18-487

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIMOTHY D. LAURENT AND SMEETA SHARON, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

PRICEWATERHOUSECOOPERS LLP, THE RETIREMENT BENEFIT ACCUMULATION PLAN FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP, and THE ADMINISTRATIVE COMMITTEE TO THE RETIREMENT BENEFIT ACCUMULATION PLAN FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York, No. 06-CV-2280 (JPO)

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN BENEFITS COUNCIL, THE BUSINESS ROUNDTABLE, AND THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *Amici Curiae* certifies as follows:

- The Chamber of Commerce of the United States of America has no parent corporation, and no company holds 10 percent or more of its stock.
- The American Benefits Council has no parent corporation, and no company holds 10 percent or more of its stock.
- The Business Roundtable has no parent corporation, and no company holds 10 percent or more of its stock.
- The ERISA Industry Committee has no parent corporation, and no company holds 10 percent or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

The **Chamber of Commerce of the United States of America** (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber's members include many employers that offer ERISA-governed benefit plans to their employees, as well as companies that fund or administer such plans. An important function of the Chamber is to represent the interests of the business community in matters before Congress, the Executive Branch, and the courts.

The **American Benefits Council** (Council) is a national non-profit dedicated to protecting and fostering privately sponsored employee-benefit plans. Its approximately 440 members are primarily large, multistate employers that provide employee benefits to active and retired workers and their families. The Council's members also include organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

The **Business Roundtable** (BRT) is an association of chief executive officers of leading U.S. companies working to promote a thriving U.S. economy and expanded opportunity for all Americans. BRT members lead companies that together have more than $7 trillion in annual revenues and employ nearly 16 million employees. BRT was founded on the belief that businesses should play an active and effective role in the formation of public policy, and the organization regularly participates in litigation as *amicus* where important business interests are at stake.

The **ERISA Industry Committee** ("ERIC") is a nonprofit organization representing the Nation's largest sponsors of ERISA-covered pension, healthcare, disability, and other employee benefits plans. ERIC's members provide benefits to millions of active employees, retired workers, and their families nationwide. ERIC often participates as *amicus* in cases that may impact employee benefits plan design or administration.

Amici's members include numerous plan sponsors and fiduciaries. They therefore have a strong interest in ERISA litigation and regularly participate as *amici curiae* in this Court and in other courts on issues that affect employee-benefit design or administration.

In enacting ERISA, Congress sought to preserve a balanced employee-benefit system, which included a "carefully crafted and detailed enforcement scheme," *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1980). As the Supreme Court has instructed, courts should not "tamper with" that scheme "by extending remedies not specifically authorized by [ERISA's] text." *Great_West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)). Plaintiffs' effort to go back in time and retroactively amend a prior version of the plan for the purpose of obtaining monetary relief under the guise of an "affirmative injunction" that completely lacks prospective significance would not just "tamper with" the statute; it would rewrite the statute entirely. *Amici* thus strongly support affirmance of the decision by the district court, which recognized that courts may not graft remedies onto the statute that Congress did not provide.

INTRODUCTION

Plaintiffs allege that the retirement plan offered by their former employer, PricewaterhouseCoopers (PwC) used to violate ERISA because it did not provide "whipsaw" payments to employees who took their retirement benefits early as a lump sum. According to Plaintiffs, these whipsaw payments were required by an IRS notice interpreting provisions of the Internal Revenue Code—an IRS notice that Congress said was not "a correct interpretation of the present law" and

expressly rejected in "clarifying" legislation in 2006. H.R. Rep. 109-232, pt. 2, at 126-127 (2005). Plaintiffs do not dispute that PwC's current plan complies with all statutory and regulatory requirements, nor do they dispute that the provision allowing make-whole relief for any losses to the plan caused by a fiduciary breach, § 502(a)(2),[2] does not afford them any relief. They nevertheless ask the Court to read ERISA's equitable-relief provision, § 502(a)(3), to authorize a multi-billion dollar monetary award.

Plaintiffs' argument on appeal is premised on a fundamental misunderstanding: it assumes that a private damages remedy must be available in every ERISA case. The Supreme Court and this Court have repeatedly rejected precisely this type of argument, recognizing that ERISA's "carefully crafted and detailed" enforcement provisions limit the relief available in some cases and for certain types of violations. *Cent. States, Se. & Sw. Areas Health & Welfare Fund v. Gerber Life Ins. Co.*, 771 F.3d 150, 152 (2d Cir. 2014). This is no surprise: plan sponsors, fiduciaries, and administrators must comply with thousands of requirements in ERISA, the Internal Revenue Code, regulations promulgated by the Department of Labor and the Department of Treasury, not to mention opinion letters, guidance documents, and IRS notices like the IRS notice Plaintiffs rely on

[2] The Chamber cites the sections as they appear in ERISA, as the district court did below, rather than the corresponding U.S. Code citations. A helpful cross-reference guide can be found at https://benefitslink.com/erisa/crossreference.html.

here. And because Congress did not want to discourage employers from offering retirement plans—which are, after all, entirely voluntary—it had to strike a careful "balance[e] between ensuring fair and prompt enforcement of rights under a plan and the encouragement of such plans." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010). What this means is that not every statutory or regulatory violation is a breach of fiduciary duty, and, as a result, employers do not have to fear that even good-faith statutory or regulatory violations could trigger enormous damages liability. If it did, then few employers would offer retirement plans.

As a result, courts have read ERISA's equitable-relief provision to ensure that when a plaintiff seeks an "injunction" or "equitable relief," it is not just a request for money damages in disguise. But that is exactly what Plaintiffs seek here—purely retrospective monetary relief for a plan-design error that no longer exists and that Congress never thought was an error at all.

This Court should reject Plaintiffs' effort to broadly extend § 502(a)(3) far beyond its text to afford relief that Congress did not make available.

ARGUMENT

I. Rewriting ERISA to Allow Past Participants to Recover Billions of Dollars in "Equitable Relief" Would Undermine ERISA's Careful Balance and Harm Plan Sponsors and Plan Participants.

Plaintiffs ask this Court to create a new ERISA remedy, which they call "equitable relief." But it has no basis in equity. Plaintiffs want to allow *past*

participants to sue for purely retrospective relief for an alleged past error in plan design that is unquestionably not an error under current law. Plaintiffs call their novel proposal "enforce-and-recalculate," but it is more accurately characterized as "retroactively-rewrite-and-recalculate." Their argument is driven by the view that divergence from even the most obscure and detailed requirements found in agency guidance documents (including those based on interpretations of the law Congress subsequently rejected) *require* some form of redress for past plan participants. Appellants' Br. 38. But courts have consistently rejected precisely this type of argument, recognizing that it is inappropriate to judicially graft onto the statute remedies that Congress did not expressly include. Plaintiffs received every dollar they were promised under the plan's terms, and their attempt to collect additional billions in damages as a form of "equitable" relief should be rejected.

A. ERISA Does Not Offer Private Monetary Relief for Every Violation of the Statute.

Congress decided to create a uniform framework to regulate private employee benefits after a decade of exhaustive study and input from myriad stakeholders. *See generally* James A. Wooten, *The Employee Retirement Income Security Act of 1974: A Political History* (2004). The statute it ultimately enacted, ERISA, is "enormously complex and detailed." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993); *see also Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 361 (1980) (ERISA is "comprehensive and reticulated"). This level of

detail and complexity was not spared in ERISA's enforcement provisions, which are "carefully crafted and detailed." *Cent. States*, 771 F.3d at 152 (quoting *Mertens*, 508 U.S. at 258).

These enforcement provisions do not provide a private damages remedy for every error. And for good reason: ERISA and its implementing regulations span more than 800 pages and include thousands of detailed requirements, including reporting and disclosure provisions, participation and vesting rules, provisions governing default investment options, and rules governing participant loans, among myriad others. *See* 29 U.S.C. Chapter 18; 29 C.F.R. Chapter XXV. ERISA plans must also abide by guidance documents and opinion letters from the Department of Labor (DOL) and satisfy a dizzying array of requirements found in the Internal Revenue Code, regulations promulgated by the Department of Treasury, and notices issued by the Internal Revenue Service.[3]

Given the extent of the statutory and regulatory requirements, it is easy for

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[3] Plaintiffs' claims in this case provide a perfect example of the complicated web of requirements found in various statutory and regulatory provisions. Although Plaintiffs repeatedly contend that the Plan "violated ERISA," Appellants' Br. 3, 4, 6, 13, 29, in 60 pages of briefing they do not cite any provision of ERISA that PwC violated. Instead, they point only to an IRS notice interpreting provisions of Internal Revenue Code and tax regulations promulgated by the Department of Treasury. *See* IRS Notice 96-8, 1996 WL 17901 (Feb. 5, 1996). As discussed below, in 2006 Congress "clarif[ied]" that whipsaw payments are not required and that the IRS's Notice 96-8 is not "a correct interpretation of the present law." H.R. Rep. 109-232, pt. 2, at 126-127 (2005).

plan sponsors or plan administrators to get tripped up and make an error, even when acting in good faith to comply with the statutory and regulatory requirements. If every such error could result in massive civil damages liability, it would create a significant disincentive for employers to sponsor ERISA plans, directly undermining one of Congress's goals when it decided to regulate pension benefits. Federal law does not "require[] employers to establish employee benefit plans," nor does it "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). Thus, when Congress enacted ERISA, it sought "not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [employee-benefit] plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). The statute, including its enforcement provisions, accordingly "represents a careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of such plans." *Conkright* 559 U.S. at 517.

It is therefore little surprise that ERISA's enforcement provisions are detailed and specific, and that particular remedies are limited to certain types of violations. For example, ERISA includes criminal penalties, but only for specified violations—*e.g.*, if there is a willful violation of ERISA's reporting or disclosure requirements. ERISA § 501. The Secretary of Labor may enforce ERISA's

disclosure obligations through the imposition of civil penalties, but plan participants have the right to file private actions to enforce only a limited subset of these disclosure requirements. *See id.* § 502(c). The statute provides for the recovery of monetary damages, but only from a fiduciary for a breach of fiduciary duty, *id.* §§ 409(a), § 502(a)(2), and it permits a recovery of benefits but only for benefits promised "under the terms of [the] plan," *id.* § 502(a)(1)(B).

Most relevant here, § 502(a)(3) permits an ERISA plaintiff "to enjoin" any violation of Title I of ERISA or of the plan, or "to obtain other appropriate equitable relief" to address such a violation. Because of the specific terms Congress used and because of the carefully reticulated nature of this enforcement scheme as a whole, the Supreme Court has repeatedly refused to construe this provision as an all-purpose authorization of whatever relief a plaintiff might desire. In particular, money damages cannot be shoe-horned into the term "appropriate *equitable* relief." *See, e.g.*, *Mertens*, 508 U.S. at 255-259; *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209-218 (2002).

The courts of appeals have followed the Supreme Court's guidance by rejecting ERISA plaintiffs' attempts to read into the statue remedies that are not expressly provided. *Cent. States*, 771 F.3d at 159. In *Central States*, for example, an ERISA plan, through its trustee, sued a plan insurance provider that had refused to pay beneficiaries' medical bills. *Id.* at 152. The plaintiffs sought two-step relief

to enforce the terms of the plan under ERISA § 502(a)(3) in the form of (i) a "declaration" that the insurer had primary responsibility for coverage, and (ii) "injunctive 'relief'" compelling past and future payments based on that newly-declared responsibility. *Cent. States*, 771 F.3d at 154. This Court looked beyond the way the plaintiffs "styled" their claims, recognizing that the claims were, "in essence, legal ones for money damages even though they are covered by an equitable label." *Id*. And in a section with the heading "In the Circumstances Presented by This Case, ERISA Plans May Have No Remedy," this Court expressly rejected the notion, advanced by Plaintiffs here, "that the underlying purposes of ERISA and of equitable relief generally would permit a court to fashion an appropriate remedy," recognizing that such an argument was foreclosed by Supreme Court precedent interpreting § 502(a)(3). *Cent. States*, 771 F.3d at 159; *see also Gerosa v. Savasta & Co.*, 329 F.3d 317, 323 (2d Cir. 2003) (concluding that there was "no remedy available under ERISA to redress" violations of ERISA's actuarial provisions that caused the plan to become dangerously underfunded). The same reasoning applies here.[4]

[4] That *Central States* was brought by a plan and plan trustee, rather than by a plan participant, is irrelevant to the decision's applicability here. Section 502(a)(3) allows "a participant, beneficiary, or fiduciary" to obtain injunctive or other equitable relief under this subsection, and there is no textual basis to interpret "equitable relief" differently in a case brought by a participant than in a case brought by a fiduciary.

Other courts have followed this approach as well. In *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246 (10th Cir. 2004)—a case that, like this one, involved alleged violations under Title I of ERISA—employees filed suit after the plan sponsor closed a plant to prevent them from becoming eligible for pension and health-care benefits. They sought lost benefits, backpay, and reinstatement or front pay under § 502(a)(3). *Id.* The Tenth Circuit concluded that the relief the plaintiffs sought was not available under § 502(a)(3) because the plaintiffs were really seeking money damages, despite their attempt to label the relief "equitable." *Id.* at 1254. In doing so, the court rejected the plaintiffs' argument that it should endorse a broader reading of § 502(a)(3) to make the aggrieved worker whole and deter future violations of the statute, as the court reasoned that these sort of "policy arguments are better addressed to Congress." *Id.* at 1259.

Peralta v. Hispanic Business, Inc., 419 F.3d 1064 (9th Cir. 2005), provides another example of a court refusing to stretch the scope of § 502(a)(3). There, a former plan participant sued the plan administrator, alleging that the administrator committed a fiduciary breach by failing to timely inform her that her long-term disability (LTD) plan had been canceled. *Id.* at 1067. Because the plaintiff did not know about the benefit termination, she did not purchase outside LTD insurance, and she received no LTD benefits after suffering injuries in a serious automobile accident. *Id.* Just like Plaintiffs here, the plaintiff in *Peralta* sought two-step relief

under § 502(a)(3): "reinstatement" in the plan "and payment of benefits thereunder." *Id.* at 1073. But because the LTD plan no longer existed, the court recognized that the proposed equitable relief depended on a fiction that was invented only to allow the plaintiff to recover "a monetary recovery" for past harm. *Id.* The court thus concluded that because there was no fraud or deliberate misrepresentation by the plan administrator, "no remedy" was available. *Id.* 1073, 1076. It stated that only Congress could provide the relief the plaintiff sought, and Congress had not done so in § 502(a)(3). *Id.* at 1076.

Thus, Plaintiffs are simply incorrect when they suggest (at 38) that equity *requires* an avenue for monetary relief anytime a plan fiduciary, sponsor, or administrator runs afoul of one of the thousands of rules that apply to employee-benefit plans under ERISA, the Internal Revenue Code, DOL regulations, treasury regulations, or, as here, an IRS notice applying provisions of the Internal Revenue Code and treasury regulations. In enacting ERISA, Congress had to "resolve[] innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens*, 508 U.S. at 262. It struck numerous compromises in doing so, which is why courts properly decline to create new remedies that are not included in the statute: ERISA's "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." *Id.* at 254; *see also Cent.*

States, 771 F.3d at 152 ("courts are not at liberty to alter" ERISA's "carefully crafted and detailed enforcement scheme" by allowing a damages recovery under § 502(a)(3)).

In fact, this case offers a perfect illustration of why it made sense for Congress to provide only prospective *injunctive* relief to address plan-design errors but not the stand-alone monetary damages Plaintiffs seek here. Employers enjoy an enormous amount of flexibility in designing an ERISA plan because, as noted, ERISA does not "mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed*, 517 U.S. at 887. Plan sponsors have many choices and must make trade-offs in deciding what benefits to offer plan participants and how generously to contribute to their employees' retirement.

If a plan sponsor makes an error in plan-design, and includes a provision that violates one of the many statutory or regulatory provisions governing accrual and forfeiture, it could bring the plan into compliance in a variety of ways without risking the plan's solvency. Here, for example, Plaintiffs concede (at 11) that it was perfectly legal for plan sponsors to avoid whipsaw payments by using as its crediting rate for active participants an interest rate equivalent to the 30-year Treasury rate. Had participants or the IRS brought this issue to PwC's attention, it easily could have redesigned the plan to avoid those payments consistent with ERISA and the Internal Revenue Code—by, for example using the 30-year

Treasury Rate as the crediting rate for all participants, capping the returns available to participants to the 30-year Treasury rate, or disallowing lump-sum payments altogether. Any of these options would have been legal, yet all of them would have made plan participants *worse off* than under the status quo.[5] Moreover, it is not as if the IRS lacked the opportunity to address any deficiencies in the plan—it approved of PwC's plan, concluding that the plan satisfied accrual and vesting requirements, *twice*. PwC Br. 7.

It makes little sense to construe § 502(a)(3) to allow plan participants to foist upon a plan sponsor a plan term that it never would have chosen, that is not required by law, and that could pose a serious risk of plan underfunding. It makes even less sense to rewrite the plan for *past* participants to provide retrospective benefit increases, creating enormous potential damages liability that a sponsor could not have anticipated. *See Conkright*, 559 U.S. at 517 ("ERISA induces employers to offer benefits by assuring a *predictable set of liabilities*, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." (emphasis added) (quotation marks and brackets omitted)).

[5] This is why, as PwC points out, typical equity practice was to allow rescission of illegal contracts rather than reformation absent fraud or mutual mistake. PwC Br. 44-45.

Plaintiffs and the Secretary repeatedly tell this Court that they simply seek an "affirmative injunction" "to correct" or "to conform" the text of the plan to "bring the [plan's] terms into compliance with ERISA's whipsaw standards." Appellants' Br. 25, 29, 38; *see also id.* at 37 ("to add a lawful method of the plan's text"); *id.* at 41, 42, 45, 46, 47; United States Br. 7 (arguing that the court "may enjoin the continued use of [the] illegal terms"); *id.* at 20 (asking for "an affirmative injunction ordering PwC to enforce the Plan in compliance with ERISA's requirements"); *id.* at 24. Their repeated use of the present tense ignores the fact that there *is* no illegal term in the plan because Congress expressly stated in 2006 that whipsaw payments are not required under ERISA. Pension Protection Act of 2006 (PPA), Pub. L. 109-280, 120 Stat. 780, § 701(a)(2). Plaintiffs do not actually want an amendment to the plan; they want a time machine. Plaintiffs seek to amend pre-PPA version of the plan for the sole purpose of allowing them to recover billions of dollars in past damages. The injunction Plaintiffs seek is just a legal fiction.

B. Adopting Plaintiffs' Position Would Not Advance ERISA's Purpose and Would Discourage Employers from Offering Employee-Benefit Plans.

In suggesting that a monetary remedy is necessary here to vindicate the purpose of ERISA, Appellants' Br. 21, 38, Plaintiffs omit the *actual* purpose of

ERISA's detailed accrual and forfeiture rules. As this Court has previously explained:

> there can be no doubt that ERISA was enacted for the purpose of assuring employees that they would not be deprived of their reasonably-anticipated pension benefits; an employer was to be prevented from "pulling the rug out from under" promised retirement benefits upon which his employees had relied during their long years of service

Amato v. W. Union Int'l, Inc., 773 F.2d 1402, 1409 (2d Cir. 1985), *abrogated on unrelated grounds by Mead Corp. v. Tilley*, 490 U.S. 714 (1989).[6]

Plaintiffs here do not (and cannot) allege that PwC "pull[ed] the rug," out from them in this way. Indeed, it is undisputed that PwC provided participants who left the company with exactly what the plan's terms promised them—an amount that did not include whipsaw payments. Plaintiffs accuse PwC (at 58 n.6) of engaging in a "whipsaw-avoidance strategy." But they concede (at 11) that structuring a plan to avoid whipsaw payments is exactly what plan sponsors were permitted to do, by crediting all plan participants with a plan interest rate that corresponds with the 30-year Treasury rate.

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[6] *See also* ERISA § 2(a); *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 3745 (1980) (explaining that Congress enacted ERISA to ensure that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it"); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004) ("There is no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving the benefits their employers promised them."); *Gallione v. Flaherty*, 70 F.3d 724, 727 (2d Cir. 1995) (describing legislative history).

Plaintiffs effectively seek to penalize PwC, to the tune of billions of dollars, for structuring its plan *more generously* to give participants the opportunity to be credited with *much more* interest than the 30-year Treasury rate. This "perverse result" is precisely why Congress included in the Pension Protection Act of 2006[7] a provision "clarifying" that whipsaw payments are not required and that the IRS's Notice 96-8 is not "a correct interpretation of the present law." H.R. Rep. 109-232, pt. 2, at 126-127 (2005). As Congress recognized, such an interpretation "could harm plan participants" because it could cause employers to "reduce[] the level of interest credits under their cash balance plan." *Id.*

Plaintiffs' request to go back in time and work a change to a prior version of the plan would create an even more absurd result: it would provide past participants with an extraordinary windfall recovery of supposedly past-due benefits that they neither "reasonably-anticipated" nor "relied upon." *Amato*, 773 F.2d at 1409. This request has no place in equity, which "abhors a windfall." *Prudential Ins. Co. of Am. v. S.S. Am. Lancer*, 870 F.2d 867, 871 (2d Cir. 1989); *see also Henry v. Champlain Enter., Inc.*, 445 F.3d 610, 624 (2d Cir. 2006) (Sotomayor, J.) (vacating damages award for plaintiffs, and explained that the aim of ERISA is "to make the plaintiffs whole, but not to give them a windfall" (quotation marks omitted)). Moreover, as the IRS recognized when it declined to

[7] Pub. L. 109-280, 120 Stat. 780.

assess any penalties given PwC's "good faith" reliance on the IRS's two prior approvals of the plan, such a result "would be detrimental to the Plan, the Plan sponsor and the Plan participants." PwC Br. 10.

Interpreting § 502(a)(3) in this manner could also persuade some employers that the upside of offering an ERISA plan simply does not outweigh the risk of an enormous damages awards for good-faith misapplications of ERISA's complex statutory and regulatory requirements—including requirements imposed only by the sort of dubious IRS notice at issue here, which Congress subsequently abrogated. *See Varity*, 516 U.S. at 515.

C. Enforcing the Statute *as Written* Would Not Allow Plans to Violate ERISA with Impunity.

Contrary to Plaintiffs' suggestion (at 20), enforcing the strict limits on damage remedies dictated by ERISA's text would not enable plans to disregard their statutory obligations or result in a "self-defeating" statute. ERISA and the Internal Revenue Code contain a variety of enforcement mechanisms that strongly incentivize ERISA plans to comply with ERISA provisions, Internal Revenue Code provisions, DOL regulations, Treasury regulations, and agency documents in administering an ERISA plan.

First, any *ongoing* violation of ERISA is a proper basis for true equitable relief. Any current plan participant or beneficiary can bring such an action; so can the Secretary of Labor. 29 U.S.C. § 1132(a)(3) (5). And the court in such an

action can "enjoin any act or practice which violates"—present tense—"any provision of [ERISA]." *Id.* This case does not involve any such request for true equitable relief, because the plan's provisions are fully in compliance with current law as clarified by Congress. The plaintiff class comprises only *past* plan participants, and they complain only about *past* conduct that they contend violated (past tense) a *past* version of ERISA.

Plan participants also may bring an action against an ERISA plan in Tax Court to challenge any plan provisions that they believe do not comply with ERISA. 26 U.S.C. § 7476. Indeed, this provision exists "to allow certain employees and other interested parties to act as watchdogs: when a plan or an amendment to a plan hurts those employees' interests by failing to conform to ERISA's requirements, those employees can seek a declaration preventing the plan from receiving a determination that will ensure favorable tax status." *Flynn v. Commissioner*, 269 F.3d 1064, 1066 (D.C. Cir. 2001). Plaintiffs, however, chose not to challenge the plan when they were participants, which would have given PwC a chance to cure any deficiencies in its accrual and vesting requirements. Instead, they waited until they had already taken and received the early lump-sum distribution that the plan's terms had promised them—an early lump-sum distribution that ERISA plans are not required to make available—and then sued to obtain past money damages, without regard to how such a lawsuit could impact the

plan's solvency and the remaining plan participants.

The IRS is also empowered to audit ERISA plans and, where they do not comply with ERISA and the Internal Revenue Code, to impose significant penalties, require that changes be made to the plan to bring it into compliance, or withhold continuing qualification of the plan that is necessary for employers to enjoy the enormous tax benefits associated with having a "qualified" retirement plan. *See*, *e.g.*, *Pender v. Bank of Am. Corp.*, 788 F.3d 354, 360 (4th Cir. 2015) (noting that the defendant had reached a settlement with the IRS that resulted in a $10 million fine, payments made to plan participants, and numerous additional plan changes); *see also* Internal Revenue Service, *A Guide to Common Qualified Plan Requirements*, https://www.irs.gov/retirement-plans/a-guide-to-common-qualified-plan-requirements (last updated May 29, 2018). Without the IRS's tax qualification, a plan "would, for all practical purposes, fail altogether." *Thompson v. Reti. Plan for Emps. of S.C. Johnson & Son, Inc.*, 651 F.3d 600, 609 n.14 (7th Cir. 2011).

The IRS has considerable discretion about whether and how to impose penalties so as to ensure they do not jeopardize the plan's solvency. And that is exactly what happened here—the IRS conducted an audit, determined that the plan *might have* violated ERISA's backloading rules or anti-forfeiture requirements, but declined to apply these conclusions retroactively to the plan because the Agency

concluded that doing so "would be detrimental to the Plan sponsor and the Plan participants." PwC Br. 10. By contrast, private plaintiffs—especially plaintiffs who are no longer participants in a plan—have no reason to forbear in order to protect the interests of the plan and its current participants. If private plaintiffs could seek a monetary recovery for past conduct, they would have every incentive to pursue every penny, no matter the consequences for the plan.

All of these enforcement mechanisms create extraordinary incentives for plan sponsors, fiduciaries, and administrators to comply with all of the statutory and regulatory requirements that apply to ERISA plans. At the same time, they allow for appropriate administrative discretion and calibration to ensure that plans making good-faith efforts to adhere to complicated statutory and regulatory requirements do not expose the plan or the plan sponsor to devastating damages liability.

II. The Secretary's Argument That Any Plan-Design Error Is a Breach of Fiduciary Duty—*or Fraud*—Is Unsupported.

The Secretary of Labor argues, as an "additional basis for equitable relief," that the plan administrator breached a fiduciary duty by making claims calculations in a way that conflicted with ERISA. Secretary's Br. 21-23; *see also id.* at 8-9, 17-18. The Court should reject the Secretary's invitation to massively expand the concept of fiduciary breach under ERISA by construing *any* ERISA violation, including a purported design error for a plan twice approved by the IRS, as a *per se*

fiduciary breach that is compensable with make-whole relief under § 502(a)(3).

Fiduciary breaches do not occur anytime someone makes an error involving an ERISA plan. Instead, "[i]n every case charging breach of ERISA fiduciary duty, . . . the threshold question is . . . whether that person was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint." *Pegram v. Herdrich*, 530 U.S. 211, 226 (2000). As the Supreme Court has recognized, not every action taken by a plan administrator is a fiduciary function—only actions taken when the administrator "was exercising 'discretionary authority' respecting the plan's 'management' or 'administration.'" *Varity*, 516 U.S. at 498; *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) ("one is a fiduciary to the extent he exercises any discretionary authority or control"). Ministerial acts of "processing claims," "applying plan eligibility rules," and "calculating benefits" based on formulas set forth in the plan are not discretionary acts. *Briscoe v. Fine*, 444 F.3d 478, 488 (6th Cir. 2006) (citation omitted); *see also Pender,* 788 F.3d at 363 (plan administrator did not "exercise discretion" when it effectuated a transfer of funds from one pension plan to another pursuant to a provision of the plan document that the IRS later determined was illegal).[8]

[8] The plan document here only underscored the administrator's lack of discretionary authority in calculating benefits. It provides that the plan administrator has "no power to add to, subtract from, or modify any of the terms of

Plan participants benefit when administrators' discretion in calculating claimed benefits is carefully spelled out in the plan. Requiring plan administrators to adhere strictly to the terms of the plan helps to ensure that participants receive the benefits that they were promised, which was a primary reason for ERISA's enactment. *See* pp.__, *supra*. If plan administrators were expected to exercise independent and discretionary judgment for every benefit claim calculation, the uniformity, timeliness, and certainty of benefit claim decisions that plan participants rely upon would be at risk—particularly given the vast body of legal requirements contained in ERISA, the Internal Revenue Code, DOL and Treasury regulations, and agency guidance documents that could conceivably relate to these decisions. And if plan administrators were expected to effectively rewrite the terms of the plan in light of its own independent judgment about what ERISA requires, that would undermine "the statute's division of authority between a plan's sponsor and the plan's administrator," who is supposed to "follow [the plan's] terms" in administering the plan. *CIGNA Corp. v. Amara*, 563 U.S. 421, 437 (2011).

Ultimately, Plaintiffs do not complain about anything the plan administrator actually did wrong, and the Secretary even concedes that the accrual requirements

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the Plan, or to change or add to any benefits provided by the Plan, or to waive or fail to apply any requirements of eligibility for a benefit under the Plan." PwC Br. 6-7.

Plaintiffs allege were violated were imposed by ERISA "on the plan directly," not on any fiduciary. Secretary's Br. 14. That is why this case stands in stark contrast to *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), which held that "the duty of prudence trumps the plan document." *Id.* at 2468. *Dudenhoeffer* instructs that *when a fiduciary is exercising discretionary fiduciary authority*, a plan provision that conflicts with the fiduciary duty to act prudently and loyally cannot immunize the fiduciary from liability when the fiduciary *does not* act prudently and loyally.

In *Dudenhoeffer*, the plaintiffs complained that the plan fiduciaries did not exercise prudence and loyalty when managing investments on behalf of the plan—a core fiduciary function; fiduciary status was never in dispute. *Id.* at 2465. Here, by contrast, neither Plaintiffs nor the Secretary have identified any fiduciary function that the plan administrator was exercising when it performed the ministerial calculation of benefits. And nowhere in *Dudenhoeffer* did the Supreme Court suggest that it was creating a claim of fiduciary breach *per se* anytime a plan administrator follows a plan provision that is inconsistent with one of the many statutory and regulatory requirements governing ERISA plans. Rather, the Court merely indicated that *if* the fiduciary acts imprudently while performing fiduciary functions, compliance with the terms of the plan may not provide a defense. *Id.*

Furthermore, the Supreme Court has already concluded that, "without exception," plan-design decisions cannot be the subject of a fiduciary-breach claim because designing a plan is *not* a fiduciary function. *Hughes Aircraft Co. v. Jacobson*, 5258 U.S. 432, 445 (1999); *see also Lockheed*, 517 U.S. at 890 (noting that "other portions of ERISA govern" plan amendments, but "ERISA's fiduciary provisions" do not); *Cement & Concrete Workers Dist. Council Pension Fund v. Ullico Cas. Co.*, 387 F. Supp. 2d 175, 184 (E.D.N.Y. 2005) ("Trustees do not breach their fiduciary duties under ERISA simply by presiding over a plan which fails in some respect to conform to one of ERISA's myriad provisions."), *aff'd*, 199 F. App'x 29 (2d Cir. 2006). But if ERISA plaintiffs could simply repackage complaints about a plan's design into claims of fiduciary breach by the administrator merely for implementing that plan design, then virtually every plan-design error would turn into a fiduciary-breach case.

ERISA plans are not self-executing. There will always be *someone* responsible for administering the plan according to its terms—typically, as here, the plan sponsor itself or an employee who works for the plan sponsor. The Secretary's attempt to expand the scope of ERISA liability should be rejected.[9]

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[9] The Secretary's position (at 25-26 n.8), stated only in a footnote, that administering a plan that violates some provision of ERISA or the Internal Revenue not only constitutes a fiduciary breach but may also constitute "fraud" or "inequitable conduct" has not been adopted by any court of which *amici* are aware. Secretary's Br. 25-26 n.8. In any event, the Secretary appears to agree that there

CONCLUSION

This Court should affirm the district court's judgment and hold that Plaintiffs are not entitled to the backward-looking monetary recovery they seek.

Respectfully submitted,

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were no allegations of fraud or inequitable conduct in this case. The projection rate about which Plaintiffs complain was fully disclosed in the plan and had *twice* been approved by the IRS, as the IRS itself acknowledged. PwC Br. 10.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Second Circuit Local Rule 32.1(a)(4). The brief contains 6,130 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman font, using Microsoft Word 2010.

/s/ Brian. T. Burgess
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Date: November 14, 2018

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system this 14th day of November, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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