No. __-__

In The
Supreme Court of the United States

PHILLIP C. ENGERS, WARREN J. MCFALL, DONALD G. NOERR, AND GERALD SMIT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

AT&T, INC., AT&T PENSION BENEFIT PLAN, AND AT&T PUERTO RICAN PENSION BENEFIT PLAN,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether periods of "wear-away" in pension benefits that discriminate based on age are excepted from ADEA §4(a)'s protection and this Court's ruling on disparate impact in *Smith v. City of Jackson*, 544 U.S. 228 (2005).

2. Whether the failure to properly adopt an unfavorable transition rule for over three years is a matter of plan interpretation under *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995).

3. Whether under *CIGNA Corp. v. Amara*, 131 S.Ct. 1866 (2011), appropriate equitable relief for inadequate disclosures in an SPD can be denied unless "extraordinary circumstances" are demonstrated.

PARTIES TO THE PROCEEDINGS

The petitioners are Phillip C. Engers, Warren J. McFall, Donald G. Noerr, Gerald Smit, and a class of all other participants in the former AT&T Management Pension Plan who are similarly situated.

The respondents are AT&T, Inc., the AT&T Pension Benefit Plan, and the AT&T Puerto Rican Pension Benefit Plan.

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PETITION FOR A WRIT OF CERTIORARI

On behalf of Phillip C. Engers, Warren J. McFall, Donald G. Noerr, and Gerald Smit, the members of the certified ERISA class, and the 23,938 plaintiffs who joined in the ADEA collective action in *Engers v. AT&T, Inc.,* the undersigned counsel petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (App. 1a) is unofficially reported at 2011 WL 2507089. The five opinions of the District of New Jersey that the Third Circuit's opinion affirms are reported officially and unofficially at 1999 U.S. Dist. LEXIS 6260 (4/23/1999) (App. 26a); 2000 U.S. Dist. LEXIS 10937 (6/29/2000) (App. 35a); 2002 WL 32159586 (10/17/2002) (App. 58a); 428 F.Supp.2d 213 (3/31/2006) (App. 99a); 2010 WL 2326211 (6/7/2010) (App. 185a).

JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on June 22, 2011. The order denying the Petitioners' petition for rehearing and rehearing *en banc* was entered on August 1, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act ("ADEA") provides, in relevant part, that:

> 1. "It shall be unlawful for an employer–
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age."

ADEA §4(a), 29 U.S.C. §623(a).

2. "[I]t shall be unlawful for an employer ... to establish or maintain an employee pension benefit plan which requires or permits ... the cessation of an employee's benefit accrual, or the reduction of an employee's benefit accrual, because of age." ADEA §4(i)(1), 29 U.S.C. §623(i)(1).

3. "Compliance with the requirements of this subsection [§4(i)] with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section [§4] relating to benefit accrual under such plan." ADEA §4(i)(4), 29 U.S.C. §623(i)(4).

The Employee Retirement Income Security Act ("ERISA") provides, in relevant part, that:

1. "Every employee benefit plan shall ... provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan."

ERISA §402(b)(3), 29 U.S.C. §1102(b)(3).

2. "A summary plan description ... shall be furnished to participants and beneficiaries as provided in section 104(b). The summary plan description shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." ERISA §102(a), 29 U.S.C. §1022(a). The cross-referenced "subsection (b)" requires that the summary plan description "contain ... a description of the provisions providing for nonforfeitable pension benefits [and the] circumstances which may result in disqualification, ineligibility or loss of benefits." 29 U.S.C. §1022(b).

3. A "summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished" no later than 210 days after the close of the plan year." ERISA §102(a), 29 U.S.C. §1022(a) (emph. added).

4. "A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan." ERISA §502(a)(3), 29 U.S.C. 1132(a)(3).

STATEMENT

This case concerns the losses by 45,000 older current and former salaried AT&T employees of over $2 billion in retirement benefits as a result of the way AT&T converted their pension plan to a "cash balance" pension formula. AT&T designed the transition to a cash balance formula in an age discriminatory way in disregard of ADEA §4(a) and the disparate impact action recognized in *Smith v. City of Jackson*, 544 U.S. 228 (2005). In adopting the discriminatory provisions, AT&T also failed to follow the plan's amendment procedures as required by *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). AT&T further failed to understandably disclose the losses of future retirement benefits and the "clearly less valuable" nature of a "cash payment" option as this Court's decision in *CIGNA Corp. v. Amara*, 131 S.Ct. 1866 (2011), requires.

Petitioners are current and former salaried employees who participated in the AT&T Management Pension Plan before and after AT&T's conversion to a "cash balance" pension formula. The certified nationwide ERISA class consists of over 45,000 current and former salaried employees. Twenty-three thousand nine hundred and thirty-eight (23,938) of those employees filed individual consents to affirmatively join the ADEA claims in 2007, making this the largest opt-in collective action in United States history. None of the 23,938 opt-in plaintiffs or 45,000 ERISA class members has had a day in court to prove their ADEA or ERISA claims. Instead, this case has been dismissed on technical grounds that cannot be reconciled with

this Court's precedents, the decisions of other circuits, and Congress' objectives of protecting the "anticipated retirement benefits" of employees, their spouses and their families and putting an end to "age discrimination in all forms of employee benefits." ERISA §2(a), 29 U.S.C. §1001(a); S. Rep. No. 101-263, at 11, 1990 U.S.C.C.A.N. 1509, 1521-22.

Before 1998, AT&T offered a traditional defined benefit pension plan to the salaried employees. The AT&T Management Pension Plan ("the Plan") provided retirement benefits equal to an employee's average compensation during a pay base averaging period, multiplied by 1.6% times their years of credited service. Until the end of 1996, the Plan provided benefits equal to a participant's average compensation during 1987-92 multiplied by 1.6% times years of credited service through the end of 1992. For years of service after 1992, the additional benefit accrual rate equaled 1.6% of each year's annual compensation. JA 603.[1]

In April 1997, AT&T's Board of Directors met and authorized AT&T's Senior Vice-President for Compensation and Benefits or his delegate to adopt: (1) "Special Update" amendments, which were to be effective retroactive to January 1, 1997, and (2) "Cash Balance" amendments, which were to be effective January 1, 1998. JA 1749-51. At the April 1997 meeting, the Board approved Resolutions covering most of the details of the Special Update and Cash

[1] JA __ refers to the Joint Appendix in the Third Circuit.

Balance changes. JA 1338-61. As discussed below, however, one of the most unfavorable Cash Balance amendments, a "greater-of" transition provision that produced the age discriminatory periods of wear-away, was not actually adopted by the Board or a duly-authorized person or entity until October 16, 2000–three and one-half years later. JA 1277-78.

The "Special Update" amendments were advantageous to the employees and were properly adopted by the Board's resolutions and a document entitled "Approval of Plan Language for Certain Amendments Adopted" dated December 19, 1997. JA 1281. The Special Update amendments improved the retirement plan's 1.6% of pay formula by advancing the pay base "window" from an average based on pay in 1987-92 to an average based on pay in 1994-1996. The Special Update amendments also provided a credit of up to one year of service for employees in addition to their service through the end of 1996. JA 1287-88.

The "Cash Balance" amendments changed the plan's traditional defined benefit formula to a cash balance pension formula in a manner that generally reduces future benefits. Under AT&T's conversion provisions, employees received a hypothetical initial cash balance account based on the participant's accrued benefits as of July 31, 1997, multiplied by a conversion factor in a table. JA 704-5. Hypothetical "pay" and "interest" credits were added to the account on an annual basis. JA 1843-44. The Plan's provisions for early retirement were modified from offering an unreduced early retirement benefit at age 55, to a much less favorable set of early retirement reduction

factors. JA 1854-55.

As a result of the conversion factors used to establish the initial cash balance accounts and the "greater of" transition provision that AT&T did not adopt until October 16, 2000, JA 1147, older employees experienced periods of "wear-away," which AT&T called "crossover." During those years, the new cash balance pay credits added nothing to the retirement benefits that would actually be payable. JA 1848-54. In effect, AT&T gave employees cash balance pay and interest credits with one set of provisions and took them back with the "greater-of" provision for varying periods of years. For employees who were age 45 and over, the wear-away periods averaged *eight years*. JA 2074. For instance, named Plaintiff Gerald Smit was eligible for a retirement benefit of $1,985 per month as of August 1, 1997. JA 1915. When Mr. Smit retired eight years later, he was only eligible for exactly the same $1,985 monthly benefit. JA 1813, 3500. His benefit did not increase by $1 for his additional eight years of service. *Id.* The over $55,000 in cash balance pay and interest credits that were assigned to his cash balance "account" during this period did not translate into any additional benefits because of the Plan's wear-away provision. JA 3512.[2]

In contrast to the wear-away periods that Mr. Smit

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[2] To further reduce costs, AT&T designed a "cash payment" option under which older employees surrendered part of the value of their previously-earned benefits when they selected the cash payment option. JA 1854-56.

and other older employees endured, internal presentations for select AT&T executives showed that AT&T knew that "Younger Employees" would earn additional benefits "Immediately." JA 1626, 1648, 1745. PowerPoint presentations stated that the Special Update benefit would not be "Overtaken by Cash Balance [for] 3-8 Years" except that "Younger Employees" would earn additional benefits "Immediately." JA 1626 and 2826. Discovery revealed that the in-house AT&T actuary principally responsible for designing the cash balance transition prepared an Excel spreadsheet calculating up to 8-year "crossovers" as a strict mathematical function of only two factors: age and years of service. JA 2724-27.

Plaintiffs' statistical expert, Dr. Robert Bardwell, calculated the duration of the periods of wear-away under AT&T's transition design for each of 51,015 participants. JA 2029, 2032-36. Dr. Bardwell found dramatic statistical disparities based on age in the duration of the "wear-away" periods. The average wear-away period for employees age 40 and over was 6.8 years, nearly twice as long as for younger employees, and 8 years for employees over age 45. JA 2063-64, 2074. Dr. Bardwell's regression analysis showed that the statistical significance of age on the length of the wear-away period was 99 standard deviations, which ruled out the possibility that the impact is due to chance. JA 2071.

This age discriminatory "wear-away" design was developed by consultants and actuaries at an AT&T subsidiary called Actuarial Sciences Associates and was only previewed by a select circle of Human

Resources executives. *See* JA 1699-1700, 2400. The first review of "wear-away" outside that circle was by AT&T's "Operations Group," which included AT&T's CEO, in September 1999. JA 1998-2003. AT&T's Board of Directors never reviewed the wear-away design. Indeed, Robert Allen, AT&T's CEO and the Chairman of its Board until the end of 1997, testified in 2009 that he still did not understand wear-away or crossover. JA 2434-43.[3]

On October 16, 2000, exactly 3½ years after the April 16, 1997 Board meeting, Brian Byrnes, a delegate of AT&T's Senior Vice-President for Compensation and Benefits adopted an "amended and restated" Plan document. That document contained provisions restricting the payment of the benefits derived from the cash balance formula based on a "greater of" design. This was the first Plan document containing the provisions which actually produced the lengthy periods of wear-away. *See* JA 1147. Participants who requested the amended Plan document prior to October 2000 were told that an amended Plan document could not be provided to them because it did not exist. JA 1363-67.

At his Rule 30(b)(6) deposition, Mr. Byrnes admitted that the Board's April 1997 Resolutions did not contain the amendments on wear-away, JA 2333, stating: "They didn't say you could. They didn't say you

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[3] Thomas Wyman, the Chair of AT&T's Compensation Committee, likewise testified that he did not consider "crossover" in adopting the Resolutions. JA 2395-98.

could not." JA 2334. Consistent with this testimony, Mr. Byrnes wrote a letter on April 21, 1999 stating that wear-away "is an open question." JA 2017.

AT&T easily could have avoided any age discriminatory periods of wear-away by adopting an "A+B" transition, in which the benefits earned under the cash balance formula would be added to the previously-earned benefits. With an A+B transition, the benefits of both older and younger employees would increase "immediately." JA 543-44, 1849, 3502. A 2005 study by AARP found that AT&T was virtually alone among large employers in failing to avoid "a period of no benefit accrual (commonly referred to as the 'wear-away' period)." AARP Public Policy Institute, *Transition Provisions in Large Converted Cash Balance Pension Plans*, at 1, 3, and 20.[4] When Congress learned about the wear-away periods that employees were experiencing in cash balance conversions, it so disapproved that it enacted a section in the 2006 Pension Protection Act flatly prohibiting the practice for all cash balance conversions after June 29, 2005, regardless of whether it was shown to be age discriminatory. P.L. 109-280, §701(a).

To "sell" the cash balance design to the employees, AT&T decided not to disclose the "bad parts" of the conversion, including the periods of wear-away, up front. JA 1725. Although minutes of communications group meetings stated that "employees in 40's could

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[4] Available online at http://assets.aarp.org/rgcenter/econ/2005_13_pension.pdf

lose, have to wait 10 years for benefits," JA 780, an April 1997 letter and Fact Sheet suggested that cash balance benefits were comparable, JA 625-27, inaccurately describing "steady account growth" and that "[y]our account's value will grow over time." JA 672-73. While a "Key Dates" chronology said accruals under the pre-Special Update benefit formula would "cease" on July 31, 1997, JA 669, AT&T's employees were not informed that the new cash balance credits would be illusory for years beyond that date. AT&T said "In general, if you are within 7 years of retirement eligibility under the current plan, your special update will most likely provide a greater benefit than the cash balance feature," but did not explain that this meant that employees would work for the next 8 years without earning any additional benefits. JA 626. AT&T also failed to disclose reductions in the rate of future benefit accruals after the wear-away periods of 20% or more. JA 625-41.

Plaintiffs' communications expert, Professor James Stratman of the University of Colorado at Denver, found that AT&T's summary plan description ("SPD") failed to disclose that the cash balance credits were not payable during periods of wear-away. Professor Stratman found the SPD indicated that initial cash balances were derived from the benefits under the updated formulas and suggested that the benefits continue to grow "each year" above those benefits. JA 621, 637-38; see also JA 737 (describing "How Your Cash Balance Account Grows"). He also found that the SPD and benefit election materials failed to disclose that the "cash payment" option was "clearly less valuable" than the annuities starting at age 55, even

though AT&T's actuaries and benefit consultants were keenly aware of this. *See* JA 641-44, 819-23. Not only did AT&T fail to inform its employees, but an August 1997 booklet entitled "Your Pension Improvements" falsely represented to them that the "overall value of your pension likely will remain the same" regardless of the option chosen. JA 685.

In five different opinions, the District Court for the District of New Jersey entered summary judgment for AT&T on all of Plaintiffs' ADEA and ERISA claims. On the ADEA claims, the District Court first dismissed the disparate impact and treatment claims, App.48a-49a; 2000 U.S. Dist. LEXIS 10937, *17-18, subsequently reinstated the disparate impact claim after this Court's 2005 decision in *Smith v. City of Jackson*, App. 182a, only to dismiss it again without reaching the merits. App. 195a-196a; 2010 WL 2326211, *4-5. In the second dismissal, the District Court ruled that compliance with ADEA §4(i) offers a "complete defense" to any disparate impact claim relating to pension benefits, and therefore that the evidence that older employees "[l]ost benefits" during "wear-away" periods was not "relevant" under the ADEA. App. 191a, 194a; 2010 WL 2326211 at *3-4.

The District Court held that Plaintiffs' claim that the Plan document was not properly amended to adopt the "greater-of" provision was an "entirely new legal theory" with "nothing" in the record to support it and that "Defendants would suffer substantial prejudice were this Court to accept this new theory," App. 197a-198a; 2010 WL 2326211 at *5-6, even though Plaintiffs pointed to specific paragraphs in their amended

Complaint as early as 1999 and to their motion for summary judgment on the same theory in 2004. JA 247, 254, 301-8.

On the SPD claims, the District Court held the Plaintiffs were required to establish "extraordinary circumstances" to obtain any relief, and never reached whether AT&T's disclosures were adequate. App. 152a-161a; 428 F.Supp. 2d 213, 240-43. The District Court also held Plaintiffs could not proceed with the claim that AT&T failed to disclose the "relative value" of the cash payment option and falsely represented that the "overall value" of a benefit available at age 55 was "likely" the "same." The District Court held that those claims were precluded because Plaintiffs potentially could recover for violations of ERISA's SPD rules, while at the same time the District Court was dismissing those claims. App. 142a-144a; 428 F.Supp.2d at 235-36.

Plaintiffs appealed the dismissals of their claims to the Third Circuit Court of Appeals. On June 22, 2011, the Third Circuit affirmed the judgment in favor of AT&T on all counts. The Third Circuit agreed with the District Court's dismissal of the disparate impact and treatment claims under the ADEA on the ground that "compliance with ADEA §4(i) [is] a complete defense to [the] ADEA claims." App. 7a. The Third Circuit found that ADEA §4(i)(4) "by its terms applies to any claim under section 4," including disparate impact claims based on any periods of wear-away. *Id*.

The Third Circuit held that the District Court erred in finding that the untimely plan amendment

claim presented an "entirely new legal theory," App. 9a, but proceeded to hold that an AT&T Committee's interpretation of the amendments was "eminently reasonable" and that Plaintiffs "[did] not address the Committee's arguments for its interpretation" or present sufficient evidence to support "[their] reading of the amendments." App. 9a-10a. The AT&T Committee's "interpretation" was not based on any words in the Board's 1997 Resolutions, but on non-plan communications in the period after April 1997, including a sentence with the words "greater than" in AT&T's 1998 SPD. JA 4606-4607; *see also* JA 3412. The Committee reasoned that these communications made AT&T's intent clear, regardless of the words in the 1997 Resolutions. JA 3412, 4607.

On the SPD violations, the Third Circuit found that even if there were no understandable disclosures in the SPD of wear-away or the clearly less valuable nature of the cash payment option, "[a]t most," AT&T "did not want to tell the bad parts up front." App 13a. In a footnote, the Third Circuit ruled that Plaintiffs did not establish the "extraordinary circumstances" required to obtain any equitable relief for an SPD violation. App. 13a-14a n.9. The Third Circuit ruled that *CIGNA Corp. v. Amara*, 131 S.Ct. 1866 (2011), "does not alter this conclusion" because *Amara* "expressly declined to address 'other prerequisites' for equitable relief," and "we see no reason to depart from our longstanding rule that an equitable estoppel claim under §502(a)(3) cannot be based merely on ... disclosure violations ... without a showing of extraordinary circumstances." App. 13a-14a n. 9.

REASONS FOR GRANTING THE PETITION

Supreme Court Rules 10(a) and (c) provide that certiorari may be granted when a court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this Court," "has decided an important question of federal law that has not been, but should be, settled by this Court," or "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter."

The decision on the ADEA claim conflicts with this Court's decision in *Smith v. City of Jackson,* 544 U.S. 228 (2005), which requires courts to recognize disparate impact claims under the ADEA as long as "the specific employment practices that are allegedly responsible for any observed statistical disparities" are "isolat[ed] and identif[ied]" by the plaintiffs. 544 U.S. at 241 (quoting *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 656 (1989)). If left standing, the Third Circuit's "not precedential" decision and two recent decisions of the Tenth Circuit[5] will rewrite the statutory standards in ADEA §4(a) and (i) in a manner that conflicts with decisions of this Court and the Second, Fourth, Seventh and Eighth Circuits consistently addressing discrimination related to retirement benefits under §4(a), subject to the

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[5] *Jensen v. Solvay Chemicals*, 625 F.3d 641 (10th Cir. 2010); *Tomlinson v. El Paso Corp.*, 653 F.3d 1281 (10th Cir. 8/11/2011). *Jensen* was remanded for further proceedings on two ERISA violations.

affirmative defenses in §4(f)(1) and (2), including the "equal cost or equal benefit" and reasonable factor other than age ("RFOA") defenses. The decision also conflicts with the holding in *City of Jackson* that the ADEA "focuses on *the effects of the action on the employee* rather than the motivation for the action of the employer." 544 U.S. at 236 (emph. added).

In ruling that §4(i) offers a "complete defense" to age discrimination related to retirement benefits, the Third Circuit followed the Tenth Circuit's decision in *Jensen v. Solvay Chemicals*, 625 F.3d 641, 660 (10th Cir. 2010). By contrast, this Court and the Second, Fourth, Seventh and the Eighth Circuits have consistently addressed age discrimination claims "related to retirement benefits" under ADEA §4(a) subject to the affirmative defenses afforded by §4(f), with no reference to ADEA §4(i) as a "complete defense" to disparate treatment or disparate impact claims. *See Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 143-48 (2008); *Lockheed Corp. v. Spink*, 517 U.S. 882, 896-97 (1996); *Hazen Paper Corp. v. Biggins*, 507 U.S. 604, 611-13 (1993); *Mitchell-White v. Northwest Airlines, Inc.*, 2011 WL 5023252 *3 (2d Cir. 11/21/2011); *Abrahamson v. Bd. of Educ.*, 374 F.3d 66, 72-76 (2d Cir. 2004); *EEOC v. Baltimore County*, 385 Fed. Appx. 322, 325 (4th Cir. 6/25/2010); *Solon v. Gary Community Sch. Corp.*, 180 F.3d 844, 851-55 (7th Cir. 1999); *Schultz v. Windstream Communications, Inc.*, 600 F.3d 948, 953-54 (8th Cir. 2011); *EEOC v. Minnesota Dept. of Corrections*, 648 F.3d 910, 912-14 (8th Cir. 2011).

The Third Circuit's decision on the plan

amendment claim conflicts with *Amara*, *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), and decisions of the Fifth, Ninth, Eleventh and District of Columbia Circuits applying *Schoonejongen*. Rather than determining when the Plan document was amended to adopt the "greater-of" transition provision, the Third Circuit relied on an AT&T-appointed Committee's interpretation of non-plan communications, including AT&T's January 1998 SPD, to hold that the AT&T Plan document was properly amended in April 1997 to adopt the "greater-of" transition. The Third Circuit's deference to an AT&T Committee's "interpretation" of whether the Plan document was properly amended by non-plan communications does not follow *Schoonejongen* or *Amara*'s unanimous holding that SPDs "do not themselves constitute the terms of the plan." 131 S.Ct. at 1878. No other circuit has interpreted *Schoonejongen* as support for deferring to the interpretation of the plan sponsor, or a committee appointed by a plan sponsor, on whether a plan document was properly amended. *See Overby v. National Ass'n of Letter Carriers*, 595 F.3d 1290, 1293 (D.C. Cir. 2010); *Halliburton Co. Benefits Committee v. Graves*, 463 F.3d 360, 371-72 (5th Cir. 2006); *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir. 2003); *Shaw v. Conn. Gen. Life Ins. Co.*, 353 F.3d 1276, 1283 (11th Cir.2003).

The Third Circuit's decision on the "prerequisites" to obtain any relief for an inadequate SPD decides an important federal question in conflict with this Court's recent decision in *Amara*. Notwithstanding the holding

in *Amara* that "detrimental reliance" is *not* a general prerequisite for equitable remedies for an inadequate SPD, 131 S.Ct. at 1881-82, the Third Circuit held that "extraordinary circumstances," which the Third Circuit expressly defines to include "detrimental reliance," can still be required as a condition for equitable relief from an inadequate SPD. App. 13a-14a n.9.

This Court has granted certiorari in other ADEA and ERISA cases based on conflicts with its precedents and the decisions of other circuits. *See, e.g.*, *Reeves v. Sanderson Plumbing Prods.,* 530 U.S. 133, 140 (2000); *O'Connor v. Consol. Coin Caterers Corp*., 517 U.S. 308, 310 (1996); *Conkright v. Frommert*, 130 S.Ct. 1640, 1646-47 (2010); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 44, 49 (1987). Granting certiorari to review a non-precedential opinion is appropriate because the decision it follows on the ADEA, *Jensen v. Solvay Chemicals*, is published, because FRAP 32.1 now permits citation of non-precedential decisions,[6] and because it prevents unpublished decisions from insulating results that do not conform with *stare decisis.* In the alternative, this Court should grant, vacate, and remand the Third Circuit's decision in light of *Amara* and *City of Jackson*. Because the Third Circuit ignored *City of Jackson* and purportedly applied *Amara* only in a footnote that plainly cannot be reconciled with this Court's decision (because

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[6] The Third Circuit's ruling on "extraordinary circumstances" was already cited and followed in *Jensen v. Solvay Chemicals*, C.A. 06-273, Dkt.#216 at 42 (D. Wyo. 10/12/2011).

"extraordinary circumstances" as defined by the Third Circuit includes "detrimental reliance"), this Court should grant the petition, vacate the judgment and remand for the Third Circuit to take a closer look at *Amara* and *City of Jackson*.

I. *Smith v. City of Jackson* Requires Courts to Recognize a Disparate Impact Claim Under the ADEA When the "Specific Employment Practice" that Produces the Disparities Is Isolated and Identified.

As *Amara* found, "wear-away" is a "phenomenon" in which "it would take [an] employee several additional years of work simply to catch up (under the new plan) to where he had already been (under the old plan)." 131 S.Ct. at 1874. Not earning any retirement benefits in exchange for over eight years of work is obviously a very unfavorable "term[] [or] condition[] ... of employment" within the meaning of ADEA §4(a)(1).[7] A 1999 survey by renowned pollster Frank Luntz, which was undertaken because of the controversies over cash balance conversions, shows that even if it is only for a year, employees "overwhelmingly" believe that a company "does not have the legal right to change its pension plan to stop adding additional benefits, even if it would not affect what has already been earned." JA 3442.

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[7] It is also an unfavorable limitation on "employment opportunities" and "status as an employee" under §4(a)(2).

After reinstating the Plaintiffs' disparate impact claim based on *City of Jackson* and supervising an opt-in process that resulted in 23,938 current and former employees affirmatively opting into the ADEA collective action, the district court dismissed the age discrimination claim on the self-contradictory ground that evidence that benefits were "[l]ost" during periods of wear-away based on age is not "relevant evidence" of age discrimination. App. 194a; 2010 WL 2326211 at *4.

ADEA §4(a) was enacted in 1967 to prohibit age discrimination in employment opportunities and in the wages that employees earn in exchange for their services. By amending the definition of "terms, conditions, or privileges of employment" in 1990 to specifically include employee benefits, Congress made it "unmistakably clear" that "age discrimination in all forms of employee benefits" must end. S. Rep. No. 101-263, at 11, 1990 U.S.C.C.A.N. 1509, 1521-22.[8] This Court's 2005 decision in *City of Jackson* supports these objectives by holding that disparate impact claims must be cognizable because the ADEA "focuses on the effects of the action on the employee rather than the motivation of the employer." 544 U.S. 236.[9]

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[8] The 1990 amendments to the ADEA amended the definition of the "terms, conditions, or privileges of employment" to "encompass[] all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." ADEA §11(l), 29 U.S.C. §630(l).

[9] Before *City of Jackson,* only the Second, Eighth and Ninth Circuits recognized disparate impact claims under the ADEA. *See* 544 U.S. at 237 n.9; *Frank v. United*

When periods of wear-away are designed in a manner that discriminates on the basis of age, the disparate impact claim recognized in *City of Jackson* must be available to put an end to the discrimination. Preserving the protection that *City of Jackson* offers is particularly important to ending age discrimination when, as here, nominally equal cash balance pay and interest credits do not produce any increases in benefits at retirement for older employees because of the disparate impact of a "wear-away" or other disjunctive condition on receipt of those credits.

In this case, the Third Circuit dismissed the age discrimination claims that 23,938 current and former AT&T employees had joined by ignoring the disparate impact claim recognized in *Smith v. City of Jackson*, 544 U.S. 228 (2005), and rewriting the text of ADEA §§4(i)(1) and (4) to offer employers a "complete defense" against discrimination. App. 7a. Excel spreadsheets, PowerPoint presentations and other internal communications all showed that AT&T designed its cash balance conversion to provide older employees only with bookkeeping credits, rather than actual retirement benefits, for periods that *averaged almost 8 years*. JA 2074. Contrary to the Third Circuit's holding, this was not an "implication" of a cash balance conversion, App.4a, but a deliberate, easily avoidable choice. AT&T knew and intended the periods of wear-away would eliminate an important incentive for older

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Airlines, 216 F.3d 845 (9th Cir. 2000); *District 37, AFSCME v. NYC Dep't of Parks*, 113 F.3d 347 (2d Cir. 1997); *Smith v. City of Des Moines*, 99 F.3d 1466 (8th Cir. 1996).

employees to continue to work at AT&T. JA 2487, 2567. AT&T followed up on that "stick" by offering close to 20,000 employees, 90% of whom were over age 40, the "carrot" of a voluntary retirement incentive program, JA 2673, and then flagging the employment records of everyone who accepted to keep them from ever being rehired–even on a contract basis.[10]

By showing disparate impact and identifying the "specific employment practice" that produced it, Petitioners satisfied the twin prongs of *City of Jackson,* 544 U.S. at 241. Petitioners showed disparate impact by Dr. Bardwell's statistical analysis demonstrating that the average wear-away period for employees age 40 and over is nearly twice as long as for younger employees and that the chances of AT&T's "wear-away" being independent of age are "less than the chance of winning a six-number lottery nine times in a row, each time with only one ticket." JA 2036. Petitioners have also isolated and identified the "specific employment practice" that caused the observed disparate impact through their actuarial expert's analysis and spreadsheets demonstrating that the discriminatory periods of wear-away are the inevitable product of AT&T's "greater-of" design, easily avoided with an "A+B" transition. JA 1848-1854.

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[10] In *EEOC v. AT&T*, C.A. 09-7323 (JPO) (S.D.N.Y.), the EEOC and AT&T entered into a consent decree dated October 14, 2011 in which AT&T agrees, 14 years after the fact, to revise its employment policies to allow the re-employment of former employees who left under AT&T's 1998 "VRIP" program.

The decisions of the Third and the Tenth Circuits mean that employers would be free to discriminate on the basis of age in the provision of retirement benefits even after Congress clarified in 1990 that §4(a) prohibits discrimination in employee benefits and even after this Court recognized disparate impact claims in *City of Jackson* in 2005. The Third and the Tenth Circuits have erred in failing to recognize the disparate impact claim that *City of Jackson* upheld on the ground that ADEA §4(i)(1) "sets out specific rules governing age discrimination related to retirement benefits." App. 6a. In fact, ADEA §4(i)(1) has a limited focus on "the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age." It does *not* govern "age discrimination related to retirement benefits" in general. These Circuits have further erred in holding that ADEA §4(i)(4) "by its terms applies to any claim under section 4." App. 7a n.6. In fact, ADEA §4(i)(4) does *not* apply to "any claim under section 4" but is limited to "compliance with the requirements of this section relating to benefit accrual under [a] plan." Sweeping every claim "related to retirement benefits" out from §4(a) and under §4(i) clearly alters the design of the statutory scheme in a manner that is not clear from the words of the statute alone. This Court has consistently instructed that if a provision like ADEA §4(i)(4) is ambiguous, it must be read to carry out the statutory objectives, not to limit or defeat them. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979). Here, the Third and Tenth Circuits would rewrite §4(i) in a manner that defeats

the disparate impact claim recognized in *City of Jackson* and the statutory objective of ending age discrimination related to employee benefits.

This Court and the Second, Fourth, Seventh and the Eighth Circuits have, by contrast, consistently addressed age discrimination claims "related to retirement benefits" under ADEA §4(a), subject to the affirmative defenses afforded by §4(f), without any reference to ADEA §4(i) extending a "complete defense" to employers from disparate treatment or impact claims. *See Ky. Ret. Sys. v. EEOC*, 554 U.S. 135, 143-48 (2008), and the Supreme Court and circuit cases cited at p. 16 *infra*. The Third and Tenth Circuits' rewriting of ADEA §4(i) as a "complete defense" to claims under ADEA §4(a) conflicts with the decisions of this Court and these four circuits and would deny employees the statutorily-intended protection against discrimination in the receipt of retirement benefits. For this remarkable proposition, the Third and the Tenth Circuits relied on *Register v. PNC Fin. Servs. Group,* 477 F.3d 56, 70 (3d Cir. 2007), for the holding that the term "benefit accrual" in ERISA §204(b)(1)(H), 29 U.S.C. §1054(b)(1)(H), and by extension in ADEA §4(i)(1), is limited to cash balance credits, or "inputs," and is not "concerned with ... what the employee eventually may obtain from the plan on retirement." App. 6a; 653 F.3d at 1287-88.[11] In light of Congress' objective of ending all age discrimination in the terms

[11] ADEA §4(i) and ERISA §204(b)(1)(H) "are to be interpreted in a consistent manner." H.Conf. Rep. 99-1012, at 378-79, 1986 U.S.C.C.A.N. 3868, 4023-24.

or conditions of employment, including terms and conditions related to employee benefits, the idea that the ADEA's protection against age discrimination only prohibits discrimination in "inputs," a term which is found *nowhere* in the statute or legislative history, and not discrimination in "what the employee eventually may obtain from the plan on retirement," is farfetched at best. Moreover, even accepting all or part of *Register*'s remarkable construction, there are two logical consequences, neither of which leads to the conclusion that disparate impact actions must be precluded by a showing that nominally equal credits or "inputs" have been offered: First, if *Register* is correct in holding that "the requirements ... relating to benefit accrual" are limited to nominally equal "inputs," the preclusive effect of ADEA §4(i) should extend no further than that limited construction and Petitioners should be able to proceed with their disparate impact claim under ADEA §4(a) and *City of Jackson*, subject to the affirmative §4(f) defenses. Alternatively, if *Register* is correct about "inputs" but incorrect that §4(i) is not equally "concerned with ... what the employee eventually may obtain from the plan on retirement," Petitioners should be able to proceed with their disparate impact claim under ADEA §4(i).

Petitioners submit that their statistically and actuarially-proven disparate impact claim under *City of Jackson* must proceed if the ADEA is to fulfill its promise of ending age discrimination in benefits, as Congress intended. ADEA §4(i) does not partially overrule *City of Jackson* to create a "complete defense" under which "[l]ost benefits" during "wear-away"

periods are not "relevant evidence" of discrimination. App. 191a, 194a; 2010 WL 2326211 at *3-4.

In the six years since *City of Jackson*, the case law has shown that Petitioners' road to relief will be anything but uncontested. However, the statute requires that Petitioners have the opportunity to prove disparate impact. Since *City of Jackson*, the circuits have often dismissed disparate impact claims brought under §4(a) on the ground that plaintiffs did not identify the "specific employment practice" that led to the observed disparities. *See Summers v. Winter*, 303 Fed. Appx. 716, 719 (11th Cir. 2008); *Adam v. Kempthorne*, 292 Fed. Appx. 646, 652 (9th Cir. 2008); *Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1201 (10th Cir. 2006); *Chouinard v. N.H. Dep't of Corr.*, 157 Fed. Appx. 322, 325 (1st Cir. 2005). Here, however, Petitioners have plainly offered at least a prima facie identification of the "specific employment practice" leading to the observed disparities.

The case law also shows that employers will assert §4(f) defenses to *City of Jackson* claims. The only circuit court decisions to recognize disparate impact claims after *City of Jackson* both addressed RFOA defenses. *See Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008), and 358 Fed. Appx. 233, 235-36 (2d Cir. 2009), on remand (ordering new trial on affirmative "reasonable factor other than age" defense); *Aldridge v. City of Memphis*, 404 Fed. Appx. 29, 41 (6th Cir. 2010). Here, AT&T already asserted an RFOA defense and Petitioners responded to those arguments below. But the Third Circuit did not allow the claim to

proceed under §4(a), or reach AT&T's §4(f) affirmative defenses, because it ruled that §4(i) offers AT&T a "complete defense" to any discrimination "related to retirement benefits" based on offering nominally equal credits. As stated, the text of ADEA §4(i) will not support that "complete defense," and it conflicts with the objective of the statute and the decisions of this Court and the Second, Fourth, Seventh and Eighth Circuits, consistently addressing discrimination claims related to retirement benefits under §4(a).

II. AT&T's "Greater-Of" Transition Provision Was Not Properly Adopted in Accordance with *Curtiss-Wright Corp. v. Schoonejongen*.

Petitioners offered indisputable evidence that the most unfavorable feature of AT&T's new cash balance conversion, the "greater-of" provision that produced the periods of wear-away, was *not* adopted as an amendment to AT&T's Plan document until October 16, 2000–three and one-half years after AT&T's Board approved the resolutions on cash balance. This Court's *Schoonejongen* decision establishes that the failure to establish and follow a plan's "amendment procedure" violates ERISA §402(b)(3): An "unfavorable plan amendment" that is not "properly adopted" is "invalid." *Id*. 514 U.S. at 82-84. Here, the "greater of" transition provision is plainly *not* in the Board's April 1997 Resolutions, as demonstrated by reading the text of those Resolutions, JA 1338-57, looking at the "greater of" provision which was adopted on October 16, 2000, JA 1147, and reviewing the testimony of AT&T's Rule 30(b)(6) witness. JA 2333-34.

The Third Circuit recognized that the district court erred in dismissing Petitioners' ERISA §402(b) claim on the ground that it was an "entirely new legal theory," App. 9a (citing *Skinner v. Switzer*, 131 S.Ct. 1289, 1296 (2011)), but nevertheless failed to reach ERISA §402(b)(3) and *Schoonejongen*. Instead, the opinion recast the claim as one of plan interpretation, stating that Petitioners contend that "the amendments [the term the decision uses to refer to the Board Resolutions] are not properly *construed* as establishing the greater-of rule and limitations on certain benefit options." App. 9a (emph. added). Proceeding from the false premise that the issue was one of plan interpretation rather than properly amending the plan, the panel opined that an AT&T-selected "Committee" construed the Resolutions to provide for these rules on "eminently reasonable" grounds and incorrectly stated that Petitioners did "not address the Committee's arguments for its interpretation." App. 10a. In fact, Petitioners addressed the Committee's arguments before the district court, Dkt.#454-1 at 42-49 and Dkt.#463 at 13-20, and on appeal. App. Br. at 33-37. Petitioners emphasized that even under an "abuse of discretion" standard, interpretive authority can never be used to impose a requirement that is *not* in the Plan document. *Miller v. Am. Airlines, Inc.*, 632 F.3d 837, 849 (3d Cir. 2011) ("employer who imposes requirements extrinsic to the plan in evaluating eligibility for benefits acts arbitrarily and capriciously"); *accord*, *Dewitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 520 (3d Cir. 1997); *Epright v. Envtl. Res. Mgmt., Inc.*, 81 F.3d 342-43 (3d Cir. 1996).

Here, the greater-of/wear-away transition provisions in the October 16, 2000 Plan document are nowhere to be found in the Board's April 1997 Resolutions. *Compare* JA 1338-57 *with* JA 1147. To demonstrate this fact, Petitioners offered the district court a provision-by-provision analysis of the Resolutions' text compared with the provisions of the Plan document that were adopted on October 16, 2000. *See* Dkt.#457 at 36-38. AT&T's Committee, by contrast, never reviewed the text, but pointed to manifestations of intent outside of the Resolutions, primarily in the 1998 SPD. *See* JA 3486-92. *Amara*, however, clearly rejects the proposition that a Plan document can be amended by an SPD or other non-plan communication. 131 S.Ct. at 1877-78.

In deferring to AT&T's Committee, the Third Circuit also improperly disregarded the binding Rule 30(b)(6) admissions of Brian Byrnes, the delegate of the Board who executed the restated plan with the "greater-of" provisions on October 16, 2000. Mr. Byrnes admitted that AT&T's Board of Directors did not have an intent on wear-away or crossover, testifying that the Board of Directors "didn't say you could. They didn't say you could not." JA 2334, 3950. This admission was not just enough to defeat summary judgment; it was binding on AT&T because Mr. Byrnes was AT&T's designated Rule 30(b)(6) witness. JA 3950. Mr. Byrnes' testimony was also supported by his April 1999 letter stating that "crossover," AT&T's term for wear-away, was an "open question," JA 2017, and by the evidence uncovered in discovery that no presentation on wear-away was made to AT&T's

Operations Group, including its CEO, until September 1999. JA 1998-2003. At a Court-ordered deposition in 2009, Robert Allen, the CEO and Chairman of the Board until the end of 1997, testified that he did not understand the concept of wear-away even in 2009. JA 2434-43.

The Third Circuit nevertheless disregarded Mr. Byrnes' Rule 30(b)(6) admission by focusing on his subsequent statement "that providing the sum of the two benefits was inconsistent with the Plan's design." App.10a. "[T]he Plan's design" was, however, Mr. Byrnes' and AT&T's jargon for the intent of the actuarial consultants and HR executives who worked on the cash balance proposals. *See* JA 1699-1700, 2400. It was not a reference to the AT&T Board's intent or any language in the April 1997 Resolutions.

The Third Circuit's opinion improperly disregards Mr. Byrnes' Rule 30(b)(6) admission and the other evidence Petitioners offered concerning adoption of the wear-away provision, in concluding that it "shows at most that the language of the plan amendments was ambiguous." App.10a. *Schoonejongen*, as well as black letter summary judgment rules against weighing the evidence, preclude that result. The Board's April 1997 Resolutions contained no language that can reasonably be interpreted as a plan amendment providing for a "greater of" transition. JA 1338-57. Both *Schoonejongen* and *Amara* preclude the AT&T Committee's use of a reference to "greater than" in the SPD or another non-plan communication as though it were a plan amendment. *See* 131 S.Ct. at 1877-78.

III. Under *CIGNA Corp. v. Amara,* Appropriate Equitable Relief for Violations of the SPD Rules Cannot Be Conditioned on "Extraordinary Circumstances."

Amara recognizes that equitable relief for a violation of the SPD requirements can be obtained without proving "detrimental reliance" and that "actual harm" may "come from the loss of a right protected by ERISA." 131 S.Ct. at 1881. Here, the Third Circuit ruled that "[b]ecause Engers seeks equitable relief ..., he must show extraordinary circumstances." App.13a-14a n.9. The opinion describes this as "our [the Third Circuit's] longstanding rule" and saw "no reason to depart from" it based on *Amara*. *Id*. "Extraordinary circumstances" is not, however, a general prerequisite to "equitable relief" and, as defined by the Third Circuit, it expressly includes "detrimental reliance." *See, e.g.*, *Lettrich v. J. C. Penney Co.*, 213 F.3d 765, 771 (3d Cir. 2000) Accordingly, the panel's imposition of such a requirement conflicts with *Amara*.

The Third Circuit's decision maintains that *Amara* declined to address "other prerequisites" for equitable relief. App. 13a-14a n.9. However, *Amara* does not authorize the lower courts to fashion "other prerequisites" to equitable relief that are not "impose[d]" by "the specific remedy being contemplated." 131 S.Ct. at 1881. Instead, it holds that any prerequisites to relief must come from either the statutory requirements or "the law of equity." *Id*.

Following *Amara*, the "extraordinary circumstances" standard the Third Circuit has used of "bad faith, active concealment, or detrimental reliance," *Lettrich,* 213 F.3d at 771, might continue to be appropriate in equitable estoppel cases. But "detrimental reliance" cannot be imposed as a general condition of appropriate equitable relief. 131 S.Ct. at 1881-82. The other two "extraordinary circumstances"–bad faith and active concealment–are equally untenable as general conditions to equitable relief.

Even before *Amara*, the Third Circuit had itself *not* used "extraordinary circumstances" as a condition to relief for breach of the fiduciary "duty to inform" in *Bixler v. Central Pa. Teamsters Health & Wel. Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993), or *Jordan v. Federal Express Corp.,* 116 F.3d 1005, 1011 (3d Cir. 1997). The Third Circuit also did not require "extraordinary circumstances" as a condition to relief for an inadequate SPD in *Burstein v. Retirement Account Plan*, 334 F.3d 365, 380-81 (3d Cir. 2003).[12]

The Third Circuit further ruled that if an "active concealment" standard survives *Amara*, as the panel ruled it does, Petitioners did not offer "sufficient evidence" to avoid summary judgment. App.13a. However, Plaintiffs offered extensive evidence

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[12] The Third Circuit distinguishes *Burstein* as a case addressing "benefits misleadingly promised by an SPD." App. 13a n.9. *Burstein* concerned a failure to disclose circumstances in which "cash balance" benefits can be lost, 334 F.3d at 379, the same as here. *See* JA 620-21, 634-40.

indicating active concealment, including minutes of internal AT&T communications meetings asking, "Why would we want to tell people that the special update is higher than Cash Balance?" and "do we want to explain the crossover or sell Cash Balance?" (JA 776), and a videotaped seminar showing AT&T Human Resources leaders being instructed on how to avoid employees' requests for comparisons of the old and new benefits (JA 532, 4240-41). Other documents showed AT&T withholding information that the cash payment option, which three-fourths of retiring employees ultimately selected, was "clearly less valuable" than the monthly benefit, JA 776, 819, 1700, and falsely telling them that the value of the option will "likely will remain the same." JA 685. AT&T's failure to tell retiring employees about the lower value of the cash payment option was undeniably harmful. Bonny Berger was, for example, entitled to a monthly pension benefit of $1,672.63 at age 55 under the prior formula, which was worth 42.5% more than the cash payment option which she ultimately selected. JA 548-49. But AT&T made false representations about the equivalence of the options, and abjured the fiduciary "duty to inform" that was recognized in the law of trusts even before ERISA. *See, e.g., Bixler*, 12 F.3d at 1300; *Res. (2d) of Trusts*, §173.[13]

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[13] Petitioners showed that the district court's rejection of "extraordinary circumstances" necessarily involved the weighing of evidence and credibility determinations which should not take place on summary judgment. Br. at 47. Instead of correcting that error, the Third Circuit compounded it, finding that "[a]t most, Engers's evidence

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, this Court should GVR the case in light of *CIGNA Corp. v. Amara* and *Smith v. City of Jackson*.

Respectfully submitted,

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shows that AT&T ... did not want to tell the bad parts up front," App.14a, improperly adding that "no reasonable jury could conclude that AT&T actively concealed wear-away or other key plan features from participants." App.15a.