No. 11-1001

In The
Supreme Court of the United States

STERLING CHEMICALS, INC., *et al.*,

Petitioners,

v.

ROBERT E. EVANS, *et al.*,

Respondents.

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

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN BENEFITS COUNCIL IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents 300,000 direct members and indirectly represents three million businesses and organizations. The Chamber has members of every size, in every industry sector, and from every region of the United States

The American Benefits Council (the "Council") is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 350 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief.

Counsel of record received timely notice of intent to file this brief (on March 4, 2012, which was more than 10 days prior to the due date). Both Petitioner and Respondent have consented to the filing of a brief *amicus curiae* in this matter, and copies of the consent letters are being filed simultaneously herewith.

or provide services to retirement and health plans covering more than 100 million Americans.

A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community. This case presents important issues under the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. The Chamber has filed *amicus* briefs in several ERISA cases recently heard by this Court, including *Conkright v. Frommert*, 559 U.S. ___ (2010), *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), and *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008). Likewise, the Council frequently participates as *amicus curiae* in cases that have the potential for far-reaching effects on employee benefit plan design or administration.

Given the enormous costs, risks, and the evolving burdens and liabilities confronting businesses in the United States, *amici* are well-suited to address the interests of the business community at large and provide a statement of position that is broader and more far-reaching than the more limited interests of the litigants.

Amici and their members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. The misguided decision below, which allows employee benefit plans to have been amended unknowingly and unintentionally by corporate purchase agreements that were neither identified nor intended as plan amendments, profoundly and adversely affects *amici*'s members by throwing the terms of their plans into doubt, introducing the prospect of enormous unanticipated liabilities, and opening the door to unnecessary, time-consuming and expensive litigation over the operation of their plans for many prior years. We believe this Court's review is urgently needed.

SUMMARY OF ARGUMENT

A. In addition to the two conflicts identified in the petition for certiorari with the First and Sixth Circuits, the decision below conflicts with a new decision of the Third Circuit – *Shaver et al. v. Siemens Corporation et al.*, 2012 U.S. App. LEXIS 4081, 2012 WL 639269 (3d Cir. February 29, 2012). In *Shaver*, the district court adopted the same view as the decision below, holding that the terms of a corporate purchase agreement not only amended but actually created an ERISA-covered benefit plan. The Third Circuit reversed and held that a contractual commitment of a purchaser to a seller under a corporate purchase agreement (neither identified nor intended as a plan amendment) does not create or amend an employee benefit plan of the purchaser, putting the decision below in direct conflict with the Third Circuit as well.

B. The decision below directly conflicts with this Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), in which the Court authoritatively construed the provisions of ERISA regarding amendment of ERISA-covered employee benefit plans. There, the Court confirmed that a simple amendment procedure – reservation to the sponsor of the right to amend – was entirely satisfactory under ERISA and was to be given full effect in order to (i) assure that "proposed plan amendments, which are fairly serious events, are recognized as such" and (ii) "enable[ ] plan administrators . . . to have a mechanism for sorting out, from among the occasional corporate communications that pass through their offices and that conflict with the existing plan terms, the bona fide amendments from those that are not." 514 U.S. at 82.

By contrast, the decision below took as a plan amendment a provision from a corporate purchase agreement that was not denominated as a plan amendment, was not intended to be a plan amendment, and was not adopted by the person identified in the plan document as having exclusive authority to adopt plan amendments. In doing so, the decision below obliterated the ERISA scheme so carefully explicated and preserved in *Curtiss-Wright*, to the very great detriment of plans everywhere.

C. In obliterating the formalities required for plan amendments, the decision below unsettles the terms of all plans whose sponsors have entered into corporate purchase agreements with provisions regarding employee benefits (which is virtually all of them). If left uncorrected, this would have important implications in several areas:

1. Plan administrators would be required to review all prior purchase agreements to try and decide what terms of those agreements constituted plan amendments even though not denominated or intended as plan amendments. Then they would have to decide exactly what the terms of those amendments were and face the prospect of retroactively adjusting benefits either upward or downward, including for participants whose benefits have already been paid.

Moreover, the plan administrator's duty of disclosure under ERISA would require that all such documents be made available to the participants in the plan upon request. As a result, all participants would be entitled to copies of corporate purchase agreements, board minutes, etc., so they could decide for themselves whether any such documents represented plan amendments and, if so, what the terms of those amendments were.

2. Purported plan amendments lurking within corporate purchase agreements will not have been drafted with the care required for compliance with ERISA and the Internal Revenue Code – naturally, because they were never intended to be plan amendments. As a result, omission of critical language will result in inadvertent violations of ERISA and the Internal Revenue Code, with the latter quite

unnecessarily exposing pension and profit sharing plans to the nightmare of disqualification for tax purposes.

3. A new class of ERISA litigation will be created – the battle between employers and employees over corporate purchase agreements. Whereas compliance with corporate purchase agreements has always been a matter of contract between the seller and purchaser, now employees will have a right of action as participants in ERISA-covered employee benefit plans to test corporate purchase agreements under ERISA on the theory that they constituted plan amendments. This new cause of action will bring them all the advantages of ERISA – liberal jurisdiction and venue, a host of complex provisions to argue about,[2] the overlay of ERISA fiduciary responsibility (which requires the fiduciary to eschew its own self-interest and act solely in the interest of the participants), and recovery of attorneys' fees.

In reaction, plan administrators may be forced to take advantage of this Court's invitation in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989): "A trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court." If any participant resides in the Fifth Circuit, a plan

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[2] *See Shaver, supra,* where the Third Circuit spent the better part of 78 pages unraveling technical ERISA issues (in the alternative).

administrator might be well advised to file an action in the First, Third or Sixth Circuits seeking instructions as to whether the provisions of one or more corporate purchase agreements constitute plan amendments and, if so, exactly what they require – a wasteful and burdensome exercise that Congress cannot have intended.

ARGUMENT

A. A Recent Decision of the Third Circuit Puts the Fifth Circuit Directly in Conflict with the Third Circuit, in Addition to the First and Sixth Circuits, on the Question Presented.

The petition presents the question whether a contractual commitment of a purchaser to a seller under a corporate purchase agreement also constitutes an amendment of the purchaser's ERISA-covered employee benefit plans. In this case, the district court held that the purchase agreement did not constitute an amendment of the purchaser's retiree medical plan. The Fifth Circuit reversed and held that the purchase agreement did constitute an amendment of the purchaser's retiree medical plan.

By contrast, in a decision published after the petition for *certiorari* was filed in this case, the U.S. Court of Appeals for the Third Circuit held to the contrary. *Shaver v. Siemens Corporation*, 2012 U.S. App. LEXIS 4081, 2012 WL 639269 (3d Cir. February

29, 2012).[3] In a pattern just the opposite of this case, the Magistrate Judge in *Shaver* concluded, and the district court held, that the terms of the purchase agreement not just amended but actually created a pension plan of the purchaser. The Third Circuit reversed and held that the purchase agreement neither amended nor created a pension plan of the purchaser.

In *Shaver*, a corporate purchaser entered into a purchase agreement with a corporate seller in which the seller sold a business unit to the purchaser. The employees of that business unit were terminated by the seller and hired by the purchaser. In the purchase agreement, the purchaser committed to the seller that it would provide a pension plan to the newly acquired employees with terms and conditions substantively identical to the seller's pension plan. As a result, upon retirement, the employees would receive a pension from the seller's pension plan for benefits accrued before the sale and a pension from the purchaser's pension plan for benefits accrued after the sale. (Slip Op. at 7-12)

In the thirteen-day interval between the execution of the purchase agreement and the closing of the transaction, the employees were terminated by the seller and hired by the purchaser. The purchase agreement provided that, during this thirteen-day

[3] The slip opinion is available on the website of the Third Circuit at http://www.ca3.uscourts.gov/opinarch/104147p.pdf.

interval, the employees would continue to accrue benefits under the seller's pension plan. In return, the purchaser agreed not to terminate such employees other than for cause and that, if it nevertheless did so, it would reimburse the seller for any actuarial pension loss caused by the termination. (Slip Op. at 10-11)

Both the Magistrate Judge and the district court concluded that the obligation undertaken by the purchaser during this period of thirteen days constituted an ERISA-covered pension plan sponsored by the purchaser, which they called the "transition plan." The Third Circuit described the recommendation of the Magistrate Judge (Slip Op. at 28) thus: "[T]he Magistrate Judge concluded that Siemens [the purchaser] adopted an ERISA 'transition' plan for the thirteen-day period from August 19 to August 31, 1998, by virtue of Westinghouse's [the seller's] extension of its pension plan to cover the legacy employees during that time."

The district court so held in its memorandum opinion adopting the recommendation of the Magistrate Judge. Referring to "the thirteen day period in which Siemens committed itself in the Asset Purchase Agreement ('APA') to provide transitional coverage," the district court wrote, "Because there was a clear establishment of specific benefits for an identifiable class of employees over a set period of time, with measures to administer the benefits to the beneficiaries, all of which had to be reviewed on an employee-by-employee basis pursuant to specified criteria, an ERISA Plan was established and maintained [by virtue of the purchase agreement during the transition period] . . . [T]he court is satisfied that Siemens [the purchaser] established and maintained an ERISA Plan for transferred employees affording coverage from August 19, 1998, to August 31, 1998." *Shaver v. Siemens Corp.*, 2007 WL 1006681 (W.D. Pa. 2007) (Slip Op. at 8)

The Third Circuit reversed, holding that the purchase agreement did not create an ERISA-covered pension plan, sponsored by the purchaser, for thirteen days: "Therefore, we reject the Magistrate Judge's first theory supporting Siemens' [the purchaser's] liability because she founded that theory on the incorrect conclusion that Siemens created an ERISA 'transition' plan containing PJS benefits for the period from August 19 to August 31, 1998." (Slip Op. at 36-37) The Third Circuit acknowledged that the purchase agreement created a contractual obligation for the purchaser to adopt or amend pension plans, in order to carry out its commitments to the seller under the purchase agreement, but rejected the theory that any contractual obligation of the purchaser to the seller under the purchase agreement *ipso facto* created a pension plan.

The decision of the Third Circuit in *Shaver* can therefore be added to the conflicts with the First Circuit and Sixth Circuit that are described in the petition, underlining the need for correction of the decision below.

B. Besides Conflicting with at Least Three Other Courts of Appeals, the Decision Below Conflicts with This Court's Decision in *Curtiss-Wright v. Schoonejongen*.

The decision below relies on the proposition that an ERISA-covered plan can be amended by a person other than the person designated in the plan document as having the exclusive authority to amend the plan and, in doing so, conflicts with the Court's decision in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

In *Curtiss-Wright*, this Court observed that ERISA requires that an ERISA-covered plan contain a procedure for amending the plan and for identifying the parties with authority to make amendments.[4] The Court commented that identifying the persons outright meets that requirement: "The text of § 402(b)(3) speaks, somewhat awkwardly, of requiring a *procedure* for identifying the persons with amendment authority, rather than requiring identification of those persons outright. Be that as it may, a plan that simply identifies the persons outright necessarily indicates a procedure for identifying the persons as well." *Curtiss-Wright*, 514 U.S. at 79.

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[4] "Every employee benefit plan shall . . . provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan." ERISA § 402(b), 29 U.S.C. § 1102(b).

As this Court's opinion in *Curtiss-Wright* noted, a definite amendment procedure that specifies the person with authority to amend the plan serves several important goals, including:

> "such a requirement increases the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve" and

> "having an amendment procedure enables plan administrators, the people who manage the plan on a day-to-day level, to have a mechanism for sorting out, from among the occasional corporate communications that pass through their offices and that conflict with the existing plan terms, the bona fide amendments from those that are not. In fact, plan administrators may have a statutory responsibility to do this sorting out. *See* 29 U.S.C. § 1104(a)(1)(D) (plan administrators have a duty to run the plan 'in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [the statute],' which would include the amendment procedure provision)." 514 U.S. at 82.

In concluding that the plan in this case was amended by a party other than the person specified in the plan, the decision below frustrates those goals and directly conflicts with *Curtiss-Wright*. At the time of the supposed amendment by adoption of the purchase agreement, the plan document in this case specifically provided that it could be amended only by the purchaser's Employee Benefit Plans Committee. (Slip Op. at 3) Yet the Fifth Circuit held that adoption of the purchase agreement by the purchaser's board of directors worked a valid amendment of the plan: "Thus, even if the Committee was the only entity expressly authorized to modify or amend the Sterling Plan under the formal plan documents, the board of directors was empowered to revoke such delegation and authorize the chairman to amend the Sterling Plan by signing the APA." (Slip Op. at 15)

So, according to the Fifth Circuit, execution of the purchase agreement actually worked *two* amendments of the purchaser's plan: first, it amended the plan to change the person authorized to amend the plan from the Employee Benefit Plans Committee to the board of directors, and then it amended the plan to include the limitation on raising premiums paid by retirees under the plan.

The opinion below does not explain how the first amendment could have occurred. If the plan permitted only the Employee Benefit Plans Committee to amend the plan, how did the board of directors amend the plan to substitute itself for the Employee Benefit Plans Committee? And how can such an amendment be drawn from the language of the purchase agreement, which says nothing at all about the person authorized to amend the plan?

Both supposed amendments are without any visible means of support in ERISA and directly contradict *Curtiss-Wright*:

– Rather than "increas[ing] the likelihood that proposed plan amendments, which are fairly serious events, are recognized as such and given the special consideration they deserve," such sleight-of-hand reduces that likelihood.

– Rather than "enable[ing] plan administrators, the people who manage the plan on a day-to-day level, to have a mechanism for sorting out, from among the occasional corporate communications that pass through their offices and that conflict with the existing plan terms, the bona fide amendments from those that are not," the holding below only creates confusion over when and how a plan has been amended.

The Court should grant the petition in order to preserve the *Curtiss-Wright* decision and the important principles for which it stands.

C. The Decision Below Unsettles the Terms of ERISA-Covered Plans, Generating Administrative Uncertainty and Serious Compliance Issues and Potentially Burdening the Federal Courts with a New, Entirely Unnecessary Class of ERISA Litigation.

In a corporate sale of assets, it is usually in the best interests of both the seller and the purchaser to provide for continuity of employee benefits. It is in the interest of the seller, for example, to avoid a rush of premature retirements under the seller's pension plan, which could upset actuarial projections and impose unforeseen costs. It is in the interest of the purchaser to retain the employees who have the skills to operate the business and, for that purpose, it is in the interest of the purchaser to provide employee benefits comparable to what they enjoyed in the employ of the seller.

As a result, most purchase agreements have a substantial section called "Employee Benefits" or the like. There the seller typically seeks to commit the purchaser to provide as much continuity of benefits as possible, and the purchaser typically agrees to as much continuity as it considers desirable (to retain the employees) and economically feasible – each pursuing its own interests.

For the purchaser, the "Employee Benefits" section of the purchase agreement represents a commitment *to the seller* to produce a particular result; it does not represent a commitment to the employees (who are not parties to the purchase agreement). After the purchase agreement is concluded, the purchaser sets about amending its employee benefit plans in order to fulfill its obligations *to the seller* under the purchase agreement. It is the plan documents themselves that represent the purchaser's promise *to the employees*, so the purchaser needs to amend the plan documents, pursuant to each plan's amendment procedure, in order to fulfill its commitment to the seller under the purchase agreement.

1. But if contractual commitments of purchasers to sellers under corporate purchase agreements can also constitute amendments of the purchasers' ERISA-covered employee benefit plans as a matter of law, the administrators of those plans face difficult questions: What purchase agreements has the sponsor entered into? Did they contain any provisions that constitute amendments of the plans that I administer? What exactly are the changes? How can I be sure that the plan was amended and what exactly the new terms of the plan are? How far back must I go to look for such amendments? And what if participants in the past have received too much or too little in benefits?

Just as the court of appeals decision in *Curtiss-Wright* unsettled the terms of an untold number of employee benefit plans by invalidating amendments previously made over decades, the decision below unsettles the terms of an untold number of employee benefit plans by adding amendments. Worse, it adds amendments that were never intended as amendments or drafted as amendments and therefore are unlikely to specify the elements necessary for accurate plan administration, leaving plan administrators guessing, not only about whether some language in a purchase agreement amended their plan, but also precisely what the terms of those amendments are.[5]

The plan administrator's statutory duty of disclosure only exacerbates the problem. ERISA requires the plan administrator to furnish to participants on request all "instruments under which the plan was established or is operated." ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4). If a corporate purchase agreement constitutes an amendment to an ERISA-covered plan, participants must be given copies on request, and how is a participant to know which ones constitute amendments unless he is given all of them? Indeed, if almost any corporate document, right up to minutes of the meetings of the board of directors, might be characterized in subsequent litigation as a plan amendment, how can the participants be denied access to any of them?

2. Retirement plans, such as defined benefit pension plans and 401(k) plans, are among the most highly regulated arrangements under the Internal Revenue Code, not to mention the extensive regulation under ERISA. Drafting amendments requires specialized expertise, very close attention to the regulations, and considerable time. Missteps can be very costly, since errors in complying with the Internal Revenue Code carry the ultimate penalty of

[5] In the *Shaver* case, the most recent conflict among the circuits, this very problem generated a slip opinion 78 pages long.

disqualification of the plan for tax purposes. It is unreasonable and unworkable to expect fully-formed plan amendments to be produced simultaneously with execution of a purchase agreement; amendments must come later with the exercise of great care by specialists.[6]

To take just one example, amendments to plans that are tax-qualified under section 401(a) of the Internal Revenue Code, such as defined benefit pension plans and 401(k) plans, routinely include a critical safety valve – a recitation that adoption of the amendment is conditioned on its not adversely affecting the tax-qualification of the plan under the Code.[7] Because commitments of purchasers (or sellers) in corporate purchase agreements have never before been considered *ipso facto* plan amendments, no such protective language appears in corporate purchase agreements, putting an untold number of plans at risk of disqualification if corporate purchase agreements – never drafted with the intent that they satisfy the voluminous requirements of the Internal Revenue Code – really do constitute plan amendments.

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[6] The law often permits amendments to be adopted at a later date, but with retroactive effect. *See*, *e.g.*, Internal Revenue Code § 401(b), 26 U.S.C. § 401(b).

[7] Disqualification of a pension or 401(k) plan is a nightmare – loss of the employer's deduction for certain contributions, taxability of all of the investment earnings of the associated trust fund, and immediate taxation of the participants in the plan on all of their vested benefits.

3. The decision below creates the potential for a new and entirely unnecessary class of ERISA litigation – a battle between employers and employees over corporate purchase transactions. Whereas interpretation of and compliance with corporate purchase agreements used to be limited to the seller and the purchaser, the decision below invites *employees* to litigate corporate purchase agreements. Claiming standing as participants in the plan that was supposedly amended (or created, as in *Shaver*) by the purchase agreement, employees will enjoy all the tactical advantages that ERISA offers, including liberal jurisdiction and venue, the complex substantive requirements of ERISA (so laboriously addressed by the Third Circuit in *Shaver*, for example), the strictures of fiduciary responsibility under ERISA, the survival of claims after bankruptcy (as in the decision below), and recovery of attorneys' fees.

But the federal courts may not have to wait for employees to sue; plan administrators will be compelled to sue in federal court to settle the terms of the plans that they administer. This is not an area where the plan administrator can act reasonably and invoke the "arbitrary or capricious" standard of review. The validity of a plan amendment under ERISA section 402(b) is a question of law as to which the plan administrator receives no deference. As a result, the plan administrator acts in peril of personal liability for any error in determining what purchase agreements have amended the plan and exactly how.[8]

In the climate of uncertainty created by the decision below, and faced with enormous personal liability, the only prudent course for plan administrators, as fiduciaries under ERISA, will be to apply to a federal district court for instructions as to what the terms of the plan are. This Court has expressly recognized the right of a fiduciary under ERISA to apply to a federal court for instructions. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) ("A trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court.")

Needless to say, enmeshing the federal courts in deciding exactly how the terms of ERISA-covered pension and welfare benefit plans have been altered by corporate purchase agreements over many years represents a cost to the private sector and a burden to the judiciary that cannot possibly have been intended by Congress in ERISA and will only feed the growing attitude of employers that the legal regulation of employee benefit plans has made them too risky and too expensive.

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[8] Under ERISA, fiduciary liability is personal, not a liability of the plan. ERISA § 409(a), 29 U.S.C. § 1109. And ERISA § 502(l), 29 U.S.C. § 1132(l), imposes an additional 20% penalty upon the fiduciary personally (unless waived or reduced by the Secretary of Labor).

Given the interstate reach of many employee benefit plans and the liberal venue and universal service of process provisions of ERISA, the problem cannot be contained in the Fifth Circuit. While the decision below conflicts with decisions of the First, Third and Sixth Circuits, many employee benefit plans cover participants in more than one circuit. All it takes, therefore, is one participant in the Fifth Circuit to institute a class action on behalf of all participants nationwide.[9] Plans all across the United States will be exposed to egregious forum-shopping if clever class-action counsel can identify even one employee or retiree residing in the Fifth Circuit – not a difficult task with respect to most companies of national stature.

In order to protect themselves against such forum-shopping, the administrators of such plans will be forced to launch pre-emptive strikes in one of the circuits that disagree with the Fifth. These pre-emptive strikes will take the form of an action for declaratory judgment by the plan administrator against the participants as a defendant class, seeking to settle the terms of the plan. To make matters even worse, such actions will not be limited to the validity

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[9] ERISA effectively permits an action to be brought in any district where the participant resides, on the ground the breach occurred there; this is all the more true for retirees, who may retire to any circuit regardless of where their former employer conducted business. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2).

of such amendments – that is, whether the purchase agreement amended the plan or not – but also the meaning of such amendments, since the language of the purchase agreements will have left many important details unspecified. Such a wasteful, burdensome exercise cannot have been within the contemplation of the Congress that enacted ERISA.

CONCLUSION

Seventeen years ago, this Court's decision in *Curtiss-Wright* preserved a simple mandate of Congress – that each plan covered by ERISA include a procedure for amending the plan – against an attack that would have unsettled the terms of an unimaginable number of both pension and health and welfare plans and would have thrown open the doors of the federal courts to a new, entirely unnecessary class of ERISA litigation. The time has come to preserve *Curtiss-Wright* against a new attack that presents the same danger – the inadvertent, unintended, even unauthorized amendment of employee benefit plans by unrelated corporate transactional documents. For the reasons set forth above, as well as in the petition for a writ of *certiorari*, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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