NO. 06-962

IN THE

Supreme Court of the United States

XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, et al.,

Petitioners,

v.

WALDAMAR MILLER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Proposed Regulations

Other Authorities

COUNTER STATEMENT OF THE CASE

Generally, Respondents agree with the declarative portions of the Statement of the Case as set forth in the Petition. A few modifications will be noted in this Section.

The question set forth at the beginning of the Petitioners' Statement – like the "Question Presented" in their Petition – presents an odd view of the Ninth Circuit's Amended Order. In the Statement, Petitioners pose the question as whether ERISA requires an offset for prior distributions to "be calculated using interest and other assumptions in effect at the time the prior distribution was made to the exclusion of all other methods." *Petition* at 1. This stilted formulation does not appear anywhere in the decision below.

The Amended Order did not prescribe one "method" to the exclusion of all other methods. In fact, the exact calculations arising from that Order need to be determined by the district court on remand. Any "method" contained in the plan may be used, but only if it complies with all applicable legal limitations. The Amended Order invalidated Xerox's use of its "phantom account" offset provision because that approach reduced subsequent benefit distributions by more than the actuarial equivalent of the prior distribution. That exaggerated offset is not permitted by ERISA.

The Petition incorrectly states that IRS Revenue Ruling 76-259, 1976-2 Cum. Bull. 111, "requires" pension plans to take an offset for prior profit sharing plan distributions. *Petition* at 3, *n. 2; Petition* at 5. That Revenue Ruling permits floor offset arrangements to integrate pension plans with dissimilar profit sharing plans. Nothing requires offsets or causes them to apply in the absence of a valid plan term.

REASONS FOR DENYING THE WRIT

1. **There is no conflict among Circuits.** The Retirement Income Guarantee Plan (the "RIGP" or "Plan") involved in this case is part of a floor offset arrangement. The controversy arose because the plan offsets the participant's annuity under the defined benefit RIGP not only by the actual amount of distributions made from the Xerox Profit Sharing Plan but also by "phantom" earnings on such amount. Those phantom earnings are computed as if the distribution had earned the same rate of return earned by the Plan's managed investment fund. As the basis for the asserted conflict among Circuits, Petitioners claim that "the Second Circuit has held that ERISA permits the Xerox Plan to calculate the offset for prior distributions in this manner. *Frommert v. Conkright*, 433 F.3d 254 (2d Cir. 2006)." *Petition at 2; see also Petition at 8.* That contention mischaracterizes the *Frommert* decision.

In *Frommert*, the Second Circuit agreed with the plaintiffs' claim that Xerox could not take an offset for "phantom" earnings for employees who were rehired prior to 1998, on the grounds that Xerox had not properly adopted the amendment that sought to add the "phantom account" terms to the RIGP after that Plan was restructured. *Id.* at 265-267. Since, as a matter of law, the phantom account was not part of the Plan until 1998, the Second Circuit held that such amendment violated the "anti-cutback" terms of ERISA §§ 204(g) and (h); 29 U.S.C. §1054(g) and (h). *Id.* at 263. The Second Circuit also reversed the District Court's summary judgment which had

rejected the plaintiffs' claim for recovery based on breach of fiduciary duty. *Id.* at 269-272[1].

Concluding that adequate notice of the Plan Amendment was provided to participants in 1998, the Second Circuit concluded that "for employees rehired subsequent to the amendment of the plan through the 1998 SPD, the phantom account is a component of the Plan that they joined and thus may permissibly be applied to them." *Id.* at 263[2]. That statement is not a Second Circuit determination that ERISA permits offsets to be computed "in the manner" used by the Plan or that the phantom account approach is immune from all challenges that it substantively violates ERISA. Nothing in the *Frommert* decisions suggests that the plaintiffs in that case made, nor that the *Frommert* courts considered, the legal challenges addressed in the Ninth Circuit decision below.

The District Court in *Frommert* had stated that a claim that had been made in that case under ERISA §203(a)(2), 29 U.S.C. §1053(a)(2), "is little more than a restatement of plaintiffs' other claims." *Frommert* v. *Conkright*, 328 F. Supp. 2d 420, 438 (W.D.N.Y. 2004). On this point, the Second Circuit stated:

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[1] The Second Circuit has determined, as a matter of law, that Xerox also failed to properly perform its obligation to provide an understandable summary to plan participants regarding their benefits. *Layaou v. Xerox Corporation*, 238 F. 3d 205, 210-211 (2d. Cir. 2001).

[2] Since *Frommert* was filed in 1999, it is doubtful that any plaintiff in that case was denied relief as a result of the Court's limitation of its relief to those rehired by 1998.

> We do not reach the issue of the plaintiffs' anti-forfeiture claim under ERISA §203(a)(2), 29 U.S.C. §1053(a)(2), because we find that it is duplicative of their anti-cutback claim.

433 F.3d 254, 263, n. 10.

Thus, the fact that the Second Circuit did not also reverse on the anti-forfeiture claim only means that the Second Circuit concluded that the plaintiffs in *Frommert* had already been granted all of the relief they had actually requested.[3] Neither the District Court nor the Second Circuit addressed ERISA's rules regarding actuarial equivalence.

On remand, however, the Western District of New York endorsed the Ninth Circuit's decision in this current case:

> Utilization of this phantom account or anything similar to it has been soundly rejected by the Court of Appeals in this case as well as a previous case involving the same Plan, *Layaou v. Xerox Corporation*, 238 F.3d 205 (2d Cir. 2001). Other courts have reached the same conclusion. *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006); *Berger v. Xerox Corp. Ret.*

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[3] Conversely, while favorably citing *Frommert*, the Ninth Circuit found it unnecessary to reach the plaintiffs' claims for relief based on Xerox's failure to comply with ERISA's disclosure rules. (App. 10a-11a, n.7). *See* footnote 1 above. Appendix references in this Opposition Brief refer to the Appendix to the Petition.

Income Guarantee Plan, 338 F.3d 755 (7th Cir. 2005).

Frommert v. Conkright, ___ F. Supp. 2d ___, 2007 WL 174157 (W.D.N.Y. 2007) (on remand), at p. 5.

Circuit Court decisions consistently conclude that ERISA requires actuarial equivalence when determining the proper relationship between a participant's defined benefit and an amount paid prior to retirement age. *See, e.g., Berger. v. Xerox Corp. Retirement Income Guarantee Plan*, 338 F.3d 755 (7th Cir. 2003); *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000). All of such guidance squares with the decision below. Contrary to assertions in the Petition (*see Petition* at 10), the *Frommert* decisions certainly do not hold that ERISA permits the Xerox Plan Administrator to compute anyone's benefits based on the "soundly rejected" phantom account.

2. **The decision below is correct**. In framing the Question Presented, Petitioners assert that the phantom account approach treats prior distributions by "valuing those benefits in the same way as benefits due at retirement, thus ensuring that employees who receive distributions before retirement from other sources are treated no better than employees who do not receive such distributions." *Petition* at i.

Because the Plan is a defined benefit plan under ERISA, the participants have vested rights to certain defined benefit payments. To determine whether a certain payment received in an earlier year treats the participant "the same" as a different payment in a later year, some means of considering the time factor must be used. There is ample authority showing that established actuarial factors (that is, published tables of interest rates) must be used for that purpose. Those standards tell us

whether amounts paid at different times are "the same" for ERISA purposes. The phantom account approach is inconsistent with that authority and would cause the participant's defined benefit not to be "defined".

Petitioners are really arguing that the phantom account approach should be permitted to protect Xerox, so that the amount Xerox must contribute to the trust fund to pay benefits will be the same whether or not an individual received part of his benefit in an earlier and different form of payment[4]. But the sponsor of a defined benefit plan must contribute into the Plan's trust fund such amount as is necessary in order to be able to pay the defined benefits that will become due. Petitioners have not provided any legal authority or equitable rationale supporting their presumption that the equivalency of different benefit forms should be determined by reference to the investment profits Xerox hoped to make.

ERISA offers plan sponsors a specific means to account for prior distributions. *See* ERISA §§204(d) and (e); 29 U.S.C. §§1054(d) and (e). A plan may condition the restoration of prior service credits on a participant's repayment of any amounts previously received together with interest at statutorily defined rates. That Congressionally-designed "buy back" rule reflects ERISA's consistent use of actuarially-defined standards and offered Xerox a fair and clearly stated means to be sure that both the company and its employees were treated fairly. Tellingly, that buyback approach is not based on putting the

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[4] However, if a participant had not been laid off, he would have been accruing additional benefits. Clearly, Xerox does not intend to treat him "the same way" as if he had actually stayed in the Plan.

plan sponsor in the same position as if the distributed funds had actually been invested by the plan's investment fund.

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), and other authority cited in Petitioners' brief, permit pension plan benefits to be "integrated" with benefits from other sources. Petitioners are apparently contending that such authority means that nothing in ERISA restricts a plan sponsor's creativity in specifying how much of a retirement annuity may be negated by some earlier lump sum payment. But none of that authority actually permits an offset by anything more than the dollar amount actually received from the other source. Although general ERISA actuarial principles might permit an actuarially-based adjustment when such other amounts were paid at a different time (so they would be comparable to early payments from the plan itself), no authority suggests that such other payments can be adjusted based on the rate of return earned by the trust fund that pays the plan's defined benefits.

The Petition asserts that a recent Treasury Department Proposed Regulation cannot be reconciled with the Ninth Circuit's decision.[5] That Proposed Regulation calls for earlier distributions to be compared to retirement age annuities using an interest rate equal to the higher of 5% or the interest rate defined in the plan for purposes of determining offsets for prior distributions. This Proposed Regulation deals with Internal Revenue Code rules, not contained in ERISA, that limit the dollar amount of tax favored benefits. The Proposed

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[5] Petitioners' brief cites Prop. Treas. Reg. 1.415(b)-2(b)(1)(ii)(B)(2), but probably intends to refer to Prop. Treas. Reg. 1.415(b)-2(b)(2)(i) and (ii).

Regulation demonstrates the fundamental role of actuarial factors (as opposed to "phantom" accounts) in pension plan laws. The Proposed Regulation does not somehow negate limitations arising from other applicable ERISA rules, and does not support use of a "phantom account."

3. **The "phantom account" approach has other defects that are not now before the Court.** As previously discussed, there are several things wrong with Xerox's phantom account. The Order challenged by the Petition only addressed one of those failings.

The Second Circuit has established as a matter of law that plan terms allowing such approach were not properly added to the Plan text until 1998 and, for that reason, that only the pre-amendment plan terms may be used with respect to participants rehired during or prior to 1998. *Frommert* v. *Conkright*, *supra*, 433 F. 3d at 263. The Western District of New York has now determined the effect of that holding on benefit computations. The aggregate benefit may be reduced only by the amount of the benefits already received by the participant. *Frommert* v. *Conkright (on remand)*, *supra*. 2007 WL 174157 at 6.

Because the Ninth Circuit reversed the District Court's decision but did not reach the issues resolved in *Frommert*, Respondents obviously will press the *Frommert* issues on the remand of the case below. To obtain an adequate and reasonable benefit, RIGP participants will rely not only on this Ninth Circuit decision but also on the separate grounds established by *Frommert* and also by the separate grounds established by *Layaou v. Xerox Corporation, supra.*

4. **The decision below will affect few plans of other sponsors**. The parties disagree as to the exact meaning of the Ninth Circuit's Amended Order. The Order originally entered below clearly stated that the participant's aggregate defined benefit, as earned for two periods of service, may be offset only by the defined benefit accrued as of the date of the first payment. The Amended Order, while stating (for example) that the offset cannot exceed the annuity amount that those distributions would have provided, leaves some ambiguity as to the exact actuarial factors that apply for that purpose. Petitioners assert an extremely narrow interpretation of the Amended Order. This disagreement will be addressed on the existing remand to the Central District of California.

Referring to the narrow way they claim the Ninth Circuit's Amended Order must be applied ("to the exclusion of all other methods"), Petitioners state: "... most pension plans, including the Xerox [Plan], do not calculate the offsets in this way. For example, the Xerox Plan calculates the offset [using a phantom account]," *Petition* at 1 (emphasis added). When such statements in the Petition are read carefully, it becomes apparent that Petitioners know that the phantom account approach is an abnormal one. The Petition does not -- and truthfully could not -- state that any significant number of plans use a "phantom account."

Since no statute or Regulation actually authorizes floor offset plans, plan sponsors have used Revenue Ruling 76-259 as guidance. Petitioners' position is apparently based on how Xerox's advisors have chosen to read a phrase contained in a parenthetical clause contained in that ruling. The clause allows defined benefits to be offset by the amount deemed provided by the account balance in a profit sharing plan, and also by "the additional amount that would have been provided by any prior

distribution from the account balance." Xerox apparently wishes to interpret this phrase as if it had permitted an offset in an amount equal to the additional dollar amount to which the account balance apparently would have grown if it had not been distributed but instead had been invested by the plan's investment managers.

The 1976 Revenue Ruling does not say that. Quite to the contrary, Revenue Ruling 76-259 states that the defined benefit plan "must provide the actuarial basis that will be employed to determine the benefit deemed to be provided by the profit sharing plan." (App. 97a) The "amount that would have been provided" (as used in this Revenue Ruling and subsequently in the Ninth Circuit's Amended Order) refers to the defined benefit annuity that is attributable, under that proper actuarial basis, to the amount distributed by the profit sharing plan. To the extent that the Ruling does not clearly specify how earlier distributions should be accounted for, Petitioners apparently are contending that anything goes. Thus, they assert that "some" plan sponsors (meaning Xerox) use a "phantom account," while others (essentially, everyone else) "convert the prior distribution directly into an actuarially equivalent pension benefit." *Petition* at 4. With no supporting evidence, Petitioners are simply asserting that Xerox's own aggressive interpretation of a phrase in a Revenue Ruling constitutes established practice.

The Ninth Circuit's decision is "far-reaching" only in the sense that it reflects the general and pervasive importance of actuarial principles under ERISA's defined benefit rules. That decision does not upset the reasonable expectation of any pension plan sponsor. Under ERISA and the Internal Revenue Code, defined benefit pension plans are subject to various rules and requirements that require consideration of actuarial factors. These requirements may apply different factors for different

purposes. Plan administrators are quite accustomed to dealing with such requirements.

Certain employer associations which filed an amicus brief seeking a rehearing below have informed Respondents' counsel that they intend also to file an amicus brief regarding this Petition. Based on their brief below, they will attempt to create the false impressions: (a) that the Xerox "phantom account" approach is standard in floor offset plans; and (b) that "black letter law" is inconsistent with the decision below. Obviously, at least one of their members – Xerox – has applied plan terms that are not permitted by the decision below. However, outlandish allegations such as that made in their amicus brief below, that "the panel's decision dangerously undermines the private employer provided retirement system," are unsupportable and incorrect. A simple question will be whether their alarmist statements will be backed up with anything that is specific, on point, and supported by the record.

The substance of the applicable legal constraints would not be changed even if many companies engaged in this illegal practice (which we believe not to be the case). To see an example, one must look no further than the recent controversy over cash balance plans in which courts have now universally determined that a benefit-valuation approach used by pension plans of many large employers (including this same Xerox Plan) ignored ERISA's actuarial standards and was unlawful. See, *e.g., Berger v. Xerox, supra; Esden v. Bank of Boston, supra.* Employers cannot rewrite law merely by failing to comply with it.

CONCLUSION

The decision below is well decided. It is not in conflict with holdings from any Circuit and is consistent with existing law and practice. The Petition should be denied.

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Respectfully submitted,

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