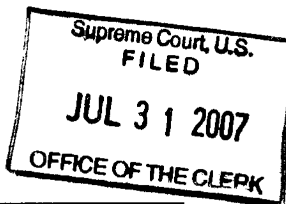
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No. 06-1398

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,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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July 31, 2007

CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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The petition shows that the Court of Appeals impermissibly substituted its judgment for that of the Plan administrator in construing the language of the Ameritech Management Pension Plan ("the Plan"). As a result, the Seventh Circuit rejected the administrator's reasoned conclusion that actuarial changes brought about by the Plan's Eleventh Amendment (which Congress had specifically authorized) did not run afoul of the Plan's "anti-cutback" provision. Failing to defer to the administrator's interpretation, the Court of Appeals approved a $31 million windfall for Respondent and the class members, at the expense of other Plan participants and beneficiaries.

In rejecting the Plan administrator's reasonable interpretation, the Court of Appeals ran afoul of the principles of deference established in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-15 (1989). In addition, the Court of Appeals applied rules of interpretation that have no place in ERISA cases, as other courts have correctly held. First, it concluded that ERISA plan provisions based on statutory requirements should be read to afford participants greater protection than the statute. Second, it concluded that ambiguities in plan language should be construed in favor of a claimant and against the plan. This case squarely presents these and other issues on which the lower courts are deeply divided. The petition should be granted consistent with Congress's objective of achieving uniformity in the area of retirement-benefits law.

Respondent fails to address most of these points. Like the Court of Appeals, she barely mentions the judicial deference to which the Plan administrator is entitled under *Firestone*. With one exception, Respondent does not dispute the existence of the relevant circuit splits warranting this Court's attention. Nor does Respondent dispute that—as *amici* American Benefits Council and ERISA Industry Committee confirm—the issues presented by the petition have widespread significance for ERISA plans and beneficiaries. Furthermore, the merits

arguments that Respondent makes in opposition to the petition are unpersuasive.

Because the decision of the Court of Appeals was incorrect and presents important questions on which the circuits are divided, the petition should be granted.

I. THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THIS COURT

Respondent argues that several issues raised in the petition are not properly before this Court. Those arguments are factually incorrect and rest on misunderstandings about the scope of this Court's review.

First, Respondent claims that the Plan has failed to preserve the argument that Section 12.1 was intended to demonstrate the Plan's compliance with legal requirements for favorable tax treatment. *See* Opp. 1. Section 12.1's meaning and application to Respondent's lump sum were centrally at issue below, and therefore any arguments in support of the Plan's position on those issues may be presented in this Court. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[O]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (internal quotation marks omitted).

In any event, Respondent is mistaken about the record below. As the Court of Appeals expressly recognized, the Plan argued that it was "legally obligated" to include a provision tracking ERISA Section 204(g), 29 U.S.C. § 1054(g); the Court of Appeals rejected that argument on the merits. Pet. App. 9a. Accordingly, the question was "pressed or passed upon below" (indeed, it was both pressed *and* passed upon) and may properly be considered by this Court. *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); *accord*

Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1099 n.8 (1991).[1]

Respondent's contention that the Plan waived the argument that Section 12.1 prohibits only eliminating (rather than reducing) an optional form of benefits, *see* Opp. 13, also involves a subsidiary point in support of the central question. And it misstates the facts. The Plan argued below that Respondent's lump-sum payment was an optional form of benefit for purposes of Section 12.1, and pointed out that Section 12.1 prohibits only the elimination of such benefits, not reductions of them. *See* Opening Br. for Defendant-Appellant Ameritech Management Pension Plan 22, 29, 33, 34 (Mar. 6, 2006) ("Opening Br.").

Respondent is correct that the Plan did not specifically state below that "prejudgment interest is not an equitable remedy available under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)." Opp. 18. Instead, the Plan argued broadly that ERISA does not authorize awards of prejudgment interest. *See* Opening Br. 40. That argument encompassed all of ERISA's sections. (And besides, as explained, the Plan is not limited to the precise arguments previously made in support of its position on prejudgment interest.) In addition, notwithstanding Respondent's claim to the contrary, the lead case on which the Plan relied *did* discuss Section 502(a)(3) and this Court's analysis of that section in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002). *See Flint v. ABB, Inc.*, 337 F.3d 1326, 1330-31 (11th Cir. 2003). Respondent's

[1] Respondent also incorrectly claims that the Court of Appeals rejected this argument as untimely in the course of denying rehearing. *See* Opp. 1. In its petition for rehearing, the Plan cited an Internal Revenue Service ("IRS") regulation supporting its position on this question. *See* Petition for Rehearing and Suggestion for Rehearing En Banc of Appellant Ameritech Management Pension Plan 7 (Jan. 23, 2007). The Court of Appeals noted that the Plan had not cited the provision in its initial briefing, but at no time did the court suggest that the underlying argument, or even reliance on the IRS regulation, was barred. *See* Pet. App. 28a.

suggestion that the Plan may not cite *Great-West* as additional authority in this Court is equally without merit. *See Lebron*, 513 U.S. at 379.

Finally, the fact that the Plan did not discuss the Court of Appeals' reliance on the canon of *contra proferentem* in its petition for rehearing, *see* Opp. 1, has no bearing on this Court's review. There is no requirement that a party seek rehearing of an issue before presenting it to this Court. *See* Sup. Ct. R. 13.

II. THE COURT OF APPEALS ERRONEOUSLY REJECTED THE PLAN ADMINISTRATOR'S INTERPRETATION OF SECTION 12.1

The Court of Appeals adopted an interpretive rule under which, when the terms of an ERISA plan articulate a statutory protection, the plan presumptively must be read to afford plan beneficiaries greater protection than the statutory provision, on the basis that otherwise the plan provision would be "superfluous." Pet. App. 9a; *see* Pet. 18. The Seventh Circuit's rule directly conflicts with the decisions of several other circuits and is in tension with this Court's admonition that ERISA plans "must generally be construed in light of ERISA's policies," *Central States Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 568 (1985). In contrast, the Plan administrator harmonized the language of Section 12.1, ERISA, and the Retirement Protection Act of 1994, Pub. L. No. 103-465, § 767(d)(2), 108 Stat. 4809, 5040, and concluded that (i) Respondent's lump-sum payout was not an "accrued benefit" protected against cutback by Section 12.1, and (ii) even if it were, the changes brought about by the Eleventh Amendment were "permitted by law" and thus allowed by Section 12.1's savings clause. *See* Pet. 7.

Respondent does not contest that the interpretive rule adopted by the Seventh Circuit conflicts with the positions of other Courts of Appeals. *See* Pet. 18-20. She instead asserts that the issue is not important, because there is no formal duty to "cut and paste scores of ERISA provisions into each plan." Opp. 12. As the petition

describes, however, drafters must as a practical matter include within the terms of their plans provisions that reflect statutory requirements. *See* Pet. 3-4; *see generally* John H. Langbein et al., *Pension and Employee Benefit Law* 348 (4th ed. 2006). Respondent ignores the Plan's demonstration of the practical importance of reading plan provisions harmoniously with the underlying law.

Respondent primarily disputes the merits of the administrator's conclusion that her lump-sum payment was not an "accrued benefit" protected against reduction by Section 12.1. Respondent emphasizes that ERISA Section 204(g), its Tax Code analog (26 U.S.C. § 411(d)(6)), and their implementing regulations provide certain protections for early retirement benefits. *See* Opp. 9-15 (citing *Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 744, 745 (2004); Rev. Rul. 81-12, 1981-1 C.B. 228; Internal Revenue Manual § 4.72.10.6; 26 C.F.R. § 1.411(a)-11)).

True enough. But the language at issue here was drafted by the Plan sponsor, not Congress or the IRS, and it was drafted against the background of an exception created by the Retirement Protection Act. The question before the Plan administrator was whether, in Section 12.1, the Plan sponsor voluntarily provided Respondent and the other class members greater protection than the law required, to the disadvantage of other Plan participants and beneficiaries. None of Respondent's authorities supports Judge Posner's conclusion that, because ERISA Section 204(g) treats a reduction in an early retirement benefit *as if* it were a reduction in an accrued benefit, the phrase "accrued benefit," as used in Plan Section 12.1, must be judicially defined to *comprise* early retirement benefits so that Section 12.1 has this expansive effect. *See* Pet. App. 7a-9a.

For instance, although *Central Laborers'* confirms that Section 204(g)(2) protects early retirement benefits, the Court did not hold, as Respondent suggests, that, for purposes of a private anti-cutback provision, an optional form of early retirement benefit must be deemed to be an

accrued benefit. *See* Opp. 9-10. Rather, the holding of *Central Laborers'*—which has no bearing on this case—was that a plan amendment that effectively suspended a participant's monthly benefits under an early retirement plan "ha[d] the effect of 'eliminating or reducing an early retirement benefit'" for purposes of the statutory anti-cutback rule. 541 U.S. at 744.

The Plan administrator's conclusion that Respondent's lump-sum payments are best viewed as an "optional form of benefit" under Section 12.1 is consistent with the language of the Plan and the requirements of ERISA. In fact, in arguing to the contrary, Respondent is forced to take the position that Section 12.1's restriction on "reduc[ing]" accrued benefits allows the Plan to "eliminate lump sum distributions entirely," but not to take the lesser step of reducing the amount of a lump sum through actuarial changes. Opp. 14. That tortured reading of Section 12.1 might not even be a permissible construction of the Plan; it certainly is not the only possible one.

III. THE COURT OF APPEALS ERRONEOUSLY APPLIED *CONTRA PROFERENTEM*

Respondent does not dispute that the circuits are deeply divided on the question whether the canon of *contra proferentem* applies in the ERISA context.[2] Nor does Respondent dispute that, as *amici* confirm, this issue is critically important to ERISA plans and beneficiaries and warrants this Court's attention.[3]

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[2] This case presents a better vehicle than *Carolina Care Plan, Inc. v. McKenzie*, No. 06-1182 (distributed for Conference of Sept. 24, 2007), for resolving the *contra proferentem* issue, because it also implicates additional ERISA issues that deserve resolution by this Court. Furthermore, Judge Posner's particular influence in the ERISA area, *see* Opp. 9 n.2, makes review of his incorrect and harmful decision especially warranted.

[3] A recent Sixth Circuit decision, *West v. AK Steel Corp. Retirement Accumulation Pension Plan*, 484 F.3d 395 (6th Cir. 2007), underscores the importance of this question. In *West*, a plaintiff class consisting of early retirees who elected to take lump-sum payments obtained an award of more than $46 million on the ground that their payments

Respondent instead suggests that the Court of Appeals did not actually construe ambiguities against Petitioner as the drafter of the plan. *See* Opp. 15-16. But plainly it did. In his analysis of Section 12.1, Judge Posner expressly "invok[ed] the principle that ambiguities in a contract that remain after extrinsic evidence has been presented (which neither party wishes to do in this case) are resolved against the party who drafted the contract." Pet. App. 9a. Respondent absurdly theorizes that Judge Posner was here referring to language concerning "the early retirement program through which Plaintiffs received their lump sum distributions," and "*not* Section 12.1." Opp. 16. There was no dispute below concerning the scope of the early retirement plan or the meaning of its terms; the dispute involved the validity of the Plan administrator's interpretation of Section 12.1. Similarly, Respondent's suggestion that the court below did not rely on the canon of *contra proferentem* because it did not use that Latin name, *see* Opp. 15, is silly.

The Plan administrator's interpretation is consistent with the definition of "accrued benefit" found in the Plan[4] as well as that found in ERISA, *see* 29 U.S.C. § 1002(23)(A), and keeps Section 12.1 in line with the requirements of ERISA Section 204(g) and the Retirement Protection Act. In this case, the Court of Appeals could not have concluded that the administrator's interpreta-

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were improperly calculated. Due to differences in the structures of the relevant plans, the plaintiffs in *West* (represented by Respondent's counsel here) could prevail only by arguing the opposite of what Respondent has argued here: namely, that a lump-sum amount was *not* an "accrued benefit" under the plan. The District Court agreed. *See* 318 F. Supp. 2d 579, 584-85 (S.D. Ohio 2004) ("[C]ontrary to Defendants' premise, a participant's accrued benefit . . . is an annuity."). The Sixth Circuit affirmed, saying that "ambiguity must be resolved in the plaintiff's favor." 484 F.3d at 409.

[4] This definition did not apply to Section 12.1. *See* Pet. App. 7a. But, in the absence of a separate, applicable definition, the definition of "accrued benefit" used elsewhere in the Plan is an appropriate "guid[e] to meaning" (*id.* at 11a) that the Plan administrator could properly consult.

tion was unambiguously incorrect *without* looking beyond the terms and context of the Plan. Its reliance on *contra proferentem*, however, cannot be squared with the deference required by *Firestone*. *See* 489 U.S. at 110-15.

The fact that the Seventh Circuit has arguably been inconsistent in applying *contra proferentem* to ERISA cases, *see* Pet. 23 n.10; Opp. 17, does not lessen the urgency of review by this Court. As the petition and supporting *amici* show, there is a deep and well-developed split among the circuits no matter how the Seventh Circuit may ultimately resolve the issue. The inconsistent Seventh Circuit case law serves only to illustrate the recurring nature of this question and the need for clear guidance from this Court.

IV. THE COURT OF APPEALS ERRED IN AWARDING PREJUDGMENT INTEREST AT THE PRIME RATE

In addition to making a misplaced waiver argument concerning the award of prejudgment interest in this case, *see supra* p. 2, Respondent disputes that there is a meaningful circuit split concerning the appropriate interest rate to be applied if prejudgment interest is available. *See* Opp. 18-25. Only by cherry-picking decisions, however, can Respondent claim that "the Circuits are developing a uniform approach . . . in which economic considerations are dominant," and even then she must concede that the circuits permit awards based on differing criteria. Opp. 20. The reality is that deep divisions exist.

Respondent acknowledges (at 23) the Seventh Circuit's rejection of awards based on the statutory rate for post-judgment interest, holding that "[t]his rate is too low, because there is no default risk with Treasury bills." *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 437 (7th Cir. 1989).[5] In contrast, many circuits

[5] Although *Gorenstein* was not an ERISA case, the Seventh Circuit has subsequently held that "[*Gorenstein*'s] presumption in favor of pre-

allow awards of prejudgment interest based on the statutory postjudgment interest rate. *See* Pet. 28-29 (collecting cases). Respondent either distorts or ignores the holdings of those cases.[6]

For instance, Respondent claims that in *Parke v. First Reliance Standard Life Insurance Co.*, 368 F.3d 999, 1006-09 (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." Opp. 23. Not so. In *Parke*, the Eighth Circuit held that the *purpose* of awarding prejudgment interest is to prevent plans from profiting from a breach of their fiduciary duties to beneficiaries, *see* 368 F.3d at 1009, but the award it affirmed was calculated using the statutory rate. *See Parke v. First Reliance Standard Life Ins. Co.*, No. 99-1039 (JRT/FLN), 2003 WL 131731, at *2 n.2 (D. Minn. Jan. 8, 2003).

Respondent cites *Rybarczyk v. TRW, Inc.*, 235 F.3d 975, 981, 985 (6th Cir. 2000), to suggest that the Sixth Circuit favors awards based on the rate of return earned by the plan during the relevant period of time. Yet in other decisions that both pre-date and post-date *Rybarczyk*, the Sixth Circuit has affirmed awards of prejudgment interest based on the statutory postjudgment rate. *See Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 585 & n.3 (6th Cir. 2002); *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 619 (6th Cir. 1998).

Thus, at least five circuits affirm awards for prejudgment interest based on the federal postjudgment interest rate—awards that the Seventh Circuit would reverse.[7] In

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judgment interest awards is specifically applicable to ERISA cases." *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692, 696 (7th Cir. 1991).

[6] The circuits' application of an abuse-of-discretion standard when reviewing awards of prejudgment interest does not lessen the need for this Court's intervention to establish uniform boundaries within which district courts may exercise their discretion.

[7] Respondent concedes that the First, Second, and Ninth Circuits also disagree with the Seventh Circuit and permit awards of prejudg-

contrast, the Fourth, Fifth, Tenth, and Eleventh Circuits have affirmed awards based on *state* statutory interest rates. *See Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1031 (4th Cir. 1993) (en banc); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 984 (5th Cir. 1991); *Allison v. Bank One – Denver*, 289 F.3d 1223, 1243-44 (10th Cir. 2002); *Florence Nightingale Nursing Serv., Inc. v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1484 (11th Cir. 1995). The Third and District of Columbia Circuits have given their district courts little guidance in determining the appropriate rate to apply. *See Skretvedt v. E.I. DuPont de Nemours*, 372 F.3d 193, 215 n.30 (3d Cir. 2004); *Moore v. CapitalCare, Inc.*, 461 F.3d 1, 12-13 (D.C. Cir. 2006). In short, the circuits show no sign of developing a "uniform approach." Opp. 20.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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ment interest based on the statutory postjudgment interest rate. *See* Opp. 20-21, 23.

[8] Ultimate agreement on what rate of interest to apply is particularly unlikely inasmuch as the circuits disagree about the purpose of awarding prejudgment interest in ERISA cases. Some view it as a means of compensating the plaintiff for the interest he would have received had his full benefit been paid on a timely basis, *see, e.g., Blankenship v. Liberty Life Assurance Co. of Boston*, 486 F.3d 620, 628 (9th Cir. 2007), while others view it as a means of forcing the defendant to disgorge ill-gotten gains, *see Parke*, 368 F.3d at 1009 (suggesting that *Great-West* precludes prejudgment interest awards intended "to compensate [the plaintiff] for the delay"); *Rybarczyk*, 235 F.3d at 986. The Seventh Circuit takes the position that prejudgment interest is intended to be a measure of what the plaintiff would have charged if she had made an unsecured loan to the defendant. *See Gorenstein*, 874 F.2d at 436.

Respectfully submitted,

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