No. ______

In the Supreme Court of the United States

BRENTLEY COATES,

Petitioner,

v.

AGILENT TECHNOLOGIES and AGILENT TECHNOLOGIES, INC. DEFERRED PROFIT-SHARING PLAN, the HEWLETT-PACKARD COMPANY, and the HEWLETT-PACKARD COMPANY DEFERRED PROFIT-SHARING PLAN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether participants in individual account plans may obtain relief to the plan under section 502(a)(2) of ERISA when the alleged violations affected some, but not all, of the plan participants' accounts.

2. Whether a fiduciary has a duty under ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), to disregard the terms of the plan document where those terms require him to violate his fiduciary duties under ERISA § 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B).

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Petitioner Brentley Coates respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-5a) are not reported. The opinions of the district court (App., *infra*, 6a-24a) are not reported.

JURISDICTION

The court of appeals denied rehearing of the appeal and entered its judgment on April 13, 2006 (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 404(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1104(a) (App., *infra*, 25a-26a). Section 409 of ERISA, 29 U.S.C §1109 (App., *infra*, 27a). Section 502(a)(2) of ERISA, 29 U.S.C. §1132(a)(2) (App., *infra*, 28a). Department of Labor – Part 2550, Rules and Regulations for Fiduciary Responsibility, 29 C.F.R. §2550.404(a)-1 (App., *infra*, 29a-31a)

STATEMENT

Plaintiff-Petitioner Brentley Coates invoked the jurisdiction of the district court under section 502 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132, and under 28 U.S.C § 1331 (general federal question jurisdiction). He sued on behalf of

the plan pursuant to ERISA section 409, 29 U.S.C. §1109, but the fiduciary breaches alleged adversely affected only a discrete subset of plan participants: those over the age of 55 whose individual account balances were transferred by the plan's fiduciaries, pursuant to a directive by the plan sponsor, from a portfolio of fixed-income securities into one overwhelmingly invested in equities. He alleged that the Plan's fiduciaries should have declined to follow the plan sponsor's amendment of the plan instrument because it required them to breach their fiduciary duties to him and his class of similarly situated older participants who had invested their retirement assets in the fixed income investment option.

Upholding the district court's order dismissing the action under Fed. R. Civ. P. 12(b)(6), the Ninth Circuit Court of Appeals held that the plan sponsor's decision to eliminate the fixed income option, "Fund B," was not subject to the fiduciary standards of ERISA section 404 and that Defendants did not breach any duties by following the terms of the plan amendment. App., *infra*, 4a. The court also held that Defendant fiduciaries' "duties ran to the plan as a whole, not to any subset of beneficiaries, because fiduciaries are required 'to take impartial account of the interests of all beneficiaries.'" *Id.*, citing *Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996). The Court also cited 29 C.F.R. §2550.404a-1 as "describing [a] fiduciary's duties in reference to the plan as a whole." App., *infra*, 4a.

More than half of all pension assets in the United States are now held by individual account plans.[1] Participants in these plans now vastly outnumber those who participate in traditional defined benefit plan.[2]

If not overruled, the Ninth Circuit's decision will undermine the fiduciary's duty under ERISA § 404(1)(D), 29 U.S.C. § 1104(a)(1)(D), to decline to follow the terms of a plan if following them would require the fiduciary to breach his fiduciary duties. The Ninth Circuit's decision holds that ERISA plan participants may not obtain losses for fiduciary breaches which harm subsets of participants but not "all participants" or the plan itself. ERISA individual account plan participants within the jurisdictions of the Third and Sixth Circuits, however, have the right to seek relief where the fiduciary's acts or omissions allegedly harm only a subset of a plan's participants. *See*, *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); *In re Schering-Plough*, 420 F.3d 231 (3d Cir. 2005).

The Ninth Circuit's decision also impermissibly shields ERISA fiduciaries from the need to exercise any and all responsibility under section 404 simply because the plan

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[1] See Federal Reserve Board, *Flow of Funds Accounts of the United States: Flows and Outstandings First Quarter 2006*, Fed. Res. Statistical Release Z.1, at 113 (June 8, 2006)(indicating defined benefit plans as holding 1,916.5 billion in assets, and defined contribution plans as holding 2,868.7 billion in assets.)

[2] See *Bureau of Labor Statistics, U.S. Department of Labor, National Compensation Survey: Employee Benefits In Private Industry* at 6, (March 2005) (indicating that 42 percent of workers participate in defined contribution plans, and 21 percent participate in defined contribution plans.)

sponsor issued an instruction. This holding is contrary to those of the Third, Fifth, Sixth, and Tenth Circuits. *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978); *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995); *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); *Laborer's Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999).

Petitioner was a long-term employee of Defendant Hewlett-Packard ("HP") and then its spin-off company, Defendant Agilent Technologies, Inc. ("Agilent"). Excepts of Record filed with the Court of Appeal ("ER") at pp. 44, 47. As such, he was a participant in the Hewlett-Packard Deferred Profit Sharing Plan ("HP DPSP"), a deferred profit sharing plan qualified under Revenue Ruling 56-497. ER p. 47.

From its inception until the late 1980's, the HP DPSP required that the individual accounts of participants under age 55 be invested in "Fund A," a balanced fund consisting of investments in equities and bonds. ER pp. 47-48. However, for participants over age 55, the Plan mandated that a fraction of his or her account be transferred from Fund A to Fund B, a fixed-income fund, such that by the time the participant turned age 65, all of his or her account balance would be invested in Fund B (the "asset transfer rule"). By this mechanism, the fiduciaries of the HP DPSP sought to protect its older participants from the higher risk associated with Fund A as they approached retirement age. ER p. 48.

Sometime before 1990, the HP DPSP revoked the mandatory aspect of the asset transfer rule and, instead, offered a discretionary transfer procedure which allowed over age-55 participants to decide themselves, on an annual basis, the allocation of their account balances between Fund A and

Fund B. ER p. 49. Nevertheless, while the asset transfer rule became optional, HP and the HP DPSP provided financial seminars and educational information to Petitioner and his class throughout Petitioner's employment which emphasized the prudence of the reallocation model implemented by the asset transfer rule. ER p. 48. This educational information explained that for the older worker approaching retirement, the primary question is not the historic "long term" average performance of equities, but rather the average during the period the older worker or retiree is actually so invested. ER p. 48. Thus, this information stressed the importance of the phased reallocation of retirement assets for older workers as a means of minimizing the risk associated with the inherent price volatility of equities. ER pp. 48-49.

In 1993, HP froze the HP DPSP and ceased making contributions to it. ER p. 49. From then on, the value of each participant's individual account became solely a function of the earnings and losses it sustained from investing in the two funds made available to participants. *Id*. This rendered the ability to allocate plan accounts between Fund A and the less volatile Fund B particularly critical, especially for older participants. Moreover, the frozen DPSP accepted no new participants. *Id*.

As a result, the DPSP participant population, demographically, consisted of an unusually large proportion of rapidly aging employees – a characteristic that only became more pronounced over time. *Id*.

In October 1999, Petitioner, who was over age 55, elected to allocate 100% of his account balance to Fund B, the fixed-income fund, and his account was so invested by the Defendants. ER p. 49. On information and belief, there were approximately 1,500 DPSP participants with accounts

invested in Fund B at that time. Declaration of Janet E. Brown in Support of Plaintiffs' Opposition to Agilent's Motion to Dismiss First Amended Complaint ("Brown Decl.") at Exh. A; ER 64-65. Petitioner filed an identical declaration in opposition to HP's motion to dismiss the First Amended Complaint. Clerk's Record ("CR") # 35.

In May 2000, in conjunction with a spin-off of HP subsidiary Agilent as a wholly independent company, Agilent and HP, in their capacities as Plan fiduciaries, announced to the participants that HP and Agilent had established two separate DPSP plans (the "HP DPSP" and the "Agilent DPSP", jointly the "DPSP"), but that HP would continue "to manage" both plans' assets. ER pp. 49-50. However, in reality, the purported separation of the DPSP into two plans was cosmetic only; the two "plans" continued to operate and function *de facto* as a single plan for all practical purposes. *Id*.

The announcement also stated that with respect to both the HP and Agilent DPSPs, Defendants would eliminate Fund B as an investment option effective May 31, 2000. ER p. 50. Without detailed information – or indeed any specific citation whatsoever – Defendants claimed that "securities law" required the elimination of Fund B. *Id*. This claim was false, as no requirement of securities law (or any other legal requirement) mandated the elimination of Fund B. *Id*. In 1993, HP froze the HP DPSP and ceased making contributions to it. ER p. 49.

On May 31, 2000, account balances invested in fixed income securities were liquidated and automatically reinvested in Fund A, a "balanced" portfolio heavily overweighted in equities. *Id*. at ¶ 31; CR # 26; ER p. 50. This transfer of accounts from Fund B to Fund A was implemented

immediately, thereby converting overnight the Fund B participants' accounts from approximately 96% fixed-income investments to only 35.3% fixed-income investments. *See* Brown Decl. Exhibit B; CR # 34; ER pp. 67-80.

At the time of the May 2000 announcement, Defendants knew or should have known, inter alia, that:

- The participants in the DPSP at that time consisted of an unusually disproportionate number of employees age 55 and older (and that this demographic characteristic would become more and more pronounced over time);
- There would be no fresh infusions of employer or employee contributions into the frozen plan, and that therefore participants' retirement security depended wholly on the investment returns on existing accounts;
- The participants had been encouraged not only to invest in Fund B, but to increase the proportion of their account allocation in Fund B as they approached retirement;
- The immediate divestiture of the participants' fixed income account holdings and reinvestment into a primarily equity-based fund violated the precepts of Modern Portfolio Theory as applied to this particular participant population;
- The immediate reallocation of the participants' fixed income retirement assets rather than their periodic reinvestment on a cost-averaging basis imprudently exposed Appellant and his class to unnecessary volatility and risk of loss at the worst time possible -- just before their retirements; and,
- The investment structure of Fund A, without reallocation of its investments to reduce the potential for short-term volatility, was inappropriate for a

frozen group of aging participants, particularly the over-55 group constituting the class herein.

During April 2000 – just prior to the May 2000 announcement described above — there was a series of email communications between an individual named Elizabeth Obershaw, on information and belief an employee of HP acting on behalf of HP in its fiduciary capacity, and William Sharpe, on information and belief a professor at Stanford University and an investment consultant retained by the DPSP, regarding the elimination of Fund B as an investment option for DPSP participants. *See* Brown Decl. Exhibit A; ER pp. 64-65. These communications demonstrate that Defendants knew the potential problems arising from the elimination of Fund B and that Defendants were aware of how the transfer would adversely affect those 1500 plan participants with assets invested in Fund B. The communications further demonstrate that, despite their knowledge of these problems and the potential consequences, Defendants chose to ignore their own concerns about the prudence of these investments.

Petitioner filed a timely notice of appeal to the Court of Appeals for the Ninth Circuit on December 11, 2003. ER 90-92. After oral argument, the court of appeals upheld the district court's decision on January 12, 2006. App., *infra*, 3a-5a. On April 13, 2006, the court of appeals denied Petitioner's timely motion for rehearing. App., *infra*, 1a-2a. Final judgment was entered on April 13, 2006. *Id*.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant the Writ With Regard To The Question Of Whether A Subclass Of Plan Participants May State A Claim Under ERISA Section 502(a)(2).

As described above, Petitioner sought relief to the plan for alleged breaches of fiduciary duty that affected some, but not all, of the plan participants' accounts. The Ninth Circuit therefore concluded that Petitioner failed to state a claim under ERISA section 502(a)(2), reasoning that "Defendants' duties ran to the plan as a whole, not to any subset of beneficiaries, because fiduciaries are required 'to take impartial account of the interests of all beneficiaries.'" App., *infra*, 4a, citing *Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996).

In holding that a subset of beneficiaries cannot state a claim under section 502(a)(2), the Ninth Circuit has taken a position contrary to that of several other Courts of Appeal. Conflict over this important issue undermines ERISA's national enforcement scheme. Accordingly, this Court should grant *certiorari* to review this Question Presented.

A. The Courts of Appeal Are Divided Over This Question.

Although the Ninth Circuit cited to this Court's decision in *Varity* in denying Petitioner's appeal, the "plan as a whole" language that provided the foundation for its reasoning originates from another decision of this Court, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985).

In *Russell*, this Court held that the plaintiff therein lacked standing to bring a claim under sections 409 and 502(a)(2) for

a violation of fiduciary duty, where she sought to recover punitive damages allegedly caused by the denial of her benefits under the plan. In examining the remedial provisions of ERISA, this Court held that suits under section 409 must "be brought in a representative capacity *on behalf of the plan as a whole*." *Id*. at 142, n.9 (emphasis added).

Much has been made of the phrase "plan as a whole" since this decision was issued. The phrase does not appear anywhere within the text of ERISA or its related regulations.[3] However, from these four words, several important and frequently repeating issues have emerged, and the Circuits have widely varied in their interpretations of them. One of these issues centers on the question of whether a claim under ERISA section 502(a)(2) may be brought "on behalf of the plan" even if the fiduciary violations complained of were directed at a subclass of plan participants rather than toward all plan participants equally.

The Sixth and the Third Circuits have answered this question in the affirmative. In *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995), the defendants relied upon *Russell* to argue that a subclass of plan participants had no standing to seek recovery on behalf of a plan under § 409. The Sixth Circuit rejected this argument, stating that:

> Defendants' argument that a breach must harm the entire plan to give rise to liability under § 1109 would insulate fiduciaries who breach their duty so long as

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[3] The Ninth Circuit in its decision in the instant action cited 29 C.F.R. §2550.404a-1 as "describing [a] fiduciary's duties in reference to the plan as a whole." However, the regulation says nothing of the sort.

> the breach does not harm all of a plan's participants. Such a result clearly would contravene ERISA's imposition of a fiduciary duty that has been characterized as "the highest known to law."

Id. at 1453 (citations omitted.). The Third Circuit has adopted a similar position. *In re Schering-Plough Corporation ERISA Litigation*, 420 F.3d 231 (3d Cir. 2005).

The Fifth Circuit, in contrast, recently grappled with the same issue but suggested the opposite conclusion: that a fiduciary may *not* be liable for fiduciary breaches that are directed only at a particular subset of participants. *Milofsky v. American Airlines, Inc.*, 404 F.3d 338 (5th Cir. 2005). However, this decision was vacated *en banc* (442 F.3d 311 (5th Cir. 2006)) and remanded to the district court for further proceedings, so the state of the case law in that circuit is unclear.

The Ninth Circuit decision in this case, however, squarely rejects the position of the Sixth and Third Circuits. By holding that Petitioner cannot assert a claim under section 502(a)(2) on behalf of the plan because the alleged fiduciary violations affected only Petitioner's subclass of participants, the Ninth Circuit has created a clear conflict among the Courts of Appeal that should be resolved.

B. Circuit Conflict Over This Question Undermines ERISA's National Enforcement Scheme.

The Secretary of Labor, who is charged with interpreting and enforcing the provisions of Title I of ERISA, has described Petitioner's Question Presented as "an important and recurring issue." *See* the amicus brief filed by the Secretary of Labor in *Milofsky*, *supra*, ("*SOL Milofsky brief*")

at 1. Because her interests include "promoting uniformity of law, protecting beneficiaries, [and] enforcing fiduciary standards,"[4] the Secretary has consistently taken the position that participants in individual account plans, like Petitioner, may obtain relief to the plan under section 502(a)(2) of ERISA when the alleged violations affect some, but not all, of the plan participants' accounts. *SOL Milofsky brief*; *see also* the Secretary's amicus brief in *Schering-Plough*, supra ("*SOL Schering-Plough brief*").

In her amicus brief in *Milofsky*, the Secretary argued that "[i]t would be contrary to the intent and text of [ERISA sections 409 and 502(a)(2)] to hold that plan fiduciaries that violate ERISA's fiduciary standards are not liable simply because their violation did not affect the accounts of every single (or even most) plan participant." *SOL Milofsky brief* at 9. Similarly, in her amicus brief in *Schering-Plough*, the Secretary noted that there was "no basis for reading *Russell* so broadly that losses caused by fiduciary mismanagement, that significantly diminish the retirement security of participants or the amount of assets held in trust, cannot be recovered unless all of the participants are affected." *SOL Schering-Plough brief* at 6.

The Ninth Circuit decision herein, which diverges from both the law of other circuits and the position of the Department of Labor, undermines the national uniformity that forms the underpinning of ERISA's federal enforcement scheme. Accordingly, *certiorari* should be granted in this case to resolve this conflict.

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[4] *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986)(*en banc*).

II. The Court Should Grant The Writ With Regard To The Question Of Whether A Fiduciary Has A Duty To Disregard Plan Terms If Those Terms Require Him To Violate His Fiduciary Duties.

In denying Petitioner's claim, the Ninth Circuit concluded that "Defendants had discretion in their role as plan sponsor to merge Fund B into Fund A." App., *infra*, 4a, citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999). Petitioner did not dispute that plan sponsor activities are not subject to ERISA's fiduciary standards. However, Petitioner contended that if following the terms of a plan would require a fiduciary to violate his fiduciary obligations under ERISA, the fiduciary must decline to follow those plan terms. Relying on *Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1093 (9th Cir. 2004), the Ninth Circuit summarily rejected this fundamental notion. App., *infra*, 4a.

The position of the Ninth Circuit on this issue is directly at odds with the holdings in at least four other Circuits. The holding is also in conflict, in principle, with several decisions from this Court. Because this conflict implicates ERISA's most fundamental fiduciary standards, *certiorari* should be granted to review this question.

A. The Courts Of Appeal Are Divided Over This Question.

ERISA requires fiduciaries to discharge their duties "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of [ERISA]."* 29 U.S.C. § 1104(a)(1)(D) (emphasis added). The position of the Ninth Circuit not only renders this provision of ERISA meaningless, but also conflicts with the established case law of the Tenth, Third,

Sixth and Fifth Circuits. *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978); *Moench v. Robertson*, 62 F.3d 553, 558 (3d Cir. 1995); *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); and *Laborer's Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999).

In *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), the Tenth Circuit held that the trustees of employee stock ownership plans ("ESOPs"), which require the assets of a plan to be primarily or even totally invested in employer stock, are still subject to the prudence and loyalty duties set forth in ERISA, even though they are statutorily exempt from the diversification requirement: "The legislative history combined with a natural and clear reading of § 404, lead to the inexorable conclusion that ESOP fiduciaries are subject to the same fiduciary standards as any other fiduciary except to the extent that the standards require diversification of investments." *Id.* at 460. The court opined that the mere fact that a fiduciary has followed the express terms of the plan and invested in a manner which is "not inconsistent with any Specific prohibition of the Act," does not mean that the fiduciary "will be deemed to have met the 'exclusive benefit' and 'prudent man' requirements of s 404(a)(1)." *Id.* at 459.

In *Moench v. Robertson*, 62 F.3d 553, 558 (3d Cir. 1995), another ESOP case, the terms of the plan required the plan fiduciaries to invest primarily in employer stock. *Id.* at 558. As the company's financial situation began to decline, however, the plan fiduciaries continued to invest in company stock, despite repeated assertions from some corporation insiders that the plan should consider investing elsewhere. *Id.* at 558-9. The plan's participants sued for breach. Much like the court in the instant case, the district court had held that plaintiff had "failed to establish that [the Committee's] actions in directing the purchases of stock for the Plan were other

than in accordance with the requirements of the Plan or otherwise in violation of ERISA." *Id*. at 560. The Third Circuit reversed, noting that the defendants' argument was "inconsistent with ERISA inasmuch as it constrains the [fiduciary's] ability to act in the best interest of the beneficiaries." *Id*. at 567. The court cited *Eaves* with approval, noting that even though ESOPs are designed, in part, to limit fiduciaries' exposure to liability by removing the duty to diversify, there are circumstances where the duties of prudence and loyalty demand that an ESOP fiduciary defy the terms of the ESOP and invest the plans assets in the best interests of beneficiaries. *Id*. at 569-70. With that in mind, the court established a standard of review in which "an ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by investing in employer securities." *Id* at 571.

The Sixth Circuit adopted the *Moench* standard in *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995), noting that "ERISA seeks to accomplish its goal of employee protection 'by requiring such plans to name fiduciaries and by giving them strict and detailed duties and obligations.'" *Id* at 1457, citing *Moench*, 62 F.3d at 560.

Kuper, *Moench*, and *Eaves* all involved ESOPs. However, both this Court and the Fifth Circuit have applied the principles embodied in those cases outside the ESOP context. In *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 (1985), this Court held that "trust documents cannot excuse trustees from their duties under ERISA, and...trust documents must generally be construed in light of ERISA's policies." *Id*., citing ERISA § 404(a)(1)(D), 29 U.S.C.

§ 1104(a)(1)(D)); *see also Laborer's Nat'l Pension Fund v. Northern Trust Quantitative Advisors, Inc.*, 173 F.3d 313, 322 (5th Cir. 1999). The Court further noted that "trustees are understood to have all such powers as are necessary or appropriate for the carrying out of the purposes of the trust." *Central States*, 472 U.S. at 570.

In *Pegram v. Herdrich*, 530 U.S. 211 (2000), this Court elaborated on this reasoning in *dicta*, noting that:

> A plan might lawfully provide for a bonus for administrators who denied benefits to every 10th beneficiary, but it would be difficult for an administrator who received the bonus to defend against the claim that he had not been solely attentive to the beneficiaries' interests in carrying out his administrative duties.

Id. at 227, n.7.

By rejecting the line of authority discussed above to hold that a fiduciary is exempt from ERISA's fiduciary provisions when following the dictates of plan terms, the Ninth Circuit in this action has created a clear conflict within the Circuits.

B. Circuit Conflict Over This Question Undermines ERISA's National Enforcement Scheme.

As discussed above, the Secretary of Labor is charged with enforcing ERISA's standards and promoting uniformity of law. Here, as with Petitioner's first Question Presented, the Secretary has taken a position contrary to that of the Ninth Circuit on this issue.

The Secretary filed a brief as an *amicus curiae* during the appeal of *Tatum v. R. J. Reynolds Tobacco Co.*, 392 F.3d 636 (4th Cir. 2004), which presented a fact pattern analogous to that in Petitioner's case. In *Tatum*, after the plan sponsor amended the plan to require the sale of certain stocks held by the plan, the plan fiduciary followed the amendment and so sold the assets. The plaintiffs sued, claiming that "defendants breached their fiduciary duties under ERISA when they failed to exercise their discretion to maintain the Nabisco funds as investment options for Tobacco Plan participants." *Id*. at 6. Much like the Defendants in this case, defendants in *Tatum* argued that the plaintiff "fails to state a claim for breach of fiduciary duty under ERISA because the liquidation of the Nabisco funds (or stocks) in the Plan was a non-discretionary act required by the amendments." *Id*. at 7.

The Secretary of Labor argued in her *amicus* brief that, even if the plan terms could be interpreted to require the sale of the stock in question, fiduciaries had the duty to ignore those terms:

> While the act of amending the plan to require the sale of the stocks was a settlor function, the fiduciary's decision to sell the stocks in a block on January 31, 2000, was a fiduciary act subject to the duties of prudence and loyalty under ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B). The plain import of section 404(a)(1)(D) is that a plan sponsor may not simply override ERISA's requirements. To the contrary, section 404(a)(1)(D) provides that the fiduciary must override plan provisions that are not in accordance with ERISA's requirements...If obeying a plan provision requires the fiduciary to act imprudently and disloyally in violation of ERISA section 404(a)(1)(A) and (B), 29 U.S.C.

> § 1104(a)(1)(A) and (B), the provision is not consistent with ERISA and the fiduciary has a duty to disregard it.

SOL Tatum Brief at 12, citing *Central States*, 472 U.S. at 568.[5]

Similarly, in her *amicus* brief in *Agway, Inc. Employees' 401(K) Thrift Investment Plan v. Magnuson*, 03 CV 1060 (NDNY 2004), the Secretary again noted that "fiduciaries have a duty under section 404(a)(1)(D) to decline to follow the terms of the plan document where those terms require them to act imprudently in violation of ERISA section 404(a)(1)(B)." *SOL Agway brief* at 9 (citing *Central States*, 472 U.S. at 568; *Fink v. Nat'l Sav. Bank and Trust*, 772 F.2d 951, 955-6 (D.C. Cir 1985)). The Secretary further cited "numerous recent cases recogniz[ing] that, under section 404(a)(1)(D), ERISA's requirement of prudence takes precedence over plan language."[6] *Id*. at 11. Finally, the Secretary opined that the "presumption of prudence" in *Kuper* and *Moench* is inapplicable to non-ESOP retirement plans, and a fiduciary's duty to disregard plan terms where prudence so requires remains applicable to retirement plan fiduciaries. *Id*. at 12-15.

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[5] While the Fourth Circuit found in favor of the plaintiffs in *Tatum*, the Court declined to reach the issue discussed herein.

[6] *Citing In re WorldCom, Inc.*, 263 F. Supp. 2d 745, 764 (S.D.N.Y. 2003); *In re Williams Co. ERISA Litig*., 271 F. Supp. 2d 1328, 1343 (N.D. Okla. 2003); *Rankin v. Rots*, 278 F. Supp. 2d 853, 857 (E.D. Mich. 2003); *In re Enron Corp. Sec., Derivative & ERISA Litig*., 284 F. Supp. 2d 511, 549 n.51, 656 (S.D. Tex. 2003).

The Ninth Circuit decision herein, which diverges from both the law of other circuits and the position of the Department of Labor, undermines the national uniformity in ERISA's federal enforcement scheme. Accordingly, *certiorari* should be granted in this case to resolve this conflict.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully Submitted,

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