No. 07-906

IN THE

Supreme Court of the United States

ROHM AND HAAS PENSION PLAN,

Petitioner,

v.

GARY WILLIAMS,
Individually and on Behalf of Others Similarly Situated,

Respondent.

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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February 8, 2008

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

1. The Chamber of Commerce of the United States of America ("Chamber") respectfully moves for leave to file an *amicus curiae* brief in support of Petitioner. All parties have received timely notice of the Chamber's filing of this brief, to which Petitioner has consented. Counsel for Respondent declined to consent to the Chamber's filing, thus necessitating this motion for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b).

2. The Chamber is the world's largest federation of businesses, representing an underlying membership of more than three million businesses and organizations.

3. A principal function of the Chamber is to advocate the interests of the business community by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses.

4. Many of the Chamber's members sponsor and maintain defined benefit pension plans and other employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461.

5. Thus, the Chamber has participated as *amicus curiae* and advocated on behalf of the business community in numerous cases before this Court that have involved the interpretation of ERISA. *See, e.g.*, *LaRue v. DeWolff, Boberg & Assocs., Inc.*, No. 06-856 (U.S. argued Nov. 26, 2007); *Beck v. PACE Int'l Union*, 127 S. Ct. 2310 (2007); *Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

6. This case concerns the question whether a cost-of-living adjustment in a defined benefit plan is a *per se* "accrued benefit" under ERISA, 29 U.S.C. § 1002(23)(A). The question presented directly implicates the Chamber's interest in the correct and uniform interpretation of the obligations that ERISA imposes on sponsors of defined benefit plans.

7. For these reasons and those set out in the brief, the Chamber respectfully moves this Court to allow it to file this *amicus curiae* brief urging the Court to grant the petition for a writ of certiorari and to reverse the judgment below.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses. A principal function of the Chamber is to advocate the interests of the business community in courts across the Nation by filing *amicus curiae* briefs in cases involving issues of national concern to American businesses. The Chamber has participated as *amicus curiae* in numerous cases before this Court that have raised issues of vital concern to the Nation's businesses, including cases construing the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461.

Many of the Chamber's members sponsor and maintain defined benefit pension plans governed by ERISA. The Chamber thus has a strong interest in the proper interpretation of the obligations that ERISA imposes on plan sponsors. In addition, the Chamber has long advocated national uniformity in federal law. The predictability engendered by a uniform federal legal scheme promotes efficient

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[1] Pursuant to Supreme Court Rule 37.6, the Chamber states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties received notice at least 10 days prior to the due date of the filing of this brief, to which Petitioner has consented. Counsel for Respondent declined to consent to this filing, thus necessitating the foregoing motion for leave to file an *amicus curiae* brief pursuant to Supreme Court Rule 37.2(b).

business operations, especially in the area of ERISA plan design and administration, and protects businesses against the costs and risks of navigating a maze of inconsistent interpretations of federal laws.

The question presented in this case—whether a cost-of-living adjustment ("COLA") that a defined benefit pension plan has discretion to provide to participants who elect to receive monthly annuities constitutes a *per se* accrued benefit under ERISA, 29 U.S.C. § 1002(23)(A), and therefore must also be provided to participants who choose to receive their benefits in a one-time lump-sum distribution—directly implicates the Chamber's interests in the correct and uniform interpretation of ERISA's requirements. Indeed, numerous private pension plans have COLAs like that in the Rohm and Haas Plan. *See* Craig Copeland, *Retirees with Pension Income and Characteristics of Their Former Job*, Notes (Employee Benefit Research Inst.), Feb. 2003, at 5-6 (noting that approximately 17% of private-sector retirees (and 55% of public-sector retirees) receive benefits under a defined benefit pension plan that includes an automatic COLA).

The Chamber and its members thus have a strong interest in the Court's granting plenary review and correcting the erroneous judgment of the court below.

SUMMARY OF ARGUMENT

The Seventh Circuit's conclusion that a COLA is a *per se* accrued benefit contravenes both the policies underlying ERISA and the statute's plain language.

1. The decision below will have adverse consequences for pension plan sponsors and participants alike. *First*, it eliminates an incentive for participants to choose monthly annuities instead of a lump-sum distribution, contrary to the public interest in ensuring that retirees have guaranteed lifetime income. *Second*, by subjecting plan sponsors to financial obligations greater than those that they assumed under the terms of a plan, the Seventh Circuit's decision increases the risk that plan sponsors will choose not to offer COLAs in the first place. *Third*, the Seventh Circuit's decision upsets the settled funding and corporate accounting expectations of plan sponsors, whose actuaries must rely on the terms of a plan in conducting financial accounting and ERISA-mandated funding valuations. Fourth, the decision below is at odds with decisions of the Fourth and Ninth Circuits, thereby subjecting plan sponsors to inconsistent obligations regarding plan funding and contravening ERISA's goal of creating a uniform national scheme to govern plan administration.

2. The Seventh Circuit's decision also contravenes the statutory language of ERISA and exacerbates the confusion among the courts of appeals concerning the statutory distinction between accrued benefits and retirement-type subsidies.

ERISA defines an "accrued benefit" as "the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit *commencing at normal retirement age* . . . ." 29 U.S.C. § 1002(23)(A) (emphasis added). A COLA falls outside the definition of an accrued benefit because, by its very nature, it does not commence *at* normal retirement age.

Rather than being an accrued benefit, the COLA in the Rohm and Haas Plan is a retirement-type subsidy—*i.e.*, it is a supplement in excess of "the actuarial equivalent of the normal retirement benefit"—paid only to participants who chose to receive monthly annuities. The distinction between an accrued benefit and a retirement-type subsidy has significant legal consequences. While both forms of benefit are subject to ERISA's anti-cutback protection, *see* 29 U.S.C. § 1054(g)(1), (2), ERISA otherwise regulates accrued benefits far more extensively than it does retirement-type subsidies, and in particular requires only that the present value of an accrued benefit, not retirement-type subsidies, be paid to participants who elect a lump-sum distribution.

Like the Seventh Circuit, other courts of appeals have also conflated these benefit concepts. The decision below exacerbates that confusion among the lower courts and imposes liability costs on plans that ERISA does not mandate and that plan sponsors have not anticipated. This Court should grant the petition for certiorari and reverse the erroneous judgment of the Seventh Circuit.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION CONTRAVENES THE POLICIES UNDERLYING ERISA AND CREATES UNCERTAINTY FOR SPONSORS OF DEFINED BENEFIT PENSION PLANS REGARDING THEIR FUNDING OBLIGATIONS.

The decision below undermines the policies underlying ERISA and will have adverse consequences for both pension plan sponsors and participants in several important respects.

First, the decision below contravenes sound retirement planning by making lump-sum distributions more attractive relative to monthly retirement annuities. By "offer[ing] retirees the opportunity . . . for a lifelong stream of guaranteed income," annuitization solves the problem of "longevity risk, or the risk that [a retiree] will live significantly beyond her expected life span and thus run out of money." Jeffrey R. Brown, *How Should We Insure Longevity Risk in Pensions and Social Security?*, An Issue in Brief (Ctr. for Ret. Research at Boston Coll.), Aug. 2000, at 1, 5 (emphasis removed). Academics and public policy experts have therefore long advocated greater reliance on annuities as a part of sound retirement policy. *See id.*; Jeffrey R. Brown & Mark J. Warshawsky, *Longevity-Insured Retirement Distributions from Pension Plans: Market and Regulatory Issues* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 8064, 2001) ("Yaari (1965) was the first to demonstrate the economic value of annuitization in a life cycle model with uncertain lifetimes . . . .").

Indeed, noting that lump-sum distributions "encourage[] spending rather than saving," an Advisory Council convened by the Department of Labor recommended in 1998 that annuities be the primary form of distribution for retirement benefits. *See* U.S. Dep't of Labor, Advisory Council on Employee Welfare & Pension Benefits, Report of the Working Group on Retirement Plan Leakage: "Are We Cashing Out Our Future?" (1998), *available at* http://www.dol.gov/ebsa/adcoun/leaknew1.htm. So, too, the Report of the House Ways and Means Committee, in connection with the Pension Protection Act of 2005, noted that "discouraging annuitization" in favor of "lump-sum distributions . . . may reduce retirement income security" and "lead[] to a drain on pension plan assets, which can undermine the [interests] of other plan participants." H.R. Rep. No. 109-232, pt. 2, at 108 (2005). By compelling pension plans that offer COLAs to monthly annuitants to also pay the present value of the COLA as part of a lump-sum distribution, the Seventh Circuit's decision removes a significant incentive for participants to choose annuities, thereby contravening sound public policy.

Second, by failing to adhere to the bedrock principle that a participant's entitlement to benefits under an ERISA-governed plan is to be determined in accordance with the terms of the plan, the Seventh Circuit's decision ultimately harms plan sponsors and participants alike. "Nothing in ERISA requires employers to establish employee benefits plans" or to offer a particular "kind of benefits . . . if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996); *see also Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (explaining that "employers have large leeway to design [ERISA] plans as they see fit"); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981) (explaining that "private parties, not the Government, control the level of benefits" offered by an ERISA plan in the first instance). Thus, while ERISA "protect[s] employees' justified expectations of receiving the benefits their employers promise them," *Cent. Laborers' Pension Fund v. Heinz*, 541 U.S. 739, 743 (2004), the statute also protects plans and plan sponsors by looking to the terms of the plan when defining a participant's entitlement to benefits, and when defining "accrued benefit[s]" in particular, 29 U.S.C. § 1002(23)(A). *See, e.g.*, *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). In this way, the statute ensures that employers do not face liability for financial obligations greater than those that they chose to assume and expressly memorialized in the terms of an ERISA plan.

The Seventh Circuit's decision, however, imposes by judicial fiat the requirement that a COLA be paid to participants who choose a lump-sum distribution whenever a plan also provides a COLA to those who elect a monthly annuity, notwithstanding the express language in the Rohm and Haas Plan that a COLA is available to monthly annuitants only. By rewriting the terms of the Plan, the Seventh Circuit's decision makes it more likely that plan sponsors will choose not to offer COLAs in the first instance.

Third, the Seventh Circuit's conclusion that a COLA is a *per se* accrued benefit under ERISA upsets the settled funding expectations and corporate accounting responsibilities of sponsors of defined benefit pension plans. ERISA requires the sponsors of defined benefit plans to adhere to strict minimum funding requirements in order to ensure the solvency of the plans. *See* 29 U.S.C. §§ 1081-1085; *see also Alessi*, 451 U.S. at 510 n.5 (describing ERISA's minimum funding requirements). Moreover, corporate plan sponsors are required to account for the financial impact of their plans in accordance with Financial Accounting Standards Statement No. 87 ("FAS 87"), one of the rules promulgated by the Financial Accounting Standards Board. *See* Statement of Fin. Accounting Standards No. 87 (Fin. Accounting Standards Bd. 1985).

In determining the amount of funding needed to satisfy ERISA's requirements, actuaries are required to assess a plan's liabilities based on the design features of the plan as memorialized in the written plan documents. *See* Actuarial Standard of Practice No. 4, § 3.5 (Actuarial Standards Bd. 2007) (instructing actuaries to "measur[e] pension obligations and determin[e] plan costs or contributions" taking into account "plan provisions"); *see also* Measurement of Assets and Liabilities for Pension Funding Purposes, 72 Fed. Reg. 74,215, 74,223 (proposed Dec. 31, 2007) (if adopted, to be codified at 26 C.F.R. § 1.430(d)-1(d)) ("[T]he determination of a plan's funding target and target normal cost for a plan year is based on plan provisions that are adopted no later than the valuation date for the plan year and that become effective during that plan year."). Likewise, FAS 87 "requires use of the terms of the pension plan itself" to determine corporate expenses resulting from the plan. FAS 87, ¶ 14.

But under the Seventh Circuit's holding, a COLA is a *per se* accrued benefit—regardless of unambiguous pension plan language that a COLA is excluded from the definition of "accrued benefit" and is unavailable when participants choose a lump-sum pension distribution. That holding imposes new and unforeseen liabilities on plans and plan sponsors whose actuaries, as required by actuarial standards of practice and FAS 87, anticipated funding requirements and corporate liabilities based on the terms of the pension plan. More specifically, by essentially rewriting the terms of pension plans like the Rohm and Haas Plan, the Seventh Circuit's decision forces actuaries and accountants to recalculate the amount of projected lump-sum pension distributions by including the value of COLAs. This will cause all private pension plans that have COLAs, but distinguish between COLAs in an annuity and a lump-sum form of pension, to necessarily have greater pension funding liability and corporate accounting expense than their sponsors had forecast.

Fourth, the Seventh Circuit's decision contravenes ERISA's goal of facilitating "nationally uniform plan administration." *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001). The conflict between the Seventh Circuit and the Fourth and Ninth Circuits over whether a COLA is a *per se* accrued benefit vastly complicates the determination of whether a plan is adequately funded to cover its liabilities, an inquiry that now depends on different standards in different circuits. *See* Pet. at 11-23 (describing how the Seventh Circuit's *per se* definition of an accrued benefit conflicts with the case-by-case approach of the Fourth and Ninth Circuits). This Court's review is needed to restore "a uniform administrative scheme [that] provides a set of standard procedures" for determining plan liabilities and funding requirements. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987); *see also N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (explaining that Congress intended that ERISA would ensure that "'plans and plan sponsors [are] subject to a uniform body of benefits law'") (citation omitted).

In sum, the Seventh Circuit's decision undermines sound retirement policy by encouraging lump-sum distributions over annuitization; increases the risk that employers will choose not to offer COLAs; imposes new and unanticipated financial obligations on plan sponsors; and creates substantial uncertainty regarding the funding requirements for defined benefit pension plans and the corporate liabilities incurred by plan sponsors. This Court's review of the lower court's decision is warranted.

II. THE SEVENTH CIRCUIT'S DECISION CONTRAVENES ERISA'S DEFINITION OF AN "ACCRUED BENEFIT" AND EXACERBATES EXISTING CONFUSION AMONG THE LOWER COURTS ABOUT THE IMPORTANT STATUTORY DISTINCTION BETWEEN ACCRUED BENEFITS AND RETIREMENT-TYPE SUBSIDIES.

Not only does the Seventh Circuit's decision have adverse policy implications, but it also contravenes ERISA's statutory text and further confuses the state of the law among courts of appeals concerning the distinction between accrued benefits and retirement-type subsidies.

ERISA defines an "accrued benefit" "in the case of a defined benefit plan [as] the individual's accrued benefit *determined under the plan* and . . . expressed in the form of an annual benefit *commencing at normal retirement age* . . . ." 29 U.S.C. § 1002(23)(A) (emphasis added). As the Petition explains, the Seventh Circuit's decision contravenes this definition and creates a circuit split with decisions of the Fourth and Ninth Circuits by holding categorically that a COLA is an accrued benefit under ERISA, even if the terms of the plan expressly exclude the COLA from the plan's definition of accrued benefits. *See* Pet. at 11-23. Consistent with the text of the statute, the Fourth and Ninth Circuits have engaged in a case-by-case inquiry, dependent on the terms of the plan at issue, to determine whether a COLA or other form of benefit is an "accrued benefit." *See Bd. of Trs. of the Sheet Metal Workers' Nat'l Pension Fund v. Comm'r*, 318 F.3d 599 (4th Cir. 2003); *San Diego AFL-CIO Bus Drivers Local Div. 1309 v. San Diego Transit Corp.*, 26 F.3d 132 (9th Cir. 1994) (unpublished mem.).

In addition, the Seventh Circuit's decision merits this Court's review for another independent reason: The very nature of a COLA is facially inconsistent with the statutory definition of an "accrued benefit" because a COLA does not "*commenc[e]* at normal retirement age." 29 U.S.C. § 1002(23)(A) (emphasis added). Under the Rohm and Haas Plan, the only benefit that commences at normal retirement age is the basic form of pension, *i.e.*, the participant's level life annuity. The COLA in the Plan is an upward "annual adjustment to monthly payments from the Plan," providing "a benefit enhancement" that is "intended to keep pace with inflation." Pet. App. at 68a-69a. Thus, a participant receives a COLA, at the earliest, the year after retiring, and even then only if there has been an intervening increase in the cost of living after a person's commencement of monthly pension payments such that the Plan supplements the initial monthly amount. Because a participant does not begin to receive a COLA until *after* "commencing . . . retirement," a COLA does not fall within the statutory definition of an "accrued benefit," which must necessarily "commenc[e] at normal retirement age." 29 U.S.C. § 1002(23)(A); *see also* 26 C.F.R. § 1.411(d)-3(g)(3) (defining "annuity commencement date" as "the annuity starting date," or, "in the case of a retroactive annuity starting date . . . the date of the first payment of benefits pursuant to a participant election of a retroactive annuity starting date").

The Seventh Circuit's treatment of a COLA as a *per se* accrued benefit is in tension with decisions of the Third, Fourth, Sixth, and Tenth Circuits, which have properly interpreted the requirement that an "accrued benefit" must "commenc[e] at normal retirement age," 29 U.S.C. § 1002(23)(A), in accordance with ERISA's plain language. These courts have explained that various forms of benefits that commence before, rather than at, normal retirement age are not accrued benefits. *See, e.g.*, *Cattin v. Gen. Motors Corp.*, 955 F.2d 416, 423 (6th Cir. 1992); *Am. Stores Co. v. Am. Stores Co. Ret. Plan*, 928 F.2d 986, 990 (10th Cir. 1991); *Berger v. Edgewater Steel Co.*, 911 F.2d 911, 918 (3d Cir. 1990); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 284 (3d Cir. 1988); *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406, 410 (4th Cir. 1983). Similarly, a COLA that commences *after* normal retirement age cannot be an accrued benefit, contrary to the Seventh Circuit's conclusion.[2]

Rather than being an accrued benefit, the COLA in the Rohm and Haas Plan is a retirement-type subsidy—*i.e.*, a supplement in excess of "the actuarial equivalent of the normal retirement benefit"—paid only to participants who chose to receive monthly annuities. *Ashenbaugh v. Crucible Inc., 1975 Salaried Ret. Plan*, 854 F.2d 1516, 1521 n.6 (3d Cir. 1988). Indeed, the benefit sought by Respondent—the lump-sum value of the pension annuity as enhanced by the addition of the COLA—is necessarily greater than the actuarial present value of the level life annuity that commenced at normal retirement. Thus, a COLA falls squarely within the definition of a retirement-type subsidy established by Treasury regulations. *See* 26 C.F.R. § 1.411(d)-3(g)(6)(iv) (defining "retirement-type subsidy" to mean "the excess, if any, of the actuarial present value of a retirement-type benefit over the actuarial present value of the accrued benefit commencing at normal retirement age or at actual commencement date").

The Seventh Circuit's error in treating a COLA as an accrued benefit rather than a retirement-type subsidy has significant consequences. To be sure, ERISA provides some protection to both accrued benefits and retirement-type subsidies. But where it does so, ERISA recognizes that a retirement-type

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2 Even to the extent that a pension plan were to allow early retirement prior to normal retirement age, and commencement of pension payments at that earlier date, the COLA supplement still would not commence at normal retirement but necessarily at least a year following the early retirement date.

subsidy is distinct from an accrued benefit. Specifically, both an accrued benefit and a retirement-type subsidy are subject to ERISA's anti-cutback protection, which prohibits a pension plan amendment that reduces or eliminates certain types of benefits once offered in the pension plan document. *See* 29 U.S.C. § 1054(g)(1) (providing anti-cutback protection for accrued benefits); § 1054(g)(2) (providing that, for purposes of anti-cutback protection, a retirement-type subsidy, early retirement benefit, or optional form of benefit "shall be treated as" an accrued benefit). In addition, an administrator of a defined benefit plan is required to provide a detailed notice to each individual affected by an amendment that otherwise lawfully reduces the rate of future benefit accruals or the plan participant's ability to obtain a future retirement-type subsidy. *See* § 1054(h)(1) (requiring notice of reduction in rate of future benefit accruals); § 1054(h)(9) (providing that for purposes of this notice requirement, reduction of a retirement-type subsidy or early retirement benefit "shall be treated as having the effect of reducing the rate of future benefit accrual").

But otherwise, ERISA regulates accrued benefits and retirement-type subsidies distinctly. For example, once vested, an employee's right to an accrued benefit is nonforfeitable. *See* § 1053(a). In addition, ERISA imposes minimum standards on the rate by which accrued benefits must be earned in defined benefit plans. *See* § 1054(b)(1). Finally, and as was at issue in this case, a pension paid to a retiree in the form of a lump sum must equal at least the actuarial present value of such retiree's accrued benefit. *See* § 1054(c)(3); *see also Lyons v. Georgia-Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1251-52 (11th Cir. 2000).

None of these statutory protections apply to a "retirement-type subsidy." Thus, *only* the pension plan participant's accrued benefit, and not a retirement-type subsidy, must be paid when the participant chooses a lump-sum form of pension distribution. *See* 29 U.S.C. § 1054(c)(3).

Accordingly, if a plan sponsor provides for a COLA to be added to the monthly annuity form of pension benefit that begins at normal retirement, the anti-cutback protection afforded by § 1054(g) prohibits the pension plan sponsor from later amending the plan to eliminate the COLA from the annuity form of pension benefit. However, because a COLA merely receives the lesser statutory protection of a retirement-type subsidy and *not* the greater statutory protection afforded an accrued benefit, if a plan (like that offered by Rohm and Haas) unambiguously provides that a lump-sum distribution shall not include the value of a COLA, ERISA imposes no obligation to provide it.

Some courts of appeals have properly understood the critical distinction between accrued benefits and the category of benefits afforded lesser protections, which includes retirement-type subsidies, early retirement benefits, and optional forms of benefits. *See, e.g.*, *Costantino v. TRW, Inc.*, 13 F.3d 969, 979-80 (6th Cir. 1994) (recognizing the distinction between "the *definition* of 'accrued benefits'" and ERISA's "strategy of protecting [retirement-type] subsidies by *treating* them as 'accrued benefits' in several provisions"); *Steiner Corp. Ret. Plan v. Johnson & Higgins of Cal.*, 31 F.3d 935, 939 (10th Cir. 1994).

More commonly, however, courts—as in the decision below—have improperly conflated these two distinct categories of benefits. *See, e.g.*, *Herman v. Cent. States, Se. & Sw. Areas Pension Fund*, 423 F.3d 684, 691 (7th Cir. 2005) (describing early retirement benefits as "'accrued benefits' within the meaning of ERISA") (citation omitted); *Perreca v. Gluck*, 295 F.3d 215, 228 (2d Cir. 2002) (referring to "an optional form of benefit, which includes lump sum payments," as an "accrued benefit"); *Hein v. FDIC*, 88 F.3d 210, 217 (3d Cir. 1996) (stating that § 1054(g)(2) "mandates *accrual*" of early retirement benefits) (emphasis added); *Spacek v. Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283, 291 n.9 (5th Cir. 1998) (noting prior Fifth Circuit precedent concluding that "benefits protected by § 1054(g)(2) are 'vested or accrued'").

Thus, not only is the Seventh Circuit's decision wrong as a matter of statutory interpretation, but it exacerbates the existing confusion among the courts of appeals about the difference between accrued benefits and retirement-type subsidies (as well as early retirement benefits and other optional forms of benefit for which ERISA grants lesser protection). Because ERISA requires only that accrued benefits, and not retirement-type subsidies, be paid to participants who elect a lump-sum distribution, *see* 29 U.S.C. § 1054(c)(3), the decision below, like those of other courts that have conflated these forms of benefits, threatens to impose on plans substantial liability and pension design burdens that ERISA does not mandate and that plan sponsors have not anticipated. This Court's review is needed to clarify the distinction between accrued benefits and those benefits subject to lesser ERISA protection, and thus eliminate lower court confusion that unnecessarily increases the already significant financial burden imposed on companies that provide a traditional, defined benefit form of pension plan.

CONCLUSION

The petition for a writ of certiorari should be granted.

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