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No. 13-1010

In The Supreme Court of the United States

M&G POLYMERS USA, LLC; M&G POLYMERS USA, LLC COMPREHENSIVE MEDICAL BENEFITS PROGRAM FOR EMPLOYEES AND THEIR DEPENDENTS; THE M&G CATASTROPHIC MEDICAL PLAN; THE M&G MEDICAL NECESSITY BENEFITS PROGRAM OF HOSPITAL, SURGICAL, MEDICAL, AND PRESCRIPTION DRUG BENEFITS FOR EMPLOYEES AND THEIR DEPENDENTS; AND THE M&G MAJOR MEDICAL BENEFITS PLAN,

Petitioners,

v.

HOBERT FREEL TACKETT; WOODROW K. PYLES; UNITED STEEL, PAPER AND FORESTRY, RUBBER MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION; AND HARLAN B. CONLEY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

Whether, when construing collective bargaining agreements in Labor Management Relations Act (LMRA) cases, courts should presume that silence concerning the duration of retiree health-care benefits means the parties intended those benefits to vest (and therefore continue indefinitely), as the Sixth Circuit holds; or should require a clear statement that health-care benefits are intended to survive the termination of the collective bargaining agreement, as the Third Circuit holds; or should require at least some language in the agreement that can reasonably support an interpretation that health-care benefits should continue indefinitely, as the Second and Seventh Circuits hold.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The caption of this petition contains all parties to the proceedings.

Petitioner M&G Polymers USA, LLC, is a wholly owned subsidiary of Mossi & Ghisolfi International and is incorporated in West Virginia. Petitioner M&G Polymers USA, LLC Comprehensive Medical Benefits Program For Employees And Their Dependents is a medical benefits program sponsored by M&G. Petitioner The M&G Catastrophic Medical Plan is a medical benefits program sponsored by M&G. Petitioner The M&G Medical Necessity Benefits Program Of Hospital, Surgical, Medical, And Prescription Drug Benefits For Employees And Their Dependents is a medical benefits program sponsored by M&G. Petitioner The M&G Major Medical Benefits Plan is a medical benefits program sponsored by M&G.

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OPINIONS AND ORDERS BELOW

The order of the court of appeals denying *en banc* rehearing (Pet. App. 148-49), is unreported. The panel opinion (Pet. App. 1-23), is reported at 733 F.3d 589 (6th Cir. 2013) ("*Tackett II*"). The opinion and order of the district court (Pet. App. 24-87) is reported at 853 F. Supp. 2d 697 (S.D. Ohio 2012). The Sixth Circuit's previous opinion (Pet. App. 88-121), is reported at 561 F.3d 478 (6th Cir. 2009) ("*Tackett I*"). The district court's original opinion and order (Pet. App. 121-47), is reported at 523 F. Supp. 2d 684 (S.D. Ohio 2007).

STATEMENT OF JURISDICTION

The court of appeals filed its order denying *en banc* rehearing on October 22, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), are set forth at Pet. App. 150-52.

STATEMENT

When employees and unions bargain with employers for retiree health-care benefits, those benefits—and the conditions for receiving them—are set out in collective bargaining agreements. Those agreements virtually never specify the duration of the benefits. And as a general rule, the obligations set out in a collective bargaining agreement end when the agreement itself terminates.

Nonetheless, the Sixth Circuit in this case applied its "presum[ption] that the parties intended retiree welfare benefits to continue for life, notwithstanding the expiration of [the] collective bargaining agreement." See *Int'l Union, UAW* v. *Skinner Engine Co.*, 188 F.3d 130, 140 (3d Cir. 1999). The court of appeals thus held that the collective bargaining agreements at issue here vested retirees with a right to lifetime, contribution-free health-care benefits, even though no affirmative language indicated such an intent.

In reaching that conclusion, the Sixth Circuit applied what is known as its "*Yard-Man* presumption"—created by that court in *International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America* v. *Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983). The *Yard-Man* presumption (or inference) is an aberration that cannot be justified as a matter of contract interpretation or labor law. It lacks any statutory basis and runs directly counter to Congress' intent "not to provide for the vesting of employee welfare benefits." *Skinner*, 188 F.3d at 141. And it is wholly unnecessary, as

"those who fear that their unions will not bargain for continued benefits for retirees need only see to it that specific vesting language protecting those benefits is incorporated into collective bargaining agreements." *Ibid.* This Court should reject *Yard-Man*, require at least some affirmative indication in the language of the agreement that the parties to a collective bargaining agreement intend to vest retiree health-care benefits in perpetuity, and reverse the contrary judgment below.

A. Background

Where employees are represented by a union, it will negotiate with their employer to establish working conditions, safety measures, wages, hours, and seniority rules, among other things. See 29 U.S.C. § 158(d); *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 209-10 (1964). The terms reached through the negotiations are memorialized in a collective bargaining agreement, which is a contract between the union and the employer that serves, in turn, as the foundation for the relationship between unionized employees and their employer. See 29 U.S.C. § 185(a); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 657 (1965); *Textile Workers Union of Am.* v. *Lincoln Mills of Ala.*, 353 U.S. 448, 454 (1957).

Fringe benefits for unionized employees may be set forth in the collective bargaining agreement itself or in a separate document that is incorporated into and becomes part of the agreement. In some industries,

such as the rubber industry in this case, employers and unions historically negotiate a pension and insurance agreement ("P&I agreement") for this purpose. This is a separate contract that is incorporated by reference into the collective bargaining agreement and details both pension benefits and welfare benefits available to eligible union members. Welfare benefits include such things as life insurance coverage, disability benefits, supplemental workers' compensation, dental and vision care, health-care benefits, and severance benefits.

Since the Employee Retirement Income Security Act (ERISA) was enacted in 1974, "employee pension benefit plan[s]" have been treated differently from "employee welfare benefit plan[s]," including health benefits. Compare 29 U.S.C. § 1002(2)(A), with § 1002(1). For the former category, Congress created elaborate vesting, accrual, participation, and minimum funding requirements that cannot be bargained away. *Id.* §§ 1053, 1082, 1083, & 1084. For the latter category, Congress quite deliberately took a different approach in providing that welfare benefits do not vest by law and are not subject to accrual, participation, and funding rules. See *id.* § 1051(1) (exempting "employee welfare benefit plan[s]" from the pension vesting rules set forth at § 1053).

Thus ERISA establishes no "minimum * * * vesting requirements for welfare plans as it does for pension plans," and as a result, employers are "generally free * * * for any reason at any time to adopt, modify, or terminate welfare plans." *Curtiss-Wright*

Corp. v. *Schoonejongen*, 514 U.S. 73, 78 (1995); see also 29 U.S.C. § 1051 (ERISA's vesting, participation, and anti-cutback provisions do not apply to "employee welfare benefit plan[s]"). Employers may nonetheless choose to vest health and welfare benefits. *Skinner*, 188 F.3d at 138 (employers may "relinquish their right to unilaterally terminate those benefits and provide for lifetime vesting").

Further, because ERISA preempts state law, there is no room for states to amend Congress' design. 29 U.S.C. § 1144(a) (1974). Thus state law cannot force an employer to establish a benefit plan, *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 11-12 (1987), and, most pertinent here, cannot force the vesting of health-care benefits. *Standard Oil Co.* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981).

"The disparate treatment" Congress has "accorded welfare plans" as opposed to pension plans "is not accidental." *Wise* v. *El Paso Nat. Gas Co.*, 986 F.2d 929, 935 (5th Cir. 1993). It reflects the reality that pension plans are qualitatively different than welfare plans. That is, the future expense of pension plans, typically paid as fixed annuities, is based on relatively stable data and can be calculated with a high degree of actuarial certainty. *Moore* v. *Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988). In contrast, health-insurance costs vary dramatically based on inflation, changes in medical practice, claims history, and other factors that are notoriously unpredictable. *Ibid*. Those "unstable variables prevent accurate

prediction of future needs and costs" and dictate that employers be given significant latitude in granting health-related benefits. *Ibid.*; see also 29 U.S.C. § 1051. By exempting welfare benefits from vesting requirements, Congress recognized that employers and employees alike benefit from greater flexibility in responding to the ever-changing marketplace for health benefits.

The different treatment Congress accorded welfare and pension benefits also reflects the reality that imposing vesting requirements increases plan administration burdens and costs. *Hozier* v. *Midwest Fasteners, Inc.*, 908 F.2d 1155, 1160 (3d Cir. 1990). Although Congress determined those burdens and costs were warranted with respect to pension benefits, it did not view welfare benefits the same way. See, e.g., H. Rep. No. 807, 93d Congr., 2d Sess. 60, reprinted in 1974 U.S. Code Cong. & Admin. News 4670, 4726 ("To require the vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income."). Congress thus "balance[d] its desire to regulate extant plans more extensively against the danger that increased regulation would deter employers from creating such plans in the first place." *Hozier*, 908 F.2d at 1160.

B. Facts and Procedural History

Since 2000, M&G has operated a chemical plant in Apple Grove, West Virginia. Before that, Goodyear

and Shell operated the plant and employed its workers. Pet. App. 3. As relevant here, the local union and the employers negotiated a series of five collective bargaining agreements to govern the relationship between the workers and their employers at the plant.

Along with the collective bargaining agreements, the parties negotiated P&I agreements detailing the pension benefits and welfare benefits available to eligible union members. *Id.* at 3-7. The P&I agreements were initially negotiated between the International union and the employers, and then adopted by the local union through the collective bargaining agreements. *Id.* at 3-4. Each P&I agreement included explicit durational limits that specifically applied to the health-care benefits described therein.[1]

In addition to the P&I agreements, the International union negotiated side agreements—known as "cap" agreements—obligating retirees to make contributions toward their health-care costs to the extent those costs exceeded the cap. *Id.* at 32-34.[2]

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[1] See, e.g., JA 33, 44 ("Effective January 1, 1992 *and for the duration of this Agreement thereafter*, the Employer will provide" the health-care benefits described. (emphasis added)).

[2] See, e.g., JA 436 ("If the average annual cost of health care benefits for each such group described in paragraph 1 above exceeds the specified amount, the cost in excess of that amount shall be allocated evenly to all retired employees (including surviving spouse) in such group."). In the courts below, the parties vigorously disputed the extent to which the cap agreements applied, but that dispute is not relevant to the issue before the Court.

In 2006, M&G informed retirees from the West Virginia plant that they would be required to contribute to their health-care costs. *Id.* at 139. This class action followed. Plaintiffs—the International union and retirees residing in Ohio, within the Sixth Circuit—asserted three claims: (1) violation of labor agreements, actionable under LMRA § 301(a), 29 U.S.C. § 185(a) (Count I); (2) violation of employee welfare benefit plans, actionable under ERISA §§ 502(a)(1)(B) & (a)(3), 29 U.S.C. §§ 1132(a)(1)(B) & (a)(3) (Count II); and (3) breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) (Count III). *Id*. at 123 & 140. The union and the plaintiff retirees alleged they had a right to vested, lifetime health-care benefits without any contributions on their part on account of language in some of the P&I agreements referring to a "full Company contribution towards the cost of benefits." *Id*. at 140.[3]

Initially, the district court granted M&G's motion to dismiss all three claims as a matter of law. *Id.* at 146-47. In the district court's view, the absence of language in the collective bargaining agreements specifying vesting, combined with the cap agreements, unambiguously fixed the amount M&G was obligated to contribute toward retiree health-care benefits and permitted retiree contributions. *Id.* at

[3] The "full Company contribution" language only appears in three of the five agreements at issue. JA 134, 189 (1994 P&I Agreement); *id.* at 263 (1997 P&I Agreement); *id.* at 415 (2000 P&I Agreement).

143-47. The district court recognized that a promise of a "full Company contribution" said nothing about the duration of the available benefits—or that the total costs would be paid fully by M&G—and ruled in its favor on the vesting question as a matter of law. *Id.* at 142-43 ("'[A] full Company contribution' is consistent with caps." (alteration in original)). The retirees and the union appealed.

The Sixth Circuit reversed in part, concluding that the retirees sufficiently pleaded an intention to vest health-care benefits to survive a motion to dismiss, and remanded for further proceedings. *Id.* at 90. In reaching that conclusion, the Sixth Circuit relied heavily on *Yard-Man*, which presumes that retiree health-care benefits obtained through a collective bargaining agreement are vested. *Ibid.*

The court of appeals first invoked the "context of the labor-management negotiations identified in *Yard-Man*" to "find it unlikely" that the union would have agreed to non-vested health-care benefits given the promise of a "full Company contribution" in the collective bargaining agreements. *Id.* at 112. The court of appeals also presumed vesting from the location of that promissory language, which followed a provision requiring shorter-tenured employees to make specific contributions to health-care costs. *Ibid.* That led the court to believe that workers who did not have to make these specific contributions were thus guaranteed unalterable benefits for life at no cost to them. *Ibid.*

Further noting that the collective bargaining agreements "tied eligibility for health-care benefits to pension benefits," the court of appeals treated that as an additional factor indicating that vesting was intended. *Ibid.* And so from silence on vesting, the court inferred that the parties really intended for the employer to provide the health-care benefits in perpetuity—a result required, the court made clear, by *Yard-Man*. *Id.* at 113-14 ("When the plan document at issue is a collective bargaining agreement, the interpretative principles outlined in *Yard-Man* govern a court's determination of the parties' intent to vest health-care benefits." (citing *Maurer* v. *Joy Techs., Inc.*, 212 F.3d 907, 917 (6th Cir. 2000))).

Although the Sixth Circuit claimed it was not deciding the ultimate question of vesting, *id.* at 61-62, its opinion was "an unqualified declaration" that "the parties intended health-care benefits to vest." *Id.* at 62; see also *id.* at 111-12 (referring to language in some of the P&I agreements that the employer would make a "full Company contribution" toward the costs of health-care benefits).

On remand, the district court conducted a bench trial on liability and held that the retirees had a right to health-care benefits for life. *Id.* at 25. The bench trial did not establish the vesting of benefits, though—that question had already been answered by the Sixth Circuit when it held that "[a] court may find vested rights 'under a [collective bargaining agreement] even if the intent to vest has not been explicitly

set out in the agreement.'" *Id.* at 58. As the Sixth Circuit itself later recognized, the prior panel decision established "a controlling interpretation of the [collective bargaining agreement] that prove[d] dispositive of at least the vesting issue, if not the issue of capped versus uncapped benefits." *Id.* at 61. The district court's ruling addressed merely "what vested" in concluding that the retirees had a vested right to free health-care benefits for life. The district court issued a permanent injunction barring M&G from collecting contributions from retirees as a condition to the receipt of benefits. *Id.* at 86-87. M&G appealed.

Guided once again by *Yard-Man*, the Sixth Circuit affirmed. The court of appeals approved the district court's presumption that the language in the collective bargaining agreement vested a right to lifetime, contribution-free benefits in the absence of any extrinsic evidence to the contrary. *Id.* at 2-3. Although the cap agreements were potentially extrinsic evidence against vesting, the court of appeals agreed with the district court that they were insufficient to counter the retirees' argument once vesting was assumed. *Id.* at 22.

The Sixth Circuit denied M&G's petition for rehearing *en banc*. *Id.* at 148-49.



SUMMARY OF ARGUMENT

Under ordinary rules of contract interpretation, the language of the agreement is paramount and extrinsic evidence is used only to clarify ambiguity, never to create it. Here, the Sixth Circuit disregarded those rules of interpretation and applied a presumption in favor of benefit vesting so strong it overcame both an unambiguous contract and unassailable extrinsic evidence that rebutted any presumption of vesting. It therefore is unsurprising that petitioners would have prevailed in any circuit—and under any standard—that does not presume or imply contractual obligations to retirees. The decision below should be reversed.

The Sixth Circuit's error came in using the *Yard-Man* presumption that relies on the context of retiree health-care—rather than the text of the operative agreement—to establish vesting. The court first assumed unvested benefits were unlikely and then set out to justify that conclusion by seizing on the "full Company contribution" language. That language, however, says nothing about the duration of the health-care benefits. The lack of a durational term in the collective bargaining agreement hardly makes it ambiguous. In the bargaining context, benefits are well known to expire with the agreement that provides them. *Litton* v. *NLRB*, 501 U.S. 190, 207-08 (1991).

Yet *Yard-Man* evidently demands that an employer expressly deny vesting of retiree benefits if

those benefits are to end with the collective bargaining agreement. And so in addition to disregarding the normal rules of contract interpretation, the Sixth Circuit's presumption also ignores Congress' deliberate policy choice not to require vesting of retiree health-care benefits (as opposed to pension benefits). *Yard-Man*'s "inference" concerning an extra-textual obligation cannot be correct.

The legal standards for making vesting determinations applied in other circuits, however, both conform with ordinary rules of contract interpretation and facilitate national labor policy instead of working against it. The Third Circuit uses what has been called a "clear statement rule" that requires any claim of vesting to be based on an express statement in the agreement to that effect. At the same time, the Second and Seventh Circuits hold that a collective bargaining agreement must have at least some language indicating an intent for the health-care benefits to vest.

While some might argue that such text-based rules operate as a presumption *against* vesting, there is, in reality, no thumb on the scale either way in these circuits. Given the background rule that benefits cease with the termination of the collective bargaining agreement unless otherwise provided, the ordinary rules of contract interpretation would require any promise of vesting to be explicit in the language of the agreement. That requirement of affirmative vesting language—something beyond mere silence on the duration of the benefit—allows

the burden of proof to remain with the plaintiff who is, after all, the one invoking vesting. A rule that allows the parties to rely on the language of the agreement that binds them is no presumption. It is simply an ordinary rule of contract interpretation. See, e.g., *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548-49 (2013) (explaining that in construing contracts, courts look to the terms of the plan, consider the parties' intent, and when appropriate take account of the governing background rules).

Whatever the precise contours of the legal standards applied by the Second, Third, and Seventh Circuits, petitioners would have prevailed there and in any circuit not predisposed to find vesting. Language in the P&I agreements at issue indicated that the benefits provided therein would expire when the governing documents did. The only exceptions—and there were several—would necessarily be indicated in the contract. In describing pension benefits, for instance, the P&I agreements acknowledged that they could not be reduced and that certain amounts were vested according to various schedules. In contrast, the retiree health-care provisions contained no durational language even arguably vesting the benefits. Absent such language, any contractual obligations regarding the retiree health-care benefits last only so long as the collective bargaining agreement—or another one replacing it—is operative.

The fact that the Sixth Circuit ignored that evidence only confirms the power (and error) of its *Yard-Man* presumption. It also underscores the need for a rule that establishes a uniform requirement of textual clarity in establishing employer obligations in collective bargaining agreements where the duration of retiree health-care benefits is concerned. Otherwise, courts will continue to enact their own policy preferences under the guise of "ordinary" contract construction that is anything but. This Court should reject the *Yard-Man* presumption, clarify that at least some affirmative indication of vesting is required in the language of collective bargaining agreements, and reverse the judgment below.

ARGUMENT

I. THE SIXTH CIRCUIT'S *YARD-MAN* PRESUMPTION VIOLATES ORDINARY RULES OF CONTRACT INTERPRETATION, CONFLICTS WITH CONGRESSIONAL INTENT, AND DISSERVES NATIONAL LABOR POLICY

This Court has held that collective bargaining agreements should be construed by applying ordinary rules of contract interpretation when not inconsistent with federal labor policy. *Transp.-Commc'n Emps. Union* v. *Union Pac. R.R.*, 385 U.S. 157, 160-61 (1966); *Textile Workers*, 353 U.S. at 456. Neither ordinary rules of contract interpretation nor federal labor policy support—much less require—the Sixth

Circuit's *Yard-Man* presumption that contractual silence means that retiree health benefits have vested.

A. Health-Care Benefits Granted Without A Durational Clause Or Vesting Guarantee Terminate With The Agreement That Provides Them

Contract interpretation, like statutory analysis, begins with the agreement's plain language. *McCutchen*, 133 S. Ct. at 1548-49. That is because there is no more reliable indicator of the parties' intent—which is the touchstone of the analysis—than the words they chose to express that intent. See, e.g., *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010). And without a clear intent on the face of the agreement to confer certain benefits, contracts are not understood to provide them. A. FARNSWORTH, CONTRACTS §§ 3.1, 3.3 (1982).

In this case, it is undisputed that the collective bargaining agreements did not specify the duration of the retiree health-care benefits provided by the company separately from the duration of the agreements themselves. Contrary to the Sixth Circuit's approach, however, that contractual silence as to duration did not give the court of appeals license to violate the normal rules of contract interpretation by effectively rewriting the agreement to provide vested benefits that the parties neither bargained for nor specified in the language of the agreement itself.

Two bedrock principles reinforce that conclusion. First, Congress has established the default rule that employers are "generally free * * * for any reason at any time, to adopt, modify or terminate welfare plans." *Schoonejongen*, 514 U.S. at 78. Second, this Court has held that when a collective bargaining agreement expires, its provisions do too. *Litton*, 501 U.S. at 207-08 (holding that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement" unless the "collective-bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration"). Both principles flatly contradict the Sixth Circuit's view that silence on the duration of benefits creates ambiguity in a collective bargaining agreement.

To be sure, negotiated provisions in a collective bargaining agreement may outlive the agreement—if the parties so provide. See *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 554-55 (1964). But that intention must be clearly spelled out in the agreement itself. *Ibid.*; *Litton*, 501 U.S. at 207-08 (holding that obligations survive the termination of the agreement if it "provides in *explicit* terms that certain benefits continue after the agreement's expiration" (emphasis added)). That is plainly not the case here. As a result, under the normal rules of contract interpretation as informed by national labor policy, the benefits at issue either expired at the end of the agreement or were permissibly alterable by M&G based on other agreements between the parties.

The Sixth Circuit, however, reached precisely the opposite conclusion—construing the absence of any durational term for retiree health-care benefits in the agreement to allow an inference that the parties meant for health-care benefits to be vested for life. That holding became the basis for the district court's subsequent finding that the negotiated caps on employer contributions could not be enforced. Thus, the root of the problem is the Sixth Circuit's previous decision in *Yard-Man*.

B. *Yard-Man*'s Inconsistent Policy Rationales Cannot Justify Its A-Textual Approach

In *Yard-Man*, the plaintiff retirees and their union brought suit when a factory closed and the company informed the union that retiree health benefits would end when the collective bargaining agreement expired. As here, the agreement was silent on the duration of benefits. The Sixth Circuit determined, however, that extrinsic evidence should be used to resolve the purported "ambiguity" because, according to the court, "when the parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree." *Yard-Man*, 716 F.2d at 1482.

The *Yard-Man* court offered two policy reasons to justify its presumption of vesting. First, because

retiree benefits are based on a recipient's "status" as a retiree, they should continue as long as the recipient remains a retiree. *Ibid*. Second, because welfare benefits are a permissive subject of bargaining—and thus unions do not have to defend the retirees' rights once the retirees are no longer part of the bargaining unit—there must be a presumption in favor of vesting to protect the group that is no longer in a position to bargain with the employer. *Ibid.* Even assuming policy arguments like these could ever justify the Sixth Circuit's departure from the normal rules of contract interpretation, both fail on their own terms.

First, the notion that courts should deem healthcare benefits to vest merely because they were granted to retirees (i.e., the "status" rationale) finds no support in law or logic. Of course retiree medical benefits are tied to an employee's status as a retiree—that is their purpose. But that temporal link does not establish that pension benefits and welfare benefits are equivalent in terms of their duration and mutability.

Second, the permissive-bargaining rationale overlooks the interest of the unions in ensuring the protection of their former members. After all, today's active employees are tomorrow's retirees. Unions and employees are well aware that these types of benefits are constantly up for negotiation and revision. If a party desired (and were able) to secure such benefits in perpetuity, no matter the cost, language confirming such an extraordinary allowance would be easy

enough to draft. See Gregory Parker Rogers, *Rethinking* Yard-Man: *A Return to Fundamental Contract Principles in Retiree Benefits Litigation*, 37 Emory L.J. 1033, 1067 (1988) ("If the union was serious about getting benefits for its retirees beyond the end of the contract as 'deferred compensation,' then almost certainly it would demand a clause in the collective bargaining agreement to that effect.").

Moreover, the permissive-bargaining rationale ignores the reality that unions frequently do negotiate over the health benefits of current retirees. *Ibid.* The instant case proves the point. Over the course of 15 years, the union and the company negotiated cap agreements that explicitly altered the terms of current retirees' health benefits. Pet. App. 38-51.[4]

Otherwise, given the baseline rule that the terms of collective bargaining agreements expire when the agreement does (absent an express textual indicator to the contrary), the parties have no need to separately and explicitly address the duration of benefits. If the parties want a term renewed, they can negotiate for it to become part of the next agreement. In the absence of any separate durational term concerning medical benefits, then, ordinary principles of contract

[4] The existence of retiree benefits as a mandatory subject of bargaining here—adopted at least as recently as the fifth collective bargaining agreement, JA 441—only confirms the error of the *Yard-Man* rationale that retirees need vested benefits because no one will negotiate on their behalf after retirement.

interpretation dictate that the parties did not intend the benefits to extend beyond the termination of the contract, much less to vest.

But in the Sixth Circuit, the opposite is true—"[u]nless a company can point to explicit language in the relevant agreement stating that 'retiree benefits' terminate at a particular date or do not vest, the benefits seem to vest as a matter of law." *Noe* v. *Polyone Corp.*, 520 F.3d 548, 568 (6th Cir. 2008) (Sutton, J., concurring in part and dissenting in part). Employers sued in the Sixth Circuit are left trying to prove a negative when, if anything, "a reversal of [the Sixth Circuit's] presumptions would make better sense—that if the union negotiated for such rights, they would surely appear in the collective bargaining agreement." *Rossetto* v. *Pabst Brewing Co.*, 217 F.3d 539, 543-44 (7th Cir. 2000) (Posner, J.).

By requiring defendant employers to be clear when *not* desiring a benefit to vest, the Sixth Circuit reverses the burdens of proof not only in contract interpretation but also in litigation generally. After all, it is the union or the retirees—not the employer—that bears the burden of proof in these cases to establish vested benefits. See, e.g., *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir. 1990). Employers should not be left trying to prove a negative.[5]

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[5] The *Yard-Man* court professed to "agree" that "traditional rules of contractual interpretation require a clear manifestation of intent before conferring a benefit or obligation" but

(Continued on following page)

That may be why Judge Easterbrook, writing in favor of a strong presumption against vesting, suggested that "as the duration and cost of the supposed promise increase," so too should "the level of formality required to conclude that a promise exists." *Bidlack* v. *Wheelabrator Corp.*, 993 F.2d 603, 618 (7th Cir. 1993) (en banc) (Easterbrook, J., dissenting). That conclusion necessarily follows from the logic that an employer would have thought long and hard before committing itself to providing health-care benefits in perpetuity (and with no additional contributions from former employees). That is especially true given that, unlike pension obligations that are typically fixed for the retiree's life, health-care obligations are virtually unlimited.

C. There Is No Basis For *Yard-Man*'s Presumption In This Court's Precedents

As explained *supra* at 4-6, Congress chose to provide employers with the flexibility to adapt welfare benefits—like health benefits—to rapidly escalating costs. See 29 U.S.C. § 1202(c) (1974); see also I.R.C. §§ 106, 162 (incentivizing employers to offer health-care benefits by providing generous tax breaks, but not mandating vesting). The Sixth Circuit's *Yard-Man* presumption upsets that balance by

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disagreed—with no citation of authority or elaboration—"that the duration of the benefit once clearly conferred is subject to this stricture." 716 F.2d at 1481 n.2.

fixing collectively bargained health-care benefits at the point of retirement, and erases the distinction Congress has drawn between welfare benefits (including health-care benefits) and pension benefits.

This Court's recent decision in *Fifth Third Bancorp* v. *Dudenhoeffer*, 134 S. Ct. 2459 (2014), is instructive. There, the Court rejected a judicially created presumption arising under Section 404(a)(1)(B) of ERISA that an employer acts prudently when making decisions about the employer's securities (e.g., whether or not to buy or sell) in an ERISA pension plan. *Id.* at 2467. Virtually all of the courts of appeals applied the presumption to impose a higher burden of proof on plaintiffs alleging that an employer's failure to dispose of the employer stock in the face of declining markets (or other company-specific events) was a breach of the duty of prudence under Section 404(a)(1)(B). *Ibid.* This Court rejected the presumption of prudence, emphasizing that ERISA § 404(a)(2), one of the purported bases for the presumption, "makes no reference to a special 'presumption' in favor of ESOP [employee stock ownership plan] fiduciaries." *Ibid.*

Here, there is not even an arguable statutory basis for the Sixth Circuit's *Yard-Man* presumption—and the Sixth Circuit has never claimed otherwise. Nor is there anything approaching the uniformity with which the courts of appeals embraced the presumption of prudence in favor of ESOP fiduciaries. To the contrary, the Sixth Circuit is an outlier in that regard. Pet. 10-17. By comparison, the *Yard-Man*

presumption rests on even shakier ground than the presumption of prudence this Court unanimously rejected in *Fifth Third*. The *Yard-Man* presumption should likewise be dispatched.

In applying that presumption, the Sixth Circuit is not only wrong but also internally inconsistent. The court unabashedly admits that its "*Yard-Man* test applies to claims for benefits that arise out of a [collective bargaining agreement]," and not "to cases in which an employer unilaterally instituted a retiree benefit program." *Reese* v. *CNH Am. LLC*, 574 F.3d 315, 328 (6th Cir. 2009) (internal citations omitted); see also *Sengpiel* v. *B.F. Goodrich Co*., 156 F.3d 660, 667 (6th Cir. 1998) (holding that where benefits are not collectively bargained, the employer may alter or even terminate the benefits unless the plan documents prohibit the changes "in clear and express language"). That is inconsistent with simple logic, which would suggest that if interpretive presumptions were legitimate—a scenario recently rejected by *Fifth Third*—it should be an unrepresented retiree that benefitted from the extra-textual protection. *Rossetto*, 217 F.3d at 543-44 (Posner, J.).

No one can disagree with Judge Sutton that, at times, the "precise weight of the *Yard-Man* 'inference' * * * is elusive." *Reese*, 574 F.3d at 321. The *Yard-Man* presumption obviously does not mean that the employer loses in every case. What it does mean, though, is that employers lose unless there is an explicit *denial* of vesting *and* health-care benefits are not linked to retirement (which is, given the

background rules discussed above, virtually never the case). See, e.g., *Yolton* v. *El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 583 (6th Cir. 2006); *Golden* v. *Kelsey-Hayes Co.*, 73 F.3d 648, 656-57 (6th Cir. 1996).

Yard-Man thus wrongly implies contractual obligations from silence to create liability where none originally existed. In doing so, it violates the ordinary rules of contract interpretation and upsets Congress' careful balancing of interests in distinguishing between pension and welfare benefits—all without any statutory basis whatsoever. This Court should reject the *Yard-Man* presumption in no uncertain terms, just as it did the presumption at issue in *Fifth Third*.

II. THE VESTING OF HEALTH-CARE BENEFITS MUST BE CLEAR AND EXPRESS IN THE LANGUAGE OF THE AGREEMENT

In contrast to the Sixth Circuit's a-textual approach, the Third Circuit's requirement of a clear, express statement that the parties intended for health-care benefits to vest—i.e., to extend beyond the term of the agreement—comports with ordinary rules of contract interpretation, offends no policy of federal labor law, and tracks the congressional assessment under ERISA that welfare benefits should not vest unless there is an express agreement that they should. See *Skinner*, 188 F.3d at 139 ("Because vesting of welfare plan benefits constitutes an extra-ERISA commitment, an employer's commitment to

vest such benefits is not to be inferred lightly and must be stated in clear and express language.").[6]

The Third Circuit adopted its clear statement rule in *UAW* v. *Skinner Engine Corp.* The plaintiffs there brought a § 301 action after the company altered a number of welfare benefits related to life and health. *Id.* at 136-37. The Third Circuit expressly declined to follow *Yard-Man*, *id.* at 139, relying instead on Congress' explicit exemption of welfare benefits from ERISA's vesting requirements. The court concluded that it is "illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires" and that it is "not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of gratuitous inferences." *Id.* at 141.

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[6] Far from being a thumb on the scales in favor of employers, the Third Circuit's clear statement rule is analytically similar to like rules applied in other contracting contexts, such as the requirement of "precise language of the contract for a 'clear intent' to rebut the presumption that [third parties] are merely incidental beneficiaries" of government contracts. See, e.g., *Orff* v. *United States*, 358 F.3d 1137, 1147 n.5 (9th Cir. 2004); cf. ANTONIN SCALIA, A MATTER OF INTERPRETATION 29 (1997) (observing in the context of statutory construction that "[s]ome of the rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway. For example, since congressional elimination of state sovereign immunity is such an extraordinary act, one would normally expect it to be explicitly decreed rather than offhandedly implied—so something like a 'clear statement' rule is merely normal interpretation.").

The Third Circuit similarly rejected the Sixth Circuit's rationale that a presumption in favor of vesting is justified because the benefits are a subject of permissive collective bargaining. *Ibid.* Rather, as the Third Circuit observed, "those who fear that their unions will not bargain for continued benefits for retirees need only see to it that specific vesting language protecting those benefits is incorporated into collective bargaining agreements." *Ibid.* (quoting *Bidlack*, 993 F.2d at 609 (Posner, J., plurality opinion)).

After rejecting the *Yard-Man* approach, the Third Circuit turned to the language of the agreement. Though the agreement described the benefits at issue using terms such as "will continue" and "shall remain," the Third Circuit reasoned that those terms did not "clearly and expressly indicate vesting since there is simply no durational language to qualify" them. *Ibid.* The court noted that extrinsic evidence can be used to clarify contracts, but only when there is actual ambiguity. *Id.* at 145. "Silence on duration, however, may not be interpreted as an agreement by the company to vest retiree benefits in perpetuity." *Id.* at 147.

That rule—covering the exact situation here—is correct, comports with ordinary rules of contract interpretation, and offends no labor policy. It aligns with normal contract interpretation far more than looking to infer the parties' intent and presuming it from either silence or the "context" of the agreement, as the Sixth Circuit does. And it manifests the same

healthy skepticism with which extra-textual claims of ambiguity are greeted in contract interpretation generally. After all, the parol evidence rule exists for good reason.

The familiar maxim that contract interpretation (like statutory interpretation) generally begins (and frequently ends) with the language of the agreement applies with special force here, where certainty is important to both employers and retirees about whether collective bargaining agreements provide for vested health-care benefits. In that respect, the Third Circuit's clear statement rule is entirely consistent with national labor policy in that, as this Court has observed, "the administration of collective bargaining contracts [is to be] accomplished under a uniform body of federal substantive law." *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 200 (1962). A clear statement rule is best suited to provide that uniformity and certainty.[7]

Further, allowing employers to require individuals to contribute some amount toward their health-care costs (where, as here, there is no clear and express statement of vesting in the collective bargaining agreement) furthers national labor policy by enabling employers to continue providing health-care benefits without turning those benefits into a crushing liability. In contrast, the Sixth Circuit's contrary

[7] A clear statement rule also comports with Congress' policy choices under ERISA. *Supra* at 4-6.

rule may actually disserve national labor policy by discouraging employers from continuing to provide post-retirement medical coverage to current employees altogether to avoid that liability.

A clear statement rule would further national labor policy in yet another way by almost certainly reducing litigation and encouraging the resolution of labor issues at the collective bargaining table, not the courthouse. See 29 U.S.C. § 171(a) (Taft-Hartley Act) ("It is the policy of the United States that—(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representative of their employees * * * .").

Requiring the language of collective bargaining agreements to clearly establish legal obligations furthers national labor policy goals and should be encouraged. This Court should therefore embrace the Third Circuit's rule that "[s]ilence on duration * * * may not be interpreted as an agreement by the company to vest retiree benefits in perpetuity." *Skinner*, 188 F.3d at 147. Instead, a clear and express contractual statement is required. Because there is unquestionably no such statement here, the Sixth Circuit's judgment should be reversed.

III. ALTERNATIVELY, THERE MUST BE LANGUAGE IN THE AGREEMENT CAPABLE OF BEING REASONABLY INTERPRETED AS A PROMISE OF VESTING

Although they do not require a clear and express statement of vesting as the Third Circuit does, the Second and Seventh Circuits still require that to reach a fact-finder, a plaintiff must be able to "point to written language capable of reasonably being interpreted as creating a promise" to vest the benefits. *Am. Fed'n of Grain Millers, AFL-CIO* v. *Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) (quoting *Schonholz* v. *Long Island Jewish Med. Ctr.*, 87 F.3d 72, 78 (2d Cir. 1996)); see *Rossetto*, 217 F.3d at 544. The judgment below cannot stand under that legal standard either.

For example, in *Joyce* v. *Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999), the Second Circuit (like the Third Circuit in *Skinner*) held that language stating benefits "will be provided for employees receiving or becoming entitled to receive pension payments" did not create ambiguity concerning the vesting of benefits. Likewise, language in the agreement concerning the termination of the various benefits at potential future dates beyond the collective bargaining agreement could not "reasonably be read as binding [the employer] to vest the benefits at issue" because (as in the case at bar) there was only silence with regard to duration. *Ibid.* Ultimately, without "language that affirmatively operates to create the promise of vesting," the Second Circuit

declined to read such a promise into the agreement. *Id.* at 135.

The Second Circuit acknowledged that, while "context surely matters in the [vesting] analysis, at root the text itself must create a disputed question of fact as to vesting." *Ibid.* (citing *Bidlack*, 993 F.2d at 605-08 (Posner, J., plurality opinion) ("[T]here must be either contractual language on which to hang the label of ambiguous or some yawning void.")). It is not enough to point to silence concerning the duration of a benefit when benefits are expected to terminate at the end of the agreement. See *Litton*, 501 U.S. at 207-08; *Allied Chem. & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). As a result, the Second Circuit reasoned that "absence of language in the [agreement] flatly *rejecting* the concept of vesting does not alter the retirees' failure to identify language that affirmatively operates to imply vesting." *Joyce*, 171 F.3d at 135.

Similarly, in the Seventh Circuit, a plaintiff must normally show ambiguity in the *language* of the agreement before extrinsic evidence can be used to support a finding of vested benefits. *Rossetto*, 217 F.3d at 544. In *Rossetto*, the plaintiffs sued their former employer for benefits terminated at the conclusion of the operative collective bargaining agreement. The Seventh Circuit recognized that its "en banc decision in *Bidlack* established a presumption that an employee's entitlement to such benefits expires with the agreement creating the entitlement, rather than vesting, but the presumption can be knocked out by a

showing of genuine ambiguity, either patent or latent, *beyond silence*." *Id.* at 543 (emphasis added) (citing *Bidlack*, 993 F.2d at 606-07 (Posner, J., plurality opinion)). The plaintiffs prevailed in *Rossetto*, but only on the basis of a rare "latent ambiguity"—i.e., objectively ambiguous evidence outside the contract language.[8]

Thus in either the Second or the Seventh Circuit, respondents would have been required to identify specific language in the collective bargaining agreements that "affirmatively operates to imply vesting." *Joyce*, 171 F.3d at 135. This they cannot do. In the Sixth Circuit, however, defendants such as petitioners are required to identify particular language *rejecting* vesting. That approach turns ordinary contract principles and proof burdens upside down. Accordingly, this Court should reject the Sixth Circuit's approach and, if it declines to embrace the Third Circuit's clear statement rule, require, as the Second and Seventh Circuits do, that collective

[8] Latent ambiguities are of the type mentioned in the famous case of *Raffles* v. *Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (ex. 1864). There, a contract clearly called for shipment on a vessel named Peerless, but two ships departing from the same port shared that name. The hornbook rule derived from that case holds that any ambiguity may be resolved by reference to objective evidence—*beyond the self-serving testimony of one side*—that the contract could actually mean two things. Latent ambiguity is not an issue in the instant case, though, as respondents did not offer—and the Sixth Circuit did not identify—any objective evidence of an ambiguity that could support vesting.

bargaining agreements must contain language that can reasonably be construed as vesting benefits.

The clear statement rule and the affirmative-textual-indication rule are similar in that both require some basis in the actual language of the agreement that the parties intended vesting. Crucially, under either rule, mere durational silence is not enough to find benefits vested. That is because silence can neither guarantee a vested right nor create ambiguity in light of the background principles at work here. Nor can context be used to create an ambiguity that is then resolved by the same context.

Yard-Man has shown—in this very case—the confusion that can be sown by extra-textual considerations. A text-based rule will minimize that confusion and promote uniformity among the circuits concerning the appropriate level of "clarity" regarding vesting commitments. Then "the administration of collective bargaining contracts [will be able to be] accomplished under a uniform body of federal substantive law." *Smith*, 371 U.S. at 200.

At a minimum, then, there must be affirmative language indicating vesting in the collective bargaining agreement. There is no such language in the agreement here, so the Sixth Circuit's decision that the health-care benefits nonetheless were vested should be reversed.

IV. UNDER ANY MEANINGFUL STANDARD, THE SIXTH CIRCUIT'S JUDGMENT CANNOT STAND

While there has been isolated support for *Yard-Man*, see, e.g., *USW* v. *Connors Steel Co.*, 855 F.2d 1499, 1505 (11th Cir. 1988) (agreeing, in dicta, with the Sixth Circuit), the circuits almost uniformly disavow the Sixth Circuit's approach and instead insist on at least some textual indication of vesting. Because there is no such language in the collective bargaining agreement at issue here, petitioners would prevail under any of those other standards. As already demonstrated, *supra* 25-33, petitioners would prevail under the rules of construction applied by the Second, Third, and Seventh Circuits. And as demonstrated below, petitioners would prevail under any other standard that, in contrast to *Yard-Man*, does not presume vesting but instead relies on the plain language of the agreement to determine the scope and duration of the benefits conveyed within.

A. Durational Language In The Operative Agreements Indicates That The Health-Care Benefits Were To End With Those Agreements

The P&I agreements at issue here applied to union-represented employees by way of the local collective bargaining agreements and were specifically subject to durational clauses. For example, the local union and the employer entered into a collective bargaining agreement effective November 6, 1994

that expired November 6, 1997. JA 195. The collective bargaining agreement adopted the P&I agreement through Letter A, which provided that "for the duration of our Articles of Agreement which continue in effect until 12:01 a.m., November 6, 1994, and for the term of our next Agreement, the benefit plans currently applicable to employees you represent at the Point Pleasant Polyester Plant will be continued." *Id.* at 196-97.

The same durational limits are explicit in the P&I agreements. For example, the P&I agreement incorporated into the 1994 collective bargaining agreement described above introduced the health-care benefits program by explaining that "[e]ffective January 1, 1995 and for the duration of this Agreement thereafter, the Employer will provide" the health-care benefits described. *Id.* at 85. A Supplemental P&I agreement signed thereafter included the same language. *Id.* at 89, 100, 157. The Supplemental P&I further stated that "[t]he International Union, Local Unions, and the Employer agree that this Agreement terminates on April 19, 1997 and shall not be continued beyond that date." *Id.* at 97.[9]

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[9] Similar language can be found in the other collective bargaining agreements and P&Is at issue here. For example, the parties agreed to a collective bargaining agreement effective November 6, 1991 through November 6, 1994. JA 82. Through Letter A of that agreement, the parties agreed "that for the duration of this agreement all the terms and conditions of the Pension, Insurance and Service Award Agreement of May 15, 1991, as from time to time amended, between the Goodyear Tire

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This language plainly indicates that the health-care benefits were intended to last only as long as the agreement was in place. And having been set out in the collective bargaining agreement that adopted the P&I, and again at the very beginning of the P&I agreement itself, the language did not need to be repeated where the "full Company contribution" is mentioned. *Id.* at 134-35, 189.

B. When The Parties Intended Benefits To Vest, They Adopted Specific Language To Accomplish That Intention

The limited duration of the health-care benefits is made all the more clear when contrasted with

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and Rubber Company and the United Rubber, Cork, Linoleum and Plastic Workers of America, including the covering letters under the same date, will be applied to the employees covered by this Agreement[.]" *Id.* at 83-84. The P&I agreement adopted by the collective bargaining agreement also included durational limits, stating that "[e]ffective January 1, 1992 and for the duration of this Agreement thereafter, the Employer will provide" the medical benefits described. *Id.* at 33; see also *id*. at 11.

Likewise, the collective bargaining agreement effective November 6, 1997 through November 6, 2000 included Letter A, by which the "Company and the Union agree[d] that for the duration of our Articles of Agreement which continue in effect until 12:01 a.m., November 6, 2000, the benefit plans currently applicable to employees you [the union] represent at the Point Pleasant Polyester Plant will be continued[.]" *Id.* at 276. The P&I agreement, by its terms, was also limited to the duration of the agreement. See *id.* at 201 ("Effective May 9, 1997, and for the duration of this Agreement thereafter, the Employer will provide" certain medical benefits.).

express vesting language found elsewhere in the P&I agreements. For example, the 2000 P&I agreement references pension benefits that cannot be "reduced, suspended or discontinued." JA 376. And the section of the P&I that deals with "Top Heavy Vesting" references "an [e]mployee's nonforfeitable right" to a percentage of income conforming to a "vesting schedule." *Id.* at 376-77. Where the parties intended for a benefit to be vested, then, they knew how to draft language to express that intent. In contrast, there is no vesting language with respect to the health-care benefits at issue in this case. The agreement expressly limits those benefits to "the duration of this Agreement." *Id*. at 377.

Even if one thought the language describing a "full Company contribution" toward health care benefits (see, e.g., *id.* at 134-35, 189, 415) were ambiguous standing on its own—an argument undermined by the International union continuing to negotiate cap agreements even with the P&I language in place—considering the agreement as a whole would confirm that health-care benefits were never intended to outlive the agreement between the parties. Take, for example, the section of the P&I agreement that provides payment of a Special Medicare Benefit. *Id.* at 139, 421. It provides that the payment will continue as long as the Pensioner "continue[s] to be covered for benefits under this [contract]." If it is possible for the Pensioner to not continue to be covered, the benefits must not be vested. And it is a familiar rule of contract construction

that contracts must be read as a whole. See, e.g., *Instone Travel Tech. Marine & Offshore* v. *Int'l Shipping Partners, Inc.*, 334 F.3d 423, 428 (5th Cir. 2003) ("[T]he court should read all parts of the contract together to ascertain the agreement of the parties, ensuring that each provision of the contract is given effect and none are rendered meaningless." (citations omitted)).[10]

C. The Power Of The *Yard-Man* Presumption Is Apparent In Its Ability To Overcome Plain Contractual Language

As in other cases where it was applied, however, the *Yard-Man* presumption overcame the plain language of the agreement here. That much can be seen from the Sixth Circuit's decision in *Tackett I* reversing the district court's dismissal of respondents' claims as a matter of law and holding that the benefits were vested as a matter of law. Pet. App. 114. Indeed, the

[10] The Sixth Circuit purports to follow ordinary contract principles (just as it disclaims applying any presumption of vesting) but, as Judge Sutton has explained, the reality in the Sixth Circuit is that "[u]nless a company can point to explicit language in the relevant agreement stating that 'retiree benefits' terminate at a particular date or do not vest, the benefits seem to vest as a matter of law." *Noe*, 520 F.3d at 568 (Sutton, J., concurring in part and dissenting in part). That the Sixth Circuit purports to reach that result under "ordinary contract principles," see, e.g., *Yard-Man*, 716 F.2d at 1481 n.2, is all the more reason this Court should make clear that those principles, properly understood and applied, do not support, much less require, the Sixth Circuit's approach to these cases.

decision overturned the district court's initial dismissal of all respondents' claims based on the undisputed evidence of cap agreements in place concerning the health-care benefits. *Id.* at 129, 131, 134.

In using *Yard-Man* to tie the district court's hands, the *Tackett I* panel held that "[a] court may find vested rights 'under a [collective bargaining agreement] even if the intent to vest has not been explicitly set out in the agreement.'" *Id.* at 58. In fact, the *Tackett II* panel later acknowledged that the court's earlier holding established "a controlling interpretation" of the collective bargaining agreement that was "dispositive of at least the vesting issue." *Id.* at 61. Thus, while the first panel paid lip service to not deciding the ultimate question, *id.* at 61-62, its summary of the agreement at issue was in fact "an unqualified declaration" that "'the parties intended health-care benefits to vest.'" *Id.* at 62. It was therefore unsurprising when the district court eventually made factual findings that aligned with its "conclusion that the Sixth Circuit answered the threshold vesting issue." *Id.* at 63.

But the collective bargaining agreement at issue was, at most, silent on that "threshold" issue—and as a result, the agreement's expiration provision controls and retiree health-care benefits do not extend beyond the agreement's terms. One may agree or disagree with the wisdom or policy of retiree benefits being subject to future negotiations. What cannot be debated, however, is that those individuals have the right to insist—before retirement, through their

union representatives—on the right to full vesting of benefits, and to weigh the inevitable trade-offs that must be made to obtain such an extraordinary benefit. Once *Yard-Man* was applied, however, the Sixth Circuit simply presumed that the parties intended vesting based on a-textual factors such as status and permissive bargaining.

Thus the trial that eventually took place had nothing to do with the vesting question that has divided the circuits. It simply determined "*what* vested"—not *whether* anything vested as an initial matter. Pet. App. 64 (emphasis in original). The district court was only "called upon to explain whether what vested include[d] specific benefits." *Ibid.* Once the error of *Tackett I* in applying *Yard-Man* is exposed, the correctness of the district court's original dismissal of respondents' claims as a matter of law becomes clear and unassailable.

Although the circuits may be "all over the lot" in their approaches to the vesting issue, petitioners in this case would have prevailed in any other circuit that has rejected *Yard-Man*. The First Circuit, for example, has declined to follow the Sixth Circuit because "the use of presumptions may interfere with the correct interpretation, under normal LMRA rules, of the understanding reached by the parties." *Senior* v. *NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 218 (1st Cir. 2006). Similarly, the Fifth and Eighth Circuits also have rejected the notion of a *Yard-Man* presumption. *United Paperworkers Int'l Union* v. *Champion Int'l Corp.*, 908 F.2d 1252, 1261 n.12 (5th Cir. 1990)

("To the extent that *Yard-Man* held that there is, as a general proposition, an inference of an intent to vest retirement benefits (because they are 'status' benefits), we find merit in the Eighth Circuit's criticism in *Anderson* [v. *Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516-20 (8th Cir. 1988),] of this aspect of *Yard-Man* and find no basis in logic or federal labor policy for such a broad inference.").

It may be that the Fifth Circuit would tolerate extrinsic evidence and inferences beyond what the Second or Seventh Circuit might allow, *ibid.*, but that is of no moment here because the Fifth Circuit nonetheless relies on the contract language *first* before roaming outside the contract in search of an intent to vest. *Int'l Ass'n of Machinists & Aerospace Workers, Woodworkers Div.* v. *Masonite Corp.*, 122 F.3d 228, 233 (5th Cir. 1997).

The key point is that whatever their differences, all of these circuits have uniformly rejected the Sixth Circuit's approach in which silence and context come together to both create an ambiguity and then resolve it. Here, the Sixth Circuit held that the context of retiree benefits created an "ambiguity" from silence; the court then resolved the "ambiguity" it had created by treating that context as extrinsic evidence which proves vesting. That *Yard-Man* double-whammy cannot be right.

But even if durational silence were properly treated as ambiguity, petitioners would still prevail here. That is because, before the Sixth Circuit put

its *Yard-Man* thumb on the scales, the district court initially ruled that extrinsic evidence—the cap agreements—required dismissal in petitioners' favor as a matter of law. Pet. App. 146-47.

This case thus confirms Judge Sutton's suspicion that in the Sixth Circuit, "[u]nless a company can point to explicit language in the relevant agreement stating that 'retiree benefits' terminate at a particular date or do not vest, the benefits seem to vest as a matter of law." *Noe*, 520 F.3d at 568 (Sutton, J., concurring in part and dissenting in part). That rule has no support in law or logic. Even if, then, silence in a collective bargaining agreement could be deemed an "ambiguity" justifying resort to extrinsic evidence (which it cannot), the evidence here (i.e., the cap agreements) makes plain that the benefits did not vest, respondents' claims should have been dismissed, and the Sixth Circuit's judgment should be reversed.



CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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