No. 23-734

In the Supreme Court of the United States

JODY ROSE, ADMINISTRATRIX OF THE ESTATE OF KYREE DEVON HOLMAN, DECEASED, PETITIONER,

v.

PSA AIRLINES, INC., PSA AIRLINES, INC. GROUP BENEFIT PLAN, UMR, INC. QUANTUM HEALTH, INC. *AKA* MYQHEALTH BY QUANTUM, AND MCMC, LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

NORRIS A. ADAMS, II
CAITLIN HALE WALTON
ESSEX RICHARDS, P.A.
1701 SOUTH BOULEVARD
CHARLOTTE, NC 28203
(704) 377-4300

COLLEEN R. SMITH
STRIS & MAHER LLP
1717 K STREET NW
STE. 900
WASHINGTON, D.C. 20006
(202) 800-5749

PETER K. STRIS
RACHANA A. PATHAK
Counsel of Record
JOHN STOKES
STRIS & MAHER LLP
777 S. FIGUEROA STREET
SUITE 3850
LOS ANGELES, CA 90017
(213) 995-6800
rpathak@stris.com

Counsel continued on inside cover

BRIDGET C. ASAY
STRIS & MAHER LLP
15 E. STATE ST., STE. 2
MONTPELIER, VT 05602
(802) 858-4285

Counsel for Petitioner

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REPLY BRIEF FOR THE PETITIONER

This case checks all the boxes for plenary review—if not summary reversal.

First, the decision below indisputably created a 6-1 circuit split on the question of whether non-tracing monetary remedies, like surcharge, are available under 29 U.S.C. § 1132(a)(3) to ERISA plan participants suing fiduciaries for breach of fiduciary duty. *See infra* Part I.

Second, that 6-1 circuit split warrants immediate review by this Court. All six majority circuits will not, as Respondents suggest, simply reverse their position because a divided Fourth Circuit panel decided to do so in this case. And even if all six circuits did choose to follow the lead of the panel majority here, that process would entail years of uncertainty and disuniformity over the question presented—a critical threshold issue in most ERISA cases. *See infra* Part II.

Third, there is nothing about this case that makes it an "unsuitable vehicle" for considering the question presented. Indeed, Respondents' boilerplate vehicle arguments are wholly unsubstantial. *See infra* Part III.

And finally, the decision below blatantly disregarded this Court's holding in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), and instead adopted a brand new test to determine which remedies were "typically available in equity" that is both ahistorical and contrary to Congressional intent. *See infra* Part IV. This departure from settled law warrants plenary review, if not outright summary reversal directing the Fourth Circuit to follow *Amara*.

I. The decision below undeniably created a 6-1 circuit split over the question presented.

A. The parties agree on a few essential points.

First, Petitioner and Respondents agree that the question presented is whether non-tracing monetary remedies like surcharge are available under Section 502(a)(3) of ERISA to plan participants suing a breaching fiduciary. *Compare* Pet. i, *with* BIO i.

Second, Petitioner and Respondents agree that—prior to the decision below—*every circuit that squarely addressed the question presented (seven of them)* answered "yes." *Compare* Pet. 21-22 (citing relevant cases from Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits), *with* BIO 15-16 (conceding that Fourth, Fifth, Seventh, Eighth, and Ninth Circuits answered "yes" to the question presented in precedential published decisions),[1] *and* BIO 17-18 (conceding same for Second and Eleventh Circuits).[2]

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[1] Because the decisions from these circuits pre-date *Montanile v. Bd. of Trs.*, 577 U.S. 136 (2016), Respondents speculate that "if given the opportunity, these courts would join the Fourth Circuit and return to their pre-*Amara* precedent." BIO 16. As explained below, *infra* Part II.A., that is astonishingly unlikely. But likely or not, the fact that Respondents are predicting whether these circuits will *change* their answer to the question presented to "no" is a concession that their *current* answer is "yes."

[2] Respondents note that "those circuits have issued decisions affirming the availability of surcharge *after Montanile issued*." BIO 17-18 (emphasis added). But according to Respondents, that is only because "in each case, no party or amicus cited *Montanile* in their briefing." *Id.* at 18. And "if those courts had considered *Montanile* . . . they

Third, Petitioner and Respondents agree that the Fourth Circuit is currently *the only circuit* to answer "no" to the question presented. *Compare* Pet. 22, *with* BIO 15 ("The Fourth Circuit is the only court of appeals to" "revert[] to its pre-*Amara* case law and conclude[] that surcharge is not a remedy available under Section 502(a)(3).").

B. These agreed upon premises establish a straightforward 6-1 circuit split. Nonetheless, Respondents describe the split as "illusory." BIO 2, 15. This descriptor is demonstrably false.

A circuit split occurs when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]" U.S. Sup. Ct. R. 10(a). Here, the Fourth Circuit "has entered a decision in conflict with the decision of" the Second, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits "on the same important matter": "[W]hether a plan participant may pursue the remedy of surcharge … under Section 502(a)(3) against a plan fiduciary that allegedly breaches its fiduciary duties." BIO i.

This circuit split is as real as they get—and this case is presumptively certworthy as a result.

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may well have reached a different result." *Id.* Again, Respondents' speculation about whether these circuits will *change* their answer to the question presented to "no" is a concession that their current answer is "yes."

II. The circuit split demands immediate review.

Respondents' *actual* position is that the 6-1 circuit split is not worthy of immediate review. *E.g.* BIO 3 ("The absence of a circuit conflict *warranting this Court's attention*" means "there is no reason for the Court's involvement *now*." (emphasis added)). They support this self-serving assertion with three arguments. BIO 20-22.

A. First, Respondents argue the split will resolve itself because all six majority circuits will now reverse their positions and henceforth refuse to follow *Amara*. Not so. Some—if not all—of the six majority circuits will likely agree with the dissenting judge in the decision below.

This Court does not casually overturn or withdraw prior precedent or mince words when it does so. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 264-67 (2022). It plainly did not do so in *Montanile*. As the dissent below aptly explained, "[t]o show the Supreme Court has rejected *Amara*'s blessing of surcharge as a proper remedy under Section 502(a)(3)," the majority "relies on a footnote in *Montanile*." Pet. App. 30a. That "terse footnote" "did not say *Amara* had been inconsistent with the Court's previous decisions. Nor did it say the Court was now adopting an approach contrary to *Amara*." *Id.* at 32a, 30a. Instead, the footnote was an aside—as footnotes usually are—to reject a single litigant's reading of *Amara* that was not material to the outcome of the case. No rational reader could interpret *Montanile*'s footnote 3 as a clear abandonment of *Amara*. *See also infra* Part IV.

If there were any legitimate grounds to argue that *Montanile* suddenly empowered the lower courts to ignore *Amara*'s endorsement of surcharge, many litigants would have done so immediately after *Montanile* issued. Instead, it took more than five years for this argument to

surface. Respondents' contradictions on this point are telling. They repeatedly insist that "*Montanile* "made clear" that *Amara* wasn't binding. *See* BIO 2, 8, 16, 22 (emphasis added). Yet despite this supposed clarity, Respondents cannot identify a single brief at either the district court or circuit court level raising this argument before this case. Nor can they identify a single district or circuit court that thought to raise the argument *sua sponte*.

Accordingly, there is every reason to believe that all six of the majority circuits, or at least some, will reject the faulty reasoning of the panel majority and instead follow the lead of the dissent, which carefully considered and rejected each of the majority's arguments.

B. Second, Respondents argue there is no rush to review the question presented. To the contrary, denying the Petition will postpone the inevitable and guarantee years of disuniformity.

For the circuit split to disappear, at least six other circuits will have to take the issue up anew, agree with Respondents' unsupported arguments, and overrule prior circuit precedent. It would take years for even a handful of the six circuit courts to do so. For all six circuits to agree, it could take over a decade. All the while district courts, plan participants, and plan administrators will flounder in uncertainty. This uncertainty and the corresponding expenditure of legal fees and judicial resources demand this Court's immediate intervention.

As explained in the Petition, there is simply no benefit to percolation here. Pet. 29-30. By Respondents' own admission, percolation will only generate lower court decisions weighing in on whether *Montanile*'s footnote 3 overruled *Amara*. BIO 22. But those decisions will not enhance this Court's decision making. Only this Court can clarify what it meant in *Montanile*. *Cf. FBI v. Fikre*, 601

U.S. __, 2024 WL 1160994, *5 (2024) ("Rather than resolve who has the better reading of another court's decisions, it is enough to underline the reason for our own.").

C. Third, Respondents suggest that the issue is so unimportant and arises so infrequently in the circuit courts that it is not worthy of this Court's review. *E.g.*, BIO 21. This is disingenuous and incorrect.

Respondents cannot—indeed do not—deny that the availability and appropriateness of surcharge in any particular case is constantly litigated in the district courts. *See, e.g.*, Pet. 31-32. Plan participants and beneficiaries seek surcharge (and other non-tracing remedies) against fiduciaries repeatedly, and especially when ERISA's other remedial provisions, like 29 U.S.C. § 1132(a)(1)(B), fall short. The reason the question presented has not appeared more in the circuit courts after *Montanile* is because *Amara* was unambiguous, and, in most circuits, post-*Amara* precedent clearly made surcharge available against fiduciaries under § 1132(a)(3). Pet. 21-24.

Moreover, in the decades prior to *Amara*—before this Court settled the issue—the availability of monetary remedies under § 1132(a)(3) in suits against fiduciaries was a hotly contested issue that regularly drew the involvement of the federal government *See, e.g.*, Brief for the United States as Amicus Curiae, *Amschwand v. Spherion Corp.*, No. 07-841, 2008 WL 2185730, at *15 (U.S. Sup. Ct. May 23, 2008) (supporting petition for certiorari and outlining circuit split) (cert. denied); Brief for the United States as Amicus Curiae, *LaRue v. DeWolff, Boberg & Associates, Inc.*, No. 06-856, 2007 WL 1467083, at *19 (U.S. Sup. Ct. May 18, 2007) (explaining that "confusion about the scope of Section 502(a)(3), … has created 'an unjust and increasingly tangled ERISA regime'" and that "[i]n those circuits that have precluded a surcharge remedy against

ERISA fiduciaries, many plan participants and beneficiaries may be deprived of pecuniary redress from fiduciaries that have committed serious violations of ERISA's provisions and directly injured those they are charged with protecting. A wide range of injuries for which many courts previously granted monetary relief under Section 502(a)(3) are likely to go unredressed.").

Finally, the circuit split has practical consequences for litigants. ERISA participants and beneficiaries in 28 states and 2 territories can pursue critical monetary remedies against breaching fiduciaries. In stark contrast, ERISA participants and beneficiaries in 5 states can only recover profits and losses from a breaching fiduciary if those funds are specifically identifiable (i.e., traceable).

ERISA was designed to achieve national uniformity. Pet. 29-30. Disuniformity on this critical threshold question about available remedies is intolerable, especially when the disagreement turns entirely on the meaning of this Court's past rulings.

III. Respondents' vehicle arguments are baseless.

Respondents also claim that "this case is an unsuitable vehicle for considering the question presented." BIO 22 (cleaned up). But their brief discussion of "vehicle" considerations (BIO 22-25) is hard to take seriously.

A. Respondents' primary assertion is that "this case [is] a poor vehicle … in light of its interlocutory posture [because] that alone furnishe[s] sufficient ground for the denial of a petition." BIO 22 (cleaned up). That is wrong.

This Court regularly grants certiorari "to review many nonfinal dispositions without any further explanation[.]" *Courts of Appeals—In General—Certiorari*, 17 Fed. Prac. & Proc. Juris. § 4036 & n.74 (3d ed.). Such review is explicitly permitted by 28 U.S.C. § 1254(1), which authorizes certiorari review of any case "in the courts of

appeals" "*before or after* rendition of judgement." (emphasis added). This Court has granted certiorari to review nonfinal orders for centuries,[3] and even a cursory review of recent cases confirms this routine practice.[4]

B. Respondents' secondary assertion is that "[t]he petition is also a poor vehicle because petitioner is unlikely to benefit from a decision by this Court adopting her understanding of Section 502(a)(3)." BIO 23. Their points are neither true nor relevant.

Rose alleges that all Defendants were fiduciaries who egregiously breached their duties and were unjustly enriched as a result. The clearest example of such unjust enrichment is that Defendants were permitted to keep the money they should have used to pay for Kyree's heart transplant. As this Court held in *Amara*, these are precisely the type of allegations that entitle participants to pursue surcharge under § 1132(a)(3). 563 U.S. at 441 ("Equity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, *or to prevent the trustee's unjust enrichment*." (emphasis added)); *see also, e.g.*, *McCravy v. Metro Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir.

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[3] *See, e.g., Forsyth v. City of Hammond*, 166 U.S. 506, 514 (1897); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377 (1945); *Weatherford v. Bursey*, 429 U.S. 545, 550 (1977); *Cutter v. Wilkinson*, 544 U.S. 709, 717-18 (2005) (granting certiorari to consider motion to dismiss RLUIPA claims, despite remand to permit plaintiffs to proceed with alternative claims).

[4] *See, e.g.*, *Devillier v. Texas*, No. 22-913, 144 S.Ct. 477 (Mem), 2023 WL 6319651 (Sept. 29, 2023) (granting certiorari to review a single legal question on a motion to dismiss despite circuit court's remand to permit plaintiffs to pursue alternative claims and arguments); *Netchoice, LLC v. Paxton*, No. 22-555, 144 S.Ct. 477 (Mem), 2023 WL 6319650, at *1 (Sept. 29, 2023); *Idaho v. United States*, No. 23-727, 144 S. Ct. 541 (Mem) (Jan. 5, 2024).

2012) (quoting same language). Once this Court reverses the Fourth Circuit, Rose will face no impediment to seeking surcharge in this litigation. And while Rose might not ultimately prevail at trial against every Defendant, *see* BIO 24 (UMR, Quantum, and MCMC dispute fiduciary status and breach), that is *always* a possibility when this Court reviews an order of dismissal. In short, there is no impediment to this Court's immediate review of the pure legal question presented here.

IV. The decision below is wrong.

Respondents do not dispute, first, that the Fourth Circuit refused to follow *Amara*, and second, that it did so based on its newly invented ERISA rule: That the only equitable remedies available under (a)(3) are those that were "traditionally available in concurrent-jurisdiction cases." Pet. App. 17a. Respondents do not cite a single case from this Court or any court in the 50-year history of ERISA that applies this test.

The Fourth Circuit's refusal to follow *Amara* warrants summary reversal. At a minimum, the Court should grant certiorari to review the Fourth Circuit's unsupported and historically inaccurate analysis.

A. This Court should summarily reverse and direct the Fourth Circuit to follow *Amara*. In *Amara*—which, like this case, was a suit against a fiduciary for breach of fiduciary duty—the Court explained that *Mertens* and *Great West* did not preclude the district court from relying on § 1132(a)(3) to award the payment of money to plaintiffs. What was the "critical difference"? The *Amara* defendant was "analogous to a trustee." 563 U.S. at 442. And "[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." *Id.* at 441.

The Fourth Circuit's decision squarely conflicts with *Amara*'s reasoning and with its unequivocal remand instructions. *Amara* distinguished *Mertens* and *Great West* because they were not suits against trustees, and confirmed that remedies historically available in suits against trustees in courts of equity "were traditionally considered equitable remedies." *Amara*, 563 U.S. at 439-440. The fact that a remedy like surcharge "takes the form of a money payment does not remove it from the category of traditionally equitable relief" that may be awarded under § 1132(a)(3). *Id.* at 441-442. The Court expressly directed the district court to "revisit" its remedy determination based on these "general principles"—including the Court's holding that surcharge was an available remedy under (a)(3). *Id.* at 442, 444. Whether or not the Court was strictly obligated to provide remand instructions, the Court did so in a binding, precedential opinion.

The Fourth Circuit refused to follow that opinion. It rejected *Amara's* careful and critical distinction between trustees and non-fiduciaries, reasoning that this "distinction is not one that matters" because "whether a given remedy is 'equitable' under the statute does not depend on … the identities of the plaintiff and the defendant." Pet. App. 23a. Respondents defend the Fourth Circuit based on the flimsiest of reeds: That in *Montanile*, a case with a *nonfiduciary* defendant, this Court overruled *Amara* and silently—and without explanation—eliminated a swath of remedies available against fiduciaries under § 1132(a)(3). That simply did not happen, in a footnote or otherwise.

B. Aside from its improper disregard of binding precedent, the Fourth Circuit's new "concurrent jurisdiction" test is wrong. At the outset, its underlying premise makes

no sense. Respondents contend that this Court, in assessing whether a remedy was traditionally available in equity, should ignore the remedies that were available in cases within the sole jurisdiction of the pre-merger equity courts. That is, according to Respondents, those cases most closely associated with the chancery courts—including suits against trustees for breach of their duties—have no relevance in determining whether a remedy was traditionally available in equity. This Court has never said that, and for good reason.

The Fourth Circuit's rule makes even less sense in the context of ERISA. In crafting ERISA, including its fiduciary obligations and its remedial scheme, Congress looked to the law of trusts and its enforcement mechanisms. *See, e.g.*, H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 295 (1974) ("The objectives of the[] [fiduciary obligation] provisions [in ERISA] are to make applicable the law of trusts … and to provide effective remedies for breaches of trust."). Certainly Congress intended that a broader set of remedies would be available against breaching fiduciaries than against non-fiduciaries. That distinction is built in to the historical understanding of equitable remedies. Ignoring this distinction, and disregarding the remedies that the courts of chancery could award against breaching trustees, is both ahistorical and contrary to Congress's intent.

CONCLUSION

The petition should be granted or the decision below should be summarily reversed.

Respectfully submitted,

NORRIS A. ADAMS, II
CAITLIN HALE WALTON
ESSEX RICHARDS, P.A.
1701 SOUTH BOULEVARD

PETER K. STRIS
RACHANA A. PATHAK
Counsel of Record
JOHN STOKES

CHARLOTTE, NC 28203
(704) 377-4300

STRIS & MAHER LLP
777 S. FIGUEROA STREET
SUITE 3850
LOS ANGELES, CA 90017
(213) 995-6800
rpathak@stris.com

COLLEEN R. SMITH
STRIS & MAHER LLP
1717 K STREET NW
STE. 900
WASHINGTON, D.C. 20006
(202) 800-5749

BRIDGET C. ASAY
STRIS & MAHER LLP
15 E. STATE ST., STE. 2
MONTPELIER, VT 05602
(802) 858-4285

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