No. 01-1710

In the Supreme Court of the United States

EMPIRE BLUE CROSS AND BLUE SHIELD, PETITIONER

v.

JOHN F. BYRNES, ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED*

1. Whether, under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.*, extrinsic evidence may be considered in determining whether benefits are vested under an employee welfare plan when the language of the plan is ambiguous on that issue.

2. Whether employee plan participants may combine, in a single action, a claim for benefits improperly denied (under 29 U.S.C. 1132(a)(1)(B)) and a claim for breach of fiduciary duty based on the misrepresentation of plan benefits (under 29 U.S.C. 1132(a)(3)).

3. Whether a "discretionary" act by a plan administrator to reduce vested employee welfare benefits may violate a fiduciary duty under ERISA.

4. Whether an employer breaches a fiduciary duty under ERISA by promising lifetime welfare benefits to employees without fairly and clearly disclosing that it reserves the right to change or terminate those benefits.

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* The first question presented in this brief corresponds to the first question presented in the petition. Questions 2, 3, and 4 in this brief state separately the three distinct issues that are subsumed within the second question presented in the petition. See Pet. Reply Br. 1.

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This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner seeks review of two decisions of the Second Circuit that involve former employees of petitioner who challenge a post-retirement reduction in their life insurance benefits. Pet. App. 2a, 26a.[1] Respondents retired at various times between 1989 and 1998. Some retired under petitioner's normal retirement program. Others retired under the Voluntary

[1] Although the two cases had different names at other stages of the litigation, this brief will follow the petition and call them *Byrnes* (Pet. App. 1a-24a) and *Alicea* (*id.* at 25a-46a).

Separation Opportunity Program (VSOP), an early retirement program offered in 1992, or the Voluntary Incentive Program (VIP), a similar program offered in 1993. *Id.* at 2a, 3a, 27a. The documents pertaining to each of those programs state that retirees will be provided, for the remainder of their lives, with company-paid life insurance coverage in an amount equal to their last annual salaries. *Id.* at 48a. After respondents retired, however, petitioner amended its benefits plan in 1998 to reduce their life insurance coverage to a flat $7500. *Id.* at 7a, 31a.

2. The relevant plan documents all contain the same benefit formula for retiree life insurance. They differ, however, in the extent to which a right to amend those benefits was reserved.

a. Two summary plan descriptions (SPDs) issued by petitioner before 1987 state that "retired employees, after completion of twenty years of full-time permanent service and at least age 55 will be insured" at a specified level "for the remainder of their lives." Pet. App. 4a-5a.[2] These SPDs contain no reservation of a right to amend. *Ibid.* The SPD issued in 1987, however, while stating that "your life insurance coverage *remains in force for the rest of your life, at no cost to you*," then further states (*id.* at 5a-6a, 28a):

> The company expects and intends to continue the Plans in your Benefits Program indefinitely, but reserves its right to end each of the Plans, if neces-

[2] The summary plan description (SPD) required by ERISA is to "be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. 1022(a).

> sary. The company also reserves its right to amend each of the Plans at any time.

b. The VSOP and VIP plans contain an express reservation of petitioner's right to adjust retiree health insurance benefits. Their description of retiree life insurance benefits, however, contain no such reservation. Pet. App. 6a-7a, 29a-30a. Each of those plans also specifies (in somewhat varying text) that:

> The Corporation reserves the right to amend and/or terminate the * * * Program at any time for any purpose. The Corporation also reserves the right to announce new and different plans and programs as business needs require, although there are no plans to do so at this time.

Id. at 6a, 29a, 58a-59a, 74a-75a (VSOP program); see *id.* at 7a, 29a-30a (VIP program). Neither the VSOP nor the VIP documents refer to the earlier SPDs. 00-9469 C.A. App. 534-571.

c. Petitioner also sent exit letters to many respondents on their retirement that describe the "employee benefits [that] will still be available to you and your spouse during your lifetimes." Pet. App. 72a. Those letters described the amount of life insurance coverage that would "remain constant for life" and said nothing about the possibility of any further changes or reductions in life insurance benefits after retirement. *Ibid.*

3. Respondents brought suit against petitioner under Section 502(a)(1)(B) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132(a)(1)(B), to determine their rights to future life insurance benefits. Pet. App. 2a, 27a, 32a-33a. The *Byrnes* respondents relied primarily on the pre-1987 SPDs and claimed that their insurance rights were vested prior to their retirement. The *Alicea* respondents relied pri-

marily on the provisions of the 1987 SPD and the VSOP and VIP documents.

In addition to their claim for vested benefits under Section 502(a)(1)(B), respondents sought relief under Section 502(a)(3) of ERISA, 29 U.S.C. 1132(a)(3), for alleged breaches of fiduciary duty. Respondents claimed that petitioner "repeatedly provid[ed] misleading information about 'lifetime' life insurance benefits" (Pet. App. 43a), in violation of the duty under Section 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. 1104(a)(1)(A), (B), to deal fairly and honestly with beneficiaries. Pet. App. 2a, 43a- 45a. Respondents further claimed that petitioner had failed to pay them the full life insurance benefits promised under the plan, in violation of the duty under Section 404(a)(1)(D) of ERISA, 29 U.S.C. 1104(a)(1)(D), to administer the plan in accordance with its governing documents.

4. The district court granted summary judgment to petitioner on all claims. Pet. App. 47a-81a. In *Byrnes*, the court held that the pre-1987 SPDs "do not express an intent to vest in the plaintiffs a retiree life insurance benefit before they retired." *Id.* at 56a. The court concluded that the "reservation of rights clauses contained in [the 1987 SPD] and the VSOP and VIP documents are sufficient to negate any language cited by plaintiffs as evidence of a promise of vested benefits." *Id.* at 59a. In *Alicea*, the court further stated that the "exit letters and representations cited by the plaintiffs are at best extrinsic evidence and cannot be invoked to create an ambiguity which is not evident in the plan documents and SPDs themselves." *Id.* at 78a.

With respect to the fiduciary breach claims, the district court held that petitioner did not act as a fiduciary in amending the plan and did not otherwise breach its fiduciary duties because it did not mislead respondents

about their retiree life insurance benefits. Pet. App. 63a-65a, 79a. The court stated that ERISA does not require petitioner "to begin every communication with the plaintiffs by restating the caveat that it had reserved the right to change the life insurance plan." *Id.* at 65a.

5. a. The court of appeals reversed and remanded most of the claims in each case. Pet. App. 1a-46a. The court held that summary judgment on a benefit claim is improper, and that the plaintiffs should be allowed to introduce extrinsic evidence at trial, if there is language in plan documents that is "*capable of reasonably being interpreted* as creating a promise" to provide vested benefits. *Id.* at 12a (citation omitted). The court acknowledged that a conflict exists among the circuits on that issue and that the Fifth Circuit has held that only a "clear and express" promise and "precise language denying the right to withdraw benefits" will support a claim of vested employee welfare benefits. *Id.* at 10a-12a (quoting *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929, 937-938 (5th Cir.), cert. denied, 510 U.S. 870 (1993)). The court explained that it had "rejected *Wise* twice before," however, and found no reason to adopt the Fifth Circuit rule in this case. Pet. App. 12a.

b. Applying its own decisional rule, the Second Circuit concluded in *Byrnes* that the pre-1987 SPDs could reasonably be interpreted as vesting lifetime life insurance benefits in employees when they became eligible for retirement upon completing twenty years of service and reaching age 55. Pet. App. 12a-15a. The court stated that petitioner's benefit provisions "can be construed as an offer that specifies performance as the means of acceptance." *Id.* at 13a. For employees who accepted this "offer" of benefits by beginning "perform-

ance" before 1987 and thereafter working "at least twenty years until attaining the age of 55," the court concluded that the 1987 SPD and the VSOP and VIP documents were not relevant because the benefits of those employees vested before those documents were adopted. *Id.* at 13a-14a & n.6.

In *Alicea*, however, the plaintiffs had disclaimed reliance on the pre-1987 SPDs, and the court of appeals held that the 1987 SPD is not ambiguous, for it contains a clear reservation of the right to amend or terminate benefits at any time. The court therefore upheld the award of summary judgment for petitioner against the normal retirees in that case. Pet. App. 36a-40a.

For the early retirees under the VSOP and VIP programs in *Alicea*, however, the court reversed the summary judgment for petitioner. The court held that the VSOP and VIP plan descriptions contain language that is reasonably capable of being interpreted as a promise of lifetime benefits and that the reservation of rights language in those documents is ambiguous rather than clear. Pet. App. 34a-36a. The court explained that the language of these plan descriptions was "capable of being interpreted to mean that [petitioner] merely reserved the right to change the [early retirement] *program* for those individuals who have not already retired under the terms described, not the right to alter the described benefits for those individuals who had retired under those terms." *Id.* at 35a.

c. In both *Byrnes* and *Alicea*, the court of appeals reversed the award of summary judgment to petitioner on the fiduciary breach claims. Pet. App. 18a-23a, 43a-46a. The court noted that a violation of fiduciary responsibility under Section 404(a)(1)(D) of ERISA, 29 U.S.C. 1104(a)(1)(D), could occur if an employer "violated the plan documents" by effecting a "discretion-

ary" reduction in vested benefits. Pet. App. 20a. The court further held that a violation of the fiduciary duty to deal honestly with plan participants under Section 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. 1104(a)(1)(A), (B), could have occurred when petitioner "repeatedly describ[ed] its life insurance benefit as remaining constant for life." Pet. App. 21a. Without reaching the ultimate question of liability on these theories of fiduciary breach, the court remanded for the trial court "to evaluate Empire's communications with [respondents] for affirmative misrepresentations regarding plan benefits and for failure to provide completely accurate plan information." *Id.* at 21a-22a; see also *id.* at 43a-46a.

DISCUSSION

Two of the questions presented warrant review by this Court at this time. The question of the proper legal standard for determining the vesting of employee welfare benefits (Question 1 as set forth in this brief) and the question of the permissible scope of the action for breach of fiduciary duty under ERISA (Question 2 in this brief) have created conflicts among the courts of appeals on matters of fundamental importance to plans and their participants. Although it appears that the court of appeals correctly decided each of these questions, review by this Court is warranted to resolve the circuit conflicts. Even though the ultimate merits of each claim have been remanded for trial, these two threshold legal questions require no additional factual development and are now ripe for review.

Two additional issues addressed by the court of appeals, however, require factual development by the parties and cannot properly be addressed on this incomplete record. In particular, the Court need not

review at this time the question whether a "discretionary" act by a plan administrator to reduce vested benefits (Question 3 in this brief) could violate a fiduciary duty under ERISA. There is no conflict on this issue or any holding or finding in this case that such a "discretionary" act occurred. Similarly, the question whether an affirmative misrepresentation or misleading description of plan benefits violates a fiduciary duty under ERISA (Question 4 in this brief) is not ripe for review because there is no clear conflict in the circuits, the issue is highly fact-sensitive, and the relevant factual record can be developed only on remand.

1. *The Legal Standard for Determining The Contractual Vesting of Employee Welfare Benefits.* a. Although ERISA does not itself mandate the vesting of welfare benefits, 29 U.S.C. 1051(1), an employer may provide vested benefits by contract. *Inter-Modal Rail Employees Ass'n* v. *Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 514 (1997). As petitioner argues (Pet. 11- 15), and as the court of appeals recognized (Pet. App. 11a-12a), there is a persistent and well-developed circuit conflict over the standard for evaluating contractual vesting claims under ERISA welfare plans. This decisional conflict has substantial recurring importance, for its resolution is outcome-determinative in many cases, including the present one.

The Seventh, Eighth, and Eleventh Circuits agree with the Second Circuit that, if the language of the plan is ambiguous with respect to vesting, the plan participant may introduce relevant extrinsic evidence to establish the meaning of the plan. Pet. App. 12a; *American Fed'n of Grain Millers* v. *International Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997); *Rosetto* v. *Pabst Brewing Co.*, 217 F.3d 539, 546-547 (7th Cir. 2000), cert. denied, 531 U.S. 1192 (2001); *Bidlack* v. *Wheelabrator*

Corp., 993 F.2d 603, 607-608 (7th Cir.) (en banc), cert. denied, 510 U.S. 909 (1993); *Jensen* v. *SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994), cert. denied, 514 U.S. 1050 (1995); *Stewart* v. *KHD Deutz of Am. Corp.*, 980 F.2d 698, 702-703 (11th Cir. 1993). Under the Second Circuit's formulation of this test, "a plaintiff need only 'point to written language *capable of reasonably being interpreted* as creating a promise' to survive an employer's summary judgment motion." Pet. App. 12a (citation omitted).

The Third, Fourth, Fifth, Sixth, and Tenth Circuits, however, have taken a different view. They hold that there must be "clear and express" language in the plan to defeat an employer's motion for summary judgment. *International Union* v. *Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999); *In re Unisys Corp.*, 58 F.3d 896, 902 (3d Cir. 1995); *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994), cert. denied, 514 U.S. 1057 (1995); *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d at 937-938; *Sprague* v. *General Motors Corp.*, 133 F.3d 388, 400 (6th Cir.) (en banc), cert. denied, 524 U.S. 923 (1998); *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996). Those courts require plaintiffs to show "strong prohibitory or granting language" in plan documents, such as "precise language denying the right to withdraw benefits." *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d at 938.[3]

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[3] Recent regulations issued by the Secretary of Labor may yield less ambiguity in future plan documents. The Secretary is authorized to require that specific information be included in SPDs. 29 U.S.C. 1029(c). A regulation that is effective for plan years beginning in 2002 requires SPDs to summarize plan provisions that relate to the amendment or termination of benefits. 29 C.F.R. 2520.102-3(*l*). This regulation may reduce, but will not

Petitioner errs, however, in asserting (Pet. 15-16) that a separate circuit conflict exists on the question whether retiree welfare benefits can vest *before* an employee retires. No court of appeals has adopted a rule that retiree welfare benefits cannot vest before retirement. Indeed, the principal case cited by petitioner held that retiree welfare benefits can vest before retirement if the plan so provides in "clear and express" language. *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d at 937-938.[4] The court held in *Wise* that pre-retirement vesting could occur if the SPD included "precise language denying the right to withdraw benefits." *Id.* at 938. The question of pre-retirement vesting is thus merely an aspect of the general question of the standard for evaluating contractual vesting claims, on which there is a firm and acknowledged circuit conflict.

b. On the merits, the contractual-vesting test adopted by the Second Circuit is correct. This Court has made clear that employee benefits provided through ERISA plans are contractual in nature. "Nothing in ERISA requires employers to establish employee benefits plans" or "mandate[s] 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). Benefits provided under an employee benefit plan are a "*quid pro quo* between the plan sponsor

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eliminate, vesting disputes in the future, and it does not affect disputes over the rights of current retirees.

[4] The other two cases cited by petitioner (Pet. 16) also do not hold that there is a general rule against pre-retirement vesting. See *Maurer* v. *Joy Techs. Inc.*, 212 F.3d 907, 915 (6th Cir. 2000); *Houghton* v. *SIPCO, Inc.*, 38 F.3d 953, 957 (8th Cir. 1994). Indeed, in *Maurer*, the court emphasized that "it is unlikely that [retirement] benefits * * * would be left to the contingencies of future negotiations." 212 F.3d at 915.

and the participant: that is, the employer promises to pay increased benefits in exchange for the performance of some condition by the employee." *Id.* at 894. ERISA is not designed to create benefits but "to ensure that employees will not be left emptyhanded once employers have guaranteed them certain benefits." *Id.* at 887. See also *Helwig* v. *Kelsey-Hayes Co.*, 93 F.3d 243, 250 (6th Cir. 1996) ("[w]hen making decisions about where and how long to work, employees * * * rely on the promises made to them, particularly when those promises are in writing"), cert. denied, 519 U.S. 1059 (1997). ERISA therefore requires that benefits under pension and welfare plans be paid in accordance with the terms of the plan, unless doing so would conflict with some other provision of the Act. See 29 U.S.C. 1104(a)(1)(D), 1132(a)(1)(B).

Because employee benefits under ERISA are contractual in nature, it follows that disputes concerning the scope and content of the benefits provided should be resolved by reference to trust and contract principles. In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), this Court emphasized that principles of trust law and contract law are applicable in construing benefit provisions. *Id.* at 111-112. The Court explained that "ERISA was enacted to promote the interests of employees and their beneficiaries in employee benefit plans" and "to protect contractually defined benefits." *Id.* at 113. By incorporating underlying principles of trust and contract law, ERISA ensures that "employees and their beneficiaries" are not "afford[ed] less protection * * * than they enjoyed before ERISA was enacted." *Id.* at 113-114.

It is, of course, an established principle of trust and contract law that extrinsic evidence may be considered in resolving ambiguities in the terms of the governing

documents. See *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. at 112-113; Restatement (Second) of Trusts §§ 4, 164 (1959); A. Scott & W. Fratcher, *The Law of Trusts* §§ 4, 164.1 (4th ed. 1988); Restatement (Second) of Contracts § 202 (1979); 5 *Corbin on Contracts* § 24.7 (rev. ed. 1998); J. Calamari & J. Perillo, *The Law of Contracts* § 3-10 (3d ed. 1987).[5] If a court finds ambiguity in the language of plan documents, it should therefore resolve that ambiguity by considering and weighing extrinsic evidence, ordinarily at trial. See Restatement (Second) of Contracts, *supra*, § 212 cmt. e; Fed. R. Civ. P. 56(c).

The interpretive approach applied by the Second, Seventh, Eighth and Eleventh Circuits comports with these traditional trust and contract principles. Conversely, the "clear and express" language requirement for determining welfare plan benefits under the decisions of the Third, Fourth, Fifth, Sixth, and Tenth Circuits lacks any basis in traditional trust and contract principles. No trust or contract principle requires a beneficiary to show a "clear and express" entitlement to a benefit.

Because ERISA is presumed to "afford [no] less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted" (*Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. at 113-114), the statute should not be interpreted to authorize a result that is harsher than those principles would authorize. A few courts have nonetheless attempted to find support for the "clear and express" vesting test in the fact that ERISA exempts employee *welfare* plans from the

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[5] In this case (as in many cases involving welfare benefits), the governing terms of benefits plans are set forth in the SPDs, the VSOP, and the VIP documents. See Pet. App. 3a-15a.

express vesting requirements that apply to employee *pension* plans under 29 U.S.C. 1051(1). See Pet. 13-15. That rationale is defective, however, because ERISA neither requires nor prohibits the vesting of welfare benefits. The statute leaves employers free to choose whether (and to what extent) to provide for such benefits and their vesting. *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995). When a plan *does* provide vested welfare benefits, however, the employer may not then ignore its freely-adopted contractual commitments to employees. *Lockheed Corp.* v. *Spink*, 517 U.S. at 887. Nothing in ERISA establishes a special rule of construction under which employee welfare benefits vest only if plan documents so provide in "clear and express" language.[6]

The "clear and express" test should also be rejected for an additional reason: a plan sponsor can easily take steps to avoid misleading employees by specifying clear and specific benefits through a careful drafting of plan documents. For this same underlying reason, contract law generally endorses the principle that ambiguities are to be interpreted against the drafter. Restatement (Second) of Contracts, *supra*, § 206. As the Seventh Circuit stated in holding that extrinsic evidence may be considered in interpreting ambiguous employee benefit

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[6] Plaintiffs have the burden of proof on the issue of contractual vesting. *Jensen* v. *SIPCO, Inc.*, 38 F.3d at 949. Some courts have further held that, because there is no statutory vesting requirement for ERISA welfare plans, a presumption against vesting exists. *Rosetto* v. *Pabst Brewing Co.*, 217 F.3d at 544. Even under that analysis, however, the presumption "disappear[s] once evidence [is] introduced," and it does not "continue to weigh in the decision maker's balance after other evidence [comes] in." *Ibid.* Compare *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 507-512 (1993).

provisions in *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d at 609, "[c]ourts do not sit to relieve contract parties of their improvident commitments."

2. *The Availability Of Fiduciary Remedies.* Petitioner errs in stating that this case presents the question whether respondents may pursue both welfare benefit claims under Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B), and fiduciary breach claims under Section 502(a)(3), 29 U.S.C. 1132(a)(3), for "the same alleged injury" (Pet. 20). Respondents do not allege a single, unitary injury. Instead, they allege two distinct injuries: one for being denied the benefits that they claim are owed under the terms of the plan; the other for misrepresentations by plan fiduciaries as to the benefits they are to receive. The question actually presented in this case is thus whether a participant may join a claim for benefits with a claim for misrepresentation about the benefits to be obtained under the plan.

In *Varity Corp.* v. *Howe*, 516 U.S. 489, 492 (1996), this Court held that plan participants may seek relief under Section 502(a)(3) for breaches of fiduciary duty from misrepresentations about plan benefits. In response to the suggestion that "lawyers will complicate ordinary benefit claims by dressing them up in 'fiduciary duty' clothing" and "characterize a denial of benefits as a breach of fiduciary duty," the Court stated that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be 'appropriate.'" *Id.* at 514, 515. As petitioner notes (Pet. 20-24), this statement in *Varity* has led to a conflict among the circuits on the question whether participants may simultaneously bring claims under Section 502 of ERISA for benefits and for misrepresentation about benefits.

Some circuits have read *Varity* to preclude a fiduciary claim even when the related benefit claim is denied. *Tolson* v. *Avondale Indus., Inc.*, 141 F.3d 604, 610 (5th Cir. 1998); *Wilkins* v. *Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 615-616 (6th Cir. 1998). In the *Tolson* case, the Fifth Circuit expressly held that plan participants and beneficiaries cannot assert a fiduciary breach claim for misrepresentation under Section 502(a)(3) whenever they *can* assert a benefit claim under Section 502(a)(1)(B). 141 F.3d at 610.[7]

The Second Circuit expressly rejected that view in this case.[8] It held that *Varity* "did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available; instead, the district court's remedy is limited to such equitable relief as is considered appropriate." Pet. App. 23a. The fiduciary breach alleged here is a claim that petitioner misled respondents about the nature of their benefits.

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[7] Although the decisions of the First and Ninth Circuits cited by petitioner (Pet. 22-23) rely on *Varity*, they do not conflict directly with the Second Circuit's holding in this case. In *LaRocca* v. *Borden, Inc.*, 276 F.3d 22, 25, 28 (1st Cir. 2002), the plaintiffs had already obtained relief on their benefit claims by stipulation, and the only remaining question was whether additional equitable relief would be "appropriate." In *Bowles* v. *Reade*, 198 F.3d 752, 759-760 (9th Cir. 1999), the court similarly held that a fiduciary claim would not be allowed when "another section of ERISA already provided * * * an adequate remedy."

[8] The Third and Seventh Circuits, while not addressing the question explicitly, have routinely allowed plaintiffs to pursue both benefit claims and misrepresentation claims to judgment. See, *e.g.*, *Harte* v. *Bethlehem Steel Corp.*, 214 F.3d 446 (3d Cir.), cert. denied, 531 U.S. 1037 (2000); *Jordan* v. *Federal Express Corp.*, 116 F.3d 1005 (3d Cir. 1997); *Kamler* v. *H/N Telecomms. Servs., Inc.*, 305 F.3d 672 (7th Cir. 2002); *Bowerman* v. *Wal-Mart Stores, Inc.*, 226 F.3d 574 (7th Cir. 2000).

That claim is clearly distinct from the Section 502(a)(1)(B) claim that the SPDs, VSOP, or VIP provided vested benefits by their own terms. If the benefits claim fails, the breach of fiduciary duty claim is then the only possible remedy. *Id.* at 22a. The court of appeals correctly held that it is only when a benefit claim is *successful* that the court would be required to determine whether additional, equitable "relief" for a misrepresentation claim under Section 502(a)(3) would then be "appropriate." Pet. App. 23a.

Petitioner's contrary interpretation of *Varity* is inconsistent with ordinary principles of civil procedure, which permit the joinder of alternative—and even inconsistent—claims in a single action. Fed. R. Civ. P. 8(a), 8(e)(2); 5 C. Wright & A. Miller, *Federal Practice & Procedure* §§ 1221, 1282, 1283 (2d ed. 1990); 2 J. Moore, *Moore's Federal Practice* § 8.09[2] (3d ed. 2002). It is also inconsistent with the goal of ERISA to provide "appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). Although the Second Circuit thus appears correct in its interpretation of *Varity*, review by this Court is warranted to resolve the circuit conflict on this recurring issue.

3. a. *A Discretionary Act Of A Plan Administrator Is Subject To Fiduciary Obligations.* Petitioner asserts that the court of appeals improperly held that the action of an employer in modifying a welfare plan may constitute a "fiduciary act." Pet. 24. The court, however, made no such holding in this case. Instead, the court reiterated the established rule that "[a]n employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary." Pet. App. 20a (citation omitted). See *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 443-446 (1999); *Lockheed Corp.* v. *Spink*, 517

U.S. at 890-891. The court stated, however, that a reduction of vested benefits may not involve merely the amendment of an existing plan and that the employer may have exercised "discretionary authority" under the plan in reducing *vested* benefits. Pet. App. 20a. The court noted that an employer that exercises "discretionary authority" in administering a plan acts as a fiduciary and may be liable if its actions "violate[] the plan documents." *Ibid.*

That ordinary description of the fiduciary obligation of a plan administrator does not create any conflict among the circuits or with any decision of this Court.[9] Moreover, there is no finding or holding that any such "discretionary" act in the administration (as distinguished from the amendment) of the plan occurred in this case. Petitioner's request for review of this question on the merits is thus hypothetical and premature.

b. *Misrepresentation Is A Breach Of Fiduciary Duty.* The other question relating to fiduciary duties that petitioner seeks to raise is whether "an ERISA plan fiduciary's failure to disclose the fact that welfare plan benefits are not vested can itself constitute a breach of fiduciary duty" (Pet. 28). That, however, is also not an accurate description of the holding of the court of appeals in this case.

The court of appeals directed the district court on remand to "permit a trier of fact to evaluate Empire's communications with plaintiffs for affirmative misrepresentations regarding plan benefits and for failure to

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[9] In the decisions cited by petitioner (Pet. 26-27; Reply Br. 9), by contrast, the courts held only that the plan amendment was not a fiduciary act. See H*ozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1162 (3d Cir. 1990); *Wulf* v. *Quantum Chemical Corp.*, 26 F.3d 1368, 1377-1378 (6th Cir.), cert. denied, 513 U.S. 1058 (1994).

provide completely accurate plan information. A trier of fact could find that there was a fiduciary duty and that Empire breached it." Pet. App. 21a-22a. That holding is unexceptionable, for this Court expressly held in *Varity Corp.* v. *Howe*, 516 U.S. at 498-507, that affirmative misrepresentations about plan benefits may constitute a breach of fiduciary duty under ERISA. *Id.* at 506-507.

The allegedly inconsistent cases that petitioner cites (Pet. 28-30) stand for a more limited and quite different proposition. They hold that, because the reporting and disclosure provisions of ERISA do not require SPDs to address the vesting of welfare benefits (see 29 U.S.C. 1022), the absence of any such disclosure does not *by itself* establish a per se violation of any fiduciary duty. *Jensen* v. *SIPCO, Inc.*, 38 F.3d at 952; *Gable* v. *Sweetheart Cup Co.*, 35 F.3d at 858; *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d at 934-937. Nothing in the decision in this case conflicts with those decisions or even addresses that issue.

For example, petitioner argues (Pet. 29) that the decision below conflicts with *Sprague* v. *General Motors Corp.*, 133 F.3d at 405, which held that a breach of fiduciary duty is not established merely by the fact that "the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." In the present case, the court of appeals did not hold that this fact, by itself, would establish a breach of fiduciary duty. Instead, the court remanded the case for the district court to determine whether petitioner engaged in "affirmative misrepresentations." Pet. App. 21a-22a. That remand order does not conflict with the more limited holding of *Sprague*. To the contrary, on the proposition actually

addressed by the court of appeals in this case, there is general agreement that a fiduciary duty exists under ERISA for employers (i) to answer specific questions accurately and (ii) to provide relevant information to plan participants even when the participants have not framed or asked the fiduciary precisely the right question. See, *e.g.*, *Griggs* v. *E.I. Dupont de Nemours* & Co., 237 F.3d 371, 380-381 (4th Cir. 2001); *In re Unisys Corp.*, 57 F.3d 1255, 1264 (3d Cir. 1995), cert. denied, 517 U.S. 1103 (1996); *Anweiler* v. *American Elec. Power Serv. Corp.*, 3 F.3d 986, 991-992 (7th Cir. 1993); *Eddy* v. *Colonial Life Ins. Co. of Am.*, 919 F.2d 747, 751 (D.C. Cir. 1990). Indeed, in *Sprague* v. *General Motors Corp.*, 133 F.3d at 406, the court expressly reserved the possibility of liability in precisely such situations.[10]

There is thus no well-framed conflict among the circuits on the question of the scope of the fiduciary duty of disclosure under ERISA. And, at this stage of this case, there is no holding that any such violation occurred. Because the facts that relate to the ultimate question of liability on the merits have not yet been

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[10] One frequently cited formulation of that duty, relied on by the court below (Pet. App. 21a), is set forth in *In re Unisys Corp.*, 57 F.3d at 1264: "when a plan administrator affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries." That formulation is consistent with a trustee's duty "to inform the beneficiary of important matters concerning the trust" and to provide "the beneficiary * * * all information about the trust and its execution for which he has any reasonable use." G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 961 (rev. 2d ed. 1983); see also Restatement (Second) of Trusts, *supra*, § 173 cmt. d.

developed in this case, that issue is not ripe for resolution in this Court.

CONCLUSION

The Court should grant the petition for a writ of certiorari limited to Questions 1 and 2 set forth in this brief.

Respectfully submitted.

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** The Solicitor General is recused in this case.