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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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As it has done in other cases, the Sixth Circuit "inferred" here that the context of retiree benefits meant the parties intended the medical benefits at issue to vest. That determination—the key issue in the case—took place long before any factfinding or credibility determinations by the trial court. It was an outcome-determinative holding decided solely on the basis of language in the collective bargaining agreement. But had the case arisen in another circuit, the district court's original determination against vesting would have been upheld and the trial would have never taken place.

Judges and academics alike have long speculated about when this Court might decide the questions presented and put an end to the Sixth Circuit's a-textual (and unwarranted) *Yard-Man* doctrine. Respondents stand with the Sixth Circuit in disavowing its effects but, as Judge Sutton has noted, *Yard-Man* "must mean something or else there would be no point in having it." *Reese* v. *CNH Am. LLC*, 574 F.3d 315, 321 (6th Cir. 2009).

This case is an ideal vehicle for restoring uniformity on a recurring issue that will only increase in importance over the coming years as health-care regimes become increasingly complicated. Contrary to respondents' attempt to obscure it, the issues before this Court are ones of pure law—i.e., determining the role contractual silence should play in evidencing an intent to vest health-care benefits in collective bargaining agreements (and relatedly,

whether a different interpretive rule should apply in the collective-bargaining context than in the ERISA context). Unlike previous petitions, those issues of pure law are squarely presented here in a final judgment and, respondents' overheated rhetoric aside, can be resolved by this Court without any incursion into the fact-finding province of the district courts.

The Court should grant M&G's petition, reverse the Sixth Circuit, and restore uniformity on the exceedingly important question of how to read collective bargaining agreements to determine whether retiree health-care benefits have vested.

I. A Circuit Split Regarding The *Yard-Man* Presumption Is Evident

Respondents recognize that, in the retiree health-care benefits context, "traditional contract-interpretation rules" are "refined by * * * nuanced, Sixth Circuit jurisprudence." Opp. 9. The word "nuanced" may never have carried more weight. Indeed, if *Yard-Man* were truly as innocuous as respondents would have it, there would be little point for the Sixth Circuit to deploy it each time it is faced with a case regarding retiree health-care benefits in collective bargaining agreements. As the petition explained (at 10-11), the attempts of various Sixth Circuit panels to downplay the effect the presumption has on "normal contract interpretation principles" only underscore the Sixth Circuit's wrong turn away from those principles. Indeed, the circuit split on this issue could not be clearer.

To begin, as demonstrated in the petition (at 10-17), the difference between the Sixth Circuit and others—such as the Second, Third, and Seventh—is stark and evident in the case law. Commentators both in favor of and opposed to *Yard-Man* openly acknowledge that the doctrine alters the calculus in the Sixth Circuit. See, e.g., Pet. 12 (citing commentators). And the case at bar shows why the split matters to employers dealing with an increasingly complicated health-care system and faced with entirely different outcomes depending on where a case is brought. See Pet. 22-25.

A. Contrary to respondents' repeated claims, the Sixth Circuit's *Yard-Man* doctrine is no insignificant matter of garden-variety contract interpretation. As the Sixth Circuit explained in this very case, "[c]ourts reviewing a collective bargaining agreement must also keep in mind the context of labor-management negotiations on retiree health-care benefits." Pet. App. 110.

In the Sixth Circuit, however, "context" has subsumed "text"—and turned the rules of ordinary contrary interpretation on their heads when it comes to collective bargaining agreements. The Sixth Circuit's a-textual approach thus allows extrinsic evidence to make its way into the determination from the outset: a practice plainly contrary to the normal rules of contract interpretation. See *Reese*, 574 F.3d at 321 ("Although we do not apply a 'legal presumption that benefits vest' and although we require plaintiffs to bear the burden of proving that vesting

has occurred, we apply an 'inference' that 'it is unlikely that [welfare benefits] would be left to the contingencies of future negotiations,' so long as we can find either 'explicit contractual language *or* extrinsic evidence indicating' an intent to vest benefits." (alteration in original) (emphasis added)).

In overturning the district court's initial ruling in favor of petitioners, the Sixth Circuit panel relied on the "*context* of the labor-management negotiations identified in *Yard-Man*" to "find it unlikely" that the union would have agreed to non-vested health-care benefits. Pet. App. 112 (emphasis added). Though it is undisputed that the agreement was silent on the vesting question, and it is undisputed that the union is a sophisticated party that could have inserted unambiguous vesting language if that is what it wanted, the panel "inferred" vesting based solely on the promise of a "full Company contribution."

The panel next "inferred" vesting from the placement of the vesting language in the contract. It followed the provision that required certain employees to make contributions to the health-care costs. This led the panel to believe that those who did not have to contribute were thus vested with the benefits. Pet. App. 112. But the panel—and now respondents—ignore that collective bargaining agreements expire with the termination of the agreement. *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 207 (1991). So just because a "full Company contribution" is promised in a collective bargaining agreement does

not mean it is vested beyond the life of that agreement.

Finally, the panel noted that the collective bargaining agreement "tied eligibility for health-care benefits to pension benefits" and treated that as a factor indicating that vesting was intended. Pet. App. 112. And so from silence, the panel inferred that petitioners really meant for the benefits to live beyond the collective bargaining agreement itself. That result follows directly and inexorably from *Yard-Man*. Pet. App. 113-14 ("When the plan document at issue is a collective bargaining agreement, the interpretative principles outlined in *Yard-Man* govern a court's determination of the parties' intent to vest health-care benefits." (citing, as Judge Posner did, *Maurer* v. *Joy Techs., Inc.*, 212 F.3d 907, 917 (6th Cir. 2000))).

The *Yard-Man* presumption—or inference, the difference is mere semantics—is thus fundamentally at odds with the basic rules of contract interpretation correctly followed by other circuits.

B. In the lower courts, retiree health-care benefit cases truly "are all over the lot. Some presume vesting. Some insist that there be express language to that effect. Some presume nothing." *Rossetto* v. *Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000) (citations omitted). Even more important than Judge Posner's apt description of that sorry state of affairs—a description that easily withstands respondents' feeble attempt to discredit it—is the holding set forth by the Seventh Circuit in that case.

The Seventh Circuit recognized a "presumption *against* vesting" that "kicks in only if all the court has to go on is silence." *Id.* at 544 (emphasis added). This presumption "enables the employer to fend off a trial without having thought to have included in the contract an express provision limiting the duration of the benefits." *Ibid.* Even if one is inclined to agree with *Yard-Man*, as respondents plainly do, this holding evidences a direct circuit conflict on the precise question presented here.

But other cases evidence the circuit split as well, and respondents cannot deny the existence of that split merely by insisting that the courts on the other side of it are wrong. See, e.g., Opp. 17 (discussing *UAW* v. *Skinner Engine Co.*, 188 F.3d 130, 139-41 (3d Cir. 1999) (panel including then-Judge Alito) (rejecting *Yard-Man*)). And respondents do not even address the Second Circuit's explicit rejection of *Yard-Man*. Pet. 15-16 (citing *Joyce* v. *Curtiss-Wright Corp.*, 171 F.3d 130, 134-35 (2d Cir. 1999) (panel including then-Judge Sotomayor)). If anything, respondents' merits-based arguments only confirm the existence of a split that has been explicitly recognized by courts and commentators alike. See Pet. 10-17.

C. Respondents attempt to downplay the split (and the importance of resolving it) by pointing out that employers sometimes manage to win even in the Sixth Circuit. Opp. 9, 17. But as the commentators cited in the petition (at 12 & n.2) have explained, the difference in outcomes in the two circuits with the

most diametrically opposed approaches to the vesting question—the Sixth and the Seventh—speaks for itself, as employers win only 11 percent of the time in the Sixth Circuit versus almost 80 percent of the time in the Seventh Circuit on this issue. Even those who approve of the Sixth Circuit's approach recognize the presumption in favor of vesting. *Id.* at 11. It cannot be credibly maintained that the circuits are not deeply divided on the question of retiree health-care benefit interpretation.

II. The Sixth Circuit's Resolution Of The Purely Legal Issues Presented Here Was Outcome Determinative

This case turned on the Sixth Circuit panel's decision in *Tackett I*—based on the *Yard-Man* presumption—that the benefits were vested as a matter of law. Pet. App. 114. Indeed, the district court initially dismissed all of respondents' claims given the undisputed evidence of cap agreements in place concerning the health-care benefits. In *Tackett I*, however, the Sixth Circuit used *Yard-Man* to tie the district court's hands. Pet. App. 90. Although respondents are correct that credibility determinations were made in their favor later in the proceedings, those determinations are irrelevant to the questions presented here. By that point in the proceedings, only the question of *what* vested was left for the district court to answer. *Id.* at 64.

The district court did not establish the vesting of benefits—that question was decided for it by the Sixth Circuit in its first panel opinion, when it held, contra other circuits, that "[a] court may find vested rights under a [collective bargaining agreement] even if the intent to vest has not been explicitly set out in the agreement." Pet. App. 58 (citation and internal quotation marks omitted). As the Sixth Circuit itself recognized, the interlocutory panel holding established "a controlling interpretation of the [collective bargaining agreement] that prove[d] dispositive of at least the vesting issue, if not the issue of capped versus uncapped benefits." *Id.* at 61. Though the Sixth Circuit paid lip service to not deciding the ultimate question, *id.* at 61-62, its summary of the agreement at issue was "an unqualified declaration" that "'the parties intended health-care benefits to vest.'" *Id.* at 62. The district court thus eventually made factual findings that aligned with its "conclusion that the Sixth Circuit answered the threshold vesting issue." *Id.* at 63.

But the collective bargaining agreement at issue here was silent on that "threshold" issue—and typically, when an agreement expires, its provisions do not outlive it. One may agree or disagree with the wisdom or policy of retirees being subject to future negotiations, but those individuals have the right to insist—before retirement, through their union representatives—on the right to full vesting of benefits. Once *Yard-Man* is applied, however, courts simply assume—or infer, or presume—that an employer

intended vesting based on factors such as tying the benefits to retirement status.

No one can disagree with Judge Sutton that the "precise weight of the *Yard-Man* 'inference' * * * is elusive." *Reese*, 574 F.3d at 321. The inference obviously does not mean that the employees win every time. What it does mean, though, is that employees win when there is no explicit *denial* of vesting and the health-care benefits are linked to retiree benefits (which is, of course, always the case). See, e.g., *Yolton* v. *El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 583 (6th Cir. 2006); *Golden* v. *Kelsey-Hayes Co.*, 73 F.3d 648, 656-57 (6th Cir. 1996). *Yard-Man* is thus a proxy for arguing that contractual silence shows an intent to vest if the health-care benefits were granted in the retiree context.

The "trial" repeatedly invoked by respondents thus had nothing to do with the vesting question that has divided the circuits. That question was decided by the Sixth Circuit based solely on its interpretation of the collective bargaining agreement at issue. The bench trial simply determined "*what* vested" not whether anything vested as an initial matter. Pet. App. 64 (emphasis in original). The district court was only "called upon to explain whether what vested include[d] specific benefits." *Ibid.* Accordingly, the issue presented here involves no factbound inquiry warranting any deference to the trial court's findings. It is a textbook example of a circuit split that has led to wildly divergent outcomes and created incentives for inappropriate forum shopping.

The time has come to resolve this important and recurring question. Though this Court has denied certiorari in other cases raising this question, the petition here presents the issue cleanly and in a procedurally final posture. It is therefore an ideal vehicle for resolving the circuit split and bringing uniformity to retiree health-care benefit interpretation across the circuits.

III. Respondents Do Not Dispute The Existence Of A Related But Distinct Circuit Split

Respondents do not dispute the existence of a circuit split on the second question presented by the petition—whether the same rules of interpretation should apply to collective bargaining agreements as they do in the ERISA context. Instead, respondents offer only the conclusory assertion that both "ERISA plans and contractually bargained plans are interpreted in accordance with traditional rules of contract interpretation." Opp. 21; see also *id.* at 15 ("[E]very circuit resolves LMRA/ERISA retirement healthcare cases by applying traditional contract interpretation rules."). Respondents make no attempt to distinguish the cases cited in the petition that catalog the differences in approaches within the circuits. See Pet. 17-19.

The bulk of respondents' argument on this issue is devoted to refuting Judge Posner's view that the Sixth Circuit's presumptions—applying a "clear

statement rule" in the ERISA context, and an "inference" in favor of vesting in the collective bargaining context—should be reversed, if anything. *Rossetto*, 217 F.3d at 543-44. But that is an argument on the merits, not against review. Respondents' resort to merits arguments at this stage is both premature and revealing. And this is, once again, a dispositive issue—if the Sixth Circuit interpreted collective bargaining agreements the same way it approaches ERISA plans, the silence concerning vesting would have been resolved in favor of M&G. This case is thus an ideal vehicle for resolving that important, recurring issue, too—and respondents make no argument to the contrary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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