No.

In the Supreme Court of the United States

JUANITA NICHOLS, PETITIONER

v.

RELIANCE STANDARD LIFE INSURANCE COMPANY

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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QUESTION PRESENTED

This case presents an important and recurring question involving ERISA long-term disability insurance.

In the decision below, the Fifth Circuit deepened an existing conflict over the proper way to define a worker's "regular occupation," which is the critical benchmark for deciding whether a worker is disabled. The Fifth Circuit, siding with the Sixth and Eighth Circuits, defined the term at the "high[est] level of generality"—classifying a worker's *generic* occupation without accounting for "each of a claimant's job duties." Other circuits, by contrast, define "regular occupation" as "a position of the same general character as the insured's previous job, requiring similar skills and training, and involving comparable duties." Instead of defining "regular occupation" in a broad or generic way, these circuits consider the claimant's "actual job duties"—"the usual work that the insured is actually performing immediately before the onset of disability," taking into account the "nature of the institution where she was employed." The practical difference is stark: think "doctor" versus "orthopedic surgeon in a small medical practice"; "teacher" versus "special-education food instructor;" or "attorney" versus "high-stress trial litigator."

The Fifth Circuit openly admitted that its definition is "different from the definition endorsed" by multiple circuits, and the Eighth Circuit has likewise recognized that the "circuits are split" on this common question.

The question presented is:

Whether "regular occupation" refers to a general *category* of employment in a broad and generic sense, or instead refers to a claimant's "actual job duties"—"the usual work that the insured is actually performing immediately before the onset of disability."

PARTIES TO THE PROCEEDING BELOW

Petitioner is Juanita Nichols, the appellant below and plaintiff in the district court.

Respondent is Reliance Standard Life Insurance Company, the appellee below and defendant in the district court.

Peco Foods, Inc., was a defendant in the district court, but was dismissed with prejudice before final judgment. It was not a party to the proceedings in the court of appeals.

RELATED PROCEEDINGS

United States District Court (S.D. Miss.):

Nichols v. *Reliance Standard Life Ins. Co.*, No. 3:17-CV-42-CWR-FKB (June 29, 2018) (order on summary judgment)

United States Court of Appeals (5th Cir.):

Nichols v. *Reliance Standard Life Ins. Co.*, No. 18-60499 (May 23, 2019)

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Juanita Nichols respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is reported at 924 F.3d 802. The order and opinion of the district court (App., *infra*, 23a-59a) is unreported but available at 2018 WL 3213618.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a), provides in pertinent part:

> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> * * * * *
>
> (B) to recover benefits due to him under the terms of his 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 * * * .

INTRODUCTION

This case presents an exceptionally important question under ERISA for long-term disability insurance. The proper definition of "regular occupation" has created a square and entrenched conflict among courts of appeals; that conflict has been recognized by multiple circuits, district courts, and expert commentators. See, *e.g.*, App., *infra*, 16a n.11; *Darvell* v. *Life Ins. Co. of N. Am.*, 597 F.3d 929, 935-936 (8th Cir. 2010); 1 Life & Health Ins. Law § 15:4 (2d ed.) ("Courts construe occupational disability clauses in a variety of ways."); 36 No. 16 Emp. Alert NL 8 (Aug. 6, 2019) (flagging conflict). Indeed, it was even candidly recognized by respondent below. See, *e.g.*, Resp. C.A. Opening Br. 28; Resp. C.A. Reply Br. 12.

This issue continues to generate confusion in an area that demands uniformity: no one benefits when ERISA claimants win or lose based on the happenstance of where their employer is located, and ERISA administrators certainly do not benefit by incurring added litigation cost when appellate courts disagree over the "central" inquiry

driving the benefit determination. The Fifth Circuit resolved this pure legal issue as the dispositive question on appeal; the issue is perfectly presented on these facts, and there is no question that it is outcome-determinative: Indeed, the district court applied out-of-circuit authority and petitioner won, but the Fifth Circuit rejected those cases and petitioner lost.

The end result is that all stakeholders are left to wonder what rules will govern their disability claims. While workers in most circuits obtain benefits if they cannot perform the actual duties of their actual occupation, workers in the Fifth Circuit are forced to start over, learning new skills and mastering a new industry, because some version of their "generic" occupation can be described at a high enough level of generality to exclude the material tasks of their employment.

This issue has sweeping legal and practical effects, and the conflict has persisted long enough. This Court's review is urgently warranted.

STATEMENT

A. Statutory And Legal Background

1. a. Congress enacted ERISA "'to promote the interests of employees and their beneficiaries in employee benefit plans,'" and "'to protect contractually defined benefits.'" *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 113 (1989). While employers have no obligation to establish plans, ERISA seeks "to ensure" that employees "receive [their rightful] benefits" when plans are established. *Conkright* v. *Frommert*, 559 U.S. 506, 516 (2010). To that end, ERISA imposes a variety of obligations on plan administrators and fiduciaries (*e.g.*, 29 U.S.C. 1001(b)), while "provid[ing] 'a panoply of remedial devices' for participants and beneficiaries" to enforce those obligations. *Firestone*, 489 U.S. at 108.

Every ERISA plan is "maintained pursuant to a written instrument," which must identify one or more fiduciaries to administer the plan. 29 U.S.C. 1102(a)(1). In many instances, "the entity that administers the plan, such as an employer or an insurance company, both determines whether an employee is eligible for benefits and pays benefits out of its own pocket." *Metropolitan Life Ins. Co.* v. *Glenn*, 554 U.S. 105, 108 (2008). Regardless, the fiduciary always must "discharge [its] duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1).

b. ERISA authorizes judicial review to recover improperly denied benefits and to establish beneficiaries' rights. 29 U.S.C. 1132(a)(1)(B); see *Glenn*, 554 U.S. at 115. Section 1132(a) entitles a plan participant to sue "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits." 29 U.S.C. 1132(a)(1)(B). Section 1132(a)'s enforcement scheme "is one of the essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 52 (1987).

"Claims for benefits based on the terms of an ERISA plan are contractual in nature and are governed by federal common law contract principles." *Baldwin* v. *University of Pitts. Med. Ctr.*, 636 F.3d 69, 75 (3d Cir. 2011); see also, *e.g.*, *Tippitt* v. *Reliance Standard Life Ins. Co.*, 457 F.3d 1227, 1234-1235 (11th Cir. 2006). "Accordingly, where claims put at issue the meaning of plan terms," courts "apply the federal common law of contract to interpret those terms." *Baldwin*, 636 F.3d at 75.

2. One type of common benefit enforced via ERISA is disability insurance. These policies generally come in two forms. The first is a "general disability, or nonoccupational, policy," which "defines disability in terms of the inability of the insured to engage in any gainful occupation."

10A *Couch on Insurance* § 146:3. The second is an "occupational" disability policy, which "requires only that the insured be unable to perform the duties of the insured's particular occupation in order to be considered 'totally disabled.'" *Ibid.*

Occupational-disability policies are often limited to terms of a specific number of years. "The expectation is that, by that time, the insured will have made the necessary adjustment to another line of work or, if that is not possible because of the severity of the disability, will qualify for continued benefits" under a policy for general disability. *McFarland* v. *General Am. Life Ins. Co.*, 149 F.3d 583, 587 (7th Cir. 1998). But the interim period is covered even without complete disability to "protect the individual whose economic expectations and commitments are disrupted by a change in occupational status due to injury or sickness." *Id.* at 588.

B. Facts And Procedural History

1. Petitioner spent her entire career doing "one thing and one thing only"—working as a Hazard Analysis and Critical Control Points (HACCP) coordinator at Peco Foods, Inc., a poultry-processing plant located in Sebastopol, Mississippi. App., *infra*, 25a.[1] Due to the nature of

[1] HACCP is a "management system in which food safety is addressed through the analysis and control of biological, chemical, and physical hazards from raw material production, procurement and handling, to manufacturing, distribution and consumption of the finished product." It requires a "systematic approach to the identification, evaluation, and control of food safety hazards," tailored to "specific" operations and ensuring employees "learn the skills necessary to make it function properly." The FDA considers it "essential that the unique conditions within each facility be considered during the development of all components of the HACCP plan," and that the "HACCP team consist[] of individuals who have specific knowledge and expertise appropriate to the product and process." The "HACCP

the work, petitioner was routinely exposed to temperatures around 40 degrees. *Id.* at 27a; see, *e.g.*, 9 C.F.R. 381.66 (setting chilling and freezing procedures for poultry facilities). After about two decades on the job, petitioner was diagnosed with a "host of circulatory system disorders including Raynaud's disease," which could leave her with gangrene if she stayed exposed to cold temperatures. App., *infra*, 26a. This new condition forced her to stop working at Peco, and she applied for disability benefits from respondent, who issued Pico's group disability policy. *Ibid.*

Under that policy, petitioner qualified for benefits if, "as a result of an Injury or Sickness," she could not "perform the material duties of []her Regular Occupation." The policy defined "regular occupation" as "the occupation the Insured is routinely performing when Total Disability begins. [Respondent] will look at the Insured's occupation as it is normally performed in the national economy, and not the unique duties performed for a specific employer or in a specific locale." App., *infra*, 26a-27a; see also C.A. E.R. 26-27.

Pico supplied respondent with a detailed job description for her position as HACCP coordinator. Among other things, petitioner's responsibilities included training "quality assurance employees with the help of supervisors in all aspects of HACCP"; "[r]eviewing the necessary reports and forms to comply with all government regulations"; "working with USDA and Shipping Department to provide all paperwork required for the export of product"; and "physically inspect[ing] products for both naturally

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coordinator and team are selected and trained as necessary," and "[t]he team is then responsible for developing the initial plan and coordinating its implementation." See generally FDA, *HACCP Principles & Application Guidelines* (Aug. 14, 1997) <https://tinyurl.com/fda-haccp>.

occurring and processing defects," such as "deformity, bruising in excess, infection, discoloration, abscess," "foreign material, bones, extraneous material (to include fecal matter), feathers, broken bones/miscuts, missed heads, torn pieces, fat levels, etc." C.A. E.R. 324-325; see also *id.* at 207. Her role as HACCP coordinator thus involved industry-specific training and action, including specific knowledge of poultry, Pico's processes, the governing regulations, and poultry-related pathogens and hazards.

Although respondent had access to this detailed job description, it instead used the Department of Labor's "Dictionary of Occupational Titles" (DOT) to classify petitioner's "regular occupation." App., *infra*, 3a. In doing so, respondent concluded that petitioner's regular occupation was "Sanitarian," which did not require "employment at a poultry processing facility nor exposure to the cold." *Ibid.* Because respondent concluded that the "regular occupation of sanitarian, 'as it is typically performed in the national economy,' did not require working in the cold," it denied petitioner's application for long-term disability benefits. *Ibid.*[2]

2. Petitioner challenged the benefit denial under ERISA, and the district court rejected respondent's denial as an abuse of discretion. App., *infra*, 5a.

The court found that petitioner's "specific job duties, as described by her employer, fell into three categories," only one of which was squarely covered by the DOT's entry of "sanitarian." App., *infra*, 31a-33a. The court further noted that "wherever [petitioner's] job was performed in

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[2] As courts routinely acknowledge, the DOT is "an obsolete catalog of jobs (most of the entries in it date back to 1977)." *Hermann* v. *Colvin*, 772 F.3d 1110, 1113 (7th Cir. 2014). "Since it was last updated in 1991, it is certain that 'many of the jobs have changed and some have disappeared.'" *Spicher* v. *Berryhill*, 898 F.3d 754, 759 (7th Cir. 2018).

the national economy, it would require her to perform sanitary-training duties, meat inspection duties, and meat packaging duties." *Ibid.* And since "[c]ommon sense says that an occupation involving inspection and packaging of meat products would require exposure to refrigeration and low temperatures," it was "'unreasonable'" for respondent's "vocational expert[s] to define occupational duties by relying exclusively on a single Dictionary Title 'that does not refer' to [those] important job duties." *Id.* at 34a (citing *Lasser* v. *Reliance Standard Life Ins. Co.*, 344 F.3d 381 (3d Cir. 2003), and *Kinstler* v. *First Reliance Life Ins. Co.*, 181 F.3d 243 (2d Cir. 1999)).

The district court next found that respondent operated under a conflict of interest with a "history of biased claims administration." App., *infra*, 35a-36a. The court "conducted a cumbersome review of judicial opinions addressing Reliance's behavior in disability cases," and "found over 100 opinions in the last 21 years criticizing Reliance's disability decisions, including over 60 opinions reversing a decision as an abuse of discretion or as arbitrary and capricious." *Id.* at 38a. The court further noted that "[t]hese opinions are often scathing": "Judges describe the behavior underlying Reliance's claims administration as 'arbitrary,' 'blind,' 'conclusory,' 'extreme,' 'flawed,' 'fraught,' 'illogical,' 'inadequate,' 'inappropriate,' 'incomplete,' 'indifferent,' 'lax,' 'misguided,' 'opportunisti[c],' 'precusory,' 'questionable,' 'remarkable,' 'selective,' 'self-serving,' 'skewed,' 'tainted,' 'troubling,' 'unfair,' 'unreasonable,' and 'unreliable.'" *Id.* at 38a, 50a (footnotes omitted).

The district court finally "highlighted" "the specific wrong alleged by [petitioner]: the arbitrary determination of a claimant's occupation," including classifying occupations "'without regard to the importance of [job] du-

ties.'" App., *infra*, 52a. As the court explained, even if respondent is permitted to use the DOT, it routinely erred by "'clearly ignor[ing] the actual duties of [a claimant's] job," and sticking to the DOT "despite the 'disparity' between a classification 'and the reality of [claimant's] regular occupation.'" *Id.* at 52a-53a.

The court accordingly held that respondent abused its discretion and entered an order awarding petitioner her benefits. App., *infra*, 55a-59a.

3. The Fifth Circuit reversed. App., *infra*, 1a-22a. It held that "our precedent does not require that an administrator consider each of a claimant's job duties to determine his regular occupation," and thus it was irrelevant that respondent failed to "account for Nichols's job duties outside the DOT description of what a sanitarian does." *Id.* at 9a.

The court of appeals explained that it was bound by *House* v. *American United Life Ins. Co.*, 499 F.3d 443 (5th Cir. 2007). App., *infra*, 9a. It noted that *House* "defined 'regular occupation' in an LTD plan as 'a general occupation rather than a particular position with a particular employer.'" *Ibid.* That meant "a claimant's regular occupation must be defined at a high level of generality,' referencing the activities that constitute the material duties of [the claimant's occupation] as they are found in the general economy.'" *Ibid.* "*House* thus suggests that features of a claimant's job within a general type of work (for example, the unique features of working as a *trial* attorney) are irrelevant to defining the material duties of a claimant's regular occupation (attorney)." *Id.* at 9a-10a.

The court further explained that the Fifth Circuit had also "held that a plan administrator need not account for each of a claimant's job duties when using the DOT to identify the duties of a claimant's regular occupation as found in the general economy." App., *infra*, at 10a-11a. It

thus followed that an "administrator's interpretation of the material duties of a claimant's occupation based on the DOT was 'fair and reasonable,' even though the essential duties identified did not match each duty actually performed." *Id.* at 11a.

Applying that binding law to this case, the court had little trouble reversing. Under settled Fifth Circuit authority, respondent "did not need to account for every task Nichols performed as HACCP Coordinator when assessing her regular occupation." App., *infra*, 15a. The court admitted that "the occupation of sanitarian does not account for whatever meat packaging duties the job of HACCP Coordinator involved," but it found that irrelevant. *Id.* at 15a-16a. "No matter what other circuits require, our precedent dictates that regular occupation is to be defined generally and need not account for each of a claimant's unique job duties." *Id.* at 16a n.11.[3]

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[3] The panel's holding turned expressly on circuit authority defining "regular occupation," not the extra language in Pico's policy (noting that respondent would view petitioner's "regular occupation" "as it is normally performed in the national economy, and not the unique duties performed for a specific employer or in a specific locale"). This is wholly unsurprising: the "national economy" language does not help respondent here, because *every* comparable position in *every* poultry plant nationwide has the identical restrictions on working in the cold. The parties' dispute thus turns on the predicate step—defining "regular occupation" *before* asking how that occupation is performed in the national economy. For example, there are ER nurses, orthopedic surgeons, and trial attorneys in the national economy, and one can define their national duties by looking at *their* respective occupations. That does not justify defining "regular occupation" as a generic profession at the highest level of generality, especially when that category *excludes* duties, skills, training, and expertise found in *all* typical examples of that employment on a national basis. That issue implicates the heart of the circuit conflict, and it was the stated basis of the

The court thus explicitly faulted the district court for relying on *Lasser* v. *Reliance Standard Life Ins. Co.*, 344 F.3d 381 (3d Cir. 2003), and *Kinstler* v. *First Reliance Life Ins. Co.*, 181 F.3d 243 (2d Cir. 1999). App., *infra*, 16a n.11. As the court explained, "our definition of 'regular occupation' established in *House* is different from the definition endorsed by the Second and Third Circuits." *Ibid.*; see also *ibid.* ("'[t]he circuits are split' on whether to define regular occupation based on the 'claimant's actual job duties' or 'the insured's occupation as it is performed in a typical work setting in the general economy'") (quoting *Darvell* v. *Life Ins. Co. of N. Am.*, 597 F.3d 929, 935-936 (8th Cir. 2010)). The panel found that respondent's analysis may have been "cursory" in this case (*id.* at 16a n.12), but its interpretation of "regular occupation" was consistent with Fifth Circuit law.[4]

REASONS FOR GRANTING THE PETITION

This case readily satisfies the Court's traditional criteria for review. The proper interpretation of "regular occupation" has openly divided the courts of appeals and split panels on multiple circuits. The division is both longstanding and entrenched; the competing arguments are clear and well-developed, and the conflict has lasted for over a decade with no indication that either side will back down. There is no benefit to further percolation, but there is an obvious cost: the conflict implicates the central issue dictating whether employees are entitled to ERISA benefits, and the outcome now turns on where a suit is

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panel's disposition. See, *e.g.*, App., *infra*, 9a-16a (repeatedly relying in *House*'s core interpretation of "regular occupation").

[4] The panel separately brushed aside the district court's evidence of biased claims administration because its collection of cases were identified by the district court instead of petitioner, and respondent was not provided an opportunity to respond. App., *infra*, 20a-21a.

filed. Insurance requires predictability, and the divergent results here are intolerable.

Further review is necessary to eliminate this entrenched conflict, and this case is an ideal vehicle for resolving the confusion. The decision below turned directly on the pure question of law at the heart of the split. The district court followed multiple decisions from one side, and petitioner won; the Fifth Circuit rejected those very decisions and petitioner lost. The disposition is outcome-determinative. And until this Court intervenes, the conflict will persist and the same term in thousands of plans with millions (or billions) at stake will mean different things based on the happenstance of where an employer is located. No one benefits from the huge costs and uncertainty of constant litigation over the threshold term underlying common ERISA disability plans. This Court's urgent guidance is warranted, and the petition for a writ of certiorari should be granted.

A. There Is An Express And Intractable Conflict Over The Definition Of "Regular Occupation" In ERISA Disability Plans

The Fifth Circuit's decision deepens a preexisting "split" over the threshold issue central to ERISA disability determinations: how to define the claimant's "regular occupation" for purposes of long-term disability insurance. App., *infra*, 16a n.11 (quoting *Darvell*, 597 F.3d at 935-936). That circuit conflict is both undeniable and entrenched, and it should be resolved by this Court.

1. a. The decision below directly conflicts with settled law in the Second Circuit. In *Kinstler* v. *First Reliance Standard Life Ins. Co.*, 181 F.3d 243 (2d Cir. 1999), an ERISA plan, as here, provided long-term disability benefits if the insured could not "'perform the material duties of his/her regular occupation.'" 181 F.3d at 245-246. The

plaintiff in that case was the "Director of Nursing Services" at a small drug rehabilitation center. *Id.* at 245. Although the DOT classified "Director of Nursing" as involving only sedentary activities, the plaintiff's actual "job description" required "60 percent administrative duties and 40 percent clinical duties." *Id.* at 247. After the plaintiff was injured in a car accident, it was undisputed that "she was disabled from all but sedentary work," making it impossible for her to perform her clinical duties. *Id.* at 246-247.

Reliance nonetheless denied her disability claim. 181 F.3d at 247-248. Reliance acknowledged that her position, unlike a nursing director in a "hospital" or "large institution," required "direct patient care," which she could no longer perform. *Id.* at 247. But Reliance explained that its "'decision is based not on a specific job as performed at a specific place of employment—rather, we have chose[n] to use the Department of Labor standards as set forth in the Dictionary of Occupational Titles which makes no mention of these [non-sedentary] activities as *essential* functions of this occupation.'" *Ibid.* (emphasis and brackets in original). Because Reliance determined that the plaintiff could perform the tasks of the DOT's "Director of Nursing," it concluded that she was not disabled—even though her current position was non-sedentary and "she could not, based on her education and experience, obtain a purely administrative or managerial position" as director of nursing at a larger institution. *Ibid.*

On appeal, the Second Circuit rejected Reliance's position, holding that it misinterpreted the plan and improperly denied the claimant benefits. 181 F.3d at 252-253. Unlike the Fifth Circuit, the Second Circuit defined "regular occupation" as "'a position of the same general character as the insured's previous job, requiring similar skills and training, and involving comparable duties.'" *Id.* at 252;

contra App., *infra*, 16a n.11 (expressly disapproving *Kinstler*). It accordingly rejected Reliance's use of the DOT's "job description for 'DIRECTOR, NURSING SERVICE.'" *Id.* at 253. As the court explained, although "Kinstler's title at [the rehabilitation center] was 'Director of Nursing,'" "her 'regular occupation' may not be defined without some consideration of the nature of the institution where she was employed." *Ibid.* That did not mean limiting the term "to include only the characteristics of her [current] job," but "it must be defined as a position of the 'same general character' as her job, *i.e.*, a director of nursing at a small health care agency, as distinguished from a large general purpose hospital." *Ibid.*

Because it was clear that "some material duties of her occupation require performance of non-sedentary tasks"—"even though at a large hospital, a director of nursing might have only the sedentary tasks identified in the [DOT]"—she was entitled to disability benefits. 181 F.3d at 253. This conclusion cannot be squared with the Fifth Circuit's opposite conclusion below: "No matter what other circuits require, our precedent dictates that regular occupation is to be defined generally and need not account for each of a claimant's unique job duties." App., *infra*, 16a n.11 (disavowing *Kinstler* and invoking *House*).

Kinstler has now been settled law in the Second Circuit for over two decades. Accordingly, unlike in the Fifth Circuit, it is not enough to identify a "general occupation" at "a high level of generality." App., *infra*, 9a. "Regarding regular occupation, the Second Circuit requires consideration of 'a position of the same general character as the insured's previous job, requiring similar skills and training, and involving comparable duties.'" *Sewell* v. *Lincoln Life & Annuity Co. of N.Y.*, No. 11-4236, 2013 WL 1187431, at *4, *13 (S.D.N.Y. Mar. 22, 2013) (applying *Kinstler* to plan language materially indistinguishable

from the plan language here). Petitioner would have prevailed had that correct standard been applied below. App., *infra*, 31a-35a; see also, *e.g.*, *Shore* v. *PaineWebber Long Term Disability Plan*, No. 04-4152, 2007 WL 3047113, at *11-*12 (S.D.N.Y. Oct. 15, 2007) (in deciding the "threshold" issue of "regular occupation," "Reliance did not follow the clear guidance from the Second Circuit and instead categorized Plaintiff's occupation solely by focusing on her title" in the DOT; "[i]n reflexively using the DOT classification," "Defendants clearly ignored *the actual duties of Plaintiff's job and the institution where she was employed*") (emphasis added); *Peck* v. *Aetna Life Ins. Co.*, 495 F. Supp. 2d 271, 277-278 (D. Conn. 2007) (rejecting, under *Kinstler*, Aetna's reliance on the DOT to classify the insured as a "*registered* nurse," not an "*operating room* nurse"; requiring Aetna to consider "the general character of Peck's duties as a North Shore operating room nurse" and "the nature of the North Shore facility") (emphases added).[5]

b. The Fifth Circuit's decision also contravenes settled law in the Third Circuit. In *Lasser* v. *Reliance Standard Life Ins. Co.*, 344 F.3d 381 (3d Cir. 2003), a divided panel rejected Reliance's interpretation of "regular occupation" in an ERISA disability plan, declaring Reliance's definition "arbitrary and capricious." 344 F.3d at 383.

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[5] Although *Kinstler* arose under de novo review, "its principle is applied in cases reviewed on an arbitrary and capricious standard." *Sewell*, 2013 WL 1187431, at *13 n.8 (citing authority). And, indeed, *Kinstler* itself affirmed a lower-court decision expressly noting it "would have reached the same result under the more deferential arbitrary and capricious standard of review." *Kinstler*, 181 F.3d at 248. This is presumably why the Fifth Circuit declared its precedent "different," not *distinguishable*, from the Second Circuit's. App., *infra*, 16a n.11.

In that case, an orthopedic surgeon sought long-term disability benefits after suffering a heart attack. 344 F.3d at 383. His treating physician advised him to reduce his work-related stress, which he did by cutting his "patient load by 50%," dropping after-hours "on call" responsibilities, and not performing emergency surgeries. *Ibid.* Under his ERISA plan, he was entitled to benefits if he was "'capable of performing the material duties of his/her regular occupation on [only] a part-time basis or [only] some of the material duties on a full-time basis.'" *Ibid.* (brackets in original).

Despite the significant reductions in his practice, Reliance declared the plaintiff "nondisabl[ed]" and denied relief. 344 F.3d at 384. In supporting its determination, "Reliance argue[d] that 'regular occupation' is *broad, indeed generic*." *Id.* at 385 (emphasis added). It stated that "'regular occupation is not your job with a specific employer, it is not your job in a particular work environment, nor is it your specialty in a particular occupational field." *Ibid.* Instead, "your own or regular occupation" is determined "as it is performed in a typical work setting for *any* employer in the general economy." *Ibid.* (emphasis added).

The panel majority emphatically rejected Reliance's argument, finding the key term "not ambiguous." 344 F.3d at 385-386. It explained that "regular occupation" is not "broad" or "generic," but "the usual work that the insured is actually performing immediately before the onset of disability." *Id.* at 386. The majority grounded this reading in "[b]oth the purpose of disability insurance and the modifier 'his/her' before 'regular occupation.'" *Id.* at 385-386 (observing that the policy's entire point is to "protect[] the insured from inability to 'perform the material duties of his/her regular occupation'").

"Applying the text as written," the majority concluded, "Dr. Lasser's regular occupation was an orthopedic surgeon responsible for emergency surgery and on-call duties in a relatively small practice group and within a reasonable travel distance from his home in New Jersey." 344 F.3d at 386. As the majority explained, Reliance erred by looking to the DOT to define the plaintiff's "regular occupation" as a general "surgeon" (*id.* at 387 n.5), and it erred again by defining the occupation "generically without reference to Dr. Lasser's particular duties." *Id.* at 387 & n.5. An insured's "regular occupation," in short, is "that in which he was actually engaged immediately before becoming disabled." *Id.* at 392.[6]

Judge Garth dissented. 344 F.3d at 392-399. Like the Fifth Circuit, Judge Garth would have credited Reliance's use of the DOT to classify the occupation at a high level of generality: "Reliance looked to the duties of a general surgeon as defined in the [DOT]. 'Emergency' and/or 'on-call' work are not included in [those] material duties." *Id.* at 395.

The split panel in *Lasser* thus reflects the broader split now entrenched between the Third and Fifth Circuits. App., *infra*, 16a n.11. And despite the split, the

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[6] The majority further relied on precedent in the Second Circuit: "Even were a court not to limit itself exclusively to the claimant's extant duties, that person's 'regular occupation' nonetheless requires 'some consideration of the nature of the institution [at which the claimant] was employed.'" 344 F.3d at 386 (quoting *Kinstler*, 181 F.3d at 253); see also *ibid.* (noting *Kinstler*'s adoption of earlier authority that "defined 'regular occupation' as 'a position of the same general character as the insured's previous job, requiring similar skills and training, and involving comparable duties'"). This further aligns the law in the Second and Third Circuits, which each squarely depart from established precedent in the Fifth Circuit. App., *infra*, 16a n.11.

Third Circuit has repeatedly confirmed that "*Lasser* controls": "[t]he unambiguous plain meaning" of "regular occupation" is "'the usual work that the insured is actually performing immediately before the onset of disability,'" which requires the insurer to "consider [the claimant's] actual job duties." *Patterson* v. *Aetna Life Ins. Co.*, 763 F. App'x 268, 272-273 (3d Cir. 2019);[7] see also, *e.g.*, *Duda* v. *Standard Ins. Co.*, 649 F. App'x 230, 239 (3d Cir. 2016) (following *Lasser*); *Byrd* v. *Reliance Standard Life Ins. Co.*, 160 F. App'x 209, 211-212 (3d Cir. 2015) (same). The Third Circuit's authority is directly at odds with the Fifth Circuit's decision below. See, *e.g.*, App., *infra*, 13a-15a ("Reliance did not need to account for every task Nichols performed as HACCP Coordinator when assessing her regular occupation"; "[u]nder *House*, we may not determine the material duties of Nichols's regular occupation by differentiating between sanitarians generally—who might work at a variety of food processing plants—and a sanitarian who works at a poultry processing plant"). Indeed, as respondent itself has admitted, these conflicting bodies of law are "irreconcilable." Resp. C.A. Reply Br. 12 (contrasting *Lasser* and *House*).[8]

c. The Ninth Circuit has likewise endorsed the approach of other circuits and rejected the Fifth Circuit's

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[7] The policy at issue in *Patterson* used the phrase "own occupation," instead of "regular occupation." 763 F. App'x at 270. But courts routinely "equate[]" the two, as did *Patterson* itself. *Id.* at 271-272 (citing multiple circuits).

[8] See also, *e.g.*, *Kaelin* v. *Tenet Emp. Benefit Plan*, No. 04-2871, 2007 WL 4142770, at *5 (E.D. Pa. Nov. 21, 2007) ("'it is the specific job duties of the individual that are important, rather than a general job title'"); *Weiss* v. *Prudential Ins. Co. of Am.*, 497 F. Supp. 2d 606, 612-613 (D.N.J. 2007) (construing parallel plan language, under *Lasser*, as defining a claimant's "regular occupation" as a "special education food services teacher," not simply "the broad category of 'teacher'").

position: "even if use of the Department of Labor's [DOT] is appropriate, Standard's exclusive reliance on the DOT failed to take into account Salz's 'Own Occupation'; "a proper administrative review requires Standard to analyze, in a reasoned and deliberative fashion, *what the claimant actually does* before it determines what the 'Material Duties' of a claimant's occupation are." *Salz* v. *Standard Ins. Co.*, 380 F. App'x 723, 724 (9th Cir. 2010) (per curiam) (citing, *e.g.*, *Lasser* and *Kinstler*; emphasis added); see also, *e.g.*, *Popovich* v. *Metropolitan Life Ins. Co.*, 281 F. Supp. 3d 993, 1006 (C.D. Cal. 2017) ("[w]hen a LTD plan conditions LTD benefits to a claimant's inability to do his 'usual' or 'regular' occupation, the insurer must analyze 'what the claimant actually does'") (quoting *Salz*, 380 F. App'x at 724).

Thus in the Ninth Circuit, unlike the Fifth Circuit, "the term 'regular occupation' unambiguously refers to the usual work that the insured performed immediately before the onset of disability." *Wirries* v. *Reliance Standard Life Ins. Co.*, 247 F. App'x 870, 871 (9th Cir. 2007) (per curiam). Where a claimant's "[actual] duties go beyond the job requirements provided by the DOT," the insurer "abuse[s] its discretion in relying on the DOT job description to interpret the term 'regular occupation.'" *Id.* at 872.[9]

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[9] In *Wirries*, the Ninth Circuit explicitly "agreed" with the district court (247 F. App'x at 871), which itself rejected Reliance's argument that "'regular occupation' [is] encompassed within the DOT definition of a generic Vice President position in any company" (*Wirries* v. *Reliance Standard Ins. Co.*, No. 01-565, 2005 WL 2138682, at *5 (D. Idaho Sept. 1, 2005)). As the district court explained, "In Wirries case, if her 'regular occupation' were to be defined in a manner analogous to that of *Kinstler*, then it would be defined in terms of a position of the 'same general character' as her job at Scientech, i.e. a vice president in charge of an entire region (Western) for a national corporation. A normal work day was 12 hours, supervising 300 employees.

d. The Fifth Circuit's decision is also out of step with decisions of the Tenth Circuit. In *Caldwell* v. *Life Ins. Co. of N. Am.*, 287 F.3d 1276 (10th Cir. 2002), the court rejected an insurer's refusal to provide disability benefits to an employee of an oil-drilling-services company. 287 F.3d at 1279. Although the employee "could perform the normal duties of a customer service representative"—his nominal role—it was "undisputed" that his position required "more than just those sedentary duties," including "'occasionally'" "carrying, pulling, pushing, and lifting of 50 to 100 pounds," and "working 'with/near dangerous machinery,' *i.e.*, 'oilfield service rigs.'" *Id.* at 1284. Because the employee could not "perform his *own* job duties"—even though he presumably could work as a "customer service representative" elsewhere—the court found the decision denying "'own occupation' disability benefits" arbitrary and capricious. *Id.* at 1283-1286.

Likewise, in *Bishop* v. *Long Term Disability Income Plan of SAP Am., Inc.*, 232 F. App'x 792 (10th Cir. 2007), the court rejected the insurer's attempt to define the claimant's "regular occupation" by referencing the DOT. 232 F. App'x at 793. It held that the insurer was "required to consider [the claimant's] actual job duties in defining 'his occupation,'" and found it "[n]otabl[e]" that the plan did "not reference DOT definitions." *Id.* at 794-795. The

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* * * [W]hile the DOT definition for a generic vice president's job may have described some of the activities that Wirries performed, it did not capture or describe the much higher level of management responsibilities * * * . Without belaboring the point, there can be a tremendous amount of difference between being a vice president for a small family-owned corporation engaged in the heating and cooling business, for example, compared to being a vice president for a national corporation such as Microsoft." *Ibid.*; see also *id.* at *10 (concluding that Reliance used an "erroneous interpretation of the plan term[] of 'regular occupation,'" citing *Lasser* and *Kinstler*).

failure to take all "essential dut[ies]" of the actual job into account "rendered the decision arbitrary and capricious." *Id.* at 795.

This clear methodology is again incompatible with the Fifth Circuit's conflicting analysis. See, *e.g.*, *Darvell*, 597 F.3d at 935-936 (counting *Bishop* and *Lasser* together on the opposite side of the "[circuit] split").

2. Multiple circuits, however, have embraced the Fifth Circuit's interpretation of "regular occupation."

a. First, the Eighth Circuit squarely held that "'regular occupation' can be interpreted to refer to [the claimant's] *generic occupation*, rather than his specific position." *Darvell* v. *Life Ins. Co. of N. Am.*, 597 F.3d 929, 936 (8th Cir. 2010) (emphasis added).

The Eighth Circuit openly acknowledged that "[t]he circuits are split, under abuse of discretion review, on this issue." 597 F.3d at 935. In examining the split, the court identified two competing ways to construe the term "regular occupation": it could refer to (i) "the duties that are commonly performed by those who hold the same occupation as defined by the DOT (a 'generic' approach)," or (ii) the duties that the specific claimant actually performed for his employer (a 'claimant-specific' approach)." *Ibid.* The Eighth Circuit picked sides by choosing the "generic" approach under the DOT. It thus rejected the claimant's argument that the insurer "abused its discretion by using the DOT description of [his] occupation, rather than a description of his actual job duties." *Id.* at 934. Contra, *e.g.*, *Lasser*, 344 F.3d at 386; *Kinstler*, 181 F.3d at 252.

b. The Sixth Circuit, splitting 2-1, likewise determined that "[t]he word 'occupation' is sufficiently general and flexible to justify determining a particular employee's 'occupation' in light of the position descriptions in the [DOT]

rather than examining in detail the specific duties the employee performed." *Osborne* v. *Hartford Life & Accident Ins. Co.*, 465 F.3d 296, 299 (6th Cir. 2006). The majority thus sided with those courts "uph[olding]" an "interpretation of 'regular occupation' as meaning a general occupation rather than a particular position with a particular employer." *Id.* at 300 (quoting *Schmidlkofer* v. *Director Distrib., Assocs., Inc.*, 107 F. App'x 631, 633 (6th Cir. 2004)).

Judge Cole dissented. 465 F.3d at 301-304. He found that "the plain language of the disability policy compelled Hartford to consider Osborne's actual job duties," and he further rejected Hartford's "reliance on the [DOT]" in light of the admitted "discrepancy between the significant travel required by Osborne's actual position and the [DOT's] classification of his occupation as sedentary." *Id.* at 301-302. Given that Osborne's "job description" was accurate and the DOT was not, Judge Cole found little sense in the insurer "insist[ing], without explanation, that the [DOT] applies." *Id.* at 303.

Like the Second and Third Circuits, Judge Cole thus faulted the majority for letting the insurer emphasize the DOT's general categories "to the exclusion of [the insured's] actual job duties." 465 F.3d at 302, 304 (citing *Kinstler* and *Lasser*). He further suggested the Sixth Circuit's analysis conflicted with those decisions (citing *Lasser* with a "*but see*"), and questioned the logic of "consult[ing] the [DOT] to determine the nature of the plaintiff's occupation, rather than look to her specific duties as manifested in her actual job." *Id.* at 302. The full Sixth Circuit, however, disagreed, denying rehearing over Judge Cole's recorded dissent. See *id.* at 296 n.*.[10]

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[10] *Osborne* is not the only case that divided a panel on this side of the conflict. The Fifth Circuit's decision in *House* itself prompted a

Osborne is now established law in the Sixth Circuit. See, *e.g.*, *Rothe* v. *Duke Energy Long Term Disability Plan*, 688 F. App'x 316, 319-320 (6th Cir. 2017) ("[w]e have held that 'own occupation' is a general term that refers to categories of work as opposed to the employee's particular duties," citing *Osborne*). Had the identical fact-pattern arisen in the Second, Third, Ninth, or Tenth Circuits, the issue would have been resolved exactly the opposite way. See, *e.g.*, *Rucker* v. *Life Ins. Co. of N. Am.*, No. 10-3308, 2012 WL 956507, at *8 (E.D. La. Mar. 20, 2012) (expressly acknowledging the conflict between *Darvell*, *Osborne*, and *House*, on the one hand, and *Caldwell* and *Lasser*, on the other).[11]

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dissent by Judge Dennis, whose logic traces the views of multiple circuits: "Use of the term 'regular occupation' * * * means the individual insured's usual and customary means of earning a livelihood, and does not permit the insurer to define total disability at an unreasonably high level of generality so as to offer the insured no real protection in the event he becomes disabled to perform the duties required by his previous regular income-earning activities. As a lawyer, House was still qualified and able to work as a civil servant or governmental attorney, but as a regular occupation that role did not provide him with the earning capacity of his pre-disability high-stress job as an active, experienced actual trial lawyer." 499 F.3d at 462 (Dennis, J., dissenting).

[11] The Fourth Circuit has decisions cutting both ways. Compare, *e.g.*, *Gallagher* v. *Reliance Standard Life Ins. Co.*, 305 F.3d 264, 272-273 (4th Cir. 2002) ("A general job description of the DOT, to be applicable, must involve comparable duties but not necessarily every duty."), with, *e.g.*, *Mitchell* v. *Fortis Benefits Ins. Co.*, 163 F. App'x 183, 190 (4th Cir. 2005) (per curiam) (invoking *Kinstler* for the proposition that "a reasonable description of a claimant's regular occupation must also take into account the specific nature of the claimant's prior employment"); *O'Bryhim* v. *Reliance Standard Life Ins. Co.*, 188 F.3d 502, at *8 (4th Cir. 1999) (unpublished) (defining "regular occupation" by examining the actual duties and features of the insured's job, not simply his job title). Given the presence of multiple

This wide disconnect only underscores the deep confusion this issue has produced, and the obvious need for this Court's immediate intervention.

* * *

The conflict over the meaning of "regular occupation" is indisputable and entrenched. The Fifth Circuit expressly acknowledged the split and adhered to its "generic" approach; multiple courts of appeals (and dozens of lower courts) have endorsed the opposite position, some now for decades. The Fifth Circuit declared that its holding was dictated by circuit precedent, and it reversed the district court for adopting the contrary views of other courts of appeals. Each side of the split has now recognized the conflict and refused to abandon its own position, even over panel dissents. There is no realistic prospect that this conflict will somehow resolve itself.

In the meantime, the threshold inquiry driving ERISA benefits determinations will turn on the happenstance of where a dispute arises. It will continue to invite litigation over scarce ERISA funds, and it will continue to generate confusion in an area demanding predictability and uniformity. See *Conkright* v. *Frommert*, 559 U.S. 506, 518 (2010). Further review is plainly warranted.

B. The Proper Interpretation Of "Regular Occupation" Is A Recurring Question Of Exceptional Importance

The question presented is of exceptional legal and practical importance. The proper definition of "regular occupation" is often a dispositive threshold issue. It dictates whether claimants are entitled to benefits under thousands of policies with millions (or more) at stake. The

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circuits on each side of the conflict, the split will persist no matter which side the Fourth Circuit ultimately chooses.

sheer number of decisions from a multitude of jurisdictions underscores its obvious significance; indeed, it arises virtually every time an employee seeks disability benefits. As it stands now, however, the circuits remain intractably divided, and the uncertainty deprives regulated stakeholders of needed stability and uniformity in a context that requires both. There is no point in waiting for courts and parties to waste even more time and resources litigating a core question that begs for a clear answer.

Nor is there any hope of the issue resolving itself. As illustrated above, courts are well aware of the competing sides of the argument; they have repeatedly picked those sides without a uniform consensus emerging, and the confusion only promises to worsen as remaining circuits weigh in. And those courts will have no shortage of opportunities: approximately 34% of employees in the private sector had long-term disability insurance in 2018 (Bureau of Labor Statistics, *Employee access to disability insurance plans* (Oct. 26, 2018) <https://tinyurl.com/bls-ltdi-stats>), and Reliance alone administers millions of disability policy certificates amounting to potentially billions of coverage. See Reliance Standard Life Ins. Co., *2018 Annual Statement* <https://tinyurl.com/RSLIC-2018>. This issue will continue to confound lower courts until this Court resolves the question.

And the current division is particularly troubling in this context. Congress enacted ERISA in part to bring about uniformity and predictability to employee-benefit plans. For that reason, this Court often grants review to ensure the application of uniform standards under ERISA. See, *e.g.*, *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 381 (2002); *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 148 (2001). Here, however, petitioner would have prevailed had these proceedings occurred in New York, Pennsylvania, California, or Colorado, but she lost due to

the happenstance that her employment arose in Mississippi. An employee's rights under ERISA should not be determined by geography. Given the legal and practical interests in clarity and uniformity, the existing conflict is especially untenable.

This petition, in short, presents a clear, entrenched conflict on a significant legal question that arises repeatedly in ERISA disputes nationwide. The Fifth Circuit's holding frustrates ERISA's effective administration, and deprives ERISA beneficiaries of the entire point of long-term disability insurance: "The purpose * * * is to protect the individual whose economic expectations and commitments are disrupted by a change in occupational status due to injury or sickness." *McFarland* v. *General Am. Life Ins. Co.*, 149 F.3d 583, 588 (7th Cir. 1998); see also *Seitz* v. *Metropolitan Life Ins. Co.*, 433 F.3d 647, 651 (8th Cir. 2006). These policies do little good if an employee is out of luck until she manages to be retrained in a new position, learn an entire new industry, forfeit all seniority, and essentially start over from scratch—all because an outdated publication, at the highest level of generality, says the employee can perform a "generic" version of her occupation without regard to her actual skills, training, experience, or expertise. The real-world importance of this question is hard to overstate. Certiorari is plainly warranted.

C. This Case Is An Optimal Vehicle For Deciding The Question Presented

This case is a perfect vehicle for deciding this significant question. The dispute turns on a pure question of law. It was squarely raised and resolved at each stage below, and both courts (the district court and Fifth Circuit) carefully addressed the question and treated it as dispositive. App., *infra*, 9a-16a, 29a-35a. Nor is there any doubt that this issue was outcome-determinative. The district court

applied the majority standard (from *Lasser* and *Kinstler*) and petitioner won; the Fifth Circuit applied the opposite standard (from *House* and *Darvell*) and petitioner lost. *Id.* at 12a-13a; 15a-16a n.11. The stark division over this fundamental legal issue drives the result.

Nor are there any factual or procedural obstacles to resolving the question presented. The relevant facts are undisputed and perfectly frame the circuit conflict. Respondent "used [the] DOT to determine that Nichols's regular occupation was that of sanitarian." App., *infra*, 11a. Yet it was uncontested that "sanitarian" did not cover the actual duties of petitioner's actual position—an HACCP coordinator in a chicken-processing facility dealing with poultry-specific equipment, processes, regulations, standards, hazards, and products. *Id.* at 15a-16a, 25a, 31a-32a; see also C.A. E.R. 207, 324-325. Although those facts easily satisfy the controlling rule in other circuits, petitioner instead lost because her case arose in the Fifth Circuit, where:

- "a claimant's regular occupation must be defined at a high level of generality," App., *infra*, 9a;
- "features of a claimant's job within a general type of work (for example, the unique features of working as a *trial* attorney) are irrelevant to defining the material duties of a claimant's regular occupation (attorney)," App., *infra*, 10a;
- "the administrator's interpretation of the material duties of a claimant's occupation based on the DOT [is] 'fair and reasonable,' even though the essential duties identified d[o] not match each duty actually performed," App., *infra*, 11a; and
- "[n]o matter what other circuits require, our precedent dictates that regular occupation is to be defined generally and need not account for each of a claimant's unique job duties," App., *infra*, 16a n.11.

At bottom, "[u]nder *House*," the Fifth Circuit "may not determine the material duties of Nichols's regular occupation by differentiating between sanitarians generally—who might work at a variety of food processing plants—and a sanitarian who works at a poultry processing plant." App., *infra*, 13a. That legal holding is irreconcilable with settled law in other circuits. See Part A.1, *supra*. The arguments have been fully vetted and further percolation promises nothing but additional conflicts and wasteful litigation. The issue is ripe for review and calls out for a definitive resolution from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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