No. 12-202

In the Supreme Court of the United States

JOHN HANCOCK LIFE INSURANCE COMPANY (U.S.A.);
John Hancock Investment Management Services, LLC;
John Hancock Funds, LLC; John Hancock Distributors, LLC,
Petitioners,

v.

Danielle SANTOMENNO, for the use and benefit of the JOHN HANCOCK TRUST and the John Hancock Funds II; Karen Poley and Barbara Poley, for the use and benefit of the John Hancock Funds II; Danielle Santomenno, Karen Poley and Barbara Poley individually and on behalf of Employee Retirement Income Security Act of 1974, as amended ("ERISA"), employee benefit plans that held, or continue to hold, group variable annuity contracts issued/sold by John Hancock Life Insurance Life Insurance Company (U.S.A.), and Participants and beneficiaries of all such ERISA covered employee benefit plans; and Danielle Santomenno individually and on behalf of any person or entity that is a party to, or has acquired rights under, an individual or group variable annuity contract that was issued/sold by John Hancock Life Insurance Company (U.S.A.) where the underlying investment was a John Hancock proprietary fund contained in the John Hancock Trust,
Respondents.

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

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the Petition for Writ of Certiorari, pursuant to SUP. CT. R. 29.6, remains accurate.

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INTRODUCTION

Respondents present no meaningful reason to deny the Petition. They cannot and do not deny that, as a result of the decision below, an ERISA[1] plan participant in the Third Circuit can sue an alleged fiduciary service provider on behalf of a plan without first presenting the claim to the administrator or trustee who hired the service provider, but could not do so in the Eleventh Circuit. Respondents assert instead that the Court should not be troubled by this disparity—even where it results in conflicting regulation of the very same plan and service provider—because the Eleventh and Third Circuits employed different analyses in reaching their contradictory outcomes. But a situation in which there are divergent results for the same claims on the same facts presents the precise type of case that warrants this Court's review.

Respondents' additional arguments, as to the merits, are better served for a subsequent stage of proceedings. To the extent those merits arguments are relevant here, they further reflect the importance of the issues that counsel in favor of the Court's review.

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[1] Employee Retirement Income Security Act of 1974, as amended.

ARGUMENT

I. WHETHER A PARTICIPANT MUST PRESENT A PLAN'S CLAIM TO THE ADMINISTRATOR OR TRUSTEE BEFORE SUING A SERVICE PROVIDER ON BEHALF OF A PLAN IS THE SUBJECT OF A SPLIT OF AUTHORITY THAT WARRANTS THE COURT'S REVIEW

Respondents assert that no split of authority exists between the Third Circuit and the Eleventh Circuit because the latter's decision in *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325 (11th Cir. 2006), only reached its result by considering a different legal theory than did the former in the decision below. Brief in Opposition ("Opp.") 13-19. In making this argument, Respondents elevate form over substance. Contrary to their argument, a direct and clear split exists.

Respondents do not contest that the facts of *Bickley* and this case are indistinguishable. Participants in both cases asserted 29 U.S.C. § 1132(a)(2) and (3) breach of ERISA fiduciary duty claims on behalf of their plans against third party service providers hired by the plan administrator or trustee. In each case, participants challenged the fees charged by the service providers, who were alleged to be plan fiduciaries. Respondents do not contest that both courts addressed the same ultimate legal question: Whether participants must first present the plan's claim to the plan administrator or trustee before bringing suit. And the plan administrator and trustees were not parties in either case.

Respondents' principal contention in opposition to the Petition is that the Eleventh Circuit characterized

its pre-suit condition as a requirement that the participant exhaust her plan's administrative remedies before bringing suit, whereas the Third Circuit—which had previously split with the Eleventh Circuit as to whether exhaustion applies to breach of fiduciary suits—analyzed whether the pre-suit demand requirement of trust law applied.

Presented with the same legal question interpreting precisely the same statutory language—whether a participant could sue under 29 U.S.C. § 1132(a)(2) and (3) without precondition—the courts reached different answers. This is the very question that Chief Justice Roberts explained was left open after *LaRue v. DeWolff, Boberg & Assoc., Inc.*, 552 U.S. 248, 253 n.3 (2008). *See* Petition for Writ of Certiorari ("Pet.") 16. In *Bickley*, the Eleventh Circuit held that the participant could not proceed with the plan's claim without allowing the plan administrator to "receive and review" the claim and "respond" before suit was filed. 461 F.3d at 1329-30. In *Santomenno*, the Third Circuit allowed the participants to proceed with their suit against Petitioners without giving the plan trustee any opportunity to receive, review, or respond to the claim.

Consequently, in the Third Circuit, a participant can sue a service provider under ERISA on behalf of the plan without first presenting the claim to the plan administrator or trustee who is vested with decision-making authority for the plan. In the Eleventh Circuit, she cannot.[2] And contrary to Respondents' argument,

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[2] In light of the Eleventh Circuit's ruling, Respondents' assertion in their Opp. at 18 that "no Circuit Court has inferred [a] procedural condition" to suit under 29 U.S.C. § 1132(a)(2) or (3) is

the Eleventh Circuit—although using the semantics "exhaustion" to reach its conclusion—utilized the very underlying rational rejected by the Third Circuit, that the person chosen by an employer to be responsible for a plan should be allowed "an opportunity to . . . determine, as trustee of the Plan, whether it is in the best interest of the Plan to pursue such [claim]." 461 F.3d at 1330. Because "two courts have decided the same legal issue in opposite ways," EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE 242 (9th ed. 2007), the Petition should be granted—particularly where the statute at issue was designed specifically to create uniformity of plan operation, not inconsistency of results. Pet. 3-4.

Respondents further assert that the Petition should not be granted because it raises a "new argument." Opp. 19-21. That is simply incorrect. Petitioners extensively cited the district court decision in *Bickley* below. *See*, *e.g.*, Br. of Defs.-Appellees 12, 30-31, 35, October 24, 2011. At oral argument, Petitioners again

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plainly wrong. Also, contrary to Respondents' argument at Opp. 8, it is of no import that the Eleventh Circuit tied its holding to specific administrative remedies available under the plan at issue. Respondents cannot support their bald assertion that remedies within their plans were "non-existent." Opp. 8. Respondents did not plead any facts concerning the terms of their plans and did not attach the plan documents to their pleading, as the district court observed. Pet. App. 28a. The plan language that the Eleventh Circuit found compelling—"[i]f you have questions about your plan, you should contact the Plan Administrator"—is required to be in every plan's summary plan description, so one would expect that Respondents' plans (or plan summaries) contained that provision or one like it. 29 C.F.R. § 2520.102-3(t)(2) (2010).

specifically pointed out that *Bickley* precluded a participant from suing under these facts:

> COURT: Well, is there a past decision on precisely this issue?
>
> MR. FLECKNER: There isn't, but if you look —well, the *Bickley* case I think actually addresses this specifically and says that a participant cannot sue a service provider even one who's alleged to be a fiduciary.

Reply App. 2a-3a.[3]

II. RESPONDENTS' MERITS ARGUMENTS PROVIDE NO BASIS TO DENY THE PETITION AND ONLY HIGHLIGHT THE IMPORTANCE OF THE QUESTION PRESENTED

None of Respondents' merits arguments provides a basis for the Court to ignore the current conflict between the Third and Eleventh Circuits on a question with broad implications for ERISA plans and plan

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[3] Respondents also mischaracterize the holding of *Bickley*. Opp. 5. The *Bickley* district court held, among other things, that given the "breadth of discretion concerning whether or not to bring a lawsuit" afforded to plan administrators and trustees, a participant "lacks derivative standing to" sue under ERISA on behalf of a plan where the participant did not first raise the claim to the plan administrator or trustee. *Bickley v. Caremark RX, Inc.*, 361 F. Supp. 2d 1317, 1328-29 (N.D. Ala. 2004). Further, *Bickley*'s separate discussion of FED. R. CIV. P. 23.1, identified at Opp. 23-25, is not relevant here because Petitioners do not, and have not, argued that FED. R. CIV. P. 23.1 applies to ERISA suits; rather, they have asserted that independent trust law principles—long incorporated under ERISA—require pre-suit demand under these facts.

participants, administrators, trustees, and service providers. Any examination of the merits at this stage confirms that the Petition presents an important issue concerning whether courts may ignore the statutory role of plan trustees to act in the interests of the entire plan.

Respondents myopically focus on only a few portions of the statute's remedial section. They ignore entirely the statutory provisions giving trustees the central role in plan decision-making. The statute vests trustees with "exclusive authority and discretion" with respect to plan assets.[4] It provides that trustee responsibilities —unlike other fiduciary responsibilities—are non-delegable.[5] Trustees, unlike participants, are required to act prudently and in the best interests of the entire plan. 29 U.S.C. § 1104(a). Trustees are required to take action to enforce the plan's rights to all funds due it. *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp.*, 472 U.S. 559, 571 (1985).[6] "[E]stablishing

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[4] 29 U.S.C. § 1103(a).

[5] 29 U.S.C. § 1105(c)(1), (3).

[6] *See also McMahon v. McDowell*, 794 F.2d 100, 112 (3d Cir. 1986) ("trustees have a duty to investigate [potential claims] . . . and, if in the best interests of the plan participants, to bring suit"); *Harris v. Koenig*, 602 F. Supp. 2d 39, 54-55 (D.D.C. 2009) (duties of loyalty and prudence under 29 U.S.C. § 1104(a) include investigating potential claims against a third party and bringing suit if in the best interests of the plan). Given this preexisting obligation on trustees to sue if warranted, Respondents' assertion at Opp. 26 that a pre-suit demand requirement would burden employers who offer employee benefits plans by imposing litigation responsibilities on them is without merit. In any event, employers who offer

[these] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans" is among the statute's stated purposes. 29 U.S.C. § 1001(b).

Respondents, and the court below, have made no attempt to harmonize these fiduciary provisions with their view that participants should have unfettered litigation authority on behalf of plans.[7] Simply pointing to the absence of an explicit pre-suit demand requirement as "an end run around [29 U.S.C. § 1103(a)]"[8] fails to refute that the statute contemplates that litigation authority is vested with trustees. Circuit courts have unanimously held that preconditions to ERISA suits—even those not explicitly stated in the statute—are appropriate where they give meaning to ERISA's broader objectives. *See* Pet. 16 n.8 (citing circuit court decisions requiring exhaustion of administrative remedies prior to suit over benefit claims).

Respondents' view that they may usurp the trustees' control of litigation on behalf of a plan is also entirely impractical. Unlike trustees and other fiduciaries, participants are bound by no duties of care

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benefit plans are not authorized to bring fiduciary claims under 29 U.S.C. § 1132(a)(2) and (3), although trustees are.

[7] Respondents' citation to 29 U.S.C. § 1132(g)(2) sheds no light on the issue. Section 1132(g)(2) allows specific remedies for suits to redress delinquent contributions to a multi-employer plan.

[8] *DiFelice v. U.S. Airways, Inc.*, 397 F. Supp. 2d 735, 757 (E.D. Va. 2005) (citing, among others, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

or loyalty to the plan or other participants. They have no statutory constraints on acting in their own self-interest, even when their interests diverge from those of the plan they are purporting to represent. *See, e.g.*, *Ellis v. Metro. Life Ins. Co.*, 126 F.3d 228, 234 (4th Cir. 1997). Unsurprisingly, then, plan participants generally are prohibited from resolving plan claims on their own. *See, e.g.*, *Bowles v. Reade*, 198 F.3d 752, 756, 760 (9th Cir. 1999) (participant could not settle claims on behalf of plans); *In re Williams Cos. ERISA Litig.*, 231 F.R.D. 416, 423 (N.D. Okla. 2005) ("claims here are brought on behalf of the Plan, and a participant cannot release the Plan's claims, as a matter of law"). Respondents fail to account for how they will overcome such obstacles if they are allowed to circumvent the trustees in pursuing their plans' claims.

Respondents also are incorrect in arguing that, just because a *trustee* can be sued without precondition under trust law, so, too, can *any* fiduciary be sued under ERISA without precondition. Opp. 28-29. Trust law distinguishes between suits against trustees, which do not require preconditions, and suits against non-trustee fiduciaries, which require preconditions. *See, e.g.*, *Murray v. U.S. Bank Trust Nat'l Ass'n*, 365 F.3d 1284, 1286, 1291 (11th Cir. 2004) (beneficiaries may not initiate breach of fiduciary duty suit against "trust fiduciary defendants" before giving trustee opportunity to sue).

There is also no basis for Respondents' assertion at Opp. 27 that a pre-suit demand requirement would deny participants access to the courts. Petitioners do not dispute that ERISA authorizes participants to sue. However, because plan administrators and trustees are

uniquely *obligated* to act in the interest of the entire plan—and trustees have exclusive control over plan assets such as choses in action—reading the statute as a whole counsels in favor of applying the trust law rule that affords the trustee the opportunity to receive and evaluate the purported plan claim before it is filed. As with the universally-applied requirement to exhaust administrative remedies for benefit claims under 29 U.S.C. § 1132(a)(1)(B), a participant may sue a service provider hired by a trustee for breach of fiduciary duty if, upon satisfaction of the procedural condition, the trustee or administrator wrongly declines to bring the claim. Suits directly against the trustee would not require any pre-suit condition at all under traditional trust law. 4 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 24.3.1 at 1664-65 (5th ed. 2008).

Respondents are also incorrect that the trust law principle adopted by the district court here would constrain the ability of the Secretary of Labor to bring enforcement suits against breaching fiduciaries. Opp. 19. The statute vests plan trustees and administrators with fiduciary duties including enforcement obligations with respect to *their plan*. Employer control over the private operation of these voluntary plans is enhanced by continued deference to the authority of the administrators and trustees employees appoint. *See* Pet. 26-27. Consequently, private suits to enforce plan interests would require precondition before they could be asserted by participants. The Secretary operates under no such constraints. The Secretary may "seek[] to vindicate a public interest that is broader than the interests of [private] plaintiffs." *Donovan v. Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983).

"[Private] plaintiffs [are] interested in recouping only their *own* economic losses; the Secretary seeks to determine the legality of specific conduct and to prevent those who have engaged in illegal activity from causing loss to any future ERISA plan participant." *Id.* at 1462-63. Prosecution of the public interests by the Department of Labor would not be affected by adherence to the trust law rule that regulates the private operation of trusts.

Respondents' arguments are informed by the same misapplication of law reflected in the decision below. Given the strong national interest in the uniform (and correct) operation of retirement and other employee benefit plans, and the importance of properly interpreting federal statutes in their entirety to effectuate congressional objectives, the Petition should be granted.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition for a Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 11-2520

[Dated February 9, 2012]

DANIELLE SANTOMENNO,	)
et al.,	)
	)
Appellants,	)
	)
v.	)
	)
JOHN HANCOCK LIFE	)
INSURANCE COMPANY,	)
et al.,	)
	)
Appellees.	)
	)

21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

February 9, 2012

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE DOLORES K. SLOVITER UNITED STATES THIRD CIRCUIT CHIEF JUDGE and THE HONORABLE THOMAS I. VANASKIE UNITED STATES THIRD CIRCUIT JUDGE and THE HONORABLE LOUIS H. POLLAK UNITED STATES DISTRICT COURT SENIOR JUDGE

* * *

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THE COURT: Well, is there a past decision on precisely this issue?

MR. FLECKNER: There isn't, but if you look -- well, the Bickley case I think actually addresses this specifically and says that a participant cannot sue a

service provider even one who's alleged to be a fiduciary. I'm not aware of the Department of Labor submitting a brief in the Bickley case.

We believe, Your Honor, that the Department of Labor as we note in our brief has said in the past that a plan asset includes a chosen action, a suit, and consistent with that view trust law says even suits against fiduciary, and we cite these cases at Page 14 and 15, even under the common law of trust going back for centuries a suit against a third party can't be brought without the trustee's involvement and that's been interpreted in a number of courts that we cite as including suits against fiduciaries. So we believe --

* * *