No. 17-1328

In the Supreme Court of the United States

ROBERT N. PRESTON, ET AL., PETITIONERS

v.

R. ALEXANDER ACOSTA, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners can invoke 29 U.S.C. 1113(1) to bar this action as untimely, notwithstanding that they expressly waived their rights under that provision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 873 F.3d 877. The opinion of the district court (Pet. App. 20a-26a) granting petitioners' motion to dismiss is not published in the Federal Supplement but is available at 2015 WL 13647378.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2017. A petition for rehearing was denied on December 13, 2017 (Pet. App. 27a-28a). The petition for a writ of certiorari was filed on March 13, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, protects "the interests of participants in employee benefit plans and

their beneficiaries * * * by establishing standards of conduct * * * for fiduciaries of employee benefit plans." 29 U.S.C. 1001(b). The standards imposed on fiduciaries of ERISA plans include the duties of loyalty and care. See 29 U.S.C. 1104(a). If those standards are not met, ERISA "provid[es] for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). A plan participant, beneficiary, fiduciary, or the Secretary of Labor may bring a civil action to remedy a breach of fiduciary duty or a violation of ERISA. 29 U.S.C. 1132(a)(2), (3), and (5). As relevant here, such a civil action "is timely if filed no more than six years after 'the date of the last action which constituted a part of the breach or violation' or 'in the case of an omission the latest date on which the fiduciary could have cured the breach or violation.'" *Tibble* v. *Edison Int'l*, 135 S. Ct. 1823, 1826 (2015) (quoting 29 U.S.C. 1113(1)).

2. The TPP Employee Stock Ownership Plan (Plan) was established to provide retirement income for employees of TPP Holdings, Inc. (TPP), a privately held corporation. Pet. App. 2a. The Plan purchased TPP stock from Robert Preston, TPP's owner and the Plan's trustee, in 2004, 2006, and 2008. *Id.* at 21a. The Secretary investigated those transactions to determine whether Preston, TPP, and the Plan (collectively petitioners) violated their ERISA fiduciary duties, 29 U.S.C. 1104, and ERISA's prohibited transaction provisions, 29 U.S.C. 1106. Upon concluding that ERISA violations occurred, the Secretary notified petitioners, and the parties attempted to negotiate a settlement. See Pet. App. 3a.

To allow time for settlement negotiations, the Secretary and petitioners entered into four separate "tolling agreements" that spanned from August 2011 through the end of 2014. Pet. App. 3a. In each agreement, "the

Secretary offered to delay filing any action until a specified date," and "in exchange," petitioners stipulated that they would "'not assert in any manner the defense of statute of limitations, the doctrine of waiver, laches, or estoppel, or any other matter constituting an avoidance of the Secretary's claims that is based on the time within which the Secretary commenced such action.'" *Id.* at 3a-4a. Petitioners' express waiver applied only to suits filed by the Secretary during the time period specified by the agreements. *Ibid.* Petitioners "entered into the tolling agreements knowingly, willingly, and voluntarily." *Id.* at 4a.

Settlement negotiations were unsuccessful. On December 30, 2014, the Secretary filed the complaint in this case. Pet. App. 4a. It is undisputed that the Secretary's filing came "before the expiration of the agreed-upon tolling period." *Ibid.* In the complaint, the Secretary alleged that "Preston, who also served as the Plan's trustee, breached his fiduciary duties and engaged in prohibited self-dealing when, in 2006 and then again in 2008, he knowingly caused the Plan to purchase his own TPP stock at an inflated price." *Id.* at 2a-3a. The Secretary also alleged that petitioners breached their fiduciary duties by failing to properly pay Plan benefits to hundreds of participants in 2008. *Id.* at 3a, 21a.

"Despite their agreements not to assert a time bar, [petitioners] moved to dismiss the Secretary's complaint on the ground that all claims arising from alleged violations that occurred before December 30, 2008—six years prior to the complaint's filing—were foreclosed by ERISA's limitation-of-actions provision" contained in 29 U.S.C. 1113(1). Pet. App. 4a-5a. Petitioners con-

tended that Section 1113(1) establishes a statute of repose "that cannot be waived, even by a party's express agreement." *Id.* at 5a.

The district court granted the motion to dismiss. Pet. App. 20a-26a. The court agreed with petitioners that Section 1113(1) is a statute of repose and that it "is not subject to * * * express waiver." *Id.* at 24a. The court dismissed the Secretary's claims arising from events occurring before December 30, 2008, six years before the date of the Secretary's complaint. *Id.* at 5a. The court did not dismiss the Secretary's claims related to events occurring after that date. See D. Ct. Doc. 18 (Nov. 2, 2015).

After denying the Secretary's motion for reconsideration, the district court granted the Secretary leave to file an interlocutory appeal pursuant to 28 U.S.C. 1292(b). Pet. App. 5a. The court certified the following question: "Is the limitation of actions contained in 29 U.S.C. § 1113 subject to express waiver?" *Ibid.*

3. The court of appeals granted the Secretary's petition for interlocutory review and answered yes to the certified question: "Section 1113(1)'s statute of repose is subject to express waiver." Pet. App. 2a. The court first determined that Section 1113(1) is not jurisdictional and, therefore, is presumptively waivable. *Id.* at 6a-10a. The court explained that this Court "has emphasized—repeatedly—that statutory limitation periods and other filing deadlines 'ordinarily are not jurisdictional' and that a particular time bar should be treated as jurisdictional 'only if Congress has 'clearly stated' that it is.'" *Id.* at 8a (quoting *Musacchio* v. *United States*, 136 S. Ct. 709, 716-717 (2016)). "Establishing the requisite clear statement requires a party to

'clear a high bar.'" *Ibid.* (quoting *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015)).

The court of appeals had "little difficulty concluding that Section 1113(1)'s limitations period is not jurisdictional." Pet. App. 8a. The court explained that Section 1113(1) does not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Ibid.* (quoting *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 515 (2006)). The court also considered Section 1113(1)'s statutory context, which likewise confirmed its non-jurisdictional character. *Id.* at 9a-10a. For example, the time limit is located in Part 4 of ERISA titled "Fiduciary Responsibility," not among ERISA's "Jurisdiction" provisions in Part 5, titled "Administration and Enforcement." *Id.* at 10a. In the absence of any "clear textual indication that Section 1113(1)'s time bar was intended to limit courts' subject matter jurisdiction," the court held the provision "non-jurisdictional and therefore * * * presumptively waivable." *Ibid.*

The court of appeals next turned to petitioners' arguments that Section 1113(1) is a statute of repose and, as such, is categorically non-waivable. Pet. App. 11a. The court agreed with petitioners that Section 1113(1) is a statute of repose. *Id.* at 11a-12a. But the court rejected the "real thrust of [petitioners'] position," which is that a statute of repose "is inherently and 'by definition' non-waivable—even (as in this case) by express agreement." *Id.* at 12a. The court rejected that contention as "inconsistent with both law and logic." *Ibid.*

In particular, the court of appeals rejected petitioners' reliance on cases involving equitable tolling of a statute of repose. Pet. App. 12a-15a; *e.g.*, *California Pub. Emps.' Ret. Sys.* v. *ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017); *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014).

The court explained that enforcing an express waiver was an "altogether separate" question. Pet. App. 12a. "[T]he judge-made doctrine of equitable tolling has nothing to do with a defendant's waiver, let alone express waiver," the court stated. *Ibid.* The court elaborated that "[a] statute of repose confers on a defendant a personal privilege of sorts, in the form of an immunity from further liability." *Id.* at 14a. "While that privilege can't just be snatched out of the defendant's hand" by "a squishy doctrine like equitable tolling," "there is nothing to prevent the defendant from voluntarily giving it away." *Ibid.*

The court of appeals then examined this Court's decision in *Midstate Horticultural Co.* v. *Pennsylvania Railroad*, 320 U.S. 356 (1943) (*Midstate*). Pet. App. 15a-16a. The court of appeals observed that, in *Midstate*, this Court had held that "a limitations period contained in the Interstate Commerce Act could [not] be waived 'by express agreement,'" because doing so would frustrate the Act's antidiscrimination purpose of ensuring fair and reasonable transportation rates by "advantaging one party over the other." Pet. App. 15a (quoting *Midstate*, 320 U.S. at 357). But the court of appeals explained that *Midstate* did not "impose a blanket rule prohibiting express waivers of statutes of repose," but instead was "bound up in the specifics of the Interstate Commerce Act." *Id.* at 15a-16a.

The court of appeals further concluded that the Court's analysis in *Midstate* undercut petitioners' argument, because their position "would frustrate, rather than advance, ERISA's overarching purpose." Pet. App. 16a. In particular, the court determined that petitioners' argument would undercut the express statutory purpose of protecting "the interests of participants in

employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, *and by providing for appropriate remedies, sanctions, and ready access to the Federal courts*." *Ibid.* (quoting 29 U.S.C. 1001(b)).

The court of appeals also concluded that the "background understanding" was that "statutes of repose *are* subject to express waiver." Pet. App. 17a. For example, the court noted, the North Carolina Supreme Court had held "that a statute of repose applicable to claims arising out of improvements to real property could be waived by mutual agreement," and the Supreme Court of Colorado "reached the same conclusion regarding a statute of repose in that State's Uniform Fraudulent Transfer Act." *Ibid.* (citing *Christie* v. *Hartley Constr., Inc.*, 766 S.E.2d 283 (N.C. 2014), and *Lewis* v. *Taylor*, 375 P.3d 1205 (Colo. 2016) (en banc)). The court of appeals "found no indication that Congress intended to enshrine some contrary—and idiosyncratic—rule in Section 1113(1)." *Id.* at 17a-18a.

Finally, the court of appeals relied on a more general "'presumption of waivability,'" to which this Court has "long adhered." Pet. App. 18a (quoting *United States* v. *Mezzanatto*, 513 U.S. 196, 202 (1995)). The court explained that this Court had "held more than a century ago that '[a] party may waive any provision . . . of a statute[] intended for his benefit,'" in the absence of an affirmative congressional intent to preclude waiver. *Ibid.* (quoting *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873)) (brackets in original). Given that criminal defendants can waive their fundamental constitutional protections, the court asked "[w]hy [would there be] a different rule for ERISA's statute of repose?" *Id.*

at 18a. "It would," the court continued, "be passing strange—bizarre, in fact—to conclude that while a litigant can renounce his most basic freedoms under the United States Constitution, he is powerless to waive the protection of . . . ERISA's statute of repose." *Id.* at 19a. The court of appeals accordingly reversed the district court's decision dismissing the Secretary's suit in part, and remanded for further proceedings.

ARGUMENT

Petitioners expressly agreed not to assert in any manner their rights under the time limitation set forth in 29 U.S.C. 1113(1). They nonetheless contend (Pet. 10-27) that the Secretary's action should be dismissed on the ground that it is untimely under that provision. In particular, petitioners contend that their express waiver of their rights under Section 1113(1) is unenforceable because Section 1113(1) is a statute of repose and, they contend, the beneficiary of a statute of repose cannot waive the right to invoke its protection. The court of appeals correctly rejected that contention. Section 1113(1) is not jurisdictional, and nothing in the statute's text or the broader statutory scheme suggests that a party cannot knowingly and voluntarily waive its rights under that provision. The court of appeals' decision also does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. At the outset, review is unwarranted because this case arises in an interlocutory posture. The district court dismissed the Secretary's claims arising from events occurring before December 30, 2008, but not the Secretary's claims related to events after that date. See Pet. App. 5a. The court then certified its decision for interlocutory review under 28 U.S.C. 1292(b), and the

court of appeals reversed and remanded for further proceedings. See Pet. App. 5a, 19a. Ordinarily, a case's interlocutory posture "itself alone furnishe[s] sufficient ground for the denial" *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see, *e.g.*, *Abbott* v. *Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari). Petitioners will have the opportunity to raise their current contentions, together with any other issues that may arise on remand, in a single petition for a writ of certiorari following the further proceedings in the lower courts. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam).

2. In any event, petitioners' contentions do not warrant further review, because the court of appeals' decision is correct and it does not conflict with any decision of this Court or any other court of appeals.

a. The court of appeals correctly concluded that a defendant can expressly waive its right to invoke Section 1113(1). First, the court correctly held that Section 1113(1) is not jurisdictional and therefore is presumptively waivable. The Court "treat[s] a time bar as jurisdictional only if Congress has 'clearly stated' that it is." *Musacchio* v. *United States*, 136 S. Ct. 709, 717 (2016) (quoting *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013)). Accordingly, "the enactment of time-limitation periods * * * without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture." *Holland* v. *Florida*, 560 U.S. 631, 645 (2010) (citation omitted). Thus, "[i]f properly invoked, mandatory claim-processing rules must be enforced" and are not subject to equitable tolling, "but they may be waived or forfeited." *Hamer* v. *Neighborhood Hous. Servs.*, 138 S. Ct. 13, 17 (2017).

Such rules thus ensure "relief to a party properly raising them, but do not compel the same result if the party forfeits them." *Id.* at 18 (quoting *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) (per curiam)).

"Against that backdrop," the court of appeals had "little difficulty" concluding that Section 1113(1) is not jurisdictional. Pet. App. 8a. Section 1113(1) states that "[n]o action may be commenced * * * with respect to a fiduciary's breach" more than "six years after (A) the date of the last action which constituted a part of the breach", or (B) "the latest date on which the fiduciary could have cured the breach." 29 U.S.C. 1113(1). "Neither Section 1113(1)'s text nor the broader statutory context in which it exists provides any indication—let alone the required clear statement—that its limitations period is intended to curtail a reviewing court's jurisdiction." Pet. App. 8a.

This Court's recent decision in *Musacchio* further indicates that Section 1113(1) is not jurisdictional and thus presumptively waiveable. In *Musacchio*, the Court held that the limitation on actions contained in the general federal criminal statute of limitations, 18 U.S.C. 3282(a), is not jurisdictional and may be waived. 136 S. Ct. at 716. That provision states that "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." 18 U.S.C. 3282(a). That time limitation, like Section 1113(1), runs from the violation or offense, and the Court concluded that the provision is nonjurisdictional and thus can be waived. *Musacchio*, 136 S. Ct. at 717-718.

b. The court of appeals next correctly concluded that nothing in Section 1113(1) overcomes the presumption

of waiveability. Section 1113(1) is indeed a statute of repose, see Pet. App. 11a-12a, a point that the Secretary did not dispute. And statutes of repose are ordinarily not subject to equitable tolling. *Id.* at 12a-14a; see *California Pub. Emps.' Ret. Sys.* v. *ANZ Sec., Inc.*, 137 S. Ct. 2042 (2017) (*ANZ*); *CTS Corp.* v. *Waldburger*, 134 S. Ct. 2175 (2014).

But as the court of appeals explained, this case "has nothing to do with equitable tolling." Pet. App. 13a. Rather, petitioners "executed a series of contracts in which they expressly—and (as they have since acknowledged) knowingly, willingly, and voluntarily—renounced their rights under Section 1113(1)." *Id.* at 13a-14a. "That express waiver makes this case a whole different ballgame." *Id.* at 14a. As the court of appeals put it, "[a] statute of repose confers on a defendant a personal privilege of sorts, in the form of an immunity from further liability" that "can't just be snatched out of the defendant's hand" through equitable tolling. *Ibid.* But "there is nothing to prevent the defendant from voluntarily giving it away." *Ibid.*

As the court of appeals noted, "all manner of personal rights"—including fundamental constitutional rights—can be waived. Pet. App. 18a. In particular, "absent some affirmative indication of Congress' intent to preclude waiver," federal "statutory provisions are subject to waiver by voluntary agreement of the parties." *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995); see *Shutte* v. *Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873) ("A party may waive any provision * * * of a statute[] intended for his benefit."). Indeed, as the court of appeals determined, the "background understanding [is] that statutes of repose *are* subject to ex-

press waiver." Pet. App. 17a; see, *e.g.*, *Christie* v. *Hartley Constr., Inc.*, 766 S.E.2d 283, 287 (N.C. 2014) ("see[ing] no public policy reason why the beneficiary of a statute of repose cannot bargain away, or even waive, that benefit"). "It would be passing strange—bizarre, in fact—to conclude that while a litigant can renounce his most basic freedoms under the United States Constitution, he is powerless to waive" his rights under ERISA's statute of repose in Section 1113(1). Pet. App. 19a.

c. Contrary to petitioners' contention (Pet. 18-24), the court of appeals' decision does not conflict with *Midstate Horticultural Co.* v. *Pennsylvania Railroad*, 320 U.S. 356 (1943). Petitioners' contention is based on a misreading of *Midstate*, which did not establish a categorical rule that statutes of repose are not waivable. In *Midstate*, the Court held that a defendant carrier could invoke the statute of repose in Section 16(3)(a) of the Interstate Commerce Act, 49 U.S.C. 16(3)(a) (1934), notwithstanding its express agreement with a shipper to waive its rights under that provision. 320 U.S. at 367. The Court started by rejecting as unhelpful in resolving that question the parties' framing of the question as whether that provision "operates, with the lapse of time, to extinguish the right which is the foundation for the claim or merely to bar the remedy for its enforcement." *Id.* at 358-359. The Court instead explained that "the controlling question" was "whether the policy of interstate commerce legislation contemplates the one result or the other." *Id.* at 360. The Court then concluded that it would conflict with Congress's intent in the Interstate Commerce Act to allow a waiver of that particular time limitation, because it would frustrate the Act's basic policy of "uniformity and equality of treatment, as between carrier and shipper," by allowing the carrier to

create a preference for that specific shipper, in violation of the Act's antidiscrimination provisions. *Id.* at 361; see *id.* at 366-367.

Midstate thus did not "impose a blanket rule prohibiting express waivers of statutes of repose," but instead is "bound up in the specifics of the Interstate Commerce Act." Pet. App. 15a-16a. Indeed, this Court later confirmed that *Midstate* turned on a statute-specific inquiry, by describing *Midstate* as holding "that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released *if such waiver or release contravenes the statutory policy*." *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 704 (1945) (emphasis added). The court of appeals here engaged in the requisite inquiry, concluding that allowing a party to renege on its express waiver of its rights under Section 1113(1) "would frustrate, rather than advance, ERISA's overarching purpose." Pet. App. 16a. In particular, it would impede Congress's aim of protecting "the interests of participants in employee benefit plans and their beneficiaries . . . *by providing for appropriate remedies, sanctions, and ready access to the Federal courts.*'" *Ibid.* (quoting 29 U.S.C. 1001(b)). Nothing in the court of appeals' ERISA-specific decision conflicts with *Midstate*.

The court of appeals' decision is also consistent with this Court's recent decision in *ANZ*. In *ANZ*, the Court held that the tolling doctrine of *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), was "based on traditional equitable powers," and therefore "does not apply" to the three-year statute of repose in Section 13 of the Securities Act of 1933, 15 U.S.C. 77m. *ANZ*, 137 S. Ct. at 2052; see *id.* at 2051 ('[T]he Court repeatedly has stated in broad terms that statutes of repose

are not subject to equitable tolling."). But as noted above, see pp. 9-12, *supra*, this case is not about equitable tolling, and a defendant can voluntarily waive the personal benefit of a statute of repose.

d. The court of appeals' decision does not conflict with any decision of another court of appeals. Indeed, no other court of appeals has considered whether Section 1113(1) is subject to express waiver.

First, contrary to petitioners' contention (Pet. 11-12), the decision below does not conflict with the Second Circuit's decision in *Police & Fire Retirement System* v. *IndyMac MBS, Inc.*, 721 F.3d 95 (2013), cert. dismissed, 135 S. Ct. 42 (2014). That decision addressed the same question this Court later decided in *ANZ*: Whether the *American Pipe* tolling doctrine applies to Section 13 of the Securities Act. See *id.* at 109-110; see also *ANZ*, 137 S. Ct. at 2052 (holding that "the *American Pipe* tolling rule does not apply to the 3-year bar mandated in § 13"). But again, this case does not involve tolling. Rather, the question is whether petitioners can successfully invoke the time limitation set forth in Section 1113(1), notwithstanding that they expressly waived their rights under that provision in order to engage in settlement negotiations and forestall the filing of a suit by the Secretary in the meantime. The Second Circuit's statement that "a statute of repose is 'subject [only] to legislatively created exceptions,'" *IndyMac*, 721 F.3d at 106 (citation omitted), sheds no light on the question here, because it does not involve an unwritten "exception" to a statute of repose: It involves petitioners' express waiver of whatever rights that provision otherwise provided to them.

There is similarly no conflict with the Tenth Circuit's decisions in *National Credit Union Administration*

Board v. *Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1226-1241 (2014), cert. denied, 135 S. Ct. 949 (2015), and *National Credit Union Administration Board* v. *Barclays Capital, Inc.*, 785 F.3d 387 (2015). In *Nomura*, the court held that the Federal Credit Union Act's "Extender Statute," 12 U.S.C. 1787(b)(14), supplanted the three-year statute of repose contained in Section 13 of the Securities Act, 15 U.S.C. 77m. *Nomura*, 764 F.3d at 1225-1226. That issue is clearly distinct from the question here. Petitioners cite (Pet. 12) the court's statement in a footnote that, although "statutes of repose are not subject to *equitable* tolling, they are 'subject . . . to legislatively created exceptions.'" 764 F.3d at 1225 n.12 (quoting *IndyMac*, 721 F.3d at 105). But that statement is dicta and, as explained above, nothing in the Eleventh Circuit's decision is to the contrary.

Barclays Capital is also inapposite. In that case, the Tenth Circuit held that a party was estopped from invoking the statute of limitations under the Extender Statute, after it had expressly agreed to waive its rights under that statute in order to engage in settlement negotiations. 785 F.3d at 393-395; see *id.* at 395 ("Barclays expressly promised not to raise the statute of limitations defense * * * and we hold Barclays to that promise."). The court of appeals' decision to bind petitioners to their express waiver here is fully consistent with the result in *Barclays Capital*.

In the course of its analysis in *Barclays Capital*, the Tenth Circuit asserted that the "Securities Act's three-year statute of repose * * *, of course, is not waivable," and that "[i]f that statute of repose governed this case, that would be the end of the [plaintiffs'] claims." 785 F.3d at 390-391. But "that statute of repose" does not "govern[] this case" either, *ibid.*, because this case likewise

does not arise under the Securities Act. This is an ERISA case. And as this Court established in *Midstate* and its progeny, the question whether a party can renege on its express waiver of its rights under a non-jurisdictional statute of repose depends on the statute-specific question whether "such waiver or release contravenes the statutory policy." *Brooklyn Sav. Bank*, 324 U.S. at 704 (citing *Midstate*, 320 U.S. at 212).

Petitioners also contend (Pet. Br. 13-14) that the court of appeals' decision conflicts with *Hoglund* v. *Lane*, 44 App. D.C. 310 (D.C. Cir. 1916), aff'd, 244 U.S. 174 (1917). But *Hoglund* did not address any question about ERISA. Indeed, Congress did not enact ERISA until 1974—more than 50 years after the D.C. Circuit decided *Hoglund*.

Hoglund also did not involve a defendant that was seeking to invoke a statutory time limitation after inducing the plaintiff to delay by expressly waiving its right to rely on that very provision. Rather, the court held that a party could not forfeit its rights under the statute at issue "by failing to take timely advantage of it." 44 App. D.C. at 312-313. The government in *Hoglund* apparently used the word "waive[r]" to describe the party's delay in invoking its rights. *Id.* at 312. But this Court has since clarified that "[t]he terms waiver and forfeiture—though often used interchangeably by jurists and litigants—are not synonymous." *Hamer*, 138 S. Ct. at 17 n.1; see *United States* v. *Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture."). "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). *Hoglund* involved the former ("the failure to

make the timely assertion of a right"), whereas this case involves the latter ("the 'intentional relinquishment or abandonment of a known right'"). *Ibid.* (citation omitted). There is accordingly no conflict with *Hoglund*, because it addressed a different contention about a different statute.

Finally, in a series of footnotes (Pet. 15-16 & nn.2-4), petitioners collect decisions from other courts of appeals, district courts, and bankruptcy courts, and then assert that they "have either expressly stated or clearly indicated that parties cannot waive the limitations period in a statute of repose." *Id.* at 16. But decisions from the district courts and bankruptcy courts cannot establish a circuit conflict, and the court of appeals' decisions petitioners cite are clearly inapposite.

For example, in *Archer* v. *Nissan Motor Acceptance Corp.*, 550 F.3d 506 (2008), the Fifth Circuit held that the statute of repose in 15 U.S.C. 1691e(f) "establish[ed] with clear text" that it was "a 'jurisdictional bar.'" 550 F.3d at 508 (citation omitted). But the court of appeals held here that Section 1113(1) is *not* jurisdictional, and petitioners do not dispute that holding. The determination that Section 1113(1) is not jurisdictional is critical, because nonjurisdictional time limitations ordinarily are subject to waiver. *E.g.*, *Musacchio*, 136 S. Ct. at 717-718.[*]

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[*] The only decision petitioners cite that involves waiver under Section 1113(1) is *Harris* v. *Bruister*, No. 10-cv-77, 2013 WL 6805155 (S.D. Miss. Dec. 20, 2013), which held that Section 1113(1) "is a jurisdictional prerequisite to suit" that therefore "cannot be waived or tolled." *Id.* at *6. But petitioners do not defend the characterization of Section 1113(1) as jurisdictional. *Harris* thus provides little if any support for their position. In any event, any tension between the court of appeals' decision here and the unpublished district court opinion in *Harris* would not warrant this Court's review.

The Ninth Circuit's decision in *Weil* v. *Elliott*, 859 F.3d 812 (2017), does not support petitioners, because it held that the time limit in 11 U.S.C. 727(e)(1) *could* be waived. 859 F.3d at 814-815. And the remaining decisions involve state statutes. See *Hinkle* v. *Henderson*, 85 F.3d 298, 302 (7th Cir. 1996) (noting without deciding that it "may be true that a defendant cannot waive a statute of repose," but concluding that "the Illinois legislature can"); *First United Methodist Church of Hyattsville* v. *United States Gypsum Co.*, 882 F.2d 862, 864-866 (4th Cir. 1989) (holding that equitable tolling did not apply to a state statute of repose), cert. denied, 493 U.S. 1070 (1990); *Hayden* v. *Ford Motor Co.*, 497 F.2d 1292, 1294-1295 (6th Cir. 1974) (holding that the defendant waived a state statute of limitations). In sum, this case is interlocutory, the court of appeals' decision is correct, and it does not conflict with any decision of this Court or another court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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