No. 09-804

IN THE
# Supreme Court of the United States

CIGNA CORPORATION AND CIGNA PENSION PLAN,
*Petitioners,*

v.

JANICE C. AMARA ET AL., individually and on behalf of all others similarly situated,
*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## SUPPLEMENTAL BRIEF FOR PETITIONERS

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## RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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## SUPPLEMENTAL BRIEF FOR PETITIONERS

The government concedes that "courts disagree on the extent to which participants must show prejudice or reliance to recover benefits as described in the SPD." U.S. Br. 10. Indeed, the government could not plausibly have denied the existence of this "disagree[ment]" because both the lower courts and respondents themselves have explicitly acknowledged that the "Courts of Appeals . . . have taken differing positions on this question." *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 380 (3d Cir. 2003); *see also Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 n.1 (5th Cir. 2007) ("five-way circuit split"); Opp. at 9.

The government further admits that "this Court's intervention may be warranted at some point to resolve this disagreement." U.S. Br. 17. Again, the government could hardly have advanced a different view: Ten circuits have now weighed in on the question, at least three firmly entrenched positions have emerged, and the split has only deepened in recent years. *See Washington*, 497 F.3d at 458-59 (adopting the no-reliance-or-prejudice standard applied by only two other circuits). The reasons for this Court to settle this disputed issue of ERISA law—which has profound implications for ERISA plans and their sponsors, administrators, and participants—are clear and compelling.

Despite acknowledging the widespread "disagreement" among the circuits and the inevitable need for this Court's guidance, the government urges the Court to deny review because this case purport-

edly "is not an appropriate vehicle" for resolving the question presented. U.S. Br. 10.

The government's grounds for opposing review are specious. In fact, the government's defense of the "likely harm" standard applied by the Second Circuit—*but by no other court*—simply underscores the necessity of this Court's review. If the government and Second Circuit are correct, then *nine* circuits—the six circuits that require an individualized showing of reliance or prejudice, and the three circuits that do not require any showing of reliance or prejudice—are applying the wrong standard. If the lower courts are indeed committing such nearly universal error, then this Court should grant review and conclusively dispel that pervasive misunderstanding of ERISA.

The government's efforts to portray this case as a poor vehicle are equally unpersuasive. The government's primary contention appears to be that the specific facts of this case might not recur in the future. But the *legal* issue presented arises whenever plan participants seek to recover benefits based on a conflict between an SPD and the plan. In *every* such case, the court must decide upon a legal standard that will govern recovery based on the alleged conflict—no matter whether the conflict concerns the possibility of "wear away," the years of service required to receive benefits (*Washington*, 497 F.3d at 455), the effect of "breaks in service" (*Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 251 (1st Cir. 1984) (Breyer, J.)), or any other plan provision.

That legal question is squarely presented in this case and should be authoritatively resolved by this Court.

## ARGUMENT

This Court recently reaffirmed that "ERISA '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 HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002)). But the "efficiency, predictability, and uniformity" that are the hallmarks of ERISA (*id.*) are impossible to attain where, as here, the circuits are hopelessly divided on a recurring question of ERISA interpretation.

The government appears to be content with prolonging that uncertainty and disuniformity because the Second Circuit purportedly decided *this* case correctly. Even if the Second Circuit's application of its aberrational "likely harm" standard were correct, however, that would be no reason to deny review. Doing so would permit nine circuits to continue applying two other standards that the government believes to be erroneous—one of which authorizes "windfall[s] for some employees at the expense of plans and their sponsors" (U.S. Br. 12), and the other of which purportedly imposes unwarranted evidentiary burdens on plan participants. *Id.* at 15. If the Second Circuit, alone among the courts of appeals, has decided this issue correctly, then this Court should grant review and say so.

In any event, the Second Circuit's decision is *not* correct—as the Eighth Circuit recently held in a decision that expressly *rejected* the Second Circuit's "likely harm" standard in favor of the reliance-or-prejudice approach. *See Greeley v. Fairview Health Servs.*, 479 F.3d 612, 614 (8th Cir. 2007) (district

court "erred by adopting a 'likely harm' prejudice standard" because, "to recover . . . for a faulty SPD, this court requires the employee to show he relied on its terms to his detriment"). Applying any rule other than the reliance-or-prejudice standard adopted by the majority of circuits "would allow a windfall for" employees who never read the SPD and who were thus not even aware that the language of the SPD conflicted with the terms of the plan. *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996). Such unwarranted recoveries by employees who suffered no cognizable injury would "unfairly increase costs for employers and their insurers, who rely on the terms of the plan in providing benefits and coverage." *Id.* "This in turn could jeopardize the solvency of the plan with respect to the remaining employees" (*id.*), and undermine the "careful balanc[e]" that ERISA strikes between protecting plan participants and promoting plan formation. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987).

In this case, the shortcomings of the Second Circuit's "likely harm" standard were magnified 26,000-fold by the district court's refusal to "require an individualized showing" of harm from *any* member of the class—"even from the named Plaintiffs themselves." Pet. App. 164a. The individual class members were not required to prove that they actually read the allegedly deficient SPD, that the SPD gave them an erroneous impression about the features of CIGNA's cash balance plan, or that they took (or decided not to take) some specific action as a result of their review of the SPD. The possibility that thousands of uninjured class members may have been permitted to recover by this undifferentiated, classwide approach is legally intolerable. *Cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's

requirements must be interpreted in keeping with Article III constraints, and . . . 'shall not abridge, enlarge or modify any substantive right.'") (quoting 28 U.S.C. § 2072(b)).[1]

Moreover, none of the purported vehicular problems identified by the government can withstand even cursory examination.

The government first contends that review is not warranted because the "factual setting" of this case "is not likely to recur" due to the fact that "'wear away' is now illegal" under amendments to ERISA. U.S. Br. 17, 18. But, as explained above, whether the specific *facts* of this case recur, the question of *law* presented by those facts—the showing that a plaintiff must make to recover based on a conflict between the SPD and the plan—recurs with great frequency and is certain to continue to produce divergent judicial outcomes in the future. *See, e.g.*, Reply Br. 5 (citing recent cases). Indeed, the factual setting of this case has no bearing on whether the district court should have required respondents to make

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[1] The Second Circuit's decision is wrong for the additional reason that the publication of CIGNA's SPD did not satisfy the Plan's formal amendment procedures and thus cannot have modified the benefits to which participants were entitled under the terms of the Plan. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83-85 (1995). The government contends that *Curtiss-Wright* is inapposite because the district court's award of additional benefits allegedly did "not rest on the theory that the SPD has formally amended the plan." U.S. Br. 16. But, in awarding relief to the class, the district court explicitly held that "the terms of [the Plan] ha[d] been correspondingly *modified* by CIGNA's October 1998 and September 1999 Summary Plan Descriptions." Pet. App. 218a (emphasis added). *Curtiss-Wright* forecloses the possibility of such unforeseen and unauthorized plan amendments.

an individualized showing of reliance or prejudice to recover based on the conflict between the SPD and the Plan. The answer to that legal question is determined by the provisions of ERISA—which apply with equal force to *all* SPD-based claims—and does not vary based on the facts of each particular SPD-based dispute.[2]

Second, the government observes that Section 204(h) of ERISA, 29 U.S.C. § 1054(h), was amended in 2001 to provide an additional remedy for "defective notice of a plan amendment reducing the future accrual of benefits." U.S. Br. 18. But the revised version of Section 204(h) applies only to the specific notices required under that section of ERISA, *not to SPDs*. Had Congress intended to provide the identical remedy for defective SPDs, it would have amended ERISA's SPD provisions to include the same language as amended Section 204(h). It did not do so. 29 U.S.C. §§ 1022, 1024. Moreover, Section 204(h) applies only to a limited subset of pension-plan amendments—those that result in a "sig-

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[2] The government's suggestion that the six circuits that apply the reliance-or-prejudice standard "might well agree with the courts below" that respondents' showing was "sufficient to entitle affected employees to relief" is wholly unfounded. U.S. Br. 18. Those courts require "*each* individual plaintiff [to] demonstrate some reasonable reliance on the SPD provisions or prejudice flowing from the inconsistency between the SPD and the Plan master document." *Chiles*, 95 F.3d at 1519 (emphasis added); *see also Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1344 (11th Cir. 2006) ("in order to be entitled to relief each class member must prove that he relied on the . . . plan's SPD"). In this case, in contrast, the district court expressly refused to "require an individualized showing" of reliance or prejudice and assumed that "*all* class members were affected *equally*" by CIGNA's SPD. Pet. App. 164a-65a (emphases added).

nificant reduction in the rate of future benefit accrual" (*id.* § 1054(h)(1))—and is categorically inapplicable to cases involving disability and other *welfare* benefit plans. *See* 29 U.S.C. § 1054(h)(6) ("In the case of any egregious failure to meet any requirement of this subsection . . . the provisions of the applicable *pension* plan shall be applied . . . .") (emphasis added). For those reasons, the question presented in this case has continued to arise frequently since the 2001 amendments in both the pension and welfare settings—and will continue to confound courts in the future in the absence of authoritative guidance from this Court. *See, e.g.*, *Washington*, 497 F.3d 453; *Morales-Alejandro v. Med. Card Sys., Inc.*, 486 F.3d 693 (1st Cir. 2007); *Greeley*, 479 F.3d 612; *Schwartz v. Prudential Ins. Co. of Am.*, 450 F.3d 697 (7th Cir. 2006); *Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572 (2d Cir. 2006); *Heffner*, 443 F.3d 1330; *Burstein*, 334 F.3d 365.

Third, the government contends that CIGNA "fail[ed] to take advantage of opportunities to discover whether individual class members were actually harmed" by its SPD. U.S. Br. 18. As the district court recognized, however, CIGNA did "request[ ] documents from and depos[e] the eight class members chosen by Plaintiffs" (Pet. App. 166a)—and that discovery, together with trial testimony, established that at least some of the class members understood exactly how their benefits were being calculated after CIGNA transitioned to the cash balance plan. *See, e.g.*, Tr. 84-85, 140-41 (testimony of class representative Gisela Broderick that she understood that the Plan did not provide for the "A+B" benefits formula later awarded by the district court). CIGNA's decision not to seek additional discovery was based on its position that the *"plan participant[s]* should be re-

quired to prove detrimental reliance before being entitled to benefits based on a flawed SPD" (Pet. App. 165a n.1 (emphasis added))—an understanding of the applicable burden of proof that was supported by the decisions of six circuits. *See, e.g., Stilner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1478 (4th Cir. 1996) (en banc) ("an ERISA claimant must demonstrate that he either relied upon or was prejudiced by [the] representations" in the SPD); *Govoni*, 732 F.2d at 252 (same). The district court disagreed, and held that "*CIGNA* bears the burden of demonstrating harmless error" under the Second Circuit's "likely harm" standard. Pet. App. 167a (emphasis added).

The evidentiary record does not pose an obstacle to this Court's review of that legal determination. The answer to the question presented—whether a class-wide showing of "likely harm" is sufficient to permit recovery based on a conflict between an SPD and the plan—does not turn on whether, in fact, respondents demonstrated likely harm and CIGNA rebutted that showing. It turns on the legal principles governing the interpretation of ERISA. Moreover, if the Second Circuit's "likely harm" standard is correct (or if the lower courts should have applied the no-reliance-or-prejudice standard endorsed by the Third, Fifth, and Sixth Circuits), then this Court could affirm the decision below on the current record. If the Second Circuit was wrong, however, and should have required an individualized showing of reliance or prejudice, then the Court could examine respondents' evidence to determine whether they met their evidentiary burden (or remand the case for the lower courts to undertake that inquiry in the first instance). Under that reliance-or-prejudice standard, the burden of proof rests squarely on the

plaintiff, and a defendant could therefore prevail without coming forward with *any* evidence at all.

Finally, the government theorizes that, if "the SPD remedial issue were resolved in CIGNA's favor," the district court might order a "comparable" remedy based on a violation of a *different* provision of ERISA—Section 204(h). U.S. Br. 19. The government's prediction about what the district court "*might*" do on remand is sheer speculation. The district court has already determined, "in an exercise of its equitable powers," not to award additional benefits based on the Section 204(h) violation (Pet. App. 191a)—and it might well reinstate that conclusion on remand. Moreover, the possibility that the district court would revisit the Section 204(h) remedy in response to this Court's decision hardly justifies leaving in place a legally flawed SPD-based remedy and declining to provide the lower courts with urgently needed guidance on a question that has generated an acknowledged and intractable conflict among the circuits.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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