No. _____

In The
Supreme Court of the United States

BENEFIT STRATEGIES WEST, INC. and
LESLIE MANN-DAMON,

Petitioners,

v.

ROGER NAUMANN et al.,

Respondents.

On Petition for a Writ of Certiorari to the Arizona Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

GARY DUKARICH
Counsel of Record
STEVEN L. EVANS
NICHOLAS J. KUNTZ
MICHAEL MALIN
EVANS DUKARICH LLP
9885 S. Priest Drive
Suite 104
Tempe, Arizona 85284
(602) 288-3325
MinuteEntries@Evans.law

QUESTION PRESENTED

The Ninth Circuit, stepping out from the other circuits, rendered federal jurisdictional decisions in *Paulsen v. CNF, Inc.* and *Bafford v. Northrup Grumman Corp.* that appear to vitiate ERISA's exclusive jurisdiction and supersedure statutes and preemption doctrine in a way that would allow state courts to use state law to render uninformed, incorrect and conflicting rulings about federal matters, and in the case at bar a state court relied on those cases in asserting state court jurisdiction and applying state law to an ERISA dispute.

In that context, the question presented is whether the Arizona Court of Appeals, relying on *Paulsen* and especially on *Bafford*, violated ERISA's exclusive federal jurisdiction and supersedure statutes and preemption doctrine by asserting state law and state-court jurisdiction over a case an ERISA plan's trustees and participant brought against the plan's drafter and administrator about whether the plan was drafted and administered in accordance with federal ERISA law.

PARTIES TO THE PROCEEDINGS

Petitioner Benefit Strategies West, Inc. and Petitioner Leslie Mann-Damon in her capacity as Personal Representative of the Estate of Janet Odenwald, Deceased, are Defendants and were Appellees below.[1]

Respondent Roger Naumann in his personal capacity and Roger Naumann and Cheryl Naumann in their capacity as trustees of the Second Home Pet Resort Pension Plan are Plaintiffs and were Appellants below.

RULE 29.6 DISCLOSURE

No parent or publicly owned corporation owns 10% or more of the stock in petitioner Benefit Strategies West, Inc.

[1] Leslie Mann-Damon is successor to Janet Hanson as Personal Representative of the Estate of Janet Odenwald, Deceased. In this petition the term "Petitioners" refers to and includes both Leslie Mann-Damon and Janet Hanson as applicable.

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Benefit Strategies West, Inc., and Leslie Mann-Damon in her capacity as personal representative of the Estate of Janet Odenwald, Deceased, respectfully petition for a writ of certiorari to review the judgment of the Arizona Court of Appeals in this matter.

OPINIONS BELOW

The unreported decision of the Arizona Superior Court is reprinted in the Appendix (App.) at 1a-7a. The decision of the Arizona Court of Appeals, reported at 253 Ariz. 176 and 510 P.3d 513, is reprinted at App. 8a-23a. The unreported Arizona Court of Appeals denial of motion for reconsideration is reprinted at App. 24a-25a. The unreported Arizona Supreme Court denial of petition for review is reprinted at App. 26a-27a.

JURISDICTION

Following the Arizona Court of Appeals entering its ruling and then denying a motion for reconsideration, the Supreme Court of Arizona denied a petition for review on January 31, 2023. App. 25a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Title 29 U.S.C. § 1132 provides in pertinent part:

(e) Jurisdiction

(1) . . . [T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. . . .

Title 29 U.S.C. § 1144 provides in pertinent part:

(a) Supersedure; . . .

. . . [T]he provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

INTRODUCTION

This Case Presents a Timely Opportunity to Stem the State Courts' Intrusion into Exclusive Federal ERISA Jurisdiction Invited by Two Progressively Worse Ninth Circuit Decisions.

Obviously Petitioners here have a problem. But federal ERISA law *also* has a problem, in the form of improperly expanding state court forays into exclu–sively federal ERISA law and jurisdiction in spite of clear statutory command and pre-emption doctrine, a problem that evades normal federal of-right review. The ramifications of the present state court case hence

stretch far beyond its boundaries, presenting impor–tant federal jurisdictional and supersedure issues. Here the Arizona Court of Appeals ("ACOA") fell victim to bad law and bad counsel on ERISA from the Ninth Circuit; the state court was led to render an erroneous decision, the one most egregiously afoul on this issue to date and one that requires reversal for itself but also requires correction of the federal bad law that spurred it.

Congress wisely provided that core ERISA cases should be decided exclusively under federal law, and heard exclusively by federal courts. *See* 29 U.S.C. §§ 1132(e), 1144(a). Of course, not every case where an ERISA plan can be found somewhere in the back–ground requires exclusively federal adjudication. Guided by this Court's pronouncements in cases like *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004), a reasonable federal jurisprudence has grown up dividing claims that present core federal-law ERISA issues from claims that present state-law issues even though an ERISA plan may be somewhere involved. *See, e.g., Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474 (2020); *Bui v. Am. Tel. & Tel. Co.*, 310 F.3d 1143 (9th Cir. 1999).

Unfortunately, the Ninth Circuit has decided two cases, *Paulsen v. CNF Inc.*, 559 F.3d 1061 (9th Cir. 2009), and *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020 (9th Cir. 2021), that wrongly and progres–sively vitiate the ERISA exclusive jurisdiction and supersedure statutes and pre-emption doctrine along with principles laid down by this Court in cases like *Aetna*. Those two cases, especially *Bafford*, permit state courts to take jurisdiction even where core ERISA principles are being adjudicated in disputes

between core ERISA actors and parties. The Ninth Circuit added its own gloss to this Court's guidance, then moved its jurisprudence farther and farther away from that guidance, also breaking away from the other circuits, and now this renegade result has broken out of the federal system and into the states.

Invited by the Ninth Circuit in *Paulsen* and *Bafford*, the ACOA, apparently the first state court but likely not the last, has not surprisingly appropri–ated for itself jurisdiction over still purer ERISA disputes. This is not the first example of state courts dabbling in federal ERISA law, not even the first in Arizona, and the results can be and have been dismal. The state courts are simply not equipped to decide these specialized federal issues. However, if the Ninth Circuit's *Paulsen* and *Bafford* decision and this state court's decision are not cut back, under the Ninth Circuit's tutelage the states will continue intruding deeper into federal jurisdiction and making bad law, and the danger of this overreach metastasizing across the states if not to the other circuits will grow rapidly over time.

Because of the inter-system nature of the problem's spread its review must come extraordinarily, and so opportunities for effective review and staunching will not come often. However, the case at bar happens to presents just such an opportunity while the breakout into the states is still small and containable. Now is the time to prune off this bad limb of overreaching state court involvement in federal ERISA issues and to reaffirm the proper interpretation of the juris–dictional principles and guidance of this Court. The case at bar is a timely and even lucky opportunity to do just that, before these successively worse decisions

have time to spread farther and wreak significant damage.

STATEMENT OF THE CASE

Respondents originally brought an action in Federal District Court for the District of Arizona for breach of fiduciary duty under federal ERISA law against several parties involved with an ERISA pension plan, including Petitioners who were not ERISA fiduciaries.

Petitioners were voluntarily dismissed from the federal action with prejudice by stipulation. Petitioners had brought a motion to dismiss on the ground that Respondents' sole claim was for breach of ERISA fiduciary duty, and since Petitioners were not ERISA fiduciaries, no such claim would lie against them. Rather than fight the dismissal motion or attempt to amend their complaint to state a non-fiduciary cause of action under federal law, Respondents came up with stipulating to dismiss the federal action and release all federal claims against Petitioners with prejudice. The federal court issued an order dismissing the federal action and Petitioners with prejudice as to any federal claims that were or could have been brought against them.

After the federal action ended, Respondents filed a complaint against Petitioners in the Arizona Superior Court with three purported state-law claims: Breach of contract, breach of implied warranty, and professional negligence. The complaint contains the following allegations:

* * *

14. Rosenthal recommended to the Naumanns to create a pension plan for SHPR as a retirement tax benefit strategy which would also benefit the employees.

15. Rosenthal recommended Odenwald of BSW to set up and administer the Plan.

* * *

16. Upon information and belief, Odenwald drafted the Plan documents.

18. At all times material hereto, BSW was the third-party administrator of the Plan.

19. During the life of the Plan, the Naumanns, as Trustees, relied upon the calculations provided by BWS [*sic*] and Odenwald regarding the contributions to be made to Plan and to protect Plan participants' interests.

20. The Naumanns also relied on the recommendations Odenwald regarding [*sic*] the contributions to be made on Roger Naumann's part to maximize his tax benefit.

* * *

26. The underfunding of the Plan was caused by BSW and Odenwald's failure to accurately calculate the contributions made to the Plan.

* * *

32. Plaintiffs entered into a valid contract with BSW for the creation and administration of the Plan.

33 The contract required that BSW administer the Plan according to the Plan terms including

> calculating contributions in exchange for agreed upon compensations.
>
> * * *
>
> 35. BSW breached the contract by providing inaccurate calculations of Plan contributions.
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> 36. Plaintiffs relied upon BSW when making contributions and providing employees with information regarding employee contributions.
>
> * * *
>
> 49. Odenwald owed a duty to Plaintiffs to protect Plaintiffs from harm caused by improp–er management of the Plan.

Upon motion, the Superior Court entered judgment dismissing the complaint for lack of jurisdiction due to federal pre-emption. App. 1a - 7a.

Respondents appealed, and the ACOA reversed and remanded, finding valid state law claims and state court jurisdiction. App. 8a-23a. Petitioners timely filed a motion for reconsideration with the ACOA, which was denied.[2] App. 24a-25a. Petitioners then timely petitioned the Arizona Supreme Court for review, which was denied on January 31, 2023. App. 26a-27a.

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[2] Due to a change in the personal representative of the Estate of Janet Odenwald, Deceased, Petitioners sought and were granted an extension of time to file their motion for reconsideration with the ACOA.

REASONS FOR GRANTING THE PETITION

I. Prior to the Ninth Circuit's Overreach, this Court Well Maintained the Separation Between Federal ERISA Claims and State-Law Claims Incidentally Involving an ERISA Plan.

The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). The ERISA exclusive federal jurisdiction and supersedure statutes of 29 U.S.C. §§ 1132 and 1144 are a wise and appropriate reservation of ERISA cases, which are highly technical and specialized, to federal expertise. This Court has recognized this special statutory policy and has continually held that employee benefit plan regulation is "exclusively a federal concern." *Aetna*, 542 U.S. at 208 (citation omitted).

However, not every case touching anywhere in any fashion on an ERISA Plan is a federal ERISA case:

> The governing text of ERISA is clearly expansive. [29 U.S.C. § 1144(a)] marks for pre-emption "all state laws insofar as they ... relate to any employee benefit plan" covered by ERISA, and one might be excused for wonder–ing, at first blush, whether the words of limi–tation ("insofar as they . . . relate") do much limiting. If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere." [Citation omitted.] But that, of course, would be to read Congress's words of limitation as mere sham, and to read

> the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality. . . .
>
> In [*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)], we explained that "[a] law 'relates to' an employee benefit plan, in the nor–mal sense of the phrase, if it has a connection with or reference to such a plan." . . . But this still leaves us to question whether the [state laws in question] have a "connection with" the ERISA plans, and here an uncritical literalism is no more help than in trying to construe "relate to." For the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections. We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.
>
> Congress intended to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Gov–ernment and to prevent the potential for con–flict in substantive law requiring the tailoring of plans and employer conduct to the pecul–iarities of the law of each jurisdiction [citation and internal punctuation omitted].

N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655-57 (1995).

Armed with this lodestar of congressional intent to create a uniform federal body of benefits law and avoid conflicting directives for ERISA plans between states or between federal and state, this Court has laid down a stream of practical guidance that makes sense in the applicable specific situations. As one recent example, in *Rutledge*, 141 S. Ct. 474, this Court held a state law controlling the rates at which pharmacy benefit managers reimburse pharmacies for prescriptions would not be pre-empted by federal law under ERISA simply because some of those prescriptions were written for patients as members of ERISA plans.

The circuits similarly have in general performed pretty well in recognizing state-law cases that are not transformed into federal cases simply because an ERISA plan appears somewhere in the picture. In *Bui*, for example, the Ninth Circuit correctly found state law applied to a medical malpractice claim where the only connection between a defendant's alleged wrong–doing and an ERISA plan was that the allegedly deficient medical services had originally been pro–cured through the plan. 310 F.3d at 1147-49.

None of the cases have ever directly put it in these terms, but Petitioners submit that the decisional jurisprudence of the federal-state jurisdictional allo–cation can be expressed as evaluating on a continuum the proximity of the ERISA plan to the gravamen of the dispute, and how directly the dispute relates to the workings of the plan as opposed to the plan being just an opaque player among the case's cast of characters. Viewed in that light, the progression in outcomes pursued by the Ninth Circuit and now by the ACOA becomes perhaps more conceptually clear—and more ominous.

II. The Ninth Circuit, Beginning in *Paulsen* and Then More Strongly in *Bafford*, Wrongly Invited State Courts to Adjudicate Core Federal ERISA Disputes Using State Law.

a. The Ninth Circuit's Relationship Test.

The Ninth Circuit developed its own extension of this Court's federal jurisdiction and pre-emption criteria:

> The key to distinguishing between what ERISA preempts and what it does not lies, we believe, in recognizing that the statute comprehensively regulates certain *relationships*, for instance, the relationship between plan and plan member, between plan and employer, between employer and employee (to the extent an employee benefit plan is involved), and between plan and trustee.

Gen. Am. Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1521 (9th Cir. 1993) (emphasis in original). The Ninth Circuit is not alone in using a relationship test. *See Gerosa v. Savasta & Co.*, 329 F.3d 317, 324 (2d Cir. 2003) (collecting cases). Petitioners may not necessarily have a problem with the relationship test itself, but they do object to the sclerotic way some Ninth Circuit cases have applied it and narrowed it, inviting the state court's error at bar.

Importantly, the list of relationships and plan actors mentioned in *General American Life* was not mean to be exhaustive. *See* 984 F.2d at 1521 (list of relationships prefaced with, "for instance"); *see also, e.g., Providence Health Plan v. McDowell*, 385 F.3d 1168, 1172 (9th Cir. 2004) ("courts in this circuit use a relationship test. Specifically, the emphasis is on the

genuine impact that the action has on a relationship governed by ERISA, *such as* the relationship between the plan and a participant") (emphasis added).

b. *Paulsen* Opens a Crack.

Then the Ninth Circuit decided *Paulsen v. CNF Inc.*, 559 F.3d 1061 (9th Cir. 2009), and the problem leading to this petition began. In *Paulsen* the plaintiffs were ERISA plan participants and the relevant defendant was an outside actuarial firm providing services to the plan. Part of an existing ERISA plan was being spun off into a new plan, and the firm of Towers Perrin was engaged to perform actuarial services, specifically:

> [T]o value the benefit liabilities to be transferred to the [new] plan and associated assets to be transferred to cover those liabil–ities. This was done to certify compliance with the requirement of ERISA § 208, 29 U.S.C. § 1058, that each participant in the spun-off plan would (if the plan then terminated) receive a benefit immediately after the spinoff equal to or greater than the benefit she would have been entitled to receive immediately before the spinoff (if the plan had then terminated). Towers Perrin also provided actuarial services to the new [ ] plan and certified for several years after the spinoff that the new plan was ade–quately funded.

Id. at 1065. After the plan was found to be under-funded, the employee participants sued several parties and "also sued Towers Perrin for professional negligence under state law in valuing the plan liabilities to be transferred at spinoff and in repeat–

edly certifying post-spinoff that the new plan was adequately funded." *Id.* at 1066. *Inter alia*, Towers Perrin had used actuarial assumptions to conclude in each of four years that the plan was fully funded for its likely obligations; relying on this, the employer made no contributions to the plan in those years. *Id.* at 1067-68 & n.6.

The *Paulsen* court applied the Ninth Circuit's relationship test to find the state-law claims against Towers Perrin not to be pre-empted by ERISA. *Id.* at 1082-83. Despite following all previous courts in using an "*e.g.*" notation when reciting the example party relationships subject to federal pre-emption, *id.* at 1083, the *Paulsen* analysis introduced error into the relationship test when it suddenly, without explanation or citation, froze that list into being exclusive and removed any actuary, and by explicit extension *any non-fiduciary service provider at all*, from being eligible for the pre-emption category:

> Under the relationship test, the Employees' state law claims do not encroach on ERISA-regulated relationships. The duty giving rise to the negligence claim runs from a third-party actuary, i.e., a non-fiduciary service provider, to the plan participants as intended third party beneficiaries of the actuary's service contract. The Employees' claims against Towers Perrin do not interfere with relationships between the plans and a participant, between the plans and [plan sponsors] CNF or CFC, or between those companies and their employees. At most they might interfere with a relationship between the plan and its third-party service provider. . . . Here, ERISA does not regulate the relationship at issue and, therefore, there is no express

> preemption under the "connection with" prong. Moreover, there is no indication that the negli–gence would result in a multiplicity of regula–tion, Congress's chief concern in enacting the ERISA pre-emption statute.

Id. at 1083. This blanket pronouncement of an actuarial-participant relationship being outside the scope of ERISA regulation is simply incorrect. For instance, although *Gerosa* does not pre-empt a claim against an actuary, it approvingly presumes that at least some actuarial conduct is regulated by ERISA and that actuarial negligence at least arguably vio–lates ERISA law. 329 F.3d at 320–21 & n.4 (quoting the ERISA actuarial requirements found in 29 U.S.C. § 1023(a)(4)(B)).

It is not directly at issue here whether *Paulsen* was rightly or wrongly decided, but *Paulsen* should at most represent the absolute permissible limit of proximity between the gravamen of a case dispute and an ERISA plan's core functioning before federal law and federal jurisdiction step in. Where, as in *Paulsen*: (1) a defendant's activities interact with specific ERISA law requirements, (2) defendant's alleged actuarial misconduct in violation of those specialized federal requirements causes the plan sponsor itself to take action—or as in *Paulsen* fail to take action—directly related to the plan's function and require–ments, and (3) such action or inaction by a central plan actor damages another central plan actor, the claim of misconduct does implicate ERISA law and core ERISA plan functions. This raises the need for uniform application of federal ERISA law and avoiding conflicting state directives. At any rate, *Paulsen* was just the prelude to more egregious invasions of federal jurisdiction to come.

c. *Bafford* Inflames a Problem.

The problematic crack opened by *Paulsen* grew significantly worse with *Bafford v. Northrop Grum–man Corp.*, 994 F.3d 1020 (9th Cir. 2021). In *Bafford* the plaintiffs again were plan participants, but now the defendant was an outside provider of plan admin–istrative services (though not the plan administrator itself):

> Northrop Grumman sponsored an . . . [ERISA Plan]. Northrop delegated administration of the Plan to an Administrative Committee (Committee), which in turn contracted with Hewitt (now Alight Solutions), a company that provided outside administrative services for the Plan. One of Hewitt's responsibilities was to generate statements for Plan participants showing what their monthly pension benefit would be when they retired, using participant-entered assumptions. Plaintiffs Stephen Baf–ford and Evelyn Wilson both requested these statements using an online platform provided by Hewitt in the years leading up to their retirement. Hewitt mailed the statements to Plaintiffs on Northrop letterhead.
>
> The statements mailed to Plaintiffs in response to their online platform requests grossly over–estimated the benefits to which each plaintiff would be entitled. After Plaintiffs retired and began collecting benefits in the amount the statements predicted they would, Northrop sent them notices that the statements gener–ated by the online platform had been incorrect.

Id. at 1024 (the predictions were off by about a factor of two).

The Hewitt estimates were badly off because the employees had had two periods of employment with Northrop Grumman and "the estimates generated through the online platform calculated the anticipated benefit using Plaintiffs' salaries during their *second* period of employment, not the *first* period, as required by the Plan. *Id.* at 1025 (emphases in original).

Bafford cites and quotes *Paulsen* extensively in analyzing the Ninth Circuit's relationship test, including *Paulsen*'s exclusion of any third-party service provider from being in a relationship eligible for federal pre-emption. *See id.* at 1031 (citing and quoting 559 F.3d at 1083). *Bafford* then fully removes the open-endedness from the relationship test as previously announced and used in prior Ninth Circuit cases, and instead delineates a strictly limited list of party relationships eligible for pre-emption:

> The *Paulsen* reasoning applies with equal force here. Plaintiffs' claims against Hewitt do not bear on the relationship between Plaintiffs and the Plan; between Northrop, the Committee, and the Plan; or between Plaintiffs, Northrop, and the Committee. Consequently, the state-law professional negligence claim does not have a "connection with" an ERISA plan as the case-law uses that phrase, and ERISA does not preempt the cause of action.

Id. at 1031–32 (footnote omitted).

Bafford enlarges significantly the error begun in *Paulsen*, because now *no* non-fiduciary service provider, and in fact *no* party other than the plan itself (presumably through its trustees), its sponsor, administrator, or participants are eligible for federal jurisdiction. Comparison of the identities of the liti-

gants with those fixed parties named in its closed list of eligible parties under the relationship test becomes in *Bafford* the sum total of the jurisdictional analysis; no other factors or policy enter in. *See id.* Applying one static list without any further analysis is glaringly inconsistent with the guidance of this Court.[3]

Further, state law claims prevail in *Bafford* even though the position of the litigants and also the nature of the defendant's alleged malfeasance are much closer to the core of the plan's operation and structure than in *Paulsen*. The plaintiffs are plan participants as in *Paulsen*, but the defendant is not just a financial/actuarial service provider but rather is an adjunct to the plan administrator (Northrop Grumman's "Committee") and the defendant is performing plan administrative duties, not just general calculations. Moreover, the defendant's alleged malfeasance does not merely involve as in *Paulsen* general actuarial and financial calculations but now involves interpretation, or rather misinterpretation, of the specific provisions of the plan. *See id.* at 1025 ("the [erroneous] estimates . . . calculated the anticipated benefit using Plaintiffs' salaries during their *second* period of employment, not the *first* period, *as required by the Plan*") (latter emphasis added).

Under *Bafford* the Ninth Circuit's relationship test becomes a one-dimensional check-box exclusionary rule based solely on party identity or labels. The policy rationale and nuance of this Court's *New York State Conference, Aetna*, and other decisions are gone, and none of the reasoning underlying the relationship test

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[3] In the benefits claim processing context, for example, disputes with third party insurers, who are not any of the *Paulsen* or *Bafford* enumerated core parties, are federally pre-empted. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987).

survives. Armed with the staging of *Bafford*'s further excursion from *Paulsen*, the progression to the state court's still greater error in the case at bar was, if not inevitable, certainly directly invited.

III. The ACOA Decision at Bar Extends the Erroneous Shrinkage of Federal Jurisdiction Still Farther and Heralds Dangerous State Court Invasion of Exclusive Federal ERISA Jurisdiction at the Ninth Circuit's Behest.

The ACOA decision at bar, invited by and relying on the *Paulsen* and especially the *Bafford* decision, takes the level of error from those cases still higher. There is no question *Bafford* is the major driver behind the ACOA's decision (and its error) here. *Bafford* came down while the appeal was pending, and the ACOA ordered supplemental briefing specifically on *Bafford*. The ACOA opinion adopts the Ninth Circuit's relationship test, and in doing so the opinion discuses, analyzes, and relies on *Bafford* extensively. *See* App. 16a-18a. The opinion also cites and relies on *Paulsen*. *See* App. 15a, 16a, 17a, 20a.

In the case at bar the parties are not just closer to, they now in fact *are* the core plan parties of the relationship test. Here the plaintiffs/Respondents are plan participants and *also* the plan *trustees* (which is to say, the plan itself). The defendants/Petitioners are the plan's administrator, specifically a third party administrator, or "TPA." There is no other adminis–trator for this plan besides defendants. ERISA law regulates and imposes direct responsibilities on plan administrators. *See, e.g.*, 29 U.S.C. § 1023(a)(3)(A) (plan administrator required to retain an accountant). A plan administrator is subject to statutory ERISA

liability for its missteps. *See, e.g.*, 29 U.S.C. § 1132(a)(4), (c)(1), (2) (establishing cause of action for misstatements by plan administrator in reports to regulators); *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 539 (7th Cir. 1991) (same). And, as noted above, a plan administrator is on *Bafford*'s list of parties subject to pre-emption. It would therefore be error to flatly rule a plan administrator out of the group of core plan parties whose relationships are subject to pre-emption.

Moreover, here the activities and alleged malfeasance of defendants are closer to the core of the plan function and structure than in either *Paulsen* or *Bafford*, and in fact are *at* that very core. Adjudication of plaintiffs' claims requires analysis of the plan provision and of federal ERISA law. Plaintiffs allege defendants failed to perform proper calculations (Cmplt. ¶¶ 19, 20, 26, 33, 35, 36), which "feels" like *Paulsen* and *Bafford*; however, going farther here, plaintiffs also alleged defendants calculated and set up the wrong contributions themselves. (*Id.*) Even more, under the well-pled complaint rule plaintiffs' complaint puts on trial the ERISA plan itself that defendants drafted, as well as defendants' administration of that plan per its provisions. The complaint alleges that defendants were recommended to plaintiffs "to set up and administer the Plan" (*id.* ¶ 15), that plaintiffs had a contract with defendants "for the creation and administration of the Plan," (*id.* ¶ 32), that defendants "drafted the Plan documents" (*id.* ¶ 16), that the contract required defendants "administer the Plan *according to the Plan terms*" (*id.* ¶ 33 (emphasis added)), and that defendants had charge of "protect[ing] Plaintiffs from harm caused by improper management of the Plan" (*id.* ¶ 49). These

allegations of defendants' core role in creating and managing the ERISA plan are only relevant to claims of negligence and breach of contract if plaintiffs are alleging the plan itself is infirm or defendants did wrong in creating and administering the plan.

Adjudicating any of plaintiffs' theories requires both ERISA law and the plan's terms be consulted and construed in order to determine whether the plan and its provisions as drafted are sufficient under and consistent with ERISA law, who bears which respon–sibilities under the plan, and whether defendants' administration and the recommended contributions were consistent with the plan's terms and with the law. The ACOA, however, was prevented from understanding that this level of involvement and interaction of plan provisions and ERISA provisions should necessarily bring with it federal jurisdiction and federal law. *See Joos v. Intermountain Health Care, Inc.*, 25 F.3d 915, 917 (10th Cir.1994) ("[i]f elements of the ERISA plan are inherently part of the factual basis of the . . . lawsuit, the lawsuit is preempted in part because of the possibility of inconsistent or contradicting interpretations"). The state law invoked by such claims clearly "governs a central matter of plan administration," *Rutledge*, 141 S.Ct. at 480 (citation omitted). The ACOA had no business intruding state law and state jurisdiction into this kind of core dispute between an ERISA plan's principal players regarding the plan's core operation. Yet, *Paulsen* and *Bafford* were telling the ACOA it was okay to do this. *See* App. 19a ("*Bafford* is again instructive").

Clearly the ACOA erred in applying Arizona state law and jurisdiction to this sort of core ERISA dispute, but what makes its error more significant to this

Court is how that error directly springs from *Bafford*'s erroneous approach to the relationship test and indirectly echoes the foundational ill departure of *Paulsen*. The ACOA incongruously cites this Court's recent *Rutledge* decision in false parallel with the Ninth Circuit's *Bafford* and *Paulsen* decisions, but those latter two blinded the ACOA to the fact that the issue in *Rutledge* of control of general pharmacy rates is materially different in nature from the ERISA plan operational disputes in *Paulsen* and especially in *Bafford. See* App. 13a, 15a, 16a.

IV. There is Demonstrated Danger in State Courts Dabbling in Adjudicating These Sorts of Core ERISA Disputes.

The provision of exclusive federal jurisdiction for ERISA is more than just an abstract prudence, and the dangers in ignoring it are very real. There is a great danger whenever state courts wade into special–ized, technical federal areas like ERISA in which they have no particular experience and no particular stake in coming to the correct outcomes. As a stark homol–ogous example, a few years before its blunder in the case at bar, the ACOA in *Shah v. Baloch*, 244 Ariz. 129, 418 P.3d 902 (2017), misread another ERISA provision with horrendous results.[4] There, ironically, the ACOA as a threshold jurisdictional matter did get federal pre-emption correct and it applied federal law. *Id.* at 130, ¶ 4, 418 P.3d at 903. In then interpreting substantive federal ERISA law, however, it badly misunderstood and mishandled ERISA's anti-alienation bar in 29 U.S.C. § 1056(d)(1) and ended up

[4] Undersigned counsel was not involved in the *Shah* case and reports it only as an observer.

holding that even monies *knowingly and fraudulently stashed in an ERISA plan by any participant (trustee or not) in bad faith* are exempt from retrieval by the fraudster's creditors. *See id.* at 130-32, ¶¶ 6-11, 418 P.3d at 903-05. In reaching this shocking result the ACOA relied upon but misunderstood and impermis–sibly extended the trustee-specific rule of *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 376-77 (1990), finally in unknowing near-irony resting on its quote of *Guidry*: "Understandably, there may be a natural distaste for the result we reach here. The statute, however, is clear." 244 Ariz. at 132, 418 P.3d at 905 (quoting 493 U.S. at 377). This is of course a different ERISA issue from the one at bar, but the point is that the danger of state courts dab–bling here is *real*.

The danger is also spreading and accelerating. Each new rung of this unfortunate ladder propels state courts deeper into federal ERISA territory. Peti–tioners believe *Paulsen* was wrongly decided, but acknowledge there are a few similar-feeling decisions around and the point might be debatable. *Bafford*, however, tends toward the clearly wrong, and steps out from any other decided case. The state court decision at bar is then even more clearly wrong and farther out from any precedent, while also breaking the decision-making out of the federal system and into the states. On that conceptual continuum of plan proximity Petitioners suggest here, each decision's further extension is leveraged from the predecessor decision.

From the twelve years between *Paulsen* and *Bafford*, the state court case was argued on *Bafford*'s heels and resulted in its decision just one year later. The state court opinion is published. While it is cur–

rently the only state case building on *Bafford*, it won't be the last, and it won't be alone for long. Before this Court may have another chance to review this issue—and for the reasons discussed below *only* this Court can perform that review—there could be very many more state cases like it, and even going beyond it, further invading and shrinking federal ERISA juris–diction.

V. No Other Circuits Have Yet Gone to the Ninth Circuit's Extreme, Which Leaves the Ninth Circuit out of Step, but This Offers Little Protection for the Future.

While certain other circuits have employed some variant of the relationship test, and have sometimes used it to find state-law claims appropriate, Peti–tioners are unaware of any instance where another circuit has used it to find state law appropriate for such a core ERISA plan dispute as was presented in *Bafford* or the case at bar. *See, e.g., Gerosa*, 329 F.3d at 319-20, 324 (similar to *Paulsen*; relationship test considered in allowing state-law claim for negligent outside actuarial work); *LeBlanc v. Cahill*, 153 F.3d 134, 148 (4th Cir.1998) (relationship test considered in allowing state-law claim for straightforward investment fraud); *In Home Health, Inc. v. Prudential Ins. Co.*, 101 F.3d 600, 602, 605-06 (8th Cir.1996) (relationship test considered in allowing state-law claim for misinforming participant of maximum benefits limit);[5] *Morstein v. Nat'l Ins. Servs., Inc.*, 93

[5] *In Home Health* may have been wrongly decided in favor of state-law claims, since the disputing parties were apparently the plan sponsor and the plan administrator; as little as Petitioners think of *Bafford*, even it includes a plan sponsor and a plan administrator in its rigid list of parties whose disputes are eligi–

F.3d 715, 722–23 (11th Cir.1996); (relationship test considered in allowing state-law claim against insurance agent convincing client to change plans); *Airparts Co. v. Custom Benefit Servs. of Austin, Inc.*, 28 F.3d 1062, 1064, 1066 (10th Cir.1994) (relationship test considered in allowing state-law claim against outside, non-administrator consultant);[6] *Perkins v. Time Ins. Co.*, 898 F.2d 470, 472, 473–74 (5th Cir. 1990) (relationship test considered in pre-empting state-law claim between participant-employee and sponsor-employer for misrepresentation of plan's cov–erage, but allowing state-law claim against outside insurance agent for same). While not exactly a circuit split, the Ninth Circuit has departed from the norms among the other circuits.

Various cases in the circuits and in this Court have appreciated the difficulty in articulating the distinc–tion between disputes that deserve exclusive federal law and jurisdiction and those that do not, and clearly, as *Paulsen*, *Bafford*, and the case at bar demonstrate, there is a continuum, or perhaps more precisely a slippery slope. It is possible for any preset formulation

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ble for pre-emption. *See* 994 F.3d at 1031-32. Further, the alleged defalcation in *In Home Health* may have pertained to the admin–istrator's duties under the plan. It would be hard to say without more information and analysis, though, as the alleged misrepre–sentation does appear to be rather ministerial. Over-rigid appli–cation of the relationship test in either direction is to be avoided, and if the plan administrator's car collides with the plan spon–sor's car on the way to a plan meeting, that is not an ERISA case. At any rate, more plan-centric defendant activities were going on in *Bafford*, and far more in the case at bar.

[6] Petitioners would not completely agree with the *Airparts* ruling, however, at least without more information and analysis, as the defendant there was giving advice apparently going to details of plan operation. *See* 28 F.3d at 1064.

to fail against the incrementalism of that slope, especially when the formulation is drained of its vitality as happened in *Paulsen* and *Bafford*.

There remains, however, a certain holistic sense of the correctness of the federal or state jurisdictional allocation under the facts and circumstances of any particular case, perhaps along the conceptual contin–uum of proximity that Petitioners here propose, a sense as Justice Stewart applied it to pornography of "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 197, (1964) (Stewart, J., concurring). Perhaps the other circuits have known it better when they have seen it, or perhaps they have just not been presented with a particularly tricky set of facts like these. In any event, and whatever the validity of *Paulsen*, when it comes to *Bafford* and even more to the ACOA decision at bar, the correctness of exclusive federal jurisdiction to adjudicate the core ERISA plan disputes these cases present is there to be seen, if one looks hard enough. However, given the analytical trap these difficult situations sprung on the Ninth Circuit and the ACOA, it would be helpful to all the circuits (and all the states) for this Court to update its guidance to address and correct the special problems encountered here.

VI. Because This Federally-Caused Problem Is Manifesting in the State Courts, Securing Federal Review is Difficult and Opportunities to Redress the Problem Will Not Come up Often.

The problem of expanding state-court ERISA juris–diction is ripe for review and correction, but opportu–nities to review and redress it are not plentiful.

Review of the problem identified here is difficult, because this federal problem is manifesting in the state systems and so there is no of-right open channel for federal review and redress. The Ninth Circuit's error is causing distributed, displaced effects in a different system. Appeals from state-court jurisdiction grabs inspired by the Ninth Circuit are not landing back in the Ninth Circuit (or in any other federal court having of-right recourse), they are landing instead in the state appellate courts, where the value of state-court jurisdiction even over exclusively federal mat–ters may be viewed quite differently.

There is little incentive and anyway no effective power for review of this problem in the state systems. We already know the Arizona appellate courts did not here rise to the challenge (one of them *caused* the problem). As crowded as the state dockets are, state courts are ever inclined at least subliminally to expand their own jurisdiction. And as to the federal-side expansion of state-court jurisdiction coming from the Ninth Circuit, even if state courts did feel that expansion was imprudent they have no power to effectively question or correct that bad federal move.

Fairly few of these cases come up for ordinary, of-right review in the federal system, and of course no state-appellate decisions are subject to of-right federal review. Only a narrow range of case postures here ever ordinarily qualify for federal review. In *Paulsen*, 559 F.3d at 1081-85, and *Bafford*, 994 F.3d at 1030-32 (as generally in the other cases discussed here), state-law claims had been added to federal claims brought in federal court but were then dismissed from the federal action as pre-empted, and from there the Ninth Circuit restored them.

This leaves the particular posture of this case as the only posture providing a federal check on improper state-court jurisdictional expansion, and review here is not of-right but rather is discretionary and extra–ordinary. Making available an effective federal review of state court jurisdictional expansion thus requires, as happens to be present in the case at bar, a state litigant and counsel willing to endure frustration up through the highest court of the state and then willing to fight the odds in petitioning for extraordinary, dis–cretionary review through certiorari. Given the effort required and the odds against, that likely will not happen often.

VII. Fortunately, the Case at Bar Does Present a Timely and On-Point Opportunity, While Correcting the ACOA's Particular Error Here, Also to Correct the Ninth Circuit's Overreach and Curb the Resulting State Court Invasion of Exclusive Federal ERISA Jurisdiction.

As far as Petitioners can tell, this Court has not had any recent opportunity to consider or confront the particular problem raised here. Certiorari was denied in *Paulsen*. 558 U.S. 1111 (2010) (mem). This is certainly understandable given the newness of the Ninth Circuit's trend with *Paulsen* at that time, but that trend has gotten out of hand and spawned *Bafford* and now the ACOA decision. Unfortunately, certiorari was not sought in *Bafford*, and so this Court has had no recent chance to visit the issue. Now, however, the case at bar does present an on-point opportunity to perform the needed review and correction by reversing a state court's impingement of federal ERISA law and jurisdiction and in the process deal appropriately with the Ninth Circuit's erroneous

Bafford and *Paulsen* decisions. While perhaps not the largest, most complex case considered at conference or the most monumental in its social import, the issues and problem this case presents are quite important in their realm.

If certiorari is granted, Petitioners will request the ACOA decision be reversed and the state case below be dismissed for lack of jurisdiction. However, Petitioners also anticipate that, importantly for restoring the proper federal-state ERISA jurisdictional boundaries, such reversal could also involve overruling or otherwise disapproving of the Ninth Circuit's overreaching *Paulsen* and especially *Bafford* decisions and reaffirming a clear return to the principles of ERISA jurisdictional guidance previously laid down by this Court's cases.

CONCLUSION

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

Respectfully submitted,

GARY DUKARICH
Counsel of Record
STEVEN L. EVANS
NICHOLAS J. KUNTZ
MICHAEL MALIN
EVANS DUKARICH LLP
9885 S. Priest Drive
Suite 104
Tempe, AZ 85284
(602) 288-3325
MinuteEntries@Evans.law
Counsel for Petitioners

May 1, 2023

APPENDIX TABLE OF CONTENTS

Granted with Modifications
See eSignature page

Clerk of the Superior Court
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Steven L. Evans, State Bar No. 012998
Gary Dukarich, State Bar No. 012119
Nicholas J. Kuntz, State Bar No. 035759
EVANS DUKARICH LLP
P.O. Box 14086
Tempe, Arizona 85284-0069
(602) 288-3325
SEvans@Evans.law
GDukarich@Evans.law
NKuntz@Evans.law
Attorneys for Defendants

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

ROGER AND CHERYL NAUMANN, trustees of the Second Home Pet Resort Pension Plan; and ROGER NAUMANN, in his personal capacity as a beneficiary of the Second Home Pet Resort Pension Plan,

Plaintiffs,

vs.

BENEFIT STRATEGIES WEST, INC., an Arizona corporation; JANET HANSON, in her capacity as personal representative of the Estate of Janet Odenwald; JOHN DOES I-X; JANE DOES I-X; BLACK CORPORATIONS I-X; and WHITE CORPORATIONS I-X,
Defendants.

No. CV2019-096473

DISMISSAL ORDER AND JUDGMENT

Upon consideration of Defendants' *Motion to Dismiss Complaint, and Request for Attorneys'* Fees, the Response and Reply thereto, and upon consideration of Defendants' *Application for Approval of Attorneys' Fees, Costs and Expenses,*

The Court finds:

1. Plaintiffs are without jurisdiction to bring in state court their claims pertaining to an ERISA plan, they have previously dismissed with prejudice all of their federal-law claims, and their state-law claims, if any, are all fully preempted by federal law.

2. Given the fundamental jurisdictional defect in Plaintiff's Complaint and in their basic theory of the case, allowing Plaintiffs leave to amend their Complaint would be futile.

3. Defendants are the successful parties establishing just claims and just defenses in a contested action arising out of a contract and are therefore entitled within the Court's discretion to attorneys' fees pursuant to A.R.S. Section 12-341.01, which discretion the Court chooses to exercise for both the earlier federal court action and the later state court action.

4. The earlier federal action was brought under the applicable ERISA subchapter by an ERISA participant, beneficiary, or fiduciary, and the later state court action was as well an attempt to bring an action *de facto* under that same subchapter, therefore enabling the Court in its discretion to allow reasonable attorneys' fees and costs in both actions to Defendants pursuant to 29 U.S.C. Section 1132(g)(1), which discretion the Court chooses to exercise for

both the earlier federal court action and the later state court action.

5. The parties agreed by stipulation upon dismissing the federal action to allow an award of attorneys' fees and costs for that action to be made within the Court's discretion to the prevailing party in any later action such as the state court action, which discretion the Court chooses to exercise.

6. Roger Naumann's participation in both the earlier federal court action and the later state court action in his personal capacity as a beneficiary of the Second Home Pet Resort Pension Plan was maintained for the benefit of his marital community, and therefore the awards under this Judgment are community debts as to him, and may be collected from his community property and from his separate property.

Based on the foregoing,

IT IS ORDERED GRANTING Defendants' *Motion to Dismiss Complaint, and Request for Attorneys' Fees*, and GRANTING Defendants' *Application for Approval of Attorneys' Fees, Costs and Expenses* in the amount of $24,075.00 for attorneys' fees and $563.05 for costs and expenses, for a total of $24,638.05.

IT IS FURTHER ORDERED that Plaintiffs' Complaint shall be, and hereby is, dismissed with prejudice, and Plaintiffs shall take nothing thereby.

IT IS FURTHER ORDERED that jointly and severally Benefit Strategies West, Inc. and Janet Hanson in her capacity as Personal Representative of the Estate of Janet Odenwald shall have judgment against, jointly and severally, (i) Roger and Cheryl Naumann as trustees of the Second Home Pet Resort

Pension Plan and (ii) Roger Naumann in his personal capacity and payable from his community property and from his separate property, in the amount of $24,638.05.

IT IS FURTHER ORDERED that post-judgment interest shall accrue on this Judgment at the rate of four and one-quarter percent (4.25%) per annum from the date of entry of this Judgment until paid, pursuant to A.R.S. Section 44-1201(B).

No further matters remain pending, and this Dismissal Order and Judgment is entered as a final judgment of the Court under Arizona Rule of Civil Procedure 54(c).

DATED: _____, 2020.

_____
Hon. Daniel Martin
Judge of the Superior Court

Filing ID: 11933323 Case Number: CV2019-096473
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/S/ Daniel Martin Date: 8/24/2020

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DARYL R WILSON

GARY DUKARICH

IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

ROGER NAUMANN, et al., *Plaintiffs/Appellants*,

v.

BENEFIT STRATEGIES WEST, INC., et al.,
Defendants/Appellees.

No. 1 CA-CV 20-0537
FILED 4-21-2022

Appeal from the Superior Court
in Maricopa County
No. CV2019-096473
The Honorable Daniel G. Martin, Judge

VACATED AND REMANDED

COUNSEL

Gordon Rees Scully Mansukhani, LLP, Phoenix
By Daryl R. Wilson
Counsel for Plaintiffs/Appellants

Evans Dukarich LLP, Tempe
By Steven L. Evans, Gary Dukarich, Nicholas J. Kuntz, Michael D. Malin
Counsel for Defendants/Appellees

OPINION

Judge Brian Y. Furuya delivered the opinion of the Court, in which Chief Judge Kent E. Cattani and Judge Samuel A. Thumma joined.

F U R U Y A, Judge:

¶1 Plaintiffs Roger and Cheryl Naumann (the "Naumanns") appeal the dismissal of their three common law claims, which the superior court found were preempted by the federal Employee Retirement Income Security Act of 1974 ("ERISA"), codified at 29 U.S.C. §§ 1001–1461. For the following reasons, we vacate the dismissal of their complaint and remand.

FACTS AND PROCEDURAL HISTORY

¶2 The Naumanns own and operate the Second Home Pet
Resort, L.L.C. (the "SHPR"). They retained David Rosenthal to provide investment advice for SHPR. Rosenthal recommended creation of a pension plan (the "Plan") for the benefit of the Naumanns and SHPR employees. Rosenthal recommended the Naumanns hire Janet Odenwald, the principal owner and professional of Benefit Strategies West, Inc. ("BSW"), to set up and administer the Plan. The Naumanns hired BSW and established the Plan effective January 2013.

¶3 The Naumanns served as trustees of the Plan, while BSW (with Odenwald as the primary service provider) served as the third-party administrator. The Naumanns relied upon calculations performed by Odenwald and BSW to determine the contributions to be made to the Plan and to protect Plan participants' interests. The Naumanns also relied on recommendations by Odenwald and BSW to maximize tax benefits. By mid-2018, the Naumanns had contributed over $235,000 to the Plan.

¶4 After Odenwald died, the Naumanns learned that the Plan was underfunded by at least $460,000. In 2019, the Naumanns sued Odenwald's estate (the "Estate") and others, but not BSW, in federal district court, alleging Odenwald breached a fiduciary duty under ERISA by failing to provide accurate Plan contribution calculations, which resulted in underfunding of the Plan. The Estate moved to dismiss, claiming Odenwald and BSW provided ministerial services and thus owed no fiduciary duty under ERISA. Relying on a stipulation of the parties that neither Odenwald nor BSW were fiduciaries under ERISA, the district court dismissed the complaint against the Estate with prejudice, adding that the personal representative of the Estate, BSW "and any other related persons or parties not named in this case are dismissed with prejudice as to any federal law claims that have been or could have been brought and without prejudice to any state law claims."

¶5 The Naumanns then filed this case in superior court against the Estate and BSW (the "Defendants"). The Naumanns alleged three Arizona common law

claims: (1) BSW breached its contract "by providing inaccurate calculations of Plan contributions"; (2) the Defendants breached an implied warranty "to perform the contract with care and diligence and in a reasonable, non-negligent manner . . . by failing to perform their contractual obligations in a reasonable and non-negligent manner"; and (3) the Defendants committed professional negligence by failing to provide accurate Plan contribution calculations.

¶6 The Defendants moved to dismiss, arguing the Naumanns' claims were barred by express and conflict preemption under ERISA. Attaching the federal court stipulation, the Defendants argued the Naumanns' claims "are inextricably bound to the ERISA framework and are inherently swept aside by the exclusive authority of ERISA." After briefing and oral argument, the superior court found ERISA preempted the Naumanns' claims and dismissed the complaint.

¶7 Following entry of final judgment, the Naumanns timely appealed, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1) and --2101(A)(1).

DISCUSSION

I. Standard of Review

¶8 We review the dismissal of a complaint for lack of subject matter jurisdiction de novo. *Satterly v. Life Care Ctrs. of Am., Inc.*, 204 Ariz. 174, 177, ¶ 5 (App. 2003). Whether ERISA preempts a state law claim is a legal issue also subject to de novo review. *Id.* We assume the truth of the well-pled factual allegations

in the complaint and indulge all reasonable inferences therefrom. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, ¶ 7 (2008).

II. ERISA Overview & Preemption

¶9 It is undisputed that the Plan is governed by ERISA. *See* 29 U.S.C. § 1003. ERISA is an "intricate, comprehensive" statute governing employee benefit plans, including pension and welfare plans. *Boggs v. Boggs*, 520 U.S. 833, 839, 841 (1997); *see* 29 U.S.C. § 1001. ERISA's regulatory scheme is designed to safeguard the establishment, operation, and administration of employee benefit plans by setting forth minimum standards to assure the "equitable character of such plans and their financial soundness." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (citing 29 U.S.C. § 1001(a)). ERISA provides "appropriate remedies, sanctions, and ready access" to federal courts when ERISA administrators fail to comply with such standards. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004); *Boggs*, 520 U.S. at 839; 29 U.S.C. § 1001(b).

¶10 In order "to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations," *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11 (1987), ERISA contains "expansive pre-emption provisions, . . . which are intended to ensure that employee benefit plan regulation [be] 'exclusively a federal concern,'" *Aetna Health Inc.*, 542 U.S. at 208 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)). Although broad, ERISA preemption is not limitless and does not apply to every instance where ERISA and

state law happen to intersect. Rather, preemption of state law occurs when a state law claim expressly relates to an ERISA employee benefit plan, known as "express preemption," or when it conflicts with ERISA's prescribed civil enforcement regimes, known as "conflict preemption." *See Rutledge v. Pharm. Care Mgmt. Ass'n*, 141 S. Ct. 474, 476, 479–83 (2020); *Rush Prudential HMO, Inc.*, 536 U.S. at 364, 375–80; *Paulsen v. CNF Inc.*, 559 F.3d 1061, 1081 (9th Cir. 2009). As such, we must determine whether the Naumanns' three Arizona common law claims, based on the allegation that the Defendants improperly calculated the amount needed to properly fund the Plan, are preempted by ERISA under express or conflict preemption.

¶11 When evaluating whether Arizona law is preempted by ERISA, we must consider "ERISA's objectives 'as a guide to the scope of the state law that Congress understood would survive.'" *Rutledge*, 141 S. Ct. at 480 (quoting *Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997)). Thus, "congressional intent is relevant to the preemption analysis." *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1031 (9th Cir. 2021); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987).

III. ERISA Does Not Expressly Preempt the Naumanns' State Law Claims

¶12 ERISA expressly preempts "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a) (emphasis added). "'A state law relates to an ERISA plan if it has a connection with or

reference to such a plan.'" *Rutledge*, 141 S. Ct. at 479 (quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 147 (2001)).

A. The Naumanns' State Law Claims Do Not Have "an Impermissible Connection With" the Plan.

¶13 Not every potential connection with a state law will run afoul of ERISA's express preemption provision. As the United States Supreme Court observed in *Rutledge*, ERISA is:

> primarily concerned with pre-empting laws that require providers to structure benefit plans in particular ways, such as by requiring payment of specific benefits, or by binding plan administrators to specific rules for determining beneficiary status, [or] . . . if acute, albeit indirect, economic effects of the state law force an ERISA plan to adopt a certain scheme of substantive coverage.

Rutledge, 141 S. Ct. at 480 (citations and internal quotation marks omitted). Accordingly, a state law claim has "an impermissible connection with" an ERISA plan if the applicable state law "governs a central matter of plan administration or interferes with nationally uniform plan administration." *Id.* at 476, 480 (citing *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 320 (2016)). "Crucially, not every state law that affects an ERISA plan or causes some disuniformity in plan administration has an impermissible connection with an ERISA plan." *Id.*

¶14 Here, the Naumanns' state law claims do not "govern[] a central matter of plan administration" but rather concern a professional services contract with a third-party administrator to perform, in relevant part, non-discretionary, ministerial tasks; namely, calculating contributions "according to the Plan terms" to guide the Naumanns in sufficiently funding the Plan. *See Rutledge*, 141 S. Ct. at 480; *Bafford*, 1024–1028, 1032.

¶15 Likewise, there is nothing in the record indicating the Naumanns' state law claims would "interfere[] with nationally uniform plan administration." *Rutledge*, 141 S. Ct. at 480. The Naumanns' Arizona common law claims against the Defendants regarding calculation of contributions to fund the Plan would not in any way affect (let alone interfere with) ERISA-related plan administration, nationally, locally, or otherwise.

¶16 The Ninth Circuit additionally employs a "relationship test" in analyzing the "connection with" inquiry, under which ERISA preempts a state law claim where that "claim bears on an ERISA-regulated relationship." *Paulsen*, 559 F.3d at 1082–83. Such relationships include, for example, those between a (1) plan and plan member, (2) plan and employer, (3) employer and employee, and (4) plan and trustee. *Id.* (citations omitted).

¶17 Here, no such relationship exists between the Naumanns and the Defendants. Instead, the Naumanns are suing a third-party service provider that performed, as relevant here, the non-discretionary, ministerial task of calculating Plan

contributions according to Plan terms. *See Bafford*, 994 F.3d at 1031–32. ERISA does not "purport to regulate those relationships where a plan operates just like any other commercial entity— for instance, the relationship between the plan and its own employees, or the plan and its insurers or creditors, or the plan and the landlords from whom it leases office space." *Paulsen*, 559 F.3d at 1083. As in *Paulsen*, the state law claims here may "[a]t most . . . interfere with a relationship between the plan and its third-party service provider," meaning they are not preempted by ERISA. *Id.* Therefore, the Naumanns' state law claims bear no impermissible connection with their Plan under either *Rutledge* or *Paulsen*.

¶18 The Ninth Circuit's recent decision in *Bafford v. Northrop Grumman Corp.* supports this conclusion. 994 F.3d 1020 (9th Cir. 2021). In *Bafford*, Northrop Grumman Corporation sponsored an employee pension plan governed by ERISA. *Id.* at 1024. Hewitt Associates L.L.C. ("Hewitt"), in turn, provided "outside administrative services" for the plan, including providing plan participants estimates of what their monthly pension benefits would be upon retirement. *Id.* at 1024–25. Hewitt's estimates, however, overestimated the benefits certain participants would receive upon their retirement. *Id.* After the *Bafford* plaintiffs, who were plan participants, retired, they learned Hewitt's estimates were wrong. *Id.* The *Bafford* plaintiffs sued Hewitt for breach of fiduciary duties under ERISA and professional negligence and negligent misrepresentation under state law for the miscalculation of their benefits, with the district court dismissing all claims. *Id.* at 1024–28, 1030–32.

¶19 On appeal, the *Bafford* court found that calculation of benefits pursuant to a plan formula is not a fiduciary function, but a "ministerial function that does not have a fiduciary duty attached to it," and thus affirmed the dismissal of the plaintiffs' breach of fiduciary duty claim. *Id.* at 1024–28, 1032. But it further held that ERISA did not expressly preempt the plaintiffs' state law claims against Hewitt. *Id.* at 1030–32.

¶20 Analyzing the "connection with" prong, the *Bafford* court explained that a state law claim is preempted under that ground if it "bears on an ERISA-regulated relationship," such as the relationship between the plan and its members, between the plan and the employer, or between the employer and its employees. *Id.* at 1031–32; *see Paulsen*, 559 F.3d at 1082–83. Because Hewitt's duty giving rise to the negligence claims did not arise out of any of those relationships but rather "from a third-party actuary, *i.e.*, a non-fiduciary service provider, to the plan participants as intended third party beneficiaries of the actuary's service contract," the claims did not have an impermissible connection with the ERISA plan. *Bafford*, 994 F.3d at 1031– 32 (citing *Paulsen*, 559 F.3d at 1083).

¶21 Here, as in *Bafford*, the Naumanns, acting as trustees for the Plan, engaged an outside administrative service provider—BSW—to assist with calculating Plan contributions. As in *Bafford*, BSW provided incorrect calculations regarding contributions to be made to sufficiently fund the Plan. This failure resulted in a substantial underfunding of the Plan, which in turn allegedly caused loss of

retirement and tax benefits. The Naumanns sued the Estate in federal court, alleging breach of fiduciary duty, but ultimately were compelled to abandon that claim because, as explained in *Bafford*, third-party administrators do not generally owe fiduciary duties under ERISA for ministerial actions, such as performing calculations according to a plan formula. *See id.* at 1024–1028, 1032. Also parallel to *Bafford*, the superior court dismissed the Naumanns' state law claims against the third-party administrator as preempted by ERISA. But *Bafford* clarifies that asserting state law claims against those performing a ministerial function does not impact any fiduciary relationship or duty that would invoke ERISA's express preemption as intended by Congress. *See id.*

¶22 To the contrary, the *Bafford* court observed that "[h]olding both that Hewitt's calculations were not a fiduciary function and that [the plaintiffs'] state-law claims are preempted would deprive [p]laintiffs of a remedy for the wrong they allege without examination of the merits of their claim." *Id.* at 1031. As in *Bafford*, "there is no 'ERISA-related purpose that denial of a remedy would serve' in this instance." *Id.* at 1031 (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996)). Thus, the Naumanns' state law claims have no impermissible connection with the Plan that would warrant express preemption under ERISA.

B. The Naumanns' State Law Claims Do Not Have an Impermissible "Reference To" the Plan.

¶23 A state law claim has an impermissible "reference to" an

ERISA plan if the state law at issue "acts immediately and exclusively upon ERISA plans" or "the existence of ERISA plans is essential to the law's operation." *Rutledge*, 141 S. Ct. at 478, 481, 483 (citation omitted); *accord Cal. Div. of Lab. Standards Enf't*, 519 U.S. at 325; *Bafford*, 994 F.3d at 1031.

¶24 Where state laws regulate "areas where ERISA has nothing to say," even when they have "incidental effect on ERISA plans," those state law claims are not preempted by ERISA. *Egelhoff*, 532 U.S. at 147–48. Here, the Naumanns' state law claims do not necessarily turn on the Plan itself but on whether the Defendants provided accurate contribution calculations to the Naumanns.

¶25 *Bafford* is again instructive. Analyzing the "reference to" inquiry, the *Bafford* court explained that because the plaintiffs' negligence claims against Hewitt were based on state common law negligence principles and state statute, which did not act immediately and exclusively on ERISA plans, nor was the existence of an ERISA plan essential to the operation of those laws, the claims did not have an impermissible reference to the ERISA plan. *Bafford*, 994 F.3d at 1031–32 (citing *Paulsen*, 559 F.3d at 1082).

¶26 Similarly, the Naumanns' contract and negligence claims here do not immediately or exclusively act upon the Plan. Instead, they are based on Arizona law that long pre-dates ERISA and is not reliant on an ERISA plan or ERISA itself for its operation. *See, e.g.*, *Kain v. Ariz. Copper Co.*, 14 Ariz. 566, 569–73 (1913) (breach of contract); *Bartlett-*

Heard Land & Cattle Co. v. Harris, 28 Ariz. 497, 504 (1925) (common law breach of warranty); *Butler v. Rule*, 29 Ariz. 405, 416 (1926) (common law malpractice/professional negligence claims). As such, the Naumanns' state law claims make no impermissible reference to their Plan.

¶27 Because the Naumanns' three state law claims have neither an impermissible "connection with," nor an impermissible "reference to," the Plan, we conclude that those claims are not expressly preempted by ERISA.

IV. The Naumanns' State Law Claims Are Not Subject to Conflict Preemption

¶28 The civil enforcement provisions in ERISA list those entities that may file civil actions, *see* 29 U.S.C. § 1132(a)(1)–(11), and include thirteen avenues of relief that plan participants or beneficiaries may specifically seek in court, *see* 29 U.S.C. § 1132(a)(1)(A)–(B), (c)(1)–(12). Where state law claims would conflict with any of the prescribed enforcement provisions, conflict preemption applies. *See Rush Prudential HMO, Inc.*, 536 U.S. at 375–80; *Paulsen*, 559 F.3d at 1081. "Conventional conflict pre-emption principles require pre-emption where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [in enacting ERISA]." *Boggs*, 520 U.S. at 844 (internal quotation omitted).

¶29 Here, there is no such conflict. ERISA's civil enforcement scheme does not provide relief for any of the state law claims asserted by the Naumanns. As the Naumanns have conceded, the Defendants do not owe any ERISA-derived fiduciary duties to the Naumanns concerning the calculation of Plan contributions according to Plan terms. *See Bafford*, 994 F.3d at 1024–1028, 1032. Similarly, ERISA's civil enforcement provisions do not directly provide relief for breach of a third-party administrator's professional services contract or negligent performance of a non-fiduciary service under that contract. *See* 29 U.S.C. § 1132. As a result, federal and state law do not conflict, and compliance with both is the norm, not a "physical impossibility." *Boggs*, 520 U.S. at 844 (citation omitted). For these same reasons, Arizona's common law is not an obstacle to the full and complete implementation of ERISA. Indeed, dismissal of the Naumanns' ERISA claims because the Defendants' calculations were not a fiduciary function and also holding that the state law claims were preempted "would deprive [the Naumanns] of a remedy for the wrong they allege without examination of the merits of their claim[,] . . . [which] would be inconsistent with ERISA's purpose." *Bafford*, 994 F.3d at 1031. Therefore, the Naumanns' three state common law claims are not precluded by conflict preemption under ERISA.

V. Attorneys' Fee Award

¶30 In light of our decision, we vacate the superior court's award of attorneys' fees to the Defendants because they are no longer necessarily the successful party in the litigation. *See* A.R.S. § 12-341.01(A).

¶31 Both parties request an award of their attorneys' fees on appeal pursuant to 29 U.S.C. § 1132(g)(1), A.R.S. § 12-349, and A.R.S. § 12341.01(A)(1). The ERISA attorneys' fees provision is inapplicable because this action was brought pursuant to Arizona state law and is not an ERISA civil enforcement action. *See* 29 U.S.C. § 1132(g)(1) (authorizing a discretionary fee award in "any action under this subchapter," referring to ERISA's civil enforcement scheme). Further, A.R.S. § 12-349 is inapplicable as a basis to justify a fee award in this appeal. Finally, in our discretion, we deny the fee requests pursuant to A.R.S. § 12-341.01(A)(1) as premature. However, we commend to the discretion of the superior court to consider awarding to the successful party reasonable attorneys' fees, including, but not limited to, those fees expended in this appeal after a final decision on the merits of the Naumanns' claims. *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, 134, ¶ 38 (App. 2012).

¶32 As the successful party in this appeal, the Naumanns are entitled to their taxable costs incurred on appeal upon compliance with ARCAP 21.

CONCLUSION

¶33 For the foregoing reasons, neither express preemption nor conflict preemption pursuant to ERISA bars the Naumanns' three Arizona state law claims against the Defendants. Accordingly, we vacate the dismissal of the complaint and the related attorneys' fees award in favor of the Defendants, reinstate the Naumanns' complaint, and remand to the superior court for proceedings upon the merits of

the Naumanns' state law claims consistent with this opinion.

AMY M. WOOD • Clerk of the Court
FILED: JT

[SEAL]
DIVISION ONE
FILED: 09/29/2022
AMY M. WOOD,
CLERK
BY: KLE

IN THE

COURT OF APPEALS

STATE OF ARIZONA
DIVISION ONE

ROGER NAUMANN, et al.,	)	Court of Appeals
	)	Division One
Plaintiffs/Appellants,	)	No. 1 CA-CV 20-0537
	)	
v.	)	Maricopa County
	)	Superior Court
BENEFIT STRATEGIES WEST INC., et al.,	)	No. CV2019-096473
	)	
Defendants/Appellees.	)	
	)	

ORDER DENYING MOTION FOR RECONSIDERATION

The court, Chief Judge Kent E. Cattani, Judge Samuel A. Thumma, and Judge Brian Y. Furuya has

received and considered Defendants/Appellees Motion for Reconsideration. After consideration,

IT IS ORDERED denying the Motion for Reconsideration.

/s/
Brian Y. Furuya, Judge

A copy of the foregoing
was sent to:

Daryl R Wilson
Gary Dukarich
Steven L Evans
Nicholas J Kuntz
Michael D Malin

Supreme Court

STATE OF ARIZONA

ROBERT BRUTINEL
Chief Justice

ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007
TELEPHONE: (602) 452-3396

TRACIE K. LINDEMAN
Clerk of the Court

January 31, 2023

RE: NAUMANN et al v BENEFIT STRATEGIES et al

Arizona Supreme Court No. CV-22-0111-PR
Court of Appeals, Division One No. 1 CA-CV 20-0537
Maricopa County Superior Court No. CV2019-096473

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on January 31, 2023, in regard to the above referenced cause:

ORDERED: Appellees' Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellees Benefit Strategies et al) = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellants Naumann et al.) = GRANTED.

Tracie K. Lindeman, Clerk

TO:
Daryl R Wilson
Steven L Evans
Gary Dukarich
Nicholas J Kuntz
Michael D Malin
Sean Smith
Amy M Wood
jd