No. 22-417

In the Supreme Court of the United States

GARY METZGAR, RICHARD MUELLER,
KEVIN REAGAN, RONALD REAGAN, CHARLES PUGLIA,
SHERWOOD NOBLE, DALIEL O'CALLAGHAN,

Petitioners,

v.

U.A. PLUMBERS AND STEAMFITTERS
LOCAL NO. 22 PENSION FUND, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PENSION RIGHTS CENTER IN SUPPORT OF PETITIONERS

NORMAN STEIN
PENSION RIGHTS CENTER
4542 NE 94TH STREET
SEATTLE, WA 98115
(215) 571-4740
NPS32@DREXEL.EDU

JEFFREY LEWIS
COUNSEL OF RECORD
KELLER ROHRBACK, LLP
180 GRAND AVENUE
SUITE 1380
OAKLAND, CA 96412
(510) 463-3900
JLEWIS@KELLERROHRBACK.COM

NOVEMBER 29, 2022 *COUNSEL FOR AMICUS CURIAE*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

INTEREST OF THE AMICUS CURIAE

The PENSION RIGHTS CENTER ("the Center") is a Washington, D.C. nonprofit, nonpartisan consumer organization that has been working for more than four decades to protect and promote the retirement security of American workers, retirees, and their families.[1] The Center provides legal and strategic advice on retirement income issues and helps individuals communicate their concerns about those issues to policymakers, courts, and the public. The Center also provides technical assistance and training to six regional pension counseling projects sponsored by the United States Administration for Community Living.

The Center has a significant interest in ensuring that participants in retirement plans—and especially defined benefit plans—can rely on the terms of their plans, especially insofar as those terms dictate benefit levels and conditions for benefit eligibility. The Center's interest here coincides with two of the fundamental reforms that Congress wove into the fabric of The Employee Retirement Income Security Act of 1974 ("ERISA"): that a participant should be able to understand the benefits they have accrued and that a plan cannot reduce a participant's accrued retirement benefit

---

[1] The Petitioner and the Respondents have consented to the filing of this brief. The parties received notice at least 10 days prior to the brief's due date of amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or in part, and no person (other than amicus curiae or its counsel) made a monetary contribution intended to fund the preparation or submission of this brief.

once earned, although it may reduce the rate of benefit accrual for future years.

In this case, the Respondent plan and its trustees negated a long-standing, reasonable, and stable understanding of the plan's express terms, an understanding that Respondents themselves created and clearly communicated to all plan participants, including Petitioners, over the plan's history: namely that a participant could begin receipt of an early retirement benefit at age 55 (with 30 years of service) so long as the participant did not engage in "covered employment" as defined by the plan. (This benefit is referred to in this brief as the "rule-of-85" benefit.") The plan's trust agreement specifically provided that employment for a contributing employer as a project manager or estimator or managerial capacity was not disqualifying employment.

Petitioners, relying on the plan and trust as written and as understood by the trustees, contributing employers, and participants through the plan's history, began working in non-covered employment and applied for early retirement benefits. The plan, fully cognizant of the employment of Petitioners, began to pay benefits and continued to pay benefits until 2011, when Respondent trustees decided to add a new interpretative gloss to eligibility for early retirement benefits.

Under the new interpretation, applied retroactively to benefits already earned, a participant cannot receive early retirement benefits if the participant works in any capacity with their previous employer, unless the participant had previously severed all employment ties with a participating employer and at that time had no intention to resume work. Under this construction of the plan, Petitioners were not entitled to the benefits the plan had promised them and been paying them, in some cases for almost a decade.

The Petitioners faced a stark choice at this point: quit their jobs or have their retirement benefits suspended. (Had the plan's retroactive interpretation been in effect when Petitioners applied for early retirement, their array of plausible choices would have included, for example, seeking out new employment with a non-contributing employer or continuing to work in covered employment and thereby increasing their accrued retirement benefits through additional service.)

And when Petitioners brought a civil action seeking to resolve the legality of the Respondent plan trustee's actions, the plan for the first time demanded that Petitioners not only choose between forgoing retirement benefits or continuing to work, but also repay the early retirement benefits that the plan had already paid to them. In 2016, the trustees amended the plan to also provide for 12% interest on any benefit "overpayments" and any attorney's fees and other costs in recovering the benefits. In some cases, the trustees demanded repayment of more than one million dollars.

The sequence of events that occurred in this case, and the devastating impact on the Petitioners' financial security in retirement, are the sorts of retirement nightmares to which Congress intended ERISA to be the antidote. The Center files this brief to urge the Court to restore the basic promise of ERISA: that a participant can rely on the terms of their plan and the benefits promised by the plan.

SUMMARY OF ARGUMENT

There is no dispute that until 2011, when the trustee Respondents "reinterpreted" the plan, participants were entitled under the plan's terms to "rule-of-85" early retirement benefits if they shifted from covered employment into project management, estimating, or managerial employment. But in 2011, the plan trustees, concerned about possible theoretical tax qualification issues, in essence rewrote the plan to require that a participant must sever employment with their employer with no intent to return to employment in order to receive these benefits. The plan then wrote to Petitioners, informing them that their benefits would be suspended unless they immediately severed their employment.

The Center's brief is focused on four points: first, the "reinterpretation" of the plan was in reality an amendment to the plan, which unlawfully reduced the accrued benefits of Petitioners in violation of ERISA § 204(g)(1), 29 U.S.C. § 1054(g)(1); second, that in ignoring plan and trust language and a long-standing interpretation of the plan, the trustees decision to reinterpret the plan was arbitrary and capricious and should be rejected under ERISA; third, that the trustees, if they were concerned about how the plan's early retirement provisions might impact the plan's tax qualification, ignored options that could have preserved Petitioner's benefits without threatening the plan's tax qualification but instead immediately proceeded to an interpretation that would cancel the plan's obligations to Petitioners; and fourth, the decision below, if allowed to stand, may open up a new era of instability in benefit eligibility and calculation that will challenge participants, plan administrators, agencies and the courts.

ARGUMENT

I. OVERVIEW

A core principle of ERISA, which Jacob Javits, one of its sponsors, called "the greatest development in the life of the American worker since Social Security," 120 Cong. Rec. 29, 933 (1974) (statement of Senator Javits), was that a participant in a retirement plan could rely on the benefit promises embodied in such plans. "When Congress enacted ERISA, it wanted to make sure that if a worker has been promised a defined pension benefit upon retirement—and he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Central Laborers Pension Fund v. Heinz*, 541 U.S. 739 (2004) ("*Central Laborers*") (quoting *Lockheed Corp. v. Spink*, 517 U.S. 992, 887 (1996) and *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359), 375 (1980)). Or as the authors of the preeminent law school ERISA textbook put it, "The central problem to which ERISA is addressed is the loss of pension benefits previously promised," *Central Laborers* (quoting John Langbein & Bruce Wolk, PENSION AND EMPLOYEE BENEFIT LAW 121 (3d ed. 2000)).

ERISA thus provides that "the accrued benefit of a participant under a plan may not be decreased by an amendment to the plan," with some limited exceptions not relevant to the benefit decreases in this case. ERISA§ 204(g)(1), 29 U.S.C. § 1054(g)(1). Almost two decades ago, in *Central Laborers*, this Court ruled that an amendment an early retirement benefit suspension provision violates this rule if the suspension applies to benefits accrued before the amendment. *Central Laborers*. That was effectively the situation here, where Petitioners worked under a plan that was consistently interpreted to permit early retirement benefits to be paid to a participant who moved from covered employment to an uncovered managerial or similar position. After participants relied on the plan promise and years after they commenced receiving benefits, the plan trustees informed Petitioners that they needed to stop work because the trustees had changed their interpretation of the plan *ab initio*. (And in 2012, the trustees revised the plan language to conform to their new "interpretation.")

This was highly prejudicial to Petitioners, who could not go back in time and seek out employment with a non-contributing employer or decide to remain in covered employment and increase their retirement benefits. The problem was compounded when the Plan, despite contrary representations to the IRS, informed participants that they would also have to repay the benefits they had already received, and then further informed them that the repayment would include interest at a rate of 12% plus any legal or other expenses incurred by the plan to collect the early retirement benefits already paid.

II. The Court Should Resolve a Circuit Split on Whether a "Reinterpretation" of a Long-Standing Interpretation of Plan Terms Is Subject to ERISA's Anti-Cutback Rule

As noted in the Petition for Certiorari, the Third and Sixth Circuit Courts of Appeals have recognized that an interpretation of a plan's terms that repudiates a prior interpretation and results in a decrease in a participant's accrued benefit, can violate section 204(g) of ERISA, 29 U.S.C. § 1054(g)(1). *See* Petition for A Writ of Certiorari at 17-19, discussing, *e.g., Cottillion v. United Refining Co*., 781 F.3d 47 (3d Cir. 2015); *Johnston v. Dow Employees Pension Plan*, 703 F. Appx 397 (6th Cir. 2017)(quoting with approval *Cottillion* at 407); and *Deschamos v. Bridgestone Americas, Inc. Salaried Employees Retirement Plan*, 169 F.Supp.3d 735 (2015) (treating a reinterpretation of a plan term, which substantially departed from an earlier interpretation, as a plan amendment that reduced an accrued benefit); *see also Fentron Industries v. National Shopmen Pension Fund,* 674 2d 1300, 1305 (9th Cir. 1982) (treating use of one plan section to decrease previously vested rights as in essence a vesting schedule amendment).

Petitioners recognize, however, that other circuits have held to the contrary. Petition for A Writ of Certiorari, at 19-22. While the Third and Sixth Circuit recognition that the reversal of a previous plan interpretation can violate section 204(g) is consistent with the "central problem to which ERISA is addressed," the fact that there is a meaningful split among the circuits is sufficient reason for the Court to grant the writ of certiorari.

III. A UNILATERAL REINTERPRETATION OF A LONG-STANDING CONSTRUCTION OF PLAN TERMS VIOLATES THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW OF A BENEFIT DENIAL

Even assuming for argument's sake that the so-called reinterpretation of the plan was not an amendment, the Court should grant certiorari. The courts below ruled that the trustees' decision to reverse their long-standing interpretation of the plan's provisions on early retirement benefit eligibility was reasonable and satisfied ERISA's arbitrary and capricious standard of review. These rulings, which are inconsistent with the principle that participants can both determine the benefit they have already earned and rely on the promise embodied therein, warrant review from this Court.

As we previously noted, the trustees had long interpreted the plan to provide that a participant became eligible for early retirement benefits as early as age 55 so long as they were not working in covered employment. The governing plan document provided specifically that they could receive benefits even though they were working in certain managerial or professional positions rather than covered employment. This interpretation of the plan's terms was long-standing and stable and provided the plan no less than participants with certain advantages, for it encouraged older participants to move from covered employment to non-covered employment, opening up covered positions for younger workers. The ratio of older to younger workers is an important cost component of a defined benefit plan, so the plan's practice provided important advantages. It also no doubt provided flexibility to employers that were signatory to the plan. And older plan participants, of course, relied upon this understanding of the plan in formulating their own retirement plans.

Years after the Petitioners retired in reliance on the trustees' consistent interpretation of the plan, the trustees changed that interpretation, based on their view that the plan might lose its tax qualified status if they did not. In the next section, we suggest that the trustees had other options that would not involve changing the rules of the game for Petitioners who had relied on those rules. If the arbitrary and capricious standard of review requires anything other than rubber-stamping trustee decisions, it should require that rules, once adopted, can be changed only prospectively and only by plan amendment. Otherwise, ERISA's promise and purpose—that participants in a plan can determine in advance of their retirement what their benefits will be and can rely on the plan satisfying those benefit promises, is mostly chimera.

It should be said that the idea that plan trustees cannot reverse long-standing plan interpretations is consistent with the Court's holding in *Conkright v. Frommert*, 559 U.S. 506 (2010). In *Conkright*, the Second Circuit had previously held that a fiduciary's interpretation of a plan term was unreasonable. On remand, the plan fiduciary interpreted the plan a second time, but the district court and the Second Circuit each held that the fiduciary, by initially reaching an unreasonable interpretation, was not entitled to a discretionary standard of judicial review for its new interpretation. This Court reversed, finding that discretionary review "protects the statute's interest in efficiency, predictability and uniformity." But in the context of this case, the trustees' actions undercut rather than advanced these values. A unilateral decision to reinterpret a plan's terms and retroactively revise them is the definition of arbitrary.

Moreover, as we will show in the next section, the plan's trustees could have taken steps to preserve the early retirement benefits of Petitioners without putting the plan's tax-qualified status in potential jeopardy.

IV. THE TRUSTEES COULD HAVE TAKEN STEPS TO PRESERVE BENEFIT PROMISES TO PETITIONERS WITHOUT JEOPARDIZING THE PLAN'S TAX QUALIFICATION

The trustees claim that they retroactively amended their interpretation of the eligibility conditions for receiving rule-of-85 benefits because, after attending a conference, a trustee and the plan administrator became concerned that the plan interpretation of eligibility for early retirement benefits was contrary to an IRS position on plan qualification.[2]

The plan then used the IRS's voluntary compliance program, in which the plan identifies a tax qualification defect and proposes how to remedy it. The plan proposed to change its interpretation of the plan's eligibility conditions for taking a "rule-of-85" benefit,

[2] It is, in any event, unlikely that the way in which the plan was being operated would have put the plan's tax qualification at risk. Under ERISA, multiemployer plans are given broad authority to define disqualifying employment broadly or narrowly in ways that single-employer plans cannot. For example, a multiemployer plan, by it written terms, can define plan-covered employment as work in the industry within the geographic region covered by the plan. But as this Court has held, the plan may not amend those conditions retroactively. *See Central Laborers*. Under the terms of the Respondent plan, Petitioners were not employed under the plan if they worked as project managers, estimators or in managerial capacities.

so that a participant had to first sever any employment relationship with a contributing employer with an intention that the separation from the industry be permanent. The plan would cease to pay benefits to Petitioners unless they ceased their employment. The plan further indicated that it did not intend to recoup the benefits paid under the plan's prior practice. *The IRS responded to the submission indicating that it would not seek at this time to challenge the plan's qualification, but also noting that the plan's new interpretation would not affect participants rights under Title I of ERISA*. And even though the IRS indicated it would not challenge the plan's exempt status under the conditions represented in the letter, the plan later decided to "recoup" the rule-of-85 benefits that had been paid under the trustees' prior interpretation of the plan's terms.

The trustees had other options, however, which might have preserved the plan's prior benefit promises while maintaining the plan's tax qualification. The trustees could, for example, have informed the IRS that given the reliance interests Petitioners had in the plan's previous interpretation of the conditions for rule-of-85 benefits, it would amend the plan to eliminate the benefits going forward. The IRS might have accepted this correction if it had been proposed. Instead, however, the trustees proposed a remedy that eliminated the benefits for participants unless they immediately resigned from their non-disqualifying employment.

The trustee could also have taken advantage of a Code provision added as part of the Pension Protection Act of 2006, Pub. L. No. 109-280, § 901 (2006), which permits in-service distributions to participants who had attained age 62, IRC § 401(a)(36), which in 2011, when the trustees reinterpreted the plan, would have permitted most of the Petitioners to continue work <u>and</u> collect benefits. Thus, the trustee had options that could have preserved the benefit promises on which Petitioners relied while potentially maintaining tax exempt status. The trustees, however, either failed to consider or rejected these options, suggesting that the trustees may have been at least as motivated to reduce already-earned benefits as they were to preserve the plan's tax qualification.[3]

V. THE DECISION BELOW, IF LEFT TO STAND, WILL OPEN AN ERA OF INSTABILITY AND UNCERTAINTY IN BENEFIT ELIGIBILITY AND PLAN STABILITY THAT WILL CHALLENGE PARTICIPANTS, PLAN ADMINISTRATORS, AGENCIES AND THE COURTS

This Court has endorsed the idea that "[t]he central problem to which ERISA is addressed is the loss of pension benefits previously promised," *Central Laborers* (quoting John Langbein & Bruce Wolk, PENSION AND EMPLOYEE BENEFIT LAW 121 (3d ed. 2000)*), supra*. The Second Circuit decision below, and the almost certain flurry of similar decisions in the future if that decision is left to stand, threatens the retirement security of virtually every participant in a defined benefit plans: a fiduciary's change of mind or heart can undermine the best laid plans of participants and their families. It will give plan administrators a new task, that of continually revisiting prior plan

---

[3] Plan interpretation is a fiduciary function under ERISA, requiring that the fiduciary act "solely in the interests of the participants." ERISA § 404(a), 29 U.S.C. § 1104(a). When a fiduciary is changing its interpretation of a plan, such duty should include, at a minimum, minimizing the impact of the new interpretation on affected plan participants. The trustees did not attempt to do this here.

interpretations. It will leave intact the conflict among the circuits concerning ERISA § 204(g). And it will put continuing pressures on the Federal agencies responsible for administering ERISA and on the judiciary to ensure that such power to reinterpret does not return the United States retirement system to the years before passage of ERISA.

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY LEWIS
COUNSEL OF RECORD
KELLER ROHRBACK, LLP
180 GRAND AVENUE
SUITE 1380
OAKLAND, CA 96412
(510) 463-3900
JLEWIS@KELLERROHRBACK.COM

NORMAN STEIN
PROFESSOR OF LAW
PENSION RIGHTS CENTER
4542 NE 94TH STREET
SEATTLE, WA 98115
(215) 571-4740
NPS32@DREXEL.EDU

COUNSEL FOR AMICUS CURIAE

NOVEMBER 29, 2022