No.

In the Supreme Court of the United States

BARBARA FLETCHER, *et al.*,
Petitioners,

v.

HONEYWELL INTERNATIONAL INC.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

William Wertheimer
Law Office of
William Wertheimer
2018 North Lakeshore
Carsonville, MI 48419
(248) 396-2125
billwertheimer@gmail.com

Stuart M. Israel
Counsel of Record
John G. Adam
Legghio & Israel, P.C.
306 South Washington
Suite 600
Royal Oak, MI 48067
(248) 398-5900
israel@legghioisrael.com
jga@legghioisrael.com

Counsel for Petitioners

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Fletcher v. Honeywell International Inc., 892 F.3d 217 (6th Cir. 2018) holds that a "CBA's general durational clause applies to [retiree] healthcare benefits unless it contains clear, affirmative language indicating the contrary." *Fletcher* holds that courts may not consider "extrinsic" trial evidence of the parties' intentions even though the CBA—read "naturally"—is "arguably" ambiguous, "implies" healthcare until the retiree's "death," and explicitly promises to continue healthcare for the retiree's survivors' "lifetime."

Fletcher's reluctant concurring judge recognizes that the Honeywell CBAs are "ambiguous" on "their face" and require consideration of "extrinsic evidence" to "ascertain the intent of the parties"—but that Sixth Circuit decisions "preclude" this.

Fletcher raises these questions warranting review under S.Ct.Rules 10(a) and (c):

1. **whether** *Fletcher* conflicts with *CNH Industrial v. Reese*, 138 S.Ct. 761 (2018) and other Supreme Court decisions holding that obligations outlasting CBA expiration may be "implied" and with the Seventh Circuit holding that lifetime retiree healthcare obligations do not require "'magic words' or unequivocal contract language";

2. **whether** *Fletcher* applies an anti-vesting presumption which conflicts with *M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926 (2015), which abrogated all presumptions regarding collectively-bargained retiree healthcare as violating "ordinary contract principles";

3. **whether** *Fletcher* ignores "federal common law" patent and latent ambiguity principles, in conflict with Third and Seventh Circuit fringe-benefit decisions;

4. **whether** *Fletcher* elevates judicial suppositions over due process required by Rule 12(b)(6); and

5. **whether** *Fletcher*'s "new heightened standard" again warrants "exercise of this Court's supervisory power" where Sixth Circuit judges write that the Circuit's post-*Tackett* retiree healthcare decisions cause "contradiction and confusion in an area of the law that demands consistency and clarity"; that despite *Tackett*'s direction that "the parties' intentions control," the Circuit has "installed duration clauses as the new absolute determiner of intent, regardless of the actual intent of the parties"; and that the Circuit's "jurisprudential path" since *Tackett* "should sit uneasily with all of us."

PARTIES TO THE PROCEEDING

In addition to **(1)** retiree Barbara Fletcher, named in the caption, the parties include retirees **(2)** Timothy Philpot, **(3)** Marcia Fink, and **(4)** Lucinda Smith, individually and for a similarly-situated class totaling about 500 people. Fletcher, Philpot, Fink, and Smith were appellees and are petitioners.

Appellant and respondent is Honeywell International Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioners Fletcher, Philpot, Fink, and Smith are individuals. All are retirees from the Greenville, Ohio oil filter plant and members of the class they represent, which consists of similarly-situated individuals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Petitioners Fletcher, Philpot, Fink, and Smith, for themselves and a similarly-situated class, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The June 8, 2018 Court of Appeals opinion is *Fletcher v. Honeywell International Inc.*, 892 F.3d 217 (6th Cir. 2018) (App. 1-23).

The July 12, 2018 Court of Appeals order denying rehearing *en banc* is App. 92-93.

The August 8, 2018 Court of Appeals order staying the mandate pending this petition is App. 94-95.

The district court's February 28, 2017 post-trial judgment for petitioners is 238 F.Supp.3d 992 (S.D. Ohio 2017) (App. 24-61).

The district court's November 15, 2016 opinion denying respondent's dismissal motion and petitioners' summary judgment motion is App. 62-91.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §1254(1).

The Sixth Circuit opinion issued June 8, 2018. (App. 1). The Sixth Circuit denied *en banc* rehearing on July 12, 2018. (App. 92).

STATUTORY PROVISIONS

Employee Retirement Income Security Act (ERISA) Section 2(b), 29 U.S.C. §1001(b), in part:

> [It is ERISA] policy…to protect…the interests of participants in employee benefit plans and their beneficiaries…by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

ERISA Section 502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), in part:

> A civil action may be brought—(1) by a participant or beneficiary…(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

Labor-Management Relations Act (LMRA) Section 301(a), 29 U.S.C. §185(a), in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in his chapter…may be brought 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.

STATEMENT OF THE CASE

The plaintiff-class includes about 500 retirees and surviving spouses. The retirees worked at the Greenville, Ohio oil filter plant owned by Honeywell and its predecessors. They retired under collective bargaining agreements ("CBAs") negotiated by their union—United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW")—and its predecessor.

In the article titled *Health and Retirement Benefits*, each governing CBA promises "medical" for retirees and each retiree's "spouse and dependent children." (See App. 73-75).

Under the sub-heading *Pension Plan Benefits*, each CBA promises that upon retirement, Honeywell "will continue to pay the full cost of medical for the retiree" and "50% [later 60%] of the cost of the dependent portion of retiree health care" and that Honeywell will provide "reimbursement" of "Medicare Part B or C premiums for Early, Normal, and Disability retirees."

Under the sub-heading *Health Care Benefits*, each CBA promises: "Upon the death of a retiree, the Company will continue coverage for the spouses and dependent children for their lifetime."

Honeywell sold the plant in 2011 and the UAW-Honeywell collective-bargaining relationship ended. After the sale and the relationship ended, and after the last CBA expired by its terms in 2014, Honeywell still continued healthcare for all who retired before June 2012.

1.

In 2015, *Tackett* "completely upended the way that [the Sixth] Circuit interprets the vesting of benefits in collective-bargaining agreements." (App. 22).

Honeywell wrote to retirees and surviving spouses on December 28, 2015 that it would "terminate the retiree medical and prescription drug coverage currently provided to you and your covered dependents as of December 31, 2016."

The retirees sued for CBA breach and ERISA violation, alleging each retiree "earned lifetime healthcare coverage and benefits by working for decades at the Greenville plant."

2.

Honeywell filed a Rule 12(b)(6) dismissal motion. The retirees filed a Rule 56 summary judgment motion. The district court denied both motions. (App. 62).

The district court found it "undisputed that Honeywell contractually agreed to provide retiree healthcare benefits." The court found "the parties explicitly agreed" to "lifetime" healthcare for "surviving spouses and dependents" upon each retiree's "death." The court found the CBA promises create a "very strong inference" that the parties "intended to vest lifetime healthcare benefits in the retirees themselves." (App. 80).

But the district court found—"[h]aving examined the entire agreement, and applied ordinary contract principles"—both sides "offered reasonable interpretations of the relevant terms." The court found

the CBAs "ambiguous concerning the parties' intent to vest lifetime retiree healthcare benefits." The court ordered trial. (App. 87).

3.

The district court conducted the trial on January 30 and 31, 2017. The court heard testimony from eight witnesses, four called by the retirees and four by Honeywell:

by the retirees

1. **Edward "Buzz" Fink** worked at the Greenville plant as an hourly employee for more than 30 years. He was a UAW Local 2413 bargainer during the 2000, 2003, 2008, and 2011 negotiations.

2. **Sharon Meadows** was a UAW benefits specialist. She was a UAW bargainer during the 2000 and 2003 negotiations.

3. **Steve Shelton** (by video deposition) was a UAW regional representative. He was a UAW bargainer during the 2000, 2003, and 2008 negotiations.

4. **Richard Hancock** (by deposition) was the human resource manager at Greenville and Honeywell's chief bargainer during the 2011 negotiations.

by Honeywell

5. **Edward Bocik** is Honeywell's vice-president of labor relations. He participated in the 1989 pre-UAW negotiations.

6. **Robert McKeage** (by video deposition) was chief Honeywell bargainer during the 2000 negotiations.

7. **Edward Thompson** (by video deposition and transcript) was a Honeywell bargainer during the 2003 and 2008 negotiations.

8. **Eric Warren** is Honeywell's director of benefits, labor, and retirement plans and attended some of the 2003 and 2008 negotiations.

The governing language originated in the 2000 CBA. Four witnesses were 2000 bargainers. Honeywell chief bargainer McKeage had no memory of the 2000 negotiations regarding retiree healthcare duration. The union bargainers—Meadows, Fink, and Shelton—testified that in 2000 Honeywell and UAW agreed to lifetime retiree healthcare. Their testimony was corroborated by the FRE 801(d)(2) admissions of the late Michael Rihm, Honeywell manager, bargainer, and signatory to the 2000 CBA.

The 2011 CBA was the last governing the Greenville plant. Honeywell manager and 2011 chief bargainer Hancock testified that Greenville employees who retired before June 2012 had healthcare benefits "until they died." (App.53).

Other trial evidence addressed Honeywell's lifetime retiree healthcare practices and performance before, during, and after the 2000, 2003, 2008, and 2011 CBAs.

The district court made detailed fact-findings and conclusions of law. (App. 30-58). Based on the evidence and credibility assessment, the court found

the retirees proved "that Honeywell agreed to provide lifetime healthcare benefits to its retirees at the Greenville, Ohio plant." (App. 58).

4.

The district court found that "Honeywell agreed to provide lifetime healthcare benefits to its retirees," that "the CBA embodies the parties' understanding that Honeywell would provide lifetime healthcare coverage for its retirees," that the 2000 bargaining history "standing alone, is more than sufficient to render judgment" for the retirees, and that "subsequent events also support a finding that Honeywell agreed to provide lifetime retiree healthcare benefits." (App. 27, 37, 45).

The district court considered the credibility of the retirees' witnesses contrasted to Honeywell's "somewhat muddy" witnesses; Honeywell's "inability to offer a reasoned explanation" for CBA terms applying "only to future retirees"; and Honeywell's "course of conduct" in continuing retiree healthcare through 2016, after 2011 when the plant sold and after the last CBA expired in 2014, performance providing "an objective manifestation" of the "parties' earlier intent to vest lifetime retiree healthcare benefits." (App. 35, 50, 55-56, 58).

The district court cited the testimony of Richard Hancock, "Honeywell's lead negotiator in 2011." The evidence proved "Hancock's understanding that retiree healthcare benefits were vested." "Hancock acknowledged that it was a lifetime benefit." (App. 52-54).

The district court entered judgment for the retirees and permanently enjoined Honeywell from ending healthcare for former union-represented Greenville employees who retired "before June 1, 2012." (App. 58).

5.

Honeywell appealed to the Sixth Circuit.

The Sixth Circuit majority found that the CBA language—that upon retirement Honeywell will "continue to pay the full cost of medical for the retiree" and "upon the death of a retiree" "will continue" healthcare for the retiree's survivors "for their lifetime"—is "arguably" ambiguous and, read "naturally," "implies" vested lifetime retiree healthcare. (App. 18-19, 36). But the majority disregarded what the CBAs imply, refused to consider the trial record, and reversed the district court.

The majority adopted "Honeywell's arguments" that the CBAs do not promise vesting although—the majority wrote—Honeywell's arguments were "highly unusual," "very strange" to the "average person," not "naturally" derived from the CBAs, and contrary to what the CBA language "implies." (App. 16, 18-19).

The majority presumed to "distill a clear rule"—that a "CBA's general durational clause applies to healthcare benefits unless it contains clear, affirmative language indicating the contrary." (App. 12).

Judge Eric Clay "reluctantly" concurred. He wrote that earlier Sixth Circuit decisions "preclude" consideration of the trial record to "ascertain the intent of the parties" even though the Honeywell CBAs "on their face" are "ambiguous." (App. 22-23).

6.

The retirees sought rehearing *en banc*, arguing that the newly-distilled *Fletcher* rule—requiring "clear, affirmative language" to show vesting—conflicts with *CNH Industrial v. Reese*, 138 S.Ct. 761 (2018), which holds that vesting obligations may be "implied."

The retirees argued, too, that *Fletcher* conflicts with other Supreme Court decisions and with *Tackett*-prescribed ordinary contract principles and federal labor law, and with federal common law ambiguity principles applied in the Third and Seventh Circuits and even—in non-CBA contexts—in the Sixth Circuit.

The Sixth Circuit denied rehearing *en banc* (App. 92), but stayed the mandate pending this certiorari petition (App. 94).

REASONS FOR GRANTING THE WRIT

M&G Polymers USA, LLC v. Tackett, 135 S.Ct. 926 (2015) abrogated the Sixth Circuit's "*Yard-Man* inference" which until then, since 1983, presumed retiree healthcare vesting.

Tackett found that the Sixth Circuit inference "violate[d] ordinary contract principles," was "too speculative" and "too far removed from the context of any particular contract," had a "shaky factual foundation," and derived from judicial "suppositions" about "likely behavior" in collective-bargaining. 135 S.Ct. at 935-936.

After *Tackett*, CBA promises are to be assessed by the "ordinary principles of contract law" consistent with "federal labor policy," without a "thumb" on either side of the scale, based on "record evidence." A court "may look to known customs or usages in a particular industry to determine the meaning" of a CBA "using affirmative evidentiary support in a given case." Ultimately, "the parties' intentions control." 135 S.Ct. at 933, 935.

Tackett also had the effect of abrogating other circuits' anti-vesting presumptions. See *Underwood v. Chicago*, 779 F.3d 461, 462-463 (7th Cir. 2015) (after *Tackett*, there are no presumptions "for or against vesting").

CNH Industrial v. Reese, 138 S.Ct. 761, 765 (2018) again reversed the Sixth Circuit, finding that a "silent" CBA had no "explicit terms, implied terms, or industry practice" to suggest "vested health care benefits for life."

1.

In *Fletcher*, the CBAs are not silent. Indeed, *Fletcher* recognized that the CBA promise—that upon retirement Honeywell "will continue to pay" the "full cost of medical for the retiree" and "upon the death of a retiree" "will continue" healthcare for the retiree's survivors "for their lifetime"—read "naturally," is "arguably" ambiguous and "implies" vested lifetime retiree healthcare. (App. 18-19).

But *Fletcher* disregarded that the CBA language implies vesting. And *Fletcher* refused to consider the trial evidence that *proves* vesting. *Fletcher* presumed to "distill a clear rule"—that a "CBA's general durational clause applies to healthcare benefits unless it contains clear, affirmative language indicating to the contrary." (App. 12).

Fletcher conflicts with *Tackett* and *Reese*, federal labor law, and the Third and Seventh Circuits, which do not require "clear, affirmative language."

2.

Fletcher is worthy of this Court's review under S.Ct.Rules 10(a) and (c) ***because*** it conflicts, on important federal questions regarding collectively-bargained retiree healthcare, with relevant decisions of this Court; ***because*** it conflicts, on important questions of federal labor law and federal common law ambiguity principles, with other circuits; ***and because*** it conflicts with the federal rules, entitling litigants to due process and their "day in court."

First, *Fletcher* conflicts with *Tackett* and *Reese*, and with the Seventh Circuit, which hold that vested

retiree healthcare obligations may be implied, that unequivocal language is not necessary, and that the parties' intentions control.

Fletcher also conflicts with federal labor policy, endorsed by *Tackett*, and specified in a half-century of Supreme Court decisions which hold that post-expiration CBA obligations may be "implied" and that "context" and the "common law" and practices of the plant and industry are "equally a part of the [CBA] although not expressed in it." (**Argument I**).

Second, *Fletcher* also conflicts with *Tackett* by doing exactly what caused this Court to abrogate the pro-vesting "*Yard-Man* inference." *Fletcher* creates an anti-vesting "clear, affirmative language" presumption, which it "distills" from its "own suppositions" about collective-bargaining—"suppositions" without "foundation," "too speculative," and "too far removed" from the parties' actual intent, here demonstrated by the CBAs' implied terms and proved at trial. (**Argument II**).

Third, *Fletcher* conflicts with federal common law ambiguity principles, applied in Third and Seventh Circuit fringe-benefit cases. (**Argument III**).

Fourth, *Fletcher* denies the retirees their "day in court," placing Sixth Circuit suppositions above the "record evidence," which includes the testimony of Honeywell chief bargainer Richard Hancock that Honeywell promised Greenville retirees healthcare "until they died."

Fletcher reverses the district court denial of Honeywell's Rule 12(b)(6) motion, but disregards the standards set by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)

and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007). They require the reviewing court to construe the retirees' allegations in the light most favorable to the retirees, accept their allegations as true, and draw all reasonable inferences in favor of the retirees. *Fletcher* recognizes that the CBA language is "arguably" ambiguous and "implies" lifetime retiree healthcare, but *Fletcher* simultaneously bars the trial evidence that resolves all ambiguity and proves the parties intended lifetime retiree healthcare. *Fletcher* conflicts with *Iqbal* and *Twombly* as well as with *Tackett*, which prescribes: "the parties' intentions control." (**Argument IV**).

3.

To "distill" its anti-vesting presumption, *Fletcher* travels a prohibited path. It disregards CBA "explicit terms" *and* "implied terms." It disregards federal labor law and federal common law ambiguity principles. It elevates "suppositions" over the trial record. It creates a judicially-convenient mechanical presumption at the expense of "ordinary contract principles," the "parties' intentions," Rule 12(b)(6) principles, and the rule of law.

CBA language which "implies" lifetime retiree healthcare cannot simultaneously "unambiguously" preclude lifetime retiree healthcare. *Fletcher*'s suppositions conflict with the trial record and with the law set in *Tackett* and *Reese*, and in this Court's labor decisions back to 1960, and with federal common law principles developed in LMRA and ERISA fringe-benefit cases in the Third and Seventh Circuits, and with the due process standards embodied in the Federal Rules of Civil Procedure.

4.

In dissent from denial of *en banc* review in *UAW v. Kelsey-Hayes Co.*, 872 F.3d 388, 392 (6th Cir. 2017), Judge Robert Griffin wrote that "retiree healthcare guarantees" present "a question of exceptional importance."

Judge Griffin characterized the Sixth Circuit's post-*Tackett* decisions as a "mess," creating "contradiction and confusion in an area of the law that demands consistency and clarity." Judge Griffin wrote (872 F.3d at 392):

> District judges, litigants, and subsequent [Sixth Circuit] panels need authoritative and non-conflicting guidance, and results should not depend upon the composition of the three judge panel.

Post-*Tackett*, the Sixth Circuit needed more correction in 2018, in *Reese* and in *UAW v. Kelsey-Hayes Co.*, 138 S.Ct. 1166 (2018), granting certiorari, vacating, and remanding 854 F.3d 862 (6th Cir. 2017) in light of *Reese*.

Post-*Reese*, *Fletcher* shows the Sixth Circuit remains aberrant—in conflict with *Tackett* and *Reese*, in conflict with Seventh Circuit retiree healthcare decisions, at odds with federal common law ambiguity principles applied in the Third and Seventh Circuits, contrary to federal labor law, and internally-inconsistent and confused.

The *Fletcher* majority found "Honeywell's arguments" to be "highly unusual," "very strange" to the "average person," not "naturally" derived from the

CBAs, and contrary to what the CBA language "implies." (App. 18-19). Still, the majority sided with Honeywell.

Judge Eric Clay "reluctantly" concurred, but pointed out that the CBAs are—"on their face"—"ambiguous." He wrote the panel "should" consider the trial record "to ascertain the intent of the parties"—but Sixth Circuit decisions "preclude" this. (App. 22-23).

Sixth Circuit jurisprudence in this area of "exceptional importance" is still in need of "authoritative and non-conflicting guidance."

5.

In earlier "reluctant" concurrence—in *Cole v. Meritor Inc.*, 855 F.3d 695, 702 (6th Cir. 2017), *cert. den.* 138 S.Ct. 477 (2017)—Judge Helene White recognized that the Sixth Circuit conflicts with *Tackett*'s directive that "the parties' intentions control." Judge White wrote that the Sixth Circuit has "installed duration clauses as the new absolute determiner of intent, regardless of the actual intent of the parties."

In another "reluctant" concurrence, in *IUE-CWA v. General Electric Co.*, 2018 WL 3949188 at *14, __ Fed.Appx. __ (6th Cir. 2018), Judge Jane Stranch expresses "concern about the jurisprudential path" the Sixth Circuit has "chosen to follow."

In the Sixth Circuit, Judge Stranch writes, it is now "exceedingly difficult, if not impossible, to reach the factual evidence of promises made—evidence that often shows an employer's clear and consistent promises to its employees that they and their families will receive lifetime healthcare." *Id.* at *15.

In particular, Judge Stranch observes, the Sixth Circuit has "yet to definitively identify an ambiguity or even contract language that marks one." Judge Stranch writes that the Sixth Circuit post-*Tackett* path "should sit uneasily with all of us." *Id.*

Even writing the majority opinion in *IUE-CWA*, Judge Clay acknowledges the disconnect between the "prevalence of lifetime benefits in unionized, manufacturing sectors" back to the 1960s evidenced in the "sheer deluge" of retiree healthcare claims in the Sixth Circuit and the Sixth Circuit's post-*Tackett* rejection of retiree claims. *Id.* at *13.

In *Fletcher*, Judge Clay lamented the "new, heightened standard"—*i.e.*, the "clear, affirmative language" requirement—that precludes trial evidence to "ascertain the intent of the parties." This *post hoc* standard "seems less than fair," he wrote, but it is what Sixth Circuit cases "require." (App. 23).

The Sixth Circuit now employs an extreme ahistorical anti-vesting presumption that conflicts with "ordinary contract principles" prescribed by this Court.

6.

Tackett and *Reese* teach the "parties' intentions control" and vesting may be proved by "explicit terms, implied terms, *or* industry practice." **But *Fletcher*** holds that the only way to prove vesting is with "clear, affirmative language."

Tackett teaches the parties' intentions are to be determined by "record evidence," not judicial suppositions. **But *Fletcher*** indulges suppositions—which it concedes are "unusual" and "very strange" to

the "average person," and not "naturally" derived from the CBAs—and ignores the "record evidence" presented at trial.

Tackett teaches that "ordinary contract principles" applied to CBAs must be consistent with "federal labor policy." Federal labor policy, articulated by this Court since 1960, holds that CBA obligations may be "implied" and courts must consider CBA "context" and the "common law" and practices of the plant and industry, which are "equally part of the [CBA] although not expressed in it." **But *Fletcher*** finds federal labor policy unworthy of mention.

The Third and Seventh Circuits, in LMRA and ERISA fringe-benefit cases, teach that under federal common law ambiguity principles, courts "must" consider "real-world context" to resolve patent ambiguity and to identify and resolve latent ambiguity. **But *Fletcher*** finds these ordinary contract principles unworthy of mention.

The Sixth Circuit's *pro-vesting* presumption prompted rebuke in *Tackett* in 2015 and in *Reese* in 2018. The Sixth Circuit has now created an *anti-vesting* presumption which disregards the parties' contemporaneous intentions and exalts judicially-convenient theory over fact. Mark Twain wrote: "How empty is theory in the presence of fact." The Sixth Circuit again needs this Court's intercession to ensure the rule of law.

SUMMARY OF ARGUMENT

In *Fletcher*, the Sixth Circuit creates an extreme anti-vesting "clear, affirmative language" presumption which indulges suppositions, ignores facts, and denies retirees their "day in court" to enforce the lifetime healthcare each earned with 30-plus years of industrial labor.

The Sixth Circuit conflicts with *Tackett*, *Reese*, and the Seventh Circuit, which hold that CBA obligations may be implied and unequivocal language is not needed (**Argument I**), with *Tackett*'s presumption-prohibition (**Argument II**), with ambiguity principles applied in Third and Seventh Circuit ERISA/LMRA fringe-benefit cases (**Argument III**), and with the rule of law (**Argument IV**).

ARGUMENT

I. *FLETCHER*'S "CLEAR, AFFIRMATIVE LANGUAGE" REQUIREMENT CONFLICTS WITH THE SUPREME COURT AND SEVENTH CIRCUIT PRINCIPLES THAT COLLECTIVELY-BARGAINED RETIREE HEALTHCARE VESTING OBLIGATIONS MAY BE "IMPLIED" AND DO NOT REQUIRE "UNEQUIVOCAL CONTRACT LANGUAGE"

Fletcher holds that a "CBA's general durational clause applies to [retiree] healthcare benefits unless it contains clear, affirmative language indicating the contrary." *Fletcher* conflicts with *Reese*, *Tackett*, earlier Supreme Court decisions, and the Seventh Circuit.

A.

Reese, following *Tackett*, teaches that vested lifetime retirement healthcare may be proved by "explicit terms, implied terms, or industry practice." 138 S.Ct. at 765.

In *Reese*, the Sixth Circuit "did not point to any explicit terms, implied terms, or industry practice suggesting that the [governing CBA] vested health care benefits for life," but, rather, the Sixth Circuit applied "several of the *Yard-Man* inferences" to "erroneously presume lifetime vesting from silence." 138 S.Ct. at 765-766.

In *Fletcher*, the CBAs are not silent. They promise that upon retirement Honeywell "will continue to pay for the full cost of medical for the retiree" and "[u]pon the death of a retiree" Honeywell "will continue"

healthcare for the retiree's survivors "for their lifetime." This language at the least—even *Fletcher* recognizes—is "arguably" ambiguous and "implies" lifetime retiree healthcare. (App. 18-19).

When CBA terms imply lifetime healthcare, the retirees are entitled to judgment or, if there is ambiguity, to trial. But *Fletcher* disregards both the implied obligations and the trial evidence that proves the parties intended vested lifetime retiree healthcare.

B.

The principles that contract obligations may be "implied" and proved by "record evidence" of practice and performance are essential to *Tackett*-endorsed (135 S.Ct. at 933, 935-936) "federal labor policy."

See, *e.g.*, *John Wiley & Sons v. Livingston*, 376 U.S. 543, 550 (1964) (a CBA "is not an ordinary contract"); *Litton Financial Printing v. NLRB*, 501 U.S. 190, 203 (1991) (post-expiration CBA obligations may be "express or implied"); *USWA v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 579-581 (1960) (a CBA "calls into being…the common law of a particular industry or of a particular plant" and "of the shop which implements and furnishes the context of the agreement"; a court "is not confined to the express provisions of the contract"; "the practices of the industry and the shop" are "equally a part of the collective bargaining agreement although not expressed in it"); *USWA v. American Mfg. Co.*, 363 U.S. 564, 567 (1960) ("special heed should be given to the context in which [CBAs] are negotiated"); and *Consolidated Rail Corp. v. Railway Labor Exec. Ass'n.*, 491 U.S. 299, 311 (1989) (CBA obligations may be "implied").

Practice, performance, and context also are considerations in *all* circumstances governed by "ordinary contract principles." See, *e.g.*, *Brooklyn Life Ins. Co. v. Dutcher*, 95 U.S. 269, 273 (1877) ("There is no surer way to find out what parties meant, than to see what they have done."); *Old Colony Trust v. City of Omaha*, 230 U.S. 100, 118 (1913) (the "practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy" is of "great, if not controlling, influence"); *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010) (the parties' "course of performance" is "highly significant" evidence of their contractual intentions); and *Williston on Contracts*, addressed in Argument III (*e.g.*, courts "must consider" the parties' "conduct" and "surrounding circumstances" to determine "what the parties intended").

But *Fletcher* disregards these principles.

C.

Fletcher's "clear, affirmative language" requirement is indeed "clear," but it conflicts with this Court's holdings that obligations that outlast the limited-duration CBAs in which they are promised may be implied.

As Justice Ginsburg wrote in *Tackett*, 135 S.Ct. at 937-938, *concur.*: "No rule requires 'clear and express' language in order to show that parties intended health-care benefits to vest."

Reese holds (138 S.Ct. at 765) that bargained lifetime retiree healthcare obligations can be proved by "explicit terms, implied terms, *or* industry practice." But *Fletcher* insists on explicit terms.

Fletcher also conflicts with the Seventh Circuit, which rejects mechanical prerequisites—like the rule now employed by the Sixth Circuit—as "extreme."

See *Temme v. Bemis Co., Inc.*, 622 F.3d 730, 736 (7th Cir. 2010) ("the lack of an explicit vesting term is not determinative"; "'magic words' or unequivocal contract language" promising "lifetime" retiree healthcare are *not* required) and *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607 (7th Cir. 1993) (*en banc*) (*rejecting* the "extreme" position that to create lifetime retiree healthcare obligations a CBA "must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire when the contract expires").

In *Fletcher*, the Sixth Circuit has again "departed from the accepted and usual course of judicial proceedings," as S.Ct.Rule 10(a) puts it, so "as to call for an exercise of this Court's supervisory power" to enforce *Tackett*, *Reese*, Supreme Court labor cases, and the rule of law.

II. *FLETCHER* CONFLICTS WITH THE SUPREME COURT PRINCIPLES BARRING PRESUMPTIONS IN COLLECTIVELY-BARGAINED RETIREE HEALTHCARE ACTIONS

A.

Fletcher's newly-distilled "clear, affirmative language" rule is a formulaic, ahistorical, anti-vesting presumption that retroactively disadvantages every industrial worker in the Sixth Circuit who retired since the 1965 enactment of Medicare. *Tackett* bars such presumptions. See, *e.g.*, *Underwood v. Chicago*, 779

F.3d 461, 462-463 (7th Cir. 2015) (after *Tackett*, presumptions "for or against vesting" are improper).

It seems the Sixth Circuit—stung by the rebukes in *Tackett* and *Reese*—now applies the "clear, affirmative language" rule to foreclose retiree invocation of "implied terms" and to bar "record evidence" of practice and performance resolving alternative CBA interpretations. *Fletcher* selectively ignores ordinary contract principles and chooses a "jurisprudential path" that is clear—but wrong.

B.

That the Sixth Circuit's anti-vesting presumption yields untenable results is shown by decisions on which *Fletcher* relies: *Cole v. Meritor, Inc.*, 855 F.3d 695 (6th Cir. 2017), *cert. denied* 138 S.Ct. 477 (2017) and *Cooper v. Honeywell International Inc.*, 884 F.3d 612 (6th Cir. 2018).

1.

Cole, 855 F.3d at 700-702, cited in *Fletcher* (App. 9), found that CBA terms—promising healthcare "at retirement" which "shall be continued thereafter"—"unambiguously did not provide for vested retiree healthcare benefits."

The record evidence in *Cole*—summarized at 516 F.Supp.2d at 857-864, 870-873 and 549 F.3d at 1068-1069—included five decades of written "lifetime" and "for life" admissions. The 2000 CBA applied the healthcare promises to a "hypothetical" 55-year old, showing shared costs up to the retiree's 80th birthday in 2028, 25 years after that CBA was to expire. "For life" and "lifetime" admissions in *Cole* were in

prescription cards, insurance booklets, and letters. Company officials made "for life" and "lifetime" admissions across the bargaining table and directly to retirees and retirees' spouses.

One typical admission was in the company's letter to a surviving spouse after her retiree-husband's death (516 F.Supp.2d at 859, ¶21): "You will continue to have your medical, dental, vision, hearing aid and prescription drug coverage at no cost to you for your lifetime."

But *Cole* supposed that written and oral "for life" and "lifetime" admissions spanning five decades merely reflected "loose talk." 855 F.3d at 701-702.

Judge White's reluctant *Cole* concurrence identifies the Sixth Circuit's aberrant path, on which, contrary to *Tackett*, "duration clauses" have come to be "the new absolute determiner of intent, *regardless of the actual intent of the parties*." 855 F.3d at 702 (emphasis added).

2.

Cooper, 884 F.3d at 614, cited in *Fletcher* (App. 11-12), reversed a preliminary injunction preserving healthcare for pre-65 retirees because—the Sixth Circuit said—"until age 65" language does not provide an "alternative end date" to a general durational clause. The Sixth Circuit read an unstated limitation into the CBA, holding "until age 65" healthcare "only lasted" until age 65 *or* CBA expiration, whichever comes first. The *whichever* clause is *not* in the CBA.

Cooper conflicts with the Fourth and Ninth Circuits and other jurisdictions. See, *e.g.*:

(1) *Barton v. Constellium*, 856 F.3d 348, 354 (4th Cir. 2017) (healthcare promised until Medicare—*i.e.*, until age 65—reflects the "parties' understanding that the retirees' benefits would survive the CBA");

(2) *Alday v. Raytheon Co.*, 693 F.3d 772, 785 (9th Cir. 2012) (CBA promises of healthcare "until the retiree attains age 65" set "a specific duration," a "fixed period" for each retiree);

(3) *John Morrell & Co. v. UFCW*, 37 F.3d 1302, 1308 (8th Cir. 1994), *cert. denied* 515 U.S. 1105 (1995) (CBAs—that "conferred fixed five-year health benefits" on retirees between the "ages of 50 and 54 who elected a separation pension after a plant closing"—promise "limited vested retirement health benefits");

(4) *Keffer v. H.K. Porter*, 872 F.2d 60, 63 (4th Cir. 1989) (CBA term—that healthcare "shall terminate" when a retiree becomes "eligible for Medicare"—vested healthcare until 65);

(5) *Pacheco v. Honeywell Int'l.*, 289 F.Supp.3d 1011, 1026 (D. Minn. 2018), *app. pending* (CBA "age 65" promise "unambiguously" creates "vested healthcare" for "pre-65 retirees until they reach age 65");

(6) *Matthews v. CTA*, 51 N.E.3d 753, 786 (Ill. S.Ct. 2016) (CBA promises healthcare until a "retiree's sixty-fifth birthday");

(7) *Baltimore County v. Fraternal Order of Police*, 144 A.3d 1213, 1225 (Md. COA 2016) (CBA promises healthcare "until age 65"—when a retiree becomes "eligible for Medicare").

3.

The Sixth Circuit anti-vesting presumption requires extreme suspension of disbelief.

Cole holds that CBAs promising healthcare—beginning at retirement and which "shall be continued thereafter"—are "unambiguous in not vesting" healthcare. **Only in the Sixth Circuit** is the word *thereafter* "unambiguously" *not* durational.

Cole dismisses "for life" and "lifetime" admissions spanning five decades as "loose talk." **Only in the Sixth Circuit** is consideration of the parties' words and deeds *verboten*.

Cooper holds that "until age 65" promises "unambiguously" mean "until age 65" *or* the CBA expires, *whichever* comes first—even though there is no *or* or *whichever* in the CBA promise. **Only in the Sixth Circuit** does a court get to rewrite contracts *and* history.

In *IUE-CWA* (at *8), Judge Clay wrote that *Fletcher* takes Sixth Circuit caselaw "one step further." Indeed, *Fletcher*—relying on *Cole* and *Cooper*—makes the Sixth

Circuit anti-vesting presumption even more impervious to facts—and even more extreme.

C.

In 2016, *Tackett v. M&G Polymers USA, LLC*, 811 F.3d 204, 209 (6th Cir.), on remand, cited Justice Ginsburg in *Tackett*, 135 S.Ct. at 937-938, *concur.*, stating: "No rule requires 'clear and express' language in order to show that parties intended health-care benefits to vest."

Later in 2016, *Gallo v. Moen, Inc.*, 813 F.3d 265, 274 (6th Cir.), *cert. denied* 137 S.Ct. 375 (2016), held that *Tackett* "still permits the courts to draw implications and inferences from" CBAs and "*Tackett* does not create a clear-statement rule."

But now *Fletcher* "distills" a mechanical anti-vesting presumption, requiring "clear, affirmative language."

The Seventh Circuit rejected this view as "extreme" before *Tackett*, at a time when that Circuit applied an anti-vesting presumption. Even then, the Seventh Circuit recognized, CBAs cannot be read mechanically or understood out of context. See *Temme*, 622 F.3d at 736 ("the lack of an explicit vesting term is not determinative"; "'magic words' or unequivocal contract language" promising "lifetime" retiree healthcare not required) and *Bidlack*, 993 F.2d at 607 (rejecting as "extreme" that a CBA "must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire when the contract expires").

In *Bidlack*, Judge Posner observed that "magic words"/"unequivocal contract language" prerequisites

would make "life simpler for courts." But the Seventh Circuit held that a court should not "refuse to enforce a contract merely because the parties have failed to use a prescribed formula." *Bidlack* warned (993 F.2d at 607): "courts should be cautious about adding formal hoops that contract parties must jump through."

Yard-Man created a "formal hoop" in the form of a *pro-vesting* presumption. But *Tackett* held, as the Seventh Circuit later put it, all presumptions are improper, "for or against vesting." *Underwood*, 779 F.3d at 462-463. In *Fletcher*, however, the Sixth Circuit creates a new "formal hoop" in the form of its *anti-vesting* presumption.

D.

The Sixth Circuit erases history, like the Ministry of Truth in *Nineteen Eighty-Four*. The presumption ignores that post-CBA obligations may be "implied" and proved by "industry practice" (*Reese*, 138 S.Ct. at 765), industry "customs" (*Tackett*, 135 S.Ct. at 935, 938), or the "common law" of the "industry" and "the plant" (*Warrior & Gulf*, 363 U.S. at 579-580), and that there is "no surer way to find out what parties meant, than to see what they have done" (*Brooklyn Life*, 95 U.S. at 273).

Here is some industry and company history, lost on the Sixth Circuit.

When Medicare began in 1966, employers could "offer health benefits to their retirees with the assurance that the Federal Government would pay for many of the medical costs incurred by company retirees age 65 and older." *Developments in Aging: 1966*, Senate Rep. No. 105-36 (1967) at 191. Retiree

healthcare promises proliferated. A 1968 study of 98 large bargained plans showed that more than "3 out of 5" extended healthcare to retirees, 85 percent "financed in full by the employer." W. Kolodrubetz, "Employee-Benefit Plans, 1950-67," 32 *Soc. Sec. Bulletin* 1, 4 (April 1969). Leading "the 1967 CBA settlements" including retiree healthcare were "the Auto Workers in the automobile and farm equipment industries." *Id.* at 5.

These promises helped retain qualified autoworkers. Retiree healthcare was not expensive after Medicare and moderated union economic demands made for the more-numerous active workers. Retirement did not start as early or last as long. See *Retiree Health Benefits* (PLI 1989) at 74 (retiree healthcare benefits "help the organization achieve its human resources goals").

As the Seventh Circuit recognized, by the 1970s the "social reality" was that collectively-bargained retiree healthcare was vested. In the 1980s, however, "spiraling medical costs, heightened foreign competition, epidemic corporate takeovers and the declining bargaining power of labor" changed the "social reality." Some employers negotiated an end to healthcare for future retirees. *Bland v. Fiatallis N.A., Inc.*, 401 F.3d 779, 782-783 (7th Cir. 2005), citing *Bidlack*, 993 F.2d at 613 (Cudahy, J., *concur.*).

But Honeywell did the opposite. For "many decades"—since the 1970s—Greenville retirees got lifetime healthcare, though the CBAs were silent. But in 2000, at UAW's insistence the parties added new CBA terms and—the district court held—"Honeywell agreed to provide lifetime healthcare benefits to its retirees at the Greenville, Ohio plant." (App. 58).

Honeywell kept its promise for 16 years after 2000—after the plant sold in 2011 and after the last Greenville CBA expired by its terms in 2014. Only later "did Honeywell reassess its position concerning its obligation to continue providing retiree healthcare." (App. 55). *Tackett* provided Honeywell a *deus ex machina* rationale for rewriting history.

E.

Fletcher relegates admissions, performance, and practice to the Orwellian "memory hole." *Fletcher* ignores implied obligations and refuses to consider the trial record. *Fletcher* exalts magic-word abstractions and unsupported suppositions. *Fletcher* ignores federal labor law and federal common law ambiguity principles. *Fletcher* once again makes the Sixth Circuit aberrant—here, at the expense of retirees denied the lifetime healthcare each earned with 30-plus years of industrial labor.

Fletcher makes "life simpler" for the Sixth Circuit, but disserves the rule of law by presuming away facts and making CBA rights depend on "formal hoops" and "magic words," "regardless of the actual intent of the parties."

III. *FLETCHER* CONFLICTS WITH THE THIRD AND SEVENTH CIRCUITS' APPLICATION OF FEDERAL COMMON LAW AMBIGUITY PRINCIPLES IN LMRA AND ERISA BENEFITS CASES

The *Fletcher* majority recognizes that the "average person" would understand the Honeywell CBAs to promise healthcare upon retirement, continuing until

"death," and then to continue for the retiree's survivors' "lifetime." (App. 18).

But the *Fletcher* majority gives no further attention to the "average person." Or to what the CBA language implies. Or to Judge Clay's recognition that the CBAs "appear on their face to be ambiguous." Or to the trial record proving lifetime healthcare.

Like the new pharaoh in *Exodus* who "knew not Joseph," in LMRA/ERISA retiree healthcare litigation—in conflict with the Third and Seventh Circuits—the Sixth Circuit "knows not" federal common law ambiguity principles.

A. Patent Ambiguity Principles

The Honeywell CBA promises—"arguably" ambiguous, which "appear on their face to be ambiguous," and which, read "naturally," to the "average person" imply lifetime retiree healthcare—call for application of the federal common law *patent ambiguity* principle, requiring consideration of evidence "extrinsic" to the CBAs' "four corners" to ascertain the contracting parties' intent. *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 547 (7th Cir. 2000), *cert denied* 531 U.S. 1192 (2001): "merely suggestive language"—suggesting a "grant of lifetime benefits"—entitles retirees to present "extrinsic" evidence of the parties' "lifetime" intentions.

See also *Harris v. County of Orange*, 2018 WL 4211161 at *6-7, __ F.3d __ (9th Cir. 2018) (applying California contract law; federal citations omitted) ("once a plaintiff identifies an express contract covering the substance of a [retiree healthcare] benefit, it may rely on extrinsic evidence to prove the existence of an

implied term requiring the continuation of that benefit in perpetuity"; proofs may include "course of conduct," "negotiations," and statements regarding "background, purpose, and intent" to show benefits "vest" and "support the conclusion" that the contract "impliedly promised a lifetime benefit, which could not be unilaterally eliminated or reduced").

Here, the CBA promise of "lifetime" healthcare for retirees' survivors at the least *suggests* lifetime retiree healthcare. In *Bidlack*, 993 F.2d at 608, the Seventh Circuit recognizes that such CBA language "could be thought a promise" that *both* "retired employees" and "their spouses will be covered for the rest of their lives."

Here, the retirees got their trial and proved their case, but the Sixth Circuit—seemingly unaware of the ambiguity principles applied in the Seventh Circuit—ignored the trial and what *Tackett* (135 S.Ct. at 935-936) calls the "record evidence."

B. Latent Ambiguity Principles

Even if what the Honeywell CBA promise implies is insufficiently "affirmative" to show *patent ambiguity*, the "record evidence" proves *latent ambiguity*—and entitles the retirees to their post-trial judgment.

1.

Latent ambiguity—"sometimes called, an extrinsic, ambiguity"—is present if a CBA—though "clear on its face" to an "uninformed reader"—is the subject of objective "extrinsic" evidence that would cause one "knowledgeable about the real-world context of the agreement" to "realize" it is "possible to interpret" the

CBA "in more than one way." *Rossetto*, 217 F.3d at 542-543, 547 (citations omitted).

Objective "extrinsic" evidence may include, as in *Rossetto*, industry practice and performance, and it may include "course of dealing," bargaining history, and FRE 801(d)(2) employer admissions by word and deed.

See *e.g.*, **(1)** *Baldwin v. Univ. of Pittsburgh Medical Ctr.*, 636 F.3d 69, 76 (3rd Cir. 2011) ("terms that appear clear and unambiguous on their face, but whose meaning is made uncertain due to facts beyond the four corners of the contract, suffer from latent ambiguity"); **(2)** *Smith v. Hartford Ins. Group*, 6 F.3d 131, 138-139 n.9 (3rd Cir. 1993) (applying "federal common law"; where the "parties' performance" shows "competing meanings" of an ERISA plan, "latent ambiguity" bars summary judgment); and **(3)** *Mathews v. Sears Pension Plan*, 144 F.3d 461, 468 (7th Cir. 1998) ("'course of dealing' evidence" is "admissible to show that a seemingly clear contractual provision is actually ambiguous"; parties' actions have particular "credibility" because they are more than the "self-serving testimony of a party to the contract").

Where the CBA is "arguably" ambiguous and "implies" vesting, at the least there is latent ambiguity entitling retirees to present "extrinsic" evidence to show, and resolve, that ambiguity based on "record evidence"—not judicial "supposition." See *Baldwin*, 636 F.3d at 76 (citation omitted, emphasis added): under "common law contract principles in an ERISA context" the "court *must* 'hear the proffer of the parties and consider extrinsic evidence to determine whether there is an ambiguity'"—including "bargaining history,

and the conduct of the parties that reflects their understanding of the contract's meaning."

But *Fletcher* refused to consider the "record evidence"—despite Judge Clay's view that the panel "should" consider the extrinsic evidence "to ascertain the intent of the parties." (App. 22-23). Rather, *Fletcher chose* to remain "uninformed" about "real-world context" and ignored that the trial *proved* lifetime retiree healthcare.

2.

Latent ambiguity principles are "ordinary contract principles" used to ensure that courts give effect to the contracting parties' contemporaneous intent. Even the Sixth Circuit applies these principles—*outside* the CBA context.

See *e.g.*, **(1)** *Stryker Corp. v. Nat'l. Union Fire Ins. Co.*, 842 F.3d 422, 427 (6th Cir. 2016) (citations omitted, emphasis added) (applying Michigan contract law; a "written instrument that is clear on its face may, upon consideration of extrinsic evidence or some collateral matter, be rendered latently ambiguous when applied in the real world"; courts admit "parol evidence, *in the first instance*, to reveal" latent ambiguity; this exception to "the parol evidence rule" is "justified" because it permits "courts to ascertain and carry into effect the intention of contracting parties"); **(2)** *Consolidated Rail Corp. v. GTW RR Co.*, 607 Fed.Appx. 484, 494 (6th Cir. 2015) (citations omitted, emphasis added) (applying Michigan contract law; because "detection" of "latent ambiguity requires" consideration of "factors outside the instrument," "extrinsic evidence is *obviously admissible* to prove" the

"ambiguity, as well as to resolve" it; the "cardinal rule" is "to ascertain the intention of the parties"; "To this rule all others are subordinate."); **(3)** *GenCorp., Inc. v. American Intern. Underwriters*, 178 F.3d 804, 818 (6th Cir. 1999) (citation omitted) (applying Ohio contract law; "latent ambiguity arises when language is clear on its face, but some intrinsic fact or extraneous evidence gives rise to two or more possible meanings"); and **(4)** *Sault Ste. Marie Tribe v. Granholm*, 475 F.3d 805, 812-814 (6th Cir. 2007) (citations omitted, emphasis added) (applying Michigan contract law; "the *allegation* of a latent ambiguity gives a court cause to consider extrinsic evidence"; "extrinsic evidence is *obviously admissible*" to prove latent ambiguity; the "court *must* consider the extrinsic evidence to determine if there exists an ambiguity" and, if so, "to resolve that ambiguity").

3.

In *every* case where ordinary contract principles apply and "the parties' intentions control," courts "must consider" the contemporaneous "surrounding circumstances" and must not indulge word-parsing abstractions based on hindsight judicial suppositions.

See *Miller v. Robertson*, 266 U.S. 243, 251 (1924) (the parties' "intention" is "to be gathered" from "the whole instrument read in the light of the circumstances at the time of negotiations leading up to its execution") and *Davison v. Von Lingen*, 113 U.S. 40, 50 (1885) ("the instrument must be construed with reference to the intention of the parties when it was made, irrespective of any events afterwards occurring").

See also *Williston on Contracts* §§30:19, 30:23, 32:7 (emphasis added) ("Circumstances surrounding the execution of a contract *may always be shown and are relevant to a determination of what the parties intended.*"; courts are to "ascertain the meaning of the contract at the time and place of its execution," considering the "circumstances surrounding the execution," the "common law in effect in the jurisdiction," and the "commercial or other setting in which the contract was negotiated and other objectively determinable factors that give a context to the transaction between the parties").

And see *Williston* §§30:5 and 31:7 (emphasis added) (to determine whether contract terms "are susceptible of different meanings," courts "*must consider*" the parties' alternative meanings and "any extrinsic evidence offered in support of those meanings" such as "bargaining history" and "any conduct of the parties which reflects their understanding of the contract's meaning"; "few courts" give contracts their "literal meaning" if "surrounding circumstances" show "literal construction or interpretation will defeat or frustrate the intentions of the parties").

As Judge Clay's reluctant concurrence suggests (App. 22-23), the parties' 2000-2011 intentions were not retroactively transmogrified in 2015 when *Tackett* "completely upended" Sixth Circuit law. This is why Judge Clay wrote that it "seems less than fair" to disregard history and the trial record to "impose" *Fletcher*'s "new, heightened standard" on retirees 18 years *post hoc*.

But when it comes to collectively-bargained retiree healthcare, the Sixth Circuit ignores ambiguity

principles, "surrounding circumstances," *and* the contemporaneous "actual intent of the parties."

4.

Latent ambiguity principles are "ordinary" in *all* contract cases, but are essential to *Tackett*-prescribed "federal labor policy" which, as discussed, recognizes "implied" promises and mandates consideration of "context" and the "common law" and practices of the industry and plant, which are "equally a part of the [CBA] although not expressed in it." See Argument II.

Latent ambiguity principles, Third and Seventh Circuit decisions hold, "must" be applied in fringe-benefit cases to give force to "real-world context," to the parties' "actual intent," and to labor policy—set by Congress in 29 U.S.C. §1001(b)—to "protect" participants in and beneficiaries of ERISA-regulated healthcare plans.

In *every* context—*except* in Sixth Circuit LMRA/ERISA retiree healthcare cases—ambiguity principles apply. To borrow again from Orwell, in the Sixth Circuit some "ordinary contract principles"—and some litigants—are "more equal" than others.

IV. *FLETCHER* ERRONEOUSLY ELEVATES JUDICIAL SUPPOSITIONS OVER DUE PROCESS REQUIRED BY RULE 12(b)(6)

A.

The district court denied Honeywell's 12(b)(6) motion, finding that both parties "offered reasonable interpretations" of the "relevant" CBA terms, that "the CBA is ambiguous concerning the parties' intent to vest

lifetime retiree healthcare benefits," and that the court "must, therefore, resort to extrinsic evidence to resolve the ambiguity" *i.e.*, at trial. (App. 87).

Indeed, Honeywell counsel "admitted" his "proferred explanation"—that Honeywell was obligated "to provide lifetime healthcare benefits to surviving spouses and dependents, but not to the retirees themselves"—was "extrinsic" speculation not "properly considered" in 12(b)(6) analysis. Honeywell counsel also "conceded" he could not support his "proffered explanation" with "cases" addressing "similar language." (App. 82).

In contrast, the retirees were well-supported by "cases"—from the Sixth and Seventh Circuits and elsewhere—and by "common sense."

See *e.g.*, App. 43-44 and **(1)** *UAW v. Loral Corp.*, 873 F.Supp. 57, 64 (N.D. Ohio 1994) (emphasis in original), *aff'd* 107 F.3d 11 at *3 (6th Cir. 1997) (it "defies common sense" to believe parties would provide lifetime healthcare for surviving spouses and dependents, but not for the retirees themselves; rejecting the "construction" that the CBAs promised lifetime healthcare for survivors but permitted the employer to end the "underlying benefits for retirees"; "If the retiree had not been expected to receive the benefits *until his or her death*, what benefits would have existed for the surviving spouses 'to continue to receive'?"); **(2)** *Winnett v. Caterpillar, Inc.*, 510 Fed.Appx. 417, 420-421 (6th Cir. 2013) (emphasis in original) ("common-sense" holds that spouses "are third-party beneficiaries"; rejecting that surviving spouses "would get benefits that *exceeded* those of the retirees from whom their benefits derive"); **(3)** *Bidlack*

v. Wheelabrator Corp., 993 F.2d 603, 608 (7th Cir. 1993) (*en banc*) (a CBA promise that, upon the death of the retiree, the surviving spouse will continue to receive healthcare "could be thought a promise to retired employees that they and their spouses will be covered for the rest of their lives"); **(4)** *Jansen v. Greyhound Corp.*, 692 F.Supp. 1029, 1036 (N.D. Iowa 1987) (finding it "inconceivable" that defendants could "reduce or terminate" retiree benefits "at will" when "the contract specifies that a retiree's spouse shall have lifetime medical benefits"); **(5)** *Sloan v. BorgWarner, Inc.*, 2016 WL 7107228 at *11 (E.D. Mich.) ("it would be an odd result indeed if the retirees were only entitled to receive medical coverages during the life of the three-year agreement but their spouses were to receive them for life"); **(6)** *Alday v. Raytheon Co.*, 693 F.3d 772, 778 n.1 (9th Cir. 2012) ("spouses' and dependents' rights under the contracts are derivative of the retirees'"); and **(7)** *Coffin v. Bowater Inc.*, 228 F.R.D. 397, 405 (D. Me. 2005) ("claims held by spouses and dependents are entirely derivative of the retirees' claims").

B.

Under *Iqbal*, 556 U.S. at 678, and *Twombly*, 550 U.S. at 556-557, 570, to survive Honeywell's 12(b)(6) motion, the retirees needed only to state "a plausible claim for relief." The district court found the retirees' claim plausible *and* that Honeywell's alternative CBA interpretation—though unsupported by caselaw, based on "extrinsic" speculation, and "very strange" to the "average person"—was "sufficient to create an ambiguity concerning the parties' intent to vest lifetime

retiree healthcare benefits"—an ambiguity *requiring* trial. (App. 83, 91).

But the Sixth Circuit ignored the trial and *sub silentio* granted Honeywell's 12(b)(6) motion. This conflicts with *Reese* and *Tackett*, federal labor law, and federal common law ambiguity principles—as shown in Arguments I-III. It also nullifies plaintiff-favorable 12(b)(6) due process standards and improperly obstructs the retirees' "ready access to the federal courts" safeguarded by ERISA, 29 U.S.C. §1001(b).

C.

Fletcher cannot be defended under Rule 12(b)(6), because *Fletcher* disregards plaintiff-favorable *Iqbal* and *Twombly* standards.

Fletcher cannot be defended under Rule 56, because the Sixth Circuit's own findings—that the CBA language is "arguably" ambiguous and "implies" lifetime retiree healthcare—demonstrate disputed material fact questions which require trial.

The only rationale for *Fletcher* is untenable: the Sixth Circuit anti-vesting presumption, which the Circuit now applies "regardless of the actual intent of the parties."

Under Rule 12(b)(6) *or* Rule 56, *and* under ERISA, the retirees were entitled to "ready access" to federal court and trial. They got their trial and proved their case. But in *Fletcher* facts and trial and due process bow to the anti-vesting presumption. This makes it "simple" for the Sixth Circuit, but wrongly does so at the expense of the retirees and the rule of law.

CONCLUSION

It is said that ours is the era of the "vanishing trial." If left to the Sixth Circuit, there never will be another trial on ERISA/LMRA retiree healthcare promises because the "jurisprudential path" chosen by the Sixth Circuit presumes no vesting.

The presumption disregards facts and arrogates to Sixth Circuit supposition all questions regarding the parties' intent. But—as this Court and other circuits and ordinary contract principles hold—CBA implications and ambiguities and the parties' intent should not be hostage to *post hoc* judicially-convenient ahistorical presumption about "likely behavior" which rests on "shaky" or no factual foundation. Rather, CBA rights and parties' intentions should be addressed in their "real-world context" and decided on "record evidence."

Fletcher suffers from the same legal infirmities that caused this Court to abrogate the *Yard-Man* inference. As bad, *Fletcher* nullifies due process standards embodied in the Federal Rules and labor policy stated in ERISA. We ask the Court to correct the Sixth Circuit's aberrant "jurisprudential path."

Stuart M. Israel
Counsel of Record
John G. Adam
Legghio & Israel, P.C.
306 South Washington
Suite 600
Royal Oak, MI 48067
(248) 398-5900
israel@legghioisrael.com
jga@legghioisrael.com

William Wertheimer
Law Office of William Wertheimer
2018 North Lakeshore
Carsonville, MI 48419
(248) 396-2125
billwertheimer@gmail.com

Counsel for Petitioners

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