No. 18-578

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 a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

ANNE E. REA
DAVID F. GRAHAM
TACY F. FLINT
STEVEN J. HOROWITZ
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

CARTER G. PHILLIPS*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondent

January 17, 2019

* Counsel of Record

QUESTION PRESENTED

Plaintiffs in this case sought an accounting for profits under ERISA § 502(a)(3). The district court found that Defendants did not retain any profit from the challenged transaction, that any award of "profits" would constitute an inequitable penalty, and that such an award would be "inappropriate" in light of all of the relevant circumstances.

The question presented is:

Whether a district court is legally required under ERISA § 502(a)(3)—which empowers district courts to fashion "appropriate equitable relief"—to order a remedy that it concludes is inappropriate, unsupported by the facts, and contrary to the equities of a particular case.

RULE 29.6 STATEMENT

Bank of America Corporation has no parent corporation, and no publicly held entity owns 10% or more of its stock.

The Bank of America Pension Plan has no parent corporation, and no publicly held entity owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

INTRODUCTION

In 1998, Bank of America Corporation amended its retirement plans to permit employees to transfer their 401(k) account balances to the Bank of America Pension Plan (the "Plan"). As an incentive, the Plan provided transferring employees valuable guarantees against investment losses. Thousands of employees opted in, and none suffered any financial loss from doing so. The IRS nonetheless later challenged the plan amendments permitting the transfer, objecting to the failure to maintain the "separate account feature" of the original 401(k) Plan for those employees who chose to transfer their accounts. The IRS challenge resulted in a settlement the practical effect of which was to unwind the transfer in 2009, although the affected employees retained the guarantees against investment losses that they had been provided in the interim.

This case arises from a four-day bench trial on the question "whether, after it restored the separate account feature [of the 401(k) Plan] and paid a $10 million fine to the IRS, the Bank nevertheless profited from its transfer strategy."[1] (Pet. App. 8.) The district court found that no profit was retained. Every dollar Plaintiffs sought was one "*that the Plan would have earned regardless of whether the transfer occurred*." (Pet. App. 70–71.) The court also concluded that Plaintiffs' proposed methodology for measuring "profit" was contrary to equity because it "would serve as a penalty," and also "would be inappropriate because it would produce 'profits' having nothing to do with the

[1] In the quoted passage, "the Bank" encompasses all Defendants, including the Plan, to which the assets were transferred. Bank of America itself never had control over the transferred assets.

transfers." (Pet. App. 85.) In short, the facts and the equities pointed to the same result, and Plaintiffs' claim for an accounting was dismissed.

The court of appeals was right to affirm the district court's factbound determination, and its unpublished decision does not warrant this Court's review. Following this Court's guidance, all judges on the panel agreed—along with every circuit to address the question—that ERISA § 502(a)(3) vests district courts with the discretion to determine whether a given equitable remedy is "appropriate" under the "particular facts of the case." (Pet. App. 22; see also Pet. App. 30 (dissenting opinion).) And even if the circuits had uniformly misinterpreted § 502(a)(3), it would make no difference here. The district court made extensive factual findings and equitable determinations that independently support its judgment.

The petition does not even attempt to identify a circuit split. Its plea for clarity rests most heavily on a 13-year-old observation from the Solicitor General that this Court had not prescribed a general "framework for determining whether a particular form of equitable relief is 'appropriate' in a given case." Pet. i (citing Brief for the United States as Amicus Curiae Supporting Respondent at 27, *Sereboff* v. *Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006) (No. 05-260)). But this Court has addressed the meaning of § 502(a)(3) four times since that observation was made, and any doubt regarding whether the term "appropriate" vests district courts with discretion to deny a requested remedy found to be inequitable has been resolved by those intervening decisions. Indeed, Petitioners' own view is that one of these cases—*US Airways, Inc.* v. *McCutchen*, 569 U.S. 88 (2013)—"settle[s] the question presented by this case." (Pet. 22.) The petition thus amounts to nothing more than a request for error correction based on a case Petitioners failed even to *mention* in their panel-stage briefs below. And the court of appeals committed no error in any event.

The petition should be denied.

STATEMENT OF THE CASE

1. This case involves a challenge to a 1998 amendment of the Bank's retirement plans, which permitted employees (including Petitioners here) to transfer their 401(k) account balances from the 401(k) Plan to the Pension Plan.

In the 401(k) Plan, Petitioners held separate accounts and had the opportunity to direct the investment of assets in their accounts. The value of each participant's account increased or decreased based on the performance of their investment choices. Once Petitioners elected to transfer their account balances to the Pension Plan, they were held in an "ERISA-segregated trust."[2] (Pet. App. 78.) Petitioners held hypothetical accounts, referred to as "transferred savings accounts." They chose notional investments from the same mix of investment options that had been available in the 401(k) Plan, and they were entitled to a defined benefit based on the value of their hypothetical accounts. See generally *Pender* v. *Bank of Am. Corp.* ("*Pender I*"), 788 F.3d 354, 358–59 (4th Cir. 2015).

The transfer to the Pension Plan was optional: only those participants who affirmatively requested a transfer saw their balances transferred. *Pender I*, 788 F.3d at 363. To incentivize 401(k) Plan participants to opt in, the Bank offered an extraordinarily valuable

---

[2] Contrary to Petitioners' assertion (Pet. 8), there has never been a "Bank-controlled fund" that could "generate investment profits" for the Bank.

incentive. Specifically, transferring participants were guaranteed that the value of their accounts would never be less than what it was at the time of the transfer, no matter how their notional investments performed. *Id.* at 364.

The transfer offered a potential benefit to the Pension Plan as well. As the Bank made clear to participants, the Pension Plan had the opportunity to invest the transferred assets, and it could potentially make more money in investment returns than it would need to pay out on participants' accounts. *Id.* at 359 n.3. Any such surplus could be used by the Plan to fund other benefits or to defray the costs of plan administration. See ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1). Any surplus would never be available to the Bank itself, however.

2. The transfer strategy did not turn out as anticipated. First, the IRS challenged the pension plan amendments that permitted the transfer on the ground that they eliminated the "separate account feature" of the 401(k) Plan, which the IRS characterized as a "protected benefit." *Pender I*, 788 F.3d at 363. Pursuant to a settlement agreement with the IRS, Respondents paid a $10 million fine and restored the "separate account feature" by, in effect, unwinding the transfers in April 2009. See *id.* at 360.

Second, the Plan did not out-earn participants' investment choices. The Plan adopted a specific and well-documented investment strategy tied closely to the transferred accounts—one that was *not* applied in connection with legacy plan assets and liabilities that were in the Plan before the transfer. (Pet. App. 48–49.) Under that investment strategy, the Plan was much more heavily invested in equities than the notional investments made by participants. (Pet. App. 48–49.) During the transfer period from 1998–2009, however, equity markets experienced multiple historic downturns, including the Great Recession of 2007 to 2009. (Pet. App. 48.) Accordingly, the Plan's own equity-heavy investment strategy tied to the transferred accounts did far worse than the notional investments chosen by participants, which the Plan had promised to use as the basis for crediting the participants' accounts—producing a $149 million loss to the Plan. (Pet. App. 11.) The Plan was also required, pursuant to its promised guarantee and the IRS settlement, to cover any losses in the notional accounts resulting from the participants' own hypothetical investment choices—producing further substantial losses. All told, the Plan suffered a total loss (including various costs associated with the IRS settlement) of $272 million in connection with the transfers. (Pet. App. 11.)

3. The relevant proceedings below begin with the Fourth Circuit's 2015 opinion reversing an earlier grant of summary judgment to Respondents on Petitioners' claim under ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1). See *Pender I*, 788 F.3d at 360–61, 370. *Pender I* noted that the "separate account feature" had been restored and that Petitioners had suffered no financial loss, *id.* at 365–68, but those facts did not dispose of Petitioners' claim for an accounting for profits. The Fourth Circuit thus remanded for a determination of whether Respondents "retained a profit [from the transfers], even after . . . restor[ing] the separate account feature to Plaintiffs and pa[ying] a $10 million fine to the IRS." *Id.* at 368. In doing so, the court of appeals noted that the case "may well . . . become moot" if the district court were to determine on remand that no profit was retained. *Id.* at 368.

The district court held a four-day bench trial to answer the question left open by *Pender I*. Both sides argued that the district court should assess "profit" according to the standards of *Restatement (Third) of Restitution and Unjust Enrichment* § 51 (Am. Law Inst. 2011), which directs courts to measure those gains that are "properly *attributable to* the defendant's interference with the claimant's legally protected rights." *Id.* at cmt. a (emphasis added); see also *id.* § 51(5) (directing courts to consider "causation," consistent with "reason and fairness"). (See 4th Cir. J.A. 168, 187, 292.) Applying that standard, the district court found as a fact that the Plan retained no profit attributable to the transfers. (Pet. App. 70–71 (finding that every dollar Plaintiffs sought was one "that the Plan would have earned regardless of whether the transfer occurred" (emphasis omitted)).) It credited the testimony of Respondents' witnesses and the Plan's contemporaneous records showing that the transfer strategy in fact resulted in substantial losses.[3] (Pet. App. 49, 55–59.) In addition, the district court determined that ordering disgorgement would constitute an inequitable penalty. (Pet. App. 72.) Because there was no "profit" to disgorge, the district court entered judgment for Respondents. (Pet. App. 98.)

On appeal, Petitioners did not challenge the district court's factual findings. Instead, Petitioners urged that, irrespective of any factual findings and equitable considerations, the district court was legally *required*

---

[3] Petitioners suggest that their alternative calculation of 28.6% in net profits was "undisputed" and "unrefuted." (Pet. 8–9.) In fact, that calculation was shown to be deeply flawed through cross-examination of Petitioners' expert, and it was both disputed by Respondents and rejected by the district court. (*See* Pet. App. 85 (describing calculation as "flawed and unreliable"); 4th Cir. Resp. Br. at 54–58.)

to apply a "proportionate-share-of-the-whole methodology" and award "profits" that the district court had factually found were entirely unrelated to the transfer. (Pet. App. 70–71.) Indeed, Petitioners asserted that "courts in ERISA cases *cannot* rely on their judgment to devise relief that is fair, reasonable, and 'equitable' in the particular circumstances of the case." (4th Cir. Br. of Pls.-Appellants 30–31.) The Fourth Circuit declined to adopt Petitioners' unyielding rule. It noted that even if a proportionate-share award were "a form of equitable relief . . . 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." (Pet. App. 21–22.) Here, the court of appeals held that it was "within the district court's discretion to determine," based on its unchallenged factual findings, that Plaintiffs' preferred methodology "would be inappropriate *in this case*." (Pet. App. 25.)

Judge Keenan, writing in dissent, noted that she "agree[d] with the majority that a court examining an ERISA violation is not *required* to apply a proportionate-share-of-the-whole approach" in commingling cases—an aspect of her opinion that Petitioners conspicuously neglect to mention. (Pet. App. 30.) She nonetheless thought that the district court abused its discretion based on the facts of the case. (Pet. App. 31.)

REASONS FOR DENYING THE PETITION

There is no circuit split and no other compelling reason to grant certiorari. The district court found—as a fact, applying the legal framework from *Restatement* § 51 relied upon by *both sides* as providing the rule of decision—that the Plan did not realize or retain any profit from the transfers, and thus that any restitutionary remedy would constitute an inequitable penalty and would be inappropriate. The court of appeals respected these factbound determinations, and it affirmed in a non-precedential opinion. Moreover, its decision to do so was correct. And even if the question presented were important, this case would be a poor vehicle for addressing it.

The petition should be denied.

I. CERTIORARI IS NOT WARRANTED TO REVIEW THE DISTRICT COURT'S CORRECT, FACTBOUND, AND DISCRETIONARY DETERMINATION THAT PLAINTIFFS WERE NOT ENTITLED TO RESTITUTION.

A. There Is No Conflict Among The Circuits.

Petitioners do not even attempt to identify a division of authority regarding the question presented. The decision below itself suggests that no such conflict exists, noting that "[o]ther circuit courts have reached the same conclusion," *i.e.*, that "a district court has discretion to deny . . . relief [under § 502(a)(3)] if the court deems such relief inappropriate under the particular facts of the case." (Pet. App. 21–22.) And the Fourth Circuit was right: other circuits have recognized that ERISA § 502(a)(3) by its express terms vests district courts with considerable discretion *not* to impose a remedy based on the specific facts and circumstances. See, *e.g.*, *McDonald* v. *Pension Plan of the NYSA-ILA Pension Tr. Fund*, 320 F.3d 151, 161 (2d Cir. 2003) ("[Section 502(a)(3)] does not require district courts to grant particular relief; rather, it affords district courts the discretion to fashion appropriate equitable relief . . . .").

The circuit court decisions provide no hint of uncertainty regarding the question presented, so Petitioners turn to scouring the Solicitor General's briefs in

ERISA cases over the past two decades. Those efforts uncovered a 2006 brief in which the Solicitor General noted that this Court had not "defined when relief is 'appropriate' under Section 502(a)(3)." Brief for the United States as Amicus Curiae Supporting Respondent at 27, *Sereboff*, 547 U.S. 356 (No. 05-260) (cited at Pet. i, 7, 19).

Petitioners fail to mention, however, that in the very same paragraph of the very same brief, the Solicitor General made clear that he did *not* think that district courts are barred from making "appropriateness" determinations based on the facts and circumstances of a particular case. To the contrary, the Solicitor General argued that courts may fashion "appropriate" relief based on the "nature and purposes of an ERISA benefit plan." *Id.* (internal quotation marks omitted). The Solicitor General has reiterated the point that the district courts are vested with the discretion to determine an "appropriate" remedy under ERISA § 502(a)(3) in multiple briefs since *Sereboff*. See, *e.g.*, Brief for the United States as Amicus Curiae Supporting Neither Party at 14, *McCutchen*, 569 U.S. 88 (No. 11-1285) ("the word 'appropriate' serves the further purpose of directing the court to choose a particular remedy that is well suited to the circumstances"); Brief for the United States as Amicus Curiae (Cert.) at 21, *CIGNA Corp.* v. *Amara*, 563 U.S. 421 (2011) (Nos. 09-784 & 09-804) ("a district court has broad discretion to determine the appropriate remedy for ERISA violations").

In any event, whatever the import of the isolated sentence Petitioner cites may have been in 2006, this Court has addressed the meaning of § 502(a)(3) four separate times since the Solicitor General's observation was made. See *Montanile* v. *Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016); *McCutchen*, 569 U.S. at 100–01; *CIGNA Corp.*, 563 U.S. at 442–43; *Sereboff*, 547 U.S. at 361–69. Indeed, Petitioners' own view is that *McCutchen* "settled the question presented by this case" in 2013. (Pet. 22.)

What matters is whether this case presents an important unresolved question of federal law that justifies this Court's intervention *now*. The lack of any conflict among the courts of appeals, coupled with Petitioners' own view that the case involves the misapplication of settled law, confirms that certiorari is unwarranted.

B. The Non-Precedential, Factbound Decision Below Does Not Resolve Any Important Question Of Federal Law.

Petitioners attempt to frame an issue here as if the district court had recognized, as a factual matter, that the Plan retained a profit from the transfers but then, with the court of appeals' sanction, declined 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." (Pet. i.) But that is not at all what occurred in the decisions below, and the putative issue is largely invented.

As the court of appeals explained, the "district court's decision rested on extensive factual findings, none of which Plaintiffs challenge . . . as clearly erroneous," based on "contemporaneous [Plan] records maintained in the ordinary course of business." (Pet. App. 24.) Among other things, the district court found that those records provided "a *factual basis*" to determine that Respondents "did not profit *from the transaction*." (Pet. App. 27 (emphasis added).) And contrary to Petitioners' suggestion that their calculation of cumulative returns was "undisputed" (Pet. 8), the district court rejected Plaintiffs' calculation as "less accurate and reliable" than Defendants' (Pet. App. 50), and "contrary to the weight of the evidence." (Pet. App. 69; see also Pet. App. 72 (finding that Defendants offered the "best approximation" of profits).) The district court's decision was deeply factual, and the Fourth Circuit was appropriately deferential.

The Plan records and testimony on which the district court relied make this an atypical case. Commingling of assets often makes it difficult to disentangle profits attributable to the challenged conduct from those that would have been earned in any event. The proportionate-share approach is designed to address this difficulty. (Pet. App. 25 (citing Austin W. Scott, *The Right to Follow Money Wrongfully Mingled with Other Money*, 27 Harv. L. Rev. 125, 125 (1913)).) But here, the district court found as a factual matter that the Plan's contemporaneous records and accompanying testimony made this the unusual case where it was possible to determine precisely that the Plan did *not* earn any profit as a result of the challenged transfer, and affirmatively disproved any causal attribution. (Pet. App. 70–71 (finding that every dollar Plaintiffs sought was one "that the Plan would have earned regardless of whether the transfer occurred" (emphasis omitted)).) Petitioners have not identified any case from any era—pre-merger or not—in which a court in equity (1) found that *no profit* resulted from challenged conduct but (2) ordered disgorgement on a proportionate-share theory anyway.

It is therefore unsurprising that no judge—not even Judge Keenan, who dissented from the panel opinion—called for a vote on Petitioners' request for rehearing *en banc*. (Pet. App. 135.) The members of the panel disagreed over whether the district court abused its discretion (Pet. App. 31), but none of the judges suggested that the panel was articulating any significant new principle of federal law. And in recognition of the factbound nature of its decision, the Fourth Circuit issued an unpublished opinion. (Pet. App. 3.) Thus, even if the panel opinion could be fairly read to articulate some new principle of law, that principle would not be binding even in the Fourth Circuit. See *Minor* v. *Bostwick Labs., Inc.*, 669 F.3d 428, 433 n.6 (4th Cir. 2012).

C. The Decision Below Is Correct.

Given the factbound nature of the decision below and the lack of any split of decisional authority, the petition ultimately amounts to nothing more than a request for error correction, which is inherently unworthy of review by this Court. And in any event, the court of appeals did not err.

Petitioners nowhere mention the provisions of *Restatement* § 51 that they urged the district court to apply—which they described as "effectively a statute that [the district court] is bound to follow." (4th Cir. J.A. 474.) *Restatement* § 51 calls for an inquiry into causal attribution: courts are to identify the profits "*attributable to* the defendant's interference with the claimant's legally protected rights." *Restatement (Third) of Restitution and Unjust Enrichment* § 51 cmt. a (emphasis added); see also 1 Dan B. Dobbs, *Law of Remedies* § 4.4(3) (2d ed. 1993) (advocating an approach that would "apportion the profits between the investments that produce them"). Consistent with the *Restatement*, ERISA courts have routinely evaluated causal attribution in cases involving disgorgement of profits. See, *e.g.*, *Wsol* v. *Fiduciary Mgmt. Assocs., Inc.*, 266 F.3d 654, 658 (7th Cir. 2001) (explaining that, if no "profits [were] obtained that differ from what they would have been had there been no breach of fiduciary duty, there is no remedy"); *Leigh* v. *Engle*, 858 F.2d 361, 366 (7th Cir. 1988) (affirming denial of disgorgement where profits "did not result from misuse of trust assets"); *Edmonson* v. *Lincoln Nat'l Life Ins. Co.*, 725 F.3d 406, 415 (3d Cir. 2013) (looking to the attribution standard of *Restatement* § 51). Following *Restatement* § 51, the district court determined as a factual matter that no profit resulted from the transfers. (Pet. App. 79.) The factual finding was not challenged in the court of appeals (Pet. App. 24), and it is sufficient on its own to support the judgment.

The petition's reading of ERISA § 502(a)(3) is striking. In Petitioners' view, a statute that empowers courts to award "appropriate equitable relief . . . to redress [ERISA] violations" prohibits judges from exercising their judgment based on the facts and circumstances of the case to deny or otherwise limit relief, even where there is an unchallenged factual finding of no causal connection between the wrong and the requested remedy. Petitioners do not cite any case for the proposition that a pre-merger equity court would consider causation or attribution "legally irrelevant" (*e.g.*, Pet. 4), and the *Restatement* suggests that both are quite relevant.

Moreover, this Court has made clear that courts have discretion to withhold an otherwise-available equitable remedy under § 502(a)(3) if they determine that the remedy would be inappropriate. See *CIGNA Corp.*, 563 U.S. at 442–43 (leaving it to the district court to decide whether it is "appropriate to exercise its discretion under § 502(a)(3) to impose [a given] remedy on remand").

Petitioners' contrary view—that in ERISA cases courts must wear factual blinders in deciding whether requested relief would achieve an equitable outcome—is based on a misreading of this Court's cases. First, Petitioners argue that this Court has established a general principle that ERISA courts must strictly adhere to the "law of equity" as reflected in "standard equity treatises and case law from the days of the divided bench." (Pet. 25.) For that principle, however, they look primarily to a line of cases beginning with *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), in which this Court has held that "equitable relief" within the meaning of ERISA § 502(a)(3) is limited to "those *categories* of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." 508 U.S. at 256 (first emphasis added). *Mertens* held that compensatory damages did not meet this standard. *Id.* at 255; *accord Great-W. Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210 (2002) (holding that a claim based on "a contractual obligation to pay money" did not either). The *Mertens* line of cases does not hold or even suggest that a district court is forbidden to exercise its discretion to deny a remedy based on the particular facts and circumstances. As the court of appeals recognized, those cases simply address the question of "what *forms* of 'equitable relief' [are] available" under ERISA § 502(a)(3). (Pet. App. 20.)

Petitioners thus turn to *McCutchen*, a case Petitioners now say "should have settled the question presented by this case" (Pet. 22), but that they did not even cite in their Fourth Circuit briefs. As the absence of *McCutchen* from Petitioners' briefing in the court of appeals suggests, the case does not help them. *McCutchen* holds simply that "equitable rules can[not] override the clear terms of a plan." 569 U.S. at 91. Like *Mertens*, it does not hold or even remotely suggest that § 502(a)(3) compels a district court to award relief even where the particular facts of the case establish that the relief would be inappropriate.[4]

II. EVEN IF THE QUESTION PRESENTED WERE SIGNIFICANT, THIS CASE WOULD BE A POOR VEHICLE FOR ADDRESSING IT.

Petitioners assert that this Court should decide whether ERISA § 502(a)(3) gives a district court "broad discretion" to set aside "the remedy that a pre-merger equity [court] would have awarded" based on "the judge's own concepts of fairness and justice." (Pet. 26.) And Petitioners further assert that this question is "dispositive," *i.e.*, that the outcome here turns entirely on "the meaning of the word 'appropriate' in ERISA § 502(a)(3)." (Pet. 31.) Not so. Even if there were a need to provide guidance regarding the meaning of "appropriate," this case would be a poor vehicle for doing so.

1. As an initial matter, the judgment is independently supported by findings, legal conclusions, and equitable determinations that have nothing to do with the meaning of "appropriate."

First, the district court found as a factual matter that the Plan did not retain a single dollar in profit related to the transfers. (Pet. App. 70–71.) That finding was based on "contemporaneous records that the Plan maintained in the ordinary course of business." (Pet. App. 55–56.) It was also based on an assessment of witness credibility. (Pet. App. 48 ("Defendants' experts provided evidence at trial that is more credible

---

[4] *Sereboff*, which Petitioners also did not cite in their Fourth Circuit briefs, is even further afield. There, this Court simply held that an equitable lien by agreement was a form of "equitable relief" that could properly be sought under ERISA § 502(a)(3). *See* 547 U.S. at 369.

than the testimony provided by the Plaintiffs' experts.").) In short, the district court found as a matter of fact that there were no profits to apportion.

Second, as noted above, the district court applied a principle of causal attribution that is deeply rooted in the law of equity. As the district court explained, the "accounting for profits" Plaintiffs sought requires "the identification and measurement of those gains to the defendant that should be regarded as unjust enrichment, in that they are properly *attributable to* the defendant's interference with the claimant's legally protected rights." (Pet. App. 83 (citing *Restatement (Third) of Restitution and Unjust Enrichment* § 51(5) & cmt. a).) The *Restatement* provision on which the district court relied directs courts to apply "such tests of causation and remoteness," make "such apportionments," and recognize "such credits or deductions . . . *as reason and fairness dictate*, consistent with the object of restitution."[5] *Restatement (Third) of Restitution and Unjust Enrichment* § 51(5) (emphasis added); see also 1 Dobbs, *supra*, § 4.4(3) ("some effort must be made to apportion the profits between the investments that produce them"). The legal principle of attribution—combined with the district court's findings regarding causation—fully supports the judgment here,

---

[5] *See also, e.g.*, *SEC* v. *First City Fin. Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("Since disgorgement primarily serves to prevent unjust enrichment, the court may exercise its equitable power only over property causally related to the wrongdoing."); *Peters Corp.* v. *N.M. Banquest Inv'rs Corp.*, 188 P.3d 1185, 1194 (N.M. 2008) (breach of fiduciary duty: "a causal connection must exist between the breach and the benefit sought to be disgorged"); *Uzyel* v. *Kadisha*, 188 Cal. App. 4th 866, 894 (2010) (breach of trust: disgorgement "involves questions of causation and remoteness, that is, how far to follow a chain of causation before deciding that the causal connection is too attenuated to justify a recovery").

irrespective of the meaning of "appropriate" under ERISA § 502(a)(3).

Third, the district court concluded, as a matter of equity, that the relief Plaintiffs sought would constitute a penalty. (Pet. App. 85.) This determination, too, has a strong pedigree in the law of equity. See, *e.g.*, *Restatement (Third) of Restitution and Unjust Enrichment* § 51(4) (explaining that the "object of restitution . . . is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty."). Because courts of equity have long denied punitive remedies without the help of the word "appropriate" in ERISA § 502(a)(3), the meaning of that word is not case-dispositive.

2. There are also significant waiver issues that could complicate this Court's review of the question presented. For example, although the petition does not cite *Restatement* § 51—which supports the district court's approach to causal attribution and its refusal to impose a penalty—that is the very provision that Petitioners said should govern in the district court. Petitioners even argued that the appropriate measure of unjust enrichment was "the net profit attributable to the underlying wrong," and that equity courts should avoid, "so far as possible, the imposition of a penalty." (4th Cir. J.A. 292 (quoting *Restatement (Third) of Restitution and Unjust Enrichment* § 51(4)) (emphasis omitted).) In fact, during opening statements, Plaintiffs argued that the "restatement, in particular Sections 51 and 53," was "effectively a statute that [the district court] is bound to follow." (4th Cir. J.A. 474) Thus, Petitioners should not be heard to argue that the district court was forbidden to engage in the very causal attribution analysis that the *Restatement* prescribes and that they urged the court to undertake.

In addition, Petitioners argue that the question presented "should have [been] settled" by *McCutchen*, and they further argue that the "Fourth Circuit did not consider itself bound" to what Petitioners believe that case holds. (Pet. 22.) But Petitioners did not even *cite McCutchen* to the panel, much less argue that it "settled" any question regarding the interpretation of § 502(a)(3). Thus, contrary to Petitioners' suggestion, there is nothing "unclear" about the "reasons" the Fourth Circuit did not rely on *McCutchen*. (Pet. 22.) Having failed to give the panel any reason to consider their arguments regarding *McCutchen*, Petitioners should not be permitted to advance an argument based on that case in this Court.

3. Finally, Respondents have substantial equitable defenses that introduce further complexity. Petitioners themselves acknowledge that claims under ERISA § 502(a)(3) must take "traditional equitable defenses" into account. (Pet. 3.) Respondents have asserted such "traditional" defenses, including "laches, estoppel, and consent." (Pet. App. 51-52 n.1.)

Respondents' consent defense is a case in point. The petition repeatedly turns to authorities that discuss "wrongful" commingling of money (see, *e.g.*, Pet. 12–15), but Respondents' consent defense casts serious doubt on the relevance of those authorities. To be sure, the transfers may have violated ERISA § 204(g)(1) by eliminating a "separate account feature," but Petitioners affirmatively opted in to the transfer and received valuable guarantees against investment losses for doing so. Does a rule governing "wrongful" commingling also apply where a plaintiff expressly and knowingly directed that the funds be commingled? The district court did not need to address this question, because the court found that no profits were retained as a result of the transfer. Setting that factual finding to one side, however, Petitioners' consent would make any award of profits inappropriate in this case, even if only "traditional" equitable defenses were to apply.

Because the question presented is not dispositive, because Petitioners waived key issues below, and because Respondents' equitable defenses will complicate this Court's review, this case is a hopelessly inapt vehicle for addressing the question presented.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

Respectfully submitted,

ANNE E. REA
DAVID F. GRAHAM
TACY F. FLINT
STEVEN J. HOROWITZ
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

CARTER G. PHILLIPS*
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondent

January 17, 2019

* Counsel of Record