No. 95-809

In The

Supreme Court of the United States

October Term, 1995

LOCKHEED CORPORATION, a Delaware corporation; DANIEL M. TELLEP; ROBERT A. FUHRMAN; VINCENT N. MARAFINO; K.H. ANDERSON; L. BERNARD; R.W. BERRY; P.N. BRAUN-AGEL; D.L. BRONCO; R.H. NORTHCUTT; W.E. SKOWRONSKI; A.G. VAN SHAICK; and W.T. VINCENT,

Petitioners,

vs.

PAUL L. SPINK, individually and on behalf of a class of similarly-situated individuals,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

THERESA M. TRABER
Counsel of Record
BERT VOORHEES
TRABER, VOORHEES & OLGUIN
128 N. Fair Oaks Avenue,
Suite 204
Pasadena, California 91103
Telephone: (818) 585-9611

Attorneys for Respondents Paul L. Spink, et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

Respondent-Plaintiffs restate the Questions Presented in the Petition as follows:

1. Whether the Ninth Circuit correctly held that the named fiduciaries of a pension plan engaged in a prohibited transaction in violation of Section 406 of the Employee Retirement Income Security Act of 1974 ("ERISA"), when they caused the plan to pay assets held in trust in exchange for mandatory waivers of all employment-related claims which could be brought against Lockheed, a party-in-interest and a named plan fiduciary.

2. Whether the Ninth Circuit correctly applied the legal standard this Court enunciated in *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483 (1994) in holding that the Omnibus Budget Reconciliation Act of 1986 ("OBRA 1986"), which amended ERISA and the Age Discrimination in Employment Act ("ADEA") to eradicate age discrimination, requires Lockheed to calculate pension benefits for older workers by including all years of service regardless of age, including those years when an employee was excluded from plan participation because of age.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court:

The Respondents, Paul L. Spink, *et al.*, respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the Ninth Circuit's decision in this case, which is reprinted at pages 1a-21a in Petitioners' Appendix.[1]

STATEMENT OF THE CASE

Petitioners misrepresent and omit key facts and distort the ruling of the Ninth Circuit which they seek to have this Court review. Accordingly, Respondents will correct herein the incomplete and inaccurate depiction of this case presented to the Court with regard to each Question Presented.

A. The "Prohibited Transaction" Question

Factual Background. Because it reversed the district court's dismissal of Respondents' complaint for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Ninth Circuit's ruling was based on the factual allegations of the complaint, as supplemented by the plan documents which were presented to the district court in connection with the motion to dismiss. The pertinent factual allegations are accurately set forth in the Ninth Circuit's opinion at pages 2a-5a of the Petition's Appendix.

In setting forth the facts pertinent to a review of the first Question Presented, however, Lockheed obscures the fact that all the key respondents here are "named fiduciaries" under the

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[1] Throughout this Opposition, the following abbreviations are used: "ER" (Excerpts of Record filed with the Ninth Circuit); "CR" with number (Clerk's Record, with reference to the docket number of the document; the trial court's docket sheet may be found at pages 58-59 of the Excerpts of Record); "Pet." (Defendants' Petition); "Pet. App." (Appendix attached to Defendants' Petition).

terms of the pension plan, distorts the nature and scope of the waiver it imposed on employees seeking early retirement and implies incorrectly that Respondent, Paul L. Spink, was somehow a disinterested bystander neither eligible for enhanced pension benefits nor harmed by Lockheed's unlawful conduct. Because of these misrepresentations, Respondents will briefly set forth the actual facts underlying their claims so as to correct the false impression created by the Petition.

Petitioner Lockheed Corporation is not only the plan sponsor of the Lockheed Retirement Plan for Certain Salaried Employees ("Plan") but also a "named fiduciary" under the terms of the Plan, and exercises its authority as such by resolution of its Board of Directors. (ER 4; CR 7, at p. 126). Lockheed and its officers, Petitioners Tellep, Fuhrman, and Marafino, are all "parties in interest" and "fiduciaries" within the meaning of ERISA. (ER 4-5). The remaining petitioners are all members of the Retirement Plan Committee of the Plan and as such are also "named fiduciaries" under the Plan. (ER 5-7; CR 7 at pp. 126-127).

All the conduct leading to the prohibited transaction here was undertaken by named fiduciaries directly. First, Lockheed amended the Plan to include unlawful provisions which caused the Plan to spend assets held in trust in exchange for broad waivers of all employment-related claims against Lockheed. Then, members of the Plan Committee administered the Plan according to these illegal terms, directly using plan assets for the benefit of Lockheed.

Lockheed passed Plan amendments at a Board of Directors meeting on May 8, 1990, creating a Special Retirement Opportunity ("SRO") and a 1990 Voluntary Retirement Program ("VRP"), which were made available to certain employees until June 30, 1990. Under the SRO and VRP provisions of the Plan, eligible employees were offered the retirement incentive of increased pension benefits – paid for out of the plan assets held in trust – in exchange for a mandatory agreement to release and discharge Lockheed from

virtually all employment-related claims the employee might have against the company.[2]

Although eligible to elect the SRO option, Spink did not do so because he did not want to waive his right to assert his claim that Lockheed's calculation of his pension benefits constituted age discrimination under ERISA and the ADEA. After more than 11 years of continuous service with Lockheed, Spink retired on June 30, 1990 with a pension benefit of less than $100 per month because Petitioners only credited him with the last 18 months of his employment. (ER 8-9; Pet. App. 4a).

The Complaint. Petitioners attempt to obtain this Court's review of the first Question Presented by trying to mislead the Court into thinking that Respondents challenged Lockheed's scheme of buying waivers of employment-related claims with plan assets held in trust solely on the ground that this conduct constituted a breach of fiduciary duties under § 404(a)(1)(A)(i) of ERISA. (Pet. 3). But this is not true. The Complaint also asserts a claim attacking Lockheed's scheme as a prohibited transaction in which the Petitioners caused the Plan to engage in a transaction which they knew or should have known constituted a direct or indirect use of Plan assets for the benefit of a party in interest (Defendant Lockheed) in violation of ERISA §§ 406(a) and (b), 29 U.S.C. §§ 1106(a)

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[2] It is patently false for Lockheed to assert that this case involves the payment of early retirement benefits in exchange for a narrowly tailored "agreement releasing Lockheed from any claims relating to the employee's decision to elect early retirement." (Pet. 3). Instead, as alleged in the Complaint, each employee seeking benefits under Lockheed's early retirement programs was "required to release and discharge the defendant Lockheed from almost all claims arising out of, or in any way related to, her/his employment with defendant Lockheed or the termination of that employment and to refrain from participating in any lawsuit to assert any such claims." (ER 20). Further, as the Ninth Circuit noted, the "all-encompassing" releases sought by Lockheed were described in the Plan as waiving "any claims . . . arising from termination of employment *or otherwise*." (Pet. App. 17a; CR 7 at p. 196 [emphasis added]).

and (b). (ER 23). Respondents also raised that the challenged scheme violated Section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1), which provides that "the assets of the plan shall never inure to the benefit of any employer." Thus, contrary to Petitioners' suggestion, Respondents raised three separate theories based on three distinct statutory provisions, not a single amorphous attack under ERISA's "fiduciary duty provisions." (Pet. 3).

The Ninth Circuit's Decision. In describing the court of appeals' ruling, Lockheed improperly reduces these three distinct statutory attacks to the single issue of whether a fiduciary breach occurred under Section 404. In order to accomplish this sleight-of-hand, Petitioners argue that the Ninth Circuit's ruling on the "prohibited transaction" claim under Section 406 was actually an improper determination on the "fiduciary breach" claim under Section 404.[3]

In fact, the Ninth Circuit ruled that the Petitioners – all of whom are named fiduciaries or their corporate officers – caused the plan to engage in a prohibited transaction in violation of Section 406[4] and explicitly declined to rule on Respondents' alternative theories that Petitioners' conduct

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[3] Thus, Lockheed first states that the Ninth Circuit "held that Lockheed breached its fiduciary duty under ERISA by amending its Plan" and then concedes that the court of appeals "[s]pecifically" held that Lockheed had violated the prohibited transaction provision of Section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), because the Plan amendment 'provides for use of Plan assets to purchase a significant benefit for Lockheed.' " (Pet. 5-6).

[4] Section 406(a)(1)(D), 29 U.S.C. §§ 1106(a)(1)(D), provides, in relevant part:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan, . . .

violated the anti-inurement clause of Section 403 and constituted a breach of fiduciary duties under Section 404.[5] What is more, the court of appeals' decision on the Section 406 claim is both straightforward and correct.

In essence, the Court held that, while the decision-making process of amending a pension plan may or may not be subject to analysis as a fiduciary act, the end product of the process – *i.e.*, the terms of the plan as amended – cannot violate the substantive provisions of ERISA. The Ninth Circuit explained:

> Lockheed is free to disregard employees' interests in amending the Plan, but it is not free to disregard the prohibitions of ERISA. "The substantive terms of . . . employee benefit plans must comply with the detailed and comprehensive standards of ERISA." *United Mine Workers of Am. Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982).

(Pet. App. 16a). The court of appeals found the terms of the plan in effect after the amendment process violated ERISA's Section 406(a)(1)(D), because these terms made the payment of plan assets in exchange for a waiver of claims against Lockheed a part of plan administration, literally "caus[ing] [the] pension plan to engage in" thousands of transactions in which the assets of the plan were "use[d] by or for the benefit of a party in interest," Lockheed. (Pet. App. 16a ["[the provisions of Section 406(a)(1)(D)] prohibit plan documents from providing for use of plan funds to buy the releases."]).

B. The "OBRA 1986" Question

While Respondents have no quarrel with the Petition's recitation of the basic facts underlying their claims of age discrimination under ERISA and the ADEA, Petitioners take

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[5] As to the claim that Petitioners' conduct violated their fiduciary duties under ERISA § 404(a)(1)(A)(i), the court of appeals refused to examine "whether an employer acts as a fiduciary when it amends the plan in a way which affects plan assets." (Pet. App. 14a, n.5).

pains to twist the holdings of both the district court and the Ninth Circuit in an apparent effort to demonstrate that the latter engaged in an extreme departure from established principles of statutory interpretation. As the following demonstrates, however, the two court decisions differ from one another not because of the radically different approach taken by one court or the other, but because the district court focussed on the wrong statutory provision.[6]

The district court's opinion. Respondents contend that Petitioners' practice of excluding certain years of service from benefit accrual calculations because of the employee's age at the time of hire constitutes a violation of the proscriptions under ERISA and the ADEA against maintaining a pension plan under which "an employee's benefit accrual is ceased, or the rate of an employee's benefit accrual is reduced, because of the attainment of any age." ERISA § 204, 29 U.S.C. § 1054(a)(1) and (b)(1)(H)(i); ADEA § 4, 29 U.S.C. § 623(j)(1)(A).

The district court refused to focus on the statutory language on which Respondents' claims are based and undertook no serious analysis of the provision of OBRA 1986 which established the effective date for this prohibition. Instead the district court focussed primary attention on a completely different statutory provision – the clause outlawing age-based exclusion from plan participation – and its effective date to determine that the "plain language" of OBRA 1986 defeated Respondents' claims. (Pet. App. 26a-27a). In what can only be described as an absurd reversal of logic, the district court looked to "the OBRA 1986 amendments concerning benefit accrual" – the statutory provisions on which Respondents' claims are actually grounded – to "provide **analogous support** for the Court's conclusion" *only after* it had examined

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[6] The district court, of course, did not have the benefit of this Court's analysis in *Landgraf* and failed to apply the same analytical model.

and relied on provisions of secondary relevance to reach that conclusion. (Pet. App. 27a [emphasis added]).

The court of appeals' decision. The Ninth Circuit, on the other hand, centered its analysis on the substantive provisions which Respondents have sought to enforce. After acknowledging the controlling authority of this Court's decision in *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483, the Ninth Circuit determined that the retroactive intent of the relevant provisions of OBRA 1986 was "manifested in its text" by examining the substantive and effective date provisions of OBRA 1986 and the legislative history leading to its enactment. (Pet. App. 7a-8a n.1).

First, the court of appeals examined the prohibitions in Sections 9201 and 9202 against reducing "the rate of an employee's benefit accrual" and found that the "most natural reading" of these provisions "compels us to conclude that pre-enactment service years must be included in benefit accrual calculation." (Pet. App. 7a). Second, it rejected Petitioners' invitation to carve out an exception to the rule that the rate of benefit accrual may not be reduced because of age, because Congress delineated the only exceptions to the rule and there was no statutory basis for creating the additional exception urged by Petitioners. (*Id.* 9a-10a). Third, the Ninth Circuit's review of the legislative history and structure of OBRA 1986 produced further evidence that its reading of the plain language of the statute supported Respondents' claims. (*Id.* 10a-13a). Finally, while both parties urged the court to consider their view of regulatory pronouncements of the Internal Revenue Service, the Ninth Circuit "decline[d] to apply either of these interpretations" because the IRS never adopted final regulations based on its proposed interpretations. (*Id.* 13a).

REASONS FOR DENYING THE WRIT

Petitioners have not satisfied any of the criteria traditionally applied by this Court in determining whether to grant a Writ of Certiorari.

First, Petitioners fail to demonstrate any conflict at all, much less an intolerable one, among the circuits regarding the first question presented. Petitioners are unable to cite to a single case holding that named fiduciaries do not violate Section 406(a)(1)(D) when they amend the terms of a pension plan to build in a requirement that plan assets held in trust be used to benefit a party in interest. Most of the cases Petitioners rely on deal instead with the question of whether plan fiduciaries breach their fiduciary duties under a different provision of ERISA, Section 404, when they disregard the interests of participants and beneficiaries in passing a plan amendment which itself does not violate ERISA.

Second, there is no other reason warranting Supreme Court review of the first question. Petitioners point to nothing which shows that even one employer, other than Lockheed, has ever used plan assets held in trust to buy waivers of any and all employment-related claims in connection with the payment of early retirement benefits. Because Petitioners' conduct falls squarely within the prohibitions of Section 406 of ERISA, it is highly unlikely that employers who take seriously their responsibilities under the law would pattern their conduct after Lockheed's. Nor is there anything on which Petitioners rely which even implies that the ability to do so is necessary to advance any important public interest. On the contrary, the limited ruling in this case fosters ERISA's central purpose of preventing fiduciaries and parties in interest from diverting assets held in trust for plan participants and beneficiaries to their own purposes.

Third, Petitioners have not shown either a split among the circuits or a doctrinal conflict between the Ninth Circuit's resolution of the OBRA 1986 issue and relevant Supreme Court authority. At best, Petitioners' argument amounts to a groundless complaint that the Ninth Circuit misapplied the properly-stated rule of law enunciated in *Landgraf v. USI Film Prods.*, 114 S.Ct. 1483, and, thus, is inappropriate for review by this Court.

Finally, there is no other compelling reason for this Court to review the OBRA 1986 issue. Petitioners are unable to show that the Ninth Circuit's interpretation will have any effect on the practices of other employers or on the smooth functioning of large pension plans. For example, Petitioners contend that a large number of plans are likely to have adopted the age-based reduction in benefit accrual computations which they did, by relying on IRS pronouncements purportedly permitting such a reduction. But it is simply untrue that the Ninth Circuit's decision is in conflict with IRS pronouncements on the issue. To the extent that other plans reasonably relied on the IRS in formulating the terms of their plan, those plans would conform to the standards enunciated by the Ninth Circuit.

Further, even if the court were to credit Petitioners' unsupported speculation that other companies perpetuated age distinctions in their benefit calculations after the passage of OBRA 1986 in the same way that Petitioners did, review by this Court would be unwarranted, not only because the Ninth Circuit's ruling is correct, but also because the issue raised is one which affects only a very tiny fraction of pension plan participants who worked and retired during a narrow window of time in the late 1980s and 1990s, and the decision will have virtually no impact on pension plan administration after these particular participants are deceased. Finally, the question has not been addressed by any other court of appeals and is not likely to recur.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS OR OTHER COMPELLING REASON TO GRANT REVIEW OF THE NINTH CIRCUIT'S HOLDING THAT PETITIONERS VIOLATED SECTION 406 BY AMENDING THE PLAN DOCUMENT TO CAUSE THE PLAN TO ENGAGE IN PROHIBITED TRANSACTIONS.

A. The Ninth Circuit Invalidated Plan Provisions Which Violated Substantive Terms of ERISA, Not Lawful Plan Amendments Imposing Eligibility Requirements.

Shaping their argument to create an issue for review which does not actually exist, Petitioners assert that the Ninth

Circuit's decision "imposes fiduciary responsibilities upon an employer when it amends a plan," but they fail to identify the duty which has been wrongly foisted on them or what aspect of the process of amending the plan was deemed by the Ninth Circuit to be a breach of that fiduciary duty. The reason for this conspicuous void is that the Ninth Circuit did not rule one way or the other on this aspect of Respondents' complaint.

The fiduciary duties imposed under ERISA are set forth in Section 404, 29 U.S.C. § 1104. It is true that the complaint alleges that Petitioners violated several of its fiduciary duties under Section 404,[7] and that the district court dismissed those claims. (ER 22-23; Pet. App. 28a-32a). Although Respondents urged the court of appeals to do so, however, the Ninth Circuit declined to rule on or even discuss their arguments that Petitioners' conduct in amending the plan and implementing that amendment constituted a breach of their fiduciary duties under Section 404 of ERISA. (Pet. App. 14a, n.5).

Petitioners complain, nonetheless, that the Ninth Circuit's ruling interferes with their right to freely amend the plan document and refer to cases which purportedly stand for the proposition that employers such as Lockheed may amend a benefit plan under ERISA "for any reason at any time." *Curtiss-Wright Corp. v. Schoonejongen*, ___ U.S. ___, 115 S.Ct. 1223, 1228, 131 L.Ed. 2d 94 (1995). But the issue here is neither the reason for the amendment, its timing, the motivation of those amending the plan, nor any other aspect of the amendment process itself.

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[7] In their complaint, Respondents charged Petitioners with breaching their fiduciary duty under Section 404(a)(1) to "discharge his duties with respect to the plan solely in the interest of the participants and beneficiaries"; their duty under Section 404(a)(1)(A)(i) to discharge their duties for the exclusive purpose of providing benefits to Plan participants and their beneficiaries; their duty under Section 404(a)(1)(B) to discharge their duties with the care, skill, prudence and diligence under circumstances that a prudent person would employ under like circumstances; and their duty under Section 404(a)(1)(D) to act in compliance with the provisions in the Plan and Trust Agreement prohibiting use or diversion of any Plan funds for any purpose other than for the sole and exclusive benefit of the Plan participants and beneficiaries. (ER 22-23).

Instead, as the Ninth Circuit recognized, the central question raised by Respondents is whether the end product of that process – that is, the plan document as amended – violates a substantive provision of ERISA. In this case, the Ninth Circuit held that the amended plan document violated Section 406(a)(1)(D), by requiring the plan to engage in multiple transactions using plan assets held in trust for the benefit of a party in interest.

While they attack the Ninth Circuit's holding on grounds not addressed by the court of appeals, Petitioners are forced to acknowledge that their power to amend the plan is not unlimited. In fact, they explicitly admit that the power to amend may not be exercised to create plan provisions which violate the substantive terms of ERISA. (Pet. 7-8). Such a conclusion is compelled by virtually every case cited in the Petition.[8] As a result, the courts in those cases go beyond the initial question of whether the amendment process may be scrutinized as a fiduciary act to determine whether the plan document, as amended, violates any substantive provision of ERISA.[9]

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[8] *See, e.g., Izzarelli v. Rexene Products Co.*, 24 F.3d 1506, 1524 (5th Cir. 1994) ("[I]n general, an employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, . . . , provided that the benefits reduced or eliminated are not accrued or vested at the time, and that the amendment does not otherwise violate ERISA or the express terms of the plan."); *Moore v. Reynolds Metals Co. Retirement P.*, 740 F.2d 454, 457 (6th Cir. 1984) ("[A]n employer is free to choose which benefits to include in a retirement program so long as the stringent requirements of ERISA are met and no other law or policy is violated.").

[9] *See, e.g., Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. at 1228 (Because ERISA does not "establish any minimum participation, vesting or funding requirements for welfare plans as it does for pension plans," the fact "that Curtiss-Wright amended its plan to deprive respondents of health benefits is not a cognizable complaint under ERISA"); *Averhart v. U.S. West Management Pension Plan*, 46 F.2d 1480, 1488 (10th Cir. 1994) (holding not only that amendment is not a fiduciary act but also that the amended provisions do not violate ERISA).

This is true even in *Johnson v. Georgia-Pacific Corporation*, 19 F.3d 1184 (7th Cir. 1994) – a case which Petitioners showcase in their argument. (Pet. 9). In *Johnson*, the Board of Directors of the plan sponsor adopted a plan amendment in November, 1989 which provided that, in the event of a change in control of the corporation, benefits to current employees would be increased so as to exhaust the surplus assets and those increased benefits would be deemed vested immediately. Corporate control did change and, in March, 1990, the terms of the plan, as amended, provided increased and fully vested benefits to current employees. In response to a challenge by retirees who did not benefit from the amendment, the court of appeals looked first at the amendment process, then at the implementation of the amendment, and finally at the terms of the plan as amended.

With regard to the first issue, the court of appeals held that "when amending the plan in November, 1989 the defendants did not act as fiduciaries under ERISA." Turning next to the issue of whether the "implementation of the amendment in March, 1990" violated the provisions of ERISA, the court considered whether the increase and immediate vesting of benefits resulted in a breach of any ERISA prohibitions. Among the issues considered was whether the March, 1990 benefit increase "exchang[ed] one instrument or asset for another" so as to result in a "disposition" of assets within the definition of a "fiduciary" under 29 U.S.C. § 1002(21)(A), or whether it constituted an "exchange [of] assets between the trust and the employer" in violation of Section 406 of ERISA, 29 U.S.C. § 1106(a). Since no asset was exchanged for another or otherwise disposed of, the *Johnson* court ruled that the amendment did not violate these substantive provisions. *Id.*, at 1189.[10]

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[10] Unlike in this case, the corporate officials who amended the plan in *Johnson* received no benefit for themselves or the plan sponsor in exchange for the enhanced benefits which went to employees in March, 1990. It may be said that they never received any "benefit" at all, since any "advantage"

Finally, the court of appeals addressed the retirees' argument that the terms of the plan as amended violated their rights under ERISA by denying them enhanced benefits which were provided to current employees. The *Johnson* court rejected this claim, relying on this Court's ruling in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91, 103 S.Ct. 2890, 2896-7, 77 L.Ed. 2d 490 (1983) that "ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." *Johnson*, 19 F.3d at 1190. Thus, far from conflicting with the Ninth Circuit's opinion here, *Johnson* provides implicit support by recognizing both that the amended plan must comply with ERISA's terms in order to pass muster and that a plan amendment which causes the plan to engage in a prohibited transaction violates ERISA.

It is extremely misleading for Petitioners to refer to the plan provisions which establish the early retirement program here as imposing only benign "eligibility criteria." The kinds of eligibility criteria which have been upheld by the courts are provisions, like the requirement of current employment status in *Johnson*, which themselves do not violate any substantive provision of ERISA. *E.g.*, *Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498 (2d Cir. 1995) (challenging plan amendment which provided enhanced retirement benefits to employees in certain divisions, while denying them to others); *Belade v. ITT Corp.*, 909 F.2d 736 (2d Cir. 1990) (attacking newly created retirement plan offering benefits only to certain full-time employees in designated departments).[11] While

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they may have obtained as a result of the initial amendment's deterrent impact on a takeover attempt was either lost or shown to be imaginary when corporate control in fact changed hands, despite the plan amendment.

[11] *See also Averhart v. U.S. West Management Pension Plan*, 46 F.3d at 1488 (challenge to providing benefits to employees eligible for Directors' Retirement Program but not to other employees); *Izzarelli v. Rexene Products Co.*, 24 F.3d at 1523 (challenge to amended plan amounts to argument that new terms benefitted some participants at the expense of

Petitioners imposed these sorts of eligibility criteria in connection with their 1990 early retirement programs, Respondents have never contested their right to do so.[12]

In sum, the Ninth Circuit did not issue any ruling on Petitioners' right to dictate legitimate eligibility requirements. Instead the court below reversed the district court's dismissal based on the narrow determination that the amended plan document itself violated ERISA by providing for numerous transactions in which plan assets held in trust were used to buy off employment-related claims against Party-in-Interest and Named Fiduciary Lockheed, in clear violation of the prohibition in Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D).

B. Far From Demonstrating An Intolerable Split Among the Circuits, Petitioners Cannot Point to A Single Case Which Conflicts With the Ninth Circuit's Decision Below.

On pages 10 through 11 of the Petition, Petitioners cite 10 cases decided by 8 different circuit courts in an effort to convince this Court that the Ninth Circuit's prohibited transaction ruling conflicts with virtually every appellate court which has addressed such an issue. A review of these cases, however, reveals that not one of them even involves a claim

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others); *Moore v. Reynolds Metals Co. Retirement P.*, 740 F.2d 454, 455 (6th Cir. 1984) (challenge to requirement that employees complete 5-month waiting period in order to receive benefits).

[12] To be considered an "Eligible Member" with respect to the 1990 early retirement program, an employee had to be a salaried employee on the payroll of certain identified Lockheed corporate entities on or after May 8, 1990, who reported to a particular Lockheed division, who would have qualified for early retirement by June 30, 1990, and who had received a written layoff notice on or before June 30, 1990. (CR 7 at pp. 194-195). Although these provisions set up eligibility criteria which distinguish between various classes of plan participants, Respondents do not challenge these provisions because, unlike the waiver requirement, they do not violate the substantive terms of ERISA.

by the plaintiffs that the employer, trustees or any other fiduciary violated Section 406(a)(1)(D), by using pension plan assets held in trust to benefit a party in interest, either by amending the plan to impose unlawful terms, by implementing such terms, or otherwise.

At the core of most of Petitioners' cases are claims under a completely different provision of ERISA, giving rise to rulings as to whether the defendant-employer breached its fiduciary duties under Section 404.[13] Further, many cases Petitioners wrongly point to as contrary to the Ninth Circuit's decision here do not even deal with pension plans where funds are held in trust, but rather involve welfare benefit plans which are unfunded and, thus, do not distribute funds which have been held in trust for plan participants and beneficiaries.[14] The crux of the present case, however, is the use

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[13] *See Siskind v. Sperry Retirement Program, Unisys*, 47 F.3d 498 (2d Cir. 1995) (challenging plan amendment as violative of existing plan provision and raising fiduciary breach claim under § 404); *Belade v. ITT Corp.*, 909 F.2d at 737 (§ 404 fiduciary breach claim); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1158-59 (3d Cir. 1990) (claim under § 404(a)(1) for fiduciary breach, in addition to claim for benefits under the plan and allegation of reporting and disclosure violations); *Izzarelli v. Rexene Products Co.*, 24 F.3d at 1513 (claims brought under §§ 404 and 405 and to enforce the anti-cutback provision of § 204(g); *Moore v. Reynolds Metals Co. Retirement P.*, 740 F.2d at 456 (challenge of plan provision as arbitrary and capricious); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988) (claims for plan benefits and for breach of fiduciary duties); *Averhart v. U.S. West Management Pension Plan*, 46 F.3d at 1488 (claims to enforce the plan terms, attacking claim rejection as arbitrary, and for breach of fiduciary duties under § 404(a)(1).

[14] Unlike with pension plans, ERISA does not impose any minimum participation, vesting or funding requirements on welfare plans, so there is no issue of a separate fund which is held in trust. *Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. at 1228; *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d at 1158-1162, esp. 1159 ("Because the severance plan at issue in this case was unfunded, there is no question regarding the management or investment of a separate trust."). *See also Sutton v. Weirton Steel Division of National Steel Corp.*, 724 F.2d 406, 411 (4th Cir. 1983) ("ERISA does

of pension funds held in trust to liquidate liabilities of a party in interest.[15]

In fact, the only case cited by Petitioners in which the court rules on a Section 406 claim in a pension plan setting is *Johnson v. Georgia-Pacific Corporation*, 19 F.3d 1184. As explained at more length above, none of the assets held in trust in *Johnson* were transferred to or used to benefit a party in interest, so the court naturally found no Section 406 violation.[16] Because the facts here are entirely different, *Johnson*

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not impress a trust upon [the employer's] corporate treasury for the payment of the contingent benefits" and "it is the unfunded nature of [the employer's] contingent liability that distinguishes this case from the cases, . . . where courts have found that fiduciaries have violated § 1106."); *Musto v. American General Corp.*, 861 F.2d at 901 n.2, 911; *Anderson v. John Morrell & Co.*, 830 F.2d 872, 875-876 (8th Cir. 1987); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986).

[15] Petitioners admit that they could not pay out pension funds to "settle lawsuits against Lockheed that were unrelated to pension benefits," implicitly recognizing that by liquidating these liabilities with plan assets they would be engaging in prohibited transactions to benefit a party in interest. Such settlement would likely exchange pension funds for broad waivers of existing and potential claims. At the same time, however, Petitioners attempt to argue that there was no "transfer of assets" to Lockheed because pension funds held in trust were paid only to plan participants as benefits. (Pet. 13-14). This argument exposes the true issue Petitioners would have this Court decide – whether they can evade the proscriptions of ERISA's prohibited transactions provisions by calling a payment out of the pension trust a "benefit" even though it would be illegal if it were called a payment in settlement of potential or actual claims. Indeed counsel for Petitioners argued to the Ninth Circuit that it would be proper for the plan to identify persons with lawsuits against Lockheed and amend the plan to provide them with enhanced benefits in exchange for an agreement to dismiss their lawsuits.

[16] *Phillips v. Amoco Oil Co.*, 799 F.2d at 1471-72 is even farther afield, holding as it does that a transaction which affects "contingent and non-vested future retirement interests" in a welfare plan cannot be a prohibited transaction under Section 406 because it does not involve "monies, property or fiscal assets" held in trust by the plan.

is inapposite and, thus, cannot be said to create any conflict with the Ninth Circuit's decision in this case.

Contrary to their suggestion, moreover, there are no cases which support Petitioners' use of waivers in this context. *Astor v. International Business Machines Corp.*, 7 F.3d 533, 534-6 (6th Cir. 1993) does not conflict with the Ninth Circuit's decision here, not only because it involved a newly-funded early retirement program rather than the payment of existing pension plan assets held in trust,[17] but also because the plaintiffs in *Astor* never challenged the waiver requirement, instead claiming fraudulent inducement to accept the program. *Cirillo v. Arco Chemical Co.*, 862 F.2d 448 (3rd Cir. 1988) is even farther afield, since it is not a case brought under ERISA at all and deals solely with whether the employee executed a "knowing and voluntary" waiver of his ADEA rights.

C. No Compelling Reason Exists For Granting Review.

Despite the narrow and clearly correct ruling of the Ninth Circuit, Petitioners project that the decision below will have a cataclysmic impact on labor relations, the discretion of employers to make business decisions, and the smooth administration of pension plans throughout the nation. These projections are wildly exaggerated or downright fanciful.

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[17] The same is true of *Harlan v. Sohio Petroleum Co.*, 677 F.Supp. 1021 (N.D.Cal. 1988), where the employer implemented a new welfare benefit plan for employees who were involuntarily terminated and required releases as a condition of participation. In finding that requiring such a waiver did not violate § 404(a)(1)(A) of ERISA, the *Harlan* court explained that § 404 does not apply to the "creation" of a plan and carefully noted that "[t]his is not a situation where the plan had already been in effect, and the defendant [employer] later sought to condition the benefits on a later required release." *Id.*, 677 F.Supp. at 1026.

Petitioners argue that the Ninth Circuit's "prohibited transaction" ruling here will interfere with employers' ability to "add new benefits or increase present benefits" for a wide spectrum of "corporate purposes." (Pet. 14). But the decision below does not challenge the *purpose* of the plan amendment or any fiduciary's *motivation* in establishing it. In light of the Ninth Circuit's statement that "Lockheed is free to disregard employees' interest in amending the Plan," it cannot be said that the decision below places any limitation on an employer's ability to amend its plan as part of the settlement of a collective bargaining dispute, to avoid a strike, or in the other contexts raised by Petitioners. (Pet. App. 16a). The decision below simply affirms established Supreme Court law that the terms of any such amendment cannot violate substantive provisions of ERISA. *E.g.*, *United Mine Workers of Am. Health and Retirement Funds v. Robinson*, 455 U.S. at 575.

Nor is there anything in the Ninth Circuit's decision which suggests that an employer will engage in a prohibited transaction whenever "it amends its plan to encourage voluntary early retirement" or otherwise provides an early retirement window to induce retirement with pay in lieu of layoff. (Pet. 15). The opinion below does not outlaw any form of early retirement program *except* those which require employees to relinquish all rights they may have to sue their employer in order to obtain enhanced benefits which are paid out of pension funds held in trust.[18] It does not bar employers from providing enhanced benefits out of plan assets without requiring a waiver of all claims. Nor does it prevent an employer from financing such a program with its own assets.[19] Because of the narrow scope of the Ninth Circuit's

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[18] The Ninth Circuit did not decide whether the release was impermissibly broad in its scope, whether such a release could be obtained in connection with enhanced benefits paid out of corporate assets, or whether a more narrow release of claims would be permissible. (Pet. App. 17a-18a).

[19] For this reason, there is no conflict between the Ninth Circuit's ruling and Treasury regulations referring to the use of covenants not to

ruling, Petitioners' concern about the continued vitality of early retirement programs as a method of corporate downsizing is misplaced. (Pet. 26).

In fact, the very authorities relied upon by Petitioners reveal that the likely impact of the Ninth Circuit's ruling is quite small. While it found that 80 percent of the Fortune 100 companies offered some sort of early retirement program at least one year during the period from 1979 through 1988, the U.S. Government Accounting Office (GAO) determined that only 28 percent of the employers with such programs required participants to sign waivers **of any sort** in order to receive benefits. *See* General Accounting Office Use of Waivers by Large Companies Offering Exit Incentives to Employees, GAO/HRD 89-87 at 4-5 (1989). More significantly, only about 5 percent of the 198,281 employees who elected to leave under early retirement programs during the relevant ten years had to sign waivers in order to receive enhanced benefits under an existing pension plan, as opposed to a newly created severance package program, and there is no indication in the report as to whether these enhanced benefits were paid out of pension assets held in trust or by a new contribution by

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compete and waivers. (Pet. 15). Even if it were correct to say, as Petitioners do, that these regulations "expressly recognize that pension plans may condition the receipt of benefits upon covenants not to compete and on waivers" – which they do not – nothing in the regulations indicates that any covenant or waiver would be valid if it were required in connection with the distribution of benefits paid out of funds held in trust. Instead, the regulations cited by Petitioners list a series of possible circumstances and indicates that they will not be considered in determining if a benefit plan has violated ERISA's *nondiscrimination requirements*. *E.g.*, Treas. Reg. §§ 1.401(a)(4)-4(b)(2)(ii)(B).

the sponsoring employer.[20] *Id.*, at 7. Even assuming, *arguendo*, that all these benefits were paid out of assets held in trust and all of the waivers were as all-inclusive as those used by Petitioners here, according to the authorities cited in the Petition, the practice at issue here affected less than 10,000 employees out of a workforce of approximately 8.3 million over a ten-year period. *Id.*, at 4.

In sum, because of its narrow holding, the Ninth Circuit's decision will have very little effect on early retirement incentive programs as they are used by the vast majority of businesses in the United States. While it seems that such programs are used by a number of companies and that a small proportion of them request waivers in exchange for the early retirement benefits, it is clear that few employers have followed Lockheed's lead by dipping into plan assets held in trust – as opposed to their own corporate funds – to buy waivers of any and all employment-related claims in connection with the payment of such benefits.

Even if it were true, moreover, that numerous employers wished to adopt the early retirement scheme devised by Lockheed, there are strong policy reasons for upholding the prohibition recognized by the Ninth Circuit in this case. The law should not countenance a corporate strategy which uses plan assets held in trust as if they belonged in the coffers of the plan sponsor, merely because the strategy is accomplished by formal amendment of the plan document or by calling the transfer of assets a payment of benefits. Such a ruling would eviscerate the force of Section 406 and effectively gut the prohibitions against improper use of trust funds which constitute the foundation not only of ERISA but of long-recognized common law trust principles.

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[20] Petitioners' reliance on the Grant article poses the same problems since the fact that waivers were used in an early retirement program does not mean that the benefits are paid out of pension funds held in trust. (Pet. 27-8 *quoting* Grant, The "Open Window" – Special Early Retirement Plans in Transition, 16 Empl. Ben. J. 10, 15 (March, 1991)).

II. THERE IS NO REASON TO GRANT REVIEW OF THE NINTH CIRCUIT'S INTERPRETATION OF OBRA 1986 BECAUSE THE COURT OF APPEAL PROPERLY APPLIED THIS COURT'S ANALYSIS IN *LANDGRAF* AND ISSUED A RULING CONSISTENT WITH IRS PRONOUNCEMENTS ON A QUESTION WHOSE IMPACT IS VERY LIMITED AND DISSIPATES OVER TIME.

A. Since the Court of Appeals Cited To and Applied This Court's Ruling in *Landgraf*, Petitioners' Challenge Amounts To A Quarrel With The Ninth Circuit's Application of A Properly Stated Rule of Law.

Trying to convince this Court to review the Ninth Circuit's interpretation of OBRA 1986, Petitioners claim that the decision below is "flatly inconsistent" with this Court's ruling in *Landgraf v. USI Film Products*, 114 S.Ct. 1483, within the meaning of Rule 10(c) of the Rules of the Supreme Court. Perusal of the Ninth Circuit's decision and Petitioners' complaints about that decision reveals, however, that Petitioners are really claiming that the court of appeals "misappli[ed] . . . a properly stated rule of law." Rather that unmasking a doctrinal disagreement of any sort, the Petition quibbles with the Ninth Circuit's interpretation of the key provision on which Respondents' claims are based, ignores the Ninth Circuit's reliance on statutory language and legislative history which supports its conclusion, and improperly transforms one aspect of this Court's analysis of unique statutory provisions in *Landgraf* into a broad, inflexible rule of statutory construction. But a comparison of *Landgraf* and the Ninth Circuit's analysis below makes clear that the court of appeals applied the principles of statutory construction enunciated by this Court.

The precise issue before the Court in *Landgraf* was whether provisions of the Civil Rights Act of 1991 which added a new damages remedy and a concomitant right to jury trial should be applied to a Title VII case that was pending on appeal when the statute was enacted. *Ibid.*, 114 S.Ct. at 1488.

After detailed examination of its previous precedents interpreting statutes which were claimed to have retroactive application in some manner (*id.*, at 1496-1504), this Court laid out a blueprint for judicial analysis of the issue:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statutes would have retroactive effect. . . . If the statute would operate retroactively, our traditional presumption [against retroactive application] teaches us that it does not govern absent clear congressional intent favoring such a result.

Id., at 1505.

The *Landgraf* Court applied this 3-step analytical model in its evaluation of the 1991 Act. The Court explained that "the first question" in its inquiry was "whether the statutory text on which petitioner relies manifests an intent that the 1991 Act should be applied to cases that arose and went to trial before its enactment." *Id.*, at 1492. The Court analyzed the language of the substantive statutes relied on by the petitioners, the effective date provisions, their relationship to other provisions in the 1991 Act, their significance in light of similar provisions rejected in earlier versions of the Act, and indications of Congressional intent which emerge from the legislative history. Based on this inquiry, the Court concluded there was no guidance in the language of the statute itself or in the legislative history illuminating that statute as to whether the Act's provisions should apply to cases on appeal. *Id.*, at 1490-96.

Turning to the second step, the Court then evaluated whether the particular provisions at issue in the case operated retroactively so as to give rise to the presumption against retroactivity. Finding they did, the Court applied the presumption because, at the third step of its analysis, it found "no

clear evidence of congressional intent that § 102 of the Civil Rights Act of 1991 should apply to cases arising before its enactment." *Id.*, at 1508.

The Ninth Circuit recognized the controlling force of this Court's holding in *Landgraf*. (Pet. App. 8a, n.1). Because the parties debated the issue of whether Respondents' argument amounted to a request for retroactive application, the court noted in a footnote that, "to the extent [its] interpretation requires employers to include pre-enactment service years in calculating accrued benefits, it applies retroactively."[21] The court explained, however, that "this observation does not affect our conclusion because our analysis is based on retroactive intent of the statute *manifested in its text*." (*Id.* [emphasis added], *citing to Landgraf*, 114 S.Ct. at 1492). Thus, the Ninth Circuit followed the *Landgraf* model fashioned by this Court, but did not proceed past the first step because it found that "Congress ha[d] expressly prescribed the statute's proper reach." *Id.*, at 1505. Thus, contrary to Petitioners' suggestion, there was no need for the court of appeals "to resort to judicial default rules" by applying the presumption against retroactivity "absent clear congressional intent favoring such a result." *Id.*

Nor can it be said that the Ninth Circuit departed from this Court's method of evaluating "the statute's proper reach." Like the *Landgraf* Court, the Ninth Circuit began by examining the substantive provisions relied on by Respondents, holding that "the most natural reading" of OBRA 1986's prohibitions on reducing "the rate of an employee's benefit accrual" because of age "compels us to conclude that pre-enactment service years must be included in benefit accrual

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[21] These comments constituted a rejection of Respondents' argument below that the construction they proposed did not result in a truly retroactive application, but only in the current application of a benefit calculation formula based on factors, like years of service or level of compensation, which made reference to events from the past.

calculation." (Pet. App. 5a-9a, *esp.* 7a).[22] Recognizing that, under Lockheed's plan, Respondents were credited with fewer years of service because of their age, the court of appeals found that this age-based reduction comes within the "essence of OBRA's express prohibitions" and implied that allowing a rate reduction to be accomplished indirectly by discounting the number of credited service years would eviscerate the force of the OBRA 1986 prohibition. (*Id.* 9a).[23]

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[22] Revealing what really bothers them about the Ninth Circuit's decision, Petitioners include a lengthy attack on that court's conclusion that the "natural reading" of OBRA 1986's prohibition on reducing "the rate of an employee's benefit accrual" supports Respondents' claims. (Pet. 19-20). At the core of this attack is not a doctrinal conflict with *Landgraf* but Petitioners' desire that the court of appeals impose a narrow construction on the word "rate," so the statute would preclude age discrimination through the manipulation of only certain factors in a benefit accrual formula but not others. Because there are a myriad of ways such a formula can be altered to discriminate against older workers, however, the Ninth Circuit recognized that *any* type of change in the formula which constitutes a reduction based on age violates OBRA 1986. (Pet. App. 9a).

This does not mean, as Petitioners suggest, that the Ninth Circuit was confused about the difference between the rate of benefit accrual and the total benefits accrued. The formula described in the Petition illustrates the problem the Ninth Circuit sought to obviate. That formula has three factors: a percentage figure which is applied to final compensation, a final compensation figure, and the number of years of service. Petitioners say that the "rate" of benefit accrual is the percentage figure, that this is the only "rate" which may not be reduced because of age. (Pet. 20 n.12). In fact, however, the benefit accrual formula may be reduced by manipulating any of the 3 factors, *e.g.*, by cutting out certain years based on age from the "years of service" calculation, by disregarding certain compensation levels for years when the participant was 61 or older, or by applying a different percentage figure for years worked after age 61. To allow such manipulation of the benefit accrual formula would eviscerate OBRA 1986's prohibition of aged-based discrimination in benefit accrual.

[23] The Ninth Circuit rejected Petitioners' invitation to carve out an exception for an aged-based reduction based on the previously lawful exclusion of older workers from the plan, because the court found no justification for the exception in the statutory language. (Pet. App. 9a-10a).

As in *Landgraf*, the Ninth Circuit also probed the legislative history and determined that it "verifie[d] [the court's] reading of the language of the OBRA 1986 amendments." (Pet. App. 10a). Following the lead of the *Landgraf* court, the Ninth Circuit looked at the relevant effective date clause, which is § 9204(a)(1) of OBRA 1986, and its relation to an earlier version of this clause which would have limited OBRA 1986's prohibition on age-based benefit calculations to certain "accrual computation periods." (*Landgraf*, 114 S.Ct. at 1493-1494; Pet. App. 10a-11a). Based on this comparison, the Ninth Circuit determined that Congress intended no limit on the years of service to be included in benefit calculations since it excised plain language specifically limiting benefit accrual periods in favor of language imposing no such restrictions and making the prohibition broadly applicable to all employees "who have one hour of service in any plan year to which the amendments apply." (Pet. App. 11a, *quoting* OBRA 1986, § 9204(a)(1)).

The Ninth Circuit also scrutinized the effective date clause for the benefit accrual provisions in relation to the effective date clause for OBRA 1986's provision outlawing age-based exclusion from plan participation. The court of appeals found language in § 9204(b) which Congress could have used to restrict the application of the benefit accrual provisions to post-enactment years,[24] but which it declined to use in the immediately adjacent § 9204(a), and inferred from that comparison that Congress did not intend the same restriction to apply to the benefit accrual provisions.[25] The court

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[24] Section 9204(b) provides that the amendments requiring nondiscriminatory participation "shall apply only with respect to plan years beginning on or after January 1, 1988, and only with respect to service performed on or after such date."

[25] Petitioners contend that the Ninth Circuit's comparison of subsections (a) and (b) of § 9204 conflicts with this Court's supposed holding in *Landgraf* that "'negative inferences' made from the inclusion of prospectivity language in one part of a statute but not another cannot constitute

also rejected Petitioners' suggestion below that subsection (b) should be read to impose a restrictive application on the benefit accrual provisions controlled by the effective date clause in subsection (a), logically concluding that there was no reason for Congress to impose such a limitation indirectly through subsection (b) when it could have inserted an explicit restriction in subsection (a). (Pet. App. 11a-12a).[26]

In its evaluation of Respondents' claims that Petitioners "reduc[ed] . . . the rate of [their] benefit accrual because of age," the Ninth Circuit not only followed the analytical framework outlined by this Court in *Landgraf*, it also patterned the more intricate aspects of its statutory interpretation

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clear legislative intent of retroactivity." (Pet. 22). *Landgraf* simply does not stand for such a proposition. Instead the court in *Landgraf* ruled that, in light of the fact that explicit retroactivity language existed in a prior version of the Civil Rights Act and that it was mentioned as a reason for the prior bill's veto, and given the broad coverage of the Act, specific prospectivity language in two relatively minor provisions in a bill with more than 50 sections did not necessarily imbue a nondescript provision requiring that the Act be "effective upon enactment" with retroactive meaning. *Id.*, 114 S.Ct. at 1493-94. By contrast, the Ninth Circuit here compared the only two effective date clauses, sitting side-by-side in a 4-section bill, and came to a conclusion which was compatible with its reading of the substantive provision at issue and Congress's rejection of a previous version which explicitly limited the retroactive application of that provision.

[26] Petitioners argue that the language differences in the two subsections derive from congressional awareness of pending litigation claiming that the reductions in benefit accrual based on age were illegal under the ADEA, and a desire by Congress to "leave open the ultimate resolution of the issue of accrual cessation (for pre-OBRA 1986 participants) for the then-ongoing litigation." (Pet. 22-23). There is nothing, however, in the statute or the legislative history which supports this speculation about congressional motives. Nor do Petitioners explain why this historical context would have prompted Congress to choose the language it did rather than explicitly stating that the new provisions only apply prospectively and, thus, do not interfere with any judicial interpretations of existing law.

after the analysis pursued by the *Landgraf* court. Since Petitioners' argument that the Ninth Circuit's ruling creates a doctrinal conflict with Supreme Court law boils down to a misguided complaint with the lower court's careful application of the higher court's enunciated principles, further review by this Court is plainly unwarranted.

B. Relevant Pronouncements of the Internal Revenue Service, Entitled to Deference, Are Consistent With The Ninth Circuit's Interpretation of OBRA 1986.

Petitioners also protest the Ninth Circuit's refusal to interpret pronouncements of the Internal Revenue Service (IRS) as consistent with their position and entitled to deference in construing the provisions of OBRA 1986. (Pet. 23-25). While the Ninth Circuit clearly could not defer to regulations which conflict with OBRA 1986's meaning as "manifested in its text," we address Petitioners' flawed argument because they claim that many employers have detrimentally relied on these IRS pronouncements about the application of OBRA 1986. Since pertinent IRS pronouncements are **consistent** with the Ninth Circuit's determination that no years of service may be disregarded in benefit calculations because of the employee's previous exclusion based on age, however, there is no concern that the decision here will upset the administration of plans whose administrators relied on the IRS in fashioning their plans.

On April 11, 1988, the IRS published proposed regulations setting forth the general rule that pre-enactment years of service are to be included in benefit accrual calculations but carving out an exception for persons, like Respondents, who were previously excluded from participation because of age. Prop. Treas. Regs. § 1.411(b)-2, 53 Fed. Reg. 11, 877 (1988). These proposed regulations were never issued as final regulations.

Instead, on December 9, 1988, the IRS issued Notice 88-126 announcing its intent to issue final regulations which

"will provide that the OBRA benefit accrual rules apply to all years of service (including years of service before January 1, 1988) completed by a participant in a noncontributory defined benefit plan who has at least 1 hour of service with the plan sponsor in a plan year beginning on or after January 1, 1988." IRS Notice 88-126, 1988-2 C.B. 538 (1988). There is nothing in the IRS notice which indicates an intent to carve out an exception to this rule for participants who were once lawfully excluded from participation because of their age.

What is more, the notice explicitly provides that, while "[t]axpayers may rely on this notice until the final regulations are published," "[n]o inference should be drawn, . . . , regarding any issue not specifically addressed in this notice." *Id.* The broad directive to include all years of service in any benefit calculation is "specifically addressed" in the notice, but Petitioners' proposed exception is not. Thus, reasonable reliance on this IRS notice would lead a taxpayer to include all service years in benefit accrual calculations. Given the lack of final regulations, the limited substantive scope of the IRS notice, and the absence of statutory support, carving out the exception taken by Petitioners is not only an unwarranted action under the IRS notice but a legal gamble for which the law provides no insurance.

C. The OBRA 1986 Question Is A Matter Of Minimal Import Which Will Affect A Very Limited Number Of Pensioners For A Short Period of Time.

Petitioners posit that the Ninth Circuit's ruling on OBRA 1986's application will have a "nationwide impact" on "employers and pension plans nationwide" who will now have to provide additional benefits to "thousands of employees" "at great cost" to themselves, but none of these bald assertions are supported by any authority. (Pet. 29). Looking merely at the legal parameters of the issue, however, it is clear that the ruling's impact will be small in scope and limited in duration, and that the issue presented – which has never been addressed

by any other circuit court – will likely never recur because of its rapidly passing significance. Thus, there is no reason for this Court to devote its resources to reviewing this issue.

Given the IRS pronouncement requiring that all years of service be included in benefit calculation under the OBRA 1986 amendments, the number of employers who risked violation of this rule is likely to be exceedingly small. Further, the scope of employees affected by the narrow issue presented here is very narrow. The only persons impacted by the Ninth Circuit's ruling are employees (a) who started working for an employer before the first day of the pension plan year beginning sometime in 1988; (b) who were within 5 years of normal retirement age – usually after the age of 60 – at the time they started working; (c) who continued to work at least one day in the 1988 plan year and, thus, became plan participants under OBRA 1986; (d) whose employer had a pension plan which excluded such workers from plan participation because of their age; and (e) whose pension plan refused to include pre-1988 years of service in calculating their benefits under the plan. The *youngest* of this class of persons turned 60 sometime in 1988 and are currently at least 67 years old. No other persons will fit into this class in the future, and the number of persons is rapidly dwindling as a natural result of the death of these retirees.

The issue raised here is not one which has aroused any interest in legal circles. No other court of appeals has addressed the issue to date. Further, given the fact that the issue is not likely to recur because of its passing relevance and in light of the limited number of plans and participants to whom it may apply, it is unlikely that any federal court will ever have to confront the question again. In short, this is not the type of "important federal issue" to which this Court should turn its attention.

CONCLUSION

For all of the foregoing reasons, Respondents pray that the petition for writ of certiorari be denied.

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Respectfully submitted,

THERESA M. TRABER
Counsel of Record
Admitted to the Bar of the
Supreme Court on 10/10/95
BERT VOORHEES
TRABER, VOORHEES & OLGUIN
128 N. Fair Oaks Avenue,
Suite 204
Pasadena, California 91103
Telephone: (818) 585-9611

Attorneys for Respondents