No. 20-28

IN THE

Supreme Court of the United States

PRICEWATERHOUSECOOPERS LLP, THE RETIREMENT BENEFIT ACCUMULATION PLAN FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP, AND THE ADMINISTRATIVE COMMITTEE TO THE RETIREMENT BENEFIT ACCUMULATION PLAN FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP,

Petitioners,

v.

TIMOTHY D. LAURENT AND SMEETA SHARON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

DANIEL J. THOMASCH
RICHARD W. MARK
AMER S. AHMED
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

MIGUEL A. ESTRADA
Counsel of Record
LUCAS C. TOWNSEND
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The question in this case is whether a litigant unable to state a claim under the ERISA causes of action that Congress enacted can combine desirable parts from those separate causes of action to form a new one—while jettisoning the unfavorable parts. Urging a theory that occurred to no one below, the Acting Solicitor General answers this question in the affirmative by noting that the Federal Rules of Civil Procedure allow parties to plead contingent claims. The federal rules allow parties to plead in various ways the causes of action that Congress *actually created*. But that truism has no bearing on whether parties can make up Frankenstein causes of action that Congress never enacted. The fundamental flaw in the decision below was in allowing a mix-and-match cause of action that Congress did not authorize in ERISA.

The government also contends that this Court's decision in *CIGNA Corp.* v. *Amara*, 563 U.S. 421 (2011), supports the mix-and-match approach—a revisionist reading of *Amara* that would have embarrassed even Soviet-era apparatchiks accustomed to airbrushing away inconvenient realities. In *Amara* this Court *reversed* the Second Circuit's previous attempt to allow a reform-and-enforce remedy under § 502(a)(1)(B) alone. The Second Circuit's new attempt to allow that same remedy—this time with an extra citation to § 502(a)(3)—conflicts with *Amara* and decisions of other courts of appeals, thus warranting this Court's review.

The government does not attempt to defend the Second Circuit's holding that reformation is

"categorically available" regardless of whether the traditional conditions for equitable reformation exist. Pet. App. 16a. Nor could it, since that holding also conflicts with multiple decisions of this Court and other circuits. Despite the Acting Solicitor General's plea for delay, the "interlocutory" posture of this case does not counsel against review. U.S.Br. 22. If the cause of action that the Second Circuit made up for Respondents does not exist now, it never will.

I. THIS COURT SHOULD REVIEW THE SECOND CIRCUIT'S HOLDING PERMITTING ENFORCEMENT OF A REFORMED PLAN UNDER § 502(a)(1)(B).

The Second Circuit erred fundamentally by authorizing a two-subsection remedy for a single liability claim. Under its decision, plaintiffs can use § 502(a)(1)(B) and § 502(a)(3) "simultaneously" to evade the limitations that apply to each subsection "independently." Pet. App. 19a. The government's attempts to justify that holding fail—and its efforts to wave off conflicting decisions from this Court and other circuits only confirm the need for review.

A. The government's insistence that the holding below "reflects an ordinary application" of Federal Rule of Civil Procedure 18, U.S.Br. 7—which the Second Circuit did not even cite—betrays a misunderstanding of basic legal principles. That Rule permits litigants to plead separate causes of action that actually exist as "independent," "alternative," or "contingent" claims. Fed. R. Civ. P. 18. It does not allow litigants to stitch together a new cause of action from the bits and pieces they like of separate statutory causes of action while ignoring the limitations and restrictions written into those causes of action. *See* Fed. R. Civ. P. 18(b) ("the court may grant relief only

in accordance with the parties' relative substantive rights"). Nor could it do so under the Rules Enabling Act. *See* 28 U.S.C. § 2072(b) ("Such rules shall not abridge, enlarge or modify any substantive right."). However ERISA plaintiffs style their complaints, they may plead only the causes of action that Congress enacted in ERISA's "carefully crafted and detailed enforcement scheme." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 254 (1993).

Under § 502(a)(3), a plaintiff seeking money must show that such a remedy was "*typically* available in equity." *Montanile* v. *Bd. of Trustees of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016). Under § 502(a)(1)(B), a plaintiff may only enforce the terms of a plan "as written." *Amara*, 563 U.S. at 436. Plaintiffs do not have a viable claim under either provision. And they cannot rely on Rule 18 to concoct a hybrid remedy that cherry-picks their favored parts of each while ignoring limitations in each subsection that preclude the claims as a matter of law.[1]

B. The Acting Solicitor General's attempt to reconcile the decision below with *Amara* is equally misguided. In *Amara*, this Court reversed the lower courts' reform-and-enforce remedy as unavailable under § 502(a)(1)(B) and remanded for consideration whether such relief was available under § 502(a)(3) *alone*. *See* 563 U.S. at 434, 445. In the government's view, however, the lower courts' error in *Amara* was that they "found authority for both steps solely under

[1] In any event, Respondents did not plead a claim for money benefits under § 502(a)(1)(B) contingent upon reformation under § 502(a)(3); they pleaded a single claim for PwC's failure to "disregard" the terms of the Plan in calculating their normal retirement benefit. CA2 JA, at A-144, 153-54; *see also* Pet. 2; Reply Br. 5.

Section 502(a)(1)(B)." U.S.Br. 9. If the lower courts had simply added a citation to § 502(a)(3), the government suggests, this Court would have affirmed. *See id.* at 10 ("But the Court in *Amara* held only that the district court was precluded from relying on Section 502(a)(1)(B) alone, not that it could not rely on it in combination with Section 502(a)(3).").

This description of *Amara* is outlandish. As the Acting Solicitor General reads *Amara*, this Court granted review, heard argument, and reversed simply because the Second Circuit failed to cite § 502(a)(3) in addition to § 502(a)(1)(B). On this reading, the Second Circuit's legal analysis was spot-on, but that court committed a citation error. But as the government notes, this Court "'reviews judgments, not statements in opinions.'" U.S.Br. 19 (citation omitted). It certainly does not grant review to correct trivial citation errors in lower courts' opinions.

This Court remanded *Amara* for consideration of whether a fraud claim under § 502(a)(3) alone could result in an award of damages; *Amara* does not support judicial invention of hybrid ERISA actions so long as the court cites multiple subsections. ERISA creates eleven causes of action that plaintiffs may invoke, but each must be established according to its elements. The statute's use of the word "or" does not permit courts to borrow only the plaintiff-favorable portions of several causes of action to make up a new one. *Contra* U.S.Br. 11.

C. Despite the government's contention that there is no "court of appeals decision that squarely conflicts with the decision below," U.S.Br. 13, its own brief confirms that the circuits are sharply divided.

As an initial matter, the Acting Solicitor General concedes that "the Fourth and Eighth Circuits [have]

both held, consistent with this Court's decision in *Amara*, that ERISA plaintiffs could not seek relief exclusively under Section 502(a)(1)(B) in circumstances where their claims did not seek to enforce the plans as written." U.S.Br. 14. To evade the obvious split, the government asserts that neither decision "rejected an ERISA plaintiff's attempt to proceed in two steps under Section 502(a)(3) and Section 502(a)(1)(B)." *Id.* at 15. But the government backs up this assertion only with trivial distinctions.[2]

Even less defensible is the government's attempt to deny what the Second Circuit acknowledged—that the *Laurent* decision conflicts with the Third Circuit's decision in *Eichorn* v. *AT&T Corp.*, 484 F.3d 644 (3d Cir. 2007). In *Eichorn*, the Third Circuit *rejected* plaintiffs' proposed "bootstrap approach" of "adjust[ing] . . . pension records" to redress an ERISA violation and then enforcing those records as adjusted. *Id*. at 653. Contrary to the government's assertion, the Third Circuit did not do so "in the course of rejecting the plaintiffs' attempt to proceed exclusively under Section 502(a)(1)(B)." U.S.Br. 13. The Third Circuit had *already* concluded that § 502(a)(1)(B) did "not provide relief for the violation

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[2] The Eighth Circuit's statement in *Ross* v. *Rail Car America Group Disability Income Plan* that "[i]n order to obtain complete relief, a successful plaintiff may need to assert claims against *both a plan and its sponsor and/or administrator and/or issuer of an insurance policy* that provides benefits under the plan, asserting claims under §§ [502](a)(1)(B) and (a)(3)" does not suggest that a plaintiff can mix and match aspects of multiple claims, 285 F.3d 735, 741 n.7 (8th Cir. 2002) (emphasis added), notwithstanding the doctored quotation in the government's brief, *see* U.S.Br. 15 ("'a successful plaintiff may need to assert claims' under *both* Section 502(a)(1)(B) *and* 502(a)(3) 'to obtain complete relief'").

of ERISA that the plaintiffs ha[d] alleged, and, accordingly, [that] summary judgment on the issue was proper" before it even considered plaintiffs' "bootstrap approach." 484 F.3d at 653. The government notes that in *Eichorn*, "each claim failed." U.S.Br. 13. The same is true here: Because "controlling cases" prevented Respondents from prevailing "under both § 502(a)(3) and § 502(a)(1)(B) independently," the case could proceed only if Respondents were allowed to join parts of those unavailable causes of action and pursue them both "simultaneously," Pet. App. 18a-19a—the approach the Third Circuit rejected.

The Acting Solicitor General's response to *Todisco* v. *Verizon Communications, Inc.*, 497 F.3d 95 (1st Cir. 2007), is likewise inapposite. The government asserts that *Todisco* did not involve "a claim for reformation," U.S.Br. 15, without attempting to explain why the First Circuit would have reached a different result had it construed plaintiffs' request for "two step" enforcement of a "reformulated plan" as involving reformation rather than "equitable estoppel," 497 F.3d at 101. And the fact that "both of the individual steps failed" in *Todisco*, U.S.Br. 15, hardly distinguishes the case. There (as here), the plaintiff's § 502(a)(3) claim failed because she sought *monetary* relief. 497 F.3d at 100. And there (as here), the plaintiff's § 502(a)(1)(B) claim failed because she sought to enforce the plan as reformulated, not as written. *Id.* at 101. The only meaningful difference between the Second Circuit's holding below and *Todisco* is that the First Circuit refused to allow a "two-step process" to create a mix-and-match claim. *Id.*

The Sixth Circuit's recent decision in *DaVita, Inc.* v. *Marietta Memorial Hospital Employee Health Benefit Plan*, 978 F.3d 326 (6th Cir. 2020), *cert. filed*, No. 20-1641 (U.S. May 21, 2021), only underscores the importance of the question presented and the urgent need for review. There, the plaintiffs sued for unpaid benefits under § 502(a)(1)(B), seeking to invalidate supposedly unlawful provisions of a plan and to compel the plan to pay what would have been owed if the plan's terms were lawful. 978 F.3d at 343 n.12. Judge Murphy's separate opinion explained the flaw—unbriefed by the parties—in that theory: Section 502(a)(1)(B) "does not give courts the power to change a plan's terms and instead merely allows plaintiffs to enforce those terms as written." *Id.* at 368 (Murphy, J., dissenting in part). Responding to Judge Murphy's opinion in a footnote and citing the decision below, the majority stated that "[c]ourts may *first reform* a plan's terms per § [502](a)(3) before *proceeding to enforce* the reformed plan per § [502](a)(1)(B)," and that the plaintiffs could fix any problem by adding a citation to § 502(a)(3) in their complaint. *Id.* at 343 n.12 (majority op.).

The Sixth Circuit majority's cursory reasoning does not add force to Respondents' (or the Second Circuit's) arguments on the merits, but it does deepen the circuit split and confirm that the question presented is important and recurring. This Court should grant review to prevent other circuits from evading ERISA's limitations by endorsing mix-and-match remedies that Congress never enacted.

II. THIS COURT SHOULD REVIEW THE SECOND CIRCUIT'S HOLDING PERMITTING EQUITABLE REFORMATION UNDER § 502(a)(3) ABSENT THE CONDITIONS EQUITY COURTS IMPOSED ON THAT RELIEF.

The Second Circuit categorically and unambiguously held "that § 502(a)(3) authorizes district courts to grant equitable relief—including reformation—to remedy violations of subsection I of ERISA, *even in the absence of mistake, fraud, or other conduct traditionally considered to be inequitable*." Pet. App. 17a (emphasis added). The government cannot defend that holding. It does not even try.[3] The holding flatly contradicts this Court's holding in *Great-West Life & Annuity Insurance Co.* v. *Knudson*, that equitable remedies under § 502(a)(3) must satisfy "the conditions that equity attached to [their] provision," and cannot be premised solely on "the nature of the relief." 534 U.S. 204, 216 (2002). And the government concedes that "courts of equity traditionally permitted reformation 'where there [wa]s a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other.'" U.S.Br. 18 (citation omitted).

The Second Circuit's categorical holding also sharply conflicts with decisions of other courts of appeals. *See* Pet. 29-31. As the government concedes, multiple courts have held that reformation is available under § 502(a)(3) "*only* in the event of mistake or fraud." *E.g.*, *Gabriel* v. *Alaska Elec.*

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[3] Nor does the government embrace Respondents' odd argument that this holding—which was central to the judgment below—is somehow outside the question presented. *See* U.S.Br. 8.

Pension Fund, 773 F.3d 945, 955 (9th Cir. 2014) (emphasis added); *see* U.S.Br. 20-21.

The best the Acting Solicitor General can muster to reconcile the Second Circuit's holding with those of other courts of appeals is the suggestion that those courts did not "address[] whether or when an employer's inclusion of plan terms violative of ERISA could satisfy those requirements." U.S.Br. 21. But the government cannot point to anything in any of those opinions suggesting that the mere inclusion of plan terms violative of ERISA would have mattered.

The Acting Solicitor General nonetheless insists, as did the brief in opposition, that the mere fact that a plan term violates ERISA may be enough to establish "fraud as that term was broadly understood in equity." U.S.Br. 18; BIO 29-31. That argument contradicts Respondents' pleadings and arguments over fourteen years of litigation. *See* Pet. 31-32. Not even Respondents suggested that the complaint's cursory statement that "they 'unwittingly' forfeited their pension benefits on the basis of the alleged ERISA violations" was enough to allege that they were mistaken about their promised benefits. U.S.Br. 18.[4] The government's argument contradicts Respondents' concession in the district court that they do *not* allege "that [PwC] committed fraud in connection with the projection" of their benefits. Pet. App. 50a n.2. And it contradicts the Second Circuit's explanation that here, "there is no allegation that the violation stems from traditional fraud, mistake, or otherwise inequitable conduct." Pet. App. 15a. In

[4] Nor could they, given that they received exactly what was written in the Plan—as the government's brief explains. *See* U.S.Br. 4.

sum, there is no support in the record of this case for dismissing the Second Circuit's holding as mere "language that could extend beyond the circumstances of this case." U.S.Br. 19.[5]

More importantly, the government's argument is plain wrong. As PwC explained, "reformation to meet a legal standard" was a "form[] of *nontraditional* reformation [that] generated controversy." 2 Dan Dobbs, *Law of Remedies* § 4.3(7), at 619-20 (2d ed. 1993) (emphasis added). The government has no answer on this point and offers no explanation how a nontraditional and controversial form of reformation could satisfy this Court's requirement that the only remedies available under § 502(a)(3) are those that were "*typically* available in equity." *Great-West*, 534 U.S. at 210 (citation omitted). Indeed, it does not cite a single case—from the days of the divided bench or otherwise—awarding reformation solely on the basis that a contract contains an unlawful term.

The Acting Solicitor General's purported vehicle problems do not counsel against review. Although this case arises in an "interlocutory" posture, U.S.Br. 21, the district court granted judgment in PwC's favor. Reversal of the Second Circuit's erroneous judgment would return the case to that court solely to consider whether any error previously preserved and briefed by Respondents in the appeal below—but not considered by the Second Circuit—warrants setting aside the judgment in PwC's favor. Respondents have no

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[5] The Second Circuit understands the panel's decision below as binding. *See*, *e.g.*, *Conn. Gen. Life Ins. Co.* v. *BioHealth Labs., Inc.*, 988 F.3d 127, 133 (2d Cir. 2021) ("While a showing that the Labs engaged in fraud would no doubt be sufficient to prove Cigna's ERISA [§ 502(a)(3)] claim, it is by no means necessary." (citing *Laurent*)).

§ 502(a)(1)(B) claim under *Amara*, and the availability of relief under § 502(a)(3) is a purely legal, case-dispositive issue that does not require further factual development. Respondents have no claim under that section because they are former plan members seeking reformation solely as a platform for obtaining "money damages," a classic form of legal relief. *Great-West*, 534 U.S. at 210. There is no need for the parties or the district court to expend time and resources litigating the hybrid claim that the Second Circuit invented only to learn at final judgment that Respondents never had a viable reformation claim—-or any other valid equitable claim—in the first instance. If Respondents do not have a cause of action now, they never will.

The Department of Labor's alternative theories that the Acting Solicitor General does not even embrace now do not provide "alternative grounds for affirmance." U.S.Br. 22. As this Court has recently explained, "our adversarial system of adjudication" relies on the parties, not amici, to frame the issues for the courts. *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). And even if the Second Circuit could on remand take up the Department of Labor's arguments, that would affect only this case. But the question presented here—including the Second Circuit's categorical and indefensible holding with respect to the availability of reformation under § 502(a)(3)—is important far beyond the bounds of this dispute.

Indeed, the government does not dispute the importance of the question presented. Nor does the government address the uncertainty the Second Circuit's decision will cause, such as what statute of limitations would govern a mix-and-match claim. *See*

Pet. 33; *cf. Conn. Gen. Life Ins. Co.*, 988 F.3d at 133 (analogizing § 502(a)(3) claim to unjust-enrichment claim for statute-of-limitations purposes). This Court's review is urgently needed now to restore national uniformity to ERISA's remedial scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL J. THOMASCH
RICHARD W. MARK
AMER S. AHMED
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

MIGUEL A. ESTRADA
Counsel of Record
LUCAS C. TOWNSEND
JACOB T. SPENCER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioners

June 7, 2021