No. 13-1010

IN THE
Supreme Court of the United States

M&G POLYMERS USA, LLC, ET AL.,

Petitioners,

v.

HOBERT FREEL TACKETT, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE ERISA INDUSTRY COMMITTEE AND THE AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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The ERISA Industry Committee (ERIC) and the American Benefits Council (the Council) respectfully submit this brief as *amici curiae* in support of petitioners.[1]

INTEREST OF *AMICI CURIAE*

ERIC is a nonprofit organization representing the Nation's largest employers that maintain ERISA covered pension, healthcare, disability, and other employee benefit plans. These employers provide benefits to millions of active workers, retired persons, and their families nationwide. For this reason, ERIC frequently participates as *amicus curiae* in cases that have the potential for far reaching effects on employee benefit plan design or administration.[2]

The Council is a broad-based nonprofit trade association founded to protect and foster the growth

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[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici*, their members, or counsel made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.3, the parties in this case have granted blanket consent to the filing of *amicus curiae* briefs.

[2] *See, e.g.*, *Conkright v. Frommert*, 559 U.S. 506 (2010) *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248 (2008); *Beck v. PACE Int'l Union*, 551 U.S. 96 (2007); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

of the Nation's privately sponsored employee benefit plans. The Council's members include both small and large employer-sponsors of employee benefit plans, including many Fortune 500 companies. Collectively, the Council's approximately 300 members sponsor and administer plans covering more than 100 million plan participants and beneficiaries. The Council also frequently participates as *amicus curiae* in cases that have the potential for far reaching effects on employee benefit plan design or administration.[3]

Amici and their members seek to ensure that voluntary employee benefit plans remain a workable and vital feature of the American employment landscape. When courts interpret collective bargaining agreements to provide lifetime, unalterable healthcare benefits to retirees—in the absence of any language explicitly stating that such benefits were intended to vest for life—many employers may question the wisdom of offering any kind of healthcare benefits to their employees after their retirement date.

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[3] *See, e.g.*, *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009); *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008); *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question of how to interpret a collective bargaining agreement to determine whether the obligation to provide retiree healthcare benefits survives the agreement's expiration and vests for life. If there is one thing that employers, retirees, and labor unions need in this area of the law, it is certainty. Employers need certainty to conduct their businesses with a clear understanding of whether they will be compelled to provide retirees and their families with decades' worth of healthcare benefits when healthcare treatments, technologies, and drugs are ever-changing. Retirees need certainty to plan their retirement with knowledge of exactly how long any employer-provided coverage will last and whether they might need to explore other options for healthcare coverage both before and after becoming eligible for Medicare. And unions need certainty to effectively engage in collective bargaining with respect to the duration of retiree healthcare benefits.

In light of this collective and overriding need for certainty, this Court should apply the longstanding rule that the benefits and burdens of a contract do not survive the agreement's expiration (and thus do not vest for life) absent a clear and unequivocal statement to the contrary. The cases are legion holding that (1) the benefits and burdens of a contract typically do not survive its expiration absent an express statement of such intent; and (2) contractual silence or ambiguity generally is not read to impose onerous burdens on a party. Because finding that retiree healthcare benefits have vested for life contravenes both of these venerable principles,

courts should—at the very least—require the parties to state their intent to achieve such vesting in clear and unequivocal terms. If the parties wish to negotiate lifetime healthcare benefits for retirees and their families, they are free to do so. But such lifetime benefits should not be a "gotcha" sprung by the judiciary on employers who never intended to assume such costly and unpredictable burdens. Thus, unless clearly stated otherwise, the terms of a collective bargaining agreement pertaining to retiree healthcare benefits should apply only to those employees who retire during the term of the agreement and only for the duration of the agreement.

Requiring parties to state their intentions clearly is all the more appropriate because Congress, in enacting the Employee Retirement Income Security Act of 1974 (ERISA), consciously imposed a vesting standard for *pension* benefits but not *healthcare* benefits. In distinguishing between the two types of benefits, Congress recognized that it is easier for employers to anticipate the costs of pension plans, which are based on fairly stable and predictable data. Healthcare costs, by contrast, are inherently uncertain—new treatments, technologies, and drugs are always emerging, and (as a result) health plan designs, costs, and standards are constantly changing. No reasonable employer can be deemed by *implication* to have unalterably committed itself to provide such uncertain and costly benefits for life.

The Sixth Circuit's contrary rule—that retiree healthcare benefits in a collective bargaining agreement are *presumed* to vest for life—is made up out of whole cloth. Nothing in contract law, labor law, or employee-benefits law supports the notion

that silence regarding a benefit's duration can be interpreted as a promise to provide that benefit for life. And there is no reason to presume that an employer would agree *sub silentio* to such a costly and open-ended commitment. To the contrary, presuming vesting of lifetime retiree healthcare benefits saddles employers with massive, unexpected financial burdens, and leads employers to question the wisdom of providing such benefits at all, for fear that a court might later encumber them with obligations they never intended to assume.

Applying traditional rules of contract interpretation, the judgment below must be reversed because the collective bargaining agreements at issue here do not include a clear and unambiguous statement (or, indeed, any statement at all) of an intent to vest benefits. In finding that retiree healthcare benefits had vested for life, the Sixth Circuit—as it has done in prior cases—relied on a series of special rules of contract interpretation that it has created in this context. Those rules seize upon boilerplate terms of collective bargaining agreements—such as the linking of eligibility for retiree healthcare coverage to eligibility for a pension—to conclude that the parties must have intended to provide lifetime healthcare benefits to retirees. Such strained implications, however, do not remotely qualify as a clear and unequivocal statement that healthcare benefits will vest for life.

Finally, even assuming *arguendo* that it was appropriate for the Sixth Circuit to have relied on policy considerations to support its presumption favoring vesting in *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), such policy considerations have changed dramatically since then. Expansions in

Medicare coverage, as well as the enactment of the Patient Protection and Affordable Care Act and other pathmarking healthcare-related legislation, have created healthcare options that did not exist in 1983. These options ensure that retirees and their families will have access to affordable, comprehensive healthcare coverage even in the absence of the Sixth Circuit's artificial rule that unilaterally imposes lifetime healthcare obligations on employers.

ARGUMENT

I. This Court Should Set Forth Predictable Rules Regarding The Vesting Of Retiree Healthcare Benefits.

It is important to have clear, predictable rules for determining when retiree healthcare benefits will be deemed to have vested for life and thus rendered forever unalterable. *See Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (noting "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities"); *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (emphasizing, in the pension benefits context, the virtues of a rule that "promotes predictability" and "assure[s] a predictable set of liabilities") (internal quotation marks omitted). That is true for at least three reasons.

First, the lack of a clear rule regarding the vesting of healthcare benefits could burden employers with enormous healthcare costs for which they neither bargained nor are financially prepared. Providing lifetime healthcare benefits to retirees is an incredibly expensive undertaking. Even for a company with a relatively small retiree population, the cost of providing lifetime healthcare benefits can easily exceed tens or hundreds of millions of dollars.

Such costs are substantially higher, of course, for those companies with *hundreds of thousands* of retirees.[4] And those costs will only increase as the retiree population continues to age, life expectancies go up, and increases in healthcare costs continue to outpace inflation and economic growth.[5]

Although some employers might knowingly choose to incur such large and unpredictable costs, the current state of the law creates the possibility that an employer that never agreed or expected to provide lifetime benefits could later be told by a court that benefits did in fact vest and it now is on the hook for hundreds of millions of dollars in unexpected costs. Such enormous, unanticipated costs can have a crippling impact on a company's financial health. *See, e.g.*, *Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 429 (6th Cir. 2010) (CEO testifying that vested retiree healthcare liabilities "could have bankrupted the company by rendering it unable to obtain capital"). At the very least, the prospect that a court could later impose such unexpected costs "might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from

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[4] *See, e.g.*, Malcolm Gladwell, Overdrive: Who Really Rescued General Motors, The New Yorker, November 1, 2010, available at http://goo.gl/yLxTpC (noting that, as of 2007, General Motors had around 517,000 retirees).

[5] See United States Census Bureau, An Aging Nation: The older Population in the United States, May 2014, at 1, available at http://www.census.gov/prod/2014pubs/p25-1140.pdf; Deloitte Center for Health Solutions, Health care costs, benefits, and reform: What's the next move for employers?, 2013, at 1, available at http://goo.gl/LW3gJs

adopting them." *Conkright*, 559 U.S. at 517 (internal quotation marks omitted).

Second, without a clear rule specifying when retiree healthcare benefits vest under a collective bargaining agreement and when they do not, employers will again be subject to the same unpredictability and inconsistency concerns that prompted this Court to grant *certiorari* in the first place. *See, e.g.*, *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000) (explaining that courts are "all over the lot" in determining whether retiree healthcare benefits in a collective bargaining agreement have vested). Without a clear rule, courts in different jurisdictions will undoubtedly continue to take different approaches and reach different results regarding the vesting of retiree healthcare benefits. Such a patchwork of legal approaches undermines the "congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law." *Smith v. Evening News Ass'n*, 371 U.S. 195, 200 (1962); *see also Conkright*, 559 U.S. at 517 (2010) (emphasizing that rules in the pension benefit context should "serve[] the interest of uniformity" and "avoid a patchwork of different interpretations of a plan, like the one here, that covers employees in different jurisdictions"). It also would "make administration of a nationwide [healthcare] plan more difficult," thus producing "considerable inefficiencies, which the employer might choose to offset by lowering benefit levels." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987) (relying on this reasoning in the context of applying ERISA's preemption provision to a state law) (internal quotation marks omitted). And it will encourage plaintiffs to forum shop, seeking out those

courts that have construed collective bargaining agreements in manner more favorable to a finding of vesting.

Third, anything short of a clear rule regarding the vesting of retiree healthcare benefits will inevitably lead to more litigation, burdening the courts with disputes that could and should have been resolved at the bargaining table. *See, e.g.*, *Pease v. Production Workers Union of Chicago & Vicinity Local 707*, 386 F.3d 819, 823 (7th Cir. 2004) (noting federal labor law's desire for disputes to be "resolved by the affected parties over the bargaining table [] rather than in court"); *Federal Express Corp. v. Air Line Pilots Ass'n*, 67 F.3d 961, 964 n.4 (D.C. Cir. 1995) ("[C]ollective bargaining, rather than litigation, is the favored mode of settling labor disputes."); *see also* 29 U.S.C. § 201(a). This is not a matter of speculation. For years, the lower federal courts have lamented the seemingly endless stream of retiree healthcare cases that have been spawned by unpredictable and inconsistent legal rules. *See, e.g.*, *Pabst Brewing*, 217 F.3d at 541 (noting that the question of whether retiree healthcare benefits are vested has been "much-litigated"); *Local Lodge 470 of Dist. 161 v. PPG Indus., Inc.*, No. Civ. 01-22110, 2006 WL 901927, *1 (W.D. Pa. March 31, 2006) (noting that "[t]here has been much litigation in this arena in the last fifteen years and copious amounts of 'ink' have been expended" in addressing the duration of retiree healthcare benefits). A clear rule from this Court would help resolve that problem, relieving the courts and the parties from the consequences of contractual uncertainty. *See Conkright*, 559 U.S. at 517 (noting, in the pension benefit context, the virtues of a rule that "promotes efficiency by

encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation").

II. An Intent To Vest Retiree Healthcare Benefits Must Be Stated In Clear And Unambiguous Terms.

In light of the importance of a predictable rule governing the vesting of retiree healthcare benefits, the Court should hold that such benefits vest only when a collective bargaining agreement includes a clear and unambiguous statement that retiree healthcare benefits will be provided for life, notwithstanding the expiration of the applicable collective bargaining agreement. Such a clear-statement rule is consistent with basic principles of contract interpretation, the choices Congress made in enacting ERISA, the nature of healthcare benefits generally, and the purposes of collective bargaining.

The general rule is that contractual obligations included in a collective bargaining agreement terminate upon the expiration of that agreement. *See*, *e.g.*, *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991) (noting that, "in the ordinary course," contractual obligations cease "upon termination of the bargaining agreement").[6] Although parties can

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[6] The National Labor Relations Act, 29 U.S.C. §§ 151 et seq. ("NLRA"), does provide that some obligations continue to apply after the expiration of a collective bargaining agreement as "terms and conditions of employment." 29 U.S.C. § 158(d). This preserves the status quo during bargaining by the union and the employer until there is a new, agreed upon collective bargaining agreement. The surviving "terms and conditions" will cease either when (i) the parties reach a new collective bargaining agreement, or (ii) the parties come to an impasse in bargaining

agree that contractual obligations will persist even after a collective bargaining agreement expires, such an agreement must be stated in "explicit terms." *Id.* (explaining that rights vest "if a collective-bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration"). Normal rules of collective-bargaining-agreement interpretation thus counsel in favor of requiring a clear statement before retiree healthcare benefits can be deemed to have vested for life.

Common sense confirms what baseline rules of contract interpretation suggest. As explained above, providing decades' worth of healthcare benefits to retirees is an enormously expensive and unpredictable obligation for a company to assume. It is simply implausible to believe that a company would assume such an extraordinary obligation *sub silentio*. Private parties, like legislatures, typically do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *cf. Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013) (if a significant concession is alleged in a contract, "we would expect a clear indication of such [and] not inscrutable silence"). Before imposing such a commitment, courts are

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and the employer choses unilaterally to impose new "terms and conditions." As the statutory text suggests, and this Court has held, those status quo "terms and conditions" apply only to "employees" and do not include benefits provided to retirees. *See Allied Chem. and Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). Retiree healthcare benefits are thus not among the "terms and conditions of employment" that continue to apply even after the expiration of a collective bargaining agreement. *See id.*

entitled and required to insist that it be stated in clear and unequivocal terms. *See, e.g.*, *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 618 (7th Cir. 1993) (Easterbrook, J. dissenting) ("[A]s the duration and cost of the supposed promise increase, so does the level of formality required to conclude that a promise exists."); *Int'l Union v. ZF Boge Elastmetall LLC*, 649 F.3d 641, 648 (7th Cir. 2011) ("Courts are reluctant to interpret contracts providing for some perpetual or unlimited contractual right unless the contract clearly states that that is the intention of the parties.") (internal quotation marks omitted).

That is all the more true given that Congress explicitly considered and *rejected* vesting for healthcare benefits in enacting ERISA. Although that statute contains elaborate vesting requirements for *pension* benefits, those statutory vesting standards do not apply to *healthcare* benefits. *See, e.g.*, *Crown Cork & Seal Co. v. Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 501 F.3d 912, 919 (8th Cir. 2007); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999); *Gable v. Sweetheart Cup Co.,* 35 F.3d 851, 855 (4th Cir. 1994). "This was not merely an oversight on the part of Congress." *Skinner Engine*, 188 F.3d at 138. To the contrary, Congress deliberately chose *not* to impose vesting requirements for healthcare benefits because "[t]o require the vesting of those ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." *Id.* (internal quotation marks omitted). Because Congress deliberately refused to establish a mandatory vesting regime for retiree healthcare benefits, parties seeking to deviate from that baseline in a collective

bargaining agreement should be required to make their intentions clear.

Important differences in the manner in which pension benefits and healthcare benefits are funded also explains why it is far more appropriate to subject the former to vesting standards than the latter. Pension plans are pre-funded by law. That is, employers (and often times employees) fund pension benefits over an employee's career according to regulated actuarial standards designed to ensure that the plan has adequate funding to pay the promised benefits after retirement. *See, e.g.*, *Barker v. Kansas*, 503 U.S. 594, 603 (1992) (recognizing that "a typical pension[] represents deferred compensation"); 29 U.S.C. § 1053(a)(1)(ii) (defining an employee's pension as an "accrued benefit derived from his own contributions" or "from employer contributions"). While there are some exceptions, healthcare plans are (for the most part) funded on a pay-as-you-go basis, meaning that employers incur costs and pay claims as they arise. Thus, whereas companies can predict with a fair degree of accuracy the financial cost of funding a pension plan, healthcare benefits are subject to so many unstable variables that it "prevent[s] accurate prediction of future needs and costs." *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988). That inability to accurately predict what healthcare costs will be decades into the future, coupled with the fact that healthcare costs are incurred on a pay-as-you-go basis, only confirms that no reasonable employer would agree to provide such benefits in perpetuity without a clear statement of such intent.

The need for national clarity based upon clear and express language is particularly important in this

context because a finding of vested lifetime benefits distorts the collective-bargaining process. The purpose of reoccurring collective bargaining is to allow labor and management regularly to reassess the competitive landscape and make changes as needed to ensure the health of the business and the well-being of employees: "Rational contracting over long periods requires flexibility. What worked yesterday may be counterproductive today. Labor and management need freedom to adapt their arrangement as circumstances change." *Bidlack*, 993 F.2d at 618 (7th Cir. 1993) (Easterbrook, J., dissenting). Finding retiree healthcare benefits to have vested for life, however, ties the hands of labor and management, preventing them from making changes to benefits, coverages, and cost-allocations, even if both sides agree that such changes make sense. The financial burdens of vesting can also prevent employers and unions from agreeing to new benefits for *active* employees, thus directly impacting a union's ability to obtain improvements that its membership might otherwise be able to get if retiree healthcare benefits were not locked into place. By insisting on express vesting language, courts can ensure that the parties really intended to tie their own hands before a court hamstrings the negotiating freedom that would otherwise exist.[7]

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[7] Although retirees typically are not part of the "bargaining unit" for whom unions negotiate, employers and unions can, if they so choose, negotiate and agree to terms in a collective bargaining agreement providing healthcare benefits to existing retirees. *See*, *e.g.*, *Pittsburgh Plate Glass*, 404 U.S. at 170-73. In the absence of vesting, therefore, employers and unions have a free hand to adjust retiree healthcare benefits to respond to evolving business realities. A finding of vesting, in contrast,

Additionally, vesting in the context of healthcare benefits would mean that retirees would be locked into a single set of treatments, services, and medications—because employers could not be deemed to have consented to covering treatments and medications that did not ever exist at the time the collective bargaining agreement was ratified. But healthcare plans are "subject to fluctuating and unpredictable variables," including "inflation, changes in medical practice and technology, and increases in the cost of treatment." *Moore*, 856 F.2d at 492. Doctors and insurance providers come and go. Medical technologies and practices evolve over time. And healthcare plans change from year to year. No plan administrator or participant wants to be locked into a single plan, or a single set of services, or even a single kind of coverage, which may no longer be relevant, appropriate, or preferred over the years. Instead, it is in everyone's interests—retirees included—for healthcare benefits to evolve over time as treatments and delivery mechanisms change. In light of that inherent need for flexibility, the vesting of retiree healthcare benefits is not something that should be inferred in the absence of a clear statement of intent that the parties actually did intend to be locked into a single set of services or level of medical coverage.

None of this is to say, of course, that an employer cannot commit to providing lifetime healthcare benefits to retirees if it affirmatively chooses to do so (and in the manner it chooses to do so). But in light

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locks employers and unions into a set of benefits that cannot be changed, even if circumstances shift dramatically.

of traditional rules of contract interpretation, Congress' deliberate decision not to subject healthcare benefits to ERISA's vesting regime, the significance (both in terms of duration and costs) of finding benefits to be vested, and the nature of collective bargaining, parties must at the very least state their intent to vest benefits in express and unequivocal terms. Mere silence regarding the duration of those benefits—or even unclear or ambiguous language—cannot be enough to trigger such a significant obligation: "It unsettles and in the end disserves the institution of voluntary agreement to permit straws in the wind to become shackles." *Bidlack*, 993 F.2d at 618 (Easterbrook, J. dissenting).

Finally, recognizing that collective bargaining agreements typically do not provide for vested healthcare benefits (absent a clear statement of an unequivocal intent to do so) will not automatically result in scores of employers terminating retiree healthcare plans. Employers have strong incentives to offer healthcare benefits to their employees and retirees, including the need to attract and retain skilled workers and maintain good relationships with unions and employees. That is precisely why most employers offer healthcare benefits to their salaried, non-collectively-bargained employees, even though those employers have no legal or contractual obligation to do so. Employers will thus continue to offer and provide healthcare benefits to their retiree populations where it makes business sense to provide such benefits, without being compelled to do so by the Sixth Circuit's artificial vesting rule.

III. The Court Should Expressly Reject The Flawed Rules Of Contract Interpretation Applied By The Sixth Circuit In This Case.

When proper rules of contract interpretation are applied, the judgment below must be reversed because the contracts in this case did not include a clear and unequivocal statement that the parties intended to vest retiree healthcare benefits for life. In reaching a contrary conclusion, the Sixth Circuit again applied a special body of contract law that it has developed in this context to find a "clear and unambiguous" intent to vest benefits where none exists. Those rules of interpretation help explain why the Sixth Circuit has "concluded that benefits have vested (or likely vested) in 16 out of 18 reported cases" since 1983, Pet. 12, while simultaneously purporting to disclaim the application of the *Yard-Man* presumption in favor of vesting, *see, e.g.*, *Yolton v. El Paso Tennessee Pipeline Co.*, 435 F.3d 571, 579 (6th Cir. 2006); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996).

This Court should expressly reject the Sixth Circuit's reliance on neutral or ambiguous contract provisions to find vesting of lifetime retiree healthcare benefits. Contrary to the Sixth Circuit's reasoning, the provisions discussed below do not and cannot suggest an intent to extend retiree healthcare benefits beyond the expiration date of a collective bargaining agreement.[8]

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[8] The Sixth Circuit's rule also ignores that many plans clearly state that the employer is reserving the right to modify or terminate the plan in the future. Such plans, which often are incorporated by reference into the collective bargaining agreement itself, cannot be deemed to create vested benefits,

Full Premium/Contribution. The Sixth Circuit often holds (as it did in this case) that use of phrases such as "full premium," "full contribution," or "full cost" to describe a company's retiree healthcare obligation indicates that the parties intended for those benefits to vest for life. *See, e.g.*, Pet. App. 11 (relying on the phrase "full Company contribution" to find vesting); *Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 262 (6th Cir. 2012) (relying on phrase "[t]he Company agree[s] to pay the cost of [healthcare] insurance for the retiree and his dependents" to find vesting) (internal quotation marks omitted). Such promises, the Sixth Circuit has reasoned, would be "illusory" if a company could "unilaterally change the level of contribution" after the contract's expiration. Pet. App. 11.

That makes no sense. A company's promise to pay the "full premium" of retiree healthcare benefits specifies the amount the company has agreed to contribute *during the term of the contract*; it does not at all suggest that the company has agreed to continue to pay that amount for retirees *after the contract has expired*. Nor is there anything "illusory" about such a promise. A commitment to pay the "full premium" of retiree healthcare is a fully enforceable obligation while the collective bargaining agreement is in effect. The fact that such an obligation—like most other provisions of a collective bargaining agreement—ceases to apply as a contractual obligation once the contract expires does not render that promise "illusory."

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given the employer's clearly stated intention to reserve all rights.

Tying of Eligibility for Pension & Healthcare Benefits. The Sixth Circuit in this case also held (as it has in countless prior cases) that the parties must have intended to vest retiree healthcare benefits because the applicable collective bargaining agreements "tied *eligibility* for health-care benefits to pension benefits." Pet. App. 12 (emphasis added); *see also, e.g.*, *Noe v. PolyOne Corp.,* 520 F.3d 548, 558 (6th Cir. 2008) ("According to this court, language in an agreement that ties eligibility for retiree health benefits to eligibility for a pension indicates an intent to vest the health benefits."); *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 422 (6th Cir. 2004) ("Because the Supplemental Agreement ties eligibility for retirement-health benefits to eligibility for a pension ... there is little room for debate that the retirees' health benefits vested upon retirement.").

But such cross-referencing of eligibility requirements says nothing at all about whether the parties agreed to lifetime healthcare benefits for retirees. By stating that benefits will be provided to those "who are eligible for and receiving a monthly pension," Pet. App. 6, or to those who are "eligible for benefits under ... [the] Pension Plan," *McCoy*, 390 F.3d at 419, the parties are simply identifying *who* will receive healthcare benefits; they are not saying anything about the *duration* of that benefit. For that reason, the prototypical language on which the Sixth Circuit relies to find vesting affords healthcare benefits to those individuals "*who* are eligible" for a pension, Pet. App. 6 (emphasis added), not to individuals "*so long as*" they receive a pension. There is, moreover, a straightforward reason why employers apply the same eligibility rules for pensions and healthcare benefits, and that reason has nothing at

all to do with vesting or duration: corporate benefits departments simply find it easier to administer post-retirement benefits, including healthcare and pension plans, if there is a commonality with respect to eligibility.

General Durational Clauses. The Sixth Circuit also consistently holds that a general durational clause in a collective bargaining agreement—*e.g.*, the provision stating that the contract will expire on a date certain—is not sufficient to terminate retiree healthcare benefits at the conclusion of that agreement. *See, e.g.*, *Noe*, 520 F.3d at 554 ("[A]bsent specific durational language referring to retiree benefits themselves, courts have held that the general durational language says nothing about those retiree benefits.") (internal quotation marks omitted); *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1071 (6th Cir. 2008) ("[T]he rule in this circuit [is] that general durational clauses cannot trump contractual promises of lifetime retiree healthcare benefits."); *Yolton*, 435 F.3d at 580 ("[G]eneral durational provisions only refer to the length of the [collective bargaining agreements] and not the period of time contemplated for retiree benefits." (internal quotation marks omitted)).

Again, that is wrong. As explained, contractual obligations included in a collective bargaining agreement generally terminate upon the agreement's expiration. *See Litton*, 501 U.S. at 207. There is nothing in law or logic that carves out an exception to that general rule for retiree healthcare benefits. To the contrary, although the NLRA mandates that "terms and conditions of employment" must survive the expiration of a collective bargaining agreement in certain circumstances, retiree healthcare benefits are

not among such terms and are instead treated as ordinary "contractual obligations" that "cease[], in the ordinary course, upon termination of the bargaining agreement." *Id*.

Specific Durational Clauses. Finally, the Sixth Circuit also has "consistently held that the inclusion of specific durational limitations in some provisions, but not others, suggests that benefits not so specifically limited, were intended to survive." *Moore v. Menasha Corp.*, 690 F.3d 444, 458 (6th Cir. 2012) (internal quotation marks omitted). That too reflects a flawed understanding of how collective bargaining agreements typically are drafted.

Specific durational clauses operate to terminate certain contractual obligations before the date on which the collective bargaining agreement terminates as a whole—if, for example, certain events occur or if an earlier time period is reached. The choice to attach such language to specific contractual obligations, however, hardly suggests that all other obligations not so limited were intended to survive in perpetuity. The parties' failure to include specific language terminating retiree healthcare benefits on a specific date thus does nothing to suggest that the parties intended for those benefits to survive the expiration of the contract and vest for life.

To conclude, the Sixth Circuit has used these false rules of interpretation to impose in fact what it has disclaimed in form—a presumption in favor of vesting that finds an intent to permanently vest benefits from language that suggests nothing of the sort. This Court should expressly reject those rules.

IV. The Healthcare Coverage Landscape Has Improved Significantly Since *Yard-Man* Was Decided.

Finally, dramatic improvements in the availability and affordability of healthcare options for retirees provide yet another reason to reject the Sixth Circuit's artificial rule presuming that healthcare benefits vest for life.

Yard-Man was decided at a time when retirees—especially pre-65 retirees who were not yet eligible for Medicare—faced significant obstacles to obtaining non-employer-provided healthcare coverage. Access to affordable individual healthcare plans was limited. Exclusions for pre-existing medical conditions (even under a spouse's employer-provided plan) often resulted in inadequate coverage. And retirees had few protections under federal law that would guarantee a baseline level of coverage or require private insurers to issue affordable plans.

Although the so-called *Yard-Man* presumption could not be legally justified even under that regime, any policy considerations that may have existed when it was first applied no longer exist. Since *Yard-Man* was decided in 1983, a number of legal changes have significantly expanded the availability and affordability of healthcare benefits for both pre-65 and post-65 retirees. Those legal changes have dramatically shifted the landscape for post-employment healthcare benefits and undermined the policy considerations (if any) that originally supported the *Yard-Man* presumption.

With respect to pre-65 retirees, Congress has enacted a number of statutes over the past 30 years that have increased access to healthcare coverage for

retirees who are not yet eligible for Medicare. For example, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), expanded the availability and breadth of health plans available to retirees who lost coverage. Pub. L. No. 104-191, 110 Stat. 1936 (1996). In particular, HIPAA eliminated (or greatly restricted) insurability rules, pre-existing condition limitations, and enrollment rules that previously had worked to deny coverage to retirees who, after losing their own coverage, then sought coverage under a spouse's employer health plan. *See, e.g.*, *id*, title I, §§ 701-702; *see also* 29 U.S.C. § 1182. HIPAA also required employer group health plans to give special enrollment opportunities to a covered employee's dependents (including a spouse) who lost coverage under another plan. *See* 29 U.S.C § 1181. Thus, under HIPAA, a retiree who loses coverage under an employer's plan is automatically provided an opportunity to enroll in coverage under his or her spouse's group health plan, with no (or few) restrictions for pre-existing conditions.

Congress and the Internal Revenue Service have also created funding arrangements that give employers and employees innovative ways to provide retiree health coverage. Two of these innovations—Health Reimbursement Arrangements (HRAs) and Health Savings Accounts (HSAs)—permit employers (in the case of HRAs) or employers and employees (in the case of HSAs) to make tax-favored contributions towards the cost of retiree medical care. *See* IRS Notice 2002-45; IRS Rev. Rul. 2002-41; Pub. L. No. 108-173, 117 Stat. 2066 (2003).

In general, these arrangements allow for tax-favored contributions that can be used by active or retired employees to cover healthcare expenses in the

current year or rolled over for use in future years. Because the balances in HRAs and HSAs roll over from year to year—and, in the case of HRAs, accumulate earnings on a tax-free basis—these arrangements are valuable tools for offsetting the cost of retiree medical care for both employers and retirees. They also provide retirees with greater flexibility, permitting them to purchase insurance that is tailored to their particular needs (as opposed to the traditional model in which the insurance design is decided for them).

And the most-significant change for pre-65 retirees in the past 30 years has been the enactment of the Patient Protection and Affordable Care Act (ACA). Pub. L. No. 111–148, 124 Stat. 119 (2010). The ACA is comprised of the Patient Protection and Affordable Care Act and The Health Care and Education Reconciliation Act of 2010 (Pub. L. No. 111–152, 124 Stat. 1029). In general, the ACA requires insurance companies to sell insurance to everyone regardless of their health status. The ACA accomplishes that goal by (1) prohibiting insurers from denying coverage to individuals due to pre-existing conditions, *see* Pub. L. No. 111-148 at § 2704; (2) requiring insurers to offer the same premium price to all applicants of the same age and geographic location, *see id.* § 2701; (3) providing subsidies so that most low- and middle-income individuals (*i.e.*, those with income below 400% of the federal poverty level) can receive no- or low-cost insurance, *see id.* § 1401; (4) imposing minimum-coverage standards and other policy enhancements; (5) precluding the termination of coverage because of a person's health; and (6) first limiting and ultimately eliminating plan provisions that impose annual or lifetime limits on benefits. *See*

Focus on Health Reform, *Summary of the Affordable Care Act*, The Henry J. Kaiser Family Found., April 23, 2013, available at http://goo.gl/Z5qnT. In addition, the ACA establishes federal and state marketplaces through which individuals (and their families) can readily access quality insurance. *See* Pub. L. No. 111-148 at §§ 1301-04.

The reforms implemented by the ACA have redefined the healthcare coverage landscape in a manner that is worlds apart from what existed when *Yard-Man* was decided. In 1983, a pre-65 retiree who lost coverage through his employer would have had a difficult time finding replacement coverage at an affordable price, particularly if he suffered from a pre-existing medical condition. Now, health insurers *must* offer high-quality healthcare coverage to retirees at affordable rates without regard to pre-existing medical conditions. The availability of federal subsidies, moreover, helps defray costs even further for those pre-65 retirees earning between 100% and 400% of the federal poverty level. For example, a retired couple who are both 61 years old with household income of $60,000 per year will pay a premium of no more than $5,700 per year ($475 per month) for high-quality health insurance. *See* Health Reform Subsidy Calculator, The Henry J. Kaiser Family Found, available at http://goo.gl/WLjzU.

In addition, Congress also has greatly expanded healthcare options for post-65, Medicare-eligible retirees. Even in 1983, Medicare-eligible retirees enjoyed baseline coverage under Parts A and B of the Medicare Act, which paid for (among other things) hospital care, doctor visits, medical equipment, laboratory and diagnostic services, preventive care, outpatient care, and home healthcare. *See*

Medicare.gov, *What Does Medicare Part A Cover*, available at http://goo.gl/tbO27; *see also id.*, *What Does Medicare Part B Cover*, available at http://goo.gl/ec4pBi.

As part of the Balanced Budget Act of 1997, however, Congress adopted a new Medicare-coverage option, known as "Part C," that significantly expanded the healthcare options available to Medicare-eligible retirees. *See* 42 U.S.C. §§ 1395w-21-29. Part C plans (now referred to as Medicare Advantage Plans) are offered by private insurance companies that receive compensation from the federal government. In general, Medicare Advantage Plans greatly reduce the amount of out-of-pocket expenses that a retiree is required to pay and may offer significantly broader benefit options than basic Medicare, such as dental, vision, hearing and/or health and wellness programs. *See* Medicare.gov, *Medicare Advantage Plans cover all Medicare Services* available at http://goo.gl/bS2ePZ. According to the Kaiser Family Foundation, the utilization of Medicare Advantage Plans continues to grow rapidly, with almost one out of every three Medicare-eligible individuals enrolled in a Medicare Advantage Plan. *See* Marsha Gold, *et al.*, *Medicare Advantage 2014 Spotlight: Enrollment Market Update*, The Henry J. Kaiser Family Found., (April 2014), available at http://goo.gl/qD6IkO.

Moreover, Congress created an entirely new prescription drug program for Medicare-eligible retirees, referred to as Medicare Part D. 42 U.S.C. §§ 1395w-101-154. Part D went into effect in 2006 and guarantees retirees access to affordable and comprehensive prescription drug coverage. Medicare-eligible retirees can obtain their Part D coverage by

joining private, standalone prescription drug plans or by joining a public Medicare Part C Plan (discussed above) that offers prescription drug coverage. *See* Medicare.gov, *What is Medicare?* available at http://goo.gl/mqpfvb. In 2010, Congress expanded Part D coverage and reimbursements further by including a provision in the Affordable Care Act to close a coverage gap, known as the "donut hole." *See* http://goo.gl/ZwsfcD. Thus, unlike retirees in 1983, post-65 retirees today enjoy robust prescription drug coverage under Medicare Part D.

By themselves, these Medicare programs offer post-65 retirees sound and affordable health insurance. For those post-65 retirees who wish to purchase coverage that supplements Medicare, however, there has developed over time a wide array of Medicare supplement plans also known as "Medigap" insurance. Medigap policies offer retirees an affordable way to cover certain healthcare costs that are not covered by traditional Medicare. Over the past 30 years, federal legislation has fostered the development of Medigap policies, making those policies more affordable and more widely available than when *Yard-Man* was decided. *See, e.g.*, The Medicare and Medicaid Patient Program Protection Act of 1987 (Pub. L. No. 100–93, 101 Stat. 680 (1987)) (imposing criminal sanctions on anyone making false claims with respect to the sale of a Medigap policy); The Omnibus Budget Reconciliation Act of 1987 (Pub. L. No. 100–203, 101 Stat. 1330 (1987)) (allowing participating physicians and other health care providers and vendors to be paid directly by Medigap plans); The Medicare Catastrophic Coverage Act of 1988 (Pub. L. No. 100–360, 102 Stat. 683 (1988)) (directing the Department of Health and Human

Services to establish protocols for retirees to obtain information about their Medigap insurer and requiring Medigap plans to meet or exceed national healthcare guidelines); The Omnibus Budget Reconciliation Act of 1990 (Pub. L. No. 101–508, 104 Stat. 1388 (1990)) (standardizing Medigap plans, imposing guaranteed plan renewability, curtailing the use of pre-existing condition limitations and other forms of health-based pricing, and requiring insurers return benefits to policyholders that amount to at least 75% of the aggregate premium amount); Balanced Budget Act of 1997 (Pub. L. No. 105–33, 111 Stat. 251 (1997)) (introducing more protections for retirees by limiting pre-existing condition exclusions); The Consolidated Appropriations Act, 2001 (Pub. L. No. 106–554, 114 Stat. 2763 (2000)) (prohibiting certain discriminatory practices in Medigap plans); The Medicare Improvements for Patients and Providers Act of 2008 (Pub. L. No. 110–275, 122 Stat. 2494 (2008)) (establishing enhanced benefits standards for Medigap Plans).

These and other statutes show the great lengths to which the Federal Government has gone over the past 30 years to expand and enhance the healthcare options available to retirees. Today, both pre-65 and post-65 retirees enjoy many options for obtaining comprehensive healthcare coverage that were unavailable when the Sixth Circuit decided *Yard-Man* in 1983, thereby rendering obsolete any policy considerations underlying the *Yard-Man* presumption (which was legally unjustifiable from the outset).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

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