No. 14-152

In the Supreme Court of the United States

BRIAN SEXTON,

Petitioner,

v.

PANEL PROCESSING, INC., ET AL.,

Respondents.

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

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an unsolicited email that asserts violations of the Employee Retirement Income Security Act, but neither requests information nor prompts an investigation, amounts to "giv[ing] information * * * in any inquiry" within the meaning of Section 510 of the ERISA, 29 U.S.C. § 1140.

RULE 29.6 STATEMENT

Respondent Panel Processing, Inc. is an employee-owned company with no parent corporation. Panel Processing of Coldwater, Inc. is a wholly-owned subsidiary of Panel Processing, Inc. No publicly held corporation owns 10 percent or more of the outstanding stock of either company.

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BRIEF IN OPPOSITION

Congress has enacted nearly forty anti-retaliation provisions to protect whistleblowers from reprisals by their employers. Such provisions typically include two distinct clauses: an "opposition clause" that protects employees from retaliation for opposing, reporting, or complaining about unlawful practices; and a "participation clause" that protects employees from retaliation for participating, testifying, or giving information in inquiries, proceedings, or hearings. *Crawford* v. *Metro. Gov't of Nashville and Davidson Cty.*, 555 U.S. 271, 274 (2009). The Employee Retirement Income Security Act's anti-retaliation provision is unusual in that it includes only a participation clause. ERISA § 510, 29 U.S.C. § 1140. The question presented here is whether ERISA § 510 should be interpreted to protect unsolicited complaints despite the omission of an opposition clause.

In this case, petitioner Brian Sexton sued his employer, respondent Panel Processing, for wrongful discharge.[1] Six months prior to his dismissal, petitioner sent an unsolicited email to respondent's chief executive officer, asserting violations of ERISA and threatening to report the alleged violations to state and federal authorities. But petitioner did not follow through on his threat. Nor did he pursue the matter further within the company. For its part, respondent

[1] Because respondent Panel Processing of Coldwater, Inc. is a wholly-owned subsidiary of respondent Panel Processing, Inc., and because the separateness of the two companies is not material to the question presented, we refer to the two companies collectively, for simplicity's sake, as "respondent" or "Panel Processing."

simply ignored the message. Six months later, petitioner's employment was terminated.

The district court rejected petitioner's anti-retaliation claim, explaining that ERISA § 510 protects only participation in inquiries or proceedings, and not the filings of a complaint. With Judge Sutton writing for the majority, the Sixth Circuit affirmed.

Petitioner now seeks further review before this Court, claiming that there is a division of authority among the courts of appeals on the question whether his unsolicited email, which neither requested information nor prompted an investigation, amounted to "giv[ing] information * * * in any inquiry" within the meaning of ERISA § 510. In petitioner's view, the question is important and recurring, and this is a clean vehicle for addressing it.

In fact, the petition presents no sound basis for granting review. Contrary to petitioner's argument (Pet. 13), the Sixth Circuit's decision below did not deepen a circuit split—outside of dictum, only the Third and Fourth Circuits have addressed the question presented on similar facts, and both arrived at the same result as the Sixth Circuit below. And the question presented is of exceedingly narrow importance—it does not arise frequently, and because ERISA's anti-retaliation provision is unusually narrow, the holding below will have no broader implications for other statutes. Finally, the lower court carefully examined the plain language of Section 510, harmonized it with the scores of other anti-retaliation provisions throughout the U.S. Code, and provided compelling reasons for affirming. Against this background, further review is not warranted.

STATEMENT

1. This case concerns ERISA § 510, 29 U.S.C. § 1140, the Act's anti-retaliation provision. "Congress has enacted roughly forty anti-retaliation laws," most of which expressly protect not only "employees who participate, testify or give information in inquiries, investigations, proceedings or hearings," but separately also "employees who oppose, report or complain about unlawful practices." Pet. App. 6a-7a. According to this Court's shorthand, the first kind of protection is called a "participation clause," and the second kind is called an "opposition clause." *Crawford*, 555 U.S. at 274.

Unlike the substantial majority of anti-retaliation provisions found throughout the U.S. Code (Pet. App. 7a), Section 510 of ERISA lacks an opposition clause; it includes only a participation clause. That clause provides, in relevant part, that an employer may not retaliate against an employee "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. Petitioner served as the general manager of respondent's Coldwater, Michigan factory and, in 2003, was appointed to the company's board of directors. *Id*. at 47a. Some time later, he was appointed a trustee of respondent's employee stock ownership program, or ESOP. An ESOP is an ERISA-protected pension plan that invests primarily in the shares of the employer's stock. See Pet. App. 47a n.4.

Respondent's corporate bylaws call for the selection of directors by general election of the outstanding shares of the company's voting stock. Pet. App. 49a. At the 2011 shareholder meeting, two of seven

director positions were held open for election. *Id.* at 51a. Participants in the ESOP were provided with a ballot indicating that the company's board of directors had nominated two individuals to fill the open seats. *Id.* at 51a-52a. At the same time, two other employees mounted a write-in campaign; not satisfied with the board's nominees, petitioner supported the write-in campaign. *Id.* at 53a-54a.

On Friday, April 29, 2011, before the shareholder meeting took place, the board of directors held a meeting with all seven then-sitting directors present. Pet. App. 54a. There is no dispute that petitioner was removed from both the ESOP committee and the board of directors at that meeting. See Pet. App. 3a, 54a-55a; D. Ct. Dkt. 13, at PageID 162.

Shortly after the board meeting in which petitioner was removed from his positions on the board of directors and ESOP committee, the shareholder meeting and election took place. Pet. App. 55a. Although the write-in candidates received more votes than the board's nominees, the board refused to seat the write-in candidates, citing the company's bylaws. *Ibid.* See also *id.* at 2a-3a.

The following Monday, May 2, 2011, petitioner sent an email to respondent's chief executive officer, Eric Smith, threatening to report the board's actions to the U.S. Department of Labor and the Michigan Department of Licensing and Regulatory Affairs. Pet. App. 3a, 55a-56a. Petitioner's email did not request information from Smith or anyone else, and neither Smith nor anyone else from Panel Processing responded to the email. *Ibid.* Petitioner did not follow through with his threat to contact government authorities. *Id.* at 3a, 56a-57a.

Nearly six months later, respondent terminated petitioner's employment. Pet. App. 3a, 57a.

3. Petitioner sued respondent in state court, alleging violations of the Michigan Whistleblowers' Protection Act and breach of contract. Pet. App. 3a. With respect to the whistleblower claim, petitioner alleged that respondent fired him because—although petitioner's threatening email had been sent six months earlier with no intervening threats or other developments—respondent allegedly believed that petitioner "was about to report a violation or suspected violation of state or federal law." D. Ct. Dkt. 1-2, at PageID10 ¶ 13.

Invoking the doctrine of complete preemption, respondent removed the suit to the District Court for the Eastern District of Michigan. *Id*. at 3a-4a.[2]

The district court granted summary judgment to respondent. Pet. App. 45a-81a. Construing petitioner's state-law whistleblower claim as an unlawful retaliation claim under ERISA § 510 (29 U.S.C. § 1140), the district court concluded that petitioner's email had not been given in a "proceeding" within the meaning of Section 510. Petitioner "had not initiated litigation at the time of his email," the court explained, and no other "judicial proceeding was [then] pending." Pet. App. 66a. Thus, the court concluded that petitioner's email "was not given in a 'proceeding.'" *Ibid*.

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[2] "Under th[e] so-called complete preemption doctrine, a plaintiff's state cause of action may be recast as a federal claim for relief, making its removal by the defendant proper on the basis of federal question jurisdiction." *Vaden* v. *Discover Bank*, 556 U.S. 49, 61 (2009) (internal quotation and alteration marks omitted).

"Nor," the district court continued, "was it given in an 'inquiry.'" Pet. App. 66a. "The ordinary meaning" of the term *inquiry* is "asking for information—not offering it." *Ibid.* Understood in this way, the "plain terms" of the statute "do[] not apply to [the giving of] unsolicited information" or "an isolated accusation." *Ibid.* Here, because petitioner's email was an unsolicited accusation of a violation that "neither refers to questions asked *of* [petitioner] nor to questions asked *by* [him]," it was not part of an "inquiry." *Id.* at 80a.

Having determined that petitioner's email was not part of a "proceeding" or "inquiry" within the meaning of Section 510, the district court granted summary judgment on petitioner's ERISA claim and declined to exercise supplemental jurisdiction over the remaining state law claims; it therefore dismissed the case in its entirety. Pet. App. 80a-81a.

The court of appeals affirmed. Pet. App. 1a-20a. Noting at the outset (*id.* at 5a) that "[n]o one claims that [petitioner] sent [his] email in the context of a 'proceeding,'" the court turned immediately to the question whether petitioner's email was in itself, or otherwise initiated, an inquiry.

Writing for the majority, Judge Sutton explained that the term *inquiry* may mean either an "official investigation" or simply "a question or request for information." *Id.* at 5a. But "[u]nder either definition, no inquiry occurred" here because petitioner "did not send the email in connection with an official investigation" and "did not send the email in response to a question or request for information." *Ibid.* The email was "nothing more than a complaint accompanied by a threat" that "neither asks nor answers a question." *Id.* at 6a. It therefore did not

amount to the giving of information in an inquiry. *Ibid.* A contrary decision, the court explained, would require both striking language out of the statute and adding new language in. *Id.* at 8a-10a.

The court added that it also "would parody the presumption against redundancy." Pet. App. 8a. Unlike "[m]ost anti-retaliation laws," the court noted, ERISA's anti-retaliation provision does not include an opposition clause. *Id.* at 6a-8a. To read ERISA's standalone participation clause as protecting oppositions and complaints nonetheless would make superfluous the express opposition clauses found elsewhere in the U.S. Code. *Id.* at 7a-8a.

Dispensing, seriatim, with the remaining arguments pressed in petitioner's favor—including those invoking purpose, policy, history, and deference—the Sixth Circuit concluded that Section 510's plain text cannot be interpreted to cover unsolicited complaints that do not prompt investigations. Pet. App. 10a-20a. And because ERISA's anti-retaliation provision is unusually narrow—because standalone participation clauses are a rarity in the Code—the court added that its "decision has few if any consequences beyond [ERISA § 510]." *Id.* at 20a.

Judge White dissented. Pet. App. 22a-44a. In her view, this Court's recent decisions interpreting the retaliation provisions of Title VII and the Fair Labor Standards Act "demonstrate the trend of [this] Court to interpret anti-retaliation provisions to afford broad protection of employees." *Id.* at 23a. Relying principally on a liberal interpretation and expansive reading of the statute, but without discussing the differences between the narrow ERISA anti-retaliation provision (which includes only a participation clause) and the broader anti-retaliation provisions of other

statutes (which include both participation and opposition clauses), Judge White "agree[d] with the Secretary [of Labor]," who had participated in the appeal as an *amicus curiae*, "that a complaint may, in context, be an inquiry," and that petitioner, in sending his email, was "inquiring whether the board would take action or Sexton would be required to do so." *Id.* at 43a.

REASONS FOR DENYING THE PETITION

The petition in this case presents the question whether an unsolicited email that complains about asserted violations of ERISA, but neither requests information nor prompts an investigation, amounts to "giv[ing] information * * * in any inquiry" within the meaning of Section 510 of the Act, 29 U.S.C. § 1140. Petitioner argues that there is a conflict among the circuits over that question (Pet. 9-13); the issue is a matter of significant practical importance (Pet. 14-16); and the decision below, answering the question in the negative, is inconsistent with the Court's precedents (Pet. 16-19).

None of those contentions holds up to scrutiny. The circuits are not in disagreement, the issue is not frequently litigated or independently important, and the Sixth Circuit's carefully-considered decision is entirely faithful to settled rules of statutory interpretation. The petition accordingly should be denied.

A. There is no circuit conflict

Petitioner begins by arguing (Pet. 8-9) that "there is a deep circuit split on the question presented" because "the Fifth, Seventh, and Ninth Circuits have held that section 510 protects employees who make unsolicited complaints to management." But as

the court below put it, the decisions of those other courts "offer less than advertised." Pet. App. 17a.

To begin with, the Seventh Circuit's decision in *George* v. *Junior Achievement of Central Indiana, Inc.*, 694 F.3d 812 (7th Cir. 2012), is factually distinguishable from this case. There, an employee made an unsolicited complaint that his employer had failed to deposit money owed to his retirement account. *Id.* at 813. Unlike in this case, however, an inquiry ensued: the employee himself followed up on his complaint by "ask[ing] (repeatedly) what would be done to remedy the situation," and the employer "responded * * * rather than ignoring" the complaint (*id.* at 817) by, among other things, "ask[ing] questions" of its own (*id.* at 815). It was on the basis of the parties' questions and "response[s]" that the Seventh Circuit concluded that the case "involved an 'inquiry'"; matters would have been different, the court observed, if the employer "had ignored" the employee's initial complaint. *Id.* at 817.

The decision below is entirely consistent with that reasoning. Unlike in *George*, petitioner's isolated email did not initiate an exchange of any kind. "Neither the chairman nor anyone else responded to the email," and after sending the email, petitioner himself "took no further action." Pet. App. 3a; see also *id.* at 5a-6a ("[E]ven after he sent the email, no one asked [petitioner] any questions about the subject of the email, and no investigation involving him ever occurred."). As for the email itself, it "neither asks nor answers a question." *Id.* at 6a. The facts of this case therefore bear no meaningful resemblance to those at issue in *George*, and there is no basis for thinking that petitioner would have obtained a different result in the Seventh Circuit.

Petitioner also cites the Ninth Circuit's decades-old decision in *Hashimoto* v. *Bank of Hawaii*, 999 F.2d 408 (9th Cir. 1993). See Pet. 11. The question presented in that case was whether the plaintiff's state-law whistleblower claim was preempted by ERISA, and, if so, whether it "should be recharacterized as an ERISA claim under 29 U.S.C. § 1140." *Hashimoto,* 999 F.2d at 409. The Ninth Circuit answered both questions affirmatively. *Id.* at 412. But that holding did not require the court to opine on the merits of the plaintiff's newly-recast ERISA claim. As the Fifth Circuit explained in a similar case, the preemption analysis turns on whether "the cause of action would conflict with [ERISA's] enforcement provisions," and not "on whether ERISA [actually] provides the remedy the plaintiff seeks." *Anderson* v. *Elec. Data Sys. Corp.*, 11 F.3d 1311, 1314 (5th Cir. 1994). The court's holding in *Hashimoto* therefore "does not cover the issue at hand." Pet. App. 18a.[3]

The Fifth Circuit's decision in *Anderson*—which, despite purportedly deepening the circuit split, receives just two passing citations in the petition (at 9, 11)—follows that same pattern. The Fifth Circuit's holding there was limited to its conclusion that the plaintiff's "state wrongful discharge cause of action * * * is preempted by ERISA, because the cause of action would conflict with [ERISA's] enforcement provisions." 11 F.3d at 1314. Yet the court recognized that a finding of preemption does not necessarily

[3] Tellingly, *Hashimoto* has been cited by the Ninth Circuit in just one subsequent case in the 21 years since it was decided, for a proposition wholly unrelated to question presented here. See *McBride* v. *PLM Int'l, Inc.*, 153 F.3d 972 (9th Cir. 1998), withdrawn and superseded, 179 F.3d 737 (9th Cir. 1999).

mean that ERISA provides a remedy; on the contrary, preemption "'may leave [the plaintiff] *without* a remedy.'" *Id.* at 1314 & n.4 (emphasis added). Thus the Fifth Circuit's "passing remark" (Pet. App. 17a) that Section 510 "addresses * * * discharges for providing information or testimony relating to ERISA" (11 F.3d at 1314) is, likewise, not a part of the holding in that case.

That leaves the Second, Third, and Fourth Circuits' respective decisions in *Nicolaou* v. *Horizon Media, Inc.*, 402 F.3d 325 (2d Cir. 2005) (per curiam), *Edwards* v. *A.H. Cornell & Son, Inc.*, 610 F.3d 217 (3d Cir. 2010), and *King* v. *Marriott International Inc.*, 337 F.3d 421 (4th Cir. 2003). But *Nicolaou* did not involve an unanswered complaint; rather, after the plaintiff complained in that case, she "was contacted to meet with [company management] in order to give information about the alleged [violations]." 402 F.3d at 330. Thus the plaintiff's complaint, although unsolicited, initiated a follow-up meeting with the company president—and, crucially, it was what the plaintiff said *in that meeting* that resulted in her termination. *Id.* at 329-330. Having allowed the case to proceed on that basis, the Second Circuit was not presented with the question at issue here.

As for *Edwards* and *King*, those two cases held, consistently with the decision below, that unsolicited ERISA complaints like petitioner's do not constitute the giving of information in an "inquiry" within the meaning of Section 510 of the Act. See *Edwards*, 610 F.3d at 225 ("unsolicited internal complaints are not protected under Section 510 of ERISA, 29 U.S.C. § 1140"); *King*, 337 F.3d at 428 ("internal complaints" are not "within the ambit of section 510"). There

accordingly is no confusion among the lower courts warranting this Court's intervention.[4]

B. The Sixth Circuit's opinion has limited practical importance

Faced with an ordinary matter of statutory interpretation over which there is no conflict, petitioner argues (Pet. 14-16) that review is warranted because the question presented is "important for other reasons." That is mistaken. In fact, the question presented is rarely litigated, and the decision below has no implications beyond the narrow factual confines of this case.

Petitioner says first (Pet. 14) that the question presented is "recurring" and "arises regularly." But to support that claim, petitioner notes only that there are "[t]hree reported circuit opinions since 2010" addressing the question presented. *Ibid*. That may be so, but the statutory provision at issue here was adopted as part of ERISA's original enactment in 1974, fully *forty years ago*. See Pub. L. No. 93-406, Title I, § 510, 88 Stat. 829 (1974). It was not until twenty years later that the first cases that petitioner says are involved in the asserted conflict were decided. After that, "nearly [another] decade passed without the federal appellate courts addressing whether

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[4] To be sure, the dissent and the Third, Fourth, and Seventh Circuits—citing the same cases we just discussed—have suggested that there is a conflict among the lower courts over the question presented. See Pet. App. 30a-32a; *George*, 694 F.3d at 814; *Edwards*, 610 F.3d at 220-221; *King*, 337 F.3d at 428. But neither the dissent nor those other courts looked critically at what, precisely, was taking place in each of the cases cited for the purported conflict. As we have just demonstrated, the split does not survive that missing closer look.

§ 510 protects unsolicited complaints." Pet. App. 69a. It therefore is not accurate to say that the question presented is frequently litigated.

Petitioner observes (Pet. 14) that the U.S. Secretary of Labor participated as an *amicus curiae* below, which he says "shows that the issue is important." But petitioner does not explain why that is so. As the Sixth Circuit explained in refusing to defer to the Secretary's views, ERISA "does not give the Secretary any authority to administer [Section 510], instead contemplating enforcement through private causes of action." Pet App. 19a. The participation of a government department in a case that turns on a statutory provision not administered by that department does not indicate that further review is warranted.

Petitioner also says (Pet. 14) that the "broader context of whistleblower protection and ERISA compliance" makes this case important. But that only begs the question on the merits—does Section 510 provide "whistleblower protection" in circumstances like these? As the Sixth Circuit demonstrated below, the answer to that question is *no*.

Petitioner next asserts (Pet. 15) that academic commentary addressing the question presented "underscor[es] the question's importance." But each of the articles cited by the petition is a student note or comment. That an esoteric statutory question has grabbed the attention of a handful of law students does not mean that it warrants review by this Court.

Finally, petitioner claims (Pet. 15) that "the question presented is important because it affects all employees with retaliation claims related to retirement plans." That is plainly wrong. The question

presented does not affect the employees whom Section 510 *actually* protects: those, for example, with claims that they suffered retaliation because they "testified or [are] about to testify in" a "proceeding relating to [ERISA]." 29 U.S.C. § 1140. In fact, the *only* employees it affects are those few who, like petitioner, make unsolicited complaints concerning asserted violations of the Act, in response to which no inquiry is initiated by anyone.

A final point concerning the limited importance of this case bears mention. As the Sixth Circuit explained below (Pet. App. 6a-8a), "Congress has enacted roughly forty anti-retaliation laws," most of which, by their express terms, include both an opposition clause and a participation clause. The Sixth Circuit identified just two other federal statutes—the Longshore and Harbor Workers' Compensation Act (33 U.S.C. § 948a) and the Clean Air Act (42 U.S.C. § 7622(a))—that, like ERISA, omit an opposition clause. See Pet. App. 7a. Because the lower court's reasoning turns wholly on that omission, the decision below will have "few if any consequences beyond" this case. Pet. App. 20a.

C. The decision below is correct

The absence of a clear conflict of authority and the limited importance of the question presented are reason enough to deny the petition. It weighs even further in favor of denying review that the Sixth Circuit's carefully reasoned opinion is undoubtedly correct.

1. Petitioner does not even attempt to square his position on the merits with the plain text of the statute, which is the starting point for all questions of statutory interpretation. *E.g.*, *Bailey* v. *United*

States, 516 U.S. 137, 144 (1995). But that is unsurprising because—as the Sixth Circuit explained at length (Pet. App. 5a-12a)—there is only one possible reading of the statute at issue here. In enacting ERISA's anti-retaliation provision, "Congress included only a clause protecting people who give information or testify in inquiries or proceedings" and did not include "a clause protecting people who oppose, report or complain about unlawful practices." *Id.* at 7a-8a. Reading the provision to cover petitioner's unsolicited complaint nonetheless would "[s]ubtract[] words from the law" and "add words in their place," additionally "blur[ring the] meaning" of the words left intact. *Id.* at 8a-10a.

The lower court found further support for its plain language interpretation (Pet. App. 6a-8a) from other whistleblower protection laws throughout the U.S. Code. Once again, most of those laws include protection for both the giving of information *and* the filing of complaints. Pet. App. 7a. That is significant both because the disparate inclusion and exclusion of language in different code sections is presumed purposeful (*e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983)), and because reading ERISA § 510 to protect not only participation in inquiries but also standalone objections would render the opposition clauses in other sections of the Code superfluous (*e.g.*, *Bilski* v. *Kappos*, 130 S. Ct. 3218, 3228 (2010)).

2. Unable to mount a plain-text defense of his interpretation of the law, petitioner argues instead (Pet. 16-19) that the decision below conflicts with this Court's decisions in *Crawford* and *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011)—cases that interpreted the anti-retaliation provisions of different statutes containing

different language. Petitioner is wrong that those decisions are incompatible with the Sixth Circuit's well-reasoned opinion in this case; in fact, the lower court's approach is entirely consistent with each.

Take first *Crawford*, which not only is consistent with the decision below, but lends strong support to it. The question presented there was whether the anti-retaliation protection of Title VII of the Civil Rights Act of 1964 "extends to an employee who speaks out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation." *Crawford*, 555 U.S. at 273. In holding that it does, the Court reasoned that Title VII's opposition clause—one of the sort lacking from ERISA § 510—protects any statement that is "disapproving" of or "resistant or antagonistic" to alleged violations of the law. *Id.* at 276 (brackets omitted). The upshot is clear: Because the email at issue here was disapproving of and antagonistic to respondent's refusal to seat the write-in candidates, it *would have been* protected by an anti-retaliation provision containing an opposition clause like the one at issue in *Crawford*. But because Section 510 does not, in fact, contain a similar opposition clause, petitioner's email is not protected. To conclude otherwise would mean that the clause interpreted by this Court in *Crawford* was unnecessary. "This would violate the canon against interpreting any statutory provision in a manner that would render another provision superfluous." *Bilski*, 130 S. Ct. at 3228.

As for *Kasten*, that case concerned the anti-retaliation provision of the Fair Labor Standards Act, which also contains an opposition clause. See 29 U.S.C. § 215(a)(3). To be sure, this Court said that

the particular language of the FLSA's opposition clause "suggest[ed] a broad interpretation." *Kasten*, 131 S. Ct. at 1332. But because the language at issue in that case is not present in ERISA § 510, that statement has no bearing on the question presented here. In concluding that Section 510 cannot be understood to cover unsolicited complaints like the email at issue in this case, moreover, the Sixth Circuit relied exclusively on the plain language of the statute, which it found unambiguous. See Pet. App. 18a-19a. There accordingly was no occasion for the lower court to turn (as did this Court in *Kasten*) to the canons of construction that guide interpretation of ambiguous statutes, such as *Skidmore* deference. After all, when the statute's "text is patently clear," the "analysis begins and ends with the text." *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1755 (2014).[5]

There accordingly is no basis for granting the petition. The conflict among the circuits is illusory, the question is unimportant, and the Sixth Circuit properly interpreted the statute at issue here.

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[5] Petitioner's contention (Pet. 18) that the decision below presents a "dilemma" for fiduciaries like him is puzzling. For one thing, petitioner was no longer a company director or ESOP committee member when he sent his email. For another, there is no basis for believing that a plan fiduciary in petitioner's position would have had a duty to send the email. The heart of the matter here was an internal power struggle, not concern for mismanagement of the ESOP's assets. In any event, petitioner's policy arguments cannot overcome the statute's plain text.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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