IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 06-55599

DAVID HURLIC, SUSANNA H. SELESKY, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs-*Appellants*,

v.

SOUTHERN CALIFORNIA GAS COMPANY; THE SOUTHERN CALIFORNIA GAS COMPANY PENSION PLAN,

Defendants-*Appellees*.

Appeal from the United States District Court for the
Central District of California
Case No. 2:05-cv-05027-R-MAN

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

Of Counsel

Sonya D. Winner
COVINGTON & BURLING LLP
One Front Street
35th Floor
San Francisco, CA 94111

Jeffrey G. Huvelle
John M. Vine
Eric R. Sonnenschein
COVINGTON & BURLING LLP
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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS AND OTHER ADMINISTRATIVE GUIDANCE

LEGISLATIVE HISTORY

FEDERAL RULES

ARTICLES AND OTHER PUBLICATIONS

MISCELLANEOUS

QUESTION ADDRESSED BY AMICUS

Whether every cash balance plan in the country is inherently age discriminatory under ERISA § 204(b)(1)(H).

STATEMENT OF IDENTITY AND INTEREST

With consent from all parties, pursuant to FRAP 29(a), The ERISA Industry Committee ("ERIC") respectfully submits this *amicus curiae* brief in support of appellees: The Southern California Gas Company Pension Plan and Southern California Gas Company ("SCGC").

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 is committed to promoting a regulatory environment that allows voluntary employer-sponsored pension plans to flourish.

ERIC has participated as an *amicus* in the Supreme Court in cases of exceptional importance relating to employee benefit plan design or administration. ERIC participates as an *amicus* in the courts of appeals infrequently, but does so here because this case raises an issue of major importance. Affirmance of the decision below is critical to more than a thousand employers, including many of

ERIC's members who have voluntarily decided to help employees meet their retirement needs by sponsoring cash balance defined benefit plans and other types of pension plans that adjust benefits to reflect the time value of money. Affirmance is also important to the many employees in this country whose retirement security depends on the continued viability of employer-sponsored defined benefit pension plans.

INTRODUCTION

Defined benefit pension plans provide retirement benefits to millions of American workers. Employees typically are not required to contribute to these plans, and in most cases, the employer is solely responsible for ensuring that the plan has sufficient assets to pay the plan's benefits.

Although defined benefit plans have played a critical role in helping Americans achieve a secure retirement, the number of defined benefit plans has been shrinking: employers sponsored 114,000 defined benefit plans in 1985 but only 32,000 in 2004.[1] This decline would have been far more severe if many employers over the past 20 years had not adopted a type of defined benefit plan known as a cash balance plan.

---

[1] PBGC, *Pension Insurance Data Handbook 2004*, at 56, 87, *available at* http://www.pbgc.gov/docs/2004databook.pdf (last visited Oct. 9, 2006).

Cash balance plans offer several advantages over traditional defined benefit plans. Cash balance plans are generally easier for employees to understand than traditional defined benefit plans, provide greater "portability" of benefits, allow employees to accrue benefits more evenly over the course of their careers, and are better suited to the increased job-mobility of contemporary labor markets. *See Esden v. Bank of Boston*, 229 F.3d 154, 158 n.5 (2d Cir. 2000). Cash balance plans also enable employers to offer benefits that they might otherwise be financially unable or unwilling to provide. *Id.* These plans are now commonplace, covering eight million participants, and accounting for nearly 25 percent of all employees covered by single-employer defined benefit pension plans as of 2003.[2] Organizations sponsoring cash balance plans include not only Fortune 100 companies, but also numerous healthcare institutions (*e.g.*, All Saints Hospital Systems, Riverside Community Hospital), universities (*e.g.*, Harvard University, University of Miami), and charitable groups (*e.g.*, Daughters of Charity, YWCA).[3]

---

2 *Supra* note 1 at 60.

3 Comm'ee on Education and the Workforce, Democratic Staff, U.S. House of Representatives, *Companies that Have Converted to Cash Balance Pension Plans*, (2003), *http://edworkforce.house.gov/democrats/pdf/cashbalancecompanies.pdf.*

This appeal raises the question whether *all* cash balance plans are inherently age discriminatory under ERISA § 204(b)(1)(H). A decision concluding that these plans are categorically unlawful would impose crippling liabilities on numerous companies and undermine ERISA's fundamental goal of encouraging employers to offer pension plans. We urge this Court to construe § 204(b)(1)(H) in a sensible manner and conclude that cash balance plans do not violate ERISA.

BACKGROUND

1. The Omnibus Budget Reconciliation Act of 1986 ("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 did not require that employees who worked *beyond* normal retirement age continue earning pension benefits. *See* H.R. Rep. No. 99-1012, at 378 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3868, 4023; *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 its intent – 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), which states in pertinent part:

> [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.

29 U.S.C. § 1054(b)(1)(H)(i). Under the heading "Reasons for Change," the Conference Report explained that the OBRA provisions were adopted to resolve the ongoing uncertainty over whether it was lawful to cut off further pension accruals for employees who work past normal retirement age. H.R. Rep. No. 99-1012, at 378.

2. Cash Balance Plans.

Plaintiffs in this case challenge the legality of cash balance plans. A cash balance plan is a type of defined benefit plan that expresses an employee's benefit as an account balance. Cash balance plans resemble defined contribution plans in that the annual benefit accrual is stated as an addition to a bookkeeping account. *See Esden*, 229 F.3d at 158. An employee's account in a cash balance plan is not an asset-based account of the kind maintained under a defined contribution plan, however. It is a formula-based account under which the plan sponsor records benefits in the form of pay credits and interest credits in an account maintained for each participant. *See Cooper v. IBM Personal Pension Plan*, 457 F.3d 636, 637 (7th Cir. 2006).

Over the past 15 years, the Treasury Department has issued regulations and other guidance explaining how cash balance plans may comply with the IRC. *See infra* pp. 24-27. This guidance states, among other things, that a cash balance plan does not violate § 204(b)(1)(H) simply because it guarantees each participant the right to continue to earn interest on the balance in her cash balance account through normal retirement age, even if she stops working for her employer. *Id.*

Notwithstanding this guidance, plaintiffs have recently contended, in "a flurry of litigation," that cash balance plans violate § 204(b)(1)(H) under an age discrimination theory that would effectively render cash balance plans "per se illegal." *Drutis v. Quebecor World (USA), Inc.*, No. 04-269-KSF, slip op. at 4 (E.D. Ky. Sept. 25, 2006); *Eaton v. Onan Corp.* 117 F. Supp. 2d 812, 815 (S.D. Ind. 2000). Pared to its core, the theory is that cash balance plans are age discriminatory because they credit interest.

A cash balance plan periodically credits interest on a participant's account balance until the participant takes a distribution of that balance. Thus, the longer a participant waits to receive the account balance, the more interest will be credited to the account. In dozens of lawsuits filed across the country – including the present case – plaintiffs have alleged that this feature of cash balance plans discriminates against older workers, because a younger employee will be credited with more interest than a similarly situated older employee if both wait until age 65 to take their benefits, resulting in nominally larger age-65 benefits for younger employees. *See Cooper*, 457 F.3d at 638; *App. Br.* 19-21. Under this theory, *all* cash balance plans violate ERISA § 204(b)(1)(H), because *all* cash balance plans credit more interest to a younger employee than to a similarly situated older employee if both employees wait until age 65 to receive a distribution from the plan.

SUMMARY OF ARGUMENT

This appeal raises the question whether cash balance plans are inherently age discriminatory under ERISA § 204(b)(1)(H). The Seventh Circuit recently addressed this question, emphatically answering "no." *See Cooper v. IBM Personal Pension Plan*, 457 F.3d 636 (7th Cir. 2006). The Seventh Circuit recognized that it was "not sensible" to interpret § 204(b)(1)(H) to condemn all cash balance plans as age discriminatory simply because such plans provide interest, noting that "[n]othing in the language or background of § 204(b)(1)(H) suggests that Congress set out to legislate against the fact that younger workers have (statistically) more time left before retirement, and thus a greater opportunity to earn interest on each year's retirement savings" than older employees. *Cooper,* 457 F.3d at 639.

This Court should follow *Cooper*. This Court has a practice of avoiding inter-circuit conflicts absent a strong reason to disagree with another circuit. *Torre v. Brickley*, 278 F.3d 917, 919 (9th Cir. 2002). There are powerful reasons to follow *Cooper*, not to disagree with it. *Cooper*'s holding that cash balance plans are not inherently age discriminatory is consistent with the text, purpose, and background of § 204(b)(1)(H), as well as fundamental principles of age discrimination law and long-standing authoritative regulatory guidance. Plaintiffs' proposed interpretation, by contrast, produces absurd results, violates fundamental rules of statutory construction, contradicts the long-held views of the Treasury, and would needlessly threaten the viability of voluntary employer-sponsored pension plans. If this Court were to accept Plaintiffs' theory, employers who conduct business in the Seventh and the Ninth Circuits would be subject to inconsistent obligations with respect to their pension plans.

Plaintiffs posit that cash balance plans should be deemed age discriminatory merely because they credit interest to compensate participants for the passage of time. But the interest credits provided by the SCGC Plan (and other cash balance plans) are not age discriminatory. These credits are provided at the same rate for all employees, regardless of age, and under no circumstance will a younger employee accumulate more interest than a similarly situated older employee if both wait the same number of years to receive their benefits. A younger employee will accumulate more interest than an older employee by age 65 if both wait until that age to take their benefits, but only because the younger employee in that scenario waits longer to receive his or her benefits. In such circumstances, the extra interest merely compensates the younger employee for the longer wait.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' AGE DISCRIMINATION CLAIM.

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." 29 U.S.C. § 1054(b)(1)(H). The SCGC plan satisfies this provision as a matter of law.

Although the phrase "rate of benefit accrual" is not defined in § 204(b)(1)(H), the phrase is most sensibly and naturally read in the context of cash balance plans as referring to changes over time in an individual's account balance, as virtually every court to consider the issue has held. *See, e.g.*, *Cooper*, 457 F.3d at 639 ("'[B]enefit accrual' reads most naturally as a reference to what the employer puts in" to the account); *Laurent v. PricewaterhouseCoopers*, 2006 WL 2546805, *13 (S.D.N.Y. 2006) ("[T]he rate of benefit accrual is . . . determined by the change in account balance."); *Hirt v. Equitable*, 441 F. Supp. 2d 516, 551 (S.D.N.Y. 2006) ("[T]he rate of contributions to Cash Account balances, and thus the rate of benefit accrual, do not change; they are equal regardless of age."); *Tootle v. ARINC, Inc.*, 222 F.R.D. 88, 94 (D. Md. 2004) ("The more sensible approach . . . under cash balance plans [is] examining . . . the changes over time in an individual's account balance"); *Onan*, 117 F. Supp. 2d at 832-33 ("[T]he rate of benefit accrual should be defined as the change in the employee's cash balance account from one year to the next."); *Register v. PNC*, 2005 WL 3120268 *7 (E.D. Pa. 2005) ("[I]t follows logically that the rate of benefit accrual is determined by the change in the account balance.")

This interpretation is consistent with the manner in which benefits are actually expressed by a cash balance formula, and provides a "precise, quantifiable, clear measure" of how employees are treated without the need for "any estimates or actuarial assumptions." *Onan*, 117 F. Supp. 2d at 826. Moreover, this interpretation avoids the absurdities and other problems associated with Plaintiffs' construction of the statute, *see infra* pp. 12-29, and is supported by guidance issued by the Treasury Department, which has likewise indicated that it would interpret the phrase "rate of benefit accrual" in a cash balance plan as referring to "the additions to the participant's hypothetical account for the plan year." *Cooper*, 457 F.3d at 639 (citing 67 Fed. Reg. 76,123, 76,126 (Dec. 11, 2002).)

In this case, the SCGC plan complies with § 204(b)(1)(H) because there is no age at which the Plan ceases to provide pay credits or interest credits, nor is there any age at which the Plan begins to provide those credits at a lower rate. (ER 245 ¶ 18.) Accordingly, there is *no age* at which an employee's account balance grows less in a given year than it would if the employee were younger, and *no age* at which the rate of an employee's benefit accrual is "reduced." Plaintiffs' age discrimination claim was properly dismissed with prejudice.

II. PLAINTIFFS BASE THEIR AGE DISCRIMINATION CLAIM ON AN ERRONEOUS INTERPRETATION OF § 204(b)(1)(H).

Plaintiffs' age discrimination claim is not founded on allegations that older employees are treated worse than similarly situated younger employees in real economic terms. Nor could it be. The SCGC plan provides older employees with pay credits and interest credits that are *the same or greater than* what similarly situated younger employees receive. (ER 245 ¶ 18.)

Rather, Plaintiffs' claim is premised on a construction of § 204(b)(1)(H) that categorically condemns all cash balance plans as "age discriminatory" even though such plans typically treat older employees the same as, or substantially better than, similarly situated younger employees. Among other things, Plaintiffs' interpretation: (1) rewrites the statute to include a defined term – accrued benefit – that Congress chose not to use; (2) misconstrues the statute's causation requirement; (3) produces absurd results; (4) conflicts with long-standing Treasury guidance; and (5) would, if adopted, needlessly imperil the pension system.

A. Plaintiffs Rewrite § 204(b)(1)(H) to Use a Defined Term that Congress Chose Not to Use.

Plaintiffs' age discrimination theory depends on the proposition that "rate of benefit accrual" in § 204(b)(1)(H) must refer to the rate at which a participant accrues an age 65 annuity – *i.e.*, that the phrase "benefit accrual" must be equated with the defined term "accrued benefit." *App. Br.* 12. But § 204(b)(1)(H) does not use the term "accrued benefit" and does not require that the "accrued benefit" be used as the metric in assessing age discrimination, as numerous courts have recognized.

Settled rules of statutory construction support these courts' conclusions. Congress has used the term "accrued benefit" in dozens of ERISA provisions, but conspicuously omitted the term in § 204(b)(1)(H). Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is to be presumed that Congress acted "intentionally and purposely" in its omission. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994).

Congress's purpose in enacting § 204(b)(1)(H) confirms that the omission was deliberate: Congress was concerned primarily if not exclusively with ensuring that benefit accruals would continue *after* normal retirement age. *See supra* pp. 4-

6. It therefore would have made *no sense* to adopt a test of age discrimination that focused on benefits payable *at* normal retirement age, which is what the statute would have done had it used the term "accrued benefit." Indeed, if benefit accruals *after* normal retirement age must be measured in terms of an annuity payable *at* normal retirement age (*i.e.*, the accrued benefit), as Plaintiffs argue, then the sole example of a compliant plan in the Conference Report on § 204(b)(1)(H) "would become illegal." *Onan*, 117 F. Supp. 2d at 830.

Moreover, the term "accrued benefit" was part of the very problem that § 204(b)(1)(H) was intended to solve. The definition of "accrued benefit" incorporates the term "normal retirement age," which, at the time § 204(b)(1)(H) was adopted, generally referred to the age at which benefit accruals ended.[4] The point of § 204(b)(1)(H) was that accruals should not end by reason of attaining any age.

Although Plaintiffs and their amicus purport to rely on subparagraphs (A) through (G) of ERISA § 204(b)(1) to support their construction of "rate of benefit accrual," these provisions undercut their position. *App. Br.* 29-31. ERISA's anti-

---

4 *See* 26 C.F.R. § 1.411(a)-7(b)(1); H.R. Rep. No. 93-807, at 20 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4687.

backloading rules refer, for example, to the "annual rate" at which participants can "accrue the retirement benefits *payable at normal retirement age*." 29 U.S.C. § 1054(b)(1)(B) (emphasis added). Such provisions prove that, when Congress wanted to mandate that the rate of accrual be tied to an age-65 annuity, it did so expressly. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) ("[H]ad Congress meant to broaden application of the statute beyond actual 'use' [in 18 U.S.C. § 924(c)(1)], Congress could and would have so specified, as it did in § 924(d)(1).")

Plaintiffs and their amicus also argue that a Treasury regulation issued under a *different* ERISA provision, § 204(h), supports their construction of § 204(b)(1)(H). *App. Br.* 28. But Treasury has expressly indicated when addressing § 204(b)(1)(H) itself that cash balance plans are *not* inherently age discriminatory, and that the rate of an employee's benefit accrual under § 204(b)(1)(H) is the annual rate of growth of the participant's account in a cash balance plan. *See infra* pp. 24-27.

Plaintiffs' reliance on Treasury's construction of § 204(h) is also problematic because (1) § 204(h) is a notice provision that uses different language and has a different purpose than § 204(b)(1)(H); (2) Treasury has gone out of its way to state that its interpretation of § 204(h) "does not indicate any possible outcome" on its interpretation of § 204(b)(1)(H), 68 Fed. Reg. 17,277, 17,278

(Apr. 9, 2003); and (3) Treasury has *not* construed § 204(h) to focus exclusively on the participant's "accrued benefit."[5]

Finally, Plaintiffs and their amicus argue that because § 204(b)(2) focuses on "the rate at which amounts are allocated to the employee's account" for defined contribution plans, and § 204(b)(1)(H) focuses on the "rate of benefit accrual" for defined benefit plans, a cash balance plan's compliance cannot be determined on the basis of the growth of a participant's account balance. *App. Br.* 35-36. Plaintiffs are again mistaken.

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 thus subjects such plans to an age discrimination requirement that focuses *solely* on the *actual* allocations to an employee's account. *Id.* § 1054(b)(2).

A defined benefit plan, by contrast, is any plan other than a defined contribution plan. *Id.* § 1002(35). A defined benefit plan may therefore express

---

[5] Section 204(h) requires a plan administrator to provide affected participants with advance notice of any plan amendment that reduces the "rate of future benefit accrual." 29 U.S.C. § 1054(h). But the § 204(h) regulations cited by plaintiffs 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* mandate a rigid and exclusive focus on participants' "accrued benefits."

the participant's benefit in any number of ways. For example, a defined benefit plan might express a participant's benefit as an annuity commencing at early or normal retirement age, an annuity commencing immediately, or an account balance (other than an account balance based solely on *actual* contributions, investment experience, and forfeitures, in which case it would be a defined contribution plan).[6]

Because defined benefit plans can express a participant's benefit in a wide variety of ways, § 204(b)(1)(H) 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 is the one that applies to defined benefit plans: it considers the plan formula, which, for a cash balance plan, is expressed as an account balance and is unrelated to *actual* contributions and investment return of the plan.

B. The "Reductions" Plaintiffs Allege Are Not "Because of" Age.

A plaintiff must allege facts showing not only that there has been a "reduction" in an employee's rate of benefit accrual, but also that the reduction is

---

[6] A cash balance plan differs from a defined contribution plan because a cash balance account is not based on *actual* contributions (as in a defined contribution plan) nor is a cash balance account based on the plan's investment experience and forfeitures (as in a defined contribution plan).

"because of" the attainment of any age. ERISA § 204(b)(1)(H); *Cooper*, 457 F.3d at 642. Plaintiffs have failed to do this.

The crux of Plaintiffs' claim is that cash balance plans are age discriminatory because they guarantee more interest to younger employees than to older employees if each waits until age 65 to take his benefits. *App. Br.* 21. Unquestionably, a 24-year-old will accumulate more interest under a cash balance plan than a similarly situated 64-year-old if each waits until he or she is age 65 to receive benefits. But this will not be because of "age"; it will be because the younger employee waits 40 years longer to receive benefits. *See Cooper*, 457 F.3d at 641 (number of "years the [account] balance has been allowed to compound" is analytically distinct from age). If both employees were to wait the same number of years, they would have the same account balances, and receive the same amount of interest. This is age-neutrality, not age discrimination.

To discern whether a reduction in the rate of benefit accrual is actually caused by age, "it is essential to separate age *discrimination* from other characteristics that may be correlated with age."[7] *Id.* at 642 (citing *Hazen Paper v.*

---

7 The only court to accept Plaintiffs' interpretation of § 204(b)(1)(H) reached its decision by ignoring this command (and making numerous other errors). *See Richards v. FleetBoston Fin. Corp.*, 427 F. Supp. 2d 150 (D. Conn. 2006). *Richards* attempted to skirt *Hazen Paper* on the ground that a later case, *Smith v.* (continued…)

Biggins, 507 U.S. 604 (1993)). In *Cooper*, one needed to look only "at IBM's formula to rule out a violation" because that plan's cash balance formula was "age-neutral." *Cooper*, 457 F.3d at 642. The same is true here. Because the SCGC formula provides interest credits at an age-neutral rate, any reductions in the rate of benefit accrual could not be caused by *age*. Plainly, the cause of the "reductions" that Plaintiffs allege is that younger employees *wait longer* than older employees to receive their age-65 benefits.

C. Plaintiffs' Interpretation Produces Absurd Results.

Plaintiffs' interpretation should also be rejected because it would produce absurd results and cause "[a]ll sort of things [to] go wrong" if accepted. *Cooper*, 457 F.3d at 639. While Plaintiffs ignore such consequences, courts are to avoid interpretations that produce "unreasonable" and "absurd" results. *Am. Tobacco Co. v. Patterson,* 456 U.S. 63, 71 (1982); *United States v. Turkette*, 452 U.S. 576, 580 (1981).

City of Jackson, 544 U.S. 228 (2005) held that a plaintiff can satisfy the requirements of ADEA § 4(a)(2) based solely on disparate impact. *Richards*, 427 F. Supp. 2d at 167. But *Smith* did not hold that ERISA § 204(b)(1)(H) permits disparate impact claims. The relevant language in ADEA § 4(a)(2) differs significantly from the language in ADEA § 4(i) and ERISA § 204(b)(1)(H), and in any event the plaintiffs in *Richards* had *not* made a disparate impact claim.

If a 24-year-old and a 64-year-old each went to a bank and deposited $500 in a savings account, no one would think that the 64-year-old was entitled to earn the same amount of interest on the $500 deposit as the 24-year-old by the time each turned age 65. Yet that is exactly what Plaintiffs assert here. They contend that cash balance plans are age discriminatory because a younger employee will earn more interest on a pay credit than a similarly situated older employee will earn by the time each turns age 65, and that to be treated "equally," all employees must earn the same amount of interest by the time they reach age 65. Under plaintiffs' view, in order for the 24-year-old and 64-year-old to have "equal" accrual rates, the 64-year-old must be credited *in one year* with all of the interest that the 24-year-old would earn by waiting *41 years,* to age 65, to receive benefits.

This interpretation would transform § 204(b)(1)(H) from a statute that *prohibits* age discrimination into one that *requires* radical reverse age discrimination. Under Plaintiffs' approach, older employees would need to be drastically *favored* – requiring that older employees receive *immediately* all of the interest it would take younger employees *decades* to earn. In many instances, this warped version of "equality" would require that if the account balance of a 21-year-old received an interest credit of $275, the account balance of a similarly situated 64-year-old would need to receive an interest credit of nearly $50,000 in a single year. Such a result would contravene the principle that "[r]everse age discrimination is not the theory of ERISA," *see Lunn v. Montgomery Ward*, 166 F.3d 880, 883 (7th Cir. 1999), and flout the rule that anti-discrimination statutes should be read to provide equal treatment, not preferential treatment. *Cf. Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("Title VII . . . does not demand that an employer give preferential treatment to minorities or women.").

Plaintiffs' theory would also create an internal conflict in ERISA. Contributory defined benefit plans, which require employees to make periodic contributions, would be unlawful under Plaintiffs' theory by virtue of ERISA's requirement that such plans credit interest on their contributions, *see* 29 U.S.C. §§ 1054(c)(1)&(2), because younger employees would receive more interest than would older employees by the time each reached age 65. *See Onan*, 117 F. Supp. 2d at 831. Thus, contributory defined benefit plans would *violate* ERISA for providing interest *mandated by* ERISA. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (court should "fit, if possible, all parts [of statute] into an harmonious whole.").

Plaintiffs' interpretation of § 204(b)(1)(H) would also invalidate other long-accepted defined benefit plans that use interest-like features to adjust an employee's benefit for the passage of time. For example, a variable annuity plan that increases benefits based on asset returns would be impermissible because younger participants would have more years until normal retirement age to reap the benefits of market rates of return. Likewise, career average pay plans that provide for pre-retirement indexing would be unlawful. In these plans, accrued benefits are increased based on changes in an index, such as consumer prices, so as to offset the effects of inflation while employees defer receipt of benefits. Under Plaintiffs' theory, the mere fact that younger workers would have more years until normal retirement age to benefit from indexing would make these plans age discriminatory.

In addition, cash balance plans would be condemned as "age discriminatory" for providing a pattern of accrual that Congress explicitly indicated is *not discriminatory* in the context of defined contribution plans. *See, e.g., Cooper*, 457 F.3d at 641. Typically, defined contribution plans grant equal contributions to employees who are similarly situated except in age. But if equal contributions are made to the account of a 24-year-old and a 64-year-old, the 24-year-old will have a larger account balance at age 65, because the 24-year-old will have an extra 40 years to accrue investment earnings. This is the same result that, in Plaintiffs' view, renders cash balance plans age discriminatory. But it would have made no sense for Congress to condemn interest in a defined benefit plan as "age discriminatory" while treating interest or other investment earnings in a defined contribution plan as non-discriminatory under § 204(b)(2). *See Cooper*, 457 F.3d at 641; *Onan,* 117 F. Supp. 2d at 832.

More generally, it defies common sense that the mere provision of interest at an age-neutral rate could cause a plan to violate § 204(b)(1)(H). Interest is routinely used by banks, insurance companies, the United States Treasury, and other institutions to compensate individuals for the economic effects of the passage of time. It simply is not plausible that Congress intended to strike down pension plans for doing the same. Moreover, if cash balance plans did not provide interest, employees who had to wait many years to receive benefits would be at a tremendous economic disadvantage compared to those who do not, because such employees would be disproportionately harmed by inflation. As one court observed:

> The payment of interest, actually or by implication, maintains the value to the participant of the employer's contribution, without attrition from inflation, and prevents the employer's obligation from being diminished in value. In terms of change in Cash Account balance, the rate and amount of contribution is the same to all participants, whatever their age. That equality could not be achieved if a younger worker, who has longer to work until normal retirement age, were to be prevented from earning compounding interest on the worker's Cash

> Account balance. The compounding of interest, that is, the payment or contribution of interest on prior months' accumulations, make it possible for all participants to be treated equally, and that necessarily means that accumulations will be larger according to the number of years that a participant has to wait until normal retirement age. *Hirt*, 441 F. Supp. 2d at 550-51.

D. Plaintiffs' Interpretation Conflicts With Treasury Guidance.

Plaintiffs' theory turns on the fact that cash balance plans guarantee participants the right to earn future interest credits through normal retirement age, even if the participant stops working for the plan sponsor. But for the past 15 years, the Treasury Department has made clear 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. Hundreds of employers, including many of ERIC's members, have relied on this guidance, and Treasury's considered views are entitled to deference. *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 844 (1984); *Cooper*, 457 F.3d at 639; *Hirt*, 441 F. Supp. 2d at 546-48.

IRC § 401(a)(4) Regulations. Treasury Regulations require that cash balance plans provide guaranteed interest credits in order to qualify for a safe harbor under the IRC's § 401(a)(4) nondiscrimination rules. 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) subject to an express Congressional mandate to "coordinate" the nondiscrimination rules with IRC § 411(b)(1)(H). 26 U.S.C. §

411(b)(1)(H)(v). Treasury's "coordinated" interpretation applies to § 204(b)(1)(H). ERISA § 204(b)(1)(H)(vi). The 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 counterpart to § 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), *also available at* 1991 WL 11000230.

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 established under the IRC and ERISA for lump sum payments. Treasury stated in the Notice that, in order to 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. *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 are lawful, and that the guarantee of interest is *required.* Notice 96-8 has been described as "authoritative." *Berger v. Xerox*, 338 F.3d 755, 762 (7th Cir. 2003). If Treasury agreed that the guaranteed interest credits provided by cash balance plans are inherently age discriminatory, Treasury's promulgation of interest crediting rates for purposes of the lump sum payment rules would have perversely encouraged plans to violate the age discrimination rules.

2002 Proposed Regulations. The Treasury Department in 2002 again provided that guaranteed interest credits would not cause a cash balance plan to fail § 204(b)(1)(H), and indicated that whether a plan complies with § 204(b)(1)(H) can be determined by examining the annual allocations to a participant's account balance. *See* 67 Fed. Reg. 76,123, 76,126 (Dec. 11, 2002). Essentially, the approach in the proposed regulations asks, "if [a particular] employee were younger, would [his] hypothetical balance have grown more this year?" *Cooper*, 457 F.3d at 640. If the answer is no, as is the answer in this case, the plan does not violate § 204(b)(1)(H).

2005 and 2006 Revenue Proposals. In its Revenue Proposals for 2005 and 2006, the Treasury Department again stated that "cash balance plans and cash balance conversions are not inherently age-discriminatory." Department of Treasury, *General Explanations of the Administration's Fiscal Year 2006 Revenue Proposals* 82 (2005); Department of Treasury, *General Explanations of the Administration's Fiscal Year 2005 Revenue Proposals* 104 (2004).

Pension Protection Act of 2006. On August 17, 2006, Congress enacted the Pension Protection Act ("PPA"), confirming that cash balance plans are not inherently age discriminatory. *See* Section 701, PPA of 2006, P.L. No. 109-280. Responding to the "confused logic" asserted in lawsuits such as this one "that compound interest in a pension plan is age discriminatory," the Act clarifies that cash balance plans are not age discriminatory merely because these plans provide more interest to younger employees than older employees if both wait until age 65 to take their benefits. 152 Cong. Rec. S8747, 8751(Aug. 3, 2006). Consistent with the long-standing views of Treasury, the PPA makes clear that cash balance plans' compliance with § 204(b)(1)(H) need not be tested exclusively on the basis of an age-65 annuity, and further provides that indexing benefits for the passage of time (as cash balance plans do through interest credits) does not constitute age discrimination. *See* PPA § 701(a)(1) (amending ERISA §§ 204(b)(5)(A)(i),(iv) &

204(b)(5)(E).) These provisions are set forth in § 701 of the Act, which also states that nothing in the amendments made by that section shall be construed to create an inference with respect to the treatment of cash balance plans under § 204(b)(1)(H) as in effect before the amendments. *Id.* § 701(d).

E. Plaintiffs' Interpretation of § 204(b)(1)(H) Would Imperil the Pension System.

In addition to its other flaws, Plaintiffs' interpretation would needlessly imperil the pension system. There are more than 1,500 cash balance plans in the United States today, providing retirement benefits to over eight million participants,[8] and accounting for at least 40% of all defined benefit plan assets. Plaintiffs' reading of § 204(b)(1)(H) would invalidate *all* of these plans for periods prior to the effective date of the PPA.

The cost of bringing all cash balance plans into compliance with Plaintiffs' reverse discriminatory interpretation of § 204(b)(1)(H) – *i.e.*, giving decades' worth of interest to older employees immediately – has been estimated to be in the hundreds of *billions* of dollars,[9] and would devastate a defined benefit pension system that "has never been under greater stress," whose funding levels are *already*

---

8 *See supra* note 1 at 59-60.

9 Brief of Appellant at 42, *Cooper v. IBM Personal Pension Plan*, No. 05-3588 (7th Cir. Oct. 27, 2005), 2005 WL 3738660.

"at an all-time low," and whose number of participants *already* "may be poised for a substantial decline."[10] Acceptance of plaintiffs' theory would exacerbate these problems, doubtless bankrupting numerous employers, causing more employers to terminate or freeze their pension plans, leaving countless workers with diminished retirement security, and contradicting the Supreme Court's command that ERISA should not be interpreted to impose burdens that unduly discourage employers from offering benefit plans in the first place. *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

III. AARP'S CRITICISMS OF CASH BALANCE PLANS LACK MERIT.

In its amicus brief, AARP castigates "cash balance conversions" as a "means by which companies reduce future benefits of employees." *Amicus Br.* 4. As a legal matter, this criticism is irrelevant because ERISA does not require employers to provide *any* future pension benefits, *see Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996), and also because the theory of age discrimination asserted here has nothing to do with reductions in future benefits – cash balance plans that *increase* future benefits are "age discriminatory" under Plaintiffs' theory as well.

---

[10] PBGC, *2005 Pension Insurance Data Book*, at 15, *available at* http://www.pbgc.gov/docs/2005databook.pdf (last visited Oct. 9, 2006).

As a factual matter, AARP's criticism is also unfounded. Conversions to cash balance plans *increase* pension wealth for most employees who had been covered by traditional defined benefit plans. Many traditional plans concentrate pension wealth in the small percentage of employees who work for a single employer for decades and retire in their 50s. *Cooper*, 457 F.3d at 642. But in many industries, few employees now retire in their mid-50s after spending 20 to 30 years with the same employer.[11] As a result, only a small portion of employees receive substantial retirement benefits under many traditional defined benefit plans.

Because cash balance plans typically provide pay and interest credits at the same rates to employees regardless of age or service, cash balance plans deliver benefits more equitably than do many traditional pension plans. "By distributing pension wealth more equally across the population than [traditional defined benefit] plans, cash balance plans would increase median lifetime pension wealth

---

11 Olivia Mitchell & Janemarie Mulvey, *Possible Implications of Mandating Choice in Corporate Defined Benefit Plans,* Pension Research Council, at 9 (PRC WP 2003-25).

in the total covered population and more people would gain pension wealth than lose."[12]

One of the groups benefiting from cash balance plans consists of older employees who work past normal retirement age. Traditional plans often suspend benefit payments for employees who work past normal retirement age. For the worker who remains on the job past normal retirement age, foregoing benefit payments for the period of continuing employment offsets the additional benefit accruals earned during this period. As a result, the value of the benefit provided by a traditional plan typically falls steeply after the employee attains the plan's normal retirement age.

By contrast, cash balance plans provide pay credits as well as interest credits after normal retirement age so that an employee retains the value of the benefit that the employee has earned whether or not he or she remains on the job after a specified age. Because older workers value the opportunity to continue working past traditional retirement age and adding to the value of their pension, cash balance plans do not discourage workers from remaining on the job at older ages.

---

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

Cash balance plans also offer advantages over defined contribution plans. Under a cash balance plan, the employer, not the employee, bears the investment and funding risk, meaning that if the funds in the trust are inadequate to pay promised benefits, the employer is obligated to make up the shortfall. The guaranteed nature of these benefits can be especially important to older employees, who have shorter time horizons to retirement and are thus particularly vulnerable to sudden market downturns and investment risk. Cash balance plans thus provide all employees, including older employees, with advantages that neither traditional defined benefit plans, nor defined contribution plans, provide. This is further reason that this Court should join Congress, the United States Treasury, and numerous courts in recognizing that cash balance plans represent an important, lawful component of our pension system.

CONCLUSION

The district court's judgment should be affirmed.

Dated: October 11, 2006

Respectfully submitted,

Jeffrey G. Huvelle

Jeffrey G. Huvelle
John M. Vine
Eric R. Sonnenschein
COVINGTON & BURLING LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
202-662-6000

Attorneys for *Amicus Curiae*
The ERISA Industry Committee

Of Counsel

Sonya D. Winner
COVINGTON & BURLING LLP
One Front Street
35th Floor
San Francisco, CA 94111

COMBINED CERTIFICATIONS

Pursuant to Federal Rule of Civil Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B)(iii), this brief includes 6977words. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned relied upon the word count of this word-processing system in preparing this certificate.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionally-spaced typeface using Microsoft Word in 14 point using Times New Roman Style.

Jeffrey G. Huvelle

Jeffrey G. Huvelle
Covington & Burling LLP
Attorneys for *Amicus Curiae*
The ERISA Industry Committee

Dated: October 11, 2006

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 11th day of October 2006, an original and 15 copies of the foregoing Brief *Amicus Curiae* in Support of Defendants-Appellees, were sent via Federal Express service, to the Clerk of the Court for the Ninth Circuit and two copies to counsel listed below:

Jeffrey Lewis
Vincent Cheng
Lewis, Feinberg, Renaker & Jackson, P.C.
1330 Broadway, Suite 1800
Oakland, CA 94612

James M. Finberg
Steven Tindall
Leiff, Cabraser, Heimann & Bernstein, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111

Mark E. Haddad
Michael C. Kelley
Sidley Austin, LLP
555 West Fifth Street, Suite 400
Los Angeles, CA 90013

Jeffrey R. Tone
Anne E. Rea
Chris K. Meyer
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603

Mary Ellen Signorille
AARP Foundation Litigation
601 E Street, NW
Washington, DC 20049

Melvin Radowitz
AARP
601 E Street, NW
Washington, DC 20049

Dated: October 11, 2006

Eric Sonnenschein

Eric R. Sonnenschein
Covington & Burling LLP
Attorneys for *Amicus Curiae*
The ERISA Industry Committee