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

BRIEF OF *AMICI CURIAE* THE AMERICAN BENEFITS COUNCIL, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE ERISA INDUSTRY COMMITTEE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The American Benefits Council (the "Council") is a broad-based nonprofit organization dedicated to protecting and fostering privately sponsored employee benefit plans. The Council's approximately 400 members are primarily large U.S. employers that provide employee benefits to active and retired workers. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health plans covering millions of Americans.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It directly represents 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of the Nation's business community in matters before Congress, the Executive Branch, and the courts.

The ERISA Industry Committee ("ERIC") is a nonprofit organization comprised of large employers who sponsor pension, savings, healthcare, disability, and other

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1. No counsel for any party authored this brief in whole or in part, and no person or entity other than Amici, their counsel, and their members has made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, Amici have provided all counsel of record with timely notice of their intent to file this brief, and all parties have consented to the filing.

employee benefit plans for millions of active workers, retired persons, and their families. It is the only national association advocating solely for the employee benefit and compensation interests of the country's largest employers. ERIC supports its members by advocating on federal policies, regulations, and other matters that affect members' ability to deliver benefits, their cost and their effectiveness, as well as the role of those benefits in the American economy.

The Council, the Chamber, and ERIC frequently participate as amici curiae in cases with the potential to significantly affect the design and administration of employee benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA"). The members of all three organizations have a strong interest in the Court's review of the Tenth Circuit's decision in this case because that decision will dramatically increase the potential exposure of benefit plan sponsors and administrators, which, in turn, will discourage many employers from offering such plans in the first place. Accordingly, amici submit this brief to aid the Court in understanding the deleterious impact of the Tenth Circuit's decision and the critical need for this Court's review.

SUMMARY OF THE ARGUMENT

The Tenth Circuit's construction of ERISA § 413 disregards ERISA's statutory design and the original intent of the "fraud or concealment" exception. Section 413 prescribes a six-year statute of repose for fiduciary breach claims. 29 U.S.C. § 1113. It nevertheless carves out a narrow exception to that period of repose: "except that *in the case of fraud or concealment*, such action may

be commenced not later than six years after the date of discovery of such breach or violation." *Id.* (emphasis added). In the Tenth Circuit's view, when Congress made an exception for "fraud," it meant to include situations where the underlying cause of action is based on fraud—in other words, where a participant brings a fiduciary breach claim based on a fraudulent communication. In effect, the Tenth Circuit held that Congress meant to eliminate the statute of repose for all ERISA fraudulent communication claims.

What the Tenth Circuit failed to recognize is that when Congress enacted § 413, it did not anticipate that participants would bring fiduciary breach claims based on fraudulent communications. To the contrary, Congress drafted ERISA so that plan communications would be governed by ERISA's disclosure provisions, while the provision governing fiduciary breach claims applied only where a fiduciary harmed *the plan* through mismanagement or self-dealing. It was only years later that courts recognized that ERISA's catch-all remediation provision, § 502(a)(3), authorized participants to bring fiduciary breach claims based on misrepresentations. But the fact that fiduciary breach claims sounding in fraud can be brought only pursuant to ERISA's catch-all provision underscores that Congress did not specifically contemplate these claims; if it had, it would have provided for them in the statute's fiduciary breach provision.

Congress therefore could not have intended for the "fraud or concealment" exception to apply to fiduciary breach claims based on allegations of fraud because it did not anticipate the existence of such claims in the first place. Instead, when Congress made an exception for "fraud,"

it had in mind the common-law rule that tolls a statute of limitations when a defendant commits fraud to cover up a breach that has already occurred.

The Tenth Circuit's construction of the "fraud or concealment" exception not only is erroneous, but it also will have grave consequences for ERISA plan sponsors and fiduciaries. Under the rule handed down in this case, ERISA plans can now be sued for an isolated statement that may or may not have been made by a representative of the plan or employer in the distant past. This case presents a perfect example: Some of the plaintiff participants have sued for oral misrepresentations allegedly made more than *twenty years ago*. ERISA plans cannot reasonably be expected to defend against such stale claims. The documentary evidence relevant to disproving a fraud allegation in many cases will have long been destroyed, and witnesses (provided that they are still alive) cannot be expected to recollect isolated interactions with participants that occurred decades earlier. Moreover, many of the ancient claims permitted by the Tenth Circuit's decision carry significant liability in the form of decades' worth of lost benefits plus prejudgment interest. Given that many misrepresentation claims are brought in the form of class actions or with multiple plaintiffs, the Tenth Circuit's decision will dramatically increase the potential liability of ERISA plans and could ultimately discourage employers from offering benefit plans in the first place.

In giving § 413's "fraud or concealment" exception an overly broad construction, the Tenth Circuit has split from the large majority of Circuits, which recognize that the exception applies only when a fiduciary takes steps to hide

a breach that has already occurred. This Court's review is necessary to restore uniformity to the law and protect ERISA plans from the deluge of litigation and potential liability that would flow from the Tenth Circuit's decision.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION IGNORES THE INTENT OF CONGRESS AS DEMONSTRATED BY ERISA'S STATUTORY DESIGN.

The Tenth Circuit's holding that § 413's "fraud or concealment" exception can be invoked whenever a plan participant brings a fiduciary breach claim based on a fraudulent communication improperly divorces the term "fraud" from its statutory context. *See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (explaining that a court's duty is "to construe statutes, not isolated provisions"). As discussed below, a holistic examination of ERISA's text and structure demonstrates that Congress did not contemplate that plan communications would be regulated under ERISA's fiduciary breach provisions. Accordingly, when Congress discussed "fraud" in the context of ERISA's statute of repose, it did not mean causes of action based on fraudulent communications. To the contrary, "fraud" referred to fraudulent acts taken after a fiduciary breach was committed that prevent the breach from being discovered.

ERISA's primary provisions for regulating the conduct of fiduciaries are §§ 409 and 502(a)(2), which together authorize a cause of action for breach of fiduciary

duty. 29 U.S.C. §§ 1109, 1132(a)(2). Critically, those provisions permit participants to sue only *on behalf of the plan* for harm suffered *by the plan* on account of fiduciary breaches such as self-dealing, plan mismanagement, or other similar malfeasance that harms the plan. *Id.*; *see also id.* § 1104. But the provisions do not permit participants to sue in their personal capacities for damages incurred to themselves on account of a breach of fiduciary duty. *See id.* § 1132(a)(2); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985) (holding that plan participants cannot pursue claims for individual relief for a fiduciary breach under 29 U.S.C. § 1132(a)(2)). Consequently, they do not provide for a fiduciary breach claim based on faulty communications, which harm individuals but not the plan itself.

ERISA does regulate plan communications to participants, but it does so in a section separate and apart from its fiduciary breach provisions. *See* 29 U.S.C. §§ 1021-1031. These rules governing plan disclosures were designed to ensure that participants are adequately informed about their benefits. *Curtiss-Wright Corp. v. Schoonejogan*, 514 U.S. 73, 83 (1995). For violations of these disclosure rules, Congress created an enforcement mechanism that is distinct from the enforcement mechanism for fiduciary breaches: Depending on the violation, the Secretary of Labor is empowered to seek civil penalties of either $100 or $1000 per day for noncompliance with these rules, and an aggrieved participant may seek penalties of $100 per day. 29 U.S.C. § 1132(a)(1)(A), (a)(6), (c).

Accordingly, based on the text of ERISA's fiduciary breach and disclosure provisions, it is evident that when Congress enacted ERISA, it did not have in mind

the possibility of a fiduciary breach claim based on a fraudulent communication to a plan participant. It follows inexorably that when Congress used the word "fraud" in the statute of repose for fiduciary breaches, it did not mean claims that a fiduciary made fraudulent statements to participants. Instead, consistent with common-law principles governing statutes of limitations, Congress intended to carve a narrow exception to ERISA's statute of repose for instances in which a fiduciary commits fraudulent acts subsequent to a breach of fiduciary duty that harms the plan (such as self-dealing) in an effort to keep its misconduct hidden. *See, e.g., Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 340-41 (5th Cir. 1971) ("It is a well settled principle of general common law as well as of federal law that fraudulent concealment of a cause of action by the defendant will toll the statute of limitations." (citations omitted)); *see also* App. 39 (noting that statutes of repose—unlike statutes of limitations—are immune from tolling doctrines unless Congress creates an exception).

To be sure, courts eventually recognized that plan participants could bring fiduciary breach claims on their own behalf based on fraudulent communications by a fiduciary by suing under ERISA § 502(a)(3), a catch-all provision that does not mention fiduciary breaches but instead permits participants to sue for "appropriate equitable relief" to enforce, or redress violations of, ERISA or an ERISA plan. *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 507-15 (1996); *see also* 29 U.S.C. § 1132(a)(3). Notwithstanding that legal development, however, there is no evidence in the text of ERISA or the legislative history that Congress specifically contemplated participants bringing fiduciary breach claims based on fraudulent communications. Indeed, the fact that such breach claims

must be brought under ERISA's catch-all provision instead of its fiduciary breach provisions strongly suggests that, while such claims may fall within the ambit of claims for fiduciary breach, Congress did not anticipate these claims when it enacted ERISA.

Accordingly, when Congress created an exception to the statute of repose for "fraud or concealment," it could not have had in mind fiduciary breach claims sounding in fraud. The Tenth Circuit's ruling thus expands § 413's "fraud or concealment" exception beyond its original intent and substantially undermines the statute of repose in a manner that could not have been intended by Congress.

II. THE TENTH CIRCUIT'S ERRONEOUS DECISION FORCES ERISA PLANS TO DEFEND AGAINST PERPETUAL BREACH OF FIDUCIARY DUTY CLAIMS AND THEREBY DRAMATICALLY INCREASES THEIR EXPOSURE TO LIABILITY.

The Tenth Circuit misconstrued ERISA § 413 in a manner that will have grave consequences for benefit plan sponsors and fiduciaries. Fiduciary breach claims based on misrepresentations comprise a large percentage of ERISA litigation today. *See* Keith R. McMurdy & Sarah K. Ivy, *Lead Us Not into Misrepresentation: The Road from Berlin to Unisys*, Bloomberg BNA (Jul. 9, 2010) (calling a misrepresentation claim "one of the most recognized" under ERISA). If the Tenth Circuit's decision is allowed to stand, there will effectively be no statute of repose for many of these claims.

Without the benefit of § 413's statute of repose, ERISA plans will be forced to defend against perpetual breach of

fiduciary duty claims seeking damages that have accrued for decades. Given that ERISA claims are sometimes brought as part of large class actions (or on behalf of large groups of individual plaintiffs), decades' worth of damages (plus prejudgment interest) could quickly enter the realm of hundreds of millions of dollars. *See* pages 12-13, *infra*. Moreover, plans will often have to defend against these stale claims without the benefit of documentary evidence or witness recollections, which in many cases will have long since faded.

This Court has explained that ERISA should not be interpreted in a manner that exposes benefit plans to litigation risk so extensive that it discourages plans from being created in the first place. *See Varity*, 516 U.S. at 497 (explaining that one of Congress's goals in crafting ERISA was "not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place"). Review by this Court is necessary to protect ERISA plans from facing precisely the type of vast liability that will discourage employers from offering benefit plans at all.

A. The Tenth Circuit's Ruling Significantly Expands ERISA Liability.

The Tenth Circuit's decision sharply increases the liability faced by ERISA plans by effectively making communications claims immune from any statute of repose. This ruling, coming in the wake of other recent developments in ERISA law that have similarly expanded plan liability, will have a devastating effect on plan sponsors and fiduciaries.

A major expansion of ERISA liability occurred several years ago when courts began permitting plan participants to sue on their own behalf for a fiduciary breach—as opposed to on behalf of the plan, as the statute provides. *See* Point I, *supra*; *see also* 29 U.S.C. § 1132(a)(2). In *Varity*, this Court sanctioned that expansion of ERISA liability. In that case, an employer allegedly used fraudulent statements to convince employees to switch to a benefits plan associated with a new company that the employer knew would likely become insolvent. 516 U.S. at 493-94. When the new company went bankrupt and the employees lost their benefits, they sued for breach of fiduciary duty on their own behalf pursuant to ERISA's catch-all provision, § 502(a)(3). *Id.* at 494; *see also* 29 U.S.C. § 1132(a)(3). The lower courts sided with the employees and ordered the employer to restore the employees to the original (solvent) benefits plan. 516 U.S. at 494-95. This Court affirmed, holding that the order to restore the employees to their original plan was "appropriate equitable relief" and therefore permissible in a case brought under § 502(a)(3). *Id.* at 492.

The holding of *Varity* that plan participants can bring fiduciary breach claims on their own behalf under § 502(a)(3) takes on particular significance in light of this Court's interpretation of "appropriate equitable relief" under § 502(a)(3). In *CIGNA Corp. v. Amara*, this Court permitted participants to sue under § 502(a)(3) to seek "make-whole" surcharge relief for statutory violations of ERISA disclosure rules. 131 S. Ct. 1866, 1880 (2011). The *Amara* Court also suggested that plan participants suing under § 502(a)(3) could seek to reform an ERISA plan so that the plan's terms are consistent with the representations made by a fiduciary. *Id.* at 1879-80.

Although not styled as money damages, the relief authorized in *Amara* is indistinguishable from money damages. Indeed, on remand in *Amara*, the district court acknowledged as much, holding that "surcharge, reformation, and estoppel are remedies generally available under § 502(a)(3), even if the practical result of entering such relief is a monetary payment." *Amara v. CIGNA Corp.*, 925 F. Supp. 2d 242, 250 (D. Conn. 2012). The district court further noted that an ERISA plan fiduciary could be surcharged in favor of plan participants "to compensate for damages caused by its breach of duty," and the court ultimately ordered that the defendant's plan be reformed, recognizing that damages would "flow directly and automatically from the reformation." *Id.* at 255-61, 264-65.[2] The Second Circuit affirmed the award. *Amara v. CIGNA Corp.*, 775 F.3d 510 (2d Cir. 2014).

In the wake of *Varity* and *Amara*, ERISA plan participants may bring fiduciary breach claims on their own behalf based on allegations that they received misrepresentations about their plans. That already gives ERISA's private cause of action an expansive reading and provides plan participants with a broad opportunity to bring claims for the equivalent of monetary relief against plan sponsors and fiduciaries. The Tenth Circuit's decision would expand the potential liability under ERISA for misrepresentation claims still further, allowing claims to be brought decades after the supposed misrepresentation was made.

2. Although the district court held that surcharge was "available under § 502(a)(3)," it determined that surcharge relief would be difficult to administer on a classwide basis and therefore ordered only reformation in favor of the plaintiff class.

To make matters worse for ERISA plans, some lower courts have shown a willingness to certify misrepresentation claims for classes consisting of every employee that ever received a supposedly faulty communication. As a general matter, these class certifications are improper because it is impossible to prove that every class member relied on a misrepresentation to his or her detriment using common evidence. Nevertheless, some courts have interpreted *Amara* as disposing of the need to show reliance at all for an ERISA misrepresentation claim (even though *Amara* said nothing about the substantive elements of ERISA claims). *See, e.g.*, *Osberg v. Foot Locker, Inc.*, No. 07-cv-1358, 2014 WL 5796686, at *4-5 (S.D.N.Y. Sept. 24, 2014) ("*Osberg II*"). Other courts have presumed classwide reliance using ill-fitting doctrines like the fraud-on-the-market theory. *See Harris v. Amgen Corp.*, 788 F.3d 916, 940-41 (9th Cir. 2015). Either way, the net result of these class certifications, if upheld, is that ERISA misrepresentation claims will get larger. And if lower courts follow the Tenth Circuit's decision, they will certify even larger classes of employees that go back decades. The certification of these gargantuan classes will inevitably force ERISA plan sponsors and administrators into large settlements for even unmeritorious claims. *See In re Visa Check/Mastercard Antitrust Litig.*, 280 F.3d 124, 148 (2d Cir. 2011) (noting that class certification orders that raise the "risk, however small, of potentially ruinous liability" are inevitably settled).

A case currently pending in the Southern District of New York, *Osberg v. Foot Locker, Inc.*, is a perfect example of this danger. In that case, the named plaintiff is a former Foot Locker employee who brought a breach of fiduciary duty claim based on allegedly misleading plan

communications made in 1996. *Osberg v. Foot Locker, Inc.*, 907 F. Supp. 2d 527, 529, 531 (S.D.N.Y. 2012) ("*Osberg I*"), *vacated in part*, 555 F. App'x 77 (2d Cir. 2014). Those communications supposedly suggested that employee retirement benefits would accrue continuously when in fact accruals could be frozen for a period of time. *Id.* at 529. The plaintiff purported to bring a fiduciary breach claim on behalf of every Foot Locker plan participant as of December 31, 1995. *Osberg II*, 2014 WL 5796686 at *2. The district court certified the fiduciary breach claim for that vast class of plaintiffs. *Id.* at *6.

Critically, the *Osberg* court followed the Second Circuit's rule (which mirrors the Tenth Circuit's decision here) by certifying a class consisting of approximately *16,000 employees* dating back *twenty years*, and it rejected the argument that the class should exclude employees who left Foot Locker—and thus ceased to have any conceivable reliance on plan communications—more than six years before the lawsuit was commenced. *Id.* at *5-6. Collectively, the potential damages owed to this class exceed $100 million. *Osberg* is emblematic of the extraordinary liability that ERISA plans could face on account of the rule handed down by the Tenth Circuit in this case.

The Tenth Circuit's decision guts the statute of repose for misrepresentation claims and compounds the liability facing ERISA plans in two critical ways. First, it dramatically increases the number of viable misrepresentation claims: Claims that otherwise should be time-barred are now timely because most plaintiffs bringing misrepresentation claims can invoke the "fraud or concealment" exception. Second, the amount of money

damages that can be sought for each misrepresentation claim is greater because now plaintiffs can seek decades' worth of damages (plus compounding prejudgment interest). The net effect for ERISA plans is that their total potential liability is radically higher under the rule announced by the Tenth Circuit.

The Tenth Circuit's decision not only runs contrary to the rule of repose instituted by Congress, but it also dramatically increases the liability potential for ERISA plans. This Court's review is necessary to address this massive expansion of ERISA liability, which ultimately will discourage employers from offering benefit plans and increase costs for the plans that do exist.

B. The Tenth Circuit Failed to Consider the Grave Impact that Its Ruling Will Have on ERISA Plans.

As this Court has repeatedly recognized, there is a "tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981). ERISA is "an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993). In other words, vindicating the long-term interests of plan participants also requires making the administration of benefit plans manageable and keeping litigation costs reasonable. *See Varity*, 516 U.S. at 497. Otherwise, employers will be hesitant to offer benefit plans at all. *Id.*

The Tenth Circuit refused to consider those consequences when it rendered its decision in this case. Instead, it interpreted the "fraud or concealment" exception solely in light of ERISA's policy of encouraging disclosures to plan participants. App. 39-40. In so doing, the Tenth Circuit failed to consider the severe effects that its ruling will have on ERISA plans. That was a serious error. *See Varity*, 516 U.S. at 497; *Mertens*, 508 U.S. at 262.

The Tenth Circuit's failure to balance competing policy concerns is particularly egregious given that the statutory provision at issue—§ 413—is a *statute of repose*. App. 33. As this Court has explained, "statutes of repose reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014). When Congress enacted § 413, it determined that a claim for a breach of fiduciary duty generally should be extinguished after six years regardless of whether the plaintiff has actual or constructive knowledge that the breach occurred. *See, e.g.*, *Barker v. Am. Mobil Power Corp.*, 64 F.3d 1397, 1400-03 (9th Cir. 1995) (dismissing as time-barred a fiduciary breach claim based on mismanagement of fund assets despite the fact that the plaintiffs had no way of discovering the mismanagement until they sought and were denied benefits over a decade later). It makes no sense that the Tenth Circuit construed § 413 against the backdrop of policy considerations favoring plan participants given that the provision exists for the benefit of ERISA sponsors and fiduciaries.

To be sure, Congress created an exception to the six-year rule of repose in cases of "fraud or concealment." But

statutory exceptions are meant to be construed narrowly, *Comm'r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989), and therefore the existence of an exception does not justify the Tenth Circuit's disregard of the policies underlying the statute of repose.

Indeed, the policies animating the rule of repose are particularly relevant in the context of misrepresentation claims against a fiduciary. As this Court has explained, statutes of limitation and repose exist to protect defendants from having to defend claims for which "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Yet that is precisely the situation with respect to stale misrepresentation claims: ERISA defendants often cannot defend against these claims because the documentary or cognitive evidence that supports their defense no longer exists.

Take the present case, for example. One of the plaintiffs here alleges that *30 years ago* a manager made a false oral statement to him about his retirement plan. Another plaintiff brings a fiduciary breach claim based on an oral misrepresentation allegedly made in 1988. It is exceedingly unlikely that any ERISA plan sponsor or fiduciary could marshal evidence to demonstrate the falsity of such allegations. Managers alleged to have made misrepresentations decades earlier—provided that they are still alive—likely do not remember anything about an ancient interaction with an employee, and any documentary evidence would likely have been destroyed long ago pursuant to document retention policies. *Cf.* 29 U.S.C. § 1027 (requiring ERISA plans to maintain

certain documents relevant to employee benefits for only six years). It is utterly implausible that Congress would have intended to make ERISA plans defend against decades-old misrepresentation claims absent extenuating circumstances like a fiduciary subsequently engaging in fraud to cover up the misrepresentation.

Vindicating the claims of plan participants was not Congress's sole concern when it enacted § 413. *See In re Bernard L. Madoff Inv. Secs. LLC*, 773 F.3d 411, 423 (2d Cir. 2014) (explaining that statutes of limitations "reflect that, at a certain point, the need for finality is paramount even in light of countervailing equity considerations"). In fact, all of the parties would agree that the six-year statute of repose would apply to a claim that a plan fiduciary engaged in self-dealing by investing plan funds in a company owned by the fiduciary. *See, e.g.*, *Bona v. Barasch*, No. 01-cv-2289, 2003 WL 1395932, at *19 (S.D.N.Y. Mar. 20, 2003) (holding that prohibited transaction claims were time-barred insofar as they pertained to contracts entered into more than six years before suit was commenced). But that type of breach is just as difficult for a plan participant to detect as a misrepresentation by a plan fiduciary. There is no logical reason why Congress would intend for one difficult-to-detect breach claim (based on self-dealing) to be subject to a six-year statute of repose while another difficult-to-detect breach claim (based on a misrepresentation) would be perpetually timely. The more reasonable explanation is that Congress intended for every fiduciary breach claim to be equally subject to the six-year statute of repose unless the fiduciary took steps subsequent to the original breach to hide the fact that the breach had occurred. The Tenth Circuit's decision—which privileges some fiduciary breach

claims but not others—flunks the common-sense test and must be reversed.

* * * * *

When Congress drafted § 413, it did not intend to empower plan participants to bring fiduciary breach claims based on misrepresentations allegedly made decades before the filing of suit. By allowing such a claim in this case, the Tenth Circuit's decision runs directly counter to the policies underlying § 413's statute of repose; dramatically increases the exposure of ERISA plans; makes it virtually impossible for plans to defend themselves; and ultimately discourages employers from offering benefit plans to their employees for fear of opening themselves up to being sued for vast amounts of damages.

The Tenth Circuit has joined the Second Circuit in allowing perpetual ERISA fiduciary breach claims based on misrepresentations. In so ruling, the Tenth Circuit has split from six of its sister Circuits, all of whom recognize that every ERISA fiduciary breach claim should be subject to the same six-year statute of repose unless a defendant takes affirmative steps to hide the breach. Amici respectfully suggest that this Court should review the Tenth Circuit's decision to ensure that ERISA plans are protected from stale fiduciary breach claims and to endorse the construction of ERISA § 413's "fraud or concealment" exception reached by the majority of the nation's Circuit Courts.

III. THE TENTH CIRCUIT'S DECISION CREATES UNCERTAINTY IN THE LAW AND THEREBY UNDERCUTS A KEY PURPOSE OF ERISA.

The Tenth Circuit's decision requires this Court's review for the additional reason that it fosters precisely the type of uncertainty and inconsistency in the law governing employee benefits that ERISA was designed to eliminate. It is beyond dispute that one of Congress's primary goals in enacting ERISA was to cultivate national uniformity and predictability in the field of employee benefits law. Prior to ERISA, benefit plans were subject to a patchwork of disparate State laws that derived from the common law of trusts and contracts. That made employee benefit plans exceedingly difficult to administer, especially for national corporations whose plans had become "increasingly interstate." S. Rep. No. 93-127, at 29 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4865.

Congress accordingly enacted ERISA to create a uniform set of federal rules governing employee benefit plans to "help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws." *Id.*; *see also* H.R. Rep. 93-533, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 4639, 4655 ("Because of the interstate character of employee benefit plans, the Committee believes it essential to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluation of fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports.").

Congress believed that legal uniformity would "induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct."

Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 379 (2002); *see also Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 122 (2008) (Roberts, C.J., dissenting) (noting that "certainty and predictability are important criteria under ERISA"). Conversely, "[a] patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Fort Halifax Packaging Co. v. Coyne*, 482 U.S. 1, 11 (1987).

The Circuit split exacerbated by the Tenth Circuit's decision undercuts the Congressional goals of uniformity and predictability under ERISA in a manner that underscores the need for this Court's review. On account of the Circuit split, the legal rights and obligations of the administrators and fiduciaries of benefit plans that cross state lines will depend on the jurisdiction in which they find themselves sued. For example, an employer alleged to have breached a fiduciary duty by making a single oral misrepresentation in 1980 could be liable if sued in New York or Denver under Second or Tenth Circuit precedent, *see* App. 38-39 (holding that misrepresentation claim is entitled to "fraud or concealment" exception); *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 189 (2d Cir. 2001) (same), but not if sued in Chicago under Seventh Circuit precedent, *see Radiology Ctr., S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220 (7th Cir. 1990) (limiting "fraud or concealment" exception to cases where fraud occurred subsequent to the breach of duty). This lack of consistency is anathema to Congress's desire for uniformity in employee benefits law. *See Conkright v. Frommert*, 559 U.S. 506, 520 (2010) ("Uniformity is impossible, however, if plans are subject to different legal obligations in different States.");

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) (explaining that a goal of ERISA is "to minimize the administrative and financial burden of complying with conflicting directives among states . . . Such an outcome is fundamentally at odds with the goal of uniformity that Congress sought to employ").

This Court has frequently recognized that Circuit splits that undermine the uniformity and predictability of ERISA warrant review. For instance, just last year, the Court resolved a split among the Circuits concerning the pleading standards applicable to ERISA fiduciary breach claims arising from plan losses in employer stock funds. *See Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2465 (2014) (granting certiorari "[i]n light of differences among the Courts of Appeals"); *see also U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1544 (2013) (resolving Circuit split on ERISA question); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 291 (2009) (same). Indeed, twice in recent years the Court has granted review to resolve Circuit splits that—like the one here—concern the application of ERISA's statute of limitations. *See Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015); *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604 (2013). The statute-of-limitations issue implicated here is just as critical to ERISA plan administrators as the issues in *Tibble* and *Heimeshoff* because the Tenth Circuit's construction of the "fraud or concealment" exception will dramatically increase the potential liabilities faced by ERISA plans. Amici therefore urge the Court to review the Tenth Circuit's decision and resolve the inconsistency among the Circuits concerning ERISA's statute of repose.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to review the Tenth Circuit's decision should be granted.

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