No. 24-10084

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RANI BOLTON, et al.,

Plaintiffs-Appellants,

v.

INLAND FRESH SEAFOOD CORPORATION OF AMERICA, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia
Case No. 1:22-CV-04602-LMM
The Honorable Judge Leigh Martin May

BRIEF FOR THE ACTING U.S. SECRETARY OF LABOR AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS' PETITION FOR INITIAL HEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the undersigned counsel for the Acting Secretary of Labor as amicus curiae certifies that, in addition to those identified in the briefs filed by Plaintiffs-Appellants and Defendants-Appellees, the following persons and entities may have an interest in the outcome of this case:

1. Berry, Wayne, U.S. Department of Labor, Office of the Solicitor, counsel for the Secretary of Labor;
2. Byrum, Blair, U.S. Department of Labor, Office of the Solicitor, counsel for the Secretary of Labor;
3. Employee Benefits Security Administration, U.S. Department of Labor;
4. Hahn, Jeffrey, U.S. Department of Labor, Office of the Solicitor, counsel for the Secretary of Labor;
5. Nanda, Seema, Solicitor of Labor, U.S. Department of Labor, counsel for the Secretary of Labor;
6. Office of the Solicitor, U.S. Department of Labor; and
7. Su, Julie, Acting Secretary of Labor, U.S. Department of Labor.

The undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

/s/ Blair L. Byrum
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Date: May 22, 2024

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STATEMENT OF THE ISSUE, IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Acting Secretary of Labor ("Secretary") files this brief pursuant to Federal Rule of Appellate Procedure 29. The Secretary has primary regulatory and enforcement authority for Title I of ERISA. 29 U.S.C. §§ 1132, 1135. The Secretary's interests include promoting uniformity of law, protecting plan participants and beneficiaries, and enforcing fiduciary standards. *Sec'y of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) (en banc). The Secretary depends on plan participants to bring their own actions to complement the Secretary's enforcement responsibilities. *See id.*

Here, participants in the Inland Fresh Seafood Corporation of America, Inc. Employee Stock Ownership Plan ("ESOP" or "Plan") filed suit alleging that the ESOP's fiduciaries caused the ESOP to overpay for employer stock in violation of ERISA's fiduciary standards and prohibited transaction rules. The district court dismissed Plaintiffs' claims for failure to exhaust the Plan's purported internal remedies before filing suit. Though the majority of circuits hold that exhaustion is not required before asserting ERISA statutory claims, the district court explained that "'[t]he law is clear in this circuit that plaintiffs in ERISA actions must exhaust available administrative remedies before suing in federal court.'" A244 (Order at 5, ECF No. 23 (quoting *Lanfear v. Home Depot, Inc.*, 536 F.3d 1217, 1223 (11th Cir. 2008))). The question presented is whether the Eleventh Circuit should grant initial

en banc review to reconsider its precedent holding that participants must first exhaust their plan's internal remedial procedures before asserting ERISA statutory claims in court.

SUMMARY OF THE ARGUMENT

En banc review is warranted where "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2). This standard is met because this Court's requirement that participants exhaust their plan's internal remedies before bringing ERISA statutory claims "conflicts with the authoritative decisions of other United States Court of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). Plaintiffs bringing ERISA statutory claims in the Eleventh Circuit are subject to an anomalous procedural hurdle that creates disparities in ERISA's remedial scheme. This Court's unique statutory exhaustion requirement is unsupported by the statutory text, subverts Congress's intent of providing "ready access to the Federal courts," 29 U.S.C. § 1001(b), and makes little practical sense. The Secretary thus urges the Court to grant Plaintiffs' petition to reconsider its precedent that participants must exhaust their plan's internal remedies before bringing ERISA statutory claims in court.

ARGUMENT

I. The Court Should Grant En Banc Review Because Its Precedent Requiring Exhaustion for ERISA Statutory Claims Conflicts with the Majority of Circuits

This Court first held that exhaustion was required for ERISA statutory claims nearly forty years ago, in *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985). At that time, only two other circuits had weighed in on the question. The Ninth Circuit had taken the opposite view, holding that exhaustion was not required before asserting statutory claims. *Amaro v. Cont'l Can Co.*, 724 F.2d 747, 751–52 (9th Cir. 1984), *overruled on other grounds by Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019). And the Seventh Circuit had adopted a more flexible position, holding that exhaustion generally "is committed to the sound discretion of the [trial] court," though it found that a district court did not abuse its discretion in waiving exhaustion where the "issue is solely a question of statutory interpretation." *Janowski v. Int'l Bhd. of Teamsters Loc. No. 710 Pension Fund*, 673 F.2d 931, 935 (7th Cir. 1982), *cert. granted, judgment vacated*, 463 U.S. 1222 (1983) (remanding on other grounds).

Since *Mason*, six additional circuits have joined the Ninth Circuit in holding that exhaustion of a plan's internal remedies—though required before bringing claims for plan benefits—is *not* required "'when plaintiffs seek to enforce statutory ERISA rights rather than contractual rights created by the terms of the Plan.'"

Hitchcock v. Cumberland Univ. 403(b) DC Plan, 851 F.3d 552, 564 (6th Cir. 2017) (quoting *Stephens v. Pension Ben. Guar. Corp.*, 755 F.3d 959, 965 (D.C. Cir. 2014)); *see also Milofsky v. Am. Airlines, Inc.*, 442 F.3d 311, 313 (5th Cir. 2006) (en banc); *Smith v. Sydnor*, 184 F.3d 356, 364–65 (4th Cir. 1999); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1204–05 (10th Cir. 1990); *Zipf v. AT & T*, 799 F.2d 889, 891–94 (3d Cir. 1986). The Seventh Circuit has reiterated its view that district courts have discretion to require exhaustion of non-benefit claims under ERISA, but it too does not mandate exhaustion. *See*, *e.g.*, *Lindemann v. Mobil Oil Corp.*, 79 F.3d 647, 649–50 (7th Cir. 1996) (whether to require exhaustion is "within the discretion of the trial court"). Not a single additional circuit has joined this Court in holding that exhaustion is required for ERISA statutory claims.

The Eleventh Circuit thus stands increasingly alone in its "unique" and absolute requirement of exhaustion for ERISA statutory violations. A253 (Order at 14); *Mason*, 763 F.2d at 1227.

II. The Eleventh Circuit's Reasons for Exhaustion Do Not Apply to ERISA Statutory Claims

When it first held that exhaustion was required for claims alleging ERISA statutory violations, this Court cited reasons another circuit gave for requiring exhaustion before asserting claims for benefits due under the terms of a plan. *See Mason*, 763 F.2d at 1226–27. But unlike in the benefits context, requiring

exhaustion of statutory claims has no basis in ERISA's text, its purposes, or sound policy.

A. There Is No Basis in ERISA for Exhaustion of Statutory Claims

Under ERISA, a plan participant may bring a civil action (1) for "benefits due" under the terms of an employee benefit plan pursuant to 29 U.S.C. § 1132(a)(1)(B) and (2) to remedy violations of ERISA's statutory requirements pursuant to 29 U.S.C. § 1132(a)(2) and (3). All federal circuits require participants to exhaust a plan's administrative remedies before bringing the first type of claim for benefits due. *See Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 418 & n.4 (6th Cir. 1998) (collecting cases). That requirement is firmly rooted in ERISA, which requires plans, "in accordance with regulations of the Secretary," to have claims procedures that afford participants "full and fair review" of their "*claim for benefits*." 29 U.S.C. § 1133 (emphasis added). The Secretary's claims-procedure regulation, in turn, "sets forth minimum requirements for employee benefit plan procedures pertaining to *claims for benefits* by participants and beneficiaries." 29 C.F.R. § 2560.503-1(a) (emphasis added). "[D]ue to ERISA's provision for the administrative review of benefits," courts "have read an exhaustion of administrative remedies requirement into the statute." *Fallick*, 162 F.3d at 418.

This rationale does not extend, however, to claims for statutory violations. Unlike in the benefits context, no provision of ERISA expressly or implicitly

requires exhaustion of a plan's internal remedies before a participant may bring a claim for statutory violations. While "Congress required plans to provide procedures to review claims for benefits," it "did not require internal remedial procedures to embrace claims based on ERISA's substantive guarantees." *Stephens*, 755 F.3d at 965. Though *Mason* concluded that "an exhaustion requirement in the ERISA context appears to be consistent with the intent of Congress that pension plans provide intrafund review procedures," 763 F.2d at 1227, nothing in ERISA's text or legislative history suggests those procedures should apply to anything other than benefit claims. *See Stephens*, 755 F.3d at 966 (reasoning ERISA's legislative history and 29 U.S.C. § 1133 "[do] not require pension plans to create internal remedial procedures to evaluate statutory claims").

B. Statutory Interpretation Is the Province of Courts, Not Plan Fiduciaries

In addition to incorrectly finding that exhaustion of statutory claims was grounded in ERISA, *Mason* further reasoned that exhaustion of statutory claims allows trustees "to carry out their fiduciary duties expertly and efficiently by preventing premature judicial intervention in the decisionmaking process . . . ." 763 F.2d at 1227. Here too, while this rationale has purchase in the benefits context, it does not apply to the statutory context.

In the benefits context, the plan fiduciary is usually given discretionary authority by the plan document to interpret the plan and make benefit

determinations, which are generally subject to a deferential standard of review based on an administrative record. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 259 (2008) (Roberts, J., concurring) ("ERISA plans may grant administrators and fiduciaries discretion in determining benefit eligibility and the meaning of plan terms, decisions that courts may review only for an abuse of discretion."). In contrast, claims for statutory violations do not "implicate[] the expertise of a plan fiduciary" but instead "involve[] the interpretation and application of a federal statute, which is within the expertise of the judiciary." *Smith*, 184 F.3d at 365. "Accordingly, one of the primary justifications for an exhaustion requirement in other contexts, deference to administrative expertise, is simply absent." *Zipf*, 799 F.2d at 893.

Additionally, unlike in adjudicating benefit claims, plan fiduciaries often have a vested self-interest in evaluating statutory violations. That is because ERISA makes fiduciaries "personally liable" to the plan for losses caused by their breaches. 29 U.S.C. § 1109(a). It makes little sense to force participants to bring their statutory grievances to fiduciaries whose personal liability hinges on the outcome. *See Smith*, 184 F.3d at 365 n.9 ("By allowing a plaintiff to bring a claim for breach of fiduciary duty in federal court before exhausting administrative remedies, we recognize the general principle . . . that we do not give full credence to an ERISA fiduciary's assessment of his own allegedly wrongful conduct.").

C. Requiring Exhaustion for ERISA Statutory Claims Is Contrary to ERISA's Purposes

Imposing an exhaustion requirement for statutory claims is also antithetical to ERISA's purposes. First, an exhaustion requirement undermines ERISA's goal of "ready access to the Federal courts," 29 U.S.C. § 1001(b). The plain language of 29 U.S.C. § 1132(a)(2) and (3) expressly gives participants the right to bring a civil action to remedy fiduciary breaches, without any procedural preconditions.

An exhaustion requirement also is at odds with ERISA's goal of providing "uniformity in the administration of benefit plans for the protection of plan participants." *Smith v. Jefferson Pilot Life Ins. Co*., 14 F.3d 562, 570 (11th Cir. 1994). As other circuits have noted, "direct resort to the federal courts where claimants assert statutory rights . . . better promotes Congress's intent to create minimum terms and conditions for pension plans." *Stephens*, 755 F.3d at 966. "Indeed, there is a strong interest in judicial resolution of these claims, for the purpose of providing a consistent source of law to help plan fiduciaries and participants predict the legality of proposed actions." *Zipf*, 799 F.2d at 893.

Requiring exhaustion of statutory claims also undercuts ERISA's express policy of protecting "the interests of participants in employee benefit plans and their beneficiaries . . . ." 29 U.S.C. § 1001(b). As explained, because plan fiduciaries overseeing plan review procedures are often the exact parties accused of statutory violations, the interests of plan participants are in no way protected by a

rule that makes conflicted and self-interested fiduciaries the gatekeepers of participants' claims. *Cf. Santomenno ex rel. John Hancock Tr. v. John Hancock Life Ins. Co. (U.S.A.)*, 677 F.3d 178, 188–89 (3d Cir. 2012) (rejecting pre-suit demand requirement for claims under 29 U.S.C. § 1132(a)(2) and (3) because "the protective purposes of ERISA would be subverted if the section covering fiduciary breach required beneficiaries to ask trustees to sue themselves").

D. Requiring Exhaustion for ERISA Statutory Claims Makes No Practical Sense

Contorting review procedures mandated by ERISA for benefit claims to apply to ERISA statutory violations also makes no practical sense, as amply illustrated by this case. First, statutory claims are fundamentally different from claims for benefits "due . . . *under the terms of [the] plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). Plaintiffs' complaint is not that Defendants misapplied the Plan and improperly denied them individual benefits, but that Defendants transgressed ERISA's fiduciary standards and harmed the Plan as a whole. *See Smith*, 184 F.3d at 362–63 (reasoning plaintiff "does not challenge a denial of benefits . . . but rather the *conduct* . . . that he claims has lowered the value of . . . participants' 401(k) Plan accounts."). Indeed, the remedial provisions they invoke, 29 U.S.C. §§ 1132(a)(2) and 1109(a), "provid[e] relief singularly to the plan," not benefits to a participant, and seek to "protect the entire plan" rather

than "the rights of an individual." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985).

Second, the benefit-review procedures mandated by 29 U.S.C. § 1133 and prescribed in the Secretary's claims regulation, 29 C.F.R. § 2560.503-1, are simply not designed for statutory claims, and the Inland ESOP's claims procedures unsurprisingly do not embrace them. The district court here strained to fit Plaintiffs' claims into the Plan's review procedures by noting that the Plan document gives the ESOP Committee the power to "'construe and interpret the Plan and decide *all* questions arising in the administration, interpretation and application of the Plan and Trust Agreement' and sets out review procedures." A248 (Order at 9). But allegations of fiduciary misconduct are not "questions" relating to plan administration but assertions of wrongdoing. Moreover, the Plan's "review procedures" are by their plain terms meant to apply to review of benefit determination grievances, not the alleged fiduciary violations here. *See* Summary Plan Document at 14, ECF No. 35-1 ("Although you do not need to file a formal claim to receive your *benefit*, you may submit a written claim . . . or seek a review of the determination by the Committee on your *Plan benefit*.") (emphasis added). In fact, the Plan appears to direct participants to *court* in the event of a fiduciary's malfeasance. *See id.* at 17 ("If it should happen that Plan fiduciaries misuse the Plan's money . . . you may seek assistance from the U.S. Department of Labor, *or*

you may file suit in a federal court.") (emphasis added). It strains credulity that Plaintiffs should have known to avail themselves of these facially inapplicable "procedures" before asserting fiduciary violations of the kind that the Plan itself directs to court.

Third, even if a plan's benefit-review procedures could be used to assert statutory violations, plan fiduciaries—aside from potentially being conflicted—often are utterly incapable of providing the full relief enumerated by ERISA. Here, Plaintiffs seek to hold Defendants personally liable for plan-wide loss restoration associated with their alleged fiduciary breaches, as authorized by ERISA. *See* 29 U.S.C. § 1109; *Smith*, 184 F.3d at 363 ("Under ERISA, damages for breach of fiduciary duty inure to the benefit of the plan as a whole rather than to individuals."). While plan administrators can review individual benefit denials and award benefits, they cannot impose personal liability on breaching fiduciaries to restore plan losses or subject non-fiduciaries to equitable relief. For example, the Inland Plan administrator has no inherent power to compel the Inland executives who sold their stock to the ESOP to make restitution to the Plan or disgorge their ill-gotten profits. *See* 29 U.S.C. § 1132(a)(3). In short, there is no sound basis to require participants to bring their statutory claims to plan fiduciaries who are powerless and disincentivized to do anything about it. *See Chailland v. Brown & Root, Inc.*, 45 F.3d 947, 950 n.7 (5th Cir. 1995) (finding no "legal or logical

justification for requiring exhaustion of remedies when, as here, the grievance is completely foreign to the plan and plan is incapable of providing a remedy.").

CONCLUSION

Accordingly, this Court should grant Plaintiffs' petition for hearing en banc.

Respectfully submitted,

Date: May 22, 2024

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Date: May 22, 2024

CERTIFICATE OF SERVICE

I hereby certify that on this day, May 22, 2024, I electronically filed the foregoing amicus brief with the Clerk of the Court for the U.S. Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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Date: May 22, 2024