No. 21-

IN THE
Supreme Court of the United States

FIRST RELIANCE STANDARD LIFE INSURANCE COMPANY,

Petitioner,

v.

GIORGIO ARMANI CORPORATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, a fiduciary can seek contribution and indemnity from a co-fiduciary.

PARTIES TO THE PROCEEDING

First Reliance Standard Life Insurance Company, petitioner on review, was the defendant-third-party-plaintiff-appellant below.

Giorgio Armani Corporation, respondent on review, was the third-party-defendant-appellee below.

Soohyun Cho was the plaintiff-appellee below. First Reliance states its belief, under this Court's Rule 12.6, that Cho has no interest in the outcome of the petition.

RULE 29.6 DISCLOSURE STATEMENT

First Reliance Standard Life Insurance Company is a wholly owned subsidiary of Tokio Marine Holdings, Inc., a publicly traded company.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit:

Cho v. *First Reliance Standard Life Ins. Co.*, Nos. 20-55314, 20-55581 (July 9, 2021) (reported at 852 F. App'x 304).

U.S. District Court for the Central District of California:

Cho v. *First Reliance Standard Life Ins. Co.*, No. 2:18-cv-4132-MWF (SKx) (Mar. 5, 2020) (unreported).

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First Reliance Standard Life Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 852 F. App'x 304. Pet. App. 1a-4a. The district court's opinion dismissing First Reliance's third-party complaint is not reported, but is available at 2019 WL 3243723. Pet. App. 5a-16a. The district court's opinion granting plaintiff Soohyun Cho judgment is not reported. Pet. App. 17a-43a.

JURISDICTION

The Ninth Circuit entered judgment on July 9, 2021, Pet. App. 2a, and denied First Reliance's timely

rehearing petition on September 8, 2021. Pet. App. 44a-45a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

29 U.S.C. § 1132 provides, in relevant part:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought—
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; * * * .

INTRODUCTION

Suppose that two fiduciaries breach their duties under the Employee Retirement Income Security Act of 1974 (ERISA) and harm a beneficiary. But—for whatever reason—the beneficiary sues only the less-culpable fiduciary. Should the less-culpable fiduciary be allowed to seek contribution and indemnity from the more-culpable yet un-sued co-fiduciary?

Of course. Bedrock principles of equity and trust law—to say nothing of common sense—teach that co-fiduciaries can assert claims against each other to allocate responsibility for a beneficiary's damages in proportion to their fault. Contribution and indemnity ensure that fiduciaries are held to account for their breaches and deter additional breaches in the future. Contribution and indemnity also ensure that one

fiduciary is not left paying for damages primarily inflicted by others.

But the Ninth Circuit—joined by the Eighth Circuit—holds that an ERISA fiduciary can never seek contribution or indemnity from a co-fiduciary. The Ninth and Eighth Circuits believe that because ERISA does not expressly mention contribution and indemnity, they are not available remedies under the statute. But, as the Second and Seventh Circuits have explained, that narrow focus ignores ERISA's incorporation of historic equitable remedies and general trust-law principles to fill in statutory gaps.

The Ninth Circuit entrenched this split in its decision below. Respondent Giorgio Armani Corporation misled Soohyun Cho into believing that she had $450,000 in enhanced life-insurance coverage for her husband that she was not, in fact, eligible for under the First Reliance group life-insurance policy covering Armani employees. Cho understandably did not want to sue her own employer, so she sued First Reliance instead. First Reliance, in turn, sought to have Armani pay its fair share of Cho's damages through a claim for contribution and indemnity. But Ninth Circuit precedent meant that claim had to be dismissed as not cognizable under ERISA. The upshot? First Reliance was left paying $450,000—plus attorney's fees—for Armani's mistake, and Armani got away with paying nothing.

Nothing in law or logic requires this inequitable result. And this Court has already recognized the importance of the question presented by calling for the Solicitor General's views on it five years ago, only to have the case settle before the United States weighed in.

The Court should grant the petition.

STATEMENT

1. Soohyun Cho works at Respondent Giorgio Armani Corporation and participates in its employee-welfare benefit plan. C.A. ER87. Armani employees like Cho and their spouses can enroll in a group life insurance policy underwritten by First Reliance. *Id.* Cho and her husband could obtain $50,000 in guaranteed coverage just by applying and paying the premium. Pet. App. 20a. Cho and her husband could also obtain up to $500,000 in coverage by applying and submitting the "required proof of good health" for First Reliance's approval. C.A. ER114; C.A. ER116; C.A. ER133.

First Reliance's proof-of-good-health requirement, also known as a proof-of-insurability requirement, ensures that beneficiaries do not seek additional coverage only after receiving a terminal diagnosis. Cho's husband was diagnosed with pancreatic cancer—a typically fatal illness—in 2015. Pet. App. 7a, 24a. Cho subsequently enrolled her husband in Armani's group life insurance plan at the $500,000 benefit level during Armani's 2016 open-enrollment season. *Id.* at 21a-22a.

Armani's group life insurance plan is self-administered by Armani, meaning that Armani is "responsible for ensuring that coverage elections (including any required proof of good health) are processed in accordance with the terms and conditions of the applicable policy." *Id.* at 22a. Armani never asked Cho to submit proof of good health for her husband and First Reliance never approved Cho's husband for $500,000 in benefits. *Id.* at 22a-23a. But Armani deducted premiums from Cho's paycheck and prepared benefits

statements incorrectly showing that her husband had $500,000 in coverage. *Id.* at 22a, 25a.

First Reliance discovered Armani's oversight during a review in late April and May 2017 and agreed to retroactively approve Cho's husband for $500,000 in coverage so long as Cho submitted the required proof of good health at the time of enrollment and First Reliance approved it. *Id.* at 22a-23a. Armani's human resources department contacted Cho on June 2, 2017, to request proof, and Cho admitted that she had enrolled her husband following his diagnosis to ensure her family had funds after he passed. *Id.* at 23a-24a. Cho accordingly did not submit proof of insurability before her husband died on June 28, 2017. *Id.* at 24a-25a.

2. Cho submitted a claim for $500,000 in benefits, which First Reliance denied except for the $50,000 in guaranteed coverage, explaining that Cho had never submitted the required proof of insurability. *Id.* at 25a-26a. Cho sued First Reliance under ERISA for $450,000 in additional benefits, claiming that she detrimentally relied on Armani accepting her application, taking her premiums, and telling her she had $500,000 in coverage to believe that she in fact had $500,000 in coverage. C.A. ER88. Cho did not, however, sue Armani, who was the fiduciary actually responsible for misleading her as to available plan benefits. First Reliance therefore sought contribution and indemnity from Armani under ERISA § 502(a)(3), claiming that Armani breached its duties as a plan fiduciary by not obtaining proof of insurability from Cho. C.A. ER73-76.

The District Court found for Cho on the merits and dismissed First Reliance's third-party complaint

against Armani. Pet. App. 17a-43a; *id.* at 5a-16a. Applying circuit precedent, the District Court held that Armani was First Reliance's apparent agent for purposes of enrolling beneficiaries, collecting their premiums, and collecting proof of insurability. *Id.* at 29a-31a. The District Court then held that First Reliance, through its agent Armani, waived the proof-of-insurability requirement. *Id.* at 31a-39a. And because Cho was not obligated to provide proof of her husband's good health at the time she elected $500,000 in benefits, First Reliance was obligated to pay Cho the $450,000 balance of her denied claim. *Id.* at 38a-39a, 42a. The District Court also held that Ninth Circuit precedent foreclosed First Reliance's attempt to seek contribution or indemnity from Armani. *Id.* at 9a-15a. The District Court subsequently awarded Cho $173,642.23 in attorney fees and costs. C.A. ER12.

3. The Ninth Circuit affirmed. Pet. App. 1a-4a. As relevant here, the court of appeals held—relying on prior panel precedent—that First Reliance could not assert a claim for contribution or indemnity against Armani for breach of its fiduciary duties. *Id.* at 4a (citing *Kim* v. *Fujikawa*, 871 F.2d 1427, 1432 (9th Cir. 1989) and *Call* v. *Sumitomo Bank of Cal.*, 881 F.2d 626, 631 (9th Cir. 1989)).

The panel denied First Reliance's petition for rehearing and the full Ninth Circuit denied First Reliance's petition for rehearing en banc. Pet. App. 44a-45a. Judge Forrest, however, noted her vote in favor of rehearing en banc. *Id.* at 45a. First Reliance subsequently transmitted payment of the District Court's judgment to Cho.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW ENTRENCHES A CIRCUIT SPLIT.

The Ninth Circuit's decision below entrenches a split between the Ninth and Eighth Circuits on the one side and the Second and Seventh Circuits on the other. An ERISA fiduciary's indemnity and contribution rights should not depend on accidents of geography; this Court should reconcile the circuits.

1. The Ninth Circuit holds that a fiduciary cannot seek contribution and indemnity from a culpable co-fiduciary. Pet. App. 4a. In *Kim* v. *Fujikawa*, the court stated that "in light of 'ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a comprehensive and reticulated statute,' it seems clear that 'Congress did *not* intend to authorize other remedies [under ERISA] that it simply forgot to incorporate expressly.' " 871 F.2d at 1432 (quoting *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985)) (brackets in *Kim*). In light of this observation, the court disagreed that "Congress implicitly intended to allow a cause of action for contribution under ERISA." *Id.* at 1432. The court also cited this Court's cases denying contribution under Title VII and the antitrust laws, believing, like in those cases, there was no sign in ERISA's "legislative history 'that Congress was concerned with softening the blow on joint wrongdoers.' " *Id.* at 1432-33 (quoting *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981)).

The Ninth Circuit reaffirmed *Kim* in *Call* v. *Sumitomo Bank of California*. 881 F.2d at 630-631. The court admitted that the fiduciaries seeking

contribution and the Department of Labor, which had appeared as *amicus curiae*, "offer[ed] several persuasive arguments in support of their position that ERISA may be interpreted to authorize a contribution cause of action among co-fiduciaries." *Id.* at 630. But the court held that it was "foreclosed from considering these arguments because they were rejected in" *Kim*. *Id.*

The Eighth Circuit agrees with the Ninth. It has stated that it "think[s]" that "the Ninth Circuit in *Kim* v. *Fujikawa* * * * express[es] the better view that a right of contribution is not available." *Travelers Cas. & Sur. Co. of Am.* v. *IADA Servs., Inc.*, 497 F.3d 862, 866 (8th Cir. 2007). Like the Ninth Circuit, the Eighth Circuit agrees that ERISA's "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at 865 (internal quotation marks and citation omitted). And like the Ninth Circuit, the Eighth Circuit holds that this Court's decisions denying contribution and indemnity to joint wrongdoers under other statutes supported denying contribution and indemnity to fiduciaries under ERISA. *Id.* at 864-865.

2. The Second and Seventh Circuits, by contrast, hold that ERISA authorizes contribution and indemnity. The Second Circuit has held that "Congress intended courts to fashion a federal common law of ERISA and * * * that rights to indemnity and contribution are integral aspects of that law." *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1029 (2d Cir. 1992). Invoking this Court's teaching that "courts are to develop a 'federal common law

of rights and obligations under ERISA-regulated plans,' " the Second Circuit has held that "federal courts have been authorized to develop a federal common law under ERISA, and in doing so, are to be guided by the principles of traditional trust law." *Chemung Canal Tr. Co.* v. *Sovran Bank/Md.*, 939 F.2d 12, 16 (2d Cir. 1991) (quoting *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989)). The Second Circuit also observed that "the right of contribution among co-trustees has been for over a century, and remains, an integral and universally-recognized part of trust doctrine." *Id.* Putting these principles together, the Second Circuit "conclude[d] that the traditional trust law right to contribution must also be recognized as a part of ERISA." *Id.*

The Second Circuit rejected arguments, like those accepted by the Ninth and Eighth Circuits, that analogized to cases where this Court has not found a right to contribution or indemnity under other statutory schemes. *Id.* at 16-17. The Second Circuit explained those cases were "distinguishable" because they "drew a sharp contrast with other areas of the law, such as admiralty and labor relations, where [courts'] power to fashion rules of federal common law is well established." *Id.* at 17. Unlike Title VII and the antitrust laws, "under ERISA, both the legislative history and the statute itself clearly contemplate development of a federal common law." *Id.* The cases denying contribution and indemnity therefore were not "impediments to [the court] holding that, under ERISA, a federal common law, including the traditional trust concept of a right to contribution, is appropriate." *Id.*

The Second Circuit likewise rejected arguments that ERISA lacking an explicit contribution remedy meant

Congress did not intend to provide one. *Id.* at 17-18. The Second Circuit explained that "ERISA was designed specifically to provide redress for plaintiffs—the plan's participants and beneficiaries." *Id.* at 18. As a result, "[i]ts remedies do not purport to deal with allocating joint liabilities among fiduciaries," and "congress wanted courts to fill any gaps in the statute by looking to traditional trust law principles," as the Second Circuit had. *Id.*

The Seventh Circuit concurs. It has explained that "ERISA grants the courts the power to shape an award so as to make the injured plan whole while at the same time apportioning the damages equitably between the wrongdoers" and that "[a]n award of indemnification" is "properly within the court's equitable powers." *Free* v. *Briody*, 732 F.2d 1331, 1337 (7th Cir. 1984). The Seventh Circuit observed that "Congress did not provide an explicit right to indemnity," but found that "not dispositive" because "in the case of ERISA Congress intended to protect trustees from being ruined by the actions of their cofiduciaries." *Id.* The Seventh Circuit held that "the legislative history of ERISA * * * demonstrates that Congress intended to codify the principles of trust law with whatever alterations were needed to fit the needs of employee benefit plans," and that "[g]eneral principles of trust law provide for indemnification under the appropriate circumstances." *Id.* at 1337-38.

The Seventh Circuit later re-affirmed these holdings, explaining that "the district court's remedial authority under ERISA includes the power of courts under the law of trusts, which vests in them the authority to fashion 'traditional equitable remedies.' " *Chesemore* v. *Fenkell*, 829 F.3d 803, 811 (7th Cir.

2016) (quoting *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 440 (2011)). The court further explained that "[i]ndemnification and contribution are among those remedies." *Id.* at 812-813.

The Seventh Circuit "acknowledge[d] * * * that the circuits are not uniform on the question of contribution and indemnification," noting the disagreement between itself and the Second Circuit on the one side and the Eighth and Ninth Circuits on the other. *Id.* at 813. The court declined, however, to "overrul[e] circuit precedent simply to move from one side of a circuit split to the other." *Id.* Moreover, the Seventh Circuit was "not convinced that *Free* was wrongly decided," explaining that "[i]f we are to interpret ERISA according to the background principles of trust law—as the Supreme Court has repeatedly instructed us to do—then indemnification and contribution are available equitable remedies under the statute." *Id.*

3. This Court should intervene to resolve the circuit split. Sup. Ct. R. 10(a). The division is mature, with the Ninth Circuit below and the Seventh Circuit in *Chesemore* declining to change their positions. Pet. App. 45a (denying rehearing en banc); *Chesemore*, 829 F.3d at 813 (declining to overturn circuit precedent). The continuing split is also contrary to ERISA's "interest[] in * * * uniformity." *Conkright* v. *Frommert*, 559 U.S. 506, 518 (2010). Large, multi-state employers like Armani may cover employees in multiple circuits with the same plan. If Cho had worked in New York at Armani's headquarters instead of in California, First Reliance would have been able to seek contribution and indemnity against Armani. First Reliance's rights with respect to Armani's error—and cofiduciaries' rights with respect to each other's

breaches—should not depend on where a beneficiary happens to live.

II. ERISA FIDUCIARIES CAN SEEK INDEMNITY AND CONTRIBUTION FROM CO-FIDUCIARIES.

The Ninth Circuit held that claims for contribution and indemnity are not cognizable under ERISA, relying on prior precedent that concluded the statute does not expressly authorize those two forms of relief. Pet. App. 4a. But ERISA *does* expressly authorize them; Section 502(a)(3) allows courts to award a plan fiduciary "appropriate equitable relief," which contribution and indemnity are. *See* 29 U.S.C. § 1132(a)(3). Moreover, the Ninth Circuit overlooked the traditional trust-law principles that courts use to fill in ERISA's gaps and that authorize contribution and indemnity. Under either approach, contribution and indemnity are available.

1. To find congressional authorization for contribution and indemnity in ERISA, one need look no further than Section 502(a)(3). *See* 29 U.S.C. § 1132(a)(3). Section 502(a)(3) permits a fiduciary to bring a civil action for "appropriate equitable relief" to "redress * * * violations" of ERISA or an ERISA plan's terms. *Id.* § 1132(a)(3).

This Court has interpreted the phrase "appropriate equitable relief" to mean "the kinds of relief typically available in equity in the days of the divided bench." *US Airways, Inc.* v. *McCutchen*, 569 U.S. 88, 94-95 (2013) (internal quotation marks omitted). To fit that definition, the fiduciary's claim must be one that could have been brought in a court of equity before the merger of law and equity, and the fiduciary's requested relief must be equitable in nature. *See id.* at 95; *see also CIGNA*, 563 U.S. at 440-441.

A fiduciary's claim for contribution and indemnity against a breaching co-fiduciary fits the bill. As an initial matter, both "case law from the days of the divided bench," *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 363 (2006), and "standard current works," *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 217 (2002), confirm that, prior to the merger of law and equity, claims for contribution and indemnity were within the equity courts' jurisdiction. *See, e.g.*, *Dupont de Nemours & Co.* v. *Vance*, 60 U.S. (19 How.) 162, 176 (1856) ("[F]rom the earliest of the chancery reports, we learn that chancery will enforce an average or contribution to be made, when necessary * * * ."); 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 1252, at 486 (9th ed. 1866) (describing contribution as "a remedy, which can be obtained in equity only"). Thus, before the merger of law and equity, a fiduciary held liable for breach of trust could bring an action in equity for contribution and indemnity against a culpable co-fiduciary. *See, e.g.*, *Blyth* v. *Fladgate* (1891) 1 Ch. 337, 346, 363-364; 4 Spencer W. Symons, *Pomeroy's Equity Jurisprudence* § 1081, at 232-233 nn.20, 1 (5th ed. 1941) (collecting cases from equity courts involving contribution and indemnity claims among co-trustees); *see also Marine & River Phosphate Mining & Mfg. Co.* v. *Bradley*, 105 U.S. 175, 182 (1881) (explaining that "the necessity of enforcing[] a trust, marshalling assets, and equalizing contributions, constitutes a clear ground of equity jurisdiction").

Those same authorities confirm that contribution and indemnity are, by their very nature, *equitable* forms of relief. *See, e.g.*, 1 Symons, *supra*, § 407, at 764-765; 1 George E. Palmer, *The Law of Restitution* § 1.5(d) (1978). Contribution and indemnity prevent

unjust enrichment, and thereby ensure that one party does not have to pay for losses that were caused, in whole or in part, by another's wrongdoing. *See, e.g.*, 1 Dan B. Dobbs, *Law of Remedies* § 4.3(4), at 607-608 (2d ed. 1993) (characterizing contribution and indemnity as forms of equitable restitution, distinct from remedies at law); *see also Robinson* v. *Harkin* (1896) 2 Ch. 415, 426 ("The reason [for contribution] given in the books is, that *in aequali jure* the law requires equality; one shall not bear the burthen in ease of the rest, and the law is grounded in great equity." (citation omitted)).

Given their equitable roots, contribution and indemnity are "appropriate equitable relief" under Section 502(a)(3). For that reason, a claim for contribution and indemnity against a breaching co-fiduciary falls within Section 502(a)(3). *See, e.g.*, *US Airways*, 569 U.S at 94-95 (holding that a fiduciary's claim for relief was cognizable under Section 502(a)(3) where the basis for the claim and the nature of the requested relief were grounded in equity); *Sereboff*, 547 U.S. at 363-364 (same); *CIGNA*, 563 U.S. at 439-440 (same). In concluding that nothing in ERISA permits fiduciaries to seek contribution and indemnity, the Ninth Circuit passed by Section 502(a)(3)'s incorporation of historic equity practice.

2. Even if Section 502(a)(3) did not provide for contribution and indemnity, a right to contribution and indemnity would still exist under the federal common law of ERISA, which Congress has authorized federal courts to develop. As this Court has repeatedly explained, in enacting ERISA, "Congress invoked the common law of trusts to define the general scope of * * * authority and responsibility" of "trustees and

other fiduciaries" instead of "explicitly enumerating *all* of the[ir] powers and duties." *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985). Congress "intended that a body of Federal substantive law w[ould] be developed by the courts" to fill in the statute's gaps and "deal with issues involving rights and obligations under" ERISA plans. *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987) (quoting 120 Cong. Rec. 29,942 (1974) (statement of Sen. Javits)).

In developing federal common law rules under ERISA, courts refer to fundamental trust-law principles. *See Firestone Tire & Rubber Co.*, 489 U.S. at 110-111. Here, the law of trusts permits suits for contribution and indemnity among co-trustees. *See* 4 Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott and Ascher on Trusts* § 24.32 (5th ed. 2007); George Gleason Bogert, George Taylor Bogert & Amy Morris Hess, *The Law of Trusts and Trustees* § 862 (2021 update); *Restatement (Second) of Trusts* § 258 (1959). Under general trust-law principles, as long as a trustee is not substantially more at fault for a breach of trust than his co-trustee, and did not act in bad faith, the trustee "is entitled" to contribution from the co-trustee. Scott, Fratcher & Ascher, *supra*, § 24.32; *see also Restatement (Second) of Trusts* § 258. And if a trustee has paid the full amount of damages caused by a co-trustee's misdeeds, despite having played only a "nominal[]" role in the breach himself, trust law permits courts to shift "the entire burden" of the loss to the more "blameworthy" co-trustee. Bogert, Bogert & Hess, *supra*, § 862 ("In enforcing the liabilities of co-trustees equity considers where the burden should ultimately fall, in view of the part which each trustee took in the transaction."). The law

of trusts accordingly recognizes a trustee's right to seek contribution and indemnity from a co-trustee—and federal courts are well within their ERISA gap-filling powers to do so as well.

3. The Ninth Circuit purported to find support for its decision in this Court's precedents. Yet nothing in this Court's case law supports—much less requires—the Ninth Circuit's cramped reading of ERISA.

The Ninth Circuit relied heavily on *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), for the proposition that Congress could not have intended to authorize remedies that it intentionally omitted from ERISA's text. *See* Pet. App. 4a (citing the portions of *Kim* and *Call* discussing *Russell*). But unlike this case, *Russell* involved a request for compensatory and punitive damages that bore no connection to ERISA's text, *see Russell*, 473 U.S. at 144, and concerned § 502(a)(2), a different provision of ERISA, *id.* at 140-144. *Russell* therefore has little bearing on the scope of relief available under Section 502(a)(*3*)—a fact that this Court subsequently confirmed. *Varity Corp.* v. *Howe*, 516 U.S. 489, 509 (1996) (explaining that *Russell* was distinguishable because it "discusses § 502(a)'s *second* subsection, not its *third* subsection").

The Ninth Circuit also leaned on *Texas Industries* to assert that ERISA does not permit liable fiduciaries to receive equitable relief because fiduciaries belong to "the class * * * whose activities Congress intended to regulate for the protection and benefit of" ERISA plans and participants. *Kim*, 871 F.2d at 1433 (quoting *Texas Indus.*, 451 U.S. at 639); *see also* Pet. App. 4a (citing the discussion of *Texas Industries* in *Kim* and *Call*). The Ninth Circuit's supposed bar on

fiduciaries receiving relief appears nowhere in ERISA, however, and *Texas Industries* does not support the Ninth Circuit's atextual analysis.

For one, Section 502(a)(3) authorizes a fiduciary to seek "appropriate equitable relief" to remedy a violation of ERISA or an ERISA plan's terms, 29 U.S.C. § 1132(a)(3), and unlike other ERISA provisions, does not limit who the fiduciary may sue or limit the uses to which the recovery may be put, *compare* 29 U.S.C. § 1109, *with id.* § 1132(a)(3). And although *Texas Industries* rejected a regulated party's attempt to seek contribution under the antitrust laws, the decision hinged on the absence of any statutory language authorizing contribution, and the fact that courts' circumscribed power to develop federal common law under the antitrust laws did not extend to the shaping of remedies. *See* 451 U.S. at 639-646. *Texas Industries* thus stands in sharp contrast to this case, where ERISA *does* authorize contribution and indemnity, and federal courts *do* have the power to fashion relief in accordance with traditional equity and trust-law principles—which, as just discussed, allow claims for contribution and indemnity among co-trustees. *See, e.g*, Bogert, Bogert & Hess, *supra*, § 862; Scott, Fratcher & Ascher, *supra*, § 24.32.

Moreover, contrary to the Ninth Circuit's suggestion, *see* Pet. App. 4a, there is nothing untoward about awarding contribution and indemnity to an ERISA fiduciary. An award of contribution or indemnity merely re-allocates responsibility for the beneficiaries' losses among co-fiduciaries based on their respective degrees of culpability. *See, e.g.*, *Restatement (Second) of Trusts* § 258; Bogert, Bogert & Hess, *supra*, § 862. And, importantly, contribution and indemnity ensure

that each wrongdoer pays the price for his own wrongs. *See* Dobbs, *supra*, § 4.3(4), at 607-608. It is therefore little wonder that contribution and indemnity are established remedies in equity and trust law, and are remedies that ERISA allows courts to award.

III. THIS CASE IS AN APPROPRIATE VEHICLE TO RESOLVE AN IMPORTANT QUESTION OF ERISA PROCEDURE.

The decision below creates an untenable system in which some culpable co-fiduciaries are held to account for their actions, while others escape scot-free. That outcome not only makes no sense; it also undermines the animating purposes behind ERISA's statutory scheme. This Court's intervention is needed to avoid perverse results, and this case presents a clean vehicle for the Court's review.

1. At its core, ERISA reflects a balance between two competing goals: (1) providing "employees enhanced protection for their benefits," and (2) ensuring that the "administrative costs" of maintaining employee benefit plans do not "unduly discourage employers from offering [such] plans in the first place." *Varity Corp.*, 516 U.S. at 497; *see also* 29 U.S.C. §§ 1001, 1001b. To protect employees and beneficiaries, the statute "enforce[s] * * * strict fiduciary standards of care in the administration of all aspects of" employee benefit plans. *Russell*, 473 U.S. at 158 (Brennan, J., concurring in the judgment); *see also* 29 U.S.C. § 1001(b). And to limit administrative costs, ERISA "assur[es] a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002).

The Ninth Circuit's ruling vitiates these statutory goals. Whereas contribution and indemnity encourage strict compliance with fiduciary duties by generally guaranteeing that each co-fiduciary responsible for a loss will be required to pay its fair share, the Ninth Circuit's rule allows a co-fiduciary to take its chances, armed with the knowledge that it will have to pay for its role in a loss only if it ends up being the fiduciary that the plaintiff chooses to sue. And depending on the type of plan at issue, that may be considered a risk worth taking. For instance, where, as here, an employer and an insurance company are co-fiduciaries, an employee seeking to redress a breach has every incentive to sue the faceless insurance company instead of her direct employer—even though the employer may be substantially more responsible for the breach. Thus, far from promoting diligent performance of fiduciary duties, the Ninth Circuit's rule incentivizes co-fiduciaries to game the system—a result that Congress could not have intended. *Cf. Guididas* v. *Community Nat'l Bank Corp.*, No. 8:11-cv-2545-T-30TBM, 2012 WL 5974984, at *5 (M.D. Fla. Nov. 5, 2012) (warning of the potential for gamesmanship among breaching co-fiduciaries if contribution is not permitted under ERISA).

The Ninth Circuit's decision also harms ERISA's "interests in efficiency, predictability, and uniformity." *Conkright*, 559 U.S. at 518. As the law currently stands, a fiduciary's right to seek contribution and indemnity from a co-fiduciary depends on where the suit is filed, not on any "uniform standard[] of primary conduct" or "uniform regime of ultimate remedial orders and awards." *Rush*, 536 U.S. at 379. That uncertainty is consequential: without the assurance that contribution and indemnity will be available if and

when needed, fiduciaries will be forced to factor the possibility of having to pay for a co-fiduciary's wrongdoings into their cost of doing business—thereby raising the cost of ERISA plans in the process. But that is neither a rational nor an efficient outcome. If a fiduciary is held financially liable for a co-fiduciary's actions, the most logical response is to permit the fiduciary to recover its expenses directly from the co-fiduciary, not pass them along to beneficiaries and employees. By placing the burden of rectifying errors on the party who committed them, the right to contribution and indemnity creates a "predictable set of liabilities" that helps keep the overall costs of ERISA plans down. *See Conkright*, 559 U.S. at 517 (citation omitted). The Ninth Circuit's refusal to equitably apportion responsibility for a loss does just the reverse.

Recognizing contribution and indemnity as available remedies between co-fiduciaries does not harm beneficiaries or participants, the primary objects of ERISA's concern. *See* 29 U.S.C. § 1001(b) (stating ERISA's policy of protecting "the interests of participants in employee benefit plans and their beneficiaries"). Under a contribution-and-indemnity regime, participants and beneficiaries "would continue to recover their full loss from any or all breaching fiduciaries, each of whom would be jointly and severally liable to the plaintiffs." *Chemung Canal Tr. Co.*, 939 F.2d at 16. At the same time, "[t]here is no reason why a single fiduciary who is only partially responsible for a loss should bear its full brunt. Full responsibility should not depend on the fortuity of which fiduciary a plaintiff elects to sue." *Id.*

2. The issue presented is undeniably important, as this Court has already recognized. Five years ago, the

Court considered a petition presenting the same question regarding the availability of contribution and indemnity under ERISA. *See* Petition for Writ of Certiorari at i, *Fenkell* v. *Alliance Holdings, Inc.*, No. 16-473 (Oct. 7, 2016). The Court called for the views of the Acting Solicitor General, but the parties dismissed the case before the government could express its position. *See* Order Inviting Acting Solicitor General to File Brief, *Fenkell*, No. 16-473 (Jan. 9, 2017); Order Dismissing Petition, *Fenkell*, No. 16-473 (Jan. 19, 2017).

This case is also an appropriate vehicle to resolve the split regarding contribution and indemnity. The issue was pressed and passed on below, *see* Pet. App. 4a, and the relevant facts are undisputed, *see id.* at 9a. What's more, the question presented is outcome-determinative as between First Reliance and Armani; the parties concur that Armani, not First Reliance, was responsible to obtain and did not obtain proof of insurability from Cho. *See id.* at 7a-9a. In fact, First Reliance identified Armani's error before Cho's husband's death and was working with Armani to address it when he passed. *Id.* at 22a-25a. The Court should grant certiorari to bring uniformity to the lower courts on this important question of ERISA practice and procedure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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