No. 16-473

In The Supreme Court of the United States

DAVID B. FENKELL,

Petitioner,

v.

ALLIANCE HOLDINGS, INC., A.H.I., INC., AH TRANSITION CORP., and the ALLIANCE HOLDINGS, INC., EMPLOYEE STOCK OWNERSHIP PLAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

When a district court has ordered co-fiduciaries to make an ERISA plan whole, whether the district court can—under *CIGNA Corp.* v. *Amara*, 563 U.S. 421 (2011), and ERISA §§ 409(a), 502(a)(2), or 502(a)(3)—order a breaching fiduciary, whose "culpability vastly exceed[s]" that of his co-fiduciaries, to participate in the plan's recovery by indemnifying co-fiduciaries.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The petition accurately lists the parties to the proceedings.

Respondent Alliance Holdings, Inc. ("Alliance") states that it has no parent companies and that no publicly held company owns 10% or more of its stock. Respondent A.H.I., Inc. is a wholly-owned subsidiary of Alliance Holdings, Inc. Respondent Alliance Holdings, Inc., Employee Stock Ownership Plan ("ESOP") is a qualified retirement benefits plan under ERISA established for the benefit of employees employed by Alliance or its subsidiaries. Respondent AH Transition Corp. is wholly-owned by the ESOP. Alliance is owned by the ESOP and AH Transition Corp.

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STATEMENT

This Court applies trust-law principles when considering the duties of ERISA fiduciaries and the equitable remedies available to redress breaches of those duties. See *CIGNA Corp.* v. *Amara*, 563 U.S. 421 (2011). Here, the Seventh Circuit relied upon *Amara* in holding that a breaching fiduciary whose "culpability vastly exceed[s]" that of co-fiduciaries can be required to indemnify co-fiduciaries for relief they provide to an ERISA plan. But the petition fails to address or even cite *Amara*. The petition also fails to mention that after *Amara*, there is no disagreement in the courts of appeals on these governing principles—and thus no need for this Court's review.

After *Amara*, the "acute" or "mature" circuit split petitioner seeks to extrapolate (at 10-13) from *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), and cases applying it is more theoretical than real. Because *Russell* did not address equitable relief against an ERISA fiduciary, *Amara* did not discuss or even cite *Russell*. Furthermore, this Court limited *Russell*'s reach in *LaRue* v. *DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), noting that the extra-contractual damages sought in *Russell* did not relate to the financial integrity of the plan. In addition, *Russell* and its progeny—*Travelers Casualty & Surety Co. of America* v. *IADA Services Inc.*, 497 F.3d 862 (8th Cir. 2007), and *Kim* v. *Fujikawa*, 871 F.2d 1427 (9th Cir. 1989)—are easily distinguishable on their own terms, based on the nature of the remedy sought and who was seeking it. The claimed split is thus illusory—and the

absence of any conflicting court of appeals' decisions post-*Amara* makes review unnecessary for that reason, too.

In addition to neglecting *Amara*, the petition also ignores the textual authorization for the remedy at issue found in ERISA § 409(a), 29 U.S.C. § 1109(a). Section 409(a) provides that a breaching fiduciary of an ERISA plan "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary"—precisely the type of equitable relief also available under *Amara* through ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). And while the petition does cite ERISA § 405, 29 U.S.C. § 1105, which concerns liability for breach of a co-fiduciary, the petition does not address the trust principle—applicable under that section—that the liability of co-fiduciaries should depend on their relative fault. See RESTATEMENT (SECOND) OF TRUSTS § 258 cmt. d (AM. LAW INST. 1959); RESTATEMENT (THIRD) OF TRUSTS, § 102 cmt. b(2) (AM. LAW INST. 2012). As a result, even if the claimed split were resolved in petitioner's favor, it would not change the outcome of this case—and review should be denied for that reason, as well.

Petitioner's arguments for error correction fare no better. The contention that non-ERISA cases—including *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and *Northwest Airlines, Inc.* v. *Transport Workers Union of America*, 451 U.S. 77 (1981)—foreclose an indemnity or contribution remedy under ERISA ignores *Amara*'s incorporation of trust

law for fashioning ERISA relief and the express authorization of equitable relief by Section 409(a). And because there is no new "cause of action" in the instant case, the criteria for implying rights of action based on *Cort* v. *Ash*, 422 U.S. 66 (1975), have nothing to do with the ERISA-authorized equitable remedies fashioned by the district court.

The district court's indemnity remedy against petitioner is appropriate equitable relief under *Amara*, under ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2)—which enforces ERISA § 409(a), 29 U.S.C. § 1109(a)—and under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). The petition for a writ of certiorari should be denied.

1. An "employee stock ownership plan" (ESOP) is "a type of pension plan that invests primarily in the stock of the company that employs the plan participants." *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459, 2463 (2014). Respondent Alliance Holdings, Inc. (Alliance) is owned directly and indirectly by respondent Alliance ESOP. App. 72a-73a. Petitioner David Fenkell was Alliance's president, CEO, and sole director, and the Alliance ESOP's sole trustee. *Id.* at 4a, 11a, 73a.

In 2002, Alliance acquired Trachte Building Systems for $24 million and folded Trachte's ESOP into Alliance's ESOP. *Id.* at 2a. In 2007, a newly-formed Trachte ESOP paid $45 million for Trachte's stock and incurred $36 million in debt. *Id.* at 2a-3a. The district court found that "no independent buyer [would have] paid anywhere near that price." *Id.* at 2a. Because the

purchase price was inflated and the debt load unsustainable, Trachte's stock became worthless in 2008. *Id.* at 7a. This wiped out the equity of the Trachte ESOP employees and participants, whose ESOP assets (previously held in the Alliance ESOP) were used by petitioner to finance the spinoff.

2. In 2009, some of the Trachte ESOP employees and participants filed a class action lawsuit alleging breaches of fiduciary duty in violation of ERISA. *Chesemore* v. *Alliance Holdings, Inc.*, No. 09-cv-00413-wmc (W.D. Wisc. June 30, 2009), ECF No. 1. Petitioner, Alliance, and the trustees of the new Trachte ESOP were named as defendants, and the Alliance ESOP was named as a nominal defendant. App. 7a-8a, 71a-72a. The district court certified a class of current and former employees who participated in the old Trachte ESOP, the Alliance ESOP, and the new Trachte ESOP. *Id.* at 7a. The court also certified a subclass of participants who would have remained employees of Alliance (and participants in the Alliance ESOP) but for the 2007 transaction. *Id.* at 7a-8a.

After trial, the district court determined that petitioner was "far and away the most culpable" breaching fiduciary and knew exactly what he was doing when he "orchestrated" the Trachte spinoff to enrich himself. *Id.* at 9a-10a (quoting *id.* at 55a). Petitioner "devised and implemented a complicated leveraged buy-out to off-load [Trachte] onto Trachte's employees." *Id.* at 6a. And in doing so, petitioner violated ERISA in three distinct ways: (1) by forcing the Trachte trustees to overpay for the spun-off Trachte assets acquired by the

Trachte ESOP; (2) by arranging the transaction so that no independent person would look out for the interests of the Trachte employees' ESOP accounts; and (3) by enriching himself at the expense of ESOP participants through "phantom stock" payments when the Trachte transaction was completed. *Id.* at 154a-59a.

As a remedy for these violations, the district court ordered (1) petitioner and Alliance to restore $7,803,543 in plan assets for the Trachte participants whose plan assets had been held in the Alliance ESOP; (2) the Trachte trustees to restore $6,473,857 to the newly formed Trachte ESOP, and petitioner and Alliance to indemnify the Trachte trustees for any payments made; and (3) petitioner to restore to Trachte an additional $2,896,000 attributable to the phantom-stock proceeds petitioner paid himself from the transaction. *Id.* at 62a-63a. Although the district court found that Alliance only acted "through [petitioner's] authority" and that two additional Alliance executives were not ERISA fiduciaries, the court held Alliance jointly and severally liable for petitioner's wrongful acts. *Id.* at 62a-63a, 73a, 160a.

3. Before final judgment, the plaintiffs entered into three separate settlements with the Trachte trustees, Alliance, and petitioner concerning his phantom stock violation. The Trachte trustees settled the claims against them for $3,250,000, and assigned their indemnity claim and other claims against petitioner to the plaintiffs. ECF No. 899 at 18, 23. Because it was jointly and severally liable with petitioner, Alliance settled with plaintiffs for approximately $12,800,000

in cash and stock (including a payment of $5,325,000 toward plaintiffs' attorneys' fees). Plaintiffs, in turn, assigned their remaining rights against petitioner (except for attorneys' fees) to Alliance, including the indemnity and other claims of the Trachte trustees. ECF No. 874 at 1-11; see ECF No. 876 at 6-7; ECF No. 889 at 5.

Petitioner settled his phantom stock violation with plaintiffs, but he did not pay or contribute to Alliance's settlement that addressed the other consequences of his wrongdoing. ECF No. 854 at 1-6; see ECF No. 876 at 5; ECF No. 889 at 5. In its judgment order, the district court approved the settlements and further ordered petitioner to restore $2,044,014 to the Alliance ESOP for the subclass. App. 23a.

4. On appeal to the Seventh Circuit, petitioner did not challenge the district court's liability and culpability findings but instead "attempt[ed] to zero out the actual cost of his liability" as to remedies. App. 11a. In an opinion authored by Judge Sykes, the Seventh Circuit unanimously affirmed the district court's various orders in all respects, stating that the only "significant legal issue" raised by petitioner was his challenge to the district court's order that he indemnify the Trachte trustees for any amounts paid. *Ibid.*

Rejecting petitioner's challenge to the indemnity award, the court of appeals first observed that the district court had determined that petitioner's "culpability vastly exceeded [that of the Trachte trustees]":

> The judge found that Fenkell orchestrated [the Trachte trustees'] installation * * * and directed their actions. And they in turn did his bidding, both because they were inexperienced as fiduciaries and because he called the shots as controlling owner, sole director, president, and CEO of Alliance. In short, Fenkell had authority over the Trachte trustees and used that authority and his control of the Alliance ESOP assets to orchestrate the inflated leveraged buy-out. As the judge analogized, "Fenkell was the unquestioned conductor and the Trachte [t]rustees mere musicians."

Ibid. (quoting *id.* at 62a); see also *id.* at 2a-9a (detailing petitioner's domination over and control of the Trachte trustees).

Petitioner did not contest these factual determinations on appeal. *Id.* at 11a. As a result, the court of appeals confirmed that he was a functional ERISA fiduciary because he controlled both sides of the Trachte spin-off transaction and used his "position of authority over the Trachte trustees to control the assets spun off from the Alliance ESOP." *Id.* at 16a-17a.

The Seventh Circuit observed that "ERISA contemplates the allocation of fiduciary obligations among co-fiduciaries" but does not specifically mention contribution or indemnity. *Id.* at 12a (citing ERISA § 405(b)(1)(B), 29 U.S.C. § 1105(b)(1)(B)). Rather, ERISA § 502(a)(3) broadly permits a court to fashion "appropriate equitable relief" in response to a claim "'by a plan participant, beneficiary, or fiduciary.'" *Ibid.*

(citing 29 U.S.C. § 1132(a)(3)). The court of appeals heavily relied upon this Court's decision in *Amara*, which "explained that 'appropriate equitable relief' * * * means 'those categories of relief that, traditionally speaking (*i.e.*, prior to the merger of law and equity) were typically available in equity.' " *Ibid.* (quoting 563 U.S. at 439). The Seventh Circuit also found support in this Court's numerous ERISA decisions affirming the role of trust law when determining fiduciary responsibilities and fashioning remedies, as well as in this Court's decisions that indemnification and contribution are among the "traditional equitable remedies" available under trust law. *Id.* at 13a (citation omitted).

The Seventh Circuit recognized that, "on the subject of fiduciary liability, ERISA says only that a fiduciary 'shall be personally liable to make good to such plan' for a breach of his duties," and that this language "might imply that [a breaching fiduciary] cannot be liable to a cofiduciary" because "a cofiduciary is not a plan." *Id.* at 13a (quoting ERISA § 409(a), 29 U.S.C. § 1109(a)). The court did not, however, address ERISA § 409(a)'s further provision that in addition to making a plan whole for losses, a breaching fiduciary "shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary." ERISA § 409(a), 29 U.S.C. § 1109(a).

The Seventh Circuit also looked to its own decision in *Free* v. *Briody*, 732 F.2d 1331 (7th Cir. 1984), which held that indemnity for less culpable breaching fiduciaries is an available remedy because "Congress intended to codify the principles of trust law with

whatever alterations were needed to fit the needs of employee benefit plans." App. 14a (quoting *Free*, 732 F.2d at 1337-38).

For that reason, the court of appeals rejected petitioner's reliance on this Court's decision in *Russell*, which pre-dates *Amara* and did not consider the role of trust law in determining available ERISA remedies against breaching fiduciaries. *Russell* simply disallowed a claim under ERISA § 409 by a plan beneficiary for extra-contractual damages of emotional distress or pain and suffering where the relief sought would not inure to the benefit of the plan. 473 U.S. at 134. The court noted that two other courts of appeals, in decisions pre-dating *Amara*—*Travelers*, 497 F.3d at 864-66, and *Kim*, 871 F.2d at 1432-33—had interpreted *Russell* to say that ERISA does not permit indemnity and contribution. App. 15a.

The Seventh Circuit also affirmed the district court's order issued during the pendency of petitioner's appeal that held him in contempt of court for refusing to comply with the court's 2014 judgment order that he restore $2,044,014 to the Alliance ESOP as restitution for the subclass. *Id.* at 23a. In doing so, the court of appeals highlighted the "abundant evidence" before the district court that petitioner had substantial assets and that he "was actually taking affirmative steps to put his assets (at least technically) outside the reach of the [p]lan and other creditors." *Id.* at 23a-24a. The

court of appeals dismissed every argument raised by petitioner against the contempt finding as "frivolous." *Id.* at 4a, 24a-25a.

REASONS FOR DENYING THE PETITION

I. There Is No Conflict That This Court Needs To Resolve.

Petitioner asks this Court to resolve a "mature" circuit split on ERISA remedies without citing—much less addressing—this Court's superseding decision in *Amara*, the decision upon which the court of appeals principally relied to determine that a breaching fiduciary whose "culpability vastly exceed[s]" that of co-fiduciaries can be required in equity to indemnify his co-fiduciaries for relief provided to an ERISA plan.

Petitioner relies heavily (at 11-13) on *Russell*—and court of appeals decisions pre-dating *Amara* that apply *Russell*—to make the case for a "mature" circuit split. *Amara*, however, put any doubts on this score to rest. And when *Amara* is paired with the full text of ERISA § 409(a), the supposed conflict vanishes.

As the Seventh Circuit recognized, *Amara* and numerous other decisions of this Court apply trust law principles when considering the duties of ERISA fiduciaries and the remedies a court can provide to redress breaches of those duties. See *Montanile* v. *Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 658-59 (2016); *Tibble* v. *Edison Int'l*, 135 S. Ct.

1823, 1828 (2015); *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989); *Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 570 (1985); see also *U.S. Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1547 (2013) (looking to "the historic practice of equity courts" in holding that an employer is permitted under ERISA § 502(a)(3) to enforce an ERISA plan reimbursement provision).

None of these cases refer to *Russell* as having any bearing on identifying the remedies typically available at equity. And *Montanile*, *Tibble*, and *Amara* do not even cite it. This is no oversight—*Russell* simply did not address the remedies typically available at equity. Rather, *Russell* only addressed the distinct question of whether an individual plan participant can seek the legal remedies of extra-contractual pain and suffering damages—and rejected those damages because the legal relief sought would not inure to the benefit of the plan. *Russell*, 473 U.S. at 139-48; see *McCutchen*, 133 S. Ct. at 1548.

Here, unlike in *Russell*, the district court ordered petitioner—the most culpable breaching fiduciary—to *participate in the plan's recovery* by indemnifying the Trachte trustees he controlled and dominated. This is entirely consistent with trust law. ERISA "typically treats" a plan fiduciary "as a trustee," and a plan "as a trust." *Amara*, 563 U.S. at 439. Under trust law, courts of equity could allocate the liability for breaches of fiduciary duty according to the co-trustees' culpability:

> In enforcing the liabilities of co-trustees equity considers where the burden should ultimately fall, in view of the part which each trustee took in the transaction. If one trustee [i]s solely or principally active in the commission of the breach, and the other trustee was passive or only nominally a participant, ***the court * * * may grant the latter a right of indemnity against the former and throw the entire burden on the party most blameworthy***.

GEORGE GLEASON BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 862 (rev. 3d ed. Supp. 2016) (emphasis added); see RESTATEMENT (SECOND) OF TRUSTS § 258 cmt. d; RESTATEMENT (THIRD) OF TRUSTS § 102 cmt. b(2) ("If the fault between or among trustees is sufficiently disproportionate, * * * the trustee(s) significantly less at fault are entitled to a full indemnity."); App. 12a-13a (collecting decisions of this Court recognizing the role of trust law in determining the contours of ERISA remedies and fiduciary obligations).[1]

To be sure, *Amara*'s discussion of equitable remedies was in the context of "appropriate equitable relief" under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). But if

[1] As the Seventh Circuit recognized, indemnity is a well-known equitable component of trust law. App. 12a-13a (citing *Marine & River Phosphate Mining & Mfg. Co.* v. *Bradley*, 105 U.S. 175, 182 (1881) ("[T]he necessity of enforcing[] a trust, marshalling assets, and equalizing contributions[] constitutes a clear ground of equity jurisdiction.")); see also BOGERT, *supra* § 862. Petitioner makes no argument to the contrary.

petitioner's quarrel is with the Seventh Circuit's reliance on *Free*—which in turn relied on ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2)—the petition also fails to address the full scope of the remedies available under that section. ERISA § 502(a)(2) actions by their own terms remedy breaches of fiduciary duty through ERISA § 409(a), 29 U.S.C. § 1109(a). ERISA § 409(a) begins by addressing make-whole relief to a benefit plan for losses caused by a breaching fiduciary, but it further provides that a breaching fiduciary "shall be subject to *such other equitable or remedial relief as the court may deem appropriate*" (emphasis added)—precisely the type of equitable relief also available under *Amara* and through ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). It is telling that the petition fails to mention this controlling provision.[2]

The district court determined that petitioner should participate in the ESOP's recovery by providing indemnity to the trustees for any restoration they made to the ESOP. Whether viewed as concomitant to restoring the plan's losses, or as "such other equitable or remedial relief as the court may deem appropriate," the district court unquestionably was authorized by ERISA § 409(a) to order the equitable remedy of indemnity. In doing so, it did not authorize a freestanding "cause of action" for indemnity, as the petition contends. It required indemnity by petitioner as part

[2] The availability of such a broad equitable remedy in the statute directly undermines petitioner's claim (at 19-20) that there is no room for requiring indemnity or contribution as a matter of federal common law.

and parcel of its remedial order providing relief to the Trachte ESOP. See also ERISA § 405, 29 U.S.C. § 1105 (recognizing appropriateness of allocating relative liability as between fiduciaries).

Russell had no occasion to consider these issues. See *LaRue*, 552 U.S. at 253-54 (explaining that the misconduct alleged in *Russell*, and the extra-contractual damages sought, did not relate to the financial integrity of the plan); *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 252-63 (1993) (disallowing claim for money damages for actuarial malpractice by plan beneficiary against a non-fiduciary service provider because legal damages are not available under ERISA).

In the five years since the Court decided *Amara*, there has been no disagreement in the courts of appeals on these principles, or concerning ERISA § 409(a)'s authorization of "such other equitable relief or remedial as the court may deem appropriate." Accordingly, the petition's assertion—ignoring *Amara*—of an "acute" or "mature" circuit split based upon *Russell* provides no basis for this Court's review. The petition raises only hypothetical questions that are irrelevant as a practical matter given (1) the limitations the Court has since placed on *Russell*; and (2) the supervening decision in *Amara*.

Even before *Amara*, however, any supposed conflict was not sufficiently developed or clear. The Seventh Circuit's decision here was partially grounded in its prior decision in *Free*, a pre-*Russell* case based on principles that this Court would later embrace in

Amara. And in recognizing the potential availability of contribution, the Second Circuit's decision in *Chemung Canal Trust Co.* v. *Sovran Bank/Maryland* distinguished *Russell*'s rejection of a plan beneficiary's claims for extra-contractual damages from a contribution claim by an arguably less culpable former ERISA fiduciary under trust law principles. See 939 F.2d 12, 15-16 (2d Cir. 1991), cert. denied, 505 U.S. 1212 (1992).

The supposedly conflicting decisions in *Travelers* and *Kim* are distinguishable, too. Those cases purported to apply *Russell* to deny contribution claims by *wrongdoers*. Indeed, the culpability of the party seeking contribution in *Kim* vastly exceeded that of the party from whom contribution was sought. See 871 F.2d at 1428-29. This would amount to petitioner here—"far and away the most culpable" wrongdoer—initiating a standalone lawsuit for contribution against the less culpable Trachte trustees whom he controlled and dominated. Kim, like petitioner, was "solely or principally active in the commission of the breach," and trust law provided Kim's targets (like the Trachte trustees here) with "a right of indemnity [that would] throw the entire burden on the party most blameworthy," not the other way around. See BOGERT, *supra* § 862; RESTATEMENT (THIRD) OF TRUSTS § 102 cmt. b(2).

Trust-law principles at equity would likewise have denied the relief sought in *Travelers* for similar reasons. Thus, there was no clear conflict even before *Amara*—just fundamentally different factual circumstances that naturally led to different outcomes.

Regardless, there is no need for this Court to resolve an alleged conflict among lower courts that did not have the benefit of this Court's clarifying decision in *Amara*. Even accepting the shallow (2-2) split claimed by petitioner, *Amara* changed the calculus, making the claimed split stale at best. At the same time, the Seventh Circuit is the first court of appeals to consider the issue in the wake of *Amara*, making review at this time premature. Either way, there is no circuit split warranting this Court's attention and the petition should be denied.

II. The Seventh Circuit's Decision Is Correct.

As demonstrated above, the Seventh Circuit's decision in this case is entirely consistent with *Amara* and this Court's other cases instructing the lower courts to interpret ERISA according to the principles of trust law. In arguing to the contrary, petitioner incorrectly asserts that the district court created a new private "cause of action" because "*Russell* establishes that no right to contribution or indemnity is expressly authorized by ERISA." Pet. 16. But of course *Russell* says no such thing. See Part I *supra*. Petitioner also invokes *Cort* v. *Ash*, 422 U.S. at 78, to argue that "actions" for indemnity and contribution are improper under ERISA. See Pet. 17-19. That argument fares no better.

The equitable relief fashioned in this case is not a "usual 'right of action'"—it is a remedial "procedural device for equitably distributing responsibility for

plaintiff[s'] losses proportionally among those responsible for the losses, and without regard to which particular persons plaintiff chose to sue in the first instance." See *Chemung*, 939 F.2d at 15-16. By ordering plan losses to be restored and requiring petitioner to participate in that equitable relief through indemnity, the district court simply ordered the relief that ERISA §§ 409(a), 502(a)(2), and 502(a)(3) authorize—*i.e.*, such "equitable relief" that the court deemed "appropriate" in the circumstances. It is thus "misleading to so characterize a defendant's right of contribution [or indemnity as a 'right of action']," as petitioner attempts to do. See *Chemung*, 939 F.2d at 15.

In non-ERISA contexts, the Court has explained that a right to indemnity or contribution may be recognized "through the affirmative creation of a right of action by Congress" or "through the power of federal courts to fashion a federal common law of contribution." *Texas Industries*, 451 U.S. at 638 & n.10 (rejecting contribution in antitrust case); *Northwest Airlines*, 451 U.S. at 90-91 (rejecting contribution in Equal Pay Act and Title VII case). But contrary to petitioner's assumptions (at 14-16), these cases do not apply in the ERISA context. Neither antitrust law nor the Equal Pay Act nor Title VII, by their terms, address the district court's remedial powers under ERISA to provide equitable relief as it deems appropriate against a fiduciary like petitioner whose "culpability vastly exceed[s]" that of his co-fiduciaries.

And because indemnity was provided through the district court's remedial power to fashion the equitable

relief that it deemed appropriate, neither the four-factor *Cort* analysis for determining implied rights of action nor the availability of an "implied cause of action" is relevant here. Rather, the text of ERISA, this Court's guidance on interpreting ERISA, and the incorporation of trust law principles in ERISA all demonstrate that a *remedy* of indemnity or contribution is authorized under ERISA.[3]

Petitioner argues (at 19) that "[p]ermitting co-fiduciaries to avoid liability through indemnity or contribution would undermine [the ERISA] statutory scheme." But quite the opposite is true. Petitioner is far and away the most culpable party—his "culpability vastly exceed[s]" that of the Trachte co-fiduciaries. App. 10a-11a, 55a. Yet, as the Seventh Circuit observed, *he* is the party seeking to "zero out the actual cost of his liability." *Id.* at 11a. Contrary to petitioner's assertion, it is the result petitioner seeks that would imperil ERISA's statutory scheme. The indemnity

[3] Whether considered as the equitable remedy it is or the "cause of action" petitioner would have it be, the first three *Cort* factors strongly support the relief fashioned by the district court, and petitioner concedes (at 18) that the fourth factor is "mostly irrelevant." First, the district court fashioned appropriate equitable relief benefiting plaintiffs. It ordered a restoration of plaintiffs' Trachte plan assets and deterred additional violations of plaintiffs' ERISA rights by holding petitioner to account through indemnity for controlling and dominating the Trachte trustees to violate ERISA and serve his personal financial interests. Second, it is undeniable that the text of ERISA, the Court's decisions, and Congress's intent each direct that equitable trust-law principles be applied when fashioning relief. Third, as *Amara* teaches, Congress intended to codify the principles of trust law in ERISA.

remedy approved by the Seventh Circuit here is unquestionably appropriate under *Amara*, ERISA § 502(a)(2)—which enforces ERISA § 409(a)—and ERISA § 502(a)(3). If anything, then, it furthers ERISA's statutory purposes.

CONCLUSION

The petition for a writ of certiorari should be denied.

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