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September 2, 2026

VIA CM/ECF
Patricia S. Dodszuweit
Office of the Clerk
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Re: *Lewandowski v. Johnson & Johnson et al.*, Case No. 26-1107
FRAP 28(j) Letter of Supplemental Authority

Dear Ms. Dodszuweit:

Pursuant to FRAP 28(j), Plaintiff-Appellant submits the attached Brief for the United States as Amicus Curiae, recently filed in the U.S. Supreme Court. *See* Ex. A, Br. for the United States, *Aldridge v. Regions Bank*, No. 25-590 (U.S.). The brief provides the United States' position on a question presented in this appeal—whether ERISA authorizes the equitable remedy of surcharge in a suit against a fiduciary for breach of fiduciary duty. *See* Answering Br.63-67; Reply Br.21-25. In the United States' view, "the surcharge remedy qualifies as 'equitable relief' available under Section 502(a)(3)." Ex. A at 11 (cleaned up). The United States' position supports Plaintiff-Appellant's position in this Court.

In *Aldridge*, the Sixth Circuit held that surcharge does not qualify as "equitable relief" under Section 502(a)(3). *See* Ex. A at 2. Defendants-Appellees here relied on *Aldridge* and its reasoning in arguing that "'surcharge' is not available under (a)(3)." Answering Br.65. The United States has now rejected those arguments, explaining that *Aldridge* made "several errors" and that "in a suit against a fiduciary for breach of fiduciary duty, surcharge continues to fall within the scope of the term 'appropriate equitable relief.'" Ex. A at 13 (cleaned up).[1]

The United States also rejected the contention, made here by Defendants-Appellees (*see* Answering Br.64), that *Montanile v. Board of Trs. of the Nat'l*

[1] The United States recommended denying certiorari for prudential reasons that do not apply here.

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Elevator Indus. Health Benefit Plan, 577 U.S. 136 (2016), disavowed the discussion of surcharge in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011). *See* Ex. A at 12-13. The United States explained that *Montanile* "does not cast doubt on *CIGNA*'s conclusion." *Id.* at 13.

The United States' brief in *Aldridge* is consistent with an amicus brief recently filed in the Fifth Circuit by the Acting Secretary of Labor. *See* Ex. B, Amicus Curiae Br., *Aramark Servs. v. Aetna Life Ins. Co.*, No. 24-40323 (5th Cir. Aug. 31, 2026). That brief likewise explains that "surcharge is a form of 'appropriate equitable relief' that may be awarded for claims brought against fiduciaries for breaches of fiduciary duties." *Id.* at 9.

Sincerely,

/s/ Michael Lieberman

Michael Lieberman

CERTIFICATE OF SERVICE

The undersigned certifies that on this 2nd day of September 2026, I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: September 2, 2026

/s/ Michael Lieberman
Counsel for Plaintiff-Appellant

EXHIBIT A

No. 25-590

In the Supreme Court of the United States

JERRY ALDRIDGE, ET AL., PETITIONERS

v.

REGIONS BANK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether an action for the remedy of surcharge seeks "equitable relief" within the meaning of Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3).

2. Whether ERISA preempts petitioners' state-law claims.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

INTRODUCTION

Petitioners in this case are participants in an employee benefits plan who allege that respondent mismanaged the trust that held their benefits. They brought a claim for "surcharge"—a monetary remedy for losses to a trust that developed in the courts of equity in the days of the divided bench. Petitioners sought that remedy under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), which authorizes plan participants to obtain "appropriate equitable relief" to redress violations of ERISA or the terms of the plan. Petitioners also brought state-law claims for (among other things) breach of fiduciary duty and breach of contract.

The Sixth Circuit rejected petitioners' federal- and state-law claims. The court concluded, as a categorical matter, that surcharge too closely resembles money damages to qualify as "equitable relief" under Section 502(a)(3). See Pet. App. 33a. It further held that petitioners' state-law claims are expressly preempted by ERISA Section 514(a), 29 U.S.C. 1144(a). Pet. App. 25a.

The court of appeals erred in its analysis of surcharge. Properly understood, surcharge can qualify as "appropriate equitable relief" under Section 502(a)(3), but only in a suit against a fiduciary for breach of fiduciary duties. See *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 442 (2011). This case, however, is not a suitable vehicle to address the availability of surcharge under Section 502(a)(3), because of the unusual nature of the plan at issue here. So-called "top-hat plans" like the one involved in this case are not subject to ERISA's fiduciary-duty rules, see 29 U.S.C. 1101(a), and the parties dispute whether respondent qualifies as a fiduciary in the relevant sense. The Court would need to resolve that threshold issue before it could address the surcharge question on which petitioners seek review. And deciding the surcharge question in the idiosyncratic context of a top-hat plan might provide lower courts and litigants with limited guidance in more typical cases going forward.

Petitioners also ask this Court to review the Sixth Circuit's holding that their state-law claims are preempted. That holding is correct and does not conflict with any decision of another court of appeals. The petition for a writ of certiorari should be denied.

STATEMENT

1. a. ERISA protects "the interests of participants in employee benefit plans and their beneficiaries" by "establishing standards of conduct" for plan fiduciaries and "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Among other requirements, ERISA obligates plan fiduciaries to carry out their duties "with the care, skill, prudence, and diligence" of a "prudent man" under the circumstances, and to act in accordance with governing plan documents. 29 U.S.C. 1104(a)(1)(B); see 29 U.S.C. 1104(a)(1)(D).

ERISA Section 502(a), 29 U.S.C. 1132(a), establishes a "comprehensive civil enforcement scheme." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208 (2004) (citation omitted). Section 502(a)'s subsections authorize various causes of action, including an action to enforce the terms of a plan and an action to recover losses to a plan caused by a fiduciary's breach of duties. 29 U.S.C. 1132(a)(1)(B) and (2); see 29 U.S.C. 1109. This case involves Section 502(a)(3), which authorizes 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).

This Court has described ERISA's remedial scheme as "exclusive," in light of the statute's "expansive preemption provisions." *Davila*, 542 U.S. at 208-209. Section 514 provides that, subject to certain limited exceptions, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. 1144(a).

b. Some ERISA provisions do not apply to certain plans for high-level employees, colloquially known as "top-hat plans." See U.S. Dep't of Labor Op. No. 90-14A, 1990 WL 123933 (May 8, 1990). Congress determined that high-level employees "would not need" all of the "substantive rights and protections" that ERISA provides, because "by virtue of their position or compensation level," those employees "have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan." *Id.* at *1. Congress therefore exempted top-hat plans from ERISA's requirements pertaining to vesting, funding, and—especially relevant here—fiduciary responsibilities. *Id.* at *2; see 29 U.S.C. 1051(2), 1081(a)(3), 1101(a)(1).

To qualify for the top-hat-plan exemption, a plan must be limited to a "select group of management or highly compensated employees," and it must be "unfunded." 29 U.S.C. 1101(a)(1). A top-hat plan is "'unfunded'" if the plan assets "are the general assets of the employer and are subject to the claims of the employer's creditors" in the event of insolvency. *In re IT Grp., Inc.*, 448 F.3d 661, 665 (3d Cir. 2006) (quoting David J. Cartano, *Taxation of Compensation & Benefits* § 20.01, at 709 (2004)). That arrangement carries risk for employees, who "may never receive the money if the company becomes insolvent." *Ibid.* (citation omitted). But it also produces a tax benefit: "[t]he employee is not subject to tax on the compensation until he or she actually receives the deferred amount," *ibid.*, at which point he or she "will likely have less income (and fall in a lower tax bracket)," Pet. App. 8a.

To provide top-hat-plan participants with some measure of security, employers sometimes put their benefits into an account known as a "rabbi trust"—so named because the IRS first addressed the arrangement in a letter to a synagogue concerning benefits set aside for its rabbi. Pet. App. 9a (citation omitted), see IRS Priv. Ltr. Rul. 8113107 (Dec. 31, 1980). The assets in a rabbi trust are severed from general corporate assets and can be used only to pay the participants' benefits. See Pet. App. 9a. But the arrangement still satisfies ERISA's requirement that top-hat plans be "unfunded," 29 U.S.C. 1101(a)(1), because the trust's assets remain available to pay the company's creditors in the event of insolvency. See U.S. Dep't of Labor Op. No. 91-16A, 1991 WL 60254 (Apr. 5, 1991).

2. a. Petitioners are former high-level employees of the restaurant chain Ruby Tuesday, Inc., who participated in Ruby Tuesday's top-hat retirement and pension plans. Pet. App. 9a, 51a. Ruby Tuesday's predecessor established a rabbi trust for the plans and entered into a contract through which respondent's predecessor agreed to oversee that trust. *Id.* at 9a-10a. The rabbi-trust agreement "incorporated by reference" the terms of the top-hat plans. D. Ct. Doc. 19-3, at 1 (May 31, 2021) (Trust Agreement).

The agreement tasked respondent with the general "day-to-day administration of the [p]lans." Pet. App. 10a; see Trust Agreement 6-8. It also imposed several specific duties on both respondent and Ruby Tuesday itself in the event that Ruby Tuesday underwent a change in control. See Trust Agreement 8-10. For example, the agreement required Ruby Tuesday "to fund" the plans with "the present value actuarial equivalent of unpaid benefits" within 30 days after any change of control. *Id.* at 6. It further directed respondent to terminate the trust upon receipt of a "writing" to that effect signed by Ruby Tuesday. *Id.* at 15. And it required respondent "to take any and all legal action to enforce" Ruby Tuesday's obligations under the trust agreement. *Id.* at 17.

b. Between 2017 and 2021, respondent allegedly breached the trust agreement in three ways. See Pet. App. 10a. First, after Ruby Tuesday was acquired by a private investment firm in December 2017, respondent failed to compel Ruby Tuesday to fund the plans, as the agreement required respondent to do following a change in control. *Ibid.* Second, when Ruby Tuesday's board terminated the plans in March 2019, respondent failed to notify plan participants of their right to a lump-sum payout. *Ibid.* Finally, in July 2020, respondent ceased all benefit payments to participants based on Ruby Tuesday's oral instruction, rather than waiting for written notice, which Ruby Tuesday did not provide until September 2020. *Id.* at 10a-11a.

In October 2020, Ruby Tuesday filed for Chapter 11 bankruptcy. Pet. App. 11a. The bankruptcy court ordered respondent to transfer the assets held in the rabbi trust to the bankruptcy estate for the benefit of Ruby Tuesday's creditors. *Id.* at 11a, 44a. Petitioners (and other plan participants) initially objected, but they ultimately settled with Ruby Tuesday's bankruptcy estate and received their fees and a share of the assets held in the fund. *Id.* at 11a, 44a-55a In exchange, petitioners waived their right to appeal the bankruptcy-court orders directing respondent to pay the trust funds into the bankruptcy estate. *Id.* at 11a.

c. Petitioners then sued respondent in the United States District Court for the Eastern District of Tennessee. See Pet. App. 54a. Their amended complaint asserted a claim for "'appropriate equitable relief'" under ERISA Section 502(a)(3), "in the form of equitable surcharge in the amounts that should have been paid to [them] as benefits under the terms of the Plans and the Trust." Am. Compl. ¶ 161. Petitioners also brought state-law claims for breach of fiduciary duty, breach of trust, breach of contract, and negligence. *Id.* ¶¶ 162-185.

The district court dismissed petitioners' state-law claims, concluding that they were preempted by ERISA Section 514, 29 U.S.C. 1144. Pet. App. 65a.

After discovery, the district court granted summary judgment to respondent on petitioners' remaining ERISA claim. Pet. App. 49a. The court held that petitioners' surcharge claim did not qualify as a claim for "equitable relief" within the meaning of Section 502(a)(3) because petitioners were essentially seeking compensatory damages. *Id.* at 48a.

d. The court of appeals affirmed both judgments. Pet. App. 39a. The court first held that petitioners' state-law claims were expressly preempted under 29 U.S.C. 1144(a) because those claims have a "connection with" the plans. Pet. App. 21a-22a (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)); see *id.* at 14a-27a. The court next concluded that petitioners' ERISA claim for surcharge did not seek "equitable relief" within the meaning of Section 502(a)(3) because petitioners were seeking the legal remedy of "damages under another label." *Id.* at 7a; see *id.* at 27a-39a. The court of appeals acknowledged that, in *CIGNA Corp.* v. *Amara*, 563 U.S. 421 (2011), this Court had identified surcharge as an "exclusively equitable" remedy that was available in equity courts during the time of the divided bench. Pet. App. 33a (quoting *CIGNA*, 563 U.S. at 442). But the court viewed *CIGNA*'s treatment of surcharge as "dicta" that "conflicts with" this Court's earlier interpretation of Section 502(a)(3) in *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993). Pet. App. 34a.

DISCUSSION

In the government's view, the petition for a writ of certiorari should be denied. As to the first question presented, the court of appeals erred in concluding that the term "equitable relief" in ERISA Section 502(a)(3), 29 U.S.C. 1132(a), categorically excludes monetary surcharge remedies. This case is a poor vehicle for resolving that general question, however, because the top-hat plan at issue here differs in significant respects from typical ERISA plans, and the defendant in this case is not subject to ERISA's fiduciary provisions. With respect to the second question presented, the court correctly held that ERISA preempts petitioners' state-law claims, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

A. This Case Is A Poor Vehicle For Deciding Whether And In What Circumstances A Monetary Surcharge Remedy Qualifies As "Equitable Relief" Under ERISA Section 502(a)(3)

Petitioners first ask (Pet. i, 14-33) this Court to decide whether surcharge qualifies as "equitable relief" under ERISA Section 502(a)(3), 29 U.S.C. 1132(a)(3). Although the court of appeals erred in analyzing that question, this case is a poor vehicle to resolve the issue. The availability of surcharge as a remedy under Section 502(a)(3) turns on whether the plaintiff is suing a fiduciary for an alleged violation of a fiduciary duty. See *CIGNA Corp.* v. *Amara*, 563 U.S. 421, 442 (2011). This case, however, arises in the unusual context of a top-hat plan that is not subject to ERISA's fiduciary requirements, and it involves a defendant whose fiduciary status is disputed. In these idiosyncratic circumstances, it is not clear that any other court of appeals would have reached a different bottom-line conclusion.

This Court previously granted certiorari on the question whether surcharge is available *against a fiduciary* under Section 502(a)(3), but it did not ultimately decide the question in that case. See *LaRue* v. *DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 252 (2008). If the Court wishes to revisit the issue, it should do so in a case in which the defendant is undisputedly a fiduciary.

1. The court of appeals concluded that the term "equitable relief" in ERISA Section 502(a)(3) categorically excludes monetary surcharge remedies. See Pet. App. 33a. That is incorrect. As this Court recognized in *CIGNA*, surcharge is a traditional form of equitable relief in suits against fiduciaries alleging breach of fiduciary duty. 563 U.S. at 442. Section 502(a)(3) is best read to incorporate that understanding.

a. Surcharge has a long historical pedigree as an equitable remedy for breach of fiduciary duty. In the days of the divided bench, subject to narrow exceptions not relevant here, equity courts exercised exclusive jurisdiction over claims by beneficiaries against trustees for breach of trust. See *Duvall* v. *Craig*, 15 U.S. (2 Wheat.) 45, 56 (1817) ("A trustee, merely as such, is, in general, only suable in equity."); *Manhattan Bank of Memphis* v. *Walker*, 130 U.S. 267, 271 (1889) ("The suit is plainly one of equitable cognizance, the bill being filed to charge the defendant, as a trustee, for a breach of trust."). Equity courts could remedy such breaches by ordering monetary payment, sometimes called a "surcharge." See, *e.g.*, *Princess Lida of Thurns & Taxis* v. *Thompson,* 305 U.S. 456, 458, 464 (1939) (describing authority of Pennsylvania state court, in "suit in equity," "to surcharge [trustee] with losses incurred").

Surcharge had its roots in the traditional equitable remedy of "accounting for profits," which required the trustee to account for and give up any profits he had made that rightfully belonged to the trust itself. See Samuel L. Bray, *Fiduciary Remedies*, in *The Oxford Handbook of Fiduciary Law* 449 (Evan J. Criddle et al. eds., 2019). Surcharge "emerged" as a "shortcut." *Id.* at 457. Without conducting an accounting, a beneficiary could sue in equity "for what might be called the expected results on the negative side of the ledger." *Ibid.* This type of remedy became known as a "surcharge," because the trustee was "chargeable" for the recovery on top of the trust balance reflected in his accounting. See George Gleason Bogert et al., *Bogert's The Law of Trusts and Trustees* § 862 (May 2026 update) (explaining that a trustee may be ordered to pay "on an accounting where the trustee is surcharged beyond the amount of his admitted liability").

Although surcharge is a monetary remedy for a plaintiff's losses, it differs in several meaningful respects from the classic legal remedy of damages. First, surcharge is meant to make the *trust* (rather than the plaintiff) whole, so it "allows no recovery for nonpecuniary losses, such as emotional distress." Bray 457. Moreover, surcharge is a more forward-looking remedy than traditional monetary relief. For example, an equity court may calculate the plaintiff's loss as of the time of the court order, rather than the time of the breach, "on the theory that what the beneficiary is owed is a continuing obligation of prudent administration by the fiduciary." *Ibid.*; see, *e.g.*, *Melick* v. *Voorhees*, 24 N.J. Eq. 305, 308 (Ch. 1873), aff'd, 25 N.J. Eq. 523 (1874). Additionally, because surcharge is an equitable remedy, the defendant may assert equitable defenses such as laches and unclean hands. See, *e.g.*, *McGrann* v. *Allen*, 140 A. 552 (Pa. 1928). Moreover, in some instances, courts may permit the trustee to offset his surcharge liability based on services he performed as fiduciary. See Bogert § 980; *In re McCalla's Est.*, 33 Pa. D. & C. 643, 660 (Orph. 1938).

b. Based on surcharge's unique nature and history, this Court in *CIGNA* correctly recognized that, in a suit against an ERISA fiduciary for breach of duty, "[t]he surcharge remedy" qualifies as "'equitable relief'" available under Section 502(a)(3). 563 U.S. at 442 (quoting 29 U.S.C. 1132(a)(3)).

This Court first addressed the scope of Section 502(a)(3) in *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993). The *Mertens* Court held that "equitable relief" under Section 502(a)(3) is limited to forms of relief that were "*typically* available in equity" before law and equity merged. *Id.* at 256. Applying that standard, the Court held that Section 502(a)(3) does not authorize recovery of money damages from a nonfiduciary third party that has provided services to a plan, *id.* at 256-263, explaining that damages are "the classic form of *legal* relief," *id.* at 255.

The Court revisited the scope of Section 502(a)(3) in two subsequent suits against nonfiduciaries, *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), and *Sereboff* v. *Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006). Both cases involved restitution, and in both cases the Court reaffirmed that the determination whether that remedy "is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." *Sereboff*, 547 U.S. at 363 (quoting *Great-West*, 534 U.S. at 213).

In *CIGNA*, the Court addressed the availability of surcharge in "a suit by a beneficiary against a plan fiduciary." 563 U.S. at 439. The Court analyzed a district-court order that required fiduciaries to compensate participants for losses resulting from the fiduciaries' allegedly misleading statements. *Id.* at 432-433. The Court held that the ERISA provision on which the district court had relied (ERISA Section 502(a)(1)(B), 29 U.S.C. 1132(a)(1)(B)) did not authorize such relief, *CIGNA*, 563 U.S. at 435-438, but that a court could order the same relief in the form of a surcharge under Section 502(a)(3), *id.* at 438-442. In explaining why surcharge qualifies as "equitable relief," the Court discussed surcharge's history as an "exclusively equitable" remedy available against breaching trustees. *Id.* at 442 (citations omitted). The Court further explained that, while monetary make-whole relief had not been available in *Mertens*, "the fact that the defendant in [*CIGNA*], unlike the defendant in *Mertens*, is analogous to a trustee makes a critical difference." *Id.* at 442.

This Court has never disavowed *CIGNA*'s analysis of equitable surcharge. Although the Court in *Montanile* v. *Board of Trustees of the National Elevator Industry Health Benefit Plan*, 577 U.S. 136 (2016), stated that *CIGNA*'s discussion of Section 502(a)(3) "was not essential to resolving that case," it did not identify any substantive flaws in that discussion. *Id.* at 148 n.3. The *Montanile* Court rejected the argument that *CIGNA* had "all but overrul[ed]" *Mertens* and *Great-West*, stating that the "interpretation of 'equitable relief'" that the Court had adopted in those cases "remains unchanged." *Ibid.*

Whereas *Mertens* and *Great-West* involved monetary relief against nonfiduciaries, *CIGNA* was a suit against a plan fiduciary. *CIGNA*, 563 U.S. at 439. The *CIGNA* Court emphasized that distinction. See *id.* at 442 ("[T]he fact that the defendant in this case, unlike the defendant in *Mertens*, is analogous to a trustee makes a critical difference."). The *Montanile* Court's reaffirmation of *Mertens* and *Great-West* therefore does not cast doubt on *CIGNA*'s conclusion that, in a suit against a fiduciary for breach of fiduciary duty, surcharge continues to "fall within the scope of the term 'appropriate equitable relief' in § 502(a)(3)." *Ibid.*

CIGNA's analysis of equitable surcharge adheres to this Court's traditional practice of applying "principles of trust law" in interpreting ERISA. *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989); see *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). And the *CIGNA* Court's interpretation of Section 502(a)(3) respects ERISA's structure and purpose. This Court has characterized Section 502(a)(3) as a "safety net" for redressing ERISA violations that other provisions "do[ ] not elsewhere adequately remedy." *Varity Corp.*, 516 U.S. at 512. A monetary surcharge remedy sometimes may be the only effective means to redress harms from a fiduciary breach. See *CIGNA*, 563 U.S. at 440. Permitting such relief under Section 502(a)(3) allows that provision to perform its "safety net" function.

c. The court of appeals held that the "equitable relief" authorized by Section 502(a)(3) can never include monetary surcharge. See Pet. App. 33a. The court's analysis reflected several errors.

To begin, the court of appeals treated *Montanile*'s footnote as a license to disregard this Court's thorough, reasoned discussion of surcharge in *CIGNA*. See Pet. App. 33a-34a, 37a. That was an overreading of *Montanile*. *Montanile* said only that *CIGNA*'s discussion of

Section 502(a)(3) was "not essential to resolving that case," not that *CIGNA*'s analysis was wrong. 577 U.S. at 148 n.3. And because *Montanile* did not involve a claim for surcharge or a suit against a fiduciary, any substantive discussion of those issues would itself have been dicta.

The court of appeals concluded that "surcharge and damages are 'essentially equivalent'" because both involve "'monetary relief'" that compensates "a plaintiff for the losses that the defendant caused." Pet. App. 35a (quoting *Rose* v. *PSA Airlines, Inc.*, 80 F.4th 488, 498 (4th Cir. 2023), cert. denied, 144 S. Ct. 1346 (2024)). That comparison overlooks important differences between the two remedies. As explained above, surcharge and damages cover different types of losses, can be calculated from different points in time, and are subject to different defenses. See pp. 10-11, *supra*.

The court of appeals also minimized surcharge's historical pedigree as an equitable remedy for breaches of fiduciary duty. See pp. 9-10, *supra*. Citing *Mertens*, the court construed Section 502(a)(3)'s reference to "equitable relief" as limited to remedies that could issue in equity when equity courts had "*concurrent* jurisdiction" with the courts of law over a particular cause of action. See Pet. App. 30a, 33a. *Mertens* does not say that. *Mertens* instructs that a fundamentally legal remedy does not qualify as "equitable relief" simply because it could have been awarded in pre-merger breach-of-trust cases subject to equity courts' exclusive jurisdiction. See *Mertens*, 508 U.S. at 255-258. The Court did not say that a remedy like surcharge against a fiduciary, which developed and existed *exclusively* in the courts of equity, should be treated as legal relief. Cf. *CIGNA*, 563 U.S. at 442.

2. Although the Sixth Circuit's analysis was flawed, this case's idiosyncratic factual context makes it an unsuitable vehicle for clarifying the propriety of surcharge relief under Section 502(a)(3).

As explained above, a top-hat plan is a type of unfunded employee benefit plan that is available only to select groups of high-level employees. See p. 4, *supra*. Congress exempted top-hat plans from various ERISA protections, on the theory that high-level employees have enough bargaining power to influence the terms of their plans. See U.S. Dep't of Labor Op. No. 90-14A. Most relevant for present purposes, top-hat plans are not subject to ERISA's requirements for fiduciaries. 29 U.S.C. 1101(a).

That unusual feature of top-hat plans bears directly on the surcharge issue in this case. Under *CIGNA*, the fiduciary status of the defendant "makes a critical difference" in determining whether surcharge is "'appropriate equitable relief'" under Section 502(a)(3). 563 U.S. at 442. Thus, in *CIGNA*, the Court concluded that plaintiffs could seek surcharge under Section 502(a)(3) in a suit "against a plan fiduciary (whom ERISA typically treats as a trustee) about the terms of a plan (which ERISA typically treats as a trust)." *Id.* at 439.

Here, by contrast, petitioners are not suing a "plan fiduciary" in the same sense, because top-hat plans are not subject to ERISA's fiduciary rules. See 29 U.S.C. 1101(a)(1). There is consequently reason to doubt that surcharge is available in this case under a faithful application of *CIGNA*. Cf. Br. in Opp. 23. Some district courts have concluded that, although ERISA authorizes surcharge relief in some circumstances, "surcharge is not an available remedy for 'top hat' ERISA plans." *Berland* v. *X Corp.*, No. 24-cv-7589, 2025 WL 1223547, at *4

(N.D. Cal. Apr. 28, 2025); see *Metaxas* v. *Gateway Bank, F.S.B.*, No. 20-cv-1184, 2024 WL 3488247, at *6-*7 (N.D. Cal. July 18, 2024) (rejecting claim for surcharge on this ground).

Petitioners contend that, although top-hat plans are exempted from ERISA's fiduciary rules, respondent is still a fiduciary in the sense that *CIGNA* makes relevant. See Cert. Reply Br. 5. In petitioners' view, a defendant's status as an ERISA fiduciary matters under *CIGNA* only because an ERISA fiduciary is "analogous to a trustee" sued in a pre-merger court of equity; and here, respondent actually is a trustee of the rabbi trust. *Ibid.* (emphasis omitted) (quoting *CIGNA*, 563 U.S. at 442). The court of appeals did not address that argument, however, because it viewed surcharge as categorically unavailable under Section 502(a)(3), regardless of the fiduciary status of the particular defendant involved. See Pet. App. 33a. The Court thus would need to grapple with that threshold fiduciary-status issue in the first instance in order to apply *CIGNA*'s analysis to petitioners' claims. Because surcharge disputes rarely arise in the top-hat-plan context, that threshold issue itself is not a question of broad continuing importance, and a decision applying Section 502(a)(3) to the top-hat plan here might not provide useful guidance to lower courts and litigants in more typical fact patterns.

3. Petitioners have correctly identified a circuit conflict concerning the availability under Section 502(a)(3) of surcharge *against ERISA fiduciaries*. But petitioners have not identified any court of appeals decision finding surcharge to be available against a rabbi-trust administrator like respondent. The absence of such a conflict further counsels against granting review in this case.

As the court below observed, the circuits are divided over whether "ERISA plan participants may seek this type of monetary award against ERISA fiduciaries under [29 U.S.C.] 1132(a)(3)." Pet. App. 33a. The majority of circuits to consider the issue have held that, under Section 502(a)(3), "equitable surcharge is a typical equitable remedy that may be imposed on a fiduciary for a breach of fiduciary duty." *Gimeno* v. *NCHMD, Inc.*, 38 F.4th 910, 915 (11th Cir. 2022); see *Sullivan-Mestecky* v. *Verizon Commc'ns Inc.*, 961 F.3d 91, 99 (2d Cir. 2020); *Kenseth* v. *Dean Health Plan, Inc.*, 722 F.3d 869, 876-879 (7th Cir. 2013); *Silva* v. *Metropolitan Life Ins. Co.*, 762 F.3d 711, 724 (8th Cir. 2014); *Gabriel* v. *Alaska Elec. Pension Fund*, 773 F.3d 945, 955 (9th Cir. 2014). Several of those decisions postdate *Montanile*. One of those decisions applied *CIGNA*'s analysis because the court found that analysis "'persuasive,'' even though the court recognized that *CIGNA*'s discussion of Section 502(a)(3) was "likely dicta." *Gimeno*, 38 F.4th at 915 (citation omitted); contra Br. in Opp. 20. A panel of the Fifth Circuit recently reached the same conclusion in *Aramark Services, Inc. Group Health Plan* v. *Aetna Life Insurance Co.*, 162 F.4th 532, 541-544 (2025), although that decision has been vacated and the case will be reheard en banc, see *Aramark Servs., Inc. Grp. Health Plan* v. *Aetna Life Ins. Co.*, 173 F.4th 744 (5th Cir. 2025) (per curiam).

Conversely, the Fourth Circuit and now the Sixth Circuit below have held that surcharge "is unavailable under § 502(a)(3)," regardless of a defendant's fiduciary status. *Rose*, 80 F.4th at 504; see Pet. App. 33a. Given that conflict, the Court may want to revisit the availability of surcharge against ERISA fiduciaries in a future case.

Petitioners do not identify any conflict on the availability of surcharge in a case involving a top-hat plan. And it is not clear that any court of appeals would reach a different conclusion from the Sixth Circuit on these facts. Several of the courts that have permitted plaintiffs to seek surcharge have reasoned that "a defendant's status as a fiduciary makes a 'critical difference' in the availability of monetary equitable relief." *Gimeno*, 38 F.4th at 915 (quoting *CIGNA*, 563 U.S. at 442); see *Aramark*, 162 F.4th at 543-544; cf. *Rose*, 80 F.4th at 507 (Heytens, J., concurring in part and dissenting in part). It is uncertain whether those courts would consider a rabbi-trust administrator to be a fiduciary in the relevant sense under *CIGNA*. Cf. *Goldstein* v. *Johnson & Johnson*, 251 F.3d 433, 443 (3d Cir. 2001) (rejecting the argument that "administrators of top-hat plans are also fiduciaries"). Indeed, as noted above, several district courts have determined that surcharge is not available under Section 502(a)(3) to enforce top-hat plans. See *Metaxas*, 2024 WL 3488247, at *6-*7; cf. *Berland*, 2025 WL 1223547, at *4; *Kurisu* v. *Svenhard Swedish Bakery Supplemental Key Mgmt. Ret. Plan*, No. 20-cv-06409, 2021 WL 3271252, at *10 (N.D. Cal. July 30, 2021).

The specific question whether surcharge is an available remedy in a suit against a rabbi-trust administrator does not warrant this Court's review. No circuit conflict exists on that question, and the surcharge issue appears to have rarely arisen in the context of top-hat plans. Although this Court may wish to address the propriety of surcharge under Section 502(a)(3), it should await a case that presents the issue in a more typical factual context.

B. The Court Of Appeals' Preemption Holding Does Not Warrant This Court's Review

Petitioners also challenge (Pet. i, 14) the court of appeals' holding that ERISA expressly preempts their state-law claims. The court's preemption holding is correct and does not warrant further review.

1. Subject to certain exceptions that are not relevant here, ERISA expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. 1144(a). Giving that language its "broad common-sense meaning," this Court has held that a state law "'relates to'" an employee benefit plan "'if it has a connection with or reference to such a plan.'" *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) (quoting *Shaw* v. *Delta Air Lines*, 463 U.S. 85, 97 (1983)).

In *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987), this Court concluded that "state common law causes of action" for benefits owed under an ERISA plan satisfy that test and thus "fall under ERISA's express preemption clause." *Id.* at 47-48. The Court further explained that Congress's careful selection of specific remedies in ERISA Section 502(a) "strongly" indicates "that ERISA's civil enforcement remedies were intended to be exclusive." *Id.* at 54. Thus, "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." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 209 (2004).

The court of appeals correctly applied those principles in this case. Petitioners' state-law causes of action seek the benefits owed to them under the terms of the plans and the trust. See Pet. App. 22a, 25a; p. 6, *supra*.

These claims at least have a "connection with" employee benefit plans, as they "touch matters that ERISA already covers." *Id.* at 16a-17a; see *Pilot Life*, 481 U.S. at 47. Moreover, ERISA supplies a specific cause of action to a plan participant "to recover benefits due to him under the terms of his plan" or "to enforce his rights under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). Permitting petitioners to pursue "alternative enforcement mechanisms" under state law thus "would undermine Congress's policy choices to include only certain remedies in" Section 502(a). Pet. App. 22a (brackets, citation, and internal quotation marks omitted); see *Pilot Life*, 481 U.S. at 54.

2. Petitioners do not contest that reasoning. Instead, they argue that, if their ERISA claim for surcharge cannot go forward, preemption of their alternative state-law remedy would be a "jarring result." Pet. 5. But this Court rejected substantially the same argument in *Pilot Life*, explaining that Congress's decision *not* to provide a particular remedy in ERISA carries as much preemptive force as a decision to provide that remedy. See 481 U.S. at 54 (plaintiffs may not "obtain remedies under state law that Congress rejected in ERISA").

Petitioners also raise (Pet. 31-32) a related argument that is specific to top-hat plans. They contend that ERISA's top-hat-plan exemption from ERISA fiduciary rules reflects Congress's view that high-level employees have sufficient bargaining power to influence their plans, and that participants' exercise of such influence would be substantially negated if the bargained-for terms could not be enforced through state-law breach-of-contract actions. Petitioners are wrong, however, in suggesting that preemption of state-law claims would leave top-hat plan participants without a remedy, since ERISA Section 502(a)(1)(B) supplies a cause of action for plan participants to enforce the terms of their plans. See Pet. App. 24a-25a; 29 U.S.C. 1132(a)(1)(B) (authorizing a participant to sue "to recover benefits due to him under the terms of his plan" or "to enforce his rights under the terms of his plan").

In this case, petitioners tried to raise a Section 502(a)(1)(B) claim against Ruby Tuesday in the bankruptcy proceedings, but those proceedings ultimately resulted in a settlement. See D. Ct. Doc. 61-39, at 19 (Feb. 16, 2024). Petitioners contended below that the Section 502(a)(1)(B) cause of action does not fit their current claims because they are seeking to enforce the terms of the rabbi trust rather than the terms of the plan. See Pet. App. 25a. But accepting that premise would presumably doom petitioners' Section 502(a)(3) claims as well, since relief under that provision is also limited to violations of ERISA itself "or the terms of the plan." 29 U.S.C. 1132(a)(3); see Pet. App. 32a (declining to address that issue). And the overlap between these claims and the settled bankruptcy claims further highlights the atypical nature of this case. See p. 15, *supra*.

3. Petitioners do not identify a conflict between the court of appeals' preemption ruling and any decision of this Court or another court of appeals. Their case-specific disagreement with the preemption holding below does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2026

EXHIBIT B

No. 24-40323

In the United States Court of Appeals for the Fifth Circuit

ARAMARK SERVICES, INCORPORATED GROUP HEALTH PLAN; ARAMARK SERVICES INCORPORATED, *formerly known as* ARAMARK CORPORATION; ARAMARK UNIFORM SERVICES, GROUP HEALTH AND WELFARE PLAN; ARAMARK BENEFITS COMPLIANCE REVIEW COMMITTEE,

Plaintiffs-Appellees,

v.

AETNA LIFE INSURANCE COMPANY,

Defendant-Appellant.

AMICUS CURIAE BRIEF OF THE U.S. ACTING SECRETARY OF LABOR SUPPORTING PLAINTIFFS-APPELLEES

On Appeal from the United States District Court for the Eastern District of Texas, Case No. 2:23-CV-446

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CERTIFICATE OF INTERESTED PERSONS

Case No. 24-40323

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Jonathan Berry, Solicitor, United States Department of Labor
2. Wayne R. Berry, Associate Solicitor for Plan Benefits Security, Office of the Solicitor, United States Department of Labor
3. Daniel Colbert, Senior Trial Attorney, Office of the Solicitor, United States Department of Labor
4. Megan E. Guenther, Deputy Associate Solicitor for Plan Benefits Security, Office of the Solicitor, United States Department of Labor
5. Keith E. Sonderling, Acting Secretary, United States Department of Labor
6. Stephen Stasko, Counselor, Office of the Solicitor, United States Department of Labor
7. Edward M. Wenger, Senior Counselor, Office of the Solicitor, United States Department of Labor

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned hereby certifies that none of the above-listed persons are corporate entities.

/s/ Edward M. Wenger
EDWARD M. WENGER
Attorney of Record for Proposed
Amicus Curiae the Acting
Secretary of Labor
August 31, 2026

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IDENTITY & INTEREST OF AMICUS CURIAE[1]

The issue in this case is whether an action for the remedy of surcharge seeks "equitable relief" within the meaning of the parties' arbitration clause. The parties and the courts have treated that issue as overlapping with the question whether surcharge qualifies as "appropriate equitable relief" within the meaning of Section 1132(a)(3) Employee Retirement Income Security Act (ERISA). 29 U.S.C. § 1132(a)(3). As the United States officer with chief authority over Title I of ERISA, the Acting Secretary of Labor must help "assure the . . . uniformity of enforcement of . . . the ERISA statutes" when the need arises. *See Sec'y of Lab. v. Fitzsimmons*, 805 F.2d 682, 693 (7th Cir. 1986) (en banc). This duty includes clarifying and harmonizing the scope of relief that ERISA provides, the common law from which it borrows, and the Supreme Court jurisprudence construing it. The Acting Secretary thus offers the following brief addressing the meaning of ERISA Section 1132(a)(3) to aid the Court.[2]

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[1] Federal Rule of Appellate Procedure 29(a)(2) provides that a United States officer "may file an amicus brief without the consent of the parties or leave of court." Because the Acting Secretary files this amicus brief past the Court-appointed deadline, however, he moves to file out of time.

[2] The Acting Secretary takes no position on the meaning of the parties' arbitration agreement or the extent to which it tracks ERISA's meaning.

INTRODUCTION & SUMMARY OF ARGUMENT[3]

In 1974, Congress enacted ERISA in response to the Studebaker Corporation's insolvency and the consequential loss of promised pensions that otherwise would have protected the automobile company's employees through their retirement. Congress self-consciously and expressly created "minimum standards" to assure "the equitable character of" ERISA-covered "plans and their financial soundness." 29 U.S.C. § 1001(a). For those entrusted with responsibilities vis-à-vis ERISA-covered plans—i.e., fiduciaries—Congress imposed similar standards of care that have historically, as a matter of common law, applied to trustees. And Congress put in teeth by "providing for appropriate remedies, sanctions, and ready access to the Federal courts." *Id.* § 1001(b).

In the course of addressing the meaning of the parties' arbitration agreements, the parties have debated the scope of remedies available when an ERISA fiduciary transgresses its statutorily imposed duties (the highest imposed by law). Specifically, when Congress entitled fiduciary-breach victims to sue for "appropriate equitable relief," 29 U.S.C. § 1132(a)(3), may a court award money to make the victim whole?

Because "[e]quity suffers not a right to be without a remedy," R. Francis, Maxims of Equity 29 (1st Am. ed. 1823), the Supreme Court has stated that

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[3] The Acting Secretary notes that the United States is filing a brief in the Supreme Court of the United States on similar issues in *Aldridge v. Regions Bank*, No. 25-590.

"surcharge"—i.e., a monetary award intended to make whole a fiduciary-breach victim—could be awarded in a suit brought under ERISA. *CIGNA Corp. v. Amara*, 563 U.S. 421, 442 (2011). In so doing, the Court painstakingly recounted surcharge's historic pedigree and concluded that it was a common—indeed "exclusively"—equitable trust-law remedy that fit comfortably within ERISA's trust-law-infused statutory regime.

Examining equity's long history confirms that the *CIGNA* Court got it right—surcharge was "typically available in equity" when courts were divided into those of law and equity. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993) (emphasis omitted). That means that it is available under Section 1132(a)(3). And for its part, the Supreme Court has never repudiated its extended *CIGNA* discourse.

Courts across the nation have largely (and correctly) followed *CIGNA*. Aetna, however, wants this Court to join the minority view and disregard the *CIGNA* Court's reasoned analysis. Focusing on a single footnote in *Montanile v. Bd. of Trustees of Nat. Elevator Indus.*, 577 U.S. 136, 148 n.3 (2016), Aetna surmises that *CIGNA* has been gutted, and that monetary remedies are only equitable when they seek traceable funds in the fiduciaries' possession—not money collectable from any of their general assets. Because surcharge seeks the latter, Aetna reasons that it cannot be awarded in an ERISA breach-of-fiduciary-duty lawsuit.

A panel of this Court rejected Aetna's argument, reaffirming earlier Circuit precedent holding that surcharge is available under Section 1132(a)(3). In so doing, it followed longstanding trust-law equitable practice and joined five other circuits while rejecting the Fourth and Sixth Circuits' mistaken holdings to the contrary. *Compare, e.g.*, *Gimeno v. NCHMD, Inc.*, 38 F.4th 910, 914–15 (11th Cir. 2022) *with Rose v. PSA Airlines, Inc.*, 80 F.4th 488, 495–504 (4th Cir. 2023). The Acting Secretary now respectfully requests that the Court rule in accordance with its two correctly decided prior decisions and reaffirm that surcharge is an available remedy in suits brought under ERISA.

BACKGROUND

A. ERISA protects America's employer-sponsored retirement, health, and welfare plans. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). Participants in and beneficiaries of those plans have a property interest in the plan's assets, as demarcated by the plan's documents. *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 100 (2013). To protect those property interests, ERISA treats covered plans as if they were trusts that an employer creates for its employees. 29 U.S.C. § 1103(a)(1); *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). For that reason, the Supreme Court has held that trust law largely informs the way ERISA operates. *Firestone*, 489 U.S. at 110.

Those who exercise discretionary authority or control over ERISA plans are functionally the plans' trustees and are referred to as "fiduciaries." *See LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 253 n.4 (2008); *see also* 29 U.S.C. § 1002(21). Their unique role carries heightened obligations. Specifically, they must follow the plan's written terms and abide by certain trust-law-derived duties that are now enumerated in ERISA. *See* 29 U.S.C. § 1104(a). Relevant here, the duty of loyalty requires fiduciaries to (among other things) "deal fairly and honestly with beneficiaries" and "ensure that a plan receives all funds to which it is entitled." *Cunningham v. Cornell Univ.*, 604 U.S. 693, 696 (2025).

To animate these goals, ERISA's "comprehensive" enforcement provisions ensure that plan participants and beneficiaries get the benefits that their plans' terms promise them if a fiduciary breaches an ERISA-imposed fiduciary duty. *Nachman Corp. v. Pension Ben. Guar. Corp.*, 446 U.S. 359, 361 (1980). In some cases, enforcement is straightforward. In a run-of-the-mill case, an aggrieved participant or beneficiary can sue for the benefits to which the plan's terms entitle them, 29 U.S.C. § 1132(a)(1)(B), or for plan-wide relief, *id.* § 1132(a)(2).

For more complex enforcement actions, ERISA includes a catchall provision that functions as a safety net by providing remedies for injuries that the other enforcement mechanisms cannot reach.[4] *Howe*, 516 U.S. at 512. These remedies may take the form of any “appropriate equitable relief.” 29 U.S.C. § 1132(a)(3). The Supreme Court has held that this provision allows courts to award any remedy “typically available in equity.” *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 256 (1993). “Typically available in equity,” in turn, means the sort of remedy that courts of equity awarded before the 1938 merger of law and equity. *Montanile v. Bd. of Trs. of Nat. Elevator Indus. Health Benefit Plan*, 577 U.S. 136, 142 (2016) (quoting *id.*). Critically, and as discussed at greater length below, *infra* at 10–12, pre-merger courts of equity routinely bestowed monetary awards in circumstances that differed qualitatively from legal compensatory damages.

B. Plaintiff Appellee Aramark Services provides food, uniforms, and facility services to public buildings and businesses.[5] *Aramark Servs., Inc. Grp. Health Plan v. Aetna Life Ins. Co.*, 162 F.4th 532, 534 (5th Cir. 2025), *reh’g en banc granted, opinion vacated*, 173 F.4th 744 (5th Cir. 2026). It has several health plans for its employees through which Aramark pays their medical bills. *Id.* Aramark contracted with Aetna to administer the health plans. *Id.* at 534–35. For a monthly fee, Aetna,

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[4] Though only plan participants, beneficiaries, and fiduciaries can sue under Section 1132(a)(3), the Acting Secretary can obtain similar relief under Section 1132(a)(5). *See* 29 U.S.C. § 1132(a)(5).

[5] The named plaintiffs include Aramark Services, its Incorporated Group Health Plan, and the company’s benefits compliance review committee. The Acting Secretary refers to them all as Aramark.

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among other things, adjudicated payment claims with its network of healthcare providers, reported on the plans' financial status, and handled plan participants' calls and correspondence about their benefits. *Id.* at 535. Aetna does not dispute that, for the purposes of this appeal, it owed fiduciary duties as the plan's administrator. *Id.* at 541 n.24; Excerpted Record on Appeal at 56–59 (Am. Compl. ¶¶ 99–108; 117–24).

Aramark claims that Aetna charged it excessive service fees while producing subpar results and driving up its employees' healthcare costs. It also alleges that Aetna negligently and imprudently paid millions of dollars of fraudulent and non-subrogated healthcare-provider claims, retained millions of dollars more in undisclosed fees, and engaged in claims processing-related misconduct in violation of ERISA's fiduciary duties. *Aramark*, 162 F.4th at 535. Based on these allegations, Aramark sued, seeking "reimburse[ment] . . . for any and all losses resulting from [Aetna] breaching its fiduciary duties."[6] Excerpted Record on Appeal at 60–61 (Am. Compl. Prayer for Relief).

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[6] Aramark sought this remedy for various alleged fiduciary breaches involving several fund and asset sources. *Aramark*, 162 F.4th at 535. The Acting Secretary takes no position on whether surcharge is an acceptable remedy for these alleged breaches and their related funding and asset sources. He argues only that surcharge is an available equitable remedy generally against fiduciaries for fiduciary breaches.

The contract governing the relationship between Aetna and Aramark included a clause that forced all lawsuits into arbitration—except those seeking "equitable relief." Excerpted Record on Appeal at 21. Based on this clause, Aetna attempted to compel arbitration and moved to stay the proceedings below. *Id.* Aramark opposed the motion to stay, arguing that, because it sought an equitable surcharge, the arbitration clause did not apply. *Id.* at 24.

C. The district court denied Aetna's motion for a stay. After noting that Aramark sought money that would make it whole in a suit brought against a fiduciary premised on alleged fiduciary breaches, the court looked to the Supreme Court's decision in *CIGNA*, which interpreted similar language in ERISA Section 1132(a)(3). *Id.* at 25. Because the *CIGNA* Court had stated that surcharge was indeed typically awarded by courts of equity when lawsuits were brought against trustees for breaches of fiduciary duties, the district court concluded that Aramark sought the sort of equitable relief that brought its case outside the arbitration clause's purview. *Id.* at 26 (citing *CIGNA*, 563 U.S. at 440–42).

A divided panel of this Court affirmed. The majority noted that an earlier circuit panel, citing *CIGNA*, held that surcharge was an available equitable remedy under ERISA. *Aramark*, 162 F.4th at 544 (citing *Gearlds v. Entergy Servs.*, Inc., 709 F.3d 448, 452 (5th Cir. 2013)). The majority also reasoned that *Gearlds* remained good law despite recent Supreme Court precedent, none of which addressed claims brought against ERISA fiduciaries for fiduciary breaches. *Id.*

Judge Jones dissented in part. In her view, *CIGNA*—and by extension *Gearlds*—had indeed been abrogated by a footnote in *Montanile*. She reasoned, further, that *CIGNA*'s surcharge discussion was dicta and could thus be disregarded. *Id.* at 548 (Jones, J., dissenting in part) (citing *Montanile*, 577 U.S. at 148 n.3). Finally, she construed the Supreme Court's jurisprudence in this area to limit monetary, yet equitable, remedies to instances in which a "plaintiff could trace the funds or property [it sought to recover] in a defendant's possession." *Id.* at 546 (Jones, J., dissenting in part) (citing *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211, 213 (2002)).

On April 28, 2026, the Court agreed to rehear this case en banc.

ARGUMENT

I. SURCHARGE IS AN EQUITABLE REMEDY AVAILABLE UNDER SECTION 1132(A)(3).

For purposes of ERISA, surcharge is a form of "appropriate equitable relief" that may be awarded for claims brought against fiduciaries for breaches of fiduciary duties. 29 U.S.C. § 1132(a)(3). This is true both as a matter of historical analysis and Supreme Court jurisprudence. Dating to the Middle Ages, surcharge was a commonly used, *exclusively* equitable remedy that could be awarded against a trustee for losses caused by violations of his trust-related duties. And as a matter of precedent, the only time the Supreme Court has ever taken up the surcharge question in a case involving a breach-of-fiduciary claim brought against an ERISA fiduciary, it reasoned that surcharge could be awarded under Section 1132(a)(3). *See CIGNA*, 563 U.S. at 442. For its part, the Department of Labor has long agreed that surcharge is available as a remedy under ERISA. *See, e.g.*, *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F.Supp.2d 511, 607 (S.D. Tex. 2003). And because surcharge is sometimes the only method by which a court can make whole participants who suffer ERISA violations, concluding that it is available animates the purpose that ERISA was enacted to serve.

For all these reasons, the panel majority got the ERISA issue right, and the en banc court should make that manifest.

A. As a matter of history, surcharge was a typically available equitable remedy.

Surcharge—or "equitable compensation"—is a longstanding remedy derived from the traditional equitable process of "accounting." Arising in medieval equity courts and evolving through the nineteenth century, accounting required trustees to report the assets they held in trust. Samuel Bray, *Fiduciary Remedies*, The Oxford Handbook of Fiduciary Law, 449, 452 (Evan J. Criddle, et al. ed., 2019). If the trust assets were depleted, a court could award an "accounting for profits," which required trustees to restore any assets of which they deprived the trust. *Id.* Critically, given the sui generis nature of trust law throughout the Anglo-American legal system, these causes of action could be heard only in courts of equity. *See CIGNA*, 563 U.S. at 442.

Surcharge developed as a shortcut for accounting. Simply put, if an aggrieved person could show that a trustee had somehow wrongfully deprived the trust of value, a court of equity could force the offending trustee to pay money to account for the losses without first ordering it to conduct an accounting. In other words, "without [requiring] an accounting, a beneficiary could sue for . . . the expected results on the negative side of the ledger." Bray, *supra*, at 457. A surcharge is thus "make-whole" relief; it restores specific trust property (i.e., the account balance) to a state unblemished by trustees' actions. *CIGNA*, 563 U.S. at 442.

Although an award of money for losses superficially resembles monetary damages (a quintessentially legal remedy), those similarities fade on closer inspection. The differences lie primarily in trustees' unique duties, the forebears of the fiduciary duties currently enumerated in ERISA. Consistent with surcharge's origins in equitable accounting, trust beneficiaries could only seek surcharge against a trustee (in the ERISA context, against a plan fiduciary), and surcharge could only be awarded enough to restore the trust to its state absent the breach of trust (in the ERISA context, a fiduciary breach). These limits existed because the unique responsibilities imposed on trustees made them solely "chargeable with . . . any profit which would have accrued to the trust estate if there had been no breach of trust," even including profits forgone because the trustee "fail[ed] to purchase specific property which it is his duty to purchase." *LaRue*, 552 U.S. at 253 n.4 (quoting 1 Restatement (Second) of Trusts § 205, and Comment i (1957); § 211)).

Critically, surcharge was a remedy exclusively available in equity. Suits against trustees proceeded only in trust law, over which equitable courts had exclusive jurisdiction. *Manhattan Bank of Memphis v. Walker*, 130 U.S. 267, 271 (1889). And courts of equity commonly awarded surcharge as relief.[7] Thus, surcharge was a typical, indeed exclusively, equitable remedy available back when courts divided their jurisdiction between law and equity.[8] *See* Bray, *supra*, at 458 n.66.

[7] *See, e.g.*, *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 463–64 (1939) (explaining that courts have the equitable power to "surcharge [the trustee] with losses incurred"); *Manhattan Bank*, 130 U.S. at 279 (ordering an equitable monetary remedy "for the proper value of the $5,200 of bonds" a trustee misappropriated); *Kendall v. DeForest*, 101 F. 167, 170 (2d Cir. 1900) (upholding decree that held trustee liable to beneficiaries for income deficiency resulting from breach of trust that had depleted annuity fund); *Gates v. Plainfield Trust Co.*, 194 A. 65, 66 (N.J. 1937) (per curiam) (upholding decree that required executor to pay income to life beneficiary); *cf. United States v. Mitchell*, 463 U.S. 206, 226 (1983) (relying on trust law to hold that Indians—whose tribes have a trust relationship with the U.S. government—could sue for monetary relief for losses allegedly caused by government's violation of timber-management duties).

[8] Treatises both before and after the years of the divided bench accord. 2 Joseph Story, *Commentaries on Equity Jurisprudence* §§ 1266–78, at 519–34 (12th ed. 1877); 1 John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 1080, at 2481–82 (4th ed. 1918); Restatement (Second) of Trusts, § 205, at 458 cmt. a; 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 199.3, at 206 (4th ed. 1987);

B. Given ERISA's incorporation of trust-law principles, it necessarily follows that surcharge is an appropriate equitable remedy when a fiduciary breaches a fiduciary duty.

ERISA carries surcharge's role and purpose to the present. As mentioned above, ERISA fiduciaries are, for all intents and purposes, trustees. They have responsibility for the plan assets that they hold in trust, and ERISA subjects them to fiduciary duties that impose heightened obligations on their conduct. *Beck v. PACE Int'l Union*, 551 U.S. 96, 102 (2007). More specifically, they must act exclusively in the interest of plan participants and beneficiaries any time they take a fiduciary action, and just like their trustee ancestors, they can be held to account when a fiduciary-duty breach causes a financial loss. *Pegram v. Herdrich*, 530 U.S. 211, 224 (2000).

That last point bears emphasis. Just like trustees, ERISA fiduciaries' unique roles and responsibilities expose them to unique liability if they breach those duties. ERISA fiduciaries can be held "personally liable" and are expected to restore "any losses to the plan resulting from each [fiduciary-duty] breach," as well as "any profits of such fiduciary which have been made through use of assets of the plan[.]" 29 U.S.C. § 1109(a). This mirrors precisely trustees' liability to restore any ill-gotten profit to the trust. *LaRue*, 552 U.S. at 253 n.4; *see also supra* at 11.

George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 862, at 36 (rev. 2d ed. 1995).

Given the inimitable nature of the trust/trustee relationship, as well as the fact that suits against trustees could only be brought in courts of equity, it follows that the remedies plan participants can obtain from fiduciaries differ inherently from those they can obtain from non-fiduciaries. Fiduciaries are ERISA's primary regulated actors. *Mertens*, 508 U.S. at 253–54. For all these reasons, it should be entirely noncontroversial that the equitable remedies ERISA makes available against fiduciaries extend more broadly than those it imposes against non-fiduciaries.

Surcharge is of that ilk—an equitable remedy that is available for suits against a fiduciary, and for claims of fiduciary-duty breaches. It is precisely the type of remedy that remains in the quiver to enforce the heightened duties that ERISA imposes upon fiduciaries. Indeed, fiduciaries' greater liability for monetary remedies like surcharge is a burden of the mighty: fiduciaries (but not non-fiduciaries) are responsible for retirement and health plans' assets and property under certain fiduciary duties, so courts can require them (but not non-fiduciaries) to make plans whole for any losses associated with their breach of those duties.

C. Surcharge is not merely monetary damages under a different moniker.

As noted above, conceded by Aramark, acknowledged by the Acting Secretary, and relied upon by the panel dissent, surcharge resembles—at least superficially—monetary damages that are traditionally considered a legal, as opposed to an equitable, remedy. But even though neither surcharge nor monetary damages require a plaintiff to identify specific funds that are unlawfully in the hands of a defendant, the similarities end there. These differences matter, they outnumber the likenesses, and they keep surcharge squarely within the equitable-remedy limitation in Section 1132(a)(3).

The scope of fiduciaries' duties under ERISA and the fiduciaries' role in managing plan assets impose significant, property-rights-based limitations on the scope of any surcharge relief. These limitations do not exist when a plaintiff seeks monetary damages for a legal claim. All ERISA remedies turn on the property interest participants and beneficiaries have in the retirement or health plan under its terms. *U.S. Airways*, 569 U.S. at 100. But unlike legal damages, the equitable remedies ERISA offers go no further than making sure that those property interests remain whole and intact.

ERISA plan participants and beneficiaries have no general property interest in the plan itself. *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 542–43 (2020). But they do have a property interest in what the plan's terms guarantee them, *id.*, and, in some circumstances, an interest in the plan's overall financial integrity, *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985). This limitation affects all of ERISA's substantive provisions; the duty of loyalty does not, for example, require plan fiduciaries to give plan participants benefits above and beyond those that the plan's terms entitle them to receive. *See* 29 U.S.C. § 1104(a)(1)(A)(i), (D).

Under ERISA, any equitable relief must be "appropriate" to that property entitlement. *Id.* § 1132(a)(3). ERISA thus strictly connects any potential recovery to the plan's assets and the portion to which its terms entitle the participants and beneficiaries.

Equitable remedies restore damage to property and funds to which plaintiffs have a finite, circumscribed property right. *Montanile*, 577 U.S. at 148 n.3. Properly understood, surcharge does just that, and no more: it makes whole plan participants and beneficiaries by restoring to them the plan property—and only such property—that was promised to them under the plan's terms. *CIGNA*, 563 U.S. at 442. Consistent with its origins as an equitable trust-law remedy, surcharge is only available against the fiduciaries responsible for—and with heightened duties toward—those limited funds of which the fiduciaries' breach deprived the participants or beneficiaries. And like all equitable claims, surcharge claims carry no jury-trial right, and defendants enjoy the full panoply of equitable defenses like laches and unclean hands, which prevent abuses from both courts and plaintiffs. Bray, *supra*, at 458.

Contrast that with legal damages: legal relief is open-ended while equitable relief is not. With legal relief, courts can award individual plaintiffs nearly any sum that fits their injuries, and those sums need not be tethered to any property entitlement. Unlike surcharge, legal relief is compensatory. It can encompass nonpecuniary losses like emotional distress, loss of society, and similar harms "not capable of measurement by any material . . . standard." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978) (quoting 1 S. Speiser, Recovery for Wrongful Death, § 3:49 (2d ed. 1975)). And it can include punitive damages meant to affirmatively punish defendants for their actions even if there is no material harm. *See Smith v. Wade*, 461 U.S. 30, 35 (1983). Legal relief has few inherent limits—plaintiffs can be awarded essentially whatever is deemed fair by a jury. Bray, *supra*, at 457.

In other words, the differences between surcharge and money damages are legion, qualitative, and meaningful. These variances should quell any apprehension that allowing them under Section 1132(a)(3) would reduce to a specter the limitations on ERISA relief intended by Congress. For these reasons, the panel majority was correct.

D. Surcharge fills a specific—but crucial—role in enforcing ERISA.

Surcharge is an archetype of the relief that Section 1132(a)(3)'s catchall, safety-net provision provides to ensure that ERISA violations do not lack a meaningful remedy. *Howe*, 516 U.S. at 512. Some fiduciary breaches neither violate the plan's terms nor harm the plan as a whole, yet they still clearly cause losses—sometimes substantial—to plan participants and beneficiaries. If disallowed, certain plan participants and beneficiaries—including those affected by outright fraud—

may find themselves with no way to be made whole in the wake of losses caused by fiduciaries for breaches of fiduciary duty, which would in turn undermine the entire reason ERISA was enacted in the first place.

An example illustrates this process. Suppose an ERISA plan offered a one-time payment of five thousand dollars for each plan participant who retired after thirty or more years of consecutive service with the company that sponsored the plan. To receive this benefit under the plan's terms, participants must simply fill out a form within thirty days of retirement. Suppose also that the plan's fiduciary, concerned with the company's bottom line, dishonestly told participants that filling out the eligibility form was unnecessary to obtain the benefit. Doing so would be fraud—and, as the Supreme Court has held, an obvious violation of that fiduciary's duty of loyalty. *Howe*, 516 U.S. at 506.

As flagrant as the fiduciary's breach would be in such a scenario, ERISA's usual enforcement provisions provide no relief. Because the fiduciary's fraud led plan participants to not fill out the form as required by the plan's terms, those participants cannot obtain relief under Section 1132(a)(1)(B), which allows recovery for benefits due. *See* 29 U.S.C. § 1132(a)(1)(B). And because the fiduciary's actions also caused no loss to the plan as a whole, those participants would remain similarly unable to recover the lost benefits under Section 1132(a)(2). *See Russell*, 473 U.S. at 140.

Contrast that deficiency with a more mundane, unintentional ERISA violation for which the statute provides clear relief. Suppose, rather than fraudulently lying about what the plan requires to prevent plan participants and beneficiaries from getting the one-time retirement benefit, that the plan's fiduciary inadvertently reads the plan to require participants to give notice of retirement when doing so is not required. If the fiduciary told plan participants and beneficiaries of this misreading, doing so would deprive of the retirement benefit and they could sue for benefits due under the plan's terms. 29 U.S.C. § 1132(a)(1)(B).

A surcharge awarded under Section 1132(a)(3) remedies the fraud described above. The harm is obvious: plan participants *should* have gotten the retirement benefit under the plan's terms, but the fiduciary's fraudulent breach of his duty of loyalty prevented them from receiving their benefits. Section 1132(a)(3) can give participants a surcharge equal to the retirement benefit. Doing so provides "appropriate equitable relief": the benefits contemplated by the plan's terms strictly limit the monetary relief available via surcharge to the amount that it would take to make whole the participants' property interest encroached upon by the fiduciary's breach.[9] This follows the basic equity maxim: "that if by fraud or misrepresentation

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[9] *See also Silva v. Metropolitan Life Ins. Co.*, 762 F. 3d 711, 715 (8th Cir. 2014) (permitting a surcharge for the beneficiary of a life insurance policy after the insurer denied his claim for benefits because the deceased policy holder had not submitted sufficient "evidence of insurability" because his plan's fiduciary did not put out a summary plan description mentioning the requirement); *Perez v. Silva*, 185

one prevents acts from being done, equity treats [the act] as if it were done." *Carpenter v. Providence Washington Ins. Co.*, 45 U.S. 185, 224 (1846) (internal quotation marks omitted). And just as importantly, it ensures that every ERISA plaintiff can get the relief appropriate for their injury.

These hypotheticals help illustrate why surcharge is necessary to ensure that ERISA provides the robust relief and protection that Congress plainly intended. The foregoing shows that ERISA's primary remedial provisions can sometimes provide relief for simple fiduciary mistakes but not more malicious fraud. Allowing surcharge under Section 1132(a)(3) fills that counter-intuitive gap.

II. THE SUPREME COURT HAS RECOGNIZED THAT SURCHARGE IS AVAILABLE UNDER SECTION 1132(a)(3).

Recognizing all this history, trust-law tradition, and statutory application, the Supreme Court explicitly said in *CIGNA* that surcharge was available as a remedy under Section 1132(a)(3). *CIGNA* was one of many cases in which the Court addressed which remedies were "typically available at equity" for purposes of ERISA. It remains the Court's most thorough analysis of the equitable remedies

F. Supp. 3d 698, 703–04 (D. Md. 2016) (similarly permitting the Secretary of Labor to seek a surcharge for such conduct); *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 882 (7th Cir. 2013) (holding surcharge was available to health plan participant who was incorrectly told that a procedure was covered by her plan); *McCravy v. Metropolitan Life Ins. Co.*, 743 F. Supp. 2d 511, 523–25 (D. S.C. 2009) (letting a life insurance plan participant seek surcharge when she was denied benefits following the death of her daughter, where plan fiduciary had not informed her that the daughter was no longer a "child" within plan definition).

available in a cause of action for breach of fiduciary duty brought against an ERISA fiduciary. And contrary to a minority of circuits, the Supreme Court has never called into question its position on this issue.

CIGNA was a prototypical surcharge case. It analyzed a district-court order that required fiduciaries to pay losses to participants resulting from misleading statements that the fiduciaries made. *CIGNA*, 563 U.S. at 432–433. In *CIGNA*, the Court held that the ERISA provision on which the district court relied did not provide such relief, but it nonetheless instructed the district court to consider on remand that 29 U.S.C. § 1132(a)(3) allowed it to award a surcharge. *Id.* at 440–442. The Court drew on some of the history and statutory analysis described above, focusing on surcharge's status as an "exclusively equitable" remedy commonly used in equitable trust-law cases and distinguishing past cases in which it denied monetary remedies because they involved non-fiduciaries. *Id.* at 441–442 (citations omitted).

As the panel majority recognized here, the Supreme Court has never wavered from these statements. That said, the Sixth Circuit, the Fourth Circuit, and the panel dissent have disregarded *CIGNA*'s relevant discussion as dicta and have opined that a footnote in *Montanile sub silentio* abrogated *CIGNA*'s surcharge discussion. 577 U.S. at 148 n.3. The Acting Secretary is respectfully of the opinion that it did not.

In the Acting Secretary's view, *Montanile* is best read to support the opposite conclusion. As an initial matter, it bears noting that the Supreme Court has warned repeatedly that it does not *sub silentio* overrule its prior decisions. *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000). The notion that the *Montanile* Court nullified *CIGNA*'s detailed ERISA-remedies guidance in a footnote that itself was not necessary to *Montanile*'s outcome runs afoul of the Court's pronouncements on the seriousness of stare decisis. Yet that is precisely what Aetna claims, contending that *Montanile* "decisively rejected" *CIGNA* as "short-lived" dictum. Appellant's Br. at 14, 23.

But the *Montanile* footnote onto which Aetna clings merely clarified that *CIGNA* did not "all but overrul[e]" the Court's earlier ERISA-remedies decisions. *Montanile*, 577 U.S. at 148 n.3. Far from doing so, the Court explained, *CIGNA* "reaffirmed" that caselaw, which necessarily means that *CIGNA* harmonizes with that caselaw. *Id.* In other words, the footnote in *Montanile* is precisely the sort of passing observation for which the Court has cautioned against giving decisive weight. *See Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22, 42 (2025).

Taking the *Montanile* Court at its word that it was not overruling any part of *CIGNA*, the correct way to harmonize the Court's jurisprudence in this area is the conclusion reached by the panel majority: surcharge is available, but only for breach-of-fiduciary-duty claims brought against ERISA fiduciaries. This is true even if a plaintiff bringing a breach of fiduciary duty claim against an ERISA fiduciary cannot identify the "particular funds or property in the defendant's possession." *Id.* (citing

CIGNA, 563 U.S. at 439). As explained above, ERISA treats fiduciaries differently than non-fiduciaries, and it does so for good reason. Because equity holds fiduciaries to a higher standard than non-fiduciaries, it is wholly appropriate that the availability of surcharge turns on whether a defendant owes fiduciary duties to a plaintiff.

CIGNA's careful analysis should guide this Court. Even if *CIGNA*'s surcharge discussion was not strictly "essential to resolving t[he] case," it is still a legal pronouncement endorsed by the Supreme Court, and it was offered as instruction to aid the district court's analysis on remand. *Montanile*, 577 U.S. at 148 n.3. As this Court has noted, lower courts are "generally bound by Supreme Court dicta" when its guidance is "recent and detailed." *Hollis v. Lynch*, 827 F.3d 436, 448 (5th Cir. 2016) (quoting *Gearlds*, 709 F.3d at 452). And in such cases, Supreme Court dicta informs lower courts' decisions "almost as firmly as . . . the Court's outright holdings." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1079 (10th Cir. 2018). This is especially true where, as here, the purported dicta contains "explicit directives . . . to the lower court concerning proceedings on remand." *In re Ultra Petroleum Corp.*, 28 F.4th 629, 640–41 (5th Cir. 2022) (quoting *Cole Energy Dev. Co. v. Ingersoll-Rand Co.*, 8 F.3d 607, 609 (7th Cir. 1993)).

CIGNA's surcharge discussion more than meets this standard. Far from a drive-by dictum or an unadorned statement, *CIGNA*'s surcharge discourse was robust, it built upon past caselaw, and it analyzed closely the case's facts and all relevant history. *CIGNA*, 563 U.S. at 441–45. This is enough, based on this Circuit's earlier precedent, to be considered binding.

Indeed, the Court had previously encountered similar facts, and when it did, it reached similar conclusions. For example, in *Varity Corp. v. Howe*, the Court held that ERISA provided a remedy for similar fiduciary breaches involving fiduciary misstatements, even if it left what remedy would be appropriate for another day. *Howe*, 516 U.S. at 515. *CIGNA* expanded upon this holding and applied the Court's ERISA-remedies caselaw when doing so. *CIGNA*, 563 U.S. at 441–45. That discussion is far more probative for answering whether surcharge is an available ERISA remedy than the cursory lines *Montanile* stowed in a footnote, especially considering that the same footnote also noted that *CIGNA* "reinforce[d]" past caselaw. *Montanile*, 577 U.S. at 148 n.3. The panel majority was correct when it declined to minimize *CIGNA*'s surcharge discussion into unearned obscurity.

CIGNA was correctly decided, and per *Montanile*, it can be read in harmony with the rest of the Court's jurisprudence regarding the forms of equitable relief available under Section 1132(a)(3). And in any event, the Court remains bound *CIGNA*'s analysis and conclusion, even if such analysis and conclusion might be viewed as dicta. For these reasons, the panel majority was correct when it held that surcharge is available under Section 1132(a)(3) for fiduciary-duty breaches claims brought against ERISA fiduciaries.

CONCLUSION

Without surcharge woven into its tapestry, ERISA cannot provide participants and beneficiaries wronged by fiduciary breaches with the relief they desperately need. Because of surcharge's long history as a typically available equitable remedy, its clear limitations tied to property interests, and its strong place in ERISA's statutory architecture, this Court need not contemplate that possibility. For all these reasons, the Acting Secretary respectfully submits that surcharge is a form of "equitable relief" available against fiduciaries for breach of fiduciary duty under ERISA Section 1132(a)(3).

August 31, 2026

Respectfully submitted,

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/s/ Edward M. Wenger
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August 31, 2026

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 31st day of August, 2026, a true copy of the Amicus Curiae Brief of the Acting U.S. Secretary of Labor in Support of the Plaintiffs-Appellees was filed electronically with the Clerk of Court using the Court's CM/ECF system, which will send by email a notice of docketing activity to all registered Attorney Filers.

<u>/s/ Edward M. Wenger</u>
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August 31, 2026