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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition remains accurate.

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INTRODUCTION

Armani concedes the petition's key arguments in favor of certiorari. Armani admits that there is a 2-2 circuit split on whether ERISA fiduciaries can seek indemnity and contribution from their co-fiduciaries. Armani admits that this Court viewed the split as sufficiently important to warrant calling for the views of the Acting Solicitor General five years ago—views the Court never received because the case settled shortly thereafter. And Armani says nothing about all of the cases and treatises demonstrating that indemnity and contribution are equitable remedies that were available in the equity courts, confirming that indemnity and contribution are "appropriate equitable relief" under ERISA's Section 502(a)(3).

What little Armani does have to say against certiorari is either an attempt at distraction or incorrect. Armani contends that the split is less than it seems, but ends up grasping at irrelevant factual distinctions or—even worse—nonbinding dissents. Armani contends that the split is shallow and stale, but this Court regularly grants petitions alleging splits of similar depth and age. And Armani contends that the split is unimportant, but questions of indemnity and contribution routinely arise in district court ERISA cases, showing the need for this Court's intervention.

So Armani retreats to the respondent's final refuge: It is right on the merits. But Armani's repeated refrain—that ERISA does not mention indemnity and contribution, and therefore must not allow those remedies—is contrary to decades of this Court's case law. For one, Section 502(a)(3) incorporates numerous unenumerated remedies under its umbrella of "appropriate equitable relief." For another, Congress intended federal courts to use their common-law powers to fill in ERISA's gaps with the historic law of trusts, and indemnity and contribution between co-fiduciaries was undeniably available at common law.

The Court should grant and reverse.

ARGUMENT

I. THE SPLIT IS REAL AND IMPORTANT.

Armani does not—and cannot—deny the 2-2 circuit split on the availability of indemnity and contribution under ERISA. Pet. 7-12. Armani instead contends that the split is shallow, stale, and inconsequential. Opp. 12-28. It is wrong across the board.

1. Armani admits that the Seventh and Second Circuits allow indemnity and contribution while the

Eighth and Ninth Circuits do not. Opp. 14-27. But Armani tries to downplay the split. The Seventh Circuit, it says, allows indemnity and contribution only under "narrowly appropriate circumstances." Opp. 27 (quoting *Free* v. *Briody*, 732 F.2d 1331, 1337 (7th Cir. 1984)).

The Seventh Circuit has never limited *Free* to its facts. Rather, in *Chesemore* v. *Fenkell*, the Seventh Circuit explained that *Free* "held that ERISA's grant of equitable remedial power and its foundation in principles of trust law permit the courts to order contribution or indemnification among cofiduciaries based on degrees of culpability." 829 F.3d 803, 812 (7th Cir. 2016). *Chesemore* further explained that, under *Free*, "[g]eneral principles of trust law provide for indemnification under appropriate circumstances," so judges have "the power to shape an award so as to * * * apportion[ ] the damages equitably between the wrongdoers." *Id.* (quoting *Free*, 732 F.2d at 1337-38). And *Chesemore* explained what those "appropriate circumstances" were: Indemnification and contribution are available "as allowed in the law of trusts." *Id.* The Seventh Circuit allows indemnification and contribution in *all* cases where the common-law of trusts would, not cases factually identical to *Free*.

Armani also contends that the disagreement between the Ninth and Second Circuits is somehow less because the Second Circuit's allowance of indemnity and contribution came over a dissent. Opp. 23-24 (discussing *Chemung Canal Tr. Co.* v. *Sovran Bank/Md.*, 939 F.2d 12, 18-19 (2d Cir. 1991) (Altimari, J., concurring in part and dissenting in part)). But majorities, not dissents, dictate a circuit's law. And so, after *Chemung Canal*, the Second Circuit has repeated and

reaffirmed that indemnification and contribution are available between ERISA co-fiduciaries. *See Smith* v. *Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240-241 (2d Cir. 2002); *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1027, 1029 (2d Cir. 1992). The split is real.

2. Armani also contends that the split is too shallow and too old to be worth this Court's time. *See* Opp. 12. But this Court routinely grants similar four-circuit splits, putting the 2-2 split here in the heartland of the cases this Court hears. *See*, *e.g.*, *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 453 n.2 (2012) (3-1 split); *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 57 & n.3 (2011) (same). Indeed, the Court routinely grants petitions *in ERISA cases* involving four or fewer circuits. *See*, *e.g.*, *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739, 743 (2004) (1-1 split); *Bay Area Laundry & Dry Cleaning Pension Tr. Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 200 (1997) (3-1 split); *Boggs* v. *Boggs*, 520 U.S. 833, 839 (1997) (1-1 split). The split here also involves the circuits with the largest metropolitan centers—the Second, Seventh, Eighth, and Ninth—where one would expect a large proportion of ERISA litigation to arise. There is no reason to wait for even more circuits to weigh in, especially where the ones involved have dug in. *See* Pet. 11.

Armani is also wrong that the split's age makes it unworthy of this Court's review. This Court regularly addresses splits that have lingered for some time, including a recent grant that took up a 50-year-old disagreement among the courts of appeals. *See Kemp* v. *United States*, No. 21-5726 (Jan. 10, 2022); *see also*, *e.g.*, *Salinas* v. *U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 696

(2021) (noting a "longstanding split among the Circuits"); *Lange* v. *California*, 141 S. Ct. 2011, 2017 n.1 (2021) (noting a split with cases stretching back to 1989). The split's persistence confirms that it will not resolve on its own. Moreover, holding that ERISA allows fiduciaries to seek indemnification and contribution will inform ERISA law more-generally by building on the Court's Section 502(a)(3) and common-law-of-trusts cases.

Finally, Armani contends that the split isn't important because it doesn't frequently generate circuit opinions. *See* Opp. 12. The paucity of circuit opinions is not surprising. Indemnity and contribution would come up on appeal only if the sued fiduciary defended the case to a merits judgment and was found liable, which is not common because defendants often settle once a case survives a motion to dismiss and discovery. District court cases, moreover, confirm that the indemnity-and-contribution question frequently arises and that courts in circuits that have not yet addressed the issue are in disarray. *See*, *e.g.*, *Remy* v. *Lubbock Nat'l Bank*, 403 F. Supp. 3d 496, 502 (E.D.N.C. 2019) (noting that Fourth Circuit district courts are divided); *Swenson* v. *Lincoln Nat'l Life Ins. Co.*, No. 17-0417, 2018 WL 2269918, at *2 (W.D. La. May 16, 2018) (same for Fifth Circuit district courts); *Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr.* v. *Alerus Fin., N.A.*, No. 12-cv-02547-RM-MEH, 2015 WL 2018973, at *2 (D. Colo. May 1, 2015) (same for Tenth Circuit district courts); *Romano* v. *John Hancock Life Ins. Co. (USA)*, No. 19-21147-CIV, 2021 WL 4441348, at *4 (S.D. Fla. Sept. 28, 2021) (same for Eleventh Circuit district courts). Granting the petition would reconcile not just the four circuits

involved; it would give guidance to district courts across the country.

This Court already confirmed the split's importance when it called for the views of the Acting Solicitor General in *Fenkell* v. *Alliance Holdings, Inc.*, No. 16-473, which Armani concedes presented the exact same question. *See* Pet. 20-21; Opp. 13-14. If the Court does not grant the petition outright, it should at the very least again seek the United States' views.

II. ERISA AUTHORIZES SUITS FOR CONTRIBUTION AND INDEMNITY AMONG CO-FIDUCIARIES.

Armani insists that allowing suits for contribution and indemnity would "read into ERISA" a remedy that Congress chose to omit. Opp. 4. But Armani's argument works only if the Court reads out of ERISA the statute's express incorporation of traditional trust-law principles in Section 502(a)(3).

1. Armani contends that contribution and indemnity are unavailable under ERISA, because the statute does not mention those remedies by name. Opp. 31-32. That argument conflicts with ERISA's text and decades of this Court's jurisprudence.

By its terms, Section 502(a)(3) permits courts to award "appropriate equitable relief" to "redress * * * violations" of ERISA or an ERISA plan's terms. 29 U.S.C. § 1132(a)(3). This Court has long recognized that Section 502(a)(3) "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [ERISA] does not elsewhere adequately remedy." *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996).

Section 502(a)(3) authorizes remedies ERISA does not mention so long as the remedy qualifies as

"appropriate equitable relief"—that is, so long as it was among "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 (2013) (internal quotation marks omitted). This Court has therefore construed Section 502(a)(3) to allow claims for a variety of equitable remedies, none of which specifically appear in ERISA's text. The Court, for example, has allowed enforcement of equitable liens by agreement against plan beneficiaries, even though ERISA never mentions that remedy. *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 361-368 (2006). And the Court has upheld an award of contract reformation, equitable estoppel, and equitable surcharge under Section 502(a)(3), even though ERISA does not call out any of the three. *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 440-442 (2011).

Armani does not dispute that fiduciaries can seek "appropriate equitable relief" under Section 502(a)(3). *See* Pet. 12-13. Nor does it contest that contribution and indemnity are traditional equitable remedies. *See id*. Armani instead simply proclaims that contribution and indemnity do not "redress 'any act or practice which violates any provision of [ERISA].' " Opp. 31 (quoting *Meoli* v. *American Med. Servs. of San Diego*, 35 F. Supp. 2d 761, 762 (S.D. Cal. 1999)).

Armani's quotation of a single district court case addresses only half of Section 502(a)(3). Section 502(a)(3) permits a civil action by a fiduciary to redress "any act or practice which violates any provision of [ERISA] *or* the terms of the plan." 29 U.S.C. § 1132(a)(3) (emphasis added). The requirement that Armani collect proof of insurability is a term of the Armani plan, *see* Pet. 4, and so First Reliance's claims

against Armani seek redress from Armani for the company's violation of the plan's terms.

Moreover, a suit for contribution and indemnity is hardly just "for the benefit of the party who [brings] it." *Meoli*, 35 F. Supp. 2d at 764. Indemnity and contribution ensure that co-fiduciaries are held responsible for their role in a violation and thereby deter future breaches. *See, e.g.*, 1 Dan B. Dobbs, *Law of Remedies* § 4.3(4), at 607-608 (2d ed. 1993); *see also* Pet. 18-19. That benefits all parties to an ERISA plan: Fiduciaries, sponsors, participants, and beneficiaries.

Having ignored Section 502(a)(3)'s text, Armani seeks shelter in cases finding no implied right of contribution or indemnity in other statutes. Opp. 28-30. Those cases have no relevance here, where ERISA authorizes the remedy First Reliance seeks. *Cf., e.g.*, *Northwest Airlines, Inc.* v. *Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 91 (1981) (premising its discussion on the statute's lack of an express provision for contribution and indemnity). The relevant cases are the ones analyzing the meaning of "appropriate equitable relief" under Section 502(a)(3). *See, e.g.*, *US Airways*, 569 U.S. at 94-95; *CIGNA*, 563 U.S. at 439-442; *Sereboff*, 547 U.S. at 361-364 (2006). Armani does not engage with any of them. Its silence is telling.

2. Armani next argues that Congress must have "deliberately omitted" contribution and indemnity from ERISA because it did not include them among the trust-law remedies that it codified. Opp. 32. Armani's argument misunderstands Congress's incorporation of trust-law principles and conflicts with this Court's cases—cases which Armani yet again ignores.

In enacting ERISA, Congress did not define all of a fiduciary's rights and obligations with respect to a plan. Rather, Congress relied on trust law to "define the *general* scope" of fiduciaries' "powers and duties," and left courts to apply settled trust-law principles for the rest. *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 570 (1985) (emphasis added). That Congress did not explicitly incorporate an established trust-law principle into ERISA therefore does not mean that Congress "considered and foreclosed" its application. Opp. 32. To the contrary, Congress expected courts to consult established trust-law principles when developing federal common law to fill in ERISA's gaps. *See, e.g.*, *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989) (adopting a de novo standard of review for benefits claims unless the plan gives the administrator or fiduciary discretionary authority "[c]onsistent with established principles of trust law").

Moreover, given that "ERISA was designed specifically to provide redress" for plans' "participants and beneficiaries," it makes good sense that contribution and indemnity were not among the trust-law principles that Congress explicitly codified. *Chemung Canal Tr. Co.*, 939 F.2d at 18. Contribution and indemnity have no bearing on a participant or beneficiary's ability to recover. They simply apportion responsibility for a loss as between two potentially responsible fiduciaries. Contribution and indemnity are therefore the exact types of remedies that Congress left courts the discretion to fashion, either as "appropriate equitable relief" under Section 502(a)(3), or as a matter of federal common law.

III. CONTRIBUTION AND INDEMNITY WILL NOT UNDERMINE ERISA'S GOALS.

Armani downplays the need for this Court's intervention with two contradictory positions. On the one hand, Armani claims that the "vast majority of fiduciaries" resolve contribution-and-indemnity issues through "business relationships" rather than ERISA litigation. Opp. 14. On the other, Armani claims that a decision in First Reliance's favor would open "the floodgates" to contribution and indemnity suits, wreaking havoc on ERISA participants and employers alike. Opp. 33. Both points are mistaken.

1. Armani seems to assume that fiduciaries can and have worked out indemnity and contribution as a matter of contract. Opp. 14. But Armani is simply wrong that the issue has been negotiated away to nothingness. The district court cases reveal that the availability of indemnity and contribution between co-fiduciaries is a regularly litigated question outside of the Second, Seventh, Eighth and Ninth Circuits. *See supra* p. 5. Lower courts need this Court's guidance.

Armani is also wrong that insurers and administrators can confidently contract for indemnity and contribution. *See* Opp. 14. A state-law suit to enforce a contractual indemnity-and-contribution clause would be preempted by ERISA. *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208-209 (2004) (explaining the breadth of ERISA's preemption provisions); *see also Travelers Cas. & Sur. Co. of Am.* v. *IADA Servs., Inc.*, 497 F.3d 862, 867-868 (8th Cir. 2007) (holding that ERISA preempted state-law contribution and indemnity claims). If there is to be a right to indemnity and contribution among fiduciaries, it must come from ERISA and this Court.

To be sure, fiduciaries could build the possibility of having to pay for their co-fiduciaries' errors into their costs of doing business. But that just passes the expense along to participants. Even then, the circuit split exacerbates the problems for plans trying to price in the cost of indemnity and contribution. Consider multi-state employers, like Armani, who offer benefits under a single plan. The employer would either have to raise prices across the board—even though many courts would allow claims for contribution and indemnity—or adopt jurisdiction-specific policies and give up the efficiency that comes from a nationwide plan. Under either scenario, the administrative costs of providing ERISA plans would increase and participants and beneficiaries would bear the brunt of a co-fiduciary's breach. Those outcomes run counter to ERISA's legislative goals. *See, e.g.*, *Conkright* v. *Frommert*, 559 U.S. 506, 516-517 (2010); *see also* Pet. 18-20.

2. Finally, allowing indemnity and contribution will neither "overtake ERISA benefits suits" nor "dissuade employers from creating ERISA plans." Opp. 33.

Allowing contribution and indemnity will not overly complicate otherwise-straightforward ERISA suits. For one, indemnity and contribution have been allowed in the Second and Seventh Circuits—as well as many district courts—for decades, and Armani does not identify any issues that these courts have faced. For another, district courts have docket-management tools at their disposal to ensure ERISA participants and beneficiaries promptly receive the benefits they are due without being sidetracked by indemnity-and-contribution claims between fiduciaries. *See Dietz* v. *Bouldin*, 579 U.S. 40, 47 (2016) ("[D]istrict courts have

the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases."). In appropriate cases, for instance, a district court could try the beneficiary's claims first and enter a partial final judgment before ruling on contribution and indemnity. *See* Fed. R. Civ. P. 42(b) (allowing for separate trials on "separate issues, claims, crossclaims, counterclaims, or third-party claims"); Fed. R. Civ. P. 54(b) (allowing for entry of partial final judgment). District Courts can manage indemnity and contribution claims in a way that does not unduly delay payment to deserving participants and beneficiaries.

Moreover, allowing contribution and indemnity under ERISA will encourage—not discourage—employer participation. With a "predictable set of liabilities" and "standards" in place, *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002), employers will not have to worry about footing the bill for a co-fiduciary's breach. A clear rule may also cause culpable co-fiduciaries to settle, opting to pay for their errors rather than spend additional resources litigating. Even without settlement, litigation over contribution and indemnity would be far less protracted than now. The court need only adjudicate each fiduciary's role in a loss, not whether a right to contribution and indemnity exists at all.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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