NO. _____

In the Supreme Court of the United States

SAMUEL GONZALES,
Petitioner,

v.

CONOCOPHILLIPS COMPANY; FRANK ALEXANDER; DAN MECHAM; CONOCOPHILLIPS SEVERANCE PAY PLAN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether and to what extent district courts must consider ERISA's purpose "to protect *** the interests of participants in employee benefit plans and their beneficiaries," 29 U.S.C. § 1001(b), in exercising their discretion to award attorney's fees to a successful defendant under 29 U.S.C. § 1132(g)(1).

2. Whether the burden-shifting framework established by *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) for proving discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which is "designed to assure that the plaintiff [has] his day in court despite the unavailability of direct evidence," *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (internal quotation omitted), applies when the plaintiff can prove discrimination by direct evidence.

STATEMENT OF RELATED PROCEEDINGS

Samuel Gonzales v. *ConocoPhillips Company; Frank Alexander; Dan Mecham; ConocoPhillips Pay Plan*, Nos. 19-20285, 19-20467 (CA5) (opinion issued and judgment entered April 3, 2020)

Samuel Gonzales v. *ConocoPhillips Company; Frank Alexander; Dan Mecham; ConocoPhillips Pay Plan*, No. 4:17-CV-2374 (S.D. Tex.) (opinion issued and judgment entered April 11, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel Gonzales respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

INTRODUCTION

This petition concerns a critically important issue of statutory interpretation regarding Section 502(g)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(g)(1): how to square this provisions allowance for attorney's fees to "either party" with ERISA's textual commitment "to protect *** the interests

of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b).

These dueling textual imperatives have created a "conundrum" for lower courts, *Martin* v. *Arkansas Blue Cross & Blue Shield*, 299 F.3d 966, 969 (8th Cir. 2002), because Section 502(g)(1) might make fees available to either side, but is silent on whether this means fees are available *on equal terms* to each side. And allowing defendants to obtain fee awards as plaintiffs enjoy would threaten to "chill[]" ERISA "suits brought in good faith"—the very mechanism by which Congress sought to protect participants and beneficiaries. *Salovaara* v. *Eckert,* 222 F.3d 19, 28 (2d Cir. 2000). After all, potential ERISA claimants contemplating suit must consider the likelihood that even if they win, their recovery might be cannibalized by attorney's fees. If they lose, they might have to bear the other side's fees too. This could dissuade even the most worthy ERISA claimants, because, as this Court has recognized, "the course of litigation is rarely predictable," *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 422 (1978), and courts have an acknowledged tendency to employ "post hoc reasoning" in assessing attorney's fees, "by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation," *id.* at 421-422. Without a realistic opportunity to obtain fees, and avoid being saddled with the other side's fees, a lawsuit might seem too much a gamble. And that would mean the very benefits ERISA sought to provide to participants and beneficiaries would be lost for "all but the most airtight claims." *Id.* at 421.

Balancing ERISA's dealing textual concerns is therefore a core concern of lower courts, and the subject of a longstanding, multi-faced, deeply entrenched and

acknowledged circuit split. Most circuits require that district courts take ERISA's remedial purpose into account in employing five universally employed factors, transforming them into an asymmetric standard that cuts different ways based on whether the fee claimant is the plaintiff or defendant, and does so in a manner that "very frequently suggests that attorney fees should not be charged against ERISA plaintiffs"—not without some evidence that the claims were insubstantial or brought for improper reasons. *Operating Eng'rs Pension Trust* v. *Gilliam*, 737 F.2d 1501, 1506 (9th Cir. 1984). The Fifth Circuit, by contrast, employs a claimant-blind standard. The Fifth Circuit may have traditionally employed the same "five factors" as other courts, but it refuses to force—or even permit—district courts to account for ERISA's remedial purpose in employing them, and thus allows fee awards to defendants that might chill other deserving plaintiffs from bringing suit.

This conflict has only deepened after this Court's decision in *Hardt* v. *Reliance Standard Life Ins. Co.*, 560 U.S. 242 (2010), which made fees available to any party that has achieved "some degree of success on the merits," *id.* at 245, thereby casting doubt on the five factors' future. The vast majority of circuits have held that Hardt did not disturb circuits' use of the five factors. Yet the Fifth Circuit, virtually alone, takes *Hardt* as making the factors completely voluntary for lower courts, making success—and success alone—the lone legal principle guiding district courts' discretion in awarding fees. The upshot is that district courts in the Fifth Circuit are free to give attorney's fees to any successful defendant, on any terms, even in a close case brought in the utmost good faith. And that means prospective ERISA plaintiffs are subject to a

chilling penalty on exercise of their statutory ERISA rights that is imposed nowhere else. The conflict between the Fifth Circuit and others cannot be allowed to persist.

And this is the case to resolve the conflict. This is was a close case in which the district court found no evidence of bad faith or improper motive—because no such evidence exists. It awarded fees to Respondents solely because Gonzales lost. In any other circuit, that award would have been vacated. Accordingly, the only reason Gonzales is forced to pay over $180,000 in fees is that his claims arose in the Fifth Circuit. This case therefore puts the rub to the distinction between the standards employed in the Fifth Circuit and virtually everywhere else. Plenary review should be granted on this question.

This question is joined with another on Gonzalez's Title VII claim that also deserves this Court's attention. The lower court breaks with decades of Supreme Court precedent, and decisions of other circuits, that restricts this Court's burden-shifting format from *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) to cases involving only *circumstantial* evidence of discrimination. But Gonzales has direct evidence of discrimination: a ConocoPhillips policy that explicitly targeted expatriate American ConocoPhillips employees working abroad for termination on the basis of their national origin. It is unfair and improper to mechanically apply *McDonnell Douglas* where such direct evidence exists—thereby giving a defendant a chance to explain-away obvious discrimination as if it could be something else. Plenary review is appropriate for this question as well.

The petition should be granted.

OPINIONS BELOW

The Fifth Circuit's opinion (App., *infra*, 1a-7a) is reproduced at 806 Fed. App'x 289. Its order denying rehearing (*id*. 8a-9a) is unpublished. The relevant district court' orders and opinions (*id.* 10a-17a) are unpublished.

JURISDICTION

The Fifth Circuit issued its opinion and judgment on April 3, 2020 (App., *infra*, 1a-7a), and denied a timely en banc petition on June 9, 2020 (App., *infra*, 8a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the United States Code at issue in this case are reproduced in the appendix. (App., *infra*, 19a)

STATEMENT

A. Background

1. Congress enacted ERISA "to protect *** the interests of participants in employee benefit plans and their beneficiaries *** by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts" when those standards are violated. 29 U.S.C. § 1001(b). One of the "remedies" ERISA provides is awards of attorney's fees in suits brought by plan participants or beneficiaries under Section 502. 29 U.S.C. § 1132(a)(1)(B). Fee awards are governed by Section 502(g)(1), which states:

> In any action under this subchapter *** by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1132(g)(1).

2. In *Hardt*, this Court determined a party need only achieve "some degree of success on the merits to recover fees. 560 U.S. at 244. But while Section 502(g)(1) gives district courts discretion to award fees to either successful plaintiffs or successful defendants, it is silent on whether both can obtain fees on equal terms.

This Court has held that similarly worded statutes conveying district courts "discretion" to award fees imposed no such equal-terms mandate, but rather imposed asymmetric standards where necessary to protect Congress's "policy" objectives embodied in the fee-award statute. Indeed, *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 401, 402 (1968), the Court imposed an automatic presumption that plaintiffs recover fees unless "special circumstances would render such an award unjust" in interpreting Section 204(b) of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), another statute that gives district courts "discretion" to award fees. But in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 414 (1978), the Court interpreted the same language in Title VII giving district courts "discretion" to "allow the prevailing party" a reasonable fee, 42 U.S.C. § 2000e–5(b), to impose the opposite presumption for prevailing defendants, requiring that they should be *denied* fees, unless the district court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation." 434 U.S. at 421.

The Court deemed the *Piggie Park* plaintiff-side presumption necessary to incentivize the civil rights plaintiff, who sues "not for himself alone but also as a private attorney general" vindicating congressional priority of "the highest priority." 390 U.S. at 402. And it deemed the opposite *Christiansburg Garment* presumption necessary to

avoid "substantially add[ing] to the risks inherent in most litigation" and "undercut[ing] the efforts of Congress to promote the vigorous enforcement of" the rights Congress creates." 434 U.S. at 422. And the Court has maintained that asymmetric standard ever sense. *CRST Van Express, Inc.* v. *EEOC*, 136 S. Ct. 1642, 1467 (2016).

The Court has extended this asymmetric approach to other statutes based on their "similarity of language" and "common raison d'etre." *Northcross* v. *Bd. of Educ.*, 412 U.S. 427, 428 (1973) (applying the *Piggie Park* plaintiff-side presumption to Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, which provides that "the court, in its discretion," may award fees to the prevailing party); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975) (holding the same for Title VII); *Hughes* v. *Rowe*, 449 U.S. 5, 7, 14 (1980) (per curiam) (adopting the *Christiansburg Garment* defendant-side presumption to suits under 42 U.S.C. § 1983); *Pennsylvania* v. *Delaware Valley Citizens' Council*, 478 U.S. 546, 560 (1986) (doing the same for defendant awards under Section 304(d) of the Clean Air Act, 84 Stat. 1706, 42 U.S.C. § 7604(d), which similarly provides that the district court "may" award fees to "either party").

3. The Court has never addressed whether ERISA Section 502(g)(1) is subject to such an asymmetric standard. But a clear circuit majority holds that such an approach is required to protect ERISA's "remedial purpose: to protect beneficiaries of pension plans," e.g., *Meredith* v. *Navistar Int'l Transp. Corp.*, 935 F.2d 124, 129 (7th Cir. 1991)—although few go so far as to impose the out-and-out presumptions of *Piggie Park* and *Christiansburg Garment*. Instead, a majority imposes an asymmetric standard on the factors employed by "virtually every court of

appeals" to channel district courts' discretion in awarding fees under Section 502(g)(1). *Gray* v. *New England Tel. & Tel. Co.*, 792 F.2d 251, 258 (1st Cir. 1986). Those factors, originally developed by the Tenth Circuit in *Eaves* v. *Penn*, 587 F.2d 453, 465 (10th Cir. 1978), generally include the following:

> (1) the degree of the offending parties' culpability or bad faith;
>
> (2) the degree of the ability of the offending parties to personally satisfy an award of attorneys fees;
>
> (3) whether or not an award of attorneys fees against the offending parties would deter other persons acting under similar circumstances;
>
> (4) the amount of benefit conferred on members of the pension plan as a whole; and
>
> (5) the relative merits of the parties' position.
>
> *Ibid.*

4. Under the asymmetric standard the majority imposes on these factors, successful plaintiffs "are more likely to be awarded attorneys' fees" than prevailing defendants, *Nachwalter* v. *Christie*, 805 F.2d 956, 962 (11th Cir. 1986), and "an award of attorneys' fees against an ERISA plaintiff will rarely be justified." *Leigh* v. *Engle*, 727 F.2d 113, 140 n.39 (7th Cir. 1984). The majority deems this dual standard essential to "prevent the chilling of suits brought in good faith," *Salovaara*, 222 F.2d at 28, and to preserve the critical role that "private actions by beneficiaries seeking in good faith to secure their rights under

employee benefit plans" has in preserving Congress's remedial purpose in ERISA. *Meredith*, 935 F.2d at 128–129. The majority deems this asymmetric approach the best way of respecting both "the remedial purpose of ERISA on behalf of beneficiaries and participants," stated in the text, and "the clear statutory language that makes fees available to '"either party."' *Honolulu Joint Apprenticeship & Training Comm. of United Ass'n Local Union No. 675* v. *Foster*, 332 F.3d 1234, 1240 (9th Cir. 2003) (quoting 29 U.S.C. § 1132(g)(1)).

5. Yet the Fifth Circuit stands virtually alone in refusing to give effect to ERISA's textually stated purpose of protecting ERISA plan participants and beneficiaries. It does not require district courts to consider ERISA's "remedial" purpose in deciding whether to award fees, even though the Fifth Circuit was the first to recognize the importance of that remedial purpose. *Dennard* v. *Richards Grp., Inc.*, 681 F.2d 306, 319 (5th Cir. 1982). And the Fifth Circuit refuses to employ either the "*Piggie Park*" plaintiff-favoring presumption to ERISA, or the "*Christiansburg Garment* bifurcation between prevailing plaintiffs and defendants." *Iron Workers Local No. 272* v. *Bowen*, 624 F.2d 1255, 1266 & n. 24 (5th Cir. 1980). Furthermore, while the Fifth Circuit has adopted the "five-factor" approach to fee awards, it has refused to instruct lower courts to consider ERISA's remedial approach in applying those factors. *Ibid.* And after *Hardt*, it made district courts' compliance with the five factors entirely optional, concluding that they do not "need to consider" them. *LifeCare Mgmt. Servs. LLC* v. *Ins. Mgmt. Admin. Inc.*, 703 F.3d 835, 846 (5th Cir. 2013). That discards any asymmetry that might be found in the factors themselves. Accordingly, in the Fifth Circuit, a district court can award

fees to a successful defendant without deciding whether the plaintiff has engaged in "bad faith" or "culpable" conduct, or raised insubstantial claims—-the most critical of the five factors. And it does not matter whether such an award risks deterring future ERISA plaintiffs. As this case amply illustrates, all that matters is whether the defendant has succeeded on the merits.

B. Factual background

Samuel Gonzales is a petroleum engineer who worked for several years on international assignment for ConocoPhillips in Australia. (App., *infra*, 2a) He was terminated from that position in 2016, after 9 years with the company, and denied severance benefits under the company's severance pay plan. (*Id.* 3a) Gonzales traced the circumstances of his termination to a policy that the company initiated in 2015, through which it sought to "nationalize" its workforce—"replac[ing] expat[]" employees working on projects outside their home countries "with nationals" from the countries where projects were located to avoid the "additional expenses" of supporting those expatriate employees. (ROA.19-20285.1280-1281, 1432)

Gonzales sued Respondents, claiming that denial of his severance benefits violated ERISA sections 502(a)(1)(B), 502(c), and 503. (App., *infra*, 2a) He also brought claims under Title VII and § 1981, claiming that ConocoPhillips' "nationalization" policy constitutes improper national-origin discrimination. (*Ibid.*)

Respondents sought summary judgment on both Gonzales's ERISA and Title VII claims. They claimed that Gonzales's termination had no connection to ConocoPhillips' "nationalization" policy. Instead, they contended it resulted from time Gonzales spent in immigration detention,

after his previous work visa had expired, and he was issued a "bridging" visa while his renewal application was processed. (*Id.* 2a.) But that "bridging" visa was cancelled after criminal charges were filed against him and he was detained. *(Id.* 2a-3a*)* ConocoPhillips maintained this detention left Gonzales "absen[t without leave" and unable "to perform his job duties." (*Id.* 3a) And ConocoPhillips maintained that the charge meant Gonzales had failed to "remain eligible" to obtain a new permanent work visa. (*Id.* 3a) That was so even though maintaining a visa was never listed as one of Gonzales's job requirements, and even after that charge was dropped under Section 25 "of the Criminal Procedure Act" of Western Australia, which is a dismissal for lack of evidence. (ROA.19-20285.1286)

But Gonzales provided evidence that ConocoPhillips' proffered reasons for his termination were contrived. For instance, he fatally undermined ConocoPhillips' narrative that his termination was traceable to his detention and criminal charge, rather than ConocoPhillips' "nationalization" policy, with evidence showing that *months* before the criminal charge was filed in February of 2016, ConocoPhillips had already planned to "nationalize" his role pursuant to the policy, "repatriate" him to the U.S., and likely "terminate[]" him. (ROA.19-20285.1280-1281, 1285) The charge and detention simply provided cover for the discriminatory decision ConocoPhillips had already made—a convenient way to avoid scrutiny of its "nationalization" policy and deny Gonzales severance benefits the company otherwise thought it would have to provide.

Gonzales also put the lie to ConocoPhillips' claim that the dropped charge rendered him ineligible for a renewal visa. While Australian immigration law provides that those *convicted* of certain crimes become categorically

ineligible for Gonzales's form of work visa, charges dropped for lack of evidence have *no* bearing in the eligibility determination. (ROA.19-20467.479) To the extent anything in Gonzales's past might have threatened his chances of getting a visa, it did not render him *ineligible*, but would instead be assessed according to softer criteria, to determine whether that history indicated he was a person who was "not of good character," or likely to engage in future "criminal conduct." (ROA.19-20467.479-480) Indeed, while Australian immigration officials eventually informed Gonzales that his visa was likely to be denied, they gave no indication that it was because of the dropped charge, his detention, or his character. (ROA.19-20285.1287 [R.E.12]) They instead indicated it was because—and only because—ConocoPhillips had withdrawn its sponsorship of Gonzales's visa when it decided to terminate him. (*Ibid.*)

Furthermore, Gonzales demonstrated the charge that he had been "absent without leave" during his detention was both inconsistent and incorrect. Gonzales presented evidence that the company allowed him to use vacation days until April 1, 2016, and thereafter placed him on "unpaid leave" for the remainder of his detention. (ROA.19-20285.1299 [R.E.13], 19-20285.1431 [R.E.22]) Accordingly, to the extent Gonzales had any difficulty "perform[ing] his job duties" during his detention, ConocoPhillips had *excused* that difficulty, only to claim later that it had not.

Gonzales contended that these inaccuracies and position-shifts in ConocoPhillips' reasons for his termination provided sufficient evidence to survive summary judgment on his Title VII claim, and to suggest that his termination was not for "good cause" so as to justify the denial of his severance benefits, thereby violating ERISA. Yet

the district court granted ConocoPhillips' motion for summary judgment on both claims (App., *infra* 10a-11a) and found "good cause" to award ConocoPhillips $186,000 in attorney's fees. (*Id.* 17a)

C. The decision below

1. A panel of this court affirmed. With regard to Gonzales's Title VII claim, the panel "appl[ied] the burden-shifting framework set forth in *McDonnell Douglas*" and held that "even assuming arguendo that Gonzales has established a prima facie case of discrimination, he has failed to demonstrate that ConocoPhillips' reason for terminating his employment was pretextual" as necessary to satisfy that framework. (App., *infra*, 5a-6a) It accepted uncritically ConocoPhillips' contention that it had terminated Gonzales because he was absent "without leave" after his vacation time ran out (*id.* at 6a), claiming this rendered him "unable to perform his job duties," and likewise parroted ConocoPhillips' contention that Gonzales "failed to maintain eligibility" for his work visa—never mentioning the evidence undermining each of those contentions. The panel therefore affirmed the dismissal of Gonzales's Title VII claim.

The panel then used those same basic contested facts about Gonzales's Title VII claim as the basis to affirm dismissal of his ERISA claims. The panel held that deferential review of the plan administrators' decision to deny Gonzales's severance was appropriate because ConocoPhillips' severance pay plan "delegates discretionary authority to the plan administrator" and it held that plan administrator's decision to deny Gonzales severance benefits was supported by "substantial evidence." (App., *infra* 4aa) The panel determined that "the Plan administrator

correctly found that Gonzales did not satisfy all of the Plan's "Qualifying Circumstances" necessary for severance benefits "because he did not suffer a layoff," but "was terminated for cause." (*Id.* 4a-5a) This despite the fact that the Plan administrator admitted he did not actually make *any* independent determination that Gonzales was terminated for cause, but simply relied on a notation in ConocoPhillips' personnel records. (ROA.19-20467.572, ¶10) Finally, the panel affirmed the award of attorney's fees in ConocoPhillips's favor, concluding that the grant of summary judgment for ConocoPhillips showed "'some degree of success on the merits'"—which was all circuit law after *Hardt* required for an award of attorney's fees. (App., *infra* 7a, quoting *North Cypress Med. Ctr. Operating Co., Ltd.* v. *Aetna Life Ins. Co.*, 898 F.3d 461, 485 (5th Cir. 2018)).

2. Stanley sought panel rehearing and en banc review, pointing out the inconsistency between the Fifth Circuit's lax standards for reviewing attorney's fee awards and the standards in other circuits, as well as the error in the the panel's application of the *McDonald Douglass* burden-shifting framework to a case involving direct evidence of employment discrimination. But the court denied review. (App., *infra*, 9a)

REASONS FOR GRANTING THE PETITION

The traditional criteria of certworthiness are all present here. There are acknowledged, wide-spread, and fully developed spits on both Questions Presented. Those questions are right now leading to different results in similar cases across jurisdictional lines. And this case is a compelling one for resolving both questions.

The case is of obvious national importance, embracing the standards applied in every circuit. The erroneous rules applied below will not only have serious adverse consequences for all ERISA plan participants and beneficiaries who might face an attorney's fee award, but will also adversely affect employees who faces the most serious, obvious, and invidious forms of workplace discrimination. And the standards employed by the Fifth Circuit on these questions cannot be justified under any rational conception of Title VII or ERISA law.

A. The Fifth Circuit conflicts with other circuits and this Courts' precedent on both Questions Presented.

Review is warranted because the Fifth Circuit's resolution of both Questions Presented conflicts with other circuits and this Court's precedent.

1. The conflict on the first Question Presented.

There are acknowledged, widespread, and entrenched conflicts encompassing all but one of the circuits on the first Question Presented. Those conflicts have only deepened in the wake of this Court's decision in *Hardt.* And the Fifth Circuit's position within those splits are unsupportable.

a. Even before the Court's opinion in *Hardt*, the circuits were divided over whether fee awards for successful plaintiffs and successful defendants must be judged by different standards to protect ERISA's essential remedial purpose. A majority holds that it must. For some in this camp, including the Fourth, Eighth, Eleventh, and D.C. Circuits, this asymmetric standard manifests as a pro-plaintiff gloss on all aspects of fee awards, including

consideration of the traditional five factors courts employ in determining such awards. *Quesinberry* v. *Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1030 (4th Cir. 1993) (holding that district court should "consider the remedial purposes of ERISA in making its determination regarding attorneys' fees"); *Eddy* v. *Colonial Life Ins. Co. of Am.*, 59 F.3d 201, 207 (D.C. Cir. 1995) (holding that ERISA's "statutory purpose" must be a "constant guide," "inform[ing] and channel[ing] the application and evaluation of the [five] factors"); *Martin*, 299 F.3d at 971 (holding that the factors should not be "mechanically applied" to avoid undermining "'both the substantive purpose of ERISA and the discretion vested in the courts to carry out that purpose.'") (quoting *Eddy*, 59 F.3d at 207); *Nachwalter* v. *Christie*, 805 F.2d 956, 962 (11th Cir. 1986) (holding that district courts, in "applying" the factors, "should bear in mind ERISA's essential remedial purpose: to protect beneficiaries of pension plans").

b. Other circuits have sought to protect ERISA's "remedial purpose" through a more explicitly asymmetric standard following the Seventh Circuit's decision in *Marquardt* v. *North American Car Corp.*, 652 F.2d 715 (7th Cir. 1981). *Marquardt* deemed such asymmetry to be required by *Christiansburg Garment*. *Marquardt* emphasized that the course of ERISA litigation is no more "'predictable'" than that under the Title II claims at issue in *Christiansburg Garment*. 652 F.2d at 720 n.6 (quoting 434 U.S. at 421). *Marquardt* also emphasized that ERISA claimants, like their "civil rights actions" cousins, often act as "'private attorney's general' in vindicating national policy," so it found *Christiansburg Garment*'s "reasons" for its "policy discouraging assessing attorneys" fees against plaintiffs" to be "applicable to ERISA cases." *Ibid.*

Yet *Marquardt* determined this public interest factor "is not as strongly applicable in ERISA actions" as it is in civil rights cases, so the court did not go so far as to adopt *Christiansburg Garment's* presumption against defendant awards. *Ibid.* Instead, it outlined certain "consideration[s]" that district courts must apply to the traditional "five-factor" test that cause it to toggle in different directions for successful plaintiffs than successful defendants. *Id.* at 720. First, *Marquardt* required courts to analyze the "culpability" of a losing beneficiary under the first factor differently from that of a losing employer: The latter has necessarily "violated ERISA," while the former may "only [be] in error or unable to prove his case." *Ibid.* Second, an employer "often will be in a position to pay its own fees while the employee will be hard pressed to pay both his own and the employer's fees"—especially if he is suing for benefits. *Ibid.* So *Marquardt* held the "ability to pay" factor will "rarely" counsel in favor of defendant awards. *Id.* at 721. It likewise directed that consideration of the "deterrence" factor also "generally will not justify" defendant awards, because defendants facing the prospect of paying attorney's fees to successful plaintiffs will have "added incentive to comply with ERISA." *Ibid.* But for a plaintiff beneficiary or participant, merely "bear[ing] his own attorneys' fees and costs" will be sufficient deterrent against filing "a frivolous or baseless suit." *Ibid.*

Marquardt also emphasized that the fourth and fifth factors point in different directions depending upon the fee claimant. See *id.* at 721. A successful ERISA suit will generally benefit "all participants in an ERISA plan" and beneficiaries will "have added incentive" to convey those benefits "if their attorneys' fees will be paid by defendants." *Id.* at 721. But employers seldom need a similar

incentive to defend ERISA suits. See *id.* at 721. And in evaluating the relative merits of the parties' positions, *Marquardt* emphasized that courts should be careful neither to penalize ERISA claimants for seeking to enforce employer obligations under ERISA nor to encourage employers to be indifferent to their obligations. *Ibid.*

c. Different circuits have approached *Marquardt*'s asymmetric standard in different ways. The Ninth Circuit for example, has directed district courts to give "careful consideration," *Tingey* v. *Pixley-Richards W., Inc.*, 958 F.2d 908, 909 (9th Cir. 1992) to "the considerations expressed in *Marquardt*" in deciding whether to award fees to successful defendants, *Carpenters S. Cal. Admin. Corp.* v. *Russell*, 726 F.2d 1410, 1416-1417 (9th Cir. 1984). But it departed from *Marquardt* in adopting the *Piggie Park* presumption for successful plaintiffs. *Smith* v. *CMTA-IAM Pension Tr.*, 746 F.2d 587, 589 (9th Cir. 1984).

Every circuit outside the Ninth has rejected this plaintiffs'-side presumption, and many have noted the conflict on the issue. *Cottrill* v. *Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 225–226 (1st Cir. 1996) (noting the conflict), *abrogated on other grounds by Hardt*, *supra*; *Gray*, 792 F.2d at 258 (noting the conflict); *McPherson* v. *Employees' Pension Plan of Am. Re–Ins. Co.,* 33 F.3d 253, 254 (3d Cir. 1994); *Custer* v. *Pan Am. Life Ins. Co.,* 12 F.3d 410, 422 (4th Cir. 1993); *Armistead* v. *Vernitron Corp.,* 944 F.2d 1287, 1302 (6th Cir. 1991); *Iron Workers Local No. 272* v. *Bowen,* 624 F.2d 1255, 1265–1266 (5th Cir. 1980); *Martin*, 299 F.3d at 970; *Florence Nightingale Nursing Serv., Inc.* v. *Blue Cross/Blue Shield,* 41 F.3d 1476, 1485–1486 (11th Cir. 1995); *Eddy*, 59 F.3d at 206-207.

But several circuits, including the First, Second, Fourth, and Sixth have joined the Ninth in expressly

requiring district courts to apply *Marquardt's* considerations before awarding fees to successful defendants. *Gray*, 792 F.3d at 258 (citing *Marquardt* and noting that the pro-plaintiff "bias" in the standard did not "thwart the legislative injunctive that attorney's fees may be awarded to 'either' party"); *Salovaara*, 222 F.3d at 28-29 (noting that courts should have "latitude" to "consider which party is requesting gees" and must apply the *Marquardt* criteria accordingly); *Firestone Tire & Rubber Co.* v. *Neusser*, 810 F.2d 550, 557 (6th Cir. 1987) (internal quotation omitted) (following *Marquardt*'s logic that certain factors, such as whether the suit benefited other plan participants or whether an award will "deter" bad conduct, militate against a defendant award because they are "more relevant to the question of whether attorney's fees should be awarded to ERISA plaintiffs than to ERISA defendants").

Courts in this camp have also specifically emphasized the first and third of the traditional factors—the culpability or "good faith" of the plaintiff in commencing the litigation and "relative merits" of her claims—in preserving ERISA's remedial purpose. *Beatty* v. *North Central Companies, Inc.*, 282 F.3d 602, 605-606 (8th Cir. 2002); see also *Toussaint* v. *JJ Weiser, Inc.*, 648 F.3d 108, 111 (2d Cir. 2011) (holding that the inquiry requires a "focus on the first *** factor: whether plaintiffs brought the complaint in good faith"); *United Bhd. of Carpenters & Joiners of Am.* v. *Endicott Enterprises, Inc.*, 806 F.2d 918, 923 (9th Cir. 1986) (finding it an abuse of discretion to award fees to a successful defendant absent plaintiff bad faith).

After *Marquardt*, the Seventh Circuit came around to an even stronger version of this position, holding that plaintiff's culpability, good faith, and the merits of her

position are *the only* important factors. At first, the court did so by adopting a standard outside of the five favors: one taken from the Equal Access to Justice Act, which permits fee awards only when the plaintiff's position was not "'substantially justified.'" *Bittner* v. *Sadoff & Rudoy Indus.*, 728 F.2d 820, 830 (7th Cir. 1984) (quoting 28 U.S.C. § 2412(d)(1)(A)). And after flirting with applying *both* the *Bittner*-based EAJA approach and the *Marquardt*-based five-factors approach, the Seventh Circuit eventually decided that "whichever approach is used, the bottom-line question is the same: was the losing party's position substantially justified and taken in good faith, or was that party simply out to harass its opponent?" *Meredith*, 935 F.2d at 128. And this "bottom-line question" must be answered with ERISA's "remedial" purpose in mind. *Id.* at 129.

That brings a grand total of eight circuits in the asymmetrical standards camp for fee awards under Section 502(g)(1): the First, Second, Fourth, Sixth, Seventh, Eighth, Ninth, Eleventh, and D.C.

d. By contrast, only the Third Circuit supports the Fifth's side in refusing to impose an explicitly asymmetrical approach in fee awards. *Ellison* v. *Shenago Inc. Pension Bd.*, 956 F.2d 1268, 1275 (3d Cir. 1992) (citing the Fifth Circuit's decision in *Bowen*, 625 F.2d 1265). And that support is highly qualified, because the Third Circuit has held that the "five factors" *alone* have sufficient asymmetry to "adequately address ERISA's policy concerns of remediation and deterrence." 956 F.2d at 1275. The only remaining circuit—the Tenth—has not squarely addressed the

issue.[1] This extensive conflict alone justifies this Court's intervention.

e. But this conflict has only deepened after *Hardt* brought the future of the five factors into question. *Hardt* held that the traditional "five factors" had no place in determining whether the district court's discretion to award fees was triggered, 560 U.S. at 254-255, finding them to have "no obvious relation to § 1132(g)(1)'s text or to our fee-shifting jurisprudence." *Id.* at 255. And the Court in dicta indicated that the factors "are not required for channeling a court's discretion" once that discretion is triggered. *Ibid.* Yet the Court expressly left open whether the factors might play a role "once a claimant has satisfied"

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[1] A similar division exists with regard to the amendments to ERISA's fee-shifting provision, 29 U.S.C. §§ 1001-1461, that were made by the Multiemployer Pension Plan Amendments Act (MPPAA), 29 U.S.C. §§ 1381-1483—which allows employers in certain multi-employer plans to sue the plan to recover benefits due their employees. 29 U.S.C. § 1451(a)(1). "[W]ith the exception of the Third Circuit, the five-factor test originally adopted for fee requests under section 1132(g)(1) has been applied universally in situations where employers have requested fees under the MPPAA." *Anita Foundations, Inc.* v. *ILGWU Nat. Ret. Fund*, 902 F.2d 185, 188 (2d Cir. 1990) (citing *Rootberg* v. *Central States, Southeast and Southwest Areas Pension Fund*, 856 F.2d 796, 798 (7th Cir. 1988); *Cuyamaca Meats, Inc.* v. *San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 827 F.2d 491, 500 (9th Cir. 1987); *Central States, Southeast and Southwest Areas Pension Fund* v. *888 Corp.*, 813 F.2d 760, 767 (6th Cir. 1987). And they do so with *Marquardt's* considerations in mind. *Anita*, 902 F.32d at 189. But the Third Circuit employs a "frivolous litigation standard" under which a prevailing employer will receive attorney's fees "only if the underlying claim against it was frivolous, unreasonable, or without foundation." *Dorn's Transportation, Inc.* v. *Teamsters Pension Trust Fund*, 799 F.2d 45, 46 (3d Cir. 1986).

the success requirement," and "thus becomes eligible for a fees award under § 1132(g)(1)." *Id.* at 255 n.8.

A majority of courts have concluded that *Hardt* left the five factors unchanged, requiring that they be applied despite *Hardt*'s dicta. *O'Callaghan* v. *SPX Corp.*, 442 Fed. App'x. 180, 186 (6th Cir. 2011) (holding that "*Hardt* does not change the district court's five-factor analysis," but simply "relaxes the threshold for eligibility for attorney's fees"); *Gastronomical Workers Union Local 610 & Metro. Hotel Ass'n Pension Fund* v. *Dorado Beach Hotel Corp.*, 617 F.3d 54, 66 (1st Cir. 2010) ("[T]he Justices did not necessarily prohibit consideration of the five factors"); *Williams* v. *Metro. Life Ins. Co.*, 609 F.3d 622, 635 (4th Cir. 2010) ("[O]nce a court in this Circuit determines that a litigant in an ERISA case has achieved some degree of success on the merits, the court should continue to apply the general guidelines that we identified *** when exercising its discretion to award attorneys' fees to an eligible party.") (internal quotation omitted); *Simonia* v. *Glendale Nissan/Infiniti Disability Plan*, 608 F.3d 1118, 1120-1121 (9th Cir. 2010) (holding that "after determining a litigant has achieved some degree of success on the merits, district courts must still consider the [] factors before exercising their discretion to award fees under § 1132(g)(1)"); *Treasurer, Trustees of Drury Indust., Inc. Health Care Plan & Trust* v. *Goding*, 692 F.3d 888, 898-899 (8th Cir. 2012) (same). As the factors survive in those jurisdictions, the asymmetric approach applied to those factors in these jurisdictions survives as well.

Indeed, even the Third Circuit, the only court to lend even qualified support to the Fifth Circuit's position, continues to require consideration of the traditional factors. *Nat'l Sec. Sys, Inc.* v. *Iola*, 700 F.3d 65, 103-104 (3d Cir.

2012) ("Once satisfied that a party has met that threshold standard [of "some degree of success on the merits"], the [district] court must consider the [five] policy factors in determining whether to award fees and costs.")

Yet even among the minority of circuits like the Fifth that have followed *Hardt*'s dicta and made the factors optional, most continue to retain an emphasis on ERISA's "remedial" purpose and continue requiring an asymmetrical approach to fee awards. The Second Circuit has held that *Hardt* "does not disturb" the circuit's "'favorable slant toward ERISA plaintiffs'" and requires courts to continue "focus[ing] on the first [] factor: whether plaintiffs brought the complaint in good faith." *Toussaint*, 648 F.3d at 111 (quoting *Salovaara*, 222 F.3d at 19). The Seventh Circuit has similarly held that while *Hardt* may have modified the part of the circuit's "bottom-line" approach focusing on whether the plaintiff's position was brought in "bad faith," it left in place the emphasis on whether the plaintiff's claims were "substantially justified," as required under *Bittner*'s EAJA-based approach. *Loomis* v. *Exelon Corp.*, 658 F.3d 667, 675 (7th Cir. 2011).

No circuit has come over to the Fifth Circuit's idea of a neutral, voluntary standard. Even the Third Circuit employs an asymmetric standard, if only because of the pro-plaintiff nature of the factors themselves. Accordingly, *Hardt* may have added dimensions to the split—dimensions that have now persisted for more than a decade—but it has not made the split go away.

f. There is no question that split is real and consequential. Any standard that requires district courts to explicitly consider ERISA's remedial purpose in making fee awards cannot be squared with a standard that prohibits such consideration of remedial purpose. A standard that explicitly

instructs district courts to pass on special considerations that make make fee awards more likely for succeeding plaintiffs than succeeding defendants, and vacates district court awards that fail to consider those special considerations, see *Paddack* v. *Morris*, 783 F.2d 844, 846 (9th Cir. 1986), cannot be squared with one that refuses to require district courts to employ those special considerations. Any standard that prohibits fee awards to successful plaintiffs absent plaintiff culpability, bad faith, or an "insubstantial" position, e.g., *Salovarra*, 222 F.3d at 28-29, cannot be squared with one that allows fees to defendants simply for succeeding. Any standard that requires reversal for a district court's refusal to consider the traditional factors, *Tomask*o v. *Weinstock*, 255 Fed. App'x 676, 680-681 (3d Cir. 2007) or if the district court abuses its discretion in applying them, *Firestone Tire & Rubber Co*. v. *Neusser*, 810 F.2d 550, 557 (6th Cir. 1987), cannot be squared with one making those factors entirely voluntary, especially when that saps any purpose-furthering benefit stemming from the five factors themselves. And finally, any standard that suggests fee awards should "rarely" be granted to successful defendants, and under which such awards are regularly overturned, cannot be squared with a standard under which such awards are routine. ERISA plaintiffs in the Fifth Circuits are therefore subject to attorney fee awards that are not tolerated anywhere else.

The split is also fully developed and entrenched. Every circuit save one has weighed in. The issue has arisen in hundreds of cases over the past decades. The view in most circuits has remained unchanged. And the Fifth Circuit is unlikely to come over to the majority, especially given that petitioner sought rehearing on this very question, but the court nonetheless denied review. Nothing will be gained

from further percolation. This is as complete and well-developed as any split gets, especially on a question as naturally fact-specific as employment of a multi-factor test.

g. The Court should use this case to address this conflict, because the Fifth Circuit's position within that split is plainly incorrect. Text, history, and precedent all require district courts to employ an asymmetric standard for awards of attorney's fees between successful defendants and successful plaintiffs under ERISA Section 502(g)(1), because ERISA is not a neutral statute. It protects the "interests of participants and *** beneficiaries," not plans. 29 U.S.C. § 1001(b). And the right to attorney's fees ERISA provides may be available to all litigants, but is a "remedy" that is specifically *for* the benefit of "plan participants" and "beneficiaries"—to protect their "ready access to the Federal courts." *Ibid.* Congress provided that remedy to address "possible concern that attorney's fees might present a barrier to maintenance of suits for small claims, thereby risking underenforcement of beneficiaries statutory rights." *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985).

It was precisely to avoid this chilling of statutory rights, and "undercut[ing] the efforts of Congress to promote the vigorous enforcement of" congressional objectives, that this Court has interpreted other statutes to impose asymmetrical standards. *Christiansburg Garment*, 434 U.S. at 422. *Christiansburg Garment* and *Piggie Park* thus confirm that Congress requires awards of attorney's fees to be aligned with Congress's statutory goals—it may be necessary, but not sufficient, simply to succeed.

And just as the similarity in language and purposes between Title II and Title VII and other statutes led the Court in *Piggie Park* and *Christiansburg Garment* to

expand the asymmetric approach to other statutes, the similarity in language and purposes between ERISA and these other statutes should dictate a similar asymmetric approach. This line of cases also forms an integral part of the "historic fee-shifting principles and intuitive notions of fairness' that have long guided this Court's interpretation of fee-shifting statutes." *Hardt*, 560 U.S. at 255 (internal quotation omitted). And following them is all the more logical because Congress obviously had in mind, and intended to endorse, the asymmetric standards established in *Piggie Park*, *supra*, decided in 1968, when it wrote ERISA in 1974, Pub. L. No. 93-406 (Sept. 2, 1974), 88 Stat. 829, even though *Christiansburg Garment* did not extend those asymmetric principles to defendant-side awards until 1978. Accordingly, that history should guide the Court to apply an asymmetric approach here.

Finally, the necessity for that asymmetric standard ultimately does not depend upon whether *Hardt* made the traditional five factors voluntary or not. Doing away with the five factors might do away with *Marquardt*'s specific considerations tied to those factors. But it does not change the reasoning in the majority of circuits reasoning that all aspects of fee awards under Section 502(g)(1) should be employed with ERISA's remedial purpose in mind. Nor does it change those courts' refusal to award fees to prevailing defendants absent bad faith, culpable conduct, or frivolous claims.

In any event, regardless of which among the several asymmetrical standards that have developed in the decade since *Hardt* is the correct one, the result that should absolutely not happen is what the Fifth Circuit allows, and the district court dutifully provided: an automatic, unreasoned assessment of fees against a plaintiff merely

because he ultimately proved unsuccessful. That imposes an undue punishment on a plaintiff merely for exercising the right to "ready access to the Federal Courts" ERISA meant to provide. 29 U.S.C. § 1001(b). And it poses an unacceptable risk of chilling the very behavior ERISA sought to foster. That approach cannot be squared with Congress's purposes in enacting ERISA.

None of this is to say employers have no legitimate interest in deterring frivolous litigation, or legitimate fear of being overwhelmed with the expense in defending against it. That is exactly why ERISA makes fee awards available to either party, and it is exactly why, even under the asymmetric standards employed in the majority of courts, fees are available to successful defendants when the district court finds that the plaintiff had an improper motive in bringing it, or the merits of his suit prove insubstantial. Accordingly, the majority approach balances the appropriate concerns of both plaintiffs and defendants. The Fifth Circuit approach, by contrast, overturns them, both over-compensating defendants and over-deterring plaintiffs. Its approach makes every ERISA claim subject to a stiff monetary penalty simply because it fails under one of the many creative procedural obstacles that employers are often able to raise against an ERISA beneficiary's claim. That would deter many meritorious claims—allowing employers to retain benefits they do not deserve—and encourage employer obstructionism, knowing that simply by advancing litigation, and incurring more fees, they would make it more likely that the plaintiff would have to drop out for fear of incurring heavy penalties. Plenary review is necessary to ensure that this erroneous approach is overturned.

2. The conflict on the second Question Presented.

Certiorari should also be granted on the second Question Presented because the decision below conflicts with the decisions of other circuits and this Court in subjecting Gonzales's Title VII claim to the "burden-shifting framework set forth in *McDonnell Douglas*." (App., *infra*, 5a) That framework requires the plaintiff in an employment discrimination case to "establish a prima facie case of employment discrimination," then the "burden of production shifts" to the employer to offer a "legitimate nondiscriminatory explanation" for the adverse employment action, at which point the plaintiff can show the proffered explanation "is merely a pretext for the discrimination." (*Ibid.*; *see also McDonnell Douglas*, 411 U.S. at 802, 804-05)

This burden-shifting framework is designed "to assure that the plaintiff [has] his day in court *despite* the unavailability of direct evidence." *Trans World Airlines*, 469 U.S. at 121 (internal quotation omitted). And its entire logic is tied to circumstances where discrimination is proven by circumstantial evidence: If the plaintiff is permitted to go forward merely by "offering evidence adequate to create an *inference* that an employment decision was based on a discriminatory criterion," *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 358 (1977) (emphasis added), then it is only fair that the defendant be afforded an opportunity to offer evidence to defeat those inferences before a Title VII claim is proven.

But there is no similar need to allow the defendant to reset the stage when it has offered up *direct* evidence of its discriminatory motive—the defendant has *told the world* it is discriminating. Accordingly, for more than three decades it has been settled that "the *McDonnell*

Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines*, 469 U.S. at 121. That remains settled law virtually everywhere outside the Fifth Circuit. See, e.g., *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 64 (lst Cir. 2002) (describing *McDonnell Douglas* as a "circumstantial evidence model").

The Fifth Circuit therefore broke with other courts in applying *McDonnell Douglas* to Gonzales's claims, because Gonzales has presented *direct* evidence that he has suffered employment discrimination—from ConocoPhillips' own admitted "nationalization" policy. A policy that subjects Gonzales to differential treatment simply because he is American—to the point that he was removed from a job *he already had* in order to give it to a non-American—is evidence of discrimination in plain sight, constituting direct evidence of cognizable national-origin discrimination. See, e.g., *Fortino* v. *Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991) (stating that Title VII protects Americans from discrimination in favor of foreign workers).

But application of the *McDonnell Douglass* burden-shifting scheme to Gonzalez's claims perversely allowed ConocoPhillips to try and explain-away discrimination in plain sight, "disproving" the inference of discrimination by the policy to make it *appear* non-discriminatory. ConocoPhillips' insists that its policy of "nationalizing" roles in other countries does not necessarily require taking the role away from an American and giving it to someone of another nationality; it simply meant putting a person in the position who was on "local" payroll. (Appellees' Br. 54, citing ROA.19-20467.1263-1264) By that logic, *anyone* could serve in a "nationalized" role in Australia—

including an American—if they agreed not to accept the extra benefits that come with an expatriate assignment.

That policy might not be non-discriminatory. But it is not the policy ConocoPhillips described to the Texas Workforce Commission: There it explained that its "nationalization" policy involved "reducing the numbers of employees working outside their home country"—having Americans work in America, and Australians work in Australia, and *replacing* those working outside their home country. (ROA.19-20285.1432 [R.E.22]) Before the TWC, ConocoPhillips asserted that *this* version of its policy was nondiscriminatory because it claimed it "did not consider the nationality of the employee selected for repatriation"—so *anyone* in Australia who is not Australian will be sent home, whether they are American, French, or Mexican. (*Ibid.*) But calling a policy favoring Australians nondiscriminatory simply because excludes everyone who is not Australian is like saying that a "White's Only" lunch counter is not discriminatory because it excludes *everyone* who is not white. Accordingly, there is a material fact issue about what ConocoPhillips' "nationalization" policy actually is—the unvarnished version it presented to the TWC, or the version it came up with only during litigation. If it is the latter, it is plainly discriminatory. And none of ConocoPhillips dissembling about the *nature* of the policy should be able to change the fact that the policy itself is direct—not circumstantial—evidence of discrimination.

Accordingly, the panel's decision to apply *McDonnell Douglas* to Gonzales's claims challenging that policy is directly at odds with binding Supreme Court authority and creates inter-circuit conflicts. This decision also imposes extra burdens to proving a discrimination claim, and gives defendants unwarranted chances to avoid liability, in cases

where the defendant is so blatant as to state its discriminatory intent outright. Plenary review is also necessary to undo this serious error.

B. The Questions Presented are of obvious national importance, and this is the appropriate vehicle to address them.

1. Finally, certiorari is also warranted because the Questions Presented raise recurring questions of national significance. This is especially true of the first Question presented, which encompasses all but one of the regional circuits, and involves splits that have persisted nearly as long as ERISA has existed. *Hardt* has done nothing to dispel these festering conflicts. Indeed, they have only deepened in the decade since *Hardt* has decided.

And these festering conflicts are bad for labor law writ large. They raise a critical risk of subjecting deserving plan participants and beneficiaries subject to fee awards under Section 502(g)(1), as well as the employers governed by the MPPAA whose fee awards are governed by the same standards. And this risk of overdeterrence can be especially hard when the plaintiff is a trustee, forcing them to choose between satisfying "fiduciary duties" requiring them to bring suit and potentially incurring a risk of incurring substantial attorney's fees that other beneficiaries would ultimately have to bear. *Bowen*, 624 F.2d at 1266 (citing 29 U.S.C. § 1105(a)(3)).

2. This case is an excellent vehicle to overturn the Fifth Circuit's erroneous precedent and resolve the festering conflicts in federal benefits law. The major reason the split has persisted for decades has been the lack of a plaintiff with Gonzales's courage willing to challenge it and risk adding to an appellate-affirmed assessment of fees with

still more fees. And his case presents the perfect set of facts to challenge the Fifth Circuit's erroneous standard because it highlights the difference between fee awards in the Fifth Circuit and everywhere else. Had the district court given any serious consideration of the five factors, or ERISA's remedial purpose, it would never have awarded fees to ConocoPhillips. The district court did not find that Gonzalez had any culpable or bad faith motive. Nor did it find his ERISA claims were frivolous. And such findings could not be supported on this record.

There is absolutely no evidence of bad faith on Gonzales's part. Indeed, in suggesting otherwise, the worst behavior Respondents could come up with is the fact that Gonzales had the temerity to believe his lawyers when they told him that they mailed a letter giving ConocoPhillips notice of claim, simply because ConocoPhillips claims it never received that letter. (See Appellees' Br. 24) But it is not bad faith for Gonzales to believe what his lawyers told him.

Moreover, Gonzales's ERISA claims are far more than insubstantial or frivolous: they are meritorious under applicable circuit precedent. As to Gonzales's Section 502(a), claim, the panel held ConocoPhillips' severance pay plan "delegate[ed] discretionary authority to the plan administrator" (App., *infra*, 4a)—as ConocoPhillips urged it to do (Appellees' Br. 35). And the panel held that the plan administrator's decision was "supported by substantial evidence" because the panel thought the administrator *independently* "found that Gonzales" did not "suffer a layoff," but was instead "terminated for cause." (App., *infra*, 5a)

But the plan administrator admitted he did not do that. All he did was look in ConocoPhillips' personnel system for a notation *ConocoPhillips* had made that Gonzales had

been fired for cause. (ROA.19-20467.572, ¶10) This meant that the plan administrator *did not* decide Gonzales was terminated for cause, he decided only that *his employer* thought Gonzales was. And under circuit precedent, such reliance on conclusory assertions in company documents is an abuse of discretion requiring that the decision be overturned. *Napoli v. Johnson & Johnson, Inc.*, 624 Fed. App'x 861, 864 (5th Cir. 2015) (plan administrator abused his discretion in relying solely on an employer-generated letter relaying unsubstantiated allegations that an employee had violated employment policies).

The Plan administrator's abuse of discretion is made worse by his manifest conflict of interest in this case. ConocoPhillips self-funded the plan and staffed it with ConocoPhillips employees (ROA.19-20285.2039, 2088, 2096), meaning that every benefits decision affects the company's bottom line, and the company "potentially benefits from every denied claim." *Schexnayder v. Hartford Life & Acc. Ins. Co.*, 600 F.3d 465, 470 (5th Cir. 2010) (internal quotation omitted). Under circuit precedent, that creates "a structural conflict of interest"—one that takes on additional significance "where the circumstances suggest a higher likelihood that [the conflict] affected the benefits decision," such as where the plan administrator "arbitrarily refuse[s] to consider and credit reliable evidence" in denying benefits. *Id.* 469-71.

That is exactly what happened here. While the plan administrator claimed to have reviewed the entire administrative record in considering Gonzales's claim for severance benefits, he admitted the sole piece of information he actually relied upon in determining that Gonzales had been terminated for cause was a notation in Gonzales's personnel file. Had the administrator considered the

entire record, he would have been forced to consider information demonstrating that the decision was instead traceable to ConocoPhillips' nationalization policy, not Gonzales's detention or the charge. (ROA.19-20467.570-571, 607-609) And that means the administrator's decision was not supported by substantial evidence. And the district court erred in granting summary judgment. A meritorious claim is one that absolutely cannot support an award of fees to the other side. And that is yet another reason review should be granted in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 6, 2020

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed April 3, 2020]

No. 19-20285
Consolidated with 19-20467

SAMUEL GONZALES,

Plaintiff-Appellant,

v.

CONOCOPHILLIPS COMPANY; FRANK ALEXANDER; DAN MECHAM; CONOCOPHILLIPS SEVERANCE PAY PLAN,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-2374

Before DAVIS, JONES, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:[*]

Plaintiff-Appellant Samuel Gonzales brought suit against Defendants-Appellees ConocoPhillips, its Severance Pay Plan, and two Plan administrators. In his

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

complaint, Gonzales asserted claims against Defendants for employment discrimination on the basis of national origin under Title VII and § 1981, as well as claims for wrongful denial of severance benefits, failure to timely provide plan documents, and breach of fiduciary duty under ERISA Sections 502(a)(1)(B), 502(c), and 503. The district court granted summary judgment in favor of Defendants on all claims and dismissed Gonzales' suit in its entirety. The court awarded Defendants $186,000 in attorneys' fees. Gonzales appeals the court's final judgment and award of attorneys' fees. We AFFIRM.

I.

Samuel Gonzales was first employed by Conoco Phillips in 2002 as a petroleum engineer. In 2011, Gonzales accepted an international assignment as a senior drilling engineer based in Australia. To be eligible to work in Australia, Gonzales was required to obtain a temporary work visa (457 visa), which includes certain character and fitness requirements. Gonzales applied for and successfully obtained a 457 visa permitting him to work in Australia from January 2012 to January 2016.[1]

While in Australia, Gonzales was convicted of several criminal offenses, including a July 2014 conviction for aggravated assault against his wife for which he was sentenced to one year probation. On January 7, 2016, Gonzales disclosed these convictions to the Australian Department of Immigration (the Department) in his application to renew his 457 visa, and Gonzales obtained a bridging visa while his 457 visa application was being reviewed and processed. On March 1, 2016, the Department cancelled Gonzales' bridging visa on character grounds, and Gonzales was detained in an immigration detention facility. After learning that

[1] Gonzales' 457 visa was set to expire on January 11, 2016.

Gonzales would not be available to work for the foreseeable future, ConocoPhillips put Gonzales on a paid leave of absence. Gonzales remained on paid leave until April 1, 2016, when he had exhausted all of his paid time off. On June 24, 2016, Gonzales was released from the immigration detention facility and returned to the United States. On June 27, 2016, ConocoPhillips terminated Gonzales for cause, citing his absence from work without leave, his inability to perform his job duties, and his failure to maintain eligibility for his 457 visa in Australia. Thereafter, Gonzales filed suit. ConocoPhillips moved for summary judgment. Following a lengthy discovery process, the district court granted summary judgment in favor of ConocoPhillips and awarded ConocoPhillips attorneys' fees.

II.

We review *de novo* a district court's grant of summary judgment, "applying the same legal standards that controlled the district court's decision." *Nichols v. Reliance Standard Life Ins. Co.*, 924 F.3d 802, 808 (5th Cir. 2019) (quoting *White v. Life Ins. Co. of N. Am.*, 892 F.3d 762, 767 (5th Cir. 2018)). Summary judgment is appropriate when the movant is entitled to judgment as a matter of law, and there is no genuine dispute of material fact. FED. R. CIV. P. 56(a). "An issue of material fact is genuine if a reasonable jury could return a verdict for the nonmovant." *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 377 (5th Cir. 2010). We "draw all reasonable inferences in favor of the nonmoving party, and avoid credibility determinations and weighing of the evidence." *Goudeau v. Nat'l Oilwell Varco, L.P.*, 793 F.3d 470, 474 (5th Cir. 2015). "However, a party cannot defeat summary judgment with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir.

2007) (internal quotation marks and citation omitted). The movant is entitled to summary judgment if "the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

ERISA Claims

Where, as here, a plan subject to ERISA delegates discretionary authority to the plan administrator, we review the denial of a claim for an abuse of discretion. *See Ariana M. v. Humana Health Plan of Tex., Inc.*, 884 F.3d 246, 247 (5th Cir. 2018) (en banc) (citing *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989)). A plan administrator abuses its discretion if its decision is arbitrary or capricious. *Truitt v. Unum Life Ins. Co. of Am.*, 729 F.3d 497, 508 (5th Cir. 2013). "A decision is arbitrary and capricious only if it is made without a rational connection between the known facts and the decision or between the found facts and the decision." *Id.* (citation omitted). If the plan administrator's decision is supported by substantial evidence and is not arbitrary and capricious, it must prevail. *Nichols*, 924 F.3d at 808 (citation omitted). "Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Ellis v. Liberty Life Assur. Co. of Bos.*, 394 F.3d 262, 273 (5th Cir. 2004) (cleaned up)). Under this standard, we must uphold the plan administrator's decision if our review "assure[s] that the administrator's decision fall[s] somewhere on a continuum of reasonableness – even if on the low end." *Id.* (quoting *Holland v. Int'l Paper Co. Ret. Plan*, 576 F.3d 240, 247 (5th Cir. 2009) (citation omitted)).

Here, the Plan administrator's decision is supported by substantial evidence. In order to be eligible to receive

benefits under the Plan, Gonzales had to meet all Qualifying Circumstances and could not have a Disqualifying Circumstance. The Plan administrator correctly found that Gonzales did not satisfy all of the Qualifying Circumstances because he did not suffer a layoff; in fact, Gonzales was terminated for cause, which is a Disqualifying Circumstance. Accordingly, the Plan administrator did not abuse his discretion in concluding that Gonzales was not eligible to receive Plan benefits. Furthermore, Gonzales failed to produce sufficient evidence that the Plan administrators either breached their fiduciary duty or failed to provide plan documents.[2] The district court, therefore, did not err in granting summary judgment on Gonzales' ERISA claims.

Employment Discrimination

As to Gonzales' discrimination claims, we apply the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Lee v. Kansas City Southern Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009). To establish a prima facie case of employment discrimination, Gonzales must demonstrate that he (1) is a member of a protected class, (2) was qualified for his position, (3) was the subject of an adverse employment

[2] Gonzales alleges the Plan administrators had a conflict of interest and did not give him a full and fair review. To that end, he raises several evidentiary issues, asserting that the court should have looked at evidence outside the administrative record to determine whether the Plan administrators wrongfully denied Gonzales benefits and breached their fiduciary duty to him. We find Gonzales' arguments meritless. The district court conducted a bench trial specifically for the purpose of determining whether the administrative record was complete, and after hearing testimony from the Plan administrators, as well as arguments from counsel, the district court determined the administrative record was complete. The court's decision to constrain the record to the evidence that was before the Plan administrator is in line with our precedent. *See Nichols*, 924 F.3d at 811–12, n.10.

action, and (4) was treated less favorably because of his membership in that protected class than were other similarly situated employees who were not members of the protected class. *Id.*

Once Gonzales demonstrates a prima facie case, the burden of production shifts to ConocoPhillips to offer an alternative, nondiscriminatory explanation for the adverse employment action. *Id.* If ConocoPhillips can provide a legitimate nondiscriminatory explanation, Gonzales would then be required to demonstrate that ConocoPhillips explanation is merely a pretext for the discrimination. *Id.*

Even assuming arguendo that Gonzales has established a prima facie case of discrimination, he has failed to demonstrate that ConocoPhillips reason for terminating his employment was pretextual. It is undisputed that Gonzales was absent from work without leave beginning April 1, 2016 through June 24, 2016, when he was released from the immigration detention facility. Moreover, Gonzales was unable to perform his job duties while in the immigration detention facility. And ultimately, Gonzales failed to maintain eligibility for his 457 visa in Australia based on his character and fitness. Accordingly, the district court did not err in granting summary judgment on Gonzales' discrimination claims.

III.

Finally, we review the district court's award of attorneys' fees under ERISA for an abuse of discretion. *North Cypress Med. Ctr. Operating Co., Ltd. v. Aetna Life Ins. Co.*, 898 F.3d 461, 485 (5th Cir. 2018). "A claimant must show some degree of success on the merits before a court may award attorney's fees. Success means the court can fairly call the outcome of the litigation some success on the merits without conducting a lengthy inquiry into the question whether a particular party's success was

substantial or occurred on a central issue." *Id.* (internal quotation marks and citations omitted).

Although the district court here did not expressly articulate in its order for attorneys' fees how Conoco Phillips showed some degree of success on the merits, it is clear that by granting ConocoPhillips' motion for summary judgment as to all of Gonzales' claims, the district court did indeed find that ConocoPhillips had shown some success on the merits. *See 1 Lincoln Fin. Co. v. Metro Life Ins. Co.*, 428 F. App'x 394, 396 (5th Cir. 2011) (concluding that the district court's grant of summary judgment showed the moving party had succeeded on the merits). Given that and the costs actually incurred by ConocoPhillips, we find that the district court did not abuse its discretion in its award of attorneys' fees. We AFFIRM the court's order and award.

APPENDIX B

[Filed: June 9, 2020]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20285
Consolidated with 19-20467

SAMUEL GONZALES,

Plaintiff-Appellant

v.

CONOCOPHILLIPS COMPANY; FRANK ALEXANDER; DAN MECHAM; CONOCOPHILLIPS SEVERANCE PAY PLAN,

Defendants-Appellees

Appeals from the United States District Court
for the Southern District of Texas

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 4/3/20, 5 Cir., _____, _____ F.3d _____)

Before DAVIS, JONES, and ENGELHARDT, Circuit Judges. PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and

5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed: April 11, 2019]

Civil Action No. 4:17-CV-2374

SAMUEL GONZALES,

Plaintiff,

vs.

CONOCOPHILLIPS COMPANY, *et al*,

Defendants.

MEMORANDUM AND ORDER

Came on to be considered the plaintiff's, Samuel Gonzales, claim that the defendants, ConocoPhillips Company, Frank Alexander, in his fiduciary capacity, Dan Mecham in his fiduciary capacity and the Conoco Phillips Severance Pay Plan, breached their duty under the ConocoPhillips Severance Plan by wrongfully denying him severance benefits in violation of the Employees Retirement Income Security Act of 1974 ("ERISA"). The defendants contest the plaintiff's ERISA claim and, further, seek summary judgment on the plaintiff's severed claim under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et. seq.* Regarding his Civil Rights claim, the plaintiff asserts that he suffered disparate treatment and disparate impact, when he was denied severance benefits.

After a careful review of the documents on file, the Administrative Record, and the receipt of testimonial evidence concerning the completeness of the administrative record the Court concludes the plaintiff's ERISA claim is unmeritorious and further, that the defendants' summary judgment should be granted.

I

The plaintiff was first employed by ConocoPhillips in 2002 in the position of petroleum engineer. In 2011, he accepted a reassignment as a senior drilling engineer and was relocated to Australia. To relocate, the plaintiff applied for and received an appropriate work visa and was employed in Australia. The plaintiff worked in Australia until June 27, 2016, when he was terminated for cause.

It is undisputed that the plaintiff engaged in criminal conduct on several occasions, that the conviction for assault resulted in a period of incarceration that impacted his employment and that convictions reduced his chance of getting a "work visa" so that he could continue his presence and employment in Australia. It is also clear that the plaintiff was fully aware that his prior conviction and, particularly, his failure to report same to his employer and Australian officials could negatively impact his ability to obtain a work visa. As a result, the Australian Immigration Department refused to issue the plaintiff a work visa and his bridge visa was cancelled.

On June 27, 2016, ConocoPhillips terminated the plaintiff's employment upon his return to the United States. He contends that in October 2016, he applied for severance pay, however, he did not receive a refusal notice until August 22, 2017. As a result of this alleged misconduct by the defendants, the plaintiff seeks both ERISA relief and damages for allege Civil Rights violations. The Court is of the opinion that the plaintiff's

ERISA claim fails. Equally, and based on the same fact(s), the plaintiff's Title VII claim fails.

II.

The plaintiff contends that the defendants failed to consider the entire record that, from the plaintiff's perspective, includes emails between various Conoco Phillips' employees and the Plan fiduciaries. The plaintiff suggests that such conduct was conspiratorial and designed to defeat his opportunity to receive severance pay.

Fifth Circuit case law does not permit an ERISA plaintiff to go beyond the administrative record when challenging a plan administrator's factual determinations. The Fifth Circuit has recognized some issues, which a reviewing court may resolve, by considering evidence outside of the administrative record. Among those issues are whether the plan administrator has given uniform construction to a plan, *Wildrew v. ARCO Chem. Co.,* 9 F.2d 632, 637 (5th Cir. 1992), and disputes over medical terminology and practice that expert opinion may clarify, *Vega v. Nat'l Life Ins. Servs. Inc.,* 188 F.3d 287, 299 (5th Cir. 1999).

Those limited exceptions do not appear to cover inquiries into the thought processes of plan administrators. Assuming that both parties were given an opportunity to present facts to the administrator, our review of factual determinations is confined to the record available to the administrator." *Meditrust Fin. Servs. Corp. v. Sterling Chem., Inc.,* 168 F.3d 211, 215 (5th Cir. 1999). *Borelli v. Fed. Express Corp. Long Term Disability Plan*, No. 6:04-CV-539, 2005 WL 8160870, at *1 (E.D. Tex. July 22, 2005).

The administrative record in this case shows that the plaintiff's opportunity for severance pay ended on June 27,

2016, when he was terminated for cause. In order to eligibility for a severance claim, the plaintiff was required to establish that he did not have a disqualifying event. It is undisputed that at the time of layoffs, the plaintiff was not an employee, that he had been terminated for cause and, therefore, had suffered a disqualifying event.

The fiduciary of the Plan also concluded that the plaintiff failed to establish the necessary qualifying circumstances to receive severance and had at least one disqualifying circumstance. The evidence also established that the Plan Administrator did not receive the plaintiff's claim until August 2017, more than a year after his employment terminated.

There is no evidence that the Plan Administrator acted in bad faith or otherwise did any act that prejudiced the plaintiff either in filing or establishing his claim. Therefore, the Court holds that the Plan Administrator did not abuse his discretion by denying the plaintiff's ERISA claim. *See* 29 U.S.C. § 1133; *see also N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, No. 4:09-CV-2556, 2017 U.S. Dist. 16076, at * 14-15 (S.D. Tex., Feb. 6, 2017).

The evidence also fails to support the plaintiff's claims of disparate treatment and disparate impact based on national origin. In this claim, the plaintiff asserts that his work visa was not renewed based ConocoPhillips acts that blocked his application for renewal. This claim fails on two accounts. First, the plaintiff's national origin claim is brought under 42 U.S.C. § 1981. In this regard, he claims that ConocoPhillips replaced him, an (American expatriate), with an Australian national. A national origin is not an actionable claim. *See Odubela v. Exxon Mobile Corp.,* 736 F. App. X 437, 442 (5th Cir. 2018). Simply claiming that his is an American, does not identify a cognizable group or

class of persons that are "subject to intentional discrimination". *Id.*

The second basis upon which the plaintiff's national origin – disparate treatment/impact claim fails is grounded in the elements of proof. In order for the plaintiff to prevail, he must establish a *prima facie* case against the defendants. In light of the statutory basis upon which an employee may file a § 1981 suit, the sole defendant is ConocoPhillips. It is undisputed that ConocoPhillips was the plaintiff's employer. With that said, the plaintiff must prove each of the elements of his claim in order to shift the burden of production to ConocoPhillips. He has failed to present evidence that contradicts ConocoPhillips' facts or bring himself within the protections afforded by law.

In order to establish his claim(s), the plaintiff must establish, among other elements, that he was a member of a protected class, that he was qualified for his position he sought to maintain, and that the basis stated for his termination was not factually neutral. *Kim v. Hospira, Inc.,* No. 17-50562, 2018 U.S. App. Lexis 879, *at 4 (5th Cir. January 12, 2018). The plaintiff cannot establish either of the elements. In fact, the uncontradicted evidence establishes that the status of American expatriate, is not a protected class. Moreover, the plaintiff was unqualified to maintain the position because one of the conditions for securing and maintaining employment in Australia was in possession of a work visa. The Australian Immigration authorities rejected the plaintiff's application to renew his work visa which meant the plaintiff could not work or even remain in Australia.

Finally, there is no evidence that ConocoPhillips "cost-reduction" practices, that included lay-offs to achieve or control costs across the Company, were not applied in a neutral fashion. More specifically, there is no evidence

that the cost-reduction plan was applied against a class of employee who were qualified to make a discrimination claim. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In conclusion, the direct evidence rebuts all presumptions that circumstantial evidence might raise in behalf of the plaintiff. *Kim*, 2018 U.S. App. LEXUS 874, at * 4 (the evidence does not establish who the employees were who were laid off, nor that any were Americans.)

After a careful analysis of the pleadings, evidence and arguments, the Court concludes that the plaintiff's Civil Rights suit should also be dismissed. It is Ordered that the defendants' motion for summary judgment is Granted and the plaintiff's suit is Dismissed in its entirety with prejudice.

It is so Ordered.

SIGNED on this 11th day of April, 2019.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed: April 11, 2019]

Civil Action No. 4:17-CV-02374

SAMUEL GONZALES,

Plaintiff,

vs.

CONOCOPHILLIPS COMPANY, *et al*,

Defendants.

FINAL JUDGMENT

Pursuant to the Memorandum and Order entered in this case, the plaintiff, Samuel Gonzales, shall take nothing by his suit.

This is a Final Judgment.

SIGNED on this 11th day of April, 2019.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed: June 26, 2019]

Civil Action No. 4:17-CV-2374

SAMUEL GONZALES,

Plaintiff,

vs.

CONOCOPHILLIPS COMPANY, *et al*,

Defendants.

ORDER

The Court, having considered the defendants' motion for attorneys' fees and costs, all responses, objections and replies, thereto, and the arguments of counsel, if any, is of the opinion that good cause exists for granting the motion in part.

The Court determines that the plaintiff's ability to pay an attorneys' fee is limited to his earned income and bonus(es), if any, resulting in an annual income in the range of $250,000. The Court is of the opinion that the fees and costs sought are reasonable. In light of this fact, the Court determines that an award equal to 30% of the requested attorneys' fees sought is reasonable.

It is ORDERED that the defendants' motion for attorneys' fees is GRANTED in the amount of $186,000, costs of court plus and post-judgment interest at the rate of 1.98% until paid.

It is so ORDERED.

SIGNED on this 26th day of June, 2019.

/s/ Kenneth M. Hoyt
Kenneth M. Hoyt
United States District Judge

APPENDIX F

29 U.S.C. § 1001

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

* * *

29 U.S.C. § 1132

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.