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

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF

Petitioners, supporting their petition for writ of certiorari (the "Petition") to review the Arizona Court of Appeals ("ACOA") ruling, here reply to respondents' Brief in Opposition ("BIO").[1]

I. The BIO Demonstrates More and Different Things Than Respondents Suspect

a. The BIO and Its Research Are Welcome and Useful

Petitioners without irony welcome the addition of the BIO to the certiorari analysis mix. As discussed below, its points do advance the analysis, though probably not in ways respondents envisaged. Its case research is useful, although that research actually serves to demonstrate both the recent resurgence of the pre-emption jurisdictional problem discussed in the Petition and also that the problem is likely even worse than presented in the Petition.

b. The BIO's Cited Cases Are All Old, Suggesting This Court's *Aetna*-era Jurisdictional Rulings Interrupted the Earlier Error, Until *Paulsen* and *Bafford*.

The BIO has turned up state court incursions into federal ERISA jurisdiction in the area of non-fiduciary

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[1] Undersigned counsel apologizes to the Court for failing to include in the Petition a section denominated "Summary of Argument," and requests the Court accept the Petition's section denominated "Introduction" as approximately performing that function.

service providers to plans, coming much earlier than the COA ruling below, and indeed also some federal court permissions back then for those incursions. Oddly, however, all the BIO's cited cases are rather old, rendered twenty to thirty years ago, with no cases cited coming from the era of *Paulsen v. CNF, Inc.*, 559 F.3d 1061 (9th Cir. 2009), and *Bafford v. Northrup Grumman Corp.*, 994 F.3d 1020 (9th Cir. 2021). This strange dearth of newer cases outside these two Ninth Circuit decisions hardly suggests a constant or continuing jurisprudence.

The BIO's cases all come before the later round of jurisdictional pre-emption rulings by this Court laying down a more proper interplay between federal ERISA jurisdiction and surrounding state jurisdiction, such as *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004). It seems—and it would be hoped—that this Court's decisions in its *Aetna* and other cases of that era outmoded or at least subdued these incorrect earlier cases.[2] That is, at least until the Ninth Circuit's *Paulsen* decision apparently began the march again toward state courts determining core ERISA disputes.

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[2] The BIO's notion of "well-settled" state and federal cases going in its direction begs the question of why, if the issue were so well settled, the Ninth Circuit felt it necessary to publish opinions in both *Paulsen* and *Bafford*. This Court's *Aetna*-era rulings interrupted the BIO's earlier purportedly "well-settled law," and those intervening rulings explain the need for renewed publication; *Paulsen*, 559 F.3d at 1076 & n.16, 1084, indirectly cites *Aetna* and also refers to *LaRue v. DeWolff, Boberg & Associates*, 552 U.S. 248 (2008), while *Bafford*, 994 F.3d at 1026, cites *Pegram v. Herdrich*, 530 U.S. 211 (2000).

c. The BIO Does Unearth Some Early State Cases as Wrong and Dangerous as the Case at Bar.

Petitioners acknowledge the BIO's success in finding older, prior-era cases presaging the more recent error embodied in *Paulson* and *Bafford* on the federal side and in the ACOA decision on the state side. These improper state incursions into federal ERISA jurisdiction include *Simon Levi Co. v. Dun & Bradstreet Pension Services, Inc.*, 55 Cal. App.4th 496, 64 Cal. Rptr. 2d 159 (1997). There is no question this California appeals decision stands for the proposition the BIO cites it for, and there is no question this decision is wrong and dangerous.

There, the defendant was the third-party administrator, or "contract administrator" of an ERISA plan, and it

> perform[ed] such duties as allocating contributions, forfeitures, and earnings of the Plan among participants; posting distributions made to participant's accounts; maintaining participant records; processing benefit claims; and . . . calculating the amount of benefits payable to Plan participants. Levi [the Plan sponsor and administrator] had no expertise in administering employee benefit plans and relied on the expertise of [the defendant] in administering the Plan.[3]

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[33] Undersigned counsel wishes to qualify a statement in the Petition (at 18), that "[t]here is no other administrator for this [Naumann] plan besides defendants." Some documents plaintiff Naumann signed recite his capacity as administrator of the plan. Even if he is found to be a titular administrator for the plan, though, defendants are still the actual, functional administrator

Id. at 499, 64 Cal. Rptr. 2d at 160-61. The plan administrator was sued for negligently advising the plan sponsor to overpay a terminating employee for her investment in the plan. *Id.*, 64 Cal. Rptr. 2d at 161. Even though committing this alleged mistake would have required the defendant to interpret both ERISA law and the terms of the ERISA plan, the state appeals court ruled this a state law and state court claim rather than an exclusively federal ERISA case.

Shofer v. Stuart Hack Co., 324 Md. 92, 595 A.2d 1078, (1991), is similarly wrong and dangerous. There, petitioner Shofer was the plan's sole trustee. On the other side,

> [r]espondent[s] . . . are pension plan consultants. They prepared the Catalina plan and amendments thereto. Hack Co. acts as a professional plan administrator, and it is the administrator of the Catalina plan. Respondents routinely rendered professional assistance to Catalina. This included advising Shofer or Catalina as to the tax implications of transactions that they were contemplating. That was a normal part of the business relationship between respondents, [plan trustee] Shofer, and [plan sponsor] Catalina.

Id. at 95–96, 595 A.2d at 1079–80. The plan administrator provided advice to the plan trustee that the trustee followed, allegedly causing adverse tax consequences for the plan. *Id.* at 96, 595 A.2d at 1080.

Dealing with this claim for bad advice about the plan's operation given by the plan administrator to the

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for the plan, in parallel with the defendants in *Bafford* and here in *Simon Levi Co.*

plan's trustee, the Maryland appeals court amazingly concluded "[t]he state law liability . . . of the [administrator] does not turn on[] the construction, interpretation or application of ERISA or of a plan; rather, those liabilities depend on duties arising from the nonfiduciary relationships." *Id. at* 103, 595 A.2d at 1083. The court distinguished a case finding pre-emption where a plan administrator inaccurately calculated lump sum benefits payable to terminated employees, reasoning that improper *benefits* analysis interpreted ERISA provisions and plan provisions but improper tax benefit analysis did not. *Id.* at 108, 595 A.2d at 1086 (citing and distinguishing *Casper Air Serv. v. Sun Life Assur. Co. of Canada*, 752 F. Supp. 1005, 1006 (D. Wyo. 1990)). The court drew a bright line around the non-fiduciary status of the plan administrator, and apparently made this the deciding jurisdictional factor. *Id.* at 109, 595 A.2d at 1086.

In *Harmon City, Inc. v. Nielsen & Senior*, 907 P.2d 1162, 1164 (Utah 1995), the claim was against lawyers, among them

> Gottfredson [who] represented to the [plan sponsor and trustee] that he and other members of his law firm were experts on [ERISA]. In about 1973, Gottfredson drafted the initial HCI Plan. In addition, the lawyers provided annual auditors' letters for both [the Plan's sponsor] and the Plan. Although the lawyers were neither Plan fiduciaries nor Plan administrators, both [the Plan sponsor] and the Plan trustees frequently asked the lawyers whether the investments they were contemplating were legally permissible and sought general advice as to what types of investments they could legally make.

Id. at 1165.

The lawyers allegedly gave the plan sponsor and trustee bad advice about the suitability of certain real estate loans under ERISA law, leading to the plan undertaking transactions directly prohibited by ERISA. *Id.* at 1165-66. Plaintiffs brought malpractice claims and hired an ERISA expert who opined that

> the lawyers' repeated and consistent failure to properly advise the Plan trustees regarding "plan/party in interest prohibited transactions" described in 29 U.S.C. § 1106, fiduciary prohibited transactions described in 29 U.S.C. § 1106(b), diversification requirements described in 29 U.S.C. § 1104(a)(1)(C), and the "solely in the interest of" and "prudent man" provisions of 29 U.S.C. § 1104(a)(1)(B) was "flagrantly reckless, with willful and wanton disregard of the standard of care for attorneys practicing in [ERISA] law."

Id. at 1166. Despite the core issues of ERISA law directly at issue, the Utah Supreme Court held this to be a state court matter because the claim did not involve plan *benefits*, and the lawyers were not themselves plan fiduciaries or plan administrators. *Id.* at 1170.

All these state cases are wrong to turn core ERISA disputes requiring analysis of ERISA law and plan provisions into state cases. The *Simon Levi Co.* state court is as wrong as *Bafford* or the ACOA decision in demarking as a state claim a plan's third-party administrator advising the plan's sponsor to misdistribute participant benefits. The *Shofer* state court is just as wrong in demarking as a state claim bad advice about plan operation given by the plan

administrator to the plan trustee. The *Harmon City* state court is just as wrong in demarking as a state claim ERISA lawyers giving the plan sponsor and trustee advice to engage in transactions directly prohibited by ERISA statutes, and where the plaintiffs' ERISA expert opined on the specific standard of care for ERISA lawyers.

These BIO state decisions demonstrate, as contended in the Petition, that state courts have a proclivity for expanding their own jurisdiction while being ill-prepared to deal with technical ERISA subject matter.[4]

II. The BIO Unwittingly Contributes Conceptual Clarity That the Jurisdictional Analysis Has Been Distorted by a One-Dimensional "Relationship Test"

The Petition outlines practical problems with the "relationship test" and its application by the courts. The BIO in turn operates to point up why the relationship test needs this Court's review, namely because its results are sometimes just wrong, and often inconsistent or confusing.

Prior use of a relationship test the BIO characterizes as "well settled" does not justify that use, not if it leads to wrong results. "Well-settled" error is still error. This Court has never passed on the relationship

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[4] Petitioners also acknowledge the BIO points up earlier federal cases—some cited in the Petition—that improperly transform core ERISA disputes into state claims. Their existence, however, especially before the *Aetna*-era jurisprudence of this Court, does not bolster respondents' position—federal subject matter jurisdiction is not a majority vote or a popularity contest.

test or its application. The test is not supplied or even suggested by the ERISA statutes.

The BIO cases point up a main problem with a one-dimensional relationship test: it looks only at the parties' identities and relationships, and it crowds out analysis of the nature of the items in dispute, including the proximity of those items to core operation of an ERISA plan and provisions of ERISA law. This opens the door to ill-prepared state courts taking ERISA cases based solely on litigants falling outside a narrowly defined approved list, despite those cases presenting core ERISA disputes and issues requiring highly technical interpretation and analysis.

Thus, relying on the relationship test alone, a state court cited in the BIO found state claims where lawyers *crashed an ERISA plan* by misadvising the plan fiduciary on specific technical ERISA issues and prohibitions, simply because they were lawyers rather than themselves being the plan administrators: "Defendant lawyers were simply outside professionals who advised Plan fiduciaries [to commit acts prohibited by ERISA statutes] and who did not directly perform any administrative act vis-a-vis the Plan." *Harmon City*, 907 P.2d at 1170.

Relying essentially on the relationship test alone, a federal court cited in the BIO found state claims where the defendant was

> a firm hired by plaintiffs [the plan and its trustees] to provide expert benefit plan consultation. Plaintiffs specifically alleged that [defendant] . . . improperly calculated pension benefits, proposed and drafted a useless plan amendment, and deliberately concealed the

> cost of the amendment and its eventual uselessness from plaintiffs.

Airparts Co. v. Custom Ben. Servs., Inc., 28 F.3d 1062, 1064 (10th Cir. 1994). Because the defendant was not a plan administrator and did not directly implement the plan's harmful move, the case became a state case, even though the defendant had through specific ERISA and plan advisement caused the administrator to make the harmful move. Ironically, the lower federal court had correctly understood this:

> The [claim] in this case directly concerns the administration of the plan by the defendant and defendant's actions regarding the calculation and distribution of benefits under the plan. Although the claim is not against the fiduciary of the plan, the alleged claim still affects the relationship between the trustees, the pension plan sponsor, the administrator, and the beneficiaries.

828 F. Supp. 870, 873-74 (D. Kan. 1993), *rev'd*, 28 F.3d 1062.

The relationship test may not necessarily have to be scrapped; perhaps it can be salvaged simply by broadening the list of ERISA actors falling within it. Or, perhaps it must be better integrated with an improved second-dimension test considering the issues in dispute and their proximity to the core of plan provisions and ERISA law. In any event, the damage caused by the relationship test as currently applied is made clear in the BIO cases, and it must be reviewed and scrutinized by this Court.

III. Even If Petitioners Were Not to Ultimately Prevail, Everyone Still Benefits from the Clarity Review Would Bring.

a. Yes, Due to the Larger Issues and Brewing Problem, Review Here and Now Is More Important Than Is Petitioners' Outcome.

Even if state law and jurisdiction were ultimately to be found here, this Court still can render unique service in granting review to bring badly needed clarity to the relationship test and proper delineation of jurisdiction where non-fiduciary actors are involved.

The problem presented by *Paulsen* and *Bafford*, and if respondents like, first presented by the BIO cases, has now resurged to a point where it must be definitively resolved by this Court. Those earlier cases sound a warning about where *Paulsen* and *Bafford* will lead if left unchecked, and the jurisdictional hunger of the state courts cannot be doubted. This is no time to wait. On federal subject matter jurisdiction this Court must be vigilant and unswayed in making *de novo* determinations. This is no issue for circuit experimentation and awaiting some circuit split; if the circuits are uniformly wrong on this, then they are still wrong.

The BIO takes pains to capture every denial of certiorari in its cases, but it hardly needs be said that denial of certiorari in any particular case means little. Petitioners concede their own troubles, *if viewed in isolation*, are not likely worthy of certiorari. It is instead the *pattern*, the cumulative problem all these cases together present of state court incursion into

federal ERISA jurisdiction, first earlier on, as outlined in the BIO, then temporarily tamed by this Court, then later revitalized by *Paulsen*, *Bafford*, and now the ACOA decision, that must be considered as a whole, and dealt with now.

As discussed in the Petition, the manifesting in the state court systems of this federal jurisdictional problem does limit the opportunities for federal review. Of the three BIO state court ERISA jurisdiction grabs discussed above, only one resulted in a petition for certiorari. *See Stuart Hack Co. v. Shofer*, 502 U.S. 1096 (1992) (mem). So often litigants faced with a jurisdictional overreach will simply take their chances in the state system. The posture of this case is special, though, and petitioners freely acknowledge they have special motivation to contest jurisdiction because the unusual tactical choice made by plaintiffs' counsel aligns federal jurisdiction with substantive victory. That will not often happen, though. The time is now and the rare opportunity is here; Petitioners invite the Court to take it.

b. The Need for Clarity Now Is Great.

There is no room or time to allow crafting of some piecemeal federal common law of ERISA jurisdiction by various lower federal courts, and certainly not by *state* courts. The case law is still so far from clear or unambiguous. *See, e.g. Shofer*, 324 Md. at 102, 595 A.2d at 1083 (terming it a "morass"). The coherence of the jurisprudence has further been damaged by sclerotic application of the relationship test, as the BIO cases demonstrate.

Petitioners acknowledge the problem may also involve the scope of ERISA equitable and other

remedies for claims against non-fiduciaries. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) (analyzing ERISA equitable remedies against non-fiduciaries). Courts may be "bending the limits" out of well-intentioned concern over available remedies. *See Harmon City*, 907 P.2d at 1170-71 (expressing concern over lack of legal remedy against non-fiduciaries and finding no pre-emption). Petitioners would remind these well-intentioned judges that "absence of a remedy under ERISA does not necessarily mean that state-law remedies are preserved." *Smith v. Provident Bank*, 170 F.3d 609, 616 (6th Cir. 1999). However, if there is indeed to be an "accommodating bending" of federal subject matter jurisdiction, this Court should review and pronounce to make explicit that this is permitted and under what specific conditions and rules, so that parties, practitioners and courts need not guess at the proper analysis.

Petitioners ask, finally: *Is it really so*, under the correct jurisdictional standard, that if a plan trustee violates specific ERISA provisions in applying core provisions of a plan and causes detriment to the plan's participants then that is an exclusively federal matter, but if the plan instead contracts with a third-party administrator who that very same way causes that very same detriment then it becomes a state matter? If this is indeed the proper standard then petitioners will grudgingly accept it, but such a strange, non-intuitive delineation needs to be explicitly confirmed by this Court. And, on the other hand, if that is ***not*** so, now is the time for this Court to address the long-perplexing, still-growing problem and set it right.

CONCLUSION

For the foregoing reasons and those in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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