No. 22-56042

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN BALEJA,
on behalf of himself and all others similarly situated,
Plaintiff-Appellant,

v.

NORTHROP GRUMMAN SPACE AND MISSION SYSTEMS CORP. SALARIED PENSION PLAN; NORTHROP GRUMMAN BENEFIT PLANS ADMINISTRATIVE COMMITTEE; NORTHROP GRUMMAN CORPORATION; DOES 1 THROUGH 10, inclusive,
Defendants-Appellees.

On Appeal from the United States District Court for the Central District of California
No. 5:17-cv-00235
Hon. Jesus G. Bernal

BRIEF OF *AMICI CURIAE* AMERICAN BENEFITS COUNCIL AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING OR REHEARING EN BANC

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Ninth Circuit Rule 26.1, American Benefits Council and the National Association of Manufacturers, as *amici curiae*, make the following disclosure:

No *amicus* is a subsidiary or affiliate of a publicly owned corporation nor are they publicly traded. No publicly held corporation has a direct financial interest in the outcome of this litigation due to the *amici's* participation.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the American Benefits Council ("Council") and the National Association of Manufacturers ("NAM"). The Council is dedicated to protecting employer-sponsored benefit plans and represents more major employers—over 220 of the world's largest corporations—than any other association that exclusively advocates on the full range of benefit issues. Council members, including organizations supporting employers of all sizes, directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs. The Council frequently participates as amicus curiae before the Supreme and Circuit Courts in cases with potential to significantly affect the administration and sustainability of employee benefit plans under ERISA. This is such a case.

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million people, annually contributes $2.87 trillion to the national economy, has the largest economic impact of any major sector, and accounts for over half of all national private-sector research and

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[1] No party's counsel authored this brief in whole or in part, and no party and no one other than *Amici,* their members, or their counsel contributed money intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief. Fed. R. App. P. 29(a)(4)(E); Cir. R. 29-2.

development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the nation. The NAM regularly submits amicus briefs in cases presenting issues of importance to the manufacturing community, including those impacting retirement benefits provided by private employers.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Council and the NAM submit this brief to explain the importance of maintaining the well-established standards governing the Employee Retirement Income Security Act of 1974 ("ERISA") and show how the panel's decision will disrupt plan administration nationwide by conflicting with those standards. ERISA creates no substantive entitlement to employer-provided benefits; rather, employers voluntarily create and maintain ERISA plans and are generally free to modify or terminate them "for any reason at any time." *Curtiss-Wright Corp. v. Schoonejongen,* 514 U.S. 73, 78 (1995). ERISA represents "careful balancing" between protecting participants' rights and encouraging employers to maintain the plans. *Conkright v. Frommert*, 559 U.S. 506, 516–18 (2010). This balancing act is crucial—it is undeniable that if the system becomes too complex or one-sided, "administrative costs, or litigation expenses, [will] unduly discourage employers from offering [ERISA] plans in the first place." *Id.* Here, the panel's decision,

which disrupted this balancing act, has undesirable impacts beyond the instant parties. Critically, this decision will harm plans and participants nationwide.

The panel's opinion turns decades of ERISA precedent on its head in three ways. First, it conflicts with black letter law and enables plaintiffs without standing to bring costly ERISA claims. Plaintiff cannot bring a claim about benefits inapplicable to him; to do so not only ignores the importance of Article III standing but opens the floodgates for litigation from improper plaintiffs.

Second, it undermines efficient, predictable, and uniform plan interpretation by side-stepping the mandatory deference ERISA affords plan administrators to interpret plans. It has been well-settled law for over three decades that courts must defer to the plan administrator's interpretation of a plan. *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 110–11 (1989); *see Ian C. v. UnitedHealthcare Ins. Co.,* 87 F.4th 1207, 1218 (10th Cir. 2023) ("The [Supreme] Court has faced multiple opportunities to overturn or otherwise tweak *Firestone* deference; and in every instance, it has declined."). Proper deference requires that, before rejecting a plan's interpretation, the court should *at minimum* provide the plan administrator an opportunity to demonstrate any extrinsic ambiguities in a plan provision by allowing it to present evidence supporting its interpretation within the plan's context. To forgo evidence from the most knowledgeable party and interpret the plan only in the abstract violates the proper deference standard, jeopardizes

uniformity, and threatens costly litigation.

Third, allowing a breach of fiduciary duty claim based on a Summary Plan Description ("SPD") circulated decades ago contravenes statutory SPD disclosure requirements, replaces the certainty the statute of repose gives plans with the constant threat of litigation, and undermines the goal of preserving limited plan assets. This panel's decision cannot be reconciled with ERISA's concrete goals of balance, stability, predictability, and efficiency.

BACKGROUND

Plaintiff-Appellant is a member of Defendants' TRW Salaried Pension Plan ("Plan"). In 1978, TRW acquired the defense contractor ESL, Inc., and, in 1984, TRW transferred ESL employees, including Plaintiff, into its own Plan and terminated ESL's plan. 3- ER-478; 4-SER-624. TRW amended its Plan to include an offset ("ESL Offset") to prevent duplication of previous ESL benefits and disclosed the Offset in multiple ways, including in a 1985 SPD. 5-ER-938–39; 3-ER-372; 4-ER-912. Over thirty years later, Plaintiff challenged the ESL Offset, claiming that the 1985 SPD did not properly disclose it ("Disclosure Claim").

The district court ruled in favor of Defendants and found the Disclosure Claim time-barred by ERISA's six-year statute of repose. 1-ER-41–42. In post-trial briefing, Plaintiff raised a completely *new* and previously unconsidered claim that Defendant violated a *different* Plan provision by failing to pay Class Members

a minimum monthly benefit that was allegedly shielded from the Offset ("New Minimum Benefit Claim"). 1-ER-25.

On appeal, the panel reversed the district court's decision on the Disclosure Claim, disregarding the statute of repose and finding the claim timely. Mem. at 3. For the New Minimum Benefit Claim, the panel ruled in favor of Plaintiff's new and previously unconsidered claim. Mem. at 8–9. The panel barred the Plan administrator from presenting testimony on the ambiguity or context of this provision, and instead interpreted the provision's "plain meaning" in a vacuum. *Id.* For the following reasons, the Court should grant panel or *en banc* rehearing and reverse the panel's decision.

ARGUMENT

I. Plaintiff's Lack of Article III Standing Prohibits the Court From Deciding The Minimum Benefit Claim

The injury in fact requirement under Article III is a bedrock principle of our judicial system's authority. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The Supreme Court in *Thole v. U.S. Bank* clearly required that an ERISA plan participant have a concrete injury to bring a claim. 590 U.S. 538, 538 (2020). Consistent with that precedent, this Circuit has held that a statutory ERISA violation alone does not confer standing; a plaintiff must have suffered a particularized, cognizable, or "concrete injury-in-fact." *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270- 71 (9th Cir. 2019).

This precedent precludes Plaintiff from asserting his Minimum Benefit claim. Plaintiff has a greater benefit under the Plan's ordinary benefit formula than this minimum benefit and therefore has no redress contingent on the Minimum Benefit Claim. *See* Dkt. No. 67-1 at 12-15. Thus, Plaintiff has "no concrete stake in the lawsuit," and "lack[s] Article III standing" because "[w]in or lose, [Plaintiff] would still receive the exact same monthly benefits…." *Thole,* 590 U.S. at 538. Because Plaintiff lacks Article III standing to assert the claim personally, he cannot bring the claim in a representative capacity. *Pence v. Andrus,* 586 F.2d 733, 736–37 (9th Cir.1978).

To reverse the law and allow any uninjured participant of a plan to bring a claim will overwhelm ERISA plans with unqualified claimants seeking payouts. Rehearing is necessary for the Court to properly adjudicate whether Plaintiff lacked standing to assert the claim and whether the panel consequently lacked jurisdiction over it.

II. Judicial Deference to an Administrator's Decision is Well-Established and Imperative to the Goals of ERISA

Next, *amici* agree with Defendant that the panel erred by not affording deference to the Plan Administrator's reasonable and proper interpretation of the Plan's minimum benefit provision consistent with the Plan terms. Dkt. No. 67-1 at 18–20. *Amici* offer the Court additional context: in failing to defer to the Plan administrator, and failing to hear evidence about Defendant's proper and

reasonable interpretation of the Plan, the panel's decision is inconsistent with the Supreme Court's instructive *Firestone* deference and the national body of case law adhering to it.

To comprehend the serious implications of ignoring *Firestone*'s deference, it is imperative to appreciate its longstanding impact. When enacting ERISA, Congress made clear that ERISA only protects benefits *already earned*, and certainly "d[oes] not require employers to establish benefit plans in the first place." *Conkright*, 559 U.S. at 516–17. Cognizant that plan sponsors may terminate their plans if ERISA was too one-sided or costly, Congress instilled the goal of safeguarding a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Id.*

The Supreme Court has identified additional concrete goals, including efficiency, limited administrative and litigation costs, predictability, uniformity, and fairness. *Id.* at 517; *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 379 (2002) (finding ERISA "induc[es] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards…"). There is substantial case law interpreting ERISA to uphold these goals, including the well-settled precedent of judicial deference to a plan administrator's interpretation. *Firestone,* 489 U.S. at 110–11 (establishing "*Firestone* deference").

A. *Firestone* Deference is Crucial to Achieving ERISA's Goals of Efficiency and Uniformity

In *Firestone*, the Supreme Court held that trust law principles, which confer discretion onto a trustee and prohibit court intervention "except to prevent an abuse … of his discretion," also guide ERISA fiduciaries. *Firestone*, 489 U.S. at 110–11. Accordingly, *Firestone* established a broad standard of judicial deference toward a plan administrator's interpretation of the plan. *Id.* at 109–15. Where a plan provides its administrator discretion, the court must review its decisions under the "arbitrary and capricious standard," and not disturb an administrator's reasonable interpretation of the plan. *Id.*

The Court explained in *Conkright* that *Firestone* deference is essential to support Congress's goals for ERISA, holding that deference preserves and promotes: (1) the competing interests and "'careful balancing' on which ERISA is based"; (2) efficiency and preserving limited resources by avoiding costly litigation; (3) fairness by preventing inappropriate and inequitable "windfalls for particular employees" which depletes a shared plan's limited resources; and (4) predictability and uniformity, allowing employers and employees to rely on the expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations. 559 U.S. 506, 517–20 (2010).

B. Courts Cannot Usurp the Role of the Plan Administrator

In *Conkright*, the Supreme Court explained that courts are less-equipped

than plan administrators to interpret ERISA plans and that ERISA is an enormously "complex and detailed statute," resulting in "lengthy and complicated" plans. *Id*. at 509–17. A failure to defer to a plan administrator could result in an undesirable "patchwork of different interpretations," where the same plan is interpreted differently for employees by different courts based on different evidence. *Id.*

Inconsistencies across jurisdictions would impair ERISA's framework. A "patchwork of different interpretations" would (1) "introduce considerable inefficiencies in benefit program operation" and adjudication, (2) make it "impossible even to determine whether an ERISA plan is solvent…if the plan is interpreted to mean different things in different places"; and (3) "lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them." *Id.* at 517–18.

To prevent inconsistencies, the Ninth Circuit has recognized the importance of courts not stepping into the role of the administrator and interpreting the plan, admitting: "we should not allow ourselves to be seduced into making a decision which belongs to the plan administrator in the first instance" because "we cannot, and will not, predict how the plan administrator, who has the primary duty of construction, will construe the terms of the [plan]." *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1013 (9th Cir. 1997). Courts have "developed [administrative

rules] to prevent [themselves] from becoming substitute plan administrators" to safeguard broad deference and uniform decision-making. *Campbell v. Hartford Life & Acc. Ins. Co.*, 2022 WL 620151, at *3 (6th Cir. Mar. 3, 2022); *Perry v. Simplicity Eng'g, a Div. of Lukens Gen. Indus., Inc.,* 900 F.2d 963, 966 (6th Cir. 1990) ("Nothing in [ERISA's] legislative history suggests that Congress intended that federal district courts would function as substitute plan administrators…. Such a procedure would frustrate the goal of prompt resolution of claims by the fiduciary….").

Thus, it is well-settled nationwide that a plan administrator is the chosen party to interpret a plan and its ambiguities efficiently and correctly. For a court to usurp the role of the plan administrator and disregard evidence of ambiguity would not just disrupt Ninth Circuit precedent but would result in confusion in sister circuits and question the applicability of *Firestone* deference nationwide.

C. *Firestone* Deference Prohibits Courts from Creating Ad Hoc Exceptions or Evidentiary Rules

The Supreme Court has endorsed rules expanding *Firestone* deference and warned about the dangerous consequences of crafting exceptions, cautioning that adding "'special procedural or evidentiary rules' to the mix," could bring about the unwanted result of "near universal *de novo* review" of plan decisions. *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 107 (2008). Exceptions would result in precarious situations where the court could find "deference is less important." *Conkright,* 559

U.S. at 507, 513 (noting *Firestone* "set out a broad standard of deference without any suggestion that the standard was susceptible to ad hoc exceptions").

Deferring to a plan administrator's understanding is necessary, even where judicial review finds that a decision is "arbitrary and capricious." *See Miles v. Principal Life Ins. Co.*, 720 F.3d 472, 486–90 (2d Cir. 2013). Appellate courts have remanded such cases so that the plan administrator has "the opportunity to consider the evidence under the appropriate legal standards." *Id*. at 490.

Even when a court reviews a plan *de novo*—a much more stringent standard of review than applicable here—the court still must "revie[w] the employee's claim as it would have any other contract claim—by looking to the terms of the plan and other manifestations of the parties' intent." *Firestone,* 489 U.S. at 112–13; *see Abatie v. Alta Health & Life Ins. Co.,* 458 F.3d 955, 970 (9th Cir. 2006) (holding courts may "consider extra-judicial evidence" to conduct an adequate "*de novo* review").

The complexity of ERISA plans—including voluminous plan documents and changes over time—makes court review of evidence imperative to understand the ambiguities, intent, and context of the plan. This ensures the *Firestone* standard is met and that the national body of ERISA case law remains in harmony.

D. ERISA Jurisprudence Requires Deference to the Plan Administrator's Interpretation and Certainly Consideration of Contextual Evidence

Here, the Court is mandated to grant deference to the plan administrator's interpretation of the plan. The Supreme Court explicitly instructs that *Firestone* Deference prohibits courts from second guessing plan administrators unless their interpretation is unreasonable. In this case, the plan administrator had no opportunity to address the plan provision at issue because Plaintiff failed to raise the Minimum Benefit Claim at the administrative level. Moreover, the administrator was not allowed to explain that its interpretation, contrary to the panel's, was reasonable and based on other plan documents and surrounding provisions. 1-ER-25. There is no doubt that the plan administrator is in the best position to understand the entirety of the plan, including intent or ambiguities not readily apparent on the face of one section of one document. *See Conkright,* 559 U.S. at 509-17. It is difficult to see how the appropriate standard of deference to a plan administrator was upheld where a panel reverses a district court's opinion, finds the Plan's interpretation unreasonable, and makes a new and independent interpretation of one provision all while refusing to accept the Plan's testimony about the complexities of that provision. While *Amici* do not believe the record supports a departure from the Plan administrator's interpretation, at the very least this Court must hear all evidence that could inform its decision on whether there is

an ambiguity in the plan, and how that ambiguity should be resolved.

Moreover, employers and plan participants need certainty about their plans. Here, consider, *arguendo,* if a court in a different jurisdiction were to properly hear this issue and either (1) give deference to the Plan administrator's interpretation, or (2) permit the Plan administrator to present evidence of its interpretation and rule in favor of the Plan administrator's interpretation. This very possible scenario, giving rise to conflicting determinations based on an identical set of facts, is exactly what the Supreme Court warned against in *Conkright*, where "failing to defer to the Plan Administrator…could well cause the Plan to be subject to different interpretations in [different states]," causing havoc for the plan and its participants. 559 U.S. at 520-21 ("*Firestone* deference serves to avoid [jurisdictional inconsistencies]" which "preserve[s] the 'careful balancing' of interests that ERISA represents."); *Egelhoff v. Egelhoff,* 532 U.S. 141, 148 (2001) ("Uniformity is impossible, however, if plans are subject to different legal obligations in different States.").

To be clear, while *Firestone* mandates broad deference, it does not give plan administrators unfettered decision-making authority, and an administrator's interpretation can be refused. *See Conkright,* 559 U.S. at 508 ("[A] deferential standard of review also does not mean that the plan administrator will always prevail on the merits."). However, in light of the edict of deference, such a finding

must be done on the merits, and must include a review of the evidence necessary to ensure a fully informed decision consistent with ERISA law nationally. To do otherwise harms *both* plan sponsors *and* employees and disrupts precedent nationwide. Rehearing would allow the Court to fully adjudicate the Plan's proper interpretation informed by extrinsic evidence on the context, intent, and ambiguity of the Plan.

III. Limitation Periods for Extraneous Plan Summaries Should Not Be Extended

Finally, *Amici* agree with Defendants that the panel incorrectly found that Plaintiff's Disclosure Claim—that Defendants did not properly disclose an offset ("ESL Offset") to prevent duplication of benefits—is not barred by ERISA's six-year statute of repose. Relying on the continuing violation doctrine, the panel reasoned that Plaintiff timely filed his lawsuit in 2017 because an SPD issued in 2014 "was the 'last action' in a series of allegedly misleading statements about the pension offset" with the first statement occurring in the 1985 SPD. Mem. at 3 (quoting 29 U.S.C. § 1113(1)(A)). *Amici* offer the Court additional context for why the panel's adoption of the continuing violation doctrine in this context improperly disturbs carefully crafted and well-settled SPD disclosure law.

A. SPDs are Summary by Nature, Not Necessarily Plan Terms, and Need to Only Reference an Offset

ERISA requires that SPDs "be written in a manner calculated to be

understood by the average plan participant and ... be sufficiently accurate and comprehensive to reasonably apprise [participants] of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1); 29 C.F.R. § 2520.102–2. Courts routinely interpret this clause to emphasize that SPDs are mere *summaries* of otherwise complex plans and instruct that drafters should prioritize clarity over completeness. *See Lorenzen v. Emps. Ret. Plan of the Sperry & Hutchinson Co.,* 896 F.2d 228, 236 (7th Cir. 1990) ("[T]he law is clear that the plan summary is not required to anticipate every possible idiosyncratic contingency that might affect a particular participant's or beneficiary's status. If it were, the summaries would be choked with detail and hopelessly confusing. Clarity and completeness are competing goods."). To prevent summaries from becoming too complex, courts afford SPD drafters "continued judgment and discretion" and urge them to "tak[e] into account such factors as the level of education and comprehension of the typical plan participant." *Lee v. Union Elec. Co.,* 789 F.2d 1303, 1307 (8th Cir. 1986).

The Supreme Court clarified that SPDs are, by definition, summaries and *not* the underlying plan contract; SPDs, "important as they are, provide communication with beneficiaries *about* the plan . . .their statements do not themselves constitute the *terms* of the plan." *CIGNA Corp. v. Amara,* 563 U.S. 421, 437–38 (2011) (holding that "[t]o make the language of a plan summary legally binding could

well lead plan administrators to sacrifice simplicity and comprehensibility in order to describe plan terms in the language of lawyers" and would "bring about complexity that would defeat the fundamental purpose of the summaries").

As summaries, SPDs cannot illuminate all situations applicable to individual participants and it is the beneficiary's job to further inquire about their plan. *Farr v. U.S. W. Commc'ns, Inc.*, 151 F.3d 908, 915 (9th Cir. 1998), *amended,* 179 F.3d 1252 (9th Cir. 1999) ("[An SPD] cannot violate ERISA merely because it could have included language more specifically discussing the precise situation of a particular beneficiary."); *Lee v. Union Elec. Co.*, 789 F.2d 1303, 1307–08 (8th Cir. 1986) (agreeing that a participant could contact his company about any confusion with his SPD, and it would be "tautological" to include more individualized attention to details in the SPD). Even the Definitely Determinable Benefit rule does not require the *SPD* to be wholly inclusive, it only requires that benefits under a pension plan be determinable from a plan document rather than left to discretion. 26 U.S.C. § 401(a)(25); 26 C.F.R. 1.401–1(b)(1)(i).

The Ninth Circuit has held that an SPD "cannot violate ERISA merely because it could have included language more specifically discussing the precise situation of a particular beneficiary," and need only show the existence of a plan offset as a general "circumstanc[e] which may result in disqualification, ineligibility, or denial or loss of benefits." *Stahl v. Tony's Bldg. Materials, Inc.,*

875 F.2d 1404, 1406–08 (9th Cir. 1989); *see also Roche v. TECO Energy, Inc*., 2024 WL 3966067, at *7–8 (M.D. Fla. Aug. 28, 2024) (finding no breach of fiduciary duty where plaintiff alleged the plan offset was not clearly defined because "neither the legislature, the Department of Labor, nor the courts have opted to require SPDs to explain a plan's method of calculating benefits," nor does it need to provide "specific advice to employees on how to shape their conduct to fit the rules"). Thus, an SPD does not have to provide all meaning and significance of an offset to properly disclose it.

B. SPDs Require Routine Updates and Disclosure, Making Past SPDs Particularly Extraneous

ERISA's statutory language and case law clarify that the relevance of SPDs expire with a new SPD; ERISA requires the plan to disclose SPDs routinely, after material modifications, and when a participant requests the current SPD. 29 U.S.C. § 1024.

Statutory disclosure requirements limit beneficiaries' entitlement to only *current* SPDs, as outdated SPDs have no application in understanding benefits. *See Curtiss-Wright Corp.,* 514 U.S. at 83–84 (noting ERISA provides "a comprehensive set of 'reporting and disclosure' requirements" where plan administrators must periodically furnish "currently operative, governing plan documents"); *Jackson v. E.J. Brach Corp.,* 937 F. Supp. 735, 739 (N.D. Ill. 1996) (while a failure to produce outdated summaries "may have been *at one time* an

ERISA violation," there is "no statutory basis for penalizing an administrator for failing to provide documents which have no current application whatsoever"). Also, plans need not always furnish SPDs to retirees that are no longer participants. 29 C.F.R. §§ 2520.104b-2, 2520.104b-4(b), 2510.3–3; *Childers v. NW. Airlines, Inc.,* 688 F. Supp. 1357, 1361 (D. Minn. 1988) (finding no duty to "furnish information to nonparticipants").

Here, allowing Plaintiff to bring suit based on a stale summary from 1985 runs afoul of the purpose of SPDs and the disclosure requirements meant to keep participants timely informed of the *current* plan. It also conflicts with the "basic purpose of a statute of limitations" which is to protect "against the prosecution of stale claims." *Rustico v. Intuitive Surgical, Inc.,* 993 F.3d 1085, 1093 (9th Cir. 2021). A plan sponsor should be allowed peace from a litigious plaintiff decades after an SPD has expired; here the panel's decision makes the limitations indeterminable.

To allow a plan administrator to be liable for a plan *summary* years later contravenes ERISA's goals of balancing interests and avoiding inflated administration costs. *See Conkright*, 559 U.S. at 517. To mischaracterize the purpose of summary documents and allow participants to bring stale claims not only forecloses the statutory SPD disclosure procedures followed nationwide but would improperly tip the scales for participants. *Id.* Fearing the loss of statutory

protections, plan sponsors may choose to terminate their ERISA plans. *Id.* Rehearing is necessary for the Court to properly reverse the panel's decision and apply the statute of repose to Plaintiff's Disclosure Claim.

CONCLUSION

For the foregoing reasons, this Court should grant panel or *en banc* rehearing and reverse the panel's decision.

Dated: September 26, 2024

Respectfully submitted,

/s/ Christopher J. Rillo

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Alison Karol Sigurdsson
Catherine A. Scott

Counsel for Proposed Amici

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 22-56042

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- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☐ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ________.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Christopher J. Rillo **Date** September 26, 2024
(use "s/[typed name]" to sign electronically-filed documents)