No. 16-86

In The

Supreme Court of the United States

SAINT PETER'S HEALTHCARE SYSTEM, ET AL.,

Petitioners,

v.

LAURENCE KAPLAN,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY

Respondent disputes none of the following: The question presented is an important question of federal law. ERISA—a comprehensive federal regulatory scheme premised on national uniformity—currently applies differently to religious organizations in different circuits. The question presented affects millions of employees and hundreds if not thousands of religious nonprofits across the nation. The issue is recurring; indeed, an avalanche of class actions seek untold billions of dollars. The three relevant federal agencies for decades have rejected a church-establishment requirement, and countless religious organizations have relied on the agencies' interpretations. And three federal appellate courts have recently rejected the agencies' conclusions, upset what was a longstanding status quo, and created immense confusion.

This Court, not the lower courts, should have the final say on this important issue. And only this Court can resolve the disuniformity now causing massive upheaval in the administration of pension plans by religious employers. Time is of the essence, and further percolation will not assist this Court's resolution of the church-establishment question. The Court should grant certiorari.

I. The Court Should Decide the Church-Establishment Question Now

Respondent declares that "[t]his petition represents petitioner's attempt—in the face of consistent rulings (without dissent) by the only three courts of appeals to address the issue—to exempt the SPHS pension plan from ERISA." Opp. 1. That statement is untethered from reality. Saint Peter's did not

bring this case, much less "attempt" to exempt its plan from ERISA "in the face" of contrary appellate authority. Saint Peter's began operating as an ERISA-exempt church plan in 2006, and received an IRS ruling retroactively confirming its church plan status in 2013, before the recent appellate decisions. The only "attempt" here is respondent's attempt to disturb three decades of settled law and unchallenged administrative practice.

1. Respondent agrees that, since 1983, the IRS, DOL, and PBGC have issued hundreds of opinions, letter rulings, and settlement agreements assuring church-affiliated employers that their pension plans are exempt from ERISA, regardless of whether a church established the plans. Pet. 6-8. Respondent suggests that these opinions are basically worthless—due no deference and unworthy of petitioners' reasonable reliance. Opp. 13-14. Not only does this reasoning contradict those agencies' own assurances (Pet. 17), it flies in the face of common sense. ERISA is a notoriously complicated, nationwide regulatory scheme. Organizations must be able to rely on the unanimous and longstanding opinions of the three federal agencies charged with interpreting that statute. Saint Peter's and countless other religious organizations undisputedly *have* relied on the opinions of these agencies for decades. Pet. 16-18.[1]

The Third, Seventh, and Ninth Circuit decisions upset over thirty years of administrative practice. Respondent contends the courts were correct in refusing to defer to the decisions of the IRS, DOL, and

[1] Respondent suggests that PLRs apply only "with respect to ... tax-qualification status." Opp. 13. But Saint Peter's can't operate a church plan for tax purposes but not ERISA purposes.

PBGC. As an initial matter, the courts' criticisms of the agency statements are unfounded. Pet. 33; *see also Dignity Health* Pet. 33-34 (No. 16-258). The IRS's 1983 memorandum merits special deference since the IRS contemporaneously understood that Congress was reversing the IRS's 1977 interpretation. Pet. 5-7.

But regardless whether these agency rulings deserve deference—a merits question—they demonstrate the need for this Court's review. The 1983 memorandum has been followed by the IRS, PBGC, and DOL. Opp. 13. The IRS and DOL have issued over 550 rulings applying the memorandum. Contrary to respondent's suggestion (Opp. 15 n.3), it is not only judicial invalidations of notice-and-comment regulations that invade reliance interests and warrant review. *E.g.*, *Morton v. Ruiz*, 415 U.S. 199 (1974) (BIA manual).

2. The five amici highlight the immediate and irreparable burdens at stake. Absent this Court's intervention, the court of appeals decisions will have a devastating financial effect on religious employers and plan participants. Petitioners and other religious nonprofits within the Third, Seventh, and Ninth Circuits would have to restructure their plans to comply with ERISA's manifold duties and requirements. Respondent says these are the requirements "Congress deemed necessary" (Opp. 16), but that is the ultimate question in this case. And while religious nonprofits including Saint Peter's have *ceased* complying with ERISA (Opp. 16-17), the burdens involved in *complying* with ERISA are much different.

These burdens are the tip of the iceberg. Respondent alleges that Saint Peter's owes him hun-

dreds of millions of dollars in penalties—for just one year. Pet. 20-21. Respondent now says such relief could be an "abuse of discretion" (Opp. 21), but tellingly does not offer to withdraw his demands. Regardless, religious employers could find themselves in violation of federal securities laws, giving rise to potential civil penalties and even criminal liability. Brief of Church Alliance as *Amicus Curiae* in Support of Petitioners 5-8.

The loss of church-plan status could also strip plans of their qualified tax status under § 401 of the Code, with disastrous consequences for *employees*. *Id.* at 10-11. For example, participants would be taxed on benefits when they are vested, rather than distributed; amounts in trust to fund retirement benefits would be reduced by income taxes on the trust's earnings; and participants would be unable to defer federal income taxes by rolling distributions over into an IRA or another qualified plan. *Id.* The question presented is thus hardly of "dwindling importance" to Saint Peter's, which still operates the plan at issue. Opp. 9.

It makes no sense to force religious organizations, courts, and federal agencies to muddle through these questions now when the threshold question presented may render the entire enterprise unnecessary. More church plans are being sued, even since this petition was filed,[2] and respondent's counsel are advertising for new plaintiffs against new hospitals. If respondent's counsel have the time, energy, and resources to file dozens of class actions in nearly eve-

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[2] Complaint, *Mollet v. Hosp. Sisters Health Sys.*, No. 16-cv-9238 (N.D. Ill. Sept. 26, 2016); Complaint, *Holcomb v. Hosp. Sisters Health Sys.*, No. 16-cv-3282 (C.D. Ill. Oct. 11, 2016).

ry circuit, and the matter is important enough to drain the resources of trial and appellate courts and religious nonprofits across the nation with litigation that could last decades, surely the sound administration of justice counsels for this Court's resolving the issue in one fell swoop now.

3. Respondent claims that granting the petition will harm petitioners' employees. Opp. 15-17. But respondent presents no evidence or *plausible* allegation that Saint Peter's Plan is underfunded (which it is not). Nor does respondent allege that Saint Peter's has failed to pay any benefit to any employee, before or after the plan began operating as a church plan. A few more months of the status quo pending this Court's decision is far less risky than fundamentally altering the pensions and benefits plans of thousands of employees.

Respondent asserts that the interlocutory posture makes the case unworthy of review. Opp. 12. He contends the Court should permit his other claims—including for hundreds of millions in penalties—to be adjudicated *before* the Court decides the church-establishment question. But ERISA coverage is a threshold question, no facts or further percolation would illuminate the question, and it is ripe for decision. That is why this case was certified for and resolved via interlocutory appeal. It makes no sense to litigate the pending claims below to then return to this Court to finally resolve a by-then-long-overdue issue. That is not in the interest of employers or employees.

And Saint Peter's mentioned the millions in community benefits it provides (Pet. 21) not for comparison with secular nonprofit hospitals (Opp. 18), but because forcing any nonprofit hospital to engage

in massively expensive and potentially unnecessary litigation harms patients by constricting the hospital's ability to heal the sick and poor. That is why the Court should grant certiorari.[3]

4. Respondent does not dispute that this case squarely presents the church-establishment question. He rather contends that review of the question presented might not alter the result. Opp. 27. But the presence of alternative grounds potentially supporting the judgment that have not been passed upon by the courts below hardly counsels for denial of certiorari; this Court regularly grants cases in such circumstances, including ERISA cases. *E.g.*, *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 242 & n.1 (2000). And the Court should grant certiorari because of the importance of a national resolution of the church-establishment question.

Respondent's alternative arguments are also meritless. Respondent contends that subparagraph (C)'s "principal purpose" requirement bars church-related organizations from using internal subcommittees (rather than external church-affiliated corporations) to administer their church plans. Opp. 28-29. The federal agencies unanimously disagree. *E.g.*, IRS GCM 39,007, 1983 WL 197946, at *4 (July 1, 1983). Under the text, a church plan may be maintained by a church-affiliated "organization,

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[3] Saint Peter's contributed $36.2 million in community benefits in 2012, and $39.7 million in 2014 (the petition transposed 2014 for 2012). Saint Peter's Healthcare System, 2014 Consolidated Financial Statements at 13. During both years Saint Peter's operated as a church plan, contrary to respondent's suggestion (Opp. 18, 20).

whether a civil law corporation or otherwise, the principal purpose of which is the administration or funding of a [pension plan] for the employees of a church." 29 U.S.C. § 1002(33)(C)(i) (emphasis added). The emphasized words, which respondent omits when he sets forth the statute (Opp. 28), establish that an internal, church-affiliated subcommittee with the requisite principal purpose can qualify.

Respondent also contends that the Plan is not maintained "'for' the 'employees' of a church," Opp. 29, a phrase that includes employees of an organization "controlled by or associated with a church," § 1002(33)(C)(ii). Respondent contends that Saint Peter's is not "controlled by" or "associated" with the Catholic Church. Opp. 29-30. This argument is frivolous. Among other things, the Bishop of the Roman Catholic Diocese of Metuchen is the *sole member* of Saint Peter's, and controls the Saint Peter's Board. That satisfies any definition of control. Pet. 9.[4]

As for association, the statute requires only that an organization "share[] common religious bonds and convictions" with a church. § 1002(33)(C)(iv). Saint Peter's easily qualifies, Pet. 9; the IRS deems a listing in the Official Catholic Directory sufficient evidence of association. And while respondent cites factors discussed in *Lown* and *Chronister* (Opp. 30), those cases involved hospitals that *disclaimed* any association with a church.

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[4] Respondent's statement that Saint Peter's "represented that it has no members" (Opp. 29) is based on a few inadvertently-checked boxes on an IRS form that Saint Peter's subsequently corrected. COA App. 675-79.

II. Absent Review, ERISA Will Apply Differently In Different Circuits

Before respondent's counsel orchestrated these suits in 2013, *every* court to consider the issue had held or assumed that church plans need not be established by churches. Pet. 17. In this new wave of litigation, however, as the district court concluded, the lower federal courts are "split" and cases "conflict with each other." Pet. App. 59a. The Seventh Circuit acknowledged that the question "is springing up across the country" and has "divided" the district courts. *Stapleton v. Advocate Health Care Network*, 817 F.3d 519, 520 (7th Cir. 2016). These conflicting decisions severely undermine ERISA's goal of national uniformity and leave religious nonprofits and their plan participants in an untenable position of uncertainty. While respondent disputes the existence of a circuit split, he does not dispute that ERISA as a practical matter now applies differently in different circuits.

1. The Fourth Circuit declared that "a plan established by a corporation associated with a church can still qualify as a church plan." *Lown v. Continental Cas. Co.*, 238 F.3d 543, 547 (4th Cir. 2001). That sentence appeared in the portion of the Fourth Circuit's opinion in which the court outlined the exemptions' requirements. The Fourth Circuit then determined whether the plan at issue satisfied the requirements, and concluded that it did not. *Id.* at 548. That analysis would have been completely unnecessary if there were a church-establishment requirement. *Id.* at 546. And the Fourth Circuit plainly analyzed the statute—it followed its rejection of a church-establishment requirement by quoting the text of subparagraph (C). That was explanation

enough, because the IRS, DOL, PBGC, and Fourth Circuit reading of the statute is not complicated: Subparagraph (C) defines a church plan to "include" plans maintained by church-controlled or church-associated organizations. The Eighth Circuit followed the Fourth Circuit in *Chronister*. Pet. 22.

But even if the holdings were dicta (Opp. 11), they are de facto controlling. District courts follow these decisions. Pet. 23-24; *see also Flynn v. Ascension Health Long Term Disability Plan*, 73 F. Supp. 3d 1080, 1083 (E.D. Mo. 2014).

2. And even absent a crisp circuit conflict in the sense of conflicting decisions, there is manifestly a crisp conflict in practice. In the circuits that have not yet addressed the question, religious organizations, relying on long-settled agency rulings, currently operate exempt church plans, regardless of who established the plans. Since this petition was filed, respondent's counsel have entered into settlements that allow hospitals to operate *exempt* from ERISA unless this Court grants review and imposes a church-establishment requirement. Class Action Settlement Agreement § 4.1.4, *Lann v. Trinity Health*, No. 14-cv-02237 (D. Md. Aug. 1, 2016). The Court often waits for a circuit split so as to be sure a conflict is producing differential application of the law. There are no doubts on that score here. As for respondent's contention that "plan sponsors have no contrary authority on which to rely," Opp. 14, there remains a memorandum from the general counsel of the IRS and over 550 express agency rulings, not to mention *Lown, Chronister*, countless district court decisions, and respondents' counsel's settlements.

3. The need for uniformity is especially compelling under ERISA. Pet. 15, 24-25. Respondent ar-

gues that a church-establishment requirement will create greater uniformity if ERISA, rather than state law, applies more broadly. Opp. 14. But applying state law where ERISA on its face does not apply hardly undermines ERISA's overarching goal of nationwide uniformity. The problem here is that identical plans are treated differently *under ERISA*—some covered, some not, depending on the location of the plan.

III. There Is No Church-Establishment Requirement

Respondent's merits arguments are contrary to the text and the legislative history. Saint Peter's believes that the statute clearly forecloses a church-establishment requirement, but at a minimum respondent's gymnastics make clear that there is a substantial question this Court should decide. The Seventh Circuit agreed when it stayed its mandate in *Advocate*.[5]

1. Respondent does not coherently address his interpretation's surplusage problem. Pet. 25-26. Respondent cites the *Advocate* opposition, which states that "established" is not superfluous in subparagraph C because subparagraph C "repeats the basic definition of a church plan from sub[paragraph] 33(A)." *Advocate* Opp. 29 (No. 16-74). That is our point. Because subparagraph C repeats "established," subparagraph C alters the entire "basic definition" of subparagraph A, not just the maintenance requirement. And Congress did not eliminate "established" "altogether" (*Advocate* Opp. 29), *i.e.* from

[5] Petitioners did not ask the Third Circuit to stay the mandate here; a stay motion is before the district court.

subparagraph A, because there was no need—plans maintained by churches are established by churches.

Petitioners' counsel made no "concession" (Opp. 23) about the *church plan* exemption. Counsel's brief discussion of a hypothetical veterans' disability statute raised at oral argument is irrelevant here. And respondent's reliance on the hypothetical confirms its slant. Respondent contends that "[j]ust as Congress in the hypothetical likely viewed disability as essential to qualify for free insurance, Congress here viewed the church's establishment of the plan as essential." Opp. 23. If it is assumed that the hypothetical Congress viewed disability as essential, that would support the Third Circuit's interpretation of the hypothetical statute. But whether Congress viewed church-establishment as essential is the question presented here.

2. Respondent cites not a single sentence from the legislative history indicating that Congress wanted to retain a church-establishment requirement. Opp. 24. The snippets cited simply state that plans that were established by churches still qualified. Respondent's discussion of Congress's goals in amending the exemption (Opp. 3, 24) is incomplete and misleading. Pet. 28-32. Respondent does not dispute that the bill's co-sponsor expressed concern that the original definition prevented pension boards—which are not churches—from establishing church plans. Pet. 28.

3. Respondent's policy arguments are irrelevant to the statutory-interpretation question and meritless. Rejecting a church-establishment requirement would not "advantage[]" religious hospitals over their secular competitors. Opp. 8, 12, 16, 18-19. Saint Peter's competitors do not generally offer defined-

benefit plans, because they are too costly. Pet. 10. Respondent describes Saint Peter's, which operates a single hospital, as "large" (Opp. i, 8), but the decision below equally applies to a two-room clinic run exclusively by Catholic sisters.

Respondent fails to explain how or why a church-establishment requirement could protect plan participants against failures. Opp. 23-24. A church that "establishes a plan" has no "legal" obligation to fund the plan (*cf.* Opp. 24). And a church has no greater "moral" obligation (*id.*) than its affiliated religious organizations. Further, church agencies may often be wealthier than affiliated churches—especially than the congregational churches the amendment was designed to accommodate, like local synagogues. Pet. 30.

4. No court has accepted respondent's contention (Opp. 24-25) that the agency interpretation creates a First Amendment problem. The only constitutional problem springs from respondent's interpretation, which produces denominational discrimination and excessive governmental entanglement. Pet. 30-32. And contrary to respondent's suggestion (Opp. 27), if *both* sides contend that the other's position raises constitutional doubt, the constitutional issue is unavoidable and only highlights the need for this Court's attention.

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Respondent does not ask this Court to solicit the Solicitor General's views, and there is no need. The petition raises a clean, squarely presented question of statutory interpretation. And the delay associated with a CVSG would leave religious hospitals and other religious employers in limbo, not to mention

aggravate the enormous settlement pressures associated with class actions seeking billions of dollars.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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