No. 22-417

IN THE

Supreme Court of the United States

GARY METZGAR, *et al.*,

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 IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners presented compelling reasons to grant the Petition, where the Second Circuit found ERISA Respondents did not act arbitrarily and capriciously when they determined Petitioners were not entitled to early pensions because they kept working for their employer and never retired under the terms of the Plan and applicable law, consistent with the decisions of all other federal courts that have addressed this issue.

PARTIES TO THE PROCEEDING

Petitioners are Gary Metzgar, Richard Mueller, Kevin Reagan, Ronald Reagan, Charles Puglia, Sherwood Noble, and Daniel O'Callaghan. All Petitioners were plaintiffs-appellants below.

Respondents are U.A. Plumbers and Steamfitters Local No. 22 Pension Fund ("Plan"), Board of Trustees of U.A. Plumbers and Steamfitters Local No. 22 Pension Fund ("Trustees"), and Debra Korpolinski, in her capacity as Plan Administrator, for the U.A. Plumbers & Steamfitters Local 22 Pension Fund. All Respondents were defendants-appellees below.

CORPORATE DISCLOSURE STATEMENT

No Respondent is a corporation.

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STATEMENT

This is an ERISA benefits dispute in which the Second Circuit U.S. Court of Appeals held it reasonable that the Trustees corrected their mistaken grant of pensions to the Petitioners. Petitioners attempted to "double dip", simultaneously collecting their monthly early pension checks plus paychecks from their employers; they never separated from employment. The problem is that the Plan and applicable law do not allow for the payment of these early pensions without separation from employment. The Trustees, upon discovering their error granting the early pensions, had no choice but to correct the mistake; they offered the Petitioners the option to continue working in which case their pensions would be stopped, or to stop working and the pensions would continue.

The Petitioners filed the underlying action to continue the unlawful practice of collecting their early pensions and paychecks without retiring. Petitioners argue that Respondents' actions violated the so-called anti-cutback rule (29 U.S.C. § 1054(g)) which generally prohibits reductions in accrued benefits. Petitioners, in essence, seek a ruling that a Pension Plan cannot correct its mistakes regardless of the consequences.

The Second Circuit resolved the dispute when it held the Board of Trustees' determination—that Petitioners were not entitled to early pensions because they failed to separate from employment—was not arbitrary and capricious. The Trustees' determination followed the terms of the Plan and applicable law and avoided the potential loss of the Plan's favorable tax qualification status. Such loss would have harmed many hundreds of participants and beneficiaries of the Plan. The Second

Circuit's decision is consistent with every other federal court which has addressed this same issue, three District Courts and the United States Court of Appeals for the Ninth Circuit.

Petitioners assert that a purported split in the Circuits regarding whether the anti-cutback rule is only triggered by a formal written plan amendment, as opposed to a reinterpretation, necessitates intervention by this Court. According to Petitioners, some courts are improperly taking the position that the anti-cutback rule is limited to reductions caused by formal amendments.

Intervention is not necessary. First, this Court rejected a Petition on the identical alleged conflict in *Cottillion v. United Refining Company*, 781 F.3d 47 (3rd Cir. 2015) *cert denied* (577 U.S. 871). Second, the supposed split does not matter in the case at bar because the anti-cutback rule only applies to accrued benefits and no accrued benefit arose here. Petitioners never had a right to the early pensions they seek without separation from employment.[1] Finally, there is no substantive split—courts, including the Second Circuit, in addressing anti-cutback allegations focus on whether there is an accrued benefit and whether any reduction occurred. The Second Circuit here, in dismissing this action, did not restrict its anti-cutback analysis to whether a formal plan amendment was present; rather it determined that the Trustees reasonably concluded that no benefit ever accrued.

1. The Second Circuit, affirming dismissal of the Complaint, did not directly address whether Petitioner's early pensions were unlawful. [See App. p. 7a.] As established in the record of this case, the pensions were unlawful and Respondents would prevail on alternative grounds in the event this case was remanded.

The decision below does not conflict with the decisions of this Court or of any other court of appeals. Further review of this correct ruling is unwarranted.

A. Factual Background

Between 2002 and 2009 each of the Petitioners applied for and commenced receiving early retirement pensions from the U.A. Plumbers & Steamfitters Local 22 Pension Plan ("Plan" or "Local 22 Pension Plan") at age 55. Approving the pensions was erroneous because these participants never retired; they all continued to work for their respective employers without separation. [See App. pp. 19a-21a.[2]]

Pursuant to the Plan's terms and its restriction to operate as a tax-exempt trust, participants may only be paid an early retirement pension once they reach their 55th birthday, have the required years of service, and "retire." [See App. p. 3a.]

When the Trustees in 2011 realized their error—that it was impermissible under the Plan and Internal Revenue Code to provide early pension benefits to participants who never ceased working—they immediately informed all Plan participants, including, of course, the Petitioners. The Trustees advised the Plan participants who retired early and continued to work that they must cease that continued employment in order to receive their pension benefits. Alternatively, they were advised they could continue their employment, but pension payments would be stopped until they actually retired. [See App. pp. 21a-22a.]

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2. References in this form are to the pages of the Appendix filed with the Petition for Writ of Certiorari.

Petitioners Metzgar, Mueller, and O'Callaghan opted to continue working for their employer and their pensions were stopped effective February 1, 2012. The remaining four Petitioners—Noble, K. Reagan, R. Reagan, and Puglia—chose to stop working for their employer and their pensions continued. [See App. p. 22a.]

With the favorable Qualified tax-exempt status of the Local 22 Pension Plan at risk, the Trustees took necessary measures to address their mistake. They stopped the pensions of participants who had never retired, committed not to grant such pensions in the future, and applied to the Internal Revenue Service for relief from the errors under the Internal Revenue Services' Voluntary Compliance Program.

The U.A. Plumbers & Steamfitters Local No. 22 Pension Plan

Petitioners are participants in the Local 22 Pension Plan, a multi-employer defined benefit pension plan with approximately 1900 participants and beneficiaries. The Plan is funded through contributions by participating employers in the plumbing and steamfitting industry. Contributions are required by the collective bargaining agreements between the U.A. Plumbers & Steamfitters Local Union No. 22 and participating employers. Participants working for those contributing employers accumulate the necessary service credits for pension purposes. [See App. pp. 16a-17a.]

Operation and administration of the Plan is the responsibility of the Trustees. Thus, the Trust Agreement establishing the Plan provides:

> The Trustees have full and exclusive discretionary authority to determine all questions of coverage and eligibility, method of providing for benefits and all other related matters. [See App. p. 17a.]

The Trustees, in carrying out their duties must, without deviation, ensure the Plan qualifies as a tax-exempt trust, and, thus, must comply with the Employee Retirement Income Security Act ("ERISA") and the Internal Revenue Code ("Code") in operating the Fund and Plan of Benefits. The Trust Agreement provides:

> The Trust and the Plan of Benefits…will be structured and operated to qualify for approval by the Internal Revenue Service as a tax exempt Trust and Plan to ensure that the Employer contributions to the Fund are proper deductions for income tax purposes.
>
> It is the intention of the Trustees to fully comply with all requirements of the Internal Revenue Code …. [See App. p. 17a.]

Applicable Law and Regulations

The Internal Revenue Code prohibits Qualified tax-exempt pension plans, like the Local 22 Pension Plan, from making early retirement distributions prior to an employee's separation from employment. The regulations promulgated pursuant to Section 401(a) of the Internal Revenue Code, provide that:

> A pension plan within the meaning of section 401(a) is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to his employees over a period of years, usually for life, **after retirement**. [26 C.F.R. § 1.401-1(b)(1)(i); emphasis added].

For a retirement to be lawful under the applicable Internal Revenue Service ("IRS") requirements, the employee must possess the intent to permanently separate from employment and actually cease performing services for that employer. *See* IRS Revenue Ruling 71-437:

> A pension plan does not qualify [under 401(a)] if it permits distributions of the employer's contributions or increments thereon prior to severance of employment or termination of the plan. *Id.*

See also IRS Revenue Ruling 74-254 (a Qualified pension plan must not permit distributions prior to an employee's termination of employment).

In a 2010 Private Letter Ruling addressing early retirement benefits and continued employment the IRS opined:

> When an employee legitimately retires, he separates from service with the employer. Accordingly, **if both the employer and employee know at the time of retirement' that the employee will, with reasonable certainty, continue to perform services for the employer, a termination of employment**

> **has not occurred upon 'retirement' and the employee has not legitimately retired.**
>
> *****
>
> Accordingly because these employees would not actually separate from service and cease performing services for the employer when they 'retire' these 'retirements' would not constitute a legitimate basis to allow participants to qualify for early retirement benefits. . . . **Such 'retirements' will violate section 401(a) of the Code and result in the disqualification of the Plan under section 401(a) of the Code.** [See Internal Revenue Service Private Letter Ruling ("PLR") 201147038, pages 5 and 6 (April 20, 2010); emphasis added.]

The Code provided in 2011 one narrow exception to the prohibition of in-service distribution; a pension plan could provide that participants who reach age 62 may continue to work while receiving a pension benefit. See, IRC Section 401(a)(36):

> A trust forming part of a pension plan shall not be treated as failing to constitute a qualified trust under this section solely because the plan provides that a distribution may be made from such trust to an employee who has attained age

> 62[3] and who is not separated from employment at the time of such distribution.[4]

The Internal Revenue Service issued guidance explaining how this provision applies to an early pension, like the one Petitioners' claim they are entitled to:

> An early retirement benefit, including an unreduced early retirement benefit, is permitted to be conditioned on completion of a stated number of years of service (such as 30 years of

3. After the events of this action, amendments to I.R.C. § 401(a)(36) allowed plans to make in-service distributions at earlier ages under certain conditions neither met nor alleged to be met here. In 2019, the statutory age was lowered to 59½ pursuant to Section 104(a) of the American Miners Act for plans that adopt provisions allowing for in-service distributions. See IRS Notice 2020-68, Section F, describing the change, and stating that in order to adopt the 2019 in-service provision, the Plan must be amended. In December 2020, as part of the Taxpayer Certainty and Disaster Tax Relief Act, IRC § 401(a)(36) was again amended and now permits in-service distribution at age 55 for certain plans if: (1) "the plan provides that a distribution may be made from such trust to an employee…who is not separated from employment at the time of such distribution"; (2) "the trust…was in existence before January 1, 1970"; and (3) "before December 31, 2011, at a time when the plan provided that distributions may be made to an employee who has attained age 55 and who is not separated from employment at the time of such distribution, the plan received at least 1 written determination from the Internal Revenue Service that the trust…constituted a qualified trust".

4. ERISA contained the same provision prohibiting in-service distributions, with the same narrow exception for plans with provisions permitting distributions at age 62 without separation of employment. See 29. U.S.C. § 1002(2)(A).

> service). However, an early retirement benefit **is generally only permitted to commence with an annuity starting date that is after severance from employment (except to the extent permitted under § 401(a)(36)),** as added by the Pension Protection Act of 2006, Pub. L. 109-280. [See IRS Notice 2007-69, p. 8; emphasis added.]

Adopting a Section 401(a)(36) provision (permitting participants at age 62 to continue to work while receiving pensions) is permissive, not mandatory (see IRS Notice 2020-68, Section F, Q F-1). Here, the Pension Fund Trustees had not adopted such a provision; the Plan required that participants must retire to receive early pension benefits. [See App. p. 3a.]

Petitioners' Early Retirement Applications

Petitioners' early pension applications were all approved, and benefits commenced when they were age 55. Before applying for pensions each Petitioner arranged with his employer to continue working, even after he "retired". And, when they applied for the early pension benefits each Petitioner communicated to Fund Office Staff that they intended to continue to work for their employer while collecting pension benefits. [See App. pp. 19a-20a.]

The Pension Plan's Early Retirement Provisions

Pursuant to the Plan's provisions that it be administered as a tax-exempt trust, participants may only be paid an early retirement pension when they satisfy three

conditions: they must at least reach their 55th birthday[5]; accumulate the required years of credited service; and **retire**–terminate service with all participating employers. [See App. p. 3a.]

Correction of the Pension Mistake

In the Fall of 2011, Administrator Debra Korpolinski and then-Trustee Michael McNally first learned that it was illegal for the Fund to pay early retirement pensions under the Plan to those who continued to work for their employers. They had attended an instructional session sponsored by the International Foundation of Employee Benefit Plans in New Orleans, Louisiana where speakers explained that it was unlawful to pay early retirement pensions without separation from employment. [See App., pp. 21a-22a.]

In November 2011, after review of the Plan documents and applicable law, including Internal Revenue Service rules and regulations, and on the advice of legal counsel, the Board of Trustees determined that an operational error/mistake had been made; many Plan participants, including the Petitioners, had been approved for and paid early retirement pension payments without having terminated employment, in violation of the Plan and applicable law. [See App., pp. 21a-22a.]

By letter dated December 27, 2011, a notice was sent to Plan participants, including Petitioners, who were collecting early pension benefits without separation from

5. The Plan's Normal Retirement age was and remains age 65.

employment, informing them that their January 1, 2012 benefit payment would be their last benefit payment until they severed employment with their employer, or until they reached age 65. [See App., p. 22a.]. The letter concluded by informing each participant that they had the right to appeal the determination in accordance with the Plan procedures. *Id.*

The effect of the Trustees' decision was to return these participants to the positions they would have been but for the erroneous payments of early pension benefits. Those who wished to continue to work could do so, but they could not continue to also receive illegal in-service pensions; those who wished to continue to receive monthly pensions could do so, but not continue their employment, they must actually retire. Petitioners retained almost all of the windfall they had improperly reaped collecting both pension and salary between 2002 and February 1, 2012.[6]

Petitioners' Internal Appeals to the Trustees

By letter dated March 2, 2012, Petitioners' counsel filed an internal appeal on their behalf challenging the Fund's December 27, 2011 benefit determinations. On May 11, 2012, a hearing was held before the Board of

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6. The Trustees were required, pursuant to the United States Department of Labor, to seek recoupment from participants of all improper payments plus interest. [See DOL Opinion Letter 77-07 (April 4, 1977).] In accordance with DOL directives, the Trustees reduced Petitioners' pensions going forward by no more than 25%. Assuming life expectancy of twenty more years Petitioners will experience a windfall exceeding $4 million despite the 25% pension offsets. Petitioners are challenging the offsets in a separate action. *See Metzgar v. U.A. Plumbers & Steamfitters Local 22 Pension Fund, et al.*, 17-CV-726V(F) ("Metzgar II").

Trustees to address the appeal. After review of the record on appeal and testimony, the Trustees determined that Petitioners had not retired, as they had not separated from employment with their employers as required by the Plan and applicable law. [See App., p. 25a.]

February 10, 2012 Clarifying Amendment to Support VCP Application

After the Trustees' December 2011 decision that the Plan could not pay early retirement pensions to those who continued to work, the Trustees took two further actions. On February 12, 2012, the Trustees amended the Plan to make clearer that early pension benefits could not be paid to those who continued to work; and they applied to the IRS under its Voluntary Correction Program to rescue the Plan's Qualified status. [See App., p. 23a.]

As noted, the clarifying amendment was adopted on February 10, 2012; after the December 27, 2011 final benefit determinations finding payment of the early pension benefits to participants who had not retired were improper under the terms of the Plan and the existing law. The amendment added language substantively duplicative of the Plan's Qualified tax-exempt mandate and existing Plan provision 5.2(c) requiring termination from employment.

Voluntary Correction Program

Because providing the early retirement pension benefits in these circumstances was illegal, the Fund advised the Internal Revenue Service of its error under the IRS Voluntary Correction Program ("VCP"), included

within the Service's "Employee Plans Compliance Resolution System" ("EPCRS"). See IRS Revenue Procedure 2019-19 Part I, Section 1.01, which provides in part that: "This system . . . permits Plan Sponsors to correct [certain] failures and thereby continue to provide their employees with retirement benefits on a tax-favored basis."[7]

Pursuant to that Program a pension fund that erred can acknowledge its mistake, explain what occurred, and propose a method of correction for IRS approval. The Trustees followed that procedure: they advised the IRS what occurred—participants had mistakenly been provided early retirement pension benefits while they continued to work—and proposed to correct the mistake by terminating such pensions and confirming that it would

7. The purpose of the Program is described in Section 1.01, as follows: "This revenue procedure updates the comprehensive system of correction programs for sponsors of retirement plans that are intended to satisfy the requirements of § 401(a), 403(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code (the "Code"), but that have not met these requirements for a period of time. **This system, the Employee Plans Compliance Resolution System ('EPCRS'), permits Plan Sponsors to correct these failures and thereby continue to provide their employees with retirement benefits on a tax-favored basis.**". [Emphasis added.]

The Program further describes the General Principles underlying the program at Section 1.02, including the following: "Sponsors and other administrators should make voluntary and timely correction of any plan failures, whether involving discrimination in favor of highly compensated employees, plan operations, the terms of the plan document, or adoption of a plan by an ineligible employer. **Timely and efficient correction protects participating employees by providing them with their expected retirement benefits, including favorable tax treatment."** [Emphasis added.]

no longer provide early pension benefits to those who continued to work. [See App., pp. 23a-25a.] To assure the IRS that the mistake would not occur again, the Plan was amended to clarify the prohibition of collecting an early pension while continuing to work.

The IRS accepted the proposed correction and advised the Fund that if it effected its correction method—ceasing pensions to early retirees who continued to work—the IRS would take no action against the Fund, i.e., the IRS would not penalize the Fund by revoking its tax exempt status. [See App., p. 24a.]

B. Proceedings in the District Court

Petitioners challenged the Trustees' determination by filing the instant action. The District Court summarily dismissed Petitioner's Complaint on the merits holding that the Trustees reasonably found Petitioners were not entitled to their early pensions. Critically, the District Court held that the Trustees' prior mistaken practice of granting early pensions without first requiring that participants stop working, "was not reasonable or tenable". (See App., p. 45a.) On the central question in this action—what constitutes a retirement under a TaxQualified Plan—Magistrate Judge Foschio concluded:

> Given that the purpose of § 401(a) is to assure that tax-exempt pension trusts shall function for the sole purpose of providing retirement income and not for other financial purposes such as income enhancements and estate creation, the relevant I.R.S. regulations, rulings and the PLR [Private Letter Ruling] requiring an

> early retirement applicant to forgo continued employment with a participating employer cannot be said to be inconsistent with § 401(a) and Plaintiffs offer no reason to find otherwise.
>
> Significantly, other decisions which addressed this issue, *Meakin [v. California Field Ironworkers Pension Trust*, 2018 U.S. Dist. LEXIS 6233 (N.D. Cal. January 12, 2018.)] and Maltese [v. Nat'l Roofing Indus. Pension Plan, 2016 U.S. Dist. LEXIS 171403 (N.D. W. Va. December 12, 2016)] have also concluded the I.R.S.'s regulations, rulings and the PLR represent a legally correct analysis of the question.
>
> The court therefore finds such regulations, rulings and the PLR are entitled to persuasive effect and that Defendants committed no legal error in seeking to conform Plaintiffs' pensions to § 401(a)'s requirements. [See App., p. 60a; internal citations omitted.]

This conclusion was grounded in the terms of the Local 22 Pension Plan, and the law under which those terms must be applied. To collect an early pension from the Plan —benefits commencing at age 55—a participant must first "retire".[8]

8. While the Plan allows a return to work without a suspension of benefits in limited circumstances, a "retirement"—severance from employment—must occur before a participant is eligible to collect retirement benefits in the first place.

In finding that the anti-cutback rules do not apply to this action because there was no accrued benefit, Magistrate Judge Foschio stated:

> Because Plaintiffs' Special Early Retirement pensions were improperly approved, based on Defendants' misunderstanding of § 401(a)'s requirement no such benefit accrued to Plaintiffs and Plaintiffs did not suffer a reduction of "an accrued benefit" by virtue of Defendants' suspension of Plaintiffs' pension or termination of Plaintiffs' continued employment within the scope of protection under § 204(g). [See App., p. 63a.]

In his Decision and Order dated October 7, 2020, United States District Court Judge John L. Sinatra adopted Magistrate Judge Foschio's Report and Recommendation. [See App., pp. 84a-87a.]

C. Proceedings on Appeal

On appeal, the Second Circuit affirmed the judgment of the district court dismissing the Complaint. The Second Circuit found:

> Defendants did not wrongfully deny Plaintiffs benefits in violation of 29 U.S.C. § 1132(a)(1)(B) by requiring them to choose between continuing to receive pension benefits and continuing to work in nondisqualifying employment for a contributing employer. '[W]here…the relevant plan vests its administrator with discretionary authority over benefits decisions…the

> administrator's decisions may be overturned only if they are arbitrary and capricious' *Roganti v. Metro. Life Ins. Co.*, 786 F.3d 201, 210 (2d Cir. 2015). As explained above, Defendants' decision to require Plaintiffs either to stop working or to stop receiving pension benefits was not arbitrary and capricious because it was based on a reasonable interpretation of the Plan. We thus affirm the district court's conclusion that Defendants did not wrongfully deny benefits to Plaintiffs. [See App., p. 9a.]

Same as the District Court, the Second Court determined that the anti-cutback rule was not applicable because the Trustees were reasonable in finding that Petitioners "were never entitled to the accrued benefit they claim to have lost." [See App., p. 9a.]

REASONS FOR DENYING THE PETITION

This is a typical ERISA benefits dispute in which the Second Circuit correctly concluded the Trustees were reasonable to reverse their mistake and stop Petitioners' "double dipping", as they never stopped working and were not entitled to early pensions under the terms of the Plan and applicable law. The decision below is consistent with every federal court that has addressed this issue.

I. THE SECOND CIRCUIT'S CORRECT DECISION WAS CONSISTENT WITH ALL OTHER FEDERAL COURTS

Petitioners' position that an employee can continue working without separation and receive early retirement benefits has been rejected by every court which has addressed the issue. Thus, in a case almost identical to the present dispute, *Meakin v. California Field Ironworkers Pension Trust*, 2018 U.S. Dist. LEXIS 6233 *15-16 (N.D. Cal. 2018), *aff'd*, 774 Fed. App'x 1036 (9th Cir. 2019), the district court held that:

> It was reasonable for the Trustees to conclude that, in order to maintain a tax exempt status under § 401(a), a plan could not allow pension payments to individuals who had not had a severance from their employment. Id. at * 15.

The court went on to observe that:

> It was also reasonable for the Trustees to prioritize protecting the Plan's tax exempt status over avoiding disruption of Plaintiff's pension payments. As fiduciaries, the Trustees were obligated to 'discharge [their] duties… for the exclusive purpose of providing benefits to participants and their beneficiaries; and defraying reasonable expenses of administering the plan'. 29 U.S.C. § 1104(a)(1)(A) . **It seems highly unlikely that jeopardizing tax exempt status for the whole in order to permit continued pension payments for a small number of individuals (here, 58) would be**

> **consistent with this obligation, and it was not unreasonable for the Trustees to conclude the same.** [*Id.* at * 17; emphasis added.][9]

In *Meakin*, the plaintiff participant of the California Field Ironworkers pension plan, a multi-employer pension plan like the Local 22 Pension Plan here, was approved for an early retirement pension in July 2008. However, as part of a plan practice, plaintiff was not required to stop working for his participating employer while he continued receiving an early retirement pension; he had changed positions but continued working for his same employer as a safety director and estimator, a non-bargaining unit position.

In 2011, the Ironworker Trustees determined that in-service distributions for early retirees had to stop; the distributions violated the Internal Revenue Code and ERISA. The plaintiff in *Meakin* continued to work, his pension was terminated, and he sued.

When it dismissed the Complaint the *Meakin* district court determined that:

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9. In this regard, the Brief of Amicus Curiae Pension Rights Center in support of Petitioners simply misses the mark. The Center, with a charge to protect and promote retirement security, eschews the interests of all participants to benefit the few Petitioners seeking to claim an illegal benefit. Its argument seeks a windfall of millions of dollars in benefits and salary for Petitioners, while ignoring the importance of stability of the Plan for the other almost 2000 participants. The Trustees' corrective action—stopping the improper pensions mandated by the Plan and applicable law—preserved the advantageous tax-qualified status of the Fund for the benefit of the whole.

> The fact that the Trustees' course of action required deviation from their practices in the past (i.e., permitting pension payments for non-severed retirees vs. not permitting pension payments for non-severed retirees) does not, in and of itself, render the Trustees' decision unreasonable." *Id.* at * 17-18.

The 9th Circuit affirmed, 774 Fed. App'x 1036 (2019).

In *Maltese v. Nat'l Roofing Indus. Pension Plan*, 2016 U.S. Dist. LEXIS 171403 (N.D. W. Va. 2016), the court also dismissed a participant's complaint seeking benefits because he never terminated employment when collecting an early pension. The pension plan in *Maltese* was to be operated, per its terms, as a Qualified tax-exempt plan. In explaining its decision, the court stated:

> A beneficiary who 'retires' for thirty days with an express agreement with the employer that he will return to work as an estimator after the thirty-day period cannot receive benefits under the Plan if the Plan is to maintain its tax-exempt status. *Id.* at *14.

And in *Chavis v. Plumbers & Steamfitters Local 486 Pension Plan, supra,* 2020 U.S. Dist. LEXIS 54838 (D. Md. 2020), the court found that plaintiffs did not retire under the terms of the Plan and applicable law when the individuals resigned from their union positions and then applied for and were approved for early retirement benefits while continuing to work for the same employer,

but in nonunion management positions.[10] According to the *Chavis* court, a Qualified plan cannot retain its tax-exempt status if it allows such early retirements without separation of employment, “and it is clear that the intent of the Plan is to abide by the law, including the IRC”. *Id.* at *80.

See, also *Aracich v. Bd of Trs.*, 2022 U.S. Dist. LEXIS 169877 (S.D.N.Y. September 20, 2022), where the court observed, in rejecting a claim for benefits for a plaintiff who had not retired within the meaning of the pension plan: “[I]t was reasonable, and consistent with the Trustees’ obligations to Plan participants to interpret the Plan in a manner that will maintain the pension fund’s tax-qualified status. In fact, Section 8.7 of the Pension Plan Document requires that the Pension Plan ‘be interpreted and applied consistent with the requirements for tax qualification.’” *Id.* at *11.

Finally, in one New York State Appellate Division case, *Meckes v. Cina*, 75 A.D.2d 470 (4th Dept. 1980), *aff’d* 54 NY2d 894, the court held that benefits were not allowed under the Qualified Plan where the employee had not terminated his employment. In *Meckes*, the participant, just like the Petitioners here, attempted to collect pension benefits after accepting a transfer to a non-union job with the same employer. The court, articulating a slightly different rationale than did the above cited federal

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10. The court in *Chavis* did state that the plaintiffs were entitled to benefits while working at age 62, because the pension plan’s normal retirement age was age 62 and the plan allowed normal retirement benefits without separation from employment. The normal retirement age under the Local 22 Pension Plan is age 65. [See App., p. 3a.]

courts, affirmed the Trustees' denial of benefits finding that the Trustees' determination that a "transfer" did not constitute a termination of employment is consistent with Black's Law Dictionary which "defines 'termination of employment' as 'a complete severance of relationship of employer and employee'". *Id.* at 474. The court held that the plaintiff's job transfer as termination theory would appear to "violate Internal Revenue Service regulations and cause the fund to lose its tax-exempt status." *Id.* at 475.

Here, Petitioners did not stop working for their employers. Thus, the Trustees did not act arbitrarily and capriciously when they found that Petitioners had never retired and therefore benefits had to stop. As Magistrate Judge Foschio found:

> [It] would have been unreasonable for Defendants as fiduciaries to act other than in compliance with their obligation under the Trust and applicable tax law as interpreted by the I.R.S. to assure such tax-exempt status where the failure to do so would thereby jeopardize the future viability of the Fund to the economic detriment of all beneficiaries. [See App., pp. 66a-67a.]

The payment of these early pensions was unlawful in the first place; the Trustees had no choice.

II. PETITIONERS' PURPORTED CIRCUIT CONFLICT DOES NOT MATTER FOR THIS ACTION

The basis of Petitioners' purported Circuit conflict is that there is a split over what type of action (formal amendment only, or plan interpretations as well) triggers anti-cutback rules. However, even if the Court were to agree that there is a circuit split, and the Second Circuit is on the wrong side of it, the result below would be the same. Petitioners were never entitled to the early pensions they seek, and the anti-cutback rule does not require a plan to continue paying benefits that a participant never had a right to in the first place.

To succeed on a claim under the anti-cutback statute, a plaintiff must establish an "accrued benefit" had been earned. The District Court in this action found because "Plaintiffs' Special Early Retirement pensions were improperly approved by Defendants in violation of 401(a), such pensions did not constitute a benefit that had accrued to Plaintiffs." [See App., p. 62a.]

As to primary anti-cutback requirement—actual existence of an earned accrued benefit—it is fundamental that Section 204(g) "cannot create an entitlement to benefits when no entitlement exists under the terms of the Plan." *See Hein v. FDIC,* 88 F.3d 210, 217 (3d Cir. 1996). Rather, a participant must establish independently that the benefit existed. In *Meakin*, *supra,* the Ninth Circuit was clear that the anti-cutback rule did not apply to early retirement claims, mirroring those brought by Petitioners here. The *Meakin* plaintiff's claim that the anti-cutback rule restricted the Trustees from changing course and

stopping his pension because he continued working was dismissed by the court as the condition to separate from employment "had always been present even if the Trustees had not enforced it." *See Meakin,* 774 Fed. Appx. at *1039.

Similarly, in *Wetzler v. Illinois CPA Society*, 586 F.3d 1053 (7th Cir. 2009) the Seventh Circuit rejected a lump sum distribution anti-cutback claim because the plan never provided for the distribution sought. There, the underfunded plan mistakenly issued a lump sum distribution without requiring an executive to post security in violation of applicable tax laws. Once the Board discovered the distribution violated the law and risked the Plan's tax status, they adopted an amendment clarifying that lump sum distributions without security were prohibited. The plaintiff in *Wetzler* argued that the amendment violated ERISA's anti-cutback provision because it eliminated a pre-existing right to receive a lump sum distribution. The court rejected that claim finding plaintiff "never had the option of collecting lump sum distributions prior to [the Amendment], which makes this case distinct from *Heinz* where the amendment altered a preexisting benefit." *Id.* at 1059. The court went on to state:

> [The Amendment] did not eliminate or affect any lump-sum option that was previously available to plan members. Instead, the Amendment gave the Plan a way of correcting a distribution that was not allowed under the Treasury Regulations at the time it was made. *Id.* at 1059-60.

The court in *Sims v. American Postal Workers Acc. Ben. Association,* 2013 U.S. Dist. LEXIS 124555 at *6 (D.N.H. 2013), *aff'd,* No. 13-2246 (1st Cir. Aug. 6, 2014), also dismissed a 204(g) claim where there was no entitlement to the underlying benefit sought. In *Sims*, the court determined that a pension plan administrator's prior mistake in using an employee's "annualized" wages instead of the actual annual compensation (as required by the Plan), to calculate benefits did not result in accrual of a benefit under § 204(g). The court found that the plaintiff participant "never accrued a right to the higher pension payments [under the Administrator's prior mistaken formula] he seeks. The fact that an Administrator misconstrued Plan language in the past does not entitle [the participant] to benefit from the Administrator's error." *Id.* at *16.

The above decisions are consistent with other courts addressing accrual issues such as *Hunter v. Caliber Systems, Inc.*, 220 F.3d 702, 712-717 (6th Cir. 2000) (where the administrator determined that a lump sum distribution would violate Plan terms and applicable I.R.S. regulations, no accrued benefit existed for such distributions under § 204(g)); *Herman v. Cent. States, Southeast & Southwest Areas Pension Fund*, 423 F.3d 684, 692 (7th Cir. 2005) (plan's action to expand ability to recover overpayments to prevent pensioners from receiving a windfall to which they had no right was not a 204(g) violation where the participants were not eligible for the mistaken pension benefits in the first place); *Shopmen's Local Union No. 527 Pension v. T. Bruce Sales, Inc.*, 2007 U.S. Dist. LEXIS 8673 at *13 (W.D. Pa. 2007) (where the court found that the requirement to separate from service to collect a pension was always part of the plan and amendments stating that

requirement did not "impose any new condition on the receipt of benefits").

Here, the Second Circuit found the Trustees acted reasonably when they stopped pension payments to which participants were not entitled. It is clear that no right to an early pension while continuing to work had accrued: the Plan always required that participants cease working for their employers to obtain an early pension; and the law prohibited awarding such early pensions for those who continued to work. Surely, this normal analysis is not worthy of Supreme Court review.

The benefit claimed by Petitioners—working while collecting early pension benefits—never accrued; and no amendment was adopted by the Trustees affecting that claimed benefit. As the Magistrate's Report and Recommendation found:

> Defendants' 2011 Determination therefore did not alter an existing term of the Plan nor did it add any provision to the Plan; rather, it construed and applied the relevant terms so as to comply with previously existing and applicable Internal Revenue Code requirements, specifically § 401(a). [See App., p. 36a.]

In other words, the Trustees were not shifting from one plausible interpretation to another. They were instead correcting a mistake. Petitioners' anti-cutback arguments, based on the Trustees' benefit determinations, were properly rejected by the courts below.

As noted above, Petitioners' purported Circuit split (as to whether a formal amendment is required), already rejected by this Court in *Cottillion, supra* as a ground for appeal, is a distraction from the fundamentals of this action and the precedents across the Circuits—the anti-cutback rule is inapplicable where participants never had a right to the benefit at issue. Further, Petitioners' unfounded concern that a rash of courts will ignore reductions in accrued benefits when there is no formal amendment, is belied by IRS rules which explicitly prohibit plans from reducing *accrued* benefits "through the exercise of discretion" regardless of whether a formal amendment was adopted. See 26 CFR § 1.411(d)-4, Q/A 4. (As recognized by Petitioners, the bulk of the decisions[11] they cite for the proposition that the anti-cutback rule is limited to formal amendments were effectively overturned by this regulation. See Petition, p. 22.)

The Second Circuit in this action looked beyond whether a formal amendment occurred. Petitioners' anti-cutback claim was dismissed by the Second Circuit because the court found the Trustees' determination—Petitioners "were never entitled to the accrued benefits they claim to have lost"—was supported by the Plan and applicable law, and was "reasonable". [See App. pp. 6a-9a.]

11. *Stewart v. National Shopmen Pension Fund,* 730 F.2d 1552 (D.C. Cir. 1984); *Oster v. Barco of California Employees' Retirement Plan*, 869 F.2d 1215 (9th Cir. 1988); and *Dooley v. Am. Airlines, Inc.,* 797 F.2d 1447 (7th Cir. 1986).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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