No. 12-729

IN THE
Supreme Court of the United States

JULIE HEIMESHOFF,

Petitioner,

v.

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

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents ask the Court to "imagine" a one-year statute of limitations for ERISA denial-of-benefit claims running from the date of final denial. Resp. Br. 1. They assert that such a statute of limitations would be valid and ask whether their three-year statute of limitations provision—which starts the clock running not from final denial but from a point much earlier, when "proof of loss" is due—should be viewed any differently. The answer, in a word, is yes.

A one-year statute of limitations that starts running when a claim can be filed in court complies with basic, longstanding federal limitations principles; is clear and concrete from the outset; encourages participation in and deters manipulation of ERISA's internal benefits resolution process; and avoids enmeshing the federal courts in an endless series of post hoc "case-specific" adjudications over whether the application of a "proof-of-loss" accrual date is "reasonable[]" or barred by "traditional equitable principles," including "estoppel and waiver, [and] equitable tolling." *Id.* at 14, 48-49. Respondents' limitations provision does none of these things. As the United States put it, Respondents' provision "is inconsistent with ERISA's two-tiered remedial scheme," and their "ad hoc approach" to enforcing it fails to "furnish the clear, predictable rules necessary to avoid distorting the parties' incentives." U.S. Br. 7.

In her opening brief, Petitioner asked why any player in ERISA—participants, plan fiduciaries, or courts—would want such a provision. Respondents

answered this question with a shrug, offering no reason other than that "proof-of-loss" accrual provisions are "ubiquitous" in state insurance contexts. Resp. Br. 16. That answer is telling: State insurance contexts look nothing like ERISA precisely because they do not require claimants to exhaust a mandatory internal resolution process before filing suit in court. Respondents cannot escape the fact that, in every other context involving mandatory exhaustion, the statute of limitations does not begin to run until a claim is ripe for judicial review. ERISA is no different.

To be sure, ERISA plans are free to implement a limitations provision that "assures fairness to defendants by preventing fraudulent and stale claims," *id.* at 5, but that right may not come at the expense of ERISA's comprehensive remedial scheme or the standard federal rule—incorporated into ERISA for denial-of-benefit claims—that a limitations period may not begin running until the claim can be filed in court. Nor does it need to. The judgment should be reversed.

ARGUMENT

I. Respondents' Accrual Provision Violates the Longstanding Rule that, Unless Congress Says Otherwise, a Statute of Limitations Cannot Start Running Before a Claim Can Be Filed in Court.

A. Respondents have no real answer to the fact that, under longstanding precedent of this Court, the limitations period for a federal statutory cause of action cannot "commence to run on one day while the right to sue ripen[s] on a later day . . . unless *the*

statute indicates otherwise." *TRW Inc. v. Andrews*, 534 U.S. 19, 34 n.6 (2001) (emphasis added). *See also Wallace v. Kato*, 549 U.S. 384, 388 (2007); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 200-01 (1997). Because ERISA lacks any accrual provision with regard to denial-of-benefit claims under § 502(a)(1)(B), the statute does not "indicate[] otherwise." *TRW Inc.*, 534 U.S. at 34 n.6. As the United States explains, Congress's silence indicates that it expected this well-established accrual rule to apply. U.S. Br. 6.

Respondents acknowledge that this rule exists, but argue that it is merely a "default rule of statutory interpretation" that does not prohibit a contracting party from specifying an accrual date for a federal cause of action that precedes the date the claim could be filed in court. Resp. Br. 28. Respondents' best cases, however, prove the opposite. Both *Dodd v. United States*, 545 U.S. 353 (2005), and *McMahon v. United States*, 342 U.S. 25 (1951), involved federal statutes in which *Congress*—not a contracting party—chose to depart from the standard rule by explicitly establishing an accrual date that precedes the date that a federal claim may be filed in court. *See Dodd*, 545 U.S. at 358-60 (noting that the "plain text" of the statute "clearly specifies" that the limitations period on a federal habeas claim "begins to run" before some plaintiffs could file their claims in court); *McMahon*, 342 U.S. at 27 (holding that, based on the "language used in the Suits in Admiralty Act," the "period of limitation is to be computed from the date of the injury").

Respondents see these cases as proof that their limitations provision is appropriate. *See* Resp. Br. 33 (arguing that their limitations provision is "like the one in *Dodd*" because it sets the clock running "at a time other than the cause of action's 'accrual'"). But that gets it exactly backward. As we and the United States explained (Pet'r Br. 27-28; U.S. Br. 13-14), these cases confirm that only *Congress* can override the general accrual rule, by saying so explicitly in the statute itself. Had Congress said that a limitations period for § 502(a)(1)(B) denial-of-benefits claims could commence at a point before a plaintiff could file that claim in court (as it has for § 502(a)(2) claims, *see* Pet'r Br. 28), Respondents' accrual provision would not offend the statute. "[A]bsen[t] . . . any such indication," however, the limitations period does not begin to run until a plaintiff can file her claim in court. *Reiter v. Cooper*, 507 U.S. 258, 267 (1993).[1]

Respondents fare no better in claiming that this rule applies only to statutes that actually use the word "accrues," Resp. Br. 28, or where a "statutory limitations provision" is "ambiguous," *id.* at 30. There are myriad other statutory schemes lacking either feature in which the limitations period on a federal claim does not begin to run until the claim is ripe for judicial review. *See*, *e.g.*, *Wallace*, 549 U.S. at

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[1] Even Respondents' state cases make this point. *See, e.g.*, *Proc v. Home Ins. Co.*, 217 N.E.2d 136, 139 (N.Y. 1966) ("In view of the pains taken by *the Legislature* to delineate the precise starting point of the period of limitations . . . [t]he court will not subvert this clearly expressed legislative design[.]") (emphasis added).

388 (42 U.S.C. § 1983); *Randall v. Laconia, NH*, 679 F.3d 1, 6-7 (1st Cir. 2012) (42 U.S.C. § 4852d); *Frame v. City of Arlington*, 657 F.3d 215, 238 (5th Cir. 2011) (42 U.S.C. § 12132); *Wike v. Vertue, Inc.*, 566 F.3d 590, 593 (6th Cir. 2009) (15 U.S.C. §§ 1693 *et seq.*); *Stanley v. Trustees of Cal. State Univ.*, 433 F.3d 1129, 1136 (9th Cir. 2006) (20 U.S.C. § 1681); *California v. Neville Chem. Co.*, 358 F.3d 661, 667-68 (9th Cir. 2004) (42 U.S.C. §§ 9601 *et seq.*); *Snow v. First Am. Title Ins. Co.*, 332 F.3d 356, 359-60 (5th Cir. 2003) (12 U.S.C. §§ 2601 *et seq.*); *Wachtel v. West*, 476 F.2d 1062, 1065-66 (6th Cir. 1973) (15 U.S.C. §§ 1601 *et seq.*). These cases confirm that it is a matter of "basic limitations principles"—not the existence of magic words like "accrue"—that a limitations period cannot commence before the right to sue ripens unless the statute indicates otherwise. *Bay Area Laundry*, 522 U.S. at 201.

B. Respondents are therefore left with one lone assertion: That, because some courts have permitted parties to shorten the *length* of a limitations period, it "follows" that parties can also "choose the starting point from which the limitations period is measured." Resp Br. 19. This argument wrongly assumes that the rules governing the *length* of a limitations period are the same as those governing the date on which a federal statutory cause of action *accrues* for limitations purposes. They are not.

Where Congress has not specified a limitations period for a federal cause of action, the length of that period is ordinarily borrowed from state law. *See, e.g.*, *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 464 (1975). And, where permissible, the length

of the period can also be stipulated to by the parties. *See, e.g.*, *Mo., K. & T.R. Co. v. Harriman Bros.*, 227 U.S. 657, 672-73 (1913). But "the accrual date of a [federal statutory] cause of action" is a "question of federal law" that is *not* resolved by the same rules governing the length of a limitations period. *Wallace*, 549 U.S. at 388; *Cope v. Anderson*, 331 U.S. 461, 464 (1947); *see also* U.S. Br. 14. Instead, unless Congress has specified otherwise, the limitations clock for a federal statutory claim begins to run when the claim is ripe for judicial review.

That is why Respondents' cases permitting parties to shorten the length of a limitations period do not further their cause. *See* Resp. Br. 16-19 (citing, among others, *Order of United Commercial Travelers of America v. Wolfe*, 331 U.S. 586, 608 (1947), and *Riddlesbarger v. Hartford Insurance Co.*, 74 U.S. (7 Wall.) 386, 390 (1869)). These cases merely stand for the uncontroversial proposition that, where a federal statute is silent as to the length of a limitations period and state law does not indicate otherwise, parties may stipulate to a "shorter period" for bringing an action. *Wolfe*, 331 U.S. at 608 (authorizing shorter period "absent a controlling statute to the contrary"); *Riddlesbarger*, 74 U.S. (7 Wall.) at 390 (same). That makes sense for statutory claims where Congress has not itself specified a limitations period (as in *Wolfe* and *Riddlesbarger*), because the "*length* of [a limitations] period" is "necessarily arbitrary" and "reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones." *Johnson*, 421 U.S. at 463-64 (emphasis added).

In the absence of Congress's "value judgment," parties remain free to make this choice themselves.

What is not "arbitrary," and therefore not open to alteration, is the point at which the limitations period commences. For federal statutes, Congress controls this feature of law, either by incorporating the "standard rule" that a limitations period commences when a claim is ripe for judicial review or by departing from it with specific language. *See TRW Inc.*, 534 U.S. at 34 n.6. Permitting parties, or courts, to override this basic federal principle—against which Congress has legislated for well over a century—would "rip" the rule "from its berth," *id.*, "reverse prior congressional judgments," and "make[] all unspecifying new legislation a roll of the dice," *id.* at 38 (Scalia, J., concurring in judgment). Congress cannot have intended that result when it enacted ERISA.

II. Respondents' Accrual Provision Undermines ERISA's Remedial Framework and Written-Plan Requirement and Generates a Host of Real-World Problems.

Respondents' accrual provision is also "at odds with the purpose [and] operation" of ERISA—in particular the statute's remedial scheme and written-plan requirement—and creates a panoply of real-world problems. *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 161 (1983). The provision is therefore invalid. *See U.S. Airways, Inc. v. McCutchen*, ___ U.S. ___, 133 S. Ct. 1537, 1548 (2013) (plan terms only enforceable insofar as they "accord with the statute") (citing 29 U.S.C. § 1104(a)(1)(D)); *Midstate Horticultural Co. v. Penn.*

R.R. Co., 320 U.S. 356, 358 (1943) ("[A]n agreement is invalid" where it is "contrary to the intent and effect" of a federal statute.); *see also Hardin v. Straub*, 490 U.S. 536, 538-39 (1989) (borrowing features of a state statute of limitations not appropriate where they would "defeat the goals of the federal statute at issue").

A. As previously explained, a limitations provision that starts the clock ticking on a federal statutory claim before the completion of a mandatory administrative proceeding is incompatible with the statute's remedial framework because it both undermines the non-judicial process and jeopardizes the right to file a statutorily guaranteed claim. *See* Pet'r Br. 22-25, 39-43; *see also Crown Coat Front Co. v. United States*, 386 U.S. 503, 514 (1967). The United States agrees. *See* U.S. Br. 19.

And so held this Court in *Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. 355 (1977), which invalidated an accrual provision uncannily similar to Respondents'. There, a California state statute of limitations provided one year to file a Title VII discrimination claim and tied the start of the period not to the accrual of the cause of action but instead to the administrative filing of the claim. *Id.* at 357-58. *Occidental* refused to enforce the provision on the ground that, because a Title VII claim is conditioned on the completion of a mandatory administrative process, starting the limitations period running at the start of the administrative process "would be inconsistent with the underlying policies of the federal statute." 432 U.S. at 367.

Occidental is particularly relevant here because of the striking parallels between Title VII and ERISA. Like ERISA, Title VII contains no explicit statute of limitations and establishes an "overall enforcement structure" that includes "a sequential series of steps beginning with" an "informal, noncoercive" pre-suit administrative procedure that, by law, must be exhausted before "commencing a civil action." *Id.* at 368, 392. The *Occidental* Court held that the state's limitations period, which started the clock ticking before completion of the administrative process, was incompatible with Title VII's two-tiered remedial framework: "In view of the federal policy requiring employment discrimination claims to be . . . administratively resolved before suit is brought in a federal court," it would be "hardly appropriate" to permit a limitations provision that did not "take[] into account the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities." *Id.* at 368.

Occidental's reasoning has been adopted across the board for federal regimes that require exhaustion of an internal process before commencing suit. *See* Pet'r Br. 22-25; *see also Frandsen v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Emps.*, 782 F.2d 674, 681 (7th Cir. 1986) (starting limitations clock before plaintiff has exhausted mandatory internal remedies "would contravene the . . . policy of encouraging workers to pursue internal . . . remedies, while ensuring them a judicial forum in which to resolve disputes").

Respondents counter that "[a]ll these schemes show is that there is more than one way to draft a limitations period." Resp. Br. 30 n.11. But they in fact show the opposite. For claims conditioned on the

exhaustion of a mandatory administrative or internal process, there is *only one* way to draft a limitations period compatible with the statute's structure and objectives: Start it running when the administrative process is complete, and not before.

Not surprisingly, Respondents identify *no* case where this Court, or any other, has embraced their novel position that uncoupling the commencement of a limitations period from the accrual of a federal statutory cause of action is consistent with the remedial policies of a statute that conditions a federal claim on the exhaustion of a mandatory pre-suit process. This lack of authority makes sense, because it defies "logic" to assert, as Respondents do, that the clock on this type of claim could start running, and possibly even run out, before the administrative process is complete. *Ortiz v. Sec'y of Def.*, 41 F.3d 738, 743 (D.C. Cir. 1994); *see United States v. Meyer*, 808 F.2d 912, 916 (1st Cir. 1987) (observing that, with one exception not relevant here, "no court has ever held that, in a case where an antecedent administrative judgment is a statutory prerequisite to the maintenance of a civil enforcement action, the limitations period on a recovery suit runs from the date of the underlying violation as opposed to the date on which the penalty was administratively imposed"). As the United States explained, such a result is incompatible with ERISA, "because it sets the two procedures for redress—internal claim processes and judicial review—against each other, thereby undermining the availability and efficacy of both." U.S. Br. 19.

The upshot: Where a federal statutory claim is conditioned on the exhaustion of a mandatory pre-suit process, a limitations provision that starts the

clock running before completion of that process is incompatible with the policies and objectives of the statute. Because Respondents' limitations provision does not take into account the "delay[ed] judicial action" premised on the completion of the internal resolutions benefits process, it "frustrates" the federal policies of the statute and cannot stand. *Occidental*, 432 U.S. at 367, 368.

It is no answer to say (as Respondents and their *amici* repeatedly do) that accrual provisions starting the limitations clock running when "proof of loss" is due, rather than when the claim is ripe, are used "ubiquitous[ly]" outside of ERISA, particularly in certain state insurance contexts. Resp. Br. 5-6, 16, 20-21. As explained in our opening brief and echoed by the United States, state insurance "proof-of-loss" provisions say nothing about the validity of such a provision in ERISA, because state insurance claimants are not required to exhaust a lengthy and indeterminate internal resolution process before proceeding to court. Pet'r Br. 31-32; U.S. Br. 29-30. Inserting a "proof-of-loss" accrual date into a statutory scheme that requires exhaustion of internal remedies would leave ERISA beneficiaries with less protection for their benefits than they would have under state law alone—an outcome that contradicts ERISA's "desire to offer employees *enhanced* protection for their benefits." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996) (emphasis added).

Moreover, Respondents' repeated suggestion that, under state law, they are required to include their "proof-of-loss" language is false. Resp. Br. 5-6, 20-21, 36. First, they have already conceded that Connecticut state law does not require any particular accrual provisions in group disability insurance

policies. *See* Brief in Opposition (BIO) 22 n.11. Second, the "vast majority" of states do not require *any* insurer to use the language Respondents have used. Resp. Br. 6. Respondents' plan starts the clock ticking "90 days *after the start of the period* for which The Hartford owes payment." BIO App. 5a, 7a (emphasis added). But most states with a "proof-of-loss" requirement—including Connecticut—require that the limitations clock run from "ninety (90) days *after the termination of the period* for which the insurer is liable." *Wetzel v. Lou Ehlers Cadillac Grp. Long Term Disability Ins. Program*, 222 F.3d 643, 647 n.5 (9th Cir. 2000) (emphasis added); *see also* Conn. Gen. Stat. § 38a-483(a)(7). But even if state law required Respondents to use the "proof-of-loss" language at issue here, that requirement would be likely preempted under ERISA. U.S. Br. 28 n.5.

At the same time, Respondents completely ignore the one state insurance context—Underinsured Motorist (UIM) insurance—that *does* condition a legal claim on the completion of an internal resolution process. Some UIM insurers have sought to do precisely what Respondents seek to do here—run the limitations clock from a point in time before the claim is ripe for judicial review—and state courts have repeatedly rejected these attempts as unfair and illogical. *See McDonnell v. State Farm Mut. Auto. Ins. Co.*, 299 P.3d 715, 733 (Alaska 2013) (rejecting as "illogical and unreasonable" an insurer's contractual limitations provision that started the clock ticking before accrual because such a provision would "considerably reduce the insured's time to file suit"); *State Farm Mut. Auto. Ins. Co. v. Fitts*, 99 P.3d 1160, 1162-63 (Nev. 2004) (same, noting that it would burden the courts as well as insureds by

forcing protective filing of claims simply in order to preserve them); *Nicodemus v. Milwaukee Mut. Ins. Co.*, 612 N.W.2d 785, 788-89 (Iowa 2000) (same).

B. Respondents' accrual provision also runs afoul of ERISA's written-plan requirement and would enmesh the federal courts in endless litigation over "reasonableness."

Here is how Respondents characterize their approach:

- Requiring a "case-by-case inquiry into . . . reasonableness," BIO 24, and "case-specific adjustment" of limitations provisions, Resp. Br. 14.
- Mandating that courts "develop[] tests to assess the reasonableness of [a] limitations period[]." *Id.* at 47.
- Depending on courts to police limitations provisions for "waiver," "estoppel," and "equitable tolling." *Id.* at 14.
- Necessitating that courts determine, in every case, when "proof of loss" was due. *Id.* at 42 n.19, 44 n.20.

These very words make clear that Respondents' approach violates ERISA's written-plan requirement. That requirement is designed to ensure that "every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan" "*at any time*." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (internal citation omitted) (second emphasis added). A contractual limitations period that is, in every case, "subject to reasonableness and traditional equitable

principles," which depend on a host of unpredictable factors, comes nowhere close to satisfying this obligation. Resp. Br. 48-49.

Respondents attempt to downplay the unwieldiness of their approach by arguing that these "background rules" are no different from those endorsed by this Court in *U.S. Airways*. *See id.* at 49 ("When a plan 'leaves space' for background equitable rules to apply, it does not offend the parties' reasonable expectations or the written-plan requirement to apply them."). But consider the very different background rule at issue in *U.S. Airways*—whether the "common fund doctrine" applied in the absence of a clear disclaimer in the plan language to require a plan fiduciary to offset its lien by an appropriate amount of attorney's fees. 133 S. Ct. at 1548. Consulting a plan's reimbursement provision, both employees and plan fiduciaries could easily ascertain whether this background rule would apply and, more importantly, *how* it would apply, down the road if or when the provision triggered.

Respondents' "background rules" provide no similar certainty. Yes, a party might know that these principles *may* apply, but he or she will never know *if* or *how* they will apply. Under Respondents' approach, no party to an ERISA plan has any way to know with certainty what rights and obligations exist under the plan. Will a court invalidate the accrual provision? Blue-pencil it by adding several additional months onto the limitations period? Toll the time for filing a claim? Enforce it? No one—not even Respondents—can have any idea until it happens in a particular case under particular facts. This result, as the United States pointed out, "is directly contrary to ERISA's goal of fostering a

predictable set of liabilities" and "a uniform regime of ultimate remedial orders." U.S. Br. 27 (internal quotations omitted).[2]

Indeed, many courts have already struggled with some of these criteria. For example, the question of whether running the clock from when "proof of loss" is due is "reasonable" has been the subject of extensive litigation, and different courts have reached differing conclusions about the same time periods. *E.g.*, *compare Hinojos v. Prudential Ins. Co. of Am.*, 2011 WL 7768621, at *6-*7 (D.N.M. Oct. 19, 2011) (five-month period to file suit was unreasonable), *with Rotondi v. Hartford Life & Accident Grp.*, 2010 WL 3720830, at *8 (S.D.N.Y. Sept. 22, 2010) (five months was reasonable); *compare McVicker v. Blue Shield of Cal.*, 2007 WL 3407433, at *6 (N.D. Cal. Nov. 13, 2007) (two-year

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[2] Ultimately, Respondents' *U.S. Airways*-based argument leads them into an indefensible position. Respondents argue that their altered accrual provision is valid because it is *necessarily* "subject to reasonableness and traditional equitable principles," so as to protect against the possibility that the time will run before a plaintiff can file in court. Resp. Br. 48-49. But they abruptly shift gears and assert that these protective doctrines can be "oust[ed]" simply via plan language disclaiming them. *See id.* at 49 (stating that these doctrines are "background rules" that apply only "in the absence of a contrary agreement"). So, under Respondents' theory, it would be permissible and enforceable to include a three-year limitations period that (1) runs from the date "proof of loss" is due and (2) disclaims the precise doctrines (equitable tolling, waiver, estoppel, and reasonableness) that supposedly make this type of limitations provision acceptable in the first place.

period from time of first denial was unreasonable) *with Marquette Gen. Hosp., Inc. v. Starmark Ins. Co.*, 2011 WL 2118582, at *5 (W.D. Mich. May 26, 2011) (two-year period was reasonable).

Litigation is also bound to arise regarding the question of when "proof of loss" is due under a given plan. Respondents claim that since their "proof-of-loss" date is clear, all parties will be able to calculate, with certainty, when the limitations period begins to run. *See* Resp. Br. 39, 47. In reality, however, although the initial proof-of-loss due date in the plan may be clear, confusion arises when the plan requests additional information supporting the participant's claim and imposes a new due date. Indeed, in *this* routine case, as Respondents admit, it remains uncertain whether the Plan's additional request for proof supporting Ms. Heimeshoff's disability, a request that included a new due date, reset the limitations period. *Id.* at n.19. And this case is hardly unique—uncertainty over "proof-of-loss" dates has already triggered substantial litigation, and more is sure to come. *See, e.g.*, *Hyder v. Kemper Nat'l Servs., Inc.*, 302 Fed. App'x 731, 733 (9th Cir. 2008); *Fry v. Hartford Ins. Co.*, 2011 WL 1672474, at *1 (W.D.N.Y. May 3, 2011).

These uncertainties are compounded in cases where the plan participant receives benefits that are later terminated. Most courts, including the only federal court of appeals to consider the question, have held that the original "proof-of-loss" date, when the claimant *first* sought benefits, triggers the statute of limitations. *E.g.*, *Abena v. Metro. Life Ins. Co.*, 544 F.3d 880, 884 (7th Cir. 2008); *Touqan v. Metro. Life Ins. Co.*, 2012 WL 3465493, at *3 (E.D. Mich. Aug. 14, 2012); *Smith v. Unum Provident*, 2012

WL 1436458, at *2 n.1 (W.D. Ky. Apr. 24, 2012). Other courts consider a plan's later request for proof of continuing disability to begin the limitations clock. *E.g.*, *Homesley v. Hartford Life & Accident Ins. Co.*, 2011 WL 2619370, at *3 (W.D. Okla. July 1, 2011); *Rotondi*, 2010 WL 3720830, at *8. Still others view the entire notion that the clock for a claimant's denial-of-benefits claim runs while he is receiving benefits as nonsense. *E.g.*, *Forrest v. Paul Revere Life Ins. Co.*, 662 F. Supp. 2d 183, 191-92 (D. Mass. 2009); *Skipper v. Claims Servs. Int'l*, 213 F. Supp. 2d 4, 6-8 (D. Mass. 2002).

Respondents nonetheless assure the Court that the problems and uncertainty created by their accrual provision are hypothetical and will "virtually never" arise. Resp. Br. 40. But plan exhaustion can—and frequently does—take years in spite of the Department of Labor (DOL) regulations governing the ERISA claims process. *See, e.g.*, *Lamantia v. Voluntary Plan Adm'rs, Inc.*, 401 F.3d 1114, 1120 (9th Cir. 2005) (*four year* period running from date of loss elapsed before claimant could file denial-of-benefits claim); *Hansen v. Aetna Health & Life Ins. Co.*, 1999 WL 1074078, at *4 (D. Or. Nov. 4, 1999) (two year period running from date of loss elapsed before claimant could file denial-of-benefits claim, plan argued that limitations provision was nevertheless "reasonable"). It is therefore false—and demonstrably so—that "even a lengthy administrative review process would still leave ample time to sue." Resp. Br. 45.[3]

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[3] Respondents are wrong in contending that, if the DOL regulations are strictly followed, the maximum time period that

Making matters worse, some plans couple the "proof-of-loss" accrual date with a *shorter* length of time to file suit—one or two years instead of three—and this Court's decision will apply to those plans, too. *See, e.g.*, *Baptist Mem'l Hosp.—DeSoto, Inc. v. Crain Auto. Inc.*, 392 F. App'x 288, 294 (5th Cir. 2010) (one year); *Clark v. Nationwide Mut. Ins. Co.*, ___ F. Supp. 2d ___, 2013 WL 1194927, at *9 (S.D. W. Va. Mar. 22, 2013) (one year); *Skipper*, 213 F. Supp. 2d at 5 (two years); *Wesley v. NMU Pension & Welfare Plan*, 2002 WL 10486, at *1 (S.D.N.Y. Jan. 3, 2002) (two years). For many of these plans, even strict adherence to the DOL regulations could leave an ERISA beneficiary with little or no time to file her claim in court.

To the extent Respondents are concerned about the overall time a participant has to sue, there is no reason that Respondents could not amend their plan to have a shorter limitations period that runs from final denial. Indeed, many plans do. *See, e.g.*, *Scharff*

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exhaustion of the internal review process should take is 375 days, just over a year. Resp. Br. 40. A study of recent cases conducted by one of Respondents' own *amici*—the American Council of Life Insurers—reveals that, in the typical case, exhaustion can take 15 to 16 months. Br. for Am. Council of Life Insurers, et al. as Amici Curiae Supporting Resp. 29. And, as the United States explains, by permitting the time to be tolled when additional proof is requested, the timelines in the DOL regulations are by no means ironclad; to the contrary, they are intended to offer the plan and participant flexibility so that the plan has the opportunity to fully and fairly consider the claim. U.S. Br. 20. Indeed, here, internal exhaustion took 718 days, about two years, and Respondents do not argue that the DOL regulations were violated in this case. *See id.*

v. Raytheon Co. Short Term Disability Plan, 581 F.3d 899, 902 (9th Cir. 2009); *Gibbons v. Qwest*, 2012 WL 6022210, at *1 (D. Utah Dec. 4, 2012).

Respondents cannot even claim that their accrual provision advances any of the objectives behind limitations periods generally. One key purpose of limitations periods is to put defendants on notice of adverse claims. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352 (1983). But ERISA's internal review process does just that. *See Occidental*, 432 U.S. at 372 (requiring a limitations period to run from the completion of a pre-suit administrative process "will not . . . deprive defendants . . . of fundamental fairness or subject them to surprise and prejudice that can result from the prosecution of stale claims").

Second, limitations periods encourage potential plaintiffs to file suit before evidence is destroyed and memories fade. *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). But again, when there is an internal review process ongoing, that concern is nonexistent. During internal review of a beneficiary's claim, the relevant evidence is preserved and organized and is ready if and when the beneficiary decides to file suit.

* * *

Although statutes of limitations are designed to protect the potential defendant and preserve evidence, they also reflect a balance made between those interests and the time the potential plaintiff needs to file a claim. *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Applying the federal rule that a claim accrues, and the statute of limitations begins to run when, the plaintiff can bring the claim in

court—here, when the internal review process has been exhausted—preserves that balance and honors the purposes behind statutes of limitation. Respondents' approach does neither.

III. Even If Respondents' "Proof-of-Loss" Accrual Date Is Enforceable, the Limitations Period Does Not Run During Mandatory Exhaustion Because It Is Tolled.

Even if the proof-of-loss accrual date in the Plan is enforceable, Respondents' limitations provision still does not bar this case because the limitations period was tolled while Petitioner pursued the Plan's internal review procedures. Respondents present no authority that contradicts the basic federal law rule that limitation periods are tolled while mandatory pre-suit procedures are exhausted.

Respondents protest, first, that Petitioner waived the tolling argument because she did not make exactly the same assertion below. Resp. Br. 49-50. But once a party properly raises a claim, "a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992). Petitioner's contention that limitations periods are tolled during mandatory pre-suit exhaustion is just another way of supporting the same claim she has been making all along: The limitations period did not run while she exhausted the Plan's review process and, therefore, her suit is timely.

On the merits, Respondents cite no authority—none—contradicting the basic federal rule that when there is mandatory exhaustion of pre-suit

procedures, the limitations period is tolled during those procedures. *See* Corman, Limitations of Actions § 8.4.1, at 10, 15-16 (1991); 51 Am. Jur. 2d Limitation of Actions § 186 (2013); *see also Harris v. Alumax Mill Prods., Inc.*, 897 F.2d 400, 404 (9th Cir. 1990); *Trent v. Bolger*, 837 F.2d 657, 659 (4th Cir. 1988).

Instead, Respondents discuss the standard that applies to a different type of tolling—equitable tolling—that, they say, cannot be satisfied here. Resp. Br. 50. This argument conflates two different categories of tolling. In the category applicable here—exhaustion tolling—tolling applies automatically while a plaintiff pursues a mandatory pre-suit procedure. Corman, Limitations of Actions, § 8.4.1, at 10, 15-16 (1991). In the other—equitable tolling—tolling applies at the discretion of a court when several fact-specific criteria are met. *See, e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

The two tolling doctrines are distinct, as evidenced by the fact that none of Respondents' equitable-tolling cases involves properly pursued mandatory pre-suit proceedings. For instance, in Respondents' key case, *Wallace v. Kato*, there was no mandatory pre-suit exhaustion that precluded the plaintiff from filing his claim. 549 U.S. at 394. For that reason alone, *Wallace*'s discussion of the rules that apply to "equitable" tolling has no relevance here.

Pace v. DiGuglielmo, 544 U.S. 408 (2005), is equally off-point. *Pace* concerned a prisoner's untimely, and therefore improper, pursuit of mandatory pre-suit state relief. *Id.* at 418. The

question was whether "equitable tolling" could nevertheless save the prisoner's claim; the Court concluded it could not. *Id.* at 419. That holding has nothing to do with this case, as Respondents have never alleged that Petitioner failed to properly pursue the Plan's internal procedures.

Besides relying on irrelevant "equitable tolling" cases, Respondents attempt to make hay out of the fact that, in some of the tolling cases, the courts declined to toll the limitations period. Resp. Br. 51 & nn.22-23, 52 n.25. However, these cases are no different from *Wallace* or *Pace*—either the administrative procedure was not mandatory or, if it was, the plaintiffs failed to follow that procedure. *See Johnson*, 421 U.S. at 463 (no tolling because no mandatory pre-suit exhaustion); *Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2011) (no tolling where prisoner failed to exhaust his remedies before filing suit). Ultimately, Respondents cannot explain why it would be acceptable to permit the "unconscionable" result that "the time for suit [will] be consumed" while a plaintiff is exhausting mandatory pre-suit procedures. Couch on Insurance 3d §§ 236:6-236:7, at 236-19 (2000).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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