No. 22-1210

IN THE
Supreme Court of the United States

COLGATE-PALMOLIVE COMPANY, ET AL.,
Petitioners,

v.

REBECCA MCCUTCHEON, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit erred by refusing to consider extrinsic evidence about Petitioners' intent in adopting an amendment to a pension plan, where the language of the amendment was unambiguous, the District Court found the proffered evidence to be of insufficient reliability to meet even the standard that Petitioners argue is appropriate, and Petitioners failed to appeal that aspect of the District Court's decision.

2. Whether the Second Circuit erred by finding that the unambiguous language of the retirement plan at issue dictated the use of a selected interest rate in computing benefits.

CORPORATE DISCLOSURE STATEMENT

Respondents Rebecca McCutcheon and Paul Caufield are unincorporated individuals.

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INTRODUCTION

This case arises out of a long-running dispute about the meaning of defendant-petitioner Colgate's now-superseded 1994 retirement Plan document and a 2005 amendment to that Plan document, which together addressed issues unique to Colgate's transition from one form of retirement plan to another. Prior to 1989, Colgate offered its employees a traditional defined-benefit pension; effective 1989, Colgate adopted a cash-balance plan, which was set forth in a highly technical 138-page 1994 Plan document with multiple appendices tailored to the specifics of Colgate's workforce.

The District Court and the Second Circuit each delved into the 1994 Plan document and the 2005 amendment and reached the same conclusion: the plain text of the documents unambiguously required Colgate to pay plaintiffs-respondents ("Respondents") and the class they represented greater retirement benefits than they had previously received. Each of these courts also relied on the unambiguous language of the Plan documents to reject an effort by Colgate and the other defendants-petitioners (collectively, "Petitioners") to dramatically reduce Respondents' damages by manipulating the interest rate used in the damages calculation.

Petitioners do not, because they cannot, claim that the Plan language at issue here appears in other plan documents, such that the interpretation of the specific terms of these documents might matter to anyone other than the parties here. Instead, Petitioners strain to elevate the importance of this dispute by claiming that it implicates two different circuit splits over pure issues of law under the Employee

Retirement Income Security Act ("ERISA"), the resolution of which it claims would be outcome-determinative. But, as we show in detail below, there is no circuit split on either of Petitioners' questions presented. As we further show, even if the legal rules for which Petitioners advocate were adopted, they would not change the outcome. Petitioners still would lose, because they failed to establish the factual predicates needed to prevail even under those rules. This case is therefore not a suitable vehicle to address either of the (non-existent) circuit splits that Colgate alleges. The petition for a writ of certiorari should be denied.

STATEMENT

It is undisputed at this juncture of the case that Colgate's 1994 "cash balance" pension plan (also known as a "personal retirement account" or "PRA" plan) had two significant flaws that adversely affected "grandfathered" employees—that is, employees who began working for Colgate prior to the 1994 plan's retroactive effective date of 1989, and who thus had been participants in Colgate's previous final-average-pay pension plan. Pet. App. 6a-11a.

The first flaw was that, while certain grandfathered employees had been paying into the plan out of their own pocket to preserve their ability to retire under the pre-1989 grandfathered pension benefit if that benefit was worth more than their PRA benefit, the plan's formula for computing the lump-sum equivalent of their annuity entitlement failed to account for the sometimes-higher value of the grandfathered annuity. Pet. App. 9a-11a. The second flaw was that the plan's formula for computing the lump-sum equivalent even of the PRA-based annuity

violated ERISA in a way that adversely affected participants during the relevant time period. Pet. App. 6a-9a. It is now undisputed that these flaws generated illegal "forfeitures" under ERISA as applied to the group of departing employees who left Colgate's employ between 1994 and 2003 and who ultimately became members of the certified class in this litigation. Pet. App. 3a-4a & n.2, 10a-11a, 16a. That group's lead class representative is Respondent Rebecca McCutcheon. Pet. App. 15a-16a.

In 2005, Colgate adopted an amendment to the plan, called the Residual Annuity Amendment ("RAA"), the text of which is set forth in the Petition at page 7. That Amendment refers back to the underlying 130-plus page Plan Document. *Id.*

The central dispute between the parties in this case is over the meaning of the Residual Annuity Amendment. Respondents' contention has been that the Amendment's plain language requires that class members receive a supplemental age 65 annuity that redresses both forfeitures. Petitioners' contention has been that the Amendment should be construed to only redress the first of the two forfeitures.

The District Court carefully evaluated the competing arguments and examined the text of the RAA together with the underlying Plan document, holding that the text unambiguously redresses both forfeitures. Pet. App. 67a-78a. Because the text was unambiguous, no deference was owed to Colgate's plan administrator under case law that Colgate does not dispute. Pet. App. 65a-67a. The ERISA judicial remedy, the District Court held, was for Petitioners to calculate the supplemental age 65 annuities owed to the class members by using the "20 + 1%" interest rate

that it found was unambiguously set forth in § 1.3 of the Plan. Pet. App. 83a-84a.[1]

The Second Circuit reviewed the District Court's opinion *de novo* and likewise examined the text of the RAA together with the underlying Plan document and held the text to be unambiguous in redressing both forfeitures. Pet. App. 20a-38a. It also agreed with the District Court that § 1.3 of the Plan unambiguously required the use of the "20 + 1%" interest rate to calculate age 65 annuities for the purpose of remedying the class members' losses. Pet. App. 42a-46a.

Petitioners now ask this Court to grant certiorari to review the Second Circuit's decision.

REASONS FOR DENYING THE WRIT

I. The Question Whether the Second Circuit Should Have Considered Petitioners' Extrinsic Evidence Despite Finding the Plan Document Unambiguous Does Not Merit Review.

A. There Is No Circuit Split on Whether There Is a "Latent Ambiguity" Exception to the "Four Corners" Rule.

As Petitioners themselves ultimately acknowledge, every court of appeals, including the Seventh Circuit, adheres to the principle that "'if fiduciaries or administrators of an ERISA plan controvert the plain meaning of a plan, their actions are arbitrary and capricious,'" depriving them of the

[1] The "20" in the formula refers to the rate for 20-year U.S. Treasury bonds.

deference to which they generally are entitled. Pet. 20 (quoting *Swaback v. Am. Info. Techs. Corp.*, 103 F.3d 535, 540 (7th Cir. 1996)). Petitioners further acknowledge that every court of appeals, including the Seventh Circuit, likewise adheres to the general rule that "'[e]xtrinsic evidence should not be used where the contract is unambiguous.'" *Id.* (quoting *Swaback*, 103 F.3d at 541).

Where Petitioners claim that the circuits diverge is *not* on the bedrock standard of deference applicable to a plan administrator's interpretation of the plan document, but rather on the circuits' "approaches to extrinsic evidence." Pet. 22.

According to Petitioners, the Second Circuit rigidly adheres, without exception, to the "four corners" rule—i.e., the rule providing that where the language of a plan document is unambiguous, the parties' intent is determined within the four corners of the document and without reference to extrinsic evidence. Pet. 19 (citing *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002)).

In contrast, say Petitioners, the Seventh Circuit, under *Mathews v. Sears Pension Plan*, 144 F.3d 461, 466-67 (7th Cir. 1998), recognizes an exception to the "four corners" rule where the proponent of the extrinsic evidence contends that there is a "latent ambiguity," meaning an ambiguity not evident from the face of the document, and the proponent has adduced "objective" evidence to reveal that ambiguity. Pet. 20-21. "Objective" evidence under the Seventh Circuit test means evidence that can be supplied by a disinterested third party to elucidate a contested word or phrase in a document, as distinct from subjective evidence that "depend[s] on the credibility of

testimony (oral or written) of an interested party … to the litigation." *Mathews*, 144 F.3d at 467. *See also id.* at 466-67 (describing the objective-evidence criterion as an important "limitation" on the latent-ambiguity exception that prevents it from undermining "the venerable 'four corners' rule").

The insurmountable problem for Petitioners in asserting that the Seventh Circuit's *Mathews* decision is inconsistent with Second Circuit authority is that the Second Circuit has never rejected *Mathews* itself or the broader proposition that the "four corners" rule has a latent-ambiguity exception. Quite to the contrary, in *Kerin v. U.S. Postal Service*, 116 F.3d 988, 992 n.2 (2d Cir. 1997), the Second Circuit examined objective extrinsic evidence to find that a term in a contract that, while appearing unambiguous on its face, actually had a specialized meaning different from its apparent meaning, and to then conclude that the specialized meaning must be given effect. The Second Circuit explained that while under "the 'four corners' doctrine, extrinsic evidence is generally inadmissible to determine whether a contract is ambiguous," "[t]his principle, however, is *not* absolute." *Id.* (emphasis added).

What's more, in rejecting an absolutist view of the "four corners" doctrine, the Second Circuit looked to none other than the Seventh Circuit:

> The most thoughtful consideration of this issue under federal common law may be found in *AM Int'l, Inc. v. Graphic Management Assocs., Inc.,* 44 F.3d 572, 575-77 (7th Cir. 1995) (Posner, C.J.). In *AM International*, the court distinguished between "subjective" evidence, which it defined as "the testimony of the parties

> themselves as to what they believe the contract means," and "objective" evidence, which it defined as "evidence of ambiguity that can be supplied by disinterested third parties." *Id.* at 575. It then went on to hold that while the court could never consider subjective evidence to determine whether a contract was ambiguous, it could in some cases—such as those involving terms of art—consider objective evidence. *Id.*

Kerin, 116 F.3d at 992 n.2.

Finally, the Second Circuit went on in *Kerin* to say that "[w]e have implicitly adopted a similar rule in this circuit, for while we have stated that the question of whether a contract is ambiguous must generally be determined without resort to extrinsic evidence … we have also stated that this question must be considered from the viewpoint of one 'cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.'" *Id.* (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996)).

While *Kerin* is not an ERISA case, it is a case that required the Second Circuit to apply "federal common law" contract-interpretation principles. *Id.* at 991. And the Second Circuit has indicated that its general adherence to the "four corners" rule would yield in an appropriate ERISA plan-interpretation case just as it has yielded in contract-interpretation cases. Indeed, in the *Feifer* decision that Petitioners cite to portray the Second Circuit as absolutist in applying the "four corners" rule, the court, after describing that rule as "axiomatic," immediately quoted with approval a New York state contract case for the proposition that "'[e]vidence outside the four corners of the document

as to what was really intended but unstated or misstated is *generally* inadmissible to add to or vary the writing.'" 306 F.3d at 1210 (emphasis added) (citation omitted). Furthermore, the losing party in *Feifer* did not purport to possess "objective" extrinsic evidence that would satisfy the Seventh Circuit's exception to the "four corners" rule, nor did that party ask the Second Circuit to adopt the Seventh Circuit's approach to that issue. *Feifer* thus is not in conflict with Seventh Circuit precedent.

Indeed, Petitioners cite no case from *any* circuit that expresses disagreement with or acknowledges any conflict with the Seventh Circuit's decision in *Mathews* or with the principle for which *Mathews* stands.[2] There is, in sum, no circuit split as to the first of the two questions in the Petition.

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[2] Petitioners claim that the Sixth Circuit is in conflict with the Seventh Circuit, Pet. 22, but they are unable to cite any Sixth Circuit case expressing disagreement with the Seventh Circuit as to the latent-ambiguity doctrine. Petitioners' inability to do so should not be surprising, for in *Watkins v. Honeywell, Int'l Inc.*, 875 F.3d 321, 328 (6th Cir. 2017), the Sixth Circuit itself applied the latent-ambiguity doctrine. And, while the court of appeals found that the proponent of the extrinsic evidence there could not satisfy the requirements of the doctrine by linking his evidence to any allegedly ambiguous word or phrase in the contract, the court did not reject the doctrine itself or the Seventh Circuit precedents enunciating the doctrine. To the contrary, the Sixth Circuit followed a Seventh Circuit precedent rejecting the application of the doctrine on similar facts. *Id.* at 326 (citing *Pabst Brewing Co., Inc. v. Corrao*, 161 F.3d 434, 441 (7th Cir. 1998)).

B. Petitioners Would Not Prevail Even Under the Standard That They Tout, Making This Case a Poor Vehicle for Review

Confirming that Petitioners' first question presented is not worthy of this Court's review is that Petitioners would not prevail even under the standard that they urge this Court to apply.

In the Seventh Circuit, a party seeking to have extrinsic evidence considered through the latent-ambiguity doctrine can do so only under very limited circumstances. The party must, in particular, meet two conditions. First, as already noted, "to be admissible to establish [a latent] ambiguity, extrinsic evidence must be objective; that is, it must not depend on the credibility of testimony (oral or written) of an interested party—either a party to the litigation or … an agent or employee of the party." *Mathews*, 144 F.3d at 467. Second—and left entirely out of the Petition—where a party is claiming that a particular word or phrase has a meaning different from that which appears plain on its face, the extrinsic evidence cannot float around at large; it must be tied to the allegedly ambiguous word or phrase. *Pabst Brewing Company, Inc. v. Corrao*, 161 F.3d 434, 441 (7th Cir. 1998) (refusing to consider extrinsic evidence about the parties' intent regarding the duration of medical benefits when the extrinsic evidence was not linked to the specific meaning of the phrase "for the term of this Agreement").

In *Mathews* itself, for example, a seemingly clear phrase in an ERISA plan was shown to be latently ambiguous because a Treasury regulation used the

same phrase to convey a specialized meaning different from the colloquial meaning. 144 F.3d at 467.

Before the lower courts, Petitioners unleashed a barrage of extrinsic evidence—largely consisting of self-serving testimony from Colgate's own employees and consultants—about Colgate's purported intent in enacting the 2005 amendment at issue here. A896-97.[3] Included with that evidence were the documents on which Petitioners rely in their Petition: the December 2004 minutes of Colgate's Employee Relations Committee, as well as a May 2004 presentation from Colgate's outside consultant that discussed the planned adoption of the 2005 amendment. Pet. 24-25.[4]

None of these materials show any latent ambiguity. Indeed, though Petitioners tellingly fail to disclose the point in their Petition, they argued to the District Court that if the court found the 2005 Plan amendment to be unambiguous within its four corners, the District Court should order reformation of the Plan document based on the same extrinsic evidence Petitioners now put forth in their Petition. A903-04. Petitioners, moreover, cited Seventh Circuit precedent as the basis for this argument. A903. And the District Court rejected Petitioners' bid for reformation, not on the ground that the Seventh

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[3] "A___" refers to pages in the Joint Appendix the parties filed in the Court of Appeals. The Joint Appendix was filed with the Second Circuit at docket entries 64-70.

[4] Petitioners also point to *2014* minutes purportedly showing their intent, Pet. 25 n.4, but those minutes were drafted by Colgate after this dispute arose and cannot possibly satisfy the objectivity criterion. *See* A855.

Circuit cases were inconsistent with Second Circuit cases (because they aren't, *see supra*), but on a more quotidian ground: the extrinsic evidence Petitioners proffered did not meet the Seventh Circuit's own standard for consideration of extrinsic evidence to override the plain meaning of the terms of an unambiguous plan document—that the evidence be "objective" and demonstrate the claimed latent ambiguity. *See Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808, 820 (7th Cir. 2010) (citing *Mathews* and stating that this requirement had to be met both in latent-ambiguity cases and in reformation cases); Pet. App. 77a-78a.

More specifically, in evaluating Petitioners' argument, the District Court explained that in order to "substantiat[e] an intent contrary to the clear and unambiguous plan's terms, the defendant must meet the high bar of … relying only on objective, written evidence that is not dependent on the credibility … of an interested party." Pet. App. 77a (internal quotation marks omitted).

The District Court found that none of Petitioners' proffered evidence met this standard. On the contrary, the District Court found that the extrinsic evidence tended to show that Colgate intended the 2005 amendment to bring the plan into full compliance with the law—a goal that the plain meaning of the amendment accomplished but that Petitioners' interpretation did not. Pet. App. 77a-78a.[5]

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[5] Perhaps realizing that the contract-law concept of "latent ambiguity" that the Seventh Circuit imported into ERISA plan-interpretation cases is itself insufficiently expansive

On appeal, Petitioners abandoned their bid for reformation. Instead, they staked their appeal to the Second Circuit on the proposition that the plan documents were ambiguous on their face—*not*, as they say now, clear on their face but capable of being shown through extrinsic evidence to have a meaning contrary to their plain language. Defs.'-Appellants' Br. at 26-38 (ECF No. 74, 2d Cir. Case No. 20-3225). As that was the theory of Petitioners' appeal, the Second Circuit understandably declined even to consider the extrinsic evidence because it rejected Petitioners' facial ambiguity premise. Pet. App. 32a-33a. And the Second Circuit certainly did not "acknowledge the likelihood" that Petitioners' extrinsic evidence would have changed the outcome, as Colgate wishfully suggests. Pet. 2. Rather, the Court of Appeals simply noted in generic terms that "[i]t may be true that Colgate's intent when adopting the [2005 Plan amendment] was different from the

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in its allowance of extrinsic evidence to salvage Petitioners' case, Petitioners suggest that a more liberal standard for allowing extrinsic evidence, borrowed from the Uniform Trust Code, should govern. *See* Pet. 19. But that standard reflects the ERISA law of no circuit. More broadly, Petitioners' entire premise that contract law should be eschewed in favor of trust law in construing ERISA defined-benefit pension plans is contrary to a recent precedent of this Court. *See Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020) (observing that "a defined-benefit plan is more in the nature of a contract" than a trust and drawing on principles of contract law).

actual effect of the text's unambiguous language, but that does not control our analysis." Pet App. 33a.[6]

In short, even if this Court were to conclude, contrary to our submission, that the Second Circuit's approach to extrinsic evidence conflicts with the Seventh Circuit's approach and were to adopt the latter approach, the outcome of this case still would not change. Petitioners quite simply cannot show ambiguity in the text of the 2005 amendment, or grounds for contradicting it, under any circuit's standard. This case is therefore the opposite of the "[i]deal [v]ehicle" Petitioners claim it is for resolving the parties' dispute over the meaning of the 2005 amendment. Pet. 24 (heading). Certiorari should be denied on the first question presented.

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[6] Nor, contrary to Petitioners' repeated assertions, did the Second Circuit characterize Petitioners' extrinsic evidence as "substantial." *See* Pet. 2, 18. When the Second Circuit used the word "substantial," it was quoting back Petitioners' own brief, not providing the court's independent characterization of that evidence. Pet. App. 33a. Nor did the Second Circuit suggest in any way that it believed Petitioners' extrinsic evidence was persuasive; on the contrary, it rejected Petitioners' claim that the amendment as written was "'illogical'" and instead found that the plain meaning made "perfectly good sense." Pet. App. 30a, 35a. Indeed, the Second Circuit noted that it would be difficult for Petitioners to make any persuasive case about Colgate's intent given that "the history of the Plan is one of flawed design and implementation," marked by a "cornucopia of missteps" by Colgate. *Id.* 37a-38a n.19.

II. There Is No Circuit Split Over Plan Interpretations Involving "Actuarial Assumptions," and Respondents Would Prevail Under Any of the Cases Petitioners Cite.

Petitioners' second ground for review rests on the claim that there is a circuit split over whether courts "should defer to plan administrator interpretations involving actuarial assumptions." Pet. 26 (heading). As we explain below, there is no such split. But, again, the result in this case would be the same under any of the cases Petitioners cite.

Petitioners' second issue does not concern whether class members' rights were violated in the first instance, but rather how to calculate the remedy for an already adjudicated violation. Both of the courts below concluded that Respondents, who had taken their retirement benefits as a lump sum, had been underpaid relative to the annuities they could have elected to take instead. *See* Pet. App. 34a-46a, 72a-74a, 83a-84a. Both courts therefore directed Petitioners to pay the difference between the value of Respondents' lump-sum payments (expressed as an annuity calculated with legally required interest rates) and the value of the annuity Respondents could have taken at retirement under the plan's applicable interest rate. *Id.*

Determining the value of the annuity Respondents could have taken at their retirement under the applicable plan interest rate should have been a simple task, because Colgate had already calculated the value of that very annuity at the time each individual left Colgate's employ. Pet. App. 46a. Indeed, in real time, Colgate gave each employee who

announced his or her decision to leave Colgate a written statement setting out the monthly annuity amount to help the employee choose between the lump sum or annuity options available under the plan. *Id.*; A542 (1994 written statement for Respondent Rebecca McCutcheon when her surname was Caufield).

Once in litigation, however, Petitioners claimed that they should be allowed to *recalculate* the annuities the retirees could have taken at the time they retired, even though they had retired long ago. Pet. App. 42a-46a, 72a-74a. And Petitioners claimed that they should perform this calculation using a different interest rate than they had always used because, Petitioners said, its Plan document contained no instructions on what interest rate was to be used in calculating retirement annuities. Pet. App. 43a-45a. The obvious point of this manipulation was for Petitioners to say that annuities were worth less than the retirees were told at the time of their departure from Colgate, which meant the Respondents had not been underpaid by as much as they claimed, which in turn dramatically reduced Petitioners' damages liability.

The Second Circuit properly rejected Petitioners' maneuvering, finding that the unambiguous text of the Plan required Petitioners to use the interest rate that they had in fact always used. Pet. App. 43a ("when calculating a member's PRA annuity, § 1.3 of the Plan requires Colgate to use the 20+1% projection rate"). The Court specifically rejected the argument Petitioners make here—that different interest rates should be used for different steps in the calculation—explaining that "under the *plain text* of the Plan,

§ 1.3's rate selection applies to the whole process of 'converting' a member's account into an age 65 annuity, without distinguishing between the steps of that conversion calculation." Pet. App. 44a (emphasis added).[7]

The Second Circuit then went on to confirm its conclusion with two other observations. One observation was that, in actual practice, Colgate had always used the rate dictated by § 1.3 of the Plan. Pet. App. 46a.[8] The other observation related to Internal Revenue Code § 401(a)(25), 26 U.S.C. § 401(a)(25).

ERISA requires that each retirement plan have a core form of retirement benefit—called the accrued benefit—that receives various protections and that is expressed in the form of an annuity. 26 U.S.C. § 411(a)(7)(A)(i) (the "'accrued benefit' [is] expressed in the form of an annual benefit commencing at normal retirement age"). Section 401(a)(25) requires that this accrued benefit be "definitely determinable," that is, that there be fixed inputs to the calculation, such that post hoc employer discretion in calculating

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[7] Petitioners misleadingly suggest that the Second Circuit relied on non-textual principles of "plan mechanics" to reach its conclusion, as if the court of appeals were relying on emanations from a penumbra. Pet. 34. But the Court's source for describing the mechanics of the Plan was the "plain text" of the Plan itself, as the passage quoted above in text demonstrates.

[8] In this litigation, Petitioners have taken the position that Colgate's unbroken past practice is irrelevant because it had never previously calculated Respondents' age 65 annuities *for the purpose* of comparing them to lump sums. Pet. 36 n.7-8. But the age 65 annuity value is the age 65 annuity value, regardless of the reason for calculating it.

the annuity is precluded. The point of I.R.C. § 401(a)(25) is to prevent employers from manipulating the value of the core, protected retirement benefit. *See* Pet. App. 45a.

In claiming that it should be permitted, for purposes of calculating damages, to select a new interest rate to calculate the annuities Respondents could have taken at retirement (i.e., their accrued benefit), Petitioners had to take the bizarre position that the plan did not tell Colgate what interest rate to use in calculating that annuity. Pet. 34. That would be an obvious violation of I.R.C. § 401(a)(25), which would have jeopardized the plan's ability to maintain its tax qualified status. In light of this, the Court of Appeals found that even on the assumption that the plan was ambiguous—which the Court of Appeals had already found that it was not—Petitioners' reading would not be reasonable under applicable canons of construction. Pet. App. 44a-46a.

The Court of Appeals made clear that it understood that I.R.C. § 401(a)(25)'s requirement that accrued benefits be "definitely determinable" cannot be enforced through a private cause of action, and that it does not create a private right of action for additional ERISA benefits. Pet. App. 45a n.22. However, the Court of Appeals explained that Respondents were not bringing any claim under § 401(a)(25); rather, the "definitely determinable" requirement was merely something that the Court of Appeals could "consider when evaluating Colgate's own interpretation" of the Plan. *Id.* It was eminently reasonable for the Court of Appeals to observe that Petitioners' interpretation was not just inconsistent with the plain text of the Plan, but also unpersuasive

for the separate reason that it would jeopardize the Plan's tax qualification. Given that "the tax consequences of not qualifying are so severe that practical considerations generally force employers to qualify their plans," *Crawford v. Roane*, 53 F.3d 750, 756-57 (6th Cir. 1995) (citation omitted), and given that Petitioners never denied that they intend to operate as a tax qualified plan, this consequence showed the arbitrary nature of Petitioners' proffered interpretation of the Plan.

Reading the Second Circuit's decision makes plain that the Second Circuit did not, as Petitioners would have it, create any general rule that plan terms containing actuarial assumptions are not entitled to deference—nor have Petitioners cited any court so holding. The Second Circuit simply found that Petitioners' argument was wrong based on the text of the Plan document, and, in dicta, that even if the Plan language were ambiguous, Petitioners' reading would be unreasonable.

For this reason, there is no conflict between the Ninth Circuit's decision in *McDaniel v. Chevron Corp.*, 203 F.3d 1099 (9th Cir. 2000) and the Tenth Circuit's decision in *Stamper v. Total Petroleum*, 188 F.3d 1233 (10th Cir. 1999), on the one hand, and the Second Circuit's decision here, on the other. *McDaniel* holds only that the fact that a plan contains an ambiguous actuarial term does not by itself violate ERISA's requirements for accrued benefits. 203 F.3d at 1117-18. In other words, participants in an ERISA plan cannot bring a claim for benefits simply by pointing to an ambiguous term that may not have complied with the requirement in I.R.C. § 401(a)(25) that accrued benefits be "definitely determinable." *Id. Stamper* and

the other cases Petitioners cite make the same point: there is no private right of action to enforce a violation of the "definitely determinable" requirement of I.R.C. § 401(a)(25), and a violation of that section is not the basis for a claim for benefits under ERISA. *See Stamper*, 188 F.3d at 1239 ("the provisions of 26 U.S.C. § 401(a) and the regulations promulgated under them cannot form the basis of an ERISA action"). As already explained, the Second Circuit did not reject this principle—on the contrary, the Second Circuit acknowledged it.

McDaniel and *Stamper* did *not* hold, however, that a court cannot consider whether a plan administrator's reading would throw the plan into violation of § 401(a)(25) in the course of determining whether the plan administrator's reading was unreasonable or arbitrary. Petitioners have cited no case with any such holding.[9] Indeed, it is a common principle that a court should not interpret documents so as to "render them illegal … where the wording lends itself to a logically acceptable construction that

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[9] The fact that Petitioners have not identified any actual circuit split is driven home by the fact that the Seventh Circuit would be on both sides of the circuit split as Petitioners try to frame it. The Seventh Circuit, like other circuits, holds that I.R.C. § 401(a)(25) does not create a private right of action for ERISA benefits. *Reklau v. Merchs. Nat'l Corp.*, 808 F.2d 628, 631 (7th Cir. 1986). However, the Seventh Circuit also holds that a court weighing the appropriate remedy for a violation of an ERISA plan may consider whether the plan administrator's proposed remedy would have the illogical effect of jeopardizing a plan's tax-qualification status. *Thompson v. Ret. Plan for Emps. of S.C. Johnson & Son, Inc.*, 651 F.3d 600, 609-10 & n.15 (7th Cir. 2011).

renders them legal." *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977); *see also Frommert v. Conkright*, 738 F.3d 522, 531 (2d Cir. 2013). In short, there is no conflict between the circuits on this issue.

Nor is there any conflict between the Second Circuit's decision and this Court's decision in *Conkright v. Frommert*, 559 U.S. 506 (2010). In *Conkright*, the lower courts had attempted to determine benefits for class members where the plan administrator's initial approach had been deemed an unreasonable interpretation of ambiguous plan language. This Court rejected a "one-strike-and-you're-out" approach to deference, holding that deference to the plan administrator's reading of ambiguous language was appropriate even if the plan administrator had previously erred. *Id.* at 513. Here, unlike in *Conkright*, both the District Court and the Court of Appeals found that the *un*ambiguous Plan language (supported by Colgate's unbroken past practice) dictated the use of a certain interest rate. The District Court and the Court of Appeals therefore did not defer to Petitioners' reading of the plan. However, the District Court and the Second Circuit certainly did not adopt any rule that deference was *never* appropriate when actuarial assumptions were involved, but simply that deference was not appropriate given the clarity of the particular Plan language here. Earlier in their submission, Petitioners themselves acknowledged that "if fiduciaries or administrators of an ERISA plan controvert the plain meaning of a plan, their actions are arbitrary and capricious." Pet. 20 (internal

quotation marks and citation omitted). That is, in substance, what the lower courts found here.

The truth is that Petitioners are trying to change a calculation Colgate made decades ago, in violation of Colgate's own unambiguous Plan documents, and at risk of jeopardizing the plan's tax qualification status, all in order to minimize Colgate's liability for its adjudicated violations of ERISA. Petitioners have identified no case blessing a remotely similar *post hoc* action by a plan administrator, because no such case exists.

* * *

We step back to observe that, as to both of the questions on which Petitioners seek review, the Second Circuit and the District Court delved deeply into the lengthy and reticulated Plan documents and amendments here and issued thorough and thoughtful opinions concerning both Colgate's 1994 Plan document and its 2005 amendment. The lower courts thus acquitted their responsibility to resolve the parties' fact-specific dispute in an exemplary manner, making it unnecessary for this Court to render a third opinion. That is especially so because the opinions below make clear that Petitioners' latest legal arguments would not change the outcome in any event. Nor is there any reason to doubt the correctness of those careful opinions as to this specific dispute between these parties.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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