No. 22-1210

IN THE
Supreme Court of the United States

COLGATE-PALMOLIVE COMPANY, *ET AL.*,
Petitioners,

v.

REBECCA MCCUTCHEON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *ET AL.*,
Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondents' Opposition underscores circuit splits with respect to two issues of ERISA plan interpretation: (1) consideration of extrinsic evidence; and (2) application of *Firestone* deference to plans involving actuarial assumptions. This Court should intervene to provide clarity on these important and recurring issues, and thereby ensure that courts accord appropriate deference to plan administrators.

ARGUMENT

I. The Second Circuit's Refusal to Consider Extrinsic Evidence Warrants Review.

Respondents oppose certiorari on the first point on two grounds. First, Respondents deny the existence of a circuit split on when courts may consider extrinsic evidence, but do so by relying on inapposite, non-ERISA case law. Second, Respondents contend the circuit split makes no difference to the result, despite the Second Circuit's stated belief that it "ha[d] no choice" under its precedent but to ignore "the extrinsic evidence of purpose". Pet.App. 38a. Respondents' attempts to avoid this Court's review are unavailing.

A. There Is a Conflict in the Circuits Regarding Consideration of Extrinsic Evidence in ERISA Plan Interpretation.

Respondents attempt to obscure the circuit split by invoking non-ERISA cases to support their argument that the Second and Seventh Circuits approach extrinsic evidence in lockstep. They do not.

The Seventh Circuit (among others) recognizes the doctrine of extrinsic ambiguity in ERISA cases, permitting consideration of objective evidence to show that an ERISA plan's plain language is susceptible of more than one meaning. *See Mathews v. Sears Pension Plan*, 144 F.3d 461 (7th Cir. 1998). The Second Circuit (among others) rejects that doctrine. Indeed, in ERISA cases, these circuits recognize no exception to the "four corners" rule.

In denying the existence of a circuit split, Respondents make a critical concession: the rule of law articulated by the Seventh Circuit in *Mathews*, on which Petitioners rely, is correct. *See* Opp. 6, 8. Accordingly, the question is whether the Second Circuit follows the *Mathews* rule.

Contrary to Respondents' Opposition, the Second Circuit precludes consideration of objective evidence in ERISA cases. The court below relied on *Feifer v. Prudential Insurance Co. of America*, 306 F.3d 1202, 1210 (2d Cir. 2002), which (as quoted in the decision below) holds: "It is axiomatic that where the language of a [plan] is unambiguous, the parties' intent is determined within the four corners of the contract, without reference to external evidence." Pet.App. 33a. The court below also relied on *Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*, 497 F.3d 234, 244 n.6 (2d Cir. 2007), which holds that whether ERISA plan language "is ambiguous is a question of law that is resolved *by reference to the contract alone*". Pet.App. 33a (emphasis added in decision below). Accordingly, the court below declared, "we will not invoke extrinsic evidence of a Plan's purpose to inject ambiguity into otherwise unambiguous language." *Id.* The court

below clearly stated a categorical prohibition against extrinsic evidence in ERISA plan interpretation.

Respondents' invocation of *Kerin v. U.S. Postal Serv.*, 116 F.3d 988 (2d Cir. 1997), Opp. 6-7, does not change this. Crucially, *Kerin* is ***not an ERISA case***. The issue in *Kerin* was "which of the parties was responsible for maintaining the sewerage system and the parking lot at the postal facility" in connection with a building the plaintiff had leased to the Postal Service. 116 F.3d at 989. Respondents' decision to use this irrelevant case as the core of their argument underscores their position's weakness.

ERISA plan interpretation is different from conventional contract interpretation. Respondents do not—and cannot—assert otherwise. The precedent on which the decision below relied concludes that the ERISA statute itself precludes consideration of extrinsic evidence—without exception: "29 U.S.C. § 1102(a)(1), which contains ERISA's written instrument requirement, essentially operates as a strong integration clause, statutorily inserted in every plan document." *Feifer*, 306 F.3d at 1210 (internal quotation marks and citation omitted). There is no such provision under "'federal common law' contract-interpretation principles". Opp. 7 (quoting *Kerin*, 116 F.3d at 991). Tellingly, Respondents ignore this statutory distinction.[1] While ERISA plan administrators should have leeway to consider extrinsic evidence in plan interpretation—drawing on

[1] The same applies to the Sixth Circuit. There, too, the case on which Respondents rely, *Watkins v. Honeywell, Int'l Inc.,* 875 F.3d 321, 328 (6th Cir. 2017) (Opp. 8 n.2), is inapposite because it is not an ERISA case.

trust law principles, *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)—the Second Circuit (and others) misuse ERISA's written instrument requirement to apply an even more restrictive approach than in federal common-law contract cases.

The circuit split warrants this Court's intervention. The decision below, if not reversed, permits courts to avoid deference to plan administrators by refusing to consider extrinsic evidence even when it would demonstrate a latent ambiguity. This legal rule creates a gaping exception that undermines this Court's decisions applying the arbitrary and capricious standard of review where "the benefit plan gives the administrator or fiduciary discretionary authority ... to construe the terms of the plan". *Firestone*, 489 U.S. at 115; *see* Pet. 15-17.

B. Under the Proper Standard, Colgate Would Prevail.

Colgate presented compelling extrinsic evidence of a latent ambiguity in the Employees' Retirement Income Plan (the "Plan"), under which the Plan administrator reasonably construed Plan terms contrary to what the Second Circuit believed was the plain language. But this Court need not take Colgate's word for it: the Second Circuit acknowledged below that consideration of this evidence likely would have changed the outcome.

1. The Second Circuit made clear that its decision depended on rejecting Colgate's extrinsic evidence. First, when setting forth the "four corners" rule, the court stated: "It may be true that Colgate's

intent when adopting the RAA was different from the actual effect of the text's unambiguous language, but that does not control our analysis." Pet.App. 33a. The court refused to consider Colgate's evidence, which it believed would "put the extrinsic evidence cart before the textual horse", *id.*, because Colgate drew the Plan purpose from extrinsic evidence, not "from the text of the Plan", *id.* 32a. Second, the court acknowledged that its decision "may have some peculiar, though not inexplicable, effects". *Id.* 38a. The court stated, however, that as "we read our case law", "we have no choice but to adopt what we see as the unambiguous reading". *Id.*

Thus, the Second Circuit plainly believed the result was compelled by the circuit split raised in point 1 of the Petition, despite the "peculiar" result contrary to Colgate's intent. Pet.App. 33a, 38a. Respondents contend that the Second Circuit "noted in generic terms" that Colgate's intent may have been different from the Plan's unambiguous language. Opp. 12-13. But calling language "generic" does not make it so. The court below expressly declined to consider "substantial extrinsic evidence demonstrating that the purpose of the RAA was to ensure that Grandfathered Participants received the full value of their 'old' Grandfathered Formula benefit even if they elected to receive their benefit under the 'new' PRA formula as a lump sum". Pet.App. 33a (quoting Colgate Br. 39, where Colgate laid out the extrinsic evidence in detail).

2. Colgate's evidence is compelling. Respondents attempt to undermine this evidence by asserting that it is self-serving and unreliable. Opp. 9-10. But these criticisms are meritless.

Colgate's evidence includes presentations from 2004—not drafted by Colgate, but rather delivered to the Committee by its outside consultant, Mellon. Pet. 24 (citing A969). Colgate's evidence also includes minutes of the 2004 Committee meeting, when the Plan amendment at issue (the RAA) was first proposed—years before this litigation or its predecessor action was filed. *Id.* 24-25 (citing A999-1000). This evidence is both contemporaneous and objective.

Moreover, the evidence gives meaning to a latent ambiguity in the Plan text. For example, the term "otherwise payable" does *not* unambiguously refer to "the larger of [a participant's] grandfathered annuity or her PRA annuity", as the Second Circuit found based on its reading of "[t]he clear text of the Plan, without more". Pet.App. 27a. Rather, the evidence demonstrates that it was reasonable for the Plan administrator to conclude that "otherwise payable" referred to the grandfathered benefit alone. *See* A969 ("the incremental value of the grandfather benefit"); A999-1000 (RAA would "make the total benefit equivalent to the grandfathered formula benefit"). The evidence shows that the Plan language is extrinsically ambiguous and means what Colgate says it means.

3. Respondents also construct a strained inferential argument that conflates contract reformation and extrinsic ambiguity. Colgate asserted a reformation defense in the District Court, in the alternative to its Plan interpretation argument. Pet.App. 75a-78a. Respondents argue that (i) because a Seventh Circuit case involving reformation also discussed *Mathews*, the standard for reformation is

the same as for extrinsic ambiguity and (ii) because Colgate did not appeal the District Court's decision denying reformation, Colgate necessarily loses its argument here. Opp. 10-13. Respondents' argument is untenable and finds no support in *Young v. Verizon's Bell Atl. Cash Balance Plan*, 615 F.3d 808 (7th Cir. 2010).

Respondents' analogy is incorrect for two primary reasons. First, this case is about extrinsic ambiguity, not (as in *Young*) a scrivener's error. 615 F.3d at 817-18. Colgate does not contend that the words "otherwise payable" were a scrivener's error, and evidence that may fail to show a scrivener's error may still show an extrinsic ambiguity. Second, a reformation defense requires "clear and convincing evidence", Pet.App. 77a; *Young*, 615 F.3d at 819, a standard of proof inapplicable to Plan interpretation. Thus, the District Court's decision not to order reformation has no bearing on whether the Second Circuit was required as a matter of law to consider extrinsic evidence that demonstrates a latent ambiguity in Plan language.

II. Review Is Warranted to Determine Whether *Firestone* Deference Applies to Plan Terms Involving Actuarial Assumptions.

The Second Circuit decided a second issue that warrants review: it refused to defer to a plan administrator's interpretation of ambiguous plan terms that involve actuarial assumptions because a provision of the Internal Revenue Code (omitted from ERISA) requires, as a condition for tax qualification, that a participant's accrued benefit be "definitely

determinable". Pet.App. 44a-45a (quoting I.R.C. § 401(a)(25)). This decision widens a circuit split and conflicts with *Conkright v. Frommert*, 559 U.S. 506 (2010).

The departure from *Conkright* highlights this issue's significance. In *Conkright*, as in this case, the lower court held that the plan administrator's initial interpretation was incorrect, and the plan administrator responded by adopting a new interpretation involving an actuarial assumption. 559 U.S. at 510-11. If *Firestone* deference does not apply to interpretations involving actuarial assumptions, then no deference was due in *Conkright*. Yet this Court held that the plan administrator's reasonable interpretation *was* entitled to deference. *Id.* at 522.

Conkright parallels this case in other respects. Respondents argue that the disputed 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". Opp. 14. They also criticize Petitioners for seeking, "[o]nce in litigation", to "recalculate the annuities that retirees could have taken at the time they retired". *Id.* 15. The Court rejected the same arguments in granting review and reversing in *Conkright*.

Respondents try to distinguish *Conkright* on the ground that the plan language in that case was ambiguous. Opp. 20. But the Second Circuit held that it would not defer to the plan administrator's interpretation even if the plan language were ambiguous. Pet.App. 44a. And as explained in the Petition (Pet. 34-37) and below (*infra* p. 12), the

Second Circuit's decision does not rest solely on the Plan's plain text.

A. The Circuits Are Split on an Important Question of *Firestone* Deference.

The circuits are divided over whether *Firestone* deference extends to a plan administrator's interpretation of plan terms involving actuarial assumptions. Respondents' attempt to deny that split (Opp. 18-20) fails.

In *McDaniel v. Chevron Corp.*, 203 F.3d 1099 (2000), the Ninth Circuit held that a plan administrator's interpretation is entitled to *Firestone* deference even when it involves actuarial assumptions. There, the plaintiffs argued that recognizing ambiguity that permits *Firestone* deference would violate the Internal Revenue Code's requirement that the plan's assumptions be "definitely determinable" for purposes of tax qualification. *Id.* at 1114-20. The court rejected that argument, noting that the "definitely determinable" requirement is not part of ERISA. *Id.* at 1117. The Second Circuit reached a conflicting result, holding that it would not defer to the plan administrator because doing so "would render the Plan unlawful because I.R.C. § 401(a)(25) requires that a participant's accrued benefit be 'definitely determinable'". Pet.App. 45a. That ruling squarely conflicts with *McDaniel*.

Respondents incorrectly suggest that *McDaniel* held only that "there is no private right of action to enforce a violation of the 'definitely determinable' requirement." Opp. 18-19. *McDaniel* clearly went

further, by deferring to the plan administrator's interpretation involving actuarial assumptions. Respondents also argue that *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". *Id.* 18. Once again, *McDaniel* went further: it deferred to the plan administrator's interpretation. That conflicts with the Second Circuit's determination that it "would not defer" to a plan administrator's interpretation of ambiguous terms involving actuarial assumptions. Pet.App. 44a.[2]

Respondents do not dispute that other courts of appeals have deferred to plan administrator interpretations involving actuarial assumptions. *See* Pet. 29-30 (citing cases).[3] As the Tenth Circuit explained, "it would be improper to read into ERISA a requirement Congress elected to apply only to the Tax Code". *Stamper v. Total Petroleum, Inc. Ret. Plan*, 188 F.3d 1233, 1239 (10th Cir. 1999). Accordingly, whether the Tax Code's "definitely determinable" standard is satisfied is a matter of tax qualification, not ERISA compliance. The Tax Code's qualification

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[2] Respondents assert in passing that the Second Circuit's refusal to defer was "dicta." Opp. 8. But the opinion states that it "would not defer" and makes clear that its determination does not depend on whether the plan language is ambiguous. Pet.App. 44a; *see also* Pet.App. 46a (affirming "[f]or these reasons").

[3] Respondents contend (Opp. 19 n.9) that the Seventh Circuit is "on both sides" of the split. In *Reklau v. Merchants National Corp.*, 808 F.2d 628 (7th Cir. 1986), however, the court simply recognized the general principle that the Tax Code's qualification provisions do not apply to ERISA. It did not address 401(a)(25) or its effect on *Firestone* deference.

requirements do not change ERISA's standard of review. At most, whether a plan administrator's interpretation could reasonably be expected to jeopardize a pension plan's qualified status would be a factor in evaluating an interpretation's reasonableness. *Cf. Metlife v. Glenn*, 554 U.S. 105, 115-17 (2008) (holding that *Firestone*'s deferential standard continues to apply when a trustee is conflicted, but the conflict can be considered in determining whether the trustee abused its discretion). Such jeopardy would be highly unusual, however, because the Tax Code sets forth a process by which the IRS may approve plans and the plan administrator may rely on the IRS's approval. *See, e.g.,* Rev. Proc. 2023-4.

The Second Circuit's decision widens a circuit split on an important issue, given that actuarial assumptions permeate pension calculations. The Second Circuit's approach creates a sweeping exception to *Firestone* deference, undermining the predictability of ERISA plan interpretations and risking differing judicial interpretation of the same plan. *See* Pet 32-33.

B. This Case Is an Excellent Vehicle to Resolve the Split.

Respondents' primary argument for denying review is that the Plan's plain text resolves the interpretive issue. Opp. 15-16. In reality, however, the Second Circuit's decision is not grounded solely in the Plan's plain text. The interpretive issue concerns the interest rate used to project the PRA balance to age 65. *See* Pet. 33-35. Colgate proffered an interpretation that uses the Plan's interest crediting rate (set forth

in the Plan) to make this projection. In rejecting Colgate's interpretation, the court looked to "plan mechanics" to "reveal[] … the appropriate rate." Pet.App 42a. Relying on "plan mechanics" (*i.e.*, the court's understanding of how the plan operates) is not equivalent to relying on unambiguous plan language. Respondents assert, however, that it is "misleading[]" to read anything into the court's own words, because the court also said 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". Opp. 15-16 & n.7 (quoting Pet.App. 44a). But the court's own explanation reveals that the relevant Plan language is not free from ambiguity, and therefore the court was *not* relying solely on plain text. As the Petition explains, *converting* a participant's cash balance into an annuity and *projecting* that balance forward to age 65 are distinct operations. Pet. 34. Indeed, "projection" and "conversion" are terms of art with different meanings. *Id.* 35 n.6. In concluding that "converting" includes "projecting", the Second Circuit thus went beyond the Plan text's plain meaning and relied on its own non-expert (and incorrect) understanding that "converting" must include "projecting", without deferring to the plan administrator's contrary view.

Respondents also argue that review should be denied because Colgate calculated the value of each participant's annuity when they departed from Colgate and should not be allowed to change that recalculation. Opp. 14-15. But the court's decision required Colgate to make a *new* calculation that it had never made (a projection of the two forms of the "new"

PRA benefit), and that calculation created a substantial liability for the Plan from the use of inconsistent interest rates. Contrary to Respondents' suggestion (Opp. 15), Colgate's proffered interpretation would not claw back benefits or pay participants "less than [they] were told" they would receive. To the contrary, it would simply reduce the enormous windfall participants will otherwise receive from projecting balances forward using one interest rate and discounting them backward using another.

In sum, this case squarely presents the issue on which the circuits are split and provides an excellent vehicle to resolve the split.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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