No. 24-12773

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

WILLIAM DRUMMOND and RICHARD ODOM, individually and on behalf of all others similarly situated,
Plaintiffs-Appellants,

v.

SOUTHERN COMPANY SERVICES, INC.; THE SOUTHERN COMPANY PENSION PLAN; and THE BENEFITS ADMINISTRATION COMMITTEE,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, The Honorable Judge Steve C. Jones, No. 2:22-CV-00174-SCJ

BRIEF OF THE ERISA INDUSTRY COMMITTEE, THE AMERICAN BENEFITS COUNCIL, AND THE COMMITTEE ON INVESTMENT OF EMPLOYEE BENEFIT ASSETS, INC. AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Drummond v. Southern Company Services, Inc.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3, amici curiae The ERISA Industry Committee, The American Benefits Council, and the Committee on Investment of Employee Benefit Assets Inc. submit the following Corporate Disclosure Statement:

1. The ERISA Industry Committee is a non-profit corporation, it does not have a parent corporation, no publicly held corporation owns 10% or more of its stock, and it is not a subsidiary or affiliate of a publicly held corporation.

2. The American Benefits Council is a non-profit corporation, it does not have a parent corporation, no publicly held corporation owns 10% or more of its stock, and it is not a subsidiary or affiliate of a publicly held corporation.

3. Committee on Investment of Employee Benefit Assets Inc. is a non-profit corporation, it does not have a parent corporation, no publicly held corporation owns 10% or more of its stock, and it is not a subsidiary or affiliate of a publicly held corporation.

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The undersigned counsel of record certifies that, in addition to those persons and entities identified in the brief filed by Plaintiffs-Appellants, the following persons and entities as described in Eleventh Circuit Rule 26.1.2(c) have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. The American Benefits Council, amicus curiae.

2. The Committee on Investment of Employee Benefit Assets Inc., amicus curiae.

3. The ERISA Industry Committee, amicus curiae.

4. Crowell & Moring LLP, law firm representing amici curiae.

5. McGuire, Morgan, Crowell & Moring LLP, Counsel for amici curiae The ERISA Industry Committee, The American Benefits Council, and The Committee on Investment of Employee Benefit Assets Inc.

6. Ruddy, Samuel, Crowell & Moring LLP, Counsel for amici curiae The ERISA Industry Committee, The American Benefits Council, and The Committee on Investment of Employee Benefit Assets Inc.

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7. Wolff, Daniel W., Crowell & Moring LLP, Counsel for amici curiae The ERISA Industry Committee, The American Benefits Council, and The Committee on Investment of Employee Benefit Assets Inc.

The undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

Amici Curiae will file a revised certificate of interested persons and corporate disclosure statement should they become aware of a change in interests that would affect the disclosures required by Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-4.

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INTEREST OF THE *AMICI CURIAE*[1]

The ERISA Industry Committee ("ERIC") is a national non-profit business trade association representing the interests of approximately 100 of the nation's largest employers in their capacity as sponsors of employee benefit plans for their workers, retirees, and families. ERIC routinely participates as *amicus curiae* in cases arising under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 *et seq*. ("ERISA"), with the potential to affect benefit plan design, expense, regulatory compliance, or administration.

The American Benefits Council ("Council") is a national non-profit organization dedicated to protecting and fostering privately sponsored employee benefit plans. Collectively, the Council's more than 430 members either directly sponsor or provide services to retirement plans and health and welfare plans covering virtually all Americans who participate in employer-sponsored programs. The Council frequently participates as *amicus curiae* before the Supreme Court and federal

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for a party authored this brief in whole or in part. No party, no counsel for a party, and no person other than *Amici*, their members, and their counsel made a monetary contribution to fund the preparation or submission of this brief.

courts of appeals, including this one, in cases with potential to significantly affect the administration and sustainability of employee benefit plans under ERISA.

The Committee on Investment of Employee Benefit Assets Inc. ("CIEBA") is a group of 114 of the country's leading Chief Investment Officer Fiduciaries who collectively oversee over $2.6 trillion in retirement plan assets, in plans covering approximately 17 million participants. CIEBA members are responsible for overseeing a substantial portion of the assets held in the private-sector retirement system and have a direct interest in its effective regulation.

SUMMARY OF THE ARGUMENT

Appellants ask the Court to do away with ERISA's bedrock principle and the carefully constructed scheme built upon it over more than five decades. That bedrock principle is that the adoption and maintenance of private sector employee benefit plans would be completely voluntary, and that ERISA would create a regulatory environment conducive to employer choice regarding plan terms. ERISA deliberately left employee benefit plan design to private parties—including employees, either acting through their bargaining representative or voting with their feet, that is, by seeking out a job with a compensation and benefits package more to their liking. Overthrowing the regulatory regime contemplated by the Congress in 1974 would be a radical step with radical consequences, and this Court should reject Appellants' invitation to walk down that path.

A core tenet of ERISA is that employers—not Congress or the courts—determine benefit plan design and the level of benefits provided. ERISA therefore leaves private parties free to react to market forces and their workforce's needs to select a suitable package of compensation and benefits. As the text of ERISA plainly shows, this bedrock principle applies to selecting the actuarial assumptions used to calculate two extremely common employer-sponsored plan benefits: a retirement benefit called a qualified joint and survivor annuity ("QJSA"), and a pre-retirement spousal death benefit called a qualified preretirement survivor annuity ("QPSA"). Appellants urge the Court to rewrite ERISA's provisions for calculating QJSAs and QPSA charges, 29 U.S.C. §§ 1055(d) and (e). They ask the Court to graft supposed "reasonableness" and "currentness" standards for mortality assumptions onto the phrase "actuarial equivalent," which appears in subsections (d) and (e). No "reasonableness" or "currentness" standard appears anywhere in these provisions. Appellants' supposed "standards" are nothing but *ad hoc* inventions to support the monetary outcome plaintiffs have in mind.

The district court here correctly rejected Appellants' invitation to fashion unwritten, judge-made standards for actuarial assumptions where the Congress elected not to specify any. Consistent with ERISA's purpose of encouraging the voluntary formation of employee benefit plans, the statute gives plan sponsors wide discretion to determine how their plan will calculate benefits earned by employees, including discretion over the assumptions that will be used to convert a single life annuity into a QJSA and to calculate QPSA charges. The Court should not disrupt these deliberate choices because ERISA speaks explicitly when it imposes requirements on plan design—including by stating exactly when "[a]ctuarial assumptions must be reasonable." *E.g.*, 29 U.S.C. § 1085a(c)(3). Congress did not impose any such explicit standard here. The Court should "presume that Congress said what it meant and meant what it said." *United States v. Tigua*, 963 F.3d 1138, 1143 (11th Cir. 2020) (internal quotation marks and citation omitted).

Appellants assert that without their unwritten standards, absurd results would follow. Not so. The preferences of the parties involved, as mediated by the labor market, facilitate the delivery of benefits that are both reasonable and attractive.

Indeed, it is Appellants' proposed standards that would lead to absurd results. The extra-textual "reasonableness" and "currentness" standards Appellants advocate come with a cost: they would bring with them administrative burdens, sometimes unworkable ones, and pointlessly increased costs. As a result, they would discourage employers from offering benefits, an outcome completely at odds with ERISA's purpose. Many employees' benefits would be *reduced*, not increased. And single plaintiffs and the ERISA plaintiffs' bar would obtain veto power over benefits accepted by employees. These sweeping implications for multi-*trillion*-dollar employment-sponsored retirement plans should counsel judicial restraint, not imposition of a new, unwritten standard.

ARGUMENT

I. ERISA SPEAKS EXPLICITLY WHEN IT IMPOSES REASONABLENESS OR CURRENTNESS REQUIREMENTS ON ACTUARIAL STANDARDS.

This case is a class action seeking to overturn a decision embodied in a plan document concerning how to calculate QJSA payments and

QPSA charges in the defined benefit pension plans maintained by Appellants' employer. The answer to this question will have a broad impact not only on employers that sponsor such plans, but on the entire American economy. Employer-sponsored retirement plans in the United States totaled $26.3 trillion as of 2022—of which more than $3.7 trillion was held in private sector employer-sponsored defined benefit plans.[2] Cong. Res. Serv., *U.S. Retirement Assets: Data in Brief* at i, 1 (Sept. 20, 2023).[3] A substantial portion of the $3.7 trillion in defined benefits will eventually be disbursed as QJSAs and QPSAs. Subject to a handful of exceptions, QJSAs are the default form of retirement annuity payable to married employees, and QPSAs are the default death benefit for spouses of employees who die with vested pension benefits prior to retirement. *See* Stephanie Sorenson, *Key considerations for retirement plan spousal rights and payment options*, Milliman (Aug. 13, 2024).[4]

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[2] For context, the entire United States defense budget in 2024 was $883.7 billion. Senate Comm. On Armed Servs., *Summary of the Fiscal Year 2024 National Defense Authorization Act* 1, https://www.armed-services.senate.gov/imo/media/doc/fy24_ndaa_conference_executive_summary1.pdf (last visited Feb. 3, 2025).

[3] https://crsreports.congress.gov/product/pdf/R/R47699.

[4] https://www.milliman.com/en/insight/key-considerations-retirement-plan-spousal-rights-payment.

ERISA states that QJSAs should: (1) pay a surviving spouse "not less than 50 percent of (and [] not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse," and (2) be "the actuarial equivalent of a single annuity for the life of the participant." 29 U.S.C. § 1055(d). QPSA benefits are tied to § 1055(d)'s QJSA requirements because, under the statute, QPSAs generally should provide "not less than the amounts which would be payable as a survivor annuity under the [QJSA] under the plan (or the actuarial equivalent thereof)" in the month when the decedent "would have attained the earliest retirement age under the plan." 29 U.S.C. § 1055(e).

Because QJSAs are lifetime annuities (*i.e.*, regular payments for the life of the employee and surviving spouse), calculating the monthly payment due involves taking into account two unknowns: (1) whether the annuitant will survive to each given month so as to be eligible for the next monthly payment; and (2) an interest rate to discount the value of future payments to present value. ERISA does not include any rules or standards regarding the mortality assumptions or interest rate that must be used for this calculation. Instead, both factors are specified in the terms of an employer's retirement plan. *See Belknap v. Partners Healthcare Sys., Inc.*, 588 F. Supp. 3d 161, 175 (D. Mass. 2022) ("[I]t is [actuarial] industry practice to refer to the plan documents to determine the actuarial assumptions used to calculate an actuarially equivalent benefit."); *see also* ERISA § 402(b)(4) (requiring that the plan document pursuant to which a pension plan is maintained "specify the basis on which payments are made to and from the plan").

Against this backdrop, Appellants ask this Court to read two unwritten rules into the pertinent provisions of ERISA. First, Appellants ask this Court to fashion a judge-made "reasonableness" standard for the actuarial assumptions used to calculate QJSA payments (and therefore used for QPSA charges as well). Appellants' Br. at 28. Second, and as a corollary, Appellants argue that their "reasonableness" standard requires that the mortality assumption specified in the plan be "current." The extra-textual gloss Appellants ask the court to adopt does not "fix" an omission in the statute or improve it in any demonstrable way, because Appellants do not define what constitutes sufficient reasonableness or currentness to pass muster under their desired re-write of Congress' work. However, one significant drawback to

Appellants' request is implicit in their novel "currentness" requirement: to keep current, employers will be required to amend their defined benefit pension plans at regular or irregular intervals to switch from one mortality assumption to another in the name of keeping "current." Appellants' Br. at 31.

If Appellants' rules were not adopted, they argue, employers "c[ould] use any mortality table they want, no matter how absurd the choice could be." *Id.* at 32. The district court correctly rejected these arguments.

The threshold problem with Appellants' argument is that Congress deliberately avoided imposing the standards they propose. Although in other parts of ERISA Congress added reasonableness requirements and specified how employers must calculate benefits, it did not do so in § 1055(d). The Court should not disrupt these deliberate choices because ERISA speaks explicitly when it imposes requirements on important matters of plan design. Far from creating absurd consequences, leaving plan design decisions to employers works. Free market forces effectively ensure plan benefits are not just "reasonable," but actually desirable for employees.

A. Congress Deliberately Avoided Imposing Appellants' Preferred Actuarial Requirements.

To encourage the voluntary creation of employee benefit plans, ERISA offers employers flexibility to determine whether to offer a plan, the level of benefits to be offered, and, except as explicitly required by the text of ERISA, how those benefits will be calculated. ERISA did not impose the actuarial requirements Appellants propose here. ERISA's silence should not be regarded as forgetfulness, neglect, or an invitation to judicial rulemaking. *See, e.g.*, *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985) (declining to respond to an omission by "tamper[ing] with an enforcement scheme crafted with such evident care as the one in ERISA" to impose extratextual remedies).

1. In order to encourage plan formation, Congress provided plan sponsors discretion over benefit design choices.

ERISA was designed to "'induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (internal quotation marks and citation omitted). The statute was the product of a decade of congressional study into employee benefits, which resulted in a "comprehensive and reticulated statute." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (internal quotation marks and citation omitted).

Despite ERISA's detailed provisions, however, Congress recognized that it should not, as a matter of public policy, dictate that employers offer any particular employee benefit. Given "the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force," *Boggs v. Boggs*, 520 U.S. 833, 839 (1997), these plans must be designed by plan sponsors to meet business imperatives and the needs of their workforces. Consequently, "ERISA le[ft] th[e] question [of the content of benefits] to the private parties creating the plan" so that "the private parties, not the Government, control the level of benefits[.]" *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) (explaining that ERISA's central purpose is "to protect *contractually defined benefits*") (emphasis added) (internal quotation marks and citation omitted).

For decades, courts have respected Congress's choice to leave decisions regarding acceptable benefits to employers, except as explicitly required by ERISA. Courts have consequently refused to impose judicially created duties—of reasonableness or otherwise—on "decision[s] regarding the form or structure of [a] [p]lan such as who is entitled to receive [p]lan benefits and in what amounts, or how such benefits are calculated." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999); *see also, e.g.*, *id.* at 445 (explaining "that, *without exception*, '[p]lan sponsors who alter the terms of a plan [or choose not to do so] do not fall into the category of fiduciaries'") (emphasis added) (citation omitted); *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) ("Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan."). ERISA duties instead generally attach once a plan is written, requiring plan fiduciaries to follow the terms of the plan as written. *See Nazay v. Miller*, 949 F.2d 1323, 1329 (3d Cir. 1991); *see also, e.g.*, *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 (2013) ("The plan, in short, is at the center of ERISA."); *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283 (3d Cir. 1988) ("ERISA is concerned with the *administration* of an established plan and its elements.").

While ERISA offers employers significant discretion for matters not addressed by the statute, courts also recognize that when ERISA *does* impose plan design requirements, it does so explicitly. Put simply, "because ERISA is a comprehensive and reticulated statute, and is enormously complex and detailed, it should not be supplemented by extratextual remedies[.]" *Hughes Aircraft*, 525 U.S. at 447 (internal quotation marks and citations omitted); *see also, e.g.*, *Cent. Pa. Teamsters Pension Fund v. McCormick Dray Line, Inc.*, 85 F.3d 1098, 1106-07 (3d Cir. 1996) (refusing to read an unwritten notification requirement into ERISA because, "[g]iven ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a comprehensive and reticulated statute, [t]he assumption of inadvertent omission is rendered especially suspect") (internal quotation marks and citation omitted).

2. ERISA's text confirms Appellants' unwritten "reasonableness" and "currentness" standards have no legal basis.

Under this well-settled understanding of ERISA, the Court should not impose Appellants' invented and unwritten "reasonableness" and "currentness" standards. ERISA's text consistently demonstrates that

Congress spoke explicitly when it imposed reasonableness requirements on plan design. For example, ERISA requires that plans afford a "*reasonable* opportunity" to appeal claim denials. 29 U.S.C. § 1133(2). And even within one of the very sections in which Appellants ground their dispute, ERISA imposes *five* separate reasonableness requirements on the time period within which the plan must provide a written explanation of a participant's QJSA terms and right to choose a different form of benefits. *See* 29 U.S.C. § 1055(c)(3)(A)–(B).

Indeed, ERISA demonstrates that Congress spoke explicitly whenever it imposed reasonableness standards on actuarial assumptions and methodologies. For example:

- 29 U.S.C. § 1393(a)(1) requires an employer to use "*actuarial assumptions … which, in the aggregate, are reasonable*" when calculating its liability for withdrawing from a multiemployer group plan (emphasis added); and

- 29 U.S.C. § 1085a includes *four* different reasonableness standards for actuarial assumptions and methodologies used in developing a plan funding methodology:

  ⇒ § 1085a(c)(2)(A) requires funding methodology to determine asset value "on the basis of any *reasonable actuarial method of valuation*;"

  ⇒ § 1085a(c)(3)—titled "*Actuarial assumptions must be reasonable*"—requires a plan's funding methodology to determine "all costs, liabilities, rates of interest, and other factors . . . on the basis of *actuarial assumptions and methods . . . each of which is reasonable* (taking into account the experience of the plan and *reasonable* expectations);"

⇒ § 1085a(j)(3) requires funding restoration plans to "consist of actions that are calculated, based on *reasonably anticipated experience and reasonable actuarial assumptions*;" and

⇒ § 1085a(j)(4) permits plan actuaries to certify whether a "plan is in funding restoration status for the plan year" using a calculation of the plan's funding liability that is in part based "*on reasonable actuarial estimates, assumptions, and methods*."

29 U.S.C. § 1085a (emphasis added).

Congress tellingly did not include any similar language here. *See* 29 U.S.C. § 1055(d); *Belknap*, 588 F. Supp. 3d at 171. Especially given that ERISA "should not be supplemented by extratextual remedies," *Hughes Aircraft*, 525 U.S. at 447, this Court should "presume that Congress said what it meant and meant what it said in the Act, and use[d] different language in similar sections . . . [to convey] different meanings." *Tigua*, 963 F.3d at 1143 (internal quotation marks and citation omitted). Otherwise, Congress's numerous explicit references in ERISA to "reasonable" actuarial assumptions and methods would be mere surplusage. *See In re Shek*, 947 F.3d 770, 777 (11th Cir. 2020) ("Th[e] surplusage canon obliges us, whenever possible, to disfavor an interpretation when that interpretation would render a 'clause, sentence, or word . . . superfluous, void, or insignificant.'").

B. Market Forces Effectively Regulate Benefit Plan Design Where Congress Has Chosen Not To Legislate.

Notwithstanding Congress's clear decision to avoid imposing Appellants' preferred standards, Appellants argue that adhering to the statute's plain text would permit employers to use "absurd" mortality tables to calculate QJSA payments and QPSA fees. Appellants' Br. at 32. This argument ignores reality.

As the recent so-called "Great Resignation" has shown, competition for employee talent in the free market is fierce. In the post-pandemic "[l]abor-driven market," benefits are a key factor for numerous workers when deciding to take a job—or to leave a job for a better one. Deepanjana Varshney, *Exploring the Great Resignation – Implications and Strategic Measures for Business*, Rutgers Bus. Rev. 91 (Spring 2024);[5] *see also Workers Say Getting Benefits Right Is Even More Important This Year – and COVID-19 Is the Main Cause*, BusinessWire (Sept. 22, 2020).[6]

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[5] https://rbr.business.rutgers.edu/sites/default/files/documents/rbr-090108.pdf.

[6] https://www.businesswire.com/news/home/20200922005574/en/Workers-Say-Getting-Benefits-Right-Is-Even-More-Important-This-Year-

Faced with this fierce competitive environment, employers responded not only by increasing pay, but also by updating benefits packages. *See* Stephen Miller, *Employers Respond to Great Resignation by Raising Pay, Improving Benefits*, SHRM (Nov. 1, 2021);[7] *see also, e.g.*, Dan Casarella, *4 Smart Enhanced Employee Benefits to Kickstart Recruiting*, CO by U.S. Chamber of Commerce (Mar. 16, 2022) (noting a 2022 study where 98 percent of business leaders surveyed reported that they were planning to offer or expand at least one new benefit offering);[8] Emp. Benefit Res. Inst., *A View from EBRI's Retirement Security Research Center: Real World Insight About the Great Resignation's Impact on Work, Benefits, and Retirement Trends*, at 6 (Sept. 15, 2022) (noting that employers were responding to the tight labor market by, among other things, focusing on "flexibility regarding how retirement benefits can be taken").[9] These benefits are readily disclosed to

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%E2%80%93-and-COVID-19-Is-the-Main-Cause.

[7] https://www.shrm.org/topics-tools/news/benefits-compensation/employers-respond-to-great-resignation-raising-pay-improving-benefits.

[8] https://www.uschamber.com/co/run/human-resources/enhanced-employee-benefits.

[9] https://www.ebri.org/docs/default-source/point-of-view/pov_2-rsrccovidworkforce-15sept22.pdf?sfvrsn=9fb1382f_2.

employees, enabling them to see, for example, what their projected QJSA payments could be and make informed decisions regarding the adequacy of their benefits. *See generally, e.g.*, 29 U.S.C. § 1025 (imposing requirements for regularly reporting pension plan benefits to participants and beneficiaries).

Against these realities, Appellants' assertions of absurd consequences fall short. Put simply, labor market pressures ensure that retirement plan provisions are mutually beneficial for employers and employees. Those provisions as a whole must be attractive enough to encourage employees to accept employment with the plan sponsor and remain in their jobs. Congress understood this and chose to leave the specifics of QJSA and QPSA payment rates—like most other aspects of retirement plan design—to the parties directly involved. The Court should honor that deliberate decision.

II. A REASONABLENESS OR CURRENTNESS REQUIREMENT WOULD UNDERMINE ERISA'S PURPOSE AND DISADVANTAGE BOTH EMPLOYEES AND EMPLOYERS.

Moreover, it is Appellants' unwritten rules that would lead to absurd consequences. Adopting Appellants' rules would impose unworkable administrative burdens and costs that would disincentivize employers from offering benefits. Appellants' proposed rules would further harm employees by *reducing* many employees' retirement benefits, limiting employers' ability to offer employee-friendly benefits, and supplanting benefit plan designs agreed upon by employees. These sweeping implications for multi-trillion-dollar employer-sponsored retirement plans and beyond should counsel judicial restraint, not recognition of Appellants' proposed rules.

A. Appellants' Proposed Rules Are Unworkable And Would Disincentivize Employers From Offering Retirement Benefits.

Appellants' unwritten, judicially fashioned standards would create substantial administrative burdens and expenses that discourage employers from offering retirement plans and divert funds that might otherwise go towards employee benefits.

Administering an employee benefit plan is expensive and burdensome in the first place. It requires undertaking "a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).

Appellants' ever-evolving "reasonableness" requirements would make this burden crushing. As Appellants would have it, life expectancies constantly change, and what is "reasonable" under Appellants' unexplained standards today may not be "reasonable" tomorrow. *See* Appellants' Br. at 31 (arguing that plans should always use supposedly "current" actuarial assumptions). For example, an unexpected global pandemic could meaningfully reduce life expectancy. *See* José Manuel Aburto et. al, *Quantifying impacts of the COVID-19 pandemic through life-expectancy losses: a population-level study of 29 countries*, Int. J. of Epidemiology 63, 64 (2021).[10] And the development of a vaccine or medical treatment in record time could subsequently counteract that change. *See* Virat Agrawal, Neeraj Sood, Christopher M. Whaley, *The impact of the global COVID-19 vaccination campaign on all-cause mortality*, Ctr. for Econ. Pol'y Res. (Feb. 21, 2024).[11] Under Appellants' rules, plan sponsors would constantly have to amend and re-

[10] https://academic.oup.com/ije/article/51/1/63/6375510.

[11] https://cepr.org/voxeu/columns/impact-global-covid-19-vaccination-campaign-all-cause-mortality

amend the terms of their plans to account for each development—and any others that could possibly impact life expectancy. *See Belknap*, 585 F. Supp. 3d at 175 (acknowledging that the actuarial assumptions used to calculate QJSA benefits are contained in the terms of a plan).

Amending a plan triggers substantial administrative burdens. To maintain a plan's tax benefits for employers and employees, the plan sponsor must conduct extensive testing to ensure the timing of any amendment does not discriminate in favor of highly compensated employees ("HCEs") or former HCEs. *See generally, e.g.*, 26 U.S.C. §§ 401(a)(4), 410(b); 26 C.F.R. §§ 1.401(a)(4)-1(b)(4), 1.401(a)(4)-5(a) (detailing nondiscrimination testing requirements). Notice of any amendment must also be provided to plan members if the change amounts to a "material modification" in plan terms (29 U.S.C. §§ 1022(a), 1024(b)(1)) or significantly reduces early retirement benefits or the rate of future benefit accruals (29 U.S.C. § 1054(h)(1); 26 C.F.R. § 54.4980F-1(A-1)(a)). And depending on the circumstances and plan terms, some amendments may even require approval by plan participants before they can take effect. *See, e.g.*, *Hoak v. Plan Admin. of Plans of NCR Corp.*, 717 F. Supp. 3d 1280, 1291 (N.D. Ga. 2024) (noting plan term that required "the consent of . . . a majority in interest of the [plan] Participants" under certain circumstances) (emphasis removed). Imposing these burdens on employers *ad infinitum*, as Appellants suggest, would be patently unworkable.

To complicate matters further, Appellants' request to fashion a vague, judge-made "reasonableness" standard would open a floodgate of litigation and necessarily create a patchwork of diverging precedent. *See, e.g.*, *Trs. of Constr. Indus. & Laborers Health & Welfare Tr. v. Redland Ins. Co.*, 460 F.3d 1253, 1258-59 (9th Cir. 2006) (noting a circuit split regarding which fees may be recoverable as "reasonable attorneys' fees" under 29 U.S.C. § 1132(g)(2)(D)); *Elenowitz v. FedEx Ground Package Sys., Inc.*, No. 21-cv-2109, 2022 WL 19402461, at *5 (D.S.C. Sept. 23, 2022) (noting a circuit split regarding what constitutes a "reasonable accommodation" under the Family and Medical Leave Act). This type of conflict in substantive law is "[p]articularly disruptive" for employers seeking to offer employee benefits in multiple jurisdictions and "is fundamentally at odds with the goal of uniformity that Congress sought to implement" in ERISA. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990).

The upshot of all these added administrative and litigation burdens and costs, as well as the general unpredictability that ever-changing mortality assumptions would entail, is that employers will be discouraged from offering employee benefits, especially defined benefit plans, and will have fewer resources to put towards them. *See FMC Corp. v. Holliday*, 498 U.S. 52, 59-60 (1990). Such a result is precisely what ERISA sought to avoid.

B. Reasonableness And Currentness Requirements Would Harm Employees.

In addition to disincentivizing and reducing funding available for employee benefits, Appellants' "reasonableness" and "currentness" rules would further harm employees in three ways.

First, Appellants' rules would *reduce* retirement benefits for many employees. For example, "the use of [an] allegedly outdated mortality table (with a shorter life expectancy) would increase the actuarial factor and therefore *increase* benefits for participants who retired after normal retirement age." *Belknap*, 588 F. Supp. 3d at 176; *see also Torres v. Am. Airlines, Inc.*, No. 18-cv-00983, 2020 WL 3485580, at *10, *12 (N.D. Tex. May 22, 2020) (denying class certification because certain class members would be worse off using updated mortality tables); *Thorne v. U.S.*

Bancorp, No. CV 18-3405, 2021 WL 1977126, at *2 (D. Minn. May 18, 2021) (denying class certification where "no model results in higher benefits for all class members and each model results in lower benefits for some class members"). Thus, if Appellants' position were accepted, the benefits for these employees would actually be reduced. Indeed, that employees could be harmed by such updates is confirmed by the fact that Appellants amended their complaint to remove Appellant Drummond from Counts I and II because he was better off under the plan's current mortality tables. *Compare* First Am. Compl. ¶¶ 140-59 *with* Second Am. Compl. ¶¶ 35-78. Appellants' "reasonableness" standards would therefore harm many of the employees they claim the standards would protect.

Second, Appellants' reasonableness standard would preclude employers from applying actuarial assumptions that favor employees. If all actuarial assumptions must be "reasonable" as of the date that benefits commence, then employers would be prohibited from applying "unreasonable" life expectancy or interest rate assumptions that favor employees. This would deprive employers and employees of a key tool in designing benefit plans that attract and retain talent. Such a result is inherently unfair to the employees Appellants claim to represent.

Third, Appellants' "reasonableness" and "currentness" standards could have even broader workplace impacts where employee benefits are part of a collective bargaining agreement. Empirical research demonstrates that union "collective bargaining efforts target employee benefits [even] more than they do wages." Matthew Knepper, *From the Fringe to the Fore: Labor Unions and Employee Compensation*, Rev. of Econ. & Stat., Vol. 102, No. 1, 2020, at 5 (Mar. 16, 2019).[12] Collective bargaining agreements therefore often include terms regarding defined retirement benefits because well over 50 percent of union members are offered defined benefit retirement plans. *See* Dep. Asst. Sec. for Microeconomics Laura Feiveson, *Labor Unions and the U.S. Economy*, U.S. Dep't of Treasury, at Fig. 3 (Aug. 28, 2023).[13] But if courts recognized Appellants' proposed "reasonableness" rules, single plaintiffs and the ERISA plaintiffs' bar could overturn entire collective bargaining agreements—and any accompanying wage and benefit increases and

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[12] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3805722.

[13] https://home.treasury.gov/news/featured-stories/labor-unions-and-the-us-economy#ftn8.

workplace protections—simply because the agreed benefits use supposedly "unreasonable" factors to calculate QJSAs and QPSA fees. Such a result would harm employees far more than they would benefit from a marginal increase in QJSA payments or marginal decrease in QPSA fees.

In short, Appellants' proposed "reasonableness" and "currentness" standards are not the panacea Appellants suggest. Especially given that ERISA "should not be supplemented by extratextual remedies," *Hughes Aircraft*, 525 U.S. at 447, the Court should heed ERISA's text rather than adopting unwritten rules that could have sweeping impacts on trillions of dollars in employer-sponsored retirement benefits and workplaces writ large.

CONCLUSION

For the foregoing reasons, ERIC, the Council, and CIEBA respectfully request that this Court affirm the judgment of the district court in this case.

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,708 words, excluding those parts exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that on February 3, 2025, the forgoing brief was electronically filed with the Clerk of Court for the U.S. Court of Appeals for the Eleventh Circuit via the appellate CM/ECF system.

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