No. _____

In The

Supreme Court of the United States

HARPER EXCAVATING, INC.,
Petitioner,

v.

JEFFREY HANSEN,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does one who would have rights or claims under ERISA "but for" the wrongful acts of that person's former employer have standing to sue on those claims in federal court?

2. Does *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), which extends federal court jurisdiction under ERISA to "a former employee with . . . a colorable claim that he or she will prevail in a suit for benefits" (489 U.S. at 117–18), implicitly indorse the "but for" basis for federal standing adopted by six of the lower circuit courts?

3. Does one who obtains a ruling of liability for ERISA damages against his former employer accordingly have a "colorable claim" to vested benefits pursuant to the fourth prong of the *Firestone* test?

4. Is standing under ERISA determined at the time the wrongful acts complained of occurred, or at the time of the filing of the litigation?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Harper Excavating, Inc., a Utah corporation. Harper Excavating was the defendant in the District Court and the appellee in the Court of Appeals. It brings this action on its own behalf.

At all relevant times herein, Harper Excavating was solely owned by Rulon J. and Paula Harper. During no relevant time herein did a parent or publicly held company own 10% of Harper Excavating's stock.

Respondent is Jeffrey Hansen, an individual believed to be residing in Salt Lake County, Utah. He was the plaintiff in the District Court and appellant in the Court of Appeals. He also acts on his own behalf.

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STATUTES

CASES

[1] West recently published this case in its Federal Reporter as *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216 (10th Cir. 2011). However, the Federal Reporter version is not yet paginated. Therefore, Harper cites to the Westlaw version of this case throughout this petition.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Utah District Court upon which appeal to the Tenth Circuit was taken is unreported but found at *Hansen v. Harper Excavating, Inc.*, 2:07-cv-00679-BSJ, Order, Doc. 25 (D.Utah April 25, 2008)["*Hansen II*"]. The opinion of the Tenth Circuit at issue is reported at *Hansen v. Harper Excavating, Inc.*, No. 08–4089, 2011 WL 1379821 (10th Cir. Apr. 13, 2011) ["*Hansen II Appeal*"]. The opinion of the Utah District Court providing Hansen relief under ERISA on his earlier filed case is unreported but found at *Hansen v. Harper Excavating, Inc.*, No. 2:05–cv–00940–DAK, Mem. Decision and Order, Doc. 99 (D.Utah. May 8, 2007) ["*Hansen I*"]

JURISDICTION

The Tenth Circuit Court of Appeals entered its order denying federal jurisdiction and entering an order of remand on April 13, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the extent of federal jurisdiction under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132.

STATEMENT OF THE CASE

This case presents significant questions about the extent to which federal jurisdiction and standing apply to ERISA claims brought by individuals against their former employers. Resolution of these questions by this Court will significantly assist in determining the full intended scope and coverage of ERISA, considered by many as the single most important piece of federal legislation regarding employee benefits, particularly benefits enjoyed after retirement.[1] If this Court denies certiorari, the existing confusion about the rights of former employees to recover under ERISA will continue among the circuit courts.

One of the ongoing areas of concern for employees is the extent to which they can hold their former employers responsible for ERISA benefits once they are no longer employed. The cases on the subject are replete with examples of employers convincing a retiring or departing employee that no further or superior benefits are available than those currently offered, which the employee discovers to be untrue, but only after terminating his employment. In the instant case, the departing employee learned after his employment ended that he had no employer-sponsored health insurance. In strongly divided decisions, nine of the eleven federal circuit courts have wrestled with whether former employees

[1]According to the Second Circuit, one of the most important purposes of ERISA is "to assure American workers that they may look forward with anticipation to a retirement with financial security and dignity . . . ." *Demirovic v. Bldg. Serv. 32 B-J Pension Fund*, 467 F.3d 208, 215 (2nd Cir. 2006).

in these situations have ERISA claims. Over 20 years ago, this Court attempted to resolve the issue of standing to sue under ERISA in the seminal case of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Using that case as a guide, six circuit courts have permitted former employees, who would have had ERISA standing but for the misconduct of their employers, to sue under ERISA. Three circuit courts have not, often distinguishing *Firestone*, thus bringing about a clear split of opinion and ambiguity in the law. Among this minority is the Tenth Circuit, which reiterated its rejection of the "but for" exception in the instant case.

In the instant case, the Tenth Circuit ruled that the lower court lacked jurisdiction even though Mr. Hansen would have had ERISA standing "but for" Harper's failure to properly enroll Hansen in its ERISA plan. The Tenth Circuit further acknowledged that its refusal to accept the "but for" analysis was contrary to decisions by the First, Second, Third, Fifth, Sixth and Eighth Circuit Courts of Appeal, but emphasized that its ruling was consistent with decisions by the Fourth and Eleventh Circuit Courts of Appeal. *Hansen II Appeal*, 2011 WL 1379821, at *7.

Because of the clear split among nine of the eleven Circuit Courts of Appeal and the overall importance of the issue, this case is ripe for review. Review is also appropriate so this Court can clarify and define the scope and limitations of ERISA standing and concomitant federal jurisdiction in situations where a putative claimant is no longer employed by the defendant-employer. Additionally,

the current state of conflict allows anomalies—such as found in the instant case—where a former employee can sue for and recover ERISA benefits in federal court and simultaneously seek common law damages in a separate state court action. Given the widespread scope and application of ERISA, a decision clarifying these issues, and eliminating the possibility of ERISA forum shopping, is of profound national importance.

FACTUAL BACKGROUND

Jeffrey Hansen was employed by Harper from November 24, 2003 to April 28, 2004. On March 9, 2004, Hansen attempted to enroll in Harper's ERISA-regulated health insurance plan. Unfortunately, Hansen applied some eight days beyond the permitted application period. Nevertheless, Harper began immediately deducting plan premiums from Hansen's paychecks and gave Hansen the group number for the insurance plan. After Hansen's employment with Harper terminated, Hansen became ill and sought medical treatment. However, Hansen discovered he did not actually have health insurance through Harper's insurance plan and accordingly incurred uninsured medical expenses and other damages. Hansen believed he did not have insurance coverage due to the improper conduct of Harper.

Hansen sued Harper in federal court under the authority of ERISA (*Hansen I*) and obtained a ruling from the court confirming ERISA jurisdiction and establishing liability against Harper. Prior to a scheduled trial on damages in *Hansen I*, Hansen

filed a second action against Harper in Utah state court (*Hansen II*), asserting many of the same claims but seeking damages under various state law theories. Harper removed *Hansen II* to federal court, where the case was held in abeyance until after the court in *Hansen I* entered a judgment on damages. At that point, the court in *Hansen II* ruled it had jurisdiction, and then proceeded to dismiss the case on the bases of ERISA preemption and res judicata.

Hansen appealed the removal and subsequent dismissal of *Hansen II* to the Tenth Circuit (*Hansen II Appeal*). On appeal the Tenth Circuit reversed, holding Hansen did not have standing under ERISA to bring *Hansen II*, which effectively deprived the lower federal court of jurisdiction over the matter and necessitated remand of the case to the Utah district court.

PROCEEDINGS BELOW

The District Court

The instant action (*Hansen II*) commenced on May 29, 2007 when Hansen filed a complaint in Utah state court seeking damages from Harper's alleged failure to provide him insurance coverage. Hansen brought his suit even though he had earlier filed an ERISA action in the U.S. District Court of Utah (*Hansen I*) and even though at the time of filing *Hansen II*, *Hansen I* had not concluded. Eventually, Hansen filed a motion for partial summary judgment in *Hansen I* on the issue of Harper's liability under ERISA. In its ruling, the *Hansen I* district court determined it had jurisdiction under ERISA and

granted the motion in favor of Hansen. *Hansen I* was then was scheduled for a damages trial.

Prior to the damages trial in *Hansen I*, Hansen filed the complaint in *Hansen II,* raising issues very similar to *Hansen I* but seeking recovery under Utah common law. Harper removed *Hansen II* to federal court and filed a motion to dismiss on the basis of ERISA preemption and res judicata. The *Hansen II* court stayed Harper's motion until the *Hansen I* damages trial concluded. At the conclusion of *Hansen I*, where the court awarded Hansen damages and attorneys fees, and after Harper satisfied Hansen's judgment, the *Hansen II* court determined it had jurisdiction and granted Harper's motion to dismiss. Hansen appealed to the Tenth Circuit Court of Appeals.

The Court of Appeals

The Tenth Circuit reversed the district court, holding Hansen had no standing under ERISA to bring *Hansen II* and that, consequently, the case was to be remanded to state court. The Tenth Circuit initially analyzed the time at which ERISA standing is determined. It concluded:

> Two possibilities suggest themselves: either when the wrongful behavior occurred, or when the complaint was filed. This distinction matters; Hansen appears to have been a current employee reasonably expected to be in covered employment at the time of Harper's wrongful

> behavior (which is to say Harper's failure to tell Hansen of the proper enrollment window), but by the time he filed the complaint, he was a former employee with no reasonable expectation of returning to covered employment or with a colorable claim to vested benefits under the plan, and thus he would not have had ERISA standing to sue. Our cases do not expressly answer the question, but they suggest that standing is assessed at the time the complaint is filed. We agree, and hold that ERISA standing is assessed as of the filing of a complaint.

Hansen II Appeal, 2011 WL 1379821, at *5. In the next part of its analysis, the Tenth Circuit rejected the "but for" exception to ERISA standing, which would have given the federal court jurisdiction over Hansen's claims in *Hansen II.* Specifically, the Tenth Circuit ruled that the "but for" exception "may be . . . compelling . . . in the abstract, *but this circuit has repeatedly and unequivocally rejected the "but-for" exception to the ERISA standing requirement adopted by several other circuits*." *Hansen II Appeal*, 2011 WL 1379821, at *8-*9 (emphasis added). In stating this position, the Tenth Circuit described how other circuit courts had ruled on the issue:

At the heart of Harper's argument for why Hansen has standing under ERISA in this case is the notion that, but for the misdeeds of Harper, Hansen would have been a participant in the ERISA-regulated plan. This may be a compelling argument in the abstract, but this circuit has repeatedly and unequivocally rejected the "but-for" exception to the ERISA standing requirement adopted by several other circuits. [T]he First, Second, Fifth, Sixth, and Eighth Circuits have held that former employees may sue under ERISA if they make a 'but for' claim that they would have been participants had their employers not engaged in wrongful behavior. [Citing *Felix v. Lucent Techs., Inc.,* 387 F.3d 1146, 1159 (10th Cir.2004).] The Third Circuit also so holds. *See Leuthner v. Blue Cross & Blue Shield,* 454 F.3d 120, 129 (3rd Cir. 2006). This court, however, has expressly rejected the doctrine of 'but for' standing. [Citing *Chastain v. AT & T,* 558 F.3d 1177, 1183 (10th Cir. 2009); *Felix*, 387 F.3d at 1159-61; and *Raymond v. Mobil Oil Corp.*, 983 F.2d 463, 474 (10th Cir. 1990).] We are joined in that rejection by

> the Fourth and Eleventh Circuits. *See Sanson v. Gen. Motors Corp.*, 966 F.2d 618, 619, 621 (11th Cir. 1992); *Stanton v. Gulf Oil Corp.*, 792 F.2d 432, 434 (4th Cir. 1986).

Hansen II Appeal, 2011 WL 1379821, at*7.[2]

Finally, the Tenth Circuit concluded Hansen did not have standing under any of the four prongs of the test set forth by this Court in *Firestone*. In an interesting twist, the Tenth Circuit held that Hansen's actual recovery of ERISA benefits in *Hansen I* precluded the Tenth Circuit's jurisdiction over *Hansen II*. The Tenth Circuit stated:

> We are, thus, left with the final option that Hansen might be a former employee with a colorable claim that he will prevail in a suit for benefits. But, of course, Hansen has already prevailed in a suit for benefits in Hansen I; he thus no longer has a 'colorable claim' that he will do so in the

[2] Although that decision was by a three judge panel and not *en banc*, there appears to be no doubt that the Tenth Circuit's rejection of Harper's "but for" ERISA standing argument would be affirmed in an *en banc* hearing. The three Tenth Circuit cases which have addressed this issue–*Hansen II*, *Chastain*, and *Felix*–involved three different panels, with only one judge repeating and all being unanimous decisions. Specifically, those cases had the following judges: *Hansen II*–Ebel, Tymkovich, and Gorsuch; *Chastain*–Tacha, Briscoe, and O'Brien; and *Felix*–Ebel, Anderson, and McConnell. Considering how strongly and unequivocally the Tenth Circuit has rejected "but for" basis for ERISA standing, Harper believes pursuit of a rehearing *en banc* would have been futile.

> future. Therefore, Hansen is not a former employee with a colorable claim that he will in the future prevail in a suit for benefits. He is a 'former employee who has neither a reasonable expectation of returning to covered employment nor a colorable claim to vested benefits [who] simply does not fit within the phrase 'may become eligible." *Firestone*, 489 U.S. at 118 (alteration omitted), and thus he has no standing under ERISA.

Hansen II Appeal, 2011 WL 1379821, at *8. Consequently, the Tenth Circuit entered an order remanding the case to state court, where the case currently resides.

REASONS FOR GRANTING THE WRIT

I. The Case Presents Exceptionally Important Questions of Federal Law on Which Virtually All of the Circuits Are in Conflict.

ERISA was "designed to have a sweeping preemptive effect in the employee benefit plan field." *Am. Progressive Life and Health Ins. Co. v. Corcoran*, 715 F.2d 784, 786 (2nd Cir. 1983). Indeed, any employee who is a "participant" in an ERISA benefit plan must bring any claims arising from that plan under ERISA in federal court. For purposes of ERISA, "participants" are defined as "employees in, or reasonably expected to be in, currently covered

employment, or former employees who have a reasonable expectation of returning to covered employment or who have a colorable claim to vested benefits." *Firestone*, 489 U.S. at 117. According to *Firestone*, a former employee has a "colorable claim to vested benefits" if he or she has a colorable claim that (a) he or she will prevail in a suit for benefits, or (b) his or her eligibility requirements will be fulfilled in the future. *Id.* at 117-18.

In many instances, an employee may claim that, but for the misrepresentations or misconduct of the employer, he or she would have been a participant in the employer's ERISA plan. For example, a common scenario running through case law in the various circuits is that of an employee who is told there will never be a better retirement plan, and, based on that representation, takes early retirement. The employee later learns the employer did, in fact, offer a better retirement plan. Of course, the employee never became a participant in the better plan because of the early retirement. This example is often referred to as the "but for" exception, because it is an exception to the general rule limiting ERISA standing to actual plan participants.

The primary question for this Court is whether an employee who would have been an ERISA plan participant "but for" his or her employer's misconduct has standing to sue under ERISA. This is an issue which is ripe for this Court's resolution. Nine of the eleven circuits have considered it, and they are sharply divided in their respective rulings. Six circuits, including the First,

Second, Third, Fifth, Sixth and Eighth Circuits, have accepted the "but for" exception to ERISA standing. Even then, and as shown below, those circuits' rulings are not wholly consistent with each other. For example, while those courts have generally relied on the fourth prong of the *Firestone* test, they have inconsistently applied that prong. Likewise, there is some disparity in the positions of the Fourth, Tenth, and Eleventh Circuits, which have rejected the "but for" exception.

A. The Six Circuit Courts Which Have Found Post-Employment Standing Have Done So Principally under the "But For" Exception.

Christopher v. Mobil Oil Corp., 950 F.2d 1209 (5th Cir. 1992) is the earliest case analyzing the "but for" exception. In *Christopher*, the Fifth Circuit concluded that the plaintiffs–former employees who alleged their employer wrongfully induced them into early retirement– had to look solely to ERISA for relief, notwithstanding they did not meet any of the first three prongs of the *Firestone* test and would not likely meet the fourth prong.[3] *Christopher*, 950 F.2d at 1213, 1221. The Fifth Circuit stated:

> It would be unusual if in that situation his ability to assert a claim at all turned on whether or

[3]All former retirees had received all the benefits due them under Mobil's retirement plan (no "colorable claim for vested benefits") and none had a reasonable expectation of returning to covered employment. *See Christopher*, 950 F.2d at 1220-21 (citing *Firestone*'s fourth ERISA standing prong).

> not his requested relief included reinstatement; it would seem more logical to say that but for the employer's conduct alleged to be in violation of ERISA, the employee *would* be a current employee with a reasonable expectation of receiving benefits, and the employer should not be able through its own malfeasance to defeat the employee's standing.

Id. at 1221 (emphasis in original).

In *Vartanian v. Monsanto Co.,* 14 F.3d 697 (1st Cir. 1994), an employee named Vartanian retired earlier than necessary in reliance on his employer's misrepresentation that no new, more favorable retirement plan was available. The First Circuit held Vartanian had standing to sue under ERISA even though he had never actually become a participant in the more favorable plan. In so holding, the First Circuit stated "it would be entirely inconsistent with the ERISA statute for this court to decline to bar Vartanian, for lack of 'standing', from showing that, 'but for' [employer]'s wrongful conduct, he would be a 'participant' in the [more favorable] plan." *Id.* at 698-701.

The Second Circuit in *Mullins v. Pfizer, Inc.*, 23 F.3d 663 (2nd Cir. 1994) adopted *Vartanian*'s reasoning to hold that a former employee who retired in reliance on his employer's alleged misrepresentation about the forthcoming availability of a retirement plan superior to the one available at

the time the employee retired had standing under ERISA. Noting other circuits' rejection of the "but for" exception, the Second Circuit stated: "[I]t is more consistent with legislative intent to afford standing in the present context. . . . To hold otherwise would have the anomalous effect of allowing a fiduciary through its own malfeasance to defeat the employee's standing." *Id.* at 668.

In *Leuthner v. Blue Cross and Blue Shield*, 454 F.3d 120 (3rd Cir. 2006), the Third Circuit reaffirmed its acceptance of the "but for" exception in situations where a former plan participant loses his or her participant status due to an employer's misconduct. The *Leuthner* court stated:

> ERISA's legislative history indicates that Congress intended the federal courts to construe the statutory standing requirements broadly in order to facilitate enforcement of its remedial provisions. . . . Refusing to allow 'but for' standing would frustrate Congress's intention to remove jurisdictional and procedural obstacles to ERISA claims. . . . Therefore, in the proper case, we may find that a plaintiff has statutory standing if the plaintiff can in good faith plead that she was an ERISA plan participant or beneficiary and that she still would be but for

> the alleged malfeasance of a plan fiduciary.

Id. at 128-29.

In finding that a former employee had standing to sue under ERISA, the Sixth Circuit stated that "[s]o long as a former employee would have been in a class eligible to become a member of the plan but for the fiduciary's alleged breach of duty, he may become eligible for benefits under the plan" and has standing under ERISA. *Swinney v. General Motors Corp.*, 46 F.3d 512, 519 (6th Cir. 1995) (internal quotations omitted). Like the other circuits upholding the "but for" exception, the *Swinney* court stated a contrary ruling "would clearly frustrate Congress's intent to remove jurisdictional and procedural obstacles if we held that ERISA preempts the plaintiffs' state law claims and yet denies them standing to pursue a federal claim." *Id.* at 519.

Finally, in *Adamson v. Armco, Inc.*, 44 F.3d 650 (8th Cir. 1995), the Eighth Circuit affirmed its recognition of "but for" ERISA standing "when the fiduciary's breach of duty has deprived the . . . plaintiff of participant status." *Id.* at 655. That court noted, however, that ERISA standing did not extend to claimants whose "loss of participant status resulted from their own actions." *Id.*

B. Three Circuits Have Rejected the "But For" Exception.

The Fourth Circuit has declined to adopt the "but for" exception. In *Stanton v. Gulf Oil Corp.*, 792

F.2d 432 (4th Cir. 1986), a former employee argued he had ERISA standing because, "but for" his employer's misrepresentations about the unavailability of a retirement plan superior to the one under which he retired, he would have been a participant in the better plan. *Id.* at 434. Rejecting that argument, the *Stanton* court stated:

> The effect of reading in a 'but for' test is to impose participant status on every single employee who *but for* some future contingency may become eligible. Neither caselaw nor other provision of ERISA supports such a reading of 'participant.'

Id. at 435 (emphasis in original). Factually, *Stanton* is nearly identical to *Christopher, Vartanian,* and *Mullins*, but the outcome of its analysis of the "but for" exception is opposite.

The Eleventh Circuit has held similarly to the Fourth Circuit. In *Sanson v. General Motors Corp.,* an employee named Sanson voluntarily retired in reliance on his employer's representation that a special retirement plan would not be available to him. 966 F.2d 618, 619 (11th Cir. 1992). Shortly thereafter, the employer offered a special retirement plan to certain employees. *Id.* at 619. Sanson sued his employer under Georgia state law, alleging "but for the [mis]representation, he would have continued his employment until it would have been clearer whether the special retirement program would be offered to [him]." *Id.* The employer argued that

because Sanson was not a plan participant, he had no standing to sue under ERISA. *Sanson*, 966 F.2d at 621. Sanson "acknowledge[d] his inability to express a statutory basis for maintaining [his] action under ERISA, but contend[ed] that there must be some avenue whereby an individual who is defrauded out of pension benefits can obtain a remedy." *Id.* Drawing upon precedent, and over a vigorous dissent[4] which highlights the conflict between the circuits, the Eleventh Circuit rejected the "but for" exception. *Id.* at 622-23.

The Tenth Circuit, as noted in *Hansen II Appeal*, has also declined to adopt the "but for" exception. In so holding, the Tenth Circuit has noted that "[t]o say that but for [a party's] conduct, plaintiffs would have standing is to admit that they lack standing and to allow those who merely *claim* to be participants to be deemed as such." *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1536 (10th Cir. 1993) (emphasis in original).

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[4]Judge Birch dissented from the *Sanson* majority, stating "finding . . . preemption in this case not only fails to further any . . . protective policy, it conceivably offers an unscrupulous employer a method of avoiding employee benefit 'burdens.' An employer in this circuit can now hoodwink a long time employee and leave him stranded without any recourse whatsoever." 966 F.2d at 623 (Birch, J., dissenting). Judge Birch went further: "the only notification offered to employers [by the majority's holdings] is that they may lie to future retirees about potential future benefit plans without fear of repercussions, as long as the fraud at issue involves misrepresentations as to the very existence of a special retirement plan." *Id.* at 625. Judge Birch's concerns comport with those expressed by the *Christopher, Vartanian,* and *Mullins* courts en route to finding "but for" ERISA standing.

Hansen respectfully submits that the position taken by the majority of the nine circuit courts weighing in on the subject is the correct one. By utilizing the "but for" exception to extend ERISA jurisdiction to certain former employees, those courts are not only preventing unscrupulous employers from taking advantage of their employees, but are also providing relief consistent with the terms and scope of the law itself, all very much in keeping with the *Firestone* decision.

Indeed, the principal purpose of ERISA is to confer statutory benefits on employees in exchange for restricting and specifically defining the benefits to be obtained under ERISA. In this regard, ERISA is similar to the enactment of worker's compensation laws which gave otherwise unavailable recovery rights to employees, but then proscribed those rights and made them the exclusive remedies against the employers. In the same respect, ERISA provides specific benefits to covered employees but then proscribes other kinds of rights and remedies available at common law, such as the right to a jury trial, the right to claims for pain and suffering or other consequential damages, and the right to proceed in state court. If an employer can defeat some of the purposes of ERISA by terminating an employee's employment under false pretenses so that the employee no longer has vested rights, then the whole concept of ERISA is undermined.

For these reasons, this Court should grant certiorari and hold that those who have been deprived of their ERISA rights by the wrongful

conduct of their former employer have standing to sue under ERISA.

II. This Court Should Adopt, and Where Necessary, Clarify the "But For" Exception.

Harper urges this Court to adopt the "but for" exception for several reasons. First and foremost, it would prevent an employer from defeating an employee's ERISA standing "through its own malfeasance." *Christopher*, 950 F.2d at 1221. To address the *Stanton* court's fear that adoption of the "but for" exception would effectively extend standing to myriad future contingencies, this Court could clarify that the only applicable contingency is where an employer's alleged misconduct deprives an employee of plan participant status.

Second, adoption of the "but for" exception would be consistent with Congress's intent "to remove jurisdictional and procedural obstacles to ERISA claims" and to have ERISA's standing requirements construed broadly "in order to facilitate enforcement of [ERISA's] remedial provisions." *Leuthner*, 454 F.3d at 128-29.

Third, adoption of the "but for" exception would serve to provide needed clarification to the fourth prong of the *Firestone* test and close the very loophole Hansen exploited in this case. Under the fourth prong, a former employee is a plan participant and thus has ERISA standing if the employee has a colorable claim that he or she *will prevail* in a suit for benefits. 489 U.S. at 117-18 (emphasis added). In the instant case, Hansen filed an ERISA case in

federal court and prevailed. He then filed a second case in Utah state court, asserting various common law claims arising from the same facts. The Tenth Circuit held Hansen did not have ERISA standing because he did not satisfy the fourth prong of the *Firestone* test:

> We are, thus, left with the final option that Hansen might be a former employee with a colorable claim that he will prevail in a suit for benefits. But, of course, Hansen has *already* prevailed in a suit for benefits in Hansen I; he thus no longer has a 'colorable claim' that he will do so in the future.

Hansen II Appeal, 2011 WL 1379821, at *8 (emphasis added). That is an absurd result which creates a loophole a plaintiff can exploit by strategically timing the filing of two complaints to perform an end run around ERISA preemption. That certainly cannot be what Congress intended when it enacted ERISA. Of course, had the Tenth Circuit accepted the "but for" exception, it would have affirmed the district court's dismissal of *Hansen II*.

Fourth, adoption of the "but for" exception would prevent plaintiffs from forum shopping by filing their claims in jurisdictions that either utilize or reject the "but for" exception, depending on their preferences.

Finally, most courts have analyzed the "but for" exception in situations involving former employees who retired in reliance on employer misrepresentations. However, this case presents a different scenario; *i.e.*, a former employee who would have been enrolled in an ERISA plan from the outset but for his employer's alleged misconduct. In other words, this case represents a second category of cases where the "but for" exception is highly relevant. Third and fourth categories of cases surely exist and are likely soon to emerge. Before that happens, it would be helpful for this Court to provide a final disposition on the question.

III. This Court Should Find That ERISA Standing is Determined at the Time of the Employer's Allegedly Wrongful Conduct.

In *Hansen II Appeal*, the Tenth Circuit ruled that ERISA standing is determined at the time the plaintiff files the underlying complaint rather than at the time the alleged employer misconduct occurred. *Hansen II Appeal*, 2011 WL 1379821, at *5. Harper believes such a ruling is problematic and contradicts the intent of ERISA. It certainly gives both employers and employees the ability to control a lawsuit.

For example, a plaintiff who learns his or her employer wronged him or her while still employed can either immediately sue in federal court under ERISA or terminate employment and seek redress in state court. Likewise, an employer can make misrepresentations to induce an employee to retire early or otherwise terminate the employment

relationship in order to thwart a future ERISA action in federal court.

This sort of forum shopping cannot be what Congress had in mind when it enacted ERISA as a statute with broad application to employers and employees and a "sweeping" preemption clause. *See Teamsters & Employers Welfare Trust of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 887 (7th Cir. 2002). Moreover, determining standing at the time a complaint is filed can lead to the possibility of double recovery, as is the case here. For these reasons, this Court should rule that ERISA standing is established at the time of the employer's alleged misconduct.

CONCLUSION

For the foregoing reasons, Harper Excavating respectfully requests that the Court grant its petition for certiorari.

Respectfully submitted,

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