No. 06-923

IN THE

Supreme Court of the United States

METLIFE (METROPOLITAN LIFE INSURANCE COMPANY) AND LONG TERM DISABILITY PLAN FOR ASSOCIATES OF SEARS, ROEBUCK AND COMPANY,

Petitioners,

– v. –

WANDA GLENN,

Respondent.

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

BRIEF FOR SOUTH BROOKLYN LEGAL SERVICES AND LEGAL SERVICES NYC AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

South Brooklyn Legal Services ("SBLS") and Legal Services NYC, amici curiae, submit this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States. The brief is written in support of Respondent and the judgment of the United States Court of Appeals for the Sixth Circuit in *Wanda Glenn v. Metropolitan Life Insurance Company*, 461 F.3d 660 (6th Cir 2007). All parties have consented to its submission.[1]

SBLS provides free civil legal services to individuals unable to afford private counsel. Legal Services NYC supports, coordinates, and funds the work of SBLS and other affiliated offices in New York City's five boroughs. Legal Services NYC is the largest recipient of grants from the Legal Services Corporation, an independent and non-profit corporation formed and funded by Congress pursuant to the Legal Services Act, 42 U.S.C. §§ 2996, *et seq*. SBLS also receives grants from other sources, including the Administration on Aging of the United States Department of Health and Human Services, which is the principal funding source for the Mid-Atlantic Pension Counseling Project

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[1] Pursuant to Sup. Ct. Rule 37.6, counsel for amici curiae hereby certifies that this brief was authored in whole by their attorneys, and that no individual or entity other than amici curiae has contributed monetarily to the preparation or submission of this brief.

("MAPCP"), which is housed at SBLS. MAPCP provides advice and other non-litigation assistance concerning pensions and related employee benefit plans to individuals residing or formerly employed in the states of New York and New Jersey. SBLS staff have extensive first-hand knowledge of the problems people encounter when they try to learn about, or exercise their right to, benefits for which they are eligible due to age, injury or infirmity. In the experience of SBLS lawyers, of all the obstacles these men and women face, none is greater than the deferential judicial review of benefit denials.

SUMMARY OF ARGUMENT

1. Under the Employee Retirement Income Security Act ("ERISA" or "the statute") participants have actions for benefits presumptively decided de novo without deference to the plan administrator. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) ("*Bruch*"). Although plan documents may give the trustee discretionary authority, "if a plan gives discretion to an administrator or fiduciary who is operating under a possible or actual conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" *Id.* at 115 (quoting Restatement (Second) of Trusts § 187 cmt. d (1959)).

While most circuits have given significant weight to conflicts of interest, some courts of appeals have forged a peculiar definition of

"conflict of interest" that does not encompass an objective conflict of economic interest unless the aggrieved participant is somehow able to demonstrate that the benefit denial was subjectively affected by the conflict. Petitioners have asked this Court to adopt this definition

The United States Court of Appeals for the Second Circuit is one of the courts of appeals that has already granted Petitioners' wish. Our survey of cases decided by the four district courts located in New York State, the courts which hear the great majority of cases filed within the circuit, have shown that, in practice, the application of this definition has placed a burden on plaintiffs that, except in rare cases, they simply cannot carry. In fact, the burden was carried in only 2 of 65 cases.

2. The deferential standard of review applied to decisions by administrative agencies is inappropriate for conflicted plan administrators because plans lack the procedural protections required of agencies, including a trial-like hearing presided over by an impartial adjudicator.

3. The deferential standard Petitioners seek would violate Congress's intent to give civil actions, in the district courts, a primary role in protecting participants right to a hearing presided over by an adjudicator whose interests do not conflict with the claimant's. In ERISA Congress broadly empowered the federal courts to serve as a "safety net," replacing and enlarging the remedies previously available in state court.

ARGUMENT

1. ADOPTING PETITIONERS' DEFERENTIAL APPROACH TO REVIEW OF DECISIONS BY DUAL-ROLE INSURERS WOULD EVISCERATE THE PROTECTION FOR PARTICIPANTS PROVIDED BY *BRUCH*

The case before this Court places in sharp focus an anomaly: Since *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101 (1989), ERISA-fiduciary decisions have been presumptively subject to de novo review, whereas the great majority of cases decided since *Bruch* have been reviewed under the extremely deferential "arbitrary or capricious standard." This anomaly is a consequence of the almost universal insertion, in the aftermath of *Bruch*, of self-serving clauses endowing plan fiduciaries with discretionary authority. *See* Donald T. Bogan & Benjamin Fu, ERISA: *No Further Inquiry Into Conflicted Administrator Denials*, 58 Okl. L. Rev. 637, 647-648 (2006); John H. Longbein, Trust Law as Regulatory Law: *The Unum/Provident Scandal and the Review of Benefit Denials After ERISA*, 101 Nw. U.L. Rev. 1315, 1324 (2007); *see also Pinto v. Reliance Standard Life Ins. Co.*, 214 F.3d 377, 383 n.2 (3d Cir. 2000).[2]

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[2] It need not be argued strenuously that the process of plan amendment was rarely one of arms length bargaining. This is particularly so in light of the dramatic diminution, since ERISA was enacted, in the percentage of benefit plans whose terms were determined

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Predictably, the companies have used these clauses as a basis for obtaining deferential judicial review. As authority they have pointed to the *Bruch* court's passing reference to the old rule that "a court of equity will not interfere to control" a trustee who exercises in "a discretion vested in them by the instrument with which they act." *Bruch*, 489 U.S. at 112, (quoting *Nichols v. Eaton*, 472 U.S. 716, 724-725 (1875)). Just as predictably, they have rarely acknowledged the Court's observation that "[o]f course, if a plan gives discretion to an administrator or fiduciary who is operating under a possible or actual conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion." *Bruch*, 489 U.S. at 115, (quoting Restatement (Second) of Trusts § 187 cmt. d (1959)). To the disappointment of plan administrators with conflicts of interest, the majority of courts of appeals have striven, in

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through a process of collective bargaining. Today virtually all benefit plans are contracts of adhesion. *See* John H. Longbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and the Review of Benefit Denials After ERISA*, 101 Nw. U.L. Rev. 1315, 1323 (2007) (ERISA plans are characteristic contracts of adhesion, offered on a take the job or leave it basis. As a practical matter the employee has no opportunity to bargain with the employer on such matters as the standard of review of benefit denials."); *see also* Alison M. Sulentic, *Secrets Lies & ERISA: The Social Ethics of Misrepresentations and Omissions in Summary Plan Descriptions*, 40 J. Marshall L. 731 (2007).

accordance with *Bruch*, to temper their deference to their decisions by considering their conflict "as a factor." To do this, these eight courts of appeal use varying forms of "sliding scale" analysis to determine the degree of deference appropriate in each particular case. In addition, two courts of appeal have sanctioned the use of burden-shifting. *See* Brief Amicus Curiae Brief of the United States in Support of Petition for Writ of Certiorari at 7-10 (describing different approaches.)

A minority of courts of appeals have taken a different approach. These courts have forged a peculiarly narrow definition of "conflicts of interest," indeed, a definition so narrow that, in these circuits meaningful judicial review in such cases has all but ceased to exist. In the circuits that have taken this approach, an administrator whose assets are diminished each time it grants a claim is not presumed to have interests in conflict with those it adjudicates. Such a conflict only exists if the participant somehow manages to demonstrate to the court that "the administrator was in fact influenced by such conflict." *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1255-56 (2d. Cir. 1996).[3] Absent such a showing, the court reviews the

[3] This is the position taken in the first, second, and seventh circuits. *See, e.g.*, *Wright v. R.R. Donnelly & Sons Co. Group Benefits Plan*, 402 F.3d 67 (1st Cir. 2005); *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975 (7th Cir. 1999); *Pagan v. NYNEX Pension Plan*, 52 F.3d 438 (2d Cir. 1996).

decision under the deferential arbitrary or capricious standard. Unsurprisingly, this is the approach that Petitioners have asked this Court to impose nationally.

There is no need to speculate about what the consequences will be if Petitioners have their way; one need only look at what has happened where their proposed rule has already been adopted. Simply put, the effect has been a judicial regime of passive acquiescence to virtually all fiduciary decisions, irrespective of whether the courts themselves believe the decisions to be unfair or mistaken.

This is demonstrated, for example, by a review of the cases in which the issue was raised and resolved by one of the four district courts in New York State since the United States Court of Appeals for the Second Circuit first adopted this approach in *Pagan v. NYNEX Pension Plan*, 52 F.3d 438 (2d Cir. 1996). Of the 65 published or electronically available cases, only two found the plaintiff able to carry the burden.[4]

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[4] The two cases are *Diamond v. Treasurers & Ticket Sellers Union Local 751 Pension Fund*, No. 05 Civ. 1937, 2006 WL 2462907 (S.D.N.Y. Aug. 22, 2006) (plaintiff demonstrated that personal animus by plan manager affected decision); and *Schwartz v. Oxford Health Plans,* 175 F. Supp. 2d 581, 590-91 (S.D.N.Y. 2001) (plaintiff demonstrated conflict of interest affected denial of monies for cancer treatment). In a third case, not included in the total, also from the Southern District, *Suozzo v. Bergreen*,

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No. 00 CIV. 9649, 2002 WL 1402316 (S.D.N.Y. June, 27, 2002), the court refused to decide the issue on a motion to dismiss inasmuch as the court did not yet have the administrative record. The ultimate resolution of the issue is unknown. The cases in which the plaintiff failed to carry the burden are: *Bacquie v. Liberty Mut. Ins. Co.*, 247 Fed. Appx. 296 (2d Cir. 2007); *Russo v. Continental Cas. Co.*, 214 Fed. Appx. 7 (2d Cir. 2007); *Flanagan v. First Unum Life Ins.*, 170 Fed. Appx. 182 (2d Cir. 2006); *Smith v. First UNUM Life Ins. Co.,* 157 Fed. Appx. 332 (2d Cir. 2005); *Waksman v. IBM Separation Allowance Plan,* 138 Fed. Appx. 370 (2d Cir. 2005); *Kirk v. Readers Digest Ass'n.,* 57 Fed. Appx. 20 (2d Cir. 2003); *Krizek v. Cigna Group Ins.*, 345 F.3d 91 (2d Cir. 2003); *Caidor v. Chase Manhattan Bank,* 29 Fed. Appx. 704 (2d Cir. 2002); *Fay v. Oxford Health Plan*, 287 F.3d 96 (2d Cir. 2002); *Pulvers v. First UNUM Life Ins. Co.*, 210 F.3d 89 (2d Cir. 2000); *Whitney v. Empire Blue Cross & Blue Shield*, 106 F.3d 475 (2d Cir. 1997); *Sullivan v. LTV Aerospace & Defense Corp.*, 82 F.3d 1251, 1255-56 (2d Cir. 1996); *Meehan v. Atlantic Mut. Ins. Co.*, No. 06-CV-3265, 2008 WL 268805 (E.D.N.Y. Jan. 30, 2008); *Gannon v. Aetna Life Ins. Co.*, No. 05 Civ. 2160, 2007 WL 2844869 (S.D.N.Y. Sept. 28, 2007); *Fedderwitz v. Metropolitan Life Ins. Co., Inc.'s Disability Unit*, No. 05 CV 10193, 2007 WL 2846365 (S.D.N.Y. Sept. 27, 2007); *McGann v. Travelers Property Cas. Corp.*, No. 06-CV-527, 2007 WL 2769500 (E.D.N.Y. Sept. 21, 2007); *Guglielmi v. Northwestern Mut. Life Ins. Co.*, No. 06 Civ. 3431, 2007 WL 1975480 (S.D.N.Y. July 6, 2007); *McCauley v. First UNUM Life Ins. Co.*, No. 07 Civ. 7662, 2006 WL 2854162 (S.D.N.Y. Oct. 5, 2006); *Greenberg v. Unum Life Ins. Co. of Amer.*, No. CV-03-1396, 2006 WL 842395 (E.D.N.Y. Mar. 27, 2006); *Harrison v. Metropolitan Life Ins. Co.*, 417 F. Supp. 2d. 424 (S.D.N.Y. 2006); *Pelosi v. Schwab Capital Mkts., L.P.*, 462 F. Supp. 2d 503 (S.D.N.Y. 2006); *Nelson v. Unum Life Ins. Co. of Amer.*, 421 F. Supp. 2d 558 (E.D.N.Y. 2006); *Marasco v. Bridgestone/Firestone, Inc.*, No. 02-CV-6257, 2006 WL 354980 (E.D.N.Y. Feb. 15, 2006); *Lee v. Aetna*
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Life & Cas. Ins. Co., No. 05 Civ. 2960,2006 WL 345854 (S.D.N.Y. Feb. 13, 2006); *Badawy v. First Reliance Standard Life Ins. Co.,* No. 04 Civ. 01619, 2005 WL 2396908 (S.D.N.Y. Sept. 28, 2005); *Anderson v. Sotheby's Inc. Severance Plan*, No. 04 Civ. 8180, 2005 WL 2583715 (S.D.N.Y. Oct. 11, 2005); *Pava v. Hartford Life & Accident Ins. Co.*, No. 03 CV 2609, 2005 WL 2039192 (E.D.N.Y. Aug. 24, 2005); *Nerys v. Building Service 32B-J Health Fund,* No. 03 Civ. 0093, 2004 WL 2210256 (S.D.N.Y. Sept. 30, 2004); *Owen v. Wade Lupe Constr. Co.,* 325 F. Supp. 2d 146 (N.D.N.Y. 2004); *Chan v. Hartford Life Ins. Co.,* No. 02 Civ. 2943, 2004 WL 2002988 (S.D.N.Y. Sept. 8, 2004); *Snyder v. First Unum Life Ins. Co.,* No. 02-CV-889S, 2004 WL 1784334 (W.D.N.Y. Aug. 6, 2004); *Shutts v. First Unum Life Ins. Co.,* 310 F. Supp. 2d 489 (N.D.N.Y. 2004); *Tocker v. Philip Morris Cos. Inc.*, 346 F. Supp. 2d 460 (S.D.N.Y. 2004); *Cook v. New York Times Co. Long-Term Disability Plan,* No. 02 Civ. 9154, 2004 WL 203111 (S.D.N.Y. Jan. 30, 2004); *Couture v. UNUM Provident Corp.*, 315 F. Supp. 2d 418 (S.D.N.Y. 2004); *Wagner v. First Unum Life Ins. Co.,* No. 02 Civ. 9135, 2003 WL 21960997 (S.D.N.Y. Aug. 13, 2003); *Doe v. Cigna,* 304 F. Supp. 2d 477 (W.D.N.Y. 2003); *Bergquist v. Aetna U.S. Healthcare,* 289 F. Supp. 2d 400 (S.D.N.Y. 2003); *Armstrong v. Liberty Mut. Life Assur. Co.,* 273 F. Supp. 2d 395 (S.D.N.Y. 2003); *Scannell v. Metropolitan Life Ins. Co.*, No. 03 Civ.990, 2003 WL 22722954 (S.D.N.Y. Nov. 18, 2003); *Henar v. First Unum Life Ins. Co.,* No. 02 Civ. 1570, 2002 WL 31098495 (S.D.N.Y. Sept. 19, 2002); *Maniatty v. Unumprovident Corp.,* 218 F. Supp. 2d 500 (S.D.N.Y. 2002); *Rosenthal v. First Unum Life Ins. Co.,* No. 00 CIV. 3204, 2002 WL 975627 (S.D.N.Y. May 9, 2002); *Thompson v. General Elec. Co.,* No. 01 Civ. 4438, 2002 WL 482862 (S.D.N.Y. Mar. 29, 2002); *Zervos v. Verizon New York, Inc.,* No. 01 CIV 685, 2001 WL 1262941 (S.D.N.Y. Oct. 22, 2001), *rev'd on other grounds,* 277 F.3d 635 (2d Cir. 2002); *Corvi v. Eastman Kodak Co. Long Term Disability Plan,* No. 01 CIV 365, 2001 WL 484008 (S.D.N.Y. May 8, 2001); *Flynn v. Hach,* 138 F. Supp. 2d
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The reasons for this are not difficult to discern. Even in the minority of cases in which there is "a smoking gun" that shows that the conflict affected the decision, it is rarely, if ever, in the possession of the plaintiff, the party carrying the burden of proof. And even when discovery is allowed, it is unlikely that the ordinary participant or beneficiary has the level of resources that enabled, for example, a team of government lawyers to conduct the kind of wide ranging investigation that led to the uncovering of Unum's biased clams adjudication. *See* Brief for Respondent at 16-17.

The impracticality and unfairness of using this subjective definition is implicitly indicated by the fact that it is not the one used in the law of trusts or in the rules that govern the disqualification of adjudicators ranging from judges to baseball umpires. *Id.* at 16. This is

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334 (E.D.N.Y. 2001); *Bjork v. Eastman Kodak Co.*, 189 F. Supp. 2d 3 (W.D.N.Y. 2001); *Turay v. Aetna U.S. Healthcare*, 160 F. Supp .2d 557 (S.D.N.Y. 2001); *Risenhoover v. Bayer Corp.,* 83 F. Supp. 2d 408 (S.D.N.Y. 2000); *Administrative Comm. of the Time Warner, Inc. Benefit Plans v. Biscardi,* No. 99 CIV. 12270, 2001 WL 286749 (S.D.N.Y. Mar. 21, 2001); *Boesel v. The Chase Manhattan Bank,* 62 F. Supp. 2d 1015 (W.D.N.Y. 1999); *Weissman v. First Unum Life Ins. Co.,* 44 F. Supp. 2d 512 (S.D.N.Y. 1999*); DeVere v. Northrop Grumman Corp.,* No. 97-CV-3324, 1999 WL 182670 (E.D.N.Y. Mar. 24, 1999); *Elsroth v. Consolidated Edison,* 10 F. Supp. 2d 427 (S.D.N.Y. 1998); *Semmler v. Metropolitan Life Ins. Co.,* 172 F.R.D. 86 (S.D.N.Y. 1997).

not surprising. As the United States pointed out, at the time *Bruch* was argued, it is "illogical to assume that administrators . . . whose benefits are paid from the employer's assets will function with the same impartiality as a neutral trustee of a funded plan, since the administrator's employer will sustain a financial loss with every award of benefits. Despite Firestone's insistence that self-interest played no role in its denial of respondents' claims, and whether or not it did in this case, the members of this Court need not 'close [their] eyes to what [they] must perceive as men." Brief for United States as Amicus Curiae in *Bruch* at 11-12. (quoting *People ex. Rel. Portland Cement Co, v. Knapp*, 230 N.Y. 48, 63, 129 N.E. 202, 208, *cert. denied*, 256 U.S. 702 (1921) (brackets added by government; citation to petitioner's brief omitted)).

2. THE DEFERENCE ACCORDED ADMINISTRATIVE AGENCIES SHOULD NOT BE EXTENDED TO DUAL ROLE ADMINISTRATORS BECAUSE BENEFIT PLANS DO NOT PROVIDE THE PROCEDURAL PROTECTIONS REQUIRED OF AGENCIES

It is ironic that some courts have come to cite *Bruch* as authority for treating ERISA-plan decisions as if they were administrative decisions, and for adopting from administrative law the "arbitrary and capricious" standard in reviewing those decisions. The applicability of that standard was the central contention of the employer in *Bruch*, and almost the entire

decision is devoted to its refutation. The Court's rejection of the employer's argument was not based on an abstract application of trust law but on the Court's recognition that Congress had used trust law as a means of effecting its goal of "promot[ing] the interests of employees and their beneficiaries in employee benefit plans." *Bruch*, 489 U.S. at 114 (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983)).

Even if ERISA did not "abound with the language and terminology of trust law," *Bruch*, 489 U.S. at 109, the application of administrative law's deferential standard of review to ERISA claim denials by dual role administrators would be illogical because ERISA claimants do not enjoy *any* of the procedural safeguards provided by administrative agencies. *See Ramsey v. Hercules, Inc.,* 77 F. 3d 199, 205 (7th Cir. 1996); *Brown v. Blue Cross and Blue Shield of Ala., Inc.*, 898 F.2d 1556, 1564 n.7 (11th Cir. 1990).

To list the safeguards that claimants before federal agencies enjoy, but which ERISA claimants do not, is to list the elements of fairness itself. Above all, agency claimants enjoy the right to a full evidentiary hearing, 5 U.S.C. § 554(c)(2), "conducted in an impartial manner" by a duly appointed administrative law judge or other impartial decision-maker, 5 U.S.C. § 556(a). These adjudicators are "functionally comparable" to federal judges. *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 756-57 (2002) (quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978)) (citation

omitted). They have the power to issue subpoenas, 5 U.S.C. § 556(b)(2), the power to "rule on offers of proof and receive relevant evidence," 5 U.S.C. § 556(b)(3), the power to take or require the taking of depositions "when the ends of justice would be served," 5 U.S.C. § 556(b)(4), and the power to "regulate the course of the hearing," 5 U.S.C. § 556(b)(5). *See Federal Maritime Comm'n*, 438 U.S. at 513. And if, despite these safeguards, the agency fact-finding process is found to be inadequate, a reviewing court applies de novo review. *See* 5 U.S.C. § 706(2)(f).

Crucial to this scheme is the impartiality of the agency and of the men and woman it employs to hear and decide claims. Their impartiality, of course, requires the absence of any objective conflicts of interest. *See* Brief for Respondent at 16-17, 25-30 and authorities cited therein. When an agency decision-maker does have such a conflict, it is redressed not through judicial review—heightened or otherwise—but simply by disqualification. *See Gibson v. Berryhill*, 411 U.S. 564, 579 (1972); Kenneth C. Davis, *Administrative Law Text* § 12.04, p. 250 (1972). All told, the elements of the administrative process, which mirror those used by courts, simultaneously fulfill the requirements of due process and decrease the likelihood of an erroneous decision.

The similarities of the procedures used by administrative agencies and courts, and of the corresponding reliability of their decisions, put into sharper relief the qualitative difference

between administrative adjudication and decision-making by conflicted ERISA fiduciaries. This qualitative difference was addressed by Judge Posner when he observed, with reference to adjudications made by the Social Security Administration, that such decisions were made by "a public agency that denies benefits only after giving an applicant an opportunity for a full and fair adjudicative hearing before a judicial officer, an administrative law judge. The procedural safeguards thus accorded, designed to assure a full and fair hearing, are missing from determinations by plan administrators." *Herzberger v. Standard Ins.* Co., 205 F.3d 327, 332 (7th Cir. 2000).

3. A DEFERENTIAL STANDARD OF REVIEW FOR CONFLICTED ADMINISTRATORS WOULD VIOLATE CONGRESS'S INTENTION THAT PARTICIPANTS BE PROTECTED THROUGH THE COURTS

Congress could have provided claimants with an authentic administrative process with all the safeguards mentioned in the last argument. In fact, Congress considered, but decided against, creating an administrative agency to adjudicate claims in the manner of other federal agencies. *See* 2 Subcommittee on Labor of the Senate Committee on Public Labor and Public Welfare, 94th Cong. 2d Sess. Legislative History of the Employee Retirement Security Act of 1974, 1835-1836 (Comm. Print 1976). As an alternative, Congress chose to protect participants by making plan administrators their fiduciaries, e.g., 29 U.S.C. § 1104, and by providing participants

with "appropriate remedies, sanctions, and ready access to the courts." 29 U.S.C. § 1001(b).

To this end, Congress enlarged district court jurisdiction to encompass suits brought by participants against benefit plans for failure to furnish them with plan documents, 29 U.S.C. § 1132(a)(1)(A); for monies due to them under the terms of the those documents, 29 U.S.C. § 1132(a)(1)(B); and for breach of fiduciary duty, 29 U.S.C. § 1109. Congress further endowed the courts with full equity jurisdiction in ERISA cases so they could serve as "a safety net offering appropriate equitable relief" to redress violations of ERISA that could not be remedied through any of the other statutory claims. *Varity v. Howe*, 516 U.S. 489, 512 (1996) (citing 29 U.S.C. § 1132(a)(3)). And, "in order to remove a possible procedural obstacle to having all proper parties before the court," Congress provided participants with nationwide service of process, H.R. Rep. 93-533, 93rd Cong., 2nd Sess. (Oct. 2, 1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655; *see* 29 U.S.C. § 1132(e)(2), provided exceptionally liberal venue provisions, 29 U.S.C. § 1132(e)(2), and gave judges the power to award attorney fees, 29 U.S.C. § 1132(g).

Each of the claims that ERISA affords participants is referred to as a "civil action," 29 U.S.C. § 1132(a), and nothing suggests that this phrase has anything other than its ordinary meaning. No reference is made to phrases such as "arbitrary and capricious," "abuse of discretion," or "substantial evidence," phrases that are easily recognized as signposts for the

deferential review of administrative proceedings. When Congress intends to limit the scope of district court review, it uses specific terms of art. As this Court has explained, "[i]n most instances, of course, where Congress intends review to be confined to the administrative record, it so indicates either expressly or by the use of terms like 'substantial evidence,' which has 'become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court." *Chandler v. Roudebush*, 425 U.S. 840, 862 (1976) (quoting *United States v. Bianchi & Co.*, 373 U.S. 709, 713 (1963)).

The typical pre-ERISA remedy was an action for breach of contract "in which the [state] court reviewed the employees' claim as it would any other contract claim . . . ." *Bruch*, 489 U.S. at 111. *See, e.g., Strickland v. American Confectionary & Bakers Union*, 1974 Ok. 111, 527 P.2 10 (1974) (contract action); *Jacoby v. Grays Harbor Chair & Mfg. Co.,* 77 Wash. 2d 911, 468 P.2d 666 (1970) (contract action decided after jury trial); *Ellis v. Emhart Mfg. Co.*, 151 Conn. 501, 891 A.2d 546 (1963) (contract action); *Frietzche v. First Western Bank & Trust Co.,* 168 Cal. App. 705, 336 P.2d 589 (1959) (action for declaration of contractual rights decided de novo); *Sigman v. Rudolph Wurlitzer*, 57 Ohio App. 4, 11 N.E.2d 878 (1937) (contract action decided after jury trial).

ERISA's preemption clause, which deprived state courts of the power to try such suits, was not intended to reduce the ability of participants to obtain judicial redress. As the legislative

history makes clear, Congress intended that the federal courts would be, if anything, more protective of participants than the state courts had been. See H.R. Rep. 93-533, 93rd Cong., 2nd Sess. (Oct. 2, 1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655. Under ERISA, the courts were expected to provide participants "the full range of legal and equitable remedies available in both state and federal courts." H.R. Rep. 93-533, 93rd Cong., 2nd Sess. (Oct. 2, 1973), reprinted in 1974 U.S.C.C.A.N. 4639, 4655. Thus in *Bruch*, the Court, in rejecting the employer's argument against de novo review, observed that, requiring anything less "would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Bruch*, 489 U.S. at 114.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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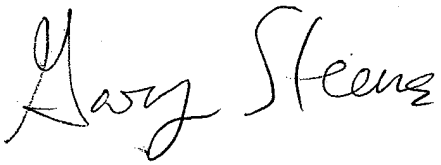
Pursuant to Rule 33(h) of the Rule of the Supreme Court, I certify that, in the brief for amici curiae Brooklyn Legal Services and Legal Services NYC, the number of words, including those contained in footnotes, is 4305.



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COUNTY OF NEW YORK) SS.

Dave Jackson, Being duly sworn, deposes and says that deponent is not party to the action, and is over 18 years of age.

That on 3/31/2008 deponent caused to be served 3 copy(s) of the within

Brief for South Brooklyn Legal Services and Legal Services NYC as Amici Curiae in Support of Respondent

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Sworn to me this
March 31, 2008

JOANNE KIM
Notary Public, State of New York
No. 01KI6121208
Qualified in Queens County
Commission Expires January 10, 2009

Case Name: Metlife (Metropolitan Life Insurance) v. Wanda Glenn (4)

Docket/Case No.: 06-923