NO. 11-843

In the

Supreme Court of the United States

JAMES BARBERIS and ROGER DEMONTRAVEL, on behalf of themselves and all others similarly situated,

Petitioners,

v.

RETIREMENT PLAN FOR EMPLOYEES OF S.C. JOHNSON & SON, INC., and RETIREMENT PLAN FOR EMPLOYEES OF JOHNSONDIVERSEY, INC.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit, applying the same legal standard adopted by every Court of Appeals to have considered the issue, properly concluded that petitioners' ERISA claim for benefits alleging that their lump-sum payment was too small accrued for statute of limitations purposes when they received the lump-sum distribution and not years later when they concluded it was too small.

PARTIES TO THE PROCEEDINGS

Petitioners James Barberis and Roger DeMontravel, and two subclasses of similarly situated individuals, were plaintiffs-appellants and cross-appellees in the court below. Respondents Retirement Plan for Employees of S.C. Johnson & Son, Inc., and Retirement Plan for Employees of JohnsonDiversey, Inc. were defendants-appellees and cross-appellants in the court below.

RULE 26.1 STATEMENT

Respondent Retirement Plan for Employees of S.C. Johnson & Son, Inc., has no parent company. There is no publicly traded company that owns 10% or more of its stock.

Respondent Retirement Plan for Employees of Diversey, Inc., has no parent company. There is no publicly traded company that owns 10% or more of its stock. Sealed Air Corporation is the indirect corporate parent of Diversey Holdings, Inc. and its subsidiary Diversey, Inc. Diversey, Inc. is the plan sponsor for respondent Retirement Plan for Employees of Diversey, Inc. There is no publicly traded company that owns 10% or more of the stock of Sealed Air Corporation.

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BRIEF IN OPPOSITION

Respondents Retirement Plan for Employees of S.C. Johnson & Son, Inc. (the "Plan") and Retirement Plan for Employees of JohnsonDiversey, Inc. (together, the "Plans"), respectfully submit this brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The June 22, 2011, opinion of the United States Court of Appeals for the Seventh Circuit is reported at 651 F.3d 600 and reproduced at Pet.App.1a–24a.[1] The Seventh Circuit's unreported August 5, 2011, Order denying the petition for rehearing and rehearing *en banc* is reproduced at Pet.App.94a–95a. The March 26, 2010, Order of the District Court is reported at 716 F. Supp. 2d 752 and reproduced at Pet.App.61a–93a. The June 30, 2010, Order of the District Court is reported at 716 F. Supp. 2d 768 and reproduced at Pet.App.49a–60a. The unreported November 18, 2010, Order of the District Court is available at 2010 WL 4723410 and reproduced at Pet.App.25a–48a.

JURISDICTION

The Seventh Circuit rendered its decision on June 22, 2011. Petitioners' request for rehearing *en banc* was denied on August 5, 2011. On October 27, 2011, Justice Kagan granted petitioners' requested extension of time for the filing of a petition for certiorari to and including January 2, 2012, a Court holiday. A timely petition for certiorari was filed on

[1] "Pet.App." refers to the Petition Appendix.

January 3, 2012, and docketed on January 5, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent parts of Sections 502(a) and 204(c)(3) of ERISA, 29 U.S.C. §§ 1132(a) & 1054(c), are set forth in the Petition Appendix.

INTRODUCTION

There is no conflict in the Circuits on the proper accrual standard for ERISA benefit claims. The legal standard applied below, that an ERISA benefit cause of action "accrues upon a clear and unequivocal repudiation of rights under a pension plan which has been made known to the beneficiary," has been adopted by every court of appeals that has squarely considered the issue. *See Winnett v. Caterpillar, Inc.*, 609 F.3d 404, 410–11 (6th Cir. 2010); *Miller v. Fortis Benefits Ins. Co.*, 475 F.3d 516, 520–21 (3d Cir. 2007); *Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44, 48 (2d Cir. 1999); *Union Pac. R.R. Co. v. Beckham*, 138 F.3d 325, 331–32 (8th Cir. 1998), *cert. denied*, 525 U.S. 817 (1998); *Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62, 67 (7th Cir. 1996).

Implicitly recognizing the absence of any split in the ERISA context, petitioners attempt to raise the level of generality several notches and invite the Court to "address the broader conflict about the discovery rule applicable to federal actions generally." Pet.40. This Court should decline that invitation. First, there is no such conflict. When a claim accrues under federal common law depends on the particular context of the claim and the statutory scheme that authorizes it. To the extent courts apply different formulations of the discovery rule in different statutory contexts, that reflects differences in the statutory schemes and their respective indicia of congressional intent. What results is not a circuit split, but simply a reflection of the fact that there is no single uniform statute of limitations statute that applies identically to each and every federal statute.

Second, this case is not the place for the Court to revisit the discovery rule generally. The Seventh Circuit specifically rejected Petitioners' contention "that the injury was somehow concealed from them." Pet.App.16a n.9. A discovery rule cannot make their claims timely. Moreover, the accrual rule applied by the Seventh Circuit is one that has been specifically developed by the courts of appeals for the ERISA benefit context and consistent with the courts' obligation to develop the common law under ERISA taking into account the "'special nature and purpose of employee benefit plans.'" *See Varity Corp. v. Howe*, 516 U.S. 489, 496–97 (1996).

In short, what this case involves is not a circuit split about abstract principles of accrual, but a fact-bound application of the uniform rule applied by the court of appeals for determining when ERISA benefit claims accrues. The Court of Appeals reached the unremarkable conclusion that a claim that a lump-sum distribution was too small accrued when the lump-sum distribution was paid, not years later when the plaintiffs concluded it was too small. Indeed, the Seventh Circuit thought it was "a very close question" whether the claim accrued even earlier. But there is no other question that is close, let alone any issue that merits this Court's review.

STATEMENT OF THE CASE

A. Relevant Facts.

Petitioner James Barberis is a former employee of respondent S.C. Johnson & Son, Inc., who left S.C. Johnson in 1998. Petitioner Roger DeMontravel is a former employee of respondent JohnsonDiversey, Inc., S.C. Johnson's former industrial products division, which was spun off in 1999. He left JohnsonDiversey in 1999. Together, Petitioners represent the "Subclass B" plaintiffs in this case—those who ended their employment with S.C. Johnson or JohnsonDiversey and received a lump-sum distribution before November 27, 2001, that is, more than six years before this lawsuit was filed.

Effective June 1, 1998, S.C. Johnson amended its defined benefit pension plan, which had provided a pension to employees determined largely by the employee's tenure and salary, and converted it to a "cash-balance" plan, which is a specific type of defined benefit plan that uses "notional accounts" (*i.e.*, accounts that do not actually contain money) to calculate pension benefits for each participant. These notional accounts would be enhanced each year with service credits equal to a portion of the participants' salary and with interest credits that would be calculated at a rate set by the Plan.[2]

[2] The JohnsonDiversey, Inc. plan was formed as a cash-balance plan and became effective January 1, 1999, when its assets and liabilities were separated from the S.C. Johnson Plan to provide pension benefits to former S.C. Johnson employees transferred to JohnsonDiversey when it was spun off. Dkt.130-

Dkt.91 at 7; Dkt.130-1 at 5.[3] The Plan set the interest rate at the greater of 4% or 75% of the Plan's rate of return on its investments.

Plan participants whose employment with S.C. Johnson ended before the normal retirement age of 65 had a choice about what to do with their funds in the Plan when they departed: They could either take single lump-sum distribution in an amount equal to their account balance or leave their funds with the Plan until age 65 and continue to earn interest credits (but not service credits, because service to S.C. Johnson had ended). A90–92; DA18.[4] ERISA requires such lump-sum distributions to be the "actuarial equivalent" of the value of the account had the participant remained to age 65, *see* 29 U.S.C. § 1054(c)(3); Pet.App.96a, and IRS interpretations specified how plans must determine that equivalence, *see* IRS Notice 96-9, "Weighted Average Interest Rate Update," 1996-6 C.B. 363 (Feb. 5, 1996). Because the Plan awarded interest credits to participants, the actuarial equivalent of a lump-sum benefit had to include credit for the

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1 at 5–6; Dkt.133-1 at 3. The terms of the S.C. Johnson Plan and JohnsonDiversey plan are identical in all respects pertinent to the Petition. Dkt.91 at 10; A88, 109. For simplicity and unless otherwise indicated, this brief refers only to the S.C. Johnson Plan.

[3] "Dkt." refers to the docket of the Eastern District of Wisconsin District Court, Case No. 2:07-cv-01047-JPS.

[4] "A" refers to the Special Appendix for Plaintiffs-Appellants-Cross-Appellees in Nos. 10-3917 and 10-3918 (7th Circuit). "DA" refers to the Defendants-Appellees-Cross-Appellants' Appendix, in Nos. 10-3917, 10-3918, 10-3988, 10-3989 (7th Circuit).

interest that would have been earned, discounted to reflect the present value of those future interest credits. To satisfy this requirement, the Plan included a "whipsaw" calculation that would project the value of interest credits to age 65 and then discount it to reflect the present value of the future interest using the legally prescribed discount rate (the Treasury Rate). The Plan specified that it would use as its projection rate the same Treasury rate used to discount the future interest credits to present value (as opposed to some formula that would estimate the future performance of Plan investments and then estimate the likely value of future interest credits using the Plan's 4%/75% formula). This created what the court below termed a "wash calculation." Pet.App.3a. And it had the effect of ensuring that participants who chose to take a lump-sum would receive an amount equal to their current balance (or their current balance increased by the Treasury rate to account for future interest and discounted back to present value using the same rate, which is to say, their current balance).

The mechanics of that calculation were detailed in the amended Plan itself. They were not detailed in the Plan's communications with participants. But those communications received by Plan participants repeatedly and clearly explained the calculation's bottom line: Take a lump sum and get your current balance; defer withdrawal and continue to earn interest credits. Beginning as early as the spring of 1998 and continuing through 1999, Plan participants received a series of educational newsletters that described how participant account balances would grow through service and interest credits. DA10–12,

15. Those newsletters clearly explained that participants who left S.C. Johnson before age 65 could choose to cash out their benefits and take a one-time, lump-sum distribution and that those lump sums would include only the participant's account balance at the time of distribution. DA15, 17, 19–21. Specifically, the newsletters explained that terminated employees' early lump-sum distribution would equal their "entire Cash Balance Plan account balance," DA17, and that "[i]f you choose to receive a lump-sum payment of your account balance, your account will be considered to be 'paid in full.'" DA15. The newsletters stated that "[w]hen you retire you can receive your entire account balance in one lump sum payment." DA19–20.

By contrast, the newsletters also clearly explained that if former employees remained in the Plan and deferred distribution, their pension benefit would continue to grow through annual interest credits. DA15–20. For example, one "Investing in You" newsletter explained: "Employees can now take their funds with them if they leave the Company. Or, they can leave their money in the plan and continue to earn investment credits." DA15. And the newsletter specifically cautioned employees to "[r]emember that you stop earning contribution credits when you leave the Company, and you stop earning investment credits when you take your money out of the plan." DA18.

Plan participants also received summary plan descriptions (SPDs) that similarly explained the bottom line of early payment under the Plan: If they took a lump-sum payment, "[t]he entire value of your account is paid in one payment" and "[n]o further pension benefit will be payable from the Company." DA03, 06. And under the heading "Payment Options" the SPDs stated explicitly: "You can choose from several payment options including a lump sum payment and several types of annuities. You can also choose to leave your money in the plan and continue to earn investment credits." DA06. Plan participants received SPDs containing identical language each fall beginning in 1998 and continuing through 2002. Dkt.130-1 at 8–9; DA01–06; Dkt.132-1 at 29–40, 50–61.

Consistent with all of these clear descriptions of the Plan's lump-sum option (as well as with the Plan document itself), former employees who chose to take a lump sum received the current value of their notional accounts, no more and no less, as their distribution. *See* Pet.App.13a–14a. Participants received annual, personalized statements showing the current amount in their notional accounts, Dkt.135-1 at 2, so participants knew how much a lump-sum distribution equal to their current account balance would be.

B. The Proceedings Below.

1. On November 27, 2007, several former S.C. Johnson employees filed the first of the consolidated cases that formed the proceedings below. Several months later, former employees of JohnsonDiversey joined the case. The plaintiffs charged that because the Plan by its terms called for the use of the Treasury rate to calculate future interest credits (as opposed to using a projection rate that more closely mirrored the way in which future interest credits

were calculated for those who remained in the Plan), which resulted in a wash transaction, the Plan's method of calculating lump-sum distributions caused a forfeiture of future interest credits. Dkt.24 at 21–22. The proposed class included all Plan participants who took pre-age 65 lump-sum distributions between January 1, 1998, and August 17, 2006, when ERISA was amended to relieve cash-benefit plans of the requirement to perform the whipsaw interest calculation.[5]

After motions to dismiss for failure to exhaust administrative remedies were denied, the Plans conceded that the future interest calculation was unlawful. A35, 46–47. The parties then filed cross-motions for summary judgment. The Plans argued that all of the claims were time-barred under the applicable six-year statute of limitations because the plaintiffs' claims for lump-sum distributions in excess of their current account balances accrued when the Plans' participants were clearly informed in 1998 and 1999 that lump-sum distributions would be limited to the amount of the participant's account balance. Dkt.127 at 17–27. The plaintiffs, although acknowledging that the applicable statute of limitations was six years, argued that all the claims were timely, including those filed more than six years after the lump-sum distributions were received, because "claims under ERISA do not accrue until the victim has been injured and becomes aware

[5] *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 701(a)(2), 120 Stat. 780, 920, 984 (2006) (providing that the "accrued benefit may, under the terms of the plan, be expressed as . . . the balance of a hypothetical account").

of that injury." Dkt.167 at 27. Plan participants were not aware that the payment each received equal to his account balance was "an *injury*, instead of payment in full of the Plans' obligations" until some unspecified time when they learned that such payment was illegal under ERISA. Dkt.167 at 3, 27.

2. The District Court for the Eastern of District of Wisconsin held that the claims accrued for statute of limitations purposes when the Plans' participants received their lump-sum distributions. Specifically, the court concluded that "individual plaintiffs were on notice that their lump sum payment did not include a projection of interest credits that exceeded the discount rate of those credits to present value because the plaintiffs received lump sum distributions equal to the amount of their notional account balance, and no more." Pet.App.83a.

The District Court therefore held that the claims of Subclass A, which included participants who received their lump-sum distributions on or after November 27, 2001, were timely. But the claims of Subclass B, which included participants who received their distributions before that date, were not.

Following entry of summary judgment against Subclass B, Petitioners moved for reconsideration on the ground that "they did not 'discover' injury until sometime after receiving lump sum payments." Pet.App.51a. The district court denied the motion.

3. Petitioners appealed from the dismissal of their claims and the Plans cross-appealed from the

ruling that the Subclass A claims were timely.[6] The Seventh Circuit affirmed the ruling of the District Court on the statute of limitations. The Court of Appeals explained that the "'general federal common law rule is that an ERISA claim accrues when the plaintiff knows or should know of conduct that interferes with the plaintiff's ERISA rights.'" Pet.App.9a. And for claims to recover benefits under ERISA Section 502(a), like Petitioners', the benefit claim accrues "upon a clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary." Pet.App.9a (quotation marks omitted).

Noting that it was a "very close question" based upon the evidence in the record, the court below nevertheless disagreed with the Plans that the SPDs and other communications to the Plan participants during 1998 and 1999 amounted to an "unequivocal repudiation sufficient to trigger the statute of limitations." Pet.App.10a (quotation marks omitted). Although the court acknowledged that "it is certainly possible that generic Plan communications can prospectively repudiate unequivocally participant rights," the court agreed with the District Court that "when the participants received their lump-sum distributions, this served as an unequivocal repudiation of any entitlement to benefits beyond the account balance." Pet.App.12a–

[6] Although not pertinent to this Petition, the Plans also cross-appealed from the district court's ruling concerning the calculation of interest owed to the prevailing Subclass A plaintiffs. The aspects of the decision below related to Subclass A are addressed in the Plans' cross-petition for a writ of certiorari.

13a. The court "specifically reject[ed]" Petitioners' argument that they "could not have understood their injury without seeing the full Plan document." Pet.App.14a. The record showed, as the District Court concluded, that the Plan did not improperly conceal the calculation in the Plan document. In any event, Petitioners "did not need to see the wash calculation language in the Plan to understand that they had received their account balance and nothing more." Pet.App.14a.

The Court of Appeals denied rehearing and rehearing *en banc*, Pet.App.94a, and this Petition followed.

REASONS FOR DENYING THE PETITION

The Seventh Circuit in this case applied a well-established and broadly accepted legal standard for ERISA benefit claims to the facts before it and concluded that Petitioners' claims were time-barred but the claims of other plaintiffs were not. There is no circuit split on the proper accrual rule for such claims. Every court of appeals to consider the question has applied the same standard—that an ERISA benefit cause of action accrues upon a "clear repudiation" of rights under a benefit plan. Five circuits—the Second, Third, Sixth, Seventh and Eighth—have held that where, as here, there was no denial of a formal claim for additional benefits, the cause of action accrues upon a "clear repudiation" of rights under the plan. Two other circuits, the Fourth and the Ninth, have adopted similar repudiation rules that are consistent with the Seventh Circuit.

Petitioners implicitly concede the absence of a meaningful split in the ERISA context by attempting to shift the focus to a much higher level of generality and inviting the Court to address a divergence of views as to when and how the discovery rule applies. Pet.2, 15–16, 40. But whatever differences there might be about when federal claims generally accrue, they are not differences that cause the circuits to diverge in ERISA benefit cases. And the federal law of when a claim accrues admits of no easy generalization, but depends on the statutory and factual context of the claim. *See, e.g.*, *Rotella v. Wood*, 528 U.S. 549, 557–58 (2000) (resolving a circuit conflict in the RICO context based in part on the "congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize" racketeering activity).

It is therefore neither necessary nor provident for this Court to review the fact-bound decision below.

I. THERE IS NO CIRCUIT SPLIT.

The courts of appeals agree on when an ERISA benefit cause of action accrues. "'Uniformly, courts recognize that an ERISA cause of action accrues when an application for benefits is denied.'" *Held v. Mfrs. Hanover Leasing Corp.,* 912 F.2d 1197, 1205 (10th Cir.1990) (collecting cases); *see, e.g.*, *Beckham,* 138 F.3d at 330 (8th Cir. 1998) ("[T]he general rule in an ERISA action is that a cause of action accrues after a claim for benefits has been made and has been formally denied."), *cert. denied,* 525 U.S. 817 (1998); *Cottrill v. Sparrow, Johnson & Ursillo, Inc.,* 100 F.3d 220, 223 (1st Cir. 1996) ("Ordinarily, a cause of action under ERISA . . . accrue[s] when a fiduciary denies a participant benefits."); *Stevens v. Emp'r-Teamsters Joint Council No. 84 Pension Fund,* 979 F.2d 444, 451 (6th Cir. 1992) ("An ERISA cause of action for benefits under ERISA does not arise until a claim for benefits has been made and formally denied."); *Rodriguez v. MEBA Pension Trust,* 872 F.2d 69, 72 (4th Cir. 1989) ("An ERISA cause of action does not accrue until a claim of benefits has been made and formally denied."); *Jenkins v. Local 705 Int'l Bhd. of Teamsters Pension Plan,* 713 F.2d 247, 254 (7th Cir. 1983) ("A cause of action under Section 502 of ERISA, 29 U.S.C. § 1132, arose when the trustees of the pension plan denied applicant's benefit application."); *Paris v. Profit Sharing Plan for Emps. of Howard B. Wolf, Inc.,* 637 F.2d 357, 361 (5th Cir.1981) ("We hold that for purposes of ERISA a cause of action does not accrue until an application is denied.").

A. That rule is straightforward when a formal application for additional benefits is made and denied. Although the answer is perhaps less obvious when the unavailability of an additional benefit is clear without the formal application and rejection of a claim for benefits, the courts of appeals have nonetheless resolved that question uniformly. All five courts of appeals to consider squarely the issue of when an ERISA benefit claim accrues absent a claim for benefits have applied the "clear repudiation" rule applied by the Seventh Circuit in this case: "a cause of action accrues upon a clear and unequivocal repudiation of rights under the pension plan which has been made known to the beneficiary." *Daill*, 100 F.3d at 66; *see also Young v.*

Verizon's Bell Atlantic Cash Balance Plan, 615 F.3d 808, 816 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2924 (2011); Pet.App.9a. Indeed, many of the subsequent cases from other Circuits expressly rely on the Seventh Circuit's 1996 *Daill* decision.

In the Second Circuit, "a cause of action under ERISA accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff—regardless of whether the plaintiff has filed a formal application for benefits." *Carey v. Int'l Bhd. of Elec. Workers Local 363 Pension Plan*, 201 F.3d 44, 49 (2d Cir. 1999); *see also Hirt v. Equitable Ret. Plan for Employees, Managers and Agents*, 285 F. Appx. 802, 804 (July 9, 2008) (concluding in case involving ERISA Section 204(g) claims that the summary plan description "constituted a clear repudiation of any pre-amendment benefits that plaintiffs could possibly claim").

The Third Circuit has similarly held that a "*formal* denial is not required if there has been a repudiation of the benefits by the fiduciary which was *clear* and made known the beneficiary" and that the clear repudiation can occur even before a claim for benefits is made. *See Miller*, 475 F.3d at 520–21 (holding that the plaintiff's ERISA benefit cause of action accrued in April 1987 when he began receiving incorrectly calculated benefits and not in 2002 when he learned of the miscalculation and inquired about it or in March 2003 when the claim formally was denied); *Romero v. Allstate Corp.*, 404 F.3d 212, 223 (3d Cir. 2005) (the clear repudiation rule "avoids a myriad of ills that would accompany any rule that required denial of a formal application for benefits before a claim accrues").

The Sixth Circuit applies the "clear repudiation" rule and holds that "when a fiduciary gives a claimant clear and unequivocal repudiation of benefits that alone is adequate to commence accrual, regardless of whether the repudiation is formal or not." *Morrison v. Marsh & McLennan Companies, Inc.*, 439 F.3d 295, 302 (6th Cir. 2006). That court has applied the rule in an ERISA benefit case in holding that claims for healthcare benefits accrued when a labor agreement altering those benefits was announced and described by a series of notices and the summary plan description. *See Winnett*, 609 F.3d at 410. The Plans relied on *Winnett* to argue that the claims accrued even before the lump-sum distributions were paid, back in 1998 and 1999 when the SPDs and other documents made it unmistakable that a departing employee would receive only the current balance and would need to leave his money in the Plans to earn additional interest credits. Although the Seventh Circuit thought it was "a very close case," it ultimately concluded that the repudiation was not unmistakably clear until the lump-sum distribution in the amount of the current balance was actually paid. But that is a factual difference; the legal principle it applied is no different from the Sixth Circuit's rule.

Likewise, the Eighth Circuit has held that "consistent with the discovery rule, an ERISA beneficiary's cause of action accrues before a formal denial, and even before a claim for benefits is filed 'where there has been a repudiation by the fiduciary which is *clear* and made known to the beneficiar[y]'". *See Beckham*, 138 F.3d at 330–31 (claims for service credits accrued when plaintiffs were "unequivocally informed" and not when they sought legal advice or when they were denied benefits).

Petitioners are wrong when they argue that the Second, Third, and Eighth Circuits apply a unique "variant" of a general "injury discovery rule" different from the Seventh Circuit. Pet.18, 23-24. All three circuits in fact apply a standard that not only is consistent with but was developed in express reliance upon the Seventh Circuit precedent. *See, e.g.*, *Carey*, 201 F.3d at 47 (2d Cir. 1999) (citing and discussing *Daill*); *Beckham*, 138 F.3d at 330 (8th Cir. 1998) (citing *Daill*); *Romero*, 404 F.3d at 223 (3d Cir. 2005) (collecting clear repudiation cases, including *Daill*, and stating that "we too have applied the 'clear repudiation' concept in numerous cases involving ERISA"). *See also Winnett*, 609 F.3d at 410 (collecting cases).[7]

Contrary to Petitioners' characterization of *Winnett* and the decision below, the Sixth and Seventh Circuits do not apply a "conduct-

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[7] Petitioners mischaracterize the Third Circuit's *Romero* decision. Pet.17. *Romero* relied upon rather than deviated from the Seventh Circuit rule. The clear repudiation standard applied is the same. The difference is in the application of the standard to the facts. *Romero*, decided on a motion to dismiss, concluded that "[o]n the face of this Complaint one cannot determine when" a clear repudiation occurred. *Romero*, 404 F.3d at 224. But the court also stated that there "may be circumstances under which benefits are clearly repudiated as of" the date of a plan amendment. *Id*. Here, the Seventh Circuit had a factual record on summary judgment and concluded that there was in fact a clear repudiation of rights at least by the time of the lump-sum distributions.

constituting-violation" general discovery rule that differs from the other courts of appeals. Pet.32–33. They are applying the same "clear repudiation" legal standard. To the extent that "conduct" triggers the limitations period in these cases, that is only because the distinction between "conduct" and "injury" makes no difference. In these cases, the conduct and injury occur at the same time: the time of clear repudiation. The fact that the injury and not the conduct is determinative cannot obscure that they are often simultaneous. The Seventh Circuit has recognized this precise point. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) ("Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date—*often the same, but sometimes later*—on which the plaintiff discovers that he has been injured." (emphasis added); *accord Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342–43 (D.C. Cir. 1991) (Ruth Bader Ginsburg, J.).

In *Winnett*, the Sixth Circuit concluded the plan's distribution to participants of summary plan descriptions advising them of benefits changes "provided the 'clear repudiation' necessary" for the claims to accrue. *Winnett*, 609 F.3d at 410. In this case, the Seventh Circuit made the fact-bound determination that the right to future interest credits was clearly repudiated when Petitioners were given a lump sum distribution equal to the "account balance and nothing more." Pet.App.14a. The court also specifically rejected Petitioners' contention that their injury had been concealed from them. Pet.App.16a n.9. In both *Winnett* and this case, the injury and conduct occurred at the time of clear repudiation. *Cf. Connors*, 935 F.2d at 342 ("where the defendant communicates his repudiation of the contract or fails to deliver the goods on the appointed day one would expect the plaintiff to become aware of the injury at the time it occurs").

Petitioners therefore mischaracterize the decision of the court below when they describe it as applying a general Seventh Circuit rule that "a claim accrues when a plaintiff knows of the conduct that constitutes a violation of federal law." Pet.App.14, 33. Worse still, they simply misstate the specific holding in this case when they describe the court below as holding that the "mere payment of a benefit can without more trigger the statute of limitations." Pet.App.39. That is not the standard applied by the Seventh Circuit in this case or more generally. The Seventh Circuit standard asks whether there was a "clear and unequivocal repudiation" of benefits. And the holding in this case was that the lump-sum payment was the "final step of a clear repudiation of the participants' entitlement to" more than what was reflected in their notional accounts. Pet.App.13a–14a. The distributions were the "final step" in a repudiation that included repeated and consistent communications to participants consistently describing the lump-sum benefit as one that would include nothing more than the value of the accounts.

B. Two other circuits have rules that are not materially different from the "clear repudiation" rule applied by Seventh Circuit and the four other courts of appeals. In *Cotter v. Eastern Conference of Teamsters Retirement Plan*, 898 F.2d 424, 429 (4th Cir. 1990), the Fourth Circuit recognized that a plaintiff's ERISA benefit claim can accrue at "the time at which some event other than a denial of a claim should have alerted [the plaintiff] to his entitlement to the benefits he did not receive." *Id.* at 429. And the Ninth Circuit has held that an ERISA benefit claim can accrue either at the time a claim for benefits is actually denied or "when the plan communicates a 'clear and continuing repudiation of a claimant's rights under a plan such that the claimant could not have reasonably believed but that his or her benefits had been finally denied.'" *Withrow v. Halsey*, 655 F.3d 1032, 1036 (9th Cir. 2011); *see Martin v. Constr. Laborer's Pension Trust,* 947 F.2d 1381, 1384–86 (9th Cir. 1991) (applying the rule in the LMRA context).[8]

Plaintiffs are wrong to cordon off these two circuits from the Seventh Circuit and the consistent body of clear repudiation cases. Pet.25–27; 30–31. They are simply different formulations—barely distinguishable in the case of the Ninth Circuit—of the same basic standard. Indeed, more impartial readers have not only viewed *Cotter* as consistent with the clear repudiation rule—they have relied upon *Cotter* as authority for applying a clear repudiation rule. *See Miller*, 475 F.3d (describing *Cotter* as consistent with Second and Seventh Circuits and relying on *Cotter* to apply clear

[8] *Martin* involved a claim under the LMRA and not ERISA, but as the Second Circuit has pointed out, the Ninth Circuit "relied heavily, and explicitly, on cases arising under ERISA" and its "reasoning was not specific to the LMRA." *See Carey*, 201 F.3d at 47 & n.3. The Ninth Circuit continues to rely on *Martin* in ERISA cases.

repudiation rule); *Beckham*, 138 F.3d at 331 (collecting clear repudiation cases, including *Cotter*).

Petitioners characterize the Ninth Circuit as applying a strict "claim-denial" standard that is necessarily in tension with the decision below. Pet.26–27. But other courts of appeals have thought the Ninth Circuit rule consistent with their own clear repudiation rules. *See Beckham*, 138 F.3d at 331 (collecting clear repudiation cases from the circuits, and including the Ninth Circuit); *Carey*, 201 F.3d at 48 (stating that with its application of the clear repudiation rule the Second Circuit was following the Ninth Circuit).[9] Even the Seventh Circuit looked to the Ninth for precedent when it first articulated the clear repudiation rule. *See Daill*, 100 F.3d at 67 (finding "little difference" between the facts of its case and the Ninth Circuit's *Martin* case). And in all events, a strict "claim-denial" rule cannot apply in this or similar cases. As the Court of Appeals explained, Petitioners asked for and were "given a pass on exhausting their internal remedies." Pet.App.16a. And without exhaustion of Plan remedies, setting the date of accrual on the date of claim denial would allow Petitioners "to slip by with no accrual date" and sanction "nullification of the statute of limitations." Pet.App.16a. Nothing

[9] That all of these circuits so consistently cite each other's decisions to support their own in this area only underscores the extent to which the developing law in this area is free of serious conflict. This is why Petitioners are wrong when they argue that the Third, Seventh, and Ninth Circuits apply "three quite different 'repudiation' rules." Pet.35–36. There are different decisions involving different facts, but not "quite different" rules.

in the Ninth Circuit's ERISA benefit claim accrual decisions sanctions that sort of nullification.

C. The Fifth, Tenth, and Eleventh Circuits continue to apply the basic rule that ERISA causes of action accrue when a claim is made and formally denied. *See Paris*, 637 F.2d at 361 (holding that "for purposes of ERISA a cause of action does not accrue until an application is denied");[10] *Lee v. Rocky Mountain UFCW Unions & Emp'rs Trust Pension Plan*, 13 F.3d 405 n.3 (10th Cir. 1993) (ERISA denial of benefits claim accrued on date claim for benefits denied); *Held*, 912 F.2d at 1206. But those Circuits have not addressed the application of that basic rule when there is no formal application for additional benefits and a clear denial. But that does not in any way suggest those Circuits would not follow their sister Circuits in adopting the clear repudiation test. Instead, it suggests that the scenario giving rise to this case is not recurring enough to have generated a decision in any of those Circuits.

As Judge Owen has explained, the Fifth Circuit's "claim-denial" rule is not a "one-size-fits-all rule" to be applied "irrespective of the facts." *Peace v. Am. Gen. Life Ins. Co.*, 462 F.3d 437, 455 (5th Cir. 2006) (Owen, J., dissenting). And that court has not had the opportunity "to address squarely a repudiation of rights under a plan before a request for benefits has been made." *Id.* The same is true of

[10] The rule of *Paris* also applies in the Eleventh Circuit. *See Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (*en banc*) (adopting as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981).

the Eleventh Circuit.[11] And the Tenth Circuit has acknowledged, even if not yet applied, the "clear repudiation" rule. *See Held*, 912 F.2d at 1205 (noting Second Circuit decision in *Miles v. New York State Teamsters Conference Pension & Ret. Fund Emp. Pension Benefit Plan,* 698 F.2d 593, 598 (2d Cir. 1983)).

Petitioners are wrong, therefore, when they argue that the Fifth and Eleventh Circuits apply an "ERISA-claim-denial" rule, Pet.24–29, and that the Tenth Circuit applies a general "injury-and-causation" rule, Pet.29–30, that necessarily diverge from the approach taken by the Seventh Circuit. Even courts of appeals that now apply a clear repudiation rule applied the basic claim-denial rule in the straightforward cases. This is because the most common case is the one where there is a claim for benefits and that claim is denied. *Cf.* Pet.App.12a–13a (noting that it is "certainly possible that generic Plan communications can prospectively repudiate unequivocally participant rights" but that "the more traditional case in which recovery is barred involves some direct communication to a

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[11] In the one Eleventh Circuit case relied upon by Petitioners, the court could not have considered a repudiation rule because the facts as indicated by the district court foreclosed it. *See Hoover v. Bank of Am. Corp.*, 286 F. Supp. 2d 1326, 1334–35 (M.D. Fla. 2003) (defendant's "clear repudiation of Plaintiff's 'claim'" did not occur until months before lawsuit was filed; no earlier communications indicated "a clear repudiation" of plaintiff's "request for additional benefits" and the defendant had in fact "appeared to have changed its earlier position" by granting plaintiff some additional benefits), *aff'd*, *Hoover v. Bank of Am. Corp.*, 127 F. App'x 470, No. 03-15482, 2005 WL 80957 (11th Cir. Jan. 5, 2005).

participant who is actually pressing the issue"). The ERISA-specific law has developed case-by-case, with the circuits recognizing and applying the clear repudiation rule as a variant of the traditional benefit-claim-made-benefit-claim-denied rule when confronted with facts that do not involve a straightforward denial of an application for benefits. *Compare, e.g.*, *Jenkins*, 713 F.2d at 254 (7th Cir. 1983) (ERISA cause of action accrued when claim denied) *with Daill*, 100 F.3d at 67 (7th Cir. 1996) (ERISA cause of action accrued even though Daill had not filed a formal application for benefits because fund denied his appeal and clearly repudiated his right to the benefits) *with* Pet.App.13a–14a (distribution of lump-sum in amount equal to account consistent with plan descriptions and other information communicated to participant clearly repudiated participant's right to any additional amount). There is no tension between the rules. A flat denial of an application is the ultimate clear repudiation and a clear repudiation obviates any reason to apply. In all events, there is no reason the ERISA benefit accrual standard will not similarly develop in the courts of appeals that have yet to consider the less traditional cases.

II. THIS ERISA BENEFIT CASE IS NOT THE PLACE TO REVISIT WHEN FEDERAL CAUSES OF ACTION GENERALLY ACCRUE.

Whatever disagreements might exist among the courts of appeals regarding the federal discovery rule generally, the Court need not consider them here. Indeed, Petitioners' effort to generate an uber-split based on different approaches to accrual principles in different contexts is fundamentally misguided. To the extent courts apply slightly different approaches to accrual principles in disparate statutory contexts, they are following this Court's guidance. This Court has emphasized repeatedly that accrual rules must take account of the statutory context in which they arise. And with respect to ERISA benefit claims in particular, the courts of appeals, including the Seventh Circuit in the decision below, have done just that with the marked consistency discussed above.

A. When this Court has reviewed cases in past Terms involving the potential application of a federal discovery rule, it has done so to resolve clear circuit splits over the proper application of the discovery rule in a specific statutory context. That is the level of specificity at which the certiorari process operates. For example, when this Court first granted certiorari to consider when civil RICO claims accrue, it did so to consider a clear and unambiguous circuit split in which three circuits had "applied forms of an 'injury and pattern discovery' civil RICO accrual rule," other circuits had applied "forms of an 'injury discovery' rule" in RICO cases, and one circuit had applied a "last predicate act rule." *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 185–86 (1997) (rejecting the last predicate act rule). The petition in that case, unlike the Petition here, presented actual applications of the different discovery rules in the specific RICO context. When the Court considered the RICO accrual rule again three years later, it did so specifically to consider the two competing rules that remained after *Klehr*. *See Rotella*, 528 U.S. at 554. The same has been true when this Court has considered when other federal causes of action accrue. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 26 (2001) (noting that the Ninth Circuit held that Fair Credit Reporting Act "incorporates a general discovery rule" but four other circuits "concluded that a discovery exception other than the one Congress expressed may not be read into the Act"); *see also Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1793 (2010) (noting "disagreements among the Courts of Appeals" identified in the petition concerning federal securities fraud claims).

As explained, there is simply no circuit split concerning the application of accrual rules in the context of ERISA benefit cases. The fact that the uniform rule in the ERISA benefit context may vary somewhat from principles applied in distinct contexts is entirely beside the point. This Court has instructed the lower courts to develop the law under ERISA taking into account "the special nature and purpose of employee benefit plans." *See Varity Corp.*, 516 U.S. at 496–97. The Seventh Circuit did just that, developing an accrual rule not just specific to ERISA claims but specific to ERISA benefit claims. *See* Pet.App.9a n.5 (explaining that the court has "formulated an independent accrual framework for § 510 claims" because it "believed that the considerations underlying accrual in cases brought under § 502(a) (like the present case) were distinguishable"). The other courts of appeals have done the same. *See, e.g.*, *Romero*, 404 F.3d at 222 (explaining that although courts generally "employ the federal 'discovery rule'" to determine when a federal cause of action accrues, the "rule that has developed in the more specific ERISA context is that an ERISA nonfiduciary duty claim will accrue after a claim for benefits due under an ERISA plan has been made and formally denied," which includes the "concept" of "clear repudiation").

The clear repudiation rule respects the "careful balancing" under ERISA "between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans" in the first place. *Cf. Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004) (noting that "[t]he limited remedies available under ERISA are an inherent part" of that "careful balancing"); *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 259 (2008) (Roberts, C.J., concurring) (explaining that the safeguards of requiring exhaustion of administrative remedies and deference to plan administrators "encourage employers and others to undertake the voluntary step of providing medical and retirement benefits to plan participants and have no doubt engendered substantial reliance interests on the part of plans and fiduciaries").

The need for such balancing is particularly clear in a case like this, where Petitioners urge an accrual rule that would essentially mean there is no statute of limitations for their claims. Even though the gravamen of Petitioners' claims is that they were entitled to a lump-sum distribution larger than their account balances, they contend their claim did not accrue when they were told they would get only their account balance or even when they were given a lump-sum balance equal to their stated account balance. Instead, Petitioners' contend their claim does not accrue until years later when they determined the precise reason that the Plan gave them a lump-sum distribution equal to their account balance. That is not so much an accrual rule as a complete immunity from the statute of limitations. If ERISA provides no repose, employers will surely think twice about creating such plans.

In light of the ERISA-specific development of the accrual rules, it would make little sense for the Court to grant review in this case simply to consider broader issues concerning the general "federal discovery rule." Even in reviewing cases where the courts of appeals actually have applied the general federal discovery rule, this Court has been cautious not to address issues at a higher level of generality than is necessary to resolve the case. *See TRW, Inc.*, 534 U.S. at 27 (noting that court of appeals "rested its decision on the premise that all federal statutes of limitations, regardless of context, incorporate a general discovery rule 'unless Congress has expressly legislated otherwise'" and declining to say or decide whether that presumption was correct).

III. THIS FACT-BOUND CASE DOES NOT MERIT THIS COURT'S REVIEW.

The Petition effectively asks this Court to sit as a court of error to review and reverse the Seventh Circuit's fact-bound determination on accrual. That request is doubly problematic. Not only is that kind of fact-bound dispute a wholly unpromising candidate for this Court's review, but the only fact-bound issue that is even debatable is that raised in the conditional cross-petition. The Court of Appeals acknowledged that it was a "very close" question on the facts whether the summary plan descriptions and informational material amounted to an "unequivocal repudiation" of the petitioners' right to future interest credits. Pet.App.10a. On the record before it, the court below concluded that those materials, which specifically told participants they would receive only their current balances as a lump-sum distribution and would need to keep their money in the plan to earn future interest, did not amount to a clear repudiation. Instead, the court held that the repudiation only became clear when departing employees received the "lump-sum" distributions, which "served as the final step of a clear repudiation" given that they "were calculated consistent with the Plan document and every Plan communication" to the participants. Pet.App.13a–14a. The alternative Petitioners offered—essentially a statute-of-limitations period that would never begin to run—did not present a close question, let alone a certworthy one.

Petitioners are wrong to suggest that a different accrual rule, and in particular an injury discovery rule, would lead to their claims being timely. Again the fact-bound nature of the case and the findings of the court below are fatal to Petitioners. Under their proposed standard, even Petitioners concede, as they must, that a cause action accrues not just when a plaintiff knows of the injury but also where the plaintiff should have known. *See* Pet.34–35; *Merck*, 130 S. Ct. at 1795. That test is hopelessly fact-dependent, as Petitioners themselves demonstrate when they rely upon deposition testimony of S.C. Johnson executives to buttress their contention that they could not have known of their injury. Pet.10–11.

Equally important, both courts below had a view of the evidence that does not and cannot support Petitioners' suggestion that their claims would have been timely if only an injury rule had been applied. The District Court concluded on Petitioners' motion for reconsideration that the evidence showed that participants were "aware that their lump sum distributions equaled the value of their account balance, and no more," and that the receipt of the lump-sum distributions therefore was a "clear and unequivocal repudiation of any right to additional pension benefits." Pet.App.52a. The district court also concluded that no "discovery rule" could prevent the statute of limitations from running because "the information giving rise to the plaintiffs' claims was readily available to the plaintiffs through reasonable diligence," including in the Plan documents themselves, which "included all the requisite information underlying the current lump sum claims." Pet.App.55a. The Seventh Circuit specifically rejected Petitioners' argument that "they could not have understood their injury without seeing the full Plan document" because the wash calculation was in fact "designed to have no effect" and Petitioners therefore "did not need to see the wash calculation language in the Plan to understand that they had received their account balance and nothing more." Pet.App.14a. Both courts below specifically rejected Petitioners' central argument that the Plan "hid" the Plan terms and information concerning Petitioners' right to interest credits. The District Court concluded that there was "no evidence showing that the Plans purposefully concealed details about the calculation of lump sum distributions from plan participants." Pet.App.59a. And the Seventh Circuit specifically rejected Petitioners' contention "that the injury was somehow concealed from them." Pet.App.16a n.9. In short, Petitioners would not prevail even under their own proposed rule. Given the view of the facts taken by both courts below, Petitioners "should have known" of their injury at the very latest when they received their lump-sum distributions.

The relevant legal question is not the general federal accrual standard, or even the rule in ERISA cases. The relevant question instead concerns the accrual rule for ERISA benefit claims. On that question there is no split in authority. Every circuit applies a general rule that a claim for benefits accrues when the benefits are denied. And every circuit to confront the specific question of what rule to apply when no application for benefits was made has applied some variant of the clear repudiation rule applied below. This case involves nothing more than a fact-bound application of that uniform rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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