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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The "anti-cutback" rule in Section 204(g) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), generally prohibits any amendment of a qualified pension plan that has the effect of eliminating or reducing an early retirement benefit attributable to services provided by a participant before the amendment.

The question presented is whether an amendment to a multiemployer pension plan that provides for the suspension of the payment of early retirement benefits during the period that a participant, after retiring, is employed by another firm in the same industry is a prohibited elimination or reduction of such benefits when applied to employees who retired prior to adoption of the amendment.

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This brief is submitted in response to the order of the Court inviting the Solicitor General to express the views of the United States.

STATEMENT

The "anti-cutback" rule in Section 204(g)(1) and (2) of the Employee Retirement Income Security Act of 1974, (ERISA) provides that the accrued benefit of a pension plan participant may not be decreased by an amendment to the pension plan, and further provides that a plan amendment that has the effect of eliminating or reducing an early retirement benefit attributable to service before the amendment shall be treated as a prohibited reduction of accrued benefits. 29 U.S.C.

1054(g)(1) and (2). The court of appeals held in this case that an amendment to a multiemployer pension plan that provides for the suspension of the payment of early retirement benefits during the period that a participant, after retiring, is employed in the same industry is a prohibited elimination or redution of such benefits when applied to employees who retired prior to adoption of the amendment. It is the position of the United States that the ruling of the court of appeals is erroneous and warrants review by this Court.

1. Respondents are participants in a multiemployer defined benefit pension plan that is administered by petitioner Central Laborers' Pension Fund. Respondents retired in 1996, when they were each 39 years old. On their retirements, they qualified for and began receiving monthly benefit payments. Those payments were available to plan participants who retired at any age, so long as they had earned a threshold number of pension credits. The monthly payments available on their retirements were the same as the payments available at normal retirement age. The benefits were not actuarially reduced to take into account the fact that payments that begin at an earlier age would be likely to continue over a longer period. Pet. App. 4a. Under the plan, monthly benefit payments for persons who retire before age 60 are suspended during periods when the retirees thereafter work in certain "disqualifying employment." At the time that respondents retired, the plan defined "disqualifying employment" for this purpose as employment "in a job classification of any type specified and covered in a collective bargaining agreement or in any occupation or job classification where contributions are to be made to the Fund pursuant to a written agreement (either as a union or non-union construction worker)." *Ibid.*

After their retirement, respondents obtained jobs as supervisors in the construction industry. That type of employment was not "disqualifying employment" under the plan, and respondents therefore continued to collect their monthly pension benefits. Two years after respondents retired, however, the plan was amended. As amended, the definition of "disqualifying employment" was expanded (for participants who retire before age 53) to include work "in any capacity in the construction industry (either as a union or non-union construction worker)." Pet. App. 5a. The Pension Fund construed this amended definition of "disqualifying employment" to encompass the supervisory work performed by respondents and therefore suspended their monthly benefit payments. *Ibid.*

2. Respondents brought this action against the Pension Fund to obtain payment of the suspended benefits under Section 502 of ERISA, 29 U.S.C. 1132. Respondents contended that the amendment to the definition of "disqualifying employment" under the plan to include supervisory work violates the "anti-cutback" rule of Section 204(g) of ERISA, 29 U.S.C. 1054(g). The "anti-cutback" rule of ERISA imposes requirements that are identical to the requirements of Section 411(d)(6) of the Internal Revenue Code, 26 U.S.C. 411(d)(6). These provisions prohibit a qualified plan from retroactively "eliminating or reducing an early retirement benefit." 29 U.S.C. 1054(g)(2)(A); 26 U.S.C. 411(d)(6)(B)(i).

The district court ruled in favor of the Pension Fund. Pet. App. 33a-45a. Relying on *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (5th Cir. 1998), the court held that the amendment to the pension plan did not violate the anti-cutback rule because it concerned a "suspension" of benefit payments and not a "reduction" of early retirement benefits. Pet. App. 36a-

38a. The court explained that, "unlike a reduction in benefits situation, where benefits are suspended, the suspension is temporary in nature and completely under the control of the retirees who can avoid or terminate suspension of benefit payments by declining or terminating disqualifying employment." *Id.* at 38a.

3. The court of appeals reversed. Pet. App. 3a-31a. The panel majority held that the amendment to the plan resulted in an impermissible "reduction" of early retirement benefits under Section 204(g) of ERISA because respondents lost the right they previously had to receive monthly retirement benefits while they worked as construction supervisors. Pet. App. 9a. Although the court recognized that the "suspension" of benefit payments during such employment was only temporary under the plan, the majority reasoned that the suspension effected a permanent "reduction" for the months that the benefit payments were suspended. The court concluded that this "reduction" of benefits paid to respondents due to the expanded plan definition of "disqualifying employment" violated the anti-cutback rule of ERISA. *Id.* at 9a-10a.

In so ruling, the court expressly rejected the contrary interpretation of the anti-cutback rule adopted by the Fifth Circuit in *Spacek*. Pet. App. 3a-4a.[1] The court explained that, while not all "suspensions" are to be treated as "reductions" of benefits under this statute, "if the suspension is pursuant to an amendment that reduces benefits (attributable to service before the

[1] The court noted that, because its decision conflicts with the decision of the Fifth Circuit in *Spacek*, "it has been circulated * * * to all members of the court in regular active service. A majority did not wish to hear the case en banc." Pet. App. 4a n.1.

amendment), then it is a reduction within the anti-cutback rule." *Id.* at 12a.

Judge Cudahy dissented. Pet. App. 24a-31a. He reasoned that a "reduction" of benefits does not occur from a "suspension" of benefit payments under the amended employment disqualification rules when, as here, the participant's post-retirement earned income replaces the plan benefit. *Id.* at 25a. He pointed out that "the suspension of pension payments does not reduce the recipient's current income because the temporarily lost pension income is replaced by earned income * * * from the very same construction industry." *Ibid.* Judge Cudahy concluded that the reasoning of the Fifth Circuit in *Spacek* was "quite compelling" and should not have been rejected by the panel in this case. *Id.* at 24a.

DISCUSSION

The court of appeals erred in concluding that a "suspension" of the payment of early retirement benefits that results from an amendment to the post-retirement "disqualifying employment" provision of the plan is a "reduction" of plan benefits for the employees who retired before adoption of the amendment and is therefore prohibited under the anti-cutback rule of Section 204(g) of ERISA, 29 U.S.C. 1054(g). The question presented in this case has substantial recurring importance in the routine administration of pension plans throughout the Nation. And, as the court below acknowledged (Pet. App. 3a), its decision in this case squarely conflicts with the decision of the Fifth Circuit in *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283 (1998).

Resolution of this conflict by this Court is warranted by the importance of the issue and by the need to ensure the uniform application of this broadly applicable

statute. Absent review by this Court, the conflict created by the decision in this case will result in disparate treatment of similarly situated pension plans and participants based solely upon the happenstance of their geographic location.

1. Section 204(g)(1) of ERISA generally provides that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan * * * ." 29 U.S.C. 1054(g)(1). Section 204(g)(2) then further provides that a plan amendment that has the effect of "eliminating or reducing an early retirement benefit" is to be treated as a decrease of an "accrued benefit" that is barred by Section 204(g)(1). 29 U.S.C. 1054(g)(2). The prohibitions imposed by those provisions are known as the "anti-cutback" rule.

In this case, the court of appeals held that a "suspension" of the payment of early retirement benefits that results from an amendment to a plan's "disqualifying employment" provision is a "reduction" of benefits prohibited under this anti-cutback rule. In reaching that conclusion, the court acknowledged (Pet. App. 3a-4a, 11a n.7) that its decision squarely conflicts with the decision of the Fifth Circuit in *Spacek* v. *Maritime Association*, *supra*, and with the reasoning and conclusion of the Sixth Circuit in *Whisman* v. *Robbins*, 55 F.3d 1140 (1995).[2]

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[2] In *Whisman*, as in *Spacek*, the court concluded that the anti-cutback rule does not apply to a plan amendment that expands restrictions on post-retirement employment, because such a "suspension" is not a "reduction or elimination" of accrued benefits within the meaning of that statute. 55 F.3d at 1147. As the Fifth Circuit noted in *Spacek*, 134 F.3d at 288 n.6., however, the *Whisman* court went on to conclude that the plaintiff would not have prevailed in that case even under the plan as it existed prior to its amendment. 55 F.3d. at 1148. For this reason, the court below

The facts of *Spacek* are indistinguishable from those of the present case. In *Spacek*, a plan participant took early retirement and thereafter became reemployed in the same industry. At the time of his retirement, the provisions of the plan were such that his reemployment did not affect his ability to receive early retirement benefits. After his retirement, however, the plan was amended to suspend the payment of early retirement benefits to retirees who were reemployed in the same industry. When the participant became reemployed, the plan suspended payment of his early retirement benefits. 134 F.3d at 286-287. The Fifth Circuit concluded that no prohibited cutback of benefits occurred because the "suspension" of the payment of benefits attributable to a plan amendment that expands the definition of disqualifying post-retirement employment does not result in a prohibited "reduction" of benefits under ERISA even as applied to participants who had retired prior to the amendment. *Id.* at 287-292.

The court in *Spacek* correctly rested its conclusion on three principal grounds:

(i) First, as the Fifth Circuit noted (134 F.3d at 288-289), Congress has differentiated between a "reduction" of benefits and a "suspension" of benefit payments in several provisions of the statute. For example, Section 4281(a) of ERISA provides that, in certain situations involving terminated benefit plans, the plan sponsor "shall *amend the plan to reduce benefits*, and shall *suspend benefit payments*, as required by this section." 29 U.S.C. 1441(a) (emphasis added). Congress is thus well aware of the literal difference between an amendment to reduce benefits and a suspension of bene-

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described that alternative holding in *Whisman* as "dicta." Pet. App. 11a n.7.

fit payments. Similar separate usages of these terms appear in other ERISA provisions. See 29 U.S.C. 1342(d)(1)(A)(v); 29 U.S.C. 1053(a)(3)(E)(ii); 29 U.S.C. 1301(a)(8); cf. 29 C.F.R. 2520.104b-4(a)(1)(iii), (2)(iv). As the Fifth Circuit observed in *Spacek*, if a "reduction" of benefits automatically encompasses every "suspension" of benefit payments, the separate usages of these two terms in ERISA would be redundant, which would be contrary to the settled rule of statutory construction that each word of a statute is "to have meaning." 134 F.3d at 289 (quoting *Bailey* v. *United States*, 516 U.S. 137, 145 (1995)).

(ii) While the anti-cutback rule of Section 204(g) expressly prohibits a decrease of an accrued benefit, it does not purport to prohibit a suspension of benefit payments that is authorized under other provisions of the statute. In particular, the anti-cutback rule does not prohibit the suspension of the payment of retirement benefits authorized by Section 203(a) of ERISA, 29 U.S.C. 1053(a). That provision authorizes the inclusion in multiemployer plans (such as the plans involved in *Spacek* and in the present case) of provisions that suspend the payment of retirement benefits "for such period as the employee is employed, subsequent to the commencement of payment of such benefits * * * in the same industry, in the same trade or craft, and the same geographic area covered by the plan * * * ." 29 U.S.C. 1053(a)(3)(B). In enacting the anti-cutback rule, Congress did not intend to treat a temporary "suspension" of benefit payments under this type of "disqualifying employment" provision—a suspension that is entirely within the control of the retiree—as a prohibited "reduction" of accrued benefits under the plan itself. *Spacek*, 134 F.3d at 289-290.

Representative William Clay, who introduced the House bill that led to the enactment of paragraph (2) of the anti-cutback provision, made this point clear during the congressional debates (130 Cong. Rec. 23,487 (1984) (emphasis added)):

> I wish to further clarify *the anti cutback provisions* of Section 301 of the bill. Those provisions *are not intended to apply to benefit changes authorized by existing law. * * * Nor do those provisions in any way apply to or affect the provisions of ERISA section 203(a)(3)(B)* [, 29 U.S.C. 1053(a)(3)(B),] and code section 411(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.*

As the court emphasized in *Spacek*, Representative Clay's statement indicates that Section 203(a)(3)(B) of ERISA "authorizes the very type of [plan] amendment at issue in this case [for employees who retire under a qualified plan], and * * * [the anti-cutback rule] in no way limits this authorization." 134 F.3d at 290.

The anti-cutback rule in Section 204(g)(2) was enacted for the purpose of affording early retirement benefits "the same form of protection from reduction by amendment afforded to accrued benefits." *Spacek*, 134 F.3d at 291 (citing, *e.g.*, H.R. Rep. No. 655, 98th Cong., 2d Sess. 25-26 (1984)). Since "an amendment such as the one at issue here would not violate [the anti-cutback rule] if it were applied to suspend fully accrued benefits, it plainly cannot violate [the anti-cutback rule] if it is applied to early retirement benefits, which may or may not be fully accrued." 134 F.d at 291.

(iii) The Fifth Circuit also correctly noted in *Spacek* that the regulations that have been adopted to implement this complex statute support the conclusion that the plan amendments involved in this case and *Spacek* do not violate the anti-cutback rule. When an employee's pension benefit commences before normal retirement age, Section 204(c)(3) of ERISA specifies that the "accrued" portion of the early-retirement benefit is the "actuarial equivalent" of the retirement benefit available at normal retirement age. 29 U.S.C. 1054(c)(3); see 26 U.S.C. 411(c)(3). The regulations adopted to implement that provision specify that, in computing the actuarial equivalent of the retirement benefit available at normal retirement age for the purposes of this provision, "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under [ERISA] section 203(a)(3)(B)." 26 C.F.R. 1.411(c)-1(f). The Fifth Circuit correctly concluded in *Spacek* that, "because the reduction in total benefits paid over the lifetime of the plan participant as a result of the suspension need not be accounted for actuarially in computing the participant's accrued benefit under [29 U.S.C.] § 1054(c)(3)," an amendment authorizing such a suspension "does not serve to decrease the participant's accrued benefits, and thus cannot violate [the anti-cutback provision of] § 1054(g)." 134 F.3d at 291.

2. In the present case, the court of appeals erred in rejecting each of the three rationales of the *Spacek* court. The court reasoned that the suspension of benefit payments under the plan amendment violates the anti-cutback rule because the retired employees permanently lost a supposed "right" to work as construction supervisors while receiving monthly pension benefits. Pet. App. 9a-10a. In reaching that conclusion, the court

disagreed with *Spacek*'s plain language analysis, found unpersuasive the *Spacek* court's reliance on the legislative history of the statute, and rejected the *Spacek* court's reliance on the relevant regulations. *Id.* at 11a-21a.

a. The court reasoned that an amendment that expands the "disqualifying employment" provisions of a plan causes a "reduction" of benefits prohibited by the anti-cutback rule because even a temporary suspension of benefit payments permanently eliminates the benefit for the months that the suspension is in effect. The court stated that a "disqualifying employment" suspension reduces the total benefits that the participants receive during their lifetime because "the retiree never recovers the payments lost during the employment period." Pet. App. 10a.

In reaching this conclusion, however, the court ignored the fact that respondents lacked a statutorily protected right to receive such payments while working, for the plan retained the right to amend its "disqualifying employment" provision in the manner authorized by Section 203(a)(3)(B) of ERISA, 29 U.S.C. 1053(a)(3)(B). Since that provision authorizes the employer to adopt a "disqualifying employment" provision under which "the payment of benefits is suspended" when specified post-retirement employment occurs (29 U.S.C. 1053(a)(3)(B)) the adoption of such a provision is not a "reduction" of "accrued" benefits. See *Spacek* 134 F.3d at 291; pages 7-9, *supra*.

Moreover, as Judge Cudahy explained in his dissenting opinion in this case, a suspension of pension payments under a "disqualifying employment" provision does not inherently reduce the income received by respondents, since the temporary suspension of their pension income is replaced by earned income derived

from employment in the same industry. Pet. App. 25a. As Judge Cudahy observed, in light of the fact that employees in this industry can take early retirement (as respondents did) when they are still in their thirties, "one might logically expect employment restrictions on early retirees to be more onerous than those on normal retirees." *Id.* at 28a-29a. Without such restrictions, the financial integrity of the plan may be affected by paying benefits to participants "who have not really retired." *Id.* at 31a.

In enacting Section 203(a)(3)(B) of ERISA, Congress authorized the suspension of benefit payments for the very purpose of preventing "double-dipping" through post-retirement employment in the same industry. Such "double-dipping" obviously disadvantages the employees who must continue to fund the benefits of early retirees, while competing with them for the same wages.

b. The court also erred in this case in finding the legislative history of the anti-cutback rule to be unpersuasive. The court stated that the floor statement of Representative William Clay was ambiguous and that there was no other support in the legislative history for Representative Clay's understanding of the statute. Pet App. 16a. As the dissent correctly observed, however, the "effort of the majority to explain away this comment is unconvincing." *Id.* at 26a.

The history of the statute clearly reveals that the fundamental purpose for the addition of paragraph (2) to the anti-cutback rule was to afford early retirement benefits the same form of protection from reduction by amendment that is afforded to normal accrued benefits. S. Rep. No. 575, 98th Cong., 2d Sess. 27-28 (1984). As the *Spacek* court observed, since the amendment of a post-retirement "disqualifying employment" provision

under Section 203(a)(3)(B) does not abridge the "accrued benefits" of plan participants upon normal retirement, "then it also cannot violate [the anti-cutback rule when] applied to early retirement benefits." 134 F.3d at 291.

c. The court of appeals also erred in this case in concluding that the Treasury regulations that interpret the Internal Revenue Code counterpart of the anti-cutback rule (26 U.S.C. 411(d)(6)) support its conclusion in this case. Pet. App. 21a. That regulation broadly specifies that a plan may not be amended to add new conditions that restrict the availability of a "protected benefit that has already accrued." 26 C.F.R. 1.411(d)-4 Q&A-7. By its plain terms, however, that regulation has no relevance to plan amendments that affect a benefit that is *not* "protected" under ERISA. Since an employee does not have a right to be free from an employment disqualification provision that (as in this case) conforms to Section 203(a)(3)(B) of ERISA, this regulation is simply inapplicable to this case.

The agency's further guidance makes this clear. The Internal Revenue Manual expressly states that an amendment that reduces retirement benefits "on account of [Section] 203(a)(3)(B) service does not violate [the anti-cutback rule]." Int. Rev. Manual 4.72.14.3.5.3(7) (quoted at Pet. App. 22a n.17).[3] The majority was mistaken in suggesting (Pet. App. 22a n.17) that this statement in the Manual does not represent a long-standing agency interpretation. The Internal Revenue Service reports that it has consistently approved plan amendments that have provided

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[3] As the dissent noted in this case, this provision of the Manual "fits neatly into the interpretation derived from plain meaning" and "is, therefore, hard to explain away." Pet. App. 26a.

for the suspension of post-retirement benefits under employment disqualification provisions that conform to Section 203(a)(3)(B) of ERISA.

3. Respondents err in claiming that the conflict among the circuits is not yet well established because the panel in *Spacek* did not "follow earlier Fifth Circuit precedent on the status of early-retirement benefits." Br. in Opp. 10. The earlier Fifth Circuit decision cited by respondents is *Harms* v. *Cavenham Forest Industries, Inc.*, 984 F.2d 686, 691-692 (1993). In that case, the court held that certain early retirement benefits for plan participants who were involuntarily separated from employment constituted accrued benefits for purposes of the anti-cutback rule.

The unanimous panel in *Spacek* concluded that its opinion in that case was *not* in tension with that court's earlier decision in *Harms*. While acknowledging that the *Harms* panel had concluded that the retirement benefits at issue in that case were "accrued," the *Spacek* panel explained that the question whether the suspension of such benefits under an employment disqualification provision that conformed to Section 203(a)(3)(B) of ERISA would be regarded as "reducing" any accrued benefits was simply not before the court in *Harms*. 134 F.3d at 291 n.9. As the *Spacek* panel concluded, because a plan amendment of a "disqualifying employment" provision that complies with Section 203(a)(3)(B) would not reduce "accrued benefits" for normal retirement purposes, "it plainly cannot violate" the anti-cutback rule as "applied to early retirement benefits * * * ." *Id.* at 291. The Sixth Circuit reached that same conclusion in *Whisman* v. *Robbins*, *supra*. See note 2, *supra*.

This direct conflict that exists among the circuits warrants resolution by this Court. Respondents are

incorrect in suggesting (Br. in Opp. 12) that this Court should delay addressing the issue in this case until other courts have considered the matter in a variety of factual situations. The question of law presented in this case does not vary based on the underlying facts. Moreover, three circuits have already ruled on the question presented in this case, and the court below has declined to rehear the issue en banc. See notes 1 & 2, *supra*. The present case is therefore an appropriate vehicle for resolving the square conflict among the circuits on this issue.[4]

4. The question addressed in this case has substantial recurring importance. As the National Coordinating Committee for Multiemployer Plans notes (NCCMP Amicus Br. 2-3, 9-12), multiemployer plans provide coverage for millions of workers throughout the Nation, and suspension-of-benefit provisions are frequently used by these plans to manage plan expenses and workforce levels. The decision of the court of appeals in this case would restrict the historic ability of multiemployer pension plans to tailor permitted

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[4] Respondents point out (Br. in Opp. 12) that neither the Fifth Circuit nor the Seventh Circuit had occasion to address the amendment to the anti-cutback rule enacted by Congress in 2001. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 645(b)(2), 115 Stat. 38. This amendment authorizes the Treasury to issue regulations that would permit plan amendments to eliminate or reduce early retirement benefits that create significant burdens and complexities for a plan if the amendments do not adversely affect the rights of any participant "in a more than a de minimis manner." H.R. Conf. Rep. No. 84, 107th Cong., 1st Sess. 254-256 (2001). That amendment has no bearing on the separate and prior question whether a plan amendment that expands a permitted suspension of the payment of benefits under Section 203(a)(3)(B) of ERISA *is* a "reduction" of "accrued" benefits for purposes of the anti-cutback rule.

suspension-of-benefit provisions to current employment conditions.

The conflict created by the decision in this case would also preclude a uniform national administration of pension plan rules. One of the principal goals of ERISA is "to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9 (1987). Uniformity is obviously impossible when, as in this instance, pension plans are made subject to varying legal obligations in different parts of the country. *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001). Because multiemployer plans often operate in more than one federal circuit, individual plans may become subject to inconsistent obligations under the decision in this case.

Review by this Court of the conflict created by the decision in this case is thus warranted both by the importance of the issue and by the need to ensure uniformity in the administration of this national legislation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2003