No. 11-

IN THE
Supreme Court of the United States

U.S. AIRWAYS, INC., in its capacity as Fiduciary and Plan Administrator of the U.S. AIRWAYS, INC. EMPLOYEE BENEFITS PLAN,

Petitioner,

v.

JAMES MCCUTCHEN and ROSEN, LOUIK & PERRY, P.C.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Employee benefit plans often cover a participant's medical bills in the event of injury but require that, if the participant obtains compensation from a third party for that injury, he or she reimburse the plan in full. Under Section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), plans may enforce these reimbursement provisions in court by seeking "appropriate equitable relief" to enforce "the terms of the plan." 29 U.S.C. § 1132(a)(3).

Twice in recent years this Court has resolved disputes about how Section 502(a)(3) works in reimbursement actions. In the more recent case, *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), the Court expressly reserved a third question about the provision. The Third Circuit, in its words, has now "squarely" answered "the question that *Sereboff* left open," Pet. App. 9a, and has done so in a way that, as it acknowledged, splits the circuits.

The question presented is: Whether the Third Circuit correctly held—in conflict with the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits—that ERISA Section 502(a)(3) authorizes courts to use equitable principles to rewrite contractual language and refuse to order participants to reimburse their plan for benefits paid, even where the plan's terms give it an absolute right to full reimbursement.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the U.S. Court of Appeals for the Third Circuit:

1. US Airways, Inc., the petitioner on review, was plaintiff-appellee below.

2. James McCutchen and Rosen, Louik & Perry, P.C., respondents on review, were defendants-appellants below.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner US Airways, Inc. is a wholly-owned subsidiary of US Airways Group, Inc., which owns 10 percent or more of US Airways, Inc. stock. US Airways Group, Inc. is a publicly-traded company.

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U.S. Airways, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The District Court's order is not reported, but is available at 2010 WL 3420951 (Pet. App. 18a). The Third Circuit's decision is reported at 663 F.3d 671 (Pet. App. 1a).

JURISDICTION

The Third Circuit entered judgment on November 16, 2011 and denied rehearing on January 4, 2012. Pet. App. 38a, 41a. On March 17, 2012, Justice Alito extended the time to file this petition to May 3, 2012. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides in relevant part:

> A civil action may be brought * * * by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan[.]

INTRODUCTION

The Employee Retirement Income Security Act ("ERISA") is a legislative balancing act: Congress chose to regulate employee benefit plans, but at the same time it sought to avoid discouraging employers from offering benefits in the first place. Congress thus set out in ERISA to "induc[e] employers to offer benefits by assuring a predictable set of liabilities." *Rush Prudential HMO Inc.* v. *Moran*, 536 U.S. 355, 379 (2002). To accomplish that goal, ERISA relies on a "straightforward rule" of "hewing to" the contractual "plan documents" in which plans set forth their terms. *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300 (2009). ERISA "is built around reliance on the face of [those] written plan documents," *id.* (citation omitted), and its "repeatedly emphasized purpose [is] to protect contractually defined benefits." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985).

The Third Circuit's decision below eviscerates that statutory purpose—and, in so doing, precipitates a circuit split on a question this Court expressly "left open" in an earlier case. Pet. App. 9a. The issue

involves reimbursement provisions of employee benefit plans. Those provisions typically require participants to reimburse the plan for medical payments made on their behalf if they end up recovering from third parties. In *Sereboff* v. *Mid Atlantic Medical Services, Inc.,* 547 U.S. 356 (2006), this Court held that plans can enforce reimbursement provisions under ERISA Section 502(a)(3)—which authorizes plans to seek "appropriate equitable relief" to enforce plan terms, 29 U.S.C. § 1132(a)(3)—because the provisions amount to an equitable lien by agreement. But *Sereboff* reserved for another day the separate question whether plan participants can rely on equitable *defenses* to defeat an unambiguous reimbursement provision. 547 U.S. at 368 n.2.

Five courts of appeals have answered that question in the negative, holding that clearly-worded reimbursement provisions should be enforced as written. The Third Circuit has now expressly broken with those courts. In the decision below, it wrote that it "disagree[d]" with their holdings. Pet. App. 14a. It instead held that Section 502(a)(3) authorizes courts to rewrite unambiguous plan language—and thus eliminate a plan's right to reimbursement—if the court feels that enforcing the plan's terms is not "appropriate" in a given case.

That holding warrants review. It splits the circuits. It flies in the face of this Court's cases and ERISA's expressed intent. It endangers employer-provided health plans—and the tens of millions of American workers who participate in those plans—by cutting into reimbursement revenues on which they rely to remain financially viable. And it creates confusion on a recurring, and oft-litigated, issue: The federal courts decide dozens of ERISA reim-

bursement cases each year, and this Court has granted *certiorari* no fewer than four times in an effort to establish national uniformity with respect to ERISA remedies under Section 502(a)(3).

This case, in short, is a prime candidate for *certiorari* review. The Court should grant the writ and reverse the decision below.

STATEMENT

A. ERISA and Section 502(a)(3)

1. Congress enacted ERISA to provide a uniform regulatory regime over employee benefit plans. *See* 29 U.S.C. § 1001(b). The statute "places the regulation of private sector employee benefit plans (including health benefits) primarily under federal jurisdiction for about 177 million people." Congressional Res. Serv., *ERISA Regulation of Health Plans: Fact Sheet* 1 (Oct. 3, 2007).[1] And "[w]hile ERISA does not require an employer to offer health benefits, it does mandate compliance if such benefits are offered." *Id.*

Benefit plans set forth their terms in written plan documents, which constitute "contracts." *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1879 (2011). Section 502 of ERISA, codified at 29 U.S.C. § 1132, regulates how parties to these contracts can enforce them. Section 502(a)(1) authorizes plan participants to file civil actions seeking the usual panoply of remedies at law. For plans themselves, Section 502(a)(3) provides that a plan administrator seeking to enforce the plan's terms against a participant must file a civil action and seek an injunction or "other appropriate equitable relief * * * to enforce

[1] *Available at* http://congressionalresearch.com/RS20315/document.php?study=ERISA+Regulation+of+Health+Plans+Fact+Sheet.

any provisions of this subchapter or the terms of the plan[.]" *Id.* § 1132(a)(3)(B).

This Court repeatedly has "had occasion to clarify" the remedies available under the "other appropriate equitable relief" language of Section 502(a)(3). *Sereboff*, 547 U.S. at 361. In *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), the Court construed the provision to authorize only "those categories of relief that were typically available in equity." *Id.* at 255-256 (emphasis deleted). But in two cases that followed—both of which involved reimbursement actions similar to the one here—the Court made clear that while the relief sought must be equitable, that does not prevent plans from enforcing their terms and collecting reimbursement. In *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), the Court held that plans may seek restitution for a participant's failure to reimburse so long as the reimbursement claim is *equitable*, not legal. *Id.* at 213. And in *Sereboff*, a unanimous Court explained that reimbursement provisions create an "equitable lien by agreement" that the plan may enforce under Section 502(a)(3). 547 U.S. at 364-365. The Court ordered the defendant plan participants to reimburse their plan some $74,000—the amount the plan had paid out to cover their medical expenses. *Id.* at 360.

The participants in *Sereboff* separately argued that even if the relief the plan sought was "equitable," it was not "appropriate" under Section 502(a)(3)'s "other appropriate equitable relief" provision. *Id.* at 368 n.2. That was so, they argued, because the word "appropriate" authorizes courts to consider equitable defenses such as the "make-whole doctrine"—which requires that an insured party be fully compensated

for all injuries before a subrogee can obtain any reimbursement—and use those defenses to effectively override the plan's contractual reimbursement provision. *Id.* This Court identified the argument but reserved it for another day: "[F]rom our examination of the record it does not appear that the Sereboffs raised this distinct assertion below. We decline to consider it for the first time here." *Id.*

2. Both before and after *Sereboff*, courts of appeals have confronted that reserved question—and until the decision below in this case, all had answered it in the negative, holding that unambiguous reimbursement provisions should be enforced as written. In *Administrative Committee of Wal-Mart Stores* v. *Shank*, 500 F.3d 834 (8th Cir. 2007), *cert. denied*, 552 U.S. 1275 (2008), for example, the plan included a reimbursement provision similar to the one at issue here. *Id.* at 835. Despite the provision's unambiguous terms, the plan participants argued that full reimbursement was not "appropriate" under Section 502(a)(3), and they asked the court to apply one of two equitable defenses—either the "make whole" doctrine or a *pro rata* share requirement—to override the reimbursement provision. *Id.* at 837.

The Eighth Circuit declined to read Section 502(a)(3) to import equitable defenses into ERISA or to authorize them as a matter of federal common law. It explained that "[r]eimbursement and subrogation provisions are crucial to the financial viability of self-funded ERISA plans," and that plans must " 'preserve assets to satisfy future, as well as present, claims.' " *Id.* at 838 (quoting *Varity Corp.* v. *Howe*, 516 U.S. 489, 514 (1996)). And it recognized that "[a]mong the primary purposes of ERISA is to ensure the integrity of written plans." *Id.* It accordingly

refused to use Section 502(a)(3) "to alter the express terms of a written plan." *Id.* at 838. The panel concluded: "Nothing in the statute suggests Congress intended that section 502(a)(3)'s limitation of the [plan's] recovery to 'appropriate equitable relief' would upset [the parties'] contractually defined expectations." *Id.* at 839.

Other circuits have reached the same conclusion, holding that Section 502(a)(3) does not authorize courts to rewrite reimbursement provisions and that to do so would "frustrate, rather than effectuate, ERISA's 'repeatedly emphasized purpose to protect contractually defined benefits.' " *Zurich Am. Ins. Co.* v. *O'Hara*, 604 F.3d 1232, 1237 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 943 (2011) (quoting *Russell*, 473 U.S. at 148). *Accord Moore* v. *CapitalCare, Inc.*, 461 F.3d 1, 9 (D.C. Cir. 2006); *Bombardier Areospace Empl. Welfare Benefits Plan* v. *Ferrer, Poirot, & Wansbrough*, 354 F.3d 348, 357 (5th Cir. 2003), *cert. denied*, 541 U.S. 1072 (2004); *Administrative Comm. of Wal-Mart Stores* v. *Varco*, 338 F.3d 680 (7th Cir. 2003), *cert. denied*, 542 U.S. 945 (2004).

B. The Decision Below

1. The decision below breaks with that previously uniform line of circuit court decisions. The case "stems from a tragic car accident in which a young driver lost control of her car, crossed the median of the road, and struck a car driven by" respondent James McCutchen. Pet. App. 3a. McCutchen was seriously injured in the January 2007 accident—he underwent a hip replacement and physical therapy—and those injuries, combined with previous chronic ailments, left him "functionally disabled." *Id.*

McCutchen was covered by a health benefit plan (the "Plan") administered and self-financed by his

employer, US Airways. After the accident, the Plan "paid medical expenses in the amount of $66,866 on his behalf." *Id.* Meanwhile, McCutchen sought to recover from the driver who had injured him. He eventually settled with that driver for $10,000. *Id.* "[W]ith his lawyers' assistance, he and his wife received another $100,000 in under-insured motorist coverage for a total third-party recovery of $110,000." His attorneys took their fees off the top of that recovery. After those fees and expenses, McCutchen's "net recovery was less than $66,000." *Id.*

2. The Plan contains a reimbursement provision effectively identical to the ones the courts of appeals addressed in *Shank* and the other cases just discussed. The provision is included in the Summary Plan Description, in a paragraph entitled "Subrogation and Right of Reimbursement." It provides:

> The purpose of the Plan is to provide coverage for qualified expenses that are not covered by a third party. If the Plan pays benefits for any claim you incur as the result of negligence, willful misconduct, or other actions of a third party, *the Plan will be subrogated to all your rights of recovery. You will be required to reimburse the Plan for amounts paid for claims out of any monies recovered from a third party*, including, but not limited to, your own insurance company[.] * * * In addition you * * * may not negotiate any agreements with a third party that would undermine the subrogation rights of the Plan. [Pet. App. 4a-5a (emphasis added).]

Invoking that provision, US Airways in June 2007 placed McCutchen and his counsel on notice of a potential lien against any recovery they might ob-

tain. Pet. App. 19a-20a. McCutchen and his counsel nonetheless settled his claims in 2008 and failed to inform US Airways about the settlements. *See id.*

US Airways eventually found out about the settlements anyway. Applying the reimbursement provision by its terms, US Airways asked McCutchen to reimburse the Plan "for the entire $66,866 that it had paid for [his] medical bills." Pet. App. 3a. McCutchen refused. His attorneys, meanwhile, placed $41,500 of the $110,000 recovery in a trust account, "reasoning that any lien found to be valid would have to be reduced by a proportional amount of legal costs." Pet. App. 4a.

US Airways, acting in its capacity as plan administrator, then filed suit, seeking "appropriate equitable relief" under Section 502(a)(3) "in the form of a constructive trust or an equitable lien on the $41,500 held in trust and the remaining $25,366 personally from McCutchen." Pet. App. 4a. US Airways argued that the reimbursement provision plainly entitled the Plan to full reimbursement. McCutchen, in response, raised the panoply of arguments that plan participants had raised in cases like *Shank* and *O'Hara.* He argued that any reimbursement should be reduced, or eliminated entirely, under the make-whole and *pro-rata*-share doctrines. Pet. App. 5a. And he argued that "US Airways, which made no contribution to his attorneys' fees and expenses, would be unjustly enriched if it were now permitted to recover from him without any allowance for those costs[.]" *Id.* He asked the court to apply those equitable doctrines under Section 502(a)(3) to override the Plan's reimbursement rights. Pet. App. 5a.

3. Recognizing that the reimbursement provision's "any monies recovered" language plainly entitled the

Plan to full reimbursement, the District Court "rejected McCutchen's arguments and granted summary judgment to US Airways." *Id.*

The Third Circuit reversed. As the panel saw it, "it would be strange for Congress to have intended that relief under Section 502(a)(3) be limited to traditional equitable categories," as described in *Knudson* and *Sereboff*, "but not limited by other equitable doctrines and defenses that were traditionally applicable to those categories." Pet. App. 10a. It thus held that "Congress intended to limit the equitable relief available under Section 502(a)(3) through the application of equitable defenses." Pet. App. 11a.

The panel attempted to find support for that approach in this Court's recent decision in *CIGNA Corp.* v. *Amara*, which held that courts have "[t]he power to reform contracts" in ERISA cases "*to prevent fraud*." 131 S. Ct. at 1879 (emphasis added). The panel acknowledged that there was not even the slightest hint of fraud or dishonesty in this case. Pet. App. 15a. It nonetheless read *CIGNA* to stand broadly for the proposition that "the importance of the written benefit plan is not inviolable, but is subject—based upon equitable doctrines and principles—to modification and, indeed, even equitable reformation under Section 502(a)(3)." *Id.* It further concluded that, in equity, "contractual language [i]s not as sacrosanct as it is normally considered to be when applying breach of contract principles at common law." *Id.*

The panel acknowledged that its holding created a split with the Fifth, Seventh, Eighth, and Eleventh Circuit cases discussed above. The panel cited all of those cases, quoted *Shank* and *O'Hara*, and squarely rejected their analysis. It wrote: "We disagree with

those circuits that have held that it would be pioneering federal common law to apply equitable limitations on an equitable claim. * * * By categorically excluding the equitable limitations that Section 502(a)(3)'s reference to equitable remedies necessarily contains, the *Shank* and *O'Hara* courts depart from the text of ERISA." Pet. App. 14a-15a. The court remanded the case for a determination of what—if any—reimbursement McCutchen should be required to provide.

US Airways sought rehearing. It was denied. Pet. App. 41a. This petition followed.

REASONS FOR GRANTING THE PETITION

This case meets every criterion for *certiorari* review. The decision below creates a "direct conflict" among the circuits. R. Stern *et al.*, *Supreme Court Practice* 242 (9th ed. 2007) *("Stern & Gressman")*. The conflict is over an oft-litigated statutory provision that this Court has seen fit to construe on multiple occasions—the last time expressly reserving the question now presented here. The Third Circuit's approach conflicts with this Court's decisions. And the subject matter is of significant importance to millions of ERISA plans and plan participants across the nation: Plans seek to recoup billions of dollars a year through reimbursement, and they rely on reimbursement provisions to remain financially viable in a healthcare market characterized by spiraling costs. The approach adopted below would cut into those recoveries, making employer-sponsored coverage less affordable and potentially provoking some employers to drop their benefit plans altogether. Just as important, the Third Circuit's approach renders it impossible for plans to rely on their reimbursement rights; after all, any given

judge could choose to erase them from the contract. That is precisely the opposite of what Congress wanted when it enacted a statute designed to "induce[ ] employers to offer benefits by assuring a predictable set of liabilities." *Rush Prudential*, 536 U.S. at 379. The petition should be granted.

I. THE QUESTION PRESENTED HAS DIVIDED THE CIRCUITS.

There is no question that the decision on review created a circuit split: The Third Circuit says courts can use equitable principles to override contractual reimbursement provisions under Section 502(a)(3). Five other circuits say they cannot. As in *Sereboff*, the Court should "grant[ ] certiorari to resolve the disagreement." 547 U.S. at 361.

1. Prior to the decision below, every circuit to consider the question enforced unambiguous benefit-plan reimbursement provisions under Section 502(a)(3), observing that ERISA's primary purpose is "to protect the integrity of [ERISA] plans and the expectations of their participants and beneficiaries." *O'Hara*, 604 F.3d at 1237 n.3 (citation omitted).

The Eleventh Circuit. The Eleventh Circuit in *O'Hara* sustained a claim identical to US Airways' claim here—that is, a claim for reimbursement corresponding to medical benefits paid—by enforcing the reimbursement provision as written. The plan participant argued, as McCutchen did below, that full reimbursement was not "appropriate" under Section 502(a)(3). 604 F.3d at 1236. He argued, also as here, that such reimbursement would "unduly punish[ ] him" and "unjustly enrich[ ]" the plan. *Id.* at 1237. And he argued, also as here, that the court should apply equitable principles through Section 502(a)(3) to override the plan's reimbursement

provision. *Id.* The Eleventh Circuit rejected these arguments across the board. It found that refusing to enforce the reimbursement provision as written would "frustrate, rather than effectuate, ERISA's 'repeatedly emphasized purpose to protect contractually defined benefits.' " *Id.* (quoting *Russell*, 473 U.S. at 148). As the court of appeals explained, enforcing reimbursement provisions as written is critical to plan solvency—and thus benefits *all* plan participants. *Id.* at 1238.

The Eighth Circuit. Likewise, in *Shank*, the Eighth Circuit rejected a plan participant's argument that full reimbursement was not "appropriate" under Section 502(a)(3) and that the court should apply make-whole and *pro rata* equitable theories to rewrite the contract. 500 F.3d at 837. The court declared itself "not persuaded that [the plan's] full recovery according to the terms of the plan is not 'appropriate' relief within the meaning of ERISA." *Id.* It wrote that because "ensur[ing] the integrity of written plans" was "[a]mong the primary purposes of ERISA," it would not "alter the express terms of a written plan." *Id.* at 838. "This is especially true in the context of section 502(a)(3)," it observed, because that provision " 'does not, after all, authorize appropriate equitable relief *at large*, but only appropriate equitable relief for the purpose of * * * enforc[ing] any provisions of ERISA or an ERISA plan.' " *Id.* (quoting *Mertens*, 508 U.S. at 253).

The D.C. Circuit. The D.C. Circuit reached the same conclusion in *Moore*. The plan participants in *Moore*, like those in *Shank* and *O'Hara*, relied on the term "appropriate" in Section 502(a)(3), arguing that it contemplated equitable defenses to the contractual reimbursement obligation. 461 F.3d at 8-9. The

plan argued that the Moores had waived that argument, but the court brushed the waiver issue aside, holding that the participants' argument failed even if it was preserved. *Id.* at 8 n.9. The court wrote: "[T]he ERISA plan unambiguously establishes a plan priority to any third party recovery the beneficiary obtains * * *. We believe that this language plainly entitles [the plan] to recover from the Moores all amounts the ERISA plan has paid[.]" *Id.* at 10.

The Fifth & Seventh Circuits. The Fifth and Seventh Circuits likewise rejected attempts to rewrite reimbursement provisions on equitable theories, both in opinions issued before this Court decided *Sereboff*.[2] In *Bombardier*, the Fifth Circuit rejected a plan participant's argument that amounts designated as attorneys' fees were outside the scope of the plan's reimbursement rights: "This assertion ignores [the participant's] pre-existing contractual reimbursement obligation to the Plan * * * . This pre-existing reimbursement obligation precluded [him] from contracting away to the law firm that which he did not own himself, namely, the right to all or any portion of the $13,643.63 that rightfully belonged to the plan." 354 F.3d at 357. Likewise, in *Varco*, the Seventh Circuit refused to reduce the plan's contractual reimbursement to account for attorney's fees the plan participant had incurred. 338 F.3d at 691. The court rejected the participant's argument that it

[2] *Sereboff* identified *Bombardier* and *Varco* as two decisions on one side of the circuit split over whether a plan fiduciary could seek reimbursement from a third-party settlement under Section 502(a)(3). 547 U.S. at 361 n.1. Because this Court resolved the split in favor of *Bombardier* and *Varco*, the reasoning of those cases was left intact. And because both cases had addressed the issue left open in *Sereboff* and presented in this case, they form part of the circuit split here, too.

would be "unjust enrichment" for the plan to obtain reimbursement without contributing to the attorney's fees. Because the plan language was clear and unambiguous, the court wrote, "any so-called enrichment is not unjust." *Id.* at 692.

2. The Third Circuit, however, "disagreed" with the analysis of its sister circuits to have addressed the issue. Pet. App. 14a. According to the Third Circuit, *O'Hara*, *Shank*, *Bombardier*, and *Varco* all impermissibly "depart[ed] from the text of ERISA," Pet. App. 15a, so the Third Circuit departed from them. Thus, after the Third Circuit's decision, the same case, with the same reimbursement provision, will come out differently in the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits than it would in the Third Circuit. That is "a real or 'intolerable' conflict on the same matter of law or fact"—in other words, an outcome-determinative circuit split—of the sort this Court regularly grants *certiorari* to resolve. *Stern & Gressman* 241.

The lower courts, too, appear to be recognizing the new divide between the circuits in the few months since the Third Circuit's decision issued. In *Schwade* v. *Total Plastics, Inc.*, __ F. Supp. 2d __, 2011 WL 5459649 (M.D. Fla. Nov. 10, 2011), the District Court wrote that the Third Circuit's decision created a "circuit split" and that the decision is "irreconcilable" with the Eleventh Circuit's decision in *O'Hara*. *Id.* at *16. Just so. This Court should step in to unify the law, as it did in *Knudson* when one court of appeals split with three other circuits on the meaning of Section 502(a)(3). *See* Pet. for Certiorari, *Knudson*, 534 U.S. 204 (No. 99-1789), 2000 WL 34014494, at *10.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S CASES AND WITH FUNDAMENTAL PRINCIPLES OF ERISA.

This case separately warrants review because it involves an "important federal question," and the Third Circuit's resolution of that question "conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

1. ERISA's statutory scheme is "built around reliance on the face of written plan documents." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995). The court below rejected that fundamental principle when it nullified the Plan provision requiring participants "to reimburse the Plan for amounts paid for claims out of any monies recovered from a third party." Pet. App. 26a. The effect of the Third Circuit's decision is to read into every ERISA plan an implicit limitation on the plan's rights: Reimbursement is permitted only where, in the court's view, it is justified under the facts of a particular case.

That approach conflicts with this Court's ERISA precedents in two key ways. *First*, it ignores the teaching that Section 502(a)(3) "does not * * * authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or * * * enforc[ing] any provisions' of ERISA or an ERISA plan." *Mertens*, 508 U.S. at 253 (citation omitted; alteration and second ellipsis in original). The Third Circuit turned that principle on its head when it concluded that the right to seek equitable relief to *enforce* a plan somehow "expressly tempered" the importance of the *terms* of the plan. Pet. App. 16a. That does not follow; Congress empowered plans to seek equitable relief to enforce their *written terms*, not terms cho-

sen at random by a judge. Construing Section 502(a)(3) as the Third Circuit did here contradicts what this Court has described as ERISA's "repeatedly emphasized purpose": "to protect contractually defined benefits." *Russell*, 473 U.S. at 148.

Second, the decision below is wholly inconsistent with this Court's instruction that, when "fashioning 'appropriate' equitable relief" under Section 502(a)(3), a court should "keep in mind the special nature and purpose of employee benefit plans." *Varity Corp.*, 516 U.S. at 515 (quotation marks & citation omitted). When US Airways "raise[d] a practical concern that the application of equitable principles will increase plan costs and premiums," the Third Circuit dismissed the concern out of hand, concluding that it "does not address the statutory language and is, in any event, unsubstantiated by the circumstances of this case." Pet. App. 16a. That was a shallow brushoff. The "statutory language" of Section 502(a)(3) does not sit in a vacuum; it is part of a highly complex statutory scheme. And the relevant point of that scheme, as this Court has explained time and again, is that ERISA plans must be able to control their liabilities so that they can afford to provide benefits to *all* employees, not just those before the court in a particular case.

"ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits." *Curtiss-Wright Corp.*, 514 U.S. at 78. Instead, as already explained, the statute " 'induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred.' " *Conkright* v. *Frommert*,

130 S. Ct. 1640, 1649 (2010) (quoting *Rush Prudential*, 536 U.S. at 379). And it counsels "[d]eference to plan administrators, who have a duty to all beneficiaries to preserve limited plan assets." *Id.* at 1650. The Third Circuit's decision undercuts all of these goals. It throws predictability out the window for ERISA plans. And it causes contractual benefits to run in only one direction: The *participant* is guaranteed the certainty of immediate reimbursement for medical expenses, but the *plan* is denied the same guarantee of reimbursement from third-party recovery. After the Third Circuit's decision, subrogation and reimbursement depend on a court's approval of the propriety of that relief, or perhaps just a portion of it, on a case-by-case basis, long after a plan has paid the money it is contractually obligated to commit. This is antithetical to "a uniform regime of ultimate remedial orders and awards." *Id.* at 1649.

2. The court purported to find authority for its approach from this Court's decision in *CIGNA*, 131 S. Ct. 1866. But it could do so only by distorting *CIGNA*'s reasoning. In *CIGNA*, this Court held that reformation of a benefit plan may be an appropriate remedy under Section 502(a)(3) in certain cases because "the power to reform contracts * * * is a traditional power of an equity court * * * *used to prevent fraud*." 131 S. Ct. at 1879 (emphasis added). The *CIGNA* Court thus grounded reformation in its historical context and recognized its potential availability in one type of case: where a contracting party committed fraud or misrepresentation. *See id.* The Third Circuit ignored this critical contextual point, however, and held without limitation that "the importance of the written benefit plan is not inviolable, but is subject—based upon equitable doctrines

and principles—to modification and, indeed, even equitable reformation under § 502(a)(3)." Pet. App. 15a. It declined to limit reformation to cases of "intentional misrepresentations by the employer and fiduciary," as had this Court, but instead read into *CIGNA* an unmentioned "broader" principle: namely, that "when courts were sitting in equity in the days of the divided bench (or even when they apply equitable principles today) contractual language was not as sacrosanct as it is normally considered to be when applying breach of contract principles at common law." *Id.* There simply is no warrant in *CIGNA* (or any of the other sources the panel cited) for that sweeping departure from ERISA's long-standing focus on the benefit plan's written terms.

3. The decision below already has been severely criticized by one district court, which catalogued in detail the ways the Third Circuit strayed from this Court's decisions. *See Schwade*, *supra*, 2011 WL 5459649. As *Schwade* observed, ERISA plans are voluntary, so "encouraging an employer to volunteer requires, as explained throughout ERISA's case law, both predictable regulation and reliable construction of the plan." *Id.* at *17. That is precisely why the approach taken by the Third Circuit is so pernicious: "[E]veryman's notion of equity is uncertain and variable. * * * Although perhaps momentarily gratifying to the sensibilities of a judge, foisting an involuntary and unpredictable obligation on an ERISA plan endangers both the statutory ERISA regime and the salutary benefits broadly available as a result of the regime." *Id.* at *17, *20.

The *Schwade* court was equally critical of the Third Circuit's assertion that enforcing the reimbursement

provision would give US Airways a "windfall." *See* Pet. App. 16a. Wrote the court:

> Were McCutchen's employer compelled to provide a plan, were that plan immune from insolvency, were money but manna from heaven, the pejorative term "windfall" might apply. Needless to say, none of those assumptions is true. *McCutchen* leaves a mystery: How can a plan obtain a "windfall" by merely enforcing a contractual right that protects plan assets? "Windfall" means unearned money; McCutchen's ERISA plan sought re-imbursement of money paid by the plan and owed by McCutchen. * * * If *McCutchen*'s ungoverned notion of equity becomes pandemic, consistent plan operation becomes impossible, inconsistent judicial ruling becomes commonplace, and some beneficiaries become profiteers at the expense of others. [*Schwade*, *supra*, 2011 WL 5459649, at *20.]

That is exactly right. The decision below is not just wrong and in conflict with other circuits; it is dangerous to boot. This Court's intervention is required.

III. THE CONFLICT AMONG THE CIRCUITS CONCERNS AN IMPORTANT, RECURRING ISSUE THAT SHOULD BE DECIDED BY THIS COURT.

Finally, there can be no question that the question presented is sufficiently important to warrant review. ERISA governs the interactions between the majority of employees and their employers across the country—tens of millions of people and thousands of plans. Section 502(a) provides the primary enforcement mechanism for all of those stakeholders. It is a fixture in the federal courts—which, no doubt, explains why this Court so frequently has been called

upon to interpret it. And the need for review, and correction, is particularly urgent here because the Third Circuit's approach threatens the viability of the ERISA plans that provide so many Americans with their health coverage.

1. "Employment-based health benefits plans are * * * the dominant source of health coverage in the United States," with over half of the nation's entire population covered by these plans. P. Fronstin, *Sources of Health Insurance & Characteristics of the Uninsured: Analysis of the March 2011 Current Population Survey*, Employee Benefit Res. Inst. Issue Brief 362, Sept. 2011, at 4.[3] As Congress recognized in enacting ERISA, "the continued well-being and security of millions of employees and their dependents are directly affected by these plans." 29 U.S.C. § 1001(a).

2. In recent years, however, "the cost of providing health benefits" has "outpace[d] increases in worker earnings, in some years by a factor of four or five." Fronstin, *supra*, at 10. As a result, "[t]he percentage of individuals with employment-based health benefits decreased from 69.3 percent in 2000 to 58.7 percent in 2010." *Id.* Even a one-percent increase in costs has devastating effects: "each one percent increase in managed care plans' costs * * * results in a potential loss of insurance coverage for about 315,000 individuals." Health Economics Practice, Barents Group, LLC, *Impacts of Four Legislative*

[3] *Available at* http://www.ebri.org/pdf/briefspdf/EBRI_IB_09-2011_No362_Uninsured1.pdf.

Provisions on Managed Care Consumers: 1999-2003, at iii (1998).[4]

That sort of plan-killing cost increase would follow from the Third Circuit's rule. Reimbursement from third-party recoveries is essential for the solvency of many ERISA plans. *See* Br. of Amicus Curiae Central States, Southeast & Southwest Areas Health & Welfare Fund in Support of Petitioners, *Knudson*, 534 U.S. 204 (No. 99-1786), 2001 WL 492255, at *2 (plan benefit levels are based on "actuarial assumptions which assume a certain level of subrogation recoveries"; thus "such recoveries are necessary to provide assets sufficient to fund" promised benefits). Indeed, estimates suggest that plans recover more than $1 billion annually under reimbursement provisions. Br. of Amicus Curiae America's Health Ins. Plans, Inc. *et al.* in Support of Respondent, *Sereboff*, 547 U.S. 356 (No. 05-260), 2006 WL 460877, at *3 n.3. If ERISA plans—in particular, self-funded plans—are not able to recoup their losses using this important tool, the result will be "either * * * reduced health care benefits, or higher out-of-pocket costs for participants in the form of higher co-payments and deductibles, or both." Mot. of Self-Insurance Inst. of Am., Inc. for Leave to File a Brief Amicus Curiae in Support of Petitioners, *Knudson*, 534 U.S. 204 (No. 99-1786), 2001 WL 456442.

Moreover, the Third Circuit's ruling will introduce significant uncertainty—and significant new costs—into plan administration and litigation. Litigation costs will increase because ERISA plans will have to demonstrate the propriety of reimbursement on a

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[4] *Available at* http://www.uhia.net/web-storage/webstorage5/Impact%20of%20Four%20Legislative%20Provisions%20-%20Barrents%20Group.pdf.

case-by-case basis. Plans that have members in many states, as most large plans do, will be able to enforce their contractual language against some members but not against others. And the *McCutchen* rule will spark forum shopping in cases involving those large plans. After all, Section 502(a) lawsuits may be brought "in the district where the plan is administered, where the breach took place, or where a defendant resides *or may be found*," 29 U.S.C. § 1132(e) (emphasis added), and some courts have interpreted that to mean venue is proper in any district with which a plan has minimum contacts. *See Waeltz* v. *Delta Pilots Retirement Plan*, 301 F.3d 804, 809 (7th Cir. 2002); *I.A.M. Nat'l Pension Fund* v. *Wakefield Indus., Inc.*, 699 F.2d 1254, 1257 (D.C. Cir. 1983). If the Third Circuit's decision stands, plan participants from across the country will flood that Circuit's courts with declaratory judgment actions, arguing that the plan has minimum contacts in a Third Circuit state and attempting to avail themselves of *McCutchen*'s unprecedented rule.

These are precisely the sorts of ERISA-distorting errors this Court has previously granted *certiorari* to correct. In *Conkright*, for example, the Court reviewed and reversed a decision that—like the decision below—had the effect of "interject[ing] other additional issues into ERISA litigation," thereby "increas[ing] litigation costs." 130 S. Ct. at 1649-50. In overturning the lower court's decision to limit the deference owed an ERISA plan administrator, this Court recognized the "uniformity problems that arise from creating ad hoc exceptions" affecting the enforcement of ERISA plans. *Id.* at 1650. That perfectly describes the Third Circuit's decision to interject

ad hoc equitable determinations into the enforcement of unambiguous reimbursement provisions.

3. This Court, of course, has recognized the particular importance of Section 502(a)(3) by opining repeatedly on its proper interpretation and scope. *See CIGNA*, 131 S. Ct. 1866; *Sereboff*, 547 U.S. 356; *Knudson*, 534 U.S. 204; *Harris Trust & Savings Bank, Inc.* v. *Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Varity Corp.*, 516 U.S. 489; *Mertens*, 508 U.S. 248; *Russell*, 473 U.S. 134. The issue presents itself frequently in the lower courts too. To offer two illustrations: *Sereboff*'s holding concerning "appropriate equitable relief" under Section 502(a)(3) has been invoked in some 260 cases in less than six years. And this Court decided *CIGNA* less than a year ago, yet its discussion of equitable reformation in the ERISA context already has been cited by courts 34 times. There can be no question that the meaning of Section 502(a)(3) is an "important and recurring" issue worthy of review. *Stern & Gressman* at 228.

4. Finally, this case presents an excellent vehicle to resolve the question recognized, but left undecided, in *Sereboff*. The case "squarely presents" the issue, as the court below recognized. Pet. App. 9a. The factual record is well-developed and undisputed in all relevant parts. The circuit split is well-defined, outcome-determinative, and conceded by the decision below. *See* Pet. App. 13a-14a; *see also Sereboff*, 547 U.S. at 361 (granting *certiorari* where court below had recognized a circuit conflict concerning Section 502(a)(3)). And the time is right for review: Half the circuits have weighed in; they are irrevocably split; and for the reasons just discussed, the Third Circuit's decision will quickly begin causing administra-

tive complications, distorting litigation choices, and increasing the costs and complexity of litigation—just what ERISA was designed to prevent. Given the square conflict and the importance of the issue presented, there is no reason for this Court to let it percolate any longer. Review is not just appropriate; it is essential.

CONCLUSION

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

Respectfully submitted,

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