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

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

Respondents say all circuits apply the same standards and different case outcomes reflect different facts. Their opposition hinges on this claim. They do not deny that the existence of diverging standards for evergreen-clause notices would cause intolerable inconsistencies for the legal status of collective bargaining agreements, across a range of contexts. Nor do they dispute that federal law cannot tolerate inconsistency of that sort. See Pet. 28-32; Amici Br. 15-17.

But respondents' core claim is meritless. The Sixth and Seventh Circuits demand a *clear statement* of an intent to terminate and distinguish "termination" from synonymous concepts, even when the contract does not require specific wording in the notice. The Seventh Circuit also prohibits considering extrinsic evidence of the contracting parties' intentions, even when the notice is ambiguous. Both courts ground their strict rules in legislative history and policy concerns that sacrifice ordinary contract principles to favor employee benefit plans. In contrast, the First and Third Circuits, like the National Labor Relations Board ("NLRB"), infer an intent to terminate whenever the notice fairly conveys that intention and the agreement does not require specific wording. And in cases of ambiguity, they consult extrinsic evidence, as does the Fifth Circuit.

Had the Seventh Circuit applied the latter approach, it would have reached the opposite result. There is no need to guess about that, because the

features that the Seventh Circuit found problematic under its clear-statement rule—failing to use the word "termination" and requesting to "negotiat[e]"—have been found unproblematic in the First and Third Circuits and NLRB. So long as a court does not demand more clarity than the parties' own contracts, the only possible conclusion here is the one the district court reached. The Union's timely notices that the existing agreements were expiring at the end of January 2019, and that it wanted to negotiate new ones, conveyed its intent to prevent the old agreements from extending past January 2019. And any possible doubt is dispelled by extrinsic evidence, shared with respondents in real time, which shows that petitioners and the Union understood the notices as termination notices.

In claiming that all circuits treat this issue identically, respondents ignore the actual reasoning of the First, Third, and Fifth Circuits, as well as the NLRB. They attempt to reinvent these contrary precedents through the lens of respondents' flawed argument on the merits. But outside the Sixth and Seventh Circuits, it is not the presence of magic words, or special solicitude for benefit plans, that governs. It is ordinary contract law, including extrinsic evidence when appropriate.

When adjudicators apply different ground rules, contracts will renew in some jurisdictions but not others. Respondents do not dispute that such inconsistency is terrible for federal labor and benefits law. Nor do they claim this case is a bad vehicle to resolve points of disagreement. Because respondents fail to

prove the law consistent, the Court should grant the petition and ensure that collective bargaining agreements are judged under consistent standards nationwide.

A. The Lower Courts And NLRB Subject Evergreen-Clause Notices To Different Standards

Respondents argue that all circuits apply the same legal test and that differing outcomes result from differing facts. Neither claim is correct.

1. Respondents ignore that while several circuits use the term "unequivocal" when articulating their standards, their actual standards are different. The Seventh Circuit's standard includes clear-statement and strict-construction rules: If an evergreen clause requires notice of an intent to terminate, "anything short of a clear expression of such intent fails to qualify." Pet. App. 10a. Notices are "strictly interpret[ed]," and must not only be unequivocal, but "unequivocal *and unmistakable*." *Id.* at 8a, 17a (emphasis added). The Sixth Circuit similarly holds that "[a] notice to terminate must be clear and explicit," and the court's analysis of the notice must remain "superficial." *Orrand* v. *Scassa Asphalt, Inc.*, 794 F.3d 556, 564 (6th Cir. 2015) (citations omitted).

The First and Fifth Circuits, like the district court here, find a notice unequivocal if it does not send conflicting messages about the author's intentions. Pet.

16-17 & n.1. The First Circuit cited the Fifth Circuit for this understanding of "unequivocal" notice. See *New England Carpenters Cent. Collection Agency* v. *Labonte Drywall Co.*, 795 F.3d 271, 278 (1st Cir. 2015) (citing *La. Bricklayers & Trowel Trades Pension Fund & Welfare Fund* v. *Alfred Miller Gen. Masonry Contracting Co.*, 157 F.3d 404, 409 (5th Cir. 1998)).[1] The First Circuit also relied on NLRB precedent, *id.* at 277 & n.4, which finds a writing equivocal if its words are "inconsistent" with the author's conduct, *Retail Assocs., Inc.*, 120 N.L.R.B. 388, 391-392 (1958).

For the First Circuit, an unequivocal notice need not contain "precise language." *Labonte Drywall*, 795 F.3d at 278 (citation omitted). Requirements for linguistic precision or clarity arise, if at all, only from the evergreen clause itself. Indeed, the First Circuit explicitly refused to impose a stricter clear-statement requirement from the Sixth Circuit: it explained that it was "bound by the 'timely and unequivocal' standard," not some more demanding "clear and unambiguous" standard found in Sixth Circuit cases. *Id.* at 277 n.4.

Respondents object to placing the "magic words" label on the Seventh Circuit's approach. But Seventh Circuit precedent literally calls "terminate" a "magic

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[1] Respondents contend (at 17-18) that the Fifth Circuit endorses a clear-statement rule, citing *Oil Workers International Union, Local No. 463* v. *Texoma Natural Gas Co.*, 146 F.2d 62, 65 (5th Cir. 1944). Not so. The Fifth Circuit simply recognized that "[t]he correspondence between the parties, as well as their actions subsequent to the first year period, clearly demonstrate[d] that neither considered the contract terminated." *Id.* at 64-65.

word"—albeit a magic word that sometimes flunks the court's extreme demands for clarity. *Off. & Pro. Emps. Int'l Union, Loc. 95* v. *Wood Cnty. Tel. Co.*, 408 F.3d 314, 316 (7th Cir. 2005) ("The notice was ambiguous because it used the magic word 'terminate' (implying that the expiration date would not roll forward) but could have been read to emphasize the word 'modify' instead."). Respondents' objection relies on a footnote in the opinion below, but it too underscores that the word "terminate" is not always enough for the Seventh Circuit. Pet. App. 17a n.3. True, the same footnote cryptically cited *Labonte Drywall* as a "caution against a rigid requirement for using the word 'terminate.'" *Ibid.* But that cursory mention of *Labonte Drywall* does not somehow make the two decisions consistent. They are not: The Seventh Circuit ruled against petitioners because "[t]he supposed termination letters did not mention termination." Pet. App. 3a. The First Circuit *rejected* the idea that a "letter did not communicate an unequivocal intent to terminate * * * because it 'ma[de] no mention of "termination."'" *Labonte Drywall*, 795 F.3d at 277-278; see Pet. 17-18.

Although the conflict with the First Circuit is especially sharp, the Seventh Circuit diverges from the Third Circuit and NLRB, too. The court below never claimed that its approach tracks the Third Circuit's or the NLRB's. And even respondents do not claim that the NLRB—the federal experts on labor relations—requires linguistic specificity to terminate a collective bargaining agreement. Cf. Pet. 15-16. Respondents unpersuasively argue (at 16) that the Third Circuit

imposed a "clear-notice" requirement in *Paterson Parchment Paper Co.* v. *International Brotherhood of Paper Makers*, 191 F.2d 252, 254 (1951). But there, the Third Circuit simply found that a particular notice, which requested "a meeting with the Company for the purpose of discussing changes in the contract for the coming year," clearly implied an "unwillingness to continue under [the old contract's] provisions beyond its potential expiration date." *Id.* at 253-254. That just proves petitioners' point, because the Third Circuit would find the same implication in the Union's requests to meet to negotiate new agreements.

2. Respondents attempt (at 19-20) to dismiss cases that reached different results by claiming that those cases' evergreen clauses contained different wording. But that was not the basis for those decisions. Decisionmakers outside the Sixth and Seventh Circuits do not attach talismanic importance to every possible distinction between such overlapping concepts as termination, expiration, renegotiation, reopening, and modification. Petitioners already noted, for example, the recognized conflict between the Sixth Circuit and the NLRB on whether and how to distinguish "modification" notices from "termination" notices. Pet. 20 n.2. Similarly, the Federal Mediation and Conciliation Service does not even include "Termination" as an option on Form F-7, which parties must file when giving "written notice of proposed termination or modification." C.A. App. 65, 68; see 29 C.F.R. 1402.1. Here, the box for terminating the old contracts and negotiating new

ones was "Renegotiation," and the Union checked it. C.A. App. 65, 68.

Because the NLRB has consistently rejected the premise that "termination" is a special word, it had no trouble recognizing the phrasing here—announcing that the agreement is expiring in just over two months and that the parties should meet to negotiate a new one—as notice of an intent to *terminate*:

> [T]he January 7 letter starts off, "In accordance with the collective bargaining agreement the New Jersey Esso Employees' Association hereby gives notice that the agreement expires on March 31, 1984." I find this language to constitute a clear and unequivocal notice of *termination*. The letter then goes on to state that the Union "further gives notice that we are prepared to meet with the Company * * * in order to negotiate a new contract." Such language in the most clear and precise terms imaginable gives notice that the Union intends to *terminate* the present contract "in order to negotiate a new contract."

N.J. Esso Emps. Ass'n, 275 N.L.R.B. 216, 218 (1985) (emphasis added); cf. Pet. 6-7 (quoting the Union's letters). Respondents' only response is to rewrite the NLRB decisions using premises that the NLRB firmly rejects—like the premise that the subtlest word variations carry entirely different meanings.

Respondents' opposition to certiorari thus reduces to their argument on the merits. In their view, the NLRB *should* distinguish termination from concepts

like expiration and renegotiation. But the argument fails even as a merits argument. Though respondents claim the mantle of textualism, arguing (at 23) that the parties' evergreen clause attaches "plainly different meanings" to "expiration" and "termination," respondents never say what the difference is. That is no surprise, because the suggestion finds no support in either the contract or the English language.

As for the contract, its only arguable distinction between these words is referring to January 31, 2019 as the "expiration date" while referring to each later anniversary of that date as a "succeeding termination date." Pet. App. 5a. Here, though, the Union sought to end the agreement on January 31, 2019, not January 31 of a later year, so it respected the evergreen clause's wording by referring to "expiration," not "termination."

As for ordinary English, petitioners have already shown that no contract can expire on a given date while continuing for another year. Pet. 27. And this Court has thus always treated an expiring collective bargaining agreement as coming to an end. See, *e.g.*, *Litton Fin. Printing Div., Litton Bus. Sys., Inc.* v. *NLRB*, 501 U.S. 190, 206 (1991) ("[A]n expired contract has by its own terms released all its parties from their respective contractual obligations, except obligations already fixed under the contract but as yet unsatisfied."); Pet. 26-27. Respondents ignore these points.[2]

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[2] Some linguists define "expiration" as ending "according to the contractual terms, by lapse of time," while "termination" can also encompass ending "by the occurrence of a condition

Posturing aside, the textualist approach to evergreen clauses is what the First Circuit articulated. If an evergreen clause "require[s] [the parties] to use [some] particular language in its notice of termination," courts should enforce those requirements. *Labonte Drywall*, 795 F.3d at 278. But courts should not engraft requirements of their own making onto the parties' agreement to favor benefit plans, as the Seventh Circuit did below.

B. The Seventh Circuit's Approach Violates This Court's Precedent

The First Circuit's refusal to "insert [an unwritten] condition into [the parties'] agreement" respects ordinary principles of contract interpretation. *Labonte Drywall*, 795 F.3d at 278; Pet. 24. Respondents appear to agree (at 27) that it would violate this Court's holdings to depart from ordinary contract principles. See *M&G Polymers USA, LLC* v. *Tackett*, 574 U.S. 427, 438 (2015); see also *CNH Indus. N.V.* v. *Reese*, 138 S. Ct. 761, 763 (2018) (per curiam). But they try to turn the tables, claiming that *petitioners* disregard contract law by pointing to extrinsic evidence. That accusation is baseless.

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subsequent or by a party's act." *Garner's Dictionary of Legal Usage* 344 (3d ed. 2011). Such a distinction only hurts respondents, by treating "*expiration* [as] a subspecies of *termination*." *Ibid.* On this view, not all terminations are expirations, but all expirations are terminations. So when the Union stated that the agreements were expiring, it necessarily conveyed that the agreements were terminating.

Although the Seventh Circuit said that these contracts were unambiguous, Pet. App. 13a, it did not treat the evergreen notices as unambiguous, *id.* at 24a-25a. But when, as here, the contract does not itself require clear notice, there is no distinction between notice ambiguity and evergreen-clause ambiguity. The evergreen clause explains what notices must say to end the agreements. If it is unclear whether the notices meet those requirements, the scope of the evergreen clause is unclear. So ordinary contract principles would direct the court to extrinsic evidence. See, *e.g.*, *Kaufman & Broad Home Sys., Inc.* v. *Int'l Bhd. of Firemen & Oilers*, 607 F.2d 1104, 1112 (5th Cir. 1979) ("[A]ssuming [a]rguendo that the agreement is ambiguous, the extrinsic evidence presented at trial supports the Union's view" that the contract had ended).[3]

Yet the Seventh Circuit ruled that "an ambiguous or equivocal notice * * * does not open a door for parol or extrinsic evidence, at least in disputes with third-party beneficiaries like the plaintiff fund in these appeals." Pet. App. 24a-25a. Here, as elsewhere, the court created a special rule to favor multiemployer pension funds, which supposedly deserve special treatment "under ERISA." *Id.* at 24a. Through selective quotation, respondents nonetheless insist (at 27) that

[3] Below, both sides argued that their respective reading of the evergreen clause and Union letters was unambiguously correct. But each proposed that the court consider additional evidence if the evergreen clause and letters were not enough on their own: petitioners stressed the contracting parties' contemporaneous conduct, and respondents sought discovery into the Union's subjective intent.

the Seventh Circuit followed ordinary contract principles. But they omit the important part of the quote: contract principles apply, according to the Seventh Circuit, only "to the extent that those principles are consistent with ERISA." Pet. App. 8a. The Seventh Circuit violated *Tackett* by taking the view that "many of the defenses available under the NLRA or under traditional contract law do not fly under ERISA." *Id.* at 10a (citation omitted).

Ordinary contract principles lead to the First Circuit's approach, for the reasons it gave: courts must not superimpose conditions onto an agreement's termination provision and should consider the parties' contemporaneous conduct to resolve ambiguities over a notice's effect. *Labonte Drywall*, 795 F.3d at 277-279.

C. Leaving The Seventh Circuit's Decision In Place Would Create Serious Harms

Respondents do not really deny that unions, employers, and benefit funds all need certainty on whether a collective bargaining agreement has ended or renewed. They simply contend that the Seventh Circuit's demand for precise wording best promotes that result. That contention is wildly implausible—even assuming judges could agree on what wording counts as "clear." Here, the contracting parties had a shared understanding of their own contractual relationship, which they communicated to respondents in real time. But long-after-the-fact ERISA litigation has allowed respondents to override the contracting parties'

understanding of their contract. If that result stands, the process will repeat itself often for other parties and other contracts.

In hindsight, respondents fault petitioners for not sending their own termination notices more than sixty days before January 31, 2019 or not negotiating a different pension arrangement with the Union. But as amici explain (at 12), that paints a highly unrealistic view of labor negotiations. Those negotiations are often initiated and conducted by non-lawyers, who are likely to be focused on broad economic goals and the basic requirements of federal labor law, not the nuances of certain courts' ERISA jurisprudence, which would not even seem relevant unless the parties expected to negotiate for new pension plan arrangements. There is no reason to assume that in November 2018, petitioners wanted to end their current contracts. But they understood the Union's letters—sent in accordance with the contract's 60-day deadline for termination notices—as having done so, and would have known that federal labor law obligated them to bargain in good faith.

This friction between federal labor law and the Sixth and Seventh Circuits' ERISA doctrine calls out for this Court's review. Respondents do not deny that under today's status quo, the same collective bargaining agreement might continue as a legally binding document for some purposes (or in some circuits) while having otherwise ceased to exist. That breeds chaos. Under the reasoning of the decision below, petitioners should have ignored the terms of the 2019 collective

bargaining agreements until January 31, 2020, because the 2013 agreements extended another year. Had petitioners done that, they surely would have been found by the NLRB to have committed an unfair labor practice.

Respondents half-heartedly argue (at 18) that it is no big deal for ERISA doctrines and NLRB rulings to produce conflicting outcomes. But to the many employers and unions that need to understand and comply with all their legal duties, it is a huge deal. Presumably the NLRB would agree. Federal law cannot tolerate inconsistency over which collective bargaining agreement governs at a given time, see Pet. 31, and this Court should not tolerate it either.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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