

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 M&G POLYMERS USA, LLC, ET :

4 AL., :

5 Petitioners :

6 v. : No. 13-1010

7 HOBERT FREEL TACKETT, ET :

8 AL. :

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10 Washington, D.C.

11 Monday, November 10, 2014

12

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 11:08 a.m.

16 APPEARANCES:

17 ALLYSON N. HO, ESQ., Dallas, Tex.; on behalf of
18 Petitioners.

19 JULIA P. CLARK, ESQ., Washington, D.C.; on behalf of
20 Respondents.

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1 P R O C E E D I N G S

2 (11:08 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 13-1010, M&G Polymers v. Tackett.
5 Ms. Ho.

6 ORAL ARGUMENT OF ALLYSON N. HO

7 ON BEHALF OF PETITIONERS

8 MS. HO: Thank you, Mr. Chief Justice, and
9 may it please the Court:

10 A promise of unalterable, costly healthcare
11 benefits should be negotiated at the bargaining table,
12 not imposed at the courthouse. In a series of cases,
13 the Sixth Circuit has required courts to infer from
14 contractual silence a promise of vested benefits.

15 JUSTICE GINSBURG: But the -- we're dealing
16 with a case where there isn't silence. I mean, it's a
17 matter of construing what the words mean, but for
18 example, this collective bargaining agreement says that
19 the employees will receive a full company contribution
20 toward the cost of health benefits. That's not silent.

21 MS. HO: Your Honor, respectfully, it is
22 silent with respect to the duration of the full company
23 contribution toward benefits. The word "receiving,"
24 which I understand Your Honor to be focusing on,
25 indicates that the individual has to be retired; in

1 other words, and actually receiving a pension and
2 receiving a benefits. It's not -- it's not a durational
3 term. And so --

4 JUSTICE SOTOMAYOR: That's what you say, but
5 there was a hearing by the district court. You're
6 recommending we apply ordinary contract principles, no?

7 MS. HO: Yes. There's -- there's no
8 disagreement and the courts of appeal don't -- don't
9 disagree that ordinary contract interpretation
10 principles apply.

11 JUSTICE SOTOMAYOR: Assume -- assume that I
12 find those words ambiguous, you have a hearing. The
13 district court had a hearing, and it didn't -- I don't
14 think the district court relied on a presumption. It
15 relied on a bevy of evidence, including the fact that
16 your company bought the predecessor company, assessing
17 the health contributions at full value for retirees.

18 Why -- why wouldn't ordinary contract
19 principles permit the district court to do exactly what
20 it did here?

21 MS. HO: Justice Sotomayor, I want to go
22 back to -- to the first part of your question which
23 said, well, wasn't -- wasn't there a trial here? And
24 our position is that it never -- it never should have
25 gotten to that because the district judge initially, as

1 a matter of law, looked at the contract language here,
2 declined to apply Yard-Man, and said, I don't find a
3 promise of vesting.

4 On appeal, the Sixth Circuit said, we
5 disagree. Under Yard-Man, there is at least an
6 inference of vesting here and instructed the district
7 judge to apply Yard-Man on remand, which the district
8 judge did, and on page 20 of Petitioner's appendix, in
9 the opinion on remand, the district judge says, "Those
10 directives," meaning the Sixth Circuit's directions in
11 Yard-Man, "require this Court to reach the conclusion
12 That the part that the plaintiffs here obtained vested
13 benefits."

14 JUSTICE KAGAN: Ms. Ho, I'm wondering if you
15 would agree with this. If we could start all over
16 again, forget all the history that you just said, if we
17 could start all over again, you, I think, just agreed
18 that we would use ordinary contract principles; is that
19 right?

20 MS. HO: Correct.

21 JUSTICE KAGAN: Okay. So ordinary contract
22 principles, we would -- first, we would look at the
23 agreement, and if the agreement said something clearly
24 either way, whether it was for vesting or against
25 vesting, the agreement would control; is that correct?

Official

1 MS. HO: That's correct.

2 JUSTICE KAGAN: And if the agreement was
3 ambiguous, we could take extrinsic evidence to clarify
4 the terms of the agreement; is that correct?

5 MS. HO: Objective extrinsic evidence, yes,
6 that's correct.

7 JUSTICE KAGAN: Okay, so --

8 JUSTICE SCALIA: You acknowledge that? See,
9 I wouldn't acknowledge that if I were you.

10 MS. HO: Well, Your Honor, I'm --

11 JUSTICE SCALIA: You don't believe in the
12 parol evidence rule?

13 MS. HO: Objective -- objective extrinsic
14 evidence, Your Honor, would be -- in other words,
15 admissible -- admissible on a finding of ambiguity.

16 JUSTICE KAGAN: Custom, practice.

17 MS. HO: But I -- but I think it's
18 important, Justice Kagan, if I may, to point out that in
19 the Sixth Circuit, and I think this is one way in which
20 what happened here departs from ordinary contract
21 interpretation, is that in the Sixth Circuit, the
22 inference applies of vesting based either on text or --

23 JUSTICE KAGAN: Yes, I hear you.

24 MS. HO: -- or extrinsic -- extrinsic evidence.

25 JUSTICE KAGAN: Yes, I hear you. I was not

1 getting you to agree with Yard-Man and I was not getting
2 you to agree to the Sixth Circuit.

3 MS. HO: Certainly, Your Honor.

4 JUSTICE KAGAN: Yes. But what -- what I
5 want to -- is you look at the text, if the text says it
6 either way, you go with the text; if the text doesn't
7 say it either way, it's permissible to look at extrinsic
8 evidence, like, the practice of the parties and, you
9 know, what you sold this for and things like that.

10 MS. HO: Well, I -- I would agree with you
11 up to a point, and I think where -- where I might part
12 company or maybe add to that discussion would be to say
13 that ordinary contract interpretation does say, I think,
14 in McCutchen this Court referred to that, in
15 Stolt-Nielsen this Court applied the principle that
16 where a contract is silent, courts apply the relevant
17 default principles; in other words, silence -- I just
18 want to make clear that silence doesn't always equal
19 ambiguity. And our position --

20 JUSTICE KAGAN: Well, but then you get to
21 Justice Ginsburg's question, don't you, which is that
22 this is a case where actually the parties are disputing
23 language. It's not really a case where there is
24 silence. I mean, you've come in and you've given some
25 language that's very good for your side, which is that

1 duration clause, and the other party has come in and
2 focused on the word "receiving" and focused on the tying
3 arrangement between this and pensions, and focused on
4 the surviving spouse clause. So you have -- you have
5 some language, they have some language.

6 MS. HO: Well, I think, Your Honor, at a
7 minimum, that's why we're entitled to reversal and a
8 remand, if - if this Court declines to require a clear
9 statement as -- as part of -- as part of ordinary
10 contract interpretation. I think we would at a minimum
11 be entitled to have -- have that look --

12 JUSTICE GINSBURG: Where does --

13 MS. HO: -- at the language without the
14 Yard-Man inference.

15 JUSTICE GINSBURG: Where does -- where does
16 ordinary contract interpretation require a clear
17 statement?

18 MS. HO: Certainly, Your Honor, we think --
19 we think ordinary contract interpretation says where
20 there is -- where there is silence here, and there is no
21 durational term, there's no indication of vesting,
22 there's no indication of how long the full company
23 contribution should last, that where there is silent --
24 silence, as this Court did in McCutchen, this Court looks to
25 see, well, what are the operative default rules that -- that

1 we assume that if the parties didn't contract around --

2 JUSTICE GINSBURG: Well, you keep saying
3 when there is silence, and as Justice Kagan pointed out
4 and as I pointed out, one side is not silent. There are
5 always indicia that vesting was intended.

6 MS. HO: I think there -- there is
7 silence -- there is no question that there is silence in
8 the operative term of the promise, which is a full
9 company contribution toward healthcare benefits. It's
10 true that the other side has pointed to various textual
11 cues that I think, if anything, Justice Ginsburg,
12 underscore the lack of such terms in the one place in
13 the contract where we would expect it to be. And that
14 is in the --

15 JUSTICE KENNEDY: But I thought your -but I
16 thought your position here was that what the contract says
17 under ordinary principles of contract interpretation is not
18 the point. The point is, is that in the first court of
19 appeals case, they mention Yard-Man at least four times
20 and said the Yard-Man presumption controls, and that's
21 what the district court thought.

22 MS. HO: Yes.

23 JUSTICE KENNEDY: And the question -- the
24 principal question here is whether the Yard-Man
25 presumption should have a -- play a significant part in

1 the interpretation of this contract, and you say no.

2 MS. HO: Correct.

3 JUSTICE KENNEDY: And there would be -- and
4 presumably there would be -- we could make that decision
5 in remand so that we don't interpret this contract
6 initially without -- without the benefit of what the
7 district court and -- and the court of appeals would say
8 without the Yard-Man presumption if you prevail.

9 MS. HO: Certainly, Your Honor.

10 JUSTICE SCALIA: Unless, of course, the
11 Yard-Man presumption is normal contract interpretation.
12 That is, you know, the court of appeals could be saying
13 that when you look at the totality of the contract where
14 the benefits are being given for, as payment for work,
15 you get them if you've worked so many years, they
16 increase when you've worked more years. Where that is
17 the case, it is a reasonable assumption, call it a
18 presumption if you like, that any promise to pay those
19 benefits continues after the termination of the -- of
20 the union contract. In other words, I'm not sure that
21 the court of appeals would agree that -- that this
22 presumption is contrary to normal contractual
23 interpretation. I think the court of appeals would say
24 that is normal contractual interpretation.

25 MS. HO: Justice Scalia, I think there's --

1 I think you're right that the Sixth Circuit would and
2 has said that all it's doing in these cases is applying
3 ordinary contract interpretation. I think as Judge
4 Sutton and others have pointed out, saying doesn't make
5 it so. And I think there can be no question when you
6 look at the -- when you look at the cases, and I think
7 this case is a good example of the work that Yard-Man is
8 doing. And Yard-Man itself, Justice Scalia, in a
9 footnote in its opinion, acknowledges that ordinary
10 contract interpretation rules apply with respect to
11 interpreting the contract generally. But with respect
12 to the issue here, which is the duration of the -of the
13 contract, the Sixth Circuit itself in Yard-Man said that
14 the normal "strictures," was the word used, doesn't
15 apply.

16 So I think at least as an initial matter,
17 the Sixth Circuit did not conceive of this as ordinary
18 contract interpretation and that it's really its own
19 policy-based rationales for why it's appropriate, in a
20 sense, to put a thumb on the scales here in favor of
21 retiree.

22 But I think if you look at -if you look at the
23 rules, maybe that's the most clear way to see that it's not
24 ordinary, is saying to courts you can look at text or
25 extrinsic evidence. That's not normal contract

1 interpretation. To say to courts you --you can ignore a
2 contract duration clause if it doesn't specifically refer
3 to retiree health care benefits.

4 JUSTICE SOTOMAYOR: Well, we know that
5 contracts have certain assumptions about them, about
6 what continues. Arbitration provisions continue after
7 the expiration. We have found that, correct?

8 MS. HO: Correct. In the labor context,
9 that's correct, whether the labor --

10 JUSTICE SOTOMAYOR: And Justice Scalia just
11 said to you something that talks about retirement and
12 the surviving spouse and her right to get things would
13 -- I think could reasonably be viewed as a vesting
14 provision.

15 MS. HO: I would respectfully disagree with
16 that, Justice Sotomayor, for two primary reasons: I
17 think the first reason is that all of these other
18 textual cues are reasonably read in conjunction with the
19 contract, both with the contract expiration clause,
20 which --which says that the benefits are for the duration
21 of the agreement; but even without that clause, are read
22 in the context of the background rule --

23 JUSTICE SOTOMAYOR: See, that's --

24 MS. HO: -- with respect to the terms
25 expiring with the agreement.

1 JUSTICE SOTOMAYOR: -- that's the question for
2 the following reason, okay? I don't know whether there's a
3 lifetime health benefit if this company stops providing
4 any, meaning if the company some day says we're not
5 going to give any whatsoever, the issue -- that, I
6 think, is a more interesting question because then the
7 contract has truly expired. But if it chooses to, it
8 seems to me that the full benefits or -- will receive a
9 reduced -- will receive a full company contribution,
10 could suggest that that doesn't expire.

11 MS. HO: We --

12 JUSTICE SOTOMAYOR: So long as the health --
13 as long as the company is providing health insurance.

14 MS. HO: Our position is the full company
15 contribution language, as --as the district judge in this
16 case initially held when looking at that language, does
17 not have a durational term that's not sufficient to
18 imply vesting. In this particular case, and I think
19 Your Honor raised the issue of the term of the agreement
20 and applying during that, in terms of going forwards, I
21 just want to be clear, we have never sought to terminate
22 the benefits, and, in fact, now the retiree benefits are
23 the subject of mandatory bargaining --

24 JUSTICE GINSBURG: But could you have -- if
25 the collective bargaining agreement has expired, you

1 have your duration clause, and the company instead of
2 saying, retirees, we're going to make you contribute
3 something to the health care, says: Well, the contract
4 expired; no health coverage at all for retirees. Under
5 your theory, I assume they could do that.

6 MS. HO: Well, under ERISA, where Congress
7 said, unlike pension benefits, we're not going to
8 require health care benefits to vest, the only way --

9 JUSTICE GINSBURG: But the fact --

10 MS. HO: -- the only way the benefits vest
11 is by contract.

12 JUSTICE GINSBURG: Is it your position that
13 once the contract expires, the employer is free to say
14 no health coverage for retirees, period?

15 MS. HO: If there has been no vesting, yes.
16 In this case, the company, each successor company and
17 the union, entered into a series of agreements --

18 JUSTICE SCALIA: But you answered the
19 question. The answer is yes, right? The company can
20 terminate. You're saying it hasn't terminated here,
21 it's a nice company; but it doesn't have to be a nice
22 company, does it? Isn't that your position?

23 MS. HO: Our position --- I'm just trying to
24 be consistent with the record in this case, Your
25 Honor -- is as a general matter, yes, the terms don't

1 outlest -- outlast the terms of the agreement, but there
2 is a difference in this case.

3 JUSTICE SCALIA: What I would like to hear,
4 earlier you said there were two reasons: One was the
5 termination clause and second that the contract had to
6 be read in light of the background rule -- then you got
7 cut off. And I really want to know what the background
8 rule you were about to refer to was.

9 MS. HO: Certainly, Your Honor. I think
10 there are two background rules in play here. And the
11 first rule is that we don't normally read into silence
12 where parties have undertaken extra-statutory
13 obligations or extraordinary undertakings. We don't
14 read those terms into silence. We expect that if such a
15 serious undertaking as a promise of health care benefits
16 for life were to have been made, that we would expect to
17 see it, just like this Court said in the Tern case about
18 --

19 JUSTICE SCALIA: What's the second one --
20 before you get cut off again, what's the second one?

21 MS. HO: Certainly. And I think the second
22 background rule here is related to the first. And
23 that's the extra-statutory obligation here, that where
24 Congress has said in ERISA, it's explicitly exempted
25 welfare benefits from automatic vesting. So, if the --

1 in other words, what's being asked for here is the
2 exception to the rule. So we would expect to see that
3 clear in the contract.

4 JUSTICE KAGAN: Ms. Ho, Congress has said,
5 yes, in pension benefits, there's vesting. And in
6 health care benefits we leave it to the parties; is that
7 right?

8 MS. HO: That's correct.

9 JUSTICE KAGAN: So it doesn't have any
10 implication for health care benefits other than we leave
11 it to the parties, isn't that right?

12 MS. HO: I would respectfully -- maybe I
13 would not so much disagree as take that a step further.
14 I think it does have an implication here because it
15 establishes a default rule that, unless as a matter of
16 contract there is an agreement to vest, then the
17 benefits otherwise do not vest. And I think we would
18 expect, applying normal contract principles, would
19 expect to see that clear on the face of the contract.

20 JUSTICE KAGAN: Well, but then you're back
21 to your first background rule, which is that we would
22 expect to see this if it were there. But you can -- I
23 mean, that seems -- that statement has its corollary,
24 right? Which is that, you know, either party -- we
25 would expect, we would expect to see if the union had

1 won, that it would say vested. We would expect to see
2 if the employer had won, it would say unvested.

3 And, indeed, I think that there's an amicus
4 brief in this case that suggests that there was a survey
5 done of all these agreements and about 60 percent of
6 them say quite explicitly unvested. Yours doesn't do
7 that. So there we are. We're left with this ambiguity,
8 and you have some language and they have some language
9 and some judge has to figure it out.

10 MS. HO: Well, and I think -- I think your
11 question raises two issues, one of which goes back to
12 our previous discussion about the role that ERISA has to
13 play here. And I think if you put the onus on the
14 employer to say what's clear, you're in a sense saying,
15 even though Congress doesn't require it to be vested,
16 we're going to ask --

17 JUSTICE KAGAN: Congress has said we don't
18 care. Congress has said we leave it to them.

19 MS. HO: Right, but there's no obligation to
20 do it. So normally we would expect to see the
21 obligation on the party who wants the benefit to seek
22 the clear language, to seek the promise, as opposed to
23 the party who doesn't. And I think if you sort of play
24 that out in terms of as a practical matter, particularly
25 in the context of negotiations, one would also expect to

1 see the party who wants the benefit bargaining for the
2 benefits.

3 JUSTICE ALITO: This is an important benefit
4 and an expensive one. Why is it that in this collective
5 bargaining agreement and apparently many others -- I
6 don't know whether the figure is 40 percent or whatever
7 it is -- there isn't anything explicit one way or the
8 other?

9 MS. HO: I think --

10 JUSTICE ALITO: This certainly can't be
11 something that didn't occur to the employer or to the
12 union. Why did they choose to leave it silent? Why did
13 they choose not to address it expressly?

14 MS. HO: I think there -- one could consider
15 that they didn't express it directly or one could read the
16 contract as saying there simply is no -- silence says
17 there is no promise of vesting here, because that is an
18 extraordinary obligation for a company to take on.

19 JUSTICE GINSBURG: How about "Retirees will
20 receive health benefits as long as they are eligible for
21 and receiving a monthly pension"? Doesn't that sound
22 like as long as they're getting the pension, they will
23 get health benefits?

24 MS. HO: No, Your Honor. Again, read in
25 conjunction with either the express clause in this case

1 or the background rule that the terms expire with the
2 agreement, that doesn't indicate that those -- those
3 extend. And I think what -- what the Sixth Circuit has
4 done, and it did in this case, it instructed this Court
5 that the mere fact that the retiree healthcare benefits
6 were tied to receipt of a pension was sufficient to
7 indicate vesting. I think that essentially undoes what
8 Congress did in saying you -- you have to vest in
9 pension; you don't have to vest in the welfare context.

10 The Sixth Circuit essentially puts those
11 things --

12 JUSTICE SCALIA: Well, I don't think it's
13 reversing that. I think it's -- it's an argument of --
14 of contractual expression, contractual intent. It says
15 if you tie the continuing receipt of health benefits to
16 the continuing receipt of retirement benefits, and if
17 you know that retirement benefits survive the
18 termination of the contract, right? You acknowledge
19 that.

20 MS. HO: The vesting.

21 JUSTICE SCALIA: It seems to suggest that --
22 that health benefits continue as long as retirement
23 benefits do. Now, I mean, maybe there are other
24 indications, but that one certainly seems to -- seems to
25 tie health benefits to retirement benefits.

1 MS. HO: I don't think so, Your Honor.
2 Because I think one con- -- one consequence of that is
3 essentially no matter what the parties contract or agree
4 to, you're always going to have vesting, even though
5 it's the exception and not the rule, simply by tying the
6 healthcare benefits to -- to retirement status.

7 JUSTICE GINSBURG: Why do you have to -- why
8 do you have to do that? If you want to treat them as
9 separate, treat them as separate. Don't tie them
10 together. There was nothing that required these two to
11 be tied together.

12 MS. HO: Well, Your Honor, I think the
13 practical reason for -- for linking those two is not to
14 indicate vesting, but to ensure that the recipient is --
15 is actually retired for purposes of receiving the
16 benefits.

17 JUSTICE KENNEDY: Well, I thought it was
18 your position that whatever might be the outcome of
19 these questions, the Sixth Circuit didn't think that
20 that was the right analysis, that the Sixth Circuit
21 didn't think the result could be reached without
22 imposing the presumption of your argument, and so
23 instructed the district court. And that's the issue
24 before us.

25 MS. HO: That's correct, Your Honor. And

1 the district court -- and the district court made clear
2 on remand, and the Sixth Circuit in the second appeal,
3 in Tackett II, explicitly approved, and the word the
4 Sixth Circuit used was "presumption," that the district
5 court decided correctly in applying the presumption to
6 this case.

7 JUSTICE GINSBURG: I thought that the
8 district court on remand said it would have come out the
9 same way anyway. They said there are no facts that
10 would defeat this same conclusion.

11 MS. HO: Correct, Your Honor. And I -- and
12 I think that's an important response to what Justice
13 Sotomayor was pointing out earlier about the fact that
14 there was a trial here. I think that -- that language
15 makes clear that the trial here was about what -- what
16 vested, and that's the district judge making clear that
17 whatever facts there had been, it would have reached the
18 same conclusion about vesting, which is the only issue
19 before this Court based on the Sixth Circuit's
20 directive, as Justice Kennedy was pointing out, to apply
21 Yard-Man and to apply the Yard-Man presumption.

22 JUSTICE SCALIA: You know, the nice thing
23 about a contract case of this sort is you can't feel bad
24 about it. Whoever loses deserves to lose.

25 (Laughter.)

1 JUSTICE SCALIA: I mean, this thing is
2 obviously an important feature. Both sides knew it was
3 left unaddressed, so, you know, whoever loses deserves
4 to lose for casting this upon us when it could have been
5 said very clearly in the contract. Such an important
6 feature. So I hope we'll get it right, but, you know, I
7 can't feel bad about it.

8 (Laughter.)

9 JUSTICE BREYER: Well, you know, the workers
10 who don't discover they've been retired for five years and
11 don't have any health benefits might feel a little bad
12 about it.

13 MS. HO: And -- and Your Honor, I -- I
14 agree.

15 JUSTICE BREYER: I'm taking sides, but I
16 want to --

17 (Laughter.)

18 JUSTICE BREYER: I mean, what I've listened
19 to sort of drives me to the conclusion where you
20 started, decide these things without any presumption,
21 period. Ordinary contract. Go read the contract.
22 Where it's ambiguous, Judge, ask them for extrinsic
23 evidence if they want to present it. Decide it like any
24 other case. I started there. Maybe I've heard
25 something that should change my mind. I often do change

1 it in oral argument, but I haven't yet.

2 MS. HO: And -- and --

3 JUSTICE SCALIA: He agrees with you, doesn't
4 he? I mean, you're not going to argue that, are you?

5 MS. HO: No, Your Honor.

6 JUSTICE BREYER: So you say just have us
7 decide it, and in this case, I've read an awful lot that
8 you may well lose.

9 MS. HO: Well, I would -- I would -- I would
10 say this -- this, Your Honor. There's no disagreement
11 that ordinary contract interpretation principles apply.
12 I think the -- the dispute is over, number one, how the
13 Sixth Circuit applied them in this case, and it used the
14 Yard-Man presumption, which we disagree with. But I
15 think under -- under either sort of -- however much
16 clarity is required in these contracts, I think in this
17 case you only get to a promise of vested benefits by
18 reverse engineering language elsewhere in the agreement
19 that only highlights the lack of it where you would most
20 expect to find it, and that ignores the contract
21 expiration clause here, which makes clear it's a full
22 company contribution during the term of the agreement.

23 And if I may reserve the rest of my time for
24 rebuttal.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 MS. HO: Thank you.

2 CHIEF JUSTICE ROBERTS: Ms. Clark?

3 ORAL ARGUMENT OF JULIA P. CLARK

4 ON BEHALF OF RESPONDENTS

5 MS. CLARK: Mr. Chief Justice, and may it
6 please the Court:

7 As the Court has so aptly noted, this is a
8 contract dispute, and our argument is simply that
9 contract disputes relating to retiree health benefits
10 should be decided like every other dispute under a
11 collective bargaining agreement. To determine what the
12 parties intended without applying any presumptions --

13 JUSTICE BREYER: Isn't that what Justice
14 Scalia believes? I tend to agree with him. He said --
15 he said the other side is arguing the same thing, and --
16 and says since both sides want to argue the same thing,
17 maybe we can just agree with them.

18 (Laughter.)

19 MS. CLARK: That's music to my ears, Your
20 Honor.

21 CHIEF JUSTICE ROBERTS: Well, it may be
22 music, but it -- Yard-Man says that retiree healthcare
23 benefits are not subject to the stricture of ordinary
24 contract interpretation and -- I mean, that's what
25 Yard-Man says, and so I think you would have to vacate

1 if we're going to say apply the normal principles of
2 contract interpretation.

3 MS. CLARK: I have two answers to that. Let
4 me start with what Yard-Man actually did. If you read
5 the entire opinion, and unfortunately it's rather long,
6 it details a number of contract provisions in that
7 contract which the Court found supported the intention
8 of both parties to create a benefit that would last
9 beyond the expiration of the collective bargaining
10 agreement.

11 There was, for example -- and this is kind
12 of the -- the most obvious contrast, the retiree benefit
13 was described with some words like "continues." The
14 benefit for the surviving spouse of a retiree was stated
15 to continue as long as this contract is in effect.

16 Now, the Court took that, rightly so, to
17 suggest that the retiree would have a lifetime benefit,
18 but that a surviving spouse, who was still alive after
19 the retiree died, would continue to have benefits until
20 the next agreement -- I'm sorry, the agreement, because
21 it kept -- it kept rolling forward in agreements. So
22 the surviving spouse was limited to the term of a
23 contract while the retiree was not.

24 There are a number of other contract
25 provisions that they note, which very clearly supported

1 the inference that the retiree's benefit was intended to
2 continue.

3 CHIEF JUSTICE ROBERTS: Well, I know you're
4 saying that you win without Yard-Man, but -- but it
5 still seemed to mean something to the Sixth Circuit.
6 And the many other courts of appeals that have addressed
7 the question have distinguished what they're doing,
8 saying, you know, we're not going to follow Yard-Man.
9 We're going to apply normal principles of contract
10 interpretation.

11 MS. CLARK: And, Your Honor, that was where
12 I was getting to the second piece of my argument -- the
13 second piece of my answer to your question. And that is
14 that we believe, particularly based on the limited
15 arguments that were made by Petitioner below, that this
16 Court could affirm this decision on normal principles of
17 contract interpretation, but if the Court wants to be
18 sure that the judgment below is, in fact, based on
19 normal principles of contract interpretation, we are
20 perfectly comfortable with a remand for that purpose.

21 JUSTICE SOTOMAYOR: Now, the only point of
22 this that I'm unsure of is that almost all of the other
23 circuits require either a clear statement of vesting or
24 at least words clearly susceptible to vesting. One or
25 the other. What do you -- How do you stand on those two

1 principles of statutory construction --

2 MS. CLARK: Number one -- well, number two.
3 I'm disagreeing with both parts of your -- of the
4 premises of the question.

5 JUSTICE SOTOMAYOR: I'm saying what other --
6 I think other courts have done this, correct? They have
7 presumptions against vesting, some of the courts.

8 MS. CLARK: Some may. Skinner Engine is
9 really the only one that flatly says we're going to ask
10 for clear and express language. Even they will consider
11 extrinsic evidence for the purpose of demonstrating an
12 ambiguity. The Skinner Engine opinion itself says that
13 it would consider that; it just found the evidence in
14 that case not sufficient.

15 But among the other circuits, I count five
16 that apply traditional rules of contract interpretation
17 and that only say -- not clear language, not specific
18 language -- but say only we are looking, as in all other
19 contract cases, for some language that is reasonably
20 susceptible to the interpretation that's offered by the
21 retirees. And that's the classic formulation. It's the
22 one that we urge this Court to adopt. And indeed --

23 JUSTICE GINSBURG: Is that -- is that the
24 Second and Seventh -- are you saying essentially you
25 agree with the position of the Second and Seventh

1 Circuits?

2 MS. CLARK: The Second Circuit, Justice
3 Ginsburg, in the opinion in *Joyce v. Curtiss-Wright*,
4 articulated that precise standard. It then, in a kind
5 of a summary of its opinion, used the word "specific
6 language," which has come to be cited to mean something
7 more than language reasonably susceptible. To that
8 extent we would not agree with the Second Circuit. As
9 far as they went, relying on traditional principles, we
10 agree with them.

11 CHIEF JUSTICE ROBERTS: Is it a traditional
12 principle of contract interpretation that if you're
13 dealing with something as big a deal as healthcare
14 benefits for life, you might expect that to be
15 addressed -- addressed more specifically?

16 MS. CLARK: Mr. Chief Justice, no. There
17 are many contract provisions that are a bigger deal than
18 this. I mean -- and it is not the traditional rule of
19 contract interpretation that the courts look to see
20 which party had a bigger stake and punish them if their
21 language is ambiguous. Quite the contrary, it's treated
22 like any other issue of contract interpretation: Is the
23 language reasonably susceptible to more than one
24 interpretation?

25 JUSTICE KENNEDY: You want us to write an

1 opinion saying that whether or not health care benefits
2 survive in a collective bargaining agreement is not a
3 big deal?

4 MS. CLARK: No, Justice Kennedy, that's not
5 what I'm saying.

6 JUSTICE KENNEDY: Well, then I'm thinking --
7 I don't understand your answer to the question --

8 MS. CLARK: I'm simply --

9 JUSTICE KENNEDY: -- posed by the Chief
10 Justice.

11 MS. CLARK: I am saying that there are many
12 contract issues that come before the courts that are a
13 big deal. This is one of them, particularly for the
14 retirees. It is a big deal. But the point is simply
15 that traditional rules of contract interpretation don't
16 treat ambiguity any differently when it is in a contract
17 provision that's a big deal for one side or the other,
18 or both sides.

19 JUSTICE KENNEDY: But that's exactly
20 contrary to what your argument instructs.

21 MS. CLARK: Justice Kennedy, I think not. I
22 think that the -- the essence of the Yard-Man inference,
23 and that's the term that the court used, is not that
24 different from what this Court recognized in the Nolde
25 Brothers case and in the Litton case, which is that

1 there are some terms in collective bargaining agreements
2 which by their nature are offering -- may be; let me
3 rephrase -- by their nature may be offering something in
4 exchange for service that's already rendered. So if the
5 performance is complete on one side and all that remains
6 is for the other side to keep its end of the bargain,
7 the Court in Litton and in Nolde recognized that those
8 promises, as a normal rule, will continue. They will
9 not expire when the rest of the agreement expires.

10 And accordingly the Court, dealing with an
11 issue of severance pay in Nolde, where all that there
12 was in the contract was a promise that there would be
13 severance pay proportional to years of service, said
14 that when the employer closed the plant after the
15 contract expired, that there was a possibility that that
16 severance pay was intended still to be paid to people
17 who had earned it, and therefore ordered arbitration of
18 the dispute.

19 In Litton, the question was whether when the
20 plant laid off a number of workers after the contract
21 expired, was the employer obligated to arbitrate over
22 the question whether seniority should have protected
23 people in those layoffs. The Court reached the
24 conclusion that there was not the same kind of character
25 of deferred compensation about layoffs, seniority in

1 layoffs, as there was in the notion of a severance pay
2 that people may have earned over time.

3 So the Court was ready without any explicit
4 language in the contract, without any presumption, to
5 say this is an issue that has to be determined by the
6 processes that are normally applied to determine
7 ambiguous contract promises. Does this promise --

8 CHIEF JUSTICE ROBERTS: That's the general
9 principle of what custom or practice in the industry or
10 something like that, which I guess -- I guess that's an
11 ordinary principle of contract interpretation that could
12 be applied.

13 MS. CLARK: Mr. Chief Justice, it certainly
14 is one of the principles that this Court has said must
15 be considered in the case of all collective bargaining
16 agreements. Transportation-Communications Union said
17 practice, usage and custom should always be considered
18 for interpreting collective bargaining agreements, and
19 we are fully behind that.

20 JUSTICE SCALIA: Is there a practice on
21 this -- on this subject?

22 MS. CLARK: Yes, there is evidence of a
23 practice on this subject, Justice Scalia. The -- in
24 this case -- there are two things. One is the sales
25 agreement, which Justice Sotomayor pointed out during

1 the Petitioner's argument, where --

2 JUSTICE SCALIA: Okay, I'm not talking --
3 I'm talking --

4 MS. CLARK: Okay.

5 JUSTICE SCALIA: -- about in the industry.

6 MS. CLARK: Okay. In the industry in
7 general, this is -- this is rubber industry language.
8 You will see it in many of the reported decisions that
9 come out of the Sixth Circuit that -- because there were
10 a number of rubber companies headquartered in Ohio. And
11 the combination of "the retiree will receive health
12 benefits" combined with "and the surviving spouse will
13 receive them until death or remarriage," is a very
14 common formula in the --

15 JUSTICE SCALIA: Yeah, but Sixth Circuit we
16 can't rely on because of Yard-Man.

17 MS. CLARK: Well, Your Honor, I would say,
18 number one, that those two provisions combined certainly
19 do say a lot about the duration of the promise that the
20 employer was making. The sales agreement here
21 specifically reflected that the credit on the purchase
22 price which M&G received was calculated based on
23 actuarial assumptions that these were lifetime benefits
24 with no retiree contributions.

25 JUSTICE SOTOMAYOR: This may be an unfair

1 question, but following up on what Justice Scalia is
2 getting at, I don't know how many others of those rubber
3 companies are requiring contributions of active
4 employees that are different than the contributions of
5 retired employees. Do you have any information about
6 that?

7 MS. CLARK: I do not, and it's certainly not
8 in this record.

9 So the second -- the second point of
10 practice --

11 JUSTICE KAGAN: Please.

12 MS. CLARK: The second point of practice
13 that I want to point out is this: The 1997 collective
14 bargaining agreement omitted all reference to retiree
15 health benefits for people who had retired before
16 January 1, 1996. So beginning in '97 and in 2000 you
17 have a collective bargaining agreement which says people
18 who retire 1-1-96 and after will receive the following
19 health benefit. The record is undisputed that, even
20 though the contract was silent beginning in 1997, the
21 employer continued to pay retiree healthcare benefits to
22 those people who retired before 1997, and indeed that
23 liability was transferred from Shell to M&G as part of
24 the sale.

25 That is a point that we made. It's

1 undisputed. Petitioner did not respond to it in any
2 way. So we do have that kind of evidence of what the
3 parties have done under this agreement.

4 JUSTICE KAGAN: And is it right that
5 Petitioners' original arguments were not that they
6 didn't have to pay these at all, but only that these
7 benefits were capped at a certain level; is that right?

8 MS. CLARK: That is correct. And, indeed,
9 that was the issue that -- on which the company moved to
10 dismiss the complaint in the first instance. It was the
11 issue on which the district court initially dismissed
12 finding that there were cap letters that limited the
13 amount that the employer had to pay; that, when it was
14 tried before the district court, the district court
15 rejected all of that evidence on credibility grounds and
16 found that, based on the credibility of the witnesses,
17 this was a lifetime obligation which everybody had
18 understood until the employer found a way to try to
19 reduce its costs, and --

20 JUSTICE SOTOMAYOR: Can I ask you a question
21 about retirees? I don't know if it's industry standard
22 or just this contract. Are retirees eligible to vote on
23 the agreements that are entered into by the union?

24 MS. CLARK: They are not.

25 JUSTICE SOTOMAYOR: They are not.

1 And is that generally true of retirees?

2 MS. CLARK: Generally, that is true because
3 they are not members of the bargaining unit once they
4 retire, and only members of the bargaining unit are
5 represented in bargaining or have any right to vote on
6 the ratification of an agreement.

7 JUSTICE SOTOMAYOR: And do they -- does the
8 union represent them in any other disputes they may have
9 as retirees with -- because generally, the union
10 represents employees, active employees?

11 MS. CLARK: Yes, it does. It is the agent,
12 and that in the statutory term, as well as the common
13 law term, for the employees in the bargaining unit.
14 Once an individual retires, the union is no longer his
15 or her agent. The union no longer has any authority nor
16 any obligation to represent the retiree.

17 JUSTICE SCALIA: So -- so in a way, you
18 would expect the union to give this away so -- so it can
19 get higher benefits for the people that are still in its
20 bargaining unit, wouldn't you?

21 MS. CLARK: That is one of the concerns.

22 JUSTICE SCALIA: Well, that's a cynical --

23 MS. CLARK: No. That -- that, indeed, is
24 one of the things that Yard-Man points out, is that --
25 is that that is a reason to assume that the parties

1 would want to make this clear in the agreement.

2 JUSTICE SCALIA: Right, right.

3 MS. CLARK: And -- and, in fact, you know,
4 to -- to be clear, there are agreements in which the
5 union and the employer agree in advance that the
6 retirees will have these benefits until and unless the
7 union and the employer bargain something else. And
8 that's just a different species of contractual vesting.
9 There is a condition. It's imposed at the time of
10 retirement. The benefit is paid consistently with that
11 condition.

12 There are, at the opposite end of the
13 spectrum, agreements, and I tried a case in which this
14 was the -- this was the understanding. When the retiree
15 went out the door, that package of benefits was exactly
16 what that retiree was going to have for the rest of his
17 or her life. No changes permitted by any means
18 whatsoever.

19 And -- and so the span and the spectrum of
20 contractual vesting in this area is very broad. And our
21 point to you is to say there is no one-size-fits-all
22 solution here. It is what the parties agreed to. And
23 if there is ambiguity in the collective bargaining
24 agreement, as there plainly was here with provisions
25 that could be read on each side, then it goes to the

1 processes which the common law has established over
2 hundreds, if not thousands, of years to say we're going
3 to consider the entire agreement.

4 We don't compartmentalize some other
5 provisions in the agreement and say, oh, wait a minute,
6 they don't have anything to do with this. If they give
7 a clue about what the parties had in mind with respect
8 to the retiree health benefits, they must be considered.
9 They must all be put into the mix of what the Court will
10 determine.

11 JUSTICE GINSBURG: Is -- is one of -- is one
12 of the ingredients that goes into this mix the
13 background rule that I -- I thought your friend would
14 bring up, and that is it is the normal rule in contract
15 interpretation that when the contract expires, so do its
16 terms. If you start with that, contract expires, all
17 its terms expire. Isn't that --

18 MS. CLARK: This Court addressed that in
19 Litton. And the clear ruling of the Court there was
20 that exceptions to that rule are determined by normal
21 contract interpretation.

22 CHIEF JUSTICE ROBERTS: Well, what about the
23 arbitration context of Litton? I mean, the idea is,
24 well, of course, it doesn't expire because you might
25 have disputes, particularly disputes going in connection

1 with the expiration. So the idea in Litton, that the
2 arbitration requirements continue, really can't be
3 applied outside that context.

4 MS. CLARK: Certainly, to the extent that
5 Litton says we're going to presume that the arbitration
6 promise continues, that does not apply here.

7 But the second level of consideration in
8 Litton, you know -- so the first question was the Court
9 says arbitration, we're going to presume it continues
10 unless the parties have made it very clear that it
11 doesn't, so that it can kind of clean up all the
12 disputes under the parties -- that -- that the parties
13 have.

14 But then the second layer was is the
15 particular contract provision in dispute here, there the
16 seniority provision that I mentioned a moment ago, the
17 kind of contract provision that we believe may have some
18 post-expiration binding effect on the employer. And the
19 Court contrasted Nolde, in which it was severance pay,
20 noting that that was in the nature of a deferred
21 compensation claim, and also pointed out that if a
22 particular contract right may be deemed to have accrued
23 or vested while the agreement was in effect, it would
24 normally remain in effect.

25 JUSTICE KAGAN: So is this the language

1 you're referring to, "Exceptions are determined by
2 contract interpretation, rights which accrued or vested
3 under the agreement will, as a general rule, survive
4 termination of the agreement"?

5 MS. CLARK: That is one of the passages that
6 we're referring to. We're also referring to a passage
7 on page 203 of the Court's opinion, which says, "A
8 similar duty, i.e., a constraint on the employer after
9 the expiration date," which is the sentence before, "may
10 arise as well from the express or implied terms of the
11 expired agreement itself." Express or implied.

12 JUSTICE KAGAN: Go back to something that
13 you said earlier that I wasn't sure I understood from
14 reading the briefs. You said that this was a standard
15 form contract that arose in Ohio for rubber companies;
16 is that right?

17 MS. CLARK: That's close. I mean, the
18 rubber industry bargained as a group. There were a
19 number -- and there were pattern bargaining. It was
20 just common in a number of industries, you know, one
21 large employer might be the lead company in a round of
22 bargaining. And Goodyear was involved, as you know, in
23 the early contracts here.

24 So there's a bargaining with one big
25 employer, and it sets a pattern. And then the other

1 companies in the industry bargaining with the same union
2 may adopt that pattern. And that goes for wages and --
3 and all of the economic terms of the agreement, as well
4 as benefits and working conditions and everything else
5 in the contract.

6 This language about retiree health benefits
7 shows up in a large number of the rubber contracts, and
8 because they were headquartered in Ohio, not to be
9 surprising, they -- they --

10 JUSTICE KAGAN: And did these contracts
11 arise before or after Yard-Man?

12 MS. CLARK: These -- the initial contracts
13 were pre-Yard-Man. They've obviously been renegotiated.
14 For instance, the 95-point rule in this agreement was
15 post-Yard-Man. I mean, it was bargained to --
16 previously, it was somebody with at least 10 years of
17 service gets 100 percent paid, and they made that a
18 little bit less generous for people who are hired after
19 the change was made. They adopted the 95-point rule
20 with -- as you know, it's proportional to that for
21 people with less than 95 points in age and service.

22 So it's -- there -- changes were made, but
23 the basic pattern of retiree gets these benefits with a
24 full company contribution, the language about the
25 retiree receiving a pension, which, in my mind, very

1 plainly does speak to duration, as does surviving
2 spouse, until death or remarriage. I don't know how you
3 read those words to mean anything other than duration.

4 So there is enough in this contract to
5 support the interpretation that the retirees placed on
6 it. The Court properly tried the case, received
7 extrinsic evidence, ruled that it was, indeed, a
8 lifetime promise. If this Court has any doubt whether
9 traditional principles of contract interpretation were
10 applied without presumptions, as I said earlier, we
11 would be willing to welcome a remand for a determination
12 under traditional principles of contract interpretation.

13 If the Court has no further questions, I
14 believe that concludes my argument.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Ms. Clark.

17 Ms. Ho, you have four minutes remaining.

18 REBUTTAL ARGUMENT OF ALLYSON N. HO

19 ON BEHALF OF PETITIONERS

20 MS. HO: Thank you, Mr. Chief Justice.

21 Three points: First, I think at a minimum
22 we're not hearing a lot here today defending Yard-Man.
23 I think there can be little serious question that
24 Yard-Man infected every aspect of the proceedings below.
25 Indeed, it was dispositive. So I think at -- at a

1 minimum we're entitled to -- to a vacatur and remand for
2 ordinary contract principles to be require -- to be
3 applied.

4 We think that requiring clarity is
5 consistent with those principles, but even as a matter
6 of sort of what -- what Respondent has suggested in
7 terms of reasonably susceptible, the standard that
8 Justice Sotomayor mentions, I think it will be important
9 if this Court remands for consideration of ordinary
10 contract interpretation, that it's clear that what the
11 Sixth Circuit has been doing under that banner is
12 anything but; that looking at putting text on a par with
13 extrinsic evidence is not ordinary contract
14 interpretation; that ignoring contract expiration
15 clauses, unless they specifically reference healthcare
16 benefits, is not ordinary.

17 JUSTICE SOTOMAYOR: I'm not sure that's
18 true. I --

19 MS. HO: Respectfully --

20 JUSTICE SOTOMAYOR: The language of vesting
21 has to be reasonably susceptible from something in the
22 contract.

23 MS. HO: Correct, Your Honor. We -- we
24 absolutely agree with that, and we -- and we believe
25 here the full company contribution language, which is

1 the promise at issue, that's the language that the Sixth
2 Circuit looked at.

3 JUSTICE SOTOMAYOR: But the contract as a
4 whole.

5 MS. HO: In other words, a full company
6 contribution toward healthcare benefits, when read in
7 conjunction with the contract's expiration clause, it
8 says for the duration of this agreement.

9 JUSTICE SOTOMAYOR: How about the spouses?

10 MS. HO: We believe that those -- those
11 provisions indicate when the benefits would -- would --
12 would cease; in other words, until death, until
13 remarriage. And if anything, Justice, they highlight
14 the absence of such language in respect to the promise
15 to retirees where ordinary contract interpretation would
16 tell you if -- if -- if a promise were made, that's
17 where it would have been made.

18 JUSTICE GINSBURG: Are you saying it does
19 continue as to the spouse? I didn't get the point.

20 MS. HO: No, Your Honor. Our point -- our
21 point is that the benefits are for the term of the
22 agreement until death or remarriage, both events that
23 can happen during the term -- during the term of the
24 agreement. And in all events, Your Honor, that's not
25 language that the Sixth Circuit looked at or considered

1 in making its determination here that the benefits
2 vested based on the Yard-Man presumption and inference.

3 So at a minimum we believe that we're
4 entitled to a vacatur and remand for the Court of
5 Appeals to apply proper principles of contract
6 interpretation in the first instance.

7 If there are no further questions.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 The case is submitted.

10 (Whereupon, at 12:00 p.m., the case in the
11 above-entitled matter was submitted.)

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