Nos. 16-56529 & 16-56532

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR,
Plaintiff-Appellee,

v.

SCOTT BRAIN,
MELISSA W. COOK, and
MELISSA W. COOK & ASSOCIATES, PC
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
No. 2:14-CV-03911-JAK-AGR
Hon. John A. Kronstadt

SECRETARY'S PETITION FOR PANEL OR EN BANC REHEARING

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
for Plan Benefits Security

THOMAS TSO
Counsel for Appellate
and Special Litigation

BLAIR L. BYRUM
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave., NW, N-4611
Washington, DC 20210
(202) 693-5595

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases:

Federal Cases-(continued):

Federal Statutes:

Federal Statutes-(continued):

Miscellaneous:

SECRETARY'S PETITION FOR PANEL OR EN BANC REHEARING

STATEMENT OF COUNSEL

A divided panel of this Court (Smith & Drain, JJ. with Schroeder, J., dissenting) held that a trustee did not breach his fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") when he executed a strategy of retaliation against a trust fund employee. Acosta v. Brain, 910 F.3d 502, 516 (9th Cir. 2018). In an effort to cover up reports of his own misconduct, the trustee caused the employee to be placed on administrative leave and ultimately caused her termination by outsourcing her department (a service provider to the plan). Id. at 507-11. He did so because the employee participated in a Department of Labor ("DOL") investigation of the trustee's potential ERISA violations and raised complaints that the trustee engaged in misconduct detrimental to the trust fund. Id. The panel majority reasoned that the trustee did not breach his fiduciary duties because he acted as an employer when he engaged in retaliation. Id. at 516-21. In reaching this conclusion, it ignored factual findings undisputed on appeal that the trustee's actions to retaliate against the employee included the use of his fiduciary powers. The panel decision permits fiduciaries committing acts harmful to the trust to insulate their acts from ERISA liability simply because they took illegal employer decisions along with illegal fiduciary actions.

A person is an ERISA plan fiduciary "to the extent . . . he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets." 29 U.S.C. § 1002(21)(A)(i). This Court "construe[s] ERISA fiduciary status 'liberally, consistent with ERISA's policies and objectives.'" Johnson v. Couturier, 572 F.3d 1067, 1076 (9th Cir. 2009) (citation omitted). ERISA section 404 provides that fiduciaries must act "solely in the interest of the participants and beneficiaries" and "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(A) & (B). A trustee "must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest." Pegram v. Herdrich, 530 U.S. 211, 224 (2000) (quoting G. Bogert & G. Bogert, Law of Trusts and Trustees § 543 (rev. 2d ed. 1980)).

The panel majority's decision that the trustee was not acting in his fiduciary capacity ignores the district court's undisputed factual findings, undermines ERISA's broad definition of fiduciary status, and conflicts with this Court's "policy of interpreting the fiduciary duty broadly." Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1468 (9th Cir. 1995). The panel decision vacated the permanent

injunction that barred Defendants from serving the fund after dismissing the fiduciary breach claims. Brain, 910 F.3d at 521-23. The panel decision threatens to curtail the ability of the Secretary of Labor and others to hold fiduciaries accountable for failing to act in the best interest of plan participants and beneficiaries by insulating acts from liability simply because the fiduciary committed fiduciary breaches while also violating ERISA as an employer. Such a decision raises a question of exceptional importance that deserves the attention of the full court.

STATEMENT OF ISSUE

Whether the panel erred by concluding that the defendant trustee did not act in a fiduciary capacity when he exercised both employer and fiduciary powers to retaliate against a trust employee for participating in a DOL investigation and raising complaints about his conduct detrimental to the trust.

STATEMENT OF THE CASE

The Secretary sued Scott Brain, a former trustee of the Cement Masons Southern California Trust Funds (the "Funds"), which administered five ERISA-covered trusts, and Melissa Cook and her law firm (the "Cook Defendants"), former counsel to the Funds. Brain, 910 F.3d at 507. After a five-day bench trial, the district court found that Brain and Cook had retaliated against Cheryle Robbins, an employee of the Funds' Audit and Collections Department ("A&C

Department"), for complaining about misconduct by Brain and participating in a DOL investigation of Brain. Id. at 507-08, 511. Brain and Cook organized a trustee meeting where they caused Robbins to be placed on administrative leave. Id. at 508-10. As part of a concerted strategy, they caused the work of Robbins's department to be outsourced to another company and took actions to successfully prevent Robbins from being hired by that company, even though all other employees of Robbins's department were hired. Id. at 510-11.

The district court found that Brain and the Cook Defendants violated ERISA's anti-retaliation provision, section 510, 29 U.S.C. § 1140, by causing Robbins to be placed on administrative leave and eventually terminated in retaliation for protected conduct. Brain, 910 F.3d at 511. It also held that Brain violated his fiduciary duties to the Funds under ERISA section 404, 29 U.S.C. § 1104, and that the Cook Defendants knowingly participated in his breach. Brain, 910 F.3d at 511. The district court issued a permanent injunction removing Brain as the Funds' trustee and prohibiting him from future fiduciary service to the Funds. Id. at 512. It also permanently enjoined the Cook Defendants from providing services to the Funds and ordered them to disgorge $61,480.62 in fees under section 502(a)(5). Id. at 512, 523 n.8.

A panel of this Court unanimously affirmed the district court's conclusion that Brain and the Cook Defendants violated ERISA section 510. Brain, 910 F.3d

at 512. But by a 2-1 vote, the panel reversed the district court's holding that Brain also breached his fiduciary duties under ERISA section 404. Id. at 516, 525 (Schroeder, J., dissenting). Referring to the "two-hat" principle, which recognizes that a fiduciary may sometimes act as employer and other times act as fiduciary, the panel held that the district court did not address whether Brain was "wearing his ERISA fiduciary hat" when he took the actions at issue, id. at 517-18, and rejected the Secretary's argument that Brain's actions to retaliate against Robbins were taken as a fiduciary in the course of discretionary plan management and administration, id. at 519, which are by definition fiduciary functions, 29 U.S.C. § 1002(21)(A)(i),(ii).

The dissent would have affirmed the district court's fiduciary breach holding, finding that Brain was "clearly acting as a fiduciary" and reasoning that "there is no law to support characterizing a fiduciary's efforts to cover up trust fund mismanagement as business, rather than fiduciary decisions." Brain, 910 F.3d at 525-26 (Schroeder, J., dissenting).

The Secretary seeks en banc or panel rehearing on the reversal of the fiduciary breach decision.

ARGUMENT

The Panel Erred in Concluding Brain Did Not Act as a Fiduciary When He Retaliated Against Robbins

1. ERISA defines a fiduciary with a "functional test." E.g., Kayes, 51 F.3d at 1459. Even though it is undisputed that Brain was a trustee, the panel majority states that it "lack[ed] basic information such as whether Brain was a named or a functional fiduciary."[1] Brain, 910 F.3d at 518. But that particular information is not needed because regardless of whether he was named as a fiduciary in the plan or was a functional fiduciary, the question is whether he acted in that fiduciary capacity when he orchestrated the retaliation against Robbins because she complained about how Brain was carrying out his fiduciary duties and participated in a DOL investigation of Brain. What matters is "whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." Pegram, 530 U.S. at 226.

The dissenting opinion noted Brain's failure to dispute his fiduciary status below. Brain, 910 F.3d at 525 (Schroeder, J., dissenting) ("a question that no one in this case heretofore has thought necessary to ask"); see also Sec'y ER 34

[1] Brain was the Funds' trustee, a position which "by [its] very nature require[s] persons who hold [it] to perform [fiduciary functions]." Questions and answers relating to fiduciary responsibility under the Employee Retirement Income Security Act of 1974, 29 C.F.R. § 2509.75–8 (D-3 Answer). "Plan trustees and plan administrators are, by definition, plan fiduciaries." Eskelin v. Ranson Cos., 121 F.3d 715 (9th Cir. 1997) (unpublished) (citing 29 C.F.R. § 2509.75–8).

("Brain . . . concedes that he is a fiduciary under § 404, and [he] appears to concede that the alleged underlying conduct occurred . . . . Instead, [he] argue[s] that none of these actions constitutes a breach of fiduciary duty . . . ."). But the panel majority, based on its own reading of the facts and relying on arguments never raised in the district court, reached its own conclusions about Brain's fiduciary status.

As the panel majority notes, a "trustee under ERISA may wear different hats," Brain, 910 F.3d at 517 (quoting Pegram, 530 U.S. at 225), and the same person may sometimes act as an employer and sometimes act as a fiduciary. "Employers, for example, can be ERISA fiduciaries and still take actions to the disadvantage of employee beneficiaries, when they act as employers." Pegram, 530 U.S. at 225. Nevertheless, persons with two hats often undertake concerted actions as both employers and as plan fiduciaries without clearly demarcating which hat they are wearing. See Varity Corp. v. Howe, 516 U.S. 489, 503 (1996) ("[R]easonable employees, in the circumstances found by the District Court, could have thought that Varity was communicating with them *both* in its capacity as employer *and* in its capacity as plan administrator." (emphasis in original)).

2. This petition presents an important question concerning the operation of plans that hire their own employees. In those circumstances, the trustees operating the plan must make both decisions as the employer and as fiduciaries on behalf of

the plan. See Lane v. Goren, 743 F.2d 1337 (9th Cir. 1984); see also Gen. Am. Life Ins. Co. v. Castonguay, 984 F.2d 1518, 1522 (9th Cir. 1993). Brain's conduct did not, as the panel majority assumed, constitute only an employer decision. Instead, Brain acted against Robbins as both a fiduciary and as an employer; he retaliated against Robbins and her department by removing them as the Funds' service provider—a fiduciary decision. Brain, 910 F.3d at 509-11.[2]

The undisputed facts establish that Brain exercised fiduciary decisions of plan management and administration when retaliating against Robbins. Robbins served the plan as an employee in the A&C Department. Brain, 910 F.3d at 507. The A&C Department provided important services to the plan, including audits. Id. Its role in completing audits is an important aspect of plan administration. See Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559,

[2] Even in cases where plans do not hire their own employees, plan tasks may be performed by the corporate plan sponsor's employees or a third-party service provider's employees. E.g., In re Northrop Grumman Corp. Erisa Litig., No. CV0606213MMMJCX, 2015 WL 10433713, at *17 (C.D. Cal. Nov. 24, 2015). In these situations, the corporate plan sponsor or third-party provider is subject to section 510 as a "person" who "[is] prohibit[ed] . . . from taking any adverse employment action against an employee" for protected activities related to the plan. Kimbro v. Atl. Richfield Co., 889 F.2d 869, 880 (9th Cir. 1989). Even in these cases, the corporate plan sponsor may use both employer and fiduciary authority to retaliate against employees for whistleblowing on ERISA violations, for example, by intentionally discharging an employee who is serving as a trustee to the plan, causing his removal as a trustee. Such retaliatory actions may violate both section 510 and fiduciary duties. See infra at 10.

571 (1985). The provision of services under ERISA makes a person, like the A&C Department and its corporate entity, a service provider. See, e.g., S. Cal., Ariz., Colo., & S. Nev. Glaziers Architectural Metal & Glass Workers Pension Tr. v. Seay, 66 F. App'x 114, 117 (9th Cir. 2003) (unpublished) (citing 29 U.S.C. § 1002(14)(B)). The district court also found as a fact (undisputed on appeal) that

> [i]n sum, the DOL has demonstrated by a preponderance of the evidence that the Cook Defendants and Brain decided to begin the process of outsourcing the A&C Department's work and dissolving the Administrative Corporation in response to Robbins' protected activities and that they caused Zenith to elect not to hire Robbins. But-for the DOL investigation and Robbins' role in it, there is no showing that the Joint Board would have taken these same steps.[3]

ER 63. Indeed, in ruling on the fiduciary breach claim against Brain, the district court relied on these factual findings, which included the Joint Board's decision to outsource the A&C Department's work to a third-party service provider. ER 49-51, 71. In short, the district court found that the Joint Board, as trustees of the plan, decided to change service providers based on Defendants' retaliation against Robbins, which started with placing her on administrative leave. Within this undisputed factual context, Brain undertook retaliatory actions as a fiduciary with Cook's knowing participation. Defendants manipulated and used fiduciary decisions—the retention of a service provider—to retaliate against Robbins and

[3] "Administrative Corporation" refers to the Cement Masons Southern California Administrative Corporation, an entity that the Funds formed to employ A&C Department staff. Brain, 910 F.3d at 507.

protect Brain from removal. See Brain, 910 F.3d at 510-11. Based on the undisputed factual findings, the district court was clearly correct that Brain exercised fiduciary authority to retaliate against Robbins and that he breached his fiduciary duties to serve his own personal interests.

3. The fiduciary decision to retain or remove plan service providers is an important part of a fiduciary's job. "Like the selection of providers, the retention of providers is a necessary part of the administration of an ERISA plan." Bui v. Am. Tel. & Tel. Co. Inc., 310 F.3d 1143, 1152 (9th Cir. 2002). The Secretary's long-standing regulations affirm that the selection and retention of service providers is a part of plan administration:

> A plan fiduciary may rely on information, data, statistics or analyses furnished by persons performing ministerial functions for the plan, **provided that he has exercised prudence in the selection and retention of such persons**. The plan fiduciary will be deemed to have acted prudently in such selection and retention if, in the exercise of ordinary care in such situation, he has no reason to doubt the competence, integrity or responsibility of such persons.

Questions and answers relating to fiduciary responsibility under the Employee Retirement Income Security Act of 1974, 29 C.F.R. § 2509.75–8 (FR-11, Answer) (emphasis added). This Court and others have looked carefully at whether plan fiduciaries conducted a prudent process in choosing service providers. See Waller v. Blue Cross of Cal., 32 F.3d 1337, 1344 (9th Cir. 1994); see also Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 296 (5th Cir. 2000).

4. Not only did Defendants manipulate this important fiduciary decision to further their retaliatory aims, the purpose and intent of their retaliation was to influence another fiduciary decision—the retention of Brain as trustee. See Couturier, 572 F.3d at 1076; Batchelor v. Oak Hill Med. Grp., 870 F.2d 1446, 1449 (9th Cir. 1989). As the dissent emphasized, the Defendants' actions, as a whole, to "oust" Robbins "was a calculated move to insulate the Fund mismanagement from further scrutiny" in violation of ERISA's goals and purposes. See Brain, 910 F.3d at 526 (Schroeder, J., dissenting). The district court found that Brain and Cook called a special meeting of the Funds' Joint Board and "'fir[ed] up' their allies for the actions that would be taken in response to Robbins'[s] contacts with the DOL." Brain, 910 F.3d at 509. At the meeting, their "critical statements of Robbins 'created an environment that was hostile to her' and 'caused' the trustees to vote unanimously to put Robins on leave." Id. These actions were taken to insulate Brain from Robbins's reports of his misconduct: Cook "described Robbins's [DOL contact] as inappropriate" and Brain asked another trustee to share "how Robbins had pressured him to . . . complain about Brain." Id. Thus, Brain and Cook's actions were taken to influence plan management and administration by removing an individual participating in DOL's investigation of Brain and complaining of Brain's misconduct. See id. at 508-11. In short, the whole purpose of Brain's actions was to conceal fiduciary misconduct.

5. The panel majority did not address the undisputed factual context of the decision to place Robbins on administrative leave, which was the beginning of Defendants' broader strategy to protect Brain and get rid of Robbins. Instead, it erred in creating an all-or-nothing proposition between employer and fiduciary action based solely on the fact that placing persons on administrative leave is typically an employer function. "[W]hen a fiduciary's actions that are taken in connection with the performance of his duties as trustee or administrator are in his own interest as well, [this Court] rigorously scrutinize[s] the conduct." Cunha v. Ward Foods, Inc., 804 F.2d 1418, 1432 (9th Cir. 1986). It is this intersection that often requires clarification from courts. See Pegram, 530 U.S. at 231-37 (concluding mixed eligibility and treatment decisions by HMO physicians were not fiduciary in nature); Varity, 516 U.S. at 498-505 (concluding employer was acting as ERISA fiduciary when it made misrepresentations regarding employee benefits); see also Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1465 (4th Cir. 1996) ("[P]lan sponsors . . . are *generally* free under ERISA to amend plans without triggering fiduciary status. However, the power (through plan amendment) to appoint, retain and remove plan fiduciaries constitutes 'discretionary authority' over the management or administration of a plan within the meaning of § 1002(21)(A)." (emphasis in original) (internal citation omitted)). Even accepting the fact that administrative leave is typically an employer act,

Defendants indisputably mixed fiduciary and employer decisions to further personal interests, including by influencing the trustees' selection of service providers. Unlike Pegram, 530 U.S. at 232, the case law presents no doubt that the underlying fiduciary act—selection of service providers to the plan—relates to the "fiduciaries' financial decisions" and implicates potential "financial mismanagement" of the plan, areas that ERISA directly regulates as fiduciary conduct. For this reason, the district court correctly concluded that Brain acted as a fiduciary and violated his fiduciary duties in addition to section 510's anti-retaliation provision. In concert with Brain, Cook knowingly participated in that retaliation and also the fiduciary breach. The fact that a trustee may sometimes act as fiduciary and sometimes act as employer should not insulate the trustee from liability for breaching his fiduciary duties when his conduct implicates both employer and fiduciary decisions.

In contrast to the majority's analysis, the dissent "rigorously scrutinize[d]" Defendants' conduct by examining the unchallenged factual findings on appeal. Cunha, 804 F.2d at 1432; see Brain, 910 F.3d at 525-26 (Schroeder, J., dissenting). As the dissent recognized, the factual context of this case points toward a fiduciary decision intertwined with an employer decision. "Robbins blew the whistle on Brain's Fund mismanagement—Brain's decision to oust her was a calculated move to insulate the Fund mismanagement from further scrutiny." Brain, 910 F.3d at

526 (Schroeder, J., dissenting). Permitting fiduciaries to blur the lines between fiduciary and non-fiduciary conduct undermines decades of case law requiring close scrutiny by courts when fiduciaries attempt to skirt responsibilities by masquerading as acting purely in a non-fiduciary capacity, like the proverbial wolf in sheep's clothing. The Supreme Court admonished lower courts not to ignore the "factual context," Varity, 516 U.S. at 503, and not to assume employer actions are just "ordinary business decision[s]" that "'turn[ed] out to have an adverse impact on the plan,'" id. at 505 (quoting id. at 539 (Thomas, J., dissenting)). "Instead, [the court must] accept the undisputed facts found, and factual inferences drawn, by the District Court." Id. In Varity, the Court recognized that the defendants "*intentionally* connected" statements made typically in an employer capacity to statements made in a fiduciary capacity. Id. (emphasis in original). The panel majority not only ignored the factual context, the district court's undisputed factual findings and its factual inferences, the panel majority also ignored that Defendants "*intentionally* connected" fiduciary decisions (retention of service providers) with an arguably employer decision (placing Robbins on administrative leave), as in Varity, using both types of decisions to further a strategy of inhibiting Robbins's complaints against Brain. The Secretary seeks rehearing to ensure that such mixing of fiduciary and employer functions is carefully scrutinized.

6. Defendants' use of comingled employer and fiduciary decisions to retaliate against Robbins and protect Brain only reinforces the finding that Brain breached his duty of loyalty to the Funds. See Pegram, 530 U.S. at 224; N.L.R.B. v. Amax Coal Co., 453 U.S. 322, 329-30 (1981) ("To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with 'uncompromising rigidity.'" (citation omitted)). Defendants' manipulation of fiduciary decisions to stifle reports of Brain's own misconduct harms the interest of the plan participants and beneficiaries. Cf. Varity, 516 U.S. at 506 ("To participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense is not to act 'solely in the interest of the participants and beneficiaries.'" (citation omitted)). The district court reasonably concluded that Brain was not acting "solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104, when he used his authority to influence the trustees to place Robbins on administrative leave as part of a broader strategy to stifle her communicating with the DOL about his potential wrongdoing as a trustee. See Brain, 910 F.3d at 526 (Schroeder, J., dissenting) ("The majority's approach conflicts with ERISA's goal to safeguard trust funds, and the Supreme Court's implementing directive to construe broadly the fiduciary duties incumbent

in administering an ERISA trust."). In doing so, Brain acted to further his own personal interests rather than the Funds' interests.

7. In response to the Secretary's arguments that Brain was acting as a fiduciary, the panel majority attacks arguments the Secretary did not make. First, the Secretary did not argue that Brain's duty of loyalty extends to Robbins individually or that Brain has any fiduciary duties toward Robbins. Rather, the Secretary argued that Brain's actions toward Robbins harmed participants and beneficiaries by concealing potential ERISA misconduct. Sec'y Br. 37-38. Moreover, the district court explicitly held that Brain breached his fiduciary duties to the Funds, not Robbins. ER 2-3, 71. Second, the majority implies that the Secretary argued that fees the Funds paid to Cook were evidence of fiduciary liability or status; to the contrary, the Secretary simply recognized those fees as damages or loss from Defendants' actions. Sec'y Br. 39-40. None of these arguments or conclusions undermine the dissent's correct statement of the factual context, which is unchallenged on appeal.

8. As a result of reversing the district court's fiduciary breach holding, the panel majority improperly dismissed the injunctive relief issued against Defendants, which was important for the Funds' protection. The panel majority held that the district court based the injunctive relief on ERISA section 409, 29 U.S.C. § 1109, which provides for the removal of breaching fiduciaries, and

reversed the injunction based on its holding that there was no fiduciary breach. Brain, 910 F.3d at 521. It also rejected ERISA section 502(a)(5), 29 U.S.C. § 1132(a)(5), which provides for "other appropriate equitable relief," as an alternative basis for affirmance. Id. at 521-23.

Because the panel majority erred in concluding that Brain did not act as a fiduciary and did not breach his fiduciary duties, injunctive relief under ERISA section 409 is appropriate. It is well established that district courts, after examining the factual circumstances, may issue injunctive relief against fiduciaries who fail to perform their jobs. E.g., Chao v. Merino, 452 F.3d 174, 185-86 (2d Cir. 2006) (upholding permanent injunction against a fiduciary who failed to monitor and remove another fiduciary who embezzled funds from the plan). Such relief is particularly appropriate here, where the district court, after carefully examining the facts, found that Brain used his fiduciary powers to remove a conscientious employee who was seeking to protect the plan and the interests of its participants, and that Cook knowingly participated in that breach.

CONCLUSION

In holding that Brain did not act as a fiduciary, the panel majority raises a question that no one asked, contradicts the district court's unchallenged factual findings and inferences, and ignores the factual context for Brain's actions, which sought to use both fiduciary and employer powers to further his own retaliatory

agenda with Cook's knowing participation. These actions sought to protect Brain from oversight as a fiduciary and block information that could have been used for his removal as trustee. The panel majority ignores these facts by labeling Brain's actions as "employer" acts, insulating his and Cook's actions from review as acts of a breaching fiduciary and knowing participant, thereby insulating Defendants from fiduciary responsibility.

For the reasons above, the Secretary respectfully requests that the Court grant his petition for en banc or panel rehearing.

Respectfully submitted,

KATE S. O'SCANNLAIN
Solicitor of Labor

G. WILLIAM SCOTT
Associate Solicitor
for Plan Benefits Security

THOMAS TSO
Counsel for Appellate
and Special Litigation

s/ Blair L. Byrum

BLAIR L. BYRUM
Trial Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave., N.W., Room N-4611
Washington, D.C. 20210
(202) 693-5595

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 16-56529 & 16-56532

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is *(select one)*:

[x] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** 4188**.**

(Petitions and answers must not exceed 4,200 words)

OR

[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Blair L. Byrum **Date** 1/18/2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on this day, January 18, 2019, I electronically filed the foregoing **SECRETARY'S PETITION FOR PANEL OR EN BANC REHEARING** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will send notification of such filing to all registered counsel of record.

/s Blair L. Byrum
BLAIR L. BYRUM
Trial Attorney
United States Department of Labor
Office of the Solicitor
Plan Benefits Security Division
200 Constitution Ave., NW, N-4611
Washington, DC 20210
Telephone: (202) 693-5595