No. _____

In the Supreme Court of the United States

JOHN E. DOWLING,

Petitioner,

v.

PENSION PLAN FOR SALARIED EMPLOYEES OF UNION PACIFIC CORPORATION AND AFFILIATES, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et seq. is a comprehensive federal statute designed to "promote the interests of employees and their beneficiaries in employee benefit plans…and to protect contractually defined benefits." *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). ERISA establishes an unwavering fundamental rule that plan terms must be set forth in writing and plan administrators must act in accordance with the terms of the plan as written. In some cases, as here, the terms of the plan grant discretionary authority to the plan administrator to interpret the plan provisions. Courts must review such discretionary actions under a under a deferential abuse of discretion standard. *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 115. However, the plan terms remain the center of any ERISA analysis.

The question presented is:

Whether, in administering an ERISA-governed pension plan, a plan administrator with discretionary interpretive authority may ignore a general rule that is expressly stated in the plan – and capable of being applied to the circumstances as written – and substitute a different rule, thereby creating an exception to the general rule that does not otherwise exist in the plan itself.

PARTIES TO THE PROCEEDING

All parties to the proceedings below are parties before this Court.

Petitioner, John E. Dowling, was the Plaintiff in the District Court proceedings and the Appellant in the Court of Appeals.

Respondents are Pension Plan for Salaried Employees of Union Pacific Corporation and Affiliates; Roy Schroer, Named Fiduciary-Plan Administration of Pension Plan for Salaried Employees of Union Pacific Corporation and Affiliates; Edwin A. Willis, Delegate of the Named Fiduciary-Plan Administration of the Pension Plan for Salaried Employees of Union Pacific Corporation and Affiliates; Supplemental Pension Plan for Officers and Managers of Union Pacific Corporation and Affiliates; Roy Schroer, Administrator of the Supplemental Pension Plan for Officers and Managers of Union Pacific Corporation and Affiliates; Edwin A. Willis, Delegate of the Administrator of the Supplemental Pension Plan for Officers and Managers of Union Pacific Corporation and Affiliates; and Union Pacific Corporation. Respondents were the Defendants in the District Court proceedings and the Appellees in the Court of Appeals.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Petitioner, John E. Dowling (Dowling), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 15, 2017.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (App. 1-37) is reported at 871 F.3d 239 (2017). The opinion of the United States District Court for the Eastern District of Pennsylvania (App. 38-50) is reported at 173 F.Supp.3d 88.

JURISDICTION

The Third Circuit entered judgment on September 15, 2017 and denied rehearing on October 19, 2017. App. 51. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §1102(a)(1)

(a) Named fiduciaries

> **(1)** Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

29 U.S.C. §1102(b)(4)

(b) Requisite features of plan

Every employee benefit plan shall—

. . .

(4) specify the basis on which payments are made to and from the plan.

29 U.S.C. §1104(a)(1)(D)

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and–

. . .

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III.

STATEMENT OF THE CASE

This is a dispute regarding the calculation of Dowling's pension benefit under a pension plan sponsored by his former employer, Union Pacific Corporation (Union Pacific). Federal jurisdiction in the district court was grounded in 28 U.S.C. § 1331 in that the action arose under the laws of the United States, specifically the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 et seq.

I. Legal Background

Simply stated, an ERISA-governed pension plan is a contract governed by the terms set forth in written plan documents. *CIGNA Corp. v. Amara*, 563 U.S. 421

(2011). This Court has long recognized that ERISA's principal function is to "protect contractually defined benefits." *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100, 133 S. Ct. 1537, 185 L. Ed. 2d 654 (2013) (citation omitted). To accomplish this purpose, ERISA requires that "[e]very employee benefit plan be established and maintained pursuant to a written instrument," 29 U.S.C. §1102(a)(1), "specify[ing] the basis on which payments are made to and from the plan," 29 U.S.C. §1102(b)(4). *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, et al.*, 555 U.S. 285, 300 (2009).

A plan administrator has an absolute duty to act "in accordance with the documents and instruments governing the plan," insofar as those documents are consistent with the statute. 29 U.S.C. §1104(a)(1)(D). This Court has recognized that there *is no exemption* from the duty to administer the plan *in accordance with its written terms*. *Kennedy,* 555 U.S. at 300. To the contrary, ERISA's enforcement provisions reinforce this directive by providing a mechanism for recovering benefits, enforcing rights and clarifying rights "*under the terms of the plan*." 29 U.S.C. §1132(a)(1)(B). *Id.*

This Court has repeatedly noted that ERISA "is built around reliance on the face of written plan documents." *US Airways, Inc. v. McCutchen*, 569 U.S. at 100, *quoting Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995). The requirement of a written plan is so that "every employee may, *on examining the plan documents,* determine exactly what his rights and obligations are under the plan." *Curtiss-Wright*, 514 U.S. at 83, *quoting* H.R. Rep. No. 93-1280, p. 297(1974)

U.S. Code Cong. & Admin. News pp. 4639, 5077, 5078 (emphasis added by the Court). In short, a participant's claim to benefits under an ERISA plan – and a Plan administrator's determination of that claim – "stands or falls by the terms of the plan." *Kennedy*, 555 U.S. at 300.

ERISA's concern is with the administration and enforcement of benefit plans as written and not with the precise design of the plans themselves. *See, Heimeshoff v. Hartford Life & Acc. Ins. Co.*, __U.S.__, 134 S. Ct. 604, 611-612 (2013); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003); *see also*, *DeWitt v. Penn-Del Directory Corp.*, 106 F.3d 514 (3d Cir. 1997). ERISA does not address the specifics of plan design; that is left to the plan sponsor. ERISA, rather, follows standard trust law principles in dictating that whatever terms a company chooses, it is bound by those terms. *Curtiss-Wright*, 514 U.S. at 85.

Thus, ERISA relies on "a straightforward rule of hewing to the directives of the plan documents…" *Kennedy*, 555 U.S. at 300. "The plan, in short, is at the center of ERISA." *US Airway v. McCutchen,* 569 U.S. at 100-101.

Here, the plan administrator's calculation of Dowling's pension benefit – specifically the calculation of his Final Average Compensation from a date other than that expressly specified in the Plan – flies in the face of the most fundamental principles underlying ERISA and directly conflicts this Court's longstanding jurisprudence recognizing the primacy of the terms of the plan as written. The Third Circuit's affirmance of this calculation (by a 2-1 panel decision) does the same.

II. Factual and Procedural History

A. Factual Background

Dowling began working for Union Pacific in 1988, eventually serving as Vice President of Corporate Development. Unfortunately, his life changed drastically in July of 1995 when he was diagnosed with multiple sclerosis and became permanently disabled. On February 1, 1997, Dowling began receiving long-term disability benefits which were available for the duration of his disability or until age 65, whichever came first. Thereafter, Dowling remained permanently disabled and never returned to work. App. 4; *A33*[1].

Dowling turned 65 in 2012, at which time his long-term disability benefits stopped, and he began receiving his retirement benefits under the Union Pacific pension plan (the Plan).[2] Based on the calculations of Union Pacific's plan administrator (sometimes referred to herein simply as "Union Pacific"), Dowling receives a gross pension benefit of approximately $84,000 per year. App. 4-5; *A38 & A48*. However, Dowling asserts that under the plain and unambiguous language of the Plan he should be receiving a much higher pension benefit of approximately $140,000 to $150,000 per year.

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[1] "A" citations refer to pages in the record before the Third Circuit.

[2] The Plan grants its administrator discretion in interpreting the terms of the Plan.

B. Plan Provisions

The Plan as a whole is a dense document consisting of twenty Articles addressing various components. Fortunately, only a few of these Articles are pertinent here. First, Article V of the Plan establishes the basic pension benefit formula as a percentage of the participant's "Final Average Compensation" multiplied by his years of "Credited Service". *A160, Section 5.01(a).*

Article II defines the "Final Average Compensation" component of the pension formula as the participant's average monthly compensation for the 36 consecutive calendar months of highest compensation during the 10-year period "immediately preceding . . . the last date on which he is a Covered Employee." App. 6; *A144, Section 2.35*. This is the only definition of Final Average Compensation found anywhere in the Plan and it applies to all Participants.

Article II also sets forth definitions of additional key terms used throughout the Plan, including the following terms establishing the effect that total disability has on a participant's status under the Plan. Under these definitions,

- a Participant has a Total Disability as of the date he begins receiving long-term disability benefits. *A153, Section 2.71*. This becomes his Disability Date, which renders him a Disabled Participant (defined as a Participant who has a Disability Date). *A142, Sections 2.25, 2.26; see also A36-37.*

- a Participant's Total Disability also causes a Separation from Service (defined as "death,

retirement, resignation, discharge, Total Disability or any absence that causes him to cease to be an Employee…") *A152, Section 2.67.*

- Due to the Separation from Service caused by Total Disability, a Disabled Participant ceases to be a Covered Employee as of his Disability Date. *A140 & A152, Sections 2.21 and 2.67; see also, A51, A53 and A110.*

Article IV governs the "Credited Service" component of the pension formula and provides as a general rule that Credited Service accrues only while a Participant is a Covered Employee. App. 6; *A144, Section 402(a).* However, an express exception to this general rule is provided for Disabled Participants. Instead of stopping the accumulation of Credited Service as of his Disability Date (when he ceases to be a Covered Employee) as would be required by the general rule, the Plan allows a Disabled Participant to continue accruing years of Credited Service during his disability as if he remained a Covered Employee during this time period and until he "ceases to be a Disabled Participant." App. 7; *A157, Section 4.02(c)(2).*

Article VI specifically cross references Section 4.02(c)(2) requiring the continued accrual of Credited Service while a Disabled Participant and establishes that a Disabled Participant ceases to be such when, *inter alia*, he elects to begin receiving his pension benefits. App. 7; *A178.*

Article VI also governs the general availability of pension benefits based on when a participant has a Separation from Service and when he elects to begin receiving his pension. A participant's pension benefit

is typically calculated as of the date of his Separation from Service. Sec. 6.01, 6.02 and 6.04. *A173-A176.* However, a special rule is established for Disabled Participants, who by definition have had a Separation from Service at the time of their Total Disability, but have continued to accrue Credited Service thereafter. Section 6.05 provides that "When a Disabled Participant ceases to be such, he shall cease to be credited with years of…Credited Service, and he shall be entitled to a pension under the other provisions of this Article [VI]…applied as if his Separation from Service occurred on the date he ceased to be a Disabled Participant…" App. 7; *A178.*

C. Application of Plan terms to Dowling

1. Dowling's status under the Plan

All parties agree that the series of events relating to Dowling's disability resulted in the following consequences under the Plan:

(1) Dowling assumed a status of Total Disability on February 1, 1997, and, because of his Total Disability, incurred a Separation from Service on that date. *A36-37; A51, A53 & A110.*

(2) Dowling also ceased being a Covered Employee on February 1, 1997 due to his Separation from Service on that date. *A51, A53 & A110.*

(3) Because Dowling never again returned to work, February 1, 1997 was the last date on which Dowling was a Covered Employee. *A51, A53 & A110.*

(4) Dowling's Disability Date was February 1, 1997 and he became a Disabled Participant as of that date. He continued his status as a Disabled Participant for the entire time between February 1, 1997 and 2012, when he ceased being a Disabled Participant due to his retirement. *A36-37.*

2. Calculation of Dowling's pension benefits under the Plan

In calculating Dowling's pension benefit, Union Pacific correctly credited Dowling with 15.6 years of Credited Service for the time he was a Disabled Participant between 1997 and his retirement in 2012 which, combined with his Credited Service accrued while working, resulted in a total of 24 years of Credited Service at the time of his retirement. The dispute centers on the other key component of Dowling's pension benefit, *i.e.*, the computation of Dowling's Final Average Compensation, specifically the date from which this computation was made.

There is absolutely no dispute that the last date on which Dowling was a Covered Employee was February 1, 1997, the date he had a Separation from Service due to his Total Disability. *A51, A53 & A110.* Yet rather than calculating Dowling's Final Average Compensation based on his earnings during the 10-year period immediately preceding February 1, 1997 – the last date on which Dowling was a *Covered Employee* – Union Pacific's plan administrator made this calculation based on the 10-year period immediately preceding Dowling's *retirement date* in 2012. In doing so, the plan administrator operated as

if Dowling had worked and been paid his final base salary— $208,000 per year—up until his retirement in 2012, even though Dowling had not in reality worked or been paid any salary at all during that period. App. 4-5

Dowling disputes the plan administrator's calculation and asserts that, by the Plan's plain and unambiguous terms, his Final Average Compensation must be calculated based on his earnings during the 10-year period immediately preceding February 1, 1997 – when he had a permanent Separation from Service and ceased being a Covered Employee – and not on a hypothetical income stream for the ten years prior to his 2012 retirement date. This would result in Union Pacific owing Dowling a much higher pension benefit because during that earlier period Dowling received significant performance bonuses on top of his base salary. App. 5; *A476 & A488-A493; A482*.

D. Procedural History

Dowling filed a claim via the Plan's administrative procedures asking for a benefit increase. In lengthy written responses, the plan administrator specifically acknowledged that Dowling had, in fact, ceased to be a Covered Employee in 1997 when he suffered a Total Disability, which would typically require that his Final Average Compensation be calculated based on the 10 years prior to that date. *A51, A53 & A110.* However, the plan administrator denied Dowling's claim, stating that other provisions of the Plan created "special rules" for the calculation of a Disabled Participant's Final Average Compensation.

These other provisions relied on by Union Pacific were Section 2.18(a)(3)(C), App. 8 and *A139* (defining the various components included in "Compensation" and providing that an employee who is credited with service during a period of absence is deemed to have received Compensation at his base pay rate during such period); Section 4.02(c)(2), App. 7 and *A157* (requiring the crediting of Credited Service to a Disabled Participant during his disability); and Section 6.05, App. 7 & *A178* (providing for the calculation of a Disabled Participant's pension benefit[3] as of the date he ceases to be a Disabled Participant, rather than at the time he had a Separation of Service).

Although none of these other provisions in any way reference Final Average Compensation, the plan administrator nevertheless asserted that Dowling was deemed to have received his base salary during the time he was a Disabled Participant and that therefore his Final Average Compensation must be computed using the 10-year period prior to his retirement, rather than the 10-year period prior to the time he ceased being a Covered Employee.

After exhausting his administrative remedies, Dowling filed suit against Union Pacific, the Plan and its administrators in the Eastern District of Pennsylvania seeking a declaratory judgment and an

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[3] Pension benefit is not synonymous with Final Average Compensation, which is only one component of the pension benefit.

award of additional pension benefits under the Plan, pursuant to ERISA, 29 U.S.C. § 1132(a)(1)(B).[4]

1. Proceedings in the District Court

After limited discovery, the parties filed cross motions for summary judgment in the District Court. Neither party asserted that the Plan terms governing the calculation of Dowling's pension benefit were in any way ambiguous. Just the opposite, the parties agreed that the Plan terms are clear and unambiguous.[5] They disagreed, however, as to whether Union Pacific's calculation of Dowling's pension benefit, specifically his Final Average Compensation, was consistent with the clear and unambiguous terms of the Plan.

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[4] Dowling also sought an award of benefits under the Supplemental Pension Plan for Officers and Managers of Union Pacific Corporation and Affiliates, a separate unfunded plan providing deferred compensation to certain Union Pacific managers, officers and highly compensated employees. The supplemental plan provides benefits representing that portion of the benefits that would otherwise have been payable to the participant under the pension plan but for certain annual compensation and maximum benefit limits imposed by the Internal Revenue Code. Dowling's claim for benefits under the Supplemental Pension Plan turns entirely on whether he is successful in his claim for additional benefits under the Pension Plan. Therefore, we focus our arguments on the claim for increased benefits under the Pension Plan because they are determinative of the claim for benefits under the Supplemental Pension Plan as well.

[5] The parties did present arguments in the alternative addressing the issues in the event the court found the language ambiguous. Neither party, however, advocated this position.

Dowling argued that the plan administrator's calculation of his Final Average Compensation was directly contrary to the plain language of the Plan, which unambiguously defines Final Average Compensation using the 10-year period preceding the last date on which he was a Covered Employee. Union Pacific readily acknowledged that the last date on which Dowling was a Covered Employee was February 1, 1997. Yet, instead of using this date to determine Dowling's Final Average Compensation, Union Pacific used the 10-year period preceding Dowling's 2012 retirement date – a direct contradiction of the Plan's unambiguous language.

Union Pacific did not dispute that the Plan language clearly defined Final Average Compensation in reference to the 10-year period prior to a participant's last day as a Covered Employee or that Dowling's last date as a Covered Employee was in 1997. Instead, Union Pacific again argued that the other "special rules" in the Plan clearly and unambiguously established an exception to the general rule regarding the date from which Final Average Compensation is to be calculated for Disabled Participants. According to Union Pacific, these "special rules" required them to treat Dowling as if he had been paid his base salary during the 15 years he was a Disabled Participant and to calculate his Final Average Compensation based on this "deemed" compensation during the 10-year period prior to his retirement date.

The District Court sided with Union Pacific, holding that the plan administrator's calculation of Dowling's pension benefit was consistent with the plain and unambiguous language of the Plan, namely, the

purported "special rules" for Disabled Participants cited by Union Pacific. App. 38-50. Dowling then appealed to the Third Circuit.

2. Proceedings in the Third Circuit Court of Appeals

On appeal, the parties maintained their respective positions that the Plan language was clear and unambiguous and that the sole question was whether Union Pacific's plan administrator had acted in conformance with those clear and unambiguous terms in calculating Dowling's pension benefits. In a 2-1 panel decision, the Third Circuit affirmed the District Court's grant of summary judgment in favor of Union Pacific, but in doing so took an entirely different turn from both the parties' arguments and from the District Court's reasoning.

Rather than finding Union Pacific's calculations consistent with the plain and unambiguous language of the plan, the panel majority held that the Plan language was ambiguous and that the plan administrator's interpretation of the Plan was reasonable under the deferential standard of review set forth in *Firestone Tire and Rubber Co. v. Bruch,* 489 U.S. 101, 115, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989). App. 3-4 & 13-15. The majority cited the Plan's "terminology, silence and structure" as the bases for finding the Plan ambiguous regarding the date from which a Disabled Participant's Final Average Compensation is to be calculated. App. 3. For purposes of this Petition, it is the panel majority's

analysis regarding the Plan's purported "silence" on this issue that is of particular concern.[6]

In articulating its "silence" theory, the majority noted that the Plan establishes certain default rules for pension benefit calculation in general, with an exception to those default rules established for Disabled Participants in only *two* relevant respects, neither of which relate to the calculation of Final Average Compensation. These exceptions relate only to ongoing accrual of Credited Service while a Disabled Participant, pursuant to Section 4.02(c)(2); and the manner in which a Disabled Participant becomes entitled to his pension benefit when he ceases being a Disabled Participant, pursuant to Section 6.05. There is no corresponding exception in the Plan for the manner in which a Disabled Participant's Final Average Compensation is to be calculated. App. 18-19; *A144*.

The panel majority concluded that the Plan's provision of specific exceptions for Disabled Participants in these two respects, but not with regard to Final Average Compensation, created a "gaping hole

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[6] The "terminology" the majority deemed ambiguous was the term "absence" in the provision of the Plan defining the various components of "Compensation", including the deeming of base pay during periods of absence. The majority did not find the terminology defining Final Average Compensation, or the date from which is to be calculated, ambiguous. App. 15-18. As to the plan structure, the majority essentially pointed to the fact the Plan as a whole is lengthy and somewhat convoluted. It agreed, however, that the relevant terms governing this dispute implicate only a few sections of the Plan, which it readily identified. App. 20-21.

as to whether the default-and-exception pattern continues for calculation of the Final Average Compensation for disabled participants." App. 19. In other words, according to the majority, the Plan's failure to provide an exception to the general rule for calculating Final Average Compensation for disabled participants rendered it "silent" on this issue. In the face of such "silence", the panel majority held that it was not unreasonable for the plan administrator to create an exception to the default Final Average Compensation rule, "even though nothing in the plan says to do as much." App. 19.

Dowling had pointed to the express exceptions for Disabled Participants created in Sections 4.02(c)(2) and 6.05 – without mention of Final Average Compensation in either of these provisions – as further evidence that the Plan, in fact, provides no such exception to the general rule governing Final Average Compensation. Characterizing this as an argument under the *expressio unius* canon of construction, the majority stated:

> That argument might win the day if we were reviewing the plan *de novo*, but the *expressio unius* canon cuts the opposite way when we are paying deference to a plan administrator, because when a plan administrator interprets a text that contains a "mandate in one section and silence in another," the silence "often suggests . . . simply a decision not to mandate any solution . . ., i.e., to leave the question" open to the reasonable interpretation of the administrative decisionmaker. *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 493-95 (D.C. Cir. 2016) (quoting *Catawba Cty. v. EPA*, 571 F.3d 20, 36

> (D.C. Cir. 2009) (finding in the context of Chevron deference that the *expressio unius* canon counsels against the court disturbing an agency's interpretation)). Such is the case here.

App. 19-20.

In a strong dissent, Judge Ambro of the Third Circuit characterized the panel majority's ambiguity analysis as "creative", "imaginative" and "innovative", App. 31-32, and instead concluded that the relevant Plan provisions – specifically the provision governing the date from which Final Average Compensation is to be calculated – clearly and unambiguously entitled Dowling to the additional pension benefits he sought. App 28-30 & 35. Judge Ambro ardently disagreed with the majority's analysis of the Plan's purported "silence", stating:

> In their view, the Plan failed to specify how to calculate a Disabled Participant's Final Average Compensation. So rather than follow the default rule provided for all Participants, the Plan administrator was free to make one up. That can't be right. If a Plan administrator may depart from a general rule whenever a more specific one might have been, but is not, provided, what's to stop him from simply denying Disabled Participants their pensions entirely?

App. 33-34.

REASONS FOR GRANTING THE PETITION

I. Summary of Argument

This case presents a clear case of both the plan administrator and the Third Circuit majority failing to apply the most fundamental principle underlying ERISA: the "straightforward rule of hewing to the directives of the plan documents…" *Kennedy*, 555 U.S. at 300. This directly conflicts with the longstanding jurisprudence of this Court on the exceptionally important federal issues embodied in ERISA, including the fundamental principle that "every employee may, *on examining the plan documents,* determine exactly what his rights and obligations are under the plan." *Curtiss-Wright*, 514 U.S. at 83, quoting H.R. Rep. No. 93-1280, p. 297(1974) U.S. Code Cong. & Admin. News pp. 4639, 5077, 5078 (emphasis added by the Court).

This case also presents the opportunity for this Court to decide an important federal question regarding the appropriate limits of a plan administrator's discretion under the deferential review standard set forth in *Firestone*. The Third Circuit panel majority essentially determined that, under this deferential standard, the plan administrator could disregard an express general rule established in the Plan and unilaterally create an exception in direct contravention of that express general rule. Other than identifying conflict of interest as a factor to be considered, *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), this Court has provided little guidance as to what constitutes an abuse of discretion under the *Firestone* deferential standard of review. This case presents a prime example of why such guidance is needed.

II. Argument

A. The Third Circuit panel majority has decided an exceptionally important question of federal law in a way that conflicts with relevant decisions of this Court, and undermines the fundamental principles at the heart of ERISA.

1. The Third Circuit's decision conflicts with the longstanding jurisprudence of this Court emphasizing the sanctity of the written plan terms in the context of ERISA.

As set forth above, this Court has repeatedly and consistently stressed the primacy of the written plan documents in determining the parties' rights and obligations under ERISA plans. *See*, *Kennedy*, 555 U.S. at 300 (there are no exemptions from the "plan documents rule" under ERISA and the claim "stands or falls by the terms of the plan"); *US Airways, Inc. v. McCutchen*, 569 U.S. at 100-101 ("[t]he plan, in short, is at the center of ERISA"); and *Curtiss-Wright Corp.*, 514 U.S. at 83 (ERISA "is built around reliance on the face of written plan documents").

The Third Circuit majority violated the plan documents rule when it sanctioned Union Pacific's disregard of the express terms of the Plan and gave credence to an exception that simply does not exist in the plan document. There is no dispute that the Plan says that Final Average Compensation shall be calculated as of "x" date. There is likewise no dispute as to when that "x" date is for Dowling. Union Pacific however did not use Dowling's "x" date in calculating

his Final Average Compensation, it used a "y" date instead.

Union Pacific purported to justify its position by asserting that certain sections of the Plan – other than the actual definition of Final Average Compensation – required that Final Average Compensation be calculated as of "y" date for disabled participants such as Dowling. The Third Circuit panel, however, found no textual support in the Plan for the administrator's position and indeed there is none. The Plan contains a *single* definition of Final Average Compensation, and this definition provides a *single* reference date from which Final Average Compensation. That reference date is "x", not "y".

The majority's countenance of the plan administrator's calculation of Dowling's Final Average Compensation using a self-created exception to the definition of Final Average Compensation that admittedly appears nowhere in the Plan documents – and which conflicts with a clear definition that is *expressly* stated in the Plan document – is nothing short of extraordinary and is in direct contradiction with the numerous decisions of this Court requiring strict adherence to plan documents rule.

As a corollary to the plan documents rule, ERISA is concerned only with the terms of the plan, as written, not whether those terms are good or bad, or whether some other terms would be more reasonable. *Heimeshoff,* 134 S. Ct. at 611-612; *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 833 (2003) (ERISA's concern is with the administration and enforcement of benefit plans *as written* and not with the precise design of the plans themselves.) ERISA

does not address the specifics of plan design; that is left to the plan sponsor. ERISA, rather, merely requires that whatever terms a company chooses, it is bound by those terms. *Curtiss-Wright*, 514 U.S. at 85.

The majority also violated this basic principle by engaging in an extensive analysis as to why it would be reasonable for the Plan to be designed as interpreted by Union Pacific (*i.e.*, crediting Dowling with years of service during his disability and calculating his Final Average Compensation with respect to those same years). App. 21-23. Yet the majority also readily acknowledged that the Plan was not, in fact, designed that way. See App. 19 (discussing plan administrator's choice to treat Dowling's formal retirement date like his final day of work, "even though nothing in the plan says to do as much."). Indeed, not only does "nothing in the plan say to do as much", but something in the Plan actually says to do *something else entirely*.

In short, the majority did not determine that the plan administrator's calculation of Dowling's Final Average Compensation was reasonable *under the actual terms of the Plan*. Instead, it essentially determined that the plan administrator's interpretation would be a reasonable way to design a plan because it is reasonable in the abstract and reflects "good policy". App.21-23. But as Judge Ambro noted in his dissent, the court was "not asked to opine whether the administrator has imagined a reasonable way to allocate pension benefits." App. 34-35. It was asked to determine whether the plan administrator's interpretation was reasonable under the express terms of this particular plan, which it failed to do.

2. The Third Circuit's decision conflicts with this Court's jurisprudence regarding the separate roles of the plan sponsor and plan administrator under ERISA.

ERISA also creates a division of authority between a plan's sponsor – who establishes the terms of a plan – and a plan's administrator who controls the operation and administration of the plan in accordance with those terms. In *CIGNA v. Amara*, this Court observed that "[t]he plan's sponsor (*e.g.*, the employer), like a trust's settlor, creates the basic terms and conditions of the plan, executes a written instrument containing those terms and conditions, and provides in that instrument 'a procedure' for making amendments." 563 U.S. at 437 (statutory citations omitted). A plan administrator, a trustee-like fiduciary, manages and administers the plan and, in doing so, *follows the terms established by the plan sponsor in the written plan documents. Id.* The Court noted that ERISA carefully distinguishes these two roles, stating that there is "no reason to believe that the statute intends to mix the responsibilities by giving the administrator power to set plan terms indirectly," for example, through issuing a Summary Plan Description. *Id.*

If a plan administrator cannot set plan terms indirectly even through the issuance of a formal document such as a Summary Plan Description, it certainly follows that he cannot set plan terms indirectly by interpreting a plan to contain an exception that it does not in fact contain. Yet that is precisely the result that the Third Circuit majority has allowed here. The statutory language "speaks of

enforcing the terms of the plan, not of *changing* them." *CIGNA Corp. v. Amara*, 563 U.S. at 436, *citing,* 29 U.S.C. § 1132(a)(1)(B) (emphasis in original). The Third Circuit's majority opinion violates this principle – it does not enforce the terms of the Plan as written, but instead changes the definition of a key term in the Plan to mean something completely different than what the Plan language states.

3. The Third Circuit's decision conflicts with this Court's jurisprudence regarding the interpretation of ERISA plans in accordance with ordinary principles of contract law.

This Court has held that ERISA plans should be interpreted in accordance with ordinary principles of contract law, to the extent not inconsistent with the statute. *See*, *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015). In the Third Circuit, these ordinary principles of contract law provide that the issue of whether plan language is ambiguous or unambiguous is determined by the court *de novo*. *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 121 (3d Cir. 2012). Language is ambiguous if, from an objective standpoint, it is subject to reasonable alternative interpretations. *McDowell v. Philadelphia Housing Authority*, 423 F.3d 233 (3d Cir. 2005).

Consistent with this Court's holdings enforcing the plan documents rule, the Third Circuit recognizes that "the strongest external sign of agreement between contracting parties is the words they use in their written contract. Thus, the sanctity of the written words of the contract is embedded in the law of contract interpretation." *In re Unisys Corp. Long-Term*

Disability Plan ERISA Litigation, 97 F.3d 710, 715 (3d Cir. 1996) (quoting, *Mellon Bank, N.A., v. Aetna Business Credit, Inc.,* 619 F.2d 1001, 1009 (3d Cir. 1980)). Accordingly, the Court may not "demote the written word to a reduced status in contract interpretation. Although extrinsic evidence may be considered under proper circumstances, the parties remain bound by the appropriate objective definition of the words they use to express their intent." *Id.*, (quoting *Mellon Bank*, 619 F.2d at 1013). Where the Plan provides an express definition of a term, that definition, not extrinsic evidence, is to be used to interpret the term. *Epright v. Environmental Resources Management, Inc. Health and Welfare Plan,* 81 F.3d 335, 340 (3rd Cir. 1996).

The panel majority failed to even mention its obligation to consider the actual language of the Plan vis-à-vis the relevant express definitions of Final Average Compensation, Covered Employee, Disabled Participant and Separation from Service, and certainly did not utilize the required standards of contract interpretation. Under the express terms of the Plan there is no "gaping hole" regarding to the definition of Final Average Compensation in the context of Disabled Participant – the Plan provides a single definition of Final Average Compensations for "Participants" and, by express definition, a "Disabled Participant" is a "Participant". App.29; *A142, A144-A145.* The Plan is only "silent" as to any special rule or exception that would provide a *different* Final Average Compensation rule for Disabled Participants. Under general contract principles, a Plan's failure to carve out an exception to an expressly defined general rule, does not mean that there is ambiguity as to whether the general rule

should apply. Rather, silence in the face of a general rule means the general rule remains in effect. *See, e.g., US Airways v. McCutchen*, 569 U.S. at 101 & 105 (where plan was silent on allocation of attorneys' fees, default "common fund" rule applied).

In sum, the Third Circuit's majority opinion undermines one of the most fundamental principles underlying the ERISA statute – that the express terms of the Plan are paramount and are to be administered and enforced *as written*. The opinion further directly conflicts with this Court's longstanding jurisprudence upholding this fundamental principle, and its corollaries identified above. As such, review by this Court is warranted.

B. The Third Circuit majority decided an important issue of federal law that has not been, but should be, settled by this Court.

In *Firestone*, *supra*, this Court held that where the terms of plan grant discretion to the plan administrator to interpret the plan terms, courts must review those interpretations under a deferential abuse of discretion standard. However, other than clarifying that a conflict of interest is but one factor to be considered, *Glenn*, *supra,* this Court has provided little additional guidance on how the abuse of discretion standard is to be applied. Here, the Third Circuit panel majority essentially determined that, under this deferential standard, the plan administrator could disregard an express general rule established in the Plan and unilaterally create an exception in direct contravention of that express general rule. As aptly stated by Judge Ambro in his dissent, "[t]hat can't be right." App. 33.

In fact, it is not even right under Third Circuit precedent governing the abuse of discretion standard, which first and foremost holds that the administrator's interpretation of the plan terms may not controvert the plain language of the document. *Cottillion v. United Refining*, 781 F.3d 47, 55 (3d Cir. 2015); *Dewitt* 106 F.3d at 520 (3rd Cir. 1997); *Epright v. Environmental Resources Management, Inc. Health and Welfare Plan*, 81 F.3d 335, 339 (3d Cir. 1996). Additionally, even when an ambiguity is found, Third Circuit precedent requires that a plan administrator's plan interpretation must be reasonable, as informed by the following factors:

> (1) whether the interpretation is consistent with the goals of the plan; (2) whether it renders any language in the plan meaningless or internally inconsistent; (3) whether it conflicts with the substantive or procedural requirements of the ERISA statute; (4) whether the [relevant entities have] interpreted the provision at issue consistently; and (5) whether the interpretation is contrary to the clear language of the plan.

Howley v. Mellon Financial Corp., et al., 625 F.3d 788, 795 (3d Cir. 2010) (citation omitted).

The Third Circuit majority, however, made no mention of these factors and certainly did not apply them. Had it done so, it would have had to reckon, at a minimum, with the disconnect between the express Plan terms and the plan administrator's interpretation; its conflict with ERISA requirements (including the separate roles of sponsor and administrator); and the fact that other key language in the Plan is rendered entirely meaningless by the plan administrator's

interpretation. For example, by express definition, a Separation from Service occurs when a participant has a Total Disability and becomes a Disabled Participant. App. 30; *A152.* But this definition is entirely negated by the plan administrator's interpretation, which treats a Disabled Participant as if he does *not* have a Separation from Service at the time of Total Disability.

Not only did the majority fail to articulate or apply appropriate standards in its abuse of discretion analysis, it interjected an entirely new and seemingly unprecedented standard. In discussing what it characterized as "the *expressio unius* canon" in the context of the deferential standard of review, the majority noted that the canon "cuts the opposite way [than usual here] because when a plan administrator interprets a text that contains a 'mandate in one section and silence in another,' the silence often suggests simply a decision not to mandate any solution, i.e., to leave the question open to the reasonable interpretation of the administrative decisionmaker." App. 20.

In support of this proposition, the majority cited to two Federal Circuit Court cases relating to *Chevron* deference in the context of an administrative agency's interpretation of statutes through agency rulemaking (referring to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)). *Chevron* deference, however, is grounded at least in part on an administrative agency's rulemaking authority under the Administrative Procedures Act, and Congress's authority to delegate this duty to such agencies. *See, Texas Rural Legal Aid, Inc. v. Legal Services Corp.,* 940 F.2d 685 (1991). It is no surprise then, that there

appears to be no precedent for such analysis in the context of ERISA plan administration considering ERISA's emphasis on requiring written plan documents which clearly inform beneficiaries of their rights and obligations, its mandate that Plan Administrators dutifully comply with those express written terms, and the entirely segregated roles between establishing plan terms (a sponsor role) and administering those terms (the administrator's role). In short, it is highly questionable whether, in the context of ERISA, purposeful silence on a key plan provision could reasonably be read as *carte blanche* authority to allow plan administrators to create their own plan terms where none otherwise exist.

Given the significance of the majority's reliance on this novel reasoning (App. 20, noting that otherwise Dowling's arguments "might win the day"), this presents an extremely important question worthy of review by this Court. Moreover, the majority's failure to apply meaningful standards in conducting its abuse of discretion analysis – coupled with the lack of further guidance from this Court regarding such standards – also warrants review and clarification by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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