Case No. 07-5086

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JULIUS NOE, ET AL.,

Plaintiffs-Appellants-Respondents,

v.

POLYONE CORPORATION,

Defendant-Appellee-Petitioner.

Appeal from the United States District Court
for the Western District of Kentucky
(District Court Case No. 3:06-CV-00170-JIG)
Hon. John G. Heyburn, II, Chief District Judge

BRIEF OF THE ERISA INDUSTRY COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF POLYONE CORPORATION'S PETITION FOR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

The ERISA Industry Committee is a non-stock, non-profit corporation. It has no corporate affiliation or financial interests subject to disclosure under Fed. R. App. P. 26.1 or 6th Cir. R. 26.1.

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INTEREST OF AMICUS CURIAE

ERIC is a non-profit association whose members include America's largest private-sector employers. Those employers provide benefits to millions of active and retired workers and their families through employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* As set forth at greater length in its motion for leave to file this brief, ERIC has a strong interest in the issues presented in this case.

SUMMARY OF ARGUMENT

The panel in this case held, in conflict with every other circuit that has addressed the question, that if an agreement between an employer and a union provides that retired employees will receive health care coverage, and the agreement does not state expressly that the retiree health care coverage will terminate on a specified date or does not vest at all, the retiree health care coverage will vest by operation of law. From an ERISA standpoint, the panel's decision merits rehearing *en banc* for three reasons.

First, by creating a circuit split, the panel decision subverts Congress's goal of providing uniform nationwide regulation of employee benefit plans. Uniform nationwide standards are vital to the success of employer-provided benefit plans. *See* Part II, *infra*. Second, by holding that retiree health care coverage vests by operation of law unless the relevant labor agreement specifically provides to the con-

trary, the panel decision subverts Congress's intent that retiree health care coverage *not* vest by operation of law. *See* Part III, *infra*. Third, the panel decision endangers the employee benefit system by imposing hundreds of billions of dollars of unforeseen and unaffordable liability for retiree health care. *See* Part IV, *infra*.

ARGUMENT

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996). But if an employer establishes an employee benefit plan, the plan is governed by ERISA.

ERISA defines "employee benefit plan" as including both pension plans and welfare plans. 29 U.S.C. § 1002(3). An "employee pension benefit plan" provides income deferral or retirement income, *id.* § 1002(2); an "employee welfare benefit plan" includes any program that provides health care or benefits, including medical, surgical, or hospital care or benefits. *Id.* § 1002(1). *See Shaw*, 463 U.S. at 90-91 & n.5. Pension benefits are required to vest (that is, to become nonforfeitable) in accordance with a schedule that meets ERISA's vesting standards. 29 U.S.C.

§ 1023. By contrast, ERISA does not impose vesting standards on welfare benefits. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

I. EMPLOYER-SPONSORED RETIREE HEALTH CARE COVERAGE IS VULNERABLE TO EROSION.

Employment-based health plans provide health coverage to more than 161 million Americans under age 65, representing 62.2 percent of all health coverage in the United States.[1] More than 80 percent of these 161 million Americans are covered by ERISA-governed plans.[2] Private-sector employers on average pay more than 80 percent of the premium for each employee. For employees with single-person coverage, employers contribute almost $300 a month toward the premium for each employee. For employees with family medical coverage, that figure jumps to slightly more than $660 a month.[3]

In addition to providing health care coverage to current employees, some employers offer health care coverage to retirees. Employers are not legally obligated to provide retiree health care coverage, and several factors have combined to

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1 William Pierron & Paul Fronstin, *ERISA Pre-emption: Implications for Health Reform and Coverage*, Employee Benefits Research Institute (EBRI) Issue Brief No. 314, at 10 fig. 1 (Feb. 2008).

2 *Id.* at 11.

3 U.S. Department of Labor, Bureau of Labor Statistics, *National Compensation Survey: Employee Benefits in Private Industry in the United States, March 2007*, at 19-20 tables. 11 & 12 (2007).

place economic pressure on employers to eliminate or cut back on retiree health care coverage. These factors include the rising cost of health care, increases in the number of retirees and their increased longevity, and changes in the accounting rules for retiree health care coverage.[4]

As of 1999, about 37 percent of early retirees, and about 26 percent of Medicare-eligible retirees, had employer-sponsored health care coverage.[5] Surveys indicate that the percentage of firms sponsoring plans providing retiree health care coverage has gradually eroded or, at best, has remained the same.[6] Large firms are more likely than smaller firms to sponsor plans providing health care coverage for retirees. In 2000, just over one-half of firms with 5,000 or more employees sponsored plans providing retiree health care coverage, compared to only 9 percent of firms with fewer than 200 employees.[7]

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4 *See* 68 Fed. Reg. 41542, 41543-44 (July 14, 2003).

5 GAO, *Retiree Health Benefits: Employer-Sponsored Benefits May Be Vulnerable To Further Erosion* 2, 8-9 (May 2001).

6 GAO, *Retiree Health Benefits*, at 6. The GAO report cites a study by William M. Mercer, Incorporated, finding that the percentage of firms providing health care coverage for early retirees fell from 41 percent in 1997 to 36 percent in 2000, while the percentage of firms providing health care coverage for Medicare-eligible retirees fell from 35 percent to 29 percent during the same period. A study by the Kaiser Family Foundation, also cited by the GAO, found that the percentage of large employers sponsoring retiree health care coverage held steady at 37 percent between 1997 and 2000. *Id.*

7 *Id.* at 8 (citing Kaiser Family Foundation study).

The Equal Employment Opportunity Commission has determined that "employer-sponsored retiree health benefits clearly benefit employees."[8] The Commission noted that "[a]lternatives to employer-sponsored retiree health coverage are costly, offer fewer benefits, and may be limited in availability, particularly for retirees not yet eligible for Medicare."[9] Accordingly, the EEOC determined that "it is in the best interest of both employers and employees for the Commission to pursue a policy that permits employers to offer these benefits to the greatest extent possible."[10]

II. THE PANEL DECISION THREATENS EMPLOYMENT-BASED RETIREE HEALTH CARE COVERAGE BY SUBVERTING CONGRESS'S GOAL OF UNIFORM NATIONAL REGULATION.

The circuit split created by the panel decision frustrates Congress's goal of uniform nationwide treatment of employee benefit plans, *see Lockheed Corp. v.. Spink,* 517 U.S. 882, 890-891 (1996); *Gen. Motors Corp. v. Buha*, 623 F.2d 455, 459 (6th Cir. 1980), and violates the general principle that "inter-circuit conflicts should be avoided wherever it is possible to do so in good faith and in reason," *In re Glenn*, 760 F.2d 1428, 1440 (6th Cir. 1985). Moreover, by creating disuni-

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8 68 Fed. Reg. at 41543.
9 *Id.* at 41544.
10 *Id.* at 41543.

formity among the circuits, the panel decision threatens the success of employer-based health care coverage, which depends on uniform federal regulation.

This Court has long recognized that "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Caffey v. Unum Life Ins. Co.*, 302 F.3d 576, 582 (6th Cir. 2002) (citation omitted). For this very reason, Congress included in ERISA a broadly worded preemption provision "to minimize the administrative and financial burden of complying with conflicting directives among [different jurisdictions] requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction." *Ky. Ass'n of Health Plans, Inc. v. Nichols*, 227 F.3d 352, 358 (6th Cir. 2000) (citation omitted and alteration in original).[11]

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[11] ERISA's preemption provision states that ERISA supersedes state laws that "relate to any employee benefit plan." 29 U.S.C. § 1144(a). Thanks to this provision, multi-jurisdictional employers are able to provide health care benefits on a uniform basis to similarly situated participants, regardless of the jurisdiction in which the participants work or reside. Nationwide uniformity allows health care plans to operate efficiently and provide participants and their families with health care coverage at a lower cost than would be possible if their plans were required to comply with the varying requirements of each jurisdiction in which the employer conducts business or in which a participant resides.

The panel decision threatens the uniform nationwide regulation of employee benefit plans—including employee welfare benefit plans—that Congress sought by precluding state regulation of such plans. The presumption in other circuits is that retiree health benefits do *not* vest, absent a clear expression of intent that they *should vest*. By contrast, under the panel decision, the presumption is that retiree health benefits *do* vest, absent a clear expression of intent that they *should not*. Rehearing *en banc* is required to eliminate the conflict between the panel decision and the decisions in other circuits and thereby avoid the balkanized regulation of employee benefit plans that Congress sought to avoid.

III. THE PANEL DECISION IS CONTRARY TO CONGRESS'S INTENT THAT EMPLOYEE WELFARE BENEFITS NOT VEST BY OPERATION OF LAW.

"ERISA [does not] establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (citing *Shaw v. Delta Airlines, Inc.*, 43 U.S. 85 at 90-91). "Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans." *Adams v. Avondale Indus.*, 905 F.2d 943, 947 (6th Cir. 1990).

Accordingly, this Court properly cautioned in *Adams* that "we must avoid any rule that would have the effect of undermining Congress' considered decision

that welfare benefit plans not be subject to a vesting requirement." *Id.* Thus, as this Court stated in *Sprague v. Gen. Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (*en banc*), "an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest 'must be found in the plan documents and must be stated in clear and express language.'" *Id.* at 400 (citation omitted). *See also id.* ("To vest benefits is to render them forever unalterable.").

The panel decision disregards this Court's admonition in *Sprague* that "an employer's commitment to vest such benefits is not to be inferred lightly," *id.*, because it holds, as a practical matter, that employee welfare benefits vest by operation of law *unless* the labor agreement specifically provides the contrary. In establishing such a rule, the panel decision frustrates Congress's intent that such benefits *not* vest by operation of law. Rehearing *en banc* should be granted to align the law in this Circuit with Congressional intent.

IV. THE PANEL DECISION THREATENS THE PRIVATE EMPLOYEE BENEFIT SYSTEM.

The panel decision holds that if a labor agreement provides for retiree health care coverage, retiree coverage will vest by operation of law, unless the agreement explicitly provides that the retiree health care coverage does not vest. Many employers will not be able to obtain union agreement to the introduction of an explicit statement of this kind. Moreover, it is not clear that adding such a provision to an

existing agreement will solve the problem that the panel decision creates. Employees who have already retired, employees who are eligible to retire, and even employees who are not yet eligible to retire can be expected to claim that the addition of a vesting disclaimer cannot eliminate the rights that the panel decision suggests that these retirees and employees now have. Although it remains to be seen whether such claims will be successful, the panel decision certainly increases the chances that such claims will be made.

Unless the panel decision is reversed, the practical effect of the decision will be to expose employers to the risk of being held responsible for billions of dollars in unforeseen liabilities. Liabilities of this magnitude could force some employers into bankruptcy and jeopardize both retiree pension benefits and retiree health benefits, as well as the jobs of active employees. In addition, the risk of incurring such liabilities will doubtless provide additional incentive to those employers that now provide retiree health care coverage to cease doing so as soon as they can.[12] These consequences will not serve anyone's interests: not the interests of the employers, not the interests of the employees and retirees who currently receive em-

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[12] The incentive to eliminate retiree health care coverage will be magnified by ERISA § 502(e), which allows plan participants to bring suit wherever the defendant can be found. *See* 29 U.S.C. § 1132(e).

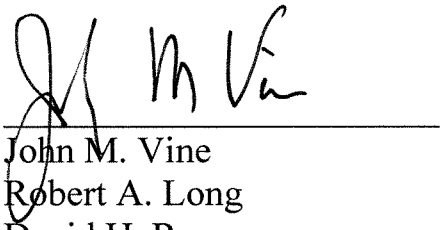
ployer-provided health care coverage and certainly not the interests of the nation's health care system.

In light of the current economic downturn, these ripple effects of the panel decision could not be more ill-timed. Avoiding them is yet a further reason to grant rehearing *en banc*.

CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be granted.

Respectfully submitted,



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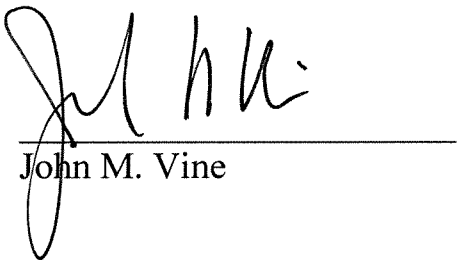
Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with an oral instruction from the Clerk's Office that *amicus curiae* briefs in support of the Petition for Rehearing in this case may be up to 10 pages in length. Pursuant to Fed. R. App. P. 32(a)(7)(B) this brief contains 2,136 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman, 14 point.



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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of April 2008, I caused two true and correct copies of the foregoing Brief of the ERISA Industry Committee as *Amicus Curiae* in Support of Appellee's Petition for Rehearing *En Banc* to be served by e-mail and Federal Express on the following:

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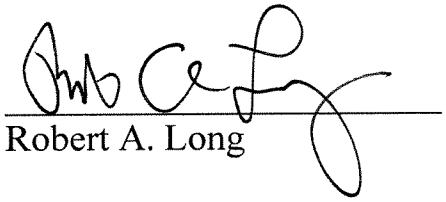

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