No. __-____

IN THE
Supreme Court of the United States

WILLIAM DOUGLAS FULGHUM, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

EMBARQ CORPORATION, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Employee Retirement Income Security Act of 1974 ("ERISA"), employers may assume contractual obligations to provide welfare (*i.e.*, non-pension) benefits to retired employees. An employer's ability to terminate welfare benefits previously promised to retirees presents a question of ERISA plan interpretation. When a plan protects employees' welfare benefits from future reductions, an employer's termination of those benefits gives rise to a cause of action under ERISA known as a "contractual-vesting claim." After acknowledging a "circuit split on the summary judgment standard for contractual vesting," the Tenth Circuit below rejected petitioners' contractual-vesting claims as a matter of law because the plan documents did not contain "clear and express" language making their benefits irrevocable. App. 6a-7a. The question presented is:

Whether an ERISA-governed welfare plan must include "clear and express" vesting language as a prerequisite to a contractual-vesting claim as a matter of law.

LIST OF PARTIES TO THE PROCEEDING

Petitioners William Douglas Fulghum, Dorsey Daniel, John Douglas Hollingsworth, Willie Dorman, Robert E. King, Calvin Bruce Joyner, Timothy Dillon, Sue Barnes, William Games, Betsy Bullock, Kenneth A. Carpenter, Betty A. Carpenter, Carl W. Somdahl, Wanda W. Shipley, Laudie Colon McLaurin, and Bessie M. Reveal, individually and on behalf of all members of the certified Class, were the plaintiffs in the district court and the appellants in the court of appeals.

Respondents Embarq Corporation; Embarq Mid-Atlantic Management Services Company, formerly known as Sprint Mid-Atlantic Telecom, Inc.; Embarq Retiree Medical Plan; Employee Benefits Committee of Embarq Corporation as Plan Administrator of the Embarq Retiree Medical Plan; Sprint Nextel Corporation; Sprint Group Life and Longterm Disability Plans; Sprint Retiree Medical Plan; Sprint Welfare Benefit Plan for Retirees and Non-Flexcare Participants; Group Health Plan for Certain Retirees and Employees of Sprint Corporation; Carolina Telephone and Telegraph Company, LLC, formerly known as Carolina Telephone and Telegraph Company; Carolina Telephone and Telegraph Company Voluntary Employees' Beneficiary Association Sickness Death Benefit Plan; Group Life Accidental Death and Dismemberment and Dependent Life Plan for Employees of Carolina Telephone and Telegraph Company; and Randall T. Parker, as Plan Administrator for all of the Employee Welfare Benefit Plans of Embarq Corporation and Carolina Telephone and Telegraph Company, LLC were the defendants in the district court and the appellees in the court of appeals.

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INTRODUCTION

In today's economic climate, health and life-insurance benefits often form a vital part of the compensation employees receive before and after retirement. Those benefits are usually set forth in a type of employee benefit plan that the Employee Retirement Income Security Act of 1974 ("ERISA") calls a "welfare plan." Although ERISA does not require welfare plans to make their benefits "vested" – *i.e.*, protected from future reductions – it does require employers to honor the vesting commitments they make in their ERISA plan documents. This case presents the important question of how courts should determine when an ERISA-governed welfare plan gives employees a vested right to retirement benefits.

Petitioners are retired employees and beneficiaries of various telephone companies; they sued those companies for unilaterally cutting their post-retirement health and life-insurance benefits. At summary judgment, petitioners identified numerous instances of plan language reasonably interpreted as a commitment to provide vested benefits throughout retirement, and they presented an array of extrinsic evidence supporting that interpretation. But the

Tenth Circuit refused to consider that evidence, holding that welfare benefits can vest only if the plan says so using "clear and express" language. App. 6a. The court used that rule to reject petitioners' claims as a matter of law.

The decision below demands this Court's review. First, as the decision itself acknowledged, it deepened a "circuit split on the summary judgment standard for contractual vesting." App. 6a-7a. Five circuits evaluate contractual-vesting claims using ordinary principles of contract law, under which ambiguous plan language requires interpretation by a fact-finder at trial. Six other circuits, by contrast, reject contractual-vesting claims as a matter of law unless the plan vests benefits using "clear and express" language. The decision below invoked that rule to extinguish claims that would have entitled petitioners to a trial in other circuits.

Second, the decision below defies this Court's repeated instruction that courts should interpret ERISA plans using ordinary principles of contract law. The clear-and-express-language rule deviates from those principles, as four members of this Court recently concluded in no uncertain terms. *See M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 938 (2015) (Ginsburg, J., concurring) ("[N]o rule requires 'clear and express' language in order to show that parties intended health-care benefits to vest."). The artificial interpretive rule employed by the decision below not only violates this Court's direction to apply traditional contract-law principles, but also undermines the protective policies at the heart of ERISA's remedial scheme.

Third, the question presented is of profound importance to the Nation's workforce. Congress

enacted ERISA to protect workers from the tragedy of losing promised retirement benefits, and the clear-and-express-language rule vitiates that protection by giving employers virtual carte blanche to renege on their promises of future benefits. This Court should therefore grant review to give all retirees the benefit of a uniform, nationwide rule that accords with traditional principles of contract law.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-45a) is reported at 785 F.3d 395. The memorandum and order of the district court (App. 46a-143a) is reported at 938 F. Supp. 2d 1090.

JURISDICTION

The court of appeals entered its judgment on April 27, 2015. On July 17, 2015, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to August 25, 2015. App. 144a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. ERISA, broadly speaking, governs two types of employee-benefit plans. "[P]ension plans" provide employees with retirement income, whereas "welfare plans" provide non-pension benefits such as health or life insurance. 29 U.S.C. § 1002(1)-(2). ERISA imposes many of the same requirements on both types of plans, including requirements that plan sponsors provide broad disclosures and adhere to strict fiduciary standards. *See id.* §§ 1021-1031, 1101(a).

Pension plans are also subject to ERISA's "vesting" rules, which provide minimum schedules by which employees must attain vested rights to future benefits. *Id.* § 1053. Once employees become vested in a

certain portion of their pension benefits, employers cannot later terminate those benefits. *Id.* § 1053(a). Welfare plans, by contrast, are exempt from ERISA's vesting rules. *See M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 933 (2015). In other words, ERISA does not require employers to provide welfare benefits throughout employees' retirement; employers may decline even to offer such benefits, or they may retain the contractual freedom to decide later to rescind them. *Id.*

Employers, however, may also "contractually cede[] [their] freedom" to revoke employees' welfare benefits. *Inter-Modal Rail Emps. Ass'n v. Atchison, T. & S.F. Ry Co.*, 520 U.S. 510, 515 (1997). When "ordinary principles of contract law" reveal that a welfare plan confers vested benefits, *Tackett*, 135 S. Ct. at 933, an employer's later revocation of those benefits gives rise to a claim under ERISA. *See* 29 U.S.C. § 1132(a)(1)(B). Such a claim is known as a "contractual-vesting claim."

2.a. Petitioners are 15 retired employees and beneficiaries of the respondent telephone companies (collectively with their predecessors and subsidiaries, the "Companies"), who assert contractual-vesting claims on behalf of a class of similarly situated retirees and beneficiaries. For years, the Companies sponsored ERISA welfare plans that provided valuable post-retirement health and life-insurance benefits. App. 4a. But between 2005 and 2007, the Companies drastically reduced or eliminated many of those benefits. *Id.* Petitioners and their spouses depended on the benefits the Companies revoked and, based on the Companies' longstanding conduct and representations, understood those benefits to have vested upon retirement.

Prior to the Companies' sudden termination of petitioners' benefits, the terms of those benefits were set forth in the Companies' "summary plan descriptions" ("SPDs").[1] SPDs are documents ERISA requires plan administrators to furnish to participants describing their benefits in language "calculated to be understood by the average" employee. 29 U.S.C. § 1022(a). SPDs must apprise participants of their "rights and obligations under the plan," and they must describe the "circumstances which may result in . . . denial or loss of benefits." *Id.* § 1022(a)-(b). This case turns on whether the Companies' SPDs, when properly interpreted, promised vested health and life-insurance benefits throughout retirement.

b. There are 30 SPDs at issue, which the courts below organized into four groups. App. 5a & n.3. Group One consists of 16 SPDs that "purport[] to promise lifetime benefits." App. 71a; *see* App. 7a-9a. Those SPDs told employees, on a page entitled "When Coverage Ends," that their "coverage under the Retiree Medical Plan ends . . . when you die." *E.g.*, C.A. App. 1618. Those SPDs also assured employees they could "feel secure that your family's health and well-being will be protected after you stop working." *Id.* at 1605. Separately, on a page omitted from the table of contents, the SPDs contained a so-called "reservation of rights" clause stating that "the company reserves the right to amend or terminate this plan, or any statement made in this summary plan description, at any time." *Id.* at 1604. The SPDs' durational and eligibility provisions did not cross-reference that page. Some of the Group One

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[1] The parties agreed, and the courts below noted, that the terms of the SPDs formed "part of the Plans" and were binding on the Companies for purposes of petitioners' claims. App. 7a n.4.

SPDs contained additional generic language suggesting that the Companies could amend or terminate the plan, App. 60a-64a, but none specified whether an amendment could reduce current benefits for existing retirees or otherwise limited the SPDs' separate promise of benefits lasting until "you die," C.A. App. 1618.

Group Two consists of three SPDs describing life-insurance benefits for active and retired employees. App. 12a, 72a-74a. Those SPDs told employees that "the amount of your Life Insurance during the first five years following the date of your retirement will be an amount equal to the amount of your Life Insurance on the day preceding the date of your retirement." C.A. App. 1843. They further stated that coverage would adjust "[o]n the fifth anniversary" of retirement to "the greater of (a) one-half of the amount of Life Insurance" previously received or "(b) $1,500." *Id.* None of the SPDs in Group Two "contain[ed] an express reservation of rights provision." App. 72a. They told employees that "insurance under the Group Policy will end on . . . the date the Group Policy terminates," but specified neither who could terminate the policy nor the conditions under which such termination could occur. C.A. App. 1842. Nor did the SPDs rule out continuing benefits under a different policy or insurer. *Id.*

Group Three consists of four SPDs describing medical benefits. App. 15a, 82a-84a. Those SPDs provided that "[a]ll benefits currently offered to active employees will continue after retirement" and that employees under age 65 "will be insured for the same benefits currently offered to regular employees." *E.g.*, C.A. App. 1894. They later stated that "the Company reserves the right to amend, discontinue or

terminate the Plan, for reasons of business necessity or financial hardship." *Id.* at 1910. The SPDs did not specify what type of "business necessity" allowed termination, nor the effect such termination might have on already-retired beneficiaries. *Id.*

Group Four consists of seven SPDs describing life insurance. App. 19a, 89a-91a. Those SPDs informed employees that "[y]ou will be insured on the day you become eligible," and they tied eligibility to service years and pension eligibility. *E.g.*, C.A. App. 2003; *see id.* at 1999-2003. The Group Four SPDs further "contain[ed] duration limits" for active employees but omitted such limits "for retirees." App. 19a. As with the SPDs in Group Three, they "reserve[d] the right to amend, discontinue or terminate the plan, for reasons of business necessity or financial hardship." *E.g.*, C.A. App. 2021. But they neither defined the term "business necessity" nor explained the effect that termination would have on benefits for existing retirees. *Id.*

c. During the decades preceding their decision to slash benefits, the Companies manifested an intent to provide retirees with lifetime, vested health and life-insurance benefits. App. 58a (noting "'course of performance' evidence"). Company staff routinely described those benefits, in both oral and written communications with participants, as lasting "for lifetime." C.A. App. 4788; *see*, *e.g.*, *id.* at 7442 ("for life"), 7444 ("lifetime coverage"), 7450 ("until your death"). For example, Lisa Hux – one of the Companies' benefits administrators – counseled employees that "they were going to have life insurance provided throughout their retirement." *Id.* at 7642. She considered vested benefits to be a "promise . . . made to people who were retiring," and she testified that an

entitlement to such benefits was a "well understood part of being an employee." *Id.* at 7642-43.

The Companies knew that retirees viewed their coverage "as a 'vested' benefit," *id.* at 8013, and several internal analyses reflected the Companies' contemporaneous understanding that the SPDs did not likely allow them to "take away benefits from current retirees," *id.* at 8042-43. For years, the Companies' conduct demonstrated the same understanding. The Companies historically treated retirees' health and life-insurance benefits as "grandfathered" and insulated existing retirees from plan amendments. *Id.* at 7638; *see*, *e.g.*, *id.* at 1842-44, 1881-84, 7629-32. Prior to the actions that precipitated this lawsuit, the Companies thus applied welfare-plan amendments only to benefits for future (not existing) retirees, which resulted in 170 "legacy plans" providing grandfathered benefits for retirees across various locations and time periods. *Id.* at 8050. That practice contributed to petitioners' understanding that their benefits, though subject to prospective amendment for future retirees, had vested upon their retirement. *See*, *e.g.*, *id.* at 5014-17, 5202.

The only expert analysis in the record reached a similar conclusion. Petitioners retained Gail Stygall, a professor of linguistics who has served as an expert on benefit-plan language, to analyze the Companies' SPDs. *See id.* at 8073-159. Based on the structure and text of those SPDs, as well as industry practices for conveying employee-benefit information, she concluded that participants would reasonably have understood them to promise lifetime benefits. *Id.* at 8098-102, 8111-14. She further concluded that any so-called "reservation of rights" language allowing the Companies later to reduce benefits was "confus-

ing, contradictory and ambiguous to the average plan participant reader." *Id.* at 8118.[2]

3. In December 2007, petitioners filed suit on behalf of a proposed class of retirees and beneficiaries injured by the Companies' benefit reductions. They asserted two claims under ERISA, alleging that the Companies: (1) breached their contractual duties by reducing retirees' vested benefits, 29 U.S.C. § 1132(a)(1)(B), and (2) breached their fiduciary duties by misrepresenting those benefits, *id.* §§ 1104(a)(1), 1132(a)(3). After the district court certified a class on the contract claims, the Companies moved for summary judgment as to all the named plaintiffs and many (but not all) class members. The court granted that motion as to 15 of the 17 named plaintiffs and all of the class members against whom the Companies moved. App. 53a-96a.[3]

The district court held that "[c]ontractual vesting of a welfare benefit is an extra-ERISA commitment that must be stated in clear and express language." App. 55a-56a (internal quotations omitted). Judged against that standard, the court found the Companies' SPDs "unambiguous . . . as a matter of law." App. 57a. The court thus dismissed the contract

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[2] For example, Professor Stygall analyzed the clauses in Groups Three and Four giving the Companies the right to amend the plans for "business necessity or financial hardship," and she found them likely to strike the average plan participant as limited to "instances where the company is demonstrably in financial distress, such as bankruptcy." C.A. App. 8102. Petitioners presented evidence below that no such necessity compelled the benefit cuts at issue. *See id.* at 7357-59 (citing exhibits).

[3] The district court entered final judgment as to the dismissed retirees pursuant to Federal Rule of Civil Procedure 54(b), which enabled an appeal. App. 133a-138a.

claims without considering petitioners' extrinsic evidence. App. 58a. The court also dismissed the fiduciary-duty claims as time-barred. App. 102a-110a.

4. The Tenth Circuit affirmed in part and reversed in part. It reversed the district court's dismissal of petitioners' fiduciary-duty claims and held those claims timely. App. 25a-35a. As for petitioners' contract claims, it affirmed the district court's ruling that the Companies' SPDs did not promise vested benefits. App. 2a-3a.[4] The Tenth Circuit agreed with the district court that circuit precedent foreclosed "[a] plaintiff [from] prov[ing] his employer promised vested benefits unless he identifies 'clear and express language' in the plan making such a promise." App. 6a (quoting *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996)). In doing so, it acknowledged a "circuit split on the summary judgment standard for contractual vesting," noting that some other circuits have "adopt[ed] a lower standard" under which contractual-vesting claims need not identify clear-and-express vesting language. App. 6a-7a (citing *American Fed'n of Grain Millers, AFL-CIO v. International Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997)).

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[4] The Tenth Circuit reversed on procedural grounds the district court's ruling as to certain class members whose claims were based on SPDs "other than the [ones] specifically discussed" in the Companies' summary-judgment motion. App. 24a. The district court on remand dismissed the contractual-vesting claims of other class members, as well as the claims of the two remaining plaintiffs. *See Fulghum v. Embarq Corp.*, No. 07-CV-2602, 2015 WL 3632490 (D. Kan. June 10, 2015). The parties thereafter stipulated to dismissal of all remaining contractual-vesting claims, without prejudice to further appellate review. *See* Order, *Fulghum v. Embarq Corp.*, No. 07-CV-2602 (D. Kan. July 27, 2015).

The Tenth Circuit then held that petitioners could not satisfy its stringent standard for contractual vesting. Specifically, it reviewed each group of SPDs and concluded that none "contains clear and express language promising vested benefits." App. 7a. It reiterated the clear-and-express-language rule throughout its analysis, reasoning that each iteration of vesting language that petitioners identified was insufficiently "clear[]" or "unequivocal[]" to survive summary judgment. App. 10a (Group One); *see* App. 12a (Group Two), 15a (Group Three), 19a (Group Four). Given the absence of explicit vesting language, the court held that "no reasonable person in the position of a plan participant would have understood [the SPDs] as a promise of lifetime health or life insurance benefits." App. 19a.

For the Tenth Circuit, the absence of clear-and-express vesting language in the SPDs thus left "no ambiguity [to] be resolved in Plaintiffs' favor." App. 19a-20a. Because it found the SPDs "unambiguous" under the legal standard it applied, the court refused to consider petitioners' extrinsic evidence, including their "'course-of-performance' evidence and the opinion of Gail Stygall." App. 20a.[5]

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[5] On April 27, 2015, the panel granted in part the parties' cross-motions for rehearing and issued an updated opinion. App. 1a. Although that opinion reached the same result, it contained additional analysis of the fiduciary-duty issue. App. 25a n.17. The changes did not affect the court's resolution of petitioners' contractual-vesting claims.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS A CONFLICT OVER WHETHER WELFARE PLANS CAN VEST BENEFITS ONLY THROUGH "CLEAR AND EXPRESS" LANGUAGE

The decision below acknowledged a "circuit split" over the legal standard it used to dispose of petitioners' contractual-vesting claims. App. 6a-7a. Five circuits allow employees asserting such claims to proceed to trial if they identify plan language from which a fact-finder reasonably could infer a promise of vested benefits. Under that "lower standard" for "summary judgment," *id.*, petitioners would have been entitled to a trial. By contrast, six circuits (including the Tenth) require employees to identify "'clear and express language' in the plan" promising vested benefits. App. 6a (quoting *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996)).

Virtually every court of appeals has now picked a side in that dispute, and several have expressly noted the circuit conflict. *See*, *e.g.*, *Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 230-31 (1st Cir. 2006) (noting "substantial disagreement among the courts" over "different rules of construction as to vesting of welfare benefits"); *American Fed'n of Grain Millers, AFL-CIO v. International Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) ("the circuits disagree" over "what language is required to create a promise to vest"). Certiorari is warranted to resolve that conflict.

A. The Circuits Are Divided Over Whether Contractual-Vesting Claims Must Be Based On "Clear And Express" Language

1. Five circuits have rejected the clear-and-express-language rule

The decision below conflicts with decisions of the First, Second, Seventh, Eighth, and Eleventh Circuits. In those circuits, employees asserting contractual-vesting claims need not base their claims on "clear and express" language. Rather, ambiguous plan language subject to genuine factual disputes entitles employees to a trial.

The Second Circuit has "rejected" the Tenth Circuit's requirement of "'clear and express language'" in favor of a rule "permit[ting] a plaintiff to get to a trier of fact based on ambiguous plan language." *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 83-84 (2d Cir. 2001) (quoting *Multifoods*, 116 F.3d at 980). In *Devlin*, the district court awarded summary judgment to an employer because the plan lacked "clear and express" language conferring vested benefits. *Id.* at 82-83 (internal quotations omitted). The Second Circuit reversed, holding that the plan contained "ambiguous language" – including a statement that employees "will be insured" after retirement – that a fact-finder could interpret as a "promise to vest lifetime life insurance benefits." *Id.* at 84-85. The Second Circuit thus remanded for trial under "the proper standard," suggesting that the court admit "extrinsic evidence to clarify the meaning of [the plan's] ambiguous language." *Id.* at 85.

As the Second Circuit later summarized, the *Devlin* rule holds that "the vesting question cannot be determined as a matter of law where a plan is not explicit one way or the other." *Feifer v. Prudential*

Ins. Co. of Am., 306 F.3d 1202, 1211 (2d Cir. 2002). Because a clear-and-express-language rule conflicts directly with that holding, the Second Circuit repeatedly has reversed district courts for using the Tenth Circuit's rule to award summary judgment to employers. *See*, *e.g.*, *Devlin*, 274 F.3d at 83-85; *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 98 (2d Cir. 2001) (partially reversing summary-judgment ruling and "instruct[ing] the district court to allow . . . extrinsic evidence"); *Schonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 78 (2d Cir. 1996) (district court erred in requiring "unambiguous language" to support vesting).

The First Circuit likewise "reject[ed]" the requirement that welfare plans contain a "clear and express statement" of vesting. *Balestracci*, 449 F.3d at 231; *see Senior v. NSTAR Elec. & Gas Gorp.*, 449 F.3d 206, 216 (1st Cir. 2006) ("[w]e reject th[e] clear and express statement test"). Noting that such a requirement represents a "departure" from "ordinary rules of ERISA plan interpretation," the First Circuit requires courts instead to use "extrinsic evidence" to interpret "ambigu[ous]" vesting language. *Balestracci*, 449 F.3d at 230-31. Such evidence can include "related agreements, the practices in the company, and the custom and usage as to [welfare] benefits." *Senior*, 449 F.3d at 221.[6] Accordingly, contractual-vesting claims in the First Circuit often hinge on the type of extrinsic evidence that the decision below

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[6] *Senior* affirmed summary judgment for the employer because the extrinsic evidence – including "past custom and usage" – demonstrated that the parties did not intend to provide retirees with vested benefits. 449 F.3d at 222-24. Here, by contrast, the Tenth Circuit refused to consider extrinsic evidence at all; had it done so, it would have concluded that petitioners presented triable issues of fact. *See supra* pp. 7-9.

disregarded. *Compare Teamsters Local Union No. 340 v. Eaton*, --- F. Supp. 3d ---, 2015 WL 413864, at *6 (D. Me. Jan. 30, 2015) (finding for employer because "extrinsic evidence . . . suggest[s] an intent that the retiree benefits not vest"), *with Dejoe v. Unum Life Ins. Co. of Am.*, No. 07-109-P-S, 2008 WL 2945576, at *7-9 (July 28, 2008) (construing plan ambiguity against employer), *aff'd*, 2008 WL 3929581 (D. Me. Aug. 27, 2008).

Similarly, the Seventh Circuit has held that "the lack of an explicit vesting term is not determinative" of a contractual-vesting claim. *Temme v. Bemis Co.*, 622 F.3d 730, 736 (7th Cir. 2010).[7] Simple ambiguity – such as language promising coverage "in the event of death" – can create a triable issue of fact without any need for "unequivocal contract language" promising "lifetime benefits." *Id.* at 736-37. Indeed, the Seventh Circuit holds summary judgment inappropriate where "extrinsic evidence" reveals a "latent ambiguity" in otherwise clear plan language. *Rossetto*, 217 F.3d at 545-46. Employees armed with such evidence – who would lose as a matter of law in the Tenth Circuit – can thus survive summary judgment despite contractual "silence . . . with respect to vesting." *Id.* at 546.[8]

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[7] Although *Temme* addressed the standard for vesting of ERISA welfare benefits under collective bargaining agreements ("CBAs") – rather than ERISA plan documents – the Seventh Circuit applies the same standard in both contexts. *See Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 544 (7th Cir. 2000) ("[t]he distinction between [CBAs] and ERISA plans is not recognized in our cases").

[8] The Seventh Circuit has suggested at times that the "intention to vest must be found in clear and express language in plan documents." *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 784 (7th Cir. 2005) (internal quotations omitted). But the bulk of

The Eighth Circuit also has rejected the requirement that employees base contractual-vesting claims on "clear and express language." *Barker v. Ceridian Corp.*, 122 F.3d 628, 637 (8th Cir. 1997) ("*Barker I*") (citing *Chiles*). In its place, the court has adopted the Second Circuit rule that employees need merely "point to written language that could be interpreted as a promise to vest." *Id.* at 635. Courts in the Eighth Circuit therefore may use extrinsic evidence to infer vested rights from ambiguous plan language. *See Halbach v. Great-West Life & Annuity Ins. Co.*, 561 F.3d 872, 881 (8th Cir. 2009) (reversing and remanding for consideration of "extrinsic evidence" to interpret "ambiguous" vesting language); *Barker v. Ceridian Corp.*, 193 F.3d 976, 982-83 (8th Cir. 1999) ("*Barker II*") (reversing judgment for employers due to extrinsic evidence of "contemporaneous interpretation of the [plan] by the employer").

Finally, the Eleventh Circuit has held that "an ERISA plaintiff is generally not required to demonstrate his entitlement to benefits in clear and express language." *Jones v. American Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1070 (11th Cir. 2004). That court instead applies "traditional rules of contractual interpretation" to contractual-vesting claims. *Stewart v. KHD Deutz of Am. Corp.*, 980 F.2d 698, 702 (11th Cir. 1993). Under those rules, ambiguous contract language – such as language stating that benefits "'shall be provided at the following levels . . .

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the Seventh Circuit's cases reject such a requirement. *See*, *e.g.*, *Temme*, 622 F.3d at 736; *Rossetto*, 217 F.3d at 545-46; *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607-10 (7th Cir. 1993). In *Bland* itself, which contained the clear-and-express-language reference, the court clarified that a plan need not "state unequivocally that the employer is creating [vested] rights." 401 F.3d at 784 (internal quotations omitted).

During Retirement'" – may "reasonably be interpreted to require [an employer] to provide benefits to qualifying employees throughout retirement." *Id.* at 702-03 (alteration in original). Such language, when coupled with supporting "extrinsic evidence," entitles contractual-vesting plaintiffs to a trial in the Eleventh Circuit. *Id.* at 703-04.

2. Five other circuits hold that welfare benefits vest only upon a showing of "clear and express" language

In sharp contrast with those five circuits, five other circuits mirror the Tenth Circuit and bar contractual-vesting claims unless "clear and express" vesting language appears in plan documents.

The Sixth Circuit allows contractual-vesting claims based on welfare-plan documents only where those documents contain "'clear and express'" language promising vested benefits. *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc) (quoting *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993)). Under the Sixth Circuit's test, plan language "imply[ing] generally that benefits" are vested is insufficient; employees can overcome summary judgment only by identifying language "expressly" stating that benefits vest. *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 668 (6th Cir. 1998). With respect to the ERISA plan documents that it governs, that clear-and-express-language rule typically forecloses contractual-vesting claims brought in the Sixth Circuit. *See*, *e.g.*, *Reese v. CNH Am. LLC*, 574 F.3d 315, 328 (6th Cir. 2009) (addressing whether "the *Sprague* standard" applied

because otherwise-prevailing "retirees would have lost" under that standard).[9]

The Third Circuit follows the same rule and refuses to recognize contractual-vesting claims in the absence of "clear and express language" in a plan document. *In re Unisys Corp. Retiree Med. Benefits "ERISA" Litig.*, 58 F.3d 896, 902 (3d Cir. 1995); *see In re Lucent Death Benefits ERISA Litig.*, 541 F.3d 250, 256 (3d Cir. 2008). That rule poses a formidable obstacle to contractual-vesting claims in the Third Circuit; the court has dismissed such claims even when a plan document "uses the term 'vested rights.'" *Lettrich v. J.C. Penney Co.*, 90 F. App'x 604, 610 (3d Cir. 2004) (per curiam) (holding that general sunset clause rendered "vested rights" term insufficiently clear to survive summary judgment).

The Fifth Circuit, for its part, appears to be the progenitor of the clear-and-express-language rule. *See Wise*, 986 F.2d at 937 (contractual vesting "must be stated in clear and express language"). That court treats "[c]ontractual vesting [as] a narrow doctrine" applicable only when an employee identifies "strong

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[9] The Sixth Circuit's interpretation of "health-care-benefit promises differ[s] depending on whether the contract stemmed from a CBA or not." *Reese*, 574 F.3d at 321. Where a vesting claim turns (as here) on a non-collectively-bargained ERISA document, the court "require[s] a clear statement before . . . infer[ring] that an employer meant to promise health benefits for life." *Id.* Where benefits arise "from a CBA, by contrast," the Sixth Circuit until recently "put a thumb on the scales" in "favor[] [of] vesting." *Id.* Last Term, this Court overruled the latter presumption but did not review the Sixth Circuit's test for non-collectively-bargained documents under ERISA. *See M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926 (2015); *M&G Polymers USA, LLC v. Tackett*, 134 S. Ct. 2136 (2014) (denying review of question concerning non-collectively-bargained ERISA plans); *see also infra* Part II.A.

prohibitory or granting language" in a plan document. *Id.* at 938. When different plan terms conflict, the Fifth Circuit construes the ambiguity against employees and rejects contractual-vesting claims as a matter of law. *See id.*

The Fourth Circuit has followed the Fifth Circuit and held that "any participant's right to a fixed level of lifetime benefits must be 'found in . . . clear and express language.'" *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) (quoting *Wise*, 986 F.2d at 937). That rule, which courts in the Fourth Circuit recognize as a "presumption against vesting," *Quesenberry v. Volvo Grp. N. Am., Inc.*, No. 1:09cv00022, 2010 WL 723714, at *10 (Mar. 2, 2010), *adopted*, 2010 WL 1064460 (W.D. Va. Mar. 18, 2010), often proves decisive in contractual-vesting cases. *Compare id.* at *10-13 (rejecting that presumption in collective-bargaining context and thus denying summary judgment) *with Crosby v. Electronic Data Sys. Corp. Health Benefit Plan*, No. 3:07-cv-272, 2008 WL 5244437, at *5-6 (W.D.N.C. Dec. 15, 2008) (applying that rule to dismiss ERISA claim for lack of a "'clear and express' vested right in health benefits").

Finally, the Ninth Circuit agrees that "vesting of a welfare benefit" represents "'an extra-ERISA commitment that must be stated in clear and express language.'" *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154, 1160 (9th Cir. 2001) (quoting *Chiles*, 95 F.3d at 1513). The Ninth Circuit, like other circuits following that rule, typically rejects contractual-vesting claims without considering extrinsic evidence. *See id.*; *Cinelli v. Security Pac. Corp.*, 61 F.3d 1437, 1441 (9th Cir. 1995) (affirming summary judgment based on lack of "clear and express" language) (internal quotations omitted).

B. The Decision Below Deepens The Conflict By Using The Clear-And-Express-Language Rule To Disregard Ambiguity That Would Otherwise Warrant A Trial

The decision below worsens the "circuit split" it identified (at App. 6a-7a) by using the clear-and-express-language rule to disregard factual disputes that would have entitled petitioners to a trial in other circuits. The Tenth Circuit began its analysis by requiring petitioners to "identif[y] 'clear and express language' in the plan" promising vested benefits. App. 6a (quoting *Chiles*, 95 F.3d at 1513). The court then repeatedly employed that rule to reject each of petitioners' claims as a matter of law. App. 10a (SPDs "do not unequivocally state that medical benefits will continue"); *id.* (SPDs do not "clearly and expressly state that health benefits are vested"); App. 12a (SPDs "cannot be interpreted to contain clear and express language promising vested lifetime benefits"); *id.* ("no SPD in Group 2 contains clear and express language promising vested benefits") (internal quotations omitted); App. 15a ("Plaintiffs have failed to identify any 'clear and express' language promising lifetime life insurance benefits"); *id.* (SPD "does not clearly and expressly promise lifetime benefits"); App. 19a (petitioners did not "identify affirmative language promising lifetime benefits").

The sheer frequency with which the Tenth Circuit invoked the clear-and-express-language rule leaves no doubt that the rule tainted the court's contractual analysis. It examined each of petitioners' arguments through the prism of that rule, using it to conclude that "no reasonable person" could have interpreted the "language identified by Plaintiffs as a promise of lifetime . . . benefits." App. 19a. Although the court's

erroneous legal rule infected virtually every step of its analysis, three examples in particular illustrate the severity of the conflict it intensified.

First, the decision below used the clear-and-express-language rule to discount vesting language that other circuits have held sufficient to defeat summary judgment. To take one of many examples, the Group 2 SPDs told employees that "the amount of your Life Insurance during the first five years following the date of your retirement *will be* an amount equal to the amount of your Life Insurance on the day preceding the date of your retirement." C.A. App. 1843 (emphasis added). They further explained that, "[o]n the fifth anniversary" of retirement, life-insurance benefits would adjust "to *the greater of* (a) one-half of the amount" previously received or "(b) $1,500." *Id.* (emphasis added). Other SPDs used similar, future-oriented language suggesting a vested right to post-retirement benefits. *E.g.*, *id.* at 1894 ("[a]ll benefits currently offered to active employees will continue after retirement"); *id.* ("you will be insured for the same benefits currently offered"); *id.* at 1618 (coverage ends "when you die"); *see also* App. 71a (district court recognizing that Group One SPDs "purport[] to promise lifetime benefits").

The Tenth Circuit dismissed all that language as insufficiently "'clear and express'" to create a triable issue of fact. App. 6a (quoting *Chiles*, 95 F.3d at 1513). In the circuits that reject the Tenth Circuit's rule, however, such language presents factual issues for trial. *See*, *e.g.*, *Halbach*, 561 F.3d at 881 (statement that "'benefits will continue until . . . the calendar month in which the maximum benefit period ends'" was sufficiently "ambiguous" to warrant trial); *Devlin*, 274 F.3d at 84 (statement

that employees meeting service benchmarks "'*will be insured*' . . . can be reasonably read as promising" vested benefits); *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994) (statement "that benefits *will be* provided" constitutes "an ambiguous expression of an intent to vest retiree benefits"); *Stewart*, 980 F.2d at 702-03 (statement that coverage "'shall be provided at the following levels . . . During Retirement'" raised triable question whether employer intended to provide vested "benefits to qualifying employees throughout retirement") (alteration in original). Had petitioners brought suit in one of those circuits, the language they identified would have defeated summary judgment.

Second, the decision below used the clear-and-express-language rule to ignore ambiguity in the reservation-of-rights clauses on which it relied. For example, the court leaned heavily on a statement in the Group 2 SPDs stating that "insurance under the Group Policy will end on . . . the date the Group Policy terminates." C.A. App. 1842. But, as both courts below acknowledged, such language did not constitute an "'express reservation of rights provision.'" App. 13a (quoting App. 72a). It never explained who could terminate the policy; under what circumstances such termination could occur; or the effect such termination would have on current retirees whose benefits the SPDs elsewhere indicated were vested. *See* C.A. App. 1843 (stating retirees' benefits "will be" at fixed amounts). For the Tenth Circuit, however, such ambiguities made no difference because the "'clear and express language'" rule required it to resolve them all in the Companies' favor. App. 6a.

Other circuits interpret ambiguous reservation-of-rights clauses differently. In the circuits that reject

the clear-and-express-language rule, reservation-of-rights clauses demand consideration of extrinsic evidence when they "conflict[]" with other clauses or are "'not facially unambiguous.'" *Barker I*, 122 F.3d at 635 (quoting *Jensen*, 38 F.3d at 950); *see Abbruscato*, 274 F.3d at 97-98 (summary judgment inappropriate where "reservation of rights clause" did not "*unambiguously* reserve[] [the employer's] right to reduce the life insurance benefits"). That approach would have led to a different outcome here. The Seventh Circuit has applied that framework to a termination clause stating that "'the Plan may be changed or discontinued,'" calling it rife with "ambiguity" because "the possibility of change is announced in the passive voice." *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 308 (7th Cir. 1996). Like the similarly passive "termination" language in the Group 2 SPDs, the plan language in *Diehl* did not definitively answer the question "'[c]hanged or discontinued by whom?'" *Id.* Without the thumb on the scale provided by the clear-and-express-language rule, such an "unsure foundation" for terminating benefits would not have entitled the Companies to summary judgment. *Id.*

Third, the decision below used the clear-and-express-language rule to disregard extrinsic evidence that other circuits would have considered. Petitioners presented voluminous extrinsic evidence demonstrating the Companies' historical intent to provide lifetime medical and life-insurance benefits. *See supra* pp. 7-9. Under the clear-and-express-language rule, however, the Tenth Circuit deemed those facts irrelevant because the SPDs contained "no ambiguity that must be resolved" through extrinsic evidence. App. 19a-20a. That is how the clear-and-express-

language rule operates: unless plan documents state unequivocally that welfare benefits are vested, courts find the documents unambiguous and refuse to consider extrinsic evidence. *See*, *e.g.*, *Sengpiel*, 156 F.3d at 668 n.7 (extrinsic evidence inadmissible where plan documents "do not express a clear intent to vest" benefits).

By contrast, circuits rejecting the clear-and-express-language rule consider the type of extrinsic evidence the decision below ignored. *See*, *e.g.*, *Balestracci*, 449 F.3d at 230-31 ("ambiguity in a plan" justifies "reference . . . to extrinsic evidence"); *Barker II*, 193 F.3d at 981 (interpreting "ambiguous" plan documents "by examining extrinsic evidence of the [employer's] intent"). Such evidence can be decisive. Indeed, the Seventh Circuit has used "extrinsic evidence" to discern "latent ambiguity" in a welfare plan that was otherwise "completely silent on duration." *Rossetto*, 217 F.3d at 545. There, the court reversed an order awarding summary judgment to an employer because the bargaining history and course of performance revealed that the contract's "silence . . . with respect to vesting makes the agreement genuinely ambiguous." *Id.* at 546. Such latent ambiguity entitled the *Rossetto* retirees to a trial despite the lack of any affirmative vesting language in the contract. *See id.* Had the decision below employed the Seventh Circuit's rule rather than the clear-and-express-language rule, it too would have allowed petitioners a trial.

In sum, the fate of contractual-vesting claims currently depends on the circuit in which they are decided. Whereas five circuits evaluate such claims using traditional contract-law principles, six others reject such claims as a matter of law unless based on

"clear and express" language. As the decision below well illustrates, which rule a court employs usually dictates whether a contractual-vesting claim survives summary judgment.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS GOVERNING ERISA PLAN INTERPRETATION

A. The Clear-And-Express-Language Rule Is Incompatible With Traditional Principles Of Contract Interpretation

1. It is well-settled that courts should "construe ERISA plans, as they do other contracts, by 'looking to the terms of the plan' as well as to 'other manifestations of the parties' intent.'" *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1548-49 (2013) (quoting *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989)). This Court reiterated that point just last Term, requiring courts to determine whether welfare benefits vest using "ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *Tackett*, 135 S. Ct. at 933.

The clear-and-express-language rule violates the basic principles of welfare-plan interpretation that *Tackett* reaffirmed. The Court there confronted the Sixth Circuit's so-called "*Yard-Man*" presumption, which "plac[ed] a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." *Id.* at 935 (citing *International Union, United Auto. Workers (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)). Under *Yard-Man* and its progeny, the Sixth Circuit applied a "presumption of vesting" to CBAs granting welfare benefits, inferring an intent to provide lifetime benefits as a matter of law "absent specific durational language" stating

otherwise. *Id.* (internal quotations and alteration omitted).

Such a blanket presumption, this Court explained, "violates ordinary contract principles" by "distort[ing] the attempt 'to ascertain the intention of *the parties*'" to each individual contract. *Id.* (quoting 11 Richard A. Lord, *Williston on Contracts* § 30:2, at 18 (4th ed. 2012) ("Williston")). Indeed, the inferences on which the Sixth Circuit based the *Yard-Man* presumption arose "not from record evidence" about any particular contract, but from "its own suppositions" about the negotiating behavior of employers and unions in general. *Id.*; *see id.* (*Yard-Man* assumed "without any foundation" that all parties negotiating CBA benefits "likely intend[] those benefits to continue as long as the beneficiary remains a retiree") (internal quotations omitted). Suppositions so abstract are "too speculative and too far removed from the context of any particular contract to be useful in discerning the parties' intention." *Id.* This Court therefore rejected *Yard-Man* and instructed the Sixth Circuit instead to determine whether CBAs vest welfare benefits under "ordinary principles of contract law." *Id.* at 937.

2. The clear-and-express-language rule represents the same error the Sixth Circuit made in *Yard-Man*, just in the other direction. Like the *Yard-Man* presumption, the clear-and-express-language rule "plac[es] a thumb on the scale" of contract interpretation, *Tackett*, 135 S. Ct. at 935, but where *Yard-Man* presumed vesting, the clear-and-express-language rule presumes the opposite. *See Balestracci*, 449 F.3d at 230-31 (rejecting latter rule as "presumption" in conflict with "ordinary rules" of "plan interpretation").

The Tenth Circuit's presumption is no better than the one *Tackett* rejected. Courts employing the clear-and-express-language rule say they do so because welfare benefits represent an "extra-ERISA commitment," *Chiles*, 95 F.3d at 1513 (internal quotations omitted) – implying that employers would never use anything less than unequivocal language to offer benefits beyond what ERISA mandates. That assumption lacks foundation in any "record evidence." *Tackett*, 135 S. Ct. at 935. Indeed, the decision below construed the SPDs based not on actual evidence about the Companies (or the telephone industry), but on circuit precedent adopting the same type of generalized inference that led *Yard-Man* astray. The Tenth Circuit's inference – that *no* employer could possibly intend to vest welfare benefits through ambiguous language – conflicts with the core principles this Court applied in *Tackett*. *See id.* at 938 (Ginsburg, J., concurring) ("[N]o rule requires 'clear and express' language in order to show that parties intended health-care benefits to vest.").

The clear-and-express-language rule further ignores that "[t]he words of a plan may speak clearly, but they may also leave gaps." *US Airways*, 133 S. Ct. at 1549. Courts thus "must often 'look outside the plan's written language' to decide what an agreement means." *Id.* (quoting *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1877 (2011)). Where plan language appears ambiguous, courts should "consider extrinsic evidence to determine the intentions of the parties." *Tackett*, 135 S. Ct. at 938 (Ginsburg, J., concurring). Such evidence may include "known customs or usages in a particular industry," *id.* at 935 (majority), the parties' "bargaining history," and "any conduct of

the parties which reflects their understanding of the contract's meaning," Williston § 30:5, at 84-85.

Petitioners presented such evidence in spades. *See supra* pp. 7-9. But the Tenth Circuit refused to consider it, holding that the absence of explicit vesting language in the SPDs decided the issue as a matter of law. App. 19a-20a. The court erred in using an artificial rule of construction, rather than relevant extrinsic evidence, to determine whether the SPDs manifested an intent to vest health and life-insurance benefits. *See Tackett*, 135 S. Ct. at 935 (courts should consider relevant "customs or usages" based on "affirmative evidentiary support in a given case"); 5 Margaret N. Kniffin, *Corbin on Contracts* § 24.7 (Joseph M. Perillo ed., 1998) (requiring "extrinsic evidence be admitted" "before a court can give any meaning" to ambiguous terms).

Basic trust-law principles reinforce that conclusion. *See Firestone*, 489 U.S. at 112 (drawing ERISA interpretive standards from "trust law"). Under the traditional law of trusts, settlors could not "cut[] down or tak[e] away the interest of any beneficiary" unless "the terms of the trust reserve[d] a power" to do so. Restatement (Second) of Trusts § 331 cmt. a (1959) ("Second Restatement"). Modern trust law relaxes that "traditionally presumed irrevocability of trusts," but it adheres to the venerable principle that "extrinsic evidence" may be admitted "to prove the settlor's intention" where the trust instrument "is incomplete [or] uncertain." Restatement (Third) of Trusts § 63 cmt. b & reporter's notes (2003) ("Third Restatement"). The clear-and-express-language rule, which typically bars extrinsic evidence of vesting, contravenes that principle. *See id.* cmt. c(1) ("any circumstances or competent testimony that sheds

light on the settlor's intention may properly tend to rebut or reinforce" an inference of vesting); *see also Firestone*, 489 U.S. at 112 (trusts "'interpreted in light of all the circumstances and such other evidence of the intention of the settlor'") (quoting Second Restatement § 4 cmt. d).[10]

3. *Tackett*'s allusion to the "traditional principle that courts should not construe ambiguous writings to create lifetime promises" does not suggest a different conclusion. 135 S. Ct. at 936 (citing 3 Arthur L. Corbin, *Corbin on Contracts* § 553, at 216 (1960) ("Corbin")). That principle, which *Tackett* faulted the Sixth Circuit for "fail[ing] even to consider," *id.*, merely holds that contracts lacking express durational language should be limited to a "'reasonable time,'" *id.* (quoting Corbin § 553, at 216). What constitutes a "reasonable time" is ordinarily a "question of fact" that requires "due consideration [of] all the factors involved." Corbin § 553, at 216. Courts thus determine the duration of open-ended contractual promises by using traditional interpretive tools to reach a "reasonable result under the circumstances that exist." *Id.* at 213.

That principle undercut the *Yard-Man* presumption, which artificially inferred lifetime vesting from contractual silence. *See Tackett*, 135 S. Ct. at 936. It likewise undercuts the equally artificial clear-and-express-language rule. *See id.* at 938 (Ginsburg,

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[10] The Uniform Trust Code recently adopted a presumption of revocability that an "*express* contrary provision is needed to overcome," but that rule is "prospective only" and generally did not apply when the SPDs at issue were drafted and implemented. Third Restatement § 63 cmts. b-d & reporter's notes. Moreover, that new standard conflicts with the still-prevailing "preferred *common-law* view," which does not condition vesting on an express statement of irrevocability. *Id.*

J., concurring) (rejecting that rule). Rather than indulge either presumption, courts should determine the duration of welfare benefits as they do all other contractual questions: by conducting a "careful and painstaking search of all the factors shedding light on the intent of the parties." Williston § 30:5, at 86; *see* Corbin § 553, at 215 (noting that the vesting of retirement benefits "for life" poses "no special problem of interpretation"). The Tenth Circuit's failure to follow that rule warrants certiorari.

B. The Clear-And-Express-Language Rule Frustrates ERISA's Remedial Purpose

The anti-vesting presumption embodied by the clear-and-express-language rule also vitiates ERISA's remedial scheme. ERISA protects "participants in employee benefit plans and their beneficiaries, by requiring . . . disclosure and reporting to participants." 29 U.S.C. § 1001(b). The statute's disclosure requirements – which apply to welfare plans – seek to ensure that each "participant knows exactly where he stands with respect to the plan." *Firestone*, 489 U.S. at 118 (internal quotations omitted).

SPDs form the centerpiece of ERISA's disclosure regime. Employers must write SPDs "in a manner calculated to be understood by the average plan participant," 29 U.S.C. § 1022(a), avoiding "jargon" and "long, complex sentences" that could confuse lay participants, 29 C.F.R. § 2520.102-2(a). SPDs similarly may not present restrictions in a way that leaves them "minimized, rendered obscure or otherwise . . . unimportant." *Id.* § 2520.102-2(b). Statements of benefits must also make their limitations clear and identify any risks of benefit loss. *Id.* § 2520.102-3(*l*). Those rules further Congress's "basic summary plan description objective: clear, simple communication." *CIGNA*, 131 S. Ct. at 1877.

Construing ambiguity against lay retirees (as the clear-and-express-language rule does) frustrates that objective. The core purpose of an SPD is to convey benefit information in a way that retirees can comprehend. When employers fail in that task, they should not then be permitted to reap the benefit of ambiguous language that employees reasonably understood to promise lifetime benefits. *See Rossetto*, 217 F.3d at 543-44 (suggesting that, outside the collective-bargaining context, "an employee ought to get the benefit of vague language in his ERISA plan"). By punishing employees for relying on impermissibly unclear vesting language in SPDs, the clear-and-express-language rule undermines the "interests of employees" that ERISA's disclosure rules protect. *Firestone*, 489 U.S. at 113 (internal quotations omitted). In that sense, it is even worse than the *Yard-Man* presumption, which was restricted to union-negotiated contracts free from ERISA's strict disclosure and fiduciary rules. *See supra* note 9.

The clear-and-express-language rule also compares unfavorably to the *Yard-Man* presumption because SPDs, unlike the negotiated contracts to which *Yard-Man* applied, reflect employers' unilateral draftsmanship. In contrast to CBAs, therefore, SPDs are subject to the "general maxim that a contract should be construed most strongly against the drafter." *United States v. Seckinger*, 397 U.S. 203, 210 (1970); *see* Williston § 32:12, at 777 (calling that principle "generally accepted"). That principle suggests that employers should bear the risk of ambiguity in SPDs' vesting language; after all, such language is controlled by the employer who drafts it, not the lay employees who read it. Construing such language

against employers makes particular sense under ERISA, whose remedial scheme counsels against "plac[ing] the burden of careless drafting on the employee." *Washington v. Murphy Oil USA, Inc.*, 497 F.3d 453, 458 (5th Cir. 2007).

The Tenth Circuit recognizes that very principle in other ERISA contexts. *See Rasenack ex rel. Tribolet v. AIG Life Ins. Co.*, 585 F.3d 1311, 1318 (10th Cir. 2009) ("The doctrine of *contra preferentem*, which construes all ambiguities against the drafter, applies to *de novo* review of ERISA plans."). The decision below nodded briefly toward that principle, App. 9a, but then disregarded it by using the clear-and-express-language rule to eliminate any ambiguity that otherwise would have been resolved in petitioners' favor, App. 19a-20a. The court's inconsistent approach to different "types of employment contracts only underscores [its] deviation from ordinary principles of contract law." *Tackett*, 135 S. Ct. at 937.

III. WHETHER WELFARE BENEFITS MAY VEST ONLY THROUGH "CLEAR AND EXPRESS" LANGUAGE IS A RECURRING QUESTION OF NATIONAL IMPORTANCE

A. The Decision Below Has Major Ramifications For The National Economy

The rules for interpreting employer-sponsored welfare plans have a profound impact on the national economy. Congress enacted ERISA because benefit plans "directly affect[]" "the continued well-being and security of millions of employees and their dependents." 29 U.S.C. § 1001(a). ERISA's remedial scheme reflects "the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force." *Boggs v. Boggs*, 520 U.S. 833, 839 (1997).

Since ERISA's enactment in 1974, the health benefits provided by employer-sponsored welfare plans have become even more essential. ERISA today governs 2.4 million health plans alone, on top of a similar number of other welfare plans. *See* DOL Report[11] at 8. ERISA-governed welfare and pension plans now hold roughly $8.5 trillion in assets. *See id.* Moreover, roughly 149 million nonelderly people today depend on employer-sponsored health plans. *See* Kaiser Family Found., *Employer Health Benefits: 2014 Annual Survey* 1 (2014), http://files.kff.org/attachment/2014-employer-health-benefits-survey-full-report. For such people, ensuring that "health and other benefits will be there when needed" is critical to their "overall financial security." DOL Report at 8.[12]

The clear-and-express-language rule jeopardizes the benefits – and thus the financial security – of millions of people who depend on ERISA-governed welfare plans. That rule gives employers virtually unlimited discretion to rescind previously promised benefits – no matter how strongly their contractual language implies that benefits are vested, or how overwhelming the extrinsic evidence supporting that view. When employers exploit that rule to strip retirees of promised health and life-insurance benefits, they create the "great personal traged[ies]"

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[11] U.S. Dep't of Labor, *FY 2014 Annual Performance Report* ("DOL Report"), https://www.dol.gov/dol/budget/2016/PDF/CBJ-2016-V1-01.pdf.

[12] *See also Local Lodge 470 of Dist. 161 v. PPG Indus., Inc.*, No. Civ.A. 01-2110, 2006 WL 901927, at *1 (W.D. Pa. Mar. 31, 2006) (when employers may "reduce or terminate medical benefits" has "significant consequences for . . . retirees and . . . employer[s] alike in today's world of spiraling health care costs").

that ERISA was enacted to prevent. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 374 (1980) (internal quotations omitted).

The resulting threat to "the financial security of the Nation's work force" warrants certiorari. *Boggs*, 520 U.S. at 839. If employers promise lifetime welfare benefits, ERISA prohibits them from "circumvent[ing] the provision of promised benefits." *Inter-Modal Rail Emps. Ass'n v. Atchison, T. & S.F. Ry. Co.*, 520 U.S. 510, 515 (1997) (internal quotations omitted). The federal requirement that employers abide by their welfare-plan promises "helps to make promises credible" and protects the legitimacy of the entire benefits system. *Id.* (internal quotations omitted). The decision below weakens that protection by allowing employers to revoke vital benefits that they historically intended – and that employees reasonably understood – to be permanent. This Court's review is needed to restore that protection and ensure that welfare plans function as Congress intended.

B. This Court's Review Is Necessary To Provide A Uniform Interpretive Framework For ERISA-Governed Welfare Plans

The uncertainty over how to interpret welfare plans heightens the need for this Court's intervention. Disputes over welfare-plan benefits arise frequently, and the resulting lawsuits often hinge on the legal standard governing when such benefits vest. *See Rossetto*, 217 F.3d at 541 ("when a right to health benefits" survives later amendments is a "much-litigated issue"); *Local Lodge*, 2006 WL 901927, at *1 (observing "much litigation in this arena in the last fifteen years"). As things stand, the outcome of such lawsuits hinges on the circuit in

which they are decided. *See supra* pp. 12-19. Given that large ERISA plans often cover participants "in more than one judicial circuit," the persistent conflict over how to interpret such plans is especially "troubling." *Mason v. Continental Grp., Inc.*, 474 U.S. 1087, 1087 (1986) (White, J., dissenting from denial of certiorari). That conflict demands a nationwide rule that only this Court can supply.

Allowing the conflict to persist any longer would frustrate one of ERISA's core purposes. Congress intended ERISA "to provide a uniform regulatory regime over employee benefit plans." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 208 (2004). Geographical variation in the legal standard applicable to welfare-plan vesting interferes with the uniformity that ERISA seeks to promote. *See Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001) ("Uniformity is impossible . . . if plans are subject to different legal obligations in different States."). The Court should grant certiorari to eliminate that variation and provide all retirees the benefit of a uniform rule of plan construction comporting with ordinary principles of contract law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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