No. ________

In the Supreme Court of the United States

ROBERT N. PRESTON, TPP HOLDINGS, INC.,
d/b/a THE PRESTON PARTNERSHIP, LLC,
and THE TPP HOLDINGS, INC. EMPLOYEE
STOCK OWNERSHIP PLAN,

Petitioners,

–v–

SECRETARY, UNITED STATES
DEPARTMENT OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether courts and parties can use the non-statutory doctrine of waiver to extend the time limit imposed by the statute of repose in 29 U.S.C. § 1113(1) despite Congress' expressed intent to bar actions after this six-year statutory period elapses.

PARTIES TO THE PROCEEDING

1. Robert N. Preston, TPP Holdings, Inc., d/b/a The Preston Partnership, LLC, and The TPP Holdings, Inc. Employee Stock Ownership Plan, petitioners on review, were the defendants-appellees below.

2. Secretary, United States Department of Labor, respondent on review, was the plaintiff-appellant below.

RULE 29.6 DISCLOSURE STATEMENT

TPP Holdings, Inc., d/b/a The Preston Partnership, LLC, and The TPP Holdings, Inc. Employee Stock Ownership Plan have no parent corporation or entity, and no publicly-traded entity owns ten percent or more of the membership or equity interest of TPP Holdings, Inc., d/b/a The Preston Partnership, LLC, or The TPP Holdings, Inc. Employee Stock Ownership Plan.

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ROBERT N. PRESTON, TPP HOLDINGS, INC.,
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PETITION FOR A WRIT OF CERTIORARI

Robert N. Preston, TPP Holdings, Inc., d/b/a The Preston Partnership, LLC, and The TPP Holdings, Inc. Employee Stock Ownership Plan respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion is reported at 873 F.3d 877. App. 1a. The order of the District Court granting Petitioners' motion to dismiss, App. 20a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2017. App. 1a. The court of appeals entered an order denying Petitioners' petition for panel rehearing on December 13, 2017. App. 27a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This action concerns the "[l]imitation of actions" section of the Employee Retirement Income Security Act of 1974 ("ERISA"), as provided in 29 U.S.C. § 1113. Section 1113 states the following, in its entirety:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of--
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or

> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

STATEMENT

This case presents the straightforward issue as to whether courts will give effect to Congress' intent when it includes a statute of repose in a statute. The specific question is whether courts and parties can utilize the non-statutory doctrine of waiver to defeat and extend the time limitation in 29 U.S.C. § 1113(1)'s statute of repose. This case presents an excellent opportunity to address this issue, as this Court, the Court of Appeals, the District Court, and the parties are in agreement that Section 1113(1) constitutes a statute of repose and not a statute of limitations.

The issue that divided the Eleventh Circuit and the District Court in this case is whether the inclusion of a statute of repose in Section 1113(1)—rather than only a statute of limitations—is even relevant to the waiver determination. Based on this Court's precedent and the law of numerous Courts of Appeals, it is not only relevant that Section 1113(1) includes a statute of repose, this finding leads to the only appropriate outcome in this case—parties cannot waive the time limit in this statute of repose.

The Eleventh Circuit found otherwise utilizing the same analysis it would employ when interpreting a statute of limitations. For the Eleventh Circuit, Congress' choice to include a statute of repose in Section 1113 had no bearing on the outcome of this case. Instead, the Eleventh Circuit elected to utilize an analysis that presumed the existence of exceptions to statutes of repose, regardless of whether those exceptions were intended or anticipated by Congress. In doing so, the Eleventh Circuit failed to respect Congress' intent, created a direct conflict with the law of other Courts of Appeals, and starkly departed from this Court's decisions in *Mid State Horticultural Co. v. Pennsylvania Railroad Co.* (*Mid State*), 320 U.S. 356 (1943) and *California Public Employees' Retirement System v. ANZ Securities, Inc.* (*ANZ*), 137 S. Ct. 2042 (2017). The Court should grant this Petition and interpret and apply Section 1113(1) as Congress intended.

A. Background

The statutory time limitation at issue—29 U.S.C. § 1113(1)—provides a fixed "six year[ ]" deadline on certain "action[s] . . . commenced under this subchapter." This six-year period runs from a defendant's last culpable act—i.e., "(A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation." 29 U.S.C. § 1113(1). Section 1113 also provides an "except[ion]" applicable "in the case of fraud or concealment." Section 1113 does not include any additional language qualifying or limiting the six-year period provided in Section 1113(1). *See id.* § 1113.

This Court, the Circuit Court, the District Court, and Respondent have all recognized that Section 1113 (1) is a statute of repose. *See ANZ*, 137 S. Ct. 2042, 2050 (2017) (citing Section 1113 as an example of a "statute of repose [that] itself contains an express exception"); App. 11a ("[W]e agree with [Petitioners]—and [Respondent], for that matter—that Section 1113 (1)'s limitation-of-actions provision is indeed a statute of repose, and not a mere statute of limitations."); App. 23a ("This Court first agrees with [Petitioners] (and [Respondent] does not dispute) that the six-year limitation period in § 1113(1) is a statute of repose as distinguished from a statute of limitation." (citations omitted)). This Court identified several indicators as to whether a time limit is a statute of repose. For example, statutes of repose often "admit[ ] of no exception and on [their] face create[ ] a fixed bar against future liability." *ANZ*, 137 S. Ct. at 2049 (citing *CTS Corp. v. Waldburger* (*CTS*), 134 S. Ct. 2175, 2182–83 (2014)). Additionally, it is "close to a dispositive indication that [a] statute is one of repose" if it "runs from the defendant's last culpable act" and "not from the accrual of the claim." *Id.* Further, "[t]he pairing of a shorter statute of limitations and a longer statute of repose is a common feature of statutory time limits." *Id.* (citing *Gabelli v. SEC*, 568 U.S. 442, 453 (2013)). 29 U.S.C. § 1113(1) shares these common attributes and, consequently, it is appropriately characterized as a statute of repose.

"[S]tatutes of repose are enacted to give more explicit and certain protection to defendants" than statutes of limitation. *Id.* "A statute of repose . . . puts an outer limit on the right to bring a civil action." *CTS*, 134 S. Ct. at 2182. "The repose provision is . . . equivalent to a cutoff, in essence an absolute bar on a defendant's temporal liability." *Id.* at 2183 (citations omitted). "Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" *Id.* (quoting 54 C.J.S., *Limitations of Actions* § 7, p. 24 (2010) [hereinafter C.J.S.]).

"In contrast" to statutes of limitation, which "bear on the availability of remedies," statutes of repose "affect the availability of the underlying right." 1 C. Corman, Limitation of Actions § 1.1, p. 4 (1991) [hereinafter Corman] (emphasis omitted); *see, e.g.*, C.J.S. § 29, at 45 ("A statute of repose does not deny a remedy for a vested cause of action but rather bars the cause of action before it ever arises."). "That right is no longer available on the expiration of the specified period of time." Corman § 1.1, at 4.

Also unlike statutes of limitation, "[s]tatutes of repose . . . generally may not be tolled, even in cases of extraordinary circumstances beyond a plaintiff's control." *CTS*, 134 S. Ct. at 2183 (citations omitted). "Tolling" of a statute of repose "is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances." *ANZ*, 137 S. Ct. at 2050. "In theory, at least, the legislative bar to subsequent action is absolute, subject only to legislatively created exceptions (such as fraud) set forth in the statute of repose." Corman § 1.1, at 5.

B. Facts and Procedural History

Between August 2011 and May 2014, Petitioners and Respondent entered into four separate agreements. In each of these agreements, the parties agreed to toll the limitations period contained in 29 U.S.C. § 1113 until specified dates with respect to any actions brought by Respondent under ERISA involving certain acts or omissions.

On December 30, 2014, Respondent filed their complaint against Petitioners. In this complaint, Respondent claimed that Petitioners violated various provisions of ERISA. Respondent filed their complaint within the time period provided by the parties' agreements. However, Respondent alleged that most if not all of the purported conduct that constituted the bases for Respondent's claims occurred more than six years prior to Respondent filing the complaint.

On May 15, 2015, Petitioners filed a motion to dismiss wherein they requested that the District Court dismiss Respondent's claims to the extent they are barred by the statute of repose in 29 U.S.C. § 1113. In an order entered on October 27, 2015, the District Court granted Petitioners' motion to dismiss. App. 20a. In its order, the District Court noted that "liability . . . no longer exist[s]" after "the legislatively determined period of time" provided in a statute of repose. App. 25a (quoting *CTS*, 134 S. Ct. 2175, 2183 (2014)). The District Court found that "[i]f [Petitioners'] liability no longer existed at the conclusion of the period of repose, it follows that a tolling agreement would be of no effect." App. 25a. The District Court then dismissed "all of [Respondent's] claims related to events that occurred prior to December 30, 2008, . . . pursuant to 29 U.S.C. § 1113." App. 26a.

The District Court denied Respondent's subsequent motion for reconsideration. On November 22, 2016, the District Court granted Respondent's motion for certification of an interlocutory appeal and certified the following question to the Eleventh Circuit: "Is the limitation of actions contained in 29 U.S.C. § 1113 subject to express waiver?"

This Court released its decision in *ANZ* on June 26, 2017. 137 S. Ct. 2042 (2017). On July 11, 2017—after the close of briefing, but three months before the panel issued its decision—Petitioner filed a letter informing the Eleventh Circuit regarding the supplemental authority of this Court's decision in *ANZ*.

In a published opinion entered on October 12, 2017, a panel of the Eleventh Circuit answered the district court's certified question in the affirmative and remanded this matter. App. 19a. In its opinion, the Eleventh Circuit provided the following discussion regarding the structure of its analysis:

> Under our precedent, the jumping-off point is *In re Pugh*, 158 F.3d 530 (11th Cir. 1998), which, as [Respondent] points out, indicates that the principal criterion in deciding whether a limitations period can be waived is its "jurisdictional" character. . . . We acknowledged that the waiver issue could "be conceptualized in different ways"—including, as relevant here, either "as a dispute over whether the[ ] code provisions constitute statutes of repose or statutes of limitations" or, instead, "as a disagreement over whether the[ ] code provisions constitute grants of subject matter jurisdiction that leave a court without any authority to hear certain proceedings . . . after the limitations period has elapsed." *Id.* at 533–34. We concluded that the latter approach—keying the waiver determination to the particular time bar's

> "jurisdictional" character—was "more conducive to reasoned analysis." *Id.* at 533. Pursuant to *Pugh*, then, we begin our assessment of Section 1113(1) by considering whether it limits courts' subject matter jurisdiction—in which case its time bar is not waivable—or is instead a non-jurisdictional claim-processing rule—in which case waiver is permissible. *See id.* at 534.

App. 6a–7a (first and second alterations added). The Eleventh Circuit further stated 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.'" App. 8a (quoting *Musacchio v. United States*, 136 S. Ct. 709, 716–17 (2016)). The Court of Appeals then engaged in this jurisdictional analysis and found that "[n]either 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." App. 8a. The Eleventh Circuit ultimately held that "Section 1113(1)'s time bar . . . is non-jurisdictional and therefore (under *Pugh*) presumptively waivable." App. 10a.

The Court of Appeals next found that Section 1113(1) is, in fact, a statute of repose—but only <u>after</u> the panel provided its holding. App. 11a. The Eleventh Circuit did not engage in any form of altered analysis due to this finding based on this Court's decisions in *ANZ* or *Mid State*. *See* App. 11a–16a. Instead, the Eleventh Circuit distinguished this Court's decision in *ANZ* on the basis that *ANZ* was an "equitable-tolling case[ ]." App. 14a. The Eleventh Circuit further noted that, as Section 1113(1) has a fraud-or-concealment exception, this might "plausibly open[ ] the door to equitable tolling," which "would seem to clinch the case for enforcing an express waiver." App. 15a. The Court of Appeals also distinguished this Court's decision in *Mid State* because that case was "bound up in the specifics of the Interstate Commerce Act and the policies that the Court found underlay it." App. 15a–16a. The Eleventh Circuit then cited a handful of state-court cases for the proposition that there is a "well-established . . . understanding that statutes of repose are subject to express waiver." App. 17a (emphasis omitted). Finally, the Eleventh Circuit found that "there is just no good reason to conclude that Section 1113(1)—unlike other federal (and even constitutional) protections—can't be expressly waived simply because it's a statute of repose." App. 19a.

Petitioners filed a petition for panel rehearing on November 22, 2017. The Eleventh Circuit denied this petition for panel rehearing on December 13, 2017. App. 27a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit chose to presume the availability of waiver to extend the time limitation in Section 1113(1). In doing so, it was irrelevant to the Eleventh Circuit's analysis whether Congress chose to use a statute of repose or a statute of limitations in this Section. The Eleventh Circuit's errant analysis led it to an outcome that directly conflicts with the law of numerous other Courts of Appeals, such as the

Second, Tenth, and D.C. Circuits. Additionally, the Eleventh Circuit's opinion pervasively conflicts with this Court's precedent in *Mid State* and *ANZ*. Further, the Eleventh Circuit's opinion will have substantial ramifications, as other courts that follow the Eleventh Circuit's decision in this often-addressed area of law will similarly fail to give effect to—or even fully consider—Congress' choice to utilize a statute of repose. Action by this Court is needed to resolve the split between the Circuits and ensure that courts give proper respect to the intent of Congress when analyzing statutes of repose. Petitioners therefore respectfully request that the Court grant this Petition.

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURTS

In the decision below, the Eleventh Circuit disregarded the intent of Congress and the plain language of 29 U.S.C. § 1113(1) by holding that parties can waive the limitations period provided in this statute of repose. The Eleventh Circuit's opinion in this case directly conflicts with the governing law of the Second, Tenth, and D.C. Circuits because the Eleventh Circuit found that the statute of repose in Section 1113(1) includes a waiver exception that is not provided by the statutory text. The Court should grant this Petition and resolve this split among the Courts of Appeals.

Unlike the Eleventh Circuit, the Second Circuit leaves the decision to Congress—and not courts or the parties to litigation—to decide whether a statute of repose included by Congress in legislative text may be waived or extended. Specifically, in *Police and Fire Retirement System of City of Detroit v.*

IndyMac MBS, Inc., the Second Circuit stated that "a statute of repose is 'subject [only] to legislatively created exceptions.'" 721 F.3d 95, 106 (2d Cir. 2013) (alteration in original) (quoting *P. Stolz Family P'ship L.P. v. Daum*, 355 F.3d 92, 102 (2d Cir. 2004)), *cert. granted*, 134 S. Ct. 1515, *cert. dismissed as improvidently granted*, 135 S. Ct. 42 (2014); *cf.* Corman § 1.1, at 5 ("In theory, at least, the legislative bar to subsequent action is absolute, subject only to legislatively created exceptions (such as fraud) set forth in the statute of repose."). The *IndyMac* court then found that, as there was not a valid legislatively created exception permitting tolling under a statute of repose—Section 13 of the Securities Act of 1933—such an exception was not permitted. *See id.* at 109; *see also In re Bear Stearns Cos. Sec., Derivative, & ERISA Litig.*, 995 F. Supp. 2d 291, 300 (S.D.N.Y. 2014) (noting that the *IndyMac* court "concluded that" the potential exception under consideration "did not apply to statutes of repose" because it was "not . . . a legislatively created exception"), *aff'd*, *SRM Global Master Fund Ltd. P'ship v. Bear Stearns Cos.*, 829 F.3d 173 (2d Cir. 2016).

Similarly, the Tenth Circuit stated that "statutes of repose . . . are 'subject . . . to legislatively created exceptions.'" *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1225 n.12 (10th Cir. 2014) (second alteration in original) (quoting *IndyMac MBS, Inc.*, 721 F.3d at 105)), *cert. denied*, 135 S. Ct. 949 (2015). The Tenth Circuit has further explicitly and unequivocally stated that, "of course," a "statute of repose"—15 U.S.C. § 77m—"is not waivable." *Nat'l Credit Union Admin. Bd. v. Barclays Capital Inc.*, 785 F.3d 387, 390 (10th Cir. 2015).

The text-based position of the Second and Tenth Circuits on this issue is neither novel nor new, as the Court of Appeals of the District of Columbia took the same approach over a century ago. In *Hoglund v. Lane*, the petitioner "made a homestead entry for . . . public lands" and "a final certificate was duly issued to him." 44 App. D.C. 310, 311 (D.C. Cir. 1916), *aff'd*, 244 U.S. 174 (1917). Shortly after the petitioner's homestead entry, the President "issued a proclamation creating the Klamath National Forest, which embraced within its limits the land entered by petitioner." *Id.* at 311. Roughly eight years after the petitioner's homestead entry, the Secretary of the Interior found that the petitioner had failed to comply with "the provisions of the homestead law, and therefore his land was embraced within the withdrawal of" lands provided by the President's proclamation. *Id.*

The issue in *Hoglund* was whether the Secretary's ruling was timely under the governing law—an Act of March 3, 1891. This Act included a "proviso" stating, in relevant part, that an "entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him" after "two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead . . . laws." *Id.* at 312. The government argued that this provision was "merely a statute of limitations" and "the petitioner waived its benefit by failing to take timely advantage of it," such as through "non-residence and lack of cultivation." *Id.* at 312–13. The Court of Appeals of the District of Columbia disagreed and noted that the government's claim "could only be accomplished within the limitations of the act." *Id.* at 313. The *Hoglund* court further stated the following:

> [The proviso] is not a mere statute of limitations, which relates to and affects procedure, and could therefore be waived. It is a statute of repose affecting and settling the title to real estate. It establishes a limitation within which the government or a private individual may by protest or contest challenge the title of an entryman. When the time expires, the right ceases. If there is any waiver here, it is on the part of the government, and not the entryman.

Id. The *Hoglund* court thus expressly found that, absent statutory language to the contrary, the purported waiver of the petitioner could not toll or otherwise extend the statute of repose. *Id.*; *see also Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994) ("[T]he special provision Congress made elsewhere in [29 U.S.C.] § 1113 for fraud or concealment . . . indicat[es] that Congress meant to toll the statute only in instances of fraud or concealment."). On appeal, this Court affirmed the decision of the Court of Appeals of the District of Columbia and stated that "in a case like this, where, according to the conceded facts, no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but, on the contrary, a plain duty to see that the entryman receives a patent." *Lane v. Hoglund*, 244 U.S. 174, 181 (1917).

Under this governing law from the Second, Tenth, and D.C. Circuits, the sole relevant issue in this case is whether there is a legislatively created exception to Section 1113(1)'s statute of repose that operates to extend this limitations period due to waiver. Section

1113 does not include any express legislative language providing for a waiver exception.[1] *See* 29 U.S.C. § 1113. As such, under the law of the Second, Tenth, and D.C. Circuits, waiver is an invalid basis to extend the limitations period in Section 1113(1) and Respondent's untimely claims should be dismissed.

The Second, Tenth, and D.C. Circuits are not alone in finding that, absent express legislative language to the contrary, waiver and similar exceptions do not defeat or otherwise extend the time limitation in a statute of repose. A litany of other Courts of Appeals,[2]

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[1] Section § 1113(1) arguably does include a legislatively created exception pertaining to cases involving "fraud or concealment." 29 U.S.C. § 1113; *see Fulghum v. Embarq Corp.*, 785 F.3d 395, 414 (10th Cir. 2015) ("We believe . . . that the 'fraud or concealment' provision [of 29 U.S.C. § 1113] is a legislatively created exception to the six-year statute of repose." (citing *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1225 n.12 (10th Cir. 2014))). Respondent did not argue before the District Court that this potential exception applied in this case. As such, this fraud-or-concealment provision is not at issue here.

[2] *See Archer v. Nissan Motor Acceptance Corp.*, 550 F.3d 506, 508 (5th Cir. 2008) (finding that a statutory time limitation "is a statute of repose establishing with clear text a jurisdictional bar under which federal courts lack the power to extend the period to allow for late adjudication of claims" (citation omitted)); *Hinkle by Hinkle v. Henderson*, 85 F.3d 298, 302 (7th Cir. 1996) ("[W]hile it may be true that a defendant cannot waive a statute of repose, the . . . legislature can."); *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989) ("[A] statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." (citing *Knox v. AC & S, Inc.*, 690 F. Supp. 752, 759 (S.D. Ind. 1988))), *cert. denied*, 493 U.S. 1070 (1990); *Hayden v. Ford Motor Co.*, 497 F.2d 1292, 1294 (6th Cir.

district courts,[3] and bankruptcy courts[4] have either expressly stated or clearly indicated that parties cannot waive the limitations period in a statute of repose.

1974) ("Since a statute limiting the time within which actions shall be brought is for the benefit and repose of individuals . . . , it is a general rule that the protection may be waived by one entitled to rely on it, unless the statutory provision . . . goes to the right of action . . . ." (emphasis added)); *see also Weil v. Elliott*, 859 F.3d 812, 816 (9th Cir. 2017) (Christen, J., concurring) ("'A statute of repose, like a jurisdictional prerequisite, extinguishes a cause of action after a fixed period of time . . . regardless of when the cause of action accrued' and may not be waived." (alteration in original) (quoting *Albillo-De Leon v. Gonzales*, 410 F.3d 1090, 1097 n.5 (9th Cir. 2005))).

[3] *See, e.g.*, *Nichols v. Whitten*, CIVIL ACTION NO. 1:15-CV-273, 2015 WL 8959426, at *3 (M.D. Pa. Dec. 16, 2015) ("Unlike a statute of limitations, a statute of repose is non-waivable." (citing *Luzadder v. Despatch Oven Co.*, 834 F.2d 355, 357–58 (3d Cir. 1987))); *Harris v. Bruister*, Civil Action No. 4:10cv77–DPJ–FKB, 2013 WL 6805155, at *6 (S.D. Miss. Dec. 20, 2013) (stating that a statute of repose "is a jurisdictional prerequisite to suit that cannot be waived or tolled" (citations omitted)); *Nat'l Credit Union Admin. Bd. v. Credit Suisse Sec. (USA) LLC*, 939 F. Supp. 2d 1113, 1125–26 (D. Kan. 2013) (finding that "the parties' tolling agreement" could not "modify" a statute of repose); *Lewis v. Russell*, 838 F. Supp. 2d 1063, 1069 (E.D. Cal. 2012) ("The extinguishment of a claim before it accrues distinguishes statutes of repose from traditional affirmative defenses, such as statutes of limitations, and means that 'a statute of repose cannot be waived.'" (quoting *Donell v. Keppers*, 835 F. Supp. 2d 871, 877 (S.D. Cal. 2011))); *Donell*, 835 F. Supp. 2d at 877 ("Unlike a traditional statute of limitations, a statute of repose cannot be waived." (citing *Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1130 (D. Ariz. 2006))); *Klein v. Capital One Fin. Corp.*, No. 4:10–CV–00629–EJL, 2011 WL 3270438, at *7 n.5 (D. Idaho July 29, 2011) ("[T]he statute of repose . . . cannot be waived." (quoting *Warfield*, 453 F. Supp. 2d at 1130)); *Am. Fed'n of Teachers, AFL-CIO v. Bullock*, 605 F. Supp. 2d 251, 261 (D.D.C. 2009)

Despite the absence of a statutory waiver exception, the Eleventh Circuit determined that such an exception was apparently included through some other means in finding that Petitioners could waive the time limitation in Section 1113(1)'s statute of repose. In doing so, the Eleventh Circuit created a direct conflict with the law of the Second, Tenth, and D.C. Circuits, as well as the multitude of other Circuits and jurisdictions that similarly do not permit extensions to time limitations in statutes of repose based on waiver or similar non-statutory exceptions.

("[T]he statute of repose is a substantive provision which may not be waived because the time limit expressly qualifies the right which the statute creates." (quoting *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 421 (Del. 1984))).

[4] *See, e.g.*, *In re Tag Entm't Corp.*, Case No.: 1:09–bk–26982–VK, 2016 WL 1239519, at *16 (Bankr. C.D. Cal. Mar. 29, 2016) ("[A] statute of repose cannot be waived." (quoting *Donell*, 835 F. Supp. 2d at 877)); *In re Feggins*, 535 B.R. 862, 873 (Bankr. M.D. Ala. 2015) ("[T]here are procedural differences between limitation and repose, because limitation can be waived or tolled while repose cannot."); *In re Margaux Tex. Ventures, Inc.*, 545 B.R. 506, 526 (Bankr. N.D. Tex. 2014) ("[A] statute of limitations, unlike a statute of repose, can be extended by agreement, tolled, waived, or the subject of estoppel."); *In re Martin Levy of Berlin D.M.D., P.C.*, 416 B.R. 1, 7 (D. Mass. 2009) (stating that "a true statute of limitations" is "subject to extension by agreement, estoppel, tolling or waiver," while "a statute of repose" is "an absolute bar on a plaintiff's ability to bring suit"); *In re Commercial Fin. Servs., Inc.*, 294 B.R. 164, 173 (Bankr. N.D. Okla. 2003) ("While statutes of limitation are subject to tolling and waiver, statutes of repose act as an absolute bar on a plaintiff's ability to bring suit after a certain period of time and are not tolled for any reason." (citing *First United Methodist Church of Hyattsville*, 882 F.2d at 865–66)); *In re Frascatore*, 98 B.R. 710, 718 (Bankr. E.D. Pa. 1989) (stating that a "statute of repose . . . is nonwaivable" (citing *Luzadder*, 834 F.2d at 357–58)).

The ruling by the Eleventh Circuit created a disparity in the outcome of this litigation based solely on the applicable Circuit. If this case was before the Second, Tenth, or D.C. Circuits—or any of the other Circuits with similar governing law—Respondent's claims would be dismissed because waiver is not a legislatively created exception to the time limitation in Section 1113(1)'s statute of repose. However, this matter went before the Eleventh Circuit, which chose a radically different approach that, in effect, permitted Respondent's untimely claims to survive based on a judicially created and imposed waiver exception. This Court should grant this Petition and resolve this split between the Circuits.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT

This Court resolved the present issue over 70 years ago in *Mid State Horticultural Co. v. Pennsylvania Railroad Co.*, 320 U.S. 356 (1943). In *Mid State*, the respondent "sued to recover the full amount of freight charges on twenty-one carloads of grapes shipped by petitioner." *Id.* at 356. The issue before the Court was "whether the action was brought in time under Section 16(3)(a) of the Interstate Commerce Act." *Id.* Section 16(3)(a) provided the following: "All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." *Id.* at 357 (citation omitted).

The parties in *Mid State*—like Petitioners and Respondent here—entered into a tolling agreement prior to the expiration of the time period in Section 16(3)(a). *Id.* Respondent filed suit after Section 16(3)(a)'s deadline, but "within the extended time" provided by the parties' agreement. *Id.* at 358. Thus, the *Mid State* case turned on the question of "whether [Section 16(3)(a)'s] limitation can be waived by express agreement made before the period ends." *Id.* at 357.

The *Mid State* Court framed this question as, "[i]n classical statement, . . . whether [Section 16(3)(a)] operates, with the lapse of time, to extinguish the right which is the foundation for the claim or merely to bar the right which is the foundation for the claim or merely to bar the remedy for its enforcement." *Id.* at 358–59. In other words, the Court framed the issue as whether this statutory language constituted a statute of repose or a statute of limitations. *See, e.g.*, *CTS*, 134 S. Ct. 2175, 2182 (2014) ("A statute of repose . . . puts an outer limit on the right to bring a civil action."); Corman § 1.1, at 4 (stating that "statutes of limitations bear on the availability of remedies," while "statutes of repose affect the availability of the underlying right" (emphasis omitted)); C.J.S. § 29, at 45–46 ("Statutes of repose completely extinguish the substantive right, not just the remedy.").

To determine whether Section 16(3)(a) constituted a statute of repose, the Court looked to the "patterns of legislation followed in the Act and . . . judicial decision in treating problems of time limitation and related questions arising under it" to ascertain "indicia of Congress' intention"—something the Court noted then, as now, "is the controlling question." *Mid State*, 320 U.S. at 360–61. After surveying the structure of the Interstate Commerce Act and applicable case law, the Court found that Section 16(3)(a) was a statute of repose—<u>i.e.</u>, "Congress intended, when the period has run, to put an end to the substantive claim and the corresponding liability." *Id.* at 364. "The cause of action, the very foundation for relief, is extinguished." *Id.* The Court then ruled "that the [parties' tolling] agreement is invalid as being contrary to the intent and effect of" Section 16(3)(a) and the Interstate Commerce Act. *Id.* at 358.

This Court's decision in *Mid State* should have resolved this matter before the Court of Appeals. In particular, under *Mid State*, parties cannot waive the time limitations in statutes of repose like 29 U.S.C. § 1113(1). *See, e.g.*, *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 72 (1956) ("The teaching of the [*Mid State*] case . . . is that the running of the statute destroys the right to affirmative recovery as well as the remedy, so that the period of limitations cannot be waived by the parties."). However, the Eleventh Circuit explicitly declined to follow this precedent and, instead, extended the limitations period in Section 1113(1) through a non-statutory waiver exception. The Eleventh Circuit's ruling thus presents a direct conflict with this Court's decision in *Mid State* and the Court should grant this petition to correct the Eleventh Circuit's errant ruling.

The Eleventh Circuit's decision also conflicts with this Court's decision last term in *California Public Employees' Retirement System v. ANZ Securities, Inc.*, 137 S. Ct. 2042 (2017). In *ANZ*, the Court noted that the determination that a time limitation is a statute of repose is "critical," *id.* at 2050, and "transforms the analysis," *id.* at 2055. The Court then provided a straightforward analysis, which closely mirrors the law of the numerous Circuits discussed above.

Specifically, the Court stated that the "[t]olling" of a statute of repose "is permissible only where there is a particular indication that the legislature did not intend the statute to provide complete repose but instead anticipated the extension of the statutory period under certain circumstances." *Id.* at 2050. The Court further noted that courts cannot extend "the statutory period based on equitable principles" because "[t]he unqualified nature" of Congress' choice to provide for "a fixed limit" through the inclusion of a statute of repose "supersedes the courts' residual authority." *Id.* at 2051.

Based on this Court's decision in *ANZ*, the appropriate analysis in this case is simple. *Cf. Leber v. Citigroup 401(k) Plan Inv. Comm.*, --- F.R.D. ---, 07–Cv–9329 (SHS), 2017 WL 5664850, at *5 (S.D.N.Y. Nov. 27, 2017) ("Although the *ANZ* case involved one particular statute of repose, the case's reasoning extends to other statutes of repose." (citing *ANZ*, 137 S. Ct. at 2050)). As recognized by this Court, the Circuit Court, and the District Court, the statutory provision at issue here—29 U.S.C. § 1113(1)—is a statute of repose. *See ANZ*, 137 S. Ct. at 2050 (citing Section 1113 as an example of a "statute of repose [that] itself contains an express exception"); App. 11a ("[W]e agree with [Petitioners]—and [Respondent], for that matter—that Section 1113(1)'s limitation-of-actions provision is indeed a statute of repose, and not a mere statute of limitations."); App. 23a ("This Court . . . agrees with [Petitioners] (and [Respondent] does not dispute) that the six-year limitation period in § 1113(1) is a statute of repose . . . ."). Consequently, an extension of Section 1113(1)'s time limit due to a purported waiver "is permissible only where there is a particular indication that the legislature . . . anticipated the extension of the statutory period" based on a waiver exception. *ANZ*, 137 S. Ct. at 2050. There is no "particular indication" that Congress intended waiver to operate as an exception to Section 1113(1). Waiver therefore cannot operate to extend the time limit provided in this statute of repose and the Eleventh Circuit's holding to the contrary patently conflicts with this Court's decision in *ANZ*.

Petitioners notified the Eleventh Circuit of the *ANZ* decision three months prior to the Court of Appeals publishing its decision. However, despite the clear instructions provided by the Court in *ANZ*, the Eleventh Circuit eschewed the analysis dictated by this precedent. Indeed, the Eleventh Circuit explicitly declined to base its analysis on the threshold query <u>required</u> by *ANZ*—whether the statutory provision at issue is a statute of repose. App. 6a–7a. Rather, pursuant to its prior opinion in *In re Pugh*, 158 F.3d 530 (11th Cir. 1998), the Eleventh Circuit employed an analysis addressing whether Section 1113(1) "limits courts' subject matter jurisdiction . . . or is instead a non-jurisdictional claim-processing rule." App. 7a. The Eleventh Circuit thus ignored this Court's admonition that a statute of repose—like that in Section 1113(1)—transforms the analysis, *see ANZ*, 137 S. Ct. at 2055, and, instead, utilized the same analysis the Eleventh Circuit would use when interpreting a statute of limitations, *see* App. 6a–10a.

Additionally, the Eleventh Circuit employed the exact opposite presumption than that required by this Court's decision in *ANZ*. Under *ANZ*, the extension of the time limitation in a statute of repose "is permissible only where there is a particular indication that the legislature . . . anticipated the extension of the statutory period under certain circumstances." 137 S. Ct. at 2050. Rather than performing this required analysis, the Eleventh Circuit followed the polar opposite approach that, absent a "clear statement" from Congress that Section 1113(1) is "jurisdictional," there is a presumption that this statute of repose is "not jurisdictional" and therefore subject to exceptions, including waiver. App. 7a–8a (citation omitted). In other words, the Eleventh Circuit flipped the relevant inquiry and presumption on their heads.

The Eleventh Circuit's use of an errant analysis led it to an outcome that is directly at odds with this Court's decision in *ANZ*. In particular, the Eleventh Circuit found that the time limitation in Section 1113(1) can be tolled by the doctrine of waiver. App. 10a & 19a. The Eleventh Circuit erred in making this finding because there is no particular indication that Congress anticipated that waiver would be an exception to this statute of repose. *See ANZ*, 137 S. Ct. at 2050. Furthermore, waiver is an equitable doctrine. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002) (describing "waiver, estoppel, and equitable tolling" as "equitable doctrines"); *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 221 (1990) (Stevens, J., dissenting) (stating that "statute[s] of limitations" are "an area over which the federal courts historically have asserted equitable discretion to craft rules of tolling, laches, and waiver" (citations omitted)); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982) (holding that the time limit to "fil[e] a Title VII suit" is "subject to waiver as well as tolling when equity so requires"). Consequently, like all equitable, non-statutory principles, waiver cannot be the basis for extending the time period provided by a statute of repose. *See ANZ*, 137 S. Ct. at 2051 & 2055. The Eleventh Circuit's decision thus pervasively and substantively conflicts with this Court's decision in *ANZ*.

Ultimately, instead of following this Court's precedent in *Mid State* and *ANZ*, the Eleventh Circuit found that the time limit in Section 1113(1) can be extended based on a doctrine that is not moored in the legislative text—the equitable doctrine of waiver. In doing so, the Eleventh Circuit ignored Congress' judgment, as evidenced by the inclusion of a statute of repose in Section 1113(1), that "as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." *ANZ*, 137 S. Ct. at 2051 (quoting *CTS*, 134 S. Ct. 2175, 2183 (2014)). The Court should grant this Petition, resolve the pervasive conflicts between the Eleventh Circuit's opinion and this Court's precedent, and return Section 1113(1) to an interpretation that comports with the intent of Congress.

III. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW

The importance of this case lies in whether courts will respect and give effect to the intentions of Congress when Congress includes time limitations in its legislation. As this Court noted, "the question whether a tolling rule applies to a given statutory time bar is one 'of statutory intent.'" *ANZ*, 137 S. Ct. 2042, 2050 (2017) (quoting *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1232 (2014)). Through the inclusion of a statute of repose in Section 1113(1), Congress demonstrated its intent to provide a fixed bar to actions in clear and plain language. *See, e.g.*, *Larson v. Northrop Corp.*, 21 F.3d 1164, 1172 (D.C. Cir. 1994) (stating that the fact "the limitations period in [29 U.S.C.] § 1113(1)[ ] is six years"—i.e., "double that in [Section 1113(2)'s] . . . statute of limitations"—"suggests a judgment by Congress that when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's right to seek a remedy."); *cf. Brock v. Nellis*, 809 F.2d 753, 755 (11th Cir.) ("Although the legislative history of ERISA's statute of limitations is scant, nothing in its language or goals indicates that courts are to read into it anything more than its plain meaning."), *cert. dismissed*, *Guild v. Brock*, 108 S. Ct. 33 (1987). Congress could have elected to include a waiver exception in Section 1113(1). However, Congress chose not to do so. Thus, the appropriate method to give effect to Congress' intent is straightforward: apply the language of the statute, as written, and avoid grafting a waiver exception onto Section 1113(1) that is absent from the statutory text. *See, e.g.*, *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009) ("It is well established that, when the statutory language is plain, we must enforce it according to its terms." (collecting cases)); *Lane v. Hoglund*, 244 U.S. 174, 181 (1917) (stating that "where . . . no proceeding was begun within the prescribed period, there is no room for the exercise of discretion or judgment, but, on the contrary, a plain duty" to apply the time limit in the statute); *see also ANZ*, 137 S. Ct. at 2049 ("[A] statute that 'sets forth its time limitations in unusually emphatic form . . . cannot easily be read as containing implicit exceptions.'" (second alteration in original) (quoting *United States v. Brockamp*, 519 U.S. 347, 350 (1997))).

The Eleventh Circuit's approach in this case does the opposite and ignores the intent of Congress in both substance and procedure. Under the Eleventh Circuit's chosen interpretation and analysis, it is irrelevant that Congress elected to include a statute of repose in Section 1113(1). Instead, all courts in the Eleventh Circuit—as well as the courts in other circuits that choose to follow the Eleventh Circuit's decision—will apply the exact same jurisdiction-based analysis to all statutory time limitations, whether they are statutes of limitations or statutes of repose. *See* App. 6a–7a (declining to "conceptualize[ ]" the analysis based on the distinction of "statutes of repose or statutes of limitations" and, instead, "keying the waiver determination to the particular time bar's jurisdictional character" (citation omitted)). Further, under this analysis, courts are free to incorporate any number of exceptions into statutes of repose, regardless of whether those exceptions are included in the statutory language. The Eleventh Circuit's analysis and ruling in this case fail to respect Congress' choice to utilize a statute of repose and thereby infringe on the Legislature's right to make the law. *Cf. ANZ*, 137 S. Ct. at 2053–54 ("[T]his Court 'lack[s] the authority to rewrite' the statute of repose or to ignore its plain import." (second alteration in original) (quoting *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015))); *United States v. First Nat'l Bank of Detroit, Minn.*, 234 U.S. 245, 260 (1914) ("The responsibility for the justice or wisdom of legislation rests with the Congress, and it is the province of the courts to enforce, not to make, the laws." (citations omitted)); *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 483 (S.D.N.Y. 2011) ("When it comes to statutes of repose, . . . the relevant policies are those of Congress rather than any that courts might think preferable."). The Court should grant this Petition and return courts' treatment of Section 1113(1) to an interpretation that provides appropriate deference to the choices and intent of Congress.

Finally, the import of this matter is apparent from its likelihood for repetition. The Eleventh Circuit's analysis and rulings in this case extend far beyond Section 1113(1) and will influence courts' treatment of statutes of repose in other enactments of Congress. Any delay in resolving the instant matter will ensure that courts and parties continue to disagree as to whether a non-statutory exception, such as waiver, applies to statutes of repose. Like the instant case, the outcome of those disagreements will rest not with the language of the statute, but with the applicable circuit. The Court should forestall this ongoing division between the Courts of Appeals and grant this Petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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