No. 12-35458

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREGORY R. GABRIEL,
Plaintiff-Appellant,

v.

ALASKA ELECTRICAL PENSION FUND, et al.,
Defendants-Appellees.

On Appeal from
the United States District Court for the District of Alaska,
Timothy M. Burgess, District Judge

BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT URGING PANEL REHEARING AND/OR REHEARING EN BANC

Catha Worthman
Lindsay Nako
Julie Wilensky
Lewis, Feinberg, Lee,
Renaker & Jackson, P.C.
476 9th Street
Oakland, CA 94618
(510) 839-6824

Roberta L. Steele
National Employment Lawyers
Association
417 Montgomery Street, 4th Floor
San Francisco, CA 94104
(415) 296-7629

Counsel for *Amicus Curiae* NELA

Mary Ellen Signorille
AARP Foundation Litigation

Anita Khushalani
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Counsel for *Amicus Curiae* AARP

TABLE OF CONTENTS

DISCLOSURE STATEMENT OF *AMICI CURIAE* 1

INTERESTS OF *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. THE PANEL OPINION CONFLICTS WITH *AMARA* AND THE PRECEDENT OF THREE CIRCUIT COURTS, AND IS INCONSISTENT WITH ERISA'S PROTECTIVE PURPOSES. 6

A. The Panel's Holding On Surcharge Conflicts With *Amara*, Which Makes Surcharge Available Where A Participant Shows That A Breach Of Fiduciary Duty Injured "Him Or Her." 6

B. The Panel's Holding On Surcharge Conflicts With The Precedent Of The Fourth, Fifth, And Seventh Circuits. 7

C. The Panel's Holding On Surcharge Contravenes ERISA's Purpose And Will Leave Many Victims Of Breaches Of Fiduciary Duty Without A Remedy. 9

D. The Court's Ruling Conflates Sections 502(a)(2) And 502(a)(3), Leaving Many Plaintiffs Without An Individual Remedy For Fiduciary Breaches. 13

II. THE PANEL'S INTERPRETATION OF REFORMATION CONFLICTS WITH SUPREME COURT AND NINTH CIRCUIT PRECEDENT AND REQUIRES REHEARING. 15

III. THE PANEL'S NARROWING OF THE AVAILABILITY OF SURCHARGE AND REFORMATION IS UNNECESSARY, BECAUSE DEFENSES EXIST TO THESE EQUITABLE REMEDIES. 18

CONCLUSION 19

CERTIFICATE OF COMPLIANCE 20

CERTIFICATE OF SERVICE 21

TABLE OF AUTHORITIES

Federal Cases

Abatie v. Alta Health & Life Ins. Co.,
458 F.3d 955 (9th Cir. 2006) 14

Aetna Health, Inc. v. Davila,
542 U.S. 200 (2004).....12

Chappel v. Lab. Corp of Am.,
232 F.3d 719 (9th Cir. 2000) 15

Cicio v. Does 1-8,
321 F.3d 83 (2d Cir. 2003) 12

Cigna Corp. v. Amara,
131 S. Ct. 1866 (2011)..... *passim*

DiFelice v. Aetna U.S. Healthcare,
346 F.3d 442 (3d Cir. 2003) 12

Echague v. Metro Life Insurance Co., No. 12-CV-00640-WHO,
___ F. Supp. 2d. ___ 2014 WL 2089331 (N.D. Cal. May 19, 2014).....11

Eichorn v. AT&T Corp.,
489 F.3d 590 (3d Cir. 2007) 11, 12

Enniss v. Enniss,
198 Fed. App'x 594 (9th Cir. 2006) (mem.).....17

Gabriel v. Alaska Elec. Pension Fund,
___ F.3d ___ 2014 WL 2535469 (9th Cir. June 6, 2014) ..... *passim*

Gearlds v. Entergy Servs., Inc.,
709 F.3d 448 (5th Cir. 2013) 8, 9, 10

Greaney v. W. Farm Bureau Life Ins. Co.,
973 F.2d 812 (9th Cir. 1992) 18

Horan v. Kaiser Steel Ret. Plan,
947 F.2d 1412 (9th Cir. 1991) 14

Howard v. Shay,
100 F.3d 1484 (9th Cir. 1996) 12

Hughes Salaried Retirees Action Comm. v. Adm'r of the Hughes Non-Bargaining Ret. Plan,
72 F.3d 686 (9th Cir. 1995) 17

Johnson v. Couturier,
572 F.3d 1067 (9th Cir. 2009) 12

Kenseth v. Dean Health Plan, Inc.,
722 F.3d 869 (7th Cir. 2013) 8, 9, 10

Lind v. Aetna Health Inc.,
466 F.3d 1195 (10th Cir. 2006) 12

Mass. Mut. Life Ins. v. Russell,
473 U.S. 134 (1985)..... 13, 15

Mathews v. Chevron Corp.,
362 F.3d 1172 (9th Cir. 2004) 5, 17, 18

McCravy v. Metro. Life Ins. Co.,
690 F.3d 176 (4th Cir. 2012) 8, 9, 10

Pereira v. Farace,
413 F.3d 330 (2d Cir. 2005) 12

Skinner v. Northrop Grumman Ret. Plan B,
673 F.3d 1162 (9th Cir. 2012) 7, 8

Varity Corp. v. Howe,
516 U.S. 489 (1996)..... 14, 15

Federal Statutes

ERISA § 2(b), 29 U.S.C. § 1001(b)..... 9, 15

ERISA § 104(b), 29 U.S.C. § 1024(b).....17

ERISA § 404(a), 29 U.S.C. § 1104(a) 9

ERISA § 409, 29 U.S.C. § 1109 13

ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) 14, 15

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2).....13

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)..... 4, 8, 13

Federal Rules and Regulations

29 C.F.R. § 2560.503-1.....17

Fed. R. App. P. 29(c) 1

Fed. R. App. P. 35(b) 4

Other Authorities

2 Dan B. Dobbs, *Law of Remedies* § 9.5 (2d ed. 1993) 16

R. Francis, *Maxims of Equity* (1st Am. ed. 1823)..... 5

John H. Langbein, What ERISA Means by "Equitable": 103 Colum. L. Rev. 1317 (2003).....12

Colleen E. Medill, Resolving the Judicial Paradox of 'Equitable' Relief Under ERISA Section 502(a)(3), 39 J. Marshall L. Rev. 827 (2006).....12

1 S. Symons, *Pomeroy's Equity Jurisprudence* § 109 (5th ed. 1941) 18

4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1375 (5th ed. 1941).....16

Shortchanged, Pension Miscalculations: Hearing Before the Special Committee on Aging, United States Senate, One Hundred Fifth Congress, First Session, Washington, DC, June 16, 1997 (Vol. 4) 18

DISCLOSURE STATEMENT OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(c), *amici curiae* AARP and National Employment Lawyers Association (NELA) disclose that they are both not-for-profit corporations with no parent corporations and no publicly traded stock. No party or counsel for any party was involved in authoring or editing this brief in whole or in part. No entity or person, aside from the *amici curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief.

INTERESTS OF *AMICI CURIAE*[1]

AARP and NELA have participated as *amicus curiae*, either jointly or singly, in numerous cases involving ERISA's civil enforcement and remedies provisions in the Supreme Court and in federal appellate courts. ERISA's protections and plan participants' opportunities to enforce those protections are of vital concern to workers of all ages and to retirees. With this *amici curiae* brief, AARP and NELA urge the Court to grant Plaintiff-Appellant's Petition for Panel Rehearing and/or for Rehearing En Banc.

AARP is a nonprofit, nonpartisan organization, with a membership that helps people turn their goals and dreams into real possibilities, seeks to strengthen communities, and fights for the issues that matter most to families, such as healthcare, employment and income security, retirement planning, affordable utilities, and protection from financial abuse. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits. One of AARP's main objectives is to ensure that participants receive those benefits to which they are entitled in accordance with ERISA's protections.

[1] As also stated in the accompanying motion, AARP and NELA sought consent to file this brief. Appellant has consented and Appellees have not.

NELA is the largest professional membership organization in the country of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been treated illegally in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

SUMMARY OF ARGUMENT

AARP and NELA respectfully request that this Court grant Plaintiff-Appellant's Petition for Panel Rehearing and/or Rehearing En Banc in *Gabriel v. Alaska Electrical Pension Fund*, ___ F.3d ___, 2014 WL 2535469 (9th Cir. June 6, 2014) ("Petition").[2] The Petition presents a matter of "exceptional importance" concerning the appropriate scope of relief available for a breach of fiduciary duty claim under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, 29 U.S.C. § 1132(a)(3). Fed. R. App. P. 35(b)(1)(B).

The Panel Opinion unduly limits the availability of equitable remedies for individuals harmed by fiduciary misconduct within the Ninth Circuit. In particular, the Panel's holding that surcharge "includ[es] only unjust enrichment and losses to the trust estate" (slip op. 23) conflicts with the Supreme Court's decision in *Cigna Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011), and the subsequent precedent of the three other courts of appeals that have considered the scope of the surcharge remedy under ERISA Section 502(a)(3), warranting rehearing by the Panel or the en banc court. Fed. R. App. P. 35(b)(1)(A) & (B), 9th Cir. R. 35-1. In contrast to the Panel Opinion, these courts have all recognized that surcharge is appropriate to support an award of equitable monetary relief where a participant in or beneficiary

[2] Referred to as "Panel Opinion" and cited to as "slip op."

of an employee benefit plan is harmed by fiduciary breach, without requiring unjust enrichment to the fiduciary or loss to the trust estate.

Likewise, the Panel Opinion narrows the availability of reformation as an equitable remedy under Section 502(a)(3), in conflict with *Amara* and this Court's decision in *Mathews v. Chevron Corp*., 362 F.3d 1172 (9th Cir. 2004). The Panel erred by limiting reformation to situations where the employee benefit plan document "itself . . . contain[s] an error." Slip op. 30.

ERISA is designed to provide remedies for plan participants and beneficiaries who are harmed by breaches of fiduciary duty. Moreover, as the Supreme Court instructed in *Amara*, "[e]quity suffers not a right to be without a remedy." 131 S. Ct. at 1879 (quoting R. Francis, *Maxims of Equity* 29 (1st Am. ed. 1823)). If allowed to stand unmodified, the Panel Opinion will deprive many plan participants and beneficiaries of meaningful relief in unfortunately common situations, and return Ninth Circuit law to the highly-criticized situation pre-*Amara*. The case should be reheard.

ARGUMENT

I. THE PANEL OPINION CONFLICTS WITH *AMARA* AND THE PRECEDENT OF THREE CIRCUIT COURTS, AND IS INCONSISTENT WITH ERISA'S PROTECTIVE PURPOSES.

A. The Panel's Holding On Surcharge Conflicts With *Amara*, Which Makes Surcharge Available Where A Participant Shows That A Breach Of Fiduciary Duty Injured "Him Or Her."

The Panel's holding on surcharge conflicts with *Cigna Corp. v. Amara*, 131 S. Ct. 1866, 1879 (2011), in which the Supreme Court made clear that "to obtain relief by surcharge . . . a plan participant or beneficiary must show that the violation injured *him or her*." 131 S. Ct. at 1881 (emphasis added). Nowhere in *Amara* did the Court limit the availability of surcharge to situations where a fiduciary caused a loss to the trust estate or was unjustly enriched, as the Panel has done. *See* slip op. 19-20. To the contrary, the Court explained that in the law of trusts, "[t]he surcharge remedy extended to a breach of trust committed by a fiduciary encompassing *any violation* of a duty imposed upon that fiduciary." *Amara*, 131 S. Ct. at 1880 (emphasis added). Thus, an injury from a breach of fiduciary duty warranting make-whole relief through surcharge includes "the loss of a right protected by ERISA or its trust-law antecedents." *Id.* at 1881. *Amara*'s approach is consistent with the courts of equity, which "simply ordered a trust or beneficiary made whole following a trustee's breach of trust." *Id.*

The Panel Opinion forecloses relief in precisely those situations where *Amara* clarifies that surcharge is available. If the Supreme Court had intended surcharge to apply only in cases of a loss to the trust or unjust enrichment of the fiduciary, it would have ruled out surcharge on the facts in *Amara* as a matter of law. Although *Amara* concerned a pension plan, the fiduciary breach concerned improper notices to plan participants—not a loss to the trust estate or unjust enrichment of a fiduciary. *See* slip op. 42 (Berzon, J., dissenting) (citing *Amara*, 131 S. Ct. at 1870, 1872). In "identif[ying] equitable principles that the court might apply on remand," 131 S. Ct. at 1871, the Court did not so limit the remedy.

B. The Panel's Holding On Surcharge Conflicts With The Precedent Of The Fourth, Fifth, And Seventh Circuits.

As Judge Berzon's dissent notes, the Panel's holding on surcharge brings the Ninth Circuit "needlessly into conflict" with the three other courts of appeals that have considered the scope of surcharge following *Amara*.[3] *See* slip op. 43 (Berzon,

[3] The Panel also misconstrues Ninth Circuit precedent by suggesting that its holding on surcharge flows from being "bound" by *Skinner v. Northrop Grumman Retirement Plan B*, 673 F.3d 1162 (9th Cir. 2012), which it characterizes as "correctly identif[ying] surcharge as including *only* unjust enrichment and losses to the trust estate." Slip op. 23 (emphasis added). *Skinner* does no such thing. This Court rejected surcharge because the participants had not shown "actual harm," as they did not establish "that their current positions are any different than they would have been without the inaccurate [summary plan description]." 673 F.3d at 1167. As Judge Berzon points out, while *Skinner* describes two potential bases for surcharge, it did "not identify them as exclusive." Slip op. 43 (Berzon, J., dissenting). To the contrary, *Skinner* notes that "[t]he beneficiary can pursue the

J., dissenting). The Fourth, Fifth, and Seventh Circuits have followed the Supreme Court's guidance that make-whole surcharge relief is available when a breach of fiduciary duty harms a participant or beneficiary, without requiring harm to the trust or unjust enrichment to the fiduciary. *McCravy v. Metro. Life Ins. Co.*, 690 F.3d 176 (4th Cir. 2012); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448 (5th Cir. 2013); *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869 (7th Cir. 2013). These cases concerned harms suffered by participants or beneficiaries themselves—not plans—as a result of fiduciary breaches, and these plaintiffs would be foreclosed from surcharge relief under the Panel's unduly narrow standard. *See* slip op. 41 (Berzon, J., dissenting).

Contrary to the Panel's assertion, Judge Berzon's dissent is not "misleading" in characterizing these cases as having made surcharge available when a participant is harmed by a breach of fiduciary duty. Slip op. 23 n.6. As in *Amara*, these circuit courts articulated statements of law to guide the lower courts on remand. For example, in *Kenseth*, the Seventh Circuit described the contours of the surcharge remedy and concluded that under *Amara*, the plaintiff "may seek make-whole money damages as an equitable remedy under section 1132(a)(3) if she can in fact demonstrate that [the defendant] breached its fiduciary duty to her and that

---

remedy that will put the beneficiary in the position he or she would have attained but for the trustee's breach." *Id.* (quoting *Skinner*, 673 F.3d at 1167).

the breach caused her damages." 722 F.3d at 882; *see also Gearlds*, 709 F.3d at 452; *McCravy*, 690 F.3d at 178. If make-whole relief were limited to circumstances where a fiduciary caused a loss to plan assets or enjoyed unjust enrichment, these circuit courts would have foreclosed the plaintiffs from surcharge relief as a matter of law.

C. The Panel's Holding On Surcharge Contravenes ERISA's Purpose And Will Leave Many Victims Of Breaches Of Fiduciary Duty Without A Remedy.

The Panel's restrictive interpretation of surcharge not only conflicts with Supreme Court and other circuit court precedent, it also contravenes the protective goals of ERISA. The Panel rules out make-whole relief under ERISA Section 502(a)(3) not only for breaches of fiduciary duty involving retirement plans where the harm is to the individual beneficiary rather than the trust, but also fiduciary breaches involving health insurance and life insurance plans, which may not be funded by trusts. This harmful consequence is inconsistent with ERISA's purpose of protecting "the interest of participants in employee benefit plans and their beneficiaries." 29 U.S.C. § 1001(b); *see also* 29 U.S.C. § 1104(a) (providing that fiduciaries must exercise their duties "solely in the interest of participants and beneficiaries").

McCravy, *Gearlds*, and *Kenseth* vividly illustrate the types of harm that participants and beneficiaries experience from breaches of fiduciary duty, none of

which could be remedied under the Panel's narrow reading of surcharge. In *McCravy*, the insurance company accepted and retained the plaintiff's payments of life insurance premiums for coverage of her daughter, then refused to pay the policy proceeds after the daughter was murdered at age 25, because the daughter was not actually covered under the plan. *See* 690 F.3d at 178. The plaintiff was harmed by believing, understandably, that she purchased life insurance coverage for her daughter, only to discover after her daughter's untimely death that coverage was illusory.[4] In *Gearlds*, the plaintiff accepted early retirement and waived alternative medical coverage based on the plan administrator's assurances that he would have lifetime medical benefits, then his benefits were later terminated when the plan administrator discovered an error in calculating his service credit. *See* 709 F.3d at 449-50. In *Kenseth*, the plaintiff had surgery after her insurance company advised her that the surgery was covered by the plan. The insurance company notified her the day after surgery that the procedure was not covered and billed her $77,974. *See* 722 F.3d at 871-72, 883. In all three cases, the circuit courts recognized the impact of *Amara* and its expansion of available remedies. *E.g.*, *McCravy*, 690 F.3d at 180 (noting that *Amara* clarified that "various lower courts

[4] Relying on *Amara*, the Fourth Circuit held that the plaintiff's potential recovery was not "limited, as a matter of law, to a premium refund," and that on remand, she could seek "make-whole relief"—*i.e.*, full policy benefits—through surcharge. *See id.* at 180, 181-82.

. . . had (mis)construed Supreme Court precedent to limit severely the remedies available to plaintiffs suing fiduciaries" under ERISA Section 502(a)(3)).

Cases pending in the Ninth Circuit further illustrate the harms participants and beneficiaries experience from fiduciary wrongdoing— harms that may go unredressed under the Panel Opinion. For example, in *Echague v. Metro Life Insurance Co.*, No. 12-CV-00640-WHO, ___ F. Supp. 2d. ___ 2014 WL 2089331 (N.D. Cal. May 19, 2014), a plan participant with cancer made specific written inquiries about how to maintain her life insurance policies and where to send payment when she went on leave, and the fiduciary failed to respond with complete and accurate information. *Id.* at *17. After the participant died, her husband was denied the $440,000 proceeds of the policy on the ground that coverage had lapsed. The court awarded the husband the face value of the policies as surcharge relief for the defendant's breach of fiduciary duties. *Id* at *22. Following *Gabriel*, the defendant sought reconsideration due to the "intervening change in the law," arguing that the plaintiff is not entitled to a remedy because there was no "harm to the trust" or "unjust enrichment." No. 12-CV-00640-WHO (Dkt. No. 142) (June 30, 2014).

Pre-*Amara*, numerous courts and scholars condemned the state of the law that "prohibit[ed] many legitimate plaintiffs from seeking an ERISA remedy." *Eichorn v. AT&T Corp.*, 489 F.3d 590, 593 (3d Cir. 2007) (Ambro, J., concurring

in denial of petition for rehearing en banc, noting "Judicial and scholarly concern could hardly be higher"); *see also*, *e.g.*, *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 222 (2004) (Ginsburg, J., joined by Breyer, J., concurring) (citing the "rising judicial chorus" decrying "an unjust and increasingly tangled ERISA regime"); Colleen E. Medill, Resolving the Judicial Paradox of 'Equitable' Relief Under ERISA Section 502(a)(3), 39 J. Marshall L. Rev. 827, 852 (2006) (describing participants and beneficiaries "betrayed . . . without a remedy").[5] The Panel Opinion unnecessarily returns participants and beneficiaries in the Ninth Circuit to this inequitable and erroneous state of the law—one contrary to the fundamental purpose of ERISA, to protect participants and beneficiaries by charging fiduciaries with duties that this Court has repeatedly recognized are the "highest known to the law." *Johnson v. Couturier*, 572 F.3d 1067, 1077 (9th Cir. 2009) (quoting *Howard v. Shay*, 100 F.3d 1484, 1488 (9th Cir. 1996)).

[5] *See also*, *e.g.*, *Lind v. Aetna Health Inc.*, 466 F.3d 1195, 1200 (10th Cir. 2006); *Pereira v. Farace*, 413 F.3d 330, 345-46 (2d Cir. 2005) (Newman, J., concurring); *Cicio v. Does 1-8*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part), *vacated*, 542 U.S. 933 (2004); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 467 (3d Cir. 2003) (Becker, J., concurring); John H. Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Errors in *Russell*, *Mertens*, and *Great-West*, 103 Colum. L. Rev. 1317, 1353-1362 (2003).

D. The Court's Ruling Conflates Sections 502(a)(2) And 502(a)(3), Leaving Many Plaintiffs Without An Individual Remedy For Fiduciary Breaches.

In holding that the surcharge remedy was exclusively available in equity "when a breach of trust committed by a fiduciary resulted in a loss to the trust estate or allowed the fiduciary to profit at the expense of the trust," the Panel conflated remedies available under ERISA Section 502(a)(3), 29 U.S.C. § 1132(a)(3), with those available under ERISA Section 502(a)(2), 29 U.S.C. § 1132(a)(2). Slip op. 19. This contravenes prior decisions of the Supreme Court and this Court, and renders Section 502(a)(3) and controlling Supreme Court precedent superfluous.

Section 502(a)(2) permits a civil action for relief under ERISA Section 409, 29 U.S.C. § 1109. Section 409 provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses *to the plan* resulting from each such breach, and to *restore to such plan* any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

29 U.S.C. § 1109(a) (emphasis added).

Thus, breaches of fiduciary duty resulting in a loss to a trust or profit at the expense of a trust are appropriately brought under Section 502(a)(2). *See, e.g.*, *Massachusetts Mutual Life Ins. v. Russell*, 473 U.S. 134, 140-41 (1985). Following

Russell, courts initially understood this to mean that "[a]n individual beneficiary may bring a fiduciary breach claim, but must do so for the benefit of the plan" and could not bring a fiduciary breach claim for an individual recovery. *Horan v. Kaiser Steel Ret. Plan*, 947 F.2d 1412, 1418 (9th Cir. 1991), *abrogated by Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996), *also rev'd on other grounds by Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955, 965 (9th Cir. 2006).

In its subsequent decision in *Varity*, however, the Supreme Court clarified that ERISA provides "yet other remedies for yet other breaches of other sorts of fiduciary obligation in another, 'catchall' remedial section"—Section 502(a)(3). 516 U.S. at 512. Based on the overall statutory structure of Section 502(a), the Court determined that Section 502(a)(3) "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 *does not elsewhere* adequately remedy." *Id.* (emphasis added). Notably, *Varity*'s focus was on individual (as opposed to plan) relief, as it construed Section 502(a)(3) to be available where a claim for benefits under ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), does not suffice. In addition, "ERISA's basic purposes favor a reading of the *third* subsection that provides the plaintiffs with a[n individual] remedy." *Id*. at 513 (original emphasis). These basic purposes include "protect[ing] . . . participants . . . by establishing standards of conduct, responsibility, and

obligation for fiduciaries . . . and . . . providing appropriate remedies . . . and ready access to the Federal courts." *Id.* (quoting 29 U.S.C. § 1001(b)).

Thus, following *Russell* and *Varity*, plaintiffs are entitled to seek remedies for harm to a plan under Section 502(a)(2), and also are entitled to seek remedies for individual losses caused by fiduciary breaches outside the plan under Section 502(a)(3). *See, e.g., Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 727 (9th Cir. 2000) ("When a fiduciary breaches its duty and relief is not otherwise available under the statute, § 502(a)(3) of ERISA provides for individualized equitable relief."). Indeed, "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." *Varity*, 516 U.S. at 513.

As discussed above, even a cursory review of the cases suggests the range of injuries that could go unredressed, in contravention of ERISA's text and the Supreme Court's interpretation of it, if the Panel Opinion remains standing.

II. THE PANEL'S INTERPRETATION OF REFORMATION CONFLICTS WITH SUPREME COURT AND NINTH CIRCUIT PRECEDENT AND REQUIRES REHEARING.

The Panel's holding on reformation also requires rehearing. Its narrow reading of the circumstances under which reformation can be employed as an equitable remedy is neither consistent with *Amara* nor the law of remedies. If Mr.

Gabriel can prove his claim of misrepresentation, he could be entitled to reformation.

Reformation is justified for fraud, duress, and mistake, including unilateral mistake where one party is guilty of a misrepresentation or other inequitable conduct. 2 Dan B. Dobbs, *Law of Remedies* § 9.5, at 616 (2d ed. 1993) ("Dobbs"). Moreover, reformation has been employed to conform a writing to a legal standard. Dobbs, § 9.5, at 614. In such instances, fact patterns have included unconscionable contractual provisions, unforeseen occurrences changing the circumstances of the parties, or a failure of the parties to have knowledge of all facts necessary to write the contract in the first place. *Id*. at 614-615 n.9.

Amara confirmed that reformation of plan terms could be employed to remedy defendant Cigna's misrepresentations, as reformation was a remedy that was typically available in equity. 131 S. Ct. at 1879. The Court noted that reformation was "chiefly occasioned by fraud or mistake." *Id.* (quoting 4 S. Symons, *Pomeroy's Equity Jurisprudence* § 1375, at 1000 (5th ed. 1941)) ("Pomeroy"). The Court did not hold that reformation was limited to only claims of fraud and mistake, or limited to plan documents. *Cf.* slip op. 30 (rejecting reformation claim "because the Plan itself does not contain an error").

The Panel Opinion conflicts with *Amara*, because it limits the documents that can be reformed to the plan document itself and the trust agreement. *Id*.

ERISA's operational documents are much broader than merely the plan and the trust agreement. *See* 29 U.S.C. § 1024(b) (summary plan description, trust agreement, annual report, bargaining agreement, contract, actuarial report may be requested); *see also Hughes Salaried Retirees Action Comm. v. Adm'r of the Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686, 690 (9th Cir. 1995) (ERISA Section 104(b), 29 U.S.C. § 1024(b), requires disclosures about the plan and benefits). Moreover, many documents ranging from service and wage records to the plan's internal guidelines are relevant to the adjudication of a benefit claim. *See, e.g.*, 29 C.F.R. § 2560.503-1. Within the discretion of the court, all of these documents may be reformed when appropriate. *See, e.g.*, *Mathews v. Chevron Corp.*, 362 F.3d 1172 (9th Cir. 2004).

In *Mathews v. Chevron Corp.*, this Court found that the employer had misrepresented to employees its intention to adopt an early retirement program, for which they would have been eligible. *Id.* at 1184. To remedy the fiduciary breach, this court ordered the employer to reform its personnel records so the employees would be eligible for the benefits. In *Mathews*, this Court held even pre-*Amara* that it was appropriate to order this remedy, which would "result in Chevron paying plaintiffs 'sums of money' equivalent to the . . . benefits they lost because of Chevron's breach." *Id.* at 1186. Subsequently, in *Enniss v. Enniss*, 198 Fed. App'x 594 (9th Cir. 2006) (mem.), this Court ordered the creation of a rabbi

trust to replace a pension benefit from a terminated plan, finding it similar to the instatement ordered in *Mathews*. 198 Fed. App'x at 596.

In contrast, under the Panel's reformation paradigm, reformation can only occur to the plan document,[6] leaving participants with no method of reforming a plan's records if, for example, the plan records reflect the wrong number of years of service needed to calculate the pension benefit—a very common situation faced by many plan participants and retirees in the experience of AARP and NELA.[7] This cannot be. Equity enables the court to devise and shape relief according to the unique circumstances of each case. 1 Pomeroy § 109.

III. THE PANEL'S NARROWING OF THE AVAILABILITY OF SURCHARGE AND REFORMATION IS UNNECESSARY, BECAUSE DEFENSES EXIST TO THESE EQUITABLE REMEDIES.

AARP and NELA recognize that there may be circumstances where equitable relief—whether through surcharge, reformation, or some other equitable remedy—may be inappropriate, even where the plaintiff has satisfied the affirmative requirements for such relief. In these circumstances, defenses exist that

[6] The Panel also mischaracterizes *Greaney v. Western Farm Bureau Life Insurance Co.*, as supporting the proposition that "[e]quitable remedies are not available where the claim 'would result in a payment of benefits that would be inconsistent with the written plan.'" Slip op. 32 (quoting *Greaney*, 973 F.2d 812, 822 (9th Cir. 1992)). *Greaney* concerns only equitable estoppel, not *all* "equitable remedies," and that case does not concern reformation.

[7] *See also Shortchanged, Pension Miscalculations:* Hearing Before the Special Committee on Aging, United States Senate, One Hundred Fifth Congress, First Session, Washington, DC, June 16, 1997 (Vol. 4).

serve to protect defendants from unfair prosecution, including unclean hands, laches, and estoppel. The Panel is silent regarding such defenses, even though they are vehicles for limiting relief where appropriate. Instead, the Panel has effectively eliminated the availability of the surcharge and reformation remedies for many ERISA plaintiffs in a manner that conflicts with Supreme Court authority, other circuit courts, and the protective purposes and text of ERISA.

CONCLUSION

For the foregoing reasons, AARP and NELA request that the Court grant Plaintiff-Appellant's Petition for Panel Rehearing and/or for Rehearing En Banc.

Dated: July 21, 2014

Respectfully submitted,

/s/ Julie Wilensky
Catha Worthman
Lindsay Nako
Julie Wilensky
Lewis, Feinberg, Lee,
Renaker & Jackson, P.C.
476 9th Street
Oakland, CA 94607
(510) 839-6824

Roberta L. Steele
National Employment Lawyers Association
417 Montgomery Street, 4th Floor
San Francisco, CA 94104
(415) 296-7629

Attorneys for *Amicus Curiae* NELA

/s/ Mary Ellen Signorille
Mary Ellen Signorille
AARP Foundation Litigation

Anita Khushalani
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

Attorneys for *Amicus Curiae* AARP

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Ninth Circuit Rule 29-2(c) because this brief contains 4,150 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: July 21, 2014

Respectfully submitted,

/s/ Julie Wilensky
Julie Wilensky

CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Number 12-35458

BRIEF *AMICI CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT URGING PANEL REHEARING AND/OR REHEARING EN BANC

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 21, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Julie Wilensky
Julie Wilensky