No. 11-1285

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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SUMMARY OF ARGUMENT

Respondents concede that the decision below created a "split" among the circuits, Opp. 23, on a statutory provision so critical to ERISA's overall scheme that this Court has granted certiorari time and again to interpret it. Having retreated that far, Respondents are left to argue merely for delay: They quibble with the depth of the split; they call for yet more percolation; they assert that the Third Circuit's rule will cause ERISA plans no harm; they claim this case is a poor vehicle. Each argument fails.

1. The Third Circuit acknowledged that its decision created a circuit split. Pet. App. 14a-15a. Respondents nonetheless gamely attempt to explain that away. They can minimize the split, however, only by mischaracterizing the cases involved. Respondents argue, for example, that two decisions addressed only "the predicate question that this Court resolved in *Sereboff* [v. *Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006)]." Opp. 12. That is flatly wrong. Both actually decided the question presented here. Respondents argue that two other decisions "focused on an entirely different set of issues." Opp. 11. That too is incorrect; those decisions address exactly the question now presented. And Respondents suggest that *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866 (2011), somehow erases the circuit split, but *CIGNA* did not change the governing legal principles in the least. The split is real; Respondents cannot wave it away.

2. Respondents also argue that further percolation is needed. Wrong again. Half the circuits have weighed in. None shows any sign of reversing itself. And as Petitioner has explained, the Third Circuit's rule has the potential to quickly become the de facto *national* rule in light of ERISA's elastic forum-selection provision. Pet. 23. Respondents, tellingly, ignore this point altogether. This Court need not await further percolation when the incorrect decision below is primed to begin distorting ERISA litigation right away, nationwide.

3. On the merits, Respondents argue that a rule enforcing ERISA plans as written is one of law, not equity, in violation of Section 502(a)(3). That argument betrays a basic misunderstanding of the relief at issue here: an equitable lien by agreement, which

works to give effect to an agreement between parties. The approach of the majority of circuits—which hews to the terms of the plan—honors both that equitable remedy and the plain language of Section 502(a)(3).

4. Finally, Respondents argue that the decision below—which authorizes judges to slash plan reimbursements on little else than a whim—will not "increas[e] plan costs and premiums." Opp. 30-32. Common sense belies that assertion, as do the cases and commentaries cited in the petition (at 21-23), by *amici*,[1] and below. This Court should grant the writ and reverse.

ARGUMENT

I. THE SPLIT IS WELL-ARTICULATED AND REVIEW IS APPROPRIATE NOW.

1. The decision below acknowledged that it was splitting the circuits. Pet. App. 14a-15a. Faced with that obstacle, Respondents concede that there is what they dub a "post-*Sereboff* split." Opp. 23. But Respondents contend that Petitioner—and thus the Third Circuit itself—"overstate[ ]" the split because the decisions arrayed on the other side are distinguishable. Opp. 12. Not so.

a. Respondents maintain that two of the five cited decisions—*Bombardier Aerospace Employee Welfare Benefits Plan* v. *Ferrer, Poirot, & Wansbrough*, 354 F.3d 348 (5th Cir. 2003), and *Administrative Committee of Wal-Mart Stores, Inc.* v. *Varco*, 338 F.3d 680 (7th Cir. 2003)—"solely addressed the predicate question that this Court resolved in *Sereboff*:

[1] *See* Brief for National Ass'n of Subrogation Prof'ls, *et al.* as *Amici Curiae* Supporting Petitioner 4-10 ("NASP *Amici* Br.").

whether a claim for reimbursement is 'equitable[.]' " Opp. 12.

That is untrue. The Fifth and Seventh Circuits *began* by addressing "the predicate question that this Court resolved in *Sereboff*." *See Bombardier*, 354 F.3d at 355-358; *Varco*, 338 F.3d at 686-688. But both courts went on to answer a second question: whether equitable defenses such as the "common-fund doctrine"[2] can "defeat[ ] the terms of an ERISA plan" expressly requiring full reimbursement from participants. *Varco*, 338 F.3d at 689-692; *Bombardier*, 354 F.3d at 360-362. Both answered "no." *Varco*, 338 F.3d at 691; *Bombardier*, 354 F.3d at 362. Both held that "[e]nrichment is not 'unjust' where it is allowed by the express terms of the plan," *id.* at 692 (citation omitted)—the precise opposite of the holding below. Pet. App. 16a.

As the Third Circuit itself concluded below, these decisions cannot be reconciled. Pet. App. 14a-15a. That conclusion holds more weight than Respondents' self-serving efforts to deny a split.

b. Even if the Court were to look only at post-*Sereboff* cases, moreover, the post-*Sereboff* decisions discussed in the petition—*Zurich Am. Ins. Co.* v. *O'Hara*, 604 F.3d 1232 (11th Cir. 2010); *Administrative Comm. of Wal-Mart Stores, Inc.* v. *Shank*, 500 F.3d 834 (8th Cir. 2007); and *Moore* v. *CapitalCare, Inc.*, 461 F.3d 1 (D.C. Cir. 2006)—similarly are arrayed against the decision below. As we explained (Pet. 12-14), each involved ERISA plan language requiring full reimbursement; each confronted the argument that full reimbursement was not "appro-

[2] The common-fund doctrine is an "equitable" defense. *Dennis* v. *Higgins*, 498 U.S. 439, 441 (1991).

priate" under Section 502(a)(3) because equitable defenses applied; and each rejected that argument, concluding that the plan must be applied as written. Those holdings squarely conflict with the decision below—which is why the Third Circuit acknowledged at least *Shank* and *O'Hara*, and explicitly broke with them. Pet. App. 15a; *see also Moore*, 461 F.3d at 10 (rejecting the make-whole defense where the ERISA plan unambiguously required full reimbursement). Even discounting the pre-*Sereboff* decisions, then, the split is 3-1—the lineup that inspired review in *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204 (2002). *See* Pet. 15.

Respondents, naturally, seek to distinguish all of these decisions, too. They argue, for example, that *Shank* and *O'Hara* "merely held that federal common law does not limit the measure of relief under a Section 502(a)(3) claim for equitable reimbursement," and did not address "whether the *statute itself* * * * requires a court to apply equitable limitations on a claim for reimbursement under Section 502(a)(3)." Opp. 16-17 & n.6. That again is untrue. Both courts faced the same statutory argument Respondents make here. *See Shank*, 500 F.3d at 837 ("The Shanks contend[ ] that full reimbursement to the Committee is not 'appropriate' under section 502(a)(3)"); *O'Hara*, 604 F.3d at 1236 ("O'Hara argues that enforcement of the reimbursement and subrogation provision is not 'appropriate' " under Section 502(a)(3)). And both courts rejected it, unconvinced that "full recovery according to the terms of the plan is not 'appropriate' relief within the meaning of ERISA." *Shank*, 500 F.3d at 837; *O'Hara*, 604 F.3d at 1238. That these courts used the term "federal common law" to describe the bene-

ficiaries' equitable theories changes nothing. After all, the theories in question—primarily the "make whole" doctrine—*are* part of the federal common law, but they are also equitable. *See* Pet. App. 9a n.2. That is why Respondents eventually retreat, in a footnote, from their meritless contention that *Shank* and *O'Hara* considered only "federal common law" and not "the statute itself." Opp. 17 n.6.

2. Respondents next argue that this Court's decision in *CIGNA* extinguishes the circuit split because (they say) "the lower court is the only court of appeals to address *CIGNA*'s impact on claims for equitable reimbursement under Section 502(a)(3)." Opp. 22. That argument wildly overstates the Third Circuit's reliance on *CIGNA*. The court below did not even discuss *CIGNA* until long *after* it had already held that equitable principles could be used to rewrite ERISA contractual language. *See* Pet. App. 11a (articulating holding); *id.* 15a (discussing *CIGNA*). And when the court did discuss *CIGNA*, it did so merely to underscore the conclusion it had already reached on Section 502(a)(3)'s text: that equity is "sometimes less deferential to absolute freedom of contract." *Id.* 16a. *CIGNA* did not change the court's analysis.

Nor is *CIGNA* some sea-change decision that renders the circuit split illusory. *CIGNA* did not purport to alter the legal principles governing Section 502(a)(3). Quite the contrary: *CIGNA* is grounded in the Court's previous 502(a)(3) cases—*Mertens* v. *Hewitt Assocs.*, 508 U.S. 248 (1993), *Knudson*, and *Sereboff*. *See* 131 S. Ct. at 1878-79. And *CIGNA* reaffirmed that the relief available under Section 502(a)(3) is limited to "traditional equitable relief," *id.* at 1879—which, as discussed below, is limited in

equitable-lien-by-agreement cases to enforcement of the parties' intended agreement.

Respondents' argument that review should be denied so the Court can wait and see whether "all subsequent courts agree with the lower court's reading of *CIGNA*," Opp. 22, fares no better. After all, the Third Circuit understood *CIGNA* to mean that "contractual language was not as sacrosanct as it is normally considered to be when applying breach of contract principles at common law." Pet. App. 15a. But as Petitioner explained (Pet. 18-19), that is plainly wrong. *CIGNA* suggested only that a court could rewrite an ERISA plan "*to prevent fraud*." 131 S. Ct. at 1879 (emphasis added). This Court correctly went no further, for equity cannot change contractual terms "in the absence of fraud" or the like. *Manufacturers' Fin. Co.* v. *McKey*, 294 U.S. 442, 449 (1935); *accord Restatement (Second) of Contracts* § 153 (1979). The court below, in short, erred both in applying *CIGNA* outside the fraud context and in understanding *CIGNA* to mean that judges sitting in equity enjoyed broad power to alter contracts. Those errors cut in *favor* of certiorari, not against it. *See* S. Ct. R. 10(c).

Finally, while "wait-and-see" approaches may work in some circumstances, they manifestly do not in the context of Section 502(a) due to its broad venue provision. Pet. 23. Because ERISA plan beneficiaries may sue wherever a defendant "may be found," 29 U.S.C. § 1132(e)(2), the Third Circuit's rule threatens to become the de facto rule nationwide, with no more "percolation" at all. Respondents offer no response—none—to this.

II. THE THIRD CIRCUIT WAS WRONG ON THE MERITS.

1. Respondents spend nearly half of their bulky opposition arguing the merits of the Third Circuit's decision. Their approach is understandable, given how little Respondents can muster against certiorari, but their merits arguments are just as wanting.

Respondents argue that the Third Circuit's holding is correct because the contrary approach embraced by five circuits—enforcing ERISA reimbursement provisions as written—"reads the words 'appropriate equitable relief' right out of the statute" and converts Section 502(a)(3) into "a legal remedy." Opp. 23. Respondents misunderstand both Section 502(a)(3) and the relief at issue in reimbursement cases.[3]

Section 502(a)(3) authorizes "appropriate equitable relief *to enforce * * * the terms of the plan*." 29 U.S.C. § 1132(a)(3) (emphasis added). The "terms of the plan," therefore, are what is to be "enforce[d]," and the statute requires courts to ask whether there is an appropriate equitable remedy available to "enforce" them. *Id.* This Court has made that quite clear: Section 502(a)(3) "does not, after all, authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of * * *

[3] Respondents also point to *Arkansas Department of Health & Human Services* v. *Ahlborn*, 547 U.S. 268 (2006), contending that that decision categorically disapproves of provisions calling for full reimbursement. Opp. 34-35. *Ahlborn* involved the Medicaid statute, which expressly limits reimbursement rights "*to payment for medical care* from any third party." *Id.* at 280 (citation omitted). It is hardly surprising that the Court rejected a state's attempt to claim an award compensating a beneficiary for costs *other than* medical care. *See id.*

'enforc[ing] any provisions of ERISA or an ERISA plan.' " *Mertens*, 508 U.S. at 253.

That basic principle is crucial. It hews closely to the remedy—equitable lien by agreement—this Court approved in *Sereboff*. Equitable liens by agreement are grounded in the maxim that "equity will regard that as done which was *agreed to be done*," *Runstetler* v. *Atkinson*, 11 D.C. 382, 384 (1883) (emphasis added); *accord* 51 Am. Jur. 2d Liens § 40. The remedy thus enforces an actual agreement between parties; it "cannot be invoked to create a right contrary to the agreement of the parties." *Good* v. *Jarrard*, 93 S.C. 229, 239 (1912). And what was "agreed to be done," *Runstetler*, 11 D.C. at 384, is just that; it is not what a later-arriving judge sitting in equity thinks *ought* be done.

In light of these principles, it makes sense that a court applying Section 502(a)(3) would enforce a reimbursement provision as agreed upon, not as modified by some extrinsic notion of fairness. That does not transform the relief into a "legal remedy." Opp. 23. Quite the contrary: The provision as agreed upon is the *sine qua non* of the equitable lien by agreement, and enforcement of the lien accordingly "enforce[s] * * * the terms of the plan." 29 U.S.C. § 1132(a)(3). A *modified* reimbursement amount would *not* enforce the terms of the plan, and could not be considered "appropriate equitable relief" under Section 502(a)(3).[4]

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[4] The Third Circuit strayed by confusing the equitable lien by agreement with its more nebulous cousin, the equitable lien to prevent unjust enrichment. See Pet. App. 11a-12a. The treatises and cases explicitly distinguish the two. *See* 1 D.B. Dobbs, *Law of Remedies* § 4.3(3), at 601-602 (2d ed. 1993); *Sereboff*, 547 U.S. at 364-365.

2. Respondents next argue that the Third Circuit's rule is faithful to ERISA, and that the majority rule is not, because "the primary purpose of ERISA is to protect *people*—participants and beneficiaries—not *plans*." Opp. 28. Quite so. ERISA is not drawn up to protect one particular participant or beneficiary; it protects all. Which is why the principle Respondents embrace cuts *against* the Third Circuit's rule. ERISA "recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interests of all beneficiaries." *Varity Corp.* v. *Howe*, 516 U.S. 489, 514 (1996). And as courts have recognized, "[r]eimbursement inures to the benefit of all participants and beneficiaries by reducing the total cost of the Plan." *O'Hara*, 604 F.3d at 1238. The solution that best protects *all* beneficiaries is to enforce the plan's terms as written. *Id.* at 1237-38; *Shank*, 500 F.3d at 838; NASP *Amici* Br. 12-13.

III. THE DECISION BELOW WILL SEVERELY HARM ERISA PLANS.

1. Respondents argue that the rule adopted below "would not * * * increas[e] plan costs and premiums." Opp. 30. That is incorrect. Courts and commentators have long recognized that when plans cannot recover reimbursement, their increased costs are "defrayed by other plan members" via "higher premium payments." *O'Hara*, 604 F.3d at 1238; *accord Shank*, 500 F.3d at 838; *see also, e.g.*, M.C. Campbell, *Non-Consensual Suretyship*, 45 Yale L.J. 69, 100 (1935); NASP *Amici* Br. 7-10. And if such a plan does not increase premiums, the plan must absorb the additional costs itself—an outcome that undis-

putedly will threaten some plans' solvency. Pet. 21-22. Respondents' assertion to the contrary is absurd.

2. Respondents likewise contest Petitioner's observation that the lower court's approach—prizing individualized approaches to "equity" over plain plan language—"would create an unwieldy, standard-less mess." Opp. 33. Never fear, Respondents say; "courts fashioning equitable relief 'rarely' will need do anything more than consult the standard equitable treatises, as the lower court did here." *Id.* (citation omitted). But the Third Circuit certainly did not "fashion[ ] equitable relief" by merely consulting a treatise. It did not fashion equitable relief at all. Instead, it announced a legal rule, then remanded the case with instructions for the District Court to "engage in any additional fact-finding it finds necessary" and consider, among other things, "the work performed," and "the allocation of costs and risks between the parties." Pet. App. 17a. It is *that* process, repeated *ad infinitum* in many courts, that "will introduce significant uncertainty—and significant new costs—into plan administration and litigation." Pet. 22. Respondents' argument again proves Petitioner's point.

3. Respondents also argue that courts in other equitable-reimbursement settings "have had no problem fashioning relief in individual cases." Opp. 34. But the issue is not whether courts would have trouble fashioning relief in those "individual cases"; it is whether that case-by-case determination would reduce employers' incentive "to offer benefits by assuring a predictable set of liabilities," as ERISA is supposed to do. *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002). Where the "predictable set of liabilities" is left largely to chance and

circumstance, the answer, obviously, is yes. *See* NASP *Amici* Br. 8-10.

IV. THIS CASE PROVIDES AN IDEAL VEHICLE.

Finally, Respondents attack this case's suitability as a vehicle. But the question presented—as framed by *both* parties—is a purely legal one. No action the District Court could take would have any bearing on the Third Circuit's holding regarding Section 502(a)(3). Either a court can rewrite ERISA plans as part of "appropriate equitable relief" (as the Third Circuit held) or it cannot (as the Fifth, Seventh, Eighth, Eleventh, and D.C. Circuits held). And Petitioner's injury cannot be mooted on remand because the Third Circuit has already determined that "the judgment requiring McCutchen to provide full reimbursement to US Airways constitutes inappropriate and inequitable relief." Pet. App. 16a.

This Court regularly grants review in cases, like this one, where the court of appeals has announced a legal rule worthy of review and remanded for further proceedings. *See, e.g.*, *Filarsky* v. *Delia*, 132 S. Ct. 1657 (2012); *FAA* v. *Cooper*, 132 S. Ct. 1331 (2012); *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 131 S. Ct. 2806 (2011). This Court should do the same here and resolve the split.

CONCLUSION

Respondents' own Question Presented asks whether ERISA beneficiaries must fully reimburse their ERISA plans "simply because the plan language so provides." Opp. i. This Court's decisions, and the great weight of the circuits, supply the answer: Yes.

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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June 2012