No. ______

In the
Supreme Court of the United States

ALLIED ELECTRICAL CONTRACTORS, INC.,
A Tennessee Corporation,
Petitioner,

v.

LINE CONSTRUCTION BENEFIT FUND,
A HEALTH AND WELFARE FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Employee Retirement Income Security Act grants employee benefit plans status as entities that can "sue and be sued." But ERISA only grants a right of action to a "participant, beneficiary, or fiduciary" to sue to enforce a plan. Did the Court of Appeals err when it allowed a benefit plan to enforce a plan as a "fiduciary" even though ERISA does not contemplate benefit plans in the definition of "fiduciary"?

2. The Labor Management Relations Act prevents employers from contributing to employee benefit plans except in strict accordance with a written agreement. The agreement here required the employer to sign a letter of consent to show the employer's consent to the agreement. Did the Court of Appeals err when it found that the employer's conduct alone manifested its assent to the agreement even though it had not signed a letter of assent?

PARTIES TO THE PROCEEDINGS

Respondent Line Construction Benefit Fund instituted the proceedings below by filing an ERISA enforcement action for delinquent contributions against Petitioner Allied Electrical Contractors, Inc. in the United States District Court for the Northern District of Illinois. The District Court granted Respondent LINECO's motion for summary judgment, which Respondent Allied appealed to the United States Court of Appeals for the Seventh Circuit.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, Petitioner Allied Electrical Contractors, Inc. hereby states that it has no parent company, and no public company owns 10% or more of its stock.

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OPINIONS BELOW

The panel decision of the United States Court of Appeals for the Seventh Circuit is published at 591 F.3d 576 (7th Cir. 2010) (Pet. App. 1a–10a). The United States District Court for the Northern District of Illinois's Memorandum Opinion and Order (Pet. App. 17a–33a) granting Respondent's Motion for Summary Judgment is unpublished. The District Court's Order of Judgment (Pet. App. 13a–14a) is also unpublished.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its decision on January 8, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Employee Retirement Income Security Act of 1974 are reproduced at Pet. App. 40a–52a: 29 U.S.C. §§ 1002(9), (21)(A); 29 U.S.C. § 1102(a); 29 U.S.C. § 1104; 29 U.S.C. § 1109; 29 U.S.C. §§ 1132 (a)(3), (d)(1), (e)(1); and 29 U.S.C. § 1145. The following provisions of the Labor Management Relations Act are reproduced at Pet. App. 36a–40a: 29 U.S.C. §§ 186(a), (c).

STATEMENT OF THE CASE

Allied Electrical Contractors, Inc., the Petitioner in this case, is a Tennessee Corporation that provides electrical contracting services.[1] Respondent Line Construction Benefit Fund, a Health and Welfare Fund ("Lineco"), is a multiemployer benefit fund that employers, such as Allied, contribute to according to the provisions of collective bargaining agreements that unions negotiate with groups that represent employers, such as The Southeastern Line Constructors Chapter of the National Electrical Contractors Association ("NECA"), which Allied joined in 2002.[2] When Allied sent in its application to join NECA on August 28, 2002, Allied's President, Michael Eskridge, also sent a letter making it clear that one of Allied's goals in joining NECA was to become involved in the negotiating committee.[3] NECA later negotiated the CBA at issue in this case with the International Brotherhood of Electrical Workers, Local Union 474 ("the Union") in 2005, but Mr. Eskridge was not a part of those negotiations.[4]

The CBA set forth the terms under which Lineco would receive contributions from employers, including a provision requiring employers to pay into the fund for all covered employees.[5] Because the Agreement was negotiated between the Union and NECA — and

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[1] (Pet. App. 19a.)

[2] *Id.* at 2a, 20a.

[3] *Id.* at 20a.

[4] *Id.* at 3a, 20a.

[5] *Id.*

not directly with the employers[6] — the CBA included a clause stating, "[the CBA] shall apply to all firms who sign a letter of consent to be bound by the terms of this agreement."[7] The CBA became effective on December 1, 2005.[8] Allied did not sign a letter of consent until December 6, 2006, over a year after the Agreement went into effect.[9]

In the meantime, Allied began contributing to Lineco.[10] Allied made payments in accordance with the 2005 CBA until July and August 2006, when Allied missed two payments to Lineco.[11] In October of 2006, the Union barred Allied President Michael Eskridge from a NECA–Union negotiating session because Allied had failed to sign a letter of assent as the CBA required.[12] Shortly thereafter, on December 7, 2006, Allied's President executed a letter of assent.[13] Allied also missed payments to Lineco in December 2006, January 2007, and February 2007, but resumed

[6] *Id.* at 20a.

[7] *Id.* at 19a.

[8] *Id.* at 3a.

[9] *Id.* at 20a.

[10] *Id.* at 21a.

[11] *Id.* at 20a.

[12] *Id.*

[13] *Id.*

making payments as the CBA requires in March 2007.[14]

On February 20, 2007, Lineco sued Allied in the United States District Court for the Northern District of Illinois under Sections 502(a)(3), (g)(2), and 515 of the Employee Retirement Income Security Act of 1974 ("ERISA") for the delinquent contributions. Lineco, as a multiemployer benefit fund administered under Section 302(c)(5) of the Labor Management Relations Act and Section 515 of ERISA, asserted that the district court could exercise jurisdiction under Section 502(e)(1),(2) of ERISA because Lineco was administered in the Northern District of Illinois.

On April 30, 2009, Allied moved to dismiss Lineco's Complaint on the basis that ERISA authorizes only a "participant, beneficiary, or fiduciary" to sue to enforce the terms of a plan.[15] As a multi-employer benefit plan — and not a "participant, beneficiary, or fiduciary" — Allied claimed that ERISA did not authorize Lineco to maintain a cause of action for delinquent contributions.[16] Alternatively, Allied moved for partial summary judgment as to any contributions due before December 6, 2007, when Allied executed a Letter of Consent agreeing to be bound to CBA.[17] Lineco responded by filing a cross-motion for summary judgment on May 23, 2008.

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[14] *Id.* at 3a.

[15] *Id.* at 4a, 18a. *See* 29 U.S.C. §§ 1132(a)(1)(3), (e)(1).

[16] *Id.*

[17] *Id.* at 4a.

On November 26, 2008, the district court granted Lineco's cross-motion for summary judgment.[18] The district court entered judgment against Allied on January 29, 2009, for $200,816.36, the amount of the delinquent contributions plus interest, statutory liquidated damages, attorneys' fees, and costs.[19] Less than a month later, on February 27, 2009, Allied filed its timely Notice of Appeal to the United States Court of Appeals for the Seventh Circuit.

After full briefing and oral argument, the Seventh Circuit issued a published opinion on January 8, 2010. In its opinion, the court summarized the first question presented as follows:

> Section 1132(d)(1) establishes the legal status of multiemployer plans for purposes of ERISA: "An employee benefit plan may sue or be sued under this title as an entity." Section 1132(e), however, does not mention plans as such in the list of authorized plaintiffs. Instead, as we just noted, it grants a right of action to "fiduciaries of a plan." We must therefore determine who is a fiduciary of a plan and whether a plan itself may sue either as a fiduciary or on behalf of the fiduciaries.
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> * * *
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> Allied focuses on the second part of the inquiry and asserts that a plan cannot be a fiduciary of itself. In our view, however, this is too simplistic a view of a plan. Any and all actions

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[18] *Id.* at 18a.

[19] *Id.* at 4a.

> taken by a plan are done by the administrators who act on its behalf—in other words, by the fiduciaries who exercise discretionary authority or control with respect to the management of a plan.[20]

This issue — whether a plan may sue to enforce its terms — divides the Circuits. Two Circuits have held that ERISA does not authorize a benefit plan to maintain a right of action for delinquent contributions.[21] In contrast, the Sixth Circuit — and now the Seventh — have allowed a multiemployer benefit plan to sue to enforce a plan, either as an entity that "may sue and be sued" or as a "fiduciary."[22] As noted by the American Bar Association's *The Tax Lawyer*, this case presents an excellent vehicle to resolve the serious issues that this split creates.[23]

The Seventh Circuit summarized the second question presented as follows:

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[20] *Id.* at 5a.

[21] *See Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 981–984 (9th Cir. 1999); *Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assur. Co.*, 700 F.2d 889, 893 (2d Cir. 1983).

[22] *See Line Construction Benefit Fund v. Allied Electrical Contractors, Inc.*, 591 F.3d 576, 579–80 (7th Cir. 2010); *Saramar Alum. Co. v. Pension Plan for Employees of Alum. Indus. & Allied Indus. of Youngstown Ohio Metro. Area,* 782 F.2d 577, 581 (6th Cir. 1986).

[23] Note, *Circuit Split Over ERISA Standing Remains, Despite Clear Statutory Provisions*, 63 Tax Law. 249 (2009)

> Allied also argues that the CBA's explicit requirement of a letter of consent should preclude the court from holding it bound by the agreement until it issued such a letter. See *Merrimen v. Paul F. Rost Electric, Inc.,* 861 F.2d 135 (6th Cir. 1988) (finding no obligation where the employer did not sign a letter of assent as required by the CBA). We have not taken such a formalistic position. Instead, we have held repeatedly that conduct manifesting assent creates an obligation.

This holding — that a conduct can manifest an employer's consent even when the CBA explicitly requires the employer's signature — expressly creates a Circuit split with the Sixth Circuit.[24]

This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION DEEPENS THE CIRCUIT SPLIT AND THE APPARENT CONFLICT WITH THIS COURT'S DECISION OVER WHETHER ERISA GRANTS EMPLOYEE BENEFIT PLANS A RIGHT TO SUE FOR DELINQUENT CONTRIBUTIONS.

The Court should grant *certiorari* to resolve the clash between the Second and Ninth Circuits, which properly recognize that ERISA does not enumerate benefit plans as entities that may sue for delinquent

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[24] *See Merrimen v. Paul F. Rost Electric, Inc.,* 861 F.2d 135 (6th Cir. 1988).

contributions, and the Sixth and Seventh Circuits, which find that benefit plans are fiduciaries because a plan intrinsically includes those who must act on its behalf. The Seventh Circuit's overly expansive view of the term "fiduciary" conflicts with plain language of ERISA (as the Second and Ninth Circuits have correctly recognized), as well as language in this Court's well-reasoned decision in *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*.[25] Furthermore, the Seventh Circuit's decision judicially legislates around the safeguards that Congress took care to write in to ERISA's plain language.

A. The Seventh Circuit's decision that benefit plans are "fiduciaries" under ERISA directly conflicts with the Second and Ninth Circuits, which hold that Employee Benefit Plans do not have standing to sue for delinquent contributions.

Section 515 of ERISA requires employers who are "obligated to make contributions to a multiemployer plan" to contribute in accordance with the benefit plan's terms and conditions. When an employer fails to do so, Section 502(a)(3) authorizes a "participant, beneficiary, and fiduciary" to bring an action to enforce the terms of the plan.[26] The Ninth and Second Circuits have recognized that when Congress enumerated these specific entities, it did not list benefit plans as entities

[25] *See* 463 U.S. 1, 22–25 (1983).

[26] 29 U.S.C. § 1132(a)(3)(ii).

that could sue for delinquent contributions.[27] The Sixth and Seventh Circuits, on the other hand, have relied upon Section 502(d)(1) — which states that "an employee benefit plan may sue or be sued under this subchapter as an entity" — and Section 502(e) to find that employee benefit plans have standing to sue for delinquent contributions as fiduciaries.[28]

1. The Second and Ninth Circuits correctly recognize that employee benefit plans do not have standing to sue for delinquent contributions under of Section 515 of ERISA because plans are not participants, beneficiaries, or fiduciaries as Section 502(a)(3) requires.

In *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*,[29] the Court of Appeals for the Ninth Circuit analyzed ERISA's language and correctly determined that an employee benefit fund lacks standing to sue under ERISA. There, the Ninth Circuit examined ERISA's definition of "fiduciary" to determine if a benefit plan could be considered a fiduciary:

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[27] *See Nor-Cal Plumbing, Inc.*, 185 F.3d at 981–984; *Pressroom*, 700 F.2d at 893.

[28] *See Allied Electrical Contractors, Inc.*, 591 F.3d at 579–80; *Saramar Alum. Co. v. Pension Plan for Employees of Alum. Indus. & Allied Indus. of Youngstown Ohio Metro. Area,* 782 F.2d 577, 581 (6th Cir. 1986).

[29] *See Nor-Cal Plumbing, Inc.*, 185 F.3d 978.

> . . . 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, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. . . .[30]

The Ninth Circuit properly inferred from this definition that ". . . the 'person' and the 'plan' must be separate entities," since the statute uses the verbiage, "a *person* is a fiduciary *with respect to a plan*."[31] The Ninth Circuit then acknowledged that because ". . . the Trust Funds are the ERISA plans themselves . . . they cannot be ERISA fiduciaries with respect to the plans."[32] Ultimately, this recognition led the *Nor-Cal Plumbing* court to conclude that federal courts cannot hear ". . . a civil action under ERISA that is brought by

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[30] 29 U.S.C. § 1002(21)(A) (emphasis added).

[31] 29 U.S.C. § 1002(21)(A); *Nor-Cal Plumbing, Inc.*, 185 F.3d at 981 (emphasis added).

[32] *Nor-Cal Plumbing, Inc.*, 185 F.3d at 981; *see also Franchise Tax Bd. v. Construction Laborers Vacation Trust,* 463 U.S. 1, 27 (1983).

a person who is not a 'participant, beneficiary, or fiduciary.'"[33]

The *Nor-Cal Plumbing* court also examined Section 502(d)(1) of ERISA and found that this Section only allows benefit plans to sue or be sued where the court already has jurisdiction.[34] Likewise, the Ninth Circuit concluded that Section 515 of ERISA "merely creates a cause of action against" against employers who fail to contribute in accordance with the terms of a plan. Neither of these Sections, the Ninth Circuit appropriately recognized, "create[s] a separate basis for jurisdiction."[35] While this Court's recent decision in *Union Pacific R.R. Co. v. Bhd of Locomotive Eng'rs and Trainmen Gen. Comm. of Adjustment, Cent. Region*[36] may call into question the Ninth Circuit's use of the word "jurisdiction" to describe the fact that a benefit plan was not an enumerated party who could maintain a right of action for delinquent contributions under ERISA, the court's reasoning remains sound.

The Court of Appeals for the Second Circuit reached a similar conclusion in *Pressroom Unions-Printers League Income Sec. Fund v. Continental Assur. Co.*[37] There, the Second Circuit stated plainly,

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[33] *See id.*

[34] *See id.* at 983.

[35] *See id.*

[36] 130 S.Ct. 584, 597 (2009).

[37] *Pressroom Unions-Printers League Income Sec. Fund v. Continental Assur. Co.*, 700 F.2d 889 (2d Cir. 1983).

"The jurisdictional provisions of ERISA do not on their face authorize a pension fund to assert a cause of action."[38] As a recent article from the ABA's Tax Lawyer — *Circuit Split Over ERISA Standing Remains, Despite Clear Statutory Provisions* — points out:

> *Pressroom* stated that the proper inquiry was not "whether the legislative history reveals that Congress intended to *prevent* actions by [non-enumerated parties such as plans], but instead . . . whether there is any indication that the legislature intended to *grant* subject matter jurisdiction" to those parties.[39]

In finding that ERISA does not grant the plan standing to sue under ERISA, the Second Circuit concluded, "It is beyond dispute that only Congress is empowered to grant and extend the subject matter jurisdiction of the federal judiciary . . . ."[40]

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[38] *See id.* at 891.

[39] Note, *Circuit Split Over ERISA Standing Remains, Despite Clear Statutory Provisions*, 63 Tax Law. 249 (2009) (quoting *Pressroom*, 700 F.2d at 892).

[40] *Pressroom*, 700 F.2d at 891.

2. The Seventh Circuit's decision below — and the Sixth Circuit's decision in *Saramar Aluminum Co. v. Pension Plan* — directly conflicts with the Second and Ninth Circuits and incorrectly holds that Section 502(d)(1) of ERISA grants a benefit plan a right to sue as a "fiduciary," despite ERISA's specific language indicating otherwise.

The Seventh Circuit's decision in this case recognized that ERISA does not mention benefit plans "in the list of authorized plaintiffs" who may bring an action to enforce the terms of a plan.[41] Congress specifically enumerated the persons "empowered to bring an action . . . to enforce . . . the terms of the plan" in Section 502(a)(3), where Congress listed only "participant[s], beneficiar[ies], or fiduciary[ies]." Nevertheless, the Seventh Circuit determined that a plan could maintain a right of action as a "fiduciary" under Section 502(e), which grants jurisdiction to the federal district courts over civil actions "brought by the Secretary or by a participant, beneficiary, [or] fiduciary. . . ."[42]

In reaching this decision, the Seventh Circuit reiterated its earlier holding in *Automobile Mechanics Local 701 Welfare and Pension Funds v. Vanguard Car Rental USA, Inc.*, where it stated, "Section 1132(e) complements § 1145 by authorizing certain parties to

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[41] *Allied Electrical Contractors, Inc.*, 591 F.3d at 579.

[42] 29 U.S.C. § 1132(e); *see Allied Electrical Contractors, Inc.*, 591 F.3d at 580.

enforce the substantive right."[43] In *Vanguard*, the Seventh Circuit relied on the broad language in Section 502(d)(1) that plans "may sue and be sued under [ERISA] as an entity," but failed to explain why a plan was otherwise "empowered to bring a civil action" under Section 502(a).[44] The *Allied* decision fills this gap by specifically holding that benefit plans are "fiduciaries" under Section 502(e), which presumably suffices for purposes of Section 502(a) as well.

In doing so, the *Allied* decision assumes that a benefit plan may be a fiduciary of itself. ERISA specifically defines "fiduciary" in two ways. First, Section 402(a)(1) allows a plan to name its fiduciaries in the plan documents.[45] Second, Section 3(21)(a) defines the functions that a fiduciary normally performs:

> 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, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or

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[43] *Auto. Mech. Local 701 Welfare and Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 745 (7th Cir. 2007).

[44] *See* 29 U.S.C. § 1132(a).

[45] 29 U.S.C. § 1102(a)(1).

> discretionary responsibility in the administration of such plan.[46]

The Seventh Circuit's decision relies on this latter method of establishing fiduciary status, but only in a general sense.[47] After reciting this definition, the *Allied* court states that "[a]ny and all actions taken by a plan are done by the administrators who act on its behalf — in other words, by the fiduciaries who exercise discretionary authority or control with respect to the management of a plan."[48]

Similarly, the Sixth Circuit's opinion in *Saramar Aluminum Co. v. Pension Plan* concludes that a pension plan necessarily includes those "who must act for the Plan."[49] In *Saramar Aluminum*, the Sixth Circuit analyzed the plan's provisions as to the plan's powers, and after determining that the plan had entered an agreement with a bank for making distributions as directed by the administrators, reasoned that the plan itself was a "fiduciary" for purposes of maintaining a right of action under Section 502 of ERISA.[50]

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[46] 29 U.S.C. § 1002(21)(A).

[47] *See Allied Electrical Contractors, Inc.,* 591 F.3d at 579.

[48] *See id.*

[49] *Saramar Alum. Co.*, 782 F.2d at 581.

[50] *See id.*

But both of these decisions strain the definition of "fiduciary" beyond its "ordinary, contemporary, common meaning."[51] First, as correctly pointed out by the Ninth Circuit in *Nor-Cal Plumbing*, the definition of "fiduciary" begins by stating that "a person is a fiduciary *with respect to* a plan," strongly indicating that Congress viewed the person and the plan as separate entities.[52] Furthermore, ERISA defines "person" separately to include several kinds of entities, none of which is a benefit plan.[53] Against this backdrop, "[i]t is unlikely that the somewhat absurd interpretation that plans can be fiduciaries of themselves would be regarded as the 'ordinary, contemporary, [and] common meaning' of section 3(21)(A)."[54]

B. The Seventh Circuit's decision conflicts with language in this Court's decision in *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California.*

The Seventh Circuit's holding that a benefit plan is a "fiduciary" under Section 502(e) conflicts with

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[51] *See Perrin v. United States*, 444 U.S. 37, 42 (1979).

[52] *Nor-Cal Plumbing, Inc.*, 185 F.3d at 981; 29 U.S.C. § 1002(21)(A).

[53] *See* 29 U.S.C. § 1002(9); *see also Note, Circuit Split Over ERISA Standing Remains, Despite Clear Statutory Provisions,* 63 Tax Law. at 259–60.

[54] *Note, Circuit Split Over ERISA Standing Remains, Despite Clear Statutory Provisions,* 63 Tax Law. at 259.

language in two of this Court's decisions: *Franchise Tax Bd. v. Construction Laborers Vacation Trust*[55] and *Massachusetts Mutual Life Insurance Co. v. Russell.*[56] Although neither case directly resolves this issue, this Court's decisions in those cases strongly suggest the proper interpretation of Section 502.

In *Franchise Tax Board,* a California state tax board sought a declaratory judgment in the California State court on the issue of whether the trustees for the CLVT had the power to honor the State's levy upon them — an issue that this Court called "undoubtedly a concern under ERISA."[57] CLVT attempted to remove the case to federal district court on the basis that the tax board's request for declaratory relief "arises under ERISA."[58] This Court analyzed Section 502(a)(3)(B) of ERISA and determined that a "a participant, beneficiary, or fiduciary" could certainly ". . . bring a declaratory judgment action in federal court to determine . . ." this very question. But because the Franchise Tax Board was not a "participant, beneficiary, or fiduciary," the Court held that the issue did not "arise under" ERISA:

> The phrasing of § 502(a) is instructive. Section 502(a) specifies which persons — participants, beneficiaries, fiduciaries, or the Secretary of

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[55] 463 U.S. 1, 27 (1983).

[56] 473 U.S. 134 (1985).

[57] *Franchise Tax Bd.*, 463 U.S. at 26.

[58] *See id.* at 27.

> Labor — may bring actions for particular kinds of relief.
> * * *
> ERISA carefully enumerates the parties entitled to seek relief under § 502; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issues in this case. A suit for similar relief by some other party does not "arise under" that provision.[59]

Similarly, Congress did not list benefit plans among those who could sue to enforce delinquent contributions.[60] Instead, Congress clearly defined a "fiduciary" as a "person" — which it defined without including benefit plans[61] — and further delineated fiduciaries and plans by stating that "a person is a fiduciary with respect to a plan . . . ."[62]

This latter point is illustrated even more clearly in this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell.*[63] There the Court analyzed Section 409 of ERISA, which deals with the breach of

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[59] *Id.*

[60] *See* 29 U.S.C. § 1132(a)(3).

[61] *See* 29 U.S.C. § 1002(9).

[62] 29 U.S.C. § 1002(21)(A); *see also Nor-Cal Plumbing, Inc.*, 185 F.3d at 981.

[63] 473 U.S. 134 (1985).

the fiduciary duty, and drew attention to the relationship between a plan and its fiduciary:

> But when the entire section is examined, the emphasis on the relationship between the fiduciary and the plan as an entity becomes apparent. Thus, not only is the relevant fiduciary relationship characterized at the outset as one "with respect to a plan," but the potential personal liability of the fiduciary is "to make good *to such plan* any losses *to the plan* ... and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan....*"[64]

This explanation becomes utterly meaningless if a plan can be a fiduciary of itself. Surely, if Congress intended such a result, it would have said so. Such an omission ". . . is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated statute.'"[65]

This Court's decisions in *Franchise Tax Board* and *Russell* convinced the Ninth Circuit to reverse course and find that only enumerated parties have standing to sue under ERISA.[66] Before the Court issued these two decisions, the Ninth Circuit treated trust funds as

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[64] *See Russell*, 473 U.S. at 140; 29 U.S.C. § 1109(a).

[65] *See Russell*, 473 U.S. at 147.

[66] Note, *Circuit Split Over ERISA Standing Remains, Despite Clear Statutory Provisions,* 63 Tax Law. at 254.

proper plaintiffs in ERISA actions.[67] But beginning with *Cripps v. Life Ins. Co. of N. Am.* in 1992, the Ninth Circuit recognized that this Court's decisions in *Franchise Tax Board* and *Russell* required more scrutiny as to who could maintain a right of action under ERISA.[68] In stark contrast, the decisions of the Sixth and Seventh Circuits have accorded this Court's decisions in *Franchise Tax Board* and *Russell* little, if any, weight, which has served to deepen the split in the Circuits even further.

C. The conflict among the Circuit Courts of Appeal has serious practical consequences warranting further review.

As illustrated by this Court's decision in *Russell*, there are practical ramifications of being a "fiduciary" under ERISA — considerations that have been completely overlooked by the Sixth and Seventh Circuits. First and foremost is the fact that fiduciaries are liable to the plan for breaching their fiduciary duty. Such a finding also leads to absurd results if beneficiaries and participants could sue plans directly for breach of the plan's fiduciary duty to itself. Finally, finding that a plan is a fiduciary sets up inconsistencies in applying a statute of limitations.

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[67] *See, e.g., Brick Masons Pension Trust v. Indus. Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir. 1988); *Operating Eng'rs Pension Trust v. Cecil Backhoe Serv., Inc.*, 795 F.2d 1501 (9th Cir. 1986); *Laborers Health & Welfare Trust Fund for N. Cal. v. Kaufman & Broad of N. Cal., Inc.*, 707 F.2d 412, 416 (9th Cir. 1982).

[68] 980 F.2d 1261, 1265 (9th Cir. 1992).

1. The Seventh Circuit's decision circumvents the protections that Congress enacted to prevent misuse and mismanagement of plan assets by plan administrators.

"The congressional debates surrounding the ERISA's enactment demonstrate that Congress was concerned about mismanagement and manipulation by the individuals managing employee benefit plans."[69] To ensure that funds are not mismanaged and to reduce the potential for abuse,[70] Congress drafted the sections of ERISA dealing with the duties of a fiduciary.[71] These sections require fiduciaries to act prudently and in the best interests of a plan, and impose personal liability when a fiduciary breaches his duty.[72]

The Seventh Circuit's decision avoids this safeguard by summarily giving standing to anyone who sues in the name of the plan without ensuring that "actual fiduciaries who can be held liable for their actions are bringing these suits."[73] For example, not all plan administrators will qualify as "fiduciaries."

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[69] Note, *Circuit Split Over ERISA Standing Remains, Despite Clear Statutory Provisions,* 63 Tax Law. at 262.

[70] 120 CONG. REC. 29,954 (1974) (statement of Sen. Nelson); 120 CONG. REC. 29,961 (1974) (statement of Sen. Clark.)

[71] *See* 29 U.S.C. §§ 1104, 1109.

[72] *See id.*

[73] Note, *Circuit Split Over ERISA Standing Remains, Despite Clear Statutory Provisions,* 63 Tax Law. at 263.

The Department of Labor has promulgated regulations clarifying the definition of "fiduciary," which provides that "a person who provides purely ministerial functions . . . within a framework of policies, interpretations, rule, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority."[74] The regulation lists some ministerial functions, such as calculation of benefits, collecting contributions, processing claims, and making recommendations to others.[75]

In other words, ministerial administrators performing these types of activities — which includes collecting contributions — are not always "fiduciaries" themselves under the DOL's definition. If such a plan administrator were to breach the fiduciary duty in the course of collecting contributions, he would have no personal liability, leaving the plan with no recourse. Because of this, the Seventh Circuit's decision permits an interpretation of "fiduciary" that conflicts with the DOL's definition of "fiduciary" and in turn circumvents the very safeguards that Congress legislated into ERISA.

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[74] Questions and Answers Relating to Fiduciary Responsibility Under the Employee Retirement Income Security Act of 1974, 29 C.F.R. § 2509.75-8 (2008).

[75] *See id.*

2. The Seventh Circuit's decision that a plan is a fiduciary leads to absurd results because a plan would be liable to itself for breaching the fiduciary duty under Section 409 of ERISA.

This Court in *Russell* emphasized ". . . the relationship between the fiduciary and the plan as an entity."[76] The Court also recognized ". . . the potential personal liability of the fiduciary" who must ". . . make good *to such plan* any losses *to the plan* . . . and to restore *to such plan* any profits of such fiduciary which have been made through use of assets *of the plan*. . . ."[77] It's this relationship that shows why recognizing a plan as a "fiduciary" creates an absurd result:

> . . . [F]iduciary status suggests that participants and beneficiaries could sue the plans themselves for breach of fiduciary duty. Of course, since restitution from breach of fiduciary duty necessarily flows to the plan itself, suing the plan would not accomplish the goal of a lawsuit, which is to compensate the plan (and by extension, the beneficiaries) for the losses sustained. The plan, if found guilty, would pay restitution back into its own pockets.[78]

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[76] *See Russell*, 473 U.S. at 140.

[77] *See id.* (quoting 29 U.S.C. § 1109(a)).

[78] Note, *Circuit Split Over ERISA Standing Remains, Despite Clear Statutory Provisions,* 63 Tax Law. at 264.

This Court has long recognized that courts should interpret statutes so as to avoid "absurd results" and "internal inconsistencies."[79]

3. The Seventh Circuit's decision that a plan is a fiduciary will lead to inconsistent statutes of limitations because it will be difficult to determine when a "plan" discovered a violation of ERISA.

The Seventh Circuit's decision to recognize the plan as a fiduciary could cause problems with the statute of limitations. "Under ERISA, the running of the statute of limitations does not commence until the plaintiff gains actual knowledge of the breach or violation, unless more than six years has passed since the breach or violation has occurred."[80] As the Ninth Circuit recognized in *Nor-Cal Plumbing*, "If the plan itself is the plaintiff, whose knowledge would trigger the statute?"[81] This could lead to serious uncertainty regarding when a "plan" actually discovers a violation of ERISA.[82] This Court should grant this petition and resolve the uncertainty and the Circuit split.

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[79] *See United States v. Turkette*, 452 U.S 576, 580 (1981).

[80] *Nor-Cal Plumbing, Inc.* 185 F.3d at 983 n.5; 29 U.S.C. § 1113.

[81] *See id.*

[82] Note, *Circuit Split Over ERISA Standing Remains, Despite Clear Statutory Provisions,* 63 Tax Law. at 264–65.

II. THE SEVENTH CIRCUIT'S DECISION CREATES A CONFLICT WITH THE SIXTH CIRCUIT OVER WHETHER CONDUCT ALONE MAY MANIFEST AN EMPLOYER'S ASSENT TO CONTRIBUTE TO A BENEFIT PLAN WHEN THE AGREEMENT ITSELF REQUIRES THE EMPLOYER'S SIGNATURE ON A LETTER OF ASSENT.

Section 302(a) of the Labor Management Relations Act makes it unlawful for employers to pay union affiliated entities, including union established ERISA funds, but for the narrow exceptions set out in § 302(c).[83] One of the exceptions under Section 302(c) allows employers to make payments to a trust fund established for the benefit of the employees.[84] Because such payments are technically exceptions to the rule prohibiting payments to labor organizations, courts have long interpreted these exceptions very narrowly.[85] As the Second Circuit noted in *Moglia v. Geoghegan*, "The reason for the rigid structure of Section 302 is to insure that employer contributions are only for a proper purpose. . . . Any erosion of the strict

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[83] *See* 29 U.S.C. §§ 186(a), 186(c); *see also Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 588 (1993).

[84] *See* 29 U.S.C. § 186(c)(5).

[85] *See Bricklayers, Masons and Plas. Intern. Union of Am., Local Union No. 15, Orlando, Fla. v. Stuart Plas. Co., Inc.*, 512 F.2d 1017 (5th Cir. 1975) ("Section 302(c) is a narrow exception to the general prohibition of employer-employee payments contained in Sections 302(a) and 302(b). Strict compliance with the terms of Section 302(c) is required . . . .")

requirements of this section could provide an unintended loophole for the unscrupulous."[86]

In addition to the narrow exceptions found in Section 302 of LMRA, Section 515 of ERISA also contains limitations with regard to multiemployer plans:

> Every employer who is obligated to make contributions to a *multiemployer plan* under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions *in accordance with the terms and conditions of such plan or such agreement.*[87]

Together, Section 302 of LMRA and Section 515 of ERISA provide a rigid structure within which employers and labor organizations must operate with regard to contributions to trust funds.

Allied, the Petitioner in this case, is an electrical contractor who made payments to Lineco, a multiemployer benefit fund administered in accordance with section 302(c)(5) of the LMRA and section 515 of ERISA.[88] In 2005, the Southeastern Line Constructors Chapter of NECA and the Union agreed to a CBA that expressed the terms under which Lineco would receive contributions under the trust

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[86] 403 F.2d 110 (2d Cir. 1968).

[87] *See* 29 U.S.C. § 1145 (emphasis added).

[88] *Allied Electrical Contractors, Inc.,* 591 F.3d at 578.

agreement that established the fund.[89] Importantly, this CBA included a clause making it applicable only to "firms who sign a letter of consent to be bound by the terms of this agreement."[90] Despite the CBA's requirement, Allied did not execute a letter of assent until December 2006.[91]

Allied made payments in accordance with the 2005 CBA until July and August 2006, when Allied missed two payments to Lineco.[92] In October of 2006, the Union barred Allied President Michael Eskridge from a NECA–Union negotiating session because Allied had failed to sign a letter of assent as the CBA required.[93] Shortly thereafter, on December 7, 2006, Allied executed a letter of assent.[94]

The Seventh Circuit decision that Allied's conduct manifested its assent — in spite of the CBA's express requirement that only "firms who sign a letter of consent" will be bound — directly conflicts with the Sixth Circuit's opinion in *Merrimen v. Paul F. Rost*

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[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

Electric, Inc.[95] In *Merrimen*, the Sixth Circuit found that an employer was not bound to make pension contributions even though it had voluntarily made some contributions in the past.[96] The Sixth Circuit recognized that the employer had not signed a letter of assent, and that the collective bargaining agreement there required the employer's signature to manifest his assent to the CBA.[97] After citing the *Merrimen* opinion, the Seventh Circuit replied simply, "We have not taken such a formalistic position."[98] The Seventh Circuit explained, "As long as the agreement is written, it does not have to be a 'signed, unexpired collective bargaining agreement between the parties' or even a signed agreement at all."[99]

The problem is that the Sixth Circuit agrees with this logic — i.e. there is no "statutory" signature requirement.[100] But that is not what *Merrimen* stands for: It's only when the agreement itself requires a signed letter of assent that an employer's signature is

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[95] *Compare Allied Electrical Contractors, Inc.,* 591 F.3d at 581 *with Merrimen v. Paul F. Rost Electric, Inc.,* 861 F.2d 135 (6th Cir. 1988).

[96] *Merrimen*, 861 F.2d at 139.

[97] *See id.*

[98] *Allied Electrical Contractors, Inc.,* 591 F.3d at 581.

[99] *See id.* (internal citations removed).

[100] *Cf. Nat'l Leadburners Health and Welfare Fund v. O.G. Kelley & Co., Inc.*, 129 F.3d 372, 374 (6th Cir. 1997) (recognizing that there is nothing in the statute that requires an employer's signature to manifest his assent to be bound to a CBA.)

required.[101] The Seventh Circuit's opinion acknowledged the distinction, but offered no explanation for holding otherwise except for saying that the Seventh Circuit is not so "formalistic."[102]

This question warrants further review to resolve this Circuit split and to clarify the LMRA's statutory language, which specifies that the basis on which trust payments are to be made must be detailed in a "written agreement *with the employer*."[103] The Seventh Circuit neglected Allied's argument that the agreement in this case was not "with the employer," rather this agreement was made between the union and a negotiating committee of an association of which the Petitioner was not a part. Accordingly, regardless of whether the agreement is signed or unsigned, the point is that the agreement is not with this employer as LMRA requires since Allied did not sign the Letter of Assent as the CBA required. The agreement at issue here was negotiated by a multiemployer group, not by the employer. Because of this, the CBA requires a signed Letter of Assent in order for the agreement to become effective as to a particular employer. Thus, enforcement of this agreement would not only violate the very terms of the agreement, it would in turn violate the strictures of Section 515. This is the point that the Sixth Circuit appropriately recognized in *Merrimen*, but was overlooked in *Allied*.

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[101] *Merrimen*, 861 F.2d at 139.

[102] *See Allied Electrical Contractors, Inc.*, 591 F.3d at 581.

[103] 29 U.S.C. § 186(c)(5)(B) (emphasis added).

The Seventh Circuit's decision here also appears to be in conflict with decisions from the Second and Fifth Circuit, which has endorsed the Sixth Circuit. Specifically, the Second Circuit held in *Moglia v. Geoghegan* — albeit in factually distinguishable circumstances —that without signatures on the collective bargaining agreement and the trust agreement attached to it, a written agreement under § 302(c) did not exist.[104] Likewise, the Fifth Circuit in *Bricklayers Local 15 v. Stuart Plastering Co.* found that a written agreement under § 302(c) did not exist, partially because the employer did not sign the trust agreements.[105] The Fifth Circuit has since reaffirmed its decision in *Firesheets v. A.G. Bldg. Specialists, Inc.*, where the Fifth Circuit explicitly endorsed the Sixth Circuit's reasoning in *Merrimen.*[106] Because the Seventh Circuit's decision in *Allied* serves to deepen the split on this issue, the Court should grant this Petition.

CONCLUSION

ERISA only authorizes three parties to bring a suit to enforce the terms of benefit plan: a participant, beneficiary, or fiduciary. Because Lineco is not one of these enumerated parties, the Seventh Circuit's decision conflicts with ERISA's plain language and, in doing so, conflicts with the decisions of two other

[104] *Moglia v. Geoghegan,* 403 F.2d 110, 118 (2d Cir. 1968), *cert. denied,* 394 U.S. 919 (1969).

[105] *Stuart Plast. Co.,* 512 F.2d 1017.

[106] *Firesheets v. A.G. Bldg. Specialists, Inc.*, 134 F.3d 729, 732 (5th Cir. 1998).

Circuits. Likewise, Section 302 of LMRA requires employers who contribute to benefit plans to act in strict accordance with the terms of a written agreement. The written agreement here requires the employer to sign a letter of consent to manifest his assent to the Agreement. By holding that the employer's conduct alone can manifest his assent, despite the contractual requirement for a signature, the Seventh Circuit has created a Circuit split with the Sixth Circuit. For all of these reasons, the petition for a writ of certiorari should be granted.

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