No. 06-201

IN THE

Supreme Court of the United States

EL PASO TENNESSEE PIPELINE CO.,
Petitioner,

v.

GLADYS YOLTON, WILBUR MONTGOMERY, ELSIE TEAS, ROBERT BETKER, EDWARD MAYNARD, and GARY HALSTEAD, on behalf of themselves and a similarly situated class,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE AMERICAN BENEFITS COUNCIL AS *AMICI CURIAE* IN SUPPORT OF EL PASO TENNESSEE PIPELINE CO.

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America (the Chamber), the world's largest business federation, represents an underlying membership of over three million businesses and organizations of every size, in every industry sector, and from every geographic region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The National Association of Manufacturers (the NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The American Benefits Council (the Council) is a broad-based, non-profit trade association founded in 1967 to protect and foster the growth of this nation's privately sponsored employee benefit plans. The Council's members include both small and large employer-sponsors of employee benefit plans, including many Fortune 500 companies. Collectively, its more than 250 members sponsor and administer plans covering more than 100 million plan participants and beneficiaries.

Amici's members and employers have a critical need to know with certainty the scope of employer commitments to provide and pay for health care benefits for their employees

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[1] Pursuant to 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, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties, including those in a related Petition which may be consolidated with this matter (*CNH Am. LLC. v. Yolton*; Docket No. 06-176), have consented to the filing of this brief. Their consent letters are on file with the Clerk's office.

and their former employees. Many *amici* members provide health care benefits to employees and retired employees and their dependents in several states and arrange for the provision of health care services through employee welfare benefit plans regulated under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (ERISA). Consistent with federal labor policy under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (NLRA), the Labor-Management Relations Act, 29 U.S.C. § 185a (LMRA), and with this Court's precedents, *amici* members have collectively bargained retiree health care benefits and have attempted to apply labor contract provisions relating to those benefits.

The Sixth Circuit decision below, *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006) (*Yolton*), employed the much discredited "*Yard-Man* inference," *see Int'l Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983) (*Yard-Man*), in order to infer an unintended lifetime health care benefit for retirees under the parties' collective bargaining agreements. After *Yard-Man*, the circuits divided in their approaches to labor contract interpretation and often interpreted the same or virtually identical labor contract provisions inconsistently. *Yolton* perpetuates this discord. Not only did *Yolton* nullify provisions limiting the existence of the benefit plan to the duration of the labor contract and capping employer contribution to retiree benefits, but it also inferred an employer commitment of lifetime retiree benefits from provisions describing pension eligibility, an approach rejected in several other circuits. The long unresolved split in the circuits has frustrated efforts of *amici* members, and especially their national employer members with operations in several states, to establish a consistent, nationwide approach to retiree benefits. Highly unsettled and inconsistent interpretations of the same or virtually identical labor contract terms have caused this uncertainty, contrary to federal labor and employee benefit law principles.

Despite repeated criticism and rejection of the *Yard-Man* inference by several circuits, the circuits that follow *Yard-Man's* approach infer lifetime benefits and impose an immense and unexpected burden on employers while providing retirees with an unbargained-for windfall. As a result of this outcome-determinative and irreconcilable split in the circuits, forum shopping by retirees and unions has forced American companies, and particularly national employers, to defend contract language at great expense in circuits where a handful of retirees may reside but never worked, and where benefit plans were not in fact negotiated or administered. The enormous funding liability for such unintended lifetime benefits has weakened American companies by forcing them to reduce their active work forces and to cease providing retiree health care benefits for future retirees, contrary to ERISA's policy of encouraging employers to provide benefits voluntarily. American employers have diverted funds from research and development to pay for retiree benefit costs and have been forced to absorb the unexpected and enormous cost of lifetime retiree benefits in the pricing of their products. Some have been driven to the brink of bankruptcy, particularly in industries with significant retiree populations.

Amici thus file this brief in support of the petition for certiorari seeking resolution of this deep-seated and unresolved split in the federal circuits. In order to permit U.S. businesses to predict labor costs and to avoid enormous and unintended financial liabilities that weaken their domestic and global competitiveness, *amici* urge this Court to grant the petition for review in order to resolve the split in the circuits by reaffirming a fundamental principle of labor law: the presumption that benefits expire upon contract expiration unless the parties clearly provide otherwise, as this Court recognized in *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 207 (1991). To return the parties to the bargaining table without a presumption that favors one side (the *Yard-Man* inference) and with a presumption consistent with both federal

labor law and ERISA (the *Litton* presumption), this Court should, on plenary consideration, reaffirm that retiree health benefits do not vest unless collectively bargained agreements contain a clear statement that retiree benefits last for life and thus survive labor contract expiration.

STATEMENT OF THE CASE

Amici incorporate the Statement of the Case in the petition for writ of certiorari and briefly summarize the portion of *Yolton* relevant to their arguments.

Petitioner's predecessor (J. I. Case) negotiated a group insurance plan with Respondents' union, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Each collectively bargained labor agreement from 1971 to 1990 contained no express lifetime language in the retiree benefits provision itself, but did expressly provide that the "group insurance plan" (*i.e.*, the source of the retiree health care benefits) would "run concurrently with" the labor agreement, Pet. 3a-4a; thus, when the labor contract expired, so did the benefits. An Extension Agreement, extending most terms of the 1990 labor contract through February 2, 1995, continued to incorporate the group insurance plan and its express provision that the benefit plan only continued concurrently with the labor contract [*Id.*]. The Extension Agreement also stated that "[e]xcept for pension improvements, all wage schedules, pension benefit and insurance levels would remain in effect at the current schedule rates or levels for the term of the Extension Agreement." Pet. 44a.

During the negotiations for the Extension Agreement, the UAW agreed to a Letter of Understanding that expressly provided for a cap on employer contributions to retiree health care benefits as of April 1, 1998. Pet. 4a. Petitioner invoked the cap on employer contributions three times. Pet. 6a-7a.

Respondents challenged the clear and express cap on employer expenditures by suing in the Sixth Circuit, where a few

of the retirees lived, to take advantage of Sixth Circuit law favorable to retirees. By November 1993, petitioner's plants were located only in states in the Seventh and Eighth Circuits. Pet. 24-25. Although *Yolton* claims that the Sixth Circuit does not follow any one-sided presumption in favor of retirees, in all eleven LMRA Section 301 retiree benefit class actions in that Circuit, the court of appeals has found that the retirees' benefits were vested or likely to be vested. Pet. 15, n.5. In contrast, in ten such cases, the Seventh Circuit has found retiree benefits vested for life only once, and only on the basis of clear and express lifetime language. *Id.* The group insurance plan retiree benefit provision did not expressly state that the benefits were lifetime in duration; nevertheless, *Yolton* found, in affirming a preliminary injunction, that the retirees' benefits were likely vested. To reach that result, *Yolton* eviscerated the express duration provision limiting the benefit plan to the term of the labor agreement and effectively erased the negotiated cap on employer contributions to retiree health care benefits. *Yolton* also mischaracterized contract language, given contrary interpretations in other circuits, and applied the now discredited *Yard-Man* inference to find lifetime benefits where none were intended or clearly expressed.

SUMMARY OF ARGUMENT

Since the controversial *Yard-Man* decision in 1983 that sparked an irreconcilable split in the federal circuits, *amici* members have incurred substantial litigation costs in every one of the federal circuits and have suffered the imposition of lifetime retiree benefits by judicial fiat, even where labor contracts did not expressly promise lifetime retiree benefits. Employers would not, and certainly do not, intend to enter into so costly a commitment as lifetime retiree benefits by silence or ambiguity.[2]

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[2] *Yolton* alone compelled payment of retiree health care benefits costing approximately $1.8 million per month. CNH Pet. 3. To further illustrate, other preliminary injunctions compelled an annualized payment for

The split in the circuits has frustrated federal labor policy and impeded collective bargaining. Reacting to *Yard-Man*, the courts of appeals have followed such diverse approaches to determining the duration of retiree benefits that the law has become a patchwork of unsettled and inconsistent interpretations, sometimes of the same or similar contract language. Some circuits have strayed far from a cardinal principle of federal labor law reaffirmed in *Litton*, 501 U.S. at 207-08, *i.e.*, that obligations expire upon labor contract termination absent a clear statement otherwise, including benefit obligations. The *Litton* presumption should continue to inform the bargaining process because it reflects the realities of that process. Employers can predict the cost of welfare benefits over the life of a labor contract; however, the costs of such benefits defy accurate prediction over decades. Conferring lifetime retiree benefits as did *Yard-Man* and *Yolton* from a presumption that favors one side in collective bargaining contravenes settled federal labor policy.

The *Litton* presumption also comports with ERISA. Aware of the volatile nature of benefit costs, Congress expressly exempted welfare benefits from ERISA's vesting requirements and sought to encourage employers to offer such benefits voluntarily. Because of the immense costs of unintended retiree benefits, employers have now ceased to offer retiree benefits to future retirees, even as the national health care crisis escalates and baby boomers edge toward Medicare eligibility.

Without a resolution of the split in the circuits, retiree benefit litigation will continue to clog federal dockets. The circuit split, combined with the liberal venue provisions of the LMRA and ERISA, has encouraged costly class action litigation as retirees and their unions forum shop to gain a better outcome than they

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such benefits of $1.9 million in 1994 dollars, *Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410, 416 (E.D. Mich. 1994), and an annualized payment of $1,080,000 in 1991 dollars, *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261, 1268 (W.D. Mich. 1990), *aff'd*, 948 F.2d 1290 (6th Cir. 1991).

had negotiated at the bargaining table. The unresolved conflict within the federal circuits continues to jeopardize American businesses, which never intended to enter into such enormous long-term liabilities driven by ever-escalating health care costs, and imperils America's global competitiveness.

ARGUMENT

I. THE CONFLICT IN THE CIRCUITS REGARDING THE PROPER LEGAL STANDARD FOR DETERMINING THE DURATION OF RETIREE BENEFITS IMPEDES LABOR CONTRACT NEGOTIATION AND UNDERMINES FEDERAL LABOR POLICY.

By adopting a legal rule that presumes the vesting of lifetime retiree benefits, several courts of appeals, including the Sixth Circuit, have imposed on numerous businesses a devastating and immense burden to which those employers never agreed or intended to agree. Rather than ensuring nationwide labor law (as Congress intended), the split in the circuits regarding the proper legal standard for determining the duration of retiree health care benefits has resulted in inconsistencies difficult even to categorize. Petitioner groups the circuits under three different standards for the "vesting" of collectively bargained retiree benefits; CNH puts the count at two circuits following *Yard-Man* and eight rejecting the *Yard-Man* inference. The varied approaches, however the circuits align, have produced irreconcilable interpretations of similar contract provisions, impeding settled and uniform labor contract interpretation and hampering labor contract negotiations, contrary to the LMRA and the NLRA.

Amici respectfully request that this Court grant plenary consideration in order to restore clarity to labor contract negotiations in all federal circuits by reaffirming the *Litton* presumption that benefits are not vested and do not survive labor contract termination unless the agreement provides "in

explicit terms that certain benefits continue after the agreement's expiration." 501 U.S. at 207.

A. The Courts of Appeals Inconsistently Apply or Fail to Apply the *Litton* Presumption.

The federal circuits remain "all over the lot," *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000), and in disarray over whether to apply the *Litton* presumption, the "*Yard-Man* inference" or any presumption when interpreting collectively bargained retiree benefit provisions.

Three circuits (the Second, Third and Seventh) adhere, some expressly and some *sub rosa*, to the *Litton* presumption that benefits expire upon labor contract expiration unless express language provides otherwise. *See Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134-35 (2d Cir. 1999) (rejecting any inference of retiree benefit vesting when the labor agreement is silent on the issue of duration, stating that the documents must contain express language "capable of reasonably being interpreted" as creating a promise to vest benefits, and rejecting plaintiffs' "extensive linguistic contortion[s]" seeking to "manufacture" an ambiguity); *Int'l Union, UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999) (J. Alito participating) (explicitly requiring a clear statement of vesting beyond labor contract expiration); *Rossetto*, 217 F.3d at 547 (presuming no vesting from silence "unless the plaintiff can show by objective evidence that the agreement is latently ambiguous"); *Cherry v. Auburn Gear, Inc.*, 441 F.3d 476, 481 (7th Cir. 2006) (finding "[t]he presumption that health care benefits do not exceed the life of an agreement imposes a high burden of proof upon the retirees").

Three circuits (the Sixth, despite its recent protestations otherwise, Fourth and Tenth) follow the completely contrary, much criticized *Yard-Man* inference that retiree benefits vest upon retirement or as deferred compensation; the inference thus "tips the scales" in favor of retirees. *See Yard-Man*, 716

F.2d 1476*; Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1297 (6th Cir. 1991)*; Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) (discussing the policy behind the "*Yard-Man* inference" approvingly without explicitly adopting it); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1514 (10th Cir. 1996) (supporting use of *Yard-Man* inference in construing labor contracts, but not ERISA agreements).

Still others (the First, Fifth, and Sixth) claim that they follow no presumption at all. *See Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 216-18 & n.16 (1st Cir. 2006); *Int'l Ass'n of Machinists v. Masonite Corp.*, 122 F.3d 228, 231-32 (5th Cir. 1997) (declining to apply the *Yard-Man* inference); *Yolton*, Pet. 12-13a (protesting that the *Yard-Man* inference is not a presumption, but merely another indication of intent confirmed by other factors). Others (the Eighth, Ninth and Eleventh) seem to adopt this approach by resolving cases without employing any presumption. *See Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516-20 (8th Cir. 1988) ("We believe that it is not at all inconsistent with labor policy to require plaintiffs to prove their case without the aid of 'gratuitous inferences.'"); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223-25 (9th Cir. 1984); *Stewart v. KHD Deutz Corp. of Am.*, 980 F.2d 698, 702 & n.3 (11th Cir. 1993).

B. The Protracted Split in the Circuits Has Caused Inconsistent Labor Contract Interpretation.

Whatever the reasoning followed in each circuit, one unpleasant reality remains for employers: plaintiffs race to a circuit that follows *Yard-Man* to determine contract interpretation and litigation outcome. Yet this Court has recognized that the realm of labor negotiations and the interpretation of labor contracts calls for uniform law. *Local 174, Teamsters v. Lucas Flour Co.*, 359 U.S. 95, 103 (1962). This Court has also cautioned that "[t]he need for uniformity. . . is greatest where its absence would threaten the smooth func-

tioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it." *UAW, AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966). Contrary to this goal of federal labor policy that there should arise a federal common law of uniform contract interpretation, the protracted split in the circuits has fostered inconsistent and thus unsettled interpretations of the same or identical labor contract provisions.

1. *The Circuit Split Has Fostered Unsettled Interpretations of Pension Eligibility Provisions as Implying Lifetime Health Benefits.*

Four circuits reject the Sixth Circuit's insistence that language of description regarding pension eligibility constitutes language of prescription of lifetime health benefits.

Yolton followed earlier Sixth Circuit opinions tying the duration of retiree health care benefits to pension eligibility. Pet. App. 13a, 18-19a. *See Golden*, 73 F.3d at 656; *McCoy v. Meridian Auto. Sys., Inc.*, 390 F.3d 417, 422 (6th Cir. 2004). In contrast, the Third Circuit criticized the Sixth Circuit's *Yard-Man* inference, its methodology, and its illogical leap from language of pension eligibility to an intention to vest retiree welfare benefits for life. *See Skinner*, 188 F.3d 130. As here, the labor contracts in *Skinner* did not contain express and clear language that retiree benefits "will continue for life." S*kinner* declined to infer that retiree health benefits vest for life simply because they are supposedly tied to pension eligibility, and pensions last for life. 188 F.3d at 141-142. The Second, Seventh and Ninth Circuits have also declined to elevate mere language of description (a supposed "tie-in" with pension eligibility) to an implied lifetime durational term for retiree benefits. *See Joyce*, 171 F.3d at 135; *Cherry*, 441 F.3d at 484 ("Words that signify a lifetime commitment in a pension plan may not have the same effect in the context of health benefits."); *Puzis v. Masters Mates and Pilots Plans*, 1989 WL 57657 at *2 (9th Cir. May 22, 1989).

2. *The Circuit Split Has Fostered Inconsistent Interpretations of Express Durational Provisions For Benefit Programs in Labor Contracts.*

Yolton also perpetuates the split in the circuits over interpretation of express durational provisions for benefit programs. Unlike other circuits, the Sixth Circuit ignores the distinction between a general duration provision that simply limits the term of the contract and a "specific" duration provision that expressly refers to the benefit program and links its duration to the fixed term of the labor contract.

Recent Sixth Circuit cases mischaracterize durational provisions that expressly and specifically refer to the group insurance programs as "general" durational provisions. Pet. 14a. *See Golden*, 73 F.3d at 656 (citing *Golden*, 845 F. Supp. at 413-15; *Schalk*, 751 F. Supp. at 1265). The durational provisions in the labor contracts in *Yolton* clearly refer to the group insurance program and expressly state that the program "runs concurrently" with the fixed term of the labor contract. Pet. 3a-4a. The Extension Agreement also clearly states that the level of insurance benefits would be provided "during the term of the Agreement." Pet. 4a.

In contrast to the Sixth Circuit, the Eighth Circuit has refused to find a perpetual commitment of lifetime retiree benefits when specific durational provisions expressly refer to benefit programs as running for the fixed period of the labor contact, finding that the durational provisions referring to the benefits program "show[ed] an intent to limit benefits to the duration of the agreement. 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." *Anderson*, 836 F.2d at 1519; *see also John Morrell & Co. v. United Food & Comm. Workers Int'l Union*, 37 F.3d 1302, 1307 (8th Cir. 1994) (finding no lifetime benefits where each master agreement contained a "term clause" limiting the duration of the retiree benefits to the duration of the master agreement). The Second Circuit has also found

that language guaranteeing a level of benefits "during the term of the agreement" created a benefit obligation running only for the fixed period of the labor contract and no longer. *Am. Fed. of Grain Millers, AFL-CIO v. Int'l Multifoods Corp.*, 116 F.3d 976, 981 (2d Cir. 1997).

3. *The Circuit Split Has Impeded the Collective Bargaining Process*.

The unresolved split in the courts of appeals has fostered bargaining and litigation strategies that have impeded the collective bargaining process. Unions decline to bargain over retiree benefits because they understand that the mere act of bargaining may serve as evidence that the benefits are not vested, and because they seek to preserve labor agreement ambiguities in order to invoke the *Yard-Man* inference. Moreover, injection of a presumption favoring one side of collective bargaining, as in circuits following *Yard-Man*, has also adversely affected collective bargaining.

In contrast, the presumption that this Court follows under federal labor law (that, generally, contractual obligations, including benefit obligations, end when a labor contract ends unless the parties clearly state otherwise) favors neither side and allows the parties freedom of contract. The *Yard-Man* inference favors one side of collective bargaining and thus disturbs the dynamics of bargaining established under federal labor law. *Senior*, 449 F.3d at 218.

The inconsistent approaches in the courts of appeals have even caused some circuits to permit the introduction of extrinsic evidence of an undisclosed intent never clearly expressed in labor contract provisions. The Fifth and Ninth Circuit have permitted retirees to introduce extrinsic evidence of lifetime benefits to overcome labor contract silence regarding the duration of retiree medical benefits. *See, e.g., United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1242 (5th Cir. 1990) (remanding with direction to consider extrinsic evidence where labor agreement did not speak to the

issue of vesting); *Bower*, 725 F.2d at 1223-24 (same). In such cases, retirees can prevail on the merits even when the labor contract contains no language whatsoever that retiree benefits endure for life or survive contract expiration.

Likewise troubling, *Yolton* permitted the introduction of extrinsic evidence of various prior oral and written statements of "lifetime" retiree benefits, outside of the labor contract, to trump the clear and express contract provision in the Letter of Understanding placing a cap on employer expenditures for retiree benefits. Pet. 18-20a. Under such circumstances, in the absence of the *Litton* presumption which favors neither side, unions can simply remain silent during the collective bargaining process in the hope of later convincing a court to review extrinsic evidence that retirees "heard" or "believed" that their retiree health benefits were "for life," less reliable evidence of intent than the language of the contract itself. In contrast, other circuits recognize that, under ordinary principles of labor contract interpretation, extrinsic evidence cannot vary the express terms of a labor contract or generate an ambiguity. *See, e.g.*, *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995).

II. THE CONFLICT IN THE CIRCUITS REGARDING THE PROPER LEGAL STANDARD FOR DETERMINING RETIREE BENEFIT DURATION UNDERMINES FEDERAL POLICY UNDER ERISA.

Given the unpredictable nature of benefit costs over long periods of time, Congress declined to vest employee welfare benefits when it passed ERISA. The *Litton* presumption that benefits terminate with contract expiration unless the parties clearly provide otherwise comports with ERISA.

A. Welfare Benefits Remain Unvested Under ERISA, Given Their Unpredictability Over Time.

Congress expressly exempted employee welfare benefits from ERISA's stringent vesting requirements. 29 U.S.C. § 1053. As a result of this congressional judgment, ERISA

provides, consistent with the *Litton* presumption, that welfare benefits do not automatically vest.

As this Court has remarked, Congress declined to vest employee welfare benefits under ERISA. *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995) (noting that ERISA does not mandate minimum vesting requirements for welfare benefits) (citing *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990)). Congress did not impose such vesting "for fear that placing such a burden on employers would inhibit the establishment of such plans" and because it sought "to keep costs within reasonable limits" by permitting benefit amendment in a widely fluctuating market of unpredictable health care costs, *Adams*, 905 F.2d at 947:

> Congress evidenced its recognition of the need for flexibility in rejecting automatic vesting of welfare plans. Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation. These unstable variables prevent accurate prediction of future needs and costs.

Moore v. Metro. Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988).

B. The *Yard-Man* Inference Remains Inconsistent with ERISA and Contravenes ERISA's Purpose to Encourage Employers to Provide Benefits Voluntarily.

Four circuits have criticized the *Yard-Man* inference as particularly inappropriate in light of Congress' exemption of employee welfare benefits from vesting under ERISA. Concerned about escalating health care costs and aware that circuits adhering to a presumption inconsistent with ERISA may unexpectedly find lifetime benefits, employers feel that they can avert future unbargained-for lifetime liabilities by

declining to provide retiree medical benefits to future retirees, contrary to ERISA's purpose of fostering a climate where employers voluntarily provide such benefits.

The Third Circuit has persuasively catalogued the fallacies and faulty assumptions in which the Sixth Circuit engaged in *Yard-Man* and its progeny. Echoing the rationale of the Eighth Circuit in *Anderson*, 836 F.2d at 1517-18, *Skinner* squarely rejects the "*Yard-Man* inference" of vesting ERISA-governed retiree insurance benefits: "Congress explicitly exempted welfare benefits from ERISA's vesting requirements. It, therefore, seems illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires." *Skinner*, 188 F.3d at 140-141. *See also IAM v. Masonite Corp.*, 122 F.3d at 231; *Rossetto*, 217 F.3d at 543.

Reeling from unintended lifetime health care costs that cannot be reduced by requiring contributions from or deterring benefits for current retirees, many employers have ceased to offer retiree health care to current and succeeding generations of workers, contravening one of the purposes of ERISA, *i.e.*, to encourage employers to provide health care benefits voluntarily. In fact, between 1988 and 2005, the percentage of employers of 200 or more employees offering retiree health benefits dropped from 66% to 33%, a trend that increases the likelihood that future retirees will lack health care coverage under employer-sponsored benefit plans.[3]

III. THE CIRCUIT SPLIT THREATENS THE FINANCIAL HEALTH AND GLOBAL COMPETITIVENESS OF AMERICAN COMPANIES.

The protracted split in the circuits in retiree benefit litigation has had disastrous consequences for American employers and for the nation. Contradictory and confusing decisions

[3] Findings from the Kaiser/Hewitt 2005 Survey on Retiree Health Benefits at v, available online at http://www.kff.org/medicare/upload/7439.pdf (Kaiser/Hewitt 2005 Survey).

have inhibited labor contract negotiations, jeopardized the settled interpretation of labor contracts, forced plant closings and work force reductions by employers saddled with so-called legacy costs, and lessened the global competitiveness of U.S. businesses. At the same time, the deep-seated split has encouraged expensive benefit litigation as retirees and their unions shop for forums favorable to retirees.

A. The Split Has Forced Work Force Reductions, Exacerbating the Problem of Paying For Escalating Health Care Benefits for Active and Retired Employees and Reducing American Global Competitiveness.

The American economy as a whole can ill afford the divisive split in the circuits, as the active American work force shrinks relative to the retiree population, and as the cost of health care benefits escalates. The influential and divisive *Yard-Man* decision and its progeny contributed to a downward spiral work force reductions driven in part by escalating retiree benefit costs.[4]

American companies have responded to circuit decisions imposing lifetime benefits by lowering active employee payroll costs in order to pay for retiree health benefits. The shrinking American work force of active employees now struggles to support an ever-increasing retiree population as baby boomers retire: while active employees outnumbered Social Security recipients by 5 to 1 in the 1960's, by 2050 that ratio will drop to less than 2 to 1.[5] That shrinking work force will further decline: the aging work force in America will retire in significant numbers over the next five years.

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[4] Rogers, *Rethinking Yard-Man: A Return to Fundamental Contract Principles in Retiree Benefits Litigation*, 37 Emory L.J. 1033 (Fall 1988) at 1033-34.

[5] John Boehner, Chairman, House Education & the Workforce Committee, *Assessing Retiree Health Legacy Costs: Is America Prepared for a Healthy Retirement?*, available online at http://edworkforce.house.gov/issues/107th/workforce/retireehealthcare/factsheet.htm.

At the Ford Motor Company, General Motors Corporation, Daimler-Chrysler and automotive suppliers Delphi and Visteon, for example, nearly half of the 302,500 UAW members will meet the age and years of service eligibility requirements in order to retire within the next five years,[6] swelling the ranks of retirees and reducing the ranks of those whose productivity purchases their health care benefits.

Health care costs have dramatically increased. Once so slight a cost that workers diverted little more than a few cents per hour worked towards benefits,[7] health care costs have annually increased by double digit inflation. Among employers surveyed for the Kaiser/Hewitt annual survey on retiree health benefits in 2005, the total retiree health care costs were estimated at $22.9 billion for 2005 and were estimated at 17.4 billion in 2004, an increase of almost 13% over the prior year's costs; health care costs for 2003 had also risen almost 13% over 2002 costs.[8] Some twenty years after the parties negotiated the then relatively inexpensive retiree health care benefits, the General Accounting Office predicted that employer retiree health benefit payments would rise to $25 billion annually by 2008.[9] One study concluded that the costs of physician care tripled, and hospital care costs rose by 600%, or three times the general inflation rate, between 1965

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[6] Hammond, *General Motors—A Legacy of Problems*, available online at http://www.carlist.com/autonews/2005/autonews_131.html (Hammond).

[7] Kelly, *Welfare Benefit Plans in Corporate Acquisitions and Dispositions*, 20 Real Property, Probate and Trust Journal 1045 (1985).

[8] Kaiser/Hewitt 2005 Survey at vi n.8; *Findings from the Kaiser/Hewitt 2004 Survey on Retiree Health Benefits* at vii., available online at http://www.kff.org/medicare/7194/index.cfm (Kaiser/Hewitt 2004 Survey).

[9] Testimony of Lawrence H. Thompson, Assistant Comptroller General, Human Resources Program, U.S. General Accounting Office, on September 15, 1988, to the House Ways and Means Oversight Committee, as reported in Sept. 19, 1988, BNA Pensions and Benefits Daily at 5.

(the decade when retiree benefits were first negotiated) and 1983 (the year that *Yard-Man* employed a vesting inference to interpret alleged labor contract ambiguity).[10]

These unintended and unanticipated costs also force American companies to price their products out of the domestic and global markets.[11] American manufacturing companies with sizeable retiree populations and labor contracts in place when *Yard-Man* changed the legal landscape simply cannot compete with foreign companies whose active work forces lack the years of service to near retirement.

B. The Split Encourages Forum-Shopping As Companies Face More Stringent Accounting Standards for Post-Retirement Funding Liability.

Yolton will fan the flames of forum-shopping, already rife because of the past split in the circuits, just as employers must digest Statement of Financial Accounting Standards (SFAS) No. 158, the new Financial Accounting Standards Board (FASB) standard requiring them to book the funding required for their post-retirement obligations on their balance sheets.[12]

Nearly two-thirds of the employers surveyed by Kaiser/ Hewitt in 2005 reported having a cap on employer contributions to retiree health care, such as the negotiated cap that *Yolton* in essence nullified, an increase from fifty-four percent in 2004.[13] *Yolton* empowers retirees to file litigation

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[10] Chollet and Friedland, *Employer-Paid Retiree Health Insurance: History and Current Issues*, Employee Benefits Research Institute, (Sept. 9, 1985) at 2.

[11] For example, health care costs for General Motors Corporation's active workers and one million retirees account for an additional $1,525 per car; and the once robust company has lost market share in part because of retiree health care costs, as each active worker supports the post-retirement pension and welfare benefits for 2.5 retirees. Hammond.

[12] SFAS 158 was released on September 29, 2006 and is available online at http://www.fasb.org/pdf/fas158.pdf.

[13] Kaiser/Hewitt 2005 Survey at vii; Kaiser/Hewitt 2004 Survey at ix.

seeking to repudiate those caps, and another round of litigation circuit by circuit will begin on what Judge Posner characterized as the "much-litigated issue of when a right to health benefits that is granted to retired workers by a collective bargaining agreement (or an ERISA plan. . .) survives the termination of the agreement." *Rossetto,* 217 F.3d at 541.

Forum-shopping will begin anew, as retirees race to favorable circuits to challenge negotiated caps. This case presents an excellent example of forum shopping. Well aware that the Sixth Circuit infers that retiree benefits vest for life, the retirees in this case, who worked in the Seventh and Eighth Circuits that have rejected the *Yard-Man* inference, filed in the Sixth. Pet. 24-25. In another example of forum and perhaps judge shopping, retirees recently filed two cases in the Sixth Circuit against Boeing Company, voluntarily dismissing the first in Michigan and filing a second in Tennessee to avoid litigating in the Seventh Circuit, where Boeing filed a declaratory judgment action and where its plans were administered. *See*: *Boeing Company v. March*, Case No. 06cv4997 (N.D. Ill. 2006), ¶¶ 32-34.

American employers have long struggled to meet Financial Accounting Statement No. 106, an accounting standard promulgated by the FASB over objection by American businesses in part in reaction to *Yard-Man* and its progeny. FAS-106 required the inclusion of retiree benefits as contingent liabilities on company financial statements, typically in footnotes. SFAS 158 requires American companies to recognize the funded status of post-retirement benefits, of which health care benefits comprise the lion's share, directly on their balance sheets.[14] The new standard may require companies to

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[14] *Proposed Accounting for Pension and Other Postretirement Benefits*, KPMG LLP Defining Issues, March 2005; *FASB to Change Employers' Balance Sheet for Pensions and Retiree Health Benefits in 2006*, Aon Consulting Alert, April 5, 2006 at 2, available online at http://www.aon.com/about/publications/alert/alert_4_5_06.jsp.

reassess unfunded liabilities for post-retirement welfare benefits in order to report their post-retirement benefit plan funding accurately on company balance sheets.

Unless this Court resolves the split in the circuits and reaffirms the presumption that all obligations, including retiree benefits, end when labor contracts end absent clear agreement otherwise, some circuits will continue to vest lifetime benefits from silence and ambiguity. The resulting enormous and unanticipated liabilities under the proposed new booking standards will jeopardize the financial viability of American companies in the eyes of potential investors and shareholders.

CONCLUSION

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

Respectfully submitted,

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