No. 09-448

In The Supreme Court of the United States

BRIDGET HARDT,

Petitioner,

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Respondent Reliance Standard Life Insurance Company abandons the central argument it urged below and in its opposition in this Court (*see* BIO 2-9), and that the Fourth Circuit adopted in vacating the district court's fee award—namely, that ERISA Section 502(g)(1) is a "prevailing party" statute governed by *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001). Instead, Reliance now advances as a new theory that Section 502(g)(1) is not a traditional "prevailing party" statute as in *Buckhannon*, but rather is governed by *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), which expressly rejected a strict "prevailing party" requirement when a statute lacks that term of art. At the same time, Reliance seeks to apply the strictest interpretation (however untenable) of *Buckhannon*'s "prevailing party" standard.

Respondent's desertion of the Fourth Circuit's rule that ERISA Section 502(g)(1) is a *Buckhannon* "prevailing party" statute readily allows the Court to resolve this case on the narrow ground raised by the first question presented. Reliance below, and in opposing certiorari here, did not object to the well-established five-factor test, which has proved during the past thirty years to be a workable standard to appropriately guide—and limit—district courts' Congressionally-granted discretion to award fees to either party. The five-factor test is consistent with *Ruckelshaus*. It remains faithful to ERISA's trust law origins and express goal to ensure participants' and beneficiaries' rights are not underenforced, while allowing ERISA-governed plans to develop. The Court accordingly should give effect to Congress' considered decision not to include the "prevailing party" term of art by reversing the Fourth Circuit.

If the Court reaches the second question, it should reject Reliance's attempt to meld *Ruckelshaus* into *Buckhannon* and other "prevailing party" cases. Reliance makes the remarkable argument—notwithstanding *Ruckelshaus*' express rejection of a narrow "prevailing party" requirement—that *Ruckelshaus*' modest standard of "some success on the merits" means that all similarly-worded fee-shifting statutes that do not use the "prevailing party" term of art must be interpreted just like "prevailing party" statutes. Reliance further argues that those statutes require judicial action in the form of a judgment or consent decree before fees may be awarded and that this judicially-ordered relief must be substantive, not purely procedural.

Reliance's argument rests on a fundamental misreading of *Ruckelshaus*, which interpreted statutes containing "whenever appropriate" fee-shifting language. *Ruckelshaus* acknowledged that these "whenever appropriate" fee statutes—and Reliance concedes "there is no principled difference" between "whenever appropriate" fee statutes and Section 502(g)(1) (Resp. Br. at 19)—are more expansive than statutes containing the "prevailing party" term of art. *See* 463 U.S. at 686 n.8, 689. *Ruckelshaus* recognized that "suits that force[] defendants to abandon illegal conduct, although without court order," fall within this more expansive category. *Id*. at 686 n.8. The Court viewed Congress' decision not to use the "prevailing party" term of art as "reject[ing] the restrictive notions of 'prevailing party'" that had applied in cases where courts refused to award fees—*e.g.*, where the claimant secured the very relief sought from a private party in a non-judicial proceeding after the lawsuit was filed or where the claimant received the requested relief after filing but without a formal court adjudication. *See id*. at 689-90 (citing *Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976) and *Goodall v. Mason*, 419 F. Supp. 980 (E.D. Va. 1976) as examples of cases rejected by the more expansive "whenever appropriate" fee-shifting term).

By further proposing a mandatory "court-ordered judgment on the merits" standard, coupled with a formalistic (and unworkable) "substance vs. purely procedural relief" overlay, Reliance ultimately turns *Ruckelshaus* on its head as more restrictive than *Buckhannon*'s "prevailing party" test.

This is not to say that Hardt does not meet *Ruckelshaus* and *Buckhannon* as written; she does. Hardt obtained a court order finding that she "did not get the kind of review to which she was entitled under applicable law" in that Reliance's benefits review "failed to comply with [] ERISA" and was "not based on substantial evidence." Pet. App. 47a, 48a. That order, which the district court specifically stated was "on [the] merits" (Pet. App. 41a n.3), effectively vacated Reliance's decision to terminate Hardt's LTD benefits and directed Reliance to reconsider her continued eligibility for benefits in accordance with law. This judicial relief constitutes "success on the merits." *See Shalala v. Schaefer*, 509 U.S. 292, 302 (1993).

Reliance has not provided a valid reason why the Court should superimpose a prevailing party or judgment requirement upon Section 502(g)(1) when those terms, by Congressional design, were not included there. Nor has Reliance offered any justification for this Court to discard a thirty-year-old, effectively-functioning test that is true to ERISA's equity roots, its express statutory text and purpose, and this Court's precedent. At bottom, Reliance's proposed rules not only upset settled law, but are unfaithful to ERISA's text and explicit goal to protect claimants and beneficiaries from underenforcement of their statutory rights.

ARGUMENT

I. The Court Should Decide the Case on the Ground That ERISA Section 502(g)(1) Does Not Limit Fees To a "Prevailing Party."

Respondent no longer contends that Section 502(g)(1) is a *Buckhannon* "prevailing party" statute. Yet that was the basis for the Fourth Circuit's judgment. That judgment cannot stand, as Reliance effectively concedes by abandoning its premise. *See* Resp. Br. 33 (arguing "modified prevailing party standard" from *Ruckelshaus* governs). Indeed, Reliance does not cite *Buckhannon* at all in Part I of its argument on the first question presented. The Court should decide—consistent with all the parties' submissions—that Section 502(g)(1) is not a "prevailing party" statute governed by *Buckhannon.*

A. The First Question Presented Is Properly Before the Court and Respondent Has Waived Its Argument Otherwise.

Reliance half-heartedly asserts in a footnote (at 9 n.4), that the Court should not address the first question presented because the question supposedly was not pressed or passed on below. Reliance waived this assertion by not raising it in its brief in opposition. *See* Rule 15.2; *see also* A*etna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004) (deeming respondent's argument waived where not raised in brief in opposition).

Reliance's position also is factually and legally meritless. Relying on its longstanding precedent, the Fourth Circuit held: "It is well settled that 'only a prevailing party is entitled to consideration for

attorney's fees in an ERISA action.'" Pet. App. 7a-8a (quoting *Martin v. Blue Cross & Blue Shield of Va., Inc.*, 115 F.3d 1201, 1210 (4th Cir. 1997)). The first question presented—whether ERISA restricts an award of fees only to a prevailing party—was passed on by the court below; indeed, it was central to the judgment. The first question thus is properly before the Court. *United States v. Williams*, 504 U.S. 36, 42 (1992) (holding traditional rule "permit[s] review of an issue not pressed [below] so long as it has been passed upon").[1]

B. Section 502(g)(1)'s Text Demonstrates It Is Not a "Prevailing Party" Statute and Does Not Require a Judgment To Trigger Fees.

As explained in Hardt's opening brief (at 20-27), Congress specifically determined on two separate occasions *not* to require either prevailing party status or a judgment in order to trigger eligibility for a fee award under Section 502(g)(1). *See also* United States Br. 11-14. Reliance nonetheless asserts (at 33, 35, 47-47) that Section 502(g)(1) requires a court-ordered judgment granting a participant's claims for benefits before fees may be awarded. In addition to misreading *Ruckelshaus* in this regard, Reliance's position (at 22-27) contradicts the plain language of the statute, as well as its context and history.

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[1] The Court also should reject Reliance's contention (at 9 n.4) that the second question does not merit review. This Court already has granted review on that important issue dividing the lower courts. If, however, the Court holds that Section 502(g)(1) is not a "prevailing party" statute, then it need not reach the second question, as Hardt is entitled to fees under the five-factor test.

For example, Reliance glosses over the fact that ERISA's precursor, the Welfare and Pension Plans Disclosure Act, *required a judgment* before fees could be awarded. 29 U.S.C. § 308(c) (providing court "may in its discretion, in addition to any judgment awarded to the plaintiff," award fees "paid by the defendant") (repealed 1974). Reliance notes that Congress, in enacting ERISA to replace the WPPDA, expanded fee awards to be granted "to either party." Without any support, Reliance speculates from that (at 23) that Congress may not have wanted to mandate fees to prevailing parties, but fails to acknowledge that fee awards under the WPPDA already were discretionary, not automatic. *See*, *e.g.*, *Kolentus v. Avco Corp.*, 798 F.2d 949, 960 (7th Cir. 1986).[2]

Reliance further fails to address that Congress not only extended to whom fees could be awarded (and

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[2] Reliance mistakenly relies (at 24-25) on the Securities Exchange Act of 1934, including its legislative history, and the Trust Indenture Act as support for its view that ERISA's fee provision was meant to prevent strike suits. Those provisions from a Congress forty years prior to ERISA's enactment have no bearing here, as they sought to prevent strike suits by authorizing the posting of a bond to cover anticipated costs (including attorney's fees). See 15 U.S.C. §§ 78i(e), 78r(a); 15 U.S.C. § 77www(a).

By contrast, Section 502(g)(1) does not permit a bond posting to curb ERISA claims. Congress instead declared an object of ERISA "to protect" participants and their beneficiaries by "providing for appropriate remedies, sanctions, and *ready access to the Federal courts*." 29 U.S.C. § 1001(b) (emphasis added). This text is clear enough, but legislative history shows Congress rejected requests to add a strike suit provision to ERISA. See Pet. Br. at 21-22 n.3.

from whom fees could be taxed), but also expanded the *nature of the act* necessary to trigger a fee award. In ERISA, Congress *removed* the requirement of a judgment to trigger fees that existed in the relatively ineffectual WPPDA. *Compare* 29 U.S.C. § 308(c) (repealed 1974), *with* 29 U.S.C. § 1132(g)(1).

And Reliance simply is wrong when it suggests (at 31 n.11) that the later insertion of "prevailing party" and "judgment" language in separate sections of ERISA is irrelevant to interpreting Section 502(g)(1). Contrary to Reliance's suggestion otherwise (*id.*), Congress simultaneously inserted *in the same legislation* the word "judgment" within the newly-created Section 502(g)(2) and included the "prevailing party" term of art in 29 U.S.C. § 1451(e), but amended and reenacted Section 502(g)(1) without such language. *See* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 104(2), 94 Stat. 1208, 1263 (adding 29 U.S.C. § 1451(e)); *id.*, at §306(b), 94 Stat. 1295 (amending original Section 502(g) and enacting new Section 502(g)(1) and its statutory sibling as Section 502(g)(2)).

This course of events demonstrates Congress' intent not to have Section 502(g)(1) governed by these more restrictive fee standards. *See Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2349 (2009) ("negative implications raised by disparate provisions are strongest" where the provisions were "considered simultaneously when the language raising the implication was inserted"); and *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) ("when Congress includes particular language in one section of a statute but omits it in another section of the same

Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations omitted).

In sum, Reliance offers no valid reason to override Congress' clear intent that Section 502(g)(1) not require a judgment or narrow "prevailing party" standard before fees may issue.

C. The Five-Factor Test Is Consistent With *Ruckelshaus* and Has Proved To Be a Workable Test Faithful To ERISA's Explicit Purpose, While Permitting the Growth of ERISA Plans.

Reliance complains (at 19, 27, 51) that the five-factor test is inconsistent with *Ruckelshaus* and ERISA's goal to encourage formation of employee benefit plans. This argument fails.

First, Reliance has waived this argument, twice. Reliance contends (at 60 n.27) that Hardt should have complained below regarding the five-factor test. Yet, Hardt *prevailed* before the district court on her motion for fees. She did not appeal that award. Reliance did. Reliance chose not to challenge the use of or findings under that standard, instead limiting itself to the *Buckhannon* "prevailing party" issue. *See* Cert. Pet. at 11. Reliance again failed to raise the validity of the five-factor test as an issue in its brief in opposition. *See* Rule 15.2.[3]

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[3] Reliance errs in claiming (at 5) it could not obtain review of the district court's order, which essentially vacated Reliance's decision to terminate Hardt's (*cont.*)

Regardless, the five-factor test is consistent with *Ruckelshaus*. Reliance shadowboxes when it asserts that the five-factor test would allow a completely unsuccessful litigant to be awarded fees. That is not Hardt's position, nor is it the way the test operates in the real-world. Indeed, in its merits brief Reliance fails to cite a single case where the five-factor test has led to an award of fees to a party that did not achieve some success or otherwise confer a benefit on an ERISA plan or its participants and beneficiaries. That absence speaks volumes regarding whether this longstanding test has been consistent with *Ruckelshaus* over the past thirty years.

Hardt's opening brief (at 36-37) stated that the five-factor test generally will limit fees to litigants who have achieved some success on their claims. This point recognized that under trust law, to which Congress expected courts to turn for guidance in ERISA cases, the determination of "success" may look beyond the parties and specific claims to include considerations related to the trust. The trust law

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LTD benefits and required Reliance, under explicit threat of judgment, to re-determine her entitlement to benefits within thirty days. Yet the Fourth Circuit has not taken a position within the circuit split regarding whether remedial ERISA "remand" orders are appealable. *See* United States Br. 28 n.8. Reliance also arguably could have, but did not, seek immediate appeal under 28 U.S.C. § 1292(b). Finally, if Reliance disagreed with the court's ruling and believed Hardt was not disabled at the time of the decision under review, Resp. Br. 44, Reliance could have maintained its position and then appealed the resulting district court judgment.

cases cited by Hardt (at 32-35) and the United States (at 15-19) establish that courts were not constrained by narrow "prevailing party" requirements. Reliance does not and cannot contest that these cases explicitly state that courts may award fees "regardless of outcome," *Hurley v. Noone*, 196 N.E.2d 905, 910 (Mass. 1964), or even to "an unsuccessful litigant," *In re Bitton's Trust*, 244 N.Y.S.2d 926, 931-33 (Sup. Ct. 1963). *See* Resp. Br. 65 n.30.

These trust cases recognize the availability of awards to parties who did not receive a favorable judgment where the suit conferred some benefit to the trust or person related to it. *See Hurley*, 196 N.E.2d at 910; *In re Bitton's Trust*, 244 N.Y.S.2d at 931-33; *In re Catell's Estate*, 38 A.2d 466 (Del. Ch. 1944) (awarding fees on ground that the suit arose from trustee's failure to abide by trust terms, even though the party was unsuccessful in his claim to remove the trustee); *Daniel v. White*, 252 S.E.2d 912, 915 (S.C. 1979) (awarding fees to losing plaintiff because he performed a service to the trust and benefited others); *Old Colony Trust Co. v. Rodd*, 254 N.E.2d 886, 890 (Mass. 1970 (mistakenly labeled as *Marshall v. Babson Inst.* (United States Br. 17), but correctly cited and described as permitting consideration of fee award despite affirming lower court decree against the plaintiff); *see also*, *e.g.*, *Grein v. Cavano*, 379 P.2d 209, 214 (Wash. 1963) ("The party whose participation in the litigation brings benefit to the common fund is entitled to an award of reasonable attorneys' fees regardless of his success in litigation.").

In any event, this case does not present the outer limits of whether a court would necessarily abuse its discretion if it awarded fees to a claimant who did not obtain some success for herself or the plan or its participants and beneficiaries. The five-factor test takes these considerations into account, and no case in three decades that the parties could find has held that the test would extend to parties who achieved nothing.

Moreover, endorsing the five-factor test here would not, as Reliance claims (at 31-33), affect other statutes listed in Reliance's appendix. Reliance fails to account for application of trust law principles in interpreting ERISA, *see* Pet. Br. 32-37; United States Br. 15-21, which distinguishes Section 502(g)(1) from similarly-worded statutes serving different purposes in unrelated contexts. Reliance also refuses to recognize that, unlike other statutes, ERISA's express purpose is "to protect" participants and beneficiaries by providing "appropriate remedies, sanctions and ready access to Federal courts." 29 U.S.C. § 1001(b).

In reality, the five-factor test has long coexisted with the development and growth of ERISA-covered plans. *See* Resp. Br. 60 (acknowledging "every circuit" "applies some version of the five-factor test" since its adoption in 1978). Reliance provides no empirical support for its supposition that eliminating the Fourth Circuit's extra-statutory "prevailing party" requirement would somehow lead to an explosion of fee awards, nor that it would affect adoption of ERISA plans. *Cf. Metro. Life Ins. Co. v. Glenn*, 128 S.Ct. 2343, 2349 (2008) ("We have no reason, empirical or

otherwise, to believe that our decision will seriously discourage the creation of benefit plans.").

* * *

The Fourth Circuit erred in reading the "prevailing party" test from *Buckhannon* into Section 502(g)(1). Hardt is entitled to fees under the five-factor test as determined by the district court in its appropriate discretion, and Reliance did not challenge that issue on appeal. Therefore, in vacating the Fourth Circuit's erroneous judgment, the Court should remand with instructions to enter the original attorney's fees order and to conduct further proceedings relating to Hardt's entitlement to fees for the appeals.

II. If the Court Reaches the Second Question Presented, Hardt Is Eligible for a Fee Award Based on the Judicial Order Finding an ERISA Violation and Requiring Compliance With the Statute, After Which the Administrator Granted the Benefits Sought.

For the above reasons, the Court need not reach the second question. But if it does, Hardt is entitled to fees because she meets both *Buckhannon*'s "prevailing party" test, and *Ruckelshaus*' more expansive standard. Pet. Br. 38-50; United States Br. 21-30.

Reliance now contends (at 13-33) that Section 502(g)(1) should be governed by *Ruckelshaus* (rather than *Buckhannon*). Reliance acknowledges that *Ruckelshaus* represents a more expansive standard for fees than a "prevailing party" statute. *Id.* at 26. But it then argues (at 34-50) that to satisfy *Ruckelshaus* a claimant must have procured success on the merits via a judicially-ordered judgment that

constitutes "substantive" relief—a new standard which is even more restrictive than *Buckhannon*'s "prevailing party" test.

The Court should not adopt Reliance's radical test. Reliance's position is based on a fundamental misreading of *Ruckelshaus*, conflicts with this Court's precedents, and undermines ERISA's carefully-crafted remedial scheme.

A. Reliance's Proposed Test Conflicts With the Holding of *Ruckelshaus* Because It Is More Restrictive Than *Buckhannon*.

To appreciate the extreme nature of Reliance's position, it helps to review what *Buckhannon* requires.

A party must satisfy two preconditions to become eligible for fees under a traditional "prevailing party" standard. First, the party "must succeed on any significant issue in litigation which achieves some of the benefit it sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)) (internal quotation marks omitted). The "touchstone" of that success "is the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Sole v. Wyner*, 551 U.S. 74, 82 (2007) (quoting *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 792-793 (1989)). Second, that material alteration must be judicially sanctioned. *Buckhannon*, 532 U.S. at 605.

Judgments on the merits or consent decrees, although sufficient, are not necessary to trigger fee awards under this "prevailing party" standard. *Buckhannon*, 532 U.S. at 605 (treating judgments and consent decrees as "examples" of judicial orders that constitute "a material alteration of the legal relationship"). In fact, interim fee awards are allowed "when a party has prevailed on the merits of at least some of his claims." *Id.* at 603 (quoting *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam)). And this is so "although final remedial orders [have] not been entered." *Hanrahan*, 446 U.S. at 757 (citing *Bradley v. Richmond School Board*, 416 U.S. 696 (1974)); *see Bradley*, 416 U.S. at 723 n.28 ("the entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of [a fee] award").[4]

B. Respondent Misreads *Ruckelshaus*.

Reliance misreads *Ruckelshaus* in two fundamental ways. First, Reliance improperly interprets *Ruckelshaus* as requiring judicially-ordered relief on the merits (though Hardt achieved that here, as discussed below). Nothing in

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[4] In *Bradley*, the statute under which fees were awarded, 20 U.S.C. § 1617 (since repealed), permitted awards only "[u]pon entry of a final order by a court of the United States." In allowing an interim award, the Court noted that "many final orders may issue in the course of litigation." *Id.* at 723. Thus, where a statute does not expressly make entry of final judgment a prerequisite, fee awards may be appropriate prior to entry of a formal, final judgment under Fed. R. Civ. P. 58 or dismissal under Fed. R. Civ. P. 41.

Ruckelshaus dictates that the requisite success under statutes that do not use the "prevailing party" term of art must derive from a court-ordered judgment on the merits or otherwise be judicially-sanctioned. (*Buckhannon* requires a "judicial imprimatur," but that is for "prevailing party" statutes.) *Ruckelshaus* recognized that the difference between prevailing party and "whenever appropriate" statutes includes not only the degree of success, but also the impetus for the success.

The Court specifically acknowledged that Congress in "whenever appropriate" fee statutes intended to authorize fees for "legitimate" lawsuits that "'forced defendants to abandon illegal conduct, although without a formal court order.'" *Ruckelshaus*, 463 U.S. at 686 n.8 (1983). The Court in *Ruckelshaus* also pointed to specific examples of cases Congress rejected by adopting the more expansive "whenever appropriate" fee-shifting term, including where the claimant secured the very relief sought in the lawsuit from a private party in a non-judicial proceeding and where the claimant received the requested relief after the lawsuit was filed but without a formal court adjudication. *See id*. at 689-90 (citing *Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir. 1976) and *Goodall v. Mason*, 419 F. Supp. 980 (E.D. Va. 1976)).

By citing these types of cases as ones in which fees could issue under the "whenever appropriate" statutes, *Ruckelshaus* rejected Reliance's argument that a party must obtain "substantive judicial relief" that can only be measured by the content of a judgment. Resp. Br. at 35, 45-47. Every court of

appeals to have considered the question agrees that *Ruckelshaus* differs from *Buckhannon* in this key respect and that *Ruckelshaus* continues to govern statutes that omit "prevailing party" language. *See* Pet. Br. 39 (citing cases). And Reliance's argument ignores that Congress specifically omitted from Section 502(g)(1) the requirement of a judgment. *See* Section I.B, *supra*.[5]

Second, Reliance inappropriately divides the world into "prevailing parties" and non-prevailing parties, and equates the totally losing parties in *Ruckelshaus*—those who were completely unsuccessful on every aspect of their claims—with all other so-called non-prevailing parties. Yet the thrust of *Ruckelshaus* was that Congress recognized and allowed for fees in the vast middle ground between the two extremes of a litigant who obtains "prevailing party" status and one who is otherwise "completely unsuccessful."

Reliance then misapplies *Ruckelshaus* by placing Hardt in the same category as the plaintiffs in *Ruckelshaus* who were "wholly unsuccessful" in their

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[5] Reliance therefore errs in relying on Fed. R. Civ. P. 54(d)(2), which by its terms does not apply when a statute "provide[s] otherwise." Moreover, where multiple claims are at issue, Rule 54(b) treats orders and decisions that adjudicate some but not all of the claims on the merits as something other than a judgment, unless the district court expressly determines otherwise. Under this Court's "prevailing party" jurisprudence an order that resolves some claims in favor of the plaintiff is sufficient to support a fee award for work on those claims, even if the timing must await a final judgment.

claims and requested fees against a defendant "who was completely successful on all issues." Hardt was a "prevailing party" in this case and by no means brought a "totally unsuccessful action." And Reliance in no way can be equated to a party who was "completely successful" on all issues.

As a result of Hardt's suit, the court effectively vacated Reliance's prior decision to terminate Hardt's LTD benefits, finding it violated ERISA and was unsupported by substantial evidence. The district court explicitly stated it was "assess[ing] the case on its merits." Pet. App. 41a n.3. As relief, the court required Reliance to consider specific evidence and act within 30 days, or judgment would issue in Hardt's favor. Hardt obtained the benefits during the court-supervised reconsideration. Once Reliance complied with the remedial order, the court ruled on the fee petition, entered judgment in Hardt's favor and dismissed the case.[6]

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[6] Reliance states (at 44 n.20) that the record appropriately is limited to evidence before the administrator at the time of the decision to terminate Hardt's benefits. Yet Reliance then asks the Court to open the record via a lodging to include a medical record generated more than two years after its decision to terminate Hardt's LTD benefits. *Id.* at 7 n.3.

The Court should decline the lodging. There is nothing in the record to support Reliance's assertion on appeal that it relied on this new material on "remand." Indeed, in contemporaneous filings with the Court and correspondence with Hardt, Reliance did not reference these records as a basis for granting Hardt the benefits. JA115a; 117a-123a.

The district court did not specify the type of dismissal after its prior "on [the] merits" "remand" order. Pet. App. 41a. Respondent speculates it was a dismissal on mootness grounds. Resp. Br. 48. But that does not square with its request to the district court that the "case [] be dismissed *with prejudice*," JA115a (emphasis added), which is shorthand for "on the merits." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001).

Regardless, the disposition here is nearly identical to that in a "sentence six" Social Security case, where fees are available after a Secretary grants benefits on remand. *See Shalala v. Schaefer*, 509 U.S. 292, 300 and n.4. In *Sullivan v. Hudson*, which this Court treats as a "sentence six" case (*see Schaefer*, 509 U.S. at 299-300 and n.3, n.4), the district court simply dismissed the case and entered judgment in favor of plaintiff *only* on attorney's fees. *See Hudson*, 490 U.S. 877, 882.

Hardt achieved a "material alteration" of the legal relationship between the parties by judicial order and thus satisfies *Buckhannon*, which necessarily means she also fulfills *Ruckelshaus'* lesser requirement of "success on the merits."

C. Reliance's Attempt To Characterize the Relief Granted In This Case as "Purely Procedural" Is Inaccurate and Inconsistent With Precedent.

Reliance asserts that the finding of an ERISA violation here cannot constitute success on the merits to support a fee award because the judicial relief for that violation—an effective vacatur of the benefits

decision and an order to issue a new one in accordance with the court's opinion—was "purely procedural," not substantive. Resp. Br. at 38-42. That is a false and inapt distinction, especially when one compares the truncated footnote Reliance sets forth with the full footnote as written by the district court. *Compare* Resp. Br. 41-42 (truncated footnote), *with* Pet. App. 20a n.5 (providing in the remainder: "Nonetheless, speculation as to what might have happened is useless in light of what actually did happen—namely, the defendant, under threat of judgment against it, reversed its decision and chose to award the plaintiff the precise relief she was seeking. Clearly, then, the *plaintiff was afforded judicially sanctioned relief*.") (emphasis added)).

The legal right at issue here includes the right to a full and fair claims process when determining benefits. *See* 29 U.S.C. § 1133. It also involves the right to ensure Reliance has faithfully carried out its fiduciary obligations in making that benefit determination. *See Glenn*, 128 S.Ct. at 2347 ("a benefit determination [is] a fiduciary act (*i.e.*, an act in which the administrator owes a special duty of loyalty to the plan beneficiaries"); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (same).[7] These rights may be enforced by a court order enjoining the violation or other appropriate equitable relief redressing the violation or enforcing the right. *See* 29 U.S.C. § 1132(a)(3); *see also*, *Varity Corp. v. Howe*, 516 U.S. 489, 512-15 (1996).

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[7] All cases respondent relies upon (at 39-41) to make its "substantive vs. purely procedural" argument pre-date *Bruch*'s recognition in 1989 that a benefits decision is a fiduciary act, later reinforced by *Glenn*.

That these rights also are related to a claim for benefits (indeed, are intertwined with it) does not make the relief afforded for such violations any less relevant for measuring "success on the merits." Without a "full and fair" review, the administrator abuses its discretion and violates a fiduciary duty, particularly when its decision, as here, is not supported by substantial evidence. *See Glenn*, 128 S.Ct. at 2347. In this regard, ordering the claims administrator to abide by the statutory-mandated "full and fair" review process constitutes relief for these violations.

Such a result also follows from the Social Security Act cases cited in Hardt's merits brief. Pet. Br. at 41-45 (citing *Shaefer* and *Hudson*); *see also*, United States Br. 24-28. A "sentence four" remand order" is identical to the district court's order in this case, except for the entry of judgment. While required under the SSA, 42 U.S.C. § 405(g), entry of judgment is not required under Section 502(g)(1). Yet in both cases the district court has found a violation of law and vacated the underlying benefits decision. As relief, the court orders a new benefits decision in accordance with the law. Thus, it is the finding of a violation in a judicially-enforced order that triggers eligibility for fees under a "prevailing party" statute in this context. *See Schaefer*, 509 U.S. at 302. The unique element of EAJA's judgment feature simply affects the *timing* of an award (within 30 days after entry of judgment), not *eligibility* for the award.

Reliance does not and cannot contend that the relief awarded in a "sentence four" Social Security case is any less "procedural" or more "substantive" than that awarded here. A court ordered "remand" for a new benefits determination due to a violation of law is enough to trigger "prevailing party" status—the order substantially affects the legal relationship between the parties. *See Schaefer*, 509 U.S. at 302. Accordingly, Reliance's attempted distinction between procedure and substance in this context is foreclosed by *Schaefer*.

This situation is entirely different from that in *Hanrahan*, on which Reliance relies for its proposed substantive/procedural distinction. The plaintiff in *Hanrahan* simply obtained reversal of a directed verdict issued by the district court; there was no finding that defendant had violated the law nor any order of relief on the merits of the claim. *See* 446 U.S. at 758-59. It is this distinction (not a procedure vs. substance distinction) that makes the difference in triggering eligibility for fees.

These events also reinforce that Reliance reached the correct result only after, pursuant to court order and under threat of judgment, it finally provided Hardt the "full and fair" review to which she was entitled by law. That result should have been achieved in the first instance had Reliance complied with ERISA. And Reliance's policy argument that administrators will "think twice" before awarding benefits or be incented to *deny* benefits on "remand" (at 51, emphasis in original) ignores the administrator's fiduciary obligations in benefits determinations and inappropriately places the focus

on an administrator's actions on "remand," rather than whether the original award was in accordance with law. Reliance's policy arguments thus counsel in favor of adopting Hardt's proposed rule (Pet. Br. at 40-41), which trigger's fees based on a "remand" order that, as here, is based on an ERISA violation. Fiduciaries should be incented to comply with the law in the first instance.[8]

In sum, an ERISA claim for benefits concerns not solely whether benefits should be awarded, but also whether the administrator acted lawfully in reviewing the evidence or applying the plan, usually including whether substantial evidence supports the determination. Courts that find the administrator acted arbitrarily and capriciously and therefore unlawfully (as here), have not simply made a procedural ruling on a question of law (as in *Hanrahan*). Instead, they have found that rights guaranteed by ERISA were violated. By remanding for a new determination, courts provide relief on the merits both in the sense of vacating the original decision and by mandating that the claimant receive the right to a full and fair review as required by statute. This result is sufficient to trigger an award of fees under "prevailing party" statutes, and therefore

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[8] Reliance errs in suggesting (at 40, 51) it is settled law that a court apply an abuse of discretion standard to review of a "remand" benefit decision by an administrator previously found to have violated a fiduciary duty on the same matter. *Cf.* Brief for United States as Amicus Curiae Supporting Respondents in *Conkright v. Frommert*, No. 08-810, at 9-10, 13-24.

should be sufficient to render a party eligible for fees under Section 502(g)(1).

D. Reliance's Rule Would Eviscerate Critical ERISA Enforcement Provisions.

ERISA relies on several enforcement mechanisms—which Reliance apparently deems "purely procedural"—to ensure participants and beneficiaries are protected. Under Reliance's test, those critical statutory rights would become meaningless.

For example, plan administrators are required to provide information and documents to participants and beneficiaries. *See* 29 U.S.C. § 1166 (requiring notice of ERISA rights and right to continue in plan); *id.* § 1021(e)(1) (requiring notice of excess pension assets to health benefits accounts); *id.* § 1021(f) (requiring annual notice for defined benefit plan funding and other information); *id.* § 1025(a) (requiring pension benefits statements with specific information); and *id.* § 1024(b)(4) (requiring copy of plan and other documents upon request). Many of these documents are necessary to determine whether ERISA has been violated, and ERISA allows private enforcement for violations. *See id.* § 1132(a)(1)(A), *id.* § 1132(c). Similarly, ERISA requires a benefit plan to allow an appeal of an adverse benefit decision. *Id.* § 1133(2).

Under Reliance's proposed rule, an administrator could refuse to provide mandated documents and information or refuse to process a benefit appeal and then, when ordered by a court to do so, argue that there is no right to a fee award because the order is

"purely procedural." This bizarre result cannot be the intent of Congress in enacting a fee provision allowing a court to award fees in its discretion to either party to protect rights of participants and beneficiaries.

III. Simply Applying Common Law Exceptions Would Render Section 502(g)(1) Superfluous.

Finally, to address Reliance's closing suggestion that the Court apply only existing common law exceptions to determine eligibility for awards under ERISA Section 502(g)(1): if Congress wanted only existing exceptions to the American Rule to apply, there would have been no need to enact the fee-shifting provision of Section 502(g)(1). Moreover, as explained in Hardt's opening brief (at 32-37), common law trust cases provide broad discretion to courts to award attorney's fees even absent a strictly prevailing party. *See also* note 5, *supra*; United States Br. at 15-21.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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