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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Under the "anti-cutback" rule contained in section 204(g)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1054(g)(1), "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," unless that amendment is authorized under two sections of ERISA not relevant here. ERISA § 204(g)(2), added by the Retirement Equity Act of 1984, clarifies that "[f]or purposes of" this anti-cutback rule, "a plan amendment which has the effect of * * * (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy * * *, or (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits," and thus is also prohibited.

The question presented is whether, when an ERISA pension plan is amended to expand the categories of "disqualifying" post-retirement employment that "suspend" early retirement benefits under the plan, it violates ERISA's anti-cutback rule to apply that amendment to the accrued benefits of plan participants who had already retired, were already receiving those benefits, and were already working in forms of post-retirement employment that were non-disqualifying under the prior version of the plan but are disqualifying under the amended version of the plan.

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BRIEF FOR THE RESPONDENTS

The anti-cutback rule contained in section 204(g) of ERISA, 29 U.S.C. § 1054(g), provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," and clarifies that under this provision an amendment that "has the effect of * * * (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy * * *, or (B) eliminating an optional form of benefit," if that benefit is "attributable to service before the amendment," is a prohibited decrease. In this litigation, the Seventh Circuit held that an amendment that expanded the conditions under which a pension fund can "suspend" payment of already-accrued benefits violates this anti-cutback rule. The Seventh Circuit's decision is entirely faithful to the statute's language and is plainly correct.

RELEVANT STATUTORY PROVISIONS

ERISA §§ 3(23), 203(a), 203(a)(3), 204(c)(3) & 204(g), which are codified at 29 U.S.C. §§ 1002(23), 1053(a), 1053(a)(3), 1054(c)(3) & 1054(g), are reproduced in relevant part in the addendum to this brief.

STATEMENT OF THE CASE

1. ERISA "is a 'comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system.'" *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 209 (2002) (quoting *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp*. v. *Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980))). It is a commonplace that ERISA does not require an employer to provide its employees with any specific benefits. See, *e.g.*, *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 887 (1996); Pet. App. 5a-6a. ERISA does, however, extensively regulate benefits once those benefits *are* provided. Thus, "ERISA protects employee pensions and

other benefits by providing insurance (for vested pension rights), specifying certain plan characteristics in detail (such as when and how pensions vest), and by setting forth certain general fiduciary duties applicable to the management of both pension and nonpension benefit plans." *Varity Corp.* v. *Howe*, 516 U.S. 489, 496 (1996) (citations omitted); see also Pet. App. 6a.

For example, ERISA § 203 places various limits on the terms that can be included in a pension plan. Importantly, ERISA § 203 limits what terms can *ever* be in a plan; it says nothing about the permissibility of plan amendments. Under this section, a pension fund may "provide[]" that the payment of normal retirement benefits be "suspended" when a participant has resumed specific types of employment after initially retiring – but limits what types of subsequent employment can lead to such suspensions. See ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B). In the case of participants in a "multiemployer plan,"[1] normal retirement benefits may be suspended only if the participant resumes work in a job "in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced," and only during the period in which the par-

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[1] ERISA § 3(37), 29 U.S.C. § 1002(37), defines a multiemployer plan as a plan "maintained pursuant to one or more collective bargaining agreements" between a union or unions and employers, "to which more than one employer is required to contribute." Multiemployer plans "are common in industries with many small companies, each too small to justify an individual plan. They are also found in industries where, because of seasonal or irregular employment and high labor mobility, few workers would qualify under an individual company's plan (if one were established)." JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW 62-63 (3d ed. 2000) (quoting EBRI, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 55-59 (3d ed. 1987)).

ticipant is engaged in this disqualifying employment. ERISA § 203(a)(3)(B)(ii), 29 U.S.C. § 1053(a)(3)(B)(ii).[2]

2. As this Court has repeatedly explained, "when Congress enacted ERISA it 'wanted to make 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.'" *Lockheed*, 517 U.S. at 887 (quoting *Nachman*, 446 U.S. at 375) (internal alterations omitted). Thus, ERISA provides, for example, a host of funding and vesting rules to protect participants' promised benefits. See page 2, *supra*; Pet. App. 6a. But the most direct protection of workers' reasonable reliance interests is the "anti-cutback" rule contained in ERISA § 204(g).

As originally enacted, ERISA § 204(g) provided that, with narrow exceptions, "[t]he accrued benefit of a participant under a plan *may not be decreased by an amendment of the plan*." Pub. L. No. 93-406, Tit. I, § 204(g), 88 Stat. 858

[2] Although a plan is required to abide by ERISA § 203(a)(3)(B)'s suspension rules in the case of "normal" retirement benefits – that is, retirement benefits available to an employee who has reached the normal retirement age, either as defined in the plan or under ERISA's default "normal" retirement age of 65 (see ERISA § 3(24), 29 U.S.C. § 1002(24)) – these rules do not apply to "early" retirement benefits. Thus, the Department of Labor's regulations implementing ERISA § 203 specify that "[a] plan may provide for the suspension of pension benefits which commence prior to the attainment of normal retirement age * * * for any reemployment and without regard to the provisions of section 203(a)(3)(B) and this regulation to the extent (but only to the extent) that suspension of such benefits does not affect a retiree'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).

(emphasis added).[3] Because of the way accrued benefits were defined under ERISA, some courts found that this provision "did not prevent the reduction of a plan's alternative schedule of benefits for workers who retired early." JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION & EMPLOYEE BENEFIT LAW 164 (3d ed. 2000); see also U.S. Br. 20-21. Congress legislatively cured this uncertainty in 1984 by amending ERISA § 204(g). The existing general rule was renumbered as section 204(g)(1), and a new subsection 204(g)(2) was added, which provides that:

> For purposes of paragraph (1), a plan amendment which has the effect of –
>
> (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy.

Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, § 301(a)(2), 98 Stat. 1451.

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[3] Reductions in benefits were allowed "with the consent of the Secretary of Labor, in the event of a substantial business hardship, (sec. 412(c)(8) of the [Internal Revenue] Code [and the parallel section 302 of ERISA]) or [under] the rules permitting a reduction of benefits in the case of certain multiemployer plans (sec. 4281 of ERISA)." S. REP. NO. 98-575, at 30.

3. The Central Laborers' Pension Fund ("the Fund") is a multiemployer pension fund whose participants are mainly construction workers in central Illinois. The Fund is a "qualified" pension plan governed by ERISA. Participants are entitled to a variety of retirement benefits under the Fund; in particular, the Fund offers a traditional retirement pension (available to participants aged 65 or older), as well as two distinct forms of early-retirement benefits. All three are "defined benefit" pensions.[4]

Eligibility for the form of early-retirement benefit at issue in this case, which the Fund calls a "Service-Only Pension," depends only on the number of years of "vesting service" or the number of "pension credits" that the participant has accrued. See J.A. 38.[5] Participants may retire and receive their "service-only" pension once they have accumulated 30 "pension credits," regardless of their age at the time of retirement. The pension a participant receives each month under the "service-only" program is the same amount he would receive each month under the normal retirement plan. See *ibid.*; Pet. App. 4a. Thus, because statistically an early retiree is ex-

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[4] A "defined benefit" retirement plan "is one where the employee, upon retirement, is entitled to a fixed periodic payment." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 439 (1999) (citation and internal quotation marks omitted). "[T]he employer typically bears the entire investment risk" in a defined benefit plan. *Ibid.* Defined benefit plans contrast with "defined contribution plans," which are "one[s] where employees and employers may contribute to the plan, and the * * * employee receives whatever level of benefits the amount contributed on his behalf will provide." *Ibid*. (citation and internal quotation marks omitted).

[5] Under the Plan, "pension credits" are accrued based on the number of years that the participant has worked for employers who participate in the Fund and the number of hours the participant worked for these employers in each of those years. See J.A. 37 (Plan § 3.5(a)).

pected to receive his pension for a longer period than someone retiring at the "normal" age, the "service-only" pension is a "retirement-type subsidy" as that term is used in ERISA § 204(g)(2)(A). See *Bellas* v. *CBS, Inc.*, 221 F.3d 517, 525 (3d Cir. 2000).

4. Thomas E. Heinz and Richard J. Schmitt, Jr. are each participants in the Fund. Pet. App. 4a; J.A. 78. As of 1996, each had accrued at least 30 "pension credits," and thus had met all of the conditions to retire and to receive his "service-only" pension. Both did so. *Ibid.* Under the terms of the Fund when Messrs. Heinz and Schmitt retired, the service-only pension was to be suspended if a participant worked in specified "disqualifying employment." Although working as a union or non-union construction worker was disqualifying under the plan as it then existed (see *ibid.*), it is uncontroverted that working as a *supervisor* in the construction industry was *not* "disqualifying employment." See J.A. 79; Pet. App. 5a. After retiring as construction workers, both respondents began working as supervisors in the construction industry, while – as the plan allowed – collecting their early-retirement pensions. J.A. 80.

Two years after respondents retired, the Fund amended the terms of the plan to expand the definition of disqualifying employment for purposes of early-retirement benefits. Under this 1998 amendment, the Fund would suspend early retirement benefits for work "in any capacity in the construction industry (either as a union or non-union construction worker)." See J.A. 63 (Plan § 6.7(b)(1)), 79-80; Pet. App. 5a. Although this amendment focused on "construction worker[s]," the Fund interpreted the amendment to prohibit employment even in a supervisory capacity in the construction industry. The plan also construed the amendment to apply to participants who had already qualified for early-retirement benefits prior to the amendment. Because Messrs. Heinz and Schmitt continued to work as supervisors in the construction industry, the Fund notified them that payment of their benefits would be suspended if they did not quit their jobs and, when they did not, suspended payment of their early retirement pension benefits.

5. After exhausting intra-Fund avenues for review of the decision to suspend payment of their benefits, Messrs. Heinz and Schmitt brought suit in the Central District of Illinois. See J.A. 10-19. They claimed that the retroactive application of the 1998 Amendment to suspend their benefits violated the plain terms of the anti-cutback rule in ERISA § 204(g), which precludes amendments that "decrease[]" accrued benefits and, in particular, amendments that "ha[ve] the effect of eliminating or reducing an early retirement benefit." See J.A. 15.[6] On cross-motions for judgment on the pleadings, the district court ruled in the Fund's favor. See Pet. App. 33a-45a.

6. The Seventh Circuit reversed. See Pet. App. 3a-31a. According to the court of appeals,

> plaintiffs' loss of the option of working as construction supervisors was a reduction of their early retirement benefits within the meaning of [ERISA § 204(g)(2)]. A participant's benefits cannot be understood without reference to the conditions imposed on receiving those benefits, and an amendment placing materially greater restrictions on the receipt of the benefit "reduces" the benefit just as surely as a decrease in the size of the monthly benefit payment.

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[6] In the alternative, they argued that the Fund acted arbitrarily and capriciously in interpreting the 1998 amendment to render their employment disqualifying because the amendment by its terms is limited to employment as a (union or non-union) "*construction worker*," rather than as a *supervisor* in the construction industry. J.A. 17-18 (emphasis added).

Pet. App. 9a. The court rejected the Fund's attempt to distinguish between an amendment that allows the Fund to suspend payments in a broader range of circumstances and amendments that decrease the value of benefits in other ways. As the court explained,

> [a]lthough with a suspension the interruption in benefit payments is temporary, the retiree never recovers the payments lost during the employment period. The amendment thus "eliminates" monthly benefit payments for participants who take certain jobs after retirement and "reduces" the participant's total early retirement benefits by an amount determined by how long the disqualifying work continues. Plaintiffs lost a valuable right they had earned before the amendment – the right to continue to work in the industry while receiving monthly benefit payments – and that loss was permanent.

Pet. App. 10a.

The court considered the Fifth Circuit's decision in *Spacek* v. *Maritime Association, I L A Pension Plan*, 134 F.3d 283 (5th Cir. 1998), on which the district court had relied, but found it unconvincing. Pet. App. 11a-22a. In particular, the court disputed the notion that its decision would render the word "suspension" redundant elsewhere in ERISA (Pet. App. 12a-15a), explained that a comment by Representative Clay in the final House debates over REA was ambiguous at best and in any event due little weight (Pet. App. 16a-17a), and found a Treasury Regulation relied on by *Spacek* to be irrelevant to the interpretation of the appropriate scope of the anti-cutback rule (Pet. App. 18a-20a). Having ruled for respondents on statutory grounds, the court did not reach respondents' alternative arbitrary-and-capricious argument. See Pet. App. 23a. Judge Cudahy dissented. See Pet. App. 24a-31a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although it is easy to lose sight of the controlling ERISA principle in the maze of distracting and inapposite technicalities constructed by petitioner and its *amici*, the issue here actually is simple and straightforward. "[W]hen Congress enacted ERISA it 'wanted to make 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.'" *Lockheed*, 517 U.S. at 887 (quoting *Nachman*, 446 U.S. at 375) (emphasis added; internal alterations omitted). Under the explicit terms of the pension plan that existed during the time when Messrs. Heinz and Schmitt were accruing their pension benefits, they were promised that after retiring from their jobs as construction workers they would be entitled to receive a specific amount of money each month *whether or not* they thereafter accepted employment as supervisors in the construction industry. By amending the terms of the plan such that respondents would *not* receive benefit payments if they worked as supervisors, the Fund broke its promise to them, and, by "decreas[ing]" the value of their pension benefits, manifestly violated the plain terms of the anti-cutback rule, ERISA § 204(g).

The statutory command of ERISA § 204(g) is straightforward; plans cannot be amended to decrease the value of previously accrued benefits. Critically, the "accrued benefits" of plan members are more than merely a specific number of dollars a month. In fact, the government's own regulations implementing ERISA are full of examples demonstrating that *terms and conditions affecting accrued benefits*, even if not expressed in the form of dollars-per-month, are nonetheless protected by the anti-cutback rule and cannot be changed retroactively. Because the opportunity to work in specific jobs while receiving benefits is plainly a valuable right, removing that opportunity is forbidden.

Rather than focus on the anti-cutback rule, petitioner and its *amici* devote endless attention to ERISA § 203(a)(3)(B), which limits the types of suspension rules the drafters of a plan may include under specific circumstances. This statutory provision is simply irrelevant to this case. First of all, because respondents are receiving *subsidized early retirement benefits*, rather than the "*normal retirement benefits*" addressed in ERISA § 203(a), ERISA § 203(a)(3)(B) by its very terms does not apply. In any event, even if ERISA § 203(a)(3)(B) were to apply to early retirement benefits, this subsection merely authorizes plans to "provide" suspension rules *in the first place*; it says nothing whatsoever about whether a plan may *amend* its suspension rules, let alone whether any such amendment may apply to benefits earned before the date of that amendment. *That* is the job of the anti-cutback rule. This distinction between *creating* a plan that allows for suspensions and *changing* a plan after the fact to alter dramatically the circumstances in which suspensions are permissible is fundamental to ERISA. By ignoring that distinction, petitioner would pull the rug out from under retirees and defeat legitimate expectations – the very outcome ERISA was enacted to prevent.

Finally, petitioner and its *amici* focus extensively on a number of regulations, on legislative history, and on policy arguments that they suggest should cause this Court to depart from the plain text of ERISA. Not only are these arguments far from sufficient to warrant violating the cardinal rule that it is the *text* of a statute that controls, but they also fall apart on closer examination. Neither the regulations nor the legislative history nor the various policies underlying ERISA suggest that a plan should be allowed to break its promise to its participants and to change plan provisions retroactively.

ARGUMENT

I. UNDER ERISA § 204(g), A PENSION PLAN MAY NOT BE AMENDED TO EXPAND THE TYPES OF POST-RETIREMENT EMPLOYMENT UNDER WHICH PREVIOUSLY ACCRUED PENSION BENEFITS MAY BE SUSPENDED.

This case should begin and end with the clear mandate of ERISA § 204(g), the anti-cutback rule.[7] Under that provision, "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan," unless the amendment falls within exceptions for plans undergoing substantial business hardship or that have been terminated. See ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1). The statute clarifies further that included within this blanket prohibition are amendments that "ha[ve] the effect of – (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or (B) eliminating an optional form of benefit." *Id.* § 204(g)(2), 29 U.S.C. § 1054(g)(2). Amending a plan to include an expanded suspension rule "decrease[s]" the value of benefits accrued before that amendment, and thus violates the anti-cutback rule.

It is a foundational principle of ERISA law that pension benefits, once accrued, may not be reduced. This Court has repeatedly explained that "when Congress enacted ERISA it 'wanted to make sure that if a worker has been promised a

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[7] In this brief we focus on Title I of ERISA – and in particular on ERISA § 204(g) and ERISA § 203(a)(3)(B) (26 U.S.C. §§ 1054(g), 1053(a)(3)(B)) – rather than on the parallel provisions of the Internal Revenue Code that were promulgated as Title II of ERISA – IRC §§ 411(d)(6) and 411(a)(3)(B). The Code provisions are in all relevant respects identical to the ERISA provisions, except that while a plan is *forbidden* from violating the ERISA provisions, a violation of the Code provisions merely renders the plan *unqualified* for favored tax treatment.

defined pension benefit upon retirement – and if he has fulfilled whatever conditions are required to obtain a vested benefit – he actually will receive it.'" *Lockheed*, 517 U.S. at 887 (quoting *Nachman*, 446 U.S. at 375) (internal alterations omitted); see also, *e.g.*, *Boggs* v. *Boggs*, 520 U.S. 833, 845 (1997) ("The principal object of the statute is to protect plan participants and beneficiaries."); S. REP. NO. 93-127, at 1 (ERISA addresses "the issue of whether American working men and women shall receive private pension plan benefits which they have been led to believe would be theirs upon retirement") (*reprinted at* I ERISA LEGIS. HIST. 587).

To implement this precept, Congress included the anti-cutback rule in ERISA. Furthermore, after several courts interpreted the initial version of the anti-cutback rule to be inapplicable to early retirement benefits, Congress clarified that the statute protects these benefits, as well. See page 4, *supra*; U.S. Br. 20-21; S. REP. NO. 98-575, at 27 ("the protection of accrued benefits, which are essentially retirement benefits, against reduction by plan amendments is an essential safeguard for plan participants and their beneficiaries").

There are two evident questions that must be answered in analyzing the scope of the anti-cutback rule: first, *what* benefits are protected by this rule, and second, *from what* are those benefits protected. Although neither petitioner nor its *amici* have focused on it in the slightest, this case revolves around the answer to the first of these questions.

A. The "Accrued Benefits" Protected By The Anti-Cutback Rule Include All The Terms And Conditions That Affect The Value Of Those Benefits.

The anti-cutback rule protects a participant's "accrued benefit." See ERISA § 204(g)(1). That "accrued benefit" must be determined by reference to the terms defining entitlement to those benefits. Thus, in the case of a defined benefit plan, an accrued benefit "is defined as 'the individual's accrued benefit *determined under the plan* [and ordinarily is] expressed in the form of an annual benefit commencing at retirement age.'" *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 440 (1999) (quoting ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A)) (emphasis added, alteration in *Hughes*).

Although this definition is in part circular, its basic thrust is clear – the accrued benefit under a plan is whatever benefit the plan promised to its participants. Thus, this Court has explained that "ERISA leaves [the] question [of the content of the benefits protected by a plan] largely to the private parties creating the plan." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). In other words, the parties to a plan, "not the Government, control the level of benefits" offered under that plan. *Ibid.*; see also, *e.g.*, *Lockheed*, 517 U.S. at 887 ("ERISA [does not] mandate what kind of benefits employers must provide if they choose to have [a benefit] plan").

The fundamental fallacy in petitioner's analysis of this case is to view the respondents' accrued benefit simply in terms of the number of dollars to which each is entitled per month or per year, in years when they were eligible for benefits. While of course that is a significant part of the definition of their benefit under the plan, it is by no means the entire definition. Rather, various *other* terms and conditions contained in the Plan – including the terms specifying under what conditions benefit payments will be suspended for post-retirement employment – are also part of a participant's "accrued benefit." ERISA, the regulations implementing it, and the case law interpreting it are full of evidence that one must define "accrued benefit" broadly. In fact, the proposition that the accrued benefit under a plan must be understood to be more than simply a dollar amount per year is uncontroversial. The following five aspects of the statute and the regulations implementing it demonstrate this fact beyond any reasonable doubt. Thus, because the suspension terms are part of

Messrs. Heinz and Schmitt's accrued benefits, they, too, are protected by the anti-cutback rule.

1. Although under ERISA § 3(23) – which defines the term "accrued benefit" – one normally "expresse[s]" an accrued benefit in terms of the amount of money to which the participant is entitled per year commencing at normal retirement age (*ibid.*; see also *Hughes Aircraft*, 525 U.S. at 440; pages 12-13, *supra*), that does not imply that the accrued benefit provided by a plan is always, or even usually, simply a specified amount of money per year, nor does it suggest that the full value of a benefit can always be captured in such a formula. That is the point of ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3), which is cross-referenced in ERISA § 3(23) and explains that "if an employee's accrued benefit [under a plan] 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." (emphasis added)[8] In other words, the plan defines the benefit that is protected; it is up to the plan's actuaries to place a dollar value on that benefit for actuarial purposes. See, *e.g.*, *Lindsay* v. *Thiokol Corp.*, 112 F.3d 1068, 1071 (10th Cir. 1997) (accrued benefit can be defined as "86.7% of some other quantity").

2. Another example demonstrating the breadth of the term "accrued benefit" is the IRS's regulations under the Code equivalent to ERISA § 204(g), which provide that, while the availability of benefits (or of a specific form of benefit) may be "limited to employees who satisfy certain

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[8] The IRS's regulation defining the term "accrued benefit" likewise explains that an accrued benefit under a defined benefit plan is an "annual benefit commencing at normal retirement age" unless the plan uses a different form, at which point the accrued benefit is the actuarial equivalent of the benefit defined in the plan. See 26 C.F.R. § 1.411(a)-7(a).

objective conditions" (26 C.F.R. § 1.411(d)-4 Q&A-6), "[t]he *addition* of * * * objective conditions with respect to a * * * protected benefit that has already accrued" violates the anti-cutback rule, as does "any *change* to existing conditions * * * that results in any further restriction." 26 C.F.R. § 1.411(d)-4 Q&A-7 (emphasis added).[9] In other words, it is not only the payment of a specific number of dollars per month that is protected by the anti-cutback rule, nor is it merely the actuarial value of that stream of benefits that is protected. Rather, the anti-cutback rule protects all aspects of those benefits – including conditions related to their payment – as defined by the plan at the time those benefits accrued.[10]

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[9] As the government explains in its brief, the regulations implementing IRC § 411(d)(6), the Internal Revenue Code equivalent to ERISA's anti-cutback rule, also apply to the ERISA provision codified at ERISA § 204(g). See U.S. Br. 23 n.8.

[10] In fact, ERISA § 204(g)(2) itself confirms this understanding. The statute notes that, "[i]n the case of a retirement-type subsidy, the [anti-cutback rule] shall apply only with respect to a participant who satisfies (either before or after the amendment) *the preamendment conditions* for the subsidy." (emphasis added). In other words, a plan can create a new retirement-type subsidy with different conditions, but, at least with respect to previously accrued benefits, must allow participants to "grow into" the preamendment retirement-type subsidy by satisfying the conditions for that subsidy that had existed and formed part of the definition of that subsidy. See, *e.g.*, *Ahng* v. *Allsteel, Inc.*, 96 F.3d 1033, 1036 (7th Cir. 1996) ("The courts of appeals that have ruled on an employee's right to 'grow into' early retirement benefits have * * * uniformly held that as long as an employee satisfies, or will be able to satisfy, the eligibility requirements of the early retirement benefit in effect prior to the amendment, § 204(g) protects the benefit."); *Hein* v. *FDIC*, 88 F.3d 210, 213 (3d Cir. 1996) (same); *Hunger* v. *AB*, 12 F.3d 118, 120 (8th Cir. 1993) (same).

The examples given under these IRS regulations demonstrate this fact well. For example, although *ex ante* "a plan may provide that a single sum distribution is available only if the employee is in extreme financial need as defined under the terms of the plan" or condition lump-sum distribution "on the execution of a covenant not to compete" (*id.* at Q&A-6), no such condition can be added by amendment and applied to previously accrued benefits (*id.* at Q&A-7). Importantly, even though in each of these two instances the specified condition has no actuarial effect on the dollar value of the benefits provided – lump-sum distributions are calculated by determining the expected value of a stream of monthly payments (see ERISA § 204(c)(3)) – nonetheless, because the addition of these conditions decreases the *real-world* value of a participant's accrued benefit, such conditions violate the anti-cutback rule.

Because the conditions under which an accrued benefit will be paid are themselves part of that benefit, it follows that even contingent benefits that may *never* be paid are protected by the anti-cutback rule. For example, certain forms of "plant shutdown" benefits are "accrued benefits" for purposes of the anti-cutback rule, even though the participant is entitled to *nothing* under such a benefit unless the plant is in fact closed. See, *e.g.*, *Bellas*, 221 F.3d 517; *Richardson* v. *Pension Plan of Bethlehem Steel Corp.*, 67 F.3d 1462 (9th Cir. 1995), *withdrawn on other grounds by* 112 F.3d 982 (9th Cir. 1997); *Harms* v. *Cavenham Forest Indus., Inc.*, 984 F.2d 686 (5th Cir. 1993); Ameri R. Giannotti, Comment, *ERISA's Anticutback Rule And Contingent Early Retirement Benefits*, 68 U. CHI. L. REV. 1341 (2001).[11] Plans occasionally argue

[11] Under the protected type of plant shutdown benefit, a participant is entitled to a subsidized early retirement benefit commencing at the time of shutdown. This discussion focuses only on plant-shutdown benefits that are payable for life; other forms of severance pay arrangements are employee *welfare* plans instead of

that this form of benefit is not protected by the anti-cutback rule because the benefit depends on a contingent event – the plant being closed – and because it is difficult to place an actuarial value on such benefits. But such benefits are simply subsidized early retirement benefits contingent on an objective condition – plant closure – and therefore this argument is regularly rejected.[12] As the Third Circuit explained, "unpredictable contingent event benefits that provide a benefit greater than the actuarially reduced normal retirement benefit are retirement-type subsidies, and therefore are accrued benefits under section 204(g)." *Bellas*, 221 F.3d at 532. And the fact that the valuation of a contingent benefit "largely * * * defie[s] conventional actuarial principles" does not mean that those benefits have no value. *Id.* at 535.[13]

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employee *pension* plans, and therefore are not protected by the anti-cutback rule. See *Bellas*, 221 F.3d at 529; *Richardson*, 67 F.3d at 1468; *Harms*, 984 F.2d at 691 n.7 (citing 29 C.F.R. § 2510.3-1(a)(3)).

[12] Although a few old cases held that plant shutdown benefits are not protected by the anti-cutback rule (see *Ross* v. *Pension Plan for Hourly Employees of SKF Indus., Inc.*, 847 F.2d 329 (6th Cir. 1988); *Blank* v. *Bethlehem Steel Corp.*, 758 F. Supp. 697 (M.D. Fla. 1990)), that position has more recently been rejected by every court to consider it. See *Bellas*, 221 F.3d at 526-528, 532-533 (discussing these cases and explaining why they are wrong).

[13] *Amicus* Central States attempts to distinguish the plant-shutdown cases on the ground that in these cases the employer has some control over whether the contingent event occurs, whereas here the participant controls whether he or she accepts post-retirement employment. See Central States Br. 10. There are two responses. First, the question who can influence the occurrence of a contingent event is irrelevant to our point, which is that the conditions under which benefits will be paid under a pension plan must be understood to be a part of those benefits. Second, this distinction only suggests that plant closure benefits might not be al-

In its *amicus* brief, the government posits that 26 C.F.R. § 1.411(d)-4 Q&A-7 does not prevent a plan from changing the specific objective condition at issue here – whether respondents were working in the disqualifying employment specified in the plan at the time their benefits accrued. See U.S. Br. 27; see also Pet. Br. 27. As we discuss below (at Part II.B), that argument is based on a flawed interpretation of ERISA § 203(a)(3)(B). The important point to note, however, is that the government does not deny that, under this regulation, it is a fallacy to view the "accrued benefit" protected by the anti-cutback rule as simply the entitlement to the payment of a specific amount of money per month (or of the actuarial equivalent of that payment stream). Rather, the "conditions" under which a benefit will be paid are themselves part of the protected benefit.

3. Further proof that the accrued benefit under a plan is more than simply the entitlement to a specific amount of money per month comes from the fact that it is well established that "cost of living adjustment," or COLA, provisions are protected by the anti-cutback rule. See, *e.g.*, *Hickey* v. *Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465 (7th Cir. 1992); *Shaw* v. *Int'l Ass'n of Machinists & Aerospace Workers Pension Plan*, 750 F.2d 1458 (9th Cir. 1985).[14] In fact, the IRS acknowledges that a

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lowed under ERISA at all, not that the terms of either plant closure benefits or of suspension rules do not form part of an accrued benefit. Under 26 C.F.R. § 1.411(d)-4 Q&A-6(a)(1), benefits may not be "subject to the *employer's* discretion." (emphasis added). However, nothing in ERISA precludes benefits from being subject to some act within the *employee's* discretion.

[14] In a pension plan that includes a COLA, the benefit provided in any given year increases "in order to offset or at least reduce the anticipated effects of inflation." See MICHAEL J. CANAN & DAVID R. BAKER, 1 QUALIFIED RETIREMENT PLANS § 3.52[D], at 217 (2002). For example, the COLA in *Hickey* "provided that if the

COLA provision cannot be removed with respect to previously accrued benefits. See *Bd. of Trustees of the Sheet Metal Workers' Nat'l Pension Fund* v. *Comm'r*, 318 F.3d 599, 605 (4th Cir. 2003).[15] As the Seventh Circuit explained, "[a] participant's right to have his basic benefit adjusted for changes in the cost-of-living accrue[s] each year along with the right to the basic benefit." *Hickey*, 980 F.2d at 469; see also *Shaw*, 750 F.2d at 1464. This is true even though it is actuarially difficult to value a COLA provision in terms of the entitlement to a specific amount of money per year, as accrued benefits are ordinarily expressed under ERISA § 3(23)(A).[16]

Consumer Price Index ('CPI') increased in any year following a participant's retirement, then the monthly benefit would be increased accordingly, thus preventing a reduction in the real value of the benefits." 980 F.2d at 466-467. Similarly, the "living pension" feature in *Shaw* "geared increases in the retiree's pension benefits to salary increases in the position the retiree held immediately prior to retirement." 750 F.2d at 1460.

[15] Because the participants on whose behalf the IRS sued in *Sheet Metal Workers* had retired *before* the plan was amended to include a COLA provision, the Fourth Circuit held that the COLA was not an accrued benefit *as to those particular participants*. See 318 F.3d at 604. Implicit in that analysis, however, is the court's acknowledgment that the COLA would have been protected by the anti-cutback rule for benefits accrued after the COLA provision was added to the plan.

[16] *Michael* v. *Riverside Cement Co. Pension Plan,* 266 F.3d 1023 (9th Cir. 2001), is another case that demonstrates the same point. In *Michael*, the participant initially retired and began receiving accrued pension benefits, but then subsequently returned to work for the same employer. At the time he initially retired, the plan's rules provided that any benefits paid under a "first" retirement would not be offset against benefits paid after a "second" retirement. See *id.* at 1024-1025. While Michael was working the sec-

4. In addition to 26 C.F.R. § 1.411(d)-4 Q&A-7, another IRS regulation also demonstrates the fallacy of arguing that the benefit protected by ERISA § 204(g) is merely the entitlement to a specific number of dollars per month upon reaching normal retirement age. The IRS has always interpreted the Code equivalent to the anti-cutback rule – IRC § 411(d)(6) – to preclude amendments that directly "*or indirectly*" affect a participant's accrued benefit. 26 C.F.R. § 1.411(d)-3(b) (emphasis added).[17] While the word "indirectly" is never defined, the examples given by the IRS, as well as case law applying this regulation, show that the "accrued benefit" that is protected by the anti-cutback rule in-

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ond time, the plan's rules were changed to require previously-paid benefits to be offset against a participant's accrued benefit if he re-retired. The court rejected the plan's effort to apply this new rule to the benefits accrued prior to Michael's first retirement. As the court explained, the correct way to define those benefits was as the "payments [he] received *under the condition that*, if he were to be reemployed, as he was, they would not cause a reduction in his second retirement benefit based on his total years of service." *Id.* at 1027 (emphasis added). Changing that "condition" would reduce his benefits. See *ibid.* (explaining that one must "look[] beyond the net effect of a plan amendment on annual benefit payments, to the features of the benefit formula itself") (citing *Shaw*, 750 F.2d at 1463-1465). There is no analytical difference between the "offset" of prior benefit payments in *Michael* and the "suspension" of benefit payments at issue here.

[17] See also T.D. 7501, 1977-2 C.B. 133, 165 (promulgating 26 C.F.R. § 1.411(d)-3(b)). Congress, too, has always understood the anti-cutback rule to preclude amendments that indirectly affect accrued benefits. See S. REP. NO. 98-575, at 27 (describing the anti-cutback rule prior to passage of REA and explaining that "for purposes of determining whether a participant's accrued benefit is decreased, all of the provisions of the plan affecting directly *or indirectly* the accrued benefit are taken into account") (citing Rev. Rul. 81-12, 1981-1 C.B. 228) (emphasis added).

cludes the terms and conditions under which benefits will be paid.

Thus, the anti-cutback rule protects, among other things, "provisions relating to years of service and breaks in service for determining benefit accrual, and to actuarial factors for determining optional or early retirement benefits." 26 C.F.R. § 1.411(d)-3(b). In particular, the IRS has long held that an amendment that changes a discount rate used to calculate an unsubsidized early retirement benefit triggers the anti-cutback rule. Rev. Rul. 81-12, 1981-1 C.B. 228. But although changing a discount factor will change the monthly payment to a participant who has opted to receive his accrued benefit in the form of an unsubsidized early retirement benefit,[18] the *accrued benefit* to which the participant is entitled in such situation remains the value of his or her benefit "expressed in the form of an annual benefit commencing at *normal* retirement age" (ERISA § 3(23)(A) (emphasis added)), which by definition will not change when the discount rate used to calculate an *alternative* to that normal retirement benefit is changed. Thus, a change in the discount rate has no effect – and at the very least has no direct effect – on the value of the participant's accrued benefit under ERISA. Nonetheless, the IRS acknowledges that applying an amendment increasing a discount rate to accrued benefits is strictly forbidden by the anti-cutback rule.

[18] Unsubsidized early retirement benefits entail a smaller monthly payment than normal retirement benefits because the monthly payment is reduced to take into account the increased amount of time such benefits will be paid. For example, a hypothetical participant who is expected to live until age 78 will on average receive a string of benefit payments for 13 years if he retires at age 65, but for 23 years if he retires at age 55. See LANGBEIN & WOLK, PENSION & EMPLOYEE BENEFIT LAW 447-448.

5. ERISA § 204(g)(2)(B), 29 U.S.C. § 1054(g)(2)(B), which stresses that a plan amendment that eliminates a previously available "optional form of benefit" violates the anti-cutback rule, is yet further evidence of the scope of the accrued benefit protected by the anti-cutback rule. An "optional form of benefit" is simply "a distribution form with respect to an employee's benefit * * *." 26 C.F.R. § 1.411(d)-4 Q&A-1(b). But even if two optional forms of benefit are *actuarially equivalent*, the plan cannot remove one of these forms because one form may seem more valuable to a specific participant. See page 16, *supra*.

For example, at the time a participant accrued benefits, a plan might provide that retirement benefits are always paid out in either a life annuity or a joint and survivor annuity. Each of those payment options is an "optional form of benefit" that cannot be eliminated. Thus, the plan could subsequently choose to provide payment of retirement benefits in a lump sum payment option, but only by *adding* that as another option, not by eliminating the annuity options (at least with respect to benefits attributable to service before the amendment). See *Counts* v. *Kissack Water & Oil Serv., Inc.*, 986 F.2d 1322, 1324 (10th Cir. 1993). A plan cannot eliminate an "optional form of benefit" – a form of distribution of benefits specified in the plan at the time benefits accrued – even if the plan adds an alternative, actuarially equivalent method of distribution.[19]

[19] Because the term accrued benefit "refers only to pension or retirement benefits" (26 C.F.R. § 1.411(a)-7(a)(1)(ii)), the IRS's regulations explain that "ancillary benefits not directly related to retirement benefits" are not part of the accrued benefit provided under a plan. *Ibid*. Therefore, these ancillary benefits may be changed even with respect to a participant who has accrued benefits that *are* protected by the anti-cutback rule. See 26 C.F.R. § 1.411(d)(4) Q&A-1(d). The suspension rules at issue in this case cannot be described as "ancillary," however, because they directly

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The point of this extended discourse should not be lost: the accrued benefits protected by the anti-cutback rule depend on the terms of the plan, but even though those accrued benefits "ordinarily [are] expressed in the form of an annual benefit commencing at normal retirement age" (*Hughes*, 525 U.S. at 440 (alterations omitted)), it is in fact the *entire* plan that describes the benefits, not merely any one narrow provision that can be plucked out of context and *called* the benefit to which the participant is entitled.

B. Because The "Accrued Benefits" Protected By The Anti-Cutback Rule Include The Terms And Conditions Affecting Payment Of Those Benefits, An Amendment May Not Alter The Terms Under Which Payment Of A Previously Accrued Benefit Is Suspended.

1. Once one understands that the "accrued benefit" protected by ERISA § 204(g) is more than simply the entitlement to a specific amount of money per month during the period when payments are made – but instead includes the various "conditions" under which that benefit will be available (26 C.F.R. § 1.411(d)-4 Q&A-7), as well as terms of the plan that "indirectly" affect the benefit (26 C.F.R. § 1.411(d)-3(b)) – this becomes a simple case. It is beyond cavil that a plan A, under which one is entitled to $1000 per month for the remainder of one's life, is worth more than a plan B, under which one is entitled to $1000 per month except in any month in which one accepts post-retirement employment in job category X, which in turn is worth more than a plan C, under which one is entitled to $1000 per month except in any month in which one accepts post-retirement employment in

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affect a participant's pension benefits – the payment of a specified amount of money each month.

job categories X or Y. While it might be difficult to determine the exact valuation of these three distinct benefits – because the second and third involve conditional events whose possibility is unknown and may be difficult to estimate – there is no question about their *comparative* worth.

This truism can best be demonstrated by fleshing out the above, as in the following hypothetical example:

PLAN	FORMULA	VALUE OF BENEFIT
A	$1000/month * the participant's estimated lifespan measured in months (300 months).	$1,000/month * 300 months: **$300,000**
B	$1000/month * the participant's estimated lifespan * a discount factor based on the estimated probability that he or she will decide to work in job X for some number of months and to forgo benefit payments in those months (0.07).	$1,000/month * 300 months * (1-0.07, or 0.93): **$279,000**
C	$1000/month * the participant's estimated lifespan * a discount factor based on the estimated probability that he or she will decide to work in job X (0.07) or in job Y (0.06) for some number of months and to forgo benefit payments in those months.	$1,000/month * 300 months * (1-(.07+.06), or 0.87): **$261,000**

Obviously, these numbers are hypothetical, and this table significantly oversimplifies the task of calculating the actuarial value of these three benefit plans (as we have ignored the time-value of money, as well as other variable and contingent events that would go into the calculation). But these are merely details; the bottom line is that, *however* these values are estimated, Plan A necessarily would be more valuable to a participant than Plan B, which would necessarily be more valuable to a participant than Plan C.

If these three hypothetical benefits are worth different amounts, then a plan amendment that changes the benefit available to a plan participant from A to B to C obviously "decreases" the value of the participant's accrued benefit (ERISA § 204(g)(1)), and, where the benefits involved are early retirement benefits or retirement-type subsidies, such amendment "has the effect of * * * reducing" the participant's previously accrued benefits (ERISA § 204(g)(2)(A)).[20] There is no functional difference between such an amendment and an amendment that removes a COLA provision, changes an actuarial factor, or adds an objective condition to a benefit calculation.[21]

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[20] It also "has the effect of * * * eliminating an optional form of benefit" (ERISA § 204(g)(2)(B)), in that a participant is entitled to receive benefits as a monthly annuity *with the condition* that no benefits would be paid in any month during which he worked in specified jobs. The terms of benefit payment, including the suspension rules, define the optional form of benefit that the plan provided at the time a participant's benefits accrued. See page 22, *supra*.

[21] Although, as we said above (at 12), this case turns on the question what is the benefit protected by the anti-cutback rule, the answer to our second question – *from what* are those benefits protected – also demonstrates the flaws in petitioner's argument. Not only does ERISA § 204(g) specify that an amendment that causes *any* "decrease" in accrued benefits is barred, but ERISA

2. The fact that under the IRS's regulations a plan need not adjust the actuarial value of a participant's benefit if his benefit payments are suspended *pursuant to a valid suspension provision already in the plan* (see 26 C.F.R. § 1.411(c)-1(f); see also Pet. Br. 27; U.S. Br. 23-24), in no way undercuts this argument. The 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. Thus, a participant in our hypothetical Plan B has no cause to complain when his benefits are suspended during months in which he chooses to work in job X, and is not entitled to have his future benefit payments increased in light of such suspensions. But it in no way follows that switching this participant from Plan B to Plan C does not decrease the value of the participant's accrued benefit.

Thus, almost all of the government's argument, as well as much of petitioner's argument, is aimed at a straw man: the proposition that the actual "suspension of benefit payments" is not a "reduction of benefits." See U.S. Br. 13-19; Pet. Br. 30; see also Central States Br. 5-6, SHRM Br. 11. We agree completely. See Pet. App. 12a-13a. For starters, only *amendments* are barred by ERISA § 204(g), and when a pension fund suspends benefit payments to a participant pursuant to existing plan terms there is no plan amendment involved. But it in no way "follows" (U.S. Br. 19) from this that an amendment *changing the plan's suspension rules* does not decrease a participant's accrued benefit. Neither petitioner

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§ 204(g)(2) clarifies that any amendment that even "*has the effect of* * * * reducing" early retirement benefits is also precluded. *Ibid.* (emphasis added). The "has the effect of" phrase demonstrates the expansive scope of the anti-cutback rule. See *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 138-139 (1990) (noting that phrase "having the effect of" is "broad" and "expansive[]").

nor the government ever explains why this should be the case; the government instead merely cites *Spacek* and Judge Cudahy's dissent below as support for that proposition. See *ibid.*

In fact, the IRS's own interpretation of the anti-cutback rule in a parallel situation demonstrates why this second step does not "follow[]." As we discussed above (at 21), under 26 C.F.R. § 1.411(d)-3(b), a plan cannot be amended to change the discount factor used to calculate unsubsidized early retirement benefits. For example, under this rule, a plan cannot increase the interest rate used to calculate actuarial equivalence (with respect to previously accrued benefits) from 4% to 5%. See Rev. Rul. 81-12, 1981-1 C.B. 228 (Example 1).[22] However, if the plan had initially been drafted to "specif[y] * * * an interest rate equal to 50% of the prime rate of a specified unrelated bank as of the date of separation," the fact that "the prime rate increases from 8% to 10% so that the interest rate used to compute actuarial equivalence changes from 4% to 5%" would not preclude the plan from using the new 5% value. *Ibid.* (Example 2). The point is that whereas in the former case, the plan was *amended* to reduce the size of benefit payments, in the latter case the exact same real-world change happened as a result of an external, variable factor that had already been included as a term of the plan.

The parallel to this case is obvious. The actual suspension of benefits, if authorized under the already-extant terms of a plan, is allowed – just as a plan can use a variable measure of the interest rate that causes a plan's discount rate to increase. But this does not mean that the plan can be *amended* to make exactly the same change. An amendment undermines one of Congress's fundamental purposes in enacting ERISA by defeating expectations in a way that previ-

[22] The higher the interest rate is, the larger the discount value is. See *ibid*.

ously authorized suspensions and previously authorized changes in interest rates would not. Such an amendment is a decrease in accrued benefits, and is forbidden by the anti-cutback rule.

It also follows that the fact that the phrases "reduce benefits" and "suspend benefit payments" are used in conjunction in several provisions of ERISA (see Pet. Br. 31; Central States Br. 5; see also *Spacek*, 134 F.3d at 288-289) is simply irrelevant. Once one understands that it is a fallacy to view the actual failure to send a benefit check in any given month *pursuant to a preexisting plan provision permitting such a suspension* to be a "reduction of benefits," there is nothing odd about providing that a plan in serious financial trouble could either suspend benefit payments or reduce benefits or both.

3. There is no dispute that Messrs. Heinz and Schmitt's early retirement benefits are "accrued benefits" as that term is used in ERISA (see J.A. 21 (Answer ¶ 16)), and that the Plan provided that those benefits would be suspended if they took jobs as construction laborers, but would not be suspended if they took jobs as construction supervisors. The 1998 amendment adding this second category of disqualifying employment therefore decreased their benefits, by reducing the value of those benefits and by eliminating a previously available "optional form of benefit."

Petitioner is of course correct in stressing (at Pet. Br. 18) 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. Rather, it was *the plan itself* that created this expectation.

In *theory*, a pension plan might be drafted specifically to provide that the suspension rules that apply to previously accrued benefits could be expanded at a later date. Under such a rule, a later amendment *in fact* expanding the scope of disqualifying employment would not be a reduction in accrued benefits, because the true value of the benefits provided under the plan should always have been adjusted based on the *possibility* of such future amendment. But this theoretical plan provision does not help petitioner here, for three reasons.

For starters, the plan at issue in this case did not include any such qualification. Although petitioner stresses that "[t]he Plan provides that it may be amended, and furthermore expressly states that the definition of 'disqualifying employment' may be modified" (Pet. Br. 23 (citing J.A. 23, 46, 50); see also *id.* at 19 n.4), nothing in these plan provisions authorized an amendment that decreases accrued benefits or expands the scope of disqualifying employment as it applies to previously accrued benefits. Rather, the plan specifies in no uncertain terms that although it "may be amended at any time by the Trustees, * * * *no amendment may decrease the accrued benefit of any participant*" unless the amendment falls within two irrelevant exceptions. J.A. 50 (Plan § 8.1) (emphasis added); J.A. 13 (Cplt. ¶ 10). Nothing in the other two provisions petitioner cites contradicts this straightforward limitation.[23]

Second, if a plan could contain a provision allowing the plan to be amended retroactively to reduce previously accrued benefits, the anti-cutback rule would become

[23] The Summary Plan Description merely explains that "[t]he Trustees reserve the right to amend" the Plan. J.A. 23. And while Plan § 6.7(d)(1) requires the Plan to *notify* a participant who has returned to work and who then stops working of "any material change in the suspension rules" (J.A. 46), this provision does not itself *authorize* any amendment to those rules. Even if it were to be read to be a separate authorization for plan amendments, however, there is nothing in this provision that is inconsistent with or trumps the requirement, in Plan § 8.1, that an amendment not "decrease" the accrued benefit.

meaningless. It seems likely that all plans would add such a provision, and workers would then be left with no protection against cutbacks "authorized" by this plan provision. Any reading of the anti-cutback rule that would allow plans to opt out of that rule would render the rule a nullity.

Finally, a provision allowing the plan to alter its suspension rules at any time would be unlawful. The IRS's regulations implementing ERISA specify that benefits may not depend on "objective conditions *that are within the employer's discretion*." 26 C.F.R. § 1.411(d)-4 Q&A-6(b) (emphasis added). Just like a plan may not condition the availability of lump-sum distributions on "the level of the plan's funded status" (*ibid.*), so too it may not condition the suspension rules at any given point on its own choice whether to expand or contract those rules.

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Because Respondents accrued their pension benefits under a rule whereby their subsidized ("Service Only") early retirement benefits would be paid to them in any month in which they did not work as a construction *worker*, that rule is part of the benefit protected by the anti-cutback rule. By changing the conditions under which they are entitled to receive their benefit payments, petitioner decreased their accrued benefit and violated ERISA § 204(g).

II. ERISA § 203(a)(3)(B) DOES NOT AUTHORIZE THE AMENDMENT OF A PLAN TO EXPAND THE TYPES OF POST-RETIREMENT EMPLOYMENT UNDER WHICH PREVIOUSLY ACCRUED PENSION BENEFITS MAY BE SUSPENDED.

Despite petitioner's protestations to the contrary, nothing in ERISA § 203(a)(3)(B), 29 U.S.C. § 1053(a)(3)(B) – or in its Internal Revenue Code counterpart, IRC § 411(a)(3)(B) – authorizes a plan to reduce a participant's accrued benefits by *amending the plan* to expand the types of post-retirement employment under which those benefits are suspended. In fact, a careful reading of the plain text of ERISA § 203(a) demonstrates that this statutory provision is completely irrelevant to this litigation. And, on balance, neither the regulatory materials implementing ERISA nor the statute's legislative history supports petitioner's argument. Thus, even were ERISA § 203(a) ambiguous, which it is not, the IRS's interpretation of that provision would be due no deference.

A. ERISA § 203(a)(3)(B) Has No Relevance To This Case, As It Does Not Apply To Early Retirement Benefits.

As we discussed above, it is a foundational principle of ERISA that it is up to the parties to a plan to determine what benefits are offered under that plan. See page 13, *supra*. ERISA § 203(a) creates an exception to this general rule. Under this statutory provision, pension plans must "provide that an employee's right to his normal retirement benefit [be] nonforfeitable upon the attainment of normal retirement age." *Ibid*. Thus, once a participant reaches normal retirement age and commences receiving his or her normal retirement benefit, the plan is legally obligated to continue to pay that benefit "unconditional[ly]." ERISA § 3(19), 29 U.S.C. § 1002(19); see also U.S. Br. 11.

Petitioner and its *amici* stress an exception to the nonforfeitability rule, which they claim is relevant to this case. Under ERISA § 203(a)(3)(B), plans may "provide[] that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits," in specified jobs.[24] Because ER-

[24] For multiemployer plans, the payment of benefits may be suspended for subsequent employment "in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced." ERISA

ISA § 203(a)(3)(B) is merely a subsection to the nonforfeitability rule contained in ERISA § 203(a) – which protects normal retirement benefits payable after normal retirement age – it must be read as part of that overarching section. See, *e.g.*, *Smith* v. *United States*, 508 U.S. 223, 233 (1993) ("[j]ust as a single word cannot be read in isolation, nor can a single provision of a statute").

Thus, this provision creates a legislative exception to the nonforfeitability rule. In other words, without this provision no plan would be *allowed* to suspend the payment of normal retirement benefits for *any* post-normal-retirement-age reemployment. This provision both *authorizes* such suspensions and *limits* the forms of post-retirement reemployment under which a plan may suspend the payment of benefits.

However, because ERISA § 203(a) protects only *normal* retirement benefits payable after normal retirement age, it is well established that subsection 203(a)(3)(B) has no relevance to the terms under which a plan chooses to provide a subsidized *early* retirement benefit. In fact, that is how the IRS itself interprets the statute. The regulations implementing this subsection explain that:

> A plan may provide for the suspension of pension benefits which commence prior to normal retirement age, or for the suspension of that portion of pension benefits which exceeds the normal retirement benefit, or both, for *any* reemployment and *without regard to the provisions of section 203(a)(3)(B)* and this regulation * * *.

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§ 203(a)(3)(B)(ii). For other plans, benefits may be suspended for subsequent employment "by an employer who maintains the plan." *Id.* § 203(a)(3)(B)(i), 29 U.S.C. § 1053(a)(3)(B)(i).

29 C.F.R. § 2530.203-3(a).[25] In other words, nothing in ERISA § 203(a)(3)(B) limits the forms of suspension rules that a plan can include for participants who retire before normal retirement age. Therefore, plans can, if they choose, specify that *any* post-retirement work will cause the plan to suspend the payment of subsidized early retirement benefits.[26]

But this authority to exceed the limits contained in ERISA § 203(a)(3)(B) for early retirement benefits has a flip side. If ERISA § 203(a)(3)(B) does not limit the forms of suspension rules a plan can include for benefits payable prior to normal retirement age or for subsidized early retirement benefits, so too it cannot be the authority for a plan to contain such rules in the first place. And if ERISA § 203(a)(3)(B) is not the statutory authority for such rules to exist, it also follows that it cannot be statutory authority for the proposition that a plan can *change* an existing suspension rule applicable to early retirement benefits.

Thus, despite the extensive attention petitioner and its *amici* give to ERISA § 203(a)(3)(B), that provision is simply irrelevant to this case. Rather, suspension rules applicable to benefits payable prior to normal retirement age, or to the sub-

[25] To prevent a plan from indirectly violating ERISA § 203(a)'s non-forfeitability rule, the regulation clarifies that this is the case only "to the extent * * * that suspension of such benefits does not affect a retiree'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).

[26] In fact, a recent amendment to the plan in this very case provides that, for participants who retire before age 53, benefit payments attributable to benefits accrued after the date of that amendment, September 30, 1998, will be suspended for "employment which results in *any type of compensation* for services rendered." J.A. 64 (Amendment 7 to Plan § 6.7(c)(1)(ii)) (emphasis added).

sidized portion of early retirement benefits payable at any age – and thus the suspension rules applicable to respondents' benefits in this case – are authorized under the general rule that, absent a specific limitation in ERISA, the parties to a plan can draft whatever rules they see fit. See page 13, *supra*. Such plan provisions, however, may only be amended to the extent the amendment does not violate the anti-cutback rule. See ERISA § 204(g); Part I, *supra*.

B. Even If ERISA § 203(a)(3)(B) Were Relevant To This Case, This Statutory Provision Does Not Authorize A Plan To Amend Its Suspension Rules With Respect To Previously Accrued Benefits.

1. Nothing In The Text of ERISA § 203(a)(3)(B) Suggests That An Amended Suspension Rule Can Apply To Previously Accrued Benefits.

Even if ERISA § 203(a)(3)(B) were relevant to this litigation, petitioner and its *amici* misinterpret it. Under this subsection, a plan may "provide[]" a suspension rule for post-retirement reemployment. However, nothing in the language of this subsection authorizes a plan to *change* or *amend* the suspension rule originally "provide[d]" in the plan. See *Lamie* v. *U.S. Trustee*, 124 S. Ct. 1023, 1030 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.'") (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (in turn quoting prior case law)).

To begin with, as a textual matter the statutory term – "provide" – does not suggest that the trustees of a plan can change a previously existing suspension rule. "Provide" means "to *make* a proviso or stipulation." WEBSTER'S THIRD NEW INT'L DICTIONARY 1827 (1986) (definition 2) (emphasis added); see also OXFORD ENGLISH DICTIONARY 713 (2d ed. 1989) (definition 2.c) ("[t]o make it, or lay it down as, a provision or arrangement; to stipulate *that*") (emphasis in original); AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) (definition 3) ("[t]o *set down* as a stipulation") (emphasis added). Thus, ERISA § 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."[27]

A related example will clarify the point. ERISA § 203(a)(3)(A), 29 U.S.C. § 1053(a)(3)(A), which is statutorily parallel to ERISA § 203(a)(3)(B), allows a plan to "provide[]" that a participant's benefits will not be payable "if the participant dies." Because of this provision, plans may provide that "a participant who dies before retiring receives no benefits." LANGBEIN & WOLK, PENSION AND EMPLOYEE BENEFIT LAW 135. However, if a plan were to offer its participants the choice between a life annuity and an actuarially equivalent alternative "optional form of benefit," in which benefits would be paid to the participant or the participant's estate for exactly 15 years (cf. 26 C.F.R. § 1.411(d)-4 Q&A-1(b)(2) (Example 1)), no one would argue that, based on ERISA § 203(a)(3)(A), the plan could cease paying benefits to the estate of a participant who chose the 15-year annuity but who died in year six. That would not be the form of payment to which the participant agreed.[28] Nor

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[27] Throughout its brief, petitioner asserts that ERISA § 203(a)(3)(B) allows a plan to "adopt" a suspension provision. See Pet. Br. 11, 15, 16, 17, 21. That is not the statutory term. In any event, nothing about the word "adopt" implies that a plan could modify – *re*-adopt – an already existing suspension rule.

[28] Note that, although ERISA § 203(a)(3)(A) makes an exception to the forfeitability rule for "a survivor annuity which is payable as provided in § 205 [29 U.S.C. § 1055]" (*ibid.*), the fixed-term annuity described in the text is not the "Qualified Joint and Survivor

would anyone argue that the plan could be *amended* to authorize the cessation of these monthly payments, even though ERISA § 203(a)(3)(A) allows a plan to "provide[]" that benefits be forfeited when the participant dies.

But there is no difference between an amendment seeking to use ERISA § 203(a)(3)(A) to change the terms of payment of a participant's accrued benefit and an amendment using ERISA § 203(a)(3)(B) to change the terms of payment of that benefit. ERISA § 203(a)(3)(A) allows plans to "provide[]" for benefits to terminate at death, but does not authorize a plan to change the rules as to previously accrued benefits. Similarly, the parallel ERISA § 203(a)(3)(B) allows plans to "provide[]" for suspension rules, but does not authorize those rules to be changed with respect to previously accrued benefits. Therefore, under a straightforward textual analysis of the statute, petitioner's argument must be rejected.

2. The Structure Of ERISA As A Whole Undermines Petitioner's Argument.

Turning to ERISA as a whole, nothing about the structure of the statute implies that ERISA § 203(a)(3)(B) *should* be the authority for a plan's trustees to amend a suspension rule. See *Smith*, 508 U.S. at 233 ("a single provision of a statute" "cannot be read in isolation"). Rather, authority for all plan amendments comes from ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), which requires any plan subject to ERISA to "provide a procedure for amending such plan." The *types* of amendments that may be made under ERISA § 402(b)(3), however, are limited in various ways by the remainder of the

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Annuity" defined in ERISA § 205. An ERISA § 205 annuity is one that lasts until both the participant and his or her spouse have died. See ERISA § 205(d)(1). Therefore, the fixed-term annuity described in the text is protected only because it is the form of payment to which the parties agreed.

statute. In particular, the applicability of amendments to previously accrued benefits is limited by ERISA § 204(g). *See* Part I, *supra*. ERISA § 203(a)(3)(B) is *also* a limit on amendments, of course; because of this provision a plan could not be amended – even for newly accrued benefits – to provide that normal retirement benefits paid after normal retirement age would be suspended for all forms of post-retirement employment. See page 31 & note 24, *supra*. But the only logical reading of the statute as a whole is that ERISA § 203(a)(3)(B) contains certain restrictions on plan provisions, and ERISA § 204(g) contains *other* restrictions on plan provisions. Any provision added or modified by a plan amendment must satisfy both of these subsections, as well as many other specific requirements specified in various parts of ERISA. Thus, although a plan can be amended to include more restrictive suspension rules, those new rules cannot be applied to previously accrued benefits. See Pet. App. 10a n.6.

In fact, as the government noted in its brief, "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." U.S. Br. 10-11 (quoting LANGBEIN & WOLK, PENSION AND EMPLOYEE BENEFIT LAW 122). It would make little structural sense to expect the suspension rule contained in ERISA § 203(a)(3)(B), which addresses vesting, to be a limitation on the anti-cutback rule, which involves benefit accruals.

3. Administrative Materials Interpreting ERISA §§ 203(a)(3)(B) And 204(g) Contain Conflicting Interpretations Of These Provisions, And Do Not Warrant Departing From The Plain Text Of The Statute.

Although petitioner, and the government as *amicus*, point to various IRS and Department of Labor administrative materials that they assert interpret ERISA § 203(a)(3)(B) to authorize the amendment at issue in this case (see Pet. Br. 17-18; U.S. Br. 23-27), the majority of these materials in fact provide no support whatsoever for that argument.

For example, 29 C.F.R. § 2530.203-3(a) (cited at Pet. Br. 18) implements ERISA § 203(a)(3)(B), but merely reiterates that a plan can "*provide*[] that the payment of benefits" be suspended in specified circumstances. *Ibid.* (emphasis added). It does not address when the plan must so "provide," and whether, once the plan does so provide, the suspension provision may be changed.

Similarly, 26 C.F.R. § 1.411(c)-1(f) and the various IRS publications explaining it (cited at Pet. Br. 27; U.S. Br. 23-24) are equally unhelpful to petitioner. Under this regulation, "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under [ERISA] § 203(a)(3)(B)." 26 C.F.R. § 1.411(c)-1(f). But as we have already explained, this regulation merely clarifies that the true actuarial value of an accrued benefit *already includes* the possibility that benefit payments will be suspended in the situations specified in that plan. Therefore, this regulation does not suggest that a plan can expand the scope of disqualifying employment with respect to previously accrued benefits. See page 26, *supra*.

The "Listing of Required Modifications" ("LRM") discussed by the government (at U.S. Br. 25-26) likewise offers no support to petitioner's argument. As the cover page to that manual explains, the IRS issued it "to assist sponsors who are *drafting or redrafting* plans," by publishing "samples of plan provisions that have been found to satisfy certain specific requirements of the Internal Revenue Code." Internal Revenue Service, *Defined Benefit Listing of Requirement Modifications and Information Package*, cover page (2000) (*available at* http://www.irs.gov/pub/irs-tege/db_lrm.pdf) (emphasis added) (quoted at U.S. Br. 25). However, the authors of the LRM are quick to stress in that very same introductory paragraph that the sample provisions in the LRM "may or may not be acceptable in different plans *depending on the context in which used*." *Ibid*. (emphasis added). Furthermore, nothing in the relevant section of the document (LRM 55, at 109-111) says *anything* about a suspension provision being added to an already existing plan, or discusses to what benefits such newly added provisions could apply.

The final regulatory item cited by petitioner and the government (see Pet. Br. 27; U.S. Br. 26) – Internal Revenue Manual ("IRM") § 4.72.14.3.5.3(7) (*available at* http://www.irs.gov/irm/part4/ch47s19.html) – does, it is true, offer limited support for their argument. According to the IRM, "[a]n amendment that reduces [accrued] benefits on account of 203(a)(3)(B) service does not violate [the Internal Revenue Code parallel to ERISA § 204(g)]." But in this instance the IRM is entitled to little or no deference from this Court.

Neither petitioner nor the government claim that the IRM is due *Chevron* deference. See Pet. Br. 27-28; U.S. Br. 26-27. Rather, under *United States* v. *Mead Corp.*, 533 U.S. 218, 228 (2001), this regulation is due deference to the extent it has the power to persuade. See *ibid.*; Pet App. 22a n.17. But there is no *reasoning* whatsoever given in the IRM. In situations involving *Skidmore* deference, conclusory statements do not have persuasive value; one of the main justifications for *Skidmore* deference is the "'validity of [an agency's] *reasoning*.'" *Mead Corp*., 533 U.S. at 228 (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944)) (emphasis added).

Furthermore, the IRM also *undermines* petitioner's argument. In the IRM, the IRS notes – as we discussed above (at 32-33) – that under ERISA § 203(a) "receipt of protected benefits *other than the normal retirement benefits* may be conditioned on the participant's not performing *any* type of reemployment." IRM § 4.72.14.3.5.3(7) (emphasis added). However, the IRM provides that a plan may only include such a blanket suspension rule "if the provision is present in the plan *from its establishment*." *Ibid.* (emphasis added). In other words, the IRS acknowledges that an amendment expanding the scope of disqualifying employment must, at least in certain circumstances, be viewed to be a prohibited reduction of benefits.[29] In its *amicus* brief, however, the government spends many pages disputing the notion that the suspension of benefit payments can *ever* decrease the value of an accrued benefit. See U.S. Br. 13-19; see also Pet. Br. 28-29.

In sum, nothing in the regulations or administrative guidance issued under ERISA § 203(a)(3)(B) or § 204(g) should persuade this Court to ignore the plain text of those statutes. While there is one conclusory and unreasoned statement in an IRS manual consistent with petitioner's position, that statement is unsupported, is not due deference under *Chevron*, and is outweighed by other regulatory positions that undermine petitioner's argument.

4. The Legislative History On Which Petitioner And Its *Amici* Rely Does Not Help Their Argument.

Petitioner and its *amici* also rely heavily on legislative history to support their argument, but these materials, too, are largely irrelevant.

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[29] Under this portion of the IRM, an amendment expanding the suspension rule for subsidized early retirement benefits payable before normal retirement age to authorize suspension for *any* post-retirement reemployment would violate the anti-cutback rule. It is presumably for this reason that when the Fund implemented its any-employment-is-suspending rule in 1998, that new rule applied only to benefits accrued after the date of that amendment. See note 26, *supra*.

a. For starters, the vast majority of the legislative history on which petitioner and its *amici* focus addresses an uncontroversial point: that there are good reasons why the authors of a multiemployer plan should be allowed to include a suspension rule *in the first place*. Suspension rules allow a plan "'to protect participants against their pension plan being used, in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of, employees covered by the plan.'" Pet. Br. 23 (quoting III ERISA LEGIS. HIST. 4738 (statement of Sen. Williams)); see also Pet. Br. 23-24 ("Congress intended to 'protect unions against undercutting of wage scales and the additional expense generated by the need to subsidize retirement benefits for those who have left the work force as well as retirement benefits for those continuing to work.'") (quoting III ERISA LEGIS. HIST. 4772 (statement of Sen. Javits)); U.S. Br. 15 (collecting legislative history to same effect); Nat'l Coord. Comm. Br. 12-13 (collecting legislative history to same effect).

Critically, none of this legislative history has *anything* to do with the question presented in this litigation: whether, in a situation where a plan initially chose not to include a suspension rule at all, or initially chose to limit that suspension rule to a subset of the types of disqualifying employment that it could have specified to be disqualifying, that plan should later be allowed to *change* its rule with respect to previously accrued benefits.

b. Petitioner and its *amici* also focus on Representative Clay's explanation of the REA amendment to ERISA § 204(g), which clarified that the anti-cutback rule applies to early retirement benefits as well as normal retirement benefits (see page 4, *supra*). See Pet. Br. 34; U.S. Br. 22. This floor statement, too, is off point. Representative Clay said only that the new provision being added to ERISA § 204(g) did not "affect the provision of ERISA § 203(a)(3)(B) * * * relating to the suspension of benefits for postretirement employment, including the authorization for multiemployer plans to adopt stricter rules *for the suspension of subsidized early retirement benefits*." 130 Cong. Rec. 23,487 (daily ed. Aug. 9, 1984) (emphasis added).

In other words, Representative Clay merely clarified that, in adding ERISA § 204(g)(2) to the anti-cutback rule, Congress was not eliminating the distinction drawn in ERISA § 203(a) between normal retirement benefits – which could only be suspended for specific forms of post-retirement employment (see note 24, *supra*) – and early retirement benefits or benefits payable before normal retirement age, which a plan could provide would be suspended for *any* post-retirement reemployment. See pages 32-33, *supra*; Pet. App. 16a n.11. In fact, this is one of the examples Representative Clay specifically gave immediately following the quote upon which petitioner and its *amici* so heavily rely; despite this amendment, "a multiemployer plan which contains postretirement benefit suspension rules providing for the suspension of subsidized early retirement benefits on grounds other than those described in ERISA section 203(a)(3)([B]) * * * (as authorized by existing law) remains free to apply those rules." 130 Cong. Rec. 23,487-23,488 (statement of Rep. Clay).

c. In fact, the only piece of legislative history that petitioner or any of its *amici* could dredge up that even *arguably* supports petitioner's argument is one floor statement by Representative Dent made while Congress was debating whether to enact ERISA. See Pet. Br. 21-22; U.S. Br. 15-16; Nat'l Coord. Comm. Br. 13-14. On August 22, 1974, Representative Dent stated that

> the conferees expressly provided in Section 203(a)(3)(B) that a plan be permitted to suspend benefits under certain circumstances. This section further authorizes the Secretary to prescribe regulations necessary to carry out the purposes of this provision.

> It is contemplated that those regulations would permit a plan's provisions concerning suspension to take into account the particular facts and circumstances of the industry; the objectives of industrial stability; the conditions of employment and earnings in the industry; the benefit payment period of the plan; and the burden of onerous and costly administrative procedures imposed upon the plan by these provisions.

120 Cong. Rec. 29,192, 29,197 (daily ed. Aug. 22, 1974) (*reprinted at* III ERISA LEGIS. HIST. 4669-4670).

This statement can be read multiple ways. For example, it is an entirely plausible reading of this speech to interpret Representative Dent merely to be comparing the needs of different industries and explaining that plans in these different industries might want to implement different suspension rules. Under this reading of Representative Dent's statement, nothing about his comments suggests that he had even considered the question whether a plan's suspension rules may be amended retroactively.

But even if this one ambiguous floor statement is read to imply that Representative Dent believed suspension rules could be amended retroactively, it is an insupportably thin reed on which to base petitioner's entire case, and is not nearly enough evidence to warrant rejecting the plain import of the actual *text* of the statute. This Court recently rejected a similar statutory-interpretation argument based on "two sentences contained within 472 pages of written statements" in a statute's legislative history. *Lamie*, 124 S. Ct. at 1034. What this Court said in *Lamie* is equally true here: "Nothing in the legislative history confirms that this particular point bore on the congressional deliberations or was given specific consideration. These uncertainties illustrate the difficulty of relying on legislative history * * * and the advantage of * * * [basing a decision] on the statutory text." See also, *e.g.*, *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 457 n.15 (2002) (rejecting "placing an obligation on Members of Congress * * * to monitor their colleague's floor statements"); *Garcia* v. *United States*, 469 U.S. 70, 76 & n.3 (1984) ("In surveying legislative history we have * * * eschewed reliance on the passing comments of one Member, and casual statements from the floor debates.") (citations omitted); 2A NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 48:15 (6th ed. 2000) ("Isolated remarks by the sponsor of a bill that are ambiguous are not sufficient to demonstrate congressional intent.").

5. The Policy Arguments Raised By Petitioner And Its *Amici* Are Misguided.

Petitioner and its *amici* spend many pages explaining why plans *should* be allowed to modify suspension rules retroactively to compensate for changing market conditions and a plan's financial health. See Pet. Br. 21-26; U.S. Br. 28-29; Central States Br. 4; Nat'l Coord. Comm. Br. 12-20. Although these policy justifications have no legal significance, there are nonetheless at least six responses to them.

First, it is again critical to distinguish between the policy arguments made for why suspension rules might be a good idea – such as to prevent members of a multiemployer plan from "retiring" and immediately resuming identical employment in a non-union job paying less than the union jobs covered by the plan, or to prevent "double dipping" – and any policy justification for allowing a plan to change its rules retroactively. See page 41, *supra*. Petitioner and its *amici* repeatedly try to conflate the two questions.

Second, the flip side to these arguments is that plan participants justifiably rely on the terms of their plans as those plans existed when their benefits accrued.[30] Suspension rules

[30] In fact, a Department of Labor regulation at least implicitly demonstrates this. Under that regulation,

affect the value of retirement benefits to plan participants, and therefore are negotiated in detail. When a plan changes its rules retroactively it is simply reneging on its collectively bargained contractual obligation to its participants.[31]

Third, ERISA already contains provisions under which employers *may* retroactively amend their suspension rules, when they face "substantial business hardship." See ERISA § 302(c)(8), 29 U.S.C. § 1082(c)(8); U.S. Br. 28 n.9.[32] This escape hatch exists specifically for those instances where a pension fund might not otherwise be able to fulfill its obliga-

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> [i]f a plan provides for benefits suspension, the plan shall adopt a procedure * * * whereunder an employee may request, and the plan administrator in a reasonable amount of time will render, a determination of whether specific contemplated employment will be section 203(a)(3)(B) service for purposes of plan provisions concerning suspension of benefits.

29 C.F.R. § 2530.203-3(b)(6). In other words, before retiring a plan participant can ask – and the participants in this case *did* ask – whether a specific post-retirement job would lead to the suspension of benefits payments. This underscores the fact that participants may decide whether to retire at least in part based on whether they can take specific post-retirement employment.

[31] Relatedly, the argument that all plans would immediately implement the most restrictive suspension rules possible if this Court were to hold that the anti-cutback rule precludes a plan from retroactively amending its suspension rules (see Pet. Br. 26; U.S. Br. 29; Nat'l Coord. Comm. Br. 27) has no basis. Rather, these rules are a subject of concern to employees and thus employees may negotiate to include liberal reemployment rules in their plans. Furthermore, "employers have incentives to offer attractive benefit plans because of their role in attracting workers, improving morale, and increasing employee retention." Giannotti, *supra*, 68 U. CHI. L. REV. at 1366.

[32] In this case, petitioner did not seek to amend its plan under the "substantial business hardship" rules. See Pet. App. 7a.

tions. See, *e.g.*, *Shaw*, 750 F.2d at 1465 (rejecting argument that a plan should be allowed to remove a COLA provision unilaterally because of financial distress, but noting that the plan "can now submit its discussion of financial hardship, *which is irrelevant to our decision*, to the Secretary [of Labor]" under the hardship rules) (emphasis added). Except for instances of financial hardship that fit within ERISA § 302(c)(8), the very choice to create a defined-benefit plan rather than a defined-contribution plan entails the *conscious decision* that the plan (and the employers who fund it) may be subjected to additional financial burdens if some prediction – for example, expected rates of return of the fund's investments in the market or, as in this case, the number of employees who will choose to accept early retirement – turns out to be wrong. See *Hughes Aircraft*, 525 U.S. at 439. Thus, although these hardship rules may be used only when a plan is in substantial financial distress (see U.S. Br. 28 n.9), it made perfect sense for Congress to choose to place the reliance interests of plan participants above a plan's desire to make retroactive amendments in all but extreme cases.[33]

Fourth, it is simply not the case that allowing plans to amend their suspension rules only with respect to newly accrued benefits will leave them powerless to respond to changing market conditions.[34] It will make it more difficult,

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[33] In any event, an amendment expanding limitations on post-retirement reemployment is unlikely to protect the financial well-being of a pension plan because under such an amendment participants are still entitled to retire and collect their pensions. Even under the amended version of the plan at issue in this litigation, Messrs. Heinz and Schmitt are entitled to receive their pensions merely by choosing to stop working altogether, or even simply by going to work in an unrelated industry. See Pet. Br. 19.

[34] Nor is it the case – contra U.S. Br 29; Nat'l Coord. Comm. Br. 28 – that it would be an administrative nightmare were this Court to hold that new suspension rules apply only to benefits accrued

to be sure, but the prospective tightening of these rules will certainly have some impact. Furthermore, there is nothing preventing a plan from amending its rules retroactively to *reduce* the number of situations in which payments may be suspended. Thus, if the employer-sponsors of a plan felt a pressing need for more workers, the trustees of that plan could use such an amendment to encourage previously retired participants to return to the job market. Cf. Pet. Br. 23.

Fifth, neither the fact that respondents' early retirement benefit is subsidized, nor the fact that they accepted early retirement at the age of 39, justifies allowing the plan to punish them by forbidding them from accepting previously authorized post-retirement employment. Respondents did *exactly* what the plan allowed them to do at the time they retired, and, as we have repeatedly explained, it is up to the parties to a plan to decide what benefits are available under that plan. One cannot fault a participant in a plan for choosing an option authorized by the plan.

Finally, it is important to recognize that "normal retirement age" is a legal fiction. As the leading authority on ERISA has explained, it is merely one of a number of variables used to calculate participants' accrued benefits, rather than any indication of the age at which participants to a plan will, in fact, "normal[ly]" retire. See LANGBEIN & WOLK, PENSION AND EMPLOYEE BENEFIT LAW 445 (citing DAN M. MCGILL & DONALD S. GRUBBS, JR., FUNDAMENTALS OF PRIVATE PENSIONS 129-131 (6th ed. 1989)). In its *amicus* brief in this case, the National Coordinating Committee for Multiemployer Plans explained that early retirement is in fact common in the construction industry because "[c]onstruction

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after the enactment of such amendment. As we discussed above, the plan in this case *already has* certain suspension rules that apply only to benefits accrued after the date those suspension rules were enacted. See note 26, *supra*.

work is physically hard, and is often performed under harsh climatic conditions." Nat'l Coord. Comm. Br. 10 (quoting 144 Cong. Rec. 7574, 7578 (daily ed. July 7, 1998) (statement of Sen. D'Amato)). Thus, the fact that respondents retired at an early age under the subsidized early retirement pension offered by the Fund is understandable; it seems quite likely that a significant percentage of participants in the Fund do so as well. The sponsors of the plan presumably expect – or should expect – to pay subsidized early retirement benefits to many plan participants, and the existence of such benefits therefore must be accounted for in setting the level of a participant's "normal" retirement benefit in the first place. To allow the Fund to change the rules in mid-course would unfairly shift the risk of plan funding deficits from the plan's sponsors to participants in that plan.

* * * * *

The Seventh Circuit's interpretation of the anti-cutback rule is the only one that comports with the policies of ERISA. ERISA § 204(g) forbids amendments that decrease the value of an accrued benefit, which is exactly what the Fund's amendment did in this case. Because nothing in ERISA § 203(a)(3)(B) in any way allows what ERISA § 204(g) forbids, the court of appeals' decision is plainly correct.

CONCLUSION

The judgment of the Seventh Circuit should be affirmed.

Respectfully submitted.

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ADDENDUM

1. ERISA § 3, 29 U.S.C. § 1002, provides:

DEFINITIONS.

For purposes of this subchapter:

* * *

(23) The term "accrued benefit" means—

(A) in the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in [ERISA § 204(c)(3), 29 U.S.C. § 1054(c)(3)], expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.

The accrued benefit of an employee shall not be less than the amount determined under [ERISA § 204(c)(2)(B), 29 U.S.C. § 1054(c)(2)(B)] with respect to the employee's accumulated contribution.

2. ERISA § 203, 29 U.S.C. § 1053, provides:

MINIMUM VESTING STANDARDS.

(a) Nonforfeitability Requirements. – Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

* * *

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a survivor annuity which is payable as provided in [ERISA § 205, 29 U.S.C. § 1055]).

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

3. ERISA § 204, 29 U.S.C. § 1054, provides:

BENEFIT ACCRUAL REQUIREMENTS.

* * *

(c) Employee's Accrued Benefits Derived From Employer And Employee Contributions.

* * *

(3) For purposes of this section, in the case of any defined benefit plan, if an employee's accrued benefit is to be determined as an amount other than an annual benefit commencing at normal retirement age, or if the accrued benefit derived from contributions made by an employee is to be determined with respect to a benefit other than an annual benefit in the form of a single life annuity (without ancillary benefits) commencing at normal retirement age, the employee's accrued benefit, or the accrued benefits derived from contributions made by an employee, as the case may be, shall be the actuarial equivalent of such benefit or amount determined under paragraph (1) or (2).

* * *

(g) Decrease Of Accrued Benefits Through Amendment Of Plan.

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in [ERISA § 302(c)(8), 29 U.S.C. § 1082(c)(8) or ERISA § 4281, 29 U.S.C. § 1441].

(2) For purposes of paragraph (1), a plan amendment which has the effect of—

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury shall by regulations provide that this paragraph shall not apply to any plan amendment which reduces or eliminates benefits or subsidies which create significant burdens or complexities for the plan and plan participants, unless such amendment adversely affects the rights of any participant in a more than de minimis manner. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).