No.

In The
Supreme Court of the United States

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

Petitioners,

v.

CIGNA CORPORATION AND CIGNA PENSION PLAN,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents two questions related to the questions currently before the Court on certiorari in *Conkright v. Frommert*, No. 08-810 (oral argument scheduled for January 20, 2010):

1. Whether a district court, after finding violations of the advance notice of reduction requirement in ERISA §204(h), errs in concluding that it lacks the authority to require the prior benefit provisions to be reinstated.

2. Whether a district court, after finding that participants were promised "comparable" or "larger" future retirement benefits in a Summary of Material Modification that ERISA §102 requires to be accurate and understandable to the average plan participant, errs in concluding that it lacks the authority to require at least "comparable" future benefits to be provided.

PARTIES TO THE PROCEEDINGS

The petitioners 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.

The respondents are the CIGNA Corporation and the CIGNA Pension Plan.

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PETITION FOR A WRIT OF CERTIORARI

On behalf of Janice C. Amara, Gisela R. Broderick, and Annette S. Glanz, and the members of the certified class in *Amara, et al. v. CIGNA Corp., et al.*, the undersigned counsel petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, at 1a-3a) is at 2009 WL 3199061. The opinion of the district court on relief (App., 4a-75a) is reported at 559 F.Supp.2d 192, and the opinion of the district court on liability (App., 76a-244a) is reported at 534 F.Supp.2d 288.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2009. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act ("ERISA") provides, in relevant part, that:

1. A pension plan "may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth

the plan amendment and its effective date." ERISA §204(h), 29 U.S.C. 1054(h) (as in effect before 2001). The Treasury regulations promulgated thereunder allow a summary of the amendment to be furnished to participants "if the summary is written in a manner calculated to be understood by the average plan participant." Treas. Reg. 1.411(d)-6, Q&A-10 (1998).

2. A summary of any material modification in the terms of the plan shall be furnished no later than 210 days after the close of the plan year that describes the modifications in a sufficiently accurate manner to be understood by the average plan participant. ERISA §§102 and 104(b)(1), 29 U.S.C. 1022 and 1024(b)(1); 29 C.F.R. 2520.104b-3(a).

ERISA contains two sections related to civil enforcement of these rules:

1. A civil action may be brought by a participant or beneficiary to recover benefits due under the terms of his plan or to enforce his rights under the terms of the plan. ERISA §502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B).

2. A civil action may be brought to enjoin any act or practice which violates any provision of this title or the terms of the plan, or obtain other appropriate equitable relief to redress such violations or to enforce any provisions of this title or the terms of the plan. ERISA §502(a)(3), 29 U.S.C. 1132(a)(3).

STATEMENT

1. This case presents two questions related to the questions currently before the Court on certiorari in *Conkright v. Frommert*, No. 08-810, concerning a district court's "allowable discretion ... in the course of calculating additional benefits due under [a] plan as a result of an ERISA violation." The purpose of this petition is to allow the Court to dispose of this case following its ruling on the merits in *Conkright*.

2. Janice C. Amara filed this lawsuit on December 19, 2001 as a proposed class action against CIGNA Corp. and the CIGNA Corp. Pension Plan concerning CIGNA's conversion of its traditional defined benefit pension formula to a cash balance formula. Gisela R. Broderick and Annette S. Glanz were added as additional named representatives on February 17, 2006.

3. The Complaint alleges that the conversion of the retirement plan to a cash balance formula significantly reduced future rates of retirement benefit accruals and created periods of "wear-away" during which employees do not earn any additional pension benefits at all. Plaintiffs alleged that CIGNA violated ERISA by failing to disclose the significant benefit reductions, the wear-aways and other disadvantages of the amended plan to employees in an ERISA-required Section 204(h) notice or a Summary of Material Modification ("SMM").

4. On December 20, 2002, the District Court certified a class of over 27,000 current and former

CIGNA employees. DA-70.

5. After a seven-day bench trial in September 2006, and January 2007, with over 500 exhibits and sixteen witnesses, the District Court found in a 122-page decision issued on February 15, 2008 (the Liability Decision) that CIGNA violated ERISA's disclosure requirements by failing to disclose the significant reductions and instead making misleading statements that future benefits would be comparable or larger than those under the prior benefit formula. App. 183a-187a, 242a.

6. The District Court found that CIGNA described the conversion as an "enhancement" that offered "comparable" or "larger" retirement benefits, with no "cost savings" for CIGNA, in a series of communications to participants, including a November 1997 Newsletter, a December 1997 Retirement Information Kit, and two nearly-identical Summary Plan Descriptions distributed in 1998 and 1999. App. 103a–115a, 185a-188a. In the litigation, CIGNA described the November 1997 Newsletter as its ERISA §204(h) notice and the December 1997 Retirement Information Kit as a Summary of Material Modification under ERISA §102. *Id.* at 183a, 195a.

7. The District Court found that, at the time these written representations were made, CIGNA knew the changes were going to significantly reduce the employees' future retirement benefits and provide substantial cost savings to CIGNA. App. 180a-182a. CIGNA specifically instructed its communications contractors and key benefits personnel to refuse to

provide accurate comparative information in written communications or in response to individual inquiries. App. 193a.

8. The District Court held that "in effectuating the conversion to the cash balance plan, CIGNA did not give a key notice to employees that is required by ERISA; and CIGNA's summary plan description and other materials were inadequate under ERISA and in some instances, downright misleading." App. 79a. The District Court found that "the transition to Part B worked a significant reduction in the rate of future benefit accrual, meaning that a §204(h) notice was due." *Id.* at 30a. The District Court determined that "CIGNA was aware of the significant reduction in the rate of future benefit accrual" but "misled plan participants into believing that significant reductions in the rate of future benefit accrual were not a component or a possible result of Part B." *Id.* at 185a, 195a.

9. The District Court determined that "CIGNA wished to avoid the employee backlash likely to result from a thorough discussion of these aspects of Part B, and that CIGNA sought to negate the risk of backlash by producing affirmatively and materially misleading notices regarding Part B." App. 195a. "CIGNA chose not to inform its employees about [the true] effects in order to ease the transition to a less favorable retirement program" and "avoid the employee backlash likely to result." *Id.* at 192a-193a, 195a.

10. The District Court concluded that "CIGNA's successful efforts to conceal the full effects of the

transition to Part B deprived plaintiffs of the opportunity to take timely action in response to the purported amendment," App. 219a, and held that under *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004), participants were "likely prejudiced" or harmed by the defects in disclosure and that CIGNA did not provide any evidence of harmless error to rebut that presumption. *Id.* at 219a and 6a-12a.

11. The District Court specifically rejected CIGNA's argument that no ERISA §204(h) violation occurred because CIGNA had technically frozen the prior formula prior to adopting the reduction in future benefits. The District Court found that "CIGNA made clear from the outset that its intent was to shift directly from Part A to Part B, with the freeze only as an interim stopgap." App. 178a. The Court held that "[p]ermitting employers to avoid these important obligations simply by exploiting the technicality of 'freezing' old benefits before retroactively instituting new ones runs diametrically opposite to th[e] purpose" of Section 204(h), "namely to protect employees' interests and their reasonable expectations." *Id.* at 179a. In fact, CIGNA's SMM described the cash balance benefits "in comparison with" the benefits offered under the prior formula, *id.* at 186a-187a, 219a, and the amended Plan document expressly provided that the terms of the Plan "prior to January 1, 1998" are the "Part A" terms. DA-123, §§1.39-1.40.[1]

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[1] The "Part A" provisions also continued to be effective until March 31, 2008 for several thousand "grand-fathered"

12. Following additional briefing and argument, the District Court issued a separate decision on relief (the Relief Decision) on June 13, 2008. In that decision, the Court followed *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006) ("*Frommert I*"), in ruling that relief could be provided under ERISA §502(a)(1)(B). App. 23a-30a. To remedy CIGNA's failure to disclose the periods of "wear-away," the Court ordered CIGNA to implement an "A+B" formula under which the cash balance credits must yield a positive addition to the participant's previously-earned retirement benefits. The Court also ordered CIGNA to "belatedly" notify everyone, including rehires and retirees, about "the true effect on their retirement benefits of the transition to Part B" and separately directed that relief be provided for CIGNA's violations of the "relative value" disclosure rules. App. 42a.

13. However, despite having found that CIGNA violated ERISA §204(h)'s notice rule not only by omission but by affirmatively misleading statements, the District Court declined to reinstate participants to the prior plan formula or provide restitution for past due payments. Because of the "nominal" freeze that the Court previously "ignore[d]" as a "technicality," App. 37a, 178a-179a, the Court ruled that substantive relief was an "impossibility." *Id.* at 42a. Because CIGNA had placed a nominal freeze between the prior plan provisions and the permanent cash balance reductions "essentially as a "placeholder," *id.* at 35a, the Court held that the status quo ante was a freeze:

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employees. App. 38a, 88a.

"[T]he apparently exclusive remedy of invalidation" would require "a return not to a viable benefit plan, but to a freeze, " *Id.* at 39a-41a ("plan participants would return to a frozen Part A, rather than Part A itself .... As a result, plan participants would gain nothing, and CIGNA would face a minor inconvenience, but little else").

14. Simultaneously, the District Court again recognized that the freezing of Part A after December 31, 1997 "served essentially as a placeholder, and was intended to disappear once Part B became operative." App. 35a, 37a. The District Court also acknowledged that by "not ordering the invalidation of Part B, the Court has permitted CIGNA effectively to eviscerate the notice requirements of §204(h)....Such an outcome is particularly troublesome because, as the Court found in its Liability Opinion, CIGNA never intended the freeze to be permanent." *Id.* at 40a-41a. The District Court also recognized that the "leverage" to ensure that companies comply with ERISA's requirements for full and timely disclosure of benefit reductions is the "realistic possibility" of "returning" to the prior benefit formula if the notice is inadequate or misleading. *Id.*

15. The District Court further declined to provide any reparative relief for the misleading representations in CIGNA's Summary of Material Modification that participants would receive "comparable" or "larger" benefits. The Court stated that it believed that those violations could only be remedied if it were "entirely to rewrite the Plan's provisions, with no clear guidance from the Plan itself

or the relevant notices and disclosures" and held that "the Court does not have such authority." App. 49a-51a.[2]

16. At the beginning and end of the Relief Decision, the District Court emphasized its "considerable uncertainty regarding the proper resolution of many of the issues addressed" and "the lack of clear guidance" on the resolution of those issues and, accordingly, stayed its judgment *sua sponte* pending "further guidance" from the Second Circuit. App. 5a,72a. The District Court specifically discussed its "considerable uncertainty" about the relief for the §204(h) violation and described that outcome as "particularly troublesome." App. 39a, 41a.

17. During the appellate argument on May 21, 2009, CIGNA's counsel conceded that the disclosures were "totally inadequate" and that CIGNA's "notice here failed." However, after certiorari was granted on June 29, 2009 in *Conkright* on a district court's "allowable discretion" in remedying "an ERISA violation," the Second Circuit summarily affirmed the District Court's declination to provide relief for the §204(h) violations and the misleading representations in the SMM about "comparable" or "larger" benefits.[3]

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[2] The District Court said that Plaintiffs "concede[d] that the Court does not have such authority," but Plaintiffs' position was that the Court could provide the requested relief without "rewriting" the Plan or it could reinstate the prior formula.

[3] One of the members of the *Amara* panel wrote the opinion in *Frommert v. Conkright* on which certiorari was granted.

The summary affirmance properly describes the issues of whether "the district court erred in:

> 1) concluding that it lacked the authority to provide complete relief for defendants-appellees' ERISA violations;
>
> 2) failing to require prior benefit provisions to be reinstated until proper notice of reductions was provided; [and]
>
> 3) failing to require CIGNA to pay comparable benefits to affected participants until proper notice was provided."

App. 2a. After setting out the issues, the summary affirmance simply concludes, with no other explanation, that "[w]e affirm the judgment of the district court for substantially the reasons stated in Judge Kravitz's two well-reasoned and scholarly opinions." *Id.* at 3a.[4] The "guidance" that Judge Kravitz requested to address his "considerable uncertainty" with the "particularly troublesome" outcome was not provided.

18. In *Frommert I*, supra, the Second Circuit determined that Xerox violated ERISA §204(h) when it amended its retirement plan in 1998 to "clarify" a phantom offset without disclosing the amendment to its employees. The Second Circuit ruled that the

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[4] The Court of Appeals summarily denied CIGNA's cross-appeal on the same basis.

failure to disclose the amendment in advance as required by §204(h) made the amendment "ineffective." 433 F.3d at 266 and 268.

19. The Second Circuit found that because the violations affected a closed group of participants who were rehired before a new SPD was distributed in 1998, which fully disclosed the phantom offset, "sweeping relief" under ERISA §502(a)(3) was not "warranted" and that "the necessary remedies can be *fully* provided under [ERISA] §502(a)(1)(B)." *Id.* at 269-70 (emph. added). The Second Circuit then remanded the case with directions to the District Court that:

> [T]he remedy crafted for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. We recognize the difficulty that this task poses because of the ambiguous manner in which the pre-amendment terms of the Plan described how prior distributions were to be treated. As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Id. at 268.

20. On remand, the District Court issued a decision, after considering relief proposals from both parties, in which it found that "there was no description whatsoever as to the mechanics of this so-

called phantom account" in the "non-duplication" provision, e.g., no description of a rate of interest or a mechanism for calculating a phantom offset. 472 F.Supp.2d 452, 457-58 (W.D.N.Y. 2007). The District Court concluded that in these circumstances the offset should be the "nominal value" of the prior distributions. *Id.*

21. The Xerox Defendants appealed and in *Frommert v. Conkright (Frommert II),* 535 F.3d 111, 123 (2008), the Second Circuit affirmed the District Court's decision "crafting a remedy for the identified ERISA violations." The Second Circuit held that:

> The District Court had discretion to design a remedy to provide Plaintiffs-Appellees with the proper level of pension benefits in light of the ERISA violations we identified in our prior decision. As Defendants-Appellants wrote a pension plan that addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence, we see no problem with the District Court's selection of one reasonable approach among several reasonable alternatives.

Id. at 119.

22. On November 20, 2009, the *Amara* plaintiffs (joined by the Pension Rights Center) filed an amicus curiae brief in support of the respondents in *Conkright v. Frommert,* submitting that the Second Circuit's instructions were essentially correct. The *Amara*

plaintiffs-petitioners maintain that the same type of instruction should have been issued to address the District Court's "considerable uncertainty" about the resolution of the relief issues and confirm that the District Court has the discretion to provide appropriate relief consistent with the statutory purposes, rather than reach the "particularly troublesome" outcome of providing no relief.

REASONS FOR GRANTING THE PETITION

The questions presented by this petition are closely related to those before the Court in *Conkright v. Frommert*, No. 08-810 (oral argument scheduled for January 20, 2010). The Court's resolution of the question in *Conkright* about the district court's "allowable discretion" in "calculating additional benefits due under the plan as a result of an ERISA violation" could affect the proper disposition of this case. Accordingly, petitioners ask this Court to hold the petition for proper disposition following the Court's ruling in *Conkright*.

When it has been proven, as here, that a company has violated the disclosure requirements of ERISA, it is critical to the retirement security of the employees who participate in such plans that the federal courts are authorized to afford appropriate remedies. The District Court in *Amara* had two ways to provide appropriate redress for the disclosure violations that it found in its Liability Decision: (1) reinstate the prior benefit formula to provide relief for the ERISA §204(h) notice violation until CIGNA provided the required notice of a significant reduction in future benefits, or

(2) require CIGNA to keep the promises in the Summary of Material Modifications of "comparable" or "larger" benefits with no "cost savings" to CIGNA. The District Court declined to do either one, while expressing "considerable uncertainty" about this "particularly troublesome" outcome and asking for "further guidance" from the Second Circuit.

Approximately one month after the oral argument in *Amara*, the petition for certiorari in *Conkright v. Frommert* was granted. *Conkright* presents the question of a district court's "allowable discretion ... in the course of calculating additional benefits due under the plan as a result of an ERISA violation." In *Conkright*, the Second Circuit instructed the district court to determine "which of [the] various proposed remedies was the most fair and equitable." 535 F.3d at 118-19. On appeal of the decision on remand, the Second Circuit concluded that the District Court acted within its "allowable discretion" in "design[ing] a remedy to provide Plaintiffs-Appellees with the proper level of benefits in light of the ERISA violations we identified in our prior decision." 535 F.3d at 119.

Like *Conkright,* the *Amara* case concerns violations of ERISA's disclosure rules and a district court's authority in providing remedies for the violations. In *Amara*, however, the District Court concluded that it lacked the authority to determine "which of [the] various proposed remedies was the most fair and equitable." 535 F.3d at 118-19. Instead, the District Court declined to provide any reparative remedies for two violations. At the same time, the Court expressed "considerable uncertainty" with that outcome and

sought "further guidance" from the appellate court. After certiorari was granted in *Conkright*, the Second Circuit summarily affirmed, without providing the District Court with the guidance that it sought. This Court's resolution of *Conkright* is likely to supply the appropriate analysis of the district courts' allowable discretion in fashioning remedies for statutory violations.

I.

No one disputes that a district court's choice of remedies for statutory violations is reviewed for an excess of allowable discretion. "As a general matter, a district court is afforded broad discretion to enter that relief it calculates will best remedy the conduct it has found to be unlawful." *United States v. Microsoft Corp.*, 253 F.3d 34, 105 (D.C. Cir. 2001). The standard of review for the district court's "chosen remedy" is "for an excess of allowable discretion." *Frommert II*, supra, 535 F.3d at 117.[5] However, "[d]etermining what remedies are available under a statute is a question of statutory interpretation that requires de novo review." *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 305 (3d Cir. 2008). In *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996), this Court stated, "We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a

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[5] See also *Cook v. Liberty Life Assurance Co.*, 320 F.3d 11, 24 (1st Cir. 2003); *Grossmuller v. UAW, Local 813*, 715 F.2d 853, 859 (3d Cir. 1983); *Halpin v. W.W. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (9th Cir. 2001).

remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law."

As in *Varity*, ERISA's disclosure obligations are at issue in this case and in *Conkright*. Congress enacted ERISA's disclosure requirements to further "ERISA's central goals" of ensuring that participants are fully informed of their "rights and obligations" under the benefit programs in exchange for which they provide their services. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). As part of ERISA's regulatory scheme, ERISA §§204(h) and 102 effectively offer built-in remedies for violations. ERISA §204(h) makes an amendment that significantly reduces future retirement benefits ineffective "unless" the statutory notice requirements are satisfied. See, e.g., *Frommert I*, 433 F.3d at 268; *Hurlic v. So. Cal. Gas*, 539 F.3d 1024, 1038 (9th Cir. 2008); *Production & Maintenance Employees' Local 504 v. Roadmaster*, 954 F.2d 1397, 1404 (7th Cir. 1992). Similarly, ERISA §102, 29 U.S.C. 1022, requires an accurate summary of any material modification to the plan to be furnished that is written in a manner calculated to be understood by the average plan participant. See, e.g., *Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986). As this Court found in *Kennedy v. Plan Administrator for DuPont Sav. & Investment Plan*, 129 S.Ct. 865, 877 (2009), the statements in an ERISA-required summary are part of the "documents and instruments governing the plan."

In his treatise, Professor Dobbs observes that "when the statutory scheme permits only equitable relief ... denial of that relief would be a denial of the right granted by the statute." *Law of Remedies*, §2.4(7). For this reason, a district court's discretion is rarely unfettered, but is constrained by the statutory text, the statutory objectives, and any regulations to remedies that do not effectively allow that which the statute prohibits. See, e.g., *Varity*, supra, 516 U.S. at 515; *Albemarle Paper v. Moody*, 422 U.S. 405, 416-17 (1975) (a district court's discretionary decision to fashion relief must "be measured against the purposes which inform" the statute); *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 (1989) ("discretion is rarely without limits"; even if "the text of the provision does not specify any limits upon the district courts' discretion" limits may be found in "the large objectives" of the Act).

Thus, where the "equitable jurisdiction" of the court is "properly invoked," the district court has "the power to decide all relevant matters in dispute and to award complete relief." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398-99 (1946); accord, *Mitchell v. De Mario Jewelry*, 361 U.S. 288, 291-92 (1960) (recognizing "historic power of equity to provide complete relief in light of the statutory purposes"). In *Albermarle Paper v. Moody*, supra, 422 U.S. at 416-17, this Court held that a district court's decisions in fashioning relief, while discretionary, "must be measured against the purposes which inform" the statute:

> [T]here may be cases calling for one remedy but not another, and– owing to the structure of the federal judiciary– these choices are, of course, left in the first instance to the district courts. However, such discretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles." ... In *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 292 (1960), this Court held, in the face of a silent statute, that district courts enjoyed the 'historic power of equity' to award lost wages to workmen unlawfully discriminated against under §17 of the Fair Labor Standards Act of 1938.... The Court simultaneously noted that "the statutory purposes [leave] little room for the exercise of discretion not to order reimbursement." 361 U.S. at 296.

In its brief in support of the respondents in *Conkright*, the Solicitor General also offers an excellent summary of the "pre-existing trust law" to which *Varity* refers:

> "Where the court finds that there has been an abuse of a discretionary power, the decree to be rendered is in its discretion." George Gleason Bogert & George Taylor Bogert, *The Law of Trusts & Trustees* § 560, at 222 (rev. 2d ed. 1980) (Bogert). The court may exercise that discretion either by ordering the trustee to make "a new decision in the light of rules expounded by the court," or by "decid[ing] for

> the trustee how he should act," including "by stating the exact result [the court] desires to achieve." *Id.* at 222-223; see Third Restatement § 50 & cmt. b at 258, 261.
>
> Courts often choose to direct how the trustee should act when they conclude that the trustee did not exercise his discretion "honestly and fairly." 3 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 18.2.1, at 1348 (5th ed. 2007) (Scott); see, *e.g.*, *Collister* v. *Fassitt*, 57 N.E. 490, 493-494 (N.Y. 1900). But contrary to petitioners' contention (Br. 39-46), courts also frequently direct trustees to take specific actions without finding that they engaged in "fraud, bad faith, or dishonesty." Br. 39.

Brief for the United States as Amicus Curiae Supporting Respondents in *Conkright v. Frommert*, 08-810, at 15-16 (filed November 20, 2009).

II.

As a result, if ERISA §§204(h) and 102 were violated, as the District Court clearly found here in its extraordinarily thorough 122-page decision, the District Court's allowable discretion does not extend to allowing the "ineffective" or misrepresented modification to continue. Such an outcome is inconsistent not only with ERISA's purposes, but other notice statutes like COBRA and the Worker Adjustment and Retraining Notification (the "WARN")

Act.[6] Like ERISA §204(h), the notice requirements in COBRA and the WARN Act cannot remedy misconduct, or deter it, unless the courts are authorized to undo the wrongs that are committed. See, e.g., *Smith v. Rogers Galvanizing Co.*, 128 F.3d 1380, 1383-85 (10th Cir. 1997) (affirming award of retroactive insurance coverage when COBRA "notice was inadequate"); *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1158-59 (9th Cir.), *cert. denied*, 534 U.S. 973 (2001) (holding that the WARN Act "is a wage worker's equivalent of business interruption insurance [that] protects a worker from being told on payday that the plant is closing that afternoon and his stream of income is shut off").

Although the District Court appears to have seen it as an obstacle, the fact that the invalidation of a trust or contract provision by a common law or statutory rule leaves some uncertainty as to the appropriate relief is not unusual. Judges and juries frequently grapple with appropriate relief when trust or contract provisions are invalidated by common law or statutory rules. It is black-letter trust and contract law that the remedy for a breach of trust or contract is to put the beneficiary in the position he would occupy if the breach had not occurred. See, e.g., *Donovan v.*

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[6] COBRA was enacted in the same legislation as ERISA §204(h) and the WARN Act was enacted only two years later. See P.L. 99-272 (COBRA), §§10002(a) and 11006, and P.L. 100-379 (WARN Act), §5; see also *Geissal v. Moore Med. Corp.*, 524 U.S. 74, 79-80 (1998).

Bierwirth, 754 F.2d 1049, 1056 (2d Cir. 1985); *Res. (Second) of Contracts*, 347 cmt a.

In these circumstances, the district court's expression of "considerable uncertainty" about its discretion to remedy the ERISA §§204(h) and 102 violations was not properly addressed by a summary affirmance, but should have been addressed with guidance on the district court's authority in light of "the language of the statute, the Act's purposes, and pre-existing trust law." *Varity*, supra, 516 U.S. at 515. As shown above, that guidance should have affirmed that where the "equitable jurisdiction" of the court is "properly invoked," the district court has "the power to decide all relevant matters in dispute and to award complete relief." *Porter v. Warner Holding Co.*, supra, 328 U.S. at 398-99.

III.

The District Court found in *Amara* that CIGNA had violated the advance notice requirement in ERISA §204(h), not only by omitting notice of the reductions but by affirmatively and knowingly misleading employees that their future retirement benefits would be "comparable" or "larger" than those they earned before. However, at the relief stage, the District Court declined to offer a substantive remedy for the violation on the ground that the only option was "a return not to a viable benefit plan, but to a freeze." App. 39a. According to the Relief Decision, "returning to [the] Part A" benefit formula was an "impossibility." *Id.* at 42a.

As indicated above, the District Court's Liability Decision flatly rejects CIGNA's argument that this transitional freeze was the immediately preceding benefit formula. The District Court found that "CIGNA made clear from the outset that its intent was to shift directly from Part A to Part B, with the freeze only as an interim stopgap," and held that "[p]ermitting employers to avoid these important obligations simply by exploiting the technicality of 'freezing' old benefits before retroactively instituting new ones runs diametrically opposite to th[e] purpose" of Section 204(h). App. 178a-179a. The Relief Decision recognizes the inconsistency with both the Liability Decision and the statutory purposes and acknowledges that this "particularly troublesome" outcome is "effectively to eviscerate" the statute. App. 40a-41a.

The only other reason the District Court offered for declining to provide relief was that it would be "extremely costly" for CIGNA to "extend Part A to as many as ten or twenty thousand additional employees." App. 38a. However, Congress clearly envisioned that the remedies for ERISA §204(h) violations could be costly because the statutory protection is limited to "significant" reductions in future pension benefits. The pension benefits that would be reinstated by the remedy of invalidation are simply the ones that CIGNA's employees earned before the cash balance conversion, the costs of which "are inseparable incidents of the plaintiff's right" under ERISA §204(h). See Dobbs, *Law of Remedies* (2d ed.), §2.4(5) ("Some hardships to the defendant are inseparable incidents of the plaintiff's right" compared

to situations where the "hardship to the defendant far exceeds the benefit to which the plaintiff is entitled"). Thus, this is not a case where a judge's or jury's authority could result in an award that is disproportionate to the harm done by the violations. Compare *BMW of N. Am. v. Gore*, 517 U.S. 559, 582 (1996) ($2 million punitive damage award to respondent was "500 times the amount of his actual harm as determined by the jury").[7]

IV.

The District Court also declined to provide a remedy for CIGNA's promises in its Summary of Material Modification of "comparable" or "larger" retirement benefits on the ground that this would require it "entirely to rewrite" the Plan, which "the Court does not have [the] authority" to do. App. 50a-51a. In the oral argument on relief, the District Court questioned whether "it is within even my equitable power to say ... comparable means 90 percent of Part A." Tr. 1817.

While the term "comparable" obviously confers some degree of latitude, it is not too indefinite to enforce but is routinely construed to mean "at least equal" or "substantially equivalent." For example, in *Fruin v. Colonnade One at Old Greenwich Ltd. P'ship*,

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[7] On the upper end, relief for violations of ERISA's statutory provisions is constrained by this Court's holding in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 , 144 (1985), that extracontractual damages are not permitted.

662 A.2d 129 (Conn. App. 1995), a contract set a $255,000 purchase price for a condominium but included a provision that would match the lower sale price of a unit with "comparable" footage. The Plaintiff sought to rescind the sales agreement because the term "comparable" was "not definite enough" and "makes it impossible to calculate the purchase price." *Id.* at 133. The court affirmed the trial court's decision that the contract was not void because the price of the unit could be "ascertained with reasonable certainty." *Id.* at 134.

The term "comparable" is not only used in business agreements, but is frequently used in employment law. In *Adams v. Wyoming*, 975 P.2d 17, 19-20 (Sup.Ct.Wyo. 1999), the issue was whether a post-injury wage which was 89% of the pre-injury wage was a "comparable or higher wage," a term that the State's worker's compensation statute did not define. The court looked at the dictionary meaning of comparable, how the term was defined in other legislation, and the purpose of the statute and concluded that "comparable means substantially equal or equivalent." Accord, *Carpenter v. Arkansas Best Corp.*, 810 P.2d 1221, 1222 (Sup.Ct.NM 1991) ("comparable means 'substantially equal' or 'equivalent' in light of what we think the statute is trying to accomplish"; 84% was *not* a "comparable wage").

In the context of ERISA, corporate merger and acquisition agreements often require "comparable" benefits. No one suggests that these terms cannot be

enforced without "entirely ... rewrit[ing]" the Plan. See, e.g., *Halliburton Co. Benefits Committee v. Graves*, 463 F.3d 360, 365 and 378 (5th Cir. 2006) (under merger agreement surviving company had to continue "substantially comparable" benefits for similarly situated active employees); *Elmore v. Cone Mills Corp.*, 6 F.3d 1028, 1031 n.3 (4th Cir. 1993) (in buyout negotiations, employer promised retirement benefits "at least comparable" to current plans); *Belland v. PBGC*, 726 F.2d 839, 841 (D.C. Cir. 1984) (employees to receive benefits "comparable" to former plan under collective bargaining agreement); *Livernois v. Warner-Lambert Co.*, 723 F.2d 1148,1151 n.3 (4th Cir. 1983) (in contract to provide "comparable benefits," "'comparable' means 'at least equal'").

Many severance pay plans also deny benefits to employees who are offered "comparable" positions by acquiring companies. Some of those plans define the term "comparable," while others leave it undefined. Again, no one suggests that these terms can only be enforced by "entirely ... rewrit[ing]" the plan. See, e.g., *Campbell v. BankBoston*, 327 F.3d 1, 3 (1st Cir. 2003) ("comparable employment" defined as "one with a base salary within 10% of the current job"); *Adams v. Thiokol Corp.*, 231 F.3d 837, 841 and 845 (1st Cir. 2000) ("comparable job" was "one that is within 10% of your current pay or one that is more than your current pay"); *Easterly v. Philips Elecs. N. Am. Corp.*, 37 Fed. Appx. 166, 170 (6th Cir. 2002) ("Comparable employment is defined as any position that allows the employee to retain their current salary"); *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 931 (10th Cir. 1992)

(plaintiffs obtained "comparable" jobs where they retained same positions and salaries with only "minor" differences in benefits); *Yochum v. Barnett Banks Inc.*, 234 F.3d 541, 546 (11th Cir. 2000) (reversing determination that executive was offered "comparable employment" when term was defined to mean "equivalent compensation and benefits"); *Kolkowski v. Goodrich Corp.*, 448 F.3d 843, 852-53 (6th Cir. 2006) (employee entitled to severance benefits when he was not offered "at least comparable" benefits).[8]

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[8] Congress and the courts have also used the term "comparable" in other employment-related statutes. Under Title VII, employees have a duty to mitigate damages by locating "comparable" employment, which is defined as "virtually identical" employment. See *Palasota v. Haggar Clothing Co.*, 499 F.3d 474, 486 (5th Cir. 2007); *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983); *Hutchison v. Amateur Elec. Supply*, 42 F.3d 1037, 1044 (7th Cir. 1994).

Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301, et seq., and 20 C.F.R. 1002, et seq, individuals who leave civilian employment to undertake military service are entitled to be reemployed in their civilian job or a "comparable" or "similar" position. 20 C.F.R. 1002.192. They are also required to receive the same non-seniority rights and benefits as the employer provides for "comparable" non-military leave. 20 C.F.R.1002.150. Accord *United States v. Clark*, 454 U.S. 555, 556 (1982) (under "prevailing wage" system for Federal blue-collar employees, rate of pay is based on prevailing wage rate for "comparable" work in local areas).

V.

Thus, petitioners respectfully submit that the obstacles to relief that the District Court found were ones that it clearly had the discretion to overcome: First, the Court's determination at the relief stage that a "stopgap" freeze insulated CIGNA from providing any relief for violations of the §204(h) notice requirement is clearly contrary to the Court's Liability Decision. The District Court recognized this and also recognized that its decision not to provide relief was "effectively to eviscerate" the statutory scheme by allowing deliberately undisclosed reductions to become effective–which is "diametrically opposite" to the statutory language and purpose. The District Court's expression of "considerable uncertainty" about this "particularly troublesome" outcome should have been addressed by the appellate court with guidance, rather than a summary affirmance.

Second, the Court's determination that it "does not have [the] authority" to provide any relief for CIGNA's representations that the cash balance benefits were "comparable" or "larger" without "rewrit[ing]" the plan is plainly incorrect. As described, there are many ERISA and non-ERISA decisions applying the terms "comparable" or "substantially equivalent" without "entirely...rewrit[ing]" relevant contract or trust provisions or statutes. The essence of discretion is choosing between reasonable alternatives, and avoiding unreasonable ones. If "comparable" or "larger" can mean different things, the district court must weigh the options against the statutory objectives and the

statutory standard of the understanding of an "average plan participant." Here, the District Court already found that plan participants were led to believe that reductions were "not a component or a possible result" of the changes. App. 185a. In *Conkright*, the District Court properly emphasized that "this Court is not charged with writing a sound retirement plan. Rather, I must interpret the Plan as written and consider what a reasonable employee would have understood to be the case concerning the effect of prior distributions." 472 F.Supp.2d at 457.[9]

Declining to exercise discretion because there is more than one way to precisely define "comparable" effectively results in a default in favor of the company that violated the law. As the District Court recognized, providing no relief because a choice would have to be made between reasonable alternatives does not further the statutory objectives but harms the employees who lose anticipated and much-needed retirement income, while rewarding the company for proven misconduct.

VI.

In its decision on ERISA §204(h), the District Court appears to have decided that the remedy for an ERISA §204(h) violation under ERISA §502(a)(1)(B) is an all-

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[9] See generally, Lisa J. Bernt, "Finding the Right Jobs for the Reasonable Person in Employment Law," 77 *UMKC Law Review* 1, 3, 14 (2009) (analyzing the use of "reasonable person" or "average" person standard in employment law, distinguishing between "normative" and "descriptive" applications of that standard).

or-nothing proposition, with no discretion for the district court to determine "appropriate relief." App. 39a (describing the "apparently exclusive remedy of invalidation"). As indicated, this conclusion is at odds with *Frommert I* and *II*, both of which recognize the district court has discretion to craft appropriate relief under ERISA §502(a)(1)(B). 433 F.3d at 268; 535 F.3d at 119.[10]

Even if the District Court's discretion under ERISA §502(a)(1)(B) was limited, the District Court should have turned to ERISA §502(a)(3), which expressly provides for "appropriate equitable relief ... to redress" statutory violations. When full relief is unavailable under ERISA §502(a)(1)(B), *Varity*, supra, recognizes that ERISA §502(a)(3) provides the "catchall" "safety net, offering appropriate equitable relief for injuries caused by violations that §502 does not elsewhere adequately remedy." 516 U.S. at 512.

Varity addresses "misleading" assurances to participants, nearly identical to those the District Court found in *Amara*, "that they would continue to receive similar benefits in practice," 516 U.S. at 501–even though the company "knew ... the reality was very different" and was "aware of the importance of the matter" to the employees. 516 U.S. at 494 and 503. As in *Amara*, the Varity Corp. provided its employees with "materially misleading" assurances "to persuade the employees ... to accept the change," "to avoid the

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[10] See also n. 5, supra, on the district court's discretion under ERISA §502(a)(1)(B).

undesirable fallout that could have accompanied" forthright disclosures, and "to save the employer money at the beneficiaries' expense." *Id.* at 493-94 and 505-6.

In *Varity*, this Court affirmed the Eighth Circuit's award of equitable relief. This Court recognized that the participants sought "an order that, in essence, would reinstate each of them as a participant in the employer's ERISA plan," 516 U.S. at 492, and provide "the benefits they would have been owed under their old, Massey-Ferguson plan, had they not transferred to Massey Combines." *Id.* at 494-95. The Eighth Circuit ruled that the plaintiffs were "entitled to an injunction reinstating them as members of the M-F Welfare Benefits Plan" from which they had been "induced" to move with knowingly misleading promises. The Eighth Circuit further directed the district court to make "an award in the nature of restitution to compensate them for benefits of which ... they had been deprived." 36 F.3d 746, 756 (1994); and 41 F.3d 1263 (clarifying remand). This Court affirmed the Eighth Circuit's judgment, holding that under ERISA §502(a)'s "broad" authority to provide relief for statutory violations, including breaches of duty in "conveying information about the likely future of plan benefits," participants are entitled to the kind of relief the lower courts ordered. *Id.* at 502 and 510. This Court concluded that "[g]iven [ERISA's] objectives, it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Id.* at 513.

CONCLUSION

The Second Circuit held in *Frommert I* and *II* that district courts have discretion to craft "appropriate remed[ies]" for violations of ERISA's disclosure obligations by using "equitable principles" "in light of ERISA violations identified" by the court. 433 F.3d at 268 and 535 F.3d at 123. In *Varity*, this Court also held that "We are not aware of any ERISA-related purpose that denial of a remedy would serve. Rather, we believe that granting a remedy is consistent with the literal language of the statute, the Act's purposes, and pre-existing trust law." 516 U.S. at 515. This is the kind of instruction the *Amara* district court should have been provided after it expressed "considerable uncertainty" about the "particularly troublesome" outcome of offering no relief for two statutory violations that it found at trial and stayed its judgment *sua sponte* pending "further guidance" from the appellate court.

For these reasons, this petition should be held pending the Court's decision in *Conkright v. Frommert*, No. 08-810, and disposed of accordingly.

Respectfully submitted,

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