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 FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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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 healthcare 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 healthcare benefits should continue indefinitely, as the Second and Seventh Circuits hold.

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Business Roundtable is an association of chief executive officers who collectively manage more than 14 million employees and $6 trillion in annual revenues. The association was founded on the belief that businesses should play an active and effective role in the formation of public policy. It participates in litigation as *amicus curiae* in a variety of contexts where important business interests are at stake.

The members of both *amici* have a substantial interest in the proper interpretation of collective bargaining agreements regarding the provision of healthcare benefits to employees, retired employees, and their dependents, through employee welfare benefit plans regulated by the Employee Retirement In-

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[1] The parties consented to this filing. Their letters of consent are on file with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici*, their members, and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

come Security Act, 29 U.S.C. §§ 1001-1461 (ERISA). As explained below, by requiring a company to provide unalterable, or "vested," healthcare benefits for their retired employees (and their dependents), the Sixth Circuit's decision below threatens to impose enormous and unforeseen retroactive funding liabilities on American companies. Employers may be forced to reduce their active work forces, divert funds from research and development, or absorb these unexpected and substantial costs by raising prices for their products and services. Some employers, particularly those in industries with significant retiree populations, already have been driven to the brink of bankruptcy by the Sixth Circuit's approach to interpreting collective bargaining agreements that provide retiree healthcare benefits. *Amici* therefore submit this brief to apprise this Court of the potential consequences for American business if the Sixth Circuit's judgment is affirmed.

SUMMARY OF ARGUMENT

The Sixth Circuit held that the parties' collective bargaining agreements granted M&G Polymers USA's retirees a vested right to lifetime, contribution-free healthcare benefits. It reached this conclusion even though the agreements, among other things: (1) included no promise of vested benefits; (2) contained a durational clause expressly denoting each agreement's expiration date, with no carve-out or separate durational provision addressed to retiree benefits; and (3) were, as a matter of course, accompanied by "cap letters" that limited the employer's annual contribution to retiree healthcare costs. The Sixth Circuit was able to reach this outcome only by relying on its so-called *Yard-Man* presumption, see *International Union, UAW* v. *Yard-Man, Inc.*, 716 F.2d 1476 (6th

Cir. 1983), which infers that an employer agreed to provide perpetual, unalterable benefits to retirees and their dependents based *not* on what an agreement says, but rather on the supposed meaning of its silence.

The Sixth Circuit's interpretive approach misreads silence as reflecting an affirmative agreement by the parties. Silence is not how sophisticated parties memorialize an agreement to provide costly, immutable healthcare benefits. This Court recognized as much in *Litton Financial Printing Division* v. *NLRB*, 501 U.S. 190 (1991), ruling that "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement" unless the "collective-bargaining agreement provides in explicit terms that certain benefits continue after the agreement's expiration." *Id.* at 207. By recognizing that parties to a collective bargaining agreement will rarely, if ever, agree to provide a substantial benefit, in perpetuity, without doing so *expressly*, the rule in *Litton* best reflects the parties' likely intent. It is also a clear rule that produces consistent results.

The *Yard-Man* presumption, on the other hand, not only conflicts with both *Litton* and the realities of collective bargaining, it also distorts and imbalances the collective bargaining process, misconstrues this Court's holding in *Allied Chemical and Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 181 (1971), and flies in the face of Congress's decision to make employee-pension plans and employee welfare benefit plans under ERISA subject to different vesting rules. By rejecting *Yard-Man* in no uncertain terms, this Court would make clear that every provision in a collective bargaining agreement—including those concerning retiree welfare benefits—should be interpret-

ed consistent with established federal labor policy under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (NLRA) and the Labor-Management Relations Act, 29 U.S.C. § 185a (LMRA), as well as ERISA, this Court's precedents interpreting those laws, and traditional methods of contract interpretation.

Finally, the Sixth Circuit's presumption of vesting should also be rejected because it harms all of the parties involved. The Sixth Circuit's approach imposes unpredictable and substantial labor costs on American companies, weakening their international competitiveness and adversely affecting their employees, retirees, and customers. Healthcare costs keep rising, and the cost of providing healthcare benefits only increases as individuals age. At the same time, as life expectancy increases, the retiree population grows both in absolute numbers and in proportion to active employees. A judicially created obligation to provide retirees with irreducible lifelong benefits thus forces employers to bear substantial, retroactive, and unbargained-for costs. This hurts employers, puts downward pressure on active employees' wages and financial opportunities, and even harms retirees themselves, as it precludes cost-efficient access to the newest and best medical care.

These demographic and societal trends underscore the implausibility of the Sixth Circuit's presumption that employers would silently agree to provide vested, lifelong healthcare benefits for retirees and their dependents. Faithfulness to the *Litton* rule as the starting point for the relevant contractual analysis would properly limit employers' retiree obligations to those voluntarily undertaken, thereby protecting em-

ployers, employees, retirees, and the American economy as a whole against all of these problems.

ARGUMENT

I. Benefit obligations do not outlast the collective bargaining agreement in which they are found, unless the agreement itself affirmatively provides otherwise.

As urged by Petitioners, this Court should reaffirm that the clear-statement rule set forth in *Litton* governs the interpretation of retiree welfare benefit provisions. That rule aligns with the reality that employers agreeing to vested healthcare benefits for retirees would only do so expressly. It also provides a clear rule that will produce consistent and predictable results.

At a minimum, this Court should reject the Sixth Circuit's use of contractual silence to compel fixed welfare benefits for the duration of retirees' lives, and clarify that an obligation such as this must be reflected in the affirmative terms of the agreement—not through silence. Failing such affirmative agreement, retiree healthcare provisions must be understood to expire with the agreement of which they are a part.

A. Under *Litton*, absent agreement to the contrary, contractual obligations cease with the collective bargaining agreement of which they are a part.

As a general rule of labor law, when a collective bargaining agreement expires, so too do both sides' obligations thereunder. As this Court said in *Litton*: "contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement" unless the "collective-bargaining agreement

provides in explicit terms that certain benefits continue after the agreement's expiration." 501 U.S. at 207. This Court should reaffirm that principle here.

1. The collective bargaining process mandates and facilitates good-faith meetings to establish the terms of an employment relationship by mutual agreement. 29 U.S.C. § 158(d); *NLRB* v. *Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 488 (1960) (collective bargaining "encourage[s] an attitude of settlement through give and take"). Among its other purposes, the NLRA was enacted to "achieve stability in collective-bargaining relationships." *Auciello Iron Works, Inc.* v. *NLRB*, 517 U.S. 781, 786 (1996) (citations omitted). That policy reflects, at its core, a recognition that permitting the parties to negotiate their own contracts *without judicial interference* will maximize the potential for effective and stable labor relations. See *H.K. Porter Co., Inc.* v. *NLRB*, 397 U.S. 99, 103 (1970) ("The object of [the NLRA] was * * * to ensure that employers and their employees could work together to establish mutually satisfactory conditions.").

Because collective bargaining is driven by mutual give and take, no obligation may arise under a collective bargaining agreement absent a memorialized meeting of the minds; the NLRA "does not compel either party to agree to a proposal or require the making of a concession." *Id.* at 106; accord *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

2. The Sixth Circuit's so-called *Yard-Man* presumption, however, is wholly inconsistent with this scheme. In this case, the Sixth Circuit applied *Yard-Man* to conclude that the company's commitment to make a "full * * * contribution" to retiree benefit costs

would be rendered "illusory" if the company could "unilaterally change the level of contribution" after the agreement's expiration. Pet. App. 11. But the same could be said of any other obligation that expires with the agreement. Such an obligation is not "illusory"; it is binding and enforceable *only during the term of the parties' agreement*.

Moreover, the Sixth Circuit ignored the collective bargaining agreement's "general" durational clause. Pet. App. 28 (explaining that the collective bargaining agreements "typically" lasted about three years). Under its *Yard-Man* presumption, although every other provision in an agreement is controlled by a general durational clause, the Sixth Circuit has decided that retiree welfare benefits are not. See, *e.g.*, *Noe* v. *PolyOne Corp.*, 520 F.3d 548, 554 (6th Cir. 2008); *Maurer* v. *Joy Techs., Inc.*, 212 F.3d 907, 917-918 (6th Cir. 2000). This approach is neither warranted nor logical.

Indeed, most courts have disagreed with the Sixth Circuit and recognized that a party's obligations under an agreement are controlled by the agreement's general durational clause absent some textual indication to the contrary. *E.g.*, *Barnett* v. *Ameren Corp.*, 436 F.3d 830, 832-833 (7th Cir. 2006) ("If [an agreement] or other governing document provides for health-care benefits for retirees, but is silent on the issue of whether or not those benefits exceed the life of the agreement, then in this circuit the presumption is that the benefits expire with the agreement.") (citations omitted); *Am. Fed. of Grain Millers, AFL-CIO* v. *Int'l Multifoods Corp.*, 116 F.3d 976, 981 (2d Cir. 1997) (stating that language guaranteeing a level of benefits "during the term of th[e] agreement" created a benefit obligation running only for the fixed period

of the labor contract and no longer); *Anderson* v. *Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1519 (8th Cir. 1988) ("It would render the durational clauses nugatory to hold that benefits continue for life even though the agreement which provides the benefits expires on a certain date.").

This Court too should reject the Sixth Circuit's *Yard-Man* presumption and require, consistent with *Litton*, that an employer's obligation to provide retiree healthcare benefits ends with the collective bargaining agreement in which the benefits are provided, unless the agreement explicitly provides otherwise.

B. Presuming that benefits vest based on silence ignores and distorts the collective bargaining process.

At a minimum, an agreement to provide vested retiree healthcare benefits for life may not be inferred from silence. This is the fundamental problem with the *Yard-Man* presumption: it places an outcome-determinative significance on silence, inferring regardless of the facts of a particular case that the parties "likely intended [retiree welfare] benefits to continue as long as the beneficiary remains a retiree." *Yard-Man*, 716 F.2d at 1482. This approach effectively adds terms to the parties' agreement by judicial fiat, which is contrary to established principles of federal law and labor policy. It also interferes with the bilateral bargaining scheme established by the federal labor laws. Indeed, far from reflecting the reality of collective bargaining, a vesting presumption ignores and distorts the collective bargaining process.

1. This Court has made clear that no court "directly or indirectly * * * sit[s] in judgment upon the

substantive terms of collective bargaining agreements." *NLRB* v. *Am. Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). Similarly, this Court has long recognized that, when interpreting a collective bargaining agreement, traditional rules of contract interpretation must be applied in light of basic principles of the federal labor scheme. See *Textile Workers Union of Am.* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957) ("the substantive law to apply in suits under [Section 301] is federal law, which the courts must fashion from the policy of our national labor laws"); see also *Smith* v. *Evening News Ass'n*, 371 U.S. 195, 200 (1962) (using as a touchstone for interpreting Section 301 the "congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law").

To be sure, the NLRA requires employers and unions to bargain with respect to a number of mandatory subjects—but retiree benefits are not among them. 29 U.S.C. §§ 158(a)(3) and 158(b)(5); *Pittsburgh Plate Glass*, 404 U.S. at 181 n.20 (1971). As a result, a collective bargaining agreement can *wholly exclude* retiree welfare benefits, yet be in full compliance with federal law. Thus, an employer's obligations to retirees are—and must be—defined solely by the agreement. And even *if* retiree healthcare benefits are contemplated by the agreement, once that contract expires, employers are "generally free * * * for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995).

This is what silence—a lack of agreement—must be understood to leave in place. In the event the parties to a collective bargaining agreement actually in-

tend to vest retiree healthcare benefits, they must do so affirmatively. Otherwise—that is, absent a memorialized undertaking to provide unalterable benefits in perpetuity—retiree welfare provisions expire with the rest of the parties' agreement.

As this case shows, the Sixth Circuit's *Yard-Man* presumption stands in opposition to all of this. The court below inferred that retiree benefits are fixed for the duration of the retirees' lives, despite the fact that no language in the agreement promised forever unalterable benefits, each agreement had a general durational clause with no exception or carve-out for retiree benefits, the employer never relinquished its right to modify or even cease providing retiree benefits, and retiree benefits under prior agreements were capped by side agreements. In this way, the court below effectively imposed a substantive term on the parties, in direct violation of federal labor law. See *Am. Nat'l Ins. Co.*, 343 U.S. at 404. This unwarranted result directly contravenes federal labor policy.

2. A further problem is the impact of the Sixth Circuit's flawed approach on the collective bargaining process itself. "It is implicit in the entire structure of the [NLRA] that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *H.K. Porter*, 397 U.S. at 107-108. Courts likewise are "referees" that should not alter the parties' obligations under the agreement. Rather, as reflected in this Court's precedent and federal labor policy, a reviewing court should recognize an obligation only when it is evident from the text that such obligation was contemplated and agreed upon *by the parties*. See *Litton*, 501 U.S. at 207; *Am. Nat'l Ins. Co.*, 343 U.S. at 404. Anything more transforms a judge

from a "referee" into a player. Accordingly, the courts of appeals (other than the Sixth Circuit) are rightly reluctant to undercut a collective bargaining party's ability to freely negotiate and agree upon the terms of an agreement.

As this Court recognized in *Pittsburgh Plate Glass*, retirees are frequently part of the negotiating process. 404 U.S. at 175-176. To begin with, retirees are not strangers to the collective bargaining relationship, having started as bargaining unit employees. Nor are they without the protections of federal labor law, which mandates good faith bargaining and provides them a remedy for any contract breaches. *Id.* at 181 n.20 ("The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed.").

Indeed, in this case, an affiliate of United Steelworkers, "North America's largest industrial union," which represents more than 1.2 million members throughout multiple countries, represented M&G's employees and retirees in negotiations.[2] This capable and sophisticated group does not need a judicially created advantage.

Further demonstrating the illogic of its approach, even the Sixth Circuit has refused to extend a *Yard-Man*-esque presumption to every retiree welfare benefit plan. Rather, the Sixth Circuit applies *Yard-Man*

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[2] United Steelworkers, http://www.usw.org/union/mission. The Union itself employs nearly 1,800 individuals, has raised nearly $24 million in contributions, and has spent over $6.5 million lobbying federal matters alone. United Steelworkers: Summary, OpenSecrets, https://www.opensecrets.org/orgs/summary.php?id=D000000102&cycle=A.

only to retiree healthcare provisions in collectively bargained agreements. See *Reese* v. *CNH Am. LLC* ("*Reese I*"), 574 F.3d 315, 321 (6th Cir. 2009) ("When the health plan was not collectively bargained, we require a clear statement before we will infer that an employer meant to promise health benefits for life."). Thus, the Sixth Circuit itself would have reached the exact opposite conclusion if M&G had established the same benefits for non-union retirees outside of the collective bargaining context. The Sixth Circuit's treatment of retiree benefits provisions in non-collectively bargained agreements underscores that the *Yard-Man* presumption is an unwarranted anomaly.

3. *Yard-Man*, moreover, significantly distorts the collective bargaining process. As discussed above, if a bargaining party has a right to healthcare benefits, it can *only* be because the collective bargaining parties have agreed to it as a matter of contract. Welfare benefits (unlike pension benefits) do not vest as a matter of law. See 29 U.S.C. § 1051. Accordingly, if a union desires to provide vested welfare benefits for its members, it must bargain for them—and presumably give something else up in exchange. *Yard-Man*, however, turns the tables by presuming that retiree welfare benefits *are* vested, thereby effectively shifting the burden to *employers* to guard *against* vesting.

In this case, for example, the Sixth Circuit effectively required M&G to have obtained an express durational clause stating when retiree welfare benefits expire. Only with such a clause could the company overcome the inference that the parties had the "intent to vest lifetime contribution-free benefits." Pet. App. 20. According to the court below, "[t]o the extent that vesting was presumed, it was not the dis-

trict court that, *sua sponte*, shifted the burden of proof." *Ibid.* Plainly, however, M&G could avoid liability for vested lifetime benefits only one way: an express statement disclaiming the proposition that retiree welfare benefits outlasted the agreement itself. See *Noe*, 520 F.3d at 554 (despite a general durational clause, holding retiree benefits vested based on the absence of any language "specifically stating that retiree health benefits expire upon termination of the agreement"); *Maurer*, 212 F.3d at 917-918 (same). As a matter of practice, M&G would have had to bargain for such an express disclaimer, which is to say, M&G would have had to give up something in return.

Even if that does not amount to shifting the "burden of proof," Pet. App. 20, it most certainly shifts the burden of bargaining. Under a judicially imposed default rule that renders retiree benefits vested and perpetual, employers must make a concession to get an agreement that provides otherwise—which is improper, indeed perverse, given *Curtiss-Wright* and the rule that employers generally have free reign to change or not provide retiree benefits at all. See 514 U.S. at 78. The *Yard-Man* presumption thus unfairly and inappropriately compromises an employer's ability to negotiate a collective bargaining agreement from the outset. In the interest of removing such a judicially created distortion—as the NLRA demands—this Court should rule at a minimum that retiree benefits are *not* presumptively vested.

C. The *Yard-Man* decision fundamentally misinterprets *Pittsburgh Plate Glass* and ignores ERISA's vesting rules.

The Sixth Circuit's *Yard-Man* presumption should be rejected not only for how it elevates silence over the affirmative terms of the parties' agreement, but also because, when the Sixth Circuit created the presumption in the first instance, it misconstrued this Court's precedent and ignored Congress's directive to treat pensions and welfare benefits differently. Rather than endorse this anomalous result, this Court should do what almost every court that has considered the issue has done: reject *Yard-Man*.

1. Interwoven throughout the Sixth Circuit's *Yard-Man* decision are citations to this Court's decision in *Pittsburgh Plate Glass*. See, *e.g.*, *Yard-Man*, 716 F.2d at 1482. But nothing in *Pittsburgh Plate Glass* supports the Sixth Circuit's conclusion that retiree healthcare benefits are "status" benefits that the parties are "unlikely" to have "left to the contingencies of future negotiations." *Ibid.*

In *Pittsburgh Plate Glass*, this Court held that benefits for retired workers are a permissive—not mandatory—subject of collective bargaining, 404 U.S. at 170, 180-82, and that unions have no *duty* to represent retired workers in negotiations with the employer, though they may (and often do) choose to do so, *id.* at 181 n.20. This Court did not hold that retiree benefits are "a form of delayed compensation or reward for past services" that could never be altered. *Yard-Man*, 716 F.2d at 1482. Rather, it recognized that benefits for existing retirees *can* be (and frequently are) the subject of collective bargaining. *Pittsburgh Plate Glass*, 404 U.S. at 170, 180-82. To

consider those benefits presumptively unalterable, therefore, is to proceed from a premise wholly at odds with *Pittsburgh Plate Glass*.

The *Yard-Man* inference, at least in part, stems from the Sixth Circuit's belief that if employees choose to "forego wages now in expectation of retiree benefits, they would want assurance that once they retire they will continue to receive such benefits regardless of the bargain reached in subsequent agreements." *Yard-Man*, 716 F.2d at 1482. Because employees might "want" this result—even though they did not bargain for it—the *Yard-Man* court found "an intent to create interminable rights to retiree insurance benefits in the absence of explicit language [to this effect]." *Ibid.* But this turns *Pittsburgh Plate Glass* on its head. This Court recognized that retiree benefits may be a subject of collective bargaining—so whatever employees may "want" in the way of benefits upon retirement must be bargained for and obtained through affirmative agreement.

Furthermore, because all employees are potential retirees, the union is perfectly fit to bargain over whether benefits will vest. Indeed, as *Pittsburgh Plate Glass* recognized, retirees have a right to enforce contractual promises pursuant to Section 301 of the LMRA. 404 U.S. at 181 n.20. Thus, *Yard-Man's* concern that retirees would be without protection upon leaving the bargaining unit is without merit.

2. Given that Congress intended for pensions and retiree welfare benefits to be treated differently, the Sixth Circuit also misses the mark in finding retiree welfare benefits to be vested based on their mere association with pension benefits. See, *e.g.*, Pet. App. 20; *Noe*, 520 F.3d at 558-559 (citing *McCoy* v. *Meridi-*

an Auto. Sys., Inc., 390 F.3d 417, 419 (6th Cir. 2004); *Golden* v. *Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996)). According to the Sixth Circuit, when an agreement "ties" eligibility for pensions and retiree healthcare benefits together (for example, by stating that a pension-eligible employee qualifies for retiree welfare benefits), this indicates "that the parties intended that the company provide lifetime health benefits as well." *Golden*, 73 F.3d at 656.

But like its presumption regarding the parties' likely intent regarding so-called "status" benefits, drawing an inference from the "tying" of welfare benefits and pensions is illogical. Pension benefits vest as a matter of law. Healthcare benefits do not. See 29 U.S.C. § 1051. One important reason for that distinction is that, while pension costs are relatively predictable, healthcare costs are not. See *Int'l Union, UAW* v. *Skinner Engine Co.*, 188 F.3d 130, 138 (3d Cir. 1999) ("Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate," but "[a]utomatic vesting was rejected [for welfare plans] because the costs of such plans are subject to fluctuating and unpredictable variables.") (quoting *Moore* v. *Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988)).

An agreement may address both benefits together, but that is simply because a retiree may become *eligible* for both benefits at the same point in time. That eligibility connection says nothing about whether the two benefits have the same *duration* or *immutability*. The presumption that merely offering both benefits *ipso facto* vests the otherwise un-vested welfare benefit—without any express language so providing—is untenable and blinks the careful choices Congress made when it enacted ERISA.

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To be clear, *amici* do not contend that employers may not, or even should not, offer retirees a vested right to lifetime healthcare benefits. But employers should not be deemed to have done so where the supposed undertaking is not affirmatively reflected in the parties' agreement—much less where, as here, the agreement has a general durational clause that, on its face, governs retiree benefits provisions (not to mention the cap letters which belie the presumed intent to provide lifetime, uncapped benefits).

II. Finding vested benefits absent affirmative agreement would impose massive retroactive liability on employers and work to the detriment of everyone involved.

An artificial inference of vesting directly or indirectly harms everyone involved—employers, employees, retirees, and even consumers. Among other things, the Sixth Circuit's approach encourages companies to cease providing retiree benefits, threatens to reduce active workers' wages and financial opportunities, and potentially results in increased prices and reduced availability of goods and services. In addition, endorsing *Yard-Man* would negatively affect the employer-employee relationship in numerous ways, including by forcing employers to absorb massive unexpected costs while simultaneously altering the tenor of future labor negotiations. These results are both unwarranted and undesirable.

A. Endorsing *Yard-Man* would lead to massive and unexpected retroactive costs for employers.

To date, very few employers have expressly *disclaimed* the vesting of retiree welfare benefits in their

collective bargaining agreements. That is for good reason: this Court's decision in *Litton*, and the general disapproval of *Yard-Man* by most courts outside the Sixth Circuit. But if this Court embraces *Yard-Man*, it could trigger widespread uncertainty and litigation over expired agreements that could, in many cases, result in far more expensive retiree benefits than employers budgeted.

In the collective bargaining process, employers cost out the expense of proposed wages, benefits, and other terms and conditions of employment over the life of the agreement. A judicial presumption of vesting, imposed post hoc, adds significant uncertainty; not even the parties to the agreement can predict the long-term costs. And in business, with uncertainty comes instability—or even insolvency.[3]

These problems are exacerbated in this context, with the changing regulatory framework, the longer life-expectancy of Americans and swelling retiree ranks, and the high costs of healthcare.

First, *Yard-Man*'s rigid vesting rule makes it costly, difficult, or even impossible for companies to respond when regulatory changes (*e.g.*, the Affordable Care Act) *force* them to alter coverage. See *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC* v. *Kelsey-Hayes Co.*, 750 F.3d 546, 555 (6th Cir. 2014) (rejecting company's attempt to replace direct cover-

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[3] Some employers "are being forced into economic restructuring" due to the increased cost of providing health benefits to retirees. United States Social Security Administration, Social Security Advisory Board, *The Unsustainable Cost of Health Care*, September 2009, http://www.ssab.gov/documents/TheUnsustainableCostofHealthCare_508.pdf.

age with equivalent-value vouchers that would have allowed retirees to purchase the coverage best suited to their individual needs).

Second, due to increased life expectancy and the size of the baby boomer generation, the Social Security Administration estimates that the number of Americans over 65 will increase to more than 77 million by 2033 from 46.6 million today.[4] This is an increase of *more than 65 percent* in just 20 years. The fallout from this shift in the active labor force will have effects all through the American economy—and not least in the context of employer-provided healthcare coverage.

Third, total healthcare spending in the United States is expected to reach $5.0 trillion in 2022—up from $2.6 trillion in 2010 and $75 billion in 1970.[5] By 2022, healthcare spending will account for *nearly 20 percent* of gross domestic product.[6] To be sure, retirees will represent a significant part of this cost.

These realities mean that extending *Yard-Man* may force employers to face massive costs for which they did not budget (or agree to). What is more, not only might retroactive vesting of retiree healthcare benefits threaten an employer's bottom-line *today*, the cost of healthcare and the increasing imbalance

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[4] See United States Social Security Administration, *Fact Sheet: Social Security*, http://www.ssa.gov/OACT/FACTS.

[5] See Centers for Medicare and Medicaid Services, *National Health Expenditures Projections 2012-2022*, http://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/Downloads/Proj2012.pdf.

[6] *Id.*

between retirees and active workers may strain an employer's ability to remain solvent and in compliance with its *Yard-Man*-imposed obligations *tomorrow*. See, *e.g.*, *Wood* v. *Detroit Diesel Corp.*, 607 F.3d 427, 436 (6th Cir. 2010) (to save the company from insolvency, the parties needed "to shift the risk of above-cap costs off the company by capping retirees' vested health care benefits").

B. Nearly every party to a collective bargaining agreement suffers from *Yard-Man*'s presumption of vesting.

Imposing significant and unexpected costs on employers for agreements that have already been negotiated will also infect future negotiations over new agreements. Likely, this will be to the detriment of everyone involved.

Affirming the Sixth Circuit's interpretive approach would have far-reaching negative effects on employers. Some may seek concessions in future agreements to account for previously unforeseen financial liabilities. Others may be forced to implement more dramatic workplace changes, such as plant closings or workforce reductions, to offset the newly-incurred legacy costs. Still others may be forced to close their doors altogether.

Employees would suffer, too. Even if retiree benefits are deemed fixed and vested under *Yard-Man*, the benefits, wages, and very jobs of current employees remain negotiable from one agreement to the next. As the Social Security Advisory Board has suggested: "In the long run, most of the impact of rising health care costs on employers can be shifted to their workers by reducing wage growth, hiring fewer workers, or hiring more part-time workers who are typi-

cally not eligible for health insurance coverage."[7] And not only *can* such costs be shifted in these ways, they almost have to be, given that wages and salaries accounted for $6.9 trillion of the $8.6 trillion employers spent on total compensation in 2012.[8] As an employer's largest non-fixed cost (nearly 80% of *total* compensation), active employees are necessarily first in line to shoulder the impact of *Yard-Man*—in the form of both current wages and benefits, and the benefits offered when they themselves retire.

Finally, even retirees are, as a group, better off without the unfairness or uncertainty of a *Yard-Man* type inference. As Judge Sutton has explained, "healthcare benefits—what is provided and what it costs—have not been remotely static in modern memory." *Reese* v. *CNH Am. LLC* ("*Reese II*"), 694

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[7] United States Social Security Administration, Social Security Advisory Board, *The Unsustainable Cost of Health Care*, September 2009, http://www.ssab.gov/documents/TheUnsustainableCostofHealthCare_508.pdf.

[8] See United States Bureau of Economic Analysis, "Table 7.18. Relation of Wages and Salaries in the National Income and Product Accounts to Wages and Salaries as Published by the Bureau of Labor Statistics" (2012 data last revised Aug. 7, 2013), http://www.bea.gov/National/nipaweb/nipawebPreview/TableView.asp?SelectedTable=295&FirstYear=2011&LastYear=2012&Freq=Year&3Place=Y; United States Bureau of Economic Analysis, "Table 7.8. Supplements to Wages and Salaries by Type" (2012 data last revised Aug. 7, 2013), http://www.bea.gov/National/nipaweb/nipawebPreview/TableView.asp?SelectedTable=285&FirstYear=2011&LastYear=2012&Freq=Year&3Place=Y. As Table 7.8 reflects, employers spent $1.7 trillion on employee benefits in 2012, or 19.6% of total compensation.

F.3d 681, 683 (6th Cir. 2012). Accordingly, many retirees "do not want lifetime eligibility for the medical-insurance plan in place on the day of retirement, even if that means they would pay no premiums for it." *Id.* at 683-684. Rather, they "want eligibility for up-to-date medical-insurance plans, all with access to up-to-date medical procedures and drugs"—that is, "something more than a fixed, unalterable bundle of services; they want coverage to account for new and better, yet likely more expensive, procedures and medications than the ones in existence at retirement." *Id.* at 684.

On this basis, the Sixth Circuit has recognized that employers may be permitted to make "reasonable" alterations to coverage, even where retiree benefits are deemed vested under *Yard-Man*. *Reese I*, 574 F.3d at 327. But this is an uncertain and incomplete solution.

Take, for example, the Sixth Circuit's recent decision in *Kelsey-Hayes*. In that case, the employer attempted to shift its retirees' healthcare benefits from traditional group insurance coverage to a system of "Health Reimbursement Accounts." *Kelsey-Hayes*, 750 F.3d at 550. These Accounts "were designed to function, essentially, as a health care voucher system," so the retirees could "use these funds to purchase their own insurance from among a variety of providers." *Ibid.* For 2011, the company had allocated vouchers well in excess of the amount the average employee was expected to need. See *id.* at 550, 557. Nonetheless, the retirees sued the employer *and they won*. The Sixth Circuit, relying heavily on *Yard-Man* and its progeny, held that the collective bargaining agreement's "language alone, *when construed in light of the* Yard-Man *inference*, created a vested lifetime

right to health care benefits." *Id.* at 554-555 (emphasis added). And "whether the [Accounts] are 'better' or 'worse' than the prior group coverages is immaterial as a legal matter * * * the [Accounts] were simply not what was collectively bargained [for]." *Id.* at 557. This kind of rigidity and stagnation is not good for anyone.

In short, *Yard-Man* produces no winners. Employers are forced to operate on a leaner budget, employees are forced to shoulder part of this cost, and retirees may be left with an outdated benefit plan that fails to keep pace with life-saving and life-enhancing medical innovations. These problems, however, can be readily avoided should this Court disavow the *Yard-Man* presumption and require courts to reason not from an ill-founded presumption but rather from the collective bargaining agreement's express terms. Rejecting *Yard-Man* would put negotiating parties on equal footing, facilitate consistent and predictable interpretation of collective bargaining agreements, and ultimately best serve all stakeholders.

CONCLUSION

For the foregoing reasons, this Court should reverse the Sixth Circuit's judgment.

Respectfully submitted.

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JULY 2014