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 Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When employers agree to make contributions to multiemployer benefit plans, they must make those contributions "in accordance with the terms and conditions" of their collective bargaining agreements and the plan, under federal law. 29 U.S.C. § 1145.

In this case, did the court of appeals correctly decide that petitioners owe pension contributions to respondents for the 12-month period at issue, where the court found that (1) none of the bargaining parties had served a timely notice of termination in accordance with their agreements' specific terms and conditions governing termination, and therefore (2) the agreements continued under the terms of the agreements' "evergreen" clauses for the 12-month period?

PARTIES TO THE PROCEEDING

Petitioners

Transervice Logistics, Inc., a New York corporation, and Zenith Logistics, Inc., an Ohio corporation, are the petitioners.

Petitioners were defendants in the district court and appellees in the court of appeals.

Respondents

Central States, Southeast and Southwest Areas Pension Fund and its designated trustee, Charles A. Whobrey, are the respondents.

Respondents were plaintiffs in the district court and appellants in the court of appeals.

RULE 29.6 DISCLOSURE STATEMENT

Respondents state that neither one of them is a corporation.

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INTRODUCTION

This case presents a narrow dispute between two employers and a pension plan regarding the duration of the employers' obligation to contribute to the plan for their employees. The case's resolution was based on the particular language in petitioners' contracts, and on the effect a notice letter had on each contract's duration. Respondents—the plan and its trustee—asked for the contracts to be enforced as written. The court of appeals agreed that petitioners were bound by the language of their contracts and that petitioners owed contributions to the plan.

Petitioners have not presented the "compelling reasons" justifying a writ of certiorari, as required by this Court's rules. The Seventh Circuit identified that the circuit courts of appeals are in harmony on the analytical approach and legal standard applicable to termination defenses involving collective bargaining agreements. Petitioners misconstrue that case law and other decisions to invent a circuit split. But there is no split in authority. This case is merely the latest decision in a uniform body of law.

The case also does not present an important question of federal law that must be settled by this Court or precedent that conflicts with any of this Court's decisions. The Seventh Circuit's holding was based on the precise terms of petitioners' agreements and respondents' trust agreement and will necessarily have a limited impact beyond this case.

Boiled down, petitioners' protests are directed at the court of appeals' application of law to fact. But a dispute over the application of settled law to facts of a particular case is not a compelling reason justifying this Court's review. The petition should be denied.

STATEMENT OF THE CASE

1. Respondent Central States, Southeast and Southwest Areas Pension Fund (the "Fund") is a multiemployer pension benefit plan and trust. Respondent Charles A. Whobrey is one of the Fund's trustees. Petitioners, Transervice Logistics, Inc. and Zenith Logistics, Inc., are trucking logistics companies. Pet. App. ("App."), at 4a. Some of their employees are represented, for purposes of collective bargaining, by General Drivers, Warehousemen & Helpers Local Union No. 89 (the "Union"), an affiliate of the International Brotherhood of Teamsters. *Ibid.*

Petitioners each signed a collective bargaining agreement with the Union in 2013. *Ibid.* Under those agreements, petitioners agreed to make pension contributions to the Fund on behalf of covered employees, making the Fund a third-party beneficiary of the agreements. *Id.* at 2a, 4a.

The 2013 agreements each included a provision addressing the agreement's duration and the parties' defined procedure for contract termination. *Id.* at 4a-5a. Specifically, each agreement would remain in effect until an initial expiration date and would automatically extend for another year—under what is commonly known as an "evergreen" clause—unless one of the parties provided timely notice of its "intention to terminate" the agreement:

> This Agreement shall be effective as of February 1, 2013 and shall expire January 31, 2019; provided, however, that if neither party gives the other party written notice 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, subject to sixty (60) days' notice of termination prior to any succeeding termination date.

Ibid.

Each petitioner also agreed to be bound by the Fund's trust agreement, including the "entire term" provision found in Article III, Section 7(a), which states:

> An Employer is obliged to contribute to the Fund for the *entire term* of any collective bargaining agreement … (*including any extension of a collective bargaining agreement through an evergreen clause* …).

Id. at 4a (emphasis added); C.A. App. 48. This same provision also addresses what happens if an employer attempts to prematurely cut off its pension obligation to the Fund in a successor agreement:

> The following provisions contained in any agreement shall not be enforceable against the Fund … (a) a provision contained in … any agreement entered into by an Employer and Union subsequent to the collective bargaining agreement that purports to authorize the elimination or reduction of the duty to contribute to the Fund before the termination of the collective bargaining agreement … under its duration provision (including any extension through an evergreen clause) ….

C.A. App. 48. Thus, each petitioner agreed that its obligation to the Fund would continue through the end of any one-year extension under the evergreen

clause, even if it subsequently came to terms with the Union on a successor agreement that would supersede the 2013 agreement as to all other terms.

In letters dated January 30, 2019, petitioners informed the Fund that they had signed successor agreements with the Union. App. 6a; C.A. App. 69, 77. Petitioners also stated that they believed that their obligations to the Fund under the 2013 agreements would cease effective January 31, 2019. C.A. App. 69, 77. The successor agreements provided that covered employees would participate in a different pension plan. App. 6a. Petitioners stopped contributing to the Fund shortly thereafter. *Ibid.*

After receiving the successor agreements, the Fund asked each petitioner to provide a copy of any written notice that either it or the Union had served on each other, in accordance with the termination procedure outlined in the 2013 agreements. *Ibid.* Proof of such notices helps the Fund determine whether a participating employer has contributed to the Fund for the "entire term" of its collective bargaining agreement. *Id.* at 4a, 6a; C.A. App. 48.

In response, neither petitioner provided a copy of any notice that it had served on the Union. App. 6a. Instead, each petitioner provided a copy of a letter from the Union's president dated November 6, 2018. *Id.* at 5a-6a. Each letter included a subject line referring to the initial expiration date—January 31, 2019—included in the 2013 agreements.[1] *Id.* at 5a. In

[1] One letter misstated the expiration date as February 1, 2019, instead of January 31, 2019, but that did not affect the decisions below. App. 15a n.2.

the body of the letters, the Union then expressed its desire to schedule a date to negotiate with petitioners:

> Your present contract with General Drivers, Warehousemen, and Helpers, Local Union No. 89, expires as noted above.
>
> It is our desire to meet with you at an early date for the purpose of negotiating a new contract.
>
> We trust the forthcoming negotiations will result in an agreement that will be fair and just too [sic] all parties involved and that a better spirit of harmony and cooperation will be derived there from [sic].

Id. at 5a-6a. Neither petitioner replied to the letter it received. *Id.* at 6a.

After reviewing the materials provided by petitioners, the Fund concluded that the 2013 agreements had not been timely terminated in the manner set forth in the agreements. In particular, the only intent the Union expressed in its letters was a "desire" to schedule meetings for negotiations, not to terminate or cancel any existing agreements. *Id.* at 6a. Therefore, by their terms, the 2013 agreements automatically extended for an additional year under the evergreen clause. *Id.* at 5a. Petitioners, thus, owed contributions to the Fund for their covered employees through January 2020—*i.e.,* the end of the 2013 agreements' "entire term," after accounting for the one-year extension—because petitioners and the Union agreed that any successor agreement provisions that purport to eliminate the duty to contribute to the Fund before the end of the entire

term "shall not be enforceable against the Fund."[2] *Id.* at 4a, 6a-7a; C.A. App. 48.

The Fund billed petitioners every month from February 2019 through January 2020, but petitioners did not pay the contributions. App. 7a. Nevertheless, the Fund has provided pension credit to petitioners' covered employees for the work they performed during that 12-month period (contrary to the assertions of petitioners' amici[3]). C.A. Appellant Br. 7 (citing record affidavits in each district court proceeding).

2. After unsuccessful attempts to reach a resolution with petitioners, the Fund filed separate one-count complaints against them pursuant to relevant sections of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1132, 1145. App. 7a. Petitioners moved to dismiss the complaints based on a termination

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[2] The Fund acknowledged that the successor agreements signed in January 2019 expressed the bargaining parties' intention to terminate the pension obligation at the end of the one-year extension, meaning that petitioners would owe pension contributions for only an additional 12 months.

[3] Amici from four employer associations mistakenly assert that petitioners' employees ceased accruing benefits in the Fund on February 1, 2019. Br. of Amici Curiae the Ass'n of Food & Dairy Retailers, Wholesalers, and Mfrs., Associated Gen. Contractors of Am., Am. Bakers Ass'n, and HR Policy Ass'n ("Amici Br."), at 10-11. That is not true—the Fund is obligated to provide benefits for the period in question, in accordance with its plan and trust agreement. *See* 29 U.S.C. § 1104(a)(1)(D); *Cent. States, Se. & Sw. Areas Pension Fund* v. *Joe McClelland, Inc.*, 23 F.3d 1256, 1259 (7th Cir. 1994) ("The employer's legal obligation to contribute, and not the employer's actual payment, serves as the basis of the Fund's obligation to extend pension credits to the employees.").

defense, allegedly supported by the Union's negotiation letters. *Ibid.* The district court granted those motions and entered judgment for petitioners. *Id.* at 7a-8a; *see also id.* at 28a-37a.

3. On appeal, the Seventh Circuit reversed. *Id.* at 1a-27a. In its unanimous opinion, the court explained that the starting point for its analysis of petitioners' termination defenses was the "terms of the contract, including the evergreen clause's requirements for termination." *Id.* at 26a. Because the 2013 agreements' termination clause required a party to express an "intention to terminate," the court reasoned that "to terminate, one of the parties … needed to express an active desire for the agreement to end," in writing, and before the 60-day deadline. *Id.* at 5a, 26a. The Union did not express any such "active desire" for the 2013 agreements to end on their expiration date—rather, it "stated a desire to negotiate." *Id.* at 6a. The court reiterated its guidance that "[i]n the context of an evergreen clause … [a] desire to negotiate a new contract is quite consistent with a desire to leave the existing agreement in place unless and until a new deal is reached." *Id.* at 3a; *see also id.* at 19a (citing *Office & Prof'l Emps. Int'l Union, Local 95* v. *Wood Cty. Tel. Co.*, 408 F.3d 314, 315 (7th Cir. 2005) (Easterbrook, J.)).

If petitioners wanted to terminate the 2013 agreements to effectuate a withdrawal from the Fund by their preferred date—or even if petitioners were unsure of the effect of the Union's letters—the court said that all petitioners needed to do was send their own letter expressing their intention. *Id.* at 26a. Neither petitioner did so. *Id.* at 6a. And although the bargaining parties eventually came to terms on

successor agreements on the eve of the old expiration date of January 31, 2019, the new expiration date under the terms of their contracts had already rolled over to January 31, 2020, by that point. *Id.* at 5a, 22a. Most contractual terms under the successor agreements could take effect immediately, but given petitioners' independent contractual duty to contribute to the Fund for the "entire term" of the old agreements, including any one-year extension, petitioners owed the Fund contributions through the end of January 2020. *Id.* at 4a, 27a.

The appeals court addressed petitioners' argument that the outcome of the negotiations was evidence of the Union's intent and should cure their own failure to provide notice of an intent to terminate the agreements. *Id.* at 22a-25a. Here, the court made clear that it was the Union's intentions in November 2018 (when it sent the letters) that mattered, but those letters only expressed a desire to negotiate. *Id.* at 22a. Further—and contrary to the narrative suggested by petitioners and their amici—the record includes no evidence whatsoever indicating that the Union wanted to terminate the 2013 agreements in November 2018 "*regardless of the outcome of the requested negotiations*." *Ibid.*; *see also id.* at 14a. The court also noted that it would make no sense for it to assume that the Union had any such intent, because the Union would have been at risk of losing its ability to arbitrate grievances or to forestall a lockout if negotiations for a successor agreement had broken down. *Id.* at 18a; *see also* C.A. App. 26, 36 (2013 agreements contained "No Strike, No Lockout" clauses while agreements were in effect).

Given the consequences of termination, the court of appeals concluded that the bargaining parties had to "clearly express an intent to terminate … [to] meet the evergreen clauses' requirements for termination," which they did not do. App. 21a. A standard requiring a clear or unequivocal expression of intent, in accordance with the contract's terms, it reasoned, was "consistent with the decisions of our colleagues in all other circuits that have addressed [the] issue." *Id.* at 12a-13a (citing the First, Fifth, Sixth, and Eighth Circuits). The court also noted that, within the Seventh Circuit, the same contract-based standard applies to cases arising under ERISA and those arising under labor law statutes. *Id.* at 10a-11a & n.1. This contract-based standard requires courts to analyze the "particular contract" at hand to see if the notice complies with the bargained-for termination procedure. *Id.* at 11a; *see also id.* at 19a n.4. The court expressly rejected the idea that magic words are needed, but it explained that the party's notice must nevertheless provide clarity as to the parties' intentions. *Id.* at 17a & n.3.

The court, thus, remanded the cases back to the district court for further proceedings, where the parties are now exchanging discovery on the exact amounts owed. *Id.* at 27a. The court of appeals commended the district court for correctly following the circuit courts' uniform body of federal law, but it instructed that the district court's "application of that standard" was in error. *Id.* at 13a.

* * *

REASONS FOR DENYING THE PETITION

There is no circuit split for this Court to resolve. A careful reading of the case law shows that the Seventh Circuit was correct when it identified its approach to petitioners' termination defenses as consistent with the approach of all other circuits that have addressed similar defenses. Petitioners place undue emphasis on slight variations in courts' formulations of the same rule, but at bottom, all the circuits—including the First and Third Circuits—approach termination defenses in a consistent manner. With no circuit split to rely on, petitioners fail to present any real threat of forum shopping by plans in the future.

Furthermore, there is no federal interest served by having this Court analyze how a particular contract should be read. The contract-specific nature of evergreen clauses and plan language means that court decisions in this subcategory of ERISA law are, by their nature, narrow and fact-specific. Petitioners wish to conceive of a new, "flexible" approach applicable to all collective bargaining agreements, but any such generally applicable approach allowing bargaining parties to stray from the language of their contracts would be at odds with ERISA, federal labor law, and this Court's precedents. Petitioners' and their amici's concerns about this case's alleged impact on labor negotiations nationwide are overblown because they are based on a misunderstanding of black-letter contract law.

The Seventh Circuit applied a settled legal standard to the facts of this case. Its holding was well-reasoned and based on applicable precedent. There is no compelling reason for this Court to review the case.

I. The Circuit Courts of Appeals Apply a Uniform Standard to Termination Defenses

Petitioners suggest that this case involves a situation where an appeals court recognized the approach of other circuits and went in a different direction. But here, the Seventh Circuit *followed* the other circuit courts in reaching its conclusion. Without any real split in authority, Petitioners attempt to recharacterize the opinion below as requiring "magic words," but the Seventh Circuit made clear that it was not crafting any such hurdle. Petitioners are then left to stretch the facts of this case to align with other decisions involving different fact patterns, but that attempt also fails.

1. The Seventh Circuit did not break any new ground when it articulated the framework and applicable standard for analyzing a party's termination defense. That analysis depends on the contract at hand, and thus, courts must start by analyzing the specific "method of termination" set forth in the collective bargaining agreement. App. 11a, 26a. The court explained that if the agreement's termination provisions are unambiguous, then they should be enforced as written, just as it had held several decades earlier in a case involving an illegal strike. *Id.* at 11a (citing *Contempo Design, Inc.* v. *Chi. & Ne. Ill. Dist. Council of Carpenters*, 226 F.3d 535, 546 (7th Cir. 2000) (en banc)).

Enforcing a contract according to its terms is not just sound labor policy. In the ERISA context, Congress demands it. Under ERISA, employers must make promised contributions to multiemployer

benefit plans "in accordance with the terms and conditions" of their collective bargaining agreement and the plan. 29 U.S.C. § 1145. This statutory mandate "makes clear that a court deciding a contribution obligation should hold the parties to the terms of their contracts as written." App. 9a.

The Seventh Circuit determined, and all parties here agree, that the bargained-for termination method in each of the 2013 agreements was unambiguous and required one of the bargaining parties to serve a written notice of its "intention to terminate" the agreement by the 60-day deadline. *Id.* at 5a, 13a-14a. If no such notice was served, the bargaining parties agreed that the agreement "shall continue for another year" under the evergreen clause. *Id.* at 4a-5a.

So, "to satisfy the termination procedure," petitioners had to show that the Union's letters requesting negotiations expressed the requisite intent to terminate. *Id.* at 2a. Here, the court of appeals elaborated on the legal standard applicable for showing the requisite intent; one of the bargaining parties must have communicated an "active desire for the agreement to end." *Id.* at 26a. To express that active desire—particularly in the context of an evergreen clause, which parties include "in their collective bargaining agreements to ensure stability"—the party must speak in "clear" or "unequivocal" terms. *Id.* at 10a, 13a, 16a.

The circuit courts of appeals are in accord in requiring a clear expression of intent. *See New England Carpenters Cent. Collection Agency* v. *Labonte Drywall Co.*, 795 F.3d 271, 277 (1st Cir. 2015)

("A party's stated intent to withdraw from a collective bargaining relationship is effective only if it is both timely and unequivocal." (citation omitted)); *La. Bricklayers & Trowel Trades Pension Fund* v. *Alfred Miller Gen. Masonry Contracting Co.*, 157 F.3d 404, 409 (5th Cir. 1998) (finding that a letter did not "unequivocally indicate[] an intention to terminate the CBA"); *Orrand* v. *Scassa Asphalt, Inc.*, 794 F.3d 556, 564 (6th Cir. 2015) ("The [court's] inquiry must confirm that the [party] unequivocally communicated its intent to withdraw from the CBA. … A notice to terminate must be clear and explicit." (citations omitted)); *Twin City Pipe Trades Serv. Ass'n* v. *Frank O'Laughlin Plumbing & Heating Co.*, 759 F.3d 881, 886 (8th Cir. 2014) (finding that "two letters did not … unequivocally express the clear and explicit intent necessary to terminate participation in a CBA"). As explained, *infra*, the unique features of the contractual language and notices at issue in these cases help explain why termination defenses sometimes succeed and sometimes do not. But the legal standard requiring a clear expression of intent is uniform across the board. *See* App. 12a-13a.

None of the circuits, the Sixth and Seventh Circuits included, requires a party to use "magic words" when expressing an intention to terminate. Petitioners try to create a circuit split by insisting that the Seventh Circuit adopted a "magic-words" requirement for termination defenses, Pet. Br. 23, but the court explicitly rejected that approach.

The Seventh Circuit, again, emphasized that courts must "look to the language of the evergreen clause establishing the method of termination and analyze whether the alleged notice complied." App.

11a. The 2013 agreements required notice of an "intention to terminate," and the court of appeals explicitly emphasized that no specific words, such as "we intend to terminate," are required to comply with that type of notice requirement. *Id.* at 5a, 17a. Nonetheless, the parties' use of—or omission of—the express word or words referenced in the bargaining parties' contract (*i.e.,* "terminate") may be relevant in assessing whether the party had the requisite intent. *Id.* at 6a (observing that the Union had not used the word "'terminate' or any synonym" thereof in its letters). But even those facts are not dispositive because the court emphasized that "using the word 'terminate' does not necessarily make a notice effective" if, for instance, the word is stated in passive or equivocal terms. *Id.* at 17a n.3. The true test does not depend on magic words, but on whether the notice clearly "express[es] an active desire for the agreement to end." *Id.* at 26a. The Union's negotiation letters did not express the requisite intent under this standard.[4]

2. Once this false asymmetry about a "magic words" requirement between the Seventh Circuit and the other circuits is eliminated, the decisions requiring clear expressions of intent can all be reconciled. Petitioners rely on *Labonte Drywall* to argue that the First Circuit employs a different

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[4] Petitioners imply that the "magic word" required by the Seventh Circuit is "terminate," Pet. Br. 13, but their amici concede that the Seventh Circuit "failed to explain which magic terms suffice," Amici Br. 15. Petitioners and their amici have, thus, shown that their arguments about a "magic words" requirement collapse under their own weight because they cannot illustrate or agree on which terms are "magic" and which terms are not.

approach, but neither the First Circuit's legal standard nor the facts of that case support petitioners. As the Seventh Circuit identified, App. 12a, and as petitioners concede, Pet. Br. 16, the First Circuit in *Labonte Drywall* explicitly required that a party's stated intent must be "unequivocal." *Labonte Drywall*, 795 F.3d at 277. The employer's letter in *Labonte Drywall* met this standard because it did not merely express whether the employer wanted the existing agreement to end—it went much further than that. The employer stated in blunt terms that it had not done union work in almost 18 months and that it lost "so much money again" on its last job with the union that it was "no longer bidding or doing any more union work." *Id.* at 275. The employer, thus, did not equivocate, but instead was clear about the status of its relations with the union: their collective bargaining relationship was over. *Id.* at 278.

This stands in sharp contrast with the Union's letters, which *requested negotiations*. And although the Union expected those negotiations to eventually result in a new contract, the notice omitted any reference to the intention that petitioners have read into the letters—that the Union supposedly wanted the 2013 agreements to end on the expiration date regardless of the outcome of the negotiations. The Seventh Circuit noted that, just like the First Circuit, it would not apply a rigid requirement for specific words. App. 17a & n.3. But the clear-notice standard requires that the notice be "unmistakable," meaning that the court would not mistakenly read petitioners' speculative intentions into the letter. *Id.* at 17a. Specifically, the court would not assume that the union had abandoned the stability provided by the

bargained-for evergreen clause during negotiations, especially when there is nothing in the letter even remotely expressing that intent. *Id.* at 14a-16a.

Petitioners also rely on *Paterson Parchment Paper Co.* v. *International Brotherhood of Paper Makers*, 191 F.2d 252 (3d Cir. 1951) for their purported circuit split, but the Third Circuit's and Seventh Circuit's approaches are consistent. Petitioners fail to mention that the Third Circuit stated in *Paterson Parchment* (nearly 75 years ago) that it was construing a collective bargaining agreement "in accordance with Pennsylvania law." *Id.* at 253. Therefore, petitioners are stretching when they say that the Third Circuit has truly "weighed in" on the correct legal standard. Pet. Br. 28. But even assuming the Third Circuit's decision is applicable here, its rule formulation is functionally identical to the other circuits. In *Paterson Parchment*, the Third Circuit looked for a "plain manifestation" of the union's intent to determine whether the union had intended to terminate the collective bargaining agreement. 191 F.2d at 254. This is merely a different formulation of the same clear-notice standard because Pennsylvania law requires that "a notice for the recission or termination of a contract must be clear and unambiguous, conveying an unquestionable purpose to insist on the cancellation." *Berwick Hotel Co.* v. *Vaughn*, 150 A. 613, 616 (Pa. 1930).

The facts of *Paterson Parchment* also help explain why the notice was sufficient in that case. The agreement's termination method in *Paterson Parchment* was different in that any "notice" would forestall the evergreen clause, 191 F.2d at 253, unlike here, where the notice had to show the "parties[']

intention to terminate." App. 5a. The union's letter in *Paterson Parchment* also specifically identified itself as a "notification in compliance to the sixty (60) days notice stipulation, in our contract," and so the Third Circuit found that the union was "clear" that it was unwilling to continue under the old contract beyond the expiration date. 191 F.2d at 253-54 & n.1. In contrast, the Union here made no attempt to identify its letters as complying with the 2013 agreements' termination provisions, nor did it state or suggest it would be unwilling to perform under the agreements beyond the expiration date. Whether viewed under a plain-manifestation standard or a clear-expression standard, petitioners' attempt to rely on the Union's letters would fail in any of the circuit courts, including the Third Circuit.

Petitioners also fail to show that other courts of appeals are applying a different standard. They argue that the Fifth Circuit's unequivocal-notice standard in *Louisiana Bricklayers* merely "prohibit[ed] conflicting messages" but did not require a showing of an intent to end the agreement. Pet. Br. 17 n.1. This is a re-write of the Fifth Circuit's own words. While it may be true that *Louisiana Bricklayers* presented an easy case where the employer's equivocations doomed its termination defense, courts in the Fifth Circuit have long held that a notice of termination "must be clear and explicit." *Texoma Nat. Gas Co.* v. *Oil Workers Int'l Union, Local No. 463*, 58 F. Supp. 132, 138-39 (N.D. Tex. 1943), *aff'd* 146 F.2d 62 (5th Cir. 1945). When the contract requires a party to expressly terminate the existing agreement, notices requesting negotiations do not suffice. *See id.* 146 F.2d at 65 ("[W]e find nothing in the written notices [which

sought to "negotiate"] … evidencing a desire to terminate the contract; nor do we think that the written notices had that effect.").

Petitioners also ignore Eighth Circuit precedent altogether. The Eighth Circuit's requirement of an unequivocal notice falls directly in line with the Seventh Circuit and the rest of the circuits. *Frank O'Laughlin Plumbing*, 759 F.3d at 886. The court below noted this in its analysis. App. 12a-13a.

3. The National Labor Relations Board employs a similar approach. As an initial matter, Supreme Court Rule 10 does not speak of alleged conflicts between circuit courts and federal agencies as providing a compelling reason to warrant this Court's review. This makes sense because in many contexts, as is the case here with final Board decisions, the circuit courts have the power to review the agency decisions. 29 U.S.C. § 160(e)-(f). If the Board has taken a detour that diverges with the circuit courts' holdings, the circuit courts can correct the error.

Furthermore, there are several flaws in petitioners' reliance on Board decisions to create a split in authority. *First*, Board decisions dispense with "magic words" requirements, too, but that analysis is fully consistent with the approach of the circuit courts. The Seventh Circuit and the other circuits would agree that "rigid requirements" demanding absolute perfection are not defensible. *See, e.g.*, App. 17a & n.3. But there is a gulf of reason between the contract-based approach followed by the circuit courts and the Board and the approach urged by petitioners. None of the Board decisions even

remotely suggest that the parties can ignore the contract's notice provisions altogether.

Second, when presenting the Board decisions, petitioners have muddied the analytical approach to termination defenses by generalizing the language of all collective bargaining agreements. Petitioners would have the Court believe that all evergreen clauses are identical. But some contracts specify that the one-year extension in the evergreen clause can be avoided by serving a notice referring to amendments or modifications, while other contracts (like the ones here) expressly require a party's intent to terminate to forestall the one-year renewal.

In fact, the Seventh Circuit explicitly addressed how different evergreen clauses can lead to different results. In its prior decision in *Oil, Chemical & Atomic Workers International Union* v. *American Maize Products Co.*, 492 F.2d 409 (7th Cir. 1974), the court interpreted a collective bargaining agreement under which the "evergreen clause expressly provided for termination upon notice of 'desire to *amend or terminate*.'" App. 19a n.4 (quoting *Am. Maize*, 492 F.2d at 410-11 (emphasis added)). In contrast, the 2013 agreements do not state that notice of a desire to renegotiate will result in termination. *Ibid.* Considering this, Board decisions interpreting contractual provisions like the one in *American Maize* are simply inapposite because the contracts here demand a different result. *See, e.g.*, *Bakery, Confectionery, Tobacco Workers & Grain Millers Int'l Union, Local No. 37*, 372 NLRB No. 17, 2022 WL 17820772, *1 (N.L.R.B. Dec. 6, 2022) (explaining agreement's duration provision, which stated that service of any timely "notice" would forestall

automatic renewal and would "reopen[] … for amendment or modification of its provisions"); *N.J. Esso Emps. Ass'n*, 275 N.L.R.B. 216, 216 (1985) (same as to service of any "written notice of termination or desired modification"); *Champaign Cty. Contractors Ass'n*, 210 N.L.R.B. 467, 468 (1974) (same as to service of any notice conveying a "desire to amend, modify, or terminate"); *In re Crowley's Milk Co.*, 79 N.L.R.B. 602, 602-03 (1948) (same as to service of any notice expressing an "intent to negotiate a contract on different terms").

Third, the Board decisions have little relevance because liability under ERISA is not coextensive with liability for unfair labor practices under federal labor laws. *See* App. 10a (citing *Martin* v. *Garman Constr. Co.*, 945 F.2d 1000, 1005 (7th Cir. 1991)); *cf. Mayeske* v. *Int'l Ass'n of Fire Fighters*, 905 F.2d 1548, 1553 (D.C. Cir. 1990) (Thomas, J.) ("Since the NLRB, in applying the National Labor Relations Act, made an inquiry different from the one that the ERISA case law requires us to make, we see no basis for giving the NLRB's decision issue-preclusive effect.). Moreover, the "flexible" approach allegedly taken by the Board, Pet. Br. 15, is often preceded by extensive testimony before an administrative law judge, analysis of past bargaining sessions, and consideration of waiver and estoppel defenses. *See Local No. 6-0682, Paper, Allied-Indus. Chem. & Energy Workers Int'l Union*, 339 N.L.R.B. 291, 299 (2003) (finding waiver of notice requirement by the union); *N.J. Esso*, 275 N.L.R.B. at 216-18 (considering testimony and prior bargaining session notices). But requiring that sort of discovery and fact-finding in a proceeding under ERISA is at odds with Congress' goal of "simplify[ing] delinquency

collection" for pension plans when it amended ERISA in 1980. *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 87 (1982) (quoting a senate committee report). Simply put, comparing the Board's decisions to those of the courts of appeals is an apples-to-oranges comparison that does not yield a legitimate split in authority warranting this Court's review.

4. Finally, there are no forum-shopping concerns created by the Seventh Circuit's decision. The circuit courts of appeals agree on the applicable standards for termination defenses, so benefit plans cannot gain some perceived advantage by filing suit in any particular district court. The Fund does indeed file all its contribution lawsuits in the Northern District of Illinois, but it does so to reduce the plan's administrative costs, not to gain a legal advantage as to one specific type of affirmative defense. *See* C.A. App. 54 (participating employers and unions agree that the Northern District of Illinois is the "most convenient forum" for such suits). This cost-saving strategy ultimately benefits all participating employers and beneficiaries, including petitioners and their employees.

In sum, the circuit courts have applied a uniform standard to termination defenses. Therefore, this Court should deny the petition.

II. No Important Questions of Federal Law Are Implicated Because This Case's Resolution Rested on Particular Contractual Provisions

1. Court decisions in this subcategory of ERISA jurisprudence analyzing termination defenses are, by their nature, narrow. A grant of the petition would

mean that this Court would be interpreting contractual provisions specific to these parties. Nearly all other employers, unions, and plans would be unaffected by the outcome because collective bargaining agreements and plan language differ in so many varying ways. There are no compelling reasons for the Court to take up that endeavor.

In this case, the specific language of the evergreen clauses and the "entire term" provision in the Fund's trust agreement set forth petitioners' benefit obligations. In ERISA, Congress established a uniform rule for how courts should enforce these obligations: participating employers "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. Congress, in other words, instructed courts to enforce the contracts as written, provided that the promised benefit is not illegal. *Id.*; *see Kaiser Steel*, 455 U.S. at 86-88.

Petitioners and their amici give lip service to the notion that § 1145 "requires adherence to the contract." Amici Br. 24; *see also* Pet. Br. 8. But they otherwise do everything they can to stray from the actual language of the applicable contracts. Neither petitioners nor their amici mention that petitioners were bound by the Fund's trust agreement. *See* App. 4a. Neither mentions the "entire term" provision at all, even though that provision is essential to understanding petitioners' contribution obligations. *See ibid.* Their amici go so far as to re-label the trust agreement as a "memorandum of understanding" before citing unrelated provisions that had no impact on the parties' arguments or the decisions below.

Amici Br. 8. And, neither mentions the bargaining parties' "own use" of the separate terms "expiration" and "termination" in their evergreen clauses, with plainly different meanings. *See* App. 5a, 16a.

The Seventh Circuit interpreted these unambiguous contracts and held that petitioners owe contributions to the Fund for the 2013 agreements' "entire term," which included the one-year extension under the evergreen clause. *Id.* at 13a, 27a. Petitioners' termination defenses failed because they could not show that they or the Union took the active steps necessary to terminate the 2013 agreements before the evergreen clause took effect. *Id.* at 26a-27a. In the absence of the "entire term" provision, perhaps petitioners would have an argument that the new pension provisions in the successor agreements should supersede the old provisions requiring contributions to the Fund. But not here. Petitioners agreed they would continue contributing to the Fund through the end of the one-year extension, regardless of whether a successor agreement was signed before the "entire term" ended. The court's narrow holding depended on the particular contracts and the absence of any notice compliant with the parties' own termination method. The same is true for other courts' decisions analyzing termination defenses—"each [case] treats the question at hand as the best way to understand a particular contract." *Id.* at 11a (quoting *Wood Cty. Tele.*, 408 F.3d at 316). Given the contract-specific nature of these cases, there is no universal federal question for this Court to settle.

2. Petitioners and their amici nevertheless speak hyperbolically about "intolerable unpredictability" and "disastrous real-world consequences" that could

result from this case. Pet. Br. 11; Amici Br. 4. Those concerns are grossly overstated. The Fund has worked with thousands of participating employers and unions over the years, and in doing so, has seen countless notices served by bargaining parties prior to their collective bargaining negotiations, which typically happen every few years. The overwhelming majority of those employers and unions serve notices that comply with their own contracts' duration provisions. If one of the parties wants to terminate the existing agreement, it is simple. Any number of synonyms and phrases can indicate that a party no long wants to perform under the collective bargaining agreement after the expiration date—*e.g.*, "cancel," "end," or "terminate," without additional language that suggests that the agreement continue. To avoid uncertainty, parties commonly refer to the specific page or section of the collective bargaining agreement with which they wish to comply. Some parties exchange multiple letters to clarify their intent.

Furthermore, if the parties are nevertheless concerned that they might not get their message across in the future—and are concerned, for instance, that they could be bound by certain benefit obligations for another year—there are options. They can ensure that the start date for new benefit obligations with a new plan do not take effect until obligations to the old benefit plan are definitively eliminated. They can bargain for an evergreen clause that can be forestalled with a notice to "terminate or modify," like the language at issue in *American Maize* and the NLRB cases. *See supra*. They can even remove the evergreen clause altogether.

Petitioners' and their amici's concerns are also befuddling because even under their theorized circuit split, the Seventh Circuit's decision did not present a sea change in the legal standard. Petitioners argue that the Sixth and Seventh Circuit stand on one side of the split in authority. But the Sixth Circuit has been stating for decades that notices must be "clear and explicit" to terminate the contract. *See, e.g.*, *Office & Prof'l Emps. Int'l Union, Local 42* v. *UAW, Westside Local 174*, 524 F.2d 1316, 1317 (6th Cir. 1975) (citation omitted); *Int'l Union of Op. Eng'rs Local No. 181* v. *Dahlem Constr. Co.*, 193 F.2d 470, 475 (6th Cir. 1951). Petitioners are also hard-pressed to claim that their bargaining strategies were formed or affected by some other circuit court's law. The 2013 agreements here governed work conditions and benefits for covered employees at a warehouse sitting within the Sixth Circuit, in Louisville, Kentucky. App. 31a; C.A. App. 24, 34. Even the Sixth Circuit's 2015 decision in *Orrand* requiring a clearly stated notice, 794 F.3d at 564, had been the law of that circuit for several years before petitioners and the Union began discussions for successor agreements in late 2018 and early 2019. In short, petitioners and their amici are exaggerating when they suggest they could not have anticipated that the Seventh Circuit would require petitioners to follow their contracts, or that this case changes the future of collective-bargaining negotiations.

Petitioners and their amici press for the creation of a flexible, anything-goes rule based on the parties' supposed "practical construction" of their agreement, not on the agreement's terms. Pet. Br. 4. But it is hard to see how such an expansion of contractual flexibility would lead to *more* predictability for employers,

unions, and benefit plans. For instance, petitioners' amici profess that collective bargaining agreements are "rarely" terminated, Amici Br. 3, but under the looser approach they want this Court to adopt, the Union's letters supposedly *would* result in the rare outcome of termination on the expiration date. It is far from certain that the Union would subscribe to petitioners' "practical construction."

3. Petitioners' desire to stray from the language of their contracts would also conflict with ERISA, federal labor law, and this Court's precedent. In essence, petitioners are arguing that they or the Union should have been able to terminate their contracts in a manner not specified in their agreements—either by serving mere negotiation letters or by backdating an illusory "notice" as timely once a new successor agreement had been reached. But this would conflict with ERISA's requirement that employers contribute to plans in accordance with their written contracts. 29 U.S.C. § 1145. Plans' attempts to hold employers to their promise to fund employee benefits would be completely undermined if employers could always assert the defense that their contract means something other than what it says. As a bulwark to this defense, ERISA and the National Labor Relations Act ("NLRA") prevent courts from giving force to oral understandings between the union and employer that contradict the writings. *Id.*; *see* 29 U.S.C. § 186(c)(5)(B); *see also, e.g.*, *Mo-Kan Teamsters Pension Fund* v. *Creason*, 716 F.2d 772, 777 (10th Cir. 1983) ("[A]n employer and a union may not orally modify the terms of employee trust provisions in a collective bargaining agreement." (citation omitted)).

Petitioners' desire to flout their contracts would also conflict with this Court's guidance in *M&G Polymers USA, LLC* v. *Tackett*, 574 U.S. 427 (2015). There, the Court explained that "the written agreement is presumed to encompass the whole agreement of the parties." *Id.* at 440. The Court also made clear that "[w]here the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." *Id.* at 435. Petitioners want to deviate from these ordinary principles of contract law and open the door to extrinsic evidence of their own "practical construction," but the court of appeals correctly rebuffed this tactic because the relevant agreements were unambiguous. App. 13a, 24a-25a.

Petitioners make much of the fact that the Seventh Circuit did not cite *Tackett* and its guidance that courts must follow "ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." 574 U.S. at 435. But the Seventh Circuit cited a very similar rule requiring that its analysis follow "general principles of contract interpretation." App. 8a (quoting *Schultz* v. *Aviall, Inc. Long Term Disability Plan*, 670 F.3d 834, 838 (7th Cir. 2012)). And in any event, the Seventh Circuit followed *Tackett* by ascertaining the meaning of the 2013 agreements based on their "plainly expressed intent" and by refusing to allow extrinsic evidence to change the meaning of unambiguous words. 574 U.S. at 435.

Petitioners' approach—which would allow for admission of extrinsic evidence on unambiguous contractual terms—is not only inconsistent with ordinary contract principles, but it also would be

"inconsistent with federal labor policy," *id.*, because of ERISA and the NLRA's aforementioned prohibition on employer attempts to rely on oral understandings that contradict the writings. And nothing in *Tackett* suggests that an equivocal notice can open the door to extrinsic evidence on an unambiguous contract, and so the Seventh Circuit correctly enforced the contracts as written. App. 25a.[5]

Petitioners and their amici have also ignored other principles of contract law and related case law when they suggest that the successor agreements should supersede the 2013 agreements as to all terms. With most provisions, the bargaining parties could renegotiate their obligations and have those new obligations go into effect immediately. But the Fund's status as a third-party beneficiary in the 2013 agreements matters. Contractual parties cannot eradicate a third-party beneficiary's rights without the third-party's consent if the contract so requires. *See* Restatement (Second) of Contracts § 304 (1981) ("A promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."); *id.* § 311(1) ("Discharge or modification of a duty to an intended beneficiary … by a subsequent agreement between promisor and promisee is ineffective if a term of the promise creating the duty

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[5] Petitioners rely on dicta from a Fifth Circuit case to suggest that the parties' conduct can be considered to interpret the notice. *Kaufman & Broad Home Sys., Inc.* v. *Int'l Bhd. of Firemen & Oilers*, 607 F.2d 1104 (5th Cir. 1979). But the Fifth Circuit in *Kaufman* made clear that its holding was that the "duration clause [was] unambiguous" and so the extrinsic evidence was not central to the holding. *Id.* at 1109.

so provides."). As this Court has noted, "the language of the contract" will control whether "the right of the beneficiary is not to be affected," and in turn, will determine whether the Fund can "seek judicial enforcement of the trust provisions." *Schneider Moving & Storage Co.* v. *Robbins*, 466 U.S. 364, 371 (1984) (citing Restatement (Second) of Contracts § 309, cmt. b).

Here, the "entire term" provision in the trust agreement not only defined the length of petitioners' contribution obligation, but it also prohibited petitioners and the Union from eliminating that obligation prematurely. C.A. App. 48. Nothing in the Seventh Circuit's analysis prohibits the successor agreements from taking effect immediately as to all other terms, but petitioners could not eliminate their obligations to the Fund before the end of the one-year extension because of the promises they made to the Fund. This unique set of circumstances will not present itself with many other plans or contracts.

4. Finally, the Seventh Circuit did not rely heavily on legislative history in reaching its conclusion. The starting and ending points of the court's analysis were the *contracts*. Nonetheless, the Seventh Circuit's citation to ERISA's legislative purposes was not out of place. Congress' goal of stabilizing multiemployer plan is well-documented, and this Court has cited to the same legislative history that the Seventh Circuit cited on several occasions. *See, e.g.*, *Laborers Health & Welfare Tr. Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 545-49 & nn. 12, 14-15 (1988); *Cent. States, Se. & Sw. Areas Pension Fund* v. *Cent. Transp., Inc.*, 472 U.S. 559, 580-81 & n.22 (1985); *Kaiser Steel*, 455 U.S. at 87. Petitioners' attack on

supposed public policy considerations also has no real bite. Petitioners cite no case law challenging the interpretation of ERISA that the Seventh Circuit applied in this case, which prohibits the bargaining parties from having hidden "understandings or defenses" that contradict the writings.[6]

Because the Seventh Circuit's ruling was based on the contracts, it fell in line with Congress's intent and this Court's precedents. But at the same time, because the contracts are unique, the holding is narrow in scope and will not have a broad impact beyond this case. For these reasons, the petition should be denied.

III. The Seventh Circuit Correctly Interpreted and Enforced the Contracts at Issue

Lastly, the Court should deny the petition because the court of appeals' holding was correct. In late 2018, with the date for an automatic, one-year extension approaching, petitioners made no attempt to terminate the agreements themselves. The Union

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[6] Relatedly, petitioners' amici argue that ERISA's separate withdrawal liability provisions should "fully protect[]" plans from the burdens of unfunded benefits, Amici Br. 18, but that argument completely overlooks congressional intent. Congress amended ERISA in 1980 to add the withdrawal liability provisions and to provide plans with a direct cause of action to collect delinquent contributions. *See Advanced Lightweight*, 484 U.S. at 545-46 (explaining that "Congress responded to two concerns" of unfunded withdrawals and contribution delinquencies by adding the withdrawal liability provisions and ERISA § 515, 29 U.S.C. § 1145). Congress thus intended contribution funding and withdrawal-liability funding for plans as complements, not as substitutes for one another.

sought to schedule a meeting with petitioners for negotiations, but it did not express any desire to terminate the 2013 agreements before the new deal was reached. A one-year extension of the 2013 agreements under the evergreen clause was the natural result, because the bargaining parties had not terminated their existing agreements in accordance with their chosen termination procedure. Consequently, the Seventh Circuit correctly held that petitioners' obligations to contribute to the Fund under the 2013 agreements and the trust agreement extended through January 2020 and that the case must be remanded for further proceedings.

1. The court of appeals explained that the ERISA *statute*—and not ERISA's purpose or legislative history—dictates that "a plan may enforce the writings according to their terms." App. 10a (citing 29 U.S.C. § 1145). Moreover, courts enforce the contracts as written in suits under § 1145 because third-party beneficiaries like the Fund "take contracts as they find them." *Ibid.*

The relevant contracts (the 2013 agreements and the trust agreement) were unambiguous as to their duration and petitioners' obligations. Once it was clear that petitioners had not served a termination notice—and considering that the Union's letters had not expressed any desire to have the 2013 agreements end—the Fund's fiduciaries properly discharged their duties under ERISA by providing pension credit to the covered employees who worked during the 12 months at issue and by billing the employers for delinquent contributions. *See* 29 U.S.C. § 1104(a)(1)(D) (requiring plan fiduciaries to discharge their duties "in accordance with the documents and instruments

governing the plan"); *Cent. Transp.*, 472 U.S. at 573 (explaining that fund trustees have a "responsibility for assuring full and prompt collection of contributions owed to the plan" as part of their duties to protect trust assets).

When the contributions never came, the Fund sued to collect the delinquent contributions, asking the courts below to recognize that neither bargaining party complied with their termination method and to enforce the evergreen clauses and "entire term" provision, as written. The Fund did not at any point advocate for a magic-words rule. Rather, it asked for the contracts to be enforced so that it would not be stuck providing pension credit to the employees for the year in question without any corresponding contributions to fund the benefits. The Seventh Circuit's decision helps ensure that the Fund will not be left with unfunded benefit obligations.

2. Petitioners' arguments are largely directed at the application of law to fact, but the Seventh Circuit explained point-by-point why the facts here do not support a termination defense. The Union served letters and mediator notices referring to its desire for negotiations over a new contract, but that did not equate to a desire to have the 2013 agreements end on the expiration date of January 31, 2019, regardless of the outcome of negotiations. As other circuits outside the Sixth and Seventh Circuits have explained, notices requesting negotiations and notices requesting termination carry different consequences, "except in the face of contractual language that equates [them]." *Dist. No. 1—Marine Eng'rs Beneficial Ass'n* v. *GFC Crane Consultants, Inc.*, 331 F.3d 1287, 1290 (11th Cir. 2003); *see also, e.g.*, *Motor*

Carriers Council of St. Louis, Inc. v. *Local Union No. 600, Int'l Bhd. of Teamsters*, 486 F.2d 650, 651-53 (8th Cir. 1973) (notice requesting negotiations did not result in termination under the contract, and so the union's strike was unlawful).

Notably, the Union and petitioners each had a strategic incentive to keep the agreements in place until a new deal was reached, which helps explain the Union's language choice and petitioners' own failure to serve a notice. Specifically, because the 2013 agreements included a no-strike, no-lockout clause, petitioners could ensure that a strike would not occur if the 2013 agreements remained in effect under the evergreen clause. App. 19a ("Keeping [the prior agreement] in force while the parties negotiate for a replacement reduces the risk of labor strife and lost productivity." (quoting *Wood Cty. Tele.*, 408 F.3d at 315)). The same is true for the Union, which could avoid a lockout and continue to arbitrate grievances. But if the 2013 agreements were terminated, a strike or lockout would become a real possibility.

Petitioners tried to re-write their own contracts and the Union's letters by suggesting that "expiration" and "termination" had the same meaning. But the contracts plainly used those two terms differently, with different meanings. App. 5a, 16a. So did Congress in the NLRA, as the appeals court noted. *Id.* at 16a (quoting 29 U.S.C. § 158(d)(1)). In the context of an evergreen clause, which parties include in their contracts for stability, the court reasoned that it would be ignoring the parties' plainly expressed intent if it allowed for a mere reference to the expiration date in the Union's letters to terminate the contracts. *Id.* at 3a, 16a. And it would make no

sense to require the Union to affirmatively say that it wanted the 2013 agreements to extend past the expiration date, because the parties had already expressed that the contracts "shall continue" unless one of the parties took the active steps necessary for termination. *Id.* at 5a, 15a. Neither party did that here. Accordingly, the Seventh Circuit correctly held that petitioners owe the Fund contributions for the 12 months in question. This Court should let that decision stand.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

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