No. 07-841

In the Supreme Court of the United States

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND, PETITIONER

v.

SPHERION CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

GREGORY F. JACOB
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
Department of Labor
Washington, D.C. 20210

PAUL D. CLEMENT
Solicitor General
Counsel of Record

EDWIN S. KNEEDLER
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether an action by a plan beneficiary against a plan fiduciary for monetary relief equal to the insurance benefits that the beneficiary would have received absent the fiduciary's breach of fiduciary duty seeks "equitable relief" within the meaning of Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(a)(3).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 07-841

MELISSA AMSCHWAND, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF THOMAS AMSCHWAND, PETITIONER

v.

SPHERION CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, to ensure "the continued well-being and security of millions of employees and their dependents" who are participants in or beneficiaries of employee benefit plans. 29 U.S.C. 1001(a). To that end, ERISA imposes stringent duties on plan fiduciaries, 29 U.S.C. 1104 (2000 & Supp. IV 2004), and provides several "carefully integrated" remedial provisions to enforce those duties.

Massachusetts Mut. Life Ins. Co. v. *Russell*, 473 U.S. 134, 146 (1985); see 29 U.S.C. 1001(b). This case concerns one of those provisions, ERISA Section 502(a)(3), which allows a participant, beneficiary, or fiduciary to sue "to enjoin any act or practice which violates" ERISA or "to obtain other appropriate equitable relief * * * to redress such violations." 29 U.S.C. 1132(a)(3).

2. Thomas Amschwand was employed by respondent Spherion Corporation, formerly known as Interim Services, Inc. (Spherion). Amschwand was a participant in Spherion's Group Life and Accidental Death and Dismemberment Insurance Plan (the plan), an ERISA-covered welfare plan. Spherion was the plan administrator and an ERISA fiduciary. Amschwand diligently sought to provide for his wife under the plan, and Spherion repeatedly assured him that he had succeeded. Thus, at the time he died in February 2001, Amschwand thought he had obtained $426,000 in life insurance benefits for his wife. As it turned out, however, that was not the case. Pet. App. 4a, 27a-29a, 31a; Sixth Am. Compl. 2, 4; R. 1883; AMS272.

In August 1999, Amschwand was diagnosed with a rare form of heart cancer and took leave from his job. While he was on leave, Spherion changed life insurance carriers and purchased a new group policy from Aetna Life Insurance Company. Amschwand elected a total of $426,000 in basic and supplemental coverage under the new policy. Spherion confirmed that Amschwand was enrolled under the new policy. Pet. App. 2a-4a, 29a-30a.

Amschwand wrote checks to Spherion to cover the cost of his life insurance. Spherion cashed the checks, depositing them into an account in the name of the Interim/PPA Health Benefits Trust. Spherion paid monthly premiums to Aetna on the group life insurance

policy, which was held in Spherion's name. Pet. App. 4a, 29a-30a; Sixth Am. Compl. 4, 6; Spherion Answer to Sixth Am. Compl. 4, 5; R. 950, 1539, 1566-1567, 1881, 2077-2093, 2494-2495; MDPROD1358-1359.

Unbeknownst to Amschwand, however, the Aetna policy contained a provision denominated the "Active Work Rule." That provision stated:

> If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage) would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day.

Pet. App. 3a, 29a. Although Aetna agreed to waive the Rule for employees identified by Spherion who were on leave on the effective date of the new group policy, Spherion did not provide Amschwand's name to Aetna. Spherion also never informed Amschwand about the Active Work Rule. And, despite Amschwand's repeated requests for the summary of coverage under the policy or other documentation of his coverage, Spherion failed to provide Amschwand with the summary, which described the Active Work Rule. Instead, Spherion repeatedly informed Amschwand that he was covered at the levels that he had elected. *Id.* at 3a-4a, 29a-30a.

After Amschwand's death, petitioner, who is his widow, filed a claim for the life insurance benefits with Aetna. Aetna denied the claim on the ground that Amschwand was ineligible for the benefits under the Active Work Rule because he had not returned to work for a full day after the policy became effective. Aetna affirmed the denial of benefits on administrative appeal. Pet. App. 5a, 30a; R. 2494-2495.

Petitioner then filed suit under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), against Spherion, the Trustees of the Interim Health Benefits Trust, and the plan. As relevant here, petitioner alleges that Spherion breached its fiduciary duties under ERISA by failing to provide the appropriate paperwork to Aetna to obtain a waiver of the Active Work Rule for Amschwand, failing to provide him with the plan documents that he requested, failing to inform him about the Active Work Rule, and misrepresenting that he was fully covered under the Aetna policy. Sixth Am. Compl. 3-17.

Petitioner seeks to recover from Spherion "all monetary losses caused by its breach of fiduciary duty," specifically "the value of the life insurance benefits" that she would have received but for the breach. Sixth Am. Compl. 16. Alternatively, she seeks an order enjoining Spherion and the other respondents from denying the benefits based on the Active Work Rule. *Ibid.*; see Pet. App. 31a.

3. The district court granted summary judgment for respondents on the Section 502(a)(3) claim. Pet. App. 27a-42a. The court reasoned that *Mertens* v. *Hewitt Associates,* 508 U.S. 248 (1993), and *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), foreclose petitioner's suit. Pet. App. 34a-40a. In reaching that conclusion, the district court relied heavily on the Tenth Circuit's decision in *Callery* v. *United States Life Ins. Co.*, 392 F.3d 401 (2004), cert. denied, 546 U.S. 812 (2005). The district court concluded that "*Callery* is persuasive for the proposition that monetary damages equal to the benefits a beneficiary would have received but for the fiduciary's breach do not constitute 'equitable relief' and are therefore unavailable under ERISA § 502(a)(3)." Pet. App. 39a. Moreover, the district court

reasoned, "an injunction is simply an indirect attempt to recover from [respondents] what [petitioner] cannot recover directly—the value of the life insurance proceeds." *Id.* at 40a. The court therefore dismissed petitioner's Section 502(a)(3) claim. *Ibid.*[1]

4. The court of appeals affirmed. Pet. App. 1a-14a. It observed that "[t]he scope and nature of relief available to aggrieved parties under [Section 502(a)(3)] has been circumscribed by a line of [this Court's] decisions beginning with *Mertens*." *Id.* at 6a. The court of appeals explained that *Mertens* held that "equitable relief" under Section 502(a)(3) encompasses only relief "*typically* available in equity," and that Section 502(a)(3) therefore does not authorize a suit for monetary damages against a non-fiduciary who provides services to a plan. *Id.* at 6a-7a (quoting *Mertens*, 508 U.S. at 256). The court of appeals read *Mertens* to hold that "consequential damages [are] a legal rather than equitable remedy" and thus are unavailable under Section 502(a)(3), "[d]espite the fact that monetary damages were among the remedies historically granted by prefusion equity courts in actions brought by a beneficiary against a trustee." *Id.* at 6a. The court reasoned that "[t]he spectrum of § 502(a)(3) relief contracted further" in *Great-West*. *Id.* at 7a. It read *Great-West* as adding a "second requirement" to the *Mertens* requirement that the nature of the relief being sought must be "typically" available in equity—"that the cause of action giving rise

[1] The court did not dismiss petitioner's claim for statutory penalties under ERISA Section 502(a)(1)(A) and (c)(1)(B), 29 U.S.C. 1132(a)(1)(A) and (c)(1)(B), based on respondents' failure to produce plan documents, and for attorney's fees and costs under ERISA Section 502(g)(1), 29 U.S.C. 1132(g)(1)). Pet. App. 41a. The court later awarded petitioner $78,840 plus interest in penalties, fees, and costs. *Id.* at 16a, 18a-25a.

to the claim be generically equitable as well." *Id.* at 8a. That "two-part equity test," the court of appeals stated, was recently reinforced by *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). Pet. App. 8a-9a. The court of appeals additionally observed that "*Sereboff* seems to confirm that the *sine qua non* of restitutionary recovery available under § 502(a)(3) is a defendant's possession of the disputed res." *Ibid.*

The court of appeals then rejected petitioner's contention that the relief she seeks is equitable because Spherion is a fiduciary, whereas in *Mertens* and *Great-West*, the plaintiffs sought monetary relief from non-fiduciaries. Pet. App. 9a-10a. In the court's view, "[u]nder *Great-West*, only the nature of the claim and the relief sought—not the status of the litigants—determine the scope of available § 502(a)(3) recovery." *Id.* at 10a. Therefore, the court of appeals concluded, it "is irrelevant to ERISA's remedial scheme" that "wider relief was traditionally available in equity courts against fiduciaries." *Id.* at 10a-11a.

Viewing the remedy that petitioner seeks as restitution, the court of appeals held that the requested relief does not qualify as "equitable" because "Spherion never maintained possession of Amschwand's insurance proceeds." Pet. App. 11a-12a. "[I]f Spherion breached its fiduciary duty," the court reasoned, "the appropriate equitable remedy is the disgorgement of Spherion's ill-gotten profits, *i.e.*, refund of the policy premiums." *Id.* at 12a-13a. But an award of "the lost policy proceeds," the court concluded, "is simply a form of make-whole damage[s]" "akin to" legal relief. *Id.* at 13a. Likewise, the court held, petitioner's request for injunctive relief barring respondents from relying on the Active Work Rule is "essentially indistinguishable from a demand for

payment." *Id.* at 13a n.7. Accordingly, the court considered itself "obliged to follow [this] Court's decision in *Great-West* and deny § 502(a)(3) relief." *Id.* at 14a.

Judge Benavides concurred specially. He wrote:

> The facts as detailed in Chief Judge Jones's opinion scream out for a remedy beyond the simple return of premiums. Regrettably, under existing law it is not available. I am constrained to join the court's opinion, which I find correctly applies controlling precedent.

Pet. App. 14a.

DISCUSSION

The court of appeals erroneously held that Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), does not authorize a suit by a plan beneficiary against a plan fiduciary for monetary relief equal to the insurance benefits that the beneficiary would have received but for the fiduciary's breach of its fiduciary duty. That kind of suit is directly analogous to an action against a breaching trustee for monetary redress of a breach of trust, an action that was typically available in courts of equity in the days of the divided bench. The suit therefore seeks "equitable relief" and is authorized by Section 502(a)(3).

The question whether Section 502(a)(3) authorizes suits seeking monetary redress from breaching fiduciaries has divided the courts of appeals. The availability of those suits is critical to ERISA's goal of protecting plan participants and beneficiaries through the creation and enforcement of stringent fiduciary duties. If those suits are not available, numerous participants and beneficiaries who have suffered serious economic injuries because of fiduciary breaches will be left without any meaningful remedy, a result Congress could not have

intended when it enacted ERISA. This Court granted review on the Section 502(a)(3) issue in *LaRue* v. *DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020, 1023 (2008). The Court did not address the issue, however, because it resolved the case on other grounds. *Ibid.* Therefore, the Court should grant the petition for a writ of certiorari in this case to eliminate the confusion among the courts of appeals and to ensure that plan participants and beneficiaries are not deprived of the protections provided by ERISA.

A. The Decision Of The Court Of Appeals Is Incorrect

1. ERISA seeks "to protect * * * participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). "Congress invoked the common law of trusts to define the general scope of [fiduciary] authority and responsibility" under ERISA. *Central States Southeast and Southwest Areas Pension Fund* v. *Central Transp. Inc.*, 472 U.S. 559, 570 (1985). Congress intended trust law to inform interpretation of both ERISA's fiduciary duties and the remedial provisions designed to enforce those duties. *Varity Corp.* v. *Howe*, 516 U.S. 489, 502 (1996); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989); H.R. Conf. Rep. No. 280, 93d Cong., 2d Sess. 295 (1975).

The remedial provision at issue here, Section 502(a)(3), authorizes participants and beneficiaries to sue to obtain "appropriate equitable relief" to redress violations of ERISA, including its fiduciary duties, or to enforce ERISA's requirements or the terms of the plan. 29 U.S.C. 1132(a)(3). This Court has addressed the

scope of the "equitable relief" available under Section 502(a)(3) in three principal cases.

First, in *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248 (1993), the Court held that "equitable relief" means relief that was "*typically* available in equity." *Id.* at 256. Applying that standard, the Court concluded that Section 502(a)(3) does not permit a suit seeking money damages from a *non*-fiduciary (an actuary) who provided services to a plan. *Id.* at 256-263.[2]

The Court revisited the scope of Section 502(a)(3) in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002). That case involved a plan's suit against a beneficiary to enforce a provision in a health insurance contract requiring the beneficiary to reimburse the plan for medical benefits for which the beneficiary received a recovery from a third party. *Id.* at 207. The Court held that the monetary recovery sought by the plan was not equitable restitution because the recovery would be paid, not from an identifiable *res* to which the plan claimed a right, but from the general assets of the beneficiary. *Id.* at 210. The Court explained that, in the days of the divided bench, restitution was available at both law and equity, and, therefore, "whether it is

[2] Such non-fiduciaries have "no real power to control what the plan d[oes]," *Mertens*, 508 U.S. at 262, and their role is therefore somewhat peripheral under ERISA. Moreover, courts of appeals "routinely find that garden-variety state-law malpractice or negligence claims against non-fiduciary plan advisors, such as accountants, attorneys, and consultants, are not preempted" by ERISA under 29 U.S.C. 1144(a). *Gerosa* v. *Savasta & Co.*, 329 F.3d 317, 324 (2d Cir.) (citing cases), cert. denied, 540 U.S. 967, and 540 U.S. 1074 (2003). By contrast, the role of fiduciaries, who have primary responsibility for administration and control of ERISA-covered plans, see *Mertens*, 508 U.S. at 262, is central under ERISA, and state-law suits against fiduciaries by participants and beneficiaries would be preempted by ERISA, see p. 18, *infra*.

legal or equitable" under Section 502(a)(3) "depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Id.* at 213 (citation omitted; brackets in original).

The Court most recently addressed the meaning of "equitable relief" in *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). There, the Court held that a plan could enforce a reimbursement provision under Section 502(a)(3) because the beneficiary had preserved the disputed funds pending resolution of the claim, and the plan sought to enforce "an equitable lien established by agreement" over those funds. *Id.* at 362-368. The Court concluded that the plan sought "equitable relief" within the meaning of Section 502(a)(3) because both the basis for the plan's claim and the relief it sought would have been considered equitable in the days of the divided bench. *Ibid.*[3]

2. Under the analysis set forth in those cases, petitioner's suit against a plan fiduciary to recover monetary losses caused by a breach of fiduciary duty seeks "equitable relief." Her suit is directly analogous to a traditional action by the beneficiary of a trust to compel the trustee to redress a breach of trust. Both the basis for

[3] The Court has also addressed the scope of Section 502(a)(3) in other cases. For example, in *Harris Trust & Savings Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000), the Court held that an action for restitution or disgorgement of profits against someone who had benefitted from a breach of trust qualified as equitable relief under Section 502(a)(3). And, in *Varity Corp.*, 516 U.S. at 512, the Court stated that Section 502(a)(3) is a "catchall" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Based on that understanding, the Court held that Section 502(a)(3) authorized the reinstatement of the plaintiff employees to a plan that they had been tricked into leaving by the plan fiduciary. *Id.* at 492, 507-515.

the claim—breach of trust—and the requested relief—monetary redress that was sometimes called "surcharge"—were considered equitable in the days of the divided bench.

Indeed, the equity courts exercised *exclusive* jurisdiction over claims by a beneficiary against a trustee for breach of trust, subject to limited exceptions that do not apply here. Restatement (Second) of Trusts § 197, at 433 (1959) (Second Restatement); *id.* § 198, at 434; 1 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 151, at 184 (4th ed. 1918) (Pomeroy); 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 975, at 175 (12th ed. 1877) (Story); see *Duvall* v. *Craig*, 15 U.S. (2 Wheat.) 45, 56 (1817) ("A trustee, merely as such, is, in general, only suable in equity."); *Manhattan Bank* v. *Walker*, 130 U.S. 267, 271 (1889) ("The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for a breach of trust.").[4]

Equity provided a variety of remedies for breach of trust. Second Restatement § 199, at 437. One equitable remedy was "to compel the trustee to redress [the]

[4] Equity recognized both express and implied trusts. 1 Pomeroy § 152, at 185; 2 Story § 1195, at 434. Express trusts arose when the parties had objectively manifested the intent to create a trust relationship, although neither a written document nor the use of any formal or technical words was required. Second Restatement §§ 2, 24, at 6-12, 67. Implied trusts arose by operation of law, for example, when one person held legal title to property but the consideration had been provided by another. *Id.* §§ 404, 440, at 326, 393; 1 Pomeroy § 155, at 189-190; 3 *id.* § 1037, at 2345-2346. Equity courts would also exercise jurisdiction over actions against individuals who were not actual trustees but who owed fiduciary duties to the complaining parties. 1 *id.* § 157, at 193-194; 3 *id.* §§ 1088, 1097, at 2510-2511, 2535-2536. Those quasi-trustees included executors and administrators of estates, guardians, corporate directors, agents and the like. *Ibid.*

breach," including by "the payment of money." *Ibid.*; 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 199.3, at 206 (4th ed. 1987) (Scott); see 3 Pomeroy § 1080, at 2481-2482; 2 Story §§ 1266-1278, at 519-534. That monetary recovery, which was sometimes referred to as "surcharge," required the breaching fiduciary to pay "the amount necessary to compensate fully for the consequences of the breach," by, for example, "restor[ing] the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Restatement (Third) of Trusts § 205 & cmt. a, at 223 (1992); see 3 Scott § 205, at 238-239; *Black's Law Dictionary* 1482 (8th ed. 2004); *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Mosser* v. *Darrow*, 341 U.S. 267, 270-273 (1951); *Princess Lida of Thurn & Taxis* v. *Thompson*, 305 U.S. 456, 458, 463-464 (1939). Depending on the circumstances, the beneficiary could "charge the trustee with any loss that resulted from the breach of trust, or with any profit made through the breach of trust, or with any profit that would have accrued if there had been no breach of trust." 3 Scott § 205, at 237; see Second Restatement § 205, at 458.[5]

[5] The equitable remedies for breach of trust applied to implied trusts as well as express trusts. See 2 Story §§ 1266-1278, at 519-534 (discussing monetary relief for breach of trust in chapter on implied trusts); James P. Holcombe, *An Introduction to Equity Jurisprudence on the Basis of Story's Commentaries* 246-249 (1846) (same); *e.g.*, *Jones* v. *Van Doren*, 130 U.S. 684, 692 (1889) (court of equity may award monetary relief necessary "fully to indemnify the plaintiff" when trustee has sold real property held in implied trust); *Adair* v. *Shaw*, 1 Schoales & Lefroy 243, 262, 272 (Ir. High Ct. Ch. 1803) (person who comes into property bound by a trust with knowledge of the trust is treated as a trustee and is chargeable in equity for breach of trust whether or not he benefitted from the breach). Equity courts would also surcharge

Liability for breach of trust could be imposed "either in a suit brought for that purpose or on an accounting where the trustee [was] surcharged beyond the amount of his admitted liability." George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 862, at 36 (rev. 2d ed. 1995). Depending on the nature of the breach, the monetary recovery could be paid to the beneficiary rather than the trust itself. See, *e.g.*, *Gates* v. *Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (per curiam) (upholding decree that required executor to pay income to life beneficiary); *Kendall* v. *DeForest*, 101 F. 167, 170 (2d Cir. 1900) (upholding decree that held trustee liable to beneficiaries for income deficiency resulting from breach of trust that had depleted annuity fund); cf. *United States* v. *Mitchell*, 463 U.S. 206, 226 (1983) (relying on trust law in holding that individual Indian beneficiaries could sue for monetary compensation for losses allegedly caused by government's violation of statutes imposing specific duties concerning management of timber).

Equity courts surcharged fiduciaries for breaches very similar to the one at issue in this case. See, *e.g.*, *Marriott* v. *Kinnersley*, 48 Eng. Rep. 187, 188 (High Ct. Ch. 1830) (trustee charged with losses resulting from failure to pay premium on life insurance policy); see also *Appeal of the Harrisburg Nat'l Bank*, 84 Pa. 380, 383 (1877) (court of equity may surcharge administrator of estate with life insurance policy proceeds that the administrator negligently lost). Accordingly, petitioner's suit, which requests monetary redress equal to the life

---

quasi-trustees who had breached their fiduciary duties. See, *e.g.*, *Gates* v. *Plainfield Trust Co.*, 194 A. 65 (N.J. 1937) (per curiam) (executor); *Bosworth* v. *Allen*, 61 N.E. 163, 165-166 (N.Y. 1901) (corporate directors).

insurance benefits that she lost because of Spherion's breach of its fiduciary duties, seeks "equitable relief" under Section 502(a)(3), and the court of appeals erred in holding to the contrary. Cf. *Harris Trust & Savs. Bank* v. *Salomon Smith Barney Inc.*, 530 U.S. 238, 250 (2000) (relying on the historical availability of an action in equity against a person who acquired property from a breaching fiduciary in concluding that such a suit seeks "equitable relief" within the meaning of Section 502(a)(3)).

The court of appeals mistakenly believed that its holding was compelled by *Mertens*, *Great-West*, and *Sereboff*. See Pet. App. 6a-14a. Unlike petitioner, however, the plaintiffs in *Mertens* did not seek to surcharge fiduciaries with the loss they suffered, but instead sought damages for that loss from a *non*-fiduciary third party. See 508 U.S. at 253-254, 262; cf. *Appeal of the Harrisburg Nat'l Bank*, 84 Pa. at 383-384 (court of equity has no jurisdiction to order third party who is holding life insurance proceeds that administrator negligently failed to collect to pay those proceeds to estate). Likewise, *Great-West* involved neither a suit against a fiduciary nor a suit to obtain the equitable remedy of surcharge, but instead a suit by the plan for money damages under a contract. See 534 U.S. at 212-218. Neither case indicates that Section 502(a)(3) does not authorize petitioner's suit.

Nor does *Sereboff* "confirm," as the court of appeals apparently believed, that a monetary recovery qualifies as "equitable relief" under Section 502(a)(3) only if it constitutes equitable restitution of a "disputed res." Pet. App. 8a-9a, 12a. On the contrary, *Sereboff* reiterates that a suit seeks "equitable relief" whenever the basis for the claim and the relief sought would have been con-

sidered equitable in the days of the divided bench. See 547 U.S. at 362-368. And the Court held that Section 502(a)(3) authorizes a form of monetary relief, an "equitable lien 'by agreement,'" that the Court expressly distinguished from equitable restitution. *Id.* at 364-365.

B. The Courts Of Appeals Are Divided On Whether Suits Against Fiduciaries For Monetary Redress Of Fiduciary Breaches Seek Equitable Relief

1. The decision of the court of appeals warrants this Court's review because it deepens an existing conflict among the courts of appeals. Most courts of appeals, like the court below, have mistakenly concluded that this Court's cases dictate the conclusion that Section 502(a)(3) does not authorize suits against an ERISA fiduciary for monetary redress of losses caused by a breach of fiduciary duty. See *Goeres* v. *Charles Schwab & Co.*, 220 Fed. Appx. 663 (9th Cir. 2007), petition for cert. pending, No. 06-1521 (filed May 15, 2007); *Todisco* v. *Verizon Communications, Inc.*, 497 F.3d 95, 99-100 (1st Cir. 2007); *Coan* v. *Kaufman*, 457 F.3d 250, 262-264 (2d Cir. 2006) (reversing prior holding in *Strom* v. *Goldman, Sachs & Co.*, 202 F.3d 138 (2d Cir. 1999)); *Calhoon* v. *TWA*, 400 F.3d 593, 596-598 (8th Cir. 2005); *Callery* v. *United States Life Ins. Co.*, 392 F.3d 401, 404-409 (10th Cir. 2004); *Helfrich* v. *PNC Bank., Ky., Inc.*, 267 F.3d 477, 481-482 (6th Cir. 2001), cert. denied, 535 U.S. 928 (2002); see also *Fox* v. *Herzog Heine Geduld, Inc.*, 232 Fed. Appx. 104, 106 (3d Cir. 2007) (holding that, under *Great-West*, "[i]n order to award equitable relief under § 502(a)(3), 'money or property identified as belonging in good conscience to the plaintiff [must] clearly be traced to particular funds or property in the defendant's possession'") (citation omitted; brackets in

original). The Seventh Circuit, on the other hand, has held that Section 502(a)(3) does authorize such suits because monetary relief, "when sought as a remedy for breach of fiduciary duty[,] * * * is properly regarded as an equitable remedy." *Bowerman* v. *Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (2000) (citation omitted).[6]

The Seventh Circuit has not chosen to revisit *Bowerman* after *Great-West*. On the contrary, in a decision that post-dates *Great-West*, the court of appeals remanded to allow the plaintiff to amend his complaint to add ERISA claims because, in the court's view, "ERISA 'as currently written and interpreted, may allo[w] at least some forms of "make-whole" relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench.'" *McDonald* v. *Household Int'l, Inc.*, 425 F.3d 424, 430 (7th Cir. 2005) (citation omitted).

2. The confusion about whether monetary redress from a breaching fiduciary is equitable relief recoverable under Section 502(a)(3) has also generated a related conflict among the courts of appeals. Until recently, all the courts of appeals that have considered an action for monetary relief against a breaching fiduciary under Section 502(a)(2) or (a)(3) of ERISA have concluded that there is no right to a jury trial because the claims are equitable. See, *e.g.*, *Phelps* v. *C.T. Enters., Inc.*, 394 F.3d 213, 222 (4th Cir. 2005); *Borst* v. *Chevron Corp.*, 36

[6] Although the Seventh Circuit denominated the remedy in that case "restitution," it approved an award of the benefits that the participant would have received but for the breach, precisely what petitioner is requesting in this case. *Bowerman*, 226 F.3d at 592. Moreover, the court rested its conclusion on the fact that actions and remedies against a fiduciary for breach of fiduciary duty have traditionally been viewed as equitable. See *ibid.* (citing *Strom*, 202 F.3d at 144-145).

F.3d 1308, 1323-1324 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995); accord *Broadnax Mills, Inc.* v. *Blue Cross & Blue Shield*, 876 F. Supp. 809, 816-817 (E.D. Va. 1995). Likewise, courts have generally held that there is no right to a jury trial in non-ERISA cases where the plaintiffs seek monetary recovery for fiduciary breaches. See, *e.g.*, *In re Evangelist*, 760 F.2d 27, 29 (1st Cir. 1985); *Uselman* v. *Uselman*, 464 N.W.2d 130, 137-138 (Minn. 1990); *First Ala. Bank* v. *Spragins*, 475 So. 2d 512, 514 (Ala. 1987) (per curiam); accord *Camrex (Holdings) Ltd.* v. *Camrex Reliance Paint Co.*, 90 F.R.D. 313, 321 (E.D.N.Y. 1981) (no jury trial in shareholder derivative action for accounting from breaching fiduciary).

The Second Circuit, however, recently held that the defendants were entitled to a jury trial in a non-ERISA case in which shareholders sought to recover monetary losses from corporate fiduciaries accused of breaching their fiduciary duties. *Pereira* v. *Farace*, 413 F.3d 330, 339-341 (2005), cert. denied, 547 U.S. 1147 (2006). Based on this Court's analysis in *Great-West* of the scope of equitable relief available under ERISA, the Second Circuit concluded that such a remedy is necessarily "legal" rather than "equitable," and therefore fiduciary defendants are entitled to a jury trial. *Id.* at 340-341. The court of appeals determined that *Great-West* dictated that result even though, as the concurring judge pointed out, it is "at odds with centuries of equitable proceedings involving claims against trustees, estate executors, and other fiduciaries." *Id.* at 344.

Relying on reasoning similar to the Second Circuit's analysis in *Pereira*, district courts have begun to hold that jury trial trials are available in breach of fiduciary duty cases under ERISA, despite the prior uniform precedent to the contrary. See, *e.g.*, *Chao* v. *Meixner*, No.

1:07-cv-0595-WSD, 2007 WL 4225069, at *5 (N.D. Ga. Nov. 27, 2007); *Ellis* v. *Rycenga Homes, Inc.*, No. 1:04-cv-694, 2007 WL 1032367, at * 4 (W.D. Mich. Apr. 2, 2007); *Bona* v. *Barash*, No. 01 Civ. 2289 (MBM), 2003 WL 1395932, at *35 (S.D.N.Y. Mar. 20, 2003). This Court should grant the petition for a writ of certiorari to eliminate the confusion among the lower courts on whether monetary redress against a breaching fiduciary is "equitable relief."

C. The Question Presented Is Important

The question whether Section 502(a)(3) authorizes monetary relief against plan fiduciaries who have breached their duties is an important one. The narrow view of Section 502(a)(3) adopted by most courts of appeals would leave many plan participants and beneficiaries who have been harmed by fiduciary breaches without any meaningful remedy. Congress could not have intended that result, which would severely undermine ERISA's express statutory goal of "protect[ing] * * * the interests of participants in employee benefit plans and their beneficiaries" by imposing stringent duties on plan fiduciaries and providing "ready access to the Federal courts" to remedy breaches of those duties. 29 U.S.C. 1001(b).

ERISA's broad preemption provision forecloses state-law remedies against plan fiduciaries who breach their duties under ERISA. See 29 U.S.C. 1144(a); *e.g.*, *Peralta* v. *Hispanic Bus., Inc.*, 419 F.3d 1064, 1069 (9th Cir. 2005); *Eckelkamp* v. *Beste*, 315 F.3d 863, 870 (8th Cir. 2002); *Dudley Supermarket, Inc.* v. *Transamerica Life Ins. & Annuity Co.*, 302 F.3d 1, 4 (1st Cir. 2002); *Kramer* v. *Smith Barney*, 80 F.3d 1080, 1083 (5th Cir. 1996). Therefore, if a plan participant or beneficiary

who has been injured by a fiduciary breach has no effective remedy under ERISA, he has no effective remedy at all. And many injured participants and beneficiaries, particularly in welfare plans, will have an effective remedy under ERISA only if they can obtain relief under Section 502(a)(3).

ERISA Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B), allows a participant or beneficiary to sue for benefits under the plan. But a participant or beneficiary is unlikely to have a viable benefits claim if, like petitioner, she was prevented from learning about and meeting the written requirements of the plan because of a fiduciary breach. Indeed, in this case, petitioner filed a benefits claim with the plan, but her claim was denied, and that denial was affirmed on administrative appeal. See p. 3, *supra*.

Nor is it likely that the injured participant or beneficiary would have a claim under Section 502(a)(2), 29 U.S.C. 1132(a)(2). That provision only allows recovery of "losses to the plan." 29 U.S.C. 1109(a). It therefore does not authorize a recovery by a participant or beneficiary who has received fewer benefits, or failed to qualify for benefits at all, because of a fiduciary breach, unless there is a corresponding loss to the plan itself. See, *e.g.*, *Varity*, 516 U.S. at 515; *Goeres*, 220 Fed. Appx. at 663.

Because of the limited relief available under ERISA's other remedial provisions, a wide range of injuries would likely go unredressed if Section 502(a)(3) did not provide monetary relief for fiduciary breaches. For example, there would likely be no recovery for a plan participant who was left without health insurance during a costly illness because the plan fiduciary had negligently failed to submit the premiums. See, *e.g.*,

McFadden v. *R&R Engine & Mach. Co.*, 102 F. Supp. 2d 458 (N.D. Ohio 2000). Similarly, there would likely be no recovery for the widow of a plan participant who was left without the life insurance proceeds she expected because the fiduciary was negligent in processing the participant's application. See, *e.g.*, *Strom*, 202 F.3d at 140-141. Indeed, participants and beneficiaries would be unable to recover their lost benefits not only when fiduciaries negligently mishandled their payments, but even when fiduciaries intentionally diverted the payments for their personal use. Likewise, participants and beneficiaries would have no meaningful relief when they received significantly lower benefits because of misinformation provided by plan fiduciaries. See, *e.g.*, *Goeres*, 220 Fed. Appx. at 663; *Griggs* v. *E.I. DuPont de Nemours & Co.*, 237 F.3d 371, 373-374 (4th Cir. 2001).

For these reasons, the narrow reading of Section 502(a)(3) mistakenly adopted by the court below and other courts of appeals has led to a "rising judicial chorus urging" the correction of "an unjust and increasingly tangled ERISA regime." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (citation omitted); see Pet. App. 14a (Benavides, J. concurring specially); *Eichorn* v. *AT&T*, 489 F.3d 590, 592-593 (3d Cir. 2007) (Ambro, J., concurring in denial of petition for rehearing en banc); *Lind* v. *Aetna Health, Inc.*, 466 F.3d 1195, 1200 (10th Cir. 2006); *Pereira*, 413 F.3d at 345-346 (Newman, J. concurring); *DiFelice* v. *Aetna U.S. Healthcare*, 346 F.3d 442, 467 (3d Cir. 2003) (Becker, J., concurring); *Cicio* v. *Does 1-8*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part), vacated, 542 U.S. 933 (2004).

Legal scholars have echoed the concern that participants and beneficiaries should not be left "betrayed

without a remedy." Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. Marshall L. Rev. 827, 852 (2006); see, *e.g.*, John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in* Russell, Mertens, *and* Great-West, 103 Colum. Law Rev. 1317, 1353-1362 (2003); Randall J. Gingiss, *The ERISA Foxtrot: Current Jurisprudence Takes One Step Forward and One Step Back in Protecting Participants' Rights*, 18 Va. Tax Rev. 417 (1998); Jayne Elizabeth Zanglein, *Closing the Gap: Safeguarding Participants' Rights by Expanding the Federal Common Law of ERISA*, 72 Wash. U.L.Q. 671 (1994). Accordingly, this Court should grant review and correct the court of appeals' misinterpretation of Section 502(a)(3) by holding that monetary relief is available against fiduciaries who breach their ERISA duties.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

EDWIN S. KNEEDLER
Deputy Solicitor General

MATTHEW D. ROBERTS
Assistant to the Solicitor General

GREGORY F. JACOB
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
Department of Labor

MAY 2008