No. 08-810

IN THE
Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN,
Petitioners,

v.

PAUL J. FROMMERT, ET. AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* BUSINESS ROUNDTABLE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other courts of appeals, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.

2. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other courts of appeals, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

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INTEREST OF *AMICI CURIAE*

Business Roundtable is an association of chief executive officers of leading U.S. companies.[1] Together, those

[1] This brief is filed with the consent of the parties, and letters of consent have been filed with the Court. Pursuant to this Court's

companies have $5 trillion in annual revenues and nearly 10 million employees. They comprise nearly a third of the total value of the U.S. stock markets and pay nearly half of all federal corporate income taxes. Annually, they return $133 billion in dividends to shareholders and the economy. Business Roundtable is committed to advocating public policies that ensure vigorous economic growth, a dynamic global economy, and a well-trained and productive workforce, which is essential to future competitiveness. Business Roundtable companies give more than $7 billion a year in combined charitable contributions, representing nearly 60 percent of total corporate giving. They are technology innovation leaders, with more than $70 billion in annual research-and-development spending—more than a third of the total private such spending in the United States.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community.

The National Association of Manufacturers ("NAM") is the Nation's largest industrial trade association, repre-

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Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

senting small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards.

This case presents important issues under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 *et seq.* Under ERISA, an ERISA plan may give its "plan administrator" the authority to interpret the plan's terms. Where that occurs, courts generally must defer to the plan administrator's reasonable construction. See *Metro. Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2348 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989). In the decision below, the court of appeals held that a district court may refuse to defer to the ERISA plan administrator's interpretation of an ambiguous ERISA plan term, and instead adopt its own reading of that term, simply because the administrator's interpretation was not issued in the course of processing a claim for benefits under the plan's claims procedures. It further held that, once a district court rejects the plan administrator's construction, the district court may then determine the benefits due plan participants based on the court's remedial "discretion" rather than the terms of the ERISA plan itself, and appellate courts must defer to the exercise of that discretion.

Amici's members sponsor and lead companies that sponsor some of the country's largest ERISA plans. Those plans often grant the plan administrator authority to interpret and resolve ambiguities within ERISA plan

documents, but are nonetheless often the subject of litigation relating to plan interpretation. The decision below undercuts the traditional deference owed to the plan administrator's construction by refusing to defer except where that construction is issued in the context of a benefits determination. The decision, moreover, erroneously gives district courts remedial "discretion" to determine plan benefits rather than requiring those benefits to be determined as a matter of law according to the terms of the plan and federal contract-construction principles.

Those holdings eviscerate the ability of plan administrators to manage plans equitably for the benefit of all plan participants. They gut ERISA's goal of nationwide uniformity, allowing federal district courts in different judicial districts to require different implementations of the same plan provisions based on different exercises of judicial remedial "discretion." And they threaten to expose myriad daily decisions by plan administrators—all made outside formal plan benefits determinations—to replacement with judicial determinations even though the plan documents grant the plan administrator global authority to interpret plan terms and nowhere limit that authority to formal benefits determinations. *Amici* have a strong interest in, and a unique perspective on, those issues.

STATEMENT

I. Statutory Framework and the Cause of Action Under ERISA § 502(a)(1)(B)

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, regulates employee-benefits plans both for the protection of plan participants and to encourage "the maintenance and growth" of such plans. 29 U.S.C. §§ 1001a(c)(2), 1001b(c)(2); see also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987)

(discussing "the public interest in encouraging the formation of employee benefit plans"). Where an employer chooses to provide an employee-benefits plan, ERISA requires that its terms be reduced to a "'written instrument.'" *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875 (2009) (quoting 29 U.S.C. §1102(a)(1)). And ERISA "generally obligates administrators to manage ERISA plans 'in accordance with the documents and instruments governing' them." *Id.* at 868 (quoting 29 U.S.C. §1104(a)(1)(D)).

The plan documents govern issues such as the procedure for funding the plan, the allocation of responsibilities for operating and administering the plan, and the basis on which payments are made to and from the plan. 29 U.S.C. §1102(b). ERISA plans can also grant the plan administrator authority to interpret the plan's terms. This Court has held that, where the plan documents provide that authority, the plan administrator's interpretation is entitled to deference. See *Metro. Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2348 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989).

ERISA also provides a comprehensive enforcement regime, including "six carefully integrated civil enforcement provisions" in ERISA §502(a) (29 U.S.C. §1132(a)). *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). Those provisions form an "interlocking, interrelated, and interdependent remedial scheme" under ERISA's "'comprehensive and reticulated'" statutory structure. *Ibid.* (quoting *Nachman Corp.* v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)). Most relevant here, §502(a)(1)(B) provides each plan beneficiary with a cause of action "to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under

the terms of the plan." 29 U.S.C. §1132(a)(1)(B). Section 502(a)(3) separately provides a cause of action for a beneficiary "(A) to enjoin any act or practice which violates any provision of this subchapter 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 subchapter or the terms of the plan." 29 U.S.C. §1132(a)(3).

II. Proceedings Below

A. The Suit, Initial Ruling, and Initial Appeal

Plaintiffs are employees of Xerox Corporation who are participants in the Xerox Corporation Retirement Income Guarantee Plan (the "plan"). Pet. App. 25a. Plaintiffs had each left the company at one point and received lump-sum distributions of their retirement benefits accrued to that date, but rejoined the company at a later date. *Ibid.* Plaintiffs sued the plan and its administrators under ERISA §§502(a)(1)(B) and 502(a)(3) (29 U.S.C. §§1132(a)(1)(B), 1132(a)(3)), among other provisions, "seeking clarification of their rights to future benefits." Pet. App. 74a-75a. The crux of their claim was that the plan administrator erred in calculating the amount by which the payouts they had previously received would reduce their future benefits. Pet. App. 75a.

The plan administrator had utilized a "phantom account offset" methodology. That methodology not only reduces the employee's level of future benefits by the amount of the previous lump-sum payment, but also takes into account the time-value of money by offsetting for "hypothetical investment gains" that would have resulted had the earlier lump-sum payment not been made to the employee and instead remained with the plan. Pet. App. 5a. Plaintiffs argued that the administrator's calculation was improper because the plan docu-

ments in effect at the time they took their lump-sum payments did not provide for the phantom account method. Pet. App. 82a. The district court granted summary judgment in favor of the plan and its administrators. It held that "defendants' calculation of plaintiffs' benefits, through use of the phantom account offset," was consistent with the plan documents. Pet. App. 93a.

Plaintiffs appealed, and the Second Circuit reversed in part. Pet. App. 22a-60a ("*Frommert I*"). The Second Circuit held that the version of the plan applicable to plaintiffs did not provide for offset of prior payouts through the phantom account method; that method was instead explained fully to participants in a later version of the plan. Pet. App. 28a-29a. The court therefore rejected the plan administrator's use of the phantom-account method in calculating plaintiffs' benefits. Pet. App. 44a.

The Second Circuit affirmed, however, the district court's dismissal of plaintiffs' claims for equitable relief under § 502(a)(3). Plaintiffs had argued that they were entitled to equitable relief under § 502(a)(3) even though they "ultimately [sought] money damages through recalculation of their pension benefits." Pet. App. 53a. According to plaintiffs, "the 'vehicle' for" the relief they sought "is a judgment declaring that the phantom account is prohibited by ERISA and enjoining its application in calculating the benefits of any Plan participants." Pet. App. 53a. The Second Circuit rejected that argument. Because plaintiffs could seek "recalculation of their benefits consistent with the terms of the Plan" under § 502(a)(1)(B), there was "no need * * * to also allow equitable relief under § 502(a)(3)." Pet. App. 53a-54a.

The Second Circuit remanded the case to the district court to determine the benefits owed to plaintiffs without

application of the phantom account method. The court stated:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. * * * As guidance for the district court, we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy.

Pet. App. 51a.

B. Remand Proceedings

On remand, the district court held a hearing and received briefing from the parties on the appropriate calculation of benefits under the plan without reference to the phantom account method the Second Circuit had disallowed. Pet. App. 102a. The plan administrator offered an interpretation based on the plan's provision that the benefits of a rehired employee "shall be offset by the accrued benefit attributable" to the prior lump-sum distribution. Pet. App. 141a. The plan administrator's proposed method would have used acceptable actuarial methodologies to convert the rehired employee's lump-sum payment into a retirement annuity using rates from the Pension Benefit Guaranty Corporation in accordance with Section 4.3(e) of the plan (which governs annuities), and then offset the floor benefit provided by the plan by that amount. Pet. App. 144a-154a. Plaintiffs, by contrast, argued that the rehired employees' benefits should be offset only by the amount of money paid in the prior lump-sum distribution, with no provision to account for the time-value of money. C.A. App. 384, 521-522.

The district court did not address the merits of the plan administrator's position. It simply stated that "[t]o the extent that there is some ambiguity as to the precise manner by which prior distributions are to be offset from present benefits, it is Xerox, not the employees, who should suffer." Pet. App. 104a. The court concluded that plaintiffs' benefits should be calculated as plaintiffs had proposed—by deducting the nominal amount of the prior lump-sum payment, without accounting for the fact that they and not the plan had the use of that money for years. See Pet. App. 102a-108a.

The Second Circuit affirmed the district court's decision in relevant part. Pet. App. 1a-21a ("*Frommert II*"). The court stated that its task was to "review [the] district court's chosen remedy of an identified ERISA violation for an excess of allowable discretion." Pet. App. 8a. There was no dispute that the plan granted the administrator discretionary authority to construe the terms of the plan. See Pet. App. 142a. But the Second Circuit held that the district court had properly declined to defer to the administrator's construction. Pet. App. 12a-13a. The court stated that the plan administrator's interpretation, which it characterized as a "mere opinion," was not entitled to deference because it had been offered outside the context of an "original benefit determination[]." Pet. App. 13a.

The Second Circuit recognized that the district court had ordered the plan administrator to recalculate plaintiffs' benefits by deducting "only the nominal value of their prior lump-sum distributions, without a 'phantom account' adjustment reflecting hypothetical investment gains or, apparently, any other adjustment to reflect the inflation-adjusted values of the prior distributions." Pet. App. 8a-9a. The Second Circuit noted the plan's argu-

ment that the district court's ruling conferred a windfall on plaintiffs, who would fare better than other plan participants who had not left and then rejoined the company. Pet. App. 10a n.3. It nevertheless affirmed because it saw "no problem with the District Court's selection of one reasonable approach among several reasonable alternatives," Pet. App. 13a-14a, and did "not view the remedy crafted by the District Court to be 'wholly unjust,'" Pet. App. 10a n.3.

SUMMARY OF ARGUMENT

I. A. Plaintiffs in this action prevailed in their suit under ERISA § 502(a)(1)(B), which creates a cause of action "to recover benefits due to [a plan beneficiary] under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Because it seeks "benefits under the terms of the plan," 29 U.S.C. § 1132(a)(1)(B), a suit under § 502(a)(1)(B) is one for "contractually authorized benefits," *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985). The court's task thus is to determine what benefits the plan's terms provide for as construed in light of federal contract-construction principles.

B.-C. The Second Circuit departed from that clear statutory directive. While the court acknowledged that the appropriate benefits calculation should be based on the "ambiguous * * * pre-amendment terms of the Plan," it failed to direct the district court to apply federal contract-construction principles to the plan language. Instead, it directed the district court to "employ equitable principles" in "fashioning" an "appropriate remedy." Pet. App. 51a. It then compounded the error by reviewing the district court's ruling "for an excess of allowable discretion." Pet. App. 8a. This Court, however, has held

that *de novo* review is appropriate when there is a "dispute over the precise terms of the plan" in a § 502(a)(1)(B) suit. *Aetna Health* v. *Davila*, 542 U.S. 200, 210 (2004). The Second Circuit's decision thus departs from the long-settled principle that the ERISA plan itself—the contract between the plan sponsor and plan participants—governs the benefits that the plan provides. And in doing so, it disrupts the carefully balanced enforcement scheme that Congress provided in ERISA.

II. A. The Second Circuit also erred when it refused to defer to the ERISA plan administrator's interpretation of the plan because it was not offered in a formal "benefits determination." Pet. App. 51. Where, as here, an ERISA plan grants the administrator authority to construe the plan terms, the courts must defer to the administrator's construction. See *Metro. Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2348 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989). That principle logically extends to *all* contexts in which the administrator must construe plan terms. There is no basis for the Second Circuit's decision to restrict deference to benefits determinations made under the plan's claims procedures.

B.-C. The Second Circuit's contrary rule threatens havoc in the multitude of circumstances in which plan administrators are required to construe plan terms outside of such benefits determinations. For example, plan administrators must interpret plan terms in order to properly invest plan assets, to set minimum annual funding levels, to determine whether to seek subrogation and reimbursement from plan participants, and to make myriad other decisions necessary to the operation and maintenance of the plan. The decision below destroys the certainty and uniformity that come with knowing a single

interpretation of the plan documents—the plan administrator's—will govern all such plan decisions. And worse, it potentially subjects plan administrators to the impossible task of administering a plan when different courts have construed the same plan terms to have different meanings.

III. No company is required to sponsor an ERISA employee-benefits plan. Despite Congress's efforts to encourage their growth, ERISA plans are currently going the way of the dinosaur, with many plan sponsors cutting back on benefits, and many new companies declining to create plans at all. The Second Circuit's rulings provide powerful new reasons to avoid sponsoring ERISA plans. Companies cannot be expected to sponsor plans when courts are free to award benefits based on their remedial "discretion," rather than on what the sponsor agreed to provide in the plan documents. And companies will be less willing to sponsor ERISA plans knowing that the plan administrators' interpretations will be entitled to no deference, even when those constructions are wholly reasonable, outside the narrow context of formal benefits determinations. ERISA class-action litigation has already reached epic proportions, and the decision below only encourages further litigation about the meaning of plan terms.

ARGUMENT

Although this case nominally concerns the standard of appellate review to be applied in an ERISA benefits-determination case—the Second Circuit reviewed the district court's ruling for "an excess of allowable discretion," Pet. App. 8a, when this Court has made clear that review is *de novo*, see *Aetna Health* v. *Davila*, 542 U.S. 200, 210 (2004)—it is about far more than that. This case also concerns the primacy of ERISA plan terms in benefits de-

terminations. "ERISA requires '[e]very employee benefit plan [to] be established and maintained pursuant to a written instrument' * * * ." *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865, 875 (2009) (quoting 29 U.S.C. §1102(b)(4)). Consistent with that, the statutory section plaintiffs prevailed under, ERISA §502(a)(1)(B), provides a cause of action to recover "benefits due * * * *under the terms of the plan*." 29 U.S.C. §1132(a)(1)(B) (emphasis added). As a result, in adjudicating cases under that provision, courts must determine what benefits *the plan* provides using federal contract-construction principles.

The Second Circuit, however, ignored that clear statutory directive. Rather than requiring the district court simply to construe the ERISA plan (according any deference due the plan administrator's interpretation), it suggested that the district court "employ equitable principles" in crafting a "remedy." Pet. App. 51a. And when the Second Circuit reviewed the district court's decision, it did not determine whether the district court correctly construed the terms of the plan (a function the court of appeals should perform *de novo*), but rather reviewed the district court's remedy "for an excess of allowable discretion." Pet. App. 8a. But a plan cannot possibly mean one thing in one court based on a district court's "discretion" and another thing in another court based on another judge's differing discretion. The plan documents can have only one meaning, and that meaning must control the amount of "benefits due * * * *under the terms of the plan*" for all participants. 29 U.S.C. §1132(a)(1)(B) (emphasis added). This Court has stressed the importance both of hewing to the terms of ERISA plan documents and of not tampering with the carefully balanced ERISA

enforcement scheme Congress has crafted. The Second Circuit's decision ignores those directives.

The Second Circuit's decision makes a second and equally fundamental error—failing to defer to the ERISA administrator's construction of plan documents. ERISA plans can grant the plan administrator authority to interpret the plan's terms. This Court has long recognized that, where the plan documents do so, the plan administrator's interpretation is entitled to deference. See *Metro. Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2348 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989). The Second Circuit's decision creates an exception to that rule, declining deference to the plan administrator's interpretation where the interpretation is not "rendered" as a "decision" in the course of processing a benefits claim under the plan's claims procedures. See Pet. App. 13a.

That holding cannot be reconciled with this Court's cases or the terms of petitioners' ERISA plan. And it threatens severe disruption to the administration of large ERISA plans. Under the Second Circuit's rule, only interpretations of the plan made during an "original benefit determination[]" are entitled to deference. Pet. App. 13a. But plan administrators have numerous duties that require them to interpret ambiguous provisions of the plan when making the myriad decisions necessary to keep the plan operating, from the selection of intermediaries to the construction of investment restrictions. Plan documents accordingly often grant the administrator broad discretionary authority to interpret the plan's terms generally—not merely in the context of processing formal benefits claims. Under the Second Circuit's decision, now the district court's construction—or its remedial "discretion"—must control all decisions notwithstanding

the plan administrator's reasonable interpretation in every context except a formal benefits determination. That cannot be correct.

Those twin rulings—providing "discretion" to the district court and refusing to defer to the plan administrator's construction—are impossible to reconcile with ERISA's goal of nationwide uniformity. They substitute the potentially different exercises of discretion by district courts for the provisions of the plan document and the plan administrator's plan-wide construction of the plan. They could make plan administration impossible, subjecting plan administrators to competing requirements from jurisdiction to jurisdiction. And they threaten to require ERISA plan administrators to pay different benefits to plan participants based on the happenstance of where the claims were filed—which is precisely what happened here.

I. Under ERISA §502(a)(1)(B), Courts Must Construe the Plan To Determine or Award Benefits Due "Under the Terms of the Plan"

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). Here, ERISA provides for benefits to be determined according to the terms of the plan. 29 U.S.C. §1102(b). And it provides a cause of action in §502(a)(1)(B) for a determination of or payment of "benefits due * * * *under the terms of the plan*." 29 U.S.C. §1132(a)(1)(B) (emphasis added).

The Second Circuit thus erred when it held that an appellate court reviews a district court's decision to require benefits payments under ERISA §502(a)(1)(B) only "for an excess of allowable discretion." Pet. App. 8a. The

role of the courts under §502(a)(1)(B) is to determine the "benefits due * * * under the terms of the plan," 29 U.S.C. §1132(a)(1)(B)—a task that requires construction of the plan terms (with appropriate deference to the plan administrator, as discussed below). Consistent with that, this Court has clearly stated that the appropriate standard of review on appeal is *de novo*. *Davila*, 542 U.S. at 210. That makes sense. A suit under §502(a)(1)(B) is one for "contractually authorized benefits," *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 147 (1985), and entitlement to relief is governed exclusively by "the terms of the plan," *Kennedy*, 129 S. Ct. 875. Longstanding principles dictate that the construction of a contract is reviewed *de novo* on appeal. See *Firestone*, 489 U.S. at 112-113.

When courts depart from statutory requirements, they often create unforeseen problems in the process. This case is no exception. The Second Circuit's failure to observe the statutory limitations on the relief available to a plan beneficiary under §502(a)(1)(B) does serious violence to ERISA and the willingness of companies to expand ERISA plans and create new ones. When a company sponsors an employee-benefits plan, it agrees to grant only such benefits as are specifically provided for in the text of the plan documents. The Second Circuit's decision, however, permits a district court to grant relief based on equitable considerations that lie beyond the text of the ERISA plan—the contract between the plan sponsor and its participants—so long as that remedy does not constitute an abuse of "allowable discretion" and is not "wholly unjust." Pet. App. 8a-10a & n.3. That is not only contrary to the statutory text, it is also grossly unfair to plan sponsors. Employers are not required to sponsor employee-benefits plans, *Lockheed Corp.* v. *Spink*, 517

U.S. 882, 887 (1996), and they cannot be expected to continue to do so if courts are given broad discretion to rewrite the terms of the deal to which the plan sponsor agreed.

A. ERISA's Enforcement Provisions Carefully Distinguish Between Causes of Action for Benefits Determinations "Under the Terms of the Plan" and Actions for Equitable Relief

"ERISA's 'comprehensive legislative scheme' includes 'an integrated system of procedures for enforcement.'" *Davila*, 542 U.S. at 208 (quoting *Russell*, 473 U.S. at 147). Those enforcement provisions, many of which are set out in ERISA § 502(a), 29 U.S.C. § 1132(a), "represent[] a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987).

Section 502(a) contains separate provisions authorizing ERISA plan beneficiaries to bring suit for, among other things, an award or determination of the benefits provided by the plan, and equitable relief for violations of ERISA itself. First, § 502(a)(1)(B) provides that a "participant or beneficiary" may bring "a civil action" "*to recover benefits due to him under the terms of the plan*, to enforce his *rights under the terms of the plan*, or to clarify his rights to future *benefits under the terms of the plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). Section 502(a)(3) then provides for equitable relief for violations of the ERISA statute or the terms of a plan. That cause of action allows a "participant, beneficiary, or fiduciary" to bring suit "(A) to enjoin any act or practice which violates any provision of this subchapter 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 subchapter or the terms of the plan." 29 U.S.C. §1132(a)(3).

Plaintiffs here were permitted to proceed *only* under §502(a)(1)(B), authorizing suits for "benefits due * * * under the terms of the plan," 29 U.S.C. §1132(a)(1)(B). See pp. 7-8, *supra*. As this Court has explained, that provision "is relatively straightforward":

> If a participant or beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring suit *seeking provision of those benefits*. A participant or beneficiary can also bring suit generically to 'enforce his rights' under the plan, or to clarify any of his rights to future benefits. Any dispute over the precise terms of the plan is resolved by a court under a *de novo* review standard, unless the terms of the plan "giv[e] the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."

Davila, 542 U.S. at 210 (quoting *Firestone*, 489 U.S. at 115) (emphasis added).

That conclusion is compelled by the statutory text. Section 502(a)(1)(B) provides a suit for "benefits due * * * under the terms of the plan," 29 U.S.C. §1132(a)(1)(B), which by necessity requires construction of the plan. An action under that provision is thus essentially "the assertion of a contractual right," *Strom* v. *Goldman, Sachs & Co.*, 202 F.3d 138, 142 (2d Cir. 1999), and is governed by a uniform "federal common law of contract" derived from "general principles of contract law and * * * ERISA's purposes," *Feifer* v. *Prudential Ins. Co.*, 306 F.3d 1202, 1210 (2d Cir. 2002); see also *Washington* v. *Murphy Oil USA, Inc.*, 497 F.3d 453, 458 (5th Cir. 2007); *Burstein* v. *Ret. Account Plan for Employees of*

Allegheny Health Educ. & Research Found., 334 F.3d 365, 381 (3d Cir. 2003); *Tolle* v. *Carroll Touch, Inc.*, 977 F.2d 1129, 1133 (7th Cir. 1992) (each observing that claims for ERISA plan benefits under § 502(a)(1)(B) are contractual in nature). As a creature of contract law, a claim under § 502(a)(1)(B) "stands or falls by 'the terms of the plan.'" *Kennedy*, 129 S. Ct. at 875 (quoting 29 U.S.C. § 1132(a)(1)(B)). Section 502(a)(1)(B) does not allow for "the recovery of extracontractual damages." *Russell*, 473 U.S. at 144.

Setting aside the deference due to plan administrators, there can be no dispute that courts of appeals must review the construction of an ERISA plan *de novo*, just as courts of appeals review questions of contract construction and statutory construction *de novo*. See *Davila*, 542 U.S. at 210 ("Any dispute over the precise terms of the [ERISA] plan is resolved by a court under a *de novo* review standard * * * ."); *Firestone*, 489 U.S. at 112-113 (review of document terms under "principles of contract law" is *de novo*); *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 369 (1995) (statutory "interpretation is a question of law"); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 948 (1995) (questions of law are reviewed *de novo*).

By contrast, this Court has indicated that § 502(a)(3), which provides a cause of action for plan beneficiaries to seek *equitable relief*, is a "'catchall' provision[]" that "act[s] as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996). Based on that, the courts of appeals have held that, "if a plaintiff can pursue [contractual] benefits under the plan pursuant to Section [502](a)(1)[(B)], there is an adequate remedy under the

plan which bars a further [equitable] remedy under Section [502](a)(3)." *Larocca* v. *Borden, Inc.*, 276 F.3d 22, 28 (1st Cir. 2002); see also *Johnson* v. *Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004); *Katz* v. *Comprehensive Plan of Group Ins.*, 197 F.3d 1084, 1088-1089 (11th Cir. 1999); *Tolson* v. *Avondale Indus. Inc.*, 141 F.3d 604, 610 (5th Cir. 1998); *Wald* v. *Sw. Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996). Here, the Second Circuit correctly held that plaintiffs were not permitted to proceed under §502(a)(3) for that very reason. See Pet. App. 53a-54a; pp. 7-8, *supra*.

B. The Second Circuit Erroneously Construed §502(a)(1)(B) To Provide Equitable Relief Rather Than the Benefits the Plan Provides

The Second Circuit's decision cannot be reconciled with §502(a)(1)(B)'s statutory text and structure. The first time this case was reviewed by the Second Circuit (in *Frommert I*), the Second Circuit partially overlooked the fact that §502(a)(1)(B) authorizes courts to award only the benefits due "under the terms of the plan." The Second Circuit properly instructed the district court on remand to "utilize an appropriate pre-amendment calculation to determine [plaintiffs'] benefits" under the "ambiguous" terms of the pre-amendment plan. Pet. App. 51a. But it then inexplicably suggested that, in doing so, the district court should "employ equitable principles" to "fashion[]" an "appropriate remedy." Pet. App. 51a.

When the district court's remand decision came back before the Second Circuit in *Frommert II*, the Second Circuit committed the same error again. The court of appeals did not review the district court's decision to determine whether it had properly construed the plan under contract principles. Instead, the court of appeals

reviewed "the district court's chosen remedy of an identified ERISA violation for *an excess of allowable discretion*." Pet. App. 8a (emphasis added). The Second Circuit then declined to overturn the district court's decision—notwithstanding that it required an economically irrational interpretation of the ERISA plan and conferred a windfall on the plaintiffs, see Brief for the Petitioners 58-62—because it did "not view the remedy crafted by the District Court to be 'wholly unjust.'" Pet. App. 10a n.3.

1. The Second Circuit grossly misconstrued the source of the right to benefits and the nature of a § 502(a)(1)(B) suit. As a result, it employed the wrong standard of review. A participant's right to benefits derives from the terms of the ERISA plan. See 29 U.S.C. § 1102(b). Correspondingly, a suit under § 502(a)(1)(B) is for "benefits due * * * *under the terms of the plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). Consequently, a court's task under § 502(a)(1)(B) is *not* to "cho[ose]" a "remedy" for an "ERISA violation" based on equitable principles, upholding any result that is not "wholly unjust." Pet. App. 8a, 10a n.3. It is to determine the plaintiffs' entitlement to "*benefits due * * * under the terms of the plan*," 29 U.S.C. § 1132(a)(1)(B) (emphasis added), using federal contract-construction principles. Because that involves a "dispute over the precise terms of the plan," this Court's decisions require the district court's ruling to be reviewed *de novo* (apart from any deference due the administrator's construction). *Davila*, 542 U.S. at 210.

Such suits are effectively creatures of contract law, *Tolle*, 977 F.2d at 1133, and thus they must "stand[] or fall[] by 'the terms of the plan,'" *Kennedy*, 129 S. Ct. at 875 (quoting 29 U.S.C. § 1132(a)(1)(B)). The courts

cannot abandon "general principles of contract law" in a § 502(a)(1)(B) suit, *Feifer*, 306 F.3d at 1210, in favor of "fashioning" a remedy based on "equitable principles," merely because, as here, construction of the plan was made "difficult[]" because of "ambiguous" language in the plan, Pet. App. 51a.[2] The Second Circuit thus doubly erred. It erroneously advised the district court in the first instance to apply equitable principles rather than federal contract-construction principles. Pet. App. 51a; p. 8, *supra*. It then erred again by reviewing the district court's decision for an abuse of discretion rather than determining *de novo* what the plan's provisions authorize. Pet. App. 8a; see p. 9, *supra*.

That double error threatens to wreak havoc. It opens the door for parties to urge district courts to exercise equitable discretion in making benefits determinations, rather than following the "straightforward rule of hewing to the directives of plan documents" as ERISA requires. *Kennedy*, 129 S. Ct. at 875. By adopting a deferential standard of review on appeal, the court of appeals' decision hamstrings appellate courts in correcting district courts that stray from plan language and federal contract-construction principles. Finally, as explained in greater detail below, that approach fatally undermines ERISA's goal of uniformity. Uniformity cannot be achieved if the same plan must pay otherwise identically situated participants different benefits based on the

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[2] The United States' arguments in its *amicus* brief at the petition stage suffer from a similar defect. The United States argued that "the district court had discretion to select a reasonable method in the exercise of its discretion *to craft an appropriate remedy for the ERISA violations*." U.S. Pet. Stage Br. 9-10 (emphasis added). Under ERISA § 502(a)(1)(B), however the issue is not a "remedy" for an "ERISA violation." It is the determination of benefits "under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

"discretion" exercised by different district courts in different § 502(a)(1)(B) suits. The plan documents can only have one meaning—that meaning cannot vary depending on which district judge hears a particular claim for benefits.

2. The Second Circuit's error is puzzling because that court itself distinguished between a § 502(a)(1)(B) suit for "benefits due * * * under the terms of the plan" and a suit for equitable relief under § 502(a)(3). In *Frommert I*, the Second Circuit affirmed the district court's dismissal of plaintiffs' claims for equitable relief under § 502(a)(3). Pet. App. 53a-54a. The plaintiffs had argued that they were entitled to equitable relief:

> [A]lthough [plaintiffs] ultimately seek money damages through recalculation of their pension benefits, the "vehicle" for such relief is a judgment declaring that the phantom account is prohibited by ERISA and enjoining its application in calculating the benefits of any Plan participants.

Pet. App. 53a. The Second Circuit correctly rejected that argument. It noted that, under this Court's decision in *Varity*, equitable relief is available under § 502(a)(3) *only* where other provisions of § 502 do not provide an adequate remedy. Pet. App. 54a. The court held that, because plaintiffs could seek recalculation of their benefits consistent with the terms of the plan under § 502(a)(1)(B), "there is no need * * * to also allow equitable relief under § 502(a)(3)." Pet. App. 53a-54a.

The court of appeals thus held that plaintiffs could proceed only under § 502(a)(1)(B), which provides solely for contractual "benefits due * * * under the terms of the plan," 29 U.S.C. § 1132(a)(1)(B), and that plaintiffs could not also seek equitable relief under § 502(a)(3). But it then turned around and simultaneously ordered the

district court to "craft" an "equitable" remedy on remand:

> On remand, the remedy crafted by the district court for those employees rehired prior to 1998 should utilize an appropriate pre-amendment calculation to determine their benefits. * * * As guidance for the district court, *we suggest that it may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy*.

Pet. App. 51a (emphasis added). When the case returned on appeal in *Frommert II*, the Second Circuit stated that its task was to "review [the] district court's chosen remedy of an identified ERISA violation for *an excess of allowable discretion*." Pet. App. 8a (emphasis added). The Second Circuit thus created a new hybrid right—equitable entitlement to benefits under the plan—that neither the statute nor the plan provides for.

This Court has expressed its "reluctan[ce] to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Russell*, 473 U.S. at 147. Here, the Second Circuit did not merely "tamper" with the various ERISA enforcement provisions that Congress delineated in § 502(a)—it turned them upside down. This Court should reverse the decision below and confirm that the only remedies available under § 502(a)(1)(B) are those stated in the text of the statute: recovery of benefits "due to [the beneficiary] *under the terms of the plan*"; enforcement of the beneficiary's "rights *under the terms of the plan*"; and clarification of the beneficiary's "rights to future benefits *under the terms of the plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). Equitable principles have no place in that determination. And the appropriate appellate standard of review of the district

court's interpretation of the terms of the plan—setting aside for the moment the deference due to the plan administrator's interpretation—is *de novo*. *Davila*, 542 U.S. at 210.

II. Judicial Deference to the Plan Administrator's Interpretation Is Essential to the Administration of Large ERISA Plans

A. The Plan Administrator's Construction of the Plan Is Entitled to Deference Whether or Not Issued in a Formal Benefits Determination

An ERISA plan administrator's interpretation of the provisions of the plan generally will be subject to *de novo* review in court, "unless the plan provides to the contrary." *Glenn*, 128 S. Ct. at 2348. Thus, where "the benefit plan expressly gives the plan administrator or fiduciary discretionary authority to determine eligibility for benefits," *Firestone*, 489 U.S. at 115, "a deferential standard of review [is] appropriate," *id.* at 111. In that circumstance, the plan administrator's "interpretation will not be disturbed if reasonable." *Ibid.* There is no dispute that, in this case, the plan vested the administrator with authority to "[c]onstrue the Plan." Pet. App. 142a.

The Second Circuit held, however, that the district court was not required to defer to the plan administrator's interpretation—which the court dismissed as a "mere opinion"—because that interpretation was not offered in the context of "render[ing] * * * the original benefit determinations." Pet. App. 13a. That decision to arbitrarily restrict judicial deference to situations in which the interpretation is offered during an original benefits determination has no basis in law or logic. This Court's cases make clear that, if the plan provides the administrator with authority to interpret plan terms generally, that interpretation is entitled to deference

whenever plan interpretation is called for. See *Glenn*, 128 S. Ct. at 2348; *Firestone*, 489 U.S. at 111. Nothing in this Court's cases suggests that deference is limited to formal benefits determinations.

Any such rule would also be inconsistent with the terms of the plan. The plan here provides that the administrator has authority to "[c]onstrue the Plan." Pet. App. 142a. It does not limit the administrator's authority to construe the plan to particular provisions (*e.g.*, those involving benefits), or to particular contexts (*e.g.*, formal benefits determinations). Rather, that authority by its terms extends to all contexts where, in administering the plan, construction of the plan by the administrator is called for. The Second Circuit's decision in this action for benefits due "under the terms of the plan," 29 U.S.C. §1132(a)(1)(B), thus disregarded the plan's unambiguous terms yet again when it refused to defer to the plan administrator's construction except in the limited context of a formal, original benefits determination.

B. An ERISA Plan Administrator's Authority To Interpret the Plan Is Crucial in Ensuring Uniform Plan Administration

The Second Circuit's decision has profoundly negative consequences. "[C]ertainty and predictability are important criteria under ERISA," *Glenn*, 128 S. Ct. at 2354 (Roberts, C.J., concurring), and they are essential to the functioning of large ERISA plans, such as those sponsored by *amici*'s members and the companies they lead. Deference to the plan administrator's interpretation ensures that a single, uniform interpretation of the plan will govern not only the payment of benefits, but also the myriad other actions that plan administrators must take pursuant to plan terms. Once the element of deference to the administrator's interpretation of the plan is removed,

the likelihood that even reasonable actions by plan administrators will be challenged in court increases dramatically. And the possibility that a single plan will be subject to different and potentially irreconcilable interpretations by different judges becomes all too real.

As "this Court has emphasized," "ERISA's goal is * * * 'uniform national treatment of pension benefits.'" *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon*, 541 U.S. 1, 17 (2004) (quoting *Patterson* v. *Shumate*, 504 U.S. 753, 765 (1992)). The need for ERISA plans to be governed by uniform, national standards is not a convenience but a necessity. Many of *amici's* members, and the companies they lead, sponsor ERISA plans that must serve tens of thousands of participants spread across numerous States. ERISA plans could not operate efficiently, and large businesses could not responsibly sponsor them, if they had to comply with different rules and potentially provide different benefits to participants merely because they reside in different judicial districts.

Discussion of "uniformity" under ERISA frequently focuses on ERISA's preemption provision, 29 U.S.C. § 1144(a), which prohibits state regulation of employee-benefits plans so as to ensure that "an employer's administrative scheme" will not be subject to a patchwork of state laws imposing "conflicting requirements." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 10 (1987). From a practical perspective, however, the requirement that federal courts defer to the plan administrator's interpretation of the plan is equally critical to ensuring nationwide uniformity. When companies vest their plan administrator with interpretive authority, they are entitled to expect that, consistent with *Firestone* and *Glenn*, the administrator's reasonable "interpretation will not be disturbed"—regardless of which of our 678

federal district court judges the case happens to draw. *Firestone*, 489 U.S. at 111; see also *Glenn*, 128 S. Ct. at 2348. Allowing each district court to disregard the administrator's interpretation of the plan's terms and conduct its own *de novo* review of the language (or worse, exercise its discretion to create a remedy based on equitable principles rather than plan language, see pp. 20-25, *supra*) creates an unacceptable—and entirely unnecessary—risk that plan administrators will be faced with irreconcilable interpretations of the plan.

C. The Decision Below Eviscerates the Uniformity of Plan Interpretation That Is Essential to Countless Plan Administrator Decisions

The decision below declined to defer to the ERISA plan administrator's interpretation of the plan because that interpretation was not offered within the context of the "original benefit determination[]." Pet. App. 13a. Plan administrators, however, are called upon to interpret the terms of the plan in countless ways outside the context of benefits determinations, and they are frequently required to defend those interpretations in court. The need for uniform interpretation of an ERISA plan is no less crucial—and the logic behind deferring to the plan administrator's interpretation of the plan is no less forceful—simply because the interpretive issue arises outside the context of a benefits determination.

For example, plan administrators must interpret ERISA plan provisions with respect to the investment of plan assets. Such provisions often are set forth in an investment policy statement, which addresses the plan administrator's responsibilities for selecting investments, as well as engaging third-party service providers to assist the administrator in its responsibilities of administering the plan. Uniform interpretation of the plan's investment

policy is, for obvious reasons, absolutely critical. An employee stock bonus plan under ERISA simply cannot function if a district court in Texas finds that the plan requires 100% of the plan investments to be in the employer's stock, while another district court in Florida finds that, under the same language of the same plan, the plan administrator breaches her fiduciary duties if she fails to diversify the plan's investments. Challenges to a plan administrator's investment decisions obviously do not arise within the context of original benefits determinations. See *Moench* v. *Robertson*, 62 F.3d 553, 566 (3d. Cir. 1995); *Armstrong* v. *LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). As a result, the decision below would allow district courts adjudicating those suits to review the implementation of the plan's investment policy without any deference to the plan administrator's interpretation. That does not merely create a grave risk of liability that makes ERISA plans unattractive. It also makes it inevitable that different adjudicators will at some point exercise their *de novo* review authority (or their discretion) to impose irreconcilable investment duties on the plan.

Plan administrators also must set "minimum annual funding levels" for certain types of covered plans under ERISA §302, 29 U.S.C. §1082. *Lockheed*, 517 U.S. at 887. Those minimum funding levels are "based on the value of the benefits earned by" plan beneficiaries. *United States* v. *Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 216 (1996). Obviously, a plan administrator's determination of "the value of the benefits earned" by the plan's beneficiaries for funding purposes will necessarily turn upon its understanding of what benefits are owed under the terms of the plan. Yet, under the Second Circuit's ruling, courts adjudicating chal-

lenges to the plan's level of funding—necessarily asserted outside the context of an "original benefit determination[]," Pet. App. 13a—would not need to defer to the administrator's interpretation of the benefits owed under the plan. ERISA plans cannot operate when major administrative decisions such as determining plan funding levels are subject to *de novo* judicial challenges that can overturn the plan administrator's reasonable interpretation of the plan language.

Plan administrators likewise are often required to construe plan provisions when deciding whether to seek subrogation and reimbursement from plan participants. In that context too, the decision below guts the traditional deference accorded to the administrator's construction. Subrogation and reimbursement decisions are never made as part of a benefits determination. To the contrary, a plan's claims for subrogation and reimbursement can be asserted only in an action that post-dates the original benefits determination. See, *e.g.*, *Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004); *Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried & Non-Salaried Bargaining Hourly Employees* v. *Whitehurst*, 102 F.3d 1368, 1373 (5th Cir. 1996); *Baxter* v. *Lynn*, 886 F.2d 182, 187 (8th Cir. 1989) (subrogation and reimbursement claims brought by plan in separate civil action). Once again, refusing deference merely because the decision is not made in a formal benefits determination proceeding is at war with the plan documents and the goal of uniformity. The plan gives the administrator general authority to construe plan terms—not just those related to the payment of benefits. And uniformity suffers where a judge in one district can agree with the plan administrator's construction that she can seek reimbursement for funds

paid to an insured plan participant, while another judge exercises his own judgment to conclude that the administrator has no right under the same plan language to reimbursement from a similarly situated plan participant.

In myriad other contexts, administrators are called upon time and again to interpret the terms of the plan outside of a benefits determination, such as in selecting an insurance underwriter for the plan, see *McDonald* v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234, 235 (5th Cir. 1995); determining when valuations and contributions of employer stock must be made, see *Izzarelli* v. *Rexene Prods. Co.*, 24 F.3d 1506, 1521-1522 (5th Cir. 1994); and determining when and how it is appropriate to suspend benefits, see *Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 712 (6th Cir. 2000). Those and countless other decisions may be the subject of litigation outside of a benefits determination. Yet, under the decision below, a district court would owe no deference to the plan administrator's interpretation in any of those situations. ERISA plans simply cannot function when there is no assurance of uniformity in the interpretation of—and no uniform respect for the administrator's interpretation of—the plan's provisions.

III. The Decision Below Discourages Companies from Providing Employees with Benefits Plans by Undermining the Predictability of Plan Interpretation and Application

One of the primary objectives of ERISA is to encourage "the maintenance and growth" of employee-benefits plans. 29 U.S.C. §§1001a(c)(2), 1001b(c)(2); see also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987) (discussing "the public interest in encouraging the formation of employee benefit plans"). "Nothing in ERISA," however, "*requires* employers to establish employee ben-

efit plans." *Lockheed*, 517 U.S. at 887 (emphasis added). Because an employer's decision to offer an employee-benefits plan is purely voluntary, Congress has expressed its "desire" that the body of ERISA law should not "create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Variety*, 516 U.S. at 497. The Second Circuit's twin holdings do precisely that. They remove the certainty and predictability that come with knowing that only the terms of the plan and federal contract principles—rather than a district court's exercise of equitable discretion—will govern ERISA benefits determinations. And they destroy any assurance that the plan administrator's interpretation of the plan will be accorded deference in the myriad circumstances in which it is at issue. The result therefore greatly increases litigation expenses, administrative cost, and exposure to unanticipated benefits obligations. The needless introduction of such uncertainty and concomitant expense into the administration of ERISA plans undoubtedly serves "to deter employers from setting up benefit plans." *Glenn*, 128 S. Ct. at 2349.

ERISA litigation has already reached epic levels and currently imposes massive costs on large ERISA plan sponsors. As one recent study observed, ERISA class actions lead all other forms of workplace litigation: The top ten ERISA class-action settlements in 2007 totaled $1.8 billion—a huge number—but in 2008, the top ten ERISA class-action settlements increased to a staggering total of *$17.7 billion*. Seyfarth Shaw LLP, Annual Workplace Class Action Litigation Report 3 (2009), http://www.seyfarth.com/dir_docs/news_item/d7e270e5-c943-4cf0-8ace-5126d42fbb8e_documentupload.pdf. The Second Circuit's decision would only make the situation

worse, "'fomenting'" additional ERISA suits by "draw-[ing] [plan administrators] into litigation * * * over the meaning and enforceability" of plan terms. *Kennedy*, 129 S. Ct. at 876 (quoting *Metro. Life Ins. Co.* v. *Wheaton*, 42 F.3d 1080, 1084 (7th Cir. 1994)). The prospect of judicial deference to the plan administrator's interpretation undoubtedly deters countless potential ERISA suits that could be conjured up based on alleged ambiguities in the plan terms. The Second Circuit's decision, however, would give prospective plaintiffs an incentive to challenge even reasonable actions by the plan administrator so long as they arise outside of a formal benefits determination. Indeed, under the remedial discretion standard adopted below, plaintiffs could potentially prevail merely by convincing a district court that their position was "one reasonable approach among several reasonable alternatives." Pet. App. 13a-14a.

It has been clear for some time that employee-benefits plans, and in particular defined-benefit pension plans, are "disappearing," with "[m]any older companies that offered them * * * scal[ing] them back or * * * abandoning them," and "[m]ost newer companies never institut-[ing] them in the first place." Philip R. Lochner, Jr., *Economic Regulation and Democratic Government*, 25 J. Corp. L. 831, 834 (2000). Indeed, the number of ERISA plans insured by the Pension Benefit Guaranty Corporation has dropped by over 70% in the last 20 years. See Pension Benefit Guaranty Corporation 2008 Annual Report, at 8, available at http://www.pbgc.gov/docs/2008_annual_report.pdf. Many of the burdens ERISA imposes on plan administrators and sponsors may not be avoidable. But the Second Circuit's rulings—that district courts can award benefits under ERISA §502(a)(1)(B) based on considerations other than the

terms of the plan, and that district courts need not defer to an ERISA plan administrator's reasonable interpretation of the plan outside the context of a benefits determination—inject expense and uncertainty not merely unnecessarily, but improperly as well.

As the Chief Justice has explained, "[e]nsuring that reviewing courts respect the discretionary authority conferred on ERISA fiduciaries encourages employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do." *Glenn*, 128 S. Ct. at 2353 (Roberts, C.J., concurring). There is no reason why a plan administrator should be stripped of that discretionary authority outside the context of benefits determinations, and the Second Circuit's ruling doing so is antithetical to ERISA's goal of encouraging employers to provide benefits plans for their employees.

CONCLUSION

For the foregoing reasons and those set forth in petitioners' brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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