No. 15-66

IN THE

Supreme Court of the United States

UNITED REFINING COMPANY, UNITED REFINING COMPANY PENSION PLAN FOR SALARIED EMPLOYEES, UNITED REFINING COMPANY RETIREMENT COMMITTEE,

Petitioners,

v.

JOHN COTTILLION, BEVERLY ELDRIDGE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the Third Circuit's Opinion unanimously affirmed the District Court's grant of summary judgment to Respondents, by assuming that the Plan Administrator had reinterpreted the 1980 and 1987 Plans and concluding that that interpretation was arbitrary and capricious because it conflicted with the express words and plain meaning of those Plans, consistent with decisions in other Circuits.

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INTRODUCTION

From 1987 until 2002, United Refining Company's Pension Plan for Salaried Employees expressly provided to terminated vested participants (TVPs) a pension benefit that could be commenced at their Early Retirement Date (age 60 or 59-1/2) without an actuarial reduction. For seventeen years (1988 to 2005), Petitioners interpreted the Plan to provide TVPs an unreduced benefit.

Thus, when Respondent John Cottillion left the United Refining Company in 1989 after working there for 28 years, Petitioners notified him that he could commence his full monthly benefit at any time after his Early Retirement Date and began to pay him an unreduced pension of $573.70 per month in 1995. These payments continued until June 2006, when at age 70, Cottillion received a letter from Lawrence Loughlin for the Retirement Committee. The letter advised him that his pension benefit had been calculated incorrectly, that benefits paid to TVPs prior to age 65 must be actuarially reduced, that he would receive no further benefits from the Plan, and that he must repay the Plan more than $14,000. The letter stated that the IRS required the reduction to preserve the Plan's favorable tax qualification; it failed to advise that the Company sought this ruling from the IRS on its own initiative by providing the IRS with sections of a plan document adopted in 2002, long after his employment with the Company ended, and without telling the IRS that the sections it provided were adopted in 2002. Similar letters were sent to fifteen other TVPs receiving monthly benefits in 2006.

Participants not yet receiving benefits were also adversely affected by Petitioners' retroactive reduction of benefits. In 2005, Respondent Beverly Eldridge and other TVPs who had not yet reached their Early Retirement Dates received letters from the Company to "clarify" that the Plan only provided actuarially reduced benefits to TVPs who commenced their benefit prior to age 65. The Company did not tell these Participants that this reduction was based on a plan document adopted in 2002, after they left the Company.

All the evidence showed that Petitioners reduced the pension benefits of TVPs who left the Company prior to the adoption of the 2002 plan document by retroactively applying the 2002 plan document to them, in violation of ERISA's anti-cutback rule, 29 U.S.C. §1054(g). Nonetheless, both the District Court and the Third Circuit below addressed Petitioners' argument that the reduction of benefits was the result of a "reinterpretation" of the earlier plan document. Both courts concluded that even under a deferential standard of review, such an interpretation conflicted with the unambiguous and express terms of the Plan, was unreasonable and an abuse of discretion.

This case involves nothing more than a court's refusal to defer to a *post hoc* rationalization of a decision to reduce benefits that was purportedly based on an interpretation that is contrary to the plain, unambiguous language of a plan that promised unreduced benefits at an early retirement date. The result reached by lower courts here is completely in line with the law in every circuit. There is no circuit split and no compelling reason to grant review.

Nor is there a circuit split on the question of whether an erroneous reinterpretation can constitute an "amendment" under §1054(g). Treas. Reg. §1.411(d)–4, adopted in 1986, resolves this question by prohibiting an employer from exercising its discretion to deny a participant an accrued benefit. Dicta in earlier cases to the contrary are overruled by Treas. Reg. §1.411(d)–4. In any event, no court has squarely held that an exercise of discretion that reduces an accrued benefit can never be an "amendment" within the meaning of §1054(g), and a ruling on that issue is not essential to the decisions of the lower courts in this case. Thus, if this Court were to grant certiorari, it would be considering a question that is purely hypothetical.

STATEMENT OF THE CASE

I. Factual Background

A. The Parties

Both named Plaintiffs, John Cottillion, who was employed by United Refining Company ("United" or the "Company") from 1960 to 1989, and Beverly Eldridge, who was employed by the Company from 1987 to 1996, were participants in the United Refining Company Pension Plan for Salaried Employees (the "Plan.") [App.74a (*citing* JA575-577, 579, 3588)[1]]. Because both Plaintiffs ended their employment after satisfying the Plan's vesting requirement, but prior to being able to retire, they are referred to as "terminated vested participants" or "TVPs." [App.74a-75a].

The Plan names the Retirement Committee as the "Administrator" of the Plan [App.75a (*citing* JA604; JA681; JA770; JA875)]. From May 3, 1988 to January 1, 2009, the Retirement Committee consisted of Lawrence Loughlin, Myron Turfitt, and John Catsimatidis. Loughlin, the Committee's Secretary, served as the Plan's day-to-day administrator. [App.75a (*citing* JA966; JA604; JA681; JA771)].

B. The 1980 and 1987 Plans

When Cottillion terminated his employment with the Company in 1989, the Plan was governed by the "United Refining Company Pension Plan for Salaried Employees as Amended and Restated Effective June 30, 1980" (the "1980 Plan") [App.75a (*citing* JA587-626)].[2] Article VII of the 1980 Plan addressed termination from employment. Specifically, §7.01 provided that "[i]f a participant's employment shall terminate prior to his Normal Retirement Date or an Early Retirement Date, for any reason other than death, he shall be entitled to a deferred vested Retirement Income if he is credited with at least ten (10) years of Vesting Service at the

[1] Citations with the prefix "JA" are to the Joint Appendix filed in the Third Circuit.

[2] The various Plan documents are referenced by their stated effective date, not the date on which they were adopted.

time of his employment termination." [App.76a (*citing* JA598)]. Section 7.02 provided that "[t]he amount and time of commencement of a deferred vested Retirement Income to a participant who satisfies the requirements of Section 7.01 shall be determined in accordance with the provisions of Section 5.03, based on the Participant's Benefit Service and Average Compensation at the time of employment termination." [App. 76a (*citing* JA598)]. The cross-referenced §5.03, stated:

> A Participant who retires on an Early Retirement Date may elect to receive one of the following:
>
> (a) His Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Normal Retirement Date would have occurred.
>
> (b) A reduced amount of Retirement Income to begin at the end of the month in which his Early Retirement Date occurs, computed so as to be a percentage of the benefit provided for him under paragraph (a) of this Section 5.03, in accordance with the following table …

[App.76a-77a] (*quoting* JA596)].[3]

[3] The table accompanying §5.03 specified a "100.0%" benefit for retirees who started collecting benefits zero, one, two or three years prior to their Normal Retirement Date, and a reduced, but

Effective July 1, 1987, United adopted "Amendment No. 5," which amended the 1980 Plan by, *inter alia*, reducing the vesting service requirement for a TVP to five years and amending §5.03 to read: "A participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs." [App.77a (*citing* JA621-22)]. Following the adoption of Amendment No. 5, United informed TVPs that they could elect to have their full retirement benefit begin without reduction at any time after their Early Retirement Date. [App.77a-78a (*citing* JA1168)]. Consequently, when Cottillion terminated his employment in 1989, United sent him a letter informing him that he could elect to receive his full retirement benefit, $573.70, following his Early Retirement Date in October, 1995, "at age 60." [App.78a (*citing* JA1170, JA1173)]. From November, 1995 through June, 2006, Cottillion received his full monthly benefit each month without any actuarial reduction for early retirement. [App.78a (*citing* JA1023-24, JA1276)].

On December 28, 1994, United adopted a restated plan document, effective January 1, 1987 (the "1987 Plan"). [App.78a (*citing* JA628-713)]. The

subsidized benefit of "93.3%" for participants four years prior to Normal Retirement Date, and an "86.7%" benefit for participants five years prior to Normal Retirement Date. [App.77a (*quoting* JA596)]. Consistent with this language, letters sent from United to TVPs during this time period informed them that any reductions in expected benefits prior to the participant's Normal Retirement date "appl[y] to ages 60 and 61 only." [App.77a; JA1160)].

1987 Plan provided that participants who terminated their employment prior to their Normal Retirement Date "shall be entitled to a deferred vested Retirement Income if he is credited with at least five (5) years of Vesting Service at the time of his employment termination." [App.78a (*citing* JA662)]. Like the 1980 Plan, §7.02 of the 1987 Plan continued to state that the amount of a TVP's benefit "***shall be determined in accordance with the provisions of Section 5.03.***" [App.78a (*quoting* JA662) (emphasis added)]. Section 5.03 of the 1987 Plan continued to provide that "A Participant who retires on an Early Retirement Date will receive his Accrued Retirement Income computed as of his Early Retirement Date commencing at the end of the month in which his Early Retirement Date occurs." [App.79a (*citing* JA650)]. Consequently, when Eldridge terminated her employment on December 6, 1996, the Retirement Committee informed her that she could elect to have her "vested benefits . . . paid monthly commencing on the first of the month following [her] 59 1/2 birthday December 2009, without any reduction for early retirement." [App.79a (*citing* JA1229; JA1231)].[4]

Before July 27, 2005, United sent all TVPs form letters and applications, like those sent to Cottillion and Eldridge, stating the amount of their full monthly retirement benefit and that they could elect to begin receiving the full benefit at any time after their Early Retirement Date. [JA1113-1115, JA1119-20, JA1170, JA1229, JA1174-1180].

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[4] Amendment No. 2 to the 1987 Plan, adopted in 1996, lowered the Plan's Early Retirement Date from age 60 to age 59-1/2. [App.79a (*citing* JA709)].

C. The 1995 and 2002 Plans

On January 30, 2002, United amended and restated the Plan in order to comply with the requirements of various legislative enactments. [App.79a (*citing* JA1232-35)]. That amended and restated plan document is referred to as the "1995 Plan." [App.79a (*citing* JA714-813)]. After the IRS advised the Company that several amendments to the 1995 Plan were required before a favorable determination letter could be issued, United adopted the 2002 Plan, on March 18, 2003. [App. 80a (*citing* JA814-961, JA1110-1152)].

Both the 1995 and 2002 Plans added language in §5.4(c), absent in the earlier Plans, requiring that benefits to a "terminated Participant" that commenced prior to the Participant's Normal Retirement Date be "actuarially reduced to reflect the earlier starting date thereof." [App.80a (*quoting* JA741, JA842)]. From 2002 through 2005, United continued to pay unreduced benefits to TVPs. [App. 81a (*citing* JA1110-1152, JA1153-1158)].

D. The Retroactive Application of §5.4(c) of the 2002 Plan to Reduce Terminated Vested Participants' Accrued Benefit

On August 17, 2005, United sent to Eldridge a letter purporting to "clarify when you can receive your pension from United Refining Company and under what terms . . ." That letter informed her that: "If you elect to receive your pension benefit before age 65, the amount you receive will be adjusted to reflect the earlier starting date." [App.81a (*quoting* JA1257)]. In

July and August 2005, substantively identical letters were sent to other TVPs who, like Eldridge, had accrued a vested benefit but had not yet commenced benefit payments. The letters contained a chart outlining the actuarial factors by which each TVP's benefits would be reduced. Attached to each letter was a copy of §5.4 of the ***2002 Plan***. [App.81a (*citing* [JA1259-1271)].

On November 28, 2005, United applied for a compliance statement under the IRS's Voluntary Correction Program ("VCP"). [App.82a (*citing* JA1110-52)]. United's VCP submission stated that under the Plan, if a TVP elects to begin payment of his or her benefit prior to the Normal Retirement date, "then the pension benefit will be actuarially reduced for the earlier payment date (***see Plan Section 5.4(c),*** last sentence)." [App.82a (*quoting* JA1114) (emphasis added)]. United's submission further stated that 16 TVPs:

> who elected to receive their deferred vested benefit prior to attaining their Normal Retirement Date were overpaid a monthly pension benefit that should have been actuarially reduced. . . .
>
> As a result, "excess amounts" were paid to terminated vested participants. This error was discovered in the current year by the Plan's actuaries, Towers Perrin.

[App.83a]. In support of its application, United referenced and attached sections of the ***2002 Plan***, including §5.4(c), which did not appear in the 1980 or 1987 Plans in effect when class members' employment terminated. [App.83a (*citing* JA1114, JA1134-43)]. However, United did not inform the IRS that the submitted plan provisions were adopted only in 2002. [JA1114, JA1134-1143]. Based on these submissions, the IRS issued a compliance statement on March 16, 2006, which authorized United to recoup past payments from, and reduce or halt future payments to, the sixteen plan participants identified in the IRS submission, including Cottillion. [App.83a (*citing* JA1157, JA1272-1274)].

Upon receiving the Compliance Statement from the IRS, Loughlin, on behalf of the Retirement Committee, sent to those TVPs who were then receiving benefit payments a letter stating that their pensions had been incorrectly calculated. The letters advised that "the Retirement Committee of the Plan [recently] discovered that the calculation of your monthly pension benefit was incorrect and was in excess of the amount permitted under the terms of the Plan." [App.83a-84a (*quoting* JA1276, JA1283-1297)]. The letters attached the Compliance Statement and, without indicating that the Compliance Statement was based on United's submission of the 2002 Plan adopted after TVPs left United, stated:

> The Plan document requires that all pension benefits paid to terminated vested participants PRIOR to their Normal Retirement Age of 65 years MUST be actuarially reduced to the earlier payment date. As your monthly

> pension benefit began before your 65th birthday, your monthly pension benefit should have been reduced to reflect the earlier payment date.
>
> [ERISA] requires the Retirement Committee to strictly follow the terms of the Plan document in order for the Plan to maintain its favorable qualification issued by the Internal Revenue Service.
>
> On March 16, 2006, the Internal Revenue Service issued their Compliance Statement that will permit the Plan to maintain its favorable Plan qualification provided the Retirement Committee corrects your monthly pension benefit payments.

[App.84a-85a (*quoting* JA1276, JA1283-1297)]. Each letter further advised of the reduced amount of the participant's future monthly benefits payments. Cottillion was advised that beginning on July 31, 2006, his monthly pension benefit payments would stop, he would not receive future payments, and that he should repay the Plan $14,475.55 to satisfy "the amount owed to the Plan for past overpayments." [App. 85a (*quoting* JA1276)]. After his benefits were cut, Cottillion, at age 71, began driving a school bus to make ends meet. [JA4108].

Each letter cautioned that "[t]his determination is based on the Internal Revenue Service's published revenue procedures and Compliance Statement which the Plan Retirement

Committee must follow." [App.85a (*quoting* JA1276, JA1283-1297)]. Further, after one TVP asked the Department of Labor ("DOL") to investigate the Company's reduction of benefits, the DOL contacted United seeking a copy of the plan document and a written statement explaining United's position. [JA560 ¶167 (*citing* JA1413)]. Loughlin responded to the DOL by providing the 2002 Plan and explaining that §5.4(c) of that plan document was the controlling provision. [JA561 ¶168 (*citing* JA1415)]. Loughlin did not provide the DOL with the 1987 Plan, which was in effect when the participant had terminated her employment in April 2000. [JA561 ¶169 (*citing* JA1414-1522)].

There was no evidence that "plan professionals" informed Loughlin that the prior interpretation had been wrong. At best, the plan actuaries "inquired" from Loughlin regarding whether TVPs were receiving full benefits before age 65, and Loughlin then consulted the plan attorney. [JA3208-09]. In fact, Petitioners maintained that its defense was not based upon any communication with the plan attorney, and Respondents were barred from discovering the plan attorney's role in submitting the VCP petition under the attorney client privilege. *Cottillion v. United Ref. Co.*, 279 F.R.D. 290, 302-303 (W.D. Pa. 2011) (Doc.121 at 14).

E. The Plan Administrator Did Not Reinterpret the 1980 or the 1987 Plans to Correct an Operational Error

While the Retirement Committee had the authority to interpret the Plan, [JA561 ¶172 (*citing*

JA607, JA687, JA883-884)], it never exercised that authority to reinterpret the 1980 or 1987 Plans. Loughlin understood that he was not responsible for interpreting the Plan either as a member of the Retirement Committee or as the Vice President of Human Resources, did not recall being involved in any instance where the Retirement Committee handled a plan interpretation question, and was not involved in any discussions where the Retirement Committee considered whether TVPs could be paid an unreduced benefit. [JA562-563 ¶¶ 180-182 (*citing* JA979-980, JA996-997, JA1012)]. Loughlin informed one participant who objected to the reduction in his benefit that the Company had applied to the IRS's voluntary correction program "to remove any decision authority from the Plan Administrator and the Company." [JA563 ¶183 (*citing* JA1359), JA555-556 ¶139-141 (*quoting* JA1359)]. Turfitt had no understanding as to the Retirement Committee's responsibility to interpret the Plan and could not say whether he had ever seen the 1987 Plan. [JA561-562 ¶¶173-174 (*citing* JA1249-1251)]. Catsimatidis did not remember whether the Retirement Committee had any responsibility to interpret the Plan or ever had occasion to interpret the Plan. He did not recall any involvement in any Retirement Committee meetings related to interpreting the Plan, could not say whether he had ever seen the 1987 Plan, and did not even know about the reduction of benefits or the VCP application until after the filing of this lawsuit. [JA562 ¶¶175-179 (*citing* JA1300-1306)].

II. Proceedings in the District Court

On June 9, 2009, Cottillion and Eldridge commenced this class action against United, the Plan and the Retirement Committee. [JA130-245]. Counts I and II of their Second Amended Complaint asserted claims for benefits and for clarification of rights to future benefits under section 502(a)(1)(B) of the Employee Retirement Income and Security Act ("ERISA"), 29 U.S.C. §1132(a)(1)(B). In Count IV, Respondents sought appropriate equitable relief under ERISA §502(a)(3), 29 U.S.C. §1132(a)(3), to redress Petitioners' violation of the anti-cutback rule in ERISA §204(g), 29 U.S.C. §1054(g), [JA398-418].[5]

In a Memorandum Opinion and Order dated April 8, 2013 [App.73a-107a], District Court Judge Sean J. McLaughlin found that "the heart of this action is Plaintiffs' contention that United Refining violated ERISA's anti-cutback provisions by attempting to retroactively reduce the amount of accrued early retirement benefits earned and/or paid to plan participants under the 1980 and 1987 Plan Documents," [App.87a], granted summary judgment in favor of Plaintiffs on their anti-cutback claim under ERISA §1054(g), and found it unnecessary to address the alternative theories of recovery advanced by Plaintiffs. [App.105a].

Judge McLaughlin expressed "no doubt about the centrality of ERISA's object of protecting employees' justified expectations of receiving benefits

[5] To be consistent with Petitioners, Respondents refer to the anti-cutback rule as ERISA §1054(g).

their employers promised them." [App.88a (*quoting Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743-44 (2004))]. "A 'crucial' component of this objective is ERISA's anti-cutback rule, which provides that '[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan...". [App.88a (*quoting Heinz*, 541 U.S. at 743-44 (*quoting* 29 U.S.C. §1054(g)))]. The district court observed that to state a claim for a violation of ERISA's anti-cutback rule, a plaintiff must show "(1) that a plan was amended and (2) that the amendment decreased an accrued benefit." [App.88a (citation omitted)].

The district court addressed Plaintiffs' contention that United retroactively applied §5.4(c) of the 1995 and 2002 Plans to reduce Plaintiffs' vested benefits which accrued under the 1980 and 1987 Plans. Judge McLaughlin also noted Defendants' counter that §5.4(c) did not alter or change the benefits provided under the 1980 and 1987 Plans, but merely stated in explicit terms what already should have been clear under each of the previous documents, that Plaintiffs' early retirement benefits must be actuarially reduced. Defendants thus contended that the Retirement Committee's decision to retroactively reduce pension benefits which had previously been paid at unreduced amounts was not occasioned by the addition of §5.4(c), but rather was an overdue correction of a longstanding mistake. [App.89a-90a].

The district court concluded:

> Whether by virtue of the addition of Section 5.4(c) to the 2002 Plan Document or in light of the Retirement Committee's reinterpretation of the 1980 and 1987 Plan Documents to preclude unreduced early retirement benefits, there has clearly been a "plan amendment" within the meaning of the anti-cutback rule.

[App.90a]. The district court also addressed United's argument that the Plan Administrator's original interpretation of the 1980 and 1987 Plans was the result of a mistake and its decision to rectify it must be accorded deference:

> We find that the Defendants' [second] construction of the Plan Documents unreasonably minimizes the explicit reference in Section 5.03 contained in Section 7.02 in favor of a series of implicit cross-references, the cumulative effect of which would render Section 7.02 meaningless.

[App.99a-100a]. Thus, the district court ruled that even if the Plan Administrator did reinterpret the 1980 and 1987 Plan, that reinterpretation was not supported by the language of those Plans.

After the summary judgment ruling, on November 5, 2013, the District Court certified pursuant to Fed. R. Civ. P. 23(a) and 23(b)(1) and (b)(2), a class of:

> All terminated vested participants in the United Refining Company Pension Plan for Salaried Employees ("Plan"), who were employed by United Refining Company and vested under either the 1980 or 1987 version of the Plan at any time between January 1, 1987 and March 18, 2003, and their beneficiaries under the Plan.

[App.62a]. The court below approved Plaintiffs as class representatives class pursuant to Rule 23(a)(3) and (a)(4). [App.58a]. The November 5, 2013 Order also awarded remedies to the class. [App.71a-72a].

III. The Opinion of the Third Circuit

As set forth in the Factual Background, there was no evidence even to suggest that Loughlin's first interpretation of the Plan was wrong or that the Retirement Committee ever reinterpreted the 1980 or 1987 Plan. Rather, well after the commencement of this litigation in 2009, Defendants attempted to rationalize *post hoc* their decision to retroactively apply the actuarial reduction language in the 2002 Plan to Respondents and members of the class, even though they had terminated their employment before the adoption of that Plan.

Nonetheless, the Third Circuit addressed Defendants' argument as though Loughlin did reinterpret the Plan and reviewed this reinterpretation under a deferential standard that would be upheld unless arbitrary and capricious. [App. 13a]. The Third Circuit concluded that "no amount of deference can rescue Loughlin's second interpretation from its flat contradiction with the terms of the 1980 and 1987 Plans." [App.14a]. After parsing the language of the 1980 and 1987 Plans, the Court concluded that "[a] straightforward reading of the 1980 and 1987 Plans, consistent with United's early interpretations of these Plans, leads to the conclusion that TVPs were entitled to pensions in an amount that did not include an actuarial adjustment for the number of years younger than 65 that they were when they retired." [App.19a]. The court held:

> Under both plans, §7.02 tells us that a TVP gets retirement income in accord with §5.03, which states that a retiree is entitled to "Accrued Retirement Income," which is calculated under §5.01 with respect to a participant's average compensation and length of service with the company. Not one of these provisions treats TVPs differently from people who retire directly from United, and no provision requires actuarial adjustment (read reduction) for taking retirement benefits early. Loughlin's second interpretation conflicted with the plain meaning of the terms of the Plans and thus denied the Employees benefits due them in violation of §1132(a)(1)(B), notwithstanding the Plans' conferral on him of discretion to interpret Plan provisions.

[App.19a].

The court also held that Loughlin's second interpretation violated ERISA's anti-cutback rule, 29 U.S.C. §1054(g). [App.20a]. There is no question that the unreduced early retirement benefit, provided to TVPs under §§7.01 and 7.02 of both Plans, exclusively upon the satisfaction of certain age and/or service requirements is an accrued benefit protected by §1054(g), and thus are "accrued benefits." [App.20a]. Loughlin's second interpretation, contrary to the plain meaning of the Plan, resulted in the improper denial of TVPs' accrued early retirement benefits and thus violated ERISA's anti-cutback rule. [App.22a].

The Third Circuit considered United's other arguments, but found "none convincing." [App.22a]. Addressing United's internal textual argument, the court found no support for United's argument, that §5.03 of the Plans entitles only a participant who retires from the Company to an unreduced benefit, in the definition of "Retirement Date." [App23a]. The court also dismissed United's reliance on an expert report by Nancy Keppelman, an ERISA lawyer. Not only is expert testimony on the interpretation of a pension plan a purely legal question not properly the subject of expert testimony, but Ms. Keppelman did not even support United's interpretation on the meaning of "retire." Section 7.01 explicitly confers early retirement benefits on TVPs, and "§7.02 clarifies that the amount of the benefits conferred by §7.01 '*shall* be determined *in accordance* with' §5.03." [App.24a]. Thus, an interpretation requiring an actuarial adjustment would *not* be in accordance with

§5.03, and would be the exact opposite of the Plan's requirements. [App.24a].[6]

United's structural argument fared no better. Article 5 of the Plans addressed benefits for Early Retirees—those who retire from United directly before turning 65—while Article 7 addresses benefits for TVPs. However, the two separate sections do

> not overcome the indisputable facts that the TVP section explicitly informs readers that TVPs' benefits are to be calculated "in accordance with" Article 5 and that *nothing* in either the 1980 Plan or the 1987 Plan refers to actuarial adjustments for people who elect to receive their pension early.

[App.26a-27a]. While the structure of the plan could suggest that without Article 7, TVPs would be entitled to nothing more than ERISA's statutory floor, "with Article 7 they are entitled to what Article 7 provides, which is benefits calculated in accordance with Article 5." [App.27a].

United's statutory argument was also inconsistent with the Plan's terms. While 29 U.S.C.

[6] The Petition at 13 contends that the Third Circuit erred by failing to consider the second sentence of §7.2. That contention is meritless as even their purported "plan design" expert, attorney Keppelman, admitted that Petitioners' proffered interpretation of this provision would violate ERISA and the Internal Revenue Code. [Doc.168-4 at page 24 of 24].

§1056(a) provides a statutory floor for the provision of early retirement benefits to TVPs, the Plan expressly provided TVPs with more than the statutory floor in language that could not be "clearer." [App.27a]. "[T]he 1980 and 1987 Plans set out a detailed scheme for calculating TVPs' benefits, one that expressly omits any actuarial adjustment." [App.28a.] Given the clear and unambiguous language of the Plans, any interpretation that actuarially reduced TVPs' early retirement benefits was unreasonable.

On April 13, 2015, the Third Circuit denied United's petition for rehearing by the panel and rehearing *en banc.* [App.2a].

REASONS FOR DENYING THE PETITION

Although there is no evidence to support United's argument that the Plan Administrator reinterpreted the 1980 and 1987 Plans, both the District Court and the Court of Appeals addressed this argument. Both courts concluded that even under a deferential standard of review, United's purported reinterpretation ignored the clear and unambiguous language of the 1980 and 1987 Plans providing TVPs an unreduced early retirement benefit. United is not entitled to a third bite at the apple before this Court to advance an argument that was thoroughly considered and rejected by both courts below and has absolutely no support in the record developed below.

I. The Third Circuit, Applying a Deferential Standard of Review, Correctly Concluded That the Second Interpretation of the 1980 and 1987 Plans That Flatly Contradicts the Plain Language of the Plans, Is Arbitrary and Capricious, and There Is No Conflict Among the Circuits on That Question.

The Third Circuit correctly decided the issue presented by the petition. There is no conflict among the circuits regarding the issue and no compelling reason for this Court to grant the petition.

Reduced to its essence, the Third Circuit held that even if the Plan Administrator reinterpreted the 1980 and 1987 Plan as requiring that benefits commenced at an Early Retirement Date by TVPs be actuarially reduced, applying a deferential standard of review, that reinterpretation was arbitrary and capricious because it conflicted with the express, plain meaning of the 1980 and 1987 Plans.

Consistent with the Third Circuit's holding, every circuit follows some version of the rule that under a deferential standard of review, an interpretation of plan language that contradicts the plain meaning of an ERISA plan or renders express terms of the plan superfluous is an abuse of discretion. *See*, *e.g.*, *Colby v. Union Sec. Ins. Co. & Mgmt. Co. for Merrimack Anesthesia Associates Long Term Disability Plan*, 705 F.3d 58, 65 (1st Cir. 2013) ("the discretion of a plan administrator is cabined by the text of the plan and the plain meaning of the words used. … 'the plain language of an ERISA plan must be enforced in accordance with its literal and natural meaning'" (citations omitted)); *Frommert v. Conkright*, 738 F.3d 522, 529-30 (2d Cir. 2013) ("[W]here the trustees of a plan impose a standard not required by the plan's provisions, or interpret the plan in a manner inconsistent with its plain words, or by their interpretation render some provisions of the plan superfluous, their actions may well be found to be arbitrary and capricious."); *Savani v. Washington Safety Mgmt. Solutions, LLC*, 474 F. App'x 310, 314 (4th Cir. 2012) ("[E]ven as an ERISA plan confers discretion on its administrator to interpret the plan, the administrator is not free to alter the terms of the plan or to construe unambiguous terms other than as written. … 'An administrator's discretion never includes the authority 'to read out unambiguous provisions' contained in an ERISA plan, and to do so constitutes an abuse of discretion.'" (citations omitted); *LifeCare Mgmt. Servs. LLC v. Ins. Mgmt. Adm'rs Inc.*, 703 F.3d 835, 841 (5th Cir. 2013) ("if an administrator interprets an ERISA plan in a manner that directly contradicts the plain meaning of the plan language, the administrator has abused his discretion") (citation omitted); *Adams v. Anheuser-Busch Companies, Inc.*, 758 F.3d 743, 747-48 (6th Cir. 2014) ("[A]n interpretation of the plan contrary to its plain language will be arbitrary and capricious."); *Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc.*, 651 F.3d 600, 608 (7th Cir. 2011) ("[T]he Plans' generalized grant of interpretive discretion did not authorize the administrators to controvert the clear terms of the Plan." (citation omitted)); *Silva v. Metro. Life Ins. Co.,* 762 F.3d 711, 718 (8th Cir. 2014) (an interpretation may be an abuse of discretion when it "renders any language meaningless or internally inconsistent"); *Cardoza v.*

United of Omaha Life Ins. Co., 708 F.3d 1196, 1207 (10th Cir. 2013) (calculation of benefits that is contrary to the plain language of the plan is not reasonable and is arbitrary and capricious); *Flinders v. Workforce Stabilization Plan of Phillips Petroleum Co.*, 491 F.3d 1180, 1194 (10th Cir. 2007) (interpretation that "conflicts with the unambiguous language" of a plan provision and with an "express statement" in the plan is unreasonable); *Wagener v. SBC Pension Benefit Plan-Non Bargained Program*, 407 F.3d 395, 404 (D.C. Cir. 2005) (applying the most deferential standard of review, it is "patently unreasonable" for the fiduciaries to interpret the plan in a manner that discriminates against plaintiffs "in direct contravention of the Plan's plain language.")[7]

The Ninth Circuit explained the policy underlying this rule, recognizing that "[p]ension plan participants should be able to reasonably rely on plan terms in planning their retirement." *Tapley v. Locals 302 & 612 of Int'l Union of Operating Engineers-Employers Const. Indus. Ret. Plan*, 728 F.3d 1134,

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[7] The Eleventh Circuit's six step approach, although articulated somewhat differently from the other circuits, leads to the same result. Thus, if an administrator is vested with discretion in reviewing and interpreting claims, but no reasonable grounds exist to support the administrator's decision, the decision must be reversed. *See*, *e.g.*, *Capone v. Aetna Life Ins. Co.*, 592 F.3d 1189, 1195 (11th Cir. 2010). *See also HCA Health Servs. of Georgia, Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 1005 (11th Cir. 2001) (administrator's interpretation is wrong and is arbitrary and capricious if it deprives participants of their contractual expectation).

1143 (9th Cir. 2013) (*citing Heinz,* 541 U.S. at 743). Thus, while

> ERISA does not require the provision of benefits to early retirees, … this Plan does. … [W]hat the Plan provides, the Trustees may not take away. It is not for this Court to proffer a reasonable interpretation of Plan language, but instead to identify and reject any interpretation that is arbitrary, misfocused and contrary to the intent of those responsible for its terms.

Tapley, 728 F.3d at 1143 (citations omitted).

The Third Circuit did apply a deferential standard of review to Petitioners' purported reinterpretation of the 1980 and 1987 Plans and held that the reinterpretation was contrary to the plain meaning of the Plans' express terms and was arbitrary and capricious. Given this conclusion, it is clear that the TVPs would have prevailed on their claim for benefits under 29 U.S.C. §1132(a)(1)(B), not only in the Third Circuit, but in every other circuit, all of which apply the same principles to matters of interpretation and would have reached the same result given the facts of this case.

As there is no conflict among the circuits on the legal principles applied to Petitioners' purported reinterpretation of the 1980 and 1987 Plans, there is no compelling reason to grant the Petition.

II. No Circuit, Including the Third Circuit in This Case, Has Rendered a Dispositive Ruling on the Issue of Whether a Second Interpretation of a Plan is an Amendment Under ERISA §1054(g), and the "Conflict" Would Be Based on a Hypothetical Question.

As discussed at length above, any view that an administrator's reinterpretation of a plan term can constitute an "amendment" within the meaning of §1054(g) was not essential to the Third Circuit's opinion below. The Third Circuit held that given the clear and unambiguous language of the 1980 and 1987 Plans, any interpretation that actuarially reduced TVPs' early retirement benefits was unreasonable.

In any event, there is no conflict among the circuits regarding whether the reinterpretation of a plan term can constitute an "amendment" within the meaning of §1054(g). While several decisions cited by Petitioners suggest that ERISA §1054(g) prohibits only formal plan amendments that reduce an accrued benefit, that view was not dispositive to the holdings of those cases. Moreover, that view has been overruled by Treas. Reg. §1.411(d)–4, 26 C.F.R. §1.411(d)–4, Q & A 4. Further, while expressing the view that an erroneous interpretation of a plan provision may be construed as an amendment for purposes of ERISA §1054(g), neither the Third nor the Sixth Circuit has actually so held.

A. No Court Has Squarely Held That Only Formally Styled Plan Amendments Are Subject To ERISA §1054(g), a View Overruled By Treas. Reg. §1.411(d)–4.

A view that only formally styled plan amendments are subject to ERISA §1054(g) was not the basis for the holdings in the decisions cited by Petitioners from the District of Columbia, Seventh, Ninth and Second Circuits.

D.C. Circuit. Stewart v. Nat'l Shopmen Pension Fund, 730 F.2d 1552 (D.C. Cir. 1984), discussed in the Petition at 15, did not involve the amendment of an accrued benefit in violation of 29 U.S.C. §1054(g). Rather, *Stewart* held that a multi-employer pension fund has the right under ERISA to use a preexisting plan provision to cancel unilaterally, for purposes of a benefit computation, the pre-contributory service credits of employees whose employer has withdrawn from a multi-employer plan, as permitted under the terms of the applicable collective bargaining agreement. The court reasoned that under 29 U.S.C. §1053(a)(3) and authority reserved under the plan, the fund was permitted to change the ***vesting*** schedule, to avoid the dumping of a substantial unfunded liability resulting from the employer's withdrawal from the plan, and that such change was not the reduction of an accrued benefit.

The Third Circuit has agreed with the distinction drawn in *Stewart*. *Hoover v. Cumberland, Maryland Area Teamsters Pension Fund*, 756 F.2d

977, 983-84 (3d Cir. 1985), noted that vesting provisions do not affect the amount of the accrued benefit, but rather govern whether all or a portion of the accrued benefit is nonforfeitable, while accrual provisions provide a formula for calculating the amount of the normal retirement benefit which an employee has earned at any given time. Thus, the Third Circuit is in accord with the holding in *Stewart.*

To the extent that *Stewart*, 730 F.2d at 1563, contains *dicta* that only a formal plan amendment can trigger §1054(g)'s prohibition of the decrease of an accrued benefit, including an early retirement benefit or retirement-type subsidy, that suggestion is called into question by Treas. Reg. §1.411(d)–4, which provides that

> a plan that permits an employer, either directly or indirectly, through the exercise of discretion, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible (but for the employer's exercise of discretion) violates the requirements of section 411(d)(6).

26 C.F.R. §1.411(d)–4, Q & A 4.[8] The relevance of this Treasury Regulation is confirmed by several courts.

[8] Treas. Reg. §1.411(d)–4 is applicable to both ERISA §1054(g) and its equivalent in the Internal Revenue Code, 26 U.S.C.

Seventh Circuit. Dooley v. American Airlines, Inc., 797 F.2d 1447 (7th Cir. 1986), like *Stewart*, did not involve the reduction of an accrued benefit, but rather a revision to the actuarial assumptions for calculating the amount of a lump sum payment option to conform to prevailing interest rates at the time of the retirement of a participant who elects the lump sum payment option. Such a change in actuarial assumptions was permitted under the terms of the plan, which conferred upon the fiduciaries the authority to change the actuarial assumptions "from time to time" in an effort to maintain actuarial equivalence. *Id.* at 1452. The result in *Dooley* would be different today; as the court itself noted, subsequent revenue rulings require that actuarial assumptions be specified in the plan in a manner that precludes employer discretion, but the court was unwilling to impose this obligation on the plan because the IRS permitted the employer to phase in compliance with the revenue rulings over a period of several years. *Id.*

Ninth Circuit. If the issue were squarely presented today, the Ninth Circuit would likely hold that an indirect action to reduce vested rights of participants has the effect of an amendment within the meaning §1054(g).

The first Ninth Circuit case cited by Petitioners did not squarely raise that issue. *Oster v. Barco of California Employees' Ret. Plan*, 869 F.2d 1215 (9th

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§411(d)(6). *See McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1118 (9th Cir. 2000).

Cir. 1988), like *Dooley*, involved a change in the plan's policy regarding a lump-sum distribution of the actuarial equivalent of a participant's accumulated benefit. Emphasizing that the plaintiff did not suffer a reduction in benefits, the court held that the modification of the lump-sum distribution policy did not rise to the level of a plan amendment under the facts presented in that case. *Id.* at 1218, 1221.

However, contrary to the Petition at 16-17, *Richardson v. Pension Plan of Bethlehem Steel Corp.*, 112 F.3d 982, 987 (9th Cir. 1997) (*citing Fentron Industries v. National Shopmen Pension Fund,* 674 F.2d 1300 (9th Cir.1982)), recognized that even when the formal terms of a plan are not changed, taking action indirectly to reduce vested rights of members has the effect of an amendment. *Richardson* involved the adoption of provisions regarding the potential payment of shutdown benefits to workers employed in a plant being divested to a purchaser. However, because the plan changes were adopted pursuant to a negotiated settlement between the employer and the workers' union, the workers' claim under ERISA §1054(g) was barred. *Richardson*, 112 F.3d at 987-8.

The most recent Ninth Circuit decision cited by Petitioner, *McDaniel v. Chevron Corp.*, 203 F.3d 1099 (9th Cir. 2000), recognized that Treas. Reg. §1.411(d)–4 imposes a legal duty to eliminate provisions that purport to give employers discretion to reduce an accrued benefit and the failure to fulfill that duty can give rise to an independent violation of ERISA §1054(g). However, *McDaniel* found that Treas. Reg. §1.411(d)–4 did not apply, where there were ambiguities regarding the plan's mortality assumptions in the requirement for calculating the amount of the benefit paid to participants electing to receive actuarially equivalent benefits in the form of a single lump sum payment of cash. *Id.* at 1118. The court upheld the administrator's interpretation of the plan's provision, which was ambiguous regarding the proper mortality assumptions, which had been uniformly and consistently followed for many years and was consistent with the plan's historical funding practices. Thus, the Ninth Circuit would likely find that Treas. Reg. §1.411(d)–4 would prohibit an exercise of discretion that reduced an accrued benefit.

Second Circuit. The most recent case cited by Petitioners, *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 241 (2013), confirmed that Treas. Reg. §1.411(d)–4 overruled *Stewart*'s suggestion that only a formal plan amendment can trigger §1054(g)'s prohibition of the decrease of an accrued benefit. The Second Circuit stated that Treas. Reg. §1.411(d)–4 "prohibits plan provisions from building certain broad reservations of discretion into the plan terms, just the sort of provision at issue in *Stewart.*" *Id.* at 183. The Second Circuit also observed that the Ninth Circuit did not need to address this issue in *McDaniel* because it ultimately held that the regulation did not apply to the facts before the court. *Id.* (*citing McDaniel*, 203 F.3d at 1118). Far from suggesting a split among the circuits, *Kirkendall* noted: "No other circuit has considered the interaction between Treas. Reg. §1.411(d)–4 and ERISA [§1054(g)]." 707 F.3d at 183.

Further, *Kirkendall* concluded that it need not address the precise reach of ERISA §1054(g). Even if

§1054(g) could apply to changes not formally stylized as "amendments,"

> [w]hatever the correct meaning of "amendment," [plaintiff's] allegation that her benefits were incorrectly calculated falls outside of that definition. Even broadly interpreted, the word "amendment" contemplates that the actual terms of the plan changed in some way, *Stewart,* 730 F.2d at 1561, or that the plan improperly reserved discretion to deny benefits, 26 C.F.R. §1.411(d)–4, and not, as claimed here, that an administrator made an incorrect factual determination of the date of a claimant's termination.

Id. at 183-84.

Thus, no court has squarely held that an exercise of discretion that reduces an accrued benefit can never be an "amendment" within the meaning of §1054(g). To the contrary, both the Ninth and the Second Circuits would likely hold that Treas. Reg. §1.411(d)–4 would prohibit such an exercise of discretion.

B. Neither the Sixth Nor the Third Circuit Has Held That an Erroneous Interpretation That Reduces an Accrued Benefit Is an "Amendment" Under ERISA §1054(g).

Desperate to fabricate a circuit split, Petitioners pluck one sentence from the opinion in *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702 (6th Cir. 2000), to suggest that the Sixth Circuit held that "[a]n erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant may be construed as an 'amendment' for the purposes of ERISA [1054(g)]." *Id.* at 712 (*quoting Hein v. F.D.I.C.,* 88 F.3d 210, 216 (3d Cir. 1996)). However, *Hunter* ultimately held that even if an erroneous interpretation or an amendment that interprets a plan could be deemed an "amendment" under the anti-cutback rule, there was no violation of that rule in the case before it.

Hunter was a complicated, multi-count class action by employees of a subsidiary against the former parent company. The subsidiary established a 401(k) plan to accept the assets attributable to its employees from the pension plans sponsored by the parent. After the assets were transferred to the 401(k), the price of the parent's stock dropped, causing plaintiffs to withdraw their stock from the 401(k). The stock rebounded the following year. Plaintiffs complained that the parent violated the anti-cutback rule by eliminating plaintiffs' right to lump sum distributions of their individual accounts under the plans sponsored by the parent.

The Sixth Circuit rejected this claim. The court concluded that even if an erroneous interpretation of a plan provision or an amendment that interprets a plan may be considered an amendment, the parent's interpretation of the language of the prior plans as not requiring a lump sum distribution under the language of the plan at issue was permitted by the plain meaning of that language. *Hunter*, 220 F.3d at 712. Under the plan language, the plaintiffs would not have been entitled to a distribution until well after the time they actually received their accounts. Thus, plaintiffs' anti-cutback claim failed. *Id.* at 717.

Further, *Hein,* the case that, according to Petitioners, triggered the view that an indirect amendment, such as an erroneous interpretation of a plan provision that results in the improper denial of benefits, may be construed as an "amendment" for purposes of the anti-cutback rule, concluded that such an amendment did not occur in the case before the court. The court held that even if an erroneous interpretation of a plan provision could be deemed an "amendment," 88 F.3d at 216-217, the plaintiff did not satisfy the pre-amendment conditions for receipt of unreduced early retirement under the plain language of the relevant company retirement plan. *Id.* at 221. Thus, the plaintiff's claim was denied.

In this case, the Third Circuit held that the plain language of the 1980 and 1987 Plans entitled plaintiffs to an unreduced early retirement benefit. Every case cited by Petitioners would have applied the same principles and reached the same conclusion.

III. The Third Circuit Correctly Applied the Decisions of This Court.

Petitioners suggest that *Conkright v. Frommert*, 559 U.S. 506 (2010), requires blind deference even to erroneous interpretations of plan language. It did not. *Conkright* merely held that a single honest mistake does not strip a plan administrator of deference, but did not intend to undermine participants' expectations regarding their earned benefits. *Id.* at 517. Thus, applying a deferential standard of review, as the Third Circuit did in this case, "does not mean that the plan administrator will prevail on the merits. It means only that the plan administrator's interpretation of the plan 'will not be disturbed if reasonable.'" *Id.* at 521 (*quoting Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)).

The Third Circuit parsed the relevant language of the 1980 and 1987 Plans and found that United's interpretation of that language was not reasonable, because it conflicted with the Plans' unambiguous and express terms. There is no compelling reason why this Court should reparse the Plans' language to consider an interpretation that Petitioners' so-called expert admitted would violate ERISA and the Internal Revenue Code. *See* note 6, *supra.*

This Court should not belabor this case further. The notion that courts should defer to plan administrators because of their familiarity with the principles that animate ERISA plans does not apply here, where the Retirement Committee members, including Loughlin, had no understanding that they were responsible for interpreting the Plan and never deliberated about whether the Plans entitled TVPs to unreduced benefits. *See* pages 13-14, *supra. Conkright*, 559 U.S. at 521, recognizes that deference should not be required when a plan administrator is too incompetent to exercise his discretion fairly.

There was ample evidence below that the Plan Administrator in this case was not competent to exercise his discretion. However, no court need go so far. Even applying a deferential standard of review, any interpretation of the 1980 and 1987 Plans that denied TVPs the promised unreduced early retirement benefit contradicted the plain meaning of those Plans and is unreasonable.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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