No. 15-66

IN THE

Supreme Court of the United States

UNITED REFINING CO., ET AL.,

Petitioners,

v.

JOHN COTTILLION, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* THE AMERICAN BENEFITS COUNCIL IN SUPPORT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Amicus the American Benefits Council (the Council) is a broad-based, nonprofit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's members are primarily large U.S. employers that provide employee benefits to active workers and retirees. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

The Council and its members have a particular interest in this case because—if allowed to stand—the Third Circuit's decision will lead to substantial uncertainty in the administration of pension plans, invite costly litigation, and ultimately discourage the Council's members from offering employee benefit plans in the future. The Council seeks to present this Court with employers' perspective on the implications of the decision below.

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[1] Pursuant to Rule 37.2, *amicus* notified all parties of its intent to file an *amicus curiae* brief at least ten days prior to the due date for the brief. The parties' written consent to this filing accompany this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

The issues presented by the petition are of immense importance to all employers that offer, or are considering offering, retirement benefits to their employees. The Employee Retirement Income Security Act (ERISA) strives to create uniform standards governing the implementation and administration of retirement plans, as this Court's ERISA jurisprudence has repeatedly recognized. This uniformity affords employers the certainty they need to offer a single benefit plan even where their employees work in multiple states and, at the same time, protects the interests of those employees.

The circuit split described in the petition directly undermines ERISA's goals of uniformity and certainty for employers offering benefit plans. Under the law of the Second, Seventh, Ninth and D.C. Circuits, employers can offer their employees retirement benefits without assuming the risk that mistakes by the plan administrator will be irreversible. In the Third and Sixth Circuits, however, an employer who chooses to offer retirement benefits can become bound—in perpetuity—to a plan administrator's mistake in interpretation. Employers that offer retirement plans extending across these circuit lines are thus subject to substantial uncertainty as to the law governing their retirement plans.

Moreover, any employer who is subject to jurisdiction in the Third and Sixth Circuits is exposed to an interpretation of ERISA that conflicts with the basic tenets of how retirement plans are supposed to be created and administered under the Act. The Third

Circuit's decision was plainly based on a misunderstanding of the distinct roles of the employer who sponsors a retirement plan and the plan administrator, who owes a fiduciary duty to plan members. Making a plan administrator's mistakes in plan interpretation irreversible not only imposes a wholly unpredictable risk on employers, but constrains the plan administrator's ability to make routine financial management decisions and thus limits the administrator's ability to act in the best interest of the plan's beneficiaries.

The effect of the Third Circuit's decision—both in its contribution to deepening an existing circuit split, and in its adoption of an untenable rule—is extremely troubling to employers, such as the Council's members. Employers who offer retirement benefits to their employees do so voluntarily. If offering such benefits exposes an employer to the uncertainty inherent in this circuit split, and the unpredictable liability that follows from the Third Circuit's rule, employers may stop offering such benefits, or may not offer such benefits in the first place.

The Council urges the Court to grant the petition and resolve the uncertainty created by the decision below.

ARGUMENT

I. The Split Among The Circuits Has Created Substantial Uncertainty For Employers.

As Petitioners explain, there is a clear split among the circuits regarding whether a retirement plan administrator who corrects an error in his or her interpretation of a pension plan has made an "amendment to the plan" within the meaning of 29 U.S.C. § 1054(g). This split is of immense importance to all employers who offer, or are considering offering, pension plans to their employees. This is particularly the case because a vast number of employers—many of which are among the Council's members—operate across multiple jurisdictions and, as a result of the split, lack certainty as to how their plans will be governed.

If an administrator's correction of a mistake in interpreting the terms of a plan constitutes an "amendment to the plan," then such mistakes become irreversible under ERISA any time the mistake causes an increase in benefits to plan members, requiring the employer to pay for that unexpected increase in perpetuity. If that is the correct interpretation of the Act—*i.e.*, an employer who undertakes to offer a retirement plan also undertakes the risk that any mistake in interpretation will be irreversible—employers need to know. Instead, employers face uncertainty as to the applicable law, which appears to depend on nothing more than the jurisdiction in which the employer is ultimately sued by a plan beneficiary.

As Petitioners explain, at least four Circuits have recognized that an administrator's correction of an

error in interpreting the employer's plan is not an "amendment to the plan" within the meaning of 29 U.S.C. § 1054(g). *See Kirkendall v. Halliburton, Inc.*, 707 F.3d 173, 184 (2d Cir.) (holding that "[e]ven broadly interpreted, the word 'amendment' contemplates that the actual terms of the plan changed in some way . . . and not, as claimed here, that an administrator made an incorrect factual determination"), *cert. denied*, 134 S. Ct. 241 (2013); *Dooley v. Am. Airlines, Inc.*, 797 F.2d 1447, 1452 (7th Cir. 1986) (holding that "we are unwilling to contort the plain meaning of 'amendment' so that it includes the valid exercise of a provision which was already firmly ensconced in the pension document"); *Oster v. Barco of Cal. Emps.' Ret. Plan*, 869 F.2d 1215, 1220-21 (9th Cir. 1988) (finding no plan amendment where plan administrator "merely adopted a policy which applied to a provision which was already part of the Plan"); *Stewart v. Nat'l Shopmen Pension Fund*, 730 F.2d 1552, 1563 (D.C. Cir. 1984). Employers who are subject to jurisdiction exclusively in those circuits can thus offer retirement benefits to their employees without concern that any mistake by the plan administrator will be irreversible, requiring the employer to pay unscheduled benefits in perpetuity.

An employer who is subject to jurisdiction in the Third or Sixth Circuits, however, assumes a substantially different risk in offering retirement benefits. In those circuits, the plan administrator's mistakes in interpretation of the plan operate as a one-way ratchet. If the plan administrator makes an erroneous interpretation that leads to increased retirement benefits and then later seeks to correct that

error—as the administrator did here—he or she is prohibited from doing so under § 1054(g). *See* Pet. App. 20a-21a ("'An erroneous interpretation of a plan provision that results in the improper denial of benefits to a plan participant may be construed as an 'amendment' for the purposes of' § 1054(g)" (quoting *Hein v. FDIC*, 88 F.3d 210, 216 (3d Cir. 1996))); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 712 (6th Cir. 2000) (same). Thus, if employers subject to jurisdiction in the Third and Sixth Circuits are to offer retirement benefits, they must (somehow) account for the risk of unpredictable mistakes by the plan administrator that bind the company to pay increased benefits even after the mistake is discovered.

The importance of this split in authority to employers is particularly acute because mistakes in interpretation by a plan administrator are not just common, but essentially guaranteed. As the Chief Justice has observed:

> People make mistakes. Even administrators of ERISA plans. That should come as no surprise, given that the Employee Retirement Income Security Act of 1974 is "an enormously complex and detailed statute," *Mertens v. Hewitt Associates*, 508 U.S. 248, 262 (1993), and the plans that administrators must construe can be lengthy and complicated.

Conkright v. Frommert, 559 U.S. 506, 509 (2010). Given the frequency with which such mistakes are made, the difference between treating them as binding on employers or capable of being corrected is substantial.

The Third Circuit compounded this problem with its untenable—and clearly atextual—articulation of the rule in this case. In setting aside the plan administrator's interpretation, the Third Circuit purported to hold that an interpretation is only an "amendment" within the meaning of § 1054(g) if it is "erroneous." Pet. App. 21a. That limitation cannot hold. The text of § 1054(g) prohibits all "amendments," making no reference to whether they are correct or erroneous. Moreover, as a matter of simple logic, if an administrator's change in interpretation can constitute an "amendment," that would be the case whether the change introduces or corrects an error. That the Third Circuit's rule cannot be cabined to "erroneous" interpretations is manifest in the district court's decision in this very case, which held that the administrator's change in interpretation was an "amendment" prohibited by § 1054(g), without ever concluding that the new interpretation was erroneous. The position taken by the Third Circuit has no basis in the text or structure of ERISA.

Moreover, the uncertainty caused by the Third Circuit's decision and the circuit split described above undermines the very purpose of ERISA. As this Court has recognized, Congress enacted ERISA out of recognition that "[a]n employer with employees in many States might find that the most efficient way to provide benefits to those employees is through a single employee benefit plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 n.25 (1983). The purpose of ERISA was "'to establish a uniform administrative scheme, which provides a set of standard procedures to guide

processing of claims and disbursement of benefits.'" *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)).

As this Court has recognized, the uniformity sought by ERISA "is impossible . . . if plans are subject to different legal obligations in different States." *Id.; see also Conkright*, 559 U.S. at 517 (emphasizing that rules in the pension benefit context should "serve[] the interest of uniformity" and "avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions"). As a result of the circuit split described above, the vast number of employers that could be subject to jurisdiction in one of the sixteen states that comprise the Second, Seventh, Ninth, and D.C. Circuits, as well as one of the seven states that comprise the Third and Sixth Circuits, face significant uncertainty regarding the law that governs the provision of retirement benefits.

Employers that offer, or are contemplating offering, retirement benefits to their employees require certainty about their exposure in the case of inevitable mistakes in interpretation by the plan administrator. The Council urges the Court to grant the petition and provide that certainty.

II. The Third Circuit's Decision Was Based On A Fundamental Misunderstanding Of The Difference Between A Plan Sponsor And A Plan Administrator.

The Third Circuit's position that a plan administrator's interpretation of a retirement plan is an "amendment to the plan" can be explained only by its failure to appreciate the difference between the roles of the employer who drafts and sponsors the plan, and the plan administrator, who implements the terms of the plan based on a fiduciary duty to the plan's beneficiaries. Given the proper background regarding how retirement plans are created and administered under ERISA, the Third Circuit's position makes little sense.

Under ERISA, it is the role of the employer who chooses to offer a retirement plan, or the "plan sponsor," to set the terms of the plan. In doing so, the sponsor is free to structure the plan based on its own self-interest and acts with no fiduciary responsibility to the persons who will benefit from the plan. Similarly, as this Court has recognized, when the plan sponsor takes action to amend the plan, it owes no fiduciary duty to the beneficiaries of the plan. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) ("In general, an employer's decision to amend a pension plan . . . does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets."); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."). Congress enacted ERISA's anti-cutback provision, 29

U.S.C. § 1054(g), specifically for this reason—to prevent plan sponsors, who act out of their own self-interest and owe no fiduciary duty to the plan members, from unilaterally changing the terms of a plan in a manner that reduces benefits that have already accrued to plan members.

The plan administrator plays an entirely distinct role. The administrator is charged with applying the terms of the plan drafted by the sponsor. Under the plain language of ERISA, the plan administrator lacks the authority to change the terms of a retirement plan, but must instead operate "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104(a)(1)(D); *see also id.* § 1102(b)(3) (the retirement plan "identif[ies] the persons who have authority to amend the plan"). In other words, the plan administrator by definition lacks authority to make an "amendment to the plan." *Id.* § 1054(g).

Moreover, the plan administrator is statutorily required to act in accordance with a strict fiduciary responsibility to the plan members and without regard for the interests of the plan sponsor. 29 U.S.C. § 1104(a)(1). For this reason, the rationale of the anti-cutback rule—to protect the beneficiaries from unwarranted reductions in their accrued benefits—has no application to the decisions of plan administrators.

Hamstringing a plan administrator's ability to correct mistakes in interpreting the plan—as the Third Circuit did in the decision below—will often directly conflict with the administrator's ability to act in the best interests of the plan members as a whole. As the D.C. Circuit recognized, to interpret § 1054(g) as the

Third Circuit did has the effect of "restrict[ing] severely the ability of the trustees to protect the fund in routine situations." *Stewart*, 730 F.2d at 1564; *see also Oster*, 869 F.2d at 1221 (recognizing that the Third Circuit's interpretation "would impair the flexibility necessary for proper financial management of [retirement] plans" (quotation marks omitted) (alteration in original)). For instance, where—as here—the plan administrator is forced to continue issuing unscheduled benefits to a subset of plan members, the plan itself may become underfunded, to the risk of all other beneficiaries. The Third Circuit's interpretation of § 1054(g) thus conflicts with the plan administrator's core fiduciary duty.

By interpreting § 1054(g) without appreciating the fundamental distinction between a plan sponsor and the plan administrator, the Third Circuit arrived at a rule that conflicts with, and disrupts, ERISA's most basic tenets. Absent this Court's intervention, businesses subject to jurisdiction in the Third Circuit (and the Sixth Circuit) will be forced to operate their retirement plans according to this untenable rule.

III. The Third And Sixth Circuits' Erroneous Position—As Well As The Existence Of The Circuit Split Itself—Will Deter Employers From Offering Pension Plans.

One of Congress's paramount goals in enacting ERISA was to encourage employers to offer employee benefit plans voluntarily. *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 648 (1990). ERISA was designed to provide "[a]n employer with employees in many States" with an "efficient way to

provide benefits to those employees . . . through a single employee benefit plan," *Shaw*, 463 U.S. at 105 n.25, and to "establish a uniform administrative scheme," *Egelhoff*, 532 U.S. at 148 (quotation marks omitted). ERISA thus embodies a "policy of inducing employers to offer benefits by assuring a predictable set of liabilities." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002); *see also Conkright*, 559 U.S. at 517 (emphasizing in the pension benefits context, the virtues of a rule that "promotes predictability" and "assure[s] a predictable set of liabilities" (internal quotation marks omitted)).

The Third Circuit's decision, if allowed to stand, undermines the goal of encouraging employers to voluntarily create and maintain employee benefit plans. Instead, it will encourage forum shopping and increase litigation costs, leading employers either to decrease employee benefits or to cease offering them altogether. *Cf. Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (noting that Congress sought to create a regulatory regime "that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place").

Absent resolution of the split among the circuits, businesses that operate across multiple states and wish to offer their employees retirement benefits will face significant unpredictability as to the rule that governs their retirement plan. Here, where the split in authority is the difference between (i) affording the plan administrator flexibility to administer the plan as it is drafted by the employer and (ii) a regime in which

the employer becomes perpetually responsible for any mistake made by the plan administrator that causes increased benefits, the uncertainty bears directly on the risk undertaken by the employer in offering a retirement plan. This legal uncertainty will inevitably deter many employers from continuing to offer retirement plans, or from choosing to offer retirement plans in the first place.

The degree with which the position of the Third and Sixth Circuits disrupts the scheme envisioned by ERISA only compounds the deterrent effect. This Court has repeatedly recognized that ERISA was meant "to ensure that plans and plan sponsors would be subject to a uniform body of benefits law," so as "to minimize the administrative and financial burden of complying with conflicting directives." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990); *see also Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300-01 (2009) (ERISA "lets employers establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits" (quotation marks omitted) (alterations in original)); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004) ("The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans.").

Yet the Third Circuit's rule increases administrative and financial burdens on employers by requiring them to comply with conflicting directives. Any employer who is subject to personal jurisdiction in Delaware, New Jersey, Pennsylvania, Kentucky, Michigan, Ohio, or Tennessee, will be discouraged from

offering its employees retirement benefits because doing so will expose the employer to irreversible errors by the plan administrator. And, for the same reason, any employer who operates exclusively in other jurisdictions and already offers retirement benefits to its employees will have cause to think twice before expanding to any of those markets.

Given the immense importance of the issues presented in Petitioners' petition and the number of employers and employees affected by it, the Council urges the Court to grant the petition and provide clear guidance regarding the erroneous decision of the Third Circuit.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' petition for a writ of certiorari.

Respectfully submitted,

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