No. 06-962

In The
Supreme Court of the United States

XEROX CORPORATION RETIREMENT
INCOME GUARANTEE PLAN, ET AL.,

Petitioners,

v.

WALDAMAR MILLER, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

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

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INTEREST OF *AMICI CURIAE*

The American Benefits Council (the "Council") is a broad-based non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans.[1] The Council's approximately 250 members, including Xerox Corporation, are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefits plans covering more than 100 million Americans.

The ERISA Industry Committee ("ERIC") is a non-profit organization representing America's largest private employers in a broad variety of industries. All of ERIC's members, including Xerox Corporation, provide benchmark benefits to tens of millions of active and retired workers and their families through pension, health care, compensation, and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA") and other Federal law. All of ERIC's members do business in more than one State, and many have employees in all fifty States.

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[1] The parties to this proceeding have consented to the filing of this *amici curiae* brief. The parties' letters of consent accompany this brief. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for any party to this dispute authored the brief in whole or in part and no person or entity, other than the *Amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

The Council and ERIC limit their *amicus* participation to significant cases in which they believe their discussion of the issues will advance arguments that will not be presented by the parties or by other *amici*. The Ninth Circuit decision in this case meets these criteria because of the devastating effects the decision would have for the very large number of defined benefit pension plans that take into account other retirement arrangements in determining benefits.

SUMMARY OF ARGUMENT

The Ninth Circuit concluded that any time a defined benefit pension plan takes into account benefits under another retirement arrangement in determining accruals, the "offset" must be calculated using a particular technique outlined by the court. Otherwise, the plan runs afoul of ERISA's anti-forfeiture rule. It is, however, well settled that offsets related to retirement income are not forfeitures but rather a method of determining accrued benefits. Nothing in ERISA requires that plans use any particular technique for calculating offsets.

By specifying a single method of calculating offsets, the Ninth Circuit's decision conflicts with ERISA's policy goals. ERISA strikes a balance between protecting employee rights and preserving employer flexibility over plan design in order to provide incentives for employers to maintain voluntary pension plans. By disturbing that balance, the Ninth Circuit's decision makes defined benefit plans less attractive to plan sponsors and undermines the voluntary employer-provided defined benefit pension system.

Offsets are widespread among defined benefit plans. Employers design offsets to fit their businesses and there are a myriad of different methodologies that plans use to calculate offsets. Many of these methodologies do not fall within the narrow confines of the Ninth Circuit's decision. The court's decision, therefore, indicates that a vast number of defined benefit plans are not appropriately accounting for benefits under other retirement arrangements and, accordingly, fail to satisfy ERISA and related tax-qualification requirements.

For these reasons, *Amici* urge this Court to grant the petition for a writ of certiorari.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IS CONTRARY TO BLACK LETTER LAW AND RESTS ON A MISREADING OF AN UNRELATED REGULATION.

The Ninth Circuit concluded that the methodology used by the Xerox defined benefit plan to take into account benefits paid to rehired participants under a related Xerox defined contribution plan "violates the substantive requirements of ERISA."[2] The decision does not explicitly identify the particular substantive requirement at issue. Nonetheless, it is clear the court concluded that the methodology used to "offset" for benefits paid under the related defined contribution plan resulted in an impermissible forfeiture. The fundamental error in the court's decision is

[2] *Miller v. Xerox Corp. Ret. Income Guarantee Plan*, 464 F.3d 871 at 874 (9th Cir. 2006).

its assumption that the accrued benefit under a defined benefit plan is determined before taking into account benefits under the defined contribution plan. It is, however, black letter law that the accrued benefit in a defined benefit plan is the benefit determined *after* applying the offset. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (offsets related to retirement income are not forfeitures but a method of determining the accrued benefit).

The Xerox defined benefit plan is part of a floor-offset arrangement and provides that employees accrue benefits after taking into account benefits under a Xerox defined contribution plan. For rehired participants, the Xerox defined benefit plan took into account amounts previously distributed from the defined contribution plan by assuming that the amounts had not been distributed and instead remained invested in the defined contribution plan. As a result, the amount of the offset for future benefit accruals depended on the investment returns the participants would have had if they had not elected to take a distribution of their defined contribution plan benefit.

In concluding that this method of calculating the offset violates ERISA, the court interpreted a long-standing regulation construing ERISA's anti-forfeiture rules. The regulation the court relied upon interprets section 204(d) of ERISA and deals with the effect a prior distribution has on a participant's accrued benefit.[3] Section 204(d) states the intuitive proposition that a participant's accrued benefit

[3] The Internal Revenue Code counterpart to ERISA § 204(d) is Code § 411(a)(7)(B) and the interpretive regulation, which applies under ERISA as well, is Treasury Regulation § 1.411(a)-7(d)(6). All references to the "Code" are to the Internal Revenue Code of 1986.

does not include a benefit that has been paid to the participant. It also provides a system for accounting for prior distributions of less than a participant's entire benefit. Under this system, in general, a plan may either (i) provide the participant with the right to repay the prior distribution and restore the participant's prior accrued benefit or (ii) restore the prior accrued benefit to the extent it has not been distributed. In the latter case, the regulation provides that the restored benefit must be at least equal to the benefit the participant had before the distribution after offset for the distribution the participant has received.

As a threshold matter, the regulation the court relied upon is entirely inapplicable to offset arrangements. The regulation simply does not address the coordination of benefits payable under another retirement arrangement. It deals with the distinct fact pattern where a participant has received a prior distribution under the plan of less than his or her full benefit; the issue is how to account for that prior distribution in the event the participant again becomes covered by the plan. Thus, the regulation addresses an issue analytically very different from coordination of benefit plans.

There is an even more fundamental error in the court's interpretation of the regulation. The regulation ensures that a participant does not forfeit any portion of his or her already accrued benefit. It has nothing to do with the manner in which a plan may determine future benefit accruals. In the instant case, there is no question that the rehired participants have been paid their entire benefit for the prior period of employment. The offset in the Xerox defined benefit plan is used to determine the benefits the rehired participants will accrue for the period of employment following rehire. The court, therefore, failed to distinguish between protecting existing benefits from forfeiture, which is the issue addressed in the regulation, and prescribing rules governing future rates of benefit accrual.

The regulation that the court misconstrued was finalized in 1977 and remains in substantially the same form.[4] To the best of our knowledge, in 30 years, no court or regulatory agency has ever suggested that it applies to offset arrangements or that it has any bearing on a participant's future rate of benefit accrual.

II. THE NINTH CIRCUIT'S DECISION INAPPROPRIATELY RESTRICTS EMPLOYER FLEXIBILITY TO DESIGN BENEFIT PLANS THAT ARE SUITED TO A VARIETY OF EMPLOYMENT CONTEXTS.

According to the Ninth Circuit, there is only one permissible method for taking into account benefits paid under another retirement arrangement in determining future benefit accruals. In the court's view, any offset must be actuarially equivalent to the benefits paid under the other arrangement and "[a]ny later change in the value of the distribution should not affect the amount of" the future benefit accruals.[5] As a result, according to the court, the actuarial assumptions in effect at the time of the prior payment are the only assumptions that may be used. There are, however, a myriad of different approaches that

[4] Treasury Decision 7501, 42 Fed. Reg. 4239 (Aug. 22, 1977) (adding Treas. Reg. § 1.411(a), 26 C.F.R. § 1.411(a)).

[5] *Miller*, 464 F.3d at 875.

plans use to take into account benefits under other retirement arrangements. Thus, the Ninth Circuit's decision indicates that a vast number of defined benefit pension plans are not appropriately accounting for other retirement arrangements and, therefore, that these plans fail to satisfy the tax-qualification and ERISA requirements[6] with potentially devastating consequences for millions of working Americans.

One of the virtues of our nation's employer-provided retirement system is its flexibility. Employers are not required to maintain employee benefit plans, and ERISA does not prescribe one type of benefit formula or one form of plan. *See, e.g., Alessi*, 451 U.S. at 511-12 ("Rather than imposing mandatory pension levels or methods for calculating benefits, Congress in ERISA set outer bounds on permissible accrual practices."). Employers are free to design their plans to provide benefits that are tailored to their labor force. Consistent with the diversity of our economy, there are a multitude of different defined benefit plan types, including, among others, final average pay plans (annuity benefits based on final pay), career average pay plans (annuity benefits based on career pay), variable annuity plans (annuity benefits that vary with the plan's investment performance), cash balance plans (lump sum benefits based on notional account balance), pension equity plans (lump sum benefits based on percentage of final pay), and defined benefit plans that are part of floor-offset arrangements. Even within any particular defined benefit plan type, there are countless different approaches taken to particular plan design questions, including the

[6] The ERISA anti-forfeiture rule is also a tax-qualification requirement. *See* Code § 411(a).

manner in which a plan takes into account retirement benefits payable under other arrangements, if at all.

In fact, one of the core objectives of ERISA is to strike a balance between encouraging employers to maintain pension plans and protecting employee interests. Congress recognized that if the rules governing benefit plans become too rigid, then employers will simply choose not to sponsor plans.

> The problem, as perceived by those who [worked on ERISA] in Congress, was how to maintain the voluntary growth of private pension plans while at the same time making needed structural reforms in such areas as vesting, funding, termination, etc., so as to safeguard workers against loss of their earned or anticipated benefits – which was their principal cause of complaint and which – over the years – had led to widespread frustration and bitterness. [ERISA] represents an overall effort to strike a balance between the clearly-demonstrated needs of workers for greater protection and the desirability of *avoiding the homogenization of pension plans into a federally-dictated structure* that would discourage voluntary initiatives for further expansion and improvement.

John H. Langbein, Susan J. Stabile & Bruce A. Wolk, *Pension and Employee Benefit Law* 87 (Robert C. Clark et al. eds., 4th ed. 2006) (quoting Senator Jacob K. Javits, the primary sponsor of ERISA) (emphasis added).

The Ninth Circuit's decision, however, would establish a rule that provides for only one method of accounting for other retirement arrangements in determining future benefit accruals. It would rewrite ERISA's delicate balance between employer flexibility and employee protections. The court's decision is not grounded in any of the statutory protections set forth in ERISA that affect accrual practices. The decision does not, for example, rest on an interpretation of ERISA's anti-backloading rules, age discrimination prohibitions or any other rule that establishes the outer bounds of permitted accrual methodologies.[7] Rather, the Ninth Circuit's decision would create an entirely new substantive rule regulating benefit accruals. This substantive rule is inconsistent with the voluntary nature of private retirement plans and no other court or regulatory body has identified such a rule since ERISA was enacted in 1974.

Coordination of benefits among retirement arrangements is in many respects a paradigmatic example of the diversity of our voluntary private employer-sponsored retirement system. It is very common for pension plans to coordinate the benefits they provide with benefits payable from retirement arrangements. These retirement arrangements typically include other defined contribution plans, as in the instant case, and other defined benefit plans, such as a defined benefit plan maintained by a joint venture or a related or predecessor employer. Other retirement arrangements that are taken into account in determining benefits include employer-funded governmental programs, such as the employer-provided portion of Social Security.

By far the most common form of direct coordination between retirement arrangements is offsetting benefits payable under one or more arrangements. Typically, offsetting benefits means that an employee accrues benefits

[7] *See* ERISA §§ 204(b)(1)(B) (anti-backloading), 204(b)(1)(H) (age discrimination).

under one plan only to the extent the value of benefits payable under another retirement arrangement is less than a stated minimum. For example, in the case of a transferred employee, a plan that determines benefits by reference to compensation and years of service might provide that an employee's benefit is determined by taking into account all years of service and compensation from all affiliated employers after offset for any benefits that have accrued under affiliates' retirement plans. In this way, a transferred employee is generally put on the same footing as an employee who has been with the employer for his or her entire career.

Just as defined benefit plans include offsets for a variety of different retirement arrangements, defined benefit plans utilize a variety of different methodologies for implementing offsets. For example, some plans include a complete offset, i.e., offset for 100% of the value of the coordinated retirement arrangement, while other plans provide for a partial offset, e.g., offset for 50% of the value of the coordinated retirement arrangement. While many plans apply the offset based on a valuation of the other retirement arrangement, there are different approaches to "valuing" the other arrangement. Some plans utilize a proxy and do not attempt to determine the value of the other arrangement with any precision. For example, a plan may make an assumption about the benefits that accrue under another plan without attempting to determine a particular participant's compensation and work history.

Other plans attempt to determine the value of benefits under another retirement arrangement with greater precision. In general, this requires converting the benefit under the other arrangement into an equivalent benefit under the defined benefit plan that applies the offset determining benefit accruals. For example, where the offset is for benefits accrued under a defined contribution plan, this generally requires converting a participant's account into an equivalent form of benefit under the defined benefit plan, generally an annuity form.

In our experience, plans utilize a variety of different assumptions in making this conversion. The most basic assumptions are those dealing with the time value of money and mortality risk. Some plans use a table of actuarial conversion factors or otherwise specify fixed assumptions, such as use of a 6% interest rate. Other plans use variable actuarial assumptions based on a widely-held security, such as the interest rate on 30-year Treasury bonds, or a basket of widely-held securities, such as the weighted average of interest rates on publicly-held high-quality, long-term corporate bonds. The Xerox defined benefit plan uses a type of variable assumption in deriving its interest component from the investment performance of the basket of investments held by the Xerox defined contribution plan.

Another basic question in offset methodology is when the actuarial factors are determined in valuing an offset. There are a variety of different approaches that plans take regarding when to determine the factors that are used to value the offset. In our experience, some plans calculate offsets using the assumptions in effect when the participant takes a distribution from the other retirement arrangement, if that occurs before distributions commence from the defined benefit plan, which is the approach mandated by the Ninth Circuit. Other defined benefit plans calculate the offset at the earliest date on which the participant both is no longer earning new benefits and is eligible for a distribution from the defined benefit plan, which is generally termination of employment. Still other defined benefit plans calculate the offset and determine the actuarial assumptions only when a participant actually takes a distribution from the defined benefit plan, which is the approach taken by the Xerox defined benefit plan.

The Ninth Circuit's prescription of uniformity in offset methodology would be very disruptive in light of the variety in approaches that plans currently use to calculate offsets. This prescription of a court-mandated methodology would result in precisely the homogenization of benefit structures that ERISA was intended to avoid.

Moreover, this mandate in methodology is entirely unprecedented. To our knowledge, there has never been any guidance that would establish a mandatory methodology for determining benefit offsets. The only statutory requirements are that the plan specify the particular assumptions that are to be used.[8] The law does not directly regulate the methodology used by plans to apply an offset. In some contexts, the law requires that other benefits get taken into account. For example, Revenue Ruling 76-259 – the seminal guidance approving floor-offset plans – directs that the defined benefit plan offset for the value of any prior distributions from the defined contribution plan but it does not prescribe a method of calculating such offset.[9]

Some provisions of ERISA or the Code require that prior distributions from a plan get taken into account for

[8] *See* Code § 401(a)(25) (requiring that a defined benefit plan specify the actuarial assumptions whenever the amount of any benefit is determined using actuarial assumptions).

[9] Revenue Ruling 76-259, 1976-2 C.B. 111 (1976).

specific purposes, generally related to testing the plan for compliance with other rules. For example, in testing a defined benefit plan to ensure that it does not discriminate in favor of highly compensated employees, regulations require that prior distributions be taken into account but do not specify a particular methodology.[10] One situation in which a specific methodology is prescribed is in a related provision in the very regulation that the Ninth Circuit relied upon.[11] The regulation includes a discussion of the amount a participant may be required to repay to restore his or her accrued benefit, if the plan permits repayment in lieu of an offset approach. Ironically, this part of the regulation utilizes a methodology to measure the restorative payment that uses actuarial factors in effect at the time of repayment, not the time of earlier distribution as the Ninth Circuit would require.

In fact, the Internal Revenue Service only recently visited for the first time how to account for distributions under another plan in proposed regulations that were issued in 2005 under section 415 of the Internal Revenue Code, which specifies the maximum benefit a participant may receive from all defined benefit plans maintained by an employer.[12] The proposed regulations include a system for accounting for prior distributions under another defined benefit plan of the same employer and only for purposes of implementing a statutory limit on benefits, which necessarily calls for uniformity. The methodology prescribed in the proposed regulations requires plans to

[10] 26 C.F.R. § 1.401(a)(4)-3(f)(7).

[11] 26 C.F.R. § 1.411(a)-7(d)(2)(ii)(B).

[12] Code § 415(b); Prop. Treas. Reg. § 1.415(b)-2, 70 Fed. Reg. 31,213, 31,228 (May 31, 2005).

apply actuarial factors in effect at the time the limit is being applied, not the date of the prior payment as the Ninth Circuit would command.[13] These regulations have proven to be very controversial within the actuarial community with many actuaries suggesting different approaches to accounting for prior distributions,[14] which should make clear that there is no single "right" technique from an actuarial perspective.[15]

In fact, the only other court to specifically address the offset methodology used by the Xerox defined benefit plan concluded that the methodology does not violate ERISA. In *Frommert v. Conkright*, the Second Circuit Court of Appeals considered the Xerox defined benefit plan and its offset methodology, *i.e.*, the precise issue before the Ninth Circuit, and concluded that this methodology is permissible.[16] This clearly highlights that the Ninth Circuit's "right" approach is just one of many.

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[13] Prop. Treas. Reg. § 1.415(b)-2(a)(3)(ii).

[14] *See, e.g.*, Letter from Donald J. Segal, Vice-Chairperson, Pension Practice Council of the American Academy of Actuaries, to Linda Marshall, Office of the Division Counsel/Associate Chief Counsel, Internal Revenue Service (August 11, 2005), *available at* www.actuary.org/pdf/pension/irc_081205.pdf. As of the date this brief was submitted, the proposed regulations have not been finalized, notwithstanding that they were released in May 2005.

[15] The Ninth Circuit's decision concludes without citation that the Xerox defined benefit plan's methodology for determining the amount of the offset, which includes the investment return a retired participant would have had, does not produce an offset that is actuarially equivalent to the prior distribution. Given that the Xerox methodology is effectively neutral as to the amount of the offset, *i.e.*, it is not systematically biased in any direction, and it captures the intervening economic environment, we see no reason why it is not an actuarially equivalent approach.

[16] *Frommert v. Conkright*, 433 F. 3d 254, 268-69 (2d Cir. 2006).

The Ninth Circuit's approach also fails to recognize that Xerox's methodology makes sense from a human resources perspective. In the context of rehired participants, it can be important for an employer to ensure that employees who have been rehired and employees who have an uninterrupted employment pattern are compensated similarly. Under the Ninth Circuit's methodology, rehired participants who receive distributions from the Xerox defined contribution plan before retirement can receive a larger or smaller pension from the defined benefit plan than similarly situated participants who do not receive distributions until retirement. The particular method of offset used by the Xerox defined benefit plan is designed to create parity between all Xerox employees. The court's system would frustrate that legitimate business purpose and undermine ERISA's stated goal of providing employers with sufficient flexibility to tailor their plans to their workforces and thereby give employers an incentive to maintain these voluntary plans.

Our retirement system is simply not the "one-size fits all" system that the Ninth Circuit's decision would create. The decision rests on a fundamental misapprehension about our nation's voluntary employer-sponsored retirement system.

III. THE NINTH CIRCUIT'S DECISION DANGEROUSLY UNDERMINES THE PRIVATE VOLUNTARY EMPLOYER-PROVIDED PENSION SYSTEM.

The Ninth Circuit decision disrupts the balance that Congress established in enacting ERISA and creates a powerful disincentive for employers to maintain defined benefit plans. One of the primary attractions for an employer that sponsors a defined benefit plan is the ability to coordinate benefits that are payable from a multiplicity of sources. By harmonizing benefits, a defined benefit plan can ensure that participants and their families receive a minimum level of retirement income. Synchronizing benefits under multiple benefit arrangements also allows an employer to provide a uniform benefit structure for its employees, even though some employees may have been previously covered under a variety of different arrangements.

Defined benefit plans help millions of Americans achieve retirement security by providing employer-funded retirement income. As of 2003 (the most recent year for which official Department of Labor statistics have been published), more than 10 million retirees were receiving benefits from defined benefit plans, with over $125 billion in benefits paid out in that year alone.[17] Given that America's personal savings rate remains one of the lowest among industrialized nations[18] and that average balances in 401(k) plans are quite modest,[19] there is no doubt that in the absence of defined benefit pensions, fewer Americans would be financially prepared for retirement.

Given these statistics, the value of defined benefit plans to many American families is undeniable. Yet our

[17] U.S. Department of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin*, Abstract of 2003 Form 5550 Annual Reports (Oct. 2006), *available at* http://www.dol.gov/ebsa/PDF/2003pensionplanbulletin.PDF.

[18] The Organization for Economic Cooperation and Development, Main Economic Indicators (Paris: OECD, January 2004).

[19] In fact, data from the Employee Benefit Research Institute shows that in 2002 the average 401(k) account balance for workers age 21 to 64 was only $33,647 and the median (mid-point) 401(k) account balance was a mere $14,000. EBRI Notes, Vol. 26, No. 1 (January 2005).

nation has seen an alarming decline in defined benefit plan sponsorship and today is a particularly precarious time for the defined benefit system. Employers are increasingly exiting the system.[20] The total number of defined benefit plans insured by the Pension Benefit Guaranty Corporation ("PBGC") has decreased from a high of more than 114,000 in 1985 to fewer than 31,000 in 2005.[21] This downward trend is even more sobering if you look solely at the past several years. Not taking into account pension plan freezes (which are also on the rise but not officially tracked by the government),[22] the PBGC reported that the number of defined benefit plans it insures has decreased by 7,000 (or 20%) in just the last five years.[23]

The Ninth Circuit's decision calls into doubt a huge number of defined benefit plans. Offsets are widespread in the defined benefit plan system and, as discussed above, there is very little uniformity in offset methodology. The portion of the retirement plan universe that includes an offset feature is difficult to quantify but there is little question that it is very significant.

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[20] Last year, the Council released a white paper discussing in detail the multiple threats to the defined benefit system. *See* American Benefits Council, White Paper, *Pensions at the Precipice: The Multiple Threats Facing our Nation's Defined Benefit Pension System* (May 2004), *available at* http://www.americanbenefitscouncil.org/documents/definedbenefits_paper.pdf.

[21] Pension Benefit Guaranty Corp., *Pension Insurance Data Book 2005*, at 2 (2006), *available at* http://www.pbgc.gov/docs/2005databook.pdf.

[22] A plan freeze typically means closing the plan to new hires and/or ceasing future accruals for current participants.

[23] PBGC *Pension Insurance Data Book 2005*, *supra* note 21, at 58 & 89.

The particular type of arrangement at issue in the instant case – a floor-offset arrangement – is not an unusual plan design. There are approximately 1,200 floor-offset arrangements, covering over 1.7 million participants and holding billions of dollars in assets.[24] Floor-offset arrangements are used because they accommodate a wide range of employment patterns. Traditional defined benefit plans tend to award significant benefits to longer service employees. In contrast, defined contribution plans generally provide level contributions to all employees and are often more valuable to shorter service employees. By combining the two accrual patterns, a floor-offset arrangement can meet the needs of a broader range of employees than either plan standing alone.

Another very common type of offset arrangement that is affected by the Ninth Circuit's decision involves an offset for the employer-funded portion of Social Security.[25] Although the federal government does not track plans that are integrated with Social Security, in a 2003 study, a prominent pension consulting firm analyzed plans maintained by 500 large employers and found that 12 percent of these plans were integrated with Social Security under

[24] The figures provided are based on IRS Form 5500 reports (Annual Return/Report of Employee Benefit Plan), which are publicly available through the Department of Labor.

[25] *See, e.g.*, Code § 401(l)(3)(D) (nondiscrimination safe harbor in Social Security offset plans). Social Security benefits are funded through the Federal Insurance Contributions Act (FICA), which taxes employers and employees on wages. *See* Code §§ 3101 and 3111. FICA taxes include two components, a Social Security tax and a Medicare tax. The Social Security tax rate is 6.2 percent of wages and is applicable to both employers and employees. *Id*.

an offset method of integration.[26] If these numbers bear out across the private defined benefit plan system, there are more than 3,700 defined benefit plans that offset for Social Security.[27] One reason an employer may integrate its defined benefit plans with Social Security is because if it did not do so, it might be possible for a participant's combined benefits from the plan and Social Security to exceed his or her salary, which would create a significant incentive for retirement. Moreover, integration can ensure that all participants receive a comparable retirement income regardless of their Social Security working history.

Perhaps the most common forms of offset are offsets related to managing changes in an employer's workforce. These changes often arise in the context of mergers and acquisitions, joint ventures, and changes in employment classification. *See, e.g., Williams v. Caterpillar, Inc.*, 944 F. 2d 658 (9th Cir. 1991) (offset in salaried management pension plan for benefits accrued under hourly pension plan). An offset, for example, in the mergers and acquisitions context can ensure that all of an employer's workforce earns a comparable gross retirement benefit, regardless of the plans that may have covered particular employees before a merger or acquisition. Similarly, as mentioned above, it is very common for defined benefit plans to include offset provisions covering transferred employees to ensure parity within a given employment context. In effect, offsets allow employers to ensure that

[26] Watson Wyatt Worldwide, *The Changing Nature of Defined Benefit Plans*, at 1-2 (February 2005), *available at* http://www.watsonwyatt.com/us/pubs/Insider/showarticle.asp?ArticleID=14328.

[27] As mentioned above, as of 2005, there were approximately 31,000 PBGC-insured defined benefit pension plans.

similarly situated employees have similar retirement benefits and avoid situations where employees may perceive themselves as being inequitably treated.

In short, defined benefit plans with an offset feature are extremely common within the voluntary private defined benefit pension plan system. The court's decision, if left standing, would call into question this important component of the defined benefit system. The result is increased pressure on the defined benefit plan system, which will likely accelerate the trend away from defined benefit plans to the detriment of millions of working Americans.

CONCLUSION

For the reasons stated above, *Amici* respectfully submit that this Court should grant the petition for a writ of certiorari.

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