No. 22-1069

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should review a state court of appeals' correct application of the Ninth Circuit Court of Appeals' "relationship test" when determining the limits of federal preemption of state law claims when this Court previously declined to review multiple Ninth Circuit decisions applying the relationship test.

2. Whether this Court should review a state court of appeals' decision that was based upon a Ninth Circuit Court of Appeals' decision regarding the scope of federal jurisdiction under the Employee Retirement Income Security Act ("ERISA"), when this Court previously declined to review *Paulson v. CNF* on January 11, 2010.

3. Whether this Court should review a state court of appeals' decision finding no preemption of state common law claims against a non-ERISA fiduciary, ministerial service provider when the jurisdictional decision is consistent with the outcomes of prior decisions in this Court, the Circuit Courts of Appeals and several state appellate courts.

PARTIES TO THE PROCEEDINGS

Petitioners' list is accurate.

RULE 29.6 DISCLOSURE

Not Applicable.

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Naumann et al. v. Benefit Strategies West, Inc. et al., Arizona Court of Appeals Division I, Opinion dated April 21, 2022, and reported at 253 Ariz. 176 (App. 2022), 510 P.3d 513 (App. 2022).

Arizona Supreme Court denial of petition for review dated January 31, 2023.

JURISDICTION

On January 31, 2023, the Arizona Supreme Court denied Petitioner's petition for review of the Arizona Court of Appeals' Decision. This Court has jurisdiction under 28 U.S.C. §1257(a).

INTRODUCTION

Petitioners fail to establish a compelling reason why this Court should grant review. The Petition argues that the state court decision should be reviewed because the Arizona Court of Appeals relied upon the Ninth Circuit's alleged misapplication of the well-settled relationship test. The Ninth Circuit's relationship test has been utilized for over thirty years. This Court has declined to review decisions which applied the relationship test on numerous occasions, including

Paulsen v. CNF, Inc., 559 F.3d 1061 (9th Cir. 2009), one of the opinions the Petition argues was improper.

Contrary to the arguments in the Petition, the Ninth Circuit's opinions in *Paulsen* and *Bafford v. Northrup Grumman Corp*., 994 F.3d 1020 (9th Cir. 2021) and the Arizona court of appeals' decision in this matter do not intrude upon or erode federal jurisdiction. Congress never intended ERISA to preempt all state law claims as this Court has held on numerous occasions. Congress never intended to preempt state common law claims, especially state law claims that do not have a corresponding remedy under ERISA.

The claims asserted by the Naumanns are run of the mill state law tort and contract claims against a non-ERISA fiduciary performing ministerial tasks. This Court, the Circuit Courts of Appeals and state appellate courts have consistently held state common law claims against non-ERISA fiduciaries were not preempted by ERISA for over thirty years. The Petition does not present an unsettled issue nor a profoundly important issue worthy of this Court's review.

STATEMENT OF THE CASE

The Naumanns do not dispute Petitioners' Statement of the Case. The Naumanns clarify that the initial action brought in the Arizona Federal District Court also included claims against an investment manager who was a statutory ERISA fiduciary. The investment manager compelled arbitration and was

dismissed from the matter. Petitioner's motion to dismiss argued that ERISA did not provide a claim for relief against Petitioners because Petitioners were not ERISA fiduciaries and performed only non-discretionary, ministerial tasks.

REASONS FOR DENYING THE PETITION

1. While Petitioners argue recent Ninth Circuit decisions and the decision below create an "erroneous shrinkage of federal jurisdiction," Petitioners are actually only objecting to the application of the relationship test which is well-settled law, and accordingly, this case is not a proper vehicle for review.

There are two types of preemption under ERISA "express preemption" under ERISA §514, 29 U.S.C. §1144" and "complete preemption" under ERISA §502, 29 U.S.C. §1132. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). ERISA's express preemption clause preempts any state law that "relate[s] to any employee benefit plan." ERISA §502. A state law "relates to" an employee benefit plan "in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).

The Petition only attacks the Ninth Circuit's application of the relationship test in both *Paulsen, supra*, and *Bafford, supra*, which were relied upon in the decision below. The relationship test has been utilized

by the Ninth Circuit for over thirty years when analyzing the connection with prong in the preemption analysis. Not only is the relationship test well-settled law, it is similar to the analysis used by other Circuit Courts of Appeals.

ERISA fiduciaries are a limited class. Lawyers, accountants, financial advisors and other professionals may render services to employers, plan trustees, and plan beneficiaries; their roles generally do not include discretionary decision-making authority over the plan or plan assets. "A party rendering professional services to a plan is not a fiduciary so long as he does not exercise any authority over the plan in a manner other than by usual professional functions." *Mertens v. Hewitt Associates*, 948 F.2d 607, 610 (9th Cir. 1991), aff'd, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993) (quoting *Nieto v. Ecker*, 845 F.2d 868, 870 (9th Cir. 1988) (internal quotations omitted)). While ERISA preempts state law claims against ERISA fiduciaries, it is undisputed in this matter that Petitioners are not ERISA fiduciaries.

The Ninth Circuit formulated the relationship test to determine whether a state law claim is preempted in *General American Life Ins. v. Castonguay*, 984 F.2d 1518, 1522 (9th Cir. 1993). The relationship test is used to determine if a state law claim encroaches upon relationships regulated by ERISA. *Oregon Teamsters Employers Trust v. Hillsboro Garbage Disposal, Inc*., 800 F.3d 1151, 1155-1156 (9th Cir. 2015).

In *Arizona State Carpenters Pension Trust Fund v. Citibank*, 125 F.3d 715 (9th Cir. 1997), the plaintiff asserted ERISA claims, along with state law claims, based upon the breach of a separate custodial agreement, breach of common law fiduciary duties, negligence, and common law fraud. *Id*. at 719. The district court dismissed the ERISA claims on the basis that the defendant was not an ERISA fiduciary and also dismissed the state law claims on the basis that the claims were preempted by ERISA. *Id*. On appeal, the Ninth Circuit reversed the dismissal of the state law claims, holding that ERISA regulates certain relationships including relationships, between the plan and plan member, the plan and employer, between employer and employee to the extent the benefit plan is involved, and the plan and trustee. *Id.* at 724. The Ninth Circuit found that state law claims against a service provider offering non-fiduciary services were not preempted because ERISA does not regulate that relationship. *Id*. at 723.

In *Abraham v. Norcal Waste Systems, Inc.*, 265 F.3d 811 (9th Cir. 2001), the Ninth Circuit applied the relationship test to determine that state law fraud, negligence and breach of fiduciary duties claims were not preempted by ERISA because the claims did not bear upon an ERISA-regulated relationship. *Id.* at 820-822 (9th Cir. 2001). This Court denied Certiorari of the *Abraham* opinion. *Norcal Waste Systems, Inc. v. Abraham*, 537 U.S. 1071 (2002). The Ninth Circuit again applied the relationship test in *Providence Health Plan v. McDowell*, 385 F.3d 1168, 1172 (9th Cir. 2004). In *McDowell*, the Ninth Circuit held the state contract

claims at issue were not preempted. *Id*. at 1172-1173. This Court denied Certiorari on April 4, 2005. *McDowell v. Providence Health Plan*, 544 U.S. 961 (2005).

The Ninth Circuit applied the relationship test in *Paulsen*, *supra*, holding that ERISA does not regulate the relationship between beneficiaries and a third-party non-fiduciary service provider. *Id*. at 1083. The Petition argues that *Paulsen* was "simply incorrect" although it fails to cite authority in support of this argument. Petition Page 14. This Court denied Certiorari review of *Paulsen* on January 11, 2010. *Paulsen v. CNF, Inc*., 558 U.S. 1111 (2010).

Bafford v. Northrup Grumman Corp., 994 F.3d 1020 (9th Cir. 2021) also applied the relationship test and determined the plaintiffs' professional negligence claims did not bear upon an ERISA regulated relationship. *Id*. at 1031-1032. The *Bafford* court held that the state law claims were not preempted because they did not have a reference to or connection with an ERISA plan. *Id*.

The court below partially relied upon *Paulsen* and *Bafford* in determining the state law claims were not preempted. The court also employed the Ninth Circuit relationship test, finding the relationship was not one Congress intended to regulate. *Naumann*, 510 P.3d at 520. The Naumanns' negligence claims at issue did not arise out of the ERISA regulated relationships and, therefore, were not preempted. *Id.*

The decisions in *Paulsen and Bafford* and the decision below are all based upon the Ninth Circuit's

well-settled relationship test. No modifications to the relationship test resulted from the opinions. In each matter, the court applied the facts on appeal and found that state law claims against a non-ERISA fiduciary, third-party service provider performing ministerial tasks were not preempted. This Court previously declined to review the *Paulsen* decision and the alleged misapplication of the relationship test in the case below does not merit review.

2. The court below properly rejected Petitioners' immunization argument.

Petitioners argued they were not ERISA fiduciaries in federal district court in support of a dismissal on the basis that ERISA provided no remedy for the claims. In state trial court, Petitioners argued the state law claims were preempted by ERISA to obtain a dismissal. Those arguments are repeated in the Petition. The court below rejected Petitioners' argument that ERISA does not provide a claim for relief because they are not ERISA fiduciaries, while still preempting the state law claims. *Naumann*, 510 P.3d at 521. This argument shows Petitioners' fundamental misunderstanding of ERISA.

The purpose of ERISA was to protect plan beneficiaries, not immunize service providers from liability for actions which harm the beneficiaries. *Bafford*, 994 F.3d at 1032. The decision of the court below on this issue is consistent with the Ninth Circuit as well as several other Circuits. *See: Memorial Hospital System*

v. Northbrook Life Ins. Co., 904 F.2d 236, 250 (5th Cir. 1990); *Gerosa v. Savasta & Co., Inc*., 329 F.3d 317, 329 (2nd Cir. 2003).

3. The outcome in *Paulsen, Bafford* and the case below are consistent with the holdings in other Circuit Courts of Appeals and state appellate courts.

Circuit Courts of Appeals and state appellate courts have consistently ruled that state law claims against non-ERISA fiduciary service providers are not preempted. While other Circuits articulate the regulated relationship a bit differently than the Ninth Circuit's relationship test, the results are the same.

a. Consistent Circuit Court Rulings.

In *Gerosa v. Savasta & Co., Inc*., 329 F.3d 317 (2nd Cir. 2003), the Second Circuit held state law claims between plans and actuaries were not pre-empted. *Id*. at 330. The *Gerosa* court noted that finding preemption would effectively immunize actuaries from liability leaving the plans without a remedy, which was inconsistent with Congressional intent. *Id.* at 329. This Court denied Certiorari on October 20, 2003. *Gerosa v. Savasta & Co., Inc*., 540 U.S. 967 (2003). Also, in *LeBlanc v. Cahill*, 153 F.3d 134 (4th Cir. 1998), the Fourth Circuit found state common law fraud and misrepresentation claims against a non-ERISA entity were not preempted and the laws did not implicate the

relationships among traditional ERISA plan entities. *Id*. at 147.

The Fifth Circuit in *Perkins v. Time Ins. Co.*, 898 F.2d 470, 473-474 (5th Cir. 1990) found no preemption of state law fraudulent inducement claims, as the claims do not affect the relations among ERISA entities, *e.g.*: the employer, the plan fiduciaries, the plan and the beneficiaries. *See also Memorial Hospital System v. Northbrook Life Ins. Co*., 904 F.2d 236 (5th Cir. 1990). Similarly, in *Smith v. Provident Bank*, 170 F.3d 609 (6th Cir. 1999), the Sixth Circuit stated: "When an ERISA plan's relationship with another entity is not governed by ERISA, it is subject to state law." *Id*. at 617. Further, the Tenth Circuit held that state professional malpractice claims brought against a non-ERISA fiduciary service provider does not have any effect on relations between traditional ERISA entities and were not preempted. *Airparts Co., Inc. v. Custom Benefit Services of Austin, Inc*., 28 F.3d 1062 (10th Cir. 1994). *Id.* at 1066-1067.

While not exhaustive, the foregoing opinions all applied some form of the relationship test similar to the Ninth Circuit. The *Provident Bank* opinion in particular clearly sets a strictly limited list of party relationships, which the Petitioners argue is the error in *Bafford*.

b. Consistent State Court Rulings.

State appellate courts have also found no ERISA preemption of state law claims when the defendant is

not a traditional ERISA entity. The Maryland Court of Appeals in *Shofer v. Hack Co.*, 324 Md. 92, 595 A.2d 1078 (Md.App. 1990) involved claims against a "pension plan professional." *Id*. at 95. After finding the defendant was not an ERISA fiduciary, the court held the state law claims were not preempted. *Id.* at 102-103. In *Simon Levi Co. v. Dun & Bradstreet Pension Services, Inc.*, 55 Cal.App.4th 496 (Cal.App. 1997), the preemption issue related to claims by the Plan against third-party contract administrators. *Id*. at 505. The California Court of Appeals held the state law claims at issue were not preempted stating "the relationship between the parties is not one generally regulated by ERISA." *Id*. at 506.

Further, the Colorado Court of Appeals found professional malpractice claims against non-ERISA fiduciaries were not preempted. *Barrett v. Hay*, 893 P.2d 1372 (Colo.Ct.App.1995). In *Harmon City, Inc. v. Nielsen & Senior*, 907 P.2d 1162, 1169 (Utah 1995), the Utah supreme court determined professional malpractice claims against a non-ERISA fiduciary were not preempted. In *Weiser v. United Food and Commercial Workers Unions*, 653 N.E. 2d 51 (Ill.App. 1995), the Illinois Appellate Court held state law claims brought by a third-party service provider were not preempted.

There is nothing extreme, dangerous or radical in the *Paulson, Bafford* or *Naumann* decisions. Each were correctly decided, and all are consistent with federal jurisprudence on ERISA preemption.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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