No. 12-306

IN THE

Supreme Court of the United States

DOMINIC CATALDO ET AL.,

Petitioners,

v.

UNITED STATES STEEL CORP., ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Section 413 of the Employee Retirement Income Security Act ("ERISA") provides that claims arising under that Act for breach of fiduciary duty must be commenced within three years of actual knowledge of the breach, except that a longer, six-year limitations period governs "in the case of fraud or concealment." 29 U.S.C. § 1113.

The question presented is whether, in asking whether the alleged breaches of fiduciary duty that formed the basis for petitioners' complaint involved "fraud," so as potentially to trigger the longer, six-year limitations period under the Act, the Sixth Circuit properly looked to petitioners' complaint and evaluated whether they had pleaded any "fraud" with particularity.

2. Section 104(b)(4) of ERISA provides that plan administrators must furnish copies of certain plan documents to any participant or beneficiary, "upon written request." 29 U.S.C. § 1024(b)(4).

The question presented is whether the Sixth Circuit correctly found that the response of the United States Steel and Carnegie Pension Fund ("the Fund") to petitioners' vague document requests, the adequacy of which petitioners did not dispute in the district court, satisfied the statute.

CORPORATE DISCLOSURE STATEMENT

Respondent United States Steel Corporation ("U. S. Steel") is a publicly held company. It has no parent company, and there is no publicly held company owning 10% or more of U. S. Steel's stock.

Respondent United States Steel and Carnegie Pension Fund (the "Fund") is a Pennsylvania non-profit membership corporation formed to administer the benefit plans of U. S. Steel and its affiliates and former affiliates.

Petitioners list USX Corporation as an additional Respondent. However, while USX Corporation was listed as a defendant below, it was never served. (*See* Pet. App. E-4). USX Corporation, therefore, is not a proper party to this petition.

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STATEMENT OF THE CASE

This petition arises out of a complaint filed by more than two hundred then-current or retired steel mill workers in Lorain, Ohio, asserting multiple violations of ERISA as well as a series of common-law torts. As relevant here, petitioners alleged that sixteen different entities—including U. S. Steel, which owned the mill prior to 1989 and then since 2001, and the Fund, which administered the pension plan for U. S. Steel employees—breached fiduciary duties; and that the Fund failed to furnish copies of certain plan documents.

1. Petitioners' claim for breach of fiduciary duty is premised on the following allegations: Until 1999, pension benefits under the plan were based in part on the participant's wages in the five years during which he earned the highest income. (Pet. App. C-4.) In 1999, participants were advised that, going forward, only years *prior* to 1999 would count toward the "best" five years. (*Id.*) The calculation was thus effectively "frozen" as of 1999. (*Id.*) When U. S. Steel acquired the steel mill in 2001, petitioners—allegedly as a result of unspecified promises from unidentified persons and entities—became "hopeful" that the "best five years" freeze would be lifted. (Pet. App. C-5.) By 2003, however, they were advised "that the current formula for calculating pension benefits would remain in place." (*Id.*; *see also* Pet App. C-10 n.3.)

In addition, petitioners allege that, in connection with an early retirement program (called "TAP") offered in 2003, some unidentified individuals in the group of petitioners were misled (by "one or more defendants") about the benefits that would be available if they took early retirement under TAP.

(Pet. App. C-5.) Those who chose the option "immediately" began to receive benefits that were below their expectations. (*Id.*)

2. The Sixth Circuit unanimously concluded that petitioners' breach-of-fiduciary-duty claim was time-barred. (Pet. App. C-18.) Under ERISA, claims for breach of fiduciary duty must ordinarily be commenced within three years after "the earliest date on which the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). Because petitioners' complaint made clear that, by 1999 and 2003, they were aware that the pension benefit formula would not be altered and that the TAP early-retirement benefits were lower than they expected, it was not disputed that petitioners' complaint (filed in 2009) was untimely under that three-year limitations period. (*See* Pet. App. C-9, C-10 n.3.)

Petitioners argued, however, that the limitations period was *six* years, because ERISA further provides that, "in the case of fraud or concealment," an action for breach of fiduciary duty "may be commenced not later than six years after the date of discovery of such breach." 29 U.S.C. § 1113. Petitioners claimed to "assert fraud in count one [breach of fiduciary duty]." (Pet. App. C-9.) More specifically, on petitioners' view, they were entitled to the longer limitations period because their fiduciary-breach claim turned on allegedly misleading and fraudulent statements about the calculation of their pension benefits and benefits under the TAP program. (Pet. App. C-16.)

The Sixth Circuit acknowledged that most Circuits have held that ERISA's "fraud or concealment" exception "does not apply" unless there was "separate conduct undertaken by the fiduciary to

hide the fraud"—*i.e.*, the exception is not triggered merely because the fiduciary-breach claim itself "is based upon fraud." (Pet. App. C-15.) The panel viewed prior Sixth Circuit caselaw as not having resolved that question, and declined to resolve it in this case. (*Id.*) The panel reasoned that, even if the "fraud or concealment" exception *did* apply broadly, even to cases in which the only fraud alleged was the underlying breach, petitioners could not invoke it because they "failed to sufficiently plead fraud in this case." (*Id.*) Petitioners' allegations, said the court, were "woefully inadequate." (Pet. App. C-16.):

> The complaint avers in relevant part that "[n]umerous Plaintiffs specifically asked (orally and in writing) [defendants] for assurances that they would receive the same T.A.P. benefits as all other . . .U.S. Steel employees. In response, one or more of [defendants] promised the Plaintiffs that they would receive the same such benefits, made representations, and provided false, inaccurate and/or misleading information."

(Pet. App. C-17.)

Citing Federal Rule of Civil Procedure 9(b), which mandates that fraud be pleaded "with particularity," the panel observed that petitioners' complaint "omits entirely the time and place" of the alleged misrepresentations, and fails even to specify *who made them*, "instead referring vaguely only to 'defendants' of which there are many in this case." (Pet. App. C-17.) These bare and conclusory allegations did not "adequately alleg[e] any underlying fraud," and so petitioners could not invoke ERISA's "fraud or concealment" exception—whatever its scope. (Pet. App. C-16.)

3. Petitioners also alleged, in their complaint, that the defendants violated § 104(b)(4) of ERISA by failing to furnish copies of certain plan documents that they had requested. (Pet. App. C-24.) The Sixth Circuit panel properly recognized that this statutory duty applied only to plan administrators, such as Respondent Fund, and not to U. S. Steel. The Sixth Circuit panel then unanimously rejected the claim.

The panel first concluded that, because, in their complaint, petitioners had referenced their request for documents and the Fund's response, both letters could be considered on a motion to dismiss. (Pet. App. C-26.) Next, the panel held that petitioners had forfeited any argument that the Fund's response was legally inadequate, because that argument "was not raised below." (*Id.*) Finally, the court held that, in any event, the claim was "meritless"; petitioners had not "specifically requested" the documents that they criticized the Fund for not having provided, and it was not clear from their vague requests that they had sought these materials. (Pet. App. C-27.)

REASONS FOR DENYING THE PETITION

I. Petitioners devote much of their petition to expounding upon two issues of ERISA law that have, to an extent, divided lower courts—but that the Sixth Circuit did not resolve, and did not need to resolve. All that the court below did was evaluate whether petitioners' claim of a breach of fiduciary duty involved "fraud," as petitioners asserted in an effort to (potentially) trigger a more generous limitations period. The court reviewed petitioners' complaint and concluded that it "failed to sufficiently plead fraud" (Pet. App. C-15); the shorter period thus applied. Petitioners criticize the court for holding them to the requirement, of the Federal Rules of Civil Procedure, that fraud be pleaded with particularity. But on that narrow question—the only one actually decided below—there is no conflict among the lower courts. To the contrary, the only two cases cited by petitioners that actually confront that issue both follow the same analysis as the panel did.

Not only is the question presented splitless, but the decision below is correct. Petitioners cite the uncontroverted principle—expressly recognized by the court below—that plaintiffs need not plead the absence of affirmative defenses, including limitations defenses. But when the limitations period turns on the *type of claim asserted*, it is perfectly legitimate—and unavoidable—for a court to look at a plaintiff's complaint in order to ascertain what type of claim he brought. It is one thing to dismiss a claim because the plaintiff failed anticipatorily to plead a basis for equitable tolling; it is quite another to observe that the statute of limitations for "fraud" does not apply because the plaintiff did not plead any "fraud."

Moreover, the question presented—whether Rule 9(b) applies in evaluating whether petitioners' claim involves "fraud" and thereby potentially qualifies for the six-year limitations period—is inconsequential. Although the Sixth Circuit did not reach the issue, most Circuits hold that the longer limitations period is available only if the "fraud or concealment" was *independent* of the breach of fiduciary duty that forms the basis for the suit (*e.g.*, an attempt to hide the breach). In those Circuits, Rule 9(b) is irrelevant, because all agree that such *independent* fraud need not be pleaded in the complaint. In addition, many courts hold—as petitioners point out, even though the Sixth Circuit did not reach this issue either—that *all* fiduciary-breach claims that "sound in fraud" must meet the heightened pleading standard of Rule 9(b), whether or not the plaintiff wants to invoke the six-year limitations period for claims of "fraud." In those courts, too, the decision below is of no consequence, because plaintiffs there *already* have to plead with particularity, even setting aside the limitations issue.

II. Petitioners also seek review of the dismissal of their claim that the plan administrator failed to comply with ERISA's requirement to furnish copies of certain plan documents upon request. No further review is warranted. The Sixth Circuit held that petitioners had not disputed in the district court the legal adequacy of the administrator's response, and had thereby forfeited the claim. Moreover, the Sixth Circuit's alternative holding—that, in light of the vagueness of petitioners' requests, the response by the administrator was sufficient—is purely fact-bound. Indeed, the only Circuit split alleged by petitioners is one with respect to which the Sixth Circuit is *on their side*.

I. THERE IS NO REASON TO REVIEW THE DISMISSAL OF PETITIONERS' FIDUCIARY-BREACH CLAIMS AS TIME-BARRED.

The Sixth Circuit held that petitioners' claim for breach of fiduciary duty was time-barred, because they had actual knowledge of the alleged breach for more than three years before commencing suit. ERISA's longer, six-year limitations period for cases involving "fraud or concealment" did not apply, because even assuming the correctness of petitioners' argument that the breach of fiduciary duty was itself an act of fraud, they had not pleaded such fraud with particularity, as required by Federal Rule 9(b).

There is no basis for further review of that holding. *First*, there is no split of authority on the narrow question that the court below resolved. *Second*, the decision below is correct. *Third*, in any event, the consequences of the decision are extremely limited.

A. There Is No Split of Authority on Any Question Resolved by the Decision Below.

Plaintiffs identify two areas of ERISA law that have divided or confused the lower courts. Neither, however, is implicated here; and there is no division of authority with respect to the only question that the Sixth Circuit did actually resolve below.

1. Under § 413 of ERISA, an action for breach of fiduciary duty must be commenced within three years after the plaintiff has "actual knowledge of the breach." 29 U.S.C. § 1113(2). However, the statute further provides that a longer, six-year period applies "in the case of fraud or concealment." *Id.* Petitioners identify and discuss a longstanding, lopsided conflict among the Circuits over the scope of the "fraud or concealment" exception. (*See* Pet. at 23-29.)

Most Circuits hold that "fraud claims do not receive the benefit of ERISA's six-year statute of limitations simply because they are fraud claims." *Martin v. Consultants & Admins., Inc.*, 966 F.2d 1078, 1095 (7th Cir. 1992). These courts, drawing upon the common-law "fraudulent concealment" rule, require "not simply [that] the alleged breach involved some kind of fraud but rather [that] the fiduciary took steps to hide its breach." *In re Unisys Corp. Retiree Med. Benefit ERISA Litig.*, 242 F.3d 497, 502 (3d Cir. 2001). In other words, most courts require a plaintiff to show fraud that is *independent* of the wrong that is the basis for the suit. By contrast, more than ten years ago, the Second Circuit "decline[d] to follow [its] sister circuits" on that issue, and instead held that the six-year period also governs "actions for breach of fiduciary duty in which the underlying action itself sounds in fraud (*i.e.*, looking to the nature of the factual allegations supporting the claim for breach of fiduciary duty)." *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 189-90 (2d Cir. 2001). This Court has denied review of that split. *See, e.g.*, *Tonnies v. Unisys Corp.*, 534 U.S. 1018 (2001).

In the court below, petitioners urged adoption of the Second Circuit's minority position, and argued that they were entitled to invoke the six-year statute of limitations because their claim of fiduciary breach sounded in fraud. Respondents argued that Sixth Circuit precedent had already sided with the other Circuits, in limiting application of the six-year period to situations of *independent* fraud or concealment, concededly not present here. (*See* Pet. App. C-10.) Critically, the panel refrained from ruling either way: "We need not take sides on the split at this time, however, for even were we to conclude that the

exception applies in such situations [*i.e.*, where the underlying allegation of fiduciary-breach sounds in fraud], plaintiffs have failed to sufficiently plead fraud." (Pet. App. C-15.) That is, the court below held that, even on the broader understanding of the "fraud or concealment" exception, petitioners could not successfully invoke it, because even their claim of breach of fiduciary duty did not involve "fraud."

Accordingly, this petition does not present the question whether ERISA's "fraud or concealment" provision "should be construed as referring to the nature of the factual allegations supporting the claim for breach of fiduciary duty, … or to steps taken by wrongdoing fiduciaries to cover their tracks." *Radiology Ctr., S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220 (7th Cir. 1990). The panel below did not decide the issue, and—for the reasons given in its opinion—it had no need to do so.

2. Plaintiffs also discuss at length the distinct question whether claims for breach of fiduciary duty, if they sound in fraud, must satisfy the requisites of Federal Rule 9(b). (*See* Pet. at 16-22, 30-36.) There is no split among the Circuits on that question. While some district courts have disagreed on this issue, it has nothing to do with ERISA's *statute of limitations*, and (not surprisingly) was therefore not resolved or even addressed by the court below.

Rule 9(b) provides that "[i]n alleging fraud …, a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). In the context of ERISA claims for breach of fiduciary duty, district courts—many cited by petitioners—have divided over whether such claims that sound in fraud must satisfy that heightened pleading standard.

Some hold that, if the alleged breach of duty *is* an act of fraud, it must be alleged with particularity. *See, e.g.*, *Lively v. Dynergy, Inc.*, 420 F. Supp. 2d 949 (S.D. Ill. Feb. 15, 2006) (applying Rule 9(b) to claims of misrepresentations in course of fiduciary breach); *In re Xcel Energy, Inc. Secs., Derivative & ERISA Litig.*, 312 F. Supp. 2d 1165, 1179 (D. Minn. 2004) ("Plaintiffs are required to plead with particularity when the alleged breach of the fiduciary is the fraudulent act."); *Lochhead v. Alacano*, 662 F. Supp. 230, 234 (D. Utah 1987) ("[A] claim for breach of fiduciary duty must be pled with particularity where the alleged breach itself is a scheme to defraud.").

Other district courts emphasize that the action is for breach of fiduciary duty—not fraud—and so Rule 9(b) ought not apply at all. *See, e.g.*, *In re Morgan Stanley ERISA Litig.*, 696 F. Supp. 2d 345, 364 (S.D.N.Y. 2009) ("[M]any courts … have determined that a fiduciary claim brought under ERISA need only plead according to the standard of Rule 8(a), regardless of whether the claims are based on an underlying fraud."); *Beesley v. Int'l Paper Co.*, No. 06-703, 2009 WL 260782, at *2 (S.D. Ill. Feb. 4, 2009) (holding claim for breach of fiduciary duty not subject to Rule 9(b) "even though some of the allegations … arguably sound in fraud or deceit"); *Rankin v. Rots*, 278 F. Supp. 2d 853, 865 (E.D. Mich. 2003) (rejecting argument that Rule 9(b) "should be extended to all breaches of fiduciary duty under ERISA where the allegations are similar to fraud").[1]

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[1] Petitioners appear to suggest that there is a three-way disagreement, with some courts requiring *all* fiduciary-breach

Importantly, none of these cases concerns the statute of limitations. Rather, they address whether a fiduciary-breach claim sounding in fraud must satisfy the heightened standard of Rule 9(b) in order to avoid dismissal under Rule 12(b)(6). Some district courts say yes; others say no. Either way, the conflict is irrelevant here, because respondents did not seek (and the court did not order) dismissal of petitioners' fiduciary-breach claim for failure to satisfy Rule 9(b). Rather, the court ordered dismissal of the claims *as time-barred*, referencing Rule 9(b) only to confirm that petitioners had not pleaded a claim of "fraud" that might trigger a longer limitations period.

Accordingly, there is no Circuit split over—and this petition does not present the question, in any event—whether claims for breach of fiduciary duty that sound in fraud must satisfy Rule 9(b). Even if petitioners are correct that they need *not* plead fraud with particularity to make out a fiduciary-breach claim, that does not undermine the panel's holding that Rule 9(b) *does* govern if a plaintiff seeks to invoke ERISA's limitations period for "fraud" claims.

3. Stripping away these extraneous matters exposes the narrow issue that the Sixth Circuit did resolve: Whether, to invoke ERISA's six-year statute of limitations based on a breach of fiduciary duty that is itself fraudulent, a plaintiff must allege the "fraud" with particularity, as required by Rule 9(b).

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claims to satisfy Rule 9(b), others applying that standard only to claims sounding in fraud, and still others never applying it. (*See* Pet. at 33-36.) But respondents are not aware of any cases applying Rule 9(b) to a claim that does not sound in fraud.

Yet, on that narrow issue, there is no conflict with *any* court. None of petitioners' cases rejecting application of Rule 9(b) did so where the plaintiff was seeking to invoke ERISA's "fraud or concealment" statute of limitations on the basis of an allegedly fraudulent breach of fiduciary duty. To the contrary, petitioners cite only *two* cases that address that issue—and both agree with the Sixth Circuit. In *Enneking v. Schmidt Builders Supply Inc.*, No. 11-cv-4111, 2012 WL 2339701 (D. Kan. June 19, 2012), the court held that "[e]ven if [it] followed the Second Circuit's application of the fraud or concealment exception," the plaintiffs' claims would still be time-barred, because they were merely "generalized claims of fraud," "not pleaded with the requisite particularity," and so did "not meet the test of Rule 9(b)." *Id.* at *8. "Plaintiffs' ERISA claims failed to properly plead fraud or fraudulent concealment with sufficient particularity to receive the benefit of the extended limitations period." *Id.* Likewise, in *Larson v. Northrop Corp.*, 21 F.3d 1164 (D.C. Cir. 1994), the court held that "allegations of fraudulent concealment, which toll the statute of limitations, must meet the requirements of [Rule 9(b)]." *Id.* at 1173. Because the plaintiff there had not "properly" pleaded fraud, the court concluded that even he "apparently did not see this as a 'case of fraud or concealment'" and accordingly refused to apply the six-year limitations period. *Id.*

In short, this case presents neither of the ERISA questions that petitioners discuss and about which some courts disagree. It presents, instead, only a far narrower question over which no courts disagree. There is no basis for this Court's intervention.

B. The Decision Below Is Correct.

The Sixth Circuit's decision is also correct. While petitioners contend that the court erred by, in effect, requiring them to anticipatorily plead their responses to the affirmative defense of statute of limitations, that is a mischaracterization of the court's holding.

There is no dispute that, as petitioners point out, the statute of limitations is an affirmative defense, and plaintiffs need not anticipate or respond to affirmative defenses in their pleadings. *See Jones v. Bock*, 549 U.S. 199, 212 (2007). (*See* Pet. at 8-16.) Indeed, the court below expressly recognized that. (*See* Pet. App. C-7 ("The statute of limitations is an affirmative defense, … and a plaintiff generally need not plead the lack of an affirmative defense to state a valid claim.").) As the court proceeded to explain, a motion to dismiss based on the statute of limitations may be granted only if "the complaint affirmatively show[s] that the claim is time-barred." (*Id.*)

Petitioners are wrong in arguing that the court below contravened those principles. Rather, it looked at petitioners' complaint to ascertain *what type of claim* they had brought—and thus what limitations period governed. The court found that petitioners "failed to sufficiently plead fraud in this case" (Pet. App. C-15)—indeed, the "allegations of fraud [were] woefully inadequate" (Pet. App. C-15-16)—and so the six-year limitations period for "fraud" claims was inapplicable. There is nothing unusual or improper about looking at the complaint to determine what sort of claim a plaintiff is pursuing. Indeed, there is no other way to make that determination. If the statute of limitations in a hypothetical case depended upon whether the claim sounded in contract or in

tort, of course the court would—and should—look at the plaintiff's complaint to determine the nature of his claim. That is all the Sixth Circuit did here.

All of the cases that petitioners cite are, for that reason, distinguishable. Each involves an affirmative defense, such as exhaustion or statute of limitations, to which the plaintiff may have a defense. They hold that the affirmative defense cannot be accepted until the plaintiff is given an opportunity to respond and, if necessary, offer supporting evidence; failure to plead around the defense in the complaint does not warrant dismissal. *See, e.g.*, *Jones*, 549 U.S. at 212 (holding that complaint cannot be dismissed simply for failure to plead exhaustion of administrative remedies); *Abbas v. Dixon*, 480 F.3d 636, 640 (2d Cir. 2007) (holding that complaint cannot be dismissed as time-barred *sua sponte* because plaintiff "might have meritorious tolling arguments"); *Leber v. Citigroup, Inc.*, No. 07-Civ.-9329, 2010 WL 935442, at *7 (S.D.N.Y. Mar. 16, 2010) (refusing to dismiss complaint as time-barred because complaint did not reveal "when most, if not all, of the relevant breaches occurred" and thus it was not clear from complaint when claims accrued).

Here, by contrast, the only disputed question relevant to the limitations defense was the legal question of which limitations period applied—and that turned exclusively on whether petitioners' case was a "case of fraud." In other words, the limitations defense depended solely on the nature of the claim asserted by petitioners. While a plaintiff may not be responsible for anticipating and pleading responses to affirmative defenses, he certainly *is* responsible for *properly pleading his own claims*.

Petitioners do cite one district court case, superficially resembling this one, which refused to dismiss an ERISA claim as time-barred on the theory that the plaintiffs were not obligated to plead their "fraud or concealment" allegations in their complaint. *See George v. Kraft Foods Global, Inc.*, 674 F. Supp. 2d 1031 (N.D. Ill. 2009). But *George* differs from this case in a critical respect: It involved an effort to invoke the six-year statute of limitations on the basis of "fraud or concealment" occurring *after*—and *independent of*—the alleged breach of fiduciary duty. *See id.* at 1046-47. When the "fraud or concealment" is independent of the wrong that forms the basis for the action, there is no dispute that the plaintiff need not plead it in his complaint, as it is not necessary to support his cause of action. But if, as is the case here, the only alleged "fraud or concealment" is bound up with the alleged breach of fiduciary duty, then it is entirely fair to expect the fraud to be properly pleaded. Indeed, another case that petitioners cite draws this precise distinction. *See Hoppe v. Smithkline Beecham Corp.*, 437 F. Supp. 2d 331, 337 n.5 (E.D. Pa. 2006) (distinguishing earlier case in which plaintiffs "pleaded fraudulent concealment both as a cause of action and as cause for tolling the statute of limitations," because there "the question of whether Rule 9(b) should be applied to the claim for tolling had been subsumed into Rule 9(b)'s application to the overarching tort action").

In short, petitioners characterized their fiduciary-breach claim as a fraud claim, and the Sixth Circuit did nothing more than look at their complaint to verify that characterization. That is not equivalent to dismissing a complaint for failure to respond in advance to an affirmative defense.

C. The Decision Below Has Very Limited Consequences, and Therefore Does Not Warrant This Court's Attention.

The Sixth Circuit's decision to apply Rule 9(b) in evaluating whether petitioners' claim involved "fraud" for purposes of ERISA's statute of limitations also has extremely limited consequences. Indeed, the court below faced this narrow, obscure issue only because it skirted the two broader questions, identified by petitioners and discussed above, that have divided some other lower courts.

First, as explained above, the vast majority of Circuits hold that ERISA's "fraud or concealment" exception applies only to fraud or concealment that is *independent* of the underlying breach of fiduciary duty, such as when the defendant attempts to hide the breach. *See supra*, Part I.A.1. In such a case, it is undisputed that the plaintiff need not plead that concealment in his complaint, and so Rule 9(b) has no application. The panel decision looking to Rule 9(b) is limited to fiduciary-breach claims that *sound in fraud*, but in the majority of Circuits, such claims *never* qualify for the longer limitations period. In other words, in most courts, plaintiffs cannot invoke the longer limitations period simply by contending that their breach claims sound in fraud, and so those courts would never reach the analysis performed by the decision below; they would never look at whether a complaint properly alleges fraud under Rule 9(b) in order to determine whether the claim is time-barred.

Second, and also as explained above, many courts require—even apart from the statute of limitations—that all fiduciary-breach claims sounding in fraud be pleaded with particularity. *See supra*, Part I.A.2. In

those courts, too, the Sixth Circuit's rule would have no impact, because those courts *already* require that claims of this nature satisfy Rule 9(b), even if they are timely under the ordinary limitations period. The minimalist nature of the Sixth Circuit's ruling in this case means that it will have very little effect in the future—only in courts that apply the six-year limitations period to breach claims that sound in fraud yet do not require those claims always to be pleaded with particularity. That is a very small number of courts and an even smaller number of cases. This does not merit this Court's attention.

II. THERE IS NO REASON TO REVIEW THE FINDING THAT THE FUND SUFFICIENTLY RESPONDED TO PETITIONERS' VAGUE DOCUMENT REQUESTS.

Petitioners also seek review of the Sixth Circuit's dismissal of their claim under § 104(b)(4) of ERISA, which requires plan administrators to furnish copies of certain plan documents to participants "upon written request." 29 U.S.C. § 1024(b)(4). As the Sixth Circuit held, this statutory requirement applies only to plan administrators, such as Respondent Fund. (Pet. App. C-24.)

No further review of that claim is warranted. *First*, the Sixth Circuit expressly found that, by failing to press the matter in the district court, petitioners forfeited any argument that the Fund's response to their document requests failed to comply with the statute. That forfeiture makes this petition an altogether inappropriate vehicle for interpreting the scope of § 104. *Second*, the question whether the Fund adequately responded to petitioners' vague requests is purely fact-bound. Indeed, the only legal

issues that petitioners identify—concerning the range of documents covered by the statute, and whether the documents must be requested by name—are issues that the Sixth Circuit has already resolved *in their favor*, and which therefore expressly had no bearing on the reasoning or judgment below.

A. Petitioners Forfeited Their Objections to the Fund's Responses, and This Case Is Therefore a Poor Vehicle for Construing the Scope of § 104(b)(4).

The court below found that petitioners' argument that "the Fund's response was legally inadequate" under § 104(b)(4) was raised "for the first time on appeal." (Pet. App. C-26.) "Because this argument was not raised below," the court held, "it is forfeited on appeal." (Pet. App. C-26-27.) That forfeiture makes this petition an inappropriate vehicle for interpreting or construing the requirements of the document-furnishing provision. Because petitioners forfeited their claim, *no* construction of the statute would result in a judgment in their favor or reversal of the Sixth Circuit's judgment against them.

B. The Adequacy of the Fund's Responses to Petitioners' Vague Document Requests Is Purely Fact-Bound.

The Sixth Circuit proceeded to hold, in the alternative, that petitioners' claim was "meritless." (Pet. App. C-27.) As for the "actuarial valuation reports" that petitioners complained they had not received, petitioners "concede[d] that they never specifically requested them." (*Id.*) Participants need not "request a specific document by name," but must somehow make clear to the administrator that the documents are within the scope of the request. (*Id.*)

Yet petitioners did not make even "a minimal effort on appeal to identify which of their specific requests reasonably embodie[d] the actuarial valuation reports." (Pet. App. C-28.) As for the "procedures" and "calculations" that petitioners criticized the Fund for not furnishing, they did not "identify specifically what they are talking about or explain why the requests were not covered by the Fund's response." (*Id.*) Moreover, if the Fund's response was deficient, petitioners "should have availed themselves of the Fund's offer to provide more documents upon a specific request." (Pet. App. C-29.) Indeed, the Fund specifically invited petitioners to ask for any additional materials believed to be outstanding. (Pet. App. F-4.) Petitioners instead initiated litigation.

The Sixth Circuit's resolution of petitioners' claim for documents is plainly and purely fact-bound. *See Green v. AT&T, Inc.*, No. 4:07-CV-1537, 2009 WL 1161576, at *7 (E.D. Mo. Apr. 29, 2009) (describing analysis whether "request is sufficiently clear" as "fact-specific inquiry"). This Court obviously has no interest in reconsidering whether the particular plan documents provided by the Fund fairly responded to petitioners' vague requests. That is not a legal issue at all, much less one worthy of this Court's time.

In an effort to create a legal dispute where there is none, petitioners contend (i) that the panel decision is contrary to *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101 (1989); and (ii) that lower courts are divided over how broadly to construe the range of documents that the statute requires plans to provide, and how specifically a participant must request them. (*See* Pet. at 36-47.) The first contention is meritless, and the second is irrelevant to this petition.

First, the *Firestone* case involved the meaning of the term "participant" in the disclosure statute. *See* 489 U.S. at 115-18. Here, of course, there is no dispute that petitioners were participants entitled to invoke § 104(b)(4); the only dispute was whether the Fund's response to the document requests complied with the statutory provision. *Firestone* is therefore irrelevant here, and the Sixth Circuit decision is certainly not in conflict with that precedent.

Second, while petitioners allege a split among the Circuits concerning whether § 104(b)(4) requires the plan to furnish certain types of documents, the Sixth Circuit has taken *petitioners' side* of that issue. In *Bartling v. Fruehauf Corp.*, 29 F.3d 1062 (6th Cir. 1994), the court ruled that "actuarial reports … must be disclosed upon request" under ERISA. *See id.* at 1070. Other Circuits have rejected that liberal reading of the statutory language. *See, e.g.*, *Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 654 (4th Cir. 1996) ("[W]e do not find *Bartling* persuasive."). The panel recognized *Bartling*'s rule that "actuarial valuation reports … must be furnished upon request," but nonetheless rejected petitioners' claims because petitioners "concede[d] that they never specifically requested" those documents. (Pet. App. C-27.) Given that the Sixth Circuit agreed with petitioners about the scope of the statutory provision, yet dismissed their claims on other grounds, this petition obviously presents no opportunity for this Court to consider the scope of § 104(b)(4) of ERISA.

Likewise, petitioners allege an "abundance of inconsistent and contradictory decisions" over how precisely a plan participant must request documents. (Pet. at 44-46.) But, whatever rule other courts may

apply—and there is no indication from the cases cited in the petition that any inconsistency exists—the Sixth Circuit has been as generous to plaintiffs as is possible. Under *Bartling*, a plan administrator must produce a document so long as he "knew or should have known" that it fell within the participant's request; it is not necessary to request a document "by name rather than by description." *Bartling*, 29 F.3d at 1071. Yet even with the benefit of that favorable rule—which the panel expressly acknowledged—the court described petitioners' claims as "meritless." (Pet. App. C-27.) Again, therefore, this petition does not present an appropriate vehicle for this Court to consider the requisite precision of document requests under § 104(b)(4) of ERISA, even if this Court were inclined to delve into that obscure issue.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted,

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