No. 15-244

In The Supreme Court of the United States

EMBARQ CORPORATION, *et al.*,

Petitioners,

v.

WILLIAM DOUGLAS FULGHUM, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

REPLY BRIEF FOR PETITIONERS

The Tenth Circuit's decision in this case exacerbates a recognized circuit split in an important area of federal law where Congress has mandated uniformity. Pet. 2-5; 11-23. Unless this Court resolves the split, whether ERISA claims for fiduciary breach can be litigated will depend on the circuit in which those claims are brought. *Id.* at 5; 21-22. And if the Tenth Circuit's decision is permitted to stand, it will eviscerate ERISA's statute of repose and improperly allow plaintiffs to assert breach of fiduciary duty claims based (as here) on decades-old alleged oral misrepresentations, *id.* at 17-20—in derogation of the fundamental principle that ERISA's focus on the "*written* terms of the plan * * * is the linchpin of 'a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" *Heimeshoff* v. *Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 612 (2013) (emphasis added) (quoting *Varity Corp.* v. *Howe*, 516 U.S. 489, 497 (1996)).

Even though the Tenth Circuit expressly acknowledged it was widening an entrenched split, App. 34-36, and even though other courts and commentators have acknowledged the split, Pet. 11 & n.4, respondents claim (i) the split is "illusory" (and thus not outcome-determinative), and alternatively (ii) that review is premature. Neither argument holds water.

The first argument against review misapprehends the Tenth Circuit's application of the exception to the statute of repose—ERISA § 413. Under the majority view, which the Tenth Circuit expressly rejected, the "fraud or concealment" exception applies only where a fiduciary has taken affirmative steps to conceal the alleged breach. Pet. 4 (citing cases). Here, respondents' underlying fiduciary breach claims are based on alleged "affirmative misrepresentations"—but that is not enough to survive dismissal under the majority view because, as the Tenth Circuit expressly recognized, respondents have "not asserted" that petitioners "concealed their alleged breach of fiduciary duty" and "[did] not contest this conclusion on appeal." App. 40. As a result, this case cleanly presents the discrete, purely legal question dividing the circuits—whether ERISA's six-year statute of repose is tolled by an alleged fiduciary breach sounding in fraud when the fiduciary has not taken affirmative steps to conceal the alleged breach. If the answer to that question is no, then contrary to the Tenth Circuit's holding, respondents' breach of fiduciary duty claims are barred as a matter of law. The split is thus real and outcome determinative.

The second argument against review ignores that interlocutory review is entirely appropriate where, as here, "'the essence' of the claimed right is a right not to stand trial." See *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 524 (1988) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985)). That is why this Court has granted interlocutory review to resolve other circuit

splits concerning tolling of statutes of limitation, see, e.g., *Minn. Mining & Mfg. Co.* v. *N.J. Wood Finishing Co.*, 381 U.S. 311, 314 (1965), and in the analogous context of immunity from suit, see, e.g., *Ashcroft* v. *Iqbal*, 556 U.S. 662, 666 (2009); *Wood* v. *Moss*, 134 S. Ct. 2056, 2061, 2065 n.4 (2014) (reversing Ninth Circuit's denial of qualified immunity and noting this Court has "repeatedly 'stressed the importance of resolving immunity questions at the earliest possible stage [of the] litigation'" (quoting *Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (per curiam))).

Similarly, there is no need to wait to resolve the split exacerbated by the Tenth Circuit's decision here concerning ERISA's statute of repose. Because this case involves an exceedingly important, recurring issue of federal law in an area where Congress has commanded uniformity, the Court should grant the petition and resolve the conflict among the courts of appeals on this issue.

I. The Decision Below Exacerbates A Recognized Circuit Split That Was Outcome-Determinative In This Case.

Faced with an acknowledged, entrenched circuit split, respondents strain to downplay it (at 10-15) as "superficial," "nominal," and "illusory." But the only thing "superficial" is respondents' attempt to discredit the Tenth Circuit's entrenchment and expansion of the split.

Respondents primarily downplay the split (at 10-11) based on the Second Circuit's decision in *Caputo* v. *Pfizer*, 267 F.3d 181 (2d Cir. 2001). It is true enough that the Second Circuit acknowledged that its interpretation of the statute "overlaps somewhat with that of our sister circuits" in that the Second Circuit also applies the statutory exception in cases of "fraudulent concealment." *Id.* at 190. But the conflict in the circuits arises where, as here, there are no allegations of concealment.

Specifically, the Second Circuit assumed as a matter of law that "affirmative misrepresentations of a material fact are self-concealing acts" and automatically trigger the exception. *Id.* at 190 n.3. That is not the law, however, in the six circuits on the other side of the split. See, e.g., *Martin* v. *Consultants & Adm'rs*, 966 F.2d 1078, 1095-96 (7th Cir. 1992) (emphasizing that "fraud claims do not receive the benefit of ERISA's six-year statute of limitations simply because they are fraud claims" and that "[t]here must be actual concealment—i.e., 'some trick or contrivance intended to exclude suspicion and prevent inquiry'" (quoting *Wood* v. *Carpenter*, 101 U.S. 135, 145 (1879))); see also Pet. 3-4; 11-16 (citing cases). Given the lack of allegations here of concealment in any form (App. 40), there can be little real question that had this case been brought in any circuit following the majority approach, respondents' breach of fiduciary duty claims would have been dismissed as time barred (just as the district court initially and correctly held).

Attempting to take advantage of a circuit split they insist does not exist, respondents contend (at 1) that the Tenth Circuit "held that the term 'fraud' encompassed respondents' claims based on the Companies' misrepresentations." But the Tenth Circuit "held" no such thing. Respondents' allegations of misrepresentations met no such test, which would require, among other things, allegations that fiduciaries intended to deceive respondents. App. 37 (citing *Caputo*, 267 F.3d at 189). The alleged statements characterized by respondents as "fraud" often were made by respondents or their fellow class members.[1] If anything, that evidence only underscores the problem with the Tenth Circuit's construction of the statute, as it would allow a plaintiff—based on self-serving, decades-old allegations—to circumvent the statute of repose and the written terms of the plan. See *Radiology Ctr., S.C.* v. *Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1221 (7th Cir. 1990) (rejecting any interpretation of the statute that would "create a longer

[1] In particular, respondents repeatedly mention plaintiff Betsy Bullock's allegation that she was told benefits were "written down in blood." Opp. 4, 6, 15, 23. Respondents fail to note, however, that Bullock attributed this statement to class member Gayle Phillips, and that it was allegedly made sometime in the 1980's during a passing conversation in a stairwell. C.A. App. 4351-52 & 4394-95. Respondents also neglect to mention that Phillips subsequently wrote to Bullock two years before Bullock's 2001 retirement that welfare benefits have never been "guaranteed" and that "[t]he company has always had the right to amend, change or terminate them at any time. * * * We can only hope and pray that doesn't happen in the future." *Id.* at 4453.

limitations period for fraud claims than for claims founded on written contracts" and incentivize artful pleading).

The key point, which respondents never meaningfully dispute, is that the circuits have intractably divided over whether the statute of repose should be construed to bar fiduciary breach claims where the fiduciary does not conceal the breach. Even in circuits that recognize so-called self-concealing breaches, the question is still whether the "fraud or concealment" exception requires affirmative steps of concealment to trigger the exception to the statute of repose. See, e.g., *J. Geils Band Emp. Benefit Plan* v. *Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1253 n.9, 1255 (1st Cir. 1996). Resolution of that issue is especially critical here where there is no allegation of concealment. Respondents necessarily, then, rely solely on the Tenth Circuit's expansion of the statutory exception to save their claims—and the claims of over 900 plaintiffs in the related *Abbott* litigation. There is nothing "nominal" about a split where, on one side, nearly 1000 claims can be litigated, while on the other side, those same claims cannot be.[2]

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[2] Of note, the *Abbott* plaintiffs—relying on the same type of evidence as respondents do here—argue that the Tenth Circuit's decision in this case triggers the statutory exception merely through "underlying fiduciary misrepresentations and * * * does not require separate acts of concealment." Second Amended Complaint at ¶ 10, *Abbott* v. *Sprint Nextel Corp.*, No. 11-cv-2572 (D. Kan. Sept. 30, 2015), ECF No. 82.

Respondents cannot alter that conclusion by noting (at 10-12) the unremarkable similarities between how courts treat self-concealing breaches, on one hand, and breaches that are subsequently concealed by a fiduciary, on the other hand. Respondents argue (at 11-12) that "the circuit conflict evaporates" if the underlying breach involves "affirmative misstatements." But in support of that proposition, respondents cite a case—involving alleged misstatements very similar to those here and in *Abbott*—that makes clear respondents would not survive summary judgment in any court holding the majority view. See *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 242 F.3d 497, 503 (3d Cir. 2001) ("[I]f all that a plaintiff can show is that a counselor represented to him that he had guaranteed lifetime health care benefits or failed to give him accurate advice knowing that he believed he had such benefits, the fraud or concealment clause is inapplicable. In such cases, Unisys cannot be said to have taken affirmative steps, either as a part of the original breach of duty or thereafter, to cover up its breach."). Faced with the reality of the record evidence, and an acknowledged circuit split, respondents beg the question by asking this Court to assume that alleged

"affirmative misstatements" constitute "fraud" and satisfy the exception to the statute of repose.[3]

Respondents further claim (at 12-14) that "the realities of ERISA litigation" make it unnecessary to resolve the conflict. But that argument rests on a false dichotomy. The Tenth Circuit did not decide whether a fiduciary's self-concealing breaches trigger the exception to the same extent as subsequent acts of concealment. The Tenth Circuit instead joined the Second Circuit in holding that fraud in the underlying breach, without more, triggers the exception and nullifies a defendant's right to repose—even in the absence of concealment by a fiduciary.

Respondents have no answer to the argument (at Pet. 15) that the Tenth Circuit's decision renders the term "concealment" superfluous in the statute—not only leaving it with no work to do, but also converting every act of "concealment" by a fiduciary into "fraud." Respondents' textual argument (at 26-28) cannot account for this anomaly. While fraud and concealment are phrased in the disjunctive in the statute,

[3] The lack of concealment also undercuts respondents' policy arguments (at 28-29)—and respondents, in turn, have no response to the serious policy concerns raised by petitioners' *amici*. See Brief of *Amici Curiae* American Benefits Counsel, et al. [hereinafter *Amici* Br.] 14-18. Respondents simply assume they come within the exception to the statute of repose—which properly construed makes allowance for stale claims only when the fiduciary conceals the breach—even though they cannot demonstrate concealment.

attempting to read the terms independently does more damage to the text than seeing them as linked (as most circuits have for years). See *Amici* Br. at 5-8. Thus it is unsurprising that respondents are unable to answer petitioners' arguments concerning the practical implications of accepting the Second and Tenth Circuits' interpretation. See Pet. 17-18.

Those implications are evident and significant. Virtually every contractual vesting claim will be accompanied by a breach of fiduciary duty claim that allegedly sounds in fraud—and the statute of repose for breaches of fiduciary duty will be functionally eliminated. The split is real, the stakes are large, and the question is important. The petition should be granted.

II. Interlocutory Review Is Especially Appropriate Where, As Here, A Statutory Right To Be Free From Litigation Is At Stake.

As petitioners previously explained (at Pet. 23-24), interlocutory review is entirely appropriate where, as here, "'the essence' of the claimed right is a right not to stand trial." See *Van Cauwenberghe*, 486 U.S. at 524 (quoting *Mitchell*, 472 U.S. at 525); see also *United States* v. *MacDonald*, 435 U.S. 850, 860 n.7 (1978) ("[C]ertain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial.").

Respondents disagree, stressing (at 18) that this Court's usual practice is to avoid interlocutory review. But where the issue is whether a defendant should be subject to litigation at all, this Court has not hesitated to grant interlocutory review—including to resolve other circuit splits concerning tolling of statutes of limitation, see, e.g., *Minn. Mining*, 381 U.S. at 314, and in the similar context of immunity from suit, see, e.g., *Iqbal*, 556 U.S. at 666; *Wood*, 134 S. Ct. at 2061. This Court has also granted interlocutory review in the Rule 12(b)(6) context and stressed the importance of protecting defendants from burdensome discovery and the costs of litigating meritless cases. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558 (2007). As in these cases, there is no need to wait to resolve the entrenched split deepened by the Tenth Circuit's decision concerning ERISA's statute of repose.

Respondents contend (at 20) that this Court's review would cause significant disruption to the district court's schedule. But it is difficult to believe this Court's consideration of a purely legal issue would trouble the district court. If this Court sides with the majority of the courts of appeals (as the district court did), the decision would obviate the district court's need to decide (again) the claims of 15 plaintiffs—potentially at trial. The parties have fully briefed a summary judgment motion covering the only claims that remain viable in the instant litigation. ECF Nos. 553, 555, & 556. And in the *Abbott* litigation, review by this Court could render it unnecessary for the district court to resolve the vast bulk of

more than 900 individual breach of fiduciary duty claims that are time-barred under the majority view. Joint Motion at ¶ 4, *Abbott v. Sprint Nextel Corp*., No. 11-cv-2572 (D. Kan. Feb. 27, 2014), ECF No. 11.

While respondents complain (at 20) of the "unnecessary cost" involved in a stay, they fail to mention that petitioners will be subjected to needless, unrecoverable litigation expenses if this Court delays review. That is why this Court has said in the analogous context of the collateral order doctrine that "[t]he critical question * * * is whether 'the essence' of the claimed right is a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524 (quoting *Mitchell*, 472 U.S. at 525). Where a party has statutory immunity from trial, the right at issue falls into the "certain narrow circumstances in which the right would be 'irretrievably lost' absent an immediate appeal." *Id.* (quoting *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 431 (1985)).[4]

Respondents further complain (at 21-22) of the delay a grant of certiorari would cause, but any such delay is no reason to deny review where, as here, the question is whether Congress prohibited the litigation itself. Cf. *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175,

[4] The Ninth Circuit has, for the same reasons, held that the applicability of a statute of repose is an issue subject to immediate appellate review under the collateral order doctrine. See *Estate of Kennedy* v. *Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1111 (9th Cir. 2002).

2183 (2014) ("Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" (quoting 54 C.J.S. *Limitations of Actions* § 7, at 24 (2010))). Although a plaintiff can seek an award of prejudgment interest to account for any "delayed justice," there is no remedy to make defendants whole if review is delayed and the right to be free from trial is irretrievably lost.

Respondents worry this Court's resources might be wasted by reviewing the case now. They suppose (at 23) that the trial record "*may* well demonstrate" the necessary fraud to trigger the exception (emphasis added). Respondents did not argue below, however, that defendants concealed any alleged fiduciary breach. App. 38 n.22. Under the majority view, plaintiffs who fail to allege that a fiduciary took some affirmative step to cover its tracks would not have a right to try such stale, self-serving claims. Given the Tenth Circuit's expansion of an entrenched circuit split, it would hardly waste this Court's time to resolve that recognized conflict.

Respondents contend (at 24) that this Court's review would be unnecessary if petitioners prevail on remand. This argument, however, misses the point. As the majority view holds, ERISA—properly construed—reflects a congressional judgment that there should not even be a trial in these circumstances. Respondents' circular argument (at 24-26) that the reasons supporting Congress' decision to prevent the prosecution of stale claims (e.g., loss of evidence and

imperfect recollection of witnesses) actually counsel in favor of trying their stale claims is nonsensical and assumes not only that a trial is inevitable, but also that their already decades-old recollections of alleged misstatements are reliable.

There is no reason to delay review particularly given that the Tenth Circuit's decision in this case, if not reviewed now, would potentially require trial—and certainly years of discovery followed by volumes of briefing—of nearly 1000 claims, almost all of which would be dismissed out of the gate in every circuit adopting the majority view. Contrary to respondents' protestations, it would be a judicious use of this Court's resources to resolve the conflict and reverse the Tenth Circuit's decision now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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