No. 09-804

In The
Supreme Court of the United States

CIGNA CORPORATION AND CIGNA PENSION PLAN,

Petitioners,

v.

JANICE C. AMARA, GISELA R. BRODERICK, ANNETTE S. GLANZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether CIGNA can challenge the Second Circuit's "likely prejudice/harmless error" standard for violations of ERISA's disclosure requirements when it did not challenge that standard in the district court, the court of appeals, or in a petition for rehearing en banc.

2. Whether a district court, after finding misleading statements in a summary of material modification ("SMM") and summary plan description ("SPD"), is precluded from finding a violation of ERISA's disclosure requirements, which are based on whether the SPD and SMM are "written in a manner calculated to be understood by the average plan participant" and are "sufficiently accurate," unless the district court conducts individual hearings into how each individual participant detrimentally relied on the misleading statements.

PARTIES TO THE PROCEEDINGS

The petitioners in 09-804 are the CIGNA Corporation and the CIGNA Pension Plan.

The respondents are Janice C. Amara, Gisela R. Broderick, Annette S. Glanz and a class of all other participants in the CIGNA Pension Plan who are similarly situated.

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Statement of the Case

After a seven-day bench trial with sixteen witnesses (only one of whom was called by the CIGNA petitioners) and over 500 exhibits, the District Court (Judge Mark R. Kravitz) issued a 122-page decision finding that CIGNA violated ERISA's disclosure requirements by describing a large benefit reduction as an "enhancement" with no "cost savings" to CIGNA in which "each dollar's worth of credits is a dollar of retirement benefits payable to you." Pet. App. at 31a, 34a, 40a. The District Court found that CIGNA's disclosures to its employees about the changes to their pension plan were "inadequate under ERISA and in some instances, downright misleading" and that CIGNA engaged in "efforts to conceal the full effects" of the changes "to avoid the employee backlash likely to result from a thorough discussion" of benefit reductions and periods of "wear-away" in which participants would not earn any additional retirement benefits. *Id.* at 8a, 114a, 137a.[1] The District Court found that CIGNA's efforts to conceal the full effects of the changes were prejudicial because they "'deprived [plaintiffs] of the opportunity to take timely action ...' whether that action was protesting at the time Part B was implemented, leaving CIGNA for another

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[1] As the District Court explained: "Wear away means that there are periods of time in which the employee's account balance is less than the employee's minimum benefit.... [I]n effect, where there is wear away, even though the employee continues to work for CIGNA and continues to receive benefit credits, the employee's expected retirement benefits have not grown beyond what the employee was entitled to under [CIGNA's Pension Plan] as of December 31, 1997." Pet. App. 24a-25a.

employer with a more favorable pension plan, or filing a lawsuit like this one." *Id.* at 137a. The District Court determined that CIGNA had failed to show that "even a single employee" had "'actual knowledge' of the undisclosed information." *Id.* at 166a; *see also id.* at 133a-136a. In response to the questions from the Second Circuit panel during oral argument, CIGNA's counsel conceded that CIGNA's "notice here failed" and that the "underlying disclosures...that were being challenged" were "totally inadequate." CD of May 21, 2009 Oral Argument, at 2:33:45 - 2:34:01.

In a separate decision, the District Court ordered remedial relief based on CIGNA's misleading statements about the periods of "wear-away" and the "relative value" of benefit options.The District Court held that CIGNA could not enforce the undisclosed wear-away provisions that kept many participants from earning additional pension benefits for years. Pet. App. at 195a-196a. It also required benefits to be restored to participants who mistakenly elected their pensions as lump sums because CIGNA concealed that the monthly pension payments had a "greater present value." *Id.* at 155a-156a, 201a-207a.[2]

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[2] The District Court declined to provide relief in the form of benefits for the violations of the ERISA "Section 204(h)" notice requirements that would have been most costly to CIGNA. Pet. App. at 190a-194a. The District Court also declined to provide relief based on CIGNA's misleading representations in the SMM that the cash balance benefits would be "comparable" or "larger" than under the preceding benefit formulas. *Id.* at 200a-201a. On January 4, 2010, the *Amara* plaintiffs-appellants filed a petition for a writ of certiorari (09-784) concerning the Second Circuit's affirmance of these rulings, asking that the petition be held

On October 6, 2009, the Second Circuit summarily affirmed the District Court's decisions on both liability and relief, commending the District Court for its "two well-reasoned and scholarly opinions." Pet. App. at 4a.

Reasons for Denying the Writ

I. The main issue that CIGNA's petition raises is a challenge to the "likely prejudice/harmless error" standard for violations of ERISA's disclosure requirements that the Second Circuit established in *Burke v. Kodak Ret. Inc. Plan*, 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004). CIGNA contends that the standard is in conflict with an "individualized" "reliance" or "prejudice" that some circuits use. Pet. at 2.

A. This issue is not properly presented to this Court because, in the proceedings below, CIGNA did not challenge the "likely prejudice/harmless error" standard. Instead, at each stage of the litigation, CIGNA contended that it should prevail under that standard. CIGNA also never requested that the Second Circuit sit *en banc* to consider modifying its "likely prejudice/harmless error" standard.

It is a basic axiom that this Court does not accept certiorari on issues that are not raised or passed upon below. *See, e.g., Sereboff v. Mid Atl. Med. Servs.*, 547

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pending resolution of the question presented in *Conkright v. Frommert* (08-810) on a district court's "allowable discretion" in "calculating additional benefits due under the plan" as a result of violations of ERISA.

U.S. 356, 368 n.2 (2006) ("Neither the District Court nor the Court of Appeals considered the argument that Mid Atlantic's claim was not 'appropriate' apart from the contention that it was not 'equitable,' and from our examination of the record it does not appear that the Sereboffs raised this distinct assertion below. We decline to consider it for the first time here"); *cf. MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (issue was properly before Court where it was "raised and preserved" in "a few pages" of appellate brief, although precedent precluded panel from taking jurisdiction).

In this case, CIGNA could have preserved the issue of a circuit conflict in its briefing, recognizing that Second Circuit precedent prevented the panel from overruling *Burke*, and asked for a rehearing *en banc* to consider that issue. But CIGNA did not do this. The first time that CIGNA questioned the "likely prejudice" standard was in a motion to stay the mandate after the summary affirmance. There, CIGNA stated, for the first time, that it intended to file a petition for certiorari with this Court challenging the Second Circuit's prejudice standard.

B. Although CIGNA decries a "deep division," Pet. at 20, the circuit precedents on which CIGNA relies were decided before this Court denied certiorari in *Burke* in 2004. Moreover, the predominant scholarly view is that "with the passage of time, the circuits have generally moved ... to the more lenient standards of the Second and Fifth Circuits" in ruling on whether employees can secure relief for representations in a summary plan description ("SPD") that conflict with a

Plan document. Charles R. Peterson, Note: "ERISA Does Not Give Employers a Free Pass," 9 *Nev. L.J.* 704, 708 (Spring 2009); *accord* Michael A. Valenza, "Accuracy Is Not a Lot to Ask," 6 *Transactions (Tenn. J. Bus. L.)* 361, 362, 392-93 (Spring 2005) (recognizing "trend" in the "recent [2003] decisions" by the Second Circuit in *Burke* and the Third Circuit in *Burstein* that "signal a shift away from the common law imposition of technical requirements"). CIGNA's depiction of "hopelessly divided" circuits or "irreconcilable standards" (Pet. at 1, 10, 12) does not reflect the legal standards that the circuits have adopted or the movement that the case law and commentary show.

The statutory standard at issue assesses whether an SPD or a summary of material modification ("SMM") is "written in a manner calculated to be understood by the average plan participant" and is "sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under the plan." ERISA §102(a), 29 U.S.C. §1022(a). The SPD or SMM (in the event plan provisions are being materially modified) must describe "the circumstances which may result in disqualification, ineligibility or denial or loss of benefits." ERISA §102(b); *see also* 29 C.F.R. 2520.102-(3)(l); *Burke*, 336 F.3d at 110. By its terms, ERISA §102(a) does not require individualized reliance to establish a violation of the SPD requirements. If a showing of prejudice is required, "likely" prejudice is consistent with a statute that is concerned with the

effect of disclosures on "the average plan participant."[3]

In *Burke*, the Second Circuit determined that "a prejudice standard is more consistent with ERISA's objective to protect the employee against inadequate SPDs" and that a "rule requiring...detrimental reliance ...imposes an insurmountable hardship on many plaintiffs." 336 F.3d at 112 (quoting *Estate of Ritzer*, 822 F.Supp. 951, 955-56 (E.D.N.Y. 1993)). The Second Circuit required the plan participant or beneficiary to show that he or she was "likely to have been harmed as a result of a deficient SPD" and provided that "[w]here a participant makes this initial showing, "the employer may rebut it through evidence that the deficient SPD was in effect a harmless error." *Id.* at 113. The Second Circuit concluded that "[t]his 'likely

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[3] Most courts decide whether the "average plan participant" standard in ERISA §102(a) has been violated as a matter of law, or a mixed question of law and fact, without "an inquiry into the subjective perception of the individual participants." *Wilson v. Southwestern Bell Tel.*, 55 F.3d 399, 407 (8th Cir. 1995) (whether SPD is calculated to be understood by the "average plan participant" "appears to be an objective standard"); *accord Arnold v. Arrow Transp. Co.*, 926 F.2d 782, 785 (9th Cir. 1991) (whether the SPD's descriptions "satisfy ERISA is a legal question"); *Amara v. CIGNA*, 2002 U.S. Dist. LEXIS 25947, *9 (D.Conn. Dec. 20, 2002) (DJS) (class certification ruling that "whether the SPD is misleading" is "a legal question common to each class member"). *See generally* Lisa J. Bernt, "Finding the Right Jobs for the Reasonable Person in Employment Law," 77 *UMKC L. Rev.* 1 (Fall 2008) (courts invoke a "reasonable" or "average" person standard "when looking to set some objective or universal (as opposed to 'subjective,' or individualized) standard of conduct"; "By using the reasonable person device in this way, we are asking: What ought the employer have done, and has the employer done it?").

prejudice' standard avoids the use of harsh common law principles to defeat employees' claims based on a federal law designed for their protection." *Id.*[4]

As CIGNA's petition indirectly concedes, to secure relief for a misleading or inadequate SPD, the Third, Fifth and Sixth Circuits do not require the showing of "likely prejudice" that the Second Circuit demands–much less the individualized reliance or actual prejudice standard that CIGNA wants. *See* Pet. at 16-17; *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. and Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003) ("a plan participant who bases a claim for plan benefits on a conflict between an SPD and plan document need neither plead nor prove reliance on the SPD"); *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458-59 (5th Cir. 2007) (the "employee need not show reliance or prejudice"); *Edwards v. State Farm Mutual Automobile Insurance Co.*, 851 F.2d 134, 137 (6th Cir. 1988) ("precedent does not dictate that a claimant who has been misled by summary descriptions must prove detrimental reliance"). Accordingly, in these circuits, the answer to CIGNA's question presented–even assuming the

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[4] The Second Circuit has applied *Burke* in *Weinreb v. Hospital for Joint Diseases Orthopaedic Institute*, 404 F.3d 167, 171 (2d Cir. 2005); *Frommert v. Conkright*, 433 F.3d 254, 267 (2d Cir. 2006);*Wilkins v. Mason Tenders Dist. Council Pension Fund*, 445 F.3d 572, 585 (2d Cir. 2006); *Tocker v. Philip Morris*, 470 F.3d 481, 489 (2d Cir. 2006); and *Schad v. Stamford Health Sys.*, 2009 WL 4981271, *2, 2009 U.S. App. LEXIS 27939, *6 (2d Cir. Dec. 21, 2009). In *Weinreb*, *Tocker*, and *Schad*, the defendants rebutted "likely prejudice" with the "harmless error" defense. *Wilkins* was remanded for "a showing of likely prejudice."

question had been preserved below–would have no effect on the outcome of this case.

The First, Fourth, Seventh, Eighth and Tenth Circuits require "some significant reliance upon, or possible prejudice flowing from, the faulty plan description." *Govoni v. Bricklayers, Masons & Plasterers Local 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984) (Breyer, J.); *Aiken v. Policy Mgmt. Systems Corp.*, 13 F.3d 138, 141 (4th Cir. 1993); *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1149 (7th Cir. 1998); *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 621 (8th Cir. 1998);[5] *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996).

Although the *Govoni* standard has been applied "with varying degrees of stringency" in these circuits, *Burke*, 336 F.3d at 113, the "possible prejudice" standard is clearly compatible with the Second Circuit's "likely prejudice/harmless error" standard, and on its face broader.[6] It is also clear that the

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[5] In *Greeley v. Fairview Health Services*, 479 F.3d 612 (8th Cir. 2007), the Eighth Circuit disagreed with the Second Circuit's "likely prejudice" standard. However, *Greeley* simultaneously affirmed the *Govoni* standard of "some significant reliance on, or possible prejudice flowing from the summary." 479 F.3d at 614 (emph. added).

[6] The terms "possible prejudice," "likely prejudice" and "harmless error" are commonly used in different areas of law, including determining the consequences of rulings and events in the progress of a trial. A Lexis search shows fifty-five decisions in which this Court has used the term "possible prejudice." No clear distinction is drawn between "possible" and "likely" prejudice, other than that the word "possible" is broader than "likely." Both

alternative of "possible prejudice, flowing from the faulty plan description" is not duplicative of "some significant reliance upon" it. For instance, in *Marolt,* the Eighth Circuit ruled that the "accessible provisions govern" when a "plan document required by law to be plainspoken for the benefit of "average plan participant[s]'...says one thing, and an obscure passage in a transactional document only lawyers will read and understand says something else." 146 F.3d at 621. The Eighth Circuit rejected Alliant's contention that the plaintiff had to prove detrimental reliance: "Alliant contends Marolt must prove she relied on the SPD to her detriment. We disagree." *Id.*; *accord Spitz v. Tepfer*, 171 F.3d 443, 448 (7th Cir. 1999) ("Whether or not Tepfer relied on that SPD language is beside the point, under decisions that have held that SPD language trumps contrary plan language").

The only circuit to adopt the individualized reliance standard touted by CIGNA is the Eleventh Circuit. *See Branch v. G. Bernd Co.*, 955 F.2d 1574, 1578-79 (11th Cir. 1992); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1340-46 (11th Cir. 2006). Even there, the precedent on which these decisions were based, *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566 (11th Cir. 1985), suggests a different view of reliance than CIGNA proposes. In *McKnight*, the Eleventh Circuit did not require Mr. McKnight to prove that he took or did not take any specific action, such as giving up his job or making a significant expenditure, based on the

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terms are distinguished from "actual prejudice."

language in the SPD. The Eleventh Circuit simply held that he "was justified in relying on the summary booklet *to determine his pension rights.*" 758 F.2d at 1571 (emph. added).

CIGNA's petition thus vastly overstates the depth and legal significance of whatever disagreements exist among the circuits about the reliance or prejudice that plaintiffs need to show to obtain redress for a misleading SPD or SMM. To the extent that there is a division among the circuits, the outlier is the Eleventh Circuit, not the Second Circuit. Here, the District Court's findings that CIGNA's descriptions of the changes were "downright misleading" combined with the admission of CIGNA's counsel that they were "totally inadequate" are sufficiently strong that whatever disagreement there is among the other circuits about the precise wording of the standard, the *Amara* plaintiffs would satisfy it. In this circumstance, the Court should not reach out to decide an issue that was not briefed, argued, or passed upon below.

II. CIGNA also contends that this Court should review the Second Circuit's application of *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). Pet. at 23. CIGNA argues that the Second Circuit misapplied *Schoonejongen* when it affirmed a district court ruling that an SPD controls where the terms of a plan and the SPD conflict. *See* Pet. at 23. The Second Circuit first concluded that the "SPD controls" in the event of a conflict with a less favorable plan provision twenty years ago in *Heidgerd v. Olin Corp.*, 906 F.2d 903, 908 (2d Cir. 1990), and has affirmed that position

in seven other decisions.[7] Every circuit that has addressed the issue of SPDs that conflict with plan terms has reached the same conclusion.[8] In *Kennedy v. Plan Administrator for DuPont Sav. & Inv. Plan*, 129 S.Ct. 865, 877 (2009), this Court recently found it to be "uncontested that the SIP [Savings & Investment Plan] and the summary plan description are "documents and instruments governing the plan" and that "[t]hose documents provide that the plan administrator will pay benefits ... in a particular way. William's designation of Liv as his beneficiary was made in the way required; Liv's waiver was not."

To justify certiorari based on an appellate decision's conflict with Supreme Court precedent, the conflict must be "direct." *Lambert v. Wicklund*, 520

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[7] *American Federation of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 983 (1997); *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 135-36 (1999); *Layaou v. Xerox Corp.*, 238 F.3d 205, 211 (2001) (Sotomayor, J.); *Burke, supra*, 336 F.3d at 110; *Frommert, supra*, 433 F.3d at 265; *Bouboulis v. Transport. Workers*, 442 F.3d 55, 61 (2006); *Tocker, supra*, 470 F.3d at 487-88.

[8] *Bard v. Boston Shipping Ass'n*, 471 F.3d 229, 245 (1st Cir. 2006); *Burstein, supra*, 334 F.3d at 378 and 381 (3d Cir. 2003); *Blackshear v. Reliance Std. Life Ins. Co.*, 509 F.3d 634, 644 (4th Cir. 2007); *Washington v. Murphy Oil USA, Inc., supra*, 497 F.3d at 457 (5th Cir. 2007); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 249 (6th Cir. 1996), *cert. denied*, 519 U.S. 1059 (1997); *Spitz v. Tepfer*, supra, 171 F.3d at 448 (7th Cir. 1999); *Halbach v. Great-West Life and Annuity Ins. Co.*, 561 F.3d 872, 877 (8th Cir. 2009); *Bergt v. Ret. Plan. for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139, 1143-45 (9th Cir. 2002); *Chiles v. Ceridian Corp., supra*, 95 F.3d at 1515 (10th Cir. 1996); *McKnight v. Southern Life & Health Ins. Co., supra*, 758 F.2d at 1570 (11th Cir. 1985).

U.S. 292, 203 (1997). Here, CIGNA's argument that the precedents of eleven circuits are in "direct" conflict with *Schoonejongen* is based on a "loose reading" of that standard.[9] The question in *Schoonejongen* was whether the requirements in ERISA §402(b)(3), 29 U.S.C. §1102(b)(3), that every employee benefit plan have a "procedure for amending [the] plan" and a procedure "for identifying the persons who have authority to amend the plan"were satisfied. 514 U.S. at 78-79. *Schoonejongen* did not question the position that the "SPD controls" in the event of a conflict between an inadequate SPD and the Plan document. Indeed, *Schoonejongen* distinguished ERISA §402(b)(3) from ERISA's "reporting and disclosure" requirements, concluding that ERISA §402(b)(3) is "not part" of those rules, which require that "both" SPDs and "plan amendment summaries 'shall be written in a manner calculated to be understood by the average plan participant.'" *Id.* at 83-84.

III. Lastly, CIGNA contends that "at a minimum" this Court should hold its petition and GVR the case based on the resolution of *Conkright v. Frommert* (08-810). Pet. at 24-26. CIGNA contends that the district court should have "afford[ed] deference to the remedy that CIGNA proposed for the alleged [sic] deficiencies

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[9] "Lawyers ... are likely to regard any case they have lost in a lower court as necessarily in conflict with some Supreme Court decision or doctrine.... But such a loose reading ... does not satisfy the Court's own understanding of what constitutes a conflict of this nature. To justify a grant of certiorari, the conflict must truly be direct...." Eugene Gressman, *et al.*, *Supreme Court Practice*, 9th ed., at Ch. 4.5.

in its SPDs." *Id.* at 25. This argument is again one that CIGNA failed to make or preserve below. The District Court's decision on relief addressed the proposal to which CIGNA refers and explained why it is insufficient. Pet. App. at 197a-198a. On appeal, CIGNA never mentioned that proposal again, much less contended that the District Court failed to give it "the deference properly afforded" to its positions. Pet. at 25.

Conclusion

For the foregoing reasons, CIGNA's petition for a writ of certiorari should be denied.

Respectfully submitted,

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