No. 24-1560

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALKER SPECIALTY CONSTRUCTION, INC.,

Plaintiff-Appellee,

V.

THE BOARD OF TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS JOINT PENSION TRUST, *et al.*,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Nevada
No. 2:23-cv-00281-APG-MDC
Hon. Andrew P. Gordon

BRIEF OF *AMICUS CURIAE* THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA IN SUPPORT OF PLAINTIFF-APPELLEE WALKER SPECIALTY CONSTRUCTION, INC., AND IN SUPPORT OF AFFIRMATION OF DISTRICT COURT

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IN THE UNITED STATES COURT OF APPEALS
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WALKER SPECIALTY CONSTRUCTION, INC. Plaintiff – Appellee vs. THE BOARD OF TRUSTEES OF THE CONSTRUCTION INDUSTRY AND LABORERS JOINT PENSION TRUST, et al. Defendants – Appellants	)	On Appeal from the United States District Court for the District of Nevada No. 2:23-cv-00281-APG-MDC Hon. Andrew P. Gordon

ASSOCIATION OF GENERAL CONTRACTORS OF AMERICA'S AMICUS BRIEF IN SUPPORT OF WALKER SPECIALITY CONSTRUCTION, INC'S RESPONSE

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Associated General Contractors of America (AGC) states that it is a national construction association and that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

The Associated General Contractors of America ("AGC") is a national construction association that works to ensure the continued success of the construction industry by advocating for federal, state, and local measures that support the industry and by connecting member firms with the resources and individuals they need to be successful businesses and corporate citizens. The AGC is comprised of eighty-nine chartered chapter affiliates. Over 28,000 firms, including approximately 7,000 of America's leading general contractors, 9,000 specialty contractors (including demolition and abatement contractors), and 12,000 services providers and suppliers belong to the AGC through its nationwide network of 89 chapters, including at least one chapter in every state plus the District of Columbia and Puerto Rico.

Many of the employers that are members of the AGC are signatory to collective bargaining agreements that require contributions to multiemployer defined benefit pension plans subject to the Taft-Hartley Act which subject AGC's employer-members to potential withdrawal liability. Many of these same members engage in demolition work, and asbestos, lead, and mold abatement on construction job sites analogous to the work performed by Plaintiff-Appellee Walker Specialty Construction, Inc. at issue in this case.

The question presented in this case is of great importance to the AGC. Its members routinely engage in construction projects throughout the United States. These projects have a defined start and a defined end, and AGC's members often contribute to Taft-Hartley multiemployer defined benefit pension plans during the time that their employees are working on such projects. Once a project ends, the member contractor's obligation to make contributions might also end. This can happen, for example, when the contractor's obligation to make contributions is solely pursuant to a project labor agreement that expires with the completion of the project. It can also happen when the obligation is pursuant to an area-wide collective bargaining agreement covering a geographic area in which the contractor is no longer working. Provided that such contractors meet the statutory requirements of the construction industry exemption, these members would not be subject to withdrawal liability. Adopting an overly narrow interpretation of the term "building and construction industry" as used in the Employee Retirement Income Security Act of 1974 (ERISA), or allowing individual pension funds to adopt inconsistent definitions of "building and construction industry," would create uncertainty in the construction industry, expose AGC's members to unanticipated withdrawal liabilities, discourage some employers form working on any projects subject to a collective bargaining agreement, and ultimately increase the price of construction in the United States.

For this reason, the proper interpretation of the "building and construction industry" exception to withdrawal liability under ERISA will significantly impact AGC's members and the construction industry as a whole.

No party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The District Court correctly determined that demolition work and asbestos, lead, and mold abatement (collectively "abatement") fall within the building and construction industry exemption to withdrawal liability under ERISA. This interpretation is consistent with the statutory text, legislative history, decades of precedent interpreting the term "building and construction industry" in the context of the Taft-Hartley Act, and with every federal court and agency that has directly addressed this issue.

Defendant-appellant's (the "Trust") overly narrow interpretation of the exemption runs contrary to Congress's intent in creating the exemption and would exclude a wide range of on-site construction activities that have long been considered part of the building and construction industry and which have an integral role in the construction process. This would undermine Congress's

purpose in creating the exemption – the recognition of the unique and transitory nature of construction work.

ERISA aims to provide certainty in employee benefit plans, and the District Court's interpretation supports this goal by offering clear guidelines and ensuring consistent application of the construction industry exemption. This approach protects employers from unexpected withdrawal liabilities and maintains the stability of multiemployer pension plans in the construction industry, benefitting both employers and employees and contributing to a more efficient and cost-effective construction industry in the United States.

This Court should affirm the District Court's well-reasoned decision and hold that, in evaluating the applicability of the construction industry exemption to employers whose obligation to contribute to the Trust has ceased, the Trust was required to apply a definition of "building and construction industry" consistent with how this term is defined within the context of the Taft-Hartley Act, under which on-site demolition and abatement (and related activities) would qualify for the building and construction industry exemption when performed as part of the construction, renovation, alteration, repair, or improvement process.

I. The District Court correctly determined that demolition and abatement fall within the building and construction industry exemption to withdrawal liability.

The District Court's interpretation of the term "building and construction industry" aligns with both Congressional intent and established precedent. When Congress enacted the Multiemployer Pension Plan Amendments Act ("MPPAA") in 1980, it specifically directed that this term should be given "the same meaning as has developed in the administration of the Taft-Hartley Act." H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1 of 76, *reprinted* in 1980 U.S.C.C.A.N. 2918, 2944. This clear legislative directive demonstrated Congress's understanding that the term "building and construction industry" already had a well-developed meaning in labor law that could be readily applied in the context of ERISA and that there was no need for Congress to reinvent the wheel with regard to defining this term.

The District Court properly adhered to this directive by construing "building and construction industry" the same way that it has been construed under Taft-Hartley for decades. In doing so, the District Court followed longstanding precedent - including National Labor Relations Board (NLRB) decisions and federal court rulings – that interpreted the phrase "building and construction industry" to encompass a wide range of on-site construction activities beyond just new construction to include work that alters, repairs, or improves existing structures -- work such as asbestos removal, demolition, and retrofitting. 1-ER-

13;1-ER-15, 18. By adopting this broader, more inclusive interpretation, the District Court correctly recognized that the "building and construction industry" has long been understood to encompass more than just new construction, reflecting both the realities of project-based construction work and the transitory nature of the construction industry that Congress sought to address with the exemption. 1-ER-17–20.

A. In applying the building and construction industry exception to withdrawal liability, Congress intended courts to apply the established meaning of "building and construction industry" under Taft-Hartley.

When Congress enacted the Multiemployer Pension Plan Amendments Act ("MPPAA") in 1980, it did not define the term "building and construction industry" for purposes of the withdrawal liability exemption. However, Congress made clear in the legislative history that, in applying the construction industry exemption, courts should interpret the term "building and construction industry" consistent with its established meaning under the Taft-Hartley Act:

> In applying this exception, the committee intends that the term "building and construction industry" be given the same meaning as has developed in the administration of the Taft-Hartley Act.

1-ER-10 (quoting H.R. Rep. No. 96-869, pt. 1, at 76 (1980)).

This unequivocal congressional directive reflects Congress's recognition that the term "building and construction industry" already had a well-developed meaning in the context of labor relations law when it passed MPPAA, and by

referencing the Taft-Hartley Act, Congress simply chose to import the established interpretation and precedents that had evolved under Taft-Hartley into the ERISA context. This approach made and continues to make public policy sense by ensuring consistency across federal labor law and by acknowledging the specialized nature of the construction industry. The Eighth Circuit, in *Union Asphalts & Roadoils, Inc. v. MO-KAN Teamsters Pension Fund* ("MO-KAN"), correctly followed this guidance, noting that, when interpreting the phrase "building and construction industry" for purposes of applying the exemption, "we look to case law under section 8(f) of the Taft–Hartley Act, 29 U.S.C. § 158(f), which contains the same term." 1-ER-10 (quoting 857 F.2d 1230, 1234 (8th Cir. 1988)).

Moreover, this interpretation is supported by the Pension Benefit Guaranty Corporation (PBGC), the federal agency responsible for interpreting ERISA. Shortly after the MPPAA was enacted, the PBGC issued opinion letters stating that the term "building and construction industry" should be "given the same meaning as has developed in administration of the Taft-Hartley Act" and that work that constituted "building and construction industry" work under Taft-Hartley would be similarly treated under ERISA." PBGC Opinion Letter 81-33, 1981 WL 17623 (Sept. 22, 1981), and PBGC Opinion Letter 82-9, 1982 WL 21109 (Mar. 26, 1982). The PBGC's guidance, while not controlling, constitutes a "body of experience and

informed judgment to which courts and litigants may properly resort for guidance." *Connolly v. Pension Benefit Guar. Corp.,* 581 F.2d 729, 730-31 (9th Cir. 1978) *cert. denied*, 440 U.S. 935 (1979).

By continually adopting this approach, courts have endeavored to ensure that the building and construction industry exemption is applied consistently with Congress's intent and in a manner that reflects the construction industry's unique characteristics.

In the context of Taft-Hartley, demolition and abatement work falls within the building and construction industry. The District Court properly held that such is also the case under MPPAA.

B. Existing precedent supports the District Court's rejection of the Trust's attempt to apply a narrower definition of "building and construction industry."

Decades of precedent interpreting "building and construction industry" in the Taft-Hartley context support including within the definition of "building and construction industry" a wide range of on-site construction activities beyond just new construction. Courts and the NLRB alike have consistently interpreted this definition to encompass work altering, repairing, or improving existing structures.

For example:

1. Asbestos removal was found to be part of the building and construction industry because it "involves the alteration and repair of buildings and

permanently attached fixtures and equipment." 1 *U.S. Abatement, Inc.*, 303 N.L.R.B. 451, 456 (1991).

2. Demolition work is work within the building and construction industry because it "was in all characteristics identical to that performed in the construction industry." *Zidell Explorations, Inc.*, 175 N.L.R.B. 887, 889 (1969).
3. Plumbing work pertaining to "repairs, remodeling, and roughing in plumbing" is considered to be work within the building and construction industry. *South Alabama Plumbing*, 333 N.L.R.B. 16, 23 (2001).
4. Retrofitting work such as replacing old fire and security systems with updated systems is considered to be work within the building and construction industry. *Johnson Controls, Inc.*, 322 N.L.R.B. 669, 673 (1996).

This precedent demonstrates that the term "building and construction industry" has long been understood to encompass more than just new construction. The District Court properly relied on this established body of law in concluding that demolition and abatement work qualify for the construction industry exemption.

C. The unique nature of the construction industry supports a broad and inclusive definition of “building and construction industry.”

A more inclusive interpretation of "building and construction industry" is further supported by the practical realities of the construction industry and the

purpose of the exemption. As noted in the legislative history, Congress recognized that "the funding base of the plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained." H.R. Rep. No. 869, 96th Cong., 2d Sess., pt.1, at 75-76. Construction work is often performed on a single-project basis involving a fluid workforce, with employees moving between different employers and different projects as the projects on which they are working are completed. Demolition, abatement, and renovation activities are integral parts of the construction ecosystem, frequently preceding or enabling new construction or improvements. They involve critical preparatory and remedial tasks that are directly connected and essential to the tasks of forming and adding to structures. Excluding these activities from the definition would artificially segment the industry in a way that does not reflect its actual functioning or the intent behind the exemption.

The District Court's adoption of the definition as interpreted under Taft-Hartley definition aligns with how demolition and abatement are viewed within the construction industry. For example, the Nevada State Contractors Board issues licenses for classifications such as "Removal of Asbestos" and "Wrecking Buildings," recognizing these activities as part of the construction industry. 1-ER-17 n.5. Similarly, construction labor union worker classifications and training programs both include demolition and abatement work as part of construction

activities. 2-ER-114–115. This more inclusive understanding of the meaning of "building and construction industry" is also reflected in safety regulations and industry practices, which treat asbestos removal and similar activities as integral parts of construction projects. 1-ER-17–18. By applying the Taft-Hartley definition of "building and construction industry" as interpreted under Taft-Hartley to the construction industry withdrawal liability exemption, the District Court's decision maintains consistency with how the industry actually operates and how regulatory bodies classify construction work.

D. Allowing the Trust to utilize a different and discretionary definition of "building and construction" would be contrary to the purpose of the building and construction industry exemption.

The Trust's overly restrictive definition of the "building and construction industry" exemption is fundamentally inconsistent with the purpose and intent of the exemption as established by Congress. By arguing that demolition and abatement work is "the opposite of the building and construction industry," the Trust seeks to exclude a significant portion of essential construction activities from the exemption's coverage. The Trust's interpretation is not only contrary to the more inclusive definition of "building and construction industry" that has developed through decades of precedent, but it also inconsistent with the reason for the exemption's existence.

As the District Court correctly recognized, the exemption was designed to account for the unique, transitory nature of the construction industry, where workers frequently move between employers and projects. 1-ER-5. If adopted, the Trust's interpretation would create artificial distinctions within the construction industry that do not reflect its actual functioning or the legislative intent behind the exemption and which would introduce uncertainty and instability into the construction labor market -- precisely the outcomes that Congress sought to avoid when it created the building and construction industry exemption.

1. The purpose of the construction industry exemption is to recognize the unique and transitory nature of construction work.

In creating the building and construction industry exemption, Congress recognized the unique, transitory nature of construction work. As the House of Representatives Report explained:

> In the construction industry, the funding base of the plan is the construction projects in the area covered by the collective bargaining agreements through which the plan is maintained. An individual employee will typically work for tens or even hundreds of different employers over his or her working career, and the volume of work for a given employer will often fluctuate greatly from year to year.

1-ER-5 (quoting H.R. Rep. No. 96-869, pt. 1, at 75 (1980)).

Because the labor pool of construction workers is industry-wide and not tied to any particular employer, a single employer's cessation of contributions to a plan do not shrink the overall contribution base or threaten a plan's funding. The

workers for whom those pension contributions were made will simply move to a new employer that will contribute to the pension fund on their behalf. As the Ninth Circuit has recognized, "the construction industry as a whole does not necessarily shrink when a contributing contractor leaves the industry; employees are often dispatched to another contributing contractor." 1-ER-5 (quoting *H.C. Elliott, Inc. v. Carpenters Pension Tr. Fund for N. California*, 859 F.2d 808, 811 (9th Cir. 1988)).

This recognition of the construction industry's unique nature is further reflected in how the industry operates on a day-to-day basis. For example, the Project Labor Agreement for Construction at the Nevada National Security Site ("NNSS Project Labor Agreement") covers a wide range of construction activities including demolition and abatement work, demonstrating the construction industry's understanding that these various tasks are part of the construction process. 2-ER-114–115.

This recognition of the unique nature of the construction industry is also demonstrated by other provisions in labor law designed to accommodate the construction industry's distinctive characteristics. For example, the Taft-Hartley Act's allowance for Section 8(f) pre-hire agreements in the construction industry stems from the same recognition of the industry's transitory nature. *Nova Plumbing, Inc. v NLRB,* 330 F.3d 531, 537 (D.C. Cir. 2003); 29 U.S.C. § 158(e). Congress has consistently recognized the unique nature of the construction

industry, further supporting an interpretation of the building and construction industry exemption that is inclusive enough to encompass the full range of on-site activities that play an integral role in the construction process, including demolition and abatement work, and other work that alters, repairs, or improves existing buildings and structures.

2. The Trust's interpretation would undermine the purpose of the construction industry exemption

The Trust's position that demolition and abatement work is "the opposite of the building and construction industry" would exclude a wide range of on-site construction activities from the exemption. 1-ER-11. This overly narrow reading runs contrary to the exemption's purpose of recognizing the transitory nature of construction work. Demolition, abatement, and related activities are integral parts of the construction process, particularly for renovation and improvement projects. These tasks are typically performed by the same pool of skilled laborers who work on other aspects of construction.[1] Excluding such work from the exemption would

[1] The NNSS agreement's provisions for workforce flexibility further demonstrate the need for flexibility and adaptability in construction employment. The NNSS agreement allows for temporary transfers of employees between different agreements (to perform different types of work) when mutually agreed upon by the employer and affected unions. 2-ER-101–102. This flexibility is crucial for efficient project management and reflects the reality that construction workers often need to move between different types of tasks as project needs evolve. The Trust's restrictive interpretation of the exemption would hinder this necessary flexibility, as employers would become reluctant to transfer workers between tasks or take on certain types of projects for fear of incurring unexpected withdrawal

create arbitrary distinctions and undermine Congress's goal in creating the exemption -- to accommodate the construction industry's unique labor dynamics.

In contrast, the Trust's narrow interpretation would require courts to draw specious and illogical distinctions between closely related construction activities. For example, if a construction laborer working on a construction project were to demolish old concrete (demolition work) in the morning to clear a project location for a new floor and were then to participate in installing the concrete for that new floor, under the Trust's interpretation this worker would not have performed work covered by the exemption in the morning but would have performed work covered by the exemption in the afternoon. The idea that a worker would be performing work covered by the exemption if they were using a sledgehammer to drive a construction stake but would not be performing work covered by the exemption if they used the same sledgehammer on the same project on the same day to break up concrete is nonsensical. Such hairsplitting would create significant uncertainty for employers and plans alike and lead to unworkable results.

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liability. By adhering to the established and more inclusive interpretation of "building and construction industry" that aligns with industry practices, this Court can help ensure that the construction industry retains the flexibility it needs to operate efficiently while still protecting the interests of workers and pension plans.

E. Allowing different Taft-Hartley funds the discretion to adopt inconsistent definitions of "building and construction" would undercut the purpose of ERISA by creating uncertainty in the industry and exposing employers to withdrawal liability on an inconsistent basis.

As the Supreme Court noted, ERISA was enacted to create "a uniform federal system of laws to govern employee benefit plans." (emphasis added) 1-ER-11 (citing *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 321 (2016)). This goal of uniformity is crucial for the construction industry, where employers and employees often work across multiple jurisdictions and on various types of projects for different employers. 1-ER-5 (quoting H.R. Rep. No. 96-869, pt. 1, at 75 (1980)). The District Court's holding – that the definition of "building and construction industry" includes on-site abatement and demolition work for purposes of applying the construction industry exemption to withdrawal liability - aligns with the established meaning of "building and construction industry" under the Taft-Hartley Act and promotes this uniformity by providing a consistent standard that can be applied across different contexts and jurisdictions. 1-ER-10.

This need for certainty is amplified by the unique characteristics of the construction industry that Congress recognized when creating the exemption. As noted in the legislative history, construction employment is characterized by fluid employer/employee relationships, and "an individual employee will typically work for tens or even hundreds of different employers over his or her working

career….”1-ER-5 (quoting H.R. Rep. No. 96-869, pt. 1, at 75 (1980)). This fluidity in employment relationships makes it essential to have clear, predictable rules governing withdrawal liability that are applied on a consistent basis to all employers. The inclusive interpretation adopted by the District Court provides this certainty by encompassing the full range of on-site construction activities, including demolition and abatement work, which are integral parts of many modern construction projects. 1-ER-17–20.

The importance of eliminating uncertainty in the construction industry is further underscored by the comprehensive nature of modern construction projects such as the NNSS Project Labor Agreement. 2-ER-114–115. The NNSS Project Labor Agreement illustrates this reality by including a wide range of activities within its scope, which includes both building work to erect a new structure and tasks such as asbestos abatement and hazardous waste removal that do not directly involve erecting a new structure, but which take place on the same worksite and which are nonetheless essential components of the construction project. 2-ER-114–115. This inclusivity reflects the interconnected nature of construction activities and the need for a flexible workforce capable of adapting to diverse project requirements. A limiting interpretation of the building and construction industry exemption that excludes demolition and abatement work would artificially segment

these interconnected activities and lead to inefficiencies and increased costs as employers attempt to navigate complex withdrawal liability rules.

Uncertainty about what activities qualify for the exemption would lead to:

1. Inconsistent application of the exemption across different jurisdictions and pension plans, resulting in disparate treatment of similarly situated employers and undermining ERISA's goal of uniformity;
2. Increased litigation (as demonstrated by the instant case), as employers and plans dispute the classification of various construction-related activities;
3. Added administrative burdens on pension fund trustees faced with setting definitions on a plan-by-plan basis;
4. Significant burdens on contractors that work across jurisdictions and must navigate differing interpretations of the exemption;
5. Difficulties in workforce planning and project bidding, as contractors struggle to distinguish between similar activities performed by the same worker[s] to anticipate potential liability; and
6. Reluctance by contractors to take on certain types of projects or work, fearing unexpected withdrawal liability.

ERISA aims to protect the interests of participants in employee benefit plans while also recognizing the need for employers to operate without undue financial burdens. See 29 U.S.C. § 1001(a). The building and construction industry

exemption serves this balance by creating an exemption from withdrawal liability for employers who qualify.

Affirming the District Court's decision would not impair the ability of the Trust to collect justified withdrawal liability from employers that truly "withdraw" from the plan within the meaning of the MPPAA amendments. As mentioned above, the Ninth Circuit has noted that "the construction industry as a whole does not necessarily shrink when a contributing contractor leaves the industry; employees are often dispatched to another contributing contractor." *H.C. Elliott, Inc. v. Carpenters Pension Tr. Fund for N. California*, 859 F.2d 808, 811 (9th Cir. 1988). This dynamic means that the withdrawal of a single employer does not threaten a plan's contribution base in the same way it might in other industries because contributions are still being made to the plan on behalf of the employees at issue – just by different employers.

Affirming the District Court's interpretation would maintain this careful balance. While ERISA and Taft-Hartley are separate statutes, they are both part of the broader framework of federal labor law. Interpreting the term "building and construction industry" consistently between these two statutes reduces confusion and promotes efficient administration of both pension plans and labor relations. Affirming the District Court's decision would also support a consistent interpretation of "building and construction industry" across ERISA and the Taft-

Hartley Act, adhere to firmly established precedent, respect the unambiguous legislative intent behind the exemption, promote legal coherence and simplify compliance for employers and plans.

In short, adopting a consistent interpretation of the "building and construction industry" term would serve the legislate purpose of proving uniformity in ERISA disputes and foster a more stable and predictable environment for employers operating in this sector, enabling them to assess potential liability and make informed business decisions. Allowing each pension fund to adopt separate and potentially inconsistent definitions of "building and construction industry" work leads to a patchwork of standards, unfairness, unpredictability, added burdens, and a fragmented legal landscape.

Conclusion

For the reasons stated above, the District Court decision should be affirmed.

Dated this 2nd day of August 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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