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 Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Sereboff v. Mid Atl. Med. Services, Inc.*, 547 U.S. 356 (2006), this Court held that an ERISA fiduciary could bring an action to enforce a reimbursement provision contained within an employee benefit plan because the action constituted "equitable" relief within the meaning of Section 502(a)(3). *Sereboff* expressly declined to decide, however, how the term "appropriate" modifies the scope of that relief, because the issue had not been raised below. 547 U.S. at 368 n.2.

This Court has since clarified, however, that Section 502(a)(3) directs courts to "look[ ] to the law of equity" when exercising their "discretion" to fashion "appropriate" relief for claims brought pursuant to that provision. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1880-81 (2011). The lower court here is the first – and only – appellate court in this country to decide the question left unanswered by *Sereboff* in light of this Court's guidance in *CIGNA*.

The question presented is this: Whether a seriously injured ERISA beneficiary who has recovered only a fraction of his damages from a third-party must reimburse his ERISA plan for 100% of his medical expenses simply because the plan language so provides, or whether the scope of the plan's relief must be measured according to "appropriate" limiting principles of equity, in accordance with the language of Section 502(a)(3).

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INTRODUCTION

Petitioner's arguments in support of review lack merit. The lower courts are not "irrevocably split" on the question presented; nor have "half the circuits weighed in" on the issue, as petitioner contends. Pet. 24. In reality, only three courts of appeals have ruled on claims for equitable reimbursement in the wake of *Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356 (2006), and only *one* of these decisions – the ruling below – was issued after this Court clarified, in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), that claims brought under ERISA Section 502(a)(3) must be evaluated according to equitable principles, rather than by strict enforcement of contract terms. The lower court's ruling thus stands alone as the only federal court ruling in the country to consider the question presented in light of this Court's most recent teachings on the meaning of the statute at issue. This alone is reason enough to deny review.

Petitioner's argument that review is warranted because the lower court's approach "flies in the face of . . . ERISA's expressed intent" is equally flawed. Pet. 3. Petitioner insists that the principal purpose of ERISA is to "protect contractually defined benefits," and that the lower court's ruling would "eviscerate" that purpose "by endanger[ing] employer-provided benefit plans." Pet. 2-3. As explained below, however, this Court has consistently held that the *principal* object of ERISA is to protect plan beneficiaries, not to enforce plan terms. The lower court's ruling effectuates that purpose by ensuring that ERISA

reimbursement actions do not yield "a windfall" for ERISA plans at beneficiaries' expense. If anything, it is petitioner's approach that would eviscerate ERISA by leaving respondent and others like him "with less than full payment for [their] emergency medical bills" – a result that, in the lower court's words, would "undermin[e] the entire purpose of the [ERISA] Plan." Pet. App. 16a.

Petitioner's contention that the lower court's approach would wreak havoc on the healthcare system by eliminating a "predictable set of liabilities" for ERISA plans is similarly baseless. Pet. 12. In requiring courts to fashion relief on a case-by-case basis according to equitable principles, the lower court adopted the same approach that courts apply in virtually every other setting in which equitable reimbursement claims are made. In fact, this Court has already adopted this approach in the Medicaid context, recognizing that "[a] rule of absolute priority" creates a risk of "preclud[ing] settlement in a large number of cases"; works dramatic inequities "to the recipient in others"; and is "absurd and fundamentally unjust." *Ark. Dep't of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 288 & n.19 (2006) (internal quotations omitted). In these other contexts, health insurance does not lay in ruin, and premiums have not spiked.

In short, petitioner's hyperbolic claims that the lower court's ruling would destroy the ERISA healthcare system, to the ultimate detriment of ERISA plans and beneficiaries alike, has no basis in reality,

lacks any support in the record, and disserves the lower court's careful, narrowly tailored ruling and the plain language of Section 502(a)(3) itself. It is petitioner's contrary approach that would undermine the system by creating results both "absurd and fundamentally unjust." *Ahlborn*, 547 U.S. at 288 n.19 (internal quotations omitted). This Court should decline petitioner's invitation to disturb the lower court's well-reasoned decision based on self-serving policy arguments that do not withstand even the mildest form of scrutiny.

STATEMENT OF THE CASE

1. Respondent James McCutchen was grievously injured in a car accident when "a young driver lost control of her car, crossed the median of the road, and struck" Mr. McCutchen's vehicle. Pet. App. 3a. Mr. McCutchen survived only after emergency surgery, and subsequently endured extensive medical care. He is now functionally disabled and suffers from significant and chronic pain that cannot be treated with medication. Mr. McCutchen's ERISA-governed, self-funded employee health benefit plan, administered by U.S. Airways and governed by ERISA (the "Plan"), paid his medical expenses, in the amount of $66,866.

Uncontroverted evidence established that Mr. McCutchen's and his wife's total damages from the accident were between $1 million and $1.75 million. Pet. App. 29a. In addition to past medical expenses of $66,866, Mr. McCutchen suffered economic damages

for past lost wages, future lost wages and loss of earning capacity, and non-economic damages for pain and suffering, embarrassment and humiliation, loss of enjoyment of life, and disfigurement. Mrs. McCutchen suffered damages for loss of consortium. *See* Appendix Vol. III, A228-229, *U.S. Airways v. McCutchen*, 663 F.3d 671 (3d Cir. 2011) (No. 10-3836) (hereinafter "ER").

After the accident, Mr. McCutchen and his wife retained a law firm, Respondent Rosen Louik & Perry, P.C. ("RLP"), to represent them in a claim against the driver of the car that caused the accident. With the firm's help, the McCutchens also made a claim for underinsurance coverage from their own automobile policy, as the driver had only $100,000 in liability coverage to compensate all four individuals injured in the accident. Pet. App. 3a.

Because the driver had limited insurance coverage, and because three other people were seriously injured or killed, the McCutchens settled with the other driver for $10,000 and then settled their underinsurance claim for policy limits of $100,000. Pet. App. 3a. The total amount that the McCutchens recovered was $110,000, which compensated them for, at most, 11% of their total damages. Pet. App. 3a; 29a.

Around the time of these settlements, RLP was contacted by one of the largest third-party subrogation recovery companies in the country, Ingenix Subrogation Services. This company informed RLP that it had been hired to pursue a subrogation/reimbursement

claim against Mr. McCutchen on behalf of his employer, U.S. Airways. It requested all the information concerning the settlements Mr. McCutchen had entered into and asserted a lien on the entire amount of medical expenses paid by the U.S. Airways' Plan.

Because Mr. McCutchen's recovery was such a small fraction of his total damages, RLP asked Ingenix to waive its asserted lien. ER208. Ingenix refused, and demanded that it be reimbursed for 100% of the medical expenses based on the language of the Plan. RLP informed Ingenix that it would escrow $41,500 in its trust account, which represented the asserted amount of the lien minus collection costs, until the dispute was resolved. ER218.

U.S. Airways then sued both Mr. McCutchen and RLP in the Western District of Pennsylvania, seeking "appropriate equitable relief" under Section 502(a)(3) of ERISA in the form of a constructive trust or equitable lien on the $41,500 held in trust and the remaining $25,366 personally from Mr. McCutchen. Pet. App. 4a. U.S. Airways based its claim for reimbursement on a provision in the Plan stating that a beneficiary is required to reimburse the Plan for any amounts it has paid out of any monies the beneficiary recovers from a third-party, without any contribution to attorneys' fees and expenses. Pet. App. 4a. U.S. Airways argued that the court was required to enforce the Plan language as written, notwithstanding Section 502(a)(3)'s reference to "appropriate equitable relief."

In response, Mr. McCutchen argued that it would be unfair and inequitable to reimburse U.S. Airways in full when he had only recovered for a small fraction of his injuries, including pain and suffering. Pet. App. 5a. He argued that U.S. 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. Pet. App. 5a.

2. The district court granted U.S. Airways' request for 100% reimbursement on the ground that it was duty-bound, under "established precedent of the Third Circuit" decided prior to *Sereboff*, to apply rules of contract law in measuring the award. Pet. App. 30a. Based on that pre-*Sereboff* precedent, the district court required Mr. McCutchen to sign over the $41,500 held in trust and to pay $25,366 from his own pocket. Pet. App. 34a.

3. A unanimous panel of the Third Circuit reversed. The court of appeals first observed that, in *Sereboff*, this Court held that an ERISA plan administrator's claim for reimbursement arises under, and is governed by, Section 502(a)(3) of ERISA. The lower court further observed that *Sereboff* "expressly reserved decision on whether the term 'appropriate,' which modifies 'equitable relief' in § 502(a)(3), would make equitable principles and defenses applicable to a claim under that section." Pet. App. 9a (citing *Sereboff*, 547 U.S. at 368 n.2).

"This case," the Third Circuit went on to explain, "squarely presents the question that *Sereboff* left open: whether § 502(a)(3)'s requirement that equitable relief be 'appropriate' means that a fiduciary like U.S. Airways is limited in its recovery from a beneficiary like McCutchen by the equitable defenses and principles that were 'typically available in equity.'" Pet. App. 9a. The court concluded that the answer is "yes," holding that phrase "appropriate equitable relief" means "more than just that the relief [an ERISA Plan] seeks must be of an equitable type; court must also exercise their discretion to limit that relief to what is 'appropriate' under traditional equitable principles." Pet. App. 9a. "In particular," the lower court found, because U.S. Airways' claim was for equitable reimbursement, the equitable principle of "unjust enrichment frames U.S. Airways' claim." Pet. App. 9a.[1]

In reaching this conclusion, the lower court followed the roadmap set out by this Court's trilogy of Section 502(a)(3) cases – *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), and *Sereboff* – to determine whether the measure of relief sought by the Plan was "appropriate" in light of the "equitable principles and defenses that were typically applied."

[1] The lower court also explained that the question of whether some version of the "make-whole" doctrine applied here, as a matter of federal or state common law, was not at issue in the case, and so expressly declined to address it. *See* Pet. App. 9a.

Pet. App. 10a-12a. In each case, this Court instructed lower courts to consult treatises on equity when interpreting Section 502(a)(3). *See Mertens*, 508 U.S. at 255-56; *Knudson*, 534 U.S. at 217; *Sereboff*, 547 U.S. at 368. In keeping with this trilogy, the lower court consulted the same treatises cited by this Court "to determine whether [the] equitable relief [sought by the Plan] is 'appropriate.'" Pet. App. 11a. The lower court found that "[t]hese sources all support [the] . . . position that the principle of unjust enrichment is broadly applicable to claims for equitable relief." Pet. App. 11a.

In so ruling, the lower court held that its prior decisions interpreting claims for reimbursement were no longer good law in light of this Court's rulings in *Knudson* and *Sereboff*. Pet. App. 12a. In particular, the lower court explained that its earlier decisions erred by framing the question as "whether federal common law can override the express language of benefit plans." Pet. App. 13a-14a. This view, the lower court concluded, is no longer valid in the face of *Sereboff's* holding, and *Knudson's* teaching, that reimbursement claims are subject to Section 502(a)(3), *not* "federal common law." Pet. App. 12a. And under this framework, the lower court explained, reimbursement claims under Section 502(a)(3) are subject to, and limited by, the application of relevant "equitable defenses and principles that were typically available in equity." Pet. App. 11a.

The lower court also faulted the two contrary post-*Sereboff* decisions of its sister courts, *Zurich*

Amer. Ins. Co. v. O'Hara, 604 F.3d 1232 (11th Cir. 2010) and *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health and Welfare Plan v. Shank*, 500 F.3d 834 (8th Cir. 2007), for adopting the same (since rejected) approach taken by the Third Circuit's pre-*Sereboff* cases. The lower court explained that, "[l]ike our pre-*Sereboff* decisions, these cases frame the question of whether equitable principles limit the scope of an administrator's right to reimbursement as a question of whether federal common law can override the Plan's controlling language." Pet. App. 13a. *Sereboff* rejected this approach, the Third Circuit noted, instead holding that, under Section 502(a)(3), a court's role is to ask "whether the relief sought in the action is 'appropriate' under traditional equitable principles and doctrines." Pet. App. 14a.

The lower court also took issue with these courts' unilateral adherence to strictly enforcing plan language. Pointing to this Court's recent decision in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), the lower court explained 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.

The Third Circuit further rejected U.S. Airways' "practical concern that the application of equitable principles will increase plan costs and premiums." Pet. App. 16a. The court noted that "[t]his concern does not address the statutory language and is, in

any event, unsubstantiated by the circumstances of this case." Pet. App. 16a. The lower court concluded that "U.S. Airways cannot plausibly claim it charged lower premiums because it anticipated a windfall." Pet. App. 16a.

4. Against this backdrop, the lower court applied the governing equitable principle of "unjust enrichment" to conclude that the judgment requiring Mr. McCutchen to provide full reimbursement to U.S. Airways "constitutes 'inappropriate' and 'inequitable' relief." Pet. App. 16a. The court noted that, "[b]ecause the amount of the judgment exceeds the net amount of McCutchen's third-party recovery, [the judgment] leaves him with less than full payment for his emergency medical bills, thus undermining the entire purpose of the Plan." Pet. App. 16a. "At the same time," the lower court found, awarding full reimbursement to the Plan "would amount to a windfall for U.S. Airways, which did not exercise its subrogation rights or contribute to the cost of obtaining the third-party recovery." Pet. App. 16a. Concluding that "[e]quity abhors a windfall," Pet. App. 16a, the lower court vacated the district court's final judgment granting full reimbursement to U.S. Airways.

The lower court ultimately declined to decide, however, "what *would* constitute appropriate relief," on the ground that "equity calls for full factual findings rather than our speculation. . . ." Pet. App. 17a. Instead, the court of appeals remanded the case to the district court to "exercise its discretion under

§ 502(a)(3)" to fashion appropriate equitable relief. Pet. App. 17a.

REASONS FOR DENYING REVIEW

I. REVIEW SHOULD BE DENIED TO ALLOW FURTHER PERCOLATION AMONG THE LOWER COURTS ON THE QUESTION PRESENTED.

Petitioner's principal basis for seeking review – that the lower court's ruling conflicts with "[f]ive other circuits" – is incorrect. *See* Pet. 12. Of petitioner's five-circuit tally, two were decided pre-*Sereboff* – this Court's seminal decision holding that ERISA reimbursement claims are "equitable" within the meaning of Section 502(a)(3). Those cases merely addressed the issue that was asked and answered in *Sereboff*, and never even reached the question presented here, which is whether the word "appropriate" in Section 502(a)(3) limits the *amount* of relief available pursuant to an ERISA reimbursement provision. Petitioner's remaining three cases were decided post-*Sereboff*, yet focused on an entirely different set of issues – i.e., whether "federal common law" limits an ERISA Plan's claim for reimbursement – and thus similarly did not reach the question presented here. *None* of these cases had the benefit of this Court's teaching in *CIGNA*, which the lower court here found highly relevant to its decision. Finally, the question presented in this case is now pending in at least one additional court of appeal, with several more courts

slated to address it in the coming months. Given this landscape, further percolation among the lower courts is warranted before this Court weighs in on the issue.

A. Petitioner Overstates the Extent of a Split Among the Lower Courts on the Question Presented.

1. To begin, two of the five decisions cited by petitioner – *Bombardier Aerospace Emp. Welfare Benefits Plan v. Ferrer, Poirot, & Wansbrough*, 354 F.3d 348 (5th Cir. 2003), and *Admin. Comm. of Wal-Mart Stores v. Varco*, 338 F.3d 680 (7th Cir. 2003) – did not even reach the question presented in this case. Instead, they solely addressed the predicate question that this Court resolved in *Sereboff*: whether a claim for reimbursement is "equitable," and therefore authorized at all, under Section 502(a)(3).[2]

This question has no relevance to this case. Prior to *Sereboff*, the lower courts were split on the threshold question of whether an ERISA Plan could even seek equitable reimbursement from an injured beneficiary. *Bombardier* and *Varco* formed one side of this

[2] *See Bombardier*, 354 F.3d at 355 (deciding whether the "Plan's suit is essentially legal in nature" or whether "it seeks relief that indeed is equitable in nature and thus authorized by § 502(a)(3)"); *Varco*, 338 F.3d at 687 (determining whether a Plan's restitution claim was "equitable under § 502(a)(3)," or whether it was "essentially a legal claim . . . to enforce its contract rights under the Plan").

split.[3] Other courts had reached the opposite conclusion.[4] *Sereboff* ultimately put this issue to rest, siding with *Bombadier* and *Varco* in holding that: (a) ERISA reimbursement claims are governed by Section 502(a)(3); and (b) such claims constitute "equitable relief" within the meaning of that statute. 547 U.S. at 369.

But *Sereboff* expressly declined to consider the essential next question, which is whether the word "appropriate" in Section 502(a)(3) modifies the *amount* of relief available to an ERISA plan for an equitable claim of reimbursement. *See id.* at 368 n.2.[5] In other words, *Sereboff* did not decide whether courts must enforce reimbursement provisions as written, or whether

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[3] *See Bombardier*, 354 F.3d at 355 ("[W]e hold the Plan's requested relief . . . to be equitable in nature. Accordingly, we further hold that § 502(a)(3) authorizes the Plan's claim for relief."); *Varco*, 338 F.3d at 688 ("[T]he reimbursement action by the Committee in this unique case is equitable because the funds . . . are identifiable, are in the control of a defendant, and the Committee is rightfully entitled to the monies under the terms of the Plan. Because those elements are met here, the Committee's claim is equitable under § 502(a)(3)(B) of ERISA. . . .").

[4] *See*, *e.g.*, *Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004) (holding that Section 502(a)(3) does not authorize a Plan's action for reimbursement).

[5] Specifically, the Court said "[n]either the District Court nor the Court of Appeals considered the argument that Mid Atlantic's claim was not 'appropriate' apart from the contention that it was not 'equitable,' and from 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*." *Sereboff*, 547 U.S. at 368 n.2 (emphasis added).

a court's job is to apply principles of equity to determine just how much relief is "appropriate" under the particular circumstances of a given case. It is that latter question that was decided by the lower court in this case. That question, however, was never addressed by *Varco* or *Bombadier*. Thus neither decision is pertinent to the question presented here.

Petitioner nonetheless strains to manufacture a split by noting that *Bombardier* and *Varco* ultimately awarded the ERISA Plans 100% reimbursement based on the language of the Plan. *See* Pet. 14-15. This result is no different from the scores of pre-*Sereboff* cases that ruled, without the benefit of *Sereboff's* guidance, in favor of ERISA Plans seeking reimbursement. *See*, *e.g.*, *Harris v. Harvard Pilgrim Health Care, Inc.*, 208 F.3d 274 (1st Cir. 2000); *United McGill Corp. v. Stinnett*, 154 F.3d 168 (4th Cir. 1998); *Ryan by Capria-Ryan v. Fed. Express Corp.*, 78 F.3d 123 (3d Cir. 1996). In those courts' view, the proper scope of relief was whatever the Plan said it was, but petitioner makes no suggestion that *those* pre-*Sereboff* cases now contribute to the split, even though they employed the same analysis.

More to the point, though, these courts all awarded full relief without first deciding how – or even whether – the word "appropriate" modifies the measure of relief that may be afforded under Section 502(a)(3). That they did not decide this question is understandable – they did not know to ask, let alone answer, this question because it was not until *Sereboff* that this Court flagged it as relevant. Instead,

these courts (including *Bombardier* and *Varco*) simply asked whether the plan language unambiguously entitled the Plan to relief and then, in the event that it did, they enforced that language. *Sereboff*, however, definitively reframed the analysis, by holding that claims for reimbursement, to the extent that they are allowed, are expressly governed by Section 502(a)(3) itself, which contains the all-important reference to *both* "appropriate" and "equitable" relief. *See Sereboff*, 547 U.S. at 369. That these pre-*Sereboff* courts saw fit to award 100% reimbursement has no bearing here because those awards were based on an analysis that failed to construe both key terms in the statute. Thus the different result between these cases, on the one hand, and the lower court's ruling, on the other, regarding the proper measure of relief to be awarded to an ERISA plan does not create, or even contribute to, any split among the circuits on the question presented here.

2. None of the three post-*Sereboff* decisions cited by petitioner provides any more convincing basis for this Court's review. Like the pre-*Sereboff* cases cited above, none of those cases meaningfully addressed how the word "appropriate" modifies the availability and scope of relief under Section 502(a)(3). Instead, they looked only to whether federal common law could modify or override clear Plan language. As a result, every one of these decisions side-stepped the question presented here.

For instance, only two questions were presented to the court in *Moore v. Capitalcare, Inc.*, 461 F.3d 1

(D.C. Cir. 2006): (1) whether the Plan's "subrogation claim is legal, not equitable, and therefore barred by ERISA"; and (2) whether the Plan was "not entitled to reimbursement because [the beneficiary] was not 'made whole' by her settlement." *Id.* at 6. Everyone agreed that the first question was settled by this Court in *Sereboff*, *see id.* at 8, and so the court was left to address the "only remaining challenge" to the subrogation claim: whether, "as a matter of federal common law," the make-whole doctrine applied to defeat a Plan's claim for reimbursement. *Id.* at 8. *Moore* has no bearing here because the lower court never considered whether the "make-whole" rule applies as a matter of federal (or state) common law. *See* Pet. App. 9a n.2 ("McCutchen does not pursue this argument on appeal, and we do not address it."). Instead, the lower court – as instructed by this Court in its (now quadrilogy of) ERISA Section 502(a)(3) cases – consulted equitable treatises to determine whether the equitable relief sought by an ERISA Plan is "appropriate" within the meaning of Section 502(a)(3). Pet. App. 11a.

Like *Moore* before them, petitioner's last two cases, *Admin. Comm. of Wal-Mart Stores, Inc. Assocs.' Health and Welfare Plan v. Shank*, 500 F.3d 834 (8th Cir. 2007), and *Zurich Amer. Ins. Co. v. O'Hara*, 604 F.3d 1232 (11th Cir. 2010), merely held that federal common law does not limit the measure of relief under a Section 502(a)(3) claim for equitable reimbursement. *See Shank*, 500 F.3d at 839 ("federal courts lack authority to fashion a rule of *federal common law* that conflicts with the written plan

and that is unnecessary to achieve the purposes of ERISA") (emphasis added); *O'Hara*, 604 F.3d at 1237 (refusing to "[a]pply[ ] *federal common law* to override the Plan's controlling language") (emphasis added).[6]

This conclusion, however, similarly side-steps the question presented here, which is whether the *statute itself*, as opposed to federal common law, requires a court to apply equitable limitations on a claim for reimbursement under Section 502(a)(3). In the days before *Sereboff*, many courts applied federal common law in ERISA cases "when necessary to effectuate the purposes of ERISA," but not "when its application would conflict with the statutory provisions of ERISA, discourage employers from implementing plans governed by ERISA, or threaten to override the explicit terms of an established ERISA benefit plan." *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1452 (4th Cir. 1992). For reimbursement claims, this rule allowed federal common law to override a Plan's reimbursement provisions "only in the absence of controlling plan language." *Varco*, 338 F.3d at 692; *see Ryan*, 78 F.3d at 127-28.

But whatever the merits of *that* question, it is a categorically different one from that addressed by the lower court here. In keeping with *Sereboff*, the lower

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[6] Although these courts said 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, they reached this conclusion *only* by asking whether federal common law doctrines could override plan language. *See id.*

court declined to consider whether federal common law doctrines could limit the availability of relief, focusing instead on the limitations embedded in the statute itself. *See* Pet. App. 9a. Thus the "disagree[ment]" between the lower court here and the *Shank* and *O'Hara* courts is only whether courts should apply "federal common law" to ERISA reimbursement claims or, as *Sereboff* instructed, courts should apply limiting principles of equity to determine how much relief is "appropriate" in a given case. Indeed, the lower court itself observed as much. *See* Pet App. 13A (noting that both *O'Hara* and *Shank* focused on "whether federal common law can override the express language of benefit plans," rather than determining whether, under Section 502(a)(3) itself, "the relief sought in the action is 'appropriate' under traditional equitable principles."). The fact remains, therefore, that neither *Shank* nor *O'Hara* even reached the precise question presented here, which is whether the word "appropriate" in Section 502(a)(3) modifies the scope of an ERISA plan's reimbursement claim under governing principles of equity.

B. *CIGNA* Bears Directly on the Question Presented, and There is No Post-*CIGNA* Split of Authority Worthy of This Court's Review.

Moreover, none of the cases cited by petitioner as creating a split, including the two most recent cases – *Shank* and *O'Hara* – provides a basis for this Court's review because they were all decided before this

Court's decision in *CIGNA*, which directly informed the approach taken by the lower court. *See* Pet. 18 (acknowledging that the lower court "purported to find authority for its approach from this Court's decision in *CIGNA*"); *see also* Pet. App. 15a-16a (lower court's discussion of *CIGNA's* relevance to question presented). This fact alone reveals the absence of any split worthy of this Court's review, let alone a "direct" one. Pet. 11.[7]

CIGNA held that "Section 502(a)(3) invokes the equitable powers of the District Court" and expects that courts will "exercise [their] discretion" to impose "appropriate" remedies for claims brought under Section 502(a)(3). 131 S. Ct. at 1880. *CIGNA* went on to explain that, as part of a district court's discretionary exercise of its equitable powers, the court must limit the availability of relief to those "traditionally considered equitable remedies," and must also look to equitable treatises when fashioning "appropriate" relief. *Id.* at 1879.

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[7] Petitioner cites to a lone post-*CIGNA* district court decision as evidence that the "lower courts, too, appear to be recognizing the new divide between the circuits." Pet. 15 (citing *Schwade v. Total Plastics, Inc.*, 2011 WL 5459649 (M.D. Fla. Nov. 10, 2011)). The *Schwade* court's discussion of the decision below was dicta, however, and arose on a motion to reconsider a ruling on an unrelated issue, and thus lacked the benefit of full briefing. In any event, this Court is not in the habit of granting *certiorari* to resolve conflicts between a court of appeals and the unreviewed decisions of district courts in other circuits.

The core teaching of *CIGNA* is that the equitable treatises cited in *Sereboff*, *Knudson*, and *Mertens* are relevant not just for determining the *type* of appropriate remedy (and whether it was traditionally equitable or not), but also for identifying the *principles* governing the award of any relief afforded by the remedy. *See id.* at 1880. In particular, *CIGNA* cited to treatises on equity to support the conclusion that "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' . . . *to prevent [a defendant's] unjust enrichment*." *Id.* (emphasis added). This ruling directly supports respondents' core theory in the lower court, which was that petitioner's claim for reimbursement should be measured according to the equitable principle of unjust enrichment. The Third Circuit embraced *CIGNA's* teaching in adopting that principle in its decision. Pet. App. 11a (citing *CIGNA* for the proposition that the "animating principle" of unjust enrichment "clearly applies to a trustee's claim for reimbursement from its beneficiary").

CIGNA is also directly relevant to the question presented here because it made clear that, under Section 502(a)(3), a court sitting in equity is *not* obligated to categorically enforce an ERISA Plan's terms as written – a conclusion that contradicts petitioner's core argument, and undermines the rulings in several of petitioner's cases. *See* Pet. 12 (contending that courts may not override contractual language when faced with a Section 502(a)(3) claim). In particular, *CIGNA* held that "[t]he power to reform contracts

(*as contrasted with the power to enforce contracts as written*) is a traditional power of an equity court, not a court of law." 131 S. Ct. at 1879 (emphasis added). *CIGNA* thus stands firmly for the principle that a court sitting in equity should not enforce a contract as written where equity demands otherwise. And, for claims arising under Section 502(a)(3), this principle authorizes a court to apply appropriate equitable principles to determine the amount of reimbursement to which a plan is entitled.

CIGNA's lessons for how courts should approach and resolve claims for equitable reimbursement have only been addressed by one court in the entire country – the lower court here. As the lower court explained, *CIGNA* demonstrates 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. In reaching this conclusion, the lower court acknowledged (as petitioner notes) that the facts and particular claims in *CIGNA* were different than those here, but the court observed that *CIGNA* stands for a broader proposition for courts considering any claim under Section 502(a)(3): "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." Pet. App. 15a. This principle led the lower court to conclude that, because

Section 502(a)(3) "invokes the equitable powers of the District Court," any relief is subject to appropriate equitable principles even if that means contractual language is given something less than full effect. Pet. App. 15a ("[A]s demonstrated by the language of § 502(a)(3) and now *CIGNA*, Congress . . . limit[ed] fiduciaries to 'appropriate equitable relief,' thus invoking principles that it surely knew are sometimes less deferential to absolute freedom of contract.").

In light of the foregoing, petitioner's invitation to this Court is premature. There is no dispute that the lower court grounded its decision on the lessons set forth in *CIGNA*. There is also no dispute that the lower court is the only court of appeals to address CIGNA's impact on claims for equitable reimbursement under Section 502(a)(3). Petitioner's claim that the Third Circuit misapplied *CIGNA* misses the point. That the lower court found *CIGNA* relevant and persuasive is reason enough to allow other courts to consider the issue. Indeed, this identical issue is pending in the Ninth Circuit, *see CGI Techs., Inc. v. Rose*, Nos. 11-35127; 11-35128 (9th Cir. argued Feb. 9, 2012), and several other cases are pending in district courts in other circuits as well. *See*, *e.g.*, *Cent. States, Se. and Sw. Areas Health and Welfare Fund v. Lewis*, No. 11-4845, 2012 WL 1719189 (N.D. Ill. May 15, 2012); *Unum Life Insurance Co. of Amer. v. Norton*, No. 10-0050, 2012 WL 360179 (N.D. Ga. Feb. 2, 2012). These courts should be allowed an opportunity to decide the issue in the first instance. If all subsequent courts agree with the lower court's reading of *CIGNA*,

then *O'Hara* and *Shank* will become vulnerable to reversal within their own circuits. There is no reason for this Court to step in now, given that the post-*Sereboff* split may disappear on its own.

II. THE THIRD CIRCUIT'S RULING IS CONSISTENT WITH THIS COURT'S PRIOR RULINGS AND IS CORRECT.

Review is also unwarranted because the lower court's ruling is consistent with the plain language of Section 502(a)(3) and with this Court's prior teachings on Section 502(a)(3). Petitioner's contrary argument hinges on the perplexing proposition that the words "appropriate equitable relief" *require* courts to categorically enforce contract language. In petitioner's view, a court *must* enforce the plan document as written when fashioning relief under Section 502(a)(3) and *may not* exercise any discretion when determining the measure of reimbursement. This approach, however, reads the words "appropriate equitable relief" right out of the statute. If petitioner were correct, then Congress would have conferred upon courts the right to grant a *legal* remedy, which is exactly what is being sought by petitioner in this case. But Congress did no such thing. Instead, it directed courts to award "appropriate equitable relief" – language that even a first year law student knows is very different from a straightforward legal remedy. Try as it might, petitioner cannot reconcile its enforce-the-contract theory with the words Congress wrote when it enacted Section 502(a)(3).

The Third Circuit's application of equitable principles also reflects a proper reading of this Court's consistent prior teachings that Congress's use of the word "appropriate" in Section 502(a)(3) is a term of limitation, restraining the availability of relief based upon traditional equitable principles. *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996) (holding that equitable relief under the statute is not automatic, but instead must be "fashion[ed]" and may be refused where "appropriate"); *see also CIGNA*, 131 S. Ct. at 1880 (holding that "Section 502(a)(3) invokes the equitable powers of the District Court" and remanding to allow the lower court to decide whether it is "appropriate to exercise its discretion under §502(a)(3) to impose [a] remedy"); *Knudson*, 534 U.S. at 211 n.1 (holding that ERISA 502(a)(3) "contain[s] the limitations upon its availability that equity typically imposes"); *Harris Trust & Sav. Bank v. Solomon Smith Barney, Inc.*, 530 U.S. 238, 252 (2000) (interpreting ERISA Section 502(a)(3) "to incorporate common-law remedial principles").

The lower court's ruling is also consistent with this Court's further instructions that, when Congress uses the term "appropriate" in connection with an equitable remedy, a court has "broad discretion" to "fashion[ ] discretionary equitable relief" through the careful consideration of relevant equitable factors. *Florence Cnty. Sch. Dist. v. Carter*, 510 U.S. 7, 16 (1993) (internal quotations omitted). This instruction embodies the fundamental principle that a district court, when sitting in equity, is a "court of conscience"

that enjoys broad discretion to afford a measure of equitable relief where equity and justice demand. *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 90 (1867).

A district court's task, then, when faced with an equitable reimbursement claim under Section 502(a)(3), is to balance all the relevant equitable factors and award only that relief that is "appropriate" in equity. Here, that is precisely what the lower court held. It opined that "the phrase 'appropriate equitable relief' means more than just that the relief must be of an equitable type; courts must also exercise their discretion to limit that relief to what is 'appropriate' under traditional equitable principles." Pet. App. 9a.

This Court's precedents reveal the folly of petitioner's contrary position that a court is prohibited from doing anything other than categorically enforcing plan language. In *Sereboff*, for example, the Court held that, when determining the "scope of remedial power conferred on district courts" by Section 502(a)(3), courts must be guided by the law as it stood during "the days of the divided bench." 547 U.S. at 361-62; *see also Knudson*, 534 U.S. at 217 (applying equitable principles to interpret and apply Section 502(a)(3)); *CIGNA*, 131 S. Ct. at 1881 (same). Nowhere has this Court held – or even suggested – that Congress intended for courts to apply *legal* rules when determining the proper amount of relief under Section 502(a)(3).

Petitioner nonetheless argues that, because the statute authorizes appropriate equitable relief only "for the purpose of redressing any violations or enforcing any provisions of ERISA or an ERISA plan," Pet. 16 (alterations omitted), a court must enforce plan reimbursement language as written in order to "protect contractually defined benefits." Pet. 17. As the lower court held, the most basic problem with this argument is that it violates the plain language of Section 502(a)(3). Pet. App. 10a-11a. If a court's job were merely to "enforce plan terms," then there would have been no need for Congress to limit a court's role to granting "appropriate equitable relief," as it did in Section 502(a)(3).

If there were any doubt on this point, it would be dispelled by the fact that Congress included just such a contractually-based enforcement provision in a different part of Section 502 – Section 502(a)(1)(B) – that affirmatively authorizes a plaintiff to "enforce his rights under the terms of a plan." Pet. App. 6a-7a. As the lower court observed, Congress intentionally *excluded* fiduciaries (like petitioner) from pursuing relief under this provision. Pet. App. 7a (explaining that Congress limited the availability of this relief to participants and beneficiaries). Petitioner wants this form of relief imported into Section 502(a)(3). But a court cannot, as petitioner would have it, adopt a reading of that provision that would render its key limitation null and void. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 833-34 (9th Cir. 1996) ("[A] statute must be interpreted to give significance to all of its parts. We have long followed the principle that

'[s]tatutes should not be construed to make surplusage of any provision.'") (citation omitted).

In the final analysis, petitioner's insistence that courts must categorically enforce plan terms based on the language of Section 502(a)(3) reflects an effort to substitute one remedy for another. This Court has emphasized that Section 502(a)(3)'s reference to "appropriate equitable relief" is *the* key animating language of the statute, and "requires" that a court "recognize the difference between legal and equitable forms of restitution." *Knudson*, 534 U.S. at 218. The lower court correctly recognized and applied the principle that, when a party, like petitioner, seeks an equitable remedy for restitution, it is necessarily limited to a measure of relief consistent with the equitable principles governing its claim for relief. Any other interpretation "would limit the availability of relief *not at all*" and render the modifier "'appropriate' superfluous." *Id.*

III. THE LOWER COURT'S APPROACH IS CONSISTENT WITH ERISA'S CORE PURPOSES AND REPRESENTS SOUND PUBLIC POLICY.

A. ERISA's Central Purpose is to Protect Beneficiaries, Not Plans.

Nor is review warranted on the ground that the ruling below conflicts with ERISA's "primary" purpose of ensuring that plan terms are strictly enforced in order to create uniformity and foster certainty.

Pet. 17. In reality, this Court has consistently held that "[t]he principal object of [ERISA] is to protect plan participants and beneficiaries," not to enforce plan terms. *Boggs v. Boggs*, 520 U.S. 833, 845 (1997); *see also Varity*, 516 U.S. 489, 513 (1996) (holding that ERISA's ultimate purpose is "to protect the interests of participants and beneficiaries") (quoting from ERISA's basic purposes provision) (alterations omitted).

That is why, in case after case, this Court has said that the strict enforcement of plan terms is, at most, a subsidiary purpose. *See Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 114 (2008) (finding that the desire to protect participants and beneficiaries "outweighed" other subsidiary purposes, including the freedom of employers to set up their benefit plans); *Varity*, 516 U.S. at 513 (holding that ERISA's "basic purposes" of "protect[ing] the interests of participants and beneficiaries" trump other "subsidiary congressional purpose[s]").

In short, the primary purpose of ERISA is to protect *people* – participants and beneficiaries – not *plans*. The "principle" of rigid adherence to plan terms must yield when it comes up against a specific statutory provision of ERISA that imposes specific limitations on the strict enforcement of plan terms. This is because, as this Court has said, and as the lower court correctly recognized, the purpose of "enforc[ing] the terms of the plan" is "inadequate to overcome the words of [ERISA's] text regarding the

specific issue under consideration." Pet. App. 16a (quoting *Knudson*, 534 U.S. at 220).

Indeed, even the cases petitioner cites agree that the strict enforcement of plan terms must yield in the face of some specific statutory policy to the contrary. For example, in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), this Court merely held that an employer's amendment of its plan was justified *because* it was consistent with the requirements set forth in the text of ERISA, specifically Section 402(b)(3). *See id.* at 79-80. As this Court recognized two years later, however, the right that an employer or plan sponsor may have to "unilaterally amend or eliminate" its welfare benefit plan "does not justify" a departure from the plain language of ERISA. *Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka and Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997).

Section 502(a)(3), by its plain terms, overrides any policy that may exist requiring the strict enforcement of plan terms. Time and again, this Court has made clear that this provision "invokes the equitable powers of the District Court," *CIGNA*, 131 S. Ct. at 188, "incorporate[s] common-law remedial principles," *Harris Trust*, 530 U.S. at 252, and "contain[s] the limitations upon its availability that equity typically imposes." *Knudson*, 534 U.S. at 211 n.1. These limiting principles are "explicit" in the words "appropriate equitable relief," *Harris Trust*, 530 U.S. at 250, and therefore trump plan language that would seek to override them. As the lower court recognized, any

other result would be directly contrary to ERISA's primary purpose of protecting participants, not plans.

B. The Decision Below Would Not Ultimately Harm Beneficiaries by Increasing Plan Costs and Premiums.

Petitioner makes no further headway by arguing, in response, that permitting ERISA plans to recover whatever relief they write into their plans would actually *vindicate* ERISA's objective of protecting beneficiaries by reducing their costs in the form of premium payments. *See* Pet. 21-22 (claiming that the lower court's approach would "reduce[ ] health care benefits," increase "out-of-pocket costs for participants," and eliminate health care coverage for thousands of individuals). Even if this were true as a factual matter (and, to be clear, it is not), it would be irrelevant; the statutory language is clear, and courts cannot override a statutory command based on speculative concerns that Congress may have struck an unwise balance. *Knudson*, 534 U.S. at 217 ("It is, however, not our job to find reasons for what Congress has plainly done; and it *is* our job to avoid rendering what Congress has plainly done (here, limit the available relief) devoid of reason and effect.").

But even if petitioner's policy arguments were relevant here, they lack any support in the record. At no point in this case did petitioner offer any actual evidence to support its theory that reimbursement leads to reduced premiums and overall lower health

costs. All the lower court did was to recognize as much. *See* Pet. App. 16a (rejecting petitioner's argument that an equitable approach to measuring ERISA reimbursement claims "will increase plan costs and premiums" on the ground that it was "unsubstantiated by the circumstances of this case"). Petitioner's failure to even attempt to prove its case on this point is not surprising, because available evidence suggests that subrogation and reimbursement do not lead to any reduction in premium costs.[8]

Indeed, if petitioner's sky-is-falling rhetoric about the perils of the lower court's decision were true, one would expect to see reduced benefits and higher premiums in those contexts in which courts routinely apply an equitable approach to reimbursement claims. But petitioner has not supplied any evidence that this has occurred. This, too, is not surprising, because available evidence suggests that premiums are generally consistent across industries and contexts.

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[8] *See*, *e.g.*, Brendan S. Maher & Radha A. Pathak, *Understanding and Problematizing Contractual Tort Subrogation*, 40 Loy. U. Chi. L.J. 49, 58 n.31 (2008) (concluding that "insurers will not offer lower subrogation adjusted rates even though they will grant themselves a subrogation right"); Johnny C. Parker, *The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation*, 70 Mo. L. Rev. 723, 737 (2005) ("[S]ubrogation has not led to lower premium costs for the insured."); *see also* Andrew H. Koslow, *"Appropriate Equitable Relief" in Wal-Mart v. Shank: Justice for Whom?*, 12 Quinnipiac Health L.J. 277, 279 (2009) (same); Roger M. Baron, *Subrogation: A Pandora's Box Awaiting Closure*, 41 S.D. L. Rev. 237, 243-45 (1996) (same).

See, *e.g.*, Employer Health Benefits: Annual Survey, Kaiser Family Found. & Health Research & Educ. Trust (1999-2011).[9]

In short, petitioner's contention that the lower court's approach will actually harm beneficiaries lacks any support in the record and contradicts available evidence. Petitioner's *amici* also search vainly for something – even quasi-empirical – to support this claim, but they too come up empty-handed. *See* Br. of *Amici Curiae* Nat'l Ass'n of Subrogation Professionals, et al., in Support of Petitioner at 4-7 (U.S. May 25, 2012) (citing only an unsupported thought-experiment from fifteen years ago). To the extent this contention constitutes an important element in any analysis of the question presented (as petitioner and its *amici* clearly believes it should), this Court should wait for a case in which there is some record evidence on the issue.[10]

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[9] *Available at* http://www.kff.org/insurance/ehbs-archives.cfm.

[10] Petitioner's contention that "Third Circuit's ruling will introduce significant uncertainty – and significant new costs – into plan administration and litigation," Pet. 22, is equally unsupported by any record evidence. But even if true, this assertion could be (and has been) said about *any* case in which this Court has interpreted an ERISA provision in such a way as to expand a Plan's liability or limit its relief. *See CIGNA*, 131 S. Ct. at 1881 (expanding a Plan's liability); *Glenn*, 554 U.S. at 112 (expanding a Plan's liability); *Knudson*, 534 U.S. at 217 (limiting the availability of a Plan's relief); *Varity*, 516 U.S. at 489 (expanding a Plan's liability). And, this Court has repeatedly held, if a party is unhappy with the limitations or conditions imposed by

(Continued on following page)

C. Requiring Courts to Apply Equitable Principles to Reimbursement Claims Would Not Create an Unworkable Mess.

Equally irrelevant and unsupported is petitioner's contention that the lower court's approach, which merely directs courts to apply principles of equity, would create an unwieldy, standard-less mess. *See* Pet. 20-24. As this Court has explained, the notion that forcing courts to sit in equity would engender confusion and force courts to undertake a "difficult[ ] . . . task" are both "exaggerated" and, again, irrelevant. *Knudson*, 534 U.S. at 217. Although it is "easy to disparage the law-equity dichotomy as an ancient classification and an obsolete distinction," it is this "classification and distinction that has been specified by the statute." *Id.* (internal alterations and quotations omitted). When Congress passed Section 502(a)(3), it "felt comfortable referring to equitable relief . . . precisely because the basic contours of the term are well known." *Id.* Far from the "random" and "uncertain" world petitioner envisions, Pet. 17, 22, courts fashioning equitable relief "rarely" will need do anything more than consult the standard equitable treatises, as the lower court did here. *Knudson*, 534 U.S. at 217.

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statute, those concerns are properly directed to Congress, not this Court. *Knudson*, 534 U.S. at 217.

Petitioner's scare tactics are also belied by the fact that courts in almost every other setting in which equitable reimbursement claims are permitted have had no problem fashioning relief in individual cases according to principles of equity. *See*, *e.g.*, *Ark. Dep't of Health & Human Servs. v. Ahlborn*, 547 U.S. 268 (2006) (Medicaid reimbursement); *Florence Cnty. Sch. Dist. v. Carter*, 510 U.S. 7, 16 (1993) (reimbursement under the Individuals with Disabilities Education Act); *Bradley v. Sebelius*, 621 F.3d 1330 (11th Cir. 2010) (reimbursement under Medicare Secondary Payer statute); *Werner v. Latham*, 752 A.2d 832, 835 (N.J. App. Div. 2000) (reimbursement for state-governed health insurer); *Aetna Life & Cas. Co. v. Nelson*, 492 N.E.2d 386, 390 (N.Y. 1986) (same); *Flanigan v. Dep't of Labor and Inds.*, 869 P.2d 14, 17 (1994) (reimbursement under worker's compensation statute).

Most notably, the approach adopted by the lower court here was recently – and resoundingly – endorsed by this Court in *Ahlborn*, which involved Medicaid reimbursement. There, the state of Arkansas sought to automatically impose a lien on any tort settlement obtained by a Medicaid recipient "in an amount equal to Medicaid's costs." 547 U.S. at 272. Under this approach, "when that amount [of Medicaid's costs] exceeds the portion of the settlement that represents medical costs, satisfaction of the State's lien [would] require[ ] payment out of proceeds meant to compensate the recipient for damages distinct from medical

costs – like pain and suffering, lost wages, and loss of future earnings." *Id.*

This Court squarely rejected that approach, refusing to allow Arkansas to "lay claim to more than the portion of [a Medicaid recipient's] settlement that represents medical expenses." *Id.* at 280. In so ruling, the Court noted that "[a] rule of absolute priority" poses the very real risk of "preclud[ing] settlement in a large number of cases," and works dramatic inequities "to the recipient in others." *Id.* at 288. Thus, allowing an entity to "share in damages for which it has provided no compensation . . . would be absurd and fundamentally unjust." *Id.* at 288 n.19 (internal quotations omitted). Exactly so. The lower court's decision here reflects this understanding.

Petitioner's attack on the lower court's approach also falls flat in light of this Court's reiteration, just two years ago, that the equitable side of the bench follows "a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules." *Holland v. Florida*, 130 S.Ct. 2549, 2563 (2010) (internal quotations omitted). "The flexibility inherent in equitable procedure," the Court explained, "enables courts to meet new situations that demand equitable intervention, and to accord all the relief necessary to correct . . . particular injustices." *Id.* (internal quotations omitted); *see also Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) ("In shaping equitable decrees, the trial court is vested with

broad discretionary power. . . . equitable remedies are a special blend of what is necessary, what is fair, and what is workable"); *Willard v. Tayloe*, 75 U.S. 557, 567 (1869) ("It is the advantage of a court of equity . . . that it can modify the demands of parties according to justice"). Petitioner's position would disinter these principles in exchange for a categorical rule of law, and in so doing, would perform an end run around the precise limitations Congress specified when it passed Section 502(a)(3).

IV. THE PROCEDURAL POSTURE OF THIS CASE MAKES IT A POOR VEHICLE FOR REVIEW.

Even if there were a *cert.*-worthy split in the lower courts, the interlocutory posture of this case renders it a poor vehicle for review. In the decision below, the Third Circuit merely reversed the district court's decision granting summary judgment to petitioner on its equitable reimbursement claim. In so doing, the court of appeals specifically declined to decide "what *would* constitute appropriate equitable relief for [the Plan]" because "equity calls for full factual findings rather than our speculation." Pet. App. 17a. The lower court further instructed that, "[o]n remand, the District Court should engage in any additional fact-finding it finds necessary" to "exercise its discretion to fashion 'appropriate equitable relief.' "

Given that there has been no actual finding of what would constitute appropriate equitable relief in this case, review would be premature. *See*, *e.g.*, *Bd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967); *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) ("[The Court] generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction") (Scalia, J., respecting denial of petition for writ of certiorari). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Here, the interlocutory posture leaves unsettled factual questions that directly bear on the underlying applicable rules that petitioner asks the Court to employ. As the Third Circuit explained, "[f]actors such as the distribution of the third-party recovery between McCutchen and his attorneys . . . , the nature of their agreement, the work performed, and the allocation of costs and risks between the parties to this suit" all may inform the District Court's "exercise of its discretion to fashion 'appropriate equitable relief.'" Pet. App. 17a. And it remains possible that proceedings on remand will obviate the need for any further appeal in this case. Under these circumstances, the Court's preference for review upon final judgment is consistent with the Court's broader obligation to avoid unnecessary adjudication. *See*, *e.g.*, *Ala. State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) ("It has long been [the Court's] considered

practice not to decide abstract, hypothetical or contingent questions. . . .") (citations omitted).

CONCLUSION

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

Respectfully submitted,

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