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No. 07-

IN THE

Supreme Court of the United States

BOARD OF TRUSTEES OF THE OHIO CARPENTERS PENSION FUND ON BEHALF OF THE OHIO CARPENTERS PENSION FUND, *et al.*,

Petitioners,

v.

CHARLES S. BUCCI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 523(a)(4) of the Bankruptcy Code provides that a debt "for fraud or defalcation while acting in a fiduciary capacity" is not dischargeable in bankruptcy. The question presented in this case is whether that exception to the discharge covers a debt for breach of a fiduciary duty imposed by statute—here, an alleged breach by an ERISA fiduciary of his statutory obligations.

PARTIES TO THE PROCEEDINGS

The petitioners are Board of Trustees of the Ohio Carpenters' Pension Fund; Board of Trustees of the Cleveland and Vicinity Carpenters' Hospitalization Fund; Board of Trustees of the Carpenters' Joint Apprenticeship and Training Program; Board of Trustees of the Ohio Carpenters' Annuity Fund; and the Ohio and Vicinity Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, all of whom were plaintiffs and appellants in the courts below. The respondent is Charles S. Bucci, the debtor in bankruptcy court, and the defendant and appellee in the courts below.

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Petitioners Board of Trustees of the Ohio Carpenters Pension Fund, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

INTRODUCTION

In language that traces back to the Bankruptcy Act of 1841, Section 523(a)(4) of the Bankruptcy Code provides that a debt "for fraud or defalcation while acting in a fiduciary capacity" is not dischargeable in bankruptcy. In a series of cases decided from the mid-19th until the early 20th centuries, this Court explained that this statutory language encompassed claims for defalcation arising out of the debtor's mishandling of a "technical trust." *See, e.g.*, *Chapman* v. *Forsyth*, 43 U.S. (2 How.) 202 (1844); *Hennequin* v. *Clews*, 111 U.S. 676 (1884); *Davis* v. *Aetna Acceptance Co.*, 293 U.S. 328 (1934). By contrast, the Court held that the language did not reach claims in which the debtor was merely a "trustee" for a "trust" implied by contract or impressed by operation of law (such as a constructive or resulting trust, or a trust *ex maleficio*, *Davis*, 293 U.S. at 333), even though such claims could be said to involve a breach of a "fiduciary" duty.

In the last of these older cases, *Davis* v. *Aetna Acceptance Co.*, the Court held that the claim of an ordinary secured lender would not be deemed one for "defalcation while acting ... in [a] fiduciary capacity" under the Bankruptcy Act of 1898 merely because one of the documents relating to the secured loan was labeled a "trust receipt." 293 U.S. at 334. A standard commercial loan "is not turned into one arising from a trust because the parties to one of the documents have chosen to speak of it as a trust." *Id.*

This Court has not addressed the meaning of this statutory language since *Davis*. In the intervening years, however, the case law that has developed in the lower federal courts on the scope of Section 523(a)(4) of the Bankruptcy Code is a near-hopeless tangle. In the nearly 75 years since *Davis*, Congress and state legislatures have regularly enacted legislation imposing liability for breach of various statutory obligations, often describing those obligations as "fiduciary" duties. In certain cases, such as the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et* *seq.*, such statutes have imposed on the obligor the substantive duties of a "fiduciary" under the law of trusts.

The lower courts have been remarkably unsuccessful in their efforts to develop a comprehensible body of case law explaining how the *Davis* principle (as set forth by this Court in a few cryptic paragraphs in that decision) applies to such statutory "fiduciary" duties. The particular division of authority presented by this case involves ERISA fiduciaries. As the court of appeals below noted, the Ninth Circuit has held that "ERISA satisfies the traditional requirements for a statutory fiduciary to qualify as a fiduciary under § 523(a)(4)." App. 8a (citing *In re Hemmeter*, 242 F.3d 1186 (9th Cir. 2001)). A majority of the bankruptcy and district courts to consider the issue have come to that same conclusion. The Sixth Circuit below, however, expressly rejected the Ninth Circuit's reasoning, agreeing with the Eighth Circuit and other lower courts that have "held that being an ERISA fiduciary is not itself sufficient to satisfy the fiduciary capacity element of § 523(a)(4)." *Id.* (citing *Hunter* v. *Philpott*, 373 F.3d 873 (8th Cir. 2004)).

There is thus a square and acknowledged split among the courts of appeals on whether ERISA fiduciaries are "fiduciaries" for purposes of Section 523(a)(4). More broadly, the decisions of the courts of appeals addressing whether particular statutory fiduciary duties are sufficiently like a "technical trust" so that a claim for their breach would be nondischargeable under Section 523(a)(4) reflect an intractable confusion as to the scope of that provision and the meaning of this Court's decision in *Davis*. That body of caselaw has grown into a knot that simply cannot be disentangled without this Court's intervention.

For example, the Fifth Circuit has held that contractors who misappropriated funds required to be held in trust by state statutes were not acting in a "fiduciary capacity" within the meaning of Section 523(a)(4). *See In re Nicholas*, 956 F.2d 110 (5th Cir. 1992); *In re Boyle*, 819 F.2d 583 (5th Cir. 1987); *In re Angelle*, 610 F.2d 1335 (5th Cir. 1980). The Sixth and Tenth Circuits have reached the opposite conclusion on substantively identical facts. *See In re Johnson*, 691 F.2d 249 (6th Cir. 1982); *In re Romero*, 535 F.2d 618 (10th Cir. 1976).

Similar divisions persist in the courts of appeals regarding state statutes directing that particular funds (such as payments made to an insurance agent who collects premiums on behalf of the insurer, or proceeds derived from the sale of lottery tickets, collected on behalf of a state lottery commission) be held in "trust." *Compare In re Blaszak*, 397 F.3d 386 (6th Cir. 2005); *Quaif* v. *Johnson*, 4 F.3d 950 (11th Cir. 1993) (holding that debts arising out of breach of such duties are nondischargeable under Section 523(a)(4)), *with In re Tran*, 151 F.3d 339 (5th Cir. 1998); *In re Marchiando*, 13 F.3d 1111 (7th Cir. 1994) (holding such debts dischargeable).

In short, "the cases are divided over the question whether a statute that ... deems a debtor a fiduciary in order to enlarge the remedies for default makes the debtor a 'fiduciary' for purposes of section 523(a)(4)." *In re Marchiando*, 13 F.3d at 1115. And they have made clear that further direction from this Court is imperative. As the Eleventh Circuit explained, "[u]nfortunately, the Supreme Court has not spoken on this issue since the *Davis* case, leaving the lower courts to struggle" with the application of *Davis*' principles to duties imposed by statute. *Quaif*, 4 F.3d at 953.

This division over the meaning of Section 523(a)(4), and this Court's *Davis* decision, will persist until this Court clarifies the matter. This case—arising from a decision below that expressly recognized the division of authority, App. 9a, and involving a federal statute that this Court has described as imposing "fiduciary" duties that draw on principles of trust law, *see generally LaRue* v. *DeWolff, Boberg & Assocs.*, ___ U.S. ___, 2008 WL 440748, at *3-4 (Feb. 20, 2008)—presents an ideal opportunity to do so. The petition for a writ of certiorari should therefore be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the district court, is reported at 493 F.3d 635, and is reproduced at App. 1a-15a. The opinion of the United States District Court for the Northern District of Ohio, affirming the judgment of the bankruptcy court, is reported at 351 B.R. 876 and is reproduced at App. 19a-29a. The opinion of the United States Bankruptcy Court for the Northern District of Ohio is unreported and is reproduced at App. 33a-48a.

JURISDICTION

The court of appeals entered its judgment on July 3, 2007. Petitioner filed a timely petition for rehearing or rehearing *en banc* on July 17, 2007, which the court of appeals denied on November 23, 2007. *See* App. 17a-18a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 523(a)(4) of title 11, United States Code (the "Bankruptcy Code") provides: "A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt ... (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."

Section 1002(21)(A) of title 29, chapter 18, United States Code ("ERISA") provides: "[A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets ... or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."

STATEMENT OF THE CASE

1. In February, 2003, Floors by Bucci, Inc., entered into the Northeast Ohio Carpenters' Collective Bargaining Agreement. Respondent Charles S. Bucci is the company's president and sole shareholder. It is alleged—and Bucci has not disputed—that Bucci treated the company as his alter ego, ignoring the corporate separateness from his own personal financial affairs. App. 3a, 20a, 35a.

Under the Collective Bargaining Agreement, Bucci was required to make monthly contributions (referred to as the "employer contributions") to certain pension, hospitalization, and annuity funds, for the benefit of his employees. App. 35a. The Collective Bargaining Agreement further required Bucci to withhold other benefits (described as "wage withholdings") from the employees' wages, which—like the employer contributions—were to be sent to the fund representative, for deposit into trust funds for the benefit of the employees. Bucci was required to indicate both the amount of the employer contributions and wage withholdings for each pay period on the employees' wage statements. *Id.* Between March 2003 and May 2004, however, Bucci failed to make the employer contributions required by the Collective Bargaining Agreement, and likewise failed to remit the wage withholdings he deducted from his employees' wages. *Id.*

Instead, as the bankruptcy court later concluded, the case followed a "factual scenario all too familiar to bankruptcy judges." App. 38a. "Funds the employer itself is obligated to contribute for employee benefits or pensions go unpaid," and employee contributions are "withheld from the employees' paychecks," but are not contributed to the employee benefit plans. Rather, "the employer uses the funds ... to pay other creditors in an effort to keep the business afloat." *Id.*

2. The effort to "keep the business afloat," however, was unsuccessful. In January 2005, Bucci filed a Chapter 7 bankruptcy petition. His schedules filed with the bankruptcy court listed $99,000 in debt due to the benefit funds for unpaid employer contributions and withholdings. App. 35a. The vast majority of that indebtedness, "close to $86,000," represented unpaid employer contributions. *Id.*

3. On April 11, 2005, Petitioners, the Board of Trustees of the Ohio Carpenters Pension Fund, along with a number of other employee benefit funds, filed an adversary proceeding against Bucci. The Funds sought a declaration that Bucci's debts, both for the unpaid employer contributions and for the wage withholdings, were not dischargeable in bankruptcy because they were debts for defalcation while Bucci was acting in a fiduciary capacity with respect to the Funds.

The bankruptcy court resolved the adversary proceeding on cross-motions for summary judgment. The court concluded that the debt due to the Funds for the wage withholdings was nondischargeable, App. 43a-45a, but that the debt for the unpaid employer contributions was dischargeable, App. 39a-43a.

4. While Bucci did not appeal the determination that the debt for the unpaid wage withholdings was nondischargeable, the Funds appealed to the district court from the determination that the debt for unpaid employer contributions was not a debt for "defalcation while acting in a fiduciary capacity." The district court affirmed. App. 19a-29a.

The district court observed that the "Sixth Circuit has not decided whether an ERISA fiduciary is also a fiduciary under § 523(a)(4), and there is a split in authority among the circuits." App. 26a. The district court rejected the Ninth Circuit's conclusion in *In re Hemmeter*, 242 F.3d 1186 (9th Cir. 2001), that "an ERISA fiduciary is *ipso facto* a fiduciary for purposes of § 523(a)(4)," App. 27a, and instead concluded, as had the Eighth Circuit in *Hunter* v. *Philpott*, 373 F.3d 873 (8th Cir. 2004), that "it is not enough to determine that Bucci is a fiduciary for purposes of ERISA so as to render the debt nondischargeable under the Bankruptcy Code." App. 28a.

5. The court of appeals affirmed. The court assumed *arguendo* that "the unpaid employer contributions here qualified as ERISA plan assets," App. 12a, acknowledging that the applicable trust agreements defined "trust funds" to include delinquent contributions, *see* App. 10a. In addition, the court appeared to recognize that it followed from that assumption that Bucci was a "fiduciary" within the meaning of ERISA.

See App. 13a (quoting ERISA's definition of a "fiduciary"—a person "who exercises discretionary control or authority" over plan assets).

The court emphasized, however, that it "has repeatedly construed the term 'fiduciary capacity' found in the defalcation provision of § 523(a)(4) more narrowly than the term is used in other circumstances." App. 10a (citation omitted). Specifically, relying on *Davis*, the court of appeals noted that to qualify under Section 523(a)(4), the "trust relationship must exist prior to the act creating the debt," and the trust must exist "separate from the act of wrongdoing." App. 11a (citation omitted). In this case, the court of appeals reasoned, "[t]he act that created the debt—Bucci's breach of his contractual obligation to pay the employer contributions—is also the exercise of control that the Funds allege made Bucci an ERISA fiduciary." App. 13a. For these reasons, the court found that the debt for unpaid employer contributions was dischargeable in Bucci's bankruptcy.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS HAVE DIVIDED ON WHETHER ERISA FIDUCIARY STATUS IS SUFFICIENT TO SATISFY THE FIDUCIARY CAPACITY REQUIREMENT OF 11 U.S.C. § 523(a)(4)

A. This Court's Early Cases Held That A Debt For Defalcation While Acting In A Fiduciary Capacity Encompassed Only Breaches Of Fiduciary Duty With Respect To "Express Or Technical Trusts"

The Bankruptcy Act of 1841, 5 Stat. 440, excepted from the discharge debts "created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." In *Chapman* v. *Forsyth*, 43 U.S. (2

How.) 202 (1844), this Court held that this exception did not apply to a debt owed by a "factor"—a merchant who sold goods on behalf of a principal—who filed for bankruptcy after selling the goods but before paying to his principal the amounts received on account of the sale. "If the act embrace such a debt," the Court held, "it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation of trust reposed in the debtor." *Id.* at 208. "The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act." *Id.*

In a series of later 19th century cases, this Court reaffirmed the *Chapman* principle. *See Neal* v. *Clark*, 95 U.S. 705 (1877) (adopting narrow construction of the exception to the discharge for debt created by fraud, in light of *Chapman*'s circumscribed reading of "fiduciary capacity"); *Hennequin* v. *Clews*, 111 U.S. 676, 682 (1884) (lender filed for bankruptcy after its loan to the borrower had been paid off, but before it returned the collateral pledged by the borrower; a "creditor who holds a collateral, holds it for his own benefit under contract. He is in no sense a trustee."); *Noble* v. *Hammond*, 129 U.S. 65, 68 (1889) (debt is dischargeable when produce dealer, on the request of a creditor, collected funds owed to that creditor by a third party, and without intent to defraud, commingled those funds with his own, and was then "by an unexpected revulsion, forced into bankruptcy"); *Upshur* v. *Briscoe*, 138 U.S. 365, 375 (1891) (debtor's obligation to pay principal and interest is not "created by a person while acting in a 'fiduciary character' merely because it is created under circumstances in which trust or confidence is reposed in the debtor").

Finally, in *Davis* v. *Aetna Acceptance Co.*, 293 U.S. 328 (1934), the Court held that a debt owed by an automobile dealer to a secured lender was dischargeable, notwithstanding the dealer's sale of the automobiles that secured the loan, without the dealer's having paid the proceeds over to the secured lender. "It is not enough that, by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee *ex maleficio*. He must have been a trustee before the wrong and without reference thereto." *Id.* at 333.

The *Davis* Court, following the cases described above, thus rejected the argument that the automobile dealer held either the automobiles or the proceeds from their sale "in trust" for the secured lender. "Clearly the respondent's only interest in the car was as security for the debt." 293 U.S. at 334. "The resulting obligation is not turned into one arising from a trust because the parties to one of the documents have chosen to speak of it as a trust." *Id.*

B. The Courts Have Divided On Whether A Fiduciary Duty Claim Under ERISA Satisfies *Davis'* Requirement Of A "Technical Trust"

While this Court has not addressed the scope of Section 523(a)(4) since *Davis*, courts of appeals have concluded that "fiduciary" duties imposed by statute may, in certain circumstances, satisfy *Davis'* requirement of a "technical trust." *See, e.g.*, *Quaif* v. *Johnson*, 4 F.3d 950, 953-954 (11th Cir. 1993); *In re Hemmeter*, 242 F.3d at 1190.

The circuits have divided, however, over whether a fiduciary duty imposed by ERISA satisfies this formulation. The Ninth Circuit has held that the relationship between ERISA fiduciaries and the employees who are the beneficiaries of an ERISA plan does satisfy *Davis'* requirement of a "technical trust." *Hemmeter*, 242 F.3d at 1186. In that case, a claim for breach of fiduciary duty was brought under ERISA when a company's 401(k) and Employee Stock Ownership Plans invested primarily in the company's own shares. Following the company's bankruptcy (which rendered the shares nearly worthless), the beneficiaries brought suit against a variety of ERISA fiduciaries, including Hemmeter, who was neither the "trustee" of the plan nor a member of the "Administrative Committee," but was a member of the company's board of directors that was a "named fiduciary" under ERISA. *Id.* at 1188-1189. When Hemmeter himself filed for bankruptcy protection, the beneficiaries argued that the claim for breach of fiduciary duty under ERISA was nondischargeable in bankruptcy.

The Ninth Circuit held that being an ERISA fiduciary satisfied the requirements of Section 523(a)(4). The court found that a statutory fiduciary satisfied *Davis* if "the statute (1) defines the trust *res*; (2) identifies the fiduciary's fund management duties; and (3) imposes obligations on the fiduciary prior to the alleged wrongdoing." *Hemmeter*, 242 F.3d at 1190. And it went on to hold that ERISA satisfies each of those requirements. In addition to defining the trust *res* (the "plan itself") and the duties of the fiduciaries, the statute "imposes obligations on the fiduciary prior to the alleged wrongdoing." *Id.* "Thus, ERISA satisfies the traditional requirements for a statutory fiduciary to qualify as a fiduciary under § 523(a)(4)." *Id.*

By contrast, the Eighth Circuit has expressly rejected this reasoning. In *Hunter* v. *Philpott,* employee benefit funds brought suit against the principal shareholders and officers of a company that failed to make required employer contributions to an ERISA plan, claiming breach of fiduciary duty under ERISA. When one of the shareholders filed for bankruptcy, the plaintiffs sought a determination that the debt was nondischargeable under Section 523(a)(4).

While recognizing that the Ninth Circuit had held in *Hemmeter* that the "determination that an individual is an ERISA fiduciary is enough to satisfy the requirements of § 523(a)(4)," *Hunter*, 373 F.3d at 875, the Eighth Circuit reached a contrary conclusion, holding that the unpaid employer contributions were not held in an "express trust" and thus that the debt for the unpaid contributions was dischargeable.

In this case, the Sixth Circuit expressly adopted the reasoning of the Eighth Circuit in *Hunter*, rejecting that of the Ninth Circuit in *Hemmeter*. The Eighth Circuit's approach, the court of appeals emphasized, is "consistent with the Supreme Court's holding in *Davis* that '[i]t is not enough that, by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee *ex maleficio*. He must have been a trustee before the wrong and without reference thereto.'" App. 11a.

In light of the Sixth Circuit's decision below, the courts of appeals have now divided 2-1 on the question whether a claim for breach of an ERISA fiduciary duty is a claim for "defalcation while in a fiduciary capacity" within the meaning of Section 523(a)(4) of the Bankruptcy Code. District courts and bankruptcy courts have also divided sharply on this issue, though a majority of the cases to consider the issue have followed the reasoning of the Ninth Circuit in *Hemmeter*.[1] The split among the lower courts on this important issue of federal law is longstanding and well developed, with the arguments on both sides fully explored. Certiorari is therefore warranted.

II. THE COURT OF APPEALS WAS INCORRECT TO CONCLUDE THAT THE *DAVIS* STANDARD WAS NOT SATISFIED WHERE AN ERISA FIDUCIARY USED FUND ASSETS TO PAY OTHER DEBTS

The Sixth Circuit's decision was not only in conflict with the reasoning of the Ninth Circuit and other lower courts, but wrong on the merits. That is so for two

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[1] Finding (like the Ninth Circuit) that the ERISA fiduciary relationship is sufficient to satisfy the Section 523(a)(4) "fiduciary capacity" requirement: *In re Davenport*, Adv. Pro. No. 05-9179, 2007 Bankr. LEXIS 3725 (Bankr. Ga. Sept. 6, 2007); *In re Mayo*, Adv. Pro. No. 04-1067, 2007 WL 2713064 (Bankr. D. Vt. Sept. 17, 2007); *In re O'Quinn*, 374 B.R. 171 (Bankr. M.D.N.C. 2007); *In re Johnson*, No. 03-5394, 2007 WL 646376 (S.D. Tex. Feb. 26, 2007); *In re Goodwin*, 355 B.R. 337 (Bankr. M.D. Fla. 2006); *In re Duncan*, 331 B.R. 70 (Bankr. E.D.N.Y. 2005); *In re Weston*, 307 B.R. 340 (Bankr. D.N.H. 2004); *In re Gunter*, 304 B.R. 458 (Bankr. D. Colo. 2003); *Eavenson* v. *Ramey*, 243 B.R. 160 (N.D. Ga. 1999); *In re Coleman*, 231 B.R. 393 (Bankr. S.D. Ga. 1999); *In re Eisenberg*, 189 B.R. 725 (Bankr. E.D. Wis. 1995); *In re Musgrove*, 187 B.R. 808 (Bankr. N.D. Ga. 1995); *In re Daniels*, Adv. Pro. No. 93-1332, 1994 WL 470213 (Bankr. D. Mass. Apr. 25, 1994); *In re Ardito*, No. 888-80114-20, 1988 WL 324200 (Bankr. E.D.N.Y. Sept. 20, 1988).

Finding (like the Sixth and Eighth Circuits) that ERISA fiduciary status alone is not sufficient to satisfy the Section 523(a)(4) "fiduciary capacity" requirement: *In re Tsikouris*, 340 B.R. 604 (Bankr. N.D. Ind. 2006); *In re Engleman*, 271 B.R. 366 (Bankr. W.D. Mo. 2001); *Bowman* v. *Hollander*, Adv. Pro. No. 89-0500, 1992 WL 373172 (N.D. Ohio May 25, 1992); *In re Bryant*, 73 B.R. 956 (Bankr. N.D. Tex. 1987); *In re Nielsen*, 53 B.R. 289 (Bankr. N.D. Ala. 1985).

reasons. *First*, the court erred in assuming that *Davis* should be read to exclude duties that Congress itself declares to be "fiduciary" from the scope of Section 523(a)(4). *Davis* itself, after all, involved an ordinary secured loan. In that context, it was eminently sensible for this Court to hold that such a typical commercial debt was not one for breach of fiduciary duty simply "because the parties to one of the documents have chosen to speak of it as a trust." *Davis*, 293 U.S. at 334.

The text of Section 523(a)(4), however, provides only that a debt is nondischargeable if it is one for "defalcation while acting in a fiduciary capacity." Whatever the rule may be in circumstances in which the boundaries of "fiduciary" status are defined by the common law, where Congress itself declares a particular duty to be a "fiduciary" duty, such a duty must fall within the scope of Section 523(a)(4). As with any question of statutory construction, when Congress itself speaks directly to the question presented, the words it uses must be given effect. *See, e.g.*, *Sullivan* v. *Everhart*, 494 U.S. 83, 88-89 (1990). The court of appeals thus erred in relying on the *Davis* principle to exclude Bucci's breach of his duties under ERISA from Section 523(a)(4)'s scope, in light of Congress' clear declaration that a claim for violation of an ERISA obligation is one for breach of a "fiduciary" duty.

Second, even if *Davis*' explication of what constitutes an "express or technical" trust under common law governs in this context, where ERISA itself makes clear that any person who "exercises any authority or control" with respect to the "disposition of [plan] assets" is a "fiduciary," 29 U.S.C. § 1002(21)(A)(1), the Sixth Circuit erred in its application of the *Davis* principles. The Sixth Circuit reasoned that, assuming that Bucci was an ERISA fiduciary, he was not a fiduciary within the meaning of *Davis* because "[t]he act that created the debt—Bucci's breach of his contractual obligations to pay the employer contributions—is also the exercise of control" that rendered him a fiduciary under ERISA. App. 13a; *see Davis*, 293 U.S. at 333 ("It is not enough that, by the very act of wrongdoing out of which the contested debt arose, the bankrupt has become chargeable as a trustee ex maleficio. He must have been a trustee before the wrong and without reference thereto.").

Here, Bucci was unquestionably an ERISA fiduciary *prior* to breaching that fiduciary duty, and his actions thus constituted "defalcation while acting in a fiduciary capacity" even under *Davis'* construction of that phrase.

As the Sixth Circuit recognized, the trust agreements to which Bucci agreed expressly provided "that contributions due to be received are assets belonging to the fund." App. 12a; *see also* App. 40a (bankruptcy court opinion observing that the trust agreement defined the term "trust fund" to include "all funds ... due to be received ... (including delinquent Employer Contributions)" (omission in original)). ERISA permits parties to determine by contract whether such unpaid contributions constitute "plan assets." *See In re Luna*, 406 F.3d 1192, 1200 (10th Cir. 2005) (noting that courts "look to the language of the operative documents in deciding whether unpaid contributions amount to plan assets"); *ITPE Pension*

Fund v. *Hall*, 334 F.3d 1011, 1013-1014 (11th Cir. 2003) (same).[2]

Accordingly, once Bucci's contributions to the Plan became due, and he failed to pay them, they immediately became "plan assets" under the terms of the Trust Agreements and under ERISA. At that point, Bucci held plan assets in his personal bank account and indisputably exercised control over them. Under ERISA, as discussed above, any person who "exercises any authority or control" with respect to the "disposition of [plan] assets" is a "fiduciary." 29 U.S.C. § 1002(21)(A)(1). Unless and until Bucci made the required payment over to the trust, ERISA imposed a

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[2] In cases in which parties clearly identify unpaid contributions as plan assets, lower courts routinely give effect to such agreements. *See, e.g.*, *United States* v. *LaBarbara*, 129 F.3d 81, 88 (2d Cir. 1997) ("Once wages were paid to Local 66 members, [the employer] had contractual obligations to the Funds that constituted 'assets' of the Funds[.]"); *see also Trs. of Conn. Pipe Trades Local 777 Health Fund* v. *Nettleton Mech. Contractors, Inc.*, 478 F. Supp. 2d 279, 283 (D. Conn. 2007); *Trs. of S. Cal. Pipe Trades Health & Welfare Trust Fund* v. *Temecula Mech., Inc.*, 438 F. Supp. 2d 1156, 1167 (C.D. Cal. 2006); *Laborers Combined Funds* v. *Cioppa*, 346 F. Supp. 2d 765, 771 (W.D. Pa. 2004); *Hotel Employees & Rest. Employees Int'l Union Welfare Fund* v. *Billy's 1870*, No. 03 C 8337, 2004 WL 1879986, at *2 (N.D. Ill. Aug. 12, 2004); *Trustees of Nat'l Elevator Indus. Pension, Health Benefit, Educ. Funds* v. *Lutyk*, 140 F. Supp. 2d 407, 412 (E.D. Pa. 2001); *Chi. Dist. Council of Carpenters Pension Fund* v. *Angulo*, 150 F. Supp. 2d 976, 978 (N.D. Ill. 2001); *NYSA-ILA Med. & Clinical Servs. Fund* v. *Catucci*, 60 F. Supp. 2d 194, 200-201 (S.D.N.Y. 1999); *Hanley* v. *Giordano's Rest.*, No. 94-4696, 1995 WL 442143, at *4 (S.D.N.Y. July 26, 1995); *United States* v. *Panepinto*, 818 F. Supp. 48, 51 (E.D.N.Y. 1993), *aff'd on other grounds*, 28 F.3d 103 (2d Cir. 1994); *Connors* v. *Paybra Mining Co.*, 807 F. Supp. 1242, 1246 (S.D. W. Va. 1992); *Galgay* v. *Gangloff*, 677 F. Supp. 295, 300-301 (M.D. Pa. 1987).

statutory trust on his assets, requiring that they be held for the benefit of the Funds. *See id.* § 1103 ("all assets of an employee benefit plan shall be held in trust"); *id.* § 1109 (statutory remedy for breach of fiduciary duty); *see also ITPE Pension Fund*, 334 F.3d at 1014 (observing that the "effect of language that makes unpaid contributions assets of the fund" is that, when the employer fails to make the contribution on a timely basis, the fund obtains, as a matter of law, "priority on the corporation's available resources" (citation omitted)).

Moreover, once Bucci obtained control over plan assets—the unpaid contributions—he was required, as an ERISA fiduciary, to discharge his fiduciary duties "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(1), and "in accordance with the documents and instruments governing the plan," *id.* § 1104(1)(D). He was expressly barred by statute from dealing "with the assets of the plan in his own interest or for his own account." *Id.* § 1106(b)(1).

The court of appeals thus entirely misapprehended the nature of the breach of fiduciary duty claim in concluding that Bucci's breach of fiduciary duty was the failure to make the timely payment required by the Collective Bargaining Agreement. Rather, once Bucci failed to make the required payment, the Trust Agreement, as incorporated by the Collective Bargaining Agreement, imposed a trust on the payments that were due, which he thereafter held solely for the benefit of the Funds, in a fiduciary capacity. Satisfaction of his fiduciary duties would have been a simple enough matter—paying those monies over to the Funds themselves. Bucci, however, made a different decision. He used those funds to pay debts that he owed to other creditors, in plain violation of his express fiduciary duty to use fund assets only "in the interests of the participants and beneficiaries" of the plan, 29 U.S.C. § 1104(1), and contrary to his statutory duty not to "deal with the assets of the plan in his own interest," *id.* § 1106(b)(1).

The court of appeals was thus simply incorrect in believing that this case—like those involving a "resulting trust," or "trust *ex maleficio*," which the law impresses on the assets of one who wrongfully obtains property belonging to another—involves a circumstance in which the act of wrongdoing that gives rise to the debt was the same act from which the trust arose. It was not Bucci's breach of the Collective Bargaining Agreement by failing to pay contributions that constituted a breach of fiduciary duty. Bucci breached his fiduciary duty when, after becoming a fiduciary and holding delinquent contributions in trust, he used those trust assets to pay other creditors, in violation of that trust. *See generally LaRue* v. *DeWolff, Boberg & Assocs.*, ___ U.S. ___, 2008 WL 440748, at *3 (Feb. 20, 2008) ("The principal statutory duties imposed on fiduciaries" under ERISA are designed "with an eye towards ensuring that the benefits authorized by the plan are ultimately paid to participants and beneficiaries." (internal quotation marks omitted)).

III. THE CIRCUIT SPLIT ON THE APPLICATION OF SECTION 523(a)(4) TO ERISA REFLECTS WIDESPREAD DISAGREEMENT ON THE APPLICATION OF SECTION 523(a)(4) TO STATUTORY FIDUCIARY DUTIES

The confusion regarding the application of the *Davis* principles to Section 523(a)(4) in the context of statutorily imposed fiduciary duties extends well beyond the square and acknowledged split on the ERISA question. Indeed, the courts of appeals have been entirely unsuccessful in their efforts to articulate and apply an intelligible principle governing which types of statutorily imposed duties are sufficiently like those created by an "express or technical trust" that a claim for their breach is nondischargeable under *Davis*. As a result, the lower courts have for years been calling on this Court to provide clarity to a body of law that has developed into a labyrinth of internally contradictory doctrine. This case provides an ideal opportunity for this Court to do so.

The inconsistencies and contradictions in the case law are manifold. The Fifth Circuit, for example, has held that contractors who misappropriated funds required to be held in trust by state statutes were not acting in a "fiduciary capacity" within the meaning of Section 523(a)(4). *See In re Nicholas*, 956 F.2d 110, 114 (5th Cir. 1992) (Section 523(a)(4) does not bar dischargeability of general contractor's debt to subcontractor for projects on which general contractor was fully paid); *In re Boyle*, 819 F.2d at 592 (personal liability of official of corporation that used funds advanced for specific projects on other projects in violation of state law did not fall within ambit of discharge exception); *In re Angelle*, 610 F.2d 1335, 1341 (5th Cir. 1980) (contractor who misappropriated funds advanced to him by creditors for construction of homes was not acting in "fiduciary capacity" even if state law made contractor trustee because contractor would have been trustee only at the time of and from the misappropriation).

The Sixth and Tenth Circuits have reached the opposite conclusion on substantively identical facts. *See In re Johnson*, 691 F.2d 249, 257 (6th Cir. 1982) (in breaching his duty to pay supplier in accordance with statutory priority scheme, contractor created nondischargeable debt); *In re Romero*, 535 F.2d 618, 621 (10th Cir. 1976) (under state statute, contractor owed fiduciary duty to owner who made advances for payment to materialmen and subcontractors such that contractor's debt to owner was created by fraud and was nondischargeable).

To take another example, the Sixth and Eleventh Circuits have held that insurance agents that collect premiums from customers, and who are required by state law to segregate those premiums from other funds, and to pay them only to the insurer issuing the policies, act in a fiduciary capacity within the meaning of Section 523(a)(4). *See In re Blaszak*, 397 F.3d 386, 392 (6th Cir. 2005) (Section 523(a)(4) fiduciary relationship existed where a title insurance company signed agency agreement appointing and authorizing the company to be an issuing agent for creditor and the terms of the agreement fulfilled requirements for an express or technical trust under state law); *Quaif*, 4 F.3d at 955 (where state statute created fiduciary duties, insurance agent's failure to remit the premiums to insurer constituted "defalcation" within meaning of Section 523(a)(4)).

By contrast, the Fifth and Seventh Circuits have held that lottery agents, who have state-law duties functionally identical to those imposed on insurance agents with respect to remitting the proceeds of the sale of lottery tickets to state lottery commissions, are not acting in a fiduciary capacity within the meaning of Section 523(a)(4). *See In re Tran*, 151 F.3d 339, 346 (5th Cir. 1998) (state statute requiring lottery sales agents to hold money received from sale of lottery tickets in trust for benefit of state did not give rise to kind of fiduciary relationship required to deem debtor's obligation for remittance of lottery ticket sales proceeds nondischargeable); *In re Marchiando*, 13 F.3d 1111, 1116 (7th Cir. 1994) (store owner did not stand in fiduciary relation to state, for debt dischargeability purposes, with regard to her collection and remittance of proceeds from sale of state lottery tickets).

Adding to the confusion, certain courts have held debts to be nondischargeable in contexts in which there is no serious suggestion at all of a "technical trust," merely the type of relationship involving trust and confidence that modern parlance might describe as a "fiduciary" duty, but that *Davis* and other earlier cases clearly excluded from the scope of the exception to the discharge in bankruptcy. For instance, the Fifth, Eighth, and Ninth Circuits have held that the "fiduciary" duties owed partners to a partnership, or corporate officers and directors to corporation, are "fiduciary" duties within the meaning of Section 523(a)(4), reasoning that state statutes provide that the relationship is "fiduciary in character." *See In re Short*, 818 F.2d 693, 696 (9th Cir. 1987) (debtor who had duty under joint venture agreement and state partnership law to act as trustee for affairs of joint venture was "fiduciary" for joint venture); *In re Moreno*, 892 F.2d 417 (5th Cir. 1990); *In re Bennett*, 989 F.2d 779, 787 (5th Cir. 1993) (state law imposes "trust obligations on managing partners of limited partnerships and these obligations are sufficient to meet the narrow requirements of section 523(a)(4)"); *In re Davis*, 3 F.3d 113 (5th Cir. 1993); *In re Speight*, 16 F.3d 287, 287 (8th Cir. 1994) (state court judgment rendered in context of accounting on dissolution of partnership was plainly based on finding that debtor had committed defalcation in context of fiduciary relationship).

In contrast, the leading treatise on bankruptcy law states that under *Davis*, the "general meaning of a fiduciary—a relationship involving confidence, trust and good faith—is far too broad" to support a finding that a claim for breach of that duty is nondischargeable in bankruptcy. 4 *Collier on Bankruptcy* ¶ 523.10[1][c] (15th rev. ed. 2007) (internal quotation marks omitted). Indeed, there can be no plausible reading of *Davis*, or any other coherent principle of law, in which the claims in these cases are non-dischargeable, while the claim that the Funds are asserting against Bucci is discharged in his bankruptcy.

The lower courts have recognized that this case law cannot be reconciled. "[T]he cases are divided over the question whether a statute that ... deems a debtor a fiduciary in order to enlarge the remedies for default makes the debtor a 'fiduciary' for purposes of section 523(a)(4)." *In re Marchiando*, 13 F.3d at 1115. And they have made clear that further direction from this Court is imperative.

In addition, the courts of appeals have made clear that a substantial part of the difficulty stems from the fact that the most recent guidance they have received from this Court on the subject is contained in a few cryptic paragraphs from a decision issued in the early days of the New Deal—long before Congress and state legislatures began enacting statutes imposing fiduciary obligations designed to protect employees and consumers. As the Eleventh Circuit put it: "Unfortunately, the Supreme Court has not spoken on this issue since the *Davis* case, leaving the lower courts to struggle" with the application of *Davis*' principles to duties imposed by statute. *Quaif*, 4 F.3d at 953. The disagreement among the courts of appeals on the meaning of Section 523(a)(4), and of *Davis*, will persist until this Court clarifies the matter. This case, arising from a lower court decision that expressly recognizes the circuit split, and involving a federal statute that unambiguously imposes a "fiduciary" duty, presents an ideal opportunity to do so.

CONCLUSION

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

Respectfully submitted.

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