No. 02-891

IN THE

Supreme Court of the United States

CENTRAL LABORERS' PENSION FUND,

Petitioner,

v.

THOMAS E. HEINZ and RICHARD J. SCHMITT, JR.,

Respondents.

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONER

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP") is a nonprofit, tax-exempt organization that has participated for over a quarter of a century in the development of employee benefits legislation and regulations promulgated to implement the Employee Retirement Income Security Act of 1974 ("ERISA" or "Act"), 29 U.S.C. § 1001, *et*

seq., and other laws affecting multiemployer plans.[1] Currently, 309 multiemployer pension plans are affiliated with the NCCMP. These affiliated plans cover a majority of the participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community generally. The NCCMP has frequently participated as *amicus curiae* in the United States Supreme Court and the federal courts of appeal.

Multiemployer plans provide pension coverage for some ten million American workers, one-fifth of all workers who participate in pension plans. Congress has recognized that the continued well-being and security of employees, retirees and their dependents are directly impacted by multiemployer plans, and that interference with the maintenance and growth of such plans is contrary to the national public interest. 29 U.S.C. §§ 1001(a)(1), (3) and (c)(2).

The decision below, if allowed to stand, will significantly detract from the ability of plan trustees to employ ERISA's "suspension of benefit" rules in response to fluctuating employment and retirement patterns, while at the same time making subsidized early retirement benefits available to those participants who need them the most. The applicable statutes, regulations and regulatory interpretations have long allowed pension plans a degree of flexibility when defining the scope of work an early retiree may engage in without foregoing receipt of his retirement benefits. The decision of the two-member majority below—in direct conflict with the unanimous decisions of two sister circuits—will restrict the historical ability of multiemployer pension plans to tailor such suspension of benefit provisions to current employment conditions, and hence to protect the actuarial soundness of these plans.

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[1] Pursuant to Rule 37.6 of the Rules of the Court, the undersigned hereby state that no counsel for Petitioner or Respondents authored any part of this brief. Moreover, no person or entity other than the NCCMP made a monetary contribution to the preparation or submission of this brief.

Further, the decision below will effectively force multiemployer pension plans throughout the country to review existing early retirement provisions and, very likely, to enact plan amendments that conform to the rule announced by the two-member majority below, notwithstanding the fact that a contrary rule prevails in two other circuits. Such a process will impose unnecessary administrative burdens on these plans, and may well come at the expense of enhanced early retirement options and future benefit increases for participants.

Accordingly, the NCCMP and its constituent groups have a strong interest in supporting the granting of the petition herein and in urging the reversal of the decision below. The NCCMP believes that a resolution by this Court of the conflict between the circuits will serve to ensure that multiemployer pension plans continue to have the flexibility they require to determine the conditions under which early retirees can continue to collect a pension while receiving income from current employment. Both Petitioner and Respondents have consented to the filing of this brief, as is evidenced by letters of consent that have been filed with the Court.

INTRODUCTION

The decision below concerns the extent to which a multiemployer pension plan may revise its rules pertaining to suspension of early retirement benefits when a retiree reenters employment. Under section 203(a)(3)(B) of ERISA, a multiemployer plan may include provisions suspending retirement benefits when the retiree returns to work in the same industry, in the same trade or craft, and in the same geographic area covered by the plan.[2] Multiemployer

[2] Section 203(a)(3)(B) provides, in relevant part, that—

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

plans commonly refer to employment that will trigger suspension of benefits as "disqualifying employment." (App., at 4a.) When a retiree re-enters disqualifying employment, ERISA § 203(a)(3)(B) provides that the plan's withholding of that retiree's benefit will not be deemed a forfeiture of an accrued benefit under section 203(a) of the Act, 29 U.S.C. § 1053(a).[3]

Since 1981, regulations promulgated by the Department of Labor pursuant to section 203(a)(3)(B)[4] have specified a range of permissible definitions of disqualifying employment. Multiemployer plans may adopt suspension of benefit rules restricting post-retirement employment to the full extent permitted under the regulations, or they may narrowly tailor restrictions on post-retirement employment to certain types of employment that fall somewhere within the range permitted by the regulations, or they may choose not to restrict post-retirement employment at all. Trustees of multiemployer pension plans have come to regard

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> (ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.
>
> The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed."

29 U.S.C. § 1053(a)(3)(B) and codified as section 411(a)(3)(B) of the Internal Revenue Code, 26 U.S.C. § 411(a)(3)(B). Multiemployer pension plans are subject to Title II of ERISA (codified as amendments to the Internal Revenue Code ("Code")), which duplicates those portions of Title I of ERISA (codified at Title 29 of the U.S.C.) including ERISA's provisions on vesting and accrual. Under Reorganization Plan No. 4 of 1978, §101, 43 Fed. Reg. 47713, the Internal Revenue Service was given authority over ERISA's funding, participation, vesting and benefit accrual provisions.

[3] *See* Suspension of Benefits Rules, 43 Fed. Reg. 59098, 59099 (proposed Dec. 13, 1978) (to be codified at 29 C.F.R. Part 2530) (Preamble to proposed DOL suspension of benefit rules wherein the agency explained that "the inclusion of the suspension provisions in section 203(a)(3) of the Act indicated that Congress intended to permit plans to provide for the permanent withholding of pension benefits under certain circumstances.").

[4] *See* 29 C.F.R. § 2530.203-3 *et seq.*

suspension of benefit rules as an important element of plan design which offers them flexibility in regulating early retirement benefits, if needed.

Relevant considerations such as industrial stability, conditions of employment and earnings, and the actuarial soundness of pension plans are not fixed in time but are impacted by wide fluctuations in unemployment rates, the relative aging of a workforce, the vagaries of financial markets, or other unforeseen events that impact the entire economy, specific industries or particular regions. The trustees of multiemployer pension plans, representing both labor and management,[5] are uniquely qualified to assess those circumstances insofar as they are pertinent to their own plans at any given time. Using that expertise, the trustees can employ a suspension of benefit provision as a dynamic and adaptable tool for addressing a number of economic exigencies. This approach is completely in keeping with Congress's intent in adopting section 203(a)(3)(B).[6]

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[5] *See* section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5).

[6] *See, e.g.,* 120 Cong. Rec. 29192, 29197 (daily ed. Aug. 20, 1974) (statement of Rep. Dent), *reprinted in* 3 Leg. Hist. at 4669:

> [T]he conferees expressly provided in section 203(a)(3)(B) that a plan be permitted to suspend benefits under certain circumstances. This section further authorizes the Secretary [of Labor] to prescribe regulations necessary to carry out the purposes of this provision. It is contemplated that those regulations would permit a plan's provisions concerning suspension to take into account the particular facts and circumstances of the industry; the objectives of industrial stability; the conditions of employment and earnings in the industry; the benefit payment period of the plan; and the burden of onerous and costly administrative procedures imposed upon the plan by these provisions.

See also Cong. Rec. 29928, 29930 (daily ed. Aug. 22, 1974) (statement of Sen. Williams), *reprinted in* 3 Leg. Hist. at 4738:

> The type of suspensions contemplated by this provision are those which prevent plan assets from being used to pay retirement benefits to persons who have, in fact, returned to work for employers covered by the plan. Also contemplated are provisions designed to protect participants against their pension

The decision below neither considers these realities nor acknowledges the underlying purpose of section 203(a)(3)(B). If left intact, it will significantly restrict the manner in which the trustees of multiemployer pension plans may exercise the discretion granted them under ERISA's suspension of benefit provision. It achieves this harmful result by construing a "suspension" under section 203(a)(3)(B) of ERISA as the equivalent of an "elimination" or "reduction" of early retirement benefits in violation of section 204(g) of ERISA.[7] The decision is in direct conflict with the construction given the statute by the Internal Revenue Service—the administrative agency charged with its enforcement—and the prior decisions of the Fifth Circuit in *Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998), and the Sixth Circuit in *Whisman v. Robbins*, 55 F.3d 1140 (6th Cir. 1995).

SUMMARY OF REASONS FOR REVIEW

Since the enactment of ERISA many multiemployer pension plans have used ERISA section 203(a)(3)(B) as a means of encouraging or discouraging returns to employment by early retirees in the relevant industry. The section was intended as a tool to deal with the economic

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> plan being used, in effect, to subsidize low-wage employers who hire plan retirees to compete with, and undercut the wages and working conditions of employees covered by the plan. . . .

And 120 Cong. Rec. 29928, 29942 (daily ed. Aug. 22, 1974) (statement of Sen. Javitz), *reprinted in* 3 Leg. Hist. at 4772:

> The purpose of this limited exception to what is generally a rule precluding divestiture of vested benefits is to protect unions against undercutting of wage scales and the additional expense generated by the need to subsidize retirement benefits for those who have left the work force as well as retirement benefits for those continuing to work—if such a course was required. . . . The purpose of the suspension rule is to protect the legitimate interests of the union with respect to those persons who have really not retired and not to penalize retirees where, on balance, the interests of the union are not adversely affected to a substantial degree.

[7] 29 U.S.C. § 1054(g); 26 U.S.C. § 411(d)(6).

exigencies that may affect a particular industry or a plan's actuarial soundness at any given time. For suspension of benefit rules to be effective over time, multiemployer plans must have the flexibility to expand the scope of disqualifying employment when economic conditions warrant, in order to maintain the actuarial soundness of the plan and to protect the welfare of actual retirees, active non-retired participants, and contributing employers.

Relying on the statute, prior court decisions and IRS guidance, trustees of multiemployer pension plans have often amended plans to expand definitions of disqualifying employment without reason to fear they might be violating the anti-cutback rule of ERISA section 204(g), the provision erroneously relied upon by the majority below. The decision below places a new and completely unwarranted constraint on the trustees' ability to tailor their suspension of benefit rules to changing economic conditions. The trustees of the many multiemployer pension plans that have expanded definitions of "disqualifying employment" through amendment must now assess which circuit's law might conceivably apply to such amendments, whether further plan amendments should be adopted, and even whether it is administratively feasible to bifurcate "disqualifying employment" rules on a circuit-by-circuit basis. This is flatly contrary to the salient purpose of Congress, vigilantly enforced by this Court, that ERISA plans be subject to a nationally uniform set of rules that will avoid such administrative nightmares.

If the ruling below is allowed to stand, it will likely compel most trustees to reform their plans and review and amend current suspension rules, if only in an excess of caution. It is contrary to the national interest to allow the opinion of a two-judge majority to trigger the imposition of such a substantial administrative burden and expense on hundreds of pension plans serving one-fifth of all American pension participants. Unfortunately, the decision will also probably serve as a deterrent to adoption of any but the strictest of suspension of benefit rules.

And, because the actuarial soundness of many plans will be adversely impacted by administrative efforts to comply with the Seventh Circuit's decision, sponsors of these plans likely will be compelled to adopt amendments calling for significant reductions in the rate of future benefit accruals for all plan participants.

REASONS FOR REVIEW

I. THE DECISION BELOW, IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH AND SIXTH CIRCUITS, WILL HAVE IMMEDIATE AND SERIOUS ADVERSE CONSEQUENCES FOR MULTIEMPLOYER PENSION PLANS NATIONWIDE.

A principal goal of ERISA was to enable plan sponsors to establish and maintain a uniform administrative scheme for disbursement of benefits. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). As this Court has recognized, such uniformity is impossible if plans are subject to different legal requirements in different parts of the country. *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001). Obligating a plan to satisfy a regional rule pertaining to benefits that is more costly than rules in effect elsewhere either puts the plan to the administrative burden of adopting different rules for different regions, or forces it to structure its entire system of benefits to the "least common denominator" rule of a particular region, contrary to ERISA's statutory scheme. *See Fort Halifax Packing Co.*, 482 U.S. at 10, discussing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). That is precisely the potential result in this case, since multiemployer plans will have to consider whether they will attempt somehow to comply with two distinctly different rules of law or whether they will simply conform to the least common denominator, to the potential detriment of the great majority of plan participants.

A. Suspension of benefit rules are a key component of most multiemployer plan provisions providing for early retirement benefits.

Multiemployer plans fill an important need in industries (such as construction or trucking), which are characterized by irregular employment or frequent shifts of workers between employers. Multiemployer plans also serve as a vehicle for providing benefits at an affordable cost in industries dominated by small employers, such as garment manufacturers, restaurants and service establishments.

In addition to providing workers in such industries with benefit portability, which allows employees to move from employer to employer without penalty, multiemployer plans help protect workers from the potentially devastating consequences of business downsizing, mergers and closings. Multiemployer pension plans continue even if particular employers go out of business, so that workers who lose their jobs in such circumstances remain protected in their pension benefits. Because of the often transitory nature of their employment and/or the small size of their employers, many employees would be unable to participate in any employee benefit plan were it not for the existence of multiemployer plans.

Another characteristic of multiemployer pension plans, especially those providing benefits to participants in the construction industry and related trades and crafts, is that they typically offer early retirement benefits, which are often subsidized, *i.e.,* the benefits are not actuarially reduced to account for early retirement.[8] As illustrated in the case below, a

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[8] *See, e.g.,* 144 Cong. Rec. 7574, 7578 (daily ed. July 7, 1999) (statement of Sen. D'Amato):

> [C]onstruction work is physically hard, and is often performed under harsh climatic conditions. Workers are worn down sooner than those in most other industries. Often, early retirement is a must. Multiemployer pension plans accommodate these needs of their covered workers by providing for early

participant who will not reach normal retirement age under a plan for many years will nonetheless be eligible for a subsidized early retirement benefit if he or she has completed a minimum number of years of service.[9] Because the benefits are subsidized, they are more expensive to the plan than benefits provided on or after normal retirement age.

The trustees of the Petitioner multiemployer plan amended the plan in 1998 to expand the definition of disqualifying employment to include work "in any capacity in the construction industry" to discourage a high rate of early retirement that was causing actuarially significant losses to the plan. This is a useful mechanism in industries of a cyclical nature, like construction, and potentially in any industry experiencing the vagaries of the current economy. A flexible suspension of benefits rule can be used to encourage early retirement pensioners to re-enter the workforce at times of economic boom and, conversely, to discourage "double dipping"[10] during times of economic downturn.[11]

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retirement, disability, and service pensions that provide a subsidized, partial or full pension benefit.

[9] The Respondents were each 39 years old when they qualified for the Petitioner plan's "service-only pension." To be eligible for the service-only pension, a participant had to have earned 30 or more pension credits. Normal retirement age under the plan was 65. Nevertheless, the service-only pension provided the Respondents with monthly benefit payments that were not actuarially reduced to account for payments which began at an earlier age and which would continue for a longer period. (Petitioner's Brief, p. 3; App., 4a.)

[10] The majority's opinion chides the Fund for pointing out that broadening the definition of disqualifying employment was necessary to curb the practice of "double dipping," which was causing a depletion of Fund assets. The majority apparently believed that the Fund was criticizing a practice which existed under the plan before the amendment, *i.e.,* receipt of an early retirement benefit by retirees who were not actually retired from the industry. (App. 10a-11a, n.6.) This misses the point that a certain level of double dipping may be acceptable and even desirable in times of high employment when, for example, a shortage of skilled journeymen may be plaguing a particular trade or craft and a pool of able-bodied retirees can be a welcome source of qualified journeymen. However, when bleaker economic conditions prevail, double dipping works a hardship on multiemployer plans, the predominant number of which are defined benefit plans. Defined benefit plans must continually meet ERISA's minimum funding standards (section 412 of the Code) notwithstanding the facts that (1) plan assets are typically invested in

Prior to the Seventh Circuit's decision below, multiemployer pension plans were able to, and did, act to expand and contract definitions of disqualifying employment through plan amendment, based on statutory, regulatory and judicial precedent clearly authorizing such actions. *See Spacek v. Maritime Ass'n*, 134 F.3d 283 (5th Cir. 1998) and authority cited therein; *Whisman v. Robbins*, 55 F.3d 1140, 1147 (6th Cir. 1995).

B. The decision below, and its direct conflict with the law in other circuits, will place an unacceptable administrative burden on multiemployer plans, to the detriment of millions of plan participants.

The decision below will clearly and directly impact the administration of multiemployer pension plans that are either administered in the states of Illinois, Indiana and Wisconsin, or that have participants working or residing in those states. Moreover, given ERISA's liberal venue provision whereby a suit may be brought (1) where the plan is administered; (2) where the

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equity and fixed income securities subject to the vagaries of Wall Street, and (2) the ongoing funding of such plans is dependent upon the flow of employer contributions based on hours worked by employees, even in times of high unemployment.

[11] To illustrate the usefulness of occasional adjustments in a plan's definition of disqualifying employment, one may consider the examples of a multiemployer pension plan that provides a subsidized early retirement benefit to participants with at least 20 years of service. For a number of years the plan includes a suspension of benefit rule that defines disqualifying employment to the full extent provided under Department of Labor regulations. In 1995, a 42 year old participant who has earned 20 years of service under the plan retires and begins receiving benefits. He cannot return to employment covered by the plan without having his benefits suspended. In 2000, employers contributing to the plan raise concerns that there is a shortage of qualified construction workers. To encourage retirees like the participant to return to covered employment, the trustees of the plan decide to amend the plan to provide that retirees who return to employment covered by the plan will not have their benefits suspended. In 2002, unemployment among construction workers spikes upward while the reemployed participant and numerous other retirees continue working in covered employment *and* receiving subsidized early retirement benefits (double dipping). To protect unemployed participants of the plan who are neither eligible for retirement benefits nor, at the time, accruing service credits towards retirement, the trustees choose to expand the definition of "disqualifying employment" to again include employment covered by the plan in order to discourage double dipping and reduce unemployment among active participants.

breach took place; or (3) where a defendant resides or may be found,[12] it is conceivable that a suit challenging an amendment similar to those considered by the courts in *Spacek* and *Heinz* could be brought against almost any multiemployer plan in a federal court in Illinois, Indiana or Wisconsin.

The conflict between the circuits places trustees of multiemployer plans in an untenable position in the event they either seek to amend or have previously amended a plan to expand the definition of disqualifying employment. Trustees of plans that are either administered in the Seventh Circuit or have a large number of participants in the region will have little choice but to amend their plans to comply with the holding of the two-judge majority below, notwithstanding the nationwide weight of authority to the contrary.

Other plans face a more perplexing dilemma. For trustees of plans administered outside the Fifth, Sixth or Seventh Circuits, and which have little or no contact with those circuits, the decision to amend a plan or enforce an existing amendment that expands the definition of disqualifying employment cannot be made without acknowledging the conflict between the circuits.[13] Trustees must then decide whether the plan should assume the risk of litigation and enforce these provisions or submit *de facto* to the authority of the two-judge majority below, which significantly restricts the ability of the plan to adapt to changing employment conditions.

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[12] ERISA section 502(e)(2), 29 U.S.C. § 1132(e)(2); *see also, Varsic v. United States District Court for the Central District of California*, 607 F.2d 245, 248 (9th Cir. 1979) (giving liberal interpretation to ERISA's venue provision).

[13] It is important to keep in mind that the suspension of benefit provision of a plan must be read in the context of the entire plan. In this regard, the impact of the decision below is not limited to the administration of the plan, but also goes to the trustees' consideration of benefit improvements. If the trustees heed the Seventh Circuit's holding, they will be required to reconsider generous early retirement benefits for reasons of actuarial soundness. It is thus likely that retirees will be penalized by the plan's need to accommodate the ruling below.

Similarly, large nationwide plans not administered in the Seventh Circuit, but with participants residing within the Seventh Circuit, must either bow to the least common denominator and adhere to the ruling below, or attempt to craft a piecemeal approach to their suspension of benefit rules, an administratively burdensome task which would be all but impossible to accomplish.[14] This Court has previously decried such results, in which conflicting rules of law force a plan either to adhere to the least common denominator or to adopt an administratively burdensome scheme at the possible sacrifice of higher benefit levels in the future. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 10-11.

From an administrative standpoint, the NCCMP cannot foresee a multiemployer plan overcoming the practical difficulties of establishing a scheme for complying with both *Heinz* and *Spacek*/*Whisman*. Unless the Court grants this petition and resolves the conflict, trustees of many multiemployer plans may feel compelled to amend their plans to comply with the decision below, incurring significant administrative costs and potentially jeopardizing future benefit increases.

The adverse impact of the majority opinion below is hardly limited to the administrative burden it will create for plan trustees. The decision also strips multiemployer plans of an effective tool trustees have relied on for over thirty years to help safeguard the actuarial soundness of such plans and to protect contributing employers and their employees. In so doing, the court below has placed the interests of reemployed early retirees over the interests of all other

[14] The *Heinz* decision leaves fund administrators to ponder a number of questions. For example, if a plan opts to apply *Heinz* only in cases within the jurisdiction of the Seventh Circuit, should it look to where the retiree resides or where "disqualifying work" is performed? If a retiree in Illinois moves to Pennsylvania, or vice versa, which rule should apply? And, if a plan opts to apply *Spacek* only to retirees residing in Mississippi, Louisiana and Texas, how should retirees who relocate to Texas be treated? These conundrums underscore the reason Congress sought to avoid a "patchwork scheme of regulation" in the first place. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. at 11.

plan participants (including active employees, unemployed participants and actual retirees), and the employers who contribute to such plans. As a consequence, the court has frustrated the primary purpose of Congress when it included section 203(a)(3)(B) in that Act.

II. THE DECISION BELOW IS NOT ONLY IN CONFLICT WITH THE LAW OF OTHER CIRCUITS, IT DIRECTLY CONTRADICTS AUTHORITATIVE INTERPRETATIONS OF THE INTERNAL REVENUE SERVICE.

The Petitioner fairly details the deficiencies that underscore the Seventh Circuit's reasoning that a "suspension" under ERISA section 203(a)(3)(B) equates to a "reduction" under ERISA section 204(g).[15] The Petitioner correctly observes that the reasoning of the decision below contradicts the language of the statute, applicable legislative history, and—an issue focused on herein—applicable regulations and the authoritative position of the Internal Revenue Service.

The majority opinion below "rejects as unpersuasive" IRS guidance provided to its field examiners that "[a]n amendment that reduces I.R.C. 411(d)(6) protected benefits on account of 203(a)(3)(B) service does not violate I.R.C. 411(d)(6)."[16] Multiemployer Plan Examination Guidelines of the Internal Revenue Manual, at 4.72.14.3.5.3(7) ("Suspension of Benefits") (May 4, 2001) (available on WESTLAW RIA-IRM database) (hereinafter "Multiemployer Plan Guidelines"). According to the majority a "single statement" in the IRS manual cannot be deemed to represent a longstanding agency interpretation. (App. 22a n.17.)

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[15] Judge Cudahy, in dissent, persuasively refutes the reasoning of the majority opinion.

[16] If such an amendment did violate section 411(d)(6) of the Code, the plan would be treated as not satisfying the requirements of ERISA's minimum vesting standards and would risk losing its tax qualified status. *See* Code section 411(d)(6)(A) ("A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan. . .").

The majority's analysis, however, overlooks several significant points. First, the Multiemployer Plan Guidelines set forth the technical guidance for the Service's field personnel, technical staff, and plan determination personnel. Multiemployer Plan Guidelines, at 4.72.14.1. The provision noted by the court is in fact one of seven detailed subsections dedicated solely to the examination of a multiemployer plan's suspension of benefit provisions. *Id.* 4.72.14.3.5.3(1), *et seq*. Second, the final Multiemployer Plan Guidelines were issued (post-*Spacek*) by the Service after it published proposed examination guidelines with a request for public comment. *See* Revenue Service Announcement 96-25 (Apr. 8, 1996). Finally, the court's intimation that the position taken by the IRS in the Multiemployer Plan Guidelines was not fully thought through fails to recognize that the provision is consistent with and, indeed, complements Treas. Reg. 1.411(c)-1(f), a regulation previously promulgated by the Service. The regulation provides that "[n]o adjustment to an accrued benefit is required on account of any suspension of benefits if such suspension is permitted under section 203(a)(3)(B) of [ERISA]. . . ." Accordingly, it is clear that the IRS considers a suspension under section 203(a)(3)(B) not to constitute a reduction in a participant's accrued benefit, contrary to the majority opinion below.

Clearly, the IRS guidance set forth in the Multiemployer Plan Guidelines is worthy of a degree of deference not afforded it by the majority below. *See Christensen v. Harris County*, 529 U.S. 576, 590-91 (2000) (Scalia J. concurring) (listing cases where this Court accorded deference to authoritative agency guidance in various forms).

CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges the Court to review the decision below.

Respectfully submitted,

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