No. 02-891

IN THE
Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,
Petitioner,

v.

THOMAS E. HEINZ AND RICHARD J. SCHMITT, JR.,
Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner's opening brief demonstrated that ERISA's "anti-cutback" rule does not prohibit pension plans from adopting disqualifying employment provisions that expand the circumstances in which payments on previously accrued benefits will be suspended. Respondents do not undermine that showing, which is consistent with the long-standing practice of the government and the decisions of the courts of appeals prior to the opinion below. Those authorities recognize that the principle that "ERISA provides an employer with broad authority to amend a plan" (*Hughes Aircraft Co.* v. *Jacobsen*, 525 U.S. 432, 442 (1999)) applies in this circumstance, for (as respondents' concede) the Suspension Provision does not "decrease" their "benefits" but instead merely suspends the payment of those benefits during the period that respondents elect to engage in disqualifying employment.

I. The Suspension Provision Does Not Violate The Principle That Plan Participants Are Entitled To Receive Promised Pension Benefits.

1. Respondents assert that "plan participants justifiably rely on the terms of [plans' suspension provisions] as those plans existed when their benefits accrued" (Br. 44), such that "[w]hen a plan changes its rules retroactively it is simply reneging on its collectively bargained contractual obligation to its participants" (*id.* 45). That argument misstates the expectations conferred by ERISA. There is no indication in ERISA's text or legislative history that Congress intended to confer on participants an expectation that they would have the right to retire, claim a pension, and return to work in the same industry and location in competition with other plan participants to secure a second income. To the contrary, respondents concede that petitioner is "correct in stressing that ERISA did not generate any expectation on the part of respondents that they would have the opportunity to seek post-retirement employment as construction supervisors." Br. 28.

To be sure, ERISA confers on participants expectations regarding their pension benefits. But it does so principally through the "vesting" rules of Section 203(a), which provide that pension rights are nonforfeitable – *i.e.*, may not be conditioned – *except* to the extent provided by statute, including in Section 203(a)(3)(B). *E.g.*, *Varity Corp.* v. *Howe*, 516 U.S.

489, 496 (1996) (ERISA protects benefits by, *inter alia*, "specifying certain plan characteristics in detail (such as when and how pensions vest)"), *cited in* Resp. Br. 2. Respondents read too much into this Court's statement that, in ERISA, "Congress wanted to * * * mak[e] sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain *a vested* benefit – he actually will receive it." *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 375 (1980) (emphasis added), *quoted in* Resp. Br. 3, 9, 12. The very point of the exceptions included in the vesting rules is to provide that in certain cases a vested benefit will *not* be paid. Thus, although a plan may not generally suspend payments on vested benefits, it may do so under the specific circumstances set forth in Section 203(a)(3)(B) and its implementing regulations.

With respect to post-retirement employment, it is accordingly *Section 203(a)(3)(B)* that both defines participants' reasonable expectations and ensures that plans do not unreasonably interfere with the availability of participants' pensions. Respondents concede that Section 203(a)(3)(B) "both *authorizes* such suspensions and *limits* the forms of post-retirement reemployment under which a plan may suspend the payment of benefits." Br. 32 (emphases in original).

Our opening brief explained, and respondents concede, that a plan participant has complete control over whether benefit payments are suspended and, if so, for how long. Respondents acknowledge that under the plan amendment at issue here they "are entitled to receive their pensions merely by choosing to stop working altogether, or even simply by going to work in an unrelated industry." Br. 46 n.33. See also BIO 14 n.10. The Suspension Provision thus does not interfere with participants' ability to receive their pensions.[1]

Moreover, with respect to unsubsidized early retirement benefits and normal retirement benefits, suspension of the benefit payments of a multiemployer plan participant is permitted only for employment in the same industry, trade, and geographic area as the plan. ERISA § 203(a)(3)(B)(ii), 29 U.S.C. 1053(a)(3)(B)(ii). The plan provision at issue, for ex-

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[1] Suspension is permitted only "for such period as the employee is employed," not for a longer period. ERISA § 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B).

ample, applies only to employment in the construction trade in central Illinois. See Pet. Br. 20. Benefits derived from the participant's own contributions are furthermore always inviolate. ERISA § 203(a)(1), 29 U.S.C. 1053(a)(1).[2]

2. Precisely because they overstate the expectations conferred and protected by ERISA, respondents misstate the genuine expectations of participants and pension plans. No plan participant could reasonably have believed that the definition of disqualifying employment would remain static forever. Indeed, the relevant federal regulatory agencies have provided for *decades* that Section 203(a)(3)(B) permits plans to adopt stricter definitions of disqualifying employment applicable to previously accrued benefits. See U.S. Br. 23-27. The two courts of appeals that considered the question before this case agreed. *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (CA5 1998); see also *Whisman* v. *Robbins*, 55 F.3d 1140 (CA6 1995). And the Plan in this case both provided that it could be amended (see J.A. 50 (Plan § 8.1)) and also specifically contemplated that existing retirees who return to work could be subject to a "material *change* in the suspension rules" (*id.* 46 (Plan § 6.7(d)(1)) (providing for notice of such a change) (emphasis added)).

The nation's pension plans have long relied on their authority to apply revised disqualifying employment provisions to already accrued benefits. In prosperous times, plans have provided that benefit payments would not be suspended for various forms of reemployment. The plans took that generous approach precisely because they were confident that suspension rules could later be changed – to protect the interests of plan participants who did not have both a pension and further employment – should conditions worsen. Put another way, the Plan provided that the benefit payments of participants such as respondents would be suspended for work as construction laborers (but not as supervisors) only because it knew that it could impose a broader suspension provision – within the limits of Section 203(a)(3)(B) and its implementing

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[2] Participants' interests are also protected by the fact that multiemployer employer plans are administered by a board of trustees composed equally of representatives of management and labor. See 29 U.S.C. 186(c)(5)(B).

regulations – if circumstances later changed in the central Illinois construction market or in the Plan's financial condition.

A decision of this Court abrogating pension plans' settled understanding of the authority conferred by Section 203(a)(3)(B) would have startling and potentially devastating consequences. Respondents' "cutback" argument is directed *not* at the suspension of their own benefit payments; they concede that such a suspension does not decrease their benefits. See *infra* at 14. Instead, they contend that the Plan, by expanding the forms of employment triggering suspension, violated the rights of *all* of the thousands of participants who had previously accrued benefits. They thus assert that it is the change in the rules governing suspension, not the suspension itself, that impermissibly "reduces the value" of all participants' benefits and amounts to a prohibited cutback. That proposition, if accepted, threatens to impose massive retroactive liability on both already distressed pension plans (which, having relied on the government's guidance that amendments to suspension provisions were permitted, would face exceptional liability) and their contributing employers (which would be in jeopardy of having their pension contributions deemed non-tax-exempt). Respondents' statement that their position "merely renders the plan *unqualified* for favored tax treatment" (Br. 11 n.7 (emphasis in original)) fails to appreciate the potential consequences of their theory.

Finally, respondents' position would, ironically, disadvantage most plan participants, even if respondents themselves would personally benefit. That reality is presumably why several of the nation's leading labor organizations have joined the *amicus* brief filed by the National Coordinating Committee for Multiemployer Plans in support of petitioner. If prohibited from adapting to current circumstances by applying a more stringent definition of disqualifying employment to already accrued benefits, pension plans would have no prudent choice but to define disqualifying employment as broadly as possible from the outset and maintain that position even in times of labor scarcity. To be sure, as respondents note, "there is nothing preventing a plan from amending its rules retroactively to *reduce* the number of situations in which payments may be suspended" to, for example, "encourage previously retired participants to return to the job market." Br. 47 (emphasis in original). Respondents thus contend that

Section 203(a)(3)(B) operates as a one-way ratchet – one that can only expand to the immediate benefit of current retirees, and that cannot contract as needed to further the interests of all participants. But as a practical matter, a plan would rarely amend its suspension provision to expand participants' rights to return to the workforce while receiving pension benefits if, when conditions changed, the plan were powerless to revert to its prior suspension rule. Respondents' position would thus produce a result that worked to the detriment of participants who in the future sought to return to the workforce without triggering a suspension of their benefit payments.[3]

II. The Suspension Provision Is Authorized By ERISA Section 203(a)(3)(B).

Our opening brief established that the Suspension Provision is valid because, as the ERISA regulatory authorities have concluded, Section 203(a)(3)(B) authorizes the adoption

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[3] In a footnote, respondents assert that, because "these rules are a subject of concern to employees," "employees may negotiate to include liberal reemployment rules in the plans" or employers will do so voluntarily to "'attract[] workers, improv[e] morale, and increas[e] employee retention.'" Br. 45 n.31 (quoting Ameri R. Giannotti, Comment, *ERISA's Anticutback Rule And Contingent Early Retirement Benefits*, 68 U. CHI. L. REV. 1341, 1366 (2001)). That is not correct. Multiemployer plans in particular generally encompass all union employers in a trade in a particular region; competition between plans or between employers with respect to plan terms is very limited.

Moreover, respondents ignore the well-established delineation between the roles of bargaining parties and the roles of multiemployer plan trustees set forth in Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5), and explained by the Court in *NLRB* v. *AMAX Coal Co.*, 453 U.S. 322 (1981); see also Goetz, *Developing Federal Labor Law and Welfare and Pension Plans*, 55 CORNELL L. REV. 911, 922 (1970) ("The governing trust agreement separately entered into by the parties to the collective bargaining agreement may specify general categories of benefits, but it normally delegates to the trustees broad discretion to determine specific benefit levels and eligibility requirements, to modify the benefit plan, and to administer the plan." (footnote omitted)). To suggest that employee representatives and their employer counterparts negotiate the scope of a pension plan's suspension rules is thus simply wrong.

of employment disqualification provisions that apply to the payment of all benefits. Pet. Br. 16-26. Respondents' brief fails to undermine that conclusion.

A. The Seventh Circuit's Decision Cannot Be Reconciled With The Statutory Text Or The Purposes Underlying Its Enactment.

1. Section 203(a)(3)(B) authorizes a plan to "provide[] that the payment of benefits is suspended for such period as the employee, subsequent to the commencement of payment of such benefits," is employed in certain capacities. This provision, on its face, authorizes the suspension of *all* payments that otherwise would be made during the period of reemployment, not merely payment of benefits that accrued after the suspension provision was adopted. The Department of Labor regulation implementing Section 203(a)(3)(B) – promulgated pursuant to the statutory directive to "carry out the purposes of this subparagraph" (ERISA § 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B)) – likewise draws no such distinction. See 29 C.F.R. 2530.203-3(a); Pet. Br. 17-18; SHRM Br. 15 n.23 ("this regulation was developed over a three year period based upon the Department of Labor's considered review of the text of the statute, the legislative history and numerous public comments on the proposed and final regulations" (collecting citations)). The IRS, in turn, has adopted the regulation for purposes of the parallel provisions of the Internal Revenue Code. See 26 C.F.R. 1.411(a)-4(b)(2); Pet. Br. 18.[4]

Indeed, there is no actual dispute that Section 203(a)(3)(B) and the implementing regulations apply to already accrued benefits. As noted *supra* at 4-5, respondents agree that a plan amendment may *narrow* the definition of disqualifying employment so as to make the suspension of payments on previously accrued benefits *less* likely. Because the statute thus necessarily confers the authority to reach payments attributable to already accrued benefits, there is no basis for reading into Section 203(a)(3)(B) a restriction that is nowhere suggested by its text – *viz.*, that a plan may provide for the suspension of benefit payments except to the extent that the plan provision makes the suspension of payments on previously accrued benefits *more*, rather than *less*, likely.

[4] Respondents' statement that the regulation was itself promulgated by the IRS (Br. 32) is incorrect.

2. Section 203(a)(3)(B)'s purpose reinforces its plain meaning and the agencies' long-standing construction. There is no real dispute that the statute will be hobbled if this Court accepts the holding of the majority below. Respondents can only assert that their position will not leave plans "*powerless* to respond to changing market conditions," although "[i]t will make it more difficult, to be sure." Br. 46-47 (emphasis added). The "prospective tightening of [suspension] rules," they maintain, "will certainly have *some* impact." *Id.* 47 (emphasis added). Perhaps, but Section 203(a)(3)(B)'s ability to accomplish Congress's intent would be undercut severely.

As our opening brief explained (at 21-26), a principal purpose of employment disqualification provisions authorized by Section 203(a)(3)(B) is to adjust to shorter-term shifts in labor markets and financial conditions. The *amicus* brief of the National Coordinating Committee for Multiemployer Plans details the relatively rapid shifts in local conditions that regularly confront plans, for "[d]eep and frequent fluctuations between periods of high and low unemployment are commonplace in the industries in which multiemployer plans predominate." NCCMP et al. Br. 15.[5]

Employment disqualification provisions will fulfill their purpose of adjusting to current circumstances only if they apply to already accrued benefits. "For suspension of benefit provisions to be effective over time, multiemployer plans must have the flexibility to expand the scope of disqualifying employment when economic conditions warrant, in order to maintain actuarial soundness and to protect the interests of actual retirees and active non-retired participants." NCCMP et al. Br. 6. Necessarily, a plan provision reducing or enhancing the prospect of suspension must apply to the payments of existing retirees' benefits if it is to influence those retirees' decisions whether to return to or leave the workforce. By

[5] For example, in the years prior to the Suspension Provision's adoption, construction employment in central Illinois fell by 10% and then rebounded. See Ill. Dep't of Empl. Sec., *at* http://lmi.ides.state.il.us/cesfiles/ilceshis.htm (last visited Apr. 5, 2004) (data for 1990 (224,000 jobs), 1992 (202,000), and 1994 (215,000)). During the rebound, the Plan adopted a more lenient definition of disqualifying employment; it adopted the Suspension Provision when its financial status worsened. See Pet. Br. 6-7.

definition, the benefits of existing retirees have already accrued. Respondents' construction would render employment disqualification provisions ineffective until many years after their adoption, by which time circumstances almost certainly will have changed. It is extremely unlikely that Congress would have gone to the trouble of enacting Section 203(a)(3)(B) only to have it operate so ineffectually.

For their part, respondents dispute the validity of using employment disqualification as a means of ever protecting plan assets. "[T]he very choice to create a defined-benefit plan rather than a defined contribution plan," they maintain, "entails the *conscious decision* that the plan (and the employers who fund it) may be subjected to additional financial burdens if some prediction * * * turns out to be wrong." Br. 46 (emphasis in original). That is no answer to the value of employment disqualification provisions in encouraging or discouraging retirees to return to the workforce. But in any event, Section 203(a)(3)(B)'s very existence demonstrates that Congress rejected respondents' view that plans must stand idly by as their financial situation deteriorates. The dispute in this case is *not* (as respondents' argument suggests) over whether the tool of employment disqualification can be used to adapt to existing financial circumstances (it indisputably can), but rather whether the power conferred by Section 203(a)(3)(B) should be read so narrowly that it becomes essentially ineffective by precluding pension plans from adapting their suspension provisions to current circumstances.[6]

B. The Question Presented Is Properly Resolved By Reference To Section 203(a)(3)(B).

1. Respondents hope to avoid the foregoing by asserting that Section 203(a)(3)(B) is "completely irrelevant to this litigation" (Br. 31) – a "maze of distracting and inapposite technicalities" to which petitioner and the United States have erroneously "devote[d] endless attention" (*id.* 9-10). Respondents' assertions are unfounded. Section 203(a)(3)(B), not

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[6] Respondents also contend that plans can use ERISA Section 302(c)(8)'s "escape hatch," which allows plans to reduce benefits in cases of "substantial business hardship." Br. 45. But that provision does not contradict petitioner's reading of Section 203(a)(3)(B), as it applies "only when the plan is on the verge of insolvency." U.S. Br. 28 n.9 (citing 29 U.S.C. 1083(b)(4)).

Section 204(g), is the provision of ERISA that directly addresses the question presented by this case. Section 203(a)(3)(B) authorizes pension plans to adopt suspension provisions. Respondents' position is that the authority of plans is constrained – *i.e.*, that plans may not adopt provisions which increase the likelihood that payments on already accrued benefits will be suspended. The most natural place in which Congress would have imposed such a restriction is in the text of Section 203(a)(3)(B) itself.

ERISA's structure confirms that conclusion. Respondents acknowledge that "'ERISA's benefit-accrual rules, set forth in Section 204 of the Act' are 'doctrinally distinct' from its 'vesting rules, set forth in Section 203 of the Act.'" Br. 37 (quoting U.S. Br. 10-11). The accrual rules specify how participants *earn* benefits. But ERISA does not require a plan to pay out all accrued benefits.[7] Rather, the vesting rules determine the point at which a plan must *pay* those earned benefits. Specifically, Section 203 determines when a participant's right to receive benefits becomes "nonforfeitable" – *i.e.*, "unconditional." ERISA § 3(19), 29 U.S.C. 1002(19). Thus, the question presented by this case is most naturally regarded as one of benefit vesting, not benefit accrual.

2. Respondents assert, however, that "subsection 203(a)(3)(B) has no relevance to the terms under which a plan chooses to provide a subsidized *early* retirement benefit." Br. 32 (emphasis in original). From that premise, they derive the "flip side" that Section 203 cannot be the "authority for the proposition that a plan can *change* an existing suspension rule applicable to early retirement benefits." *Id.* 33 (emphasis in original). Although respondents characterize their assertion that Section 203(a)(3)(B) does not apply to early retirement benefits as "well established" (Br. 32), they cite *no* authority adopting that construction. Both the Fifth and Seventh Cir-

[7] For example, a participant who has accrued benefits but has only four years of vesting service before incurring a permanent break in service (see ERISA Section 203(b)(3)) will not be entitled to receive that benefit if the plan uses a five-year cliff vesting schedule. Likewise, in accordance with ERISA Section 203(a)(3)(A), the accrued benefit earned by an unmarried participant who has worked 40 years in employment covered by the plan but dies prior to retirement need never be paid by the plan.

cuits have held that Section 203(a)(3)(B) does, in fact, apply. See Pet. App. 6a; *Spacek*, 134 F.3d at 290 & n.8.

Respondents misread the statute because they focus exclusively on the introductory language of Section 203(a) providing that "an employee's right to his *normal* retirement benefit is nonforfeitable upon the attainment of *normal* retirement age" (emphases added). See Br. 31. They ignore the critical language immediately thereafter: the plan "in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection." Paragraphs (1) and (2), as well as subsection (a)(3)(B), are *not* limited to normal retirement benefits, but instead expressly apply to "accrued benefits," a term that ERISA defines to include early retirement benefits.[8]

For defined benefit plans, the statute thus defines an "accrued benefit" as the "accrued benefit defined under the plan and, except as provided in section 204(c)(3), expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A), 29 U.S.C. 1002(23)(A). Section 204(c)(3), 29 U.S.C. 1054(c)(3), in turn, states that "if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, * * * the employee's accrued benefit * * * shall be the actuarial equivalent of such benefit or amount." In other words, in the context of early retirement benefits, the "accrued benefit" protected by Section 203(a) is expressed as an unsubsidized early retirement benefit (the actuarial equivalent of the retiree's normal retirement benefits). The Department of Labor regulation implementing Section 203(a) (29 C.F.R. 2530.203-3(a)) confirms that the statute covers early retirement benefits; it provides that Section 203(a)(3)(B) applies *in full* to unsubsidized early retirement benefits and *in part* to subsidized early retirement benefits. Contra Resp. Br. 3 n.2, 32-33.[9]

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[8] Section 203(a) is reproduced in relevant part in the Appendix, *infra*, at 1a-4a.

[9] Specifically, suspension of the former is permitted only if the conditions of Section 203(a)(3)(B) are satisfied; suspension of the latter is permitted only for "reemployment" (as opposed to, for example, activity disloyal to the employer). The regulation thus provides that suspension is permitted for any reemployment "only to the extent[] that suspension of such benefits does not affect a re-

3. Finally, focusing on the fact that Section 203(a)(3)(B) authorizes a plan to "'provide[]' a suspension rule for post-retirement reemployment," respondents assert that "nothing in the language of this subsection authorizes a plan to *change* or *amend* the suspension rule originally 'provide[d]' in the plan." Br. 34 (alterations and emphases in original). Respondents explain that "provide" "means 'to *make* a proviso or stipulation'" (*ibid.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1827 (1986) (emphasis in Resp. Br.)), and argue on that basis that "§ 203(a)(3)(B) by its terms allows the initial drafters of a plan to include – to 'make' or 'set down' – a suspension rule; this subsection does not, however, authorize the trustees of a plan to amend – *re*-provide, as it were – those suspension rules once they have originally been 'ma[d]e.'" *Id.* 35 (alterations and emphases in original).

This is not a serious argument. The default rule is that ERISA permits plan amendments. ERISA § 402(b)(3), 29 U.S.C. 1102(b)(3). Section 203(a)(3)(B), in authorizing plans to "provide" for employment disqualification, equally authorizes a plan to "make" such a provision in the original plan or in an amendment; it does not limit when the provision must be adopted. When Congress intended in Section 203 to limit the power to adopt amendments, it did so expressly. Section 203's vesting provisions have their *own* anti-cutback rule, which circumscribes plans' authority to adopt amendments that modify participants' vesting schedules, but which does not impose *any* limitation on amendments relating to the suspension of benefit payments. See ERISA § 203(c), 29 U.S.C. 1053(c), discussed further *infra* at 14-15.

On respondents' contrary reading, employment disqualification provisions were effectively frozen in place decades ago. Thus, according to respondents, revised provisions could not even be applied to the payment of benefits that accrue in the future. Even the Seventh Circuit rejected that view. Pet. App. 10a-11a n.6. Respondents seem to be confusing the plan's authority to *adopt an amendment* with the distinct question whether that amendment may be *applied* to already accrued benefits.

tiree's entitlement to normal retirement benefits payable after attainment of normal retirement age, or the actuarial equivalent thereof." 29 C.F.R. 2530.203-3(a). Contra Resp. Br. 33 n.25.

Indeed, respondents abandon their own argument. They state that "although a plan *can be amended* to include more restrictive suspension rules, those new rules cannot be applied to previously accrued benefits" (Br. 37 (emphasis added)). And as discussed *supra* at 4-5, respondents themselves emphasize that "there is nothing preventing a plan from amending its rules retroactively to *reduce* the number of situations in which payments may be suspended." *Id.* 47. Indeed, respondents are suing to enforce a previously *amended* disqualification provision. They simply ignore that, if Section 203(a)(3)(B) only authorizes provisions adopted as of the plan's enactment, such an amendment would be forbidden.

III. The Suspension Provision Does Not Violate Section 204(g) Because It Does Not Decrease Benefits.

ERISA Section 204(g) prohibits a plan amendment that "decrease[s]" a participant's "accrued benefit." Respondents abandon all pretense of contending that the act of *suspending* their benefit *payments* itself decreased their benefits. Instead, they contend that the Plan's mere *adoption* of the Suspension Provision was prohibited with respect to any plan participant whose benefits had previously accrued. Respondents offer an "extended discourse" (Br. 23) intended to establish the critical legal premise of their argument: that "the 'accrued benefits' protected by the anti-cutback rule include all the terms and conditions that affect the value of those benefits" (*id.* 12 (heading) (capitalization omitted)). On that basis, respondents contend that "because the suspension terms are part of Messrs. Heinz and Schmitt's accrued benefits, they, too, are protected by the anti-cutback rule." *Id.* 13-14.[10]

[10] Respondents vacillate between two theories of how the Suspension Provision decreases the "value" of their benefits. They say that "the opportunity to work in specific jobs while receiving benefits is plainly a valuable right" (Br. 9), but also contend that "[i]t is beyond cavil" that their benefits were "worth more" before the adoption of the Suspension Provision imposed a further condition on their receipt of benefit payments, apparently because they believe that the "real world" value of a life annuity is reduced if more conditions are attached to it. *Id.* 23. As we discuss *infra*, Section 204(g) neither protects an "opportunity to work" nor forbids otherwise lawful plan amendments that adversely affect the non-actuarial value of benefits.

Respondents err in their premise that Section 204(g) prohibits any amendment adding any condition affecting the value of benefits, and for that reason they mistakenly conclude that the Suspension Provision is unlawful. The statute nowhere refers to the "value" of a benefit in the sense that respondents use that term – *i.e.*, the benefit's "desirability," in contrast to its actuarial value. Regulations recently promulgated by the IRS to implement the Internal Revenue Code provision that parallels Section 204(g) thus describe a prohibited "decrease" in benefits as one that renders "the net *dollar amount* of the early retirement *annuity* * * * lower." 69 Fed. Reg. 13,769, 13,770 (Mar. 24, 2004) (emphases added). And the regulations define a "reduction" as a "reduction in the *amount*" of the benefit. *Id.* at 13,782 (emphasis added).

Assuming *arguendo* that Section 204(g) in some instances prohibits the imposition of "conditions" on already accrued benefits, it does so *not* because a "condition" relating to benefits is *itself* a protected "accrued benefit." Rather, it prohibits plans from cutting back benefits both directly and indirectly. Just as an amendment violates Section 204(g) if it directly decreases the amount of an accrued benefit or eliminates a protected "form of benefit," so too an amendment is prohibited if it adds a condition that, if triggered, would have those consequences. This is not such a case: if a participant triggers the condition imposed by the Suspension Provision by electing to return to work in the construction industry in central Illinois, the consequence is not a decrease in benefits but instead a suspension of benefit payments. Just as a plan may suspend benefit payments pursuant to Section 203(a)(3)(B) without triggering Section 204(g) (a fact respondents concede), so too it may adopt a condition that, if triggered, has as its only consequence such a suspension.

A. Petitioner's Reading Of Section 204(g) Is Supported By The Text And By The Consistent View Of The Relevant Regulatory Authorities.

1. ERISA, on its face, precludes respondents' argument that the "accrued benefit" protected by the anti-cutback rule includes the "conditions" on the benefit. The statute defines an "accrued benefit" (i) as the benefit "determined under the plan," that is (ii) "expressed in the form of an annual benefit commencing at normal retirement age" (ERISA § 3(23), 29 U.S.C. 1002(23)) or an early retirement benefit (ERISA

§ 204(c)(3), 29 U.S.C. 1054(c)(3)). See *supra* at 10. The Plan in this case, like all pension plans of which we are aware, defines the accrued benefit in financial terms. Specifically, it includes one provision addressing participants' "Eligibility" (J.A. 38 (Plan § 3.13)) and another addressing the "Amount" of the benefit (*ibid.* (Plan § 3.14)). Neither provision speaks to the suspension of benefit payments.

With respect to "Amount," the Plan defines the benefit on respondents' "Service-Only Pension": "The monthly amount of the Service-Only Pension is the same as the Regular Pension prior to any adjustment for payment in the form of a Husband-and-Wife Pension." J.A. 38 (Plan § 3.14). The Regular Pension, in turn, provides for a "monthly amount" "equal to the sum of: (a) $4.11 for each Pension Credit based on work in Covered Employment prior to January 1, 1965, plus (b) an amount for each Pension Credit earned during the Contribution Period in accordance with [a] schedule [set out in the Plan]." App., *infra*, at 11a (Plan § 3.4).

The amendment in question thus did not "decrease" respondents' defined "benefit." To be sure, while respondents have chosen to continue to work as construction supervisors, the Plan has continued to withhold their monthly checks. But that temporary "suspension" of their benefit "payments" is authorized by Section 203(a)(3)(B) (see *supra* Part II) and is not a benefit decrease. Respondents' defined benefit remains the same now as before the suspension, and payments on that benefit will resume as soon as they elect to leave disqualifying employment. See generally Pet. Br. 5, 28. Respondents thus *concede* that the withholding of payments does not "decrease" their "benefits," and "agree completely" that "the actual 'suspension of benefit payments' is not a 'reduction of benefits.'" Br. 26. They further concede "that the phrases 'reduce benefits' and 'suspend benefit payments'" have distinct meanings "in several provisions of ERISA." *Id.* 28.

An example furthermore demonstrates that respondents cannot be correct in asserting that a plan amendment which is authorized under Section 203 but which decreases the "value" of participants' benefits violates the anti-cutback rule. Respondents' position would gut plans' power, conferred in ERISA Section 203(c), to change their vesting schedules. 29 U.S.C. 1053(c), reproduced *infra* at App. 4a-5a. For example, a plan may substitute a rule providing for 100% vesting upon five years of service (so-called "cliff vesting," see Section 203(a)(2)(A)) in place of a prior rule under which benefits vested incrementally over the course of seven years (see Section 203(a)(2)(B)). In that circumstance, Section 203(c) authorizes employees with at least three years of service to choose between the two vesting schedules; employees with less service have no such option. Yet under respondents' reading of Section 204(g)'s categorical bar, such a change would be prohibited for all employees because it would decrease the "value" of the accrued benefits of participants (who would lose the valuable rights that had vested to that point). The change would be forbidden both for employees with more than three years of service and for newer employees (who have no right under Section 203(c) to object to the change). But Congress explicitly authorized such an amendment under Section 203(c) notwithstanding Section 204(g).

2. Both the relevant regulatory materials and "[t]wo decades of regulatory practice" (U.S. Br. 7) refute respondents' reading of Section 204(g). "For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embar[k] upon a voyage without a compass.'" *Mead Corp.* v. *Tilley*, 490 U.S. 714, 726 (1989).

The IRS has provided that "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under § 203(a)(3)(B)." 26 C.F.R. 1.411(c)-1(f). "It follows from that conclusion that a plan amendment permitting the suspension of benefit payments under Section 203(a)(3)(B) likewise would not result in a reduction of benefits prohibited by Section 204(g)." U.S. Br. 6. If the actual *suspension* (pursuant to which money is withheld) does not decrease the benefit, there is no basis for concluding that the *prospect* of suspension constitutes a decrease.

Respondents disagree. They assert that the point of this regulation is that "[t]he actuarial value of a participant's benefits already accounts for the *possibility* that his benefits will be suspended in this circumstance; the *actual* suspension of benefit payments is an incidental detail." Br. 26 (emphases in original). That is not correct. There is no support in ERISA, its regulations, or the Plan for the assertion that the actuarial value of a participant's benefit changes based on either the suspension of benefit payments or the prospect of suspension. Respondent is confusing the "net present value" or "perceived value" of a benefit with the "actuarial value," which is a technical term. For example, when the Plan in 1994 adopted a less restrictive disqualifying employment provision to encourage participants to return to the workforce, the actuarial value of their benefits remained unchanged. Nor did the actuarial value increase when the Plan liberalized its suspension rules. Instead, the Plan defines a benefit's "Actuarial Present Value" by reference to a Mortality Table and using a set interest rate. See App., *infra*, at 9a-10a (Plan § 1.22).

Petitioner's position is also supported by the provisions of the Internal Revenue Manual (IRM) – the official document used to review multiemployer pension plans – interpreting Internal Revenue Code Section 411(d)(6), which parallels Section 203(a)(3)(B). Issued after notice and comment (U.S. Br. 26), the IRM provides that an amendment such as the one at issue here "does *not* violate IRC 411(d)(6)." IRS Multiemployer Plan Examination Guidelines 4.72.14.3.5.3(7) (May 4, 2001) (emphasis added). See U.S. Br. 26-27. Respondents admit that the IRM embraces petitioner's position, but assert that it "is entitled to little or no deference" because it states a conclusion, rather than setting out the IRS's reasoning. Br. 39. The IRM is concise because it provides instructions to IRS employees, who do not need an explanation. Further, respondents never explain what more the IRS would be required to say: they *concede* that the suspension of benefit payments does not reduce benefits (see *supra* at 14); and the statute on its face precludes the assertion that an "accrued benefit" includes a right "to work in specific jobs" (see *supra* at 14).[11] Deference is further due the IRM because it reflects

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[11] Respondents err in asserting that "the IRM provides that a plan may only include * * * a blanket suspension rule 'if the provision is present in the plan *from its establishment*.'" Br. 39-40 (quoting IRM § 4.72.14.3.5.3(7)) (emphasis in Resp. Br.). Although the IRM states that such a provision is authorized if included in the plan "from its inception," it does *not* state that such a provision is authorized "only" in that instance. In any event, respondents' quote from the IRM is not relevant here because it deals only with plan provisions providing for suspension of benefit payments upon "any reemployment." By contrast, the challenged plan

the IRS's decades-long practice, as reflected by the List of Required Modifications the IRS has long provided to plans. See U.S. Br. 8, 26; *Alaska Dep't of Envt'l Conservation* v. *EPA*, 124 S. Ct. 983, 1001 (2004) ("We 'normally accord particular deference to an agency interpretation of "longstanding" duration.'" (quoting *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002)).

B. Respondents' Contrary Arguments Under Section 204(g) Lack Merit.

Despite this substantial authority contrary to their reading of Section 204(g), respondents assert that their position is "uncontroversial" and "beyond any reasonable doubt" (Br. 13) in light of two regulations implementing the anti-cutback rule, two statutory provisions, and two lines of cases. In fact, the authorities cited by respondents reaffirm the basic distinction Congress drew in ERISA between a prohibited decrease in benefits and a permitted suspension of benefit payments.

1. Respondents cite two regulations, both of which are reproduced in relevant part in the Appendix, *infra*, at 6a-8a, and neither of which addresses the suspension of benefit payments. Respondents would derive from the regulations the principle that "the anti-cutback rule protects all aspects of [protected] benefits – including conditions related to their payment." Br. 15. And they assert that the rationale underlying the regulations must be that "because the addition of these conditions decreases the *real-world* value of a participant's accrued benefit, such conditions violate the anti-cutback rule." *Id.* 16 (emphasis in original).

Preliminarily, respondents ignore that their position founders on the rejection of their reading by the IRS, which issued the regulations and has long approved amendments that change the terms of employment disqualification provisions. U.S. Br. 26. The IRS's actual position is codified in the IRM, discussed *supra* at 16-17.

The IRS's position is furthermore correct, for the regulations cited by respondents are inapposite. The first provides that a plan amendment may not adopt a condition that, if not satisfied by the participant, will eliminate the benefit. 26

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provision here authorizes suspension under the conditions set out in ERISA Section 203(a)(3)(B), 29 U.S.C. 1053(a)(3)(B)(ii).

C.F.R. 1.411(d)-4; see Resp. Br. 14-18. Specifically, it addresses two questions (both omitted from respondents' brief): "May a plan condition the *availability* of a Section 411(b)(6) protected *benefit* on the satisfaction of objective conditions that are specifically set forth in the plan?" (Q&A-6); and "May a plan be amended to add employer discretion or conditions restricting the *availability* of a Section 411(b)(6) protected *benefit*?" (Q&A-7). *Ibid.* (emphases added). The regulation states that new objective conditions on the availability and form of benefits are permissible if applied to benefits that accrue in the future but not if applied to previously accrued benefits. *Ibid.* The Suspension Provision, by contrast, is not a condition on the "availability" of the "benefit" but relates only to the suspension of benefit payments, which respondents correctly concede is an entirely distinct concept. Thus, each respondent's benefit remains the same no matter whether he engages in disqualifying employment. See *supra* at 14-16.

The second regulation provides that an amendment may not adversely change how benefits are computed. 26 C.F.R. 1.411(d)-3(b); see Resp. Br. 20-21. Specifically, it provides that, in "determining whether or not any participant's accrued benefit is decreased," the IRS will look to "all the provisions of a plan affecting directly or indirectly the *computation* of accrued benefits." *Ibid.* (emphasis added). Thus, a plan amendment may not change the "provisions relating to years of service and breaks in service for determining benefit accrual" (26 C.F.R. 1.411(d)-(3)(b)), which are critical factors for determining whether benefits accrue. Nor may a plan amendment adversely change the "actuarial factors for determining optional or early retirement benefits" (*ibid.*) – *i.e.*, the means of calculating the amount of the benefit. Again, the Suspension Provision does not directly or indirectly affect the *computation* (*i.e.*, amount) of accrued benefits. Rather, it relates only to the suspension of the benefit payment.

2. Respondents next cite two statutory provisions. First, ERISA Section 204(c)(3), 29 U.S.C. 1054(c)(3), provides that "if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age * * * the employee's accrued benefit * * * shall be the actuarial equivalent of such benefit." See Br. 14. This provision – which is discussed *supra* at 10 – is straightforward: the benefit accrued by employees who take early

retirement is the "actuarial equivalent" of their normal retirement benefit. For example, for a person retiring at age 39, the actuarial equivalent of a normal retirement benefit of $1000 a month would be approximately $100. This actuarial equivalent would still be expressed as "a specified amount of money" or at least "a formula." Contra Resp. Br. 14.

Second, respondents note that a provision of the anti-cutback rule added in 1984 separately forbids a plan from "eliminat[ing] a previously available 'optional form of benefit.'" Resp. Br. 22 (quoting ERISA § 204(g)(2)(B), 29 U.S.C. 1054(g)(2)(B)). But Congress's adoption of such a special rule actually undercuts their argument. The elimination of a form of a normal retirement benefit clearly reduces the "real world value" of a benefit and would be prohibited under respondents' reading of the anti-cutback rule as originally enacted. Yet Congress found it necessary to adopt the separate "optional form of benefits" provision. On respondents' view that every adverse change in the "value" of benefits is a prohibited "decrease" in "benefits," the optional form of benefit provision would be surplusage.[12]

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[12] The "optional form of benefit" provision explains why respondents err in relying on a regulation stating that a plan may not add a condition that, if not satisfied, would eliminate the availability of "a lump-sum distribution" of previously accrued benefits. Br. 16 (citing 26 C.F.R. 1.411(d)-4 Q&A-7). Although a change in the form of distribution (from, for example, a lump sum payment to a life annuity) would have "no actuarial effect on the dollar value of the benefits provided" (*ibid.*), the condition is forbidden because, if triggered, it would eliminate the "form of benefit" separately protected by Section 204(g)(2)(B).

Respondents have waived their assertion that the Suspension Provision *itself* "'has the effect of * * * eliminating an optional form of benefit.'" Br. 25 n.20 (quoting ERISA § 204(g)(2)(B), 29 U.S.C. 1054(g)(2)(B)). They did not make this argument below and assert it here only briefly in a footnote. In any event, as the regulation cited in the text explains, a protected "form of benefit" is a method of distributing the benefit, as distinct from a rule defining when payments on the benefit will be suspended.

In a footnote, respondents also recognize that the anti-cutback rule applies only to "'a participant who satisfies (either before after the amendment) the preamendment conditions for'" a subsidized benefit. Br. 15 n.10 (quoting ERISA § 204(g)(2), 29 U.S.C. 1054(g)(2)). As respondents explain, this provision requires that a

3. Respondents finally invoke two lines of cases. First, decisions hold that "contingent benefits that may never be paid are protected by the anti-cutback rule." Resp. Br. 16. Respondents give as an example "certain forms of 'plant shutdown' benefits" under which "a participant is entitled to a subsidized early retirement benefit commencing at the time of shutdown" (*id.* 16 & n.11). These cases simply hold that an earned benefit provided by the benefit formula, even if contingent, cannot be eliminated.

Second, decisions hold that "cost of living adjustment[s]" (COLAs) are protected by the anti-cutback rule. Resp. Br. 18. The plan provisions at issue in these cases provide that a benefit will be adjusted upward in line with, for example, the consumer price index, such that the COLA is part of the formula for calculating the amount of the benefit. The cases simply hold that the formula may not be changed, and the benefit amount decreased, to the participant's detriment.

In sum, because the "anti-cutback rule" of ERISA Section 204(g) does not prohibit plans from adjusting conditions that will trigger the suspension of benefit payments under Section 203(a)(3)(B), the judgment should be reversed.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's opening brief, the judgment should be reversed.

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plan "allow participants to 'grow into'" such a benefit. *Ibid.* That rule is not implicated by this case. Respondents indisputably have accrued a subsidized early retirement benefit; there is nothing more for them to "grow into." The only issue is whether the suspension of benefit payments under Section 203(a)(3)(B) amounts to a "decrease" of those benefits under Section 204(g).

Respectfully submitted,

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