No. 17-690

In The
Supreme Court of the United States

FOOT LOCKER, INC. and
FOOT LOCKER RETIREMENT PLAN,

Petitioners,

v.

GEOFFREY OSBERG, on behalf of himself
and on behalf of all others similarly situated,

Respondent.

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

BRIEF IN OPPOSITION OF RESPONDENT GEOFFREY OSBERG

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INTRODUCTION

After eight years of litigation capped by a two-week trial, the District Court found that "All of the communications [about Foot Locker's pension plan] – whether intended for company-wide dissemination or to individuals or regional groups – share core common characteristics. All failed to describe wear-away . . . [and all] were intentionally false and misleading." Pet. App. 51a. Simply put, "the communications failed to inform [employees] of wear-away. Indeed, those communications were designed to conceal that information." *Id*. 69a. The District Court found that Foot Locker achieved what it intended: "the evidence presented at trial overwhelmingly supports the Court's determination . . . as a factual matter" that "employees simply did not know that wear-away was an issue for them." *Id*. 36a, 63a. "Participants cannot see that which is hidden from them." *Id.* 118a.

The Court of Appeals affirmed, holding that "the district court did not err, much less clearly err, in concluding that class-wide mistake was demonstrated by clear and convincing evidence." *Id*. 30a.

There is no conflict among the circuits on any issue presented in this case, and these extreme facts do not pose any questions that would be significant to other litigants or the federal system.

STATEMENT OF THE CASE

A pension plan is not a gift: it is a contract that binds an employer to pay a portion of its employees' wages on a deferred basis in the form of retirement benefits. If the employer fails to pay the benefits promised, it cheats employees out of part of their compensation. This case concerns Petitioner Foot Locker's fraudulent insertion of a benefit "wear-away" provision into its pension plan that it uniformly concealed from employees.

1. *Overview*. Seeking to improve its bottom line, Foot Locker resolved to reduce its compensation costs. Pet. App. 44a-45a. However, after several months of study (*id.* 45a-50a), management determined that announcing a benefits cut would be an unacceptable "morale killer." *Id*. 8a, 48a. *See also id*. 109a ("Foot Locker admitted at trial that the very purpose of keeping wear-away a secret was to avoid negative publicity, loss of morale and inability to hire and retain employees"). So the company decided to reduce pensions without telling employees, by disguising the cuts behind the veneer of what Foot Locker dishonestly billed as an "excit[ing]" modernization of its pension program. *Id*. 8a, 51a. Aware that even a single leak of the truth would spread "like wildfire" (C.A. Appx. A-1962), management made sure to keep the wear-away provision a closely-guarded secret even from "the Foot Locker employees responsible for drafting Plan communications," C.A. Reply Br. 25. *See* Pet. App. 7a-10a, 44a-62a, 69a-70a.

The concealment efforts succeeded. Following a two-week bench trial, the District Court found that the evidence was "overwhelming" that "[a]ll of the communications – whether intended for company-wide dissemination or to individuals or regional groups – share core common characteristics. All failed to describe wear-away." Pet. App. 36a, 38a, 51a. "Indeed, those communications were designed to conceal that information." *Id.* 69a. "All the statements were intentionally false and misleading." *Id.* 51a.

The District Court concluded that Foot Locker's misconduct constituted equitable fraud, and that the company had violated ERISA § 102's standards governing the content of plan summaries as well as ERISA § 404's general fiduciary standards. *Id*. 96a-109a. Turning to relief, the District Court applied the framework established in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), a case that presented similar facts – though "[t]his case presents a more egregious set of circumstances than *Amara*." Pet. App. 38a; *id*. 88a-96a. *Amara* held that the equitable remedy of plan reformation does not require a showing of "detrimental reliance"; instead, equity courts "would reform contracts to reflect the mutual understanding of the contracting parties where fraudulent suppressions, omissions, or insertions materially affected the substance of the contract, even if the complaining party was negligent in not realizing its mistake. . . ." 563 U.S. at 443 (brackets, ellipses, quotation marks, and internal citations omitted).

The District Court found that the evidence adduced at trial established that each member of the class had carried the burden to prove the elements of an entitlement to plan reformation. Pet. App. 89a. Trial established that Foot Locker's fraudulent insertion of a wear-away provision into the plan document harmed each participant by materially reducing their pensions from the levels that had been agreed to. *Id*. 38a-51a, 119a. And the evidence was "overwhelming" that no participant was aware that Foot Locker had reduced his or her benefits via the undisclosed contract term. *Id*. 38a, 63a, 69a, 111a, 117a-118a.

Contrary to the Petition's assertion, the District Court did not deem an "inference of class-wide reliance" sufficient to establish Foot Locker's liability, Pet. 9. Instead, the District Court found that a showing of reliance was *not required*, explaining that:

> This Court previously found, based, inter alia, on *Amara*, that detrimental reliance is not required in the context of a plan reformation claim. 131 S. Ct. at 1881 ("a showing of detrimental reliance . . . is not [a] necessary element of an ERISA plan reformation claim").

Pet. App. 124a; *see also id*. 36a n.2, 109a.

On appeal, Foot Locker did not challenge the District Court's finding that the company's deception violated ERISA §§ 102 and 404, nor did Foot Locker challenge the District Court's finding that the deception constituted class-wide equitable fraud. Instead, the company quarreled with the District Court's award

of equitable relief under § 502(a)(3), arguing that the District Court erred by: (1) awarding relief to plan participants whose claims should be barred by the applicable statute of limitations; (2) ordering relief on participants' § 404(a) claims without requiring individualized proof of detrimental reliance; (3) concluding that ignorance of the plan's wear-away provision ("mistake"), a prerequisite to the equitable remedy of reformation, had been shown as to all class members; and (4) using a formula for calculating relief that was overly generous to certain plan participants. The Court of Appeals affirmed the District Court's findings of fact, rejected Foot Locker's challenges to the trial court's award of equitable relief, and affirmed the judgment. Pet. App. 4a.

Contrary to the Petition's misleading suggestion, the Court of Appeals did not hold that participants were entitled to relief without a showing of harm, Pet. 8. The Second Circuit (speaking through two different panels, Pet. App. 154a (reinstating plaintiff's reformation claim); *id.* 2a (affirming the judgment)) applied this Court's teaching in *Amara* that harm can be proved in ways other than a showing of "detrimental reliance." *Amara*, 563 U.S. at 443-45. In the case of a fraudulent alteration of a contract, the injury is self-evident: the "harm . . . flows from the mistaken party's failure to receive its expected agreement." *Amara v. CIGNA Corp.*, 775 F.3d 510, 525 n.12 (2d Cir. 2014). *Accord Amara*, 563 U.S. at 443 (injury is the wrongdoer's fraudulent alteration of a contract materially affecting its substance); *Baltzer v. Raleigh & A.A.L.R. Co.*, 115

U.S. 634, 645 (1885) ("it is well settled that equity would reform the contract, and enforce it, as reformed, if the mistake or fraud were shown").[1]

2. *The "individualized communications" defense*. Foot Locker argued in the proceedings below, as it does again in the Petition, that because it sent employees personal benefit calculations and other similar "individualized" communications about the plan, it is impossible to make any class-wide determination about what employees knew or should have figured out about wear-away. However, before, during and after trial, the District Court examined the individual communications that Foot Locker argued contained clues about the wear-away provision and, based on its factual findings as to what these communications did and did not disclose, determined that they posed no impediment to class-wide resolution of the parties' claims and defenses.

The District Court's first determination in this regard came in its initial, pre-trial class certification ruling. The court found that no individual communication contained information that was materially different from the company-wide summaries and, if anything, the individual communications perpetuated the deception. Pet. App. 147a-149a. Foot Locker filed a motion for reconsideration, which the District Court granted. Even after reconsideration the court again found the

[1] *See also Amara* Oral Arg. Tr. (Case No. 09-804) at 42 (JUSTICE ALITO: . . . "If I'm owed something under a contract, I am entitled to get that under the contract. I don't need to show . . . that I relied . . . in any way on anything").

individual communications "no[t] material[ly] differen[t]" from the company-wide communications. *Id*. 124a, 134a-135a, 137a. Indeed, the court said that the company's communications were so uniform in content, design and effect that defendants were unable to point to "even a single instance in which there would [be] a need for [ ] an individualized inquiry" on the mistake or statute of limitations issues. *Id.* 134a.

A few months later, in the context of other pre-trial proceedings, Foot Locker again urged reconsideration of the court's class certification order. D.C. Dkt. 296. The District Court again agreed to revisit its ruling, but again denied decertification after a lengthy hearing during which defense counsel focused on the same individual communications that Foot Locker discussed on appeal and cites in its Petition. D.C. Dkt. 309.

At trial, the District Court re-examined each individual communication that Foot Locker introduced and, after trial, again found "as a factual matter" that Foot Locker's mistake, statute of limitations, and decertification arguments failed. Pet. App. 36a n.2. As indicated above, the District Court concluded that trial had "overwhelmingly" established the correctness of the court's earlier rulings because "whether intended for company-wide dissemination *or to individuals or regional groups*," all of the communications failed to describe wear-away and in fact had been "designed to conceal that information." *Id*. 36a n.2, 51a (emphasis added), 69a.

On appeal, the Second Circuit similarly rejected Foot Locker's individualized communications arguments, explaining:

> Defendants do not challenge the district court's reliance on [the class-wide plan summaries], arguing instead that individualized communications received by plan participants who had inquired about various aspects of their benefits dispelled any mistake for those participants. The district court rejected that interpretation of the factual record, and we discern no clear error in the district court's finding. While the individualized communications in question provided an explanation of some of the calculations used to determine participants' benefits, *they did not disclose the existence of wearaway* or the fact that participants' benefits were not increasing despite the accumulation of pay and interest credits.

Pet. App. 29a-30a (emphasis added).

In other words, the communications were "individualized" only in ways that had no relevance to the question on the table: Were participants aware of the existence of wear-away? Participant Smith may have received a benefit statement that was "individualized" in that it listed his name and reported his particular pension account balance. And Participant Jones may have received a similarly "individualized" letter stating the various annuity or lump sum options she could elect at age 55. But, as the trial court found as a factual matter, affirmed by the court of appeals after its "review [of] the record as a whole" (*id*. 30a), the

communications were ***not*** "individualized" in the only way that mattered because none of them "disclose[d] the existence of wearaway." *Id*.

REASONS FOR DENYING THE WRIT

Neither of the questions framed by the Petition warrants this Court's attention. The decisions below faithfully apply the principles set forth in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), to the facts established at trial.[2] Moreover, there is no conflict among the circuits on any question presented in this case.

I. THE DISTRICT COURT'S FINDING THAT CLASS MEMBERS WERE IGNORANT OF THE PENSION PLAN'S CONCEALED WEAR-AWAY PROVISION WAS CORRECT AND BASED ON THE STANDARD APPLIED BY ALL OF THE CIRCUITS

To answer the first question presented by the Petition – which, tellingly, the Chamber of Commerce declined to support in its amicus brief – would essentially require this Court to second-guess the Court of Appeals' and District Court's application of settled law to

[2] The Second Circuit's conclusions are also consistent with the Department of Labor's independent assessment of the factual record and application of the governing legal standards, as reflected in the government's two amicus briefs filed in support of participants. Labor Dept. C.A. Amicus Br., Case No. 13-187 (supporting participants in 2013 appeal); Labor Dept. C.A. Amicus Br., Case No. 15-3602 (supporting participants in the appeal below).

the now-indisputable facts found at trial. The Petition seeks to disguise its request that this Court re-examine the facts found and affirmed below by asserting that the two lower courts "relieved" class members of the burden of proving that they did not know Foot Locker had fraudulently inserted the harmful wear-away provision into the formal pension plan document. Pet. *i*. But the courts below did no such thing.

To the contrary, the trial court found that participants had *proven* that each member of the class was ignorant of the wear-away provision by establishing at trial that "*All* of the communications – whether intended for company-wide dissemination or to individuals or regional groups" – were "designed to conceal," and successfully did conceal, the wear-away provision. Pet. App. 20a-29a, 51a, 69a (emphasis added). "*All* of the statements were *intentionally false* and misleading." *Id*. 51a (emphases added). "The Class has proven by clear and convincing evidence that, as a result of Foot Locker's false, misleading, and incomplete Plan descriptions, employees were ignorant of the truth about their retirement benefits." *Id*. 111a (internal quotation marks omitted). "Participants cannot see that which is hidden from them." *Id*. 118a.

The Second Circuit affirmed that conclusion after its review of "the record as a whole," finding that "[w]hile the individualized communications in question provided an explanation of some of the calculations used to determine participants' benefits, *they did not disclose the existence of wearaway*." Pet. App. 30a (emphasis added). Based upon that key factual finding,

a straightforward application of this Court's precedent led to the lower courts' conclusion that the class had sufficiently established its entitlement to equitable reformation. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (a "common question" amenable to class-wide resolution "is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof' ").

1. The Petition tries to dispute the lower courts' interpretation of the evidence by asserting that the mere existence of some individual communications made a class-wide finding impossible. Foot Locker argues that the receipt by some class members of "individualized communications" means that "the only way" participants could establish what each person "actually" knew about the plan was via testimony and cross-examination. Pet. 19. But this argument fails for each of three reasons:

First, as indicated above, after reviewing all of the communications in the record that Foot Locker sent individually to some participants, the District Court found and the Court of Appeals agreed that the communications were "individualized" only in ways that could not have alerted the recipient to the surreptitiously inserted wear-away provision. Pet. App. 30a, 51a, 69a, 108a. Where factual findings have been thus affirmed, this Court reviews them only for a "very obvious and exceptional . . . error." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 841 (1996). Because "[p]articipants cannot see that which is hidden from them"

(Pet. App. 118a), the lower courts' finding here that class members were ignorant of the plan's wear-away provision cannot possibly be deemed such an error.

Similarly unimpeachable was the lower courts' determination that individual testimony and cross-examination to "probe" each class member's understanding (Pet. 19 n.1) would have been pointless: given that all of the communications were devoid of information about wear-away, none could have instilled knowledge in any participant about wear-away, no matter how many times or how diligently a participant studied them. In other words, since none of the communications disclosed wear-away, a participant who received several individualized communications and studied the summary plan description ("SPD") would have the same knowledge about the plan's wear-away provision as colleagues who merely took a quick glance at the SPD – or, for that matter, never read any of the communications at all. The first participant might know more about the plan's vesting schedule, or her specific benefit distribution options, but she would have precisely the same knowledge about the plan's wear-away provision as her colleagues: *zero*.

Second, the Petition's "testimony" argument seeks to obscure the fact that "knowledge must almost always be proved by circumstantial evidence." *United States v. Santos*, 553 U.S. 507, 521 (2008) (Scalia, J., plurality opinion) (parenthesis omitted). Indeed, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than

direct evidence." *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 508 (1957).[3]

Where, as here, the facts adduced at trial established to the factfinder's satisfaction that "all" of Foot Locker's communications with participants were designed to, and in fact successfully did, conceal the plan's wear-away provision (Pet. App. 51a, 69a), it is impossible to fault the lower courts for concluding that participants sufficiently established that each member of the class was unaware of the provision. As this Court recently explained:

> evidence is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes – be it a class or individual action – but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action. . . . If the [evidence] could have sustained a reasonable jury finding as to [the relevant claim element] in each employee's individual action, that [evidence] is a permissible means of establishing the [element] in a class action.

Tyson Foods, 136 S. Ct. at 1046. Here, the evidence establishing uniform omission and concealment of the

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[3] This is true even in criminal cases requiring proof beyond a reasonable doubt. *E.g.*, *Holland v. United States*, 348 U.S. 121, 140 (1954) (circumstantial evidence is "intrinsically no different from testimonial evidence"); 1A K. O'Malley, J. Grenig & W. Lee, Federal Jury Practice and Instructions, Criminal § 12.04 (5th ed. 2000) ("the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence").

pension plan's wear-away provision in *all* communications with participants amply supported the finding that "as a factual matter," "employees simply did not know that wear-away was an issue for them." Pet. App. 36a n.2, 63a.[4]

Third, the proposition that the Petition espouses – that "the only way" participants could establish ignorance of the concealed wear-away provision here was via individual testimony subject to cross-examination – is refuted rather than supported by the cases the Petition cites. According to Foot Locker, decisions from the Fourth and Fifth Circuits hold that class-wide adjudication is inappropriate in cases where the legal issue is focused on the plaintiff's knowledge "***because***" the issue "requires 'individual hearings.'" Pet.

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[4] *See also BP Am. Prod. Co. v. Patterson*, 263 P.3d 103, 110 (Colo. 2011) ("ignorance . . . may be established with circumstantial evidence common to a class," for example "where there is sufficient, common evidence that the defendant concealed a material fact from class members"); *Hunter v. Moore*, 486 S.W.3d 919, 926 (Mo. 2016) ("Entitlement to reformation may be shown through circumstantial evidence"); *Chouteaux v. Leech & Co.*, 18 Pa. 224, 232 (1852) ("A mistake [about the terms of a contract] like the one alleged here can be proved as any other fact is proved, by circumstantial as well as by positive evidence"); *Kim v. Kum Gang, Inc.*, No. 12 CIV. 6344 MHD, 2015 WL 2222438, at *37 (S.D.N.Y. Mar. 19, 2015) ("in violation of statutes and regulations[, defendants] made sure to deny the workers any information that would disclose the violations of their rights"; and even though "most of the plaintiffs did not themselves testify explicitly that they were ignorant of their rights," the defendants' deliberate concealment of relevant information was "very persuasive circumstantial evidence that [the workers] did not know that they had potentially viable legal claims against their employer").

2. Through selective quotation and emphasis, Foot Locker suggests that the two circuits deem questions turning on a plaintiff's knowledge to be *categorically* incapable of class-wide resolution because establishing what a person knows or does not know *necessarily* requires individual hearings.

But the Fourth and Fifth Circuit decisions the Petition cites do not remotely state, hold, or imply any such thing. To the contrary, the decisions say that issues focused on the plaintiff's knowledge are inappropriate for class-wide adjudication ***if*** the *particular facts of the case* make it impossible to determine what each class member knew or did not know without individual hearings. In other words, it depends on the facts. No case cited by the Petition holds that issues implicating a plaintiff's knowledge are *categorically* uncertifiable as class actions. Consistent with the approach followed by all circuits, they hold that – as with any class certification analysis – it depends on the claims or defenses at issue and the facts.

The case on which the Petition chiefly relies, *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311 (4th Cir. 2006), emphasizes this very point in a passage that the Petition implies *Thorn* does not contain:

> We therefore conclude that the district court did not clearly err in finding that Jefferson-Pilot's statute of limitations defense presented issues that cannot be determined on a class-wide basis. As our discussion reveals, this conclusion is ***not*** born of a view that individual questions *necessarily* arise any time a

> defendant raises a statute of limitations defense. Such a holding would be inconsistent with *Gariety*'s requirement that the district court take a "close look" *at the facts* relevant to the certification question. Indeed, ***we can easily foresee a situation*** where the defendant's statute of limitations defense is so dependent upon facts applicable to the entire class, *qua class*, **that individual hearings would not be necessary**.[19] Appellants, however, have not shown that such facts are present here.

Thorn, 445 F.3d at 327 (internal citation omitted; emphases added). Footnote 19 of *Thorn*, *supra*, explains that:

> One such situation might have arisen here if, for example, Jefferson-Pilot had sent mailings to all of its insureds on a particular date informing them of its dual-rate practices and relied on knowledge of the content of those mailings in arguing its statute of limitations defense, and Appellants argued only that the mailings were insufficient to cause accrual.

Id. at 327 n.19. In other words, if the evidence shows that all members of the plaintiff class received the same information about a particular fact (*i.e.*, Jefferson-Pilot's "dual-rate practices"), the question "was each plaintiff aware of that fact" **can** be answered on a class-wide basis, without the necessity of individual

hearings. That is precisely what the lower courts found here. Pet. App. 29a-30a, 51a.[5]

Erasing any doubt that *Thorn*'s holding was based on the particular facts of the case, and not on a *per se* rule precluding certification of claims or defenses implicating plaintiffs' knowledge, *Thorn* explains that "[t]he parties devoted substantial portions of their respective briefs arguing whether these cases set forth [such] a per se rule," but that "[b]ecause Appellants challenged only the district court's finding that Jefferson-Pilot's statute of limitations defense was not a common issue, we need not decide whether [our

[5] *Thorn* involved violations alleged to have occurred "from twenty-seven to eighty-nine years before suit was instituted," and substantial evidence was produced by the defendant showing that plaintiffs could have discovered their claims from widespread "news media's reports." *Thorn*, 445 F.3d at 316-17. Here, in contrast, Foot Locker was the only conceivable source of information about the wear-away provision it had designed and secretly implemented. Presumably in light of *Amara*'s recognition that a plaintiff's purported "negligence in not realizing [his] mistake" is not a valid defense to an equitable reformation claim (563 U.S. at 443), Foot Locker never argued that participants could or should have ferreted out the wear-away provision buried in the actuarial-calculation terms of the formal plan document, "a transactional document only lawyers will read," *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 621 (8th Cir. 1998). *See generally Columbian Nat. Life Ins. Co. v. Black*, 35 F.2d 571, 575 (10th Cir. 1929) (rejecting defendant's claim "that the [plaintiff] was negligent in failing to discover the error" because "negligence is not in itself a defense, else there would be no ground for reformation for mistake, as mistakes nearly always presuppose negligence"); S. Williams, Kerr on Fraud and Mistake, p. 507 (5th ed. 1920) ("Mistake of fact is not the less a ground for relief because the person who made the mistake had the means of knowledge, and still less when there is a misrepresentation").

cases] set forth such a per se rule." *Thorn*, 445 F.3d at 329 n.22.

Underscoring this error, the Petition makes no attempt to explain why – if the problem is with the *category* of "claims or defenses" that "implicate questions about plaintiffs' knowledge" (Pet. *i*, 2) – the Fourth Circuit would only decline to certify cases involving a statute of limitations defense and the Fifth Circuit has a problem only with claims requiring proof of reliance (as discussed further below). Contrary to the Petition's suggestion (Pet. 13), *Zimmerman v. Bell*, 800 F.2d 386 (4th Cir. 1986), does not remotely hold that claims requiring proof of plaintiffs' knowledge are *per se* precluded from class certification in the Fourth Circuit. To the contrary, like *Thorn*, *Zimmerman* explains that "'[t]he *extensive public disclosure* of matters allegedly omitted . . . raises the possibility that the defendants can establish a defense against individual class members.'" *Id.* at 390 (emphasis added). In other words, the Fourth Circuit made clear in *Zimmerman* and *Thorn* that the particular *facts* made class-wide adjudication of plaintiffs' knowledge infeasible; not that proof of knowledge or ignorance is inherently individualized.

Like *Zimmerman*, *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), is consistent with *Thorn*, explaining that "***when*** the defendant's affirmative defenses (such as . . . the statute of limitations) may *depend on facts peculiar* to each plaintiff's case, class certification is erroneous." *Id.* at 342 (emphasis added). *Broussard* determined that class-wide adjudication of the defendant's statute of limitations

defense was not feasible on the particular facts of that case because the "representations made to each [plaintiff] varied considerably." *Id*. *See also id*. at 340-41 ("individualized representations to franchisees" contained "material variations").

Here, by contrast, the lower courts held that the class was able to prove its ignorance of the plan's wear-away provision because all of the plan-related communications – whether intended for company-wide dissemination or to individuals or regional groups – "***uniformly*** failed to describe wear-away and, in fact, concealed the phenomenon." Pet. App. 29a-30a (emphasis added).

The Fifth Circuit cases discussed on pages 14 and 15 of the Petition are along the same lines as *Thorn* and *Broussard*. They apply the Fifth Circuit's standard that "the key concept in determining the propriety of class action treatment is the existence or nonexistence of material variations in the alleged misrepresentations," *Grainger v. State Sec. Life Ins. Co.*, 547 F.2d 303, 307 (5th Cir. 1977), to fact patterns where there were in fact material variations. *E.g.*, *McManus v. Fleetwood Enterprises, Inc.*, 320 F.3d 545, 550 (5th Cir. 2003) ("the McManuses have failed to show that these potential variables are sufficiently uniform to justify class treatment"). All that the cases show is that fact-bound cases vary according to their facts.

The Fifth Circuit cases are in any event beside the point here because they involve reliance. As explained in more detail in Part II, this Court's decision in

Amara, 563 U.S. at 443, holds that ERISA plaintiffs do not have to prove reliance in order to secure plan reformation. For that reason, the Petition's reliance cases are categorically inapposite.[6]

2. The Petition's assertion of an "acknowledged" circuit split on a point of law relevant to this case is inaccurate. For starters, the Petition claims a split regarding the "element of mistake" (Pet. *i*) – but then fails to cite a single case besides *Amara* that even mentions that element, much less one that holds or suggests that mistake cannot be established class-wide where the facts make that feasible.

The split described on pages 15-16 of the Petition (expressed in dicta in two 15-year-old cases) involved an entirely different question from the one framed by the Petition. The issue on which the First and Third Circuits did not see eye-to-eye with *Broussard* was: What happens if a court determines that a defendant's statute of limitations defense is incapable of class-wide resolution based on the facts in that case? Does that determination single-handedly tip the scales on the Fed. R. Civ. P. 23(b)(3) calculus to a predominance of individual issues, "automatically" foreclosing class certification regardless of the presence of other admittedly common issues? *See Waste Mgmt. Holdings, Inc.*

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[6] Even so, the Fifth Circuit does not hold that reliance can never be proved with class-wide evidence. *See Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 415 (5th Cir. 2017). *See also* Fed. R. Civ. P. 23(b)(3) Advisory Committee's Note (1966 Amendment) ("a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action").

v. Mowbray, 208 F.3d 288, 295 (1st Cir. 2000); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 162 (3d Cir. 2002).

That Fed. R. Civ. P. 23(b)(3) predominance-calculus question has no bearing here. The question assumes as its premise that a court has already determined that the facts of the case make the defendant's statute of limitations defense incapable of class-wide adjudication, and *then* asks: Can the case nevertheless be certified under Fed. R. Civ. P. 23(b)(3) because other common issues predominate over the individualized limitations defense? The answer to that question is irrelevant here, where the District Court found that the facts of *this* case established that all participants were unaware of the pension plan's concealed wear-away clause, making the "nevertheless" question unnecessary.

II. THIS COURT RESOLVED THE RELIANCE QUESTION IN *CIGNA V. AMARA*, AND THERE IS NO CIRCUIT CONFLICT

The second question framed by the Petition – whether detrimental reliance is an element of a claim for breach of fiduciary duty under Section 404(a) of ERISA – is an equally poor candidate for review, for three independent reasons:

First, in a case like this in which the relief sought by participants is plan reformation, the answer is clearly no. As the Second Circuit held, Foot Locker's contention to the contrary is foreclosed by *CIGNA v. Amara*, in which this Court had occasion, under

circumstances similar to those here (though less egregious, Pet. App. 38a), to clarify the standard of harm that a plaintiff must show to receive equitable relief pursuant to ERISA § 502(a)(3). Although the specific issue in *Amara* was relief for a violation of the disclosure standards of § 102, the Court's reasoning applies equally when a fiduciary's statements or silence violate the fiduciary standards of ERISA § 404(a). *See* Pet. App. 26a.

In determining whether plaintiffs must prove detrimental reliance, *Amara* asks: (1) whether the substantive ERISA provision in question sets forth that standard for determining harm; and (2) whether the specific remedy being contemplated imposes such a requirement. *Amara*, 563 U.S. at 443. The Petition concedes both that (1) "the Second Circuit is correct that Section 404(a) does not explicitly reference a detrimentalreliance requirement," Pet. 25, and (2) the equitable remedy of plan reformation does not require a showing of detrimental reliance. *Id.* 22. Accordingly, plaintiffs seeking plan reformation for a violation of ERISA § 404(a) need not show detrimental reliance. It is that simple. *See* Pet. App. 24a-28a (Second Circuit so holding).

The Labor Department agrees, explaining in its amicus brief filed with the Second Circuit in support of participants that Foot Locker's § 404(a) reliance "argument was rejected by the Supreme Court" in *Amara*. Labor Dept. C.A. Br. 22, Case No. 15-3602-cv. The government explained that the statutory text of § 404(a) is straightforward: A fiduciary must "'discharge his

duties with respect to a plan solely in the interests of the participants and beneficiaries.'" *Id*. at 22 (quoting 29 U.S.C. § 1132(a)). Based on this language – which is focused solely on the conduct of the fiduciary and says nothing about a beneficiary's reliance – it is "unsurprising and beyond dispute that '[t]o participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense' is a violation of ERISA's loyalty provision codified in section 404(a)." *Id*. at 22-23 (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996)). For purposes of awarding equitable *relief* for a violation of § 404, "'any requirement of harm must come from the law of equity.'" Labor Dept. C.A. Br. 24, Case No. 15-3602-cv (quoting *Amara*, 563 U.S. at 443). "[T]he Supreme Court's decision in *Amara* . . . made clear that there is no need to establish detrimental reliance to obtain reformation as a remedy for misrepresentations of the kind at issue here." *Id*. 26-27.[7]

Second, Foot Locker and its amici are incorrect in their assertion that "[t]he Second Circuit's decision is flatly at odds with the Third and Sixth Circuits' decisions applying a detrimental-reliance requirement to

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[7] The Article III concern voiced by the Petition and the brief of amici – that "in the absence of a detrimental-reliance requirement (or the type of actual-harm requirement imposed by the Seventh Circuit), plaintiffs would be able to recover under an ERISA breach-of-fiduciary duty claim without any showing that they actually suffered an injury as a result of that fiduciary breach" (Pet. 27) – was addressed in *Amara*, 563 U.S. at 443-44. *See also supra* pp. 5-6; *Amara*, 775 F.3d at 525 n.12 (the "harm . . . flows from the mistaken party's failure to receive its expected agreement").

ERISA fiduciary breach claims after *Amara*." Pet. 25; *see also* Amici Br. 12. The Second Circuit is the only circuit – indeed, as far as Respondent is aware, the only court *at any level* besides the District Court here – to have considered whether a violation of § 404(a) requires a showing of detrimental reliance as a prerequisite for relief in the form of *plan reformation*. None of the cases cited by Foot Locker or by amici held, either pre- or post-*Amara*, that such reliance is required for plan reformation.[8] If another circuit reaches a different conclusion in a future § 404(a) case seeking plan reformation – which seems unlikely given the clarity of *Amara*'s holding – that would be the time for this Court to step in, not now.[9]

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[8] The pre-*Amara* cases cited in the Petition and amici brief, to the extent they could be read to suggest that a showing of reliance is required to obtain *any* remedy, are irrelevant for the obvious reason that they were decided without the benefit of this Court's holding in *Amara*. *See, e.g.*, Pet. App. 27a n.12 (Second Circuit distinguishing its pre-*Amara* cases on that basis); *id*. 160a-161a (different Second Circuit panel doing the same).

[9] The Labor Department's amicus brief, *supra*, expresses the government's view that post-*Amara* discord among the circuits on the reliance issue is unlikely given how "clear" *Amara*'s holding is. Labor Dept. C.A. Br. 26-27, Case No. 15-3602-cv. None of the post-*Amara* cases cited by the Petition or amici brief express disagreement with the Labor Department's and Second Circuit's understanding that *Amara* left no room for debate on the reliance question: *i.e.*, that the standard of prejudice necessary to obtain relief for a violation of § 404(a) "must come from the law of equity." Labor Dept. C.A. Br. 24-27. The two unpublished Third Circuit cases and the Sixth and Seventh Circuit cases (Pet. 23-24) involved claims for estoppel and/or money damages (surcharge), not reformation, and are consistent with *Amara* and the decision below.

Third, the ERISA § 404(a) reliance issue has no practical significance in this case given *Amara*'s undisputed holding that reliance need not be shown for a violation of ERISA § 102. The District Court determined that Foot Locker's misconduct in this case violated both § 102 and § 404(a). But the end result was no different than had plaintiff only alleged (and the District Court only found) a violation of § 102: plaintiff sought, and the class was awarded, the identical plan reformation remedy for both violations. *See* Pet. App. 107a, 119a. *See also id.* 158a (Court of Appeals recognizing that participants seek "the same relief under § 404(a) as under § 102(a)"); *Amara v. CIGNA Corp.*, 925 F.Supp.2d 242, 265-66 (D. Conn. 2012), *aff'd*, 775 F.3d 510 (2d Cir. 2014) (awarding plan reformation for a violation of § 102).

Foot Locker argues that some participants left the company before the SPD was distributed and therefore did not establish a violation of § 102, thus requiring a separate § 404 violation to support inclusion of these participants in the class-wide remedy. Pet. 29. But this argument ignores the District Court's finding that the summaries of material modifications ("SMMs"), which undisputedly were distributed to *all* members of the class, violated § 102 in the same way. *See* Pet. App. 104a-105a ("the same [§ 102] standards apply to SMMs"); *id*. 51a-54a, 89a, 108a (the 1995 SMMs distributed to all participants were "intentionally false and misleading"; "Foot Locker's disclosures in the SPD and [SMMs] fell far short of the statutory requirements"). The District Court therefore rejected Foot

Locker's argument that this group of participants should be barred from relief. Pet. App. 118a n.32. Accordingly, even if the Court of Appeals had erred by affirming the District Court's finding of a § 404(a) violation without proof of reliance, the outcome in this case would be the same. Because this Court reviews judgments, not opinions (*Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U. S. 837, 842 (1984)), it would have no occasion to address the ERISA § 404(a) reliance issue in this case.

III. THIS CASE IS A POOR VEHICLE FOR REVIEW

The extreme facts of this case make it an ill-suited vehicle to resolve any legal question of general significance.

On the first question, it is not even clear what the Petition is asking this Court to review. Foot Locker's position below was that employees' ignorance of a plan's provisions ("mistake") *can*, in appropriate cases, be adjudicated class-wide. Specifically, Foot Locker argued that "[t]he communications at issue in *Amara* . . . lacked any differentiating features that would preclude class certification" – *i.e.*, the facts in *Amara* made class-wide adjudication of mistake feasible – but this case was different because, in Foot Locker's view, the communications were "significantly more individualized and unique." *Id*. n.15. Foot Locker

C.A. Reply Br. 26.[10] The District Court's failure to appreciate this difference in the *facts*, said Foot Locker, was where the court went wrong. *Id*. at 26-27.

The Second Circuit's opinion confirms that it understood Foot Locker's argument to be that the particular facts of this case made class-wide proof of mistake infeasible. The heading of the mistake section of Foot Locker's appeal reply brief was that "The *Evidence* Does Not Support A Finding Of Classwide Misunderstanding" in this case. *Id.* at 26 (emphasis added). The Court of Appeals disagreed, explaining that "[t]he district court rejected [Foot Locker's] *interpretation of the factual record*, and we discern no clear error in the district court's finding." Pet. App. 29a-30a (emphasis added). *See also id*. 20a n.7.

The Petition, though striving to make it appear that this case presents a question of law over which circuits disagree, ultimately reverts to the same argument that Foot Locker made below: that the District Court misconstrued the "unique" facts of this case. *See* Pet. 19. This may explain why the Chamber of Commerce declined to support the Petition's first question, aware that "[a] court of law, such as this Court is,

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[10] Foot Locker made the identical argument at trial. Pet. App. 37a-38a, 108a. But as the Department of Labor explained in its Second Circuit amicus brief filed in support of participants, the District Court rejected the argument: "the district court concluded on the basis of extensive facts established at trial that, in fact, the class 'has proven by clear and convincing evidence that, as a result of Foot Locker's false, misleading, and incomplete Plan descriptions, employees were ignorant of the truth about their retirement benefits.' " Labor Dept. C.A. Br. at 28.

rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. at 841.

Indeed, the Petition tacitly concedes there is no conflict regarding the class-certifiability of the "element of mistake," the only legal question conceivably implicated by the first question presented. As noted above, the Petition fails to cite a single case besides *Amara* that even mentions that element, much less one that suggests that ignorance of a fact can never be established class-wide, regardless of the evidence.

If the Petition's theory is that *any* "claim or defense" that "implicate[s] questions about plaintiffs' knowledge" is categorically incapable of class-wide adjudication, regardless of the specific claim or facts of the given case, then Foot Locker failed to preserve that issue for review. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"). Foot Locker argued below that participants could not prove class-wide mistake or satisfaction of the statute of limitations because the facts of this case did not make that possible. *See* C.A. Reply Br. 26 n.15 (contrasting the facts here with those in *Amara*). Foot Locker never made a sweeping argument that the mere presence of *any* question that "implicates" a plaintiff's knowledge makes a case automatically uncertifiable regardless of

the particular claim or facts.[11] The Court of Appeals did not consider or address that question. *See* Pet. App. 14a & n.4; 20a n.7; 28a-30a.

In fact, Foot Locker took pains in its petition for rehearing in the Court of Appeals to clarify that its statute of limitations defense "was not individualized" for class members who left employment during the wear-away period (who happened to be the large majority of class members, *see* Foot Locker C.A. Br. 1), because in Foot Locker's view, the benefit distribution statements those participants received upon termination uniformly informed them of a key fact about the relationship between their distribution and their account balance. Foot Locker C.A. Pet. for Reh'g at 3, n.1. Foot Locker argued that these uniform distribution statements provided convincing circumstantial evidence that thousands of class members all *actually knew* this key fact – giving the court all it needed to dismiss their claims in one fell swoop without the need for individual testimony. Foot Locker C.A. Br. 27-30, 35.[12] Foot Locker thereby tacitly conceded that the

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[11] Foot Locker presumably did not make that argument because it is facially absurd. If 100 people get violently ill after eating a restaurant's beef burritos, a fact finder can rationally conclude that none of the burrito eaters actually knew that the beef contained salmonella. The same is true of the tens of thousands of individuals unwittingly injured by the Dalkon Shield and the millions who purchased Volkswagen diesel automobiles with expertly concealed emissions "defeat devices." *See also supra* pp. 12-14 & nn.3-4 (discussing circumstantial evidence of a person's knowledge).

[12] Foot Locker's theory was that (1) *circumstantial evidence* (*i.e.*, uniform distribution statements) established that thousands

suitability of knowledge-based questions for class-wide determination depends on the facts.

More generally, the Petition's attempt to portray this case as implicating important class action principles should be rejected out of hand. If Foot Locker actually believed that significant class action principles were at stake, it would have challenged the District Court's class certification orders on appeal. But, tellingly, none of the catchphrases strung together in the first question framed by the Petition – "Rule 23," "the Rules Enabling Act," and "due process" – appear even once in Foot Locker's appeal briefs. Also, if this were a momentous class action case, surely the Chamber of Commerce would have supported Petitioner on that question.

The Petition asserts five times that the judgment in this case could exceed $250 million (a figure that

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of participants *actually* knew that their distributions were larger than their account balances; (2) this should have spurred them to inquire further, even though the SPD said distributions would often be larger than account balances (Pet. App. 16a-18a & n.6), and perhaps they would have discovered the plan's concealed wear-away provision; and (3) because participants did not ask more questions, they should be charged with constructive knowledge of the wear-away provision, triggering the statute of limitations for all of them – thereby allowing the court to "enter judgment in Foot Locker's favor" as opposed to decertifying the class so that individual hearings could be conducted. Foot Locker C.A. Br. 27-31, 35. Foot Locker argued that individualized determinations were required only for class members who continued working until they were no longer in wear-away, or if the court disagreed that the knowledge instilled by the distribution notices provided constructive knowledge of wear-away. *Id*. at 27, 29, 35.

appears nowhere in the record). If accurate, the assertion is an admission that Foot Locker's undisclosed insertion of a wear-away provision into its pension plan reduced employees' retirement benefits by an average of about $5,000 per worker, saving the company the equivalent of $250 million in today's dollars "without the accompanying negative publicity, loss of morale, and decreased ability to hire and retain workers" that would have followed an above-board compensation cut. Pet. App. 8a, 119a-120a; Plaintiff C.A. Br. at 26 n.4. It is difficult to understand why the resounding success of Foot Locker's scheme to save millions in compensation expenses (*id*. 44a-51a) without "a single employee ever complain[ing] about it" – because they "did not know" their pay had been reduced (*id*. 63a) – should be a reason for this Court to second-guess the Second Circuit's affirmance of the trial court's findings.[13]

[13] This is particularly true given Foot Locker's assurance to its shareholders that a court-ordered requirement to reimburse employees for the undisclosed pension cuts would not have a material adverse impact on the company's financial position. *See* FL-2017 Q3 10-Q Filing Report, U.S. Sec. & Exch. Comm'n, Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Quarterly Period Ended: October 28, 2017 at 16 (2017), www.sec.gov/Archives/edgar/data/850209/000085020917000023/fl-20171028x10q.htm (last visited Jan. 8, 2018).

CONCLUSION

For all of the foregoing reasons, Foot Locker's petition for writ of certiorari should be denied.

Respectfully submitted,

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