No. 25-590

IN THE

Supreme Court of the United States

JERRY ALDRIDGE, *et al.*,

Petitioners,

v.

REGIONS BANK,

Respondent.

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

BRIEF OF SAMUEL L. BRAY, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Constitutional Provisions

Statutes

Other Authorities

Cited Authorities

Page

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Samuel L. Bray is a Professor of Law and the Walter Mander Research Scholar at the University of Chicago Law School. Professor Bray has written extensively about the law of remedies, with a particular focus on equitable remedies. On the specific question of whether surcharge is an equitable remedy available under ERISA, Professor Bray's scholarship is referenced by courts on both sides of the circuit split, including the court below.

SUMMARY OF THE ARGUMENT

Equitable remedies are available under ERISA. *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). However, in the years since courts in several Circuits have mistakenly held that surcharge is not an equitable remedy. This Court should grant *certiorari* to clarify for these Circuits the intent of *Amara* to allow surcharge as an equitable remedy for violations of ERISA.

Because a decision to the contrary would raise preemption issues, the Court should grant *certiorari* on both questions presented.

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1. Counsel for all parties received notice of *amici*'s intent to file this brief on January 20, 2026, following the weekend and January 19, 2026 federal holiday. The parties stated they do not object to this notice. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae* or his counsel, has made a monetary contribution to this brief's preparation or submission.

ARGUMENT

Over the last three decades, this Court has had about a dozen cases interpreting "equitable relief" under various provisions of the Employee Retirement Income Security Act of 1974 (ERISA). It is time for another.

There is confusion in the lower courts about whether this Court really meant what it said in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), namely, that "surcharge" is an equitable remedy available under ERISA. That confusion, caused in part by tensions in this Court's precedents, has now generated a sharp circuit split. The petition in this case is an ideal vehicle to resolve the split and clear up the confusion. The Court should reaffirm that surcharge is an equitable remedy available under 29 U.S.C. § 1132(a)(3).

This brief will concisely make two points. First, surcharge is an equitable remedy, a position adopted by this Court previously but ignored in practice by several Circuits. Second, if the Court grants the petition for certiorari with respect to the first question presented, it should also take up the second question presented. *Amicus* takes no position on the substantive merits of this case, i.e., whether there was in fact a violation of ERISA or a breach of contract.

I. Surcharge is an equitable remedy.

The remedy most associated with equity today is the injunction, but in a longer historical perspective, the characteristic equitable remedy was probably the accounting. And if we are thinking of trust law—which is essentially what ERISA is—then accounting was and is the quintessential equitable remedy.

When a court orders an accounting, there are multiple possible results. One is that the trustee will have to fork over the profits that were made that really belong to the trust. That is easily called an "accounting for profits." But what if the trustee's mismanagement didn't lead to profits, but instead to losses? "Surcharge," also given other names, including the broader term "equitable compensation," was how equity handled that.

I have described the connection between this remedy and an accounting thus:

> [E]quitable compensation as a distinctive remedy emerged out of accounting. It was a shortcut: without going to the trouble of an accounting, a beneficiary could sue for what might be called the expected results on the negative side of the ledger. According to its "traditional principles," equitable compensation "focused on the trustee's obligation to account for his or her stewardship of the trust property, and [t]he form of relief [was] couched in terms appropriate to require the defaulting trustee to restore to the estate the assets of which he deprived it."

Samuel L. Bray, *Fiduciary Remedies*, *in* The Oxford Handbook of Fiduciary Law 449, 456–57 (Evan J. Criddle, Paul B. Miller, & Robert H. Sitkoff eds., 2019) (alternation in original) (footnote omitted).[2] As the leading

2. The quoted source is Matthew Conaglen, *Equitable Compensation for Breach of Trust:* Off Target, 40 Melbourne U. L. Rev. 126, 127 (2016); and the cited sources are J. D. Heydon,

contemporary equity treatise puts it, the recent "advent of the term 'equitable compensation' . . . supplied a name to a form of relief which derived from the principles of account, but was awarded without the accounting procedures." Heydon, Leeming, & Turner, *supra* note 2, § 23–030, at 803.

Although equitable compensation is not restricted to trust law, in that context it is an especially critical remedy.[3]

M. J. Leeming & P. G. Turner, Meagher, Gummow and Lehane's Equity: Doctrines and Remedies 802–03 (5th ed. 2015); Conaglen, *supra*, at 146–50; *Ackerman v. Halsey*, 37 N.J. Eq. 356, 366 (Ch. 1883). A leading scholar of equity, Professor Larissa Katz, has similarly recognized the way equitable compensation, or surcharge, is nestled into an accounting:

> [T]he remedy of account [is] where what the beneficiary is in the end entitled to is the result of an equitable reconstruction of the books as they ought to be, rather than as they are. When equity surcharges the account to reflect what ought to have been received but wasn't, the beneficiary is not unjustly enriched by the trustee's payment to the beneficiary out of pocket in the amount of the surcharge.

Larissa Katz, *Equitable Remedies: Protecting "What We Have Coming to Us,"* 96 Notre Dame L. Rev. 1115, 1126 n.29 (2021).

3. "Particularly in the trust context, an award of equitable compensation is sometimes called 'surcharge,' and it may also be subsumed under the heading of 'accounting for profits.'" Samuel L. Bray & Emily Sherwin, Ames, Chafee, and Re on Remedies 869–70 (4th ed. 2024). The historical development has been from "surcharge" in trust law to a broader category of "equitable compensation" that sweeps in loss-based remedies in equity both inside and outside of trust law. *See* Jessica Hudson, Ben McFarlane & Charles Mitchell, Hayton, McFarlane and Mitchell on Equity and Trusts § 18–004, at 772 (15th ed. 2022); *cf.* Graham Virgo, The Principles of the Law of Restitution

Surcharge, or equitable compensation, as this Court said in *Amara*, is an "exclusively equitable" remedy. 563 U.S. at 442 (citing, *inter alia*, *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 464 (1939)). Moreover, surcharge can be seen as an application of the well-established equitable principle that equity regards as done that which ought to be done: "if the trustee misapplied the assets, equity would ignore the misapplication and simply hold him to account for the assets as if he had acted in accordance with his trust." Paul S. Davies, *Compensatory Remedies for Breach of Trust*, 2 Can. J. Comp. & Contemp. L. 65, 68 (2016) (quoting *Williams v. Central Bank of Nigeria* [2014] UKSC 10 (Lord Sumption SCJ) (cleaned up)).

But if it is so clear that surcharge is an equitable remedy, why is there confusion in the lower courts?

One reason is a conflation of categories: surcharge, or equitable compensation, is a monetary remedy that corresponds to loss. And we are accustomed to calling monetary remedies for loss *damages*, which is of course the standard remedy for legal claims. The court below said, for example, that "surcharge and damages are 'essentially equivalent' because they describe the same concept: 'monetary relief' that a legal or equity court would grant to compensate a plaintiff for the losses that the defendant caused." App. 35a (citation omitted).

Of course, the courts of law and equity didn't merely mete out "concepts." They gave remedies, and these

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530–31 (4th ed. 2024) (listing equitable compensation along with account of profits and proprietary remedies as types of remedy for equitable wrongs).

remedies have their own characteristics, strengths, and weaknesses. Sometimes an equitable remedy and a legal remedy will have a core similarity: an injunction is an order for someone to do something or not do something, but so are mandamus and habeas corpus. No one would say these are all names for the same "concept." And sometimes law and equity developed different remedies that even shared a name (e.g., distinctive versions of accounting, rescission, and quiet title). In short, even distinguished judges have conflated the legal remedy of "damages" and the equitable remedy of "surcharge," or "equitable compensation," despite the fact that they are different remedies with different pedigrees.[4]

Another reason for the confusion, to be candid, is the uncertain signals sent by this Court. Justice Scalia got a lot of things right in his opinion for the Court in *Great-*

4. Some differences between "damages" and "equitable compensation" are cataloged in Bray & Sherwin, *supra*, at 869–71; for a more thorough discussion, specific to breach of trust, *see* Davies, *supra*. Even apart from those differences, surcharge is equitable simply because the entire area of trust law is exclusively equitable. At issue is the distinction between equity's exclusive, concurrent, and auxiliary jurisdictions. This distinction was an organizing principle for Justice Story's *Commentaries on Equity* and is traceable to the eighteenth century. *See* Samuel L. Bray, *Equity, Law, and the Seventh Amendment*, 100 Tex. L. Rev. 467, 469–71, 487–90 (2022); David Yale, *A Trichotomy of Equity*, 6 J. Legal. Hist. 194 (1985). The Fourth and Sixth Circuit decisions correctly recognized the importance of distinguishing equity's "exclusive" and "concurrent" jurisdictions, but they incorrectly interpreted "equitable relief" in ERISA through the lens of the concurrent jurisdiction. *See Rose v. PSA Airlines, Inc.*, 80 F.4th 488, 497–98 (4th Cir. 2023); *Aldridge v. Regions Bank*, 144 F.4th 828, 845–47 (6th Cir. 2025). Trust law is a paradigm example of the exclusive jurisdiction.

West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002). But he also made some mistakes. He said that mandamus was equitable, but it is not. *Id.* at 215 (relying on *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993)). He treated equitable restitutionary relief as if it were mostly proprietary, relegating the accounting for profits—a central remedy in equity's panoply—to being "a limited exception." 534 U.S. at 214 n.2. Most relevant for present purposes, he ignored surcharge or equitable compensation. That omission was harshly criticized by Professor John Langbein in *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in* Russell, Mertens, *and* Great-West, 103 Colum. L. Rev. 1317, 1352–53, 1364–65 (2003). In *Amara*, the Court appeared to heed Professor Langbein's critique on this point, for it correctly identified surcharge, or equitable compensation, as an exclusively equitable remedy that counts as "appropriate equitable relief." 563 U.S. at 441–42. Commentators have recognized *Amara*'s course correction, *e.g.*, Bray, *Equity, Law, and the Seventh Amendment, supra*, 100 Tex. L. Rev. at 490 n.120, 504–05, and so have some of the lower federal courts. But not all—hence the circuit split.

Indeed, this is one instance of a recurring precedential problem that only this Court can solve. Here's the pattern: Case A, a decision of this Court, takes a particular path, and that decision then gets encased in circuit precedent. Then along comes Case B, which corrects Case A in some respect and points in a different direction. But because Case B does so delicately, offering a harmonious rather than repudiatory reading of Case A, some of the lower courts persist in following their prior precedent. The pattern recurs in a number of contexts. *See, e.g.*, Curtis Bradley & Tara Leigh Grove, *Disfavored Supreme*

Court Precedent in the Lower Federal Courts, 111 Va. L. Rev. 1353, 1385–88 (2025) (discussing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); Bray, *Equity, Law, and the Seventh Amendment*, *supra*, at 478–82 (discussing *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558 (1990)). The older case, mistaken in some respect, gets locked into circuit precedent, and dislodging it requires the explicit statement of this Court. That is exactly what happened in the case below. *See Aldridge*, 144 F.4th at 849 (relying on circuit precedent from a decade prior to *Amara* and stating that "[w]e must follow [it] until the Supreme Court or our en banc court overturns it").

Here, the Court need not repudiate *Knudson*. It is, in the main, good law. As the Court correctly noted in dicta in *Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan*, 577 U.S. 136, 148 n.3 (2016), it is incorrect to read *Amara* "as all but overruling" *Knudson*. Moreover, remedies against trustees were not at issue in *Knudson*. Nevertheless, *Knudson* misdescribed equitable relief on an important point, and on that point, Professor Langbein got it right and *Amara* got it right. A statute like ERISA that authorizes "equitable relief" depends on correct classification of legal and equitable remedies, and errors on this score can have serious repercussions for the statutory scheme. The confusion needs to be cleared up and the circuit split resolved by authoritatively reaffirming *Amara*. No one else can do it.

Finally, I should note that an additional benefit of this clarification is that it will help the lower federal courts avoid a similar error in the Seventh Amendment context. Because trust law and its remedies are exclusively equitable, they have nothing to do with the

"suits at common law" in which the civil jury trial right is preserved. Nevertheless, federal courts sometimes trip up on this point, conflating surcharge with damages, and thus injecting—with no historical basis whatsoever—a civil jury into suits that are in the exclusive jurisdiction of equity. *See* Bray, *Equity, Law, and the Seventh Amendment, supra*, at 490. Clarification that surcharge is not legal damages in this statutory context will make it easier for lower federal courts to see that surcharge is not legal damages in the constitutional context.

II. The Court should grant both questions presented.

The petition for certiorari has two questions presented, the first about surcharge under Section 1132(a)(3) and the second about the preemption of state-law contract claims. It may be tempting to grant just the first question, since that is where there is such a sharp circuit split. But if the Court grants the first question, it should also grant the second. Otherwise, there is a risk that the Court will answer the first question by rejecting surcharge under Section 1132(a)(3), without taking into account the interaction of that answer with the second question. A rejection of surcharge under ERISA *and* the preemption of state-law contract claims might well lead to a position that is inconceivable under trust law, ERISA, and "principles of equity," *Trump v. CASA, Inc.*, 606 U.S. 831, 861 (2025): the near total erasure of relief for plaintiffs who can credibly allege that trustees have violated their fiduciary duties and through their mismanagement lost the assets under their control.

CONCLUSION

The petition for a writ of certiorari in *Aldridge v. Regions Bank* should be granted.

Respectfully submitted,

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