NO. 06-856

IN THE
# Supreme Court of the United States

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JAMES LARUE, PETITIONER

*v.*

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

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**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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## BRIEF OF SEVEN LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*

*Amici curiae,* Roger M. Baron, John Bronsteen, Michael Evans, Frank Partnoy, Radha A. Pathak, Marcy E. Peek, and Sandra L. Rierson (hereinafter "*amici*") respectfully submit this brief in support of petitioner, James LaRue, encouraging the grant of a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, because that judgment is inconsistent with the language and intent of the ERISA statute, with this Court's precedent, and with sound public policy.[1]

*Amici* are law professors at seven law schools throughout the United States who teach and write about various subjects (*e.g.*, ERISA remedies,[2] class action litigation,[3] financial market regulation[4]) that relate to the core question presented by this case: whether 29 U.S.C. §§ 1132(a) and 1109, Sections 502(a)(2) and 409 of ERISA respectively, permit a participant in an individual account (*e.g.*, 401(k)) plan to bring a lawsuit to recover losses to his individual plan

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[1] This brief is submitted pursuant to the general consent of the parties to the filing of *amicus* briefs. Counsel of record for the petitioner has filed his consent with the Court on January 16, 2007. Counsel of record for the respondents has indicated that his consent will also be filed. Pursuant to this Court's Rule 27.6, *amici* represent that this brief was not authored, in whole or in part, by counsel for any party and that no party other than *amici* has made a monetary contribution to the preparation or submission of this brief. The names of the educational institutions are provided for identification purposes only.

[2] *See e.g.*, Roger Baron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: Its Time to Recognize the Elephant in the Courtroom*, 55 Mercer Law Review 595 (2004).

[3] *See e.g.*, John Bronsteen, *Class Action Settlements: An Opt-in Proposal*, 2005 U. Illinois L. Rev. 903 (2005).

[4] *See e.g.*, Frank Partnoy, *Infectious Greed: How Deceit and Risk Corrupted the Financial Markets* (2d rep. ed. 2004).

account caused by the plan fiduciary's misuse or mismanagement of funds.[5]

The provisions of ERISA at issue in this case were enacted to protect the American worker against the misuse or mismanagement of retirement funds by plan fiduciaries. The Fourth Circuit's interpretation of these remedial provisions affords breaching fiduciaries with safe harbor from punishment for misconduct that results in financial losses to the plans they manage. *Amici* believe that the Fourth Circuit's misinterpretation of the ERISA statute has high societal costs, and is contrary to the congressional purpose in enacting ERISA. *See e.g.,* Colleen E. Medill, *Stock Market Volatility and 401(k) Plans,* 34 U. Mich. J.L. Reform 469, 539 (2002) ("[t]he long-term policy consequences of [such an interpretation of the ERISA civil remedies statute] is likely to

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[5] This question is referred to in the Petition for a Writ of Certiorari (the "Petition") as the "502(a)(2) Question" and will be referred to as such herein. The Petition also presents a second question regarding the proper interpretation of 29 U.S.C. § 1132(a)(3), Section 502(a)(3), of ERISA. This question is referred to in the Petition as the "502(a)(3) Question" and will be referred to as such herein. *Amici* agree with petitioner that the 502(a)(3) Question is also worthy of this Court's review. That said, this Court need only reach the 502(a)(3) Question if it grants the Petition and affirms the Fourth Circuit's interpretation of Section 502(a)(2). Because *amici* agree with petitioner and the United States that the Fourth Circuit has incorrectly interpreted 502(a)(2), *amici* have chosen to restrict the scope of this brief to the 502(a)(2) Question. If the Court grants the Petition, however, *amici* urge the Court to grant review on *both* questions presented so that the Court can reach the 502(a)(3) Question should it disagree with the interpretation of Sections 502(a)(2) and 409 advanced by petitioner, the United States, and *amici.*

Should the Court reach the 502(a)(3) Question, *amici* are in agreement with the government that the make-whole relief against a breaching fiduciary at issue in this case was typically available in historical equity courts as the remedy of "surcharge."

be a significant undermining of the effectiveness of 401(k) plans in providing retirement income security.").

This case is particularly significant because, as the government points out, the Fourth Circuit's holding on the 502(a)(2) and 502(a)(3) Questions, coupled with ERISA's broad preemption of state law,[6] leaves the workforce without any adequate remedy to right a fiduciary's neglectful, or otherwise manipulative, practices. *See* Brief of the United States Sec'y of Labor as *Amicus Curiae* in Support of Petition for Rehearing *En Banc* in *LaRue v. DeWolff, Boberg & Associates, Inc. et. al.*, (No. 05-1756), 2006 WL 2050799 (July 12, 2006) (hereinafter "US. LaRue Brief") at 1-3.

## REASONS FOR GRANTING THE WRIT

### I. The Fourth Circuit's Cramped View of What Constitutes a Loss to an Individual Account Plan is Inconsistent with the Text and Intent of ERISA and this Court's Precedent.

ERISA was enacted to protect the interests of employees and their beneficiaries through a system of comprehensive federal requirements and safeguards. *See* Ellen A. Fredel, *ERISA and Managed Care: What the Courts Are Saying,* Benefits Law Journal, Vol. 8, No. 3, pp. 105 (1995). Congress took such action, "[a]fter several highly visible pension plan failures and abuses in the 1960s and 1970s." United States General Accounting Office, *Report to Congressional Requesters, Employer-Based Managed Care Plans, EIRSA's Effect on Remedies for Benefit Denials and Medical Malpractice,* p. 4 (July 1998) available at http://www.gao.gov/archive/1998/he98154.pdf (last visited January 17, 2007).

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[6] *See e.g.*, *Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41 (1987).

At the center of this case are two particular provisions of ERISA - Sections 502(a)(2) and 409. Section 502(a)(2) of ERISA allows an action to be brought by the Secretary of Labor (the "Secretary"), plan participants, beneficiaries, or fiduciaries for "appropriate relief under [§ 409]." Section 409(a), in turn, dictates that,

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

29 U.S.C. § 1109(a) (emphasis supplied).

In this case, the Fourth Circuit was forced to confront the question of whether the diminution in value of one participant's interest in an individual account plan constitutes a "loss[] to [the] plan" for purposes of Sections 502(a)(2) and 409. As explained *infra*, the Fourth Circuit's conclusion that such diminution does not constitute a plan loss is inconsistent with the text and intent of ERISA and is based on a fundamental misunderstanding of this Court's decision in *Massachusetts Mut. Life Ins. Co v. Russell,* 473 U.S. 134 (1985).

### A. The Fourth Circuit's rule is inconsistent with the plain text of ERISA, which permits the recovery of "any losses to [the] plan."

As indicated above, Section 502(a)(2) of ERISA authorizes an action for appropriate relief while Section 409 provides make-whole relief for any losses to a plan resulting from fiduciary breaches. *See* 29 U.S.C. § 1109(a). Any analysis, therefore, of whether the diminution in value of a

participant's interest in his retirement plan constitutes a "plan loss" must begin with an understanding of the nature and structure of the particular type of plan at issue.

This case involves what is known as a defined contribution plan (also known as an individual account plan).[7] In such a plan, each individual account holder is a beneficiary, and the assets in each participant's individual account collectively comprise the *corpus* of a trust. *See* 29 U.S.C. § 1103(a); *see also* 26 U.S.C. § 401(a); I.R.S., *Qualifications; Participants Rights to Exercise Control of Assets,* Rev. Rul. 89-52, 1981-1 C.B. 110, 1989 WL 572038 (Apr. 10, 1989) (all assets in each individual account are assets of the plan itself); Dan M. McGill et. al., *Fundamentals of Private Pensions* 247 (7th ed. 1996) ("the sum of all of the account balances . . . equals the total market value of the plan's assets."). This legal ownership of assets by the plan manifests itself in several substantive and procedural ways. For example, plan investing is done in a unitary fashion, and the assets of each individual account are available to satisfy the operating costs and expenses of the entire plan.[8]

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[7] As defined by ERISA, the term "individual account plan," or "defined contribution plan," refers to:

> a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

29 U.S.C. § 1102(34).

[8] *See* 1 Michael J. Canan, *Qualified Retirement Plans,* 3.1 (Practitioner ed. 1999) (although "employer contributions [are] credited to separate accounts for each employee, the trustee invests all of the funds in one certificate of deposit."); David A. Littell et. al., *Retirement Savings*

In this case, petitioner requested that losses to his interest in an individual account plan be restored to the plan by the breaching fiduciary. *See* Pet. at 8; Pet. App. at 21A.[9] The Fourth Circuit's holding, that the requested relief did not constitute a "loss to [the] plan," is based on a fundamental misunderstanding of the inherent structure of an individual account plan. In such a plan, a loss to any individual account constitutes a loss to the plan because the monies in the individual account are nothing less than the very *res* of the trust itself. *See* Dana Muir, *ERISA and Investment Issues*, 65 Ohio St. L.J. 199, 235 (2004) ("[i]n [defined contribution] plans, fiduciary breaches that cause loss to the plan typically cause that loss by affecting the value of individual participants' accounts"). Stripped to its essence, the Fourth Circuit's position is that a loss to a unit which is part of a whole does not constitute a loss to the whole itself.

In its initial opinion, published at 450 F.3d 570, the Fourth Circuit acknowledged that, "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." Pet. App. at 6a (emphasis in original). The court, however, provided absolutely no explanation of why such a view is "narrow" or why its alternative reading of the statute is even possible. Instead, the court rejected petitioner's statutory interpretation, without reference to citation or further

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*Plans: Design, Regulation, and Administration of Cash or Deferred Arrangement* 6 (1993) ("contributions are made to a single funding vehicle, usually a trust . . . as amounts are contributed to the trust, they are allocated to the participant's account.").

[9] Citations to the Petition are cited herein as "Pet. at__" whereas citations to material contained in the appendix to the Petition are cited herein as "Pet. App. at__."

explanation, by merely offering the unsupported assertion that petitioner's position, "finds no license in the statutory text and threatens to undermine the careful limitations Congress has placed on the scope of ERISA relief." Pet. App. at 6a.

After the initial Fourth Circuit opinion was published, the United States filed a brief *amicus curiae* supporting rehearing or rehearing *en banc* in which it cogently explained the error of the position adopted by the Fourth Circuit panel. *See generally* U.S. LaRue Brief at 2-14. In a published order, 458 F.3d 359, specifically dedicated to responding to the government's brief, the Fourth Circuit denied rehearing and rehearing *en banc* while continuing its adherence to an incorrect interpretation of 502(a)(2) and 409. The court stated that:

> Neither the text of Section 502(a)(2) nor Supreme Court precedent contemplate a remedy for individual, rather than plan, losses. . . If Congress meant to authorize individual damages claims under § 502(a)(2), it had only to say so.

Pet. App. at 24a. These statements beg - rather than answer - the fundamental question presented by this case (*i.e.*, whether the diminution in value of an individual's interest in a defined contribution plan constitutes a "plan" loss).

Compounding the court's failure to properly analyze the critical question is its complete misapprehension of the position advanced by the United States. For example, the court pronounced:

> LaRue involves a single plaintiff who sought to recover for an individual loss; indeed, LaRue did not even allege a "loss to the plan,"

> but only to his "interest in the plan…" [t]o adopt the Secretary's view, however, would necessarily transform every purely individual claim for breach of fiduciary duty into a "plan loss..." [t]he Secretary's view – that a purely individual claim that bears any legal relationship to a plan inures to the benefit of that plan – is contrary to the plain text of the statute.

Pet. App. at 24a (internal citations omitted).

Contrary to these conclusions, *amici* point out that the position of the United States is *not* that any individual claim for breach of fiduciary duty seeks to remediate a plan loss. Rather, the position of the United States is that the diminution in value of the interest of an individual account holder in a defined contribution plan is, by definition, a loss to the plan and, therefore, remediable under 502(a)(2). The Fourth Circuit's contrary view creates judicial burden, requiring courts to decide what constitutes a plan loss on an *ad hoc* basis without any principled way of differentiating the circumstances of given cases. *Amici* contend that the United States' position is the most sensible interpretation of the statutory language because it is reflective of the proper definition of an individual account plan. *See* Medill, 34 U. of Mich. J.L. Reform at 538-39 ("The better judicial interpretation . . . is to view the relief as flowing to the plan in accord with [S]ection 502(a)(2), so long as the monetary award is initially allocated to each participant's plan account rather than to his personal pocketbook.").[10]

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[10] A simple reality reinforces this point. Should petitioner be successful in his claim to, "have the plan 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), there is no set monetary amount that petitioner will be guaranteed to recover. The nature of the plan structure dictates that legitimate plan expenses and

### B. The Fourth Circuit's interpretation of 502(a)(2) and 409 is based on a misreading of this Court's decision in *Russell.*

*Amici* submit that the Fourth Circuit's rejection of the interpretation advanced by the United States was, in reality, motivated by the court of appeal's mistaken belief that, "[t]he Secretary's view is [] inconsistent with the Supreme Court's decision in *Russell* [because] the *Russell* Court held that 502(a)(2) requires plaintiffs to seek damages on behalf of the plan as a whole, not on their own behalf." Pet. App. at 25a (citing *Russell*, 473 U.S. at 140).

*Russell* did distinguish between individual relief and relief that, "inures to the benefit of the plan as a whole." *Russell*, 473 U.S. at 140. However, nothing in the *Russell* opinion can possibly be read to support the definition of "the plan as a whole" that has been adopted by the Fourth Circuit in the context of individual account plans. The plaintiff in *Russell* did not seek the recovery of a monetary loss caused by fiduciary breach. Instead, she sought compensation for emotional distress as well as punitive damages. In characterizing such relief as "individual," as opposed to for the benefit of "the plan as a whole," the *Russell* Court emphasized that, "the crucible of congressional concern was a misuse and mismanagement of plan assets by plan administrators." *Russell*, 473 U.S. at 140 n.8.[11] The Fourth Circuit's misapplication of one phrase in *Russell* to the very

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costs may first need to be satisfied from the balance of individual accounts on a *pro rata* basis prior to any distributions.

[11] This Court has consistently reiterated that, "[s]pecial congressional concern" has focused on preserving the integrity of plan asset management. *Varity Corp. v. Howe*, 516 U.S. 489, 511-12 (1996).

different context of individual account plans turns the reasoning of *Russell* on its head.

## II. This Court Should Clarify What Constitutes a Loss to an Individual Account Plan for Purposes of 502(a)(2).

In the more than twenty years since this Court last interpreted Section 502(a)(2), individual account plans have become the primary vehicle for private retirement savings. At the time of *Russell*, the world of such individual retirement accounts was in its infancy. Today, they are the norm. It is estimated that defined contribution plans hold approximately $2.9 trillion in assets across the country. *See* Board of Governors of the Federal Reserve System, *Flow of Fund Accounts to the United States*, *Flows and Outstandings, First Quarter 2006*, Statistical Release Z.1, at 113 (June 8, 2006). Surveys indicate that over 80% of the country's employees participate in 401(k) plans. *See* Profit Sharing 401/k Council of America, *47th Annual Survey of Profit Sharing and 401(k) Plans: Overview of Survey Results* available at http://www.psca.org/DATA/47th.html (last visited on January 17, 2007).

Plan fiduciaries are obligated to follow standards of duty, loyalty, and care that are "the highest known to the law." *Donovan v. Bierwith*, 680 F.2d 263, 272 n.8 (2d Cir. 1982). With the advent of individual account plans, fiduciary obligations related to plan management are manifested through conduct toward the individual account holders comprising the plan. Sound management obligations are owed to each plan beneficiary and proceed from a fiduciary's position of trust. *See* 29 U.S.C. § 1104(a). Contrary to the court of appeal's understanding, the nature of an individual account plan's structure is such that a breach of a fiduciary duty owed to an individual account is a breach of the duty owed to the plan. Demonstrating a breach of, "any of the responsibilities, obligations, or duties" is sufficient to

establish recovery for "any losses." 29 U.S.C. § 1109(a). *Amici* believe that this Court should therefore square the teachings of *Russell* concerning plan losses, and fiduciary duties, with the current environment of retirement savings.

### A. Because the confusion in the lower courts concerning the proper definition of a plan loss is based on differing views of *Russell*, only clarification by this Court can achieve uniformity on this important issue.

*Amici* agree with petitioner and the United States that the Fourth Circuit decision in this case has re-engendered a circuit split regarding the proper application of Section 502(a)(2). Pet. at 16-19; U.S. LaRue Brief at 11-14. A well-recognized circuit split first developed when the Fifth Circuit issued its opinion in *Milofsky v. Am. Airlines, Inc.*, 404 F.3d 338 (5th Cir. 2005). *Milofsky* held that a small subset of 401(k) plan participants lacked standing to sue under Section 502(a)(2) because they sought losses to be allocated to their individual accounts stemming from a delay in the transfer of their assets from a prior plan - breaches that were not, in the panel's view, "targeted [at] the plan as a whole." *Id.* at 343-44, n.16. However, at the urging of the United States,[12] the Fifth Circuit agreed to rehear the *Milofsky* case *en banc*, 442 F.3d 311 (5th Cir. 2006), and vacated the panel decision - temporarily eliminating the circuit split.

Given the importance and recurring nature of the question, as well as continued division among the district

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[12] Supplemental Brief of the United States Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant Requesting Rehearing and Rehearing *En Banc* of the Fourth Circuit Panel Opinion in *Milofsky*, *et. al., v. American Airlines, Inc., et. al.,* (No. 03-11087) (August 11, 2005) available at https://www.dol.gov/sol/media/briefs/milofsky(A)-8-11-05.pdf (last visited January 17, 2007).

courts,[13] it was well recognized that the *Milofsky en banc* decision far from resolved the 502(a)(2) Question. In the words of one commentary:

> Even when [the *Milofsky*] decision was automatically vacated by grant of rehearing *en banc*, hope remained that we would see a badly split decision that would inexorably reach the Supreme Court. . . The (a)(2) issue that briefly made *Milofsky* a household name. . . is going to resurface, if only because a large number of defendants in stock drop cases are continuing to raise the issue. Sooner or later, there will be a circuit court decision that actually discusses the issue, and, when it does, we'll be waiting.

Robert N. Eccles & David E. Gordon, *Old Whines, New Battles*, ERISA Litigation Reporter, Vol. 14 No. 2, pp. 1-3 (March-April 2006). The wait for such a case is over. The Fourth Circuit's decision has once again ignited the circuit division and provided the analysis that commentators hoped would be addressed by this Court.

The Fourth Circuit, in its order denying rehearing and rehearing *en banc*, challenges the suggestion by the United States that the decision in this case, "creates a conflict with decisions of the Third, Fifth, Sixth, and Seventh Circuits." Pet. App. at 26a. According to the Fourth Circuit, there is no circuit split because the decisions cited by the United States all, "involved a subset of plan beneficiaries or participants that alleged plan losses" as opposed to, "an individual plaintiff." *Id.* This distinction misses the point. As the

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[13] *Compare In Re Marsh ERISA Litigation*, 2006 WL 3706169, at * 6-7 (S.D.N.Y. Dec. 14, 2006) *with Fisher v. J.P. Morgan Chase & Co.*, 2006 WL 2819606, at * 4 (S.D.N.Y. Sept. 29, 2006).

United States has explained, U.S. LaRue Brief at 13-14, the *reasoning* employed by these other courts of appeals would directly foreclose the position adopted by the Fourth Circuit in this case. *See e.g., In re Schering-Plough Corp. ERISA Litig.*, 420 F.3d 231, 232 (3d Cir. 2005) ("the fact that the assets at issue were held for ultimate benefit of Plaintiffs does not alter the fact that they were held by the Plan."). In fact, such courts have specifically declined to limit such responsibility to only, "'loses that will ultimately redound to the benefit of all participants.'" *Id.* (citations omitted).

In any event, *amici* respectfully suggest that the 502(a)(2) Question warrants immediate review by this Court irrespective of whether or not the confusion in the lower courts rises to level of a square circuit split. As explained by petitioner and the United States, the question is of exceptional importance. *See generally* Pet. at 10-12; U.S. LaRue Brief at 4-11. Moreover, the Fourth Circuit has explicitly rejected the position of the very government agency charged with enforcement of the ERISA statute. *See* 29 U.S.C. §§ 1132, 1135 (noting that the Secretary of Labor has primary authority to interpret and enforce the provisions of Title I of ERISA). Finally, and most importantly, the confusion in the lower courts is entirely based on differing interpretations of this Court's two decade plus old *Russell* decision. *See e.g., Rogers, et. al. v. Baxter International, Inc.*, 417 F.Supp.2d 974, 981 (N.D. Ill. 2006) (noting that, "[c]ourts are currently in disagreement over the proper interpretation of 502(a)(2)" largely because of the, "gloss on [S]ections 502(a)(2) and 409(a)" offered by the Supreme Court in its 1985 *Russell* decision). The words of Chief Judge King, dissenting in the original *Milofsky* panel opinion, are particularly instructive in understanding how *Russell* has been misapplied. The dissenting opinion observed:

> *Russell* never reached the conclusion that the [*Milofsky* panel] majority reaches *i.e.*, that

> standing can exist under [Section] 502(a)(2) only if *all* plan participants would benefit from the litigation…The [panel] majority correctly notes that *Russell* distinguishes between relief for individuals and relief for the plan as a whole…*Russell* does not, however, stand for the proposition that the plan as a whole is synonymous with all participants of the plan, and several courts have rejected this definition of the plan as a whole.

*Milofsky*, 404 F.3d at 349 n.4 (King, C.J., dissenting) (emphasis in original) (citations omitted; internal quotation marks omitted).

### B. This case is an ideal vehicle to resolve what constitutes a loss to an individual account plan for purposes of 502(a)(2).

This case presents an excellent opportunity for the Court to resolve the recurring question of what constitutes a loss to an individual account plan for purposes of Sections 502(a)(2) and 409.

First, the question was squarely presented to the court of appeals. As the Fourth Circuit noted in its initial opinion, "[petitioner] first suggests that remuneration of his plan accounts finds express authorization in the text of 29 U.S.C. § 1132(a)(2)." Pet. App. at 5a.

Second, the court of appeals expressly passed on the question – rejecting the interpretation urged by petitioner and the United States and holding "Section 1132(a)(2) provides remedies only for entire plans, not for individuals." Pet. App. at 2a.

Third, it is beyond dispute that this question was outcome determinative. The Fourth Circuit declined to rest its holding on an alternative fact-bound argument (*i.e.*, waiver) advanced by the respondents, instead resting its holding exclusively on its interpretation of Section 502(a)(2). In its brief *amicus curiae* supporting rehearing and rehearing *en banc*, the United States requested that:

> (1) if the [c]ourt concludes that [petitioner] in fact waived his argument under [S]ection 502(a)(2), it vacate that portion of the decision holding that [S]ection 502(a)(2) provides no remedy; or (2) if the [c]ourt concludes that [petitioner] sufficiently raised and preserved the [S]ection 502 (a)(2) argument, it reverse the order of the district court dismissing the claim and hold that [S]ection 502 (a)(2) provides a cause of action and a remedy in the circumstances in this case.

U.S. LaRue Brief at 4. Despite the government's request that the court of appeals reach the narrower waiver issue, the Fourth Circuit devoted its entire order denying rehearing and rehearing *en banc* to disputing the position articulated by the United States, holding that the interpretation advanced by the United States is contrary to the plain text of the statute, inconsistent with *Russell,* and would strip this Court's 502(a)(3) oriented decisions in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) and *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) of any real meaning. This resolution of the 502 (a)(2) Question is clearly now the settled law of the Fourth Circuit.

Finally, counsel for both parties in this case are knowledgeable and experienced regarding both ERISA and practice before this Court. Peter K. Stris, counsel of record for petitioner, argued two cases last Term before this Court,

including *Sereboff et ux. v. Mid Atlantic Medical Services Inc.*, 126 S.Ct. 1869 (2006) - an ERISA case involving the scope of Section 502. Shaun P. Martin, co-counsel for the petitioner, is a tenured law professor who served as co-counsel before this Court in *Sereboff*. Jean-Claude Andre, co-counsel for petitioner, recently argued *Jones v. Bock*, 126 S. Ct. 1462 (2006), and *Williams v. Overton* 126 S. Ct. 1463 (2006), before this Court and will be arguing *Winkelman v. Parma City School District*, 127 S. Ct. 467 (2006), later this Term. Robert Hoskins, co-counsel for the petitioner, is an experienced ERISA practitioner who has argued numerous ERISA related cases on appeal, published in the field, and lectured about ERISA litigation. Thomas Gies, counsel of record for respondents, is an experienced litigator at a major Washington, D.C. law firm, who has litigated numerous ERISA related cases and published a variety of ERISA related commentary, *see e.g.*, Thomas P. Gies, *ERISA Preemption Meets the Union Corporate Campaign*: *The Challenge to the Maryland "Wal-Mart Bill*," ERISA Litigation Reporter, Vol. 14 No. 2, p. 3 (March-April 2006). He has also argued previously before this Court in *Jacksonville Bulk Terminals v. ILA*, 457 U.S. 702 (1982).

### C. If the Court has any reservations, it should call for the views of the Solicitor General.

If the Court has any reservations about granting the petition, *amici* respectfully suggest that the Court call for the views of the Solicitor General. As noted in the Petition, the Secretary of Labor has continuously filed *amicus* briefs on both the 502(a)(2) Question and 502(a)(3) Question in courts of appeal across the country.[14] In each case the Secretary has advanced petitioner's positions.

As explained by the United States in its brief filed with the Fourth Circuit below, the holding in this case will affect not only private litigants - but the United States as well. *See* U.S. LaRue Brief at 1. The Secretary has primary authority to interpret and enforce the provisions of Title I of ERISA. *See* 29 U.S.C. §§ 1132, 1135. Because the government plays a prominent role in the enforcement of ERISA's provisions, and the statutory provisions construed in this case are the very tools by which the Secretary carries out this obligation, *amici* believe that the Solicitor General should be called upon to resolve any uncertainty regarding the propriety of further review.

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[14] *See e.g.,* In the Fifth Circuit, Brief of the United States Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant and Requesting Reversal of the District Court Decision in *Milofsky*, *et. al., v. American Airlines, Inc., et. al.,* (No. 03-11087) (February 27, 2004) available at http://www.dol.gov/sol/media/briefs/milofsky(A)-2-27-2004.htm (last visited January 17, 2007) (addressing the 502(a)(2) Question); In the Ninth Circuit, Brief of the United States Sec'y of Labor as *Amicus Curiae* in Support of the Appellant and Requesting Reversal in *Gores v. Charles Schwab & Co., Inc., et. al. (*No. 05-15282) (July 11, 2005) available at http://www.dol.gov/sol/media/briefs/gores(A)-7-11-2005.pdf (last visited November 5, 2006) (addressing the 502(a)(3) Question).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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