No. 08-810

IN THE

Supreme Court of the United States

SALLY L. CONKRIGHT, *ET AL.*

Petitioners,

v.

PAUL J. FROMMERT, *ET AL.*,

Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

**BRIEF OF *AMICI CURIAE*
ERISA INDUSTRY COMMITTEE AND
AMERICAN BENEFITS COUNCIL
IN SUPPORT OF PETITIONERS**

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Pursuant to this Court's Rule 37.2, *amici curiae* ERISA Industry Committee ("ERIC") and American Benefits Council (the "Council") respectfully file this brief in support of petitioners.*

INTEREST OF *AMICI CURIAE*

ERIC is a nonprofit organization representing America's largest employers that maintain ERISA-covered pension, healthcare, disability, and other employee benefit plans. These employers provide benefits to millions of active workers, retired persons, and their families nationwide. For this reason, ERIC frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration.[1]

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* Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

[1] *See, e.g.*, *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009); *LaRue v. DeWolff, Boberg & Assocs.*, 128 S. Ct. 1020 (2008); *Beck v. PACE Int'l Union*, 551 U.S. 96 (2007); *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

The Council is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 300 members are primarily large U.S. employers that provide employee benefits to active and retired workers. 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 plans covering more than 100 million Americans. The Council frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration.[2]

Amici and their members seek to ensure that voluntary employee benefit plans remain a workable and vital feature of the American employment landscape. When courts refuse to defer to a plan administrator's reasonable exercise of discretionary authority, some employers may question the wisdom of continuing to maintain such plans in the future.

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[2] *See, e.g.*, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 129 S. Ct. 865 (2009); *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

BACKGROUND

This case presents the question whether a plan administrator's action taken pursuant to an express grant of discretionary authority—whether in the context of a benefits determination or any other task over which the plan gives the administrator discretion—is entitled to judicial deference under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). As a matter of both policy and precedent, the answer is yes.

The Xerox Corporation Retirement Income Guarantee Plan expressly gives the administrator discretion to interpret the plan. J.A. 32-33a ("In the administration of the Plan the Administrator may … [c]onstrue the Plan and the Trust Agreement thereunder …."). Included within this grant of discretionary authority is the power to construe the plan terms relating to retirement benefit calculations. *Id.*

Respondents are current and former Xerox employees who left the company and received a lump sum payment of benefits under the Xerox plan. Pet. App. 4a. Each of these individuals was subsequently rehired by Xerox. *Id.* In calculating pension benefits, the plan provides that the plan administrator is to take into account a participant's total years of service at Xerox. *Id.*

To avoid providing respondents a windfall for the initial pre-separation years of service for which they had already received a lump sum payment, the plan required the administrator to reduce the beneficiaries' final pension benefit by an offset amount. *Id.* In accordance with the applicable plan provision, the administrator calculated this offset

based on the amount to which the original lump sum distribution would have grown had it remained invested in the plan during the employee's absence from Xerox. *Id*. at 5a.

Respondents challenged that method of calculating the offset, and the Second Circuit sustained that challenge on the ground that the plan had not adequately disclosed the method until 1998. *Id*. at 51a. In light of that conclusion, the Second Circuit remanded the case to the district court for a new determination of benefits. *Id*. Specifically, the Second Circuit directed the district court to determine the benefits due to respondents based on an "appropriate" calculation. *Id*.

When making the benefits determination on remand, the district court obtained testimony from the plan administrator with respect to how the offset should be calculated without reference to the plan provision that—according to the Second Circuit—had not adequately been disclosed to participants until 1998. *Id*. at 11a, 13a. Specifically, and pursuant to his discretionary authority to interpret the remaining plan terms, the administrator determined the amount of the required offset by calculating the actuarial equivalent of a participant's original lump sum distribution, taking into account the time value of money. J.A. 115-16a.

Respondents again challenged the administrator's calculation, and the district court upheld the challenge. Pet. App. 104a. According to that court, "[t]o the extent that there is some ambiguity as to the precise manner by which prior distributions are to be offset from present benefits, it is Xerox, not the employees who should suffer." *Id*. Thus, the court

adopted respondents' proposed plan interpretation, holding that the plan may offset a rehired participant's final benefit only by the nominal amount of the participant's prior distribution, *without* making any allowance for the time value of money. *Id.* at 107a.

Petitioners appealed that decision to the Second Circuit, which affirmed. *Id.* at 3a. The Court of Appeals did not deny that the administrator's interpretation was reasonable, *see id.* at 13a, and expressly acknowledged that the administrator "had ample opportunity to explain fully [his] approach … before the District Court, … in [his] briefs and at oral argument, in a sworn affidavit …, and in a written report and accompanying testimony from an independent actuary who analyzed the plan administrator's approach." *Id.* at 11a. Nevertheless, the Second Circuit concluded that the administrator's interpretation was not entitled to judicial deference because it was a "mere *opinion*"; the administrator's only "decision" was his original benefit determination, which had been invalidated in the first appeal. *Id.* at 13a (emphasis in original). The Second Circuit thus deferred to the district court's interpretation of the plan. The upshot of that decision is that respondents are entitled to a calculation of benefits that differs from the calculation of benefits proffered by the plan administrator and adopted by the Ninth Circuit *under the same plan. See Miller v. Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d 871 (9th Cir. 2006).

Petitioners sought a writ of certiorari from this Court, which was granted on June 29, 2009.

SUMMARY OF ARGUMENT

The Second Circuit erred by deferring to the district court, rather than the plan administrator, in interpreting the Xerox plan. In so doing, the Second Circuit effectively replaced the administrator, who acts under the discretionary authority conferred by the plan document, with the district court as the plan's primary decisionmaker. That approach has no basis in either policy or precedent.

With respect to policy, the Second Circuit's approach would foster the disuniformity that ERISA, with its notably powerful preemption provision, was designed to prevent. To allow courts to substitute their own interpretations of a plan for an administrator's reasonable interpretation would make ERISA plans essentially unworkable, as no single person or entity would have primary interpretive authority. Indeed, the Second Circuit's approach would foster litigation as plan participants, dissatisfied with an administrator's interpretation, would shop for a more participant-friendly, if not necessarily more reasonable, judicial interpretation of the plan.

With respect to precedent, this Court has long held that ERISA must be interpreted by reference to the common law of trusts. Under trust law principles, a reviewing court must defer to a trustee's reasonable discretionary decision, even if the court could have rendered an equally reasonable alternative decision. Contrary to the Second Circuit's apparent assumption, this principle applies with full force under ERISA regardless of the context in which an administrator exercises his discretion.

ARGUMENT

The Second Circuit Erred By Deferring To The District Court, Rather Than The Plan Administrator, In Interpreting An ERISA Plan.

The Second Circuit did not and could not deny that the Xerox plan granted the administrator discretionary authority to interpret the plan, and that the administrator's interpretation was reasonable. Accordingly, as a matter of both policy and precedent, the Second Circuit should have deferred to the plan administrator, and erred by deferring instead to the district court.

A. Deference Is Warranted As A Matter Of Policy.

The Second Circuit's refusal to defer to the administrator's reasonable interpretation of the plan, if affirmed, would create insurmountable practical problems for *amici* and their members, and discourage employers from establishing and maintaining voluntary employee benefit plans. Because ERISA's text does not specify the level of judicial deference owed to an administrator's interpretation of a plan, it is entirely appropriate for this Court to consider these policy implications—as indeed this Court has done many times in considering ERISA deference issues. *See, e.g.*, *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2349 (2008); *Central States, S.E. & S.W. Areas Pension Fund v. Central Trans., Inc.*, 472 U.S. 559, 569-70 (1985).

As an initial matter, the Second Circuit's approach would make the uniform administration of

ERISA plans impossible. Instead of allowing an administrator to interpret and "fill in the gaps" in plan language (much as an administrative agency may interpret and "fill in the gaps" in statutory language under *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 847 (1984)), that approach would allow individual courts to exercise their own interpretive discretion to fill in those gaps. Given that there are often multiple reasonable interpretations of a plan (just as there are often multiple reasonable interpretations of a statute), the Second Circuit's approach is a recipe for chaos and uncertainty. If a plan administrator's reasonable interpretation is not entitled to deference, a plan's substantive provisions will be subject to different reasonable interpretations, making uniform administration virtually impossible. Thus, for example, a plan beneficiary working in a company's New York office may be entitled to benefits different from those of a colleague working in the Los Angeles office—or, indeed, different from those of another colleague in New York—simply because different courts may interpret the same plan provisions in different, albeit reasonable, ways.

Indeed, this very case highlights the point. If the decision below is allowed to stand, similarly-situated Xerox plan participants will be entitled to different benefits under the same plan depending on whether they are subject to the jurisdiction of the Second Circuit or the Ninth Circuit. *Compare* Pet. App. 13a (upholding the district court's determination that the initial lump sum distribution should be offset by the nominal dollar amount) *with Xerox Corp. Retirement Income Guarantee Plan*, 464 F.3d at 875-76 (considering the same Xerox plan and adopting the

same "actuarial equivalence" method advanced by the plan administrator but rejected by the courts below in this case).

This Court has repeatedly recognized that a paramount congressional goal in enacting ERISA was "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*, 129 S. Ct. 865, 875-76 (2009) (ERISA "lets employers establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits"); *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.").

While that point arises most often in the context of ERISA's broad preemption provision, 29 U.S.C. § 1144(a), it obviously relates as well to the deference issue presented here. "[C]onflicting directives" from different courts, acting as primary ERISA plan decisionmakers, will complicate and raise the expense of plan administration and, in turn, discourage employers from establishing and maintaining ERISA plans. *See, e.g.*, *Evans v. Eaton Corp. Long Term Disability Plan*, 514 F.3d 315, 326 (4th Cir. 2008) (a "cavalier approach to the deference owed ERISA fiduciaries" would disserve plan beneficiaries and result in "lower benefits levels and lower levels of plan formation") (internal quotation omitted). Requiring deference to an administrator's reasonable interpretation of a plan, in contrast,

"encourages employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do." *Glenn*, 128 S. Ct. at 2353 (Roberts, C.J., concurring in part and concurring in the judgment).

Indeed, the Second Circuit's decision, if allowed to stand, can be expected to fuel litigation and undermine informal resolution of disputes over plan terms. ERISA "was designed to promote internal resolution of claims, to permit broad managerial discretion on the part of pension plan trustees in formulating claims procedures, and to encourage informal and non-adversarial proceedings." *Berry v. Ciba-Geigy Corp.,* 761 F.2d 1003, 1007 n.4 (4th Cir. 1985) (internal quotation omitted); *see also Egelhoff v. Egelhoff*, 532 U.S. 141, 149-50 (2001) (same). For just this reason, ERISA beneficiaries generally must exhaust their administrative remedies before bringing a claim. *See, e.g., Communications Workers of Am. v. AT&T Co.*, 40 F.3d 426, 432 (D.C. Cir. 1994). "Much like the exhaustion doctrine in the context of judicial review of administrative agency action, the exhaustion requirement in the ERISA context serves several important purposes. By preventing premature judicial interference with a pension plan's decisionmaking processes, the exhaustion requirement enables plan administrators to apply their expertise and exercise their discretion to manage the plan's funds, correct errors, make considered interpretations of plan provisions, and assemble a factual record that will assist the court reviewing the administrators' actions." *Id.*

Increased litigation costs, of course, can be expected to lead employers either to cut benefits or to terminate employee benefit plans altogether. The Xerox plan, like all plans governed by ERISA, is maintained on a voluntary basis. Indeed, one of Congress' primary goals in enacting ERISA was to encourage employers to offer such voluntary plans. *See, e.g.*, *PBGC v. LTV Corp.*, 496 U.S. 633, 648 (1990). It hardly furthers that goal to allow courts to ignore a plan administrator's concededly reasonable interpretation of a plan. *See, e.g.*, *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").

And there is no reason to suppose that judicial deference to plan administrators will lead to abuse. Plan administrators, after all, act as fiduciaries when exercising their discretionary authority. *See, e.g.*, *Central States,* 472 U.S. at 570 n.10; *see also* 29 U.S.C. § 1104(a)(1)(A) (requiring plan administrator to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and … for the exclusive purpose of providing benefits to participants and their beneficiaries; and … defraying reasonable expenses of administering the plan"); *id.* § 1104(a)(1)(B) (requiring plan administrator to "discharge his duties with respect to a plan … with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims"). For this reason, among others, this Court concluded

in *Glenn* that a plan administrator's discretionary decisions were entitled to deference even where the administrator may have a conflict of interest; a fiduciary must be presumed to act in the best interests of the beneficiaries. *See* 128 S. Ct. at 2350.

The bottom line from a policy perspective is that plan administrators, not courts, have the necessary expertise in interpreting and applying plan terms. *See, e.g.*, *Evans*, 514 F.3d at 323 (noting "the plan administrator's greater experience and familiarity with plan terms and provisions"); *Berry,* 761 F.2d at 1006 (noting the greater institutional competence plan administrators possess relative to federal courts within their area of expertise). By deferring to the district court instead of the administrator, the Second Circuit disregarded that expertise and improperly "transfer[red] … the administration of benefit and pension plans from their designated fiduciaries to the federal courts." *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1022 (4th Cir. 1993); *see also id.* ("[S]uch a substitution of authority is plainly what the formulated standards of ERISA are intended to prevent.") (internal citation omitted). Deference to the reasonable interpretation of a plan administrator, as opposed to any other reasonable interpretation, "ensure[s] that administrative responsibility rests with those whose experience is daily and continual, not with judges whose exposure is episodic and occasional," *Berry*, 761 F.2d at 1006, and thus "safeguard[s] the superior vantage points of those entrusted with primary decisional responsibility," *Evans*, 514 F.3d at 321.

B. Deference Is Warranted As A Matter Of Precedent.

Judicial deference to a plan administrator's reasonable interpretation or application of a plan is warranted not only as a matter of policy, but also as a matter of precedent. ERISA has now been on the books for more than three decades, and has been construed frequently by this Court and other federal courts. The principles that emerge from these cases compel deference to a plan administrator's reasonable interpretation or application of a plan.

For present purposes, the key principle is that courts must interpret and apply ERISA by reference to the common law of trusts. "The fiduciary responsibility section, in essence, codifies and makes applicable to these fiduciaries certain principles developed in the evolution of the law of trusts." H.R. Rep. No. 93-533, at 11 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4649. Accordingly, "courts are to develop a federal common law of rights and obligations under ERISA-regulated plans ... guided by principles of trust law." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (internal quotations omitted); *see also LaRue v. DeWolff, Boberg & Assocs.,* 128 S. Ct. 1020, 1024 n.4 (2008) (noting that common law of trusts "informs [judicial] interpretation of ERISA's fiduciary duties"); *Davila*, 542 U.S. at 218-19 (relying on common law of trusts to determine whether benefits determination was fiduciary act); *Varity*, 516 U.S. at 496-97 (relying on common law of trusts to inform interpretation of ERISA fiduciary provisions); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255-56 (1993) (relying on common law of trusts to determine scope of available

equitable relief under ERISA); *Central States,* 472 U.S. at 570-72 (relying on common law of trusts, and noting its express invocation by Congress when enacting ERISA, to determine whether audit by ERISA plan was permitted by governing documents).

As relevant here, the common law of trusts requires courts to defer to a trustee's reasonable determination rendered within the scope of his discretionary authority. *See, e.g.*, *Restatement (Third) of Trusts* § 87 (2007) ("When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion."); *Restatement (Third) of Trusts* § 50(1) (2003) ("A discretionary power conferred upon the trustee to determine the benefits of a trust beneficiary is subject to judicial control only to prevent misinterpretation or abuse of the discretion by the trustee."); *Denver Found. v. Wells Fargo Bank*, *N.A.*, 163 P.3d 1116, 1123 (Colo. 2007) ("An arbitrary and capricious benchmark restrains the exercise of our independent review and interpretation save for instances of abuse of discretion, bad faith, dishonesty, or arbitrary action."); *see also id.* ("'The mere fact that if the discretion had been conferred upon the court, the court would have exercised the power differently, is not a sufficient reason for interfering with the exercise of the power ....'") (quoting *Restatement (Second) of Trusts* § 187 cmt. e (1959)); *In re Sullivan's Will,* 12 N.W.2d 148, 151 (Neb. 1943) (where a trust grants discretion to the trustee, "the court has no authority to substitute its judgment for that of the trustees"); *In re Marre's Estate*, 114 P.2d 586, 590-91 (Cal. 1941) ("It is well settled that the courts will not attempt to exercise discretion which

has been confided to a trustee ….”); *Hanford v. Clancy*, 183 A. 271, 272-73 (N.H. 1936) (a court may not disturb a trustee's reasonable exercise of discretionary powers).

This Court has previously recognized that this deferential standard of review from trust law also applies in the ERISA context:

> Trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers. … A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable.

Firestone, 489 U.S. at 111; *see also Glenn*, 128 S. Ct. at 2350 (noting that there is "no reason to forsake *Firestone*'s reliance upon trust law" in analyzing the appropriate level of judicial deference to a plan administrator).

The lesson from the common law, in other words, is that "judicial intervention is not warranted merely because the court would have differently exercised [its] discretion." *Restatement (Third) of Trusts* § 87 (2007). And where a court concludes that a trustee has abused his discretion, "the court should take appropriate action to curb the trustee, but [the court] may not exercise discretion for [the trustee]." *Hanford*, 183 A. at 272; *see also id.* at 272-73 (noting that a court may only enter "[a]ffirmative orders of disposition" if "there is but one reasonable disposition possible," and that "[i]f more than one reasonable disposition could be made, then the trustee must make the choice"); *see also Sullivan's Will*, 12 N.W.2d at 41 ("[T]he court cannot act for the

trustee or do anything other than prescribe the minimum or maximum limits within which the trustees must act and compel such action within such limits."); *Marre's Estate*, 114 P.2d at 590-91 (if court concludes that trustee abused his discretion, court should order trustee to make a new determination).

In light of these common law principles, the Second Circuit erred by holding that deference to the administrator was unwarranted here because (1) "the administrator had previously construed the same terms and we found such a construction to have violated ERISA" because it was not properly disclosed to plan participants, and (2) "the District Court … had no *decision* to review" on remand, but only "the mere *opinion* of the plan administrator" expressed in the course of litigation. Pet. App. 13a (emphasis added). Following trust law principles, plan administrators are entitled to judicial deference over *all* matters in which they are vested with discretionary authority, regardless of the context in which they exercise that authority.[3]

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[3] *See, e.g., Worthy v. New Orleans S.S. Ass'n*, 342 F.3d 422, 427-28 (5th Cir. 2003) (applying abuse of discretion review to uphold administrator's interpretation of plan language regarding amendment requirements); *Fenster v. Tepfer & Spitz, Ltd.*, 301 F.3d 851, 856 (7th Cir. 2002) (applying arbitrary and capricious standard applied to assess administrator's determination regarding validity of plan amendment); *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 710-12 (6th Cir. 2000) (applying arbitrary and capricious review to claim that defendants violated § 204(g) of ERISA and finding "no barrier to application of the arbitrary and capricious standard in a case such as this not involving a typical review of denial of

In particular, as most relevant here, plan administrators are entitled to judicial deference even where a court has concluded that a previous discretionary decision violated ERISA and therefore a new calculation of benefits was necessary. *See, e.g.*, *Saffle v. Sierra Pac. Power Co. Bargaining Unit Long Term Disability Income Plan*, 85 F.3d 455, 460 (9th Cir. 1996). Thus, "[i]t is not the court's function *ab initio* to apply the correct [plan interpretation] to [the participant's] claim. That function, under the

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benefits"); *Administrative Comm. of the Sea Ray Employees' Stock Ownership & Profit Sharing Plan v. Robinson*, 164 F.3d 981, 986-87 (6th Cir. 1999) (applying arbitrary and capricious review applied to plan administrator's determination of whether partial plan termination occurred); *Fox v. Fox*, 167 F.3d 880, 883-84 (4th Cir. 1999) (applying abuse of discretion review to a qualified domestic relations order determination as part of a divorce judgment); *United McGill Corp. v. Stinnett*, 154 F.3d 168, 170-71 (4th Cir. 1998) (applying deferential review to uphold plan administrator's strict application of plan's subrogation provisions); *Borda v. Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1065-69 (6th Cir. 1998) (applying deferential review to uphold plan administrator's determination that former employee did not have "affected employee" status and thus was not entitled to disbursement of unvested funds upon plan termination); *Moench v. Robertson*, 62 F.3d 553, 565 (3d Cir. 1995) (trust law should guide the standard of review over claims alleging breach of ERISA fiduciary duties); *Whisman v. Robbins*, 55 F.3d 1140, 1144 (6th Cir. 1995) (applying abuse of discretion standard applied to claim alleging improper suspension of benefits under ERISA § 203(a), which permits employers to deny payments to a participant who is of qualifying retirement age but otherwise employed); *Counts v. Kissack Water & Oil Serv., Inc.*, 986 F.2d 1322, 1324 (10th Cir. 1993) (applying arbitrary and capricious standard of review to claim alleging violation of ERISA § 204, which prohibits the elimination of a lump sum payment option).

Plan, is reserved to the Plan administrator." *Id*. at 461. If and when a court concludes that an administrator's discretionary decision violates ERISA, the court may not usurp that discretion for itself, but must allow the administrator to exercise that discretion anew in compliance with the statute.

The court may allow the administrator to exercise that discretion by remanding the case to the administrator. *See id.* (directing district court to "remand [to the plan administrator] for reevaluation of the merits of a claim"); *see also Pakovich v. Broadspire Servs., Inc.*, 535 F.3d 601, 607 (7th Cir. 2008); *Rekstad v. U.S. Bancorp,* 451 F.3d 1114, 1121 (10th Cir. 2006); *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1013-14 (9th Cir. 1997); *Miller v. United Welfare Fund*, 72 F.3d 1066, 1073-74 (2d Cir. 1995). Again, administrative law offers a helpful analogy: the general rule is that courts remand to an agency after vacating a discretionary agency decision. *See, e.g., Negusie v. Holder*, 129 S. Ct. 1159, 1167 (2009).

By the same token, the court may allow the administrator to exercise that discretion by soliciting or accepting the administrator's views in the context of the litigation (as happened here). *See, e.g.*, *Oliver v. Coca-Cola Co.*, 546 F.3d 1353, 1354 (11th Cir. 2008) (remanding to the district court with instructions to allow the plan administrator "to fully brief" the proper plan interpretation). Thus, the dispositive distinction posited by the Second Circuit between "a decision" by the administrator and "an opinion" of the administrator, *see* Pet. App. 13a, is illusory: the context in which the court receives the administrator's views is immaterial, as long as the court provides the administrator with an opportunity

to express those views, and thereby to exercise his discretionary authority in the first instance. *See id.* Yet again, administrative law offers a helpful analogy: an agency's interpretation of a statute is eligible for deference even if set forth for the first time in a brief. *See, e.g.*, *Kennedy*, 129 S. Ct. at 872 n.7; *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

In short, the Second Circuit "forg[o]t its duty of deference and its secondary rather than primary role in determining a claimant's right to benefits." *Evans*, 514 F.3d at 323. Because the Xerox plan administrator has discretion to interpret the plan, and because the administrator's interpretation here was reasonable, that interpretation is entitled to judicial deference.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

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