church, did not constitute a principal purpose organization under the church plan exemption. Therefore, under the statutory language and the overwhelming weight of authority interpreting the statute, there can be no serious dispute that the Administrative Committee is a principal purpose organization under section 3(33)(C)(i).[25] Plaintiffs have failed to allege any facts to the contrary.

F. Plaintiffs' Allegations That Bon Secours Is Not Controlled by or Associated With a Church Are Insufficient as a Matter of Law.

Plaintiffs' final effort to convince the Court that the Bon Secours Plans are not church plans rests on their insufficient allegations that the Plans are not maintained for the employees of

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(holding that plan qualifies as church plan where "Plan X is operated and maintained by a Committee established by the Board of Trustees of Hospital M. . . . The committee serves at the pleasure of the Board of Trustees of Hospital M. The Board of Trustees is subject to the control of Organization A [the religious order]").

[23] *See, e.g.*, I.R.S. P.L.R. 201421031 (May 23, 2014)

[24] I.R.S. P.L.R. 9451080 (Dec. 23, 1994) (concluding that the Employees' Retirement Plan of Bon Secours, Baltimore, Health Corporation, Inc. is a church plan, in part, because "The principal purpose of this Administrative Committee was to administer [the Plan]."); I.R.S. P.L.R. 9830031 (July 24, 1998) (concluding that the Employees' Retirement Plan of Richmond Community Hospital, Inc. is a church plan, in part because "The sole purpose of [the Administrative Committee] is to administer [the Plan] in accordance with principles and tenets of [the Order of the Sisters of Bon Secours]").

[25] To the extent that Plaintiffs allege that the Administrative Committee is not a proper "principal purpose organization" under the church plan exemption because it is not "separate from Bon Secours," that argument is misplaced. (Compl. ¶ 97.) Nothing in the statute requires the organization that "maintains" the plan to operate independently. *Medina*, 147 F. Supp. 3d at 1201 (rejecting the argument that the plan administrator committee is a "sham" because it does not operate independently of the plan sponsor).

any church[26] by an organization controlled by or associated with a church. (Compl. ¶ 99.)

1. Plaintiffs Fail to Sufficiently Allege That Bon Secours Is Not Controlled by a Church Under Section 3(33)(C)(i).

Plaintiffs' allegations that Bon Secours is not controlled by a church can be summarized as follows: (1) Bon Secours does not have a financial relationship with a church;[27] and (2) the members of the Board of Directors are not elected by a church. (Compl. ¶ 103.) Setting aside that Plaintiffs' allegations concerning control are factually incorrect, they are also insufficient as a matter of law. Controlling precedent on this point makes clear that control is sufficiently established where a majority of an organization's board members are appointed by a church's governing board or by officials of a church.

"Both the IRS regulations and the courts have used the common sense definition of organizational control: the ability of church officials to appoint the majority of the trustees or directors of an organization." *Overall*, 23 F. Supp. 3d at 829 (citing Treas. Reg. § 1.414(c)–5); *see also Lown*, 238 F.3d at 547-48 (citing and applying IRS regulation); *Catholic Charities of Maine*, 304 F. Supp. 2d at 85 (finding that the Bishop controlled the Board of Directors where he had the power to appoint and remove the members of the Board);[28] *Medina*, 147 F. Supp. 3d at

[26] Section 3(33)(C) makes clear that an employee of a church includes an employee of a tax-exempt organization that "is controlled by or associated with" a church. ERISA § 3(33)(C)(ii)(II). Thus, the Plans are maintained for the employees of a church if Bon Secours, as a 501(c)(3) corporation, is *controlled by* or *associated with* a church.

[27] Plaintiffs allege that Bon Secours is not owned or operated by a church and does not receive funding from a church. They also allege that Bon Secours does not claim that any church is liable for its debt or obligations, and that no church dictates how Bon Secours allocates its resources. (Compl. ¶ 103.)

[28] Although church control over the appointment of a majority of the organization's board members suffices to satisfy ERISA's "controlled by" element, that is not the only way to satisfy this element. For instance, the court in *Overall* found evidence of church control in a number of ways in addition to its finding that the Catholic Church (through five Catholic religious orders) was responsible for appointing board members, including that: (1) the Catholic hospital system was governed by a canonical ministry known as a public juridic person, an organization created

1201 (finding that courts' interpretations of ERISA's "controlled by" phrase as referring to corporate control is consistent with the IRS's interpretation of the phrase). The Fourth Circuit similarly held in *Lown* that an organization is controlled by a church when that church exercises corporate control over the organization, such as by retaining authority to appoint a majority of the organization's board of directors. 238 F.3d at 547 ("For example, an organization is controlled by a church when a majority of the officers or directors are appointed by a church's governing board or by officials of a church") (citation omitted) (same).[29] The IRS regulation interpreting 26 U.S.C. section 414(e)(3)(B)(ii), the parallel IRC provision, similarly provides that "an organization, a majority of whose officers or directors are appointed by a church's governing board or by officials of a church, is controlled by a church within the meaning of this paragraph." Treas. Reg. § 1.414(e)-1(d)(2).

Plaintiffs allege that Bon Secours is not controlled by a church because its Board of Directors is "appointed by the sole Member of the corporation, which is Bon Secours, as delineated in its Articles of Incorporation (which state that the corporation is a member corporation in which Defendant Bon Secours Health Systems, Inc. is its sole member, and has the exclusive power to appoint a Board of Directors)." (Compl. ¶ 60.) But this allegation is clearly wrong on its face. The Complaint defines "Bon Secours" to mean Bon Secours Health

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by the Church's canon law with the right to own property and operate under the auspices of the Church; (2) the canonical ministry members of the public juridic person were identical to the members of the board of the organization; and (3) the ministry had the authority to approve corporate documents (such as bylaws and articles), to ensure compliance with canon law, and to approve the alienation of assets and/or incurrence of debt. 23 F. Supp. 3d at 829-30. But Plaintiffs' allegations that Bon Secours is not controlled by a church are limited to the organization's finances and the appointment of board members. They are devoid of facts that would support a claim that Bon Secours is not controlled by the church based on any other factor, such as those identified by the court in *Overall*, other than the organization's finances and the appointment of board members.

[29] *See also Chronister*, 442 F.3d at 652 (same); *Rinehart*, 2009 WL 995715, at *4 (same); *Duckett v. Blue Cross & Blue Shield of Ala.*, 75 F. Supp. 2d 1310 (N.D. Ala. 1999) (same).

System, Inc. (Comp. ¶ 1.) Therefore, Plaintiffs have nonsensically alleged that Bon Secours Health System, Inc. is a member corporation whose sole member is Bon Secours Health System, Inc.—that is, itself. In actuality, the articles of incorporation to which Plaintiffs refer (attached hereto as Exhibit B)[30] clearly state that "[t]he sole member of the Corporation is Bon Secours, Inc."—*not* Defendant Bon Secours Health Systems, Inc. Plaintiffs nowhere allege that *Bon Secours, Inc.* is not a church. Plaintiffs' failure to make any allegation whatsoever with respect to the actual entity identified in the articles of incorporation as appointing the board is fatal to their assertion that Bon Secours is not controlled by a church.

2. Plaintiffs Fail to Allege Sufficiently That Bon Secours Is Not Associated With a Church Under Section 3(33)(C)(i).

Because the controlling standard under section 3(33)(C)(i) is either/or, Bon Secours need only satisfy the "controlled by" *or* the "associated with" provision to qualify for the church plan exemption. An organization is associated with a church if it shares "common bonds and convictions" with that church. ERISA § 3(33)(C)(iv); 29 U.S.C. § 1002(33)(C)(iv). In *Lown*, the Fourth Circuit unsurprisingly concluded that the Baptist healthcare system at issue was not "associated with" a church where it had formally removed itself from the South Carolina Baptist Convention years before the lawsuit. 238 F.3d at 546. In analyzing whether the hospital shared common bonds and convictions with the South Carolina Baptist Convention, the Court considered:

(1) whether the religious institution plays any official role in the governance of the organization;
(2) whether the organization receives assistance from the religious institution; and
(3) whether a denominational requirement exists for any employee or patient/customer of the organization.

[30] The Court may consider documents referred to in the complaint and relied upon by the plaintiff without converting the motion to one for summary judgment. *See Biospherics, Inc. v. Forbes, Inc.*, 989 F. Supp. 748, 749 (D. Md. 1997), *aff'd*, 151 F.3d 180 (4th Cir. 1998).

Id. at 548. Plaintiffs' reliance on and characterization of the Fourth Circuit's "associated with" analysis in *Lown* is misplaced.

First, Plaintiffs mischaracterize the test applied by the Fourth Circuit in *Lown* as a controlling, "objective, three-factor test." (Compl. ¶ 105.) While the Fourth Circuit did consider the factors listed by Plaintiffs, they hardly comprise an "objective, three-factor test," particularly when the Court explicitly stated that these three factors would simply "bear primary consideration." *Lown*, 238 F.3d at 548. The Eighth Circuit in *Chronister* also referred to them as a "non-exclusive three-factor test." 442 F.3d at 653; *see also Ledley*, slip op. at 10 (recognizing that the three factors are not the only factors a court can consider, citing *Lown*). To apply only these three factors would take a particularly cramped view of what it means to "share common bonds and convictions with a church." *Medina*, 147 F. Supp. 3d at 1201; *see also* DOL Adv. Op. 96-19A, 95-30A, 95-12A (all assessing "bonds and convictions" by considering factors that assure the organization adheres to the tenets of the church, including whether the organization is listed in a religious directory and whether the church plays a role in the organization's governance).

While no court has offered a definitive test for determining "common bonds and convictions," Plaintiffs fail to offer any supporting allegations for their contention that Bon Secours is not associated with the Roman Catholic Church even under the factors mentioned in *Lown*. In a subsequent District of Maryland case, the Court applied the *Lown* factors to determine whether St. Agnes Healthcare, a Catholic hospital system more akin to Bon Secours than the Baptist health system at issue in *Lown*, and found that, while the *Lown* factors are not the only factors to consider, they were met in that case. *Ledley* slip op. at 9-10. This Court found that St. Agnes Healthcare was "operated by" the Roman Catholic Church, pointing to the

Church's recognition of St. Agnes in the Official Catholic Directory.[31] The Court went on to find the second factor in *Lown* met because St. Agnes received assistance from the Daughters of Charity of St. Vincent de Paul in the form of services to the hospital as volunteers and employees. *Ledley*, slip op. at 9-10. Finally, this Court emphasized that St. Agnes Healthcare employees were required to provide services in accordance with Church doctrine and act in accordance with the spiritual beliefs of the Church. *Id.*; *see also Catholic Charities of Me.*, 304 F. Supp. 2d at 85 (holding that the plan was a church plan notwithstanding the lack of a denominational requirement on its employees).

While multiple other courts, including this Court in *Ledley*, and the IRS found recognition in the Official Catholic Directory indicative of association with the Roman Catholic Church, Plaintiffs here make no mention of the Directory whatsoever, nor do they provide any other factual support for their allegation that the Church does not play an official role in the governance of Bon Secours. (Compl. ¶ 106.) Plaintiffs allege that Bon Secours is not "funded" by a church, but they fail to offer any factual support regarding other types of assistance that Bon Secours could receive from the Church, such as charitable donations in the form of advice, guidance, or service. *See Ledley*, slip op. at 10 (recognizing assistance from the Church through volunteers and employees).

Finally, Plaintiffs' support for their allegation that Bon Secours does not impose a

[31] The IRS has also relied on the Official Catholic Directory to determine whether a plan sponsor is associated with the Catholic Church. *See, e.g.*, 1983 GCM at *4; s*ee also Overall*, 23 F. Supp. 3d at 831 (finding association based on Ascension Health's listing in the Official Catholic Directory, which is the Church's public declaration that Ascension Health is a Catholic organization; *Catholic Charities of Me.*, 304 F. Supp. 2d at 85-86 (referring to the Official Catholic Directory as evidence that Catholic Charities' health benefit plans qualify for ERISA church-plan status); *Hartwig v. Albertus Magnus Coll.*, 93 F. Supp. 2d 200, 202-03 (D. Conn. 2000) (explaining that "the Official Catholic Directory ... is the definitive compilation of Roman Catholic institutions in the United States").

denominational requirement on its patients or employees is similarly lacking. They rely on their allegations that Bon Secours hires and treats people of all religions and does not require its employees to sign or abide by a statement of faith. But the "denominational requirement," if one were to be imposed, can be met in a myriad of ways, as this Court recognized in *Ledley*. *Ledley*, slip op. at 10 (recognizing that St. Agnes Healthcare employees were required to provide services to patients that were governed by Church doctrine and in accordance with the spiritual beliefs of the Church). Personal statements of faith are less important where employees are required to operate under Catholic doctrine, regardless of their personal beliefs. *See Medina*, 147 F. Supp. 3d at 1202. Furthermore, to interpret the denominational requirement under *Lown* so narrowly completely fails to recognize that a denominational requirement in this context would run completely afoul of the Catholic tradition and the mission of the Congregation of the Sisters of Bon Secours to provide "Good Help to Those in Need" regardless of their religious beliefs. (Compl. ¶ 108); *see also Medina*, 147 F. Supp. 3d at 1202 (recognizing that delving into matters such as whether an entity sufficiently imposes a denominational requirement on its employees is precluded by the First Amendment); *Overall*, 23 F. Supp. 3d 832 (same).[32]

G. Count XI Must Be Dismissed Because Plaintiffs' Allegations That ERISA's Church Plan Exemption Violates the Establishment Clause Are Insufficient as a Matter of Law.

Plaintiffs argue that the church plan exemption—enacted in 1974, amended in 1980, and upheld and applied by every court and regulatory body to consider the statute—violates the First

[32] Similarly, Plaintiffs' claim that the Plans are excluded from church plan status under section 3(33)(B) must fail because it rests upon their insufficient allegations that Bon Secours is not controlled by or associated with a church. (Compl. ¶¶ 109-111.) But as an entity that is clearly controlled by and associated with a church, Bon Secours' employees are "deemed" to be employees of a church. ERISA § 3(33)(C)(ii)(II). Therefore, Plaintiffs' claim that the Plans do not meet the requirements of section 3(33)(C)(i) and are excluded under 3(33)(B) because the Plans are not maintained for the employees of a church are insufficient as a matter of law.

Amendment's Establishment Clause. (Compl. ¶¶ 113-114, 214-217.) Plaintiffs' argument ignores decades of Supreme Court precedent applying the recognized test for Establishment Clause violations.

The standard announced in the Supreme Court's landmark *Lemon* decision controls. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 101 (4th Cir. 2013) (recognizing that *Lemon* provides the analytical framework in evaluating the constitutionality of legislation under the Establishment Clause). The *Lemon* test is three-pronged: to comport with the Establishment Clause, "the governmental action (1) must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 612-13. Plaintiffs have not alleged a single fact that supports their contention that the church plan exemption violates the Establishment Clause.

As to the first prong, the Supreme Court has made clear that courts must defer to the government's professed purpose for enacting a law challenged on Establishment Clause grounds unless the secular justification is a "sham [or] merely secondary to a religious purpose." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005); *see also Glassman v. Arlington Cty.*, 628 F.3d 140, 146-47 (4th Cir. 2010). As the Supreme Court has held, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987); *see also Madison v. Riter*, 355 F.3d 310, 317 (4th Cir. 2003) (finding that Congress may legitimately minimize government burdens on religious exercise and still have a secular purpose). Here, Congress expressly articulated a secular purpose in enacting the church plan exemption: "to avoid

excessive Government entanglement with religion in violation of the first amendment to the Constitution." 124 Cong. Rec. 12,106 (1978) (statement of Rep. Conable); 125 Cong. Rec. 10,052 (1979) (statement of Sen. Talmadge) ("If we have enacted a statute that may require the church plans to come under ERISA . . . it must be changed because we have clearly created an excessive Government entanglement with religion."). Because there is no indication that Congress had ulterior motives when articulating its secular purpose, the church plan exemption satisfies *Lemon*'s first prong.

Lemon's second prong focuses on whether the government itself has advanced religion, which is impermissible, or whether the government has merely allowed religious institutions to advance themselves. *See Amos*, 483 U.S. at 337 ("a law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose"). As the Supreme Court held, and the court in *Medina* recognized, "there is ample room for [exemptions to accommodate] religion under the Establishment Clause . . . [and] we see no reason to require that the exemption comes packaged with benefits to secular entities. *Id*. at 338. Therefore, Plaintiffs' allegation that the church plan exemption harms Bon Secours' competitors and puts them at an economic disadvantage—an allegation for which Plaintiffs offer literally no factual support—is misplaced. *Medina*, 147 F. Supp. 3d at 1204 ("It is insufficient . . . to say . . . that the church plan exemption confers a benefit on [the employer] that is unavailable to non-church-affiliated entities."); *see also Madison*, 355 F.3d at 317 (finding that a statute that sought to lift government burdens on a prisoner's religious exercise does not mean that Congress is required to provide commensurate protections for other fundamental rights). The church plan exemption preserves Bon Secours' ability to carry out its own religious mission, which is permissible, and Plaintiffs have not alleged that the government itself advanced religion through the church plan exemption.

Finally, *Lemon*'s excessive entanglement prong centers on "whether the [government] involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Walz v. Tax. Comm'n of New York*, 397 U.S. 664, 675 (1970). Plaintiffs' suggestion that the church plan exemption as applied to Bon Secours somehow creates *more* government entanglement than compliance with ERISA is baseless. (Compl. ¶ 216.) As the court in *Medina* recognized,

> Ensuring ongoing ERISA compliance by church-associated entities undoubtedly would require long-term, continuing monitoring not involved in the relatively time-delimited analysis of a claim of entitlement to the exemption. Even more disturbing, compliance with ERISA's fiduciary rules, which emphasize profits above all other considerations, potentially has devastating impact on [Catholic] socially responsible investment policies . . . These considerations clearly demonstrate that Congressional fears of excessive entanglement with religion in the absence of an exemption for properly qualified church plans was not illusory or without basis.

147 F. Supp. 3d at 1205. The court in *Medina* squarely rejected the plaintiffs' Establishment Clause under the *Lemon* test, concluding that the church plan exemption "works no violation of the First Amendment" when claimed by a Catholic hospital system.

As the authority discussed above demonstrates, the church plan exemption here allows Bon Secours to express its religious freedom and further Congress' stated purpose in enacting the church plan exemption to avoid excessive government entanglement. Thus, Plaintiffs' Establishment Clause claim under Count XI must be dismissed as a matter of law.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the Complaint with prejudice. Due to the importance and complexity of these issues, Defendants respectfully request oral argument on their Motion.

Dated: December 5, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2016, a true and correct copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS was sent via the CM/ECF system, which will automatically provide notice of the filing to all counsel of record.

/s/ Adanwimo B. Esedebe
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