No. 17-515

IN THE

Supreme Court of the United States

CNH INDUSTRIAL N.V., ET AL.,
Petitioners,

v.

JACK REESE, ET AL.,
Respondents.

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

MOTION AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN BENEFITS COUNCIL, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2(b) of the Rules of this Court, the Chamber of Commerce of the United States of America (the "Chamber"), the National Association of Manufacturers ("NAM"), American Benefits Council (the "Council"), and the Business Roundtable move this Court for leave to file the attached brief in support of Petitioners.

All parties were timely notified of *amici*'s intent to file the attached brief as required by Rule 37.2(a). Petitioners have filed a blanket consent to the filing of *amicus curiae* briefs with the Clerk. Respondents, however, declined to consent to this filing.

In this case, the Sixth Circuit declined to adhere to the ordinary principles of contract interpretation this Court previously held should apply to determine whether retiree health benefits are vested. In so doing, the Sixth Circuit created an intra- and inter-circuit split and introduced untenable confusion into the law of retiree health benefits. If let stand, the Sixth Circuit's decision will make it impossible for employers and employees to meaningfully bargain or reliably plan for the future. Employers and retirees will both suffer as a result. The rule of law will suffer, too, as the Sixth Circuit's outlier rule will create strong incentives for forum shopping.

As described more fully in the accompanying brief, *amici* are four organizations whose members are deeply interested in the subject matter of this petition. *Amici*'s members have experience with both collectively bargained and non-collectively bargained

benefit plans across different industries, locations, and time periods. Retiree healthcare benefits are an important part of those plans and are often a major expense to employers. It is important to *amici*'s members that clear legal standards govern contractual provisions for such benefits. The Sixth Circuit's decision, if left in place, could disrupt the provision of retiree health benefits nationwide, which could have serious adverse effects for *amici*'s members.

Amici can thus bring an important perspective to the issues before this Court. Accordingly, *amici* respectfully request that leave to file the attached brief in support of the petition for certiorari be granted.

Respectfully submitted,

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INTERESTS OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all fifty states. Manufacturing employs more than twelve million men and women, contributes $2.7 trillion annually to the American economy, has the largest economic impact of any major sector, and accounts for three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM

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[1] *Amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties in this case received notice of the intention to file this brief at least 10 days before its due date. Petitioners have filed a blanket consent to the filing of *amicus curiae* briefs with the Clerk, and Respondents declined to consent to *amici*'s filing.

regularly files amicus briefs in cases that raise issues important to manufacturers.

American Benefits Council (the "Council") is a national nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large multistate U.S. employers that provide employee benefits to active and retired workers and their families. The Council's membership also includes organizations that provide employee benefit services to employers of all sizes. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering virtually all Americans who participate in employer-sponsored benefit programs.

The Business Roundtable is an association of chief executive officers who collectively manage more than 16 million employees and $7 trillion in annual revenues. The association was founded on the belief that businesses should play an active and effective role in the formation of public policy. It participates in litigation as amicus curiae in a variety of contexts where important business interests are at stake.

Amici have a strong interest in the outcome of this case. *Amici*'s members have experience with both collectively bargained and non-collectively bargained benefit plans across different industries, locations, and time periods. Retiree healthcare benefits are an important part of those plans and are often a major expense to the employer. It is important to *amici*'s members that clear and reliable legal standards govern contractual provisions for such benefits. Moreover, the decision of the U.S.

Court of Appeals for the Sixth Circuit in this case, if left in place, has the potential to disrupt the provision of retiree health benefits nationwide.

INTRODUCTION

This case implicates an issue of extraordinary importance to the nation's business community and workforce: retiree health benefits. In *M&G Polymers USA LLC v. Tackett*, 135 S. Ct. 926 (2015), this Court attempted to bring much-needed clarity and uniformity to the interpretation of retiree health-benefit plans by unanimously rejecting the Sixth Circuit's *Yard-Man* rule, which had improperly "plac[ed] a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements." *Id.* at 935 (discussing *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)). Just two years later, the Sixth Circuit—in the decision below and a companion opinion issued the same day—has reintroduced untenable confusion and conflict in this area of law. In effect, it is *Yard-Man* all over again.

Employers and employees cannot meaningfully bargain or reliably plan for the future in the chaotic legal landscape the Sixth Circuit has created. The massive unexpected costs and unpredictable benefits packages that will result (and, indeed, have already resulted) hurt employers and retirees alike. Flexible benefits packages are, more and more, an attractive option for both sides, as they allow leeway to accommodate changing regulatory regimes and medical technology. And the Sixth Circuit's effective presumption in favor of vested, frozen-in-time benefits makes it more difficult for parties to achieve the flexibility they intended. Moreover, the Sixth Circuit's outlier rule will undoubtedly result in large-scale forum shopping.

This case is a good vehicle for taking up the question presented and restoring the stability *Tackett*

had created. The Court should grant the petition for a writ of certiorari.

ARGUMENT

I. THE SIXTH CIRCUIT'S DECISION RE-INTRODUCED CONFUSION AND CONFLICT INTO THE LAW OF RETIREE HEALTH BENEFITS.

1. *Tackett* held that ordinary principles of contract interpretation govern the question whether collective bargaining agreements and associated benefit plans provide for vested, lifetime benefits. *See* 135 S. Ct. at 930. That ruling reinforced the status quo in all circuits save the Sixth, which had previously applied an interpretive methodology specific to retiree health benefits—the *Yard-Man* presumption—wherein vesting of benefits was presumed absent express indications to the contrary. *Id.* at 935. "A contract [that] is silent as to the duration of retiree benefits," the Court explained, cannot be construed as promising vested benefits for life. *Id.* at 937. Moreover, the Court made clear that the use of the future tense, without more, does not indicate an intent to vest. *See id.* And it specifically rejected the notion "that the tying of eligibility for health care benefits to receipt of pension benefits suggested an intent to vest health care benefits." *Id.*

2. The Sixth Circuit at first seemed to have learned its lesson, applying these principles faithfully in *Gallo v. Moen, Inc.*, 813 F.3d 265 (6th Cir. 2016). But on April 20, 2017, the Sixth Circuit simultaneously issued three retiree-health-benefit opinions, of which only one, *Cole v. Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017), applied anything like the

interpretive principles *Tackett* endorsed. In the other two decisions—the decision below and *UAW v. Kelsey-Hayes Co.*, 854 F.3d 862 (6th Cir. 2017)—the Sixth Circuit reverted to the days of *Yard-Man* by jettisoning the ordinary principles of contract interpretation in favor of an *ad hoc*, retiree-health-benefit-specific methodology that once again makes vesting the default rule in all but name. The court, in Judge Sutton's words, thereby "abrad[ed] an inter-circuit split (and an intra-circuit split) that the Supreme Court [had] just sutured shut." Pet. App. 28 (Sutton, J., dissenting).

Of course, "[a]n intra-circuit split accompanied by an inter-circuit divide followed by lack of conformity to a Supreme Court decision normally warrants en banc review." *UAW v. Kelsey-Hayes Co.*, No. 15-2285, slip op. at 4 (6th Cir., Sept. 22, 2017) (Sutton, J., concurring in denial of rehearing). But the Sixth Circuit declined to take that course—at least in part because there appears to exist no majority to support any outcome. *See id.*

3. The unclear and internally contradictory principles embraced by the majority below—particularly in conjunction with the other opinions issued the same day—have deeply unsettled retiree health benefits nationwide. As Petitioners explain at length, the Sixth Circuit's "post-*Tackett* case law is a mess," and the decision below is "in irreconcilable conflict" with other Sixth Circuit decisions, other circuits' jurisprudence, and *Tackett* itself. *Kelsey-Hayes*, No. 15-2285, slip op. at 5, 6 (Griffin, J. dissenting from denial of rehearing); *see* Pet. 12–25. As a result, neither employers nor retirees can predict the outcome of future cases, leaving retiree

health benefits in a state of limbo that—given the Sixth Circuit's apparent inability to course correct—only this Court can redress.

II. THIS CONFUSION AND CONFLICT WILL HURT EMPLOYERS AND RETIREES ALIKE.

Unless this Court intervenes, the confusion and conflict created by the decision below will wreak havoc for entities and individuals on both sides of the benefits bargaining table. These consequences will be particularly severe with respect to companies that operate across multiple jurisdictions.

1. On the employers' side, interpreting a collective bargaining agreement or benefits plan to provide for vested, lifetime benefits when the parties did not actually agree to that result imposes a massive and unanticipated financial burden. The costs—for which employers neither bargained nor would rationally have prepared—can easily exceed hundreds of millions of dollars. *See, e.g., Wood v. Detroit Diesel Corp.*, 607 F.3d 427, 429 (6th Cir. 2010) (CEO testified that vested retiree health liabilities "could have bankrupted the company by rendering it unable to obtain capital"). Those numbers will only continue to rise as the population of retirees grows and the costs of healthcare increase. *See* 2010 Census Briefs, *The Older Population: 2010*, https://www.census.gov/prod/cen2010/briefs/c2010br-09.pdf (finding that "more people were 65 years and over in 2010 than in any previous census" and that "the population 65 years and over [has] increased at a faster rate (15.1 percent) than the total U.S. population (9.7 percent)"); PricewaterhouseCoopers,

Medical Cost Trend: Behind the Numbers 2018, https://www.pwc.com/us/en/health-industries/health-research-institute/behind-the-numbers/reports/hri-behind-the-numbers-2018.pdf (highlighting long-term trend of rising healthcare costs and explaining that "growth in employer premiums is still outpacing wage growth, making benefit costs unsustainable in the long run").

These costs affect not only companies' cashflow, but also their balance sheets. Employers, after all, are required to "reflect on their balance sheets the present value of the estimated future costs for retirees' medical benefits." *Wise v. El Paso Nat. Gas Co.*, 986 F.2d 929, 932 (5th Cir. 1993). Merely calculating such liability with any degree of certainty will be extraordinarily difficult in light of the Sixth Circuit's muddled jurisprudence. Moreover, if companies must assume the Sixth Circuit's effective presumption in favor of vesting will apply, the consequences to their books could be massive. *See, e.g., UAW v. Gen. Motors Corp.*, No. 05-CV-73991-DT, 2006 WL 891151, at *3 (E.D. Mich. Mar. 31, 2006) (noting that, in 2004, General Motors reported $77 billion of "Accumulated Projected Benefit Obligations," of which $61 billion was attributable to union retirees).

Those numbers matter. In particular, booking significant retiree health insurance liability hurts companies' credit and market value. *See, e.g., Int'l Union, UAW v. Chrysler LLC*, No. 07-CV-14310, 2008 WL 2980046, at *5-*6 (E.D. Mich. July 31, 2008) (finding that Chrysler's obligations to pay retiree health benefits "adversely affect[ed] [its] creditworthiness" and "limit[ed] the company's access

to unsecured capital resources, substantially contributing to [its] precarious financial condition").

2. Lack of predictability will hurt retirees and current employees, too. Retirees, for their part, stand to lose all or most of their benefits if unanticipated retiree healthcare costs force their former employers out of business. *See Wood*, 607 F.3d at 429 (citing testimony that deeming retiree health benefits to be vested for life could be bankrupting).

Current employees, in the short term, may face lowered wages, lost hours, or even termination, as companies are forced to cut costs to pay for unanticipated healthcare costs. *See* U.S. Social Security Administration, *The Unsustainable Cost of Health Care*, p. 9 (September 2009), http://purl.access.gpo.gov/GPO/LPS118647 ("In the long run, most of the impact of rising health care costs on employers can be shifted to their workers by reducing wage growth, hiring fewer workers, or hiring more part-time workers who are typically not eligible for health insurance coverage."). In the long term, current employees may not even be offered retiree health benefits, as employers will be less willing to provide such benefits if the governing contract terms can be judicially expanded. *Cf. Moore v. Metro. Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir. 1988) ("Predictability as to the extent of future obligations would be lost, and, consequently, substantial disincentives for even offering such plans would be created."). That result would undermine one of ERISA's primary purposes—*i.e.*, to "induc[e] employers to offer benefits by assuring a *predictable* set of liabilities." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (emphasis added).

3. Companies that operate across multiple jurisdictions, and employees and retirees thereof, will be hit the hardest. That is because the Sixth Circuit's divergence from its sister circuits could yield "a patchwork of different interpretations of a [single] plan"—with benefits deemed vested for life in one jurisdiction and subject to modification in others. *Conkright v. Frommert*, 559 U.S. 506, 517 (2010). Such inconsistent plan interpretation "would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Id.*

III. FLEXIBILITY IN RETIREE HEALTH BENEFITS SERVES BOTH COMPANIES AND EMPLOYEES.

The Sixth Circuit's reversion to *Yard-Man* makes it more difficult for companies and employees to choose flexible health-benefit plans that, very often, maximize utility for all involved.

1. It perhaps goes without saying that healthcare and health insurance are subject to a complex and ever-changing regulatory regime. The Patient Protection and Affordable Care Act, 124 Stat. 119, for example, radically reshaped the health insurance market after "a long history of failed health insurance reform." *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). Further regulatory evolution, in one form or another, appears all but inevitable. *See, e.g.,* Shelby Livingston, *Insurers Won't Commit to 2018 Exchanges Until They Know ACA's Future*, MODERN HEALTHCARE, *available at*

http://www.modernhealthcare.com/article/20170203/NEWS/170209984 (Feb. 3, 2017) (noting that even health insurers lack "an inkling of what the future holds for the health insurance landscape").

2. At the same time, there continues to be "remarkable growth in modern life-saving and comfort-improving medical procedures, devices and drugs." *Reese v. CNH Am. LLC*, 694 F.3d 681, 683 (6th Cir. 2012). But these advancements often come at a cost, with new and improved treatment options offered at higher prices than old ones. *See* Institute of Medicine and National Research Council, MEDICAL INNOVATION IN THE CHANGING HEALTHCARE MARKETPLACE 15 (2002), *available at* https://www.nap.edu/read/10358/chapter/5 (finding that "technological change has been the largest single driver of growth in health care spending over the past 50 years"); Merrill Goozner, *High-Tech Medicine Contributes to High-Cost Health Care*, Kaiser Health News, https://khn.org/news/ft-health-care-high-tech-costs (Feb. 15, 2010) ("The U.S. leads the world in creating state-of-the-art diagnostic and therapeutic treatments with the potential to work miracles in millions of patients. But the miracles come at a stiff price.").

3. The combination of these factors—complex regulatory change and scientific advancement—means that decades-old benefits packages may be ill-suited to employers' or retirees' needs. Companies, on the one hand, "want the freedom to change health-insurance plans" to account for new regulatory strictures and coverage options, as well as changed cost considerations. *Reese*, 694 F.3d at 684. Retirees, on the other, "want coverage to account for new and

better, yet likely more expensive, procedures and medications than the ones in existence at retirement." *Id.*

The unsurprising result of these aligned interests has been a nationwide trend away from vested, "one size fits all" benefit plans and toward more individualized and flexible retiree health coverage—including through plans offered through private exchanges. *See, e.g.*, Frank McArdle et al., *Retiree Health Benefits at the Crossroads*, http://goo.gl/HXZt5z (Apr. 14, 2014). These kinds of arrangements can maximize utility for both sides, allowing the parties to account both for changing regulatory environments and for changing health technology.

4. The confusion sown by the decision below threatens to impose a rigid, frozen-in-time benefits regime on parties who thought they had agreed to a more flexible one. Indeed, when ordinary principles of contract interpretation are cast aside and "silence" creates sufficient ambiguity to find vesting, Pet. App. 12, confusion is the inevitable result.

IV. THE SIXTH CIRCUIT'S DECISION CREATES STRONG INCENTIVES FOR FORUM SHOPPING.

If all of that were not bad enough, the circuit split created by the decision below will invite forum shopping, creating incentives for retirees and unions nationwide to bring their claims to the Sixth Circuit.

1. This Court has consistently recognized, in myriad contexts, that forum shopping is a serious threat to the rule of law. *See, e.g., Williams-Yulee v.*

Florida Bar, 135 S. Ct. 1656, 1672 (2015) (rejecting a judicial recusal rule "that would enable transparent forum shopping"); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1969 (2014) ("The federal limitations prescription governing copyright suits serves . . . to prevent the forum shopping . . . ."); *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 583 (2013) (explaining that federal venue statute "should not create or multiply opportunities for forum shopping"); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (characterizing "discouragement of forum-shopping" as one of "the twin aims of the Erie rule").

2. Forum shopping is especially problematic in this context, as liberal venue provisions afford retirees and unions significant flexibility to seek out favorable forums in disputes about retiree health benefits. *See* LMRA § 301(a), 29 U.S.C. § 185(a) (granting venue "in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties"); ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) (granting venue "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found").

3. That flexibility made the Sixth Circuit a magnet for retiree-health-benefit litigation during the *Yard-Man* era. *Cf., e.g.,* Jeffrey S. Klein & Nicholas J. Pappas, *Recent Developments in Retiree Health Benefits Litigation*, N.Y.L.J., June 5, 2006, at 3 (noting that, during the *Yard-Man* period, vesting cases were dependent not only on the facts of the case "but also on the governing judicial precedent in the jurisdiction where the case [was] filed"); Michael S.

Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees*, 5 DEPAUL BUS. L.J. 139, 161 (1993) (highlighting possibility of races to the courthouse across different jurisdictions). In this very case, for example, the retirees sued in the Eastern District of Michigan notwithstanding that CNH had no employees or facilities within the Sixth Circuit. Pet. 25. The reason is not difficult to surmise: The retirees, like those in myriad other retiree-benefit cases, preferred the Sixth Circuit's "thumb on the scale" approach to the neutral, contract-based approach applied in other circuits.

4. In *Tackett*, the Court attempted to put an end to forum shopping in this area by restoring a single, predictable rule of law for retiree health benefits. But the Sixth Circuit has again created a circuit split. *See* Pet. App. 36 (Sutton, J., dissenting) (lamenting that the Sixth Circuit is now, "again, . . . out of step" with its sister circuits). Left uncorrected, the second *Yard-Man* era heralded in by the decision below will undoubtedly return the Sixth Circuit to its former status of "venue of choice" for retirees and unions seeking the benefit of a more favorable bargain than the one they actually struck.

V. THIS CASE IS A GOOD VEHICLE.

This case is an ideal vehicle for addressing these issues. There are no apparent vehicle flaws, the decision below turned on broad legal principles rather than on arcane plan terms, and granting this petition would allow the Court to resolve this issue before the end of this Term.

1. The petition has no apparent vehicle flaws. It squarely raises the question presented on a full and unusually well-developed record. *See* Pet. 25–26.

2. The majority's decision rests on sweeping pronouncements of law that are irreconcilable with *Tackett* and the law of other circuits. Not least, the majority held that courts may find ambiguity (1) from "silence" alone, Pet. App. 12, (2) from the mere fact that benefits are provided "past the date of retirement," *id.*, and (3) from "pension tying," *id.* at 13. These broadly applicable principles—rather than any unique facets of the agreements at issue—controlled the outcome of the case below.

Moreover, the plan terms on which the majority relied are likely to recur in nearly every retiree-health-benefits case. Benefits will be provided "past the date of retirement," Pet. App. 11, by definition, in literally every such case. Recent decisions from this Court and the Sixth Circuit make clear that "pension tying"—*i.e.*, conditioning eligibility for health benefits on eligibility for a pension—is very common, too. *See, e.g., Tackett*, 135 S. Ct. at 937 (citing tying language in the agreements at issue); *Gallo v. Moen Inc.*, 813 F.3d 265, 272 (6th Cir. 2016) (same); *Serafino v. City of Hamtramck*, No. 16-2370, 2017 WL 3833206, at *8 (6th Cir. Sept. 1, 2017) (same).

3. Furthermore, this petition is on track to be considered and decided this Term. And the importance of quickly clearing up this confusion can hardly be overstated. Waiting an additional year would impose further uncertainty costs on employers and employees. It would also create massive inefficiencies for lower courts.

Indeed, there are multiple cases currently pending in the Sixth Circuit alone (including *Tackett* itself) that present the question whether retiree healthcare benefits are vested for life—some of which have already been up and down on appeal in the wake of *Tackett*. *See, e.g., Tackett v. M & G Polymers USA, LLC*, 811 F.3d 204 (6th Cir. 2016) (remanding to the district court for further proceedings after this Court's decision); *Cole v. Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017) (remanding for further proceedings); *IUE-CWA v. Gen. Elec. Co.*, No. 4:15-CV-2301, 2017 WL 3219728 (N.D. Ohio July 28, 2017) (appeal pending); *Zino v. Whirlpool Corp.,* No. 5:11-CV-1676, 2017 WL 3219830, at *4 (N.D. Ohio July 27, 2017) (appeal pending); *Fletcher v. Honeywell Int'l, Inc.*, 238 F. Supp. 3d 992 (S.D. Ohio 2017) (appeal pending); *Cooper v. Honeywell Int'l, Inc.*, No. 1:16-CV-471, 2017 WL 213997 (W.D. Mich. Jan. 6, 2017) (appeal pending); *Watkins v. Honeywell Int'l, Inc.*, No. 3:16-CV-01925, 2016 WL 7325161 (N.D. Ohio Dec. 16, 2016) (appeal pending); *Kerns v. Caterpillar Inc.*, 144 F. Supp. 3d 963 (M.D. Tenn. 2015) (further district court proceedings pending).

In each of these cases, lower courts would benefit from prompt guidance. There is simply no reason to require courts to attempt to apply the Sixth Circuit's tangled jurisprudence and undergo yet another round of rebriefing and appeals in the event that the Court delays a year or more before taking up this question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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