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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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At each and every step of their opposition, Respondents are ignoring the realities of this case. No matter how much they insist otherwise, the Third Circuit addressed the first question presented, holding that an administrator's reinterpretation of unchanged plan language can constitute an "amendment" under §1054(g). In so doing the Third Circuit acknowledged that it was entrenching a circuit split. And no matter how much they insist otherwise, when the Third Circuit addressed the second question presented, it deleted a critical sentence from its analysis and violated important principles of plan interpretation. Meanwhile, a group whose members provide benefits to over 100 million Americans has filed an *amicus* brief opining that these issues are "of immense importance to all employers that offer, or are considering offering, retirement benefits to their employees." Brief for American Benefits Council as *Amicus Curiae* Supporting Petitioners at 2. Although the *amicus* notified Respondents of its intent to file that brief, Respondents chose not to address it.

Perhaps Respondents can ignore all these dynamics, but this Court should not. It is imperative to reimpose uniformity and to correct the serious errors in the lower courts' application of ERISA.

I. This Court should review the first question presented.

Respondents most vividly blink reality when they propose that this case does not even present the "amendment" question. *See* BIO i, 2-3, 22, 26. The Third Circuit unambiguously 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'" under §1054(g). App. 21a (internal quotation marks omitted). The Third Circuit unambiguously applied that rule and held that Loughlin's "second interpretation" violated §1054(g) for that reason. App. 20a. Respondents' suggestion that the question is merely "hypothetical" does not pass the straight-face test. BIO 3.

Respondents cannot plausibly maintain that the question is not presented on the theory that Loughlin never "reinterpreted the Plan[s]." BIO 17. It is indisputable that Loughlin was the plans' day-to-day administrator. *See* App. 6a. It is indisputable that before 2005, he administered the plans in a way that did not include the actuarial reduction. *See* App. 5a. It is indisputable that after 2005, he announced that he would begin administering the plans in way that would include the reduction. *See* App. 6a-9a. As the District Court noted, United and Respondents had "agree[d] that the calculation and payment of monthly benefits by a plan administrator represents an interpretation of the relevant Plan language." App. 91a-92a. This is why the Third Circuit spoke of Loughlin's actions as an "interpretation" or "reinterpretation" no fewer than 15 times. App. 13a, 14a, 19a, 20a, 21a, 22a, 30a, 32a. Respondents cannot change their position on that issue now.

Nor can Respondents evade review by insisting that the Third Circuit's ruling on §1054(g) was not "[d]ispositive." BIO 26. It is true that, in addition to deciding the "amendment" question, the Third Circuit held that Loughlin's second interpretation was contrary to §1132(a)(1)(B). *See* Pet. 12 (citing App. 13a-19a). But as this Court repeatedly has explained, "where there are two grounds, upon either of which

an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other." *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (internal quotation marks omitted). This Court thus has not hesitated to review "alternative holding[s]" issued by lower courts. *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401-02 (2011); *see also Schriro v. Landrigan*, 550 U.S. 467, 477-78 (2007). This Court also has not hesitated, when presented with lower-court decisions applying doctrines with multiple prongs, to correct a lower court's errors "at each step" of the way. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).

That is the path this Court should take here. Because the first question involves a circuit split, this Court should begin by holding that an administrator's interpretation of valid plan language cannot be a prohibited "amendment" under §1054(g). Once this Court has done so, it can and should also hold that Loughlin's reinterpretation of the 1987 and 1980 plans was reasonable, worthy of deference, and no violation of §1132(a)(1)(B).

A. The circuits are split on the first question presented.

Respondents' principal means of questioning the split is to claim that a Treasury regulation "overruled" the circuit-level decisions that have interpreted the word "amendment" to apply only to changes in plan language. BIO 3 (citing 26 C.F.R. §1.411(d)–4). United already has explained why this regulation does not have that effect, *see* Pet. 17-20, and Respondents are ignoring the fact that some of the cir-

cuits that have rejected the Third Circuit's approach did so after the regulation became effective in 1986. *See generally Williams v. Cordis Corp.*, 30 F.3d 1429, 1431 (C.A.11 1994) (discussing the history of 26 C.F.R. §1.411(d)–4). The Ninth Circuit in 2000, while acknowledging that the Treasury Department had issued the regulation, reiterated its existing rule that §1054(g) "applies only to formal plan amendments" and "does not apply to interpretations of ambiguous plan language." *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1121 (C.A.9 2000). The Second Circuit in 2013, likewise acknowledging the regulation, also reasoned that "the word 'amendment'" still "contemplates that the actual terms of the plan changed in some way, or that the plan improperly reserved discretion to deny benefits." *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 184 (C.A.2 2013).

Respondents apparently believe the regulation overrules these cases because, by its terms, it limits employer "discretion." 26 C.F.R. §1.411(d)–4. But the regulation does not limit an administrator's discretion to interpret the terms of a plan. It instead precludes an employer from adopting plan language that would allow it to terminate, for purely discretionary reasons, benefits "for which the participant is otherwise eligible." *Id.* The regulation thus prevents employers from giving themselves discretion to, in the Eleventh Circuit's words, make a particular benefit "optional" in a particular year. *Williams*, 30 F.3d at 1431; *accord McDaniel*, 203 F.3d at 1119. What the regulation emphatically does not do is prevent employers from giving administrators discretion to interpret plans as a general matter. If it did, it would run headlong into this Court's precedents that "per-

mit[] an employer to grant primary interpretive authority over an ERISA plan to the plan administrator." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010).

The D.C. and Seventh Circuits have not yet considered the regulation's effect on their §1054(g) "amendment" jurisprudence, on which the Second and Ninth Circuits' decisions were based. *See* Pet. 15-16 (citing *Dooley v. Am. Airlines, Inc.*, 797 F.2d 1447, 1452 (C.A.7 1986), and *Stewart v. Nat'l Shopmen Pension Fund*, 730 F.2d 1552, 1563 (C.A.D.C. 1984)). But Respondents offer no reason to believe that those courts will change their views on this question. Respondents cannot dismiss the D.C. Circuit's discussion of this point as mere "*dicta*." BIO 28. The D.C. Circuit expressly relied on its conclusions about the word "amendment" in rejecting the §1054(g) claim in its seminal decision on this issue, and that court has subsequently—in 1995, after the Treasury regulation became effective—reaffirmed its rule that §1054(g) "is specifically limited to *actual amendments*." *Andes v. Ford Motor Co.*, 70 F.3d 1332, 1335 (C.A.D.C. 1995) (quoting *Stewart*, 730 F.2d at 1563)). The Seventh Circuit likewise, in the time since the regulation became final, has held to the principle that an administrator does not effect an "amendment" by applying "a provision already in the Plan." *Adono v. Wellhausen Landscape Co.*, 258 F. App'x 12, 16 (C.A.7 2007) (citing *Dooley*, 797 F.2d at 1451-52).

Respondents are on even shakier ground when they address the other side of the split. It is remarkable that, notwithstanding the victory they secured on this point below, they now claim that the Third

Circuit has not "held" that an interpretation of unaltered plan language can be an amendment under §1054(g). BIO 26. As discussed above, Respondents appear to be taking this position because the Third Circuit also ruled in their favor with respect to §1132(a)(1)(B). But as also discussed above, Respondents' characterization of the §1054(g) ruling as dicta is not correct. *See supra* at 2-3. The Third Circuit itself has long held that "an alternate holding has the same force as a single holding; it is binding precedent." *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435, 440 (C.A.3 1982). The decision below adopted a binding rule for the Third Circuit, under which an administrator's interpretation of plan language can constitute an "amendment" for these purposes.

That also is the governing rule in the Sixth Circuit. United does not dispute Respondents' characterization of the Sixth Circuit decision at issue as a "complicated, multi-count class action." BIO 33. But that reality does not mean that the Sixth Circuit did not adopt the Third Circuit's "amendment" rule. The rule was a necessary component of the decision because, the Sixth Circuit explained, its agreement with the Third Circuit was a reason why it adopted the governing standard of review. *See Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 712 (C.A.6 2000) (citing *Hein v. Fed. Deposit Ins. Co.*, 88 F.3d 210, 216 (C.A.3 1996)). One district court within the Sixth Circuit has read that decision as requiring it to hold "that a plan administrator's statement of the proper interpretation of a plan qualifies as an 'amendment.'" *Redd v. Bhd. of Maint. of Way Emps. Div. of Int'l Bhd. of Teamsters*, No. 08-11457, 2010 WL 1286653,

at *8 (E.D. Mich. Mar. 31, 2010) (citing *Hunter*, 220 F.3d at 712). Respondents cited that very district-court decision to support their argument below. *See* Appellees' Principal CA3 Br. 36 n.9. They cannot wish this split away.

B. The split is important, and the Third Circuit is wrong.

Other than to erroneously claim that the Treasury regulation has overruled the cases on the other side of the split, *see supra* at 3-5, Respondents have offered no response to United's observations about why the Third Circuit's rule is wrong, *see* Pet. 22-24. That silence is especially noteworthy in light of the *amicus* brief submitted by the American Benefits Council, which counts among its members scores of employers and service providers with unique and expert insight on the problems the split creates. Their insight has led the Council to agree with United that "[t]he position taken by the Third Circuit has no basis in the text or structure of ERISA." Am. Benefits Council *Amicus* Br. 7. Their insight has led the Council to confirm that when taken to its logical conclusion, the Third Circuit's rule would preclude an administrator from making a good-faith "correction of a" previous good-faith "mistake in interpreting the terms of a plan." *Id.* at 4. Their insight has led the Council to observe that the Third Circuit's rule "conflicts with, and disrupts, ERISA's most basic tenets" by collapsing the "fundamental distinction between a plan sponsor and the plan administrator." *Id.* at 11. And their insight has led the Council to conclude that the split "will lead to substantial uncertainty in the administration of pension plans, invite costly litigation, and ultimately discourage the

Council's members from offering employee benefit plans in the future." *Id.* at 1.

Respondents have shrugged their shoulders in response, but employers and administrators cannot afford to be so indifferent. This Court should eliminate the uncertainty these parties now face by reviewing the first question presented and rejecting the Third Circuit's rule.

II. This Court should review the second question presented.

Respondents' brief validates United's observation that the first and second questions presented are closely intertwined. *See* Pet. 29-30 (citing *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., dissenting)). Respondents repeatedly suggest that a ruling on the first question would be "hypothetical" without a ruling on the second. BIO 3, 26. Under that logic, if the Court grants review to resolve the split over the meaning of §1054(g), it also should review the Third Circuit's interpretations of the plans and corresponding application of §1132(a)(1)(B).

That review is particularly imperative in light of the manifest flaws in the Third Circuit's analysis. To be clear, United is not making the straw-man argument Respondents are foisting upon it: United is not saying, to use Respondents' words, that this Court's jurisprudence "requires blind deference even to erroneous interpretations of plan language." BIO 35. What "this Court's precedents" instead require, as United previously observed, is for "courts to defer to administrators' *reasonable* interpretations." Pet. 24 (emphasis added). The Third Circuit contravened

those precedents when it declared Loughlin's interpretation unreasonable.

The most alarming concern on this front arises from the Third Circuit's deletion of the sentence, from Section 7.02 of the 1987 Plan, detailing how TVP "payment" was to be "made" and "determined." *See* Pet. 25-28 (citing App. 137a). Respondents do not defend that deletion in any satisfactory way. They bury their argument in—of all places—a footnote to their statement of facts. *See* BIO 20 n.6. The only thing they say in the footnote is that one of United's experts "admitted that Petitioners' proffered interpretation of this provision would violate ERISA and the Internal Revenue Code." BIO 20 n.6. Their reliance on that expert flies in the face of their position, taken only one page earlier, that "interpretation of a pension plan" is "not properly the subject of expert testimony." BIO 19. But in any event, Respondents are mischaracterizing United's interpretation and misreading what the expert said. She did not opine that reading the sentence to require the actuarial reduction would, in Respondents' words, "violate ERISA and the Internal Revenue Code." BIO 20 n.6. She instead simply answered "[y]es" when counsel asked if a problem would have arisen under those statutes if TVPs' "benefits" were not actually "payable until" they "reache[d] age 65." Doc. 168-4 at 24. United is not maintaining that the plans gave it the right not to pay benefits to TVPs until they turned 65. It simply is maintaining that the language in the plans, including the sentence the Third Circuit deleted, gave it the right to make *the actuarial reduction*. As the petition observes, that reading of the

plans would have been fully consistent with ERISA. *See* Pet. 6 (citing 29 U.S.C. §1056(a)).

As with much else in their brief, Respondents' refusal to meaningfully engage this issue should serve as compelling evidence that something went seriously awry below. As the *amicus* confirms, much is at stake, for both United in particular and the benefits system as a whole. Respondents cannot, through evasive maneuvers and artful dodges, keep this Court from addressing these important questions.

Respectfully submitted,

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