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 NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICUS CURIAE*[1]

The National Association of Manufacturers ("NAM") is the largest association of manufacturers in the United States. Its membership comprises small and large manufacturers in every industrial sector and in all fifty states. The manufacturing industry employs nearly twelve million men and women, contributes more than $1.8 trillion annually to the American economy, has the largest economic impact of any major sector, and accounts for two-thirds of private sector research and development. NAM is the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs throughout the United States.

Because cases before this Court are often important to its members, NAM regularly participates as an *amicus* before this Court. In the just-completed Term, NAM filed six *amicus* briefs on the merits,[2] and five *amicus* briefs at the petition stage.[3]

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[1] On June 20, 2014, NAM informed counsel of record for all parties of its intent to file this brief. *See* S. Ct. R. 37.3(a). Petitioners have filed a letter with the Court consenting to *amicus curiae* briefs in this matter. A consent letter from Respondents accompanies this brief. No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than NAM, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *See id.* R. 37.6.

[2] *Halliburton v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014); *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014); *Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014); *Integrity*

The issue in this case is of immense importance to NAM's members and to the American manufacturing industry as a whole. Many of NAM's members engage in collective bargaining with union representatives, and the resulting agreements often provide health benefits for retired workers. A determination that retiree health benefits are vested can impose an obligation on the employer for decades with an aggregate cost to the employer of millions or even billions of dollars. (*See* Part II below.)

Even though Congress made a careful and explicit decision when it passed the Employee Retirement Income Security Act ("ERISA") in 1974 that welfare benefits would not be mandatorily vested, manufacturers who have operations or sell products nationwide are currently subject to conflicting standards for determining whether retiree health benefits are unalterable for the life of all retirees. *See Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000) ("Cases in [the] circuits are all over the lot."). Because different circuits draw different conclusions from the same collective bargaining language, litigation on this issue is common. Representatives on both sides of the collective bargaining table simply do not know, after long and hard negotiations, what the employers' obligations to retirees will be. These con-

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Staffing Solutions, Inc. v. Busk, 134 S. Ct. 1490 (2014); *Yates v. United States*, 134 S. Ct. 1935 (2014).

[3] *Accenture, L.L.P. v. Wellogix, Inc.*, 134 S. Ct. 2725 (2014); *GenOn Power Midwest, L.P. v. Bell*, 134 S. Ct. 2696 (2014); *Oklahoma v. EPA*, 134 S. Ct. 2662 (2014); *North Dakota v. EPA*, 134 S. Ct. 2662 (2014); *Exxon Mobil Corp. v. City of New York*, 134 S. Ct. 1877 (2014).

flicting standards often lead to venue fights to determine which circuit's law will resolve the issue of vesting. (*See* Part III.B. below.)

A clear rule applicable nationwide is in the interest of manufacturers and all other employers, as well as unions, retirees, and the judicial system. Accordingly, NAM submits this brief in support of Petitioners.

SUMMARY OF ARGUMENT

Four decades ago, Congress made a careful and conscious decision not to mandate vesting of welfare benefits, including retiree health care benefits. Twice, this Court has unanimously acknowledged and paid deference to that congressional decision. The Sixth Circuit's *Yard-Man* inference,[4] and the canons of contract construction that have grown up around it, flout this congressional decision by creating a strong inference that collectively-bargained retiree health benefits *are* vested. More in accord with the congressional intent is the Third Circuit's rule that a union or retiree must show "clear and express language" in the collective bargaining agreement to demonstrate vesting.

This issue is of major consequence to manufacturers and other employers throughout the United States. Health benefits for retirees potentially impose hundreds of billions of dollars of liabilities on the Nation's employers. An inference of vesting could render those benefits unalterable, notwithstanding dramatic

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[4] *Int'l Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1482 (6th Cir. 1983).

changes in the law, technology, delivery, and cost of health care.

Moreover, the Sixth Circuit rule strongly inferring vesting has created an incentive for unions to avoid bargaining about whether benefits are vested. Even if unions do negotiate about retiree benefits, the *Yard-Man* inference allows retirees to undermine any collectively-bargained limitations on the benefits by claiming the benefits were vested, and thus unalterable even pursuant to collective bargaining. Thus the *Yard-Man* inference removes an issue of increasing importance from the bargaining table. Faced with a strong inference of vesting and union unwillingness to negotiate, or the threat that retirees can void even negotiated limits on their health benefits, too many employers have been forced into bankruptcy court. (*See* Part II.C. below.)

A clear and express language rule would address these issues. It would allow bargainers to know during negotiation what is necessary to create vesting, and would provide clear notice after execution of the agreement whether benefits are in fact vested. Judicial resolution of vesting issues would be simplified with far less need for venue fights and trials of disputed facts. Of greater importance, a clear and express language rule would fulfill rather than frustrate the congressional intent.

ARGUMENT

I. THE "CLEAR AND EXPRESS LANGUAGE" RULE FOR JUDGING WHETHER RETIREE HEALTH BENEFITS ARE VESTED WOULD SERVE THE CONGRESSIONAL INTENT AND PROMOTE GREATER CERTAINTY FOR EMPLOYERS, UNIONS, AND RETIREES.

"[T]o vest benefits is to render them forever unalterable." *Int'l Union, UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999).[5] When a court deems retiree health benefits vested, the employer must continue paying medical benefits for the life of each retiree. In light of the ever-increasing cost of medical care, the number of retirees that may benefit, and the life expectancy of each retiree, the cost to a company of such a vesting decision can be millions or even billions of dollars. (*See* Part II below.) Thus, the vesting issue is of critical importance to employers, unions, and retirees.

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[5] *See also Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc) (same); *Tackett v. M&G Polymers USA, LLC*, 733 F.3d 589, 596 (6th Cir. 2013) (*Tackett II*) (Pet. App. 11) ("To vest, in this context, means to remain binding beyond the expiration of the collective bargaining agreement." (internal quotation marks omitted)); *Yard-Man*, 716 F.2d at 1480 ("nonterminating lifelong insurance benefits").

A. Congress Made a Conscious Decision Not To Mandate Vesting of Welfare Benefits, Including Retiree Health Care Benefits.

When it passed ERISA in 1974, Congress made a careful, conscious, and clear policy decision to mandate vesting of pension benefits. ERISA § 203, 29 U.S.C. § 1053 (2012) (mandating that pension benefits are vested). In contrast, Congress made an equally careful, conscious, and clear decision *not* to mandate vesting of welfare benefits, including retiree health care benefits. ERISA § 201(1), 29 U.S.C. § 1051(1) (2012) (not vesting welfare benefits). ERISA deems health benefits to be welfare, not pension, benefits. ERISA § 3(1), 29 U.S.C. § 1002(1) (2012) (defining welfare benefit plan). This Court has unanimously recognized that "ERISA . . . specifically exempts 'employee welfare benefit plan[s]' from its stringent vesting requirements." *Inter-Modal Rail Emps. Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510, 514 (1997). Again unanimously, the Court confirmed that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans. Nor does ERISA establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (citation omitted).

This congressional decision not to mandate vesting of welfare benefits was well-reasoned. Pension benefits are normally payable in readily predictable cash installments. ERISA requires employers who

sponsor defined benefit pension plans to set aside funds for those plans. ERISA § 302, 29 U.S.C. § 1082 (2012). Welfare benefits are subject to no such funding requirement. The cost of health benefits in particular depends on the vagaries of changes in the law, advances in available treatments, escalating medical and prescription drug costs, and of course the health and lifespans of the individual beneficiaries.[6] Congress understood that mandatory vesting of health benefits "would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income." S. Rep. No. 93-383, at 51 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4890, 4935. Likewise, courts have recognized that " '[a]utomatic vesting was rejected [by Congress] because the costs of such plans are subject to fluctuating and unpredictable variables. . . . These unstable variables prevent accurate prediction of future needs and costs.' " *In re Unisys Corp. Retiree Med. Ben. ERISA Litig.*, 58 F.3d 896, 901 (3d Cir. 1995) (quoting *Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)).

For retiree health benefits to vest and continue for the retiree's life beyond the duration of the collec-

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[6] "The value of a pension benefit, whether defined or undefined, is clear cut—a matter of concrete dollars and cents, fairly measurable as a matter of principal or income stream before retirement, at retirement or after retirement. Vested health-care benefits are another matter. Employers do not send their active or retired employees a monthly account itemizing the value of their health-care benefits. And with good reason: What would it say? What could it say?" *Reese v. CNH Am. LLC,* 574 F.3d 315, 324 (6th Cir. 2009).

tive bargaining agreement ("CBA"), the employer and the union must agree that the benefits will vest. *See Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 261 (6th Cir. 2012) ("[V]esting of retiree welfare benefits is a matter of contractual agreement."). Without such an agreement to vest, promises in a collective bargaining agreement terminate when the agreement terminates. As this Court explained in *Litton Financial Printing Division v. NLRB*:

> [C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement. Exceptions are determined by contract interpretation. Rights which accrued or vested under the agreement will, as a general rule, survive termination of the agreement. And of course, if a collective-bargaining agreement provides *in explicit terms* that certain benefits continue after the agreement's expiration, disputes as to such continuing benefits may be found to arise under the agreement, and so become subject to the contract's arbitration provisions.

501 U.S. 190, 207–08 (1991) (emphasis added).

Collective bargaining agreements must be interpreted in accordance with federal labor law as supplemented by traditional rules of contract interpretation. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456–57 (1957). The lower courts uniformly express allegiance to this principle, but have employed diametrically opposing rules of construction—and reached dramatically different results—in de-

termining whether retiree health benefits are vested. *Compare Skinner*, 188 F.3d at 138–39 ("Although construction of collective bargaining agreements is generally governed by federal law, traditional rules of contract construction apply when not inconsistent with federal labor law"; holding that retiree health benefits vest only if supported by "clear and express language of an agreement to vest")*, with Yard-Man*, 716 F.2d at 1479, 1482 ("traditional rules for contractual interpretation are applied as long as their application is consistent with federal labor policies"; creating an "inference" that because retiree health benefits are a permissive subject of bargaining and are a "status benefit," they should continue for as long as the individual holds the status of retiree, i.e., for life).

The issue in this case, therefore, is whether the Sixth Circuit's judicially-created canons of contractual construction for determining vesting of retiree health benefits are faithful to the congressional decision that such benefits do not vest by operation of law.

B. The *Yard-Man* Inference Used by the Court Below Frustrates the Congressional Intent and the Expectations of Bargainers.

1. The *Yard-Man* Inference and Its Corollary Rules of Construction Foreclose Argument on Vesting.

In its two decisions in the current case, the Sixth Circuit relied heavily on *Yard-Man*.[7] Thus, the *Yard-Man* inference and its corollary canons of construction are at the center of this case.

In *Yard-Man*, the Sixth Circuit deemed "ambiguous" language in the CBA stating that "[t]he Company will provide insurance benefits equal to the active group benefits . . . for the former employee and his spouse." 716 F.2d at 1480.[8] Although the Sixth Cir-

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[7] In the first appeal to the Sixth Circuit, the court was clear that it was applying the *Yard-Man* analysis. *See Tackett v. M&G Polymers USA, LLC*, 561 F.3d 478, 481 (6th Cir. 2009) (*Tackett I*) (Pet. App. 89–90 ("In resolving this appeal, we must decide . . . whether, under this Circuit's *Yard-Man* analysis . . . the Plaintiffs have sufficiently established a right to vested health-care benefits to survive a motion to dismiss"); *id.* at 489–90 (Pet. App. 109–13) (applying *Yard-Man* analysis). On the second appeal, the Sixth Circuit quoted its earlier discussion of *Yard-Man*, and explained: "*Tackett I* interpreted the quoted language of the CBA, standing alone, as indicating an intent to vest and this interpretation bound the district court." *Tackett II*, 733 F.3d at 596–97, 599 (Pet. App. 11–13, 19).

[8] The court dismissed the durational clause in the CBA as insufficient to defeat vesting because the "clause does not specifically refer to the duration of benefits." *Yard-Man*, 716 F.2d at 1482.

cuit correctly observed that no "federal labor policy identified to this Court presumptively favor[s] the finding of interminable rights to retiree insurance benefits when the collective bargaining agreement is silent," *id.* at 1482, the court ignored the congressional directive that welfare benefits do not mandatorily vest.

Instead, the Sixth Circuit constructed a framework directly at odds with the congressional directive. The court invoked "traditional rules for contractual interpretation" for addressing the vesting issue, *id.* at 1479, but supplemented those standard rules with two additional inferences. *First*, the court correctly noted that retiree benefits are "permissive not mandatory subjects of collective bargaining," but then inferred vesting because "it is unlikely that such benefits, which are typically understood as a form of delayed compensation or reward for past services, would be left to the contingencies of future negotiations." *Id.* at 1482. Thus, it reasoned, "the finding of an intent to create interminable rights to retiree insurance benefits in the absence of explicit language is not, in any discernible way, inconsistent with federal labor law." *Id.*

Next, it created an inference based on the status of beneficiaries and retirees:

> [R]etiree benefits are in a sense "status" benefits which, as such, carry with them an inference that they continue so long as the prerequisite status is maintained. Thus, 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.*

Id. (emphasis added). The court provided no authority for either of these inferences, nor did it address, much less reconcile those inferences with, the decision by Congress *not* to mandate vesting of welfare benefits.

In the three decades since it decided *Yard-Man*, the Sixth Circuit has developed numerous corollaries to supplement the two *Yard-Man* inferences discussed above. It now holds that when CBAs use eligibility for pension benefits, which are vested, as the basis for determining eligibility for retiree health benefits, an inference arises that the health benefits are vested as well. *See, e.g.*, *Tackett II*, 733 F.3d at 597 (Pet. App. 13–15); *Golden v. Kelsey-Hayes Co. (In re Golden)*, 73 F.3d 648, 656 (6th Cir. 1996). Because CBAs commonly use the same tests for retiree health care eligibility as for pension eligibility, the "tying" analysis has become almost a per se rule of vesting that is directly contrary to congressional intent.

Moreover, the Sixth Circuit has relied on the presence of durational limits on other benefits, contrasted with the absence of durational limits specifically applicable to retiree health benefits, as a basis to infer that health benefits were subject to no durational limit and thus are vested. *Yard-Man*, 716 F.2d at 1481–82 (durational limit on savings and pension plan programs); *see also Moore v. Menasha Corp.*, 690 F.3d 444, 458 (6th Cir. 2012) ("The Sixth Circuit has consistently held that the inclusion of specific dura-

tional limitations in some provisions, but not others, suggests that benefits not so specifically limited, were intended to survive." (internal quotation marks omitted)).

It has relied on the provision of a Medicare supplement to retirees eligible for Medicare, coupled with the fact that not all current retirees will reach Medicare eligibility during the term of the existing CBA, as a basis for finding that retiree health benefits were intended to last beyond the existing CBA. Otherwise, it reasons, the promise of a Medicare supplement is "illusory" to those retirees not yet eligible for it. *See, e.g.*, *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 918 (6th Cir. 2000).

And it has found an intent to vest when an employer fails to terminate retiree health benefits immediately upon expiration of the CBA or during a strike. *See Int'l Union, UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808–09 (6th Cir. 1984); *accord Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 676 n.6 (6th Cir. 1984). Often, the Sixth Circuit combines several of these corollary inferences in a single case to find vesting.

The results speak for themselves. Since *Yard-Man*, the Sixth Circuit has addressed whether retiree health benefits were vested in twenty-one published decisions, and has held the benefits vested in all but two.[9] In effect, employers can escape vesting only by

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[9] Decisions holding benefits vested are: *Yard-Man*, 716 F.2d at 1476; *Cadillac Malleable*, 728 F.2d at 807; *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985); *Weimer*, 773 F.2d at 669; *Smith v. ABS Indus., Inc.*, 890 F.2d 841 (6th

showing a clear statement in the CBA—specifically tailored to health benefits—that unambiguously precludes vesting. *See Noe*, 520 F.3d at 565 (Sutton, J., concurring in part and dissenting in part). Thus, the *Yard-Man* rule has turned the congressional decision *not* to mandate vesting of welfare benefits on its head. In the absence of unambiguous language in the CBA negating vesting, *any retiree* can claim an inference of vested health benefits merely by observing that retiree health benefits are a permissive subject of bargaining. And, in the absence of unambiguous language in the CBA negating vesting, *any retiree* can claim the "status benefit" inference merely by being a retiree.[10]

Cir. 1989); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Golden*, 73 F.3d at 648; *Int'l Union, UAW v. BVR Liquidating, Inc.*, 190 F.3d 768 (6th Cir. 1999); *Maurer*, 212 F.3d at 907; *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417 (6th Cir. 2004); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006); *Noe v. PolyOne Corp.*, 520 F.3d 548 (6th Cir. 2008); *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064 (6th Cir. 2008); *Schreiber v. Philips Display Components Co.*, 580 F.3d 355 (6th Cir. 2009); *Reese*, 574 F.3d at 315; *Wood v. Detroit Diesel Corp.*, 607 F.3d 427 (6th Cir. 2010); *Moore*, 690 F.3d at 444; *Bender*, 681 F.3d at 253; *Tackett II*, 733 F.3d at 589 (Pet. App. 1). The two exceptions are *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877 (6th Cir. 1997) (adopting district court opinion), and *Witmer v. Acument Global Tech., Inc.*, 694 F.3d 774 (6th Cir. 2012).

[10] The Sixth Circuit has attempted to disclaim any "legal presumption" in the *Yard-Man* rule. *See Cadillac Malleable*, 728 F.2d at 808. It has asserted that "*Yard-Man* does not shift the burden of proof to the employer, nor does it require specific anti-vesting language before a court can find that the parties did not intend benefits to vest." *Golden*, 73 F.3d at 656. But the Sixth Circuit is not of uniform mind in describing *Yard-Man*, leading at least one judge to describe it once as a "presumption" and

This case illustrates the heavy if not outcome determinative tilt of Sixth Circuit precedent on vesting. In the first appeal from dismissal of the complaint, the Sixth Circuit applied the *Yard-Man* framework. It began by espousing its use of "[g]eneral principles of contract interpretation," *Tackett I*, 561 F.3d at 489 (Pet. App. 109), but then quickly moved to the inferences described above. "Language in a collective bargaining agreement," it wrote, "that equat(es) eligibility for retiree health benefits with eligibility for a pension suggests an intent to vest." *Id.* (Pet. App. 110) (internal quotation marks omitted). It noted that "it is unlikely that [retiree health benefits] would be left to the contingencies of future negotiations." *Id.* (Pet. App. 110) (internal quotation marks omitted). "[W]e find it unlikely," it further reasoned, that the union would agree to "a full Company contribution" "if the company could unilaterally change the level of contribution." *Id.* at 490 (Pet. App. 112).

On remand, the district court ruled that the benefits were vested, and on the second appeal the Sixth Circuit affirmed. It noted that the CBA language promising "a full Company contribution" "standing alone [indicated] an intent to vest and this interpretation bound the district court," and the "linkage of health care benefits to pension benefits" also supported the conclusion. *Tackett II*, 733 F.3d at 600 (Pet. App. 19–20).

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later as "nothing more than a nudge in favor of vesting in close cases." *Compare Noe*, 520 F.3d at 568 (Sutton, J., concurring in part and dissenting in part) ("an omnipresent presumption [that] appears to have become a clear-statement rule"), *with Reese*, 574 F.3d at 321 (Sutton, J.) ("nudge").

2. The *Yard-Man* Inference and Its Corollaries Are Not Well-Reasoned.

For several reasons, the *Yard-Man* inference and its corollaries are not well-reasoned. *First*, the inference and corollaries apply only to collectively-bargained retiree benefits. In contrast, for retiree health benefits that are not collectively-bargained, the Sixth Circuit defers to the congressional policy rejecting mandatory vesting. In *Sprague*, a class of retirees previously employed as salaried workers alleged that their health benefits were vested. The court rejected that argument, explaining: "Because vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest 'must be found in the plan documents and *must be stated in clear and express language*.' " 133 F.3d at 400 (emphasis added) (quoting *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993)).

Although the *Yard-Man* rule applies only to collectively-bargained benefits,[11] the Sixth Circuit has pointed to nothing in the Labor Management Relations Act ("LMRA") that overrides the strong mandate in ERISA against inferring vesting. Indeed, as shown, the LMRA requires use of rules of contract construction that are *consistent with federal labor policy*, but the *Yard-Man* rule conflicts directly with the express policy of Congress in ERISA not to mandate vesting of welfare benefits.

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[11] *BVR Liquidating*, 190 F.3d at 772–73.

Moreover, if an inference of vesting were justified—and ERISA makes clear it is not—the Sixth Circuit rule is exactly backwards. It would be more appropriate to apply such an inference to assist an individual who lacked protection of a union, and to assume the union member was adequately represented during negotiations. *See Rosetto*, 217 F.3d at 543–44 (Posner, J.) ("[R]eversal of [the Sixth Circuit's presumptions would make better sense."); *Noe*, 520 F.3d at 568–69 (Sutton, J., concurring in part and dissenting in part) ("One might have thought we would apply the same rule in both settings or, if we were to put a thumb on just one of the scales, we would do so only where the employee did not have the benefit of a union negotiating the contract.").

Second, the assumption that an inference of vesting is justified because retiree welfare benefits are a permissive subject of bargaining is both illogical and overbroad. The Sixth Circuit asserted in *Yard-Man* that it is "unlikely" employees would leave their retirement benefits "to the contingencies of future negotiations." 716 F.2d at 1482. With such a strong incentive to negotiate for vested benefits in the CBA, however, it is more logical to assume that the *absence* of explicit vesting language means the retirees *failed* to obtain a commitment to vest. It simply makes no sense to infer that a term the union and its members ardently wanted is implicit in the CBA by its silence. Further, the inference is far too broad because retiree benefits are always, as a matter of law, a permissive subject of bargaining. As a result, this inference will be present with regard to every CBA, regardless of the bargaining history and regardless of whether the

union actually gave anything in exchange for vested benefits.

The Sixth Circuit's reliance on the limits of permissive bargaining is also unpersuasive. Although it is true that unions have no statutory duty to represent existing retirees, unions *do* have a duty to represent employees *before* retirement, and thus have ample opportunity to obtain prospective vesting language. Moreover, unions are not precluded from negotiating for retirees, and in fact do so regularly, often obtaining increased benefits for retirees even though such increased benefits may require the unions to compromise benefits payable to current workers.[12]

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[12] In *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, the Court recognized that a union has "no statutory duty" to represent retirees, but that "nothing we hold today precludes permissive bargaining over the benefits of already retired employees." 404 U.S. 157, 171 n.11, 181 n.20 (1971). Although the Court acknowledged that unions might, on occasion, "favor[] active employees at the expense of retirees' benefits," *id.* at 173, unions have in fact often negotiated for enhanced benefits for their retirees. *See, e.g.*, *UMW v. Am. Commercial Lines Transp. Serv., LLC*, No. 4:08CV1777SNLJ, 2010 WL 4941346, at *23 (E.D. Mo. Nov. 30, 2010) ("Again, the Retiree Plaintiffs have all conceded that the UMWA has the authority to negotiate health benefits on their behalf, and has done so in the past."); *Yolton v. El Paso Tenn. Pipeline Co.*, 668 F. Supp. 2d 1023, 1026 (E.D. Mich. 2009) (finding "a pattern and practice of the UAW representing retirees in connection with their health care benefits and negotiating agreements that protect or improve those benefits"); *Winnett v. Caterpillar, Inc.*, 579 F. Supp. 2d 1008, 1013–15 (M.D. Tenn. 2008) ("UAW could and did negotiate increases to the pension and medical benefits offered to current retirees."). Moreover, as shown (Part II.B. below) unions have also negotiated court-approved settlements

Nor does the inference that benefits vest merely because of retiree status withstand examination. *Every* retiree formerly represented by a union can claim this inference, regardless of what may have happened in the collective bargaining negotiations. The inference would apply even if the union made an explicit demand for vested benefits and relented when the employer refused. Moreover, like the permissive bargaining inference, this universally applicable inference directly contradicts the express congressional policy rejecting mandatory vesting of welfare benefits.

In short, not only does the *Yard-Man* inference offend the conscious decision by Congress that welfare benefits are not automatically vested, each component of the inference lacks support in precedent or logic.

C. A Rule Requiring "Clear and Express Language" in the CBA for Vesting of Retiree Health Benefits Best Effectuates Congressional Intent.

In resolving claims that collectively-bargained retiree health benefits are lifetime vested and unalterable, the rule that best accommodates congressional intent and the expectations of the parties is that vesting must be shown by clear and express language in the collective bargaining agreement. This was the conclusion of the Court of Appeals for the Third Circuit in *Skinner*, 188 F.3d at 139.

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with major manufacturers on behalf of retirees regarding their health benefits.

The Third Circuit considered whether language in the CBAs promising that the employer "will continue to provide Blue Cross-Blue Shield hospitalization and surgical coverage, all costs being borne by the Company," and "will continue to provide . . . prescription drug insurance policy with deductible . . . all costs being borne by the Company," created an unalterable entitlement to fully-paid benefits for the rest of the retirees' lives. *Id.* at 135. Unlike the Sixth Circuit in *Yard-Man*, the Third Circuit carefully reviewed the provisions of ERISA that declare welfare benefits not vested, the legislative history of that decision, and the federal policies regarding interpretation of collective bargaining agreements. *Id.* at 137–39. Based on this review, the court rejected the claim for vested benefits, reasoning: "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*." *Id.* at 139 (emphasis added). This result is in accord with the Sixth Circuit's decision in *Sprague*, which addressed retiree benefits that were *not* collectively-bargained.

The court also reviewed decisions of other circuits, including the Sixth Circuit, addressing the vesting issue. It found the Sixth Circuit's *Yard-Man* inference unpersuasive. It rejected *Yard-Man*'s reasoning that because retiree health benefits are permissive subjects of bargaining, courts should assume vesting: "[T]hose 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." 188 F.3d at 141.

The Third Circuit also rejected *Yard-Man*'s denomination of retiree health benefits as "status benefits," which should be assumed to continue for as long as the retiree remained retired from the company (that is, for life). To begin, the *Skinner* court agreed with the Eighth Circuit 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.' " *Id.* at 141–42 (quoting *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988)). Further, it reasoned that "the *Yard-Man* inference may be contrary to Congress' intent in choosing specifically not to provide for the vesting of employee welfare benefits." *Id.* at 142.

In addition to fulfilling the congressional intent in ERISA, the *Skinner* rule also provides greater certainty to bargainers and allows expeditious and efficient adjudication of disputes. Bargainers on each side of the table will know what language is necessary to achieve vesting. They will also have confidence that courts will not use inferences to override intended limits on the benefits. Moreover, the face of the CBA will indicate whether or not benefits are vested without the need for extensive discovery or protracted judicial proceedings. Indeed, the clarity of the *Skinner* rule will obviate most vesting disputes altogether.[13]

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[13] The Third Circuit has held benefits vested in no published cases. It held them not vested in four cases. *Struble v. N.J. Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 331 (3d Cir. 1984); *Unisys*, 58 F.3d at 896; *Skinner*, 188 F.3d at 130; *Int'l Chem. Workers Union v. PPG Indus., Inc.*, 236 F. App'x 789 (3d Cir. 2007).

D. The Second and Seventh Circuit Approaches Provide Insufficient Certainty and May Lead to Extensive Litigation.

The Second and Seventh Circuits have taken a middle ground in addressing the vesting issue. The Second Circuit has proclaimed that "[w]e will not infer a binding obligation to vest benefits absent some language that itself reasonably supports that interpretation." *Joyce v. Curtis-Wright Corp.*, 171 F.3d 130, 133–35 (2d Cir. 1999) (deeming language stating that insurance "will be provided for employees receiving or becoming entitled to receive pension payments" insufficient to create vesting or prove an ambiguity). Likewise, the Seventh Circuit "established a presumption that an employee's entitlement to [health 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." *Rossetto*, 217 F.3d at 543.

Although on their face these standards are more consistent with the congressional policy of not mandating vesting, they are less faithful to that policy and provide less certainty than the "clear and express language" standard used in *Skinner*.[14] Like the

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[14] The Second Circuit has held benefits vested in no cases and not vested in three cases. *Am. Federation of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976 (2d Cir. 1997); *Joyce*, 171 F.3d at 130; *Baldwin v. Motor Components, L.L.C.*, 155 F. App'x 16 (2d Cir. 2005). The Seventh Circuit has held benefits vested in five cases. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301 (7th Cir.

"clear and express language" standard, the Second and Seventh Circuit standards do not allow silence to lead to an inference of vesting. Unlike the Third Circuit standard, however, they permit retirees to argue that anything less than clear language addressing vesting creates an ambiguity, thus allowing introduction of extrinsic evidence on the vesting issue. Predictably, they have led to numerous disputes about whether the collective bargaining agreement is ambiguous, and sometimes have required jury trials to resolve the vesting issue.[15] Of twenty-eight cases addressing vesting in the Second and Seventh Circuits, seven have proceeded to trial to resolve purported

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1996); *Rossetto*, 217 F.3d at 539; *Zielinski v. Pabst Brewing Co.*, 463 F.3d 615 (7th Cir. 2006); *Temme v. Bemis Co.*, 622 F.3d 730 (7th Cir. 2010). It has held benefits not vested in eight cases. *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598 (7th Cir. 1989); *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992); *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434 (7th Cir. 1998); *Int'l Union, UAW v. Rockford Powertrain, Inc.*, 350 F.3d 698 (7th Cir. 2003); *Cherry v. Auburn Gear, Inc.*, 441 F.3d 476 (7th Cir. 2006); *Barnett v. Ameren Corp.*, 436 F.3d 830 (7th Cir. 2006); *UMW v. Brushy Creek Coal Co.*, 505 F.3d 764 (7th Cir. 2007).

[15] The circuits appear to be split on whether factual disputes regarding vesting require a jury trial. The Sixth Circuit holds a jury is not appropriate, *see Reese*, 574 F.3d at 327–28, whereas the Second and Seventh Circuits appear to allow a jury trial, *see Joyce*, 171 F.3d at 133 (trial court held jury trial); *Senn*, 951 F.2d at 813–15 (affirming district court's grant of jury trial on issue of vesting).

ambiguities,[16] compared to none out of seven in the Third Circuit.[17]

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[16] In the Second Circuit, one case proceeded to trial to determine vesting. *Webb v. GAF Corp.*, 936 F. Supp. 1109 (N.D.N.Y. 1996). In six cases, the Second Circuit or its district courts determined vesting without trial. *Int'l Multifoods*, 116 F.3d at 976; *Joyce*, 171 F.3d at 130; *Baldwin*, 155 F. App'x at 16; *Parillo v. FKI Indus., Inc.*, 608 F. Supp. 2d 264 (D. Conn. 2009); *Enright v. N.Y .City Dist. Council of Carpenters Welfare Fund*, No. 12 CIV. 4181 JPO, 2013 WL 3481358 (S.D.N.Y. July 10, 2013); *Conn. Indep. Util. Workers Local 12924 v. Conn. Nat. Gas Corp.*, No. 3:12CV961 JBA, 2014 WL 941805 (D. Conn. Mar. 11, 2014). In the Seventh Circuit, six cases proceeded to trial to determine vesting. *Senn*, 951 F.2d at 806; *Bidlack*, 993 F.2d at 603; *Rossetto*, 217 F.3d at 539; *Williams v. Wellman Thermal Sys. Corp.*, 684 F. Supp. 584 (S.D. Ind. 1988); *Bialoszynski v. Milwaukee Forge*, 419 F. Supp. 2d 1045 (E.D. Wis. 2006); *Oakley v. Remy Int'l, Inc.*, 795 F. Supp. 2d 810 (S.D. Ind. 2011). Fifteen cases determined vesting without trial. *Ryan*, 877 F.2d at 598; *Murphy*, 61 F.3d at 560; *Diehl*, 102 F.3d at 301; *Corrao*, 161 F.3d; *Rockford Powertrain*, 350 F.3d at 698; *Zielinski*, 463 F.3d at615; *Cherry*, 441 F.3d at 476; *Barnett*, 436 F.3d at 830; *Brushy Creek Coal*, 505 F.3d at 764; *Temme*, 622 F.3d at 730; *Leahy v. Page Eng'g Co.*, No. 89 C 9577, 1992 WL 51710 (N.D. Ill. Mar. 10, 1992); *Oil, Chem., Atomic Workers' Int'l Union v. Amoco Corp.*, No. 93 C 5929, 1997 WL 11233 (N.D. Ill. Jan. 9, 1997); *Carnagua v. Link-Belt Co.*, No. 1:04-CV-1566-LJM-JMS, 2007 WL 2904544 (S.D. Ind. Sept. 28, 2007); *Boeing Co. v. March*, 656 F. Supp. 2d 837, 863 (N.D. Ill. 2009); *Leannah v. Alliant Energy Corp.*, 607 F. Supp. 2d 946, 954 (E.D. Wis. 2009).

[17] *Struble*, 732 F.2d at 331; *Skinner*, 188 F.3d at 130; *PPG*, 236 F. App'x at 789 (consolidating the summary judgment dispositions of *UFCWU v. PPG Indus., Inc.*, No. 2:01CV1751, 2006 WL 895087 (W.D. Pa. Mar. 31, 2006), *USW v. PPG Indus., Inc.*, No. 2:01CV1601, 2006 WL 895090 (W.D. Pa. Mar. 31, 2006), and *Local Lodge 470 of Dist. 161 v. PPG Indus., Inc.*, No. CIV.A. 01-2110, 2006 WL 901927 (W.D. Pa. Mar. 31, 2006)); *Wallitsch v. Corona Corp.*, No. CIV. A. 87-2239, 1988 WL 30037 (E.D. Pa.

Of greater concern, however, is the likelihood that a standard focused on resolving ambiguities will revive the rules of construction that have followed the *Yard-Man* inference. Although *Yard-Man* purports to follow normal rules of contract construction, it encourages word play about whether CBAs are ambiguous, and has spawned canons of construction to resolve those ambiguities that fly in the face of the congressional decision rejecting mandatory vesting of welfare benefits. (*See* Part I.B. above.) Only by requiring "clear and express language" to find vesting can the Court fulfill the congressional intent and forestall further circuit conflicts.

II. THE INFERENCE OF VESTED RETIREE HEALTH BENEFITS IMPOSES A SEVERE AND INTRACTABLE BURDEN ON EMPLOYERS.

A. Vested Retiree Health Benefits Impose a Huge Financial Cost on the Employer.

A regime inferring that retiree health benefits are vested would impose oppressive costs on the Nation's employers. Obviously, vesting means the company must pay benefits for the remainder of each individual retiree's life. With even a few hundred retirees, the annual cash flow impact can be millions of dollars, in good times and bad. Moreover, the cost of health benefits has been rising at several multiples of

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Sept. 29, 1988); *Local 56, UFCWU v. Campbell Soup Co.*, 898 F. Supp. 1118 (D.N.J. 1995); *Lewis v. Allegheny Ludlum Corp.*, No. CIV. A. 11-1619, 2012 WL 1328360 (W.D. Pa. Apr. 17, 2012).

the core inflation rate for decades. And many manufacturers, like the Nation as a whole, are seeing their retired populations grow in relation to their active work forces, meaning that fewer and fewer active workers must produce sufficient profits to pay the ever-increasing health care costs of retirees.

The annual cash flow impact, though large, is not the most severe financial impact of vested retiree health benefits. The financial statement impact is much larger. In December 1990, the Financial Accounting Standards Board ("FASB") issued Statement 106, which requires employers to report in their financial statements their Accumulated Projected Benefit Obligations ("APBO"). FASB Statement 106 "focuses principally on postretirement health care benefits."[18] Post-retirement benefits are also referred to as "Other Post-retirement Employment Obligations" ("OPEB"). In short, FASB 106 requires employers to "reflect on their balance sheets the present value of estimated future costs for retirees' medical benefits." *Wise*, 986 F.2d at 932.

As of the beginning of 2006, the unfunded retiree healthcare liability for the Standard & Poor's 500 was estimated at *$321 billion*, more than twice the unfunded pension plan liability for those firms.[19]

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[18] FASB, Summary of Statement No. 106 (Dec. 1990), *available at* www.fasb.org/st/summary/stsum/06.shtml.

[19] Stephen Moehrle, *Understanding Disclosures of Postretirement Healthcare Obligations*, CPA Journal (Sept. 2007) (citing Ian McDonald, *Health Benefits Ail as Pensions Health*, Wall St. J., June 6, 2006, *available at* www.nysscpa.org/cpajournal/2007/907/essentials/p36.htm). The underlying review of the S&P 500 is found in Howard Silverblatt and Dave Gua-

Although the booking of the liabilities by itself does not alter the company's cash flow, FASB 106 obligations affect credit worthiness as well as market and shareholder perceptions of the health of the company. Deeming these retiree health obligations vested and effectively unalterable is a severe constraint on a business.

For example, in 2004, General Motors Corporation, headquartered in the Sixth Circuit, reported APBO liability of $77 billion, of which $61 billion was attributable to UAW retirees. *UAW v. Gen. Motors Corp.*, No. 05-CV-73991-DT, 2006 WL 891151, at *3 (E.D. Mich. Mar. 31, 2006). GM's market capitalization at that time was only $15 billion. *Now for the Reckoning*, The Economist, at 72 (Oct. 13, 2005). Faced with GM's rapidly deteriorating financial situation and a threat by GM to implement unilateral changes to the retiree health benefits, the UAW agreed to negotiate about the retiree benefits on the condition that GM "fully open its books and share its complete financial data with the UAW." *Gen. Motors*, 2006 WL 891151 at *3. The negotiations proceeded against the backdrop of the *Yard-Man* inference, *id.* at *15, and ultimately required a class action settlement, approved by Judge Robert H. Cleland of the Eastern District of Michigan, to achieve resolution, *id.* at *37 (approving benefit reductions as a class action settlement). Unfortunately, the revisions were

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rino, *S&P 500 2012 Pensions and Other Post Employment Benefits (OPEB): The Final Frontier*, S&P Dow Jones Indices 7–8 (July 31, 2013), *available at* http://www.spindices.com/documents/research/sp-500-2012-pensions-and-opeb-201307.pdf.

not sufficient to save GM, which entered Chapter 11 just three years later.

In 2008, Chrysler LLC also employed the class action device to obtain a negotiated resolution of its vested benefits. At that time, Chrysler's health care benefit obligations were approximately $2.3 billion a year, "the largest portion" of which was "attributable to UAW employee and retiree health care." *Int'l Union, UAW v. Chrysler LLC*, No. 07-CV-14310, 2008 WL 2980046, at *5 (E.D. Mich. July 31, 2008). Like GM, in 2009 Chrysler sought Chapter 11 reorganization.

These retiree health care obligations impose severe restrictions on the ability of employers to operate. For example, Judge Cleland found perceptions by financial institutions of these obligations "adversely affects Chrysler's creditworthiness," *id.*, and "[t]he overall impact of Chrysler's OPEB obligation for health care is expected to continue to limit the company's access to unsecured capital resources, substantially contributing to Chrysler's precarious financial condition," *id.* at *6. Ford Motor Company recently reported that its retiree health plan "impose[s] significant liabilities on Ford that are not fully funded and will require additional cash contributions, which could impair our liquidity." *See* Ford Motor Co., Annual Report (Form 10-K), at 14 (Feb. 19, 2014).

B. The *Yard-Man* Rule Undermines Attempts by Employers To Negotiate Reductions in Vested Retiree Health Benefits.

Logic and experience show that the *Yard-Man* rule also skews the collective bargaining dynamic. Employers facing burdensome retiree health care costs have the option, if those costs are not vested, to implement reasonable modifications of those costs, often in negotiation with the unions. Reducing the benefits does not necessarily entail their complete elimination. In recent years, employers have reduced their employee health care costs by negotiating increased premiums, deductibles, and copayments with union representatives. *See* U.S. Gov't Accountability Office, GAO-06-285, *Employee Compensation* 4 (Feb. 2006). When successful, these tactics have allowed companies to remain competitive while still providing some health benefits to employees and retirees. *See, e.g.*, Steven Greenhouse, *Two Units of AT&T Reach Pacts With Union*, N.Y. Times, July 23, 2012, at B3.

With the *Yard-Man* inference as leverage, however, unions need not negotiate about retiree health benefits, allowing silence and the inference of vesting to achieve their ends. *See, e.g.*, *Gen. Motors*, 2006 WL 891151, at *3 (UAW refused to negotiate with GM about retiree health benefits until GM threatened to impose reductions unilaterally based on deteriorating financial condition, and only on condition of full access to financial records).

Even when employers succeed in negotiating limits on retiree benefits with the union, the inference that the benefits were already vested—and thus un-

alterable—*before* those negotiations can mean that any limits are swept away in subsequent litigation. *See Tackett II*, 733 F.3d at 600 (Pet. App. 20) (invalidating a negotiated cap on benefits; "[h]aving reached the conclusion that benefits were vested, it was then reasonable for the district court to conclude that those benefits could not be bargained away [by the union] without retiree permission"); *Yolton*, 435 F.3d at 583–84 (invoking *Yard-Man* inference to deem benefits vested notwithstanding a side agreement between employer and union imposing a cap on health insurance costs); *CNH Am. LLC v. UAW*, 645 F.3d 785, 788–89 (6th Cir. 2011) (describing release executed by UAW of retiree health benefit claims against CNH in exchange for CNH's $24.7 million contribution to Voluntary Employee Benefit Association; after retirees spent the money, they sued successfully to invalidate the release on the ground that the benefits were already vested before the release and claiming UAW lacked authority to negotiate reductions).

In short, so as long as the *Yard-Man* inference of vested retiree health benefits hangs over the bargaining table, unions will lack any incentive to negotiate about the issue. Even if they do negotiate, employers will lack confidence that concessions will survive if challenged by retirees in litigation. The result is not only continued financial burdens on the companies subjected to the inference, but a degradation of the collective bargaining relationship because a critically important issue is taken off the table.

C. Under *Yard-Man*, Bankruptcy May Be the Only Effective Resort for Employers To Reduce Vested Retiree Health Benefits.

Unable to reduce the retiree health benefits unilaterally as envisioned by Congress in ERISA, and faced with unions unwilling to bargain because of the *Yard-Man* inference, Chapter 11 of the Bankruptcy Code has become an all too real option. For example, in 2005, Michigan-based Delphi Corp., the world's largest maker of automobile parts, declared bankruptcy after failing to reduce its retiree obligations. *See Now for The Reckoning*, *supra*, at 72. As of December 31, 2005, Delphi faced unfunded liabilities of $10.7 billion, of which approximately $2.3 billion was attributable to unfunded pension obligations and $8.4 billion was attributable to OPEB obligations.[20] Chrysler and GM, even after taking the extraordinary step of seeking to reduce their retiree health benefit obligations using a class action settlement, entered Chapter 11 on April 30, 2009, and June 1, 2009, respectively. *See, e.g.*, Affidavit of Ronald Kolka ¶ 39 & n.8, *In re Chrysler LLC*, Case 09-50002-smb (Bankr. S.D.N.Y. Apr. 30, 2009) (as of the petition date, Chrysler was obligated to provide health care benefits to more than 106,000 retirees, surviving spouses and dependents, at a total annual cost of $970 million and an actuarial cost approximately $9.87 billion on a present value basis). Other companies that sought bankruptcy protection due in large

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[20] Delphi Corp., Annual Report (Form 10-K), at 38, 40–41 (July 11, 2006).

measure to retiree health costs are Ohio's LTV Steel in 2000 and New York's Eastman Kodak in 2013. *See* Robert Guy Matthews, *W.L. Ross Agrees to Acquire Steel Assets of Bankrupt LTV*, Wall St. J., Feb. 28, 2002, at A6; Matthew Daneman, *Kodak Bankruptcy Officially Ends*, USA Today, Sept. 3, 2013, *available at* http://www.usatoday.com/story/money/business/2013/09/03/kodak-bankruptcy-ends/2759965/.

Similarly, former Michigan Treasurer Andy Dillon recently testified in the Detroit bankruptcy proceeding that retiree health care commitments were a core reason why the City filed for bankruptcy protection, and that the City's pension shortfall was not the "driving factor." Nathan Bomey & Alisa Priddle, *Dillon: Retiree Health Care, Not Pension Shortfall, a Core Reason for Detroit Bankruptcy*, Detroit Free Press, Nov. 5. 2013, *available at* http://www.freep.com/article/20131105/NEWS01/311050046/Detroit-Chapter-9-bankruptcy-eligibility-trial-Andy-Dillon-Rich-Baird; Transcript of Trial at 150:14–15, *In re City of Detroit, MI*, Case 13-53846-swr (Bankr. E.D. Mich. Nov. 8, 2013) (testimony of Andy Dillon) ("From day one, it was the unfunded health care liability that to me was really the big challenge for the city.").

Thus, faced with burdensome retiree health care costs deemed vested under the *Yard-Man* inference, and unions reluctant to negotiate sufficient reductions, bankruptcy is an all too common outcome. A rule for resolving the vesting issue in a way more consonant with the congressional intent could avoid these unfortunate results.

III. THE "CLEAR AND EXPRESS LANGUAGE" RULE WOULD BENEFIT EMPLOYERS, UNIONS, AND COURTS.

A. A Clear Rule Would Promote More Effective Collective Bargaining.

The clear and express language rule would provide guidance to both parties during collective bargaining. Each side would know what is necessary to obtain, or to avoid, unalterable benefits for retirees. As shown (Part I.B.1. above), retiree health benefits are a permissive subject of bargaining. When they know the CBA will be construed with a strong inference that retiree health benefits are vested, unions are reluctant, if willing at all, to discuss this issue at the bargaining table. If vesting depends on the actual wording of the contract, the parties go into the negotiation in a neutral position, able to use their economic weapons to achieve their bargaining priorities without the overhang of judicial inferences.

Moreover, even when employers are able to obtain concessions at the bargaining table, those concessions may not stand up in court if attacked by the affected retirees. (*See* Part II.B. above.) Under the *Yard-Man* regime, the retirees may argue that their vested benefits could not be changed at all, even by agreement with the union, leading to invalidation of any such concessions. In the Sixth Circuit, the only proven means to effectuate a collectively-bargained reduction in retiree health benefits is through the immensely burdensome device of a judicially-approved class action settlement.

B. The "Clear and Express Language" Rule Would Reduce Future Litigation and Forum Fights.

With the clear and express language rule, the parties know upon signing whether the CBA grants lifetime unalterable retiree health benefits. Disputes, which should be few, can be resolved without extensive judicial proceedings. A clear rule that is less susceptible to interpretation from court to court would also lead to fewer disputes about venue.

Under the *Yard-Man* rule, the Sixth Circuit has become a magnet for retiree health benefit litigation. Retirees and unions use the liberal venue provisions of the LMRA and ERISA to file suit in district courts within the Sixth Circuit. *See* LMRA § 301(a), 29 U.S.C. § 185(a) (2012) (granting venue "in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties"); ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) (2012) (granting venue "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found").

Plaintiff retirees with limited connections to the Sixth Circuit have taken advantage of the *Yard-Man* rule. In this case, for example, the retiree plaintiffs worked at the Point Pleasant Polyester Plant in Apple Grove, West Virginia—plainly outside of the Sixth Circuit. *See Tackett I*, 561 F.3d at 481 (Pet. App. 91). Nevertheless, the retirees' claims were adjudicated under Sixth Circuit law.

Similarly, in *Reese*, the defendant sought a declaratory judgment in the Seventh Circuit that retirees were not entitled to lifetime healthcare benefits. 574 F.3d at 319. In addition to being the circuit where most of CNH's UAW-represented retirees had worked, CNH is headquartered in the Seventh Circuit, the CBA negotiations took place there, and CNH administers the health care plans there. *Id.* at 320. CNH's former employees responded by filing suit in Detroit, where they could benefit from the *Yard-Man* inference. *Id.* Notwithstanding the great weight of venue considerations favoring the Seventh Circuit, the district court in Detroit and the Sixth Circuit nonetheless kept the case. *Id*.

The incentive to establish jurisdiction in a friendly forum is a natural and predictable consequence of the current circuit split, but it undermines the interests of judicial efficiency and economy. Forum fights "eat[] up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). "Nothing is more wasteful than litigation about where to litigate." *Bowen v. Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting). Without a clear, uniform answer from this Court, parties will continue their race to the courthouse in an effort to litigate in the more favorable forum.

Finally, as explained above (*see* Part I.D), the Second and the Seventh Circuit standards would provide insufficient clarity and guidance to the circuits and lower courts. The predictable result under those standards would be continued differences

among the circuits, encouraging continued forum shopping. Only the clear and express language standard will avoid that result.

CONCLUSION

For the foregoing reasons and those in the briefs of Petitioners and the other *amici curiae* supporting Petitioners, the National Association of Manufacturers urges the Court to reverse the judgment of the Sixth Circuit and endorse the Third Circuit's "clear and express language" standard for resolving issues of vesting in collectively-bargained welfare benefit plans.

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