No. 15-241

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

REPLY BRIEF FOR PETITIONERS

ALAN M. SANDALS
SANDALS & ASSOCIATES, P.C.
One South Broad Street
Suite 1600
Philadelphia, PA 19107
(215) 825-4000

RICHARD T. SEYMOUR
LAW OFFICE OF RICHARD T. SEYMOUR, PLLC
Suite 900, Brawner Building
888 17th Street, N.W.
Washington, D.C. 20006
(202) 785-2145

DAVID C. FREDERICK
Counsel of Record
JOSHUA D. BRANSON
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

November 9, 2015

(Additional Counsel Listed On Inside Cover)

MARY C. O'CONNELL
DOUTHIT FRETS ROUSE
GENTILE & RHODES, LLC
5250 W. 116th Place
Suite 400
Leawood, Kansas 66211
(913) 387-1600

DIANE A. NYGAARD
KENNER NYGAARD DEMAREA
KENDALL LLC
117 West 20th Street
Suite 201
Kansas City, MO 64108
(816) 531-3100

STEWART W. FISHER
GLENN, MILLS, FISHER
& MAHONEY, P.A.
Post Office Drawer 3865
Durham, NC 27702
(919) 683-2135

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND REGULATIONS

OTHER MATERIALS

An acknowledged circuit conflict exists on the standard for determining when employees have a contractual right to vested, post-retirement health and life-insurance benefits under ERISA. In the Tenth Circuit (and five others), employees have no such right unless their employer says so in "clear and express" language. Five circuits, by contrast, have repudiated that rule as incompatible with ordinary principles of contract law. That conflict is entrenched, important, and worthy of review.

Rather than contest the conflict's existence, respondents (the "Companies") argue primarily (at 14) that it "is not implicated by this case." Yet the Companies do not dispute that the decision below cited the clear-and-express-language rule at the very outset, recognized the "circuit split," App. 6a, and then invoked that rule six more times in the next 14 pages, App. 6a-19a. Nor do they dispute that the clear-and-express-language rule here barred claims based on summary plan descriptions ("SPDs") that "purport[ed] to promise lifetime benefits," App. 71a, including some with no "'express reservation of rights provision'" at all, App. 13a (quoting App. 72a). The cases the Companies cite – which concern broad, categorical reservation-of-rights clauses within SPDs that are far less ambiguous than the ones here – merely illustrate the conflict petitioners identify.

At bottom, then, the Companies' various arguments about the facts of this case provide no reason to deny certiorari. Those arguments, which lack merit in all events, would be better addressed on remand. In the meantime, this Court should grant certiorari, resolve the circuit conflict, and reject the clear-and-express-statement rule.

DISCUSSION

I. THE DECISION BELOW WIDENS AN ACKNOWLEDGED CIRCUIT CONFLICT

The decision below recognized that its legal rule implicates a "circuit split on the summary judgment standard for contractual vesting." App. 6a-7a. The Companies do not seriously dispute that conflict's existence, but rather argue primarily (at 14) that "this case would have come out the same way" under a different rule. That argument is unpersuasive.

A. The Circuits Employ Conflicting Interpretive Rules In ERISA Contractual-Vesting Cases

The circuits themselves recognize that they employ conflicting rules of plan construction in contractual-vesting cases. *See Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 230 (1st Cir. 2006) ("[T]here is substantial disagreement among the courts . . . about whether ambiguous plan language may support . . . [a] promise[] to vest ERISA welfare plan benefits."). The Companies likewise admit that many circuits reject the clear-and-express-language rule applied by the decision below. *E.g.*, Opp. 16 (First Circuit "disclaimed a 'clear and express' rule"; "Second Circuit has also disclaimed a 'clear and express' rule"); Opp. 18 (Seventh Circuit allows plaintiffs a trial based on "ambiguity" in plan language). As the Companies observe, courts began taking note of that conflict nearly 20 years ago. *See* Opp. 14 (citing *American Fed'n of Grain Millers, AFL-CIO v. International Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997)).

The Companies' half-hearted attempt to downplay that conflict is at odds with their own counsel's prior statements to this Court. *See* Pet. for a Writ of Cert. at 10, *M&G Polymers USA, LLC v. Tackett*, No. 13-

1010 (U.S. filed Feb. 20, 2014) ("*Tackett* Pet.") ("[t]he circuits have long been divided on how to determine whether health-care benefits for retirees have vested"). As the Companies' counsel previously explained in *Tackett*, the clear-and-express-language rule constitutes a "presumption against [vesting]" that the "Second and Seventh Circuits (among others)" have "reject[ed]." *Id.* at 3; *see id.* at 21 (arguing that conflict extends "to both collective bargaining agreements and ERISA plans"). This case thus offers a "badly needed" opportunity to address what the Companies' counsel called a "hodgepodge of legal rules and dueling presumptions" applicable to contractual-vesting claims. *Id.* at 24.[1]

The Court should not allow that conflict to fester merely because the Companies speculate (at 14) that this case might "come out the same way" under a different rule. After all, the same was true in *Tackett*: there, the Court granted certiorari and reversed simply because the Sixth Circuit's interpretive rule departed from "ordinary principles of contract law." 135 S. Ct. 926, 937 (2015). It remained unclear, and this Court did not decide, whether the outcome would differ "under the correct legal principles." *Id.*; *see* Corrected Br. of Plaintiffs-Appellees at 35-54, *Tackett v. M&G Polymers USA, LLC*, No. 12-3329 (6th Cir. filed June 4, 2015), 2015 WL 3575484 (arguing on remand that the outcome should remain the same). That approach reflects this Court's broader practice

---

[1] *Tackett* itself involved contractual-vesting claims based solely on collective-bargaining agreements. Although the Companies' counsel asserted a conflict with respect to ERISA plan documents and urged certiorari on that basis too, *see Tackett* Pet. 17-22, the Court limited its review (in accordance with *Tackett*'s facts) to the *Yard-Man* presumption in the collective-bargaining context. *See* Pet. 18 n.9.

in ERISA cases. The Court routinely resolves legal conflicts over ERISA without addressing whether its holding should change the outcome of the case before it,[2] and it should follow that practice here. Whatever happens on remand, the undisputed conflict over the Tenth Circuit's legal rule merits this Court's review.

B. This Case Well-Illustrates The Conflict

In any event, the decision below hinged on the clear-and-express-statement rule. Pet. 20-25. The Tenth Circuit began by reciting the clear-and-express-language rule as the law of the circuit, App. 6a, and it invoked that rule seven total times in a span of 14 pages discussing petitioners' arguments, App. 6a-19a. The court's reasoning, read in its entirety, leaves no doubt that the clear-and-express-language rule supplied the bedrock legal principle on which the rest of its contractual analysis rested. Thus, when the court ultimately stated that "no reasonable person" could have understood petitioners' SPDs "as a promise of lifetime . . . benefits," App. 19a, it did so only because it had already used the clear-and-express-language rule to construe those SPDs as a matter of law. Pet. 10-11, 20-21.

The Companies' suggestion (at 34) that the decision below construed the SPDs independently of the clear-and-express-language rule lacks merit. In fact, the Tenth Circuit's analysis tracks the reasoning this

---

[2] *See*, *e.g.*, *Tibble v. Edison Int'l*, 135 S. Ct. 1823, 1828 (2015) ("after the Ninth Circuit considers trust-law principles, it is possible that it will" reach the same result); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2473 (2014) (allowing "courts below to apply" the Court's holding "in the first instance"); *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1882 (2011) ("Whether or not the general principles we have discussed above are properly applicable in this case is for [the courts below] to determine in the first instance.").

Court found worthy of review in *Tackett*. There, the Sixth Circuit (much like the Companies here) characterized the decision below as resting on "the language of the CBA" and "traditional rules of contract interpretation." *Tackett v. M&G Polymers USA, LLC*, 733 F.3d 589, 599-600 (6th Cir. 2013). But this Court granted review because the Sixth Circuit, while "purport[ing] to apply" ordinary contract law, had "cited" its *Yard-Man* presumption and "framed its analysis from beginning to end in light of the principles it announced in *Yard-Man*." *Tackett*, 135 S. Ct. at 934, 937 (citing *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)). The same is true here: whatever else the Tenth Circuit said about the SPDs, it "framed its analysis from beginning to end in light of" the clear-and-express-language rule. *Id*. As in *Tackett*, the taint created by that legal error warrants certiorari.

The Companies' response (at 27) that the "circuits are uniform" "[o]n the facts presented here" is incorrect and, in any event, provides no reason to deny certiorari. The cases the Companies cite (at 14-27) hold merely that contractual-vesting claims fail where a plan document contains "'an *unambiguous* reservation-of-rights provision.'" Opp. 19-20 (quoting *Stearns v. NCR Corp.*, 297 F.3d 706, 712 (8th Cir. 2002)) (emphasis added). Indeed, "[a]ll courts agree" on what to do when "a document unambiguously indicates whether retiree medical benefits are vested." *Multifoods*, 116 F.3d at 980.[3] But that is not the

[3] That is why courts sometimes "cite with approval cases on the other side of the split." Opp. 27 & n.7. When an SPD is unambiguous under ordinary contract principles, the clear-and-express-language rule makes no difference to the outcome. *See*, *e.g.*, *Abbruscato v. Empire Blue Cross & Blue Shield*, 274

question at issue here. Rather, petitioners seek review of a different question on which "the circuits disagree": how to identify and construe ERISA plan language that is "ambiguous as to whether retiree medical benefits are vested." *Id.*; *see Abbruscato*, 274 F.3d at 97-98 (vacating summary judgment where "reservation of rights clause" did not "*unambiguously* reserve[] [the employer's] right to reduce" benefits).

This case falls into that latter category. The reservation-of-rights clauses here, when interpreted under the proper legal framework, are hardly unambiguous. Pet. 22-23. The clauses in Groups Three and Four, for example, allowed the Companies to terminate benefits "for reasons of business necessity or financial hardship." Pet. 6-7. The Companies cite no case holding the phrase "business necessity or financial hardship" to be unambiguous under the proper standard, and for good reason: that phrase is likely to strike "average plan participant[s]" as limited to situations of demonstrable "financial distress, such as bankruptcy." C.A. App. 8102; *see* Pet. 9 n.2.[4] That is a far cry from the broader, categorical clauses featured in the cases the Companies cite. *See*, *e.g.*, *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 636 (7th

---

F.3d 90, 99 (2d Cir. 2001) (citing Sixth Circuit case regarding *unambiguous* SPD language).

[4] The Companies note (at 8 n.2) that the courts below excluded Professor Stygall's report analyzing the SPDs' language. But the Tenth Circuit affirmed the "refus[al] to consider" Professor Stygall's report for the same reason as with all other "extrinsic evidence": because it had already used the clear-and-express-statement rule to construe the SPDs as a matter of law. App. 20a. Without that threshold error, the report would have been admissible. *See*, *e.g.*, *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 537 (9th Cir. 1990) (expert testimony admissible to address how ERISA plan language is "commonly understood").

Cir. 2004) ("'The coverages described in this Guide may be amended, revoked or suspended at the Company's discretion at any time, even after your retirement.'") (cited at Opp. 18 n.6).[5] Although the Companies suggest that lower courts approach *those* clauses similarly, their cases confirm that the circuits rejecting the clear-and-express-statement rule would have come out differently than the decision below. *See Stearns*, 297 F.3d at 712 ("[i]f a reservation-of-rights provision is facially ambiguous, or if it conflicts with other plan provisions, the court . . . may look at extrinsic evidence"); Pet. 13-17, 20-25 (noting reversals of summary-judgment orders).[6]

The Companies' attempt to downplay the conflict is even weaker as to the Group Two SPDs. As both

---

[5] Many of those clauses contrast sharply with the narrow reservation language found in Groups Three and Four. *See*, *e.g.*, *Balestracci*, 449 F.3d at 227, 233 (noting reservation-of-rights clause stating "'[t]he Company reserves the right to change and terminate coverage for current and former employees at any time,'" and invoking extrinsic evidence of "[t]he past practice of the company" to "confirm[] our conclusion") (cited at Opp. 15-16); *Stearns*, 297 F.3d at 711-12 (discerning no "affirmative indication of vesting" that could "overcome" the employer's "unambiguous reservation of rights" clause) (cited at Opp. 19-20); *Jones v. American Gen. Life & Accident Ins. Co.*, 370 F.3d 1065, 1067 (11th Cir. 2004) (noting reservation-of-rights clause stating "'the Company . . . reserve[s] the right to amend or terminate the Plan at any time'") (cited at Opp. 21-22).

[6] Similarly, circuits rejecting the clear-and-express-statement rule would recognize the ambiguity presented by the conflict between the Group One SPDs' general reservation-of-rights clauses and their separate statements that retirees' benefits end only "when you die." Pet. 5-6, 21-22. Under ordinary contract principles, that conflict should be resolved by extrinsic evidence. *See Barker v. Ceridian Corp.*, 122 F.3d 628, 635 (8th Cir. 1997) ("conflict between" vesting language and "reservation of rights clause" created ambiguity).

courts below noted, those SPDs contain no "'express reservation of rights provision.'" App. 13a (quoting App. 72a). Rather, they state that coverage "under the Group Policy will end on . . . the date the Group Policy terminates." C.A. App. 1842. The Tenth Circuit's grant of summary judgment on the basis of a statement so vague – in which "the possibility of change is announced in the passive voice," *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 308 (7th Cir. 1996) – exemplifies the circuit conflict. The Companies cite no case suggesting that such language could warrant summary judgment without the thumb on the scale supplied by the clear-and-express-language rule.

Precedent in the Second Circuit confirms that conclusion. *See Karl v. Asarco Inc.*, No. 02 Civ. 5565(GBD), 2004 WL 2997872 (S.D.N.Y. Dec. 23, 2004). In *Karl*, the court interpreted an SPD substantially similar to the ones in Group Two here, which stated "Your coverage under the Plan terminates when . . . [t]he Group Policy terminates." *Id.* at *4. The defendants, like the Companies here, argued that language "vitiate[d]" any inference of vesting. *Id.* The court, however, applied the "standard set by the Second Circuit" and held that provision "does not unconditionally reserve the defendants' right to unilaterally terminate the plan." *Id.* at *4-5. Under the Second Circuit's rule, summary judgment was inappropriate because the SPD "could be reasonably interpreted as creating a promise . . . to vest plaintiff's life insurance benefits." *Id.* at *4. Had the Tenth Circuit followed the Second Circuit's rule rather than the clear-and-express-language rule, it too would have denied summary judgment.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

The clear-and-express-language rule is the mirror image of the *Yard-Man* presumption this Court rejected last Term. Pet. 25-30. That rule, like the *Yard-Man* presumption, construes vesting language based not on "record evidence" about the "parties' intention," but on an artificial legal construct "far removed from the context of any particular contract." *Tackett*, 135 S. Ct. at 935. Indeed, the Companies' counsel has rightly called the clear-and-express-statement rule a "presumption against vesting." *Tackett* Pet. 7; *see id.* at 14-15, 21. A presumption *against* vesting is just as inconsistent with traditional contract-law principles as was the presumption *of* vesting this Court invalidated. *See Tackett*, 135 S. Ct. 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 Companies' attempt (at 27-35) to reconcile the decision below with *Tackett* is unpersuasive. They rely mainly (at 29-30) on *Tackett*'s citation to a Sixth Circuit case applying the clear-and-express-statement rule to "noncollectively bargained contracts." 135 S. Ct. at 937 (citing *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc)). But that citation was not an endorsement of the clear-and-express-statement rule, which (unlike the *Yard-Man* presumption) was not directly before this Court. Rather, the Court used that citation to illustrate the Sixth Circuit's "different treatment" of "two types of employment contracts," *id.* – *i.e.*, that it applied the *Yard-Man* presumption to collectively bargained contracts but the opposite clear-and-express-language presumption to ERISA plan

documents. Those two conflicting rules, this Court explained, merely "underscore[d] *Yard-Man*'s deviation from ordinary principles of contract law." *Id.* As the balance of the opinion made clear, those ordinary principles are likewise incompatible with the artificial clear-and-express-language rule. Pet. 29-30.

The remainder of the Companies' arguments merely "debate the extent to which *Tackett* requires a clear-statement rule." Opp. 33 (emphasis omitted). Those arguments are better suited for merits briefing and provide no reason to deny review. At any rate, they do not support grafting a clear-and-express-statement rule onto ERISA's protective scheme. Although the Companies cite (at 30-31) rules from "other contracting contexts," none construes ambiguity (as the clear-and-express-language rule does) in favor of the drafting party. Such a rule conflicts with the "general maxim that a contract should be construed most strongly against the drafter." *United States v. Seckinger*, 397 U.S. 203, 210 (1970). It also frustrates ERISA's pro-disclosure policies and departs from traditional trust-law principles, as the Companies cannot persuasively dispute. Pet. 30-32.

III. THE QUESTION PRESENTED WARRANTS REVIEW

The decision below raises questions of profound "'importance to the financial security of the Nation's work force.'" Pet. 32 (quoting *Boggs v. Boggs*, 520 U.S. 833, 839 (1997)). Although the Companies call (at 35) that "wildly overblown," they cite the same case – for basically the same point – in support of their own petition. *See* Pet. for a Writ of Cert. at 21, *Embarq Corp. v. Fulghum*, No. 15-244 (U.S. filed Aug. 25, 2015) (citing *Boggs* and emphasizing "the centrality and importance of ERISA and its protec-

tions"). As the Companies observe, "[r]etiree-benefit plans are increasingly subject to litigation" and implicate "billions of dollars and thousands of jobs." *Id.*

The SPD disclosure regulation the Companies invoke (at 36) does not suggest otherwise. That regulation does not require employers to adopt reservation-of-rights provisions. *See* 29 C.F.R. § 2520.102-3(*l*) (requiring summary of authority, "if any," to reduce benefits). The Companies thus can cite no evidence that the "vast majority of SPDs" now include such provisions, Opp. 36, or that new SPDs will no longer present contract-interpretation issues. Indeed, a proliferation of reservation-of-rights clauses would only heighten the importance of the question presented. *See supra* pp. 5-8; *see also*, *e.g.*, *Merrill v. Briggs & Stratton Corp.*, No. 10-cv-700, 2015 WL 5172943, at *8-9 (E.D. Wis. Sept. 2, 2015) ("plaintiffs are entitled to a trial" under Seventh Circuit's rule where extrinsic evidence revealed "latent ambiguity" despite "reservation of rights language").

Nor does the Tenth Circuit's failure to "analy[ze] . . . the question presented," Opp. 35-36, support denying certiorari. The decision below lacked such analysis because the Tenth Circuit had already adopted the clear-and-express-language rule in a prior opinion. App. 6a (citing *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996)). Because virtually every circuit has now addressed this issue, *see* Pet. 12-19, future cases will likely follow the same pattern. This case thus offers an ideal opportunity for the Court to resolve the conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN M. SANDALS
SANDALS & ASSOCIATES, P.C.
One South Broad Street
Suite 1600
Philadelphia, PA 19107
(215) 825-4000

RICHARD T. SEYMOUR
LAW OFFICE OF RICHARD T. SEYMOUR, PLLC
Suite 900, Brawner Building
888 17th Street, N.W.
Washington, D.C. 20006
(202) 785-2145

MARY C. O'CONNELL
DOUTHIT FRETS ROUSE GENTILE & RHODES, LLC
5250 W. 116th Place
Suite 400
Leawood, Kansas 66211
(913) 387-1600

DAVID C. FREDERICK
Counsel of Record
JOSHUA D. BRANSON
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@khhte.com)

DIANE A. NYGAARD
KENNER NYGAARD DEMAREA KENDALL LLC
117 West 20th Street
Suite 201
Kansas City, MO 64108
(816) 531-3100

STEWART W. FISHER
GLENN, MILLS, FISHER & MAHONEY, P.A.
Post Office Drawer 3865
Durham, NC 27702
(919) 683-2135

November 9, 2015