No. ____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This petition presents a single question about the proper application of this Court's landmark decision *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), which outlined the remedies available under 29 U.S.C § 1132(a)(3), an important provision of the Employee Retirement Income Security Act of 1974 ("ERISA"). Until the Fourth Circuit issued the decision below, every circuit to address the question presented was in agreement.

In this case, the Fourth Circuit reversed its own prior circuit precedent and divided the circuits. In reliance on a footnote from an unrelated case, *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan*, 577 U.S. 136 (2016), the Fourth Circuit concluded *Amara* was no longer good law and declared that a major category of equitable remedies is not available under ERISA.

The question presented by this petition is:

Are non-tracing monetary remedies (e.g., surcharge) available under 29 U.S.C. § 1132(a)(3) to ERISA plan participants and beneficiaries asserting breach of fiduciary duty claims against plan fiduciaries?

PARTIES TO THE PROCEEDINGS

Petitioner Jody Rose, as Administratrix of the Estate of Kyree Devon Holman was the Plaintiff and Appellant in the proceedings below.

Respondents PSA Airlines, Inc., PSA Airlines, Inc. Group Benefit Plan, UMR, Inc., Quantum Health, Inc. *aka* MyQHealth by Quantum, and MCMC, LLC were the Defendants and Appellees below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

Rose v. PSA Airlines, Inc. Group Insurance Plan, et al., No. 3:19-cv-00695-GCM-DCK, U.S. District Court for the Western District of North Carolina. Judgment entered September 22, 2021.

Rose v. PSA Airlines, Inc., et al., No. 21-2207, U.S. Court of Appeals for the Fourth Circuit. Judgment entered September 11, 2023. Petition for Rehearing and Rehearing En Banc denied October 6, 2023.

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PETITION FOR A WRIT OF CERTIORARI

In late 2018, Kyree Holman, a 26-year-old flight attendant, was airlifted to Duke University Hospital to receive treatment for a life-threatening inflammation of his heart. Duke's elite team of doctors quickly realized that Kyree needed a heart transplant to survive and placed him first on the donor list.

Just one thing stood in the way: Kyree's doctors could not perform the transplant until his health plan, administered by Defendants, approved coverage for the procedure. After repeated, erroneous denials by the plan's internal review team, Duke sought an expedited external review of Kyree's claim. By law, the external reviewer was required to complete that review within 72 hours at the latest. It instead took over a month. In the meantime—five days after the external reviewer should have decided his appeal, and just as his doctors had warned—Kyree died. So it was little help when the external reviewer eventually found the transplant should have been covered all along.

It is undisputed that Defendants breached their fiduciary duties in handling Kyree's case. The only question is whether Defendants are allowed to keep the money they saved by wrongfully denying Kyree the lifesaving heart transplant he needed.

After decades of uncertainty about this exact issue, this Court made clear in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), that the answer is "no." Instead, under the equitable remedy of surcharge, breaching fiduciaries like Defendants who would be unjustly enriched if allowed to keep the funds, must forfeit them. In the wake of *Amara*, circuit after circuit—including the Fourth—took up the question presented and followed *Amara*'s unambiguous rule. In all, before this case, seven circuits affirmed

Amara's conclusion that surcharge is an equitable remedy available under 29 U.S.C. § 1132(a)(3) to plan participants harmed by a fiduciary breach in published decisions. *See infra* 21-22; *see also, e.g.*, *McCravy v. Met. Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir. 2012) (granting panel rehearing in light of *Amara*, reversing, and declaring "'surcharge,' i.e., 'make-whole relief,' constitutes 'appropriate equitable relief' under Section 1132(a)(3)"). Three more appeared to agree in dicta or unpublished decisions. *See infra* 22.

Under this unbroken line of precedent, surcharge should have been a remedy available to petitioner. But in the decision below, a deeply divided Fourth Circuit panel disrupted the consensus and found surcharge was not an equitable remedy available under § 1132(a)(3). The panel majority fundamentally misunderstood this Court's analysis in *Amara*. It also relied on an unrelated case, *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan*, 577 U.S. 136 (2016), issued just four years after *Amara*, to justify its decision. But *Montanile* neither overturned *Amara* nor suggested its analysis was incorrect.

This case warrants immediate plenary review (if not summary reversal). The decision below is not only wrong, it also directly contravenes this Court's precedent. And by disregarding this Court's express teachings, the Fourth Circuit has disrupted ERISA's uniform national scheme. Absent intervention by this Court, ERISA plan participants *even in the same plan* will have access to different remedies based solely on geography. And plan participants within the Fourth Circuit will be left without *any* remedy for certain fiduciary breaches, despite this Court's direct holding to the contrary.

Worse, the decision below will almost certainly prompt rounds of satellite litigation across the country focused on whether this Court's decision in *Amara* is correct, binding, and still good law. In other words, further percolation threatens a return to the pre-*Amara* world with prolonged and expensive litigation over an issue this Court *already decided* in *Amara*. And those court battles cannot possibly aid this Court's substantive review of the question presented because only this Court can clarify what it meant in *Amara* and in *Montanile*.

Because the decision below created a clear split and injected uncertainty in an area that was previously settled, this Court will ultimately have to resolve the issue. It is better to do so now than to allow the Fourth Circuit's ruling to sow confusion in the lower courts and further disrupt ERISA's remedial scheme.

ORDERS BELOW

The district court order giving rise to the appeal (Pet. App. 33a-37a) is unreported but available in the Westlaw database at 2021 WL 4314459. *Rose v. PSA Airlines, Inc. Grp. Ins. Plan*, No. 3:19-CV-000695-GCM-DCK, at U.S.D.C. Dkt. No. 82 (W.D.N.C. Sept. 22, 2021). The district court order adopted in part and rejected in part a report and recommendation issued by the magistrate judge. The report and recommendation (Pet. App. 39a-71a) is unreported but available in the Westlaw database at 2021 WL 4318315. *Rose v. PSA Airlines, Inc. Grp. Ins. Plan*, No. 3:19-CV-00695-GCM-DCK, at U.S.D.C. Dkt. No. 63 (W.D.N.C. Mar. 25, 2021).

The Fourth Circuit's decision affirming in part, vacating in part, and remanding the case to the district court (Pet. App. 1a-32a) is reported at 80 F.4th 488 (4th Cir. 2023). The Fourth Circuit's decision denying Rose's petition for rehearing and rehearing en banc (Pet. App. 71a)

is unreported but available in the Lexis database at 2023 U.S. App. LEXIS 26721. *Rose v. PSA Airlines, Inc.*, No. 21-2207, at Dkt. No. 75 (4th Cir. Oct. 6, 2023).

JURISDICTION

The Fourth Circuit issued its opinion and judgment on September 11, 2023. It issued an amended opinion the following day, September 12, 2023. The Fourth Circuit denied a timely-filed petition for panel rehearing and rehearing en banc on October 6, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1132(a)(3) is at issue in this petition. It 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 OF THE CASE

A. Statutory Background

1. ERISA is a sweeping federal statute designed to "provide a uniform regulatory regime over employee benefit plans," *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004), and to protect and "promote the interests of employees and their beneficiaries" who participate in such plans. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (citations omitted). ERISA sets uniform, minimum standards and requirements for the administration of employer-sponsored benefit plans and provides a robust remedial scheme through which plan participants and beneficiaries can enforce their rights under ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44 (1987); *see also* 29 U.S.C. §§ 1001, 1002. ERISA carries "extraordinary pre-emptive power," *Davila*, 542 U.S. at 209, and it provides the "exclusive vehicle for" challenging the improper denial or processing of benefits under an ERISA-protected plan, or for asserting any other rights guaranteed by ERISA. *Pilot*, 481 U.S. at 52.

2. ERISA's "carefully integrated civil enforcement" scheme is found in 29 U.S.C. § 1132(a) (ERISA § 502(a)). *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). This remedial scheme is "a distinctive feature of ERISA." *Davila*, 542 U.S. at 208. It is "interlocking, interrelated, and interdependent," and a key component of ERISA's "comprehensive and reticulated" structure. *Russell*, 473 U.S. at 146.

A plan participant generally has three potential paths for seeking relief under ERISA's civil enforcement scheme: (1) a claim under § 1132(a)(1) for wrongful denial of benefits or information; (2) a claim under § 1132(a)(2) for relief against a fiduciary for a breach of duty to the plan; or (3) a claim under § 1132(a)(3) "to enjoin any act or

practice which violates any provision of this subchapter or the terms of the plan" or 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." The third subsection, often described as the remedial scheme's "catchall" provision, functions "as a safety net, offering appropriate equitable relief for injuries caused by [ERISA] violations that § [1132] does not elsewhere adequately remedy." *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996). For example—as relevant here—a plan participant may seek individualized "equitable relief" (rather than plan-wide relief) under § 1132(a)(3) against fiduciaries who have breached their fiduciary obligations because no other subsection of § 1132(a) provides for such relief. *Id.* at 507-15.

3. This Court construed the scope of the "appropriate equitable relief" available under § 1132(a)(3) in a series of decisions beginning with *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993). In *Mertens*, the Court held that Congress intended the phrase to refer only to "those categories of relief that were *typically* available in equity" during the time of the "divided bench," *i.e.* when courts of law and courts of equity were separated. *Id.* at 256. The Court then concluded the relief the claimant in *Mertens* sought, "money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty," was, traditionally speaking, legal, not equitable, in nature. *Id.* at 251, 255.

Following *Mertens*, the Court decided several cases brought by plan fiduciaries to recover medical expenses paid to plan participants injured by third parties after those participants reached monetary settlements with the tortfeasors. This Court concluded that some of the reme-

dies the plan fiduciaries sought, like restitution or equitable lien, were typically available in equity even though they fundamentally sought monetary relief, but only if the plaintiff could identify specific funds in the defendant's possession to which they were entitled. *See Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213 (2002); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006) (holding an equitable lien by agreement over specifically identifiable funds was typically available as a remedy in pre-merger courts of equity); *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 98 (2013) (same); *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136 (2016) (where participant had already dissipated the identifiable funds, a lien on participant's general assets was not "equitable remedy").

This Court's seemingly "narrow interpretation of equitable relief under ERISA section [1132](a)(3)" announced in these cases, combined with its "broad interpretation of [ERISA's] preemption provision" appeared to leave a "gaping hole" in ERISA's remedial scheme that was the subject of extensive litigation and academic debate. Susan Harthill, *The Supreme Court Fills A Gaping Hole: Cigna Corp. v. Amara Clarifies the Scope of Equitable Relief Under ERISA*, 45 J. Marshall L. Rev. 767, 767-68 & n.3, 770-71 & n.23-26 (2012) (citation omitted); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 456 (3d Cir. 2003) ("[A] line of Supreme Court cases [has] created a 'regulatory vacuum' in which virtually all state law remedies are preempted but very few federal substitutes are provided[.]") (Becker, J., concurring).

This Court filled that "gaping hole" in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). In *Amara*, this Court considered for the first time what "equitable remedies" were available to a plan participant or beneficiary under

§ 1132(a)(3) in a suit "against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust)." *Id.* at 439. This Court explained the beneficiary's suit was "the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law." *Id.* The Court further explained that "the remedies available to those courts of equity were traditionally considered equitable remedies." *Id.* at 440 (citations omitted).

Such remedies included "obviously" equitable remedies such as injunctions, and "a host of other 'distinctively equitable' remedies," developed by the equity courts, "that were 'fitted to the nature of the primary right' they were intended to protect." *Id*. This Court then identified three "traditional equitable remedies" that the "relief entered" by the district court resembled: reformation of written contracts, estoppel, and—as relevant here—surcharge. *Id.* at 440-42.

Surcharge, the Court explained, was a "kind of monetary remedy against a trustee" "for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." *Id.* at 441. Importantly, the Court explained, "the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief." *Id.* at 441. Thus, surcharge, "f[e]ll within the scope of the term 'appropriate equitable relief' in § [1132](a)(3)." *Id.* at 440. The *Amara* Court did not declare which of the many equitable remedies available under § 1132(a)(3) to award, but rather remanded the case to allow the district court to decide that question in the first instance. *Id.* at 445.

4. Contrary to Respondents' argument below, *Amara*'s discussion of surcharge and other equitable remedies is not dicta. The courts of appeal—including the Fourth Circuit, before this case—have consistently rejected that argument. Instead, they agreed that *Amara* was a landmark decision that made clear that surcharge was available under § 1132(a)(3) in suits against plan fiduciaries for breach of fiduciary duty. *See infra* 21-22.

Indeed, the Fourth Circuit was one of the first courts to recognize *Amara*'s significant effect. *See McCravy v. Met. Life Ins. Co.*, 690 F.3d 176, 179, 183 (4th Cir. 2012) (granting rehearing, vacating, and remanding in light of *Amara*). But in the case below, the Fourth Circuit became the lone outlier in a circuit split, inexplicably using a seven-year-old decision (*Montanile*) to conclude that *Amara*'s discussion of surcharge was not good law and surcharge is not an "equitable remedy" available under § 1132(a)(3). *See infra* 15-19.

B. Factual Background

Prior to his death, Kyree Devon Holman ("Kyree") was a PSA Airlines flight attendant. Pet. App. 4a. Like many Americans, Kyree received health coverage through a "health and welfare benefit plan" (the "Plan") offered by his employer. *Ibid.* As a private-employer-offered health plan, the PSA Airlines Plan is governed by ERISA. *Ibid.*

The Plan is "fully self-funded," meaning that PSA Airlines "assumes the sole responsibility for funding the Plan benefits out of its general assets." *Ibid.* Defendants are all fiduciaries of the Plan. Am. Compl. ¶¶ 24, 112 (U.S.D.C. Dkt. No. 15). Defendant PSA Airlines is the named "Plan Administrator" and "fiduciary" of the Plan. Pet. App. 4a. Two other Defendants—UMR, Inc. and Quantum Health, Inc.—help PSA Airlines administer the Plan, including by

reviewing benefits claims. *Ibid.* The final Defendant, MCMC, LLC, performs external reviews of Plan claim decisions. *Id.* at 41a.

In late December 2018, Kyree abruptly became ill and was diagnosed with myocarditis—a dangerous inflammation of the heart muscle. *Id.* at 40a. As his condition quickly worsened, he was airlifted to Duke University Hospital. *Ibid.* The elite medical team at Duke determined Kyree needed a heart transplant to survive and that he was an appropriate candidate for the procedure. *Id.* at 40a-41a. Kyree was number one on the heart transplant waiting list. *Id.* at 41a. His medical team was prepared to perform the transplant as soon as Defendants approved the procedure—approval that came only after it was too late. *Ibid.* While Kyree was fighting for his life, Defendants subjected him and Duke to a bureaucratic run-around.

Initial Claim. Knowing Kyree's life was at stake, Duke submitted multiple urgent requests for approval of the procedure along with clinical information, progress notes, medical records, and test and lab results showing Kyree needed the procedure to survive. *Id.* at 4a, 41a.

On January 17, 2019, Defendants improperly denied Kyree's heart transplant on the grounds that it was considered experimental or investigational and therefore not covered by the Plan. *Id.* at 4a-5a, 42a.

First Internal Appeal. Duke immediately sought reconsideration of the denial. *Id.* at 42a. In support, Duke submitted detailed letters from physicians and additional clinical information, including progress notes, medical records, lab results, and clinical criteria. Am. Compl. ¶ 54.

Defendants ordered a medical review of the claim. Pet. App. 42a. Although the reviewer found Kyree would not

survive without the heart transplant, he nevertheless concluded the denial was appropriate because Kyree did not meet the "alcohol abuse criteria" that was supposedly incorporated into the Plan through something called the "InterQual criteria." *Ibid.* Citing the reviewer's findings, on January 25, 2019, Defendants again denied Kyree's claim. *Ibid.* This time they asserted that the claim did not "meet the Plan's adopted clinical criteria because the information submitted does not show" that Kyree had no history of "drug or alcohol misuse" and that he had been "drug and alcohol free for at least six months[.]" Am. Compl. ¶ 48.

Defendants' grounds for denial were entirely baseless. As an external reviewer would ultimately find, the so-called "InterQual criteria" that Defendants cited were in fact not included in the Plan, referenced by the Plan, incorporated into the Plan, or implicated by the Plan in any way. Pet. App. 5a, 42a. And regardless, Defendants didn't even apply those irrelevant criteria correctly. While the InterQual clinical criteria includes a checklist item that asks about past alcohol misuse and abstinence from alcohol for six months, it does not contain a requirement, guideline or recommendation that a heart transplant candidate have no prior history of alcohol misuse or be alcohol-free for six months in order to receive approval for a heart transplant. Am. Compl. ¶ 51, Pet. App. 5a. In short, even though they knew Kyree was dying and needed a transplant to survive, Defendants failed to assess his claim under the right criteria or read the criteria they used correctly.

Second Internal Appeal. Defendants' response to Kyree's claim only got worse. Duke immediately appealed again on an expedited basis and submitted all necessary

clinical information to show that Defendants should approve a heart transplant for Kyree. Pet. App. 42a. But the second claim review simply repeated the same mistakes as the first. Even though, again, Defendants knew Kyree would "not survive without [a] heart transplant," Defendants denied coverage on January 31, 2019. *Id.* at 5a, 42a-43a. The second review, like the first, wrongly found that denial of Kyree's claim was appropriate because Kyree did not meet the (non-existent) InterQual clinical criteria requiring "abstinence from alcohol for 6 months." *Id.* at 42a-43a. That denial exhausted the Plan's internal appeal process. *Id.* at 43a.

External Review. The next day—February 1, 2019—Duke sought an expedited external review of Defendants' denial of Kyree's claim. *Id.* at 5a. Duke labeled the appeal "*URGENT*" in large handwritten letters and again submitted all of Kyree's clinical information, test results, and medical records in support, along with letters from Duke's transplant coordinator and Duke's medical director/transplant cardiologist. Am. Compl. ¶¶ 69-71. That same day, Defendants transmitted Kyree's urgent external review request and medical records directly to Defendant MCMC, their external review contractor. *Id.* ¶ 77.

Despite the request for expedited review, MCMC performed Kyree's external review as a "standard" review to be decided within 45 days. Pet. App. 5a, 43a. The Plan and the Affordable Care Act required MCMC to complete the expedited review as expeditiously as Kyree's medical condition or circumstances required. Am. Compl. ¶¶ 79-80. At most, a request for an expedited review must be completed within 72 hours of receipt. Pet. App. 5a, 43a. Accordingly, MCMC was required to complete its expedited review no later than the afternoon of February 4, 2019. *Ibid.*

MCMC or Quantum (or both), however, had improperly determined that Kyree's claim did not meet the criteria for an expedited review.[1] Am. Compl. ¶ 83. Duke continued to urgently submit medical records and information to Defendants in support of Kyree's claim in the following days. *Id.* ¶ 84.

While Defendants shuffled their paperwork, Kyree's condition worsened. On February 9, 2019—five days after MCMC should have issued a decision on his expedited appeal—Kyree died in the cardiac unit at Duke Hospital. Pet. App. 5a, 43a. He was 27 years old. Pet. App. 4a.

On March 6, 2019—25 days after Kyree's death—MCMC overturned the denial of Kyree's heart transplant. Pet. App. 5a. MCMC found all prior reasons for the denial of Kyree's claims to be invalid. Specifically, MCMC found "[a]lcohol use before cardiac transplant" was not grounds for the "benefit exclusion" and the heart transplant was not considered to be experimental or investigational. Am. Compl. ¶ 90. "But it was too little, too late: By then, Kyree had been dead for almost a month." Pet. App. 5a

C. Prior Proceedings

Jody Rose, Kyree's mother, acting as administratrix of Kyree's Estate, filed suit against Defendants on December 20, 2019, in the Western District of North Carolina. The Estate's Amended Complaint asserted ERISA

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[1] The Affordable Care Act entitles a claimant to an expedited external review where the final adverse benefit determination involves a medical condition for which the "timeframe for completion of a standard external review would seriously jeopardize the life or health of the claimant or would jeopardize the claimant's ability to regain maximum function." 45 C.F.R. § 147.136(d)(3)(i)(B). As demonstrated by Kyree's death, the 45 day standard review period imperiled Kyree's life. His medical condition necessitated an expedited review, as amply communicated to Defendants by Duke's medical team.

claims for the wrongful denial of benefits under 29 U.S.C. § 1132(a)(1)(b) (ERISA § 502(a)(1)(b)) and for breach of fiduciary duty under 29 U.S.C. § 1132(a)(3) (ERISA § 502(a)(3)). Pet. App. 5a. Among other things, the Estate sought "declaratory and injunctive relief," monetary damages, and "appropriate equitable relief" including "surcharge, disgorgement, constructive trust, restitution, [and] equitable estoppel." *Id.* at 5a-6a. Defendants moved to dismiss the Estate's claims under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). *Id.* at 43a-44a.

1. The motions were referred to a magistrate judge, Pet. App. 39a, who recommended that the district court dismiss the Estate's § 1132(a)(1)(b) claim, but not its § 1132(a)(3) claim, Pet. App. 69a. As to the § 1132(a)(1)(b) claim, the magistrate judge reasoned that the statute does not permit a participant to recover the value of benefits he never received. Pet. App. 47a-54a. Because Kyree died while waiting for Defendants to approve his covered heart transplant, he could not receive the value of the procedure under § 1132(a)(1)(b). Pet. App. 47a-54a.

As to the Estate's § 1132(a)(3) claim, Defendants argued for dismissal on the theory that the Estate sought "compensatory damages" and § 1132(a)(3) permits only "appropriate equitable relief."[2] Pet. App. 55a. The magistrate judge disagreed. The magistrate judge relied on this Court's decision in *Amara* and the Fourth Circuit's post-

[2] Defendants also argued that the § 1132(a)(3) claim "should be dismissed because it" was duplicative of the § 1132(a)(1)(b) in that it "presents 'the exact same claim, and demand[s] the same essential relief[.]'" Pet. App. 55a. The magistrate judge also rejected this argument, explaining that while the Estate was not entitled to a duplicative *recovery* under both § 1132(a)(1)(b) and (a)(3), at the pleading stage the Estate was permitted to seek relief under both subsections. Pet. App. 56a.

Amara case *McCravy v. Met. Life Ins. Co.*, 690 F.3d 176, 181 (4th Cir. 2012), to hold that surcharge was a remedy available under § 1132(a)(3). Pet. App. 61a-62a. Surcharge is "an equitable remedy that 'provide[s] 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.'" Pet. App. 62a. The Estate had plausibly alleged that Defendants were breaching fiduciaries who had been unjustly enriched because they refused to pay the cost of the heart transplant. Pet. App. 62a-63a. Accordingly, the magistrate judge recommended that the Estate be permitted to proceed with its § 1132(a)(3) claim and seek a remedy of surcharge. Pet. App. 68a.

The district court adopted the recommendation to dismiss the Estate's § 1132(a)(1)(b) claim, but rejected the recommendation to allow the Estate's § 1132(a)(3) claim to proceed. Pet. App. 33a-37a. Instead, the district court concluded the Estate "cannot obtain the relief sought because it is merely a claim for compensatory damages and does not constitute 'appropriate equitable relief' under § [1132](a)(3)." Pet. App. 37a. Thus, even if Defendants were fiduciaries and breached their duties to Kyree in denying his claim and causing his death, the district court concluded the Estate had no remedy for that harm under ERISA. *Ibid.*

"While the facts of this case are undoubtedly tragic," the district court noted, "it is not for this Court to fashion a remedy under ERISA for these particular circumstances, rather that is the job of Congress." *Ibid.* Because the Estate could not obtain relief under either of its claims, the district court dismissed the suit in its entirety under Rule 12(b)(6) and entered judgment in Defendants' favor. *Ibid.*

2. The Estate filed a timely appeal, seeking review of the dismissal of both its claims. All three members of the panel agreed that the district court correctly dismissed the Estate's § 1132(a)(1)(B) claim. Pet. App. 7a-8a, 28a. But the panel disagreed as to whether the district court's dismissal of the Estate's § 1132(a)(3) claim was proper. Pet. App. 28a. In short, the majority agreed with the district court that "plaintiffs suing for breach of fiduciary duty" may not seek surcharge under § 1132(a)(3). Pet. App. 24a-26a. The dissent found this conclusion contrary to clear Supreme Court and Fourth Circuit precedent and therefore improper. Pet. App. 28a-32a.

a. The majority's conclusion turned on its interpretation of which categories of relief were "typically available in equity." This Court, in *Mertens*, concluded that § 1132(a)(3)'s reference to "equitable relief" "refer[ed] to those categories of relief that were *typically* available in equity" when the courts of law and equity were divided. Pet. App. 23a n.14 (quoting *Mertens*, 508 U.S. at 256).

The majority applied a framework that distinguishes between "concurrent jurisdiction" cases and those cases within the "exclusive" jurisdiction of equity courts. By "concurrent jurisdiction cases" the majority meant cases during the time of "the divided bench" in which both courts could have exercised jurisdiction but provided different remedies. *Id.* at 11a-12a. In such cases, the court of law could have provided "legal" relief (for example, money damages) while the court of equity could have provided "equitable" relief (for example, specific performance). *Id.* at 12a-14a. By "exclusive jurisdiction" cases, the majority meant those disputes that could only be heard in a court of equity. *Id.* at 12a-13a.

Neither this framework, nor the terms "concurrent" and "exclusive" jurisdiction, come from this Court's jurisprudence. The distinction does not appear anywhere in *Mertens*, *Great-West*, *Sereboff*, *Amara*, *McCutchen*, or *Montantile*. The majority acknowledged as much. Pet. App. 21a ("True, the Supreme Court did not use the term 'concurrent.'").[3]

Applying its novel framework to § 1132(a)(3), the majority concluded that remedies "'typically' available" in equity are limited only to "relief . . . traditionally available in concurrent-jurisdiction cases." Pet. App. 17a. In contrast, the majority concluded, remedies provided in "exclusive jurisdiction" cases were not "typically available in equity." *Ibid.* The majority gave a "trust suit" as an example of an "exclusive jurisdiction" case. *Ibid.* Because "[c]ourts of law refused to recognize the law of trusts," those "suits had to be brought in courts of equity, making them fall within equity's 'exclusive jurisdiction.'" *Id.* at 12a-13a.

Equity courts in "exclusive jurisdiction" cases could provide a "wider range of remedies" than in "concurrent jurisdiction" cases. *Id.* at 13a. Only the latter, narrower set of remedies, the majority concluded, should be considered remedies "typically available in equity" for the purposes of § 1132(a)(3). Pet. App. 13a, 17a.

The majority explained that equity courts sometimes granted monetary compensation, but primarily in "exclusive jurisdiction" cases, in which a court of law was not available to grant similar relief. *Id.* at 14a-15a. Thus, the majority explained, "equitable compensation—in trust cases, called a 'surcharge'"—was primarily available in

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[3] These terms also do not appear in any prior circuit court decisions addressing this issue.

courts of equity in "exclusive jurisdiction" cases because it was "essentially equivalent to monetary damages," a legal remedy. *Ibid.* Courts of equity in "concurrent jurisdiction" cases, in contrast, could "provide monetary relief" only when the plaintiff could "identify the specific property (funds) that the defendant wrongfully possessed and that rightfully belonged to the plaintiff." *Id.* at 15a-16a.

The end result of the majority's long chain of reasoning is its conclusion that monetary-like relief was only available in equity courts in "concurrent jurisdiction" cases—and thus was only a type of relief "typically available in equity"—when "a plaintiff [can] point[] to specific funds that he rightfully own[s] but that the defendant possesse[s]." *Id.* at 17a, 21a.

After it completed this analysis, the majority asserted that this distinction between "concurrent" and "exclusive" jurisdiction cases, and its corresponding conclusion regarding which remedies were "typically available in equity," was implicit in this Court's pre-*Amara* case law interpreting § 1132(a)(3), namely *Mertens* and *Great-West*. Pet. App. 18a-21a.

In reaching its decision, the majority acknowledged that this Court in *CIGNA Corp. v. Amara* had specifically stated that ERISA plaintiffs may "pursue 'make-whole,' loss-based, monetary relief under" § 1132(a)(3), "because such relief was analogous to 'surcharge,' an 'exclusively equitable' remedy under the law of trusts." Pet. App. 22a (quoting *Amara*, 563 U.S. at 442). The majority also acknowledged that two post-*Amara* Fourth Circuit cases—*McCravy v. Met. Life Ins. Co.* in 2012 and *Peters v. Aetna, Inc.* in 2021, 2 F.4th 199 (4th Cir. 2021)—had acknowledged and followed this language from *Amara*. Pet. App. 23a-24a. Nevertheless, the majority concluded that *Amara*'s discussion of surcharge was no longer good

law because, in its view, (1) it was dicta, (2) it misunderstood the distinction between "concurrent" and "exclusive" jurisdiction equity cases and was therefore inconsistent with pre-*Amara* Supreme Court case law (*Mertens* and *Great-West*), and (3) it was inconsistent with a footnote in a single post-*Amara* Supreme Court case—*Montanile v. Bd. of Trs.*, 577 U.S. 136 (2016). Pet. App. 23a-26a.[4]

b. Judge Toby Heytens dissented in part, disagreeing with the majority's entire § 1132(a)(3) analysis. Pet. App. 28a-32a. In the dissent's view, the "equitable relief" available under § 1132(a)(3) includes surcharge when the claimant asserts harm stemming from a fiduciary's breach of fiduciary duties. Pet. App. 28a, 30a-31a.

As the dissent explained, the majority's holding is a departure from Supreme Court case law (*Amara*) by which the circuit courts "are bound . . . even when we think the Court may have gotten those principles—or their application—wrong." Pet. App. 29a. *Amara* "bless[ed]" "surcharge as a proper remedy under" § 1132(a)(3), yet "[t]o show the Supreme Court has rejected *Amara*'s blessing" the majority "relies on a footnote in *Montanile*." Pet. App. 30a. That 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*." *Ibid.* In the dissent's view, in the absence of

[4] Having concluded that surcharge "is unavailable under § [1132](a)(3)," the majority remanded the case for the district court to "consider whether [the Estate] plausibly alleged facts that would support relief that was 'typically' available in equity," namely whether the Estate has alleged that specific funds to which it is entitled "remain in the defendant's possession or can be traced to other assets." Pet. App. 26a-27a.

such clear direction from the Court in *Montanile*, the majority's disregard of *Amara* was improper. *Ibid.*

Moreover, as the dissent explained, *Amara* is fully consistent with this Court's other precedents interpreting § 1132(a)(3):

> As *Amara* noted, surcharge was not available against just anyone. Rather, surcharge only "extended to a breach of trust committed *by a fiduciary* encompassing any violation of a duty imposed upon that fiduciary," which is why "the fact that the defendant in [*Amara*], unlike the defendant in *Mertens*, [was] analogous to a trustee ma[de] a critical difference."

Pet. App. 30a-31a (quoting *Amara*, 563 U.S. at 442). The dissent noted the defendants in all the cases the majority relied upon—*Mertens*, *Great-West*, *Sereboff*, *McCutchen*, and *Montanile*—were not fiduciaries, so the remedy of surcharge was not relevant or considered in those cases. Pet. App. 30a-31a.

The dissent further explained that the majority's holding was a departure from Fourth Circuit case law (*McCravy* and *Peters*), which had previously considered the majority's arguments for disregarding *Amara* "and decided it should follow *Amara*'s lead . . . anyway." Pet. App. 29a. Notably, the defendants in *McCravy* and *Peters*, like in *Amara*, were both fiduciaries, meaning the remedy of surcharge was relevant to the plaintiffs in those cases. Pet. App. 31a. The law sets a high bar for overturning prior panel precedent that, in the dissent's view, was not met in this case. *Id.* at 30a-31a.

c. The Estate filed a timely petition for rehearing and rehearing en banc. The Fourth Circuit denied that petition on October 6, 2023. *Id.* at 71a.

REASONS FOR GRANTING THE PETITION

This case warrants immediate plenary review (if not summary reversal). The divided panel below created a clear circuit split on the question presented—a question that turns on the proper interpretation of this Court's prior precedent. *See infra* 21-24. The decision below explicitly conflicts with that precedent and is clearly wrong on the merits. *See infra* 24-29. Further percolation will only generate unnecessary confusion and inconsistency in the application of a federal law which Congress designed and intended to be applied uniformly. *See infra* 29-30. The stakes here are enormous for the hundreds of millions of Americans who receive benefits from employer-sponsored benefit plans. *See infra* 30-32. And this case is an ideal vehicle. *See infra* 32-33.

I. The Fourth Circuit upset the circuits' post-*Amara* consensus and created a clear circuit split.

A. Prior to the Fourth Circuit's decision in this case, the circuits were in agreement. As the Eleventh Circuit explained just last year, "[s]ince *Amara*, every circuit court to address the issue has recognized that Section 1132(a)(3) creates a cause of action for monetary relief for breaches of fiduciary duty." *Gimeno v. NCHMD, Inc.*, 38 F.4th 910, 914-15 (11th Cir. 2022) (collecting cases).

Seven of the federal circuits—the Second, Fourth, Fifth, Seventh, Eighth, Ninth, and Eleventh—have directly addressed the question presented in precedential, published decisions. *E.g.*, *In re DeRogatis*, 904 F.3d 174, 199 (2d Cir. 2018); *Sullivan-Mestecky v. Verizon Commc'ns Inc.*, 961 F.3d 91, 102 (2d Cir. 2020); *McCravy*, 690 F.3d at 181; *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 452 (5th Cir. 2013); *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 882 (7th Cir. 2013) *Silva v. Metro. Life Ins. Co.*, 762 F.3d 711, 720-22 (8th Cir. 2014); *Gabriel v.*

Alaska Elec. Pension Fund, 773 F.3d 945, 957 (9th Cir. 2014); *Gimeno*, 38 F.4th at 915. Until this case, all agreed that "*Amara* makes it *very clear*" that surcharge is a traditional equitable remedy, and "the fact that [it] take[s] a monetary form does not alter this classification." *Moyle v. Liberty Mut. Ret. Benefit Plan*, 823 F.3d 948, 960 (9th Cir. 2016), *as amended on denial of reh'g and reh'g en banc* (Aug. 18, 2016) (emphasis added).

Three other circuits, the Third, Sixth, and Tenth Circuits also appear to agree, albeit in dicta or unpublished decisions. *See, e.g.*, *Staropoli v. Metro. Life Ins. Co.*, No. 21-2500, 2023 WL 1793884, at *4 (3d Cir. Feb. 7, 2023); *Menkes v. Prudential Ins. Co. of Am.*, 762 F.3d 285, 296 n.11 (3d Cir. 2014); *Rochow v. Life Ins. Co. of N. Am.*, 780 F.3d 364, 375 & n.4 (6th Cir. 2015); *Brown v. United of Omaha Life Ins. Co.*, 661 F. App'x 852, 860 (6th Cir. 2016); *Teets v. Great-W. Life & Annuity Ins. Co.*, 921 F.3d 1200, 1224 (10th Cir. 2019).

All told, before this case, seven circuits plainly agreed, three others appeared to agree, and only two had yet to weigh in at all.

B. The decision below upended this settled law. For the first time since *Amara*, a circuit court declared this Court's discussion of surcharge therein was not only dicta, but was incorrect and should be disregarded. Pet. App. 22a-24a ("*Amara*'s approach is antithetical to a proper § [1132](a)(3) analysis."). It is now the established law in the Fourth Circuit—and nowhere else—that surcharge is unavailable to plan participants and beneficiaries seeking relief under § 1132(a)(3) against plan fiduciaries. The upshot is that in the Fourth Circuit—and nowhere else—plan participants and beneficiaries, like Kyree and his mother, have, in essence, *no remedy at all* for egregious

fiduciary breaches, even those that cause financial ruin or, as this case demonstrates, death.[5]

C. The panel majority said its departure from *Amara* was justified because this Court had subsequently "rejected the turn that it contemplated in *Amara*" when it issued *Montanile* by "labeling *Amara*'s reasoning 'dicta' and expressly" reaffirming its "interpretation of 'equitable relief' in *Mertens* [and] *Great-West*." Pet. App. 24a. Again, the Fourth Circuit is alone in these views.

The Fifth and Eleventh circuits explicitly considered the argument that *Amara*'s discussion of surcharge was dicta in reaching their conclusions that it was a remedy available under § 1132(a)(3). Both concluded that, even if *Amara*'s discussion of surcharge was dicta, it was "thoroughly reasoned," "of considerable persuasive value," and, in any event, "correct." *Gimeno*, 38 F.4th at 915; *Gearlds*, 709 F.3d at 452 (explaining that even if *Amara*'s discussion was dicta, it would still "give serious consideration to this recent and detailed discussion of the law by a majority of the Supreme Court").[6]

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[5] That the circuit split is lopsided is not a reason to deny review. Further percolation will not resolve the split or aid this Court's review, *see infra* 29-30, and this Court regularly grants review to resolve splits with one outlier, *see, e.g.*, *Lindke v. Freed*, 143 S. Ct. 1780 (2023) (granting petition for certiorari); Petition for Writ of Certiorari at 8-16, *Lindke v. Freed*, No. 22-611, 2022 WL 18135692 (identifying 4-1 circuit split); *Pereira v. Sessions*, 138 S. Ct. 2105, 2113 & n.4 (2018) (resolving 7-1 circuit split); *United States v. Tinklenberg*, 563 U.S. 647 (2011) (resolving 11-1 circuit split); *United States v. Tinklenberg*, 579 F.3d 589, 598 (6th Cir. 2009) (acknowledging split).

[6] Notably, before the decision below, the Fourth Circuit had taken a similar view. *McCravy*, 690 F.3d at 181 ("Even assuming for the sake of argument that it is [dicta], we cannot simply override a legal pronouncement endorsed just last year by a majority of the Supreme Court.").

The circuits are also in agreement that *Montanile* did not change this Court's analysis in *Amara*. Four circuits—the Second, Eighth, Ninth, and Eleventh—issued decisions after *Montanile* adopting *Amara*'s conclusion that surcharge is a remedy available under § 1132(a)(3) to plan participants and beneficiaries suing fiduciaries. *Sullivan-Mestecky*, 961 F.3d at 102 (2nd Cir. 2020); *Powell v. Minnesota Life Ins. Co.*, 60 F.4th 1119, 1123 (8th Cir. 2023); *Castillo v. Metro. Life Ins. Co.*, 970 F.3d 1224, 1229 (9th Cir. 2020); *Gimeno*, 38 F.4th at 915 (11th Cir. 2022). None of these circuits found *Montanile* had any bearing on their analysis.[7]

In short, the other circuits have considered the Fourth Circuit's justifications and, like the panel dissent, rejected them. The circuit split is thus unequivocal and warrants this Court's intervention. Sup. Ct. R. 10(a).

II. The decision below conflicts with this Court's case law and is clearly wrong on the merits.

A. As several circuits to take up the question presented have stated: "The Supreme Court has made *quite clear* that surcharge is available to plaintiffs suing fiduciaries under Section 1132(a)(3)." *McCravy*, 690 F.3d at 181 (emphasis added); *see also Moyle*, 823 F.3d at 960 ("*Amara* makes it *very clear*" that surcharge is a traditionally equitable remedy. (emphasis added)). The decision below ignored that clear direction, and in doing so "decided an important federal question" regarding the availability of critical remedies under ERISA "in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

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[7] Again, before the decision below, the Fourth Circuit had taken a similar position. *Peters v. Aetna Inc.*, 2 F.4th 199, 217 (4th Cir. 2021).

The panel majority justified its departure from *Amara* by asserting that its discussion of surcharge (1) was dicta; (2) conflicted with this Court's prior precedent; and (3) was abrogated by this Court's decision in *Montanile*. None of these justifications is well-reasoned:

1. As discussed above, *Amara*'s discussion of surcharge is not dicta. *See supra* 8-9. But even if it were, it is consistent with this Court's other cases and is correct as a matter of law and policy.

2. *Amara*'s discussion of surcharge does not conflict with prior Supreme Court precedent. The key difference between *Amara* and this Court's prior precedent interpreting § 1132(a)(3) is this: *Amara* is the *only* case brought against a plan fiduciary. The defendant in *Mertens* was a nonfiduciary (a plan actuary), 508 U.S. at 249-50, and the defendant in *Great-West* was a plan participant, 534 U.S. at 207-09. *Amara* specifically notes that the fiduciary defendant in that case, "unlike the defendant in *Mertens*," was "analogous to a trustee," and this was the "critical difference" between the two cases. 563 U.S. at 442. That's because "[t]he surcharge remedy extended [only] to a breach of trust committed by a fiduciary," but not to participation in that breach by a nonfiduciary (as was the case in *Mertens*). *Id.* Accordingly, surcharge was available to the plaintiff in *Amara*, but not to the plaintiff in *Mertens*.

Moreover, as the panel dissent noted, the *Amara* court "extensively discussed both *Mertens* and *Great-West*" before concluding that surcharge was a remedy "typically available in equity" to beneficiaries suing trustees. Pet. App. 29a. This Court in *Amara* plainly understood and took into consideration *Mertens* and *Great-West* before declaring that surcharge was available under § 1132(a)(3) in suits against fiduciaries. Once this "critical difference"

between the cases is understood, there is no conflict; the rulings are interlocking, interrelated pieces in ERISA's remedial scheme.

3. *Montanile* did nothing to abrogate *Amara*. While the Court in *Montanile* noted (in a footnote) that *Amara*'s "discussion of § [1132](a)(3) . . . was not essential to resolving that case," it did not say *Amara*'s discussion was incorrect or overruled. 577 U.S. at 148 n.3. When viewed through the lens of the "critical difference" that makes sense. The defendant in *Montanile* was, like in *Great-West*, a plan participant—not a fiduciary. *Id.* at 140. This Court thus had no occasion to consider and overrule prior precedent expounding the equitable remedies available in suits against ERISA fiduciaries.

B. The decision below is also clearly wrong on the merits because it is predicated on the unsupported assertion that remedies "typically available in equity" include only those remedies available to equity courts in "concurrent jurisdiction" cases. *See supra* 16. But this Court has never used the "concurrent jurisdiction" of equity courts to define the outlines of remedies "typically available in equity." Instead, this Court appears to have actively rejected that premise.

In *Amara*, for instance, this Court noted a suit by a trust beneficiary against a trustee (which is analogous to a suit by a plan beneficiary against a fiduciary) was "the kind of lawsuit that, before the merger of law and equity, respondents could have brought only in a court of equity, not a court of law." 563 U.S. at 439. The *Amara* court then dug deep into the remedies available to an equity court in such a trust dispute to determine the remedies that were

"typically available in equity."[8] *Id.* at 440. In other words, this Court found remedies that were "exclusively equitable" were also "typically available in equity." *Id.* at 442.

The Court was right to draw on trust law in *Amara*. "ERISA abounds with the language and terminology of trust law," and its "legislative history confirms that the Act's fiduciary responsibility provisions, 'codify and make applicable to ERISA fiduciaries certain'" trust law "principles." *Firestone*, 489 U.S. at 110 (cleaned up) (citations omitted). It would defy logic and congressional intent to deny ERISA beneficiaries remedies traditionally available in trust disputes, while codifying the principals developed therein.

C. The decision below also runs counter to the clear purpose of ERISA because its "restrictive reading of Section 1132(a)(3)" creates perverse incentives and "extreme inequities" that ultimately harm plan participants and beneficiaries. *McCravy*, 690 F.3d at 179. Without surcharge as an available remedy against fiduciaries, "[t]he law" is "ripe for abuse by plan providers" who are "almost uniformly more sophisticated than" plan participants. *Id.*

For example, under a restrictive reading of § 1132(a)(3), a plan fiduciary could—without worry of recourse—induce a plan participant to proceed with a necessary surgery with inaccurate assurances that the procedure was covered by the plan. *See Kenseth*, 722 F.3d at

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[8] Notably, no one disagrees that surcharge was in fact available to equity courts to remedy harm caused by a breach of trust or prevent unjust enrichment of trustees. *See* Restatement (Third) of Trusts § 95 (2012). The parties only dispute whether surcharge was "*typically* available in equity."

879-83. Without surcharge, the participant would be responsible for the cost of the surgery and would have no path to recover that cost from the breaching fiduciary. *Id.*

As another common example, a fiduciary could induce a participant to purchase and pay premiums for a plan in which they are ineligible to participate without ever facing any consequences for this clear fiduciary breach. Without surcharge, the participant would be unable to procure the value of the coverage they were expecting and might even be unable to have their premium payments returned. *See, e.g.*, *Gimeno*, 38 F.4th at 916.[9]

Congress did not intend to strand harmed plan participants in this "remedy-less 'regulatory vacuum.'" *Silva*, 762 F.3d at 722. Instead, in the face of such flagrant gaps, § 1132(a)(3) steps in "to act as a safety net, offering appropriate equitable relief for injuries caused by violations that § [1132] does not elsewhere adequately remedy." *Varity*, 516 U.S. at 490.

The Fourth Circuit's retort that claimants in Kyree's situation might still have some remedy if they can prove unjust enrichment and "trace" that enrichment to a specific set of funds is, in reality, no response at all. No rational plan administrator will identify and "set aside" funds it should pay, but doesn't want to, knowing in doing so they are laying the bricks to the participant's path to recovery. Moreover, asset tracing might have made sense in *Great-West*, *Sereboff*, and *McCutchen*, where plans sought to recover specific funds that had been paid to participants. Tracing makes no practical sense here, where

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[9] And as this case illustrates, without surcharge, plan fiduciaries are incentivized to improperly deny and delay the approval of life-saving care. So long as a health plan administrator waits long enough to approve such care, they *will never have to pay* because, in the Fourth Circuit's view, ERISA provides no such recourse.

the plan has never reached the step of paying or setting aside any specific funds that could be "traced."

III. This Court's immediate review is warranted.

The question presented would not benefit from further percolation. Just the opposite: this issue of exceptional importance—which arises constantly in ERISA litigation—warrants this Court's immediate attention.

A. Further percolation would be unhelpful.

Further percolation over the question presented is not just pointless, but harmful.

1. Percolation would be pointless because the Fourth Circuit has made clear that it is content to squarely disagree with the other circuits. *See supra* 21-22, 23-24 (explaining that the position of the panel majority in this case has been rejected by numerous other circuits). Petitioner sought en banc review, which was denied *even though* (as the panel dissent made clear) the decision below expressly overruled prior Fourth Circuit authority based on two judges' reading of an intervening decision by this Court.

And the typical justification for percolation (*i.e.*, that this Court's review will benefit from a robust vetting of the question presented) simply does not apply here because the question turns *entirely* on the meaning of two prior cases of this Court (*Amara* and *Montanile)*.

2. Percolation would also be affirmatively harmful. Without this Court's intervention, the remedies available under ERISA will depend on the location of litigation, in direct conflict with Congress's intent to create a uniform, predictable, national scheme. *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct

and a uniform regime of ultimate remedial orders and awards when a violation has occurred.”).

As this Court has explained, “[u]niformity is impossible . . . if plans are subject to different legal obligations in different States.” *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001). Yet if the Fourth Circuit’s decision stands, plan administrators will face substantially varying obligations and liabilities in different circuits, and the remedies available to plan participants—even to those within the same plan—will depend on nothing more than geography.

And, worse yet, the decision below is likely to create confusion, disruption, and more litigation in the lower courts, akin to the widespread pre-*Amara* disputes over the scope of § 1132(a)(3). *See supra* 7. Only now, the inevitable litigation will turn on whether this Court’s decision in *Amara* is correct, binding, and still good law after *Montanile*. Such litigation will generate nothing but legal fees and frustration. It will certainly not aid this Court’s inevitable substantive review.

B. The question presented is exceptionally important and arises frequently in ERISA litigation.

Over 152 million Americans—nearly half of the U.S. population—receive health, retirement, or other welfare benefits through an ERISA-protected plan. *See* EMPLOYEE BENEFITS SECURITY ADMINISTRATION, *EBSA Restores Over $1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries*, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results (last visited Jan. 2, 2024). For these workers and their families, ERISA provides the only avenue of recourse when plan administrators and fiduciaries have wrongly denied them benefits or

breached their fiduciary duties. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987) ("[T]he civil enforcement provisions of ERISA § [1132](a) [are] the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits[.]"). It is difficult to understate the collective impact of the availability of ERISA's exclusive remedies on these workers and their families.

It is beyond dispute that each year the thousands of plan fiduciaries[10] in the United States make millions of decisions—if to provide certain benefits, how much to provide, and when to do so—costing hundreds of billions of dollars. For example, in 2019 alone, large self-insured, mixed-insured, and fully-insured private employer sponsored health plans paid out $152 billion in benefits to participants. U.S. DEPT. OF LABOR, *Report to Congress, Annual Report on Self-Insured Group Health Plans*, 10 (March 2022), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2022.pdf.

Unsurprisingly, these decisions, and whether surcharge is an appropriate remedy for incorrect decisions, are the subject of frequent litigation. Indeed, in the last few months alone, lower courts have allowed dozens of cases seeking surcharge or make-whole monetary relief under § 1132(a)(3) to proceed. *See, e.g.*, *Foughty v. Cleaver-Brooks, Inc.*, No. 1:23-CV-3074-TWT, 2023 WL 7287220, at *3 (N.D. Ga. Nov. 3, 2023); *Principal Life Ins.*

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[10] Employers sponsor "approximately 747,000 retirement plans, 2.5 million health plans, and 673,000 other welfare benefit plans." EMPLOYEE BENEFITS SECURITY ADMINISTRATION, *EBSA Restores Over $1.4 Billion to Employee Benefit Plans, Participants, and Beneficiaries*, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.

Co. v. Howard-Kembitzky, No. 2:22-CV-3421, 2023 WL 6392446, at *6 (S.D. Ohio Oct. 2, 2023); *Khan v. Bd. of Dirs. of Pentegra Defined Contribution Plan*, No. 20-CV-07561 (PMH), 2023 WL 6237862, at *3 (S.D.N.Y. Sept. 26, 2023); *Bruce M. v. Sutter W. Bay Med. Grp. Health & Welfare*, No. 22-CV-06149-JST, 2023 WL 6277269, at *5 (N.D. Cal. Sept. 25, 2023); *Marlowe v. WebMD, LLC*, No. 22-CV-3284 (MKV), 2023 WL 6198665, at *6 (S.D.N.Y. Sept. 22, 2023). The Fourth Circuit's wholesale elimination of this remedy long understood to be available to plan participants—if allowed to proliferate—will have widespread impact and will leave many plan participants with essentially no remedy at all for sometimes egregious fiduciary breaches.

Given the collective and individual stakes, this Court's review is urgently needed.

IV. This case is an ideal vehicle for either plenary review or summary reversal.

This case is a perfect vehicle to resolve the split created by the decision below. The panel majority unequivocally overturned prior circuit precedent and expressly recognized its disagreement with this Court's discussion of surcharge in *Amara*. There were no other conceivable grounds for the panel majority's decision. And the Fourth Circuit rejected the Estate's petition for en banc review. The question presented is thus cleanly teed up for this Court's review.

Under the circumstances, it would indeed be appropriate for the Court to summarily reverse. This Court regularly grants summary reversal, in a variety of different legal contexts, to correct a lower court's "clear misapprehension of" its "precedents." *Tolan v. Cotton*, 572 U.S. 650, 659 (2014) (in qualified immunity case, summarily reversing to correct "a clear misapprehension of summary

judgment standards in light of our precedents"); *Sexton v. Beaudreaux*, 138 S. Ct. 2555, 2557 (2018) (in federal habeas case, summarily reversing where "[t]he Court of Appeals' decision ignored well-established principles"); *CNH Indus. N.V. v. Reese*, 583 U.S. 133, 134 (2018) (summarily reversing where lower court's interpretation of collective-bargaining agreement "cannot be squared with" this Court's precedent); *see also Salazar-Limon v. City of Houston, Tex.*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of petition) (explaining "this Court" may summarily reverse "if the lower court conspicuously failed to apply a governing legal rule" and collecting such cases in qualified immunity context).

As in those cases, the decision below "failed to apply a governing legal rule" announced in this Court's precedents. But the Fourth Circuit went even further in taking it upon itself to proclaim a decision of this Court had been overruled. Summary reversal to correct this transgression is therefore appropriate.

CONCLUSION

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

Respectfully submitted.

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