Supreme Court, U.S.
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No. ____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case is a class action brought under 29 U.S.C. § 1132(a)(1)(B) to recover benefits allegedly due under the terms of a defined benefit pension plan covered by ERISA. Like most if not all such plans, the plan at issue contains an "anti-cutback" provision that protects beneficiaries against certain reductions in benefits. The Seventh Circuit determined that the plan provision was ambiguous on its face as applied to the class claims. Nevertheless, the Court of Appeals held that canons of contract construction rendered the plan administrator's interpretation unreasonable. The questions presented are:

1. Whether, under the abuse-of-discretion standard established in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), and corollary interpretive principles adopted by the Second, Fifth, Eighth, Ninth, and Tenth Circuits but rejected by the Seventh Circuit in this case, the Court of Appeals was required to defer to the plan administrator's interpretation of the plan.

2. Whether the Court of Appeals erred in awarding prejudgment interest and, in conflict with decisions of the Fourth, Fifth, Sixth, Eighth, and Ninth Circuits, in calculating that interest at the prime rate.

PARTIES TO THE PROCEEDINGS

Petitioner AT&T Pension Benefit Plan is the successor to the Ameritech Management Pension Plan, which was the named defendant in the District Court and appellant in the Court of Appeals. In 2005, the Ameritech Management Pension Plan was merged into the AT&T Pension Benefit Plan.

Respondent Linda Call, individually and on behalf of all others similarly situated, was plaintiff in the District Court and appellee in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner AT&T Pension Benefit Plan, as successor to the Ameritech Management Pension Plan, states that, although it is not a corporation, the Plan's sponsor and Plan administrator is AT&T Inc., which is a publicly held corporation. No other person or publicly held corporation owns 10% or more of the stock of AT&T Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

1. ERISA and Its Anti-Cutback Rule 2
2. The Plan Administrator's Determination 5
3. The District Court's Proceeding 7
4. The Court of Appeals' Decision 8
5. The Denial of Rehearing 12

REASONS FOR GRANTING THE PETITION 14

I. THE COURT OF APPEALS' FAILURE TO DEFER TO THE PLAN ADMINISTRATOR PUTS IT IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS 14

A. The Court of Appeals Failed To Defer to the Plan Administrator's Reasonable Interpretation of Section 12.1 15

B. The Interpretive Canons Applied by the Court of Appeals Are Inconsistent with Deferential Review and Conflict with Decisions of Other Courts of Appeals 18

1. The Court of Appeals Should Have Construed Section 12.1 Harmoniously with ERISA's Anti-Cutback Provision 18

2. The Court of Appeals Erred in Applying the Canon of *Contra Proferentem* 21

C. The Issues in This Case Are Important............. 23

II. THE AWARD OF PREJUDGMENT INTEREST AT THE PRIME RATE WAS ERROR AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS 27

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

CASES Page

Aetna Health Inc. v. Davila, 542 U.S. 200 (2004)...............2

Black & Decker Disability Plan v. Nord, 538 U.S. 822 (2003) 3

Blanton v. Anzalone, 813 F.2d 1574 (9th Cir. 1987) 28

Board of Trustees of Sheet Metal Workers' Nat'l Pension Fund v. Commissioner, 318 F.3d 599 (4th Cir. 2003) 26

Boggs v. Boggs, 520 U.S. 833 (1997) 24

Brewer v. Lincoln Nat'l Life Ins. Co., 921 F.2d 150 (8th Cir. 1990) 22

Caffey v. UNUM Life Ins. Co., 302 F.3d 576 (6th Cir. 2002) 28

Cagle v. Bruner, 112 F.3d 1510 (11th Cir. 1997)........21, 23

Carolina Care Plan Inc. v. McKenzie, 467 F.3d 383 (4th Cir. 2006), *petition for cert. pending*, No. 06-1182 (filed Feb. 26, 2007)...............22

Ceccanecchio v. Continental Cas. Co., 50 F. App'x 66 (3d Cir. 2002)...............23

Central Laborers' Pension Fund v. Heinz, 541 U.S. 739 (2004) 4, 19

Central States Pension Fund v. Central Transp., Inc., 472 U.S. 559 (1985)...............14, 20

Copeland Oaks v. Haupt, 209 F.3d 811 (6th Cir. 2000) 22

Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220 (1st Cir. 1996) 28

Counts v. Kissack Water & Oil Serv., Inc., 986 F.2d 1322 (10th Cir. 1993) 16

Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73 (1995) 20

Doe v. Group Hospitalization & Med. Servs., 3 F.3d 80 (4th Cir. 1993)...22

Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141 (2001) 4

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989) 1, 2, 3, 11, 12, 14, 16, 18, 21, 25

Flint v. ABB, Inc., 337 F.3d 1326 (11th Cir. 2003)..........28

Fritcher v. Health Care Serv. Corp., 301 F.3d 811 (7th Cir. 2002) 29

Gable v. Sweetheart Cup Co., 35 F.3d 851 (4th Cir. 1994) 19

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) 27, 28

Hamlin Dev. Co. v. Commissioner, 65 T.C.M. (CCH) 2071, 1993 WL 69569 (T.C. Mar. 15, 1993) 13

Hansen v. Continental Ins. Co., 940 F.2d 971 (5th Cir. 1991) 29

Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000).........................24, 25

Heasley v. Belden & Blake Corp., 2 F.3d 1249 (3d Cir. 1993) 23

Hess v. Reg-Ellen Mach. Tool Corp., 423 F.3d 653 (7th Cir. 2005) 23

John Morrell & Co. v. United Food & Commercial Workers Int'l Union, 37 F.3d 1302 (8th Cir. 1994) 19

Jones v. UNUM Life Ins. Co. of Am.:

223 F.3d 130 (2d Cir. 2000) 29

14 F. App'x 44 (2d Cir. 2001) 29

Kimber v. Thiokol Corp., 196 F.3d 1092 (10th Cir. 1999) 22

Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 3

Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co., 896 F.2d 228 (7th Cir. 1990) 27

Mansker v. TMG Life Ins. Co., 54 F.3d 1322 (8th Cir. 1995) 28

Mason v. Continental Group, 474 U.S. 1087 (1986) 24

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 27

Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) 27, 28

Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359 (1980) 2

Pagan v. NYNEX Pension Plan, 52 F.3d 438 (2d Cir. 1995) 22

Perreca v. Gluck, 295 F.3d 215 (2d Cir. 2002) 16

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 24

Quesinberry v. Life Ins. Co. of N. Am., 987 F.2d 1017 (4th Cir. 1993) 29

Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon, 541 U.S. 1 (2004) 2

Rodriguez-Abreu v. Chase Manhattan Bank, N.A., 986 F.2d 580 (1st Cir. 1993) 23

Ross v. Pension Plan for Hourly Employees of SKF Indus., Inc., 847 F.2d 329 (6th Cir. 1988) 16

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002) 12, 14, 24, 25

Skretvedt v. E.I. DuPont de Nemours, 372 F.3d 193 (3d Cir. 2004) 29

Spacek v. Maritime Ass'n – I.L.A. Pension Plan, 134 F.3d 283 (5th Cir. 1998), *abrogated by Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004) 19, 20, 23

Steiner Corp. Retirement Plan v. Johnson & Higgins of California, 31 F.3d 935 (10th Cir. 1994) 17

Tippitt v. Reliance Standard Life Ins. Co., 457 F.3d 1227 (11th Cir. 2006) 23

Vizcaino v. Microsoft Corp., 97 F.3d 1187 (9th Cir. 1996) 22

Welch v. UNUM Life Ins. Co., 382 F.3d 1078 (10th Cir. 2004) 19

STATUTES, REGULATIONS, AND RULES

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* 1, 2

§ 3(16)(A), 29 U.S.C. § 1002(16)(A)................................3

§ 3(16)(B), 29 U.S.C. § 1002(16)(B)................................3

§ 3(23)(A), 29 U.S.C. § 1002(23)(A)................................9

§ 204(g), 29 U.S.C. § 1054(g).................1, 4, 5, 9, 10, 11, 13, 17, 18, 19, 25, 26

§ 204(g)(1), 29 U.S.C. § 1054(g)(1).................................9

§ 204(g)(2), 29 U.S.C. § 1054(g)(2)...............................17

§ 204(g)(2)(A), 29 U.S.C. § 1054(g)(2)(A).................9, 17

§ 204(g)(2)(B), 29 U.S.C. § 1054(g)(2)(B).....................17

§ 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D) 4

§ 502(a), 29 U.S.C. § 1132(a)....................................1, 7

§ 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)...............27, 28

§ 502(a)(3), 29 U.S.C. § 1132(a)(3).........................27, 28

Internal Revenue Code (26 U.S.C.) 2

26 U.S.C. § 411(d)(6) 1, 4

26 U.S.C. § 412(c)(8)..7

26 U.S.C. § 417(e)(3)..5

Retirement Protection Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 ....6, 7, 8, 15

§ 767(d)(2), 108 Stat. 5040 6

28 U.S.C. § 1254(1)...1

28 U.S.C. § 1961(a) 12-13, 28, 29

26 C.F.R. § 1.411(d)-3(b)(4) (Example 1(ii)) 17

26 C.F.R. § 1.411(d)-4, Q&A-1(b)(2) (Example 9) 17

Fed. R. Civ. P. 23 8

LEGISLATIVE MATERIALS

H.R. Rep. No. 93-533 (1973) 24

OTHER MATERIALS

IRS, *Defined Benefit Listing of Required Modifications and Information Package* (LRM) (Feb. 2000), *available at* http://www.irs.gov/pub/irs-tege/db_lrm.pdf 11

IRS, *Favorable Determination Letter*, Pub. 794 (Sept. 2006), *available at* http://eee.irs.gov/pub/irs-pdf/p794.pdf 3-4

John H. Langbein et al., *Pension and Employee Benefit Law* (4th ed. 2006) 3, 5, 22

Restatement (Second) of Trusts (1959) 21

ERISA Fiduciary Law (Susan P. Serota & Frederick A. Brodie eds., 2d ed. 2006) 21

U.S. Gov't Accountability Office, Employee Benefits Sec. Admin., *Enforcement Improvements Made but Additional Actions Could Further Enhance Pension Plan Oversight*, GA0-07-22 (Jan. 2007), *available at* http://www.gao.gov/new.items/d0722.pdf 24

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AT&T Pension Benefit Plan (as successor to the Ameritech Management Pension Plan) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-11a) is reported at 475 F.3d 816. The memorandum order of the Court of Appeals denying Petitioner's petition for rehearing and suggestion for rehearing en banc (Pet. App. 27a-29a) is reported at 475 F.3d 816, 823. The District Court's memorandum order granting summary judgment (Pet. App. 12a-21a) is not reported, but is reprinted at 32 Empl. Benefits Cas. (BNA) 1589. The District Court's memorandum and order awarding relief (Pet. App. 22a-24a) is not reported.

JURISDICTION

The Court of Appeals entered its judgment on January 9, 2007. A timely petition for rehearing was denied on February 7, 2007. *See* Pet. App. 27a-29a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of Sections 204(g) and 502(a) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1054(g) and 1132(a), and Section 411(d)(6) of the Internal Revenue Code, 26 U.S.C. § 411(d)(6), are set forth at Pet. App. 30a-32a.

PRELIMINARY STATEMENT

This case involves interpretation of a pension plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* The central question is not *what* the plan means, but *who* decides. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), states that, when the terms of an ERISA plan vest the plan administrator with interpretive discretion, the administrator's determinations are judicially reviewable only for abuse of that discretion.

Nevertheless, the Seventh Circuit held in this case that its own resolution of "ambiguities" in the plan was binding on the plan administrator. The Court of Appeals' holding is based on erroneous rules of plan interpretation, and deepens several established circuit splits. The decision below also presents a well-developed circuit split concerning awards of prejudgment interest in cases brought to recover benefits under the terms of an ERISA plan.

Review by this Court is warranted because the Seventh Circuit has adopted canons of plan interpretation that systematically violate the deference principles that this Court established in *Firestone*, because this case presents an opportunity to resolve multiple disagreements among the circuits in a single case, and because of the importance of ERISA to the national economy and the recognized importance of uniformity in this area of the law.

STATEMENT OF THE CASE

1. ERISA and Its Anti-Cutback Rule

Congress enacted ERISA to establish a nationally uniform regulatory regime for employee benefit plans. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Title I of ERISA, 29 U.S.C. §§ 1001 *et seq.*, imposes duties on covered pension plans and their administrators. Title II, which is codified in various sections of the Internal Revenue Code (*i.e.*, Title 26 of the United States Code), addresses "'qualification of pension plans for special tax treatment, in order, among other things, to conform to the standards set forth in Title I.'" *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 6 (2004) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 n.1 (1980)).

An employer-sponsored pension plan covered by ERISA must be operated in compliance with the standards in Title I; if it is, then plan contributions, income, and benefits receive favorable tax treatment (known as

"qualification") that is generally similar to the tax-favored treatment of other retirement plans such as IRAs and 401(k) plans. *See generally id.* at 12-13; John H. Langbein et al., *Pension and Employee Benefit Law* 329-31, 343-54 (4th ed. 2006).

ERISA does not require employers to establish pension plans. Furthermore, if an employer does choose to establish a plan and thereby become a plan "sponsor," ERISA allows the employer "large leeway" to offer its employees whatever level of pension benefits the employer chooses. *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003); *see Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). Because plan sponsors have that flexibility, "the validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue." *Firestone*, 489 U.S. at 115.[1]

In drafting or amending the terms of a plan, sponsors customarily include provisions establishing the plan's compliance with ERISA's mandatory rules. Such provisions are a practical necessity under the tax laws: Because the tax rules relating to ERISA "are complex, and failing to qualify results in serious tax consequences," employers "almost always" ask the Internal Revenue Service ("IRS") to provide a determination letter confirming that the plan meets the qualification requirements of the Internal Revenue Code. *Pension and Employee Benefit Law* at 348.[2] ERISA, moreover,

[1] Employers are not fiduciaries of the plan beneficiaries when they draft or amend their plans. Like the settlor of a trust, a plan sponsor may in its discretion increase benefits or decrease them prospectively (and some retroactive reductions are authorized as well). Plan administrators, by contrast, have a fiduciary duty to the plan beneficiaries. *See Lockheed*, 517 U.S. at 890-91; *see also* 29 U.S.C. § 1002(16)(A), (B) (defining "administrator" and "plan sponsor").

[2] *See* IRS, *Favorable Determination Letter*, Pub. 794, at 1 (Sept. 2006) ("A favorable determination letter indicates that, in

requires that the terms under which a plan will be operated must be stated in the plan itself. *See Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 151 n.4 (2001) ("[U]nder the text of ERISA, the fiduciary 'shall' administer the plan 'in accordance with the documents and instruments governing the plan,' 29 U.S.C. § 1104(a)(1)(D)."). For both reasons, employers restate applicable statutory rules within the terms of the plan.

Among the requirements of ERISA is the so-called "anti-cutback rule" of ERISA Section 204(g), 29 U.S.C. § 1054(g).[3] The anti-cutback rule generally "prohibits any amendment of a pension plan that would reduce a participant's 'accrued benefit,'" *Central Laborers' Pension Fund*, 541 U.S. at 741, or reduce other benefits that ERISA treats as "accrued" for this purpose. Section 204(g) states in pertinent part:

> **Decrease of accrued benefits through amendment of plan**
>
> **(1)** The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.
>
> **(2)** For purposes of paragraph (1), a plan amendment which has the effect of—
>
> > **(A)** eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> >
> > **(B)** eliminating an optional form of benefit,

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the opinion of the Service, the terms of the plan conform to the requirements of [the Internal Revenue Code]."), *available at* http://www.irs.gov/pub/irs-pdf/p794.pdf.

[3] Section 204(g) is echoed in Section 411(d)(6) of the Internal Revenue Code, 26 U.S.C. § 411(d)(6). Thus, compliance is necessary to maintain a tax-qualified plan. *See generally Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 746-47 (2004).

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits.

29 U.S.C. § 1054(g).

2. The Plan Administrator's Determination

The AT&T Pension Benefit Plan (the "Plan"), which is the successor to the Ameritech Management Pension Plan in which Respondent participated, is a defined benefit pension plan governed by ERISA. AT&T Inc. is the sponsor and administrator of the Plan.[4]

Plan participants who are eligible to receive pension benefits have a choice of receiving their benefits in the standard form of an annuity payable in monthly installments, or as a lump-sum amount. If the participant opts to receive a lump sum, the amount of the lump sum is the present value of the expected stream of benefits that would have been provided as an annuity. *See* 26 U.S.C. § 417(e)(3) (establishing minimum rules for converting an annuity to a lump sum).

Between 1993 and 1999, Ameritech Corporation (which is now part of AT&T[5]) amended the Plan from time to time to change various provisions, including the actuarial assumptions used to convert an annuity to the equivalent lump sum. These changes were intended, in part, to maintain the Plan's compliance with evolving federal requirements. *See* Pet. App. 2a-6a. The final relevant change to the Plan was the Eleventh Amendment, which took effect on July 1, 1999. *See id.* at 15a.

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[4] A defined benefit plan "specifies an output for the participant." *Pension and Employee Benefit Law* at 40. In a defined contribution plan, the plan participant's benefits are instead determined by the participant's contributions. *See id.* at 41.

[5] In October 1999, Ameritech Corporation was merged into a subsidiary of SBC Communications Inc. SBC Communications Inc. later became AT&T Inc.

Respondent was a participant in the Plan. In November 1999, she retired from AT&T before reaching the normal retirement age of 65. Taking advantage of the lump-sum option, Respondent elected to receive her entire Plan benefit as a one-time payment. *See id.* at 7a, 12a-13a.

The Plan administrator set the amount of Respondent's lump-sum benefit at $219,312.14. *See id.* at 13a. That amount reflected an early retirement benefit as well as the conversion of Respondent's age-65 annuity benefit into a lump-sum amount. The lump sum was calculated in accordance with the Eleventh Amendment. *See id.* The actuarial changes made by the Eleventh Amendment had the effect of reducing Respondent's lump-sum benefit by approximately $36,000, as compared to what the lump sum would have been if Respondent had retired before the effective date of the Eleventh Amendment in July 1999. *See id.*

Applying the Eleventh Amendment was permissible under ERISA because the amendment's actuarial changes were exempted from the statutory anti-cutback rule under the Retirement Protection Act of 1994, Pub. L. No. 103-465, § 767(d)(2), 108 Stat. 4809, 5040. *See* Pet. App. 4a-5a, 18a. The Plan administrator determined that applying the Eleventh Amendment to Respondent's claim for benefits also was consistent with an anti-cutback provision contained within the terms of the Plan.

The anti-cutback provision, Section 12.1 of the Plan, was added as part of a major revision of the Plan in 1995 and provides in pertinent part:

> Amendment. While it is expected that the Plan will be continued, [AT&T] may terminate the Plan or amend the Plan from time to time . . . ; 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 [AT&T] 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.*

Def.-Appellant's C.A. Separate App. SA51-SA52 (Plan § 12.1) (emphasis added).[6]

The administrator determined that, just as the actuarial changes made by the Eleventh Amendment are permitted by the Retirement Protection Act and ERISA, they produce a permissible reduction in an optional form of benefit under Section 12.1. The administrator reasoned that, although the Eleventh Amendment affects the calculation of optional lump-sum benefits, it does not reduce the accrued benefit of any Plan participant because the actuarial changes relating to lump sums do not change the annuity amount the Plan would pay following a participant's retirement at age 65. Furthermore, the administrator determined, the savings clause in Section 12.1 (italicized above) permits a reduction to *either* an accrued benefit *or* an optional form of benefit, when the reduction is permitted by statute and regulation. Inasmuch as the Retirement Protection Act authorizes the actuarial changes made by the Eleventh Amendment, the Plan administrator determined that the savings clause would allow application of the Eleventh Amendment even if Respondent's lump sum were treated as an accrued benefit.

3. The District Court's Proceeding

In October 2001, Respondent filed a putative class action seeking relief under 29 U.S.C. § 1132(a). Respondent acknowledged in the litigation that the changes made by the Eleventh Amendment are exempt from the statutory anti-cutback rule under the

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[6] Section 412(c)(8) of the Internal Revenue Code, 26 U.S.C. § 412(c)(8), allows certain retroactive plan amendments. It is not relevant to this case.

Retirement Protection Act. *See* Pet. App. 4a-5a, 17a, 18a. She sought to recover benefits allegedly due under the terms of the Plan itself, on the theory that Section 12.1 prohibits a reduction in her lump-sum payment based on the Eleventh Amendment. *See id.* at 14a-15a. The United States District Court for the Southern District of Illinois certified a class under Federal Rule of Civil Procedure 23 consisting of Respondent and approximately 2,000 other Plan participants who were similarly affected by the Eleventh Amendment. *See id.* at 14a; *see also* Def.-Appellant's C.A. Separate App. SA12 (Stipulation of Facts Regarding Class Certification at 4 (filed Mar. 19, 2003)).

In March 2004, the District Court granted summary judgment in favor of Respondent. *See* Pet. App. 12a, 21a. The court agreed with Respondent that the Eleventh Amendment reduced an "accrued benefit" under Section 12.1 rather than an "optional form of benefit." *Id.* at 19a-20a. It further concluded that the savings clause in Section 12.1 ("except as otherwise permitted by law and applicable regulation") refers only to the prohibition on eliminating an optional form of benefit, and not to the same sentence's prohibition on reducing an accrued benefit. *Id.* at 20a. Therefore, according to the District Court, the fact that the Eleventh Amendment's changes to actuarial assumptions are permitted under ERISA does not make the changes permissible under Section 12.1. *Id.* at 20a-21a.

The District Court awarded Respondent and the plaintiff class $31.2 million. The award included $6.4 million in prejudgment interest at the prime rate (*i.e.*, the interest rate that commercial banks charge their most creditworthy borrowers). *See id.* at 1a, 23a, 25a-26a; *see also* Dist. Ct. Doc. 130 (filed Nov. 15, 2005) (showing calculations).

4. The Court of Appeals' Decision

The Seventh Circuit affirmed. *See* Pet. App. 1a-11a. In an opinion by Judge Posner, the Court of Appeals accepted that the Eleventh Amendment to the Plan

"brought the plan into compliance with the Retirement Protection Act and so avoided ERISA's anti-cutback rule." *Id.* at 6a. The court also agreed that Respondent could prevail only by showing that the Eleventh Amendment was impermissible under the terms of Plan Section 12.1. *Id.*

The Court of Appeals began its analysis by agreeing with the Plan that—contrary to the conclusion of the District Court—the Eleventh Amendment did *not* reduce Respondent's accrued benefit. The Seventh Circuit noted that under ERISA an "accrued benefit" is "expressed in the form of an annual benefit commencing at normal retirement age," *id.* at 7a (quoting 29 U.S.C. § 1002(23)(A)), and Respondent's lump-sum early retirement payment does not fit within this definition, *id.*

Then, however, the Court of Appeals proceeded to treat Respondent's lump sum as if it were an accrued benefit. The court stated that the term "early retirement benefit"—which appears in ERISA Section 204(g) but not Plan Section 12.1—"fits [Respondent's] claim to a T." *Id.* Under ERISA Section 204(g)(2)(A), the reduction of an early retirement benefit is treated as reducing an accrued benefit for purposes of Section 204(g)(1); thus, early retirement benefits generally may not be reduced under the statutory anti-cutback rule, even if they are not actually "accrued benefits." 29 U.S.C. § 1054(g)(2)(A).

The problem the Court of Appeals faced was that, unlike the statutory anti-cutback rule, Section 12.1 is silent on the subject of early retirement benefits. Section 12.1 addresses only reduction of an accrued benefit and elimination of an optional form of benefit. Pet. App. 8a. Rather than deferring to the Plan administrator when confronted with this textual gap, the Seventh Circuit deemed it appropriate to draw its own inferences about what AT&T, as the plan sponsor, must have intended through its silence.

The Court of Appeals assumed (contrary to the Plan administrator's determination) that the savings clause in

Section 12.1 applies only to the prohibition on eliminating an optional form of benefit, and not to the earlier prohibition on reducing accrued benefits. The court therefore read Section 12.1 as saying that no Plan amendment will (i) reduce an accrued benefit even if permitted by law and applicable regulations, or (ii) eliminate an optional form of benefit except as permitted by law and applicable regulations. *Id.*

On that basis, the Court of Appeals opaquely reasoned that, because ERISA Section 204(g) treats both early retirement benefits and optional forms of benefit as accrued benefits, and Section 12.1 (supposedly) treats optional forms of benefit differently than accrued benefits, the drafters of the Plan must have intended to lump early retirement benefits in with accrued benefits. *Id.* Thus, even though the court had acknowledged that Respondent's benefit is *not* an accrued benefit, *see id.* at 7a, it took the position that "the separate treatment of 'optional forms of benefit' in Section 12.1 implies that 'early retirement benefits' [such as Respondent's] are accrued," *id.* Because the court believed that Section 12.1's savings clause applies only to reductions in optional forms of benefit, and not reductions in accrued benefits, it concluded that the $36,000 reduction in Respondent's lump sum, although permitted by ERISA, was barred by Section 12.1. *Id.*

The Court of Appeals stated that its interpretation of Section 12.1 was required as a matter of "common sense," in order to read the Plan "sensibly." *Id.* at 8a, 9a. If, as the Plan administrator concluded, the savings clause in Section 12.1 allows reductions in accrued benefits where permitted by law or regulation, then Section 12.1 gives participants "no more protection than the statutory anti-cutback rule would give them." *Id.* at 9a. Section 12.1, the court asserted, would then be "superfluous." *Id.* "In contrast," the court continued, an approach that excludes accrued benefits from the savings clause and treats early retirement benefits as accrued benefits, supposedly gives

purpose to Section 12.1 because it "preserves early-retirement benefits by contract in situations in which ERISA would permit them to be curtailed." *Id.*

The Plan had explained that Section 12.1 was intended to protect the Plan's qualified status under the Internal Revenue Code, not to go beyond ERISA's anti-cutback protection. But the court dismissed that argument as "nonsense." *Id.* The Court of Appeals reasoned that Section 12.1 did not appear in the Plan until years after Congress established an anti-cutback rule and does not "accurately state the defendant's statutory obligations" under ERISA Section 204(g). *Id.*[7]

The Court of Appeals then speculated that Respondent might not have taken early retirement if she had understood what her lump sum would be. *Id.* Respondent in fact had received from the Plan, three months *before* her retirement, a statement showing the lump-sum benefit she would receive. Nevertheless, the court deemed it appropriate to apply against the Plan "the principle that ambiguities in a contract . . . are resolved against the party who drafted the contract." *Id.*

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[7] Before AT&T added Section 12.1 to the Plan in 1995, anti-cutback language was scattered throughout the Plan. As the Plan advised the Court of Appeals in its petition for rehearing, Section 12.1 addressed the anti-cutback requirement in one place. Under the circumstances, the Seventh Circuit could not reasonably draw any inference from its observation that Section 12.1 "did not . . . appear in earlier versions of the plan." Pet. App. 9a. The Seventh Circuit likewise was off target when it suggested that the only way to establish tax qualification with respect to Section 204(g) is to parrot the text of that provision. *See id.* at 9a, 28a-29a. Even the "sample plan language" that the IRS has released "to assist sponsors who are drafting or redrafting plans to conform to [Section 204(g)]" differs substantially from the language of the statute. IRS, *Defined Benefit Listing of Required Modifications and Information Package (LRM)* at cover, 120 (Feb. 2000), *available at* http://www.irs.gov/pub/irs-tege/db_lrm.pdf.

The Court of Appeals was required to conduct its analysis within the framework of *Firestone*, which "address[ed] the appropriate standard of judicial review of benefit determinations by fiduciaries or plan administrators under ERISA." 489 U.S. at 105; *see* Pet. App. 10a. *Firestone* established that, if an ERISA plan gives the plan administrator discretionary authority to construe the terms of the plan, then the administrator's determinations concerning benefits are judicially reviewable only for abuse of the administrator's discretion, under the "arbitrary and capricious" standard. *See* 489 U.S. at 110-15; *see also Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 378 (2002). Here, as the Court of Appeals recognized, the Plan gives the administrator "full discretionary authority to interpret the terms of the Plan and to remedy any ambiguities, inconsistencies or omissions of whatever kind." Def.-Appellant's C.A. Separate App. SA48 (Plan § 11.1(c)); *see* Pet. App. 10a.

The Seventh Circuit nevertheless ignored deference principles until the end of its opinion, and then it refused to defer. *See* Pet. App. 10a-11a. "The deference that we would normally give to the administrator of a pension plan," Judge Posner wrote, "is overridden in this case by the lack of any reasoned basis for the interpretation." *Id.* at 10a (citations omitted). By that, Judge Posner meant that the Seventh Circuit could see "no room [in the language of the Plan] for the exercise of interpretive discretion by the plan's administrator, or at least not enough to carry the day." *Id.* at 11a.

The Court of Appeals summarily rejected the Plan's other arguments on appeal. *See id.* These included the Plan's contention that Respondent should not have been awarded prejudgment interest because the terms of the Plan do not provide for it, as well as the Plan's contention that, if prejudgment interest were appropriate, it should be calculated at the statutory rate established by 28

U.S.C. § 1961(a) rather than at the prime rate used by the District Court.

5. The Denial of Rehearing

The Plan filed a timely petition for rehearing and suggestion for rehearing en banc. The Plan emphasized the reasons that motivate drafters of ERISA plans to track the evolving statutory requirements for tax-qualified status. It explained that conforming provisions such as Section 12.1 are needed to establish and maintain a plan's entitlement to favorable tax treatment. Among other authorities, the Plan cited *Hamlin Development Co. v. Commissioner*, 65 T.C.M. (CCH) 2071, 1993 WL 69569 (T.C. Mar. 15, 1993), in which the Tax Court stated that "a plan must initially meet the formal requirements [for qualified status], and must be continually amended to comport with subsequent changes to the statutory requirements." *Id.* at *10. That requirement of "compliance with the form of the Acts," the Tax Court noted, provides "important protection for employee benefits" and allows employees to determine their rights and obligations by examining the terms of their plan. *Id.* at *11. The Plan contended that, particularly in light of the background requirement of conforming plan language to ERISA's provisions, the panel should not have construed ambiguity in Section 12.1 as affording employees *greater* protection than the parallel ERISA provision.

On February 7, 2007, the Court of Appeals (with four members not participating) denied the petition for rehearing or rehearing en banc. Pet. App. 27a-29a & n.*. The court reasoned that there is no provision in ERISA that requires a plan to "recite the statute," and, if there were such a requirement, the Plan's argument about the intent underlying Section 12.1 would be persuasive only if the language of Section 12.1 "track[ed]" the language of Section 204(g). *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit has adopted rules of ERISA plan interpretation that violate *Firestone*'s requirement of judicial deference. While purporting to review the Plan administrator's interpretation of ambiguous language for abuse of discretion, the Seventh Circuit applied canons of contract construction that, in the ERISA context, inevitably remove a plan administrator's discretion to interpret ambiguous language in its plan, and predictably compel the payment of trust funds in the absence of any clear textual requirement to do so. In the process, the Court of Appeals deepened existing circuit splits. The Court of Appeals' allowance of prejudgment interest at the prime rate also was error on an issue that divides the courts of appeals. Review by this Court is warranted to establish national uniformity concerning issues that recur under ERISA.

I. THE COURT OF APPEALS' FAILURE TO DEFER TO THE PLAN ADMINISTRATOR PUTS IT IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS

The administrator of an ERISA plan must protect the interests of *all* the participants and beneficiaries, in particular by preserving and maintaining the assets of the trust. *See Firestone*, 489 U.S. at 110-11; *Central States Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 569-72 (1985). Consistent with the law of trusts, moreover, the plan sponsor may vest the plan administrator with discretion to interpret the plan documents. When the plan sponsor has chosen to give the administrator this interpretive authority, the administrator's determinations are reviewable only for abuse of discretion. *See Firestone*, 489 U.S. at 110-15; *Rush Prudential HMO*, 536 U.S. at 378. Thus, a court that substitutes its own reading of the plan for the administrator's reasonable construction, and orders a payment out of the trust fund on that basis, upsets a balance of competing interests and contravenes the intent of the plan sponsor.

In this case, the Seventh Circuit recognized that the Plan administrator's benefits determination was permissible under the statutory anti-cutback rule and determined that the relevant language in the Plan contains "ambiguities." Pet. App. 9a, 10a. But the Court of Appeals nevertheless overrode the Plan administrator's coherent interpretation of its Plan. In the process, the Court of Appeals adopted interpretive principles of general applicability in ERISA cases that conflict with the decisions of other courts of appeals, and that warrant further review in order to enforce the national uniformity that ERISA was intended to establish.

A. The Court of Appeals Failed To Defer to the Plan Administrator's Reasonable Interpretation of Section 12.1

It is undisputed that the Plan administrator's contested application of the Eleventh Amendment when calculating Respondent's lump sum was permitted under the Retirement Protection Act and agency regulations. It likewise is beyond dispute that the savings clause in Section 12.1 renders the anti-cutback provision of the Plan inapplicable to certain benefits determinations that are "permitted by law and applicable regulation." The Plan administrator explained below that Section 12.1 was added to the Plan to assist in demonstrating the Plan's compliance with statutory requirements. Accordingly, the most sensible reading of Section 12.1 in this case would be one that aligns it with the relevant statutory requirements; that is, one that allows application of the Eleventh Amendment, as ERISA does.

The Plan administrator read the savings clause in the most natural way, and thereby arrived at this sensible result. Under the Plan administrator's reading, the phrase "except as otherwise permitted by law and applicable regulation" applies to *both* reduction of an accrued benefit and elimination of an optional form of benefit. If the savings clause applied solely to elimination of an optional form of benefit, and not to reduction of an

accrued benefit as well, there would be some punctuation or enumeration setting off the treatment of accrued benefits (*without* a savings provision) from the treatment of optional forms of benefit (*with* a savings provision). Section 12.1 instead treats both subjects together, without any separating punctuation or numerals.

The Plan administrator's reading of the savings clause was not just reasonable; it was correct. The Plan administrator's construction would have been upheld under any defensible application of *Firestone*'s abuse-of-discretion standard.

Furthermore, even if the Court of Appeals were right that the savings clause applies only to elimination of an optional form of benefit, the Plan administrator's benefits determination was correct to the extent that Respondent's lump sum is an optional form of benefit. Section 12.1 prohibits "eliminat[ing] an optional form of benefit," but does not prohibit reducing an optional form of benefit. And whatever its application to accrued benefits, the savings clause plainly allows changes to an optional form of benefit that are permitted by law and regulation (as the Eleventh Amendment was).

An "optional form of benefit" exists for purposes of ERISA's anti-cutback rule when a plan participant has a choice as to how to receive his or her benefit. *See Ross v. Pension Plan for Hourly Employees of SKF Indus., Inc.*, 847 F.2d 329, 333 (6th Cir. 1988). Respondent had such a choice in this case, and she "*elected* to receive her Plan benefit as a lump sum distribution" under an early retirement option. Pet. App. 12a-13a (emphasis added). Accordingly, Respondent's lump-sum payment was an optional form of benefit for purposes of ERISA and—as the Plan administrator reasonably concluded—for purposes of Section 12.1 as well. *See Perreca v. Gluck*, 295 F.3d 215, 231 (2d Cir. 2002) (characterizing lump-sum payment option to early retirees as optional form of benefit); *Counts v. Kissack Water & Oil Serv., Inc.*, 986 F.2d 1322, 1324 (10th Cir. 1993) ("The payment of

benefits in a lump sum is one such 'optional form of benefit.'").

The Seventh Circuit's understanding seems to be that an optional form of benefit loses that status if it is also an early retirement benefit. That view conflicts with *Steiner Corp. Retirement Plan v. Johnson & Higgins of California*, 31 F.3d 935 (10th Cir. 1994), in which the Tenth Circuit concluded that, when a lump sum is offered as an alternative to an annuity, it is an "optional form of benefit" within the meaning of ERISA Section 204(g)(2)(B) even if it might otherwise be a retirement benefit covered by Section 204(g)(2)(A). *See id.* at 939-41. The Tenth Circuit's view is consistent with the language of Section 204(g)[8] and the Treasury Department's implementing regulations.[9]

If this case had arisen in the Tenth Circuit, the Plan would have prevailed because, at a bare minimum, any reduction to Respondent's lump sum involved an optional form of benefit and was "permitted by law and applicable regulations" under Section 12.1. It surely was reasonable for the Plan administrator to classify Respondent's lump sum as an optional form of benefit when the Tenth Circuit would have taken the same view.

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[8] Section 204(g)(2) makes clear that a plan amendment eliminating an optional form of benefit can, at the same time, eliminate or reduce an early retirement benefit. *See* 29 U.S.C. § 1054(g)(2) ("The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).").

[9] *See, e.g.*, 26 C.F.R. § 1.411(d)-4, Q&A-1(b)(2) (Example 9) (characterizing as an optional form of benefit "an early retirement benefit payable upon termination of employment after attainment of age 55 and either after ten years of service or, if earlier, upon plan termination"); *id.* § 1.411(d)-3(b)(4) (Example 1(ii)) (characterizing annuity that may be taken as early as age 55 as "an optional form of benefit that includes an early retirement subsidy").

B. The Interpretive Canons Applied by the Court of Appeals Are Inconsistent with Deferential Review and Conflict with Decisions of Other Courts of Appeals

The Court of Appeals' incorrect decision has broad significance because it resulted from a faulty process of ERISA plan interpretation. As other circuits have recognized, the interpretive canons applied by the Seventh Circuit in this case frequently would require overriding a plan administrator's reasonable denial of benefits, whereas a reasonable discretionary action should always be upheld under *Firestone*.

1. The Court of Appeals Should Have Construed Section 12.1 Harmoniously with ERISA's Anti-Cutback Provision

The Court of Appeals overrode the Plan administrator because it concluded that the Plan administrator's reading makes Section 12.1 redundant of ERISA Section 204(g). *See* Pet. App. 8a-9a. The Plan administrator's construction, the court said, "would leave participants with no more protection than the statutory anti-cutback rule would give them, making the section superfluous." *Id.* at 9a. To avoid duplication between a Plan protection of benefits and a statutory protection of benefits, the court gave the Plan provision a broader reading than the statutory one. This, it said, was *required* by "principles of interpretation." *Id.* at 11a.

The Court of Appeals erred in adopting the interpretive rule that, if an ERISA plan incorporates a statutory protection, the plan presumptively should be read to afford beneficiaries greater protection than the parallel statutory provision. The common practice of plan drafters, which tax rulings strongly encourage or even require, is to track the protections that ERISA affords plan beneficiaries. A plan sponsor's failure to include provisions that echo the statutory requirements may cause the plan to lose its tax-favored status. *See supra* pp. 3-4, 13. In context, a reasonable presumption is that a

plan provision that mirrors a statutory protection of benefits was included in the plan to demonstrate compliance with ERISA.

Unlike the Seventh Circuit, the Fifth Circuit reads plan provisions harmoniously with background rules of ERISA—and particularly the anti-cutback rule of ERISA Section 204(g)—unless the plan's language *expressly* compels a broader reading. In *Spacek v. Maritime Ass'n – I.L.A. Pension Plan*, 134 F.3d 283 (5th Cir. 1998), *abrogated on other grounds by Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739 (2004), the Fifth Circuit stated its rule that "[e]xtra-ERISA commitments must be found in the plan documents and must be stated in clear and express language," *id.* at 293 (internal quotation marks omitted), because "'[c]ourts may not lightly infer an intent' on the part of a plan to 'voluntarily undertak[e] an obligation to provide vested, unalterable benefits,'" *id.* (quoting *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994)). In the Fifth Circuit, this case would have been decided in favor of the Plan because there is no "clear and express language" establishing that Section 12.1 affords Respondent greater protection than ERISA Section 204(g).

Other circuits apply the same standard in the context of welfare benefit (*i.e.*, non-pension) plans governed by ERISA—which the Fifth Circuit treated as analogous in adopting its "clear and express language" rule. *See, e.g.*, *Welch v. UNUM Life Ins. Co.*, 382 F.3d 1078, 1086 (10th Cir. 2004) ("[A]n extra-ERISA commitment . . . must be stated in clear and express language.") (internal quotation marks omitted); *John Morrell & Co. v. United Food & Commercial Workers Int'l Union*, 37 F.3d 1302, 1304 (8th Cir. 1994) ("[C]ourts are reluctant to read more benefits into an ERISA plan than its plain language confers."); *Gable*, 35 F.3d at 855 ("[a]n employer may waive its statutory right to modify or terminate benefits," but such waiver "must be found in the plan documents and must be stated in clear and express language") (internal quotation

marks omitted); *see also Spacek*, 134 F.3d at 294-95. This petition should be granted to reject the Seventh Circuit's contrary approach and to establish a uniform rule for all the circuits.

This Court has instructed that ERISA plans "must generally be construed in light of ERISA's policies." *Central States*, 472 U.S. at 568. Yet the Seventh Circuit's rule is that a plan provision that parallels a statutory requirement, and thus advances statutory policies, must be read as serving *some other* purpose that ERISA does not itself advance. The Seventh Circuit's nonsensical rule is inconsistent with this Court's instruction.

The Seventh Circuit's canon of plan construction also poses a serious problem for plan sponsors and drafters. If the Seventh Circuit's approach stands, then the only way to establish a plan's tax qualification, without opening the door to judicial rewriting of the plan, is to recite the language used by Congress or model language previously approved by the IRS. That is what the Seventh Circuit suggested Ameritech should have done in drafting Section 12.1, to confirm its qualified status. *See* Pet. App. 28a-29a. Any departure from boilerplate would invite a court to find ambiguity, which would require the court to construe the language against the plan administrator. If plan sponsors must track congressional or agency language in order to protect the plan administrator's interpretive discretion, then the sponsors lose a substantial measure of freedom to determine the terms of their own benefit plans—freedom that Congress intended to preserve. *See supra* p. 3.

This Court has noted ERISA's "elaborate scheme . . . for enabling beneficiaries to learn their rights and obligations at any time, a scheme that is built around reliance on the face of written plan documents." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83-84 (1995). The Seventh Circuit's approach undermines this regime by discouraging plan sponsors from elucidating their full benefit policies and protections in the language of the

plan, for doing so may lead to a judicial expansion of the intended benefits or protections. In this way, the decision below undercuts the plan's function as a comprehensive (and comprehensible) guide to beneficiaries' rights.

2. The Court of Appeals Erred in Applying the Canon of *Contra Proferentem*

The court of appeals also erred in extending to the ERISA context the canon that ambiguous contract language should be construed against the drafter. *See* Pet. App. 9a. The *contra proferentem* canon is a rule of contract interpretation; it cannot sensibly be applied in the context of an instrument unilaterally adopted by the settlor of a trust or sponsor of an ERISA plan. *See Firestone*, 489 U.S. at 112 ("The terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the *intention of the settlor* with respect to the trust as is not inadmissible.'") (quoting Restatement (Second) of Trusts § 4 cmt. d (1959)) (emphasis added).

If ambiguities in a plan are resolved by applying the canon of *contra proferentem*, then a plan administrator nominally vested with interpretive discretion does not have the discretion that the sponsor intended to convey: The administrator must always construe ambiguity in favor of a claimant and against the plan. As the Eleventh Circuit has explained, *Firestone*'s protection of plan administrators' interpretive discretion "would have little meaning if ambiguous language in an ERISA plan were construed against the Fund." *Cagle v. Bruner*, 112 F.3d 1510, 1519 (11th Cir. 1997) (per curiam).

Nevertheless, the courts of appeals are deeply divided on the proper application of the *contra proferentem* canon to the interpretation of ERISA plans. *See ERISA Fiduciary Law* 177 (Susan P. Serota & Frederick A. Brodie eds., 2d ed. 2006) (noting that "[c]ontroversy has arisen from application of the doctrine of *contra proferentem*" and contrasting approaches of different

circuits); *Pension and Employee Benefit Law* at 677-79 (discussing conflicting approaches).

Like the Seventh Circuit in this case, the Fourth and Sixth Circuits apply the canon of *contra proferentem* when reviewing an administrator's interpretation of an ERISA plan for abuse of discretion. *See Carolina Care Plan Inc. v. McKenzie*, 467 F.3d 383, 389 (4th Cir. 2006) ("'[U]sing a presumption such as construction against the drafter in evaluating the reasonableness of an interpretation is not inconsistent with review for abuse of discretion.'") (quoting *Doe v. Group Hospitalization & Med. Servs.*, 3 F.3d 80, 89 (4th Cir. 1993)), *petition for cert. pending*, No. 06-1182 (filed Feb. 26, 2007); *Copeland Oaks v. Haupt*, 209 F.3d 811, 813 (6th Cir. 2000) ("[E]ven an arbitrary and capricious standard of review can be tempered by . . . construing ambiguities against a plan drafter.").

The Second, Eighth, Ninth, and Tenth Circuits squarely reject this approach. *See Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999) ("[W]hen a plan administrator has discretion to interpret the plan and the standard of review is arbitrary and capricious, the doctrine of *contra proferentem* is inapplicable."); *Vizcaino v. Microsoft Corp.*, 97 F.3d 1187, 1196 (9th Cir. 1996) (canon inapplicable when administrator has discretionary authority); *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 443 (2d Cir. 1995) ("[A]pplication of the rule of *contra proferentem* is limited to those occasions in which this Court reviews an ERISA plan de novo."); *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153-54 (8th Cir. 1990) ("[U]nless the plan language specifies otherwise, courts should construe any disputed language without deferring to *either* party's interpretation.") (internal quotation marks omitted).

Other courts of appeals have taken confused and inconsistent positions that highlight the need for guidance from this Court. For instance, the First and Fifth Circuits apply the *contra proferentem* canon in insurance cases

arising under ERISA, but have not adopted it in cases involving other types of ERISA plans. *See Spacek*, 134 F.3d at 298 n.14; *Rodriguez-Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580, 586 (1st Cir. 1993). The Third Circuit has applied the doctrine to determine whether a plan grants an administrator discretion, *see Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257-58 (3d Cir. 1993), but has suggested that the canon should not be used when interpreting plan language under the arbitrary–and-capricious standard, *see Ceccanecchio v. Continental Cas. Co.*, 50 F. App'x 66, 73 (3d Cir. 2002) (non-precedential). The Eleventh Circuit does not apply the canon in ordinary cases involving arbitrary-and-capricious review of a plan administrator's decision, *see Cagle*, 112 F.3d at 1519, but does apply it when an administrator operates under a conflict of interest, *see Tippitt v. Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1235 (11th Cir. 2006).[10]

Review by this Court is warranted to resolve the deep division among the courts on this fundamental issue of ERISA plan interpretation.

C. The Issues in This Case Are Important

Under any circumstances, a case involving approximately 2,000 litigants and a $31 million judgment, which involves a clearly erroneous determination of liability and squarely presents at least two recurring issues on which the courts of appeals are divided, would be a strong candidate for review by this Court. In the ERISA context, review is imperative.

The Court has recognized "the pervasive significance of pension plans in the national economy" and "the congressional mandate for their uniform and

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[10] Even the Seventh Circuit's own jurisprudence has been inconsistent, *see Hess v. Reg-Ellen Mach. Tool Corp.*, 423 F.3d 653, 662 (7th Cir. 2005) (declining to apply canon)—although this makes no difference to the cert-worthiness of the robust inter-circuit split.

comprehensive regulation." *Boggs v. Boggs*, 520 U.S. 833, 836, 839 (1997). Approximately 730,000 pension plans, with $4.9 trillion in assets and covering more than 100 million participants, are subject to ERISA.[11] ERISA plans (including the AT&T plan at issue in this case) routinely cover participants and beneficiaries in multiple judicial circuits, so that the same plan can be subject to divergent rules. Therefore, circuit splits have "the troubling effect of encouraging forum shopping by plaintiffs" who seek a larger share of a plan's trust assets. *Mason v. Continental Group, Inc.*, 474 U.S. 1087, 1087 (1986) (White, J., dissenting from denial of certiorari).

Congress intended that ERISA would end such uncertainty in the area of retirement benefits. "ERISA's policy [is] inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Rush Prudential HMO*, 536 U.S. at 379. Subjecting ERISA pension plans to different rules of interpretation in different circuits severely undermines "[t]he uniformity of decision which the Act is designed to foster" and makes it difficult for "administrators, fiduciaries and participants to predict the legality of proposed actions." H.R. Rep. No. 93-533, at 12 (1973), *quoted in Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987). The need for review here is comparable to the reasons that frequently support granting certiorari in cases involving ERISA's preemption provision. *See, e.g.*, *Boggs*, 520 U.S. at 89 (discussing reasons why this Court often reviews ERISA preemption cases).[12]

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[11] *See* U.S. Gov't Accountability Office, Employee Benefits Sec. Admin., *Enforcement Improvements Made but Additional Actions Could Further Enhance Pension Plan Oversight*, GA0-07-22, at 9 (Jan. 2007), *available at* http://www.gao.gov/new.items/d0722.pdf.

[12] This Court has previously granted review in a case involving an AT&T/Ameritech ERISA plan. In *Harris Trust &*

This case, moreover, involves a critical feature of ERISA's regulatory program. *Firestone*'s "deferential standard for reviewing benefit denials" has a central place in the so-called "ERISA world." Pet. App. 21a. Genuine deference to the interpretive decisions of plan administrators, where called for under the terms of the plan, is a "feature of judicial review highly prized by benefit plans," *Rush Prudential HMO*, 536 U.S. at 384, because it provides assurance that plans will be implemented to serve the same employment purposes that they were intended to accomplish.

Under the rules applied by the Seventh Circuit in this case, if plan language is found to be ambiguous, the ambiguity will be resolved in favor of the claimant even if the plan administrator, acting as a fiduciary of *all* participants and beneficiaries, reasonably reached the opposite conclusion. Under a correct application of *Firestone*, the plan administrator's construction would prevail. The Seventh Circuit's approach thus vitiates the deference required by *Firestone*.

Finally, this case has broad significance with respect to implementation of ERISA Section 204(g). Because tax qualification depends on stating compliance with statutory requirements, most if not all defined benefit plans covered by ERISA contain anti-cutback provisions. The language of those provisions varies widely. For instance, all of the approximately one dozen plan documents that govern the defined benefit plans that AT&T sponsors contain anti-cutback language, but the language differs across the plans and none of the plans recites Section 204(g) or the IRS's model plan language (which itself differs substantially from the statutory language, *see supra* note 7).

Savings Bank v. Salomon Smith Barney, Inc., 530 U.S. 238 (2000), the Court granted the petition for a writ of certiorari where the Seventh Circuit, apparently alone, "departed from the uniform position of the Courts of Appeals" on an issue concerning the available remedies under ERISA. *Id.* at 244-45.

Given the ubiquity and diversity of anti-cutback language in ERISA plans—and the multi-state coverage of many plans—the Seventh Circuit's decision in this case creates significant uncertainty. Anti-cutback language that was intended to establish compliance with Section 204(g) will presumptively be given a more restrictive construction in a case that arises in Illinois, Indiana, or Wisconsin. Plans that may be subject to claims within those Seventh Circuit states, or within any other circuit that applies the Seventh Circuit's canons, will act at their peril if they reduce benefits as Section 204(g) allows and business considerations sometimes dictate.[13]

If plan sponsors are unable to trim benefits as allowed by ERISA, they will be more reluctant to increase them in the first place. As the Fourth Circuit observed in a related context, "if trustees of ERISA plans knew that providing an additional benefit . . . for a given year would lock that benefit in as a floor for all future years, they would be less likely to increase benefits gratuitously in years when the plans were particularly flush." *Board of Trustees of Sheet Metal Workers Nat'l Pension Fund v. Commissioner*, 318 F.3d 599, 605 (4th Cir. 2003).

For these reasons, the Seventh Circuit's approach, although seemingly favorable to beneficiaries, may in fact cause plan sponsors to "avoid providing gratuitous benefits in the future for fear of being locked in perpetually." *Id.*

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[13] For example, a struggling company might find it necessary to reduce benefits that have not yet accrued.

II. THE AWARD OF PREJUDGMENT INTEREST AT THE PRIME RATE WAS ERROR AND CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

The legal errors and circuit splits described above warrant this Court's review. In addition, even if the Court were to disagree with the Plan after granting this petition and uphold the judgment below on the merits, this case would provide a suitable vehicle for resolving disagreement among the circuit courts concerning awards of prejudgment interest to plaintiffs who recover ERISA benefits that are due under the terms of their plans.

The Plan argued below that Respondent is not entitled to prejudgment interest, as neither Section 502(a)(1)(B) of ERISA, which authorizes a plan participant or beneficiary to bring an action "to recover benefits due to him under the terms of his plan," nor Section 502(a)(3), which authorizes actions by participants, beneficiaries, or fiduciaries to obtain "appropriate equitable relief" to redress violations of ERISA or enforce plan provisions, permits such awards. *See* 29 U.S.C. § 1132(a)(1)(B), (a)(3). The terms of the Plan do not provide for recovery of prejudgment interest. Moreover, the Seventh Circuit's precedent allowing prejudgment interest as "equitable relief," *see, e.g., Lorenzen v. Employees Retirement Plan of Sperry & Hutchinson Co.*, 896 F.2d 228, 236 (7th Cir. 1990), is difficult to reconcile with this Court's decisions. In *Great-West Life & Annuity Insurance Co. v. Knudson,* 534 U.S. 204 (2002), the Court admonished that, where "petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money—relief that was not typically available in equity," recovery is unavailable under Section 502(a)(3). *Id.* at 210; *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993) (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)) ("[ERISA's] carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other

remedies that it simply forgot to incorporate expressly'"). Indeed, the Eleventh Circuit, relying on *Great-West* and *Mertens*, has held that Section 502(a)(1)(B) does not authorize actions by plan participants or beneficiaries to recover lost interest for benefits that were wrongly delayed, and has cast doubt on whether lost interest can be recovered as equitable relief under Section 502(a)(3). *See Flint v. ABB, Inc.*, 337 F.3d 1326, 1329-31 (11th Cir. 2003).

Even if prejudgment interest may be awarded, however, the Seventh Circuit erred in affirming the District Court's decision to award prejudgment interest based on the prime rate, rather than on the statutory rate for postjudgment interest as specified in 28 U.S.C. § 1961(a).[14] That error had a significant impact: Using the statutory rate in lieu of the prime rate would have reduced the $6.4 million prejudgment interest award in this case by approximately one-third.

The circuits thoroughly disagree about the proper interest rate to apply. The Sixth, Eighth, and Ninth Circuits apply Section 1961(a) when calculating prejudgment interest in the ERISA context. *See Caffey v. UNUM Life Ins. Co.*, 302 F.3d 576, 585 & n.3 (6th Cir. 2002); *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1331 (8th Cir. 1995); *Blanton v. Anzalone*, 813 F.2d 1574, 1576 (9th Cir. 1987); *see also Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 225 (1st Cir. 1996) (noting that use of federal statutory rate "promotes uniformity").

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[14] Section 1961(a) of Title 28 provides:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding[] the date of the judgment.

The Second Circuit has affirmed the use of the rate established by Section 1961(a), *see Jones v. UNUM Life Ins. Co. of Am.*, 14 F. App'x 44, 46 (2d Cir. 2001), but has stated that "[t]he suitability of that postjudgment rate for an award of prejudgment interest will depend on the circumstances of the individual case," *Jones v. UNUM Life Ins. Co. of Am.*, 223 F.3d 130, 139 (2d Cir. 2000).

The Fifth Circuit requires district courts to apply the relevant state's statutory interest rate, while the Fourth Circuit allows that departure from the federal rate. *See Hansen v. Continental Ins. Co.*, 940 F.2d 971, 984 (5th Cir. 1991); *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1031 (4th Cir. 1993) (en banc).

The Seventh Circuit has rejected the application of § 1961(a) and urged district courts to award interest at the prime rate, as was done in this case. *See Fritcher v. Health Care Serv. Corp.*, 301 F.3d 811, 820 (7th Cir. 2002); *see also* Pet. App. 23a.

Finally, the Third Circuit has expressly declined to provide district courts guidance on what rate of interest to apply. *See Skretvedt v. E.I. DuPont de Nemours*, 372 F.3d 193, 208 (3d Cir. 2004).

The Plan's position below and in this Court is that prejudgment interest should not have been awarded in this case. Nevertheless, if this Court grants review and holds that the award of benefits was appropriate, and accepts that prejudgment interest was properly awarded, it should address the Plan's contention that Section 1961(a) establishes the applicable rate of interest. Doing so would allow the Court to resolve a question of practical importance on which lower court decisions are chaotic.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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