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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	5
I. The Bank Concedes that the Court Still Has Not Resolved When Relief is "Appropriate" Under ERISA § 502(a)(3)	5
II. If in Doubt About the Solicitor General's Current Views, the Court Should Invite an Update	7
III. The Bank's Policy Arguments Have Repeatedly Been Rejected by this Court	7
IV. There Are No Vehicle Problems	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 8

CGI Technologies & Solutions Inc. v. Rose, 683 F.3d 1113 (9th Cir. 2012) 6

CIGNA Corp. v. Amara, 563 U.S. 421 (2011) 8

Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999) 10

Holland v. Florida, 560 U.S. 631 (2010) 9

Lonchar v. Thomas, 517 U.S. 314 (1996) 8, 9, 10

MacBryde v. Burnett, 132 F.2d 898 (4th Cir. 1942) 7

Mertens v. Hewitt Associates, 508 U.S. 248 (1993) 8

Missouri v. Jenkins, 515 U.S. 70 (1995) 8

Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan, 136 S.Ct. 651 (2016) 2, 8, 10

Pender v. Bank of Am. Corp., 788 F.3d 354 (4th Cir. 2015) 3, 12, 13

Plumley v. Austin, 135 S.Ct. 828 (2015) 4

SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S.Ct. 954 (2017) 13

TABLE OF AUTHORITIES—Continued

Page

Smith v. United States, 502 U.S. 1017 (1991) 4

US Airways, Inc. v. McCutchen, 569 U.S. 88 (2013) ....*passim*

STATUTES

ERISA § 502(a)(3) ....*passim*

OTHER AUTHORITIES

1 Dan B. Dobbs, Law of Remedies §2.4(7) (2d ed. 1993) 9, 10

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Brief for the United States as Amicus Curiae, *Sereboff v. Mid Atl. Med. Servs., Inc*. (Feb. 23, 2006) (No. 05-260) 6

Adam Liptak, *Courts Write Decisions that Elude Long View*, N.Y. Times (Feb. 2, 2015).......................4

Restatement (Third) of Restitution § 59, Reptr's Notes to cmt. g (2011) 9

INTRODUCTION

The Bank of America's opposition brief confirms that this case meets the criteria for grant of certiorari. Though the Bank attempts to distract the Court with question-begging conclusions reached by the district court ("The district court found that Defendants did not retain any profit from the challenged transaction"), the Bank concedes that the petition presents a pure question of law of obvious importance—namely, in the Bank's words: "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"—if it is clear that an ***equity court*** during the days of the divided bench would have reached the opposite conclusion and ordered the remedy on the facts presented. Opp. i (emphasis added).

Said another way, the question is: What is the *legal standard* for determining whether a remedy is not only "equitable" within the meaning of ERISA § 502(a)(3), but also "appropriate." Is the remedy appropriate if a present-day district court judge thinks it is fair based on his own modern sensibilities, as Judge Wynn's panel majority opinion holds? Or is the remedy appropriate if a *pre-merger equity court* would have awarded the remedy on the facts presented, based on the application of traditional rules and principles under the "law of equity" reflected in the standard treatises and case law of the day, as Judge Keenan's dissent maintains?

If Judge Wynn's interpretation stands, 25 years of this Court's efforts 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 v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S.Ct. 651, 657 (2016), have been for naught. If the modifier "appropriate" gives an ERISA court freewheeling 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," *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100 (2013), is all but pointless. *See* Pet. 25-27.

The Bank's lead argument—that the district judge's assessment of the equities was well-grounded in his findings of fact—entirely misses the point, begging the question of what *standard* the judge was required to use to make his assessment. The judge's finding that the Bank "did not retain any profit" from its illegal strategy (Opp. i) is of no help to the Bank, because the finding was premised on the judge's assumption that he had discretion to measure "profit" in a manner that *he* thought was appropriate, not the measurement that a pre-merger equity court would have used. As Judge Keenan explains in her dissent, this makes the judge's "finding" beside the point, since it "answered the wrong question." Pet. App. 34-35 ("The undisputed evidence showed that . . . the 'pot' actually profited by about $379 million, including accrued interest. In concluding that these profits from the commingled funds were not attributable to the Bank's 'transfer

strategy,' the district court answered the wrong question").[1]

The Bank's other main argument—that the question posed by the petition was already answered 6 years ago in *McCutchen*; and that Plaintiffs purportedly concede as much—is remarkably disingenuous (as shown below), and a telling indication that the Bank has no legitimate basis for opposing certiorari.

The same can be said of the Bank's suggestion that the panel majority's decision not to publish its 26-page opinion (and 5-page dissent) is a reason to deny certiorari. To the contrary. As Justices Thomas and Scalia said in their dissent from the denial of certiorari in another recent Fourth Circuit case:

> True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit. But that in itself is yet another disturbing aspect of the Fourth Circuit's decision, and yet another reason to

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[1] The Bank's contention that "Contrary to Petitioners' assertion (Pet. 8), there has never been a 'Bank-controlled fund' that could 'generate investment profits' for the Bank," Opp. 3 n.2, is untrue. The Bank admits that the motive for its illegal commingling strategy was to use earnings on participants' 401(k) balances "to defray the costs of plan administration." Opp. 4. As the Court of Appeals explained, "[a]lthough the Bank characterized the primary effect of the transfer [strategy] as generating 'savings,' the difference between savings and profit in this context is merely semantic. Regardless of which term is used, the Bank made money." *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 359 n.3 (4th Cir. 2015).

> grant review. The Court of Appeals had full briefing and argument on [plaintiff's] claim. . . . It analyzed the claim in a 39-page opinion written over a dissent. By any standard—and certainly by the Fourth Circuit's own—this decision should have been published. . . . It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit.

Plumley v. Austin, 135 S.Ct. 828, 831 (2015) (mem.) (Thomas and Scalia, JJ., dissenting from denial of certiorari) (citations omitted).[2]

Finally, the purported vehicle problems proffered by the Bank are premised on the assumption that the Bank is correct that the district court judge's personal sense of the equities is relevant. But as noted above, the *question* is whether the judge's personal view is relevant; and the case squarely presents *that* question. The conclusions that the district court reached by

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[2] *See also Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (mem.) (Blackmun, J., dissenting from denial of certiorari) ("Nonpublication must not be a convenient means to prevent review"); Adam Liptak, *Courts Write Decisions that Elude Long View*, N.Y. Times (Feb. 2, 2015), http://www.nytimes.com/2015/02/03/us/justice-clarence-thomas-court-decisions-that-set-no-precedent.html ("In a 2006 interview, Justice John Paul Stevens said he was more likely to vote to grant review of such rulings 'on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify' ").

applying the wrong standard do not make the case any less worthy of review

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ARGUMENT

I. The Bank Concedes that the Court Still Has Not Resolved When Relief is "Appropriate" Under ERISA § 502(a)(3)

The Bank asserts that while the Solicitor General may have been correct in 2006 that "[t]his Court has not defined when relief is 'appropriate' under Section 502(a)(3)," the Court has addressed the meaning of § 502(a)(3) four times since that observation, 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." Opp. 2, 9. Indeed, says the Bank, "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).'" Opp. 2 (Bank's alteration); *see also id*. at 10.

There are several problems with the Bank's storyline:

1. First, there undeniably was a circuit split regarding the meaning of "appropriate" equitable relief under § 502(a)(3) that remained unresolved as of 2012. This Court said so. In *McCutchen*, the Court granted certiorari "to resolve a circuit split" regarding the legal standard for adjudicating a defendant's contention

that the relief requested by plaintiff "although 'equitable,' was not 'appropriate' under § 502(a)(3)." 569 U.S. at 97-98; *see also id.* at 94 & n.2. The Court cited as an example *CGI Technologies & Solutions Inc. v. Rose*, 683 F.3d 1113 (9th Cir. 2012), which concluded that "the [Supreme] Court has not yet squarely addressed wh[at] the statutory term '*appropriate* equitable relief'" means. *Id*. at 1120.

2. Second, the Bank's assertion—that "Petitioners' own view" is that *McCutchen* resolved the question—is patently false. The petition says point blank that "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." Pet. 4-5.

3. Third, the Bank itself concedes that *McCutchen* did not resolve the confusion. By the Bank's own telling, *McCutchen*'s holding was narrowly limited to the meaning of "appropriate" relief in the context of an equitable lien by agreement, the specific remedy at issue in that case. In the Bank's words: "*McCutchen* holds simply that 'equitable rules can[not] override the clear terms of a plan'"; it did not prescribe a framework for determining whether equitable relief is "appropriate." Opp. 13-14 (Bank's alteration); *see also id*. at 14 ("the case does not help" Plaintiffs).

What was true in 2006 remains true today: "This Court has not defined when relief is 'appropriate' under Section 502(a)(3)." Brief for the United States as

Amicus Curiae, *Sereboff v. Mid Atl. Med. Servs., Inc.* (Feb. 23, 2006) (No. 05-260), p.27.

II. If in Doubt About the Solicitor General's Current Views, the Court Should Invite an Update

The Bank is of course correct that the Solicitor General's observation is now 13 years old, and "[w]hat matters is whether this case presents an important unresolved question of federal law that justifies this Court's intervention *now*." Opp. 10. If the Court harbors any doubts about the Government's current take on the matter, it should invite the Solicitor to update his views.

III. The Bank's Policy Arguments Have Repeatedly Been Rejected by this Court

The Bank argues that "[t]he petition's reading of ERISA § 502(a)(3) is striking" because Plaintiffs argue that instead of consulting his own sense of fairness, the district court judge should have applied the classic "law of equity" reflected in pre-merger Restatements, treatises, and case law to determine the relief that a pre-merger equity chancellor would have deemed appropriate. Opp. 13-14. But as Judge Keenan recognized, that is precisely what this Court's precedents governing the meaning of "equitable relief" in § 502(a)(3) strongly suggest is required. Pet. App. 32-35 ("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"). *See*, *e.g.*, *Mertens v. Hewitt Associates*, 508 U.S. 248, 259 n.9 (1993) (rejecting interpretation that courts in ERISA cases "are free to craft whatever relief is most appropriate").[3]

Judge Wynn's majority opinion acknowledges that if "appropriate" equitable relief meant the relief that a *pre-merger equity court* would have considered appropriate, Plaintiffs would be entitled to their proportionate share of the commingled fund's 28.6% profit. Pet. App. 14-16. It is only because the majority thought that the word "appropriate" gave the district court broad discretion to "consider other approaches" that the Bank prevailed. Pet. App. 23; *see also id*. at 19.

According to Judge Wynn, nothing in this Court's precedents "*requires* courts [in equity cases] to invariably follow equitable rules." Pet. App. 19. The statement is startling—because it is so demonstrably incorrect. As the Court explained in *Lonchar v. Thomas*, 517 U.S. 314 (1996), as it has in countless other cases before and since:

> "[C]ourts of equity must be governed by rules and precedents no less than the courts of law." *Missouri v. Jenkins*, 515 U.S. 70, 127 (1995) (THOMAS, J., concurring). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).

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[3] *See also Montanile*, 136 S.Ct. at 655-62 & n.3 (2016) (rejecting notion that *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) effectively overruled *Mertens* and its progeny).

> As Selden pointed out so many years ago, the alternative is to use each equity chancellor's conscience as a measure of equity, which alternative would be as arbitrary and uncertain as measuring distance by the length of each chancellor's foot. See 1 J. Story, Commentaries on Equity Jurisprudence 16 (13th ed. 1886).

Lonchar, 517 U.S. at 323 (citations abbreviated).

Judge Wynn's error flowed from a misreading of *Holland v. Florida*, 560 U.S. 631 (2010). *See* Pet. App. 19. *Holland* explains that equity does not require adherence to often-rigid "*legal* rules"—which is why equity developed different, often more flexible, equitable rules. *Holland*, 560 U.S. at 649-50. But nothing in *Holland* suggests that those *equitable rules* are optional in an equity case. To the contrary, "equitable discretion has never meant that [equitable] rules are either applied or ignored as the chancellor might elect." Restatement (Third) of Restitution § 59, Reptr's Notes to cmt. g (2011).

"[I]n a democratic society where citizens possess rights under the law, not merely the hope of indulgence," it could be no other way. 1 Dan B. Dobbs, Law of Remedies §2.4(7), at 115 (2d ed. 1993). As Dobbs explains:

> A system with "no standard" is a system that frees judges from the (limited) constraints imposed by legal rules and principles and allows them to decide as their attitudes or biases

> move them, without analysis and without law. Judges do not generally act in bad faith; but the absence of meaningful guidelines or rules invites judges to do the right thing as they feel it to be, without an effort to bring us a common set of rules, a common understanding of the principles on which judges themselves act, or even a sense of our common rights as citizens.

Id. at 117. Accord *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 321 (1999) (discussing the proper "role of equity in our 'government of laws, not of men'"); *Lonchar*, 517 U.S. at 323 ("'There is no such thing in the Law, as Writs of Grace and Favour issuing from the Judges'").

To be sure, equitable discretion can be an invaluable tool—but it is a tool this Court has repeatedly held must be wielded in ERISA cases in the way an equity court "during the days of the divided bench" would have wielded it. *Montanile*, 136 S.Ct. at 657. As the Court counseled in *Grupo Mexicano*: "We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief." 527 U.S. at 322. This principle is particularly clear under this Court's ERISA remedies jurisprudence.

Judge Keenan's dissent captures the point: no federal district court judge, however well-intentioned, should have "discretion" to "reject[] an established

equitable remedy in favor of preserving the [wrongdoer's] profit margin." Pet. App. 35.

The Bank notes that Judge Keenan "'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" without regard to the specific facts at issue. Opp. 7 (alteration in original). Plaintiffs have never said otherwise: of course the facts matter. And as Judge Keenan found, on the undisputed facts in this case, an equity court would have awarded Plaintiffs their proportionate share of the investment profits generated with their 401(k) savings. Pet. App. 32-35.

IV. There Are No Vehicle Problems

The Bank argues that this case is a poor vehicle for addressing what "appropriate" equitable relief means, because "the judgment is independently supported by findings, legal conclusions, and equitable determinations that have nothing to do with the meaning of 'appropriate.'" Opp. 15. The truth is, the judgment is *only* supported by findings, conclusions, and determinations that have nothing to do with the meaning of "appropriate" under ERISA § 502(a)(3)—which is exactly why the decision below is wrong.

Whether the district court's "findings, legal conclusions, and equitable determinations" are right or wrong is not something this Court (or the Court of Appeals on remand) would need to address—because they have no bearing on the question presented or the

ultimate outcome of this case. The question, to repeat, is the *legal standard* for assessing whether a particular equitable remedy is appropriate. In Judge Keenan's words, "we are not presented with an issue of competing facts that we review for clear error." Pet. App. 35. The outcome of the case revolves purely on the meaning of "appropriate" equitable relief under ERISA § 502(a)(3).

If the legal standard is historical ("what remedy would a pre-merger equity court have considered to be appropriate"), the Court of Appeals has already said that Plaintiffs are entitled to their proportionate share of the 28.6% investment profit earned in part with their 401(k) savings. If the standard is personal ("what remedy does the district judge think is appropriate"), Plaintiffs lose—because they did not challenge the district court's "findings, legal conclusions, and equitable determinations" on appeal (on the grounds that those findings, conclusions, and determinations were beside the point—*i.e.*, they "answered the wrong question," Pet. App. 35).

The Bank's "issue waiver" arguments are pure make-weight. The Bank did not argue in the Court of Appeals, nor does it argue here, that Plaintiffs waived the question presented: what ERISA § 502(a)(3) means by "appropriate" equitable relief.

Finally, the Bank's purported equitable defenses were already considered and rejected by the Court of Appeals in *Pender v. Bank of Am. Corp.*, 788 F.3d 354 (4th Cir. 2015). The Bank argued that equitable

principles "foreclose[d] any claim for equitable relief in this case" because a "demand for equitable relief is subject to equitable defenses, including the defenses based on Plaintiffs' consent." 4th Cir. Case No. 14-1011, Dkt. 29 (Bank Resp. Br.) at 45-46. The Bank also argued that Plaintiffs' demand for relief was time-barred. *Id*. at 46-58. The Court of Appeals rejected both arguments, holding that Plaintiffs were entitled to the "equitable remedy of accounting for profits." *Pender*, 788 F.3d at 365.[4]

[4] While *Pender* did not specifically address "laches," the court's rejection of the Bank's limitations defense was dispositive, since "[a]pplying laches within a limitations period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S.Ct. 954, 960 (2017). As *Pender* recognized, the limitations period specified by Congress for ERISA claims is the period for analogous claims under state law. 788 F.3d at 368.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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