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 LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* respectfully submit this brief in support of respondents, Paul J. Frommert et al., encouraging the affirmance of the judgment of the United States Court of Appeals for the Second Circuit, because the judgment is consistent with the language and intent of the ERISA statute and with this Court's precedent.[1]

*Amici* are law professors[2] at nine law and business schools throughout the United States who teach and write about ERISA rights and remedies.[3] More

[1] This brief is submitted with the consent of the parties. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party and no party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. The names of educational institutions are provided for identification purposes only.

[2] Paul M. Secunda is an Associate Professor of Law at Marquette University Law School; Donald T. Bogan is a Professor of Law at the University of Oklahoma College of Law; Mark D. DeBofsky is an Adjunct Professor of Law at The John Marshall Law School; Susan J. Stabile is the Robert and Marion Short Distinguished Chair in Law at the University of St. Thomas School of Law; Lawrence A. Frolik is a Professor of Law at the University of Pittsburgh School of Law; David Pratt is a Professor of Law at Albany Law School; Susan Harthill is an Associate Professor of Law at the Florida Coastal Law School; Dana M. Muir is the Thurnau Professor of Business Law at the Ross School of Business at the University of Michigan, and Elizabeth Pendo is a Professor of Law at the Saint Louis University School of Law.

[3] A representative sample of *Amici* writings include: David Pratt, *Retirement in a Defined Contribution Era: Making the*

(continued...)

specifically, *Amici* teach, study and comment on the law surrounding ERISA remedies, the denial of employee benefit claims under ERISA Section 502(a)(1)(B) [29 U.S.C. § 1132(a)(1)(B)], and on the limits of judicial deference.

*Amici* have no financial stake in the outcome of this case but are interested in ensuring a uniform and coherent interpretation of the Employee Retirement Income Security Act of 1974. We file this brief to urge this Court not to import inappropriate administrative law deference principles into ERISA denial of benefits cases. We are prompted to submit this brief because the decision in this case will have wide-ranging consequences for tens of millions of American workers

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(...continued)

*Money Last,* 42 JOHN MARSHALL L. REV. (forthcoming 2009); Paul M. Secunda, *Sorry, No Remedy: Intersectionality and the Grand Irony of ERISA*, 61 HASTINGS L. J. (forthcoming 2009); Elizabeth Pendo, *Working Sick: Lessons of Chronic Illness for Health Care Reform*, 9 YALE J. HEALTH POL'Y L. & ETHICS 453 (2009); Susan Harthill, *A Square Peg in a Round Hole: Make Whole Relief Under ERISA § 502(a)(3)*, 61 OKLA. L. REV. 721 (2009); Lawrence A. Frolik & Kathryn L. Moore, LAW OF EMPLOYEE PENSION AND WELFARE BENEFITS (2d ed. 2008); Susan J. Stabile & Jayne Zanglein, ERISA LITIGATION HANDBOOK (3d ed. 2008); Mark D. DeBofsky, *What Process is Due in the Adjudication of ERISA Claims,* 41 J. MARSHALL L. REV. 811 (2007); Donald T. Bogan & Benjamin Fu, *ERISA: No Further Inquiry into Conflicted Plan Administrator Claim Denials*, 58 OKLA. L. REV. 637 (2005); Donald T. Bogan, *ERISA: Rethinking* Firestone *in Light of* Great-West*—Implications for Standard of Review and the Right to a Jury Trial in Welfare Benefit Claims*, 37 J. MARSHALL L. REV. 629 (2004); Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004); Dana Muir, *ERISA Remedies: Chimera or Congressional Compromise*, 81 IOWA L. REV. 1 (1995).

and the trillions of dollars they save and invest in pension plans. These consequences could substantially impact the standard of living of millions of future retirees.

## SUMMARY OF ARGUMENT

Congress enacted ERISA "to promote the interests of employees and their beneficiaries in employee benefit plans . . . and to protect contractually defined benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) (internal citations omitted). *Firestone* permitted, within the scope of trust law, circumstances that would allow a plan sponsor to obtain deferential court review of plan administrator claim denials. *See Firestone*, 489 U.S. at 115 ("Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.").

Applying the *Firestone* trust law-based arbitrary and capricious standard of review, the Second Circuit Court of Appeals held under a plenary standard, but also under a deferential standard of review, that Petitioners' interpretation of the Xerox pension plan so as to incorporate a "phantom account" offset was an abuse of discretion. Disagreeing with the Second Circuit's interpretation of the limits of permissible deference under ERISA, Petitioners seek to add another layer of deference to the incongruous application of trust law deference in ERISA benefits cases, by introducing even less applicable principles of

administrative law deference into ERISA. This Court should reject Petitioners' attempt to obtain *another* deferential review, now under an administrative law-based application, after the Second Circuit already ruled twice that Petitioners' interpretation of the plan was an abuse of discretion under the *Firestone* trust law-based deferential review standard.

Because this case comes with the complicated background of two separate Second Circuit Court of Appeals opinions (plus various other related opinions), it is important to clarify what the Second Circuit held in its first opinion because that holding provides the rule of the case for purposes of this appeal. In its initial *Frommert* opinion, the Second Circuit held that even under an abuse of discretion standard, Petitioners' pre-1998 imposition of the phantom account offset without plan language permitting such an offset was an abuse of discretion. See *Frommert I,* 433 F.3d 254, 265-66 (2d Cir. 2006) (*Frommert I)* ("It is clear, under either an arbitrary or capricious standard or as a matter of law, that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable."). The *Frommert I* ruling remanded the matter for calculation of benefits due under equitable considerations; and the district court's ruling that Xerox could only properly offset the monies actually paid was affirmed by the Second Circuit in the second appeal of the case. See *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008) (*Frommert II*). Having lost in *Frommert I* under the trust law abuse of discretion standard, Petitioners continue to seek deference to a position that is not even a plan interpretation since no plan language prior to 1998 even supported Xerox's position.

Because the Second Circuit previously rejected Petitioners' interpretation of the operative pre-1998 Plan documents under the *Firestone* trust law-based deferential review standard as being unreasonable, the only new deference theory Petitioners' can be advancing here is an administrative law-based deference, where courts may respect or credit an agency's advocacy position. See, e.g., *Mead v. Tilley*, 490 U.S. 714, 722 (1989) (ERISA case where Court deferred to the advocacy position of the Pension Benefit Guaranty Corporation presented in an *amicus* brief).

Lower federal courts applying *Firestone* have often confused trust law deference in ERISA claims with the kind of deference courts extend to administrative agencies. See Mark D. DeBofsky, *The Paradox of the Misuse of Administrative Law in ERISA Benefit Claims*, 37 J. MARSHALL L. REV. 727 (2004). Especially after the recognition of a plan administrator's structural conflict of interest in *Metropolitan Life Ins. Co. v. Glenn*, 552 U.S. 1161 (2008), in situations where the plan administrator both determines eligibility to receive benefits and is the source of the benefits themselves, this Court should clarify that ERISA plan administrators are not the equivalent of agency officials; that they are not administrative law judges; and that administrative law deference has no place in the ERISA claims process (except in the rare situation of when a court is reviewing an interpretation of the Department of Labor or the PBGC). See *Van Boxel v. The Journal Co. Employees Pension Trust*, 836 F.2d 1048, 1050 (7th Cir. 1987) (Posner, J.) ("Pension fund trusts are not administrative agencies and most of the decisions they make are not discretionary in the sense,

familiar from administrative law, of decisions that make policy under a broad grant of delegated powers. Certainly in such a case as the present one, pension fund trustees are not policy-makers; they are interpreters of contractual entitlements."). See also *Krolnik v Prudential Ins. Co.*, 570 F.3d 841, 843 (7th Cir. 2009) (in a case where the plan sponsor had not granted the plan administrator discretionary authority, Chief Judge Easterbrook remarked: "[W]hat *Firestone* requires is not "**review**" of any kind; it is an independent *decision* rather than "**review**" that *Firestone* contemplates.") (emphasis in original); *Ramsey v. Hercules, Inc*. 77 F.3d 199, 205 (7th Cir. 1996) ("Underlying the deferential review that fact findings of [administrative agencies] enjoy is a well established set of procedural protections that stem from the Constitution and individual statutes. Plan administrators, in contrast, neither enjoy the acknowledged expertise that justifies deferential review for agency cases . . . nor are they unbiased fact finders like the courts.").

In short, the Court should not permit administrative law deference in judicial review of ERISA benefit claims determinations. Instead, the Court should affirm the decision of the Second Circuit Court of Appeals in this case.

## ARGUMENT

### I. THE COURT SHOULD REJECT PETITIONERS' EFFORT TO ENGAGE IN SERIAL ATTEMPTS TO REINTERPRET ITS PENSION PLAN.

In its initial *Frommert* opinion, the Second Circuit Court of Appeals applied trust law deference in reviewing the former Xerox workers' challenge to Petitioners' denial of the workers' pension benefits claims. The Second Circuit, overturning the District Court, ruled that the 1998 Restatement of the Plan (which included language that arguably incorporated the "phantom account offset") constituted an unlawful amendment to the plan. See *Frommert v. Conkright*, 433 F.3d 254, 263 (2d Cir. 2006) (*Frommert I*).[4] Most importantly for purposes of the arguments presented by Petitioners to this Court, the Second Circuit also expressly held that Petitioners' interpretation of the plan documents made in the context of determining the workers eligibility for benefits—that the pre-1998 plan language included the phantom account offset—was an abuse of discretion. See *Frommert I,*

[4] The Second Circuit held that to interpret the 1998 Restatement of the Plan to include the "phantom account offset" would constitute an unlawful amendment because it operated to impermissibly reduce Respondent's benefits in violation of ERISA's anti-cutback provision (29 U.S.C. § 1154(g)). See *Frommert I*, 433 F.3d at 263. That holding necessarily incorporates the underlying assumption (which the Second Circuit also went on to expressly hold) that the pre-1998 plan documents did not include the phantom account offset; otherwise, the amendment would not have violated ERISA's anti-cutback provision. The Second Circuit also held that the plan administrator violated ERISA by failing to give proper notice to Respondents of its intent to amend the plan. See *id*.

433 F.3d at 265-66 ("It is clear, under either an arbitrary or capricious standard or as a matter of law, that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable.").

Having lost *Frommert I* under the arbitrary and capricious review standard, Petitioners now seek judicial deference to their *litigation position*.[5] They inexplicably urge the very same interpretation—pushing again the phantom account offset method—that the Second Circuit found unreasonable in 2006. Petitioners do not identify any theory of law to support this new argument for deference.

Petitioners' approach in this case is an example *par excellence* of giving the plan administrator a second bite at the apple. In fact, based on the Petitioners' theory in this case, they appear to contemplate serial attempts of interpreting the plan until they can convince a court that their interpretation is no longer arbitrary and capricious. *Amici* believe strongly that such a race-to-the-bottom not only disserves employees like Respondents in this case, but is also contrary to the very purposes of ERISA - to protect "employees' justified expectations of receiving the benefits their employers promise them." *Central Laborers' Pension*

[5] To be absolutely clear, *Amici* do not regard this case as a *Firestone* case. *Firestone* deference has already been exercised and the court's judgment was that it was exercised in an abuse of permissible discretion. The only issue now is whether to add another administrative law-based deference to the ERISA claims process by treating Xerox's plan administrator as a type of quasi-administrative agency.

*Fund v. Heinz*, 541 U.S. 739, 743 (2004). See also DeBofsky, *supra*, at 749 ("A law designed for the protection of plan participants and their beneficiaries fails to meet that goal where plan administrators are given multiple opportunities to shore up a defective record and benefits due are either delayed or denied."). It also takes place against a background where employees who are retired or close to retirement do not have the luxury to wait until the plan administrator finally gets it right. In this case alone, many of the original Respondents have already passed away during the now ten years of this litigation.

## II. THE COURT SHOULD REJECT PETITIONERS' ATTEMPT TO INTRODUCE ADMINISTRATIVE LAW DEFERENCE INTO THE ERISA BENEFIT CLAIMS PROCESS.

Since the Second Circuit previously rejected Petitioners' interpretation of the operative pre-1998 Plan documents under a *Firestone*-based analysis as being unreasonable and outside the scope of permissible discretionary authority, the only new deference theory Petitioners could advance here is an administrative law-based deference, where courts may respect or credit an agency's advocacy position. See, e.g., *Mead v. Tilley*, 490 U.S. 714, 722 (1989) (ERISA case where Court deferred to the advocacy position of the Pension Benefit Guaranty Corporation presented in an *amicus* brief).

Lower federal courts applying *Firestone* have confused deference in ERISA claims with the kind of deference courts extend to administrative agencies. See DeBofsky, *supra*, at 730-31 ("[T]he federal courts

have mistakenly incorporated administrative law principles into ERISA benefit decisions. The use of the term "administrator" in the ERISA statute has allowed other terminology to creep into ERISA, such as "administrative record."). See also John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1332-33 (2007).

In particular, when federal courts employ the summary "record review" process, see, e.g., *Wilkins v. Baptist Healthcare System, Inc.* 150 F.3d 609, 618 (6th Cir.1998) (limiting their review of ERISA cases to the administrative record), they confuse adjudicative deference common under administrative law, see Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN L. REV. 363 (1986); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L. J. 511, with fiduciary deference under trust law. See *Herzberger v. Standard Insurance Co*., 205 F.3d 327, 332 (7th Cir. 2000) (Posner, J.) ("The Social Security Administration is a public agency that denies benefits only after giving the applicant an opportunity for a full adjudicative hearing before a judicial officer, the administrative law judge. The procedural safeguards thus accorded, designed to assure a full and fair hearing, are missing from determinations by plan administrators."). See also *Perlman v. Swiss Bank Corporation Comprehensive Disability Protection Plan*, 195 F.3d 975, 983-30 (7th Cir. 1999) (Wood, J., dissenting) ("The difference between decisions made by private actors such as ERISA plans and public agencies such as SSA is the reason that the Supreme Court has instructed the lower courts to 'develop a federal common law of

rights and obligations under ERISA-regulated plans,' rather than import wholesale a body of administrative law.") (quoting *Firestone*, 489 U.S. at 110).

*Amici* believe that the Eleventh Circuit Court of Appeals in *Brown v. Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), correctly understood the proper distinction between the ERISA framework and administrative deference principles. That court "expressed caution . . . at wholesale importation of administrative agency concepts into the review of ERISA fiduciary decisions," recognizing that the "[u]se of the administrative agency analogy may, ironically, give too much deference to ERISA fiduciaries." *Id.* at 1564 n.7. This is because decisions in benefits denial cases "involve the interpretation of contractual entitlements; they 'are not discretionary in the sense, familiar from administrative law, of decisions that make policy under a broad grant of delegated powers.'" *Id.* (quoting *Van Boxel*, 836 F.2d at 1050). Even more problematic is the reality that plan administrators face inherent conflicts that do not exist in administrative agencies. Cf. *Metropolitan Life Ins. Co. v. Glenn*, 552 U.S. 1161 (2008). See also Paul M. Secunda, *Inherent Attorney Conflicts of Interest under ERISA: Using the Model Rules of Professional Conduct to Discourage Joint Representation of Dual Role Fiduciaries*, 39 J. MARSHALL L. REV. 721, 730-733 (2006) (discussing the inherently conflicted state of dual-role fiduciaries). Consequently, *Amici* agree with the finding in *Brown* that administrative deference principles are inappropriate in evaluating the application of the abuse of discretion standard in the ERISA denial of benefits context.

Instead, this Court should clarify that ERISA plan administrators are not agency officials, that they are not comparable to administrative law judges, and that administrative law deference has no place in the ERISA claims process (except, perhaps, if the court is reviewing an interpretation of the Department of Labor or the PBGC). In fact, this Court has scrupulously used the term "abuse of discretion" rather than the administrative law standard of "arbitrary and capricious." For instance, the recent *Glenn* case follows the trust law abuse of discretion standard based on the Supreme Court's continued reliance on trust law in assessing ERISA claims. *Glenn*, 128 S. Ct. at 2348.

Consistent with this view, Judge Richard Posner wrote in *Van Boxel v. The Journal Co. Employees Pension Trust*, 836 F.2d 1048, 1050 (7th Cir. 1987):

> Pension fund trusts are not administrative agencies and most of the decisions they make are not discretionary in the sense, familiar from administrative law, of decisions that make policy under a broad grant of delegated powers. Certainly in such a case as the present one, pension fund trustees are not policy-makers; they are interpreters of contractual entitlements.

See also *Krolnik v Prudential Ins. Co.*, 570 F.3d 841, 843 (7th Cir. 2009) (in a case where the plan sponsor had not granted the plan administrator discretionary authority, Chief Judge Frank Easterbrook remarked: "[W]hat *Firestone* requires is not "**review**" of any kind; it is an independent *decision* rather than "**review**" that *Firestone* contemplates.") (emphasis in original);

*Ramsey v. Hercules, Inc*. 77 F.3d 199, 205 (7th Cir. 1996) (noting that *Firestone* cases are not appeals from the ruling of an Administrative Law Judge); DeBofsky, *supra*, at 740 ("The ERISA statute's use of some of the same nomenclature utilized in administrative law has undoubtedly confused the courts and has led to an overly restrictive scope of review even when a deferential standard of review is compelled.").

To be clear, ERISA never contemplated plan administrators and plans be vested with discretion as broad as that enjoyed by agencies. In fact, the Senate Finance Committee initially recommended that administrative adjudicatory authority be granted to the Department of Labor under ERISA. See S. 1179, 93d Cong. § 602, at 209-11 (1973), *reprinted in* 1 Leg. Hist. 780, 988-90; S. REP. NO. 93-383 at 116-17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4999-5000, and *reprinted in* 1 Leg. Hist. 1184-85. After the Senate initially rejected this Finance Committee proposal, a later attempt to reinsert the administrative adjudication provision was also defeated. See 120 CONG. REC. 29,563 (1973), *reprinted in* 1 Leg. Hist. 1245-47; 119 CONG. REC. 30,401 (1973), *reprinted in* 2 Leg. Hist. 1835-38. The delegation of adjudicatory authority did not appear in the final Senate Bill submitted to Congress, and of course, does not appear in ERISA. Furthermore, Congress also rejected a proposal to allow arbitration of employee benefit claims, in favor of establishing claimants' right to bring a civil action to pursue an employee benefit claim in federal district court. See H.R. 2, 93d Cong. § 691, at 566-67 (1974), *reprinted in* 3 Leg. Hist. 3813-14; 120 CONG. REC. 29,941 (1974) (remarks of Sen. Javits), *reprinted in* 3 Leg. Hist. 4769.

Legislative history could therefore not be clearer that Congress never intended plan administrators to hold the same discretionary authority as agency officials to whom administrative deference is due. This Court should therefore refuse Petitioners' invitation to extend inapplicable administrative law principles into the ERISA framework.

## CONCLUSION

For the reasons set forth above, the judgment of the Second Circuit should be affirmed.

Respectfully submitted,

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