No. 06-1398

In the Supreme Court of the United States

AT&T PENSION BENEFIT PLAN, AS SUCCESSOR TO THE AMERITECH MANAGEMENT PENSION PLAN, PETITIONER

v.

LINDA CALL, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied the abuse-of-discretion standard of review applicable in certain denial-of-benefits cases under the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*

2. Whether the court of appeals correctly affirmed the district court's award of prejudgment interest.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, a defined benefit plan entitles employees to fixed periodic payments upon retirement. *Beck* v. *Pace Int'l Union*, 127 S. Ct. 2310, 2314 (2007). In general, defined benefits are provided in the form of an annuity. Under certain conditions, however, a defined benefit plan may also provide

for the immediate distribution of the present value of the annuity in a lump-sum payment. 29 U.S.C. 1055(g) (2000 & Supp. V 2005); 26 U.S.C. 417(e) (2000 & Supp. V 2005).

The present value is calculated using an actuarial mortality table that indicates how long a pensioner is expected to receive annuity payments and a discount rate that converts the expected stream of payments into its current value as a lump sum. Pet. App. 2a; see 29 U.S.C. 1055(g)(3); 26 U.S.C. 417(e)(3). A mortality table that predicts a longer life expectancy produces a larger lump sum. A higher discount rate produces a smaller lump sum. Pet. App. 2a.

Before 1994, ERISA generally required pension plans calculating lump-sum distributions to use a discount rate no greater than the rate that the Pension Benefit Guaranty Corporation (PBGC) would use in determining the present value for a lump-sum distribution on plan termination. 29 U.S.C. 1055(g)(3) (1988); 26 U.S.C. 411(a)(11)(B)(ii), 417(e)(3) (1988). ERISA did not, however, require plans to use a specific mortality table in calculating lump-sum distributions.

Plans are restricted in their ability to change interest rates and mortality tables by ERISA's "anti-cutback" provision. That provision generally prohibits any plan amendment that would decrease the "accrued benefit" of a plan participant, subject to limited exceptions. 29 U.S.C. 1054(g)(1); 26 U.S.C. 411(d)(6) (2000 & Supp. V 2005).

Since its enactment, ERISA has defined a participant's "accrued benefit" in a defined benefit plan as the "accrued benefit determined under the plan," generally "expressed in the form of an annual benefit commencing at *normal* retirement age." 29 U.S.C. 1002(23)(A) (emphasis added). As enacted, ERISA did not expressly address whether benefits payable on early retirement are treated like accrued benefits for purposes of applying the anti-cutback rule. In 1977, however, the Secretary of the Treasury, who is authorized to issue regulations concerning benefit accruals, see Reorg. Plan No. 4 of 1978, 3 C.F.R. 332, § 101(a) (1979); 29 U.S.C. 1202(c); 29 C.F.R. 2530.200a-2, issued regulations indicating that the anti-cutback rule applied to changes in actuarial factors used to determine optional or early-retirement benefits. See 42 Fed. Reg. 42,340 (1977) (promulgating 26 C.F.R. 1.411(d)-3(b) (1978)).

In 1984, Congress expressly addressed the issue. The Retirement Equity Act of 1984, Pub. L. No. 98-397, § 301, 98 Stat. 1426, amended ERISA's anti-cutback provision to clarify that a plan amendment that has the effect of eliminating or reducing an early-retirement benefit or a retirement-type subsidy, or eliminating an optional form of benefit "shall be treated as reducing accrued benefits." 29 U.S.C. 1054(g)(2) (2000 & Supp. V 2005); 26 U.S.C. 411(d)(6)(B) (2000 & Supp. V 2005). The 1984 amendment thus eliminated any "initial question about whether the [anti-cutback] provisions addressed early retirement benefits" and made clear that amendments reducing early-retirement benefits, as well as amendments eliminating "optional form[s] of benefit[s]," are generally prohibited by the anti-cutback rule. *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739, 744 (2004); 29 U.S.C. 1054(g)(2) (2000 & Supp. V 2005); see 26 U.S.C. 411(d)(6)(B) (2000 & Supp. V 2005).

Current Treasury regulations, promulgated in August 2005, reflect the existing statutory provisions. See 26 C.F.R. 1.411(d)-3, 1.411(d)-4; see also 26 C.F.R.

1.411(a)-7(a)(1)(i). The regulations further provide that an optional form of benefit is a "distribution alternative * * * that is available under the plan with respect to an accrued benefit or * * * a retirement-type benefit" and that the optional form includes all terms affecting its value, including actuarial factors. 26 C.F.R. 1.411(d)-3(g)(6)(ii)(A); see 70 Fed. Reg. 47,109 (2005). Thus, under the existing statute and regulations, absent an applicable exception, an amendment to an ERISA plan cannot, by changing actuarial factors, decrease the amount of early-retirement benefits that a participant would have received under an optional form of benefit, such as a lump sum, without violating the anti-cutback provision.

The Retirement Protection Act of 1994 (RPA), Pub. L. No. 103-465, Tit. VII, Subtit. F, 108 Stat. 5012, created a limited exception to the anti-cutback rule. The RPA eliminated the requirement that plans rely on the PBGC discount rate to calculate lump-sum benefits; instead, the RPA required that a participant's lump-sum benefit be no less than the present value of the participant's annuity as calculated using a mortality table specified by the Secretary of the Treasury and a discount rate based on 30-year Treasury securities (GATT rate). § 767, 108 Stat. 5037; see 29 U.S.C. 1055(g)(3)(A); 26 U.S.C. 417(e)(3)(A). The RPA gave plans until December 31, 1999, to comply with the new requirement. See § 767(c)(3), 108 Stat. 5040; 29 U.S.C. 1055(g)(3)(B); 26 U.S.C. 417(e)(3)(B). The RPA expressly provided that plan amendments adopting the Treasury mortality table and GATT rate would not be treated as reducing accrued benefits for purposes of ERISA's anti-cutback provision. § 767(d)(2), 108 Stat. 5040.

2. Until 1993, the PBGC valued pension plan benefits using a mortality table called Unisex Pensions—1984

(UP84), which had relatively short life expectancies. See 58 Fed. Reg. 5129 (1993). Because of the short life expectancies, the PBGC combined that mortality table with a relatively low discount rate (old PBGC rate) in order to produce a benefits value corresponding to the price of an equivalent annuity in the private insurance market. See *ibid.*; 63 Fed. Reg. 57,228 (1998).

In 1993, the PBGC revised its methodology for valuing benefits paid as annuities. The PBGC adopted a mortality table with longer life expectancies called the 1983 Group Annuity Mortality Table (83GAM) and a new, higher discount rate (new PBGC rate), to reflect the longer life expectancies. Pet. App. 2a-3a; 58 Fed. Reg. at 50,812. But the PBGC did not adopt the 83GAM and the new PBGC rate for valuing benefits paid as lump sums. Instead, the PBGC continued to use the UP84 mortality table and the old PBGC rate for that purpose. Pet. App. 3a; 58 Fed. Reg. at 50,814. As a result, until Congress enacted the RPA, ERISA required plans also to continue to use the old PBGC rate in calculating lump-sum distributions, although it allowed them to use any mortality table they chose. See p. 2, *supra*.

3. Petitioner is the successor to the Ameritech Management Pension Plan (Ameritech plan or plan), an ERISA defined benefit pension plan. Pet. ii. Until 1993, the Ameritech plan , in calculating lump-sum benefits, used the old PBGC rate (as required at the time by ERISA) and the mortality table used by the PBGC to value annuities (which was then the UP84 mortality table). Pet. App. 2a-3a. In 1994, the Ameritech plan was amended to clarify that, notwithstanding the PBGC's revision of the discount rate it used to calculate annuities, the plan would continue to use the old PBGC

rate to calculate lump-sum benefits. *Id.* at 3a-4a. There was no parallel amendment addressing the mortality table, which PBGC had also revised in 1993. *Id.* at 4a. A class of employees sued the plan, arguing that the plan terms therefore required use of the 83GAM mortality table adopted by the PBGC in 1993. *Id.* at 4a, 13a. The district court agreed and required the plan to apply the 83GAM mortality table. *Id.* at 4a; see *Malloy* v. *Ameritech*, No. CIV 98-488-GPM, 2000 WL 35525477 (S.D. Ill. Feb. 7, 2000). Thus, as of 1994, the plan required lump-sum distributions to be based on the 83GAM mortality table and the old PBGC rate, and ERISA's anti-cutback provision prohibited plan amendments that would result in lower lump-sum distributions. Pet. App. 4a; see p. 4, *supra*.

In July 1999, Ameritech adopted an "Eleventh Amendment" to the plan, which provided that lump-sum distributions would be the greater of (1) the amount produced by using the old PBGC rate and the UP84 mortality table or (2) the amount produced by using the GATT rate and the 83GAM mortality table. Pet. App. 5a, 15a. The Eleventh Amendment complied with the RPA's requirement for calculating lump-sum distributions, because the Treasury Department had specified that the GATT rate and the 83GAM mortality table applied for purposes of that requirement. See 26 C.F.R. 1.417(e)-1(d)(2), (3); Rev. Rul. 95-6, 1995-1 C.B. 80, superseded in part by Rev. Rul. 2001-62, 2001-2 C.B. 632. Moreover, because the RPA exempted plan amendments that adopted the Treasury Department's mortality table and the GATT rate from ERISA's anti-cutback provision, the Eleventh Amendment did not violate that anti-cutback provision. Pet. App. 5a-6a, 18a; see pp. 4-5, *supra*.

There remained an open question, however, whether the Eleventh Amendment complied with the anti-cutback provision of the Ameritech plan itself, set forth in Section 12.1 of the plan. Section 12.1, which was in effect at the time the Eleventh Amendment was adopted, provides that:

> no amendment will reduce a Participant's accrued benefit to less than the accrued benefit that he would have been entitled to receive if he had resigned from the employ of the Employers and Related Companies on the day of the amendment (except to the extent permitted by [26 U.S.C. 412(c)(8)]) and no amendment will eliminate an optional form of benefit with respect to a Participant or Beneficiary except as otherwise permitted by law and applicable regulation.

Resp. C.A. Br. 4 (emphasis omitted).

4. In November 1999, respondent Linda Call took early retirement and received a lump-sum distribution of $219,312.14, which was calculated in accordance with the Eleventh Amendment. Pet. App. 12a-13a. Under the plan terms in effect before that amendment, however, respondent would have been entitled to a l ump-sum of $255,088.45. *Id*. at 13a. Because the plan administrator refused to pay her the greater amount, respondent brought this class action lawsuit under ERISA. See *id.* at 12a-13a, 17a.

The parties' dispute turned on how to interpret Section 12.1 of the Ameritech plan. See Pet. App. 17a-21a. Respondent argued that, under Section 12.1, the actuarial assumptions used to calculate her lump-sum early-retirement distribution were part of her "accrued benefit" that could not be eliminated by amendment. *Id.* at 19a. Petitioner argued that the distribution was not an "accrued benefit" but was instead "an optional form of benefit" that the plan could eliminate under the last clause of Section 12.1 because the amendment was "otherwise permitted by law." See *id.* at 19a-20a; Pet. 7. Petitioner also argued that the "except as otherwise permitted by law" clause permits a reduction to either an accrued benefit or an optional form of benefit. *Ibid.* (emphasis omitted).

The district court granted summary judgment in respondent's favor. Pet. App. 12a-21a. The court concluded that the actuarial assumptions used to calculate respondent's lump-sum early-retirement distribution were part of her "accrued benefit." *Id.* at 19a. The court further explained that, although an optional form of benefit may be eliminated in certain instances, respondent's right to take her accrued benefit in a lump sum as an optional form of benefit was not challenged. *Id.* at 20a. The court also found it "abundantly clear that the words 'otherwise permitted by law' [in Section 12.1 of the Ameritech plan] refer only to the term 'optional form of benefit;' these words do not in any way qualify the term 'accrued benefit' which is found in the immediately preceding independent clause." *Ibid.* Because Section 12.1 was "clear and unambiguous," the court concluded that petitioner had no discretion to interpret that provision to allow the Eleventh Amendment to reduce the amount of respondent's distribution. *Id.* at 21a.

In a later decision, the district court awarded prejudgment interest calculated at the prime rate. Pet. App. 22a-24a. The court rejected, as foreclosed by Seventh Circuit precedent, petitioner's contention that prejudgment interest should not be awarded. *Id.* at 23a. Accordingly, the court entered judgment in favor of the plaintiff class in the amount of $31,193,689.56. *Id.* at 26a.

5. The court of appeals affirmed. Pet. App. 1a-11a. The court noted that Section 12.1 does not define "accrued benefit," and, although that term is defined elsewhere in the plan, the plan indicates that the definition does not apply to Section 12.1. *Id.* at 7a. The court therefore looked to the meaning of "accrued benefit" in ERISA's anti-cutback provision, 29 U.S.C. 1054(g) (2000 & Supp. V 2005). The court observed that, in that provision, an early-retirement benefit is treated as an "accrued benefit" that cannot be reduced, and the court reasoned that "accrued benefit" has the same meaning in Section 12.1. See Pet. App. 8a.

The court found that interpretation supported by Section 12.1's "separate treatment" of "optional form of benefit." Pet. App. 8a. The court concluded that an early-retirement benefit is not an "optional form of benefit," which the court described as generally a choice about "the way in which payments due to [a participant] under a plan will be made or applied," such as the choice between a lump sum or annuity. *Id.* at 7a-8a (citation omitted). Because Section 12.1 addresses reductions in a participant's "accrued benefit" in one clause, and elimination of an "optional form of benefit" in a second, independent clause, the court concluded that Section 12.1 "implies that 'early-retirement benefits' are accrued benefits within the meaning of the first clause" and that, unlike an optional form of benefit, they may not be eliminated even if the law so permits. *Id.* at 8a. If the plan meant to allow amendments that eliminate early-retirement benefits, it would have said so, the court reasoned, instead of "putting 'except as otherwise permitted' in a separate clause referring to optional forms of benefits."

Ibid. Thus, the court concluded, Section 12.1 of the plan prevents an amendment, such as the Eleventh Amendment, that reduces a lump-sum early-retirement benefit.

The court further explained that this "literal" interpretation of Section 12.1 did not affront "common sense" or "economic realities." Pet. App. 8a. Instead, the court stated that petitioner's interpretation lacks common sense because it gives no force to Section 12.1 as a private anti-cutback rule. *Id.* at 8a-9a. The court further rejected as "nonsense" petitioner's argument that Section 12.1 merely reflects petitioner's legal obligation to state its statutory obligations in the plan. *Id.* at 9a. The court reasoned that Section 12.1 did not appear in earlier versions of the plan and does not accurately state petitioner's statutory obligations. *Ibid.*

The court also observed that respondent might have decided not to retire early if she had known that she would lose $36,000 or 14% of her pension—the difference between the $219,312.14 she received and the $255,088.45 she claimed. Pet. App. 9a. That possibility, the court stated, was "a practical reason for invoking the principle that ambiguities in a contract that remain after extrinsic evidence has been presented (which neither party wishes to do in this case) are resolved against the party who drafted the contract." *Ibid.*

The court recognized that because petitioner had discretion to interpret the plan, the court could reject petitioner's interpretation only if it was "an abuse of that discretion." Pet. App. 10a. The court found, however, that deference "is overridden in this case by the lack of any reasoned basis for [petitioner's] interpretation." *Ibid.* The court stated that "unambiguous terms of a pension plan leave no room for the exercise of interpretive discretion by the plan's administrator, or at least not enough to carry the day for the administrator in this case." *Id.* at 11a.

The court did not address petitioner's objections to the award of prejudgment interest. It stated, however, that "[t]he Plan's remaining arguments are make-weights, perfunctorily argued." Pet. App. 11a.

In denying rehearing, the court reiterated that Section 12.1 does not track ERISA's anti-cutback provision, 29 U.S.C. 1054(g) (2000 & Supp. V 2005), or an IRS manual suggesting language to include in ERISA plans. Pet. App. 28a-29a. In particular, the court noted that the last clause in Section 12.1 of the Ameritech plan—"except as otherwise permitted by law and applicable regulations"—does not appear in the statute or in the IRS manual. *Id.* at 29a (emphasis omitted).

DISCUSSION

This case essentially involves a dispute about the proper interpretation, not of a federal statute or regulation, but of the Ameritech plan. Applying abuse-of-discretion review, the court of appeals held that the district court had properly rejected petitioner's interpretation of the plan as unreasonable. The court of appeals was correct to apply abuse-of-discretion review, and petitioner's case-specific disagreement with the interpretation of the plan by the two courts below does not present an important legal issue that warrants this Court's review. Petitioner's contention that the court of appeals erred in affirming the district court's award of prejudgment interest likewise does not warrant review. The decision of the court of appeals does not conflict with any decision of this Court or another court of appeals. Accordingly, the Court should deny the petition for a writ of certiorari.

A. The Plan Interpretation Issue Does Not Warrant This Court's Review

1. Petitioner's primary contention (Pet. 14-17) is that the court of appeals failed to apply abuse-of-discretion review in rejecting petitioner's interpretation of the plan and that the court's decision therefore conflicts with *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), and decisions of other courts of appeals applying the *Firestone* standard. Contrary to that contention, the court of appeals applied abuse-of-discretion review, and there is therefore no conflict.

a. In *Firestone*, this Court held that, although ERISA benefit determinations generally are reviewed *de novo*, abuse-of-discretion review applies if "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." 489 U.S. at 115. In this case, the court of appeals determined that the plan terms provide discretionary authority to the plan administrator and recognized that "to reject his interpretation we must find an abuse of that discretion." Pet. App. 10a. The court's decision is therefore consistent with *Firestone* and court of appeals decisions applying abuse-of-discretion review.

The court of appeals concluded that petitioner abused its discretion in construing Section 12.1 because petitioner's interpretation "lack[ed] * * * any reasoned basis" and was contrary to the "unambiguous terms" of the plan. Pet. App. 10a-11a. Other courts of appeals have likewise reached the unremarkable conclusion that a plan administrator abuses its discretion by adopting an interpretation that is contrary to a plan's plain language. See, *e.g., Erven* v. *Blandin Paper Co.*, 473 F.3d 903, 906, 909 (8th Cir. 2007); *DeWitt* v. *Penn-Del Directory Corp.*, 106 F.3d 514, 520 (3d Cir. 1997); *O'Shea* v. *First Manhattan Co. Thrift Plan & Trust*, 55 F.3d 109, 112 (2d Cir. 1995). Finding an abuse of discretion in those circumstances is entirely logical and consistent with this Court's refusal to defer to agency interpretations at odds with the plain language of a statute. See, *e.g.*, *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 109 (1993).

Petitioner contends (Pet. 16) that the plan administrator's construction should have been upheld under *Firestone*'s abuse-of discretion standard. Petitioner may well be correct that the court of appeals erred in concluding that the plan terms were unambiguously contrary to the administrator's interpretation.[1] But that plan-specific disagreement with the court of appeals' decision does not warrant this Court's review, especially since the district court also concluded that the adminis-

[1] There is greater ambiguity concerning the proper classification of early-retirement benefits than the court below acknowledged. Because the plan did not define "accrued benefit" as used in Section 12.1, the court of appeals looked to how that term is used in ERISA, specifically in 29 U.S.C. 1054(g) (2000 & Supp. V 2005). Pet. App. 7a. The court concluded that an early-retirement benefit is an "accrued benefit" under that provision. *Ibid.* An early-retirement benefit, however, is not strictly speaking an accrued benefit. See 26 C.F.R. 1.411(a)-7(a)(1)(i); *American Stores Co.* v. *American Stores Co. Ret. Plan*, 928 F.2d 986, 993-994 (10th Cir. 1991). Rather, an amendment eliminating or reducing an early-retirement benefit is "treated as" an accrued benefit under the anti-cutback provision. 29 U.S.C. 1054(g)(2) (2000 & Supp. V 2005). The court also concluded that respondent's lump-sum early-retirement benefit was not an optional form of benefit. Pet. App. 7a-8a. Treasury regulations, effective for amendments adopted on or after August 12, 2005, indicate, however, that an optional form of benefit includes a lump-sum benefit payable upon early retirement. See 26 C.F.R. 1.411(d)-3(g)(6)(i) and (ii)(A).

trator's interpretation was contrary to the "clear and unambiguous" terms of the plan, Pet. App. 21a. See *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

b. Petitioner also argues (Pet. 17) that the court of appeals' holding that an early-retirement benefit received in a lump sum is not an "optional form of benefit" under Section 12.1 of the Ameritech plan conflicts with *Steiner Corp. Retirement Plan* v. *Johnson & Higgins*, 31 F.3d 935 (10th Cir. 1994), cert. denied, 513 U.S. 1081 (1995), which held that a lump sum is an optional form of benefit under ERISA. See Pet. 17. Petitioner is incorrect.

Steiner differs from the decision below in critical respects. Unlike the decision below, *Steiner* did not involve an early-retirement benefit, a point which the Tenth Circuit stressed in its opinion. See 31 F.3d at 935. Moreover, *Steiner* interpreted ERISA itself, while the decision below interpreted the Ameritech plan. Although the court below relied in part on the meaning of "accrued benefit" under ERISA in interpreting the plan, the court also relied on the specific plan language—in particular its "separate treatment" of "accrued benefit" and "optional form of benefit." See Pet. App. 8a.

2. Petitioner also contends (Pet. 18-23) that the decision below conflicts with decisions of other courts of appeals because the court below purportedly applied canons of construction that are inconsistent with deferential review. The court below did not apply the canons of construction that petitioner attributes to it.

a. Petitioner asserts that the decision below adopted an "interpretive rule that, if an ERISA plan incorporates a statutory protection, the plan presumptively should be read to afford beneficiaries greater protection than the parallel statutory provision." Pet. 18. Petitioner contends (Pet. 19) that this interpretive rule conflicts with *Spacek* v. *Maritime Association—ILA Pension Plan*, 134 F.3d 283 (5th Cir. 1998) (abrogated on other grounds by *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739 (2004)) which held that a pension plan will not be construed to contain extra-statutory commitments unless they are stated in clear and express language. Petitioner further contends (Pet. 19) that the interpretive rule conflicts with decisions of other courts of appeals that have imposed a similar "clear and express language" requirement for welfare plans.

Contrary to petitioner's assertion, the decision below does not announce a broad rule that plans that incorporate an ERISA protection are presumed to afford beneficiaries greater protection than ERISA itself provides. The court of appeals construed Section 12.1 of the plan to provide greater protection than ERISA based on what the court viewed as a "literal" interpretation of the plan's terms. Pet. App. 8a. The court did not purport to rely on a presumption about how to construe plan terms that track ERISA. Instead, the court specifically rejected petitioner's contention that the terms of Section 12.1 parallel ERISA, noting that Section 12.1 contains language that departs significantly from the text of the statute. *Id.* at 9a, 28a-29a (opinion on rehearing).

Accordingly, petitioner is mistaken in asserting (Pet. 18, 20) that the decision below will interfere with the ability of pension plan sponsors to adopt plan terms that track ERISA's protections in order to ensure that their plans are tax-qualified. At most, the decision will require plan sponsors to exercise care to avoid significant unintentional deviations from statutory or regulatory language when drafting those plan terms.

The decision below also does not conflict with the holding in *Spacek* (and in court of appeals decisions involving welfare plans) that commitments beyond ERISA requirements "must be found in the plan documents and must be stated in clear and express language." *Spacek*, 134 F.3d at 293 (citation omitted). The Seventh Circuit has likewise held that clear and express language is required. See *Vallone* v. *CNA Fin. Corp.*, 375 F.3d 623, 632 (welfare plan), cert. denied, 543 U.S. 1021 (2004). The court simply found what it considered unambiguous language in this case. See Pet. App. 11a.

b. Petitioner also asserts (Pet. 21-23) that the court of appeals applied the canon of *contra proferentem*, *i.e.*, the principle that ambiguous contract language should be construed against the drafter. Petitioner contends (*ibid.*) that the courts of appeals disagree on whether and when that principle applies to the interpretation of ERISA plans and that the Court should grant review in this case to resolve that disagreement. Petitioner is correct that the courts of appeals have expressed different views on whether the *contra proferentem* principle applies when reviewing an administrator's interpretation of an ERISA plan for abuse of discretion. See, *e.g., Carolina Care Plan Inc.* v. *McKenzie,* 467 F.3d 383, 389 (4th Cir. 2006) (applying principle where plan administrator has a conflict of interest, although some other courts of appeals do not do so), cert. dismissed, 128 S. Ct. 6 (2007), and No. 06-1436 (July 30, 2007). But this case is not an appropriate vehicle to resolve that disagreement, for two reasons.

First, the decision below is ultimately based, not on the doctrine of *contra proferentem*, but on what the court viewed as the "unambiguous" language of Section 12.1. Pet. App. 11a. The court discussed the principle of *contra proferentem* only in considering whether a "literal" interpretation of Section 12.1 (*i.e.*, what it viewed as the unambiguous import of the text) "affronted the common sense of, or the economic realities behind," that section. *Id.* at 8a. After concluding that petitioner's interpretation "lacks the appeal of common sense," the court observed that respondent might have decided not to retire early if she knew that doing so would result in a substantial reduction of her pension. *Id.* at 8a-9a. The court then stated that that is a "practical reason" for invoking *contra proferentem*. The court did not say that *contra proferentem* actually *applied* in this case. On the contrary, the court recognized that the doctrine applies to "ambiguities in a contract that remain after extrinsic evidence has been presented (which neither party wishes to do in this case)." *Id.* at 9a. The court did not explain how its discussion of a rule that it recognized applied only to resolve ambiguities squared with its ultimate holding that the plan language unambiguously foreclosed petitioner's interpretation. But that ambiguity in the decision below does not justify this Court's review, especially when pre-existing Seventh Circuit precedent holds that *contra proferentem* is inapplicable when a court reviews a plan administrator's benefits decision for abuse of discretion. *Hess* v. *Reg-Ellen Mach. Tool Corp.*, 423 F.3d 653, 662 (2005).

Moreover, even if the court of appeals had based its decision in part on *contra proferentem*, review would not be warranted in this case to address the extent to which the doctrine applies in ERISA cases. The parties did not brief the issue in the court of appeals, and that court did not analyze the issue. The case therefore does not furnish a suitable setting for this Court to consider when or whether *contra proferentem* applies in an ERISA benefits case.

B. The Interest Issues Do Not Warrant This Court's Review

Petitioner also contends (Pet. 27-29) that review is warranted to decide whether ERISA authorizes an award of prejudgment interest and, if so, whether the district court erred in awarding interest at the prime rate rather than the postjudgment rate specified in 28 U.S.C. 1961(a). It is not clear that the interest issues are properly before this Court, and, in any event, they do not warrant review.

1. Although the court of appeals' opinion is not entirely clear, the court appears to have declined to address the interest issues because they were only "perfunctorily argued." Pet. App. 11a; see Pet. C.A. Br. 40-41; Pet. C.A. Reply Br. 24-25. Courts of appeals, including the Seventh Circuit, routinely decline to address issues on that ground. See, *e.g.*, *Hershinow* v. *Bonaparte*, 735 F.2d 264, 266 (7th Cir. 1984); *United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir.), cert. denied, 494 U.S. 1082 (1990); *SEC* v. *Banner Fund Int'l*, 211 F.3d 602, 613-614 (D.C. Cir. 2000). If the court in fact declined to address the interest issues because they were not adequately presented, then those issues are not properly before this Court. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Even if the court of appeals implicitly decided the interest issues on the merits, its failure to address them in its opinion makes this case a poor vehicle for further review of the issues.

2. In any event, the interest issues do not warrant this Court's review. The Court has recognized that, absent special considerations such as sovereign immunity,

the lack of a specific statutory authorization of prejudgment interest does not indicate congressional intent to deny prejudgment interest, but instead "merely indicates that the question is governed by traditional judge-made principles." *City of Milwaukee* v. *Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 194 (1995). Consistent with those principles, courts of appeals have correctly concluded that an ERISA participant or beneficiary may recover prejudgment interest in a suit to recover benefits under 29 U.S.C. 1132(a)(1)(B). See, *e.g., Moore* v. *CapitalCare, Inc.*, 461 F.3d 1, 12 (D.C. Cir. 2006); *Skretvedt* v. *E.I. DuPont de Nemours*, 372 F.3d 193, 205-206 (3d Cir. 2004); *Ford* v. *Uniroyal Pension Plan*, 154 F.3d 613, 616 (6th Cir. 1998). Courts have also allowed the recovery of prejudgment interest as an element of "appropriate equitable relief" under 29 U.S.C. 1132(a)(3). See, *e.g., Moore*, 461 F.3d at 13; *Skretvedt*, 372 F.3d at 212-215; *Parke* v. *First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1006-1009 (8th Cir. 2004); *Clair* v. *Harris Trust & Sav. Bank*, 190 F.3d 495, 498-499 (7th Cir. 1999), cert. denied, 528 U.S. 1157 (2000).

As petitioner notes (Pet. 28), the Eleventh Circuit has held that 29 U.S.C. 1132(a)(1)(B) does not authorize a participant to recover interest for a delay in paying benefits. *Flint* v. *ABB, Inc.*, 337 F.3d 1326, 1329-1331 (2003), cert. denied, 540 U.S. 1219 (2004). That holding is inapposite here, however, because this case involves an award of interest on benefits that were wrongfully denied rather than merely delayed. The Eleventh Circuit recognizes that "nothing in *Flint* would preclude the trial court from including interest * * * as part of its ultimate benefits award" in such a case. *Green* v. *Holland*, 480 F.3d 1216, 1223 n.4 (2007). The Seventh Circuit similarly recognizes a distinction between delayed and denied benefits. See *Senese* v. *Chicago Area I.B. of T. Pension Fund*, 237 F.3d 819, 825 (2001). Accordingly, there is no conflict between *Flint* and this case.

Petitioner also asserts (Pet. 27) that *Great-West Life & Annuity Insurance Co.* v. *Knudson*, 534 U.S. 204 (2002), undercuts Seventh Circuit precedent allowing prejudgment interest as an element of "equitable relief" under 29 U.S.C. 1132(a)(3). No court of appeals, however, has held that prejudgment interest is unavailable after *Great-West*. See *Green*, 480 F.3d at 1226 (reserving issue); *Flint*, 337 F.3d at 1331 (same). Neither court below indicated whether the award of interest in this case was based on 29 U.S.C. 1132(a)(1)(B) or (3). Accordingly, there is no occasion here to grant review to consider the effect of *Great-West* on some early Seventh Circuit precedents awarding prejudgment interest under 29 U.S.C. 1132(a)(3).

3. Petitioner's challenge to the interest rate used by the district court also does not warrant review. When, as in the ERISA context, an award of interest is based on common law rather than a specific statutory provision, "district courts retain discretion to choose the appropriate rate in a given case." *United States* v. *Texas*, 507 U.S. 529, 536 (1993). At least nine courts of appeals have accordingly recognized that district courts have some discretion in selecting the rate of prejudgment interest on an award of ERISA benefits.[2]

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[2] See, *e.g.*, *Cottrill* v. *Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 223 (1st Cir. 1996); *Jones* v. *UNUM Life Ins. Co. of Am.*, 223 F.3d 130, 139 (2d Cir. 2000); *Skretvedt*, 372 F.3d at 201 n.9; *Quesinberry* v. *Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1031 (4th Cir. 1993) (en banc); *Hansen* v. *Continental Ins. Co.*, 940 F.2d 971, 984 (5th Cir. 1991); *Rybarczyk* v. *TRW, Inc.*, 235 F.3d 975, 985-986 (6th Cir. 2000); *Fritcher* v. *Health Care Serv. Corp.*, 301 F.3d 811, 820 (7th Cir. 2002); *Blankenship* v.

Some courts of appeals have expressed preferences for different rates in their review of district court decisions. The Seventh Circuit has suggested use of the prime rate and cautioned against setting a rate too low by neglecting the risk of default. *Fritcher* v. *Health Care Serv. Corp.*, 301 F.3d 811, 820 (2002). The Ninth Circuit requires an explanation for not using the Treasury bill rate set by 28 U.S.C. 1961(a) for post-judgment interest. See *Blankenship* v. *Liberty Life Assurance Co.*, 486 F.3d 620, 628 (2007). The Fifth Circuit has instructed district courts to look to state law rates for guidance, although use of those rates is not mandatory. *Hansen* v. *Continental Ins. Co.*, 940 F.2d 971, 984 (1991). The Eighth Circuit has stated that the post-judgment rate should be used without suggesting that another rate is appropriate. See, *e.g., Mansker* v. *TMB Life Ins. Co.*, 54 F.3d 1322, 1330 (1995).

These modest differences in the circuits do not warrant this Court's attention in this case. The courts of appeals' general use of an abuse-of-discretion standard can be expected to lead to the use of different interest rates in at least some cases, particularly because there are "three recognized bases" for awarding prejudgment interest in ERISA benefits cases—preventing unjust enrichment, ensuring full compensation, and promoting settlement. See *Moore*, 461 F.3d at 13. Petitioner does not cite any decision in which a court of appeals has held that prejudgment interest under ERISA may never be awarded based on the prime rate, and we are not aware of any. Nor has petitioner made any argument that,

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Liberty Life Assurance Co., 486 F.3d 620, 628 (9th Cir. 2007); *Allison* v. *Bank One-Denver*, 289 F.3d 1223, 1243-1244 (10th Cir. 2002); *Florence Nightingale Nursing Serv., Inc.* v. *Blue Cross/Blue Shield*, 41 F.3d 1476, 1484 (11th Cir.), cert. denied, 514 U.S. 1128 (1995).

because of the particular facts of this case, the award of interest at the prime rate was an abuse of discretion. Accordingly, there is no reason for this Court to address whether the district court erred in awarding interest at the prime rate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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