Comments

THE ERISA CHURCH PLAN EXCEPTION: WHY THE LOWN TEST IS IMPROPERLY NARROW

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Some commentators have suggested that exempting religious organizations from legal requirements that apply to other secular organizations is bad public policy and arguably unconstitutional. For example, in October 2006 the New York Times published a series of articles about the fact that religious organizations are exempt from laws that prohibit employment discrimination, and protect an employee’s right to join a union.1 Some have suggested that courts have been overly protective of religious rights at the expense of important human rights. In at least one area of the law, however, courts have been less protective of religious organizations than Congress intended. Courts have failed to give effect to a portion of statutory language that exempts employee benefit plans sponsored by churches from complying with the Employee Retirement Income Security Act (ERISA)2 In 2006, for example, the Eighth Circuit found that Baptist Health, a hospital, was neither controlled by, nor associated with a church and thus did not qualify for the ERISA church plan exception.3 Had the court considered the entire of the statutory language, rather than just apply a more narrow test sponsored by the Fourth

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1. See Diana B. Henriques, Where Faith Abides, Employees Have Few Rights, N.Y. TIMES, Oct. 9, 2006, at A1 (outlining how various organizations with tenuous ties to religion are able to circumvent discrimination laws. These so-called religious organizations, including a church-run day care center, were not held to the same standards as civilly-run organizations).
2. Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (2000 & Supp. V 2005). I am not arguing that this exception is fair or right, merely that the legislature has the power to enact such a law under the Commerce Clause, and it is not the place of the courts to overrule the legislature’s judgment.
Circuit, it likely would have held that Baptist Health qualified for the exception.

Part I of this Comment generally discusses the ERISA church plan exception, and how it has been interpreted by the Department of Labor. Part II discusses the judicial interpretation of the exception, and demonstrates how courts are not giving full effect to the statutory language.

I. THE ERISA CHURCH PLAN EXCEPTION

A. The Broad Scope of ERISA

Generally, ERISA is a broad and all-encompassing statute that applies to:

any plan, fund, or program . . . maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . .

Almost all health insurance, life insurance, and disability plans established or used by an employer must comply with ERISA’s standards. ERISA also preempts all state laws regarding such plans, and gives the federal courts jurisdiction over all claims within the realm of law covered by ERISA.

B. The Church Plan Exception

Despite the broadness of ERISA’s stated purpose, Congress has carved out exceptions for certain organizations. In § 1003(b), Congress set forth that plans maintained by government agencies, plans maintained for

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4. Id. at 652-53. See also Lown v. Cont’l Casualty Co., 238 F.3d 543, 548 (4th Cir. 2001) (“1) whether the religious institution plays any official role in the governance of the organization; 2) whether the organization receives assistance from the religious institution; and 3) whether a denominational requirement exists for any employee or patient/customer of the organization.”).

5. 29 U.S.C. § 1002(1).

6. In fact, the exception is sometimes invoked for jurisdictional purposes. See Chronister, 442 F.3d at 650.

7. 29 U.S.C. § 1001(c) (“It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.”); see also, 60 AM. JUR. 2D Pensions § 1 (2006).
ERISA CHURCH PLAN EXCEPTION

the sole purpose of complying with workmen compensation laws, unemployment compensation laws, or disability laws, plans maintained outside the United States for nonresident aliens, excess benefit plans, and church plans do not have to comply with ERISA's requirements. As outlined by ERISA, a church plan is:

(33)(A) 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.

(B) The term “church plan” does not include a plan—

(i) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of Title 26), or

(ii) if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).

(C) For purposes of this paragraph—

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

(ii) The term employee of a church or a convention or association of churches includes—

(I) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;

8. 29 U.S.C. § 1003(b). It is important to note that these exempted organizations still must follow all state tort and contract laws. See Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523 n.20 (1981) (“This reasoning wreaks havoc on ERISA’s plain language, which pre-empts not plans, but ‘State laws.’ 29 U.S.C. § 1144(a). The only relevant state laws, or portions thereof, that survive this pre-emption provision are those relating to plans that are themselves exempted from ERISA’s scope.”).
(II) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 of Title 26 and which is controlled by or associated with a church or a convention or association of churches; and

(III) an individual described in clause (v).

(iii) A church or a convention or association of churches which is exempt from tax under section 501 of Title 26 shall be deemed the employer of any individual included as an employee under clause (ii).

(iv) An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.9

Appropriately, courts have applied this exception when the employer is an actual church. In Wolf v. Prudential Insurance Company of America,10 for example, the Tenth Circuit automatically considered the plan in contention to be a church plan. Scott Wolf was a pastor at the First Baptist Church of Morris, Oklahoma. He and his beneficiaries were insured through a plan established and maintained by the Church. There was no dispute regarding whether the plan constituted a church plan that was not governed by ERISA; that fact was only mentioned in passing in the court’s opinion when outlining the details of the case.11

That the church in question was of a well known religion did not factor into the Tenth Circuit’s reasoning. It is important to note that the term “church” in “church plan exception” is construed quite broadly. It is well established that courts do not make qualitative decisions about what constitutes a religion. For example, in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, the federal government did not contest the fact that the Centro, a small religious sect originating from the Amazon Rain Forest, was a religion that deserved due deference.12 In Cutter v. Wilkinson, the federal government stipulated that Satanism, Wicca, and Asatru were religions, and that the litigants were true in their beliefs.13

Executive agency definitions of “church” have also adhered to the unstated policy of a broad application of the terms that are religious in nature. In 1978, the I.R.S. announced a set of criteria it would use when considering whether or not an organization was a church:

11. Id. at 795.
(1) a distinct legal existence; (2) a recognized creed and form of worship; (3) a definite and distinct ecclesiastical government; (4) a formal code of doctrine and discipline; (5) a distinct religious history; (6) a membership not associated with any other church or denomination; (7) an organization of ordained ministers; (8) ordained ministers selected after completing prescribed studies; (9) a literature of its own; (10) established places of worship; (11) regular congregations; (12) regular religious services; (13) Sunday schools for religious instruction of the young; and (14) schools for the preparation of its ministers.\textsuperscript{14}

These suggested criteria allow for a variety of religions manifested through different organizational structures to qualify as a church especially since the criteria should be used as a guide rather than a necessary checklist.\textsuperscript{15}

The government’s unstated policy of not second guessing organizations that purport to be religious was again demonstrated in \textit{Wolman v. Poinsett Hutterian Brethren, Inc.}\textsuperscript{16} This case involved the Hutterian Brethren, a nontraditional religion incorporated as a church.\textsuperscript{17} According to its official Web site, the Hutterite religion is described as follows:

The religion of the Hutterites is unique in their [sic] belief in the community of goods in which all material things are held in common. ... Hutterites believe community of goods is the highest command of love. All members of the colony are provided for equally and nothing is kept for personal gain. Hutterites do not have personal bank account [sic]; rather all earnings are held communally and funding and necessities are distributed according to one's needs.\textsuperscript{18}

This association falls outside of the typical notion of a church. It seems to have more in common with an Israeli kibbutz or a farm in Communist Russia than a place of worship. Nonetheless, congruent with past cases in which the government did not attempt to decide what belief systems can constitute the impetus of a church, the District Court of South Dakota did not question its status; thus, finding it to be exempt from ERISA and outside the court’s jurisdiction.

The case arose from a battle for leadership. The plaintiffs, Joshua, David, Leonard, Jerry, Clarence, and Sam Wollman split off from the
original community after the majority of the members elected to vote out
Rev. Jacob Kleinsasser.\textsuperscript{19} According to Church doctrine, if any member
withdraws from the Church,

such member has no claim whatsoever upon the property or
funds of the colony or church. All of the labors and services
performed up to that time are considered either as compensation
for the support and services provided by the colony and church to
the member, or as a contribution by the member to the church for
church purposes.\textsuperscript{20}

Nonetheless, the plaintiffs sued their former community in an attempt to
obtain some of its land and resources. They attempted to invoke ERISA
claims in order to obtain federal jurisdiction. The court held that because
their actions were voluntary, the plaintiffs were not employees and thus
ERISA was incongruous to the situation.\textsuperscript{21} Furthermore, ERISA would
have been inapplicable if the court had determined the plaintiffs to be
employees:

In addition, even if the other requirements of ERISA were met,
ERISA would not apply to this action. Defendants are church
corporations exempt under 26 U.S.C. § 501(d) and therefore any
alleged employee benefit plan under ERISA would be a church
plan under 29 U.S.C. § 1002(33), [because its employees would
be church employees], and thereby exempt from ERISA.\textsuperscript{22}

The opinion did not address the non-traditional aspects of the Hutterian
Brethren. As with all law surrounding religion, the church plan exemption
is broad in that any manifestation of a religion is eligible; courts do not
make decisions regarding what is and is not a church based on doctrine.

\textbf{C. Qualifying Civil Organizations}

Certain civil organizations can also qualify for the church plan
exception.\textsuperscript{23} As outlined in the language of the statute, the employees of a

\begin{itemize}
\item \textsuperscript{19} Wolman, 844 F. Supp. at 541.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id. at 542.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} See 29 U.S.C. § 1002 (33)(C) (2000) ("The term employee of a church of a
convention or association of churches includes . . . an employee . . . of an organization,
whether a civil law corporation or otherwise, which is exempt from tax under section 501 of
Title 26 and which is controlled by or associated with a church or a convention or
of tax exempt organizations, including [c]orporations, and any community chest, fund, or
foundation, organized and operated exclusively for religious, charitable, scientific, testing
for public safety, literary, or educational purposes, or to foster national or international
amateur sports competition . . . ").
\end{itemize}
civil organization that is exempt from tax (for example, a charity or a hospital), and is controlled by or associated with a church or an association of churches, are considered church employees. Employee benefit plans created for or used by these organizations can thus qualify as church plans for the purpose of being excepted from the requirements of ERISA.\textsuperscript{24}

Courts have applied the statute with ease when the civil organization is directly controlled by a church in a manner that is consistent with the statute. In \textit{Tucker v. Ochsner Health Plan}, for example, the court assumed that a Baptist seminary’s plan qualified.\textsuperscript{25} In this case, Austin Tucker, a Baptist minister, had previously worked at the New Orleans Baptist Theological Seminary. He was insured under their health plan.\textsuperscript{26} Shortly before concluding his employment at the seminary, Tucker elected to terminate his health coverage in writing. After the termination of his health insurance, Tucker was injured. In his suit, Tucker claimed that due to federal COBRA provisions, he was “entitled to continued coverage upon their tender of premium payments.” The court held that because the seminary was owned by an association of Churches—i.e. because the seminary was controlled by an association of churches—it’s plan was exempt from the ERISA requirements.\textsuperscript{27}

The United States District Court for the Northern District of Illinois likewise determined that a civil organization qualified for the exception because it was controlled by a church. In reaching a determination that it lacked subject matter jurisdiction, the court in \textit{Friend v. Ancillia Systems Inc.}\textsuperscript{28} found that an employee welfare benefit plan established by Ancillia Systems, a not-for-profit organization that provided support services to local hospitals, qualified as an ERISA church plan, and was therefore exempt from enforcement under the ERISA church plan exception.\textsuperscript{29} In its analysis, the court focused on the Catholic Church’s control over the organization:

\begin{quote}
Defendant [Ancillia] is sponsored by the Poor Handmaids of Jesus Christ (“PHJC”), a religious order affiliated with the Roman
\end{quote}

\textsuperscript{24} Not all civil organizations that are controlled by or associated with a church qualify. See 29 U.S.C. § 1002(33)(B) (“The term ‘church plan’ does not include a plan . . . established and maintained primarily for the benefit of employees . . . who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513 of Title 26), or if less than substantially all of the individuals included in the plan are individuals described in subparagraph (A) or in clause (ii) of subparagraph (C) (or their beneficiaries).”). Many civil organizations, such as religious schools and hospitals meet this standard, and consequently still qualify. The organizations to which I am referring in this Comment meet the requirements set forth in this section of the statute.


\textsuperscript{26} Id. at 840.

\textsuperscript{27} Id.

\textsuperscript{28} 68 F. Supp. 2d 969 (N.D. Ill. 1999).

\textsuperscript{29} Id. at 973.
Catholic Church. The PHJC appoints all members of defendant's board of directors and three of those including the chairperson, are religious sisters of the PHJC. Defendant's board of directors must obtain prior approval from the PHJC on all major decisions.30

Because the Catholic Church was found to control the organization, Ancillia's employees were also employees of the Catholic Church. Consequently, Ancillia's employee welfare benefit plan was in fact "a church plan exempt from enforcement under § 502 of ERISA."31

Courts have been less willing to exempt civil organizations that are merely associated with a church. Language used by courts in various opinions implies that to be associated with a church, a civil law organization must also be controlled by the church. Both the language of the statute and the Department of Labor's interpretation, however, demonstrate that church association and church control are two distinct tests each requiring a different calculus.32 Opinion letters authored by the Department of Labor address this distinction between church association and church control by considering the two prongs of the statute separately.

D. The Department of Labor Tests

In various opinion letters, the Department of Labor outlined the factors that courts should consider when deciding whether a civil organization that meets the tax requirements is either controlled by or associated with a church so that it qualifies for the church plan exemption.33 These letters make clear that "controlled by" and "associated with" are two distinct tests. Although a civil organization that is controlled by a church will also be associated with it, the opposite is not necessarily true. A civil organization is not necessarily controlled by the church with which it associates. For example, in a letter dated June 19, 1995, the Department of Labor concluded that the Mercy Life Center Corporation, a not-for-profit organization founded and controlled by the Religious Sisters of Mercy

30. Id. at 971.
31. Id. at 973.
32. See 29 U.S.C. § 1002(33)(C)(iv) (2000) ("An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.").
33. See 26 U.S.C. § 501(c) (2000 & Supp. V 2005) (listing a variety of organizations that are tax exempt, including “[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . ”). If an organization does not meet the tax requirements, it will not be considered exempt under the ERISA church plan exception. All of the organizations discussed in this Comment meet the tax requirements.
("RSM"), a Catholic order of nuns, was eligible for the ERISA church plan exemption. The Department of Labor determined that the exception should be allowed because:

RSM and the Province are integral parts of the Church by virtue of the health care ministries they perform. Further, RSM and the Province are . . . controlled by the Church, and are "associated with" the Church within the meaning of section 3(33)(c)(iv) of Title I of ERISA because they clearly share common religious bonds and convictions with the Church.

Other opinion letters authored by the Department of Labor similarly distinguish church association from control. For example, in 1990, the Department of Labor advised Mr. John J. Hunter of Stradley, Ronon, Stevens & Young that the Uihlein Mercy Center ("the Center"), a hospital sanatorium that offered medical and surgical aid to the needy, qualified for the ERISA church plan exemption. The Center was founded by the New York Province of the Sisters of Mercy of the Union in the United States of America "[i]n furtherance of [their] mission within the Church . . . ." In 1986, the Center, which had been independently incorporated, joined the Eastern Mercy Health System (EMHS), a not-for-profit membership corporation run by the eight provinces of the Religious Sisters of Mercy. The Department of Labor held that the Center was eligible for the ERISA church plan exception because, through its connection to EMHS, the Center was controlled by the Religious Sisters of Mercy, who were in turn controlled by the Catholic Church. The Department of Labor concluded that the Center also qualified for the exemption because it was associated with the Catholic Church "insofar as participation of individual members of the Order as the only corporate members of the Center, through EMHS or otherwise, assures that the Center adheres to the tenets and teachings of the Church . . . ." The Department of Labor’s language demonstrates that church control over a civil organization is evidence of an association between the two entities. However, the letter clearly defined "associated with" as adhering to the tenets of a church’s practice; this adherence can be demonstrated through means other than control. This idea is further supported by the February 17, 1994 letter written to Mr. Robert L. Abramowitz of Morgan, Lewis & Bokius. In this letter, the Department of Labor stated that employee benefit plans established by the Sisters of St.

35. Id. at *7 (emphasis added).
37. Id. at *2.
38. Id. at *7 (emphasis added).
Francis of Philadelphia ("the Sisters") were church plans according to the guidelines set forth in ERISA. In 1981, the Sisters established a nonprofit membership corporation, the Franciscan Health System ("FHS"), to oversee their medical facilities. As it did in its letter to Mr. Hunter, the Department of Labor cited the Catholic Church’s control over FHS via the nuns’ control of the corporation as one reason why the corporation was eligible for the exemption from ERISA. The letter also discussed ways in which FHS was associated with the Church. Though the Department of Labor referenced control as one avenue of church association, its analysis did not end there. It also cited, for example, FHS’s listing in various Catholic directories as evidence that it held itself out to be a Catholic organization that adhered to the tenets of the Catholic Church.

The Department of Labor’s letter to Mr. John P. Gallagher of Schubert, Bellwoar, Mallon & Walheim in May of 1990 also proves that control is not the only factor in establishing an association between an organization and a church. In this letter, the Department stated that the employee plans set forth by the Congregation of the Religious Sisters of Mercy in the City of Philadelphia ("the Congregation") were church plans. The Religious Sisters of Mercy in the City of Philadelphia founded a college in 1958. Originally called the Schools of the Sisters of Mercy in Gwynedd Valley, the institution was renamed the Gwynedd Mercy College in 1962. The Department of Labor found that the college the Congregation founded was eligible for the ERISA exemption because it was controlled by the Catholic Church and because, through its teachings, it spread the message of the Catholic Church. These characteristics were sufficient to demonstrate the school’s association with the Catholic Church.

40. Id.
42. Id. See also Dep’t of Labor Pension & Welfare Benefit Program, Opinion 91-46A (Dec. 20, 1991), 1991 ERISA LEXIS 53 at *7 ("Through the Order the Church retains control over operation of the System insofar as members of the Order established the System and the System is controlled by the Order. Furthermore, the System is ‘associated with’ the Church, within the meaning of section 3(33)(C)(iv) of title I of ERISA, insofar as participation of individual members of the Order as the only corporate members of the System assures that the System adheres to the tenets and teachings of the Church and, thus shares common religious bonds and convictions with the Church.”); Dep’t of Labor Pension & Welfare Benefit Program, Opinion 95-09A (June 16, 1995), 1995 ERISA LEXIS 9, at *7-*8 ("In addition, the Academy is ‘associated with’ the Church, within the meaning of section 3(33)(C)(iv) because of the following factors, which assure that the Academy adheres to the tenets and teachings of the Church and thus evidence that it shares common religious bonds and convictions with the Church . . .").
Each of these letters proves that the Department of Labor finds that organizations may qualify for the ERISA church plan exception if they are controlled by or if they are associated with a church. They also show that the Department does indeed consider control by churches as evidence of association between churches and organizations. However, the Department’s assessments frequently relied on non-control factors as well. And, the language the Department used in its letters indicates that “associated with” does not necessarily mean “controlled by.” Therefore these letters demonstrate that organizations that can demonstrate common religious bonds, and show that they clearly adhere to church tenets are entitled to the ERISA church plan exemption, even in the absence of church control.

II. THE JUDICIAL GLOSS ON THE TESTS

Despite both the clear language of the statute\(^4\) and the Department of Labor’s interpretation,\(^4\) both of which indicate a two-part disjunctive test, courts have considered only the level of church control when determining whether civil organizations are eligible for the ERISA church plan exception. A Court should first consider whether the civil organization is controlled by a church. If it finds that the organization is not controlled by one, it should subsequently consider other factors, such as requiring that all medical decisions be congruent with church doctrine, or requiring religious education in a school, that demonstrate an association with a church. However, courts when looking to see if an organization is associated with a church have just looked at factors that demonstrate control. They have thereby truncated the statutory language, and created a repetitive rather than expansive test. In 2001, the Fourth Circuit set forth a three-part test for determining whether an otherwise eligible civil organization is associated with a church.\(^5\) Contrary to what seems to be the apparent intent of both the Department of Labor and the drafters of ERISA, this test only considers whether a civil organization is controlled by a church, not whether it is associated with a church despite the church’s lack of control. Although the test is flawed, it is popular with courts throughout the country; both the First and Eighth Circuits have adopted or given credence

\(^4\) See Pittway Corp. v. United States, 102 F.3d 932, 934 (7th Cir. 1996) (“All statutory interpretation begins with the language of the statute itself, and where ‘the statute’s language is plain, the sole function of the courts is to enforce it according to its terms.’”) (quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989)).
\(^4\) See Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 566 (1980) (“The Court has often repeated the general proposition that considerable respect is due ‘the interpretation given [a] statute by the officers or agency charged with its administration.’”) (alterations in original) (quoting Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978)).
Consequently, many organizations that would have qualified for the ERISA church plan exception according to the two-part disjunctive test have not. More importantly, the increasing popularity of the Fourth Circuit test will accelerate the incidence of these incongruous decisions.

A. The Lown Test

According to the Fourth Circuit, after determining that an organization is not controlled by a church, in order to determine if the organization nonetheless qualifies for the church plan exception via its association with a church a court should consider the following:

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

In *Lown*, for example, the Fourth Circuit considered whether a hospital, Baptist Healthcare System, was an organization that qualified for the ERISA church plan exception. Until 1993, Baptist Healthcare had been affiliated with the South Carolina Baptist Convention ("the Convention"), an association of Baptist Churches. In that year, the Convention surrendered its control over Baptist Healthcare—its members no longer served on the hospital's board, and its Churches ceased to provide funds to the hospital. The Fourth Circuit concluded that the hospital consequently was not controlled by a church. It then purported to consider whether the Convention was associated with a church or

46. See *Chronister v. Baptist Health*, 442 F.3d 648, 652 (8th Cir. 2006); *Torres v. Bella Vista Hosp.*, Inc., 523 F. Supp. 2d 123, 142 (D.P.R. 2007); *Polk v. Dubuis Health Sys.*, No. 06-1517-A, 2007 WL 2890262, at *2 (W.D. La. Sept. 28, 2007); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77, 85 (D. Me. 2004). *Contra Taylor v. Sisters of St. Francis Health Servs.*, Inc. Ltd. Trust Health Benefit Plan, No. 1:05-CV-0671-DFH-VSS, 2006 WL 2457202, at *1 (S.D. Ind. Aug. 23, 2006) (holding that the defendants demonstrated that the health services plan was a church plan in part "because of the common religious bonds and convictions [the defendant organization] shares with the Church, so that the sponsor's employees would also qualify as church employees under 29 U.S.C. § 1002(33)(C)(ii)(II)."). It is important to note that this organization was also found to have been controlled by the church, negating any need for the court to conduct an in-depth analysis of the facts necessary to demonstrate common religious bonds through means other than a church's direct control over the civil organization.

47. *Lown*, 238 F.3d at 548.

48. *Id.*

49. *See id.* (“By 1997, the South Carolina Baptist Convention did not control Baptist Healthcare. The Convention did not appoint or approve a majority of Baptist Healthcare's Board or officers, and Lown points to no other factors indicating that the Convention controlled the hospital.”).
association of churches so that it still qualified for the exception. When considering the association aspects of the statute, the Fourth Circuit should have examined whether factors outside of control demonstrated that the hospital was "associated with" a church. Instead, it repeated its prior analysis using only slightly different language, and thus put forth the idea that being associated with a church is equivalent to being controlled by a church.

The first factor of the test—"whether the religious institution plays any official role in the governance of the organization"—simply looks to see if the organization is controlled by a church, and thus adds nothing new to a court’s analysis. In Lown, the Fourth Circuit claimed that the hospital did not meet the first part of the association test because no one from the South Carolina Baptist Convention sat on its board. However, the court had already acknowledged that fact as an element in determining that a church or association of churches did not control the hospital.

The Eighth Circuit, relying on the test set forth in Lown, used the same reparatory analysis. In Chronister v. Baptist Health, the court considered whether Baptist Health, an Arkansas nonprofit corporation that owned and operated hospitals, qualified for the ERISA church plan exception. Despite having already determined that Baptist Health was not controlled by a church, the Eighth Circuit specifically referenced the fact that the Arkansas Baptist State Convention did not appoint or approve the organization’s board of directors when it discussed whether the organization was associated with a church, despite its not being controlled by one:

First, as stated above, the Arkansas Baptist State Convention has played no role in the governance of Baptist Health for nearly forty years. Moreover, the Arkansas Baptist State Convention

50. According to the language in the Department of Labor’s opinion letters, “[a]n organization . . . is associated with a church . . . if it shares common religious bonds and convictions with that church.” See Dep’t of Labor Pension & Welfare Benefit Program, Opinion 91-46A (Dec. 20, 1991), at *6. Denominational requirements for employees, requiring that all the organization’s practices adhere to the tenets of a church, requiring that all messages put forth by the organization adhere to the tenets of the church, demonstrating that the organization’s purpose is to spread the message of the church are just some factors that can show that an organization is associated with a church even if it is not controlled by it.

51. Lown, 238 F.3d at 548.
52. Id.
53. Id.
54. Id. at 546.
55. Chronister v. Baptist Health, 442 F.3d 648 (8th Cir. 2006).
56. Id. at 652 (“For example, an organization is controlled by a church when a majority of the officers or directors are appointed by a church’s governing board or by officials of a church.”).
does not appoint or approve any of Baptist Health's board members.\footnote{57} The Eighth Circuit's discussion regarding how the hospital was not associated with a church due to lack of church board control added no weight to the opinion. After acknowledging that the hospital did not meet the control standard of the statute, the court should have looked to see whether there was other factual evidence that demonstrated association. Instead, it followed the Fourth Circuit's method of analyzing association with a church, which deems control to be a necessary element of association.

The court in \textit{Catholic Charities of Maine, Inc. v. City of Portland}, did not specifically cite the Catholic Church's control over the Catholic Charities' board of directors when discussing why Catholic Charities was associated with the Catholic Church.\footnote{58} Nonetheless, it directly gave credence to the test set forth in \textit{Lown}.\footnote{59} Moreover, it most likely did not specifically consider the first aspect of the \textit{Lown} test when determining whether the charity was associated with the Catholic Church because it referenced the Catholic Church's role on the Catholic Charities' board of directors a mere sentence before launching into its association discussion.\footnote{60}

If a religious institution plays an official role in the governance of a civil organization, it is asserting control over it. While control does indeed demonstrate association, a test that is looking to see if an organization is associated with a church because it does not qualify for the ERISA church plan exemption under the control test of the statute should concentrate on other factors.

These courts' treatment of the second part of the \textit{Lown} association test—"whether the organization receives assistance from the religious institution"\footnote{61}—reaffirms the idea that they are considering "associated with" to be equivalent to "controlled by." Technically, donating funds to an organization does not mean one controls the organization. But as a general rule, large donors to an organization do exert some control over it—the donors either specifically dictate how the funds should be spent, or directly or subtly threaten to cut off funds should the organization not use them in a manner deemed proper by the source of the money. Whoever controls the funds controls the organization.\footnote{62}

\footnote{57} Id. at 653 (emphasis added).
\footnote{58} 304 F. Supp. 2d 77, 85 (D. Me. 2004).
\footnote{59} See id. (citing \textit{Lown} as a case that defines an association “by assessing whether the church plays any official role in the governance of the organization . . .”).
\footnote{60} Id.
\footnote{61} \textit{Lown}, 238 F.3d at 548.
The District Court of Maine's discussion of the funding in *Catholic Charities* demonstrates that courts use this control-through-donation analysis when considering the *Lown* test. In *Catholic Charities*, the court explained that the Diocese of Portland contributed financial support to the charity on an annual basis. The court used this fact to demonstrate that the Church and the charity had "common religious bonds." While this evidence does demonstrate that the Church supports the work of the charity, financial assistance is not the only way to demonstrate support or common religious bonds. Moreover, an absence of funding is not sufficient to demonstrate that there is no common religious bond; it is but one of many factors that can help establish that the bond exists.

Courts in addition to the District of Maine have also relied on the donation of funds or lack thereof when analyzing whether an organization is associated with a church. In *Lown*, the court when considering whether the hospital was controlled by a church or an association of churches established that the hospital had stopped receiving funds from the South Carolina Baptist Convention when it disaffiliated with the organization in 1993. It was this disaffiliation that led the court to conclude that after 1993, the South Carolina Baptist Convention no longer exerted control over the hospital. Having concluded that the lack of funding demonstrated that the hospital was not controlled by the Church, the court should have searched for any new evidence to support association. Instead, it simply asserted that the lack of funding demonstrated that no association existed in addition to demonstrating the absence of control. The Fourth Circuit used the same facts to answer what should have been two different questions.

When the Eighth Circuit analyzed *Chronister*, it also relied on the hospital's lack of monetary support from the Church as evidence that the

("Moving beyond the world of single donor to a charity seeking support from the general public, Avner Ben-Ner and Benedetto Gui argue that that it is in the very nature of a nonprofit organization to cede control to 'key high-demand stakeholders.'").

64. Id.
65. *Lown*, 238 F.3d at 548.
66. Id.
67. *See id.* (finding that by 1997 the South Carolina Baptist Convention exerted no control over the hospital). The court's earlier discussion of the lack of funds and control over the governing board suggests that these two factors are how they reached their conclusion. In its analysis of whether the hospital was associated with a church the court noted, "The only testimony on the subject came from Willis Gregory, who was Vice President of Human Resources for Baptist Healthcare at the time. He stated that the hospital 'received no monies' from South Carolina Baptist Convention, the Southern Baptist Convention, or any other Baptist entity." *Id.*
hospital was not associated with the church. However, this lack of support was already cited as evidence that the hospital was not controlled by a church. The court was simply repeating itself, and through this repetition suggested that "associated with" was identical to "controlled by."

The donation of funds is strong evidence of a tie between a church and a civil organization; it shows that the church exerts control over the civil organization, and is consequently also associated with the organization. Once it has been determined that a church does not control the civil organization in question, however, the lack of funding should be treated as extraneous evidence. A proper association test should consider factors that do not demonstrate control. When considering association, courts have already ruled out control as a means for meeting the ERISA exemption standard. Consequently, they should look to means outside of control when analyzing the association test to ensure that their analysis is not harmfully duplicative.

B. The Individual Case Analysis Approach

The third prong of the Lown test—"whether a denominational requirement exists for any employee or patient/customer of the organization"—should constitute a critical component of the courts' analysis. A court considering the issue should put this test at the forefront of its evaluation and expand it, instead of tacking it on as an afterthought once the court has already reached a determination based on the other two Lown factors.

Had the courts in Lown and Catholic Charities used this application of the test in their analysis, they would have reached the same conclusions in a more expedient fashion, and would not have created a confusing test that only looks to see if an organization is controlled by a church, rather than considering if it is associated with a church via other means. The civil organization in Lown was not associated with a church as it did not share a common religious bond or conviction with a church or an association of churches. This became clear in the court's analysis of the third prong of its test:

Third, no denominational requirement existed for anybody affiliated with Baptist Healthcare. Of course, the hospital served individuals of all faiths, and its doctors, nurses, and other

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68. Chronister v. Baptist Health, 442 F.3d, 648, 653 (8th Cir. 2006) ("[T]here is no evidence that Baptist Health received any support from the Arkansas Baptist State Convention after its disassociation.").
69. See id. at 651.
70. Lown, 238 F.3d at 548.
employees represented many different creeds. Perhaps most importantly for this prong of the inquiry, Baptist Healthcare did not even impose a denominational requirement on the ministers and chaplains affiliated with the hospital.72

The absence of a denominational requirement does not necessarily mean that the civil organization is not associated with a church. The presence of one would be conclusively show that association existed. However, many hospitals and schools with no such requirement have still qualified for ERISA church plan status.73 In those situations, not all of their employees had to practice the faith of the church with which the civil institution was associated in order for the institution to qualify. Instead, the institution as a whole had to purport to practice and uphold the convictions of the church. The fact that the hospital in Lown did not even practice Baptism in its ministerial counseling supported the court’s conclusion:

It is true that the South Carolina Baptist Convention and Baptist Healthcare both shared the name ‘Baptist.’ Yet the name is not the thing. Rather, the evidence shows that Lown has failed to satisfy any of the criteria for determining common religious bonds, and convictions between two entities.84

The court would have saved time and energy and would not have created a confusing test had it simply concluded that the South Carolina Baptist Convention did not exert control, and then looked to see if there were other facts that would suggest the hospital was associated with the Baptist Church. Under this analysis, the court should have held that Baptist Healthcare was not associated with a church because no fact demonstrated it had a tie to one. A hospital is not promulgating a specific church’s mission if ministers from a variety of faiths are allowed to preach other messages to the patients. This holding would have led to the same result without suggesting that association is interchangeable with control, and thus been more consistent with the statutory language.

Using an association test that looked beyond factors of control, the court in Catholic Charities determined that the civil organization at issue was associated with a church. The court explained that,

While there is nothing in the record to suggest that Catholic Charities imposes a denominational requirement on its employees or those who receive its services, Catholic Charities states that it provides services ‘based on Roman Catholic religious teaching

72. Lown, 238 F.3d at 548.
74. Lown, 238 F.3d at 548.
that calls on Catholics to serve those in need and considers its work a vital part of the ministry of the Roman Catholic Church to the people of the State of Maine.\textsuperscript{75}

Catholic Charities, like the civil organization discussed in \textit{Lown},\textsuperscript{76} was not deemed to be associated with a church because its employees or the people it served were Catholic. It did however, unlike the hospital in \textit{Lown} whose only ties to the Baptist Church lay in its history and name, use its organization to spread the Catholic message. It shared common religious bonds and convictions with the Church with which it purported to be associated.\textsuperscript{77}

Although use of the \textit{Lown} test simply led the courts in \textit{Lown} and \textit{Catholic Charities} to reach the proper legal conclusions in an inefficient manner, this is not always the case. Other courts that have relied on the \textit{Lown} test have reached conclusions that differ with the results that would have been obtained using an expansive association test. The court in \textit{Chronister} held that:

In sum, Baptist Health's long-term disability plan is an ERISA plan, not a 'church plan.' Because Chronister has produced insufficient evidence that Baptist Health is controlled by a Baptist church or association of churches or that there are common religious bonds and convictions between the entities, subject matter jurisdiction is proper.\textsuperscript{78}

The Eighth Circuit should have used a more in-depth analysis looking at the unique facts of the case, when it considered whether \textit{Chronister} had "common religious bonds and convictions"\textsuperscript{79} with the Baptist church. Instead, it forced the facts to fit within a narrow test. Had it looked at the case as a whole, rather than just looked to see where the facts fell under the \textit{Lown} test, it likely would have held that the hospital met the requirements of the church plan exception. The facts in \textit{Chronister} relating to Baptist Health's supposed association with a church are more similar to the facts in \textit{Catholic Charities}\textsuperscript{80} than to those in \textit{Lown}. Like the hospital in \textit{Lown} and the organization in \textit{Catholic Charities}, Baptist Health did not impose a faith requirement on its general employees or patients.\textsuperscript{82} Evidence suggests

\textsuperscript{75} Catholic Charities of Me., Inc. v. City of Portland, 304 F. Supp. 2d 77, 85 (D. Me. 2004).
\textsuperscript{76} See \textit{Lown}, 238 F.3d at 548.
\textsuperscript{78} \textit{Chronister} v. Baptist Health, 442 F.3d, 648, 653 (8th Cir. 2006).
\textsuperscript{79} \textit{Id}.
\textsuperscript{80} \textit{Catholic Charities}, 304 F. Supp. 2d at 85.
\textsuperscript{81} \textit{Lown}, 238 F.3d at 548-49.
\textsuperscript{82} See \textit{Chronister}, 442 F.3d at 653 ("Management employees are instructed to be guided by Christian principles, not specific doctrines of a Baptist church. Baptist health treats patients of all religions or faiths.").
that it, like Catholic Charities, nonetheless shared a common religious conviction with the Church to which it claimed association. First, the controllers of Baptist Health were required to be Baptist.\footnote{See id. ("Baptist Health imposes a strict denominational requirement on certain employees—administrators, president/CEO, and board members.").} Moreover, all ministerial elements of the hospital were required to be Baptist.\footnote{See id. ("Further, the chaplains must be ordained Baptist ministers.").} Finally, and perhaps most importantly, in the event that a medical procedure contradicted a tenet of the Baptist faith (i.e. a woman needed an abortion in order to save her life), a chaplain’s consent was required.\footnote{Id. at 652.} These elements suggest that Baptist Health shared common convictions and principles with the Baptist Church so much that it should qualify for the ERISA church plan exception. Like the hospitals approved by the Department of Labor, Baptist Health promulgated the Baptist faith and mission. It should not have been turned away from the exception solely because its religion is less hierarchical than Catholicism, and thus the Church did not directly control the hospital.

It is likely that the Chronister court would have reached this conclusion if it had adjusted its focus beyond the first half of the Lown association test. Because Baptist Health was not controlled by a church, it failed the first two tenets of the test, and consequently the court held that it did not meet the standard of association.\footnote{Id. at 653.} Had the court only considered an elaborated version of the third factor of the test—that is, had it considered whether the facts outside of the control issue demonstrated a common bond between the convictions of the Baptist Church and the convictions of Baptist Health—it would likely have reached a different conclusion.

If the Chronister case were an isolated instance of oversight, it would not be cause for too much concern. However, more and more courts are using, and thus giving credence to, the Lown test.\footnote{See Torres v. Bella Vista Hospital, Inc., No. 06-2158(JAG), 2007 WL 3174486 (D.P.R. Oct. 29, 2007); Polk v. Dubuis Health Sys., No. 06-1517-A, 2007 WL 2890262 (W.D. La. Sept. 28, 2007).} As this test is adopted by the various circuit courts, Congress’ intent is being thwarted and the Department of Labor’s interpretation of the statute is being pushed aside.
C. The Improper Association Test Does Not Stem from Constitutional Concerns

This is not a situation where the courts are purposefully narrowing a statute to avoid constitutional issues. Although no court has fully addressed the issue, there is a legitimate argument to be made for the idea that the ERISA church plan exception as a whole is unconstitutional. This concern is particularly relevant in light of the Court’s ruling in City of Boerne v. Flores, in which the Court demonstrated its suspicion of laws that give preferential treatment to religious organizations just because they are religious. However, ignoring the plain statutory language which states that certain civil organizations that are associated with churches can be exempt does not eliminate the constitutional questions. If the church plan exception is ever found to be unconstitutional, it will likely be due to the government giving preferential treatment to an organization simply because it is religious. If that is the case, then the exception in its entirety will be held to be unconstitutional. Under this analysis, the Lown test eliminates no questions of a constitutional nature. An argument could be made that it is only unconstitutional to allow civil organizations that are independently incorporated to take advantage of the exception. In that scenario, however, civil organizations that were controlled by or just associated with a church would fall into the same category—a civil organization given special treatment based on its religious nature. Thus, the Lown test does not help a
court avoid constitutional issues as it still allows for some religious organizations to be exempted because they are religious.

III. CONCLUSION

The benefit of the *Lown* test is that it is easy to apply and does not force the court to consider, and thereby judge, what constitutes a conviction that a church and civil organization hold in common. Nonetheless, a clear and easy test is not always the right test. In setting up the ERISA church plan exception, Congress set forth two scenarios under which a civil organization may qualify. The courts should analyze each individual case under both standards, control and association, rather than rely on a test that ignores an important part of the statute.

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91. As discussed *supra* in Part I.B, courts historically have refrained from judging religious convictions.