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,

Petitioners,

v.

PAUL J. FROMMERT, ET. AL.,

Respondents.

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

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF AND BRIEF OF BUSINESS ROUNDTABLE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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MOTION OF BUSINESS ROUNDTABLE FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* SUPPORTING PETITIONERS

Business Roundtable hereby respectfully moves for leave to file the attached brief as *amicus curiae* in this case. The consent of the attorney for petitioners was obtained, and consent of the attorney for approximately 60 of the respondents was obtained as well. Consent of the attorney representing the remaining respondents, however, was refused.

Business Roundtable is an association of chief executive officers of leading U.S. companies that, collectively, comprise nearly a third of the total value of the U.S. stock markets. This case presents whether a district court has any obligation to defer to an ERISA plan administrator's interpretation of plan terms when the interpretation relates to terms that were not considered during an administrative claim for benefits proceeding (*i.e.*, a claim that is processed pursuant to an ERISA plan's internal claims procedures). That issue is a matter of grave concern to *amicus*, whose members manage companies that maintain ERISA plans. Those plans, like most ERISA plans of large companies, are regularly the subject of litigation relating to the interpretation of their provisions. Plan administrators often are responsible for the interpretation of those ERISA plans, and that responsibility often extends to resolving ambiguities in the plan documents. The decision below undermines the traditional discretion of plan managers to interpret plan provisions to the maximum benefit of all plan participants and undercuts ERISA's goal of national uniformity. Accordingly, Business Roundtable and its members have a strong interest in, and a unique perspective on, issues

arising from the construction and operation of ERISA plans.

Business Roundtable participated in this case as *amicus curiae* in the U.S. Court of Appeals for the Second Circuit both before the panel and on rehearing. It respectfully requests that this Court grant it leave to continue its *amicus* participation in this case by filing the attached *amicus* brief in support of the petition for a writ of certiorari.

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other courts of appeals, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpretation of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.

2. Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other courts of appeals, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

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INTEREST OF *AMICUS CURIAE*

Business Roundtable is an association of chief executive officers of leading U.S. companies.[1] Together, those

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other

companies have $5 trillion in annual revenues and nearly 10 million employees. They comprise nearly a third of the total value of the U.S. stock markets and pay nearly half of all corporate income taxes paid to the federal government. Annually, they return $112 billion in dividends to shareholders and the economy. Business Roundtable is committed to advocating public policies that ensure vigorous economic growth, a dynamic global economy, and a well-trained and productive workforce, which is essential to future competitiveness. Business Roundtable companies give more than $7 billion a year in combined charitable contributions, representing nearly 60 percent of total corporate giving. They are technology innovation leaders, with more than $70 billion in annual research and development spending—more than a third of the total private R&D spending in the United States.

This case presents whether a district court may refuse to defer to the ERISA plan administrator's considered interpretation of an ambiguous term of an ERISA plan, and instead adopt its own reading of that term, simply because the administrator's interpretation was not issued in the course of processing a claim for benefits under the plan's internal claims procedures.[2] Business Roundtable's members have a profound interest in that issue. Members of Business Roundtable lead companies that manage ERISA plans. Under those ERISA plans, the plan administrator is often responsible for interpreting

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than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioner and respondents were notified of the intent to file this brief. The letters of those parties that consented to the filing of this brief have been filed with the Clerk's office; counsel for one group of respondents, however, declined consent.

[2] For purposes of this brief, the term "plan administrator" refers to any ERISA plan administrator, trustee, or other fiduciary who has been given the authority under the plan to interpret its terms.

ERISA plan documents, including the resolution of ambiguities within plan documents. Nonetheless, such plans—like most ERISA plans of large companies—are regularly the subject of litigation relating to the interpretation of their provisions.

If the ERISA plan delegates interpretive authority to the plan administrator, the administrator's interpretation has long been accorded deference by the courts. The decision below undercuts that traditional deference by refusing to defer to the plan administrator's construction except where that construction is issued in the context of a benefits determination under the plan's procedures. In adopting that approach, the decision eviscerates the ability of plan administrators to manage the plan equitably for the benefit of *all* plan participants. It guts the goal of nationwide uniformity, allowing federal district courts in hundreds of judicial districts to require different implementations of the same plan provisions based on different exercises of judicial "remedial" discretion. And it threatens to expose myriad daily decisions by plan administrators—all made outside formal plan benefits determinations—to replacement with judicial determinations even though the plan documents grant the plan administrator global authority to interpret plan terms and nowhere limit that authority to formal benefits determinations. Business Roundtable and its members have a strong interest in, and a unique perspective on, the issues presented in this case.

REASONS FOR GRANTING THE PETITION

This case presents issues of tremendous importance to ERISA plan participants, ERISA plan sponsors, and ERISA plan administrators. This Court has recognized that ERISA plans can grant the plan administrator authority to interpret the plan's terms. Where the plan documents provide that authority, the plan administra-

tor's interpretation of the plan is entitled to deference. See, *e.g.*, *Metropolitan Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2348 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-111 (1989). The Second Circuit's decision in this case creates an exception to that rule, declining deference to the plan administrator's interpretation of the plan where the interpretation is not offered in the course of processing a benefits claim under the plan's internal claims procedures. See Pet. App. 13a. Dismissing the administrator's interpretation as "mere opinion," the Second Circuit declined to require deference here because the interpretation was not "rendered" as a "decision" in a "benefits determination." *Ibid.* To make matters worse, the Second Circuit then ruled that the district court did not need to award benefits based on the proper construction of the plan, but could exercise "remedial discretion" to award *any* amount of benefits so long as the award is not "wholly unjust." *Id.* at 9a n.3, 13a.

Those holdings do not merely create conflicts with the decisions of other courts of appeals and this Court. They threaten severe disruption to the administration of ERISA plans generally. Plan administrators have numerous duties that frequently require them to interpret ambiguous provisions of the plan. Under the Second Circuit's rule, however, only interpretations of the plan made during an "original benefit determination[]" are entitled to deference. Pet. App. 13a. But plans such as the one at issue here grant the administrator broad discretionary authority to interpret the plan's terms generally—not merely in the context of processing formal benefits claims. The Second Circuit's decision, moreover, threatens to deny administrators the discretion they need to make myriad decisions to keep the plan operating, from the selection of intermediaries to the construction of investment restrictions. Outside the "benefit determination" context, the district court's construction—or its

"remedial discretion"—would control. That is impossible to reconcile with ERISA's goal of nationwide uniformity. It substitutes the potentially different exercises of discretion by district courts for the plan administrator's plan-wide construction of the plan. It could make plan administration impossible, subjecting plan administrators to competing requirements. And it threatens to require ERISA plan administrators to pay different benefits to plan participants based on the happenstance of where the claims were filed—which is precisely what happened here.

I. The Decision Below Conflicts With Longstanding Decisions From This Court And Other Courts Of Appeals

An ERISA plan administrator's interpretation of the provisions of the plan generally will be subject to *de novo* review in court, "unless the plan provides to the contrary." *Glenn*, 128 S.Ct. at 2348. Thus, where "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits *or to construe the terms of the plan*," *Firestone*, 489 U.S. at 115 (emphasis added), "'a *deferential standard* of review [is] appropriate,'" *Glenn*, 128 S.Ct. at 2348 (quoting *Firestone*, 489 U.S. at 111). In that circumstance, the plan administrator's "interpretation will not be disturbed if reasonable." *Firestone*, 489 U.S. at 111.

Here, there was no dispute that the relevant ERISA plan granted the plan administrator broad discretion to interpret the terms of the plan. See Pet. App. 78a, 141a-142a. The plan administrator twice exercised that discretion in this case. The plan administrator's original determination regarding plaintiffs' benefits claims was rejected by the courts because, according to the Second Circuit, it erroneously relied on a provision that was added to the plan after the relevant events took place. Pet. App. 24a; *id.* at 82a. Following that decision, the plan

administrator exercised his authority to interpret the plan once again, this time without relying on the inapplicable provision. That interpretation was presented to the courts "in briefs and at oral argument, in a sworn affidavit from the plan administrator, and in a written report and accompanying testimony from an independent actuary who analyzed the plan administrator's approach." Pet. App. 11a.

The court of appeals held, however, that the district court was not required to defer to the plan administrator's interpretation—which the court dismissed as a "mere opinion"—because that interpretation was not offered in the context of "render[ing] * * * the original benefit determinations." Pet. App. 13a. The court of appeals did not explain its reasoning. And its decision to arbitrarily restrict the requirement of deference to situations in which the interpretation is offered during an original benefits determination has no basis in law or logic. Indeed, the decision below directly conflicts with *Firestone* and *Glenn*, which made clear that the deference inquiry is governed entirely by *the terms of the plan*. If the plan provides the administrator with authority to interpret the plan generally, that interpretation is entitled to deference wherever plan interpretation is called for. See *Glenn*, 128 S. Ct. at 2348. Here, the plan expressly and expansively vested the administrator with the authority and obligation to interpret the plan; it did not distinguish between interpretations made in the context of benefits determinations and interpretations made in the myriad other situations in which the administrator may be called upon to construe ambiguous plan terms. Consequently, under the "straightforward rule of hewing to the directive of the plan documents," *Kennedy* v. *Plan Admin. for DuPont Sav. & Inv. Plan*, No. 07-636, __ S. Ct. __, slip op. at 14 (2009), *all* of the administrator's plan interpretations are entitled to deference—not just inter-

pretations given in a particular context or procedural posture as articulated post-hoc by different federal courts.

Court after court has come to precisely that conclusion. Analyzing *Firestone* and *Glenn*, those courts have found "no barrier to application of the arbitrary and capricious standard in a case * * * not involving a typical review of denial of benefits." *Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 711 (6th Cir. 2000). Indeed, at least six different circuits have analyzed the issue and concluded that deference to the plan administrator's interpretation is required (where provided by the plan) whenever a plan administrator must interpret ambiguous plan terms—not solely within the narrow benefits-determination context to which the decision below would confine it. See *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353 (11th Cir. 2008) (deference owed to plan administrator's determinations that are made during the course of benefits litigation); *Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004) (deference owed to plan administrator's claim of reimbursement and subrogation rights); *Hunter*, 220 F.3d at 712 (deference owed to a plan administrator's determinations to suspend benefits); *Sunbeam-Oster Co., Inc. Group Benefits Plan for Salaried & Non-Salaried Bargaining Hourly Employees* v. *Whitehurst*, 102 F.3d 1368, 1373 (5th Cir. 1996) (deference owed to plan administrator's claim of reimbursement and subrogation rights); *Moench* v. *Robertson*, 62 F.3d 553, 566 (3d. Cir. 1995) (deference owed to plan administrator's interpretation of plan's provisions pertaining to the investment of plan assets); *McDonald* v. *Provident Indem. Life Ins. Co.*, 60 F.3d 234, 235 (5th Cir. 1995) (deference owed in a breach of fiduciary duty matter relating to a plan administrator's selection of an insurance underwriter); *Izzarelli* v. *Rexene Prods. Co.*, 24 F.3d 1506, 1513 (5th Cir. 1994)

(deference owed to plan administrator's decisions regarding when valuations and contributions of employer stock would be made for an ERISA plan); *Baxter* v. *Lynn*, 886 F.2d 182, 187 (8th Cir. 1989) (deference "clearly applicable" to plan administrator's claim for subrogation). The decision in this case cannot be reconciled with those decisions. For that reason alone, further review is warranted.

II. The Decision Below Has Profoundly Negative Consequences For The Administration Of Large ERISA Plans

The decision in this case also fatally undermines important ERISA policies; threatens inconsistent and incoherent results in case after case; and has the potential to make ERISA benefits administration wholly unworkable.

A. Vesting The ERISA Plan Administrator With Authority To Interpret The Plan Is A Crucial Tool In Ensuring Uniform Plan Administration

As "this Court has emphasized," "ERISA's goal is * * * 'uniform national treatment of pension benefits.'" *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon*, 541 U.S. 1, 17 (2004) (quoting *Patterson* v. *Shumate*, 504 U.S. 753, 765 (1992)). The need for ERISA plans to be governed by uniform, national standards is not a convenience but a necessity. Many of the companies run by Business Roundtable members administer ERISA plans that must serve tens of thousands of employee-participants spread across numerous States. ERISA plans could not operate efficiently, and large businesses could not responsibly sponsor them, if they had to comply with different rules and potentially provide different benefits to members merely because they reside in a different location or judicial district.

Discussion of "uniformity" under ERISA frequently focuses on ERISA's preemption provision, 29 U.S.C. § 1144(a), which prohibits state regulation of employee benefit plans so as to ensure that "an employer's administrative scheme" will not be subject to a patchwork of state laws imposing "conflicting requirements." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 10 (1987). From a practical perspective, however, the requirement that federal courts defer to the plan administrator's interpretation of the plan is equally critical to ensuring nationwide uniformity. When companies vest their plan administrator with interpretive authority, they are entitled to expect that, consistent with *Firestone* and *Glenn*, the administrator's reasonable "interpretation will not be disturbed"—regardless of which of our 678 federal district court judges the case happens to draw. *Firestone*, 489 U.S. at 111; see also *Glenn*, 128 S. Ct. at 2348. Allowing each district court to disregard the administrator's interpretation of the plan's terms and conduct its own *de novo* review of the language (or exercise broad discretion) creates an unacceptable—and entirely unnecessary—risk that plan administrators will be faced with irreconcilable interpretations of the plan.

B. The Decision Below Eviscerates The Uniformity Of Plan Interpretation That Is Essential To Countless Plan Administrator Decisions Beyond Benefits Determinations

The decision below declined to defer to the ERISA plan administrator's interpretations of the plan because that interpretation was not offered within the context of the "original benefit determination[]." Pet. App. 13a. Plan administrators, however, are called upon to interpret the terms of the plan in countless ways outside the context of benefits determinations, and they are frequently required to defend those interpretations in the district courts. The need for uniform interpretation of

the terms of an ERISA plan is no less crucial—and the logic behind deferring to the plan administrator's interpretation of the plan is no less forceful—simply because the interpretive issue arises outside the context of a benefits determination.

For example, plan administrators must interpret ERISA plan provisions with respect to the investment of plan assets. Such provisions often are set forth in an investment policy statement, which addresses the plan administrator's responsibilities with regard to selecting investments, as well as engaging third-party service providers to assist the administrator with respect to its responsibilities of administering the plan. Uniform interpretation of the plan's investment policy is, for obvious reasons, absolutely critical. An employee stock bonus plan under ERISA simply cannot function if a district court in Texas finds that the plan requires 100% of the plan investments to be in the employer's stock, while another district court in Florida finds that, under the same language of the same plan, the plan administrator breaches her fiduciary duties if she fails to diversify the plan's investments. While challenges to a plan administrator's investment decisions are frequently asserted as breach-of-fiduciary duty claims, they do not arise within the context of original benefits determinations. See *Moench*, 62 F.3d at 556; *Armstrong* v. *LaSalle Bank Nat'l Ass'n*, 446 F.3d 728, 733 (7th Cir. 2006). Under the decision below, district courts adjudicating those suits would not be required to defer to the plan administrator's interpretation of the plan's investment policy. That does not merely create a grave risk of liability that makes ERISA plans unattractive. It also makes it inevitable that different adjudicators will at some point exercise their *de novo* review authority (or their discretion) and impose irreconcilable investment duties on the plan.

Plan administrators likewise are often required to construe plan provisions when deciding whether to seek subrogation and reimbursement from plan participants. In that context too, the decision below guts the traditional deference accorded to the administrator's construction. Subrogation and reimbursement decisions are never made as part of a benefits determination. To the contrary, a plan's claims for subrogation and reimbursement can only be asserted in an action that post-dates the original benefits determination. See, *e.g.*, *Wal-Mart Assocs.*, 393 F.3d at 1123; *Sunbeam-Oster Co.*, 102 F.3d at 1373; *Baxter*, 886 F.2d at 187 (subrogation and reimbursement claims brought by plan in separate civil action). Once again, refusing deference merely because the decision is not made in a formal benefits determination proceeding is at war with the plan documents and the goal of uniformity. The plan gives the administrator general authority to construe plan terms—not just those related to the payment of benefits. And uniformity suffers where a judge in one district can agree with the plan administrator's construction that she can seek reimbursement for funds paid to an otherwise insured plan participant, while yet another judge exercises his own judgment to conclude that the administrator has no right under that same plan language to reimbursement from a similarly situated plan participant.

The issue is thus extraordinarily important and frequently recurring. Time and again, in context after context, administrators are called upon to interpret the terms of the plan outside the context of a benefits determination, such as in selecting an insurance underwriter for the plan, see *McDonald*, 60 F.3d at 235; determining when valuations and contributions of employer stock must be made, see *Izzarelli*, 24 F.3d at 1522; and determining when and how it is appropriate to suspend benefits, see *Hunter*, 220 F.3d at 712. All of those (and

countless other) decisions may be the subject of litigation outside of a benefits determination. Yet, under the decision below, a district court would owe no deference to the plan administrator's interpretation of the plan in any of those contexts. Large ERISA plans simply cannot function when there is no assurance of uniformity in the interpretation of—and no uniform respect for the administrator's interpretation of—the plan's provisions.

III. The Impact Of The Court Of Appeals' Decision Is Exacerbated By Its Deference To District Court "Discretion"

At the same time the Second Circuit circumscribed the deference owed to the plan administrator's interpretation of an ERISA plan, it expanded the discretion of district courts to impose their own, competing constructions. A district court's decision to require benefits payments, the Second Circuit held, cannot be overturned except in the instance of an "excess of allowable discretion." Pet. App. 8a. That not only increases the likelihood that district courts will reach inconsistent interpretations of ERISA plan provisions. It also severely limits the ability of the courts of appeals to correct those inconsistencies and restore uniformity. That ruling, moreover, conflicts with the decisions of other circuit courts, which have recognized that a district court's interpretation of an ERISA plan is subject to *de novo* review in the courts of appeals.

This action was brought under ERISA § 502(a)(1)(B), which provides a cause of action "for the benefits due under the terms of the plan." Pet. App. 53a. As ERISA's text makes clear, such a claim requires courts to determine what benefits are "due to [the beneficiary] *under the terms of his plan*," to construe the scope of "his rights *under the terms of the plan*," or to decide the "rights to future benefits *under the terms of the plan*." 29 U.S.C. § 1132(a)(1)(B) (emphasis added). A § 502(a)(1)(B) claim for benefits "under the terms of the plan" is therefore

treated as akin to "the assertion of a contractual right," *Devlin* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 76, 82 (2d Cir. 2001), and is governed by a uniform "federal common law of contract" derived from "general principles of contract law and * * * ERISA's purposes," *Feifer* v. *Prudential Ins. Co.*, 306 F.3d 1202, 1210 (2d Cir. 2002). Consistent with those principles, court after court has agreed that a *district court's* construction of a plan, and its determination of benefits due "under the terms of the plan," are legal determinations that are reviewed *de novo* on appeal. *Hineman* v. *Long Term Disability Plan of E*Trade Group, Inc.*, No. 07-55079, 2008 WL 2164336, at *1 (9th Cir. 2008); *Donovan* v. *Eaton Corp. Long Term Disability Plan*, 462 F.3d 321, 326 (4th Cir. 2006); *Moriarty* v. *Svec*, 233 F.3d 955, 962 (7th Cir. 2000).

The decision below squarely conflicts with those decisions. The court of appeals refused to review the district court's benefits determination by asking whether it reflected the *best* construction of the allegedly ambiguous plan terms. Instead, the panel held that the district court's determination would be reviewed for an abuse of "allowable discretion," and sustained unless "wholly unjust." Pet. App. 8a-10a & n.3. But § 502(a)(1)(B) does not provide for a suit for benefits in an amount that is not "wholly unjust." It provides for a suit for benefits due "under the terms of the plan." The issue is not the proper remedy for an ERISA violation, such as a breach of fiduciary duty. The question is the amount of benefits the plan provides for. That is a question of law that must be reviewed *de novo* on appeal.

The Second Circuit's decision affording district courts "remedial" discretion to award benefits is fatal to the interest of national uniformity ERISA was meant to foster. Under that decision, two district courts could interpret the same plan provision so as to impose conflicting obligations upon a plan administrator, and a court of

appeals would be powerless to resolve that conflict so long as each district court's interpretation, taken on its own, did not constitute an "excess of allowable discretion," *i.e.*, was not "wholly unjust." Pet. App. 8a. That decision is inconsistent with the very purpose of ERISA and turns ERISA's promise of uniformity and manageability into an illusion.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, the petition for a writ of certiorari should be GRANTED.

Respectfully submitted.

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