No. 21-861

IN THE
SUPREME COURT OF THE UNITED STATES

FIRST RELIANCE STANDARD LIFE INSURANCE COMPANY,

Petitioner,

v.

GIORGIO ARMANI CORPORATION,

Respondent.

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

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the Ninth Circuit correctly follow well-established precedent to affirm the district court's finding that a fiduciary cannot maintain a claim for contribution or indemnification against a co-fiduciary under the express terms of the Employee Retirement Income Security Act ("ERISA") of 1974?

RULE 29.6 DISCLOSURE STATEMENT

Respondent Giorgio Armani Corporation is a privately held corporation and there are no publicly held companies that own 10% or more of its stock.

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The Ninth Circuit's opinion is reported at 852 F. App'x 304. Pet. App. 1a-4a. The district court's order 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 order granting Plaintiff Soohyun Cho judgment is not reported. Pet. App. 17a-43a.

STATEMENT OF JURISDICTION

Respondent Giorgio Armani Corporation agrees with Petitioner First Reliance Standard Life Insurance Company's jurisdictional statement and contends that jurisdiction is proper pursuant to 28 U.S.C. § 1254(1).

RELEVANT ENACTMENTS

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

After close to a decade of studying pension plans in the country, Congress enacted a comprehensive statute— the Employee Retirement Income Security Act ("ERISA") of 1974—to protect participants and beneficiaries and to regulate, among other things, the actions of the fiduciaries with regard to their funding and administration of employee benefit plans. Notably, Congress did not include a provision allowing fiduciaries to pursue contribution or indemnity from co-fiduciaries. Now, almost fifty years after Congress enacted ERISA, Petitioner First Reliance Standard Life Insurance Company ("First Reliance") attempts to read into ERISA a remedy of contribution or indemnity, which does not exist in the statute.

First Reliance's arguments are not proper for review before this Court because the remedy lies with Congress, not the courts. In hopes of getting its petition granted, First Reliance sheds artificial light on a circuit split to pique the interest of this Court. However, the circuit split is not recent and does not raise a widespread issue requiring this Court's attention.

About forty years ago, circuit courts began considering whether co-fiduciaries could seek contribution and indemnity under the statute. Since then, only four of the thirteen circuits have issued opinions on the question. The Ninth Circuit and Eighth Circuit have held that ERISA does not allow contribution or indemnity. A divided panel of the Second Circuit disagreed, with the rationale from the dissenting judge later being adopted by the Eighth

Circuit. Finally, in the oldest case, the Seventh Circuit held that ERISA did allow contribution and indemnity, but limited its holding to the specific and unique circumstances of that case.

During the last four decades, litigation over this issue has been relatively sparse and there are only a handful of court of appeal opinions. This indicates that the vast majority of fiduciaries have been able to incorporate the few applicable circuit decisions into their business decisions and whatever disputes may have come up have largely been resolved without resort to litigation.

Despite this, First Reliance now seeks to manufacture an urgent issue to be resolved by this Court. However, this is not a question that the Court need or should address. As a question of law, ERISA was not enacted to benefit fiduciaries. Thus, it follows neither concepts of statutory interpretation nor the Congressional mandate for limited federal common law to read remedies of contribution or indemnity between fiduciaries into ERISA's existing and comprehensive remedial scheme. In fact, such a decision would be contrary to both ERISA's aims and equity. Participants' and beneficiaries' suits for benefits will be taken over by third-party claims for contribution and indemnity and will unnecessarily delay efficient resolution of benefit claims.

To grant certiorari would move ERISA and equity towards inefficiency and away from Congress' aims of expediency. Instead, if First Reliance wants to present its position on allowing contribution and indemnity between fiduciaries under ERISA, the venue to do so is in Congress.

STATEMENT

In August 2013, First Reliance issued Voluntary Group Term Life Policy number VG 183839 ("Policy") to Respondent Giorgio Armani Corporation ("Armani") in order to provide life insurance benefits to Armani's eligible employees and dependents. C.A. ER69. The Policy was part of Armani's employee welfare benefit plan and was established for the benefit of its employees and their dependents. *Id*. At all relevant times, Armani was the plan sponsor and administrator. *Id*. The Policy was funded by First Reliance. C.A. ER88.

In January or February of 2016, Mrs. Cho, an employee of Armani, elected life insurance coverage for her husband, in the amount of $500,000. Pet. App. 21a-22a. At the time of enrollment, her husband had been diagnosed with pancreatic cancer. Pet. App. 7a. According to First Reliance, Mrs. Cho never submitted evidence of insurability or proof of good health as allegedly required to receive benefits above the $50,000 guaranteed issue amount. *Id*.

More than a year later, on June 28, 2017, Mrs. Cho's husband died from pancreatic cancer. Pet. App. 25a. Following her husband's death, Mrs. Cho submitted a claim to recover benefits under the Policy. C.A. ER72-73. First Reliance alleged that it never received evidence of insurability and paid Mrs. Cho only the $50,000 guaranteed issue amount. C.A. ER73.

Unsatisfied with First Reliance's payment, Mrs. Cho sued First Reliance. C.A. ER86. Mrs. Cho sought the full $500,000 of life insurance benefits. *Id*. In the First Amended Complaint ("FAC"), Mrs.

Cho alleged that First Reliance breached the Policy by failing to provide her $500,000 in life insurance benefits despite her payment of all premiums and explicit advices that she had $500,000 in dependent life coverage. C.A. ER88-89. Mrs. Cho further alleged that despite repeated requests, First Reliance failed to provide her with information relevant to her claim. C.A. ER89-90.

In Ms. Cho's action, First Reliance filed a Third-Party Complaint against Armani. First Reliance sought contribution and equitable indemnity from Armani by alleging that Armani was responsible for securing written evidence of insurability or proof of good health from Mrs. Cho regarding her husband.[1] C.A. ER74-75. First Reliance further alleged that this information was needed so that it could review and reach a determination of Mrs. Cho's insurance application. C.A. ER74, 76. Due to Armani's alleged failure to collect the evidence of insurability or proof of good health from Mrs. Cho and provide it to First Reliance, First Reliance alleged that it never approved Mrs. Cho's application and the $500,000 life insurance policy never became effective. *Id.*

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[1] It is important to note that First Reliance's Third Party Complaint was dismissed following Armani's motion to dismiss, which requires the district court to accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to First Reliance. *See Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). Thus, the factual allegations in First Reliance's Third-Party Complaint and as reiterated in its instant petition should only be accepted as true under the motion to dismiss standard rather than substantiated by actual evidence.

First Reliance also alleged that Armani was negligent in this regard and breached its fiduciary duties under ERISA. *Id.* As a result of Armani's alleged negligence and claimed breach, First Reliance alleged that it was entitled to equitable indemnification from Armani for any judgment entered against First Reliance and 100% contribution from Armani to cover any insurance over the guaranteed issue amount. C.A. ER75-77.

In response, Armani filed a motion to dismiss the Third-Party Complaint. The district court issued an order granting Armani's motion to dismiss without leave to amend pursuant to the Ninth Circuit's opinions in *Kim v. Fujikawa*, 871 F.2d 1427 (9th Cir. 1989) ("*Kim*") and *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989) ("*Call*"), which held that causes of action under ERISA for contribution or indemnification are not cognizable between co-fiduciaries. Pet. App. 6a. Specifically, the district court cited to *Kim* stating:

> [t]he Court in *Kim* specifically rejected the attempt of one breaching fiduciary to seek contribution from other allegedly breaching fiduciaries, and noted that implying a right of contribution is particularly inappropriate where, as here, "the party seeking contribution is a member of the class [e.g., fiduciaries] whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class [e.g., ERISA plans]," and where there is 'no indication in the legislative history that Congress was

> concerned with softening the blow on joint wrongdoers.' *Id*. at 1433 (citations and internal quotation marks omitted)."

Pet. App. 9a-10a.

One year after Armani's dismissal, the district court found First Reliance liable due to its waiver of the right to require evidence of insurability and proof of good health. Pet. App. 42a. Specifically, the district court found in part that "[w]hile [First Reliance] argues that it would not have approved [Ms. Cho]'s life insurance plan if it had received and reviewed the evidence of insurability, nothing in the Policy itself appears to state that someone with a pancreatic cancer diagnosis is ineligible." Pet. App. 38a. The district court further found that "[First Reliance] or its agent [Armani] had the opportunity to correct the lack of submission of proof of insurability every month Plaintiff was enrolled and paid the premium for $500,000. Pet. App. 39a. As a result, the district court awarded Ms. Cho a $450,000 judgment for First Reliance's breach of the Policy. Pet. App. 42a.

First Reliance then appealed the judgment and dismissal order to the Ninth Circuit. First Reliance argued in pertinent part that the district court incorrectly dismissed its Third Party Complaint against Armani. Br. 37-38. Specifically, First Reliance argued that the Ninth Circuit should reconsider its prior decisions and should allow claims for contribution and indemnity under ERISA. Br. 43-45.

The Ninth Circuit rejected First Reliance's arguments and affirmed the dismissal of Armani in a unanimous unpublished Memorandum. Specifically, the Ninth Circuit held that First Reliance could not "maintain a claim for contribution or indemnification against Armani" under ERISA. Pet. App. 4a. The Ninth Circuit relied on *Kim* and *Call* in reaching its determination and noted that "First Reliance makes no persuasive argument to avoid application of this settled rule to 29 U.S.C. § 1132(a)(3)." *Id.*

The Ninth Circuit then denied First Reliance's petition for panel rehearing and the petition for rehearing en banc. Pet. App. 45a.

REASONS TO DENY THE PETITION

I. Whether ERISA should allow contribution or indemnity is a question for Congress.

Congress enacted ERISA to protect "the interests of participants in employee benefit plans and their beneficiaries." *Thole v. U.S. Bank N.A., et al.,* 140 S. Ct. 1615, 1624 (2020) (Sotomayor, J., dissenting) (citing 29 U. S. C. §1001(b)). This Court has repeatedly noted that ERISA is a "'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980)). In fact, this Court has long stated that ERISA's comprehensive statutory scheme provides "strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 146-47 (1985) (emphasis in original) ("*Russell*"). This Court has therefore been notably "reluctant to tamper with [the] enforcement scheme" of ERISA by extending remedies that are not specifically authorized in the text of the statute. *Id.* at 147.

With the comprehensive nature of ERISA in mind, the question of whether, as a matter of policy, ERISA should allow contribution or indemnity going forward respectfully "is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot." *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980)). The question of whether ERISA should allow contribution and indemnity should involve public debate and the consideration of "competing values and interests, which, in our democratic system, is the business of elected representatives" in the political branches rather than the courts. *Id.* For instance, some have argued that contribution would raise "administrative costs by reducing the likelihood of settlement" and have instead proposed fiduciary insurance as a means to shift the risks and attendant costs as a more efficient solution. *See* George Lee Flint, Jr. & Philip Woods Moore Jr., *ERISA: A Co-Fiduciary Has No Right to Contribution and Indemnity*, 48 S.D. L. Rev. 7, 15; 49-50 (2003). Such debates are better suited for legislative chambers and thus the Court should not grant First Reliance's petition.

II. The relevant circuit decisions are well-established.

Even if this Court were to consider the circuit split on the issue of contribution or indemnity under ERISA, said split is not a reason to grant certiorari. Among the thirteen circuit courts, only four have faced cases presenting the question of whether ERISA allows contribution or indemnity. The remaining nine circuits have not had the opportunity to address this issue. Thus, there are only a very few circuits involved with this circuit split. Not only does this demonstrate that the legal question is not an issue that many ERISA fiduciaries face, it also demonstrates that if First Reliance has a position on whether ERISA should allow contribution or indemnity, its destination is not this Court, but rather with Congress.

There are only a handful of circuit opinions that have addressed whether ERISA allows contribution or indemnity and those cases were decided from almost 40 years ago at the oldest to approximately 15 years ago as the most recent. Thus, the laws in the respective circuits are well-established, for over a decade at the minimum. In this time, there has been no marked disruption to employee benefit plans. Neither has there been a disruption to how plan sponsors, administrators, and insurers conduct their business. Instead, those who establish, fund, and administer plans are well aware of the laws in their circuits and consider these circuit precedents as a part of their business decisions.

First Reliance does not dispute that Ninth Circuit precedent on this issue has been well-

established for over 30 years. In fact, as the parties were contracting and establishing the Policy, they were well aware, or should have been aware, of the long-established law in the Ninth Circuit that barred claims of indemnity and contribution among co-fiduciaries under ERISA. Instead, First Reliance attempts to conjure up an urgent need to review an issue that has remained undisturbed for decades and has worked without upsetting the underlying policy of ERISA.

Moreover, this Court's own history with the issue of whether ERISA allows contribution and indemnity supports not granting certiorari. In a case involving a similar legal question, the petitioner sought a writ of certiorari from this Court and argued that contribution and indemnity should not be allowed under ERISA. *See* Petition for Writ of Certiorari at i, *Fenkell v. Alliance Holdings, Inc.,* No. 16-473 (Oct. 7, 2016*)*. After briefing regarding whether to grant the petition, the case was distributed for the January 6, 2016 conference of this Court. *See* Notice of Distribution for Conference of January 6, 2017, *Fenkell*, No. 16-473 (Dec. 21, 2016). Prior to deciding on certiorari, this Court invited the Acting Solicitor General to express the views of the United States government on January 9, 2017. *See* Order Inviting Acting Solicitor General to File Brief, *Fenkell*, No. 16-473 (Jan. 9, 2017). Ten days later the parties moved to dismiss the petition. *See* Motion to Dismiss the Petition for a Writ of Certiorari Pursuant to Rule 46, *Fenkell*, No. 16-473 (Jan. 19, 2017). The Acting Solicitor General did not submit any views on the issue. Ultimately, this

Court did not grant certiorari and did not review the merits of the case.

Fenkell does not support granting certiorari here. First, *Fenkell* demonstrates the infrequency at which contribution and indemnity between ERISA fiduciaries makes it through the Judiciary and ultimately to this Court. This infrequency indicates that, for the vast majority of fiduciaries, whatever dispute there may be regarding contribution or indemnity can and is resolved among the parties through their business relationships. Second, this Court could have simply voted to grant certiorari in *Fenkell* during the January 6, 2016 conference, but did not do so.

Therefore, this Court need not grant certiorari to settle a non-existent issue. The respective circuit decisions are well-established and almost every fiduciary is able to incorporate the decisions regarding contribution and indemnity into their business relationships rather than resorting to litigation. The dearth of precedent on this issue demonstrates fiduciaries' ability to resolve any contribution and indemnity issues among themselves.

A. The Ninth Circuit has held for over thirty years that ERISA does not allow claims of contribution or indemnity between fiduciaries.

The Ninth Circuit's jurisprudence for this issue is encapsulated in two principle cases and has been established for over 30 years.

In *Kim,* the plaintiff sought to have the defendant reimburse funds, under an employee benefit plan, for funds paid out for the period from trial until judgment was rendered. 871 F.2d at 1431. The defendant responded by filing a counterclaim and a third-party complaint, seeking a right of contribution from the plaintiff and the other trustees of the funds. *Id.* The district court dismissed both the counterclaim and third-party complaint, holding that a fiduciary could not seek contribution under ERISA. *Id.* The defendant appealed the district court's decision, contending, in part, that ERISA did allow him to seek contribution. He also argued that "in enacting ERISA, Congress provided for 'broad equitable remedies,' including contribution, and that actions for contribution are consistent with the language and purposes of the statute." *Id.* at 1432.

The Ninth Circuit correctly rejected the defendant's argument stating that "section 409 of ERISA, 29 U.S.C. § 1109, only establishes remedies for the benefit of the plan. Therefore, this section cannot be read as providing for an equitable remedy of contribution in favor of a breaching fiduciary." *Id.* The Ninth Circuit further emphasized that "the Supreme Court has noted 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.'" *Id.* (citations omitted). As such, the Ninth Circuit determined that "ERISA . . . does not recognize a right of contribution." *Id.* at 1433.

The second relevant Ninth Circuit case is *Call*. In *Call,* the plaintiffs were fiduciaries for profit sharing plans. 881 F.2d at 628. The Department of Labor ("DOL") conducted an investigation into the plaintiffs' real estate investments and determined that the fiduciaries had violated their ERISA fiduciary duties in their handling of the real estate investment. *Id.* The DOL subsequently demanded that "the plans' fiduciaries restore to the plans the money lost as a result of these breaches of fiduciary duty." *Id.*

After reimbursing the plans, the plaintiffs brought an action under ERISA against the plans' trustees seeking, in part, "contribution from all of the appellees" under ERISA § 409(a), 29 U.S.C. § 1109(a). *Id.* at 629. The district court granted the defendants' motion to dismiss, noting, in part, that it "could find no indication that ERISA authorized an action for contribution from co-fiduciaries. . . . Nor could the court discern a congressional intent that the courts imply such a right of action from ERISA." *Id.* at 630.

On appeal, the plaintiffs and the DOL "as amicus curiae offered several arguments in support of their position that ERISA may be interpreted to authorize a contribution cause of action among co-fiduciaries." *Id.* at 630. However, the Ninth Circuit held that it was "foreclosed from considering these arguments because they were rejected in [the] recent decision in *Kim*[]." *Id.* The Ninth Circuit stated that *Kim* "rejected the appellant's argument that 'ERISA does not and should not prohibit actions for contribution among fiduciary trustees.'" *Id.* at 631 (citation omitted). The Ninth Circuit further stated

that it "also rejected the arguments that, 'in enacting ERISA, Congress provided for "broad equitable remedies," including contribution, ...' and that 'actions for contribution are consistent with the language and purposes of the statute.'" *Id.* (citation omitted). As such, the Ninth Circuit affirmed the district court's dismissal of appellants' contribution claim. *Id.*

Thus, for over thirty years, the law in the Ninth Circuit has been that ERISA does not allow claims of contribution and indemnity between co-fiduciaries. While the Ninth Circuit's precedent is well-established and the various circuit decisions are not disrupting the aims of ERISA, if this Court is inclined to resolve the circuit split among four circuits, it should hold that the Ninth Circuit is correct. Importantly, the Ninth Circuit rejected much of the same arguments that First Reliance now raises in its petition.

For instance, First Reliance argues that contribution and indemnity are "expressly authorize[d]" under Section 502(a)(3) because it "allows courts to award a plan fiduciary 'appropriate equitable relief,' which contribution and indemnity are." (Petition at 12)(citing 29 U.S.C. § 1132(a)(3)). As to its federal common law argument, First Reliance argues that "the Ninth Circuit overlooked the traditional trust-law principles that courts use to fill in ERISA's gaps and that authorize contribution and indemnity." (Petition at 12).

In *Kim*, the appellant similarly argued that "in enacting ERISA, Congress provided for 'broad equitable remedies,' including contribution, and that

actions for contribution are consistent with the language and purposes of the statute." 871 F.2d at 1432. The Ninth Circuit held that the text of ERISA did not provide "for an equitable remedy of contribution in favor of a *breaching fiduciary*." *Id.* (emphasis in original). The Ninth Circuit also held that contribution could not be implied "where, as in this case, the party seeking contribution is a member of the class [e.g., fiduciaries] whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class [e.g., ERISA plans], and where there is no indication in the legislative history that Congress was concerned with softening the blow on joint wrongdoers." *Id.* (internal quotations omitted) (citing *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("*Texas Industries*")). These conclusions were subsequently upheld in *Call* and again by the Ninth Circuit in this matter. *Call*, 881 F.2d at 630-31.

B. The Eighth Circuit agrees with the Ninth Circuit.

The Ninth Circuit is not alone. The Eighth Circuit agreed with the Ninth Circuit *In Travelers Cas. & Sur. Co. of Am. v. IADA Servs., Inc.*, 497 F.3d 862, 866 (8th Cir. 2007) ("*Travelers*"). In *Travelers*, Travelers performed administrative and investment services for an ERISA benefit plan. *Travelers*, 497 F.3d at 863. Travelers insured the plan's trustees, but not the appellee. *Id.* The DOL conducted an audit and alleged that "fees paid by the [plan] to [the appellee] violated various provisions of ERISA." *Id.* The appellee consented to judgment against it and Travelers paid $291,667.00 to the plan on behalf of the trustees and a $58,333.40 penalty to the DOL in

order to settle the claims. *Id.* at 863-64. Although Travelers did not insure the appellee, the settlement payments "made by Travelers for the trustees also settled the related claims against" the appellee. *Id.* at 864.

Travelers filed an amended complaint, which asserted claims for indemnification, contribution, and restitution under both ERISA and state common law. *Id.* The district court granted the appellee's motion for summary judgment, holding "that ERISA provides no contribution claim for Travelers and that the state common-law claims were preempted by ERISA." *Id.*

Travelers appealed and argued that federal courts would develop a federal common law under ERISA and that development of substantive law is guided by the common law of trust. *Id.* Travelers further argued that the law of trusts traditionally has recognized a right of contribution among co-fiduciaries. *Id.* The Eighth Circuit first noted that Travelers "overstate[d] the common law authority of the federal courts under ERISA." *Id.* at 865. While the Eighth Circuit acknowledged this Court's precedent that Congress intended federal common law to be developed for ERISA plans, it also highlighted that "[s]everal circuits have soundly concluded, however, that federal courts may adopt a common law principle under ERISA 'only if necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress.'" *Id.* (citations omitted).

Additionally, the Eighth Circuit stated that "[d]espite the authority to develop federal common law under ERISA, the Supreme Court has emphasized time and again that the statute'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.* (citation omitted). The Eighth Circuit further stated that "[b]ecause ERISA is 'a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system,' the Court has been 'especially reluctant to tamper with [the] enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text.'" *Id.*

The Eighth Circuit also addressed the divided panel decision in *Chemung Canal Tr. Co. v. Sovran Bank/Maryland* 939 F.2d 12 (2d Cir. 1991), stating that since then, this Court has reiterated more than once "its admonition that notwithstanding the authority to fashion certain rules of federal common law under ERISA, the statute'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.* (citing *Great-W. Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204, 209 (2002); *Mertens,* 508 U.S. at 254). Thus, the Eighth Circuit held that the dissenting opinion in *Chemung* and the decision in *Kim* "express the better view that a right of contribution is not available." *Id.* at 866.

Therefore, the Eighth Circuit concluded that "that there is no right of contribution under ERISA." *Id*. at 864. Accordingly, in the most recent—albeit almost 15 years old—chance that a circuit court had to consider the issue, the Eighth Circuit agreed with the Ninth Circuit and decidedly held that ERISA did not allow contribution or indemnity.

C. The Second Circuit issued a divided opinion regarding whether ERISA allows claims of contribution or indemnity between fiduciaries.

The Second Circuit judges could not fully agree on whether ERISA allows claims of contribution or indemnity. In *Chemung Canal Tr. Co. v. Sovran Bank/Maryland,* an employer, who had set up an ERISA retirement plan for its employees, removed the plan's initial trustee because he had "made imprudent investments and engaged in transactions prohibited under ERISA's fiduciary standards." 939 F.2d 12, 13 (2d Cir. 1991). For two months following removal of the initial trustee, the employer's counsel "exercised fiduciary authority over the plan and its assets," until the employer appointed Sovran as trustee from February of 1985. *Id*. Eventually, the initial trustee's imprudent investments resulted in ceased payments from said investments to the plan. *Id*. In 1989, the employer removed Sovran as trustee and appointed Chemung as the new trustee. *Id*. Chemung as well as two beneficiaries of the plan sued Sovran alleging that the Sovran "had breached its fiduciary duties to the plan." *Id*. Chemung sought to recover the losses it alleged were caused by Sovran's "lack of prudence and due diligence with respect to some of the original

investments made by" the initial trustee "but continued by Sovran, as well as two other questionable investments that Sovran itself had entered into on behalf of the plan." *Id.* at 13-14.

Sovran counterclaimed against Chemung and filed a third party complaint against the employer and certain members of the plan's investment committee and counsel. *Id.* at 14. Sovran "requested relief directly on behalf of the plan, as well as contribution or indemnity should it be found liable to the plan." *Id.* The employer and Chemung moved to dismiss Sovran's third-party complaint, arguing, in pertinent part, "ERISA did not allow claims for contribution or indemnity." *Id.* The district court held "that there was no cause of action for contribution or indemnity under ERISA." *Id.* Sovran appealed. *Id.*

The Second Circuit noted that this Court "has indicated in other contexts that a right to contribution may be recognized 'through the affirmative creation of a right of action by Congress, either expressly or by clear implication', or 'through the power of federal courts to fashion a federal common law of contribution.'" *Id.*, at 15 (citing *Texas Industries, Inc.*, 451 U.S. at 638). However, the Second Circuit noted that with respect to ERISA, Congress did not expressly deal with contribution. *Id.* Thus, the issue was "whether such a right can be recognized either by implication from the statute, or as a part of federal common law." *Id.*

The Second Circuit held that the methodology from *Cort v. Ash*, 422 U.S. 66 (1975) "is an inappropriate tool for analyzing" the issue. *Id.* Since

ERISA was enacted to protect plan participants and beneficiaries, not former fiduciaries, the Second Circuit noted that Sovran was not a member of the class for whose benefit ERISA was intended and thus the case would have to be dismissed under the *Cort* test. *Id*. Despite this, the Second Circuit held that analyzing whether contribution and indemnity were allowed under the *Cort* test was "too simplistic." *Id*. Thus, the Second Circuit held that the *Cort* test was not "well-designed to ferret out congressional intent" with regard to resolving issues of contribution. *Id*. at 15-16. Instead, the Second Circuit held that as a matter of statutory interpretation, ERISA did not preclude claims of contribution. *See id*.

Most importantly, the decision of the Second Circuit was not unanimous. Judge Altimari issued a dissent stating that "[w]hile the majority's decision makes good sense, such good sense does not always find its way into legislation enacted by Congress, as the statute at issue demonstrates." *Id*. at 18. While Judge Altimari accepted that "Congress has endowed courts with the power to formulate federal common law in ERISA cases," he also noted that Congress "has not given the federal judiciary the power to 'engraft a remedy on a statute, no matter how salutary, that [it] did not intend to provide.'" *Id*. at 18-19 (citing *Russell*, 473 U.S. at 145). Unlike the majority, Judge Altimari believed Congress was aware that indemnification and contribution between plan fiduciaries would arise under ERISA. *Id*. at 19. As evidence of said congressional awareness, Judge Altimari noted that ERISA provides the circumstances in which a fiduciary may be liable for another fiduciary's breach of fiduciary duty. *Id*.

(citing 29 U.S.C. § 1105). Moreover, "it is equally apparent that Congress was conscious that the general principles of trust law, upon which ERISA is based . . . would allow a breaching fiduciary to obtain indemnification and contribution from other wrongdoers." *Id.* (citing *Firestone Tire Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) and Restatement (second) of Trusts § 258 (1959)).

Despite Congress' "obvious awareness of both the problem at hand and its potential solution," Judge Altimari reasoned that "Congress' omission of all references to the allocation of costs among fiduciaries for joint liabilities demonstrates its rejection of the scheme of contribution and indemnification adopted by the majority." *Id.* Thus, Judge Altimari concluded that "if Congress had intended to include a right of action for contribution and indemnification it would have done so." *Id.*

The dissent in *Chemung* discusses the same rationale that serves as the foundation for the Ninth Circuit's and Eighth Circuit's contribution and indemnity precedent. This further shows that judges in the Second Circuit cannot fully agree on whether they should create new remedies under ERISA. That said, the judges in the Second Circuit did unanimously agree that ERISA did not expressly provide for contribution or indemnity between co-fiduciaries.

D. The Seventh Circuit allowed contribution and indemnity between fiduciaries under inapplicable limited circumstances.

Almost forty years ago, the Seventh Circuit held that ERISA did allow claims of contribution and indemnity, though it expressly limited the holding to the specific circumstances of the case, which are distinguishable to the facts of this case.

In *Free v. Briody*, the employer established a welfare benefit plan in 1967, which fell under the purview of ERISA when the statute was enacted. 732 F.2d 1331, 1333 (7th Cir. 1984). Hodgman had been an officer and a shareholder of the employer since 1968, became the sole shareholder in May 1978, and served as the sole trustee of the plan until 1979. *Id.* Among his investments, Hodgman transferred $8,000 of plan assets "to a purported financial advisor and investment counselor." *Id.* In 1978, an accountant warned Hodgman to obtain more information from the purported financial advisor and to "exercise greater care regarding [the plan's] assets entrusted to [the purported financial advisor]." *Id.*

The board of the employer appointed Briody as a second trustee pursuant to a plan amendment. *Id.* Briody was as a director of the employer, had been Hodgman's insurance agent, and "was a lifetime friend of Hodgman." *Id.* Hodgman continued to withdraw tens of thousands of dollars from the plan's assets for various reasons, including giving the purported financial advisor $40,000.00. *Id.* "Briody did nothing to determine what assets the [p]lan possessed or to protect the [p]lan from loss." *Id.*

Instead, his "only action as a trustee in any way related to the [t]rust was to contact the bonding company on March 23, 1979, to ensure that he was bonded as a trustee." *Id.*

The purported financial advisor never returned the plan assets invested with him and, in 1982, he pled guilty to criminal charges relating to several fraudulent transactions, including his deals with Hodgman. *Id.* The purported financial advisor, Hodgman, and the employer also filed for bankruptcy. *Id.* The district court found that Hodgman misused the plan's assets and his investments with the financial advisor, after the accountant's warnings, violated his fiduciary duties under ERISA. *Id.* The district court "also found that Briody was a trustee of the [p]lan as of March 15, 1979, and that his complete inaction violated his fiduciary duty to supervise and control the Plan assets." *Id.* Accordingly, Hodgman and Briody were removed as plan trustees, and the district court found "both of them jointly and severally liable for three-quarters of the loss incurred by the [p]lan, and held Hodgman individually liable for the remaining loss, which occurred before Briody became a trustee." *Id.* "Finally, the district court rejected Briody's claim for indemnification from Hodgman because of his 'nonfeasance and misfeasance in failing to perform his duties as a cofiduciary and trustee.'" *Id.* at 1333-34.

The Seventh Circuit noted that the "proper question is not whether a right to indemnity exists under general principles of trust law, but whether such a right is provided by ERISA or the federal common law." *Id.* at 1336. Answering this question

required statutory construction and therefore the Seventh Circuit noted that the following relevant factors: "the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Id.* (citing *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 91 (1981) ("*Northwest Airlines*") and *Cort*, 422 U.S. at 78).

The Seventh Circuit held that under "narrowly appropriate circumstances," ERISA allows a "co-trustee who has not availed himself of the protection of section 1105, and has therefore been required to make good a loss to a plan, [to] nonetheless recoup his loss from his more culpable co-trustee." *Id.* The Seventh Circuit concluded as follows:

> [a]n award of indemnification ***within the limited circumstances of this case*** appears to us to be properly within the court's equitable powers.

Id. (emphasis added). Applying this conclusion to the facts of the case, the Seventh Circuit described Briody as "a bystander although, under the applicable law designed to protect beneficiaries, he was not an innocent one." *Id.* at 1138. That is, the Seventh Circuit noted that *Briody* apparently trusted Hodgman, who had been his friend and customer. *Id.* He had also mistakenly assumed that he was appointed as a "trustee because of a requirement of the law that there be a second trustee named." *Id.*

Here, the facts of the case are sufficiently different as to not permit the same conclusion of the Seventh Circuit, which it specifically limited to the circumstances in *Free*. First Reliance was in no way a bystander. Nor did it share the same history of friendship with Armani that Briody had with Hodgman. Finally, First Reliance does not share Briody's relative inexperience regarding the duties and responsibilities of a plan fiduciary. Rather, First Reliance is a large and sophisticated entity that is experienced in administering a myriad of employee benefit plans. It is by no means ignorant of the duties and responsibilities required of an ERISA fiduciary and it entered into its fiduciary role at an arm's distance rather than via a friendly relationship. Thus, the circumstances, which the Eighth Circuit noted were the reasons for allowing indemnity under ERISA, are entirely absent here.

III. There is no implied right of contribution or indemnity between fiduciaries under ERISA.

As discussed above, of the Circuit Courts of Appeals that have analyzed the issue, not a single Circuit has concluded that ERISA's statutory scheme expressly allows for claims of contribution or indemnity between fiduciaries. In fact, all Circuits agree that ERISA, on its face, does not allow for such claims.

Whether claims for contribution or indemnity between fiduciaries should be read into ERISA, should not be a basis for granting certiorari. This Court has already provided the framework to determine whether parties who are jointly liable

under a federal statute could bring claims for contribution or indemnity. Here, Congress did not intend to create such a remedy between fiduciaries under ERISA.

In *Northwest Airlines,* this Court evaluated whether an employer that violated the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 could seek contribution from unions that allegedly contributed to the statutory violations. 451 U.S. at 79-80. Concerning whether contribution could be implied from the applicable statutes, this Court noted that the "ultimate question . . . is whether Congress intended to create the private remedy -- for example, a right to contribution -- that the plaintiff seeks to invoke." *Id*. at 91. Factors "relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Id*. (citing *Cort,* 422 U. S. at 78; *Cannon v. University of Chicago*, 441 U.S. 677, 689-709 (1979)). As to the statutory language, this Court noted that neither applicable statute "expressly creates a right to contribution in favor of employers" and that "it cannot possibly be said that employers are members of the class for whose especial benefit either the Equal Pay Act or Title VII was enacted." *Id*. at 91-92. This Court also noted that the statutes directed employers' conduct for the benefit of employees and therefore employers could not claim to be beneficiaries of either statute. *Id*. at 92. The structure of the statutes also weighed against an implied contribution remedy because the statutes' "comprehensive character of the remedial

scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." *Id*. at 93-94.

In *Texas Industries,* this Court found that a claim for contribution was unavailable under federal antitrust laws by applying a similar analysis. 451 U.S. at 639-40. Specifically, this Court held that there was no explicit statutory language creating a claim for contribution and that the suggestion of an implied cause of action was contradicted by the Sherman Act's provision of treble damages, which "reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." 451 U.S. at 639. In other words, neither the Sherman Act nor the provision of treble damages were adopted for the benefit of the participants in a conspiracy to restrain trade. *Id.* Instead, the proponent of allowing contribution was "a member of the class whose activities Congress intended to regulate for the protection and benefit *of an entirely distinct class*." *Id*. (citing *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 37 (1977) (emphasis in original)).

Here, ERISA's statutory scheme also does not permit inferring the remedy of contribution or indemnity. First, the language of the statute does not include any explicit remedy of contribution or indemnity. Also, as with the statutes involved in *Northwest Airlines* and *Texas Industries*, ERISA was meant to protect plan participants and beneficiaries. Naturally, the statute regulates the conduct of fiduciaries like First Reliance and Armani for the benefit of plan participants and beneficiaries. Finally, ERISA's comprehensive structure also

weighs against implying a remedy of contribution or indemnity. Thus, First Reliance is not in the class (participants and beneficiaries) that ERISA was enacted to protect.

Specifically as to Section 502(a)(3), a claim for contribution or indemnity is not "appropriate equitable relief" as used in that section. The district court in *Meoli v. Am. Med. Servs. of San Diego,* determined that indemnity cannot be considered "other appropriate equitable relief" because it does not redress "any act or practice which violates any provision of [ERISA]." 35 F. Supp. 2d 761, 762 (S.D. Cal. 1999).

Thus, ERISA does not allow claims of contribution or indemnity between fiduciaries.

IV. Contribution or indemnity between fiduciaries are not proper ERISA remedies under federal common law.

Certiorari is not necessary to determine whether contribution or indemnity between fiduciaries under ERISA is created by federal common law. Contribution and indemnity between fiduciaries are not proper ERISA remedies under federal common law because ERISA's comprehensive and reticulated statutory scheme is strong evidence that Congress deliberately omitted such remedies.

This Court has already decided, in *Northwest Airlines*, that the "presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." 451 U.S. at 97. When faced with "comprehensive legislative schemes" like ERISA, this

Court concluded that federal courts cannot "fashion new remedies that might upset carefully considered legislative programs." *See*., *e.g.*, *Northwest Airlines*, 451 U.S. at 97-98 and *Texas Industries,* 451 U.S. at 639-40 (holding that the Equal Pay Act and Title VII of the Civil Rights Act of 1964 are comprehensive statutes for which courts cannot upset by fashioning new remedies).

Here, Congress specifically considered and incorporated trust law remedies into the comprehensive statutory scheme of ERISA. However, Congress chose not to include contribution and indemnity between fiduciaries into ERISA. Instead, ERISA and its enforcement scheme is designed to benefit participants and beneficiaries and regulates plan fiduciaries. Thus, courts cannot usurp Congressional authority by creating the remedies of contribution and indemnity between fiduciaries by common law. *See Northwest Airlines*, 451 U.S. at 95 (citing *New Jersey v. New York*, 283 U. S. 336, 348 (1931)). In fact, the comprehensive nature of ERISA necessitates a presumption that Congress "deliberately omitted" contribution and indemnity between fiduciaries as remedies from the statute. *See id.* at 97. Therefore, this Court should not grant certiorari to review an issue that has already been considered and foreclosed by Congress.

V. Allowing claims of contribution and indemnity would not serve the legislative goals of ERISA.

By allowing claims of indemnity and contribution by co-fiduciaries, ERISA would undermined.

First, and perhaps most obvious, the frequency and volume of third party-claims for contribution and indemnity would increase. This would not only strain the resources of the parties and the Judiciary, it would also overtake ERISA benefits suits and prolong a participant or beneficiary from receiving their benefits. Thus, allowing claims of contribution and indemnity between co-fiduciaries would harm rather than serve the benefits of ERISA plan members.

Second, allowing claims of contribution and indemnity would also not serve ERISA's aim of creating an efficient system of providing benefits for employers. With the floodgates opened, co-fiduciaries will undoubtedly raise claims of contribution and indemnity in otherwise garden-variety benefits cases. *See* Flint, Jr. & Moore Jr., *supra*, at 15 ("The law-and-economics jurisprudential school further criticize the contribution rule since it also increases administrative costs by reducing the likelihood of settlement. Under the contribution rule, the settlement does not bar a court from determining further liability in a subsequent lawsuit. So the contribution rule encourages litigation, while the non-contribution rule encourages settlement, reducing administrative costs."). This is especially true when a fiduciary administers the claims and another pays for the benefits. This added ability to congest ERISA suits with third-party claims of indemnity and contribution will also dissuade employers from creating ERISA plans and will strain the efficient administration of existing plans.

CONCLUSION

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

Respectfully submitted,

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