No. 21-1266

In the Supreme Court of the United States

ERICA TALASEK,

Petitioner,

v.

NATIONAL OILWELL VARCO, L.P.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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The circuits disagree as to whether the beneficiary of an employee benefits plan can bring an estoppel claim under ERISA based on misrepresentations at variance with the terms of the plan. Some circuits, including the Fifth Circuit below, hold that a beneficiary may not bring such a claim. Pet. 13-16. Other circuits hold precisely the opposite. *Id.* at 16-23. And still other circuits have adopted intermediate positions. *Id.* at 23-25. The correct answer depends on the contours of the "equitable relief," 29 U.S.C. § 1132(a)(3)(B), to which beneficiaries are entitled under ERISA, which in turn depends on whether estoppel was available in these circumstances before the merger of law and equity. Pet. 26-33.

Respondent NOV unsurprisingly denies the existence of this circuit split. BIO 13-32. Before that, however, NOV rather more surprisingly accuses the Talaseks of insurance fraud, *id.* at 2-10, and argues that the Question Presented has already been answered in *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013). BIO 12-13. NOV also offers a defense of the decision below. *Id.* at 33-36.

NOV errs in every respect. First, this case does not involve any insurance fraud, either as a factual matter or a legal matter. Second, *McCutchen* did not address the issue raised by this case. Third, the circuit split is real. Erica Talasek would have a viable estoppel claim had her late husband worked in the Second, Third, Fourth, or Eighth Circuits. And fourth, the decision below is incorrect, because it rests on a misunderstanding of equitable estoppel.

I. This case does not involve insurance fraud.

NOV accuses the Talaseks of committing insurance fraud. BIO 2-10. This accusation is both erroneous and irrelevant to the case at this stage.

NOV's charge is erroneous. The Talaseks did not fraudulently attempt to obtain insurance. As the District Court found, Ben sought supplemental life insurance in the fall of 2013, well before he was diagnosed with cancer in 2014 and indeed before he had any idea he was seriously ill. Pet. App. 13a. By November 17, 2013, Ben had already received a statement confirming the coverage. *Id.* at 48a. As NOV's own witness acknowledged, if NOV sent the statement to Ben in mid-November, he must have applied for the insurance before then. R. 1412.

NOV's record citations ostensibly in support of its fraud theory are merely to allegations NOV made in its own summary judgment motion in the District Court. BIO 4-6 (citing R. 1009-1014). But these allegations were vigorously disputed in the District Court because they are false. R. 1225-1226. The District Court therefore ignored them when it granted summary judgment. Pet. App. 13a-14a.

NOV's accusation of fraud also has no relevance to the case at this stage. The District Court granted summary judgment, not on the ground that the Talaseks committed fraud, but on the ground that Erica could not establish the elements of estoppel. *Id.* at 32a-39a. The Court of Appeals affirmed on the ground that although Erica could establish some of the elements of estoppel—she could establish that NOV made a material misrepresentation on which the Talaseks relied to their detriment—she could not

establish that their reliance was reasonable, because the misrepresentation was contrary to the terms of the benefits plan. *Id.* at 6a-9a. Neither decision had anything to do with fraud.

II. *US Airways v. McCutchen* did not answer the Question Presented.

NOV argues that the Court answered the Question Presented in *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013). BIO 12-13. But NOV misunderstands *McCutchen*.

In *McCutchen*, the Court held that an equitable remedy intended to enforce the terms of a benefits plan may not contradict those terms. *McCutchen*, 569 U.S. at 99-101. As the Court explained, "if the agreement governs, the agreement governs." *Id.* at 99. That is, a party seeking to enforce a contract is bound by the terms of the contract, so if the contract explicitly excludes a particular form of relief, that relief is unavailable. *Id.* at 99-100.

As we explained in our certiorari petition, however, Erica Talasek is not seeking to enforce the terms of Ben's benefits plan. Pet. 33. She is seeking relief on an estoppel theory, based not on the terms of the benefits plan but on NOV's repeated misrepresentations, over several years, that Ben had purchased supplemental life insurance. Erica's claim is that NOV, a fiduciary under ERISA, breached its statutory duty of care by making these misrepresentations.

This is a crucial distinction. ERISA provides that a beneficiary may obtain equitable relief *either* "to redress such violations" of the statute *or* "to enforce … the terms of the plan." 29 U.S.C. § 1132(a)(3)(B). Erica is in the former category (she alleges that NOV

violated the statute), while Mr. McCutchen was in the latter category (he sought to enforce the terms of his benefits plan). *If* Erica were trying to enforce the terms of Ben's plan, *McCutchen* would doom her claim to failure. But she is not trying to enforce the terms of Ben's plan, so *McCutchen* has no bearing on the Question Presented.

III. The circuits are divided on whether a beneficiary can bring an estoppel claim under ERISA based on misrepresentations at variance with the terms of a benefits plan.

Despite NOV's heroic effort to harmonize the cases, BIO 13-32, there can be little doubt that the circuits are irreconcilably divided as to whether ERISA authorizes a beneficiary to bring an estoppel claim based on misrepresentations contrary to the terms of a benefits plan.

Several circuits have held, in cases with facts very similar to those of this case, that a beneficiary who would not be entitled to benefits under the terms of the plan may nevertheless recover in estoppel based on misrepresentations contrary to those terms. *See Sullivan-Mestecky v. Verizon Commc'ns Inc.*, 961 F.3d 91, 100-01 (2d Cir. 2020); *Pell v. E.I. Dupont de Nemours & Co.*, 539 F.3d 292, 300-02 (3d Cir. 2008); *Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 235-38 (3d Cir. 1994); *McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 182-83 (4th Cir. 2012); *Silva v. Metropolitan Life Ins. Co.*, 762 F.3d 711, 723-24 (8th Cir. 2014). If Ben Talasek had worked in one of these circuits, Erica would, at the very least,

have been entitled to a trial on the merits of her equitable estoppel claim.

But Ben worked in the Fifth Circuit, where circuit "precedent clearly indicates that an employee cannot reasonably rely on informal documents in the face of unambiguous terms in insurance plans." Pet. App. 7a. Erica would be equally out of luck in the First, Ninth, and Eleventh Circuits. *See Guerra-Delgado v. Popular, Inc.*, 774 F.3d 776, 782-83 (1st Cir. 2014); *Wong v. Flynn-Kerper*, 999 F.3d 1205, 1212 (9th Cir. 2021); *Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 955-59 (9th Cir. 2014); *Griffin v. Coca Cola Refreshments USA, Inc.*, 989 F.3d 923, 936 (11th Cir. 2021); *Jones v. American Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1069-71 (11th Cir. 2004).

NOV's principal argument is that every circuit considers "all relevant circumstances" in deciding whether estoppel is available. BIO 13. Not so. The First, Fifth, Ninth, and Eleventh Circuits apply a blanket rule under which estoppel is never available where the misrepresentation is contrary to the terms of the plan. *See Guerra-Delgado*, 774 F.3d at 782 ("[A]ny such claim under ERISA is necessarily limited to statements that would *interpret* the plan and cannot extend to statements that would *modify* the plan."); *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."); *Gabriel*, 773 F.3d at 955-56 ("[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 provi-

sions."); *Jones*, 370 F.3d at 1071 ("[B]ecause the Plan is unambiguous, the Appellants cannot make out a prima facie case of equitable estoppel.").

In the Second, Third, Fourth, and Eighth Circuits, by contrast, estoppel *is* available under such circumstances. *See Sullivan-Mestecky*, 961 F.3d at 100-02 (holding that the beneficiary of a plan may recover life insurance proceeds under an estoppel theory where such proceeds were not payable under the terms of the plan); *Pell*, 539 F.3d at 300-02 (holding that the beneficiary of a plan may recover pension benefits under an estoppel theory where such benefits were not payable under the terms of the plan); *McCravy*, 690 F.3d at 182-83 (holding that the beneficiary of a plan may recover life insurance proceeds under an estoppel theory where such proceeds were not payable under the terms of the plan); *Silva*, 762 F.3d at 723-24 (holding that the beneficiary of a plan may recover life insurance proceeds under an estoppel theory where such proceeds were not payable under the terms of the plan).

The other three circuits, the Sixth, Seventh, and Tenth, take three different intermediate positions. *See Bloemker v. Laborers' Local 265 Pension Fund*, 605 F.3d 436, 444 (6th Cir. 2010); *Pearson v. Voith Paper Rolls, Inc.*, 656 F.3d 504, 509 (7th Cir. 2011); *Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950, 962 (10th Cir. 2011).

This is not a "veneer of legalese," BIO 11; it is a circuit split.

Nor can the split be explained away on the theory that some of these cases were decided on summary judgment while others were decided on motions to dismiss. *Id.* at 19, 25. When beneficiaries lose in the

First, Fifth, Ninth, and Eleventh Circuits, it is not because they failed to adduce enough evidence to get past summary judgment. They lose because the misrepresentation on which they relied was contrary to the terms of the plan. When beneficiaries win in the Second, Third, Fourth, and Eighth Circuits, it is not because the case is being decided on a motion to dismiss rather than at summary judgment. They win because they are fortunate enough to be in one of the circuits that allows estoppel claims based on misrepresentations at variance with the terms of the plan. The outcomes of the cases diverge because the circuits are applying divergent rules. The circuit split is over the scope of equitable relief under ERISA. It has nothing to do with the procedural posture of the cases.

IV. The decision below rests on a misunderstanding of equitable estoppel.

NOV does not dispute that the "equitable relief" available under ERISA, 29 U.S.C. § 1132(a)(3)(B), includes the forms of relief that were available in equity courts before the merger of law and equity. *See 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). Nor does NOV dispute that equitable estoppel is one such form of relief. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011). Presumably, therefore, NOV agrees that if, in the days of the divided bench, a plaintiff could bring an estoppel claim based on misrepresentations con-

trary to the terms of a contract, a plaintiff can do so today under ERISA.

As we showed in our certiorari petition, Pet. 26-33, such a claim *was* available in the equity courts. Where one party to a contract detrimentally relied on the other's material misrepresentation, the injured party could bring a claim for estoppel regardless of whether the misrepresentation was contrary to the contract. Equitable estoppel was "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." George Richards, *A Treatise on the Law of Insurance* 68 (1892). "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." 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* 1421 (3d ed. 1905) (emphasis added).

Indeed, it was clear that equitable estoppel was available where a party misrepresented that insurance coverage existed, contrary to the terms of the contract between the parties, as in our case. *See* 3 *Corbin on Contracts* 49 (rev. ed. 1996); George Bliss, *The Law of Life Insurance* 420 (1872); *Restatement of the Law of Liability Insurance* § 6.

NOV accuses the certiorari petition of "demonizing NOV" by claiming that NOV tried "to mislead an employee." BIO 3. This is a mischaracterization of the petition, which recognized that NOV's four years of misrepresentation were caused not by malice but by an inadvertent coding error committed by NOV's

benefits department. Pet. 5. But estoppel was available in the equity courts for accidental misrepresentations as well as deliberate ones. *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.").

Estoppel was available even for honest mistakes because the purpose of estoppel was not to punish an intentional wrongdoer. 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. NOV may not have deliberately harmed Erica Talasek, but it was NOV who caused her loss, by erroneously assuring the Talaseks, every two weeks for four years, that Ben had insurance coverage. Under traditional equitable principles, NOV should bear the loss, not Erica.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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