No. 07-663

In the Supreme Court of the United States

AK STEEL CORPORATION RETIREMENT ACCUMULATION PENSION PLAN, ET AL., PETITIONERS

v.

JOHN D. WEST, 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 SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in determining that respondents' claim was a claim "to recover benefits due [to them] under the terms of the plan" under Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(1)(B).

2. Whether the court of appeals erred in applying the principle of *contra proferentem* in affirming the district court's award of additional retirement benefits to respondents.

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This brief is submitted in response to this Court's order 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.*, pension plans are classified as either "defined contribution plans" or "defined benefit plans." A "defined contribution plan" provides "an individual account for each participant," and benefits are "based solely upon the amount contributed" to that account by the participant and his employer. 29 U.S.C. 1002(34). Under such a plan, "[t]he employee bears the investment risks and the

employer does not guarantee a retirement benefit to the employee." *Register* v. *PNC Fin. Servs. Group, Inc.*, 477 F.3d 56, 61-62 (3d Cir. 2007).

A "defined benefit plan" is generally any other type of pension plan. 29 U.S.C. 1002(35). Under a traditional defined benefit plan, the participant is entitled to certain benefits upon retirement, and the "employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 364 n.5 (1980). Such a plan "consists of a general pool of assets rather than individual dedicated accounts." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999). Under such a plan, "members have a right to a certain defined level of benefits, known as 'accrued benefits.'" *Id.* at 440; see pp. 3-4, *infra*.

A "cash balance plan" is a hybrid that is classified as a defined benefit plan. See 26 C.F.R. 1.401(a)(4)-8(c)(3)(i). As under a traditional defined benefit plan, the participant is entitled to certain pension benefits, but as under a defined contribution plan, the participant's benefits are calculated using an account for each participant. *Register*, 477 F.3d at 62. Those accounts are hypothetical and are used for recordkeeping purposes only. 26 C.F.R. 1.401(a)(4)-8(c)(3)(i). Each account reflects the pension benefits that the employee has earned under the plan's benefit formula, which usually consists of "pay credits," which are hypothetical employer contributions, and "interest credits," which are hypothetical earnings on the accumulated account balance. *Register*, 477 F.3d at 62.

b. One of ERISA's primary purposes is to "protect contractually defined benefits." *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985). Congress wanted to "mak[e] sure that if a worker has been

promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.*, 446 U.S. at 375.

ERISA furthers that goal through its non-forfeiture and actuarial-equivalence provisions. First, the statute provides that, in a defined benefit plan, an employee's benefits must vest no later than as provided under the applicable statutory vesting schedule. 29 U.S.C. 1053(a) (2000 & Supp. V 2005). When the employee's benefits vest, the "employee's right to his normal retirement benefit is nonforfeitable," and, if the employee leaves his employment before normal retirement age, he is entitled to the benefit he has accrued up to that point. *Ibid.*

Second, ERISA ensures that, if a participant retires after his pension benefits have vested but before normal retirement age, he is not penalized for that choice. The statute defines a participant's "accrued benefit" as his "accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of [Title 29], expressed in the form of an annual benefit commencing at normal retirement age," *i.e.*, an annuity payable at retirement. 29 U.S.C. 1002(23)(A). ERISA then specifies that, if a participant retires early, his "accrued benefit * * * shall be the actuarial equivalent of" an annuity commencing at normal retirement age. 29 U.S.C. 1054(c)(3). Therefore, if a participant retires early and elects to take a lump-sum distribution of his vested benefits, that lump-sum amount must be at least equal to the present value of the annuity the participant would have received if he had deferred commencement of the

annuity until normal retirement age. See *ibid.*; 26 C.F.R. 1.417(e)-1.[1]

c. ERISA also protects the interests of participants and beneficiaries by "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). As relevant here, Section 502(a)(1)(B) of ERISA authorizes a plan participant or beneficiary 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). Section 502(a)(3) authorizes a plan participant, beneficiary, or fiduciary to bring a civil action "to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan," or "to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. 1132(a)(3).

2. a. Lead respondent John West (respondent) was employed by Armco, Inc., a predecessor to AK Steel Corporation, for over thirty years, and was a participant in what is now petitioner AK Steel Corporation Retirement Accumulation Pension Plan (Plan). Pet. App. 1a, 9a-10a. The Plan is a cash balance pension plan governed by ERISA. *Id.* at 1a, 6a. The Plan vests its administrator, petitioner AK Steel Corporation Benefit

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[1] ERISA's non-forfeiture and actuarial-equivalence provisions are mirrored in the Internal Revenue Code, 26 U.S.C. 401 *et seq.* See 26 U.S.C. 411(a)(2), 411(c)(3). The Secretary of the Treasury has rulemaking authority concerning ERISA's benefit-accrual and vesting provisions. Reorganization Plan No. 4 of 1978, 3 C.F.R. 332, § 101(a) (1979); see also 29 U.S.C. 1202(c) (adopting Secretary's regulations to implement ERISA); 29 C.F.R. 2530.200a-2 (same).

Plans Administrative Committee (Committee), with discretionary authority to interpret the Plan and determine entitlement to benefits. *Id.* at 92a.

As is typical in a cash balance pension plan, the Plan specifies that each participant will have a hypothetical account used for bookkeeping purposes. Pet. App. 75a-76a (Plan § 1.1). The value of that account is based on pay credits and interest credits. *Id.* at 87a-89a (Plan §§ 3.1-3.3). The Plan sets certain minimum rates for calculating interest credits. *Id.* at 88a-89a (Plan § 3.3).

The Plan defines each participant's "accrued benefit" in terms of a benefit paid as an annuity commencing at normal retirement age that is the actuarial equivalent of the amount in the participant's hypothetical account. Pet. App. 76a (Plan § 1.2). That annuity is calculated by projecting the hypothetical account amount forward to the participant's normal retirement date and converting it to an annuity. *Ibid.*

A participant who retires on or after normal retirement date may elect to receive his pension benefits in one of three ways: (a) as a "Full lump-sum payable on his Benefit-Commencement Date equal to his Accounts"; (b) as a "Full annuity beginning on his Benefit Commencement Date equal to the Actuarial Equivalent of his Accounts"; or (c) as a "Partial lump-sum and partial annuity payable or beginning on his Benefit Commencement Date equal to the respective pro-rata amounts determined under (a) and (b) above." Pet. App. 90a (Plan § 4.1). The Plan provides that a participant taking an early retirement benefit also may receive his benefit in any of those three ways. *Ibid.* (Plan § 4.2). No matter how the benefit is distributed, however, the Plan guarantees that the benefit will not be "less than the actuarial equivalent of his accrued benefit deter-

mined under the [Plan] terms." *Id.* at 5a (quoting Plan § 4.8).

b. In August 1997, respondent West elected to take early retirement and to receive his pension benefits in a lump-sum distribution. Pet. App. 9a. The Plan paid him an amount equal to the balance in his hypothetical account. *Id.* at 10a. Respondent filed an administrative appeal, arguing that that lump-sum amount was not the actuarial equivalent of the annuity he would have received at normal retirement age. *Ibid.*

Respondent contended that the Plan should have calculated his lump-sum benefit using a two-step "whipsaw calculation." Under that approach, his hypothetical account balance would be projected forward to normal retirement age using the rate, specified in the Plan, at which interest credits would have accumulated had he stayed in the Plan until normal retirement age. Pet. App. 6a-8a. Then the projected amount would be discounted back to its present value on the date of the lump-sum distribution, *id.* at 7a, using a discount rate specified by statute, see 26 U.S.C. 411(e)(2), 417(e)(3); 29 U.S.C. 1053(e)(2), 1055(g)(3); see also Pet. 11 n.4. If the rate used to calculate interest credits is greater than the statutory discount rate, then the lump-sum benefit would be greater than the participant's hypothetical account balance on the date of distribution. Pet. App. 7a. In respondent's view, the Plan was required to calculate his lump-sum benefit in that manner to comply with the non-forfeiture and actuarial-equivalent provisions of ERISA. *Id.* at 8a; Br. in Opp. 13-14.

The Committee rejected respondent's claim on the grounds that it was untimely and that respondent had received all of the benefits he was due under the Plan. Pet. App. 10a.

3. Respondent filed suit under ERISA Sections 502(a)(1)(B) and 502(a)(3), 29 U.S.C. 1132(a)(1)(B) and 1132(a)(3), arguing that the Committee's failure to use the whipsaw calculation deprived him and a class of similarly situated individuals of benefits due under the Plan, in violation of ERISA. Pet. App. 10a, 36a-37a.

a. The district court granted partial summary judgment to respondents. Pet. App. 36a-60a. It explained that, when a Plan participant "receives his or her benefit in the form of a non-annuity," *e.g.*, as a lump-sum disbursement, "ERISA requires that * * * the alternative form must 'be the actuarial equivalent' of an annuity commencing at normal retirement age." *Id.* at 40a-41a (quoting 29 U.S.C. 1054(c)(3)). Here, the court continued, the whipsaw calculation is required to determine the lump-sum amount that is actuarially equivalent to the annuity each respondent would receive at normal retirement age. *Id.* at 41a-42a. The court relied on Treasury Department regulations that interpreted ERISA to require use of the whipsaw calculation to determine actuarial equivalence for cash balance plans to avoid a forfeiture of accrued benefits, *id.* at 41a-42a, 59a-60a, as well as Section 1.2 of the Plan, which defines each participant's "accrued benefit" as an annuity at normal retirement age, not as his or her hypothetical account balance, *id.* at 45a.

b. The district court also rejected petitioners' contention that respondents' suit was not properly brought under either Section 502(a)(1)(B) or Section 502(a)(3). Pet. App. 61a-68a. It explained that respondents' claim arose under Section 502(a)(1)(B) because respondents seek "benefits 'under the terms of the Plan,'" and the fact that they also argue that Plan terms that reduce

their accrued benefits violate ERISA does not change the nature of their claim. *Id.* at 65a.

4. The court of appeals affirmed. Pet. App. 1a-33a.

a. The court first determined that respondents' claim for relief arose under ERISA Section 502(a)(1)(B). Pet. App. 11a-18a. The court held that respondents "cannot recover the relief they request" as "equitable relief" under Section 502(a)(3) because their complaint "centers on money damages for the alleged underpayment of a benefit," and money damages are "the classic form of legal relief." *Id.* at 12a-13a. But the court determined that respondents' claim was properly brought under Section 502(a)(1)(B), because "the key issue is whether [respondent West] was paid less than the full accrued benefit due him under the AK Steel Plan." *Id.* at 17a. Despite the fact that respondents contended that some Plan terms were illegal under ERISA, the court held that their claim was still one for benefits "under the terms of the Plan" because "those terms must * * * comply with ERISA." *Ibid.*

b. The court of appeals then upheld the district court's use of the whipsaw calculation to award respondents additional benefits. Pet. App. 18a-33a. The court rejected petitioners' argument that they could pay respondents lump-sum benefits equal to their account balances because the Plan "does not provide an accrued benefit in the form of an annual benefit commencing at normal retirement age." *Id.* at 25a (internal quotation marks omitted). The court noted that Section 1.2 of the Plan "clear[ly]" defines the "accrued benefit" to which each participant is entitled as an "annual benefit commencing at normal retirement age." *Id.* at 26a. "To the extent that the Plan's language with respect to lump-sum distributions is ambiguous in that it conflicts with

the definition of 'accrued benefit' in another section of the Plan," the court stated, "the ambiguity must be resolved in [respondents'] favor." *Ibid.* In any event, the court explained, Sections 4.1 and 4.2 of the Plan, which appear to limit a lump-sum disbursement to the participant's account balance (rather than the actuarial equivalent of his accrued benefit), cannot be enforced because they "d[o] not comply with the law," specifically, ERISA's anti-forfeiture and actuarial-equivalence provisions. *Id.* at 26a-27a.[2]

5. The court of appeals denied petitioners' petition for rehearing en banc, with no judge in regular active service calling for a vote. Pet. App. 34a-35a.

DISCUSSION

The court of appeals correctly held that a claim for ERISA plan benefits that requires the court to interpret the provisions of ERISA may be brought under Section 502(a)(1)(B). Petitioners' contrary contention (Pet. 13-14) represents an unduly narrow view of Section 502(a)(1)(B) that is contrary to its text as well as its fundamental purposes. There is no split in the lower courts on this issue, and further review is therefore unwarranted. Petitioners' contention (Pet. 22-27) that the court of appeals erred in applying the principle of *contra proferentem* likewise does not warrant this Court's review. Accordingly, the petition should be denied.

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[2] The court of appeals also rejected petitioners' argument that the Pension Protection Act of 2006 (PPA), Pub. L. 109-280, 120 Stat. 780, applies to respondents' claims. Pet. App. 31a-33a. The PPA amended ERISA to provide that the whipsaw calculation is not required for distributions made after August 17, 2006. PPA § 701, 120 Stat. 981. Because respondents' benefits were paid before that date, the court explained, the PPA does not apply to them. Pet. App. 32a.

A. The Section 502(a)(1)(B) Question Does Not Warrant This Court's Review

1. Petitioners contend (Pet. 13-22) that respondents do not seek "to recover benefits due to [them] under the terms of [the] plan" for purposes of ERISA Section 502(a)(1)(B) because resolution of their claim turns not only on the terms of the Plan but also on ERISA's statutory provisions. That is incorrect. Respondents are not foreclosed from suing to recover additional benefits under Section 502(a)(1)(B) because they claim that Plan provisions that cut back on accrued benefits violate ERISA.

A claim that a plan administrator failed to provide benefits in compliance with the terms of the plan and the provisions of ERISA is a claim for benefits due under the terms of the plan cognizable under Section 502(a)(1)(B). Plan documents create the "contractually defined benefits" that are the focus of ERISA's protective regime. *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 148 (1985). Because "[n]othing in ERISA requires employers to establish employee benefits plans," *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996), a participant's basic entitlement to benefits arises not under ERISA but under his plan.

ERISA provides, however, that plan fiduciaries must interpret and apply plan documents consistently with the governing provisions 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)); see *Central States, Se. & Sw. Areas Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 568 (1985) ("trust docu-

ments cannot excuse trustees from their duties under ERISA," and "trust documents must generally be construed in light of ERISA's policies").

Accordingly, a plan administrator, as an ERISA fiduciary, must look both to the terms of the plan and the requirements of ERISA in deciding a claim for benefits under the plan. When a participant seeks review of a benefits decision in federal court, the court likewise construes the plan in light of the requirements of ERISA. Although such a suit may turn on both the plan's terms and the statute's requirements, it remains a suit for benefits under the plan within the meaning of Section 502(a)(1)(B). See *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996) (Section 502(a)(1)(B) "specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims").

This Court has repeatedly recognized that ERISA plans must be interpreted and applied to adhere to ERISA's requirements. In *Central Laborers' Pension Fund* v. *Heinz*, 541 U.S. 739 (2004), for example, the Court observed—in the specific context of a suit "to recover * * * suspended benefits"—that ERISA's prohibition of forfeitures provides "a global directive that regulates the substantive content of pension plans" and "adds a mandatory term to all retirement packages that a company might offer." *Id.* at 742, 750. Similarly, in *Unum Life Ins. Co. of Am.* v. *Ward*, 526 U.S. 358 (1999), the Court concluded that a state insurance law provision that was saved from preemption under ERISA "effectively create[d] a mandatory contract term that required the insurer to prove prejudice before enforcing a timeliness-of-claim provision," and thereby overrode any contrary plan terms. *Id.* at 374, 376-377 (internal

quotation marks omitted). The *Unum* Court specifically noted that the participant's claim was one "to recover benefits due . . . under the terms of his plan," even though it was the state-law notice-prejudice rule, which overrode the terms of the plan, that "supplied the relevant rule of decision." *Id.* at 377.[3]

The principle that ERISA plans incorporate the requirements of ERISA is consistent with the fundamental principle of contract law that "[l]aws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as fully as if they had been expressly referred to or incorporated in its terms." *Norfolk & W. Ry.* v. *American Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991). That principle is also reflected in trust law, which makes clear that a trust must be interpreted and applied consistently with governing law. See Restatement (Second) of Trusts §§ 62, 166 (1959) (discussing unenforceability of illegal terms and duty of trustee to administer trust in compliance with the law). And the same principle has been applied under Section 301 of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. 141 *et seq.*, from which ERISA was drawn. See *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 76-79 (1982) (collective bargaining agreement was subject to federal labor and antitrust laws); see also 29 U.S.C. 185 (§ 301).

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[3] See also, *e.g.*, *Feifer* v. *Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002) ("ERISA's written instrument requirement essentially operates as a strong integration clause, statutorily inserted in every plan document." (internal quotation marks omitted)); *May Dep't Stores Co.* v. *Federal Ins. Co.*, 305 F.3d 597, 601-602 (7th Cir. 2002) ("[L]ike many other contracts, pension plans governed by ERISA contain provisions implied by law.").

Applying that principle, the court of appeals correctly determined that respondents' claim was one "to recover benefits due to [them] under the terms of [the] plan" for purposes of Section 502(a)(1)(B). Respondents contended that they "w[ere] paid less than the full accrued benefit due [them]" under the Plan, because Section 1.2 of the Plan entitled them to lump-sum distributions that were actuarially equivalent to the amounts in their hypothetical accounts, and Sections 4.1 and 4.2 of the Plan, which appeared to limit their lump-sum distributions to the amounts in their hypothetical accounts, violated the requirements of ERISA. *Id.* at 8a, 17a; Br. in Opp. 13-14. The relief respondents seek is in the form of additional retirement benefits, and their entitlement to those benefits arises from Section 1.2 of the Plan. The fact that respondents also contend that contrary Plan provisions are illegal under ERISA does not change the character of their claims.

2. Petitioners contend (Pet. 13-14) that Section 502(a)(1)(B) is confined to claims that rely solely on plan terms without regard to the provisions of ERISA, because Section 502(a)(1)(B) "authorizes relief only for violations of 'the terms of the plan,'" while Section 502(a)(3) "authorizes relief for violations of *either* 'any provision of this title *or* the terms of the plan.'" That argument fails. Respondents' claim *is* a claim for Plan benefits, because their entitlement to benefits arises under Section 1.2 of the Plan. Neither plan administrators nor the courts can properly resolve benefit claims without regard to the provisions of ERISA, because ERISA specifies that plan terms are operative only to the extent that they "are consistent with" the statutory provisions, 29 U.S.C. 1104(a)(1)(D), and the require-

ments of ERISA are therefore incorporated into ERISA plans. See pp. 10-13, *supra*.

In contrast to Section 502(a)(1)(B)'s specific focus on benefit claims, Section 502(a)(3) functions as a "'catch-all[],' providing 'appropriate equitable relief' for 'any' statutory violation" or violation of the terms of the plan. *Varity*, 516 U.S. at 512. It is designed to afford "relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." *Ibid.* In a suit under 502(a)(1)(B), but not one under Section 502(a)(3), a participant must point to a provision of the plan that, when read in light of a statutory requirement or prohibition, entitles him or her to benefits. Respondents have done so here, and their claim thus arises under Section 502(a)(1)(B). There accordingly is no need to rely on Section 502(a)(3).

Petitioners argue (Pet. 13) that Section 502(a)(1)(B) must be limited to claims that do not refer to the provisions of ERISA because Congress did not intend for state courts "to interpret and apply the provisions of ERISA." That is incorrect. "[S]tate courts" are "presumptively competent[] to adjudicate claims arising under the laws of the United States." *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990); see U.S. Const. Art. VI, Cl. 2. Many ERISA plans contain clauses that incorporate ERISA or require that their terms be read consistently with ERISA. It can hardly be said that allowing state courts to award benefits in light of those provisions runs contrary to the federal scheme, and it would make little sense for state-court jurisdiction to turn on whether

such incorporation of ERISA's requirements is explicit or implicit.[4]

Significantly, petitioners argued to both the district court and the court of appeals that respondents had no remedy under Section 502(a)(1)(B) or 502(a)(3), even if plan terms were clearly illegal under ERISA. See, *e.g.*, Pet. App. 12a, 64a; see also *id.* at 67a (petitioners' position would "permit plan terms that blatantly violated ERISA to stand unchallenged"). They now contend that respondents could seek equitable reformation of the Plan under Section 502(a)(3) and then seek benefits under the "reformed" plan under Section 502(a)(1)(B). There is no evident reason why a participant or beneficiary must proceed in two steps, or invoke two statutory provisions, rather than one. Petitioners suggest that the relief of reformation might be denied at the first step on the ground that it would not be "equitable" and "appropriate." Pet. 18 n.7. The fact that petitioners' position thus would either eliminate jurisdiction or sub-

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[4] The legislative history on which petitioners rely (Pet. 20-21) does not compel a different result. The broad text of Section 502(a)(1)(B), combined with the statutory requirement that plans be administered consistent with ERISA, makes clear that Congress did not intend courts considering Section 502(a)(1)(B) to ignore the provisions of ERISA. Moreover, immediately following the language petitioners cite, the Conference Report states that "[a]ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in a similar fashion to those brought under section 301 of the [LMRA]." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974). This Court has construed Section 301 to require courts to read the substantive provisions of the labor laws into the terms of collective bargaining agreements, *Kaiser Steel Corp.*, 455 U.S. at 76-79, and has recognized that Congress intended state courts to interpret the federal labor laws in Section 301 cases, see *Charles Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 506-514 (1962).

stantially restrict relief in cases involving plan terms that ERISA renders illegal weighs heavily against their interpretation. Because a plan *administrator* is obligated to disregard plan terms that are inconsistent with ERISA (see pp. 10-11, *supra*), there is no reason to believe that Congress intended to allow a *court*, when reviewing a plan's decision denying benefits, to decline to enforce the applicable provisions of ERISA.

3. Contrary to petitioners' contention (Pet.13-19), the lower courts have not divided on whether a claim like respondents' may be brought under Section 502(a)(1)(B). The Seventh Circuit has agreed with the court below that the particular type of claim at issue here—that additional plan benefits are due because failure to use the whipsaw calculation violates ERISA—arises under Section 502(a)(1)(B). See *Berger* v. *Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 763 (7th Cir. 2003). No court of appeals considering this type of claim has disagreed, and no court of appeals has adopted the radical contention that courts may not consider the requirements of ERISA in suits for benefits under Section 502(a)(1)(B).

The decision below does not conflict with the Fifth and Eighth Circuit decisions petitioners cite (Pet. 15-16). In *Ross* v. *Rail Car Am. Group Disability Income Plan*, 285 F.3d 735 (8th Cir.), cert. denied, 537 U.S. 885 (2002), a participant claimed that two amendments to a disability plan were adopted through an improper procedure, and he sought "to reform the Plan by obtaining a declaration that the purported 1990 and 1991 amendments are void." *Id.* at 739-740. Although the participant ultimately would have been entitled to additional benefits if the plan were reformed, the court determined that his claim was one for "equitable relief" under Sec-

tion 502(a)(3) because "the vehicle" he chose to reach that outcome, and the declaratory relief he sought, was "invalidation of the plan amendments." *Id.* at 740-741. *Ross* concerned a fundamentally different type of claim than the claim at issue here—a declaration that the plan must be reformed, rather than monetary relief representing additional plan benefits. And the *Ross* Court did not hold that a claim for benefits in which a court would have to interpret the plan terms in light of ERISA could not be brought under Section 502(a)(1)(B).

The decision below likewise does not conflict with *Carrabba* v. *Randalls Food Markets, Inc.*, 252 F.3d 721 (5th Cir.), cert. denied, 534 U.S. 995 (2001). The *Carrabba* court's one-paragraph affirmance of the district court's decision, which did not even mention Section 502(a)(1)(B), *id.* at 721-722, is not the type of decision that gives rise to a circuit conflict warranting this Court's review. In any event, the district court's decision affirmed in *Carrabba* does not conflict with the decision below. The district court determined that the plan in question was not exempt from ERISA's vesting requirements and then stated, in fashioning a remedy, that "equity would be served in this case if the members of the Class were to be placed in basically the same financial position in which they would be if the employer had complied with" those requirements. *Carrabba* v. *Randalls Food Markets, Inc.*, 145 F. Supp. 2d 763, 766, 770-771 (N.D. Tex. 2000). The district court did not hold that a claim for benefits that relies in part on statutory requirements can never arise under Section 502(a)(1)(B); it simply decided that the plaintiffs' partic-

ular claim, which essentially required reformation of the plan, was equitable in nature under Section 502(a)(3).[5]

Nor is there a conflict between the decision below and the state court decisions petitioners cite. *In re Marriage of Oddino*, 939 P.2d 1266 (Cal. 1997), cert. denied, 523 U.S. 1021 (1998), is entirely consistent with the decision below. There, the court held that it had jurisdiction to determine whether a certain state domestic relations order was a "qualified domestic relations order" under ERISA because the putative beneficiary sought benefits under the terms of the plan. *Id.* at 1268, 1272-1274. The court specifically rejected the argument petitioners now make, stating that "Congress did not in ERISA limit state court jurisdiction to actions in which the provisions of title I of ERISA have no application." *Id.* at 1273.[6]

In *Duffy* v. *Brannen*, 529 A.2d 643 (Vt. 1987), the court held that a participant's claim for benefits under the terms of a plan was "clearly * * * within the scope

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[5] *Todisco* v. *Verizon Communications*, 497 F.3d 95 (1st Cir. 2007), also does not conflict with the decision below. The *Todisco* Court held that a claim for compensatory money damages is not a claim for "equitable relief" under ERISA Section 502(a)(3), *id.* at 99, and a claim for money damages for an oral misrepresentation, where there was no "interpretation [of the plan] under which [the plaintiff] would be eligible for benefits," was not a claim for plan benefits under Section 502(a)(1)(B), *id.* at 97 n.3, 101-102.

[6] In its amicus brief in *Oddino*, the Department of Labor (DOL) disagreed that the beneficiary had brought a claim for benefits under Section 502(a)(1)(B) "merely by seeking an adjudication of plan rights in the context of an otherwise unrelated dissolution proceeding" in state family court. See DOL Amicus Br., *Oddino*, *supra*, 1997 WL 33559420, at *20 (filed Jan. 16, 1997). DOL's position was based on the "unusual set of facts" present in that case, *id.* at *15, and DOL did not contend that a claim for benefits that seeks to have the plan interpreted consistently with ERISA does not arise under Section 502(a)(1)(B).

of state court jurisdiction under § [502](a)(1)(B)," while her claims for statutory penalties for failure to furnish plan documents and for damages for breaches of fiduciary duties were not. *Id.* at 649-651. Similarly, in *Richland Hospital, Inc.* v. *Ralyon*, 516 N.E.2d 1236 (Ohio 1987), the court determined that it had jurisdiction under Section 502(a)(1)(B) to award plan benefits, but not to award extracontractual punitive damages. *Id.* at 1238-1240. In neither case did the court address whether a claim for benefits is one "under the terms of the plan" when the plaintiff relies on both plan terms and the requirements of ERISA, and neither case, therefore, conflicts with the decision below. The remaining state court decisions petitioners cite (Pet. 14-15) are not from the highest courts of the respective States and therefore could not give rise to the type of conflict that warrants this Court's review. See Sup. Ct. R. 10(a). Further review of petitioners' first contention is therefore unwarranted.

B. The Plan Interpretation Question Does Not Warrant This Court's Review

Petitioners also contend (Pet. 22-27) that review is warranted because the court of appeals applied the doctrine of *contra proferentem*, *i.e.*, the doctrine that ambiguous contract language should be construed against the drafter. 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 for three reasons, this case is not an appropriate vehicle to resolve that disagreement.[7]

First, the decision below is ultimately based on the court's conclusion that petitioner's interpretation of the Plan would violate ERISA, not the principle of *contra proferentem*. The court of appeals explained that Section 1.2 of the Plan unambiguously defined each participant's "accrued benefit" as an "annual benefit commencing at normal retirement age." Pet. App. 26a. The court noted that other provisions of the Plan suggested that an early retiree is entitled only to the amount in his hypothetical account, not the actuarial equivalent of an annuity at normal retirement age, but it determined that those other provisions violated ERISA's anti-forfeiture and actuarial-equivalence provisions. *Id.* at 26a-27a. The court also invoked the principle of *contra proferentem* as a basis to ignore those illegal provisions, *id.* at 26a, but that principle had no practical effect, because the court determined that the illegal provisions were unenforceable under ERISA.[8]

Second, even if the result below depended 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

[7] This Court recently denied review of the *contra proferentem* issue in *AT&T Pension Benefit Plan* v. *Call*, 128 S. Ct. 2900 (2008) (No. 06-1398). The same result is appropriate here; in both cases, the courts invoked the principle without any discussion and it was not essential to the courts' ultimate conclusion.

[8] The court of appeals cited its previous decision in *Regents of the University of Michigan* v. *Employees of Agency Rent-A-Car Hosp. Ass'n*, 122 F.3d 336, 340 (1997), but review in that case was de novo, not for abuse of discretion, and the court did not discuss when the *contra proferentem* principle applies in ERISA benefits cases.

issue in the court of appeals, and the court of appeals did not analyze the issue. Because this Court does not ordinarily address issues that were not pressed or passed upon in the court of appeals, see *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999), this case does not furnish a suitable vehicle for considering when or whether *contra proferentem* applies in an ERISA benefits case.

Third, resolution of the *contra proferentem* issue would in any event be unlikely to affect the outcome of this case. The court of appeals held, in agreement with the three other circuits that have considered the issue, that the whipsaw calculation is required for cash balance plans to avoid violation of ERISA's anti-forfeiture and actuarial-equivalence provisions. See *Berger*, 338 F.3d at 759-763; *Esden* v. *Bank of Boston*, 229 F.3d 154, 162-168 (2d Cir. 2000), cert. dismissed, 531 U.S. 1061 (2001); *Lyons* v. *Georgia-Pac. Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1241-1252 (11th Cir. 2000), cert. denied, 532 U.S. 967 (2001). Petitioners do not explain how resolution of the *contra proferentem* argument in their favor could affect the resolution of their case in light of the court of appeals' conclusion that the Plan terms upon which they rely are illegal. Moreover, the underlying whipsaw issue is of diminishing importance in light of the 2006 amendments to ERISA. See n.2, *supra*. Further review on the second issue therefore is unwarranted as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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