No. 17-528

IN THE

Supreme Court of the United States

JENNIFER STRANG,
Petitioner,

v.

FORD MOTOR COMPANY GENERAL RETIREMENT PLAN and FORD MOTOR COMPANY,
Respondents.

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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT JUNE
LAW OFFICES OF ROBERT JUNE, P.C.
415 Detroit Street,
2nd Floor
Ann Arbor, MI 48104
(734) 481-1000
bobjune@junelaw.com

MATTHEW W.H. WESSLER
Counsel of Record
RACHEL BLOOMEKATZ
DANIEL TOWNSEND
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
matt@guptawessler.com

Counsel for Petitioner

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PETITIONER'S SUPPLEMENTAL BRIEF

In its invitation brief, the government agrees that the Sixth Circuit has embraced the "mistaken" view that a breach-of-fiduciary-duty claim under section 502(a)(3) is barred where that claim seeks the same relief as a claim seeking the payment of benefits under section 502(a)(1)(B). The government also agrees that the Sixth's Circuit's view (1) "conflicts" with multiple decisions of this Court, (2) splits from the "uniform position of other courts of appeals," (3) contradicts the "position advocated by the United States for at least 15 years," and (4) is squarely presented in this case. By almost any measure, this combination of factors should warrant a grant.

The government nonetheless recommends denial because it sees "some apparent internal contradictions" within the Sixth Circuit and because the decision below is "nonprecedential." Neither reason justifies denial. The decision is unpublished precisely because there is no internal conflict: Twice in the past two years the Sixth Circuit has confirmed that a breach-of-fiduciary-duty claim may not be plead in tandem with a section 502(a)(1)(B) denial-of-benefits claim where the relief sought is "the same."

The continued survival of that erroneous rule is intolerable. Absent further review, plan participants living and working within the boundaries of the Sixth Circuit face an indefensible pleading standard that robs them of an important statutory cause of action and stands at odds with the rest of the country. This Court should grant the petition and reverse.

I. The Sixth Circuit's rule is clear and conflicts with decisions from this Court and other courts of appeals.

A. The government's brief leaves no doubt: Neither ERISA, this Court's case law, nor the Federal Rules of Civil Procedure countenance the Sixth Circuit's "mistaken" rule that a plan participant or beneficiary is automatically divested of a breach-of-fiduciary-duty claim under section 502(a)(3) if it seeks "the same relief" as a benefits claim under section 502(a)(1)(B), even if the two claims address "separate and distinct injuries." U.S. Br. at 15–16.

As the government confirms, ERISA's text and structure "make[] clear" that sections 502(a)(1)(B) and 502(a)(3) "authorize distinct actions to remedy distinct injuries." *Id.* at 9. And "[n]o sound basis exists to read [them] as mutually exclusive." *Id.* To the contrary, "where a beneficiary asserts a different injury or shows that Section 502(a)(1)(B) would not 'provide[] adequate relief, nothing precludes a separate claim under Section 502(a)(3)." *Id.* at 10 (explaining that ERISA was passed "against the backdrop of ordinary rules of civil procedure, which permit the joinder of alternative claims in a single action").

This Court's cases make the same point. In *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), as the government explains, this Court "clarified that a plaintiff's pursuit of a claim for benefits under Section 502(a)(1)(B) does not preclude appropriate equitable relief for a fiduciary breach under Section 502(a)(3)." U.S. Br. at 11. The same it true of *Varity Corp. v. Howe*, 516 U.S. 489 (1996): "where the beneficiary asserts a different injury or shows that Section 502(a)(1)(B) would not 'provide[] adequate relief,' nothing precludes a separate claim

under Section 502(a)(3)." U.S. Br. at 10 (quoting *Varity*, 516 U.S. at 515).

So too for those courts of appeals "[o]utside the Sixth Circuit." *Id.* at 11. As the government recognizes, unlike the Sixth, every circuit that has considered it has "uniformly adopted" the rule that "seeking relief under [Section 502](a)(1)(B) does not preclude seeking relief under [Section 502](a)(3)." *Id.* (quoting *Jones v. Aetna Life Ins. Co.*, 856 F.3d 541, 546–47 (8th Cir. 2017)). Under that "consensus view," a "claim seeking 'the payment of benefits under' Section 502(a)(1)(B) [can] proceed in tandem with a claim for 'an equitable remedy for the breach of fiduciary duty' under Section 502(a)(3)." *Id.* at 13 (quoting *Moyle v. Liberty Mut. Ret. Benefit Plan*, 823 F.3d 948, 961–62 (9th Cir. 2016)). In every other circuit to have addressed it, no ERISA-specific pleading rule "limit[s] the number of ways a party can initially seek relief at the motion to dismiss stage"—at least so long as the claims seek to remedy different injuries. *Id.* at 12–13.

Yet the Sixth Circuit has repeatedly taken the opposite approach. In its view, ERISA does not "allow a breach-of-fiduciary-duty claim" under section 502(a)(3) if the "only difference" between it and a section 502(a)(1)(B) benefits claim is "the nature of the alleged wrongdoing." *Donati v. Ford Motor Co.*, 821 F.3d 667, 673–74 (6th Cir. 2016). Instead, so long as the two claims seek "the same relief" the fiduciary-breach claim is barred. *Id.*; Pet. App. 13 (affirming dismissal of breach-of-fiduciary-duty claim where "the remedy sought is the same" as the benefits claim).

Put simply: The Sixth Circuit's view cannot coexist with this Court's own cases or the weight of authority from other circuits "allowing plaintiffs alleging distinct

injuries to seek relief under both Section 502(a)(1)(B) and 502(a)(3) without regard to the precise amount of relief sought." U.S. Br. at 16.

B. Despite agreeing that the Sixth Circuit's rule is both wrong and in conflict with the rest of the circuits, the government nevertheless recommends that the petition be denied. In its view, some "internal disagreement" continues to exist within the Sixth Circuit and so it speculates that the lower court might itself at some point abandon or clarify its current rule. U.S. Br. at 14–16. And, the government argues (at 17–18), the "nonprecedential status of the decision below" means that the decision will "not bind[]" future panels, cutting against a grant. Neither justification undermines the certworthiness of the narrow question presented in this case.

The government's claim (at 14) that the Sixth Circuit's "precedent on th[is] issue is not entirely clear" rests on its reading of *Rochow v. Life Insurance Co.*, 780 F.3d 364 (6th Cir. 2015) (en banc). There, the en banc court suggested that a claimant could pursue a breach-of-fiduciary-duty claim in tandem with a benefits claim if it "'is based on an *injury* separate and distinct from the denial of benefits.'" U.S. Br. at 15 (quoting *Rochow*, 780 F.3d at 372). That approach, the government says, could be seen as "consistent with the approach adopted by other courts of appeals" because it recognizes "that a plaintiff alleging separate and distinct injuries could bring claims under both provisions." *Id.*

The problem with the government's characterization is that the Sixth Circuit does not share this view of *Rochow* or its controlling rule. In *Donati*—a case decided one year after *Rochow*—the court could hardly have been clearer about the meaning of *Rochow*: where a claimant's "two claims are for the same relief, her

breach-of-fiduciary-duty claim is barred by our precedents in *Wilkins, Marks,* and *Rochow.*" 821 F.3d at 674. That definitive statement leaves no room for the government's proposed alternative reading of *Rochow*. For the Sixth Circuit, *Rochow* unambiguously requires dismissal of a claimant's fiduciary-breach claim where that claim seeks the same ultimate relief—i.e., monetary compensation—as a benefits claim. And that is true regardless of whether the injuries are distinct or the same: the panel in *Donati* explicitly held that, "[u]nder *Rochow*," if the "only difference between [the] two claims is the nature of the alleged wrongdoing" the breach-of-fiduciary-duty claim will not be "allow[ed]." *Id.* at 673–74.

The government resists this conclusion. It accuses the Sixth Circuit of misreading its own precedent and suggests that "*Donati*'s reasoning conflicts . . . with *Rochow*." U.S. Br. at 16. In its view, even after *Donati*, two separate lines of reasoning—one based on *Rochow* and one on *Donati*—could still potentially be "drawn" from Sixth Circuit precedent. *Id.* But the Sixth Circuit is the best authority on what its cases mean. And it sees *Rochow* as *dictating* this rule, not departing from it. The government's effort to parse these two decisions cannot survive the Sixth Circuit's own description of its precedent.

This case proves the point. The decision below was unpublished precisely because the panel faithfully applied controlling Sixth Circuit precedent to bar Ms. Strang's claim for appropriate equitable relief under section 502(a)(3). Citing *Rochow*, the panel "affirm[ed] the district court's dismissal of the breach-of-fiduciary-duty claim" because the "remedy sought" by the two claims was "the same: the $463,254.78." Pet. App. 13. And the panel explained why. In the Sixth Circuit, the nature

of the injury is irrelevant because, as "*Rochow* demonstrate[s]," "where an avenue of relief for the injury [i]s available under § 1132(a)(1)(B), '*irrespective of the degree of success obtained*,' a breach-of-fiduciary-duty claim cannot be brought." Pet. App. 12. In other words, the very existence of a benefits claim in the Sixth Circuit precludes the claimant from bringing a fiduciary-breach claim if the same relief is sought.

No additional clarity or guidance from the Sixth Circuit will matter. The Sixth Circuit's ironclad bar on alternative pleading is now so entrenched that it does not merit published status. And, as the government notes, the panel in this case did not even cite *Donati*—it relied instead on *Rochow* and read that decision as adopting the rule the government concedes is "mistaken." This Court should therefore grant review and reverse.

II. This case presents a clean vehicle for review.

The government's brief also does nothing to undermine the conclusion that this case offers a clean vehicle for review. It agrees that the complaint in this case plead alternative claims that encompassed different theories of injury. The "gravamen" of the denial-of-benefits claim, the government explains, is that Ms. Strang's "husband 'was entitled to benefits' under the 'terms of the Ford Plan.'" U.S. Br. at 18. The section 502(a)(3) claim, "[i]n contrast, . . . relied on the theory that Ford breached its fiduciary duties by failing to act impartially." *Id.*

By the government's own estimation (at 18–19), the complaint contains "detailed allegations" that support an independent breach-of-fiduciary duty claim. Although Ford's BIO argues against a grant by insisting that the two claims are duplicative—that both claims rest on a violation of the plan's own terms—the government points out that the BIO does so by selectively quoting "one

portion of one paragraph in the complaint," violating the basic rule that a complaint must be read "[i]n context" and construed "as a whole." *Id.* at 19. Applying the correct standard here, the government's brief makes clear that the complaint offers ample support for the claim "that respondents breached the duty of loyalty by discriminating against Mr. Strang—namely by denying him the opportunity to elect a lump-sum buyout when similarly situated Plan participants were allowed to do so." *Id.* Because that claim stands separate and apart from the denial-of-benefits claim, the decision below was both wrong and a departure from "the approach taken by other courts." *Id.*

Nevertheless, the government supports its denial recommendation by suggesting that some "ambiguities in the complaint" might permit an interpretation that, "at bottom," both claims challenge "only a denial of benefits." *Id.* at 20. But that argument is cut from the same cloth as Ford's. At this stage of the case, a court must "accept all factual allegations in the complaint as true" and "consider the complaint in its entirety." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

Because Ford sought dismissal based *only* on the Sixth Circuit's rule barring alternative pleading—it opted not to challenge the sufficiency of the allegations in the complaint—this case comes to the Court on the rule that "all reasonable inferences that can be drawn from the pleadings" *must* be drawn "in favor of the pleader." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2018). Doing so here, as the government freely admits, means that the complaint can be "read to plausibly allege" a separate and independent "breach of the duty of loyalty." U.S. Br. at 19. This Court thus has a clear path to review the

Sixth Circuit's wayward rule barring section 502(a)(3) fiduciary-breach claims when they accompany a denial-of-benefits claim.

III. There is no sound basis for delaying review.

Ultimately, as the government's brief makes clear, this case meets nearly every element in support of a grant: the Sixth Circuit's rule is "mistaken," runs afoul of this Court's decisions in *Varity* and *Amara*, splits with the "consensus view" of the other courts of appeals, disregards the longstanding "position advocated by the United States," and is squarely presented in this case.

There is also no reason to delay review. We are aware of no other case currently on appeal or pending consideration by this Court that squarely raises the single issue presented here. And, to the extent one comes, it will almost certainly arrive affixed with a "nonprecedential label" just like this one. The Sixth Circuit's rule is both clear and firm. Put another way: Any other potential vehicle will be materially indistinguishable from this one, and none is currently on the horizon.

The Court should step in now. Waiting disserves those participants and beneficiaries within the borders of Sixth Circuit who are (and will continue to be) denied the right to enforce ERISA's crucial statutory protections against fiduciary misconduct. And waiting also undermines the very thing ERISA was designed to promote: The "uniformity of decision[s]" that "help administrators, fiduciaries and participants to predict the legality of proposed actions." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (quoting ERISA's legislative history).

As it stands, participants in, and beneficiaries of, a Ford pension plan who live outside the boundaries of the Sixth Circuit can enforce breaches of fiduciary duty alongside their benefit claims. But those who belong to

the exact same plan and live in or near the Motor City cannot. That wholly arbitrary distinction is intolerable. The Court should grant the petition and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MATTHEW W.H. WESSLER
Counsel of Record
RACHEL BLOOMEKATZ
DANIEL TOWNSEND
GUPTA WESSLER PLLC
1900 L Street, NW
Suite 312
Washington, DC 20036
(202) 888-1741
matt@guptawessler.com

ROBERT JUNE
LAW OFFICES OF ROBERT JUNE, P.C.
415 Detroit Street, 2nd Floor
Ann Arbor, MI 48104
(734) 481-1000
bobjune@junelaw.com

Counsel for Petitioner

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