No. 06-1398

In The
Supreme Court of the United States

AT&T PENSION BENEFIT PLAN,
AS SUCCESSOR TO THE AMERITECH
MANAGEMENT PENSION PLAN,

Petitioner,

v.

LINDA CALL, INDIVIDUALLY AND ON BEHALF
OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether, on the specific facts of this case, the Court of Appeals correctly rejected the Ameritech Management Pension Plan's interpretation of the Plan provision in dispute, Section 12.1, because of "the lack of any reasoned basis for that interpretation." Pet. App. 10a.

2. Whether the Plan mischaracterizes the Court of Appeals' decision by asserting that Judge Posner's opinion construed ambiguities in Section 12.1 against the Plan which drafted the provision, when in fact the Court of Appeals rejected the Plan's interpretation of Section 12.1 as "unreasonable" and unworthy of deference because the provision was unambiguous and all "guides" to its meaning refuted the Plan's interpretation.

3. Whether the main argument upon which the Plan relies – that the provision in dispute is statutory boilerplate required for tax qualification – was waived in the Court of Appeals because it was not asserted in the Plan's opening appellate brief and in any event has no merit as fully explained by Judge Posner's opinion for the Court of Appeals.

4. Whether the Plan errs in contending that there are conflicts among the Circuits with respect to awarding prejudgment interest under the Employee Retirement Income Security Act ("ERISA") to plan participants who were wrongly denied benefits, when in fact all Circuits that have addressed the issue agree that prejudgment interest may be awarded in the equitable discretion of the district court based upon the specific facts and circumstances of each case in order to compensate the participants for the delay in receiving their benefits.

PARTIES TO THE PROCEEDING

The Petition inadequately describes the Plaintiff class. Class representative Linda Call was a 31-year Ameritech employee, and the 1,900 class members she represents were similarly long-term Ameritech employees. The class definition is as follows:

> All participants in the Ameritech Management Pension Plan who qualified for a Transition Benefit, received a lump sum distribution of that Transition Benefit after July 1, 1999, and whose lump sum distribution was less than it would have been had 1) the participant resigned on the day of the Eleventh Amendment, and 2) his or her lump sum had been computed utilizing the interest rate used by the PBGC to value lump sums as of the year in which they received their distribution and the mortality table set out in Revenue Ruling 95-6 which is a blended table derived from the mortality table used by the PBGC for valuing annuities.

As a result of the Plan's use of less favorable assumptions to determine the value of the class members' lump sum distribution, Ms. Call received $35,776.31 less in pension benefits than she had earned as a long-term Ameritech employee – fully 14% of the total $255,088.45 to which she was entitled. In the aggregate, the class was underpaid by more than $31 million.

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SUMMARY OF REASONS FOR DENYING THE PETITION

The Plan's arguments in this Court bear little resemblance to the case that was litigated in the District Court and Seventh Circuit.

First, the Plan's principal argument – that the plan's key provision, Section 12.1, was merely statutory boilerplate inserted to achieve tax qualification – was not raised in the Plan's opening appellate brief and therefore was waived. When the Plan stressed the point in its petition for rehearing, the Court of Appeals rejected the argument as both untimely and lacking merit.

Second, the Plan's contention that the Court of Appeals joined a Circuit conflict by using the principle of *contra proferentem* in determining whether the Plan's construction of Section 12.1 was entitled to deference is erroneous. In finding that that Plan's construction lacked any reasonable basis, Judge Posner's opinion did not construe ambiguities against the Plan, but instead found that there were no ambiguities and that all guides to construction refuted the Plan's interpretation. Moreover, the Plan did not raise the *contra proferentem* issue in its petition for rehearing in the Court of Appeals.

Third, the Plan's argument that prejudgment interest cannot be awarded as equitable relief under *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), was not made below. *Great-West* was not even cited by the Plan in the Court of Appeals.

Fourth, the Plan erroneously contends that there is a Circuit conflict with respect to the appropriate rate of prejudgment interest to be awarded to pension plan participants who were not paid the full benefits to which they were entitled. All the Circuits apply the principle that prejudgment interest may be awarded in an amount in the district court's equitable discretion based on the specific facts and circumstances of each case in order to compensate the participants for the delay in receiving their benefits.

COUNTERSTATEMENT OF THE CASE

This case involves the mortality assumptions to be used in valuing the Plaintiff class's lump sum pension distributions. The District Court and Court of Appeals rejected the Plan's use of the mortality table known as the Unisex Pension – 1984 Table ("UP84") and held that the Plan was required to use the 1983 Group Annuity Mortality Table ("83GAM"). 83GAM provides longer life expectations than the UP84. Consequently, 83GAM results in higher lump sum distributions for Plan participants than UP84.

Prior to 1994, the Plan's provisions with respect to valuing lump sum distributions required it to use the PBGC interest rate and the UP84 mortality table used by the PBGC to value annuities ("UP84").

In October 1993 the PBGC began using the 83GAM mortality table ("83GAM") to value annuities. *See Valuation of Plan Benefits in Single-Employer Plans; Valuation of Plan Benefits & Plan Assets Following Mass Withdrawal*, 58 F.R. 50812-01, 50813 (Sept. 28, 1993).

In 1994 the Plan adopted a new interest rate to value lump sum distributions – the rate used by the PBGC to value lump sums – but kept the same provision requiring use of the PBGC mortality table for valuing annuities. Because the PBGC had adopted 83GAM in place of UP84 to value annuities, the Plan should thereafter have used 83GAM to calculate its lump sum distributions.

In 1998 a class of over 10,000 Plan participants sued to require the Plan to use 83GAM and won a summary judgment requiring such use. *See Malloy v. Ameritech*, 2000 U.S. Dist. LEXIS 20490 (S.D. Ill. Feb. 7, 2000). The parties settled the case, and final judgment was entered awarding damages based on lump sum valuations using the PBGC lump sum interest rate and 83GAM. At the time summary judgment was granted and the parties entered into the settlement, Ms. Call and the class of Plan participants she represents were members of the *Malloy* class.

However, in late May 1999, shortly after the summary judgment motion was argued in *Malloy* and a ruling by the District Court requiring use of 83GAM to value lump sum distributions became imminent, the Plan adopted the Eleventh Amendment to the Plan which changed the factors to be used in valuing lump sum distributions for those participants retiring after July 1, 1999, the Eleventh Amendment's effective date. The Eleventh Amendment provided that lump sum distributions made to those participants would be valued at the greater of the distribution produced by use of (1) the PBGC interest rate for valuing lump sums and the UP84 mortality table, or (2) the interest rate on 30-year Treasury bonds and 83GAM (which are known as "GATT assumptions"). *Id.*

Approximately one year after judgment was entered in *Malloy* requiring use of 83GAM, the District Court granted the Plan's motion to redefine the class to exclude

Plaintiff Call and her class because they had retired after July 1, 1999. Based on the Eleventh Amendment, the Plan contended that Ms. Call and her class were no longer entitled to have their lump sums valued using the PBGC lump sum interest rate and 83GAM, as the court had held in *Malloy*.

The core question in this case was whether the new lump sum valuation factors adopted by the Eleventh Amendment violated the Plaintiff class members' rights under Plan Section 12.1 protecting their accrued benefits from reduction by a plan amendment. Section 12.1 provides:

> *Amendment*. While it is expected that the Plan will be continued, either the Company or the Committee may terminate the Plan or amend the Plan from time to time subject to Supplement C; provided, however, that *no amendment will reduce a participant's accrued benefit to less than the accrued benefit that he would have been entitled to receive if he had resigned from the employ of the Employers and Related Companies on the day of the amendment* (except to the extent permitted by section 412(c)(8) of the Code) and no amendment will eliminate an optional form of benefit with respect to a Participant or Beneficiary except as otherwise permitted by law and applicable regulation.

(Emphasis added).

In December 1999, the Plan paid Ms. Call $219,312.14 as a lump sum pension benefit distribution. The Plan used the PBGC interest rate for valuing lump sums and UP84 as the mortality table for calculating her lump sum distribution. If the lump sum had been valued as of June 30, 1999 (prior to the effective date of the Eleventh Amendment) pursuant to Section 12.1,[1] the PBGC interest rate for valuing lump sums and 83GAM would have been used as the mortality table, and Ms. Call's lump sum distribution would have been $255,088.45, $35,776.31 more than she received.

PROCEEDINGS BELOW

The District Court granted Plaintiffs' motion for summary judgment on liability. The District Court rejected the Plan's contention that it could use UP84 on the ground that participants' "accrued benefit," as protected by Section 12.1, did not include the actuarial assumptions used in valuing lump sums. Pet. App. 19a. The District Court held that the Plan could not define "accrued benefit" in a manner differing from ERISA's definition of the term, and that the actuarial assumptions underlying a participant's accrued right to a lump sum distribution of early retirement benefits were "accrued benefits." *Id.* The District Court found Section 12.1 to be "clear and unambiguous" in its protection of participants' accrued benefits from reduction by any Plan amendment. *Id.*, 21a. The Court also rejected the Plan's contention that the phrase "except as otherwise provided by law" at the end of Section 12.1 permitted the reduction of Plaintiffs' accrued benefits

[1] The Plan argued below that it had adopted UP84 in a May 1995 Plan amendment and therefore UP84 was the applicable mortality table even prior to the Eleventh Amendment. However, both the District Court and Court of Appeals held that the adoption of UP84 in 1995 was invalid under the Retirement Protection Act of 1994. Pet. App. 5a, 18a. The Petition does not challenge the Court of Appeals' holding on that issue.

pursuant to the Eleventh Amendment: "[I]t is abundantly clear that the words 'otherwise permitted by law' refer only to the term 'optional form of benefit' . . . [and] do not in any way qualify the term 'accrued benefit' which is found in the immediately preceding independent clause." *Id.*, 20a.

The District Court awarded the class the benefits they were denied through undervalued lump sum distributions, which in the aggregate totaled $31,193,689.56, including prejudgment interest at the prime rate. Pet. App. 26a.

The Court of Appeals affirmed. Judge Posner's opinion noted that there was no reasonable basis for limiting the meaning of the term "accrued benefit" in Section 12.1 to an annuity at normal retirement age, as the Plan contended. ERISA also protects early retirement benefits as accrued benefits against cutback by a Plan amendment. Pet App. 7a. In addition, the clause in Section 12.1 upon which the Plan so greatly relied – "except as otherwise permitted by law and applicable regulations" – was "in a separate clause referring to optional forms of benefit." *Id.*, 8a. The fact that early retirement benefits were not included in that same clause strongly supported Plaintiffs' construction of Section 12.1 as protecting early retirement benefits from any cutback. *Id.*

The Court of Appeals rejected as "nonsense" the Plan's argument that Section 12.1 is merely statutory boilerplate. Pet. App. 9a. The Court noted that this interpretation would render Section 12.1 "superfluous." *Id.* In addition, the Court held that Section 12.1 does not even "accurately state the defendant's statutory obligations. In contrast, the plaintiff's interpretation preserves early-retirement benefits by contract in situations in which ERISA would permit them to be curtailed." *Id.*

The Court of Appeals applied the principle of giving deference to the plan administrator's construction of plan provisions as required by *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989), but concluded that it "is overridden in this case by the lack of any reasoned basis for [the Plan's] interpretation." Pet. App. 10a. Judge Posner's opinion held that there was no ambiguity in Section 12.1 justifying the Plan's interpretation:

> When guides to meaning line up on one side of the case, as they do here, an adjudicator who decides the case the other way is likely to be acting unreasonably. Just as unambiguous terms of a statute leave no room for the agency that administers the statute to exercise interpretive discretion, . . . so unambiguous terms of a pension plan leave no room for the exercise of interpretive discretion by the plan's administrator, or at least not enough to carry the day for the administrator in this case. And while a contract or other instrument that looks unambiguous to the uninformed reader may be shown to be ambiguous when the context of the instrument is explained, . . . the Ameritech Management Pension Plan has presented no such evidence of a latent ambiguity.

Id., 11a (citations omitted).

The Plan petitioned for rehearing, arguing that the language of Section 12.1 is "very similar" to a sample anti-cutback provision suggested by the IRS. The Court of Appeals rejected the argument:

> A plan must comply with the statute, of course; it does not have to recite the statute. And if the

> plan did have to recite the statute (as distinct from having to be amended to comply with a statutory requirement . . .), this could not help the petitioner, because section 12.1 does not track the statute.

Pet. App. 28a (citations omitted).

The Plan also argued that the Court of Appeals had not given sufficient deference to the Plan's interpretation of Section 12.1. However, the Plan did not argue that Judge Posner had applied the principle of *contra proferentem* against the Plan in rejecting deference to its interpretation of Section 12.1. The Court noted that "nothing in the petition for rehearing undermined [the Court's] interpretation" that "the Plan reserved the right to eliminate optional benefits but not early-retirement benefits." *Id.*, 29a.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS CORRECTLY REJECTED THE PLAN'S CONSTRUCTION OF SECTION 12.1 AS UNREASONABLE.

A. Judge Posner's Interpretation of Section 12.1 Is Correct and Raises No Issue Meriting Review by this Court.

The Plan's opening brief in the Court of Appeals made two arguments concerning the construction of Section 12.1. First, "accrued benefit" should be limited to the annuity which a participant is entitled to receive at normal retirement age. Second, the concluding phrase of Section 12.1 – "except as otherwise permitted by law and applicable regulation" – should apply not only to the elimination of an optional form of benefit which it immediately follows, but should reach back to Section 12.1's first clause and immunize the reduction of a participant's accrued benefit.

The Court of Appeals correctly refused to blindly defer to the Plan's interpretation of Section 12.1 because it lacked a reasoned basis and basic common sense. Judge Posner's opinion is correct on both points.[2] More significantly, these two issues have no relevance beyond the specific facts of this case.

With respect to the meaning of "accrued benefit," both parties agreed below that the Plan incorporated the statutory meaning of the term. While the annuity at normal retirement age is the core meaning of "accrued benefit" in ERISA, the term has a much broader coverage. In *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), this Court held that "accrued benefit" includes early retirement benefits:

> ERISA's anti-cutback rule . . . provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan. . . . " 29 U.S.C. § 1054(g)(1). After some initial question about whether the provision addressed early retirement benefits, see Langbein & Wolk 164, a 1984 amendment made it clear that it does. Retirement Equity Act of 1984, § 301(a)(2), 98 Stat. 1451. Now § 204(g) provides

[2] Judge Posner has written an extraordinary number of ERISA opinions during his 25 years on the Seventh Circuit bench. He "has quietly amassed a veritable warehouse of ERISA decisions, many on the cutting edge of ERISA jurisprudence." Note, Posner and ERISA: A Survey, 7 Conn. Ins. L. J. 195, 198 (2000).

> that "a plan amendment which has the effect of . . . eliminating or reducing an early retirement benefit . . . with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits." 29 U.S.C. § 1054(g)(2).

Id. at 744.

In addition, the IRS has consistently provided that the actuarial assumptions, including the mortality table, used in valuing lump sum distributions are also "accrued benefits" protected against cutback by a plan amendment. *See* Rev. Rul. 81-12, 1981-1 C.B. 228, 1981-2 I.R.B. 10, 1981 WL 165942; Internal Revenue Manual § 4.72.10.6.[3] Indeed, this Court has rejected the Plan's simplistic argument that the anti-cutback rule protects only the nominal amount of a retiree's annuity at normal retirement age and instead has held that the terms and conditions which affect how much a retiree will actually receive in benefits are protected as accrued benefits:

> A retiree's benefit of $100 a month, say, is not reduced by a postaccrual plan amendment that suspends payments, so long as nothing affects the figure of $100 defining what he would be paid, if paid at all. Under the Plan's reading, § 204(g) would have nothing to say about an amendment that resulted even in a permanent suspension of payments. But for us to give the anti-cutback rule a reading that constricted would take textual *force majeure*, and certainly something closer to irresistible than the provision quoted in the Plan's observation that

[3] Available at http://www.irs.gov/irm/part4/ch51s13.html#d0e553059).

> accrued benefits are ordinarily "expressed in the form of an annual benefit commencing at normal retirement age," 29 U.S.C. § 1002(23)(A).

Central Laborers' Pension Fund, 541 U.S. at 745.

The Court of Appeals also properly rejected the Plan's contention that Section 12.1's concluding phrase "except as otherwise permitted by law and applicable regulation" should apply to the reduction of an "accrued benefit" in Section 12.1's first clause as well as to the elimination of an "optional form of benefit" in the second clause because that interpretation would render Section 12.1 "superfluous." Pet. App. 9a. Instead, the Court of Appeals correctly concluded that the Plan had put "except as otherwise permitted" "in a separate clause referring to optional forms of benefit" – not to accrued benefits or early retirement benefits. Pet. App. 8a.

B. The Court of Appeals Correctly Rejected the Plan's Contention that Section 12.1 Is Merely Statutory Boilerplate.

The Plan tried in its appellate Reply Brief to supplement its arguments concerning Section 12.1's meaning. For the first time, it argued (at p. 21), in one paragraph, that Section 12.1 was superfluous because it "mirrors" ERISA's anti-cutback provision for the purpose of achieving tax qualification. However, in the Seventh Circuit any argument not made in the appellant's opening brief is waived. *Hentosh v. Herman M. Finch Univ. Of Health Scis./The Chi. Med. Sch.*, 167 F.3d 1170, 1173 (7th Cir. 1999).

In any event, the Court of Appeals rejected as "nonsense" the Plan's contention that it was legally obligated to restate ERISA's requirements in its provisions. To the contrary, all ERISA provisions are implicitly part of each plan. *May Dept. Stores Co. v. Federal Ins. Co.*, 305 F.3d 597, 601 (7th Cir. 2002). Consequently, there is no need to cut and paste scores of ERISA provisions into each plan. In addition, Judge Posner noted that Section 12.1 does not "accurately state the defendant's obligations." Pet. App. 9a.

The Plan devoted most of its petition for rehearing to its statutory boilerplate argument and suggested that Section 12.1 is "very similar" to sample language suggested by the IRS for incorporation into plan provisions. *See* IRS, *Defined Benefit Listing of Required Modification and Information (LRM)* 120 (Feb. 2000), http://www.irs.gov/pub/irs-utl/db_lrm.pdf. The Court of Appeals emphatically rejected this new contention:

> The provision was not cited in any of the briefs or mentioned at the oral argument. And for good reason. The provision is materially identical to the statute, not to section 12.1.

Pet. App. 28a.

Ironically, if the Plan had incorporated the IRS sample language, the Plaintiff class's early retirement benefits would unquestionably have been protected against cutback by the Eleventh Amendment. As Judge Posner observed, the sample language tracks ERISA's anticutback provision, 29 U.S.C. § 1054(g)(2), in its explicit protection of early retirement benefits from reduction through plan amendment. In addition, the sample provision expressly protects "the actuarial basis for determining optional or early retirement benefits" from a change that reduces a participant's accrued benefit. The sample provision even cites Revenue Ruling 81-12, upon which

Plaintiffs relied, as authority for its protection of actuarial assumptions as part of the accrued benefit.

The Petition makes an additional argument not raised below. The Plan now argues that Section 12.1's prohibition of a plan amendment that "eliminates" an optional form of benefit except as authorized by law does not bar a "reduction" in the optional form of benefit. Pet. 16. This argument is barred as untimely, but it has no merit in any event. The IRS in Revenue Ruling 81-12 specifically protected the actuarial assumptions used in valuing lump sums from cutback through a plan amendment as part of the participant's accrued benefit. The IRS has also issued a regulation protecting the actuarial assumptions used in valuing lump sum distributions of early retirement benefits against cutback by a plan amendment. Treasury Regulation § 1.411(a)-11 provides that:

> (a) Scope – (1) In general. Section 411(a)(11) restricts the ability of a plan to distribute any portion of a participant's accrued benefit without the participant's consent. Section 411(a)(11) also *restricts the ability of defined benefit plans to distribute any portion of a participant's accrued benefit in optional forms of benefit without complying with specified valuation rules for determining the amount of the distribution.* If the consent requirements or the valuation rules of this section are not satisfied, the plan fails to satisfy the requirements of section 411(a).

26 C.F.R. § 1.411(a)-11 (emphasis added).

This Regulation further states that the "accrued benefit" includes both the optional forms in which an "accrued benefit" can be paid and the actuarial assumptions used in valuing a lump sum distribution of the "accrued benefit":

> (2) Accrued benefit. For purposes of this section, *an accrued benefit is valued taking into consideration the particular optional form in which the benefit is to be distributed. The value of an accrued benefit is the present value of the benefit in the distribution form determined under the plan.* For example, a plan that provides a subsidized early retirement annuity benefit may specify that the optional single sum distribution form of benefit available at early retirement age is the present value of the subsidized early retirement annuity benefit. *In this case, the subsidized early retirement annuity benefit must be used to apply the valuation requirements of this section and the resulting amount of the single sum distribution.* However, if a plan that provides a subsidized early retirement annuity benefit specifies that the single sum distribution benefit available at early retirement age is the present value of the normal retirement annuity benefit, then the normal retirement annuity benefit is used to apply the valuation requirements of this section and the resulting amount of the single sum distribution available at early retirement age.

Id. (emphasis added).

Therefore, Section 12.1 permitted the Plan to eliminate lump sum distributions entirely if authorized by law to do so. The Plan, however, did not eliminate lump sum distributions through the Eleventh Amendment. Instead it attempted to reduce the amounts of the lump sums by changing the mortality assumptions used in determining the dollar amount of the lump sums. However, the use of 83GAM to value Plaintiffs' lump sum distributions was a protected part of their accrued benefits which they had earned through their long service to Ameritech, and Section 12.1 barred that cutback of their accrued benefits.

C. The Court of Appeals Did Not Construe Ambiguities Against the Plan in Rejecting Its Unreasonable Construction of Section 12.1's Unambiguous Provisions.

In order to create the appearance of a conflict between the Seventh Circuit and other Circuits, the Plan now contends that the Court of Appeals construed ambiguities against the Plan in declining to defer to the Plan's interpretation of Section 12.1. However, the Court of Appeals did not apply *contra proferentem* in deciding the deference issue. To the contrary, Judge Posner found no ambiguities in Section 12.1 to which that principle could even apply. Judge Posner's discussion of deference extends for two pages at the close of his opinion. Pet. App. 10a-11a. The principle of *contra proferentem* is not mentioned.[4] Instead, Judge Posner explains the deference doctrine as based on the principle that the more complex and ambiguous the plan provisions in question, the greater deference is

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[4] The *amicus* brief submitted by the American Benefits Counsel and the ERISA Industry Committee–whose members are all corporate sponsors of pension plans–devotes several pages (pp. 5-8) to knocking down the *contra proferentem* strawman. The brief not only misrepresents what Judge Posner's opinion actually held, but engages in outright distortion. The *amicus* brief states (p. 7 n.4, *citing* Pet. App. 7a) that Judge Posner "determined that the terms of the plan were 'obscure'. . . . " In fact, Judge Posner said that "[a]n 'optional form of benefit' is defined neither in ERISA nor in the Ameritech plan, and its meaning is obscure." Pet. App. 7a. But Judge Posner emphasized that an "optional form of benefit" is not an "early-retirement benefit," "a term that fits plaintiff's claim to a T." *Id.*

granted to the plan administrator in resolving interpretation issues. Judge Posner found that Section 12.1 presented no complex issues or ambiguities meriting deference to the Plan's interpretation:

> [U]nambiguous terms of a pension plan leave no room for the exercise of interpretive discretion by the plan's administrator, or at least not enough to carry the day for the administrator in this case.

Pet. App. 11a.

The Plan submitted no extrinsic evidence demonstrating ambiguities in Section 12.1. *Id.* To the contrary, "[w]hen guides to meaning line up on one side of the case, as they do here, an adjudicator who decides the case the other way is likely to be acting unreasonably." *Id.* The Court rejected the Plan's construction that left Plaintiffs' early retirement benefits and the actuarial assumptions used to value their lump sum distributions unprotected from cutback not because ambiguities were construed against the Plan, but instead because of "the lack of any reasoned basis for" the Plan's interpretation of Section 12.1's unambiguous provisions. *Id.* at 10a.

In an earlier portion of his opinion, Judge Posner briefly referred to the principle of construing ambiguities against the drafter of a contract. In discussing the early retirement program through which Plaintiffs received their lump sum distributions (*not* Section 12.1), Judge Posner explained that the Plan's failure to explain to Ms. Call that by taking a lump sum distribution she would lose $36,000 (14% of her total pension benefit) would justify construing any ambiguities in the early retirement program against the Plan. However, neither during that discussion nor anywhere else in the opinion did Judge

Posner identify an ambiguity in Section 12.1. Judge Posner simply did not apply the principle of *contra proferentem* to resolve an ambiguity in Section 12.1.

Other considerations refute the Plan's fabrication of a conflict between the Court of Appeals' decision in this case and other Circuits. As the Plan admits, the Seventh Circuit has held that the principle of *contra proferentem* does not apply to the deference issue. *Hess v. Reg-Ellen Mach. Tool Corp.*, 423 F.3d 653, 662 (7th Cir. 2005). The panel in this case did not even cite *Hess*, much less attempt to overrule it.[5] "One panel of this court cannot overrule another implicitly. Overruling requires recognition of the decision to be undone and circulation to the full court under Circuit Rule 40(e)." *Brooks v. Walls*, 279 F.3d 518, 522 (7th Cir. 2002), *cert. denied*, 538 U.S. 1001 (2003).

Plainly, if the Plan believed that, in conflict with *Hess*, Judge Posner's opinion had construed ambiguities in Section 12.1 against the Plan, it would have emphasized that issue when it asked for rehearing. Yet, the Plan's rehearing petition did not even mention *contra proferentem*, thereby confirming that it is not an issue in this case.

Consequently, the Plan's arguments concerning the Seventh Circuit's construction of ambiguities in Section 12.1 against the Plan should be disregarded. The Court of Appeals' decision on deference is not in conflict with the decisions of other Circuits. Any intercircuit conflict on that issue does not justify granting review here. Resolving the question whether *contra proferentem* should or should not

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[5] Judge Kanne was on the panel in *Hess* and also on the panel in this case.

apply on the deference issue would have no impact on the result in this case. The Court of Appeals rejected the Plan's construction of Section 12.1 without construing ambiguities against the Plan, and in any event the Court found no ambiguities in Section 12.1.

Further, should the Court grant review in another pending case, *Carolina Care Plan, Inc. v. McKenzie*, No. 06-1182, to resolve the intercircuit conflict over applying *contra proferentem* on the deference issue, this case should not be held pending that decision. This Court's decision on that issue could have no impact on the result in this case, and holding this case would only further delay the Plan's payment of the wrongly withheld benefits to the members of the Plaintiff class who have been waiting to receive their full pension entitlement for several years after retiring.

II. ALL THE CIRCUITS PERMIT DISTRICT COURTS TO EXERCISE EQUITABLE DISCRETION TO AWARD PREJUDGMENT INTEREST TO PLAN PARTICIPANTS WRONGFULLY DENIED BENEFITS.

The Plan tries to create the appearance of conflicts on awarding prejudgment interest to Plan participants who, as here, have wrongfully been denied their full pension benefits.

First, the Plan claims that awarding prejudgment interest under ERISA conflicts with this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), on the ground that prejudgment interest is not an equitable remedy available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). The Plan did not make this argument in the Court of Appeals; its briefs do not even cite *Great-West*. The Plan has thus waived the point.

Rather than the *Great-West* equitable relief issue, the Plan argued below that prejudgment interest should not be awarded unless the Plan document expressly authorizes such an award. The Plan relied upon *Flint v. ABB, Inc.*, 337 F.3d 1326, 1329-1330 (11th Cir. 2003), but *Flint* was explicitly limited to cases in which benefit payments were *delayed* but not, as here, wrongfully denied. In fact, *Flint* relied on the Seventh Circuit's decision in *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 497 (7th Cir. 1999), which similarly involved delayed benefit payments. Where benefits have been wrongfully denied, the Eleventh Circuit permits district courts to award prejudgment interest. *Smith v. American Int'l Life Assur. Co.*, 50 F.3d 956, 957 (11th Cir. 1995); *Florence Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield of Ala.*, 41 F.3d 1476, 1484 (11th Cir. 1995).

The Plan now tries to bootstrap *Great-West* into this case by noting (Pet. 28) that *Flint* cited *Great-West*. However, *Flint* cited *Great-West* on the issue whether a cause of action for prejudgment interest can be implied under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), not on the nature of equitable remedies available under ERISA § 502(a)(3).

Second, the Plan argues that the Circuits are in conflict over the interest rate that should be used in awarding prejudgment interest under ERISA, with the Seventh Circuit using the prime rate, some Circuits relying upon the statutory 52-week Treasury bill rate for postjudgment interest under 28 U.S.C. § 1961(a), and other Circuits incorporating state prejudgment interest law into ERISA.

Rather than the extensive conflict depicted by the Plan, the following survey demonstrates remarkable agreement among the Circuits on the policy, purpose, and even procedure governing prejudgment interest under ERISA. Although there are subtle differences between some Circuits on the guides that district courts may use in exercising their discretion, the Circuits are developing a uniform approach to prejudgment interest in which economic considerations are dominant. A plan participant wrongfully denied benefits should be compensated for the delay by a prejudgment interest award based on what the participant would have earned on the funds, what the plan actually earned on the funds, or the amount that the plan would have had to pay in interest to borrow the amount in question. There is no reason for the Court to intervene on this issue.

First Circuit: In *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 223-225 (1st Cir. 1996), the First Circuit held that, where the governing federal statute, such as ERISA, is silent on prejudgment interest, the district court has equitable discretion to award such interest, including "broad discretion" in choosing the appropriate rate. Equitable considerations govern that decision, and the discretion is conferred on the trial judge, not the court of appeals. The district court can look for guidance in state law, or it can select the federal statutory postjudgment rate in Section 1961(a), the 52-week Treasury bill rate, as the district court did in this case. That exercise of discretion was appropriate because it favors federal uniformity. In addition, because the plan's funds were initially invested in Treasury bills, the Treasury bill rate more closely matched the likely return on the plan funds in question.

Second Circuit: In *Jones v. UNUM Life Ins. of America*, 223 F.3d 130, 139-140 (2d Cir. 2000), the district court awarded prejudgment interest at the 52-week Treasury bill rate, pursuant to Section 1961(a), but failed to explain why that rate would fully compensate the plaintiff. The Second Circuit noted that a higher rate could be justified by the fact that the plaintiffs would have invested the money at a higher rate or that the rate that the defendant would have had to pay to borrow the money would have been higher than Treasury bill rate. On remand, the district court adhered to the Treasury bill rate on the ground that the plaintiff's evidence for a higher rate was unpersuasive. The Second Circuit held that the district court had not abused its discretion because the plaintiffs' original evidence with respect to prejudgment interest was "of a general nature" and had not been supplemented upon remand. *Jones v. UNUM Life Ins. of America*, 14 Fed. Appx. 44, 2001 WL 754706 (2d Cir. 2001).

Third Circuit: In *Skretvedt v. E. I. Dupont de Nemours*, 372 F.3d 193, 215 n.30 (3d Cir. 2004), the Third Circuit suggested that, after *Great-West*, prejudgment interest may no longer be appropriate under Section 1961(a) and that the plan may be required to disgorge the gain that it made on the funds in question, which would require determining the amount of return the plan earned on the wrongfully withheld benefits. The issue was to be addressed on remand if the lower court determined that the plaintiff was entitled to prejudgment interest.

Fourth Circuit: In *Fox v. Fox*, 167 F.3d 880, 884 (4th Cir. 1999), the Fourth Circuit upheld, under the abuse of discretion standard, the 12% prejudgment interest rate awarded by the district court based on that court's finding that the S&P Index had risen by 19% during the period in question and that the plan administrator had a duty to invest plan funds to achieve a reasonable rate of return.

Fifth Circuit: The Fifth Circuit in *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 984-985 (5th Cir. 1991), held that it was appropriate for the district court to look to state law for guidance on prejudgment interest in an ERISA case, but that state law is not binding and "it is within the discretion of the district court to select an equitable rate of prejudgment interest." Although a claim for denied benefits under a plan is akin to a breach of contract action, the district court rejected the 6% prejudgment interest rate authorized by state law and instead awarded a 10% rate based on the state post-judgment statute. The Fifth Circuit found no abuse of discretion.

Sixth Circuit: In *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 981, 985 (6th Cir. 2000), the Sixth Circuit upheld the district court's prejudgment interest formula which awarded the greater of the Treasury bill rate under Section 1961(a) or the rate of return actually earned by the plan during the prejudgment period. The Court of Appeals noted that it had previously upheld an award based on the Treasury bill rate, but that was not the only permissible rate. The Court found that using the rate actually realized by TRW on the funds in question "seems an appropriate way of avoiding unjust enrichment."

Seventh Circuit: In *Fritcher v. Health Care Serv. Corp.*, 301 F.3d 811, 819-820 (7th Cir. 2002), the Seventh Circuit held that awarding prejudgment interest in an ERISA case is within the district court's discretion in balancing the equities. The Court followed Judge Posner's suggestion in *Gorenstein Enter., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989), a trademark case, that where a federal statute does not prescribe a prejudgment interest rate the prime rate is appropriate. Judge Posner noted that the Treasury bill rate under Section 1961(a) is likely too low to compensate the plaintiffs "because there is no default risk with Treasury bills." *Id.* at 437. The *Gorenstein* Court explained that it did "not want to straightjacket the district judges but we do want to caution them against the danger of setting prejudgment interest rates too low by neglecting the risk, often nontrivial, of default." *Id.* The prime rate was suggested for "convenience; a more precise estimate would be the interest rate paid by the defendant for unsecured loans." *Id.*

Eighth Circuit: In *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1006-1009 (8th Cir. 2004), the Eighth Circuit held that a plan participant is entitled to prejudgment interest based upon the return the plan earned on the wrongfully withheld benefits.

Ninth Circuit: The Ninth Circuit held in *Blankenship v. Liberty Life Assur. Co. of Boston*, 486 F.3d 620, 627-28 (9th Cir. 2007) that prejudgment interest may be awarded to a plan participant in the district court's discretion. Generally, the Section 1961(a) Treasury bill rate is "appropriate" unless the district court finds, based on "substantial evidence," that the equities require a different rate. The Court of Appeals upheld the district court's award of a higher prejudgment interest rate than the Treasury bill rate. The district court awarded prejudgment interest at a 10.01% interest rate compounded monthly based on the fact that the plaintiff would have invested the benefits in a

Vanguard mutual fund. Plaintiff's investment in that mutual fund had since its inception earned a return of 10.01%.

Tenth Circuit: In *Allison v. Bank One-Denver*, 289 F.3d 1223 (10th Cir. 2002), the Tenth Circuit upheld the district court's award of prejudgment interest to plan participants based on Colorado's statutory rate of 8%. The Court of Appeals acknowledged that incorporating the state interest rate could violate the federal policy underlying ERISA, but followed the Sixth Circuit's holding in *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 618 (6th Cir. 1998), that the state statutory rate should not be adopted "wholesale" under ERISA and that the ERISA prejudgment interest issue is left to the "sound discretion" of the district court. The Tenth Circuit relied upon the district court's statement that "it was using the rate to restore lost earnings and profits to the . . . Plaintiff, not to punish Bank One." 289 F.3d at 1244.

Eleventh Circuit: In *Florence Nightingale Nursing Serv., Inc.*, 41 F.3d at 1484, the Eleventh Circuit upheld the district court's prejudgment interest award based on the state statutory rate because the award was within the district court's "sound discretion." In a recent decision, however, the Eleventh Circuit noted that in a case in which the plan violated its own terms or ERISA in denying benefits, the Third Circuit in *Skretvedt*, 372 F.3d at 215, and the Eighth Circuit in *Parke*, 368 F.3d at 1006-1009, have "recognized a claim for interest under § 502(a)(3) on an equitable restitution theory. . . . " *Green v. Holland*, 480 F.3d 1216, 1226 n.7 (11th Cir. 2007). Because the plaintiff could not show a violation of the plan or ERISA, however, the Eleventh Circuit did not decide the issue.

D.C. Circuit: In *Moore v. CapitalCare, Inc.*, 461 F.3d 1 (D.C. Cir. 2006), the D.C. Circuit reversed the district court's denial of prejudgment interest to a plan participant. Citing the Third Circuit's decision in *Skretvedt*, 372 F.3d at 207-208, and the Seventh Circuit's decision in *Fritcher*, 301 F.3d at 820, the Court of Appeals held that an award of prejudgment interest to a plan participant is "presumptively" appropriate for three reasons: "First, to permit the fiduciary to retain the interest earned on wrongfully withheld benefits would amount to unjust enrichment – a fiduciary would benefit from failing to pay ERISA benefits. . . . Second, prejudgment interest ensures that a beneficiary is fully compensated, including for the loss of the use of money that is his. . . . Finally, prejudgment interest promotes settlement and deters any attempt to benefit unfairly from inevitable litigation delay." 461 F.3d at 13.

The Plan fails to cite several of the above decisions which support awarding prejudgment interest at market interest rates, such as the prime rate in this case, so that participants are fully compensated. As a result, the Plan's depiction of a Circuit conflict over ERISA prejudgment interest is erroneous.

CONCLUSION

For the reasons cited in this Brief, the Petition should be denied, thus enabling Ms. Call and the class to finally receive the pension benefits that they have been denied for several years.

Respectfully submitted,

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