No. _____

IN THE
Supreme Court of the United States

LOUISIANA HEALTH SERVICE & INDEMNITY CO., doing business as BLUE CROSS BLUE SHIELD OF LOUISIANA,
Petitioner,

v.

ENCOMPASS OFFICE SOLUTIONS, INC.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court seeking to identify the content of state law pursuant to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), may choose the option that expands liability under state law, absent clear, authoritative guidance from the state's courts.

2. Whether an administrator of a plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA") waives application of the plan's anti-assignment provision – with the consequence of enabling a medical provider to bring a lawsuit under ERISA – through the routine processing of a claim for benefits pursued by the provider for an ERISA participant.

PARTIES TO PROCEEDING AND RELATED CASES

Petitioner is Louisiana Health Service & Indemnity Company, doing business as Blue Cross and Blue Shield of Louisiana. It was the Defendant-Appellant below.

Respondent is Encompass Office Solutions, Incorporated. It was the Plaintiff-Appellee below.

Northern District of Texas, No. 3:11-cv-01471-M, *Encompass Office Solutions, Inc. v. Louisiana Health Serv. & Indemnity Co.*, Final Judgment entered June 6, 2017.

Fifth Circuit Court of Appeals, No 17-10736, *Encompass Office Solutions, Inc. v. Louisiana Health Serv. & Indem. Co.*, Opinion & Judgment entered March 19, 2019; Denial of Petition for Rehearing & Rehearing *En Banc* entered April 16, 2019; Mandate issued April 24, 2019.

U.S. Supreme Court, No. 18A1359, *Louisiana Health Serv. & Indem. Co. v. Encompass Office Solutions, Inc.*, Application for Extension of Time granted June 26, 2019.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states as follows:

Louisiana Health Service & Indemnity Co. is a non-profit mutual insurance company organized and existing under the laws of the State of Louisiana with no parent company, and no publicly-held corporation owns more than 10% of its stock.

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OPINIONS BELOW

The March 19, 2019 opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 919 F.3d 266 (5th Cir. 2019) and is reproduced in Petitioner's Appendix ("Pet. App.") at 1a-33a. Of the three relevant opinions of the U.S. District Court for the Northern District of Texas, the first is unreported (but appears at 2017 U.S. Dist. LEXIS 206064 (N.D. Tex. June 26, 2017)) and is reproduced at Pet. App. 34a-48a; the second (dated April 29, 2014) is unreported and is reproduced at Pet. App. 64a-92a; and the third is unreported (but appears at 2013 U.S. Dist. LEXIS 188415 (N.D. Tex. Sept. 17, 2013)) and is reproduced at Pet. App. 93a-155a.

STATEMENT OF JURISDICTION

Petitioner seeks review of the portions of the Fifth Circuit's March 19, 2019 decision that affirmed judgment against Petitioner on tort claims brought by Respondent under Louisiana law and on claims brought by Respondent under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. Petitioner timely sought panel rehearing and rehearing *en banc*, which the Fifth Circuit denied on April 16, 2019. *See* Pet. App. 57a-58a. Upon timely application filed by Petitioner, Justice Alito extended the time for filing a petition for certiorari to and including August 14, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

ERISA's civil enforcement provision, 29 U.S.C. § 1132, provides in relevant part:

(a) PERSONS EMPOWERED TO BRING A CIVIL ACTION.—A civil action may be brought—

(1) by a participant or beneficiary—

* * *

(B) to recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

STATEMENT OF THE CASE

The Petition raises two independent Questions Presented that are associated with different claims in the same case. The first Question Presented involves the long-simmering federalism-oriented controversy over the proper approach for a federal court to take when determining the content of state law under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Specifically, the first issue is whether a federal court in making such a determination may extend state law beyond the boundary thus far declared by the state's highest court or clearly stated by other state courts or, instead, should opt for the construction that establishes no new basis for state-law liability until the state courts have spoken with clarity. The latter approach would leave recognition of new state-law liability solely to the state's courts.

The second Question Presented concerns a thorny ERISA issue regarding the circumstances under which medical providers, who are nowhere mentioned in ERISA's enforcement scheme, may pursue an action under that enforcement scheme: can they do so as an assignee of a plan participant when the ERISA plan

contains an anti-assignment provision, under a theory that the plan's administrator waived the anti-assignment provision through routine processing of a claim for benefits pursued by the provider on the participant's behalf? This issue arises frequently in the federal courts, given that all circuits in at least some situations now allow provider-assignee standing under ERISA's enforcement regime.

As relevant to the first Question Presented, a divided Fifth Circuit, making its *Erie* determination, here extended a Louisiana statute-of-limitations discovery-rule doctrine known as *contra non valentem* to a context in which the Louisiana Supreme Court had never previously applied it and did so based on, at best, conflicting Louisiana intermediate appellate decisions; the outcome was to sustain liability where tort claims otherwise would be time-barred. As to the second Question Presented, the Fifth Circuit held that the ERISA plan administrator's processing of a request for benefits pursued by the provider for the participant, without initially questioning the provider's assignee status, *did* result in the waiver of the plan's otherwise-applicable anti-assignment provision, thereby allowing the provider later to sue under ERISA as an assignee. Because the Fifth Circuit's rulings on both fronts conflict with decisions of other circuits, depart from this Court's precedents, and have important doctrinal and practical implications, the Court should grant certiorari on both Questions Presented.

A. Petitioner Louisiana Health Service & Indemnity Co., doing business as Blue Cross and Blue Shield of Louisiana ("BCBSLA"), provides health insurance and

claims-processing services to, among others, private employers offering health benefits to their employees. Respondent Encompass Office Solutions, Incorporated ("Encompass") offers "equipment, drugs, supplies, and nursing staff necessary for a doctor to perform outpatient surgery in his own office, rather than in a hospital or ambulatory surgical center." Pet. App. 2a. That is, Encompass is neither a physician nor a surgical facility, but a vendor that provides accoutrements to physicians for surgery in the physician's office.

In 2010, a dispute arose between Encompass and BCBSLA over reimbursement for Encompass's supplies and services for patients who are BCBSLA members.[1] At the time, BCBSLA (like other insurers) paid the treating physician "a Global Fee" that would be "greater than the fee paid to doctors for performing surgery at a hospital" and that "is intended to compensate for all overhead costs of an in-office procedure." Pet. App. 3a. Concurrently, however, Encompass filed claims for reimbursement "separate" from the physician, and BCBSLA initially made payments to Encompass, due to a special claims-code "modifier" that Encompass used. *Id.* Encompass filed those claims directly on behalf of the patients, based on pur-

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[1] Depending on the context, BCBSLA in this Petition uses the terms "member," "patient," or ERISA "participant" or "beneficiary" to refer to an individual whose health-benefits coverage BCBSLA insures or administers and on whose behalf Encompass seeks, as an assignee, payment from BCBSLA. *See generally* 29 U.S.C. § 1002(7), (8) (ERISA defining "participant" as an employee eligible to receive ERISA-plan benefits and a "beneficiary" as a person designated by a participant or by a plan's terms to receive benefits, such as a dependent).

ported "assignment[s] of benefits" from patients. *Id.* Encompass is "an out-of-network service provider for BCBSLA members," meaning that Encompass (unlike an in-network provider) has no contract with BCBSLA under which it agrees to a pricing schedule and may automatically file claims on behalf of members (as opposed to proceeding through assignments of benefits). *Id.*

After, in effect, making duplicate payments for "several months," and as a result of a "tip" regarding Encompass's practices and a subsequent "investigation," BCBSLA stopped payments to Encompass. *Id.* BCBSLA "also learned that other insurance companies were doing the same" – *i.e.*, halting payments to Encompass. *Id.*

In August 2010, BCBSLA's Vice President, Dawn Cantrell, "sent a letter to in-network providers directing them not to use Encompass's services." *Id.* In relevant part, the letter stated (as quoted by the Fifth Circuit) that "'the facility fees charged by Encompass are not covered.'" *Id.* at 4a. The letter also stated: "'If we find that any network physician is repeatedly using Encompass to deliver facility and procedure services that are not eligible for benefits and our members are being billed for these facility charges, the network physician will be subject to termination from the Blue Cross networks.'" *Id.* (emphasis removed).

Three days after the letter's issuance, Encompass obtained a copy of the letter "and gave it to counsel." *Id.* at 5a. It also "sought clarification from BCBSLA by calling Cantrell three times," but received no response. *Id.* After BCBSLA then requested repayment of the earlier paid claims, "Encompass sued." *Id.*

B. Encompass brought its suit in 2011 in federal court in the Northern District of Texas, originally naming a Texas Blue Cross and Blue Shield entity as the sole Defendant and eventually adding BCBSLA as a Defendant. *See id.* at 5a n.1. In the second amended complaint, which was the first pleading adding BCBSLA to the case, Encompass raised just ERISA claims and state-law contract claims. On ERISA, Encompass sued as an assignee of its patients and "alleged that BCBSLA had abused its discretion in denying Encompass's claims on ERISA-covered plans." *Id.* at 5a. The contract claims were similar to the ERISA claims, except for "non-ERISA plans." *Id.* Encompass based original jurisdiction on the existence of a federal question under ERISA, diversity jurisdiction, and – in the event of no diversity – supplemental jurisdiction over the state-law claims. *See* D. Ct. ECF No. 45 at 18.

Two years after the suit began, and three years after the Cantrell letter, Encompass deposed Cantrell and a BCBSLA fraud investigator. Their testimony, as characterized by the Fifth Circuit, indicated they were unaware "of a BCBSLA policy or benefit plan that said Encompass's services were not covered" or "of a policy . . . permitting BCBSLA to terminate a physician for partnering with Encompass." Pet. App. 5a-6a. Supposedly as a result of this testimony, Encompass now believed that the Cantrell letter might have "contained false statements." *Id.* at 6a. After the depositions, in April 2013, Encompass amended its pleading to add – for the first time – state-law tort claims for defamation and tortious interference with business relations, alleging that the Cantrell letter hurt its business. *See id.*

In the district court, both sides moved for summary judgment, but the district court ultimately granted neither motion. For present purposes, the district court's denial of BCBSLA's motion for summary judgment on the state-law tort claims and ERISA claims is the most important. On the tort claims, BCBSLA moved for summary judgment on the ground that they are "barred by Louisiana's one-year prescriptive period." *Id.* at 6a. "The Louisiana Civil Code uses the term . . . 'liberative prescription' for statute of limitation." *Id.* at 146a n.21. The district court found that "a genuine dispute of material fact existed as to whether Encompass was entitled to the benefit of a discovery rule – *contra non valentem* – that would suspend the prescriptive period." *Id.* at 6a; *see id.* at 82a. As the Louisiana Supreme Court has described it, "*[c]ontra non valentem non currit praescriptio* means that prescription does not run against a person who could not bring his suit." *Wells v. Zadeck*, 89 So.3d 1145, 1150 (La. 2012).

On the ERISA claims, BCBSLA maintained that Encompass lacked standing under ERISA to sue. ERISA provides that "a civil action may be brought . . . by a *participant or beneficiary* . . . to recover benefits due to him under the terms of his plan," 29 U.S.C. § 1132(a)(1)(B) (emphasis added), and the Fifth Circuit has held that, via an assignment, "[h]ealthcare providers . . . may bring ERISA suits [under § 502(a)(1)(B)] in the shoes of their patients." *N. Cypress Med. Ctr. Op. Co. v. CIGNA Healthcare*, 781 F.3d 182, 191 (5th Cir. 2015). One argument BCBSLA asserted on standing was that terms – known as anti-assignment provisions – in the ERISA plans prohibited the assignment of benefits, so as to preclude provider-assignee standing

under ERISA in this case. *See* Pet. App. 117a. Rejecting that argument, the district court noted that BCBSLA had not "challenged the [assignments] as prohibited by the plans' anti-assignment language" during the claims-payment process or otherwise previously "attempted to invoke and give effect to the anti-assignment clauses," and BCBSLA had occasionally "paid money directly" to Encompass. *Id.* at 119a. On that basis, there was "a genuine issue of material fact as to whether BCBSLA waived the anti-assignment language contained in its plans." *Id.* at 120a.

In September 2014, Encompass tried its tort and (non-ERISA) contract claims to a jury. The jury entered a verdict for BCBSLA on all claims, but the district court ordered a new trial, finding an error in the jury instructions. *See id.* 7a; D. Ct. ECF No. 507. At the second trial, which took place in June 2016, the jury returned a verdict in favor of Encompass on the tort and contract claims, including finding that *contra non valentem* tolled prescription on the tort claims. *See* D. Ct. ECF No. 567 at 6, 9. On the tort claims, the district court entered judgment against BCBSLA for roughly $8.5 million. *See* Pet. App. 62a-63a.

The district court held in favor of Encompass on the ERISA claims as well. *See id.* at 49a-56a. It found that BCBSLA "waived the right to rely on any clause prohibiting assignment by its members/beneficiaries to Encompass, because BCBSLA made payments directly to, and communicated directly with, Encompass on certain claims." *Id.* at 51a. It likewise held that, in denying benefits to participants for Encompass's services, BCBSLA "abused its discretion." *Id.* at 53a. On the ERISA claims, the district court entered judgment

against BCBSLA for approximately $700,000. *See id.* at 62a.

Thereafter, "BCBSLA renewed its motion for judgment as a matter of law [on prescription for the tort claims], moved for reconsideration, and moved for a new trial." *Id.* at 7a. The district court denied all of the motions. *See id.*

C. In a divided decision, the Fifth Circuit affirmed, with its rulings on the tort and ERISA claims being key for this Petition. On the tort claims, BCBSLA asserted on appeal (as it did in the district court) that "*contra non valentem* does not apply as a matter of law." *Id.* at 18a. The key issue, as the Fifth Circuit saw it, was, in a defamation context, what are the standards under Louisiana law for "constructive knowledge" of a possible claim and "reasonable diligence" in pursuing it that defeat, or authorize, application of *contra non valentem*. *Id.* at 17a, 18a (internal quotation marks and citation omitted). Or stated differently, does Louisiana law hold that "[p]rescription begins when a plaintiff is put on notice to inquire further" about the truth or falsity of a statement or instead "when the plaintiff has knowledge of all the ins and outs of its claim"? 5th Cir. ECF No. 514899620 at 16 (Apr. 2, 2019). If the former, then Encompass's tort claims could not, BCBSLA argued, benefit from *contra non valentem*, because the Cantrell letter caused Encompass to hire attorneys and bring ERISA and contract claims, but Encompass then waited more than a year (*i.e.*, beyond the prescriptive period) to raise tort claims. *See id.* at 15-16.

In deciding the issue, the Fifth Circuit began by noting that "[t]he Supreme Court of Louisiana has not

evaluated *contra non valentem* for a defamation or false-statement claim[, . . . s]o we must make an 'Erie guess' [*i.e.*, a guess under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)] and determine as best we can what the highest court of the state would be most likely to decide." Pet. App. 18a (internal quotation marks and citation omitted). In defining its *Erie* inquiry, the Fifth Circuit said:

> We may look to the decisions of intermediate state courts for guidance. "Indeed, 'a decision by an intermediate appellate state court is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'"

Id. (quoting *Terrebonne Par. Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 317 (5th Cir. 2002), quoting *First Nat'l Bank of Durant v. Trans Terra Corp. Int'l*, 142 F.3d 802, 809 (5th Cir. 1998)).

The Fifth Circuit then surveyed Louisiana intermediate appellate decisions and reached the following conclusion: "Louisiana intermediate appellate court decisions show that *contra non valentem* suspends prescription for defamation and other false-statement claims if a reasonably diligent plaintiff knows about the adverse statement *but has not discovered it is false*." *Id.* at 20a (emphasis added). To discern that rule, the Fifth Circuit identified two intermediate appellate decisions supporting its construction of Louisiana law (*see id.*), but five that were to the contrary (setting a "stricter diligence bar") and a federal district court decision too that was in disagreement. *Id.* at 21a; *see id.* at 21a-22a & nn. 47, 51-53. However, the

Fifth Circuit saw all of the latter decisions as "distinguishable." *Id.* at 21a. Overall, it found "no Louisiana case standing directly against *contra non valentem* and some cases that support it." *Id.* at 19a-20a. In light of the Louisiana rule it surmised, the Fifth Circuit "believe[d] the Supreme Court of Louisiana would hold that *contra non valentem* was supported by the evidence here" and affirmed the district court's rejection of "BCBSLA's [prescription] argument . . . as a matter of law." *Id.* at 19a. The Fifth Circuit acknowledged that "[t]he issue is close." *Id.*

In affirming on the ERISA claims, the Fifth Circuit rejected BCBSLA's argument that "Encompass lacked derivative standing to sue for benefits." *Id.* at 25a. The district court, the Fifth Circuit noted, "found that BCBSLA waived the anti-assignment provisions because it made payments to, and communicated with, Encompass on at least some claims." *Id.* Agreeing, the Fifth Circuit concluded that "the anti-assignment clauses do not frustrate Encompass's recovery on ERISA claims." *Id.* at 25a-26a. Additionally, deeming BCBSLA's most "direct challenge" to the district court's finding of waiver to be that the jury, not the district court itself, should have made it, the Fifth Circuit added that waiver was "properly decided by the district court." *Id.* at 25a. Though BCBSLA had noted to the Fifth Circuit two opinions of other circuits decided post-briefing that it believed had rejected waiver in identical circumstances, the Fifth Circuit made no mention of the opinions. *See* 5th Cir. ECF No. 514468831 (May 11, 2018) (citing *Eden Surgical Ctr. v. Cognizant Tech. Sols. Corp.*, 720 F. App'x 862 (9th Cir. 2018)); 5th Cir. ECF No. 514488742 (May 25, 2018)

(citing *Am. Orthopedic & Sports Med. v. Independence Blue Cross Blue Shield*, 890 F.3d 445 (3d Cir. 2018)).

Judge Jones dissented from "the majority's conclusion upholding the contra non valentem exception to prescription" on the tort claims. Pet. App. 31a. She read Louisiana law differently than the majority, relying on the Louisiana intermediate appellate cases and the federal district court decision that the majority distinguished. *See id.* at 32a. As she saw it, "'Louisiana courts have held in regard to contra non valentem that a cause of action becomes reasonably knowable to a plaintiff at the time legal counsel is sought,'" especially in a defamation context where the plaintiff is a "sophisticated" litigant. *Id.* (quoting *Derrick v. Yamaha Power Sports of New Orleans*, 850 So.2d 829, 833 (La. Ct. App. 2003)). Commenting on Judge Jones's dissent, the majority, in its opinion, said that "[o]ur dissenting colleague takes a broader view of constructive notice and a stricter one of the required diligence." *Id.* at 19a.

BCBSLA requested rehearing and rehearing *en banc*, contending (among other things) that, under the circumstances as now presented, certification to the Louisiana Supreme Court was in order on the standards for *contra non valentem* for a defamation claim. 5th Cir. ECF No. 514899620 at 18-19 (Apr. 2, 2019). The Fifth Circuit denied the request. Pet. App. 57a-58a.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI ON THE FIRST QUESTION PRESENTED

A. The Fifth Circuit's Decision on the *Erie* Issue Conflicts with, at a Minimum, Decisions from the Third, Fourth, Sixth, and Seventh Circuits

The first Question Presented centers on the approach federal courts should take – when sitting in diversity, exercising supplemental jurisdiction, or interpreting a federal statute that incorporates state legal standards – to determine the content of the state law they must apply. Should they demur against recognizing rules that would extend state-law liability unless the state's courts have already clearly staked out such ground, or should they expand state law to the reach that, in their best judgment, the whole universe of state-law precedent and other available resources might point? On that topic, and dilemma, this Court "has provided only limited guidance." Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459, 1461 (1997). In turn, the courts of appeals are divided over the proper approach – not just among one another, but internally as well.

By way of background, the first Question Presented is an offspring of this Court's seminal decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). There, of course, the Court rejected the application of a "general federal common law" to decide state-law issues in diversity cases. Instead, the Court required that federal courts are to "apply as their rules of deci-

sion the law of the State, unwritten as well as written." *Id.* at 73.

When the highest court of the state has spoken directly to the issue at hand, the path forward is relatively simple: a pronouncement by the state's highest court "is to be accepted by federal courts as defining state law." *West v. AT&T Co.*, 311 U.S. 223, 236 (1940). "[S]ignificant difficulties arise," however, when state law is indeterminate. Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1676 (1992) [hereinafter "Sloviter"]. To be sure, a federal court can, where such a procedure exists, certify questions for decision to the state's highest court. *See* 17A *Moore's Federal Practice - Civil* § 124.22[7] (2019) [hereinafter "*Moore's Fed. Pr.*"]. But certification "is a voluntary procedure that rests in the federal court's sound discretion." *Id.* § 124.22[7][c].

It is in the situation where certification does not occur, but state law must still be determined – *i.e.*, the paradigm presented by the underlying case here – that the courts of appeals' decisions diverge widely on the approach to take to identify the suitable state-law rule. Essentially, two competing schools of thought have emerged *within* nearly every circuit, though several circuits more readily invoke a convention that would lead to an outcome opposite to the Fifth Circuit's below on the tort claims.

The first school of thought is that a federal court should take a "wide-angle" approach, as denominated by a leading treatise. Charles Alan Wright et al., *Federal Practice and Procedure* § 4507, at 179 (3d ed. 2016) [hereinafter "Wright, Miller & Cooper"]. Under

this method, "[w]hen trying to determine the relevant content of state law to decide the case before it," a federal court "may consider all of the available legal sources and, when necessary, employ its experience to make an enlightened prediction of how the state's highest court would answer the open questions." *Id.* at 178-79. As the Eighth Circuit has put it:

> Where neither the legislature nor the highest court in a state has addressed an issue, the federal court must determine what the highest state court would *probably* hold were it called upon to decide the issue. In making this determination, a federal court may consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.

Gilstrap v. Amtrak, 998 F.2d 559, 560 (8th Cir. 1993) (internal quotations marks and citations omitted) (emphasis added).

The Fifth Circuit below engaged in this "wide-angle" construct. *See* Pet. App. 18a ("we must make an *Erie* guess and determine as best we can what the highest court of the state would be most likely to decide") (internal quotation marks and citation omitted). Indeed, the shorthand "*Erie* guess" – which is largely a unique Fifth Circuit label for the inquiry to be conducted – captures the essence of the wide-angle approach: a predictive effort, or guess, at what the state's highest court probably would do. One can find

decisions in every circuit utilizing the wide-angle approach.[2]

The other school of thought is that a federal court should pursue what a different treatise describes as the "conservative" approach. 17A *Moore's Fed. Pr.* § 124.22[5]. A federal court, under the conservative rubric, does not predict or "guess" as to the appropriate state-law rule, but seeks to "'*ascertain* and "apply the most recent statement of state law by the state's highest court."'" *P&G Co. v. Haugen*, 222 F.3d 1262, 1280 (quoting *Sellers v. Allstate Ins. Co.*, 82 F.3d 350, 352 (10th Cir. 1996), quoting *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 513 (10th Cir. 1994)) (emphasis added). "[I]t is not [the federal court's] place to expand . . . state law." *Id.* Thus, where the content of state law is unsettled, "[f]ederal courts should 'hesitate prematurely to extend the law . . . in the absence of an indication from the [state] courts or the [state] legislature that such an extension would be desirable.'" *Del Webb Cmtys., Inc. v. Partington*, 652 F.3d 1145, 1154 (9th Cir. 2011) (quoting *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1238 (9th Cir. 1989)). As with the

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[2] *E.g.*, *FDIC v. Ogden Corp.*, 202 F.3d 454, 460-61 (1st Cir. 2000); *DiBella v. Hopkins*, 403 F.3d 102, 111-12 (2d Cir. 2005); *Yurecka v. Zappala*, 472 F.3d 59, 62 (3d Cir. 2006); *AGI Assocs., LLC v. City of Hickory*, 773 F.3d 576, 579 (4th Cir. 2014); *FDIC v. Abraham*, 137 F.3d 264, 268 (5th Cir. 1998); *Bailey v. V & O Press Co.*, 770 F.2d 601, 604 (6th Cir. 1985); *Dilley v. Holiday Acres Props., Inc.*, 905 F.3d 508, 513-14 (7th Cir. 2018); *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1171 (9th Cir. 2001); *Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 906 F.3d 926, 930-31 (10th Cir. 2018); *Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1326 n.5 (11th Cir. 2005); *Novak v. Capital Mgmt. & Dev. Corp.*, 452 F.3d 902, 907 (D.C. Cir. 2006).

wide-angle methodology, precedents taking the conservative approach exist throughout the circuits (including the Fifth Circuit).[3]

Occasionally, the two schools of thought clash. One such instance was *Burris Chemical, Inc. v. USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993), a case that – like the underlying suit here – required determination of whether, under state law (in particular, Florida law), a discovery rule should extend the otherwise applicable statute of limitations. Despite "a line of Florida cases" applying the rule in a different context, the Fourth Circuit refused to extend it to the new setting. *Id.* at 246. "[F]ederal courts sitting in diversity rule upon state law as it exists and do not surmise or suggest its expansion." *Id.* at 247. The dissent, consistent with the wide-angle view, criticized the majority, saying: "We have a duty to affirmatively seek out, and not ignore, as I feel the majority has, all relevant information that might enable us to make the correct prediction." *Id.* at 248 (Hall, J., dissenting).

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[3] *E.g.*, *Midwest Feeders, Inc. v. Bank of Franklin*, 886 F.3d 507, 519 (5th Cir 2018) ("we cannot use our *Erie* guess to impose upon Mississippi a new regime of liability for its banks"); *TIG Ins. Co. v. Aon Re, Inc.*, 521 F.3d 351, 361 (5th Cir. 2008) ("We will not expand state law beyond its presently existing boundaries"); *see also, e.g.*, *Doyle v. Hasbro, Inc.*, 103 F.3d 186, 192 (1st Cir. 1996); *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 662-63 (3d Cir. 1980); *Ball v. Joy Techs., Inc.*, 958 F.2d 36, 39 (4th Cir. 1991); *State Auto Prop. & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 195 (6th Cir. 2015); *King v. Damiron Corp.*, 113 F.3d 93, 95-98 (7th Cir. 1997); *Karas v. Am. Family Ins. Co.*, 33 F.3d 995, 999-1001 (8th Cir. 1994).

Yet, amidst the dueling approaches, three circuits – the Third, Sixth, and Seventh (or at least individual decisions in those three circuits) – have adopted a convention more concretely to tilt the table against a federal court's expansion of state law: they affirmatively direct that, where state law is unsettled, the federal court must choose the option *against* creating liability under state law. The leading decision invoking this liability-limiting rule is *Todd v. Societe BIC, S.A.*, 21 F.3d 1402 (7th Cir. 1994) (*en banc*). There, the *en banc* Seventh Circuit held that "[w]hen given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability," the federal court "should choose the narrower and more reasonable path (at least until the Illinois Supreme Court tells us differently)." 21 F.3d at 1412; *accord Home Valu, Inc. v. Pep Boys-Manny, Moe & Jack of Del., Inc.*, 213 F.3d 960, 965 (7th Cir. 2000) (facing "two equally plausible interpretations of state law" over which there was "considerable disagreement," adopting the "approach that is restrictive of liability"); *Birchler v. Gehl Co.*, 88 F.3d 518, 521 (7th Cir. 1996) (same).

Citing the Seventh Circuit decisions, the Third and Sixth Circuits likewise invoke the "principle that where 'two competing yet sensible interpretations' of state law exist, 'we should opt for the interpretation that restricts liability, rather than expands it, until the [state's highest court] decides differently.'" *Travelers Indem. Co. v. Dammann & Co.*, 594 F.3d 238, 253 (3d Cir. 2010) (quoting *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 680 (3d Cir. 2002), and citing *Birchler*, 88 F.3d at 521); *accord Combs v. Int'l Ins. Co.*, 354 F.3d 568, 578, 577 (6th Cir. 2004) ("[f]ederal courts hearing

diversity matters should be cautious about adopting substantive innovation in state law"; "'when given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path'") (quoting *Todd*, 21 F.3d at 1412) (internal quotation marks and citation omitted from first quotation). In short, these three circuits admonish that federal courts have "no basis for even considering the pros and cons of innovative [state-law] theories," and liability should await an "*authoritative* signal from the legislature or courts of the state." *Combs*, 354 F.3d at 577 (emphasis added).

The upshot of all of this is that, in this instance, the Fifth Circuit majority's opinion below is at odds with decisions both in its own circuit and outside of it. By extending a state-law procedural doctrine (*contra non valentem*) to a claim (defamation) for which, as the majority acknowledged, the Louisiana Supreme Court had never "evaluated" it (Pet. App. 18a), and based on what it gleaned from an opaque body of Louisiana intermediate appellate decisions, the majority's opinion was out of sync with conservative-approach decisions from the Fifth Circuit and other circuits, *see supra* p. 17 n.3 (though arguably consistent with wide-angle precedents in and outside of the Fifth Circuit, *see supra* p. 16 n.2). In particular, the majority's opinion conflicts with *Burris*, where the Fourth Circuit in analytically identical circumstances refused to extend the application of the Florida discovery rule; in fact, the Fifth Circuit majority's opinion here, in its description of its *Erie* task and conclusion, reads much like the *Burris* dissent. *Compare* Pet. App. 18a *with Burris*, 10 F.3d at 248 (Hall, J., dissenting).

Just as important, the Fifth Circuit majority's decision conflicts with the decisions from the Third, Sixth, and Seventh Circuits adopting the liability-limiting rule. The majority below acknowledged that, under Louisiana law, "[t]he issue is close," so close as to prompt a dissent from Judge Jones, who interpreted Louisiana law to require just the opposite. Pet. App. 19a. Where a case is close, the other three circuits, under their liability-limiting convention, would have "avoid[ed] speculation" and chosen "the narrower interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability." *Bircher*, 88 F.3d at 521. In contrast, the majority here adopted the path that led to liability for BCBSLA on the tort claims.

Considering the conflict between the majority in this case and four other circuits (*i.e.*, the Fourth in *Burris* and the Third, Sixth, and Seventh that apply a liability-limiting standard), the Court should grant certiorari. Overall, the entire area of standards for "guessing" (to use the wide-angle method's terminology) or "ascertaining" (to use the phraseology of the conservative approach) the state-law rule in close cases is so rife with intra- and inter-circuit contradictions that the Court's intervention is badly needed.

B. The Fifth Circuit's Decision on the *Erie* Issue Is In Tension with This Court's Precedents

As mentioned earlier, the Court has not previously, even at this late date, provided detailed guidance on the inquiry for determining state law under *Erie*, which in itself is a key reason for the Court to grant certiorari. *See infra* p. 25. Adding further to the case

for certiorari in this *particular* instance is that there is solid reason to anticipate a reversal, as the majority's opinion below is in serious tension with what the Court has said so far under *Erie*.

Erie rested on important constitutional principles: "[N]o clause in the Constitution purports to confer" on the federal courts the power to "declare substantive rules of common law applicable in a State." *Erie*, 304 U.S. at 77-78. Hence, *Erie* famously did away with the ability of the federal courts to fashion state-law rules of decision, a power given to them in *Swift v. Tyson*, 41 (16 Pet.) 1 (1842). Undoing *Swift v. Tyson* and returning power to the state courts was "fundamental to our system of federalism." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997).

Accordingly, for the better part of a century, the Court has recognized that – in cases controlled by state law – it is the states' prerogative to "define the nature and extent of [a litigant's] right[s]." *West v. AT&T Co.*, 311 U.S. 223, 236 (1940). "That object would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken." *Id.*

It is inconsistent with the state-sovereignty principles that decisions like *Erie* and *West* emphasize for a federal court to expand the reach of a state-law rule – such as *contra non valentem* (or any similar discovery rule associated with a statute of limitations) – in a "close" case (so close that learned judges from the same court of appeals diametrically differed on their understanding of state law). Pet. App. 19a. As the *Todd* line of decisions has emphasized in connection with the liability-limiting convention, choosing the option that

expands liability in a case where the state-law rule is unclear usurps from the state the power to develop the extent of its laws, skews the law in the interim in favor of an enlargement that the highest state court may eventually reject, and potentially persuades a state court against rejecting liability because a federal court has seen fit to extend liability. *See Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577-78 (6th Cir. 2004); *Todd v. Societe BIC, S.A.*, 21 F.3d 1402, 1416-17 (7th Cir. 1994) (Ripple, J., dissenting); Sloviter, 78 Va. L. Rev. at 1681.

Moreover, this Court has never utilized language like guess, predict, or "divin[e]" to describe the federal courts' task with respect to determining state law in a case controlled by state law. Wright, Miller & Cooper, § 4507, at 190. Rather, it has used the terminology of the conservative approach, as in *West*, where the Court said it is "the duty of the [federal court] in every case to *ascertain* from all the available data what the state law *is* and apply it rather than to prescribe a different rule." 311 U.S. at 237 (emphasis added). *West* likewise instructed a federal court against adopting state-law rules beyond what the state courts so far have held "even though it may think that the state Supreme Court may establish a different rule in some future litigation." *Id.* at 238. The predictive, guessing methodology used by the Fifth Circuit majority to find *contra non valentem* applicable on the tort claims pays less fidelity to *West* than a cautious approach aimed at limiting state law until a state court definitively says otherwise.

Indeed, this case presents a relatively easy instance for the Court to reject "guessing" at state law. The

Court long ago acknowledged the difficulties "in reconciling our modes of review to the civil code of practice as used in the courts of Louisiana" and warned that the federal courts "should not be hasty" in attempting to "ingraft the civil law system . . . on the stalk of the common law." *Graham v. Bayne*, 59 U.S. 60, 61-62 (1855). Under Louisiana's civil-law system, "the only authoritative sources of law are legislation and custom," *Am. Int'l Specialty Lines Ins. Co. v. Canal Indem. Co.*, 352 F.3d 254, 260-61 (5th Cir. 2003) (internal quotations marks and citation omitted); *stare decisis* "is foreign to the Civil Law," *id.*; and intermediate state appellate decisions are "secondary information." *Ardoin v. Hartford Accident & Indem. Co.*, 360 So.2d 1331, 1334 (La. 1978). Against this background, the majority below, when faced with the unsettled question of *contra non valentem*'s operation in the defamation context, found only intermediate appellate decisions available and read some this way and others that way. That is *really* a guess at the law and neither respectful of what the law currently *is* in Louisiana nor Louisiana's mode of determining governing law.

Finally, there is friction between the decision below and this Court's endorsement of federal certification of state-law questions to a state's supreme court. *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Here, the Fifth Circuit affirmatively decided what it saw as a close, open question of Louisiana law. "A more cautious approach was in order." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997); *see* Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. Rev. 1293, 1301 (2003) [hereinafter "Calabresi"] ("Well, what's the

answer? My long-suffering colleagues know what *my* answer is, and that is certify, certify, certify.").

C. The *Erie* Issue Is Important and Merits Review by This Court

The first Question Presented – namely, whether a federal court may, when the state-law standard is unclear, adopt a gloss on a state law that extends liability – is an important one for the Court to resolve. What should be an applicable state-law rule, and how to go about determining it, are issues that arise in every federal courthouse every day, as federal judges nationwide exercise diversity and supplemental jurisdiction. Not only is the inquiry among the most common a federal judge faces, it is momentous, because the task is steeped in federalism. *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) ("I have always regarded [*Erie*] as one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems.").

Notwithstanding the commonness and significance of the *Erie* inquiry, there are dis-uniform, even contradictory, standards and conventions in and among the circuits governing the query. Respectfully, a level of arbitrariness has entered the realm. Will a particular district court or court of appeals panel invoke the wide-angle test and engage in the relatively free-wheeling guess as to what state law probably is? Will they use the conservative method and guard against expanding state law to a point not yet clearly agreed upon in the state court system? Will they utilize the liability-limiting rule and choose the option that restrains liability until the state's courts clearly hold differently?

The answers to all of these questions may not just depend on the circuit in which the case arises, but on whom the particular judges are in the case. That is not a tolerable dynamic on, really, any legal issue, let alone one as common and fraught with federalism connotations as the choice of state-law rules under *Erie*.

The lack of clear standards for determining state law under *Erie* in close cases, and the resulting "intrusion of the federal courts in the law-giving function of state courts" in too many instances, has long been lamented by respected federal and state judges. Sloviter, 78 Va. L. Rev. at 1675; *see* Calabresi, 78 N.Y.U. L. Rev. 1300; Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions In New York*, 69 Fordham L. Rev. 373, 376-77 (2000). This case presents an opportunity for the Court – 81 years after *Erie* – to provide necessary clarity for the lower courts. The Court should grant certiorari on the first Question Presented to provide that clarity, and it ultimately should ease the lower courts' burden and protect state law-making prerogatives by adopting as an easy fallback the liability-limiting rule favoring the outcome under *Erie* that would restrict liability when state law currently does not clearly call for liability.

II. THE COURT SHOULD GRANT CERTIORARI ON THE SECOND QUESTION PRESENTED

A. On the ERISA Issue, the Fifth Circuit Is in Conflict with the Third and Ninth Circuits

The second Question Presented concerns whether an ERISA-plan administrator waives an anti-

assignment provision in an ERISA plan, and therefore is prevented from challenging the standing of a provider-assignee to pursue ERISA claims in court, by failing to question the assignment during routine processing of a claim for benefits pursued by the provider for an ERISA participant. In line with what occurred in this case, routine processing means handling the claim in due course at the administrative stage (before the filing of any lawsuit), possibly initially paying the provider on behalf of the participant, and fielding questions that the provider might ask regarding the claim. *See* Pet. App. 119a-20a. In situations like that, Fifth Circuit decisions finding waiver (as below) are in direct conflict with the Third and Ninth Circuits. The district courts nationwide are also sharply divided on waiver.

As with the *Erie* question, there is a bit of legal background necessary to illustrate the contours of the relevant circuit split. The waiver issue has its genesis in the circuit decisions authorizing medical providers to sue as assignees of participants and beneficiaries under ERISA's enforcement scheme. The denial-of-benefits remedy in ERISA, 29 U.S.C. § 1132(a)(1)(B), applies solely to a "participant or beneficiary." *See supra* p. 7. Though this Court has never addressed whether that specification of "participant or beneficiary" in the enforcement remedy is broad enough to include assignees of participants and beneficiaries, every circuit that has faced the issue (including the Fifth Circuit) has answered in the affirmative.[4] In

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[4] *City of Hope Nat'l Med. Ctr. v. Healthplus, Inc.*, 156 F.3d 223, 228 (1st Cir. 1998); *Simon v. GE Co.*, 263 F.3d 176, 178 (2d Cir. 2001); *N. Jersey Brain & Spine Ctr. v. Aetna, Inc.*, 801 F.3d 369,

turn, the circuits (again including the Fifth Circuit) have also uniformly held that an anti-assignment provision in an ERISA plan negates the standing that an assignment might otherwise provide.[5]

Against that backdrop comes the question of whether an ERISA-plan administrator waives application of a plan's anti-assignment provision that would prevent ERISA standing, if the administrator initially processes, without challenge, a claim for benefits sub-

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372 (3d Cir. 2015); *Hermann Hosp. v. MEBA Med. & Ben. Plan*, 845 F.2d 1286, 1290 (5th Cir. 1988); *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1277 (6th Cir. 1991); *Lutheran Med. Ctr. v. Contractors, Laborers, Teamsters & Eng'rs Health & Welfare Plan*, 25 F.3d 616, 618 (8th Cir. 1994); *Misic v. Bldg. Serv. Emps. Health & Welfare Tr.*, 789 F.2d 1374, 1379 (9th Cir. 1986); *Denver Health & Hosp. Auth. v. Beverage Distribs. Co.*, 546 F. App'x 742, 745 (10th Cir. 2013); *Cagle v. Bruner*, 112 F.3d 1510, 1515 (11th Cir. 1997). BCBSLA here uses the term "standing" to describe the concept of a provider derivatively having authority as a participant or beneficiary to sue under ERISA's enforcement scheme, as the district court and most other courts have used the term. *See* Pet. App. 113a; *but cf. Pa. Chiropractic Ass'n v. Independence Hosp. Indem. Plan, Inc.*, 802 F.3d 926, 928 (7th Cir. 2015) ("standing" is "misnomer"; the issue is "statutory coverage").

[5] *City of Hope*, 156 F.3d at 228-29; *McCulloch Orthopaedic Surgical Servs., PLLC v. Aetna Inc.*, 857 F.3d 141, 147 (2d Cir. 2017); *Am. Orthopedic & Sports Med. v. Independence Blue Cross Blue Shield*, 890 F.3d 445, 453 (3d Cir. 2018); *LeTourneau Lifelike Orthotics & Prosthetics, Inc. v. Wal-Mart Stores*, 298 F.3d 348, 352 (5th Cir. 2002); *Davidowitz v. Delta Dental Plan of Cal., Inc.*, 946 F.2d 1476, 1479-81 (9th Cir. 1991); *St. Francis Reg'l Med. Ctr. v. Blue Cross & Blue Shield of Kan., Inc.*, 49 F.3d 1460, 1465 (10th Cir. 1995); *Physicians Multispeciality Grp. v. Health Care Plan of Horton Homes, Inc.*, 371 F.3d 1291, 1295-96 (11th Cir. 2004).

mitted by the provider. The Fifth Circuit below found a waiver in such circumstances, affirming the district court's holding to the same effect. *See supra* p. 11. In earlier precedent, too, the Fifth Circuit has held that an administrator may not invoke an anti-assignment provision to nullify ERISA standing if, prior to court proceedings, it "never asserted the anti-assignment clause" as limiting the provider's rights and remedies. *Hermann Hosp. v. MEBA Med. & Benefits Plan*, 959 F.2d 569, 574 (5th Cir. 1992), *overruled on other grounds*, *Access Mediquip, L.L.C. v. UnitedHealthcare Ins. Co.*, 698 F.3d 229 (5th Cir. 2012)).

The Third Circuit has reached the direct opposite conclusion. In *American Orthopedic and Sports Medicine*, the provider argued that "[i]nsurers [had] waived their right to enforce [anti-assignment provisions] because they accepted and processed the claim form, issued a check to [the relevant participant], and failed to raise the anti-assignment clause as an affirmative defense during the internal administrative appeals process." 890 F.3d at 453. "[N]ot persuaded," the Third Circuit noted that, in other contexts, a waiver "requires a 'clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to surrender it.'" *Id.* at 454 (quoting *Brown v. City of Pittsburgh*, 186 A.2d 399, 401 (Pa. 1962)). The Third Circuit held that "routine processing of a claim form, issuing payment at the out-of-network rate, and summarily denying the informal appeal do not demonstrate 'an evident purpose to surrender' an objection to a provider's standing in a federal lawsuit." *Id.* at 453-54.

The Ninth Circuit concurs with the Third Circuit and disagrees with the Fifth Circuit. In *Eden Surgical Center v. Cognizant Technologies Solutions Corp.*, 720 F. App'x 862 (9th Cir. 2018), the provider asserted waiver of an anti-assignment provision based on "Defendants' pre-litigation conduct – in particular, its silence in response to [the provider's] administrative appeals." *Id.* at 863. The Ninth Circuit held that "waiver is inapplicable" and, as a result, that "Eden lacks derivative standing to sue." *Id.*; *see id.* ("Eden cites no authority for the proposition that Defendants had an affirmative duty to make it aware of the anti-assignment provision").

Not only are the circuits in disagreement, but the district courts are also in conflict – nationwide – over whether routine processing of a claim, in the pre-court stages, constitutes a waiver of an anti-assignment provision, resulting in standing for the provider under ERISA.[6]

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[6] *Compare Med. Soc'y of N.Y. v. UnitedHealth Grp. Inc.*, 2019 U.S. Dist. LEXIS 53097, at *26-29 (S.D.N.Y. Mar. 28, 2019) (no waiver); *Cal. Surgical Inst. v. Aetna Life & Cas. Berm.*, No. SACV 18-02157, 2019 U.S. Dist. LEXIS 65867, at *13-15 (C.D. Cal. Feb. 6, 2019) (no waiver); *Neurological Surgery, P.C. v. Travelers Co.*, 243 F. Supp. 3d 318, 328-29 (E.D.N.Y. 2017) (no waiver); *Merrick v. UnitedHealth Grp. Inc.*, 175 F. Supp. 3d 110, 122 (S.D.N.Y. 2016) (no waiver); *Griffin v. Blue Cross & Blue Shield of Ala.*, 157 F. Supp. 3d 1328, 1336 (N.D. Ga. 2015) (no waiver); *Mbody Minimally Invasive Surgery, P.C. v. Empire HealthChoice HMO, Inc.*, No. 13 Civ. 6551, 2014 U.S. Dist. LEXIS 114012, at **6-8 (S.D.N.Y. Aug. 15, 2014) (no waiver) *with Pennsylvania Chiropractic Ass'n v. Blue Cross Blue Shield Ass'n*, No. 09 C 5619, 2011 U.S. Dist. LEXIS 148689, at *27-29 (N.D. Ill. Dec. 28, 2011) (waiver); *Biomed Pharm., Inc. v. Oxford Health Plans (N.Y.), Inc.*, No. 10 Civ. 7427, 2010 U.S. Dist. LEXIS 141812, at *17-18 (S.D.N.Y. Feb. 17,

Given the division among the Circuits and district courts, the Court should grant certiorari on the second Question Presented. Roundly divided, the lower courts need direction on whether a waiver of an anti-assignment provision based on an administrator's routine claims-processing is a viable theory for a medical provider to secure derivative assignee standing.

B. The Fifth Circuit's Decision on the ERISA Issue Deviates from This Court's Precedents

As with the Fifth Circuit's treatment of the *Erie* issue, its disposition of the ERISA waiver question also departs from this Court's precedents.

The concept of assignee standing under ERISA's enforcement scheme is a debatable proposition in the first instance. The Court has emphasized that Congress sought "with care" to "delineat[e] the universe of plaintiffs who may bring certain civil actions" under ERISA's enforcement provision, 29 U.S.C. § 1132. *Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 247 (2000) (emphasis removed). Yet, in the entirety of § 1132, Congress made no reference to assignees as plaintiffs (or, for that matter, as defendants). Without a reference to assignees in § 1132, the circuits have found that a provider-assignee has the right to sue under ERISA by virtue of "federal common law." *Misic v. Bldg. Serv. Emps. Health & Welfare Tr.*, 789 F.2d 1374, 1378 (9th

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2011) (waiver); *Protocare of Metro. N.Y., Inc. v. Mut. Ass'n Adm'rs, Inc.*, 866 F. Supp. 757, 761-62 (S.D.N.Y. 1994) (waiver); *Coonce v. Aetna Life Ins. Co.*, 777 F. Supp. 759, 772 (W.D. Mo. 1991) (waiver).

Cir. 1986). Using federal common law to supplement ERISA's enforcement scheme is an endeavor the Court has rejected in other instances. *See Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259 (1993) (rejecting federal-common-law addition to the types of relief available under § 1132; "[t]he authority of courts to develop a federal common law under ERISA is not the authority to revise the text of the statute") (internal quotation marks and citation omitted). With provider-assignee standing on tenuous footing at the outset, the notion of adding a waiver rule to buttress the concept seems questionable to the next degree.

Plus, when a court finds waiver in these circumstances, it negates the operation of an ERISA-plan provision prohibiting assignments. In its ERISA case law, this Court has emphasized the primacy of ERISA plan documents and their terms. *See Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 108 (2013) (ERISA's "focus on the written terms of the plan is the linchpin of 'a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place'") (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996)) (alterations in original); *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100-01 (2013) ("The [ERISA] statutory scheme . . . 'is built around reliance on the face of written plan documents.'") (quoting *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995)). The Court should not recognize waivers of otherwise-applicable plan terms under routine, common fact scenarios, if truly "[t]he plan, in short, is at the center of ERISA." *McCutchen*, 569 U.S. at 101.

Furthermore, the Court has, in general, adopted the same view of waivers of litigation defenses as the Third Circuit did in *American Orthopedic and Sports Medicine* – namely, that they are enforceable only if they are "voluntary, knowing, and intelligently made" and that they are "not presume[d]" lightly. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185-86 (1972); *accord Wood v. Milyard*, 566 U.S. 463, 474 (2012); *cf. Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 302-03 (2009) (rejecting waivers of entitlement to pension-plan benefits, in part, to avoid "complex and subjective determinations" about whether the waiver was "knowing and voluntary"). Given that high standard for the operation of a waiver, it is the Third and Ninth Circuits' holdings, not the Fifth Circuit's, that is consonant with this Court's jurisprudence.

C. The ERISA Issue Is Important and Warrants the Court's Review

It is important for the Court to address the question of whether routine claims processing can result in the waiver of an ERISA plan's anti-assignment provision, triggering a derivative right for a provider to sue as an assignee. In the past two decades, the number of ERISA benefits lawsuits pursued by medical providers, by virtue of the assignment theory, has exponentially increased to the point where they are now commonplace in the federal courts. BCBSLA can attest from experience that it now frequently faces ERISA lawsuits by providers. With a new genre of ERISA litigation – provider-induced cases – now at the forefront, the Court should resolve the waiver issue that divides the lower courts and complicates the litigation.

Certiorari in this case would also allow the Court to address, for the first time, the whole concept of provider-assignee standing under ERISA that has propagated in the circuits without any invitation or blessing from this Court. The circuits have added providers (as assignees) to the ERISA enforcement regime, notwithstanding the already-noted tension the addition has with the Court's traditional view of the near inviolability of the regime. Before the circuits' creation gets further entrenched, the Court should consider the legitimacy of at least the new enhancement embraced in the Fifth Circuit's decision below (*i.e.*, a provider right to pursue assignee standing in the face of an anti-assignment provision).

Last, the waiver theory embraced by the Fifth Circuit threatens smooth plan administration to the detriment of participants and beneficiaries. If plan administrators believe their routine, initial processing of claims at a provider's behest, done anyway for the convenience of the participants and beneficiaries, will risk the plan's anti-assignment provision and trigger a right on the part of the provider to sue, the administrators will stop dealing with providers acting with assignments. Before the prospect of waivers infects the daily ERISA-plan administration for the worse, the Court should address whether a waiver based on routine claims processing is at all consistent with ERISA.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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