No. 08-810

In the Supreme Court of the United States

SALLY J. CONKRIGHT, ET AL., PETITIONERS

v.

PAUL J. FROMMERT, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

1. Whether, in this case under Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(1)(B), the court of appeals correctly held that plan administrators were not entitled to deference to their second interpretation of the plan when the court had found that their prior interpretation of the same plan terms was arbitrary and capricious and violated ERISA.

2. Whether the court of appeals correctly upheld the district court's choice of remedy under an abuse-of-discretion standard.

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INTEREST OF THE UNITED STATES

This case is an action under Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, which the Secretary of Labor has primary authority for administering. At the invitation of the Court, the United States filed an amicus brief at the petition stage.

STATEMENT

1. Before 1989, Xerox Corporation provided its employees with a defined benefit pension plan called the Retirement Income Guarantee Plan (Retirement Plan or Plan) and a defined contribution plan called the Profit Sharing Plan (PSP). *Miller* v. *Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871, 872 (9th Cir. 2006), cert.

denied, 549 U.S. 1280 (2007). The Retirement Plan provided each participant a fixed benefit based on his compensation and total years of service, while the PSP provided each participant the value of an individual account that consisted of annual contributions and the results of the investment performance of those contributions. *Ibid.* The Retirement Plan and PSP worked together as a "floor-offset" arrangement, under which an employee was guaranteed the Retirement Plan benefit, offset by any benefit received from the PSP, but could receive a higher benefit if that would be produced by the PSP alone. *Ibid.*

In 1989, Xerox eliminated the PSP and substantially restructured the Retirement Plan by providing for the payment of benefits according to one of three alternative formulas. Pet. App. 27a; see J.A. 6a-42a (1989 Restatement). The 1989 Restatement included a revised defined benefit formula based on compensation and total years of service (RIGP). Pet. App. 25a. It also included two new accounts—a Cash Balance Retirement Account (CBRA) and a Transitional Retirement Account (TRA). *Id.* at 26a. The CBRA, available to all employees, provided a benefit based on the balance of an employee's former PSP account, if any, increased by annual contributions by Xerox equal to five percent of the employee's salary, plus interest at a specified rate. *Ibid.* The TRA, available only to employees hired before 1989, provided a benefit based on the balance in the employee's PSP account, if any, plus gains or losses based on the investment results of the funds in which that account was invested on December 31, 1989. *Ibid.* A retiring employee was entitled to benefits based on whichever calculation method—RIGP, CBRA, or TRA—yielded the highest amount. *Id.* at 25a-26a.

To avoid paying duplicative benefits to rehired employees who had previously received retirement distributions, the 1989 Restatement provided for an offset as follows:

> *Nonduplication of Benefits*. In the event any part of or all of a [participant's] accrued benefit is distributed to him prior to his Normal Retirement Date, if Section 8.8 [dealing with incompetent beneficiaries] does not apply to such distribution and such [participant] at any time thereafter recommences active participation in the Plan, the accrued benefit of such [participant] based on all Years of Participation shall be offset by the accrued benefit attributable to such distribution.

J.A. 32a (§ 9.6).

2. The Retirement Plan administrators, who with the Plan are the petitioners in this case, interpreted the 1989 Restatement, including the non-duplication-of-benefits provision, to authorize use of a "phantom account" to calculate the offset for prior distributions (including PSP distributions). See Pet. App. 40a, 42a, 83a-86a; J.A. 70a, 77a-78a.[1] Under the phantom-account method, in determining which of the three benefit options provides the highest benefit, the administrators increased the value of the CBRA and TRA accounts to include not only prior lump-sum distributions but also the investment returns that those sums would have achieved if they had remained in the account. Pet. App.

[1] Because the term "phantom account" has been used throughout this litigation, including by Xerox, see *Layaou* v. *Xerox Corp.*, 238 F.3d 205, 207 (2d Cir. 2001) (Sotomayor, J.), this brief uses that term rather than "reconstructed account methodology," the term now used by petitioners (Br. 10).

32a-33a. By including a large amount of hypothetical growth, the phantom-account method skewed the comparison among the alternatives in favor of selecting the CBRA or TRA as providing the highest benefit. *Id.* at 50a. If the CBRA or TRA was selected, however, the phantom-account value was then deducted to compute the amount actually paid to the employee, producing a benefit significantly less than what the RIGP would have provided. *Ibid.*[2]

In 1996, respondent Paul Frommert received an estimate of his Retirement Plan pension that demonstrates the impact of the phantom-account methodology. Pet. App. 34a. Frommert, like the other respondents, previously worked for Xerox, left the company before 1989, and was later rehired. *Ibid.* When Frommert left the company, he (again like the other respondents) received a lump-sum distribution from his PSP account. See Pet. App. 84a; Pet. Br. 9. After Frommert was rehired, he received benefits statements that, by 1996, projected that he would receive a monthly pension, using the RIGP formula, of $2842. Pet. App. 34a. But use of the phantom account reduced his monthly pension to $5.31. *Ibid.*

3. In 1999, respondents sued petitioners under Section 502(a)(1)(B) and (3) of ERISA, 29 U.S.C. 1132(a)(1)(B) and (3). Respondents argued that, until the Plan and its summary plan description (SPD) were amended in 1998, the Plan did not provide for use of the phantom account to calculate the offset for prior PSP distributions and that the SPD did not disclose that the phantom account would be used. Pet. App. 75a, 81a-82a.

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[2] If the RIGP benefit was selected, that benefit was reduced by the next highest benefit amount (with the phantom-account value included in the reduction). Pet. App. 33a n.6.

Respondents contended that use of the phantom account therefore violated various provisions of ERISA, including 29 U.S.C. 1022 and 29 U.S.C. 1054(g) and (h) (2000). Pet. App. 75a-76a.

Section 1022 requires a plan administrator to give participants an SPD that is "sufficiently accurate and comprehensive to reasonably apprise [them] of their rights and obligations under the plan," "in a manner calculated to be understood by the average plan participant." 29 U.S.C. 1022(a). Section 1054(g), ERISA's anti-cutback provision, prohibits plan amendments that decrease accrued benefits. 29 U.S.C. 1054(g) (2000). Section 1054(h) requires a pension plan administrator to give participants prior written notice of plan amendments that significantly reduce the rate of future benefit accrual. 29 U.S.C. 1054(h) (2000).

The district court granted summary judgment to petitioners. Pet. App. 61a-98a. As relevant here, the court accepted their argument that "the Plan has always provided for the challenged offset" and that the 1998 amendments only made express what prior plan terms implicitly provided. *Id.* at 75a; see *id.* at 79a-93a.

4. The court of appeals vacated the district court's decision in relevant part. Pet. App. 22a-60a. The court of appeals first held "that the Plan administrator's conclusion that the Plan always included the phantom account is unreasonable," even under "an arbitrary or capricious standard" of review. *Id.* at 44a. The court reasoned that, although the Plan has always contained a non-duplication provision stating that benefits will be offset by prior distributions, *id.* at 26a-28a, the pre-1998 plan terms did not specify how to calculate the offset for the distributions received by respondents. See *id.* at 28a-29a, 37a. The court further observed that it had

already held, in *Layaou* v. *Xerox Corp.*, 238 F.3d 205, 209-212 (2d Cir. 2001) (Sotomayor, J.), that the Plan had violated ERISA's SPD requirement by failing to "provide notice" that rehired employees' "future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions." Pet. App. 43a-44a (citation omitted).

The court next held that petitioners' efforts to apply the phantom-account method before the 1998 amendments violated the requirement in Section 1054(h) that plans provide advance notice of amendments that significantly reduce the rate of future benefit accrual. Pet. App. 45a-49a. The court concluded that, based on the information provided to them, "rehired employees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they actually received." *Id.* at 47a. The court further concluded that use of the phantom account impermissibly reduced accrued benefits in violation of Section 1054(g). *Id.* at 50a-51a.

The court of appeals remanded the case for the district court to craft a remedy for those ERISA violations, "utiliz[ing] an appropriate pre-amendment calculation to determine [respondents'] benefits." Pet. App. 51a. It suggested that the district court "employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Ibid.*

5. On remand, the Plan and its administrators advocated two alternative approaches for calculating respondents' benefits. The first approach would, like the phantom account, have offset an employee's benefits by an appreciated value of his prior distribution (the administrators' appreciated-offset method). Unlike the phantom-account method, however, the administrators'

appreciated-offset method would have used a fixed interest rate, rather than hypothetical investment earnings, to calculate the appreciation. Using that rate, the administrators would have converted the employee's prior distribution into an annuity and then subtracted that annuity from the employee's RIGP benefit, expressed as an annuity and calculated using total years of service. The reduced RIGP benefit would then have been compared to the annuities that would be generated by the employee's actual CBRA and TRA balances, and the employee would have received the highest benefit. The administrators would, however, have used this approach only for benefits that accrued before the 1998 amendments. The phantom-account approach would have been used for later-accruing benefits. Pet. App. 147a-154a.

The second approach proposed by petitioners would have treated rehired employees the same as newly-hired employees, calculating their CBRA and TRA benefits based on only the actual amount in their accounts and their RIGP benefits based only on their years of service and compensation after they were rehired (the new-hire approach). 07-0418-CV Pet. C.A. Br. 6, 16, 33-36; 07-0418-CV C.A. App. A113-A114, A298, A930-A931.

Respondents also proposed two alternatives for calculating their benefits. Under one alternative, RIGP benefits would have been calculated based on employees' total years of service and would have been offset by only the actual amounts of their prior distributions. J.A. 87a-88a. Respondents contended that this method appropriately reflected their reasonable expectations based on the pre-1998 SPD. J.A. 88a-89a. Under respondents' second alternative, the offset would have

been adjusted upward, but using a different calculation than the one suggested by petitioners. J.A. 81a-86a.

The district court decided to subtract the actual amount of prior distributions without any upward adjustment. Pet. App. 104a-107a. The court noted that the pre-1998 Plan terms and SPD said "virtually nothing" about how to take into account prior distributions. *Id.* at 104a. The court concluded that subtracting only the actual amount of the distributions was straightforward, adequately prevented employees from receiving a windfall, and "most clearly reflects what a reasonable employee would have anticipated based on the not-very-clear language in the Plan and SPD." *Id.* at 107a. The court rejected the proposed calculation methods that would have made upward adjustments to the distributions, reasoning that "[i]f the employee had no notice of the 'phantom account,' he also had no notice" of those other mechanisms for calculating the offset. *Id.* at 104a.

6. The court of appeals affirmed the district court's decision in relevant part. Pet. App. 1a-21a. It reviewed the district court's choice of remedy for abuse of discretion, *id.* at 8a, and concluded that petitioners had not established that the court's approach "violated either the Plan terms or any law." *Id.* at 9a. The court of appeals also rejected petitioners' arguments that the district court erred by not adopting the new-hire approach, by not remanding to the administrators, and by declining to defer to the administrators' appreciated-offset approach. *Id.* at 9a-14a.

In addressing the deference due the administrators' appreciated-offset approach, the court of appeals recognized that where an ERISA plan gives an administrator discretion to construe plan terms, courts should review the administrator's interpretation "under an excess of

allowable discretion standard." Pet. App. 12a. The court of appeals concluded, however, that the deference principle did not apply here because the district court had no "decision" to review. *Id.* at 13a. The court of appeals explained that petitioners had 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 [the court] found such a construction to have violated ERISA." *Ibid.* Because the Plan "addresses the situation of a discharged-and-then-rehired employee with what can only be described as ambiguity, contradiction or silence," the court saw "no problem with the District Court's selection of one reasonable approach among several reasonable alternatives." *Id.* at 13a-14a.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that the district court was not required to defer to the administrators' views on how to remedy their ERISA violations. Contrary to petitioners' assertions, the court of appeals did not adopt a broad rule withholding deference whenever an administrator interprets a plan outside of a benefits determination. Instead, the court of appeals held only that the district court was not required to defer to the administrators' second interpretation of plan terms that they previously had abused their discretion in construing.

That holding is consistent with trust law, which guides the standards of review in ERISA benefits cases. Under trust law, a court is not required to give a trustee a second opportunity to make a determination that he abused his discretion in making initially. Instead, the

court has remedial latitude and may remedy the abuse of discretion in appropriate circumstances by directing the trustee how to act. Likewise, a court need not give a plan administrator who has abused his discretion in construing plan terms a second opportunity to interpret those terms. The court may itself fashion the appropriate remedy, consistent with applicable plan terms.

Allowing courts to decline to defer to administrators' fallback interpretations also furthers ERISA's purpose of protecting employee benefits. Requiring deference to administrators' subsequent attempts to construe the same terms that they previously construed arbitrarily and in violation of ERISA would encourage initial interpretations that disfavor beneficiaries and thereby undermine ERISA's fiduciary-duty requirement. That approach would also undermine ERISA's disclosure requirements and discourage participants from challenging unreasonable denials of benefits.

The court of appeals correctly applied the applicable deference principles. The district court was not required to defer to the administrators' position that the pre-1998 plan terms provided for their appreciated-offset method, because the administrators had previously abused their discretion and violated specific prohibitions in ERISA by construing the same terms to provide for the phantom-account method. Deference to the administrators' new approach was also inappropriate because, in the circumstances of this case, interpreting the Plan to provide for the administrators' appreciated-offset method would have violated ERISA.

II. The court of appeals correctly upheld the district court's choice of remedy under an abuse-of-discretion standard. A district court's interpretation of plan terms is subject to de novo appellate review even when the

district court is fashioning a remedy. But when a court has determined that an administrator's denial of benefits was arbitrary and capricious or otherwise violated ERISA, the district court's choice of remedy, if based on equitable principles rather than a determination that plan terms required a particular result, is reviewed for abuse of discretion. That is consistent with trust law, under which appellate courts apply that deferential standard in reviewing a lower court's selection of an equitable remedy.

The district court's remedial decision here was based on equitable principles, as the court of appeals had contemplated, rather than a determination that plan terms required that decision. Because the Plan and the SPD said virtually nothing about how to calculate the offset for respondents' prior distributions, reliance on proposed plan interpretations (such as the administrators' appreciated-offset method) that offset an appreciated value of the distributions would have violated ERISA's notice requirements. The district court therefore correctly rejected those interpretations and relied instead on equitable principles in selecting an offset that was otherwise consistent with the Plan as written.

In offsetting only the actual prior distributions without any upward adjustment, the district court acted well within its discretion. The court's approach best comported with respondents' reasonable expectations, the terms of the Plan, and the requirements of ERISA. It did not give respondents a windfall. Nor was it unfair to other employees, who are not similarly situated. Neither ERISA nor laws governing tax qualification of plans required an actuarial adjustment to the offset. On the contrary, under the circumstances of this case, using

the administrators' appreciated-offset method would have been unreasonable and violated ERISA.

ARGUMENT

Petitioners incorrectly contend that this case presents two broad questions about the standards of review in ERISA cases. The first question, according to petitioners (Br. i), is whether courts should defer to an administrator's interpretation of an ERISA plan only when the administrator renders the interpretation in resolving an administrative claim for benefits. The second question, petitioners assert (*ibid.*), is whether a district court's interpretation of plan terms is reviewed only for abuse of discretion if it interprets the plan in remedying an ERISA violation.

In reality, the case presents two much narrower questions. The first is whether the courts below were required to defer to the administrators' second interpretation of plan terms once their previous interpretation had been held arbitrary and capricious and in violation of ERISA. The second question is whether the court of appeals correctly upheld the district court's decision on remand under abuse-of-discretion review, given that the district court was fashioning an equitable remedy. Because the courts below were not required to defer to the administrators' fallback interpretation, and because the court of appeals applied the correct standard in reviewing the district court's remedial decision, this Court should affirm the decision below.

I. THE LOWER COURTS WERE NOT REQUIRED TO DEFER TO THE ADMINISTRATORS BECAUSE THE ADMINISTRATORS HAD PREVIOUSLY ABUSED THEIR DISCRETION IN CONSTRUING THE SAME PLAN TERMS

Contrary to petitioners' contention, the court of appeals did not hold that deference to an administrator's construction of an ERISA plan extends only to "decisions made on 'original benefits determinations.'" Pet. Br. 32 (quoting Pet. App. 13a). The court noted that, in this case, "the plan administrator never rendered a decision other than the original benefits determinations," which were premised on an interpretation of the Plan that the court had found to be unreasonable and impermissible under ERISA. Pet. App. 13a. But the court did not hold that deference is never due an administrator's interpretation "outside the context of an original claims determination." Pet. Br. 32. Instead, the court of appeals held that a court is not required to defer to an administrator's interpretation when, as in this case, "the administrator had previously construed the same terms and [the court] found such a construction to have violated ERISA." Pet. App. 13a. That holding is correct.

A. Trust Law, Read In Light Of ERISA's Purposes, Provides Guidance On When Courts Must Defer To Plan Administrators

ERISA does not specify the standards of review governing actions that, like this one, challenge an administrator's benefits determination under 29 U.S.C. 1132(a)(1)(B). *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 109 (1989). This Court concluded in *Firestone*, however, that "principles of trust law" provide

the primary guide in determining those standards, because Congress relied on trust law in shaping ERISA's protections. *Id.* at 110-111. The Court also considered ERISA's purposes, see *id.* at 113-115, recognizing, as it has in other cases, that reliance on trust law in construing ERISA must be tempered by attention to the statutory language, structure, and goals. See *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996).

Applying those principles, the Court held in *Firestone* that an administrator's benefits decision, including his interpretation of plan terms, is generally subject to de novo judicial review. 489 U.S. at 111-115. When, however, a plan gives the administrator discretion to determine benefits eligibility or to construe plan terms, review is more deferential. *Ibid.* In that circumstance, the Court noted, a trustee's exercise of a discretionary power "is not subject to control by the court except to prevent an abuse by the trustee of his discretion." *Id.* at 111 (quoting 1 Restatement (Second) of Trusts § 187, at 402 (1959) (Second Restatement)).

The Court reaffirmed *Firestone*'s approach in *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S. Ct. 2343 (2008). Considering both trust law and ERISA's purposes, *id.* at 2349-2351, the Court held that, if a plan gives an administrator discretion to make benefits determinations, the administrator's conflict of interest is considered as one "of several different, often case-specific, factors" that are "weigh[ed] all together" in determining whether he abused his discretion, *id.* at 2351. Applying that standard, the Court affirmed the decision of the court of appeals, *id.* at 2352, which had set aside the administrator's termination of the participant's benefits and ordered them reinstated, see

Glenn v. *MetLife*, 461 F.3d 660, 675 (6th Cir. 2006), aff'd, 128 S. Ct. 2343 (2008).

Firestone and *Glenn* thus make clear that trust law, read in light of ERISA's purposes, guides courts in determining the standards of review to use in actions under 29 U.S.C. 1132(a)(1)(B). Neither *Firestone* nor *Glenn* directly addresses whether an administrator who has abused his discretion in construing plan terms is entitled to deference to his fallback interpretation of the same terms. Both cases recognize, however, that trust law and ERISA authorize courts to control the actions of a fiduciary, including a plan administrator, who has abused his discretion. See *Firestone*, 489 U.S. at 111; *Glenn*, 128 S. Ct. at 2352. The court of appeals acted in accord with that recognition in holding that courts need not defer to an administrator's second attempt to interpret plan terms that he previously abused his discretion in construing.

B. Under Trust Law, Courts Need Not Defer To A Fiduciary Who Has Abused His Discretion In Making The Same Determination

The court of appeals' holding is supported by trust law, under which courts are not required to afford a trustee a second opportunity to make a determination that he already abused his discretion in making. As this Court recognized in *Firestone* and *Glenn*, courts will control trustees in the exercise of discretionary powers whenever they abuse their discretion. 1 Second Restatement § 187, at 402; 2 Restatement (Third) of Trusts § 50, at 258 (2003) (Third Restatement). "Where the court finds that there has been an abuse of a discretionary power, the decree to be rendered is in its discretion." George Gleason Bogert & George Taylor Bogert,

The Law of Trusts & Trustees § 560, at 222 (rev. 2d ed. 1980) (Bogert). The court may exercise that discretion either by ordering the trustee to make "a new decision * * * in the light of rules expounded by the court," or by "decid[ing] for the trustee how he should act," including "by stating the exact result [the court] desires to achieve." *Id.* at 222-223; see Third Restatement § 50 & cmt. b at 258, 261.

Courts often choose to direct how the trustee should act when they conclude that the trustee did not exercise his discretion "honestly and fairly." 3 Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 18.2.1, at 1348 (5th ed. 2007) (Scott); see, *e.g.*, *Collister* v. *Fassitt*, 57 N.E. 490, 493-494 (N.Y. 1900). But contrary to petitioners' contention (Br. 39-46), courts also frequently direct trustees to take specific actions without finding that they engaged in "fraud, bad faith, or dishonesty." Br. 39. Indeed, as petitioners acknowledge (Br. 45), courts, in numerous cases, have ordered trustees to pay specific amounts to beneficiaries without such findings. See Bogert 223 n.19.

For example, in *Colton* v. *Colton*, 127 U.S. 300 (1888), this Court construed a testator's will to provide a trust for the support of certain relatives, *id.* at 321, rejecting the executor's contention that the will's provisions were too indefinite for a trust to be recognized or enforced, *id.* at 319. Because the executor had failed to provide for the trust beneficiaries, this Court instructed the courts below "to determine and declare, what provision will be suitable and best under the circumstances, and all particulars and details for securing and paying it." *Id.* at 322. The Court stated that fixing the payments due was "the duty of the court," even though it

had made no finding that the trustee acted dishonestly or in bad faith. *Ibid.*[3]

Similarly, in *State* v. *Rubion*, 308 S.W.2d 4 (1958), the Texas Supreme Court held that, when a trustee has abused his discretion by failing to make payments to a beneficiary, a court may either fix the amount due or declare the boundaries of reasonable discretion to be exercised by the trustee. *Id.* at 9-11. The Texas Supreme Court then directed the trial court to specify the amounts to be paid, because that would "better promote a speedy administration of justice and a final termination of th[e] litigation." *Id.* at 11.

Some authority suggests that courts will not "ordinarily" direct a trustee how to act absent "reason to believe that the trustee will not fairly exercise [his] discretion." Scott 1348-1349. But one circumstance in which courts may have reason to believe that a trustee will not fairly exercise his discretion is when the trustee already abused his discretion in making the same deter-

[3] Elsewhere in its opinion, the Court stated that "where the manner of executing a trust is left to the discretion of trustees, and they are willing to act, and there is no *mala fides*, the court will not ordinarily control their discretion." *Colton*, 127 U.S. at 320-321. But the Court made that statement in explaining that a "court will not take upon itself, *in the first instance*," to determine the amount due beneficiaries. *Id.* at 321 (emphasis added). The Court did not suggest that a court may not fix the amount due after finding that a trustee has abused his discretion. Moreover, the Court stated that courts will intervene not only when "the exercise of the discretion by the trustees is infected with fraud or misbehavior" but also when "they decline to undertake the duty of exercising the discretion," as the executor did in *Colton*, or "generally where the discretion is mischievously and erroneously exercised." *Ibid.*; see *Webster's International Dictionary of the English Language* 929 (1890) (defining "mischievous" as "harmful" or "hurtful" and noting that the word was then "often applied where the evil [was] done carelessly").

mination. Thus, courts frequently fix the amount that a trustee must pay a beneficiary after finding that the trustee abused his discretion by setting an unreasonably low amount. See, *e.g.*, *Cool* v. *Shepherd (In re Cool's Trusteeship)*, 230 N.W. 353, 356 (Iowa 1930); *Woodward* v. *Dain*, 85 A. 660, 661 (Me. 1913) (per curiam); *Schofield* v. *Commerce Trust Co.*, 319 S.W.2d 275, 277-278 (Mo. App. 1958); *Gardner* v. *O'Loughlin*, 84 A. 935, 936 (N.H. 1912); *Stallard* v. *Johnson*, 116 P.2d 965, 967 (Okla. 1941); *Emmert* v. *Old Nat'l Bank*, 246 S.E.2d 236, 244-245 (W. Va. 1978); *LaBonde* v. *Weckesser (In re Hafemann's Will)*, 62 N.W.2d 561, 564 (Wis. 1954).

In contrast, when a trustee has not yet exercised his discretion to determine how much to pay, but instead has failed to make payments because of a mistaken belief that he lacks that discretion, the court may have no reason to believe that the trustee will fail to act fairly in exercising his discretion once the court makes clear that it exists. The cases cited by petitioners (Br. 40-42), in which courts have decided that the trustee rather than the court should exercise discretion, generally fall in that category. See *Piuma* v. *Minetti (In re Marre's Estate)*, 114 P.2d 586, 590-591 (Cal. 1941); *Sullivan* v. *Sullivan (In re Sullivan's Will)*, 12 N.W.2d 148, 151 (Neb. 1943); *Eaton* v. *Eaton*, 132 A. 10, 11 (N.H. 1926); *Manning* v. *Sheehan*, 133 N.Y.S. 1006, 1008 (Sup. Ct. 1911); *Finch* v. *Wachovia Bank & Trust Co.*, 577 S.E.2d 306, 309 (N.C. Ct. App. 2003); *In re Brown*, 29 A.2d 52, 54-55 (Pa. 1942).[4]

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[4] *Old Colony Trust Co.* v. *Rodd*, 254 N.E.2d 886 (Mass. 1970), involved a comparable situation. The trustee made unreasonably low payments because he misunderstood the standard guiding his discretion, and the court determined that he should have the opportunity to exercise his discretion going forward under the correct standard. *Id.*

Trust law thus supports the court of appeals' conclusion that deference is not required when an administrator proposes a second interpretation of plan terms that he previously construed unreasonably and in violation of ERISA. Just as a court need not give a traditional trustee a second opportunity to make a determination that he has already abused his discretion in making, a court need not give an ERISA plan administrator who has abused his discretion in construing plan terms a second opportunity to construe those same terms.

C. ERISA's Purposes Support The Conclusion That Deference Is Not Required When An Administrator Previously Abused His Discretion In Construing The Same Terms

The court of appeals' conclusion that courts are not required to defer to an administrator's second interpretation of plan terms also furthers ERISA's purposes.

1. Congress's principal purpose in enacting ERISA was "to protect * * * the interests of participants in employee benefit plans." 29 U.S.C. 1001(b). ERISA advances that goal by imposing various requirements on plans and plan administrators. See *ibid.* Those requirements would be significantly undercut if courts were always required to defer to administrators' fallback interpretations after they abused their discretion in construing the same terms.

One of ERISA's central protections is the fiduciary duty requirement, which mandates that plan administrators act solely in the interest of participants and ben-

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at 890. In *Hanford* v. *Clancy*, 183 A. 271 (N.H. 1936), on the other hand, the court stated in dicta that a court "may not exercise discretion for" the trustee even after finding that he exercised that discretion unreasonably. *Id.* at 272.

eficiaries, for the exclusive purpose of providing benefits to them. See 29 U.S.C. 1002(21)(A), 1104(a)(1)(A); 29 C.F.R. 2509.75-8 (Q&A D-3). Adherence to that fundamental obligation would be undermined if courts were required to defer to an administrator's subsequent interpretations of plan terms. In that circumstance, administrators would have less incentive to adopt the most reasonable interpretation of plan provisions when first adjudicating benefits claims, particularly if that interpretation favored beneficiaries at the expense of the plan. Administrators could instead initially adopt interpretations that unreasonably disfavored beneficiaries, because the administrators would know that, if challenged and reversed, they would have a second chance to advance a more reasonable interpretation.

Indeed, under petitioners' view, administrators would have a potentially unlimited number of bites at the interpretation apple. Unless an administrator engaged in "fraud, bad faith, or dishonesty" (Pet. Br. 39), courts would be required to defer, no matter how many times the administrator had abused his discretion in construing the very same terms. Such a rule not only would provide administrators scant incentive to interpret plans reasonably in the first instance, but also would impose on courts the difficult task of ascertaining the administrators' subjective motivations and the nontrivial prospect of adjudicating multiple iterations of the same essential controversy.

Requiring courts to defer to administrators' fallback interpretations would also undermine ERISA's disclosure requirements, including its mandate that plans provide sufficient and sufficiently clear information for participants to understand their benefit entitlements. See 29 U.S.C. 1022. That requirement is designed to

prevent employers from writing plans with "ambiguity, contradiction or silence," Pet. App. 13a, and then attempting, as petitioners are doing here, to minimize the plan's liability by adopting interpretations that beneficiaries could not have foreseen. But, if administrators get repeated opportunities to interpret and reinterpret unclear terms, employers will have every incentive to take that path, rather than to draft terms clearly in the first instance. That would thwart "one of ERISA's central goals"—"to enable plan beneficiaries to learn their rights and obligations at any time." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 83 (1995).

Requiring deference to subsequent interpretations would also undercut ERISA's requirement of prompt claims processing and "full and fair review" of benefit claims, 29 U.S.C. 1056(a), 1133, to ensure accuracy in claims processing. Administrators could deny benefits in the administrative claims process knowing that they would have additional opportunities to justify any denials that were challenged in court. At the same time, beneficiaries would know that, if they challenged a denial, they would likely be required to establish the unreasonableness of not only the administrator's initial interpretation but also other possible but not yet articulated interpretations. Beneficiaries would therefore be deterred from invoking the statutory right Congress afforded them to establish their rights to benefits in court under 29 U.S.C. 1132(a)(1)(B). See also 29 U.S.C. 1001(b) (one principal purpose of ERISA is to provide for "appropriate remedies, sanctions, and ready access to the Federal courts").

2. Contrary to petitioners' contentions (Br. 28-32, 47-48), speculation that employers will cease offering benefit plans does not justify requiring courts to defer

to an administrator's subsequent interpretations. This Court rejected a similar argument in *Firestone* when it held that de novo review is the default standard in benefits cases. 489 U.S. at 114-115. The Court concluded that the risk of discouraging employers from offering plans was "not sufficient to outweigh the reasons for a *de novo* standard." *Id.* at 115. Here too, the reasons for allowing courts to withhold deference outweigh concerns about discouraging plan formation.

That is particularly true because employers are unlikely to stop offering plans merely because courts need not defer to administrators' fallback interpretations of terms that the administrators previously construed arbitrarily. That principle will not result in "inconsistent interpretations and unexpected liabilities" (Pet. Br. 47) if administrators simply interpret plan terms reasonably in the first instance (at which point courts will give them deference). And, even if an administrator interprets a plan unreasonably and is denied deference to his fallback interpretation, an employer can minimize any adverse consequences by amending the plan to adopt its preferred interpretation going forward.[5]

[5] Petitioners are also wrong to suggest (Br. 49 n.17) that principles of administrative law provide a basis for requiring deference to administrators' fallback interpretations of plan terms. "The standard of review for agency determinations has little to nothing to do with the appropriate" standards of review in ERISA benefits cases. *Glenn*, 128 S. Ct. at 2353 (Roberts, C.J., concurring in part and concurring in the judgment). Rules governing when courts should defer to administrative agencies reflect limits on judicial authority to supervise agency policymaking that are imposed by Congress and the separation of powers. See *INS* v. *Ventura*, 537 U.S. 12, 16 (2002); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 866 (1984); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). Those limits are not relevant to when courts should defer to administrators in interpreting ERISA plans. The relevant guides

Petitioners' concerns about the court of appeals' decision are based on a misunderstanding of its scope. The court did not adopt a "hair-trigger" rule requiring de novo benefits determinations whenever administrators misconstrue plan terms or otherwise make "good-faith mistakes." Pet. Br. 48. Notably, the court did not disturb its holding in *Miller* v. *United Welfare Fund*, 72 F.3d 1066, 1071-1072 (2d Cir. 1995), that when a court concludes that an administrator has abused his discretion in denying a benefits claim, the court should normally remand to allow the administrator to consider additional evidence that might justify the denial. Instead, the court of appeals explained that *Miller* was not relevant here because there was no prospect of additional fact-finding on remand. Pet. App. 12a. The court also did not hold that an administrator who abuses his discretion in construing some plan terms should receive no deference in construing different plan terms. Instead, the court of appeals held only that deference is not required "where the administrator had previously construed the same terms and [the court] found such a construction to have violated ERISA." *Id.* at 13a.[6] And the absence of a requirement that courts defer is not equivalent to a prohibition on their doing so: even when the administrator has previously abused his discretion,

are trust law and ERISA's purposes, both of which support the decision below.

[6] Petitioners are thus incorrect in contending (Br. 48) that the decision below is inconsistent with cases holding that administrators should be given discretion to interpret plan terms that they have not previously misinterpreted. See, *e.g.*, *Oliver* v. *Coca-Cola Co.*, 546 F.3d 1353, 1353-1354 (11th Cir. 2008); *Pakovich* v. *Broadspire Servs., Inc.*, 535 F.3d 601, 606 (7th Cir. 2008); *Vizcaino* v. *Microsoft Corp.*, 120 F.3d 1006, 1013 (9th Cir. 1997) (en banc).

a court may choose to accord deference to his later interpretation of plan terms.

D. The Administrators Were Not Entitled To Deference

1. Applying the appropriate principles, the court of appeals correctly sustained the district court's determination not to defer to the administrators' new position on remand that the pre-1998 plan terms, including the non-duplication-of-benefits provision, should be read to provide for use of the appreciated-offset method in calculating respondents' benefits. Deference was not required because, as the court of appeals held, the administrators "had previously construed the same terms and [the court] found such a construction to have violated ERISA." Pet. App. 13a.

Petitioners' contention (Br. 50-51) that they were not interpreting the same terms is incorrect. As an initial matter, the court of appeals concluded that they were, and petitioners offer no reason for this Court to second-guess that fact-based conclusion. In any event, that conclusion is correct. Contrary to petitioners' assertion (Br. 50), they defended their initial benefits determination in both the district court and the court of appeals by arguing that they could interpret the pre-1998 plan terms, including the non-duplication-of-benefits provision, to authorize use of the phantom account. See Pet. App. 40a, 42a, 83a-86a. And the court of appeals rejected that precise argument, holding that "the Plan administrator's conclusion that the Plan has always included the phantom account is unreasonable," even under "an arbitrary or capricious standard," *id.* at 44a.

Petitioners are also mistaken in suggesting that their fallback interpretation of the pre-1998 plan terms was owed deference because the defect in their initial

interpretation was merely "technical," Pet. Supp. Br. 1, or a minor good-faith mistake, Pet. Br. 46. The court of appeals held not only that petitioners' initial interpretation was unreasonable but also that their efforts to implement that interpretation violated the notice requirements in 29 U.S.C. 1022 and 29 U.S.C. 1054(h) (2000) and the anti-cutback provision in 29 U.S.C. 1054(g) (2000). Pet. App. 43a-51a. Those were serious violations of important requirements enacted to further "ERISA's central goals" of ensuring that beneficiaries are fully informed of their "rights and obligations" under benefits plans, *Curtiss-Wright Corp.*, 514 U.S. at 83, and that they receive the pension benefits that they have been promised, see *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985).

2. The lower courts had an additional reason not to defer to the administrators on remand: using the administrators' proposed appreciated-offset method would have violated ERISA. In concluding that use of the phantom account violated ERISA's SPD requirement, the court of appeals had held that the pre-1998 Plan failed to provide adequate notice to rehired participants "that their future benefits would be offset by an appreciated value of their prior lump-sum distributions." Pet. App. 43a-44a (citation omitted). As the district court recognized (*id.* at 104a), interpreting the Plan to provide for the administrators' appreciated-offset method would have posed the same notice problem that the court of appeals had already identified because, like the phantom account, that method provided for an offset of an "appreciated value" of the prior distributions. In addition, although the district court did not rely on the point, and it is unclear whether the remand would have allowed it to do so, compare Pet. App. 40a n.10 with Pet.

App. 51a-52a, 60a, using the appreciated-offset method also would have violated ERISA's substantive requirements because that method reintroduced the original phantom-account method for benefits accruing after 1998. As the Ninth Circuit correctly held in *Miller* v. *Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871, 875-876 (2006), cert. denied, 549 U.S. 1280 (2007), the phantom-account method violates 29 U.S.C. 1054(c)(3) because it offsets employees' defined benefits by more than an actuarial equivalent of their prior distributions. See also Rev. Rul. 76-259, 1976-2 C.B. 111.

Accordingly, the court of appeals correctly held that the district court was not required to defer to the administrators' appreciated-offset method.[7]

II. THE COURT OF APPEALS CORRECTLY UPHELD THE DISTRICT COURT'S CHOICE OF REMEDY UNDER AN ABUSE-OF-DISCRETION STANDARD

Because the court of appeals held in its initial decision that the administrators had abused their discretion and violated ERISA, the district court had discretion to formulate a remedy. When selecting that remedy, the court appropriately applied equitable principles in a manner that was consistent with the terms of the Plan. Accordingly, the court of appeals properly reviewed the district court's decision for abuse of discretion.

[7] When, unlike in this case, the requisite notice is provided and the actuarial assumptions are reasonable (see 26 C.F.R. 1.411(a)-4(a)), ERISA permits floor-offset arrangements to make actuarial adjustments when calculating the offset for prior distributions. Indeed, the Internal Revenue Service and Treasury Department inform us that plans typically calculate the offset in that way.

A. A District Court's Choice Of Remedy For An ERISA Violation Is Reviewed For Abuse Of Discretion Unless The Court Is Interpreting Plan Terms

When a court has determined that an administrator's denial of benefits was arbitrary and capricious or otherwise violated ERISA, the district court's choice of equitable remedy is reviewed for abuse of discretion. See, *e.g., Cook* v. *Liberty Life Assurance Co.*, 320 F.3d 11, 18 (1st Cir. 2003); *Zervos* v. *Verizon N.Y., Inc.*, 277 F.3d 635, 646 (2d Cir. 2002); *Grosz-Salomon* v. *Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1158 (9th Cir. 2001); *Halpin* v. *W.W. Grainger, Inc.*, 962 F.2d 685, 697 (7th Cir. 1992); *Grossmuller* v. *UAW, Local 813*, 715 F.2d 853, 859 (3d Cir. 1983). That rule accords with trust law, under which appellate courts generally review a lower court's application of equitable principles and choice of equitable remedy for abuse of discretion. See, *e.g.*, *United States* v. *Andrews*, 530 F.3d 1232, 1238 (10th Cir. 2008); *Burkhart Grob Luft und Raumfahrt GmbH & Co. KG* v. *E-Sys., Inc.*, 257 F.3d 461, 469 (5th Cir. 2001).

At the same time, courts of appeals generally apply de novo review to a district court's interpretation of plan terms. See, *e.g.*, *Brubaker* v. *Metropolitan Life Ins. Co.*, 482 F.3d 586, 589 (D.C. Cir. 2007). That de novo review applies to plan interpretation even if an appellate court is reviewing a district court's remedial decision. See, *e.g.*, *Yolton* v. *El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 577, 584 (6th Cir.), cert. denied, 549 U.S. 1019 (2006). The district court's remedial discretion does not generally extend to plan interpretation, which is ordinarily a question of law, because the court "would necessarily abuse its discretion if it based its ruling on an erroneous

view of the law." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

B. The District Court's Choice Of Remedy Was Based On Equitable Principles

The court of appeals properly reviewed the district court's remedial decision on remand for abuse of discretion because the district court was relying on equitable principles and not on a methodology that was dictated by plan terms. As the district court noted (Pet. App. 103a), its reliance on equitable principles accorded with the instructions that the court of appeals gave in remanding the case after finding that the administrators had violated ERISA. The court of appeals instructed the district court to "utilize an appropriate pre[-1998]-amendment calculation to determine [respondents'] benefits" and suggested that the court "may wish to employ equitable principles when determining the appropriate calculation and fashioning the appropriate remedy." *Id.* at 51a.

The district court's use of such equitable principles on remand was entirely appropriate. The court could not have relied on plan terms to calculate the offset for respondents' prior distributions because the Plan did not address that issue with sufficient clarity. The court of appeals had concluded that pre-1998 plan terms "did not specify how the Plan would account for the prior distributions." Pet. App. 28a-29a. And the court of appeals had further held that, given the lack of clarity in the Plan and the SPD, use of the phantom account to calculate the offset violated ERISA, because the Plan failed to provide notice to rehired employees that an appreciated offset would be used. *Id.* at 43a. After reviewing the pre-1998 Plan on remand, the district court

agreed that "virtually nothing is set forth in either the Plan or the SPD" on how to calculate the offset for the prior distributions. *Id.* at 104a. The court also correctly concluded that suggested interpretations of the Plan (such as the administrators' proposed appreciated-offset method) that would offset an appreciated amount of the distributions would violate ERISA's notice requirements for the same reason that the court of appeals had held that the phantom account did. *Ibid.* As the court explained, "[i]f the employee had no notice of the 'phantom account,' he also had no notice" of those "other mechanisms" for calculating the offset. *Ibid.* Because reliance on such an interpretation of the Plan's general terms to calculate the offset would have violated ERISA's notice requirements, the district court instead properly relied on equitable principles to determine the appropriate offset, consistent with the general terms of the Plan as written.

Petitioners contend that the Plan was "not silent" but merely "ambiguous" about how to calculate the offset. Br. 52 (quoting Pet. App. 51a). But whether the Plan is best described as silent or ambiguous is beside the point. Even if the provisions cobbled together by petitioners (Br. 59-60) could somehow be read to provide for the administrators' appreciated-offset method, neither those terms nor the SPD provided notice "in a manner calculated to be understood by the average participant," 29 U.S.C. 1022, that respondents' benefits would be offset by that "appreciated value" of their prior distributions. Pet. App. 43a-44a (citation omitted). Under the court of appeals' prior decision, petitioners' reading of the Plan would have imposed an appreciated offset without adequate notice. ERISA therefore did

not permit, much less require, adoption of petitioners' interpretation.

Petitioners (Br. 55) further contend that the district court must have interpreted plan terms on remand because it awarded relief under 29 U.S.C. 1132(a)(1)(B). See also Business Roundtable Amicus Br. 15-25. That contention is incorrect. Section 1132(a)(1)(B) authorizes a participant to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. 1132(a)(1)(B). In determining whether a right exists under the terms of the plan, a court must consider not only the plan's written terms, but also the requirements of ERISA. See 29 U.S.C. 1104(a)(1)(D) (plan fiduciary must "discharge his duties * * * in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of*" Title I of ERISA) (emphasis added). ERISA thus in effect adds mandatory terms to plans and overrides any plan terms that are inconsistent with its requirements. See, *e.g.*, *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739, 750 (2004).

Accordingly, in an action for benefits under 29 U.S.C. 1132(a)(1)(B), a court must not only interpret the terms of the plan, but also must determine whether those provisions are consistent with ERISA's requirements and disregard any terms that are inconsistent. When ERISA requires a court to reject an interpretation of plan terms, and the remaining terms do not yield a precise calculation of benefits, the court must use its equitable authority to craft a remedy that provides participants with the appropriate benefits, consistent with the general terms of the plan and considerations such as

the reasonable expectations of the parties. That is what the district court did here. The court concluded that, to the extent plan terms could be interpreted to provide for the offset of an appreciated value of respondents' prior distributions, that interpretation would violate ERISA's notice requirements. See Pet. App. 104a. Accordingly, the court, based on equitable principles, selected an offset methodology that did not have that defect but nonetheless was consistent with the general parameters of the Plan. See *id*. at 107a.

The district court's determination resembles other instances in which courts invoke equitable powers to remedy infirmities in trusts and contracts, such as cy pres and equitable reformation. See, *e.g.*, 2 Second Restatement § 399, at 297; 1 Restatement (Second) of Contracts § 155, at 406 (1981). Just as appellate courts apply deferential review to a lower court's choice of cy pres remedy or its decision to apply equitable reformation, see, *e.g.*, *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679, 682 (8th Cir. 2002); *LPN Trust* v. *Farrar Outdoor Adver., Inc.*, 552 N.W.2d 796, 799 (S.D. 1996), so too the court of appeals appropriately reviewed the district court's choice of offset methodology for abuse of discretion.

C. The District Court Did Not Abuse Its Discretion

The district court acted within its discretion in reducing respondents' benefits by only the actual amount of their prior distributions. The court reasonably concluded that offsetting only the actual distributions "most clearly reflects what a reasonable employee would have anticipated." Pet. App. 107a. Indeed, the court of appeals had reached the same conclusion in its initial opinion. *Id.* at 47a (stating that "rehired employ-

ees likely believed that their past distributions would only be factored into their benefits calculations by taking into account the amounts they had actually received"). In adopting this approach, the district court acted consistently with plan terms, which entitled rehired employees to a benefit based on total years of employment, J.A. 24a-25a, 29a-31a; Pet. App. 25a-26a, but provided for some offset of prior distributions, J.A. 32a; Pet. App. 26a-28a, 106a. And the court acted consistently with the requirement in 29 U.S.C. 1104(a)(1)(D) that plan terms must comply with ERISA, because the court refused to rely on plan interpretations that would have violated ERISA's notice requirements.

Contrary to petitioners' contention (Br. 61), the district court's approach did not give rehired employees a windfall, because it reflected what the court reasonably found that they expected in light of the promises they had been given and the information they had received. In that regard, petitioners incorrectly assert (*ibid.*) that respondent Clair stated that he did not expect a benefit as large as the one provided by the district court's approach. Clair actually stated that he believed that offsetting only his prior distribution was appropriate because he had been promised a credit for all of his prior service. J.A. 126a.

Petitioners also err in asserting that the district court's approach is "economically irrational and unfair" to other employees. Br. 60. A face-value offset is not economically irrational. An employer could reasonably decide to offset only the face amount of prior distributions in order to encourage former employees with a high skill set to return to the company. Nor is giving former employees an incentive to return unfair to other employees. Former employees who are persuaded to

return are not similarly situated to either employees who never left (and therefore did not need to be enticed back) or newly-hired employees (who lack comparable experience).

Petitioners are likewise incorrect in suggesting (Br. 61-62) that the district court's approach violated tax-law or ERISA requirements. Contrary to petitioners' implication, Revenue Ruling 76-259, which states that floor-offset arrangements may be permissible under ERISA, does not require an offset of the full actuarial equivalent of prior distributions from profit sharing plans. On the contrary, that ruling states that floor-offset arrangements are permitted to provide for an offset of "only a specified portion of the vested account balance" in such plans. 1976-2 C.B. at 111. Nor does 26 C.F.R. 1.401(a)(4)-8(d)(1)(i) require an actuarially-adjusted offset. That regulation provides a safe harbor under which plans can be certain that they satisfy the Internal Revenue Code's prohibition against discrimination in favor of highly-compensated employees. The regulation does not require use of the safe harbor. In any event, the regulation does not limit the safe harbor to plans that provide an offset for the full actuarial equivalent of prior distributions. Instead, it states that plans will not qualify for the safe harbor if they offset more than "the actuarial equivalent of all or part of any prior distributions" attributable to employer contributions. 26 C.F.R. 1.401(a)(4)-8(d)(1)(i).

Indeed, regardless of the standard of review that applies to the district court's decision, the court was correct to reject the administrators' appreciated-offset approach. In most cases, that approach would have given rehired employees lower benefits than newly-hired employees. See J.A. 142a-143a. It therefore

would have treated rehired employees "as if they owed the [P]lan benefits upon rehire" even though "they were not informed of that situation" when they accepted reemployment. J.A. 99a. In addition, as noted above, interpreting the Plan as providing for use of the appreciated-offset approach would have violated ERISA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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