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Brief of Amici Curiae, Labor and Benefits Law Professors in Support of Respondents

Fred T. Korematsu Center for Law and Equality

No. 13-1010

IN THE
Supreme Court of the United States

M&G POLYMERS USA, LLC ET AL., *Petitioners*,
v.
HOBERT FREEL TACKETT, ET AL., *Respondents*.

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

BRIEF OF AMICI CURIAE LABOR AND BENEFITS LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are the professors of labor and employee benefits law listed in Appendix A. *Amici* have an interest in the sound development of the legal principles that guide the interpretation of collective bargaining agreement (CBA) provisions promising employer-sponsored health benefits to retirees.

Amici submit this brief to provide information regarding the legal and factual landscape in which employers operated when they originally agreed to extend ongoing health benefits to their retirees. *Amici* believe this information may assist the Court because it explains why employers reasonably negotiated a range of agreements about retiree health insurance, including agreements that promised retirees health benefits for life.

SUMMARY OF ARGUMENT

Petitioners and their *amici* argue that employers were and continue to be unlikely to grant vested retiree health benefits because of the potential for those benefits to become unpredictably expensive over time. Accordingly, they argue that a court should determine that retiree health benefits

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation of this brief. No person other than the *Amici Curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters evidencing the parties' consent to the filing of *amicus* briefs are on file with the clerk.

are vested only if the relevant CBA contains a clear statement to that effect.

Whether or not this assessment of employer reasoning is correct today, it is seriously flawed as to the period of time during which many retiree health benefits clauses were first negotiated: the mid-1960s through mid-1970s. Moreover, because the language governing retiree health insurance has often been carried, basically unchanged, from CBA to CBA, the conditions surrounding initial negotiations remain relevant to interpretation of CBA language today.

The mid-1960s to mid-1970s saw a surge in employer-provided retiree health insurance. For example, by 1974, nearly three-quarters of employer-sponsored health plans extended coverage to retirees—a significant increase from the early 1960s. Employer-provided retiree health benefits also became more generous during this time, shifting from a model in which retirees were usually responsible for the entire cost of their health insurance to one in which employers frequently paid the entire cost of that coverage.

Two important reasons explain this trend, and they also explain why employers in the 1960s and 1970s reasonably negotiated retiree health benefits that were intended to vest. First, retiree health insurance during this period was inexpensive; indeed, some employers considered the cost of these benefits to be *de minimis*. This was in part because there were fewer retirees to receive coverage; compared to today, employees tended to work until an older age, and life expectancy was shorter. In addition, in 1966, Medicare began picking up much

of the cost of health care for retirees age 65 or older. Moreover, there was little reason for employers to grapple with the possibility that benefits would become more expensive in the long term because they funded health benefits on a pay-as-you-go basis.

Second, extending retiree health benefits allowed employers to achieve other workplace management goals. These goals could be as straightforward as reaching agreement with a labor union: When retiree health insurance was inexpensive, there would have been few reasons for an employer to "hold out" over that issue in bargaining. Further, employers could use retiree health benefits as a retirement incentive in order to thin employee ranks without violating the Age Discrimination in Employment Act. That incentive would have been particularly critical in appealing to employees who were still years from qualifying for Medicare. However, retiree health benefits that lasted for only the term of the CBA in which they were negotiated would have meant little to such employees.

In sum, many contracts promising retiree health benefits were first negotiated in a context that differed dramatically from the one that exists today. In that context, it would have been eminently reasonable for employers to agree to vest retiree health benefits in order to manage their workforces and to reach agreement with unions at relatively little cost.

ARGUMENT

This case concerns the interpretation of CBA provisions that promise retiree health benefits without clearly indicating the duration of those benefits. In this and many other similar cases, the CBAs at issue either fail to address or are ambiguous as to whether coverage under an employer-sponsored health insurance plan becomes nonforfeitable—in more technical terms, "vested"—when a worker terminates active employment and becomes eligible for retiree health benefits under that plan.

This brief offers an historical account explaining why many employers expanded retiree health benefits coverage from the mid-1960s through the mid-1970s. In short, many employers regarded these benefits as inexpensive and therefore easy to grant. Moreover, employers could use retiree health benefits to obtain collective bargaining concessions from unions and to encourage older workers to retire. And, employers were far more likely to achieve these goals by agreeing to vested retiree health benefits, rather than offering benefits that would expire at the end of a single CBA term.

Despite this history, Petitioners and their *amici* argue that this Court should adopt the approach taken by the Third Circuit in *Int'l Union, UAW v. Skinner Engine Co.* 188 F.3d 130 (3d. Cir. 1999). *Skinner Engine* held that "because . . . vesting of welfare plan benefits constitutes an extra-ERISA commitment, an employer's commitment to vest benefits is not to be inferred lightly and must be

stated in clear and express language." *Id.* at 139. In arriving at this conclusion, *Skinner Engine* emphasized both that retiree health benefits are not statutorily vested by the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 ("ERISA"), and that the cost of these benefits over time is unpredictable. 188 F.3d at 138 (stating that "Congress recognized the need for flexibility with respect to an employer's right to change medical plans" because "the costs of such plans are subject to fluctuating and unpredictable variables") (internal quotation marks and citation omitted). These two "cautionary principles" led the *Skinner Engine* court to conclude that neither congressional policy nor employer incentives suggested employers were likely to have agreed to vest retiree health benefits absent clear language to the contrary. Or, as two of Petitioners' *amici* put it, "there is no reason to presume that an employer would agree *sub silentio* to such a costly and open-ended commitment." Br. of the ERISA Indus. Comm. & the Am. Benefits Council as *Amici Curiae* in Support of Pet. at 5.[2]

Today, with retirees living longer and constant improvements in healthcare technologies driving costs upward, employers may indeed be resistant to introducing lifetime retiree health insurance. However, very few of today's employer-

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[2] Petitioners and their other *amici* advance similar claims. *See* Pet. Br. at 25-26; Br. of the Council on Labor Law Equality & the Soc'y for Human Res. Mgmt. as *Amici Curiae* in Support of Pet. at 8-9 & 21n.6; Br. for the Chamber of Commerce of the USA & the Business Roundtable as *Amici Curiae* in Support of Pet. at 4.

sponsored retiree health plans are new creations. Instead, the key provisions of these plans were typically negotiated long ago. Moreover, CBA clauses regarding retiree healthcare are commonly carried from initial agreements into subsequent ones largely unchanged by either side during negotiations.[3] *See, e.g.*, *Bender v. Newell Window Furnishings, Inc.*, 681 F.3d 253, 262-63 (6th Cir. 2012) (noting that CBAs repeated language over course of more than two decades, with additions in only two agreements); *Quesenberry v. Volvo Trucks North America Retiree Healthcare Benefit Plan*, 651 F.3d 437, 438 (4th Cir. 2011) (highlighting identical retiree health provisions in CBAs from 1984 through 2005); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 575 (6th Cir. 2006) (noting that language of CBAs and group insurance plans remained "substantially unchanged" over two decades); *Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 911-14 (6th Cir. 2000) (describing similar or identical CBA language regarding retiree health benefits over multiple agreements); *Skinner Engine*, 188 F.3d at

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[3] Of particular relevance to this case, retiree health provisions in CBAs covering rubber industry employees can often be traced back several decades. *See, e.g.*, *Redington v. Goodyear Tire & Rubber Co.*, No. 5:07-cv-1999, 2008 WL 3981461, at *3 (N.D. Ohio Aug. 22, 2008) (referring to example agreements from 1976 and 1979); *Groover v. Michelin N. America, Inc.*, 90 F.Supp. 2d 1236, 1240 (M.D. Ala. 2000) (discussing series of fourteen CBAs, all of which "contain similar provisions affording medical benefits to retirees and surviving spouses of retirees"); *United Rubber, Cork, Linoleum & Plastic Workers of Am. v. Pirelli Armstrong Tire Corp.*, 873 F.Supp. 1093, 1096-98 (M.D. Tenn. 1994) (describing string of CBAs dating to 1950s, which company represented "provided lifetime health benefits to retirees").

135 (observing that series of CBAs contained retiree benefits clauses with "substantially similar language"); *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1067 (6th Cir. 2008) (observing that "core language regarding retiree healthcare coverage remained essentially unchanged" over course of twelve CBAs).

As explained below, the history and the continuity of these agreements undermine the *Skinner Engine* court's conclusion that employers were unlikely to have agreed to vest retiree health benefits, which in turn led that court to require clear CBA language before it would find vesting had occurred. Contrary to that conclusion, during a key period in the expansion of retiree health benefits—the decade or so from approximately the mid-1960s through the mid-1970s—employers generally considered retiree health insurance to be an inexpensive benefit, a useful bargaining chip, and a convenient tool to accomplish other management goals such as voluntary workforce reduction. Under those circumstances, many employers readily granted retiree health benefits. Moreover, at least some employers appear not to have considered the possibility that the benefits might eventually become significantly more expensive; instead, they focused on short- and medium-term goals that might be accomplished by granting retiree health benefits, particularly if those benefits were vested.

I. The Expansion of Employer-Provided Retiree Health Benefits

The 1960s and 1970s are critical years in understanding the development of employment-based retiree health benefits because many employers extended health insurance to retirees for the first time during those years. By the mid-1970s, retiree health benefits had become widespread and generous.

A. Increased Availability of Retiree Coverage

Employer-sponsored health insurance for active employees expanded rapidly in the United States after World War II. *See* Colin Gordon, *Dead on Arrival* 21 (2003) (reporting that at least two-thirds of employers with more than 250 employees, and more than 50% of smaller employers, sponsored health insurance plans by the late 1940s). Employment-based health coverage for retirees, however, developed more slowly. A Social Security Bulletin review of benefit plans in the 1950s observed a "trend toward making advance arrangements" for retiree health insurance, and the Bureau of Labor Statistics reported that the number of collectively bargained plans offering retiree health benefits almost doubled from 1955 to 1959. Alfred M. Skolnik, *Trends in Employee-Benefit Plans, 1954-59: Part 1,* 24 Soc. Sec. Bull., Apr. 1961, at 5, 16 (hereinafter Skolnik, *Trends*). Even so, studies conducted in the early 1960s showed the percentage of active employees with some type of retiree health coverage available increased from 29 percent in 1960

to 33 percent in 1962, then fell back to 25 percent in 1963. Alfred M. Skolnik, *Employee-Benefit Plans: Developments, 1954-63,* 28 Soc. Sec. Bull., Apr. 1965, at 10 (observing that "[p]rogress in recent years has been less clear cut with respect to the practice of continuing the health insurance coverage of retired workers").

Despite their uneven start, retiree health benefits became far more widely available in the latter half of the decade. A 1968 study of 98 large, collectively bargained plans found that "3 out of 5 plans" had extended retiree health benefits. Walter W. Kolodrubetz, *Employee-Benefit Plans, 1950-67,* 32 Soc. Sec. Bull., Apr. 1969, at 4 (hereinafter Kolodrubetz, *Employee-Benefit Plans*). Then, a 1974 study found that fully 71 percent of employer-sponsored health plans extended coverage to retirees over age 65, and by 1975 the Social Security Bulletin reported that "[m]ost group health plans permit continuation of coverage after retirement" in some form. Alfred M. Skolnik, *Twenty-Five Years of Employee-Benefit Plans,* 39 Soc. Sec. Bull., Sept. 1976, at 16 (hereinafter Skolnik, *Twenty-Five Years*).

After that, the pace of growth stabilized before eventually reversing. By 1988, the last year before retiree health plan availability began to decline, about two-thirds of large employers offered some form of health insurance to their former employees. Kaiser Family Found./Health Research & Educ. Trust, *2013 Emp. Health Benefits Survey*, Exh. 11.1 (2013), http://kff.org/report-section/ehbs-2013-section-11/ (surveying both public and private employers with 200 or more employees).

B. Lowered Cost of Coverage

The number of retirees who can claim employer-provided health benefits is just one aspect of the overall picture of these benefits. Another key aspect is the cost of coverage—in other words, the extent to which retirees are required to pay for their own benefits. But the story is similar: By the late 1960s, employers were offering retirees health insurance on increasingly generous terms.

Retiree health benefit packages initially tended to be far more restrained than those available to active employees. For example, although the Detroit automakers began in 1953 to allow retirees age 65 or older to purchase the same health insurance available to active employees, the companies charged retirees the full price of that coverage. Jill Quadagno, *One Nation, Uninsured* 148 (2005) (hereinafter Quadagno, *One Nation*). The American auto industry was not alone in this approach. In 1959, 80 percent of employers offering coverage under collectively bargained plans imposed different contribution requirements on retirees than active employees, with 75 percent requiring retirees to pay the entire premium for retiree coverage; employers also controlled retiree plan costs by imposing lifetime benefit limits and restricting available services. Skolnik, *Trends*, 24 Soc. Sec. Bull., Apr. 1961, at 16.

By the late 1960s, not even a decade later, much had changed. A 1968 study of 98 large, collectively bargained plans reported that "about 85

percent . . . were financed in full by the employer." Kolodrubetz, *Employee-Benefit Plans,* 32 Soc. Sec. Bull., Apr. 1969, at 4. Similarly, a 1973 National Industrial Conference Board study found that, "[i]n most cases where the company was providing the employee's own coverage before retirement free of charge, this policy was continued." Skolnik, *Twenty-Five Years*, 39 Soc. Sec. Bull., Sept. 1976, at 16. When the U.S. Census Bureau conducted a survey in 1988 of retiree health coverage, it found that employers were paying 100 percent of premium costs for 42 percent of covered retirees and at least some of the premium costs for another 33 percent of retirees. U.S. Dep't of Labor, *Retirement Benefits of American Workers: New Findings from the September 1994 Current Population Survey*, Tbl. E9 (Sept. 1995).

II. Reasons for Growth: Inexpensive and Useful Retiree Health Benefits

Contrary to the premise of the *Skinner Engine* court as well as the Petitioners and their *amici,* when retiree health benefits were introduced, they could often serve as relatively inexpensive methods of achieving other employer goals, such as reaching agreement with labor unions during bargaining or encouraging employees to retire. Thus, employers agreed to extend health insurance to their retirees in an era when many of those employers believed retiree health benefits created a big bang for few bucks. In other words, employers could promise retirees something the retirees would consider valuable, but at low cost, and in return achieve

several worker management goals—in many ways the perfect benefit for both sides.

Of course, not all employers who negotiated retiree health benefits during the 1960s and 1970s intended those benefits to vest. However, the contention that few employers ever would have agreed to vest retiree health benefits, and that therefore courts should be loathe to find vesting, is equally untenable.

A. Modest Costs

Unlike today's health benefits, retiree health benefits were viewed as inexpensive when they were added to employee compensation packages in the 1960s and 1970s. At least two facts explain this phenomenon: First, there were then fewer retirees, and they did not receive benefits for as long as retirees typically do today; and, second, Medicare was enacted in 1965 and began absorbing much of the cost of healthcare for retirees age 65 and older. Accordingly, it is unsurprising that, while at least some employers undoubtedly recognized the potential for costs to increase in subsequent decades, retiree healthcare expenditures in general did not draw much attention almost fifty years ago.

As Michael S. Gordon, often described as one of ERISA's architects, put it:

> Unlike pension plans, there was no crisis in health plans in 1974 . . . . Nor was there evidence of potentially out-of-control medical cost inflation, nor of new and dramatically high-priced medical technologies, the use of

> which would become the norm, rather than the exception . . . . [E]mployer-provided health insurance was cheap and plentiful.

Michael S. Gordon, *Introduction to the Second Edition: ERISA in the 21st Century*, *in Employee Benefits Law* lxviii (Steven J. Sacher et al. eds., 2d ed. 2000). Not only does this provide insight into why ERISA at the outset primarily focused on pension benefit plans rather than welfare benefit plans, it also explains why employers might have agreed to vest retiree health benefits: In contrast to the relatively determinate costs they were committing to retirement plans, the cost of future retiree health insurance simply seemed insignificant.

This may be remarkable from today's vantage point, but retiree health care benefits in earlier decades were perceived as so inexpensive that one employee benefits counsel later described them as virtually costless to employers: "[I]n order to obtain the employer's business in covering active employees, the insurance companies often agreed to cover retirees without additional cost to the employer. Needless to say, many employers accepted the offer." Interview by Editor with Steven J. Sacher, Jones Day, *VEBAs—The Answer to Healthcare Benefit Costs for Retirees?*, Metro. Corp. Counsel, Feb. 2008, at 49. Others have confirmed this report, characterizing retiree health insurance "as a goodwill gesture and an inexpensive addition to the total retirement package." *See, e.g.,* Anna M. Rappaport & Carol H. Malone, *Adequacy of Employer-Sponsored Retiree Health Benefit*

Programs, in Providing Health Care Benefits in Retirement 60 (Judith F. Mazo et al. eds., 1994).

Even if not always without cost, retiree health plans before the 1980s would have been comparatively inexpensive because of active workers' and retirees' demographics. In 1960, approximately 14.26 million individuals were receiving Social Security benefits (including retirement, disability, and survivors' benefits); by 1980, that number had reached 35.12 million. Social Security Administration, *Ratio of Social Security Covered Workers to Beneficiaries Calendar Years 1940-2010*, Social Security Online, http://www.ssa.gov/history/ratios.html. Similarly, in 1960, only 9.2 percent of the U.S. population was age 65 or older; by 1980, 11.3 percent of the population was at least age 65. Frank Hobbs & Nicole Stoops, U.S. Census Bureau, *Demographic Trends in the 20th Century*, Fig. 2-4 (Nov. 2002), http://www.census.gov/prod/2002pubs/censr-4.pdf. Thus, in the 1960s and 1970s, there were simply fewer retirees, both in absolute terms and as compared to active workers, than there are today.

Further, workers in the early 1960s tended to stay employed until at least age 65. For the five-year period from 1960 to 1965, based on Social Security data, the median age for retirement was 65; by the five-year period from 1980 to 1985, the median age for leaving the workforce had dropped to slightly below age 63. Murray Gendell, *Retirement Age Declines Again in 1990s,* 124 Monthly Lab. Rev., Oct. 2001, at 14. In addition, life expectancy in the U.S. has increased since 1960. An individual who

was 65 years old in 1959-1961 could be expected to live an average of 14.3 more years, whereas an individual who reached age 65 in 1979-1981 could be expected to live an average of 16.5 more years. Elizabeth Arias, *United States Life Tables, 2009,* 62 Nat'l Vital Statistics Reports, Jan. 16, 2014, at 51, Tbl. 21. Taken together, this statistical trifecta (a lower proportion of older Americans in the 1960s, who worked longer and did not live as long as workers who reached age 65 in later years) explains why there were simply fewer individuals eligible for employment-based retiree health benefits during the same two decades when employers were contemplating both expanding the availability of these benefits and assuming a higher percentage of the premium expense.

Retiree health insurance became even less expensive for employers with the 1965 enactment of Medicare. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965). Medicare provides generous health insurance coverage for the vast majority of the U.S. population age 65 and older. *See generally* Marilyn Moon, *Medicare: A Policy Primer* (2006). Once Medicare took effect in 1966, employers quickly realized they could "offer health benefits to their retirees with the assurance that the Federal Government would pay for many of the medical costs incurred by company retirees age 65 and older." Special Comm. on Aging, U.S. Senate, *Developments in Aging: 1996*, S. Rep. No. 105-36, at 191 (1997). Employer plans would generally coordinate with Medicare, acting as supplemental rather than primary insurance. Louis S. Reed & Kathleen Myers, *Health Insurance Coverage*

Complementary to Medicare, 30 Soc. Sec. Bull., Aug. 1967, at 6, 9. With Medicare shouldering the bulk of the healthcare costs for most retirees age 65 and older, employers could afford to be generous in extending coverage. In some cases, the presence of Medicare meant that employers were willing to offer retiree health benefits for the first time, including negotiating coverage for hourly retirees of certain Medicare premiums and deductibles. Kathleen Myers, *Employee-Benefit Plan Adjustments to Health Insurance for the Aged*, 29 Soc. Sec. Bull., July 1966, at 23 (hereinafter Myers, *Employee-Benefit Plan Adjustments*). In other cases, the Medicare foundation encouraged employers to expand existing coverage.[4]

Employers could also be unconcerned about future retiree health plan costs because they typically funded retiree benefits on a pay-as-you-go basis just as they did active employee health insurance. *Cf.* Fin. Accounting Standards Bd., *Statement of Financial Accounting Standards No. 106, Employers' Accounting for Postretirement Benefits Other Than Pensions*, 167 (1990). In other words, as long as an employer had enough cash to meet the annual premium expense, there was no incentive for that employer to worry about future

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[4] For example, Medicare's enactment prompted Ohio Bell Telephone Company, which already offered retiree health coverage, to negotiate with the Communications Workers of America to increase retiree health benefits that coordinated with Medicare. That contract then became the Communications Workers model agreement for other employer plan negotiations. Myers, *Employee-Benefit Plan Adjustments*, 29 Soc. Sec. Bull., July 1966, at 24.

costs. Not until the early 1990s did private sector employers face any kind of required financial statement disclosure of long-term retiree health benefit commitments. *Id.* at 9 (promulgating new accounting requirement for retiree health benefits generally effective for fiscal years beginning after December 15, 1992). While employers today could not be so relaxed, employer choices in the 1960s and 1970s reflected a markedly different vision. "With relatively few retirees, comparatively small health benefit costs, and a philosophy that American manufacturing would dominate world markets forever, the idea of financing retiree health from future income seemed reasonable." G. Lawrence Atkins, *The Employer Role in Financing Health Care for Retirees, in Providing Health Care Benefits in Retirement* 108 (Judith F. Mazo et al. eds., 1994).[5]

Given all this, it is not surprising that many employers found retiree health benefits relatively easy to grant at the outset. Retiree health insurance developed in a time when costs and risks appeared small. Far from expensive benefit programs to which few reasonable employers would commit, as envisioned by the *Skinner Engine* court, retiree health plans at their inception instead appeared as a comparatively inexpensive means of obtaining desired outcomes.

B. Employer Gains

"Retiree health benefits, like other benefits and compensation, are provided because they help

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[5] G. Lawrence Atkins was at the time the Director of Health Legislative Affairs at Winthrop, Stimson, Putnam & Roberts.

the organization achieve its human resource goals." William M. Mercer-Meidinger-Hansen, Inc., *Retiree Health Benefits: Plan Designs for a Changing World*, *in Employee Welfare Benefit Plans 1989,* 74 (PLI 1989). Put another way, employers "gain from offering retiree benefits if, by doing so, (1) the firm can elicit certain desirable behaviors from its workers, and (2) the advantages of providing the benefits exceed their costs." Olivia S. Mitchell, *Commentary*, *in Providing Health Care Benefits in Retirement*, 44 (Judith F. Mazo *et al.* eds., 1994). While some employers may have offered retiree health benefits out of altruism,[6] especially given their low cost as described in the previous section, many employers undoubtedly agreed to these benefits for other purposes. The following subsections describe two major employer goals served by extending retiree health benefits: first, obtaining leverage in collective bargaining; second, workforce management. Significantly, employers would have found it far more difficult to obtain these goals had they granted only retiree health benefits that expired at the end of a single CBA.

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[6] For example, Eastman Kodak's policies toward health insurance for both active employees and retirees were so generous that the company was characterized as a "doting uncle." Milt Frudenheim, *A Doting Uncle Cuts Back, and a City Feels the Pain,* N.Y. Times, Oct. 8, 1995, at C1. Retirees received entirely employer-funded health insurance, with no restrictions on providers, until the company's financial problems caused it to implement various cost-control measures. Although likely not the best explanation for most employers, it is at least possible that some—like Kodak—took seriously the vision of a caring cradle-to-grave relationship with longtime employees.

1. Collective Bargaining Gains

Collective bargaining can have a tit-for-tat quality in piecing together employee benefits packages. As described earlier, employers in the 1960s and early 1970s considered retiree health insurance a low-cost benefit. Accordingly, it became a bargaining chip that could be exchanged for concessions from unions. Indeed, many employers "viewed retiree health benefits as a 'throw-away' issue in the employee benefits bargaining process." U.S. Gen. Accounting Office, *Retiree Health Plans: Health Benefits Not Secure Under Employer-Based System*, Report No. GAO/HRD-93-125, at 1 (1993).

With employers on one side viewing retiree health benefits as an easy item to give, and "strong unions and aggressive bargaining" on the other side, interests aligned to support expansion. Joan Vogel, *Until Death Do Us Part: Vesting of Retiree Insurance,* 9 Indus. Relations L. J. 183, 199 (1987). In addition, employers sometimes negotiated agreements in which active workers deferred planned wage increases in order to offset the costs of retiree health benefits to the employer. *E.g., Cole v. ArvinMeritor, Inc.*, 516 F.Supp. 2d 850, 854-55 (E.D. Mich. 2005) (explaining that under 1962-1965 CBA one or two cents of planned wage increases would be diverted to fund retiree health benefits). Thus, retiree health benefits were (and remain) a two-way street, with unions and active workers making concessions in exchange for the insurance commitment. *E.g., Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1129 (4th Cir. 1996) (noting that Coal Commission found employer signatories to CBA had

"benefitted from UMWA concessions in exchange for better [retiree] healthcare benefits").

2. Workforce Management

Moreover, some employers viewed retiree health benefits as a workforce management tool. Passage of the Age Discrimination in Employment Act of 1967 ("ADEA"), Pub. L. No. 90-202, 81 Stat. 602 (1967), and the risk of age discrimination lawsuits meant employers seeking to reduce payroll expenses could not target workers who were at least 40 but not yet 65 years old even though such older workers were typically paid more; the statute was amended in 1978 to include workers up to age 70 in the protected group. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (1978). However, the ADEA gave employers an out, allowing age-related distinctions and eligibility provisions to be included in a "bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of the Act." 29 U.S.C. § 623(f)(2) (1986). By the mid-1970s, corporations had begun to structure early retirement incentive programs ("ERIPs") to meet the ADEA bona fide employee benefit plan exception. *See generally* Richard G. Kass, *Early Retirement Incentives and the Age Discrimination in Employment Act,* 4 Hofstra Lab. L.J. 63 (1986).[7]

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[7] Studies in the mid-1980s found that about a third of employers had offered at least one early retirement window since the early 1970s. *See* Donald Bell & William Marclay, *Trends in retirement eligibility and pension benefits, 1974-83*,

Depending on an employer's goals, ERIPs could include lowered age and service requirements for pension eligibility as well as retiree health benefits. The idea was to encourage older workers to leave active employment voluntarily, sidestepping ADEA concerns. *See* Jill S. Quadagno & Melissa Hardy, *Regulating Retirement through the Age Discrimination in Employment Act,* 13 Res. on Aging 470, 472 (1991); Quadagno, *One Nation*, *supra*, at 149 (2005). Retiree health plans could be a key part of these incentive packages. Donald T. Weckstein, *The Problematic Provision and Protection of Health and Welfare Benefits for Retirees,* 24 San Diego L. Rev. 101, 105 (1987). Because early retirees would generally not qualify for Medicare coverage until they reached age 65, they needed a health insurance bridge between active employee coverage and Medicare. Employment-based retiree health plans built that bridge. Accordingly, the popular press later characterized ERIPs as a way for employers to "open up management ranks, to thin out an overstaffed organization or to meet recessionary pressures without resorting to layoffs." Elizabeth M. Fowler, *Careers; The Early Retirement Programs,* N.Y. Times, Apr. 25, 1984, at D21.

Such workforce realignment goals further explain why some employers would have been willing to extend retiree health insurance beyond the duration of individual CBAs. ERIPs were effective only if they could entice older workers to retire,

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110 Monthly Lab. Rev., Apr. 1987, at 25; Diane E. Herz & Philip L. Rones, *Institutional barriers to employment of older workers,* 112 Monthly Lab. Rev., Apr. 1989, at 18.

relinquishing the benefits available to active employees—benefits that would, as a practical matter, certainly include health insurance during the entire term of active employment. If the promise of continuing health insurance in retirement lasted only as long as the CBA term, the value of that key retirement incentive would be much diminished. This would be especially true for potential retirees yet too young to qualify for Medicare. In light of the then-prevailing view of retiree health insurance as inexpensive, employers could be better off in the short- and medium-term when they agreed to lifetime retiree health benefits; moreover, they did not necessarily have either the foresight or the incentives to predict the long-term picture.

While these dynamics do not indicate that any individual contract was intended to vest retiree health benefits, they do illustrate the shortcomings of the one-size-fits-all approach embraced by the *Skinner Engine* court and advocated by Petitioners and their *amici*. That approach relies on assumptions that might hold today, but that do not accurately reflect the era in which the terms of most retiree health plans—terms that for many plans have persisted over the decades largely unchanged—were negotiated. This Court should not adopt that ahistorical approach.

CONCLUSION

For the foregoing reasons, this Court should reject the Petitioners' invitation to adopt the Third Circuit's approach and should not require a clear statement of intent before holding that retiree health benefits are vested.

Respectfully submitted,

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Appendix

Appendix A

The *Amici* professors have substantial experience in labor law, employee benefits law, or both. Their expertise thus bears directly on the issues before the Court in this case. *Amici* are listed in alphabetical order below. Institutional affiliations are provided only for identification purposes.

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