No. 20-28

IN THE
Supreme Court of the United States

PRICEWATERHOUSECOOPERS LLP, ET AL.,

Petitioners,

v.

TIMOTHY D. LAURENT, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE.................................. 5

REASONS FOR DENYING THE PETITION......... 10

I. ON THE QUESTION PRESENTED, THE COURT OF APPEALS FAITHFULLY APPLIED ERISA AND THIS COURT'S ERISA PRECEDENTS 11

II. THERE IS NO CIRCUIT CONFLICT REGARDING THE AVAILABILITY OF REFORMATION FOLLOWED BY ENFORCEMENT OF THE PLAN AS REFORMED 24

III. THE SECOND CIRCUIT'S CONCLUSION THAT REFORMATION IS AVAILABLE TO REDRESS A PLAN'S VIOLATION OF ERISA IS ALSO CONSISTENT WITH THIS COURT'S PRECEDENTS AND DECISIONS OF OTHER CIRCUITS.. 28

IV. THIS CASE IS A POOR VEHICLE FOR REVIEW.. 32

CONCLUSION.. 34

TABLE OF APPENDIX

APPENDIX A: 1999 Letter from
PricewaterhouseCoopers LLP to
U.S. Treasury Department, 1999 TNT 222-
22 (Nov. 18, 1999) (Dist. Ct. Dkt. 133-1)............ 1a

TABLE OF AUTHORITIES

PAGE

CASES

American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.,
148 U.S. 372 (1893) 33

Barrow v. Falck,
11 F.3d 729 (7th Cir. 1993) 9

Berger v. Xerox Corp. Ret. Income Guar. Plan,
338 F.3d 755 (7th Cir. 2003) 5, 22, 30

Central Laborers' Pension Fund v. Heinz,
541 U.S. 739 (2004) 21

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

Clarksburg Tr. Co. v. Commercial Cas. Ins. Co.,
40 F.2d 626 (4th Cir. 1930) 15

Conkright v. Frommert,
559 U.S. 506 (2010) 5, 22, 23

Contilli v. Local 705 Int'l Bhd. of Teamsters Pension Fund,
559 F.3d 720 (7th Cir. 2009) 22

Costantino v. TRW, Inc.,
13 F.3d 969 (6th Cir. 1994) 22

Dameron v. Jamison,
4 Mo. App. 299 (1877) 16

Eichorn v. AT&T Corp.,
484 F.3d 644 (3d Cir. 2007) 25

England v. Marriott Int'l,
764 F. Supp. 2d 761 (D. Md. 2011)......................32

Epstein v. United States,
174 F.2d 754 (6th Cir. 1949)................................30

Esden v. Bank of Boston,
229 F.3d 154 (2d Cir. 2000) 5, 22, 23

Firestone Tire & Rubber Co. v. Bruch,
489 U.S. 101 (1989)..3, 19

Great-West Life & Annuity Ins. Co. v. Knudson,
534 U.S. 204 (2002)..13, 18

Hill v. Blue Cross & Blue Shield of Mich.,
409 F.3d 710 (6th Cir. 2005)................................19

Hogg v. Maxwell,
218 F. 356 (2d Cir. 1914) 16

Ivinson v. Hutton,
98 U.S. 79 (1881)..29, 30

Johnson v. Meriter Health Servs. Emp. Ret. Plan,
702 F.3d 364 (7th Cir. 2012)..........................17, 32

Kifafi v. Hilton Hotels Ret. Plan,
701 F.3d 718 (D.C. Cir. 2012)..............................22

Laurent v. PricewaterhouseCoopers LLP,
794 F.3d 272 (2d Cir. 2015) 6, 7, 30

Liberty Mut. Ins. Co. v. Wetzel,
424 U.S. 737 (1976)..2, 14

Mass. Mut. Life Ins. Co. v. Russell,
473 U.S. 134 (1985)..3, 19

McDonald v. Pension Plan of NYSA-ILA Pension Tr. Fund,
320 F.3d 151 (2d Cir. 2003) 22

Mertens v. Hewitt Assocs.,
508 U.S. 248 (1993)..18

Miller v. Xerox Corp. Ret. Income Guar. Plan,
464 F.3d 871 (9th Cir. 2006)..................................22

Montanile v. Bd. of Trustees of Nat'l Elevator Indus. Health Benefit Plan,
136 S. Ct. 651 (2016)..2, 29

Moyle v. Liberty Mut. Ret. Benefit Plan,
823 F.3d 948 (9th Cir. 2016)..................................27

N.Y. State Psychiatric Ass'n v. UnitedHealth Grp.,
798 F.3d 125 (2d Cir. 2015) 19

Northern Assur. Co. v. Grand View Bldg. Ass'n,
203 U.S. 106 (1906)..15

Page v. PBGC,
968 F.2d 1310 (D.C. Cir. 1992)............................32

Palmer Steel & Iron Co. v. Heat, Light & Power Co.,
66 N.E. 690 (Ind. 1903)..16

Pender v. Bank of Am. Corp.,
788 F.3d 354 (4th Cir. 2015)....................21, 26, 30

Ross v. Bernhard,
396 U.S. 531 (1970)..3, 14

Ross v. Rail Car Am. Grp. Disability Income Plan,
285 F.3d 735 (8th Cir. 2002)..........................27, 28

SEC v. Capital Gains Research Bureau, Inc.,
375 U.S. 180 (1963)..30

Sereboff v. Mid Atl. Med. Servs., Inc.,
547 U.S. 356 (2006)..31

Smith v. Bear,
237 F.2d 79 (2d Cir. 1956)...............................3, 14

Stephens v. U.S. Airways Grp., Inc.,
644 F.3d 437 (D.C. Cir. 2011)..........................5, 24

Thompson v. Ret. Plan for Emps. of S.C. Johnson & Son, Inc.,
651 F.3d 600 (7th Cir. 2011)................................22

Todisco v. Verizon Commc'ns, Inc.,
497 F.3d 95 (1st Cir. 2007)............................26, 27

Virginia Military Inst. v. United States,
508 U.S. 946 (1993)..32

West v. AK Steel Corp.,
484 F.3d 395 (6th Cir. 2007)................................22

Williams v. Rohm & Haas Pension Plan,
497 F.3d 710 (7th Cir. 2007)................................34

RULES

Fed. R. Civ. P. 8(a)(3) 3

Fed. R. Civ. P. 12 ....7, 8

Fed. R. Civ. P. 18 2

STATUTES

29 U.S.C. § 1001 (ERISA § 2) 5

29 U.S.C. § 1002 (ERISA § 3) 5

29 U.S.C. § 1054 (ERISA § 204) 5

29 U.S.C. § 1132 (ERISA § 502) .... *passim*

OTHER AUTHORITIES

Dobbs, *Law of Remedies* (2d ed. 1993) 2, 13, 14, 15

Hearing on Hybrid Pension Plans Before the S. Comm. on Health, Educ., Labor and Pensions, 106 Cong. (1999) 23

S. Symons, *Pomeroy's Equity Jurisprudence* (5th ed. 1941)....................... *passim*

Wright & Miller, Federal Practice & Procedure (3d ed. 2020) 3, 14

INTRODUCTION

The petition for review of the ruling below is based on a false premise. The Second Circuit did not, as PricewaterhouseCoopers ("PwC") contends, invent a new "hybrid remedy" that distorts the "carefully crafted and detailed enforcement scheme" of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Pet. 2 (internal quotation marks omitted). Instead, the court held that ERISA authorizes both of the distinct forms of relief sought in the Complaint: (1) "An order … reforming the Plan, and compelling Defendants to bring the terms and administration of the Plan into compliance with ERISA … effective as of the date the alleged violations first occurred," and (2) "An order requiring Defendants to re-calculate the benefits" under the Plan-as-reformed. Dist. Ct. Dkt. 1 ("Compl.") at 26-27; Pet. App. 9a-10a.

This Court confirmed nine years ago in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), that both forms of relief are independently authorized by ERISA's remedial provisions.

First, ERISA § 502(a)(3) authorizes "appropriate equitable relief" to enforce the provisions of ERISA Title I and to "redress [] violations of … ERISA." 29 U.S.C. § 1132(a)(3). Under *Amara*, "[r]eformation of the terms of the plan" is one of the remedies that can be awarded as "appropriate equitable relief" under § 502(a)(3). 563 U.S. at 440-42. This traditional equitable remedy revises a contract's written terms "to remove a legal obstacle to the full enjoyment of the plaintiff's right." 1 S. Symons, *Pomeroy's Equity*

Jurisprudence § 112, at 145 (5th ed. 1941) ("Pomeroy").

The second remedy, "recovery of the benefits provided by the 'terms of [the] plan' *as reformed*" is "consistent with § 502(a)(1)(B)." *Amara*, 563 U.S. at 435 (emphasis and alteration in original).

Equity's "standard treatises," *see Montanile v. Bd. of Trustees of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016), confirm that a court may award both remedies in the same case. Indeed:

> Reformation is almost always sought so that some other remedy may then be pursued. For instance, the contract is reformed, and the plaintiff can then show that, as reformed, the contract was breached. He can then claim restitution, damages, or specific performance. Reformation is thus usually a way station, a precursor to some other and final remedy.

1 Dobbs, *Law of Remedies* § 4.3(7), at 618 (2d ed. 1993) ("Dobbs"). *See also* 4 Pomeroy § 1375, at 999 (similar); Dobbs § 1.1, at 3 (a "plaintiff can have more than one remedy so long as the total does not provide more than one complete compensation or one complete restitution").

The Federal Rules of Civil Procedure similarly authorize a party to "join … as many claims as it has against an opposing party," "even though one of [the claims] is contingent on the disposition of the other." Fed. R. Civ. P. 18. Thus, "a complaint asserting only one legal right [may seek] multiple remedies for the alleged violation of that right." *Liberty Mut. Ins. Co.*

v. Wetzel, 424 U.S. 737, 743 & n.4 (1976) (citing Fed. R. Civ. P. 8(a)(3)).

A court also may award "legal and equitable relief cumulatively" in the same action, 5 Wright & Miller, Federal Practice & Procedure § 1257 (3d ed. 2020), because "[u]nder the Rules there is [now] only one action—a 'civil action'—in which all claims may be joined and all remedies are available" without regard to "the difference between law and equity." *Ross v. Bernhard*, 396 U.S. 531, 539-40 (1970). It is particularly well established that a court may award both of the remedies at issue in this case: a "plaintiff is entitled to pursue his claim for equitable relief, *i.e.*, for reformation, in the same action as his suit on the contract-as-reformed." *Smith v. Bear*, 237 F.2d 79, 86 (2d Cir. 1956).

PwC's suggestion that ERISA overrides these well-established principles and limits each ERISA plaintiff to relief under only one subsection, Pet. 14, 22-23, finds no purchase in ERISA's text or legislative history and is refuted by this Court's precedents. *E.g.*, *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (relief could be awarded under both ERISA § 502(a)(1)(B) and § 502(a)(2)); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 106 (1989) (relief could be awarded under both § 502(a)(1)(A) and § 502(a)(1)(B)). Tellingly, the Petition does not cite a single authority that says otherwise.

The Petition's attempt to manufacture a conflict with other circuits also fails. None of the cited circuit decisions addressed requests by an ERISA plaintiff for the two distinct forms of relief that the Court of Appeals held were available here: (1) the traditional

equitable remedy of reformation, under § 502(a)(3); and (2) payment of benefits under the plan-as-reformed, under § 502(a)(1)(B).

The truth, as PwC admitted four years ago (Dist. Ct. Dkt. 211, at 15), is that no court at any level, save the district court below, has ever held that retired participants cannot sue to recover pension benefits that were unlawfully forfeited pursuant to plan terms that violate the statute. To the contrary, courts, including this one, have been awarding and endorsing that relief in ERISA cases for 46 years.

PwC's contention that the Second Circuit improperly combined the two discrete remedies of reformation and enforcement into a single "hybrid" is also inconsistent with PwC's post-remand arguments in the district court. PwC recently admitted that the Second Circuit's ruling authorizes the district court to award "two distinct forms of relief" for Plaintiffs' "two separate claims." Dist. Ct. Dkt. 261, at 10. In PwC's own words: "Plaintiffs' § 502(a)(3) claim begins and ends with reformation, without an associated claim for contract damages. And Plaintiffs' § 502(a)(1)(B) claim only seeks such damages." Dist. Ct. Dkt. 265, at 2.[1]

This case is also a poor vehicle for review of the Question Presented. Respondents ("Retirees") made multiple arguments in the Court of Appeals that would have supported the same outcome on different grounds. The Court of Appeals did not address those

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[1] As explained below, *infra* at 17, "damages" does not accurately characterize the monetary relief Retirees seek in this case. What they seek are the pension "benefits due" to them under the terms of the Plan after it is reformed to comply with ERISA.

questions, saying its ruling made them unnecessary to consider. Pet. App. 4a n.1, 16a n.4, 19a. There are also substantive motions now pending in the district court. If a final judgment in this case rests on the same remedies that PwC challenges here, it can seek review at that time.

The Petition should be denied.

STATEMENT OF THE CASE

"Congress enacted ERISA to ensure that employees would receive the benefits they had earned." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). *See* ERISA § 2(a), 29 U.S.C. § 1001(a).

The statute's "actuarial equivalen[ce]" requirement, ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), is integral to this objective. Under ERISA, a defined-benefit plan participant's "accrued benefit" is defined in terms of the annuity payable under the plan at normal retirement age. ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). The actuarial equivalence requirement states that "if a pension plan allows retirees to select a lump sum payment in lieu of an annuity … the lump sum must 'be worth at least as much as that annuity.'" *Stephens v. U.S. Airways Grp., Inc.*, 644 F.3d 437, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (quoting *Esden v. Bank of Boston*, 229 F.3d 154, 163 (2d Cir. 2000)). The rule protects plan participants by ensuring that they do not unwittingly "sell their pension entitlement back to the company cheap." *Berger v. Xerox Corp. Ret. Income Guar. Plan*, 338 F.3d 755, 762 (7th Cir. 2003) (Posner, J.).

In defined-benefit pension plans of the cash-balance variety at issue here, the actuarial equivalence requirement is called a "whipsaw" calculation. Until ERISA was amended prospectively in 2006, courts uniformly held that ERISA's nonforfeiture provisions required such plans to include the whipsaw calculation. *See Laurent v. PricewaterhouseCoopers LLP*, 794 F.3d 272, 275-76 (2d Cir. 2015) ("*Laurent V*").

Petitioner PwC, however, devised a scheme to circumvent this nonforfeiture rule by inserting a provision into its retirement Plan that purported to define the "normal retirement age" of its white-collar employees as five years on the job—*e.g.*, age 27 for an accountant or secretary hired at age 22. Pet. App. 6a; App. 3a-4a, 12a, 16a. PwC openly argued that this artificial normal retirement age "foiled" whipsaw and allowed PwC and clients of its large pension consulting practice to "exploit[]" other perceived loopholes in ERISA to "manipulat[e]" the statute "in previously unimagined ways." *Id.* at 15a-16a.

Respondents filed suit in March 2006, challenging the five-year retirement age as an illegal contrivance that had caused them to forfeit part of the value of their vested accrued pension benefits when they received lump-sum benefits on leaving PwC's employment. The Complaint's Prayer for Relief requested (1) "An order … reforming the Plan, and compelling Defendants to bring the terms and administration of the Plan into compliance with ERISA … effective as of the date the alleged violations first occurred," and (2) "An order requiring Defendants to re-calculate the benefits" under the Plan-as-reformed. Compl. at 26-27. In August 2006

Congress amended the statute to eliminate the whipsaw requirement prospectively. *See Laurent V*, 794 F.3d at 276.

In motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure that PwC pressed repeatedly over the years, PwC argued that the Plan did not violate ERISA. Different district court judges who were assigned to the case, including Judges Mukasey and Oetken, successively denied those motions. *See Laurent V*, 794 F.3d at 277-78. In 2014, the Second Circuit granted PwC's petition for interlocutory appeal from the last of those rulings (the "2014 First Appeal"). In briefing that Appeal, PwC conceded that if the Court of Appeals agreed with Retirees that the retirement-age contrivance was illegal, the Plan would need "*to recalculate Plaintiffs' benefits*" under the terms of the Plan as reformed to comply with ERISA. Dkt. 56 in No. 14-1179, at 1 (emphasis added); *see also id*. at 20.

In 2015 the Second Circuit unanimously held that the PwC Plan's terms violated ERISA's nonforfeiture rules and unlawfully "deprived plaintiffs of the actuarial equivalent of" their accrued benefits, "effectively penaliz[ing] employees based on the time when, and form in which, they [took] their distribution." *Laurent V*, 794 F.3d at 286. This Court denied PwC's petition for certiorari. 136 S. Ct. 981.

Following remand, both the district court and PwC said that they understood the Second Circuit's mandate to require the court to (1) reform the Plan's terms to bring them into compliance with ERISA, and then (2) enforce the terms of the revised Plan by ordering

recalculation of the pension benefits owed to Retirees under its corrected terms. Dist. Ct. Dkt. 202, at 3-4.

But seven months later, as pre-trial discovery was coming to a close, PwC filed another Rule 12 motion seeking dismissal of the Complaint on a new theory: that even if the Plan had violated ERISA, Congress provided no avenue for relief to participants seeking to recover benefits illegally forfeited pursuant to plan terms that violate the statute. Dist. Ct. Dkt. 211, at 25.

Despite PwC's acknowledgment that its novel interpretation "fl[ies] in the face of all prior [plan illegality] cases," *id.* at 15, the district court accepted the theory and dismissed the Complaint. The court concluded that it was powerless to come to the aid of retirees whose benefits had been illegally forfeited, because: (1) "the terms of the Plan speak clearly"—*i.e.*, its terms made clear that PwC's "intent" was to flout the statute, not comply with it, Pet. App. 35a; and (2) "judicial reformation under ERISA § 502(a)(3) is not available where a plaintiff seeks to impose personal liability on respondents for a contractual obligation to pay money," *id.* at 39a (internal quotation marks omitted).

Retirees appealed (the "2018 Second Appeal"), arguing that the district court's ruling was both wrong on the merits and foreclosed as a violation of the mandate waiver rule. Pet. App. 4a & n.1. On the merits, Retirees argued that when a plan violates ERISA's required minimum standards, the appropriate relief is to reform the plan under § 502(a)(3) to comply with ERISA and then order benefits to be recalculated under the reformed plan

under § 502(a)(1)(B), Dkt. 59 in No. 18-487 ("Retirees' CA2 Br.") at 29-30, 41-42; or that, alternatively, the same result can be reached under § 502(a)(1)(B) alone, on the basis that the phrase "terms of the plan" in that provision incorporates terms required by Title I. *Id.* at 30. Procedurally, Retirees argued (*id.* at 50-51) that PwC could have raised its "no remedy" theory as an additional ground for dismissal of the Complaint in the 2014 First Appeal, and that under the mandate waiver rule "[a]n argument bypassed by the litigants, and therefore not presented in the court of appeals, may not be resurrected on remand." *Barrow v. Falck*, 11 F.3d 729, 730-31 (7th Cir. 1993) (Easterbrook, J.).

The Department of Labor appeared as amicus curiae supporting Retirees on the merits. Dkt. 69 in No. 18-487 ("Labor Dep't CA2 Amicus Br."). Contrary to the Petition's assertion that the Government "did *not* … endorse [relief under] both § 502(a)(1)(B) and § 502(a)(3)," Pet. 12, the Government agreed with Retirees that reformation "is authorized under § 502(a)(3)" and enforcement of the plan-as-reformed "is authorized under § 502(a)(1)(B)," Pet. App. 10a. *See* Labor Dep't CA2 Amicus Br. at 20-21. The Government also agreed with Retirees that, in the alternative, the same result can be reached under § 502(a)(1)(B) alone, on the basis that "[t]he phrase 'terms of the plan' [in § 502(a)(1)(B)] must be interpreted to include the terms that ERISA mandates to be in the plan." *Id.* at 7-16; Pet. App. 10a.

The Court of Appeals unanimously ruled for Retirees on the merits, holding that under *Amara* and this Court's other ERISA precedents, the district court could (1) reform PwC's Plan to bring it into

compliance with ERISA, because § 502(a)(3) authorizes traditional forms of equitable relief to "redress violations of" ERISA; and (2) enforce the Plan's corrected terms by ordering recalculation of the pension benefits owed to Retirees, because § 502(a)(1)(B) authorizes enforcement of a plan's terms as reformed. Pet. App. 15a-19a.

The court stated that it did "not address Plaintiffs' alternative arguments for relief," *id.* at 19a; *see also id.* at 16a n.4. The court also said, "Because we hold that Plaintiffs prevail on the merits, we do not reach the issue of the scope of the mandate," *i.e.*, Retirees' argument that PwC had waived its no-remedy theory by failing to raise it in the first appeal. *Id.* at 4a n.1.

The Court of Appeals denied PwC's motion to stay issuance of its mandate and remanded for further proceedings consistent with its ruling. *Id.* at 19a.

Two motions are currently pending in district court: (1) a motion for summary judgment filed by Retirees, Dist. Ct. Dkt. 216; and (2) a motion to decertify the class filed by PwC, Dist. Ct. Dkt. 260.

REASONS FOR DENYING THE PETITION

The question presented by the Petition does not require this Court's attention.

The Second Circuit's ruling on the Question Presented is consistent with this and other courts' established understanding of remedies available under ERISA when a plan term that violates Title I's mandatory rules causes participants to forfeit their "nonforfeitable" pension benefits.

The asserted circuit conflict is fabricated. No court at any level, save the district court here, has ever interpreted ERISA to lock the courthouse doors to plan participants whose vested accrued pension benefits were forfeited in violation of the statute.

The other question discussed in the Petition—though not subsumed in the Question Presented—is whether "appropriate equitable relief" under § 502(a)(3) may include an order of reformation conforming a plan to the mandatory requirements of ERISA. On this question, too, PwC's arguments are wrong on the merits and there is no circuit conflict.

Finally, if the Court were interested in revisiting its prior analyses of ERISA remedies, the unusual facts of this case, involving PwC's deliberate attempt to evade a statutory requirement that was amended prospectively more than 14 years ago, and the current posture of the case, with issues the Second Circuit found unnecessary to address in *Laurent V* and substantive motions yet to be determined by the district court, makes it a poor vehicle for review of the Question Presented. If a final judgment presents the same question, PwC can seek certiorari at that time.

I. ON THE QUESTION PRESENTED, THE COURT OF APPEALS FAITHFULLY APPLIED ERISA AND THIS COURT'S ERISA PRECEDENTS

The sole "Question Presented" in the Petition is whether the Court of Appeals "improperly combined parts of two separate remedial sections under ERISA, interpreting § 502(a)(3) to permit reformation of a plan solely as a preparatory step to ultimate relief under § 502(a)(1)(B) in the form of money damages."

Pet. *i*. Throughout the Petition, PwC characterizes the Court of Appeals' ruling as creating a "hybrid 'reform-and-enforce' remedy." Pet. 3. *See also id.* 14, 17, 22, 23, 25. That characterization is simply false. The Court of Appeals' ruling is faithful to the statutory language, ERISA case law, and the principles governing traditional equitable remedies.

1. The Court of Appeals did not create some kind of new combined or "hybrid" remedy, but ordered two distinct remedies under ERISA, focused on the governing language of the statute.

The briefs and the ruling below described the combination of Section 502(a)(3) and 502(a)(1)(B) remedies as two "steps," echoing this Court's opinion in *Amara*, 563 U.S. at 435. *See*, *e.g.*, Pet. App. 18a ("two-step remedy of reformation-and-enforcement"). Read in context, it is clear that the Court of Appeals did not purport to invent a never-before-seen "hybrid" remedy. The court addressed and resolved Retirees' request for "reformation" in one section of its opinion and Retirees' request for "enforcement" of the plan-as-reformed in another section:

- Section C.1 of the opinion explains that "reformation is an equitable remedy" available under § 502(a)(3) "to reform the Plan"—*i.e.*, correct its terms—not to reform *and* enforce it. Pet. App. 15a.

- Section C.2 approves enforcement of the Plan's reformed terms as a remedy authorized under § 502(a)(1)(B). *Id.* at 18a.

Each of those remedies is independently authorized by ERISA. First, § 502(a)(3) creates a cause of

action for a participant or beneficiary "to enjoin any act or practice which violates any provision of this subchapter … or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter." Next, § 502(a)(1)(B) creates a cause of action for a participant or beneficiary "to recover benefits due to him under the terms of his plan." Relief is available under § 502(a)(1)(B) "without reference to whether the relief sought is legal or equitable." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 221 (2002).

In *Amara* this Court reviewed an order that reformed a plan (Step 1) and then required the plan administrator (Step 2) "to enforce the plan as reformed." 563 U.S. at 435. The Court said "one can fairly describe Step 2 as consistent with § 502(a)(1)(B)." *Id.* The Court went on to hold that the order of reformation in that particular case was not appropriate under § 502(a)(1)(B), but might be appropriate under § 502(a)(3) because it was a form of traditional equitable relief awarded in similar circumstances by pre-merger equity courts. The Court remanded for the lower courts to consider the appropriate remedies.

Amara thus confirmed that the two "steps" that might be needed for complete relief—reformation, followed by enforcement—were in fact two discrete "remedies." *Id.* at 440 (describing reformation as one of "three other traditional equitable *remedies*" (emphasis added)). *See also* Dobbs § 4.3(7), at 618; Pomeroy § 1375, at 999.

2. PwC's post-Petition filings in the district court admit that, contrary to what it argues here, the Court

of Appeals approved "two distinct forms of relief" for "two separate claims." Dist. Ct. Dkt. 261, at 10. *See also id.* at 2 ("the two distinct forms of relief at issue—reformation under § 502(a)(3) and recalculated benefits according to the Plan as reformed under § 502(a)(1)(B)"); *id.* at 3 ("two separate forms of relief"); Dist. Ct. Dkt. 265, at 2 (PwC admitting that "Plaintiffs' § 502(a)(3) claim begins and ends with reformation, without an associated claim for contract damages").

These PwC acknowledgments of what the Second Circuit actually ruled eviscerate PwC's contention that the Court of Appeals created some impermissible hybrid remedy. It is hornbook law that even "a complaint asserting only one legal right [may seek] multiple remedies for the alleged violation of that right," *Wetzel*, 424 U.S. at 743 n.4, including "legal and equitable relief cumulatively," 5 Wright & Miller § 1257. *See also Ross*, 396 U.S. at 539-40; *Smith*, 237 F.2d at 86 (a "plaintiff is entitled to pursue his claim for equitable relief, *i.e.*, for reformation, in the same action as his suit on the contract-as-reformed"). Equity courts applied the same principle, limited only by the need to avoid double recovery. Dobbs § 1.1, at 3; *see supra* at 2. The Court of Appeals thus stood on solid ground when it held that Retirees can pursue these two remedies sequentially to obtain a single recovery of benefits for PwC's statutory violation.

3. PwC also argues that the Court of Appeals' endorsement of reformation under § 502(a)(3) as a "preparatory step" for monetary relief under § 502(a)(1)(B) was an impermissible ploy to avoid this Court's rulings that § 502(a)(1)(B), standing alone, authorizes only the recovery of benefits under the

terms of the plan. Pet. *i*. That objection is misguided for several reasons.

First, ordering reformation as a preparatory step to enforcing the reformed plan is entirely consistent with the principles governing traditional equity remedies. *Amara* stated that "equity often considered reformation a 'preparatory step' that 'establishes the real contract'" which the court could then proceed to "enforce … as reformed" to recover money owed under the contract's corrected terms. 563 U.S. at 440-41 (quoting 4 Pomeroy, § 1375, at 999).

The Second Circuit thus did exactly what *Amara* and the equity treatises say a court is *supposed* to do when presented with a contract like the Plan "which for some reason does not conform to the actual rights and duties of the parties." Pomeroy § 112, at 146. The appropriate relief in those circumstances is to reform the contract "to remove a legal obstacle to the full enjoyment of the plaintiff's right," *id.* at 145, so that the plaintiff can then secure "restitution, damages, or specific performance" of the corrected contract. Dobbs § 4.3(7), at 618. Contrary to PwC's suggestion, reformation was *not* denied in equity cases where the only tangible effect of the reformation was to allow the plaintiff to recover money past due under the contract as corrected. *See Northern Assur. Co. v. Grand View Bldg. Ass'n*, 203 U.S. 106 (1906) (affirming judgment in equity action that reformed an insurance policy and enforced the insurer's obligation to pay insurance proceeds under the policy "as reformed" for a fire that had occurred 6 years earlier).[2]

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[2] *See also Clarksburg Tr. Co. v. Commercial Cas. Ins. Co.*, 40 F.2d 626, 629 (4th Cir. 1930) (bond guaranteeing a deposit could

Reformation is thus frequently awarded as a "preparatory step" or "precursor" to another remedy enforcing the contract as corrected, *supra* at 2, and such a use of reformation is not some illicit dodge to avoid limits on other remedies. Considering that reformation and other remedies administered by equity courts originated for the very purpose of providing needed relief that was not available in actions at law (Pomeroy § 132, at 181), it would be a perversion of equitable principles to deny reformation just because it would provide a basis for relief that cannot be obtained through non-equitable remedies alone.

Second, the Court of Appeals did not approve reformation "*solely*" as a springboard to other relief. PwC's insinuation appears to be that the court's ruling would allow a district judge to whimsically change the terms of an ERISA plan to increase participants' benefits. *See* Pet. 3, 14, 17, 25. Not so. The Court of Appeals agreed with Judge Mukasey's determination that PwC violated ERISA's vesting standards and that the appropriate remedy for that violation was to reform the Plan's terms to bring them into compliance

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be reformed in equity as a preparatory step to allow plaintiff to "recover under the bond" as reformed); *Hogg v. Maxwell*, 218 F. 356, 358 (2d Cir. 1914) ("if the relief granted were to reform it, the court could go on and do complete justice by awarding damages for the breach"); *Dameron v. Jamison*, 4 Mo. App. 299, 306 (1877) ("There is no more a misjoinder of causes of action here than there is where a plaintiff asks a court of equity to reform a policy of insurance, and in the same prayer asks a decree for the amount of the loss"); *Palmer Steel & Iron Co. v. Heat, Light & Power Co.*, 66 N.E. 690, 692 (Ind. 1903) (reformation of a fully performed contract appropriate in equity even though "[t]he ultimate relief sought is exclusively pecuniary").

with the law. Pet. App. at 15a-17a. The fact that reformation *also* functioned as a "preparatory step" for *additional* relief—recovery of benefits owed under the Plan-as-reformed—has no bearing on the fact that reformation was appropriately awarded to redress the Plan terms' violation of ERISA.

Third, the Court of Appeals did not characterize the "ultimate relief under § 502(a)(1)(B)" as "money damages." Pet. *i*. The court held that the district court could "enforce[]" the Plan-as-reformed, Pet. App. 18a—which will require the Plan to pay additional *pension benefits*, not "damages." Indeed, as the Seventh Circuit quipped in an analogous case, the contention that the money retirees stood to recover would constitute "damages" is "silly." *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 369 (7th Cir. 2012) (Posner, J.). The court explained that retired plan participants:

> seek reformation of the [] plan as a basis for claiming *additional pension benefits*. Those benefits would *not be damages*. They would be the automatic consequence of a judicial order revising the [] plan to make it more favorable to participants …. [T]he award of monetary relief will just be a matter of laying each [retiree's] pension-related employment records alongside the text of the reformed plan and computing the [retiree's] entitlement by subtracting the *benefit* already credited [] to him from the *benefit* to which the reformed plan document entitles him.

Johnson, 702 F.3d at 371 (emphases added).

Even if one could fairly characterize the money payable to Retirees as "damages," the money would

still also be "benefits" due under the terms of the Plan-as-reformed. That characterization is all that matters, because ERISA § 502(a)(1)(B) authorizes a participant or beneficiary to recover "benefits" due to him under the terms of his plan "without reference to whether the relief sought is legal or equitable." *Great-West Life*, 534 U.S. at 221. ERISA § 502(a)(1)(B) authorizes "recovery of the benefits provided by the 'terms of [the] plan' *as reformed*." *Amara*, 563 U.S. at 435 (emphasis and alteration in original). *Compare Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993) (claim was for damages, not benefits, since "[n]o one suggests that any term of the Kaiser plan … would [] be enforced by the requested judgment").

4. PwC makes a fleeting argument, unsupported by citation, that even if reformation and enforcement might typically be available in the same action, that is not true in an ERISA case because the two remedies are authorized by different subsections of ERISA § 502(a) and "Congress deliberately chose to separate each of § 502(a)'s remedial provisions with the disjunctive word 'or.'" Pet 14. But this Court's precedents dispel the notion that the word "or" in § 502(a) means "only one or the other" in a given case.

For instance, in *Massachusetts Mutual Life* the Court explained that had the plan administrator adhered to his initial determination that a participant was not entitled to disability benefits under the defendant plan, the participant:

> would have had a panoply of remedial devices at her disposal. To recover the benefits due her, she could have filed an action pursuant to § 502(a)(1)(B) to recover accrued benefits, to

> obtain a declaratory judgment that she is entitled to benefits under the provisions of the plan contract, and to enjoin the plan administrator from improperly refusing to pay benefits in the future. If the plan administrator's refusal to pay contractually authorized benefits had been willful and part of a larger systematic breach of fiduciary obligations, respondent in this hypothetical could have asked for removal of the fiduciary pursuant to §§ 502(a)(2) and 409.

473 U.S. at 146-47. *See also Firestone*, 489 U.S. at 106 (recognizing that relief can be awarded in the same case under both § 502(a)(1)(A) and § 502(a)(1)(B); *id.* at 106-07 (Court's opinion replacing the statute's use of "or" in § 502(a)(1) with "[and]," reflecting the Court's interpretation that the connector "or" in § 502(a) means "and/or").

Tellingly, PwC does not cite a single case or secondary source supporting its theory that § 502(a) articulates a one-subsection-per-case rule. Scores of ERISA cases interpret the statute otherwise. *E.g.*, *Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710 (6th Cir. 2005) (plan participants stated viable claims for cumulative relief in the form of an affirmative injunction under § 502(a)(3), restitution under § 502(a)(3), and recovery of benefits under § 502(a)(1)(B)); *N.Y. State Psychiatric Ass'n v. UnitedHealth Grp.*, 798 F.3d 125, 132-35 (2d Cir. 2015) (plan participants could seek recovery of benefits under § 502(a)(1)(B) and declaratory and injunctive relief prohibiting defendant from violating ERISA in the future, under § 502(a)(3)) (collecting cases).

PwC suggests that *Amara* implicitly supports its one-subsection-per-case theory because it "ruled that relief under § 502(a)(1)(B) was unavailable and remanded for consideration of whether § 502(a)(3) *alone* could provide equitable relief," Pet. 22 (emphasis added). That is untrue. *Amara* did not rule that *none* of the relief sought by the retirees in that case was available under § 502(a)(1)(B). 563 U.S. at 435-36. To the contrary, the Court went out of its way to explain that one of the retirees' requested forms of relief—"recovery of the benefits provided by the 'terms of [the] plan' *as reformed*"—is "consistent with § 502(a)(1)(B)." *Id.* at 435 (emphasis and alteration in original). *Amara* held that the underlying remedy of reformation is not available under § 502(a)(1)(B). *Id.* at 436. But a few pages later, the Court said that reformation could be available under § 502(a)(3), *id.* at 440-41, and remanded for the lower courts to decide which remedies were appropriate. Nothing the Court said suggested that the participants would be limited to one remedy under either § 502(a)(3) or § 502(a)(1)(B), or that the lower courts could not both reform the plan under § 502(a)(3) and enforce the plan-as-reformed under § 502(a)(1)(B).[3]

PwC makes a related argument that *Amara*'s "extended discussion of traditional equitable doctrines

[3] Even if PwC's reading of *Amara* were correct, PwC does not explain why recovery of the "money owed [to Retirees] under the plan as reformed" would not then be appropriate equitable relief under § 502(a)(3). *See Amara*, 563 U.S. at 441-44 (equitable money relief for harm resulting "from the loss of a right protected by ERISA"). *See also* Retirees' CA2 Br. 31 (if post-reformation monetary relief "for some reason is deemed unavailable under § 502(a)(1)(B), then it is clearly authorized under § 502(a)(3)"); Labor Dep't CA2 Amicus Br. 24-26 (same point).

for awarding monetary relief would have been superfluous if an award of contractual money damages simply 'follows' from judicial reformation of plan terms." Pet. 22. Not so. *Amara*'s stated intention was to set forth a menu of remedies potentially available to the district court on remand. 563 U.S. at 442-45. On page 435, the Court described the potential award of benefits under § 502(a)(1)(B). On pages 440-45, the Court described the types of relief that could be available under § 502(a)(3). The discussion of monetary relief potentially available under § 502(a)(3) was not superfluous. For example, an underpaid participant might also seek disgorgement of any extraordinary investment profits the defendant earned on the money it unlawfully refused to pay retirees as benefits. *See*, *e.g.*, *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 364-65 (4th Cir. 2015).

5. The relief approved by the Court of Appeals is neither radical nor new. Courts have long recognized that pension retirees may recover benefits unlawfully forfeited pursuant to terms of their plan that violate ERISA.

For example, in *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), a pension plan was amended to reduce a participant's pension benefits after he accepted a management position in the same industry. The plaintiff argued the amendment violated ERISA's nonforfeiture provisions and sought an award of the benefits he would have received under the plan without the unlawful amendment. *Id.* at 742-43. This Court ruled for the plaintiff, agreeing that the amendment was unlawful and could not provide grounds for denying his benefits. Although the Court did not address the specific statutory authority for the

requested remedy, the ruling issued just two years after *Great-West Life*, where the Court demanded careful attention to ERISA's remedy provisions.

Similar relief has been awarded in countless other ERISA cases. *E.g.*, *Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 726-27 (D.C. Cir. 2012) (citing *Amara*); *Thompson v. Ret. Plan for Emps. of S.C. Johnson & Son, Inc.*, 651 F.3d 600, 607-10 (7th Cir. 2011); *Contilli v. Local 705 Int'l Bhd. of Teamsters Pension Fund*, 559 F.3d 720, 723 (7th Cir. 2009); *West v. AK Steel Corp.*, 484 F.3d 395, 405 (6th Cir. 2007); *Miller v. Xerox Corp. Ret. Income Guar. Plan*, 464 F.3d 871, 878 (9th Cir. 2006); *Berger*, 338 F.3d at 763; *McDonald v. Pension Plan of NYSA-ILA Pension Tr. Fund*, 320 F.3d 151 (2d Cir. 2003); *Esden*, 229 F.3d at 177; *Costantino v. TRW, Inc.*, 13 F.3d 969, 980-82 (6th Cir. 1994).

While none of these cases specifically invoked the label "reformation" under ERISA § 502(a)(3), the relief that they endorsed was identical in substance to the relief approved by the Court of Appeals here.

6. PwC and its amici argue that retired participants should not be able to recover the portion of their benefits illegally forfeited as a result of PwC's violation of ERISA because "[g]iven this complex web of statutory and regulatory requirements, it 'should come as no surprise' that plan sponsors occasionally get tripped up and make a good-faith error in crafting their plan." Amici Br. 10 (quoting *Conkright*, 559 U.S. at 509).

This suggestion ignores that in *Conkright*, the Court did not leave retirees in the lurch, nor did it order the district court to merely correct the plan's

unlawful calculation method *prospectively*, as PwC and its amici propose is the only appropriate remedy for benefit calculations that violate ERISA. Instead, *Conkright* considered the standards that a district court should apply in determining the benefits plaintiffs would be entitled to recover following the entry of an order "exorcis[ing]" a calculation method that "violated ERISA." 559 U.S. at 510, 513.[4]

7. PwC's suggestion that the tax-qualification letters it received from the IRS should shield it from liability overlooks that ERISA Title I—which contains the § 502 remedies—and the ERISA Title II provisions that IRS administers create separate enforcement authority. "The law permits plan participants whose rights are violated by the terms of a plan … to recover benefits—even if the plan has received a favorable ruling from the service." *Hearing on Hybrid Pension Plans Before the S. Comm. on Health, Educ., Labor and Pensions*, 106 Cong. 129 (1999) (prepared testimony of Stuart Brown, Chief Counsel, IRS). Simply put, "[a]n erroneous ruling by an IRS key district director … cannot defeat the express statutory rights of plan participants. The adjudication of those rights is for the federal courts, not the field offices of the IRS." *Esden*, 229 F.3d at 177.

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[4] As in *Heinz*, the Court did not call this remedy "reformation" or address the statutory authority for exorcising the illegal calculation method. But the Court did agree—consistent with the Second Circuit's ruling in this case—that ERISA § 502(a)(1)(B) authorized retirees to recover the pension benefits that they would have received under the terms of the plan without application of the invalid calculation method. *See* 559 U.S. at 512-13.

8. Finally, PwC's and its amici's proposed enforcement scheme—that current employees should be charged with the obligation of ferreting out potential ERISA violations in their plan's lawyer-drafted formal terms before they retire—fails to appreciate that "ERISA's actuarial equivalence requirement serves to protect *actual retirees*." *Stephens*, 644 F.3d at 443 (Kavanaugh, J., concurring) (emphasis added). Retirees are the only ones actually injured when a plan violates that requirement in calculating lump-sum payments. It would have been passing strange for Congress to have crafted an enforcement scheme available only to parties that *might* someday be harmed by terms that violate the statute, but lock the courthouse doors to the only parties who were *actually* injured. As every court to have considered the question has concluded (save the district court below), Congress did no such thing in ERISA.

II. THERE IS NO CIRCUIT CONFLICT REGARDING THE AVAILABILITY OF REFORMATION FOLLOWED BY ENFORCEMENT OF THE PLAN AS REFORMED

Contrary to the Petition's assertion, no court other than the district court in this case has ever held that a judge cannot reform a plan's terms to bring them into compliance with ERISA and then order recalculation of benefits.

1. The Petition attempts to manufacture a conflict with other circuits by citing other cases that denied "two step" remedies requested in different circumstances on grounds materially different from the claims here. None of the cited circuit decisions

addressed a request by an ERISA plaintiff for the "two distinct forms of relief" for the "two separate claims," *supra* at 4, at issue here: (1) reformation under § 502(a)(3), and (2) enforcement of the reformed plan under § 502(a)(1)(B).

For example, in *Eichorn v. AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007), the plaintiff plan participants' claim was not, as it is in this case, that the terms of their pension plan violated ERISA. The claim was that their employer Lucent had interfered with plaintiffs' opportunity to qualify for further benefits under the plan by refusing to rehire them. 484 F.3d at 653. The *Eichorn* plaintiffs did not—as the Petition falsely asserts, Pet. 17—ask the court to judicially rewrite the terms of the *plan contract* "to comply with ERISA." To the contrary, plaintiffs accepted that the plan terms were perfectly legal. What plaintiffs sought was "a decree ordering Lucent to adjust its pension *records* to treat the plaintiffs as if they had remained at Lucent until retirement," which would qualify the plaintiffs for additional benefits under the *existing* plan terms. *Eichorn*, 484 F.3d at 653 (emphasis added).

This does not describe a request for the traditional equitable remedy of reformation, which seeks revision of a contract's written terms to reflect the "real contract," so that the corrected writing can then be enforced as reformed. *See Amara*, 563 U.S. at 441. The Third Circuit's rejection of plaintiffs' request to adjust their employment records has no bearing on this case.

Contrary to the Petition's mischaracterization, the Second Circuit did not "acknowledge" an actual

conflict with *Eichorn*, Pet. 13, 20—it said only that PwC "*argu[ed]* that at least one circuit has rejected this approach." Pet. App. 18a (emphasis added). Without saying one way or another whether it agreed with PwC's characterization, the Second Circuit said that "to the extent that it is so," it would not matter, because *Amara* and subsequent circuit decisions applying *Amara* have clarified that the relief sought by Retirees is indeed available. *Id.*

2. The other purportedly conflicting circuit court decisions cited by the Petition are similarly off point. As can be discerned on the face of the Petition, none involved a request for (1) the traditional equitable remedy of contract reformation, followed by (2) enforcement of the plan-as-reformed.

For example, PwC does not even try to portray *Pender v. Bank of America Corp.*, 788 F.3d 354 (4th Cir. 2015), as a case involving a request by plaintiffs to reform a plan's provisions under § 502(a)(3) and recover benefits due under the reformed plan. *See* Pet. at 18. In *Pender* the employer had already been required by the IRS to revise the plan and pay the benefits that would have accrued in the absence of the unlawful plan amendment. What plaintiffs sought was disgorgement of profits improperly earned by the employer as a result of that unlawful plan provision while it was in effect, and the court held that while such relief was not available under § 502(a)(1)(B), it could be awarded under § 502(a)(3). 788 F.3d at 361, 364.

In *Todisco v. Verizon Communications, Inc.*, 497 F.3d 95 (1st Cir. 2007), the plaintiff asked the court to bar a plan administrator "from invoking the actual

language of its plan" based on inaccurate communications from the administrator to her deceased husband about his eligibility for benefits, *id.* at 101—not to *reform* the plan's language to bring it into compliance with ERISA. *Id.* at 96 ("The essence of [plaintiff's] present claim is that equitable estoppel should operate to force Verizon to pay benefits"). Although the plaintiff invoked the term "reformation," the court treated the case as a garden-variety estoppel claim and said nothing even suggesting that reformation—where actually appropriate—could not support an award of benefits under the plan-as-reformed. *Id.* at 97-98, 101.

By PwC's own telling, none of the other cases the Petition cites at pages 19-21 & 26 involved a claim for equitable reformation and enforcement of the plan-as-reformed.

3. PwC ignores or misrepresents the decisions that *do* actually involve claims for plan reformation and enforcement as reformed, and which expressly or tacitly agree with the Second Circuit's conclusion that both remedies can be properly awarded in an ERISA case.

For instance, PwC fails to bring to the Court's attention the Ninth Circuit's decision in *Moyle v. Liberty Mutual Retirement Benefit Plan*, 823 F.3d 948 (9th Cir. 2016), which agrees with the Second Circuit that after *Amara*, it is clear that "plan reformation" is an available form of relief under § 502(a)(3), and that "once the plan [is] reformed," it can be enforced under § 502(a)(1)(B). *Id.* at 960.

PwC cites *Ross v. Rail Car America Group Disability Income Plan*, 285 F.3d 735, 740 (8th Cir. 2002), for its conclusion that a claim seeking

reformation to bring a plan into compliance with ERISA, and enforcement of the plan-as-reformed, is not available under § 502(a)(1)(B) alone. Pet. 18. However, PwC neglects to tell the Court that *Ross* went on to suggest that a plan participant could, in appropriate circumstances, obtain that same relief under §§ 502(a)(3) and 502(a)(1)(B), just as the Second Circuit held in this case. *Ross*, 285 F.3d at 741 & n.7 ("Although he ultimately seeks a restoration of full benefits … [i]n order to obtain complete relief, a successful plaintiff may need to assert claims … under [both] §§ [502](a)(1)(B) and (a)(3)").

III. THE SECOND CIRCUIT'S CONCLUSION THAT REFORMATION IS AVAILABLE TO REDRESS A PLAN'S VIOLATION OF ERISA IS ALSO CONSISTENT WITH THIS COURT'S PRECEDENTS AND DECISIONS OF OTHER CIRCUITS

Sections I and II above completely respond to the issues that are relevant to the Question Presented as stated in the Petition. PwC's argument, however, also attacks the Court of Appeals' ruling on the separate ground, not encompassed by the Question Presented, that an equitable order of reformation is not appropriate under § 502(a)(3) to correct plan terms that violate ERISA's mandatory standards for pension plans. *See* Pet. 27-31. Even though it is not part of the Question Presented, that argument is addressed in this Section III.

The Court of Appeals correctly determined that, under this Court's precedents, equitable reformation is available to bring the PwC Plan's illegal terms into

compliance with ERISA. No circuit has ever held that reformation is unavailable in that circumstance.

1. Whether the remedy that a plaintiff seeks is "appropriate equitable relief" available under ERISA § 502(a)(3) depends on (1) the basis for the plaintiff's claim and (2) the nature of the remedy sought. *Montanile*, 136 S. Ct. at 657.

The nature of the remedy at issue, reformation, indisputably is a form of relief that was "typically" available in equity. *Amara*, 563 U.S. at 439. The "standard equity treatises," *Montanile*, 136 S. Ct. at 658, and case law also make clear that the basis of the Retirees' claim for reformation is equitable. Equity courts would correct any written instrument "which for some reason does not conform to the actual rights and duties of the parties." Pomeroy § 112, at 146. This Court described this broad power in *Ivinson v. Hutton*, a pre-merger case:

> Courts of equity have jurisdiction of controversies arising out of transactions evidenced by written instruments which are lost; or if through mistake or accident the instrument has been incorrectly framed, or if the transaction is vitiated by *illegality* or fraud, or if the instrument was executed in ignorance or mistake of facts material to its operation, the error may be corrected or the erroneous transaction may be rescinded. Equities of the kind, whether it be for the re-execution, *reform*, or rescission of the instrument, like the equity for specific performance of a contract, are incapable of enforcement at common law, and therefore necessarily fall within the peculiar province of the courts invested with equitable jurisdiction.

98 U.S. 79, 82 (1881) (emphases added).

In cases of a contract term that violated the law, equity considered the illegality a form of "constructive fraud" that warranted "the same or similar relief as that granted in cases of real fraud." Pomeroy § 922, at 626. *See also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 193-94 (1963) ("Fraud has a broader meaning in equity" and "'properly includes all acts … which involve a breach of *legal* or equitable duty … and are injurious to another'" (emphasis added)).

Indeed, PwC conceded below that § 502(a)(3) authorizes a court to reform a plan's terms based solely on a violation of ERISA—without regard to the presence of actual fraud or mistake. *See* Pet. App. 18 n.5.[5]

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[5] PwC's concession was correct. While "actual" or "real" fraud requires deliberate deception and resulting harm (typically, reliance), "constructive fraud is a term that means, essentially, nothing more than the receipt and retention of unmerited benefits." *Epstein v. United States*, 174 F.2d 754, 766 (6th Cir. 1949). "Here, … plaintiffs' election to take a lump sum when they terminated employment forced them to sell their accounts back to PwC for [less] than their value if taken later as an annuity." *Laurent V*, 794 F.3d at 287 n.18. "They are, in short, being invited to sell their pension entitlement back to the company cheap, and that is a sale that ERISA prohibits." *Id.* (quoting *Berger*, 338 F.3d at 761). The Plan pocketed the illegal savings, in turn reducing PwC's required funding costs. "[T]he difference between savings and profit in this context is merely semantic. Regardless of which term is used, [the plan sponsor] made money." *Pender*, 788 F.3d at 359, n.3. *See also* Pet. App. 16a n.4 (Court of Appeals noting that the Plan's violations of ERISA might be construed as a form of fraud or mistake, and that PwC may have engaged in inequitable conduct).

The Second Circuit's comment that ERISA courts are not limited "to the specific circumstances under which those remedies were typically available in equity courts," Pet. App. 15a, was made in the context of discussing § 502(a)(3)'s explicit authorization of typically-equitable forms of relief "to enforce any provision of" ERISA and this Court's admonition in *Amara* that in determining what remedies are available under § 502(a)(3), "courts are to be guided by 'equitable principles, as modified by the obligations and injuries identified by ERISA itself." Pet. App. 16a (quoting *Amara*, 563 U.S. at 445).

2. There is no circuit conflict regarding the availability of reformation to bring a plan's terms into compliance with ERISA. None of the cases that the Petition cites involved plan terms that violated ERISA; and none held or even implied that reformation is not an available remedy to correct illegal terms. The failure of *Amara* and other cases involving allegations of fraud and misrepresentation to mention ERISA illegality as a basis for reformation is meaningless. Just as "[t]here was no need in [*Great-West Life*] to catalog all the circumstances in which equitable liens were available in equity," *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356, 365 (2006), there was no need—and consequently no attempt—in *Amara* and other cases involving alleged fraud or mistake to catalog other circumstances in which reformation was typically available in equity.

Courts that *have* been presented with plan terms that violate ERISA uniformly agree that the available and appropriate remedy is to correct the plan's terms to bring them into compliance, effective retroactively as of the date the unlawful term was first added to the

plan. For example, in *Johnson*, a case challenging terms of a plan that violated ERISA in the same way as PwC's Plan, the Seventh Circuit agreed (in a post-*Amara* ruling) that "reformation" is the available and appropriate remedy "to conform the text of the plan to" what ERISA requires, followed by recalculation of the benefits due under the corrected plan's terms. 702 F.3d at 369-71. *See also Page v. PBGC*, 968 F.2d 1310, 1311 (D.C. Cir. 1992) (appropriate relief in actions "to enforce [ERISA] Title I's prescriptions … includes amendment of a plan to delete an unlawful vesting term") (R. B. Ginsburg, J.); *England v. Marriott Int'l*, 764 F. Supp. 2d 761, 780 (D. Md. 2011) (former employees "are entitled to first pursue a claim under Section 502(a)(3) for reformation of the terms of the Retirement Awards [to make them comply with ERISA], and then to pursue a claim under Section 502(a)(1)(B) for recalculation and distribution of benefits due under the ERISA-compliant terms"); and the cases cited in Section I, *supra*, at 21-22.

IV. THIS CASE IS A POOR VEHICLE FOR REVIEW

This case is a poor vehicle to address the broad ERISA remedial issues identified in the Petition.

First, for sound reasons, the Court's general practice is to "await final judgment in the lower courts." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari). PwC recently told the district court that:

> The Second Circuit's vacatur of judgment on the pleadings did nothing more than allow Plaintiffs the opportunity to try to prove their claim—the merits of the pleaded claim were not argued or

> decided. As we show below, there are at least three undecided issues of fact that preclude entry of judgment for Plaintiffs. Indeed, the Second Circuit left all questions concerning any "relief to which Plaintiffs may be entitled … to be resolved by the district court in the first instance." …. [Moreover] it will be Plaintiffs' burden at trial to establish that the specific remedy they seek is "appropriate equitable relief" in the circumstances and, at trial, PwC will be entitled to litigate its equitable defenses.

Dist. Ct. Dkt. 259 at 1, 3.

Granting review of the Second Circuit's ruling would thus expend this Court's resources addressing a question that, by PwC's own account, might "become quite unimportant by reason of the final result." *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). If a final judgment does later present the same question, PwC can seek certiorari at that point.

Second, if this Court granted review now and disagreed with the remedies that the Second Circuit authorized, such a ruling would require remand for the Second Circuit to consider the multiple alternative grounds—both on the merits (Pet. App. 10a, 16a n.4) and under the mandate waiver rule (*id.* at 8a)—presented on the 2018 Second Appeal to vacate the district court's dismissal of the case. The Court of Appeals made clear that it did not reject any of these alternative grounds. *Id.* at 19a ("we do not address Plaintiffs' alternative arguments for relief"); *id.* at 16a n.4; *id.* at 4a n.1 ("we do not reach the issue of the scope of the mandate").

Third, the extreme facts of this case make it an ill-suited vehicle to resolve any legal question of general significance. "Employers are not required to provide pension benefits, but when they do, their plans must comply with ERISA, and the promises they make can in no way be considered mere gratuities." *Williams v. Rohm & Haas Pension Plan*, 497 F.3d 710, 714 (7th Cir. 2007). Here, not only did the Plan violate ERISA's mandatory nonforfeiture standards, but PwC—which has a large pension consulting practice—openly boasted to its clients and the public that it had intentionally set out to "foil[]" those standards. App. 16a. Congress's subsequent amendment of ERISA in 2006 did not retroactively bless any benefit distributions that had already been made, nor alter the rights of participants who had suffered illegal forfeitures under the prior rules to obtain remedies under ERISA for the benefits they had lost. If it is true, as PwC argues, that an ultimate judgment in favor of Retirees could exceed $2 billion, Pet. at 3, that is only because of the magnitude of the benefits that participants unlawfully forfeited under PwC's scheme.

CONCLUSION

The Petition should be denied.

Respectfully Submitted,

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APPENDIX

APPENDIX A

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CITE: *1999 TNT 222-20*

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HEADLINE: 1999 TNT 222-20 BLAME FOR CASH BALANCE PLAN CONTROVERSY BELONGS WITH IRS GUIDANCE, PricewaterhouseCOOPERS SAYS. (Section 411—Minimum Vesting;) (Release Date: SEPTEMBER 30, 1999) (Doc 1999-36542 (8 original pages))

CODE: *Section 411*—Minimum Vesting;
Section 414(j)—Defined Benefit Plans

ABSTRACT: Ira Cohen of PricewaterhouseCoopers LLP, Teaneck, N.J., has placed the blame for the controversy over cash balance plans on pension guidance issued by the IRS and Treasury.

SUMMARY: Ira Cohen of PricewaterhouseCoopers LLP, Teaneck, N.J., has placed the blame for the controversy over cash balance plans on pension guidance issued by the IRS and Treasury. Cohen argues that IRS guidance has created a "whipsaw effect" that "perversely" causes cash balance participants to receive earnings credits below market rates. To avoid that effect, cash balance

plans use a retirement age that is below the actual typical retirement age to determine plan benefits. If the IRS and Treasury want to eliminate the controversy over cash balance plans, he says, they should eliminate the "whipsaw effect."

AUTHOR: Cohen, Ira PricewaterhouseCoopers LLP

GEOGRAPHIC: United States

INDEX: pension plans, vesting standards, minimum; pension plans, benefits, defined

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For a summary of IR-1999-79, see Tax Notes, Oct. 25, 1999, p. 449; for the full text, see *1999 TNT 202-17*, Doc 1999-33676 (1 original page), or H&D, Oct. 20, 1999, p. 707.

TEXT:

Release Date: SEPTEMBER 30, 1999

September 30, 1999

Mr. Charles O. Rossotti
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.,
Room 3000
Washington, D.C. 20224

Mr. Jonathan Talisman
Deputy Assistant Secretary for Tax Policy
U.S. Department of The Treasury
Main Treasury, Office of the Assistant Secretary for Tax Policy
1500 Pennsylvania Avenue, N.W.
Room 1334
Washington, D.C. 20020

Dear Commissioner Rossotti and Mr. Talisman:

[1] I am writing to you to explain why one element of the current controversy over cash balance plans—a low normal retirement age in a qualified defined benefit plan,—has been a necessary result of poor rulemaking by the Treasury Department and is not a devious attempt by taxpayers to circumvent reasonable rules. (By a low normal retirement age, I mean a retirement age that is defined in the plan document that is well below that actual typical retirement age—the low retirement age might be as low as the age at five years of participation in the plan.) I urge you to consider the merits of the low normal retirement age in this context—as a hero

rather than a villain. If the IRS eliminates the use of the low normal retirement age, the IRS should also revise Notice 96-8 to correct the pension policy disaster fostered by that Notice.

I. The Whipsaw Effect

[2] The policy problem created by the Treasury Department and IRS regulations has to do with the dreaded "whipsaw effect" and rules requiring payment of minimum lump sums from qualified defined benefit plans that offer the lump sum form of distribution. Review of the minimum lump sum rules under *section 417(e) of the Internal Revenue Code* of 1986, as amended (the "Code") and the guidance relating to the "whipsaw effect" will be helpful in fully understanding the problem.

A. IRS Rules Regarding Minimum Lump Sums

[3] Let's briefly review the economic conditions prevailing when the minimum lump sum rules were first created. In the late 1970's and early 1980's, interest rates were at an all time high, often as high as 15%. In this time of high interest rates, employers frequently terminated qualified defined benefit plans with surplus assets to gain access to the surplus. The high interest rates had the effect of inflating the amount available for reversion, because pension liabilities are generally calculated as if the liability were due when the plan participants retire—some time in the future. If a plan terminates today, the present value of that future liability in a high interest rate environment is relatively small. Therefore, when plans terminate in a high interest rate environment, plan assets required to satisfy

liabilities to plan participants are relatively smaller, increasing the plan assets available for reversion.

[4] On plan termination, benefits may be settled either by purchasing an annuity contract or paying a lump sum. In the era of abnormally high interest rates, like 15% per annum, the surplus reverting to the employer upon plan termination was significantly larger if lump sums were paid than if annuities were purchased. (This resulted because the price of annuity contracts reflected the fact that annuity payments commence some time in the future, so the present value discounting required when lump sums were paid would not occur or would be performed over a shorter period of time.) Indeed, some oversight committee testimony in that era showed that some companies wanted to maximize their surplus badly enough to provide their executives with an additional bonus depending on the percentage of the executives' subordinate employees who could be induced to take a lump sum on plan termination. Plan participants, like most small investors, were typically unable to obtain those high interest rates in savings accounts or purchases of debt instruments. Consequently, participants electing lump sums received less long-term economic value than those electing annuities.

[5] Congress sought to change this result by defining minimum lump sums in terms of a maximum interest rate, so that the effect of present valuing the pension due at retirement age would be regulated by adding *Section 417(e) of the Code*. *Section 417(e)* was modified several times. At present, *Section 417(e)* states:

. . . . "(3) Determination of present value.

(A) In general.

(i) Present Value. Except as provided in sub-paragraph, for purposes of paragraphs (1) and (2), the present value shall not be less than the present value calculated by using the applicable mortality table and the applicable interest rate.

(ii) Definitions. For purposes of clause (i)—

(I) Applicable mortality table. The term "applicable mortality table" means the table prescribed by the Secretary. Such table shall be based on the prevailing commissioners' standard table (described in *section 807(d)(5)(A)*) used to determine reserves for group annuity contracts issued on the date as of which present value is being determined (without regard to any other sub-paragraph of *section 807(d)(5)*).

(II) Applicable interest rate. The term "applicable interest rate" means the annual rate of interest on 30 year Treasury securities for the month before the date of distribution or such other time as the Secretary may by regulations prescribe."

[6] The Treasury Regulations (the "Regulations") implementing the minimum lump sum legislation state that that lump sum may never be less than the present value of the annuity payable at a participant's normal retirement date at a mandated interest rate. *Section 1.417(e)-1(d)(I) of the Regulations* states:

> . . . . "The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit determined in accordance with the preceding sentence". . . .

[7] This regulatory requirement is neither mandated nor suggested by the law or the legislative history. In fact, it ignores a key element of the problem the rule was designed to address. Participants in terminating plans are allowed to take annuities or lump sums IMMEDIATELY UPON PLAN TERMINATION, even if they are still employed (if the plan design allows). The rule does, however, represent a vital regulatory step hurling cash balance plans into the jaws of the dreaded "whipsaw effect." As we will see, absent this requirement, the "whipsaw effect" would be eliminated because a plan could define the lump sum as the present value of the immediate annuity—a more accurate reflection of the design options available to plan sponsors in terminating and ongoing plans.

B. Cash Balance Plans and the "Whipsaw Effect"

[8] In simple economic terms, a cash balance plan provides a benefit in the form of an account. This notional account is credited with pay credits each year and is adjusted periodically according to an earnings index. This earnings rate is usually a predetermined independent index (such as 5-year Treasury bills or the S&P 500), or the earnings rate may be a fixed interest rate such as 5%; in some designs, participants may choose among different earnings indices which mimic actual investments such as those available in the plan sponsor's 401(k)

plan. Cash balance plans generally offer a lump sum and an immediate annuity upon termination of employment, and our experience with cash balance plans suggests that nearly all participants will take the lump sum form of distribution.

[9] Because the fundamental benefit is an account balance, these plans—unlike traditional defined benefit plans—should not save the employer money (at times of higher interest rates) when the employee takes a lump sum. After all, the account should be the account regardless of the interest rate. However, that elegant equation—the account equals the account—is not in the IRS's current mathematical repertoire.

[10] The IRS has created the "whipsaw problem," on the basis of its regulations relating to minimum lump sums. Because these regulations mandate that the minimum lump sum relates to the benefit at normal retirement age, the IRS required cash balance plans [to] develop a normal retirement age annuity benefit by projecting the account balance to normal retirement age using an interest rate reflective of the investment adjustments (the "Projection Rate"), then converting that amount to an annuity. Then, in order to comply with the minimum lump sum rules, that benefit at normal retirement age needs to be discounted to the benefit commencement date. If the projection rate is greater than the discount rate, the plan could be "whipsawed" into paying a lump sum that is greater than a participant's account. Although seemingly reasonable when viewed separately, the minimum lump sum rate and the Projection Rate therefore

combine to create the "Whipsaw Effect." This phenomenon was described in Notice 96-8.

[11] However, under that Notice, the Projection Rate to be used is not defined, nor is it defined elsewhere in any applicable IRS authority. Reasonable people can differ as to what Projection Rate is appropriate—particularly for those that are adjusted according to an equity-based index, such as the Dow Jones Industrial Average. The example below illustrates the Whipsaw Effect. Consider two participants A and B, both age 40, whose accounts earn 4%, a submarket rate, and 8%, a market rate, respectively. Also assume that the discount rate for minimum lump sums under *section 417(e)* is 6%. Assume A and B each have $ 1,000 in their accounts.

		A	B
1)	Account Balance—Beginning of year	$ 1,000	$ 1,000
2)	Investment Credit	4%	8%
3)	Account Balance— End of Year	$ 1,040	$ 1,080
4)	Years to age 65	24	24
5)	Line 3 projected to age 65	$ 2,666	$ 6,848
6)	Present Value of (5) at	$ 658	$ 1,691
7)	Lump sum Greater of (3/or/6)	$ 1,040	$ 1,691

C. Impact of the Whipsaw Effect

[12] In the above example, the employer would like to provide the account balance as improved for earnings ($ 1,040 for A and $ 1,080 for B). Because the employer had the audacity to provide B with an earnings rate that better reflected the market, the minimum lump sum increased from $ 1,080, which was all that was promised, to $ 1,691 (a 57% increase). Consequently, employers, unwilling to be gouged by the relentless teeth of the Whipsaw, provide less than a market rate of return to employee accounts. Do these rules benefit anyone? The IRS rules go out of their way to severely punish employers who credit true market related investment adjustments. These IRS rules truly assure that no good deed goes unpunished.

D. Some Conclusions Regarding the Whipsaw Effect

[13] This discussion is meant to suggest that because cash balance plans do not benefit in high interest rate environments by offering lump sums in the form of accounts, the law requiring minimum lump sums has no meaning in cash balance plans. Application of the minimum lump sum rate to lump sum distributions from cash balance plans therefore makes no sense in light of the legislative background. The IRS rules are like a solution hunting for a problem.

[14] The major problem inherent in the Whipsaw Effect is that the IRS pigeonholes cash balance plans in a manner that is fundamentally inconsistent with their basic design or rational pension policy. In the case of a traditional pension plan, an annuity is

promised. If a lump sum is provided and if the amount of the lump sum is below market equivalence, the employer or the plan realizes profit on every such lump sum election. Thus employers have a financial interest to encourage lump sums. Employees are not actuaries. They rarely seek actuarial advice. In a high interest rate environment in the absence of protective legislation, many would nonetheless take an inferior lump sum. As stated earlier, Congress passed the minimum lump sum law to avoid that situation.

[15] In the case of cash balance plans where a lump sum is the fundamental promise, the economics are reversed. Notice 96-8 first operates to reduce the earnings credit by applying the minimum lump sum rules in a way that does not acknowledge that the promise to employees in a cash balance plan is essentially different from the promise in a traditional defined benefit plan. Notice 96-8 also provides that a cash balance plan cannot subsidize the rates at which the account is converted to an annuity (to avoid an end-run around the rules that create the whipsaw problem). Thus rules designed to increase benefits in the traditional defined benefit plan tend to depress benefits in cash balance plans. Thus the rules tend to reduce employer costs in a cash balance plan at the expense of employee benefits. Although some employers may enjoy that result, many employers would prefer to credit a greater rate of return. What kind of policy precludes market rates of return from being applied to cash balance accounts or reducing the amount that may be paid as annuities? It is hard to explain such a policy.

[16] The IRS, however, would contend that its position is sound in that it requires the same mathematical relationship of annuity pensions to lump sum distributions in all type of defined benefit plans. Measured by that yardstick, the IRS is absolutely correct. This reasoning, however, is analogous to treating a nosebleed of a person by firmly applying a tourniquet around that person's neck. It works. The bleeding will stop. But like the IRS rules, the side effects are most unpleasant.

II. The Low Normal Retirement Age

[17] Sir Isaac Newton's third law of motion states that for every action there is an opposite and equal reaction. The IRS regulations needlessly created the Whipsaw Effect (the action). The Whipsaw Effect, however, disappears once a participant reaches his or her normal retirement age (because there is no longer a need to project into the future—the minimum lump sum rules require projection only until normal retirement age). Interestingly, the logical reaction to the IRS's action is to reduce the normal retirement age (the reaction) because the Whipsaw Effect would disappear at that point, Indeed, most cash balance plans with a low normal retirement age do provide earnings credits based on equity indices. Our belief is that the Whipsaw Effect should not be protected by legislation or further IRS guidance because the low normal retirement age, created by ERISA, /1/ should move the ever grinding teeth of the Whipsaw Effect away from harming plans and their participants.

[18] Rumors abound that the IRS is contemplating adopting rules that will preclude low normal

retirement ages. Any such rules would, in our opinion, require legislation. The IRS simply does not have the authority to eliminate the low normal retirement age.

[19] *Section 411(a)(8) of the Internal Revenue Code* as added by ERISA defines the normal retirement age as the earlier of (1) the time a plan participant attains the normal retirement age under the plan and (2) the later of age 65 or the 5th anniversary of plan participation. Clearly, Clause 1 permits a plan to define the normal retirement age as low as it pleases.

[20] *Revenue Ruling 78-120* permitting unrestricted use of low normal retirement ages was adopted contemporaneously with the ERISA regulations. It clearly permits the use of a low normal retirement age, based on *Section 411(a)(8) of the Code*.

III. Recommendation: IRS Elimination of the Whipsaw

[21] The IRS has the authority to eliminate the "Whipsaw Effect" by use of logic instead of blindly following technical rote in a model that the IRS itself created.

[22] The Congress provided an interest rate that must be used in computing minimum lump sums. What does that signify? If a participant received the lump sum, invested the distribution at the rate specified and withdrew assets ratably in equal installments, and if the participant was considerate enough to die precisely where the mortality table indicates, then the lump sum would accumulate

sufficient funds to provide the precise annuity. To reach this conclusion, Congress concluded that this specified minimum lump sum interest rate is the rate of return participants are likely on average to obtain on a long-term investment of amounts received in the lump sum distribution. Otherwise, there would be no actuarial equivalence. This assumes that employees receiving lump sums would, of course, have unlimited access to investment markets.

[23] Cash balance plans, however, either with or without investment choice, generally limit participants' abilities to obtain market rate earnings credits prior to the time they take a final distribution. Any limitation on rates of earnings credits available in a cash balance plan would result in lower investment returns than would otherwise be possible, not raise them. Thus as long as the available earnings credit rates do not exceed investment grade rates, the Whipsaw Effect could be eliminated by assuming that the Projected Rate is equal to the minimum lump sum rate. The IRS should issue guidance updating Notice 96-8 that articulates this principle; then plan sponsors would not be required to rely on a low normal retirement age to implement what is fundamentally sound pension policy.

IV. The Law Flaw in the Anti-Backloading Rules

[24] The IRS may be concerned about the use of low normal retirement ages for another reason. The rules against "backloading" the accrual of benefits in a defined benefit plan apply only to the accrual of benefits up to a participant's "normal retirement

age." These rules are designed to prevent plans from providing for the accrual of most of a participant's benefits later in his or her career, thereby circumventing the minimum vesting rules.

[25] The anti-backloading rules came into the law in 1974 as part of the minimum vesting standards. Under the minimum vesting standards, a participant must vest in a percentage of his or her benefit no less rapidly than under one of several statutory vesting schedules. Under the minimum vesting standards, a person's vested benefit is the product of (1) the benefit earned under the plan (the "accrued benefit") and (2) the vesting percentage. If an employer did not want to provide early vesting, the employer could provide negligible accruals until the point that employer desires to provide vesting; after all vesting 100% [] in an accrued benefit of zero is not different from not vesting at all.

[26] The fundamental problem was accruing large amounts in later years relative to small amounts in earlier years ("Backloading"). Therefore, Congress provided a floor of protection by enacting the Anti-Backloading Rules. The floor, however, was flawed. The Anti-Backloading Rules provide protection against backloading for the period from plan entry to the normal retirement age. As a matter of law, benefits accrued subsequent to the normal retirement age are not subject to anti-backloading requirements (the "Law Flaw"). This flaw is clearly undesirable, but will not be cured by trying to eliminate the low normal retirement age. The Law Flaw will still exist as applied to benefits accruing after a "normal" normal retirement age.

[27] The Law Flaw has existed for many years, but has not received significant attention until recently. The spotlight on the Law Flaw is likely to mean that the Law Flaw will be exploited in previously unimagined ways, even if the use of the low normal retirement age is inhibited through new IRS guidance. As a result, we would recommend legislation to fix the Law Flaw. Such legislation would essentially limit post-normal retirement age accrual rates to some reasonable percentage of pre-normal retirement age accrual rates. With such legislation in place, the low normal retirement age would be incapable of manipulation as a means of avoiding the Anti-Backloading Rules.

V. Conclusions

[28] The IRS has needlessly created the Whipsaw Effect, which perversely causes cash balance participants to receive earnings credits below market rates. The IRS could eliminate the Whipsaw Effect in several different ways, but until such time as the IRS does so, the low normal retirement age avoids the Whipsaw Effect. The IRS may be thinking about changing its position on low normal retirement ages, thereby strengthening the Whipsaw Effect. The IRS does not have authority to change the definition in the statute, If administratively, however, the IRS were to be successful, then participants in cash balance plans will receive less than a market return because of the IRS-created Whipsaw Effect. It is only through the strength and wisdom of our hero in this saga (the low normal retirement age) that the pension policy dragon (the Whipsaw Effect) created by the IRS has been foiled. If the IRS decides to kill off our hero, it should slay

the dragon as well—otherwise, it will be inhibiting the development of the only type of qualified defined benefit plan that provides a reasonable alternative to a private pension system that is dominated by the 401(k) plan.

Sincerely,

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