No. 08-

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

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 Circuits, 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 other Circuits, 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.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioners in this case are present or former Xerox Corporation Pension Plan Administrators Sally L. Conkright, Patricia M. Nazemetz, and Lawrence M. Becker, as well as the Xerox Corporation Retirement Income Guarantee Plan. None of the Petitioners is a corporation, and, therefore, no Petitioner has issued any stock that is owned by any publicly-traded company. Xerox Corporation, which is no longer a party to this case, is a publicly-held company.

The Respondents in this case are Paul J. Frommert, 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. McMillian, Dennis E. Baines, 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,

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL RULES AND STATUTES

MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The 2008 opinion of the Second Circuit is reported at 535 F.3d 111. (Pet App. 1a-21a.) The 2006 opinion of the Second Circuit is reported at 433 F.3d 254. (*Id.* at 22a-60a.) The opinion of the District Court on summary judgment is reported at 328 F. Supp. 2d 420. (*Id.* at 61a-98a.) The District Court's remedies opinion is reported at 472 F. Supp. 2d 452. (*Id.* at 99a-128a.)

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2008. (*Id.* at 2a.) The court of appeals denied a petition for rehearing on September 25, 2008. (*Id.* at 129a-31a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 28 U.S.C. § 1291.

STATUTES INVOLVED

Sections 502(a)(1)-(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)-(3), is reprinted in the appendix. (*Id.* at 132a-33a.)

STATEMENT OF THE CASE

Petitioners are the Xerox Corporation Retirement Income Guarantee Plan (the "Plan") and present or former Plan Administrators. Respondents are participants in the Plan who successfully challenged

one of the Plan's provisions as not having been lawfully added to the Plan until 1998. As a result of Respondents' successful challenge, the courts below were required to determine the benefits due to Respondents under the remaining terms of the Plan. In reviewing the District Court's interpretation of the remaining Plan provisions, the Second Circuit made two significant errors that warrant this Court's review.

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. That holding squarely conflicts with decisions of this Court and other Circuits. It also has dramatic consequences under ERISA because plan administrators frequently interpret plans outside the context of administrative claims proceedings.

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. That holding creates the untenable prospect that the very same plan will be subject to different "reasonable" interpretations rendered by different courts. It also departs from overwhelming precedent holding that appellate courts owe no deference to a district court's interpretation of the terms of a plan.

Review is warranted because the Second Circuit's decision critically undermines important ERISA principles. A paramount goal of ERISA is the uniform and consistent administration of employee benefit plans. Because such plans are provided by employers voluntarily, ERISA was designed in part to ensure that administrative expense and litigation uncertainty do not discourage employers from offering them at all. *See Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996). The principal means by which ERISA ensures uniform national plan administration and protects employers from surprising or contradictory plan interpretations is deference to the reasonable decisions of plan administrators. Review is warranted because the Second Circuit's errors thwart these principles.

1. The Xerox Plan. The Plan provides benefits pursuant to a so-called "floor-offset" arrangement – an arrangement that guarantees employees a floor benefit that limits their exposure to investment losses in their individual retirement accounts while allowing them to benefit from their accounts' investment gains.

Under a typical floor-offset arrangement, employees participate in both a defined benefit plan and a defined contribution plan.[1] The defined benefit

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[1] In a defined contribution plan, such as a so-called 401(k) plan, an employee's benefit consists solely of the plan assets allocated to the employee's individual account, including any investment gains or losses. *See* 29 U.S.C. § 1002(34). In a defined benefit plan, an employee receives a guaranteed benefit – typically calculated by reference to the employee's age, years of service,

plan specifies a minimum level of benefits, or "floor," to which employees are entitled based on their service to the employer. The value of the defined benefit floor is reduced, or "offset," by the pension attributable to the employee's individual defined contribution account. Thus, if the defined contribution account would provide a pension that is equal to or greater than the employee's defined benefit, the employee receives a benefit only from the defined contribution plan.[2] *See generally Lunn* v. *Montgomery Ward & Co., Inc.*, 166 F.3d 880, 881 (7th Cir. 1999) (describing the operation of floor offset arrangements).

Respondents are current or former employees of Xerox who worked for Xerox for a period of time, left Xerox's employ, and later were rehired by Xerox. (Pet. App. 25a.) When their first period of employment with Xerox ended, each Respondent received a lump sum distribution of benefits from the Plan. (*Id.*) Respondents resumed earning benefits after they were rehired. (*Id.*)

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and salary – in an amount that is specified by the terms of the plan. *See id.* § 1002(35).

[2] In this case, the Plan provides that an employee's total pension benefit shall come, first, from the employee's individual defined contribution account and, second, shall be augmented by the amount (if any) required to bring the employee's benefit up to the floor specified by one of two potentially applicable formulas under the defined benefit portion of the arrangement. (*See id.* at 134a-41a.)

In calculating the floor benefits due to these rehired employees upon retirement, the Plan takes account of *all* of their service to Xerox – including service rendered during their first period of employment. (*Id.* at 25a-26a.) Unless this floor benefit is adjusted to take into account the lump sum payments that these employees received based on their original periods of service, such employees would receive double credit for that initial service. Thus, the Plan provides that the pension benefits of rehired employees must be reduced by the value of their initial lump sum distributions.

Two Plan provisions address this reduction. The first provision, known as the "non-duplication of benefits" provision, states that the pension benefit for an employee who previously received a lump sum distribution "shall be offset by the *accrued benefit* attributable to such distribution." (*Id.* at 141a (emphasis added).) "Accrued benefit" is a defined term under the Plan. (*Id.* at 134a-35a.) The second provision, which the Second Circuit referred to as a "phantom account" offset provision, specifies a further refinement in the way that the non-duplication of benefits provision is applied. (*See id.* at 4a-5a.)

This petition arises from a dispute about how the Plan should be construed taking account of the non-duplication of benefits provision, but without reference to the so-called "phantom account" offset provision.

2. In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 111 (1989), this Court held that if an

ERISA plan grants the plan administrator discretionary authority to construe the terms of the plan, the administrator's interpretation of plan language is entitled to deference.

Here, the Plan expressly vests the Plan Administrator with broad discretionary authority, including authority to "[c]onstrue the Plan." (*Id.* at 142a.) A 1993 Plan Restatement clarifies that this authority includes the power to "resolve any ambiguity with respect" to the Plan. (*Id.* at 78a.) Nothing in the Plan limits this authority to interpretations rendered in the context of an administrative determination of the benefits due to participants or withdraws it when it is exercised in litigation.

3. The *Frommert* Lawsuit. Respondent Frommert wrote to the Plan Administrator in 1996 regarding his projected retirement benefit, which had been reduced to take account of a prior lump sum distribution he received. (*Id.* at 74a.) The Plan Administrator deemed Frommert's letter to be a request for additional benefits, which it denied on the ground that his benefit had been properly calculated in accordance with the Plan's so-called "phantom account" offset provision and other applicable provisions. (*See id.*) Frommert subsequently filed an administrative appeal of the denial of his benefits claim, which was also timely denied. (*Id.*)

In November 1999, Frommert and a number of other Respondents filed the instant lawsuit, which challenged the lawfulness of the so-called "phantom

account" offset provision. (*Id.* at 74a-75a.) On July 30, 2004, the District Court granted Petitioners' motion for summary judgment, thereby rejecting Respondents' claim. (*Id.* at 98a.)

On January 6, 2006, the Second Circuit issued an opinion reversing the District Court in part ("*Frommert I*"). The Second Circuit held that the Plan was not properly amended to include the so-called "phantom account" offset provision until 1998, when adequate notice of its terms was provided to plan participants. (*Id.* at 49a.) Its holding, however, did not disturb the non-duplication of benefits provision, which Respondents never challenged.

The Second Circuit remanded the case to the District Court with instructions to "utilize an appropriate pre-amendment calculation to determine [Respondents'] benefits." (*Id.* at 51a.) As the Second Circuit explained, in order to "fashion[] the appropriate remedy," the District Court would need to determine, under the "pre-amendment terms of the Plan" – that is, pursuant to the non-duplication of benefits provision and other remaining Plan provisions – "how prior distributions were to be treated." (*Id.*)

At the same time, the Second Circuit affirmed in relevant part the District Court's dismissal of Respondents' claim for equitable relief pursuant to ERISA § 502(a)(3), 29 U.S.C § 1132(a)(3), which generally is unavailable where another provision of ERISA provides an adequate remedy. (*Id.* at 53a-55a.) The Second Circuit rejected Respondents' claim for equitable relief because the relief they sought –

"recalculation of their benefits consistent with the terms of the Plan" – "falls comfortably within the scope of § 502(a)(1)(B)," 29 U.S.C. § 1132(a)(1)(B), which allows a plan participant to sue for "the benefits due him under the terms of his plan." (*Id.* at 53a.)

4. Proceedings On Remand. On remand, the District Court requested that the parties present evidence regarding the proper calculation of benefits for rehired employees under the pre-amendment terms of the Plan. Pursuant to his discretionary authority to construe the Plan, the Plan Administrator responded by formally submitting his interpretation of those terms to the District Court. (*Id.* at 144a-54a.)

According to the Plan Administrator, the non-duplication of benefits provision, taken together with the Plan's definition of the term "accrued benefit," has a clear and discernable meaning: it requires that the benefits of rehired employees be offset by the present-day economic value, or "actuarial equivalent," of the employees' initial lump sum distributions. (*See id.* at 147a-52a.)[3] The Ninth

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[3] Two different types of benefits (*e.g.*, a lump sum benefit and a life annuity) are "actuarially equivalent" if they have the same present value. *See* 26 C.F.R. § 1.401(a)(4)-12 (2008). Here, the Plan specifies that the "accrued benefit" attributable to an employee's defined contribution account is an actuarially equivalent annuity. Specifically, in calculating an employee's "accrued benefit" at retirement, the employee's defined contribution account (which is named the "Transitional Retirement Account") must be expressed as the annuity that could be purchased with the account using interest rate

Circuit upheld this method of calculating rehired Xerox employees' benefits as lawful and proper in another case involving the Xerox Plan. *See Miller* v. *Xerox Corp. Ret. Income Guar. Plan*, 464 F.3d 871, 875-76 (9th Cir. 2006).

The District Court nonetheless rejected this interpretation. According to the District Court, in light of the "not-very-clear language" in the pre-amendment Plan, the "ambiguity as to th[e] [offset calculation] formula . . . must be resolved in favor of the employee." (*Id.* at 107a.) The District Court therefore held that Respondents' benefits may be offset only by the *nominal* amounts of their initial lump sum distributions rather than their present-day actuarial equivalent. (*Id.* at 8a-9a.) As even Respondents' own expert recognized, however, merely offsetting by the nominal amounts of the prior distributions – as opposed to their equivalent in today's dollars – confers an enormous windfall on rehired employees by failing to account for the time value of money. (*Id.* at 156a-58a.)

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assumptions established by the Pension Benefit Guarantee Corporation. (*See* Pet. App. 26a-27a; *id.* at 141a.) The Plan Administrator accordingly interpreted the non-duplication of benefits provision – which states that the pension benefit for an employee who previously received a lump sum distribution "shall be offset by the accrued benefit attributable to such distribution" – to require an offset equal to the annuity that is actuarially equivalent to the prior lump sum distribution (using Plan-specified interest rate and mortality assumptions). (*Id.*; *id.* at 147a-52a.)

5. The *Frommert II* Decision. On appeal from the District Court's remedies opinion, the "basic question" reviewed by the Second Circuit was how to ensure that Xerox employees rehired prior to 1998 "received their due benefits in light of the ambiguous non-duplication of benefits provision." (*Id.* at 8a.) Petitioners argued that, in answering this question, the District Court should have deferred to the Plan Administrator's reasonable interpretation of the Plan provisions. (*Id.* at 10a.) The Second Circuit rejected that argument in an opinion issued on July 24, 2008.

The Second Circuit recognized that where, as here, an ERISA plan administrator is given "discretionary authority to 'construe the terms of the plan,'" the administrator's interpretation of plan language is entitled to deference. (*Id.* at 12a-13a.) The Second Circuit further acknowledged that the Plan Administrator's views were so thoroughly presented to the District Court that "nothing . . . might have been gained by the District Court's remanding the matter to the plan administrator" to provide him with an opportunity to interpret the Plan provisions. (*Id.* at 11a.)

The Second Circuit observed that there were "several reasonable alternatives" for construing the non-duplication of benefits provision, and it never suggested that the Plan Administrator's interpretation was not among these reasonable alternatives. (*Id.* at 13a-14a.) It nonetheless held that the District Court was not obliged to defer to the Plan Administrator's considered interpretation of the Plan language in question. (*Id.* at 13a.) According to the Second Circuit, the interpretation of the Plan

offered on remand was a "mere *opinion*" of the Plan Administrator to which no deference was due because it was not part of the original benefits decision made in response to Respondents' administrative challenges to their benefit calculations. (*See id.* (withholding *Firestone* deference because the District Court "had no decision to review because the plan administrator never rendered any decision other than the original benefit determinations").)

In addition to holding that the District Court had no obligation to defer to the Plan Administrator's construction of the Plan, the Second Circuit also held that *it* was required to defer to the District Court's interpretation. (*Id.*) Rather than review *de novo* the District Court's determination of the "proper level of pension benefits" under the terms of the Plan, the Second Circuit stated that it would review the District Court's interpretation of the Plan only "for an excess of allowable discretion," and thus affirmed the District Court's interpretation as "one reasonable approach among several reasonable alternatives." (*Id.* at 8a; *id.* at 13a-14a.)

REASONS FOR GRANTING THE WRIT

I. The Second Circuit Decision Conflicts with Supreme Court and Circuit Authority Regarding the Deference Owed to Plan Administrators.

In a line of cases involving ERISA plans, this Court has held that when a plan grants a plan administrator the authority to interpret the terms of the plan, the administrator's interpretation of plan

language is entitled to deference. *See, e.g.*, *Metropolitan Life Ins. Co.* v. *Glenn*, 128 S. Ct. 2343, 2350-52 (2008); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110-11 (1989). The Second Circuit carved out a broad exception to this rule: it held that no deference is due to a plan administrator's interpretation of plan language when the administrator interprets the plan outside of the plan's administrative claims process. That holding conflicts with decisions of other courts of appeals and with this Court's decisions in *Firestone* and *Glenn*.

Review should be granted to resolve this Circuit conflict, to ensure that the Second Circuit's decision does not thwart this Court's recent decision in *Glenn*, and to vindicate ERISA's fundamental goal of assuring uniform and consistent interpretations of ERISA plans.

A. The Second Circuit Decision Conflicts with Decisions of Other Circuits.

In the wake of this Court's decision in *Firestone*, most courts have held that *Firestone* deference applies to a plan administrator's interpretation of plan language regardless of the particular forum in which the plan administrator offers its interpretation. Accordingly, the courts of appeals for the Third, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits have held that *Firestone* deference applies to plan administrator interpretations offered in a variety of contexts other than administrative determinations of participants' benefits. *See Oliver* v. *Coca Cola Co.*, 546 F.3d 1353, 1354 (11th Cir. 2008)

(holding that a district court must defer to a plan administrator's reasonable interpretation of plan terms offered in the course of litigation); *Admin. Comm. of Wal-Mart Assocs. Health & Welfare Plan* v. *Willard*, 393 F.3d 1119, 1123 (10th Cir. 2004) (deferring to plan administrators' interpretation of a reimbursement and subrogation provision advanced by the administrator in action against plan beneficiary brought pursuant to that provision); *Worthy* v. *New Orleans Steamship Assoc.*, 342 F.3d 422, 427-28 (5th Cir. 2003) (granting deference to trust administrator's interpretation of trust language rendered in ERISA suit alleging that the trust administrator breached his duties under the trust); *Hunter* v. *Caliber Sys., Inc.*, 220 F.3d 702, 711 (6th Cir. 2000) (finding "no barrier to application of the [*Firestone*] arbitrary and capricious standard in a case . . . not involving a typical review of denial of benefits" and thus deferring to an interpretation of the plan expressed by means of a plan amendment); *Harte* v. *Bethlehem Steel Corp.*, 214 F.3d 446, 448, 450 (3d Cir. 2000) (upholding plan administrator's interpretation of a plan document as reasonable based on the deposition testimony of the plan administrator).

In conflict with these decisions, the decision below holds that *Firestone* deference applies only when a plan administrator offers its interpretation of the plan in the course of an administrative determination of a participant's benefit.

1. It is undisputed that the Plan at issue here grants "broad authority to the administrator to interpret the provisions of the Plan." (Pet. App. 78a.)

It is also undisputed that the Plan Administrator provided the District Court with a considered interpretation of the Plan provisions at issue 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." (*Id.* at 11a.) The Second Circuit nonetheless held that the District Court had no obligation to defer to what it characterized as the "mere *opinion*" of the Plan administrator. (*Id.* at 13a.)[4]

In denigrating the Plan Administrator's interpretation as a mere opinion to which no deference was due, the Second Circuit did not suggest that the Plan Administrator had failed to provide a considered interpretation of the Plan. To the contrary, the Second Circuit acknowledged that the Plan Administrator had placed his interpretation of the Plan before the District Court so thoroughly that "nothing" would have been gained by remanding

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[4] It 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 in *Frommert I*. In *Frommert I*, the Second Circuit held that the so-called "phantom account" offset provision had not properly been added to the Plan until 1998, and therefore could not validly be applied to pre-1998 rehires. (Pet. App. 49a.) Accordingly, it remanded to the District Court with instructions to interpret the "pre-amendment terms of the Plan" – *i.e.*, to interpret the non-duplication of benefits provision and the other remaining Plan terms in the absence of the so-called "phantom account" offset provision. (*Id.* at 51a.)

the matter to the Plan Administrator for further administrative proceedings. (*Id.* at 11a.)

Rather, the Second Circuit dismissed the Plan Administrator's interpretation of the pre-amendment terms of the Plan because it was not rendered in the course of a "benefit determination[]." (*Id.* at 13a.) In the Second Circuit's view, this meant that the District Court had only an "opinion" of the Plan Administrator, not a "decision" to review for an abuse of discretion. (*Id.*) The Second Circuit thus carved out an unwarranted exception to the usual rule of *Firestone* deference for plan administrator interpretations offered outside the course of administrative benefit determinations.[5]

2. In conflict with the Second Circuit's decision, each of the court of appeals decisions noted above (at pp. 12-13) holds that *Firestone* deference *does* apply outside the context of an administrative claim for

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[5] The Second Circuit also implied that it was appropriate to construe the "ambiguous" Plan terms in favor of Respondents pursuant to the *contra proferentem* doctrine. (Pet. App. 13a-14a.) As the Second Circuit has itself acknowledged, however, "application of the rule of *contra proferentem* is limited to those occasions in which th[e] Court reviews an ERISA plan *de novo*." *Pagan* v. *NYNEX Pension Plan*, 52 F.3d 438, 443-44 (2d Cir. 1995); *accord Kimber* v. *Thiokol Corp. Disability Benefit Plan*, 196 F.3d 1092, 1100 (10th Cir. 1999); *Morton* v. *Smith*, 91 F.3d 867, 871 n.1 (7th Cir. 1996); *Winters* v. *Costco Wholesale Corp.*, 49 F.3d 550, 554 (9th Cir. 1995). Thus, the Second Circuit's invocation of *contra proferentem* was a direct *result* of its erroneous holding that the Plan Administrator was not entitled to deference, *not* an independent basis upon which to deny deference.

benefits. The conflict is particularly stark with respect to the Eleventh Circuit's decision in *Oliver* v. *Coca-Cola Co.*, 546 F.3d at 1354.

In *Oliver*, after finding that the plan administrator's denial of benefits violated the applicable arbitrary and capricious standard of review, *see* 497 F.3d 1181, 1195-96 (11th Cir. 2007), the Eleventh Circuit remanded to the district court for a remedies calculation based on the terms of the plan, *see* 546 F.3d at 1354. As the Eleventh Circuit explained, because the participant's benefits claim had initially been denied, the plan administrator had not yet had an opportunity to interpret the plan provisions governing the calculation of the participant's benefit. *See id.* at 1353-54. The Eleventh Circuit, therefore, instructed the district court to receive evidence from the plan administrator regarding its interpretation of the plan and *to apply the deferential standard of review articulated by this Court in Glenn when considering that interpretation on remand. See id.* at 1354.

Oliver requires *Firestone* deference to the plan administrator's interpretation of an ERISA plan even when the plan administrator offers its interpretation in litigation, and in particular, following a remand from a court of appeals. Here, by contrast, the Second Circuit followed the opposite approach under very similar circumstances. Specifically, after holding in *Frommert I* that the Plan Administrator could not apply the so-called "phantom account" offset provision to employees rehired prior to 1998, the Second Circuit held that the Plan Administrator's interpretation of the

remaining Plan terms offered on remand was entitled to *no* deference because it was not offered in the course of an administrative determination of the participants' benefits.

This Court should grant the petition to resolve the conflict between *Oliver* and the other court of appeals decisions deferring to plan administrator interpretations rendered outside the context of administrative claims for benefits, on the one hand, and the decision of the Second Circuit denying deference in such cases, on the other.

B. The Second Circuit's Decision Conflicts with This Court's Decisions in *Firestone* and *Glenn*.

1. In *Firestone*, this Court observed that "ERISA abounds with the language and terminology of trust law," and concluded that it "should be guided by principles of trust law" in "determining the appropriate standard of review" in cases seeking an award of benefits due under the terms of an ERISA plan. 489 U.S. at 110-11. Trust law, moreover, counsels that "[a] trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable." *Id.* at 111; *accord* Restatement (Second) of Trusts § 187 (1959) ("Where discretion is conferred upon the trustee with respect to the exercise of a power, its exercise is not subject to control by the court, except to prevent an abuse by the trustee of his discretion."). This Court therefore concluded that in an ERISA benefits action, if the plan gives the administrator "discretionary authority

to . . . construe the terms of the plan," courts must defer to any reasonable interpretation of ambiguous plan terms offered by the administrator. *Firestone*, 489 U.S. at 115.

The Second Circuit's denial of *Firestone* deference to plan administrator interpretations that are rendered outside the context of administrative claims for benefits is fundamentally at odds with *Firestone*. *Firestone* drew no distinction between plan interpretations that are rendered in an administrative claims process and interpretations that are rendered in other contexts. To the contrary, *Firestone* holds that the source of the deference accorded to a plan administrator's interpretation of plan documents is *the text of the plan documents themselves* – just as the deference due to a trustee's interpretation of a trust is derived from the trust documents themselves. *See id.* at 111 ("Whether 'the exercise of a power is permissive or mandatory depends upon the terms of the trust.'" (quoting 3 W. Fratcher, Scott on Trusts 187, p. 14 (4th ed. 1988))). Here, the text of the Plan grants the Plan Administrator authority to construe the Plan regardless of the particular forum in which that construction is offered. Nothing in the text of the Plan indicates that deference is limited to constructions rendered during an administrative claims process. (*See* Pet. App. 141a-42a.)

In rejecting the rule of *Firestone* deference for plan interpretations offered outside of an administrative claims proceeding, the Second Circuit also overlooked this Court's earlier decision in *Central States, Southeast & Southwest Areas Pension*

Fund v. *Central Transport, Inc.*, 472 U.S. 559 (1985). There, this Court deferred to a plan administrator's considered views presented for the first time in the course of litigation. *See id.* at 568 (awarding "significant weight" to an ERISA trustee's interpretation of the trust document covering a multi-employer plan and therefore holding that the trustee was entitled to audit the records of a participating employer).

2. If there were any room for doubt about whether the Second Circuit's decision conflicts with *Firestone*, it was eliminated by this Court's recent decision in *Glenn*. That case followed *Firestone* in holding that courts "should analogize a plan administrator to the trustee of a common-law trust" in determining the appropriate standard of review for ERISA benefits claims. *Glenn*, 128 S. Ct. at 2347. Thus, where a plan grants its administrator discretionary authority to construe the terms of the plan, *Glenn* reaffirms that "'[t]rust principles make a *deferential standard* of review appropriate.'" *Id.* at 2348 (emphasis in original) (citations omitted).

Glenn makes doubly clear what should have been apparent from *Firestone*: judicial deference to a plan administrator's interpretation of an ERISA plan flows from the common law of trusts and the terms of the underlying plan documents. *See id.* The Second Circuit nonetheless devised a broad exception to the usual rule of *Firestone* deference that had no basis in the terms of the Plan or the law of trusts.[6] The

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[6] There is no analogue to an administrative claims proceeding for common-law trusts. A trust beneficiary who disagrees with

Second Circuit did not explain precisely *why* an interpretation of a plan offered in litigation deserves no *Firestone* deference, but the only apparent rationale for such a conclusion is a conflict of interest rationale: an interpretation offered in the course of litigation might be thought to be tainted by a conflict of interest.

Glenn specifically rejected this rationale, as well as the Second Circuit's general approach of devising arbitrary tests for limiting the scope of *Firestone* deference. In *Glenn*, the Court considered whether a plan administrator's interpretation of an ERISA plan is still entitled to deference when the plan administrator is acting under a conflict of interest. In the wake of the *Firestone* decision, several courts of appeals had devised elaborate tests for determining when a conflict of interest purportedly requires a court to deny *Firestone* deference to a plan administrator's interpretation of an ERISA plan.[7]

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the trustee's interpretation of the trust instrument would need to challenge that interpretation in court, and the trustee's interpretation would be given deference in that proceeding. *See generally Firestone*, 489 U.S. at 110-11. Thus, the Second Circuit's holding that a plan administrator's interpretation of a plan is not entitled to deference unless it is articulated in an administrative claims proceeding is inconsistent with the common law of trusts.

[7] For instance, the Second Circuit held that if "the administrator was in fact influenced by [a] conflict of interest, the deference otherwise accorded the administrator's decision drops away and the court interprets the plan *de novo*." *Sullivan* v. *LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1255-56 (2d Cir. 1996); *see also Fought* v. *UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006-07 (10th Cir. 2004) (holding that administrators

Glenn rejected such tests as unjustified departures from *Firestone*. *See Glenn*, 128 S. Ct. at 2350-52. In doing so, this Court warned against the use of "talismanic" rules and formulas as a substitute for the art of judging. *See id.* at 2352 (quoting *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 489 (1951)). Accordingly, it held that a conflict of interest does not support a change in the standard of review "from deferential to *de novo*," but instead is simply a "factor" that courts should consider in determining whether a plan administrator has abused its *Firestone* discretion. *Glenn*, 128 S. Ct. at 2350.

The Second Circuit here did precisely what this Court prohibited in *Glenn*: it invented an arbitrary test for stripping away *Firestone* deference from a plan administrator's interpretation of an ERISA plan. Moreover, if an actual conflict of interest is merely a factor to consider in determining whether a plan administrator has abused its *Firestone* discretion, then it follows *a fortiori* that the particular forum in which the plan administrator offers its interpretation of the plan is likewise no more than a factor to consider – *not* a basis for denying deference altogether.

3. Supreme Court review should be granted to eliminate the conflict between the Second Circuit

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acting under a possible conflict of interest have the burden of showing that their decision to deny disability benefits is supported by substantial evidence); *Pinto* v. *Reliance Standard Life Ins. Co.*, 214 F.3d 377, 393 (3d Cir. 2000) (holding that the possibility of a conflict of interest triggers a sliding scale standard of review).

decision and this Court's decisions in *Firestone* and *Glenn*. In the absence of such review, the Second Circuit's decision threatens to nullify the deferential standard of review that this Court sought to implement in *Glenn* and resurrect the practice of devising arbitrary tests for withdrawing *Firestone* deference.

Alternatively, this Court should grant the petition, vacate the Second Circuit's order, and remand this case in light of *Glenn*. The Second Circuit issued its opinion only a few weeks after *Glenn* was decided, and the Second Circuit's opinion gives no indication that the court had reviewed or considered *Glenn* at the time it issued its decision. A remand would be appropriate because there is a reasonable probability that the Second Circuit would reconsider its opinion if it were directed to consider the implications of *Glenn*. *See Lawrence* v. *Chater*, 516 U.S. 163, 167-68 (1996) (indicating that a GVR may be appropriate where "recent developments that we have reason to believe the court below did not fully consider[] reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration"); *Robinson* v. *Story*, 469 U.S. 1081 (1984) (granting, vacating and remanding in light of Supreme Court opinion issued shortly before court of appeals' decision).

C. The Second Circuit Decision Presents a Recurring Issue of Exceptional Importance.

According to the Second Circuit, *Firestone* deference does not apply unless a plan administrator's interpretation of an ERISA plan is initially offered within the context of an administrative claims proceeding. This holding, if allowed to stand, will undo this Court's decisions in *Firestone* and *Glenn* in large numbers of cases and will discourage employers from offering employee benefit plans.

1. Plan administrators are called upon to interpret the plans they administer virtually every day, and their interpretations often are rendered outside the setting of administrative claims for benefits. *See, e.g.*, pp. 12-13 (citing cases presenting various contexts in which courts have deferred to plan administrator's plan interpretations). For instance, the exception to *Firestone* deference created by the Second Circuit would apply in numerous cases in which an issue of plan interpretation first arises during the course of litigation.[8] It also would apply in

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[8] The Seventh Circuit, among other courts, has recognized that plan interpretation issues often arise in the course of litigation and has held – in conflict with the Second Circuit's decision – that *Firestone* deference applies in such cases. *See Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 606 (7th Cir. 2008) (observing that a court must seek the views of the plan administrator if an interpretive issue "did not ripen into an 'apple' ready to be bitten" until after an initial court ruling); *Gallo* v. *Amoco Corp.*, 102 F.3d 918, 923 (7th Cir. 1996) (Posner, C.J.) (observing that if, during litigation, a plan administrator's

the many cases in which participants avail themselves of exceptions to the discretionary requirement to exhaust a plan's internal claims procedure before filing suit in court.[9] And it would apply in many more cases alleging that plan fiduciaries breached their fiduciary duties to plan participants by failing to follow plan terms.[10]

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interpretation of a plan term requires additional explanation, a court must seek that explanation from the administrator and may not substitute its own interpretation).

[9] *See Perrino* v. *Southern Bell Tel. & Tel. Co.*, 209 F.3d 1309, 1315 (11th Cir. 2000) ("The decision of a district court to apply or not apply the exhaustion of administrative remedies requirement for ERISA claims is a highly discretionary decision. . . ."); *Wilczynski* v. *Lumbermens Mut. Cas. Co.*, 93 F.3d 397, 404-05 (7th Cir. 1996) (holding that plan participant had adequately alleged that it would be futile for her to exhaust administrative remedies and therefore reversing district court's dismissal of her benefits claim); *DeVito* v. *Aetna, Inc.*, 536 F. Supp. 2d 523, 532 (D.N.J. 2008) (denying motion to dismiss claim for benefits on the ground that pursuing plan's internal appeals process would have been futile).

[10] Other Circuits have recognized – in conflict with the decision of the Second Circuit – that when plan administrators are sued for breaching their fiduciary duties by failing to follow plan terms, the administrator's interpretation of plan terms is entitled to deference, notwithstanding the fact that the interpretation does not first arise in the context of an administrative claim for benefits. *See, e.g.*, *Worthy* v. *New Orleans Steamship Assoc.*, 342 F.3d 422, 427-28 (5th Cir. 2003) (deferring to ERISA trustee administrators' interpretation of trust language in a suit alleging that trust administrators violated their fiduciary duties); *Moench* v. *Robertson*, 62 F.3d 553, 566 (3d Cir. 1995) (holding that the courts must defer to

Given the multitude of contexts in which plan administrators are called upon to interpret plan terms outside of the administrative claims process, this case presents an issue that is likely to recur with great frequency.

2. This case, moreover, presents an issue of exceptional importance. ERISA regulates a voluntary regime that allows employers to decide whether to establish benefit plans and what kinds of benefits to provide. As this Court has recognized, a principle objective of ERISA is "the continuation and maintenance of voluntary private plans." *PBGC* v. *LTV Corp.*, 496 U.S. 633, 651 (1990) (quoting 29 U.S.C. § 1302(a)(1)). If employers are exposed to the frequent risk of unanticipated interpretations of their plans, they will be far less likely to offer such plans at all. *See Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996) (disfavoring rules that would "discourage employers from offering [ERISA] plans in the first place").

ERISA class actions seeking staggering sums of money based on unanticipated interpretations of plan language are becoming increasingly common.[11] *Firestone* deference is what protects employers from

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reasonable plan interpretations in a case alleging breach of fiduciary duty).

[11] *See, e.g.*, *Young* v. *Verizon's Bell Atlantic Cash Balance Plan*, 575 F. Supp. 2d 892, 909, 912 (N.D. Ill. 2008) (applying deferential standard of review and thus upholding plan administrator's reasonable interpretation of pension plan on an issue involving "hundreds of millions of dollars").

the risk of such unanticipated and potentially disastrous interpretations of their benefit plans. The abuse of discretion standard of review articulated in *Glenn* thus "protects important values," including

> the plan administrator's greater experience and familiarity with plan terms and provisions; the enhanced prospects of achieving consistent application of those terms and provisions that results; the desire of those who establish ERISA plans to preserve at least some role in their administration; and the importance of ensuring that funds which are not unlimited go to those who, according to the terms of the plan, are truly deserving.

Evans v. *Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 323 (4th Cir. 2008). If the Second Circuit's decision cutting back *Firestone* deference goes uncorrected, that doctrine – and the important role it plays in encouraging employers to offer benefit plans at all – will be dramatically eroded.

3. The facts of this case vividly illustrate the problems that arise when *Firestone* deference is not applied to a plan administrator's interpretation of an ERISA plan. Here, as a result of the Second Circuit's failure to afford such deference, the Plan Administrator is subject to two different standards for administering the Xerox Plan adopted by two different courts.

In *Miller* v. *Xerox*, the Ninth Circuit held that the Plan Administrator of the Xerox Plan was "require[d]" to calculate the offset for the rehired employees who brought that action "based on the actual *actuarial equivalent* of the [prior lump sum] distribution" those employees received. *See* 464 F.3d at 875-76 (emphasis added). Here, the Plan Administrator interpreted the terms of the pre-1998 Plan to require precisely the same offset calculation that the Ninth Circuit held was required. (*See* Pet. App. 147a-52a.) The Second Circuit, however, rejected that interpretation. Instead it held that the Plan Administrator may offset a Respondent's benefit not by the present-day actuarial equivalent of his prior lump sum distribution but only by the *nominal* amount of that distribution. (*Id.* at 8a-9a.) Thus, contrary to the goal of uniform plan administration, the Plan Administrator cannot now employ a "set of standard procedures" in calculating benefits under the Xerox Plan. *Fort Halifax Packing Co., Inc.* v. *Coyne*, 482 U.S. 1, 9 (1987) ("The most efficient way [for a plan] to meet [its] responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.").[12]

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[12] The decision of the District Court in this case also underscores the importance of deferring to plan administrators, who have greater familiarity with the plan's operations and who are expert in the complicated technical issues attendant to the administration of pension plans. Here, the District Court adopted an economically irrational interpretation of the Plan that even plaintiffs' own expert rejected as unreasonable. (*See* Pet. App. 156a-58a.) By offsetting Respondents' benefits only by

If allowed to stand, the Second Circuit's decision will strip countless other employers of the benefits of *Firestone* deference and expose them to the resulting risk of conflicting judicial interpretations of their benefit plans. Such a result would be fundamentally inconsistent "with nationally uniform plan administration," which is "[o]ne of the principal goals of ERISA." *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001); *accord Glenn*, 128 S. Ct. at 2354 (Roberts, C.J., concurring in part and concurring in the judgment) (noting that "certainty and predictability are important criteria under ERISA").

II. The Second Circuit Decision Conflicts with Authority from Other Circuits Regarding the Proper Standard of Appellate Review in Calculating Benefits Pursuant to Plan Terms.

It is well settled that appellate review of district court interpretations of written instruments, including ERISA plan documents, is *de novo*. Accordingly, the Second Circuit should have applied *de novo* review to the District Court's interpretation of the Xerox Plan -- including *de novo* review of whether the District Court properly applied *Firestone* deference in this case.

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the *nominal* amounts of their lump sum distributions, Respondents have been granted a windfall that is not available to other Xerox employees. This is because, as even Respondents' expert realized, the District Court's interpretation entirely ignores the time value of the money Respondents received ten or more years ago. (*Id.* at 156a-58a.)

Instead, the Second Circuit reviewed the District Court's interpretation of the terms of the pre-amendment Plan under a deferential "excess of allowable discretion" standard. (Pet. App. 8a.) In so doing, the Second Circuit broke with a number of other Circuits. Its decision, if upheld, will also frustrate the important ERISA goal of uniform and consistent plan interpretations. If the courts of appeals are required to affirm any "reasonable" plan interpretation offered by the district courts, neither plan administrators nor participants could ever be certain as to what a plan requires.

A. The Second Circuit Decision Creates a Circuit Conflict.

Abundant authority recognizes that appellate review of written instruments, including ERISA plan documents, is *de novo*. The Second Circuit held, however, that *de novo* review does not apply when a district court interprets a plan in the course of remedying "an identified ERISA violation." (Pet. App. 8a.) There is no basis for such an exception to the ordinary rule of *de novo* appellate review.

1. In *Frommert I*, the Second Circuit held that the "phantom account" offset provision was not properly added to the Plan until 1998 and therefore could not be applied to employees rehired before that time. It then remanded the case to the District Court with instructions to craft a "remedy . . . for those employees rehired prior to 1998 . . . utiliz[ing] an appropriate pre-amendment calculation to determine their benefits." (Pet. App. 51a.) In crafting a remedy on remand, the task of the District Court was to

determine the benefits due to Respondents "under the terms of the plan" (*id.* at 53a) – in other words, to interpret the pre-1998 terms of the Plan document. *See Firestone*, 489 U.S. at 115 ("[T]he validity of a claim to benefits under an ERISA plan is likely to turn on the interpretation of terms in the plan at issue.").[13]

After the District Court issued its opinion construing the relevant Plan terms, Petitioners appealed to the Second Circuit. The Second Circuit stated that the "District Court had discretion to design a remedy to provide [Respondents] with the proper level of pension benefits in light of the ERISA violations" identified in *Frommert I*, and thus that it would review the District Court's "chosen remedy of an identified ERISA violation" only for "an excess of allowable discretion." (Pet. App. 8a.) Pursuant to that standard, the Second Circuit concluded that the District Court's chosen remedy was "one reasonable approach among several reasonable alternatives," and thus affirmed the District Court. (*Id.* at 13a-14a.)

2. The Second Circuit's application of an "excess of allowable discretion" standard of review directly conflicts with the venerable principle that "appellate

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[13] The Second Circuit correctly recognized that this relief was to be awarded under ERISA § 502(a)(1)(B). (*Id.* at 53a-54a.) And it is clear that "nothing in [§] 502(a)(1)(B) supports damages beyond that section's language authorizing recovery of 'benefits due . . . under the terms of the plan.'" *Zimmerman* v. *Sloss Equip., Inc.*, 72 F.3d 822, 828 (10th Cir. 1995) (*quoting* 29 U.S.C. § 1132(a)(1)(B)).

courts have untrammeled power to interpret written documents." *Eddy* v. *Prudence Bonds Corp.*, 165 F.2d 157, 163 (2d Cir. 1947) (L. Hand, J.); *accord Barrett* v. *Safeway Stores, Inc.*, 538 F.2d 1311, 1313 (8th Cir. 1976) (same); *Emor, Inc.* v. *Cyprus Mines Corp.*, 467 F.2d 770, 773 (3d Cir. 1972) (same). Numerous courts of appeals have held that "an appellate court is not bound by a construction of a document based solely upon the terms of the written instrument." *FDIC* v. *Brants*, 2 F.3d 147, 150 (5th Cir. 1993) (quoting *In re Estate of Russell*, 444 P.2d 353, 362 (1968)); *accord NLRB* v. *Hobart Bros. Co.*, 372 F.2d 203, 206 (6th Cir. 1967) ("[T]he clearly erroneous rule does not prevent the Court of Appeals from construing a writing differently than the trial court's construction.").

Consistent with this authority, the Second Circuit had an obligation to determine whether – in light of the written terms of the Plan document – the District Court's interpretation of the Plan was *correct*, not merely whether it was "reasonable." Had the Second Circuit done so, Petitioners respectfully submit that it could not have affirmed the District Court's economically irrational Plan interpretation, which fails to give proper effect to the non-duplication of benefits provision, ignores the time value of money, and provides Respondents with an enormous windfall.[14]

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[14] *See supra* n.12. An economically nonsensical interpretation of a plan that results in windfalls is unreasonable as a matter of law if there is any other plausible interpretation of the plan. *See, e.g., Lunn* v. *Montgomery Ward & Co., Inc.*, 166 F.3d 880,

The Second Circuit's decision conflicts not only with ample authority applying *de novo* review to a district court's interpretation of written instruments, but also with decisions that apply *de novo* review to district court calculations of ERISA benefits pursuant to plan terms. For instance, in *Welsh* v. *Burlington Northern, Inc., Employee Benefits Plan*, 54 F.3d 1331, 1335 (8th Cir. 1995), the Eighth Circuit considered whether a plan participant was entitled to disability benefits under the terms of a plan that did not grant the administrator interpretive discretion. After affirming the district court's conclusion that the plan administrator had improperly denied benefits to the participant, the Eighth Circuit considered whether the district court had properly construed the plan's terms in calculating the amount of benefits to which the participant was entitled. *See id.* at 1340-41. In doing so, the Eighth Circuit did not defer to the district court's interpretation of the plan but instead reviewed the terms of the plan in order itself to determine the benefits due. *See id.* In other words, the Eighth Circuit – in contrast to the Second Circuit – undertook a *de novo* review of the district court's remedies calculation.

The Court should grant certiorari to correct the Second Circuit's extraordinary departure from the settled principle that appellate review of written instruments is *de novo*. Indeed, given the clarity of the Second Circuit's error, summary reversal may be

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882-83 (7th Cir. 1999); *Benefits Comm. of Saint-Gobain Corp.* v. *Key Trust Co. of Ohio, N.A.*, 313 F.3d 919, 932 (6th Cir. 2002).

appropriate. *See Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (summary reversal appropriate where the decision below is "clearly erroneous"); *see also Elder* v. *Holloway*, 510 U.S. 510, 516 (1994) (summarily reversing court of appeals' holding that a *de novo* standard of appellate review did not apply).

B. The Second Circuit Decision Presents a Recurring Issue of Exceptional Importance.

The Second Circuit held that it has no obligation to arrive at the correct interpretation of an ERISA plan (including a *de novo* determination of whether the plan terms require *Firestone* deference) in a large category of cases. Rather, in the Second Circuit's view, a court of appeals must defer to any "reasonable" interpretation of a plan offered by a district court in the course of determining the additional benefits due under the terms of the plan in the wake of an ERISA violation. This departure from traditional standards of appellate review exposes plan administrators to the untenable prospect that different district courts will adopt different interpretations of the very same ERISA plan.

For example, under the "allowable discretion" standard adopted by the Second Circuit, if two different district courts within the same Circuit adopt different interpretations of the same pension plan, the court of appeals must affirm both such interpretations if they are both within the "allowable discretion" of the district court. This would eviscerate ERISA's fundamental goal of assuring consistent and

uniform administration of pension plans throughout the country. *See Egelhoff*, 532 U.S. at 148 ("One of the principal goals of ERISA is to enable employers to establish a uniform administrative scheme. . . ."); *Berger* v. *AXA Network LLC*, 459 F.3d 804 (7th Cir. 2006) ("uniformity of treatment" of plan participants is a "primary concern" of ERISA). Moreover, employers exposed to the prospect of conflicting and inconsistent interpretations of their benefit plans will be far less likely to offer such plans at all. *See Varity*, 516 U.S. at 497.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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