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 FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, when proceeding under ERISA Section 502(a)(3), a beneficiary may seek surcharge against an ERISA non-fiduciary?
2. Whether, if surcharge is unavailable under Section 502(a)(3), state law claims arising out of a contract are preempted?

CORPORATE DISCLOSURE STATEMENT

Regions Financial Corporation is the parent company of respondent Regions Bank. The Vanguard Group, Inc., owns more than 10% of the outstanding shares of the common stock of Regions Financial Corporation.

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INTRODUCTION

In seeking certiorari, petitioners pitch this case as deepening an entrenched split concerning a plaintiff's ability to recover surcharge under Section 502(a)(3) of the Employee Retirement Income Security Act (ERISA). In reality, though, this case does not implicate any divide among the circuit courts because it involves a niche type of plan under ERISA that (as petitioners concede, Pet. 11) is exempt from the statute's typical imposition of fiduciary duties. Petitioners cannot point to a single circuit court that would resolve such a case differently than the panel below, and the unusual nature of this case makes it a poor vehicle to address the questions presented. In any event, the panel below carefully analyzed this Court's precedents and correctly rejected petitioners' claims. The petition should be denied.

Petitioners allege a 6-2 split, but that divide is illusory and stems from a misreading of this Court's caselaw—a misreading the Court has already corrected. This Court's cases are clear that Section 502(a)(3) of ERISA authorizes only those remedies that were "*typically* available in equity" and not the damages remedy petitioners seek here. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). Although dicta from this Court's decision in *CIGNA Corp. v. Amara*, 563 U.S. 421, 442 (2011), created some confusion regarding the availability of surcharge, the Court squarely resolved that confusion by confirming that *CIGNA*'s discussion of the issue was merely dicta and reaffirming the bedrock rule *Mertens* already announced. *See Montanile v. Board of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142, 147-48 & n.3 (2016). None of the cases petitioners cite as conflicting with the decision below

grapples with *Montanile*'s recent, definitive, guidance on how to interpret Section 502(a)(3).

A recent Fifth Circuit decision, *see Aramark Servs., Inc. Grp. Health Plan v. Aetna Life Ins. Co.*, 162 F.4th 532 (5th Cir. 2025), concluded that surcharge was available under Section 502(a)(3) against ERISA fiduciaries. But this case is readily distinguishable because it concerns a niche, "top-hat" plan for high-level, highly-compensated employees, like petitioners. Such plans are expressly exempted under ERISA from the typical fiduciary duties that govern ERISA plans. *See* 29 U.S.C. § 1101(a)(1). That express statutory exemption means there is no real divide among the circuits on the question whether surcharge is available against a defendant like respondent, which is exempted from fiduciary duties. Every case petitioners cite as allowing surcharge permits that remedy only against ERISA *fiduciaries*. As the Fifth Circuit specifically emphasized in *Aramark*, the ERISA claim in that case was against an ERISA fiduciary, making it fundamentally different.

In any event, the panel below got it right. In an unbroken line of holdings, this Court has explained that Section 502(a)(3) permits only those remedies that were "typically" available in equity, and not any remedy an equitable court could conceivably authorize. Those holdings, which stem from Justice Scalia's own construction of ERISA for the Court, *see Mertens*, 508 U.S. at 256, and which this Court recently reaffirmed, *see Montanile*, 577 U.S. at 148 n.3, resolve this case. Petitioners offer nothing—other than dicta this Court has already explicitly abandoned—suggesting otherwise.

This case is a fatally flawed vehicle anyway. As the panel below explained, notwithstanding available remedies, it is far from clear whether petitioners can establish liability under Section 502(a)(3) in the first place. And the unusual top-hat nature of the plan at issue here makes this case unlike mine-run ERISA cases. Although many ERISA plans protect ordinary employees from financial mismanagement or wrongdoing by fiduciaries under the statute, the plan at issue in this case is designed specifically to help highly-compensated employees and is therefore expressly *exempt* from the typical duties arising in ERISA cases. Even if there were a conflict, there is no reason for the Court to weigh in on the questions presented in this unusual, fact-bound posture.

The petition should be denied.

STATEMENT OF THE CASE

A. Legal Background

1. ERISA regulates the retirement and deferred compensation plans that employers set up for their employees. *See* 29 U.S.C. § 1002(3). It establishes "'comprehensive and reticulated'" standards governing such plans, "the product of a decade of congressional study of the Nation's private employee benefit system." *Mertens*, 508 U.S. at 251 (citation omitted). That includes "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." 29 U.S.C. § 1001(b).

To ensure that regulation is uniform, ERISA creates a single remedial scheme and expressly preempts state laws that "relate to" covered employee benefit plans. *Id.* § 1144(a); *see id.* § 1132(a). That way, plan administrators are not subject to "the potentially conflicting standards of conduct of all 50

States." Pet. App. 23a (citing *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 323 (2016)).

Typically, ERISA imposes "fiduciary responsibilit[ies]" on plan administrators to exercise prudence and loyalty concerning retirement plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983); *see* 29 U.S.C. § 1104 (setting forth "[f]iduciary duties" under ERISA). Likewise, ERISA requires most plans to be both vested and funded, 29 U.S.C. §§ 1053, 1082, giving participants a secured interest in plan benefits. *See Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 287 (2d Cir. 2000).

ERISA also establishes a variety of "'carefully crafted'" causes of action that "distinguish between the plaintiffs who may sue, the conduct that they may challenge, and the remedies that they may seek." Pet. App. 27a (quoting *Mertens*, 508 U.S. at 254). Section 502(a)(3) provides that "[a] civil action may be brought . . . 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." 29 U.S.C. § 1132(a)(3). The "other equitable relief" is tailored: it may be used either "(i) to redress such violations" of ERISA or the plan, "or (ii) to enforce any provisions of this subchapter or the terms of the plan." *Id.*

2. ERISA does not treat all plans the same. Relevant here, ERISA provides for the creation of a special "top hat" plan—"a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees." *Id.* § 1101(a)(1); *see also Goldstein v. Johnson & Johnson*, 251 F.3d 433, 435 (3d Cir. 2001).

Top-hat plans "largely exist as devices to defer taxes," which is a significant advantage for the high-level executives who usually participate in them. *Kemmerer v. ICI Ams. Inc.*, 70 F.3d 281, 286 (3d Cir. 1995), *cert. denied*, 517 U.S. 1209 (1996); *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 217 (2d Cir. 2006); Pet. App. 7a. By allowing highly paid employees to delay payment until after retirement—when their income will presumably be lower and qualify for a lower tax bracket—top-hat plans allow such employees to ultimately pay lower tax rates on that deferred compensation. Pet. App. 8a.

Congress chose to treat top-hat plans differently from other ERISA plans in two crucial respects. First, unlike typical ERISA plans, top-hat plans must be "unfunded." *Id.* (citations omitted). This means that employers may not "set[] aside money for participants (whether in 'escrow, trust fund, or otherwise')." *Id.* (quoting *Accardi v. IT Litig. Tr. (In re IT Grp., Inc.)*, 448 F.3d 661, 665 (3d Cir. 2006)). Instead, benefits must be drawn from the employer's assets rather than vested funds, meaning that the benefits are subject to claims of the employer's creditors in the event of bankruptcy. *See In re IT Grp.*, 448 F.3d at 665. As a result, the tax benefits of top-hat plans also carry with them "greater risks" of the senior-executive participants losing compensation if the company they run becomes insolvent. Pet. App. 8a. In other words, "[i]n return for th[e] tax benefit" top-hat plans confer on highly paid employees, the "beneficiaries of such plans remain vulnerable to the risk of losing their benefits in the event of their employer's bankruptcy." *Id.* at 42a (citation omitted).

Second, and particularly important here, Congress chose to exempt top-hat plans from ERISA's

imposition of fiduciary duties. *See* 29 U.S.C. § 1101(a)(1); *see also Demery*, 216 F.3d at 290 ("[T]he fiduciary responsibility provisions of ERISA do not apply to top hat plans . . . ."); *Senior Exec. Benefit Plan Participants v. New Valley Corp. (In re New Valley Corp.)*, 89 F.3d 143, 148 (3d Cir. 1996) ("The dominant characteristic of the special top hat regime is the near-complete exemption of top hat plans from ERISA's substantive requirements."), *cert. denied*, 519 U.S. 1110 (1997). This exemption recognizes that the senior executives participating in top-hat plans "have the bargaining power to 'substantially influence' the 'design' of their retirement plans" and "can insulate themselves from poor management by adding contractual protections in the plan itself." Pet. App. 7a-8a (quoting *Bakri v. Venture Mfg. Co.*, 473 F.3d 677, 678 (6th Cir. 2007)). As the Department of Labor has recognized, top-hat plans are designed to cover employees who, "by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan." *Duggan v. Hobbs*, 99 F.3d 307, 312-13 (9th Cir. 1996) (quoting U.S. Dep't of Lab., Opinion Letter 90-14A on Title I of the Employee Retirement Income Security Act (May 8, 1990), 1990 WL 123933, at *1).

Because of the fiduciary-duties exemption, "it is well-established in the caselaw that there is no cause of action for breach of fiduciary duty involving a top hat plan." *Goldstein*, 251 F.3d at 443; *see also In re New Valley Corp.*, 89 F.3d at 153 ("Top hat employees have rights only under the contract."); *Duggan*, 99 F.3d at 310 (Under "a top-hat plan, [a plan administrator] is exempt from the fiduciary duties

ERISA imposes . . . [and] cannot be held personally liable for their breach."); Pet. App. 32a, 46a-47a. Petitioners do not argue otherwise.

B. Factual Background

Petitioners were a select group of management or highly compensated long-term employees at Ruby Tuesday, Inc., a restaurant chain. They participated in Ruby Tuesday's top-hat retirement and pension plans, both of which deferred compensation until after retirement so that the participants could pay lower taxes on their income. Pet. App. 9a, 51a. To satisfy its obligations under those top-hat plans, Ruby Tuesday's predecessor entered into a special agreement, called a "rabbi trust," with the predecessor to Regions Bank. *Id.* at 9a.

A "rabbi trust"—which derives its name from the first such arrangement sought by a Jewish synagogue and approved by the IRS for its rabbi—is an arrangement that segregates top-hat funds while still preserving the plan's unfunded status. *See* I.R.S. Priv. Ltr. Rul. 8113107 (Dec. 31, 1980), 1980 WL 137740. Specifically, top-hat funds are placed in an account that can be used only to pay out participant benefits and not to make general corporate expenditures. Pet. App. 9a. The funds are thus "out of reach of the employer but are subject to the claims of the employer's creditors in the event of bankruptcy or insolvency," meaning that the plan still qualifies as unfunded. *Id.* at 42a n.1 (citation omitted). And because the funds "technically remain[] property of the employer," the plan participants are not taxed "until the assets are actually distributed" to them. *Id.* (citations omitted).

Ruby Tuesday turned to Regions to implement its rabbi trust. Among other things, their agreement established a fund to be held by Regions and instructed Regions to undertake certain duties; "[f]or the most part, . . . paying benefits as they came due." *Id. at* 10a. Regardless, the agreement made clear that the fund would be treated "as general assets" of Ruby Tuesday and "subject to the claims of [its] general creditors." *Id.* (citation omitted). Accordingly, the participants "would not 'have a preferred claim on or any beneficial ownership' interest in the fund's assets until the participants had the actual right to receive payments under the plan terms." *Id.* (citation omitted). Thus, Ruby Tuesday's plans remained unfunded, preserving their top-hat status.

Petitioners allege that Regions breached its rabbi trust agreement in several ways. To begin, they argue that after NRD Capital purchased Ruby Tuesday in 2017, Regions should have compelled Ruby Tuesday to provide it funds equal to "the present actuarial value of all unpaid benefits." *Id.* Petitioners further assert that, after Ruby Tuesday allegedly terminated the plans in 2019, Regions should have informed them of a right to take lump-sum payouts. *Id.* Finally, petitioners claim that Regions wrongly ceased providing benefits in 2020 after Ruby Tuesday orally instructed it to do so, rather than waiting for instructions in writing. *Id.* at 10a-11a.

Ruby Tuesday filed for Chapter 11 bankruptcy in late 2020. When Ruby Tuesday asked the bankruptcy court for authorization to take possession of the funds held by Regions, petitioners initially objected, arguing among other things that they were entitled to recover the fund assets "under ERISA," and citing Section 502(a)(1)(B), a different ERISA remedy provision that

empowers a participant to "'recover benefits due to him,'" "'enforce his rights,'" or "'clarify his rights to future benefits'" pursuant to "'the terms of the plan.'" *Id.* at 22a, 44a-45a (citation omitted). Ultimately, however, petitioners settled with Ruby Tuesday's bankruptcy estate, receiving their fees and a share of their trust assets, but waiving their right to appeal the bankruptcy court's orders incorporating the funds held by Regions into the bankruptcy estate. *Id.* at 11a.

C. Procedural Background

Four months after settling with Ruby Tuesday's bankruptcy estate, petitioners filed this suit against Regions in the Eastern District of Tennessee. *See id.* at 41a. They asserted an ERISA claim for "equitable relief" under 29 U.S.C. § 1132(a)(3). In particular, they claimed a right to "'equitable surcharge' of the benefits that Regions would have paid if it had not breached the [rabbi] trust agreement." Pet. App. 11a. In other words, petitioners sought monetary compensation from Regions in "the amounts that should have been paid to [them] as benefits." *Id.* at 33a (citation modified). Petitioners also brought state-law claims for breach of fiduciary duty, breach of trust, breach of contract, and negligence. *Id.* at 11a-12a.

The district court rejected petitioners' suit in full. It first determined that ERISA preempted all of petitioners' state-law claims. *See id.* at 59a-67a. Then, it explained why the ERISA claim failed for several independent reasons. *See id.* at 46a-49a. "As an initial matter, because [Ruby Tuesday's plans] are top-hat plans, they are exempt from ERISA's substantive fiduciary requirements." *Id.* at 46a-47a.

So, Regions never owed petitioners fiduciary duties to begin with. Petitioners tried to source the fiduciary duty to "Alabama state trust law" instead, *id.* at 47a (citation omitted), but the court declined, citing the "well-established" principle that "'[w]hen Congress exempts a plan from ERISA's fiduciary-duty requirements, as it did with top-hat plans, plaintiffs may not use state law to put back in what Congress has taken out,'" *id.* (alteration in original) (quoting *Loffredo v. Daimler AG*, 500 F. App'x 491, 496 (6th Cir. 2012) (Sutton, J.)). The court also rejected the argument that "federal common law rules of contract apply to the Plans at issue." *Id.* "[E]ven if" petitioners could show that "Regions violated the terms of the Trust or the Plans," ERISA's "'equitable'" relief does not allow a claim for surcharge, which is just monetary relief by another label. *Id.* at 47a-48a (citation omitted).

The Sixth Circuit affirmed in an opinion by Judge Murphy. At the outset, the court noted that petitioners failed to explain why Regions could be liable at all under ERISA. Section 502(a)(3) allows a participant to pursue equitable relief only to "redress" an ERISA violation or to "enforce" the law or the Plan terms. 29 U.S.C. § 1132(a). But ERISA exempts top-hat plans from ERISA's fiduciary duties, *see id.* § 1101(a)(1), and petitioners failed to identify any plan terms that Regions violated—instead, their allegations concerned only breaches of the rabbi trust agreement, *see* Pet. App. 32a. As a result, the court observed that it was "far from clear" that petitioners' allegations were sufficient to state a claim that Regions had violated ERISA at all. *Id.* (quoting *Mertens*, 508 U.S. at 253).

But even assuming that petitioners' allegations would have sufficed to state a claim, the panel agreed with the district court that surcharge is not an "equitable" remedy for purposes of Section 502(a)(3). That equitable relief provision in ERISA is instead limited to remedies that—as this Court has explained—were "*typically* available in equity." Pet. App. 33a (quoting *Mertens*, 508 U.S. at 256). As the court explained, this Court's precedents teach that "'*typically* available'" refers to whether the remedy was offered by premerger courts of equity in cases where they shared "concurrent" jurisdiction with courts of law. *Id.* at 29a-30a (citation omitted); *Montanile*, 577 U.S. at 142, 147-48; *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 94-95 (2013); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 361 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 219 (2002); *see Mertens*, 508 U.S. at 255-56. Any broader reading, the court explained, would "effectively read out the word 'equitable' from the statute because equity courts in trust cases could grant any conceivable remedy." Pet. App. 30a.

The court determined that the surcharge sought by petitioners was not "'*typically* available in equity'" because surcharge was not offered "outside trust cases." *Id.* at 36a. Rather, in this context, "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." *Id.* at 35a (citation omitted). And as "the classic form of *legal* relief," monetary compensation, cannot qualify as "*appropriate equitable relief*" under Section 502(a)(3). *Id.* at 28a (first emphasis added) (first quoting *Mertens*, 508 U.S. at 255; then quoting

29 U.S.C. § 1132(a)(3)); *see id.* at 31a, 34a-35a. Petitioners' ERISA claim for surcharge thus could not succeed.

Separately, the panel concluded that ERISA expressly preempted petitioners' state-law claims, including for breach of fiduciary duty. That is because "ERISA . . . establishes uniform standards to govern the conduct of those who manage covered plans." *Id.* at 24a. Those standards "supersede any and all State laws" that "relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). And "Congress contemplated that ERISA's fiduciary duties would be replaced by the contractual duties set forth in" top-hat plans, and "not by the fiduciary-duty rules from all 50 States." Pet. App. 24a. "[C]ourts would eviscerate this legislative decision to allow for 'less-intrusive regulation of top-hat plans' if they substituted 'a *more*-intrusive system' of state regulation." *Id.* at 23a (quoting *Loffredo*, 500 F. App'x at 495). As a result, petitioners could not "avoid ERISA's 'exclusive' provisions for seeking plan benefits by pursuing those benefits through a state-law contract claim as third-party beneficiaries of a rabbi trust agreements." *Id.* at 27a (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)).

REASONS FOR DENYING THE WRIT

Neither question presented warrants this Court's review. On the first question, the asserted conflict is illusory and not implicated on the facts of this case. The only circuit case going the other way in the wake of this Court's decision in *Montanile*—the Fifth Circuit's decision in *Aramark*—recognizes that Section 502(a)(3) claims are unavailable against ERISA *non*-fiduciaries, like Regions here. As a result,

petitioners cannot point to a single circuit court that would resolve the question presented in their favor. On the second question presented, the Sixth Circuit simply applied this Court's well-settled precedent to the facts of this case. Petitioners do not even try to allege a circuit conflict. Nor do they provide any credible argument that the decision below was wrong.

Even if the questions were otherwise cert-worthy, this case is the wrong vehicle to address them. The unusual, "top-hat" nature of the benefits plans at issue distinguishes this case from mine-run ERISA cases and limits the need for this Court's intervention. And, as the Sixth Circuit noted, the remedies petitioners seek here may not ever be needed in this case because it is "far from clear" that petitioners even alleged that Regions violated ERISA in the first place. Pet. App. 32a (citation omitted). Should the Court wish to address either question presented, it should wait for a case where it can do so cleanly.

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW

A. The Alleged Circuit Conflict Is Illusory

Petitioners claim the existence of a split among the courts of appeals, pointing to "six courts of appeals" that "authorize equitable surcharge," Pet. 14, and "[t]wo courts of appeals"—the panel decision below included—"hold[ing] that plaintiffs cannot seek equitable surcharge" under Section 502(a)(3), *id.* at. 19. But that split is illusory. Each of the decisions petitioners cite as permitting surcharge claims under Section 502(a)(3) fails to account for this Court's most recent guidance on the question in *Montanile*. That is why this Court already appropriately denied certiorari in a case presenting the same question that

is presented here. *See Rose v. PSA Airlines, Inc.*, 144 S. Ct. 1346 (2024) (denying certiorari). The Court should similarly deny the petition here.

1. The flaw in petitioners' attempt to establish a split starts with this Court's original guidance on what kinds of relief fall within Section 502(a)(3). In *Mertens v. Hewitt Associates*, this Court addressed "whether a nonfiduciary who knowingly participates in the breach of a fiduciary duty" under ERISA "is liable for losses that an employee benefit plan suffers as a result of the breach." 508 U.S. 248, 249-50 (1993). Like petitioners in this case, the petitioners in *Mertens* invoked Section 502(a)(3), arguing that their lawsuit sought "appropriate equitable relief" under ERISA. *Id.* at 255 (quotations and citation omitted).

This Court disagreed in an opinion by Justice Scalia. The Court explained that, because "*all* relief available for breach of trust could be obtained from a court of equity, limiting the sort of relief obtainable under § 502(a)(3) to 'equitable relief' in the sense of 'whatever relief a common-law court of equity could provide in such a case' would limit the relief *not at all*." *Id.* at 257. Instead, the Court read ERISA to draw a clear distinction "between 'equitable' and 'legal' relief." *Id.* at 258. As a result, ERISA's reference to "'equitable relief'" does not mean "whatever relief a court of equity is empowered to provide in the particular case at issue." *Id.* at 256. Instead, the Court held, "equitable relief" means "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.*

This Court cemented *Mertens*'s approach in two subsequent cases. In *Great-West Life & Annuity Insurance Co. v. Knudson*, the petitioners sought "in

essence, to impose personal liability on respondents for a contractual obligation to pay money." 534 U.S. 204, 210 (2002). Following *Mertens,* the Court, in another opinion by Justice Scalia, explained that such relief was "not typically available in equity" and therefore unavailable. *Id.* After all, "'[a] claim for money due and owing under a contract is "quintessentially an action at law."'" *Id.* (quotations and citation omitted). Then, in *Sereboff v. Mid Atlantic Medical Services, Inc.*, the Court, in an opinion by the Chief Justice, permitted a fiduciary to "seek to recover a particular fund" because that specific kind of relief was "'*typically* available in equity.'" 547 U.S. 356, 361-63 (2006) (citation omitted). The scope of relief available under Section 502(a)(3) was thus clearly established after *Mertens*, *Great-West*, and *Sereboff*: only those remedies "typically" available in equity can be afforded.

Following *Mertens*, every court of appeals to address the question presented here agreed that only those remedies "typically available in equity" can be afforded under Section 502(a)(3). *Crosby v. Bowater Inc. Ret. Plan for Salaried Emps. of Great N. Paper Inc.*, 382 F.3d 587, 589 (6th Cir. 2004) (citing *Great-West* and *Mertens*), *cert. denied*, 544 U.S. 976 (2005); *see also Kenseth v. Dean Health Plan, Inc.*, 610 F.3d 452, 482-83 (7th Cir. 2010); *Pichoff v. QHG of Springdale, Inc.*, 556 F.3d 728, 731-32 (8th Cir.), *cert. denied*, 558 U.S. 828 (2009); *Todisco v. Verizon Commc'ns, Inc.*, 497 F.3d 95, 99-101 (1st Cir. 2007); *Amschwand v. Spherion Corp.*, 505 F.3d 342, 347 (5th Cir. 2007), *cert. denied*, 554 U.S. 932 (2008); *LaRue v. Dwolff, Boberg & Assocs., Inc.*, 450 F.3d 570, 576-77 (4th Cir. 2006), *vacated on other grounds by* 552 U.S. 248 (2008); *Pereira v. Farace*, 413 F.3d 330, 340 (2d

Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006); *Callery v. United States Life Ins. Co. in the City of N.Y.*, 392 F.3d 401, 408-09 (10th Cir. 2004), *cert. denied*, 546 U.S. 812 (2005); *McLeod v. Oregon Lithoprint Inc.*, 102 F.3d 376, 378 (9th Cir. 1996), *cert. denied*, 520 U.S. 1230 (1997). As the Sixth Circuit explained in *Crosby*, "[a]n action in which the plaintiff complains that the defendant owes him money . . . is, of course, the *locus classicus* of an action at law; if we were to say that such an action qualifies as a suit in equity, we should be giving the words used by Congress in § 502(a)(3) a meaning that *Great-West* and *Mertens* teach they will not bear." *Crosby*, 382 F.3d at 589.

2. Against this settled understanding, this Court decided *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). In *CIGNA*, this Court, in an opinion by Justice Breyer, held that a different section of ERISA—Section 502(a)(1)(B)—did not authorize reformation of a plan governed by ERISA. *Id.* at 437-38. But the Court went on to question whether Section 502(a)(3) might nevertheless provide similar relief. *See id.* at 438-42. And in answering *that* question—which was not necessary to decide the case—this Court opined about the surcharge remedy petitioners seek here. *See id.* at 442. "The surcharge remedy extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary." *Id.* And, *CIGNA* opined, such a remedy could "fall within the scope of the term 'appropriate equitable relief' in § 502(a)(3)." *Id.*

Justice Scalia wrote separately in *CIGNA* to "agree . . . that § 502(a)(1)(B) . . . does not authorize relief for misrepresentations in a summary plan description," but concurred only in the judgment because he saw "no need and no justification for

saying anything more than that." *Id.* at 445 (Scalia, J., concurring in the judgment). There had been "no discussion whatsoever of . . . surcharge in the briefs of the parties or even *amici*," *id.* at 447, and the majority opinion's discussion of the issue amounted to "speculation upon speculation," *id.* at 448. *CIGNA*'s discussion of surcharge, as Justice Scalia saw it, was "utterly irrelevant." *Id.* And because the "discussion of the relief available under § 502(a)(3) and *Mertens* [was] purely dicta, binding upon neither us nor the District Court," the "District Court need not read any of it—and, indeed, if it takes our suggestions to heart, we may very well reverse." *Id.* at 449.

CIGNA produced some confusion among the circuit courts as to the availability of surcharge under Section 502(a)(3). For instance, in *Kenseth v. Dean Health Plan, Inc.*, the Seventh Circuit held that "under *CIGNA*," a plaintiff could "seek make-whole money damages as an equitable remedy under section [502](a)(3) if she can in fact demonstrate that [the defendant] breached its fiduciary duty to her and that the breach caused her damages." 722 F.3d 869, 882 (7th Cir. 2013). Other courts likewise read *CIGNA* to allow plaintiffs to seek surcharge as an equitable remedy under Section 502(a)(3) for breaches of fiduciary duty. *See Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 451 (5th Cir. 2013); *Silva v. Metropolitan Life Ins. Co.*, 762 F.3d 711, 720 (8th Cir. 2014); *Moyle v. Liberty Mut. Ret. Benefit Plan*, 823 F.3d 948, 960 (9th Cir. 2016); *Sullivan-Mestecky v. Verizon Commc'ns Inc.*, 961 F.3d 91, 102-03 (2d Cir. 2020); *Gimeno v. NCHMD, Inc.*, 38 F.4th 910, 914-15 (11th Cir. 2022).

3. But this Court clarified the issue in *Montanile v. Board of Trustees of the National Elevator Industry*

Health Benefit Plan, 577 U.S. 136 (2016). There, in an opinion by Justice Thomas, the Court addressed "what happens when a participant obtains a settlement fund from a third party," and, "in particular whether a plan fiduciary can sue under § 502(a)(3) to recover from the participant's remaining assets the medical expenses it paid on the participant's behalf." *Id.* at 139. In at least some circumstances, this Court concluded, "the fiduciary cannot bring a suit to attach the participant's general assets under § 502(a)(3) because the suit is not one for 'appropriate equitable relief.'" *Id.* Along the way, the Court explained that "the Court's discussion of § 502(a)(3) in *CIGNA* was not essential to resolving that case." *Id.* at 148 n.3. Instead, the Court's "interpretation of 'equitable relief' in *Mertens*, *Great-West*, and *Sereboff* . . . remains unchanged." *Id.*

After *Montanile* reaffirmed that the scope of equitable relief under Section 502(a)(3) is defined by the Court's decisions in *Mertens*, *Great-West*, and *Sereboff*—and not by dicta in *CIGNA*—the circuit courts have corrected course. The Fourth Circuit analyzed the question presented here at depth and concluded (like the panel decision below) that under the governing test from *Mertens*—the test that remains "unchanged" in this Circuit's caselaw—surcharge does *not* qualify as available equitable relief under ERISA. *See Rose v. PSA Airlines, Inc.*, 80 F.4th 488, 503 (4th Cir. 2023) (emphasis and citation omitted), *cert. denied*, 144 S. Ct. 1346 (2024). As *Rose* explained, this Court "has since rejected the turn that it contemplated in [*CIGNA*]." *Id.* "*Montanile*'s approach—which is really *Mertens*'s and *Great-West*'s approach—is inconsistent with" the "approach" this Court suggested in dicta in *CIGNA*, and surcharge is

therefore *not* available under Section 502(a)(3)'s provision of other equitable relief. *Id.* at 503-04. The panel decision below adopted the majority approach in *Rose*, *see* Pet. App. 28a-31a, 33a-35a, 37a, to conclude the same thing.[1]

Just as petitioners do here, the petitioners in *Rose* sought certiorari, arguing that *CIGNA*'s since-discarded approach should still control. But this Court rejected that petition, *see Rose*, 144 S. Ct. at 1346, and there is no reason for the Court to take a different approach here. As in *Rose*, the panel faithfully analyzed this Court's caselaw, including the rule articulated in *Mertens*, seemingly shifted in *CIGNA*, and then reaffirmed in *Montanile*.

4. The cases upon which petitioners rely to allege the existence of a split either predate *Montanile* or do not wrestle this Court's holding in *Montanile* that the *Mertens* approach remains "unchanged." As a result, petitioners do not identify a genuine split on the first question presented: whether surcharge claims are cognizable under Section 502(a)(3).

Three cases in petitioners' alleged split predate *Montanile*. *See Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869 (7th Cir. 2013); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448 (5th Cir. 2013); *Silva v. Metropolitan Life Ins. Co.*, 762 F.3d 711 (8th Cir. 2014). Each of those cases relied on *CIGNA* to

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[1] Judge Heytens wrote separately in *Rose*, reasoning that this Court's decisions could be reconciled by allowing surcharge claims against *ERISA fiduciaries*. *See* 80 F.4th at 507 (Heytens, J., concurring in part and dissenting in part). But no judge on the panel in *Rose* believed that a surcharge claim could be brought against a *non*-fiduciary under ERISA—the situation here. *See infra* Part I.B.

conclude that surcharge claims qualify as "equitable relief" under Section 502(a)(3). *Kenseth*, 722 F.3d at 879-80 (analyzing surcharge in light of *CIGNA*); *Gearlds*, 709 F.3d at 452 ("Gearlds's complaint is viable in light of [*CIGNA*]."); *Silva*, 762 F.3d at 720 (explaining "how [*CIGNA*] has changed the availability of relief" under Section 502(a)(3)). And because each case predated this Court's subsequent holding in *Montanile* that *CIGNA*'s discussion of Section 502(a)(3) was pure dicta, none of these cases is evidence of an bona fide divide in authorities among the circuit courts.

The three other cases petitioners rely upon post-date *Montanile*, but each fails to grapple with this Court's instruction in *Montanile* that the approach Justice Scalia articulated in *Mertens* remains "unchanged." *See Gimeno v. NCHMD, Inc.*, 38 F.4th 910, 914-15 (11th Cir. 2022); *Sullivan-Mestecky v. Verizon Commnc'ns Inc.*, 961 F.3d 91, 102-03 (2d Cir. 2020); *Moyle v. Liberty Mut. Ret. Benefit Plan*, 823 F.3d 948, 960 (9th Cir. 2016).

In *Gimeno*, for instance, the Eleventh Circuit asserted that "the Supreme Court has recognized that Section [502](a)(3) allows an ERISA beneficiary to sue an ERISA fiduciary for this kind of relief." 38 F.4th at 914. And, *Gimeno* pointed out, "[s]ince [*CIGNA*], every circuit court to address the issue has recognized that Section [502](a)(3) creates a cause of action for monetary relief for breaches of fiduciary duty." *Id.* at 914-15. But the *Gimeno* court evinced no awareness that this Court had since repudiated *CIGNA*'s dicta in *Montanile*, and the Eleventh Circuit did not even cite *Montanile* in reaching its incorrect decision regarding the scope of relief available under Section 502(a)(3). So too in the Second Circuit's opinion in

Sullivan-Mestecky, which analyzed the availability of surcharge in a single paragraph, relied entirely on *CIGNA*'s dicta, and failed to cite *Montanile*. *See Sullivan-Mestecky*, 961 F.3d at 102-03. And the same goes for the Ninth Circuit in *Moyle*, which analyzed *CIGNA* at depth while failing to cite or recognize *Montanile*. *See Moyle*, 823 F.3d at 960-62.

The bottom line is that the cases upon which petitioners rely to allege the existence of a split either neglect to analyze the question in light of this Court's most recent—and definitive—guidance on the question presented, or they predate this Court's most recent guidance altogether. Either way, petitioners fail to cite a single case from a circuit court analyzing the question here in light of this Court's holding in *Montanile* that *CIGNA*'s discussion of surcharge under Section 502(a)(3) was pure dicta. Just as the Fourth and Sixth Circuits have done, these courts can consider the question in light of *Montanile* and correctly conclude that Section 502(a)(3) does not authorize surcharge as an equitable remedy.

B. The Fifth Circuit's Recent Decision Does Not Change Things

Although the petition raises no bona fide split, the Fifth Circuit recently disagreed with the approach adopted by the Fourth and Sixth Circuits in a divided decision issued after the petition in this case was docketed. *See Aramark Servs., Inc. Grp. Health Plan v. Aetna Life Ins. Co.*, 162 F.4th 532 (5th Cir. 2025).

In *Aramark*, the Fifth Circuit considered the import of *Montanile* on surcharge claims under Section 502(a)(3) brought against "ERISA fiduciaries." *Id.* at 541. The Fifth Circuit recognized that "*Montanile* . . . explained that [*CIGNA*] did not

overrule *Mertens* and *Great-West*, and the Court reiterated that its 'interpretation of "equitable relief" in *Mertens*, *Great-West*, and *Sereboff* remains unchanged.'" *Id.* at 543 (citation omitted). But the Fifth Circuit reasoned that *Montanile* "came as no surprise" because *CIGNA* addressed "*fiduciary* defendants," whereas "*Mertens* and *Great-West* . . . addressed a distinct issue (the remedy against *non-fiduciary* defendants)." *Id.* "*Montanile*," the Fifth Circuit reasoned, "said nothing about ERISA fiduciaries." *Id.* at 544.

As the Fifth Circuit saw it, the fiduciary versus non-fiduciary line is the critical distinction. Aetna—the ERISA defendant in that case—did "not contest that it is an ERISA fiduciary." *Id.* So the court concluded that Aramark's claims "lie[d] in equity" because it was "seeking 'make-whole relief' for a 'violation of a duty imposed on that fiduciary.'" *Id.* (quoting *CIGNA*, 563 U.S. at 442). As the Fifth Circuit read the Court's decisions, *Mertens*, *Great-West*, and *Sereboff* mean that "ERISA plaintiffs cannot recover money from *non-fiduciaries*," while they can against ERISA *fiduciaries*. *Id.* at 542.[2]

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[2] Judge Jones concurred in part and dissented in part. Reviewing this Court's decisions, she explained that Section 502(a)(3) permits only relief that was "*typically* available in equity" and that *CIGNA*'s dicta about surcharge was "short-lived." 162 F.4th at 548. As she observed, "rarely has the Supreme Court so thoroughly distanced itself from 'dicta' in a previous case" as *Montanile* did with *CIGNA*. *Id.* Judge Jones further explained that *Montanile*'s course correction applied to cases involving ERISA fiduciaries and non-fiduciaries alike: "*Montanile* does not distinguish [CIGNA] factually based on the identity of the [*CIGNA*] defendant as a fiduciary." *Id.* Thus, she

Under *Aramark*'s own reasoning, the Fifth Circuit and the panel decision below are in agreement when it comes to entities, like Regions, that are *non*-fiduciaries under ERISA. All agree that ERISA exempts top-hat plan administrators from ERISA's fiduciary duty rules. Pet. 11 (acknowledging that top-hat plan administrators need not comply with fiduciary duty rules under ERISA); Pet. App. 23a (recognizing that "ERISA exempts administrators of top-hat plans from its federal fiduciary duties"). As a result, Regions is—by definition—a *non*-fiduciary to which even the Fifth Circuit's rule in *Aramark* does not apply. *See* 162 F.4th at 542.

The panel below (like Judge Jones in *Aramark, see* note 2, *supra*) rejected the argument that Section 502(a)(3) distinguishes between ERISA fiduciaries and non-fiduciaries. Pet. App. 35a-36a. As Judge Murphy explained, "[the] distinction" between fiduciaries and non-fiduciaries "did not matter under the common law of trusts." *Id.* at 35a. But the analytical difference is purely academic. To the extent there is a divergence between the Fifth Circuit's approach and the panel's reasoning below, this case does not implicate the difference. Under *Aramark*, the Fifth Circuit would decide this case the

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continued, "the dicta in [*CIGNA*] rests on a fig leaf, a nonstatutory distinction based on the identity of the defendant, and is inconsistent with the analysis of 'typical equity relief' otherwise adopted by the Supreme Court." *Id.* at 549. As a result, Judge Jones would have held that monetary compensation is unavailable under Section 502(a)(3), regardless whether the defendant is an ERISA fiduciary. *Id.* But including Judge Jones's view, the panel in *Aramark* was unanimous that Section 502(a)(3) does not create a surcharge remedy for claims against *non-fiduciaries* under ERISA.

same way the panel below did: petitioners cannot pursue a surcharge claim against Regions, a non-fiduciary, under Section 502(a)(3).

Petitioners argue that ERISA provides that "a top-hat administrator can still be a fiduciary," even if the administrator is expressly exempt from the fiduciary obligations imposed by ERISA. Pet. 27. Yet some circuit courts have already rejected that very argument. *See Goldstein v. Johnson & Johnson*, 251 F.3d 433, 443 (3d Cir. 2001) ("[W]e rejected [the] contention that . . . administrators of top-hat plans are also fiduciaries."); *see also Holloman v. Mail-Well Corp.*, 443 F.3d 832, 842 (11th Cir. 2006) (relying on *Goldstein* to reject claims against a top-hat administrator). As *Goldstein* explained, "a top hat administrator has no fiduciary responsibilities," and "[t]op hats are more analogous" to a situation in which "a plan administrator has no discretion to interpret the plan's terms (and thus is not a fiduciary), in which case the plan is reviewed de novo, according to the federal common law of contract." 251 F.3d at 443. That is why the Third Circuit expressly "reject[ed]" the "contention that, because ERISA's definitional section lists a 'fiduciary' as one who exercises discretion in interpreting the terms of a plan, administrators of top hat plans are also fiduciaries." *Id.* at 443 (citation omitted).

Nor can Plaintiffs show a split with the Fifth Circuit based on the notion that Regions, "regardless of whether it had any fiduciary duties under ERISA[,] is a trustee for a trust for which Petitioners were beneficiaries." Pet. 27. *Aramark* repeatedly drew the line at *fiduciary* status. Nowhere did the Fifth Circuit suggest that Section 502(a)(3) provides for the surcharge remedy with respect to non-fiduciary

trustees. *See* 162 F.4th at 542-43. As this Court explained in *Mertens*, "ERISA . . . defines 'fiduciary' not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan." 508 U.S. at 262; *see* 29 U.S.C. § 1002(21)(A) (defining "fiduciary"). There is no reason to think the Fifth Circuit would disregard the statute's explicit exemption of top-hat plan administrators from ERISA's fiduciary duties and allow a surcharge claim against a non-fiduciary trustee. Either way, the existence of this threshold issue is an independent reason to deny review. *See* Part III, *infra*.[3]

In short, there is no conflict warranting this Court's review.

C. The Decision Below Is Correct

The decision below is also correct. As this Court held in *Mertens*, the critical question is whether surcharge was a remedy that was "*typically* available in equity." 508 U.S. at 256. As Justice Scalia explained, Section 502(a)(3) does not allow plaintiffs to seek only "compensatory *damages*—monetary relief for all losses their plan sustained as a result of [an] alleged breach of fiduciary duties." *Id.* at 255. Section 502(a)(3)'s provision of "equitable relief" refers to remedies like injunctions and restitution,

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[3] The defendant in *Aramark* has filed a petition for rehearing. The Fifth Circuit has requested a response and the petition is pending as of the date of this submission. The existence of that pending petition further obviates the need for review in this case. If the Fifth Circuit grants rehearing, it may eliminate any possible argument as to a conflict. If the Fifth Circuit denies rehearing or agrees with the panel decision on rehearing, that case would likely provide a more appropriate opportunity for this Court to consider the question presented.

but "not compensatory damages," classic relief at law. *Id.* at 256. Moreover, Justice Scalia himself recognized the harmful dicta in *CIGNA*, *see* 563 U.S. at 449 (Scalia, J., concurring in the judgment), and in *Montanile*, this Court eliminated any confusion created by *CIGNA* by clarifying that it did not intend to depart from the path carved by Justice Scalia in *Mertens*, *see* 577 U.S. at 148 n.3.

Indeed, an unbroken line of this Court's *holdings* recognizes that Congress used the phrase "equitable relief" in Section 502(a)(3) in the narrow sense—to refer to relief that was "typically" equitable and not merely *any* kind of relief that a court sitting in equity *could* order. *See, e.g.*, *Montanile*, 577 U.S. at 142, 147-48; *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 94-95 (2013); *Sereboff*, 547 U.S. at 361; *Great-West*, 534 U.S. at 210, 219; *Mertens*, 508 U.S. at 255-59.

All of this makes sense. As the panel below correctly held, petitioners' request for "surcharge" seeks what amounts to monetary relief, and that is a quintessentially *legal* remedy, not an equitable one. *See* Pet. App. 35a (explaining that in this context, "surcharge and damages are 'essentially equivalent'" (citation omitted)). If petitioners were right, it would collapse the difference between equitable and legal relief in the ERISA context. That would render Congress's language concerning equitable remedies meaningless and radically expand the availability of traditional money damages under ERISA. *See Mertens*, 508 U.S. at 257. Indeed, the fact that petitioners invoked Section 502(a)(1)(B) in the bankruptcy proceedings to pursue functionally the same relief they seek here underscores that petitioners are confusing legal and equitable relief under ERISA.

Petitioners' argument rests on reading dicta from this Court's decision in *CIGNA* to allow surcharge claims under Section 1132(a)(3). In *CIGNA* itself, Justice Scalia—the author of *Mertens*—rejected this spin on *Mertens* in his separate opinion. Then, in *Montanile*, the Court itself explicitly disavowed *CIGNA*'s dicta. As Judge Jones observed in *Aramark*, "[r]arely has the Supreme Court so thoroughly distanced itself from 'dicta' in a previous case." 162 F.4th at 548 (Jones, J., concurring in part and dissenting in part). And petitioners point to no circuit judge who has analyzed *Montanile* and adopted petitioners' view that surcharge claims are available against even *non*-fiduciaries. Even Judge Heytens, dissenting in the Fourth Circuit's decision in *Rose*, adopted the view embraced by the Fifth Circuit in *Aramark* that the key distinction is fiduciary status. 80 F.4th at 507 (Heytens, J., concurring in part and dissenting in part) (reasoning that surcharge was not available to "just anyone" and was instead available to breaches "committed *by a fiduciary*" (citation omitted)). Put differently, petitioners would have this Court articulate a rule that no court of appeals analyzing the issue in light of *Montanile* has adopted.

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW

The second question presented—regarding ERISA's preemptive scope—is even less cert-worthy. On this question, the Sixth Circuit simply applied this Court's well-settled precedent that ERISA preempts state law claims that have a "connection with" or "reference to" an ERISA plan to the facts of this case. Pet. App. 15a (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). Petitioners do not even assert

a circuit conflict on this question. That alone is reason to deny certiorari on this question, regardless whether the Court is inclined to address the first question presented. But even beyond the (undisputed) lack of any conflict, petitioners offer no reasoning or explanation in their petition for how or why the panel's analysis was flawed.

III. THIS CASE IS A FATALLY FLAWED VEHICLE IN ANY EVENT

Even if the questions presented were cert-worthy, this case would be a horrible vehicle to resolve them.

1. For starters, the unusual, top-hat nature of Ruby Tuesday's benefits plans adds a significant "wrinkle" to the case. Pet. App. 23a. As explained above, *supra* at 4-7, it is undisputed that ERISA does not establish fiduciary duties as to top-hat plans, and that there is accordingly "no cause of action for breach of fiduciary duty involving a top hat plan." *Goldstein*, 251 F.3d at 443; *see* 29 U.S.C. § 1101(a)(1); *Demery v. Extebank Deferred Compensation Plan (B)*, 216 F.3d 283, 290 (2d Cir. 2000); *Senior Exec. Ben. Plan Participants v. New Valley Corp. (In re New Valley Corp.)*, 89 F.3d 143, 148-49 (3d Cir. 1996), *cert. denied*, 519 U.S. 1110 (1997).

If, as the Fifth Circuit held in *Aramark*, the surcharge remedy under Section 502(a)(3) is available only against ERISA fiduciaries, the dispute here is academic because Regions is a non-fiduciary administrator of a top-hat plan. *See* 162 F.4th at 542. If the Court wishes to review the issue, this Court should await a case presenting the question in the context of an ERISA *fiduciary*. If it takes up the first question presented in this context, the Court will have to confront the antecedent question whether any

remedy under Section 502(a)(3) is available against a non-fiduciary. This case may therefore produce an opinion that does not settle the question as to ERISA fiduciaries, or suggest an answer only in dicta.

At the very least, the abnormality of top-hat plans and rabbi trusts may substantially diminish the precedential and practical value of a decision from this Court. No guidance or uniformity is needed in this unusual factual context; none of the cases in the alleged circuit conflict involve top-hat plans, rabbi trusts, or anything of the sort. *See supra* at 17. That is no surprise, given the rarity with which top-hat plans—and their accompanying exemptions from ERISA's general provisions—are litigated.

What is more, because this case concerns a benefits plan that, by definition, applies only to relatively high-earning executives and management employees, it will not affect ordinary workers who are likely to be more financially dependent on ERISA benefits, or in need of guidance from this Court on such benefits. As the Sixth Circuit recognized, Congress was less concerned about top-hat plans because the "high-level executives" that participate in such plans "typically have the bargaining power to 'substantially influence' the 'design' of their retirement plans." Pet. App. 7a (citation omitted). There is no reason for this Court to reach out to decide either question presented in this context.

2. More broadly, and even if petitioners succeed on their arguments here about the availability of remedies, "it is 'far from clear'" that they have even alleged potential ERISA liability, much less that they will ultimately be able to adduce evidence to "hold Regions liable under § 1132(a)(3)." *Id.* at 32a (citing *Mertens*, 508 U.S. at 253). As the Sixth Circuit

explained, Section 502(a)(3) relief is available only to redress a violation of either ERISA itself or an ERISA benefit plan's terms. *Id.* (citing 29 U.S.C. § 1132(a)(3)). Petitioners do not—and could not—argue that Regions violated ERISA itself, since it is conceded that ERISA expressly exempts top-hat plan administrators from its fiduciary obligations. *See* 29 U.S.C. § 1101(a)(1).[4]

For purposes of liability, then, that leaves only a claim that Regions violated Ruby Tuesday's top-hat plans. "Yet [petitioners] have identified no plan terms that Regions violated." Pet. App. 32a. Instead, in an effort to "shield their state-law claims from preemption," petitioners "argue that they seek to enforce the *trust agreement*" in a manner that would compel payment of benefits they claim to be owed under the plan. *Id.* But the dubious proposition that Regions's alleged breach of the rabbi trust agreement is a "remediable wrong" under Section 1132(a)(3) has not been resolved. *Id.* (quoting *Mertens*, 508 U.S. at 254). It is entirely possible, therefore, that petitioners' claims will fail at the liability stage and never require the availability of surcharge as "appropriate equitable relief." 29 U.S.C. § 1132(a)(3).

The Court should await a case in which the remedies issue is cleanly presented and would be dispositive. This case is not close to that.

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[4] For this reason alone, the sole amicus brief in support of certiorari—which is premised on the flawed notion that Justice Scalia got it wrong in *Mertens*, Bray Br. 7—is also unavailing. Professor Bray's brief fails to account for ERISA's exemption of top-hat plans from fiduciary responsibilities.

CONCLUSION

The petition for a writ of certiorari should be denied.

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