No. 15-241

In The Supreme Court of the United States

WILLIAM DOUGLAS FULGHUM, *et al.*,

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the absence of a circuit split on the question answered by the appeals court or a conflict with this Court's cases, the Tenth Circuit's factbound application of ordinary contract interpretation principles to ERISA welfare benefit provisions warrants this Court's review.

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STATEMENT

As instructed by this Court's precedent, the Tenth Circuit applied ordinary principles of contract law in this ERISA case to hold that the pertinent summary plan descriptions unambiguously confer no vested benefits. If this Court were to do as petitioners ask—remand the case to the Tenth Circuit with instructions that it evaluate petitioners' contractual vesting claims under ordinary principles of contract law—that court would understandably wonder why it was being asked to do something it had already done.

Thus to the extent there is a circuit split on the question presented by petitioners, that split is not implicated by this case. In accordance with this Court's recent instruction in *M&G Polymers USA, LLC* v. *Tackett*, 135 S. Ct. 926 (2015), the Tenth Circuit applied ordinary principles of contract interpretation. As would have been the case in every circuit cited by the petition on the other side of the claimed split, the court of appeals concluded that the benefits at issue were not vested. Any doubts concerning the degree to which contractual vesting language should be "clear and express" would best be settled in a case where it made a difference. See *Smith* v. *Butler*, 366 U.S. 161, 161 (1961) (per curiam) (dismissing writ as improvidently granted because the decision below "did not turn on the issue on the basis of which certiorari was granted"). The petition should be denied.

1. ERISA treats welfare benefit plans differently than pension plans. *Tackett*, 135 S. Ct. at 933. As a result, "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 78 (1995). Because "employers have large leeway to design * * * welfare plans as they see fit," *Black & Decker Disability Plan* v. *Nord*, 538 U.S. 822, 833 (2003), the general rule of contract interpretation that "provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA plan." *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 611-12 (2013). Therefore courts construing welfare benefit plans must, as this Court has noted, "focus on the written terms of the plan [that are] the linchpin of a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering plans in the first place." *Id.* at 612 (second alteration in original) (quoting *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996)).

Just last Term, this Court addressed the proper construction of ERISA plans in the context of collectively bargained agreements. See *Tackett*, 135 S. Ct. at 930. In *Tackett*, this Court criticized the Sixth Circuit's failure "to consider the traditional principle that 'contractual obligations will cease, in the ordinary course, upon termination of the bargaining agreement.'" *Id.* at 937 (quoting *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 207 (1991)). While "'a collective-bargaining agreement [may] provid[e] in

explicit terms that certain benefits continue after the agreement's expiration' * * * when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life." *Ibid.* In contrast, the Sixth Circuit's prior requirement of a "specific durational clause for retiree health care benefits to prevent vesting" had "distort[ed] the text of the agreement and conflict[ed] with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties." *Id.* at 936 (citation omitted).

2. Petitioners represent retiree class members whose welfare benefits were reduced or eliminated by respondents. App. 3a. Between 2005 and 2007, respondents announced modifications to the prescription drug benefits and health-care coverage available to retirees eligible for Medicare. *Id.* at 4a; 52a. Changes were also announced concerning the company-provided life insurance for retirees. *Ibid.* Petitioners filed suit challenging the reduction of their benefits. *Id.* at 4a-5a. Petitioners' claims included contractual vesting claims under ERISA § 502(a)(1)(B) based on the language of summary plan descriptions ("SPDs"), breach of fiduciary duty claims under ERISA § 501(a)(3), and Age Discrimination in Employment Act claims under both federal law and state-law counterparts. *Id.* at 47a-48a.

3. As relevant here, respondents moved for summary judgment on the contractual vesting claims of all petitioners and selected class members. App. 5a.

The thirty-two SPDs at issue were divided into five groups based on similarities in their language. For present purposes, thirty SPDs (and four groups) are relevant. Of those thirty SPDs, twenty-seven contain provisions expressly stating that the employer(s) reserved the right to amend or terminate those benefits ("ROR provisions"), and fourteen contain provisions expressly stating that the plans or policies under which the benefits were provided could be terminated ("termination provisions"). All thirty SPDs contain at least one ROR or termination provision, eleven contain both ROR and termination provisions, five contain two or more termination provisions, and thirteen contain five or more ROR provisions. See *id.* at 7a, 13a-14a, 16a, 19a; C.A. App. 1555-63, 2724-26, 7205-06 & 7331-33.

Even though all thirty SPDs contain ROR or termination provisions (or both) stating that petitioners' health and life-insurance benefits could be terminated, petitioners contended below that the SPDs could reasonably be construed to state those benefits could *not* be terminated.

4. The sixteen SPDs in Group 1 contain an average of five ROR provisions stating that the company reserves the right to amend or terminate the plan at any time. App. 7a-9a; C.A. App. 1558-62, 2724, 2726, 7205-06 & 7331. Petitioners nevertheless contended that a reasonable person could construe these SPDs to bar respondents from amending or terminating the plan, based primarily on language stating that participants' medical insurance coverage

ends when you "die" or "do not pay your share of the cost of your coverage," and that their "basic life insurance coverage ends on the date of your death." App. 7a-8a.[1]

5. The three life insurance SPDs in Group 2 all contain termination provisions stating that "[y]our insurance under the Group Policy will end on * * * the date the Group Policy terminates," and one contains an additional termination provision stating that "[t]he Group Policy is a contract between the Policyholder [i.e., respondents] and Pilot Life which * * * may be changed or terminated * * * by those parties." App. 13a-14a, 73a. Petitioners nevertheless contended that a reasonable person would construe these SPDs to bar respondents from amending or terminating the plan, based primarily on language stating that the amount of a participant's life insurance coverage "will be" the amount equal to their active employee coverage subject only to a 50 percent reduction "on the fifth anniversary of retirement." *Id.* at 12a.

6. The four medical SPDs in Group 3 all contain ROR provisions stating that respondents "reserve[ ]

[1] The petition asserts (at 5) that the ROR provisions in Group 1 SPDs appear "on a page omitted from the table of contents" and that the "SPDs' durational and eligibility provisions did not cross-reference that page." In fact, as the district court found, "the ROR clause * * * appears either next to the Table of Contents or on the first page of [all of] the SPD[s]" in Group 1, and appears "in bold on the Table of Contents page" of the Group 1 SPDs containing only one ROR provision. App. 70a.

the right to amend, discontinue or terminate the Plan for reasons of business necessity," as well as termination provisions stating that "your insurance ends when * * * the group policy ceases" and that no benefits "will be paid under the plan * * * after * * * the Group Policy ceases." App. 83a-84a. One of those SPDs also states without qualification that respondents "reserve * * * the right to amend, discontinue or terminate the Plan and/or Plan Benefits," and another states that the "Group Policy is a contract between the Policyholder and Pilot Life" that "may be changed or terminated * * * by one of these parties." *Id.* at 16a-17a & 83a-84a. Petitioners nevertheless contended that a reasonable person would construe these SPDs to bar the company from amending or terminating the plan because the SPDs stated that benefits "will continue after retirement" and that retirees "will be insured." *Id.* at 15a.

7. The seven life insurance SPDs in Group 4 contain the same "business necessity" ROR provisions as the SPDs in Group 3, as well as termination provisions stating that "your insurance ends when * * * the group policy ceases." App. 19a, 89a & 91a. Petitioners nevertheless contended that a reasonable person would construe these SPDs to bar the company from amending or terminating the plan, based primarily on language which does not state that benefits "will" or "may" be continued, but merely states that benefits "will be reduced" by 50 percent under specified circumstances. *Id.* at 92a-93a.

8. In deciding respondents' motions for summary judgment on the contractual vesting claims, the district court addressed two distinct issues: (1) whether the SPDs were ambiguous; and (2) whether the SPDs contained "clear and express" vesting language. As to the first issue, the district court explained that "to determine the dispositive issue of whether [respondents] intended to confer vested medical and life insurance benefits upon [petitioners], the [c]ourt must analyze provisions of the SPDs" to "determine whether they are ambiguous." App. 57a. The district court further explained that "[t]o determine whether a welfare benefit plan provides for vested benefits, the [c]ourt applies general principles of contract construction." *Id.* at 56a.

The district court then applied those "general principles," including that "the [c]ourt must read the SPDs as a whole" (*id.* at 70a-71a & 78a); that its interpretation should not render SPD provisions "meaningless and * * * without effect" (*id.* at 71a); that SPD language "must be read in the context" in which it appears (*id.* at 86a); that "*if* the language is ambiguous * * * the [c]ourt consider[s] extrinsic evidence" (*id.* at 56a (emphasis added)); and that "[t]he determination of whether language in a contract is ambiguous is a question of law" (*id.* at 59a). Under those principles, the district court concluded that all thirty SPDs were unambiguous. *Id.* at 58a, 71a, 78a, 87a, 89a & 93a.

Based on its holding that the SPDs were unambiguous, the district court concluded that petitioners'

alleged "course of performance" evidence was inadmissible. *Id.* at 58a. That evidence consisted largely of testimony by petitioners themselves (along with that of class member Lisa Hux and one other class member) that company employees had orally stated retiree benefits would not be terminated. C.A. App. 7362-69.[2]

9. On appeal, and after cross-motions for rehearing, the Tenth Circuit affirmed the district court's holding that the thirty SPDs created no vested benefits. App. 3a. The Tenth Circuit, like the district court, addressed two distinct issues: (1) whether the SPDs were ambiguous; and (2) whether the SPDs contained clear and express vesting language.

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[2] Although the petition refers (at 8-9) to "expert analysis in the record" offered by Gail Stygall, in fact the district court excluded that testimony. App. 59a (finding the testimony "irrelevant and unnecessary to the [c]ourt's determination"). Although Stygall is not a lawyer and admitted she was not qualified to offer legal opinions, C.A. App. 1422, she offered opinions on two issues of law—whether the SPDs were "ambiguous," and whether they were "reasonably susceptible to the reader's conclusion that lifetime benefits have been promised." App. 59a. Respondents moved the district court, under Federal Rule of Evidence 702 and *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to exclude the report and testimony of Stygall, which it did. App. 59a. Although the petition asserts (at 11) that the Tenth Circuit refused to consider the extrinsic evidence, including "'course-of-performance' evidence and the opinion of Gail Stygall," the Tenth Circuit in fact held that the district court did not abuse its discretion by excluding it. App. 20a.

10. As to the first issue, the Tenth Circuit explained: "In deciding whether an ERISA employee welfare benefit plan provides for vested benefits, we apply general principles of contract construction. In particular, the Supreme Court has directed us to interpret an ERISA plan like any contract, by examining its language and determining the intent of the parties to the contract." App. 6a (citation and internal quotation marks omitted). The court of appeals proceeded to apply these "general principles of contract construction," *ibid.*, including that an SPD must be "read in its entirety, giving effect to all its provisions," *id.* at 12a, and that the existence of ambiguity "depends on the common and ordinary meaning as a reasonable person in the position of the plan participant would have understood the words to mean." *Id.* at 9a (citation and internal quotation marks omitted).

Applying these principles, the Tenth Circuit held that all thirty SPDs were unambiguous. *Id.* at 9a ("[h]aving reviewed the SPDs in Group 1, we conclude they are not ambiguous"); *id.* at 15a ("we agree with the district court that the Group 2 SPDs unambiguously contemplate termination of the plans"); *id.* at 16a (the Group 3 SPDs "do not promise lifetime benefits" and "leave[ ] no doubt the plan could be amended or terminated at any time"); & *id.* at 19a (petitioners "wholly failed" to "identify affirmative language promising lifetime benefits" in the Group 4 SPDs). The court of appeals thus concluded that "no reasonable person in the position of a plan participant would have understood any of the language

identified by [petitioners] as a promise of lifetime health or life insurance benefits," and instead "would have understood the Plans permitted the amendments made by [respondents]." *Id.* at 19a.

Based on these conclusions, the Tenth Circuit held that: (1) "there is no ambiguity" in any of the thirty SPDs; and that (2) "the district court did not abuse its discretion by refusing to consider the extrinsic evidence [petitioners] sought to introduce, including 'course-of-performance' evidence and the opinion of Gail Stygall." *Id.* at 19a & 20a (citation and internal quotation marks omitted).

11. Specifically, as to Group 1, the Tenth Circuit first noted that each SPD contains "(1) a statement that a retiree's coverage ends upon her death and (2) a reservation of rights ('ROR') clause pursuant to which the employer reserved the right to amend or terminate the relevant plan at any time." App. 7a. Petitioners argued that the two provisions made the SPDs ambiguous, but the Tenth Circuit rejected this conclusion because "[w]hether an ERISA plan term is ambiguous depends on the common and ordinary meaning as a reasonable person in the position of the plan participant would have understood the words to mean." *Id.* at 9a (quoting *Foster* v. *PPG Indus., Inc.*, 693 F.3d 1226, 1237 (10th Cir. 2012)). As other courts of appeals have held, "plan language that arguably promises lifetime benefits can be reconciled with an ROR clause if the promise is interpreted as a qualified one, subject to the employer's reserved right to amend or terminate those benefits." *Id.* at 11a-12a

(citing cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits). With no ambiguity as to the meaning of the contract provisions, the Tenth Circuit held that "the SPDs in Group 1 cannot be interpreted to contain clear and express language promising vested lifetime benefits." *Id.* at 12a.

12. As to Group 2, the court of appeals held that "[n]othing in the provision identified by [petitioners] * * * could reasonably be construed as a promise of lifetime benefits." App. 12a. The pertinent language stated that a plan participant's life insurance "will be" equal to his active employee coverage amount subject to a 50 percent reduction "on the fifth anniversary of retirement." *Ibid.* While the Tenth Circuit noted that this provision spoke to the amount, "[i]t, in no way, speaks to the *duration* of the benefit." *Id.* at 12a-13a. Although there was no "express reservation of rights provision," the court of appeals agreed with the district court's conclusion—based upon an express termination provision—that "the Group 2 SPDs unambiguously contemplate termination of the plans." *Id.* at 13a-15a. Because there was no ambiguity in the plan language, the court noted that the "clear and express" standard could not be satisfied either. *Id.* at 15a.

13. As to Group 3, the court of appeals rejected petitioners' argument for vested benefits based on language stating that the benefits "will continue after retirement" and that retirees "will be insured." App. 15a. While noting that this language, standing alone, does not "clearly and expressly promise lifetime

benefits because it does not state that benefits will continue, unaltered, until the retiree's death," *id.* at 15a-16a, the court reviewed the SPDs as a whole and "conclude[d] the provisions address eligibility requirements and the effect of retirement on a plan participant's benefits; they do not promise lifetime benefits." *Id.* at 16a.

The Tenth Circuit went on to address the fact that the SPDs all included ROR provisions based on "business necessity." *Id.* at 16a-17a. Petitioners argued that this standard was not met because the company faced no adverse business conditions as required by a Revenue Ruling from the IRS. *Id.* at 17a. The court rejected this argument, concluding that petitioners "failed to explain how the analysis of the term 'business necessity' in the Revenue Ruling is relevant in the context of welfare benefit plans which * * * can generally be terminated 'for any reason at any time.'" *Id.* (quoting *Schoonejongen*, 514 U.S. at 78).[3]

The court concluded that the "ROR clauses at issue here are cabined only by the condition that the change in coverage be based on a business decision." *Id.* at 18a. Because the changes saved millions of dollars by avoiding the funding of duplicative benefits available to retirees through Medicare, the business

[3] The Tenth Circuit also held that this argument "was not presented to the district court and, therefore, [was] not preserved for appellate review." App. 17a.

necessity requirement was satisfied and there was no right to vested benefits. *Id.* at 18a-19a.

14. As to Group 4, petitioners argued that the SPDs conferred vested benefits because "they contain duration limits for some plan participants but not for retirees." App. 19a. The Tenth Circuit rejected this argument "because [petitioners] must identify affirmative language promising lifetime benefits and they have wholly failed to do so." *Ibid.*

15. In sum, the Tenth Circuit held that "[r]ead in context, no reasonable person in the position of a plan participant would have understood *any* of the language identified by [petitioners] as a promise of lifetime health or life insurance benefits." App. 19a (emphasis added). There was "no ambiguity that must be resolved in [petitioners'] favor" and thus extrinsic evidence was properly excluded from consideration. *Id.* at 19a-20a. Although the court of appeals reiterated its rule that "[a] plaintiff cannot prove his employer promised vested benefits unless he identifies 'clear and express language' in the plan making such a promise" (*id.* at 6a (quoting *Chiles* v. *Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996))), it applied ordinary contract interpretation principles to hold as a threshold matter that all of the SPDs at issue unambiguously permitted the employer to change or terminate the benefits at issue.

REASONS FOR DENYING THE PETITION

I. The Claimed Split Is Not Implicated By The Tenth Circuit's Decision In This Case.

Petitioners' primary argument (at 12-25) is that the Tenth Circuit's decision deepens an existing circuit split by arriving at a conclusion that would be rejected in at least five other circuits. Going beyond mere labels to the substance of those courts' analysis, however, reveals that this case would have come out the same way even in those courts. As a result, the claimed split is not implicated by this case, and the petition should be denied for that reason alone.

To be sure, the Tenth Circuit acknowledged a nearly 20-year-old reference in a Second Circuit case to a "circuit split" on the proper standard for assessing vesting language. App. 6a-7a (citing *Am. Fed'n of Grain Millers* v. *Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997)). But the court went on to cite another Second Circuit case, applying the same standard, as authority for reading the contractual language as a whole to reconcile the purported "vesting" language with the reservation of rights language. *Id.* at 11a (citing *Abbruscato* v. *Empire Blue Cross & Blue Shield*, 274 F.3d 90, 98-99 (2d Cir. 2001)). That is unsurprising because the Tenth Circuit's holding rests solidly on the lack of ambiguity in the SPDs—not merely on the lack of "clear and express" vesting language, as petitioners would have it. Because this case would come out the same under

either standard and in any circuit, the petition should be denied.[4]

A. The Circuits Cited By Petitioners As Disagreeing With The Tenth Circuit Would Nonetheless Reach The Same Result Here.

Notwithstanding petitioners' assertion (at 12) that they would have been entitled to a trial in five other Circuits—the First, Second, Seventh, Eighth, and Eleventh—all of those courts have held that plaintiffs are not entitled to a trial where, as here, the SPDs or other plan documents state that the allegedly vested benefits could be terminated. See, e.g., *Balestracci* v. *NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 233 (1st Cir. 2006); *Abbruscato*, 274 F.3d at 99; *Vallone* v. *CNA Fin. Corp.*, 375 F.3d 623, 634-35 (7th Cir. 2004); *Stearns* v. *NCR Corp.*, 297 F.3d 706, 711-12 (8th Cir. 2002); *Jones* v. *Am. Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1070-71 (11th Cir. 2004).

1. *The First Circuit*. In *Balestracci*, the First Circuit affirmed summary judgment for the employer after examining both a reservation of rights provision

[4] As evidenced by the opinion, the Tenth Circuit is not shy about recognizing when it is, in fact, widening a split among the circuits. App. 28a-29a (recognizing the circuit split on the proper construction of ERISA § 413—29 U.S.C. § 1113—implicated by the breach of fiduciary duty claim and the subject of respondents' own petition for certiorari, No. 15-244).

in the SPD and a lifetime promise of the benefit in the individualized summaries. 449 F.3d at 231-33. Though it disclaimed a "clear and express" rule, the court did not turn to extrinsic evidence or remand the issue for trial. *Ibid.* Instead, the court reconciled the two provisions by noting that the "only reasonable reading" was that "the company would provide lifetime benefits to its retirees *subject to* its reservation of the right to modify, alter, or terminate * * * coverage should future circumstances require such changes." *Id.* at 233. That is exactly the conclusion reached by the Tenth Circuit here after it applied virtually the exact same reasoning.[5]

2. *The Second Circuit*. While the Second Circuit has also disclaimed a "clear and express" rule, that court too has affirmed summary judgment for the employer on contractual vesting claims where the SPD contained "language that *both* appears to promise lifetime life insurance coverage * * * *and* clearly reserves [the] right to amend or terminate such

[5] The other First Circuit case on which petitioners rely, *Senior* v. *NSTAR Elec. & Gas Corp.*, 449 F.3d 206 (1st Cir. 2006), likewise fails to support petitioners' contention that this case would have come out differently in that circuit. *Senior* is a companion case to *Balestracci*, focusing on the same benefits in the collective bargaining context. While similarly rejecting a "clear and express rule," the First Circuit in *Senior* affirmed summary judgment for the employer based on the reservation of rights clause even though the individualized benefits summaries stated that the benefits "will be for your life." *Id.* at 223-24. There is no conflict, then, between the case at bar and either *Balestracci* or *Senior*.

coverage." *Abbruscato*, 274 F.3d at 99. "Because the same document that potentially provided the 'lifetime' benefits also clearly informed employees that these benefits were subject to modification," the Second Circuit concluded that "the language contained in the * * * SPD is not susceptible to an interpretation that promises vested lifetime life insurance benefits." *Ibid.* Again, that is the same conclusion the Tenth Circuit reached in the instant case after following virtually the same reasoning.

Similarly, in *Joyce* v. *Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999), the court held in the collective bargaining context that language stating welfare benefits "will be provided for employees receiving or becoming entitled to receive pension payments" did not create ambiguity concerning the vesting of benefits. The Second Circuit explained that language concerning the termination of the various benefits at potential future dates beyond the collective bargaining agreement could not "reasonably be read as binding [the employer] to vest the benefits at issue" because (as in the case at bar) there was only silence with regard to duration. See *ibid.* Without "language that affirmatively operates to create the promise of vesting," the Second Circuit declined to read such a promise into the agreement. *Id.* at 135. The court reasoned that the "absence of language in the [agreement] flatly *rejecting* the concept of vesting does not alter the retirees' failure to identify language that affirmatively operates to imply vesting." *Ibid.*

3. *The Seventh Circuit*. The Seventh Circuit has repeatedly held, in a series of cases not cited in the petition, that defendants are entitled to judgment as a matter of law on contractual vesting claims where, as here, the pertinent documents state that welfare benefits are subject to termination.[6]

To be sure, as the petition points out (at 15), the Seventh Circuit has addressed the various analytical difficulties in adjudicating contractual vesting claims. The key point, though, is that a plaintiff in the Seventh Circuit still must show ambiguity in the *language* of the agreement before extrinsic evidence can be used to support a finding of vested benefits. See *Rossetto* v. *Pabst Brewing Co.*, 217 F.3d 539, 544 (7th Cir. 2000). In *Rossetto*, the plaintiffs sued their former employer for benefits that terminated along with the collective bargaining agreement that

[6] See *Sullivan* v. *CUNA Mut. Ins. Soc'y*, 649 F.3d 553, 557-58 (7th Cir. 2011) (affirming summary judgment for the employer on retirees' contractual vesting claims); *Vallone*, 375 F.3d at 634-35 (affirming summary judgment for the employer on retirees' contractual vesting claims and stating that "when 'lifetime' benefits are granted by the same contract that reserves the right to change or terminate the benefits, the 'lifetime' benefits are not vested"); *UAW* v. *Rockford Powertrain, Inc.*, 350 F.3d 698, 700, 703-05 (7th Cir. 2003) (affirming summary judgment for the employer on retirees' contractual vesting claims); see also *Senn* v. *United Dominion Indus.*, 951 F.2d 806, 816 (7th Cir. 1992) (reversing judgment for retirees on their contractual vesting claims and stating that "[i]t requires more than a statement in a [collective bargaining agreement] that welfare benefits 'will continue' to create an ambiguity about vesting").

conferred them. The Seventh Circuit recognized that its "en banc decision in *Bidlack* [v. *Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993)] established a presumption that an employee's entitlement to such benefits expires with the agreement creating the entitlement, rather than vesting, but the presumption can be knocked out by a showing of genuine ambiguity, either patent or latent, *beyond silence*." *Id.* at 543 (emphasis added).

The court remanded the case for trial in *Rossetto*, but only because there was a rare "latent ambiguity"—i.e., objectively ambiguous evidence outside the contract language that does *not* include the evidence petitioners proffered here, i.e., "the self-serving testimony of one party to the contract as to what the contract, clear on its face, 'really' means, contrary to what it seems to mean." *Id.* at 545-46. Petitioners did not argue to the district court in this case that any SPD involved latent ambiguity. Indeed, the word "latent" appeared nowhere in their brief opposing respondents' motion. See C.A. App. 7321-7407.

4. *The Eighth Circuit.* Like the Seventh Circuit, the Eighth Circuit has repeatedly held, in a series of cases not cited in the petition, that defendants are entitled to judgment as a matter of law on contractual vesting claims where, as here, the pertinent documents state that welfare benefits are subject to termination.

Thus in *Stearns*, 297 F.3d at 711-12, the Eighth Circuit affirmed summary judgment for the employer

on the retirees' contractual vesting claims, stating that "[w]e have repeatedly held that an unambiguous reservation-of-rights provision is sufficient without more to defeat a claim that retirement welfare plan benefits are vested." See also *Hughes* v. *3M Retiree Med. Plan*, 281 F.3d 786, 792-93 (8th Cir. 2002) (affirming summary judgment for the employer on retirees' contractual vesting claims); *Crown Cork & Seal Co.* v. *Int'l Ass'n of Machinists & Aerospace Workers*, 501 F.3d 912, 917-19 (8th Cir. 2007) (affirming summary judgment for the employer on union's contractual vesting claims); *Howe* v. *Varity Corp.*, 896 F.2d 1107, 1108 & 1110 (8th Cir. 1990) (reversing district court's order granting preliminary injunction in most retirees' favor on their contractual vesting claims and holding that district court's consideration of extrinsic evidence was improper where plan document reserved the right to amend or terminate the plan).

The Eighth Circuit's decision in *Howe* illustrates the lack of any meaningful (much less outcome-affecting) difference between the Eighth Circuit's approach and that of the Tenth Circuit in this case. The Eighth Circuit reasoned in *Howe* that "the mere fact that employee welfare benefits continue in retirement does not indicate that the benefits become vested for life at the moment of retirement." 896 F.2d at 1110. Without a "vesting point" indicated in the agreement, there was no ambiguity as to vesting even in the face of statements indicating that the benefits would continue. *Ibid.*

The Eighth Circuit also noted that *Anderson* v. *Alpha Portland Indus.*, 836 F.2d 1512, 1518 (8th Cir. 1988)—another case not cited in the petition—held that the plaintiffs' burden of proving vested welfare benefits "was not met by the employer's promise to provide welfare benefits 'until death of retiree' where the employer had expressly reserved the right to terminate or amend the plan." *Howe*, 896 F.2d at 1109. The Eighth Circuit would thus reach the same conclusion as the Tenth Circuit under the facts presented here.

5. *The Eleventh Circuit.* Like the other circuits discussed above, the Eleventh Circuit would have decided this case no differently than the Tenth Circuit did. In a case not cited in the petition, the Eleventh Circuit in *Alday* v. *Container Corp. of Am.*, 906 F.2d 660, 666 (11th Cir. 1990), affirmed the district court's holding that extrinsic evidence was inadmissible to construe the terms of an SPD that, like the SPDs at issue here, reserved the employer's right to amend or terminate the retiree health insurance plan. And the two cases petitioners cite from the Eleventh Circuit do not help them.

First, in *Jones*, the Eleventh Circuit granted summary judgment to the *employer* on retirees' claims for contractually vested life insurance benefits in a case materially indistinguishable from the one at bar. 370 F.3d at 1071. In *Jones*, the pertinent SPDs contained termination provisions and one version contained a reservation of rights provision. *Id.* at 1067. The SPDs also stated that employees could

"keep all or some of your Group insurance" and "will continue to be covered after they reach age 65 or retire for the full amount of insurance in effect immediately before retirement." *Id.* at 1070. Using traditional rules of contractual interpretation—even in a circuit that follows petitioners' preferred approach of applying *contra proferentem* to resolve ambiguities in ERISA-governed plans—the court held for the employer on the ground that "the Plan is unambiguous and precludes vesting of the retiree group life benefit." *Id.* at 1070-71.

Second, in *Stewart* v. *KHD Deutz of Am. Corp.*, 980 F.2d 698, 702-03 (11th Cir. 1993), the Eleventh Circuit's decision turned on the interpretation of a phrase that appears nowhere in the thirty SPDs at issue in this case—i.e., that "extended coverage * * * shall be provided at the following levels * * * * During Retirement."

In sum, petitioners are unable to show that the case at bar would come out differently even in those circuits that have purportedly adopted petitioners' preferred standard. Instead, every circuit petitioners cite as being in conflict with the Tenth Circuit would, like the Tenth Circuit, (1) give effect to provisions expressly stating that the benefits can be changed or terminated, and (2) harmonize any alleged vesting provisions by reading them together with the reservation of rights clauses or termination provisions. Because the claimed split is not implicated by this case, the petition should be denied. Any conflict in the applicable standard can be resolved in a case, unlike

this one, where the conflict is outcome-determinative and the issue is cleanly presented.

B. The Legal Analysis Applied By "Clear-Statement" Circuits In These Cases Does Not Conflict With That Applied By Circuits On The Other Side Of Petitioners' Claimed Split.

Petitioners assert (at 24) that "the fate of contractual-vesting claims currently depends on the circuit in which they are decided." Petitioners thus argue that claims like theirs would survive summary judgment in the five circuits discussed above, but not in the six circuits (including the Tenth Circuit) that purportedly apply a clear-statement rule. *Id.* at 24-25. In fact, claims like petitioners would not survive summary judgment in *any* circuit—including those circuits petitioners identify as applying a clear-statement rule. More to the point, the legal analysis actually applied to similar facts by the courts identified by petitioners as applying a clear-statement rule does not materially differ from petitioners' proposed approach. So the petition should be denied for that reason, too.

1. *The Third Circuit*. In *In re Unisys Corp. Retiree Medical Benefits "ERISA" Litigation*, 58 F.3d 896, 904 (3d Cir. 1995), the Third Circuit held that an SPD containing both a reservation of rights clause and language indicating that the benefits would be provided for the "lifetime" of the beneficiary was not

ambiguous (and therefore could not have been construed using extrinsic evidence even in a court that had rejected a clear-statement rule): "An employer who promises lifetime medical benefits, while at the same time reserving the right to amend the plan * * * has informed plan participants of the time period during which they will be eligible to receive benefits *provided* the plan continues to exist." *Ibid.*

Petitioners' citation of *Lettrich* v. *J.C. Penney Co.*, 90 F. App'x 604, 610 (3d Cir. 2004) (per curiam), similarly fails to evidence any real conflict. The court in that case, too, harmonized the alleged vesting provision by reading it together with the express termination clause that immediately followed it. *Ibid.* The Third Circuit explained that "*a cursory contextual analysis of [the] plan document* discloses that J.C. Penney did not intend to confer unalterable and irrevocable rights on its employees. This is evident because the plan document * * * reserved its right as the employer to terminate the Plan altogether." *Ibid.* (emphasis added).

2. *The Fourth Circuit*. In *Gable* v. *Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994), the Fourth Circuit affirmed summary judgment for the employer on retirees' contractual vesting claims by holding that the "express reservation of the company's right to modify or terminate the participants' benefits is plainly inconsistent with any alleged intent to vest those benefits," and that "the modification clause, standing alone, is more than sufficient to defeat plaintiffs' claim that the company provided vested

benefits." *Id.* at 856. Again, that analysis is no different from that applied in the circuits petitioners cite on the other side of the split—and certainly no different from that applied by the Tenth Circuit in this case.

3. *The Fifth Circuit*. This court, too, has recognized that "[t]he strong weight of authority throughout the circuits indicates that, in the area of welfare benefits * * * a general amendment provision in a welfare benefits plan is of itself sufficient to unambiguously negate any inference that the employer intends for employee welfare benefits to vest contractually." *Spacek* v. *Maritime Ass'n*, 134 F.3d 283, 293 (5th Cir. 1998), abrogated on other grounds, *Cent. Laborers Pension Fund* v. *Heinz*, 541 U.S. 739 (2004). The court in *Spacek* reversed summary judgment in favor of the retiree and remanded the case for entry of judgment in favor of the defendants, holding that the plan's amendment provision barred the retiree's claim for vested benefits. *Id.* at 294 & 299. See also *Wise* v. *El Paso Natural Gas Co.*, 986 F.2d 929, 937-38 (5th Cir. 1993) (affirming summary judgment for employer on retirees' contractual vesting claims based on SPD language stating that employer could amend or terminate benefits).

4. *The Sixth Circuit*. In *Sprague* v. *General Motors Corp.*, 133 F.3d 388, 401-02 (6th Cir. 1998), the *en banc* Sixth Circuit embraced a clear-statement rule, but nevertheless held that the district court properly granted summary judgment to the employer on retirees' contractual vesting claims where "[m]ost

of the [SPDs in question] unambiguously reserved [the employer's] right to amend or terminate the plan" and "[n]either the * * * plan itself nor any of the various summaries of the plan states or even implies that the plaintiffs' benefits were vested." Similarly, in *Sengpiel* v. *B.F. Goodrich Co.*, 156 F.3d 660 (6th Cir. 1998), the Sixth Circuit affirmed summary judgment for the employer on the retirees' contractual vesting claims, notwithstanding SPD language stating that "if you retire and are eligible for a pension you shall continue to have the same health coverage," because "such language neither expressly guarantees lifetime benefits *nor creates an ambiguity as to whether such benefits are vested*." *Id.* at 668 (emphasis added).

5. *The Ninth Circuit*. The Ninth Circuit affirmed summary judgment for an employer on the retirees' contractual vesting claims where the pertinent plan document "includes no vesting language and instead provides that the policy is terminable by the employer at any time." *Cinelli* v. *Sec. Pac. Corp.*, 61 F.3d 1437, 1441 (9th Cir. 1995). The court held in *Cinelli* that "[b]ecause the Plan contains no ambiguity as to the employer's right to terminate the Supplemental Plan, extrinsic evidence may not be used to alter the written terms of the plan." *Id.* at 1444.

In sum, even courts that according to petitioners have adopted a clear-statement rule actually apply, in practice, a legal analysis that is not materially different from that applied on similar facts by courts in which petitioners nonetheless insist they would have

prevailed. This can be seen in the way that courts on one side of the purported circuit split repeatedly cite with approval cases on the other side of the split to support their holdings on contractual vesting.[7]

As the discussion above demonstrates, to the extent that the circuits are split with regard to the proper standard for analyzing contractual vesting claims, that split is not implicated in this case. On the facts presented here, the circuits are uniform.

II. The Tenth Circuit's Decision Is Consistent With This Court's Precedent And Correct.

Even if the petition implicated a circuit split on the question answered by the Tenth Circuit—which it does not—the Tenth Circuit's decision is entirely

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[7] For example, the First Circuit in *Balestracci* cited with approval the Fourth Circuit's decision in *Gable* (see 449 F.3d at 232-33, citing 35 F.3d at 856); the Second Circuit in *Abbruscato* cited with approval the Sixth Circuit's decision in *Sprague* (see 274 F.3d at 99, citing 133 F.3d at 401); and the Eleventh Circuit in *Jones* cited with approval the Third Circuit's decision in *Unisys* and the Sixth Circuit's decision in *Sprague* (see 370 F.3d at 1070, citing 58 F.3d at 903-04 & 133 F.3d at 401). Likewise, the Third Circuit in *Unisys* cited with approval the Eighth Circuit's decision in *Anderson* and the Eleventh Circuit's decision in *Alday* (see 58 F.3d at 904, citing 836 F.2d at 1518 and 906 F.2d 660); the Fourth Circuit in *Gable* cited with approval the Eighth Circuit's decision in *Howe* (see 35 F.3d at 856-57, citing 896 F.2d at 1109); and the Fifth Circuit in *Spacek* cited with approval the Eighth Circuit's decision in *Howe* and the Eleventh Circuit's decision in *Alday* (see 134 F.3d at 294, citing 896 F.2d at 1108-10 and 906 F.2d at 665).

consistent with this Court's precedent and correctly applies ordinary contract interpretation principles. Petitioners' request for mere error correction should therefore be denied.

Most recently, this Court in *Tackett* elucidated the principles that courts should apply in construing language claimed to promise unalterable, contribution-free health-care benefits in collective bargaining agreements. These principles include:

- Enforcing contract provisions "as written," a principle that is "especially appropriate when enforcing an ERISA [welfare benefits] plan." *Tackett*, 135 S. Ct. at 933 (alteration in original) (quoting *Heimeshoff*, 134 S. Ct. at 611-12).
- Rejecting durational silence as sufficient to support vested benefits. *Id.* at 936 (citing and quoting 3 A. Corbin, Corbin on Contracts § 553, p. 216 (1960) (for the proposition that "contracts that are silent as to their duration will ordinarily be treated not as 'operative in perpetuity' but as 'operative for a reasonable time'")).
- Requiring a "clear manifestation of intent" to vest a benefit or obligation. *Ibid.* (citation and internal quotation marks omitted).

The Tenth Circuit's conclusion that the language at issue here unambiguously does not vest benefits is consistent with those principles.

Particularly instructive here is the contrast *Tackett* drew between the principles of contract interpretation that the Sixth Circuit purported to apply in construing ERISA plans within and outside the collective-bargaining context (i.e., the *Yard-Man* and *Sprague* lines of cases). See *Tackett*, 135 S. Ct. at 937. In *Sprague*, the *en banc* Sixth Circuit recognized that "[b]ecause vesting of welfare plan benefits is not required by law, an employer's commitment to vest such benefits is not to be inferred lightly; the intent to vest must be found in the plan documents and must be stated in clear and express language." 133 F.3d at 400. This Court's opinion in *Tackett* cited *Sprague* and quoted the above language in a parenthetical as standing for the proposition that "[t]he different treatment of these two types of employment contracts only underscores *Yard-Man*'s deviation from ordinary principles of contract law." *Tackett*, 135 S. Ct. at 937.[8]

This Court stated in *Tackett* that "when a contract is silent as to the duration of retiree benefits, a

[8] It is difficult to square petitioners' contention (at 23) that requiring "clear and express" language conflicts with *Tackett* and operates as an impermissible "thumb on the scale" in favor of employers given the Court's approving citation and quotation of *Sprague*. To the extent petitioners rely on the *Tackett* concurrence, that reliance is misplaced for at least two reasons. First, the unanimous opinion of the Court, not the concurrence, is controlling here. See *Marks* v. *United States*, 430 U.S. 188, 193 (1977). Second, because the SPD language at issue here was held to be unambiguous, any disagreement in *Tackett* between the opinion of the Court and the concurrence concerning the proper approach to ambiguous language is not implicated here.

court may not infer that the parties intended those benefits to vest for life." *Ibid.* As the Tenth Circuit held in this case, the SPDs in three of the four groups are, at best, silent on the duration of retiree benefits. See App. 12a-13a (alleged vesting provision in Group 2 SPDs "in no way * * * speaks to the *duration* of the benefit"); *id.* at 15a-16a (Group 3 SPDs do "not state that benefits will continue, unaltered, until the retiree's death"); *id.* at 19a (Group 4 SPDs include no "affirmative language promising lifetime benefits"). *Tackett* thus supports the Tenth Circuit's refusal to infer that the benefits described in those SPDs were vested. There is no daylight—much less any conflict—between the Tenth Circuit's decision in this case and the *Tackett* principles.

There is, in fact, no conflict between the *Tackett* principles and requiring a clear and express statement of intent to vest benefits. Such a requirement is analytically no different from "rules" applied in other contracting contexts. For example, this Court has recognized as "accepted with virtual unanimity among American jurisdictions" that "a contractual provision should not be construed to permit an indemnitee to recover for his own negligence" unless such intention "appear[s] with clarity from the face of the contract." *United States* v. *Seckinger*, 397 U.S. 203, 211-12 (1970). Similarly, "precise language" is required to evidence "a 'clear intent' to rebut the presumption that [third parties] are merely incidental beneficiaries" of government contracts. See, e.g., *Orff* v. *United States*, 358 F.3d 1137, 1147 n.5 (9th Cir. 2004). In

certain contexts, then, "something like a 'clear statement' rule is merely normal interpretation." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29 (1997) (observing in the context of statutory construction that "[s]ome of the rules, perhaps, can be considered merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway").

Petitioners cite this Court's statement in *Tackett* that "a court may look to known customs or usages in a particular industry to determine the meaning of a contract." Pet. 27-28 (quoting *Tackett*, 135 S. Ct. at 935). But petitioners neglect to mention that this Court also explained that in *Yard-Man*, which *Tackett* overruled, there was "no record evidence indicating that employers and unions in that industry customarily vest retiree benefits." *Tackett*, 135 S. Ct. at 935. Although petitioners assert (at 27-28) that they presented such evidence "in spades," they in fact presented no evidence that companies like respondents "customarily vest retiree benefits," and the only evidence in the record was to the contrary. See C.A. App. 2683 (citing study showing that 85 percent of companies like respondents provided no life insurance coverage to retirees).

Petitioners rely heavily (at 25-27) on *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548-49 (2013), both (1) to disparage a requirement of a clear and express statement to vest benefits, and (2) to open the door to considering extrinsic evidence even where (as here) the language is not ambiguous. But

McCutchen does not help petitioners. To be sure, this Court said that "a court must often 'look outside the plan's written language' to decide what an agreement means." *Id.* at 1549 (quoting *CIGNA Corp.* v. *Amara*, 131 S. Ct. 1866, 1877 (2011)). But this Court was not referring to extrinsic evidence. The very next sentence states that "[i]n undertaking that task, a court properly takes account of background legal rules—the doctrines that typically or traditionally have governed a given situation when no agreement states otherwise." *Ibid.* Thus, if anything, *McCutchen* cuts against petitioners' argument that default principles are somehow inherently improper. Parties remain free to contract around those rules by adding an "*express* contract term." *Ibid.* (emphasis added). *McCutchen* did not open the door to the consideration of extrinsic evidence in every case. It recognized the danger of ignoring default rules when construing contractual language because doing so "is likely to frustrate the parties' intent and produce perverse consequences." *Id.* at 1549.

Petitioners' argument (at 30-32) that a clear and express rule somehow violates ERISA's remedial purpose misunderstands the congressional scheme. As this Court has explained, "although ERISA imposes elaborate minimum funding and vesting standards for pension plans, it explicitly exempts welfare benefits plans from those rules." *Tackett*, 135 S. Ct. at 933 (citations omitted). As a result, "employers have large leeway to design disability and other welfare plans as they see fit." *Nord*, 538 U.S. at 833. And

"focus[ing] on the written terms of the plan is the linchpin of a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [welfare benefits] plans in the first place." *Tackett*, 135 S. Ct. at 933 (alteration in original) (quoting *Heimeshoff*, 134 S. Ct. at 612).

A rule that "focuses on the written terms of the plan" by requiring clarity when employers make commitments that ERISA does not require can hardly be said to thwart congressional purpose. Such a rule would further, rather than thwart, the goal of making sure each "participant knows exactly where he stands with respect to the plan." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 118 (1989) (citation omitted). And after all, ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993).[9]

While one may debate the extent to which *Tackett requires* a clear-statement rule, the debate is academic in this case because the Tenth Circuit's decision did not turn on such a rule. In affirming summary judgment for respondents, the Tenth

[9] The controlling "background legal rule" that governs vesting of welfare benefits "when no agreement states otherwise" is that an employer is free "for any reason at any time, to adopt, modify, or terminate welfare plans." *Schoonejongen*, 514 U.S. at 78.

Circuit held *both*: (1) that the SPDs unambiguously permitted retiree benefits to be amended or terminated; and (2) that the SPDs did not contain clear and express vesting language. The first ruling (like the second) is a holding (not dicta) because it was essential to the court's determination that extrinsic evidence was inadmissible to construe the SPDs. See *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("where a decision rests on two or more grounds, none can be relegated to the category of obiter dictum"). In reaching its first holding, the Tenth Circuit stated it was applying general principles of contract interpretation, and then did so.

To convince this Court that the outcome of the case nevertheless depends on the question they present, petitioners assert (at 20) that the Tenth Circuit's contractual analysis was "tainted" by the clear-statement rule. According to petitioners (at 11), this "taint" exists because the Tenth Circuit based its first holding on the second. Petitioners have it backwards. The Tenth Circuit's "no clear and express language" holding follows ineluctably from its "no unambiguous language" holding, not the other way around:

> [W]hen each SPD in Group 1 is read in its entirety, giving effect to all its provisions, it unambiguously explains to retirees that they will continue to receive life insurance benefits unless the terms of the plan are changed prior to their death. Accordingly, the SPDs in Group 1 cannot be interpreted to contain

> clear and express language promising vested lifetime benefits.

App. 12a; see also *id.* at 12a-19a (conducting similar analysis of SPDs in Groups 2-4). As the Tenth Circuit determined, if an SPD is unambiguous and cannot reasonably be construed to promise vested benefits, then it cannot be construed as containing language that clearly and expressly promises vested benefits.

Contrary to petitioners' assertions (at 11, 20-25), the Tenth Circuit explicitly based its determination that the SPDs are unambiguous on ordinary principles of contract interpretation—in particular, the principle that SPDs should be interpreted as a reasonable plan participant would have understood them. App. 19a. Petitioners are thus left to seek error correction, but there is no error to correct. The petition should be denied.

III. The Question Presented Is Of Limited And Fading Importance, And This Case Would Be A Poor Vehicle For Addressing It.

Petitioners' assertions (at 2 & 32) that "the question presented is of profound importance to the Nation's workforce," and that its resolution will have "a profound impact on the national economy," are wildly overblown. Resolution of the question presented by petitioners will not even impact the parties to this case, much less the Nation's workforce or the national economy. As demonstrated above, no matter how that

question is answered, the outcome of this case will remain unchanged.

Nor will resolution of the question presented by petitioners matter in the overwhelming majority of pending and future contractual vesting cases. In 2001 the Department of Labor issued a regulation that requires an SPD to "include a summary of any plan provisions governing the authority of the plan sponsors or others to terminate the plan or amend or eliminate benefits under the plan and the circumstances, if any, under which the plan may be terminated or benefits may be amended or eliminated." 29 C.F.R. § 2520.102-3(l); see also Amendments to Summary Plan Description Regulations, 65 Fed. Reg. 70,226 (Nov. 21, 2000) (announcing inclusion of this disclosure requirement effective January 20, 2001). The vast majority of SPDs describing welfare benefit plans that have been issued in the past 15 years, and that will be issued hereafter, include reservation of rights provisions that comply with this regulation. Because even circuits that have rejected a clear-statement rule give effect to such provisions, resolving the question presented by petitioners is of limited and diminishing importance.

What is more, the Tenth Circuit's opinion in this case contains no analysis of the question presented by petitioners. If that question is truly important and recurring, this Court can and should wait to consider it in a case where the court of appeals has directly addressed it. Here, however, the court of appeals' resolution of the case did not turn on the question

presented by petitioners, so the resolution of that question by this Court even in petitioners' favor would not affect the outcome of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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