No.

IN THE

Supreme Court of the United States

PAUL J. FROMMERT, ET AL.,

Petitioners,

v.

SALLY L. CONKRIGHT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether reversal by the United States Court of Appeals for the Second Circuit of the trial court's holding that Xerox Corporation's general release form, the execution of which is required for an employee to obtain severance pay, was unenforceable to bar the petitioners' claims under the Employee Retirement Income Security Act ("ERISA") contravenes principles of contract interpretation under federal common law.

2. Should legal standards which apply pursuant to the Older Workers Benefit Protection Act ("OWBPA") to determine whether a release form constitutes a "knowing and voluntary" waiver of claims under the Age Discrimination in Employment Act ("ADEA") also apply to determine whether a release form executed as a condition to the receipt of severance pay constitutes a "knowing and voluntary" waiver of ERISA claims?

LIST OF PARTIES

The plaintiff-appellees are: Alan H. Clair, Donald S. Foote, Thomas I. Barnes, Ronald J. Campbell, Frank D. Commesso, William F. Coons, James D. Gagnier, Brian L. Gaita, William J. Ladue, Gerald A. Leonardo, Jr., Frank Mawdesley, Harold S. Mitchell, Walter J. Petroff, Richard C. Spring, Patricia M. Johnson, F. Patricia M. Tobin, Nancy A. Revella, Anatoli G. Puschkin, William R. Plummer, Michael J. McCoy, Larry J. Gallagher, Napoleon B. Barbosa, Alexandra Spearman Harrick, Janis A. Edelman, Patricia H. Johnston, Kenneth P. Parnett, Joyce D. Cathcart, Floyd Swaim, Julie A. McMillan, Dennis E. Bains, Ruby Jean Murphy, Matthew D. Alfieri, Kathy Fay Thompson, Mary Beth Allen, Craig R. Spencer, Linda S. Bourque, Thomas Michael Vasta, Frank C. Darling, Clark C. Dingman, Carol E. Gannon, Joseph E. Wright, David M. Rohan, David B. Ruddock, Charles Hobbs, Charles Zabinski, Charles J. Maddalozzo, Joyce M. Pruett, William A. Craven, Maureen A. Loughlin Jones, Kenneth W. Pietrowski, Bonnie Cohen, Lawrence R. Holland, Gail A. Nasman, Steven D. Barley, Donna S. Lipari, Andrew C. Matteliano, Michael Horrocks, Candice J. White, Kathleen E. Hunter, John L. Crisafulli, Deborah J. Davis, Brenda H. McConnell, Kathleen A. Bowen, Robert P. Caranddo, Terence J. Kurtz, William J. Cheslock, Thomas E. Dalton, Lynn Barnsdale, Bruce D. Craig, Gary P. Hardin, Sr., Claudette M. Long, Dale Platteter, Mary Ann Sergeant, Molly White Kehoe, Irshad Quershi, David K. Young, Leslie Ann Wunsch, Eugene H. Updyke, Michael R. Benson, Alvin M. Adams, Ronnie Kolniak, James J. Farrell, Robert L. Brackhahn, Benjamin C. Roth, Richard C. Crater, Carmen J. Sofia, Kathleen W. Levea, Frederick Scacchitti, Paul Defina, James G. Walls, Gail J. Levy, John A. Williams, Crystal Thornton, Charles R. Drannbauer, William M. Burritt, Janice Ross Heiler, Thomas F. McGee, Vincent G. Johnson, F. Colt

Hitchcock, Ronnie Tabak, Martha Lee Taylor, Charles Willette and Richard J. Glikin.

The defendant-appellants are: Xerox Corporation Pension Plan Administrator, Patricia M. Nazemetz, Xerox Corporation Pension Plan Administrator, Lawrence M. Becker, Xerox Corporation Pension Plan Administrator, Xerox Corporation Retirement Income Guarantee Plan and Xerox Corporation, a New York Corporation.

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The opinion of the United States Court of Appeals for the Second Circuit is reported at *Frommert v. Conkright*, 535 F.3d 111 (2d Cir. 2008) ("*Frommert 2008*"). A portion of the decision in *Frommert 2008* vacated a ruling by United States District Judge David G. Larimer of the United States District Court for the Western District of New York that an employer-drafted standard release form which Xerox Corporation ("Xerox") required its employees to execute as a condition to the receipt of severance pay did not bar the otherwise successful claims of the plaintiff-appellees under ERISA to calculate their retirement benefits without implementation of a "phantom account" offset. The opinion of the District Court is reported at *Frommert v. Conkright*, 472 F.Supp. 2d 452 (W.D.N.Y. 2007) ("*Frommert 2007*").

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This statute states in relevant part that "Cases in the courts of appeals may be reviewed by the Supreme Court by ... writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

The opinion in *Frommert 2008* was rendered on July 24, 2008. The plaintiff-appellees filed a timely Petition for Rehearing or Rehearing *en banc* on August 7, 2008. That petition was denied by the Second Circuit on September 25, 2008. Appendix C. On October 22, 2008, the Second Circuit issued its mandate and remanded the case to the District Court for further proceedings. Appendix D. At this writing, more than one month after the Second Circuit issued its mandate, no date for a post-remand hearing has been established.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Section 203 of ERISA, 29 U.S.C. § 1053 provides that an employee's rights to retirement benefits become vested in various specified circumstances. No statutory provision under ERISA specifically addresses the circumstances under which such vested pension benefits may be waived. However, ERISA does contain a section captioned "Assignment or alienation of plan benefits," ERISA Section 206(d), 29 U.S.C. §1056(d), generally known as the anti-alienation provision, which states in pertinent part as follows: "(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

The above-cited anti-alienation provision reflects the intent of Congress that pension benefits promised by an employer deserve the highest level of protection to be afforded rights derived from federal law. Xerox's position – and the Second Circuit's decision – on this issue rests on a judicially created exception to this clear statutory principle. That is, cases interpreting this provision have found that "there is an exception to ERISA's anti-alienation provision for a knowing and voluntary waiver of retirement benefits that is executed to reach a settlement." *Rhoades v. Casey,* 196 F.3d 592, 598 (5th Cir. 1999); *see also Finz v. Schlesinger,* 957 F.2d 78, 82 (2nd Cir. 1992); cf. *Lynn v. CSX Transportation, Inc.*, 84 F.3d 970, 975 (7th Cir. 1996)(quoting *Lumpkin v. Envirodyne Industries, Inc.*, 933 F.2d 449, 455 (7th Cir.1991)) (the anti-alienation provision "does not impose a bar on settlement agreements wherein pension claims are knowingly and intentionally resolved by employees").

The Second Circuit decision in this case applies a concept of "knowing and voluntary" that is considerably different from that applied in other

Circuits. Because of the importance of pension benefits and the practical implications of drawn out litigation, this is a question of extraordinary importance requiring the Supreme Court's attention.

ERISA § 102(a), 29 U.S.C. § 1022 requires Plan sponsors to provide Plan participants with a summary plan description ("SPD") informing the Participant in "a manner calculated to be understood by the average plan participant" of important information regarding benefits. The information that must be provided ncludes "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." ERISA § 102(b), 29 U.S.C. § 1022(b); *Layaou v. Xerox Corp.*, 238 F.3d 205, 210 (2d Cir. 2001) ("*Layaou 2001*").

The provision of the OWBPA captioned "Waiver," 29 U.S.C. § 626(f), begins by stating that "An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary." That provision then sets forth standards for determining whether a waiver of claims under the ADEA is knowing and voluntary. The full provisions of 29 U.S.C. § 626 are lengthy and therefore are set out in Appendix E, pursuant to Supreme Court Rule 14.1(f). Appendix E also contains the text of 29 C.F.R. § 1625.22, a regulation promulgated by the Equal Employment Opportunity Commission to implement provisions of the OWBPA.

STATEMENT OF THE CASE

This litigation regarding the proper computation of benefits under Xerox's retirement plan has been winding its way through the courts for ten years. It was only when the petitioners finally won the day that Xerox contended that unrelated events occurring during this period made this a pyrrhic victory.

At the heart of this litigation are findings by the Second Circuit that the defendant-appellants failed to disclose information relating to the methodology to be used when calculating pension benefits for a category of Xerox employees rehired prior to publication of the 1998 SPD. Xerox's method was to offset the value of pension benefits accrued by the plaintiff subsequent to being rehired by a "phantom account" consisting of the hypothetical appreciated value of the distribution he had previously received. Based on arguments submitted by counsel for the *Frommert* plaintiffs as interveners, the Second Circuit found in *Layaou 2001*, 238 F.3d at 211, that rehired Xerox employees who had received a distribution of pension benefits when previously separated from employment were not properly informed of such offsets in SPDs published and distributed by the defendant-appellants during the period January 1, 1990 through the date of plaintiff Layaou's termination in 1995.

Based on this finding, the Second Circuit concluded that the Xerox defendants had violated ERISA Section 102(a), 29 U.S.C. § 1022(a), which provides that a SPD "shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprize such participants and beneficiaries of their rights and obligations under the plan." *Layaou 2001*, 238 F.3d at 209 (quoting 29 U.S.C. § 1022(a)).

Five years later, in *Frommert v. Conkright*, 433 F.3d 254, 263 (2d Cir. 2006) ("*Frommert 2006*"), the Second Circuit found that the failure of the defendant-appellants to disclose the existence of the phantom account offset and their intent to implement same prior to publication of the 1998 SPD when calculating rehired plan participants' pension benefits since the date of their rehire violated ERISA Section 204(g), 29 U.S.C. § 1054(g). Because the defendant-appellants had failed to provide at least fifteen days' notice of the

amendment reflected in the 1998 SPD, the Second Circuit also held that the defendants had violated ERISA Section 204(h), 29 U.S.C. § 1054(h). *Id.*

The 2006 opinion of the Second Circuit did not establish the relief to be received by the petitioners for the defendant-appellants' statutory violations. Instead, the panel remanded this case back to the District Court and specifically directed the District Court to craft the appropriate relief employing equitable principles. *Id.* at 268. After hearing testimony and argument by the parties, the trial court on January 24, 2007 rendered an opinion finding that the methodology it had previously prescribed to recalculate the pension entitlement of plaintiff Layaou in *Layaou v. Xerox Corp.*, 330 F. Supp. 2d 297 (W.D.N.Y. 2004) ("*Layaou 2004*"), also should be used to recalculate the pension benefits due to the plaintiff-appellees and similarly situated Xerox rehires. *Frommert 2007*, 472 F. Supp. 2d at 458. That methodology, described as "the Layaou 2004 methodology," required the defendant-appellants to calculate the pension entitlement of each plan participant rehired prior to publication of the 1998 SPD with the only offset being the amount of the distribution such plan participant received when previously separated from employment. *Id.* at 458-459.

By the time the District Court made its decision on remand, many of the plaintiffs had retired under "reduction in force" ("RIF") severance agreements with Xerox and had signed a general release form as part of that severance. At the request of the plaintiff-appellees, the trial court carefully reviewed the release form in order to determine whether it was enforceable to bar the successful ERISA claims of the plaintiff-appellees. The trial court found that the release form which is the subject of this petition is an employer-drafted document executed by plan participants in exchange for severance pay that makes no mention of

this case or even the Xerox pension plan. *See id.* at 459-60. Moreover, the release form does include a paragraph which the trial court found carves out from its scope the employee's right to a lawfully calculated pension. The precise language of this paragraph, which is generally numbered paragraph 5, is as follows:

> I acknowledge and agree that the consideration set forth in this Release is *in addition* to anything of value to which I am entitled by law or Xerox policy.

(Emphasis added.) *Id.* at 460; Appendix F.

The trial court concluded that paragraph 5 of the release form was not capable of being understood by the average individual eligible to participate in a reduction in force. *Id.* at 462-63. Based on the principle of contract interpretation that such documents are to be strictly construed against the employer as drafter, the District Court held that the release form did not bar the plaintiff-appellees' ERISA claims. *Id.* at 466.

The trial court also concluded that the release form failed to comply with provisions of the OWBPA which hold that execution of a release form is not deemed to be knowing and voluntary if the waiver fails to be written in a manner calculated to be understood by the average individual eligible to participate in the reduction in force and if the amount paid in exchange for the release was less than the value of the employment discrimination claims waived.[1] *Id.* at 462-

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[1] Severance payments such as those made by Xerox to its employees in connection with a voluntary or involuntary reduction in force, because

63. In the course of rendering its opinion that the release form was unenforceable, the trial court observed in a footnote that, although

> noncompliance with the OWBPA does not automatically invalidate a release as to non-ADEA claims ... [t]hat does not make such noncompliance irrelevant, however. The requirements of the OWBPA were intended by Congress to ensure that an employee's waiver of his rights be "knowing and voluntary." Thus, an employer's tendering of consideration that does not exceed the value of anything to which the employee was already entitled is some evidence that the employee's waiver executed in exchange for that consideration was not knowing and voluntary.

Frommert 2007, 472 F. Supp. 2d at 463 n.5 (citations omitted).

The defendant-appellants appealed the rulings of the trial court that the Layaou 2004 methodology was the appropriate method of calculating the pension

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they are conditioned on the waiver of pension rights in a document not subject to negotiation, constitute a species of contract of adhesion -- a standardized agreement offered by an employer to its employee in circumstances where the latter has no real bargaining power and faces economic pressure because he has just lost his job. Where one party dictates the provisions of the agreement, "the other has no more choice in fixing those terms than he has about the weather." *See Siegelman v. Cunard White Star*, 221 F.2d 189, 205 (2d Cir. 1955) (Frank, J., dissenting).

entitlements of rehired plan participants and that the release form was unenforceable.

In a decision rendered July 24, 2008, the Second Circuit upheld the determination by the trial court that the Layaou 2004 methodology was within the trial court's discretion to grant as the relief for statutory violations by the defendant-appellants. *Frommert 2008*, 535 F.3d at 117. However, the same three-judge panel inconsistently vacated the trial court's determination that the release form did not bar the ERISA claims of the plaintiff-appellees. *Id.*

In an explanatory footnote, the Second Circuit stated that, although the trial court concluded that the release form failed to comply with a provision of the OWBPA and that such noncompliance was relevant to the determination of whether the plaintiff-appellees released Xerox from ERISA claims, "such noncompliance, even if proven, is irrelevant to the question of whether a release of non-ADEA claims was 'knowing and voluntary.' " *Id.* at 122 n.4.

REASONS FOR ALLOWANCE OF THE WRIT

Despite the fact that, during ten years of litigation, the Seventh and Ninth Circuits, as well as the Second Circuit,[2] have found that the defendant plan administrators engaged in a course of administration that violated ERISA statutes designed to protect pensioners, the petitioners have not received one dollar of the enhanced pension benefits that should have been awarded to them. The conduct of the

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[2] *See Layaou 2001*; *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006), *cert. denied* 167 L.Ed. 2d 321 (2007); *Berger v. Xerox Retirement Income Guarantee Plan*, 157 F.Supp. 2d 998 (S.D. Ill. 2001), *affirmed*, 338 F.3d 755 (7th Cir. 2003); and *Frommert 2006*.

defendant-appellants in delaying resolution of this dispute over the implementation of the phantom account offset is at cross-purposes with the express Congressional intent for the passage of ERISA, namely that "[i]f a worker has been promised a defined pension benefit upon retirement - and if he has fulfilled whatever conditions are required to obtain a vested benefit - he will actually receive it." *Nachman Corp. v. Pension Benefit Guarantee Corp.*, 46 U.S. 359, 375 (1980).

This Court can take judicial notice that the recent economic slowdown has had particular impact on older workers and has put many retirees at the edge of poverty. *See, e.g.,* Appendix G, an AARP Research Report entitled "The Economic Slowdown's Impact on Middle-Aged and Older Americans." In context, Xerox's act of dragging out its unsuccessful claims in this litigation added significantly to the plight of its own employees in effect forcing many of them to accept the RIF packages.

The decision of the Second Circuit to vacate District Judge Larimer's holding that the Xerox general release form was unenforceable to bar the ERISA claims of the plaintiff-appellees turns on its head the federal common law concept that employer-drafted agreements are to be strictly construed against the drafter. Further, contrary to federal common law principles highlighted in this petition, the decision in *Frommert 2008* improperly places the burden on plan participants to establish that the release form was not a knowing and voluntary waiver of pension benefits that were vested pursuant to specific terms of ERISA. Indeed, the Second Circuit's holding that, during the course of this litigation, the value of the pension benefits waived was "indeterminate," *Frommert 2008*, 535 F.3d at 122, alone should suffice to affirm Judge Larimer's decision that the release form was unenforceable in light of the "totality of the circumstances" test set forth in *Laniok v. Brainerd*

Mfg. Co. Pension Plan, 935 F.3d 1360, 1368 (2d Cir. 1991).[3]

Unless this Court certifies the questions presented for review, the July 24, 2008 opinion of the Second Circuit could have grave and profound consequences on older workers, many of whom depended upon receiving the pension benefits promised to them by their employer to fund their retirement years. Vacation of the trial court's determination that the Xerox general release form is unenforceable to bar

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[3] The *Laniok* factors are as follows:

> 1) the plaintiff's education and business experience, 2) the amount of time the plaintiff had possession of or access to the agreement before signing it, 3) the role of plaintiff in deciding the terms of the agreement, 4) the clarity of the agreement, 5) whether the plaintiff was represented by or consulted with an attorney, [as well as whether an employer encouraged the employee to consult an attorney and whether the employee had a fair opportunity to do so] and 6) whether the consideration given in exchange for the waiver exceeds employee benefits to which the employee was already entitled by contract or law.

Laniok, 935 F.3d at 1368. These factors are similar to those applied in other Circuits. *See, e.g.*, *Hernandez v. Philip Morris USA, Inc.*, 486 F.3d 1 (1st Cir. 2007); *Long v. Sears Roebuck & Co.*, 105 F.3d 1529 (3d Cir. 1997); *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 583 (6th Cir. 1995); *Baptist v. City of Kankakee*, 481 F.3d 485 (7th Cir. 2007); *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir. 1998).

the otherwise successful ERISA claims of the plaintiff-appellees could result in widespread mischief. Employers will be encouraged to offer a nominal severance payment under vague terms designed to eliminate substantial pension benefits accrued over several years of service. Equally chilling, unless this Court grants *certiorari* and reverses the decision of the Second Circuit which is the subject of this petition, unscrupulous employers will be encouraged to defend indefensible positions of law, as the defendant-appellants have done in this case, simply to create periods of delay during which those employers will solicit execution of vague general release forms from cash-strapped plan participants so as to avoid their pension obligations.

II. PRINCIPLES OF CONTRACT INTERPRETATION UNDER FEDERAL COMMON LAW MANDATE REINSTATEMENT OF THE TRIAL COURT'S HOLDING THAT THE RELEASE FORM WAS UNENFORCEABLE TO BAR THE PETITIONERS' SUCCESSFUL ERISA CLAIMS

This Court has held that "bearing in mind the special nature and purpose of employee benefit plans [federal courts should] develop a federal common law of rights and obligations under ERISA-regulated plans." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (citing *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110-111 (1989)). Consistent with the admonition of this Court that principles of federal common law should be developed to interpret ERISA-regulated plans, the plaintiff-appellees submit that a release form executed by a plan participant as part of a severance program while the employer drags out pension litigation should not be treated as a "knowing and voluntary" waiver of pension claims or rights where the form does not reference the ongoing

litigation and was not submitted to counsel for the plan participant as part of any settlement negotiations.

A principle of contract interpretation given the imprimatur of federal common law but ignored by the Second Circuit in *Frommert 2008* is that the validity of an individual's waiver of pension claims should be subjected to closer scrutiny than his waiver of general contract claims. *Finz v. Schlesinger*, 957 F.2d 78, 81 (2d Cir. 1992). This principle of contract interpretation was diligently followed by the District Court when it carefully reviewed the provisions of the release form deemed to be ambiguous and determined that the presence of those provisions mandated that the release form could not be enforced to bar the ERISA claims of the plaintiff-appellees.

Another principle of contract interpretation applicable to circumstances where the payment of severance pay is conditioned on the execution of a release form is that courts must ensure that federally protected rights are "not undermined by private agreements born of circumstances in which employees confront extreme economic pressures or lack information regarding their legal alternatives." *Pierce v. Atchison, Topeka & Santa Fe Ry. Co.*, 110 F.3d 431, 437 (7th Cir. 1997). There can be no more extreme economic pressure than that placed upon an older employee faced with a year without income.

A third principle of federal common law of relevance to this petition is that the SPD controls in the event of a conflict between the SPD and the plan document or the plan administrator's interpretation of the plan document. This principle has not yet been the subject of an opinion by this Court.[4] The rationale for

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[4] The concept that the SPD controls in the event of a conflict has been consistently applied

that legal principle is that the SPD "will be an employee's primary source of information regarding employment benefits, and employees are entitled to rely on the descriptions contained in the summary." *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 112-13 (2d Cir. 2003).

Yet another principle of contract interpretation of federal common law germane to the issue of whether the Xerox release form bars plaintiff-appellees' otherwise meritorious claims is that a document drafted by the employer and alleged to be a waiver of pension rights must be construed in favor of the employee. *Perreca v. Gluck,* 295 F.3d 215, 223 (2d Cir. 2002) ("[A]ny ambiguity in the language used in an ERISA plan should be construed against the interests of the party that drafted the language").[5]

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outside the Second Circuit. S*ee Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981-83 (5th Cir. 1991); *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466 (7th Cir. 1998); *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994); *Bergt v. Ret. Plan for Pilots Employed by Mark Air*, 293 F.3d 1139 (9th Cir. 2003); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1518-19 (10th Cir. 1996); *McNight v. Southern Life & Heath Co.*, 758 F.2d 1566 (11th Cir. 1985).

[5] In *Frommert 2008*, the Second Circuit acknowledged that four of the *Frommert* plaintiffs had inserted language in their release forms "to carve out explicitly their claims as members of the 'Frommert lawsuit' from the universe of claims to be covered by the release." *Frommert 2008*, 535 F.3d at 120 n.3. In the brief they submitted to the Second Circuit, the defendant-appellants stated that acceptance of the four altered release forms was done "inadvertently." Appendix H at 21 n.5 The

Application of the foregoing principles of contract interpretation under federal common law solves the riddle posed by paragraph 5 of the release form: what is the explanation of the phrase "by law or Xerox policy?" Breaking this phrase into its constituent parts, as determined by the trial court, the term "by law" refers to a pension calculated in accordance with ERISA without implementation of the phantom account offset. *Frommert 2007*, 472 F. Supp. 2d at 463. The term "Xerox policy" should be deemed to refer to the calculation of the pension entitlement of a plan participant consistent with the description by the defendant-appellants of how to calculate same contained in the 1989 SPD, which is the basis for the decision in *Frommert 2007* that the methodology to be followed when calculating pension benefits should be the Layaou 2004 methodology. As declared by the trial court:

> The import of paragraph 5 is that the salary continuance given to the employee did not take the place of, but was in addition to, any benefits to which the employee was *already* entitled by law or Xerox policy.... Read that way, the releases would not bar plaintiffs' claims here. If plaintiffs were entitled to pension benefits under the law, *i.e.,* ERISA, or under Xerox's own policies, they did not waive their rights to such benefits.

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defendant-appellants thus clarified the fact that, in the ordinary case, they would not have accepted any releases which contained alterations. This was made clear in the August 8, 2006 memo addressed to plaintiff-appellee Frances Tobin, Appendix I, in which Xerox Human Resources Manager Mary Ann Mannix states "We are unable to accept your application with the change you added."

Id. at 462.

II. PRINCIPLES APPLYING TO DETERMINE IF WAIVERS ARE "KNOWING AND VOLUNTARY" UNDER THE OWBPA SHOULD ALSO APPLY TO DETERMINE WHETHER A WAIVER OF ERISA CLAIMS IS A KNOWING AND VOLUNTARY ACT BY EMPLOYEES FACED WITH TERMINATION

In *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 427 (1998), this Court held that strict compliance with the OWBPA is applicable only to ADEA claims.[6] However, employment discrimination claims such as those prohibited by the ADEA should not logically receive a higher degree of protection than an employee's contractual right to a pension. By this petition, this Court is requested, consistent with principles of contract interpretation under federal common law, to ensure that claims under ERISA be given the same protection this Court has given to ADEA claims when employees are asked to sign a release form deemed to be a waiver of both ADEA and ERISA claims in exchange for severance pay. Such an extension is natural since both bodies of law protect

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[6] This Court in *Oubre* held that failure to comply with any one provision of the OWBPA rendered an alleged waiver of ADEA claims invalid. *See Oubre*, 522 U.S. at 427. In sum, the petitioners ask this Court to apply the OWBPA to documents, such as the one at bar, which purport to waive both ADEA and ERISA claims.

employee rights and preclude waivers unless they are "knowing and voluntary."

The decision of the Second Circuit vacating Judge Larimer's well-reasoned opinion that the employer-drafted release form was unenforceable treads upon the equitable principle established under federal law that, absent clear error, appellate courts should defer to fact-intensive findings by trial courts. *Irons v. FBI*, 811 F.2d 681, 684 (1st Cir. 1987). Moreover, the decision of the Second Circuit implicitly imposes the burden of proving that the waiver is invalid on the plaintiff-appellees. Putting the burden on the employees to prove that the alleged waiver of ERISA benefits is invalid is contrary to regulations promulgated by the Equal Employment Opportunity Commission to implement provisions of the OWBPA stating that"the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary." 29 C.F.R. § 1625.22(h).

A release form is not effective under the OWBPA unless "the individual waives rights or claims only in exchange for adequate consideration in addition to anything of value to which the individual already is entitled." 29 U.S.C. § 626(f)(1)(D). The concept of what constitutes adequate consideration is the primary factor in determining whether a document alleged to be a release of employment claims under the ADEA is valid. *See EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1279-1280 (7th Cir. 1992). Consistent with the definitions contained in the ADEA — including a definition of "employer" similar to that contained in ERISA — this Court should find that, for a waiver of ERISA claims to be enforceable, the consideration paid in exchange for the waiver must exceed the benefits to which the employee was already entitled by contract or law.

Paragraph 5 of the release form mirrors a critical provision of the OWBPA, 29 U.S.C. § 626(f)(1)(D), which provides that "The individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled." To cite from Judge Larimer's careful analysis of the enforceability of the release form, "This provision [paragraph 5] was presumably included in the release in order to conform to the requirements of the [OWBPA]." *Frommert 2007*, 472 F. Supp. 2d at 462.

Both the trial court and the Second Circuit applied the factors set forth in *Laniok*, 935 F.3d at 1368, to reach different conclusions. The Second Circuit concluded, contrary to principles of contract interpretation under federal common law to be applied to documents drafted by the employer, that the fact that the exact amount of claims or benefits deemed to be waived was "indeterminate" justified vacating the trial court's decision that the release form was unenforceable to bar the ERISA claims of the plaintiff-appellees. *Frommert 2008*, 535 F.3d at 122.

In support of its holding, the Second Circuit observed that "a settlement payment, made when the law was uncertain, cannot be successfully attacked on the basis of any subsequent resolution of the uncertainty." *Frommert 2008*, 535 F.2d at 122. This observation is at odds with the following factual finding of the trial court: "In the case at bar, it appears that, at least with respect to some of the plaintiffs, the consideration received by the plaintiffs, *i.e.,* salary continuance, amounted to far less than they would have received under the Plan without the phantom account offset." *Frommert 2007*, 472 F. Supp. 2d at 464.[7]

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[7] In its opinion, the trial court noted the substantial inadequacy of the consideration paid to

As reflected by the conflicting decisions in *Frommert 2007* and *Frommert 2008*, paragraph 5 of the release form unquestionably lacks the clarity required by both the *Laniok* factors and the OWBPA. If this Court adopts, as a matter of federal common law, the OWBPA factors as the criteria to be utilized by federal courts when interpreting employer-drafted waivers of ERISA claims, such as the release form at issue, the result will be one consistent, predictable finding as to the enforceability of such putative waivers of ERISA claims.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that the Supreme Court grant review of the

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plaintiff Kenneth Pietrowski, who signed the release form. The trial court found that the lump sum equivalent of his standard RIGP annuity is more than $832,000, from which $210,000 (representing the amount of the distribution he received when first separated from employment and the amount of severance pay he received) was deducted to determine that plaintiff Pietrowski waived $622,000 by execution of the employer drafted release form. *Frommert 2007*, 472 F. Supp. 2d at 464. The trial court relied on a Xerox RIGP Plan Pension Calculation Statement dated January 31, 2006. Appendix J.

important questions presented.

Dated: December 22, 2008

Respectfully submitted,

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