No. 15-244

IN THE
Supreme Court of the United States

EMBARQ CORPORATION, ET AL.,
Petitioners,

v.

WILLIAM DOUGLAS FULGHUM, ET AL., INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant interlocutory review of the Tenth Circuit's holding that respondents' claims for breach of fiduciary duty, to the extent they are based on fraudulent misrepresentations about the benefits petitioners would provide respondents during retirement, involve a "case of fraud or concealment" under 29 U.S.C. § 1113.

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In 2005 and 2007, petitioners (the "Companies") announced drastic reductions in the health and life-insurance benefits they had long promised their retired employees. For decades, the Companies had represented that employees' benefits were irrevocable upon retirement, and the Companies' course of conduct had reinforced employees' understanding that their benefits would last throughout retirement. Respondents are former employees (and their beneficiaries) who retired while those promises were in force. They filed suit claiming that the Companies breached their contractual promises and, in the alternative, that the Companies' history of fraudulent misrepresentations about respondents' benefits breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA").

The district court held that respondents' fiduciary-duty claims were untimely and granted summary judgment to the Companies. The Tenth Circuit reversed "to the extent those claims are premised on a fraud theory." App. 5. ERISA contains a six-year discovery rule for "case[s] of fraud or concealment," 29 U.S.C. § 1113, and the Tenth Circuit held that the term "fraud" encompassed respondents' claims based on the Companies' misrepresentations. It thus remanded to the district court, while inviting the Companies to make additional statute-of-limitations arguments "[o]n remand" that were "not inconsistent with [its] opinion." App. 42. The Companies chose instead to seek this Court's interlocutory review.

Beyond the fact that the decision below was correctly decided, the petition should be denied for two reasons. First, the Companies' asserted circuit split is superficial. Although the circuits have interpreted § 1113's fraud-or-concealment provision in different

ways, the distinctions among those interpretations rarely matter in practice. In virtually every case cited to demonstrate the purported conflict, the court's interpretation of § 1113 had no meaningful effect on whether the claims were timely. The largely academic debate over § 1113 reflected in those decisions does not merit this Court's intervention.

Second, this case's interlocutory posture renders it a poor vehicle for review. This Court disfavors certiorari in the absence of a final judgment, and the Companies' petition demonstrates the wisdom of that practice. Granting certiorari at this juncture would not only risk delaying needlessly several ongoing district-court proceedings, but would expend this Court's resources addressing a question that may have no effect on the final outcome. If a final judgment does later present the same question, the Companies are free to seek certiorari at that point.

All that said, the Companies are correct about one thing: employee benefit plans that provide health and life insurance "are central to the national economy, and the financial security of the Nation's work force." Pet. 2 (internal quotations, brackets, and ellipses omitted). The national importance of ERISA plans, however, supports granting only respondents' related petition.[1] Whereas respondents' petition identifies a meaningful division among the circuits and arises from a final judgment, the Companies' petition identifies only a cosmetic conflict and presents all the concerns that usually lead the Court to deny interlocutory review. Accordingly, notwithstanding the general importance of this area of law, the Companies' petition should be denied.

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[1] *See* Pet. for a Writ of Cert. at 32-35, *Fulghum v. Embarq Corp.*, No. 15-241 (U.S. filed Aug. 24, 2015) ("Retirees' Pet.").

STATEMENT

1. ERISA is a "comprehensive and reticulated statute" that was "enacted to promote the interests of employees and their beneficiaries in employee benefit plans." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108, 113 (1989) (internal quotations omitted). ERISA's fiduciary requirements form a critical part of the protections Congress enacted. By imposing strict duties of loyalty and care on plan fiduciaries, *see* 29 U.S.C. § 1104, Congress sought to further the statute's "general objective" of protecting "the interests of participants and beneficiaries," *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996) (internal quotations and ellipses omitted).

One of ERISA's most important fiduciary requirements is its mandate that plan fiduciaries act "with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1). That requirement prevents fiduciaries from "deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense." *Varity*, 516 U.S. at 506. Thus, when a fiduciary makes fraudulent statements or omissions that mislead plan participants about the nature of their benefits, it gives rise to a claim under ERISA for breach of fiduciary duty. *See id.* at 506-08; 29 U.S.C. § 1132(a)(3).

ERISA contains a multifaceted statute of limitations for fiduciary-duty claims. Participants generally must bring such claims within six years of when the breach is completed *and* within three years of when they obtain "actual knowledge" of the breach. 29 U.S.C. § 1113(1)-(2). Those restrictions do not apply, however, "in the case of fraud or concealment." *Id.* § 1113. Where there is "fraud or concealment," a fiduciary-duty "action may be commenced not later

than six years after the date of discovery" of the alleged "breach or violation." *Id.*

2. Respondents are 15 retired employees and beneficiaries of the petitioner telephone companies, and they assert fiduciary-duty claims based on the Companies' fraudulent misstatements and omissions concerning their retirement benefits. For years, the Companies sponsored ERISA welfare plans that provided valuable post-retirement health and life-insurance benefits. App. 7. But between 2005 and 2007, the Companies drastically reduced or eliminated many of those benefits. *Id.* Respondents and their spouses depended on those benefits, which the Companies had led them to believe were permanent.

a. During the decades preceding their decision to slash health and life-insurance benefits, the Companies repeatedly described those benefits in a way that induced employees to understand they would last throughout retirement. For example, the Companies described those benefits in various communications as lasting "for lifetime," C.A. App. 4788; "for life," *id.* at 7442; "until your death," *id.* at 7450; or as "written down in blood," *id.* at 4394, 8840-41. Moreover, one benefits administrator counseled employees "they were going to have life insurance provided throughout their retirement." *Id.* at 7642. She viewed irrevocable benefits as "a promise . . . made to people who were retiring," and she knew that entitlement to such benefits was a "well understood part of being an employee." *Id.* at 7642-43. Another benefits supervisor likewise oversaw the creation of retirement "checklist[s]" stating that benefits would remain fixed "for the remainder of the retiree's lifetime." App. 143; *see*, *e.g.*, C.A. App. 7475-77, 7595-609.

The Companies' longstanding course of conduct reinforced those representations. For decades, the Companies treated existing retirees' benefits as "grand-fathered" and thereby insulated from future plan amendments. *Id.* at 7638; *see*, *e.g.*, *id.* at 1842-44, 1881-84, 7629-32. Prior to the actions that precipitated this lawsuit, therefore, the Companies had applied plan amendments only to benefits for future (not existing) retirees, which resulted in 170 "legacy plans" providing grandfathered benefits for retirees across various locations and time periods. *Id.* at 8050. That practice also contributed to respondents' understanding that their benefits, though subject to prospective amendment for future retirees, had become irrevocable upon their retirements. *See*, *e.g.*, *id.* at 5014-17, 5202.

b. The Companies knew that their longstanding conduct and representations led retirees to understand that their health and life-insurance benefits were irrevocable. The Companies were aware that most employees viewed their coverage "as a 'vested' benefit," C.A. App. 8013, and internal analyses reflected the Companies' contemporaneous understanding that they could not likely "take away benefits from current retirees," *id.* at 8042-43. Senior executives likewise indicated on several occasions that employees believed they had been promised irrevocable benefits, and benefit representatives speaking on behalf of the Companies assured employees they would receive lifetime benefits. *See id.* at 8013, 8027, 8053-60, 8070. At no point prior to termination, however, did the Companies advise respondents that they were at risk of losing their post-retirement benefits. *See* App. 142 (noting benefits supervisor who "counseled thousands of retirees"

but failed to "tell them that the company was reserving its right to terminate" benefits); C.A. App. 7463-64, 7939. One Assistant Vice President for Human Resources thus warned that any reduction in health benefits for existing retirees would "significantly change the deal that was communicated to them." *Id.* at 8027.

Respondents relied on the Companies' misstatements and omissions in determining when and whether to retire. *See*, *e.g.*, App. 142 (benefits supervisor "expected employees to rely upon" misleading checklists). For example, respondent Bullock inquired about her benefits on several occasions and was informed that her grandfathered benefits were "written down in blood." C.A. App. 4394, 8840-41. She retired in late 2001 so that she could enroll before forthcoming changes took effect for later retirees. *Id.* at 4358, 4374, 8848. Other employees were similarly misled and "forced to waive vacation time to keep th[e] lifetime coverage" the Companies had promised. App. 144; *see* C.A. App. 7675-76, 9104. When they retired, respondents did not understand the Companies could make the drastic benefit reductions they suddenly announced in 2005 and 2007. *See*, *e.g.*, *id.* at 5886-91, 8890-91, 9136-37.

3. In December 2007, respondents (and two other plaintiffs) filed suit asserting two causes of action under ERISA. The first set of claims alleged a breach of the Companies' contractual promise to provide lifetime benefits, and those claims are now the subject of respondents' related petition. *See* Retirees' Pet. 9-10. The second set of claims, brought in the alternative, alleged a breach of fiduciary duty, and those claims are the subject of the Companies' petition. Pet. 5-6.

After discovery, the district court granted the Companies' motion for summary judgment in substantial part. After rejecting most of the contractual-vesting claims, the court held respondents' fiduciary-duty claims untimely under 29 U.S.C. § 1113. App. 145-56. Noting its view that respondents' claims would be timely only if they fell within § 1113's exception for "case[s] [of] fraud or concealment," the court refused to apply that provision because it found "no evidence that Defendants actively concealed their alleged breach of fiduciary duty." App. 150. Alternatively, the court concluded that respondents' claims would remain untimely under a broader view of that provision because respondents had not pleaded "fraud with particularity." App. 150 n.124.

By contrast, the court denied summary judgment as to two plaintiffs (who are not respondents here) whose claims were timely under § 1113(1), without any need to invoke § 1113's fraud-or-concealment provision. App. 146 n.117, 156. The court then entered final judgment as to respondents pursuant to Federal Rule of Civil Procedure 54(b). App. 63-68.

4. The Tenth Circuit affirmed in part and reversed in part. After largely affirming the dismissal of the contractual-vesting claims, *see* Retirees' Pet. 10-11 & n.4, the Tenth Circuit reversed the dismissal of respondents' fiduciary-duty claims. It acknowledged that several circuits had stated that § 1113's fraud-or-concealment provision "applies only when a fiduciary conceals the alleged breach," but it noted that most had "adopted [that] standard without any in-depth analysis or discussion." App. 35-36. The court thus turned to § 1113's text, observing that the fraud-or-concealment provision – which "is set out in the disjunctive" – suggests that the words

"fraud" and "concealment" must have "separate meanings." App. 38. And the plain meaning of the word "fraud," the court explained, encompasses fiduciary-duty claims involving a "false representation . . . intended to deceive another so that he shall act upon it to his legal injury." App. 37 (internal quotations omitted).

The Tenth Circuit therefore reversed "to the extent [respondents'] claims are premised on a fraud theory." App. 5. Given the court's construction of the term "fraud," it declined to address the "further question of whether" the Companies' alternative interpretation of § 1113 would "encompass[] both self-concealing ERISA violations or only overt acts taken subsequent to the alleged breach." App. 39 n.22. Similarly, the court found it "unnecessary to address" respondents' alternative argument that their claims were timely outside of § 1113's fraud-or-concealment provision. App. 34 n.20. With respect to the district court's conclusion that respondents had "failed to plead fraud with . . . particularity," the Tenth Circuit reversed because the Companies had never moved to dismiss the complaint on that basis. App. 40-41.

Finally, the Tenth Circuit stated that, "[o]n remand," the Companies could "choose" to "present argument regarding the timeliness of [respondents'] breach of fiduciary duty claims not inconsistent with this opinion." App. 42.[2]

5. Proceedings on various retirees' fiduciary-duty claims are now continuing before the district court. The two retirees whose fiduciary-duty claims the

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[2] On April 27, 2015, the panel granted in part the parties' cross-motions for rehearing and issued an amended opinion. App. 176-77; *see* Retirees' Pet. 11 n.5. The changes do not materially affect the arguments before this Court.

district court originally held were timely (and who are not respondents here) are actively litigating their claims; merits summary-judgment briefing on those claims is scheduled to conclude on October 30, 2015. *See* Order at 1, *Fulghum v. Embarq Corp.*, No. 07-cv-2602 (D. Kan. Aug. 27, 2015) ("Status Order"). If those claims survive summary judgment, counsel expects to be ready for trial in short order.

Proceedings also continue in a related case, which involves substantially similar fiduciary-duty claims (but not contractual-vesting claims) asserted against the Companies by roughly 915 additional retirees. *See* Second Am. Compl., *Abbott v. Sprint Nextel Corp.*, No. 11-cv-2572 (D. Kan. filed Sept. 30, 2015). Discovery is actively progressing as to 73 of those retirees, while the remaining retirees' claims are stayed pending further developments on the active claims and this Court's disposition of the Companies' petition. *See* Defs.' Unopposed Mot. for 30-Day Extension of Deadline at 2, *Abbott v. Sprint Nextel Corp.*, No. 11-cv-2572 (D. Kan. filed Sept. 16, 2015); Status Order at 2. The district court has stated that it will "discuss the possibility" of imposing a broader stay in the event this Court "grants *certiorari* on either Plaintiffs' or Defendants' petition." Status Order at 2.

REASONS FOR DENYING THE PETITION

I. THE ASSERTED CIRCUIT SPLIT DOES NOT WARRANT THIS COURT'S REVIEW

Section 1113 contains a six-year discovery rule for "case[s] of fraud or concealment." The Companies seek certiorari (at 4) to resolve a purported division among the circuits over whether the phrase "fraud or concealment" requires a cover-up "*after* the underlying breach of fiduciary duty." Although the circuits have interpreted § 1113 in different ways, the conflict posited by the Companies is superficial. The distinctions among the circuits' interpretations are rarely outcome-determinative, and the contours of the various approaches remain underdeveloped. The asserted conflict does not merit review at this time.

A. The Conflict Among The Circuits' Views of § 1113's Fraud-Or-Concealment Provision Is Superficial

1. The nominal conflict over the scope of § 1113's fraud-or-concealment provision is not meaningful in practice. The Companies frame that disagreement as a temporal one: the "majority view," which the Companies defend, supposedly requires "affirmative acts of fraud or concealment *after* the alleged breach." Pet. 13 (emphasis added). By contrast, the so-called "minority view," which originates in the Second Circuit, Pet. 10 n.3, applies the fraud-or-concealment provision "whenever a breach claim is based on fraud," Pet. 13. That distinction purportedly matters when an ERISA plaintiff can prove (or plead) an underlying fraud, but cannot show any subsequent acts by the fiduciary to conceal its fraud.

In the very case that created the supposed conflict, however, the Second Circuit explained that those two approaches "present[ed] a distinction without a

difference." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 190 n.3 (2d Cir. 2001). As the Second Circuit noted, the so-called "majority" view acknowledges that fiduciary-duty claims premised on "affirmative misrepresentations of a material fact" can fall "within the 'fraud or concealment' provision" even in the absence of subsequent acts to hide the breach. *Id.* That is because courts overwhelmingly recognize such affirmative misrepresentations, even when they are part of the underlying breach, to be "self-concealing acts" that require no additional cover-up. *Id.*

Cases in the circuits adhering to the "majority view," Pet. 13, confirm that conclusion. No matter what formulation applies, a breach of fiduciary duty that involves fraudulent misrepresentations – with or without subsequent acts of concealment – typically qualifies as "fraud" under § 1113. *See In re Unisys Corp. Retiree Med. Benefit "ERISA" Litig.*, 242 F.3d 497, 503 (3d Cir. 2001) ("affirmative steps" to hide breach can satisfy § 1113 "regardless of whether [they] occur in the course of the conduct that constitutes the underlying breach or independent of and subsequent to the breach"); *J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1253 n.9 (1st Cir. 1996) ("we are inclined to think" § 1113's discovery rule encompasses "both so-called self-concealing wrongs as well as active concealment that is separate from the underlying wrongdoing") (internal quotations omitted); *Larson v. Northrop Corp.*, 21 F.3d 1164, 1173 (D.C. Cir. 1994) (exception may apply based on the "underlying breach" without any concealment "independent of and subsequent to the breach"); *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1095 (7th Cir. 1992) (exception "include[s] genuine acts of concealment committed in the course of the underlying

wrong," including "self-concealing acts").[3] When the underlying fraud involves affirmative misstatements, therefore, the asserted circuit conflict evaporates.

2. Given the significant "overlap[]" between the two prevailing interpretations of § 1113, *Caputo*, 267 F.3d at 190, the debate over the Question Presented is mostly academic. Indeed, numerous courts have confronted the Companies' asserted circuit split and found it unnecessary to choose sides.[4] And even the courts that have weighed in on the question have done so to little effect. In each case the Companies cite (at 4) as conflicting with the decision below, the statutory-interpretation question the Companies ask

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[3] *See also Schaefer v. Arkansas Med. Soc'y*, 853 F.2d 1487, 1491 (8th Cir. 1988) (suggesting that plaintiffs' claims would have been timely had they shown "justifiable reliance" as part of underlying "fraud") (internal quotations omitted). True, *Schaefer* held that the plaintiffs could not satisfy § 1113's "concealment" prong, which it held "incorporates the fraudulent concealment doctrine." *Id.* (internal quotations omitted). That holding, however, was limited to the plaintiffs' secondary theory that the 6-year period applies "to breaches of fiduciary duty coupled with 'concealment' even if no fraud exists." *Id.* (internal quotations omitted). The court did not, as the Companies suggest (at 4), incorporate the fraudulent-concealment doctrine into § 1113's "fraud" prong, which it addressed separately.

[4] *See*, *e.g.*, *Hi-Lex Controls, Inc. v. Blue Cross Blue Shield of Michigan*, 751 F.3d 740, 748 (6th Cir.) ("it remains unnecessary for us to take sides"), *cert. denied*, 135 S. Ct. 404 (2014); *Cataldo v. United States Steel Corp.*, 676 F.3d 542, 550-51 (6th Cir. 2012) ("[w]e need not take[] sides"); *Enneking v. Schmidt Builders Supply Inc.*, 875 F. Supp. 2d 1274, 1283 (D. Kan. 2012) ("[t]he court need not predict which approach the Tenth Circuit would take"); *Midgley v. Rayrock Mines, Inc.*, 374 F. Supp. 2d 1039, 1051 (D.N.M. 2005) ("[t]he Court need not decide" the scope of § 1113).

this Court to resolve had no material effect on the ultimate timeliness of the ERISA claims at issue.[5]

Those cases expose the broader flaw in the Companies' argument. Whatever may be true in theory, the realities of ERISA litigation typically obviate any need to choose between the two proffered interpretations of § 1113's fraud-or-concealment provision. Many ERISA fiduciary-duty claims satisfy both interpretations of that provision. After all, fiduciary-duty cases that sound in fraud – which are the only cases in which the Question Presented supposedly matters – usually involve some sort of affirmative misrepresentation and are thus sufficiently self-concealing to satisfy the majority standard.[6] In that

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[5] *See Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1552 & n.5 (3d Cir. 1996) (defendant's "public[] announc[ement]" of challenged decision "lay bare [the claim] for the world to see" and negated any "fraud or concealment of any kind"); *J. Geils Band*, 76 F.3d at 1256-58 (holding that plaintiffs were "on discovery notice of the alleged misrepresentations" more than six years before filing suit); *Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1401 (9th Cir. 1995) (per curiam) (holding that alleged facts "do not establish fraud"); *Larson*, 21 F.3d at 1173 ("Larson failed to plead fraud or concealment" in his complaint and "raised the issue for the first time" on summary judgment); *Radiology Ctr., S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1223 (7th Cir. 1990) (remanding for consideration of whether claims satisfied § 1113(2)'s three-year period); *Radiology Ctr., S.C. v. Stifel, Nicolaus & Co.*, No. 86 C 10166, 1991 WL 237809, at *2 (N.D. Ill. Nov. 4, 1991) (rejecting defendant's statute-of-limitations argument on remand); *Schaefer*, 853 F.2d at 1491 (affirming that "'no fraud exists'").

[6] *See, e.g.*, *Venture Global Eng'g, LLC v. Satyam Computer Servs., Ltd.*, 730 F.3d 580, 587 (6th Cir. 2013) (§ 1113's "wrongful concealment prong [was] satisfied" because the alleged "fraud was self-concealing"); *Caputo*, 267 F.3d at 190 n.3 (theory based on affirmative misstatements satisfied "our sister circuits' limitation of the provision"); *Hi-Lex Controls Inc. v. Blue Cross*

scenario, the dispute over how to interpret § 1113 "is of no moment." *Hi-Lex*, 2013 WL 2285453, at *27.

Conversely, untimely fiduciary-duty claims that fall outside § 1113's fraud-or-concealment exception generally fail because they lack sufficient allegations (or evidence) of fraud. Under the broader formulation adopted by the Second Circuit and followed by the decision below, plaintiffs invoking § 1113's discovery rule "must plead fraud with the requisite particularity." *Caputo*, 267 F.3d at 191. In the majority of cases that lack "fraud or concealment" under § 1113, a plaintiff's failure to show any such "fraud" – rather than the statutory-interpretation issue the Companies raise – proves decisive.[7] The decision below has no effect on such cases.

3. This case well illustrates the illusory nature of the Companies' asserted conflict. The district court, like most courts to confront the Question Presented, thought that the debate over § 1113's scope made no difference because respondents assertedly failed to plead fraud "with particularity." App. 150 n.124. The Tenth Circuit agreed with the district court's assessment of respondents' original complaint, but it held that dismissal on that basis was inappropriate

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& Blue Shield of Michigan, No. 11-12557, 2013 WL 2285453, at *27-29 (E.D. Mich. May 23, 2013) (dispute over § 1113 "of no moment" because underlying course of conduct was itself both fraudulent and "allay[ed] Plaintiffs' suspicion and prevent[ed] inquiry"), *aff'd*, 751 F.3d 740 (6th Cir.), *cert. denied*, 135 S. Ct. 404 (2014).

[7] *See*, *e.g.*, *Cataldo*, 676 F.3d at 551 ("Plaintiffs have not adequately alleged any underlying fraud."); *Barker*, 64 F.3d at 1401 ("While these facts may allege a mismanagement of Plan funds and therefore a breach of fiduciary duty, they do not establish fraud."); *Larson*, 21 F.3d at 1173 (plaintiff failed to plead "fraudulent concealment" with "particularity"); *Schaefer*, 853 F.2d at 1491 (lack of "justifiable reliance" negated "fraud").

at the summary-judgment stage, when the record was already "fully developed on the fraud claim." App. 41-42. Had the Companies made that argument at the appropriate time, the Tenth Circuit may have found it unnecessary to reach the § 1113 issue. *See*, *e.g.*, *Cataldo*, 676 F.3d at 550-51 (declining to "take[] sides on the split" because "plaintiffs have failed to sufficiently plead fraud"). This Court should not grant certiorari to rescue the Companies from the consequences of their own litigation choices.

In any event, the "fully developed" record now amply supports respondents' fraud claim, App. 41-42, and it confirms the superficiality of the Companies' asserted circuit split. Indeed, the record is replete with misrepresentations that satisfy both views of the fraud-or-concealment provision. *E.g.*, App. 142-43 (noting checklist misrepresenting to employees that insurance would continue "for the remainder of the retiree's lifetime"). Respondent Bullock, for instance, inquired on several occasions about her post-retirement life-insurance benefits, and the Companies reassured her that her "life insurance is written down in blood." C.A. App. 4394, 8840-41. The Companies' repeated misrepresentations – both before and after the "written down in blood" comment – induced her to retire early in an effort to obtain what she was told were grandfathered benefits. *Id.* at 4358, 4374, 8848. That is the sort of self-concealing fraud, which Ms. Bullock had no hope of discovering herself, that satisfies both interpretations of § 1113.[8]

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[8] In *Unisys*, the Third Circuit stated that the fraud-or-concealment provision does not apply "if all that a plaintiff can show is that a counselor represented to him that he had guaranteed lifetime health care benefits." 242 F.3d at 503. The court neither explained that statement nor applied that state-

B. The Court Should Allow For Further Percolation

Even were the purported circuit split sufficiently real to justify this Court's attention, certiorari would remain unwarranted at this time. As the Tenth Circuit observed, most of the cases adopting a narrow view of § 1113's fraud-or-concealment provision have done so "without any in-depth analysis or discussion." App. 35-36. The one exception – and the only case with any extended reasoning arguably supporting the Companies' position – arose in the Seventh Circuit a quarter-century ago. *Id.* (citing *Radiology Ctr.*, 919 F.2d at 1220-21). Since issuing that opinion, the Seventh Circuit revisited its holding in any significant depth only once, in 1992. *See Martin*, 966 F.2d at 1093-96.

Apart from that pair of decades-old opinions, none of the cases assertedly conflicting with the decision below contains any meaningful statutory analysis. The issue's lack of practical importance may well explain that shortcoming. *See supra* pp. 10-14. Or, as the Second Circuit theorized, perhaps those courts merely followed the "uniformly adopted theory" without realizing that its "genesis" lay in a "footnote in a district court opinion that cites no legal support for

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ment to hold the claims before it time-barred. *See id.* at 505 ("It would be inappropriate for us to decide at this stage whether 'fraud or concealment' within the meaning of Section 1113(2) has occurred in this case."). Such an isolated, non-dispositive statement does not create a genuine conflict that merits review. As the concurrence noted, a company's effort to "misle[a]d its workers into believing that they had a legally protected right to medical benefits for life" falls within the heartland of the "self-concealing wrong doctrine" recognized by the majority view of § 1113. *Id.* at 514-15 (Mansmann, J., concurring in part, and concurring in the result in part).

the proposition." *Caputo*, 267 F.3d at 189. Either way, the dearth of recent, thorough lower-court opinions disagreeing with the Tenth Circuit's reasoning counsels against certiorari. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.4(b), at 247 (10th ed. 2013) (surveying practice of denying review of underdeveloped conflicts); *cf. McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari) (issue deserved "further study" in the lower courts "before it is addressed by this Court").

The Court's decision to deny certiorari in a similar case just two Terms ago confirms that review is unwarranted at this time. In *Laskin v. Siegel*, 728 F.3d 731 (7th Cir. 2013), which the Companies' discussion of recent petitions omits (at 12 n.4), the Seventh Circuit cited the same precedent invoked by the Companies (at 4) for the proposition that § 1113 "requires evidence that a defendant took affirmative steps to hide the violation." 728 F.3d at 735 (citing *Radiology Ctr.*, 919 F.2d at 1220). The court then applied that standard to hold the plaintiff's claims untimely. *See id.* The plaintiff sought certiorari and raised the very same conflict the Companies assert here, *see* Pet. for a Writ of Cert. at 18-19, *Laskin v. Siegel*, No. 13-942 (U.S. filed Feb. 4, 2014), 2014 WL 491631 (asserting "a split in the circuits as to the meaning of the phrase 'fraud or concealment,'" and citing *Caputo*), but this Court denied review, *see Laskin v. Siegel*, 134 S. Ct. 1879 (2014). The asserted conflict over § 1113 is no more deserving of certiorari now than it was then.[9]

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[9] In fact, *Laskin* offered a better vehicle than this case, because it came to this Court as a final judgment disposing of all the retirees' claims. *See* 728 F.3d at 734 (affirming district

II. THIS CASE PRESENTS A POOR VEHICLE FOR REVIEW

A. The Interlocutory Posture Of Respondents' Fiduciary-Duty Claims Provides Sufficient Reason To Deny Review

The absence of a final judgment on respondents' fiduciary-duty claims provides an additional reason to deny the Companies' petition. Historically, the exercise of this Court's appellate and certiorari jurisdiction has been "limited to final judgments." *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 378 (1893). The Court's longstanding practice thus has been to deny certiorari where "any thing . . . remains to be done" "in the inferior court." *Life & Fire Ins. Co. of New York v. Adams*, 34 U.S. (9 Pet.) 573, 602 (1835).

Granting the Companies' petition would represent a sharp break from that practice. Here, the Tenth Circuit reversed the district court's summary-judgment ruling "to the extent Plaintiffs' breach of fiduciary duty claims are premised on a fraud theory," and it "remand[ed]" for further proceedings in the district court. App. 42. The Tenth Circuit's decision to "remand[] the case" renders it "not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). All else aside, that fact "alone furnishe[s] sufficient ground" to deny the petition. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

If the Question Presented ultimately proves worthy of this Court's attention, there will be ample

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court's summary-judgment ruling that "all of [plaintiffs'] claims were time barred"); *see also infra* Part II.

opportunity to address it at the appropriate time. *See Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., respecting denial of certiorari) (recognizing that party was "free to raise the same issue in a later petition following entry of a final judgment"). Indeed, this Court occasionally grants review at the close of litigation after having denied certiorari on the same issue at an earlier stage. *Compare Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting denial of certiorari) (noting general practice to "await final judgment in the lower courts"), *with United States v. Virginia*, 518 U.S. 515, 526 (1996) (granting review); *see also Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (collecting cases). Accordingly, to the extent § 1113's fraud-or-concealment provision affects the ultimate outcome of this case, the Companies are free to seek review of § 1113's scope after final judgment.[10]

B. The Decision Below Is An Especially Poor Candidate For Interlocutory Review

This case exemplifies the wisdom behind the Court's practice of deferring review until final

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[10] That same principle, by contrast, counsels *in favor of* granting Retirees' Petition. Respondents' contractual-vesting claims, unlike their fiduciary-duty claims, are now subject to a final judgment under Rule 54(b) that the Tenth Circuit affirmed. *See* Retirees' Pet. 9-11 & n.3. The vast majority of retirees affected by that final judgment have no alternative fiduciary-duty claims. The Retirees' Petition is thus not in an interlocutory posture, and it offers the contractual-vesting petitioners their only chance to secure this Court's review. *See Williams v. Boeing Co.*, 681 F.2d 615, 616 (9th Cir. 1982) (per curiam) (Rule 54(b) judgment is "final as to the claims and parties within its scope" and may "not be reviewed as part of an appeal from a subsequent judgment as to the remaining claims and parties").

judgment. That practice embodies a broader policy against piecemeal appeals at the very heart of "the federal judicial system." *Radio Station WOW v. Johnson*, 326 U.S. 120, 123 (1945) (emphasizing importance of allowing "litigation [to] conclude[] in the court of first instance"). The Companies' petition runs afoul of that longstanding judicial policy.

1. Interlocutory review would risk significant disruption to the ongoing district-court proceedings

Review of the Companies' petition at this juncture would conflict with principles of "good judicial administration." *Radio Station WOW*, 326 U.S. at 124. During these certiorari proceedings, the parties are continuing to litigate substantially similar claims on multiple fronts before the district court. Two of the original 17 plaintiffs, whose fiduciary-duty claims the district court held timely, App. 146 n.117, 156, are now in the midst of summary-judgment briefing. *See* Status Order at 1. Moreover, discovery is progressing with respect to the fiduciary-duty claims of 73 additional retirees. *See supra* p. 9.

The Companies' premature petition risks significant disruption to those ongoing proceedings. Certiorari at this juncture would leave the parties and the district court with two options: either continue litigating the live claims independently of any merits proceedings in this Court, or stay further litigation pending this Court's opinion (and completion of any necessary proceedings on remand).

Neither option comports with "good judicial administration." *Radio Station WOW*, 326 U.S. at 124. The first option would create unnecessary cost. As both parties have recognized, the fiduciary-duty claims that the two retirees are litigating below

implicate much of the "same testimony and evidence" as the "15 remaining plaintiffs" who are respondents in this Court. Parties' Joint Status Report at 2, *Fulghum v. Embarq Corp.*, No. 07-cv-2602 (D. Kan. filed June 30, 2015) ("Status Report"). If those two retirees were to proceed to trial in the near-term, this Court's affirmance on the same claims asserted by respondents here would force the parties and the district court later to retry many of the same issues – relying on many of the same witnesses – with respect to the remaining retirees. Such "economic waste" counsels against interlocutory review at this juncture. *Radio Station WOW*, 326 U.S. at 124.[11]

The other option is even less desirable. A wholesale stay pending this Court's review would likely delay further progress in these cases at least another year, as the parties would be forced to await not only this Court's opinion, but also the completion of additional proceedings on remand. For example, if the Court reversed, the Tenth Circuit on remand would need to address (at a minimum) whether respondents' claims remain timely outside of the fraud-or-concealment provision. *See* App. 34 n.20 (finding it "unnecessary to address" that issue); *Unisys*, 242 F.3d at 512 (Mansmann, J., concurring in part, and concurring in the result in part) (concluding that the limitations period under § 1113(1)(A) does not commence until "termination of the medical benefits that [the employer] had assured

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[11] Concerns about judicial economy led respondents to agree before the district court that "trial" of the active fiduciary-duty claims "should await completion of the Supreme Court proceedings." Status Report at 2. Respondents did not agree, however, that the Court should now take "the opportunity to resolve the purely legal issues presented in the petition." Pet. 23. Rather, respondents urge the Court to deny the Companies' petition.

the retirees they would receive for life" – a measure under which respondents' claims would all be timely); *see also CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1881-82 (2011) (identifying "actual harm" as a component of a complete cause of action). The additional time required to resolve such issues on remand would virtually guarantee a substantial delay in the ongoing district-court proceedings.

Such unnecessary delay disfavors certiorari at this early stage. *See Radio Station WOW*, 326 U.S. at 124 (identifying "delayed justice" as a key reason to avoid interlocutory appeals). Such delay would prejudice not only the 17 *Fulghum* retirees (the 15 respondents here and the two actively litigating in district court), but also the more-than-800 additional retirees and spouses whose fiduciary-duty claims remain stayed in the *Abbott* litigation. *See* Status Order at 2. Such prejudice would be severe for many retirees, who are elderly and poorly equipped to endure further delays in these litigations. The Companies identify no good reason that all retiree claims should remain on hold while it pursues an interlocutory appeal that will resolve (at best) only a piece of the remaining litigation.[12] The better course is to deny certiorari now,

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[12] That concern does not apply to Retirees' Petition, which is not in an interlocutory posture and which raises only contractual-vesting claims. Because contractual-vesting claims are not at issue in *Abbott*, Retirees' Petition (unlike the Companies') will not delay discovery for the *Abbott* retirees. Moreover, unlike with the fiduciary-duty claims, the district court has now dismissed *all* remaining contractual-vesting claims brought below; there are thus no ongoing contractual-vesting proceedings that certiorari would delay. *See* Retirees' Pet. 10 n.4. To the extent granting Retirees' Petition would affect a trial on the fiduciary-duty claims, it would promote judicial economy: contractual-vesting claims are less difficult to try than fiduciary-duty claims (the former do not, for example, require proof of misrepresenta-

allow the retirees' claims to proceed together, and then revisit the Companies' arguments (to the extent they still apply) after final judgment.

2. The Companies' petition risks wasting this Court's resources

The Companies' petition also risks expending this Court's resources on an issue that might otherwise "become quite unimportant by reason of the final result." *American Constr.*, 148 U.S. at 384. Indeed, a future final judgment on respondents' fiduciary-duty claims may not even present the question on which the Companies now seek review. *First*, the trial record may well demonstrate "fraud or concealment" as even the Companies define it. As explained above, no genuine conflict exists over whether self-concealing misrepresentations satisfy § 1113's fraud-or-concealment provision. *See supra* pp. 10-14. Respondents anticipate presenting evidence at trial sufficient to demonstrate such misrepresentations. *E.g.*, C.A. App. 4394 (representation that lifetime benefits are "written down in blood"); *cf. Osberg v. Foot Locker, Inc.*, No. 07 Civ. 1358 (KBF), 2015 WL 5786523, at *36 (S.D.N.Y. Oct. 5, 2015) ("the evidence presented at trial" established "misrepresentations" that satisfied "the fraud or concealment exception").[13] If the district court were to find a

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tions to the individual retirees), and reinstatement of respondents' contractual-vesting claims could "make trial of their [fiduciary-duty] claims unnecessary." Status Report at 4.

[13] The Companies' *amici* criticize *Osberg* as being "emblematic of the extraordinary liability" threatened by the decision below. American Benefits Council *et al.* Br. 12-13 ("Council Br."). *Amici* mostly base their criticism (at 12) on extraneous issues – such as *Osberg*'s "reliance" rulings – that this case does not present. In any event, if *amici* are correct, then this Court should wait for *Osberg* to address the scope of § 1113's fraud-or-

self-concealing fraud based on trial testimony, its judgment would no longer implicate the purported circuit split that the Companies now ask the Court to resolve.

Second, the Companies might prevail on remand and thereby obviate any need for this Court's review of the Tenth Circuit's statute-of-limitations holding. The Companies' petition criticizes (at 5) respondents' claims as resting on "decades-old alleged oral misrepresentations," and it cherry-picks (at 7) a few respondents whose claims are supposedly unsupported by even "a single document." Although respondents disagree with that characterization of the record – which contains numerous company documents confirming the alleged misrepresentations and other practices – the Companies are free to make those arguments at trial. Moreover, the Tenth Circuit invited the Companies "[o]n remand" to reassert their statute-of-limitations defense in a manner "not inconsistent with [its] opinion." App. 42. If the Companies were to succeed on such arguments, this Court would never need to address § 1113's scope.

C. The Companies' Argument In Favor Of Interlocutory Review Merely Confirms The Petition Should Be Denied

The Companies acknowledge (at 24) the "interlocutory posture" of respondents' fiduciary-duty claims, but they nonetheless urge review to vindicate what they call the "very essence of statutes of repose." According to the Companies, § 1113's main purpose is to prevent "the prosecution of stale claims, when by loss of evidence from the death of some witnesses

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concealment provision. That case will likely reach the Court in the near future and (unlike this case) will offer the Court an opportunity to evaluate the issue based on a full trial record.

and the imperfect recollection of others . . . it might be impossible to establish the truth." Pet. 24 (internal quotations omitted).

The Companies' argument merely demonstrates why certiorari should be denied. Indeed, the delay resulting from this Court's interlocutory review would exacerbate the very concerns the Companies identify. Respondents – as well as many of the remaining plaintiffs below – are elderly retirees and their beneficiaries. Many have serious health problems, and one of the original plaintiffs has already died during these proceedings. C.A. App. 9660-61 (substituting new plaintiffs following death of James Britt). Putting respondents' claims on hold for the Companies' interlocutory appeal will only increase the risk that additional retirees (and other witnesses) die, become too sick to testify, or suffer further gaps in their allegedly "imperfect recollection[s]." Pet. 24 (internal quotations omitted).

In short, if this Court grants review now and affirms, the (significantly overstated)[14] evidentiary problems the Companies identify will only worsen. On the other hand, even if the Court were to reverse, retirees' claims would likely survive under either the Companies' interpretation of § 1113 or the alternative arguments the decision below declined to reach. Under any scenario, those surviving claims – along

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[14] Experience in other circuits belies the Companies' suggestion (at 23-24) that respondents' claims are too stale to try efficiently. In *Unisys*, the parties successfully conducted a bench trial in 2005 on fiduciary-duty claims arising from retirements in the 1980s, and the Third Circuit affirmed the district court's liability finding as "well-supported by the record." *In re Unisys Corp. Retiree Med. Benefits ERISA Litig.*, 579 F.3d 220, 232 (3d Cir. 2009). The Companies identify no reason to think the parties here will be incapable of following the *Unisys* example.

with the ongoing district-court proceedings – will prevent the Companies from receiving the complete "repose from litigation" they claim (at 23) they need.[15] Review at this juncture would thus disserve the Companies' own description (at 24) of "Congress's purpose in enacting [§ 1113] in the first place."

III. THE DECISION BELOW IS CORRECT

A. The Decision Below Accords With ERISA's Text

The Tenth Circuit's interpretation of § 1113's fraud-or-concealment provision comports with the statute's plain meaning. *See Harris Trust & Sav. Bank v. Solomon Smith Barney Inc.*, 530 U.S. 238, 254 (2000) (noting that interpretation of ERISA "begins with the language of the statute") (internal quotations omitted). That exception – and its six-year discovery rule – applies "in the case of fraud *or* concealment." 29 U.S.C. § 1113 (emphasis added).

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[15] Those procedural realities distinguish this case from the "extraordinary cases" that can warrant interlocutory review. *Hamilton-Brown*, 240 U.S. at 258. Although this Court occasionally reviews statute-of-limitations or ERISA questions in an interlocutory posture, it generally does so only where (unlike here) review could dispose of the entire litigation or otherwise promote judicial economy. *See*, *e.g.*, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2181 (2014) (reviewing dispositive statute-of-repose question that led the district court to dismiss all claims); *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1544 (2013) (reviewing ERISA threshold question where decision below guaranteed that petitioner would be injured); Reply Br. in Supp. of Cert. at 12, *US Airways, Inc. v. McCutchen*, No. 11-1285 (U.S. filed June 8, 2012), 2012 WL 2128333 (noting that petitioner's "injury [could not] be mooted on remand"); *Merck & Co. v. Reynolds*, 559 U.S. 633, 642-43 (2010) (reviewing statute-of-limitations question that led the district court to dismiss all claims with prejudice).

The disjunctive term "or" demonstrates that the exception applies in two distinct circumstances: in cases of "fraud," and also in cases of "concealment." *See Garcia v. United States*, 469 U.S. 70, 73 (1984) ("[c]anons of construction indicate that terms connected in the disjunctive" should ordinarily "be given separate meanings"). The term "fraud," as commonly understood when ERISA was enacted, referred to a misrepresentation or omission "intended to deceive another so that he shall act upon it to his legal injury." App. 37 (internal quotations omitted). As the Tenth Circuit thus explained, a breach of fiduciary duty based on fraudulent conduct involves "fraud" under the ordinary meaning of § 1113's fraud-or-concealment provision. App. 37-39.

The Companies try (at 15) to avoid § 1113's plain meaning by insisting that "the purpose of the 'fraud or concealment' exception was to codify the doctrine of 'fraudulent concealment.'" They cite no evidence that Congress had any such purpose. The words Congress actually used, which are the best evidence of its intent, are common-law terms of art that suggest an intent for § 1113 to sweep more broadly than the fraudulent-concealment doctrine. *See Caputo*, 267 F.3d at 189 (declining to "fus[e] the phrase 'fraud *or* concealment' into the single term 'fraudulent concealment'"). That reading of the text also accords with the federal discovery rule, which the Companies argue (at 4) § 1113 incorporates. Under that rule, claims based on fraud do not accrue "until the fraud is discovered," regardless of whether there are "efforts on the part of the party committing the fraud to conceal it." *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1875). That longstanding rule is at odds

with the Companies' insistence that § 1113 requires post-violation acts of concealment in every case.

B. The Decision Below Accords With ERISA's Purpose

The Tenth Circuit also properly determined that its interpretation of § 1113 "promotes one of the primary purposes of ERISA." App. 39-40. One of ERISA's core aims was to protect "participants in employee benefit plans" by "requiring . . . disclosure and reporting to participants." 29 U.S.C. § 1001(b). ERISA's broad disclosure and fiduciary requirements were thus intended to promote informed decision-making and ensure that each "participant knows exactly where he stands with respect to the plan." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 118 (1989) (internal quotations omitted).

The interpretation adopted by the decision below furthers that core purpose. It recognizes that claims based on an underlying fraud, no less than claims based on acts that are subsequently concealed, typically elude detection. Such claims traditionally do not accrue until plaintiffs discover their injury, *see Bailey*, 88 U.S. (21 Wall.) at 349, and the strong disclosure policies embodied in ERISA demand the same result under § 1113. Were it otherwise, plan participants harmed by a fiduciary's fraud would virtually never have a remedy, because they would rarely (if ever) discover the fraud in time to sue. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1222 (2013) ("[A]bsent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded."). As the Tenth Circuit explained, such a "harsh result" cannot be squared with ERISA's purpose. App. 39-40.

Further, any broader concerns about stale claims, which both the Companies (at 16-20) and their *amici* (at 14-18) invoke, provide no reason to disturb the decision below. The potential existence of old claims is a feature of *both* parties' interpretations: even if this Court reversed and adopted the Companies' narrow interpretation of § 1113, ERISA fiduciaries who concealed their breaches after-the-fact would still be forced to defend against so-called "stale" claims for which "documentary or cognitive evidence . . . no longer exists." Council Br. 16. The question is not whether such claims can ever be timely, as no party disputes that they can. Instead, the question is simply whether the discovery rule Congress enacted in § 1113 should apply to claims based on fraud. In urging the Court to answer that question in the negative, the Companies would give ERISA fiduciaries virtual carte blanche to commit "fraud in a manner that it concealed itself." *Bailey*, 88 U.S. (21 Wall.) at 349. The Tenth Circuit held correctly that ERISA does not contemplate such a result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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