No. 22-935

IN THE

Supreme Court of the United States

TRANSERVICE LOGISTICS, INC., *et al.*,

Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF FOOD AND DAIRY RETAILERS, WHOLESALERS, AND MANUFACTURERS, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, AMERICAN BAKERS ASSOCIATION, AND HR POLICY ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTERESTS

Amici Curiae are four associations (the "Associations") representing the interests of numerous employers nationwide.[1] Association members have collective bargaining agreements ("CBAs") with unions, including the union here, General Drivers, Warehousemen & Helpers Local Union No. 89 ("Local 89"). Many of those CBAs contain evergreen clauses substantively identical to the clauses here, and many members participate in and contribute to multiemployer pension plans governed by ERISA like the old plan at issue here, Respondent Central States, Southeast and Southwest Areas Pension Fund ("Central States"), and the new plan here, IBT Consolidated Pension Fund ("IBT Fund"). Thus, the Associations have a keen interest in this case.

The Associations are:

• *The Association of Food and Dairy Retailers, Wholesalers, and Manufacturers*. This 13-member association represents employers in the food industry. Organized in 2009, its initial purpose was to help develop policies to bring financial stability to Central States. More generally, it represents the interests of its employer-members on issues that broadly affect this nation's multiemployer pension-plan system. Each member has

1. Pursuant to Rule 37.2, counsel for the respective parties received notice on April 14, 2023 of Amici's intent to file this brief. No counsel for a party authored this brief, in whole or in part. No person other than Amici or their members has made a monetary contribution to its preparation or submission. No counsel or party has made a monetary contribution intended to fund the preparation or submission of the brief.

unionized work forces subject to CBAs, and most members currently contribute to Central States pursuant to CBAs.

• *Associated General Contractors of America* ("AGC") is a nationwide association of construction companies and related firms. Formed in 1918, it has become the recognized leader of the U.S. construction industry. The association provides a full range of services to meet the needs and concerns of its members, thereby improving the quality of construction and protecting the public interest. AGC has more than 27,000 member firms in 89 chapters. It represents both union- and open-shop employers engaged in building, heavy, civil, industrial, utility, and other construction.

• *American Bakers Association* ("ABA") represents the nation's wholesale baking industry. Its membership includes over 300 wholesale bakery and allied services firms of all sizes, ranging from family-owned enterprises to companies affiliated with Fortune 500 corporations. Together, these companies produce approximately 80% of the nation's baked goods, employing tens of thousands of employees nationwide. Some of these employees are represented by unions. A number of ABA members have multiple CBAs with various unions, and some participate in multiemployer ERISA plans.

• *HR Policy Association* is a public-policy advocacy organization that represents the most senior human resources officers in more than 400 of the largest corporations in the United States and globally. Collectively, these companies employ more than 10 million employees in the U.S. and 20 million worldwide. Its member companies are committed to ensuring that laws and policies affecting

the workplace are sound, practical, and responsive to the needs of the modern economy.

SUMMARY OF ARGUMENT

Amici Curiae join Petitioners Transervice Logistics, Inc. and Zenith Logistics, Inc., to urge this Court to grant a writ of certiorari to review the Seventh Circuit's decision.

The Seventh Circuit ruled that Petitioners and Local 89 failed to terminate their respective CBAs because the notices of their intent to terminate the CBAs were semantically imperfect. This decision departs from the reality of common collective-bargaining practice and imposes a hyper-technical "magic words" requirement that alters standard labor-relations practice. CBAs are rarely "terminated" (in the Seventh Circuit's meaning of a total cessation of all CBA terms) upon their expiration. This occurs only when a union is formally decertified, a union disavows representation of the employer's employees, or the employer is no longer an ongoing business. Instead, most terms carry over into a new CBA and remain in effect. By any measure, complete "termination" of a CBA is rare.

Under the Seventh Circuit's ruling, standard CBA evergreen-clause language with the terms "termination" and "expiration" allows for only two options: complete termination or automatic one-year extension of the CBA. Even if the parties demonstrate a diametrically contrary intent by entering into a new CBA with only small variations, the Seventh Circuit held that the effort must fail unless one party provides notice with magic words announcing formal "termination."

The real world of labor relations is not inhabited by lexicographers versed in the fine and subtle nuances of language. Most employers do not wish to cause labor friction or inflict fear among their employees by characterizing their negotiation objectives as CBA termination (in the Seventh Circuit's meaning). Instead, employers disclose their intention to seek modifications or amendments to an expiring CBA. This practice promotes labor peace and stability. The Seventh Circuit's requirement of "unequivocal and unmistakable" notice of a formal "termination" of a CBA, and all that this entails, promotes just the opposite.

The Seventh Circuit's hyper-literal approach will have disastrous real-world consequences. If, under the Seventh Circuit's holding, evergreen clauses are triggered by an overly restrictive standard for proper notice, thereby causing the old CBAs to remain in effect for another year, employers will be saddled with additional obligations. The parties who thought they had ended their prior CBAs would still be bound by them *and* simultaneously bound by their new CBAs. Here, Petitioners would still be bound to make pension contributions to the pension plan identified in the old CBAs (the "old plan") (even though the parties had withdrawn from it) *and* simultaneously bound to contribute to the plan identified in the new CBAs (the "new plan"), which resulted in a judgment of $11.8M. Moreover, ERISA plans could use the Seventh Circuit's ruling to seek additional ERISA "withdrawal liability" that is assessed when a partial withdrawal occurs. All of this simply because Local 89's notice of intent to bargain for a new CBA did not use the magic word "terminate" and instead stated essentially the same thing: its intention to "negotiat[e] a new contract," which is exactly what Local 89 and Petitioners proceeded to do.

This result is especially perverse because Local 89 and Petitioners wanted to switch plans to *protect* the employees and beneficiaries from Central States' looming insolvency. In 2018, when the old CBAs were expiring, Central States was dying, with a projected insolvency date of 2025. Petitioners responded in an entirely logical fashion. Seeing that Central States was failing, they negotiated new CBAs that protected their workers' pensions. For their efforts, Petitioners now face a collective judgment of $11.8M and could potentially face massive ERISA withdrawal-liability claims, merely because Local 89's notices did not contain the magic word "terminate."

More broadly, unless this Court accepts review, the Circuit split could wreak havoc in labor relations. CBA parties centered in Reno could be sued by pension plans based in Chicago to take advantage of the Seventh Circuit's special requirements. It is unrealistic to expect union and company officials to know the intricacies of the law to such nuanced precision. It also is contrary to the basic tenets of contract law to not allow contracting parties to reach agreements based upon their shared mutual understanding. *See M&G Polymers USA, LLC v. Tackett* 574 U.S. 427, 435 (2015) (requiring CBA terms to be interpreted, "including those establishing ERISA plans, according to ordinary principles of contract law"). But, in the Seventh and Sixth Circuits, a meeting of the minds is not enough.

Finally, the Seventh Circuit erroneously justifies this departure from contract law as required by ERISA, Sections 502 and 515. These provisions require adherence to the terms of the parties' agreements except in extreme and inapposite circumstances. *See* 29 U.S.C. §§ 1145, 1132.

Certiorari is needed to resolve this major conflict in how the parties to CBAs may proceed to negotiate their successor agreements.

FACTUAL BACKGROUND

Central States is a multiemployer pension plan governed by ERISA. Since its formation in 1955, Central States has served as one of the primary pension plans for members of the Teamsters union and its local affiliates like Local 89. It is one of the nation's largest multiemployer pension plans, with more than 1,000 contributing employers representing 45,000 active participants in industries including trucking, car haul, warehouse, construction, food processing, and dairy and grocery trucking.[2] At its height, Central States had over 11,000 contributing employers and 400,000 active participants.[3]

For decades, Central States was financially unstable—until it received $35.8B in federal assistance a few months ago[4]—a result that nobody could have predicted in 2018, when Petitioners and Local 89 agreed to switch pension plans to the IBT Fund. A U.S. Government Accountability Office ("GAO") report issued in June 2018 found that Central States was in "critical and declining" condition following a precipitous drop in the number of participants and the national economic crises of 2001-2002 and 2008.[5]

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2. *See* https://mycentralstatespension.org/about-your-fund.

3. *See* https://mycentralstatespension.org/about-your-fund.

4. *See* https://mycentralstatespension.org/helpful-resources/pension-crisis.

5. *See* https://www.gao.gov/assets/700/692384.pdf.

Its net assets plunged from $26.8B in 2007 to $15.3B in 2016, and its percentage of funded benefits fell from 55% to 42%.[6] The GAO concluded that "participant benefits were never fully secured by plan assets over this period, as measured by ERISA's minimum funding standards, and the plan consistently needed to collect contributions in excess of those needed to fund new benefit accruals to try to make up for its underfunded status."[7] The GAO projected that Central States would be insolvent by 2025.[8]

Central States' own government filings confirmed its severely underfunded "critical and declining" condition, with vested-benefit liabilities of $41B (as of January 1, 2018) that vastly exceeded plan assets ($15B)—a funded benefit level of just 36%—and likely insolvency by 2025.[9]

Rather than sit idly and watch Central States go insolvent, Petitioners negotiated and entered into the new 2019 CBAs with Local 89 (replacing CBAs negotiated in 2013), that, *inter alia*, called for a withdrawal from Central States and for future pension contributions to be made to the more financially secure IBT Fund. The 2019 CBAs ensured that, if Petitioners' employees' Central States pension benefits were cut for any reason, even insolvency, IBT Fund would make up the difference, C.A. App. 69-83, effectively insuring the employees against future downturns and benefit cuts by Central States.

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6. *Id.* at 10, 118.

7. *Id.* at 24.

8. *Id.* at 56.

9. Accessible in EFAST Form 5500 search (last accessed Apr. 14, 2023).

Petitioners stopped making contributions to Central States and began making contributions to IBT Fund as of February 1, 2019. Pet. App. 6a. Over the next year, Petitioners collectively contributed millions of dollars into the IBT Fund for the benefit of their unionized workforces pursuant to the new CBAs. Labor peace was maintained, and pension benefits had been secured.

On January 30, 2019, Petitioners delivered written notice to Central States that Petitioners and Local 89 had decided to withdraw from Central States in favor of the IBT Fund. C.A. App. 69, 77. The notice was delivered in accordance with the terms of a memorandum of understanding ("MOU") governing Petitioners' relationship with Central States, which provided that a new CBA could "eliminate" Petitioners' obligation to make contributions to Central States if a copy of the new or successive CBA were sent to Central States by certified mail. C.A. App. 45-46. This was done on January 30, 2019, the same day the 2019 CBAs were signed. C.A. App. 69-83. Delivering the 2019 CBAs to Central States *should have* eliminated Petitioners' contribution obligations. Per the MOU, "Employer Contributions shall continue ... after termination of the collective bargaining agreement until the date the Fund receives from the Employer ... a collective bargaining agreement signed by both the Employer and the Union that eliminates the duty to contribute to the Fund[.]" C.A. App. 45-46.

Instead of accepting this complete withdrawal pursuant to the MOU, Central States sued Petitioners for alleged ERISA violations. The crux of its case is that Local 89 did not provide Petitioners with perfectly worded notices of an "intention to terminate" under the evergreen

clauses of the 2013 CBAs because Local 89's notices did not contain the word "terminate" and instead stated that Local 89 intended to "negotiat[e] a new contract" with Petitioners.

The evergreen clauses provided that the 2013 CBAs would expire on January 31, 2019, "provided, however, that if neither party gives the other party written notice within sixty (60) days prior to the said expiration date of such parties [sic] *intention to terminate* this agreement, said Agreement shall continue for another year and from year to year thereafter[.]" Pet. App. 31a (emphasis added). In Central States' view, stating an intention to "negotiat[e] a new contract" without using the magic word "terminate" rendered Local 89's notices ineffective. This view would have two consequences: (a) the 2013 CBAs did not terminate (regardless of what Petitioners and Local 89 intended and believed); and (b) Petitioners had to continue making pension contributions to Central States.

The district court correctly dismissed Central States' lawsuit because the notices clearly reflected an "intention to terminate" the 2013 CBAs. Pet. App. 37a. Among other things, an express intention to form "a new contract" plainly implies a concomitant intention to terminate the old contract. *Id.* at 35a.

The Seventh Circuit reversed, holding that, although it was "not (quite) saying that the phrase 'we intend to terminate' was required for effective notice," the "intention to terminate" must nonetheless be "unequivocal and unmistakable" on the face of the notice. *Id.* at 17a. It reached this conclusion despite the lack of any textual basis in the evergreen clause for requiring that the

"intention to terminate" be stated in "unequivocal and unmistakable" terms.

The Seventh Circuit relied largely on its perception of public policy favoring employee pensions: "Strict enforcement" of termination provisions in CBA evergreen clauses "promotes stability by protecting funds and employee pensions against strategic attempts to evade an evergreen clause." *Id.* It hypothesized that, without a heightened requirement for "unequivocal and unmistakable" notice, opportunistic employers or unions might draft a notice in an intentionally vague manner to later argue that they had (or had not) affected a termination depending upon the outcome of negotiations for a new CBA. *Id.* Pension funds supposedly need the "clarity" afforded by a heightened standard. *Id.* Accordingly, the Seventh Circuit held that Local 89's notice of its intention to "negotiat[e] a new contract" was *not* an "unequivocal and unmistakable" expression of an "intention to terminate," *id.* at 14a, 21a, so the CBAs "continued in force under the evergreen clauses" and Petitioners "remained contractually obligated to make pension contributions to [Central States] through January 31, 2020." *Id.* at 27a.

If the Seventh Circuit's decision stands, Central States would have judgments totaling $11.8M against Petitioners for unpaid pension contributions from February 1, 2019 to February 1, 2020,[10] plus liquidated damages and interest. This would be a windfall to Central States, as Petitioners' employees ceased accruing benefits in the Central States

10. Central States does not dispute that the 2013 CBAs were terminated as of February 1, 2020.

plan effective February 1, 2019, when IBT Fund assumed responsibility.

The Seventh Circuit's ruling also could trigger a much greater "withdrawal liability" penalty by extending the date of withdrawal. *See Nat'l Retirement Fund v. Metz Culinary Mgmt., Inc.*, 946 F.3d 146, 148, 150-152 (2d Cir. 2020). Under ERISA, an employer must compensate a pension plan when it withdraws from the plan, generally at the withdrawing employer's proportionate share of the amount of the plan's total unfunded benefits, thus assuring adequate funding to pay for the withdrawing employees' accrued, vested benefits. *See* 29 U.S.C. § 1381. Thus, the amount of withdrawal liability could be much greater if, under the Seventh Circuit's ruling, a plan could argue that only a "partial withdrawal" occurred, leaving the old CBA in place for another year. All this for want of a magic word.

ARGUMENT

Thousands of U.S. private-sector employers employ more than 7 million union members, comprising 6% of the national private-sector workforce.[11] Due to the clear Circuit split, Pet. 12-23, the Seventh Circuit's decision creates uncertainty about how to interpret CBAs, altering the delicate bargaining relationship among employers and unions and potentially providing third-party pension plans with a new, powerful role in labor relations. To restore stability and uniformity in labor relations and pension-plan funding, this Court should grant certiorari to review the Seventh Circuit's decision.

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11. *See* https://www.bls.gov/news.release/pdf/union2.pdf (Table 3) (Jan. 19, 2023)

I. The Seventh Circuit's Decision Will Have a Significant and Immediate Impact on Employers with Unionized Workforces.

A. Upsetting the traditional dynamics of labor negotiations.

If it stands, the Seventh Circuit's decision will have a dramatic impact on how labor negotiations will be conducted in that Circuit and elsewhere. In the real world, labor negotiations—including the delivery of notices under evergreen clauses—typically are handled by management officials and union leaders, not labor lawyers. The November 2018 notices were sent by Local 89's President to Petitioners' management representatives. C.A. App. 63, 66. This reflects the common practice of employers and unions working directly with each other in the collective-bargaining process without needlessly "lawyering up." The parties rightly focus on the substantive issues before them, not the precision of words in a notice.

The Seventh Circuit's decision upsets this traditional dynamic. Lawyers will be needed to draft carefully-worded notices that include the lawyers' best guess as to what magic words are required given the myriad jurisdictional possibilities. One party's use of counsel will cause the other party to do the same. Hand-wringing and haggling over the form of notices will reign.

Further, the notices may foster an unproductive negotiating atmosphere. Requiring an employer or union to declare in writing that it "hereby elects and states its intention to terminate" a CBA could inject a confrontational tone and connotation. *Compare with*

Local 89's chosen language: "It is our desire to meet with you at an early date for the purpose of negotiating a new contract." Pet. App. 33a. This is how employers and unions prefer to communicate when they seek to preserve labor peace. Employers and unions alike do not want to cause unnecessary labor friction by announcing an ultimate negotiation objective of contract "termination."

As noted above, CBAs are very rarely "terminated" (in the Seventh Circuit's sense of the term) without a replacement or new CBA put in place. The narrow circumstances when that might occur are formal decertification of a union, a union's disavowal of representation, or an employer's cessation as an ongoing business. The near-universal custom is for one CBA to give way to a successor CBA. If a CBA expires before a new agreement is reached, most essential terms and conditions *must remain unchanged* pending agreement on the successor CBA, at least until a good-faith bargaining impasse, pursuant to the employer's "status quo" obligation. *See* 29 U.S.C. § 158; *NLRB v. Katz*, 368 U.S. 736, 746 (1962); *Laborers Health & Welfare Tr. Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543 n.5, 551 (1988).

The Form F-7 attached to Local 89's notices demonstrate the custom of re-negotiating expiring CBAs, not their complete termination. Form F-7 is promulgated by the Federal Mediation and Conciliation Service ("FMCS"), the agency charged with mediating disputes between employers and unions in CBA negotiations. Any employer or union seeking to "terminate or modify" a CBA must submit Form F-7 to FMCS and to all CBA counterparties. 29 U.S.C. § 158(d)(3). The notice itself

states: "You are hereby notified that written notice of proposed termination or modification of the existing collective bargaining contract was served upon the party to this contract and that no other agreement has been reached." C.A. App. 65, 68. It then provides three check boxes: "Renegotiation," "Reopener," and "Initial Contract." The Seventh Circuit found it significant that Local 89 checked "renegotiation," as this merely evidenced an intention "to negotiate" and not "to terminate." Pet. App. 21a. This is pure semantics. The decision elided past the all-telling fact that *there is no check box for "termination" on Form F-7.* C.A. App. 65, 68. The FMCS recognizes that employers and unions do not seek a "termination"; instead, they renegotiate a CBA, which has the effect of replacing and terminating the prior CBA.

Taken literally, the Seventh Circuit's all-or-nothing approach (terminate or renew automatically via the evergreen clause) does not allow for amending or revising an existing CBA. For example, if a notice sent under an evergreen clause stated that the employer or union intended to negotiate a modification of certain terms but retain the others, it would fail because it did not explicitly state a desire to "terminate," thereby automatic renewing per the evergreen clause. Indeed, even a notice stating, "we hereby terminate, unless we can agree upon certain revised terms," would not be sufficient for the Seventh Circuit because it does not "unequivocally" state an intention to terminate. The Seventh Circuit's decision stands at odds with basic labor practices.

B. Causing uncertainty and confusion in labor negotiations.

The Seventh Circuit's decision also muddies the waters of evergreen clauses. Insisting upon magic words and emphasizing semantics over the parties' intent breeds confusion and uncertainty among employers and unions about how or when an evergreen-clause notice might be effective. Uncertainty breeds instability, and instability is not conducive to peaceful labor relations.

As an initial matter, the Seventh Circuit failed to explain which magic terms suffice to show "unequivocal and unmistakable" intent to terminate. The Seventh Circuit held that it was "not *(quite)* saying that the phrase 'we intend to terminate' was required for effective notice," but it did not elaborate further. Pet. App. 17a (emphasis added). "Expiration" is not clear enough, *id.* at 16a-17a, even though "expire" and "terminate" mean *exactly* the same thing when used in the intransitive sense. "Terminate" can mean "to come to an end in time." "Expire" means "to come to an end."[12] The Seventh Circuit did not explain why "terminate" must be read in its narrower transitive sense. As a practical matter, there is no meaningful distinction between words like "terminate," "expire," and "cancel." They can all mean the same thing. Requiring a hyper-strict interpretation ignores practicalities and the familiar, commonsense rules of contract interpretation in favor of hyper-technicality and semantics. It is not reasonable to expect the non-lawyer representatives of employers and unions who draft and review these notices

12. *See* https://www.merriam-webster.com/dictionary/terminate; https://www.merriam-webster.com/dictionary/expire

to know and decipher the semantics insisted upon by the Seventh Circuit.

This is not a one-off case. The evergreen clauses here use standard, commonplace terms.[13] The Seventh Circuit's decision will leave numerous employers and unions guessing, especially in Circuits that have not yet addressed the issue.

The jurisdictional split—the Seventh and Sixth Circuits have issued decisions directly at odds with precedents in the First and Third Circuits, *see* Pet. 12-23—adds to this uncertainty. The Seventh Circuit's ruling also is contrary to longstanding rulings by the National Labor Relations Board ("NLRB"). Courts in the First and Third Circuits, and the NLRB, give the notice language its ordinary meaning and determine "what a reasonable person in the position of the parties when the contract was entered, aware of all relevant circumstances, would have thought it meant." 11 Williston on Contracts § 30:6 (4th ed.). Just like interpreting any other contract.

Thus, the effectiveness of a termination notice will depend largely upon geography and forum. Employers and unions will not know if a notice is effective until

13. *See* John C. Muhs, 97 Mich. B. J. 22, 23 (2018) ("A typical evergreen clause generally provides that the term of an agreement will automatically renew for subsequent periods of the same length unless either party provides written notice of termination to the other party within some minimum period before the current term expires"); hhttps://www.investopedia.com/terms/e/evergreen.asp ("What is an Evergreen Contract? An evergreen contract automatically renews on or after the expiry date. The parties involved in the contract agree that it rolls over automatically until one gives the notice to terminate it.").

months or years *after* the successful conclusion of good faith CBA negotiations, when a plaintiff like Central States challenges the notice and selects a favored forum to adjudicate the issue. *See* 29 U.S.C. § 1132(e)(2) (ERISA suit may be filed where the plan is administered *or* where the violation occurs *or* where the defendant resides). The effectiveness of the notice might depend not on its language, but, rather, on the locus of the reviewing court. This is an open invitation to gamesmanship.

III. The Seventh Circuit's Public Policy Rationale Is Misguided.

The Seventh Circuit based its holding on a perceived need to protect employee pension benefits. It believed that requiring "unequivocal and unmistakable" evidence of an intention to terminate a CBA is necessary to ensure that pension plans cgould have "the clarity they need to avoid unfunded commitments" and costly litigation. Pet. App. 17a. Apparently, the Seventh Circuit believes that a pension plan should be able to review a termination notice and determine without a shred of doubt whether it triggers a CBA termination.[14] But *the notices at issue here were not even sent to Central States*. The notices were required to be delivered by one CBA party to the counterparty 60 days in advance of the January 31, 2019, CBA expiration. Central States was given the only notice to which it was entitled: delivery of copies of the 2019 CBAs as required by the MOU. Simply put, it makes no sense to require a CBA termination notice to be written in "unequivocal

14. The irony of the Seventh Circuit's concerns about protecting employees, in the context of a termination notice *drafted and delivered by the employees' representatives*, Local 89, should not be overlooked.

and unmistakable" terms for the benefit of pension plans that do not receive—and are not entitled to receive—the notices in the first instance.

If the need to protect employee pension benefits were its driving principle, the Seventh Circuit should have affirmed the district court. After all, the Seventh Circuit's decision would force participating employees in Local 89 to accrue one additional year of service in a plan that (in 2018-2020) was projected to be insolvent in 2025 and one less year of service in the more financially secure IBT Fund.

The Seventh Circuit's rationale also ignores the ERISA provisions that impose "withdrawal liability" on an employer when it withdraws from a multiemployer pension plan that is not fully funded. *See UMW 1974 Pension Plan v. Energy West Mining Co.*, 39 F.4th 730, 734-736 (D.C. Cir. 2022); *Sofco Erectors, Inc. v. Trs. of Ohio Operating Eng'rs Pension Fund*, 15 F.4th 407, 416 (6th Cir. 2021). Pension plans already are fully protected against the burdens of unfunded benefits resulting from an employer's withdrawal pursuant to a new CBA. There is no need for a rule of "strict interpretation" to protect the plans.

Additionally, to the extent the Seventh Circuit was concerned that an opportunistic employer might draft an intentionally vague termination notice and use that vague notice as a means of terminating the CBA altogether if negotiations break down (leaving employees without an agreement), that concern is inapt and unfounded. The notices were drafted by Local 89, not the employers. In any event, employers do not seek labor unrest as a negotiation tool, and, even if they wanted to play tricks,

labor law protects against bad-faith tactics by imposing "status quo" obligations on the parties. As discussed above, employers and unions *must* continue to operate under most terms of their prior CBA (including provisions for pension-plan contributions) and to continue negotiating until they reach an impasse. Thus, employees are already protected against a theoretical opportunistic employer.

In short, no legitimate policy rationale supports a "strict interpretation" rule on termination notices delivered pursuant to evergreen clauses. The converse is true: the Seventh Circuit's decision establishes bad policy in multiple respects. For example:

- *The decision incentivizes opportunistic third parties to interfere with labor relations.* By requiring a special heightened standard of an "unequivocal and unmistakable" intention to terminate, the Seventh Circuit placed its finger on the scales in favor of third-party beneficiaries of CBAs. This tilt will affect CBA pension plans, health-insurance plans, and even life-insurance plans:

    a. Under the Seventh Circuit's decision, whenever a successor CBA is negotiated, there is a significant risk that a third-party beneficiary will attempt to upset that agreement if it does not like the terms. This brings costly litigation, unplanned windfalls, and potential breaches of labor peace.

    b. Allowing an ERISA plan to veto the parties' agreement to new CBA terms because the notice was not drafted clearly enough for the plan

(despite being clear enough for the parties) could cause employers to comply with two concurrent CBAs with the same union, as happened here, notwithstanding the parties' clear contrary intent. This will create havoc, confusion, and unfairness—*e.g.*, having employees in two competing healthcare plans in effect simultaneously. Sometimes, it may be impossible for an employer to comply with two different CBAs—*e.g.*, when a successor CBA changes an "exclusive" dispute resolution process, creating two sets of conflicting rules.

c. Arming ERISA plans with the power to veto a successor plan by nitpicking the words used in a notice opens the door for manipulation of ERISA withdrawal-liability claims that can amount to hundreds of millions of dollars. For example, suppose an employer has two CBAs, each requiring contributions to the same pension fund. After the employer provides identical notices of termination to the unions, the parties negotiate new CBAs that require a withdrawal from the old pension plan in favor of a new plan. If the old plan elects to challenge only one of the notices, it could argue that the termination of just one CBA results in the employer suffering a partial withdrawal, followed a year later by a complete withdrawal, causing much higher withdrawal liability—and a massive windfall to the old plan.[15]

15. *See* 29 U.S.C. § 1386 (definition of a partial withdrawal) and 29 U.S.C. § 1383 (definition of a complete withdrawal).

- *The Seventh Circuit's insistence upon magic words promotes "gotcha" scenarios and elevates form over substance.* Hair-splitting semantics and technicalities can lead to enormous windfalls for the opportunistic litigant. This cannot be good policy.

- *The decision disincentivizes employers from seeking better benefits for their employees.* Here, Petitioners recognized Central States' perilous financial condition and, working with Local 89, proactively developed a solution for their employees. The Seventh Circuit's holding punishes that effort.

- *The decision fundamentally alters the dynamics of labor negotiations by elevating the role of third parties.* Rather than accept the risk of an imperfectly-worded notice leading to huge liabilities, employers will have incentive to invite pension plans, health insurers, life insurers, etc. to the bargaining table, where they can protect their own interests and impede those of unions and employers.

IV. The Seventh Circuit's Thumbs-on-Scale Legal Standard for Reviewing Evergreen Clauses Has No Basis in Law.

A. A rule of "strict interpretation" for evergreen clauses contravenes precedent.

By creating a special "strict interpretation" rule for CBA evergreen clauses, the Seventh Circuit disregarded

this Court's precedent. This Court was crystal-clear in *M&G Polymers USA, LLC v. Tackett*: "We interpret collective-bargaining agreements, including those establishing ERISA plans, *according to ordinary principles of contract law*, at least when those principles are not inconsistent with federal labor policy." 574 U.S. 427, 435 (2015) (emphasis added). Yet the Seventh Circuit made no mention of *Tackett* or ordinary principles of contract law.

The Seventh Circuit's decision violates these principles. It did not give the evergreen-clause language its plain, ordinary meaning and, to the extent reasonable questions existed regarding the meaning, it did not look to decisive corroborating evidence such as the consummation of successor CBAs that necessarily "terminated" the old CBAs. For strictly policy reasons, the Seventh Circuit changed the contractual obligation to give notice of an "intention to terminate" by adding a requirement that the "intention" be expressed in "unequivocal and unmistakable" terms. In effect, the Seventh Circuit re-wrote the evergreen clauses to require written notice of an *unequivocal and unmistakable* intention to terminate the CBA. This is plainly impermissible.

Here, the notices stated that Local 89 desired and intended to "negotiat[e] a new contract." A reasonably objective person reading this notice would conclude that Local 89 had stated an "intention to terminate," as the old CBA is terminated when the new CBA is consummated. *See* Restatement (Second) of Contracts § 279 (1981) ("Substituted Contract") ("A common type of substituted contract is one that contains a term that is inconsistent with a term of an earlier contract between the parties.

If the parties intend the *new contract* to replace all of the provisions of the earlier contract, the contract is a substituted contract.") (emphasis added).

Instead, the Seventh Circuit applied an incorrect "strict interpretation" rule and misread the clauses. According to the Seventh Circuit, expressing a clear intention to negotiate and form "a new contract" is not the same as expressing an "intention to terminate," because "there was no guarantee that new collective bargaining agreements could be reached." Pet. App. 18a. But the plain language of the evergreen clauses requires written notice of an "intention" only. An intention to do something in the future, to "terminate" or to form a "new contract," is by its nature not a guarantee. There would be no guarantee of termination even if Local 89's notice had declared: "we hereby express and state our intention to terminate the CBAs in two months, on January 31, 2019." The Seventh Circuit's "strict construction" rule masks the notices' clear and obvious intent.

B. ERISA does not impose an "unequivocal and unmistakable" requirement for CBA evergreen clauses.

ERISA also provides that CBAs establishing ERISA plans must be interpreted according to ordinary principles of contract law, except where those principles are inconsistent with federal labor policy. *See, e.g., CNH Indus. N.V. v. Reese*, 138 S. Ct. 761, 763 (2018); *Tackett*, 574 U.S. at 435. Despite this general rule, the Seventh Circuit asserts that ERISA Sections 502 and 515 embody federal labor policy that departs from ordinary contract-interpretation principles and justifies superimposing

a strict "unequivocal and unmistakable" standard for notice of intention to terminate a CBA. Not so. Neither the text of these statutory amendments nor the legislative concerns that prompted their enactment justify such an overreaching interpretation.

Section 502 of ERISA merely requires that "[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions *in accordance with the terms and conditions of such plan or such agreement*." 29 U.S.C. § 1145 (emphasis added). This simply requires adherence to the contract. Section 515 merely authorizes a fund fiduciary to sue an employer to enforce those contractual contribution obligations. *See* 29 U.S.C. § 1132. It was enacted to address congressional concerns that "'simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses *unrelated* to the employer's promise and the plans' entitlement to the contributions.'" *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86-87 (1982) (citation omitted). The Seventh Circuit's decision surely invites "costly and complex litigation" unrelated to the actual wishes of employers and unions. *Mullins* makes clear that, to the extent Section 515 limits the rights of employers, it does so only for "unrelated" and "extraneous" defenses. *Id.* at 88. Section 515 does not require—or even permit—a court to impose upon CBA parties a more exacting notice requirement than the parties choose for themselves.

CONCLUSION

The Seventh Circuit's manifest errors of law set dangerous precedent that alters the way in which employers and unions conduct labor negotiations for CBAs. Certiorari review is necessary to establish a consistent national standard that comports with real-world labor practices and settled principles of law.

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