No. 20-55222

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN H. BAFFORD, LAURA BAFFORD, and EVELYN L. WILSON, on their own behalves and on behalf of a class of similarly situated participants and beneficiaries,

Plaintiffs-Appellants,

v.

NORTHROP GRUMMAN CORPORATION, ADMINISTRATIVE COMMITTEE OF THE NORTHROP GRUMMAN PENSION PLAN, and ALIGHT SOLUTIONS LLC,

Defendants-Appellees.

SECRETARY OF LABOR'S AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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STATEMENT OF INTEREST

The Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA to ensure fair and impartial plan administration and compliance with ERISA's requirements and purposes. *See* 29 U.S.C. §§ 1132, 1135; *Donovan v. Cunningham*, 716 F.2d 1455, 1462-63 (5th Cir. 1983). In 1975, the Secretary issued an interpretive bulletin concerning fiduciary status under ERISA. 29 C.F.R. § 2509.75-8. The panel here relied on that interpretive bulletin in holding that Appellee Administrative Committee of the Northrop Grumman Pension Plan was not acting as a fiduciary when it provided erroneous benefit estimates to Appellants. In so holding, the panel misconceived the concept of fiduciary status under ERISA and misconstrued the Department of Labor's longstanding guidance. The Secretary has a significant interest in ensuring that courts correctly interpret and apply ERISA and agency guidance.

The Secretary files this brief pursuant to Circuit Rule 29-2(a).

INTRODUCTION

The panel held that although Appellee Administrative Committee of the Northrop Grumman Pension Plan (Committee) was a named Plan fiduciary, it nevertheless did not act as a fiduciary when it repeatedly misinformed Plaintiffs about their expected retirement benefits. *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020, 1025-28 (9th Cir. 2021). Relying on a Department of Labor interpretive bulletin on fiduciary status, the panel concluded that the benefit statements sent to Appellants conveyed the results of non-fiduciary "ministerial" calculations performed by Hewitt, a third-party service provider to the Northrop Plan. On this basis, the panel held not only that Hewitt was shielded from fiduciary liability, but so too was the Committee. *Id.* at 1027-28.

The panel's holding as to the Committee—which is the Plan's administrator—rests on a fundamental misconception of fiduciary status under ERISA and the Department of Labor's interpretive bulletin. The interpretive bulletin merely assures individual plan employees and service providers to ERISA plans—to the extent they lack discretionary power in their own right—that they will not become

ERISA fiduciaries by following rules set by someone else. But the bulletin does not accord derivative immunity to the powerful named fiduciaries who hire those third parties and make the rules under which they operate. In holding otherwise, the panel's decision threatens to shield ERISA plan administrators and other named fiduciaries from accountability for performing some of the most central tasks of plan management and administration whenever they enlist ministerial agents to assist them. The Secretary respectfully urges the Court to grant the petition for panel rehearing, or alternatively, for rehearing *en banc*.

ARGUMENT

To see why rehearing is appropriate, it is important to understand the different species of ERISA fiduciaries. ERISA's definition of "fiduciary" divides fiduciaries into three broad types, under three separate sub-clauses: (i) one who "exercises" discretionary authority or control over plan management or any authority over plan assets; (ii) one who renders investment advice for a fee; and (iii) one who "has" discretionary authority or discretionary responsibility in plan

administration. 29 U.S.C. § 1002(21)(A). A person is a fiduciary "to the extent" any one of those criteria are met. *Id.*

Those who "exercise" authority or "render" investment advice (the first and second types) are referred to as "functional fiduciaries" because their fiduciary status is based purely on what they do, not on any authority granted to them by the plan. 29 U.S.C. § 1002(21)(A)(i), (ii). Functional fiduciaries stand in contrast to "named fiduciaries," like plan administrators, who are fiduciaries because they *have* discretionary authority or responsibility, vested by the plan itself (the third type). 29 C.F.R. § 2509.75–8 (D-3) ("a plan administrator . . . must, by the very nature of his position, have 'discretionary authority or discretionary responsibility in the administration' of the plan within the meaning of section 3(21)(A)(iii) of the Act.") (quoting 29 U.S.C. § 1002(21)(A)(iii)). ERISA *requires* plans to identify this third type of fiduciary by designating "one or more named fiduciaries who jointly and severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a).

As the panel acknowledged, the Committee does not dispute that it is a named fiduciary under the Plan. *Bafford*, 994 F.3d at 1026. That

is because the Committee is the Plan's administrator, *id.* at 1024, a position that "has special significance under ERISA." *Bouboulis v. Transport Workers Union of America*, 442 F.3d 55, 64–65 (2d Cir. 2006) (concluding that the plan administrator "should thus be considered a fiduciary under subsection three of ERISA § 3(21)(A), even if, as the district court found, there is no evidence that [it] actually exercised this authority in a manner that would qualify under subsection one."). Indeed, the Committee was the ERISA-required named fiduciary vested with "authority to control and manage the operation and administration of the plan." 29 U.S.C. § 1102(a). Because plan administrators and other named fiduciaries are endowed with discretionary authority or responsibility, "[p]ersons who hold such positions will therefore be fiduciaries." Dept. of Labor Advisory Op. to Ms. Andrea B. Wapner, 1979 WL 169913, at *1.[1] There is thus no question that the Committee is a fiduciary under ERISA.

[1] *Olson v. E.F. Hutton & Co., Inc.,* 957 F.2d 622, 625 (8th Cir.1992) (explaining that "[s]ubsection three [of 29 U.S.C. § 1002(21)(A)] describes those individuals who have actually been granted discretionary authority, regardless of whether such authority is ever exercised.").

The only open question relevant to fiduciary status, then, is whether the Committee acted as a fiduciary "when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). This concept simply recognizes that people might play different roles at different times, and are subject to fiduciary liability only "to the extent" that they "wear the fiduciary hat." *Id.* Thus, if a plan administrator injures a plan participant in a car accident, she is not liable under ERISA because she was not acting in a fiduciary capacity when driving. So too if a CEO (who is also the administrator of the company's pension plan) makes a business decision that incidentally injures the plan; if the decision really was a business decision unrelated to plan administration, the CEO does not have fiduciary liability under ERISA. As this Court has put it, "courts must 'examine the conduct at issue to determine whether it constitutes management or administration of the plan, giving rise to fiduciary concerns, or merely a business decision that has an effect on an ERISA plan not subject to fiduciary duties.'" *Acosta v. Brain*, 910 F.3d 502, 518 (9th Cir. 2018) (*quoting In re Luna*, 406 F.3d 1192, 1207 (10th Cir. 2005)).

Here, "the action subject to complaint"—communicating with participants about their future benefits—falls squarely within the ambit of plan management and administration. Appellants describe a "systemic calculation error," persisting from 2010 to 2016, ER 352, that resulted in their repeated receipt of benefit estimates—on Northrop letterhead—that grossly overstated their expected benefits. ER 9, 348, 355-56. The fiduciary nature of such communications is evident from ERISA itself, which expressly requires plan administrators to provide "pension benefit statements" to participants in defined benefit plans based on "reasonable estimates," akin to the benefit estimates at issue here. 29 U.S.C. § 1025(a)(1)(B). And the Supreme Court has recognized that "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation," is fiduciary conduct. *Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996).

The panel held otherwise by characterizing the challenged conduct as "ministerial." *Bafford*, 994 F.3d at 1027-28. For this, the panel cited the Department of Labor's 1975 interpretive bulletin, which provides that certain administrative functions—including the "calculation of

benefits"—are not fiduciary in nature under two specific conditions. *See* 29 C.F.R. § 2509.75–8 (D-2). First, the functions must be performed by individuals or entities "who have no power to make any decisions as to plan policy, interpretations, practices or procedures." *Id.* Second, the functions must be performed "within a framework of policies, interpretations, rules, practices and procedures made by other persons." *Id.* As the bulletin explains, such individuals and entities (like third-party service providers) are not fiduciaries in those circumstances because they neither exercise nor possess discretion, but instead perform "purely ministerial functions." *Id.*

Applying the interpretive bulletin, the panel found that Hewitt, a third-party service provider hired to calculate the benefit estimates at issue, performed a "ministerial" function when doing so. On this basis, the panel not only held that Hewitt was not "performing a fiduciary function in miscalculating retirement benefits," but also that "*Northrop and the Committee* did not breach a fiduciary duty by failing to ensure that Hewitt correctly calculated Plaintiffs' benefits." *Bafford,* 994 F.3d

at 1028 (emphasis added).[2] According to the panel, "the operative fact is that the function being performed"—calculation of benefits—"was not fiduciary in nature." *Id.*

The panel's decision to accord derivative immunity to the Committee based on Hewitt's ministerial acts is contrary to the letter and purpose of the Department's interpretive bulletin.[3] The bulletin does not state that its 11 enumerated administrative functions are non-fiduciary tasks exempt from ERISA's fiduciary standards. On the contrary, those functions involve some of the most quintessential fiduciary obligations, such as "application of rules determining eligibility for participation or benefits," 29 C.F.R. § 2509.75–8 (D-2, item

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[2] The panel also described Northrop Grumman as a named fiduciary along with the Committee. *Bafford*, 994 F.3d at 1026. But the Complaint does not characterize Northrop Grumman as a named fiduciary, instead anchoring the company's fiduciary status in the fact that it appointed the Committee to be the Plan's administrator. *See* ER 347, ¶ 9. But to the extent Northrop is, in fact, a named fiduciary, the Secretary's argument that the panel erred in dismissing the claims against the Committee applies equally to Northrop.

[3] The Secretary takes no position on whether Hewitt in fact performed ministerial functions in calculating the benefit estimates at issue, and thus takes no position on whether Hewitt acted as a fiduciary. The Secretary's point is that, even assuming Hewitt performed ministerial functions and is shielded from fiduciary liability, it does not follow that the Committee is similarly shielded.

1), and "advising participants of their rights and options under the plan," *id.* (D-2, item 7). *See, e.g., Aetna Health Inc. v. Davila*, 542 U.S. 200, 220 (2004) ("[A]dministrators making benefits determinations, even determinations based extensively on medical judgments, are ordinarily acting as plan fiduciaries . . ."); *Varity* 516 U.S. at 505 ("[W]e hold that making intentional representations about the future of plan benefits in that context is an act of plan administration."); *see* 29 C.F.R. § 2509.75–8 (D-3) (clarifying that a person with discretionary authority who makes eligibility determinations is a fiduciary).

Rather, the bulletin simply clarifies that when those functions are performed by individuals and entities "who have *no power* to make any decisions as to plan policy, interpretations, practices or procedures," and "within a framework of policies, interpretations, rules, practices and procedures *made by other persons*," those individuals and entities will not be treated as "functional fiduciaries." 29 C.F.R. § 2509.75–8 (D-2) (emphasis added). The bulletin thus assures plan service providers and individual plan employees that they will not be subject to personal liability under ERISA merely for showing up to work and doing their jobs under rules set by someone else. *See* 29 U.S.C. § 1109(a).

But the bulletin in no way suggests that *named fiduciaries*—who hardly have "no power" to make plan decisions, but rather are vested with broad discretionary authority by the plan itself—are immunized from liability whenever they use ministerial agents to discharge their fiduciary duties. Again, while Hewitt might have calculated the underlying benefit estimates and placed them in the mail, it was unambiguously acting for the Committee; as the panel acknowledged, the benefit statements were sent to Appellants "on Northrop letterhead." *Bafford*, 994 F.3d at 1024. As explained, communicating with participants about their benefits is central to a plan administrator's duties. *See Varity*, 516 U.S. at 503. Such communications do not lose their fiduciary character simply because they depend on the work of ministerial agents. *In re DeRogatis*, 904 F.3d 174, 192 (2d Cir. 2018) ("Thus, the Funds may perform a fiduciary function through ministerial agents without converting those individual agents themselves into fiduciaries."). To be sure, named fiduciaries are not necessarily *liable* for every error committed by their ministerial agents (just as they are not strictly liable for their own errors). But

neither do named fiduciaries shed their fiduciary status—and the obligations that come with it—whenever they act through those agents.

Moreover, named fiduciaries are often the ones who hire ministerial agents and establish the very "framework of policies, interpretations, rules, practices and procedures" under which they operate. 29 C.F.R. § 2509.75–8 (D-2). Claims challenging that procedural framework—as Appellants appear to do here—are aimed squarely at fiduciary conduct to which ERISA's fiduciary obligations attach. *See* ER 352 ("Plaintiffs and the members of the proposed Class were the victims of a *systemic calculation error* affecting Northrop Plan participants.") (emphasis added); ER 360 ("Defendants' miscalculation of pension benefits . . . was systemic in nature . . . ."). There is certainly nothing in the interpretive bulletin to suggest that the fiduciaries who make the rules are immunized to the same extent as the agents who follow them.[4]

[4] In a separate question and answer, the interpretive bulletin also explains that plan fiduciaries must prudently select and retain ministerial agents by assuring themselves of their agents' competence, responsibility, and integrity. 29 C.F.R. § 2509.75-8 (FR-11). Claims challenging a named fiduciary's selection and monitoring of a ministerial agent also target fiduciary conduct.

Despite the panel's attempt to distinguish the Second Circuit's decisions in *In re DeRogatis* and *Sullivan-Mestecky v. Verizon Communications Inc.*, 961 F.3d 91, 104 (2d Cir. 2020), its ruling directly conflicts with both cases. The panel reasoned that the conduct at issue in those cases—"individualized consultations with benefit counselors" (*In re DeRogatis*) and "issuing written plan materials" (*Sullivan-Mesteky*)—are "well-established fiduciary functions," in contrast to the ministerial benefit calculations at issue here. *Bafford*, 994 F.3d at 1027-28. But in both cases, the Second Circuit posited that the third parties who issued the communications were "ministerial agents"—just as the panel described Hewitt. *See Sullivan-Mesteky*, 961 F.3d at 104 (noting "Aon Hewitt's status as a ministerial agent."); *In re DeRogatis*, 904 F.3d at 191 ("We therefore reject the Funds' contention that they cannot be liable for breach of fiduciary duty based on statements made by non-fiduciary, 'ministerial' employees."). And ministerial agents, by definition, perform ministerial functions. Yet the Second Circuit held in both cases that any ERISA immunity accorded to those ministerial agents did not extend to the named fiduciaries. *See, e.g., Sullivan-Mesteky*, 961 F.3d at 104 ("Verizon cannot hide behind Aon Hewitt's

actions to evade liability for the fiduciary breach that occurred here."); *In re DeRogatis*, 904 F.3d at 190 ("[T]he District Court erred in holding that neither Fund performed a fiduciary function through Keenan and Lopez when those agents communicated with the DeRogatises about their benefits."). That reasoning is irreconcilable with the panel's holding here.

While the panel sought to follow the First Circuit's lead in *Livick v. The Gillette Co.* 524 F.3d 24 (1st Cir. 2008), that case is distinguishable. Insofar as *Livick* can be read to stand for the proposition that a named plan fiduciary does not act as a fiduciary when it discharges its duties through ministerial agents, that proposition is wrong and rests on the same misreading of the Department's interpretive bulletin explained above. But even *Livick* does not support the panel's decision here: The court there held that Gillette, a named fiduciary of its own pension plan, was not subject to fiduciary liability for an erroneous benefit estimate verbally conveyed by one of the company's human resources representatives. *Id.* at 28-30. Critical to this holding, though, was that Gillette had otherwise "provided [the plaintiff] with clear, accurate, and complete information

in multiple documents." *Id.* at 30. Things are different, the First Circuit explained, "where the fiduciaries fail[] to provide clear and accurate information in the first place." *Id.* Here, the Committee—far from providing "clear, accurate, and complete information"—provided grossly inflated estimates for six years pursuant to a systemic calculation error.

Finally, if left intact, the panel's decision threatens to undermine ERISA's protective purposes by offering fiduciaries a roadmap to immunity. Of most concern, the breadth of the panel's decision would potentially allow named fiduciaries to point to the ministerial acts of their agents to disclaim all responsibility for anything to do with those acts, even if they concern the most elemental duties of plan administration. *Cf. Kayes v. Pacific Lumber Co.*, 51 F.3d 1449, 1461 (9th Cir. 1995) ("Applying a restrictive judicial gloss to the term 'fiduciary' itself would, in effect, enable trustees to transfer important responsibilities to a largely immunized 'administrative' entity."). The panel's decision appears to leave little room even for claims challenging a named fiduciary's oversight of the ministerial agents they retain or establishment of the rules and procedures under which such agents operate.

The Department's interpretive bulletin was a limited assurance that truly ministerial agents would not face personal liability under ERISA. It was not a blanket promise of immunity to powerful named fiduciaries, through the expedience of outsourcing, for the most basic aspects of plan administration.

CONCLUSION

For the foregoing reasons, the Secretary urges the Court to grant Appellants' petition for panel rehearing, or alternatively, for rehearing e*n banc*.

June 28, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Appellate Rule 35(b)(2) and Circuit Rule 35(b)(2), I certify that this amicus brief:

(i) complies with the word limit of Rule 29-2(a) because it contains 2917 words, excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

Dated: June 28, 2021

/s/ Jeffrey Hahn