No. 09-804

IN THE

Supreme Court of the United States

CIGNA CORPORATION AND CIGNA PENSION PLAN,
Petitioners,

v.

JANICE C. AMARA, GISELA R. BRODERICK, ANNETTE S. GLANZ, individually and on behalf of all others similarly situated,
Respondents.

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

BRIEF FOR NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, THE PENSION RIGHTS CENTER, AND UNITED POLICYHOLDERS, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI*[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its sixty-eight state and local affiliates have a membership of over 3,000 attorneys committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA filed or participated in filing *amicus curiae* briefs in this Court in such cases as *Conkright v. Frommert*, 130 S. Ct. 1640 (2010); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. 248 (2008); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999); *Varity Corp. v. Howe,* 516 U.S. 489 (1996); and *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989).

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[1] Pursuant to Supreme Court Rule 37.6, the *amici curiae* state that no person or entity other than the *amici* and their undersigned counsel made a monetary contribution to the preparation or submission of this brief. No attorney for any party to this matter authored this brief in whole or in part. The parties have separately consented to the filing of this brief. Undersigned counsel Ellen M. Doyle and William T. Payne represent plaintiff-appellants in a case pending in the United States Court of Appeals for the Ninth Circuit, *Skinner v. Northrop Grumman Retirement Plan B,* No. 10-55161. This appeal raises the question of whether participants must prove reliance in order to recover under an SPD that conflicts with another plan document. *Skinner* has been stayed pending disposition of the instant appeal, and this Court's disposition of the instant appeal will likely have an impact on the ultimate resolution of the *Skinner* case.

The Pension Rights Center is a Washington, D.C., nonprofit consumer organization, which has as its mission the protection and promotion of retirement security for workers, retirees and their families. For thirty-four years, the Center has provided information and assistance to thousands of participants and beneficiaries and has represented their interests before Congress the federal administrative agencies and the courts. The Pension Rights Center filed or participated in filing *amicus curiae* briefs in this Court in such cases as *LaRue*, 552 U.S. 248; and *Conkright*, 130 S. Ct. 1640; and *Firestone*, 489 U.S. 101 (1989).

United Policyholders ("UPH") is a single-issue, non-profit organization founded in 1991. The organization's mission is to educate the public, legislators and courts on insurance issues and consumer rights and to help policyholders secure fair and prompt claim settlements. These policy holders include participants in employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. UPH is a recognized charity with tax-exempt status under the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (2010), and is funded by donations and grants from individuals, businesses and foundations. UPH protects the interests of and presents the positions of policyholders through participation as *amicus curiae* in insurance-related cases throughout the country. UPH

filed or participated in filing *amicus curiae* briefs in this Court in such cases as *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149 (2010); *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); and *Humana v. Forsyth*, 525 U.S. 299 (1999).

Resolution of the issues in this case is of great importance to *amici* because it is imperative that participants have meaningful recourse under ERISA to protect and enforce their rights under employee benefit plans. Petitioners CIGNA Corporation and the CIGNA Pension Plan (collectively, "CIGNA") advocate a result that would virtually eliminate that recourse whenever ERISA plan documents are in conflict, placing a near-impossible burden on participants to establish individualized detrimental reliance. *Amici* respectfully submit that CIGNA's remedy-eliminating standard should be rejected as contrary to ERISA. Rather, consistent with ERISA, participants should be allowed to take advantage of the more participant-favorable plan document.

SUMMARY OF ARGUMENT

In this case, the Court must decide the proper course when two controlling ERISA plan documents conflict. The parties, Petitioner CIGNA and the Respondent plan participants, present the Court with two alternative resolutions of this problem. *Amici* submit that a bright-line approach more closely comports with ERISA. The Court should hold that when two plan documents are at odds, the more participant-favorable one controls, and that participants may obtain the benefits promised in that document without having to prove either detrimental reliance, as

CIGNA urges, or likely harm, the standard advocated by Respondents.

Under CIGNA's approach, which is followed in the Eleventh Circuit, an ERISA plan participant may recover on the basis of a more participant-favorable summary plan description ("SPD") only if he or she makes an individualized showing of "detrimental reliance." This standard eviscerates ERISA's remedial function. When faced with conflicting plan provisions, a participant must take concrete steps to affirmatively "rely" on the particular SPD term to establish detrimental reliance and thus obtain the promised benefits. The participant must also be in a position years or decades later to prove that reliance to a court. Further, even if a few participants could meet this imposing standard, relief would still remain elusive because the individualized nature of the required showing would almost always preclude class treatment, thus rendering it unlikely that the participant could find an attorney to bring the case. This would undercut one of the main goals of ERISA, as set forth by Congress in the statute itself, to provide "ready access to the Federal courts." ERISA section 2(b), 29 U.S.C. § 1001(b).

The Respondent-Participants advocate the approach taken by the Second Circuit in this case. The Second Circuit allows participants to recover based on a somewhat lesser showing of "likely harm." It is not impossible to establish likely harm—plaintiffs here were able to do so, and a class was certified. Certainly, application of the Second Circuit standard results in more participants receiving their promised benefits than the remedy-precluding standard that CIGNA favors.

However, there is a bright-line approach[2] that protects participants in the event of conflicting plan provisions by enforcing the more participant-favorable provision as contemplated by ERISA section 502(a)(1)(B). This standard achieves uniformity and most closely comports with ERISA's language and underlying policy. Under the first prong of this approach, the more participant-favorable plan provision controls. Under the second prong, plan participants are accorded the benefit of the more favorable provision; no further showing need be made. It is enough that an employer drafted a controlling plan document that accorded particular benefits. Courts should award those promised benefits, regardless of whether a plaintiff can establish detrimental reliance or likely harm.

As to the first prong, the more participant-favorable provision should govern, regardless of whether it is in the SPD or some other plan document. This standard furthers a fundamental purpose of ERISA—ensuring that promises made to plan participants are kept. This standard adheres most closely to the fundamental principle applied in the common law of contracts and trusts: the language of governing documents is to be construed against the drafter. The Ninth Circuit follows this approach, applying the more participant-favorable plan document regardless of whether it is an SPD or some other plan document.

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[2] Indeed, as construed by the Fifth Circuit, there is a five-way circuit split on this issue. *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 n.1 (5th Cir. 2007).

A number of circuits have stated that the SPD always controls. Under section 102(a) of ERISA, 29 U.S.C. § 1022, employers must provide their employees with the SPD, and the SPD must "be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." Unlike the SPD, other plan documents are not even provided to employees unless specifically requested; nor are they drafted in a way that most employees can understand. Because the SPD is participants' primary source of information, many courts appear to apply a bright-line rule that, in the event of a conflict, elevates the SPD over other plan documents. It is noteworthy, however, that these circuits were dealing exclusively with SPD provisions that were more favorable to participants and so did not have occasion to consider the proper standard when a provision of another plan document is more favorable.

Regardless of whether courts enforce the more participant-favorable plan provision or always enforce the SPD provision, the crucial point is that no additional showing should be required, particularly no showing of detrimental reliance. The employer makes a promise in a controlling plan document, most often the SPD. It is unreasonable to require that employees prove years or decades after an SPD was issued that they relied on a specific SPD provision that was inconsistent with a provision in some other plan document, most likely one that was never distributed. According to CIGNA, to meet the detrimental reliance standard, a participant must establish that she did in fact "make a detrimental employment or retirement decision that she would

not otherwise have made if she had known the actual terms of the plan." Br. for Pet'rs. at 38-39.

CIGNA's standard not only allows but encourages employers to draft SPD provisions that are inconsistent with other less participant-favorable plan provisions which are likely to be unpopular with employees. These unfavorable provisions may be buried in a technical and complex plan document retained in a file drawer at the employer's corporate headquarters and never provided to employees.

Fewer employees will be denied a remedy under the Second Circuit standard advocated by Respondents, which requires a showing of "likely harm." To establish likely harm, a plan participant or beneficiary must show that they were likely to have been harmed as a result of a deficient SPD. *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 113 (2d Cir. 2003), *cert. denied,* 540 U.S. 1105 (2004). Once a participant makes this initial showing, the employer may rebut it through evidence that the deficient SPD was in effect a harmless error. *Id.*

No showing of detrimental reliance or likely harm is expressly or impliedly required by ERISA. Indeed, section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), ERISA's provision for enforcing rights under plan documents, requires no such showing. Participants should be entitled to the benefits granted in the written governing documents. When those documents conflict, this Court should apply a rule that construes conflicts against the draftsman, *i.e.*, the employer. Participants should be entitled to the benefits they were promised, regardless of what exactly they can or cannot show about their own personal knowledge of the provisions and their reliance upon them. For as the Fifth Circuit concludes, "Any other rule

would be, as the Congress recognized, grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary." *Washington,* 497 F.3d at 458 (quoting *Weir v. Fed. Asset Disposition Ass'n*, 123 F.3d 281, 286 (5th Cir. 1997)).

ARGUMENT

I. THIS COURT SHOULD ADOPT A RULE THAT WHERE THERE IS A CONFLICT BETWEEN PLAN DOCUMENTS, THE MORE PARTICIPANT-FAVORABLE DOCUMENT CONTROLS, OR, IN THE ALTERATIVE, THAT THE SPD CONTROLS.

A. SPDs Are Plan Documents That Govern The Plan.

Respondent-Participants demonstrate in their brief why SPDs are among the "plan documents" that govern a plan, and *amici* adopt Respondents' arguments on this point. *See* Resps.' Br. at 14, 21-26. In summary form, section 404(a)(1)(D) of ERISA mandates that plan fiduciaries carry out the terms set forth in the "documents and instruments governing the plan insofar [as] consistent with the provisions" title I of ERISA. 29 U.S.C. § 1104(a)(1)(D).

SPDs are among the "documents and instruments governing the plan" within the meaning of ERISA. *Kennedy v. Plan Adm'r for DuPont Savings & Inv. Plan*, 129 S. Ct. 865, 867 (2009) (citing *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84 (1995)). As Respondents show, the courts of appeals also have unanimously held that SPDs are among the "docu-

ments and instruments governing the plan" within the meaning of ERISA.[3] Resps.' Br. at 39.

The simple and basic fact that SPDs are among the plan documents that specify "the terms of the plan" defeats CIGNA's lengthy argument that participants have no cause of action under ERISA section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). That provision allows a civil action by a "participant or beneficiary" to "recover benefits due to him under the terms of his plan," and benefits due under an SPD *are* benefits due under the plan. *See* Resps.' Br. at 38.

Further, when construing ERISA section 104(b)(2), courts of appeals have routinely held that SPDs are among the formal or legal documents pursuant to which plans are operated. *See Doe v. Travelers Ins. Co.*, 167 F.3d 53, 59-60 (1st Cir. 1999); *Bd. of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 142 (2d Cir. 1997); *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 658 (4th Cir. 1996). Other statutorily recognized plan documents are described as including bargaining agreements, trust agreements, contracts, or other instruments under which the plan was established or is operated. 29 U.S.C. § 1024.

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[3] While most cases involving two conflicting plan documents include an SPD, it could also be the case that neither of the conflicting documents is an SPD. *See Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991) (recognizing that a medical insurance plan can be a governing plan document); *Delgrosso v. Spang & Co.*, 769 F.2d 928, 935-56 (3d Cir. 1985) (noting that a collectively bargained pension agreement can be one of the governing plan documents); *see also Kosakow v. New Rochelle Radiology Assoc. P.C.*, 274 F.3d 706, 737 (2d Cir. 2001) (holding that a severance pay policy manual was a plan document).

B. Where There Is A Conflict Between Plan Documents, The More Participant-Favorable Document Should Control.

Where there is a clear conflict between the governing documents of an ERISA plan, the more participant-favorable document—generally, the SPD—should control. This approach, followed by the Ninth Circuit, upholds ERISA itself, and it incorporates the finely tuned presumptions and principles of contract and trust law embodied in ERISA.

In *Bergt v. Retirement Plan for Pilots Employed by MarkAir, Inc.*, 293 F.3d 1139 (9th Cir. 2002), the Ninth Circuit held that when the unambiguous provisions of a particular plan document are more favorable to plan participants than SPD provisions, the formal plan controls. *Id.* at 1145. In reaching this conclusion, the Ninth Circuit relied on five cases from five other courts of appeals that have addressed this issue. In all of these cases,

> the SPD conflicted with, and was more favorable to the employee, than the plan master document. Instead of relying on extrinsic evidence, however, these courts held that it would be unfair to have the employees bear the burden of a conflicting SPD and plan master document and, thus, decided that the provision *more favorable* to the employee controlled . . . We follow this same reasoning to conclude that when the plan master document is more favorable to the employee than the SPD, and unambiguously allows for eligibility of an employee, it controls, despite contrary unambiguous provisions in the SPD.

Id. (citations omitted).

The court reasoned:

> "Any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting, and who are most able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document. Accuracy is not a lot to ask."

Id. (quoting *Hansen v. Cont'l Ins. Co.,* 940 F.2d 971, 982 (5th Cir. 1991)). In *Hansen*, the Fifth Circuit went on to explain: "And it is especially not a lot to ask in return for the protection afforded by ERISA's preemption of state law causes of action—causes of action which threaten considerably greater liability than that allowed by ERISA." 940 F.2d at 982. In enacting ERISA, Congress balanced competing interests, granting broad preemption of state law claims and thus affording employers protection from compensatory and punitive damage awards, while also empowering participants to enforce their rights under plan documents.

The Ninth Circuit's approach is consistent with the statutory text. Under ERISA section 502(a)(1)(B), a participant or beneficiary may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Participants therefore have a right to enforce plan documents, including SPDs. When SPD terms conflict with a provision in another plan document, participants should be allowed to "recover benefits" or

"enforce [their] rights" under the plan's most participant-favorable provision.

While participants may enforce all plan documents, SPDs play a special role. Other plan documents tend to be highly technical. The SPD, in contrast, must "be written in a manner calculated to be understood by the average plan participant," and "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." ERISA § 102(a), 29 U.S.C. § 1022(a). Further, while SPDs must be distributed to participants, *id.*, other controlling plan documents need not be distributed unless a participant specifically requests them.

Because SPDs must be drafted in an "accurate and comprehensive" manner and "furnished to participants and beneficiaries," they are the principal vehicle that apprises participants of their benefits. ERISA § 102(a), 29 U.S.C. § 1102(a). So long as SPDs are accurate, they will sufficiently and comprehensively describe the benefits set forth in the plan document, and there will be no inconsistencies. However, when an SPD purports to terminate rights accorded by another plan document, it is inaccurate. Because ERISA mandates that SPDs be accurate, participants should not be bound by an inaccurate SPD that is less favorable to them than another plan document. The Ninth Circuit's position that the more participant-favorable plan document controls thus most closely comports with ERISA.

According controlling status to the most employee-favorable plan document—as does the court in *Bergt*—is also consistent with this Court's jurisprudence and ERISA's underlying policies. *Amici* of course recognize that when interpreting ambiguous

terms in an ERISA plan document, a trustee's interpretation is entitled to deference so long as the governing documents have granted the employer this discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). But discretion to interpret an ambiguous term is a far cry from *carte blanche* to entirely disregard unambiguous conflicts between two governing documents. *Firestone* and its progeny do not give employers latitude to pick and choose among competing unambiguous terms in separate plan documents on the basis of what suits the employer's interests.

Amici submit that in the particular context of reviewing plan documents that unambiguously conflict, the Court should be guided by the long-established contract law principle of *contra proferentem*. While ERISA "abounds with the language and terminology of trust law," *id.* at 110, ERISA claims are also contractual in nature.[4] *Washington,* 497 F.3d

[4] There is no doubt that federal courts should look to the common law of contracts in deciding ERISA benefit claims. *E.g.*, *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1133 (7th Cir. 1992) ("When someone raises a Section 502(a)(1)(B) claim, he or she is essentially asserting his or her contractual rights under an employee benefit plan . . . Not surprisingly, this court has concluded that Section 502(a)(1)(B) claims are creatures of contract law.") (citations omitted); *see also Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003) ("Claims for ERISA plan benefits under ERISA § 502(a)(1)(B) are contractual in nature."); *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002) ("A claim under § 1132(a)(1)(B), 'in essence, is the assertion of a contractual right.' In interpreting plan terms for purposes of claims under § 1132(a)(1)(B), we apply a federal common law of contract, informed both by general principles of contract law and by ERISA's purposes as manifested in its specific provisions.") (citations omitted).

at 458. It is black-letter contract law that when an ambiguity in a plan arises due to conflicting terms, the terms should be construed against the drafter. *See, e.g.*, *City of Rose City v. Nutmeg Ins. Co.*, 931 F.2d 13, 15 (5th Cir. 1991). Termed *contra proferentem*, this rule of construction applies when contract provisions are at odds. Notably, *contra proferentem* includes no requirement that detrimental reliance be established.

Contra proferentem is a fundamental common-law precept. *See Cent. Jersey Dodge Truck Ctr., Inc. v. Sightseer Corp.*, 608 F.2d 1106, 1110-11 (6th Cir. 1979) (construing Michigan law); *Truelsen v. European Health Spa of Neb., Inc.*, 561 F.2d 169, 170 (8th Cir. 1977) (construing Nebraska contract "most strongly against the draftsman"); *Telex Corp. v. Balch*, 382 F.2d 211, 216 (8th Cir. 1967) (construing Minnesota law); *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 319 (Ill. 1987).

Application of *contra proferentem* makes particular sense in the context of an unambiguous SPD provision. Congress elevated SPDs (as well as summaries of material modification) because these serve the all-important function of **disclosure**. In enacting the ERISA disclosure provisions, Congress intended to ensure that "'the individual participant knows exactly where he stands with respect to the plan.'" *Firestone*, 489 U.S. at 118 (quoting H.R. Rep. No. 93-533, at 11 (1973), *reprinted in* 1978 U.S.C.C.A.N.

[Footnote continued from previous page]

Such contract principles include the rule of unilateral contracts, under which action or forbearance, rather than a signature, serve as acceptance. *See Pratt v. Petroleum Prod. Mgmt., Inc. Employee Sav. Plan & Trust*, 920 F.2d 651, 661 (10th Cir. 1990); *see also* 1 Williston on Contracts § 1:17.

4649). Further, a fundamental tenet of ERISA is "adequate communication to participants"; this is necessary "if the private pension promise is to become real rather than illusory." H.R. Rep. No. 93-533, at 10, *reprinted in* 1974 U.S.C.C.A.N. 4639, at 4648.

To these ends, section 102 of ERISA sets forth specific disclosure rules. Section 102 provides that an SPD must be distributed to each participant and must accurately disclose benefit rights and obligations under the plan, including circumstances that cause benefits losses. It must be "written in a manner calculated to be understood by the average plan participant." ERISA § 102(a)-(b), 29 U.S.C. § 1022(a)-(b).

As this Court has reasoned, a party such as CIGNA "cannot overcome the common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it. [It] drafted an ambiguous document, and [it] cannot now claim the benefit of the doubt." *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995) (citations omitted). This presumption against the drafter both promotes fairness and discourages sloppy drafting. *See* OLIVER WENDELL HOLMES, THE COMMON LAW 117 (1881) ("[I]t may be considered the safest way to secure care is to throw the risk upon the person who decides what precautions shall be taken.").

CIGNA concurs with the Second Circuit's reasoning that the "'consequences of an inaccurate SPD must be placed on the employer,' because '[t]he individual employee is powerless to affect the drafting and less equipped to absorb the financial hardship of the employer's errors.'" Br. for Pet'rs. at 37 (quoting

Burke, 336 F.3d at 113, and stating that this "is no doubt true"). While CIGNA thus embraces the rule of *contra proferentem*, it leaps to the conclusion that this rule "is why [only] an employee who detrimentally relies on an SPD is entitled to recover for her injury." Br. for Pet'rs. at 37. CIGNA does not explain its logic, and it is contrary to the rule of *contra proferentem*, which includes no reliance requirement.

In *Bergt*, the Ninth Circuit cited the need to "'construe ambiguities in an ERISA plan against the drafter.'" 293 F.3d at 1145 (quoting *Barnes v. Indep. Auto. Dealers Ass'n of Cal. Health & Welfare Benefit Plan*, 64 F.3d 1389, 1393 (9th Cir. 1995)). As the Ninth Circuit later held, "Courts will generally bind ERISA defendants to the more employee favorable of two documents-even if one is erroneous." *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 904 (9th Cir. 2004).

This principle applies with equal force to the SPD and to other plan documents, both of which are documents or instruments governing the plan. Indeed, it is particularly important that SPDs be construed against their drafters since these are the plan documents actually provided to participants and most likely to be reviewed by them.

The Fourth Circuit has relied on the same rationale, explaining in *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 542-43 (4th Cir. 1992), that when an employer represents to its employees that a particular plan document which is not the SPD governs questions about benefits, the employer cannot repudiate this representation and rely on SPD statements that are less favorable to participants. The court was careful to point out, however, that the plan does not

always prevail over the SPD simply because the SPD includes such a disclaimer. Rather, employees can have the benefit of a participant-favorable SPD that ostensibly designates another document as the primary document. Thus, "where the [SPD] favors the employer, the employer cannot disavow a disclaimer in the [SPD] representing that the Plan controls." *Id.* at 543. But "where the Plan favors the employer, the employer cannot invoke the Plan by relying on a disclaimer in the [SPD] that, contrary to the intent of Congress, designates the Plan as the controlling document." *Id.* *Accord Sturges v. HyVee Employee Ben. Plan*, 991 F.2d 479, 480-81 (8th Cir. 1993); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1201 (10th Cir. 1992).

Another court makes an important point with regard to the rule of *contra proferentem*, explaining that to ignore this rule "'would require us to . . . afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted,' a result that would be at odds with the congressional purposes of promoting the interests of employees and beneficiaries and protecting *contractually* defined benefits." *Massella v. Blue Cross Blue & Shield of Conn., Inc.*, 936 F.2d 98, 107 (2d Cir. 1991) (quoting *Firestone*, 489 U.S. at 113-14).

As noted, ERISA borrows not only from contract law, but also from the law of trusts. *Firestone*, 489 U.S. at 110-114. Because of its regulatory purposes, however, *see* John H. Langbein, *Trust Law as Regulatory Law*, 101 NW. U. L. REV. 1315, 1336 (2007), ERISA is generally "more exacting" than "the common law of trusts." *Donovan v. Mazzola*, 716 F.2d 1226, 1231 (9th Cir. 1983). Congress recognized that "the typical employee benefit plan, covering hundreds or

even thousands of participants, is quite different from the testamentary trust both in purpose and in nature," and noted that courts were to adapt traditional trust law while "bearing in mind the special nature and purposes of employee benefit plans intended to be effectuated by the Act," with the goal of equipping a participant with the legal tools "to safeguard either his own rights or the plan assets". S. REP. NO. 93-127, at 29 (1973), *reprinted in* I LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 615 (Comm. Print 1976) (hereinafter *LEG. HIST.*); H.R. REP. NO. 93-533, at 12 (1973), *reprinted in* 2 LEG. HIST. 2359; *see also Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) ("ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection [to participants].").

Application of such trust law principles also favors giving precedence to the more participant-favorable plan document, based on the fact that the employer drafted both documents. *See, e.g.*, *Lee v. Blue Cross/Blue Shield of Ala.*, 10 F.3d 1547 (11th Cir. 1994) (applying *contra proferentem*); *Massella v. Blue Cross & Blue Shield of Conn., Inc.*, 936 F.2d 98, 107 (2d Cir. 1991) (holding that application of *contra proferentem* to resolve ambiguities in an ERISA plan is consistent with the basic principle of trust law that trust property is to be dealt with for the benefit of the beneficiary, and citing Restatement (Second) of Trusts § 170(1) (1959)); *Kunin v. Benefit Trust Life Insurance Co.*, 910 F.2d 534, 540-41 (9th Cir. 1990) (*contra proferentem* is consistent with trust principles).

C. Alternatively, When An SPD And Another Plan Document Conflict, The SPD Should Control.

As discussed, the Court should adopt the bright-line rule that when plan documents are inconsistent, the more participant-favorable plan document should control. The Ninth Circuit's approach most closely comports with ERISA and applicable contract law and trust law principles.

Amici recognize that courts of appeals generally accord deference to the SPD when plan documents conflict. *Washington*, 497 F.3d at 457; *Burstein*, 334 F.3d at 378; *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 247 (6th Cir. 1996). Significantly, however, in these cases, the SPD was the more participant-favorable document; the courts had no occasion to address a more participant-favorable formal plan, and the courts' reasoning suggested that employers may not be able to take advantage of a more employer-favorable SPD. *Washington*, 497 F.3d at 457 ("Because the terms of the SPD and the Plan conflict, the terms of the SPD control and are binding on [the employer]"); *Burstein*, 334 F.3d at 378 n.18 ("'[I]f there is a conflict between the summary plan description and the terms of the policy, the summary plan description shall govern. Any other rule would be, as the Congress recognized, grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary.'" (citation omitted)); *Helwig*, 93 F.3d at 247 (favoring the SPD over conflicting plan because, *inter alia,* employees should be able to count on SPDs).

Courts that apply a bright-line rule in favor of SPDs rely on fairness to employees as a rationale. Addressing a company's argument that the court should enforce a disclaimer in the SPD proclaiming that "if a conflict arose between the plan and the [SPD], the plan should prevail," the Eleventh Circuit held: "Such an assertion defeats the purpose of the [SPD]. It is of no effect to publish and distribute [an SPD] designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee . . . ." *McKnight v. S. Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985).

The Fifth Circuit also applies the rule that in the event of a conflict between the SPD and the terms of the policy, the SPD governs. *Hansen*, 940 F.2d at 981-82. That court explained that "[a]ny other rule would be, as the Congress recognized, grossly unfair to employees and would undermine ERISA's requirement of an accurate and comprehensive summary." *Id at 982.*; *see also Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 137 (6th Cir. 1988) ("Congress has promulgated clear directives prohibiting misleading [SPDs].").

In giving precedence to the SPD, courts also cite employers' temptation to mislead participants:

> Allowing the plan's master documents to trump the SPD would both undermine Congress's intent for the SPD to convey accurately plan information to employees upon which they could rely, *see* 29 U.S.C. § 1022(a) (1), and would tempt plan sponsors to engage in drafting legerdemain in order to conceal or omit the less attractive

> aspects of their plan, thereby creating for ERISA a Daliesque world of legal surrealism.

Chiles v. Ceridian Corp., 95 F.3d 1505, 1518 (10th Cir. 1996).

In short, favoring the SPD tends to validate the more participant-favorable document, given that SPDs typically are provided to employees while other plan documents typically are not. The SPD "'will be an employee's primary source of information.'" *Burke*, 336 F.3d at 110 (quoting *Heidgerd v. Olin Corp.,* 906 F.2d 903, 907 (2d Cir. 1990)).

Further, employers obviously have a greater incentive to hide unfavorable provisions in plan documents that will likely never see the light of day, rather than in SPDs which by law must be given to participants. Moreover, because formal plans are "generally voluminous documents written in technical legal terms" (Br. for Pet'rs. at 3), it is easier to include unfavorable provisions in opaque provisions. Finally, even if a formal plan document includes language more favorable to the employee, it is far less likely that such terms will come to a participant's attention, given that most participants never see the formal plan. And should participants actually obtain the formal plan, they would still have to decipher its legal jargon.

For these reasons, while contract law principles in particular favor giving participants the benefit of the plan document that favors them, in most cases—and certainly in most cases that are ultimately litigated—this document will prove to be the SPD.

II. PARTICIPANTS SHOULD NOT BE OBLIGED TO ESTABLISH DETRIMENTAL RELIANCE, LIKELY HARM, OR ANYTHING BEYOND A CLEAR CONFLICT BETWEEN TWO PLAN DOCUMENTS.

Three Circuits—the Third, the Fifth, and the Sixth—have concluded that in the event of a conflict between a more participant-favorable SPD and a plan document, the SPD controls, with no requirement that the participant make any further showing in order to gain the benefit of the SPD. *Washington*, 497 F.3d at 457; *Burstein*, 334 F.3d at 382 ("[I]n enforcing an SPD's terms, a participant does not need to plead reliance or prejudice, since the claim for plan benefits under ERISA § 502(a)(1)(B) is contractual"); *Edwards*, 851 F.2d at 137 (same). This position is most consistent with ERISA, and this Court should adopt it.

Under ERISA section 502(a)(1)(B), a participant or beneficiary may bring a claim to enforce the "plan" as it is described in the "plan documents," which include the SPD. *See* Resps.' Br. at 21, 23-24, 28-29. In the same way that no showing of detrimental reliance is necessary to enforce the terms of the plan where there is no conflict in its terms, ERISA imposes no detrimental reliance requirement when the employer has caused the terms of the plan to be in conflict.

The position proposed by CIGNA is alien to ERISA. "Detrimental reliance" is not employed anywhere in the text of ERISA, or in the common law principles that it incorporates. Section 502(a)(1)(B) provides that a participant or beneficiary is empowered to bring a civil action "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

Had Congress intended to add a conditional clause limiting section 502(a)(1)(B) to instances where detrimental reliance was demonstrated, it could have done so simply by adding the six straightforward words: "If he relied on such terms." But Congress did not explicitly or impliedly impose such a limitation. This is significant because this Court has often described ERISA as "a 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981)).

It is noteworthy that Congress has enacted other statutory schemes that expressly do require a showing of reliance, such as section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78r. In contrast, section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), for example, includes no such mandate. This Court has declined to read such a requirement into that RICO provision, concluding that the fact that the statute provides a right of action to "[a]ny person" injured by the particular violation suggests "a breadth of coverage not easily reconciled with an implicit requirement that the plaintiff show reliance in addition to injury in his business or property." *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 649 (2008). The Court would not allow a reliance requirement to enter the statute "through the back door" of analogy to common-law fraud. *Id.* at 655.

CIGNA, like the petitioners in *Bridge*, would impose a reliance requirement "through the back door," here ERISA sections 502(a)(1)(B) and 502(a)(3).

These provisions, by their terms, include no reliance requirement.

A. Requiring Participants To Demonstrate Reliance Or Some Other Individualized Standard Precludes Uniform Plan Administration.

A requirement that participants demonstrate individualized reliance or satisfy some other individualized standard would be contrary to ERISA's broader goals of ensuring efficiency, predictability, and uniformity in plan administration. *See Conkright*, 130 S. Ct. at 1648-49 (noting that Congress sought to create a system that minimizes complexity and administrative costs, and that ERISA "induc[es] employers to offer benefits by assuring a *predictable* set of liabilities, under *uniform* standards of primary conduct and a *uniform* regime of ultimate remedial orders and awards when a violation has occurred." (emphasis added) (quoting *Rush Prudential,*, 563 U.S. at 379)).

To effectuate ERISA, employers, participants, and the lower courts need bright-line rules. *See Kennedy,* 129 S. Ct. at 876 (referencing "the bright-line requirement to follow plan documents in distributing benefits"); *Hicks v. Fleming Cos.*, 961 F.2d 537, 542 (5th Cir. 1992) (adopting a bright-line rule as to what constitutes an SPD because "'reasonable participant's or case-by-case tests—with their inevitable hair-splitting factual distinctions and litigation-encouraging ambiguities—would introduce considerable uncertainty into this area of law, to the ultimate detriment, no doubt, of all parties"); *McMillan v. Parrott*, 913 F.2d 310, 312 (6th Cir. 1990) (clear rule "allows the parties to be certain of their rights and obligations").

The *ad hoc* procedure advocated by CIGNA would undermine both sides of ERISA's "'careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans.'" *Aetna*, 542 U.S. at 208 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987)). Under CIGNA's approach, employers would be denied the benefit of simplicity and would be precluded from calculating their pension obligations in advance, as it would be unclear whether any participants could prove detrimental reliance. Employees likewise would be deprived of predictability and uniformity and would not have their promised pensions. None of these consequences were intended by Congress when it enacted ERISA.

B. A Detrimental Reliance Requirement Is Contrary To ERISA, Which Creates An *Objective* Standard.

Section 102 of ERISA provides that SPDs "shall 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) (emphasis added); *see also* 29 C.F.R. § 2520.102-3(1). ERISA thus creates an objective standard.

The Ninth Circuit addressed the objective character of the "average plan participant" standard in *Stahl v. Tony's Building Materials, Inc.*, 875 F.2d 1404, 1408 (9th Cir. 1989), speaking in terms of "the ordinary employee." *See also Wilson v. Sw. Bell Tel.*, 55 F.3d 399, 407 (8th Cir. 1995) (whether SPD is calculated to be understood by the "average plan

participant . . . appears to be an objective standard"); *McGee*, 953 F.2d at 1202.

Under the statute, the pertinent inquiry does not involve the understanding of a particular participant or what it would take to apprise that participant of his or her rights and obligations. Rather, the SPD must be drafted so as to be understood by the average plan participant, and the sufficiency of the document is gauged by reasonableness, not by a particular participant's subjective understanding.[5]

There is no place in ERISA's statutory scheme for the purely subjective and individualized inquiry urged by CIGNA. CIGNA argues that the burden of establishing detrimental reliance may be satisfied by a participant's testimony, and "they need only testify about the state of their *own* minds." Br. for Pet'rs. at 39 (emphasis in original). CIGNA cites nothing in ERISA that supports the position that right to recovery is based on a participant's state of mind. To the contrary, and as noted, section 102 speaks in terms of the "average plan participant," which leaves no room for an individual state of mind.

CIGNA similarly asserts that a participant cannot be injured by a deficient SPD "unless he consults the SPD in order to 'apprise' himself 'of [his] rights and obligations under the plan,' and the SPD causes the

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[5] Respondents identify several other statutes and regulations that use the "average plan participant" formulation, and point out that none of these schemes have been construed to require any showing of detrimental reliance. Resps.' Br. at 31-33 (discussing ERISA 29 U.S.C. § 204(h)(2); the Consolidated Omnibus Budget Reconciliation Act regulations at 29 C.F.R. § 2590.606-1(c); and the Older Worker Benefit Protection Act provisions at 29 U.S.C. § 626(f)(1) and 29 C.F.R. § 1625.22(b)).

participant to misapprehend his rights and obligations." Br. for Pet'rs. at 25. To support this assertion, CIGNA cites only section 102(a). *Id.* However, section 102(a) contemplates nothing of the sort. The provision does not state that *participants* must "consult the SPD." Indeed, it places no burden at all on participants. Rather the obligation is entirely on the SPD drafter, who must write it "in a manner calculated to be understood by the average plan participant." Further, the drafter must ensure that the SPD is "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).

CIGNA goes on to attack the Second Circuit for supposedly turning section 102(a) on its head, by purportedly placing the onus of proof on CIGNA rather than on plaintiffs. Br. for Pet'rs. at 25. It is worth reviewing section 102(a) in its entirety on this point. It provides:

> A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall 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. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by

> the average plan participant and shall be furnished in accordance with section 1024(b) (1) of this title.

The provision which according to CIGNA creates burdens for participants and not for SPD drafters employs the verb "shall" six times, and includes no other verb that requires that action be taken. Each and every use of the term "shall" creates an obligation in the **employer-sponsor**. Four of the employer's obligations concern the SPD. Thus, the employer shall (1) furnish the SPD to participants as per ERISA section 104(b); (2) include in the SPD the information required in ERISA section 102(b); (3) write the SPD "in a manner calculated to be understood by the average plan participant"; and (4) ensure that the SPD is "sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." The final two obligations imposed by ERISA section 102(a) concern summaries of material modifications, and also apply an objective standard, *i.e.*, that any such summaries "shall be written in a manner calculated to be understood by the average plan participant."

C. A Detrimental Reliance Standard Is Contrary To Real-World Behavior.

CIGNA argues that each participant must prove that he or she detrimentally relied on a more favorable SPD in order to take advantage of it. Specifically, CIGNA submits, "[a] plaintiff can testify that she read the SPD, did not know of the contrary or omitted plan terms, and relied on the SPD to make a detrimental employment or retirement decision that she would not otherwise have made if she had known of the actual terms of the plan." Br. for Pet'rs. at 38-

39. CIGNA's reference to the so-called "actual terms of the plan" undermines the statutory scheme, which makes the SPD provisions every bit as enforceable as any other plan provision. In fact, ERISA requires that the SPD be "accurate." If CIGNA's detrimental reliance standard is adopted, every SPD provision may be contradicted by any other provision in any other plan document.

Further, under CIGNA's scheme, no participant can recover based on a favorable provision unless that provision was a deal-breaker for that participant. A district court has explained why this is so unreasonable:

> Plaintiffs cannot prove reliance because the SPD did not induce them to act or not act in a way that led to the forfeiture of the benefit they seek . . . Instead, Plaintiffs did what most (if not all) Plan participants would have done. They worked at Spacelabs knowing that they had a pension plan. They unlikely paid any attention to the provisions of the Plan governing partial termination. What employee anticipates the sale of his company and the partial termination of its pension plan? Even if employees had determined long before the Spacelabs sale that, based on the unambiguous SPD, they would become 100% vested in a partial termination, they could not have relied on that determination. At most they could have continued working at Spacelabs in the belief that they would vest fully.

Goldinger v. Datex-Ohmeda Cash Balance Plan, 701 F. Supp. 2d 1205 (W.D. Wash. 2010).

Requiring proof of actual reliance would undermine at least two of ERISA's fundamental goals: uniform

operation of plans under written documents, and protection of beneficiaries. Beneficiaries would frequently be unable to satisfy that burden—especially beneficiaries of deceased participants who are particularly unlikely to have evidence that the participants read the SPD and acted differently in response. *E.g.*, *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1579-1580, n.2 (11th Cir. 1992).

D. A Detrimental Reliance Requirement Would, As A Practical Matter, Foreclose Relief Even For Those Few Participants Who Could Satisfy This Heavy Burden, Thus Violating the Policies Underlying ERISA.

Even if a few individual participants could overcome these hurdles and actually demonstrate reliance, it is highly unlikely that they would ever have the opportunity to do so. CIGNA argues that each and every participant here must offer his or her own individualized proof of reliance. Yet this case involves 27,000 participants who were promised certain benefits. Under CIGNA's approach, every participant who hoped to recover would be obliged to testify as to the precise details of his or her reading of the relevant plan terms and "reliance" thereon. Under these circumstances, it is highly unlikely that a class would ever be certified, since a court could conclude that "individual" issues predominate or that the claims lack "commonality." *See, e.g., Heffner v. Blue Cross & Blue Shield of Ala., Inc.*, 443 F.3d 1330, 1340-41 (11th Cir. 2006). Even if a case were ever accorded class treatment, the logistics of the requisite proof would likely overwhelm the trial court.

Given that class certification would be so difficult to obtain, should the Court adopt the standard urged by CIGNA, few class actions would be brought in these types of cases. Where does this leave those few participants who perhaps could establish detrimental reliance? Most likely, they would be unable to obtain counsel, because it is often not cost-effective to file individual pension lawsuits (especially considering the uncertainty of recovering statutory fees). *See*, e.g., *Simonia v. Glendale Nissan/Infiniti Disability Plan*, 608 F.3d 1118 (9th Cir. 2010).[6]

For these reasons, adopting CIGNA's position (and most likely precluding class treatment) not only runs counter to the remedial policies underlying ERISA, but is also inconsistent with policies underpinning Federal Rule of Civil Procedure 23. This Court has recognized that Rule 23 was enacted to minimize the likelihood that individuals would abandon their claims because they were not economically feasible. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)).

[6] Should willing counsel be identified, in a case like this one involving many participants, thousands of lawsuits would be filed, clogging the courts with repetitive litigation involving the same issues. Even after all that litigation, few participants would actually obtain relief given the challenge of meeting CIGNA's exacting standard.

This Court has also observed that "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)); *see also In re Workers' Compensation*, 130 F.R.D. 99, 110 (D.Minn. 1990) ("If the case were not handled as a class, thousands of small claims would be either brought or unjustly abandoned. The first possibility would be a flood of cases, the second would involve individual claims abandoned because of cost."). These considerations led this Court to observe that "[c]lass actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). Other courts have made it clear that Rule 23 should be liberally construed: Even in a "doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action." *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985).

Given these realities, adopting CIGNA's position would run counter to policies underlying ERISA. As this Court noted, "Congress enacted ERISA to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts.'" *Aetna*, 542 U.S. at 208 (quoting 29 U.S.C. § 1001(b)).

CONCLUSION

For the foregoing reasons, the National Employment Lawyers Association, Pension Rights Center, and United Policyholders urge the Court to affirm the Second Circuit's decision in favor of the Respondent plan participants. In so affirming, the Court should hold that when ERISA plan documents conflict, the more participant-friendly provisions control, and participants need make no further showing in order to recover on the basis of the favorable plan document.

Respectfully submitted,

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October 22, 2010