No. 17-528

In the Supreme Court of the United States

JENNIFER STRANG, PETITIONER

v.

FORD MOTOR COMPANY GENERAL RETIREMENT PLAN, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a) (2012 & Supp. IV 2016), contains several civil enforcement provisions. As relevant here, Section 502(a)(1)(B) allows a plan participant or beneficiary to sue "to recover benefits due to him under the terms of his plan." 29 U.S.C. 1132(a)(1)(B). Section 502(a)(3) authorizes a suit for "other appropriate equitable relief" to redress violations of ERISA or plan terms. 29 U.S.C. 1132(a)(3).

The question presented is under what circumstances an ERISA plaintiff seeking to recover benefits under Section 502(a)(1)(B) may also seek equitable relief under Section 502(a)(3).

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This brief is submitted in response to the order of the Court inviting 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 denied.

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, protects "the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b); see *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996).

Among the standards ERISA imposes is a duty of loyalty, which requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the

participants and beneficiaries" of the plan. 29 U.S.C. 1104(a)(1). More specifically, the duty of loyalty requires a fiduciary to "deal fairly and honestly with beneficiaries," and to "take impartial account of the interests of all beneficiaries." *Varity*, 516 U.S. at 506, 514; see also *Pegram* v. *Herdrich*, 530 U.S. 211, 224 (2000) (elaborating duty of loyalty).

To ensure that fiduciaries meet their duties, Section 502(a) of ERISA, 29 U.S.C. 1132(a) (2012 & Supp. IV 2016), contains a series of "carefully integrated civil enforcement provisions." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). Two of those provisions are relevant here. First, Section 502(a)(1)(B) authorizes a plan participant or beneficiary to bring an action "to recover benefits due to him under the terms" of the plan. 29 U.S.C. 1132(a)(1)(B). Second, Section 502(a)(3) authorizes a participant, beneficiary, or fiduciary to seek "appropriate equitable relief * * * to redress" any violation of ERISA or the plan terms. 29 U.S.C. 1132(a)(3).

In *Varity*, this Court considered the relationship between Sections 502(a)(1)(B) and 502(a)(3). See 516 U.S. at 507-515. In particular, the Court addressed concerns that plaintiffs might "repackage" denial-of-benefits claims under Section 502(a)(1)(B) as claims for equitable relief under Section 502(a)(3), in part to take advantage of a more favorable standard of review. *Id.* at 513-514; see *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989) (discussing deferential standard of review that applies to a denial of benefits by a plan administrator who is granted discretion by the plan). The Court stated that such concerns were "unlikely to materialize" because "where Congress else-

where provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" *Varity*, 516 U.S. at 514-515.

Thus, under the approach adopted in *Varity*, a plaintiff who could obtain adequate relief through a denial-of-benefits claim under Section 502(a)(1)(B) likely could not bring the same claim under Section 502(a)(3). Cf. *Russell*, 473 U.S. at 144. But, as in *Varity* itself, a plaintiff who "could not proceed under" Section 502(a)(1)(B) likely could bring a claim under Section 502(a)(3). 516 U.S. at 515; see *CIGNA Corp.* v. *Amara,* 563 U.S. 421, 438 (2011) (concluding that claim not authorized under Section 502(a)(1)(B) could proceed under Section 502(a)(3)).

2. a. Petitioner is the surviving spouse of John Strang, a former employee of respondent Ford Motor Company (Ford). Mr. Strang retired in 2007 after 38 years at Ford, and he was a participant in Ford's pension plan—the Ford Motor Company General Retirement Plan (Plan). Pet. App. 2. Ford was both the Plan's sponsor and its administrator, an arrangement that ERISA permits. *Id.* at 20; see *Varity*, 516 U.S. at 498.

Like many other companies, Ford recently decided to restructure its pension plan. Pet. App. 2. As part of that restructuring, Ford offered its retirees the option of forgoing their remaining pension payments in favor of a single lump-sum payment. *Ibid.*; see *McCarter* v. *Retirement Plan for the Dist. Managers of the Am. Family Ins. Grp.*, 540 F.3d 649, 650-651 (7th Cir. 2008) (discussing lump-sum payment program); U.S. Gov't Accountability Office (GAO), *Private Pensions: Participants Need Better Information When Offered Lump Sums that Replace Their Lifetime Benefits*, GAO-15-74

(Jan. 27, 2015), https://www.gao.gov/products/GAO-15-74.

In April 2012, Ford sent a letter to Mr. Strang informing him that "the Ford Plan would provide retiree participants with an option to take a lump sum distribution of their remaining retirement benefits beginning in August 2012." Pet. App. 2. The letter explained that "a series of election periods will be held throughout 2012 and 2013," and that he would "be assigned a specific election period based on a random process using the last two digits of [his] Social Security Number." *Id.* at 27 (citation omitted). The letter stated that Mr. Strang would be "notified approximately one month prior to the start of" his election period and would have "90 days to make [his] decision" whether to choose the lump-sum payment. *Ibid.* "Under no circumstances," the letter stated, could Mr. Strang "change [his] assigned election period." *Ibid.*

b. In July 2012, Mr. Strang was diagnosed with terminal cancer. Pet. App. 2. In a series of ensuing communications, petitioner and Mr. Strang informed Ford of his deteriorating health and asked Ford to allow him to make his election on an expedited basis. *Id.* at 3. Ford responded that it would not make exceptions to the otherwise-applicable timing. *Ibid.*; see *id.* at 32.

On November 14, 2012, Ford sent a postcard informing Mr. Strang that his election period would be between December 14, 2012, and March 13, 2013. Pet. App. 32-33. Ford explained that it would subsequently send a "Decision Guide" and "Election Kit" for Mr. Strang to use in making his election. *Id.* at 33. In a phone call on November 16, 2012, petitioner reiterated Mr. Strang's precarious condition and asked Ford to "rush the process" so that Mr. Strang could make his

election "as soon as possible." *Id.* at 3. Ford informed petitioner that the process "could not be rushed." *Ibid.*

Later on November 16, 2012, petitioner and Mr. Strang each executed letters to Ford. Pet. App. 3. Mr. Strang wrote that his "death may be imminent" and that he wanted to document that his "election to receive [his] retirement distribution shall be the lump sum retirement distribution." *Ibid.* The letter also stated that if Mr. Strang did "not survive until December 14, 2012 and it is determined that making this plan election is NOT in the best interests of [petitioner] then she shall be empowered to make the election that is in her best interests." *Id.* at 4. Petitioner, who held her husband's power of attorney, also sent a letter describing her husband's bleak prognosis and stating that he "wishe[d] to take the buyout." *Ibid.* (brackets in original). Two days later, on November 18, 2012, Mr. Strang died. *Ibid.*

c. In February 2013, petitioner submitted a claim requesting that Ford honor her late husband's attempt to elect the lump-sum option. Pet. App. 4. The claim was inadvertently delayed, and with petitioner's consent, the matter was treated as an appeal. *Ibid.* In June 2013, a Plan committee denied the appeal because Mr. Strang's attempted election was not on "the required election forms" and was "completed prior to" the beginning of his allotted "lump sum window election period." *Id.* at 4-5. Ford informed petitioner that she retained the ability to collect a lump-sum payout of her survivor benefits, but that it would be $463,254.78 less than the payment Mr. Strang would have received. *Id.* at 4.

3. In November 2014, petitioner filed suit in federal district court asserting, *inter alia*, claims under ERISA Sections 502(a)(1)(B) and 502(a)(3). Pet. App. 5. Her

Section 502(a)(1)(B) claim alleged that Ford had wrongfully denied Mr. Strang's lump-sum payment under the terms of the Plan and requested the unpaid benefits as relief. Am. Compl. ¶¶ 57-60. Her Section 502(a)(3) claim, pleaded in the alternative, alleged that Ford breached its fiduciary duty "by unreasonably refus[ing] to allow John Strang to take a lump sum buyout of his Ford Plan pension at a time when other participants were able to take the lump sum option." *Id.* ¶ 63. To redress the alleged fiduciary breach, petitioner sought equitable remedies including "surcharge and/or restitution." *Id.* ¶ 65.

The district court dismissed petitioner's fiduciary-breach claim. Pet. App. 22-23. The court reasoned that petitioner's "request for equitable relief under" Section 502(a)(3) could not proceed because "it would duplicate the relief available under other ERISA sections," namely Section 502(a)(1)(B). *Ibid.* The court accordingly concluded that petitioner's "remedy in this matter is to seek the allegedly unpaid lump sum benefits," under Section 502(a)(1)(B), not to seek "equitable remedies for Ford's alleged breach of fiduciary duty" under Section 502(a)(3). *Id.* at 23.

The district court subsequently granted judgment to respondents on petitioner's claim for benefits under Section 502(a)(1)(B). Pet. App. 24-45. The court noted that petitioner presented "a sympathetic case," but the court determined that Ford's decision denying Mr. Strang's attempt to elect a lump-sum benefit before his assigned election period was "rational in light of the plan's provisions" and therefore not an ERISA violation. *Id.* at 39. The court explained that nothing in the administrative record undermined Ford's position that "each member's election period was assigned randomly based

on Social Security numbers" and that Mr. Strang's election period was therefore not wrongly "'delayed.'" *Id.* at 43 (citation omitted). The court added that Ford's "adherence to a system whereby election periods were randomly assigned based on Social Security numbers is neither unfair nor discriminatory, but ensures even-handed administration of the plan." *Id.* at 44.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. 1-13. Recognizing that "the facts here present a tragic case of the sometimes difficult nature of hard-line rules," the court nevertheless concluded that "nothing in the plan" barred Ford's decision to administer the lump-sum election program by creating "a fixed period during which the eligible member was required to submit specific election forms." *Id.* at 11. The court accordingly affirmed the district court's grant of judgment to respondents on petitioner's claim for benefits under Section 502(a)(1)(B). *Ibid.*

The court of appeals also affirmed the dismissal of petitioner's fiduciary-breach claim under Section 502(a)(3). Pet. App. 11-13. The court explained that, under circuit precedent, a "'claimant can pursue a breach-of-fiduciary-duty claim under [Section 502(a)(3)] * * * only where the breach of fiduciary duty claim is based on an *injury* separate and distinct from the denial of benefits or where the remedy afforded by Congress under [Section 502(a)(1)(B)] is otherwise shown to be inadequate.'" *Id.* at 11 (quoting *Rochow* v. *Life Ins. Co.*, 780 F.3d 364, 372 (6th Cir.) (en banc), cert. denied, 136 S. Ct. 480 (2015)). Applying that rule, the court concluded that "the injury for the breach of fiduciary duty and for the denial of benefits is one and the same," namely, the denial and withholding of Mr. Strang's benefits. *Ibid.* The court added that "the remedy sought is

the same: the $463,254.78 difference between what [petitioner] received and what she would have received had Mr. Strang's election been effective." *Id.* at 13. The court accordingly concluded that petitioner's claim under Section 502(a)(3) was properly dismissed. *Ibid.*

DISCUSSION

ERISA's text, structure, and purpose indicate that a plaintiff bringing a claim for benefits under Section 502(a)(1)(B) may also bring a claim for fiduciary breach under Section 502(a)(3) if the plaintiff alleges (i) distinct injuries cognizable under Section 502(a)(3), or (ii) that relief under Section 502(a)(1)(B) would be inadequate. That rule is consistent with this Court's decisions interpreting the relevant provisions of ERISA, and it has been adopted by every court of appeals that has addressed the issue. Although Sixth Circuit precedent on this question contains some apparent internal contradictions, the unpublished decision below can be understood as consistent with the statute and the uniform position of other courts of appeals. Any internal conflict within the Sixth Circuit, moreover, would not warrant this Court's review. Nor would any potential error in applying the law to the facts of this case, particularly given the ambiguous allegations in the complaint and the nonprecedential status of the decision below. In the government's view, the petition for a writ of certiorari should accordingly be denied.

A. In Appropriate Circumstances, A Plaintiff Asserting A Denial-of-Benefits Claim Under Section 502(a)(1)(B) May Also Assert A Fiduciary-Breach Claim Under Section 502(a)(3)

ERISA's text, structure, and purpose indicate that a plaintiff who asserts a denial-of-benefits claim under

Section 502(a)(1)(B) may also assert a fiduciary-breach claim under Section 502(a)(3) if she alleges (i) distinct injuries cognizable under Section 502(a)(3), or (ii) that relief under Section 502(a)(1)(B) would be inadequate.

1. The text of Sections 502(a)(1)(B) and 502(a)(3) makes clear that the two provisions authorize distinct actions to remedy distinct injuries. Section 502(a)(1)(B) authorizes a plaintiff to bring a claim to remedy one of several specific injuries: "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). In contrast, Section 502(a)(3) broadly authorizes a plaintiff to "obtain other appropriate equitable relief" to redress ERISA violations or enforce "any provisions" of the statute or plan. 29 U.S.C. 1132(a)(3). No sound basis exists to read those provisions as mutually exclusive. To the contrary, their plain language indicates that they create separate causes of action to remedy separate injuries and ensure that a plaintiff receives adequate relief.

The structure of Section 502 reinforces that understanding. As this Court explained in *Varity*, most subsections in Section 502 "focus upon specific areas, *i.e.*, * * * wrongful denial of benefits" under subsection (a)(1)(B). 516 U.S. at 512. Section 502(a)(3), however, is a "catchall" provision that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Ibid.* Thus, "where Congress * * * provided adequate relief for a beneficiary's injury" in Section 502(a)(1)(B), "there will likely be no need for further equitable relief" under Section 502(a)(3). *Id.* at 515; see *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248,

257 (2008) (Roberts, C.J., concurring in part and concurring in the judgment) (suggesting that a "claim for benefits that turns on the application and interpretation of the plan terms * * * properly lies only under § 502(a)(1)(B)"). But where the beneficiary asserts a different injury or shows that Section 502(a)(1)(B) would not "provide[] adequate relief," nothing precludes a separate claim under Section 502(a)(3). *Varity*, 516 U.S. at 515.

ERISA's purpose further underscores that interpretation. In enacting ERISA, Congress expressly stated in the statute its intent to provide injured participants and beneficiaries "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Congress also acted against the backdrop of ordinary rules of civil procedure, which permit joinder of alternative claims in a single action. See Fed. R. Civ. P. 8(a) and (d); 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1282, 1283 (3d ed. 2004); see also *United States Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457, 467 (1957). "Given these objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Varity*, 516 U.S. at 513.

This Court's decision in *CIGNA Corp.* v. *Amara*, 563 U.S. 421 (2011), illustrates the relationship between Sections 502(a)(1)(B) and 502(a)(3). In *Amara*, ERISA plan participants brought claims for benefits under Section 502(a)(1)(B) on the theory that plan administrators provided inaccurate plan descriptions. *Id.* at 429-432. The plaintiffs sought, and the district court awarded, the benefits that plan administrators had allegedly

promised. *Id.* at 433-434. Having awarded adequate relief under Section 502(a)(1)(B), the district court did not consider providing additional relief under Section 502(a)(3). *Id.* at 434.

While approving the district court's general approach, this Court concluded that the relief the district court granted was not available under Section 502(a)(1)(B) and that the court should consider whether equitable relief was available under Section 502(a)(3). *Amara*, 563 U.S. at 438-442. Of particular relevance here, the Court stated that a request for relief in "the form of a money payment does not" necessarily remove such a request "from the category of traditionally equitable relief," because equity courts "possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty" through a "surcharge" remedy. *Id.* at 441 (citation omitted). *Amara* thus clarified that a plaintiff's pursuit of a claim for benefits under Section 502(a)(1)(B) does not preclude appropriate equitable relief for a fiduciary breach under Section 502(a)(3).

2. Outside the Sixth Circuit (which is discussed in Section B, *infra*), courts of appeals have uniformly adopted the same approach. As the Eighth Circuit explained in a recent decision, "*Amara* implicitly determined that seeking relief under [Section 502](a)(1)(B) does not preclude seeking relief under [Section 502](a)(3)." *Jones* v. *Aetna Life Ins. Co.*, 856 F.3d 541, 546-547 (2017). Specifically, the court determined that a plan participant could proceed under both Sections 502(a)(1)(B) and 502(a)(3) because she asserted "different theories of liability"—namely that she was denied "benefits due under the plan" and that the plan administrator "breached its fiduciary duties" by using a

claims-handling process tainted by conflicts of interest. *Id.* at 547.

The Eighth Circuit recognized that a plaintiff's ability to proceed with claims under both Sections 502(a)(1)(B) and 502(a)(3) does not necessarily mean that she may recover under both provisions. *Jones*, 856 F.3d at 546. To the contrary, as *Varity* suggests, ERISA prohibits "duplicate *recoveries*" under Sections 502(a)(1)(B) and 502(a)(3). *Silva* v. *Metropolitan Life Ins. Co.*, 762 F.3d 711, 726 (8th Cir. 2014). That ultimate prohibition, however, "does not limit the number of ways a party can initially seek relief at the motion to dismiss stage." *Ibid.* (relying on general principles of civil procedure allowing alternative pleading).

The Second Circuit has similarly recognized "the possibility of a plaintiff successfully asserting a claim under both § 502(a)(1)(B), to enforce the terms of a plan, and § 502(a)(3) for breach of fiduciary duty." *Devlin* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 76, 89 (2001), cert. denied, 537 U.S. 1170 (2003). Like the Eighth Circuit, the Second Circuit generally prohibits a double recovery. Thus, if a plaintiff succeeds "on both claims," a court limits any remedy under Section 502(a)(3) "to such equitable relief as is considered appropriate." *Id.* at 89-90. But that limitation does not prevent a plaintiff from asserting claims under both provisions at the pleading stage. *Ibid.*; see also *New York State Psychiatric Ass'n* v. *UnitedHealth Grp.*, 798 F.3d 125, 133-135 (2d Cir. 2014) (*NYPSA*) (vacating district court's premature dismissal of Section 502(a)(3) claim), cert. denied, 136 S. Ct. 506 (2015).

The Ninth Circuit, too, has held that an ERISA plaintiff may pursue "simultaneous claims under [Section 502](a)(1)(B) and [Section 502](a)(3) * * * so long

as there is no double recovery." *Moyle* v. *Liberty Mut. Ret. Benefit Plan*, 823 F.3d 948, 961 (2016). Specifically, the court determined that a claim seeking "the payment of benefits under" Section 502(a)(1)(B) could proceed in tandem with a claim for "an equitable remedy for the breach of fiduciary duty" under Section 502(a)(3). *Id.* at 962. After surveying a range of decisions on the issue, the court explained that such pleading "is permitted under pre- and post-*Amara* cases across different circuits." *Ibid.* (collecting authorities).

3. The consensus view of the courts of appeals accords with the position advocated by the United States for at least 15 years, dating back to an amicus brief filed by the government in response to this Court's invitation in *Empire Blue Cross & Blue Shield* v. *Byrnes*, 537 U.S. 1170 (2003). There, the government explained that "a participant may join a claim for benefits" under Section 502(a)(1)(B) "with a claim for misrepresentation about the benefits to be obtained under the plan" asserted under Section 502(a)(3), because the Section 502(a)(3) claim for misrepresentation was "clearly distinct from the Section 502(a)(1)(B) claim that the [plan documents] provided vested benefits by their own terms." U.S. Amicus Br. at 14-16, *Byrnes*, *supra* (No. 01-1710). The government endorsed the Second Circuit's holding in *Devlin* that "it is only when a benefit claim is *successful* that the court would be required to determine whether additional, 'equitable'" relief for a fiduciary-breach claim under Section 502(a)(3) would be "'appropriate.'" *Id.* at 16 (citation omitted). The government has consistently reiterated that position in the courts of appeals. See, *e.g.*, Gov't C.A. Amicus Br. at 20, *NYSPA*, *supra* (No. 14-0020); Gov't C.A. Amicus Br. at 15-16, *Silva*, *supra* (No. 13-2233).

B. Sixth Circuit Precedent Can Be Understood As Consistent With ERISA And The Decisions Of Other Circuits

The parties' principal dispute centers on how to understand Sixth Circuit precedent addressing the relationship between Sections 502(a)(1)(B) and 502(a)(3). Although Sixth Circuit precedent on that issue is not entirely clear, the unpublished decision below can be understood as consistent with ERISA and the decisions of other courts of appeals. There is accordingly no compelling basis for this Court's intervention.

1. a. The en banc Sixth Circuit addressed the availability of claims under Sections 502(a)(1)(B) and 502(a)(3) in *Rochow* v. *Life Insurance Co.*, 780 F.3d 364, cert. denied, 136 S. Ct. 480 (2015). There, an ERISA plan participant who successfully recovered disability benefits under Section 502(a)(1)(B) also sought to recover disgorged profits under Section 502(a)(3) "based on the claim that the wrongful denial of benefits also constituted a breach of fiduciary duty." *Id.* at 371. The court rejected the plaintiff's Section 502(a)(3) claim as an attempt to secure "an impermissible duplicative recovery." *Ibid.* The court determined that the payment of benefits under Section 502(a)(1)(B) constituted "an adequate remedy," and that equitable relief under Section 502(a)(3) was therefore unwarranted. *Id.* at 372. That approach follows from this Court's decision in *Varity*, which held that Section 502(a)(3) provides a remedy for "violations that [Section] 502 does not elsewhere adequately remedy." 516 U.S. at 512. It also accords with decisions of other courts of appeals emphasizing that Sections 502(a)(1)(B) and 502(a)(3) do not authorize "duplicate" recoveries. *Silva*, 762 F.3d at 726; see *Moyle*, 823 F.3d at 961; *Devlin*, 274 F.3d at 89-90.

Separate from its discussion of duplicative recovery, *Rochow* explained that a claimant could "pursue a breach-of-fiduciary-duty claim under § 502(a)(3), irrespective of the degree of success obtained on a claim for recovery of benefits under § 502(a)(1)(B)," if "the breach of fiduciary duty claim is based on an *injury* separate and distinct from the denial of benefits." 780 F.3d at 372. *Rochow* concluded on the facts before it that the asserted injuries were not "separate and distinct," but rather "one and the same." *Id.* at 373; see *id.* at 374. The Sixth Circuit's recognition that a plaintiff alleging separate and distinct injuries could bring claims under both provisions, however, is consistent with the approach adopted by other courts of appeals addressing the same question. See, *e.g.*, *Jones*, 856 F.3d at 547; *NYPSA*, 798 F.3d at 133-135.

b. The Sixth Circuit appeared to apply a different approach in *Donati* v. *Ford Motor Co.*, 821 F.3d 667 (2016). The plaintiff there brought a claim for benefits under Section 502(a)(1)(B), as well as a fiduciary-breach claim under Section 502(a)(3) based on the fiduciary's alleged misrepresentation about her benefits. See *id.* at 674. The court of appeals recognized that the two claims differed in the "nature of the alleged wrongdoing —misrepresenting the cash-out value of her benefits, as opposed to wrongfully denying her benefits," but the court emphasized that the two claims sought "the exact same relief * * * : $230,361.49." *Id.* at 673-674. The court concluded that the plaintiff's "breach-of-fiduciary-duty claim [wa]s barred" because that claim sought "the same relief" as the benefits claim. *Id.* at 674.

To the extent that conclusion formed the basis of its decision, the *Donati* court was mistaken. As the en banc Sixth Circuit had correctly explained in *Rochow*, an

ERISA plaintiff may pursue a breach-of-fiduciary-duty claim under Section 502(a)(3), "irrespective of the degree of success obtained on a claim for recovery of benefits under § 502(a)(1)(B)," if "the breach of fiduciary duty claim is based on an *injury* separate and distinct from the denial of benefits." 780 F.3d at 372. Because *Donati* recognized that the plaintiff alleged separate and distinct injuries, 821 F.3d at 674, the court should have allowed her claims to proceed. *Donati* instead relied on *Rochow* in stating that "it is essential to look at the 'adequacy of relief to redress the claimant's injury, not the nature of the defendant's wrongdoing.'" *Id.* at 673 (quoting *Rochow*, 780 F.3d at 371). But *Rochow* made that statement only in the context of claims that alleged "one and the same injury," not in the context of claims—like those in *Donati*—that alleged "separate and distinct" injuries. *Rochow*, 780 F.3d at 373.

Donati's reasoning conflicts not only with *Rochow*, but also with this Court's decision in *Amara*, which allowed ERISA plaintiffs to seek the same amount of relief under Section 502(a)(3) that the district court had erroneously awarded under Section 502(a)(1)(B). See *Amara*, 563 U.S. at 438. In addition, *Donati* conflicts with decisions of other courts of appeals that have allowed plaintiffs alleging distinct injuries to seek relief under both Sections 502(a)(1)(B) and 502(a)(3) without regard to the precise amount of relief sought. See *e.g.*, *Silva*, 762 F.3d at 718 (permitting claim under Section 502(a)(3) seeking the same amount of "benefits owed under the Plan"); *id.* at 724-725 (collecting similar decisions). The *Donati* plaintiffs, however, did not seek rehearing en banc or this Court's review.

2. The unpublished decision below appears to contain reasoning drawn from both *Rochow* and *Donati*.

The court of appeals began by citing *Rochow*'s correct holding that a plaintiff may bring a Section 502(a)(3) claim alongside a Section 502(a)(1)(B) claim "where the injury is different or it would not be adequately remedied under" Section 502(a)(1)(B). Pet. App. 12; see *id.* at 11. As in *Rochow*, the court concluded that petitioner's claims did not assert "different" injuries; rather, in the court's view, "the injury for the breach of fiduciary duty and for the denial of benefits is one and the same." *Ibid.*; see *id.* at 12-13. The court then added, using reasoning similar to that in *Donati*, that "the remedy sought is" also "the same: the $463,254.78 difference between what [petitioner] would have received and what she would have received had Mr. Strang's election been effective." *Id.* at 13.

Although the precise basis for the decision below is not fully clear, the court of appeals relied principally on the rationale of *Rochow*. The court pointed only briefly to the rationale similar to that in *Donati* (albeit without citing *Donati*) as an apparent alternative ground for its decision, noting the fact that the amount of recovery would be the same under both the claim for benefits and the claim for breach of fiduciary duty. *Rochow*, moreover, is a decision of the en banc court of appeals, while *Donati* is a panel decision, which suggests that *Rochow*'s articulation of the governing principles properly reflects the position of the Sixth Circuit. Because *Rochow* is consistent with ERISA and the decisions of other courts of appeals, recitation of the governing principles in the decision below can be understood as similarly consistent and accordingly undeserving of this Court's review. Any internal disagreement within the Sixth Circuit, moreover, does not warrant this Court's intervention, especially because the decision in this case

is unpublished and not binding on future panels. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) (explaining that it "is primarily the task of a Court of Appeals," not this Court, "to reconcile its internal difficulties"); cf. Pet. App. 46 (Sixth Circuit denying petition for rehearing en banc).

C. Any Misapplication Of The Law To Petitioner's Ambiguous Allegations Would Not Warrant This Court's Review

Even if the court of appeals applied the correct rule of law, its application of that rule to petitioner's complaint was arguably incorrect. Such a case-specific error would ordinarily not warrant this Court's review, however, and the ambiguities in petitioner's complaint further counsel against this Court's intervention.

The court of appeals dismissed petitioner's Section 502(a)(3) claim because that claim, in the court's view, alleged "one and the same" injury as her claim under Section 502(a)(1)(B)—the denial of benefits. Pet. App. 11. That characterization of petitioner's allegations is questionable. The gravamen of petitioner's Section 502(a)(1)(B) claim is that her husband was "entitled to benefits" under the "terms of the Ford Plan" and that the Plan must pay them. Am. Compl. ¶ 60. In contrast, petitioner's Section 502(a)(3) claim relied on the theory that Ford breached its fiduciary duties by failing to act impartially. Specifically, petitioner alleged that "Ford unreasonably refused to allow John Strang to take a lump sum buyout of his Ford Plan pension at a time when other participants were able to take the lump sum option." *Id.* ¶ 63; see *id.* ¶ 21. In support of that claim, petitioner made detailed allegations about Ford's refusal to allow Mr. Strang to make a lump-sum election despite its knowledge of his deteriorating health, see *id.*

¶¶ 13-22, and sought to "surcharge" Ford for the monetary losses caused by its fiduciary breaches, *id.* ¶ 65.

In characterizing petitioner's claim, respondents rely heavily on one portion of one paragraph in the complaint alleging that Ford "refus[ed] to allow John Strang to take a lump sum buyout of his Ford Plan pension." Br. in Opp. 5, 12, 17-18 (quoting Am. Compl. ¶ 63); see Pet. App. 17, 22 (district court quoting the allegation in the same way). Taken alone, that portion of the allegation appears to replicate petitioner's claim for benefits and thus could support the court of appeals' conclusion that petitioner's alleged injuries were "one and the same." Pet. App. 11. The full allegation, however, states that Ford "refus[ed] to allow John Strang to take a lump sum buyout of his Ford Plan pensions *at a time when other participants were able to take the lump sum option*." Am. Compl. ¶ 63 (emphasis added). In context, that allegation could be read to claim that respondents breached the duty of loyalty by discriminating against Mr. Strang—namely by denying him the opportunity to elect a lump-sum buyout when similarly situated Plan participants were allowed to do so. See, *e.g.*, *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 47 (2011) (explaining that complaints must be construed as a whole).

If the complaint is read to plausibly allege a breach of the duty of loyalty based on discrimination by respondents against Mr. Strang, the court of appeals' conclusion that petitioner's claims under Sections 502(a)(1)(B) and 502(a)(3) assert "one and the same" injury, Pet. App. 11, would likely be incorrect and in tension with the approach taken by other courts. The Eighth Circuit, for example, has concluded that an allegation of misconduct

in a plan administrator's process for adjudicating benefits claims may state a breach of fiduciary duty cognizable under Section 502(a)(3) separate from a denial-of-benefits claim under Section 502(a)(1)(B). *Jones*, 856 F.3d at 547; see also, *e.g.*, *Summers* v. *State St. Bank & Trust Co.*, 104 F.3d 105, 108 (7th Cir. 1997) (explaining that "picking and choosing among beneficiaries" would be a "violation of the traditional duty imposed by trust law of impartiality among beneficiaries"); *Bauer-Ramazani* v. *Teachers Ins. & Annuity Ass'n of America —College Ret. & Equities Fund*, 290 F.R.D. 452, 458 (D. Vt. 2013) (certifying class of plaintiffs who alleged that "disparate treatment" in fiduciary's administration of company-wide policy breached duties of prudence and loyalty).

Ultimately, however, any such error in applying ERISA's civil enforcement provisions to the complaint in this case would not warrant this Court's review. The court of appeals' conclusion that petitioner at bottom challenged only a denial of benefits is not unreasonable in light of the ambiguities in the complaint and petitioner's limited development in the lower courts of an independent argument about a breach of the duty of loyalty. For example, petitioner's breach-of-fiduciary-duty claim under Section 502(a)(3) asserts that Mr. Strang was not permitted to apply for a lump-sum payment before his assigned election period while other participants were permitted to apply at earlier dates. In rejecting petitioner's denial-of-benefits claim under Section 502(a)(1)(B), however, the courts below held that the Plan authorizes assigning dates for lump-sum elections on a random basis and that "nothing in the administrative record" suggests "that the selection of the

dates of [Mr.] Strang's election period was anything other than random." Pet. App. 43; see *id.* at 10-11, 43-44.

In any event, the need for this Court to parse the complaint to resolve the antecedent question whether petitioner adequately alleged a fiduciary breach renders the unpublished decision below a poor vehicle to address the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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