No. 19-1144

In the

Supreme Court of the United States

MICHAEL McCARRON,

Petitioner,

v.

DeCARLO & SHANLEY, P.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

BRIEF FOR RESPONDENT

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PARTIES TO THE PROCEEDING

Michael McCarron, Petitioner.

DeCarlo & Shanley, P.C., Respondent.

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

CORPORATE DISCLOSURE STATEMENT

Respondent DeCarlo & Shanley, P.C. is a law firm that does not have a parent or subsidiary corporation and no publicly held company has any ownership therein.

Respondent Southwest Regional Council of Carpenters is a Labor Union and does not have a parent company or subsidiary corporation and no publicly owned company has any ownership interest therein. Southwest Regional Council of Carpenters is not part of this Petition, but was a party to the appellate proceeding.

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INTRODUCTION

Certiorari should not be granted for many reasons, including that there is no Circuit conflict between the cases presented by Petitioner Mike McCarron. Nor are the cases presented by McCarron—which involve ERISA benefit claims—similar to this case which involved prohibited transactions. There are also clear factual disputes in what the Petitioner asserts in this Petition from what he has successfully argued in other proceedings before the Ninth Circuit where he got a $5 million dollars damage award overturned. Here McCarron argues there were no overcharged rents, but in his successful appeal against the Southwest Regional Council of Carpenters he demonstrated that the rents were overcharged which necessitated his payment of $5 million dollars. Finally, there are numerous grounds

beyond ERISA preemption which doom McCarron's state law claims.

ARGUMENT

Petitioner Mike McCarron was the head of the Southwest Regional Council of Carpenters ("SWRCC") and a trustee of the Southwest Carpenters Training Fund ("Training Fund"), an ERISA governed fund. McCarron was a fiduciary and party in interest. 29 U.S.C. § 1002(14)(A). The SWRCC was a party-in-interest. 29 U.S.C. § 1002(14)(D); *see also* 29 U.S.C. § 1002(16)(B).

McCarron caused the SWRCC to enter certain leases with the Training Fund. These leases were well-over $5 million dollars above-market. These leases were prohibited transactions. 29 U.S.C. §§ 1106(a)(1)(a), 1108(b)(2). The United States Department of Labor ("USDOL") investigated the matter and determined that McCarron (and the other

trustees) had violated ERISA by causing the SWRCC to overcharge rents to the Training Fund, but that no action would be taken against McCarron because he had repaid the overcharges. The DOL explained:

> From 2008 through 2013, it was revealed that the Training Fund had paid rent to the SWRCC that was *grossly in excess* of comparable rental values to the lease agreements entered into prior to May 2009. Specifically, based on an assessment of comparable fair market rental values, it was concluded that the Training Fund had paid rent to the SWRCC that was $5,843,434.25 in excess of fair market rental values from 2008 through June 2013.
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> Because the terms of the lease agreements and the amounts paid by the Training Fund were in excess of comparable market rates, this office has determined that the lease agreements did not constitute a reasonable arrangement, and the amount paid by the Training Fund to the SWRCC was more than reasonable compensation. Additionally, this office has determined that the amount paid by the Training Fund of the SWRCC was in excess of adequate consideration. Consequently, the conditions of ERISA Sections 408(b)(2) and (17) were not met.
>
> By having caused the Training Fund to enter into lease agreements with a party

> in interest with terms that were in excess of market rates, and by having caused the Training Fund to make such excessive rent payments to a party in interest, the board, and the Trustees, individually, failed to discharge their duties with respect to the Training Fund solely in the interests of, and to provide benefits to, participants and beneficiaries, failed to defray reasonable expenses of administering the Training Fund, acted imprudently, caused the Training Fund to enter into non-exempt lease agreements with a party in interest, and caused assets of the Training Fund to be used for the benefit of a party in interest, in violation of ERISA Sections 401 (a)(1)(A) and (B), and 406(a)(1)(A) and (D).

District Court Docket, C.D. Cal., 14-cv-02762, ECF 443-2 (emphasis added).

McCarron sued both the Training Fund and DeCarlo & Shanley under state law claiming that they "conspired" against McCarron by advising him to repay the rent overcharges before the USDOL completed its investigation. District Court Docket, C.D. Cal., 14-cv-02762, ECF 330, First Amended Third-Party Complaint ¶ 16 ("D&S conspired with the SWTF to submit 'bills' for alleged 'overcharge' leases

…"); ¶ 65 (D&S conspired with its client, SWTF, to cause McCarron to pay the SWTF two 'bills' in response to alleged 'overcharged' leases."); ¶ 66 ("D&S conspired with the SWTF to have these 'bills', seeking $5,364,970.10, sent to McCarron."); ¶ 67 ("An agreement was made by D&S and the SWTF … to commit the wrongful act of enriching the SWTF to the tune of $5,364,970.10 at the expense of McCarron, while manufacturing grounds to remove McCarron from his position as EST.").

In an earlier ruling, the district court found that McCarron violated his LMRDA Section 501 (29 U.S.C. § 501) fiduciary duties by failing to obtain proper authorization before repaying the millions of dollars in rent overcharges he caused. McCarron appealed this ruling. McCarron argued that, even if he breached his Section 501 duties, his breach caused no damages because the overcharged rents had to be

returned. The Ninth Circuit agreed and overturned the damage award, but upheld the Section 501 liability finding against McCarron. *Sw. Reg'l Council of Carpenters v. McCarron*, 731 F. App'x 600, 602 (2018) ("The district court properly granted summary judgment as to liability on SWRCC's claim of breach of fiduciary duty under LMRDA § 501(a) because McCarron violated SWRCC's bylaws, and thus breached his fiduciary duties as a union officer as a matter of law, by making payments to the Southwest Carpenters Training Fund ('SWTF') without first referring SWTF's rental overpayment bills to SWRCC trustees for review.").

The Training Fund filed a motion to dismiss on, *inter alia*, ERISA preemption grounds. The district court asked the USDOL for its opinion whether such state law claims were preempted by EIRSA. The USDOL determined that in its judgment McCarron's

claims were preempted because they related to ERISA. District Court Docket, C.D. Cal., 14-cv-02762, ECF 451 [Statement of Interest at 5-10]. The district court agreed, dismissing the claims against the Training Fund.

D&S also filed a motion to dismiss on numerous grounds, including ERISA preemption, no right of indemnification under the LMRDA, expired statute of limitations, no duty owed by D&S to McCarron individually because its clients were the Training Fund and the SWRCC, lack of damages because the money he repaid for overcharged rents was owed by the SWRCC, and judicial estoppel to now assert that there were no rent overcharges because his prior appeal before the Ninth Circuit was expressly based on his argument and court finding that there were rent overcharges.

The district court granted D&S's motion to dismiss on ERISA preemption grounds, and the Ninth Circuit affirmed in the decision raised by Petitioner here. McCarron's claims were preempted by ERISA because his state law claims "related to" an ERISA benefit plan. *See Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) ("ERISA pre-empts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.' 29 U. S. C. § 1144(a).").

PETITIONER PRESENTS NO CIRCUIT CONFLICT AND FACTUAL DISPUTES ABOUND

McCarron's only argument as to why Certiorari should be granted is to resolve allegedly a Circuit split. But there is no Circuit split in the cases proffered by McCarron, and the cases proffered—benefit cases—are factually inapposite to the prohibited transactions he engaged in here, as are the

facts proffered by McCarron (e.g., no overcharged rents).

McCarron asserts a conflict between the 9th Circuit in *Rudel v. Hawaii Management Alliance Ass'n*, 937 F.3d 1262 (9th Cir. 2019) and the 5th Circuit in *Dialysis Newco v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246 (5th Cir. 2019). These cases involve state law in the context of plan benefits, not ERISA preemption in the context of Section 406(a) prohibited transactions involving illegal leases and rent overcharges by a party in interest. These cases do not present a Circuit split, and each Circuit cites to the other Circuit's cases as good authority in its analysis. *E.g. Rudel*, 937 F.3d at 1271 ("In reaching the conclusion that challenges to a plan's right to reimbursement are properly characterized as § 502(a) claims, we join the Third, Fourth and *Fifth* Circuits."); *Dialysis Newco*, 938 F.3d at 254-55 ("an 'assignment'

is 'distinct from merely an authorization for direct payments.'" citing *accord, e.g., Spinedex Physical Therapy USA Inc. v. United healthcare Ariz., Inc.* 770 F.3d 1282, 1296 (9th Cir. 2014) ("Anti-assignment clauses in ERISA plans are valid and enforceable.").

In *Rudel*, a health plan participant challenged a lien under state law that had been placed on a settlement by his ERISA fund. The plan removed his action from state court to federal court on the basis of Section 502 complete preemption. *Id.*, 937 F.3d at 170-172. The Ninth Circuit upheld removal because the participant's claim was really a benefit determination claim and thus the state law was preempted but found that the state law lien was "saved" from preemption under Section 514's "savings clause." *Id.*, 937 F.3d at 1274 ("the district court correctly concluded that the Hawai'i Statutes are saved from express preemption under § 514 because

they are directed at insurance practices and impact risk pooling.").

In *Dialysis Newco*, a participant assigned his right to benefits and right to sue an ERISA plan for benefits. The Fifth Circuit found the state law that purportedly invalidated the plan's anti-assignment clause preempted by ERISA because it "impacts a 'central matter of plan administration' and 'interferes with national uniform plan administration.'" *Id.*, 938 F.3d at 260, *quoting Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016). Section 514's insurance "savings clause" was not in issue.

In these cases, the Ninth Circuit and Fifth Circuit both relied on each other's precedent in correctly finding ERISA preemption. Although the Ninth Circuit's analysis went further to find that the state insurance law was saved from preemption under Section 514's "savings clause," this issue was not

presented in the Fifth Circuit case, and thus was of no moment. No Circuit conflict is found in these cases, and Petitioner presents no other basis upon which to grant its request.

Moreover, McCarron's argument here, and claims against D&S, are based on a theory that there *were* no rent-overcharges. However, before the Ninth Circuit in an earlier appeal he successfully argued that there were rent overcharges that had to be returned, and the damage award of over $5 million dollars was reversed. These and other factual and legal disputes, including numerous state law defenses, render this case not an appropriate one for review.

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CONCLUSION

Without a Circuit conflict presented, and clear factual disputes between McCarron's two different stories before separate Ninth Circuit panels, Certiorari should be denied.

DATED: May 18, 2020

Respectfully submitted,

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