No. 17-690

IN THE
Supreme Court of the United States

FOOT LOCKER, INC. and
FOOT LOCKER RETIREMENT PLAN,

Petitioners,

v.

GEOFFREY OSBERG, on behalf of himself and on behalf of all others similarly situated,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

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REPLY BRIEF FOR PETITIONERS

Confronted with multiple circuit splits—one on a recurring class-action issue and the other on the basic elements of a commonly asserted ERISA claim—respondent counters by attempting to rewrite both the questions presented and the relevant circuit court decisions. But respondent's creative repurposing of the petition cannot conceal that this case presents two important legal questions that are the subject of ever-deepening disagreements among the circuits.

On the class-action question, respondent suggests that Foot Locker is "request[ing] that this Court reexamine the facts found and affirmed below." Opp. 10. In reality, the class-action question does not turn on facts at all. Foot Locker instead challenges the *legal* adequacy of the lower courts' finding of "class-wide mistake" and asks this Court to decide whether, under applicable procedural rules and statutory and constitutional requirements, courts can facilitate class certification by relying on "generalized circumstantial evidence" of "class-wide" knowledge in the place of individualized inquiries into what each class member actually knew. Pet. App. 28a (internal quotation marks omitted). The First, Second, Third, and Eleventh Circuits say yes; the Fourth and Fifth Circuits say no.

On the ERISA question, respondent contends that this Court decided in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), that a breach-of-fiduciary-duty claim does not require a showing of detrimental reliance, Opp. 22, even though there was no fiduciary-breach claim at issue in *Amara*. *See* 563 U.S. at 443. That *sub silentio* holding would come as news to the three circuits that, unlike the Second Circuit, have continued to require a showing of detrimental reliance

in the aftermath of *Amara*—including the Eighth Circuit in a decision issued only weeks ago. *See Boyd v. ConAgra Foods, Inc.*, No. 16-1763, __ F.3d __, 2018 WL 298705, at *6 (8th Cir. Jan. 5, 2018). And there can be no question about the importance of the detrimental-reliance issue, which was the subject of an *amicus curiae* brief from the Department of Labor in the Second Circuit and a brief from the U.S. Chamber of Commerce and other *amici* in this Court.

As the Eighth Circuit's recent decision underscores—and the *amicus* participation confirms—certiorari is warranted to provide a uniform response to both of these frequently litigated and sharply disputed legal questions.

I. THE CIRCUITS ARE SPLIT OVER WHETHER QUESTIONS OF INDIVIDUALIZED KNOWLEDGE CAN BE RESOLVED ON A CLASSWIDE BASIS.

There is a direct and acknowledged circuit split over whether issues that turn on individualized questions of class members' knowledge—such as reliance, mistake, and actual notice—preclude class certification. *See* Pet. 12-18.

To evade this split, respondent contends that Foot Locker is simply asking this Court "to second-guess . . . the now-indisputable facts found at trial." Opp. 9-10. But the first question presented raises a pure question of law. The question is not whether the lower courts drew factually supported conclusions from the record evidence, but whether those conclusions are a legally permissible basis for imposing liability in a class action.

If respondent were the only plaintiff in this case, the answer to that question would be straightforward

because respondent testified about his lack of understanding of wear-away and Foot Locker was able to probe his veracity and recollection through cross-examination. The 16,000 absent class members, however, were under no comparable obligation to testify about their knowledge of wear-away, and Foot Locker had no opportunity to cross-examine them about whether they were actually mistaken about their plan benefits. The question for the Court is whether, in upholding class certification and the classwide judgment, the Second Circuit's substitution of "generalized circumstantial evidence" of "class-wide mistake," in the place of "individualized" proof from each member of the class, is consistent with Rule 23(b)(3), the Rules Enabling Act, and due process. Pet. App. 28a, 30a (internal quotation marks omitted).

That legal question is the subject of deep disagreement among the circuits. Although respondent suggests that the lower courts' conflicting conclusions are the product of "particular facts" rather than "categorical[ ]" rules, Opp. 15 (emphasis omitted), the Fifth Circuit has adopted just such a categorical prohibition on class certification in cases that implicate individualized questions of plaintiffs' knowledge. *See McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 549 (5th Cir. 2003) ("Reliance issues are fatal to a Rule 23(b)(3) class"). Indeed, the very case that respondent cites to call into question the Fifth Circuit's categorical standard confirms that the Fifth Circuit "has held consistently that a fraud class action cannot be certified when individual reliance will be an issue." *Slade v. Progressive Sec. Ins. Co.*, 856 F.3d 408, 415 (5th Cir. 2017) (internal quotation marks omitted).

The Second Circuit's approach lies at the other end of the spectrum. It upheld class certification and the classwide judgment in this case even though class

members received "individualized communications" about their plan benefits, Pet. App. 30a, including personalized benefits statements showing that some employees' pre-conversion accrued benefits exceeded the amounts in their cash-balance account—which meant that those employees were not accruing new benefits and thus were experiencing wear-away. *See* C.A. J.A. A3139-41, A3152-56; *see also* Pet. App. 29a n.13 (acknowledging that a Foot Locker employee testified that she "realized after performing her own calculations that she had not accrued additional benefits since the plan conversion").

The Second Circuit is not alone in condoning class-action treatment of claims and defenses that turn on questions of individualized knowledge. The Eleventh Circuit has expressly rejected the Fifth Circuit's rule that "individual reliance" precludes class certification, *Klay v. Humana, Inc.*, 382 F.3d 1241, 1258 (11th Cir. 2004) (internal quotation marks omitted), and both the First and Third Circuits have likewise made clear that they do not view individualized questions of knowledge as a barrier to class certification. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296-97 & n.4 (1st Cir. 2000); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 161-63 (3d Cir. 2002).

Respondent trains most of his fire on the Fourth Circuit's class-certification jurisprudence, arguing that the court has not adopted "a *per se* rule precluding certification of claims implicating plaintiffs' knowledge." Opp. 17. But that position is impossible to reconcile with *Thorn v. Jefferson-Pilot Life Insurance Co.*, 445 F.3d 311 (4th Cir. 2006), which makes clear that "in cases where the legal issue is . . . focused on the plaintiff's knowledge, such as the requirement that a plaintiff in a fraud claim reasonably

rely on the defendant's representations, we have consistently held that individual hearings are required." *Id.* at 321; *see also Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) (class treatment is "impossible" where "the extent of knowledge . . . will vary from class member to class member") (internal quotation marks and brackets omitted). And that is not how the First and Third Circuits have interpreted the Fourth Circuit's precedent. Both have expressly "reject[ed] the Fourth Circuit's" approach "to the extent that it purports to establish a per se rule" that questions of individualized knowledge preclude class certification. *Mowbray*, 208 F.3d at 296 n.4; *see also Linerboard*, 305 F.3d at 162-63.

In any event, even if the Fourth Circuit did apply the type of case-by-case inquiry that respondent suggests, that would only deepen the circuit split on this question by creating a *third* approach somewhere between the positions adopted by the five other circuits that have addressed the issue. While the First, Second, Third, and Eleventh Circuits have held that individualized questions about class members' knowledge are not a barrier to class certification and the Fifth Circuit has held that those individualized questions foreclose the possibility of classwide adjudication, the Fourth Circuit (at least according to respondent) has staked out a middle-ground position where individualized questions of knowledge *sometimes* preclude certification. Thus, if anything, respondent's reading of the case law actually exacerbates the lower-court conflict and the need for this Court's review.

While the other circuits that have grappled with the impact of individualized knowledge have confronted issues other than the mistake element of a reformation request, that does not diminish the depth

of the split or the soundness of this case as a vehicle for resolving it. Opp. 20. The question presented, in the words of the Fourth Circuit, is whether class certification is inappropriate where the claim turns on "what each [putative class member] knew . . . and when he knew it." *Broussard*, 155 F.3d at 342. That question arises whether individual knowledge is implicated by the reliance element of a fraud claim, the notice component of a statute-of-limitations defense, or the mistake element of a request for reformation of an ERISA plan. All of those settings present individualized questions about what each class member knew and when. And under a proper application of Rule 23(b)(3), the Rules Enabling Act, and due process, none of those questions is appropriate for resolution on a classwide basis. *See* Pet. 18-21.

Finally, respondent suggests in passing that Foot Locker failed to preserve its class-certification argument for this Court's review. Opp. 26-27. But Foot Locker repeatedly objected to class certification in the district court, *see*, *e.g.*, Foot Locker's Opp. to Class Certification, ECF No. 174 (Aug. 11, 2014), and then filed an unsuccessful Rule 23(f) petition in the Second Circuit challenging the class-certification ruling, *see* Order of Feb. 5, 2015, ECF No. 275 (noting denial of petition). Foot Locker reiterated that objection when it appealed the final judgment to the Second Circuit, where it urged the court to "vacate the class certification due to the inherently individualized nature of the mistake inquiry." Foot Locker C.A. Br. 48. The question was therefore consistently pressed below by Foot Locker and is squarely presented for this Court's review.[1]

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[1] Moreover, controlling circuit precedent already foreclosed Foot Locker's argument that the mistake element of respondent's

II. THE CIRCUITS ARE SPLIT OVER WHETHER RELIANCE IS AN ELEMENT OF AN ERISA FIDUCIARY-BREACH CLAIM.

Respondent's effort to reconcile the circuits' conflicting conclusions as to whether reliance is an element of an ERISA fiduciary-breach claim is equally unsuccessful. Indeed, after the petition was filed, the existing split on the issue was deepened when the Eighth Circuit sided with the Third and Sixth Circuits—in direct conflict with the Second Circuit's decision in this case—by holding that a plaintiff who "asserts a breach of fiduciary duty" claim under Section 404(a) of ERISA "must show that he reasonably relied, to his detriment, on a material misrepresentation or omission." *Boyd*, __ F.3d at __, 2018 WL 298705, at *6.

Respondent attempts to defuse the circuits' disagreement by emphasizing that, in those cases where courts have applied a detrimental-reliance requirement, the plaintiffs were not seeking plan reformation as a remedy. Opp. 24. But in none of the decisions in which the Third, Sixth, and Eighth Circuits have held that detrimental reliance is an element of a Section 404(a) claim did the court premise its analysis on the type of relief sought. Instead, each of those courts identified detrimental reliance as an essential element of *any* ERISA fiduciary-breach claim—without regard to the type of relief at issue. *See*, *e.g.*, *Deschamps v. Bridgestone Ams., Inc. Salaried Employees*

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reformation request precluded the possibility of class certification. *See Amara v. CIGNA Corp.*, 775 F.3d 510, 529 (2d Cir. 2014) (opinion on remand from this Court). Because Foot Locker's argument was "futile," it did not need to devote extensive space in its brief to preserve the point. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007).

Ret. Plan, 840 F.3d 267, 277 (6th Cir. 2016) (listing "detrimental[ ] reli[ance]" as an element of an ERISA fiduciary-breach claim without considering the remedy); *Boyle v. Int'l Bhd. of Teamsters Local 863 Welfare Fund*, 579 F. App'x 72, 77 n.4 (3d Cir. 2014) (stating that "detrimental reliance by the plaintiff on the misrepresentation" must be proved to establish an ERISA fiduciary-breach claim without discussing remedy); *Boyd*, __ F.3d at __, 2018 WL 298705, at *6 (same).

Respondent's contention (at 21) that Foot Locker's detrimental-reliance argument is "foreclosed by" this Court's decision in *Amara* has no bearing on the existence of this circuit split—or the importance of resolving it—because the Third, Sixth, and Eighth Circuits have all issued decisions holding that detrimental reliance is an element of an ERISA fiduciary-breach claim years *after* the decision in *Amara*. Thus, either *Amara* left that question unresolved—as the Third, Sixth, and Eighth Circuits have concluded—or a majority of the courts of appeals that have addressed the detrimental-reliance issue in the wake of *Amara* have misunderstood the implications of that decision. Either way, this Court's review is necessary to provide a definitive answer to this question.

In fact, to the extent that *Amara* sheds any light on the merits of the detrimental-reliance issue, it indicates that reliance *is* an element of a fiduciary-breach claim under Section 404(a). While acknowledging that there was no Section 404(a) claim at issue in *Amara*, Opp. 22, respondent embraces the two-step inquiry that the Second Circuit distilled from that opinion, which first requires courts to determine whether the "relevant substantive provision[ ] of ERISA . . . set[s] forth any particular standard for determining harm." 563 U.S. at 443; *see also* Pet. App.

26a. That inquiry is dispositive here—and obviates the need to reach the second step regarding the remedy sought by the plaintiff—because the common-law foundations of ERISA § 404(a) make clear that detrimental reliance is a fundamental element of a fiduciary-breach claim. *See*, *e.g.*, 10 Stuart M. Speiser et al., *American Law of Torts* § 32:81 ("to state a claim for breach of fiduciary duty, the plaintiff must prove that a material misrepresentation was made, on which the plaintiff detrimentally and reasonably relied"); *see also* Pet. 25-26. Respondent is altogether silent on those common-law authorities in his brief.

Respondent has only slightly more to say about the Article III problems that arise from awarding relief to ERISA plaintiffs who have not shown that they relied upon, or were otherwise harmed by, a plan administrator's breach of fiduciary duty. *See* Pet. 27. While respondent suggests that this "Article III concern . . . was addressed in *Amara*," Opp. 23 n.7, *Amara* in fact says nothing on the issue of Article III standing. That type of "drive-by jurisdictional ruling[ ]" has "no precedential effect." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (internal quotation marks omitted). Moreover, *Amara* was decided before this Court made clear that "even in the context of a statutory violation," "concrete injury" must be shown. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

The pressing need for this Court to resolve the detrimental-reliance issue is underscored by the participation of the United States Department of Labor, which filed an *amicus curiae* brief in the Second Circuit and participated in the oral argument to address that issue (without being affirmatively solicited for its views by the court). *See* Labor Dep't C.A. Br. 22-27 (arguing that ERISA § 404(a) does not include a det-

rimental-reliance requirement). In light of the Department of Labor's *amicus* participation, there can be no doubt about the importance of the detrimental-reliance issue to the sound administration of ERISA plans. Along with the Department of Labor, participants in ERISA plans, and the companies that sponsor and administer those plans, have a shared interest in legal certainty and in ensuring that ERISA provides the "uniform regime" that Congress envisioned. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002); *see also* Br. of U.S. Chamber of Commerce et al. 4 ("the Second Circuit decision disrupts the uniform regulation of employee benefit plans").

Respondent also contends that the Second Circuit's extended discussion of whether reliance is an element of an ERISA § 404(a) claim was completely unnecessary because the judgment can be upheld in full based on the Section 102 claim, which was premised on Foot Locker's issuance of a flawed summary plan description ("SPD"). Opp. 25. But respondent does not dispute that 3,500 of the 16,000 class members left Foot Locker before the SPD was distributed in December 1996 and therefore lack a claim under Section 102 based on a faulty SPD. *See* Pet. 29. And while respondent asserts that the district court nevertheless awarded relief to these 3,500 class members under Section 102 because they received other flawed plan communications, Opp. 25, the district court made clear that these class members were entitled to relief *only* under Section 404(a) for breach of fiduciary duty, not under Section 102. *See* Pet. App. 118a n.32 ("class members who left before the SPD was distributed are still entitled to relief *on their claim for breach of fiduciary duty* based on other false and misleading communications") (emphasis added).

Respondent made the same argument before the Second Circuit, asserting that the "§ 404 issues need not be reached." Osberg C.A. Br. 58. But the Second Circuit rejected that position by devoting extended discussions both to the timeliness of respondent's Section 404(a) claim, Pet. App. 20a-24a, and to whether a showing of detrimental reliance was required for that claim, *id.* at 24a-28a. None of that discussion would have been necessary if the class's Section 404(a) claim were co-extensive with its Section 102 claim. *See* Pet. 29-30.

As both the district court and Second Circuit recognized, the resolution of the detrimental-reliance question will determine whether 3,500 class members have any claim to relief at all.

* * *

ERISA was enacted to establish a nationally uniform legal framework for employee benefits plans, but such uniformity is impossible to achieve where the circuits are unable to agree about the basic standards for certifying ERISA class actions or about the fundamental elements of one of ERISA's most frequently invoked causes of action. This Court should grant review of both questions to restore the clarity and predictability that are essential to ERISA and to the viability of the employee benefits plans that are subject to its legal standards.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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