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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Cases—continued

Statutes

REPLY BRIEF FOR PETITIONER

With strategic placement of ellipsis marks, section 409(a) of ERISA subjects "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries * * * to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. § 1109(a). But in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985), this Court rejected the "'blue pencil' method of statutory interpretation" and held that, upon review of the entire statute, "Congress did not intend [section 409] to authorize any relief except for the plan itself." 473 U.S. at 144. Section 409(a)'s catchall provision can be invoked, then, only if two requirements are satisfied: (1) the remedy must be "for the plan itself;" and (2) the remedy must be "equitable or remedial."

It would seem clear that the Circuits are divided as to whether section 409(a) permits a fiduciary to seek indemnity; the Seventh Circuit said as much in the decision below (Pet. App. 16a), and numerous other courts have observed the same.[1] Respondents Alliance Holdings, Inc. et al. ("Alliance") nevertheless resist certiorari with the assertion that the split in the Circuits is "illusory." Br. in Opp. 1. As Alliance sees things, this Court's decision in *CIGNA Corp.* v. *Amara*, 563 U.S. 421 (2011), makes review unneces-

[1] See, *e.g.*, *McDannold* v. *Star Bank, N.A.*, 261 F.3d 478, 485 (6th Cir. 2001); *Computer & Eng'g Servs., Inc.* v. *Blue Cross & Blue Shield of Mich.*, 2015 WL 4207150, at *2 (E.D. Mich. July 10, 2015); *Guididas* v. *Cmty. Nat. Bank Corp.*, 2012 WL 5974984, at *5 (M.D. Fla. Nov. 5, 2012); *Urological Surgery Prof'l Ass'n* v. *William Mann Co.*, 764 F. Supp. 2d 311, 327 (D.N.H. 2011).

sary because *Amara* clarifies what constitutes "equitable" relief under ERISA. Br. in Opp. 1–3, 8–16.

We do not disagree with Alliance's assertion that indemnity is a trust-law remedy. But that is not the basis on which the lower courts are divided. None of the courts to have entertained requests for indemnification have doubted that trust law permits actions for indemnity. The Second, Seventh, Eighth, and Ninth Circuits are in conflict concerning a different issue—whether fiduciary indemnification is "for the plan itself" within the meaning of section 409(a) and *Russell*.

On that question, *Amara* says nothing relevant. There is, thus, a mature split on a question of recurring importance respecting a statute that Congress has singled out as particularly requiring uniformity. Plenary review is warranted.

A. The Circuits Are Divided.

In the petition, we identified a conflict between the Second and Seventh Circuits, which have authorized a fiduciary found to be in breach of ERISA to seek indemnity from cofiduciaries (albeit under different legal theories); and the Eighth and Ninth Circuits, which have held that ERISA does not permit fiduciary indemnity.

1. In opposition, Alliance contends that "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*." Br. in Opp. 16. Alliance's view is that *Amara* resolved the circuit split through the "incorporation of trust law for fashioning ERISA relief." *Id.* at 2–3.

But even Alliance concedes that *Amara* is only part of the picture. Alliance's argument is that "when *Amara* is paired with the full text of ERISA § 409(a), the supposed conflict vanishes." Br. in Opp. 10.

The problem with Alliance's argument is that neither the Eighth Circuit nor the Ninth Circuit has ever doubted that indemnity is an equitable remedy. To the contrary, those courts break with the Seventh Circuit on the meaning of the "full text of ERISA § 409(a)." *Amara* thus has no bearing whatsoever on the circuit split.

In particular, in *Travelers Casualty & Surety Co. of America* v. *IADA Services Inc.*, 497 F.3d 862 (8th Cir. 2007), the Eighth Circuit accepted that contribution was an "equitable remedy." *Id.* at 866. The court nevertheless held that "an equitable remedy of contribution" was unavailable under section 409(a) because "[t]he statute declares that the fiduciary shall be liable 'to make good to *such plan*' and 'to restore to *such plan*'" and the beneficiary of an equitable apportionment is not the plan. *Ibid.* The Ninth Circuit likewise acknowledged, in *Kim* v. *Fujikawa*, 871 F.2d 1427 (9th Cir. 1989), that the claimant was seeking the "equitable remedy of contribution." *Id.* at 1432. As in *Travelers*, the Ninth Circuit denied the remedy not because it doubted its equitable nature; it held that contribution was unavailable because, under *Russell*, the claimant could seek only a "remed[y] for the benefit of the *plan*," which contribution is not. *Ibid.*

Thus, even if *Amara* constituted a change in the law as to what constitutes "equitable relief," it could not have resolved the circuit split.[2]

Indeed, not even the Seventh Circuit found *Amara* to be probative on the question that has divided the lower courts. Although the court cited *Amara* when identifying the background principles governing what constitutes equitable relief, the Court did not mention *Amara* when considering whether *Russell* undermined the court's earlier interpretation of section 409(a). See Pet. App. 15a. Had *Amara* been so revelatory on that point—the premise of Alliance's opposition—the Seventh Circuit would surely have noticed.

In sum, Alliance's emphasis on *Amara* is a red herring, as that case does not speak to the division of authority identified by the Seventh Circuit and in our petition.

2. Alliance also contends that, notwithstanding *Amara*, the decisions in *Travelers* and *Kim* are "distinguishable." Br. in Opp. 15. Alliance's theory is that, in *Travelers* and in *Kim*, the parties seeking indemnity or contribution were *more* culpable than the would-be contributors, whereas, in the case at bar,

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[2] In any event, *Amara* did not alter the method for determining what constitutes "equitable relief " under ERISA, as this Court had already addressed what constitutes "equitable relief" in three prior decisions: *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248 (1993); *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002); and *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). Under those precedents, which *Amara* applied, "equitable relief" includes remedies "*typically* available in equity," but does not encompass the broader category of "'relief a common-law court of equity could provide'" in an action for breach of trust. *Mertens*, 508 U.S. at 256–57.

the party seeking indemnity was *less* culpable than the indemnitors.

That supposed factual distinction makes no difference because the Eighth and Ninth Circuits did not refuse relief on the basis of the parties' relative fault. Rather, those courts decided their respective cases on the *legal* ground that indemnity and contribution are *never* permitted under ERISA. In revisiting the issue in a subsequent case, the Ninth Circuit characterized the *Kim* holding as "unambiguous and undistinguishable" in forbidding fiduciary contribution in *every* ERISA case. *Call* v. *Sumitomo Bank of Cal.*, 881 F.2d 626, 631 (9th Cir. 1989). The legal precedents in the Eighth and Ninth Circuits foreclose indemnity irrespective of the facts. This Court need not take a position on the contours of the right to indemnity or contribution in order to decide whether ERISA permits a remedy. Cf. *Nw. Airlines, Inc.* v. *Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77, 88 (1981) ("assum[ing] that all of the elements of a typical contribution claim are established" but holding that no such remedy exists under the Equal Pay Act or Title VII).

B. The Seventh Circuit Is Wrong.

Alliance also maintains that, circuit split or not, the indemnity decree in this case was authorized by ERISA.

On this score, Alliance challenges both our articulation of the framework for assessing the availability of indemnity in claims arising under a federal statute and the application of that framework to ERISA. But Alliance's objections lack merit.

1. In *Northwest Airlines* and *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981),

this Court considered whether defendants have a right to seek indemnity as to claims brought under the Equal Pay Act, Title VII, and the Sherman and Clayton Acts. In each circumstance, the Court considered whether a right to indemnity was created by Congress, either expressly or impliedly; and whether a right to indemnity could be recognized as a matter of federal common law. Although the application of the framework was statute-dependent, the structure of the Court's analysis was not—which is entirely reasonable, given that the framework amounts to looking for a right to indemnity wherever one might be found.

Alliance responds with the straw-man argument that *Northwest Airlines* and *Texas Industries* "do not apply in the ERISA context" because "[n]either 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." Br. in Opp. 17.

We do not, of course, contend that the Sherman Act dictates whether ERISA fiduciaries may seek indemnity from cofiduciaries. Rather, *Northwest Airlines* and *Texas Industries* are meaningful because they supply the mode of analysis for evaluating whether indemnity is available under a particular federal statute. That analytical framework is unassailable.

2. Despite its evident reservations with *Northwest Airlines* and *Texas Industries*, Alliance contends that indemnity is available because Congress both expressly and impliedly authorized such a remedy.

a. The district court premised its indemnity decree on section 409(a) of ERISA, which is enforced by

section 502(a)(2). Pet. App. 61a. This Court's decision in *Russell* explains why those provisions do not expressly authorize fiduciaries to seek indemnity from cofiduciaries. In *Russell*, the Court held that the catchall provision in section 409(a) can be invoked only to provide equitable remedies "for the plan itself." 473 U.S. at 144.

Alliance evidently believes that *Russell* has been undermined by *Amara*, but, as Alliance concedes, "*Amara* did not discuss or even cite *Russell*." Br. in Opp. 1. As we have explained, the *Amara* Court did not undermine *Russell*'s requirement that relief under section 409(a) be "for the plan itself."

The only question, then, is whether indemnity is "for the plan itself." On that question, Alliance attempts a rebranding effort, characterizing indemnity as a requirement that a fiduciary "participate in the plan's recovery." Br. in Opp. 11 (emphasis omitted). But an indemnifying fiduciary does not actually "participate in the plan's recovery." An indemnitor must reimburse an indemnitee but is not obligated to the original plaintiff. See, *e.g.*, *Wicker* v. *Hoppock*, 73 U.S. 94, 99 (1867) (recognizing the "well-settled distinction between an agreement to indemnify and an agreement to pay"). This case demonstrates as much. The district court held that Fenkell had no *direct* liability to the new Trachte ESOP. Pet. App. 164a–165a. The new Trachte ESOP obtained a judgment against its trustees, and recovered that judgment in a settlement agreement with the trustees and their insurer. Neither Fenkell nor Alliance (which was also ordered to indemnify the trustees) "participate[d] in the plan's recovery." Rather, Alliance, the successor-in-interest to the indemnity right, is separately pursuing reimbursement. An after-the-fact realloca-

tion of the judgment is not, in any sense, "for the plan itself." See *Meoli* v. *Am. Med. Servs. of San Diego*, 35 F. Supp. 2d 761, 764 (S.D. Cal. 1999) ("Equitable indemnity is, thus, in any case primarily, if not entirely, for the benefit of the party who seeks it.").

Alliance also suggests that indemnity is available under section 502(a)(3) of ERISA, which authorizes a fiduciary "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." Br. in Opp. 13. But a claim under section 502(a)(3) fails for much the same reasons as a claim under sections 502(a)(2) and 409. Irrespective of whether indemnity constitutes "equitable relief," a reallocation of damages among fiduciaries does not "redress" any violation of ERISA or "enforce" ERISA's terms given that fiduciaries owe their duties to plan participants.

b. Nor did Congress impliedly authorize a right to indemnity among ERISA fiduciaries. In *Northwest Airlines*, this Court consulted the factors outlined in *Cort* v. *Ash,* 422 U.S. 66 (1975), to determine whether Congress intended to imply a right to indemnity in the context of the Equal Pay Act and Title VII. Alliance doubts the applicability of *Cort* here, arguing that indemnity is a "remedy" rather than a "cause of action." Given this Court's reliance on *Cort* in *Northwest Airlines* (see 451 U.S. at 90–91), we fail to appreciate the significance of that semantic difference.

Applying *Cort*, we explained in the petition that no right to indemnity can be implied because (1) ERISA was not enacted for the benefit of fiduciaries;

(2) Congress was not inviting the courts to imply new remedies, given that Congress expressly enumerated the remedies for fiduciary breach and articulated the rights and responsibilities of cofiduciaries without providing for indemnity; and (3) permitting indemnity would undermine Congress's expressed interest to broaden cofiduciary liability (see 29 U.S.C. § 1105).

Alliance contends, in response, that the first *Cort* factor is satisfied because "the district court fashioned appropriate equitable relief benefiting *plaintiffs*." Br. in Opp. 18 n.3 (emphasis added). In so arguing, Alliance makes the exact same mistake as the one corrected in *Northwest Airlines*, where this Court found that the court of appeals had erroneously focused on the *plaintiffs* and had "failed to focus on whether the party seeking to invoke the implied remedy is a member of a class that Congress intended to benefit." 451 U.S. at 92 n.25.

Alliance contends that the second and third factors are satisfied because Congress wanted to permit equitable remedies, as understood by the law of trusts. Br. in Opp. 18 n.3. In so arguing, however, Alliance's position on implied remedies devolves into the same argument they made about express remedies. Their express and implied remedy arguments therefore rise or fall together. For the reasons we have already expressed, both theories fail.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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