No. 13-536

IN THE

Supreme Court of the United States

ROBERT LEIMKUEHLER, AS TRUSTEE
OF THE LEIMKUEHLER, INC. PROFIT SHARING PLAN
AND ALL OTHERS SIMILARLY SITUATED,
Petitioner,

v.

AMERICAN UNITED LIFE INSURANCE COMPANY,
Respondent.

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

REPLY BRIEF FOR PETITIONER

STEPHEN M. TILLERY
Counsel of Record
ROBERT L. KING
KOREIN TILLERY LLC
505 N. 7th Street
Suite 3600
St. Louis, MO 63101
(314) 241-4844
stillery@koreintillery.com

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The petition demonstrates that the circuits are deeply divided on a fundamental issue of ERISA law never before addressed by this Court: whether the exercise of control over a retirement plan's assets is alone sufficient to confer fiduciary status. Applying the plain language of ERISA's text,[1] six circuits hold that a person who exercises "*any* control" over a plan's assets is, without more, a plan fiduciary. The decision below, by contrast, holds that a person who exercises control over plan assets is a fiduciary "only if" he is also alleged to have "mismanaged" those assets. It effectively rewrites the statutory definition to require an "abuse," not an "exercise," of authority or control of plan assets. Respondent's attempts to minimize the decision's importance and to deny the circuit split are unpersuasive.

According to respondent, "the Seventh Circuit did *not* hold, as plaintiff contends, that 'a person who exercises some authority or control over the assets of a plan is a fiduciary with respect to that plan only if he is alleged to have "mismanaged" the plan's assets.'" Opp. 14. Respondent contends (at 1, 15) the decision was merely a straightforward application of the *Pegram* rule that a service provider's non-fiduciary acts cannot give rise to liability for a fiduciary violation. That is a purely revisionist interpretation. The Seventh Circuit expressly cast its holding in terms of fiduciary status:

> … AUL's control over the separate account *can support a finding of fiduciary status only if* Leimkuehler's claims for breach of fiduciary duty *arise from AUL's handling of the separate account*.

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[1] "[A] person is a fiduciary with respect to a plan to the extent (i) he … exercises any authority or control respecting management or disposition of its assets." ERISA § 3(21)(A)(i).

> They do not. *Leimkuehler does not allege that AUL in any way mismanaged the separate account* .... Because the actions Leimkuehler complains of do not implicate AUL's control over the separate account, *the separate account does not render AUL a fiduciary* under the circumstances of this case.

Pet. App. 17a (emphases added). The Seventh Circuit's addition of an extratextual "mismanagement" element to the statutory definition creates a split with every other circuit to have addressed the issue.

In addition, rather than constituting a faithful application of this Court's holding in *Pegram v. Herdrich*, 530 U.S. 211 (2000), the Seventh Circuit's decision effectively turns the *Pegram* analysis on its head with respect to the only aspect of that case that is germane here. *Pegram* teaches that "the threshold question *is not* whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest." *Id.* at 226 (emphasis added). Rather, the threshold question is "*whether that person was acting as a fiduciary* when taking the action subject to complaint." *Id.* (emphasis added). Thus, under *Pegram*, the initial question the Seventh Circuit should have addressed is whether AUL's undisputed control of the Plan's assets rendered AUL a fiduciary at all, and not whether AUL was alleged to have "mismanaged" the plan assets it controlled.

Respondent also contends that recent Department of Labor regulations requiring the disclosure of revenue sharing practices somehow diminishes the importance of the question presented, although respondent fails to explain how that new requirement bears on whether control of plan assets, without more, gives rise to fiduciary status. In any event, the

United States has a significant interest in the proper construction of ERISA. Accordingly, if any doubt exists about the agency's views, then this Court should seek the views of the Solicitor General, especially given the Secretary's participation in proceedings below.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

Respondent argues that the circuits' standards for fiduciary status "are in harmony," and that other circuits found defendants "to be fiduciaries only when the alleged breach was directly related to the defendant's exercise over plan assets." Opp. 16. In the other circuits, however, the mere exercise of control over plan assets conferred fiduciary status. No other circuit has ever hinted that a *misuse* of that control is necessary to support a finding of fiduciary status. By conflating the threshold issue of fiduciary status with the question of a fiduciary breach, the court of appeals and respondent misconstrue ERISA's text and misinterpret other circuits' straightforward application of that text.

For instance, respondent misreads *Chao v. Day*, 436 F.3d 234 (D.C. Cir. 2006), as basing its finding of fiduciary status on the defendant's embezzlement of plan assets. But it was not his acts of thievery that led to the D.C. Circuit's conclusion that he was a fiduciary, but rather his "undeniabl[e] … 'authority or control' over the 'disposition' of the plans' assets." *Id.* at 236. "The plans sent to Day checks made payable to him. Day then deposited the plans' funds into his account. Day was obligated to 'control' the 'disposition' of those funds for paying the plans' insurance premiums." *Id.* "[I]n order to qualify as a 'fiduciary' with respect to a plan's 'assets,' a person must simply

exercise '*any* authority or control' over their management or disposition." *Id.* (citing 29 U.S.C. § 1002(21)(A)(i)).

Rather than addressing this reasoning, respondent seizes on one sentence in which the D.C. Circuit stated that its holding did not "extend fiduciary status to every person who exercises 'mere possession, or custody' over the plans' assets." *Id.* at 237. Yet respondent ignores that it was the entirely appropriate act of depositing plan checks made payable to Day into Day's own account that gave Day the necessary "control" to make him a fiduciary and thus "far more than a mere custodian." *Id.* at 238. Day's "thievery" constituted his *fiduciary breach*, not an indispensible element of his *fiduciary status*. "On the facts presented here, we hold simply that Day exercised sufficient 'authority or control' over the 'disposition' of the plans' assets to qualify as a 'fiduciary' under the disposition clause." *Id.*

In spite of respondent's indistinguishable control of plan assets in this case, the Seventh Circuit reached the opposite result here. The court of appeals expressly acknowledged that AUL receives and deposits millions of dollars in plan assets into an account "that AUL owns and controls," yet the court nevertheless concluded in irreconcilable conflict with *Day* that "AUL's control over the separate account … does not render AUL a fiduciary." Pet. App. 17a.

Likewise, the Eighth Circuit holds that ERISA "imposes fiduciary duties only if one exercises *discretionary* authority or control over plan *management,* but imposes those duties *whenever* one deals with plan *assets.* This distinction is not accidental—it reflects the high standard of care trust law imposes upon those who handle money or other assets on behalf of another." *FirsTier Bank, N.A. v. Zeller*, 16 F.3d 907, 911 (8th Cir. 1994). Under *FirsTier*,

even "an ERISA trustee who deals with plan assets in accordance with proper directions of another fiduciary is not relieved of its fiduciary duties to conform to the prudent man standard of care; to attempt to remedy known breaches of duty by other fiduciaries; *and to avoid prohibited transactions*. *Id.* at 911 (citations omitted; emphasis added). Respondent does not address any of this reasoning in *FirsTier* and thus fails to overcome the patent conflict between the Eighth Circuit's and the Seventh Circuit's holdings.

Respondent also dismisses the Ninth and Tenth Circuits' holdings in *Coldesina* and *IT Corp.* as involving plan administrators who exercised their own judgment in disposing of plan assets in inappropriate ways. Opp. 19-21. Both circuits, however, held that control of plan assets, without more, gives rise to fiduciary status. As the Ninth Circuit explained:

> There is a second reason, which does not depend on whether General American had discretion, why it may be a fiduciary. The record as it stands shows that General American controlled the money in the plan's bank account. The statute treats control over the cash differently from control over administration. The statutory qualification, that control must be "discretionary" for it to establish fiduciary status, applies to the first and third phrases, management and administration but not to the second, assets. "Any" control over disposition of plan money makes the person who has the control a fiduciary[.]

IT Corp. v. Gen. Am. Life Ins. Co., 107 F.3d 1415, 1421 (9th Cir. 1997). General American was allegedly authorized to issue checks on a plan bank account, meaning "that as a practical matter, a substantial amount of money would be under the control of Gen-

eral American, in the form of a bank account which it could deplete by writing checks." *Id*. If true, General American would be a fiduciary because "[t]he right to write checks on plan funds is 'authority or control respecting management or disposition of its assets.'" *Id*. "The words of the ERISA statute, and its purpose of assuring that people who have practical control over an ERISA plan's money have fiduciary responsibility to the plan's beneficiaries, require that a person with authority to direct payment of a plan's money be deemed a fiduciary." *Id*.

In *David P. Coldesina, D.D.S. v. Estate of Simper*, 407 F.3d 1126 (10th Cir. 2005), the facts were "even more compelling" than *IT Corp*. "because the account at issue belonged to the accountant defendants and not to the plan itself"—just like in *Leimkuehler*. *Id*. at 1134.

> Mr. Madsen received plan contribution funds from the plan, which he deposited into his business account, and then wrote checks on behalf of the plan for the amount of the contribution. This arrangement was initially set up to facilitate better recordkeeping; however, the practical reality is that Mr. Madsen had total control over the plan's money while it was in his account.

Id. at 1133. "Indeed, this practical reality is precisely why control over assets is treated differently than control over management." *Id*.

> [H]ere, where the plan was not affiliated with the account and had no authority to oversee its activities, it depended upon Mr. Madsen to ensure the funds were handled properly. Indeed,

> to say that the accountant defendants[2] did not control the money while it was in their account is to say that no one had control during that time.

Id. at 1134. The Tenth Circuit held that "the accountant defendants were fiduciaries by virtue of the parties' banking arrangement," *id.* at 1135, which gave Madsen "total control over the plan's money while it was in his account"—just like in *Leimkuehler*. *Id.* at 1133.

Similarly, the Sixth Circuit found "[t]he contractual arrangement" in *Briscoe v. Fine*, 444 F.3d 478 (6th Cir. 2006), "strikingly similar" to that in *IT Corp*. *Id.* at 493. "In both instances, a company hired a third-party administrator to perform ministerial tasks necessary to process claims, and also to pay those claims from a bank account established and funded by the company." *Id.* "Like General American, PHP had a 'substantial amount of money' under its control at any given time, and exercised that control by depositing direct payments from COBRA participants, writing checks to cover approved claims, and allotting to itself a monthly administrative fee." *Id.* The Sixth Circuit thus held that "[b]ecause PHP exercised control over plan assets, it qualifies as an ERISA fiduciary to the extent that it did so." *Id.* at 494.

Finally, the Second Circuit held "that an individual also may be an ERISA fiduciary by, as just stated, 'exercis[ing] *any* authority *or* control respecting management *or* disposition of [plan] assets,'" a fact which "the district court overlooked." *LoPresti v.*

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[2] The court referred to Madsen and his solely-owned accounting firm collectively as the "accountant defendants." 407 F.3d at 1129-30.

Terwilliger, 126 F.3d 34, 40 (2d Cir. 1997) (emphasis in original). In conflict with the decision below, the court held that one of the defendants was a fiduciary because he exercised such control when he "signed checks on [an] account" in which he had "commingl[ed] … plan assets with the Company's general assets." *Id*. The Second Circuit held that defendant's "role in determining which bills to pay" was of "*equal* import" to his commingling and check writing, rather than a *necessary* element of his fiduciary status. *Id*. (emphasis added).[3]

Respondent's attempts to deny the existence of a circuit split are wholly unconvincing. The well-defined conflict created by the Seventh Circuit's decision warrants this Court's review.

II. *LEIMKUEHLER* CONFLICTS WITH DECISIONS OF THIS COURT

In *Pegram v. Herdrich*, 530 U.S. 211 (2000), the Court articulated only one principle germane here, and the Seventh Circuit misapplied it: "the threshold question is not whether the actions of some person employed to provide services under a plan adversely affected a plan beneficiary's interest, *but whether that person was acting as a fiduciary* (that is, was performing a fiduciary function) when taking

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[3] Respondent sees significance in the fact that another defendant and co-owner stood "in a different position," because the co-owner had "'no responsibility for determining which of the company's creditors would be paid or in what order.'" 126 F.3d at 40. The Second Circuit, however, actually offered a more complete explanation: "Even though he was authorized to sign checks on the Company's account and he had some general knowledge that deductions were made from employees' wages, as the district court found, he was 'primarily a 'production' person with 'no responsibility for determining which of the company's creditors would be paid or in what order." *Id*.

the action subject to complaint."[4] *Id.* at 226. The Seventh Circuit erroneously conflated those inquiries.

That distortion of the fiduciary status analysis also undercuts this Court's decisions holding that a fiduciary is "categorically" barred from engaging in the "prohibited transactions" enumerated in ERISA § 406. *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 241-42 (2000); *Lockheed Corp. v. Spink*, 517 U.S. 882, 888 (1996); *Commissioner v. Keystone Consol. Indus., Inc.,* 508 U.S. 152, 160 (1993). "[F]iduciaries … must either avoid the transactions described in Section 406(b) or cease serving in their capacity as fiduciaries, no matter how sincerely they may believe that such transactions will benefit the plan" because "fiduciary obligations may not be turned on and off like running water." *Lowen v. Tower Asset Mgmt., Inc.*, 829 F.2d 1209, 1213, 1219 (2d Cir. 1987).

Under the Seventh Circuit's analysis, however, a person who controls a plan's assets is not "categorically" barred from engaging in a prohibited transaction; instead, he will *only* be barred from such transactions if he has also engaged in some other, additional "mismanagement" of plan assets. Indeed, that is precisely what has happened here. Petitioner alleges that AUL's revenue sharing practices violated ERISA § 406(b). Pet. 8-10, 23; Pet. App. 78a-81a. The court of appeals never reached that issue, as a result

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[4] *Pegram* did not involve the "control of assets" clause at issue here. *Pegram* involved a claim that an HMO was a fiduciary as a result of its mixed eligibility and treatment decisions, "far from" the concerns about "fiduciaries' financial decisions, focusing on pension plans" underlying Congress's enactment of ERISA. *Pegram v. Herdrich*, 530 U.S. 211, 232 (2000). The holding in *Pegram* was "that mixed eligibility decisions by HMO physicians are not fiduciary decisions under ERISA," *id.* at 237, has no application here.

of its erroneous holding that AUL's undisputed control of plan assets in AUL's "separate account" did not make AUL a fiduciary.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THIS IMPORTANT QUESTION

Respondent erroneously contends (at 23-24) that this case is an inappropriate vehicle to decide the question presented because the Department of Labor has issued regulations requiring service providers to disclose their revenue sharing practices, making any decision unlikely to affect anyone than the parties to this case. But respondent ignores the fact that the Seventh Circuit's fiduciary status holding does not depend in the slightest on AUL's undisclosed revenue sharing practices. Moreover, the fiduciary status decisions discussed by the parties stretch back 20 years and demonstrate that the proper interpretation of "fiduciary" is not only a recurring issue, but one that recurs in a wide range of non-revenue sharing contexts.

Accordingly, and particularly in view of the Secretary's *amicus* participation below, the Court should consider calling for the views of the Solicitor General, if it needs clarification on the agency's position before granting certiorari.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN M. TILLERY
Counsel of Record
ROBERT L. KING
KOREIN TILLERY LLC
505 N. 7th Street
Suite 3600
St. Louis, MO 63101
(314) 241-4844
stillery@koreintillery.com

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