No. 09-494

IN THE

Supreme Court of the United States

JERRY CRAWFORD; CHARLES ANNABEL; DARRYL BALLARD; MATTHEW BURDO; DON HOSKINS, ROY LANNING; PETER POWELL, WANDA SIMPSON, DANIEL SLANE, PETITIONERS

v.

TRW AUTOMOTIVE U.S. LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR MAURICE & JANE SUGAR LAW CENTER FOR ECONOMIC & SOCIAL JUSTICE AND INTERFAITH WORKERS JUSTICE AS AMICI CURIAE SUPPORTING PETITIONERS

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MOTION OF THE MAURICE & JANE SUGAR LAW CENTER FOR ECONOMIC & SOCIAL JUSTICE AND INTERFAITH WORKERS JUSTICE FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Now Comes the Maurice & Jane Sugar Law Center for Economic & Social Justice (Sugar Law Center) and Interfaith Workers Justice (IWJ) and respectfully moves this Court for leave to file the accompanying brief as *amici curiae* in support of the Petition for Writ of Certiorari submitted by Jerry Crawford, Charles Annabel, Darryl Ballard, Matthew Burdo, Don Hoskins, Roy Lanning, Peter Powell, Wanda Simpson, and Daniel Slane.

While Petitioners have consented to the filing of the *amici curiae* brief, the Respondent TRW Automotive U.S. LLC has refused to grant consent, necessitating this motion.

Based in Detroit Michigan, the Sugar Law Center is a leading national nonprofit whose central mission concerns the promotion of economic and social rights as human rights and civil rights within our nation's legal system. Consistent with our mission, the Law Center is extensively engaged in worksite closing and mass layoff litigation throughout the country and we are one of a very few nonprofit law centers who have undertaken such work. The Sugar Law Center is deeply interested in this case, because its outcome could affect the rights of workers to obtain a remedy for violations of the Employee Retirement Income Security Act §510 at the time of plant closings. Without

such remedy, the human right to social security is jeopardized for all our nation's workers.

Interfaith Workers Justice is one of the preeminent national nonprofit organizations dedicated to improving wages, benefits, and working conditions for all. Based in Chicago, Illinois and with a network of affiliated local organizations throughout the country, IWJ educates, organizes, and mobilizes the religious community to work with other community and labor groups on human rights and employment issues including workers wages, health care benefits, and pensions to allow workers and their families to retire with dignity. Interfaith Workers Justice has extensive expertise and is deeply interested in the issues pending before the Court because of their potential impact on the rights of working people to attain retirement benefits without interference so as to live above poverty and with dignity in old age.

Petitioners have thoroughly briefed the substantive issues of the case within the context of existing federal legislation and related case law. *Amici's* proposed brief does not repeat the substance of Petitioner's arguments but rather discusses the relationship of the issues to obligations existing under international human rights law. A universal right to social security is recognized by the United States and that right is fulfilled by public benefits and the regulation of private retirement plans. This context provides guidance and persuasive authority for the Court in deciding the merits of the pending Petition for Writ of Certiorari.

For the above reasons, this motion for leave to file the attached brief *amici curiae* should be granted.

Respectfully submitted,

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INTERESTS OF THE *AMICI CURIAE*[1]

The Maurice & Jane Sugar Law Center for Economic & Social Justice[2] is a leading national nonprofit law center and one of a very few such organizations that is extensively engaged in worksite closing and mass layoff litigation on behalf of our nation's workers. The Sugar Law Center is deeply interested in this case, because its outcome could affect the right of workers to obtain a remedy for violations of the Employee Retirement Income Security Act (ERISA) §510 during plant closings and mass layoffs. The judgment of *amici* is based on over 15 years of experience and accomplishment in the representation of thousands of displaced workers before federal and state trial and appellate courts throughout the country.

Interfaith Workers Justice is nationally recognized nonprofit with a national network of affiliated local organizations. IWJ is one of the preeminent organizations dedicated to improving wages, benefits, and working conditions. The organization educates and mobilizes the religious community to work with others advocating for the human rights of all workers, including the right to fair wages, health care benefits, and pensions to allow workers and their families to retire with dignity.

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amici curiae, its members or its counsel have made any monetary contribution to the preparation or submission of this brief.

[2] The Sugar Law Center is affiliated with the National Lawyers Guild (NLG). The NLG is a progressive bar association of attorneys and legal workers working in support of human rights.

Interfaith Workers Justice has extensive expertise with and is deeply interested in the issues pending before the Court. The judgment of *amici* is based on over a decade of experience and accomplishment working with workers, their families and communities to mobilize protection of workers rights, implement legal strategies, and advance policy reform.

Pursuant to Rule 37, all parties received notice of the intention to file *amici curiae* brief at least 10 days prior to the due date. Petitioners have granted consent to the filing of the *amici curiae* brief. Respondent TRW Automotive U.S. LLC has declined consent for the filing of the *amici curiae* brief.

INTRODUCTORY STATEMENT & SUMMARY OF ARGUMENT

This case arises from violations of an employee's right to attain retirement benefits through a private plan offered at their workplace. The Petitioner's worksite was covered by a defined benefit pension plan, which provided employees with increased benefits based on the number of accrued benefit service years worked. Employees who retired with thirty or more benefit service years were entitled to full retirement benefits, including pension income and health care. Benefit service was earned for each calendar year in which the employee worked 1680 hours. However if an employee was laid off during the calendar year, the employee was required to work an additional 170 hours for that year to be credited as a year of benefit service.

Many Petitioners had acquired thirty years of seniority with the employer but had not yet acquired

thirty years of benefit service. Three of the Petitioners were in their thirtieth year of benefit service, but because of their status on layoff, were waiting to be recalled. These employees only had to work 170 additional hours before they would have obtained thirty years of benefit service. Because of the Respondent's illegal actions, both groups of Petitioners lost the right to earn further benefit service credits. As result, **all** Petitioners lost the right to earn increased benefits under the retirement plan.

Under international human rights law, all persons have a right to social security, including income maintenance and affordable health care in old age. Nations often meet their human rights obligation by providing a combination of public benefits and access to private plans, which are regulated to prevent employers from unfairly interfering with an employee's ability to attain plan benefits. In the United States, private benefits are principally regulated by the Employee Income and Retirement Security Act.

Amici argues that within a context of protecting citizens' right to social security, ERIA §510 should be liberally construed so as to enforce the statute in the context of plant closings and discriminatory layoffs and recalls and to provide meaningful remedies to affected workers.

ARGUMENT

I. IN THE UNITED STATES, THE HUMAN RIGHT TO SOCIAL SECURITY IS, IN PART, PROTECTED BY THE REGULATION OF PRIVATE RETIREMENT BENEFITS.

1. Federal Statutes Are Properly Interpreted To Uphold Human Rights Norms

United States courts' consideration of human rights standards is not an aberration, but rather is a reflection of the historical role international law has played in shaping American law. International law generally consists of treaties, international custom as evidenced by state practice, and preemptory norms from which no civilized nation would digress. *See Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 255 at n. 5 (2d Cir. 2009); and *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 250-51 (2d Cir. 2003).

The U.S. Constitution provides that treaties are within the laws of our nation. U.S. Const., art. VI, §1, cl. 2. Likewise, customary international law and preemptory norms are also part of our law. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 737-38, 124 S.Ct. 2739, 159 L.Ed.2d 718, (2004); and Abdullahi *v. Pfizer, Inc.*, 562 F.3d 163, 176-77 (2d Cir. 2009). *See also* Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of Customary Law of Nations*, 14 U.C. Davis J. Int'l L. & Pol'y 205, 253 (2008). State practices that evidence customary law take many forms

and include what states do within international organizations and what they do through domestic actions. *See* Restatement (Third) of Foreign Relations Law of the United States § 102 (1987).

The effect of international law in maintaining causes of action and providing remedies to litigants is the subject of much debate, however recognized human rights standards is, at a minimum, strongly persuasive authority for developing continued understandings of domestic law.

This Court and other federal courts have long found that international human rights law provides persuasive guidance on understanding the scope of rights conveyed by the Constitution and federal legislation. *See, e.g., Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Rasul v. Bush*, 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004); *Lawrence v. Tex.*, 539 U.S. 558, , 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); and *Atkins v. Va.*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

While a majority of cases arise within the context of constitutional challenges, human rights standards have been found equally useful in determining the scope of rights granted by statute. In *Yusupov v. Attorney Gen. of U.S.*, 518 F.3d 185 (3d Cir. 2008), the Third Circuit recognized:

> [T]hat courts often look to legislative history because it can be a useful aid to statutory construction, and to international law to the extent that it has been incorporated into our law.

Id. at 204 n. 31. *See also Immigration and Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 436-40, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987); *Delgado v. Holder*, 563 F.3d 863, 875-76 (9th Cir. 2009); and *Stephens v. Nat'l Distillers and Chem. Corp.*, 69 F.3d 1226, 1233 n. 6 (2d Cir. 1995).

American courts have further found that federal statutes should be construed in such a manner as to avoid conflicts with human rights standards. This Court has held that "an act of congress ought never to be construed to violate the law of nations."*Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118, 2 L.Ed. 208 (1804). *See also Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S.Ct. 1510, 71 L.Ed.2d 715 (1982); and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20-21, 83 S.Ct. 671, 9 L.Ed.2d 547 (1963). A natural corollary of this maxim is that federal statutes should be interpreted to uphold human rights standards.

In the present case, international law universally recognizes an individual's right to social security at the end of one's working life and these rights are domestically realized through statutes including the Employee Retirement Income Security Act, 29 U.S.C.A. § 1001, *et. seq.* (WestLaw 2009) [hereinafter ERISA]. As a result, ERISA § 510 should be interpreted to effect a meaningful realization of citizen's right to social security.

2. The Scope Of Citizens' Right To Social Security Is Well Defined

The elements of a citizen's right to social security encompass a right to income maintenance and access to medical care at the end of one's working life. The United Nations describes the elements of a right to social security as follows:

> The right to social security encompasses the right to access and maintain benefits ... in order to secure protection, *inter alia*, from (a) lack of work-related income caused by ... old age; (b) unaffordable access to health care...

UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security (Art. 9 of the Covenant)*, 4 February 2008, E/C.12/GC/19, *available at* http://www.unhcr.org/refworld/docid/47b17b5b39c.html [accessed 19 November 2009] [CESCR General Comment No. 19].

Under international law, the minimum amount of income maintenance and health care necessary to fulfill citizens' right to social security is described as benefits providing an "an adequate standard of living and adequate access to health care." *Id.* at 7. An adequate standard of living contemplates that all persons shall enjoy support to obtain the necessities of life but also support to participate in society with dignity. The right clearly contemplates that persons will have income and health care benefits which enable them live above the poverty line.

International human rights standards recognize that the right to social security can be met by a mixture of public and private plans. *Id.* at 2, 4 & 5. When private plans are used, standards require that regulatory frameworks ensure that private actors such as corporations do not unduly interfere with an individual's right to receive social insurance and private pension benefits. *See Id.* at 13.

3. The Right To Social Security Is Established By Treaties Of The United States And By Customary International Law

Citizens' right to social security and health care is evidenced by both treaties of the United States and customary international law. In 1948, the United States and other nations convened for the 9th International Conference of American States, which was led by the U.S. Secretary of State, Gen. George Marshall. At the conference, delegates adopted the Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, [hereafter *Charter of the O.A.S*], as amended by the Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847 and adopted the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965) [hereafter *American Declaration*].

The *Charter of the O.A.S.* was signed by the United States in 1948 and ratified by the United States Senate in 1951. The *Charter of the O.A.S.* is a legally binding treaty and as such, is a statement of international law recognized within our body of laws.

The *Charter of the O.A.S.* at Article 3 recognizes that all persons are entitled to their fundamental human rights and at Articles 3 and 45 recognizes a citizen's specific right to social security. The treaty reads, in relevant part, as follows:

> **Article 45**
> The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:
>
> ***
>
> b) Work ... ***should be performed under conditions, including a system ... that ensure[s] ... a decent standard of living for the worker and his family ... in his old age*** ...
>
> * * *
>
> h) Development of ***an efficient social security policy***.

Id. (emphasis added).

A citizen's right to health care is also affirmed by the *Charter of the O.A.S.* At Articles 34 and 45, the treaty reads, in relevant part, as follows:

> **Article 34**
> The Member States agree . . . to devote their utmost efforts to accomplishing the following basic goals:
>
> ***

> i) ***Protection of man's potential through the extension and application of modern medical science***;
>
> ***
>
> **Article 45**
>
> The Member States . . . agree to dedicate every effort to the application of the following principles and mechanisms:
>
> ***
>
> b) Work ... should be performed under conditions, including a system ... ***that ensure[s]*** ... ***health*** ... for the worker and his family, both during his working years and ***in his old age***.

Id. (emphasis added).

While not an official treaty, the *American Declaration* is widely viewed as the world's first international human rights instrument and provides confirmation of O.A.S. member states' commitment to citizen's fundamental rights. Adopted at the same convention and by the same body of delegates as the Charter of the O.A.S., the *American Declaration of Rights and Duties of Man* explicitly recognizes a right to social security. The American Declaration provides:

> **Whereas**
>
> ***
>
> The international protection of the rights of man should be the principal guide of an evolving American law;
>
> ***
>
> **Right to the preservation of health and to well-being.**

> Article XI. Every person has the right to the preservation of his health through ... medical care, to the extent permitted by public and community resources.
>
> ***
>
> **Right to social security.**
> Article XVI. Every person has the right to social security which will protect him from the consequences of . . . old age.

American Declaration, supra.

Citizens' right to social security is further established by customary international law. In addition to the *Charter of the O.A.S.* and the *American Declaration*, a universal and specific right to social security is recognized by instruments of the United Nations and the International Labor Organization. *See* International Covenant on Economic, Social, and Cultural Rights, art. 9, Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (parties "recognize the right of everyone to social security"); International Labor Organization, ILO Constitution, art. III(f), *available at* http://www.ilo.org/public/english/about/ilocons t.htm; International Labor Organization, Social Security (Minimum Standards) Convention (No. 102), April 27, 1955, *available at* http://www.ilo.org/ ilolex/english/convdisp1.htm (last viewed Nov. 14, 2009); International Labor Organization, Invalidity, Old Age and Survivor's Benefits Convention (No. 128), Nov. 1, 1969, *available at* http://www.ilo.org/ ilolex/english/convdisp1.htm (last viewed Nov. 15, 2009). See also Council of Europe, European Social Charter (Revised), art. 12, ¶ 12, 3 May 1996, ETS 163. The United States is a member of both the United

Nations and the I.L.O. and at no time has objected to recognition of social security as fundamental human right.

In practice, the right to social security and medical care in old age is recognized by almost all nations. Across the globe, approximately 170 nations have laws protecting citizens' right to social security through laws providing for income security and medical care to citizens in old age. See ILO, Social Security Department, *Social Security Database Programs and Mechanisms, available at* https://www.ilo.org/dyn/sesame/ifpses.socialdatabase last viewed Nov. 16, 2009). Within American and Caribbean nations, at least 28 of 31 independent nations have such laws. *Id.*

While a right to social security and health care in old age is well-recognized within international law, the right is tangibly realized through domestic legislation.

4. The United States Plan To Provide For Citizen's Social Security Includes Public Benefits Supplemented By Private Plans.

The legislative history of the Social Security Act, 42 U.S.C.A. §301 *et seq.* (WestLaw 2009) [hereafter SSA] reveals that legislators intended to protect citizens' *right* to income security and health care in old age. As stated by Representative Charles Vilas Traux (D-Ohio) during congressional debates:

> The enactment into law of ***old-age pensions***, unemployment compensation, protection for mothers and dependent children, and the

> ***preservation of public health*** will mark another ***milestone in the battle for human rights*** waged by President Franklin D. Roosevelt and the Seventy-fourth Congress.

___ Cong. Rec. – House 5689 (daily ed. April 15, 1935) *available at* http://www.ssa.gov/history/pdf/h415.pdf (last viewed Nov. 15, 2009) (emphasis added). *See also* H.R. No. 615 at (1935) *available at* http://www.ssa.gov/history/reports/35housereport.html (last viewed Nov. 15, 2009) (See section concerning Old Age Benefits); ___ Cong. Rec. – House 5827 (daily ed. April 16, 1935) *available at* http://www.ssa.gov/history/pdf/h416.pdf (last viewed Nov. 15, 2009) (Comments of Rep. Haines; ___ Cong. Rec. – House 5792 (daily ed. April 16, 1935) *available at* http://www.ssa.gov/history/pdf/h416.pdf (last viewed Nov. 15, 2009) (Comments of Rep. Sirovich); and __ Cong. Rec. – House 5468 (daily ed. April 11, 1935) *available at* http://www.ssa.gov/history/pdf/h411.pdf (last viewed Nov. 15, 2009) (Comments of Rep. Doughton).

The Social Security Act was amended in 1965 to provide medical benefits to elderly citizens through the Medicare program. This amendment affirmed our nation's recognition of health care as a fundamental right of citizens. One scholar has noted that through Medicare and other programs:

> The United States has established a considerable legal infrastructure that effectively recognizes the human right to health care for some groups under specific circumstances.

Eleanor D. Kinney, *Recognition of the International Human Right to Health and Health Care in the United States*, 60 Rutgers L. Rev. 335, 348 (2008)

The United States, like a notable minority of other nations, protects the right to social security and health care in old age through a combination of public benefits and private plans. The intent to protect these rights with a combination of public benefits and private plans was recognized at the outset of congressional consideration of the Social Security Act. During Senate debates, Senator Elbert D. Thomas (D-Utah) observed:

> [T]he time must come when no one shall question the right of those who are past the earning age to live a life free from the ordinary economic worries. All must contribute for the good of all. ***Public attention to social security will result in persons taking for themselves private annuity policies to augment the public ones. The partnership idea is the one that I would stress.*** Partnership between the Federal Government and the States ... and ***partnership between public and private insurance institutions.***

____ Cong. Rec. – Senate 8224 (daily ed. May 27, 1935) *available at* http://www.ssa.gov/history/pdf/senate1.pdf (last viewed Nov. 15, 2009).

The partnership between public and private insurance is most dramatically illustrated by public benefits provided by the SSA and protection of private retirement benefits through ERISA. The United States thereby combines a right to certain minimum benefits

through the SSA and contemplates supplementation through private pensions regulated by ERISA. Within the United States, this combination of public and private benefits during retirement is necessary for citizens to maintain an adequate standard of living consistent with their right to social security.

A majority of persons in this country rely on a combination of public and private benefits to maintain an adequate standard of living in retirement. Government statistics confirm that retirement benefits provided by the SSA fail to provide sufficient income for many citizens to maintain a standard of living above the poverty line. In September 2009, the average monthly benefit from the SSA for a retired worker was estimated at $1,160.90. *See* U.S. Social Security Administration, *Monthly Statistical Snapshot, September 2009, available at* http://www.socialsecurity.gov/policy/docs/quickfacts/stat_snapshot/ (last viewed Nov. 19, 2009). The average worker would thereby annually receive $13,930.80 in SSA benefits.[3] The U.S. Census Bureau estimates the poverty threshold for a single person at $10,991.00. U.S. Census Bureau, *Poverty Thresholds for 2008 by Size of Family and Number of Related Children Under 18 Years*, (2008), *available at* http://www.census.gov/hhes/www/poverty/threshld/thresh08.html (last viewed Nov. 18, 2009). The National Academy of Sciences and others have criticized the official poverty threshold as grossly underestimating the amount of income necessary for persons to remain above poverty. Anna Bernasek, *A Poverty Line That's Out of Date and Out*

[3] Notably this amount is less the annual salary of a worker employed at the minimum wage.

of Favor, NYTIMES, Mar. 12, 2006 *available at* http://www.nytimes.com/2006/03/12/business/yourmoney/12view.html (last viewed Nov. 16, 2009). Whatever calculations are used however, it is clear that many retired persons' would be unable to maintain adequate standards of living above poverty without supplementing their SSA benefits.

The largest source of supplemental income for older persons who have left the workforce is private pensions. U.S. Social Security Administration, Office of Retirement and Disability Policy, *Income of the Population 55 or Older, 2006* at Table 2.A1 *available at* http://www.socialsecurity.gov/policy/docs/statcomps/income_pop55/2006/sect02.html (last viewed Nov. 18, 2009). The Social Security Administration estimates that private pensions make up 8% of total income at age 55 and more than 30% of total income by age 70. *Id.*

Persons aged 50 years and older are particularly vulnerable to pension insecurity. *See generally* Barbara A. Butrica, Howard M. Iams, Karen E. Smith, and Eric J. Toder, *The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement Incomes of Baby Boomers*, Social Security Bulletin Vol. 69, No. 3 (2009) *available at* http://www.socialsecurity.gov/policy/docs/ssb/v69n3/v69n3p1.pdf (last viewed Nov. 19, 2009). These individuals remain the last generation of workers with defined benefit employer retirement plans. *Id.* at p. 3. Traditionally, defined benefit plans are nonportable and subject to vesting requirements based on lengthy tenures of work at a single employer. Newer employees are now typically hired under defined contribution plans, which require years of periodic

investment over a lifetime of work to obtain meaningful benefits. Older employees are caught in a particularly vulnerable position when they lose their jobs late in their working life. Such workers are unable to obtain the full value of their defined benefits plan and unable to recoup losses through a defined contribution plan due to limited remaining work years. *See Id.* at p. 19. And, it is these employees who are suffering over forty percent of all long-term layoffs in recent years. *See* U.S. Department of Labor Statistics, *Mass Layoff Statistics Database, available at* http://www.bls.gov/mls/data.htm (last viewed Nov. 19, 2009).

Likewise, denial of private plan retirement income and lifetime health insurance benefits directly implicates workers ability to maintain adequate standards of living after the end of their work life. Medicare presently accounts for approximately 50% of the medical costs incurred by persons 65 years and older. U.S. Department of Health & Human Services, Centers for Medicare & Medicaid Services, Health Expenditures by Age, 2004 Age Tables, *Personal Health Care Spending by Age Group and Source of Payment, Calendar Year 2002 available at* http://www.cms.hhs.gov/NationalHealthExpendData/downloads/2004-age-tables.pdf (last viewed Nov. 19, 2009). Private health insurance and out-of-pocket payments each account for approximately 30% of these costs for such individuals. *Id.* The absence of earned pension benefits or lifetime health insurance from an employer causes unanticipated costs to be paid from modest SSA income jeopardizing an individual's ability remain above poverty.

For persons in the later years of their work life who face job separations, their right to social security is very much threatened by employer action taken to avoid paying full retirement benefits. At issue in this case is whether federal law protecting workers retirement benefits will be interpreted to promote and protect their human right to social security or whether this right will be compromised in derogation of their right to adequate standards of living in old age.

II. ERISA §510 SHOULD BE LIBERALLY CONSTRUED TO PROHIBIT DISCHARGES AND DISCRIMINATION AGAINST WORKERS TO AVOID THEIR ATTAINMENT OF BENEFIT PLAN RIGHTS.

This Honorable Court should liberally construe the provisions of ERISA §510 to give effect to the remedial and human rights purposes of the Act. ERISA is clearly a remedial statute. *Jakimas v. Hoffmann-La Roche, Inc.*, 485 F.3d 770, 784 (3d 2007); *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236 (4th Cir. 1991); and *Kross v. Western Elec. Co., Inc.*, 701 F.2d 1238, 1242 (7th Cir. 1983). Federal courts have long held that remedial statutes should be given liberal construction to affect intended purposes. See *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504 (1999); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); and *In re Carter*, 553 F.3d 979, 985-986 (6th Cir. 2009).

Federal courts have further found that civil rights statutes are liberally construed to effect remedial purposes. *See, Forester v. Chertoff*, 500 F.3d 920, 929 (9th Cir. 2007); *Tart v. Hill Behan Lumber Co.*, 31 F.3d 668, 671 (8th Cir.1994); and *Crozier v.*

Howard, 11 F.3d 967, 969 n. 3 (10th Cir. 1993). ERISA §510 is an important component of United State's legislation protecting citizen's human right to social security. As such, it should be interpreted analogous to civil rights statutes and be liberally construed to affect the purpose of preventing actions intended to interfere with an employee's attainment of plan benefits.

1. ERISA §510 Protects Workers Against Discharges Resulting From Worksite Closings And Discriminatory Layoff And Recall Decisions.

ERISA §510's plain language prohibits discharges and discriminatory acts taken with an intent to prevent an employee's attainment of retirement plan benefits. The statute states:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . .

29 U.S.C. § 1140 (WestLaw 2009). This language is consistent with international law obligations concerning the protection of citizen's human right to social security. International law requires states to "prevent third parties from interfering in any way with the enjoyment of the right to social security." CESCR General Comment No. 19. *supra* at p. 13. Consistent with these obligations, ERISA's language prohibits

undue interference and is not qualified or conditioned upon specific operational contexts of the involved worksite.

Managerial decisions made in the context of worksite closings can violate ERISA §510. In the courts below, Respondent argued that ERISA §510 is inapplicable to managerial decisions made during plant closings. Both the trial court and the United States Court of Appeals for the Sixth Circuit correctly held that ERISA §510 applies to discharges occurring in the context of plant closings. In *Inter Modal Rail Employees Ass'n v. Atchison, Topeka and Santa Fe Ry.*, 520 U.S. 510, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997) [hereafter *Inter Modal*] this Court recognized that ERISA's provisions grant employers wide flexibility to reduce or even eliminate promised benefits in the face of an economic downturn. *Id.* at 515. However the Court's decision also recognized that this flexibility is counterbalanced by ERISA §510 which prohibits employers from "circumvent[ing] the provision of promised benefits." *Id.* (citations omitted). The decision noted further that an employer seeking to alter promised benefits must adhere to the plan's procedures. *Id.* at 516. Consistent with the *Inter Modal* decision, the Sixth Circuit held that:

> While "[e]mployers or other plan sponsors are generally free under ERISA ... to adopt, modify or terminate" pension benefit plans, *Coomer v. Bethesda Hosp. Inc.*, 370 F.3d 499, 508 (6th Cir. 2004), this discretion does not permit them to discharge employees or alter their plan rights to "circumvent the provision of promised benefits." *Inter-Modal Rail Emples. Ass'n v. Atchison,*

> *Topeka & Santa Fe Ry.*, 520 U.S. 510, 515, 117 S.Ct. 1513, 137 L.Ed.2d 763 (1997) (internal quotations omitted).

Crawford v. TRW Automotive, 560 F.3d 607, 612 (6th Cir. 2009). The Sixth Circuit erred however in finding that the failure to recall is not a prohibited practice under ERISA §510.

The Respondent's failure to recall the employees was a discriminatory act within conduct prohibited by ERISA §510. The discriminatory act occurred when the employer failed to recall the Petitioners from layoff so as to thwart these employees from further attaining plan benefits. Thus, two prohibited practices are at issue in this case. First, the discharge of the employees through the plant's closure and second, the discriminatory failure to recall the employees from layoff.

To establish an ERISA §510 claim, an employee must show "that an employer had a specific intent to violate" the employee's ERISA rights. *Smith v. Ameritech*, 129 F.3d 857, 865 (6th Cir. 1997). The employee is not required to show that the employer's sole intent was to interfere with ERISA rights but rather that it was a "motivating factor" in the employer's decision. *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1043 (6th Cir. 1992). Additionally, the employee must establish a causal link between the adverse employment decision and the likelihood of future benefits. *Pennington v. Western Atlas, Inc.*, 202 F.3d 902, 906 (6th Cir. 2000) (quoting *Smith v. Ameritech, supra*).

The aggrieved party can show specific intent through direct evidence or, in the absence of direct evidence through a showing of: 1) prohibited conduct; 2) taken with the purpose of interfering; with 3) an employee's right to attain plan benefits. *Smith v. Ameritech, supra* at 865. *In the absence of direct evidence*, courts employ a burden shifting analysis, similar to that found in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). However the *Burdine* burden shifting approach only applies "**if there is no direct evidence of the employer's motivation.**" *Humphreys v. Bellaire Corp., supra* at 1043 (emphasis added).

The Sixth Circuit erred when it failed to apprehend substantial direct evidence of an intent to interfere with Petitioner's rights under their retirement plan and failed to then apply a mixed-motive analysis as stated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Direct evidence put forth by Petitioners included admissions by the Respondent company's vice president whereby he concedes that pension costs were one factor in the closing of the facility and resulting discharge of the workers. This evidence implicates prohibited conduct under ERISA consisting of the employees' resulting discharge at the time of the closing. The Sixth Circuit further erred by failing to consider direct evidence of the employer's specific intent to engage in prohibited conduct through the discriminatory failure to recall Petitioners from layoff while the plant remained open and work was available.

As noted by this Court in *Inter Modal*, ERISA grants employers broad latitude to modify and even terminate retirement plans; however to do so, employers must follow statutory and plan requirements. In the present case, the Respondent made a conscious decision to forgo modification or termination of the plan pursuant to legal requirements in favor of engaging in prohibited conduct, which included the discharge of the employees during the plant closing and the discriminatory failure to recall employees from layoff when work was available before the closing.

For the remainder of their arguments on these issues, *amici* adopts by reference the arguments of the Petitioners as stated on pp. 15 through 26 of pending *Petition for Writ of Certiorari.*

2. Effective Equitable Remedies Exist To Redress Illegal Discharges Resulting From A Plant Closing And To Redress Discriminatory Conduct Occurring Before A Closing.

While courts do not favor consideration of liability when remedies are unavailable, courts should not forgo permitted remedies so as to avoid a consideration of liability. Respondents have incorrectly argued that no effective remedy is available to Petitioners under ERISA §510.

Appropriate equitable relief is available to remedy the illegal conduct of the Respondent. ERISA §502(a)(3) broadly empowers federal courts to grant any "appropriate equitable relief" to redress violation

of the statute. 29 U.S.C. § 1132(a)(3)(B). Section 502 upholds international law principles, which require states to enact appropriate regulatory schemes and to provide remedies when citizens' rights are violated. See CESCR General Comment No. 19. *supra* at p. 14, ¶46, p. 19, ¶72 and p. 20, ¶77. ERISA accomplishes these goals through the broad equitable relief provided by §502. Equitable relief includes, but is not limited to the reinstatement, payment of back and benefits and payment of front pay and benefits.

In the absence of reinstatement, back and front pay and benefits, as forms of equitable restitution, are available as a remedy in this case. Federal courts have long found payment of back pay and benefits as an appropriate form of equitable relief to remedy violations of federal employment law. *See generally Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 571, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292-93, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49, 57 S.Ct. 615, 81 L.Ed. 893 (1937); *Schwartz v. Gregori*, 45 F.3d 1017, 1022 (6th Cir. 1995) (applying ERISA § 502); and *Warner v. Buck Creek Nursery, Inc.*, 149 F.Supp.2d 246, 256-57 (W.D.Va., 2001) (applying ERISA § 502). An award of back pay and benefits is a form of restitution when it represents the disgorgement of profits that employers realize through illegal conduct. There is ample evidence in the present case that the Respondents engaged in prohibited conduct with the intent of realizing additional profits.

Front pay and benefits is a straightforward form of equitable relief when reinstatement is unavailable. In *Schwartz v. Gregori*, the court recognized:

> The question of front pay is more straightforward. In other contexts, this court has characterized front pay as an equitable remedy. E.g., Shore v. Federal Express Corp., 42 F.3d 373 (6th Cir. 1994) (front pay under Title VII, 42 U.S.C. § 2000e-5(g), authorizing "equitable relief"); Roush v. KFC Nat'l Management Co., 10 F.3d 392, 398 (6th Cir. 1993), cert. denied, 513 U.S. 808, 115 S.Ct. 56, 130 L.Ed.2d 15 (1994) (action under Age Discrimination in Employment Act, 29 U.S.C. § 626(c)(1), authorizing legal or equitable relief; front pay characterized as equitable). Front pay is awarded only when the preferred remedy of reinstatement, indisputably an equitable remedy, is not appropriate or feasible.

Supra at 1023. Reinstatement may be a viable remedy for the Petitioners since their jobs were transferred to the Respondent's nearby alter ego facility on Mancini Drive. However, even in the absence of reinstatement, front pay and benefits is an appropriate remedy upon a finding of liability in this case and would be consistent with the nation's obligations to provide a remedy for violations of citizen's right to social security when the attainment of benefits is illegally interfered with by an employer.

For the remainder of their arguments on these issues, *amici* adopts by reference the arguments of the

Petitioners as stated on pp. 27 through 29 of pending *Petition for Writ of Certiorari.*

CONCLUSION

For the forgoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals, Sixth Circuit in this matter.

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