No. 18-______

In The

Supreme Court of the United States

WILLIAM L. PENDER and DAVID L. MCCORKLE, on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

v.

BANK OF AMERICA CORPORATION and THE BANK OF AMERICA PENSION PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition presents an important unresolved question about a remedial provision of the Employee Retirement Income Security Act of 1974 ("ERISA") that this Court has addressed no fewer than eight times in recent years.

ERISA § 502(a)(3) entitles employee benefit plan participants to "appropriate equitable relief" for violations of the Act. The Court has repeatedly construed the term "equitable relief" to mean relief that was traditionally awarded by equity courts applying "the law of equity" during the days of the divided bench. But as the Solicitor General has noted, the Court has not prescribed a framework for determining whether a particular form of equitable relief is "appropriate" in a given case. *See* Brief for the United States as Amicus Curiae, *Sereboff v. Mid-Atlantic Medical Services, Inc.* (Feb. 23, 2006) (No. 05-260), p. 27.

The question squarely presented by this case is:

Whether the word "appropriate" in ERISA § 502(a)(3) authorizes ERISA courts to decline to award an established equitable remedy based on considerations that an equity court in the days of the divided bench would have deemed legally irrelevant for purposes of the specific remedy at issue.

PARTIES

The petitioners are William Pender and David McCorkle and a certified class of all other participants in the Bank of America 401(k) Plan who are similarly situated.

The respondents are the Bank of America Corporation and the Bank of America Pension Plan (collectively, “Bank of America” or the “Bank”).

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Petitioners William Pender and David McCorkle, on behalf of themselves and a certified class of all other participants in the Bank of America 401(k) Plan who are similarly situated, respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the district court granting judgment to the Bank of America is not reported but is available at 2017 WL 1536234 (Pet. App. 37a). The Fourth Circuit's decision is not reported but is available at 736 Fed. Appx. 359 (Pet. App. 1a). The Fourth Circuit's unreported order denying petitioners' motion for rehearing en banc is reprinted at Pet. App. 133a.

JURISDICTION

The court of appeals entered judgment on June 5, 2018, and denied Petitioners' motion for rehearing on July 3, 2018. On September 25, 2018, the Chief Justice extended the time to file a petition for a writ of certiorari to October 31, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(3), provides in relevant part:

> A civil action may be brought * * * by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

INTRODUCTION

ERISA § 502(a)(3) entitles participants in an employee benefit plan to "appropriate equitable relief" for violations of the statute. 29 U.S.C. § 1132(a)(3).

This Court has repeatedly held that Congress used the phrase "equitable relief" to refer to a traditional equitable remedy that would have been awarded by an equity court in the days of the divided bench applying "the law of equity" to the facts presented. *CIGNA Corp. v. Amara*, 563 U.S. 421, 440-44 (2011); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 216 (2002) (traditional remedy satisfying "the conditions that equity applied to its provision"); *Montanile v. Bd. of Trustees of the Nat'l Elevator Indus. Health Benefit Plan*, 136 S.Ct. 651, 657-61 (2016) (relief consistent with "historical equity practice").

Twelve years ago, the Court clarified that the required historical analysis takes into account not just the conditions that equity applied to a remedy's provision, but also traditional equitable defenses—but only those defenses that would have been available to a defendant in the context of the particular equitable remedy at issue. *See Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 368 (2006) ("the parcel of equitable defenses [that] accompany [ ] such action").

In the decision below, a divided panel of the Fourth Circuit acknowledged this Court's rulings—but said that the term "equitable relief" tells only half the story. Judge Wynn's opinion for the panel majority holds that since "ERISA Section 502(a)(3) . . . expressly empowers courts to invoke their equitable authority and determine whether equitable relief is '*appropriate*,'" ERISA courts are actually "not required" to "follow equitable rules" from the days of the divided bench, but have discretion to "consider other approaches" that the ERISA court believes make more sense. Pet. App. 19a, 23a (emphasis added).

In *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013), the defendant made a similar argument, asserting that the term "appropriate" gives ERISA courts discretionary authority to make their own assessment of the equities, unconstrained by the standards that governed equity courts in the days of the divided bench. *See id.* at 98-99. The Solicitor General asked the Court to reject that interpretation and hold that § 502(a)(3)'s "requirement that equitable relief be 'appropriate' performs more limited roles under the

Act"—acting to ensure that (1) relief is not available under another more specific provision of ERISA, and (2) if not, that a court should "choose a suitable remedy from among the range of possible 'equitable relief'" awarded by equity courts in the days of the divided bench. *See* Brief for the United States as Amicus Curiae, *US Airways, Inc. v. McCutchen* (Sept. 5, 2012) (No. 11-1285), p.6. The United States said that the term "appropriate" could *not* reasonably be construed as giving ERISA courts "discretion to decline" to award the traditional equitable remedy that an equity court would have awarded in analogous circumstances—*e.g.*, to deny relief for a reason that an equity court would have considered "beside the point" for the particular remedy at issue. *Id*. at 6-7, 11, 13.

In *McCutchen*, the Court agreed with that interpretation, holding that the term "appropriate" in § 502(a)(3) did not give the district court discretion to deny the traditional equitable remedy of "lien by agreement" based on considerations that an equity court in the days of the divided bench would have considered legally irrelevant. *See McCutchen*, 569 U.S. at 98-101, 106 (explaining that because an equity court would have rejected the defendant's arguments as beside the point, "[s]o too, then," must an ERISA court). But *McCutchen*'s language and holding did not explicitly address traditional equitable remedies other than the one at issue in that case, *i.e.*, an "equitable lien by agreement." So, as the Fourth Circuit's decision in this case illustrates, *McCutchen* did not resolve what

ERISA § 502(a)(3) means by "appropriate" equitable relief generally.

This case shows the need to answer the question left open by *McCutchen*. Section 502(a)(3) is invoked with ever-increasing frequency in ERISA actions for "appropriate equitable relief." The federal courts are accustomed to exercising broad discretion to grant or deny equitable relief in cases in which they are not bound by a statutory command to apply the remedies that were available in pre-merger equity courts. This case squarely presents the question whether the word "appropriate" in Section 502(a)(3) authorizes ERISA courts to exercise that broad discretion according to their own sense of fairness, once they have verified that the form of relief the plaintiff seeks was available in equity courts pre-merger; or whether "appropriate" means what a *pre-merger equity court* would have deemed appropriate based on the facts and defenses presented.

STATEMENT

ERISA is a landmark federal statute designed "to promote the interests of employees and their beneficiaries in employee benefit plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (citation omitted).

Section 502 of ERISA sets forth the exclusive remedies that are available to a civil litigant under the statute. The most controversial part of ERISA's remedy provisions is § 502(a)(3), which authorizes a civil action to recover "appropriate equitable relief." 29 U.S.C. § 1132(a)(3).

That statutory phrase has resulted in at least eight decisions by this Court. In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Court held that Congress intended "equitable relief" to include only those types of relief that were typically available in equity during the days of the divided bench. *Id.* at 255-56. Subsequent decisions added refinements and fleshed out details. *See Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Harris Trust & Savings Bank, Inc. v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013); *Montanile v. Bd. of Trustees of the Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016).

In two of those cases, the Court ruled that ERISA courts should take into account *defenses* to equitable actions that were "typically available" in the days of the divided bench—but only those defenses that a premerger equity court would have considered germane *to the particular equitable remedy at issue*. *Sereboff*, 547 U.S. at 358, 368; *McCutchen*, 569 U.S. at 96-100.

As thorough as the Court's analysis of the term "equitable relief" has been, the Court has not prescribed a framework for determining whether equitable relief is "*appropriate*" in a given case. *See* Brief for the United States as Amicus Curiae, *Sereboff v. Mid-Atlantic Medical Services, Inc.* (Feb. 23, 2006) (No. 05-260), p.27 ("This Court has not defined when relief is 'appropriate' under Section 502(a)(3)").

This has left an opening for ERISA litigants like the Bank of America in this case to argue that ERISA § 502(a)(3) contains what effectively is a loophole that allows ERISA courts to sidestep "the historical analysis [the Court's] prior cases prescribe," *McCutchen*, 569 U.S. at 100, and instead rely on their own sense of what is "equitable." *See* Pet. App. 26a-27a, 73a, 85a.

Facts and Proceedings Below

Plaintiffs are current and former employees of the Bank of America who participated in the Bank of America 401(k) Plan.

ERISA provides that 401(k) account assets "shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants. . . ." 29 U.S.C. § 1103(c)(1). The rule is not onerous. It says to an ERISA trustee: "You are left with the entire universe of investment possibilities as outlets for your entrepreneurial impulses; you are required only to stay away from the trust assets when you seek your own fortune." J. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 657 (1995).

Despite the statute's clear command, between 1998 and 2001 the Bank of America transferred almost

$3 billion from Plaintiffs' 401(k) individual accounts to a Bank-controlled fund, where the money was "pooled, indistinguishably . . . into one 'pot' worth about $9 billion." Pet. App. 34a.

The Bank admitted that its motive for the transfers was to use employees' 401(k) balances to generate investment profits that would reduce the Bank's costs and thus increase the Bank's bottom-line earnings. Pet. App. 105a n.3. And it is undisputed that the commingled fund generated cumulative returns of 28.6% over the period that it held the 401(k) balances. Pet. App. 8.

The Class Action

Plaintiffs filed suit in 2004, alleging several ERISA violations stemming from the transfers. Pet. App. 108a. In 2005, following an audit, the Internal Revenue Service (the "IRS") concluded that the transfers violated ERISA and required the Bank to restore the individual 401(k) accounts. The IRS did not address the allocation of profits earned on the commingled fund. Pet. App. 6a-7a. The class's claim for a share of those profits proceeded in the district court, and in 2010, the district court certified a class of more than 60,000 401(k) participants. *Pender v. Bank of Am. Corp.*, 269 F.R.D. 589 (W.D.N.C. 2010). In 2013, the district court dismissed the class claims as moot. Pet. App. 110a.

The 2015 Fourth Circuit Ruling and the Remand

In 2015, the Fourth Circuit reversed the dismissal, holding that the class was entitled to "appropriate equitable relief" under § 502(a)(3) for the Bank's violation of ERISA. The Fourth Circuit cited *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), in which this Court said that if "a plaintiff is entitled to a constructive trust on particular property held by the defendant, he may also recover profits produced by the defendant's use of that property." *Id*. at 214 n.2. The Fourth Circuit held that "[t]his case presents th[e] appropriate circumstances" for the relief described in *Knudson* because "Plaintiffs seek profits generated using assets that belonged to them." Pet. App. 119a. The case was remanded to the district court with instructions to calculate the profits due to class members. *Id*. at 126a.

At the bench trial convened by the district court for that purpose, the Bank admitted that it had commingled employees' 401(k) account money with Bank-controlled money into a single pot of fungible assets. A Bank vice president testified that "as soon as the transferred assets hit the [fund], they were commingled and they lost their identity as 401(k) assets. They just became [fund] assets." Fourth Cir. Case. No. 17-1485, Dkt. 41-1 at JA580.

Unrefuted evidence showed that the proportionate share of the commingled fund's 28.6% profit that was attributable to the class's 401(k) balances was equal to $379 million. Pet. App. 34a. The Bank argued that although the assets were indistinguishable, the portion of the assets that represented 401(k) balances had actually lost money, and all the fund's investment gains were attributable to the other assets in the commingled fund. Pet. App. 9-11.

Equity courts in the days of the divided bench (*i.e.*, before the merger of law and equity courts in 1938) regularly confronted this exact situation: a trustee who improperly commingled beneficiaries' trust money with his own money in a single fund, invested the commingled money, and was then called to account to the beneficiaries for the gains made from the use of their money.

In response, equity courts developed an objective rule that "entitled" plaintiffs to a *proportionate share* of the commingled fund's aggregate gains. As the Fourth Circuit explained in *MacBryde v. Burnett*, 132 F.2d 898 (4th Cir. 1942):

> It is well settled that, if trust funds are mingled with personal funds of a trustee, the whole is impressed with a trust until separation of the trust property can be made, and that the trust [beneficiaries are] *entitled* to a proportionate part of the profits realized by the trustee in dealings with the fund in which the trust funds are mingled.

Id. at 900 (citing *Restatement (First) of Trusts* § 202 (1935)) (emphasis added).

As noted, evidence adduced at trial established that the Bank-controlled fund earned a cumulative profit of 28.6%, with the proportionate share attributable to the class's 401(k) savings equal to $379 million. The district court judge did not question the accuracy of this accounting. But based on the Bank witnesses' testimony, he held that requiring the Bank to distribute the class's allocable share of the fund's gains would be unfair to the Bank and produce a windfall to the class. The judge said that, accordingly, he was "reject[ing]" the established proportionate-share remedy. Pet. App. 50a, 68a-69a, 72a.

Specifically, the judge said that he was rejecting the established proportionate-share methodology for three reasons:

> A. As a factual matter, for reasons described earlier, the Court has found that such a methodology is flawed and unreliable, and inferior to the investment measurement proposed by Defendants;
>
> B. As an equitable matter, such a methodology would serve as a penalty and not produce equitable results; and
>
> C. As a legal matter, the Court finds that such a methodology would be *inappropriate* because it would produce "profits" having nothing to do with the transfers and is therefore contrary to the purpose of this inquiry.

Pet. App. 85a (emphasis added).

The judge cited no case, restatement, treatise, or any other precedent in which a pre-merger equity court relied on any of these considerations to "reject" the established proportionate-share remedy in a trust-money commingling case.

The 2018 Fourth Circuit Ruling

Plaintiffs appealed. In a 2-1 ruling, the Fourth Circuit affirmed, with Judge Keenan dissenting.

Writing for the majority, Judge Wynn concluded that "Plaintiffs are correct that the proportionate-share-of-the-whole approach appears to have been the predominant way of conducting an accounting for profits when unlawfully obtained funds were commingled with other funds." Pet. App. 20a. The court arrived at that conclusion after summarizing the rule's "substantial support in Restatements, treatises, and case law." *Id.* at 14a. The opinion quoted from the Restatement of Trusts that was published just before the merger of federal equity and law courts:

> For example, the *Restatement (First) of Trusts* provides that "[w]here the trustee wrongfully mingles trust property with his individual property in one indistinguishable mass" and "exchanges the mingled mass for other property" that "becomes more valuable than the mingled mass with which it is acquired, the beneficiary is entitled to a proportionate share of the property, and thus to secure the profit which arises from the transaction." *Restatement (First) of Trusts* § 202 cmt. h (1935).

Pet. App. 14a.

The opinion also cited and quoted the *Restatement (First) of Restitution* § 209 cmt. a (1937) to the same effect:

> The person whose money is wrongfully mingled with money of the wrongdoer does not thereby lose his interest in the money, although the identity of his money can no longer be shown, but he acquires an interest in the mingled fund. His interest is such that he is entitled in equity to claim *a proportionate share of the mingled fund* or a lien upon it.

Pet. App. 14a-15a (emphasis added by court). The opinion also cited the *Restatement (Second) of Trusts* § 202 (1959), a more modern source for the same principle. *Id.* at 14a.

The majority opinion acknowledged that "[l]ikewise, authoritative legal commentators support the proportionate-share-of-the-whole approach," citing and quoting 2 Dan B. Dobbs, Law of Remedies § 6.1(4), at 16-17 (2d ed. 1993):

> [W]hen the defendant uses the entire commingled fund to purchase property . . . the plaintiff is not entitled to a constructive trust on the entire property purchased, but he is entitled to a trust for a share in the property proportionate to his share in the fund.

Pet. App. 15a. As another example, the court cited and quoted Austin W. Scott, *The Right to Follow Money Wrongfully Mingled with Other Money*, 27 Harv. L. Rev. 125, 127 (1913):

> [W]here the claimant's money is mingled with that of the wrongdoer, and is therefore only partly instrumental in earning the profit[,] [t]he claimant should be entitled to a share of the profit, in so far as his property contributed to earning the profit.

Pet. App. 15a.

The majority opinion similarly acknowledged that this Court's precedent from the days of the divided bench prescribed the proportionate-share-of-the-whole remedy, citing and quoting *Henkels v. Sutherland*, 271 U.S. 298, 302 (1926):

> Since the proceeds resulting from the sale of Henkels' property have been commingled with the proceeds of other sales and thus invested, an account must be taken to ascertain the average rate of interest received by the Treasury upon all the proceeds invested and thereupon . . . a proportionate allocation made in respect of the proceeds belong to Henkels for the period of their investment.

Pet. App. 15a.

The opinion cited and quoted the Fourth Circuit's 1942 ruling in *MacBryde v. Burnett*, *see supra* at 10, and acknowledged that other federal courts of appeals "also have applied the proportionate-share-of-the-whole approach in such circumstances," citing and quoting, *inter alia*:

> *Provencher v. Berman*, 699 F.2d 568, 570 (1st Cir. 1983) (Breyer, J.) (explaining that when "a

> 'conscious wrongdoer' . . . uses commingled funds to buy property, . . . the innocent party can choose either to enforce a lien on the property for the value of the estate's funds or" claim "the proportionate share of the real estate").

Pet. App. 16a. The majority opinion also quoted *Provencher*'s description of the proportionate share rule as "virtually universal." *Id.* at 17a.[1]

But the majority opinion refused to hold that Section 502(a)(3) requires the federal courts to adhere to established rules of equity from the days of the divided bench. "That the proportionate-share-of-the-whole approach appears to have been widely, if not universally, embraced by courts and commentators does not necessarily mean, however, that the district court was *required* to follow that approach in this case. . . ." Pet. App. 18a (emphasis by court). Instead, the court held that "ERISA Section 502(a)(3), under which Plaintiffs seek relief, expressly empowers [ERISA] courts to invoke their equitable authority and determine whether equitable relief is '*appropriate*.'" *Id*. at 19a (emphasis added).

Judge Wynn reasoned that Supreme Court precedents requiring ERISA courts to abide by the historic practice of equity courts were focused solely "on the

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[1] The opinion stated that "a few courts took—and continue to take—other approaches" to relief in such cases, citing two decisions. Pet. App. 17a. Those decisions, however, merely reflect a long-established exception to the general rule, an exception that does not apply here. *See* note 2, *infra*.

meaning of 'equitable relief' in Section 502(a)(3)." In the Fourth Circuit's view, "that provision also requires that the award of such relief be 'appropriate,' indicating that a court has the power to deny such relief (even if it is a *form* of equitable relief available under Section 502(a)(3)), if [the court] deems such relief not 'appropriate' under the particular facts of the case." Pet. App. 20a-21a (emphasis in original).

In other words, the Fourth Circuit held that the phrase "appropriate equitable relief" consists of two independent parts. "Equitable relief" means the traditional equitable relief that an equity court would have awarded in the days of the divided bench. But the word "appropriate" then gives ERISA district court judges a special additional statutory power that common law equity courts did not have: discretion to decline to award a traditional equitable remedy as "inappropriate"—*for reasons that the pre-merger law of equity* deemed legally irrelevant.

Based on this interpretation, the court of appeals held that the district court judge had acted within his discretionary authority in declining to award a proportionate share of the undisputed profits because in the circumstances of this particular case he believed it would be unfair to the Bank and a windfall to the class. Pet. App. 24a-25a.

Judge Keenan disagreed, arguing in dissent that the district court's search for a remedy it thought would be fair to the Bank "answered the wrong question." *Id.* at 35a. "The court should have focused instead on the question articulated in *MacBryde* [*v. Burnett*, 132 F.2d 898 (4th Cir. 1942)], namely, what was the proportionate share of the profits made by investing the plaintiffs' portion of the funds." *Id*.

Judge Keenan said that "in reality, the [district court's] decision merely reflected the court's rejection of an established equitable remedy in favor of preserving the Bank's profit margin. . . . I cannot abide the decision by the district court and the majority to allow the Bank to profit lavishly from its wrongful use of the plaintiffs' money." *Id*.

The Court denied Plaintiffs' petition for rehearing. Pet. App. 133a.

REASONS FOR GRANTING THE PETITION

This case squarely and cleanly presents an important unresolved question regarding an oft-litigated statutory provision that this Court has deemed important enough to interpret multiple times: ERISA § 502(a)(3), which entitles participants in an employee benefit plan to "appropriate equitable relief" for violations of the statute.

The question is straightforward: Assuming that an ERISA plaintiff has established eligibility for a particular form of traditional "equitable relief" under the framework prescribed by this Court, what is the standard governing a court's determination of whether that relief is "*appropriate*" within the meaning of ERISA § 502(a)(3)?

Does "appropriate" mean:

A. That a *pre-merger equity court* would have considered the relief to be appropriate on the facts presented; *or*

B. That a *present-day ERISA court* concludes that the relief is appropriate based on its own assessment of the equities?

In other words, is an ERISA court bound to a *historic analysis* of what an equity court in the days of the divided bench would have awarded; or is the court required or permitted to determine the appropriateness of a particular equitable remedy in the exercise of its own discretion, without regard to what a pre-merger equity court would have awarded?

This Court's cases in the past 20 years have consistently required the application of remedies and defenses that were typically available in pre-merger equity courts, and have constrained ERISA courts' exercise of discretion to those remedies and those defenses. The Fourth Circuit's ruling makes it evident that there is still significant uncertainty about the freedom of lower courts to exercise discretion outside the bounds of pre-merger equity remedies and defenses. The petition should be granted so that the Court can definitively resolve this important question.

I. As the United States Has Acknowledged, this Court Has Not Prescribed a Framework for Determining Whether Equitable Relief is "Appropriate" under ERISA § 502(a)(3)

In a 2006 amicus brief, the Solicitor General noted that "[t]his Court has not defined when relief is 'appropriate' under Section 502(a)(3)." Brief for the United States as Amicus Curiae, *Sereboff v. Mid-Atlantic Medical Services, Inc.* (Feb. 23, 2006) (No. 05-260), p.27. Although the Court has issued several opinions interpreting Section 502(a)(3) since 2006, it still has not definitively resolved that question.

This Court's opinion in *Sereboff* did not address the meaning of the term "appropriate," focusing instead on the more basic question whether the plaintiff's requested remedy was "equitable relief" available under ERISA § 502(a)(3). The defendants argued that the requested remedy did not qualify as "equitable relief," because of certain defenses it asserted. This Court rejected that argument because the "parcel of equitable defenses" asserted by the defendant, while admittedly relevant to *some* equitable remedies, were considered *by equity courts* to be "beside the point" for purposes of the specific equitable remedy that the plaintiff was seeking. This Court held, for that reason, that *an ERISA court* was required to reject the defenses as legally irrelevant. *Sereboff,* 547 U.S. at 368.

Five years later, the Third Circuit concluded that the *Sereboff* rule—that an ERISA court must reject defenses that an equity court would have rejected—was limited to the meaning of the term "equitable relief," and did not apply to an ERISA court's assessment of whether the plaintiff's requested relief is "appropriate." In the Third Circuit's view, an ERISA court assessing whether relief is appropriate may properly consider *any* "equitable defenses and principles that were 'typically available in equity,'" even if an equity court in the days of the divided bench would not have considered those principles and defenses germane to the remedy at issue. *US Airways, Inc. v. McCutchen*, 663 F.3d 671, 677-79 (3d Cir. 2011). Under that view, as long as a principle or defense could be found in a classic equity treatise, an ERISA court could properly invoke it to declare a form of relief "not appropriate"—even if a pre-merger equity court would have considered the principle or defense to be legally irrelevant in the context of the specific remedy at issue.

This Court granted certiorari to review that interpretation. The plaintiff, US Airways, urged the Court to reject the Third Circuit's interpretation "that the word 'appropriate' in Section 502(a)(3) authorizes [ERISA] courts to import freewheeling equitable offsets" to the relief that an equity court in the days of the divided bench would have awarded. *See* Reply Brief for Petitioner, *US Airways, Inc. v. McCutchen* (Nov. 13, 2012) (No. 11-1285), p.5.

The United States made the same request, asking the Court to reverse the Third Circuit's conclusion "that Section 502(a)(3)'s requirement that equitable relief be 'appropriate' gave courts discretionary authority to apply their views of general equitable principles" to deny relief that a pre-merger equity court would have granted. Brief for the United States as Amicus Curiae, *US Airways, Inc. v. McCutchen* (Sept. 5, 2012) (No. 11-1285), p.13. The government argued that "[c]ontrary to the court of appeals' conclusion, inclusion of the word 'appropriate' in this provision does not provide [ERISA] courts license to invalidate or decline to" grant an established equitable remedy based on considerations that an equity court would have deemed legally irrelevant. *Id.* at 6; *see also id*. at 13.

The United States explained that "[i]nstead, the requirement that equitable relief be 'appropriate' performs more limited roles under the Act"—

> [E]quitable relief . . . is "appropriate" under Section 502(a)(3) [if] no other remedial provision of ERISA provides a more specific mechanism for enforcing respondent's reimbursement obligation. * * * Moreover, because a court in a Section 502(a)(3) suit can invoke a broad array of remedies typically available in equity, the word "appropriate" serves the further purpose of directing the court to choose a particular remedy that is well suited to the circumstances.

Id. at 6, 14.

In its decision, this Court did not define a framework for determining when equitable relief is "appropriate" under Section 502(a)(3). It held, however, that if a *pre-merger equity court* would have rejected a particular equitable defense as legally irrelevant to the remedy at issue, "[s]o too" must an ERISA court reject the defense—without regard to what the ERISA court itself thinks is "appropriate." *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 97-100 (2013). Thus, the Court rejected the Third Circuit's concept that the term "appropriate" gives ERISA courts discretion to deny an established equitable remedy for reasons that a pre-merger equity court would have considered "beside the point." *Id*.

This Court's explanation should have settled the question presented by this case—*i.e.*, what does "appropriate" equitable relief mean under ERISA § 502(a)(3)? *McCutchen* seems to say that "appropriate" relief means equitable relief *that a pre-merger equity court* would have considered to be appropriate under the circumstances. But the Fourth Circuit did not consider itself bound to that conclusion. Because there is no discussion of *McCutchen* in the Fourth Circuit's opinion, the reasons are unclear, but the Fourth Circuit may have thought that *McCutchen*'s analysis and holding were limited to equitable liens by agreement, the specific remedy at issue in that case, and inapplicable to an equitable accounting for profits, the remedy at issue in this case.

This case presents the perfect opportunity to settle definitively the question whether the word "appropriate" gives ERISA courts license to depart from pre-merger equity principles when considering a plaintiff's request for equitable relief. As the Fourth Circuit acknowledged, the remedy that plaintiffs requested here was well-established in pre-merger equity for cases like this one.[2] The Bank of America illegally transferred $3 billion of employees' 401(k) account assets into a Bank-controlled fund that earned a 28.6% net rate of return, translating to an investment profit of almost $1 billion. The law of equity says that the 60,000 employees whose retirement savings were unlawfully put at risk are "entitled" to their proportionate share of the fund's profits.

The only thing standing between those employees and the relief that pre-merger equity said they are entitled to is the Fourth Circuit's conclusion that an ERISA court has discretion to declare "inappropriate" relief that a pre-merger equity court would have found not merely "appropriate," but *compelled* by firmly-established equitable rules and standards. As the Seventh Circuit put it well:

> [E]quity has rules and standards, just like law. * * * And although the ratio of rules to standards is lower in equity than in law, in

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[2] The opinion cited two cases for the proposition that "a few courts" have taken "other approaches" in determining "whether, and to what extent, a defendant profited from the use of unlawfully obtained, and mingled, money." Pet. App. 17a. Neither of the cited cases, however, rejected a claim for a proportionate share of profits undisputedly earned by a commingled fund. Each case merely affirmed an award of interest in the absence of evidence of a fund's profits. *See Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1009 (8th Cir. 2004); *In re Mowrey's Estate*, 232 N.W. 82, 86 (Iowa 1930). The pre-merger equity rule always permitted different remedies when the commingled assets earned no profits or profits had not been proved. *See* Dobbs §§ 3.6(2) at 343-44, and 4.5(2) at 636. Such exceptions have no bearing on this case, where the earnings on the commingled fund were undisputed.

> cases where the plaintiff has an established entitlement to an equitable remedy [under the governing rules], the judge cannot refuse the remedy because it offends his personal sense of justice.

In re Grand Jury Proceedings, 894 F.2d 881, 887 (7th Cir. 1989) (Posner, J.). *Accord Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) ("courts of equity must be governed by rules and precedents no less than the courts of law").

The Fourth Circuit rejected this principle in reliance on *Holland v. Florida*, 560 U.S. 631, 649-50 (2010), which it deemed to establish an overriding principle that federal courts considering equitable remedies are not bound to "the evils of archaic rigidity." Pet. App. 19a. But *Holland* was decided under a different statute—one that, unlike ERISA § 502(a)(3), has not been interpreted as enacting a Congressional command for the courts to apply pre-merger equity principles. *See Great-West Life*, 534 U.S. at 211. The availability of more flexibility or wider discretion under a different statute cannot answer the question of what constitutes "appropriate equitable relief" under ERISA.

II. The Fourth Circuit's View of "Appropriate" Equitable Relief Clashes with 25 Years of this Court's Precedents Requiring ERISA Courts to Follow "The Historic Practice of Equity Courts" When Awarding Equitable Remedies

As noted, ERISA § 502(a)(3) entitles employee benefit plan participants to "appropriate equitable relief" for violations of the Act.

The term "equitable relief," this Court has consistently held, means relief that was traditionally awarded by pre-merger equity courts applying "the law of equity" reflected in standard equity treatises and case law from the days of the divided bench. *CIGNA Corp. v. Amara*, 563 U.S. 421, 440-44 (2011); *see also US Airways, Inc. v. McCutchen*, 569 U.S. 88, 98 (2013); *Montanile v. Bd. of Trustees of the Nat'l Elevator Indus. Health Benefit Plan*, 136 S.Ct. 651, 657-61 (2016).

As the Court explained in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002):

> Congress felt comfortable referring to equitable relief in this statute—as it has in many others—precisely because the basic contours of the term are well known. Rarely will there be need for any more "antiquarian inquiry," *post*, at [233] (opinion of GINSBURG, J.), than consulting, as we have done, standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear.

Id. at 217 (footnote omitted). *Accord Montanile*, 136 S.Ct. at 657 ("we turn to standard equity treatises"); *McCutchen*, 569 U.S. at 100 ("the historical analysis our prior cases prescribe").

In the decision below, the Fourth Circuit acknowledged that this Court's precedents require courts assessing a plaintiff's request for equitable relief to conduct a historical analysis of what a pre-merger equity court would have decided. But the court then said: Widen the lens a notch, and the complete phrase "*appropriate* equitable relief" reveals that ERISA courts are not shackled to a historical analysis after all.

To be sure, said the Fourth Circuit, *step one* of the analysis requires a district court to ask what traditional equitable remedy a 1937 equity court would have awarded on the facts presented. But *step two* is for the judge to assess whether the traditional remedy is "appropriate" based on the judge's own concepts of fairness and justice. If the judge thinks the remedy that a pre-merger equity would have awarded might be inappropriate, the judge has broad discretion to "consider other approaches" that he or she thinks are more appropriate under the circumstances. *See* Pet. App. 23a.

If the Fourth Circuit's interpretation is correct, 25 years of this Court's efforts painstakingly defining and refining the "framework for resolving th[e] inquiry" into the relief that a plaintiff is entitled to under ERISA § 502(a)(3), *Montanile*, 136 S.Ct. at 657, have been for naught. If the modifier "appropriate" gives an

ERISA court broad discretion to "consider other approaches" than the one a pre-merger equity court would have used to assess a plaintiff's entitlement to equitable relief, the "historical analysis [the Court's] cases prescribe," *McCutchen*, 569 U.S. at 100, is all but pointless.

The Fourth Circuit's conclusion below—that the district court was "not required" to enforce the established proportionate-share remedy in a trust-money commingling case—was based on the same erroneous logic adopted by the Third Circuit in *McCutchen*.

The Fourth Circuit reasoned that the modifier "appropriate" establishes a discretionary power independent of the remedies and rules typically applied by pre-merger equity courts. In Judge Wynn's words for the panel majority:

> [W]hereas . . . the Supreme Court cases . . . focused on the meaning of "equitable relief" in Section 502(a)(3), . . . that provision also requires that the award of such relief be "appropriate," indicating that a court has the power to deny such relief (even if it is a *form* of equitable relief available under Section 502(a)(3)), if it deems such relief not "appropriate" under the particular facts of the case.

Pet. App. 20a-21a (emphasis in original); *see also id*. at 21a ("even if a form of equitable relief is available under Section 502(a)(3), a district court has discretion to deny such relief if the court deems such relief inappropriate under the particular facts of the case").

And hammering home the point that, in the Fourth Circuit's view, an ERISA court is not constrained by a historical analysis of what a pre-merger equity court would have considered "appropriate," Judge Wynn emphasizes that "the district court retained discretion to consider *other approaches* in determining whether equitable relief was 'appropriate' under the particular facts of the case." *Id*. at 23a (emphasis added).

The Fourth Circuit's logic and conclusion in this regard is essentially identical to the Third Circuit's analysis that this Court reversed in *McCutchen*. Writing for that court, Judge Fuentes said that "[t]he Supreme Court reasoned in *Knudson* that 'equitable relief' must mean *something* less than *all* relief. * * * By the same logic, '*appropriate* equitable relief' must be something less than all equitable relief." *US Airways, Inc. v. McCutchen*, 663 F.3d 671, 676 (3d Cir. 2011) (some quotation marks omitted).

Judge Fuentes continued: "[I]n the absence of any indication in the language or structure of § 502(a)(3) to the contrary, we find that Congress intended to limit the equitable relief available under § 502(a)(3) through the application of [general] equitable defenses and principles that were typically available in equity"—and concluded "that the principle of unjust enrichment is broadly applicable to claims for equitable relief." *Id*. at 676-77. *See also id*. at 678 (criticizing other courts for neglecting to distinguish between the availability of "equitable relief" and an ERISA court's separate obligation to assess whether the relief is "appropriate").

In *McCutchen*, this Court rejected the Third Circuit's logic, concluding that the relief the plaintiff sought was "appropriate" *because a pre-merger equity court* would have considered it so. *See US Airways, Inc. v. McCutchen*, 569 U.S. 88, 97-100 (2013). The Court explained that an equity court in the days of the divided bench would have rejected the defendant's defenses, even though they were admittedly "equitable"—because the law of equity deemed the defenses "beside the point" in the context of the specific remedy at issue. *Id*. at 98. *McCutchen* holds that since a pre-merger equity court would have found the remedy requested by the plaintiff to be appropriate, "[s]o too" must a modern ERISA court. *Id*. at 100.

In other words, a remedy is "appropriate" within the meaning of ERISA § 502(a)(3) if an *equity court* in the days of the divided bench would have considered it so; not, as the Fourth Circuit held below, if a *modern ERISA court* thinks the remedy is "fair, reasonable, and 'equitable.'" *See* Pet. App. 20a. This is particularly true where, as here, the ERISA court's assessment of the equities is focused primarily on fairness to the lawbreaking defendant rather than the innocent victims' property rights. *See* Pet. App. 24a-27a.[3]

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[3] A comment to the 2011 version of the *Restatement of Restitution* observes that "the diminished familiarity of some courts with traditional equity techniques appears to have fostered a basic misconception: that the property rights of [victims of wrongdoing] may be either recognized or disregarded as a court may elect, to achieve a result the court views as desirable in a particular case. * * * If this were true, it would justify the age-old libel suggesting that the rights secured in equity might vary with the

III. Immediate Review is Necessary Because the Question Presented is Exceptionally Important and Requires a Uniform National Answer

This case presents the perfect opportunity to settle the question left open by *McCutchen* and provide much-needed guidance to ERISA courts who, with ever-increasing frequency, are being asked to evaluate plaintiffs' requests for "appropriate" equitable relief under ERISA § 502(a)(3).

As demonstrated above and acknowledged by the Fourth Circuit, there is no serious dispute about what a pre-merger equity court would have done here: award the 60,000 plaintiff-employees a proportionate share of the investment profits earned by the commingled fund into which the Bank illegally transferred $3 billion of their 401(k) retirement savings. Thus, the only thing standing between employees and the equitable relief to which the law of equity says they are

length of the Chancellor's foot. But equitable discretion has never meant that rules are either applied or ignored as the chancellor might elect." *Restatement (Third) of Restitution* § 59, Reptr's Notes to cmt. g (2011), criticizing *United States v. Durham*, 86 F.3d 70 (5th Cir. 1996) ("adherence to specific equitable principles" is a matter of discretion), and citing with approval *In re Grand Jury Proceedings*, 894 F.2d 881, 887 (7th Cir. 1989) and Rendleman, *The Trial Judge's Equitable Discretion Following eBay v. Merc-Exchange*, 27 Rev. Litig. 63 (2007). *See also Official Committee of Equity Security Holders v. Mabey*, 832 F.2d 299, 302 (4th Cir. 1987) ("the fact that a proceeding is equitable does not give the judge a free-floating discretion to redistribute rights in accordance with his personal views of justice and fairness, however enlightened those views may be").

entitled is the Fourth Circuit's interpretation of the term "appropriate" to mean that an ERISA court "retain[s] discretion to consider other approaches" than the one an equity court would have applied. *See* Pet. App. 23a. In other words, the meaning of the word "appropriate" in ERISA § 502(a)(3) is dispositive of whether the Bank will "profit lavishly from its wrongful use of the plaintiffs' money," Pet. App. 36a (Keenan, J., dissenting) or be required to disgorge its illegally-procured gains.

There can be no doubt that the question presented is sufficiently important to warrant review. ERISA governs the interactions between the majority of employees and their employers across the country—tens of millions of people and thousands of plans. Section 502 provides the primary enforcement mechanism for all of those stakeholders. It is a fixture in the federal courts—which, no doubt, explains why this Court so frequently has been called upon to interpret it. Clearly, the meaning of Section 502(a)(3) is an "important and recurring" issue worthy of review. S. Shapiro *et al.*, *Supreme Court Practice* 246 (10th ed. 2013).

This case presents an excellent vehicle to resolve the question recognized, but left unresolved, in *Sereboff* and *McCutchen.* As noted above, the case squarely presents the issue. The factual record is well developed and undisputed in all relevant parts. As Judge Keenan explained: "The undisputed evidence showed that nearly $3 billion of transferred assets were pooled, indistinguishably, with the Pension Plan assets into one 'pot' worth about $9 billion. And this 'pot' profited by a margin of 28.6% during the relevant period." *See* Pet. App. 34a. Under the law of equity, these undisputed facts entitle plaintiffs to a proportionate share of the pot's investment gains.

Finally, the time is right for review. The Fourth Circuit's decision holds that ERISA § 502(a)(3) contains what is effectively a loophole that gives defendants and district court judges a ready means of sidestepping this Court's historical framework for establishing eligibility for "appropriate equitable relief." Given the importance of the issue presented, there is no reason for this Court to let it percolate any longer.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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