NO. 06-_____

IN THE

Supreme Court of the United States

JAMES LARUE, PETITIONER

v.

DEWOLFF, BOBERG & ASSOCIATES, INC.; AND DEWOLFF, BOBERG & ASSOCIATES, INC., EMPLOYEES' SAVINGS PLAN

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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QUESTIONS PRESENTED

1. Section 502(a)(2) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1132(a)(2), provides that a "civil action may be brought * * * by a participant * * * for appropriate relief under section 1109 of this title." 29 U.S.C. 1109 states that "a fiduciary with respect to a plan who breaches any * * * duties imposed upon fiduciaries * * * shall be personally liable to make good to such plan any losses to the plan resulting from each such breach."

The First Question Presented is:

Does § 502(a)(2) of ERISA permit a participant to bring an action to recover losses attributable to his account in a "defined contribution plan" that were caused by fiduciary breach?[1]

2. Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), provides that a "civil action may be brought * * * by a participant * * * to obtain other appropriate equitable relief * * * to redress * * * violations" of the statute.

The Second Question Presented is:

Does § 502(a)(3) permit a participant to bring an action for monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as "surcharge")?[2]

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[1] Hereinafter, this will be referred to as the "§ 502(a)(2) Question."

[2] Hereinafter, this will be referred to as the "§ 502(a)(3) Question."

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James LaRue ("petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit" or "court of appeals") in this case.

OPINIONS BELOW

The original opinion of the Fourth Circuit (Pet. App. 1a-14a) is published at 450 F.3d 570. Petitioner requested rehearing and rehearing *en banc*, and the United States Department of Labor filed a brief *amicus curiae* in support. The order denying rehearing (Pet App. 22a-29a) is published at 458 F.3d 359. The order and opinion of the district court granting respondents' motion for judgment on the pleadings (Pet. App. 15a-21a) and the order of judgment dismissing petitioner's complaint (Pet. App. 30a-31a) are unpublished.

JURISDICTION

The Fourth Circuit denied a timely petition for rehearing and rehearing *en banc* (Pet. App. 22a-29a) on August 8, 2006. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following provisions of the Employee Retirement Income Security Act of 1974 are reproduced at Pet. App. 32a-35a: 29 U.S.C. 1002(1); 1002(2A); 1002(3); 1002(34); 1002(35); 1104(a)(1)(B); 1109; 1132(a)(2), and 1132(a)(3).

STATEMENT OF THE CASE

1. ERISA is a federal statute that regulates "employee benefit plans." 29 U.S.C. 1002(3) (noting that "employee benefit plans" include "employee pension benefit plans" and "employee welfare benefit plans").[1] The term "employee

[1] For a discussion of "employee welfare benefit plans" *see n.*8, *infra.*

pension benefit plan" encompasses two types of retirement plans: "defined benefit plans"[2] and "defined contribution plans."[3]

> A defined benefit plan promises a specified monthly benefit at retirement.
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> * * *
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> A defined contribution plan, on the other hand, does not promise a specific amount of benefits at retirement. In these plans, the employee or the employer (or both) contribute to the employee's individual account under the plan * * * These contributions generally are invested on the employee's behalf. The employee will ultimately receive the balance in their account, which is based on contributions plus or minus investment gains or losses. The value of the account will fluctuate due to the changes in the value of the investments. Examples of defined contribution plans include 401(k) plans, 403(b) plans, employee stock ownership plans, and profit-sharing plans.[4]

In the three decades since ERISA was enacted, the composition of employee pension benefit plans has overwhelmingly changed:

> While the number of defined benefit pension plans has declined, the number of 401(k) plans has grown

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[2] 29 U.S.C. 1002(35).

[3] 29 U.S.C. 1002(34). A "defined contribution plan" is also known as an "individual account plan." *Id.*

[4] United States Department of Labor Website at http://www.dol.gov/dol/topic/retirement/typesofplans.htm (last visited on November 1, 2006).

> dramatically. Section 401(k) of the Internal Revenue Code did not exist in 1974, and plans named for this tax code section did not really begin their growth until the early 1980's. In just over two decades, there are now an estimated 250,000 401(k) plans, covering 42 million workers, and holding an estimated $2 trillion in assets.[5]

According to the latest available government data, approximately $3 trillion in assets—more than half of all private pension plan funds—are currently held in defined contribution plans.[6]

2. Section 502(a) of ERISA is entitled "Civil enforcement." This section sets forth the exclusive remedies that are available to a civil litigant under the statute.[7] The importance of section 502(a) can hardly be overstated: the extraordinary breadth of subject matter covered by the ERISA statute coupled with an extremely strong ERISA

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[5] Testimony of Mr. Erik Olson, Board Member of AARP before the 107th Congress on February 27, 2002 at http://edworkforce.house.gov/hearings/107th/eer/enronfour22702/olsen.htm (last visited on November 5, 2006).

[6] Board of Governors of the Federal Reserve System, *Flow of Fund Accounts of the United States: Flows and Outstandings, Second Quarter 2006*, Statistical Release Z.1., at 113 (September 19, 2006) at http://www.federalreserve.gov/releases/Z1/Current/z1.pdf (last visited on November 3, 2006) ("Federal Reserve Statistics").

[7] *See e.g., Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 146 (1985) ("The six carefully integrated civil enforcement provisions found in section 502(a) of the statute as finally enacted provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) ("The deliberate care with which ERISA's civil enforcement remedies were drafted argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive.")

preemption doctrine have resulted in the reality that § 502(a) provides the only means for the remediation of most wrongs suffered in the employee benefits or health care context.[8] As such, it is not surprising that this Court has decided several statutory interpretation cases involving the precise scope of § 502(a).[9]

Specifically, § 502(a) "contains a six-part list of remedies, of which the final three, subsections (4)-(6), are peripheral. Subsections (1)-(3) * * * constitute the three remedy provisions upon which virtually all claims by ERISA participants and beneficiaries are brought."[10] The questions

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[8] As explained in n.1, *supra*, ERISA covers all "employee benefit plans" as well as all "employee welfare benefit plans. An "employee welfare benefit plan" is defined as one that provides employees with "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. 1002(1). As of 2002, 137 million workers, retirees, and their families were covered by such plans. *See* Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of Qualchoice's Petition for *En Banc* Rehearing in *Qualchoice, Inc. v. Rowland,* 367 F.3d 638, (CA6 2004). Almost all health insurance in the United States—except for Medicare—is provided through employer-sponsored plans and is thus subject to ERISA. *See* Loraine Schmall & Brenda Stephens, *ERISA Preemption: A Move Towards Defederalizeing Claims for Patients' Rights,* 42 Brandeis L.J. 529, 538 (2004).

[9] *See e.g.*, *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (interpreting 502(a)(2)); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (interpreting 502(a)(3)); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) (same); *Sereboff et ux. v. Mid Atlantic Medical Services, Inc*., 126 S.Ct. 1869 (2006) (same).

[10] John H. Langbein, *What ERISA Means By "Equitable": The Supreme Court's Trail Of Error In* Russell, Mertens, *and* Great-West*,* 103 COLUM. L. REV. 1317, 1334 (2002) (footnotes omitted) ("Langbein").

presented by this petition involve the interpretation of subsections (2) and (3).[11]

Section 502(a)(2) "is restricted by its terms to actions invoking fiduciary liability under ERISA § 409(a). Section 409(a) provides for recovery by the plan, not the participant or beneficiary who brings suit. (The participant or beneficiary benefits indirectly, through the enhanced value of the plan.) Section 409 authorizes recovery for 'any losses' and 'any profits,' and it further subjects the breaching fiduciary to 'such other equitable or remedial relief as the court may deem appropriate'"[12]

Section 502(a)(3) is a "'catchall' provision, in the sense that section 502(a)(3) 'act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that [section] 502 does not elsewhere adequately remedy.'"[13]

3. Petitioner is a participant in the DeWolff, Boberg & Associates, Incorporated, Employees' Savings Plan (the "DeWolff Plan"), a 401(k) plan administered by DeWolff, Boberg & Associates, Incorporated ("DeWolff"). Pet. App. 2a. Like many defined contribution plans, the DeWolff Plan "permits participants who so desire to manage their own accounts by selecting from a menu of various investment options." *Id*.

On June 2, 2004, petitioner filed a civil action against DeWolff and the DeWolff Plan (together "respondents"). Pet. App. 15a. In his lawsuit, petitioner alleged that

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[11] "Section 502(a)(1) is the workhorse of ERISA remedy law, the provision under which routine benefit denial and other ERISA claims proceed." Langbein, *supra* n.10 at 1334 (footnotes omitted). It is not involved in this case.

[12] Langbein, *supra* n.10 at 1334-35 (footnotes and citation omitted).

[13] Langbein, *supra* n.10 at 1335 (footnotes omitted) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996)).

respondents breached their duties to him under ERISA by failing to implement the investment strategy he had selected for his employee retirement account. Pet. App. 2a-3a, 15a. As compensation, petitioner requested that respondents return to his retirement account the amount by which it would have appreciated had defendants followed his instructions. Pet. App. 3a, 21a.

On February 2, 2005, respondents filed a motion for judgment on the pleadings claiming that the relief sought by petitioner for the alleged breach of fiduciary duty was not available under § 502(a) of ERISA. Pet. App. 16a. On June 23, 2005, a federal district court in South Carolina granted respondents' motion for judgment on the pleadings. Pet. App. 15a-21a. Petitioner filed a timely appeal to the Fourth Circuit. After full briefing and argument, the Fourth Circuit issued a published opinion on June 19, 2006. In this opinion, the court summarized the two questions presented as follows:

> The plaintiff in this case alleges that defendant fiduciaries breached their duty to him by failing to implement the investment strategy he had selected for his employee retirement account. Relying on two separate provisions of * * * ERISA, 29 U.S.C. 1132(a)(2) and 1132(a)(3) (2000), he seeks recovery of the amount by which his account would have appreciated had defendants followed his instructions. The district court concluded that his complaint did not request a form of relief available under ERISA, and it therefore granted defendants' motion for judgment on the pleadings.
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> We affirm. Section 1132(a)(2) provides remedies only for entire plans, not for individuals. And while 1132(a)(3) does in some cases furnish individualized remedies, the Supreme Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S.

28 (1993) and *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), compel the conclusion that it does not supply one here.[14]

Petitioner timely filed a petition for rehearing and rehearing *en banc*. The United States Department of Labor filed a brief *amicus curiae* in support. On August 8, 2006, the Fourth Circuit issued an order in which it rejected the arguments presented by the United States Department of Labor and denied the request for rehearing and rehearing *en banc*. Pet. App. 22a-29a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This petition squarely presents two related questions regarding section 502(a) of ERISA that have divided and confounded the courts of appeal. These unresolved questions are constantly recurring and their extraordinary importance has been openly acknowledged by the United States Solicitor General, the United States Department of Labor, as well as several notable commentators and jurists including members of this Court.

The sheer number of Americans and amount of money potentially affected by the resolution of the two questions presented render them as significant as the sentencing issues in *United States v. Booker*, 543 U.S. 220 (2005) and the damages issue in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). This petition presents an ideal opportunity for resolution by this Court.

Certiorari should be granted.

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[14] Pet. App. 2a.

I. The §502(a)(2) Question Warrants Further Review.

Section 502(a)(2) of ERISA provides that a "civil action may be brought * * * by a participant * * * for appropriate relief under section 1109 of this title"[15] which, in turn, provides that:

> a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach.[16]

Petitioner in this case is a participant in a 401(k) plan. He has alleged that respondents, the plan and its fiduciary, breached the "duties imposed upon fiduciaries by [section 1104 of] this subchapter" when they "failed to invest his money as directed."[17] As remediation for this breach, petitioner sought that respondents "make good to [the] plan" the losses that resulted.[18]

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[15] 29 U.S.C. 1132(a)(2).

[16] 29 U.S.C. 1109 (*i.e.*, § 409 of ERISA).

[17] Pet. App. 15a. 29 U.S.C. 1104 (*i.e.*, § 404 of ERISA) is entitled "Fiduciary duties." Section 404(a)(1)(A) imposes a duty of loyalty by requiring that "a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * for the exclusive purpose of * * * providing benefits to participants and their beneficiaries." 29 U.S.C. 1104(a)(1)(A). Section 404(a)(1)(B) imposes a duty of prudence by requiring that a fiduciary exercise "the care, skill, prudence, and diligence" of a "prudent man acting in like capacity." 29 U.S.C. 1104(a)(1)(B).

[18] As the district court noted in its opinion, "Plaintiff 'does not wish for the court to award him any money, but * * * simply wants the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty.'" Pet. App. 21a (quoting Petitioner's briefing before the district court). As the United States observed below:

In affirming the district court's granting of respondents' motion for judgment on the pleadings, the Fourth Circuit reasoned as follows:

> It is difficult to characterize the remedy plaintiff seeks as anything other than personal. He desires recovery to be paid into his plan account, an instrument that exists specifically for his benefit. The measure of that recovery is a loss suffered by him alone. And that loss itself allegedly arose as the result of defendants' failure to follow plaintiff's own particular instructions, thereby breaching a duty owed solely to him. We are therefore skeptical that plaintiff's individual remedial interest can serve as a legitimate proxy for the plan in its entirety, as 1132(a)(2) requires. To be sure, the recovery plaintiff seeks could be seen as accruing to the plan, in the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan. But such a view finds no license in the statutory text.[19]

> The ultimate allocation of the losses to LaRue's plan account does not defeat their status as "losses to the plan." All losses recovered by individual account plans are necessarily allocated between individual accounts. * * * [As] earnings and losses occur within particular investments, these amounts 'are allocated to the participants' accounts' through accounting or bookkeeping entries.

Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of Petition for Rehearing and Rehearing *En Banc* in *LaRue v. DeWolff, Boberg & Associates, Inc. et al.*, 450 F.3d 570 (July 12, 2006) (quoting David A. Littell et al., *Retirement Savings Plans: Design, Regulation and Administration of Case or Deferred Arrangements* 6 (1993)) at 5 ("U.S. Br.").

[19] Pet. App. 6a.

As explained herein, further review of the 502(a)(2) Question is warranted for three reasons. First, the ability of participants in "defined contribution plans" to bring suit under § 502(a)(2) to recover losses caused by breaching fiduciaries "is of exceptional importance."[20] Second, the Fourth Circuit's dramatic limitation, or elimination, of the ability of participants in "defined contribution plans" to recover losses under § 502(a)(2) is "unsupported under the statute."[21] Finally, the Fourth Circuit's resolution of the 502(a)(2) Question "conflicts with the decisions of every other court of appeals to have addressed the issue."[22]

A. As the United States noted below, the § 502(a)(2) Question "is of exceptional importance."

For most participants in "defined contribution plans," filing a civil action under § 502(a)(2) is the only means through which pension account losses caused by the misconduct of a fiduciary might ever be recovered. State law claims against a breaching fiduciary are preempted by ERISA, and "make-whole" (*i.e.*, compensatory) monetary relief under § 502(a)(3) is currently unavailable in most circuits. It was this very point that the United States impressed on the Fourth Circuit below when it observed that:

> At a minimum, combined with ERISA's preemptive effect and the panel's holding that no monetary relief is available under ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), the decision leaves LaRue, and individual plaintiffs like him, without any means

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[20] U.S. Br. at 4.

[21] *Id.*

[22] *Id.* at 11-12.

> whatsoever to recover losses caused even by the most egregious fiduciary breaches.[23]

Under the Fourth Circuit's interpretation of 502(a)(2), the breaching fiduciary of a "defined contribution plan" will now enjoy total immunity from personal liability for monetary losses caused by even the most egregious violation of ERISA provided that the fiduciary's misconduct has only depleted the retirement funds of a single participant in the plan.

As this case should illustrate, the risk of "single-participant" monetary losses resulting from fiduciary breach inheres in a "defined contribution plan." These plans are necessarily comprised of an individual account for each participant, and their fiduciaries must regularly discharge duties that could—if performed imprudently in violation of § 404(a)(1)(B) of ERISA—result in losses to the account of an individual participant (*e.g.,* the improper execution of investment instructions; the failure to provide material information; the negligent provision of financial advice, etc.). Any one of these acts might cause an individualized injury either because it was directed at, or relied upon by, only one plan participant.[24] Similarly, the fiduciary of a "defined

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[23] U.S. Br. at 1-2. It is worth noting that the Fourth Circuit's rule will protect breaching fiduciaries not only from injured plan participants but from the United States as well: "The Secretary of Labor brings many cases [under § 502(a)(2)] annually * * * and takes the position that if a fiduciary pockets even a single employee's contribution to the plan, the plan has received fewer assets than it is entitled to receive and has suffered a loss under ERISA's plain language. Because there is no principled way to distinguish between the wrongful failure to pay a single participant's contribution into a plan and the wrongful failure to carry out a single participant's directed investment instructions, under the panel's decision, suit a suit presumably would be precluded." U.S. Br. at 7-8.

[24] Although the 401(k) plan at issue in this case was administered by "a nationwide management consulting firm," Pet. App. 2a, there are undoubtedly countless "defined contribution plans" that have substantially fewer participants. Presumably, participants in small plans

contribution plan" could engage in deliberate conduct—in violation of § 404(a)(1)(A) of ERISA—that results in individual losses (*e.g.*, looting the account of a hapless participant; engaging in a self-dealing transaction with an individual participant, etc.).[25]

As noted earlier, *approximately $3 trillion in assets*—more than half of all private pension funds in this country—are currently held by defined contribution plans like the 401(k) plan in this case. Put simply, the importance of this issue cannot be ignored.

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are even more susceptible to suffer the type of individualized injury that is no longer remediable under the Fourth Circuit rule.

[25] Moreover, the United States correctly points out that:

> Although this case involves a single plan participant in a 401(k) plan whose claim for loss is based on the defendants failure to follow his investment directions, there is no clear and logical basis upon which to draw a line between this case and the many other cases involving the recovery of losses stemming from fiduciary breaches that primarily will benefit the accounts of only some defined contribution plan participants.

U.S. Br. at 3. Thus, under the Fourth Circuit's rule, every breaching fiduciary of a "defined contribution plan" who is sued under § 502(a)(2) is now likely to claim absolute immunity from suit under the statute except in the handful of cases in which *every* plan participant has been affected by the breach. That, in turn "is likely to force district courts and this Court to revisit the issue in numerous factual contexts as it attempts to draw the line between permissible and impermissible loss recoveries, despite ERISA's express authorization of the recovery of "any losses to the plan." U.S. Br. at 3.

B. As the United States noted below, the panel's resolution of the § 502(a)(2) Question is "unsupported under the statute."

There is no reason to believe that Congress intended the interpretation of § 502(a)(2) adopted by the Fourth Circuit. As the United States correctly argued below:

> The panel's decision is contrary to the express language of ERISA sections 409 and 502(a)(2), which authorize participants and beneficiaries alleging fiduciary breaches to bring suit to obtain "any losses to the plan resulting from each such breach." 29 U.S.C. § 1109(a). LaRue alleges that, as a direct result of a fiduciary breach, the plan has fewer assets available for the payment of his benefits. If the allegations are true, LaRue is entitled to an order restoring "any losses" to the plan.[26]

In reaching its holding regarding § 502(a)(2), the Fourth Circuit did not point to a single statutory requirements that petitioner failed to satisfy. To the contrary, the court of appeals noted that:

> To be sure, the recovery plaintiff seeks could be seen as accruing to the plan in the narrow sense that it would be paid into plaintiff's personal plan *account*, which is part of the plan.[27]

As the United States explained in their brief *amicus curiae*, there is nothing "narrow" about the view that petitioner sought the restoration of "losses *to the plan*." Petitioner's request for relief under § 502(a)(2) can *only* be viewed as

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[26] U.S. Br. at 2.

[27] Pet. App. 6a.

seeking "losses to the plan." This is true because when dealing with a "defined contribution plan,"

> any "contributions are made to a single funding vehicle," and "[a]s amounts are contributed to the trust," and earnings and losses occur within particular investments, these amounts "are allocated to the participants' accounts" through accounting or bookkeeping entries. Thus, although the plan assets are allocated to individual accounts in this manner, and the individual participant's benefit is ultimately dependent on the amounts so allocated, ownership of the accounts and of the plan's assets never passes, even in part, to participants. Rather, as a matter of statutory design, the participants have a beneficial interest in their accounts, but legal title is held in trust by one or more trustees, who have authority and discretion to manage and control the assets of the plan.[28]

In sum, when petitioner informed the district court that he "simply want[ed] the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty,"[29] that could only be accomplished by the precise procedure set forth in § 502(a)(2)—the payment by respondents (*i.e.*, the breaching fiduciaries) *to the plan*.

Unable to provide any statutory support for its interpretation of § 502(a)(2), the Fourth Circuit instead purported to base its holding on language from this Court's decision in *Massachusetts Mutual Life Insurance Co. v.*

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[28] U.S. Br. 5-6 (quoting David A. Littell et al., *Retirement Savings Plans: Design, Regulation and Administration of Case or Deferred Arrangements* 6 (1993) and citing 29 U.S.C. 1103(a); 26 U.S.C. 401(a); Rev. Rul 89-52, 1989-1 C.B. 110).

[29] Pet. App. 21a.

Russell, 473 U.S. 134 (1985).[30] The court of appeal's assertion that its § 502(a)(2) holding is compelled by this Court's decision in *Russell*, however, is completely without merit. *Russell* "present[ed] a single, narrow question: whether the §409 "appropriate relief" referred to in § 502(a)(2) includes individual recovery by a participant or beneficiary of ***extra-contractual damages*** for breach of fiduciary duty." *Russell*, 473 U.S. at 149 (Brennan, J., concurring) (emphasis added).

The plan participant in Russell did not request that the plan's fiduciaries "make good to [the] plan any losses to the plan resulting from each such breach." In fact, she did not even allege that the plan itself lost any value as the result of the fiduciaries' conduct. Instead, she claimed that she personally suffered emotional and physical harm due to an interruption of the payment of benefits and requested that the plan's fiduciaries pay *directly to her damages for mental and emotional distress as well as punitive damages. Id.* at 136-39.

Russell's teaching (*i.e.*, that recoveries under §§ 409 and 502(a)(2) must "inure[] to the benefit of the plan as a whole," *id.* at 140) can only support the interpretation of § 502(a)(2) urged by petitioner and the United States. In particular, the *Russell* Court's recognition that the focus of § 409 was to prevent the "misuse and mismanagement of plan assets," *id.* at 140 n.8 makes clear that—*in the context of a "defined contribution plan*"—actions like the one filed by Mr. LaRue are precisely what Congress contemplated in enacting § 502(a)(2).

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[30] S*ee e.g.,* Pet. App. 5a ("Recovery under [502(a)(2)] must 'inure[] to the benefit of the plan *as a whole*," not to particular persons with rights under the plan) (quoting *Russell*, 473 U.S. at 140) (emphasis added by the Fourth Circuit).

C. As the United States noted below, the panel's resolution of the § 502(a)(2) Question "creates a conflict with decisions of the Third, Fifth, Sixth, and Seventh Circuits."

As the United States correctly argued in seeking *en banc* review by the Fourth Circuit:

> The panel's decision that 401(k) plan losses that will be allocated to an individual account are not recoverable under section 502(a)(2) is also of exceptional importance because it creates a conflict with the decisions of every other court of appeals to have addressed the issue. (discussing *In re Schering-Plough Corp. ERISA Litig*., 420 F.3d 231 (CA3 2005); *Milofsky v. Am. Airlines, Inc*., 404 F.3d 338 (CA 5 2005); *Steinman v. Hicks*, 352 F.3d 1101 (CA7 2003), and *Kuper v. Iovenko*, 66 F.3d 1447 (CA6 1995).
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> * * *
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> The arguments rejected by the courts of appeals in the cases described above are no different in substance than the argument accepted by the panel here: that a participant may not sue under section 502(a)(2) to recover losses to his defined contribution plan that were caused by fiduciary breaches where the recovered losses will be allocated to his individual account.[31]

[31] U.S. Br. at 11-14.

II. The § 502(a)(3) Question Warrants Further Review.

Section 502(a)(3) of ERISA authorizes a civil action

> 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."[32]

In the seminal case of *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), this Court addressed—for the first time—the meaning and scope of the phrase "equitable relief" in § 502(a)(3). The specific question presented in *Mertens* was whether a lawsuit filed by ERISA plan beneficiaries seeking monetary relief against a third party who participated knowingly in the plan fiduciaries' breach of their fiduciary duties was one for "appropriate equitable relief" under the statute.

In concluding that the beneficiaries' claim did not constitute "equitable relief," the Court announced the (now familiar) rule that § 502(a)(3) only authorizes civil actions seeking "those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* at 256 (emphasis in original).

In the decade or so following *Mertens*, the courts of appeal squarely divided over two extremely important questions regarding what, if any, *monetary relief* could qualify as "typically available in equity" for purposes of § 502(a)(3). One of these two circuit splits was over the

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[32] 29 U.S.C. 1132(a)(3).

§ 502(a)(3) Question itself. As the United States noted in a 2004 filing with the Fifth Circuit:

> This court [the Fifth Circuit] has not considered the question whether section 502(a)(3) of ERISA authorizes participants to recover direct monetary losses caused by a fiduciary breach. Both the Second and Seventh Circuits have held that participants can obtain such relief. *See Strom v. Goldman, Sachs & Co.*, 202 F.3d 138, 133 (2d Cir. 1999); *Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574, 592 (7th Cir. 2000). The Fourth, Sixth, Eighth and Ninth Circuits have held the opposite. *Helfrich v. PNC Bank, Kentucky, Inc.*, 267 F.3d 477 (CA6 2001), *cert denied*, 535 U.S. 928 (2002); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938 (CA8 1999); *FMC Med. Plan v. Owens*, 122 F.3d 1258 (CA9 1997).[33]

The second circuit split involved a separate recurring question regarding the availability of monetary relief under § 502(a)(3): the courts of appeal divided over whether—and under what circumstances—lawsuits filed by plan fiduciaries seeking monetary reimbursement of advanced medical expenses from plan participants or beneficiaries pursuant to a contractual reimbursement provision were permissible under § 502(a)(3).[34] Recognizing the importance of that issue, this

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[33] Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellants and Requesting Reversal of the District Court's Decision in *Milofsky et al. v. American Airlines, Inc, et al.*, (No. 03-11087) (February 27, 2004) at http://www.dol.gov/sol/media/briefs/milofsky(A)-2-27-2004.htm (last visited on November 1, 2006).

[34] When a participant in or beneficiary of an ERISA welfare plan is injured (*e.g.,* in an automobile accident), she will receive money from the plan (or its insurer) to pay for her medical expenses. The injured participant or beneficiary may also bring a personal injury lawsuit for

Court granted certiorari in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) ("*Great-West*"). In *Great West*, this Court clarified the *Mertens* test and made clear that, in assessing whether a claim is remediable under § 502(a)(3), a federal court must look not only at the category of relief sought but also at the historical context in which such a remedy would have been available in a pre-merger court of equity. *Great-West*, 534 U.S. at 216. Significantly, for purposes of this petition, *Great-West* did *not* resolve the § 502(a)(3) Question.

As explained herein, further review of the § 502(a)(3) Question is warranted for two reasons. First, the ability of participants in (and beneficiaries of) ERISA plans to bring suit under § 502(a)(3) to recover monetary "make-whole" relief to compensate for losses directly caused by fiduciary breach is a "recurring issue" of "extraordinary importance." Second, the § 502(a)(3) Question was recently left open by this Court and continues to divide and confuse the courts of appeal. This Court's guidance is needed.

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money damages (including the recovery of medical expenses) against any third party who might have been responsible for her injuries. For this reason, plan fiduciaries commonly require that every plan participant contractually agree to reimburse medical expenses out of any personal injury settlement or judgment that she might recover. Whether, and under what circumstances, such reimbursement seeks relief that was "typically available in equity" and, thus, available under § 502(a)(3) was the precise question that divided the courts of appeal.

A. As the United States acknowledges, the § 502(a)(3) Question "is of extraordinary importance."

As the United States has repeatedly acknowledged, the § 502(a)(3) Question is constantly recurring and of exceptional importance. For example, in *Goeres v. Charles Schwab & Co., Inc., et al.,* the United States recently noted that:

> [the] case presents a significant and recurring remedial issue: whether section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), permits beneficiaries to recover monetary losses from fiduciaries who have breached their duties and caused harm to the beneficiaries. The Secretary has consistently taken the position, in this Court and others, that "appropriate equitable relief" in section 502(a)(3) includes recovery of monetary losses from fiduciaries because historically such relief was typically and exclusively available in equity.[35]

The recurring nature of the question cannot be overstated. The United States has chosen to address the question in *amicus curiae* briefs before this Court as well as throughout the courts of appeal.[36] The importance of the question is similarly manifest:

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[35] Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of the Appellant and Requesting Reversal in *Goeres v. Charles Schwab & Co., Inc., et al (05-15282) located at* http://www.dol.gov/sol/media/briefs/goeres(A)-07-11-2005.pdf (last visited on November 5, 2006).

[36] In the Second Circuit, *see* Brief of United States Sec'y of Labor as *Amicus Curiae* in *Coan v. Kaufman* (04-5173) (March 25, 2005) *at* http://www.dol.gov/sol/media/briefs/Coan(A)-3-25-2005.pdf (last visited November 5, 2006) ("U.S. Coan Br.") and Brief of United States Sec'y of Labor as *Amicus Curiae* Supporting Appellant's Petition for Panel and En

> the equitable nature of monetary relief to remedy fiduciary breaches – is of extraordinary importance, both in the Seventh Amendment context [] and in its impact on the ability of ERISA participants and beneficiaries who have been harmed by fiduciary breaches to bring claims for make-whole monetary relief.[37]

The interpretation of § 502(a)(3) now adopted by the majority of circuits—including the Fourth Circuit in this case—will permit "[f]iduciaries [to] violate ERISA's stringent obligations, injure beneficiaries, and evade liability for the losses they caused."[38] *See e.g., Farr v. U.S. West Communications, Inc.,* 151 F.3d 908 (CA9 1998) (acknowledging that plan fiduciaries violated their duties under ERISA by knowingly withholding information regarding material tax consequences but finding that the participants had no remedy because the amount of additional taxes incurred were legal damages).

Banc Rehearing in *Pereira v. Farace* (03-5035, 5055) at http://www.dol.gov/sol/media/briefs/pereirabrief.pdf (last visited November 5, 2006) ("U.S. Pereira Br."). In the Fourth Circuit, *see* U.S. Br., *supra n.18.* In the Fifth Circuit, *see U.S. Milofsky Br., supra n.33.* In the Ninth Circuit, *see U.S. Goeres Br., supra n.35;* In the Tenth Circuit, *see* Brief of United States Sec'y of Labor as *Amicus Curiae* in Support of the Appellant and Reversal of the District Court in *Callery v. The United States Life Insurance Company in the City of New York, J.B.'s Restaurants, Inc., J.B.'s Family Restaurants, Inc., and Star Buffet, Inc.* (03-4097) (August 20, 2003) *at http://www.dol.gov/sol/media/briefs/callery-08-20-2003.pdf* (last visited on November 5, 2006) ("U.S. Callery Br.")

[37] U.S. Pereira Br., *supra*, n.36.

[38] U.S. Callery Br., *supra* n.36.

B. As the United States acknowledges, the § 502(a)(3) Question was left open by this Court in *Aetna* and has divided the circuits.

The significance of the problem above—and the best hope for a solution—were recently articulated by members of this very Court.

> I also join "the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime." *DiFelice* v. *AETNA U.S. Healthcare*, 346 F.3d 442, 453 (CA3 2003) (Becker, J., concurring).
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> Because the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the "equitable relief" allowable under § 502(a)(3), a "regulatory vacuum" exists: "[V]irtually all state law remedies are preempted but very few federal substitutes are provided." *Id*., at 456 (internal quotation marks omitted).
>
> A series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief.
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> * * *
>
> The Government notes a potential amelioration. Recognizing that "this Court has construed Section 502(a)(3) not to authorize an award of money damages against a *non-fiduciary*," the Government suggests that the Act, as currently written and interpreted, may "allo[w] at least some forms of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in

> equity at the time of the divided bench." Brief for United States as *Amicus Curiae* 27—28, n. 13 (emphases added); cf. *ante*, at 19 ("entity with discretionary authority over benefits determinations" is a "plan fiduciary"); Tr. of Oral Arg. 13 ("Aetna is [a fiduciary]–and CIGNA is for purposes of claims processing."). As the Court points out, respondents here declined the opportunity to amend their complaints to state claims for relief under § 502(a); the District Court, therefore, properly dismissed their suits with prejudice. See *ante*, at 20, n. 7. But the Government's suggestion may indicate an effective remedy others similarly circumstanced might fruitfully pursue.[39]

Following *Aetna*, the United States has continued to vigorously assert its interpretation throughout the courts of appeal. Recently before the Ninth Circuit, the government observed that the pre-*Great-West* circuit split on the § 502(a)(3) Question still continues to linger:

> In accordance with this [proper historical analysis required by *Great-West*], the Seventh Circuit has awarded monetary relief against fiduciaries as "appropriate equitable relief" in ERISA cases. *See Bowerman v. Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000). However, a number of other courts have held to the contrary. *See, e.g., Callery v. U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004); *Helfrich v. PNC Bank, Ky., Inc.*, 267 F.3d 477, 481-82 (6th Cir. 2001); *Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 943- 44 (8th Cir. 1999); cf.

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[39] *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (Ginsburg, J, concurring).

> *Pereira v. Farace*, No. 03-5035(L), 2005 WL 1532318, at *7-9 (2d Cir. June 30, 2005) (in a state law breach of trust case, court holds that monetary relief from a breaching fiduciary is legal relief entitling defendants to jury trial.)[40]

The Seventh Circuit recently reaffirmed its position in *McDonald v. Household International, Inc.*, 425 F.3d 424, 430 (CA7 2005) ("It will be up to the McDonalds on remand to decide whether they wish to proceed with their case or to abandon it. In that connection, they may wish to take note of Justice Ginsburg's comment in her concurring opinion in *Davila*, in which she drew attention to the Government's suggestion that ERISA "as currently written and interpreted, may allo[w] at least some forms of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench."

That said, the majority of circuits have rejected the position taken by petitioner and the United States.

> [W]e now note the growing majority of appellate decisions opinion that the Supreme Court's interpretation of 502(a)(3) as it applies to non-fiduciaries would not differ with respect to fiduciaries. However, this court refused to dismiss the case at such an early stage because of the ongoing judicial debate over interpretation and intent of 502(a)(3).[41]

Rather than perform their own historical analysis, however, these "majority" courts have merely taken and misapplied

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[40] U.S. Goeres Br. at 16, n.7.

[41] *McDonald v. HSBC Finance Corporation*, 2006 WL 2669950 (S.D. Ind. 2006).

dicta from *Great West* in reaching their conclusion. For example, in explicitly rejecting the United States' interpretation of § 502(a)(3), the Second Circuit stated that:

> The Trustee contends that the holding of *Great-West* is inapplicable here because *Great-West* involved only non-fiduciary defendants. * * * [W]e are compelled to read *Great-West* as broadly as it is written. Nor can we ignore the Supreme Court's inclusion of footnote 2, highlighting a single exception to its rule that a defendant must possess the funds at issue for the remedy of equitable restitution to lie."[42]

The words of Judge Newman, who wrote a separate concurrence, are particularly instructive:

> Despite the sweep of the language from the Restatement supporting actions in equity against fiduciaries for breach of their duties and the rarity of decisions requiring a jury for such claims, I am persuaded that the Supreme Court's dictum in *Great-West*, sends a signal that should not be ignored. * * * The statement is dictum with respect to an action against a fiduciary because the defendant in *Great-West* was not a fiduciary. But the Court appears to be little concerned with the nature of the defendant and critically concerned with whether the defendant is being compelled to disgorge specific, traceable funds in his possession, in which case the action is in equity, or to pay money out of his pocket, i.e., damages, to a claimant.[43]

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[42] *Pereira,* 413 F.3d at 340.

[43] *Id. at* 344 and 346.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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