No. 12-729

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In The
# Supreme Court of the United States

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JULIE HEIMESHOFF,

*Petitioner,*

v.

HARTFORD LIFE & ACCIDENT INSURANCE CO.,
and WAL-MART STORES, INC.,

*Respondents.*

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

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## PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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## ARGUMENT

This case warrants review because it presents a question that has split the circuits for more than a decade: can an ERISA plan enforce its contractual limitations period and start the clock running on a participant's civil claim before the participant has exhausted administrative remedies and can actually bring suit?

Five circuits have said "yes," crafting a rule that requires courts to perform, in each and every case, a "reasonableness" inquiry into whether, based on the specific facts, the contractual limitations period is reasonable. *See, e.g., Burke v. Price Water House Coopers LLP Long Term Disability Plan,* 572 F.3d 76 (2d Cir. 2009). Two circuits have said "no," holding that ERISA does not permit plans to impose a contractual limitations period that begins to run before a participant's civil claim has accrued, after the claimant exhausts her administrative remedies. *See, e.g., Price v. Provident Life & Accident Ins. Co.,* 2 F.3d 986 (9th Cir. 1993); *White v. Sun Life Assur. Co.,* 488 F.3d 240 (4th Cir. 2007). In those circuits which have yet to weigh in, the district courts have reached remarkable disagreement. *See, e.g., Tuttle v. Cigna Group Ins.,* 2012 U.S. Dist. LEXIS 47500, at *5-15 (S.D. Miss. Apr. 4, 2012); *Whittaker v. Hartford Life Ins. Co.,* 2012 U.S. Dist. LEXIS 166983, at *18-23 (E.D. Pa. Nov. 25, 2012); *Zorn v. Principal Life Ins. Co.,* 2012 U.S. Dist. LEXIS 3833, at *27-30 (S.D. Ga. Jan. 12, 2012).

Faced with this landscape, Respondent[1] has opted merely to peck at the margins – it does not dispute that a split exists, or that the question presented is of central importance to ERISA fiduciaries and beneficiaries alike. Resp.Br., at 10-17. Instead, it focuses much of its energy on trivializing the degree of disagreement among the circuits, arguing there is only "limited" disagreement between one "outlier" court and the rest. But even in this effort, Respondent mischaracterizes the caselaw and ignores key holdings.

Conceding the split, Respondent places most of its opposition eggs in a request for delay: it contends that this case presents a poor vehicle for review; that the Second Circuit failed to reach several relevant issues; and that the concerns at the heart of the dispute are not implicated here. Each argument fails.

## I. The Split Is Well Defined and Review Is Appropriate Now.

Respondent contends the split among courts is merely one of "limited disagreement" between a majority and one "outlier." Not so.

A. Far from "limited," the disagreement over the enforceability of contractual limitations periods

[1] Both Respondents (Hartford Life & Accident Ins. Co. and Wal-Mart Stores, Inc.) are referred to collectively, in the singular.

beginning to run before a claimant can file suit is clear and unconditional. In *White*, the Fourth Circuit flatly rejected the Second Circuit's "case-by-case reasonableness" approach as both "sharply at odds with ERISA" and completely unworkable. As the court explained, the Second Circuit's approach "flies in the face of the ERISA statutory framework" and "immerses courts in an extra-contractual and extra-statutory endeavor that is incompatible with ERISA's written-plan requirement." *White,* 488 F.3d at 246.

Instead, the Fourth Circuit embraced a "plain and unconditional" rule: contractual limitations periods that start the clock on a participant's claim before the participant can file suit are unenforceable under ERISA. The disagreement is therefore between a "case-by-case reasonableness" approach permitting these limitations periods (creating uncertainty) and a "plain and unconditional" rule invalidating them (providing more clarity and certainty). Nothing about this dispute is limited or narrow.

Nor – though Respondent does not contest this – is the disagreement trivial: it strikes at the core of ERISA's judicial review protections for participants and beneficiaries. In *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), this Court took pains to emphasize that ERISA ensures that "a person denied benefits under an employee benefit plan [may] challenge that denial in federal court." *Id.* at 108. ERISA itself contains numerous provisions designed to ensure that beneficiaries have ready access to the courts, and this Court rejects interpretations of

ERISA that would strip away these protections. *See Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996). *See also* 29 U.S.C. § 1001(b) ("providing for . . . ready access to the Federal courts").

Whether a plan can run the clock out on a claim before the claimant exhausts remedies and can ever get into court is simply another way of accomplishing what this Court has repeatedly said plans may not do – deny "ready access to the Federal courts." *Varity*, at 513.

B. Respondent tries another erroneous tack, arguing the Fourth Circuit is an "outlier." Resp.Br., at 9. But the Ninth Circuit shares the Fourth Circuit's view that contractual limitations provisions beginning to run before a participant can file suit are unenforceable. *See Price*, 2 F.3d at 988. The district courts in those circuits yet to weigh in have either recognized or outright embraced this rule. *See Amos v. Hartford Life & Accident Ins. Co.*, 2009 U.S. Dist. LEXIS 53287, at *3-4 (N.D. Ala. June 24, 2009); *Zorn,* 2012 U.S. Dist. LEXIS 3833, at *27-30; *Tuttle,* 2012 U.S. Dist. LEXIS 47500, at *5-15.

Respondent, unsurprisingly, tries to distinguish *Price* and *White*. It argues, for example, that *Price* is really about notice, not limitations periods, and that the court never really ruled on the enforceability of contractual limitations periods like the one at issue here. That is untrue. In *Price*, the plan relied on a contractual limitations period identical to this one, arguing the claim began running from the date of

proof of loss, not the final benefits denial. *See Price*, 2 F.3d at 988. The court refused to enforce the provision, holding the correct date at which a participant's claim begins to run is the date benefits are finally denied. *Id.*

In reaching this conclusion, the court could not have been clearer that it "reject[ed] the argument" that a plan could impose a different contractual accrual date or start the clock running before finally denying benefits. *Id.* To hold otherwise, the court warned, would allow the insurer to "wait for the statute of limitations to run" before telling the participant benefits were denied. Like the Fourth Circuit, the Ninth Circuit made clear "ERISA does not permit such a result." *Id.*

Unlike Respondent, most other courts have had no difficulty understanding that the Ninth Circuit's ruling in *Price* squares comfortably with the Fourth Circuit's in *White*. *See Rossi v. Partners Healthcare System, Inc.*, 2010 WL 5313551 (D. Mass. Oct. 6, 2010) (the "Ninth Circuit has reached a similar result" to *White*); *Holder v. Lowe's Long Term Disability Plan*, 2010 U.S. Dist. LEXIS 7109, at *6-7 (E.D. Tenn. Jan. 28, 2010) (viewing Fourth and Ninth Circuits as following the same rule); *Island View Residential Treatment Center, Inc. v. Bluecross Blueshield of Mass., Inc.*, 2007 U.S. Dist. LEXIS 94901, at *42 (D.Mass. Dec. 28, 2007) (same), *aff'd,* 548 F.3d 24 (1st Cir. 2008).

Indeed, the Fourth Circuit itself made clear that its approach followed the Ninth Circuit, which "has deemed" contractual accrual provisions like the one at issue here "unenforceable." *White*, 488 F.3d at 250. As *White* explained, *Price* concluded "such provisions create incentives for plans to use their governing documents to undermine beneficiaries' civil claims." *Id.* at 250. *Both* circuits, therefore, hold that "ERISA does not permit this result." *Id.*; *Price*, 2 F.3d at 988.

Other lower courts have also embraced the Fourth Circuit's approach. Respondents trivialize this too, suggesting this Court should not trouble itself with "unpublished district court decisions." Resp.Br., at 15, n.8. But these decisions arise within those circuits that have yet to decide the issue – all the more reason to grant review and provide guidance. In *Amos*, 2009 U.S. Dist. LEXIS 53287, for example, the court struggled to find the right rule to apply when faced with a contractual limitations period that, by its terms, would have started the clock well before the time the participant could have filed a lawsuit. The court recognized the Circuit split on what triggers the limitations period. *Amos,* 2009 U.S. Dist. LEXIS 53287, at *4. The court ultimately found "persuasive the rationale of the Fourth Circuit," refusing to enforce the limitations period, but only "in the absence of guidance from the Eleventh Circuit," which remains undecided. *Amos,* at *5. *See also Jeffries v. Trustee of Northrop Grumman Savings & Inv. Plan*, 169 F.Supp.2d 1380, 1383 (M.D. Ga. 2001). These cases all but invite this Court's resolution.

**II. The Decision Below Contravenes ERISA.**

A. ERISA has one basic purpose: "to protect . . . the interests of participants . . . and beneficiaries." 29 U.S.C. § 1001(b). The Second Circuit rejected that core principle when it embraced a rule that permits plans to run the clock down (or out) on a participant's judicial claim for benefits. As the Fourth Circuit recognized, allowing plans like Hartford to begin a limitations period before a participant can even file suit "runs afoul" of ERISA, by "undermin[ing] and potentially eliminat[ing] the ERISA civil right of action." *White*, 488 F.3d at 247. ERISA's remedial scheme – which contemplates an internal appeal followed, later, by judicial review – "does not permit an ERISA plan to start the clock ticking on civil claims while the plan is still considering internal appeals." *Id.* Yet that is exactly what the Second Circuit's rule allows, and what Respondent advocates here.

This Court has repeatedly rejected plan efforts to curtail this right. In *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), the Court made clear that ERISA "permits a person denied benefits to challenge that denial in federal court." So too in *Varity*, where this Court emphasized that ERISA was designed to provide "ready access to the Federal courts." *Varity Corp. v. Howe*, 516 U.S. 489, 513 (1996). A plan may not – overtly or impliedly – impose a contractual regime that works to deny the ability of beneficiaries to gain federal court review of benefit decisions. Perhaps more pointedly in this context, an approach

that permits such an outcome will not survive scrutiny – a contractually-imposed limitation period that defeats a participant's access to courts contradicts ERISA and must be invalidated.

Respondent disagrees, arguing that contract enforcement is *the* principal purpose of ERISA, and therefore trumps any other consideration. Resp.Br., at 24. That contention fails on two levels. First, this Court has consistently held that "[t]he principal object of [ERISA] is to protect plan participants and beneficiaries," not to enforce plan terms. *Boggs v. Boggs*, 520 U.S. 833, 845 (1997). *See also MetLife v. Glenn*, 554 U.S. at 114 (the desire to protect beneficiaries "outweighed" other subsidiary purposes, including employers' freedom to set up benefit plans); *Varity*, at 513 (ERISA's ultimate purpose is "to protect the interests of participants and beneficiaries") (quoting basic purpose provision; alterations omitted).

Second, Respondent's proffered principle of categorical plan enforcement does not survive the Second Circuit's own rule. For a case-by-case reasonableness approach, courts would still be expected to depart from the plan's plain language. As the Fourth Circuit explained well, a "sometimes-enforcing approach . . . would disregard the written plan requirement" itself, since the "reasonableness" inquiry is "nowhere contained in [the] plan." *White*, 488 F.3d at 249. Contractual limitations periods would thus be enforced "sometimes, but not at other times, according to a standard neither contained in the plan document nor evident from its terms." *Id.*

Shifting gears, Respondent suggests that courts have adopted some safety valves to protect beneficiaries' judicial review rights and to comply with ERISA without resorting to a *per se* rule. According to Respondent, this includes allowing a claimant "at least a reasonable time **after exhaustion of administrative remedies** or to apply equitable tolling during the pendency of the administrative review process." Resp.Br., at 16 (quoting *Salisbury v. Hartford Life & Accident Ins. Co.,* 583 F.3d 1245, 1249 (10th Cir. 2009)). These work-arounds, however, suffer from several distinct problems.

First, as numerous courts and commentators have explained, this approach creates "as many problems as it would solve." *White*, at 248. True, as Respondent offers, courts could police the outer-bounds of reasonableness, by disregarding plan-specified accrual dates when a plan has taken so long to make a final determination that a claimant is left with no time to file suit. Resp.Br., at 15. But courts would have no easy way to determine how much of a compression of the claimant's limitation period is too much. As the Fourth Circuit noted, that approach itself imposes an extra-contractual inquiry, with far less clarity. After all, "whether an accrual provision was 'reasonable' with respect to a particular claimant would change each day that the plan did not issue a final decision." *Id.* at 248.

Respondent minimizes this concern, arguing in reality, the Second Circuit's approach is really a "nearly-always-enforcing approach," because administrators

would be unlikely to "habitually cut short the time" to bring suit. Resp.Br., at 25. That nice theory does nothing to satisfy the glaring inadequacies evident in the rule. Statutes of limitation need to be clear and unambiguous to all parties to eliminate hiding the ball and to effectuate the right of judicial review.

Second, a case-by-case reasonableness approach would "make it impossible for plans to give their participants the notice of subsequent remedies required by law." *White*, at 249. That is because "reasonableness is a subjective standard whose application to a particular claimant would shift over time." *Id.* By definition, this standard cannot be written into plans; thus, "[n]either a plan participant nor even a court could determine at the moment that a participant filed proof of claim whether his legal cause of action would accrue as provided under the plan's terms." *Id.*[2]

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[2] Some courts *have* developed a workable approach for addressing the tension between the contractual limitations period and ERISA statutes and regulations. *Novick v. Metro. Life Ins. Co.,* 764 F.Supp.2d 653 (S.D.N.Y. 2011) sets out a roadmap for ERISA plans to meet "higher-than-marketplace" standards, applying minimum notice regulations to require that the insurer inform the participant, in the adverse determination letters and Summary Plan Description, of the time limits for filing a court action. Respondent mischaracterizes *Novick* as simply an application of the "reasonableness" rule. But *Novick* did more: it refused to enforce the plan's contractual limitations provision *because* MetLife had not complied with the notice requirements. *Id.* at 660-64. *See also Ortega Candelaria v. Orthobiologics LLC*, 661 F.3d 675, 680-81 & nn.7-8 (1st Cir. 2011). These decisions
(Continued on following page)

ERISA itself disfavors exactly this type of case-by-case approach. As but one example, litigation costs will increase because plans and claimants alike will have to fight over the reasonableness of the running of a limitations period in every case. This Court, on multiple occasions, has taken the opportunity to caution against rules that "interject other additional issues into ERISA litigation" that would "increase litigation costs." *Conkright v. Frommert*, 130 S.Ct. 1640, 1649-50 (2010). Standards creating "ad hoc exceptions" – like the Second Circuit's approach here – are particularly unfavorable because of the "uniformity problems that arise." *Id.* at 1650.

Equally disconcerting, the Second Circuit's opinion gives plans free reign to bypass with impunity key notice requirements provided for in ERISA. These notice obligations – set forth in 29 U.S.C. § 1133(1), (2), and, *e.g.,* 29 C.F.R. § 2560.503-1 – require, at a minimum, that plans tell beneficiaries of the appeal review time limits, and mandate that this information be included in both the initial adverse benefit determination and the Summary Plan Description. *See, e.g.,* 29 U.S.C. §§ 1001(a), (b); 1022(a);

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have nothing to do with the reasonableness of the limitations period. Here, the Second Circuit's choice not to apply *Novick's* reasoning is problematic. Ostensibly, the court believed it could disregard *Novick* and the regulations because Petitioner had "actual knowledge" of the time limits simply because Petitioner's counsel received the plan among other documents. Suffice it to say, no case has *ever* held that actual knowledge relieves a plan from its statutorily-imposed minimum notice requirements.

29 C.F.R. §§ 2520.102-2(b), 2520.102-3(s), 2560.503-1(b)(2), (b)(3); (g)(1)(iv), (h); *MetLife v. Glenn*, 554 U.S. at 115 (imposing "higher-than-marketplace" standards on ERISA plans, referring to 29 C.F.R. § 2560.503-1).

By refusing to hold Respondent to its obligations under these requirements, the Second Circuit eviscerated them, and provided a blueprint for future plans to simply avoid higher-than-marketplace-duties completely. That decision cannot be squared with either the plain text of ERISA or its core objectives. At base, these notice requirements "protect . . . the interests of participants . . . and beneficiaries," 29 U.S.C. § 1001(b), by ensuring that beneficiaries know of, and act on, their rights to appeal an adverse benefit determination. Plans, and courts, simply may not disregard them, as Respondent and the Second Circuit did here.

## III. This Case Presents an Ideal Vehicle for Review.

ERISA requires "efficiency, predictability, and uniformity." *Conkright v. Frommert,* 130 S.Ct. 1640, 1649 (2010). Absent Supreme Court action, judicial review of adverse benefit decisions will remain uneven and unpredictable for ERISA beneficiaries and plans, contrary to *MetLife v. Glenn*, *Varity,* and ERISA itself. The twin issues at the heart of this problem are straightforwardly presented in this case: whether a contractually-imposed limitations period

that starts the clock running before internal remedies have been exhausted and the beneficiary's civil claim accrues is enforceable, and whether a plan may ignore with impunity the notice requirements imposed by ERISA. Respondent agrees ERISA contractual limitations provisions are a thorny problem. There is little doubt that these issues have bedeviled courts and confused claimants for years. There is no reason to wait.

## CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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