IN THE

Supreme Court of the United States

No. 01-678

MOTION PICTURE INDUSTRY PENSION AND HEALTH PLANS,
Petitioner,

v.

N.T. AUDIO VISUAL SUPPLY, INC.,
Respondent.

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

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 the law applicable to employee benefit plans.[1] Some 240 multiemployer plans and related international unions, with a nationwide participant base, are affiliated with the NCCMP. The NCCMP is the only national organization devoted exclusively to protecting the

[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioner or Respondent 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.

interests of multiemployer plans by advocating on behalf of these plans in Congress, in the courts and in the regulatory process.

The NCCMP was recognized by Senate cosponsors as having had a significant impact on the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), PUB. L. NO. 96-364, 94 STAT. 1208.[2] That Act amended the Employee Retirement Income Security Act of 1974 (ERISA), 88 STAT. 829, 29 U.S.C. § 1001, *et seq.*, so as to improve substantially the recourse of multiemployer plan trustees against employers who fail to fulfill their obligation to make promised contributions. Congress recognized that the financial soundness and stability of multiemployer plans was being undermined by employer delinquencies, to the direct detriment of the plans, the participants and beneficiaries, and those employers that honored their contribution obligations.

The decision below concerns the nature and extent of the trustees' burden of proof in an action under the MPPAA to collect contributions from a participating employer that has failed to keep records sufficient to establish what contributions are owed. Several decisions have placed the onus of such inadequate recordkeeping on the employer, by shifting the burden of proof to the employer to come forward with evidence contradicting the reasonable inference that contributions are due for all work performed. The decision below instead places the burden on the fund trustees to show that the undocumented and unreported work was covered work.

Multiemployer plans provide medical, pension and other coverage for millions of American workers. Multiemployer pension plans alone cover some ten million workers, one-

[2] *See* 126 CONG. REC. S9835 (daily ed., July 21, 1980) and S10,100 (daily ed., July 29, 1980).

fifth of all American workers with pension plans.[3] Congress has recognized that the continued well-being and security of these employees, retirees and their dependents are directly impacted by multiemployer plans and that problems such as employer delinquencies which tend to discourage the maintenance and growth of such plans are 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 enforce the contribution obligations of uncooperative employers, by placing the burden of inadequate recordkeeping directly on the plans.

By law, it is the employer that is obligated to maintain and to make available to plan fiduciaries records from which its contribution obligations can be determined. Without the benefit of the sensible burden-shifting mechanism recognized in other cases, the cost, difficulty and uncertainties of collection actions will likely deter trustees from suing employers who have violated their recordkeeping obligations, to the detriment of the NCCMP's constituent funds, participants and beneficiaries.

The evasion by some employers of their contribution obligations constitutes a persistent and serious problem for multiemployer plans. The plan trustees labor under an obligation to attempt to monitor employer compliance, a task made particularly burdensome when employers fail to keep the required records. The actuarial soundness of multiemployer plans can be directly and adversely affected when employers successfully evade their contribution obligations by underreporting hours. Moreover, the ability of participants and beneficiaries to claim and

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[3] *See* Harriet Weinstein and William J. Wiatrowski, *Multiemployer Pension Plans*, *Compensation and Working Conditions*, 23 (Spring 1999).

receive the full amount of benefits to which they are entitled will be seriously undermined if employers are to be effectively rewarded for failing to maintain documentation of covered work.

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, to ensure that multiemployer plans continue to have an effective remedy against employers whose inadequate recordkeeping renders it difficult to identify and quantify delinquencies to the plans. Both Petitioner and Respondent have consented to the filing of this brief, as is evidenced by letters of consent that have been filed with the Court.

INTRODUCTION

The NCCMP submits this brief *amicus curiae* to urge the Court to review the decision below, which penalizes multiemployer plans for the recordkeeping violations of individual employers.

SUMMARY OF REASONS FOR REVIEW

Multiemployer plans serve a unique and valuable role in our society by providing cost-effective pension and medical coverage for employee groups for whom single employer coverage is not a realistic option. These plans depend for their financial survival upon the timely and accurate submission of contributions by participating employers. Unfortunately, the failure of some employers to report and submit all contributions due is a substantial and persistent problem for multiemployer plans.

The 1980 MPPAA represented a significant step forward by providing multiemployer plans with an effective means of enforcing employer contribution obligations. However, employers that violate their statutory obligation to maintain records verifying the amount of covered employment performed by their workers post an ongoing obstacle to full enforcement of

contribution obligations. The decision below operates to shield such employers from any realistic enforcement mechanism. Thus, ironically, an employer that not only fails to pay required contributions but in addition violates its obligation to keep appropriate records is more likely to escape liability than an employer that merely fails to remit contributions.

By law, the obligation to generate and maintain records of covered employment rests, as it should, with the employer. Yet, the decision below saddles multiemployer plans with the burden of filling any gaps in employers' records, in actions against employers of unpaid, undocumented contributions. Such an approach is flatly inconsistent with the purposes and policies of the MPPAA, with this Court's decision in *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985), and with prior decisions of the lower courts. Moreover, the decision below relies on the erroneous and dangerous proposition that a multiemployer plan is not "injured" by an employer's failure to maintain records adequate to quantify the amount of contributions actually owed.

For all of these reasons, the NCCMP urges this Court to review the decision below.

REASONS FOR REVIEW

I. MULTIEMPLOYER PLANS, THE SOLE SOURCE OF MEDICAL AND PENSION BENEFITS FOR A SIGNIFICANT SEGMENT OF THE AMERICAN PUBLIC, DEPEND FOR THEIR SURVIVAL UPON THE READY ENFORCEABILITY OF EMPLOYER REPORTING AND CONTRIBUTION OBLIGATIONS.

The federal authority to create collectively bargained, jointly trusteed fringe benefit plans has long existed in Section 302(c)(5) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 186(c)(5). Fifty-four years following the passage of Section 302, collectively bargained multiemployer plans have become a mainstay of health and retirement protection for employees in a variety of industries in this country. Such plans recognize covered employment with any

participating employer for purposes of determining an employee's entitlement to benefits. Some ten million employees in this country participate in multiemployer plans. *See* Weinstein and Wiatrowski, *supra,* at 21.[4]

Multiemployer plans fill a particularly important need in industries characterized by irregular employment or frequent shifts of workers between employers, such as construction and trucking. *See* David M. Strauss, Executive Director of the Pension Benefits Guaranty Corporation, Remarks at the Meeting of the National Coordinating Committee for Multiemloyer Plans (Dec. 4, 1997), *at* http://www.pbgc.gov/news/speeches/NCCM1297.htm [hereinafter "Strauss Remarks"]. They are also a vehicle for providing benefits at an affordable cost in industries dominated by small employers, such as garment manufacturers, restaurants and service establishments. *Id. See generally* Weinstein and Wiatrowski, *supra*, at 20.

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 on even if particular employers go out of business, so that workers who lose their jobs in such circumstances remain protected in their pension benefits. Strauss Remarks, *supra*. Because of the 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.

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[4] In enacting MPPAA, Congress found and declared that "the continued well being and security of millions of employees, retirees and their dependents are directly affected by multiemployer plans. . . ." MPPAA § 3, PUB. L. NO. 96-364, 94 STAT. 1209 (1980) (codified at 29 U.S.C. § 1001a(3).

The success of this system of coverage directly depends on accurate employer reporting of each employee's hours of covered employment, and on timely payment of contractually established contributions for all hours of such employment. In recognition of this dependency, Congress, in the MPPAA, imposed on employers a *statutory* obligation to make contributions in accordance with the terms of multiemployer plans. MPPAA § 306, PUB. L. NO. 96-364, 94 STAT. 1208 (1980) (codified at 29 U.S.C. § 1145). The intent was to discourage delinquencies and to simplify collection of contributions from defaulting employers. *See Staff of Senate Comm. on Labor and Human Resources*, 96th CONG., 2d SESS. S., 1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration*, 44 (Comm. Print 1980), *cited in* J. Daniel Plants, Note, *Employer Recapture of ERISA Contributions Made by Mistake: A Federal Common Law Remedy to Prevent Unjust Enrichment*, 89 Mich. L. Rev. 2000, 2036-37 & n. 231 (June 1991). Employer delinquencies, Congress recognized, posed a threat to the financial stability of multiemployer plans.

Trustees of multiemployer plans are heavily dependent on complete and accurate employer reporting in order to determine what benefits are due to participants and what contributions are owed by employers. Large, geographically disbursed funds with thousands of participating employers and hundreds of thousands of participants and beneficiaries are in no position to oversee the reporting of each and every individual employer.[5] Small plans with only a few hundred participants and a handful of employers simply do not have the resources to verify employer compliance across the board. Typically, employers are required to submit reports to the funds on a monthly basis, specifying the number of hours worked in covered employment by

[5] In *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985), the plaintiff funds served more than 500,000 employees working for over 13,000 employers. 472 U.S. at 561 n.1.

each employee during the preceding month. Such reports are to be accompanied by payment of contributions at a contractually established rate for all covered work.

Many employers live up to their reporting and contribution obligations. Unfortunately, as Congress recognized during consideration of the MPPAA, a significant number do not, creating serious problems for most multiemployer plans. *See* 126 Cong. Rec. H7899 (daily ed. Aug. 26, 1980) (statement of Representative Thompson).[6] Such delinquencies deprive plans of the benefit of investment income, burden them with the costs of detection and collection, detract from the plans' ability to formulate or meet funding standards, and potentially add to the plans' unfunded liability. *Id.* They can also eventually translate into lower benefits for participants as a group and higher contribution rates for all employers. *Id.* Under Department of Labor rules, plans are obliged to award pension credits based on hours worked in covered employment, regardless of whether the employer has remitted the required contributions.[7]

Various provisions of ERISA operate to place a duty on plan trustees to preserve and maintain trust assets and to prevent employers from gaining even temporary use of assets to which a multiemployer plan is entitled. *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-73 (1985), discussing 29 U.S.C. §§ 1103, 1104 and 1106. The Secretary of Labor has interpreted the duty to prevent employer use of trust assets to include a duty on the part of the plan to verify employer determinations of hours for which

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[6] As the trustees argued in *Central States*, *supra* note 5, there exists an incentive for employers to underreport hours, in that underreporting—unless it is detected—reduces the employer's contribution liability. 472 U.S. at 567.

[7] *See* 29 C.F.R. §§ 2530.200b-2(a)(1) and (2) (computation of service required to be credited to participants must include any hour for which employee is directly or indirectly paid or entitled to payment); Dep't of Labor Advisory Opinion 76-89, issued August 31, 1976 (stating that credit must be given solely on basis of service performed for contributing employer, regardless of whether employer has made or defaulted on required contributions).

contributions are owed. *Central States*, 472 U.S. at 573-74 (citing Prohibited Transaction Exemption 76-1, 41 FED. REG. 12740, 12741 (1976)). Multiemployer plans typically adopt auditing programs whereby employer records are audited either on a random basis or as a result of a particularized concern regarding a specific employer's performance of its reporting and contribution obligations. The Supreme Court has recognized such auditing programs as a significant means by which plan trustees can satisfy the obligation to monitor employer compliance. *Central States*, 472 U.S. at 574.

The decision below, if not reversed, will erode the efficacy of trustee auditing programs and will seriously interfere with the ability of multiemployer plans to protect themselves against the persistent problem of employer delinquencies. It will become all too easy for employers to evade their contribution obligations simply by failing to maintain statutorily required records. Ironically, the decision below may reward the worst offenders, because an audit can detect and quantify the delinquencies of those employers that honor their recordkeeping obligations.

By granting this petition, the Court can act to ensure that the important accomplishments of the MPPAA in helping multiemployer plans to maintain financial self-sufficiency[8] will not be undermined.

[8] The Executive Director of the Pension Benefit Guaranty Corporation reported in 1997 that in the years since the MPPAA was enacted only 16 plans had required the assistance of the PBGC. (Strauss Remarks.)

II. THE PRIMARY OBLIGATION TO MAINTAIN AND PRODUCE RECORDS DOCUMENTING COVERED EMPLOYMENT RESTS WITH THE EMPLOYER, BUT THE ENFORCEABILITY OF THAT OBLIGATION UNDER THE MPPAA IS UNDERMINED BY THE DECISION BELOW.

Although plan trustees have an obligation to monitor employer compliance, through audits or otherwise, the primary duty to maintain records documenting and establishing the amount of covered work performed by each employee remains with the employer. Section 209 of ERISA requires an employer to "maintain records with respect to each of his employees sufficient to determine the benefits due or which may become due to such employees." 29 U.S.C. § 1059(a)(1). The same provision requires employers to furnish to plan administrators information sufficient to allow plans to make reports to employees that, *inter alia*, inform them of their accrued benefits. This Court has noted that Section 209 "requir[es] employers to maintain records on employees and to furnish to benefit plans the information needed for the plans' fulfillment of their reporting duties." *Central States*, 472 U.S. at 559-60.

The employer indeed is the only party assured to be in direct possession of the information necessary to establish which employees have performed covered work and how much of such work they have performed. In *Central States*, this Court specifically rejected the argument that a multiemployer plan had effective alternative means of monitoring employer compliance other than through full access to employer payroll and related records. Neither the interested unions, the Secretary of Labor, nor the employees themselves were deemed appropriate parties to shoulder the burden of monitoring and verifying the accuracy of hours reported by the employer. *Id.* at 461-63.

The MPPAA established a federal statutory cause of action for trustee collection of delinquent contributions, a function previously performed by a variety of actions grounded in

state law, based on collective bargaining agreements, or invoking provisions of trust agreements. *See Central States, S.E. & S.W. Areas Pension Fund v. Alco Express Co.*, 522 F. Supp. 919, 922 (E.D. Mich. 1981). In the MPPAA, Congress intended to make it easier for ERISA plans to enforce employer contribution actions without undertaking lengthy, expensive and complex litigation. *See* 126 CONG. REC. S10,102 (daily ed. July 29, 1980) (remarks of Senator Williams). *See generally* Craig W. Trepanier, Note, *Trading Places: Employer Strategies to Avoid Mandatory Awards of Interest, Liquidated Damages and Attorneys Fees Under MPPAA*, 78 Minn. L. Rev. 229, 233-35 & n.23 (November 1993). Accordingly, since the enactment of the MPPAA, plan fiduciaries have been able to sue to collect delinquent contributions under Section 502(a)(3)(B)(ii), 29 U.S.C. § 1132(a)(3)(B)(ii), of ERISA.

An action to collect underreported contributions may be accompanied by a claim to compel an audit, or a trustee suit to compel an audit may be filed as a stand-alone action unaccompanied by any claim that contributions are due and owing. *See, e.g., New York State Teamsters Conference Pension and Retirement Fund v. Boening Bros., Inc.*, 92 F.3d 127 (2d Cir. 1996). Thus, the participating employer owes a duty to a multiemployer plan to produce records sufficient to conduct an audit and a violation of that duty causes an injury to the fund which is actionable under Section 502 of ERISA.

Several courts have given further effect to the recordkeeping obligations of participating employers by finding that inadequate recordkeeping can give rise to a presumption that undocumented hours were spent in covered employment.[9] This is the burden-shifting principle

[9] *See Michigan Laborers' Health Care Fund v. Grimaldi Concrete, Inc.*, 30 F.3d 692 (6th Cir. 1994); *Brick Masons Pension Trust v. Industrial Fence & Supply, Inc.*, 839 F.2d 1333 (9th Cir. 1988); *Combs v. King*, 764 F.2d 818 (11th Cir. 1985). *But see Illinois Conference of Teamsters and Employers Welfare Fund v. Steve Gilbert Trucking*, 71 F.3d 1361 (7th Cir. 1995)

rejected by the decision below. The effect of the rule is not to require the employer to pay contributions for undocumented work, but to shift to the employer the burden of establishing that the work in question was not work for which contributions were required to be paid. If the employer—the party best situated to prove the nature of the work—fails to come forward with such proof, then a judgment against the employer for contributions for undocumented work is appropriate. *See, e.g., Michigan Laborers' Health Care Fund v. Grimaldi Concrete, Inc.*, 30 F.3d 692, 697 (7th Cir. 1994).

The burden-shifting principle enunciated in these cases is a direct and logical outgrowth of the employer's recordkeeping obligations under ERISA and of Congress's decision in the MPPAA to provide multiemployer fund trustees with an effective and cost-efficient means of enforcing the contribution obligations of employers. The rule is fair, sensible and fully in accordance with the strong federal policy favoring the maintenance, growth and financial self-sufficiency of multiemployer plans. The decision below undermines these important policies, warranting review by this Court.

III. THE DECISION BELOW PLACES A BURDEN ON PLAN TRUSTEES THAT IS AT ODDS WITH THIS COURT'S DECISION IN *CENTRAL STATES* AND WITH CONGRESSIONAL INTENT IN THE MPPAA.

The specific point at issue in *Central States* was whether the plan trustees were entitled to audit records of employees claimed by the employer not to be plan participants. The review was requested pursuant to the plaintiff funds' program of periodic audits, and the trustees sought a court order allowing fund auditors to conduct an independent verification of the company's

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(summary judgment in favor of fund reversed because employer's affidavit and deposition testimony raised genuine issue of material fact).

complete payroll records in order to determine whether the duties and status of each of its employees had been accurately reported." 472 U.S. at 563.

The lower court in *Central States* denied the trustees' request, holding in effect that the trustees were required to accept the employer's representations concerning the non-covered status of particular employees unless the trustees had "reasonable cause" to believe that a particular employee had been performing covered work, but had not been so reported. *Central States, S.E. & S.W. Areas Pension Fund v. Central Transport, Inc.*, 698 F.2d 802, 810 (6th Cir. 1983), *rev'd*, 472 U.S. 559 (1985). This Court reversed, holding that the audit program and particular request at issue were fully consistent with the general policies of ERISA as well as with the specific provisions of the statute. *Central States*, 472 U.S. at 574. Thus, the Court rejected the contention that the trustees had to satisfy a threshold burden of "reasonable cause" in order to audit records of employees claimed not to be engaged in covered employment.

The decision below places a burden on plan trustees which is similarly harmful to the financial best interest of the plan and its participants. The trustees initiated an audit of Respondent pursuant to the contractual audit procedure. (Pet. App. 2a.) The audit revealed that Respondent had failed to maintain payroll and employment records sufficient to identify the amount and type of work performed by all of its employees. (Pet. App. 20a.) Based on such information as was made available to them, the plan's auditors concluded that there were over 6000 hours of covered work performed by nineteen employees that had not been reported to the plans.[10] (Pet. App. 21a.) Each of the nineteen employees had performed some covered work for the Respondent employer. *Id.*

[10] The existence of some of these unexplained hours was detected through discrepancies between reported hours, on the one hand, and payroll records, timecards and W-2s, on the other. The remainder were revealed by unexplained cash payments to employees. (Pet. App. 7a.)

In their action to collect delinquent contributions, the trustees filed a motion for summary judgment, seeking contributions for over 6000 unexplained hours identified by the fund's auditors. Respondent opposed the motion, but failed to substantiate its contention that the hours were devoted to non-covered work. In accordance with established precedent in the Ninth Circuit and elsewhere, the District Court granted summary judgment in favor of the funds, since Respondent had failed to satisfy its evidentiary burden. (Pet. App. 15a-23a.)

The Court of Appeals reversed, in a split decision, on the basis that the trustees had failed to establish that any of the unreported hours corresponded to covered work. (Pet. App. 8a.) The majority accordingly placed the burden of Respondent's admitted statutory recordkeeping violation on the funds, even though Respondent was in the best—if, indeed, not the only—position to prove the nature of the unreported work. Judge Pregerson, dissenting, noted that the majority had reformulated the burden-shifting scheme applicable in such cases and had placed an untoward burden on multiemployer plans which could well deprive them of recourse against defaulting employers. (Pet. App. 11a, 13a.)

The majority opinion below echoes the decision struck down by this Court in *Central States*. As was the case below, the lower court in *Central States* placed the burden on the plans to come forward with threshold proof of facts which are largely or exclusively in the possession of the employer. In *Central States*, the lower court imposed on the trustees the burden of showing "reasonable cause" to believe that a particular employee was engaged in covered employment, as a condition of granting access to that employee's records. 472 U.S. at 564. In this case, the court below required the trustees to prove that there existed some covered work unreported to the plans, as a condition of enforcing Respondent's contribution obligations. (Pet.

App. 6a.) Under the holding of the majority, in order to prevail, trustees must prove the very facts that the employer's recordkeeping violations have successfully concealed.

The decision below places the trustees of multiemployer plans in an impossible position. According to this Court's opinion in *Central States*, trustees labor under an obligation to collect all contributions owed and to attempt to verify the accuracy of employer reporting. In the case of an employer which makes unrecorded cash payments to employees or which fails to keep records relating to work for which contributions are not paid, there is no cost-efficient means by which trustees can even attempt to carry out those obligations, absent the benefit of the burden-shifting principle rejected by the court below.[11] The only remaining alternative is for fund trustees to pursue extended, complex and risky litigation in order to determine and prove whether and to what extent contributions are owed.

This was one of the primary problems that the MPPAA was enacted to undo. In Senate floor debate over an early version of the legislation, the following exchange took place:

> Mr. Matsunaga: If the floor manager will yield further, the recourse available to multiemployer pension plans under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. May I inquire of the floor manager, does the bill improve the legal recourse available to plans against delinquent employers?
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> Mr. Williams: Yes, it does. . . . On the whole question of delinquent contributions and the withdrawal liability collection, the bill provides a direct and I suggest unambiguous cause of action under ERISA to a plan against a delinquent employer.

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[11] The court below appears to suggest that the trustees can satisfy their burden by having employees testify that the unreported work was in fact covered employment. As Judge Pregerson noted, this assumes that employees will be able to recall the nature and extent of their past work, and it further assumes that employees will be willing to testify against their employers. (Pet. App. 13a.) In *Central States*, this Court specifically rejected a similar suggestion that employees could be expected to come forward to assure that employers are making required contributions. 472 U.S. at 579. Neither the funds nor the employees should have to shoulder this responsibility.

> Mr. Matsunaga: If I may pose a further question, in some recent cases . . . , a simple collection action brought by plan trustees, has been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise of contributions and the plan's entitlement to the contributions. Would the bill correct this situation?
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> Mr. Williams: I feel that it would correct the situation. It is essential to the financial health of multiemployer plans that they and their actuaries be able to rely on an employer's contribution promises.

See 126 CONG. REC. S10,102 (daily ed. July 29, 1980).

Similarly, in the House, Representative Frank Thompson explained the purpose of the new federal cause of action as follows:

> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law—other than 29 U.S.C. § 186. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises. . . . [T]his legislation is intended to clarify the law . . . by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.
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> * * *
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> The public policy of this legislation to foster the preservation of the private multiemployer plan system necessitates that provision be made to discourage delinquencies and simplify delinquency collection.

126 CONG. REC. H7899 (daily ed. August 26, 1980) (statement of Rep. Thompson).

The NCCMP urges the Court to review the decision below because it places a burden on plan trustees that is inconsistent with the ruling in *Central States* and seriously undermines a primary purpose of the MPPAA.

IV. THE ERRONEOUS SUGGESTION BELOW THAT A MULTIEMPLOYER PLAN SUFFERS NO "INJURY IN FACT" WHEN A PARTICIPATING EMPLOYER FAILS TO KEEP STATUTORILY REQUIRED RECORDS COULD UNDERMINE THE ABILITY OF TRUSTEES TO VINDICATE HARMS TO THE PLAN.

The decision below turns on the majority's conclusion that the trustees herein allegedly failed to establish the "fact of damage." This concept appears to derive from this Court's decision in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Anderson*, the Court held that a plaintiff employee in a Fair Labor Standards Act case satisfies his burden of proof by establishing that he has performed work for which he was improperly compensated and by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. 328 U.S. at 687-88. The Court found the rule against recoveries for uncertain and speculative damages inapplicable because the fact of damage—if not its extent—is certain in such a case. 328 U.S. at 688.

The majority below suggested that the "fact of damage" rule may be a requirement of constitutional dimensions. (Pet. App. 8a.) Citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000), the majority pointed to the need for a plaintiff to establish "injury in fact" as a component of Article III standing. The implication is, apparently, that a plan suffers no injury when an employer's inadequate recordkeeping makes a specific quantification of covered work impossible.

The suggestion is untenable. Putting aside the logical inference that such an employer likely *did* fail to document work for which contributions were owed, trustees in these circumstances in any event are harmed by virtue of their inability to readily verify the hours on which employees' entitlement to benefits must be based. The trustees in such circumstances

suffer a cognizable injury traceable to the malfeasance of the employer and redressable in an action against that employer.

Unquestionably, an employer's failure to submit to an audit of all hours worked by employees constitutes an injury to the fund which is actionable in a suit by the trustees. *See, e.g., New York State Teamsters Conference Pension and Retirement Fund v. Boening Bros., Inc.*, 92 F.3d 127 (2d Cir. 1996). By statute, employers are obligated to provide to plan administrators information sufficient to allow the plans to inform employees of their accrued benefits. *See* 29 U.S.C. § 1059(a)(1). When employers fail to maintain and provide that information, the fund, the trustees and the participants all suffer harm. It is the trustees who are entitled, and indeed may be obligated, to take action to redress that injury, such as in an action to compel an audit. [12]

Despite this, the majority below in effect suggests that fund trustees may lack the requisite injury to support standing to vindicate an inability to identify and quantify work that may well be covered employment. Even as dicta, such a suggestion has the potential to do serious mischief by adding to the extraneous defenses that employers may raise in actions to enforce their reporting and contribution obligations. For this reason as well, the NCCMP urges the Court to grant the petition and to review and reverse the decision below.

CONCLUSION

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

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[12] In contrast, there is no express or implied right of action recognized for employees whose employers violate the recordkeeping violations imposed by the Fair Labor Standards Act. *See Floyd v. Excel Corp*., 51 F. Supp. 2d 931, 934 n.5 (C.D. Ill. 1999); *East v. Bullock's, Inc.*, 34 F. Supp 2d 1176, 1182-83 (D. Ariz. 1998).

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