No. 21-761

In the Supreme Court of the United States

OPTUMHEALTH CARE SOLUTIONS, LLC,

Petitioner,

v.

SANDRA M. PETERS,

Respondent.

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

REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

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Respondent Sandra Peters's brief in opposition confirms four things: (1) the circuit split is real, (2) the split involves an issue that touches every ERISA plan in the country, (3) the Fourth Circuit's decision below is wrong, and (4) this Court should resolve the split now—six years into the litigation—not years from now after a possible second petition.

I. THE CIRCUIT SPLIT IS REAL.

In arguing that there is no circuit split, Peters mischaracterizes the Fourth Circuit's decision below and the Tenth Circuit's holding in *Ramos v. Banner Health*, 1 F.4th 769 (10th Cir. 2021).

Although the Fourth Circuit panel paid lip service to the notion that "Optum was not a party in interest at the time it entered the agreement" with Aetna (App. 70), it ultimately held that Optum could qualify as a party in interest vis-a-vis Peters's plan because it provided services and got paid under that same agreement with Aetna. The Fourth Circuit reached that conclusion even though Optum did not have any relationship with Peters's plan, never mind a preexisting relationship. The appellate court acknowledged that Optum's contracts with Aetna fixed the rates that Aetna paid Optum for its services (App. 4) but nevertheless held that Aetna's payments to Optum "after the execution of the Aetna-Optum contracts" could transform non-fiduciary Optum into a party in interest. App. 70.

In that regard, the Fourth Circuit treated Optum's agreement with Aetna as itself unlawful under ERISA. Peters concedes as much, arguing in her opposition brief that the Fourth Circuit endorsed the theory that "a prohibited transaction occurred every time Aetna and Optum processed a benefit claim that caused the transfer of plan assets to Optum for administrative fees *pursuant to the Aetna-Optum agreement*." Peters's Br. at 10 (emphasis added). The district court reached the opposite conclusion, concluding that Optum was not a party in interest because it "had no pre-existing relationship with [Peters's] Plan, contractual or otherwise, and did not render services to the Plan itself other than providing its networks to the Plan." Pet. App. 101.

The Tenth Circuit would have affirmed the district court's holding on that score. It held in *Ramos* that contracting with and paying a third-party service provider does not transform the service provider into a party in interest under ERISA § 406(a). *See* 1 F.4th at 787.

Notwithstanding Peters's argument to the contrary, the Tenth Circuit in fact rejected the argument that she presses in this case and explained that it leads to "an absurd result: the initial agreement with a service provider would simultaneously transform that provider into a party in interest and make that same transaction prohibited under § 1106." *Ramos,* 1 F.4th at 787. Instead, the Tenth Circuit explained, "some prior relationship must exist between the fiduciary and the service provider to

make the provider a party in interest under § 1106." *Id.*

That conclusion is consistent with this Court's decision in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), that prohibited transactions all share the common feature of being "struck with plan insiders, presumably not at arm's length."[1] *Id.* at 893; *see also Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 242 (2000) (ERISA § 406(a) prohibits transactions with entities that "a fiduciary might be inclined to favor at the expense of the plan's beneficiaries"). Peters has never argued that Optum (a non-fiduciary) was a plan insider. On the contrary, it is undisputed that Optum never contracted with Peters's plan or even saw the plan documents for the plan. *See* App. 71.

In holding that Optum could have become a party in interest vis-à-vis Peters's plan by performing services and getting paid under its contract with Aetna, the Fourth Circuit split from the Tenth Circuit and other courts that have rejected the notion that ERISA prohibits arm's-length contracts with service providers. *Ramos*, 1 F.4th at 787; *see also Sellers v. Anthem Life Ins. Company*, 316 F. Supp. 25, 34–35 (D.D.C. 2018) (Section 406(a)(1) "only prohibits such service relationships with persons who are 'parties in interest' by virtue of some other relationship . . . . It does not prohibit a plan from paying an unrelated

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[1] This Court ultimately held in *Spink* that "the payment of benefits in exchange for the performance of some condition by the employee is not a 'transaction' within the meaning of [ERISA] § 406(a)." *Spink*, 517 U.S. at 895.

party, dealt with at arm's length, for services rendered."). Which brings us to the bottom line: If Peters lived in the Tenth Circuit and had filed suit there, Optum would no longer be a defendant in this case. Optum remains a defendant only because the Fourth Circuit ignored ERISA's text and broke with the Tenth Circuit, creating a split that undermines Congress's goal of promoting national standards for ERISA-governed plans.

II. THE CIRCUIT SPLIT UNDERMINES CONGRESS'S GOAL OF PROMOTING A UNIFORM REGULATORY REGIME UNDER ERISA.

Whether ERISA prohibits an arm's-length service agreement should not turn on whether a case arises in the Fourth Circuit or Tenth Circuit. And yet with the Fourth Circuit's decision below, that is now the reality.

The conflicting standards in the Fourth and Tenth Circuits will cause confusion among ERISA plan sponsors and service providers. Take, for instance, an ERISA-governed plan that has employees in both the Fourth Circuit and the Tenth Circuit. Can the plan's claims administrator hire a third-party service provider and thereafter pay the provider for services rendered? Or are those payments prohibited transactions because the contract transformed the service provider into a party in interest—even if the contract dictates the payment terms? In the Tenth Circuit, those arm's-length payments for services rendered would not raise concerns under ERISA §

406(a), but in the Fourth Circuit, they would. *See* Peters's Br. at 4, 13.

Congress enacted ERISA to "induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct . . . ." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (internal quotation marks omitted); *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans."). The Fourth Circuit's decision below will produce the opposite of certainty and predictability. It exposes plan fiduciaries and non-fiduciary service providers to litigation "merely because they engaged in an arm's length deal." *Ramos*, 1 F.4th at 787. Faced with that risk, plans and service providers might think twice about contracting for fear that litigation will follow. In the end, plan members could lose the benefit of services that save them money or enhance their experience under their plan.

This Court should weigh in to eliminate the dueling interpretations of ERISA § 406(a) in the circuits and, having granted review, should confirm that ERISA does not prohibit arm's-length agreements with service providers.

III. THE FOURTH CIRCUIT'S DECISION IS WRONG.

In holding that Optum could qualify as a party in interest vis-à-vis Peters's plan even though Optum had no relationship (pre-existing or otherwise) with the plan, the Fourth Circuit ignored ERISA

§ 406(a)(1)'s plain meaning. *See Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992).

With some exceptions, ERISA § 406(a)(1) bars a plan fiduciary from causing the plan to engage in certain transactions with a "party in interest." 29 U.S.C. § 1106(a). The statute assumes that the entity with which the plan engages in the transaction is *already* a party in interest, not that it will become one by virtue of the transaction with the plan. Likewise, ERISA defines "party in interest" in relevant part to mean "a person *providing* services to such plan." 29 U.S.C. § 1002(14)(B) (emphasis added). The term "providing" assumes that the "person" is *already* providing services to the plan, not that the "person" will provide services to the plan in the future. Together, those provisions confirm that for a service provider to qualify as a "party in interest" under ERISA § 406(a)(1), the service provider must have a relationship with the plan that preexists, and is independent of, the relationship created by the allegedly prohibited transaction.

In her opposition, Peters does not grapple with the statutory text. Neither did the Fourth Circuit below.

IV. THE COURT SHOULD RESOLVE THE QUESTION PRESENTED NOW.

Peters argues that Optum's certiorari petition is "premature" and that this Court should not grant review now because Optum could later seek certiorari review after final judgment. Peters's Br. at 7–8. But there was already a final judgment in Optum's favor. Optum seeks certiorari review of the Fourth Circuit's

decision reversing that final judgment. This Court has regularly granted certiorari in similar circumstances. *See, e.g.*, *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 139 S. Ct. 2692 (2019); *Ret. Plans Comm. of IBM v. Jander*, 139 S. Ct. 2667 (2019); *Amgen Inc. v. Harris*, 577 U.S. 308 (2016); *Gobeille v. Liberty Mut. Ins. Co.*, 576 U.S. 1053 (2015); *see also Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1657 (2017) (reviewing multiple courts of appeals' decisions affirming the denials of motions to dismiss).

In any case, Optum's petition is not "premature." We're now six years into a litigation that Optum won in the district court and would be history if the Fourth Circuit had not erred below.

* * *

Throughout this litigation, Optum has argued that it does not qualify as a "party in interest" vis-à-vis Peters's plan. The district court addressed the issue head-on, agreeing with Optum and granting summary judgment in its favor. The Fourth Circuit also weighed in, reversing the final judgment in Optum's favor and doing so in a published opinion. The issue is ripe for certiorari review.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

February 10, 2022

Respectfully submitted,

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