No. 15-638

IN THE

Supreme Court of the United States

PRICEWATERHOUSECOOPERS LLP,
THE RETIREMENT BENEFIT ACCUMULATION PLAN
FOR EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP,
AND THE ADMINISTRATIVE COMMITTEE TO THE
RETIREMENT BENEFIT ACCUMULATION PLAN FOR
EMPLOYEES OF PRICEWATERHOUSECOOPERS LLP,

Petitioners,

v.

TIMOTHY D. LAURENT AND SMEETA SHARON,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

REPLY BRIEF FOR PETITIONER

DANIEL J. THOMASCH
RICHARD W. MARK
CAITLIN J. HALLIGAN
AMER S. AHMED
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

MIGUEL A. ESTRADA
Counsel of Record
JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioners

RULE 29.6 STATEMENT

The corporate-disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

This case checks every box in the Court's criteria for certiorari: Expressly disagreeing with two other circuits, the court of appeals construed a provision of a federal statute, the Employee Retirement Income Security Act of 1974 ("ERISA"), which governs the retirement benefits of millions of American workers. The Second Circuit's construction of that provision contravenes this Court's teaching. And, as *amici* explain, it undermines Congress's purposes of fostering flexibility for employers and certainty for all stakeholders, and will foment confusion as employers, administrators, and participants attempt to cope with the conflict and the Second Circuit's nebulous new standard.

Seeking to shield the decision below from the scrutiny it deserves, respondents deploy a tapestry of obfuscation to contend that the circuits' explicit disagreement is insufficiently direct to merit review, and that the question presented does not matter. Both contentions are baseless. Respondents parade a series of supposedly "superseding" (Opp. 14) legal developments, but none of them—two statutes and a regulation, each of which even the Second Circuit recognized do *not* affect this case—altered the relevant legal landscape. None can explain the circuits' conflicting interpretations of the same statute. And none provides "clear" or "definitive" guidance on the meaning of the statute that could "moo[t]" (*id.* at 12) the need for this Court's intervention. Indeed, the 2007 Internal Revenue Service ("IRS") regulation respondents trumpet was issued *before* all three circuits issued conflicting decisions on the *statutory* question the petition presents.

Respondents' heavy reliance on that regulation in defending the decision below highlights the illogic of the Second Circuit's reasoning. Despite acknowledging that that regulation *does not apply* to this case, because the IRS did not and could not lawfully impose its new standard retrospectively, the Second Circuit nevertheless relied on the substance of that inapplicable, prospective-only regulation to disregard the IRS's prior view that *does* apply here—a view that the IRS had maintained for decades. Its misunderstanding of the regulation's irrelevance is only more reason for this Court's intervention.

This Court should not delay restoring clarity and certainty to this important area of federal law that affects long-term decisions by employers and workers nationwide. The petition should be granted.

I. RESPONDENTS FAIL TO REFUTE THE IMPORTANCE OF THE QUESTION PRESENTED THAT HAS DIVIDED THE COURTS OF APPEALS.

Respondents cannot dispute that the Second Circuit explicitly "disagree[d]" with *Fry* v. *Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644 (7th Cir. 2009) (Easterbrook, C.J.), and *McCorkle* v. *Bank of America Corp.*, 688 F.3d 164 (4th Cir. 2012), adopting an interpretation of "normal retirement age" in ERISA directly contrary to those circuits' position. Pet. App. 24a-29a & n.17. Respondents nevertheless contend (at 14-25) that the circuit split is not "squar[e]" and lacks continuing importance. Both contentions are wrong.

Respondents identify no relevant difference between the facts and legal issues presented here and those presented in *Fry* or *McCorkle*. They do not dispute the Second Circuit's conclusion that the per-

tinent plan terms here are indistinguishable from those the Seventh and Fourth Circuits confronted. Pet. App. 27a-28a. Nor do respondents deny that "normal retirement age"—a defined term of art woven throughout ERISA—affects many aspects of pension plans and their administration for which nebulous, shifting standards are unacceptable. *Cf.* Pet. 33-34; Chamber Br. 10-12.

Respondents claim instead (at 13-14) that several supposedly "superseding changes in the law" have "clarified" the "statute": a 2006 statute (prospectively) eliminating "whipsaw" payments; the IRS's 2007 regulation (prospectively) defining "normal retirement age"; and a wholly inapposite 2014 appropriations rider confirming that certain normal retirement ages used by rural electric cooperatives are lawful. Respondents assert (at 12-14) that "[t]here is no circuit split … under current law," because only the decision below postdates all three developments, and that these developments "moo[t] the relevance" of the question presented going forward. But *none* of these developments bears on the meaning of *the statute* Congress enacted, or can reconcile the decision below with the Seventh and Fourth Circuits' contrary rulings. And none eliminates the need for clear, definitive guidance from this Court on this important, recurring question.

A. Respondents invoke (at 21-24) Section 701(a)(2) of the Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a)(2), 120 Stat. 780, 984, but it did not address ERISA's definition of "normal retirement age" at all. Instead, it "prospectively repealed" the "whipsaw requirement" (Opp. 24) that courts and the IRS had created for cash-balance plans, reflecting Congress's determination that plans

that do not afford the whipsaw payments respondents seek do not shortchange participants. Pet. 9 n.2, 28. The 2006 amendment thus cannot explain the conflict between the decision below and *Fry* and *McCorkle*. All three cases involved pre-2006 events to which the amendment cannot apply. Pet. App. 9a; *Fry*, 571 F.3d at 645-46; *McCorkle*, 688 F.3d at 169.

Nor does the 2006 law "moo[t]" the question presented (Opp. 14) for *future* cases. The amendment affects just one consequence (whipsaw-payment calculations) in one circumstance (participants who elect lump sums before normal retirement age) for one type of defined-benefit plan (cash-balance plans). The question presented, however, encompasses *all* defined-benefit plans. And the Second Circuit's misinterpretation of "normal retirement age" will wrongly skew many other substantive provisions and statutorily defined terms keyed to "normal retirement age"—*e.g.*, when benefits vest and when they must be paid—and will severely curtail employer flexibility and create harmful uncertainty and unpredictability for employers and employees alike. Pet. 24-34; Chamber Br. 11-19.

B. Respondents rely heavily (at 14-21) on the IRS's *prospective* 2007 regulation, 72 Fed. Reg. 28,604 (May 22, 2007), *codified in pertinent part at* 26 C.F.R. § 1.401(a)–1. Respondents' appeal to agency expertise is bizarre, because the agency used a different regulatory framework for decades until 2007, and the decision below necessarily implies that the agency's prior, longstanding approach (and plans designed in conformity to that guidance) contravened ERISA. In any event, the regulation can neither explain the circuits' conflicting rulings nor resolve the *statutory* problem created by the decision below.

1. The 2007 regulation cannot reconcile the decision below with *Fry* or *McCorkle* because it was extant, but inapplicable, in all three. As the IRS explained, official IRS guidance issued over decades recognized that Congress, in enacting ERISA, *rejected* the IRS's pre-ERISA view requiring normal retirement ages to track typical industry or company practice. 72 Fed. Reg. at 28,604. The IRS accordingly (and correctly) made clear that "a pension plan is permitted to have a normal retirement age lower than age 65, *regardless* of the age at which employees customarily retire in the particular company or industry." *Ibid.* (emphasis added); Pet. 6, 31-32.

The 2007 regulation jettisoned that settled view. But the IRS did not impose the regulation's new standard retroactively. Indeed, it *could not* do so because no statute "express[ly]" granted it "the power to promulgate retroactive rules" in this context. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The regulation is "prospective only," Pet. App. 35a, and irrelevant here—as in *Fry* and *McCorkle*—because the claims in each case arose before the regulation took effect. *Fry*, 571 F.3d at 648 ("prospectiv[e]" regulation inapplicable to "distributions in 2003"); *McCorkle*, 688 F.3d at 169 (suit filed in 2004). And petitioners here (collectively "PwC"), like those in *Fry* and *McCorkle*, structured their plan lawfully under (and in reliance on) the IRS's then-applicable guidance.

It thus is not the 2007 regulation, but the Second Circuit's mistaken view that ERISA *requires* the regulation's general approach, that sets this case apart from *Fry* and *McCorkle*. Despite recognizing the regulation's inapplicability, the Second Circuit relied on it to dismiss the IRS's settled, pre-2007

view that *did* apply here. Pet. App. 35a. Far from "resolv[ing]" the circuits' "disagreement" (Opp. 15), the regulation has driven them apart: Two circuits correctly apprehend its irrelevance while the Second Circuit does not.

2. The circuits' disagreement about the regulation's relevance *vel non* alone disproves respondents' claim (at 1) that the regulation "moot[s]" the need for this Court's intervention. But respondents' claim that the regulation provides "clear, definitive" guidance that "moot[s]" the question presented (Opp. 12) fails in any event. *Retirement* plans are created to address events decades into the future. Because the circuits disagree on the meaning of the *statute*—with the Second's statutory analysis implying the invalidity of pre-2007 agency guidance, and the Seventh's potentially casting doubt on the current regulation—the need for review *now* is all the more urgent.

The regulation provides an array of presumptions and rules on different "normal retirement ages." For "normal retirement age[s]" between 55 and 62, it calls for a freeform, totality-of-the-circumstances analysis; ages under 55, in contrast, are presumed invalid *unless* the IRS itself affirmatively finds that the plan's age is appropriate; only normal retirement ages over 62 are safe. 26 C.F.R. § 1.401(a)–1(b)(2)(ii)-(iv). Thus, in jurisdictions (including the Seventh and Fourth Circuits) where courts, "employing traditional tools of statutory construction," "ascertai[n]" from ERISA itself a congressional "intention" to leave selection of normal retirement ages under 65 to employers' discretion, the regulations' presumptions could not displace that discretion; Congress's "intention is the law and must

be given effect." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

Even the Second Circuit—despite embracing a version of the IRS's current approach—might reject the regulation's framework to the extent it departs from the court's view of what ages "reasonabl[y] relat[e]" to industry or company practice. Pet. App. 26a-27a. A normal retirement age of "35 or 40 for shortstops"—presumptively *illegal* under the regulation—would evidently pass muster under the Second Circuit's approach. *Id.* at 19a. And while even the Second Circuit recognizes that ERISA does not require a normal retirement age to "be a literal calendar age," *id.* at 21a, the regulation defines age brackets *exclusively* in literal-calendar-age terms. National plan sponsors and participants are left in the dark concerning the regulation's application to plans that, for example, define normal retirement age based on years of service. Rather than affording ERISA stakeholders the transparent guidance they need to make long-term decisions, the regulation leaves them adrift. Employers and employees cannot fairly be expected to make decisions about *retirement* benefits based on a regulation that may well be held invalid years in the future.

Respondents are correct that this Court is not *required* to pass upon the regulation to decide this case. But they cannot ask the Court to *assume* the regulation's validity in determining the importance of the statutory question this case squarely presents. This Court has granted review even where an agency insisted that a new rule offered sufficient guidance. *Compare*, *e.g.*, *Twp. of Mt. Holly* v. *Mt. Holly Gardens Citizens in Action, Inc.*, 133 S. Ct. 2824, *cert. dismissed per Rule 46.1*, 134 S. Ct. 636 (2013), *with*

U.S. *Amicus* Br. 5-6, *Mt. Holly*, No. 11-1507 (U.S. May 17, 2013), 2013 WL 2152643. It should not withhold review based on private parties' self-serving speculation that existing guidance suffices.[1]

C. Respondents finally cite (at 24-25) a 2014 appropriations rider, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. P, § 2(a), 128 Stat. 2130, 2827 (2014), *codified at* 29 U.S.C. § 1054(k), but it is even further afield. The rider did *not* change Section 3(24)'s definition of "normal retirement age" or alter the statute in any other way relevant to this case, *Fry*, or *McCorkle*. It simply confirmed that one particular, commonly used normal retirement age is lawful: Rural electric cooperatives have long used, and the IRS repeatedly blessed, normal retirement ages defined as the earlier of 30 years or service or age 62. C.A. Dkt. 123, at 5-6. After adopting its 2007 regulation, however, the IRS reversed field and barred such employers from paying benefits to current employees who had completed 30 years of service but had not reached age 62—meaning many workers who had counted on receiving benefits at a certain date would be forced to wait years more. *Id.* at 7. Congress enacted the rider to prevent that imminent injustice by

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[1] Respondents' suggestion (at 16) that the dearth of challenges to the regulation to date implies that it is unassailable (or that petitioners have "waived" such a challenge) misses the point. That regulation *does not apply* here, but petitioners are certainly entitled to explain why the supposedly "clear, definitive" guidance respondents claim (at 12) it affords is not as advertised. The absence of challenges by *others* also hardly proves the regulation's infallibility; far more likely, it reflects that, for many employers, the prospect of an *unsuccessful* challenge poses an unacceptable risk of losing tax qualification, the death-knell for pension plans.

confirming that such plans' normal retirement ages are lawful. 29 U.S.C. § 1054(k)(1), (2)(A).

As the Second Circuit itself explained, the 2014 rider has no effect here. Pet. App. 36a-37a. It "does not say either way how Congress views a plan that defines normal retirement age based on *less* than 30 years of service," and "neither permits nor precludes" plans like PwC's that define normal retirement age as five years of service. *Ibid*. The rider thus cannot explain the Second Circuit's rejection of other circuits' reading of ERISA. And it provides no global guidance going forward.[2]

II. RESPONDENTS' DEFENSE OF THE DECISION BELOW IS UNAVAILING.

Respondents' efforts to defend the Second Circuit's ruling provide no reason to deny review. Respondents give Section 3(24)'s text the back of their hand, dismissing it (at 30) as a "definitional provision"—despite this Court's teaching that, "'[w]hen a statute includes an explicit definition,'" courts "'must follow'" it. *Burgess* v. *United States*, 553 U.S. 124, 130 (2008) (citation omitted). Their remaining arguments consist almost entirely of reciting the Second Circuit's opinion (at 26-29), with virtually no effort to square that decision with this Court's precedents or Congress's purposes. *Cf.* Pet. 20-31.

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[2] Respondents' effort (at 20) to spin the rider as proof that "Congress agrees" with the 2007 regulation is mystifying. Far from "'ratify[ing] … with positive legislation'" the IRS's view, Opp. 20-21 (citation omitted), it rebuked the agency's effort to sandbag one group of employers and workers. The rider, moreover, bears no resemblance to the regulation; it is not even clear that the normal retirement ages the rider blesses would survive under the regulation.

Respondents' only affirmative argument is the perplexing claim that the decision below tracks the IRS's *inapplicable* 2007 regulation. But while the regulation and the decision below begin from the same amorphous principle, the opinion contains nothing resembling the IRS's age brackets, each subject to different rules. In any event, as respondents stress (at 26 n.9), even the Second Circuit did not deem the regulation entitled to "deference." The Second Circuit's interpretation thus must pay its own freight; it cannot trade on the agency's credit.

Indeed, the Second Circuit's retroactive imposition here of new standards that the agency *itself* did not and could not lawfully apply retrospectively is *more* reason to reject its conclusion. The court had no warrant to ignore, in applying ERISA to the claims at issue, the indisputably reasonable view that the IRS maintained at the relevant times.

Respondents rejoin that consulting an agency's later guidance is proper when applying statutes to "'a time when there was no clear agency guidance.'" Opp. 26 n.9 (quoting *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 744 n.3 (1996)). But *Smiley* expressly distinguished that scenario from cases where a new "regulation replaced a prior agency interpretation," 517 U.S. at 744 n.3—reflecting concern for agencies' disregard for reliance interests, which the Court has echoed since, *e.g.*, *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1209 (2015). The situation *Smiley* distinguished is precisely the circumstance here: The 2007 regulation did not fill a regulatory vacuum, but *overturned* the position the IRS had embraced (on which petitioners and others relied) since ERISA's enactment and for decades thereafter.

Supra p. 5. The decision below achieved a bait-and-switch that the agency itself could not.

III. RESPONDENTS' ALLEGED VEHICLE PROBLEMS ARE MERITLESS.

Respondents' assertions (at 31-34) that this case is a poor vehicle to resolve the question presented are makeweights. Their claim (at 32) that the normal retirement age in PwC's plan ("5 years on the job") is "so extreme" that it "fail[s] any conceivable" test ignores that both *Fry*, 571 F.3d at 647, and *McCorkle*, 688 F.3d at 171-72, upheld the *same* normal retirement age. The circuits' disagreement regarding ERISA's application to materially identical terms provides an ideal opportunity to resolve the issue.

Respondents' claim (at 31-32) that the case's posture—review of the denial of a motion dismiss—poses an impediment to review is equally insubstantial. The district court certified (and the Second Circuit accepted) an immediate appeal because it would resolve a "'controlling question of law'" that would "'materially advance the ultimate termination of the litigation'": "whether 'normal retirement age' may be defined as five years of service." Pet. App. 133a-34a, 137a (quoting 28 U.S.C. § 1292(b)). This Court often reviews cases certified under Section 1292(b), *e.g.*, *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 373-74 (2004); *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 693-94 (2003)—including to review the denial of a motion to dismiss, *e.g.*, *Owens* v. *Okure*, 488 U.S. 235, 237-39 (1989); *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 485-87 (1987). The same course is warranted here.

Respondents nevertheless urge the Court (at 32-34) to deny review because they claim that either party might prevail on independent grounds. The Second Circuit, however, rested its decision solely on its answer to the question presented. Pet. App. 3a-4a. And as petitioners demonstrated, each of respondents' purportedly alternative theories stands or falls with their attack on PwC's normal retirement age. C.A. Pet. Br. 46-47, 53. Thus, as the district court concluded, respondents do *not* "have independent and alternative grounds for pursuing their claims," and "a successful appeal" by PwC "would immediately terminate the litigation." Pet. App. 133a-34a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DANIEL J. THOMASCH
RICHARD W. MARK
CAITLIN J. HALLIGAN
AMER S. AHMED
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166
(212) 351-4000

MIGUEL A. ESTRADA
Counsel of Record
JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mestrada@gibsondunn.com

Counsel for Petitioners

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APPENDIX

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Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a)(2), 120 Stat. 780, 984, *codified at* 29 U.S.C. § 1053(f)

SEC. 701. BENEFIT ACCRUAL STANDARDS.

(a) AMENDMENTS TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—

* * *

(2) DETERMINATIONS OF ACCRUED BENEFIT AS BALANCE OF BENEFIT ACCOUNT OR EQUIVALENT AMOUNTS.—Section 203 of such Act (29 U.S.C. 1053) is amended by adding at the end the following new subsection:

"(f) SPECIAL RULES FOR PLANS COMPUTING ACCRUED BENEFITS BY REFERENCE TO HYPOTHETICAL ACCOUNT BALANCE OR EQUIVALENT AMOUNTS.—

"(1) IN GENERAL.—An applicable defined benefit plan shall not be treated as failing to meet—

"(A) subject to paragraph (2), the requirements of subsection (a)(2), or

"(B) the requirements of section 204(c) or section 205(g) with respect to contributions other than employee contributions,

solely because the present value of the accrued benefit (or any portion thereof) of any participant is, under the terms of the plan,

equal to the amount expressed as the balance in the hypothetical account described in paragraph (3) or as an accumulated percentage of the participant's final average compensation.

"(2) 3-YEAR VESTING.—In the case of an applicable defined benefit plan, such plan shall be treated as meeting the requirements of subsection (a)(2) only if an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

"(3) APPLICABLE DEFINED BENEFIT PLAN AND RELATED RULES.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'applicable defined benefit plan' means a defined benefit plan under which the accrued benefit (or any portion thereof) is calculated as the balance of a hypothetical account maintained for the participant or as an accumulated percentage of the participant's final average compensation.

"(B) REGULATIONS TO INCLUDE SIMILAR PLANS.—The Secretary of the Treasury shall issue regulations which include in the definition of an applicable defined benefit plan any defined benefit plan (or any portion of such a plan) which has an effect similar to an applicable defined benefit plan.".

* * *

Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. P, § 2(a), 128 Stat. 2130, 2827 (2014), *codified at* 29 U.S.C. § 1054(k)

SEC. 2. CLARIFICATION OF THE NORMAL RETIREMENT AGE.

(a) AMENDMENTS TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—Section 204 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1054) is amended by redesignating subsection (k) as subsection (*l*) and by inserting after subsection (j) the following new subsection:

"(k) SPECIAL RULE FOR DETERMINING NORMAL RETIREMENT AGE FOR CERTAIN EXISTING DEFINED BENEFIT PLANS.—

"(1) IN GENERAL.—Notwithstanding section 3(24), an applicable plan shall not be treated as failing to meet any requirement of this title, or as failing to have a uniform normal retirement age for purposes of this title, solely because the plan provides for a normal retirement age described in paragraph (2).

"(2) APPLICABLE PLAN.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'applicable plan' means a defined benefit plan the terms of which, on or before December 8, 2014, provided for a normal retirement age which is the earlier of—

"(i) an age otherwise permitted under section 3(24), or

"(ii) the age at which a participant completes the number of years (not less than 30 years) of benefit accrual service specified by the plan.

A plan shall not fail to be treated as an applicable plan solely because the normal retirement age described in the preceding sentence only applied to certain participants or only applied to employees of certain employers in the case of a plan maintained by more than 1 employer.

"(B) EXPANDED APPLICATION.—Subject to subparagraph (C), if, after December 8, 2014, an applicable plan is amended to expand the application of the normal retirement age described in subparagraph (A) to additional participants or to employees of additional employers maintaining the plan, such plan shall also be treated as an applicable plan with respect to such participants or employees.

"(C) LIMITATION ON EXPANDED APPLICATION.—A defined benefit plan shall be an applicable plan only with respect to an individual who—

"(i) is a participant in the plan on or before January 1, 2017, or

"(ii) is an employee at any time on or before January 1, 2017, of any employer maintaining the plan, and who becomes a participant in such plan after such date.".

* * *