UNITED STATES COURT OF APPEALS
for the
THIRD CIRCUIT

Case No. 05-5445

SANDRA REGISTER; GRACE B. MERCHANT; SUSAN L. WILSON; KRISTINA BECKMAN; JOHN J. DAGGETT; RICHARD RHOADES, on behalf of themselves and all others similarly situated,

Appellants,

v.

PNC FINANCIAL SERVICES GROUP, INC.; PNC BANK NA; PENSION COMMITTEE OF PNC FINANCIAL SERVICES GROUP, INC. PENSION PLAN; PNC FINANCIAL SERVICES GROUP, INC. PENSION PLAN,

Appellees.

Appeal from the November 21, 2005 Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania (District Court Case No. 04-CV-6097)

BRIEF *AMICUS CURIAE* OF THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF APPELLEES URGING AFFIRMANCE

JEFFREY G. HUVELLE
DAVID H. REMES
JOHN M. VINE
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
202-662-6000

Attorneys for *Amicus Curiae*
The ERISA Industry Committee

CORPORATE DISCLOSURE STATEMENT

The ERISA Industry Committee is a non-profit association.

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ISSUE ADDRESSED BY AMICUS

Whether every cash balance plan in the United States is inherently unlawful under ERISA § 204(b)(1)(H).[1]

INTEREST OF AMICUS

The ERISA Industry Committee ("ERIC") is a non-profit association of employers that provide benefits to millions of active and retired workers and their families through employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* ERIC's members include America's largest employers.

ERIC has participated as an *amicus* in the Supreme Court in cases of exceptional importance for employee benefit plan design or administration.[2] ERIC participates as an *amicus* in the courts of appeals very infrequently. It does so here because this case raises an issue of major importance to employers with defined benefit plans and will set an important precedent.

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[1] Parallel citations to the United States Code are provided in the table of authorities.

[2] *See*, *e.g.*, *Gen. Dynamics Land Sys. 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); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

INTRODUCTION

Defined benefit plans play an important role in providing retirement benefits to millions of American workers and their families. Employees typically are not required to contribute to these plans. In most cases, the employer is solely responsible for ensuring that the plan has sufficient assets to pay the plan's benefits.

The number of defined benefit plans is shrinking. Employers sponsored 114,000 such plans in 1985 but only 32,000 in 2004. In the last five years, the number of such plans decreased by 21 percent. Like PNC, many employers that continue to offer defined benefit plans have converted them to a type of defined benefit plan known as a "cash balance plan." As of 2003, cash balance plans covered eight million participants, accounting for nearly 25 percent of all employees covered by single-employer defined benefit plans.[3]

Cash balance plans define an employee's benefit as the sum of the employee's accumulated pay credits and interest credits. ERISA requires that the interest provided by a cash balance plan continue to accrue, even after an employee terminates employment, until the first benefit payment is made to the employee.

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[3] Pension Benefit Guaranty Corp., *Pension Insurance Data Handbook 2004*, at 4, 56, 57, 59-60 n.7 (2005).

Thus, for any two employees who work for the same number of years and terminate their employment at the same time, the one who waits longer to receive his first payment will accumulate more interest credits.

The traditional defined benefit plans that cash balance plans are replacing are the product of an economy that no longer exists, in which jobs were secure and employees were expected to retire after working for decades for a single employer. Traditional plans strongly favor such long-serving employees. In today's economy, employees typically change jobs several times. Cash balance plans, which do not distinguish between long-serving employees and employees who change jobs many times, are the product of today's economy.

A decision invalidating every cash balance plan in the United States would imperil the private pension system. Such a decision would impose crippling liabilities on numerous companies, eliminate a plan design that has proved to be increasingly popular in recent years with employers and employees alike, and undermine ERISA's fundamental goal of encouraging employers to offer plans that provide economic security to retired employees.

THE REGULATION OF RETIREMENT PLANS

A. ERISA

ERISA comprehensively regulates employee pension plans. In this "enormously complex and detailed statute," *Mertens v. Hewitt Assocs.*, 508 U.S.

248, 262 (1993), Congress established "minimum standards" for pension plans that would "assur[e] the equitable character of such plans and their financial soundness." ERISA § 2(a). Congress, however, did not require employers to offer their employees retirement benefits and was careful not to "mandate what kind of benefits employers must provide if they choose to have" a retirement plan. *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996).

B. OBRA 1986

When ERISA was enacted in 1974, the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, permitted mandatory retirement at age 65. For employers who chose not to mandate retirement at age 65, ERISA allowed a pension plan to provide that employees who worked *beyond* normal retirement age would not earn any additional pension benefits after reaching normal retirement age. *See* H.R. Rep. No. 99-1012, at 378 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4023 (A 646); *Von Aulock v. Smith*, 720 F.2d 176, 177-80 (D.C. Cir. 1983).

In 1978, the ADEA was amended to raise from age 65 to 70 the upper age limit on the class of employees protected by the prohibition against age discrimination. Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189-90 (1978). There was disagreement, however, about whether the ADEA prohibited plans from denying

additional pension accruals to employees who worked beyond age 65. H.R. Rep. No. 99-1012, at 378, 1986 U.S.C.C.A.N. at 4023. The Department of Labor, which first administered the ADEA, stated in a bulletin that the ADEA permitted pension plans "to cease benefit accruals and allocations to an employee's account with respect to employees working beyond the normal retirement age under the plan." *Id.* But after the EEOC assumed responsibility for administering the ADEA, that agency announced an intention – never formally acted upon – "to rescind the Department of Labor's interpretation and require employers to continue benefit accruals" for employees who work past normal retirement age. *Id.*

OBRA 1986 resolved this disagreement by amending ERISA, the ADEA, and the Internal Revenue Code ("IRC") to provide that "benefit accruals or continued allocations to an employee's account under either a defined benefit plan or a defined contribution plan may not be reduced or discontinued on account of the attainment of a specified age." *Id.* The ERISA amendment appears in § 204(b)(1)(H)(i), which states:

> [a] defined benefit plan shall be treated as not satisfying the requirements of this paragraph if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age.

Congress used virtually identical language in amending the ADEA, § 4(i), and the IRC, § 411(b)(1)(H). The Conference Report stated that the three provisions "are to be interpreted in a consistent manner." H.R. Rep. No. 99-1012, at 378, 1986 U.S.C.C.A.N. at 4023.

SUMMARY OF ARGUMENT

The interest credits provided by the PNC cash balance plan do not cause the plan to violate § 204(b)(1)(H). Interest is paid at the same rate for all employees and gives younger employees no economic advantage. A younger employee will accumulate more interest than an older employee by age 65 only because it takes longer for the younger employee to reach that age. The extra interest compensates the younger employee for the longer wait. It is not age discrimination.

Appellants' contrary reading of § 204(b)(1)(H) is mistaken. Their essential mistake is to give an undefined term, "benefit accrual," the meaning of a defined term, "accrued benefit." § 204(b)(1)(H) does not require that "benefit accrual" be given this reading. On the contrary, this reading produces absurd results, violates rules of statutory construction, and is contrary to the long-held views of the Department of the Treasury. If accepted, Appellants' reading would invalidate all cash balance plans and all other plans under which retirement benefits continue

to grow as long as an employee waits to start receiving them. § 204(b)(1)(H) can and should be read to permit such plans.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY READ § 204(b)(1)(H) TO PERMIT CASH BALANCE PLANS

Section 204(b)(1)(H) provides that a defined benefit plan does not comply with ERISA "if, under the plan, an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." Because ERISA does not define the terms used in § 204(b)(1)(H), the terms are to be given their ordinary – not a specialized – meaning. *See FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

Giving its terms their ordinary meaning, § 204(b)(1)(H) is satisfied if the plan does not (1) cease the periodic accumulation of the benefit provided by the plan, or (2) reduce the rate at which an employee periodically accumulates that benefit, by reason of the employee's attainment of any age. Conversely, § 204(b)(1)(H) is violated if the plan specifies an age at which the accrual of benefits ceases or benefits start being calculated at a less favorable rate.

To determine whether there is a reduction in the rate at which benefits are calculated, the district court correctly considered how a cash balance plan actually expresses the employee's benefit. The court observed that, unlike traditional

defined benefit plans, which typically express the benefit as an annuity payable at age 65 (*i.e.*, the accrued benefit), a cash balance plan expresses the benefit as "a lump sum value." (A 4-5). This value, commonly called the "account balance," is the sum of the employee's accumulated pay credits and interest credits. Under the PNC plan – and under many other cash balance plans – the pay credits (which the PNC plan refers to as "earning credits") actually increase with age, while interest credits accumulate at exactly the same rate regardless of age. Accordingly, the court correctly concluded that there is no reduction in an employee's rate of benefit accrual, and that the PNC plan formula satisfies § 204(b)(1)(H).

The district court's analysis is consistent with the structure and purposes of ERISA and the IRC. A defined benefit plan is any plan other than a defined contribution plan. 29 U.S.C. § 1002(35). A defined benefit plan may therefore express a benefit in any manner. ERISA and the IRC contemplate defined benefit plans that do not state a participant's benefit accruals in terms of an age 65 accrued benefit. *See* IRC § 411(c)(3); ERISA § 204(c)(3); 26 C.F.R. § 1.411(a)-7(a)(1)(ii) (2006). Exercising their discretion to design their pension plans as they see fit, employers may express the benefit as, for example, (i) an immediate lump sum, (ii) an immediate annuity, (iii) a lump sum payable at normal retirement age, or (iv) an annuity commencing at normal retirement age.

The district court's interpretation of § 204(b)(1)(H) also agrees with the decisions of five other district courts that have rejected age-discrimination challenges to cash balance plans under § 204(b)(1)(H), *see Tootle v. ARINC, Inc.*, 222 F.R.D. 88 (D. Md. 2004); *Engers v. AT&T*, Civ. No. 98-3660 (JLL) (D.N.J. June 6, 2001) (unpublished letter opinion) (attached as Exhibit A); *Eaton v. Onan Corp.*, 117 F. Supp. 2d 812 (S.D. Ind. 2000), or the ADEA, *see Campbell v. BankBoston, N.A.*, 206 F. Supp. 2d 70, 78-79 (D. Mass. 2002), *aff'd on other grounds*, 327 F.3d 1 (1st Cir. 2003); *Godinez v. CBS Corp.*, No. SA CV 01-28-GLT(ANX), 2002 WL 32155542, at *2-3 (C.D. Cal. May 20, 2002), *aff'd*, No. 02-56148, 2003 WL 22803700 (9th Cir. Nov 21, 2003) (mem.). Two district courts have ruled otherwise. *Richards v. FleetBoston Fin. Corp.*, Civ. No. 3:04-cv-1638 (JCH) (D. Conn. Mar. 31, 2006) (unpublished opinion) (attached as Exhibit B); *Cooper v. IBM*, 274 F. Supp. 2d 1010 (S.D. Ill. 2003), *appeal pending*, No. 05-3588 (7th Cir. argued Feb. 16, 2006). As discussed below, *Richards* and *Cooper* are incorrect.

II. THE DISTRICT COURT CORRECTLY DECLINED TO READ "ACCRUED BENEFIT" INTO § 204(b)(1)(H)

Appellants acknowledge that statutes should be read with the presumption that "Congress expresses its purpose through the ordinary meaning of the words it uses." *Appellants' Br.* 21. Nevertheless, Appellants argue that "benefit accrual," an undefined term used in § 204(b)(1)(H), should be given the same

meaning as "accrued benefit," a defined term *not* used in § 204(b)(1)(H), because "accrued benefit" is used in § 204(b)(1)(A) through (G). *Appellants' Br.* 22-24. "Accrued benefit" is a specialized term meaning a benefit "expressed in the form of an annual benefit commencing at normal retirement age," 29 U.S.C. § 1002(23)(A), which is generally defined as age 65. The use of this specialized term makes sense in the context of subparagraphs (A) through (G); its use makes no sense, and cannot be justified, in the context of subparagraph (H).

A. Appellants' Reading of § 204(b)(1)(H) Violates Rules of Statutory Construction

1. Appellants' reading produces absurd results

When interpreting statutes, courts "must be guided to a degree by common sense." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Wherever possible, courts should avoid constructions of a statute that produce results that are "unreasonable," *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982), "improbable," *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 81 (1995), or "absurd," *United States v. Turkette*, 452 U.S. 576, 580 (1981).

Reading the term "accrued benefit" into § 204(b)(1)(H), as Appellants propose, produces just such results. Under the PNC plan, two employees, aged 25 and 65 respectively, both having five years of service and the same pay history,

would have nearly the same account balances.[4] If construed as Appellants propose, however, § 204(b)(1)(H) would require that the older employee have an account balance far larger than that of the younger employee at the end of the five years. § 204(b)(1)(H) would outlaw any plan that did not give the 65-year-old the amount of interest that the 25-year-old would accumulate over the next 40 years if he waited until age 65 to begin receiving benefits.

Interpreting § 204(b)(1)(H) to require the plan to equalize the dollar amount of the benefits of the two employees payable at age 65 would confer a huge windfall on the older employee and impose a crippling cost on the plan. It would also be economically nonsensical because it measures the interest awarded to the older employee today against the interest awarded to a younger employee over a period that ends 40 years from now. This ignores the time value of money, *i.e.*, the fundamental precept that "a given sum of money in hand is worth more than the like sum of money payable in the future." *Chesapeake & O. Ry. Co. v. Kelly*, 241 U.S. 485, 489 (1916). In our economy, interest is universally paid to compensate for the time value of money. Interest is no more "age discriminatory" in pension plans than in other facets of the economy.

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[4] The 65-year-old would have received somewhat higher pay credits, and his five years of accumulated interest would be correspondingly higher.

Even the district courts in *Cooper* and *Richards* recognized that their construction of § 204(b)(1)(H) is economically nonsensical. The *Cooper* court acknowledged that its construction ignored the precept that "[a] dollar today is worth more than the promise of a dollar a year from now," *Cooper*, 274 F. Supp. 2d at 1016, while the *Richards* court indirectly acknowledged that its construction requires employers to provide a far more costly benefit for older employees than for younger employees, *see* slip op. 24.

2. Appellants' reading violates other rules of construction

Appellants' reading of § 204(b)(1)(H) disregards two other rules of construction: the rule that where Congress uses a specialized term in some portions of a statute but not in others, the omission is presumed to be deliberate, *BFP v. Resolution Trust Co.*, 511 U.S. 531, 537 (1994), and the rule that an undefined term should be given its ordinary meaning rather than a specialized one, *FDIC v. Meyer*, 510 U.S. at 476; *see also Allied Color Corp. v. Mfrs. Hanover Trust Co.*, 484 F. Supp. 881, 883 (S.D.N.Y. 1980) ("In an area of the law replete with terms of art, the failure to use such a term is not likely to be inadvertent.").

Appellants purport to rely on the "plain and unambiguous" language of § 204(b)(1)(H), *see Appellants' Br.* 21-22, but their argument depends on reading the meaning of "accrued benefit" into "benefit accrual." Subparagraphs (A)

through (G) use the terms "accrued benefit" or "normal retirement age" to refer to benefits payable at normal retirement age; it must be presumed that Congress would have used the same terms in subparagraph (H) had it intended that provision also to refer to the rate of accrual of an age 65 benefit.[5]

There is a good reason why Congress used the defined terms "accrued benefit" and "normal retirement age" in subparagraphs (A) through (G) but not subparagraph (H). Subparagraphs (A) through (G) – each of which was part of ERISA as originally enacted in 1974 – aim to protect an employee's benefit accruals *prior* to normal retirement age. Subparagraph (H), adopted in OBRA 1986, was primarily intended to protect an employee's benefit accrual *after* normal retirement age. The terms "accrued benefit" and "normal retirement age" were part of the very problem that subparagraph (H) was intended to solve. Subparagraph

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[5] Some of Appellants' assertions about the statutory language are incorrect. Appellants assert that "accrued benefit" and "rate of benefit accrual" appear "numerous times" in § 204(b)(1), and that in each instance, unless expressly stated otherwise, "rate of accrual" refers to "accrued benefit." *Appellants' Br.* 22. But the terms "rate of benefit accrual" and "rate of accrual" do not appear anywhere in subparagraphs (A) through (G), and subparagraph (H) does not use "accrued benefit."

(H) could not have realized its aim if it referred to a participant's "accrued benefit" – *i.e.*, to the benefit payable *at* normal retirement age.[6]

Appellants argue that "rate of an employee's benefit accrual" in § 204(b)(1)(H) should be understood to refer to an employee's "accrued benefit" by analogy to § 204(h), which, they assert, uses "rate of future benefit accrual" to refer to an employee's "accrued benefit." *Appellants' Br.* 25. The analogy fails because the § 204(h) regulations that Appellants cite use "rate of future benefit accrual" to refer not only to "accrued benefit" (the annuity beginning at *normal* retirement age) but also to the annuity commencing "at *actual* retirement age, if later." 26 C.F.R. § 54.4980F-1, Q&A-6(b), -8(b) (2006) (emphasis added). The regulations thus use "rate of future benefit accrual" in a manner consistent with the purpose of § 204(h) and do not infer the meaning of a term in one provision from other terms used in other provisions for other purposes.

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[6] At the time subparagraph (H) was enacted, "normal retirement age" referred, in some circumstances, to the age at which benefit accruals ended. *See* 26 C.F.R. § 1.411(a)-7(b)(1) (2006) (if plan does not specify a particular age, then plan's normal retirement age is earliest age after which benefits do not increase with additional age or service, *i.e.*, the age at which benefit accruals cease); Prop. Treas. Reg. § 1.411(a)-7(b)(3) (reserving on definition of "normal retirement age" after OBRA 1986); *see generally Von Aulock v. Smith*, 720 F.2d 176, 181-85 (D.C. Cir. 1983) (discussing permissibility of ceasing benefit accruals after normal retirement age prior to OBRA 1986).

Appellants' argument is also refuted by clause (v) of § 204(b)(1)(H), which states that the "subsidized portion of any early retirement benefit" may be "disregarded" in applying § 204(b)(1)(H). An "early retirement benefit" is a benefit that commences earlier than "normal" retirement age. *See Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Ret. Income Trust*, 134 F. Supp. 2d 189, 201 (D. Mass. 2001). Early retirement benefits are considered "subsidized" to the extent that they are more valuable than the benefits that an employee could receive by waiting until *normal* retirement age to begin receiving benefits. *See* 26 C.F.R. § 1.411(d)-3(g)(6)(v) (2006); *Bellas v. CBS, Inc.*, 221 F.3d 517, 538 n.18 (3d Cir. 2000). By definition, an employee's "accrued benefit" – *i.e.*, the benefit payable at *normal* retirement age – is not an *early* retirement benefit, and therefore cannot contain an early retirement subsidy. *See Laurenzano*, 134 F. Supp. 2d at 201 (plans may not "characterize any part of the 'annual benefit commencing at normal retirement age' as a 'subsidy'"). Clause (v) would be meaningless if § 204(b)(1)(H) applied only to benefits payable at age 65, because benefits paid at age 65 are not paid "early" and *cannot* contain early retirement subsidies.

B. Appellants' Other Textual Arguments Are Unavailing

Appellants point to the introductory clause of § 204(b)(1)(H), which states: "Notwithstanding the preceding subparagraphs," a plan that violates sub-

paragraph (H) “shall be treated as not satisfying the requirements” of paragraph 204(b)(1). Appellants contend that this language shows that “benefit accrual” in subparagraph (H) “refers back” to and is “dependent on” the term “accrued benefit” in the preceding subparagraphs. *Appellants' Br.* 22-23. Not so. Subparagraph (H) includes the disclaimer to overcome the statements in subparagraphs (A) through (C) that compliance with any of those provisions is enough to satisfy the requirements of § 204(b)(1) in their entirety. The disclaimer was needed to make subparagraph (H) an independent requirement of § 204(b)(1).

Appellants cite *Berger v. Xerox Corp. Retirement Income Guar. Plan*, 338 F.3d 755 (7th Cir. 2003), and *Esden v. Bank of Boston*, 229 F.3d 154 (2d Cir. 2000), in support of their argument that § 204(b)(1)(H) refers to the rate of accrual of an employee's age 65 “accrued benefit.” These cases, however, support the opposite conclusion. *Berger* and *Esden* construed the lump sum payment rules in ERISA and the IRC. Those rules provide that a lump sum distribution of benefits from a pension plan must be the “actuarial equivalent” of an employee's “accrued benefit.” *Berger*, 338 F.3d at 759. Where, as in the lump sum payment rules, an ERISA provision uses the defined term “accrued benefit,” the point of reference is the benefit that an employee could receive at age 65. The same result does not follow where, as in § 204(b)(1)(H), Congress omits the term.

C. The Reasoning of *Cooper* and *Richards* Is Unsound

1. *Cooper*'s grammatical rationale is unsound

Disregarding the rules of statutory construction discussed above, the district court in *Cooper* speculated that Congress used "benefit accrual" instead of "accrued benefit" in § 204(b)(1)(H) because it wanted to be grammatically correct. *Cooper*, 274 F. Supp. 2d at 1016; *see also Richards*, slip op. 20. Congress, however, could easily have referred in § 204(b)(1)(H) to the rate of accrual of a benefit payable at age 65 (or "normal retirement age") using good grammar. It did so in § 204(b)(1)(B), referring to the "annual rate at which any individual . . . can accrue the retirement benefit payable at normal retirement age." The *Cooper* court itself identified several ways in which Congress could have referred, without grammatical injury, to the rate of accrual of a benefit payable at age 65 or "normal retirement age."[7]

[7] The *Cooper* court refers to "the rate at which th[e] age 65 annual benefit accrues," "the rate at which an employee accrues a benefit payable in the form of an annuity that commences at age 65," "the rate at which a participant's age 65 benefit accrues," and the "rate of age 65 annual benefit accrual." *Cooper v. IBM*, 274 F. Supp. 2d 1010, 1016-17 (S.D. Ill. 2003), *appeal pending*, No. 05-3588 (7th Cir. argued Feb. 16, 2006).

2. *Richards*' "binary structure" rationale is unsound

In support of its construction of § 204(b)(1)(H), the district court in *Richards* court relied on ERISA's "binary structure" of defined benefit and defined contribution plans. The court concluded that the difference in the wording of the age-discrimination prohibitions for defined benefit plans under § 204(b)(1)(H) and for defined contribution plans under § 204(b)(2) "demonstrates" that cash balance plans are age-discriminatory. *See* slip op. 20. This is incorrect.

A defined contribution plan provides a benefit based on *actual* contributions and investment returns allocated to individual accounts. 29 U.S.C. § 1002(34). ERISA subjects such plans to an age discrimination requirement that focuses on the *actual* allocations to an employee's account. § 204(b)(2).

A defined benefit plan, by contrast, may express benefits in any number of ways. Section § 204(b)(1)(H) therefore subjects these plans to an age discrimination requirement that focuses on the plan's benefit *formula*, whatever it may be, and regardless of actual contributions and investment earnings to the plan. The standard that applies to cash balance plans, therefore, is the one that applies to defined benefit plans: it considers the promise in the plan, which, for a cash balance plan, is expressed as an account balance and is unrelated to actual contributions and investment return of the plan.

Although the standards for defined contribution and defined benefit plans are different, from the employee's point of view, the economic effect of interest promised in a cash balance plan and interest actually credited in a defined contribution plan is the same. Given that the economic effect is the same, it makes no sense to treat interest credited under a cash balance plan as age discriminatory under § 204(b)(1)(H) while treating interest credited under a defined contribution plan as non-age discriminatory under § 204(b)(2).

III. CASH BALANCE PLANS DO NOT REDUCE THE RATE OF BENEFIT ACCRUAL "BECAUSE OF THE ATTAINMENT OF ANY AGE"

To state a claim under § 204(b)(1)(H), a plaintiff must allege not only that there has been a reduction in an employee's rate of benefit accrual, but also that the reduction is "because of" the attainment of any age. Unquestionably, a 24-year-old employee will accumulate more interest by the time he reaches age 65 than a 64-year-old employee with the same years of service will accumulate by the time he reaches age 65. This, however, is not "because of" the difference in their ages, but because the younger employee must wait 40 years longer than the older employee to receive his age 65 benefit. Thus, merely to allege that the interest credits for the younger employee are "more substantial" than those for the older employee, *see* Amended Compl. ¶ 54 (A 49), does not state a violation of § 204(b)(1)(H).

To be sure, when one asks "how many years of interest will an employee accumulate *by age 65*," the answer correlates with an employee's current age. However, one could just as easily ask, "How many years of interest will an employee accumulate if the employee waits until 2046 to begin receiving benefits?" The answer is the same for every employee regardless of the employee's age: two employees of different ages who wait the same length of time will accrue interest for the same number of years.

A cash balance plan provides interest credits to an employee who retires at age 65 with five years of service that are identical to the interest credits that the plan provides to an employee who terminates employment at age 25 with five years of service: if each employee takes an immediate lump sum distribution, the amount distributed to each employee will include five years' accumulation of interest credits. This is age-neutrality, not age-discrimination.

Interest credits are based on how long an employee waits to receive benefits, not on the employee's age. Thus, the present value of the benefits that the PNC plan provides to younger employees does not exceed the present value of the

benefits that the plan provides to older employees.[8] Consistent with this economic reality, Treasury has repeatedly indicated that it is lawful for a cash balance plan to credit employees with interest at a rate that does not vary with age, and IRS Notice 96-8 *requires* cash balance plans to provide interest credits in the manner that Appellants say is age discriminatory. *See* IRS Notice 96-8, 1996-1 C.B. 359 (Jan. 18, 1996), 1996 WL 17901.

Numerous courts have distinguished age from events that occur over a period of time. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) ("an employee's age is analytically distinct from his years of service.")[9]; *Lyon v. Ohio*

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[8] The PNC plan credits interest at a rate based on 30-year Treasuries. (A 7). This is the same interest rate that ERISA and the IRC require to be used to determine the present value of an annuity benefit for purposes of paying out a lump sum. ERISA § 205(g)(3)(A)(ii)(II); IRC § 417(e)(3)(A)(ii)(II). Because a lump sum payment cannot be more valuable than the joint and survivor annuity it replaces, 26 C.F.R. § 1.401(a)-20, Q&A-16 (2006), the interest rate assumption used to calculate a lump sum provides a participant with no more than a benefit that is actuarially equivalent to the annuity. Likewise, adjusting an account balance by that same interest rate does not confer an additional benefit on an employee: it merely adjusts the employee's benefit to reflect the passage of time.

[9] *Richards* attempts to skirt *Hazen Paper* on the basis that a later case, *Smith v. City of Jackson*, 125 S. Ct. 1536 (2005), held that a plaintiff can satisfy the "because of" prong of ADEA § 4(a)(2) based solely on disparate impact. Slip op. 26. But the ADEA counterpart to § 204(b)(1)(H) is § 4(a)(1), and *Smith* pointed out that § 4(a)(1) does *not* permit disparate impact claims. *Smith*, 125 S. Ct. at 1542 n.6 (plurality opinion).

Educ. Ass'n, 53 F.3d 135, 140 (6th Cir. 1995) (age and closeness to retirement are distinct); *see also Lunn v. Montgomery Ward*, 166 F.3d 880, 883-84 (7th Cir. 1999). *Lunn* made clear that tying benefits to "the performance of the stock market" is a "legitimate" practice in a defined benefit plan – even though stock market earnings increase over time in the same manner that interest credits do. *Id*. at 882. *Lunn* also explained that the practice of integrating pension benefits with social security benefits – *i.e*., reducing an employee's pension benefit based on his social security benefit – does not reduce benefit accruals because of the attainment of any age, even though social security benefits are directly linked to age. *See id.* at 883-84.

IV. APPELLANTS' ARGUMENTS ARE INCONSISTENT WITH AUTHORITATIVE TREASURY GUIDANCE

For more than 15 years, the Treasury Department has made clear its position that (1) cash balance plans are lawful and (2) it is not only permissible but necessary for cash balance plans to provide guaranteed interest credits. Treasury's views – reflected in final regulations, a preamble statement, Congressional testimony, a notice that three Courts of Appeals have found authoritative, and other agency documents – are entitled to "considerable weight." *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 844 (1984). In ruling that cash balance plans violate

§ 204(b)(1)(H), the district courts in *Richards* and *Cooper* ignored the consistent position taken by Treasury.

IRC § 401(a)(4) Regulations. Treasury Regulations require that cash balance plans provide guaranteed interest credits (as the PNC plan does) to qualify for a safe harbor under the IRC § 401(a)(4) nondiscrimination rules. *See* 26 C.F.R. § 1.401(a)(4)-8(c)(3)(iv)(A) (2006). Treasury adopted these regulations in 1991 (and reissued them in 1993) pursuant to a Congressional mandate to "coordinate" the nondiscrimination rules in IRC § 401(a)(4) with the requirements of IRC § 411(b)(1)(H). IRC § 411(b)(1)(H)(v). Treasury's "coordinated" interpretation applies to § 204(b)(1)(H). ERISA § 204(b)(1)(H)(vi). These regulations reflect Treasury's considered view that the provision of guaranteed interest credits does not reduce the rate at which benefits accrue because of age.

The Preamble to the § 401(a)(4) Regulations. Consistent with its obligation to "coordinate" the two sets of rules, Treasury stated in the 1991 Preamble to the § 401(a)(4) final regulations that guaranteed interest credits do not cause a cash balance plan to violate IRC § 411(b)(1)(H):

> The fact that interest adjustments through normal retirement age are accrued in the year of the hypothetical allocation [*i.e.*, the year a pay credit is accrued] will not cause a cash balance plan to fail to satisfy the requirements of § 411(b)(1)(H) [the IRC analogue of

§ 204(b)(1)(H)], relating to age-based reductions in the rate at which benefits accrue under a plan.

56 Fed. Reg. 47,524, 47,528 (Sept. 19, 1991), 1991 WL 11000230.

Appellants assert that the regulations introduced by the Preamble were "subsequently withdrawn" and then "reproposed" without the Preamble, *Appellants' Br*. 31, but this is wrong. Treasury simply delayed the effective date of the regulations and amended other, unrelated portions of the regulations.[10] There was no need for the subsequent Preamble to address matters that remained unchanged. That Treasury did not recant the earlier Preamble is shown by the 1999 congressional testimony of the IRS Chief Counsel affirming the 1991 Preamble statement regarding guaranteed interest credits.[11]

Notice 96-8. IRS Notice 96-8 establishes safe harbor interest crediting rates that enable cash balance plans to make lump sum payments equal to a participant's account balance without violating the rules that the IRC and ERISA prescribe for lump sum payments. Treasury stated in the Notice that, in order to

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[10] These regulations were originally to become effective in 1992, but the date was postponed to 1994 after other portions of the regulations were amended. *See* 57 Fed. Reg. 35,536, 35,536 (Aug. 10, 1992), 1992 WL 188546; 26 C.F.R. § 1.401(a)(4)-13(a) (2006).

[11] *Hybrid Pension Plans: Hearing before the Senate Comm. on Health, Education, Labor and Pensions*, 106th Cong. 118, 125-26 (1999) (prepared testimony of Stuart L. Brown).

comply with the IRC's anti-backloading rules, a cash balance plan must continue to credit interest on an employee's account balance through normal retirement age even if the employee stops working before that age. (The PNC plan uses one of these interest rates.) *See* IRS Notice 96-8, 1996-1 C.B. 359 (Jan. 18, 1996), 1996 WL 17901, pt. IV-A. Implicit in these instructions is Treasury's recognition that cash balance plans, and the crediting of interest at the approved rates, are otherwise lawful. Notice 96-8 has been described as "authoritative." *Berger*, 338 F.3d at 762; *Esden*, 229 F.3d at 171. If Treasury believed that the guaranteed interest credits provided by cash balance plans were inherently age discriminatory, it would not have prescribed the interest rates that cash balance plans could use in order to comply with ERISA's lump sum payment rules.

Treasury's Current Views. Treasury continues to take the position that cash balance plans are not inherently age discriminatory. The proposed 2002 regulations (which were subsequently withdrawn) provided that guaranteed interest credits would not cause a cash balance plan to fail § 204(b)(1)(H), *see* 67 Fed. Reg. 76,123, 76,126 (Dec. 11, 2002), 2002 WL 31753351. Even if these withdrawn regulations are given no weight, subsequent Treasury budget statements have re-

confirmed that "cash balance plans . . . are not inherently age discriminatory."[12] In suspending Treasury's efforts to address cash balance issues, Congress made clear that it did not mean "to call into question the validity of . . . cash balance" plans. H.R. Rep. No. 108-401, at 1181 (2004), 2004 U.S.C.C.A.N. 3, 460.[13]

V. ADOPTING APPELLANTS' INTERPRETATION OF § 204(B)(1)(H) WOULD IMPERIL THE NATION'S PENSION SYSTEM

Appellants' reading § 204(b)(1)(H) would invalidate over 1,500 existing cash balance plans covering eight million participants and impose hundreds of billions of dollars of unfunded liability on plan sponsors, which would be subject to enormous cash calls that would jeopardize the ability of many to do business and cause many others to terminate their pension plans. But that is only the beginning. Appellants' reading would invalidate several other long-accepted types of defined benefit plans – including variable annuity plans, career indexed plans, and pension equity plans – that use an interest rate or interest-like features to adjust an

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[12] Department of Treasury, *General Explanations of the Administration's Fiscal Year 2006 Revenue Proposals* 82 (2005), *available at* http://www.treas.gov/offices/tax-policy/library/bluebok05.pdf.

[13] Appellants note that in 1999 the IRS stayed the issuance of letters approving the *conversion* of existing defined benefit plans into cash balance plans, *Appellants' Br.* 30, but they neglect to mention that Treasury continues to issue letters approving *new* cash balance plans, *see* Treas. Ann. 2003-1, 2003-1 C.B. 281 (Jan. 13, 2003), 2002 WL 31747446.

employee's benefit over time. Contributory defined benefit plans, which require employees to make periodic contributions, would also be invalid because ERISA requires such plans to credit interest on employee contributions, *see* §§ 204(c)(1) & (2). *See Onan*, 117 F. Supp. 2d at 831. Appellants' reading would also invalidate traditional defined benefit plans with respect to benefit accruals after normal retirement. *See id.* at 830. ERISA, enacted to protect the nation's pension system, neither requires nor permits these results.

VI. AARP'S CRITICISM OF CASH BALANCE PLANS LACKS MERIT

In its *amicus* brief supporting Appellants, AARP castigates "cash balance conversions" as a "means by which companies reduce future pension benefits of employees." AARP *Amicus* Br. 5. As a legal matter, ERISA does not require employers to provide *any* future pension benefits to employees. *See Spink*, 517 U.S. at 887. As a factual matter, AARP's criticism is unfounded.

Cash balance conversions result in an *increase* in pension wealth for most employees who had been covered by traditional defined benefit plans. This is because traditional plans concentrate pension wealth in the small percentage of employees who work for a single employer for decades and retire in their 50s. Cash balance plans distribute pension wealth more evenly among employees, in-

cluding employees who work into their 60s and later, thereby increasing future pension benefits of most employees.

Traditional defined benefit plans promise employees a benefit expressed as a life annuity beginning at age 65 – for example, one percent of average annual pay, multiplied by the employee's years of service, to be paid each year until the employee dies. In addition, traditional defined benefit plans often provide incentives for employees to retire before age 65. *See* 26 C.F.R. § 1.411(d)-3(g)(6)(v) (2006). These incentives, known as "early retirement subsidies," provide retirement benefits beginning before age 65 that are more valuable than the age 65 benefit. *See* 26 C.F.R. § 1.411(d)-3(g)(6)(v) (2006). Early retirement subsidies typically are available only to longer service workers. The value of benefits earned under a traditional defined plans can be described as follows:

> [P]ension accruals in traditional [defined benefit] plans are minimal at young ages, grow rapidly in the late 40's and 50's as workers approach retirement age, and then become negative as workers lose pension wealth when they remain at work past the plan's retirement age. For workers in their early 60s who have participated in the DB plan since age 25, for example, pension wealth de-

> clines on average by about 14 percent of annual salary each year.[14]

Accordingly, traditional plans provide the most valuable benefits to employees who work for the same employer for 20 to 30 years and retire in their 50s. Employees who continue working past their 50s actually receive less valuable benefits. But few employees now retire in their mid-50's after spending 20 to 30 years with the same employer. The result is that only a small portion of employees receive substantial retirement benefits under a traditional defined benefit plan.

Cash balance plans generally distribute pension wealth more evenly among employees than do traditional defined benefit plans. This is because cash balance plans typically provide pay and interest credits at the same rates to employees throughout their careers regardless of age or service. (Some plans, such as PNC's, provide greater pay credits as an employee ages or works, but even these plans spread pension wealth more evenly than do traditional plans.) "By distributing pension wealth more equally across the population than [traditional defined benefit] plans, cash balance plans would increase median lifetime pension wealth

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[14] Johnson & Steuerle, Urban Institute, *Promoting Work at Older Ages: The Role of Hybrid Pension Plans in an Aging Population*, at 21 & Fig. 12 (2003).

in the total covered population and more people would gain pension wealth than lose."[15]

The relatively even distribution of pension wealth under cash balance plans is particularly favorable to certain segments of the workforce:

> Compared with traditional pensions, cash balance plans generate retirement wealth more evenly over time for a couple of reasons: Contributions made early on earn interest for many years, and lifetime earnings rather than final earnings determine benefits. Consequently, a worker changing jobs incurs only a small penalty. For women, who tend to have higher turnover rates than men, the ability to change jobs without jeopardizing pension wealth may be particularly important.[16]

Because they are defined benefit plans, cash balance plans offer several advantages over defined contribution plans such as 401(k) plans. The employer, rather that the employee, bears the investment risk. In addition, cash balance plans can pay out annuities, ensuring that an employee receives income for his or her life and even for the life of his or her spouse; by contrast, the benefit under a defined contribution plan is limited to the employee's account balance, and once that is exhausted, the employee receives no additional income.

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[15] Johnson & Uccello, Urban Institute, *The Potential Effects of Cash Balance Plans on the Distribution of Pension Wealth at Midlife*, at 29 (2001).

[16] Johnson & Uccello, Urban Institute, *Can Cash Balance Pension Plans Improve Retirement Security for Today's Workers?*, at 2 (2002).

It is therefore surprising that cash balance plans – and employers' conversions from traditional defined benefits plans to cash balance plans – have become controversial. Responding to the type of criticism leveled by AARP in its *amicus* brief, two Federal Reserve Board analysts have observed:

> While the idea that firms are undertaking cash balance conversions to reduce benefits lacks analytic underpinnings, it has nonetheless served as the basis of various legislative proposals in Congress and has been the dominant theme in media coverage of this trend. Because of its influence, the idea is worthy of empirical analysis. . . . Our results indicate that, while critics have decried the trend of the conversion of traditional defined benefit pension plans to cash balance plans as reducing benefit generosity, the implications for retirement security may actually be favorable. The earlier accrual and portability of benefits will better facilitate the accumulation of wealth for a more mobile labor force.[17]

CONCLUSION

For the reasons stated, the district court's judgment should be affirmed.

[17] Copeland & Coronado, Federal Reserve Board, *Cash Balance Pension Plan Conversions and the New Economy*, at 12, 22 (2002).

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Respectfully submitted,

/s/ Jeffrey G. Huvelle
Jeffrey G. Huvelle
David H. Remes
John M. Vine
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
202-662-6000

Attorneys for *Amicus Curiae*
The ERISA Industry Committee

COMBINED CERTIFICATIONS

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of the United States Court of Appeals for the Third Circuit, I, Jeffrey G. Huvelle, hereby certify the following:

1. Pursuant to Local Rule 28.3(d), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii). Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), this brief includes 6,945 words. This brief has been prepared in proportionately-spaced typeface using Microsoft Word in 14 point Century Schoolbook font. As permitted by Fed. R. App. P. 32(a)(7)(C), I have relied upon the word count of this word-processing system in preparing this certificate.

3. I certify that the .pdf version of the Brief of Amici Curiae sent by electronic mail to the court and counsel has been scanned for viruses using Symantec AntiVirus, and that no viruses have been detected. All electronic versions served are identical to the hard copies filed with the Court.

4. I certify that on April 11, 2006, two true and correct copies of the foregoing **Brief *Amicus Curiae* of the ERISA Industry Committee in Sup-**

port of Appellees Urging Affirmance, along with an electronic version of the brief on a virus-free diskette, were served via First Class United States Mail, postage prepaid, upon the following:

Arthur Makadon
William A. Slaughter
Barry L. Klein
Allison V. Kinsey
Jamie B. Lehrer
BALLARD SPAHR ANDREWS & INGERSOLL, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103

Attorneys for Appellees

David H. Weinstein
Andrea L. Wilson
WEINSTEIN KITCHENOFF & ASHER, LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103

Bryan L. Clobes
Michael S. Tarringer
MILLER, FAUCHER AND CAFFERTY LLP
One Logan Square, Suite 1700
Philadelphia, PA 19103

Hilary K. Ratway
FINKELSTEIN THOMPSON & LOUGHRAN
The Duvall Foundry
1050 30th Street, N.W.
Washington, D.C. 20007

James F. Keller
Zachary Gottesman
GOTTESMAN & ASSOCIATES
2121 URS Center
36 E. 7th Street
Cincinnati, OH 45202

Paul J. Scarlato
GOLDMAN SCARLATO & KARON, P.C.
101 West Elm Street, Suite 360
Conshohocken, PA 19428

Elmer Goldman
6659 Villager Place
Mason, OH 45040

John F. Innelli
JOHN F. INNELLI, LLC
1818 Market Street, Suite 3620
Philadelphia, PA 19103

Attorneys for Appellants

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: April 11, 2006

/s/ Jeffrey G. Huvelle
Jeffrey G. Huvelle