No. 17-690

IN THE

Supreme Court of the United States

FOOT LOCKER, INC. and FOOT LOCKER RETIREMENT PLAN,
Petitioners,

v.

GEOFFREY OSBERG, on behalf of himself and on behalf of all others similarly situated,
Respondent.

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

BRIEF FOR *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN BENEFITS COUNCIL, AND THE RETAIL LITIGATION CENTER, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are the Chamber of Commerce of the United States of America (the "Chamber"), the American Benefits Council (the "Council"), and the Retail Litigation Center, Inc. (the "RLC").

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. Many of the Chamber's members maintain, administer, or provide services to employee benefits programs governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). An important function of the Chamber is to represent the interests of the Nation's business community in matters before Congress, the Executive Branch, and the courts.

The Council is a national, non-profit organization dedicated to protecting and fostering privately

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that (1) no counsel for a party authored this brief in whole or in part; (2) no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief; and (3) no person other than *amici*, their members, or their counsel made such a monetary contribution. Pursuant to Rule 37.2(a), counsel for *amici* represents that each party's counsel of record received timely notice of *amici*'s intent to file this brief, and that all parties have consented to the filing of this brief. Counsel for respondent's consent letter is on file with the Clerk. Counsel for petitioners has filed a blanket consent letter with the Court.

sponsored employee benefit plans. It has roughly 430 members, primarily large, multi-state employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee-benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

The RLC is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The Chamber, the Council, and the RLC frequently participate as *amici curiae* in cases with the potential to significantly affect the administration and sustainability of employee benefit plans under ERISA. This is such a case. The Second Circuit's decision would permit courts to impose massive—and unpredictable—costs on plan sponsors for nonexistent harms to plan beneficiaries. Neither Article III of the U.S. Constitution nor ERISA supports that result. The decision below will ultimately frustrate ERISA's policy objective of encouraging employers to

provide voluntary benefits to employees, and thus *amici* respectfully submit this brief in support of petitioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below recognizes a fiduciary breach claim for erroneous statements on which no plan participant relied to her detriment. ERISA does not create such a claim, and Article III does not permit its litigation in federal court.

A plan sponsor can always change (prospectively) the terms of the voluntary plan benefits it offers to employees. An employee may rely on the sponsor's description of those changes in making decisions about her employment. If the sponsor's communications about the plan terms are confusing or unclear, the employee may rely on those communications to her detriment—by continuing her employment and forgoing other employment opportunities, for example, even though she would consider the revised plan terms unacceptable if they were accurately explained to her.

But an erroneous statement or omission into the void does not itself cause any injury. If a participant did not review and rely upon a communication, the participant is in no different a position from a participant who never saw the communication at all. The participant may prefer the terms of the old plan, but the participant is not harmed *by the communication* about the plan changes if she did not take or refrain from any action on its basis.

Other federal courts construing ERISA § 404(a) in the context of claims for misrepresentation have

faithfully applied this basic principle drawn from trust law. Those courts of appeals have recognized that a plaintiff alleging a fiduciary breach by misrepresentation must show, as an element of his claim, detrimental reliance on the alleged misrepresentation. ERISA provides a cause of action for losses *resulting from* the alleged breach.

The Second Circuit's holding that reliance is not an element of a claim for misrepresentation-based fiduciary breach is squarely at odds with the other courts' decisions and the ERISA principles underlying them. But the holding also sanctions claims that are jurisdictionally infirm. A plan participant who did not rely on a misleading communication has no standing to challenge it, because she cannot establish an injury-in-fact that was caused by the alleged ERISA violation. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Plaintiffs' real concern here—the implementation of less advantageous plan terms—derives from plan sponsor decisions that are *permitted* by ERISA, not from the defective communications plaintiffs now challenge.

The rule set forth below has multiple perverse policy consequences. Most basically, by creating a split with the Third, Sixth, and Seventh Circuits, the Second Circuit decision disrupts the uniform regulation of employee benefit plans. Employers will be subject to different rules in different forums, and plaintiffs armed with ERISA's broad venue provision will be encouraged to forum-shop accordingly.

Moreover, permitting plan reformation without any showing of detrimental reliance vastly enlarges the risks for employers offering benefit plans—risks

that cannot necessarily be predicted and planned for. The grave risk associated with erroneous plan disclosures under the Second Circuit's approach will put pressure on sponsors to issue needlessly complex communications, contrary to ERISA's goal of fostering participant communications that are clear and easy to understand. It will also require employers to reserve more for future, uncertain liabilities—potentially at the expense of benefit offerings to employees now. In the absence of actual harm to participants, it makes no sense to devise a fiduciary breach rule that will have the effect of narrowing employee benefits.

The petition should be granted.

ARGUMENT

I. THE SECOND CIRCUIT'S DECISION CONTRAVENES ARTICLE III AND COMMON LAW TRUST PRINCIPLES REQUIRING A SHOWING OF HARM IN ORDER TO SUSTAIN A CLAIM FOR FIDUCIARY BREACH

A. Detrimental Reliance Is An Element Of A Misrepresentation-Based Fiduciary Breach Claim Under The Common Law Of Trusts

The plaintiffs in this case allege that their employer failed to disclose benefit "wear-away" in communications about changes to their pension plan, but they do not allege that they relied on those communications to their detriment. The Second Circuit affirmed the judgment in the plaintiffs' favor, holding that detrimental reliance is not an element of a misrepresentation-based claim for fiduciary breach under ERISA § 404(a). That holding is at odds with the

common law of trusts from which ERISA's fiduciary breach principles are drawn.

Longstanding common law principles hold that equitable misrepresentation claims (and analogous fraud claims sounding in tort) require a showing of detrimental reliance. *See* Pet. 25-26; *see also Dawson v. Withycombe*, 163 P.3d 1034, 1057-58 (Ariz. Ct. App. 2007) (equitable claim for constructive fraud); *Jewish Ctr. of Sussex Cty. v. Whale*, 432 A.2d 521, 524 (N.J. 1981) (equitable claim for misrepresentation); Restatement (Second) of Torts § 525 (1977) (tort claim for fraudulent misrepresentation). The detrimental reliance requirement effectuates the more general rule of loss causation in the law of trusts. The remedy for a breach of trust should "make the trust and its beneficiaries whole." Restatement (Third) of Trusts § 100 cmt. a (2012). A trustee who commits a breach of trust is typically liable for "the amount required to *restore* the values of the trust estate and trust distributions to what they would have been *if the portion of the trust affected by the breach had been properly administered*." Restatement (Third) of Trusts § 100 (2012) (emphases added). The plaintiff must establish that the "loss *result*[*ed*] *from* the breach." *Id.* cmt. e (emphasis added). If "a trustee commits the breach and a loss is incurred, the trustee ordinarily is not chargeable with the amount of the loss if the same loss would have occurred in the absence of a breach of trust." *Id.* A showing of detrimental reliance links the loss claimed by the plaintiff with the alleged fiduciary misstatement or omission. *See CIGNA Corp. v. Amara*, 563 U.S. 421, 449 (2011) (Scalia, J., concurring) (the actual harm to employees stemming from a

misrepresentation derives from detrimental reliance and the loss of opportunity).[2]

The Second Circuit inexplicably broke with the foregoing common law trust principles in its decision below. But ERISA's fiduciary-duty standard is "derived from the common law of trusts." *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) (internal quotation marks omitted). Unless ERISA's text, structure, or purpose directs a different rule in a particular instance, courts should "look to the law of trusts" to "determin[e] the contours of an ERISA fiduciary's duty." *Id.*; *see Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (courts may "depart[]" from the common law when interpreting ERISA if inconsistent with "the language of [ERISA], its structure, or its purposes").

The Second Circuit cited no textual or other reason for its departure from the common law rule. The court effectively created a strict liability regime for misrepresentation-based claims, with no basis in ERISA. *See, e.g.*, *Hein v. TechAmerica Grp., Inc.*, 17

[2] The common law approach is reinforced by the Uniform Trust Code, a model law aimed at codifying the common law of trusts. Like the common law, the Code provides that "[a] trustee who commits a breach of trust is liable to the beneficiaries affected" for "the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred." Unif. Trust Code § 1002(a)(1). Thus, "[i]f a trustee commits a breach of trust," and the beneficiary suffers a loss, the beneficiary may "hold the trustee liable for the amount necessary to compensate fully for the consequences of the breach." *Id.* cmt. Compensable losses under the Code include "lost income, capital gain, or appreciation that would have resulted from proper administration." *Id.*

F.3d 1278, 1280 (10th Cir. 1994) (ERISA does not impose "strict liability" wherein "any time the employer failed to comply with its duties under ERISA, an employee would receive any alleged benefit he or she claims they expected"); *cf.* 29 U.S.C. § 1109(a) (fiduciaries must "make good to [the] plan any losses to the plan resulting from each [fiduciary] breach").

The Second Circuit gave this Court's decision in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2001), as the reason for its no-detrimental-reliance rule. But in *Amara*, the Court simply recognized that there may be circumstances—mutual mistake in the negotiation of a collective bargaining agreement, for example—where it can be shown that a violation caused actual harm in the absence of detrimental reliance. *Id.* at 443-44. That is, there may be pathways to "actual harm" other than detrimental reliance—but "actual harm" is nevertheless a necessary element of proof. *Id.* Those other pathways are not available when the fiduciary breach is a non-mutual miscommunication. An errant communication causes actual harm to a participant only if she relies upon it. That black-letter principle should be restored.

B. Article III Deprives A Court Of Jurisdiction Over The Claim Of A Plaintiff Who Did Not Rely On A Fiduciary Misstatement

Like all plaintiffs seeking relief in federal court, ERISA plaintiffs must establish their Article III standing to sue. *Allen v. Wright*, 468 U.S. 737, 750-51 (1984). Article III's standing requirements are familiar and well-established. To establish constitutional standing, a plaintiff must show, *inter alia*,

that she suffered an injury-in-fact, and that there was a causal connection between the injury and the defendant's conduct. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). These requirements ensure that "legal questions presented to the court will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

A constitutionally sufficient injury-in-fact must be "concrete and particularized," and "actual or imminent," not "conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). Even when a plaintiff is seeking to enforce a right created by statute, the plaintiff must show some injury related to the deprivation of that right. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."). In other words, a "bare procedural violation" of a statute, without more, is insufficient to establish the injury-in-fact requirement. *Id.* As courts have repeatedly recognized in the ERISA context, a plaintiff must establish that he suffered a constitutionally cognizable injury, and that his injury was caused by the defendant's ERISA violation.[3]

[3] *See Soehnlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 582 (6th Cir. 2016) (rejecting plaintiffs' argument that, "by merely alleging a violation of ERISA rights, [plaintiffs] satisfy their obligation under Article III"); *Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 529 (5th Cir. 2016) (holding that the "bare allegation of incursion on [a] purported statutory right . . . under

As discussed above, the decision below did not require the plaintiffs to establish that they relied upon the challenged fiduciary communications to their detriment in making decisions about their employment and retirement planning. But without reliance, a plaintiff does not have standing to challenge the breaching communication—he cannot show the alleged fiduciary breach caused him harm. In this way, Article III mirrors the substantive requirements of ERISA § 404(a). Because the Second Circuit's decision opens the door to a range of constitutionally suspect claims, it should be reversed.

ERISA is insufficient to meet the injury-in-fact prong of Article III standing"), *cert. denied*, 137 S. Ct. 1374 (2017); *Trs. of Upstate N.Y. Eng'rs Pension Fund v. Ivy Asset Mgmt.*, 843 F.3d 561, 567 (2d Cir. 2016) ("In a case arising under ERISA, a plaintiff must allege some injury or deprivation of a specific right that arose from a violation of [an ERISA] duty in order to meet the injury-in-fact requirement."); *David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (rejecting plaintiffs' argument that "the deprivation of their statutory right to have the Pension Plan operated in accordance with ERISA's fiduciary requirements is sufficient to constitute an injury-in-fact for Article III standing"); *see also Perelman v. Perelman*, 793 F.3d 368, 376 (3d Cir. 2015) (declining to "break from the reasoned consensus of our sister circuits" holding that plaintiffs cannot assert representative standing under ERISA when plaintiffs themselves have suffered no individualized injury-in-fact); *Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1125 (9th Cir. 2006) ("[T]here is no . . . tradition of unharmed ERISA beneficiaries bringing suit on behalf of their plans."); *Harley v. Minn. Min. & Mfg. Co.*, 284 F.3d 901, 906 (8th Cir. 2002) ("[T]he limits on judicial power imposed by Article III counsel against permitting participants or beneficiaries who have suffered *no* injury in fact from suing to enforce ERISA fiduciary duties on behalf of the Plan.").

II. THE SECOND CIRCUIT'S DECISION FRUSTRATES FUNDAMENTAL ERISA CONCERNS

A. This Court's Review Is Necessary To Restore The Uniform, Nationwide Application Of ERISA

When ERISA was enacted, one of Congress's primary goals was to create a "uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). To that end, ERISA establishes "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." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (internal quotation marks and alteration omitted). Divergent legal obligations in different circuits undermine the statute's goals of uniformity and predictability. *See Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001) ("Uniformity is impossible, however, if plans are subject to different legal obligations in different States."); *see also* H.R. Rep. No. 93-533, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 ("Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law . . . for evaluation of fiduciary conduct . . . ."). A "patchwork scheme of regulation" is likely to "introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packaging Co. v. Coyne*, 482 U.S. 1, 11 (1987).

The Second Circuit's decision creates a circuit split with the Third, Sixth, and Seventh Circuits. Pet. 22-25. Plan fiduciaries will be subject to different—or multiple—fiduciary standards depending on where they may be sued.[4] The divergent standards mean that plan sponsors and fiduciaries may be subject to wildly varying consequences for identical conduct, contrary to "ERISA's policy of . . . assuring a predictable set of liabilities, under uniform standards of primary conduct." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002); *see Raymond B. Yates, MD, PC Profit Sharing Plan v. Hendon*, 541 U.S. 1, 17 (2004) (discussing object of "uniform national treatment of pension benefits" under ERISA (internal quotation marks omitted)). Further, given

[4] This split is even more pronounced at the district court level: post-*Amara* district courts in the First, Fifth, Fourth, Eighth, Ninth, and Tenth Circuits have all expressly held that detrimental reliance is an element of a fiduciary-misrepresentation claim under ERISA § 404(a). *See Cont'l Ins. Co. v. Dawson*, --- F. Supp. 3d ---, 2017 WL 1196857, at *6 (N.D. Tex. Mar. 31, 2017); *Damiano v. Inst. for In Vitro Scis.*, No. 16-0920, 2016 WL 7474535, at *4 (D. Md. Dec. 29, 2016); *Fulghum v. Embarq Corp.*, No. 07-2602-EFM, 2016 WL 1060207, at *5 (D. Kan. Mar. 15, 2016); *Gleason v. SSM Health Care St. Louis*, No. 11-1182, 2012 WL 3637741, at *2 (E.D. Mo. Aug. 22, 2012); *Carr v. Int'l Game Tech.*, No. 09-0584, 2012 WL 909437, at *4 (D. Nev. Mar. 16, 2012) ("The Court [in *Amara*] did not analyze whether detrimental reliance is an element of a claim for misrepresentation in violation of fiduciary duties arising under ERISA."); *Kenney v. State St. Corp.*, No. 09-10750, 2011 WL 4344452, at *7 (D. Mass. Sept. 15, 2011) ("[N]othing about [*Amara*] suggests that a plaintiff's burden is lessened in regard to claims for negligent misrepresentation or omission nor that, having failed to allege detrimental reliance, he may still be entitled to equitable relief for such claims . . . .").

ERISA's broad venue provision, which allows claims to be brought in any district "where the plan is administered, where the breach took place, or where the defendant resides," 29 U.S.C. § 1132(e)(2), permitting the circuit split to continue will encourage forum shopping by ERISA plaintiffs. This Court frequently grants review to resolve circuit splits that disturb the uniform application of ERISA.[5] It should do so here, too.

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[5] *See, e.g.*, *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016) ("We granted certiorari to resolve a conflict among the Courts of Appeals over whether an ERISA fiduciary can enforce an equitable lien against a defendant's general assets under these circumstances."); *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 94 (2013) ("We granted certiorari to resolve a Circuit split on whether equitable defenses can so override an ERISA plan's reimbursement provision." (citation omitted)); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 361 (2006) ("The Fourth Circuit observed that the Courts of Appeals are divided on the question whether [ERISA] § 502(a)(3) authorizes recovery in these circumstances. We granted certiorari to resolve the disagreement." (citation and footnote omitted)); *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004) (granting certiorari "in order to resolve [a] resulting Circuit split"); *see also Cal. Div. of Labor Standards Enf't v. Dillingham Constr., NA, Inc.*, 519 U.S. 316, 334 (1997) (Scalia, J., concurring) ("Since ERISA was enacted in 1974, this Court has accepted certiorari in, and decided, no less than 14 cases to resolve conflicts in the Courts of Appeals regarding ERISA pre-emption of various sorts of state law.").

B. A Strict Liability Regime For Disclosure Errors Would Undermine ERISA's Objective Of Promoting Clear, Comprehensible Participant Disclosures

When enacting ERISA, Congress sought to simplify the communications provided to plan participants and beneficiaries. Before ERISA was in place, the "average plan participant, even where he [was] furnished an explanation of his plan provisions, often [could not] comprehend them because of the technicalities and complexities of the language used." H.R. Rep. No. 93-533, at 7 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4657. A primary goal of ERISA was to improve "the effectiveness of communication of plan contents to employees." *Id.*

To that end, ERISA imposes certain requirements on plan-related documents and communications. Plans must be in writing. 29 U.S.C. § 1102(a). Plan summaries must be written "in a manner calculated to be understood by the average plan participant." *Id.* § 1022(a). ERISA's disclosure requirements protect employees by ensuring that plan documents are "presented in a manner that an average and reasonable worker participant can understand intelligently." H.R. Rep. No. 93-533, at 7 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646.

The repudiation of a detrimental reliance requirement undermines this goal. "People make mistakes. Even administrators of ERISA plans." *Conkright*, 559 U.S. at 509. Yet the Second Circuit's rule exposes plan fiduciaries to potentially severe, unforeseen remedies—including plan reformation—for omissions and misstatements in plan communi-

cations, regardless of whether they caused any harm to plan participants. In this case alone, the plan sponsor faces a judgment potentially in excess of $250 million.

Risks of that scale will put pressure on plan sponsors to publish needlessly "technical[] and complex[]" plan disclosures that account for any conceivable misunderstanding or omission. H.R. Rep. No. 93-533, at 7 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4646. Participants will be told *everything* instead of something they can understand, at the expense of ERISA's objective of ensuring that plan documents may be understood "intelligently" by the "average and reasonable worker participant." *Id.* If deficient plan communications occasion strict liability, then plan administrators will inevitably "sacrifice simplicity and comprehensibility in order to describe plan terms in the language of lawyers." *Amara*, 563 U.S. at 437. That drastic result is not justified by a need to avoid communications that do not, in fact, cause any harm.

C. The Second Circuit's No-Reliance Rule May Necessitate Limits On Employee Benefit Offerings

ERISA plans are voluntary. No company is required to offer employees an ERISA plan, and employers are generally free to terminate or modify employee benefit plans "for any reason at any time." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). ERISA seeks to encourage employers to sponsor benefit plans for their employees. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54 (1987) (dis-

cussing "the public interest in encouraging the formation of employee benefit plans").

Courts have thus recognized that "ERISA represents a careful balancing between" the interests of plan participants on the one hand, and employers and plan sponsors on the other. *Conkright*, 559 U.S. at 517 (internal quotation marks omitted). In striking that balance, courts must protect employee benefits while at the same time being careful not to "create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Varity*, 516 U.S. at 497; *see Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 n.17 (1985) ("Congress was concerned lest the cost of federal standards discourage the growth of private pension plans.").

A rule that creates an unpredictable risk of very large monetary judgments will impel employers to prepare as best they can for that possibility—potentially by scaling back their benefit offerings or contributions. *See Cooper v. IBM Pers. Pension Plan*, 457 F.3d 636, 642 (7th Cir. 2006) (observing that the result of ERISA litigation was that "[the defendant] eliminated the cash-balance option for new workers and confined them to pure defined-contribution [401(k)] plans"). The Second Circuit's nominally pro-participant rule is thus actually "self-defeating," as a narrowing of employee benefits is "unfavorable rather than helpful to the employees for whose benefit [ERISA] is designed." H.R. Rep. No. 93-1280 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5167.

Indeed, the Second Circuit's rule may simply accelerate the disappearance of defined benefit pension plans like the one at issue here. In 1975, there were 103,346 such plans. By 2014, there were only 44,869. *See* U.S. Dep't of Labor, Private Pension Plan Bulletin Historical Tables and Graphs, 1975-2014, at 1 (2016), https://www.dol.gov/sites/default/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf. The decline is attributable primarily to the increasing complexity and unanticipated risks associated with the administration of pension plans, including "pressures on defined benefit plan sponsors to control costs and funding volatility" and "increased regulatory burdens." Emp. Benefit Research Inst., Retirement Trends in the United States Over the Past Quarter-Century, at 1 (2007), https://www.ebri.org/pdf/publications/facts/0607fact.pdf. If employers face obstacles to changing the terms of defined benefit pension plans in ways that make the plans sustainable, then employers will face increasing pressure to abandon that model altogether.

CONCLUSION

For these reasons, and the reasons presented in the petition for writ of certiorari, the Court should grant review in this case.

Respectfully submitted,

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