No. 17-863

In The
Supreme Court of the United States

FIRST AGENCY, INC. AND GUARANTEE TRUST LIFE INSURANCE COMPANY,

Petitioners,

v.

DAKOTAS AND WESTERN MINNESOTA ELECTRICAL INDUSTRY HEALTH & WELFARE FUND, BY RANDY STAINBROOK AND EDWARD CHRISTIAN, IN THEIR REPRESENTATIVE CAPACITY AS TRUSTEES, AND EACH OF THEIR SUCCESSORS,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should the Court grant certiorari to review the Eighth Circuit's decision that Respondent's suit seeking declaratory relief to enforce the terms of its coordination of benefits provisions in its Plan Document was appropriate equitable relief under ERISA § 502(a)(3), where the decision properly stated this Court's rules interpreting equitable relief under ERISA, and where the decision does not conflict with any other federal or state court decision?

2. Should the Court grant certiorari to review the Eighth Circuit's decision to affirm the district court's declaration that Respondent provided only secondary coverage for the claims at issue?

RULE 29.6 STATEMENT

The Dakotas and Western Minnesota Electrical Industry Health and Welfare Fund is not a nongovernmental corporation. The Fund does not have a parent corporation or shares held by a publicly traded company.

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STATEMENT OF THE CASE

The Dakotas and Western Minnesota Electrical Industry Health and Welfare Fund ("Dakotas Fund") is a Taft-Hartley, multiemployer employee welfare benefit trust fund governed by the provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Compl. ¶¶ 1–2.[1] The Dakotas Fund provides health and welfare benefits to fund participants in the electrical industry and their dependents in accordance with the terms and conditions contained in the Dakotas Fund's Summary Plan Description and Plan Document ("Dakotas Plan"). *Id.* ¶ 4.

Guarantee Trust Life Insurance Company is a mutual insurance company administered by First Agency, Inc. (collectively, "GTL") that, among other things, sells and administers student athlete medical insurance policies to educational institutions in various states across the country. *Id.* ¶¶ 5–9. At all times relevant to this case, GTL sold and administered a student athlete medical insurance policy to Westminster College in Fulton, Missouri. *Id.*

Jacob Plassmeyer is the son of Andrew Plassmeyer, who is a participant in the Dakotas Fund based on his employment under an electrical industry union collective bargaining agreement. *Id.* ¶¶ 29–30. As such, Jacob Plassmeyer was entitled to medical coverage under the Dakotas Plan as a dependent beneficiary. *Id.* ¶ 10.

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[1] Citations to "Compl." are to the trial court Complaint.

On February 13, 2014, Jacob Plassmeyer sustained an injury to his knee while participating in a school-sanctioned baseball practice at Westminster College. *Id.* ¶ 30. The GTL student athlete medical insurance policy sold to Westminster College covered accidental injuries sustained at sanctioned athletic practices and, therefore, provided coverage for the medical expenses for Jacob Plassmeyer's injuries.

Plassmeyer and his parents submitted the bills for the medical care he received for the knee injury to both the Dakotas Fund and GTL. App. 2.[2] It is generally agreed that both plans provide coverage for the submitted claims, however, both plans denied the claims pending exhaustion of the other plan's benefits. GTL denied the claims on the basis that it is an "excess only" policy and that coverage through the Dakotas Fund must exhaust first. *Id.* The Dakotas Fund similarly denied the claims in accordance with its coordination of benefits provisions. *Id.*

When GTL refused to accept primary liability for Plassmeyer's claims, the Dakotas Fund trustees, in their capacity as fiduciaries of the Fund, were forced to bring a declaratory judgment lawsuit against GTL to enforce the Dakotas Plan coordination provisions.[3] At all times during the litigation, Plassmeyer's claims remained unpaid by either party. The Dakotas Fund filed its Complaint on July 13, 2015. On August 20, 2015, GTL moved to dismiss the action for failure to state a claim under Fed. R. Civ. P. 12(b)(6). The

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[2] Citations to "App." refer to the Appendix filed with Petitioner's Petition for Writ of Certiorari.

[3] The Dakotas Fund brought claims under both ERISA § 502(a)(3) and 28 U.S.C. § 2201(a). Compl. Counts I and II.

Dakotas Fund responded and filed a cross-motion for summary judgment on September 3, 2015. On March 11, 2016, the District Court for the District of North Dakota[4] denied GTL's Motion to Dismiss and granted the Dakotas Fund's Motion for Summary Judgment. App. 17–27.

The District Court held that § 502(a)(3) allows ERISA plan trustees to bring a declaratory judgment action to determine the extent of the plan's liability. App. 17–18. The District Court further held that under the coordination of benefits provisions in the Dakotas Plan and federal common law, primary responsibility for payment of Plassmeyer's medical expenses in this case fell on GTL. App 18. The District Court also awarded the Dakotas Fund a reduced amount of attorney's fees pursuant to ERISA § 502(g)(1) in a separate order on July 15, 2016.

GTL appealed both orders to the Eighth Circuit Court of Appeals, and the Dakotas Fund cross-appealed the reduction in the amount of fees. The Eighth Circuit[5] affirmed the rulings that the Dakotas Fund's suit sought appropriate equitable relief and that GTL's policy was primary coverage for Plassmeyer's claims, but reversed the award of fees to the Dakotas Fund.

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[4] The Honorable Ralph R. Erickson presiding.

[5] The Eighth Circuit panel consisted of Circuit Judges James B. Loken, Steven M. Colloton, and Jane Kelly.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

GTL asks this Court to grant certiorari to decide whether the Eighth Circuit Court of Appeals "mistakenly appl[ied] this Court's clear direction for interpreting Section 502(a)(3) of ERISA." Pet. i. GTL does not contend that the Eighth Circuit misstated this Court's interpretation of the law or ruled in a manner that directly conflicts with this Court's prior precedent. GTL also does not assert that the Eighth Circuit's decision conflicts with any other federal or state court opinion. Instead, GTL asks this Court to serve as an error-correcting court and fix the Eighth Circuit's alleged misapplication of a properly stated rule of law. But that is not this Court's job, and GTL has provided no compelling reason for the Court to grant its petition and review this case. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly state rule of law."). Therefore, the Court should deny GTL's petition.

A. The Eighth Circuit Correctly Recited This Court's Interpretation of the Law on Equitable Relief under ERISA § 502(a)(3).

GTL does not assign any error to the Eighth Circuit's recitation of the applicable law, and, in fact, the Eighth Circuit correctly addressed the law on "appropriate equitable relief" available under ERISA § 502(a)(3) with detail and precision. *See Dakotas & Western Minn. Elec. Indus. Health & Welfare Fund v. First Agency, Inc.*, 865 F.3d 1098, 1101–03 (8th Cir.

2017); App. 3–7. Instead, GTL asserts that the Eighth Circuit *misapplied* the correctly stated rule of law in this case. This, however, is not one of the considerations governing review on certiorari. *See* Sup. Ct. R. 10. Accordingly, there is no basis to grant GTL's petition.

The Eighth Circuit's opinion does not misstate or directly conflict with any prior precedent from this Court. To the contrary, the Eighth Circuit accurately cited to the relevant statutory language and this Court's various decisions interpreting it. GTL concedes the same. Pet. 12 ("GTL agrees with . . . [t]he Eighth Circuit's analysis of recent ERISA case law[.]").

The Eighth Circuit started by noting how comprehensive and carefully integrated the rights and remedies under ERISA are. *Dakotas*, 865 F.3d at 1101. "The comprehensive nature of § 502(a)'s remedies has made the Supreme Court 'reluctant to tamper with an enforcement scheme crafted with such evident care.'" *Id.* (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)). The court then reviewed this Court's tetralogy of cases interpreting ERISA § 502(a)(3)'s limitation of "equitable relief." *Id.* Starting with *Mertens v. Hewitt Associates*, the Court held that "equitable relief" in § 502(a)(3) is limited to "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* (quoting 508 U.S. 248, 256 (1993)). The court then compared the decisions in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 210 (2002) and *Sereboff v. Mid Atlantic Medical Services, Inc.*,

547 U.S. 356, 362–63 (2006), and examples of equitable relief that are, or are not, available under § 502(a)(3). *Id.* at 1101–02. Finally, the Eighth Circuit cited this Court's most recent interpretation in *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, ___ U.S. ___, 136 S.Ct. 651, 657 (2016), including the Court's instructions to turn to standard treatises on equity "to determine how to characterize the basis of a plaintiff's claim and the nature of the remedies sought." *Id.* at 1102.

GTL takes no issue with the Eighth Circuit's analysis of "equitable relief" available under § 502(a)(3) until the court applied the law to the facts of the case and found that the Dakotas Fund's request for a declaratory judgment determining primary liability for unpaid claims qualified as equitable relief. Once again, however, this argument is not a sufficient ground to grant GTL's petition. The Eighth Circuit's decision correctly stated the rule of law that only equitable relief is available under § 502(a)(3) and faithfully followed this Court's instructions for analyzing the relief sought in this case. Thus, GTL's true complaint is that the Eighth Circuit misapplied this correct rule of law. But this Court does not correct the misapplication of properly stated rules of law, and it should decline to do so here.

B. The Eighth Circuit's Decision Does Not Conflict with Any Other Federal or State Court Decision.

Another reason the Court should reject GTL's petition is because there is no lower court conflict for

this Court to resolve. The Eighth Circuit opinion does not conflict with the decision of any other federal court of appeals, federal district court, or any state court for that matter. Because there is no outstanding conflict in the lower courts, there is nothing for this Court to reconcile. The Court should not become involved until the issue has sufficiently percolated in the lower courts. As such, GTL's petition should be denied.

Six federal courts of appeals, including the Eighth Circuit, have issued opinions in cases similar to the present one.[6] In each of these cases, injured student athletes had overlapping coverages from an ERISA plan and a private insurer. *See Dakotas*, 865 F.3d at 1102. But also in each of these cases, the ERISA plan paid the insureds' claims, then sued the non-ERISA insurers for **reimbursement** of those benefits paid. *See id.*; Pet. 5. Therefore, the circuits unanimously agreed that the ERISA plan was seeking legal relief, and not equitable relief, because it was ultimately seeking nothing more than a money judgment against the private insurers' general assets. *See Dakotas*, 865 F.3d at 1102.

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[6] *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Am. Int'l Grp., Inc.*, 840 F.3d 448 (7th Cir. 2016); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Student Assurance Servs.*, 797 F.3d 512 (8th Cir. 2015); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Health Special Risk, Inc.*, 756 F.3d 356 (5th Cir. 2014); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. First Agency, Inc.*, 756 F.3d 954 (6th Cir. 2014); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Bollinger*, 573 Fed. App'x 197 (3d Cir. 2014); *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Gerber Life Ins. Co.*, 771 F.3d 150 (2d Cir. 2014), *cert. denied*, 135 S.Ct. 1847 (2015) (collectively, the "*Central States*" cases).

The Eighth Circuit in this case, however, found these *Central States* cases distinguishable because the Dakotas Fund, unlike the Central States Fund, did *not* pay Plassmeyer's claims before filing suit against GTL. *Id.* Because the Dakotas Fund did not pay the claims, it did not seek to recover any payment of money from GTL. Rather, the Dakotas Fund sought nothing more than a declaration as to which party was primarily liable for Plassmeyer's outstanding claims so that it could finally process those pending claims, either as primary or secondary, and administer the trust accordingly.[7]

GTL does not make a single reference to any circuit split as justification for granting its petition because no such split exists. The lack of any circuit or other court conflict is highlighted by the Eighth Circuit's mention that it believed this was a case of first impression. *Id.* Because there is no circuit split or any other court conflict for this Court to resolve, the Court's review of this case is unwarranted and would be premature.

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[7] GTL argues that the timing of payment (i.e., whether Dakotas Fund paid the claims before suing or sued before paying) should not matter because the result is that GTL has to pay money, and the remedy is therefore a legal one. Pet. 23–24. But this argument conflates the obligation under which GTL would have to pay. In the *Central States* cases, the ERISA plan was trying to get the private insurers to pay money directly to the plan via its ERISA claim. The Dakotas Fund's claim, in contrast, seeks no such payment from GTL. Instead, if GTL was determined to provide primary coverage, any obligation for GTL to pay money would then arise under its own policy to the insured, which would need to be enforced by the insured in a separate action in state court.

C. The Decision Below Was Correct.

Without a circuit split to point to, and without a decision that misstates the correct rule of law or conflicts with prior precedent of this Court, GTL can only argue that the Eighth Circuit got the decision wrong. In fact, GTL devotes 26 pages of its petition arguing about why the Eighth Circuit purportedly decided the case wrong—essentially turning its petition for a writ of certiorari into a merits brief. As mentioned above, this Court is not an error-correcting court and, therefore, has no sufficient reason to review this case. Nevertheless, the Dakotas Fund provides the following response to GTL's main contentions.

In short, the Eighth Circuit correctly held that the Dakotas Fund, through its trustees, properly sought "equitable relief" under Section 502(a)(3) because the Fund was not seeking any monetary compensation from GTL, but rather a declaration relating to the administration of its trust and the enforcement of its plan terms. Similarly, the Eighth Circuit did not err in affirming the district court's decision that GTL was primarily liable for the unpaid claims based upon federal common law. Accordingly, GTL's petition should also be denied because the lower courts' decisions were correct.

1. The Eighth Circuit properly held that the Dakotas Fund sought appropriate equitable relief.

The plain language of ERISA § 502(a)(3) expressly authorizes plan fiduciaries, like the Dakotas Fund trustees, to bring civil suits "to obtain other

appropriate equitable relief . . . to enforce . . . the terms of the plan." 29 U.S.C. § 1132(a)(3). To determine whether the relief requested is equitable, a court must analyze (1) the basis for the plaintiff's claim, and (2) the nature of the underlying remedies sought. *Montanile v. Bd. of Trustees*, 136 S.Ct. 651, 657 (2016).

Here, the basis of the Dakotas Fund's claim is enforcement of the language of the Plan Document governing the Fund—specifically the coordination of benefits provisions in Section X. This basis is specifically provided for in the text of § 502(a)(3)—a fiduciary may sue to enforce the terms of the plan.[8] The nature of the underlying remedies (the relief sought) is also equitable, most analogous, to a "bill for instructions" or an injunction.

In the famous treatise *Pomeroy's Equity Jurisprudence and Equitable Remedies* (5th ed.) § 109, it is noted that,

> [t]he legal remedies by action are, in fact, only two: recovery of possession of specific things, land or chattels, and the recovery of a sum of money. Equitable remedies, on the other hand, are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the

[8] "A suit to enforce a coordination-of-benefits provision is a suit to enforce the plan in which the provision appears." *Winstead v. J.C. Penney Co.*, 933 F.2d 576, 579 (7th Cir. 1991).

> power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties.

Id. That is what distinguishes this case from the circuit court cases finding that the Central States Fund was seeking only legal relief. In those cases, the fund had already paid the claims and was always seeking recovery of that money paid no matter what equitable title it gave the claims. Conversely, the Dakotas Fund did not pay the claims and does not seek a single dollar from GTL.

GTL argues that the Eighth Circuit did not adopt any of the Dakotas Fund's arguments and that Dakotas argued that the label "declaratory relief" ought to be sufficient. Pet. 9. In actuality, the Dakotas Fund argued that its declaratory relief claim was similar to an injunction because the Fund sought to enjoin GTL from refusing to coordinate according to the Dakotas Plan terms. While the Eighth Circuit found that the relief sought was more analogous to a "bill for instructions," the court also specifically acknowledged that "[t]he declaratory relief Dakotas seeks . . . operates coercively to *enjoin* [GTL] from denying primary coverage, like coercive remedies traditionally available in equity . . . ." 865 F.3d at 1103–04 (emphasis added).[9] GTL's assertions on this point are simply incorrect.

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[9] *Cf. Ne. Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 159 (3d. Cir. 1985) (finding that "ILGWU Fund's complaint . . . would have implicated federal common law if it had been fashioned as an

The label given to the nature of the remedy the Dakotas Fund sought—whether a bill for instructions, an injunction, or something completely different—is irrelevant. What matters is that the Dakotas Fund is not seeking to impose any personal liability for monetary compensation from GTL, which is the classic form of legal relief. *See Knudson*, 534 U.S. at 210. Instead, the Dakotas Fund seeks only a declaration of its liability for the overlapping claims and to enforce its coordination of benefits provisions. "ERISA provides for equitable remedies *to enforce plan terms*, so the fact that the action involves a breach of contract can hardly be enough to prove relief is not equitable[.]" *Sereboff*, 547 U.S. at 363; *see also Heartland Health & Wellness Fund v. Salem Township Hospital Plan*, No. 3:14-cv-411, 2015 WL 5095424, at *4 (S.D. Ohio Aug. 31, 2015) ("[T]his Court can properly assert subject matter jurisdiction over non-ERISA insurance plans when they are involved in a coordination of benefits dispute with an ERISA plan."); *Quad/Med Claims, LLC v. Liberty Mutual Ins. Co.*, No. 12-cv-573-JPS, 2013 WL 123760, at *3 (E.D. Wis. Jan. 9, 2013) ("[T]here can be no question that, in *Winstead*, the plaintiff plan was seeking purely equitable relief: a declaratory judgment that the defendant plan was responsible for the insured's medical expenses.").

GTL further argues that a declaration action between two competing insurers is also a typical legal remedy. This assertion is also incorrect. As the Eighth Circuit correctly noted, declaratory judgments have

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action for an order enjoining the Teamsters Fund from continuing to refuse to pay beneficiaries in the position of Mrs. Fazio[.]").

"historical roots in equity." 865 F.3d at 1103 (quoting Edwin M. Borchard, Declaratory Judgments and Insurance Litigation, 34 Ill. L. Rev. 245, 259 (1939)); *see also Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for So. Cal.*, 463 U.S. 1, 27 n.31 (1983) ("Section 502(a)(3)(B) of ERISA has been interpreted as creating a cause of action for a declaratory judgment."). Furthermore, "[f]ederal courts sitting in equity had considered declaratory actions to determine the liability of parties under insurance contracts." *Dakotas*, 865 F.3d at 1103 (citing *Garrison v. Memphis Ins. Co.*, 60 U.S. (19 How.) 312, 15 L.Ed. 656 (1856); *London Guar. & Acc. Co. v. Shafer*, 35 F.Supp. 647, 648 (S.D. Ohio 1940)).

State courts sitting in equity have likewise decided disputes about liability between insurers. *See, e.g.*, *St. Paul Fire & Marine Ins. Co. v. Johnson*, 67 So.2d 896, 897 (Ala. 1953) ("A trial on the merits before the circuit court in equity without a jury resulted in a decree holding each company liable and prorating the loss equally between them.") (referring to *Louisville Fire & Marine Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 41 So.2d 585, 587 (Ala. 1949)); *see also Signal Cos. v. Harbor Ins. Co.*, 612 P.2d 889, 895 (Cal. 1980) ("The reciprocal rights and duties of several insurers who have covered the same event do not arise out of the contract, for their agreements are not with each other. . . . Their respective obligations flow from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden."). Finally, coordination of benefits disputes between two non-ERISA insurers are most commonly resolved in state court in a declaratory-judgment action on equitable-

contribution, equitable-subrogation or equitable-indemnification theories. *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Am. Int'l Grp., Inc.*, 840 F.3d 448, 450, n.1 (7th Cir. 2016) (citing 16 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 232.71 (3d ed. 2000); *see also Couch on Insurance* § 242:181. Therefore, a declaratory judgment action seeking to determine primary liability between two insurers certainly has history as an equitable remedy.

GTL agrees that a "bill for instructions" is an equitable remedy, but disputes that the Dakotas Fund's claim is properly characterized as such. Pet. 12. GTL's sole basis for this argument is that the Dakotas Fund is seeking the relief against a third party and not a beneficiary or co-trustee. *See* Pet. 13. But never has such a limitation on the bill for instructions remedy been imposed. Furthermore, GTL's argument that the Dakotas Fund cannot seek relief against it as a third party has already been foreclosed by this Court. *See Harris Trust v. Salomon Smith Barney*, 530 U.S. 238, 246 (2000) (ERISA "§ 502(a)(3) admits of no limit (aside from the 'appropriate equitable relief' caveat . . .) on the universe of possible defendants.").

The *Restatement (Third) of Trusts* states that "[a] trustee or beneficiary may apply to an appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions." § 71 (2007). The Dakotas trustees have a fiduciary duty to administer the trust in accordance with the terms of the trust and applicable law, as well as the functions

of "ascertaining the duties and powers of the trusteeship," "protecting trust property," and "managing the trust estate." *Restatement (Third) of Trusts*, § 76 (2007). Therefore, the trustees have a right to seek instructions on the enforcement of the Fund's coordination provisions as to another insurance policy in an effort to protect the trust from the payment of plan assets for claims that are the primary responsibility of another entity.

2. Even if the relief sought was not equitable under ERISA § 502(a)(3), the district court properly granted declaratory relief under 28 U.S.C. § 2201.

Even if the Dakotas Fund's claim did not seek equitable relief under ERISA § 502(a)(3), the district court was empowered to exercise jurisdiction under 28 U.S.C. § 1331 and properly granted declaratory relief under the federal declaratory judgment act, 28 U.S.C. § 2201. The district court found that "this suit is within the general federal question jurisdictional statute. Given ERISA's broad preemption provision, virtually every suit relating to an ERISA plan can be said to arise under federal law." App. 21. The Eighth Circuit did not address this secondary argument because it found that the Dakotas Fund's claim was equitable under ERISA § 502(a)(3). Nevertheless, long-standing case law confirms the district court was correct.

GTL argues that these typical declaratory judgment actions between two insurers belong in state court, and the Dakotas Fund's status as an ERISA plan is irrelevant. *See* Pet. 22. But the Dakotas Fund's

status as a self-funded ERISA plan has significant relevance. Because of ERISA's broad preemption provision, § 1144, the Fund is exempt from any state laws regulating insurance. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Metropolitan Life Ins. v. Massachusetts*, 471 U.S. 724 (1985).[10] This includes state coordination of benefits regulations. *PM Group Life Ins. Co. v. Western Growers Assur. Trust*, 953 F.2d 543, 546 (9th Cir. 1992). Thus, because state law on coordination of benefits between the Dakotas Fund and GTL is preempted, and ERISA has no express coordination of benefits provisions, federal common law applies to determine the liability between the two plans. *See id.*

Even absent a claim under ERISA § 502(a)(3), the Dakotas Fund brought a proper claim under 28 U.S.C. § 2201, over which the district court had jurisdiction under 28 U.S.C. § 1331. Compl. Count II. The Dakotas Fund sought a declaratory judgment that GTL was primarily liable under the federal common law that an ERISA plan's COB provisions are given priority over a private insurer's COB provisions. *See Central States v. First Agency, Inc.*, 756 F.3d 954, 957 (6th Cir. 2014). There is no question that § 1331 jurisdiction "will support claims founded upon federal common law as well as those of a statutory origin." *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 100 (1972).

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[10] *See also Central States v. Gerber Life Ins. Co.*, 771 F.3d 150, 158 (2d. Cir. 2014) ("Absent the involvement of an ERISA plan, claims between insurance companies over conflicting coordination of benefits provisions are normally raised and resolved in state courts. However, if one of the plans is an ERISA plan, such a claim may arguably be subject to ERISA's broad preemption provision.").

Numerous cases have confirmed § 1331 jurisdiction over a declaratory judgment claim brought by an ERISA plan to determine coordination of benefits. *See, e.g.*, *Bd. of Trustees of the Plumbers & Pipefitters Nat'l Pension Fund v. Fralick*, 601 Fed. App'x. 289 (5th Cir. 2015) (plan fiduciary's declaratory judgment action was within subject matter jurisdiction of district court under its federal question power); *Winstead v. J.C. Penney Co. Inc.*, 933 F.2d 576, 579 (7th Cir. 1991) ("The other possibility is that this suit is within the general federal question jurisdictional statute."); *Ne. Dept. ILGWU Health & Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 159 (3d. Cir. 1985) (finding jurisdiction under § 1331 to determine "the meaning and enforceability of seemingly conflicting provisions"); *Jones v. State Wide Aluminum, Inc.*, 246 F.Supp.2d 1018, 1027 (N.D. Ind. 2003) (finding jurisdiction under § 1331 to determine enforceability of an ERISA plan's escape clause); *see also Couch on Insurance* § 229:5 (3d ed. 2000) (stating that there is a basis for federal jurisdiction "when the risk or loss at issue involves subject matter otherwise of interest to the federal government, either *via statutes such as ERISA* . . . ." (emphasis added). Coordination of the Dakotas Fund's benefit provisions with another plan, either ERISA-governed or private, certainly involves a connection with the plan and a matter of federal concern, which is sufficient to trigger jurisdiction under § 1331. Therefore, the district court's decision was independently supportable on this alternative basis.

3. The Eighth Circuit did not err in affirming the district court's declaration that GTL was primarily liable for Plassmeyer's claims.

Because this case involved the interpretation of a federally-governed ERISA employee benefits plan, and ERISA is silent on the issue of coordination of benefits, federal common law controls the dispute on priority of coverage. GTL argues that the lower courts erred by relying on "outdated, pre-*Great-West/Sereboff/Montanile* Sixth Circuit law," and that the use of federal common law to determine priority of benefits is now foreclosed. Pet. 28 GTL is wrong on both accounts.

The lower courts did not rely on outdated Sixth Circuit law, but rather the 2014 *Central States* case. *See Dakotas*, 865 F.3d at 1104–05; App. 12. While this case quoted the *Auto Owners Ins. Co. v. Thorn Apple Valley, Inc.*, 31 F.3d 371, 374 (6th Cir. 1994) case, there is no question that the *Central States* case *postdated* the Court's *Great-West/Sereboff* cases and that the Sixth Circuit was well aware of those holdings.

GTL also argues that the Second Circuit's *Central States* case "closed the avenue" followed by the Sixth Circuit. GTL misreads and overextends the Second Circuit's quote. The "avenue" the Second Circuit was referring to is the use of federal common law to apportion liability between two plans *after* claims had been paid. *See* 771 F.3d at 158–59 (Central States "may well have no apparent venue in which to seek ***to recover the funds paid*** on behalf of the Common Insureds or similarly situated future claimants because all avenues of relief appear closed."). There is

no case overturning the federal common law rule that an ERISA plan's terms should be given priority over a conflicting private plan's terms. In fact, the Seventh Circuit *Central States* case, which followed the Second Circuit's decision, expressly endorsed the exact approach taken by the Dakotas Fund.

> If ERISA plans can't bring section 502(a)(3) suits *or* state-law claims to obtain reimbursement from other insurers with overlapping coverage obligations, then they're left with just one way to ensure that they don't pay claims for which other insurers are primarily liable: refuse to provide coverage to beneficiaries who have other insurance and sue for a declaratory judgment that the other insurer is primarily liable.

See Am. Int'l Gr., Inc., 840 F.3d 448, 454–55.

GTL also contends that this rule is unique to the Sixth Circuit and has not been applied elsewhere. This is also not true. *See, e.g.*, *Franklin Elec. Co., Inc. v. Lutheran Hosp. of Indiana*, 926 N.E.2d 1036, 1043 (Ind. Ct. App. 2010) ("The federal common law rule applicable to resolving priority of coverage disputes between an ERISA plan and a non-ERISA plan dictates that a conflict between the two will be resolved in favor of the ERISA plan."); *Travitz v. Northeast Dept. ILGWU Health & Welfare Fund*, 818 F. Supp. 761, 766 (M.D. Penn. 1993) (holding that state statute providing that ERISA plan was primary was preempted by ERISA and ERISA benefit coordination exclusion was to be enforced as written). *Couch on Insurance* has also adopted the rule. *See*

§ 220:49 (3d ed. 2000). A rule other than the one that a non-ERISA insurer's COB provisions must yield to an ERISA plan's COB provisions where the two conflict would be contrary to ERISA's key principles—to ensure the integrity of ERISA plans and their governing documents and to create uniformity and predictability in the establishment and execution of employee benefit plans. *See U.S. Airways, Inc. v. McCutchen*, 133 S.Ct. 1537, 1548 (2013); *Johnson v. Chicago Plastering Institute Health & Welfare Fund*, 341 F.Supp.2d 1011, 1020 (N.D. Ill. 2004).

Last, GTL argues that analyzing the two plans without resolving the conflict in favor of the ERISA plan results in GTL's policy prevailing because the second COB provision of the GTL policy places primary responsibility on the plan in effect for the longer period of time. Pet. 29. But by the provision's own terms, it only comes into play if *both* plans are "excess" policies. Here, neither plan is a true excess plan, and the Dakotas Fund doesn't claim to be "excess" coverage under Section 10.6 of its provisions—it is secondary coverage to a primary plan that provides specific-risk coverage.

Similarly, GTL would be primary even without the ERISA-primacy rule. Under standard insurance allocation rules, "[i]f the 'other insurance' clauses contained in the applicable policies conflict, then the courts look beyond the language of the policies and assigns primary coverage to the policy that more closely contemplated the risk." *Couch on Insurance*, § 219:44, n.6 (3d ed. 2000). Also, "[w]here two policies have competing coordination of benefits clauses, the policy which provides direct coverage for the claimant

is primary, and the policy which insures the claimant as a dependent is secondary." *Id.* at § 220:49. The Dakotas Fund incorporates both of these rules into its Plan Document, and under either of these rules, GTL's policy is primary because they provided coverage for the specific risk of student athlete injuries and covered Mr. Plassmeyer as a claimant rather than a dependent.

CONCLUSION

Respondents respectfully request that the Petition for Writ of Certiorari be DENIED for all the foregoing reasons.

Respectfully submitted,

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