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

BRIEF OF THE COUNCIL ON LABOR LAW EQUALITY AND THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER M&G POLYMERS USA, LLC

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QUESTION PRESENTED

Whether, when construing collective bargaining agreements in Labor Management Relations Act 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 healthcare 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.

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INTEREST OF THE *AMICI CURIAE* [1]

The Council on Labor Law Equality (COLLE) is a trade association founded over thirty years ago for the purpose of monitoring and commenting on developments in the interpretation of the National Labor Relations Act (NLRA) and related statutes. COLLE represents employers in virtually every business sector. Through the filing of *amicus* briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation of national labor policy on issues that affect a broad cross-section of American industry. COLLE is the nation's only brief-writing association devoted exclusively to issues arising under the NLRA and related statutes, and in recent decades has filed *amicus* briefs in nearly every significant labor case before the National Labor Relations Board, the federal courts of appeals, and the U.S. Supreme Court.

COLLE members have a vital interest in ensuring that welfare benefit plans negotiated in collective bargaining agreements are interpreted in a manner consistent with welfare plans employers implement voluntarily, without the subsequent interjection of interpretative "presumptions" or "inferences" by the federal courts. COLLE is uniquely situated to inform the Court concerning the issues raised under the

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amici* state that letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

Employee Retirement Income Security Act (ERISA) and the Labor Management Relations Act (LMRA) in this case, and the impact this Court's interpretation will have in applying those statutes to the entire business community.

The Society for Human Resource Management (SHRM) is the world's largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. The purposes of SHRM, as set forth in its by-laws, are to promote the use of sound and ethical human resource management practices in the profession, and to: (a) be a recognized world leader in human resource management; (b) provide high-quality, dynamic, and responsive programs and services; (c) be the voice of the profession on human resource management issues; (d) facilitate the development and guide the direction of the human resource profession; and (e) establish, monitor, and update standards for the profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

SHRM frequently represents its membership though the filing of *amicus curiae* briefs with courts throughout the United States in matters of common concern to human resource professionals.

SUMMARY OF ARGUMENT

Unlike pension plans, welfare plans are not subject to the vesting provisions of ERISA. The congressional policy behind this exclusion for welfare plans, and the necessity of clear language to signify a contrary intent, applies with equal force to health-care plans established unilaterally under ERISA and health-care plans established pursuant to collective bargaining under the LRMA. Indeed, in important respects the policy for requiring clear and unmistakable language to vest welfare benefits in collectively bargained plans is even more compelling.

The LMRA further underscores that an employer's commitment to inalterably vest retiree health benefits must not be presumed, but require instead clear and unmistakable language of assent. Federal common law developed under the LMRA provides that any waiver of substantive rights must be based on the existence of clear and unmistakable contractual language, and that interpretive distinctions drawn on the basis of union membership are suspect. Further, normal rules of contract interpretation support the notion that a waiver of rights, and/or the establishment of an exception to the general rule that an employer's contractual obligations terminate when the labor agreement expires, requires language clearly expressing such intention.

The imperative to establish a uniform labor policy requires a consistent and easy to understand test for determining when, in the case of a health plan created in collective bargaining, retirees become vested in a right to receive health-care benefits that cannot be either terminated or altered after the contract itself has expired. The only test consonant with ERISA, federal common law under the NLRA, and general

principles of contract law, is one which requires clear and unmistakable language evincing the plan sponsor's intention to vest retired participants in a right to receive such significant and costly employer-provided benefits in perpetuity. This Court has endorsed the clear and unmistakable standard in other contexts involving important statutory rights in the collective bargaining context, and that test is appropriately applied to adjudication of the important rights at issue here.

ARGUMENT

I. THE TEXT, STRUCTURE, AND POLICY UNDERPINNING ERISA COMPEL THE CONCLUSION THAT LIFETIME VESTING OF WELFARE BENEFITS MUST BE PREDICATED ON CLEAR AND UNMISTAKABLE LANGUAGE

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, *et seq*., is a "comprehensive and reticulated statute" governing employee pension and welfare benefit plans that was enacted by Congress after almost a decade of study. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980). Notwithstanding the broad protections ERISA provides for benefit plan participants (especially pension plan participants), nothing in ERISA creates substantive rights to employer-provided health benefits. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("Nor does ERISA establish any minimum participation, vesting, or funding requirements for welfare plans as it does for pension plans").

Accordingly, both the text and structure of ERISA differ markedly between employee *pension* plans and employee *welfare* plans, including health-care benefit

plans. ERISA imposes comprehensive vesting and funding requirements on all employee pension plans, *see* 29 U.S.C. §§ 1053, 1082, 1083, 1084, but exempts welfare plans (including health-care plans) from these same exacting requirements. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91 (1983). Significantly, while both chambers of the 93rd Congress chose to protect vested pension benefits as "accrued benefits," that term and that protection was never intended to apply to group health coverage. *See* H.R. Rep. No. 93-807 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4726; S. Rep. No. 93-383 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4889, 4935. Accordingly, because ERISA specifically exempts welfare plans from any vesting requirement, sponsors of health benefit plans generally have the right to modify or terminate them at any time. *Curtiss-Wright*, 514 U.S. at 78.

The 93rd Congress's differentiation between welfare plans and pension plans has endured for decades notwithstanding subsequent amendments to ERISA and legislation specifically addressing welfare benefit plans. *See, e.g.*, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, tit. X, 100 Stat. 327 (1985); Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (1996). If this national policy, set out in one of the most significant and impactful legislative undertakings in the last forty years, is to be changed, that adjustment is most appropriately accomplished by the Congress, not through the device of a judicially created interpretative presumption. *See, e.g., Senate Sets Sights on Retiree Benefit Vesting*; *ERISA Amendments Create New Presumption*, Pens. & Ben. Daily (BNA) (June 17, 2014) (discussing Bankruptcy Fairness and Employee Benefits Protection Act (S. 2418) designed to add

subsection (n) to ERISA's existing civil enforcement scheme, 29 U.S.C. § 1132(a)-(m), to codify a vesting presumption for retiree health-care benefits).

Congress's distinct and disparate treatment of welfare plans does not depend on whether the plans are the subject of collective bargaining. For example, while Congress amended ERISA to further safeguard the rights of beneficiaries upon termination of collectively bargained, multi-employer pension plans, *see* Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980), it has repeatedly declined to alter welfare plans' exclusion from ERISA's vesting, participation and cutback prohibitions. *See, e.g., Senate Committee on Aging Criticizes Lack of Protection for Retiree Health and Life Insurance Benefits*, Daily Report for Executives (BNA) A-2 (Aug. 4, 1986); H.R. 5475, 98th Cong. (1985) (designed to amend Title I of ERISA to presume a lifetime health benefit entitlement); *Emergency Retiree Health Benefits Protection Act of 2001*, H.R. 1322, 107th Cong. (2001) (designed to prohibit termination of retiree health benefits even if the employer's health plan reserves a general power to terminate or modify the plan).

The enduring substantive distinction drawn by Congress between pension plans and welfare plans was presumptively purposeful and intentional. *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997); *accord Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452-54 (2002) ("where Congress wanted to provide for successor liability [for LMRA-based retiree health benefits] in the Coal Act it did so explicitly") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)

("generally presumed Congress acts intentionally and purposefully" in its textual exclusion)).

Congress recognized the need for ongoing flexibility in designing and maintaining *welfare* plans when it declined to impose vesting requirements similar to those imposed on pension plans:

> Automatic vesting [of welfare benefits] was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. . . . [M]edical insurance must take account of inflation, changes in medical practice and technology, and increases in the costs of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs.

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988). While future liability for a pension annuity can be ascertained and projected with considerable accuracy, welfare benefits—especially health benefits—are affected by unpredictable variables and changing circumstances such that the future cost of providing welfare benefits is not readily ascertainable by employers. *Id.*

Indeed, as recent history illustrates, the cost of providing a health-care plan is subject to significant and unpredictable escalation; and the entire health-care market and delivery system may be subject to a host of consequential changes that can directly impact the architecture of any health-care plan, including changes imposed by the Legislature.[2] *See, e.g.*, Medicare

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[2] In a recent report to Congress, the Office of the Actuary for the Centers for Medicare and Medicaid Services estimated that 65% of small employers offering health insurance to their employees will experience an increase in premium costs when the

Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (2003); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2609 (2012) ("In enacting the [ACA], Congress comprehensively reformed the national market for health-care products and services.") (Ginsburg, J., dissenting); *United Steel, Paper and Forestry, Rubber, Mfg. Energy, Allied Industrial and Service Workers Int'l. Union v. Kelsey-Hayes Co.*, 750 F.3d 546, 562 (6th Cir. 2014) ("the one constant in healthcare is change") (Sutton, J., concurring in part and dissenting in part).

Given both the unpredictability of future costs and the changing circumstances within which such

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guaranteed issue, guaranteed renewal, and fair health insurance premiums provisions of the Affordable Care Act take effect. *See* Centers for Medicare & Medicaid Services, Office of the Actuary, *Report to Congress on the impact on premiums for individuals and families with employer-sponsored health insurance from the guaranteed issue, guaranteed renewal, and fair health insurance premiums provisions of the Affordable Care Act*, 5 (Feb. 21, 2014), *available at* http://www.cms.gov/Research-Statistics-Data-and-systems/Research/ActuarialStudies/ReportCongress.html. *See also* Bureau of Labor Statistics, *Employer Costs for Employee Compensation news release text* (June 11, 2014), *available at* http://www.bls.gov/news.release/ecec.nr0.htm (employer health-care benefits accounted for 7.9% of total compensation in 2014 versus 6.6% in 2004. These figures significantly increase for unionized workers where, in 2014, employer health benefits accounted for 12.6% of compensation costs.); Altarum Institute, *Health Sector Economic Indicators, Insights from Monthly Price Indices Through April 2014* (June 12, 2014), *available at* http://altarum.org/sites/default/files/uploaded-related-files/CSHS-Price-Brief_June%202014.pdf (since the December 2007 recession health-care prices have increased by 14.3% while prices in the economy as a whole have only risen 9.8%).

benefits are provided, Congress carefully exempted welfare plans from any vesting requirement to ensure that employers retained the "flexibility" to deal with all of the contingencies that attend employee welfare plans. *Inter-Modal*, 520 U.S. at 515. Making such plans fixed and immutable would make the ability to deal with these contingencies impossible, and thus discourage the creation of such welfare plans in the first place, thereby undermining Congress's express design. *Id*.

Absent clear language to the contrary, an employer providing a welfare plan is free to modify benefits or eliminate the plan at any time. *Curtiss-Wright*, 514 U.S. at 78. Indeed, in the instance of a non-collectively bargained retiree welfare plan it is well established (even within the Sixth Circuit) that, while an employer may choose to vest the benefits it provides, the prohibition against future modification or termination which vesting entails *cannot be inferred or presumed from silence*, but requires that the prohibition be articulated in "clear and express language." *Sengpiel v. B.F. Goodrich Co*., 156 F.3d 660, 667 (6th Cir. 1998).

What is true for ERISA plans which are unilaterally established and administered should apply with equal force to LRMA collectively bargained welfare plans. In terms of vesting, ERISA provides no basis for differentiating between a benefit plan an employer implements unilaterally, and the same benefit plan an employer implements pursuant to a bilaterally negotiated collective bargaining agreement. ERISA draws no textual or policy distinction between the two, and both are subject to the same future cost and architectural uncertainties that underlie the welfare plan exemption from any vesting requirement.

Despite the fact that ERISA makes no relevant distinction between the two types of welfare plans, and logic dictates that both be treated the same, the Sixth Circuit has adopted a line of judicial thinking that effectively stands ERISA's anti-vesting presumption on its head in the instance of collectively bargained plans. The most notable example of this judicially manufactured carve-out originated in the Sixth Circuit's *Yard-Man* decision. *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983).

Yard-Man does not purport to base its differing treatment of collectively bargained retiree health plans on the text of ERISA, since no textual authority supports the notion. Rather, the judicially created exception arises from the court's characterization of the process whereby the welfare benefit is created in the collective bargaining context. Even assuming *arguendo* that such "process" considerations could suffice to overcome the consequence of ERISA's plain language, and the contrary commands of federal common law under the LMRA, *see* Part II *infra*, these cited process considerations are simply unpersuasive.

The *Yard-Man* decision rests its presumption in favor of vesting collectively bargained retiree welfare benefits on two policy-related arguments. First, the court posits that since such benefits are tied to the recipients' "status" as retirees, the benefit should continue as long as the recipient maintains the status of "retiree." *Yard-Man*, 716 F.2d at 1482. Second, since benefits for already retired employees are only "permissive" subjects of bargaining, such a presumption is necessary to protect retirees from their former union's presumed indifference to the maintenance of such benefits in successive collective bargaining agreements. *Id.*; *see Allied Chemical and Alkali*

Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). Upon close inspection, neither argument is grounded in logic.

The fact that retiree benefits are applicable to retirees is self-evident and not alone sufficient to create a presumption of vesting. This is apparent when one considers that outside of the realm of collective bargaining, unilaterally provided retiree welfare benefit plans likewise apply to "retirees." Yet, in the absence of clear and express vesting language, retiree welfare plans that are not the result of collective bargaining can be modified or terminated at any time without regard to the fact that participants in those plans also maintain their "retiree status." *Curtiss-Wright*, 514 U.S. at 78 ("[T]hat Curtiss-Wright amended its plan to deprive [retired plan participants] of health benefits is not a cognizable complaint under ERISA; the only cognizable claim is that the company did not do so in a permissible manner."). The mere fact that the retiree benefit offered under a plan was the subject of collective bargaining cannot supply an independent basis for elevating the "status" of the recipients into a determinative factor for establishing vesting. Since retiree status is present whether the plan is administered unilaterally or is subject to collective bargaining, there is no logical reason for according "status" dispositive effect in the context of a collectively bargained plan but no effect whatsoever in the context of a non-collectively bargained plan. Assigning vesting consequence to the "status" of retired participants who receive health benefits from their former employer is circular, and sheds no light on the real question: does the language in the plan (or labor agreement or employment contract) express a clear intent by the plan sponsor to convey to a participant a legally enforceable right to receive

benefits under the plan for a specified time (e.g., for life) and at a specified level which the employer is not at liberty to change?

Similarly, the Sixth Circuit's second rationale—that a vesting presumption is justified because bargaining about benefits for retired employees is permissive—does not withstand scrutiny. First, such a presumption actually does a disservice to unions and the employees they represent, as well as the employers who bear the financial consequences. It may well be true that every employee desires an enforceable right to receive employer-provided health-care benefits for life. However, when a court relies on a judicially created presumption to vest former employees (or their dependents) in a right to receive such benefits, even in the absence of language clearly reflecting a mutual agreement between the employer and the employees' union to this end, the court has preempted the ability of the parties to bargain about the matter in the future. *See UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562, 575 n.14 (1983) (noting that under established contract principles "vested retirement rights may not be altered without the pensioner's consent.").

The cost of providing retiree health benefits is significant and consequential. Over time this "legacy" burden can adversely impact a unionized employer's competitiveness, and impinge on a union's ability to negotiate wages and other benefits for its active members (including *their* health benefits). Assigning a presumption as the Sixth Circuit has done here can have dire—if unintended—consequences. It is not unusual for employers that have accrued sizeable retiree health-care obligations that cannot be modified to be forced into bankruptcy or even liquidation.

Where employers and unions have knowingly entered into agreements that vest retirees in such a costly benefit they must accept the consequences, of course. But national labor policy is not served by a judicial presumption that excludes from the collective bargaining process the ability of union and management representatives to permissively address through good faith—even contentious—negotiations the economic realities they may face with respect to welfare benefits provided to former employees. *See Robinson*, 455 U.S. at 566-67 (recounting intense bargaining over conferring lifetime health benefits to certain classes of surviving spouses of union retirees). In *Robinson*, the Court rejected an invitation to review the parties' health benefit vesting compromise for "reasonableness" recognizing that "when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." *Id*. at 576.

Second, the Sixth Circuit's concern about permissive bargaining is premised on the assumption that a union has no interest in continuing to secure benefits for retirees in successive collective bargaining agreements. This assumption is unfounded because today's employees (for whom a union clearly has an interest) are tomorrow's retirees. Moreover, assuming *arguendo* that the concern may in some cases have merit, it cannot supply a basis for creating a judicial presumption in favor of vesting in the absence of any statutory support. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 270 (2009) (enforcing "clear and unmistakable" bargaining agreement language committing unionized employees' federal age discrimination claims to labor arbitration over employees' claims of a union conflict of interest, concluding that the

courts cannot rely on a judicial policy concern as a source of authority for introducing a qualification not found in the statutory text).

Third, presuming that an employer is disinclined to provide retiree benefits in successive bargaining agreements simply because the topic is not a mandatory subject of negotiations, is at odds with the ample evidence that (as in the instant case) employers routinely permit retirees to participate in the employer's health plan over multiple collective-bargaining agreements. Moreover, it also fails to recognize the many ways employers are advantaged by providing benefits to retirees, such as competitiveness in recruitment of new employees, the retention of current employees, and the maintenance of harmonious labor relations.

Finally, retiree benefit plans that are not collectively bargained are the product of unilateral implementation where there is neither a negotiation with employee representatives nor an assumed level of contractual or language sophistication on the part of employee or retiree beneficiaries. The Sixth Circuit never explains why it is logical to afford a vesting presumption to retirees who have an advocate (i.e., their union representatives), but not afford a presumption to non-union retirees who have no advocate.

In actuality, the introduction of a presumption in favor of vesting in the context of negotiated plans, but not unilaterally implemented plans, is *illogical*. As the Seventh Circuit aptly noted, this difference would actually support the argument for a vesting presumption in the context of *unilaterally created* welfare plans. *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543-544 (7th Cir. 2000). Yet, even the Sixth Circuit concedes that in the context of a unilaterally

established plan, no presumption of vesting arises out of silence, but requires "clear and express language." *See Sengpiel*, 156 F.3d at 667; *see also Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998). *A fortiori*, silence in a collective bargaining agreement concerning the duration of benefits to be provided under the agreement should never give rise to a presumption in favor of vesting. Vesting should only be predicated on the existence of clear and unmistakable language demonstrating the employer's intention to convey to a participant the right to receive, indefinitely, a benefit that the employer cannot modify or terminate after the contract has terminated.

This Court has recently made clear that constructive "presumptions" under ERISA must be drawn from the text of the statute. Thus, in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the Court rejected a presumption of prudence in certain stock sales regulated under ERISA that was far more broadly accepted by lower federal courts than the presumption at issue herein. In doing so, this Court noted that that the statutory reference cited as one of the bases for the presumption of prudence at issue, "makes no reference to a special 'presumption' in favor of ESOP beneficiaries." *Id*. at 2467. Thus, like the presumption of prudence in *Fifth Third Bancorp*, a presumption in favor of the vesting of retiree benefits lacks the necessary anchor in statutory text. *See, e.g.*, Bankruptcy Fairness and Employee Benefits Protection Act, S. 2418, 113th Cong. (2014) (proposing to codify a statutory "presumption" in ERISA that retiree health benefits "fully vest[]" as of "the date an employee retires or completes 20 years of service.").

Since ERISA provides no textual or policy support for the Sixth Circuit's *Yard-Man* presumption favoring vesting of retiree welfare benefits, federal labor law governing the collective bargaining process provides the only other plausible source for such a presumption. As we now show, a presumption against vesting welfare benefits is even stronger under the law and policy that govern collective bargaining.

II. LAW AND POLICY UNDER THE LMRA COMPEL THE CONCLUSION THAT RETIREE BENEFIT PLANS PROVIDED PURSUANT TO A COLLECTIVE BARGAINING AGREEMENT DO NOT VEST IN THE ABSENCE OF CLEAR AND UNMISTAKABLE LANGUAGE TO THE CONTRARY

The Labor Management Relations Act, 29 U.S.C. §§ 141, *et seq*., was enacted in part by Congress to "create a national, uniform body of labor law and policy, to protect the stability of the collective-bargaining process, and to maintain peaceful industrial relations." *United States v. Palumbo Bros. Inc*., 145 F.3d 850, 861 (7th Cir. 1998); 29 U.S.C. § 151, *et seq*. Pursuant to the LMRA, a unionized employer and its employees' authorized agent for collective bargaining negotiate labor contracts that memorialize the parties' agreement with respect to wages, hours, working conditions and other terms and conditions of employment. *See, e.g*., 29 U.S.C. § 157; *Pyett*, 556 U.S. at 255; *NLRB v. City Disposal Sys., Inc*., 465 U.S. 822, 829 (1984). In many cases these collective bargaining agreements contain language that provides health and other welfare benefits to former employees, including retirees.

The existence of multiple and conflicting interpretive standards for resolving vesting issues in welfare plans established in collective bargaining is contrary to the aspirational goal of establishing a uniform national labor policy. *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 451 (1957); *Teamsters v. Lucas Flour Co.*, 365 U.S. 95 (1962). Rather than engendering a uniform federal policy, the present interpretative standards have resulted in incompatible, policy-based decisions that sow the seeds of uncertainty.[3] A uniform policy requires a bright-line interpretive standard. The only standard that harmonizes the policy commands of both ERISA and the LMRA, and that satisfies the uniformity criteria of the LMRA is one requiring "clear and unmistakable" language.

Section 301 of the LRMA, 29 U.S.C. § 185, provides a federal cause of action for the breach of labor-management agreements, and authorizes federal courts to "fashion a body of federal law for the enforcement of collective bargaining agreements." *Lincoln Mills*, 353 U.S. at 451. Under section 301, normal rules of contract interpretation are applied in conjunction with federal labor policy. *Transportation-Communications Employees Union v. Union Pacific, R.R.*, 385 U.S. 157 (1986). Federal common law treats the terms of a collective bargaining agree-

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[3] *See generally* A. Kramer, *et al., Retiree Health Benefits: Legal Developments in a Changing Global Economy* (Aug. 2008), *available at* http://www.jonesday.com/files/Publication/b862f89d-f5f8-445f-8344-aa037c82b669/Presentation/PublicationAttachment/008b578a-4949-4371-b8e3-f557edc34941/JD~4294925.pdf.; A. Weisman, *Vested Right of Retiree to Promised Medical Insurance Benefits from Private Employer*, 74 A.L.R. 6th 267 (2010) (surveying lower court case law).

ment, including those that provide health or other benefits, as ending with the contract's expiration. *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991) ("[C]ontractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement."); *Laborers Health and Welfare Trust Fund for N. Cal. v. Advanced Lightweight Concrete Co*., 484 U.S. 539 (1988) ("If the labor legislation were simply repealed, *in toto*, petitioner would have no basis whatsoever for claiming that an employer had any duty to continue making contributions to a fund after the expiration of its contractual commitment to do so."); *Office and Professional Employees Ins. Trust Fund v. Laborers Funds Admin. Office of N. Cal. Inc*., 783 F.2d 919, 922 (9th Cir. 1986) ("An expired [collective bargaining agreement] is no longer a legally enforceable document."); *Bethlehem Steel Co. v. NLRB*, 320 F.2d 615, 619 (3d Cir. 1963) ("Since there was no contract in existence when the company discontinued these practices, its action was in conformity with the law.").[4]

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[4] Under the NLRA's "unilateral change" doctrine, certain provisions of a collective bargaining agreement may temporarily survive its expiration. *NLRB v. Katz*, 369 U.S. 736 (1960). Thus, under section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), terms and conditions, including benefits, may temporarily remain in effect following the expiration of a collective bargaining agreement while the parties either bargain to a new agreement on new terms, or to impasse. This temporary extension of the *status quo* beyond the contract's expiration should not be confused with contractual obligations or vesting. *See Laborers Health and Welfare Trust Fund for N. Cal.*, 484 U.S. at 553 (distinguishing between same in a case involving post-expiration pension contributions); *Litton Fin. Printing Div.*, 501 U.S. at 207. The *Katz* unilateral change doctrine merely preserves certain provisions of an expired collective bargaining agreement until the terminal point of negotiations where all such

Benefits provided under a collective bargaining agreement may, of course, vest where vesting is dictated by external federal law, such as pension benefits under ERISA. *See, e.g.*, 29 U.S.C. § 1053(a) ("employee's right to his normal [pension] benefit is nonforfeitable"). Congress may also vest welfare benefits by separate legislation. *Cf.* Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. § 9711(a) (statutory vesting of lifetime health benefits for certain retired union bituminous coal miners). However, Congress enacted no such legislation vesting the retiree health-care benefits at issue here.

A contractual provision may also vest current employees or retirees in a right to receive benefits after expiration of the collective bargaining agreement where the agreement demonstrates with sufficient clarity an intention by the parties to override the general principle that "an expired contract has by its own terms released all its parties from their respective contractual obligations." *Litton Fin. Printing Div.*, 501 U.S. at 206. Thus, while vesting current or former employees in a right to receive benefits post-contract expiration is possible, it is the exception and not the rule. The normal rules of contract interpretation require clear language to establish the existence of an exception. This observation is particularly apt in the present instance.

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provisions are subject to modification or termination. Its application does not entitle any person to receive any benefit under the terms of the expired agreement once the parties have complied with the collective bargaining obligations imposed on them by the NLRA.

General principles of contract interpretation, aided by common sense, dictate the conclusion that silence[5] does not signify a party's intent to forever waive its legal right to modify or terminate at the contract's end a provision that exposes it to a future substantial, unpredictable, and escalating liability. A contracting party's acceptance of an obligation so onerous, unending, and unpredictable cannot and should not simply be presumed. *See* 11 Richard Lord, *Williston on Contracts* § 31.6 (4th ed.) (2014) ("[a]dditional obligations or undertakings may not be imposed on a party under the guise of interpreting or construing a contract"); *see also id. at* § 30.6 (the duty of the court being to declare the meaning of what is written in the instrument, not what was intended to be written). General principles of contract interpretation require an obligation of such a character be predicated on clear and explicit language. ("[T]he law presumes that when the parties to a contract entered into it, they understood not only the meaning of the words and phrases they used in their agreement but also their

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[5] No collective bargaining agreement is ever truly "silent" with respect to retiree health-care vesting, because all collective bargaining agreements contain a general duration clause providing for the expiration of the contract. While the contract provision providing for retiree welfare benefits may not have specific language *within that clause* providing for termination of that particular benefit (as the Sixth Circuit insists be present), that does not entitle a party to a presumption that the benefit clause remains in effect in perpetuity. Quite the opposite is true. The general duration clause breaks any claimed "silence;" and the duration clause must be given dispositive effect *in the absence of clear language* which compels a contrary result. H. Shulman, *Reason, Contract and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1018 (1956) ("the interpretation which is most compatible with the agreement as a whole is to be preferred over one which creates anomaly.")

significance"); *see also* 20 Richard Lord, *Williston on Contracts* §§ 55.20, 55.23 (4th ed.) (2014).

These general principles of contract interpretation are mirrored in the federal law as developed under the LMRA, and compel the same conclusion. Indeed, these principles are especially applicable in the context of collective bargaining, which is conducted by sophisticated parties with a long and continuous history of negotiating their labor agreements, typically involving the same negotiators sometimes for decades. They are attuned to the importance of language memorializing their respective undertakings, due in part to the fact their ongoing relationship is more adversarial than the typical commercial contract.[6] When the judiciary invokes a presumption to vest a benefit the union did not clearly obtain in collective bargaining,

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[6] Union negotiators are well aware that bargaining about current employees' future benefits is mandatory; *see Midwest Power Systems, Inc.*, 323 NLRB 404, 406 (1997) ("The Supreme Court has clearly stated that the future retirement benefits of current active employees are a mandatory subject of collective bargaining under the Act"), *enf. denied on other grds.*, 159 F.3d 636 (D.C. Cir. 1998); whereas bargaining on behalf of already retired individuals is permissive. *Pittsburgh Plate Glass*, 404 U.S. at 181-82. Bargaining about retiree health benefits is the product of bilateral negotiation between two experienced parties, and union negotiators are well-versed in drafting contractual language that would unmistakably vest a benefit when there is mutual agreement to do so. Thus, knowing that once an individual is retired the union loses the leverage associated with a mandatory topic of bargaining, if union representatives secured in negotiations retiree health benefits for current employees that survive contract expiration they would not leave that very important benefit to be inferred from contractual silence. The burden is on the union to lock in with clear and unmistakable language any agreement it has obtained from an employer to vest current employees in this very important benefit.

the court has put its thumb on the balance of the parties' rights and obligations as established under ERISA and the LMRA.

As discussed in Part I, *supra*, employers have the statutory right under ERISA to modify or terminate a welfare benefit plan, including a health-care plan. Federal common law applicable to the interpretation of collective bargaining agreements has long held that the relinquishment of such a statutory right requires "clear and unmistakable" language signifying a waiver of that right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). As the Court observed in *Metropolitan:*

> we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable.

Id. at 708 & n.12.

While *Metropolitan* involved the waiver by a union of a represented employee's rights, the Court's logic applies with equal force in analyzing the purported waiver of the *employer's* statutory rights in the instant case.[7] Thus, under ERISA, the sponsor of a welfare

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[7] *Metropolitan* has been applied in other factual settings. For example, in *AT&T Tech., Inc. v. Communication Workers of America*, 475 U.S. 643 (1986), the Court citing *Metropolitan*, required "clear and unmistakable" language to find a waiver of the parties' right to have a federal court determine the scope of the arbitration clause in their collective bargaining agreement. *Id.* at 649. The Court further noted that the willingness of parties to enter into labor agreements that provide for arbitration of specified disputes would be "drastically reduced" if an arbitrator had the power to determine his own jurisdiction. *Id.* at 651.

benefit plan has a statutory right to modify or terminate that plan "at any time." *Inter-Modal*, 520 U.S. at 515 (quoting *Curtiss-Wright*, 514 U.S. at 78). Vesting a participant in a right to benefits under a welfare plan is an affirmative commitment by the employer pursuant to which the employer waives its right to amend and maintain control over the plan. Under the logic of *Metropolitan*, and well-settled principles of contract law, judicial enforcement of a waiver of such substantial and significant rights should require clear and unmistakable language expressing the employer's intention to do so. *See* 11 Richard Lord, *Williston on Contracts* § 39.28, (4th ed.) (2014) ("An intent to waive will not be inferred from doubtful or equivocal acts or language; rather, in the absence of an express declaration manifesting the intent not to claim the right allegedly waived, there must be a clear, unequivocal, and decisive act of the party who is claimed to have waived its rights"). The thrust of *Metropolitan*, and of contract law in general, is wholly in accord with the view espoused by the Third Circuit that an employer's supposed commitment to the provision of vested health benefits is not to be "lightly inferred," *UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999), and is entirely consistent with this Court's longstanding "clear and unmistakable" test for waiving statutory rights in LMRA cases.

Finally, the presumption in favor of vesting for collectively bargained plans, but not for non-bargained plans, is contrary to other fundamental policy principles underpinning federal labor law because this

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The necessity of clear language evincing a waiver, and the consequence of imposing a presumption in the face of silence noted in *AT&T* are equally apt here.

artificial and unfounded distinction affords significantly more favorable interpretive treatment to plan participants who claim benefits from collectively bargained ERISA plans. Thus, the Sixth Circuit accords employees who are, or were, represented by a labor organization a significant favorable presumption of vesting where the governing documents are silent with respect to the issue of duration or vesting. By contrast, their counterparts who were not represented by a labor organization receive no similar presumption in the face of silence on the issue of vesting. At its core, this constitutes impermissible discrimination between two sets of retirees that is ostensibly based on no factor other than their present or former union affiliation. The LMRA makes it unlawful for an employer or a union to discriminate on such a basis and, as a matter of federal labor policy, federal courts should not rest an interpretive presumption on that same discriminatory basis. 29 U.S.C. §§ 157, 158(a)(1), (b)(1).

CONCLUSION

The presumption that a party has waived important rights by virtue of silence finds no support in ERISA, or in federal common law as developed under the LMRA, or under general principles of contract interpretation. National labor policy requires a uniform test for establishing when, in a collectively bargained labor contract, the parties intended to vest retirees in a right to receive health-care benefits which cannot be altered or terminated after the contract has expired, even though the parties may subsequently agree that changes are desirable. The only test consonant with both federal common law under the LMRA and the principles of general contract law is one which requires clear and unmistakable language

evincing an employer's intention to vest plan participants in such an important and costly benefit.

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