No.

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**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether a showing of "likely harm" is sufficient to entitle participants in or beneficiaries of an ERISA plan to recover benefits based on an alleged inconsistency between the explanation of benefits in the Summary Plan Description or similar disclosure and the terms of the plan itself.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, Gisela R. Broderick and Annette S. Glanz were plaintiffs below and are respondents in this Court.

Pursuant to this Court's Rule 29.6, undersigned counsel state that CIGNA Corporation has no parent corporation and that no publicly held company owns 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners CIGNA Corporation and CIGNA Pension Plan (collectively, "CIGNA") respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is unpublished but is electronically reported at 2009 WL 3199061. Pet. App. 1a. The opinions of the district court are published at 559 F. Supp. 2d 192 (Pet. App. 160a) and 534 F. Supp. 2d 288 (Pet. App. 5a).

## JURISDICTION

The court of appeals filed its opinion on October 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, are set forth in the appendix to this petition.

## STATEMENT

This case provides the Court with the opportunity to resolve a deep and acknowledged circuit split on an issue of profound importance to the millions of employers and employees who sponsor and participate in benefit plans governed by ERISA. The circuits are hopelessly divided regarding 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")—a

document providing a concise overview of plan benefits—and the plan itself. In the decision below, the Second Circuit affirmed the district court's application of a "likely harm" standard that permitted each of the 26,000 members of the plaintiff class to recover based on an explanation of benefits in an SPD without a showing that any class member had relied on or was prejudiced by any inconsistency between the SPD and the terms of the plan. The Second Circuit's application of a "likely harm" standard in this case and other cases directly conflicts with decisions from the six circuits that require plaintiffs to make an individualized showing of reliance or prejudice to recover based on a deficient SPD, as well as with the decisions from the three other circuits that do not require a plaintiff to make a showing of even "likely harm" to recover.

The widespread disagreement on this question is incompatible with ERISA's objective of "provid[ing] a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Nor is it possible to reconcile the Second Circuit's "likely harm" standard—which effectively holds employers strictly liable for SPD deficiencies—with the "careful balanc[e]" that ERISA strikes between the protection of plan participants and the promotion of plan formation. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987). This Court should grant review to establish national uniformity on this important issue of ERISA law and to reject the approach of those circuits that permit plan participants to secure windfall recoveries based on SPDs they may not have even read—let alone, relied upon.

1. ERISA does not "require[ ] employers to establish employee benefits plans" or "mandate what kind of benefits employers must provide if they choose to

have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). It instead "encourag[es] the formation" of such plans by establishing a uniform legal framework that facilitates cost-effective plan administration (*Pilot Life*, 481 U.S. at 54) and that "minimize[s] the administrative and financial burden of complying with conflicting [state-law] directives." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (internal quotation marks omitted).

The protections that ERISA affords plan participants reflect the "careful balanc[e]" that Congress struck between the dual statutory objectives of protecting plan participants and promoting plan formation (*Pilot Life*, 481 U.S. at 54) as well as the overriding importance of national "uniform[ity]" to ERISA's regulatory framework. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). Thus, ERISA contains a "carefully crafted and detailed enforcement scheme" (*Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993)) that authorizes a plan participant to bring a civil action "to recover benefits due to him under the terms of the plan" (29 U.S.C. § 1132(a)(1)(B)), but that does not authorize awards of extra-contractual damages. *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985). ERISA also restricts plan participants to the remedies afforded by ERISA itself by expressly preempting all state-law claims that "relate to any employee benefit plan." 29 U.S.C. § 1144(a).

ERISA contains several disclosure provisions that are designed to ensure that participants understand their benefits and the eligibility requirements they must satisfy. Because plans are generally voluminous documents written in technical legal terms, ERISA requires plan administrators to provide par-

ticipants with SPDs that summarize the terms of the plan in plain English. 29 U.S.C. §§ 1022(a), 1024(b). SPDs must be "written in a manner calculated to be understood by the average plan participant," and must be "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." *Id.* § 1022(a). ERISA further requires that a plan provide participants with a Summary of Material Modifications ("SMM") whenever material changes are made to the plan or to the information that the plan is required to disclose in the SPD. *Id.* ERISA's "regulations regarding the content of SMMs and SPDs [are] virtually identical." Pet. App. 115a n.33.

2. CIGNA sponsors an ERISA-governed pension benefit plan for its employees. In 1998, CIGNA transitioned from a traditional defined benefit pension plan, known as "Part A," to a cash balance pension plan, known as "Part B." Pet. App. 16a-17a.

Under CIGNA's defined benefit pension plan, employees earned benefits over time based on their service and salary. Pet. App. 15a. Upon retirement, they received an annuity that provided them with an annual benefit payable for life. *Id.* at 16a. Under CIGNA's cash balance pension plan, employees still earn benefits over time based on service and salary, but—instead of being expressed in the form of an annual benefit—these amounts are "deposited" in a hypothetical "account" for each employee. *Id.* at 19a-20a. The account balances increase based on service and salary credits, as well as interest credits; at retirement, employees have the option of taking their benefit as a lump sum or in the form of an annuity payable for life. *Id.* at 21a-22a.

CIGNA is one of the "hundreds of employers [that] have adopted" cash balance plans since they "were introduced in the mid-1980s." Pet. App. 11a. Like the CIGNA Plan, most of these cash balance plans are the result of lawful "conversions from traditional defined benefit plans." *Id.* at 13a. There are many factors that can lead an employer to transition to a cash balance plan. As the district court explained, "cash balance plans are not inherently more or less costly than traditional defined benefit plans," and, "depending on how the plan is configured, . . . may provide advantages for both employees and employers." *Id.* at 11a.

CIGNA transitioned from a defined benefit plan to a cash balance plan by converting each plan participant's Part A accrued benefit into a lump sum and depositing that amount in each participant's individual Part B account as an opening balance. Pet. App. 19a. Participants thereafter accrue additional benefits based on annual pay credits and quarterly interest credits. *Id.* at 20a-21a. CIGNA also guarantees participants that, if their Part B benefit at the time of retirement is less valuable than their Part A accrued benefit at the time of the transition, they will receive their Part A benefit as a "minimum benefit." *Id.* at 22a.

In December 1997, CIGNA issued an SMM that informed participants about the forthcoming transition to a cash balance plan and that "contained detailed information about the calculation of opening balances." Pet. App. 34a. In October 1998, CIGNA issued the SPD for Part B, which it reissued in nearly identical form in September 1999. *Id.* at 39a. Among other things, the SPD provided participants with information about "eligibility; how breaks in service affect eligibility; how the cash balance ac-

count grows, including how pay and interest credits accrue; when benefits are paid; [and] how benefits are paid. . . . It also informed employees that they could obtain a copy of the Plan from the plan administrator, and the Plan was later made available on CIGNA's intranet site." *Id.* at 39a-40a.

3. In 2001, respondents filed suit against CIGNA in the United States District Court for the District of Connecticut under ERISA § 502, 29 U.S.C. § 1132. On behalf of a putative class of participants in the CIGNA Pension Plan, respondents alleged that Part B of the Plan violated numerous substantive requirements of ERISA and that CIGNA had violated certain of ERISA's disclosure requirements during the transition from its defined benefit pension plan to its cash balance plan. Pet. App. 7a. The district court certified a class of approximately 26,000 plan participants. *Id.* at 41a.

After a bench trial, the district court concluded that the terms of CIGNA's cash balance plan were lawful and rejected respondents' arguments that the Plan is age-discriminatory and violates ERISA's nonforfeiture and anti-backloading rules. Pet. App. 8a. The court emphasized that "ERISA gives employers substantial leeway in designing a pension plan," and that "CIGNA's Plan complies with the relevant statutory provisions." *Id.*

The court also determined, however, that "CIGNA's summary plan descriptions . . . were inadequate under ERISA" because "the company did not provide its employees with the information they needed to understand the conversion from a traditional defined benefit plan to a cash balance plan and its effect on their retirement benefits." Pet. App. 8a.

The district court found that the CIGNA Plan's SPDs were deficient because they failed to disclose to participants a phenomenon known as "wear away." Pet. App. 123a. "Wear away" is attributable to the interaction between the Plan's opening account balance and minimum benefit provisions. *Id.* at 24a. Specifically, although participants earn additional pay and interest credits to their Part B account balances each year they continue working, some participants might have account balances that are less valuable than their Part A minimum benefit for some period of time due to falling interest rates, mortality assumptions, or the protection of early retirement subsidized benefits. *Id.* at 22a-25a.

The district court held that this "wear away" phenomenon was not inconsistent with any of ERISA's substantive requirements. Pet. App. 8a. It nevertheless concluded that "CIGNA had a duty to inform plan participants of the possibility of wear away." *Id.* at 123a. According to the district court, CIGNA violated this duty by failing to disclose "wear away" in its SPDs. *Id.*[1]

The district court rejected CIGNA's argument that, even if its SPD were deficient, respondents were "not entitled to relief because they ha[d] failed to demonstrate injury" attributable to those deficiencies. Pet. App. 131a. Invoking the Second Circuit's decision in *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103 (2d Cir. 2003), *cert. denied*, 540 U.S.

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[1] The district court also found that the SPDs were deficient because they purportedly led plan participants to believe that all their Part A accrued benefits would be preserved in the opening Part B account balance or as part of their minimum benefit, when in fact early retirement benefits were not preserved under some circumstances. Pet. App. 128a-30a.

1105 (2004), the district court stated that recovery is appropriate where "a plan participant or beneficiary was *likely* to have been harmed as a result of a deficient SPD" and 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." Pet. App. 132a (quoting *Burke*, 336 F.3d at 113) (emphasis in *Burke*). Emphasizing the "broad nature of 'likely harm,'" the court found that respondents had made their threshold showing because CIGNA's SPDs "likely, and quite reasonably, led plan participants to believe that wear away was not a likely result of the transition to Part B." *Id.* at 132a, 136a (internal quotation marks omitted).

To rebut this presumption of "likely harm," CIGNA demonstrated that, "even if [respondents] had received all of the information they claim should have been included in the [SPDs], no Class member's benefits under Part B would have changed" (Pet. App. 133a) because the terms of the Plan do not afford CIGNA's employees the authority to disapprove plan amendments. The district court nevertheless concluded that CIGNA had failed to defeat the "likely harm" presumption because it was possible that the deficiencies in the SPDs "deprived [respondents] of the opportunity to take timely action," including "protesting at the time Part B was implemented, leaving CIGNA for another employer with a more favorable pension plan, or filing a lawsuit like this one." *Id.* at 137a (internal quotation marks omitted).

The district court then ordered briefing on remedial issues. CIGNA argued that, before a remedy could be implemented, it was necessary to determine "whether any individual employee suffered likely prejudice and/or whether the violations constituted

harmless error for that employee." Pet. App. 162a. The district court rejected CIGNA's individualized remedial approach and declined to "distinguish the named Plaintiffs from the rest of the Class," or "require an individualized showing such as that requested by CIGNA, *even from the named Plaintiffs themselves*." *Id.* at 164a (emphasis added). According to the district court, "all class members were affected equally and in a similar manner" by the deficient SPDs. *Id.* at 165a. In so holding, the court rejected CIGNA's argument that, "'[a]t a minimum, a plan participant should be required to prove detrimental reliance before being entitled to benefits based on a flawed SPD'"; that "position," the district court stated, was "contrary to Second Circuit precedent." *Id.* at 165a n.1 (citing *Burke*, 336 F.3d at 112; alteration in original).

Applying its undifferentiated, class-wide remedial approach, the district court concluded that "the terms of Part B ha[d] been . . . modified by CIGNA's October 1998 and September 1999 Summary Plan Descriptions," and ordered CIGNA to recalculate the class's benefits using a so-called "A+B" approach. Pet. App. 218a. Under that methodology, a participant will receive "all of her Part A benefits in the form those benefits were previously offered under Part A, plus all the benefits she accrued under Part B." *Id.* at 196a.[2]

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[2] In crafting this relief, the district court pointed to deficiencies in both the SPDs and the SMM, but made clear that, in the absence of the deficient SPDs, it would not have held that the terms of the Plan had been "modified" to provide for an "A+B" approach. Pet. App. 218a; *see also id.* at 200a ("the Court is reluctant . . . to reform the terms of the plan in conformity with the SMM").

"[R]ecogniz[ing] that the benefits awarded by [its] opinion are substantial, and that the law on which they are based is anything but settled," the district court *sua sponte* stayed its decision pending appeal. Pet. App. 219a. The court observed that "the relevant statutory provisions and existing case law do not provide clear guidance" on the issues before it, and concluded that a stay was warranted because "[t]he stakes are far too high—for both CIGNA and its employees—to implement the Court's judgment in the face of such substantial uncertainty." *Id.* at 161a.

The court of appeals summarily affirmed "for substantially the reasons stated in [the district court's] two well-reasoned and scholarly opinions." Pet. App. 4a.

## REASONS FOR GRANTING THE PETITION

Courts have explicitly and repeatedly recognized that the "circuits are divided over whether detrimental reliance or prejudice is required to recover in deficient SPD cases." *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 112 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004); *see also Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 n.1 (5th Cir. 2007). This Court should grant review to resolve that widely disputed and exceptionally important question of ERISA interpretation.

The circuits have adopted three irreconcilable standards regarding the showing that a plan participant (or beneficiary) must make to recover benefits based on a deficient SPD. Six circuits apply a reliance-or-prejudice standard that requires the plaintiff to "show some significant reliance upon, or possible prejudice flowing from, the faulty plan description." *Govoni v. Bricklayers, Masons & Plasterers Int'l Un-*

*ion of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984) (Breyer, J.); *see also*, *e.g.*, *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1519 (10th Cir. 1996). In contrast, three other circuits have held that "when the terms of an SPD and an ERISA plan conflict . . . , the employee need not show reliance or prejudice" to recover benefits based on the terms of the SPD. *Washington*, 497 F.3d at 458-59. The Second Circuit's "likely harm" standard—which permits recovery whenever a participant can show that he was likely harmed by a deficiency in the SPD and the employer is unable to prove harmless error—has not been adopted by *any* other circuit.

Such pervasive disagreement on a fundamental issue of ERISA law is incompatible with ERISA's goal of facilitating the "uniform national treatment of pension benefits." *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 17 (2004) (internal quotation marks omitted). As long as that disagreement persists, a plan that has participants in the Second Circuit will be subject to a different SPD liability standard than a plan in any other circuit, and a plan that has participants across the country will be subject to three conflicting liability standards. These regulatory variations generate administrative inefficiencies that inevitably increase the cost of sponsoring an employee benefit plan. Moreover, in the Second Circuit and the three circuits that do not require a showing of even "likely harm," those increased administration costs are exacerbated by the ability of plan participants to recover benefits based on a deficient SPD without demonstrating that they read—much less relied upon—the SPD. Conferring such windfall recoveries on plan participants conflicts with this Court's precedent (*see Curtiss-Wright Corp. v. Schoonejon-*

*gen*, 514 U.S. 73 (1995)) and undermines ERISA's statutory objectives by deterring the formation of new benefit plans and potentially jeopardizing the solvency of existing plans.

## I. THE CIRCUITS HAVE SPLIT THREE WAYS REGARDING THE SHOWING THAT A PLAN PARTICIPANT MUST MAKE TO RECOVER BASED ON A DEFICIENT SPD.

This Court's review is warranted to determine the showing that a plan participant must make to recover benefits based on an inconsistency between the SPD (or similar plan disclosure) and the plan itself. The circuits have adopted three fundamentally irreconcilable responses to this frequently recurring question of ERISA law.

### A. Six Circuits Require A Plan Participant To Show Reliance Or Prejudice.

The majority of circuits that have addressed the issue have held that a plan participant must make an individualized showing of reliance or prejudice to recover benefits based on a conflict between the SPD and the plan.

The reliance-or-prejudice standard originated in the First Circuit. In *Govoni v. Bricklayers, Masons & Plasterers International Union of America, Local No. 5 Pension Fund*, 732 F.2d 250 (1st Cir. 1984), the First Circuit held that a plaintiff was not entitled to recover benefits based on a deficient SPD that failed to apprise participants that retirement benefits could be diminished due to certain breaks in service. *Id.* at 252 (Breyer, J.). The court explained that, "to secure relief, [the participant] must show some significant reliance upon, or possible prejudice flowing from, the faulty plan description." *Id.* The court determined

that the plaintiff had not satisfied that standard because it could "find[ ] no evidence of prejudice" to the plaintiff, whose break in service had taken place before the deficient SPD had been issued. *Id.* at 253; *see also Fenton v. John Hancock Mut. Life Ins. Co.*, 400 F.3d 83, 88 (1st Cir. 2005) (applying *Govoni* test); *Bachelder v. Commc'ns Satellite Corp.*, 837 F.2d 519, 523 (1st Cir. 1988) (same).

The five other circuits that have subsequently adopted the reliance-or-prejudice standard have either explicitly or implicitly followed the reasoning of *Govoni*. In *Aiken v. Policy Management Systems Corp.*, 13 F.3d 138 (4th Cir. 1993), for example, the Fourth Circuit "adopt[ed] *Govoni*'s disjunctive construction as [its] own" and held that the plaintiff "must show some significant reliance upon, or possible prejudice flowing from," the deficient SPD. *Id.* at 141 (emphasis omitted); *see also Stilner v. Beretta U.S.A. Corp.*, 74 F.3d 1473, 1478 (4th Cir. 1996) (en banc) ("to secure relief under ERISA based on representations in a summary plan description that are inconsistent with provisions of the other official plan documents, an ERISA claimant must demonstrate that he either relied upon or was prejudiced by those representations").

Similarly, in *Greeley v. Fairview Health Services*, 479 F.3d 612 (8th Cir. 2007), the Eighth Circuit explicitly rejected the Second Circuit's "likely harm" approach—explaining that the district court had "erred by adopting a 'likely harm' prejudice standard" based on Second Circuit precedent. *Id.* at 614. The Eighth Circuit held 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." *Id.* (internal quotation marks omitted). The court con-

cluded that the plaintiff had failed to satisfy the reliance-or-prejudice standard because he "offered no evidence that he changed his course of action or otherwise relied on the faulty SPD," which provided a longer period of disability benefits than the plan itself. *Id.* at 615. "[F]inancial loss, without detrimental reliance," the court explained, "provides an insufficient basis for recovery." *Id.*; *see also Harris v. Blue Cross Blue Shield*, 995 F.2d 877, 880 & n.3 (8th Cir. 1993) (holding that the reliance-or-prejudice standard applies to deficient SMMs).

The Tenth Circuit has also explicitly adopted *Govoni*'s reliance-or-prejudice standard. In *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996), the Tenth Circuit held that "[o]nly where employees rely on an ambiguous or faulty SPD, or otherwise show prejudice from the inconsistency between the SPD and the master plan document, is relief appropriate." *Id.* at 1519. The court explained that "[a]ny other rule would allow a windfall for some employees." *Id*. Applying the reliance-or-prejudice standard, the court held that it was inappropriate to resolve on summary judgment whether a class of plaintiffs was entitled to recover additional long-term disability benefits based on the terms of an SPD. *Id.* The court directed that, on remand, "*each* individual plaintiff must demonstrate some reasonable reliance on the SPD provision or prejudice flowing from the inconsistency between the SPD and the Plan master document." *Id.* (emphasis added). "The issue of detrimental reliance," the Tenth Circuit concluded, "is not appropriate for class action determination." *Id.*

The Seventh Circuit also applies the reliance-or-prejudice standard. In *Hightshue v. AIG Life Insurance Co.*, 135 F.3d 1144 (7th Cir. 1998), the Seventh Circuit concluded that a plaintiff was unable to re-

cover based on alleged inconsistencies between the coverage exclusions identified in the SPD and the more extensive list of exclusions in the plan because she had not demonstrated either reliance or prejudice. *Id.* at 1149. The plaintiff could not "show reliance," the Seventh Circuit explained, "because she did not review the SPD prior to her accident," and she could not show "prejudice," the court continued, because "her [disability] claim was evaluated on the merits" by the plan administrator. *Id.*; *see also Health Cost Controls of Ill. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999) (when the plan and the SPD conflict, the plan will control "unless the plan participant or beneficiary has reasonably relied on the summary plan description to his detriment").

Finally, in *Branch v. G. Bernd Co.*, 955 F.2d 1574 (11th Cir. 1992), the Eleventh Circuit held that, "to prevent an employer from enforcing the terms of a plan that are inconsistent with those of the plan summary, a beneficiary must prove reliance on the summary." *Id.* at 1579. In so doing, the Eleventh Circuit explicitly rejected the district court's conclusion that the plaintiff could recover without demonstrating either reliance or prejudice, which the court of appeals condemned as "a form of strict liability." *Id*. at 1578. The court of appeals explained that an SPD is intended to "insur[e] that employees are fully and accurately apprised of their rights under the plan" and that "when a beneficiary fails to read or rely on the summary, whether it is accurate or not, the beneficiary . . . prevents full apprisal of the rights under the plan." *Id.* at 1579. "Beneficiaries must do their part," the court concluded, and therefore should not be permitted to recover where they cannot demonstrate that they read—much less relied on—an SPD. *Id.*; *see also Heffner v. Blue Cross &*

*Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1340 (11th Cir. 2006) (same).

### B. Three Circuits Do Not Require Any Showing Of Reliance Or Prejudice.

In direct conflict with the majority of circuits that have addressed the issue, the Third, Fifth, and Sixth Circuits do not require a plan participant to make any showing of reliance or prejudice to recover benefits based on a conflict between an SPD and the plan. In those three circuits, the participant is entitled to recovery simply by establishing the existence of a legal deficiency in the SPD—even if the participant never read the SPD.

In *Burstein v. Retirement Account Plan for Employees of Allegheny Health Education & Research Foundation*, 334 F.3d 365 (3d Cir. 2003), the Third Circuit held that "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." *Id.* at 381. According to the Third Circuit, plan benefits under ERISA are "contractual" in nature and "a court should read the terms of the 'contract' to include the terms of a plan document, as superseded and modified by conflicting language in the SPD." *Id.* In adopting this strict-liability approach, the Third Circuit explicitly "recognize[d] that other Courts of Appeals that have spoken to this issue have taken differing positions on this question." *Id.* at 380; *see also id.* at 380 n.20 (citing decisions of the First, Fourth, Seventh, and Eleventh Circuits).

The Fifth Circuit has also expressly acknowledged the split in authority on this issue, and has characterized the disagreement as even more extensive than the split identified by the Second and Third

Circuits. *See Washington v. Murphy Oil USA Inc.*, 497 F.3d 453, 458 n.1 (5th Cir. 2007) ("there appears to be 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") (emphasis added). Based on contract-law principles and the Third Circuit's reasoning in *Burstein*, the Fifth Circuit adopted the no-reliance-or-prejudice standard. *Id.* at 458-59. According to the Fifth Circuit, "when the terms of an SPD and an ERISA plan conflict and the terms of the conflicting SPD unequivocally grant the employee with a vested right to benefits, the employee need not show reliance or prejudice." *Id.*

The Sixth Circuit applies the same no-reliance-or-prejudice approach. The Sixth Circuit has reasoned that, in light of the importance of SPDs to plan participants, "it is natural for courts to hold the SPD controlling when it conflicts with the plan itself." *Flacche v. Sun Life Assurance Co. of Can. (U.S.)*, 958 F.2d 730, 736 (6th Cir. 1992); *see also Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988) ("existing precedent does not dictate that a claimant who has been misled by summary descriptions must prove detrimental reliance").

### C. The Second Circuit's "Likely Harm" Standard Is Inconsistent With The Approach Of Every Other Circuit That Has Addressed The Issue.

The Second Circuit stands alone in applying a standard that permits a plan participant to recover based on a conflict between the SPD and the plan whenever an employer is unable to rebut the participant's showing of "likely harm."

The Second Circuit adopted this "likely harm" standard in *Burke*, where it expressly acknowledged that the "circuits are divided" regarding the showing that a plaintiff must make to recover based on a deficient SPD. 336 F.3d at 112. The Second Circuit declined to follow the six circuits that apply 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." *Id.* at 106. The court instead held that plan participants need only make the significantly reduced showing that they were "*likely* to have been harmed as a result of a deficient SPD." *Id.* at 113 (emphasis in original). "Where a participant makes this initial showing," the participant is entitled to recover unless the employer is able to "rebut it through evidence that the deficient SPD was in effect a harmless error." *Id.*

Applying that "likely harm" standard, the Second Circuit held in *Burke* that a beneficiary was entitled to recover survivor income benefits, even though her deceased spouse had failed to file an affidavit mandated by the plan, because the relevant section of the SPD did not mention the affidavit requirement. 336 F.3d at 114. According to the Second Circuit, the plaintiff had made the requisite showing of likely harm because the "conspicuous absence of the . . . affidavit requirement in the" relevant section of the SPD "likely led the [plaintiff and her husband] to believe that an affidavit was unnecessary." *Id.* Recovery was appropriate, the court concluded, because the employer was unable to introduce evidence that rebutted the court's assessment of the "likely" implications of the deficient SPD. *Id.*

The district court expressly applied *Burke*'s "likely harm" standard in this case over CIGNA's objection that each class member should be required to make an individualized showing of injury attributable to CIGNA's allegedly deficient SPD. Pet. App. 131a. The district court found that respondents had made the requisite showing of "likely harm" because the SPD "likely . . . led plan participants to believe that wear away was not a likely result of the transition to Part B." *Id.* at 136a (internal quotation marks omitted). According to the district court, the possibility that the SPD might have led plan participants to hold an erroneous "belie[f]" about the features of CIGNA's cash balance plan was sufficient to entitle them to class-wide relief. *Id.* The district court thus did not require even a single class member to demonstrate that he actually read the SPD, that he harbored this erroneous "belie[f]" as a result of the SPD, or that this erroneous understanding of the plan benefits caused him to take (or refrain from taking) some action, such as looking for a new job. *Id.* at 164a-65a; *see also id.* at 135a (an "erroneous belief" about the scope of benefits "fostered by inaccurate notices regarding the terms of [a] retirement plan[ ] constitute[s] likely harm"). The Second Circuit summarily affirmed this result. *Id.* at 4a.

It is impossible to reconcile the application of *Burke*'s "likely harm" standard in this case with the standard that would have been applied in any of the nine other circuits that have addressed the issue. In the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits, every member of the plaintiff class would have been required to make an individualized showing that they relied on or were prejudiced by CIGNA's allegedly deficient SPDs. *See*, *e.g.*, *Chiles*, 95 F.3d at 1519 (in a class action, "*each* individual

plaintiff must demonstrate some reasonable reliance on the SPD provision or prejudice flowing from the inconsistency between the SPD and the Plan master document") (emphasis added). In contrast, in the Third, Fifth, and Sixth Circuits, respondents would have been entitled to recover without making even the minimal showing of "likely harm" required in this case.

That deep division in authority warrants this Court's review and resolution.

## II. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT TO BOTH PLAN SPONSORS AND PLAN PARTICIPANTS.

The Court should grant review because the extensive circuit split on the frequently recurring question of ERISA interpretation presented in this case creates intolerable regulatory uncertainty and because the Second Circuit's "likely harm" standard is fundamentally at odds with ERISA's statutory objectives and substantive provisions.

A. ERISA was designed to establish a uniform set of substantive and procedural standards governing employee benefit plans and a uniform set of remedies for violations of those regulatory requirements. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (ERISA was designed to establish a "uniform regime of ultimate remedial orders and awards when a violation has occurred").

That goal of remedial uniformity is incompatible with the divergent showings that the circuits require where plaintiffs are seeking to recover based on an inconsistency between an SPD and a plan. It directly contravenes ERISA's regulatory objectives for plaintiffs in the Third, Fifth, and Sixth Circuits to recover without making any showing of reliance or

prejudice and for plaintiffs in the Second Circuit to recover simply by making the minimal showing of "likely harm," while plaintiffs in the First, Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits must make an individualized showing of reliance or prejudice to recover. And just as ERISA plaintiffs should be required to meet a single burden of proof no matter the circuit in which they file suit, ERISA defendants should be subject to the same liability whether they are sued in New York City, Atlanta, or Philadelphia.

The regulatory uncertainty directly attributable to this circuit split results in the disparate treatment of ERISA litigants—both plaintiffs and defendants—depending on the circuit in which suit is filed. And it inevitably generates administrative inefficiencies for plan administrators. Indeed, numerous plans (including the CIGNA Plan) have participants who work and reside throughout the country. Plan administrators preparing an SPD for those plans are therefore compelled to draft the document against the backdrop of an uncertain and unpredictable regulatory framework that affords different remedial rights to participants in different jurisdictions. Even more problematic is the consideration of participants' benefits claims by plan administrators utilizing different standards of proof depending on where the participant resides or where, based on ERISA's permissive venue provisions (29 U.S.C. § 1132(e)(2)), the participant is likely to file suit. The Court's review is necessary to restore the regulatory uniformity that Congress sought to establish when it enacted ERISA.

B. Review is also warranted because the "likely harm" standard adopted by the Second Circuit undermines ERISA's statutory objectives by exposing

existing benefit plans to unforeseen liabilities and deterring the formation of new plans.

Much like the no-reliance-or-prejudice standard adopted in three circuits, the Second Circuit's "likely harm" standard is functionally equivalent to holding employers strictly liable for deficiencies in their SPDs. In this case, CIGNA was held liable for tens of millions of dollars in additional benefits simply because CIGNA's SPDs "likely . . . led plan participants to" hold erroneous "belie[fs]" about the features of their pension plan. Pet. App. 136a (internal quotation marks omitted). The Second Circuit upheld that liability even though there is no individualized proof that, after reading the SPDs, any of the 26,000 class members modified their conduct based on an erroneous understanding of their plan benefits. *Id.* at 164a-65a; *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").

It is squarely at odds with ERISA's carefully formulated statutory objectives to confer windfall recoveries on plan participants who did not rely upon and were not prejudiced by a deficient SPD—and who, in fact, may never have even read the SPD. As the Tenth Circuit explained when it adopted the reliance-or-prejudice standard, such windfall recoveries "unfairly increase costs for employers and their insurers, who rely on the terms of the plan in providing benefits and coverage. This in turn could jeopardize the solvency of the plan with respect to the remaining employees." *Chiles*, 95 F.3d at 1519.

Under this strict-liability framework, employers who have already established ERISA plans will be

compelled to guard against SPD-based liability by distributing needlessly prolix SPDs that are costly to produce and virtually impossible to comprehend. Moreover, the potential for such unpredictable and unwarranted liabilities will inevitably compel some employers to withhold wage increases and decrease benefits, and may dissuade other employers from sponsoring ERISA plans at all.

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). In the pending case, the district court crafted its so-called "A+B" remedy under the "likely harm" standard by reading "the terms of Part B" of the CIGNA Plan to "have been . . . modified by CIGNA's October 1998 and September 1999 Summary Plan Descriptions." Pet. App. 218a. Thus, based on the allegedly deficient SPDs, the court ordered the Plan to pay additional benefits to class members that were not provided under the terms of the Plan itself. But *Curtiss-Wright* makes clear that the publication of an SPD can only modify the terms of a plan where the publication of an SPD satisfies the plan's formal amendment procedures. 514 U.S. at 83-85; *see also* 29 U.S.C. § 1102(b)(3) (requiring that every plan "provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan"). Because the CIGNA Plan does not designate the publication of an SPD as a means of amending the Plan, and because the SPD was not published by the body with authority to amend the Plan, the courts below erred in holding under the "likely harm" standard that the allegedly deficient SPDs had "modified" the Plan to provide the benefits awarded by the district court.

At a minimum, before imposing such "substantial" liability on a plan and disregarding its formal amendment procedures (Pet. App. 219a), a court should make certain that each of the participants who are seeking recovery based on a deficient SPD relied on or was prejudiced by those deficiencies. Indeed, this Court has endorsed similar individualized determinations in other cases. *See United States v. Hays*, 515 U.S. 737, 744 (1995) ("individualized harm" is "require[d]" under "our standing doctrine"). It should grant certiorari and do so again here in order to ensure that benefit plans are not compelled to absorb potentially devastating liabilities to participants who suffered no injury as result of a non-compliant SPD.

## III. IF THE COURT DOES NOT GRANT PLENARY REVIEW, IT SHOULD HOLD THE PETITION AND THEN GVR THE CASE IN LIGHT OF *CONKRIGHT V. FROMMERT*.

If the Court does not grant plenary review, then it should hold this petition pending the disposition of *Conkright v. Frommert*, No. 08-810, and then GVR the case in light of that decision.

In *Frommert*, the Court will decide whether "a district court has 'allowable discretion' to adopt any 'reasonable' interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation." Pet. for Writ of Cert. at i, *Frommert* (No. 08-810). The Court's resolution of that question will have a direct bearing on the propriety of the relief ordered by the district court in this case.

In *Frommert*, the Second Circuit held that the district court did not err in crafting its own remedy

for an ERISA violation and declining to afford any deference to the remedy proposed by the plan administrator. *Frommert v. Conkright*, 535 F.3d 111, 118 (2d Cir. 2008), *cert. granted*, 129 S. Ct. 2860 (2009). According to the Second Circuit, the plan administrator's proposed remedy did not warrant deference because the administrator did not develop that remedy as part of a benefit determination. *Id.*; *see also id.* at 119 ("Defendants-Appellants have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.").

Similarly, in this case, the district court found that CIGNA was the "de facto" administrator of the Plan. Pet. App. 87a. It nevertheless declined to afford any deference to the remedy that CIGNA proposed for the alleged deficiencies in its SPDs—a recalculation of participants' opening account balances—and instead formulated its own "A+B" remedy. *Id.* at 197a-98a. Accordingly, if this Court decides in *Frommert* that an administrator's remedial interpretations are entitled to deference when made outside the benefit-determination setting, then the Second Circuit and district court should be required to revisit the propriety of the "A+B" remedy in light of the deference properly afforded to the views of the plan administrator.

Respondents themselves have recognized the overlap between the issues in *Frommert* and those presented here. They filed an *amicus curiae* brief in that case in which they acknowledged that the "decision in *Frommert* may affect their rights to retirement benefits." *Amici* Br. of Janice C. Amara et al.

at 1, *Frommert* (No. 08-810). Thus, at a minimum, the petition should be held pending the resolution of that closely related case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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