No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, PATRICIA M. NAZEMETZ, LAWRENCE M. BECKER AND XEROX CORPORATION RETIREMENT INCOME GUARANTEE PLAN, CROSS-PETITIONERS,

v.

PAUL J. FROMMERT, ET AL., RESPONDENTS
AND
KENNETH PIETROWSKI, ET AL., CROSS-RESPONDENTS

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

BRIEF IN OPPOSITION OF SIXTY-TWO [62] RESPONDENTS & SEVEN [7] CROSS-RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Second Circuit (in 2008), as Cross-Petitioners suggest, mistakenly interpreted its prior decision in this case (issued in 2006) and, as such, applied a correct—but, according to Cross-Petitioners, circumstantially inapplicable—standard in reviewing the factual findings of the district court on remand.

PARTIES TO THE PROCEEDING

All Cross-Petitioners are listed on the caption.

The Sixty-Two [62] Respondents are Paul Frommert, Mary Beth Allen, Napoleon Barbosa, Thomas Barnes, Michael Benson, Linda Bourque, Robert Brackhahn, Ronald Campbell, Robert Carrando, Joyce Cathcart, William Cheslock, Alan Clair, Bonnie Cohen, Frank Commesso, William Craven, Thomas Dalton, Frank Darling, Paul Defina, Janis Edelman, James Farrell, Don Foote, Brian Gaita, Lawrence Gallagher, Richard Glikin, Gary Hardin, Alexandra Harrick, Colt Hitchcock, Michael Horrocks, Kathleen Hunter, Patricia H. Johnston, Patricia M. Johnson, Vincent Johnson, Molly Kehoe, Ronnie Kolniak, William Ladue, Maureen Laughlin-Jones, Kathleen Levea, Claudette Long, Brenda Mcconnell, Thomas Mcgee, Julie Mcmillan, Ruby Jean Murphy, Gail Nasman, Kenneth Parnett, Dale Platteter, William Plummer, Joyce Pruett, Anatoli Puschkin, Nancy Revella, David Rohan, Ben Roth, Carmen Sofia, Richard Spring, Floyd Swaim, Kathy Thompson, Francis Pat Tobin, Thomas Vasta, James Walls, Candy White, Chuck Willette, David Young, and Charles Zabinski.

The Seven [7] Cross-Respondents are Kenneth W. Pietrowski, William M. Burritt, William F. Coons, Deborah J. Davis, Charles Hobbs, Charles J. Maddalozzo, and John A. Williams.

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INTRODUCTION

This litigation, which now enters its 10th year, involves over 100 plaintiffs—each of whom is an employee or former employee of the Xerox Corporation. Although the facts and procedural history of the case are extraordinarily complex, the reason to deny the petition filed by Sally L. Conkright *et al.* (hereinafter, the "Xerox Cross-Petition" or "Cross-Petition") is quite simple: the challenged ruling creates no conflict and poses no question worthy of review by this Court.[1]

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[1] The Cross-Petition addresses one of the issues resolved below: whether the district court selected an appropriate methodology for calculation of the plaintiffs' benefit entitlement. Pet. App. 7a-14a (Section I, captioned "Remedy"). ["Pet. App. __" is used herein to refer to pages of the appendix filed by Cross-Petitioners.] In its opinion, the court of appeals resolved a second issue: whether the claims of a subset of plaintiffs in this litigation were extinguished when they signed boilerplate releases as part of a workforce reduction that was unrelated to this litigation (hereinafter, the "Release Issue"). Pet. App 14a-21a (Section II).

The Release Issue, on which the Xerox Cross-Petitioners prevailed below, has no bearing on the claims of the sixty-two [62] respondents (hereinafter, the "Frommert Respondents"). It is, however, the subject of a pending petition for a writ of certiorari filed by the seven [7] cross-respondents (hereinafter, the "Pietrowski Cross-Respondents"). *See* Docket # 08-826.

The Release Issue is also the subject of a pending petition for a writ of certiorari filed by Robert H. Jaffe, Esq. *See* Docket # 08-803 (hereinafter, the "Jaffe Petition"). Although the caption of the Jaffe Petition appears to suggest that it is filed on behalf of all plaintiffs in this litigation, the Frommert Respondents and the Pietrowski Cross-Respondents are not represented by Mr. Jaffe. Insofar as the Jaffe Petition purports to be filed on their behalf, it was certainly not done so with their authorization.

Cross Petitioners are undoubtedly aware that a fact-bound and case-specific holding does not satisfy the criteria for *certiorari*. To sidestep that problem, they manufacture two broad legal questions regarding the proper standard of judicial review in ERISA cases. As explained *infra*, however, neither question presented in the Cross-Petition was raised or decided below.

The true grievance of Cross-Petitioners is this: they allege that the Second Circuit misconstrued its own prior opinion in this litigation, *Frommert v. Conkright*, 433 F.3d 254 (CA2 2006). As a result—according to Cross-Petitioners—the Second Circuit applied the wrong standard in reviewing the decision of the district court on remand. The essence of this argument is *not* that the Second Circuit broke with this Court and other circuits by applying a *new* standard of review. To the contrary, the actual claim of Cross-Petitioners is that the Second Circuit *misinterpreted the particular facts and circumstances of this case* and, because of that, applied the *wrong* legal standard. Even if true—and it is not—such error does not warrant further review.

Plenary review would be unwarranted even if the two questions in the Cross-Petition were fairly presented. As explained herein: (i) it is far from clear that the questions presented were outcome determinative; (ii) review is sought of an interlocutory order, rather than a final judgment; (iii) the alleged circuit split is—at best—uncertain, undeveloped, and capable of resolution without this Court's intervention, and (iv) the court of appeals explicitly held that Cross-Petitioners waived a key part of their argument.

The Cross-Petition should be denied.

STATEMENT

1. This litigation has endured for 10 years. It involves over 100 plaintiffs. And it has given rise to two written opinions by the court of appeals—one in 2006, Pet. App. 22a-60a (*Frommert I*) and another in 2008, Pet. App. 1a-21a (*Frommert II*). In light of its factual and procedural complexity, some background is necessary in order meaningfully address the contentions in the Xerox Cross-Petition.

2. At no point during the course of this litigation, have any of the following facts ever been in dispute:

- Each of the 100+ plaintiffs in this litigation worked for Xerox and "left the company at one time or another." Pet. App. 25a, 63a.
- When each plaintiff left the company, (s)he "received lump-sum distributions of [his/her earned] retirement benefits." *Id.*
- Each plaintiff was then rehired by Xerox at some point thereafter. *Id.*
- Upon rehire, each plaintiff began to accrue additional pension benefits under the Xerox Corporation Retirement Income Guarantee Plan (the "Xerox Plan"). *Id.*
- The Xerox Plan requires that benefits accrued by plaintiffs (for services rendered after rehire) be reduced (*i.e.,* "offset") by some amount to account for the lump sum payment each already received. *Id.* at 26.

The central dispute in this case is over "whether the [Xerox Plan] administrators properly offset plaintiffs' lump-sum distributions [ ] against the retirement bene-

fits accruing as a result of the employees being rehired." Pet. App. 63a.

3. Prior to the initiation of any litigation, Cross-Petitioners took the position that

> [t]he offset is calculated by the value of the prior lump-sum distribution plus any sum that the distribution would have earned (hypothetically) had it remained in the fund and been invested. The parties refer to this as the 'phantom account' offset.

Id. (hereinafter, the "Phantom Account Offset"). *See also* Pet. App. 74a (quoting pre-litigation memo from Xerox); Pet. App. 35a (same). In 1999, affected Xerox employees or former employees filed suit challenging Cross-Petitioners' application of the Phantom Account Offset to them. *Id.* at 35a, 62a.

4. Before the district court, the parties agreed that "at least by 1998, and continually since then, the [Xerox] Plan has expressly provided for the phantom account offset." Pet. App. 81a. The parties disagreed, however, over whether the relevant provisions in Xerox Plan documents *prior to 1998* could properly be interpreted as employing a phantom account offset.

Cross-Petitioners took the position that, *prior to 1998*, the relevant Xerox Plans and summary plan descriptions ("SPDs")—through the inclusion of many detailed provisions—provided for a phantom account offset. This position of Cross-Petitioners will hereinafter be referred to as the "Pre-1998 Phantom Account Interpretation." *See, e.g.,* Pet. App. 64a-71a (discussing, at length, many relevant provisions); Pet. App. 83a (noting that "the 1983 Restatement [ ] set forth a phan-

tom account provision virtually identical to the ones challenged in the case at bar") (citation omitted).

In a ruling that preceded *Frommert I*, the district court agreed with Cross-Petitioners regarding their Pre-1998 Phantom Account Interpretation. Pet. App. 85a ("Given the history of the Plan, I do not believe that the administrator's consistent application of the phantom account offset can be said to be arbitrary and capricious."). The central issue was clearly stated by the district court judge as follows:

> [t]he point, however, is that the Plan had consistently, and in my view not unreasonably, been interpreted by the administrator as providing for a phantom account offset for prior distributions * * * *

Pet. App. 87a. As such, the district court granted summary judgment to the Xerox Cross-Petitioners. Pet. App. 98a. All plaintiffs appealed. Pet. App. 24a.

5. Before the Second Circuit (*i.e.*, in *Frommert I*), the Xerox Cross-Petitioners continued to defend their Pre-1998 Phantom Account Interpretation. In the words of the Second Circuit:

> [t]he defendants contend, and the district court agreed, that the phantom account has *always* been part of the Plan * * * * Specifically, the defendants contend that the phantom account was present in versions of the Plan prior to the 1989 Restatement and that its omission from the 1989 Restatement was rectified by [ ] subsequent disclosures.

Pet. App. 42a (emphasis added).

The court of appeals, however, disagreed and found "as a matter of law, that the phantom account was not

part of the Plan until 1998 when it was added by amendment of the Plan's text through its explanation in the 1998 SPD." *Id.* As the court firmly noted:

> [i]t is clear, *under either an arbitrary or capricious standard or as a matter of law*, that the Plan administrator's conclusion that the Plan *always* included the phantom account is unreasonable.

Pet. App. 44a (emphasis added, footnote omitted). As such, the Second Circuit vacated the judgment dismissing the action, *id.* at 60a, and remanded the case to the district court to "determine[e] the appropriate calculation and fashion[ ] the appropriate remedy." *Id.* at 51a.

6. On remand, the district court "conducted a two-day hearing on the remedial issues raised by the Second Circuit and [ ] received both pre-hearing and post-hearing memoranda from both sides." Pet. App. 102a. After considering the evidence presented, the district court turned its attention to some of the very plan provisions "noted by the Court of Appeals" in *Frommert I.* Pet. App. 105a-106a (discussing sections 1.1, 4.3, and 9.6 of the Xerox Plan as well as the SPDs). Ultimately, the district court determined that the proper pre-1998 offset was the lump-sum payment itself without any appreciation adjustment. *Id.* at 106a-108a. The Xerox Cross-Petitioners appealed.

7. In *Frommert II*, the Second Circuit sought to resolve the offset issue in the wake of the plan administrator's unreasonable interpretation of the pre-1998 Plan and SPDs. *See* Pet. App. 45a n.11 ("*Frommert I*") (holding that the administrator's interpretation was "unreasonable under either [a *de novo* or deferential] standard."). The court of appeals concluded that the

offset methodology selected by the district court was a reasonable remedy for the "identified ERISA violation" committed by Cross-Petitioners. Pet. App. 8a. As such it affirmed the district court's ruling.

8. The Xerox Cross-Petitioners sought rehearing and/or rehearing *en banc*. On September 25, 2008, the Second Circuit denied that request. Pet. App. 129a-131a. The Cross-Petition followed.

REASONS FOR DENYING THE WRIT

I. NEITHER OF THE TWO QUESTIONS PRESENTED IN THE CROSS-PETITION WAS RAISED OR DECIDED BELOW

According to Cross-Petitioners, the Second Circuit's opinion contains the following two holdings:

> First, the Second Circuit held that the well established rule that courts must defer to a plan administrator's reasonable interpretation of an ERISA plan does not apply when the plan administrator interprets the plan outside the context of an administrative claim for benefits.
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> * * *
>
> Second, the Second Circuit held that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of a pension plan if the interpretation is rendered in the course of determining the additional benefits due to a plan participant as a result of a violation of law.

Pet. 2. As explained below, neither of these two alleged holdings can be found in the lower court's opinion.

A. The First Question Is Not Presented

Nowhere does the court of appeal's opinion articulate, or rely upon, a distinction between determinations made by an ERISA plan administrator inside versus "outside the context of an administrative claim for benefits." Pet. 2, 12. Relying on the phrase "mere *opinion* of the plan administrator," *id.* at 14, the Xerox Cross-Petitioners read this distinction into the Second Circuit opinion. But Cross-Petitioners cite the quoted phrase entirely out of context. The full sentence in the court of appeal's opinion reads as follows:

> Defendants-Appellants [*i.e.,* the Xerox Cross-Petitioners] have identified no authority in support of the proposition that a district court must afford deference to the mere *opinion* of the plan administrator in a case, such as this, **where the administrator had previously construed the same terms and we found such a construction to have violated ERISA.**

Pet. App. 13a (italics in original, bold emphasis added).

The Second Circuit did not refer to the plan administrator's interpretation of the plan as a "mere *opinion*" because—as Cross-Petitioners suggest—it was rendered "outside of the context of an administrative claim for benefits." Pet. 14. Rather, the court of appeals considered it a "mere *opinion*" because the administrator's previous interpretation of "the same terms" in the plan had already been rejected in *Frommert I*. *See* Pet. App. 44a-45a (rejecting the Pre-1998 Phantom Account

Interpretation as unreasonable under either a *de novo* or deferential standard.").[2]

As the court of appeals noted, Cross-Petitioners could not "identify[y any] authority in support of the proposition that a district court must afford deference to [such an] *opinion.*" Pet. App. 13a. This is hardly surprising because deference to such an opinion (*i.e.,* the *secondary* interpretation of plan terms already wrongfully interpreted by an administrator) would permit administrators to give a ranked list of their preferred litigation positions; a federal court would then be required to go down the list and choose the highest-ranked interpretation that was reasonable. This, of course, is not the law in any circuit. *See, e.g., Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (CA9 2001) ("[A] plan administrator will not get a

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[2] Buried in a footnote, the Xerox Cross-Petition asserts that "[i]t is not the case that the District Court and the Plan Administrator construed on remand the same Plan terms that the Second Circuit found to have violated ERISA." Pet. 14. Amazingly, the Cross-Petition fails to mention that the court of appeals *expressly* took the opposite position on this critical factual matter.

In any event, Xerox is simply wrong. One issue in *Frommert I* was whether the pre-1998 plan documents standing alone had provided for a phantom account offset. Xerox's Plan Administrator interpreted the pre-1998 plan documents to have required phantom accounting; plaintiffs disagreed. *Frommert I* held that while the post-1998 plan documents provided for a phantom account (because of a clear 1998 SPD); the pre-1998 documents taken in their entirety did not, *under any standard,* provide for phantom accounting. It also held that the post-1998 terms could not retroactively apply to the pre-1998 plan documents because of ERISA's anti-cutback provision. The issue on remand was the appropriate remedy for pre-1998 rehires. There was no "different" set of pre-1998 plan terms/documents for the plan administrator to interpret.

second bite at the apple when its first decision was simply contrary to the facts.").[3]

B. The Second Question Is Not Presented

It is black-letter law that "[a]n appellate court reviews a district court's choice of remedy for an ERISA violation for abuse of discretion." *Cook v. Liberty Life Ass. Co. of Boston*, 320 F.3d 11, 24 (CA1 2003) (citing *Zervos v. Verizon New York Inc.*, 277 F.3d 635 (CA2 2002); *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1163 (CA9 2001).

This is precisely how the Second Circuit characterized the relevant issue before it. Pet. App. 7a ("On appeal, [Cross-Petitioners] challenge the District Court's remedy for the ERISA violations we identified in our prior decision, *i.e.*, the impermissible amendment of the ERISA plan at issue to calculate Plaintiffs-Appellees' pension benefits according to a 'phantom account' offset method."). *See also* Pet. App. 8a (where the Second Circuit noted that "[w]e review a district court's chosen remedy of an identified ERISA violation for an excess of allowable discretion." (citation omitted).

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[3] Similarly, Cross-Petitioners' reliance on the phrase "the District Court 'had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations'" is taken out of context. Pet. 11 (citing Pet. App. 13a). The quotation in the Cross-Petition eliminates the critical ending of the court's sentence which reads "all of which were premised on the now-impermissible 'phantom account' offset mechanism." *Id.* In other words, the court was merely clarifying that once an ERISA plan administrator's original interpretation of plan language is rejected, any "secondary" interpretation advanced by the administrator is no longer an exercise of discretion entitled to judicial deference. *It is merely a litigation position.*

The courts of appeals—including the Second Circuit—are in unanimous agreement such "remedial" decisions include whether, and what, ERISA benefits to award once benefits have been improperly denied by a plan administrator. In such circumstances—like those of this case—the district court is permitted to—but need not—consider further input from the administrator. In the words of the First Circuit:

> We have no doubt that in some situations a district court, after finding a mistake in the denial of benefits, could conclude that the question of entitlement to benefits for a past period should be subject to further proceedings before the ERISA plan administrator [, h]owever, the variety of situations is so great as to justify considerable discretion on the part of the district court.

Cook, 320 F.3d at 24. As the First Circuit went on to explain, the basis for this well-settled principle is simple: "ERISA deference does not deprive a court of its discretion to formulate a necessary remedy when it determines that the plan has acted inappropriately." *Id.*

To sidestep this fact, Cross-Petitioners manufacture a question (the second question presented in the Cross-Petition) regarding whether "a district court has 'allowable discretion' to adopt any 'reasonable' interpretation of the terms of a pension plan if the interpretation is rendered in the course of determining the additional benefits due to a plan participant as a result of a violation of law." Pet. i.

Other than its use of the words "allowable discretion" and "reasonable," however, Cross-Petitioners' articulation of this question finds no support in the text of

the Second Circuit opinion. Nor can it be found in *any* of the cases cited in the Cross-Petition. For example: in asserting that the Second Circuit "creates a circuit conflict," Pet. 29, Cross-Petitioners cite six cases from various courts of appeals in the body of their argument. But of these six cases, five have nothing to do with ERISA. In fact, three of these cases were decided before ERISA even existed. *See Eddy v. Prudence Bonds Corp.*, 165 F.2d 157 (CA2 1947);[4] *Emor, Inc. v. Cyprus Mines Corp.*, 467 F.2d 770 (CA3 1972); *NLRB v. Hobart Bros. Co.*, 372 F.2d 203 (CA6 1967).[5]

C. Cross-Petitioners Are Not Credible

It bears mention that the two questions presented in the Xerox Cross-Petition are merely the latest of at least *five* certworthy issues that Cross-Petitioners claim have arisen in this case. This Rorschach approach employed by Cross-Petitioners is not credible.

For example, in seeking rehearing *en banc* of *Frommert I*, Cross-Petitioners claimed that:

> The panel decision that the manner in which appellees instituted a 'phantom account' offset, as contained in Xerox Corporation's Retirement Income Guarantee Plan [ ] violated the

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[4] Cross Petitioners' citation of this particular case is curious. Cross Petitioners seem to be suggesting that the Second Circuit panel has overruled itself *sub rosa*—at least in the ERISA context.

[5] The only ERISA case relied on by Cross-Petitioners, *Welsh v. Burlington Northern, Inc. Employee Benefits Plan*, 54 F.3d 1331, 1340 (CA8 1995), does not even stand for the proposition for which it is cited. The *Welsh* court *affirmed* the district court's interpretation and, in so doing, did *not* employ *de novo* review.

> Employee Income Retirement Security Act [ ] involves a matter of exceptional importance in that it conflicts with an authoritative decision of [the] United States Court of Appeals [for the Ninth Circuit].[6]
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> * * *
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> *En banc* consideration is also warranted [because t]he definition the panel established [of amendment] conflicts with [ ] *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).[7]
>
> *En banc* consideration is further justified on the issue as to the proper standard for recovery for an inadequate summary plan description [because the Second Circuit] standard conflicts with the standard set by authoritative decisions of other circuit courts of appeal.[8]

Cross-Petitioners' Request for Rehearing and/or Rehearing *En Banc*, 2006 WL 2362272.

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[6] Cross-Petitioners filed a petition for a writ of certiorari in the Ninth Circuit case of Xerox Corporation Retirement Income Guarantee Plan v. Miller in January of 2007. *See* http://www.scotusblog.com/movabletype/archives/06-962.pdf. This Court denied the petition. *See* Docket 06-962.

[7] In their current effort, Cross-Petitioners have replaced their claim that the Second Circuit has ignored *Schoonejongen* with the claim that the Second Circuit has now ignored *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) and *Metropolitan Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008). Pet. 17-22.

[8] Reference to this alleged circuit split is conspicuously absent from the Xerox Cross-Petition.

II. THE ACTUAL QUESTION PRESENTED IS NOT WORTHY OF FURTHER REVIEW

As explained above, this case does not involve a dispute over what standard of judicial deference should apply when reviewing the interpretation by an administrator of plan terms. The court of appeals expressly recognized the well settled principle that "where [an] ERISA plan confers upon the plan administrator discretionary authority to 'construe the terms of the plan,' the district court should review a decision by the plan administrator under an excess of allowable discretion standard." Pet. App. 12a.[9] In other words, the Second Circuit agrees with all other circuits that courts must defer to an administrator's interpretation of plan language provided that (1) the plan gives the administrator the discretion to interpret the terms of the plan and (2) the interpretation made by the plan administrator is reasonable (*i.e.*, allowable).[10]

In truth, this case involves a dispute over how to characterize what was being interpreted on remand by the district court. As explained above, the Second Circuit correctly held that the relevant plan terms were the very same ones whose interpretation by the Xerox Plan Administrator had been rejected as unreasonable

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[9] In making this statement, the court cited a prior Second Circuit opinion—*Nichols v. Prudential Ins. Co. of Am.*, 406 F.3d 98, 108 (CA2 2005). And, as the Second Circuit opinion indicates, the *Nichols* decision cited *Firestone*—this Court's seminal decision regarding judicial deference to ERISA plan administrators.

[10] Employing this standard, the Second Circuit—in *Frommert I*—rejected as unreasonable Cross-Petitioners' Pre-1998 Phantom Account Interpretation.

in *Frommert I.* On the other hand, Cross-Petitioners erroneously and unsuccessfully assert that the question on remand required interpretation of different terms.

Even if Cross-Petitioners were correct, however, such error hardly warrants further review. As codified in the Court's rules: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This Court will "intervene only in what ought to be the rare instance when the [legal] standard appears to have been * * * grossly misapplied." *Mobil Oil Corp. v. FRP,* 417 U.S. 283, 310 (1974) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 491 (1951)). This is certainly not the highly exceptional case in which further review of factual determinations or application is warranted.[11]

III. Even if the Questions in the Cross-Petition Were Presented, Plenary Review Is Unwarranted.

Plenary review would be unwarranted *even if* the questions in the Cross-Petition were fairly presented. This is true for several reasons:

First, it is far from clear that either of the judicial deference questions presented in the Cross-Petition were outcome determinative. As the Second Circuit explicitly stated in *Frommert I,* the Xerox Plan Administrator's initial interpretation of the relevant offset provisions was "unreasonable under either [a *de novo*

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[11] Any claim that the unanimous panel grossly misapplied the relevant legal standard is belied by the fact that the suggestion for rehearing *en banc* filed by the Xerox Cross-Petitioners attracted no interest by any member of the entire court of appeals.

or deferential] standard." Pet. App. 44a-45a n. 11. There is nothing in the *Frommert II* opinion to suggest that its holding would be different under a deferential standard of review; the court of appeals simply did not consider the issue.[12]

Second, Cross-Petitioners seek review of an interlocutory order, rather than a final judgment. This Court has long warned that it "should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893).

Third, the circuit conflict alleged by Cross-Petitioners is—*at best*—new, uncertain, and in need of further percolation. According to Cross-Petitioners, the opinion below *creates* a conflict with decisions of the Third, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits on the first question presented. Pet. 12. And, according Cross-Petitioners, the opinion below *creates* a conflict with the Second, Third, Fifth, Sixth, and Eighth Circuits on the second question presented. Pet. 31. At best, therefore, these alleged conflicts are new and involve only one court of appeals—the Second Circuit—in the minority column. Moreover, as explained

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[12] Cross-Petitioners argue that "the Second Circuit did not suggest that the Plan Administrator had failed to provide a considered interpretation of the Plan." Pet. 14. But they do not claim that the court of appeals determined that the plan administrator's new/alternative interpretation was *reasonable*. Nor could they. The court's opinion is silent on the issue.

in Section I, Cross-Petitioners rely on a fanciful interpretation of the opinion below to reach the conclusion that the Second Circuit has chosen to break with eight sister circuits on two different questions. At best, therefore, the alleged conflicts are uncertain. For these reasons, further percolation is desirable.

Finally, it is worth noting that the court of appeals explicitly held that Cross-Petitioners waived a portion of their argument. Pet. App. 10a ("Regarding the failure of the District Court to remand to the plan administrator, it does not appear from the record that [Cross-Petitioners] actually requested such relief from the District Court. As such, they have waived the issue for appeal.") *(citation omitted)*. Many ERISA cases will necessitate the collection of evidence by the plan administrator. Because of Cross-Petitioners' waiver, this case does not permit the Court to address the full contours of the questions presented.

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CONCLUSION

For the reasons stated herein, the Frommert Respondents and the Pietrowski Cross-Respondents respectfully request that the Cross-Petition be denied.

Respectfully submitted.

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