No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit affirmed a judgment awarding sweeping equitable relief that could exceed $250 million to a class of 16,000 participants in the Foot Locker Retirement Plan. The class alleged that Foot Locker, Inc. had violated Section 102 of the Employee Retirement Income Security Act ("ERISA") and breached its fiduciary duties under Section 404(a) of ERISA by issuing a summary plan description and other communications that failed to disclose that many class members' benefits were effectively frozen for a period of time after Foot Locker transitioned to a cash-balance plan. In upholding the certification of the class and the judgment in the class's favor, the Second Circuit relieved the individual class members of the burden of proving two essential elements of their claims: The court held that the element of mistake could be proved on a "class-wide" basis using "generalized circumstantial evidence," rather than "individualized" proof, and that class members were not obligated to prove detrimental reliance as an element of their fiduciary-breach claim.

The questions presented are:

1. Whether it violates Federal Rule of Civil Procedure 23(b)(3), the Rules Enabling Act, and due process to certify a class and uphold a classwide judgment where the claims or defenses raise individualized questions about each class member's knowledge of the defendant's alleged statutory violation.

2. Whether detrimental reliance is an element of a claim for breach of fiduciary duty under Section 404(a) of ERISA.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceeding below.

Foot Locker, Inc. has no parent company. Vanguard Group, Inc. owns more than 10% of the stock of Foot Locker, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Foot Locker, Inc. and Foot Locker Retirement Plan respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 862 F.3d 198. Pet. App. 1a. The opinion of the district court is published at 138 F. Supp. 3d 517. Pet. App. 35a. The court of appeals' order denying rehearing is unreported. Pet. App. 179a.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2017, and a timely petition for rehearing was denied on August 11, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause, Rules Enabling Act, and relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") are reproduced in the appendix to the petition at Pet. App. 181a-91a.

STATEMENT

It is a longstanding precept of due process that a plaintiff must prove every element of his claim before a defendant can be deprived of its property in a judicial proceeding. In this case, however, the Second Circuit affirmed a judgment awarding equitable relief—potentially valued at more than $250 million—to a class of 16,000 ERISA plan participants who were re-

lieved of the obligation to prove that flawed disclosures caused each of them to be mistaken about their benefits, which is an essential element of a claim for reformation of an ERISA plan. According to the Second Circuit, "individualized" evidence of mistake was not required and proof of "class-wide mistake" based on "generalized circumstantial evidence" was instead sufficient. Pet. App. 28a, 30a (internal quotation marks omitted). That ruling deepens an existing circuit split about when, if ever, claims that implicate questions about plaintiffs' knowledge can be certified for class treatment. The Second Circuit's decision affirming class certification and the classwide judgment directly conflicts with decisions from the Fourth and Fifth Circuits holding that classwide adjudication is inappropriate "in cases where the legal issue is . . . focused on the plaintiff's knowledge" because the issue requires "individual hearings." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 321 (4th Cir. 2006); *see also*, *e.g.*, *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 549-50 (5th Cir. 2003). The Second Circuit's endorsement of "class-wide mistake" also violated Federal Rule of Civil Procedure 23, the Rules Enabling Act, and due process—each of which prohibits relieving plaintiffs of their burden of proving individualized elements of their claims in order to facilitate class certification.

In addition, the Second Circuit eased the class's burden of proof in a second respect when it held that detrimental reliance is not an element of a claim for breach of fiduciary duty under ERISA § 404(a). That holding is flatly inconsistent with decisions from the Third and Sixth Circuits reaffirming in the wake of this Court's decision in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), that detrimental reliance is an element of an ERISA breach-of-fiduciary-duty claim.

See, *e.g.*, *Deschamps v. Bridgestone Ams., Inc. Salaried Emps. Ret. Plan*, 840 F.3d 267, 276-77 (6th Cir. 2016).

This Court should grant review to resolve both of these sharply disputed questions and to reaffirm the fundamental statutory and constitutional prerequisites to awarding class-wide relief in the ERISA setting and beyond.

1. Foot Locker sponsors an ERISA-governed pension benefit plan for its employees and also serves as the administrator of that plan. In the mid-1990s, Foot Locker was experiencing financial difficulties and, as part of a company-wide restructuring, decided to make changes to its pension plan. Pet. App. 44a-45a, 163a-64a. Effective January 1, 1996, Foot Locker—like many other employers at the time—converted its pension plan from a defined-benefit plan to a cash-balance plan. *Id.* at 5a.

Under Foot Locker's defined-benefit plan, employees were entitled to receive a monthly annuity that was calculated based on their compensation level and years of service. Pet. App. 5a. Employees did not begin receiving annuity payments until they reached age 65, and they were not entitled to receive the entirety of their benefits in a single lump sum. *Id.*

Under the new cash-balance plan, Foot Locker employees still earned pension benefits over time based on their compensation level and years of service, but these amounts were now deposited in a hypothetical "account" for each employee. Pet. App. 5a. The account balance increased over time based on compensation credits (calculated as a percentage of the employee's salary) and interest credits of 6% per year. *Id.* at 6a-7a. Upon leaving Foot Locker's em-

ployment, plan participants had the option of receiving an immediate payout of their retirement benefits in a single lump sum, rather than a monthly annuity beginning at age 65. *Id.* at 5a.

To transition from the defined-benefit plan to the cash-balance plan, Foot Locker converted the annuity that employees had earned prior to 1996 into a lump sum that served as their opening account balance. Pet. App. 40a. As part of the lump-sum calculation, Foot Locker applied a 9% annual discount rate for each year between the employee's current age and age 65—when the annuity would become payable—to reflect the time value of money. *Id.* at 41a. Foot Locker also discounted the present value of the annuity by a mortality discount, to reflect the possibility that the employee might not live to age 65. *Id*. In order to comply with ERISA—which prevents reductions in benefits that have already accrued, *see* 29 U.S.C. § 1054(g)—Foot Locker guaranteed that, upon the termination of their employment, employees would receive *the greater of* (1) the benefit they had accrued under the old defined-benefit plan at the time of the transition or (2) the benefit generated under the cash-balance formula. Pet. App. 6a-7a.

As a result of the 9% discount rate and mortality discount, the opening account balance for most employees was less than the value of the pension benefits they had accrued under the old defined-benefit plan when calculated using the lump-sum formula established by ERISA, which is tied to interest rates at the time a participant's employment is terminated. Pet. App. 5a-6a, 42a; *see also* 26 U.S.C. § 417(e) (prescribing a fluctuating discount rate tied to interest rates to calculate the lump-sum value of an annuity). Thus, until employees' new cash-balance accounts earned

sufficient compensation and interest credits to surpass their accrued benefit under the defined-benefit plan, their pension benefits remained effectively frozen, a phenomenon known as "wear-away." Pet. App. 7a.

Foot Locker provided its employees with both company-wide and individualized communications about the transition to the cash-balance plan and the calculation of their pension benefits. In December 1996, Foot Locker provided all employees with a summary plan description ("SPD") for its new cash-balance plan. Pet. App. 55a. Among other things, the SPD accurately stated that an employee's account balance under the new plan "would be based on an initial account balance equal to the actuarial equivalent lump sum value of your accrued benefit under the Plan as of December 31, 1995 plus interest and compensation credits, which are based on years of service and a percentage of compensation." *Id.* at 9a n.2 (internal quotation marks and ellipsis omitted). The SPD also highlighted the "greater of" feature of the plan, explaining that a participant's "accrued benefit at the time employment terminates is *the greater of* the amount determined under the Plan as amended on January 1, 1996 or your accrued benefit as of December 31, 1995." *Id.* at 10a n.2 (internal quotation marks omitted; emphasis added).

Many participants also received individualized communications about their pension benefits. For example, members of Foot Locker's Corporate Benefits Department gave presentations to groups of employees throughout the company to discuss the plan transition. In Greenville, South Carolina, employees were given a memorandum explaining that their initial account balances were calculated using a 9% discount

rate, but that "[f]ederal law requires that when a lump sum is paid, it cannot be less than a minimum lump sum determined by using the interest rate for 30 Year Treasury Bills," which, "[f]or lump sums that are paid during 1996," was 6.06%. C.A. J.A. A3115. "When the interest rate go[es] down," the memorandum continued, "the minimum lump sum increases. When the interest rate rises, the minimum lump sum will decrease." *Id.* The memorandum made clear that, when employees left the company, "the lump sum actually paid will be the greater of your account balance or the minimum lump sum calculated based on the interest rate in effect during the year in which payment is made." *Id.* The memorandum was accompanied by multiple hypothetical illustrations in which the employees' minimum lump sum based on pre-1996 accrued benefits exceeded their account balance under the cash-balance plan. *See id.* at A3116-19. Similar materials were distributed at several other Foot Locker locations. *Id.* at A1146 ¶ 30; *see also id.* at A1998 at 1425-26.

Upon request, Foot Locker also provided a number of employees with detailed individualized calculations that demonstrated the relationship between their pre-1996 accrued benefit and their account balance. Many of these individualized communications indicated that, upon leaving Foot Locker, the employees would receive a minimum lump sum based on their pre-1996 accrued benefit because it exceeded their current account balance. *See*, *e.g.*, C.A. J.A. A3139-41 (calculation for an individual employee showing a minimum lump sum in excess of the employee's account balance); *see also id.* at A3152-56 (same); *id.* at A3322-25.

2. In 2007, Geoffrey Osberg, a former Foot Locker employee, filed suit against petitioners in the United States District Court for the Southern District of New York on behalf of a putative class of participants in the Foot Locker Retirement Plan. Pet. App. 11a. As relevant here, Osberg did not allege that the terms of the cash-balance plan or the existence of a wear-away period violated ERISA. He instead alleged that Foot Locker had failed to disclose to employees that the transition from the defined-benefit plan to the cash-balance plan would cause a wear-away period for many employees. Pet. App. 10a. According to Osberg, Foot Locker had violated its obligations under Section 102 of ERISA, which requires that an SPD "be written in a manner calculated to be understood by the average plan participant," 29 U.S.C. § 1022(a), and its fiduciary duties under Section 404(a) of ERISA, *id.* § 1104(a)(1). Among other relief, Osberg sought reformation of the terms of the plan to eliminate the wear-away period.

The district court initially granted petitioners' motion for summary judgment, holding that Osberg had failed to create a triable issue of fact as to whether he had suffered "actual harm" as a result of Foot Locker's alleged disclosure violations, which the court deemed to be a prerequisite to obtaining the remedy of plan reformation. Pet. App. 177a. There was "no evidence," for example, that "had plaintiff known in late 1995 or 1996 that the change to the cash balance formula had a wear away, that employee discontent would in fact have caused management to choose an alternative." *Id.* at 176a-77a.

The district court also held that Osberg's Section 102 claim was barred by the statute of limitations because he was on constructive notice of his claims when

he received his lump-sum benefits payment upon leaving Foot Locker in 2002. Pet. App. 173a-74a. "At the time that he received his lump sum payment," the court explained, "Osberg had information sufficient to put him on notice of any basis for a claim," including the SPD's statement that "he was entitled to the greater of the pre-1996 defined benefit annuity or the cash balance amount" and "a statement showing that the amount he had earned under the cash balance program was more than $5,000 less than the amount to which he was entitled under the defined benefit plan." *Id*. at 173a. As the district court stated, "Osberg needn't have been an actuary to realize that his benefit had been frozen as a result of the cash balance conversion." *Id*.

On appeal, the Second Circuit reversed on the ground that "equity does not demand a showing of actual harm" to "obtain contract reformation." Pet. App. 160a. The Second Circuit did not address the district court's ruling on the statute of limitations. *Id.* at 158a.

3. On remand, the district court reversed its statute-of-limitations ruling and reinstated the Section 102 claim. Contrary to its earlier decision, the court now concluded that "receiving a [lump-sum] distribution would not itself constitute 'actual knowledge'" of the alleged flaws in the SPD. Pet. App. 153a.

Over petitioners' objection, the district court proceeded to certify a class of approximately 16,000 participants in the Foot Locker Retirement Plan under Federal Rule of Civil Procedure 23(b)(3). According to the district court, "[t]here is nothing 'individualized' about any of the[ ] questions" in the case that would preclude class certification. Pet. App. 146a; *see also*

id. at 137a (denying reconsideration of class certification).

After a bench trial, the district court ruled that Foot Locker had violated ERISA §§ 102 and 404(a) because "[p]lan disclosures and other communications to Participants failed to disclose wear-away." Pet. App. 38a. On the Section 404(a) claim, the court found that plaintiffs "ha[d] proven a reasonable inference of class-wide reliance" on the flawed disclosures, which the court deemed sufficient to establish that Foot Locker was liable to all 16,000 class members on the fiduciary-breach claim. *Id.* at 109a. The court likewise concluded that plaintiffs had proven "class-wide mistake" for purposes of securing reformation relief because, as a result of the flawed plan disclosures, every class member "mistakenly believed that growth in their cash balance benefit equaled growth in their pension benefit." *Id.* at 111a. The court ordered reformation of the plan by eliminating the "greater of" payment formula and authorizing participants to receive *both* their accrued benefit under the defined-benefit plan and their compensation and interest credits under the cash-balance plan, *id.* at 119a, a remedy that could cost Foot Locker more than $250 million.

4. The Second Circuit affirmed. As Foot Locker had done in the district court, it argued on appeal that the court should "vacate the class certification due to the inherently individualized nature of the mistake inquiry." Foot Locker C.A. Br. 48. The Second Circuit agreed that the class was required to prove mistake by "clear and convincing evidence" in order to secure reformation relief, but held that the "evidence need not be individualized." Pet. App. 28a. According to the court of appeals, plaintiffs had adequately estab-

lished "class-wide mistake" based on "generalized circumstantial evidence" that Foot Locker's communications "did not disclose the existence of wear-away or the fact that participants' benefits were not increasing." *Id.* at 28a, 30a (internal quotation marks omitted). The court upheld this use of classwide proof despite acknowledging that some of Foot Locker's communications were "individualized" and "provided an explanation of some of the calculations used to determine participants' benefits." *Id.* at 30a.

The court of appeals also rejected Foot Locker's argument that plaintiffs had failed to prove the detrimental-reliance element of their Section 404(a) claim for each of the 16,000 class members. The court reasoned that "[a]pplication" of this Court's decision in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011), "mandates the conclusion that detrimental reliance need not be shown where, as here, a plaintiff alleging violation of Section 404(a) seeks plan reformation." Pet. App. 26a. The Second Circuit distilled from *Amara* a two-part test for determining the applicable standard of harm: (1) "whether the substantive ERISA provision in question sets forth a standard for determining harm," and (2) "whether the specific remedy being contemplated imposes such a requirement." *Id.* (citing 563 U.S. at 443). The Second Circuit declared, without elaboration, that "the statutory text of § 404(a) does not articulate any standard for determining harm." *Id.* And the court stated that *Amara* already "deemed a showing of detrimental reliance unnecessary" "[i]n the case of reformation." *Id.* at 27a. The Second Circuit therefore declined to require "a showing of detrimental reliance . . . before granting class-wide relief on participants' § 404(a) claims." *Id.* at 27a-28a.

REASONS FOR GRANTING THE PETITION

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), this Court held that a class cannot be certified if classwide adjudication would deprive the defendant of the right "to litigate its statutory defenses to individual claims." *Id.* at 367. This case presents a separate, but closely related, issue: whether a court can facilitate class-action treatment of claims that turn on questions about the plaintiffs' individualized knowledge by permitting the plaintiffs to substitute generalized proof of classwide knowledge for individualized proof of plaintiff-specific knowledge.

The Second Circuit exacerbated an existing circuit split on this issue when it upheld class certification and the classwide judgment based on plaintiffs' "generalized circumstantial evidence" of "class-wide mistake." Pet. App. 28a, 30a (internal quotation marks omitted). In so doing, the court of appeals relieved plaintiffs of their individualized burden to prove that each member of the class was actually mistaken about his or her benefits under the Foot Locker Retirement Plan. While that holding is consistent with decisions from the First, Third, and Eleventh Circuits—which have likewise held that individualized questions of knowledge do not constitute a barrier to class certification—it is impossible to reconcile with decisions from the Fourth and Fifth Circuits concluding that class certification is inappropriate where the claims require "individualized inquiry into what each [plaintiff] knew . . . and when he knew it." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998). By permitting plaintiffs to substitute generalized classwide proof for individualized evidence, the Second Circuit nullified the predominance requirement of Federal Rule of Civil Procedure

23(b)(3) and relieved the class members of the burden of proving an individualized element of their reformation claim in violation of the Rules Enabling Act and due process.

The Second Circuit then excused plaintiffs from proving a second essential element of their claims by holding that detrimental reliance—another inherently individualized issue that should have precluded class certification—is not even an element of a claim for breach of fiduciary duty under Section 404(a) of ERISA. That holding is directly at odds with the decisions of two other circuits and misconstrues both Section 404(a) and this Court's decision in *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011).

The Court should grant review of both of these frequently recurring questions to make clear that the class-action device cannot be used to relieve plaintiffs of their individualized burdens of proof, to prevent further unconstitutional class-action judgments against defendants who have been denied their right to mount a full and fair defense, and to ensure that participants' rights and defendants' liability under ERISA do not vary based on the jurisdiction in which suit is filed.

I. THE SECOND CIRCUIT'S DECISION DEEPENS AN EXISTING CIRCUIT SPLIT OVER WHETHER A CLASS MAY BE CERTIFIED WHERE CLAIMS IMPLICATE INDIVIDUALIZED QUESTIONS REGARDING THE PLAINTIFFS' KNOWLEDGE.

A. Even before the Second Circuit's decision in this case, the circuits were deeply divided about whether the existence of issues regarding the plaintiffs' individualized knowledge precludes class certification. The Second Circuit's decision expands that

split and squarely presents the question for this Court's resolution.

The Fourth Circuit has repeatedly held that class certification is improper where claims or defenses implicate the plaintiffs' knowledge because those individualized questions cannot be resolved on a class-wide basis. In *Thorn v. Jefferson-Pilot Life Insurance Co.*, 445 F.3d 311 (4th Cir. 2006), for example, the Fourth Circuit refused to certify a class of insurance policyholders seeking to pursue a civil-rights claim against an insurer because the "statute of limitations defense did not present common issues that could be resolved on a class-wide basis." *Id*. at 314. The court explained that "[e]xamination of whether a particular plaintiff possessed sufficient information such that he knew or should have known about his cause of action will generally require individual examination of testimony from each particular plaintiff to determine what he knew and when he knew it." *Id*. at 320. That type of inquiry into "the contents of the plaintiff's mind," the court reasoned, "is not readily susceptible to class-wide determination." *Id.* The Fourth Circuit emphasized that this conclusion was in line with its decisions in prior class-certification appeals because, "where the legal issue is . . . focused on the plaintiff's knowledge . . . we have consistently held that individual hearings are required" and that class certification therefore is not appropriate. *Id.* at 321; *see also*, *e.g.*, *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) (holding that certification of fraud claims was not appropriate because "the extent of knowledge of the omitted facts or reliance on misrepresented facts will vary from" plaintiff to plaintiff).

Similarly, in *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), the

Fourth Circuit rejected certification of a class of franchisees suing for fraud, breach of fiduciary duty, and other claims because individualized questions regarding each plaintiff's knowledge precluded certification. *Id.* at 344. The court explained that the plaintiffs' fraud claims "were not readily susceptible to class-wide proof" because "these claims turn[ed] on whether each franchisee reasonably relied on [the defendant's] representations," which "would depend upon a fact-intensive inquiry into what information each franchisee actually had" obtained from the "several alternative sources of the information alleged to have been fraudulently concealed from him." *Id.* at 341-42. "[B]ecause the extent of knowledge of the omitted facts" would "vary from class member to class member," class treatment was "impossible." *Id.* at 342 (internal quotation marks and some alterations omitted). Moreover, all of the plaintiffs' claims raised individualized statute-of-limitations questions, which would depend on "what each [plaintiff] knew" and "when he knew it," and would require an examination into "[w]hether and when each [plaintiff] received, read, and understood" the defendant's communications. *Id*. "[W]hen the defendant's affirmative defenses (such as . . . the statute of limitations) may depend on facts peculiar to each plaintiff's case," the court concluded, "class certification is erroneous." *Id.* (ellipsis in original; internal quotation marks omitted).

The Fifth Circuit has also held that claims cannot be certified for class treatment where they raise individualized questions regarding the plaintiffs' knowledge. In *Castano v. American Tobacco Co.*, 84

F.3d 734 (5th Cir. 1996), for example, the court reversed certification of a class of smokers alleging fraud claims against tobacco companies because a "fraud class cannot be certified when individual reliance will be an issue." *Id.* at 745. The court found "it difficult to fathom how common issues could predominate" when, among other individualized questions, "[e]ach class member's knowledge about the effects of smoking differs." *Id*. at 742 n.15. Likewise, in *McManus v. Fleetwood Enterprises, Inc*., 320 F.3d 545 (5th Cir. 2003), the Fifth Circuit reversed certification of a fraud class because "[r]eliance issues are fatal to a Rule 23(b)(3) class for claims of fraudulent concealment." *Id.* at 549-50. "Reliance will vary from plaintiff to plaintiff," the court emphasized, because "some class members may have actually *known*" the facts that were allegedly concealed by the defendant. *Id.* at 550; *see also Sandwich Chef of Tex., Inc*. *v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003) ("[C]ases that involve individual reliance fail the predominance test."); *Bell v. Ascendant Sols., Inc*., 422 F.3d 307, 310 (5th Cir. 2005) (same).

Other courts, however, have expressly disagreed with the Fourth and Fifth Circuits, and have certified classes despite the existence of individualized issues regarding the plaintiffs' knowledge.

The First Circuit, for example, has expressly "reject[ed] the Fourth Circuit's suggestion that 'when the defendant's affirmative defenses (such as . . . the statute of limitations) may depend on facts peculiar to each plaintiff's case, class certification is erroneous.'" *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 n.4 (1st Cir. 2000) (quoting *Broussard*, 155 F.3d at 342). Applying its own divergent approach, the

First Circuit upheld certification of a class asserting a breach-of-warranty claim because "a common proffer likely would establish the factual predicate necessary for a tolling determination" on the statute-of-limitations question. *Id.* at 297.

The Third Circuit has acknowledged this split and explicitly sided with the First Circuit's permissive approach to class certification. In *In re Linerboard Antitrust Litigation*, 305 F.3d 145 (3d Cir. 2002), the Third Circuit upheld certification of an antitrust class action where the plaintiffs alleged that the statute of limitations on their claims was tolled by the defendants' fraudulent concealment of their alleged conspiracy. *Id.* at 160. The court of appeals acknowledged that "certain determinations involving the fraudulent concealment defense to the statute of limitations will require individualized proof, which might vary among the assorted [plaintiffs]." *Id.* at 162. The court also recognized that these individualized questions regarding the plaintiffs' knowledge would preclude class certification under the Fourth Circuit's decision in *Broussard*, but emphasized that the First Circuit in *Mowbray* had "reject[ed]" the Fourth Circuit's approach. *Id.* at 162. After considering both approaches, the Third Circuit "accept[ed] this reasoning" of the First Circuit "as more persuasive than that espoused by the Court of Appeals for the Fourth Circuit." *Id.* at 163. The court concluded that, "[n]otwithstanding the individual determinations that will undoubtedly arise at trial, common issues of concealment predominate." *Id.*

Exacerbating this conflict on class-certification standards, the Eleventh Circuit has explicitly rejected

the Fifth Circuit's conclusion that questions of individualized knowledge preclude class certification. In *Klay v. Humana, Inc*., 382 F.3d 1241 (11th Cir. 2004), the Eleventh Circuit affirmed class certification in a RICO suit even though the predicate claims of mail and wire fraud included a reliance requirement. *Id.* at 1257-59. The court expressly declined to follow the Fifth Circuit's holding in *Castano* that "'individual reliance'" precludes certification of a fraud class, *id.* at 1258 (quoting *Castano*, 84 F.3d at 745), and held instead that "the simple fact that reliance is an element in a cause of action is not an absolute bar to class certification." *Id.*

The Second Circuit deepened the circuit split in this case when it upheld certification of a class of 16,000 participants in the Foot Locker Retirement Plan—and the ensuing classwide judgment entered by the district court—in the face of the individualized element of mistake that each plaintiff was required to establish in order to obtain the equitable remedy of reformation. The question whether plaintiffs were mistaken in believing that they were continuing to accrue additional benefits during the wear-away period could be resolved only by 16,000 individualized inquiries into each class member's understanding of his or her benefits under the Foot Locker Plan. The Second Circuit, however, held that the "evidence need not be individualized" and that proof of "class-wide mistake" was sufficient. Pet. App. 28a, 30a. In so doing, the Second Circuit relied on and reaffirmed its earlier decision in *Amara v. CIGNA Corp*., 775 F.3d 510 (2d Cir. 2014), where, on remand from this Court, the Second Circuit rejected the argument that "determining mistake is an individualized inquiry that depends on each class member's state of mind and cannot be decided on a class-wide basis." *Id.* at 529 (internal quotation

marks omitted). As it did here, the Second Circuit held in *Amara* that a class comprising thousands of "plaintiffs can prove ignorance of a contract's terms through generalized circumstantial evidence in appropriate cases." *Id.*; *see also* Pet. App. 28a (endorsing *Amara*'s "generalized circumstantial evidence" standard).

The Second Circuit's decision upholding class certification and the classwide judgment in this case therefore squarely conflicts with the class-action standards adopted by the Fourth and Fifth Circuits, which would have decertified the class and vacated the classwide relief because the element of mistake necessarily turns on individualized questions regarding "the contents of the plaintiff's mind" that are "not readily susceptible to class-wide determination." *Thorn*, 445 F.3d at 320.

B. In addition to deepening a circuit split, the Second Circuit's decision also violates Federal Rule of Civil Procedure 23(b)(3), the Rules Enabling Act, and the Due Process Clause, and conflicts with this Court's decisions applying those limitations on the class-action procedure.

Under Federal Rule of Civil Procedure 23(b)(3), class certification is permissible only if "the questions of law or fact common to class members predominate over any questions affecting only individual members." Because Rule 23(b)(3) is "an adventuresome innovation," courts have a "duty to take a close look at whether common questions predominate over individual ones." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (internal quotation marks omitted).

The Second Circuit abdicated that obligation here when it upheld certification of the class in the face of an overwhelming number of individualized questions

regarding what each of the 16,000 class members understood about their benefits under the Foot Locker Retirement Plan. In particular, the only way to determine whether each class member was mistaken about his or her benefits under the Plan—and was therefore entitled to reformation relief—was to probe what the class member knew about wear-away based on the SPD and the unique mix of individualized benefits communications that each class member received. That issue could not be resolved on a classwide basis because each of the 16,000 class members spent different amounts of time studying the SPD, attended different benefits presentations, *see*, *e.g.*, C.A. J.A. A3115, and received different individualized benefits communications, *see*, *e.g.*, *id.* at A3139-41; *id.* at A3152-56.[1]

The Second Circuit attempted to sidestep these individualized issues by permitting the class to rely on "'generalized circumstantial evidence'" of "classwide mistake." Pet. App. 28a, 30a (quoting *Amara*, 775 F.3d at 529). In so doing, the court relieved the class members of their burden of proving an individualized element of their claims by creating an inference that every class member was mistaken about his or

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1 The Second Circuit dismissed the "individualized communications" to participants regarding their plan benefits because, in the Second Circuit's view, "they did not disclose the existence of wear-away or the fact that participants' benefits were not increasing." Pet. App. 30a. But the absent class members were not required to testify about what they *actually* understood regarding their benefits based on those individualized communications, and Foot Locker had no opportunity to probe the absent class members' understandings through cross-examination. The lower courts' classwide findings therefore do not reflect meaningful adversarial testing of absent class members' individualized experiences.

her benefits and requiring Foot Locker to *disprove* that inference. The Second Circuit's use of the class-action device to modify the substantive elements of the class members' claims, as well as Foot Locker's defenses to those claims, violates the Rules Enabling Act, which prevents courts from employing the class-action procedures in Rule 23 to "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *see also Dukes*, 564 U.S. at 367 (decertifying a class where the class-action proceeding would have eliminated the defendant's right "to litigate its statutory defenses to individual claims" in violation of the Rules Enabling Act).

The Second Circuit's decision is also incompatible with due process, which guarantees defendants an opportunity "to litigate the issues raised" by the plaintiffs' claims, *United States v. Armour & Co*., 402 U.S. 673, 682 (1971), as well the "'opportunity to present every available defense,'" *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). These fundamental due process protections apply with equal force in class actions because class-wide adjudication must "leave[ ] the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co*., 559 U.S. 393, 408 (2010) (plurality op.); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) (a class action is "a procedural right only, ancillary to the litigation of substantive claims"). Yet, the Second Circuit's decision modified the class members' burdens of proof—replacing individual evidence of plaintiff-specific mistake with "'generalized circumstantial evidence'" of "class-wide mistake," Pet. App. 28a, 30a—and denied Foot Locker its right to defend against the reformation claim based on class members' individualized failures of proof.

The class members were therefore permitted to deprive Foot Locker of its property without proving each element of their claims or confronting a full defense to those claims.[2]

* * *

The Second Circuit's decision exacerbates an existing circuit split, disregards the fundamental procedural protections embodied in federal law and the U.S. Constitution, and upholds a judgment awarding relief that could exceed $250 million to 16,000 class members who never proved their individual entitlement to reformation or confronted a complete defense to their claims. This Court should grant review to

[2] The Second Circuit's decision upholding class certification also deprived Foot Locker of its right to raise its individualized statute-of-limitations defense, which turned on when each class member knew, or should have known, about wear-away. As the Fourth Circuit recognized in *Broussard*, that type of individualized inquiry precludes class certification. 155 F.3d at 342. Petitioners therefore argued on appeal that the thousands of participants who left Foot Locker outside the limitations period should be excluded from the class based on the individualized nature of the statute-of-limitations inquiry. *See*, *e.g.*, Foot Locker C.A. Br. 20. According to the Second Circuit, petitioners "[d]uring oral argument" "clarified that, in advancing their statute of limitations arguments, they did not intend to challenge the district court's class certification rulings." Pet. App. 14a n.4. Petitioners made no such concession during oral argument; in fact, petitioners' counsel made clear that "[p]articipants who left more than three or more than six years . . . before the case was started should be excluded from the class because there is an individualized question . . . as to whether they were on constructive notice." Oral Arg. Recording at 11:51-12:10; 12:24-12:26, *available at* http://www.ca2.uscourts.gov/decisions/isysquery/c7bffbf4-25ce-47d6-aaa6-0b720ea0833b/641-650/list/ (last visited Nov. 3, 2017). The individualized nature of the statute-of-limitations inquiry is therefore an additional ground for decertifying the class that would be properly before this Court on plenary review.

make clear that claims that raise individualized questions about the plaintiffs' knowledge are not suitable for class-action treatment and that courts cannot facilitate class certification by simply replacing that individualized element with an inquiry into "class-wide" knowledge.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUITS' HOLDINGS THAT DETRIMENTAL RELIANCE IS AN ELEMENT OF A CLAIM FOR FIDUCIARY BREACH UNDER ERISA SECTION 404(A).

This case also presents a second, frequently litigated question on which the lower courts are divided: whether detrimental reliance is an element of a claim for breach of fiduciary duty under Section 404(a) of ERISA.

In *Amara*, this Court examined claims under Sections 102(a), 104(b), and 204(h) of ERISA and determined that they do not require a showing of detrimental reliance unless the plaintiff is seeking a form of equitable relief that independently requires such a showing, which reformation does not. 563 U.S. at 443. But the Court had no occasion to examine whether a claim under Section 404(a) of ERISA requires proof of detrimental reliance because the plaintiffs in *Amara* did not pursue a fiduciary-breach claim.

In the wake of *Amara*, the circuits have split over whether a claim for breach of fiduciary duty under Section 404(a) of ERISA requires a showing of detrimental reliance (even if the specific remedy being sought, such as reformation, does not).

The Third Circuit has long held that, to establish a breach of fiduciary duty under Section 404(a), plain-

tiffs "must demonstrate that" they "detrimentally relied on the misrepresentation or inadequate disclosure." *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 228 (3d Cir. 2009); *see also*, *e.g.*, *Shook v. Avaya Inc.*, 625 F.3d 69, 73 (3d Cir. 2010) ("In order to prevail on a breach of fiduciary duty claim under ERISA, a plaintiff must establish that . . . the plaintiff detrimentally relied on the misrepresentation or inadequate disclosure.") (internal quotation marks omitted); *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 492 (3d Cir. 2000) (same).

The Third Circuit has continued to adhere to this detrimental-reliance requirement in the aftermath of *Amara*. *See*, *e.g.*, *Boyle v. Int'l Bhd. of Teamsters Local 863 Welfare Fund*, 579 F. App'x 72, 77 n.4 (3d Cir. 2014) (explaining, in ERISA action, that "[t]o allege and prove a breach of fiduciary duty for misrepresentations, a plaintiff must establish . . . detrimental reliance by the plaintiff on the misrepresentation.") (internal quotation marks omitted); *Roarty v. Tyco Int'l Ltd. Grp. Bus. Travel Accident Ins. Plan*, 546 F. App'x 85, 87 (3d Cir. 2013) (affirming the district court's rejection of the plaintiff's "breach of fiduciary duty claim" under ERISA because she had not demonstrated the "detrimental reliance required").

Similarly, the Sixth Circuit has required a showing of detrimental reliance for a plaintiff to prevail on an ERISA fiduciary-breach claim both before and after *Amara*. *See*, *e.g.*, *Deschamps v. Bridgestone Ams., Inc. Salaried Emps. Ret. Plan*, 840 F.3d 267, 276-77 (6th Cir. 2016) (explaining, in ERISA action, that "[t]o establish a breach of [fiduciary] duty, [plaintiff] must show that . . . [he] detrimentally relied on the misrepresentations"); *Haviland v. MetLife Ins. Co.*, 730 F.3d

563, 575 (6th Cir. 2013) (same); *James v. Pirelli Armstrong Tire Corp.*, 305 F.3d 439, 449 (6th Cir. 2002) (same).

And although the Seventh Circuit does not require detrimental reliance to establish breach of fiduciary duty under ERISA, it does require a similar showing of injury. Recovery in the Seventh Circuit requires a demonstration that the fiduciary "breach resulted in harm to the plaintiff." *Killian v. Concert Health Plan*, 742 F.3d 651, 658 (7th Cir. 2013) (en banc) (internal quotation marks omitted).

Before *Amara*, the Second Circuit was in agreement with the Third and Sixth Circuits that detrimental reliance is an element of an ERISA fiduciary-breach claim. *See Bell v. Pfizer, Inc.*, 626 F.3d 66, 75 (2d Cir. 2010) ("where a plaintiff asserts a breach of fiduciary claim based on a material misrepresentation or omission, the plaintiff must establish detrimental reliance"); *King v. Pension Tr. Fund of the Pension Hospitalization & Benefit Plan of the Elec. Indus.*, 131 F. App'x 740, 742 (2d Cir. 2005) (same). In the decision below, however, the Second Circuit repudiated that view as superseded by *Amara* and held that "detrimental reliance need not be shown where, as here, a plaintiff alleging a violation of § 404(a) seeks plan reformation." Pet. App. 26a; *see also id.* at 27a n.12 (rejecting *Bell*). Applying a two-step test it synthesized from *Amara*, the court first stated that "the statutory text of § 404(a) does not articulate any standard for determining harm." *Id.* at 26a. Thus, according to the Second Circuit, any detrimental-reliance requirement "must arise because of the 'specific remedy being contemplated.'" *Id*. (quoting *Amara*, 563 U.S. at 443). That remedy, the court reasoned, is "plan reformation,

which *Amara I* stated does not require a showing of detrimental reliance." *Id*.

The Second Circuit's decision is flatly at odds with the Third and Sixth Circuits' decisions applying a detrimental-reliance requirement to ERISA fiduciary-breach claims after *Amara* and with the Seventh Circuit's case law applying an actual-harm requirement.

It is also at odds with Section 404(a) of ERISA itself. While the Second Circuit is correct that Section 404(a) does not explicitly reference a detrimental-reliance requirement, it is equally silent about the other elements of a fiduciary-breach claim, including the precise scope of a fiduciary's duty to plan participants. Because ERISA's fiduciary-duty standard is "derived from the common law of trusts," *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc*., 472 U.S. 559, 570 (1985), the Second Circuit should have "look[ed] to the law of trusts" to "determin[e] the contours of an ERISA fiduciary's duty" and the elements of a claim for the alleged breach of that duty. *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015).

The common-law underpinnings of Section 404(a) make clear that reliance is an essential element of a claim for breach of fiduciary duty under ERISA. In the law of trusts, "constructive fraud"—which is a claim for "breach" of an "equitable duty" that stems from a "fiduciary . . . relationship"—requires that the person under the fiduciary obligation "induce justifiable reliance by the other to his detriment." *Dawson v. Withycombe*, 163 P.3d 1034, 1057-58 (Ariz. Ct. App. 2007); *see also McCalment v. Eli Lilly & Co*., 860 N.E.2d 884, 896 (Ind. Ct. App. 2007) ("[d]etrimental reliance is . . . an element of . . . constructive fraud"); 10 Stuart M. Speiser et al., American Law of Torts § 32:81 ("Once a fiduciary relationship is established,

to state a claim for breach of fiduciary duty, the plaintiff must prove that a material misrepresentation was made, on which the plaintiff detrimentally and reasonably relied.").

Moreover, equitable claims for misrepresentation, which are similar to fiduciary-breach claims, also require a showing of "reliance by [the plaintiff] to his detriment." *Jewish Ctr. of Sussex Cty. v. Whale*, 432 A.2d 521, 524 (N.J. 1981). And in the common law of torts, reliance is an essential element of a claim for misrepresentation, which is a close analogue to the fiduciary-breach claim alleged by plaintiffs here based on the statements in Foot Locker's plan communications. *See*, *e.g.*, Restatement (Second) of Torts § 525 ("One who fraudulently makes a misrepresentation . . . for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.").

The Second Circuit misread *Amara* when it concluded that the opinion—which did not even consider a Section 404(a) claim—required the court to confine its inquiry to the statutory text and to ignore Section 404(a)'s common-law backdrop. Pet. App. 26a. That mode of analysis was appropriate in *Amara* itself where the Court was interpreting statutory provisions that impose highly specific disclosure obligations on plan administrators. *See* 563 U.S. at 443 (construing 29 U.S.C. §§ 1022(a), 1024(b), 1054(h)). It makes no sense, however, in the context of Section 404(a), which imposes broadly worded fiduciary obligations that are given content by the common law. *See Varity Corp. v. Howe*, 516 U.S. 489, 502 (1996) ("Though dictionaries sometimes help in such matters, we believe it more

important here to look to the common law, which, over the years, has given to terms such as 'fiduciary' . . . a legal meaning to which, we normally presume, Congress meant to refer.").

The Court should grant review of this question to eliminate the confusion that has emerged in the aftermath of *Amara* and to make clear that, as in other settings, plaintiffs pursuing a breach-of-fiduciary-duty claim under ERISA must prove detrimental reliance. Indeed, in the absence of a detrimental-reliance requirement (or the type of actual-harm requirement imposed by the Seventh Circuit), plaintiffs would be able to recover under an ERISA breach-of-fiduciary-duty claim without any showing that they actually suffered an injury as a result of that fiduciary breach—an outcome that would directly contravene Article III's standing requirements. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736 (2016) ("A party has standing only if he shows that he has suffered an 'injury in fact[ ]' that . . . is 'fairly traceable' to the conduct being challenged") (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The Court should step in to reaffirm that no plaintiff—including a plaintiff asserting an ERISA breach-of-fiduciary-duty claim—can recover in federal court without proving an actual injury from the alleged statutory violation.

III. THIS CASE PRESENTS A VALUABLE OPPORTUNITY TO REVIEW QUESTIONS THAT HAVE PROFOUND IMPORTANCE IN BOTH THE CLASS-ACTION AND ERISA CONTEXTS.

This case is an excellent vehicle for the Court to resolve two frequently recurring issues that have divided the lower courts and fostered far-reaching uncertainty in the class-action and ERISA contexts. The

first question presented regarding the propriety of certifying claims that turn on the plaintiffs' individualized knowledge transcends the ERISA setting and arises in virtually every class action in which the plaintiffs are pursuing a fraud claim or the defendant is seeking to interpose a statute-of-limitations defense. The second question presented regarding the elements of an ERISA fiduciary-breach claim implicates the essential elements of one of ERISA's most commonly invoked causes of action.

This case presents a particularly valuable opportunity to consider the class-action question. It is rare for this Court to have the chance to evaluate the propriety of class certification based on a full trial record that lays bare the flaws in the class-certification ruling. Most class actions end long before they reach this Court because appeals from class-certification decisions are discretionary under Federal Rule of Civil Procedure 23(f), this Court lacks jurisdiction over interlocutory state-court certification orders, and the "hydraulic pressure to settle" makes it rare for defendants to litigate a class action through trial. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 165 (3d Cir. 2001). The Court should take advantage of this unusual opportunity to provide guidance on a class-certification question that is certain to arise with great frequency in future state and federal cases—in fact, in every class action in which an element of a claim or defense implicates individualized questions of knowledge—but that is equally certain to continue evading this Court's review in the vast majority of those cases. The Court should not delay in providing much-needed and long-sought-after clarity regarding both the statutory and constitutional limitations on the class-action device. *See Philip Morris*

USA Inc. v. Scott, 131 S. Ct. 1, 4 (2010) (Scalia, J., Circuit Justice) ("The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question.").

The ERISA reliance issue is also squarely presented for this Court's review. Deferring resolution of that issue—and permitting the lower courts' confusion to fester—would be inconsistent with ERISA's overriding purpose of establishing a "uniform regime" governing employee benefit plans. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002). The disagreement among the circuits over whether a showing of detrimental reliance is required to recover under ERISA § 404(a) is fundamentally incompatible with ERISA's uniformity-enhancing objective. Plaintiffs in the Second Circuit need not make any showing of reliance to recover, while plaintiffs in the Seventh Circuit must establish actual harm, and plaintiffs in the Third and Sixth Circuits must prove detrimental reliance. ERISA defendants should be subject to the same liability whether they are sued in New York City, Chicago, Philadelphia, or Detroit, which is impossible as long as the lower courts' disagreement about the elements of an ERISA breach-of-fiduciary-duty claim is permitted to persist.

The fiduciary-breach question also has substantial implications for the outcome of this particular case: If this Court concludes that certification of plaintiffs' claims under Sections 102 and 404(a) was appropriate, the resolution of the detrimental-reliance issue will materially affect the size of the judgment because approximately 3,500 plaintiffs left Foot Locker before the SPD was distributed in December 1996 and therefore lack a claim under Section 102. *See* C.A. J.A. A1178-79. The only potentially viable

claim for those thousands of plaintiffs is under Section 404(a), and those plaintiffs thus will not be entitled to *any* relief if this Court concludes that the Second Circuit improperly relieved them of their obligation to prove the detrimental-reliance element of that claim.

Accordingly, this Court should grant review of both questions presented because each has profound practical significance for the viability of the award in this case—which, if left undisturbed, could exceed $250 million—and for future litigation in the ERISA setting and beyond.

CONCLUSION

Before relief is awarded under ERISA, a plaintiff must prove every element of his claims, and the defendant must be permitted to mount a full defense to those claims. That did not happen here, where the Second Circuit allowed plaintiffs to recover sweeping equitable relief without establishing that the individual class members misunderstood their plan benefits or relied to their detriment on Foot Locker's plan communications. This Court should grant review before any more class-action defendants—in the ERISA setting or elsewhere—are deprived of their property in proceedings where the plaintiffs were not required to prove the essential elements of their claims and the defendants were not able to present a complete defense.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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