UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ALBERT R. CHAVIES and THOMAS HOLLAND, on behalf of themselves, individually, and on behalf of all others similarly situated, and on behalf of the CHE Plans, Plaintiffs, v. CATHOLIC HEALTH EAST, a Pennsylvania Non-profit Corporation, ANTHONY CAMARATTO, an individual CLAYTON FITZHUGH, an individual, and JOHN and JANE DOES, each an individual, 1-20, Defendants.	**Civil Action No. 2:13-01645-CDJ** **CLASS ACTION** **Filed via ECF** **ORAL ARGUMENT REQUESTED**

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

This case centers on ERISA's exemption for "Church Plans." Plaintiffs, participants in the Catholic Health East Employee Pension Plan (the Plan), brought this action against Catholic Health East (CHE) and Plan fiduciaries (Defendants) asserting violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, et seq., and the United States Constitution. Plaintiffs allege that Defendants are violating numerous provisions of ERISA – including underfunding the Plan by more than $438.5 million – by erroneously claiming that the Plan is exempt from ERISA's protections because it is a Church Plan. (Compl. Counts I-VII). The Complaint explains that, as a matter of law, the Plan does not qualify for the Church Plan exemption because CHE, which established and maintains the Plan, is not a church or convention or association of churches.

Defendants moved to dismiss the Complaint under Rule 12(b)(1) for lack of subject matter jurisdiction on the purported basis that ERISA does not apply to the Plan. Defs.' Mot. To Dismiss the Compl., D.E. #33. As discussed below, this Court has federal question jurisdiction because this action arises under ERISA, a federal statute. Moreover, under controlling Third Circuit precedent, the question of whether ERISA applies to the CHE Plan is not jurisdictional. Accordingly, the only issue before this Court at this time is whether Plaintiffs' claims under ERISA are so completely devoid of merit as not to involve a federal controversy. As explained below, this is plainly not the case because the CHE Plan is covered under ERISA as a matter of law, given that it is not established by or maintained by a church or association of churches.

Furthermore, even if this Court were to decide that the CHE Plan is a Church Plan, it would still have jurisdiction over *all* counts based on Count VIII, which asserts an as applied challenge to the constitutionality of the Church Plan exemption. As explained below, Count VIII alleges that the application of the Church Plan exemption to CHE is an unconstitutional accommodation under the Establishment Clause because it harms CHE employees, unfairly disadvantages CHE competitors, and accommodates no undue burden caused by ERISA. Compl. at ¶¶ 81 and 154-156. This constitutional question, itself a federal question, determines

whether ERISA applies to the Plan, and thus provides jurisdiction over *all* of Plaintiffs' claims. *See Bell v. Hood*, 327 U.S. 678, 685 (1946) (if the "right of the [plaintiffs] to recover under their complaint will be sustained if the Constitution and the laws of the United States are given one construction and will be defeated if they are given another," then the court has jurisdiction over the dispute, and cannot dismiss on jurisdictional grounds).

II. FACTS

CHE operates a health care conglomerate and provides retirement benefits for 60,000 employees of its healthcare facilities through its Plan, which is a defined benefit plan. Compl. ¶¶ 1, 3. CHE established the Plan. Id. ¶ 77; Mem. of Law in Support of Defs.' Mot. To Dismiss the Compl. ("MTD") at 1. Neither CHE nor any of its healthcare facilities is a church. Compl. ¶ 3. Yet CHE does not administer or fund the Plan in accordance with ERISA, but rather has evaded the protections afforded to plan participants by ERISA by claiming that the Plan is an exempt "Church Plan." Compl. ¶ 3; MTD at 2.

Additionally, the Complaint explains that CHE is not controlled by any church, *Id.* ¶ 76. Nor is CHE associated with a church, as CHE does not share common religious bonds and convictions with a church. *See id*. ¶¶ 5, 73, 74. Even if the Court were to consider the disputed factual statements contained within the unreliable sample of documents improperly submitted with Defendants' motion to dismiss (*see* Plaintiffs' Mot. to Strike), the fact remains that CHE's operations and management are not bound by the Roman Catholic Church ("RCC"). *See* discussion *infra* at § IV.C.3.

III. LEGAL STANDARD

Because Defendants have moved to dismiss the complaint only under Rule 12(b)(1), the sole question before this Court is if it has subject matter jurisdiction, *i.e.*, whether it has the power to decide this dispute. Federal question jurisdiction is governed by 28 U.S.C. § 1331, which empowers federal district courts to hear all "civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. In addition, it is well settled that a

cause of action brought under federal law may only be dismissed for want of jurisdiction where the federal claim is "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (internal quotations omitted). While Defendants state, in an oblique footnote, that the Constitutional claim "may appropriately be subject to dismissal under a Fed. R. Civ. P. 12(b)(6) standard," MTD at 18, n. 14, there is no actual 12(b)(6) motion for this court to rule upon.[1]

IV. ARGUMENT

A. THIS COURT HAS JURISDICTION OVER ALL COUNTS OF THE COMPLAINT.

1. This Court has federal question jurisdiction over the ERISA claims under 28 U.S.C. § 1331

Defendants moved to dismiss the Complaint under Rule 12(b)(1), asserting that this Court does not have subject matter jurisdiction over Plaintiffs' claims. However, the plain language of 28 U.S.C. § 1331, which governs "federal question" jurisdiction, states that federal district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Moreover, ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1), provides that, with one exception not relevant here, "the district courts of the United States shall have *exclusive jurisdiction* of civil actions under this title brought by . . . a participant." (emphasis added). Accordingly this Court has exclusive jurisdiction over Plaintiffs' claims for violations of ERISA.

2. Whether the CHE Plan is covered under ERISA is a merits question, not a jurisdictional question

Under binding Third Circuit precedent, whether a plan is an ERISA covered plan is a merits inquiry that does not bear on subject matter jurisdiction. *Henglein v. Informal Plan*, 974

[1] Defendants also suggest they are "amenable" to treating their 12(b)(1) motion as a Rule 56 motion for summary judgment. (MTD at 4 n. 4). Plaintiffs question whether conversion of a facial 12(b)(1) motion is proper. But under Rule 56, Defendants would have to establish "no genuine dispute as to any material fact" and that they are "entitled to judgment as a matter of law." F. R. Civ. P. 56(a).

F.2d 391, 395 (3d Cir. 1992) ("[A] plaintiff's failure to prove the existence of an employee benefit plan, though it results in a dismissal of the claim, does not deprive the district court of subject matter jurisdiction to enter a judgment on the merits."); *see also Carver v. Global Sports, Inc*., No. 00-139, 2000 WL 378072, at *2 n. 2 (E.D. Pa. March 28, 2000) ("The law in the Third Circuit . . . does not require that the plaintiff establish the existence of an ERISA covered plan as a precondition to the court's jurisdiction."); *Buse v. Vanguard Group of Inv*. Cos., No. 91-cv-3560, 1994 WL 111359 (E.D. Pa. Mar. 31, 1994) (on remand after Third Circuit held that it was legal error to hold that the court lacked subject matter jurisdiction even after the parties agreed plan was not covered).

As the Third Circuit noted in *Airco Indus. Gases, Inc. v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028, 1032 (3d Cir. 1988), subject matter jurisdiction does not turn on whether a plaintiff "had a *valid* cause of action" under federal law but rather "whether the determination of the existence *vel non* of that cause of action is a question 'arising under the . . . laws . . . of the United States.'" *Id.* (citation omitted); *see also Empire Kosher Poultry, Inc. v. United Food & Com. Workers Health & Welfare Fund of Ne. Pennsylvania*, 285 F. Supp. 2d 573, 578 (M.D. Pa. 2003) (citing *Steel Co.*, 523 U.S. at 89-90).

Defendants' attempt to convert a merits question into a jurisdictional question is improper. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 365 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional."); *Montana-Dakota Utils. Co. v. Northwestern Public Service Co*., 341 U.S. 246, 249 (1951).[2] Contrary to Defendants' motion, to answer whether a particular plan is covered by ERISA, a court must

[2] In particular, Defendants' reliance on *Koval v. Washington Cnty. Redevelopment Auth*., 574 F.3d 238 (3d Cir. 2009) is misplaced. *See* MTD at 4, n. 5. Defendants fail to note that the Third Circuit first held that the "District Court had jurisdiction *over this action* under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(a)(1)(B)" because plaintiffs asserted ERISA claims. *Koval*, 574 F.3d at 241 (emphasis added). Only *then* did the Koval court determine that, based on the face of plaintiffs' complaint, the plan at issue was exempt from ERISA. *Id*. Here, no such determination is possible from the face of the Complaint, nor does the Court need to evaluate whether the Church Plan exemption applies for the purposes of determining whether there exists supplemental jurisdiction over any state law claims.

exercise its federal question jurisdiction to interpret a federal statute. The Supreme Court has repeatedly held, "Whether the complaint states a cause of action on which relief could be granted is a question of law and must be decided *after* and not before the court has assumed jurisdiction over the controversy." *Bell*, 327 U.S. at 682; *see also Swafford v. Templeton*, 185 U.S. 487, 493-4 (1902) (emphasis added); *Binderup v. Pathe Exchange*, 263 U.S. 291, 305-8 (1923).[3]

3. Even if this Court treated the ERISA coverage question as jurisdictional and determined that the CHE Plan is a Church Plan, it would still retain jurisdiction over all Counts.

Even if this Court determined that the CHE Plan is a Church Plan, this Court would continue to have jurisdiction over all Counts because Count VIII states a valid constitutional claim (see section IV.D, *infra*). If the Church Plan exemption were ruled unconstitutional as applied to the CHE Plan, then the CHE Plan would be governed by ERISA and the Court would have subject matter jurisdiction over all claims. As the Supreme Court has repeatedly held, if the "right of the [Plaintiffs] to recover under their complaint will be sustained if the Constitution and the laws of the United States are given one construction and will be defeated if they are given another," then the court has jurisdiction over the dispute, and cannot dismiss on jurisdictional grounds. *Bell*, 327 U.S. at 685; *Steel Co.*, 523 U.S. at 89-90. As explained in treatises on federal jurisdiction:

> the "arising under" gateway into federal court has two distinct portals in that: first, it admits litigants whose causes of action are created by federal law, that is, where federal law provides a right to relief; and second, in certain cases federal-question

[3] The other cases cited in Defendants' footnote 5 are inapposite. In *Jones v. South Williamsport School District*, No. 11-cv-1179, 2012 WL 5987132 (M.D. Pa. Nov. 29, 2012), plaintiffs conceded that the plan was an exempt governmental plan and the court dismissed the case under Rule 12(h)(3) for lack of subject matter jurisdiction over plaintiffs' *state law* claims. In *Bernard v. Comcast Comprehensive Health & Welfare Benefits Plan*, No. 09-cv-02097, 2010 WL 5060201 (M.D. Pa. Dec. 6, 2010), the court erroneously treated the merits inquiry of whether the plan was covered by ERISA as a jurisdictional inquiry. *But see Henglein*, 974 F.2d at 395. Moreover, in *Bernard*, the defendants had already answered and cross-motions for summary judgment had been filed when the court determined that it no longer had subject matter jurisdiction. As discussed below, the standard applied to the 12(b)(1) motion in *Bernard*, which was filed after Defendants answered and Plaintiffs finished discovery on all questions of fact, is not applicable here. *See infra* at section IV.C.2.

> jurisdiction will lie. . . where the vindication of a right . . . necessarily turns on some construction of federal law[,]

32A Am. Jur. 2d Federal Courts § 899.

4. The Complaint may only be dismissed for want of jurisdiction if the claims are completely devoid of merit.

When the claims asserted in a complaint rise or fall based on interpretations of either the Constitution or a federal statute, a court can grant 12(b)(1) dismissal only if it finds the claims asserted in the complaint are "completely devoid of merit." *Steel Co.*, 523 U.S. at 89 (dismissal for lack of subject matter jurisdiction is appropriate only when the claims are "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court], or otherwise completely devoid of merit as not to involve a federal controversy."); *Beazer E., Inc. v. Mead Corp.*, 525 F.3d 255 (3d Cir. 2008) (same); *Kronmuller v. W. End Fire Co.*, 123 F.R.D. 170, 173 (E.D. Pa. 1988) (if "jurisdiction is based on a federal question . . . the pleader need only show that he has alleged a claim under federal law and that the claim is not frivolous" to overcome the Rule 12(b)(1) jurisdictional challenge) (citing 5 C. Wright and A. Miller, *Federal Practice and Procedure* § 1350 (1969)). The Court should note, however, that "the accuracy of calling these dismissals jurisdictional has been questioned." *Bell*, 327 U.S. at 683.

As explained below, Plaintiffs' ERISA claims are not "completely devoid of merit." Plaintiffs' claim that CHE, as a non-church entity, cannot establish a Church Plan is grounded in the plain meaning of the text of ERISA's Church Plan exemption (see discussion of ERISA § 3(33) *infra*) and the legislative history of the exemption. However, even if this Court determines that a non-Church entity may establish a "Church Plan," ERISA would nonetheless apply because the well-pleaded facts in Plaintiffs' Complaint demonstrate that CHE is not "controlled by" or "associated with" a church. While the Constitutional claim (Count VIII) will only be decided if this Court first finds that the CHE Plan is a Church Plan (which cannot proceed at this stage in the litigation because a factual challenge to jurisdiction is premature, *see infra* section IV.C.2), Plaintiffs' Constitutional Claim is anything but "devoid of merit." As explained in section IV.C.4 below, if ERISA 3(33) were interpreted to treat the CHE Plan as a Church Plan, it

would violate the Establishment Clause. This should be the end of the matter and Defendants' motion should be denied as this Court clearly has federal question jurisdiction.

B. WERE THIS COURT TO ADDRESS THE STATUTORY INTERPRETATION ISSUE, THE CHE PLAN IS COVERED UNDER ERISA.

Plaintiffs contend that ERISA's Church Plan definition, on its face, is limited to plans established by churches. By contrast, without any supporting statutory analysis or legislative history, Defendants assert that the Church Plan definition allows large health care conglomerates like CHE to be free of the protections ERISA provides its workers. Defendants are wrong. An analysis of the "Church Plan" definition must begin "with an examination of ERISA's statutory language because *'absent a clearly expressed legislative intention to the contrary*, that language must ordinarily be regarded as conclusive." *Edwards v. A.H. Cornell and Son, Inc*., 610 F.3d 217, 222 (3d Cir. 2010) (citations omitted) (emphasis added). As discussed below, the Church Plan definition, on its face, only applies to plans established by churches. There is no "clearly expressed legislative intention to the contrary" but instead the legislative history confirms that Congress intended the Church Plan definition to be limited to plans established by churches.

In fact, the Supreme Court has recognized that ERISA was passed in 1974 because American workers were not receiving the pension benefits they were promised. *Nachman Corp. v. PBGC*, 446 U.S. 359, 374-75 (1980). ERISA was passed to "correct this condition by making sure that if a worker has been promised a . . . benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it." *Nachman*, 446 U.S. at 375. In order to achieve that goal, Congress intended that coverage "be construed liberally to provide the maximum degree of protection to working men and women" and that "exemptions should be confined to their narrow purpose." S. Rep. No. 93-127, at 4854 (1973); *see Markowitz v. Ne. Land Co*., 906 F.2d 100, 105 (3d Cir. 1990) (statutory construction requires exceptions to remedial statutes to be narrowly construed).

1. Section 3(33), on its face, restricts the Church Plan definition to plans established by churches.

As the Third Circuit stated in *Edwards*, when analyzing ERISA's statutory language, "the first step is to determine whether [the language] has a plain and unambiguous meaning." 610 F.3d at 222 (quoting *Dobrek v. Phelan*, 419 F.3d 259, 263 (3d Cir. 2005)). Defendants' interpretation of the Church Plan exemption cannot be squared with the actual language of the statute. Section 3(33) states that "[t]he term "Church Plan" means a plan established and maintained . . . for its employees (or their beneficiaries) by a church or by a convention of association of churches." ERISA § 3(33)(A). On its face, the definition requires that a *church* must establish the plan. It does not state that an organization, like CHE, can establish a Church Plan.

Section 3(33)(C) includes within the Church Plan definition a plan "maintained by an organization, whether civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program [of benefits] for the employees of a church . . . if such organization is controlled by or associated with a church." ERISA § 3(33)(C)(i). The statute, however, makes it clear that a plan "maintained" by a separate "civil law corporation or otherwise" must still be established by a church and that the organization's "principal purpose or function" must be the "administration or funding" of a plan "for the employees of a church." On its face, this does not include a plan established and maintained by a civil law corporation like CHE because its "principal purpose or function" is the provision of healthcare, not the administration or funding of a plan or program for the employees of a church.

Section 3(33)(C) also redefines the terms "employee" and "employer" for the purposes of the Church Plan definition to expand those terms beyond the common law definition of employer and employee. Section 3(33)(C)(ii) states that the term "employee of a church" includes "an employee of an organization, whether 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." Section 3(33)(C)(iii) states that a "church" shall be "deemed the employer of any individual included as an employee under clause (ii)." This language simply clarifies who can be in a Church Plan and

does not state that the organization controlled by or associated with a church can form its own Church Plan. That the associated Church "shall be deemed the employer" of an associated organization's employees does not mean the associated organization is deemed to be a Church nor that the Church is deemed to have established the associated organization's plan. If Congress had intended the statute to mean that an associated organization could establish its own Church Plan, it would not have had to alter the definition of employer and employee but could have simply defined a Church Plan as a plan "established and maintained by a church, a convention or association of churches, *or an organization controlled by or associated with a church*." Alternatively, it could have defined a "church" as including entities controlled by or associated with a church. Congress, however, did neither. Nor is there any other statutory language indicating that Congress intended for the Church Plan exemption to be broadly construed to include plans established by an organization that is not a church.

2. There is no "clearly expressed legislative intention" that the Church Plan definition include plans that are not established by churches.

There is no"clearly expressed legislative intention" to indicate that the Church Plan definition should be interpreted differently than it is written. *Edwards*, 610 F.3d at 222. To the contrary, the legislative history establishes that Congress amended the Church Plan exemption in 1980 to allow churches to continue providing benefits to employees of tax-related agencies as well as their own common law employees.

ERISA, as passed in 1974, defined a Church Plan narrowly as "a plan established and maintained for its employees by a church or by a convention or association of churches . . ." ERISA section 3(33), 29 U.S.C. 1002(33) (amended 1980). Congress originally exempted Church Plans because it was concerned that the "examinations of books and records that may be required in any particular case as part of the careful and responsible administration of the [pension] insurance system might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities." S. Rep. 93-383 at 4965 (1973).

When it passed ERISA, Congress was aware that some pension plans sponsored by churches also included employees of church agencies. Accordingly, the original definition allowed Church Plans to continue to include these individuals, but only until December 31, 1982. P.L. 93-406, 88 Stat. 829, § 3(33) (1974) (amended 1980), attached as Exhibit A. Before that deadline passed, Congress recognized that requiring churches to establish two plans – one for ministers and one for church agency employees – would be prohibitively expensive and could result in employees losing their pension benefits. *See Home Board Urges Amendments to ERISA,* Baptist Press, May 16, 1980, attached as Exhibit B ("If the Talmadge Church Plan amendments are not enacted into law, a significant number of missionaries and denominational workers would forever lose their rights to participate in Church Plan retirement").

ERISA, however, defines an "employee pension benefit plan" as a "plan" that is "established or maintained by "an employer" to the extent that it "provides retirement income to employees . . . ." ERISA section 3(2)(A), 29 U.S.C. § 1002(2)(A). "Employee" is defined as "any individual employed by an employer" and "employer" is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." ERISA section 3(5) and (6), 29 U.S.C. § 1002(5) and (6). "The gist of ERISA's definition of employer, employee organization, participant, and beneficiary is that a plan, fund, or program…covers ERISA participants because of their employee status in an employment relationship, and an employer or employee organization is the person that establishes or maintains the plan, fund, or program." *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982) (*en banc*); *see United States v. Cusumano*, 943 F.2d 305, 309 (3d Cir. 1991) (adopting the *Dillingham* test). In order to allow churches to include agency employees (who were not the common law employees of the church) in a Church Plan, it was necessary to redefine the terms "employee" and "employer." Otherwise, a Church Plan that provided benefits to individuals other than its own employees would not fall within ERISA's definition of an employee benefit plan.

Congress fixed the problem by redefining the term "employee" to include employees of church agencies and by deeming the church to be the "employer" of these employees. *See* 125 Cong. Rec. S10,052 (May 7, 1979) (Remarks of Sen. Herman Talmadge) (explaining that the legislation "retains the definition of church plan as a plan established and maintained for its employees by a church" but in order to accommodate the different church structures "all employees are deemed to be employed by the denomination").

There is nothing in ERISA's legislative history indicating that Congress also intended to give large healthcare corporations, like CHE, an exemption from ERISA. *See Wisconsin Educ. Ass'n Ins. Trust v Iowa State Bd.*, 804 F.2d 1059, 1064 (8th Cir. 1986) (noting "the absence of any legislative statement contemporaneous with ERISA's passage" regarding coverage is especially significant). To the contrary, the legislative history demonstrates that the sponsors of the amendment only intended for the Church Plan exemption to apply to plans established and maintained by churches.

3. Non-precedential district court cases and agency pronouncements cannot change the clear meaning of the statute.

Rather than explaining how unambiguous statutory language or "clearly expressed legislative history" supports their interpretation, Defendants rely on non-precedential district court cases and agency pronouncements. But the views of other courts and the agencies cannot change the statute. *See generally Anwar v. Fairfield Greenwich Ltd*., 728 F. Supp. 2d 354, 357, 371 (S.D.N.Y. 2010) (noting the phenomenon of "unwitting perpetuation of error" and refusing to adopt an interpretation of the Martin Act "perpetuated from opinion to opinion with little second-guessing" despite being "unsupported by the Martin Act's plain language [and] its legislative design").

Defendants rely heavily on IRS private letter rulings and DOL advisory opinions on Church Plans (*see* MTD at 18, n. 13). Federal courts give deference to formal agency interpretations where there is an "express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron U.S.A., Inc. v. Natural Res. Def.*

Council, 467 U.S. 837, 843-4 (1984). To warrant such deference the interpretations must be arrived at after "a formal adjudication or notice-and-comment rulemaking." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). However, as to *informal* agency interpretations, such as the letters at issue here, deference is limited to instances where the agency's interpretation has "the power to persuade." *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

The letters on which Defendants rely lack "inherent persuasive value" and therefore are not entitled to deference. They simply do not track the plain language of the statute as explained above, which makes clear that only churches can "establish" Church Plans. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2169 (2012) (no deference under Skidmore to DOL interpretation which was "quite unpersuasive," "lacks the hallmarks of through consideration," and "inconsistent" with the statute at issue). Moreover, they were prepared in very informal, non-adversary circumstances, and as the Court will note, successive letters simply repeat earlier ones virtually verbatim. Recognizing the limitations of such letters, the courts routinely refuse to defer to them.[4]

C. THE WELL-PLEADED FACTS DEMONSTRATE THAT CHE IS NOT "ASSOCIATED WITH" OR "CONTROLLED BY" THE RCC, AND FURTHER ANALYSIS OF THIS INHERENTLY FACTUAL QUESTION IS PREMATURE.

If this Court chose to decide the legal question of whether a non-church entity can establish a Church Plan and did so in Defendants' favor, it would then be presented with a mixed question of law and fact, *i.e.*, whether CHE is "controlled by" or "associated with" the RCC. Notably, this question—regardless of its resolution—would still provide the Court with subject matter jurisdiction, as the validity of Plaintiffs' claim would still rise or fall based on an interpretation of a federal statute. *See Bell*, 327 U.S. at 685. Accordingly, resolving Defendants'

[4] *E.g.*, *Thornton v. Graphic Comm.*, 566 F.3d 597, 615-16 (6th Cir. 2009) (no deference to IRS determination letter given informal nature and absence of rationale explaining conclusions); *Welsh v. Ascension Health*, No. 08-cv-348, 2009 WL 1444431, at *7 n. ll (N.D. Fla. May 21, 2009) (agency letters "may not be used or cited as legal precedent"); *Tupper v. United States*, 134 F.3d 444, 448 (1st Cir. 1998) (IRS General Counsel Memoranda "are not authority in this court").

12(b)(1) motion does not require answering this purely merits-based question. Regardless, even if this Court determined that resolution of this inquiry were necessary for federal question jurisdiction, it must decide this 12(b)(1) challenge accepting all facts in the Complaint as true and disregarding all the extraneous and unreliable materials Defendants attach to their motion.

1. Because Defendants' motion is a facial challenge to jurisdiction, the Court must accept all facts in the Complaint as true and disregard all documents attached to Defendants' motion.

As explained in detail in the Motion to Strike, because Defendants filed this jurisdictional challenge before they answered the Complaint, it is a facial challenge[5] under *Mortensen v. First Fed. Sav. And Loan Ass'n*, 549 F.2d 884, 891-92 (3d Cir. 1977). As Defendants' own authorities acknowledge, when considering a facial attack on jurisdiction, the Court must assume the veracity of the allegations in the complaint and determine whether the complaint, on its face, fails to plead an action within this Court's jurisdiction. *Bernard*, 2010 WL 5060201 at *2 (citing *Mortensen*, 549 F.2d at 891). Contrary to Defendants' argument (MTD at 4), when a defendant moves to dismiss a complaint for lack of jurisdiction before the answer is filed, the court cannot consider matters extraneous to the complaint. *Mortensen,* 549 F.2d at 891. Notwithstanding this clear authority, Defendants have inappropriately littered the docket with over 500 pages of one-sided documents. For the reasons set forth in Plaintiffs' Motion to Strike, these documents should not be considered when deciding Defendants' 12(b)(1) motion.

2. A factual challenge to jurisdiction cannot be lodged until Plaintiffs have had the opportunity to controvert Defendants' factual arguments through discovery.

To the extent Defendants seriously challenge the jurisdiction of this Court based on the material they have attempted to introduce into the record, Plaintiffs are entitled to discovery to controvert the factual basis for Defendants' argument that CHE is controlled by or associated with the RCC. *Mortensen,* 549 F.2d at 892 n. 17 and 18 (holding that "factual jurisdictional

[5] By contrast, a 12(b)(1) **factual** attack on jurisdiction may only be raised **after** "the answer has been served." *Mortensen v. First Fed. Sav. And Loan Ass'n,* 549 F.2d 884, 891-92 (3d Cir. 1977).

proceeding cannot occur until plaintiff's allegations have been controverted," and "the plaintiff ha[s] an opportunity to present facts by affidavit or by deposition, or in an evidentiary hearing, in support of his jurisdictional contention.") (citing *Local 336, Am. Federation of Musicians, AFL-CIO v. Bonatz*, 475 F.2d 433, 436 (3rd Cir. 1973)).[6]

3. Even if the Court were to consider Defendants' documents, their motion still fails because Defendants have not established that CHE is "controlled by" or "associated with" the RCC.

a. The RCC does not control CHE.

With respect to the "controlled by" prong, Defendants make the incredible argument that the RCC, not the executives and directors of the corporation, controls CHE. Specifically, Defendants assert that "the RCC controls Catholic Health East" "first through the governance oversight exercised by public juridic persons, and second, through oversight by the diocesan bishops and archbishops, and the Holy See." (MTD at 15-17). Both arguments are meritless and completely belied by the true corporate structure of CHE and by sworn statements proffered by Catholic Bishops in other federal court proceedings.

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[6] In footnote 4 of their brief, Defendants state they are "amenable" to treating this motion as a motion for summary judgment. Plaintiffs question whether a 12(b)(1) motion can be properly converted into a Rule 56 motion, given that Defendants cite no legal authority to support this proposition and there is ample authority that holds otherwise. *See Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986) ("[A] 12(b)(1) motion cannot be converted into a Rule 56 motion."); *Reichhold, Inc. v. U.S. Metals Refining Co.*, No. 03-cv-453 (DRD), 2007 WL 2363168, at *1 n. 5 (D.N.J. Aug.14, 2007) (declining to convert Defendants' 12(b)(1) motion to a summary judgment motion"); *Romah v. Scully*, No. 06-cv-698, 2007 WL 3493943, at * (W.D. Pa. Nov. 13, 2007) (failed to convert jurisdictional motion to dismiss to a Rule 56 motion based in part on the text of Rule 12 which "only refers to the defense numbered (6) as opposed to defenses numbered (2) or (5) as a basis for conversion to a motion for summary judgment when considering matters outside the pleadings.").

Assuming *arguendo* that Defendants' 12(b)(1) motion were treated as a Rule 56 motion, Defendants have not shown that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." F. R. Civ. P. 56(a). Thus, applying a Rule 56 standard, their motion is inappropriate because the evidence before this court reveals a genuine factual disagreement. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Of course, under Rule 56, Plaintiffs are entitled to "obtain affidavits or declarations or to take discovery," to prove their case with respect to association and control. Fed. R. Civ. P. 56(d)(2).

Control is determined by the actual governance of, and decision making for, a corporation. Defendants admit that CHE is a civil law corporation governed by its own board of directors with independent fiduciary duties.[7] CHE's Directors are neither appointed nor approved by the RCC, diocesan archbishops or the congregations of Sisters Religious that originally founded CHE. Defs.' Ex. 13 (D.E. # 33-6) § 4.02 and Defs.' Ex. 9 (D.E. # 33-5) § 3.02. Instead, they are selected by an internal process which is self-perpetuating. Defs.' Ex. 11 (D.E. # 33-6), Article 3 (members of CHM are the directors of CHE). Thus, based on Defendants own documents, the RCC has no actual governance authority to control CHE or the hospitals which CHE operates.

Moreover, under the applicable nonprofit corporate code of Pennsylvania, the directors of a nonprofit corporation shall "stand in a fiduciary relation to the corporation" and are required to perform their duties "in the best interests of the corporation." 15 Pa. C.S.A. § 5712(a). Similarly, "an officer shall perform his duties as an officer in good faith, in a manner he reasonably believes to be in the best interests of the corporation." *Id.* § 5712(c). Generic references in Defendants' brief to the fact that CHE operates in accordance with the "canon law" of the RCC and "for the benefit of [its] health ministries" (MTD at 15) does not change the fact that the RCC is not involved in any true governance or decision making. In fact, according to Defendants' documents, any historical financial ties that bound CHE and various religious orders were severed no later than July 2009, as part of the "evolution in structure" of CHM. And currently the RCC (through its "Congregation for Institutes of Consecrated Life and Societies of Apostolic Life") "accepts no financial right or responsibility regarding Catholic Health Ministries or its affairs." Defs. Ex. 10 (D.E. 33-5), Preamble § 5.03.

Defendants' main "control" argument is based on allegations that the Board of Directors of CHE is overseen by one or more "public juridic persons" whose actions are then overseen by

[7] *See* Defs.' Ex. 12 (D.E. # 33-5), Articles of Incorporation, and Defs.' Ex. 13 (D.E. # 33-6) § 8.03, Amended & Restated Bylaws ("Directors stand in a fiduciary relationship" to CHE and are charged with acting "in the best interest of the Corporation [i.e., CHE]").

the Catholic Bishops and the Holy See. (MTD at 16). However, any purported "oversight" by a public juridic person does not equal control of CHE by the RCC.[8]

Defendants' argument regarding the public juridic person are akin to saying that because: (1) the Secretary of State approves the creation of nonprofit corporations under Pennsylvania law; (2) the state exercises oversight over all corporations in that it can revoke the corporate status; and (3) corporations must seek state approval of certain activities, including dissolution, then the State of Pennsylvania controls all nonprofit corporations. To the contrary the creation of an entity thorough state law and ongoing oversight and approval by the state does *not equal* control. Were it any other way, every corporation would be a government entity, entitled to a government pension plan exemption, and every suit against a corporation should properly name the state as a defendant that controls the corporation. Neither this, nor the allegation that every public juridic person is actually controlled by the RCC, holds water.

In fact, the *sworn* testimony by Bishops in other proceedings clearly establishes that the public juridic persons are not controlled by the Holy See or Catholic bishops:

- In *In re Roman Catholic Archbishop of Portland in Oregon,* Adversary Proceeding No. 04-03292 (Bankr. D. Or. Sept. 19, 2005), the Archbishop of Portland admitted that public juridic persons are not controlled by the Holy See within the meaning of civil law: "The exercise by the Holy See of universal jurisdiction does not destroy" the legal autonomy of public juridic persons, which have their "own rights and duties and property, apart from the Holy See." Declaration of Nicholas P. Cafardi, Dkt. 288 at ¶ 38, 40 (attached as Ex. C).

- In *In re The Catholic Bishop of Spokane*, No. 04-08822 (E.D. Wash. Nov. 21, 2005), the Bishop of Spokane confirmed: "[T]hat a parish [a public juridic person] is under a . . . bishop's legislative power does not destroy a parish's independence or submit the parish **to the bishop's control** in such a way that the legal independence of a parish is destroyed." Affidavit of Nicholas P. Cafardi, Dkt. 29-2 at ¶ 46 (emphasis added) (attached as Ex. D).

- The Bishop of San Diego admitted that "the Church is not a monolith operating like a corporation from the top down for the benefit of the shareholders . . . [Public juridic

[8] Plaintiffs dispute the "oversight" that the RCC purportedly exercises over CHE via CHM (the public juridic person) as it is limited to the receipt of an "annual report," and the right to "request a meeting of the Members" of CHM. Defs.' Ex. 10 (D.E. # 33-5) § 5.02 and 5.04.

> persons such as parishes] **operate nearly completely autonomously from the Diocese**." Declaration of Msgr. Steven Callahan, J.C.L. in Support Response to Show Cause Dated August 10, 2007, *In re the Roman Catholic Bishop of San Diego*, No. 07-00939, Dkt. 1109 at ¶ 6 (Bankr. S.D. Calif. Aug. 27, 2007) (emphasis added) (attached as Ex. E).

In sum, Plaintiffs dispute Defendants' factual assertions and are entitled to discovery on those facts. Nonetheless, even if this Court were to consider Defendants' documents, they show that CHE is not controlled by the RCC. Absent control by a church, courts decline to find a Church Plan exemption for healthcare conglomerates. *See, e.g., Lown v. Cont'l Cas. Co.*, 238 F.3d 543, 548 (4th Cir. 2001);[9] *see also Coleman v. Pikeville United Methodist Hosp., Inc.*, No. 05-cv-32, 2008 WL 819038, at *3 (E.D. Ky. Mar. 25, 2008); *Polk v. Dubuis Health Sys.*, No. 06-cv-1517, 2007 WL 2890262, at *3 (W.D. La. Sept. 28, 2007).

b. CHE is not associated with the RCC

ERISA § 3(33)(C)(iv) provides that "associated with a church" means "shares common religious bonds and convictions with that church." As the Complaint alleges, CHE does not share religious bonds with the RCC as it is not owned, operated or funded by the RCC. Compl. ¶¶ 5, 45. CHE is now, and has been for some time, a large healthcare conglomerate that operates pursuant to extensive federal and state regulation. Compl. ¶¶ 5, 41, 50. Although CHE claims that it spends millions of dollars on charitable care because of its Catholic mission, it is required to do so in order to qualify for federal, state and local tax exemptions.[10] CHE hires people of all faiths even though the RCC requires, *as a condition of employment*, that its healthcare workers

[9] *Lown* held that no Church Plan exists where (1) state Baptist Convention "played no role in the governance of Baptist Healthcare," (2) Baptist Healthcare did not "receive[] any support from" the Convention; and (3) "no denominational requirement existed for anybody affiliated with Baptist Healthcare." *See also Chronister v. Baptist Health*, 442 F.3d 648, 652-53 (8th Cir. 2006) (no Church Plan *despite* facts that (1) "Baptist Health requires its CEO, its board of directors, and its chaplains to be members of Baptist churches"; (2) "Baptist Health's management is instructed to follow religious principles"; (3) "under Baptist doctrine, operating a facility for health care is part of the healing ministry of the church"; and (4) "if Baptist principles and secular medicine conflict, Baptist principles control")

[10] Federal law has long *required* (i) all hospitals receiving Medicare payments to treat the indigent; and (ii) all non-profit hospitals to provide a community benefit. *E.g.*, 42 USC § 1395DD, *et seq*; 26 U.S.C. § 501(r).

agree that their services will be animated by the Gospel of Jesus Christ. Compl. ¶ 74. CHE also provides non-denominational worship space in many of its facilities and actively encourages CHE clients to seek spiritual guidance from others – including protestant ministers and Jewish rabbis – who have religious convictions that the inconsistent with those of the RCC. *Id*.

CHE claims that it shares common religious bonds and convictions with the RCC because it purportedly is subject to The Ethical and Religious Directives ("ERDs"). The ERDs, however, do not require adoption by anyone of fundamental Catholic doctrine, such as baptism, Holy Communion, confession, or obedience to the Pope. *See Health Cost Control v. Fuxan*, No. 95-cv-4243, 1997 WL 725440, at *1-2 (E.D. La. Nov. 17, 1997) (holding that bonds and convictions implies a link much stronger and pervasive than just any religious connection). The ERDs also express standards that reflect the missions of *any* nonprofit organization in the United States – belief in the dignity of the human person, caring for the poor, contributing to the common good, promoting equity of care, and stewardship of resources. Defs.' Ex. B (D.E. # 33-4) at 17. Therefore, any purported adherence to the ERDs cannot constitute common "convictions" with the RCC.

Similarly, although Defendants focus largely on CHE's dedication to "healing" (MTD at 3, 10), "healing" is unquestionably the central mission of *every* legitimate healthcare facility, regardless of any purported association with a Church. *See Chronister v. Baptist Health*, 442 F.3d 648, 652-53 (8th Cir. 2006) (finding no common convictions despite the fact that "under Baptist doctrine, operating a facility for health care is part of the healing ministry of the church."). Finally, CHE, acting through its Board and Officers, does not share the common religious convictions of poverty or obedience with any of its purportedly "sponsoring" religious orders (which themselves are not churches), or it would not have paid its CEO $2.4 million in 2010. Compl. ¶ 44.

Defendants' reliance on the CHE listing in the Official Catholic Directory (OCD) is also misguided. First, the IRS standard for inclusion in the OCD is lower than the ERISA standard for control by, or association with, a church. See *Memorandum on Group Ruling on Exemption*

from Federal Income Tax and The Official Catholic Directory, United States Conference of Catholic Bishops (last visited Aug. 1, 2013), available at http://nccbuscc.org/bishops/dfi/exemptionruling.htm (Any charitable institution that is "operated . . . in connection with the RCC in the United States" can qualify for inclusion, and there is no requirement for common bonds and convictions with a church.). Second, Defendants' own documents confirm CHE did not disclose properly its affairs in its October 1997 application for inclusion in the OCD. For example and without limitation, CHE stated it would *not* "in the immediate future utilize tax-exempt bond financing." If CHE answered this question in the affirmative, this would have disqualified CHE from inclusion in the OCD. Defs.' Ex. 18 (D.E. #33-8) at 10(g). Contrary to its OCD application response, CHE did in the immediate future utilize tax-exempt bond financing, in multiple revenue bond offerings in 1998, and it still does so. *See e.g.*, *Official Statements of Terms for CHE Bond Offerings,* dated January 9, 1998 and June 25, 1998, attached as Ex. F. (CHE $1,001,580.000 revenue bonds dated 1/1/1998; CHE $41,945,000 revenue bonds dated 6/15/1998); Compl. ¶ 50.

D. THE CHURCH PLAN EXEMPTION, AS CLAIMED BY CHE, VIOLATES THE ESTABLISHMENT CLAUSE AND IS THEREFORE VOID.

While Defendants suggest in a footnote that their arguments challenging Plaintiffs' Constitutional claim should be considered under Rule 12(b)(6), they did not move under Rule 12(b)(6). In any event, under either a 12(b)(1) or 12(b)(6) standard, Count VIII states a valid Constitutional claim.

The Establishment Clause compels Congress not to favor "religious adherents collectively over nonadherents." *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17, 27 (1989) (Blackmun, J., concurring) ("[G]overnment may not favor religious belief over disbelief").[11] In scrutinizing an accommodation that applies only to religious organizations, the Supreme Court analyzes whether the accommodation:

[11] Defendants' emphasis on the absence of preference for one religion over another or a particular religious view is misplaced as here preference for religion over non-religion is at issue.

(a) Comports with a valid secular purpose for which the exemption was enacted, *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000);

(b) Relieves a significant government burden on genuine religious practice, *see Texas Monthly*, 489 U.S. at 15 (plurality opinion);

(c) Takes adequate account of harms to third parties, *see id.; see also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Thornton v. Caldor, Inc.*, 472 U.S. 703, 708-09 (1985);

(d) "Produce[s] greater state entanglement with religion than the denial of an exemption." *Texas Monthly*, 489 U.S. at 20.

The Church Plan exemption as applied to CHE fails this accommodation analysis, which Defendants largely ignore, relying instead primarily on the *Lemon v. Kurtzman*, 403 U.S. 602 (1971) test, which is not compelled in challenges to religious accommodations. *See, e.g.*, *Cutter*, 544 U.S. at 717 n.6 (unanimous decision, declining to apply *Lemon* in religious accommodation Establishment Clause challenge); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012) (deciding Establishment Clause claim with no reference to *Lemon*).[12] As explained below, under the focused Supreme Court accommodation cases, as well as under *Lemon*, the exemption, if extended to CHE, violates the Establishment Clause.

1. A CHE exemption comports with no valid secular purpose.

The Church plan exemption was enacted to avoid "examinations of books and records that . . . might be regarded as an unjustified invasion of the confidential relationship . . . with regard to churches and their religious activities." S. Rep. No. 93-383, at 4695 (1973). While perhaps justified for churches, this purpose has no application to CHE because, unlike churches, CHE has no confidential books and records to shield from government scrutiny. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314-15 (holding application of a religious accommodation unconstitutional where it "is not necessary to further any of [the stated] purposes"); Compl. ¶¶ 50, 67. Participating in Medicare and Medicaid and issuing tax exempt

[12] In *Stratechuk v. Bd. of Educ.*, 587 F.3d 597, 604 (3d Cir. 2009), cited by Defendants to support adoption of the *Lemon* test, the Third Circuit acknowledged that the accommodation test is different but related to the *Lemon* test.

bonds, CHE already purports to disclose all material financial records and relationships. Compl. ¶ 50.

Apart from legislative history, "implementation of the statute" may reveal an impermissible purpose of fostering religion. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2000); *Santa Fe Indep. Sch Dist.*, 530 U.S. at 314-15 (policy lacked secular purpose based on its text *and* implementation); *Texas Monthly*, 489 U.S. at 15-17 (same). Implementation brings breadth and effect of an exemption within the evaluation of its purpose. As set forth below, implementation of a CHE exemption economically advances claimed "religious" hospitals over non-religious non-profit hospitals, Compl. ¶¶ 153, 155(B), and therefore "lacks sufficient breadth to pass scrutiny under the Establishment Clause." *Texas Monthly*, 489 U.S. at 14; *Thornton v. Caldor*, 472 U.S. at 707-8. Breadth of the exemption was crucial in cases finding a legitimate purpose where "benefits derived by religious organizations flowed to a large number of nonreligious groups as well." *Texas Monthly, 489 U.S.* at 11 (citing *Mueller v. Allen*, 463 U.S. 388 (1983)).[13] If those exemptions had been "confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, [the Supreme Court] would not have hesitated to strike them down for lacking a secular purpose and effect." *Texas Monthly*, 489 U.S. at 11. Extension of the Church Plan exemption to CHE violates the Establishment Clause "purpose" analysis. *Id.*; *see also Lemon*, 403 U.S. at 612.

2. A CHE exemption relieves no significant burden on religious practice.

An exemption exclusively for religion must alleviate a *state-imposed* deterrent that significantly interferes with religious exercise.[14] ERISA creates no impermissible "inquiries into religious doctrine" of CHE, *Hernandez v. Comm'r*, 490 U.S. 680, 696 (1989), and requires CHE

[13] The tax exemption upheld in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), relied upon by Defendants, falls within this category because it applied to all nonprofit organizations and not just to churches. *See id.* at 672 (noting the exemption "has not singled out one particular church or religious group *or even churches as such*") (emphasis added).

[14] *See Texas Monthly*, 489 U.S. at 15; *see also Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 613 n.59 (1989) ("accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden *on the exercise of religion*.'") (citation omitted).

to violate no religious principles. Compl. ¶¶ 10, 155(C).[15] Thus exemption from ERISA for CHE removes no "significant state-imposed deterrent to the free exercise of religion." *Texas Monthly*, 489 U.S. at 15. A neutral statute, ERISA is materially indistinguishable from the array of neutral enactments that do not significantly burden religious exercise when applied to commercial activities like pension protections. *See Jimmy Swaggart Ministries v. Bd. Of Equalization,* 493 U.S. 378, 392-97 (1990) (taxes do not significantly burden religious entity that "never alleged that the mere act of paying the tax, by itself, violates its sincere religious belief"); *Tony & Susan Alamo Fnd. v. Sec'y of Labor,* 471 U.S. 290, 305-06 (1985) (applying Fair Labor Standards Act to religiously affiliated business).

Because it has no confidential religious books and records that must be protected, CHE mischaracterizes the exemption's statutory purpose by stating that it was intended to shield religious institutions from ERISA's "complex and highly technical requirements." Even if that were a concern of Congress, the Supreme Court has rejected the argument that religious exercise is harmed by having to comply with regulatory burdens. *See Hernandez*, 490 U.S. at 696-697 ("[R]outine regulatory interaction which involves no inquiries into religious doctrine . . .does not of itself violate the nonentanglement command"); *Jimmy Swaggart*, 493 U.S. at 391 (holding that even "substantial administrative burdens . . . do not arise to a constitutionally significant level").[16] Finally, Defendants' reliance on *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) and *Hosanna-Tabor* is misplaced.

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[15] Defendants' reliance on out-of-Circuit cases that upheld religious exemptions is misplaced because, as applied in those cases, the exemptions relieved significant burdens on religious practices. *Ehlers-Renziv. v. Connelly*, 224 F.3d 283 (4th Cir. 2000) (upholding a zoning ordinance exemption because it allowed churches to exhibit a cross and other religious symbols); *Boyajian v. Gatzunis*, 212 F.3d 1, 9 (1st Cir. 2000) (upholding a zoning law making it illegal to prohibit religious schools from building within the town boundary). *LeBoon v. Lancaster Jewish Community Center Association*, 503 F.3d 217 (3d Cir. 2007) is inapposite as it did not address a constitutional challenge. *See id.* at 230-31 (holding Title VII's religious organization exemption applied to a Jewish community center without considering constitutionality).

[16] *See also Lemon*, 403 U.S. at 614 ("Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts" that do not impermissibly burden religious exercise.").

Amos held simply that an LDS gymnasium "run by" and "intimately connected to the Church financially and in matters of management," *Amos*, 483 U.S. at 332, could discriminate in employment based on LDS status. CHE receives no RCC funding, is not run by the RCC, and is not intimately connected to the RCC in matters of management. Compl. ¶¶ 5-6; 45, 72. Moreover, ERISA compliance involves no "intrusive inquiry into religious belief." *See Amos*, 483 U.S. at 339. Whereas *Amos* dealt with a statute that directly regulated defendants' ability to employ based on religious affiliation, ERISA regulates not at all Defendants' claimed religious activity of providing healthcare.[17]

Hosanna-Tabor held also that a church could hire and fire ministers based on their faith—including a teacher at a church school who was certified as a minister and, according to the church, "fired for a religious reason." 132 S. Ct. at 701, 706. Application of federal employment protections in that setting would impermissibly interfere "with the internal governance of [a] church." *Id.* at 697. In contrast, CHE is not a church, Compl. ¶ 47, does not claim to be, and ERISA creates no genuine burden on any CHE religious practice, Compl. ¶¶10, 47, 155C).[18]

3. A CHE exemption gives no consideration to third party harm.

An "accommodation must be measured so that it does not override other significant interests" and must take account of harm it causes third parties. *Cutter*, 544 U.S. at 710, 722; *Texas Monthly*, 489 U.S. at 14-15; *Thornton*, 472 U.S. at 708-709. The *Cutter, Texas Monthly, Thornton* line of cases reflects long-standing recognition that courts should rigorously scrutinize

[17] A CHE exemption is not mandated by the free exercise clause. *See Alamo Fndn.*, 471 U.S. at 303 ("[T]he Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in that program actually burdens the claimant's freedom to exercise religious rights."); *Wallace v. Jaffree*, 472 U.S 38, 82 (1985) (O'Connor, J., concurring) ("[J]udicial deference to all legislation that purports to facilitate the free exercise of religion would completely vitiate the Establishment Clause.").

[18] Whether an exemption alleviates a significant religious burden relates to the "effect" prong of *Lemon*. *See Texas Monthly*, 489 U.S. at 15 (absence of a state-imposed deterrent "convey[s] a message of endorsement" of religion).

religious liberty exemptions that harm third parties.[19] As Thomas Jefferson argued over 200 years ago, "[I]t does me no injury for my neighbor to say there are twenty gods, or no god," because "[i]t neither picks my pocket nor breaks my leg."[20] Defendants would use the Church Plan exemption to "pick the pockets" of pensioners of $438.5 million, which the Establishment Clause will not allow.

Aside from pension underfunding, the exemption harms CHE workers by denying them crucial ERISA protections, including PBGC insurance, when no church is accountable for the pensions, CHE assures that religion is not a factor in employment, and pensions are part of employment compensation. Compl. ¶¶ 2, 5(A), 25, 103, 109, 113, 116, 126, 130, 153.[21] In addition, the exemption harms CHE's competitors—other non-profit hospitals (*e.g.*, Jersey Shore Hospital in Pennsylvania)—giving CHE a competitive advantage because it can devote cash that otherwise would fund the Plan to its competitive growth strategy and expanding its market share. Compl. ¶¶ 144, 155(B). The Plan is CHE's lender; competitors are disadvantaged. A CHE exemption gives no consideration to the unjustified harm to competitors or pensioners, the *great extent* of which must be weighed by the Court. *See Cutter,* 544 U.S. at 720-1, *Texas Monthly,* 489 U.S. at 14-15, *Thornton,* 472 U.S. at 708-709; *Alamo Fndn.*, 471 U.S. at 293, 299 (unfair economic "advantage over their competitors" is significant factor, even where competitors not parties to suit). These third-party harms demonstrate the impermissible effect of extending the Church Plan exemption to CHE. *See Lemon*, 403 U.S. at 612; *Texas Monthly*, 489 U.S. at 16-17; *Thornton*, 472 U.S. at 710.

Defendants' reliance on *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 38 (1999), is misplaced. While *Los Angeles Police Dep't* held that a plaintiff cannot

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[19] Defendants do not cite, much less discuss, this line of cases.

[20] Thomas Jefferson, Notes on the State of Virginia 159 (William Peden ed., 1972), quoted in Daniel Keating, *Bankruptcy, Tithing, and the Pocket-Picking Paradigm of Free Exercise*, 1996 U. Ill. L. Rev. 1041, 1041.

[21] The *Hosanna-Tabor* "ministerial exception" imposed no burden on third parties because it applied only to *ministers*, 132 S. Ct. at 706, and *Amos* involved no harm to competitors.

make a constitutional challenge based on a harm suffered by another, here the Plaintiffs have been harmed and this Court may assess harm to non-parties in determining whether the as-applied exemption is unconstitutional. *See, e.g., Alamo Fndn.*, 471 U.S. at 299 (considering the harm to non-party competitors); *Thornton*, 472 U.S. at 708-09 (considering the harm to employer and other non-party employees). *Amos,* 483 U.S. at 334-40, is distinguishable because there the exemption was necessary to avoid entanglement whereas here, application of the exemption causes greater entanglement.

4. A CHE exemption causes greater entanglement with ERISA than compliance.

A CHE exemption requires courts and agencies to examine unilateral religious "convictions" of a non-church entity and determine if they are "shared" with a church, in the absence of any actual church responsible for the pensions. Compl. ¶¶ 32, 47. This *creates* entanglement between government and putative religious beliefs. *See Texas Monthly*, 489 U.S. at 20 (government determination whether periodicals contain sufficient religious content creates greater entanglement); *Lemon*, 403 U.S. at 620 (invalidating statute calling for "state inspection and evaluation of the religious content of a religious organization"). Defendants' 500+ pages of documents proffered to support alleged religious convictions is a preview of the mandated Court review, which Defendants seek in order to qualify for the exemption.

ERISA compliance requires *zero* entanglement with religion for CHE because unlike a church, CHE has no relevant confidential financial books, records or relationships, and instead purports to disclose already all of its material financial information and relationships. *See* Compl. ¶¶ 43, 45, 50, 72. As a CHE exemption "produces greater state entanglement with religion than the denial of an exemption," it fails the Establishment Clause entanglement analysis. *See Texas Monthly*, 489 U.S. at 20; *Lemon*, 403 U.S. at 602-3.

V. CONCLUSION

Plaintiffs respectfully request that the Court deny Defendants' motion to dismiss and require Defendants to answer the Complaint.

DATED: August 1, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, exhibits, and proposed order have been filed electronically and are available for viewing and downloading from the ECF system, which in turn will send a Notice of Electronic Filing to all registered participants.

Dated: August 1, 2013

/s/ Matthew A. Smith
Matthew A. Smith

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ALBERT R. CHAVIES and THOMAS HOLLAND, on behalf of themselves, individually, and on behalf of all others similarly situated, and on behalf of the CHE Plans,

Plaintiffs,

v.

CATHOLIC HEALTH EAST, a Pennsylvania Non-profit Corporation, ANTHONY CAMARATTO, an individual CLAYTON FITZHUGH, an individual, and JOHN and JANE DOES, each an individual, 1-20,

Defendants.

Civil Action No. 2:13-01645-CDJ

CLASS ACTION

[PROPOSED] ORDER

The Court having considered the Defendants' Motion To Dismiss The Complaint (D.E. # 33), Defendants' Memorandum In Support of Defendants' Motion To Dismiss, and Plaintiffs' response thereto, it is hereby ORDERED that the Defendants' Motion is Dismiss DENIED in its entirety.

BY THE COURT:

_____
Hon. C. Darnell Jones, II
United States District Judge

Dated: _____, 2013