No. 15-683

In the Supreme Court of the United States

PRICEWATERHOUSECOOPERS LLP, ET AL., PETITIONERS

v.

TIMOTHY D. LAURENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN BENEFITS COUNCIL, AND BUSINESS ROUNDTABLE AS AMICI CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICI CURIAE[*]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing an underlying membership of over 3 million businesses and organizations of every size, in

[*] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

every industry sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, it files briefs as amicus curiae in cases that raise issues of vital concern to the Nation's business community.[1]

The American Benefits Council (Council) is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

Business Roundtable (BRT) is an association of chief executive officers of leading American companies with $7.2 trillion in annual revenues and nearly 16 million employees. BRT member companies comprise more than a quarter of the total value of the American stock market and invest $190 billion annually in research and development—equal to 70% of private research and development spending in the United States. BRT companies pay more than $230 billion in dividends to shareholders and generate more than $470 billion in sales for small-

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[1] Pursuant to Rule 37.2, counsel of record received timely notice of the intent to file this brief at least ten days before the due date. The parties have consented to the filing of this brief, and copies of their letters of consent are on file with the Clerk's Office.

and medium-sized businesses annually. United and amplifying the diverse business perspectives and voices of America's top chief executive officers, BRT promotes policies to improve American competitiveness, strengthen the economy, and spur job creation.

The Chamber, the Council, and BRT represent American businesses and business leaders. They frequently participate as amici curiae in cases with the potential to affect significantly the design and administration of employee benefit plans. This is such a case, and it presents a question of enormous practical importance to amici's members: namely, whether the statutory definition found in Section 3(24) of the Employee Retirement Income Security Act of 1974 (ERISA), allowing a "normal retirement age" to be "the time a plan participant attains normal retirement age under the plan," thereby allows a benefits plan to define a period of time as a "normal retirement age." 29 U.S.C. 1002(24)(A). In the decision below, the Second Circuit rejected the plain meaning of this statutory definition, under which a plan's definition of "normal retirement age" will apply so long as it identifies a time. Instead, creating a circuit conflict, the Second Circuit reasoned that any plan definition of "normal retirement age" must be based on the typical age at which the employer expects the plan's participants to leave the workforce.

The Second Circuit's decision directly implicates the interests of members of the Chamber, the Council, and BRT. Each year, they voluntarily elect to provide and administer ERISA plans that provide retirement benefits to employees nationwide. They depend on the plain and settled meaning of terms in ERISA in structuring and administering those plans and in projecting the financial cost of providing benefits under the plans. The decision below is the first decision from a court of ap-

peals to diverge from the plain meaning of the statutory term. For the reasons stated in this brief, amici respectfully urge the Court to grant review.

SUMMARY OF ARGUMENT

Section 3(24) of ERISA defines "normal retirement age" as the earlier of (1) "the time a plan participant attains normal retirement age under the plan," 29 U.S.C. 1002(24)(A), or (2) the later of the time a plan participant turns 65 or has participated in the plan for five years. 29 U.S.C. 1002(24)(B).

As the petition for certiorari explains, the decision under review creates an express, direct circuit conflict on the meaning of the term "normal retirement age" as found in Section 3(24)(A) of ERISA: specifically, on the question whether a benefits plan can define "normal retirement age" as a five-year term of service. Two courts of appeals had previously concluded that such a definition was within the discretion accorded to a plan. See *McCorkle* v. *Bank of America Corp.*, 688 F.3d 164, 171 (4th Cir. 2012); *Fry* v. *Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644, 648 (7th Cir. 2009).

The conclusions of those courts are consistent with the text of Section 3(24). The plain meaning of subparagraph (A) is that a plan's defined "normal retirement age" shall apply so long as it provides a "time" that a plan participant can "attain." That is further confirmed by the whole of paragraph (24), which creates a specialized meaning for the term of art "normal retirement *age*" as a "*time*"—in some instances the time someone turns an age (as under subparagraph (B)(i)), and in others the time someone completes a period of years (as under subparagraph (B)(ii)). 29 U.S.C. 1002(24)(A), (B)(i)-(ii).

The Second Circuit rejected the reasoning of the Fourth and Seventh Circuits and instead inquired into

the ordinary meaning of the phrase "normal retirement age" in subparagraph (A), even though Section 3(24) as a whole defines the exact term "normal retirement age" and provides it a specialized meaning. The Second Circuit concluded that a plan's defined "normal retirement age" suffices only if it has "some reasonable relationship" to when the plan's participants leave the workforce altogether. Pet. App. 20a, 26a-27a.

The Second Circuit's standard handcuffs plans. A "normal retirement age" for purposes of ERISA determines not "when employees must retire, but only when certain rights vest and how benefits are adjusted." *Fry*, 571 F.3d at 647. The Second Circuit's approach limits the alternatives available to plans in arranging their benefits offerings to meet companies' needs, thus burdening employers and, by making retirement plans less attractive, undermining ERISA's goal of providing benefits to employees. A narrow approach to "normal retirement age" particularly disserves employees, who in many circumstances benefit from employer definitions of "normal retirement age" that allow them to collect benefits or have their benefits vest earlier. The Second Circuit's standard simultaneously sows confusion in the interpretation and administration of ERISA, a statute that applies to plans operating nationwide. As matters currently stand, the same plan will be subject to competing interpretations depending on the district in which a claim is raised. Worse yet, in the Second Circuit, a plan will be subject to a vague, general standard that could lead to divergent results by different factfinders.

Plans are entitled to deference in determining the appropriate "normal retirement age" for their participants, and to a uniform interpretation of the statutory term. This Court's review is necessary to restore uni-

formity to the interpretation of one of ERISA's central terms.

ARGUMENT

A. The Decision Below Creates An Express, Square Circuit Conflict Concerning The Meaning Of The Term 'Normal Retirement Age' In Section 3(24)(A) Of ERISA

As the petition explains (at 13-20), the decision below explicitly creates a conflict with two other circuits on the same legal question as applied to essentially identical facts. See *McCorkle* v. *Bank of America Corp.*, 688 F.3d 164 (4th Cir. 2012); *Fry* v. *Exelon Corp. Cash Balance Pension Plan*, 571 F.3d 644 (7th Cir. 2009). All three cases involve cash-balance defined-benefit pension plans that defined "normal retirement age" as five-year terms of service. See Pet. App. 11a; *McCorkle*, 688 F.3d at 167; *Fry*, 571 F.3d at 646.[2] And in each case, plaintiffs mounted the same challenge: namely, that the five-year term arrangement violated ERISA's definition of "normal retirement age." See Pet. App. 12a; *McCorkle*, 688 F.3d at 169-170; *Fry*, 571 F.3d at 647.

The Second Circuit accepted the plaintiffs' argument and imported into the definition of "normal retirement age" a requirement that it "must bear some reasonable relation to a time when the plan's participants would, under normal circumstances, retire." Pet. App. 26a-27a. But the Fourth and Seventh Circuits each rejected that

[2] To be sure, there are minor wording differences between the definitions of "normal retirement age" in the plans at issue. The Second Circuit rightly acknowledged, however, that the differences were "essentially semantic," and did not distinguish the language in the plan it was reviewing from the language in the plans reviewed by the Fourth or Seventh Circuits. Pet. App. 27a-28a.

exact argument and held that, consistent with Section 3(24)(A), a "normal retirement age" is simply whatever time or age the plan provides (as long as it is under age 65). See *McCorkle*, 688 F.3d at 171; *Fry*, 571 F.3d at 648.[3] The Fourth and Seventh Circuits, unlike the Second Circuit in the decision below, each confirmed that ERISA's definition of normal retirement age gives discretion to a plan sponsor to set whatever age it deems to be appropriate under the plan.

The Second Circuit addressed the Fourth and Seventh Circuit's decisions and expressly rejected their reasoning. The Second Circuit stated that it "respectfully disagree[d]" with the Seventh Circuit, and found the court's reading of the statute "unpersuasive." Pet. App. 25a, 26a, 27a. And it similarly dismissed the Fourth Circuit's approach. *Id.* at 29a n.17.

B. The Decision Below Is Erroneous

1. The Second Circuit's decision simply cannot be reconciled with the text of ERISA. Section 3(24) defines "normal retirement age," providing a formula for determining its meaning. The "term 'normal retirement age' means the earlier of—"

> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of—
>
> (i) the time a plan participant attains age 65, or

[3] In *McCorkle*, the plaintiffs had conceded that the plan as issued complied with ERISA's definition of "normal retirement age." The Fourth Circuit reasoned that "Plaintiffs' concession is well-counseled, as the Plan's [normal retirement age] complies with ERISA." 688 F.3d at 171.

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. 1002(24). This case concerns the proper interpretation of subparagraph (A) of the section—"the time a plan participant attains normal retirement age under the plan."

Because the language of subparagraph (A) is plain and straightforward, the Second Circuit's "sole function" was "to enforce it according to its terms." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005) (quoting *Hartford Underwriters Insurance Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). That language provides that a plan can determine and define its own "normal retirement age"—that is, a "normal retirement age under the plan"—with the only restriction being that it involve a "time" that a "plan participant" can "attain." In other words, any age or period of years can be defined to be the "normal retirement age" under a plan and pass the requirement of Section 3(24)(A). See *Fry*, 571 F.3d at 647.

2. The rest of Section 3(24) confirms that any age or period of years selected by a plan satisfies subparagraph (A). The meaning Section 3(24) gives the term "normal retirement age" bears little resemblance to any ordinary understanding of the phrase "normal retirement age." Most fundamentally, for purposes of ERISA, "normal retirement age" is not an "age." Rather, it is always a "time"—either the time when a person attains the plan's definition of "normal retirement age" (under subparagraph (A)) or the later of when a person either turns 65 or has participated in the plan for five years (under subparagraph (B)). 29 U.S.C. 1002(24)(A), (B)(i)-(ii).

Subparagraph (B) of Section 3(24) further confirms that Congress did not intend to apply an ordinary meaning to the term "normal retirement age." It would be

strange enough, as a matter of common usage, to think of normal retirement age as any five-year period of employment. It would be stranger still to refer to a period of participation in a *retirement plan* as a normal retirement age. But that is precisely how subparagraph (B) defines "normal retirement age" for someone who starts participating in the plan after age 60. 29 U.S.C. 1002 (24)(B)(ii).

The Second Circuit therefore erred in seeking to apply an "ordinary meaning" of the words "normal retirement age" to the specialized term found in Section 3(24)(A). Pet. App. 20a. Section 3(24) shows that, for purposes of ERISA, the term "normal retirement age" is not to be given an ordinary meaning, but rather the definition provided by the statute. There is no valid reason to conduct an ordinary-meaning analysis of the term as it appears in subparagraph (A) of the same definition; to the contrary, as long as the plan identifies a "normal retirement age" that can be attained at a time, the statute is satisfied.

3. The foregoing interpretation of subparagraph (A) is consistent with the obvious intent of Congress in supplying the definition of "normal retirement age." That definition shows that Congress sought to prevent plans from setting a "normal retirement age" too high. The term accordingly is defined to be *no later than* when a participating employee turns 65, subject to the exception for new participants in the plan. 29 U.S.C. 1002(24)(B). Conversely, Congress clearly intended to give plans leeway to set an *earlier* time as the "normal retirement age" if plans so chose, by not setting a mandatory minimum age to correspond to the ceiling created by age 65.

Because a reading of Section 3(24)(A) that dictates deference to plan definitions of "normal retirement age" is surely not absurd, the Second Circuit should have ap-

plied the plan's definition. *Dodd*, 543 U.S. at 359. The Second Circuit's failure to do so flies in the face of familiar principles of statutory interpretation.

C. The Question Presented Is Exceptionally Important To The Employees Whose Retirement Savings Are Protected by ERISA-Compliant Plans And To The Employers That Provide Them

It would be difficult to overstate the significance of retirement plans to employees and employers across the country. As of October 2, 2015, ERISA governs nearly 681,000 separate retirement plans. See Department of Labor, *EBSA Restores Over $696.3 Million to Employee Benefit Plans, Participants and Beneficiaries* 1 (2015) <www.dol.gov/ebsa/pdf/fsfy15agencyresults.pdf>. The total set of health, retirement, and other benefit plans covers 143 million individuals (and their dependents) and includes assets of over $8.7 trillion. *Ibid.*[4]

Just as it is hard to overstate the importance of retirement plans to employees, it is hard to overstate the importance of uniform and predictable interpretation of ERISA to the fair administration of retirement plans. As this Court has frequently noted, ERISA was "the product of a decade of congressional study," and, as a result, it is both "comprehensive and reticulated." *Great-West Life & Annuity Co.* v. *Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens* v. *Hewitt Associates*,

[4] Indeed, if anything, retirement funds should be even larger because, despite these astonishing figures, "not enough Americans are saving for retirement." Statement of Thomas E. Perez, Secretary of Labor, Before the Subcomm. on Health, Employment, Labor & Pensions of the H. Comm. on Education & The Workforce 1 (June 17, 2015) <http://www.dol.gov/ebsa/pdf/ty061715.pdf> (describing the situation as "a retirement crisis in America").

508 U.S. 248, 251 (1993)). The statute is designed to set a series of uniform, national standards to simplify plan administration. See, *e.g.*, *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 379 (2002). Despite its comprehensiveness, Congress also intended ERISA to be flexible so as to minimize administrative or litigation costs. See *Conkright* v. *Frommert*, 559 U.S. 506, 516-517 (2010). It is therefore essential that ERISA's key terms be applied in a manner consistent with Congress's goals of flexibility and uniformity.

1. "Normal retirement age" is one of those key terms. It plays a role in determining some of the most essential features of any retirement plan—namely, when benefits must be provided and when they become vested (that is, guaranteed to the employee). The "normal retirement age specified under the plan" is one of the principal measures by which ERISA decides when plans must begin providing benefits. 29 U.S.C. 1056(a)(1). It also provides an outer limit on when benefits become "nonforfeitable" and are thus guaranteed to the employee. 29 U.S.C. 1053(a). The term "normal retirement age" is used for several other purposes in ERISA, such as establishing benefit-accrual requirements, 29 U.S.C. 1054(b); setting the accrual rate for multiemployer plan benefits, 29 U.S.C. 1322a(c)(2)(A)(i); and calculating survivor annuities, 29 U.S.C. 1056(d)(5)(A)(iii).

Not only does the term "normal retirement age" play a role in many of ERISA's substantive provisions; it also affects many of ERISA's other core definitions. The phrase "normal retirement benefit"—itself a key phrase used throughout the statute—is defined as "the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age." 29 U.S.C. 1002(22). The phrases "accrued benefit" and "vested liabilities" are also specifically defined by

reference to "normal retirement age." 29 U.S.C. 1002(23), (25).

The term "normal retirement age" is thus fundamental to the ERISA scheme. Denying plans the flexibility Congress intended with regard to that term would have significant consequences for ERISA benefits and the administration of ERISA plans. And uncertainty regarding the meaning of that term would profoundly destabilize ERISA plans. The decision under review has all of those effects.

2. By holding that a "normal retirement age" cannot be any "normal retirement age *under the plan*," even if earlier than the ceiling imposed by subsection (B), the Second Circuit's holding undermines one of the central goals of ERISA: creating flexibility for employers. This Court has emphasized that ERISA does not require that employees receive certain levels of benefits; indeed, ERISA does not require that plans be established at all. *Conkright*, 559 U.S. at 516-517. Rather, ERISA generally established "outer bounds" of permissible practices. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512 (1981).

a. Congress sought to create flexibility for employers when designing ERISA. The flexibility of the ERISA scheme benefits employers by allowing them to craft benefits in light of their particular workplaces, goals, and resources. Critically, Congress recognized that providing employers with flexibility benefited employees as well. By avoiding a "complex" system laden with "administrative costs[] or litigation expenses," Congress sought to encourage employers to offer "plans in the first place." *Conkright*, 559 U.S. at 517 (quoting *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996)).

Flexibility is most beneficial to the sponsors and beneficiaries of small plans, which have limited resources to

devote to plan administration. Although 42 million workers (a third of all private-sector employees) work for employers with fewer than 100 employees, only 14% of such employers offer retirement plans. Government Accountability Office, *Retirement Security: Challenges & Prospects for Employees of Small Businesses* 1 (2013), <http://www.gao.gov/assets/660/655889.pdf>. One of the chief obstacles to the growth of smaller plans is the administrative burden they impose. *Id.* at 8-9. Marginal losses in flexibility are therefore likely to further discourage small businesses from offering plans and thus decrease the availability of benefits to employees. See *Conkright*, 559 U.S. at 517 (noting Congress's policy of encouraging the offering of benefits through minimizing administrative burden).

Section 3(24) provides flexibility through the alternative provided in subparagraph (A) that a "normal retirement age" can be any "normal retirement age *under the plan*," as long as an employee attains it before he meets other conditions, usually turning 65. 29 U.S.C. 1002(24)(A) (emphasis added). That alternative allows an employer to determine the definition of "normal retirement age" that best meets the needs of its particular business in its particular context, with due consideration to the interests of the employees who will receive the benefits, the management who will administer the plan and budget for its future operation, and the shareholders in whose interests the company should be operated. The decision below interferes with that flexibility, to the detriment of employers and, as Congress realized, ultimately employees as well.

b. Indeed, on the question presented by this case, flexibility directly serves employees' interests. As one would expect, there are many ways plan provisions that establish an early "normal retirement age" benefit em-

ployees. Such a definition requires an employer to provide benefits at an earlier date than is typically required. Under 29 U.S.C. 1056(a), the payment of pension plan benefits is required to begin by the latest of three dates: (1) the employee's attainment of age 65 or the plan's normal retirement age; (2) the tenth anniversary of the employee's participation in the plan; or (3) the employee's termination of his employment. 29 U.S.C. 1056(a)(1)-(3). A definition of "normal retirement age" that is younger than age 65, or that is a relatively short period of service, would thereby require the payment of benefits to an employee who left the company as long as he participated in the plan for ten years. It therefore would allow an employee to retire earlier if he so chooses and to start collecting a retirement benefit immediately.

Similarly, in a defined benefit plan, benefits typically fully vest under 29 U.S.C. 1053(a) either at five years of employment, see 29 U.S.C. 1053(a)(2)(A)(ii), or at seven years, see 29 U.S.C. 1053(a)(2)(A)(iii). Benefits also fully vest, however, on the attainment of the plan's definition of "normal retirement age." 29 U.S.C. 1053(a). If, then, an employee reaches "normal retirement age" under the plan before he has worked at the company for five or seven years, his benefits vest early, and the employee no longer has to stay with his employer in order to retain those benefits. The employee could reach "normal retirement age" either because the term is defined to be an age and he reaches that age before he has worked at the company for five or seven years, or because the plan defines "normal retirement age" by a term of years shorter than five or seven years. Either way, the employee's benefits would vest before the five- or seven-year period otherwise contemplated—a clear advantage to the employee.

In fact, certain employers could choose to structure a benefit plan with these particular consequences in mind precisely in order to attract employees. A startup technology company could, for example, seek a competitive advantage in attracting employees who are not expected to stay longer than two or three years. One method for doing so would be to set "normal retirement age" at a low term of years in order to attract employees by offering early vesting of benefits so that that they can be carried to a new job. Another company, such as a private security company that often hires former police officers, could seek experienced employees, perhaps in a second career. It could see a comparative advantage in offering a "normal retirement age" of ten years of service as a way to attract experienced personnel who can then leave the workforce and start collecting their benefits as early as possible.

c. The Second Circuit's decision boxes employers into a single approach to defining "normal retirement age." Under that decision, some "reasonable relation" is required to the age at which participants would normally retire from any active employment in order for a plan's definition to qualify under the statute. Pet. App. 26a-27a. To be sure, the Second Circuit allows that such an age could potentially vary from industry to industry. See Pet. App. 22a. But the Second Circuit provides a one-size-fits-all approach within any given industry. That approach fails to take into account that companies within the same industry are often differently situated, with different needs and priorities.

The flexibility in ERISA's scheme serves to maximize the number of such differently situated employers that will find an advantage in offering benefit plans and therefore also the number of employees that will receive benefits. That is especially true for the matter in dispute

in this case, where such flexibility directly benefits employees by providing earlier full vesting and access to benefits.

3. The Second Circuit's decision also creates harmful uncertainty regarding ERISA benefits for employers and for employees, both because of the uncertainty bred by the circuit conflict and because of the uncertainty inherent in the Second Circuit's own test.

One of the policies of ERISA is to create "a uniform body of benefits law," *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142 (1990), with "a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders." *Rush Prudential*, 536 U.S. at 379. Besides being a goal in and of itself, efficiency "induc[es] employers to offer benefits" and to maintain high levels of benefits. *Ibid.*; see *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 149 (2001) (noting Congress's goal of "'minimiz[ing] the administrative and financial burdens' on plan administrators—burdens ultimately borne by the beneficiaries" (quoting *Ingersoll-Rand*, 498 U.S. at 142)).

a. Prior to ERISA, benefit plans were subject to an uneven patchwork of disparate state laws, making plans especially hard to administer for corporations whose plans had become "increasingly interstate." S. Rep. No. 127, 93d Cong., 1st Sess. (1973). Congress's response to the administrative burden of interstate plans was to foster "uniformity of decision," which would "help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." *Ibid.*

Differing interpretations by the federal courts of appeals rob ERISA of its uniform application. The effect is to return to "[a] patchwork scheme of regulation," *Fort*

Halifax Packing Co. v. *Coyne*, 482 U.S. 1, 11 (1987), with circuit boundaries replacing state lines.

b. The decision below creates substantial uncertainty even within the Second Circuit, because it is far from clear what would satisfy the Second Circuit's "reasonable relation" standard. The court essentially provided no elaboration on how to determine whether any particular age bears "some reasonable relation to a time when the plan's participants, would, under normal circumstances, retire," except to suggest that some deference is owed if companies pick ages such as 58, 60, or 62; that some variation by industry could be tolerated; and that extensive periods of years may be reasonable. Pet. App. 21a-22a, 27a & n.15.

It is entirely uncertain how companies or beneficiaries would prove a "reasonable relationship." Is any deference owed if plan sponsors pick ages under 58? What factors would go into determining a reasonable age within an industry? Must all employers in the same industry consider the same factors? Must they accord them similar weights? Would the relevant factors vary over time? Would they vary by location? What if typical practice in an industry is to leave that industry but continue working in another field? Are term-of-year retirement ages short of multiple decades acceptable? The Second Circuit's "reasonable relation" standard offers no guidance on those questions. And it accordingly invites litigation—litigation that would spawn "unexpected and inaccurate plan interpretations that might result from *de novo* judicial review." *Conkright*, 559 U.S. at 517.

c. The uncertainty spawned by the Second Circuit's decision will be especially pernicious because it could affect or undermine the long-term planning of both employees and employers. Employees need certainty about what level of retirement benefits they will actually re-

ceive (and when they will receive them). Without the certainty of steady retirement benefits, employees will be crippled in their ability to make rational decisions about their retirements. Plan sponsors also need certainty about whether their plans comply with ERISA and what levels of benefits they will be expected to provide.

4. Respondents may attempt to argue that a 2007 regulation promulgated by the Internal Revenue Service (IRS), which is not applicable in this case, see Pet. App. 35a,[5] obviates the need for the Court to resolve the circuit split at issue. Specifically, IRS has promulgated regulations stating that the "normal retirement age under a plan must be an age that is not earlier than the earliest age that is reasonably representative of the typical retirement age for the industry in which the covered workforce is employed," and establishing various tiers of presumptively acceptable ages. 26 C.F.R. 1.401(a)-1(b)(2).[6] But the mere fact that IRS has issued regulations related to this issue does not ameliorate the problems addressed above, for several reasons.

To begin with, the IRS regulation is just as inconsistent with the text and structure of the statute as the Second Circuit's standard. And its "reasonably repre-

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[5] As the Second Circuit recognized, the IRS's regulation operates only prospectively as to plan years starting in 2007. Pet. App. 35a. Because this case involves pre-2007 conduct, the regulation has no bearing. Pet. App. 35a.

[6] Under the regulations, it appears that a "normal retirement age" between 62 and 65 is protected; a "normal retirement age" below age 55 is presumed not to be; and a "normal retirement age" in between will be judged "on all of the relevant facts and circumstances." 26 C.F.R. 1.401(a)-1(b)(2)(ii)-(iv).

sentative" standard suffers from many of the same interpretative problems as the Second Circuit's standard.

Nor is there any reason to think that the IRS regulation will resolve the issue. Given the complexity surrounding both the accrual rules and the limitations periods for ERISA claims,[7] one would expect litigation to proceed without reference to the IRS regulation for many years to come if the Second Circuit's expansive standard is not addressed.

* * * * *

The Second Circuit's decision begins from the faulty premise that a statutory term should be interpreted according to the ordinary meaning of the phrase rather than the statute's definition of the term. The decision removes flexibility from ERISA plans—flexibility that benefits both employees and employers. And it replaces the terms of private pension plans with an amorphous standard that would give rise to rudderless interpretations of plan terms. Amici respectfully urge this Court to grant the petition for certiorari in order to resolve the express circuit conflict created by the Second Circuit's

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[7] There is considerable confusion in the courts regarding when ERISA claims accrue, with some courts holding that a claim does not accrue until the plan repudiates a claim for benefits, and the rejection is clearly made known to the beneficiary. See *Riley* v. *Metropolitan Life Insurance Co.*, 744 F.3d 241, 245 (1st Cir. 2014). Even once a claim accrues, many courts borrow the applicable state statute of limitations for breach of contract when a claim is brought under ERISA "to recover benefits due * * * under the terms of the plan." 29 U.S.C. 1132(a)(1)(B); see *Schumacher* v. *AK Steel Corp. Retirement Accumulation Pension Plan*, 711 F.3d 675, 682 (6th Cir. 2013). Such statutes of limitation can be as long as fifteen years. See *Meade* v. *Pension Appeals & Review Committee*, 966 F.2d 190, 193 (6th Cir. 1992).

decision and to reaffirm the principle of deference to plan terms on which ERISA is based.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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