Supreme Court, U.S.
FILED

No. 10-10-732

NOV 30 2010
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SHIRLEY EDWARDS,

Petitioner,

v.

A.H. CORNELL AND SON, INC., D/B/A AH CORNELLS; MELISSA CLOSTERMAN; SCOTT A. CORNELL,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Ari Karpf
KARPF, KARPF & VIRANT
3070 Bristol Pike
Building 2, Suite 231
Bensalem, PA 19021

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@howerussell.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTION PRESENTED

Does the anti-retaliation provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1140, permit an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute?

Blank Page

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

I. The Decision Below Adds To A Firmly Entrenched Conflict Among The Courts Of Appeals. 8

II. This Case Presents An Important And Recurring Issue Under ERISA. 14

III. ERISA's Anti-Retaliation Provision Protects Unsolicited Internal Reports Of Possible ERISA Violations. 17

A. Nothing In The Text Of Section 510 Precludes Protection For Unsolicited Internal Complaints. 18

1. An "Inquiry" Encompasses An Internal Complaint. 18

2. An "Inquiry" Includes An Employee-Initiated Communication 19

B. The Third Circuit's Rule Contravenes The Purpose Of ERISA's Anti-Retaliation Provision. 23

CONCLUSION 26

APPENDIX 1a
Court of Appeals Decision 1a
District Court Decision 31a
Denial of Rehearing Order 42a

TABLE OF AUTHORITIES

Cases

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004) 17

Anderson v. Elec. Data Sys., Corp.,
11 F.3d. 1311 (5th Cir. 1994) 8, 9, 14

Beneficial Nat'l Bank v. Anderson,
539 U.S. 1 (2003) 8

Burlington N. & Santa Fe Ry. Co. v. White,
548 U.S. 53 (2006) 7, 17

CBOCS W., Inc. v. Humphries,
553 U.S. 442 (2008) 7

Citizens' Bank v. Parker,
192 U.S. 73 (1904) 20

City of Edmonds v. Oxford House, Inc.,
514 U.S. 725 (1995) 20

Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.,
129 S. Ct. 846 (2009) 7, 22

Dunn v. Elco Enter.,
No. 05-71801, 2006 WL 1195867
(E.D. Mich. May 4, 2006) 10, 15

Electro-Mech. Corp. v. Ogan,
9 F.3d 445 (6th Cir. 1993) 19

Ello v. Singh,
531 F. Supp. 2d 552 (S.D.N.Y. 2007) 15

FMC Corp. v. Holliday,
498 U.S. 52 (1990) 16

Garcia v. United States,
469 U.S. 70 (1984) 19

Hashimoto v. Bank of Hawaii,
999 F.2d 408 (9th Cir. 1993) 8, 9, 14

Ingersoll-Rand Co. v. McClendon,
498 U.S. 133 (1990) 2, 16

Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, Santa Fe Ry. Co.,
520 U.S. 510 (1997) 16

Jackson v. Birmingham Bd. Of Educ.,
544 U.S. 167 (2005) 7

Jorgensen v. Prudential Ins. Co. of Am.,
852 F. Supp. 255 (D.N.J. 1994) 15

King v. Marriott Int'l, 337 F.3d 421
(4th Cir. 2003) ..... passim

Klein v. Banknorth Group, Inc.,
977 F. Supp. 302 (D. Vt. 1997) 15

McClendon v. Hewlett-Packard, Co.,
No. CV-05-087-S-BLW, 2005 WL 1421395
(D. Idaho June 9, 2005) 8

McLean v. Carlson Cos., Inc.,
777 F. Supp. 1480 (D. Minn. 1991) 15

McSharry v. Unumprovident Corp.,
237 F. Supp. 2d 875 (E.D. Tenn. 2002) 10, 15

Momchilov v. McIlvaine Trucking Int'l, Inc.,
No. 5:09CV1322, 2010 WL 1254216 (Mar. 24,
2010 N.D. Ohio) 14

Nicolaou v. Horizon Media, Inc.,
402 F.3d 325 (2d Cir. 2005) (per curiam) ..... passim

NLRB v. Scrivener,
405 U.S. 117 (1972) 17, 21

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 8

Rogers v. Tyson Foods, Inc.,
308 F.3d 785 (7th Cir. 2002) 8

Shaw v. Delta Air Lines, Inc.,
463 U.S. 85 (1983) 2

Simons v. Midwest Tel. Sales & Serv. Inc.,
462 F. Supp. 2d 1004 (D. Minn. 2006) 15

United States v. Mead Corp.,
533 U.S. 218 (2001) 23

Varity Corp. v. Howe,
516 U.S. 489 (1996) 19

Statutes

18 U.S.C. § 1514A(a) 10

18 U.S.C. § 1514A(b) 10

28 U.S.C. § 1254(1) 1

29 U.S.C. § 158 21

29 U.S.C. § 215(a)(3) 10

29 U.S.C. § 660(c) 10

Employee Retirement Income Security Act,
29 U.S.C. §§ 1001 *et seq.* ..... passim

29 U.S.C. § 1001(a) 15

29 U.S.C. § 1104(a)(1) 13, 20

29 U.S.C. § 1105(a)(3) 13, 20

29 U.S.C. § 1109 16

29 U.S.C. § 1109(a) 13, 20

29 U.S.C. § 1132 ..... 2, 23

29 U.S.C. § 1132(a) 10

29 U.S.C. § 1132(a)(1) 2

29 U.S.C. § 1132(a)(2) 2

29 U.S.C. § 1132(a)(3) 2

29 U.S.C. § 1132(a)(4) 2
29 U.S.C. § 1132(a)(9) 2
29 U.S.C. § 1132(e)(2) 17
29 U.S.C. § 1134 2
29 U.S.C. § 1135 ..... 10, 23
29 U.S.C. § 1136 ..... 10, 23
29 U.S.C. § 1140 ..... passim
29 U.S.C. § 1855(a) 10
29 U.S.C. § 1855(b) 10
33 U.S.C. § 1367(a) 10
33 U.S.C. § 1367(b) 10
49 U.S.C. § 31105 10

Other Authorities

Department of Labor, Description of Employee Benefits Security Administration, *available at* http://www.dol.gov/ebsa/OEManual/main.html 15

Department of Labor, Employee Benefits Security Administration, Private Pension Plan Bulletin, June 2010, *available at* http://www.dol.gov/ebsa/PDF/2007pensionplanbulletin.PDF 15

H.R. Rep. No. 93-533 (1974) 24

MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2001) 19

Report of the Congressional Budget Office (Mar. 18, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf 15

Understanding the Financial Condition of the Pension Insurance Program, *available at* http://www.pbgc.gov/media/key-resources-for-the-press/content/page15247.html 25

Blank Page

PETITION FOR A WRIT OF CERTIORARI

Petitioner Shirley Edwards respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 610 F.3d 217. The district court's opinion (Pet. App. 31a-41a) is unpublished.

JURISDICTION

The court of appeals entered judgment on June 24, 2010. Pet. App. 1a. The court denied a timely petition for rehearing and rehearing en banc on July 26, 2010. Pet. App. 42a-43a. Justice Alito extended the time for filing the petition until November 30, 2010. No. 10A370. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 510 of the Employee Retirement Income Security Act, 29 U.S.C. § 1140, provides in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act.

STATEMENT OF THE CASE

Petitioner Shirley Edwards was terminated by her employer for complaining that certain company practices violated the Employee Retirement Income Security Act (ERISA). The Third Circuit upheld the dismissal of her claim under ERISA's anti-retaliation provision, holding – in acknowledged conflict with the decisions of other circuits – that the statute does not protect unsolicited internal complaints.

1. **Statutory Framework.** ERISA is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). The statute "imposes participation, funding, and vesting requirements" on pension plans, and sets uniform standards for "reporting, disclosure, and fiduciary responsibility" for pension and other employee benefit plans. *Id.* at 91.

In passing ERISA, Congress included a detailed enforcement scheme "to preclude abuse and 'to completely secure the rights and expectations'" established by the statute. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (citation omitted). Among other things, the statute authorizes the Department of Labor to conduct investigations into possible ERISA violations and bring enforcement actions. 29 U.S.C. §§ 1132, 1134. It also allows civil actions by plan participants, beneficiaries, and fiduciaries to remedy and deter violations. 29 U.S.C. § 1132(a)(1)-(4), (a)(9).

Congress regarded ERISA's anti-retaliation provision, Section 510 of the Act, as a "crucial part" of the statute's enforcement regime. *Ingersoll-Rand*

Co., 498 U.S. at 143. The provision makes it "unlawful for any person to discharge, fine, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to" ERISA. 29 U.S.C. § 1140.

2. **Factual Background.** In March 2006, respondent A.H. Cornell and Son, Inc. hired petitioner Shirley Edwards to serve as its Director of Human Resources. Pet. App. 3a. A few years later, Edwards came to believe that the company was violating ERISA by, among other things, administering its group health plan on a discriminatory basis, not offering health benefits to some employees and misrepresenting the cost of health insurance to others to dissuade them from opting into the plan. *Id.*

Petitioner complained of the ERISA violations to the company's owners and managers. In response, respondents terminated her. Pet. App. 3a.

3. **Procedural History.** Edwards brought suit in the Eastern District of Pennsylvania, alleging that respondents violated Section 510 of ERISA by terminating her in retaliation for her "inquir[ies,] objections, opposition, and/or complaints about ERISA violations" at the company. First Amended Complaint ¶ 39. Respondents moved to dismiss, asserting that Section 510 does not apply when an employee complains to a company's owners or management rather than to an external entity. Pet. App. 33a.

a. Relying on the Second Circuit's analysis in *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (per curiam), the district court held that

Section 510 does not protect employees who raise allegations of ERISA violations within their company unless the employer solicits the information. Pet. App 40a-41a. Because Edwards had brought her complaints to respondents on her own initiative, the district court dismissed the complaint for failure to state a claim. Pet. App. 41a.

b. Edwards appealed to the Third Circuit. At the outset, the panel recognized that the courts of appeals are divided on the question "whether the anti-retaliation provision of Section 510 of ERISA, 29 U.S.C. § 1140, protects an employee's unsolicited internal complaints to management." Pet. App. 2a. "Four federal Courts of Appeals have ruled on this issue," the court observed. *Id.* "[T]he Fifth and Ninth Circuits have held in the affirmative, and the Second and Fourth Circuits have held in the negative." *Id.* In a divided decision, the panel "agree[d] with the latter, and [held] that unsolicited internal complaints are not protected." *Id.*

The majority began its analysis by recognizing that "Edwards has undoubtedly 'given information' by objecting and/or complaining to management." Pet. App. 12a. The critical question was "whether or not Edwards did so in any 'inquiry or proceeding'" relating to ERISA. *Id.* The majority held that she did not.

The court construed the term "inquiry" narrowly to include only a an externally-initiated "request for information." Pet. App. 12a. Thus, the court held, the information Edwards provided her supervisors was not part of an inquiry because she volunteered the information rather than providing it in response to a question. *Id.* The court also rejected Edwards'

assertion that her communications were themselves protected inquiries. "[A] plain reading of the provision indicates that 'inquiry' includes only inquiries made of an employee, not inquiries made by an employee." Pet. App. 13a.

The court further held that, in any event, ERISA protects only statements made in the course of a formal proceeding, like a lawsuit or agency investigation. The word "proceeding," the court observed, implies a "formal action" before a "tribunal or agency." Pet. App. 13a. And although the word "inquiry" might seem broader, the Third Circuit agreed with the Fourth that "the phrase 'testified or is about to testify' implies that the phrase 'inquiry or proceeding' is limited to more formal actions." *Id.*

The majority recognized that the Fifth and Ninth Circuits had reached the opposite conclusion. Pet. App. 7a. But in its view, the reasoning of those decisions was "not compelling." Pet. App. 14a. The Third Circuit also acknowledged that its holding conflicted with the interpretation of the Department of Labor, which construes Section 510 to protect unsolicited internal complaints. Pet. App. 12a. But the panel declined to defer to that interpretation because it found the meaning of the statutory language clear. Pet. App. 14a-15a.

For the same reason, the court refused to examine whether its holding was consistent with the statute's protective purposes. Pet. App. 14a. The majority did not dispute that under its interpretation, the statute "would permit an employer to terminate an employee upon the employee first notifying the employer of an ERISA violation." Pet. App. 14a-15a (citation omitted). But

if Congress had intended to prevent that result, the court asserted, it would have used different language. Pet. App. 15a.

c. Judge Cowen dissented. He rejected the majority's conclusion that the statutory language unambiguously precluded protection for employee-initiated internal complaints, particularly in light of the court's obligation to read the statute in light of its purposes and to avoid absurd results. Pet. App. 19a-20a. The word "inquiry," he explained, is a broad term and could be read to encompass employee complaints as the "crucial 'first step'" of many investigations. Pet. App. 22a-23a. It was "highly doubtful," he observed, "that Congress could have ever intended" to "leave[] totally unprotected" the very conduct "this remedial statutory provision was enacted to protect in the first place." Pet. App. 20a. To hold otherwise, he pointed out, required concluding that Congress "essentially permitted (and perhaps, in essence, encouraged) [an employer] to fire an employee immediately after she makes an informal complaint." Pet. App. 23a. He found this result particularly untenable as applied to certain employees who, "given their responsibility to conduct potentially sensitive and damaging investigations into possible ERISA violations and related matters, would need protection from retaliation even more than employees who merely answer[] some questions." Pet. App. 24a.

Judge Cowen further observed that the majority's rule is ultimately "unworkable." Pet. App. 23a. "[W]here does one draw the line," he asked, between an unprotected initial complaint and a protected statement "purportedly made as part of

some sort of inquiry?" *Id.* Suppose, for example, "an employee like Edwards complains to her superior, the superior asks some follow-up questions, and the employee responds to these questions." *Id.* Congress could not have intended, Judge Cowen argued, to protect those responses but not the initial complaint. *Id.*

d. Edwards filed a timely petition for rehearing en banc, which the Third Circuit denied. Pet. App. 42a-43a.

REASONS FOR GRANTING THE WRIT

As the Third Circuit acknowledged, the courts of appeals are deeply divided over whether and how ERISA's anti-retaliation provision applies in a frequently recurring circumstance: unsolicited complaints to company management. Two circuits (as well as the agency charged with ERISA's administration), construe Section 510 to cover all such complaints. Three others read the provision more narrowly, although even these circuits disagree with one another about when, if ever, statements to company management fall within the scope of the provision.

An anti-retaliation provision cannot perform its critical function in the midst of such uncertainty. Indeed, this Court has repeatedly granted certiorari to resolve similar circuit conflicts regarding the existence or scope of federal anti-retaliation protections. *See, e.g., Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 850 (2009); *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 445 (2008); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 56-57 (2006); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 172-73

(2005); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). It should follow the same course in this case.

I. The Decision Below Adds To A Firmly Entrenched Conflict Among The Courts Of Appeals.

The circuits are intractably divided over whether Section 510 encompasses unsolicited internal complaints regarding potential ERISA violations. The question arises and has important consequences in two contexts: suits brought directly under Section 510 and suits in which defendants attempt to remove state wrongful discharge claims to federal court on the ground that ERISA completely pre-empts the state law claim by providing an alternative federal cause of action.[1] Five courts of appeals have

---

[1] Although defendants may assert pre-emption defenses in state court, they may not remove the case to federal court unless ERISA "completely pre-empts" state law by "provid[ing] the exclusive cause of action for the claim asserted." *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *see also King v. Marriott Int'l*, 337 F.3d 421, 425 (4th Cir. 2003); *Rogers v. Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) (collecting authorities). Thus, to decide whether state wrongful discharge claims were completely pre-empted so as to support removal to federal court, the Fourth, Fifth, and Ninth Circuits have been required to determine whether allegations in a state complaint established a claim under Section 510. *See, e.g., King*, 337 F.3d at 425; *Anderson v. Elec. Data Sys., Corp.*, 11 F.3d. 1311, 1315 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 412 (9th Cir. 1993). Because determining the scope of Section 510 was necessary to these decisions, these cases control suits within these circuits brought directly under Section 510 as well. *See, e.g., McClendon v. Hewlett-Packard, Co.*, No. CV-05-087-S-BLW, 2005 WL 1421395, at *5 (D. Idaho June 9, 2005) ("The

considered this issue in one of these two contexts: two circuits, as well as the Department of Labor, construe Section 510 to protect unsolicited internal complaints, while three other circuits do not.

1. The Ninth Circuit was the first to construe Section 510 to protect unsolicited internal complaints. *Hashimoto v. Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993). Like petitioner in this case, the plaintiff in *Hashimoto* was terminated after she brought potential ERISA violations to the attention of her supervisors and objected when directed to engage in conduct that would violate ERISA. *Id.* at 409-10. The Ninth Circuit held that the plaintiff's complaints constituted "giv[ing] information" within the protection of Section 510. *Id.* at 411. The court reasoned that "[t]he normal first step in giving information" about an ERISA violation "would be to present the problem first to the responsible managers of the ERISA plan." *Id.* If an employee is "then discharged for raising the problem, the process of giving information or testifying is interrupted at its start: the anticipatory discharge discourages the whistle blower before the whistle is blown." *Id.*

The Fifth Circuit reached the same conclusion in *Anderson v. Electronic Data Systems, Corp.*, 11 F.3d. 1311 (5th Cir. 1994). The plaintiff in that case – an employee responsible for administering pension plan

---

Ninth Circuit could not have concluded that ERISA [complete] preemption applied without the determination that the former employee was qualified to assert ERISA participation protection. Thus, the pertinent *Hashimoto* language is not dictum, but controlling precedent.").

investments – was discharged after he objected to participating in ERISA violations and reported his concerns to company management. *Id.* at 1312-13. On appeal, the Fifth Circuit noted ERISA's broad prohibition on retaliation and held that the plaintiff's claim fell "squarely within the ambit of ERISA [Section] 510." *Id.* at 1314 (citations omitted).

A number of district courts in other circuits have adopted the same interpretation.[2]

So has the Department of Labor, the agency responsible for administering and enforcing Title I of ERISA.[3] *See* DOL C.A. Br. 5-6; DOL Br., *Nicolaou v. Horizon Media, Inc.*, *available at* 2004 WL 3525515. As the Department explained in its brief to the Third Circuit in this case, "[b]roadly but naturally construed, 'any inquiry or proceeding' encompasses plan participants' complaints to management or plan officials about wrongdoing, and the process by which that information is considered, however informal."

---

[2] *See, e.g., Dunn v. Elco Enter.*, No. 05-71801, 2006 WL 1195867, at *5 (E.D. Mich. May 4, 2006); *McSharry v. Unumprovident Corp.*, 237 F. Supp. 2d 875, 880-81 (E.D. Tenn. 2002).

[3] *See* 29 U.S.C. §§ 1132(a), 1135-36. In that role, the Secretary of Labor "may prescribe such regulations as he finds necessary or appropriate to carry out" Title I of ERISA. *Id.* § 1135. The Department also administers or enforces numerous other statutes containing anti-retaliation provisions. *See, e.g.*, 18 U.S.C. § 1514A(a)-(b) (Sarbanes-Oxley Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); *id.* § 660(c) (Occupational Safety and Health Act); *id.* § 1855(a)-(b) (Migrant and Seasonal Agricultural Worker Protection Act); 33 U.S.C. § 1367(a)-(b) (Clean Water Act); 49 U.S.C. § 31105 (Surface Transportation Assistance Act).

DOL C.A. Br. 16 (citations omitted). Otherwise, "employers could readily manipulate the applicability of section 510 by postponing proceedings or disregarding complaints, and even if formal proceedings were finally instituted, the whistleblower who serves as the catalyst for the proceedings would be wholly unprotected." DOL C.A. Br. 10.

2. "Faced with the same issue, the Fourth Circuit has . . . drawn the opposite conclusion," holding that Section 510 does not protect unsolicited internal complaints. Pet. App. 8a-9a (citing *King v. Marriot Int'l, Inc.*, 337 F.3d 421, 427-28 (4th Cir. 2003)). The plaintiff in *King* was a human resources manager who was discharged after she complained about, and refused to participate in, a plan to "transfer millions of dollars from [her employer's] medical plan into its general corporate reserve account." 337 F.3d at 423. King raised her objections to her supervisor and also requested an opinion letter from one of the company's in-house attorneys. *Id.*

The Fourth Circuit held that Section 510 provided King no protection because it covers only statements made in the course of a "legal or [an] administrative," process, "or at least something more formal than written or oral complaints made to a supervisor." *Id.* at 427. The court did not dispute that the word "inquiry" can be read more broadly, but concluded that the statute's additional "use of the phrase 'testified or is about to testify' . . . suggest[s] that the phrase 'inquir[ies] or proceeding[s]'" is limited to formal proceedings. *Id.* The court likewise recognized that the phrase "given information" was broader than "testified" but construed it as referring to "non-testimonial

information," such as "incriminating documents," turned over during a formal inquiry or proceeding. *Id.* The Fourth Circuit acknowledged that it was creating a split with the Fifth and Ninth Circuits, but it regarded those courts' decisions as "unpersuasive." *Id.* at 428.

In *Nicolaou v. Horizon Media*, 402 F.3d 325 (2d Cir. 2005) (per curiam), the Second Circuit likewise held that an employee-initiated internal complaint falls outside the protection of Section 510, but adopted a different rationale. Nicolaou was an employee-fiduciary who discovered that her employer was underfunding its ERISA-covered pension plan. *Id.* at 326. Within days after she reported this violation during a face-to-face meeting with the company's outside counsel and its president, she became the subject of "a campaign of retaliation" that culminated in her discharge. *Id.* at 329.

The Second Circuit agreed with the Fourth Circuit that an unsolicited internal complaint is not part of a "proceeding" because that term "refers to the progression of a lawsuit or other business before a court, agency, or other official body." 402 F.3d at 329. But it disagreed with the Fourth Circuit's conclusion hat an "inquiry" must be a formal proceeding as well. *Id.* at 330 n.3. "Whatever level of formality is implied by the term 'proceeding' . . . the use of the somewhat less formal term 'inquiry' in ERISA is indicative of an intent to ensure protection for those involved in the informal gathering of information.'" *Id.* at 328-29 (quoting DOL Br.). Thus, the court held, "the proper focus is not on the formality or informality of the circumstances under which an individual gives information." *Id.* at 330. The "plain meaning of

'inquiry,'" the court held, extends the statute's protection to "those involved in the informal gathering of information." *Id.* at 328-29.

That insight did not, however, lead the Second Circuit to conclude that Nicolaou had stated a claim simply because she complained to her supervisors about an ERISA violation. Having construed the word "inquiry" to "refer[] broadly to any request for information," 402 F.3d at 329, the court remanded to allow Nicolaou to "demonstrate that she was contacted to meet with [management] in order to give information" about possible ERISA violations. *Id.* at 330.

In a concurring opinion, Judge Pooler explained that limiting Section 510 to complaints made in the course of a formal proceeding would run contrary to ERISA's requirement that plan fiduciaries, like Nicolaou, investigate and take action to correct plan violations upon pain of personal liability. 402 F.3d at 330-31 (citing 29 U.S.C. §§ 1104(a)(1), 1105(a)(3), 1109(a)). Moreover, in light of that duty, she believed that an "inquiry" must include not only investigations initiated by an employer or outside entity, but also inquiries conducted by fiduciaries. *Id.* at 332.

In this case, the Third Circuit "agree[d] with the Fourth Circuit's decision in *King*" that a "plain reading" of Section 510 precludes protection for unsolicited internal complaints. Pet. App. 18a-19a. Like that court, the Third Circuit decided that "the phrase 'testified or is about to testify' implies that the phrase 'inquiry or proceeding' is limited to more formal actions." Pet. App. 13a. But it also agreed with the Second Circuit that "a plain reading of the

provision indicates that 'inquiry' includes only inquiries made of an employee, not inquiries made by an employee" or other employee-initiated complaints. *Id.* Because petitioner's objections were both informal and unsolicited, it held that Section 510 did not apply to this case. *Id.*

3. This case is an ideal vehicle for restoring uniformity to the law. The scope of Section 510's protection is squarely presented by the facts of this case: petitioner would have prevailed in the Fifth or Ninth Circuit, but would have lost in the Second and Fourth Circuits, based on a disagreement among these courts regarding the meaning of Section 510. Moreover, the scope of that provision was the sole question presented on appeal and was thoroughly considered with the benefit of extensive briefing by both the parties and the Department of Labor. Pet. App. 5a.

II. This Case Presents An Important And Recurring Issue Under ERISA.

Whether ERISA's anti-retaliation provision applies to unsolicited internal complaints is an important and recurring question.

1. As the longstanding and growing circuit conflict demonstrates, the scope of Section 510's protection is frequently litigated in the lower courts.[4]

---

[4] *See, e.g.*, *Nicolaou v. Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005); *King v. Marriott Int'l, Inc.*, 337 F.3d 421, 426-28 (4th Cir. 2003); *Anderson v. Elec. Data Sys. Corp.*, 11 F.3d 1311, 1315 (5th Cir. 1994); *Hashimoto v. Bank of Hawaii*, 999 F.2d 408, 411-12 (9th Cir. 1993); *Momchilov v. McIlvaine Trucking*

That is hardly surprising given that the statute applies to pension and benefit plans that cover over 150 million people.[5] Eighty-six million actively participate in ERISA pension plans[6] and almost seventy percent of Americans who have health insurance receive it through an ERISA-governed plan.[7]

ERISA's protections thus remain vital to the effective provision of American retirement security and medical benefits. And the Act's anti-retaliation provision is essential to the statute's effectiveness, helping "to make [ERISA's] promises credible" by protecting the individuals who are often best situated

---

Int'l, Inc., No. 5:09CV1322, 2010 WL 1254216 (Mar. 24, 2010 N.D. Ohio); *Ello v. Singh*, 531 F. Supp. 2d 552, 573 (S.D.N.Y. 2007); *Simons v. Midwest Tel. Sales & Serv. Inc.*, 462 F. Supp. 2d 1004, 1008 (D. Minn. 2006); *Dunn v. Elco Enter.*, No. 05-711, 2006 WL 1195867 (May 4, 2006 E.D. Mich.); *McSharry v. Unumprovident Corp.*, 237 F. Supp. 2d 875, 878-79 (E.D. Tenn. 2002); *Klein v. Banknorth Group, Inc.*, 977 F. Supp. 302, 304-305 (D. Vt. 1997); *Jorgensen v. Prudential Ins. Co. of Am.*, 852 F. Supp. 255, 262-63 (D.N.J. 1994); *McLean v. Carlson Cos., Inc.*, 777 F. Supp. 1480, 1483-84 (D. Minn. 1991).

[5] Department of Labor, Description of Employee Benefits Security Administration, *available at* http://www.dol.gov/ebsa/OEManual/main.html; *see also* 29 U.S.C. § 1001(a) (finding that ERISA plans directly affect "the continued well-being and security of millions of employees and their dependents").

[6] Department of Labor, Employee Benefits Security Administration, Private Pension Plan Bulletin, p. 3, June 2010, *available at* http://www.dol.gov/ebsa/PDF/2007pensionplan bulletin.PDF.

[7] *See* Report of the Congressional Budget Office 7, Table 2 (Mar. 18, 2010), *available at* http://www.cbo.gov/ftpdocs/113xx/doc11355/hr4872.pdf.

to identify and bring to light violations that can threaten the rights of thousands of workers and even the viability of an employer's benefit plan. *See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997); *see also Ingersoll-Rand Co v. McClendon*, 498 U.S. 133, 143 (1990).

2. The inconsistent application of this critical component of ERISA's enforcement regime is untenable. Congress intended ERISA to replace a "patchwork scheme of regulation" by the states. *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (citation omitted). Yet at present, employees are protected against retaliation for any unsolicited internal complaint in twelve states. In eight states, Section 510 applies only if the employee raises objections in a formal proceeding, such as a complaint to the Department of Labor or a lawsuit. And in two others, workers must show that they responded to an employer's questions and are not protected if they initiate an inquiry themselves.

Employees need to know whether they can safely bring their concerns to the attention of the company or, instead, must file a formal complaint with the Department of Labor or initiate litigation in order to secure legal protection against retaliation. The question is particularly important to plan fiduciaries, who have an obligation under ERISA to take action to correct any violation they discover. *See* 29 U.S.C. § 1109.

At the same time, varying interpretations of ERISA subject employers – particularly those operating national or regional employee benefit plans – to inconsistent rules, in conflict with Congress's intent to establish "a uniform regulatory regime over

employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004).

Congress plainly did not intend to provide employees of the same firm dramatically different protection depending on whether they worked in the company's office in Los Angeles, New York, or Philadelphia. Nor did Congress intend to subject employers to varying standards of liability depending on the circuit in which they are sued. Yet, the existing division may encourage forum shopping to achieve precisely that result under ERISA's permissive venue provision. 29 U.S.C. § 1132(e)(2) (permitting plaintiffs to file suit "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found").

III. ERISA's Anti-Retaliation Provision Protects Unsolicited Internal Reports Of Possible ERISA Violations.

Certiorari is also warranted because the decision below conflicts with the text and manifest purposes of ERISA. "[E]ffective enforcement" of a statute like ERISA can "only be expected if employees fe[el] free to approach officials with their grievances." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67 (2006) (citation omitted). Accordingly, this Court has interpreted the text of analogous anti-retaliation provisions consistent with Congress's intent to ensure that employees are "completely free from coercion against reporting" unlawful practices. *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972) (citation omitted). In this case, the Third Circuit made no pretense that its interpretation could be reconciled with these principles. It held instead that the plain

text of Section 510 required it to construe the provision in a manner that is ineffective to prevent even the most egregious employer retaliation. But that conclusion was wrong. In fact, the language easily permits, and the statutes' purposes demand, protection for all employees who make complaints regarding ERISA violations to their employers.

A. Nothing In The Text Of Section 510 Precludes Protection For Unsolicited Internal Complaints.

The language of Section 510 is broad and encompassing. The statute protects not only employees who "testify" in ERISA "proceedings," but also those who "give[] information" in "any inquiry" relating to an ERISA violation. 29 U.S.C. § 1140. The terms "information" and "inquiry" are expansive. An individual can "giv[e] information" through any number of methods – from having a face-to-face discussion to submitting formal complaint documents. The term "inquiry" is similarly sweeping. Accordingly, while an "inquiry" would certainly encompass formal proceedings or employer-initiated investigations, ordinary usage does not cabin the term to such a narrow meaning.

1. An "Inquiry" Encompasses An Internal Complaint.

The Third and Fourth Circuits have nonetheless construed the term "inquiry" as limited to "formal actions." Pet. App. 13a; *King*, 337 F.3d at 427. These courts assert that the phrase "inquiry or proceeding" must be interpreted in light of its proximity to the phrase "testified or is about to testify," which "connote[s] a formality that does not attend" to

"intra-company complaints." *King*, 337 F.3d at 427; *see also* Pet. App. 13a.

As the Second Circuit rightly observed, precisely the opposite inference arises from Congress's inclusion of the broad and colloquial words "information" and "inquiry," in addition to the more specific terms "proceeding" and "testimony." *Nicolaou*, 402 F.3d at 330 n.3. A statute must be read to "give the nouns their separate, normal meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984) (citation omitted). And in this case, "proceeding" – the narrower term – by itself encompasses a formal legal and administrative process. Lest it be rendered surplusage, the word "inquiry" must refer to something else.

Nor does the word "inquiry" naturally connote formality. Quite to the contrary, "the plain meaning of 'inquiry'" extends to an "informal gathering of information" as well as to more formal proceedings. *Nicolaou*, 402 F.3d at 328-29. *See, e.g.*, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 646 (11th ed. 2001) (defining "inquiry" as an "examination into facts or principles"); *cf. also Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996) (referring to informal "employee inquiries" to plan fiduciaries); *Electro-Mech. Corp. v. Ogan*, 9 F.3d 445, 451 (6th Cir. 1993) ("ERISA imposes a duty upon fiduciaries to respond promptly and adequately to *employee-initiated inquiries* regarding the plan or any of its terms.") (emphasis added).

2. An "Inquiry" Includes An Employee-Initiated Communication.

Even setting aside formality, the Third Circuit also held that an "inquiry" must be initiated by

someone other than the employee herself, thereby excluding from protection unsolicited complaints. Pet. App. 13a. But that conclusion finds no support in the text of Section 510. Furthermore, it would lead to difficult line-drawing and absurd results Congress could not have intended.

By its terms, Section 510 applies to "*any* inquiry" related to a possible ERISA violation. 29 U.S.C. § 1140 (emphasis added). As this Court has explained, the modifier "any" "excludes selection or distinction." *Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904). When Congress uses the word "any" it "declares the [statutory phrase it modifies] without limitation." *Id.*; *see also City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 739 (1995) (Thomas, J., dissenting) (finding it "difficult to imagine what broader terms Congress could have used" than the term "any"). By inserting "any" before the term "inquiry," Congress thus confirmed that Section 510 would protect the full range of potential inquiries relating to ERISA.

This includes cases in which an employee conveys information in the course of conducting her own inquiry into possible ERISA violations. As in this case, it is not uncommon that employees with plan-related responsibilities may come to suspect that the plan is not being operated in accordance with ERISA's mandates. Indeed, employee-fiduciaries have a statutory obligation to monitor plan compliance, investigate possible violations, and take remedial action. 29 U.S.C. §§ 1104(a)(1), 1105(a)(3), 1109(a). When they fulfill those responsibilities by alerting their employer of questionable practices in the course of attempting to determine the plan's compliance with the law, they

have "given information . . . in an[] inquiry . . . relating to" ERISA, within any reasonable construction of those words. 29 U.S.C. § 1140.

The statute's language likewise encompasses employee complaints that could cause the employer to initiate an inquiry. In *NLRB v. Scrivener*, 405 U.S. 117 (1972), this Court considered a similar question under the National Labor Relations Act (NLRA). The NLRA prohibits retaliation against an employee because he has "filed charges or given testimony under this Act." 29 U.S.C. § 158. In *Scrivener*, a union filed a charge with the National Labor Relations Board, which sent an investigator to take statements from several employees, whom the employer then promptly fired.

Although the terminated employees had not filed any charges, and although they had not yet given any testimony, this Court held that the statute protected their conduct. 405 U.S. at 121-25. "The Act's reference . . . to an employee who 'has filed charges or given testimony[]' could be read strictly and confined in its reach to formal charges and formal testimony," the Court acknowledged. *Id.* at 122. But "[i]t can also be read more broadly." *Id.* "[T]extual analysis alone" revealed "an intent on the part of Congress to afford broad rather than narrow protection to the employee," consistent with the statute's "purpose and objective." *Id.* Accordingly, the Court rejected the court of appeals' conclusion that the word "testimony" did not encompass "preliminary preparations for giving testimony," such as providing information to an investigator. *Id.* at 121.

So, too, ERISA's protection for those who "give information in any inquiry" can and should be construed to extend to the entirety of the inquiry

process, including essential preliminary steps such as providing information regarding the need for an investigation.

c. The court of appeals' contrary narrow construction of "inquiry" leads to absurd results Congress could not have intended.

For one thing, the decision below calls into question whether complaints to the Department of Labor are protected. If "a plain reading" of the word "inquiry" necessarily "includes *only* inquiries made *of* an employee," as the Third Circuit held, Pet. App. 13a (emphasis added), it does not encompass an employee's unsolicited complaint to an outside agency, even one charged with enforcing the statute.

But even assuming the court of appeals would somehow find a way to protect complaints to the Government but not to an employer, many anomalies would nonetheless remain. The protection that ERISA affords cannot sensibly turn on whether an employee provides information in response to a question or on her own initiative. *Cf. Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 851 (2009) (describing as "freakish" a rule "protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question"). Nor could Congress have intended the statute's protections to depend on whether a supervisor responds to a complaint with a follow-up question or instead fires the complainant on the spot.

Moreover, the arbitrary distinctions the Third Circuit's decision draws would be entirely too difficult to administer in practice. Congress would not have contemplated that juries would spend their time

deciding whether a worker was fired for her initial complaint or for answering a follow-up question; or whether a supervisor (lawfully) fired the employee for lodging an initial complaint with the company, or instead (unlawfully) terminated her for repeating her complaint to the Government.[8]

B. The Third Circuit's Rule Contravenes The Purpose Of ERISA's Anti-Retaliation Provision.

In fact, limiting the protections of Section 510 to solicited or external complaints would frustrate the basic purposes of ERISA's anti-retaliation provision by providing perverse incentives for both employers and employees.

By excluding protection for unsolicited complaints, the majority's rule in this case would "permit[] (and perhaps, in essence, encourage[])" supervisors to "fire an employee immediately after she makes an informal complaint instead of conducting an investigation." Pet. App. 23a (Cowen, J., dissenting). This may be particularly true when the supervisor receiving the complaint, and terminating the employee, is responsible for the

---

[8] To the extent the Court finds the text ambiguous, it should defer to the Department of Labor's interpretation. The Department – which has primary enforcement and regulatory authority under Title I of ERISA, *see* 29 U.S.C. §§ 1132, 1135-36 – has construed Section 510 to protect employee-initiated internal complaints. *See* DOL C.A. Br. 5-6; DOL Br., *Nicolaou v. Horizon Media, Inc.*, 2004 WL 3525515. That consistent position warrants deference. *See generally United States v. Mead Corp.*, 533 U.S. 218 (2001); *see also id.* at 256-57 (Scalia, J., dissenting).

violation and risks termination himself if the violation comes to light.

Employees like petitioner are often a company's best resource for preventing and remedying breaches of ERISA because they have direct knowledge of the company's practices. The decision here, however, may often prevent a company's upper management or owners from learning of problems at an early stage when they may be more readily and inexpensively remedied. That frustrates the statute's general intent to prevent violations and encourage voluntary compliance. *See* H.R. Rep. No. 93-533, at 17 (1974).

Moreover, by construing Section 510 to protect only complaints made outside the company, the decision below encourages workers to file complaints with the Department of Labor or to proceed directly to court. But complaining to the Department of Labor can be ineffective, as the Department of Labor "simply does not have the resources to monitor all alleged ERISA violations." DOL C.A. Br. 22. Moreover, even when undertaken, a Department of Labor investigation imposes significant expense on employers, creates friction within the workplace, and can often delay resolution of ERISA disputes that could be been resolved internally. In these respects, private lawsuits are even worse, imposing great expense and delay to resolve ERISA disputes that often could have been easily resolved through a simple conversation with the employer.

Worse yet, the decision below inevitably will discourage many employees from reporting ERISA violations at all, to the detriment of plan participants

and their families and, ultimately, the larger community.[9]

* * * * *

Stripped of any pretense that its narrow construction of ERISA's anti-retaliation provision is the only one permitted by the text of the statute, the Third Circuit's interpretation of Section 510 quickly collapses under the weight of common sense and congressional purpose. This Court should not permit that error to continue to propagate among the circuits.

---

[9] Left undiscovered, serious ERISA violations can jeopardize the very solvency of pension and benefit plans, imposing significant costs on other plans through increased insurance premiums to the Pension Benefits Guaranty Corporation (PBGC), the federal agency that insures ERISA defined-benefit pensions. And while the PBGC typically relies on insurance-premium revenue and not tax revenues to guarantee underfunded pensions, PBGC recognizes some potential for a taxpayer-funded bailout. *See* Understanding the Financial Condition of the Pension Insurance Program, *available at* http://www.pbgc.gov/media/key-resources-for-the-press/content/page15247.html.

CONCLUSION

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

Respectfully submitted,

Ari Karpf
KARPF, KARPF & VIRANT
3070 Bristol Pike
Building 2, Suite 231
Bensalem, PA 19021

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Kevin K. Russell
Counsel of Record
Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@howerussell.com

November 30, 2010