No. __-___

IN THE

Supreme Court of the United States

HALLIBURTON, INC.; HALLIBURTON RETIREMENT PLAN; and DRESSER INDUSTRIES, INC., CONSOLIDATED RETIREMENT PLAN,

Petitioners,

v.

KATHY JOY KIRKENDALL; WESLEY SNYDER; BARBARA CAYA; and BONNIE SETH, on behalf of themselves and others similarly situated,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit erred by holding, in accordance with the Seventh and Eleventh Circuits but in conflict with the Sixth, Eighth, and Tenth Circuits, that exhaustion of a plan's administrative remedies is *not* required before filing suit under the Employee Retirement Income Security Act ("ERISA") if the plan phrases its internal grievance procedures in permissive terms (*e.g.*, that employees "may" invoke administrative remedies).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners, who were Defendants-Appellees below, are Halliburton, Inc.; Halliburton Retirement Plan; and Dresser Industries, Inc., Consolidated Retirement Plan. Halliburton, Inc. is a publicly traded company, but is not aware of any corporation holding 10% or more of its stock based on the most recent filings made in accordance with § 13(d) or § 13(g) of the Securities and Exchange Act of 1934.

Respondents, who were Plaintiffs-Appellants below, are Kathy Joy Kirkendall; Wesley Snyder; Barbara Caya; and Bonnie Seth.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is published at 707 F.3d 173. The opinion of the district court (Pet. App. 24a) is not reported in the Federal Supplement but is available at 2011 BL 151864, as well as at 51 EBC 2197.

JURISDICTION

The Second Circuit entered judgment on January 29, 2013, and denied panel rehearing and rehearing en banc on April 8, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents are participants in the Halliburton Retirement Plan who filed a putative class action alleging that petitioners were violating ERISA, 29 U.S.C. § 1001 *et seq.*, by improperly calculating their pension benefits. None of the respondents pursued their claims through the internal claims procedure provided by the governing ERISA plan before filing suit. Nevertheless, the Second Circuit vacated the District Court's order dismissing the complaint for failure to exhaust internal plan remedies. The panel found that respondents could reasonably have believed that exhaustion was not required because the plan's claims procedure used the permissive word "may" in outlining the avenues open to aggrieved benefit claimants, supposedly suggesting that pursuit of those avenues was not mandatory.

1. Before 1987, respondents were employed by Dresser Industries and accrued retirement benefits under the Dresser Industries, Inc. Consolidated Retirement Plan (the "DICON Plan"). On January 1, 1987, Dresser Industries formed a new corporate entity, a partnership between itself and the Ingersoll Rand Company called the Dresser-Rand Company. *See* JA 19. In 1998, the Halliburton Company ("Halliburton") acquired Dresser Industries and became the sponsor of the DICON Plan. *See* JA 19-20. In 2000, Ingersoll purchased Dresser's interest in Dresser-Rand, leaving Ingersoll as the sole owner of Dresser-Rand. *See* JA 20. Halliburton continued to maintain the DICON Plan, and, on December 31, 2001, merged it into the Halliburton Retirement Plan ("Halliburton Plan" or "Plan"). *See* JA 20.

2. In accordance with ERISA, *see* 29 U.S.C. § 1133, the Halliburton Plan established a carefully crafted claims procedure through which participants could exhaust their administrative remedies. *See* JA 302-10. That claims procedure provides: "To file a benefit claim under the Plan, a Claimant must obtain from the Benefits Administrator the information and benefit claim forms, if any, provided for in the Plan and otherwise follow the procedures established … by the Committee or the Benefits Administrator for claiming Plan benefits." JA 303. In particular, to "request a Plan benefit," a participant must "fully complet[e] and submi[t]" the "benefit claim forms" provided by the Plan. JA 303. The procedure further provides that "the Claimant … may submit written comments relating to such claim to the Benefits Administrator coincident with the filing of the benefit claim form." JA 303.

If the claimant obtains an adverse decision, he "has the right to have [such determination] reviewed in accordance with" a specified appeals procedure. JA 305. To appeal the adverse benefit determination to the Halliburton Plan Committee, the claimant must submit a written request for review within 60 days, JA 305, after which time the claimant will obtain final notification of the benefit determination on review, JA 306.

3. In May 2007, respondents filed a putative class action against petitioners (the Halliburton Company, the Halliburton Retirement Plan, and the Dresser Industries, Inc. Consolidated Retirement Plan). *See* JA 9. Their basic allegation was that the Plan was improperly using the date of Halliburton's sale of its interest in the Dresser-Rand Company as the "termination date" for Dresser-Rand's employees (such as respondents). As a result, respondents were allegedly being deprived of "vesting service credit" for their service following that sale, implicating their eligibility for a subsidized early retirement benefit and thus reducing the pension benefits that would be owed to them upon their retirement. *See* JA 12.

As relevant here, the complaint asserted three counts. Count I sought a declaratory judgment. JA 13. Count II was characterized as a "Benefit Claim," alleging that respondents are entitled to have their pension benefits "redetermined" and "to be paid the difference between the correctly determined benefit and any benefit they have received from the Plan." JA 14. And another count alleged breach of fiduciary duty based on the same facts. JA 14. (Respondents also alleged violation of 29 U.S.C. §§ 1054(g) & 1058, but dismissal of that count was affirmed on appeal.)

4. Petitioners moved in the District Court for judgment on the pleadings, arguing that (i) the benefits claim should be dismissed for failure to exhaust plan remedies; (ii) the fiduciary claim was also unexhausted, as well as redundant of the benefits claim; and (iii) without either such claim, there was no cause of action to support any request for a declaratory judgment.

Respondents opposed the motion. On the issue of exhaustion, respondents submitted a declaration by the lead plaintiff, Kathy Joy Kirkendall. JA 319. It stated that Kirkendall had requested clarification of her benefits from a Halliburton employee, JA 328; she had even received a "retirement package" that included "forms and instructions for submitting a claim for benefits," Pet. App. 35a. But she did not contend that she had ever submitted that form. To the contrary, she "gave up," JA 329, and proceeded to court without filing an administrative claim.

5. Recognizing the longstanding rule that ERISA plaintiffs must "demonstrate that they have fully pursued the claims procedures prescribed by the relevant employee benefit plan prior to bringing suit," Pet. App. 32a, the District Court granted petitioners' motion. The court viewed Count II of respondents' complaint (labeled "Benefit Claim") as "squarely within the scope of relief available in a civil action authorized by ERISA" and, so, "clearly subject to the exhaustion requirement." Pet. App. 34a. "However, the complaint contains no factual allegations to indicate, or give rise to a reasonable inference, that any of the named plaintiffs have ever submitted a claim for benefits under the claims procedures established by the [Plan]." *Id.*

To the contrary, while respondents contended that Kirkendall (through counsel) had sent a letter to a Halliburton employee inquiring about her benefits, it was undisputed that she did not "actually submi[t] a claim for pension benefits that was processed by the Benefits Administrator or the Plan's Administration Committee in accordance with the Plan's Claims Procedures," much less "receiv[e] an adverse determination of her claim" and "reques[t] review of the administrator's determination." Pet. App. 35a. Likewise, Kirkendall's subsequent "request for retirement information" was just that—not "an application for pension benefits in accordance with the Fund's Claims Procedures." *Id.*

Accordingly, the District Court found "no genuine issue regarding whether Ms. Kirkendall, or any of the named plaintiffs, followed the Claims Procedures specific in the Plan," notwithstanding that they were "fully aware of the Plan's formal application and appeals process." Pet. App. 37a. The court therefore dismissed Count II. Pet. App. 38a.

The District Court also dismissed the fiduciary-breach count of respondents' complaint, for the same reasons. Pet. App. 41a. "When the facts alleged do not present a breach of fiduciary duty claim that is independent of a claim for benefits"—as was true here—"the exhaustion doctrine still applies." Pet. App. 40a. And, without viable claims for benefits or breach of fiduciary duty, respondents had no legal basis for declaratory relief. *See* Pet. App. 46a.[1]

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[1] The District Court also dismissed as a matter of the law the claims under 29 U.S.C. §§ 1054(g) & 1058. *See* Pet. App. 41a-46a.

6. On appeal, respondents renewed their argument that Kirkendall had "substantially exhausted" internal plan remedies through her letter for clarification. They argued that proceeding via the standard procedure set forth in the Plan's claims procedure was not necessary or appropriate, because that process was supposedly for claims for *present* benefits, whereas Kirkendall sought benefits that would not be available until "she actually retired."

Halliburton responded that the claims procedure was not so limited. Further, to the extent that Kirkendall believed her benefit claim deviated from the traditional, the claims procedure "entitled [her] to submit written comments relating to such claim to the benefits administrator coincident with the filing of the benefit claim form." Pet. App. 14a; JA 303.

7. The Second Circuit vacated and remanded. The panel found the claims procedure ambiguous, in that it calls for participants to submit the prescribed forms only "[t]o file a *benefit claim* under the Plan"; the court noted that the term "benefit claim" could be understood to "apply only when a plan participant is demanding benefits at the time when she is filing the claim." Pet. App. 13a (emphasis added). The panel acknowledged that Kirkendall could at least have filed the claim form together with explanatory "written comments," which the Plan's procedure authorized her to submit. But the court ruled that because the claims procedure said only that one "*may*" submit such comments, "it does not suggest that those seeking a determination of future benefits *must* avail themselves of this procedure." Pet. App. 14a (emphases added).

The panel therefore held that respondents could have "reasonably interpret[ed] the plan terms not to *require* exhaustion" (Pet. App. 16a (emphasis added)), and that exhaustion should accordingly be excused. To support that holding, the court cited two cases: *Watts v. BellSouth Telecommunications, Inc.*, 316 F.3d 1203 (11th Cir. 2003), and *Gallegos v. Mount Sinai Medical Center*, 210 F.3d 803 (7th Cir. 2000). Noting that application of this exception to the exhaustion requirement would "encourag[e] employers and plan administrators to clarify their plan terms," the court declared that it was "join[ing] with the Seventh and Eleventh Circuits in holding that plan participants will not be required to exhaust administrative remedies where they reasonably interpret the plan terms not to *require* exhaustion and do not exhaust their administrative remedies as a result." Pet. App. 16a (emphasis added).

8. Petitioners sought panel and en banc rehearing. They pointed out that other Circuits had squarely rejected the same argument—namely, that "permissive" language in a plan's claims procedure entitles participants to bypass those procedures. *See Hill v. Blue Cross & Blue Shield of Mich.*, 409 F.3d 710, 721-22 (6th Cir. 2005); *Baxter v. C.A. Muer Corp.*, 941 F.2d 451 (6th Cir. 1991) (per curiam); *Wert v. Liberty Life Assurance Co. of Boston, Inc.*, 447 F.3d 1060 (8th Cir. 2006); *Kinkead v. Sw. Bell Corp. Sickness & Accident Disability Benefit Plan*, 111 F.3d 67 (8th Cir. 1997). Indeed, the Second Circuit itself had previously rejected that argument, albeit in an unpublished opinion. *See Greifenberger v. Hartford Life Ins. Co.*, 131 F. App'x. 756 (2d Cir. 2005). Nevertheless, the Second Circuit denied the rehearing petition. *See* Pet. App. 48a.

REASONS FOR GRANTING THE PETITION

All of the federal Courts of Appeals agree that, before a participant or beneficiary may bring suit for benefits under an ERISA plan, he generally must exhaust the administrative remedies provided by the plan. *See Terry v. Bayer Corp.*, 145 F.3d 28, 40 (1st Cir. 1998); *Kennedy v. Empire Blue Cross & Blue Shield*, 989 F.2d 588, 594 (2d Cir. 1993); *Weldon v. Kraft, Inc.*, 896 F.2d 793, 800 (3d Cir. 1990); *Hickey v. Digital Equip. Corp.*, 43 F.3d 941, 945 (4th Cir. 1995); *Bourgeois v. Pension Plan for the Employees of Santa Fe Int'l Corps.*, 215 F.3d 475, 479 (5th Cir. 2000); *Weiner v. Klais & Co.*, 108 F.3d 86, 90 (6th Cir. 1997); *Powell v. AT&T Commc'ns, Inc.*, 938 F.2d 823, 826 (7th Cir. 1991); *Galman v. Prudential Ins. Co. of Am.*, 254 F.3d 768, 770 (8th Cir. 2001); *Mack v. Kuckenmeister*, 619 F.3d 1010, 1020 (9th Cir. 2010); *Held v. Mfrs. Hanover Leasing Corp.*, 912 F.2d 1197, 1206 (10th Cir. 1990); *Springer v. Wal-Mart Assocs.' Group Health Plan*, 908 F.2d 897, 899 (11th Cir. 1990); *Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 431 (D.C. Cir. 1994).

This exhaustion requirement serves a number of salutary purposes. Forcing resort to the internal claims procedures that Congress required plans to establish, *see* 29 U.S.C. § 1133, may moot the need for judicial intervention, "because the plan's own procedures will resolve many claims." *Makar v. Health Care Corp. of the Mid-Atl.*, 872 F.2d 80, 83 (4th Cir. 1989). Even if internal review does not resolve a claim, it causes the plan to "assemble a factual record that will assist the court reviewing the administrators' actions." *Commc'ns Workers*, 40 F.3d at 432. And exhaustion enables plan administrators

to apply their expertise to the "broad fiduciary rights and responsibilities" that ERISA grants them, *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980), thus allowing courts to apply the "deferential standard of review" that this Court has held to be "appropriate when a trustee exercises discretionary powers," including (when such power is granted) "to construe disputed or doubtful terms," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989).

Although the lower courts broadly agree on the general requirement of ERISA exhaustion and on its important purposes, the Circuits have divided over whether the requirement turns on the language used by the plan in setting forth its internal avenues for claiming and reviewing benefit determinations. The Second Circuit below held that exhaustion should be excused where a participant could reasonably have believed, based on the plan's use of the permissive word "may," that exhaustion was not mandatory. In so holding, the panel cited the Seventh and Eleventh Circuits, each of which has adopted the same rule. But the Sixth, Eighth, and Tenth Circuits have squarely rejected that position, holding instead that plaintiffs must exhaust any *available* remedies, whether or not the plan suggests they are optional.

Consideration of the purposes of exhaustion—and Congress's purposes in requiring plans to create internal claims procedures—shows that the latter courts are correct, and the Second, Seventh, and Eleventh Circuits are wrong. In the ERISA context, exhaustion is not a *contractual* limitation on seeking judicial review (in which case the permissive versus mandatory nature of the plan terms might matter). Rather, it is a *judicially imposed* requirement that

stems from the statutory text and purpose. Where internal plan remedies are *available*, it behooves courts to require plaintiffs to pursue them, because such pursuit makes the courts' job easier (where it does not solve the problem altogether) and preserves the discretion that Congress intended administrators to retain. None of that has anything to do with how the plan phrases its claim procedures. Indeed, this Court has recognized as much in analogous contexts.

For the same reasons, this issue is important and warrants this Court's attention. The excuse authorized by the Second, Seventh, and Eleventh Circuits—which could be invoked in a large number of cases, as it is standard language in many plans that participants "may" submit benefit claims or "may" seek administrative review if such claims are denied—threatens to undermine ERISA's exhaustion requirement, as well as the related principle of deference to plan administrators. It will lead to unnecessary litigation, inefficiency in judicial administration, and an intrusion into the role of plan administrators as courts are forced to review plan construction and application *de novo* rather than for abuse of discretion. This case is a perfect example: Because respondents never asked the administrators to resolve her claim, the District Court will be left on remand to figure out what that claim *is*, to assemble a factual record, and to construe the plan terms in the first instance. That is not the role that Congress intended federal courts to play in ERISA disputes.

In sum, this Court should grant certiorari to resolve the disagreement between the Circuits and to restore the proper, intended balance between federal courts and ERISA plan administrators.

I. THE CIRCUITS ARE DIVIDED OVER WHETHER PERMISSIVE LANGUAGE IN A PLAN'S INTERNAL CLAIMS PROCEDURE EXCUSES FAILURE TO EXHAUST.

The general rule in all Circuits is that "an ERISA action may not be brought in federal court until administrative remedies are exhausted." *Burke v. PriceWaterhouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76, 79 (2d Cir. 2009) (per curiam). But the Circuits have now divided, 3–3, over whether one must exhaust all administrative remedies that are *available* or only those remedies that the plan itself dictates as *mandatory*. Put another way, may a plaintiff bypass administrative review and bring an ERISA suit directly in federal court if he reasonably believes that, under the terms of the applicable plan, exhaustion of remedies is optional?

A. In *Hill v. Blue Cross and Blue Shield*, the Sixth Circuit considered, in relevant part, ERISA claims alleging that the defendant had "improperly denied Plaintiffs' claims for reimbursement of emergency-medical-treatment expenses." 409 F.3d at 719. Although one of the named plaintiffs alleged exhaustion, the others did not contend that they "utilized in any way the administrative-review procedures established by the Program documents." *Id.* at 721. Rather, these plaintiffs argued "that the permissive language used in establishing the administrative-review procedures means that [they] are not required to exhaust such administrative remedies." *Id.* Indeed, the relevant plan documents provided that a participant "may" request review of a disputed claim. *Id.* at 720.

The panel rejected the argument: "[P]ermissive language in an administrative-review provision does not entitle a plaintiff to forego such administrative review and instead file suit in federal court." *Id.* at 721. The court thus reaffirmed an earlier decision, *Baxter v. C.A. Muer Corp.*, in which it had similarly held that "[t]he fact that permissive language was used in framing the administrative review provision makes no difference." 941 F.2d at 454.

Eighth Circuit law is in accord. In *Kinkead v. Southwestern Bell Corp. Sickness and Accident Disability Benefit Plan*, the plaintiff argued that the plans she was suing "create[d] an optional review procedure, not a procedure that claimants must exhaust." 111 F.3d at 69. The court was not convinced. Because "benefit plans are required by law to include a claim review procedure" and because abiding by such procedures "furthers important ERISA purposes," plaintiffs must exhaust "*any* plan claim review procedure" that meets regulatory requirements; and any such procedure "will trigger the judicially imposed duty to exhaust." *Id.* at 70.

The Eighth Circuit reaffirmed and expanded on *Kinkead* in 2006, in *Wert v. Liberty Life Assurance*. The appellant contended that "certain plan language is needed to trigger an exhaustion requirement." 447 F.3d at 1063. The court adhered to *Kinkead*: The rationale "behind the exhaustion requirement"—namely, the "sound policy of not wanting courts to review plan administrators' decisions … in the absence of complete records"—applies even if the plan "uses permissive language to describe a review procedure." *Id.* at 1066. The court thus held that such language does not excuse failure to exhaust.

The Tenth Circuit, too, has reached the same conclusion. In *Whitehead v. Oklahoma Gas and Electric Co.*, 187 F.3d 1184 (10th Cir. 1999), one of the ERISA plaintiffs had "never submitted a claim of any kind to the Retirement Committee," and thus had not exhausted his administrative remedies. *Id.* at 1190. He argued, however, that the plan "did not require exhaustion." *Id.* The panel rejected that contention: "Because the exhaustion requirement is not rooted in the particular language of an ERISA plan, Appellants cannot rely on the permissive language in [the applicable plan description] to excuse a failure to exhaust." *Id.*

B. Standing in contrast to those Sixth, Eighth, and Tenth Circuit precedents is *Gallegos v. Mount Sinai Medical Center*, a Seventh Circuit decision. In that case, the plaintiff sued the plan under ERISA for terminating her disability benefits—but did not seek review of that determination through the plan's administrative review channels. On appeal, she defended her conduct by pointing out that "a plain reading" of the summary plan description "conveys to the average participant that UNUM's administrative review procedure is wholly voluntary and does not affect the ability of a participant to pursue relief through the federal court system." 210 F.3d at 808. In particular, the plan used terms like "you *may* have your claim reviewed" and "you *may* appeal" a denial of benefits. *Id.* at 810 (emphases added).

The Seventh Circuit agreed. In its view, such permissive language in describing the plan's review procedures "indicate[s] that a plan participant has the opportunity to participate in a voluntary, rather than mandatory, review procedure." *Id.* Enforcing

the exhaustion requirement on such facts would, said the Seventh Circuit, allow a plan "to mislead a claimant into procedurally defaulting her opportunity for administrative review." *Id.* at 809. Accordingly, the court ruled that estoppel principles would prevent a defendant from invoking failure to exhaust in such a case, at least if the plaintiff could show reliance on the allegedly misleading permissive language in the plan. *Id.* at 810-11.

Following suit, the Eleventh Circuit in *Watts v. BellSouth Telecommunications* held that an ERISA claim "ought not to be barred by the doctrine of exhaustion if the reason the claimant failed to exhaust is that she reasonably believed, based upon what the summary plan description said, that she was not required to exhaust her administrative remedies before filing a lawsuit." 316 F.3d at 1207. The court concluded that the plaintiff in *Watts* had reasonably so construed the plan at issue, because the plan "tells participants that they 'may use' the administrative appeal procedure if their claim is denied and they 'wish to appeal.'" *Id.* at 1208. The plan also referenced ERISA's cause of action to sue in federal court, but did not clarify that exhaustion of the internal remedies was a "prerequisite" to such a suit. *Id.* As such, the court ruled that the plan could not rely on the plaintiff's failure to satisfy that prerequisite as a basis for dismissal of the claim.

In so holding, the Eleventh Circuit observed that the Seventh Circuit in *Gallegos* "reached essentially the same rule," albeit "draped … in the fabric of estoppel" rather than as simply "an exception" to the judicially imposed exhaustion rule. *Id.* at 1209-10.

C. In its decision below, the Second Circuit cited *Gallegos* and *Watts*, observing that "[t]wo of our sister circuits have held that, where a plaintiff reasonably interprets the plan terms not to *require* exhaustion and, as a result, does not exhaust her administrative remedies, the case may proceed in federal court. Pet. App. 14a (emphasis added). That principle was applicable in this case, the panel held, because although the Halliburton Plan "entitled Kirkendall to submit written comments relating to such claim to the benefits administrator coincident with the filing of the benefit claim form"—thus resolving the concern that her claim was not a "run-of-the-mill benefits claim" given that it related to *future* benefits rather than present ones—the Plan's claims procedure "does not suggest that those seeking a determination of future benefits *must* avail themselves of this procedure." *Id.* (emphasis added). Rather, the claims procedure stated that applicants "may" submit such comments in connection with their benefit claims. *Id.*

The Second Circuit panel ruled that excusing exhaustion under these circumstances would "have the salutary effect of encouraging employers and plan administrators to clarify their plan terms" and would thereby "lea[d] more employees to pursue their benefits claims through their plan's claims procedure in the first instance." Pet. App. 15a. The court accordingly "join[ed] the Seventh and Eleventh Circuits" and vacated the District Court's order that had dismissed the benefit and fiduciary claims for failure to exhaust plan remedies. *See* Pet. App. 16a, 17a. (As a result, the dismissal of the declaratory relief count was also vacated. Pet App. 17a.)

Although the opinion below did not mention that other Circuits disagreed with the rule of *Gallegos* and *Watts*, petitioners filed a rehearing petition bringing that contrary precedent to its attention. The rehearing petition also cited *Greifenberger v. Hartford Life Ins. Co.*, an unpublished Second Circuit decision that had held—notwithstanding its express recognition that *Gallegos* was to the contrary—that "the inclusion of the term 'may' in [an ERISA] policy cannot excuse [the claimant] from the duty to exhaust administrative review before filing suit under ERISA." 131 F. App'x. at 758. The Second Circuit nevertheless denied rehearing.

* * *

There is thus a square, 3–3 split among the Circuits on the question presented by this petition, with the Sixth, Eighth, and Tenth Circuits requiring exhaustion regardless of the plan's terms, and the Second, Seventh, and Eleventh Circuits allowing an excuse to exhaustion if the plan terms suggest that administrative remedies are optional. This Court's intervention is needed to resolve this conflict.

II. PERMISSIVE LANGUAGE SHOULD NOT EXCUSE FAILURE TO EXHAUST, BECAUSE ERISA'S EXHAUSTION REQUIREMENT IS BASED ON IMPORTANT STATUTORY AND JUDICIAL POLICIES, NOT CONTRACT.

On the merits, the Circuits excusing exhaustion based on the permissive nature of the plan terms are wrong. That exception conflicts with the purposes of the exhaustion requirement and with this Court's analysis in analogous contexts. And the concerns that have motivated the exception do not support it.

A. As all of the Circuits have recognized, the requirement to exhaust administrative remedies in the ERISA context does not arise from contractual obligation. Rather, it stems from statutory inference (because ERISA mandates that plans establish claim procedures, *see* 29 U.S.C. § 1133) and considerations of judicial efficiency. In language quoted favorably by the Second Circuit, the Fifth Circuit described the purposes of ERISA exhaustion as follows:

> [T]o: (1) uphold Congress' desire that ERISA trustees be responsible for their actions, not the federal courts; (2) provide a sufficiently clear record of administrative action if litigation should ensue; and (3) assure that any judicial review of fiduciary action (or inaction) is made under the arbitrary and capricious standard, not *de novo*.

Kennedy, 989 F.2d at 594 (quoting *Denton v. First Nat'l Bank of Waco, Tex.*, 765 F.2d 1295, 1300 (5th Cir. 1985). In another oft-repeated formulation, ERISA exhaustion is designed to "help reduce the number of frivolous lawsuits under ERISA; to promote the consistent treatment of claims for benefits; to provide a nonadversarial method of claims settlement; and to minimize the costs of claims settlement for all concerned." *Amato*, 618 F.2d at 567. The courts appreciate that ERISA plan administrators are better positioned to construe and apply plan terms in the first instance, given their considerable familiarity with the plan, its history, and its operation. *See, e.g.*, *Commc'n Workers*, 40 F.3d at 432 (recognizing that exhaustion allows plan administrators "to apply their expertise").

Critically, none of these policies turns on whether the plan makes the internal review avenues mandatory. Rather, so long as those avenues *exist*, the federal courts benefit from—and Congress's objectives are furthered by—requiring participants to pursue them before bringing suit. *See Wert*, 447 F.3d at 1066 (explaining that "the rationale behind the exhaustion requirement," which "stems from the sound policy of not wanting courts to review plan administrators' decisions based on initial, often succinct denial letters in the absence of complete records," applies even if plan "uses permissive language to describe a review procedure").

In other words, federal policy directs that plan participants should exhaust their remedies, even if plans are indifferent or ambivalent on the issue. It therefore makes little sense to hinge the requirement to exhaust on what the plan happens to say about it.

B. While this Court has not addressed the exhaustion requirement in the ERISA context, it has imposed or recognized similar prerequisites to suit in other statutory contexts. And, in certain such cases, it has also made clear that the particular language establishing the alternative remedial pathway is immaterial to the scope of the exhaustion rule.

For example, "federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress," before bringing suit in federal court under the Labor Management Relations Act ("LMRA"). *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965). (Indeed, because ERISA was modeled after the LMRA, many courts originally

used that fact as support for imposing an exhaustion requirement on ERISA plaintiffs. *E.g.*, *Amato*, 618 F.2d at 567.) In *Republic Steel*, the Court noted that the collective bargaining agreement provided that employees "may" discuss their complaints with their foremen. 379 U.S. at 658. But the contract's "[u]se of the permissive 'may,'" said the Court, did not "reveal a clear understanding … that individual employees … are free to avoid the contract procedure and its time limitations in favor of a judicial suit." *Id.* at 658-59. To boot: "Any doubts must be resolved against such an interpretation." *Id.* at 659. *Accord Commc'ns Workers*, 40 F.3d at 435 (holding that, even if use of the word 'may' in grievance procedure were "ambiguous," "federal labor law still would require arbitration in this case").

The notion that the federal courts might prefer exhaustion, whatever the intent (or even preference) of the third party that established the alternative remedy, is similarly manifested in the federal habeas context. This Court has long required that "state remedies must be exhausted except in unusual circumstances" before a prisoner may seek federal relief. *Rose v. Lundy*, 455 U.S. 509, 515 (1982). Quite like the ERISA exhaustion rule, the habeas rule is designed to ensure a complete record for the federal court; to minimize the role of federal courts in state matters; and to allow for a deferential standard of review to the state court decisions. *See Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam). Tellingly, this Court held in *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), that state prisoners must exhaust even *discretionary* appeals within the state system. *Id.* at 845. Even if exhausting such appellate remedies were to place an "unwelcome"

burden on state courts that "do not wish to have the opportunity to review constitutional claims before those claims are presented to a federal habeas court," requiring such exhaustion nonetheless serves the federal interest in giving those state courts "the opportunity to resolve constitutional errors in the first instance." *Id.* at 846-47. The same is true here: Whatever *plans* may say—or even prefer—requiring exhaustion serves important *federal* interests.

C. The opinion below, like the Seventh and Eleventh Circuits, was primarily concerned not with furthering the purposes of the exhaustion requirement, but with the inequity of "misleading" plan participants about their rights. *See* Pet. App. 16a ("ERISA seeks to avoid saddling plaintiffs … with the burdens and procedural delays imposed by inartfully drafted plan terms."); *Watts*, 316 F.3d at 1208 ("[T]o the average plan participant, … there is nothing obvious about it."); *Gallegos*, 210 F.3d at 809-10 ("Allowing [a plan] to mislead a claimant into procedurally defaulting her opportunity for administrative review would contravene the purpose behind requiring administrative exhaustion."). That concern is overstated, for two reasons.

First, use of the permissive term "may" to describe an avenue for internal review is not at all misleading. When a plan says that a participant "may" request plan benefits, or "may" appeal an adverse determination, the plan is not making any representations about the prerequisites to federal litigation. Rather, it is simply apprising participants of their options. The point is that there is no *duty* or *obligation*, from the plan's perspective, to file such claims or appeals. To be sure, failing to exercise the

permissive rights may have consequences, including that federal litigation would be premature. But that hardly means that the plan is somehow tricking participants into defaulting. As one district court explained: "While this review process is optional under the Plan, should a beneficiary or legal representative opt to file suit in federal court based on the denial of benefits, this provision becomes mandatory under law." *SunTrust Bank v. Aetna Life Ins. Co.*, 251 F. Supp. 2d 1282, 1288 (E.D. Va. 2003).

Second, the equitable concern appears to be partly motivated by the belief that, if the claim is dismissed for failure to exhaust, it would be too late for the claimant to pursue the internal remedies and return to court—leaving him or her without *any* relief. But, absent a prior clear repudiation of benefits by the plan, ERISA's statute of limitations on benefit claims generally runs from the plan's final denial of the claim—*i.e.*, from the final adverse administrative decision. *See, e.g.*, *Stevens v. Employer-Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444, 451 (6th Cir. 1992). Thus, dismissal for failure to exhaust would allow the plaintiff to return to the plan and exhaust remedies, and only then would the limitations clock begin to run. Nor would much time be lost during that hiccup, because exhaustion issues can ordinarily be resolved on the pleadings—or, as here, on a motion for judgment on the pleadings converted to summary judgment under Federal Rule 12(c). *See, e.g.*, *Morillo v. 1199 SEIU Benefit & Pension Funds*, 783 F. Supp. 2d 487, 489-91, 494 (S.D.N.Y. 2011).

In some cases, the plan itself imposes a statute of limitations that restricts the time within which to

seek administrative relief, or provides that the statute of limitations on an ERISA claim against the plan will begin to run at some point *before* the final administrative denial of the claim. (Indeed, this Court recently granted certiorari to consider how to treat such provisions. *See Heimeshoff v. Hartford Life & Accident Ins. Co.* (No. 12-729).) But if it were unfair, in a particular case, to apply such a plan provision given the plan's lack of clarity on the relationship between administrative remedies and federal litigation, courts might well apply equitable tolling doctrines. *See Viti v. Guardian Life Ins. Co. of Am.*, 817 F. Supp. 2d 214, 228 (S.D.N.Y. 2011) ("Various district courts in this Circuit have concluded a period for exhausting administrative remedies as set forth in a plan document can be equitably tolled."); *see also US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1548-51 (2013) (holding that equitable principles can be applied in another ERISA context). There is, in other words, no need to categorically excuse exhaustion in order to address perceived equitable concerns.

III. THE CONTRARY RULE THREATENS TO UNDERMINE ERISA'S EXHAUSTION RULE AND ITS SALUTARY PURPOSES.

The question presented by this petition is of substantial importance. Not only does the excuse to exhaustion that the Second, Seventh, and Eleventh Circuits have adopted undermine the important purposes of the exhaustion requirement—including the principle of deference to responsible and expert plan administrators—but it threatens to do so in many cases, and in a fashion that cannot be remedied without this Court's intervention.

A. As already discussed, ERISA's exhaustion requirement plays an important role in policing the boundaries between plan administrators and federal courts, and serves the interests of both. It is one of the key "safeguards for plan administrators," *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 258 (2008) (Roberts, C.J., concurring in part and in the judgment), and also enables the factual record to be created and the disputed issues to be crystallized.

But the decision below—and the decisions of the Circuits that the panel below followed—threaten to make adherence to administrative claims procedures the exception, rather than the rule, in the ERISA context. To avoid administrative claims procedures, claimants need only identify an ambiguity in the plan's description of the administrative claims procedure, and purport to rely on that ambiguity when proceeding directly to court. Each requirement sets a very low bar that plan participants can easily satisfy, thereby bypassing exhaustion—and thus also depriving courts of their closed record for review and threatening the deference administrators are due.

Indeed, not only will the *holding* below deprive plan administrators of deference in particular cases, but its *rationale* undermines the very principle that plan administrators, given their special expertise and familiarity with the plan, are empowered to resolve any ambiguities in a plan's terms (subject only to review for abuse of discretion). *See Firestone Tire*, 489 U.S. at 111. After all, the basis for construing "may" to indicate that internal remedies are optional is that such term is "ambiguous" and a participant could "reasonably interpret" it "not to require her to file a benefits claim" or appeal. Pet

App. 16a; *see also Watts*, 316 F.3d at 1208 (finding interpretation of permissive terms "as permitting [participant] to sue even if she did not exhaust her administrative appeal remedies" to be "reasonable"). The exception to exhaustion on these facts thus rests on an implied grant of deference—not to the plan administrator, but to its *participants*. That is backwards. Judicial adoption of this exception thus also has broader implications for the jurisprudence surrounding deference to ERISA administrators. *See Conkright v. Frommert*, 130 S. Ct. 1640, 1646-47 (2010) (stating that "*Firestone* … set out a broad standard of deference without any suggestion that the standard was susceptible to ad hoc exceptions like the one adopted by the Court of Appeals").

B. This case is a perfect example of the difficulties that courts will face if exhaustion is excused on facts like these. Because there has been no administrative review of respondents' claims, all that the District Court would be left with on remand is the allegation that, "since about July, 2002 Halliburton has caused the administrators of the Plan to calculate benefits for members of the Class using March 1, 2000 as the date of termination." JA 12. There is nothing in the record to show (i) that the plan administrator has taken that position; (ii) its rationale for doing so; or (iii) how any individual's benefits would be affected by it. Nor has there been any determination by the plan administrator of how best to interpret and apply the plan terms—which are not even quoted in the short complaint—and so the District Court may have to construe those terms *de novo*. By contrast, if the court simply required respondents, like all other ERISA plaintiffs, to proceed *first* through the Plan's administrative

review channels, the administrator would have the opportunity to create a record, apply its expertise and discretion to the problem at hand, and construct a solution that could then be reviewed for abuse of discretion. *That* is how ERISA is supposed to work.

C. It is worth adding that many plans appear to use permissive terms in their claims procedures, perhaps because (as discussed above) it would be even more misleading to say that a claimant "must" file a claim form or "must" appeal from an adverse determination. District courts thus fairly routinely consider—and, in the Sixth, Eighth, and Tenth Circuits, reject—arguments like the one adopted by the court below. *See, e.g.*, *Turley v. Coventry Health Care of Iowa, Inc.*, 590 F. Supp. 2d 1126, 1132-33 (S.D. Iowa 2008) ("[T]he Eighth Circuit has determined in the ERISA context that administrative exhaustion requirements are not waived by the use of language such as 'may request a review.'"); *Keller v. Albertsons, Inc. Employees' Disability Benefits Plan*, 589 F. Supp. 2d 1205, 1209 (C.D. Cal. 2008) (excusing exhaustion on authority of *Watts*); *Moore v. Fox Chevrolet, Oldsmobile, Cadillac, Inc.*, No. 5:06-CV-42, 2007 WL 925721, at *4 (N.D.N.Y. Mar. 26, 2007) ("Concerning Plaintiffs' assertion that the Plan's permissive language does not require them to exhaust the Plan's review procedures, the Court finds that Plaintiffs were not excused from the exhaustion requirement ...."); *Goewert v. Hartford Life & Accident Ins. Co.*, 442 F. Supp. 2d 724, 728 (E.D. Mo. 2006) ("Similar to the plan in *Wert*, the Plan here describes the review procedure in permissive terms."); *Spivey v. Southern Co.*, 427 F. Supp. 2d 1144, 1156 (N.D. Ga. 2006) ("Plaintiff's final contention is that exhaustion ... is

excused pursuant to the exception recently articulated by the Eleventh Circuit in *Watts*."); *SunTrust Bank*, 251 F. Supp. 2d at 1288 ("SunTrust, however, also argues that the exhaustion requirement has no impact on its claims [because] … the internal review procedure provided by the Plan was not mandatory …."); *Jones v. State Wide Aluminum, Inc.*, 246 F. Supp. 2d 1018, 1024 (N.D. Ind. 2003) ("The gist of [the] second argument is that the Plan's permissive language does not inform the average person that she must file an internal appeal so as not to lose the right to file suit in federal court."); *Guerrero v. Lumbermen's Mut. Cas. Co.*, 174 F. Supp. 2d 1218, 1222 (D. Kan. 2001) ("In the Tenth Circuit, a plaintiff cannot rely on such permissive language to excuse the failure to exhaust administrative remedies.").

D. One might think that it would be easy for plans to avoid the *Watts-Gallegos-Halliburton* line of authority by just amending any permissive language out of the plan. As a practical matter, though, plan sponsors cannot be expected to monitor the ERISA decisions of every court across the country and implement amendments in response to each development. Indeed, amending the terms of an ERISA plan is not a simple process. It can be time-consuming and expensive, and third-party approval (such as from unions) can be required. As a result, ERISA plans are infrequently amended—a fact corroborated by the continued arising of cases involving internal plan remedies cast using permissive language, even after this issue was flagged by the Courts of Appeals. *See supra*. Moreover, even if amendment were easy for plans, it would also be easy for plaintiffs to discover other,

latent "ambiguities" in the plan's claims procedure that could be invoked as a basis for excusing exhaustion—especially if deference in construing the scope and parameters of those remedies were, as here but contrary to basic ERISA principles, granted to the plaintiffs.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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