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OF TWO EVILS, CHOOSE NEITHER. THE BIFURCATED CHURCH PLAN ELECTION

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Millions of Americans get their healthcare through health plans that are provided by a religious employer. Nearly all of these health plans invoke "church plan" status as a means to legally exclude coverage of medically-approved procedures they deem morally-objectionable. The 2017 Supreme Court holding in *Advocate Health Care Network v. Stapleton* extends church plan protections to plans covering many more millions of employees of religiously-affiliated entities. However, religious employers that exclude these procedures based on church plan status risk violating state law, and can make the plan a target for costly employee lawsuits.

This article first introduces the imbalance between how The Employee Retirement Income Security Act of 1974 ("ERISA") regulates pension plans versus health plans. ERISA requires extensive reporting, disclosure, funding, management, and insuring of employee pension plans, but imposes virtually zero substantive requirements on health plans. Under the ERISA regulatory structure, excluding treatments and procedures religious employers deem against its religious tenets from the health plan is well within a religious employer's legal rights. But, church plans (regardless of whether they are self-funded) are not governed by ERISA, unless they affirmatively elect into ERISA governance. Electing into ERISA provides a church health plan with many benefits, but would subject the pension plan to ERISA's extensive and costly regulatory and reporting requirements.

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**This article strives for bias-free use of gender pronouns where appropriate, in conformance with Section 5.5 of the APA Publication Manual, Seventh Edition, which were crafted by panels of experts on APA's bias-free language committees.

This article takes a deeper look at the 410(d) election that a church plan can make into being covered by ERISA and analyzes its hereto unexplored functionality. The article explains how the 410(d) election impacts the law that a health plan is governed by, and why that is such an important issue.

Finally, this article proposes and explores a new legal theory: The Bifurcated Church Plan Election. This theory solves a problem by providing church health plans with a way to access the protections of ERISA preemption of state law, while not burdening the church pension plan with the cost and headache of meeting ERISA's burdensome funding, reporting and Pension Benefit Guaranty Corporation (PBGC) insurance premium requirements. This solution can improve the way church plans provide employee benefits to many millions of Americans.

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INTRODUCTION

Sixteen-year-old Jessica faced the challenges of life just like every other teenager. But, at a time when most kids are arguing with their "tragically-unhip" parents about getting the keys to the car on Friday night, Jessica and their mother, Lisa, had a much larger battle in front of them. Jessica was not "just like every other teenage girl." Jessica struggled with their gender identity. They never felt like their feminine body truly matched the masculine soul that lived deep in their heart. Instead of having arguments that end in eye rolls and "whatevs," like their friends were having with their parents, Jessica and Lisa wrestled with harmonizing Jessica's gender identity and religious identity, in line with Catholic Tradition[1] and doctrine.

After years of agonizing struggle to reconcile their body with whom they believed they was at their core, Jessica and their mother decided that they would have a mastectomy and chest reconstruction surgery to help ease some of Jessica's heartfelt pain. At first, Lisa was unsure whether her employer health plan covered these procedures. After talking to her employer, Lisa discovered that she was covered under a "church plan" which provided coverage of health care, but would not cover Jessica's transgender procedures based on the Catechism of the Catholic Church (CCC), which declares "…amputations, mutilations, and sterilizations performed on innocent persons are against moral law."[2] This sensitive issue has well-founded arguments on both sides. Jessica and Lisa were pursuing a treatment correctly and commonly-prescribed by thousands of medical professionals around the world for treatment of gender dysphoria, a medically-recognized gender identity

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[1] *Luke* 10:16. Catholics distinguish capital "T" Tradition, which comes from God, either through Christ or the apostles, from lower-case "t" - human traditions or customs. Here, the sanctity of the human body as manifested in biological sex at birth is regarded by Catholics as a capital "T" Tradition.

[2] POPE JOHN PAUL II, THE CATECHISM OF THE CATHOLIC CHURCH 2297 (Libreria Editrice Vaticana, Citta del Vaticano 2d ed. 1994). There are numerous medically-approved coverages/procedures that violate myriad religious beliefs of many different religions including: same-sex spousal coverage, contraception, abortifacient prescriptions, fertility treatments, sterilization procedures, parental notice for minors seeking abortion, gender reassignment procedures, hormone treatments, embryo experimentation, genetic testing, stem cell research, in vitro fertilization, gene manipulation, organ transplants, the use of donor sperm, the use of sperm that has been cryopreserved, and surrogacy are just a few.

condition.[3] The health plan is funded by Lisa's religious employer, which is within its established constitutional rights to refuse to pay for procedures that it believes violate it's religious views.[4]

Like Lisa, millions of Americans work for religiously-affiliated employers who provide "church plans" to their employees. There are 344,894 religious congregations in the U.S. employing receptionists, pastors, ministers, and support staff.[5] There are 508 religiously-affiliated hospitals in the U.S. employing doctors, nurses, technicians, administrators, clericals, and other support staff. [6] There are more than 800 religiously-affiliated colleges and universities in the U.S. employing professors, assistants, administrators, and myriad support staff.[7] And there are 34,576 religiously-affiliated (K-through-12) schools, employing 481,558 full time teachers,[8] as well as administrators and supports staff. These religious employers account for millions of employees, and vast numbers are small to mid-sized employers for whom legal compliance costs would be a heavy burden.[9] The conflict between the rights of a religious employer to be free from paying for what they believe to be morally-objectionable treatments, and the right of an employee to access medically-approved treatments through their health plan is a far reaching debate that touches millions of men, women, and children.

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[3] KENNETH J. ZUCKER, *The DSM-5 Diagnostic Criteria for Gender Dysphoria*, *in* MANAGEMENT OF GENDER DYSPHORIA: A MULTIDISCIPLINARY APPROACH 33, 33-37 (2015).

[4] *See Enstad v. Pacehealth*, ACLU (Oct. 6, 2017), https://www.aclu.org/cases/enstad-v-peacehealth.The scenario here is based on the facts and circumstances of a lawsuit filed in October 2017, in Washington state by the ACLU on behalf of a mother and daughter. Different names but identical facts are used to emphasize how common and real this issue is. The employer in the case was a health system founded by the St. Joseph Sisters of Peace in 1890 who operate health care facilities in Washington, Oregon and Alaska. The health plan eventually settled the case by acquiescing and amending its plan to cover gender reassignment procedures, providing the employee and her daughter with relief that the courts could not grant.

[5] *Clifford Grammich et al., U.S. Religion Census: Religious Congregations & Membership Study*, 2010, ASS'N OF STATISTICIANS OF AM. RELIGIOUS BODIES (2019), , http://www.thearda.com/Archive/Files/Descriptions /RCMSMT10.asp.

[6] LOIS UTTLEY ET AL., GROWTH OF CATHOLIC HOSPITALS AND HEALTH SYSTEMS: 2016 UPDATE OF THE MISCARRIAGE OF MEDICINE REPORT (2016).

[7] STEPHEN P. BROUGHMAN ET AL., U.S. DEP'T OF EDUC., NCES 2017-13, CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2015–16 PRIVATE SCHOOL UNIVERSE SURVEY FIRST LOOK (2017).

[8] *Id.* at 7.

[9] *Id.* at 6.

In the United States, the battle between religious freedom and progressive secularism rages now as fiercely as ever. Arguments that invoke the separation of church and state are hurled far afield from the original scope of the doctrine.[10] While it may be a mainstream mantra of progressivism to call for churches to lose their tax-free status, a far lesser-known legislative benefit that religious entities enjoy has recently been scrutinized in the highest courts in the land: "church plan" status of employee benefits plans.[11] Church plan status of these plans is an incredibly-important issue, because like in Jessica's case described above, employee benefits plans can magnify some of the most contentious social concerns that our society faces. Employee health and welfare plans must address heavy issues like eligibility of same-sex spouses, coverage of contraceptives and abortifacient prescriptions, fertility treatments, parental notice for covered minors who seek abortions under the plan, and coverage of controversial gender reassignment procedures. Due to the intimate and personal nature of health care, employee benefits plans that cover health and welfare can provide a projective lens through which an employer can focus and express their views on these social issues in a way that has profound impact on the employee's life.

Churches and religious employers can sponsor employee benefit "church plans" that are granted substantive discretion under certain federal laws, but can be highly regulated by other federal laws, state statutes, state common law, and can even be subject to tort liability.[12] Church plans are generally exempt from most of the federal regulations of the Employee Retirement Income Security Act of 1974 ("ERISA") that govern most employee benefits plans.[13] Therefore, church plans do not

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[10] This Article does not address the argument, raised by some parties, that the church plan exemption is unconstitutional as a violation of the Establishment Clause of the First Amendment. *See, e.g.*, Overall v. Ascension, 23 F. Supp. 3d 816, 832–33 (E.D. Mich. 2014) (dismissing claim for lack of standing). *But see* Medina v. Catholic Health Initiatives, 147 F. Supp. 3d 1190, 1203 (D. Colo. 2015) (finding the church plan exemption to be constitutional).

[11] Advocate Health Care Network v. Stapleton, 137 S. Ct. 546 (2016).

[12] Sabrina Corlette, *Church Plans and Health Care Sharing Ministries: Different Entities, Different Consumer Protections*, GEORGETOWN U. HEALTH POLICY INST.: CTR. ON HEALTH INS. REFORMS (July 20, 2015), http://chirblog.org/church-plans-and-health-care-sharing-ministries/.

[13] 29 U.S.C. § 1003(b)(2) (2002).

enjoy ERISA's preemptive protections from state law and are consequently subject to state laws that could violate religious beliefs. It is a complex situation to navigate. Under Internal Revenue Code, Section 410(d), church plan administrators do have the option of electing for the plan to be governed by ERISA, and thus irrevocably relinquish that plan's "church plan" status.[14] This option creates a difficult choice for church plans, because church plan status cuts both ways. On one hand, a church plan that remains exempt from ERISA exposes the plan to liability under state law, but electing into ERISA governance yokes the plan with the high costs and heavy burdens of ERISA compliance. In deciding whether to be governed by ERISA, church plans face a choice between two evils.

This article will begin by first explaining how employer health plans are regulated by state law, and then will discuss how the state law is preempted by ERISA. It will then describe how church plans are specifically exempted out of ERISA governance, and thus do not enjoy the protections afforded to non-church health plans that are governed by ERISA. Then the article discusses the option that Congress gave church plans to elect into ERISA coverage, and the difficult choice this option forces upon church plan administrators. Finally, the article will present and analyze a new solution to the problems that church plans face when contemplating the choice of whether to elect into ERISA governance.

I. Health Plans Are Regulated Under State Law

Employee health plans are highly regulated by federal law[15], state law, and state causes of action, unless the plan is exempted, or the law is preempted. Absent ERISA preemption, state law

[14] I.R.C. § 410(d) (2006).

[15] Employee health plans are subject to federal regulation. Both church plans and church plans that elect into ERISA governance are subject to regulation under numerous federal laws, including the Patient Protection and Affordable Care Act ("PPACA") and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Employer-sponsored health plans are required to comply with the PPACA's changes under federal law related to restricting or eliminating lifetime and annual limits on coverage, providing coverage for preventive health care services, and extending coverage to children up to age 26, and they may be subject to separate and potentially conflicting state standards for many other coverage requirements in the PPACA. PPACA has changed the regulation of church health plans, as PPACA did not

governs employee health plans.[16] Therefore, health plans not protected by ERISA may be deemed by the state to be insurance, can be regulated by state insurance statutes, can be subject to state causes of action, and sometimes can be subject to state tort claims.

A. McCarron-Ferguson Act

The distinction between "insurance plans" and "employee benefits plans" is important, because ERISA allows a delicate balance of power between the state and federal regulatory authority. Generally, insurance plans fall under state regulatory authority recognized in the McCarron-Ferguson Act, and non-insurance employee benefits plans are regulated under ERISA. On one side of the balance, the McCarron-Ferguson Act recognizes and establishes that states have authority to regulate "the business of insurance."[17] Therefore, employee benefit plans that use state-regulated health insurance products to provide benefits are expressly regulated under state law.[18] On the other side of the balance, ERISA expressly articulates its preemption of state law by stating that ERISA "supersede[s] any and all State laws insofar as they may…relate to any employee benefit plan."[19] If left alone, that balance would tip regulatory power heavily in favor of ERISA, and would effectively neuter

include any church plan exemptions. PPACA amended both ERISA and the Internal Revenue Code (and thereby the rules applicable to church plans) to subject all group health plans to a host of new rules and requirements. Non-grandfathered church health plans must provide coverage, notices, appeals rights and reports to the federal government to nearly the same degree as plans subject to ERISA. ERISA preemption does not apply *per se* to other federal laws, particularly PPACA. Federal laws (for example, Title VII, Railway Labor Act, Taft-Hartley Act, RICO, etc.) are not preempted if ERISA preemption would "alter, amend, modify, invalidate, impair or supersede" them. *See* ERISA § 514(d) (codified at 29 U.S.C. § 1144(d) (2006)); *see also* Murphy v. Heppenstall Co., 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982) Discussion of these other federal laws is beyond the scope of the relationship of church plans and the IRC Section 410(d) election. To a great extent, other federal laws are applicable to church plans and ERISA plans alike and therefore must be afforded the appropriate due care. However, a full discussion of these federal laws is not within the scope of this article.

16 29 U.S.C. §1144(a).

17 McCarran- Ferguson Act, 15 U.S.C. §§ 1011-1015 (1945).

18 *See* 29 U.S.C. § 1144(b)(2)(A) (2006) (providing that nothing in ERISA "shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking or securities", which is also known as the "saving clause.").

19 29 U.S.C. § 1144(a).

State authority, because it would allow ERISA preemption of state law even when the employee benefits plan used an insurance product to deliver benefits.[20]

To balance the scales, ERISA recognizes state authority to regulate insurance products by way of its "Savings Clause" which states that "nothing in [ERISA] shall be construed to exempt or relieve any person from any law of any State which regulates insurance…"[21] This clause "saves" state laws from ERISA preemption when the state law specifically relates to insurance.[22] For example, if a state law mandates that insurance plans provide coverage for contraception and abortifacients, then that law is applied to insurance plans in that state, and the state has the authority to regulate and enforce that mandate on employee benefits plans that use insurance products to provide benefits.[23] ERISA's "Savings Clause" tilted the scales of power back toward the states.[24]

The balance of regulatory power between the states and ERISA seemed to be in near perfect balance, but one situation needed to be addressed. The authority granted to the states to regulate insurance, had not limited what a state could define as "insurance." Under the McCarron-Ferguson Act, states have the authority to dictate what is insurance and what is not.[25] This gave dramatic authority to the states, because they could essentially regulate anything that resembled risk-sharing.[26] Using the power of ERISA's Savings Clause, states had the authority to "deem" that an employee benefits plan was actually engaged in the "business of insurance," and was thereby subject to state laws and regulation, defeating even ERISA's preemptive power.[27] The authority to deem that any employee benefits plan can be regulated as insurance gave the states too much power.[28]

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[20] *Id.*; *see also ERISA Preemption: Remedies for Denied or Delayed Health Claims, Hearing Before S. Subcomm. Of the Comm. On Appropriations U.S. S.,* 105th Cong. 6-7 (1999) [hereinafter *ERISA Preemption*].
[21] 29 U.S.C. § 1144(b)(2)(A); *see also ERISA Preemption*, *supra* note 20.
[22] 29 U.S.C. § 1144(b)(2)(A).
[23] *See id.*
[24] *See id.*
[25] James B. Donovan, *Regulation of Insurance Under the McCarran Act*, 15 L. & CONTEMP. PROBS. 473, 474 (1950).
[26] *See id.*
[27] 29 U.S.C. § 1144(b)(2)(B) (2006).
[28] *See id.*

The drafters of ERISA solved this problem by adding the "Deemer Clause."[29] The "Deemer Clause" provides that no employee benefits plan shall be deemed "to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies."[30] Continuing the example above, an employee benefits plan that is otherwise squarely regulated under ERISA, and did not use insurance products to provide benefits could no longer be "deemed" to be insurance, and would not be subject to state laws that mandate certain benefits. ERISA's deemer clause protections solve the state overreach problem, and more evenly distribute the power to regulate insurance to the state, and the power to regulate employee benefits plans to ERISA.

States having authority to deem employee benefits plans to be insurance, creates a problem for church plans, because church plans are otherwise exempt from ERISA.[31] Being exempt from ERISA means that church plans do not enjoy ERISA's deemer clause protection. Even if a church plan is not using a state-regulated health insurance product to provide health and welfare benefits to employees, without ERISA's "deemer clause" protections, the state is not prohibited from regulating an employer health plan as insurance.[32] For example, a church plan with a self-funded (non-insured) employee health plan has no protection from a state deeming that the plan is engaged in the "business of insurance," and thereby subject to state law, under the authority granted to states under the McCarron-Ferguson Act.[33] This can be problematic for church plans because they could find themselves required to provide coverages that violate the core tenets of their faith such as coverage

[29] *Id.*
[30] *Id.*
[31] 29 U.S.C.. § 1003(b)(2) (2002).
[32] 29 U.S.C. § 1144(b)(2)(B) (2006). The so-called "deemer" clause provides that neither employee benefit plans nor trusts established under such plans "shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." For health plans that are not subject to ERISA preemption, no such prohibition exists.
[33] 15 U.S.C. §§ 1011-1015 (1945).

for abortion all the way up to time of birth.[34] ERISA's deemer clause protections are crucial to church health plans.

Church plans are exempt from licensing and solvency laws, but not exempt from substantive state law like benefits mandates. In 1999, the United States Congress enacted the Church Plan Parity and Entanglement Prevention Act ("Parity Act"), which amended the definition of church plan under ERISA §3(33)[35]. The Parity Act exempts church health plans from state licensing, solvency and insolvency requirements.[36] But, the Parity Act does not extend relief beyond licensing and solvency requirements. The Parity Act is silent on the core issues of benefit mandates, state causes of action, and tort liability. Therefore, the Parity Act does not protect church plans from a state deeming the plan to be insurance and thereby subject to substantive state insurance law (like specific benefit mandates). The Parity Act does not restrict state authority to regulate substantive insurance law under the McCarron-Ferguson Act. Although it provides relief from licensing and solvency requirements, the Parity Act does not protect church plans from state law.

B. State Statutes

Many states have enacted statutes that require health plans to cover treatments and procedures that conflict with religious principles. For example, California, New York and Oregon have state statutes that require nearly all health plans to cover abortion.[37] Colorado, Georgia, Iowa, Montana, New Hampshire, Vermont, Washington and Wisconsin all require that group health insurance cover prescription contraception, and none of these states provide a religious or moral exemption. None

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[34] Being exempt from ERISA, means that church plans have no deemer clause protection and can thereby be deemed to be "insurance" and subject to state laws that mandate that insurance plans cover what a church may hold as morally-offensive treatment or procedure. For example, on January 22nd, 2019 New York State enacted the Reproductive Health Act that expands a woman's right to an abortion with a "health" exception for abortions after 24 weeks. Such health exception has been interpreted to allow women to abort unborn babies up to the date of birth for any reason, including "age, economic, social and emotional factors." Doe v. Bolton, 410 U.S. 179 (1973).

[35] Church Plan Parity and Entanglement Prevention Act, Pub. L. No. 106-244, 114 Stat. 499 (2000).

[36] *Id.*

[37] Knox-Keene Health Care Service Plan Act of 1975; CAL. HEALTH & SAFETY CODE § 1340 et seq.; H.B. 3391, 79th Leg., Reg. Sess. (Or. 2017); N.Y. INS. LAW. § 3217 (2015); N.Y. COMP. CODES R. & REGS. tit. 11, § 52.2 (2017).

exempt houses of worship, and none exempt religiously-affiliated non-profits.[38] Further, Illinois, Maryland, Vermont, Oregon, and Washington have passed laws that require state-regulated health insurance plans to cover male sterilization procedures.[39] When a health plan is subject to state statutes, the plan can be required to provide coverage for such services, even when doing so would violate religious tenets. The coverage that states can mandate extends far beyond just the heated abortion debate.

C. *State Causes of Action*

A health and welfare plan regulated by state law is subject to liability for state law causes of action. State laws regulate behavior that a state legislature has determined meets the public policy objectives of the state. For example, states generally believe there is a general public interest in holding parties under contractual agreement to the terms of the contract. This policy allows the highest and best use of resources, encourages commerce and trade, and benefits the general social well-being, because businesses and individuals can rely on the courts to enforce the bargained-for exchange. Hence, states allow parties to pursue a cause of action for breach of contract against a party whom they believe has not lived up to their end of a deal. Under this kind of state law action, a beneficiary of a health plan governed by state law, can sue a plan for breach of contract in denying a claim in a manner that violates the terms of the contract.

D. *State Tort Liability*

Many states have recognized the power imbalance between health plans and the individuals they contract with.[40] This imbalance can make the "bargained-for exchange" of a health plan contract

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[38] *See Insurance Coverage of Contraceptives*, GUTTMACHER INST. (Jan. 1, 2020), https://www.guttmacher.org/print/state-policy/explore/insurance-coverage-contraceptives.

[39] *See* KAISER FAMILY FOUNDATION REPORT, STERILIZATION AS A FAMILY PLANNING METHOD (Dec. 14, 2018).

[40] DANIEL MALDONADO ET AL., COUCH ON INSURANCE (3d ed. 1995); *see also* Randy D. Henry, *An Analysis of Interpretation of Insurance Contracts: Common Law Versus Strict Contra Proferentem*, 36 J. INS. REGULATION 1, 1 (2017) (citing Brief for Petitioner, People's Ins. Counsel Div. v. State Farm Fire & Cas. Ins. Co., 2014 WL 4147804, at *14 (Md. 2014).

rather one-sided. These contracts are rarely "bargained-for,"[41] but instead become a type of Hobson's choice, where there is not a true choice.[42] Instead, the choice the consumer faces is between "take it" or "leave it." Where the courts have found that health plans have acted egregiously, state courts across the country have allowed plaintiffs to bring tort claims.[43] A trend that may be alarming to health plan sponsors and plan administrators is that states have been cracking down on benefit claim denials, recognizing additional liability under tort law when a plan wrongfully denies a claim.[44] For example, in 36 states, a plan beneficiary can bring a state law tort cause of action for "bad faith" denial of benefits.[45] And, in 11 states, a plan beneficiary can bring a bad faith tort claim even when the coverage denied is specifically excluded by the plan.[46]

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[41] *See* Eric M. Holmes, *Restatement of Promissory Estoppel,* 32 WILLAMETTE L. REV. 263 (1996).
[42] See Eric M. Holmes, *The Four Phases of Promissory Estoppel*, 20 SEATTLE L. REV. 45, 55 (1996).
[43] *Todd. S. Schenk, State-by-State Analysis: Bad Faith in the Absence of Coverage*, TRESSLER LLP (Jan. 2016), https://www.tresslerllp.com/docs/default-source/Publication-Documents/50_state_bad_faith_in_the_absence_of_coverage.pdf?sfvrsn=0.
[44] *Id.*
[45] *Id.*
[46] "[B]reach of an express covenant is not a necessary prerequisite to an action for bad faith…. We hold that a plaintiff … need not prevail on the contract claim in order to prevail on the bad faith claim…." Deese v. State Farm Mut. Auto. Ins. Co., 838 P.2d 1265, 1270 (Ariz. 1992); "If an insurer acts unreasonably when processing a claim, it will be held liable for bad faith despite the claim's merits." Zilisch v. State Farm Mut. Auto. Ins. Co., 995 P.2d 276 (Ariz. 2000); "The implied covenant is breached, whether the carrier pays the claim or not, when its conduct damages the very protection or security which the insured sought to gain by buying insurance." Best Place, Inc. v. Penn Am. Ins. Co., 920 P.2d 334 (Haw. 1996); "[A] failure to properly investigate an insurance claim can constitute bad faith…." Murphy v. Cincinnati Ins. Co., 576 F. Supp. 542, 543 (D. Mich. 1983); Allen v. State Farm Mut. Auto. Ins. Co., 753 S.W.2d 616, 620 (Mo. Ct. App. 1988) (finding the denial of liability without stating any ground for denial is sufficient to warrant the submission of vexatious damages); LeRette v. Am. Med. Sec., Inc., 705 N.W.2d 41, 48-9 (Neb. 2005) (reasoning that where the facts supporting a bad faith claim differ from those supporting a breach of contract claim, an insured need not prevail on the breach of contract claim in order to prevail on the bad faith claim, nor does ultimate payment of the claim defeat a bad faith claim); "[N]othing in the case law… requires that the tortious conduct be accompanied by a breach of the contract, even though most, if not all, of the cases have as a factual background the insurance company's refusal to pay. We do not believe an action for punitive damages from tortious conduct is precluded when the company eventually pays, if bad faith delay and aggravating conduct is present." Robinson v. N.C. Farm Bureau Ins. Co., 356 S.E.2d 392, 395 (N.C. Ct. App. 1987); "Thus, even if an insurance company rightly denies an insured's claim, and therefore does not breach its contract, as here, the insurance company nevertheless must employ good business practices which are neither unfair nor deceptive." Nelson v. Hartford Underwriters Ins. Co., 630 S.E.2d 221, 231 (N.C. Ct. App. 2006); "While an insured may state claims for breach of contract and breach of the duty of good faith and fair dealing, the insured does not need to prevail on the contract claim to pursue the claim for bad faith." Ahrenholtz v. Time Ins. Co., 968 P.2d 946, 951 (Wyo. 1998); Hatch v. State Farm Fire & Cas. Co., 842 P.2d 1089, 1099 (Wyo. 1992) (holding that even where a claim is fairly debatable, an insurer may be subject to liability if the manner that it investigated, handled or denied a claim violated the implied covenant of good faith, even if the policy contract is honored by the insurer).

A growing majority of jurisdictions are adopting state laws to recognize a tort cause of action against health plan insurers who, in bad faith, refuse to pay benefits to their insured.[47] This recognition has developed from courts realizing that the insured-insurer relationship formed by an insurance policy is not an ordinary commercial contract, but a special one.[48] Specifically, courts regard the insurance contract as one of adhesion, with the insurer enjoying superior bargaining power.[49]

In addition, courts have viewed the insurance industry as imbued with the public interest[50] and insurers as standing in fiduciary relationships with their insured.[51] Thus, contract remedies, generally in response to suit for policy proceeds due, have been found inadequate in protecting the insured.[52] To remedy bad faith tort cause of actions, 34 states have enacted statutes that allow state courts to award damages that not only include actual compensatory damages, but also include consequential and punitive damages.[53] While compensatory damages that result from the denial of a benefits claim can be costly to the insurer, punitive damages can be worse because the court can award punitive damages up to ten times the compensatory damages.[54] This means that plans found to have denied a

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[47] *See* Gulf Atl. Life Ins. Co. v. Barnes, 405 So. 2d 916 (Ala. 1981); United Servs. Auto Ass'n v. Werley, 526 P.2d 28 (Alaska 1974); Sparks v. Republic Nat'l Life Ins. Co., 647 P.2d 1127 (Ariz. 1982), *cert. denied*, 459 U.S. 1070 (1982); Aetna Cas. & Sur. Co. v. Broadway Arms Corp., 664 S.W.2d 463 (1983); Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973); Travelers Ins. Co. v. Savio, 706 P.2d 1258 (Colo. 1985); Grand Sheet Metal Prod. Co. v. Protection Mut. Ins. Co., 375 A.2d 428 (Conn. Super. Ct. 1977); White v. Unigard Mut. Ins. Co., 730 P.2d 1014 (Idaho 1986); Sexton v. Meridian Mut. Ins. Co., 337 N.E.2d 527 (Ind. Ct. App. 1975); Rodgers v. Pa. Life Ins. Co., 539 F. Supp. 879 (S.D. Iowa 1982); Gibson v. Nat'l Ben Franklin Ins. Co., 387 A.2d 220 (Me. 1978); Blue Cross Blue Shield of Miss. v. Campbell, 466 So. 2d 833 (Miss. 1984); St. Paul Fire & Marine Ins. Co. v. Cumiskey, 665 P.2d 223 (Mont. 1983); U.S. Fidelity & Guar. Co. v. Peterson, 540 P.2d 1070 (Nev. 1975); Payne v. N.C. Farm Bureau Mut. Ins. Co., 313 S.E.2d 912 (N.C. Ct. App. 1984); Corwin Chrysler-Plymouth v. Westchester Fire Ins. Co., 279 N.W.2d 638 (N.D. 1979); Hoskins v. Aetna Life Ins. Co., 452 N.E.2d 1315 (Ohio 1983); Christian v. Am. Home Assurance Co., 577 P.2d 899 (Okla. 1977); Bibeault v. Hanover Ins. Co., 417 A.2d 313 (R.I. 1980); Nichols v. St. Farm Mut. Auto Ins. Co., 306 S.E.2d 616 (S.C. 1983); Arnold v. Nat'l County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987); Anderson v. Continental Ins. Co., 271 N.W.2d 368 (Wis. 1978).

[48] *See, e.g.*, Egan v. Mut. of Omaha Ins. Co., 598 P.2d 452, 456 (Cal. 1979), *cert. denied*, 445 U.S. 912 (1980) (finding that an insurance policy is not a typical contract because the insured is not seeking a commercial advantage).

[49] *See, e.g.*, Gray v. Zurich Ins. Co., 419 P.2d 168, 179 (Cal. 1966) ("consumer does not occupy a sufficiently strong economic position to bargain with such institutions [insurance companies] as to specific clauses of their contracts of performance. . . ").

[50] *See, e.g.*, *Egan*, 598 P.2d at 457 (insurers are purveyors of vital quasi-public service).

[51] *See, e.g.*, *id.* at 456 (holding that in handling a claim, the insurer must give as much consideration to the insured's interest as to their own).

[52] For a discussion of the historical development of the tort of bad faith, see W. SHERNOFF ET AL., INSURANCE BAD FAITH LITIGATION §§ 1.02-1.08 (1997).

[53] Schenk, *supra* note 43.

[54] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

benefit claim in bad faith can face paying out massive damages. ERISA does not protect church plans from being deemed to be engaged in the business of insurance, so church plans could face claims for bad faith denial of benefits, even when the benefits are excluded in the plan terms.

Unlike contract remedies, the tort of bad faith denial of benefits can expose the insurance company or church plan to liability which far exceeds any benefits due the member. Insureds have recovered extracontractual damages for medical and legal expenses, loss of income and emotional distress[55] and large punitive awards.[56] The tort of bad faith therefore equalizes the insurer-insured relationship to deter insurance companies from acting in bad faith and to assure that the insured gets the benefits for which he or she bargained.[57] When a state deems a church plan to be insurance, that church plan could also be liable for these massive awards of damages, even when the plan simply denies a benefit that is expressly excluded by the plan itself.[58]

II. ERISA PROVIDES RELIEF TO HEALTH PLANS BY PREEMPTING STATE LAW

ERISA preemption provides a health plan with protections from state law ensuring minimal liability for the plan.[59] When a health plan is protected by ERISA, the state is prohibited from deeming the health plan to be "insurance," and thus ERISA prevents the state from treating the health plan as an insurance company.[60] For a health and welfare plan governed by ERISA, generally the state law is preempted, and thus the beneficiary can pursue only the limited claims and remedies available under

55 *See, e.g.*, Crisci v. Sec. Ins. Co., 426 P.2d 173, 179 (1967) (affirming emotional distress award against insurer who refused to reasonably settle claim against insured).
56 *See, e.g.*, Egan v. Mut. of Omaha Ins. Co., 598 P.2d 452, 457-59 (Cal. 1979) (permitting punitive damages where insurer intentionally failed to reasonably investigate insured's disability claim before denying benefits).
57 *See generally* SHERNOFF, *supra* note 52 (detailed discussion of evolution of bad faith cause of action).
58 *Have you checked your church plan status lately?*, GUIDESTONE, https://www.guidestoneretirement.org/AboutUs/Articles/PlanSponsorArticles/Church-Plan-Status (last visited Nov. 11, 2019).
59 John V. Tucker, *ERISA Preemption: What is it?*, HG.ORG, https://www.hg.org/legal-articles/erisa-preemption-what-is-it-51592 (last visited Jan. 20, 2020).
60 *Id.*

ERISA.[61] State statutes are preempted to the extent that they relate to, have a connection with, or reference to an ERISA plan.[62] ERISA's civil enforcement provisions completely preempt "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy."[63] Tort claims arising out of denials of care or delivery of inadequate care are preempted by ERISA.[64]

Under ERISA, a beneficiary may pursue claims only to recover the benefits due under the plan, to enforce the participant's rights under the plan, or to clarify the rights to future benefits.[65] Such limited liability under ERISA is a significant benefit to the plan, because an aggrieved beneficiary who sues the plan can only recover the rights to which they were entitled under the plan, and are barred from compensatory and punitive damages. Participants and beneficiaries of a plan governed by ERISA can only bring claims for a narrow set of claims.

A. Denial of Benefits and Rights Under the Plan

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[61] *Id.*

[62] *See* 29 U.S.C. § 1144(a) (2006); *see also* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 91-2 (1983).

[63] Employee Retirement Income Security Act of 1974, Pub. L. No. 93–406, § 502(a), 88 Stat. 829, 891 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461) (1982); Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004).

[64] *See generally* Corcoran v. United Healthcare, 965 F.2d 1321 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 812 (1992) (wrongful death action against entity which provided utilization review services for a plan and denied full-time nursing care); Rodriguez, et. al v. Pacificare of Tex. Inc., 980 F.2d 1014 (5th Cir. 1993), *cert. denied*, 113 S. Ct. 2456 (1993) (state law claim against HMO and doctor for failing to provide prompt and adequate care and coverage); Kuhl v. Lincoln Nat'l Health Plan of Kansas Cty., Inc., 999 F.2d 298 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 694 (1994) (malpractice and other claims based on denial of treatment at non-HMO hospital); Spain v. Aetna Life Ins. Co., 11 F.3d 129 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1612 (1994) (wrongful death claim based on plan's delay in approving treatment); Cannon v. Group Health Service of Okla., 77 F.3d 1270 (10th Cir. 1996) (The surviving husband of a wife who died of leukemia, was preempted from bringing claims against insurers under ERISA); Shea v. Esensten, 107 F.3d 625 (8th Cir. 1997) (claims of fraudulent nondisclosure and misrepresentation arising from HMO's compensation agreement with doctor); Elsesser v. Hosp. of Phila. C. of Osteopathic Med., 795 F. Supp. 142 (E.D. Pa. 1992) (action challenging HMO's decision not to pay for heart monitor); Dearmas v. Av-Med, Inc., 814 F. Supp. 1103 (S.D. Fla. 1993); Ricci v. Gooberman, 840 F. Supp. 316 (D.N.J. 1993) (malpractice claim against HMO based on doctor's error); Anderson v. Humana, Inc., 24 F.3d 889 (7th Cir. 1994) (consumer fraud action against HMO for failing to disclose the incentive structure under which it operated); Jass v. Prudential Health Care Plan, 88 F.3d 1482 (7th Cir. 1996) (claims for vicarious liability and loss of consortium against a managed care entity which were based on the physician's failure to treat were not preempted, but the fraud claim was preempt) Nealy v. U.S. Healthcare HMO, 844 F. Supp. 966 (S.D.N.Y. 1994) (various claims against HMO arising out of participant's death); Tolton v. Am. Biodyne, 48 F.3d 937 (6th Cir. 1995) (wrongful death and other tort claims against insurer and contract provider of managed care mental health services); Visconti by Visconti v. U.S. Health Care, 857 F. Supp. 1097 (E.D. Pa. 1994) (medical malpractice claims against HMO based on direct and vicarious liability); Dukes v. U.S. Healthcare, 57 F.3d 350 (3d Cir. 1995); Danca v. Emerson Hosp., 9 F. Supp. 2d 27 (D. Mass. 1998); Danca v. Private Health Care Sys., 185 F.3d 1 (1st Cir. 1999) (discussing utilization review entity's wrongful denial of a request for placement in a particular psychiatric facility).

[65] 29 U.S.C. § 1132(a)(1)(B) (2014).

ERISA provides beneficiaries a cause of action for the denial of benefits or rights under an ERISA plan.[66] The primary relief available to beneficiaries is that they can recover benefits owed under the terms of the plan.[67] The limitation on causes of action provide an exceptional advantage to ERISA plans, because plans regulated by ERISA are not subject to liability for state law causes of action.[68] And the remedies available under ERISA effectively eliminate the plan's liability beyond the benefits available under the plan itself.[69] ERISA's claim and remedy limitations may be the most significant feature of ERISA regulation for an employee health plan.[70]

B. Breach of Fiduciary Duty

ERISA allows beneficiaries to sue for breach of fiduciary duty,[71] and provides beneficiaries the right to obtain "equitable relief."[72] Equitable relief refers only to restitution, imposing constructive trusts, disgorgement of ill-gotten gains made at the expense of the plan, injunctions, or specific performance.[73] Monetary damages are not available as a remedy.[74] ERISA recognizes fiduciary duty, and allows a beneficiary to pursue a claim for breach of that duty.[75] Examples of breach of fiduciary duty claims include a fiduciary dealing with plan assets in the fiduciary's own interest, the fiduciary receiving any personal incentive to handle or invest plan assets in a certain manner, selling or exchanging plan property with a person of interest, lending money or extending credit to a party in interest, and many other types of transactions that principally involve plan assets and parties that could

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66 29 U.S.C. § 1002 (2008).
67 29 U.S.C. § 1132(a)(1)(B).
68 CRAIG C. MARTIN & AMANDA S. AMERT, ERISA BENEFITS LITIGATION ANSWER BOOK 2018 1-13, (Practising Law Institute 2017).
69 *Id.*
70 *Id.*
71 29 U.S.C. § 1132(a) (2014).
72 29 U.S.C. § 1132(a)(3).
73 R. Joseph Barton et al., *Remedies: Appropriate Equitable Relief Under ERISA After Montanile*, AM. CONF. INST. (Oct. 27, 2016), https://www.americanconference.com/erisa-litigation-824l17-nyc/wp-content/uploads/sites/1142/2016/10/2.05day1_Serron.Barton.Rosenberg.pdf.
74 29 U.S.C. § 1132(a)(3).
75 Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan, 136 S. Ct. 651 (2016).

have a conflict of interest.[76] While this might seem to expand the plan's liability to its beneficiaries (and it does), the fiduciary's duty imbued in the health plan outside plan asset handling, is limited to administration of the plan, and is not a general fiduciary duty in all aspects.[77] There are important fiduciary duties involved in plan administration, and fiduciary duty may be the most sensitive of all ERISA's terms relating to health plans. The breach of fiduciary duty claim, while important, is not a prohibitive burden on an employee health plan.

C. *Knowing Participation Claims*

ERISA authorizes a cause of action where a nonfiduciary knowingly participates in (1) any breach of the fiduciaries' fiduciary duties under ERISA or (2) a prohibited transaction under § 406.[78] For example, ERISA prohibits plan fiduciaries from self-dealing and causing the plan to enter into either direct or indirect transaction involving the plan, or the plans assets that have potential for a conflict of interest.[79] Prohibited transactions fall under the breach of fiduciary duty claim discusses above; however, ERISA also allows a claim against a party that knowingly participated in the transaction.[80] These claims typically involve a nonfiduciary assisting a fiduciary in the fiduciary's breach of a fiduciary duty.[81] This type of claim is an extension of the breach of fiduciary duty claim discusses above, and similarly, beneficiaries may obtain only those remedies traditionally available at equity, as discussed above.[82]

D. *Interference Claims*

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[76] *Fiduciary Responsibilities*, U.S. DEP'T OF LABOR, https://www.dol.gov/general/topic/retirement/fiduciaryresp (last visited Nov. 11, 2019).
[77] *Understanding Your Fiduciary Responsibility under A Group Health Plan*, U.S. DEP'T OF LABOR, https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/understanding-your-fiduciary-responsibilities-under-a-group-health-plan.pdf (last visited Jan. 20, 2020).
[78] 29 U.S.C. § 1132(a)(3) (2014).
[79] *Prohibited Transactions under ERISA,* FIDELITY PLAN SPONSOR WEBSTATION, https://sponsor.fidelity.com/pspublic/pca/psw/public/library/manageplans/prohibited_transactions.html# (last visited Nov. 11, 2019).
[80] *Id.*
[81] Mertens v. Hewitt Assocs., 508 U.S. 248, 273 (1993).
[82] *Id.*

ERISA provides beneficiaries a cause of action against any person that acts adversely to an employee for improper ERISA-related reasons.[83] Typically, interference claims allege either an action against an employee to prevent the employee from accessing a right under the plan, or retaliation against an employee for exercising a right under the plan. Remedies for interference claims are that beneficiaries may recover payments they would be owed under the plan (absent the interference), and the aforementioned equitable remedies.[84]

E. Federal Common Law Estoppel Claims

ERISA allows common law estoppel claims in favor of beneficiaries to enforce benefits promises, even where those promises are not included in a written plan.[85] Remedies available under these claims are again limited to the equitable remedies common to all ERISA causes of action.[86] The key component of these claims is that the claims centers on the promise of benefits under the plan.[87] These estoppel claims do not expand the causes of action that a beneficiary may bring, rather they allow equitable remedy to enforce the promises of coverage under the plan. Ultimately estoppel remedies are also limited to the benefits that the beneficiary would have received under the plan.

To summarize these claims and remedies as they apply to health plans, ERISA limits claims to a small set of specific causes of action, and limits remedies to the benefits to which the beneficiary is entitled.[88] Remedies available under state law are generally not available when a health plan is

[83] Employee Retirement Income Security Act of 1974, *supra* note 64, at § 510.
[84] Brian M. Murray, *Understanding ERISA Section 510 Discrimination and Retaliation Claims*, LEXIS PRAC. ADVISOR 1-10 (2017).
[85] MARTIN & AMERT, *supra* note 69.
[86] *Id.*
[87] *Id.* (explaining the predicate to ERISA claim is the promise of benefits under the plan)
[88] Employee Retirement Income Security Act of 1974, *supra* note 64, at § 510.

governed by ERISA.[89] This includes extra-contractual claims like promissory estoppel.[90] The Court in *Pilot Life v. Dedeaux* summarized the limitations when it wrote:

> [a] participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits.[91]

ERISA provides plans with significant protections against employee and beneficiary lawsuits, limiting both the claims that can be brought and the potential remedies if those claims are proven.[92]

III. CHURCH PLANS ARE NOT GOVERNED BY ERISA

In plain and direct language, the text of the statute makes clear that ERISA shall not apply to church plans.[93] This means there is no ERISA preemption of state law and no "deemer clause" protections for church plans.[94] State law is not preempted when applied to ERISA-exempt church plans.[95] Self-funded church plans cannot invoke ERISA's deemer clause protections against state regulation as insurance companies.

In *FMC Corp. v. Holliday*, the Supreme Court clarified that self-funded employer health plans shall not be subject to state insurance regulations.[96] Ms. Holliday was a beneficiary of a self-funded

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[89] *See* Mass.Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146 (1985) (showing punitive and extra-contractual damages not available under § 502(a)(2) of ERISA to individual participants).
[90] *See* Degan v. Ford Motor Co., 869 F.2d 889, 895 (5th Cir. 1989) (explaining ERISA precludes oral modifications to benefit plans and thus promissory estoppel claims are not cognizable).
[91] Pilot Life Ins. Co. v. Dedeaux*,* 481 U.S. 41, 53-54 (1987).
[92] Peter K. Stris, *ERISA Remedies, Welfare Benefits, and Bad Faith: Losing Sight of the Cathedral,* 26 HOFSTRA LAB. & EMP. L. J. 387, 393-94 (2009).
[93] 29 U.S.C. § 1003(b)(2) (2002) (stating "[t]he provisions of this subchapter shall not apply to any employee benefit plan if . . . such plan is a church plan . . . .").
[94] Walter Donat, *ERISA and the Preemption of State Law,* 6 FORDHAM URB. L. J. 599, 603 (1978) (citations omitted).
[95] *See* 29 U.S.C. § 1144(a) (2006) (Section 514(a) of ERISA generally preempts state laws to the extent that they "relate to" employee benefit plans subject to Title I of ERISA).
[96] *See* FMC Corp. v. Holliday, 498 U.S. 52 (1990).

health plan. Holliday sustained injuries as the result of a car accident. The health plan paid for some of her medical expenses. Holliday filed and settled a negligence suit against the other driver. The plan sought reimbursement from Ms. Holliday for the medical costs paid by the plan under the plan's subrogation clause. Ms. Holliday refused, and the plan sued her. The Court held that state law, as applied to a self-funded plan, is subject to preemption by ERISA. Specifically, the Court held that Congress intended to create an exception under Section 514(b)(2)(B) (the "deemer clause") to ensure that any employer health care plan funded solely by the employer ("self-funded plan") would not be subject to state regulation. ERISA's "deemer" clause protects self-funded employee benefits plans from states "deeming" employer plans as insurance, but, the deemer clause protections are accessible only via ERISA's regulatory structure, from which church plans are exempt.[97] Therefore, with no "deemer clause" protection, states are not barred from deeming self-funded church plans to be insurance, and regulating them under the State's insurance laws.[98]

A. Congress defines "church plan," under ERISA and the Internal Revenue Code

Over the years since enacting ERISA, Congress and the Courts have been repetitive as they have tried to bring clarity to the confusion over church plan status. Repeatedly Congress and the courts have simply expanded which employee benefit plans may be considered a church plan. Congress sings the same song, and the Courts dance the same dance: Make the definition of church plan larger and more encompassing. This tactic grants access to church plan status to a growing number of entities, but bigger isn't always better. A better solution to clarifying would be to pivot from a larger definition to a smarter and more precise implementation of church plan status, such as allowing a bifurcated church plan election.

[89] 29 U.S.C. § 1144(a).
[98] *See* 29 U.S.C. § 1144 (Section 514(b)(2)(B) of ERISA, referred to as the "deemer clause," provides that a state law "purporting to regulate insurance" generally cannot deem an employee benefit plan to be an insurance company (or in the business of insurance)).

Under (33)(A), Congress initially attempted to define the term "church plan": "The term 'church plan' means a plan established and maintained (to the extent required in clause (ii) of subparagraph (B)) 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."[99] Simultaneously, Congress amended the Internal Revenue Code, Section 414(e), to mirror the ERISA language: "For purposes of this part, the term 'church plan' means a plan established and maintained (to the extent required in paragraph (2)(B)) 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."[100]

B. *Congress expands the definition to include principal purpose organizations.*

In 1980 Congress amended ERISA to expand the definition of "church plan" to include:

> "A plan established and maintained for its employees. .. by a church or by a convention or association of churches 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, 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."[101]

This expansion allowed so-called "principal purpose organizations" to maintain church plans. This new definition created questions regarding the definition of "principal purpose," since the new language seemed to limit the new access to organizations whose only main and distinctive purpose was to maintain the church plan. The new language was unclear in whether it limited principal purpose organizations church pension and welfare boards, or did the new definition allow third-party administrators to maintain a church plan.

C. *Congress expands the definition to include plans sponsored by a "church agency."*

[99] 26 C.F.R. § 1.414(e)-1 (1980).
[100] 26 U.S.C. § 414(e) (2018).
[101] *See* 26 U.S.C. § 414(e); *see also* 29 U.S.C. § 1002(33)(C)(i) (2008).

Under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPA"), Congress sought to further clarify that affiliated church agencies could also sponsor church plans.[102] In the MPPA, Congress defines a church agency as "an organization which is exempt from tax under section 501 and which is either controlled by or associated with a church.[103] As it had before, Congress also amended the IRC to further refine the term "associated with."[104] Under Section 414(e)(3)(D), an organization is "associated with" a church if it shares common religious bonds and convictions with that church.[105] The MPPA made concrete that Congress intended that church-affiliated organizations, like Catholic Charities which is not definitively ecclesiastical in nature, would have explicit authority under the law to establish and maintain a church plan.[106]

D. The Supreme Court expands the definition even further.

In *Advocate Health v. Stapleton*, Justice Kagan of the Supreme Court of the United States, explained that the term "church plan" initially had meant a plan established and maintained by a church.[107] But, she added that ERISA 3(33)(C)(i) broadened the term "church plan" to include a plan established and maintained by an organization associated with a church and that had as its "principal purpose" the administration or funding of that plan.[108] This expansion of the definition is important because it allows access to church plan status to an organization that only maintains a church plan, where previously, the circuit courts were split on interpreting ERISA's "established and maintained" language.[109] Previously the Third, Seventh, and Ninth Circuits held that a "church plan must be established by a church," and the Fourth and Eighth Circuits held that a church plan not established

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102 *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980).
103 *Id.*
104 26 U.S.C. § 414(e)(3)(A) (2018).
105 26 U.S.C. § 414(e)(3)(D).
106 *See* Multiemployer Pension Plan Amendments Act, *supra* note 102.
107 Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1654 (2017).
108 *Id.*
109 *Id.* at 1657.

by a church, would be a church plan if it were maintained by a qualifying church-affiliated organization.[110] The Court's holding in *Advocate Health* resolved the circuit split, but yet again continued the long history of expanding the universe of entities that can access church plan status to include entities that merely maintained church plans.[111]

E. *Church plan self-certification.*

All three branches of federal government (Congress, the Department of the Treasury, and the Supreme Court) have provided input attempting to clarify the definition of church plan, and what type of entities may sponsor a church plan.[112] Despite this broad governmental interest in providing clarity, the system relies on a church entity passively self-certifying its plan. There are generally two methods by which a plan can become a church plan, neither is specifically concrete. The first method is an explicit method: the entity can obtain a private letter ruling ("PLR") from the IRS.[113] A PLR can provide insight into how the IRS may view a particular entity at a particular point in time; however, PLR's do not create precedent.[114] This means that one entity may not rely on the PLR of another entity, even if the entities are identically-situated. The second method is an implicit method. An entity can organize, and act/function as a church plan.[115] This method is not dispositive, not declarative and cannot be relied on as precedent either. Despite an apparently broad desire by all three branches of federal government to clarify the definition of church plan, establishing a church plan can be vague and uncertain.[116]

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110 *Id.*
111 *Id.* at 1663.
112 *Id.* at 1657.
113 *See id.* at 1657; *see* Gail Jones et al., *Church Plans, Government and Single-Employer Collectively Bargained Plans,* INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-tege/epchd403.pdf (last visited Nov. 7, 2019).
114 Jones et al., *supra* note 113.
115 *Id.*
116 Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1657 (2017).

Setting aside the lack of clarity in which entities may obtain church plan status, the advantages of a plan holding such status are clear as it pertains to pension plans. Church plans need not meet ERISA's reporting, funding and pension insurance requirements.[117] Therefore, plan administration is likely to be cheaper and less complex. However, the disadvantages of holding church plan status for health and welfare plans are equally as clear when one considers that church plans do not enjoy ERISA preemption of state law, and thus can be subject to state statutes that mandate specific benefits.[118] And, church plans can be subject to state statutes, causes of action and tort liability.[119] The corresponding remedies available under state law include compensatory damages and punitive damages, which can be awarded up to ten times the award amount of compensatory damages.[120] Choosing to hold "church plan" status and therein be subject to state law, exposes church health plans to significant liability.

IV. ELECTING INTO ERISA GOVERNANCE IS A DOUBLE-EDGED SWORD

I.R.C. § 410(d) provides a mechanism by which a plan may elect to be governed by ERISA.[121] When the election is applied as it is currently interpreted (to apply the ERISA election to all plans under a common sponsor), problems arise. Church health plans that make this election benefit from ERISA's protective preemptive force, however church pension plans are then subject to ERISA's costly and burdensome compliance requirements.[122] Under ERISA governance, a plan must meet

[117] *See* Tara Schulstad Scisoe, *Church Retirement Plans*, PRACTICAL L., https://www.icemiller.com/MediaLibraries/icemiller.com/IceMiller/PDFs/publications/Church-Retirement-Plans-(w-002-8456).pdf (last visited Nov. 7, 2019). Church pension plans are exempt from Title I of ERISA, and the associated Pension Benefit Guaranty Corporation (PBGC) insurance premiums that ERISA-governed pension plans are required to pay to insure the plan liabilities in the event that the plan becomes insolvent. *See id.*
[118] *Id.*
[119] Jamie Ruth Ebenstein & Mark E. Schmidtke, *ERISA Litigation Primer 2017*, DRI (2015), http://www.dri.org/docs/default-source/committee/0085/2017_erisa_lit_primer-(2).pdf?sfvrsn=2.
[120] *See id.*
[121] I.R.C. § 410(d) (2006).
[122] Scisoe, *supra* note 117, at 1.

specific notice, reporting, funding, and PBGC premium requirements.[123] For a welfare health plan, these requirements are more manageable, but for a pension plan the requirements can be excessive to the extent that they can cause administrative burden.

A. ERISA's Basic Reporting and Disclosure Requirements.

Title I of ERISA lists the basic disclosure requirements for welfare plans. The list of the basic disclosures is extensive, including providing for among other disclosures, Summary Plan Descriptions (SPD),[124] Summary of Material Modification (SMM),[125] Summary Annual Report (SAR),[126] Notification of Benefit Determination (Claims Notices or "Explanation of Benefits"),[127] and Plan Documents.[128] ERISA requires additional disclosures and notices for welfare plans, based on the specific plan details. ERISA pension reporting and disclosure requirements add a massive amount of financial disclosure data as an administrative burden. ERISA mandates more than 40 additional disclosure documents that contain hundreds of required data point for pension plans.[129] The fluid, yet detailed nature of this financial reporting and disclosure make heavy the administrative burden on the pension plan. Each of these disclosures have format and content requirements, and each is a legally-binding documentation of the plan. Without belaboring the point, creating and maintaining even just the basic disclosures is an important and meaningful administrative task. When adding the burden of pension reporting and disclosure, the administrative burden becomes massive and costly.

B. ERISA's Pension Funding Requirements.

123 *See id.*
124 *See* 29 C.F.R. § 2520.102-2 (1977).
125 *See* 29 C.F.R. § 2520.104b-3 (2002).
126. *See* 29 C.F.R. § 2520.104b-10(d) (2015) (narrative summary of the Form 5500).
127 *See* 29 C.F.R. § 2560.503-1 (2017).
128 *See* 29 C.F.R. § 2520.104b-1(b)(3) (2002).
129 *See* U.S. DEP'T OF LABOR, DEPARTMENT OF LABOR REPORTING AND DISCLOSURE GUIDE FOR EMPLOYEE BENEFITS PLANS, EMP. BENEFITS SEC. ADMIN. 2 (2017), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/reporting-and-disclosure-guide-for-employee-benefit-plans.pdf (last visited Jan. 21, 2020).

ERISA requires pension plans to maintain certain minimum funding levels and contributions for defined benefit pension plans.[130] The funding and contribution rules are complex, but generally require plans to maintain 100% of the funding target amount, representing the present value of all benefit liabilities accrued at the time of funding.[131] The rules allow plans to amortize any funding shortfall in level annual installments over a seven-year period, but require a plan that carries a funding shortfall year-over-year to make quarterly contributions to essentially "catch up" the funding to 100% of the targeted levels.[132] And plans must meet certain liquidity requirements of pension funds.[133] Under ERISA, pension plans must fund pensions to match the full liability of the pension plan.[134] This can create a significant financial burden for a church plan that has never been subject to funding requirements prior to electing into ERISA governance.

C. ERISA's Requirements to Pay Pension Benefit Guaranty Corporation Premiums.

The Pension Benefit Guaranty Corporation (PBGC) is a federal agency established by ERISA. The PBGC operates a program that insures pension plan benefits.[135] The PBGC collects premiums based on pension funding amounts, and ensures plan beneficiaries will receive at least a portion of their promised pension benefits if the plan becomes insolvent.[136] The PBGC regulates only those defined benefit (DB) plans that meet the qualification requirements of Section 401 of the IRC.[137] Single employer pension plans, that are required by ERISA to pay under the PBGC pension insurance program, pay a variety of premiums.

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130 *See* U.S. DEP'T OF LABOR, FAQS ABOUT RETIREMENT PLANS AND ERISA, EMP. BENEFITS SEC. ADMIN. 7 (2002), https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-for-workers.pdf [hereinafter FAQS] (last visited Jan. 21, 2020).
131 *See* 26 U.S.C. § 430(a)-(k) (2018).
132 *See* 26 U.S.C. § 430(c) (2018) (discussing shortfall amortization charges).
133 *See* 26 U.S.C. § 430(j)(4) (discussing liquidity requirements).
134 *See* FAQS, *supra* note 130.
135 *How PBGC Operates*, PENSION BENEFIT GUARANTY CORP., https://www.pbgc.gov/about/how-pbgc-operates (last visited Nov. 12, 2019).
136 *Id.*
137 *See* 26 U.S.C. § 401 (2018).

While many scholars and regulators would correctly argue that PBGC premiums are lower than they should be, many small to midsize employers are likely to find the extra cost of compliance to be burdensome.[138] Plan sponsors pay a flat-rate, per-participant premium. Plus, underfunded plans pay an additional premium based on the amount of plan underfunding. Besides those premiums, pension plans that are terminated in certain situations pay a per-participant premium per year for three years after termination.[139] For 2019, the PBGC flat rate premiums are $80 for each participant in the plan, per year.[140] The variable rate premium for underfunded plans is an additional annual premium of $43 for each $1,000 of unfunded vested benefits.[141] The termination premium for 2019 are an annual premium of $1,250 per participant per year for three years following plan termination, under certain circumstances.[142] Church plans are exempt from PBGC requirements, and thus do not pay these premiums.[143]

D. ERISA Preemption Advantages for Church Plans.

In electing into ERISA, governance creates clear administrative burdens and increased compliance costs for the pension plan, nonetheless, the advantages to the health plan are significant.[144] After the election is properly made, the plan is then governed by ERISA and state law is preempted.[145]

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[138] *See* P.J. Davis, *PBGC Q&A: Reverse spinoffs to reduce variable-rate premiums*, MILLIMAN (Dec. 20, 2018), https://www.milliman.com/Insight/PBGC-Q-and-A-Reverse-spinoffs-to-reduce-variablerate-premiums.
[139] *See* CONG. RES. SERV., PENSION BENEFIT GUARANTY CORP. (PBGC): A PRIMER (2019), https://fas.org/sgp/crs/misc/95-118.pdf.
[140] *Comprehensive Premium Filing Instructions for 2019 Plan Years*, PENSION BENEFIT GUARANTY CORP. (2019), https://www.pbgc.gov/sites/default/files/2019-premium-payment-instructions.pdf.
[141] *See id.* at 1; *see also* FAQS, *supra* note 130 (vested benefits are those benefits that a participant has earned a right to receive from a pension plan. Participants are entitled to their vested benefits even if they leave the pension plan or if the plan terminates).
[142] *See* CONG. RES. SERV., PENSION BENEFIT GUARANTY CORP. (PBGC): A PRIMER, *supra* note 149, at 2.
[143] *Id.* at 3*; see also PBGC Ins. Coverage*, PENSION BENEFIT GUARANTY CORP., https://www.pbgc.gov/prac/other-guidance/insurance-coverage (last visited Nov. 13, 2019).
[144] *See Advisory Council on Employee Welfare and Pension Benefit Plans*, ERISA ADVISORY COUNCIL (Nov. 2017), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/about-us/erisa-advisory-council/2017-reducing-the-burden-and-increasing-the-effectiveness-of-mandated-disclosures.pdf.
[145] *See Comprehensive Premium Filing Instructions for 2019 Plan Years, supra* note 140.

This is a massive advantage for the health plan because all the liability discussed above that the *plan* is subject to under state law, is no longer a cost, because ERISA specifically preempts those exact state laws.[146] This means that the plan is not subject to state statutes that mandate specific benefits that a religious entity could view as contrary to its moral beliefs.[147] This also means that the plan is not subject to state law causes of action, but is only subject to the limited causes of action and remedies enumerated in ERISA.[148] The claims and corresponding remedies available under ERISA are generally limited to recovering benefits due under the plan, enforcing the participant's rights under the plan, clarifying rights to future benefits.[149]

V. THE BIFURCATED CHURCH PLAN ELECTION

In analyzing the issue, it is important to understand ERISA's legislative history. In 1963, Studebaker automobile company terminated its underfunded pension plan and left thousands of employees and retirees without the pensions they had been promised.[150] This massive pension failure was the tipping point that caused Congress to take action.[151] ERISA was enacted with the primary intent to regulate pension plans, with welfare plan requirements being added to the final legislation just 10-days before the final vote, as somewhat of an afterthought.[152] This legislative history is useful to keep in mind, because it explains the fundamental framework that a bifurcated church plan election relies upon to be viable.[153] With pensions as the main focus, ERISA imposes significant substantive

[146] Paul J. Ondrasik, Jr. et al., *ERISA Preemption is Alive and Well*, STEPTOE (Apr. 5, 2016), https://www.steptoe.com/en/news-publications/erisa-preemption-is-alive-and-well.html.
[147] *Id.*
[148] William J. Kilberg & Catherine L. Heron, *The Preemption of State Law Under ERISA,* 1979 DUKE L. J. 383, 384 (1979).
[149] *Id.*
[150] *See History of PBGC*, PENSION BENEFIT GUARANTY CORP., https://www.pbgc.gov/about/who-we-are/pg/history-of-pbgc (last visited Oct. 31, 2019); *see also* SUBCOMM. ON LAB. OF THE COMM. ON LAB. AND PUB. WELFARE, 94TH CONG., LEGIS. HIST. OF THE EMP. RETIREMENT INCOME SECURITY ACT OF 1974 (Comm. Print 1976).
[151] *Id.*
[152] *History of PBGC*, *supra* note 150.
[153] *Id.*

regulation upon pension plans, but imposes almost zero substantive requirements on welfare plans.[154] Heavy pension regulation under ERISA is an incentive to keep a pension plan a church plan, and light ERISA regulation of welfare plans is an incentive to elect into ERISA governance for a church health plan.[155]

In deciding whether to elect into ERISA governance, church plans face choosing between two evils.[156] Remaining a non-electing church plan is beneficial for employee pension plans, but exposes employee welfare plans to state law. Electing into ERISA governance protects the welfare plan from state law, but subjects the pension plan to ERISA's reporting, funding and PBGC requirements. Religious employers can now utilize a legal method by which the health plans can enjoy the protections of ERISA preemption of state law, while not being forced into ERISA's disclosure requirements, the requirement that a pension plan's assets at least equal its liabilities, and the requirement that premiums be paid to the Pension Benefit Guaranty Corporation. This solution invokes a bifurcated church plan election under Section 410(d), where the pension plan retains church plan status, and the welfare plan makes a narrow election, applicable only to the welfare plan, to be governed by ERISA.[157] The viability of this solution rests on an untested legal question analyzed below: "May a church-employer sponsor a non-electing church plan pension, while concomitantly sponsoring a welfare plan that elects into ERISA governance?"[158]

A. No Binding Precedent Exists

An extensive search of numerous legal databases yields only one on-point federal case. In that one case, while the holding supports the Bifurcated Church Plan Election, the opinion itself lacks explicit

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154 *Id.*
155 FAQS, *supra* note 130.
156 *See generally* Emma Green, *The Supreme Court Case That Could Bankrupt Religious Schools and Hospitals*, THE ATLANTIC (Dec. 12, 2016), https://www.theatlantic.com/politics/archive/2016/12/advocate-health-care-erisa/510218/.
157 I.R.C. § 410(d) (2006).
158 Sciscoe, *supra* note 117.

legal reasoning to support a bifurcated church plan election. Instead the court offered only some conclusory remarks in a footnote that are not part of the holding, but are dicta. In *Flynn v. Ascension Health*, the court for the Eastern District of Missouri mused that nothing in the law prevents a plan from bifurcating the 410(d) election.[159] In an opinion signed by United States District Judge Henry Edward Autrey, the court denied the Plaintiff's motion to dismiss for lack of jurisdiction. In footnote dicta, Judge Autrey articulates his view: "The language pertaining to § 410(d) elections is clearly written from the perspective of individual plans, rather than from the perspective of individual employers," and "There is nothing in the law that prevents Ascension from choosing to make a § 410(d) election with respect to its welfare benefits plan, and not make a § 410(d) election with respect to its pension benefits plan."[160] While dicta does not provide binding precedent, Judge Autrey's message is clear and convincing: Bifurcation of the church plan election is a viable option.

B. *Analyzing the Statutory Election Language*

The starting point of any analysis of statutory interpretation is the plain language.[161] In analyzing the church plan election statute, one can look to the plain meaning of the language in question to begin the inquiry.

> "If the church or convention or association of churches which maintains any church plan makes an election under this subsection (in such form and manner as the Secretary may by regulations prescribe). . . ."[162]

[159] Flynn v. Ascension Health Long Term Disability Plan, 73 F. Supp. 3d 1080, 1086 n.6 (E.D. Mo. 2014).
[160] *Id.*
[161] *See* Hughey v. United States, 495 U.S. 411, 422 (1990) (noting that the plain language of the statute is the starting point of any analysis of statutory interpretation).
[162] 26 U.S.C. § 410(d) (2006).

1. **The Language is Ambiguous**

A statute is ambiguous if two of more reasonable interpretations exists.[163] Here, the language of Section 410(d) is ambiguous, because it does not specify with clarity to which entity the church plan election applies. The term "makes" could be reasonably construed as an act of the church-sponsor, and thus the act makes the 410(d) election into ERISA effective for the entire church-sponsor organization including all plans which the organization sponsors. Under this interpretation, the church-sponsor organizational election would mean that after the election is made, all church plans that the organization sponsors would be subject to ERISA. This term is ambiguous, because the term "makes" can also be reasonably construed to be an act limited in effect to an individual benefits plan. Under this interpretation, the act would make the § 410(d) election effective for only an individual plan. Because the term "makes" can be reasonably construed, within the context of the statute, to have two distinct and legally-significant meanings, it is an ambiguous term. To resolve this ambiguity, analysis must dissect the statutory language of Section 410(d) to determine if the election is applied to the employer or applies to the singular plan.

2. **Plain Meaning Analysis**

Courts presume that legislators use ordinary and everyday language when they draft law. Courts thus give unambiguous language its obvious or ordinary meaning. On its face, the text of the statute may lean toward a plain meaning interpretation that favors that the election is made by the employer sponsor and is applied to all plans under the employer-sponsor's authority. However, a closer look at the statutory construction makes this interpretation untenable. In the text, the article of the statute is "the church…"[164] Here, the active verb is "makes." The questionable text "which maintains any church plan" is found in a dependent clause that serves only to clarify or limit the field

163 NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:02 (8th ed. 2018).
164 26 U.S.C. § 410(d).

of those churches which may make the election.[165] Logically, a church may only make the Section 410(d) election if it maintains a church plan. The text "any church plan" has no determinative effect on which type of entity is making the election, it only creates a logical limitation to be imposed.[166]

There are exceptions to the plain meaning rule that the courts can rely on if the evidentiary support is present. The court can make one such exception if a term has both ordinary meaning and a technical meaning. In such a case, the court will favor the technical meaning, if the legislature intended a technical meaning.[167] Here, the only language in the considered text that holds a technical meaning applies only to the term "church or convention or association of churches."[168] The technical meaning of this phrase is contained in ERISA's definition of "church plan," and does not have any determinative effect on interpretation of the Section 410(d) election language.[169] The other text has little to no indication of having a technical meaning.

3. **Avoid Surplusage**

Under the Avoid Surplusage canon of statutory interpretation, the courts should presume that every word in a statute is meaningful and that a legislature would not enact law with surplus or redundant terms.[170] The court should avoid a construction that would render a term redundant or immaterial, or in conflict with other terms in the statute.[171]

Here, the language is "The Church. . . which maintains. . . any. . . church plan. . . makes an election. . ."[172] The statute uses the singular article "the" when referring to a singular Church

165 SINGER, *supra* note 163.
166 *Id.*
167 *Id.*
168 *Id.*
169 26 U.S.C. § 414(e)(1) (2018).
170 *Canons of Construction (adapted by Scalia & Garner)*, UNIV. OF HOUSTON L., https://www.law.uh.edu/faculty/adjunct/dstevenson/2018Spring/CANONS%20OF%20CONSTRUCTION.pdf (last visited Jan. 20, 2020).
171 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 180 (2012) ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory…. [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.").
172 26 C.F.R. § 1.410(d)-1(a) (1977).

organization itself.[173] This indicates that the entity making the election is singular. The statute further articulates the singularity of the elector, when it clearly articulates "convention or association. . ."[174] Both of these words ("convention" and "association") are singular. Congressional drafters that were not concerned with interpretation of singularity or plurality could have used a simpler term: "churches." However, the drafters used singular and plural distinctions with specific intent and purpose.

The statute text continues: "which maintains. . ."[175] This language is a qualifier on the singular "church." This qualifier limits the application of the statute to a subset of churches; to only churches "which maintain any church plan…". This indicates there are at least two categories of churches: those which maintain a church plan and those that do not. The language that follows next is critical: "any church plan. . ."[176] As established above, the electing entity is a singular church. Congressional drafters used precise language to clearly articulate singularity and plurality. Here, the drafters also used precise language to distinguish singularity and plurality regarding plans when they use the word "any." The word "any" indicates plurality: that there could be one or more plans. The specific and plain language indicates that a singular church entity could maintain more than one "church plan."

4. **In Pari Materia**

An equally relevant canon of statutory construction is "In Pari Materia," which means "on like subject matter." This canon requires courts to construe ambiguous language in a statute consistently with other law on the same subject. Here, Treasury Regulation 26 CFR § 1.410(d)-1(c)(2) mirrors the language in IRC 410(d). The Treas. Reg. goes on further to articulate that the [410(d)] election may be "made *only* by the plan administrator of the church plan."[177] This separates the authority to make the

173 *Id.*
174 *Id.*
175 *Id.*
176 *Id.*
177 26 C.F.R. § 11.410-1(c)(3) (2000) (emphasis added).

election into ERISA governance from the church-sponsor organization, and vests authority to make the election into ERISA governance with the plan administrator.

A plan sponsor may maintain more than one church plan.[178] The authority to elect into ERISA governance is vested only in the plan administrator, not the plan sponsor.[179] The clear language of the Treas. Reg. supports an interpretation of the term "makes" in which the effect of the election would be put in force only upon the plan over which that electing plan administrator has authority.[180] If congressional drafters wanted to articulate that any one plan administrator's election into ERISA governance for the plan over which that administrator has authority would make the election effective for the plan sponsor plus any plans sponsored by that sponsor, the drafters of the statute could have simply stated that the [410(d)] election may be "made by the plan administrator of **any** church plan." This slight modification changes the meaning of the statute and would have been simple to implement had the drafters desired such an interpretation.

Further the election process spelled out in Treas. Reg. 1.410(d)-1(c)(3) for excepting a church plan from ERISA exemption explains that to have ERISA 'apply to the church plan as if it were not a church plan,' the plan administrator must attach a statement to either the annual return required under Section 6058—Form 5500—or to a determination letter application.[181] The Treas. Reg. explains further that "[d]etermination letter applications and IRS Form 5500s are filed for *individual plans and not for the employer or the employer's 'benefit program.*'"[182]

[178] An employee benefit plan can involve either pension benefits, welfare benefits, or both. *See* 29 U.S.C. § 1002(2) (2008); 29 U.S.C. § 1002(1) (2008).
[179] 29 U.S.C. § 1002(37)(G)(V).
[180] *Id.*
[181] 26 C.F.R. § 11.410-1(c)(3) (1975).
[182] 26 C.F.R. § 1.410(d)-1(c)(3) (1977).

The Department of Labor (DOL) has issued guidance that indicates that the Section 410(d) election to subject a church plan to ERISA is available only to retirement plans and not to health plans: "an election pursuant to Code Section 410(d), as referenced in ERISA section 4(b)(2), is available for purposes of Title I of ERISA only to a pension benefit arrangement."[183] This DOL position has been considered by many courts, and all have concluded that a 410(d) election can be made by both pension and welfare plans.[184] But, the DOL's position does show that church plan elections can be made on an individual plan-by-plan basis. Under the DOL's position, a pension plan may make the 410(d) election, while the welfare plan remains a church plan. The DOL's position here is inverse to the legal question considered by this paper, but it essentially answers the same structural question of splitting or bifurcating the election. All these factors support the ability of benefits plans to be bifurcated by a 410(d) election on a plan-by-plan basis.

C. *Congressional Intent*

Any reasonable interpretation of the statutory construction and language of the Section 410(d) election arrives at a conclusion that supports the availability of a bifurcated church plan election. However, statutory interpretation is not the only (and may not be the most important) indicator of true meaning.[185] Congressional intent is a driving force in determining the ultimate purview, direction and meaning of a law. The courts' numerous reflections on ERISA's complexities have provided

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[183] Advisory Opinion from Robert J. Doyle, Director of Regulations and Interpretations at the Department of Labor, to Gair Petrie (March 6, 1995); *see also* Advisory Opinion from Robert J. Doyle, Director of Regulations and Interpretations at the Department of Labor, to James F. Podheiser (June 16th, 1995) (noting that a university had not made a Section 410(d) election for any of its plans that provided pension benefits).

[184] *See* Am. Assoc. of Christian Sch. Voluntary v. U.S., 850 F.2d 1510, 1517 (11th Cir. 1988); Hanshaw v. Life Ins. Co. of N. Am., 2014 WL 5439253, at *6 n.5, 2014 U.S. Dist. LEXIS 151411, at *18 n.5 (W.D. Ky. Oct. 22, 2014); Nielsen v. Unum Life Ins. Co. of Am., 58 F.Supp. 3d 1152, 1157–60, 2014 WL 5835310, at *2–4, 2014 U.S. Dist. LEXIS 160643, at *7–10 (W.D.Wash. Sept. 2, 2014); Little Sisters of the Poor Home for the Aged v. Sebelius, 6 F.Supp. 3d 1225, 1232, 1240 (D.Colo. 2013); Rinehart v. Life Ins. Co. of N. Am., 2009 WL 995715, at *5–6, 2009 U.S. Dist. LEXIS 32864, at *18–20 (W.D.Wash. Apr. 14, 2009); Geter v. St. Joseph Healthcare Sys., 575 F.Supp. 2d 1244, 1249–50 (D.N.M. 2008); Duckett v. Blue Cross & Blue Shield, 75 F.Supp. 2d 1310, 1316 n.3 (M.D. Ala. 1999); Jones v. Kaiser Found., 1992 WL 52522, at *1–2, (D.D.C. Feb. 26, 1992).

[185] *See* In re Phila. Newspapers, LLC, 599 F.3d 298, 314 (3d Cir. 2010) (quoting United States v. Albertini, 472 U.S. 675, 680 (1985)) (stating "[o]nly the most extraordinary showing of contrary intentions in the legislative history will justify a departure from [statutory] language.").

myriad opportunities for the court to look past statutory language to propel the law in a direction guided by legislative intent. Here, congressional intent does not contradict, but instead supports the statutory language and bifurcation of plans.

In the lead up to ERISA's enactment in 1974, legislative history shows that Congress exempted church plans from ERISA to prevent government intrusion into churches' private financial records.[186] A bifurcated church plan election, where the pension plan remains a non-electing church plan and welfare plan elects into ERISA governance, does not interfere with this congressional intent. Interpreting the 410(d) election to allow a church plan to bifurcate the election between plans does not impose a *requirement* to elect, it merely provides an *option* to elect. There is no government intrusion into churches' private financial records, because the election is optional.

According to Senator Talmadge's committee notes during debates of 1980's Multiemployer Pension Plan Amendments Act (MPPAA), the congressional intent was "to relax church plan requirements in order to reflect historical and diverse modes by which churches and their agencies pursued their missions" and to "accommodate the differences in beliefs, structures, and practices among our religious denominations."[187] Allowing a bifurcated church plan election maintains the extent of this relaxation of restrictions on church plans and grants church plans' flexibility to further manage and structure their church benefits plans to meet those diverse modes by which churches and agencies pursue their mission. The principle that underlies a bifurcated church plan election is the same principle that Congress has repeatedly shown as its motivation and overall intent with church plans: to allow for the least burdensome manner of plan administration.

D. Public Policy

[186] *See* S. REP. NO. 93-383, at 81 (1973).
[187] *See* 125 CONG. REC. S10,052 (1979) (statement of Sen. Talmadge).

A bifurcated church plan election supports greater public health and welfare by providing national churches and their agencies with more uniform administration of welfare plans, and simpler administration of pension plans across state lines. A litany of national studies show that having health coverage improves health outcomes.[188] Allowing uniform administration of welfare plans encourages churches to sponsor them, which improves access to these welfare plans. Many church plans cover employees in diverse locations. If a church health plan is forced to comply with insurance law from a wide diversity of states, plan administration will quickly become unmanageable. For example, many Catholic religious orders, like the Jesuits, Franciscans, Sisters of Charity, Benedictines, and the Dominicans all have provincial sub-units with employees and religious members throughout the United States. Allowing church health plans to have access to ERISA governance allows uniformity in the administration and thus would encourage these entities to start or continue to provide welfare plans for their employees and members. Greater access to health plans promotes public health and welfare, on its face and in substance.[189]

Allowing the pension benefits to retain church plan status encourages church-affiliated entities to continue providing pension benefits. ERISA imposes significant substantive regulation on pension plans. Pension plans subject to ERISA must provide employees with more than 40 different notices and disclosures, must maintain minimum funding levels, must file numerous financial reports, and must pay PBGC insurance premiums. These requirements combined with ERISA's pension

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[188] *See* Baker et al., *Lack of Health Insurance and Decline in Overall Health in Late Middle Age*, 345 NEW ENG. J. MED. 110 (2001); Brook et al., *Does Free Care Improve Adults' Health? Results from a Randomized Controlled Trial,* 309 NEW ENG. J. MED. 1426 (1983); Franks et al., *Health Insurance and Mortality. Evidence From a National Cohort*, 270 JAMA NETWORK 737 (1993); Hahn & Flood, *No Insurance, Public Insurance, and Private Insurance: Do These Options Contribute to Differences in General Health?*, 6 J. HEALTH CARE POOR & UNDERSERVED 41 (1995); Kasper et al., *Gaining and Losing Health Insurance: Strengthening the Evidence for Effects on Access to Care and Health Outcomes*, 57 MED. CARE RES. REV. 319 (2000); Sorlie et al., *Mortality in the Uninsured Compared with That in Persons with Public and Private Health Insurance*, 154 JAMA NETWORK 2409 (1994); and Ayanian et al., *Unmet Health Needs of Uninsured Adults in the United States*, 284 JAMA NETWORK 2061 (2000).

[189] *See generally* Kasper et al., *supra* note 188.

regulations are burdensome for the plan administrator. A church or church-affiliated entity with a limited administrative staff could be deterred from offering a pension plan.

Conversely, a church plan sponsor that uses the proposed Bifurcated Church Plan Election can provide crucial information to welfare plan participants without the excessive burden of complying with ERISA's burdensome pension regulations. ERISA requires clear communication of welfare plan details, which allows plan participants to make informed choices by providing them with importance notices. ERISA requires notices that inform participants of specific plan details, changes in coverage, and participant rights and remedies under the plan.[190] There is no compelling legal argument that providing such notice to plan participants is violative of a religious employer's right to free exercise. Importantly, disclosure of coverage details and notice of participant rights allow employees like Lisa to make informed choices about medical care for themselves and their covered family members. The Bifurcated Church Plan Election achieves better notice to plan participants without imposing the burden of ERISA's pension plan regulation.

CONCLUSION

Whether to remain a non-electing church plan, or to make the Section 410(d) election to be governed by ERISA is an important decision that carries significant consequences, no matter which way the plan goes. In contemplating this decision, church plans may have a new third option that

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[190] Plan Documents, Claims Notices or "Explanation of Benefits," Summary Annual Report (See 29 CFR § 2520.104b-10(d)), Summary of Material Modification (See 29 CFR § 2520.104b-3), Summary Plan Description (SPD) (See 29 CFR §§ 2520.102-2 and 2520.102-3), Summary of Material Reduction in Covered Services or Benefits (See 29 CFR § 2520.104b-3(d)(3)), Employer Notice to Employees of Coverage Options (See Technical Release 2013-02), External Review Process Disclosure (See Technical Release 2011-02 and 29 CFR § 2590.715-2719(c)), Internal Claims and Appeals and Internal Claims and Appeals (See 29 CFR § 2590.715-2719(b)(2)(ii)(E)), Summary of Benefits and Coverage: Notice of Modification (See 29 CFR § 2590.715- 2715(b)), Summary of Benefits and Coverage (SBC) and Uniform Glossary (See 29 CFR § 2590.715-2715(a) and (c)), Grandfathered Plan Disclosure/Notice (See 29 CFR § 2590.715-1251(a) (2)), MHPAEA Increased Cost Exemption (29 CFR § 2590.712(g)(6)), MHPAEA Claims Denial Notice (See 29 CFR § 2590.712(d)(2)), Mental Health Parity and Addiction Equity Act (MHPAEA) Criteria for Medically Necessary Determination Notice (See 29 CFR § 2590.712(d)(1)), Michelle's Law Enrollment Notice (See ERISA section 714(c)), Newborns' Act Description of Rights (See 29 CFR § 2520.102-3(u)), Wellness Program Disclosure (See 29 CFR § 2590.702(f)(2)(v)), Employer CHIPRA Notice (See 75 FR 5808-11), Notice of Special Enrollment Rights (See 29 CFR § 2590.701-6(c)), and more.

lessens the impact of making the 410(d) election for a welfare plan: the Bifurcated Church Plan Election.

Broad legal foundation supports a Bifurcated Church Plan Election. The thoughts of the court expressed in dicta in a precedential case support a Bifurcated Church Plan Election.[191] The statutory construction of the Internal Revenue Code 410(d) church plan election supports an interpretation consistent with allowing an individual election into ERISA governance on a plan-by-plan basis. The manner in which both the Treasury Department and DOL treat the issue also supports the same interpretation allowing for a Bifurcated Church Plan Election into ERISA governance. The congressional record shows that allowing the election to be made on a plan-by-plan basis is not contra to, and in-fact supports Congress' intent in enacting ERISA and the church plan election statute. The social benefit of allowing churches to bifurcate the 410(d) election into ERISA on a plan-by-plan basis is that it achieves harmony between the law and Congressional intent. A church that can elect into ERISA for its health plan achieves Congress' intent to provide administrative ease of employer health plans across multiple state jurisdictions. When that same church is allowed to simultaneously not elect into ERISA for its pension plan, the law also fulfills Congress' intent to limit government intrusion into church finances. While we may not have reliable precedent yet, the choice to make a Bifurcated Church Plan Election is likely a viable option for church plans that want to access ERISA's preemption protections from state law, while maintaining the church plan status of the pension plan.

The Bifurcated Church Plan Election proposed here encourages churches to continue providing employee benefits without forcing them to violate their religious beliefs. If church employee benefit plans can use the Bifurcated Church Plan Election as proposed here, then these plans can continue to offer employee pension plans, while not subjecting their health plan to treatments and procedures which violate the core tenets of their faith. If Lisa's employer had used the Bifurcated

[191] *See* Advocate Health Care Network v. Stapleton, 137 S. Ct. 546 (2016).

Church Plan Election, there would have been no employee confusion about whether Jessica's procedure was covered or not, because Lisa would have been provided ERISA-required notices and disclosures of exactly the covered benefits that were covered under the plan. The Bifurcated Church Plan Election would have allowed the church health plan to avoid being forced into providing and paying for coverage, in violation of religious freedom. To ensure access to health care for massive numbers of employees covered by church health plans, the Bifurcated Church Plan Election ensures that churches will not be forced to choose between paying for employee healthcare that violates religious beliefs, or entirely dropping the health plan benefits. If confronted with that choice, many church plans would have a strong incentive to discontinue coverage entirely; an avoidable outcome that benefits no-one. Religious employers that want to legally-avoid ERISA's pension mandates, while remaining free from state health plan mandates that violate their religious beliefs, can use the Bifurcated Church Plan Election to bring their employee benefits plans into harmony with the letter of the law and Congressional intent.