No. 09-804

IN THE
Supreme Court of the United States

CIGNA CORPORATION AND CIGNA PENSION PLAN,
Petitioners,

v.

JANICE C. AMARA ET AL., 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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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Confronted with a direct and acknowledged circuit split, respondents concede, as they must, that the circuits are divided as to the showing that a participant in an ERISA-governed plan must make to recover benefits based on an inconsistency between the Summary Plan Description ("SPD") and the plan itself. *See* Opp. at 9 (acknowledging that the Second Circuit's "likely harm" standard is incompatible with the "individualized reliance standard" applied by other circuits). And while respondents attempt to minimize the depth of that split—and to suggest that the circuits' inconsistent positions have begun to converge—recent decisions demonstrate that, in fact, the split continues to deepen.

Indeed, less than three years ago, the Fifth Circuit identified "a *five*-way circuit split regarding whether an ERISA claimant needs to establish reliance and/or prejudice based on the conflicting terms of an SPD." *Washington v. Murphy Oil USA Inc.*, 497 F.3d 453, 458 n.1 (5th Cir. 2007) (emphasis added). That same year, the Eighth Circuit explicitly rejected the Second Circuit's "likely harm" standard, which the district court applied here to permit recovery without a showing that *any* member of the plaintiff class had relied upon or been prejudiced by CIGNA's allegedly deficient SPDs. *See Greeley v. Fairview Health Servs.*, 479 F.3d 612, 614 (8th Cir. 2007). In direct conflict with the decision below, the Eighth Circuit held that, "[i]n order for an employee to recover from his employer for a faulty SPD," the employee must "show he relied on its terms to his detriment." *Id.*

Such widespread disagreement about a question of vital importance to both plan sponsors and participants creates intolerable legal uncertainty that impairs the efficient administration of ERISA plans and undermines the uniformity that is the hallmark of ERISA's regulatory framework. This Court should grant review to ensure, as Congress intended, that there is a single, nationally uniform standard governing the SPD-based rights and obligations of ERISA plan sponsors and participants.

I. CIGNA PRESERVED THE QUESTION PRESENTED BELOW.

Respondents argue that review is not warranted because CIGNA purportedly failed to challenge the Second Circuit's "likely harm" standard below. Opp. at 3. Respondents' attempt to erect a procedural barrier to review is unavailing.

CIGNA argued consistently and repeatedly throughout the course of the proceedings below that a showing of "likely harm" is insufficient to permit recovery based on a deficient SPD and that each class member was instead required to make an individualized showing of reliance or prejudice to recover. During the liability phase of the district court proceedings, for example, CIGNA argued that, even if its SPDs were deficient, respondents were "not entitled to relief because they ha[d] failed to demonstrate injury" attributable to those deficiencies. Pet. App. 131a. In reliance on the Second Circuit's decision in *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004), the district court explicitly rejected that argument and held that recovery is appropriate where "a plan participant or beneficiary was *likely* to have been harmed as a result of a deficient SPD." Pet. App. 132a (internal quotation marks omitted).

In the remedial phase of the district court case, CIGNA similarly argued that a remedy could only be implemented if "an[ ] individual employee suffered likely prejudice" as a result of the allegedly deficient SPDs. Pet. App. 162a; *see also* CIGNA's Memo. on Individual Issues and Class Relief 2 n.1 ("At a minimum, a plan participant should be required to prove detrimental reliance before being entitled to benefits based on a flawed SPD. The First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits all have imposed a requirement that participants prove detrimental reliance or prejudice to state a claim based on a deficient SPD."). The district court rejected CIGNA's individualized remedial approach and refused to "require an individualized showing such as that requested by CIGNA, *even from the named Plaintiffs themselves*." Pet. App. 164a (emphasis added).

CIGNA continued to press this argument on appeal. As in the district court, CIGNA argued that "a participant is not entitled to a remedy upon a finding that he/she was not *actually harmed* by a deficient disclosure" and asserted that the district court erred when it awarded classwide relief "without considering each class member's own actual knowledge and factual circumstances." CIGNA's C.A. Opening Br. 33, 34 (emphasis added). CIGNA also explicitly drew the Second Circuit's attention to the fact that "some [circuits] require a showing of prejudice or detrimental reliance and others do not" and urged that the "issue [was] appropriate for consideration by the panel, or alternatively, for consideration by the Second Circuit en banc." *Id.* at 45 n.11. CIGNA further highlighted the conflict between *Burke*'s "likely harm" standard and this Court's precedent. *See id.* at 45 ("the holding in *Burke* is inconsistent with . . . the Supreme Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995)"). Indeed, re-

spondents' own briefing acknowledged that CIGNA was challenging the validity of the standard adopted by the Second Circuit in *Burke*. *See* Pls.' C.A. Response & Reply Br. 24 (CIGNA "argues that *Burke v. Kodak*, 336 F.3d 103 (2d Cir. 2003), should be overturned").

Respondents also fault CIGNA for "contend[ing]" below "that it should prevail under th[e] standard" articulated in *Burke* and for deciding not to seek rehearing en banc. Opp. at 3. But, it is wholly unremarkable—and certainly no barrier to this Court's review—that, in the face of binding circuit precedent adopting a "likely harm" standard, CIGNA argued both that the standard was erroneous and that, if the Second Circuit persisted in its application of such a standard, that CIGNA should nevertheless prevail. There is no requirement that a party confronted with adverse circuit precedent concede the futility of its case in the lower courts in order to preserve its right to review in this Court. Nor is there a requirement that a party undertake the time-consuming and almost invariably fruitless step of petitioning for en banc review of that circuit precedent before petitioning for review in this Court. *See, e.g.*, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (deciding an issue that the petitioner had lost in the lower court based on binding circuit precedent and that it had not sought to have reheard en banc). This is especially true where the decision below was a summary affirmance that is exceptionally unlikely to garner the attention of the en banc court.

The question on which CIGNA seeks this Court's review is thus squarely presented in this case—which affords the Court an ideal opportunity to resolve an important issue of ERISA interpretation that has hopelessly divided the lower courts.

II. THE CIRCUITS HAVE REACHED IRRECONCILABLE CONCLUSIONS ABOUT THE SHOWING THAT MUST BE MADE TO RECOVER BASED ON A DEFICIENT SPD.

Respondents also attempt to evade this Court's review by arguing that the acknowledged split in the circuits regarding the standard for SPD-based recoveries has narrowed in recent years. In fact, the opposite is true.

Since the Second Circuit decided *Burke* in 2003—and, in so doing, recognized that the "circuits are divided" as to the showing that must be made to recover based on a deficient SPD (336 F.3d at 112)—the circuit split implicated in this case has not only persisted but deepened. Numerous cases have reaffirmed the position of the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits that, "to secure relief on the basis of a faulty summary plan description, the claimant must show some significant reliance on, or possible prejudice flowing from the summary." *Greeley*, 479 F.3d at 614 (internal quotation marks omitted); *see also, e.g.*, *Morales-Alejandro v. Med. Card Sys., Inc.*, 486 F.3d 693, 699 (1st Cir. 2007); *Wilson v. Metropolitan Life Ins. Co.*, 183 F. App'x 286, 291 (4th Cir. 2006); *Schwartz v. Prudential Ins. Co. of Am.*, 450 F.3d 697, 699 (7th Cir. 2006); *Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1340 (11th Cir. 2006). Moreover, the contrary position that no showing of reliance or prejudice is required to recover based on a deficient SPD—followed only in the Third and Sixth Circuits at the time *Burke* was decided—has secured a third adherent, the Fifth Circuit, in recent years. *See Washington*, 497 F.3d at 458-59. In the face of these two divergent interpretations of ERISA, the Second Circuit has repeatedly reaffirmed its own unique position

that a plan participant need only show "likely harm"—rather than actual reliance or prejudice—to recover. *See, e.g., Weinreb v. Hosp. for Joint Diseases Orthopaedic Inst.*, 404 F.3d 167, 171 (2d Cir. 2005).

It should thus come as no surprise that, in the wake of *Burke*, courts have continued to acknowledge the existence of this division in lower-court authority. *See, e.g., Fenton v. John Hancock Mut. Life Ins. Co.*, 400 F.3d 83, 88 (1st Cir. 2005) ("Not all circuits have this [reliance] requirement"); *Washington*, 497 F.3d at 458 n.1.[1] And, the recent expansion of this split has exacerbated the already substantial legal uncertainty that confronts plan administrators seeking to draft SPDs and make benefit determinations, as well as ERISA litigants seeking to pursue and defend benefits claims in court. The reasons for this Court to grant review and provide an authoritative response to this sharply disputed question have therefore grown even more compelling in recent years.

Respondents do not seriously contest the existence of this extensive circuit split—nor could they plausibly do so. They instead contend that the split is not as widespread as this three-way division in authority would suggest because the Second Circuit's "likely harm" standard is purportedly "compatible" with the showing of reliance or prejudice required in the First, Fourth, Seventh, Eighth, Tenth, and Elev-

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[1] *See also* Jayne E. Zanglein & Susan J. Stabile, ERISA LITIGATION 755 (3d ed. 2008) ("Some courts do not require proof of reliance on the favorable SPD statement, thereby potentially converting the SPD statement into a 'plan term' enforceable as a claim for benefits under Section 502(a)(1)(b); however, other courts do require proof that the inaccurate SPD statement caused reliance and harm.") (citations omitted).

enth Circuits. Opp. at 8. But, in *Burke*, the Second Circuit itself explicitly considered—and *rejected*—the reliance-or-prejudice standard because, in its view, "requiring plan participants or beneficiaries to show detrimental reliance to recover for a deficient SPD contravenes ERISA's objective to promote distribution of accurate SPDs to employees." 336 F.3d at 106. For that reason, the Second Circuit required only the minimal showing that a plan participant was "*likely* to have been harmed as a result of a deficient SPD" (*id.* at 113)—a standard that is much closer to the strict-liability approach of the Third, Fifth, and Sixth Circuits than to the showing of reliance or prejudice required by the majority of circuits that have addressed the issue. *See also Greeley*, 479 F.3d at 614 (rejecting the "likely prejudice" standard in favor of a showing of reliance or prejudice). The district court reiterated the point in this case when it rejected CIGNA's argument that, "'a plan participant should be required to prove detrimental reliance before being entitled to benefits based on a flawed SPD'" because that "position" was "contrary to Second Circuit precedent." Pet. App. 165a n.1 (citing *Burke*, 336 F.3d at 112).

Respondents are therefore wrong when they contend that, whatever the remedial standard applied in this case, they "would satisfy it." Opp. at 10. There is a vast practical difference between the Second Circuit's "likely harm" standard and the reliance-or-prejudice standard applied in six other circuits. Indeed, the district court made clear that a plaintiff need not have even read a deficient SPD to satisfy the "likely harm" standard and refused to require an "individualized showing" of harm from any member of the plaintiff class. Pet. App. 164a; *see also id.* at 167a (rejecting CIGNA's argument "that employees

who received but did not read the misleading notices and disclosures should be considered not to have demonstrated likely harm"). In contrast, courts that apply the reliance-or-prejudice standard require each individual plaintiff seeking relief to prove harm from the deficient SPD. *See Heffner*, 443 F.3d at 1344 ("in order to be entitled to relief each class member must prove that he relied on the . . . plan's SPD"); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996) (requiring "each individual" in a class action to demonstrate reliance on or prejudice flowing from a deficient SPD). Respondents did not even attempt to make such an individualized showing in this case and instead rested their case exclusively upon the Second Circuit's "likely harm" approach. That manifestly flawed standard—which facilitates the recovery of windfall benefits by participants who may not have even read a deficient SPD—should be conclusively rejected by this Court.[2]

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[2] The Second Circuit's "likely harm" standard is also inconsistent with this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), which makes clear that an SPD can only modify the terms of a plan where its publication satisfies the plan's formal amendment procedures. *Id.* at 83-85. The publication of CIGNA's SPDs did not satisfy the Plan's amendment procedures and thus, under *Curtiss-Wright*, could not have modified the terms of the Plan. Neither the Second Circuit—nor any other circuit that has awarded benefits based on a deficient SPD—has made a meaningful attempt to reconcile its decision to award additional benefits with the holding of *Curtiss-Wright*. Moreover, this Court has not hesitated to grant certiorari to reject an erroneous position unanimously adopted by the circuits. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001); *Jones v. United States*, 526 U.S. 227 (1999).

III. IN THE ALTERNATIVE, A GVR IN LIGHT OF *CONKRIGHT V. FROMMERT* IS WARRANTED.

In the event the Court does not grant plenary review, it should GVR this case in light of *Frommert*. Respondents do not contest the relevance of *Frommert* to the question whether the district court failed to afford proper weight to the views of CIGNA as "de facto" plan administrator when crafting the so-called "A+B" remedy. Respondents instead contend that CIGNA failed to preserve this issue on appeal. But, in the Second Circuit, CIGNA vigorously challenged the district court's award of additional benefits to respondents. CIGNA's C.A. Opening Br. 21-48. And, it did so on the ground that, in granting "A+B" benefits to respondents, the district court improperly "awarded . . . more benefits than they were told they could get under the Plan." *Id.* at 22 (emphasis omitted).

The Second Circuit nevertheless summarily affirmed the district court's remedy. Pet. App. 4a. If this Court holds in *Frommert* that district courts are required to afford deference to a plan administrator's interpretation of a plan rendered outside the benefit-determination setting, the lower courts should be required to reconsider the validity of awarding additional benefits in light of CIGNA's interpretation of the benefits provided by the Plan.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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