

No. 19-

1144

IN THE  
**Supreme Court of the United States**

MICHAEL MCCARRON,

*Petitioner,*

*v.*

DECARLO & SHANLEY, P.C.,

*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

**I.** Does The Employee Retirement Income Security Act of 1974 (“ERISA”) (29 U.S.C. §1144(a)), preempt state law claims of a labor union official against a private law firm based upon improper and potentially unlawful legal advice which instructed the labor union official to take actions designed to personally harm the labor union officer to the benefit the law firm that provided such advice?

**PARTIES TO THE PROCEEDINGS**

Michael McCarron, Petitioner.

DeCarlo & Shanley, P.C., Respondent.

The Southwest Regional Council of Carpenters,  
Respondent to the Appeal.

### **CORPORATE DISCLOSURE STATEMENT**

Petitioner Michael McCarron does not believe DeCarlo & Shanley, P.C. a law firm has a parent or subsidiary corporation and that no publicly held company has any ownership interest therein.

Petitioner Michael McCarron does not believe The Southwest Regional Council of Carpenters, a labor union which is not part of this Petition, but was a party to the appellate proceedings below, has a parent or subsidiary corporation and that no publicly held company has any ownership interest therein.

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## RELATED CASES

*Southwest Regional Council of Carpenters v. Michael McCarron*, United States District Court, Central District of California, Case Number 2:14-cv-02762-JVS-JC, amended final judgment entered January 4, 2019.

*Southwest Regional Council of Carpenters v. Michael McCarron*, United States Court of Appeals for the Ninth Circuit, Case Number 19-55154, judgment entered November 25, 2019.

*Southwest Regional Council of Carpenters v. Michael McCarron*, United States Court of Appeals for the Ninth Circuit, Case Number 15-55879, final amended judgment entered April 23, 2018.

## TABLE OF CONTENTS

	<i>Page</i>
QUESTION PRESENTED .....	i
PARTIES TO THE PROCEEDINGS.....	ii
CORPORATE DISCLOSURE STATEMENT .....	iii
RELATED CASES .....	iv
TABLE OF CONTENTS.....	v
TABLE OF APPENDICES .....	vi
TABLE OF CITED AUTHORITIES.....	vii
OPINION BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	1
STATEMENT OF THE CASE .....	2
REASONS FOR GRANTING THE PETITION.....	5
CONCLUSION .....	6

**TABLE OF APPENDICES**

	<i>Page</i>
APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED NOVEMBER 27, 2019.....	1a
APPENDIX B — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DATED JANUARY 4, 2019.....	4a
APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DATED NOVEMBER 19, 2018.....	7a
APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED DECEMBER 16, 2018.....	20a

## TABLE OF CITED AUTHORITIES

	<i>Page</i>
<b>FEDERAL CASES</b>	
<i>Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan,</i> 2019 U.S. App. LEXIS 27418 (5th Cir. September 11, 2019) .....	5
<i>Rudel v. Hawaii Management Alliance Association,</i> 2019 U.S. App. LEXIS 27371 (9th Cir. 2019) .....	5
<b>STATUTES</b>	
28 U.S.C. § 1254(1).....	1
29 U.S.C. § 501(a).....	4
29 U.S.C. § 1003(a).....	2
29 U.S.C. § 1003(b) .....	2
29 U.S.C. § 1144(a).....	1
29 U.S.C. § 1144(b).....	2
Fed. R. Civ. P. § 12(b)(6) .....	4
Fed. R. Civ. P. § 14(a).....	1

**OPINION BELOW**

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit is included herein as Appendix A (page 1a). The Amended Order of the United States District Court, Central District of California is included herein as Appendix B (page 4a). The Order of the United States District Court, Central District of California is included herein as Appendix C (page 7a). The Denial of Rehearing of the United States Court of Appeals for the Ninth Circuit is included herein as Appendix D (page 20a).

**JURISDICTION**

This Court has jurisdiction of this petition to review the judgment of the United States Court of Appeal for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1). The Ninth Circuit's memorandum opinion was filed on November 27, 2019 and Petitioner's Petition for Rehearing was denied on December 16, 2019

The district court had subject matter jurisdiction of McCarron's claims pursuant to Federal Rules of Civil Procedure § 14(a), which claims were dependent in some way on the claims of the Southwest Regional Council of Carpenters ("SWRCC") against McCarron in SWRCC's original complaint.

**STATUTORY PROVISIONS INVOLVED**

The Employee Retirement Income Security Act of 1974 (29 U.S.C. §1144(a)):

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

#### **STATEMENT OF THE CASE**

SWRCC is a labor union organized with the United Brotherhood of Carpenters and Joiners of America (“UBC”). The Southwest Training Fund (“SWTF”) is a multi-employer benefit plan that provides an apprenticeship program for union carpenters. McCarron served as the Executive Secretary-Treasurer of SWRCC from August 1999 to August 2013. McCarron was the SWRCC’s chief executive officer and responsible for its day to day business. It should also be noted that McCarron’s brother, Douglas McCarron (“Douglas”) was and still is the general president of the UBC as well as a Trustee of the SWTF; Chairman of the Southwest Carpenters Trust Funds, and a political rival of Petitioner.

Initially, the SWRCC filed a complaint against Petitioner Michael McCarron (“Petitioner” or “McCarron”), a union official based upon claims that McCarron issued refunds on lease payments from SWRCC to the Southwest Carpenter’s Training Fund (“SWTF”) which were above market rate, due to the 2008 real estate market collapse. McCarron also counterclaimed against SWRCC, Respondent the law firm of Decarlo & Shanley, P.C. (“D&S” or “Respondent”), and other parties not relevant

to this petition. McCarron's claims against D&S were for indemnity and contribution, as well as state law claims for negligence, breach of fiduciary duty, breach of contract, fraud and conspiracy.

As alleged in McCarron's third party complaint, SWRCC leased properties to SWTF for use as training facilities. D&S knew Petitioner was preparing to meet with other law firms to replace D&S as counsel for SWRCC and the SWTF. It was also rumored of the possibility that Petitioner would run against his brother, Douglas, for president of the UBC. These facts lead D&S and Douglas to conspire to remove Petitioner from the Union. The conspiratorial scheme was to misrepresent the SWTF lease overpayment billings to the SWRCC, by claiming Petitioner reverse engineered the SWTF leases, creating the lease overcharges, to bolster the SWRCC treasury, meaning the SWTF claimed SWRCC illegally overcharged SWTF for leases. On May 31, 2013, SWTF billed SWRCC \$4,736,970.52 (including compound interest) for alleged rent overcharges on the leased premises. On June 21, 2013 SWTF billed SWRCC a total of \$627,999.59 (including compound interest) for additional alleged rent overcharges. D&S attorney John DeCarlo, counsel to the SWRCC instructed McCarron, the Executive Secretary Treasurer of SWRCC to refund the overcharged lease payments to SWTF because of an upcoming Department of Labor ("DOL") audit. Acting on this advice (and, in fact, insistence) McCarron returned the overcharged lease payments from SWRCC to SWTF, following those procedures required of him.

Thereafter, in a star chamber proceeding, where McCarron was not permitted to have an attorney

represent him, McCarron was removed from the SWRCC and SWTF at a union disciplinary hearing, based primarily, but not exclusively, on the refund of monies from SWRCC to SWTF (again, properly done and done at the insistence of D&S). Thereafter, in April of 2014, SWRCC sued McCarron alleging violation of the LMRDA (29 U.S.C. § 501 (a)), claiming that SWRCC was injured by McCarron's reimbursement of overcharged lease payments as between SWRCC and SWTF. Of particular note is that this lawsuit was filed on behalf of SWRCC by D&S, the very law firm that told McCarron to refund the overcharged lease payments in the first instance. That is, D&S filed a lawsuit on behalf of SWRCC against McCarron for taking D&S' own advice. McCarron was ultimately vindicated by judgment on all claims brought by SWRCC against him.

D&S, the very law firm responsible for providing advice to McCarron was the same firm that turned around and sued McCarron for taking their advice (if not actual demands). McCarron's actions saved SWRCC significant sums of money, and his reward was termination and a lawsuit seeking to financially ruin him.

On November 19, 2018, the District Court heard and granted D&S' motion to dismiss (FRCP § 12(b)(6)), which was the last remaining matter in the action. Final Judgment was rendered on January 4, 2019. Thereafter, McCarron filed an appeal to the Ninth Circuit which ultimately affirmed the district court and McCarron's Petition for Rehearing was similarly denied.

## REASONS FOR GRANTING THE PETITION

This Court should grant the petition and review the judgment of the Ninth Circuit Court of Appeals because of the significant split of authority nationwide as to the scope and breadth of ERISA preemption. ERISA preemption has been a quagmire that has vexed courts, attorneys and litigants alike since its inception. This Court as well as appellate and district courts have raised the issue on numerous occasions, but, as of yet, no bright line test has yet to be adopted. Appellate courts throughout the country have split on the issue of ERISA preemption, as to which claims are, and which claims are not preempted by ERISA. This split is especially prevalent when, in cases such as this one, touch an ERISA governed relationship, but are common law claims which are not, in and of themselves governed by ERISA.

Two recent cases illustrate the difficulty lower courts currently have determining the scope of ERISA preemption. In *Rudel v. Hawaii Management Alliance Association* (9<sup>th</sup> Cir. 2019) 2019 U.S. App, LEXIS 27371, the Ninth Circuit held that in a case involving the right of a plan which paid medical benefits to seek reimbursement of out of pocket expenses against a third party tortfeasor, while the state law “related to” an ERISA plan, there was no ERISA preemption, favoring state law regulating insurance. Conversely, in *Dialysis Newco, Inc. v. Cnty. Health Sys. Grp. Health Plan* (5<sup>th</sup> Cir. September 11, 2019) 2019 U.S. App. LEXIS 27418, the Fifth Circuit found ERISA preemption holding that a third party claim which could not be assigned was preempted because the state statute “related to” the ERISA plan, but impacted a “central matter of plan administration” which interfered

with “nationally uniform plan administration.” These two recent cases are but a small, yet further example of how courts continue to struggle to determine the scope and breadth of ERISA preemption. This case provides this Court an opportunity to create a bright line test as to which state law claims are, and which are not preempted by ERISA and provide finality to settle this issue.

### CONCLUSION

For the above and foregoing reasons, Petitioner requests the issuance of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED: March 16, 2020 Respectfully submitted,

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## **APPENDIX**