No. _____

In The
Supreme Court of the United States

MELISSA AMSCHWAND, individually and on behalf of the Estate of Thomas Amschwand,
Petitioner,

v.

SPHERION CORP., *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA) provides that a participant in or beneficiary of a covered plan may bring a civil action to enjoin violations of ERISA or of the plan or "to obtain other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). The question presented is whether the court of appeals erred in holding that *equitable relief* in this statute does not include make-whole relief equal to the insurance benefits to which a plan beneficiary would have been entitled but for a plan fiduciary's breach of fiduciary duty.

PARTIES TO THE PROCEEDINGS

Petitioner is Melissa Amschwand, individually and on behalf of the Estate of Thomas Amschwand. Respondents are Spherion Corp., individually and as plan administrator of the group life policies 779407-10-001 and 779407-11-001; Group Plan Life Policies 779407-10-001 and 779407-11-001; Trustees of the Interim Health Benefits Trust Group Life Plan; and Group Life and Accidental Death and Dismemberment Insurance Plan.

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PETITION FOR A WRIT OF CERTIORARI

Melissa Amschwand, individually and on behalf of the Estate of Thomas Amschwand, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the district court granting respondents' motion for partial summary judgment (App., *infra*, 26a to 42a) is unreported. The opinion of the court of appeals affirming the district court (App., *infra*, 1a to 14a) is reported at 505 F.3d 342.

JURISDICTION

The court of appeals entered its judgment on October 18, 2007, and denied Petitioner's petition for rehearing on November 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case turns on the meaning of *equitable relief* in § 502(a)(3) of ERISA, which provides:

> A civil action may be brought—
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the

> plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 U.S.C. § 1132(a)(3) (§ 1132 is set out in full at App., *infra*, 44a to 58a).

STATEMENT OF THE CASE

1. The facts of this case are simple and stark. Mr. Amschwand was a Spherion employee who had been diagnosed with angiosarcoma, a rare and deadly form of cancer, and who expected to die. In 2000, while Mr. Amschwand was on medical leave, Spherion decided to replace Prudential with Aetna as the life insurer under its employee benefit plan. The new Aetna policy included a "special provision" entitled the "Active Work Rule": "If the employee is ill or injured and away from work on the date any of his or her Employee Coverage (or any increase in such coverage) would become effective, the effective date of coverage (or increase) will be held up until the date he or she goes back to work for one full day."

Spherion, as plan administrator and a named plan fiduciary, repeatedly assured Mr. Amschwand that he was covered under the Aetna plan and that he was entitled to the same benefits under it as under the Prudential plan. No one ever told Mr. Amschwand about the Active Work Rule. Indeed, Spherion repeatedly refused to provide Mr. Amschwand with the plan documents that would have put him on notice of this rule, claiming that these documents were "not yet available" or simply failing to respond to Mr.

Amschwand's requests altogether. It is undisputed that had Mr. Amschwand been aware of the Active Work Rule he could and would have complied with it. Because of Spherion's assurances, however, Mr. Amschwand never worked the one full day required by the Active Work Rule to trigger his Aetna coverage. And, sure enough, when he died in February 2001, Aetna relied on the Active Work Rule to deny coverage — declining to waive the rule, as it had done for all other employees affected.

Petitioner, Mr. Amschwand's widow, sued Spherion seeking, in part, "monetary losses caused by [Spherion's] breach of fiduciary duty" — that is, the life-insurance benefits she lost on account of Spherion's failure to tell Mr. Amschwand about the Active Work Rule, its failure to give him the documents that would have put him on notice of that rule, and its affirmative misrepresentations that Mr. Amschwand was covered under the Aetna plan. The United States District Court for the Southern District of Texas (Judge Ewing Werlein, Jr.) had jurisdiction under 28 U.S.C. § 1331. Judge Werlein regarded Petitioner's claim as one for "money damages" and granted Spherion's motion for summary judgment on the ground that "money damages are not available under ERISA § 502(a)(3), which provides only for 'appropriate equitable relief.' 29 U.S.C. § 1132(a)(3)." App. at 31a to 32a. The United States Court of Appeals for the Fifth Circuit (Chief Judge Edith H. Jones and Judges Fortunato P. Benavides and Carl E. Stewart) affirmed.

Both the district court and the court of appeals thought themselves constrained to deny Petitioner

relief under this Court's decisions in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), and *Sereboff v. Mid Atlantic Medical Services, Inc.*, — U.S. —, 126 S. Ct. 1869 (2006). Judge Benavides' special concurrence in the Fifth Circuit — which Petitioner here quotes in full — captures what took place below:

> The facts as detailed in Chief Judge Jones's opinion scream out for a remedy beyond the simple return of premiums. Regrettably, under existing law it is not available. I am constrained to join the court's opinion, which I find correctly applies controlling precedent.

App. at 14a; *see also* App. at 2a ("Constrained by the Supreme Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002), we must deny relief.") (Jones, C.J.); App. at 33a to 40a (holding relief foreclosed by *Mertens* and *Great West*).

The sole issue presented by this appeal — and the issue upon which Petitioner's entire case below turns — is whether her claim for monetary losses caused by Spherion's breach of fiduciary duty is, contrary to the Fifth Circuit's holding, a claim for equitable relief under § 1132(a)(3).

2. a. "ERISA's comprehensive legislative scheme includes an integrated system of procedures for its enforcement. This integrated enforcement mechanism, ERISA § 502(a), 29 U.S.C. § 1132(a), is a distinctive feature of ERISA, and essential to Congress' purpose

of creating a comprehensive statute for the regulation of employee benefit plans." *AETNA Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) (internal quotations and citations omitted). For this reason, § 1132(a) has broad preemptive effect: "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Id.* at 209. Unless ERISA provides a remedy for a plan fiduciary's breaches of fiduciary duty, no such remedy exists.

The Fifth Circuit's decision in this case is inconsistent with Congress's intent to create a comprehensive and sensible remedial scheme for the enforcement of ERISA because it creates an inexplicable gap in that scheme. Had Spherion violated the terms of the plan, Petitioner could have sued to recover the benefits due her under § 1132(a)(1)(B) ("A civil action may be brought—(1) by a participant or beneficiary— * * * (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."). Had Spherion's breach of fiduciary duty harmed the plan or if the remedy for its breach would flow to the plan, Petitioner could have sued under § 1132(a)(2) ("A civil action may be brought— * * * (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."). *See* 29 U.S.C. § 1109(a) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan

resulting from each such breach * * * and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.").

Because, instead of violating the terms of the plan, Spherion deceived Mr. Amschwand into failing to comply with the plan, Spherion escapes liability under § 1132(a)(1)(B). And because Spherion injured Petitioner directly, rather than through her interest in the plan, that is, because Spherion's breach relates to immediately payable benefits rather than future benefits, Spherion escapes liability under § 1132(a)(2). But these two facts — (1) that the breach of fiduciary duty consisted in deceit about plan terms rather than a violation of plan terms and (2) that the lost benefits are immediately payable instead of payable in the future — cannot serve as the basis for any sensible distinction. Whether the breach of fiduciary duty constitutes deceit about plan terms or a violation of plan terms and whether a breach results in lost benefits that are immediately payable or payable in the future, the result should be the same. The Fifth Circuit's decision makes these facts matter when they shouldn't.

This result, because it is inconsistent with the intent of Congress to erect a comprehensive and sensible remedial scheme, should not be permitted unless it is required by ERISA's text or this Court's prior decisions. It is not.

b. Neither ERISA's text nor this Court's prior decisions interpreting § 1132(a) require the result that the Fifth Circuit reached. Indeed, properly carried out,

the analysis required by this Court's prior decisions leads to the opposite conclusion: that Petitioner may sue under § 1132(a)(3). This is because the relief that Petitioner seeks — Spherion's making whole the monetary losses its breach of fiduciary duty caused her, namely, the life-insurance benefits that she lost because, as a result of Spherion's deceit, Mr. Amschwand did not satisfy the Active Work Rule — is within the meaning of *equitable relief* as that term is used in § 1132(a)(3). Make-whole relief in the amount of Petitioner's lost life-insurance benefits is equitable relief because, in the days of the divided bench, Spherion's breach of fiduciary duty would have given Petitioner a cause of action in equity and Petitioner has satisfied all the special conditions, including the absence of any equitable defenses, that equity attached to the award of make-whole relief.

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (money damages against non-fiduciary not equitable relief), and *Great-West Life & Annuity Insurance Co v. Knudson*, 534 U.S. 204 (2002) (restitution at law, as opposed to restitution at equity, not equitable relief), this Court held that *equitable relief* in § 1132(a) is limited to "those categories of relief that were *typically* available in equity," *Mertens*, 508 U.S. at 256. The clearest statement of what this requirement means is in Chief Justice Roberts's opinion for the unanimous Court in *Sereboff v. Mid Atlantic Medical Services, Inc.*, 126 S. Ct. 1869 (2006) (restitution at equity is equitable relief).

In *Sereboff*, the Court explained that an action seeks equitable relief when "the nature of the recovery" and "the basis for [the] claim" are equitable.

Id. at 1874. It is the first of these requirements that is at issue here and that the Court addressed in *Mertens* and *Knudson*. *Mertens* held that money damages sought against a non-fiduciary were not an equitable recovery because they were awarded primarily at law and only on special occasions, such as in the context of beneficiaries' suits for breach of trust over which the equity courts had exclusive jurisdiction, in equity. *Mertens*, 508 U.S. at 255–57.

Mertens concerned a remedy, money damages, that was traditionally legal but occasionally available in courts of equity. Such a remedy cannot be within the meaning of *equitable relief* because, since all legal remedies were occasionally available in courts of equity through the exercise of what we would today call an ancillary or supplemental jurisdiction, including these remedies would elide *equitable* from § 1132(a)(3). *Id.* at 257–58. It does not follow from this, however, that whenever a remedy is available both at law and in equity, it is not within the meaning of *equitable relief*. The same remedy may be available both at law and in equity and yet constitute equitable relief if law and equity attach different conditions to the remedy and the special conditions attached by equity are satisfied.

Sereboff and *Knudson* illustrate this rule. "[O]ne feature of equitable restitution was that it sought to impose a constructive trust or equitable lien 'on particular funds or property in the defendant's possession.' That requirement was not met in *Knudson*, because 'the funds to which petitioners claim[ed] an entitlement' were not in Knudson's possession but had instead been placed in a 'Special

Needs Trust' under California law." *Sereboff*, 126 S. Ct. at 1874 (internal citations omitted) (quoting *Knudson*, 534 U.S. at 207, 213–14). In *Sereboff*, by contrast, the plaintiff did seek specifically identifiable funds within the possession and control of the defendant. Consequently, the "impediment to characterizing the relief in *Knudson* as equitable [was] not present." *Ibid.* *Sereboff* and *Knudson* teach that when a remedy, like restitution, is available both at law and in equity, it constitutes equitable relief if, but only if, the special conditions that equity attaches to it are satisfied: in those cases, the special condition of specifically identifiable funds in the possession and control of the defendant.

Petitioner seeks to be made whole from the monetary losses that Spherion's breaches of fiduciary duty caused. This is a form of relief that, in the days of the divided bench, was available both at law, where it was called money damages, and at equity, where it was part of what was called make-whole relief. *See Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) ("The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"). But, just as in the case of restitution, law and equity attached different conditions to the award of this relief. In addition to the standard equitable defenses, equity attached the condition that the monetary relief be necessary to cure the improper administration of a trust or other relationship giving rise to fiduciary duties. While a suit for this kind of make-whole relief eventually came to be cognizable in law courts in addition to equity courts, money paid to cure the maladministration of a trust was as quintessentially

an equitable remedy as money paid to cure the breach of a contract was a quintessentially legal one:

> In some cases where no questions of accounting or discretion are involved, there has been a tendency to permit the beneficiary to sue the trustee or a third person at law, to recover either a sum due under the trust or damages for a wrongful act. Where no problems of trust administration are involved, the law court at times feels that it can competently adjudge the rights of the parties. The extent of this exceptional aid by the courts of law to the trust beneficiary is difficult to state. The beneficiary is safe in proceeding in equity in all cases. Sometimes, where his right to relief is clear and no construction of the trust or guidance of the trustee is involved, the beneficiary may be able to persuade a court of law to take jurisdiction of his case.

GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 870 (rev. 2d ed. 1995).

So too under the Restatement of Trusts. The Restatement notes Bogert & Bogert's exceptional case: "If the trustee is under a duty to pay money immediately and unconditionally to the beneficiary, the beneficiary can maintain an action at law against the trustee to enforce payment." RESTATEMENT (2D) OF TRUSTS § 198(1) (1959)). But the Restatement goes on to explain that, "Although the beneficiary can maintain an action at law against the trustee as stated in this Section, he has also equitable remedies against

the trustee." *Id.* cmt. a. Under the Restatement, these equitable remedies include "a suit * * * to compel the trustee to redress a breach of trust," *id.* § 199(c), § 199(c) cmt. c, in which the remedies awardable include "any profit which would have accrued to the trust estate if there had been no breach of trust," *id.* § 205. Again, money sought to redress the maladministration of a trustee that harms the trust beneficiary is a quintessentially equitable remedy available only occasionally in a court of law.

When the court's analysis in *Sereboff*, *Knudson*, and *Mertens* is properly applied, the relief that Petitioner seeks qualifies as equitable under § 1132(a). It is at least like the remedy, restitution, at issue in *Sereboff* and *Knudson*: available both at law and in equity, but equitable because the special conditions attached by equity to its provision are satisfied. Indeed, it is really like the inverse of *Mertens*: in *Mertens*, at issue were money damages sought by a non-fiduciary, essentially on a tort claim, a legal remedy occasionally within the ancillary jurisdiction of equity courts; here, at issue is monetary relief sought to make whole damage to a beneficiary arising out of the maladministration of a trust, that is, out of the trustee's breach of fiduciary duties, an equitable remedy occasionally within the expanding jurisdiction of the law courts, but still an *equitable* remedy.

c. Nothing in this argument is inconsistent with the Court's decision or reasoning in *Mertens*. The basis for the Court's reasoning in *Mertens* was that *equitable relief* must not be read so as to elide *equitable* entirely. 508 U.S. at 255–58. Accepting the argument that any relief ever granted in an equity

court is equitable relief would elide *equitable* because of the ancillary jurisdiction of equity courts to award legal remedies in breach-of-trust cases. *Ibid.* But to accept Petitioner's argument is not to accept this argument, for Petitioner argues not that the monetary relief she seeks would be available in *some* case cognizable in an equity court, but that it would be available in *her* case, if brought in an equity court in the days of the divided bench.

Petitioner's argument does not elide *equitable* because it applies only when the plaintiff has satisfied the particular conditions equity attached to awards of money, in this case, that they be part of making whole the damage to a beneficiary caused by the maladministration of a trust. *Equitable* still serves to block cases like *Mertens*, in which the plaintiff does not satisfy the particular conditions equity attaches to awards of money — namely, the condition that the damages be caused by a fiduciary and arise from the maladministration of a trust.

REASONS FOR GRANTING THE PETITION

1. This Court has already granted certiorari on the question presented in this case, *see LaRue v. DeWolff, Boberg & Associates, Inc.*, 127 S. Ct. 2971, 2971 (2007) (granting certiorari); Petition for Certiorari, *LaRue*, *supra*, at i ("The Second Question Presented is: Does § 502(a)(3) permit a participant to bring an action for monetary 'make-whole' relief to compensate for losses directly caused by fiduciary breach (known in pre-merger courts of equity as 'surcharge')?"), but it did so in a case that also presents a different question, *ibid.* ("The First Question Presented is: Does § 502(a)(3) of

ERISA permit a participant to bring an action to recover losses attributable to his account in a "defined contribution plan" that were caused by fiduciary breach?"), that, if answered in favor of the petitioner, moots the question presented in this case. By granting certiorari in Petitioner's case, this Court can assure itself a procedurally unblemished opportunity to address the availability of make-whole relief under § 1132(a)(3).

2. Granting certiorari is appropriate to clarify the nature of the *Mertens–Knudson–Sereboff* test in cases, like this one, that concern remedies available both in courts of law and in courts of equity. On the best reading of these cases, the test is that a remedy qualifies as *equitable relief* even though it was available both in courts of law and in courts of equity if the plaintiff satisfies the special conditions that equity attached to the provision of that remedy. In the specific context of monetary relief, a plaintiff satisfies the special conditions that equity attached if no equitable defenses apply and the monetary relief is necessary to make whole injury caused by the defendant's maladministration of a trust. The perception of the Fifth Circuit and other courts of appeal that monetary relief is *never* equitable relief is inconsistent with Congress's intent to put in place a comprehensive and sensible remedial scheme for ERISA and results from a failure to conduct the more nuanced analysis required by this Court's decisions.

3. The question presented in this case is of unusual national importance because it affects every employee benefit plan governed by ERISA. At issue is whether ERISA provides a remedy — which, because

of ERISA's broad preemptive effect, is to say whether a remedy exists — for a plan fiduciary's deceit of a participant that affects terminal rather than future benefits. Most insurance (as opposed to pension) cases in which there is deceit as to the terms of the policy fit this mold because the deceit is revealed only when payment under the insurance policy comes due. The egregious facts of this case, namely, that Mr. Amschwand did everything he should have done and was nevertheless denied relief by Aetna and, unless this Court steps in, ERISA, highlight the importance of the question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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