**No. 21-**

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# In the Supreme Court of the United States

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ERICA TALASEK,

*Petitioner*,

v.

NATIONAL OILWELL VARCO, L.P.,

*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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NITIN SUD
Sud Law P.C.
6750 West Loop South
Suite 920
Bellaire, TX 77401

STUART BANNER
*Counsel of Record*
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu

## QUESTION PRESENTED

Whether the beneficiary of an employee benefits plan can bring an equitable estoppel claim under ERISA based on misrepresentations at variance with the terms of the plan.

## RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit: *Talasek v. National Oilwell Varco, L.P.*, No. 21-20069 (Oct. 19, 2021).

U.S. District Court, Southern District of Texas: *Talasek v. Unum Life Ins. Co. of America*, No. 4:18-CV-3306 (Dec. 30, 2020).

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## PETITION FOR A WRIT OF CERTIORARI

Erica Talasek respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals is published at 16 F.4th 164 (5th Cir. 2021). The opinion of the District Court is not published but is available at 2020 WL 7773899 (S.D. Tex. 2020).

## JURISDICTION

The judgment of the Court of Appeals was entered on October 19, 2021. The Court of Appeals denied panel rehearing and rehearing en banc on November 16, 2021. On January 10, 2022, Justice Alito extended the time to file this certiorari petition to March 16, 2022. No. 21A305. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides:

(a) Persons empowered to bring a civil action

A civil action may be brought …

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

## STATEMENT

For four years, Erica Talasek and her husband Ben believed that Ben was covered by supplemental life insurance. They believed this because Ben's employer, National Oilwell Varco ("NOV"), deducted premiums for the insurance from Ben's paycheck every two weeks, and because NOV sent Ben annual benefits statements confirming that he was covered by the insurance. The Talaseks did not seek life insurance from another provider because they thought Ben was already covered. Only after Ben died did Erica discover that NOV had been misinforming the Talaseks all along. In fact, Ben did not have supplemental life insurance. Erica, now a widow with two children, was left with no income and few assets.

The question in this case is whether Erica is entitled to equitable relief under ERISA. This question has arisen in all eleven numbered circuits, which have answered it in five different ways. This case provides an ideal opportunity to resolve the conflict.

### 1. NOV leads the Talaseks to believe that Ben has purchased supplemental life insurance.

Ben Talasek worked as a machinist for NOV, a Houston-based corporation that produces equipment used in the oil and gas industry. Ben was the sole wage earner in the family. Erica, his wife, was a full-time mother for their two children, Lauren and Ben, Jr. R. 1269.[1]

[1] "R." refers to the District Court record. "App." refers to the appendix to this certiorari petition.

One of the employee benefits to which Ben was entitled was a basic life insurance policy that paid twice Ben's annual salary upon his death. App. 13a. Ben also had the option to purchase supplemental life insurance, under an insurance plan offered by the Unum Life Insurance Company. *Id.* In November 2013, during NOV's annual open enrollment period, Ben chose the supplemental life insurance. *Id.* Later that month, he received from NOV a "Benefits Confirmation Statement" showing that he had elected $300,000 of supplemental life insurance coverage, for a premium of $13.71 per biweekly pay period, which would be deducted from his pay. R. 1241. On this initial statement, the coverage was designated as "suspended," because Unum required Ben to submit an "Evidence of Insurability Form." App. 2a. Ben promptly submitted this form. *Id.*

For the next four years, NOV repeatedly assured Ben that he had purchased supplemental life insurance in the amount of $300,000. Every two weeks, for nearly four years, Ben's pay stub showed that NOV had deducted $13.71 in premiums to pay for this supplemental life insurance (the biweekly deduction increased to $19.80 in 2017). *Id.* at 14a, 49a. Each year, NOV sent Ben another "Benefits Confirmation Statement" confirming that Ben indeed had $300,000 in supplemental life insurance coverage. *Id.* at 3a. Ben received these statements in November 2014, December 2015, and December 2016. *Id.* at 49a. These benefits confirmation statements did not include the word "suspended" or any other words suggesting that Ben lacked coverage. Each statement stated plainly that Ben had "Voluntary Employee Life Insurance" in the amount of $300,000

and that Ben was paying for this insurance through biweekly deductions from his paycheck. R. 1244, 1247, 1252.

NOV's assurances that Ben had supplemental life insurance were very important to Ben and Erica, because in 2014, Ben was diagnosed with pancreatic cancer. App. 2a. As his condition worsened, Ben and Erica planned for their family's future on the assumption that the proceeds of his life insurance would be $435,000, the sum of $135,000 in basic insurance and $300,000 in supplemental insurance. R. 1270. "We literally would sit down at the kitchen table and go over our money and our family's financial security," Erica explained. *Id.* "Ben knew, and relied upon, that he held two life insurance policies; one with a policy [sic] of $135,000, and another with a value of $300,000." *Id.* As he battled against cancer, Ben explained to his parents, to Erica's sister, and to their friends that Erica and the children would be provided for after his death, because of the supplemental insurance. *Id.* at 1256-59. Ben's supervisor at work, who also knew of Ben's diagnosis, was glad that Ben had supplemental life insurance, because "I could tell that he was relying on it for future financial support for his wife and kids." *Id.* at 1268.

Ben Talasek died of pancreatic cancer in December 2017 at the age of 40. Erica was left with no income and two children to care for. Her only significant asset would be the proceeds of Ben's life insurance.

### 2. After Ben's death, Erica finds out that contrary to NOV's representations, Ben never had supplemental life insurance.

A few weeks after Ben died, Erica submitted what she thought would be a routine claim under Ben's life insurance policy. App. 3a. To her horror, the Unum Life Insurance Company informed her that four years earlier it had rejected Ben's application for supplemental life insurance. *Id.* Every two weeks for four years, NOV had deducted premiums for supplemental life insurance from Ben's paycheck, but these deductions had never paid for any insurance. For four years, NOV's benefits confirmation statements had repeatedly assured the Talaseks that Ben had $300,000 in supplemental life insurance coverage, but these assurances had been incorrect all along. Ben never had the insurance the Talasek family had been counting on.

NOV, to its credit, concedes that the fault was its own. *See, e.g.,* NOV 5th Cir. Br. at 13 (describing its representations over these four years as a "payroll mistake"), 14 ("inadvertent payroll error"). An NOV employee in the company's benefits department seems to have entered the wrong code in Ben's payroll records, which caused NOV's records to reflect that Ben did have supplemental life insurance coverage when in fact he did not. *Id.*

As Erica discovered only after Ben's death, the Unum Life Insurance Company had rejected Ben's application for supplemental life insurance in early 2014 because of Ben's worsening health. App. 3a. Ben submitted his "Evidence of Insurability" form on January 2, 2014. App. 13a. On January 18, Unum

informed Ben that he needed to correct and resubmit the form because he had mistakenly listed his own name and date of birth in the space where the form asked for his spouse's name and date of birth. *Id.* Ben made the correction and resubmitted the form, but by then his cancer had already been diagnosed. *Id.* at 13a-14a. On March 3, Ben provided blood and urine samples to Unum. *Id.* at 14a. The abnormal results of these samples caused Unum to refuse coverage later that month. *Id.* But NOV promptly began deducting premiums from Ben's paycheck in April. *Id.* The Talaseks heard only from NOV, not from Unum. Because NOV began deducting premiums from Ben's paycheck shortly after Ben provided the blood and urine samples, the Talaseks believed that Ben was insured.

Unum asserts that it sent Ben a letter in March 2014 informing him of the rejection. *Id.* But the Talaseks never received this letter. R. 1271. Erica never knew of it until several months after Ben died, when Unum explained why it was denying her claim. *Id.* at 1271-72. Rather, the Talaseks believed that Ben *was* insured, because NOV was deducting premiums from Ben's pay every two weeks, and because NOV sent Ben annual statements confirming that he was insured.

The result was a misunderstanding that endured for the last four years of Ben Talasek's life. The Unum Life Insurance Company knew that it had not insured Ben. But NOV, Ben's employer, made biweekly representations to Ben, in the form of payroll deductions, that Unum *had* insured Ben. NOV also made annual representations to Ben, in its benefits confirmation statements, that Ben was covered. If

Ben had known that he had no supplemental life insurance, he would have sought insurance from another provider, because he was understandably concerned about providing for Erica and their children. But he had no reason to seek insurance from another provider, because of these repeated assurances from NOV that he was covered.

### 3. The District Court grants NOV's motion for summary judgment.

After exhausting administrative remedies, Erica Talasek filed this lawsuit, which included several causes of action against NOV and Unum. Her principal cause of action, and the only one still present in this case, was a claim of equitable estoppel under ERISA against NOV. Erica alleged that NOV made material misrepresentations that Ben had supplemental life insurance coverage, that the Talaseks reasonably relied on these misrepresentations, and that this reliance was to their detriment because it caused them not to seek life insurance from another provider.

The District Court granted NOV's motion for summary judgment. App. 10a-11a. (In a very brief order, the District Court adopted in full the Magistrate Judge's detailed Memorandum and Recommendation, *id.* at 12a-40a, so we will treat the Magistrate Judge's Memorandum and Recommendation as the opinion of the District Court.)

The District Court began by observing that under Fifth Circuit precedent, "[t]he elements of ERISA estoppel are: (1) a material misrepresentation; (2) reasonable and detrimental reliance upon the misrepresentation; and (3) extraordinary circumstances." *Id.*

at 32a-33a. The District Court held that Erica could not establish any of these three elements.

First, the District Court concluded that there had been no material misrepresentations because Unum never stated that Ben had obtained supplemental life insurance. *Id.* at 33a-34a. The District Court acknowledged that NOV had made erroneous payroll deductions and had provided Ben with erroneous benefits confirmation statements, but the court determined that these errors "cannot be attributed to Unum because the policy expressly prevents NOV from acting as an agent for Unum." *Id.* at 34a.

Second, the District Court concluded that while Erica presented a genuine issue of material fact regarding detrimental reliance, she could not "show that the reliance was reasonable." *Id.* at 35a. The court reasoned that because it was Unum's decision to approve Ben's coverage, not NOV's decision, "it was not reasonable for Ben and Plaintiff to rely on NOV's conduct in deducting premiums and sending benefit confirmation statements." *Id.*

Third, the District Court concluded that Erica could not demonstrate extraordinary circumstances. The court held that NOV's "mistakes and oversights do not constitute extraordinary circumstances." *Id.* at 37a. Rather, the court determined, the category of extraordinary circumstances was reserved for acts of bad faith, fraud, and the like on the part of the employer. *Id.*

The District Court accordingly granted NOV's motion for summary judgment. *Id.* at 40a.[2]

**4. The Court of Appeals affirms on the ground that ERISA does not allow estoppel claims based on misrepresentations at variance with the terms of a benefits plan.**

The Court of Appeals affirmed. App. 1a-9a.

"To survive summary judgment on her estoppel claim," the Court of Appeals explained, "Talasek needed to create a genuine dispute of material fact as to whether NOV made a material misrepresentation, on which she reasonably and detrimentally relied, under extraordinary circumstances." *Id.* at 5a. The court determined that NOV *did* make a material misrepresentation and that the Talaseks *did* detrimentally rely on it, but that their reliance was unreasonable as a matter of law because NOV's misrepresentations were contrary to the terms of the benefits plan. *Id.* at 6a-9a.

First, the Court of Appeals concluded that NOV made a material misrepresentation. *Id.* at 6a. "It is difficult to imagine a misrepresentation more likely to mislead a recipient," the court noted. *Id.* "Every year for four years, Talasek and her husband received statements from NOV, purporting to identify the benefits elected and indicating the amount of the

[2] The District Court (App. 41a) subsequently adopted the Magistrate Judge's recommendation (*id.* at 42a-45a) that the premiums deducted from Ben's paycheck be refunded to Erica, along with pre-judgment interest. The amount refunded was, of course, much less than the amount of life insurance that NOV led the Talaseks to believe they had purchased. *Id.* at 44a.

deduction for each element of coverage." *Id.* The Court of Appeals held that the District Court erred in finding that Erica failed to establish this element of her estoppel claim. *Id.*

Second, the Court of Appeals agreed with the District Court that Erica established detrimental reliance. *Id.* at 7a.

Third, however, the Court of Appeals held that Erica could not establish that the Talaseks' reliance on NOV's misrepresentations was reasonable. *Id.* at 7a-9a. The court observed: "Our precedent clearly indicates that an employee cannot reasonably rely on informal documents in the face of unambiguous terms in insurance plans." *Id.* at 7a. Here, "[t]he provision of the group life insurance policy that required Ben Talasek to complete an Evidence of Insurability form before coverage could begin was unambiguous." *Id.* This provision was contained in the "Summary of Benefits" provided by Unum, which "states, in no uncertain terms, that '[e]vidence of insurability is required for any amount of life insurance.'" *Id.* at 7a-8a. "Furthermore," the Court of Appeals continued, "the Summary of Benefits also made clear that NOV's representations were not Unum's. And, perhaps most significant, it delineated when and by whom changes could be made to the terms." *Id.* at 8a.

The Court of Appeals noted that Erica did "not argue that she and her husband relied on NOV's representations to help them interpret an ambiguous or unclear term in the Summary of Benefits." *Id.* (brackets and internal quotation marks omitted). Had that been the case, the court implied, their reliance might have been reasonable. *Id.* But because

the Talaseks relied on representations that were contrary to the terms of the insurance plan, "we cannot say that Talasek's reliance on NOV's statements and deductions was reasonable—no matter how frustrating those misrepresentations were in reality." *Id.* at 8a-9a.

The Court of Appeals denied panel rehearing and rehearing en banc. *Id.* at 59a.

## REASONS FOR GRANTING THE WRIT

The Court should grant certiorari. There is a five-way split among the Courts of Appeals on this issue. The decision below is wrong, because under traditional equitable principles, equitable estoppel is available where a person detrimentally relies on misrepresentations at variance with the terms of a contract. The issue is important, as shown by the fact that it has recently arisen in all eleven numbered circuits. And this case is an excellent vehicle for resolving the conflict.

### I. The circuits are divided 4-4-1-1-1 over whether a beneficiary of an employee benefits plan can bring an estoppel claim under ERISA based on misrepresentations at variance with the terms of the plan.

The decision below further entrenches a five-way split encompassing all eleven numbered circuits. On one side of the conflict, four circuits—the First, Fifth, Ninth, and Eleventh—hold that the beneficiary of an employee benefits plan cannot bring an estoppel claim under ERISA based on misrepresentations that are contrary to the terms of the plan. On

the other side, four circuits—the Second, Third, Fourth, and Eighth—hold that such a beneficiary *can* bring an estoppel claim under ERISA based on misrepresentations contrary to the terms of the benefits plan. And in the middle, the three remaining circuits—the Sixth, Seventh, and Tenth—have adopted three different intermediate positions. Because of this conflict, cases that are identical in their material facts are decided differently in different circuits.

These cases arise under ERISA because ERISA preempts the state law that would otherwise govern. ERISA authorizes plan participants and beneficiaries (such as Erica Talasek) to bring suit against fiduciaries (such as NOV) to obtain equitable relief to redress violations of the statute's provisions. 29 U.S.C. § 1132(a)(3)(B)(i). Equitable estoppel is a form of equitable relief. *CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011). ERISA imposes a duty of care on fiduciaries. 29 U.S.C. § 1104(a)(1)(B). In these cases, the plaintiff typically alleges that the fiduciary breached this duty of care by making a material misrepresentation on which the plaintiff detrimentally relied, and that the fiduciary is accordingly estopped from denying the truth of the misrepresentation.

But what if the fiduciary's misrepresentation is at variance with the terms of the plan? This is the point on which the circuits are split.

### A. Four circuits hold that a beneficiary may not bring an estoppel claim under ERISA based on misrepresentations at variance with the terms of the plan.

The First, Ninth, and Eleventh Circuits agree with the Fifth Circuit that the beneficiary of an employee benefits plan may not bring an estoppel claim under ERISA based on misrepresentations at variance with the terms of the plan.

**First Circuit**: In *Guerra-Delgado v. Popular, Inc.*, 774 F.3d 776, 778-79 (1st Cir. 2014), an employee made the decision to retire in reliance on repeated advice from his employer that his pension would be calculated based on 28 years of service. This advice was wrong. Under the terms of the benefits plan, the employee's pension was based on only seven years of service, which caused his pension to be much smaller than he was led to believe it would be. *Id.* at 779.

The First Circuit held that the employee could not bring an estoppel claim under ERISA, because "any such claim under ERISA is necessarily limited to statements that *interpret* the plan and cannot extend to statements that would *modify* the plan." *Id.* at 782. "Two reasons support this limitation," the court explained. *Id.* "First, because an ERISA plan must be 'established and maintained pursuant to a written instrument,' 29 U.S.C. § 1102(a)(1), a plan cannot be modified orally. Therefore, it would be inherently unreasonable to rely on an oral statement purporting to modify the plan." *Id.* (citation omitted). "Second, ERISA plans must 'provide a procedure for amending [the] plan,' 29 U.S.C. § 1102(b)(3), and

modifications made in contravention of the plan's stated procedure violate that requirement." *Id.* The First Circuit accordingly concluded that estoppel claims are available under ERISA "only when the plan terms are ambiguous" and only based on "representations that interpret rather than modify the plan." *Id.* at 782-83 (internal quotation marks omitted).

The First Circuit has held this view for some time. *See also Livick v. Gillette Co.*, 524 F.3d 24, 31 (1st Cir. 2008) ("[A] plan beneficiary might reasonably rely on an informal statement interpreting an *ambiguous* plan provision; if the provision is clear, however, an informal statement in conflict with it is in effect purporting to *modify* the plan term, rendering any reliance on it inherently unreasonable."); *Todisco v. Verizon Commc'ns., Inc.*, 497 F.3d 95, 101 (1st Cir. 2007) (refusing to allow an estoppel claim where "the plan unambiguously stated that Mr. Todisco was ineligible to add supplemental life insurance").

**Ninth Circuit**: The Ninth Circuit has likewise repeatedly held that estoppel claims are unavailable under ERISA if they are based on representations at variance with the terms of a benefits plan. *See Wong v. Flynn-Kerper*, 999 F.3d 1205, 1212 (9th Cir. 2021) ("[A] party bringing a federal estoppel claim in the ERISA context must" allege "that the representations made about the plan were an interpretation of the plan, not an amendment or modification of the plan.") (citation and internal quotation marks omitted); *Beverly Oaks Physicians Surgical Ctr., LLC v. Blue Cross & Blue Shield of Illinois*, 983 F.3d 435, 442 (9th Cir. 2020) (same); *Gabriel v. Alaska Elec.*

*Pension Fund*, 773 F.3d 945, 955-56 (9th Cir. 2014) ("[W]e have consistently held that a party cannot maintain a federal equitable estoppel claim in the ERISA context when recovery on the claim would contradict written plan provisions.").

In *Gabriel*, for example, an employee retired in reliance on a letter from a plan representative stating that he would receive a pension. *Id.* at 951. This advice was erroneous. As the employee found out only after he retired, under the terms of the benefits plan he was not entitled to a pension. *Id.* at 952. The Ninth Circuit held that he could not bring an estoppel claim under ERISA, because "Gabriel has failed to show that the plan representative's January 1997 letter was an interpretation of ambiguous language in the Plan, rather than a mere mistake in assessing Gabriel's entitlement to benefits." *Id.* at 959.

**Eleventh Circuit**: The Eleventh Circuit takes the same view. In *Jones v. American Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1067-68 (11th Cir. 2004), a group of employees decided to retire in reliance on an assurance that they would keep their life insurance after retirement. This assurance was wrong. The plan stated that the employees' insurance could be terminated at any time. *Id.* at 1067. The Eleventh Circuit explained that "this court has recognized a very narrow common law doctrine under Section 502(a)(1)(B) for equitable estoppel, which is available where the plaintiff can show that (1) the relevant provisions of the plan at issue are ambiguous, and (2) the plan provider or administrator has made representations to the plaintiff that constitute an informal interpretation of the ambiguity." *Id.* at 1069. The court held that "because the Plan is un-

ambiguous, the Appellants cannot make out a prima facie case of equitable estoppel." *Id.* at 1071. *See also Griffin v. Coca Cola Refreshments USA, Inc.*, 989 F.3d 923, 936 (11th Cir. 2021) (same).

**Fifth Circuit**: As the decision below explains, the Fifth Circuit has long taken the same view. App. 7a ("Our precedent clearly indicates that an employee cannot reasonably rely on informal documents in the face of unambiguous terms in insurance plans."). *See Nichols v. Alacatel USA, Inc.*, 532 F.3d 364, 374 (5th Cir. 2008) ("ERISA-estoppel is not permitted if based on purported oral modification of plan terms.") (internal quotation marks omitted); *High v. E-Systems Inc.*, 459 F.3d 573, 580 (5th Cir. 2006) ("[A]llowing estoppel to override the clear terms of plan documents would be to enforce something other than the plan documents themselves. That would not be consistent with ERISA.") (citation and internal quotation marks omitted).

**B. Four circuits take the opposite view.**

On the other side of the split, the Second, Third, Fourth, and Eighth Circuits hold that the beneficiary of an employee benefits plan may bring an estoppel claim under ERISA based on misrepresentations that are contrary to the terms of the plan. In these circuits, the plan need not be ambiguous. Even if the representations on which the beneficiary relied are directly contrary to the plain terms of the plan, these representations can support a claim for estoppel if the beneficiary reasonably relied upon them to his or her detriment. In these four circuits, Erica Talasek would have been permitted to bring an estoppel claim under ERISA.

**Second Circuit**: *Sullivan-Mestecky v. Verizon Commc'ns Inc.*, 961 F.3d 91 (2d Cir. 2020), involved facts identical in all material respects to the facts of our case. A Verizon employee (Sullivan) applied for life insurance coverage and was told by Verizon's Benefits Center that she had obtained coverage from the Prudential Insurance Company in the amount of $679,700. *Id.* at 96. In reliance on this representation, Sullivan did not seek alternative insurance, and her daughter (Sullivan-Mestecky), the beneficiary of the policy, paid for her mother's living expenses, paid off her mother's debts, and took an extended unpaid leave of absence from work to care for her mother. *Id.* at 97. When Sullivan died, it turned out that someone at the Verizon Benefits Center had made a coding error. *Id.* at 96. The true amount of Prudential's insurance coverage was only $11,400. *Id.* at 97. This was the amount promised by the unambiguous terms of the benefits plan. *Id.* at 98.

The Second Circuit held that the daughter could bring an estoppel claim under ERISA, despite the fact that the representation on which she relied was contrary to the terms of the benefits plan. *Id.* at 100-01. The Second Circuit held:

> Sullivan-Mestecky has plausibly pled the five elements required to make a claim for estoppel against Verizon. In June 2011, Verizon's agent sent Sullivan the Retirement Enrollment Worksheet indicating that Sullivan was eligible for a life insurance policy valued at $679,700. Following that initial document, Verizon's agents sent Sullivan a Retirement Confirmation of Enrollment, a Confirmation of Coverage on Demand, a Beneficiary Confirmation Notice,

> and a W-2, all of which represented that Verizon was providing her with this generous life insurance policy. These written documents, taken together, constitute and reflect the promise that Sullivan-Mestecky seeks to enforce.

*Id.* at 101 (footnote omitted). The Second Circuit continued:

> Sullivan-Mestecky has amply pled that reliance and injury followed upon this promise. In response to Verizon's written promise, Sullivan enrolled in Verizon's offered plan, paid taxes based on the plan's taxable imputed income, and forwent procuring an alternative life insurance policy. Sullivan-Mestecky also paid her mother's debts and took an unpaid leave of absence from work to take care of her mother, anticipating that her short-term financial losses would be more than covered by Sullivan's life insurance payout. It would be unjust to allow these losses and forbearances, traceable to Verizon's gross negligence, to be borne by Sullivan and her daughter Sullivan-Mestecky, both of whom believed Verizon's repeated misrepresentations. Altogether, Sullivan-Mestecky has satisfied the standard requirements of promissory estoppel.

*Id.* (footnote omitted). The Second Circuit accordingly concluded that Sullivan-Mestecky could bring a claim of estoppel under ERISA, even though the promise of insurance coverage she sought to enforce was contrary to the terms of the benefits plan. *Id.* at 101-02.

**Third Circuit**: The Third Circuit also takes this view. In *Pell v. E.I. DuPont de Nemours & Co.*, 539

F.3d 292, 298 (3d Cir. 2008), Pell accepted a job at DuPont based on assurances that all his time with his former employer would be credited for purposes of calculating his pension. These assurances were wrong. In fact, DuPont's pension plan credited Pell for only a portion of this time, so when he retired from DuPont his pension was smaller than he had been led to expect. *Id.* at 298-99. The Third Circuit held that "Pell is entitled to relief under ERISA based on an equitable estoppel theory." *Id.* at 300. The court ordered DuPont to use the pension calculation method that Pell had been told would be used, *id.* at 297, because "when an individual acts with apparent authority to determine an employee's status in relationship to a benefit plan, the plan fiduciary can be responsible for the individual's material misstatements." *Id.* at 301. "If we were to accept DuPont's argument that Pell could not rely on his pension estimates," the court observed, "employees such as Pell would be required to continually question their benefits calculations, even if they agreed with their employers' estimates. We decline to formulate such a burdensome rule." *Id.* at 302.

The Third Circuit reached the same result for the same reason in *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226 (3d Cir. 1994), a case with facts very similar to those of this case. Curcio's husband was an employee of Capital Health Systems. He died shortly after obtaining two insurance policies totaling $400,000 in coverage—or so he thought—from John Hancock as part of Capital Health's benefits plan. *Id.* at 230. Capital Health deducted the premiums for the two policies from his biweekly paycheck. *Id.* When he died, however, it turned out that under

the terms of his benefits plan, he was entitled to only one of the policies, with coverage of only $250,000. *Id.*

The Third Circuit held that Curcio could recover from Capital Health under an estoppel theory. *Id.* at 235-38. "[A]n employer can be liable under ERISA in its fiduciary capacity for making affirmative misrepresentations," the court explained. *Id.* at 235. "Here Mrs. Curcio primarily presents an equitable estoppel claim, which is authorized under ERISA." *Id.* The Third Circuit found that Capital Health had made material misrepresentations, and that the Curcios had reasonably relied on these misrepresentations to their detriment, because they had forgone the opportunity to obtain insurance from another provider. *Id.* at 237. The court accordingly concluded that Curcio "satisfied the elements of her equitable estoppel claim" and that she "has established Capital Health's liability to her in the amount of $150,000." *Id.* at 238.

**Fourth Circuit**: The Fourth Circuit agrees with the Second and Third Circuits that the beneficiary of an employee benefits plan can bring a claim of estoppel based on representations at variance with the terms of the plan. *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012), involved facts similar to those of our case. McCravy was an employee of Bank of America who purchased life insurance coverage—or so she thought—for her daughter from the Metropolitan Life Insurance Company, as part of the bank's employee benefits plan. *Id.* at 178. She paid premiums for the insurance for more than six years. *Id.* When her daughter died, however, McCravy

learned for the first time that her daughter was ineligible for coverage under the terms of the plan. *Id.*

The Fourth Circuit held that McCravy could bring a claim of equitable estoppel under ERISA to recover the amount of the benefits she had been led to believe she would receive upon her daughter's death. *Id.* at 182-83. "This makes sense," the court explained. *Id.* at 183. Otherwise,

> fiduciaries would have every incentive to wrongfully accept premiums, even if they had no idea as to whether coverage existed—or even if they affirmatively knew that it did not. The biggest risk fiduciaries would face would be the return of their ill-gotten gains, and even this risk would only materialize in the (likely small) subset of circumstances where plan participants actually needed the benefits for which they had paid. Meanwhile, fiduciaries would enjoy essentially risk-free windfall profits from employees who paid premiums on non-existent benefits but who never filed a claim for those benefits.

*Id.* McCravy's daughter was not eligible for insurance under the terms of the benefits plan, but that was no obstacle to an equitable estoppel claim under ERISA based on representations that her daughter was insured. *Id.*[3]

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[3] *McCravy* remains the law in the Fourth Circuit despite *Retirement Comm. of DAK Americas LLC v. Brewer*, 867 F.3d 471, 484-85 (4th Cir. 2017), in which the Fourth Circuit held that estoppel could not be used to *alter* the terms of a benefits plan. In *McCravy*, as in our case, the beneficiary did not seek to alter the plan's terms, but rather to recover on an estoppel theory

**Eighth Circuit**: The Eighth Circuit is in accord. *Silva v. Metropolitan Life Ins. Co.*, 762 F.3d 711 (8th Cir. 2014), is a case very similar to this one. An employee named Abel Silva applied for supplemental life insurance as part of his employer's benefits plan. *Id.* at 713. The coverage appeared on his benefits statements. *Id.* at 713-14. The employer began taking deductions from his paycheck to pay for the premiums. *Id.* at 714. But when Abel Silva died, the insurer denied coverage on the ground that he had never been insured because he had failed to complete the required "evidence of insurability" form. *Id.* This requirement was one of the terms of the benefits plan. *Id.*

The Eighth Circuit held that Abel Silva's beneficiary could bring an estoppel claim under ERISA. *Id.* at 723-24. The court noted that he "relied on MetLife's wrongful collection of his premiums. In addition, Abel did not obtain any other supplemental life insurance policy." *Id.* at 724. The Eighth Circuit concluded:

> It is unclear what a reasonable person in Abel's position would have done differently to prevent this situation. Even if Abel read the entire Plan, he reasonably could have believed that MetLife had sufficient evidence of insurability from him or that the provision did not apply to him since MetLife began deducting premiums from his paycheck and the supplemental life insurance policy showed up on his Savvis online benefits enrollment page.

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regardless of the plan's terms. No doubt for this reason, in *DAK Americas* the Fourth Circuit did not even mention *McCravy*.

*Id.* Under the doctrine of equitable estoppel, the Eighth Circuit held, "the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Id.* (citation, internal quotation marks, and brackets omitted).

Had our case arisen in the Second, Third, Fourth, or Eighth Circuits, the outcome would have been different. In these circuits, unlike in the Fifth Circuit, a beneficiary may bring an estoppel claim under ERISA based on misrepresentations at variance with the unambiguous terms of the benefits plan. In these circuits, where an employer misrepresents to an employee that he is insured, the employee's reliance on the employer's misrepresentation can be reasonable even if the misrepresentation is contrary to the terms of the plan.

### C. The other three circuits take three different intermediate positions.

The remaining three circuits have adopted an intermediate view. In these circuits, a beneficiary may bring an estoppel claim under ERISA based on some misrepresentations, but not others, that are at variance with the terms of the benefits plan. The circuits are divided even here, however, because these circuits have taken three distinct intermediate positions. In the Seventh Circuit, a beneficiary can bring an estoppel claim based on *knowing or intentional* misrepresentations, but not on negligent misrepresentations. In the Tenth Circuit, a beneficiary can bring an estoppel claim based only on *intentional*

misrepresentations. And in the Sixth Circuit, a beneficiary can bring an estoppel claim only if the claim satisfies a multi-factor test.

**Seventh Circuit**: In *Pearson v. Voith Paper Rolls, Inc.*, 656 F.3d 504, 506-07 (7th Cir. 2011), the employee chose a severance package in reliance on erroneous financial information provided by his employer's human resources department. The erroneous advice was contrary to the terms of the benefits plan. *Id.* at 507. The Seventh Circuit held that the employee could not bring an estoppel claim, because "[s]tatements or conduct by individuals implementing the plan may estop the employer from enforcing a plan's written terms only" where the employee relied upon "a knowing misrepresentation." *Id.* at 509. The Seventh Circuit explained that "[n]egligence is not sufficient to meet the standard for a knowing misrepresentation." *Id.* In *Pearson*, the evidence did not indicate "anything more than an inadvertent mistake or negligence by the Plan. As we noted above, mistakes and negligence are not sufficient to meet the standard for a knowing misrepresentation." *Id.* at 510.

**Tenth Circuit**: The Tenth Circuit holds that "an ERISA estoppel claim might be viable in egregious cases, such as where the employer lied, engaged in fraud, or intended to deceive the participants, or where the claim was premised on the employer's interpretation of an ambiguous provision in the plan." *Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950, 962 (10th Cir. 2011) (citation and internal quotation marks omitted). But where an employer makes an *unintentional* misrepresentation at variance with the terms of the plan, no estoppel claim is available

under ERISA. *Id. See also Martinez v. Plumbers & Pipefitters Nat'l Pension Plan*, 795 F.3d 1211, 1223-24 (10th Cir. 2015) (same).

**Sixth Circuit**: The Sixth Circuit has adopted a multi-factor test of its own:

> We hold that a plaintiff can invoke equitable estoppel in the case of unambiguous pension plan provisions where the plaintiff can demonstrate the traditional elements of estoppel, including that the defendant engaged in intended deception or such gross negligence as to amount to constructive fraud, plus (1) a written representation; (2) plan provisions which, although unambiguous, did not allow for individual calculation of benefits; and (3) extraordinary circumstances in which the balance of equities strongly favors the application of estoppel.

*Bloemker v. Laborers' Local 265 Pension Fund*, 605 F.3d 436, 444 (6th Cir. 2010). *See also Pearce v. Chrysler Grp. LLC Pension Plan*, 893 F.3d 339, 350 (6th Cir. 2018) (same); *Donati v. Ford Motor Co., Gen. Ret. Plan, Ret. Comm.*, 821 F.3d 667, 675 (6th Cir. 2016) (same).

Had our case arisen in the Seventh or Tenth Circuit, Erica Talasek would likely have lost, because NOV appears to have acted negligently, not deliberately or knowingly, in misinforming the Talaseks about Ben's insurance. The Sixth Circuit's test is so fact-intensive that it is hard to predict the outcome, but Erica would at least have been able to get past summary judgment. She would not have lost as a matter of law, as she did in the Fifth Circuit.

### D. This conflict will persist until the Court resolves it.

The eleven numbered circuits have thus decided this issue in five different ways. Four circuits are on one side, four are on the other, and the remaining three have adopted three different intermediate positions. The Courts of Appeals will never resolve this conflict themselves.

Nor is there any prospect that any of this Court's recent ERISA cases will persuade the Courts of Appeals to change their views. This is an issue the Court has never addressed. The closest the Court has come to discussing the question is the brief passage in *CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011), in which the Court noted that equitable estoppel is one of the traditional equitable remedies available under ERISA. But the Court had no occasion in *Amara* to discuss estoppel in any more detail. And the split has only grown worse since *Amara*.

## II. The decision below is wrong.

The Fifth Circuit erred below in holding that under ERISA the beneficiary of an employee benefits plan may not bring a claim for equitable estoppel based on misrepresentations at variance with the terms of the plan. In fact, under traditional principles of equity, it is clear that a claim for equitable estoppel can be brought where one party to a contract relies to his detriment on misrepresentations made by the other, even where the misrepresentations are contrary to the terms of the contract.

Under section 502(a)(3) of ERISA, the beneficiary of a benefits plan may bring a civil action:

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3). This case involves subsection (B)(i), which entitles beneficiaries to obtain appropriate equitable relief to redress violations of ERISA.

There is no dispute that NOV, as the administrator of its employee benefits plan, is a fiduciary under ERISA. 29 U.S.C. § 1002(21)(A); *see Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996) (holding that an employer that administers a benefits plan is a fiduciary under ERISA). Nor is there any dispute that ERISA imposes a duty of care on fiduciaries, 29 U.S.C. § 1104(a)(1)(B), a duty that includes "the maintenance of proper records." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251-52 (1993) (citation and internal quotation marks omitted). Nor, finally, is there any dispute that a fiduciary who breaches this duty of care thereby violates ERISA, which entitles a beneficiary to "appropriate equitable relief." 29 U.S.C. § 1132(a)(3).

The equitable relief to which beneficiaries are entitled includes the forms of relief that were typically available in equity courts before the merger of law and equity. *Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142 (2016); *Sereboff v. Mid Atlantic Med Servs., Inc.*, 547 U.S. 356, 361 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210 (2002). To determine the contours of such relief, the Court looks to

standard treatises on equity. *Montanile*, 577 U.S. at 142.

Equitable estoppel is one of the forms of relief that was traditionally available in the equity courts and that is therefore available under ERISA. *Amara*, 563 U.S. at 441. "Estoppel is an equitable doctrine invoked to avoid injustice in particular cases." *Heckler v. Community Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 59 (1984). As early as 1879, the Court observed that "[t]he law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." *Dickerson v. Colgrove*, 100 U.S. 578, 580 (1879).

Under the doctrine of equitable estoppel, where A makes a representation of a material fact to B, and B reasonably relies to his detriment on A's representation, A will be estopped from denying the truth of the representation. *See, e.g.*, 4 *Williston on Contracts* § 8:3 (4th ed. Westlaw) ("[A] representation of past or existing fact made to a party who relies upon it reasonably may not thereafter be denied by the party making the representation if permitting the denial would result in injury or damage to the party who so relies."); Henry M. Herman, *The Law of Estoppel* 442-43 (1871) ("These estoppels arise where a party by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief and alter his own previous position. A party who so acted is estopped and precluded from falsifying his own representation."); Melville M. Bigelow, *A Treatise on the*

*Law of Estoppel* lx (1872) ("Where a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things.").

For B to bring a claim of equitable estoppel against A, A need not have intentionally or even knowingly misled B. Negligent misrepresentation by A can work an estoppel if B relies upon it to his detriment. *See, e.g.*, Christopher G. Tiedeman, *A Treatise on Equity Jurisprudence* 139 (1893) ("[A]n honest mistake as to facts stated may nevertheless support the claim of estoppel."); James W. Eaton, *Handbook of Equity Jurisprudence* 168 (1901) ("It is not necessary to an equitable estoppel that the party should design to mislead.").

Where there is an equitable estoppel, the court places B in the position he would have occupied had A's representation been true. *Amara*, 563 U.S. at 441. *See, e.g.*, 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* 1445 (3d ed. 1905) ("The estoppel is commensurate with the thing represented, and operates to put the party entitled to its benefit in the same position as if the thing represented were true."); Norman Fetter, *Handbook of Equity Jurisprudence* 50 (1895) ("The party entitled to the benefit of an estoppel has the same rights against the one estopped as if the representation had been true.").

Contrary to the view of the Fifth Circuit below, these principles remain true even where A's misrepresentation is at variance with the terms of a contract between A and B. *See, e.g.*, George Richards, *A Treatise on the Law of Insurance* 68 (1892) ("Estop-

pel *in pais* [a synonym for equitable estoppel] is the bar which equity raises, in the interest of fair dealing, to prevent the one party *from enforcing certain rights which it possesses under the letter of the contract* to the detriment of the other party, where, by its declarations, agreement, or conduct, it has induced the other party to rest secure in the belief that such rights have been relinquished.") (emphasis added); 2 Pomeroy, *Treatise on Equity Jurisprudence*, at 1421-22 ("Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, *of contract*, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse.") (emphasis added); 4 *Williston on Contracts* at § 39:29 ("To prove waiver [of a contractual right] by estoppel, a party need only show that it was misled to its prejudice by the conduct of the other party into the honest and reasonable belief that the latter was not insisting on, and was therefore giving up, some right.")

Equitable estoppel is available, even where the misrepresentation is contrary to the terms of a contract, because equitable estoppel is not a method of interpreting contracts. Rather, "the doctrine rests upon the following general principle: When one of two innocent persons—that is, persons each guiltless of an intentional, moral wrong—must suffer a loss, it must be borne by that one of them who by his conduct—acts or omissions—has rendered the injury possible." 2 Pomeroy, *Treatise on Equity Jurisprudence*, at 1421. As then-Professor Keeton observed,

"[t]he principle of granting redress for detrimental reliance is in essence more like tort than contract; it imposes liability on the basis of conduct rather than sustaining it on the basis of manifested consent." Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rev. 961, 979 (1970).

For this reason, one of the classic fact patterns giving rise to equitable estoppel is where a party misrepresents that insurance coverage exists—contrary to the terms of the written insurance contract—thereby inducing the other party to forego the opportunity of procuring insurance from another provider. *See, e.g.*, 3 *Corbin on Contracts* 49 (rev. ed. 1996) (noting that equitable estoppel is available in "this straightforward example. A party asks an insurance agent if a particular matter is covered by a certain kind of insurance policy. Although the written policy does not cover that matter, the agent responds: 'We've got you covered.'"); George Bliss, *The Law of Life Insurance* 420 (1872) (where an insurer "induces a person to believe that his policy is still in force," the insurer "may very properly be held to have waived any defence on those grounds, or rather, to be estopped from setting up any such defence"); Keeton, *Insurance Law Rights at Variance with Policy Provisions*, at 967 ("The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.").

The Restatement of the Law of Liability Insurance includes an entire section on this point. As the

Restatement explains, "[a] party to an insurance policy who makes a promise or representation that can reasonably be expected to induce detrimental reliance by another party to the policy is estopped from denying the promise or representation if the other party does in fact reasonably and detrimentally rely on that promise or representation." *Restatement of the Law of Liability Insurance* § 6. The Restatement notes that "*even if the promise or representation of an insurer's agent contradicts the clear language of the policy, it will generally be reasonable for the policyholder to rely on that promise or representation*." *Id.* cmt. c (emphasis added). The Restatement further explains that "[d]etrimental reliance can include an insured's decision not to seek alternative coverage when the insurer represents that a particular risk will be covered." *Id.*

In short, the Fifth Circuit (along with the First, Ninth, and Eleventh Circuits) misunderstands equitable estoppel. Equitable estoppel has never been confined to circumstances in which a written contract is ambiguous. Rather, equitable estoppel has always been available where the relied-upon representation is contrary to the unambiguous terms of a written contract. Indeed, equitable estoppel has often been invoked in the exact circumstances of our case, where the misrepresentation concerns insurance coverage that does not in fact exist.

These circuits have expressed concern that allowing a claim for equitable estoppel in these circumstances would constitute an impermissible amendment to the terms of the benefits plan. *Guerra-Delgado*, 774 F.3d at 782; *Gabriel*, 773 F.3d at 956; *High*, 459 F.3d at 580. *Cf. US Airways, Inc. v.*

*McCutchen*, 569 U.S. 88, 99-101 (2013) (noting that an equitable remedy intended to enforce the terms of a benefits plan may not contradict those terms). But this concern is misplaced. Section 502(a)(3) of ERISA provides that beneficiaries may seek equitable relief *either* to enforce the terms of a benefits plan *or* to redress violations of the statute. 29 U.S.C. § 1132(a)(3); *McCutchen*, 569 U.S. at 100. When a beneficiary brings a claim of equitable estoppel, she is in the latter category, not the former. She does not seek to enforce or modify the terms of a benefits plan. Rather, she seeks to redress a violation of the statute—here, the administrator's breach of the duty of care that ERISA imposes on fiduciaries.

Under the Fifth Circuit's view (and that of the First, Ninth, and Eleventh Circuits), estoppel would be unavailable even where the employer *intentionally* misleads the employee about the terms of a benefits plan. Such an outcome would have been unthinkable in the days of the divided bench, when it was well understood that "equitable estoppel 'forms a very essential element in ... fair dealing, and rebuke of all fraudulent misrepresentation, which it is the boast of courts of equity constantly to promote.'" *Amara*, 563 U.S. at 441 (quoting 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 1533, at 776 (12th ed. 1877)).

### III. The question presented is important and this case is an ideal vehicle for deciding it.

There can be little doubt of the importance of this question. In recent years it has arisen in all eleven numbered circuits. The frequency with which the is-

sue recurs is hardly surprising, because 141 million Americans participate in employee benefits plans governed by ERISA. U.S. Dept. of Labor, *Fact Sheet: What is ERISA*, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa (data as of FY 2013). This issue necessarily arises under ERISA, not state contract law, because ERISA preempts the state law that would otherwise govern.

Because of the circuit split, identically situated employees and beneficiaries are treated differently in different circuits. Firms with workplaces in more than one circuit, including NOV itself, are governed by inconsistent rules. The "central design of ERISA" was to establish uniform national standards for employee benefits plans, *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 326 (2016), but this purpose is undermined as long as employees and beneficiaries can recover in some circuits but not others.

This case is the perfect vehicle in which to answer the question presented. Equitable estoppel is the only issue left in the case. There are no threshold issues. The question will be outcome-determinative: If NOV is estopped from denying that Ben Talasek had supplemental life insurance, Erica will be entitled to the proceeds of that insurance. It is hard to imagine that any better vehicle will come along.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

NITIN SUD
Sud Law P.C.
6750 West Loop South
Suite 920
Bellaire, TX 77401

STUART BANNER
*Counsel of Record*
UCLA School of Law
Supreme Court Clinic
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-8506
banner@law.ucla.edu