No. 19-___

IN THE

Supreme Court of the United States

WALID JAMMAL, et al.,

Petitioners,

v.

AMERICAN FAMILY INSURANCE COMPANY, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Charles J. Crueger
Erin K. Dickinson
CRUEGER DICKINSON LLC
4532 North Oakland Avenue
Whitefish Bay, WI 53211

Edward A. Wallace
Kara A. Elgersma
WEXLER WALLACE LLP
55 West Monroe Street,
Suite 3300
Chicago, IL 60603

Brian H. Fletcher
Counsel of Record
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-3345
bfletcher@law.stanford.edu

QUESTIONS PRESENTED

Like many federal statutes, the Employee Retirement Income Security Act of 1974 incorporates the traditional common-law test for distinguishing between employees (who are covered by the Act) and independent contractors (who are not). This case presents two questions about that important and oft-litigated test, both of which have divided the courts of appeals:

1. Whether a district court's finding that a worker is an employee under the common-law test should be reviewed for clear error, as the Fourth, Seventh, Ninth, and Tenth Circuits hold; using a hybrid standard, as the Second and Eighth Circuits hold; or de novo, as the Sixth Circuit held here.

2. Whether the same traditional inquiry governs under all the statutes that incorporate the common-law test for employee status, as several circuits hold, or whether courts may modify the test based on the purpose of each statute, as the Sixth Circuit held here.

PARTIES TO THE PROCEEDING

Petitioners, the plaintiffs below, are Walid Jammal, Kathleen Tuersley, Cinda J. Durachinsky, and Nathan Garrett. Petitioners represent a certified class of respondents' current and former insurance agents.

Respondents, the defendants below, are American Family Insurance Company, American Family Mutual Insurance Company, American Family Life Insurance Company, American Standard Insurance Company of Wisconsin, American Family Termination Benefits Plan, Retirement Plan for Employees of American Family Insurance Group, American Family 401k Plan, Group Life Plan, Group Health Plan, Group Dental Plan, Long Term Disability Plan, American Family Insurance Group Master Retirement Trust, 401k Plan Administrative Committee, and Committee of Employees and District Manager Retirement Plan.

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Jammal v. American Family Insurance Co., No. 17-4125 (6th Cir. Jan. 29, 2019)

In re American Family Insurance Co., No. 17-308 (6th Cir. Oct. 26, 2017)

In re American Family Insurance Co., No. 17-307 (6th Cir. Oct. 26, 2017)

In re American Family Insurance Co., No. 16-305 (6th Cir. May 11, 2016)

Jammal v. American Family Insurance Group, No. 13-cv-437 (N.D. Ohio Aug. 1, 2017)

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
RELATED PROCEEDINGS iii
TABLE OF AUTHORITIES vi
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT RULE AND STATUTES 1
INTRODUCTION 2
STATEMENT OF THE CASE 3
A. *Darden* and the common-law test 3
B. The present controversy 6
REASONS FOR GRANTING THE WRIT 11
I. This Court should decide the proper standard of review for a district court's determination of employment status under the common-law test 11
A. The courts of appeals are divided 11
B. This Court should resolve the circuit conflict 14
C. This case is an ideal vehicle for deciding the question presented 16
D. The Sixth Circuit's de novo standard is wrong 17
II. This Court should decide whether the common-law test for employment status is subject to statute-specific modifications 22

A. *Darden* forecloses the Sixth Circuit's ERISA-specific approach 23

B. The Sixth Circuit's approach conflicts with the decisions of other courts of appeals..... 25

C. The Court should resolve the conflict created by the Sixth Circuit's decision..... 27

III. If the Court does not grant plenary review, it should hold this petition pending its decision in *Monasky* 28

CONCLUSION 29

APPENDIX

Appendix A, Opinion of the U.S. Court of Appeals for the Sixth Circuit, issued January 29, 2019 ..... 1a

Appendix B, Memorandum Opinion of the U.S. District Court for the Northern District of Ohio, issued August 1, 2017..... 38a

Appendix C, Order of the U.S. Court of Appeals for the Sixth Circuit, denying rehearing and rehearing en banc, issued March 25, 2019 ..... 90a

Appendix D, Title 29 United States Code, Section 1002 (Definitions) 92a

Appendix E, Title 29 United States Code, Section 1132 (Civil Enforcement) 94a

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 17

Aymes v. Bonelli,
980 F.2d 857 (2d Cir. 1992)..... 13

Baker v. Tex. & P. Ry. Co.,
359 U.S. 227 (1959) (per curiam)..... 15, 21

Barnhart v. N.Y. Life Ins. Co.,
141 F.3d 1310 (9th Cir. 1998) 26, 27

Berger Transfer & Storage v. Cent. States, Se. & Sw. Areas Pension Fund,
85 F.3d 1374 (8th Cir. 1996) 13, 27

Breaux & Daigle, Inc. v. United States,
900 F.2d 49 (5th Cir. 1990) 13

Cent. States, Se. & Sw. Areas Pension Fund v. Nagy,
714 F.3d 545 (7th Cir. 2013) 12

Chin v. United States,
57 F.3d 722 (9th Cir. 1995) 12

Clackamas Gastroenterology Assocs., P.C. v. Wells,
538 U.S. 440 (2003) 5, 15, 25

Cmty. for Creative Non-Violence v. Reid,
490 U.S. 730 (1989) 5, 15, 24

Comm'r v. Duberstein,
363 U.S. 278 (1960) 18, 19

Creel v. United States,
598 F.3d 210 (5th Cir. 2010) 15

Daughtrey v. Honeywell, Inc.,
3 F.3d 1488 (11th Cir. 1993) 11, 27

Dole v. Snell,
875 F.2d 802 (10th Cir. 1989) 13

Dykes v. DePuy,
140 F.3d 31 (1st Cir. 1998)..... 26

Eren v. Comm'r,
180 F.3d 594 (4th Cir. 1999) 12, 15

Halo Elecs., Inc. v. Pulse Elecs., Inc.,
136 S. Ct. 1923 (2016) 14

Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.,
572 U.S. 559 (2014) 14, 29

Hillstrom v. Kenefick,
484 F.3d 519 (8th Cir. 2007) 27

Hockett v. Sun Co.,
109 F.3d 1515 (10th Cir. 1997) 12, 27

Kelley v. S. Pac. Co.,
419 U.S. 318 (1974) 20

Knight v. United Farm Bureau Mut. Ins. Co.,
950 F.2d 377 (7th Cir. 1991) 12, 15

Marvel v. United States,
719 F.2d 1507 (10th Cir. 1983) 13

Mazzei v. Rock N Around Trucking, Inc.,
246 F.3d 956 (7th Cir. 2001) 27

McDougall v. Pioneer Ranch Ltd. P'ship,
494 F.3d 571 (7th Cir. 2007) 15

McLane Co. v. EEOC,
137 S. Ct. 1159 (2017) 14, 29

Monasky v. Taglieri,
No. 18-935 (cert. granted June 10, 2019)..... 14, 28

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (1992) .....*passim*

New Prime Inc. v. Oliveira,
139 S. Ct. 532 (2019) 5

NLRB v. United Ins. Co.,
390 U.S. 254 (1968) 5, 21

Ornelas v. United States,
517 U.S. 690 (1996) 19

Prof'l & Exec. Leasing, Inc. v. Comm'r,
862 F.2d 751 (9th Cir. 1988) 12

Roth v. Am. Hosp. Supply Corp.,
965 F.2d 862 (10th Cir. 1992) 12, 26

Rutherford Food Corp. v. McComb,
331 U.S. 722 (1947) 13

Sacchi v. IHC Health Servs., Inc.,
918 F.3d 1155 (10th Cir. 2019) 26

Salve Regina Coll. v. Russell,
499 U.S. 225 (1991) 18, 19, 22

Schwieger v. Farm Bureau Ins. Co.,
207 F.3d 480 (8th Cir. 2000) 13, 15

Singer Mfg. Co. v. Rahn,
132 U.S. 518 (1889) 5

Speen v. Crown Clothing Corp.,
102 F.3d 625 (1st Cir. 1996)..... 26

Teva Pharms. USA, Inc. v. Sandoz, Inc.,
134 S. Ct. 1761 (2014) 29

Teva Pharms. USA, Inc. v. Sandoz, Inc.,
574 U.S. 318 (2015) 14

U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC,
137 S. Ct. 1372 (2017) 29

U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC,
138 S. Ct. 960 (2018) 14, 18, 19, 22

Universal Camera Corp. v. NLRB,
340 U.S. 474 (1951) 21

Walters v. Metro. Educ. Enters., Inc.,
519 U.S. 202 (1997) 5

Ward v. Atlantic Coast Line R.R.,
362 U.S. 396 (1959) (per curiam) 5, 21

Ware v. United States,
67 F.3d 574 (6th Cir. 1995) 25, 28

Weber v. Comm'r,
60 F.3d 1104 (4th Cir. 1995) 12, 15

Wilde v. County of Kandiyohi,
15 F.3d 103 (8th Cir. 1994) 26

Worth v. Tyer,
276 F.3d 249 (7th Cir. 2001) 12

Statutes

26 U.S.C. § 7459(a) 15

26 U.S.C. § 7482(a) 15

28 U.S.C. § 1254(1) 1

Age Discrimination in Employment Act of
1967, Pub. L. No. 90-202, 81 Stat. 602 26

Americans with Disabilities Act of 1990,
Pub. L. No. 101-336, 104 Stat. 327 ..... 5, 26

Copyright Act of 1976, Pub. L. No. 94-553,
90 Stat. 2541 ..... 5, 15

Employee Retirement Income Security Act of
1974, Pub. L. No. 93-406, 88 Stat. 829 .....*passim*

Fair Labor Standards Act of 1938,
29 U.S.C. § 201 *et seq.*..... 13

Federal Employers' Liability Act of 1908, 45 U.S.C. § 51 *et seq.* 5, 15

Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671 *et seq.* 15

National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 5

Rule

Fed. R. Civ. P. 52(a)(6)..... 1, 12

Other Authorities

Edwards, Harry T. and Linda A. Elliot, *Federal Courts Standards of Review* (2007) 14

Restatement (Second) of Agency (1958)..... 5

Treasury Inspector General for Tax Administration, Office of Inspections and Evaluations, *Additional Actions Are Needed To Make the Worker Misclassification Initiative with the Department of Labor a Success* (Feb. 20, 2018) 16, 17

Wald, Patricia M., *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371 (1995)..... 14

Weil, David, *Lots of Employees Get Misclassified as Contractors*, Harv. Bus. Rev. (July 5, 2017)..... 16

PETITION FOR A WRIT OF CERTIORARI

Petitioners Walid Jammal, et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1a-37a) is published at 914 F.3d 449. The opinion of the district court (Pet. App. 38a-89a) is not published in the Federal Supplement, but is available at 2017 WL 3268032.

JURISDICTION

The judgment of the court of appeals was issued on January 29, 2019. Pet. App. 1a. The court denied a timely petition for rehearing on March 25, 2019. *Id.* 90a. On June 11, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 22, 2019. No. 18A1287. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT RULE AND STATUTES

Federal Rule of Civil Procedure 52(a)(6) provides:

> Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

Relevant statutory provisions are set forth in the appendix to this petition. Pet. App. 92a-94a.

INTRODUCTION

In *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), this Court held that the Employee Retirement Income Security Act of 1974 (ERISA), incorporates the traditional common-law test for distinguishing between employees and independent contractors. The same test also governs under Title VII, the Internal Revenue Code, and scores of other federal statutes that turn on employment status. This case presents two related questions about that important and frequently litigated test—one procedural, the other substantive. Both have divided the courts of appeals.

The procedural question concerns the appropriate standard of appellate review. Explicitly rejecting its "sister circuits' jurisprudence," the Sixth Circuit held that both a district court's ultimate finding of employment status and its subsidiary findings on a dozen common-law factors must be reviewed de novo. Pet. App. 13a-14a. That holding creates a new fault line in an acknowledged circuit split. Because the common-law test is deeply fact-intensive, the Fourth, Seventh, Ninth, and Tenth Circuits have long held that a district court's finding of employment status may be reviewed only for clear error. The Second and Eighth Circuits apply a hybrid standard, reviewing findings on the common-law factors for clear error, but the ultimate finding of employment status de novo. Only the Sixth Circuit applies a fully de novo standard.

The substantive question is whether courts may modify the traditional common-law test on a statute-by-statute basis to better fit the perceived purposes of the various laws that incorporate it. The Sixth Circuit held that they may. Pet. App. 15a. It then held, based on its view of ERISA's purpose, that the hiring party's

"control and supervision"—the touchstone of the traditional common-law test—"is less important in an ERISA context" than it is under other statutes. *Id.* 18a (citation omitted). That holding defies this Court's decision in *Darden*, which emphatically disapproved statute-specific modifications to the common-law test in the very context of ERISA. It also conflicts with the decisions of other courts of appeals, which apply the same traditional control-focused inquiry under all the statutes that incorporate the common-law test—including ERISA.

This Court should grant review and bring uniformity to these important questions of federal law. Both questions regularly arise under some of the most frequently litigated statutes in the U.S. Code. And their significance is only growing as the rapid spread of nontraditional work arrangements—sometimes called the "gig economy"—leads to more and more disputes about employment status.

STATEMENT OF THE CASE

A. *Darden* and the common-law test

Over the years, this Court has "often been asked to construe the meaning of 'employee' where the statute containing the term does not helpfully define it." *Darden*, 503 U.S. at 322. In *Darden*, the Court resolved that recurring issue by adopting a presumption that when Congress uses the term "employee," it intends to incorporate the traditional common-law test for employee status.

1. Like this case, *Darden* arose under ERISA, which safeguards pensions and other benefits promised to employees, but not to independent contractors. 503 U.S. at 320-21. The plaintiff in *Darden* was a former

insurance agent who alleged that the termination of his pension had violated ERISA. *Id.* at 319-20. The district court rejected his claim, holding that he was not covered by ERISA because he was an independent contractor. *Id.* at 321.

On appeal, the Fourth Circuit acknowledged that the plaintiff likely did not qualify as an employee "under traditional principles of agency law." *Darden*, 503 U.S. at 321. But the Fourth Circuit believed that strict adherence to the common-law test would have been inconsistent with ERISA's "declared policy and purposes," which include protecting workers' expected benefits. *Id.* (citation omitted). It therefore held that ERISA should be construed to incorporate a broader test for employee status. *Id.* at 321-22.

This Court rejected that ERISA-specific approach. It emphasized that "where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Darden*, 503 U.S. at 322 (brackets, citation, and ellipses omitted). The Court explained that it had held that other statutes that use the term "employee" refer to "the conventional master-servant relationship as understood by common-law agency doctrine." *Id.* at 322-23 (citation omitted). The Court reaffirmed those holdings and adopted a general "presumption" that the term "employee" carries its "agency law definition" unless Congress "clearly indicates otherwise." *Id.* at 325. And the Court relied on that presumption to hold that ERISA's references to "employees" incorporate the traditional common-law test. *Id.* at 323.

2. Consistent with *Darden*'s presumption, this Court has held that the common-law test determines a worker's status under many other statutes, including Title VII, *see Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 211-12 (1997); the Americans with Disabilities Act, *see Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444-51 (2003); the Internal Revenue Code, *see Darden*, 503 U.S. at 324; the National Labor Relations Act, *see NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968); the Copyright Act, *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-41 (1989); and the Federal Employers' Liability Act, *see Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396, 398-400 & n.1 (1959) (per curiam).

3. The common law has long defined an employee (or "servant") as a worker whose performance of the job is subject to the hiring party's "control or right to control." Restatement (Second) of Agency § 220(1) (1958). In other words, a worker is an employee if the hiring party retains the authority to dictate "not only what shall be done, but how it shall be done." *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 523 (1889) (citation omitted); *see, e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 541-42 (2019); *Clackamas*, 538 U.S. at 448.

In *Darden*, this Court reiterated that the common-law test focuses on "the hiring party's right to control the manner and means by which the product is accomplished." 503 U.S. at 323 (citation omitted). The Court explained that in conducting that inquiry, the factfinder should consider a nonexhaustive list of twelve factors drawn from the Restatement and other common-law sources:

> [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of

> the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party's discretion over when and how long to work; [7] the method of payment; [8] the hired party's role in hiring and paying assistants; [9] whether the work is part of the regular business of the hiring party; [10] whether the hiring party is in business; [11] the provision of employee benefits; and [12] the tax treatment of the hired party.

Id. at 323-24 (citation omitted). The Court emphasized that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 324 (citation omitted).

B. The present controversy

Petitioners are former insurance agents for respondent American Family Insurance Company. They filed this suit in 2013, contending that although American Family called them independent contractors, its pervasive control over their work means that they were in truth employees. Petitioners seek relief for American Family's failure to comply with ERISA's minimum standards in administering their pension plan. Pet. App. 40a.

1. The district court certified a class of American Family's current and former agents and denied American Family's motions to dismiss and for summary judgment. Pet. App. 39a-41a. The case proceeded to a trial, which the court bifurcated to first address petitioners' employment status. *Id.* 41a-42a.

During a twelve-day trial, the court and an advisory jury reviewed American Family's policies, training manuals, and other records. Pet. App. 38a-39a. They also heard from twenty-seven witnesses, including American Family executives, managers, and agents. *Id.* Those witnesses sometimes gave conflicting accounts of American Family's practices, and the parties vigorously disputed the relevant facts. *See, e.g.*, *id.* 55a, 60a-61a, 67a-68a.

2. After being instructed on the common-law test, the advisory jury unanimously found that petitioners were employees. Pet. App. 42a. The district court then reached the same determination based on its own extensive findings of fact. *Id.* 38a-89a.

The court explained that American Family controlled its agents through a network of sales managers whose only job was to supervise the agents' work. Pet. App. 59a-61a, 72a-73a. The court credited petitioners' evidence that "American Family trained its sales managers to treat agents in the same manner as they would treat employees." *Id.* 85a. And the court found that, "consistent with their training," managers "acted as if they had the right to control the manner and means by which their agents sold and serviced insurance policies." *Id.* 86a. In fact, some managers did not even know that agents were purportedly independent contractors. *Id.* 69a. Others "considered agents to be independent contractors 'for tax purposes only.'" *Id.* 86a.

The court found that, through these managers, American Family exercised far more control over its

agents than is typical in the insurance industry. For example:

- American Family prohibited agents from taking vacations or "otherwise being absent from the office" without approval. Pet. App. 78a.
- American Family required agents to submit detailed daily activity reports and to participate in various mandatory events. *Id.* 76a-78a.
- "[A]gents did not own a book of business" or "own any policies"; instead, customer relationships belonged to American Family. *Id.* 84a-85a.
- "American Family could and did unilaterally reassign policies" between agents. *Id.* 85a.
- "American Family could require agents to service policies they did not initiate" and to do so "without compensation." *Id.*
- "American Family actively discouraged and in some cases prohibited agents from taking on other employment even if it was unrelated to insurance sales." *Id.*

The court also made specific findings on each of the common-law factors identified in *Darden*. It found that the indefinite duration of the parties' relationship and the fact that the agents' work is American Family's core business "clearly favor employee status"; that the agents' tax treatment and commission-based pay "clearly favor independent contractor status"; and that the other factors were mixed. Pet. App. 83a-84a.

Based on its assessment of all of the relevant circumstances, the court determined that petitioners were employees. Pet. App. 87a. In so doing, it emphasized that American Family's "level and breadth

of control" distinguish this case from cases in which other insurance agents have been found to be independent contractors. *Id.*

3. The district court authorized an interlocutory appeal, and a divided panel of the Sixth Circuit reversed. Pet. App. 1a-37a.

a. The Sixth Circuit began with an extended analysis of the standard of review. Pet. App. 8a-15a. It explained that circuit precedent established that a district court's "ultimate conclusion" on employment status is reviewed de novo, but that the Sixth Circuit had not yet decided the standard applicable to subsidiary findings on the common-law factors. *Id.* 12a. The court acknowledged that "[o]ther circuits" have "explicitly considered this question" and treat those findings as "factual matters subject to review for clear error." *Id.* 13a. But the court rejected its "sister circuits' jurisprudence." *Id.* Instead, it held that de novo review is required because "[e]ach *Darden* factor is . . . itself a 'legal standard' that the district court is applying to the facts." *Id.* 14a.

The Sixth Circuit also held that it should "review de novo" the "weight assigned to each of the *Darden* factors." Pet. App. 15a. The court reasoned that de novo review is proper because "certain factors may carry more or less weight depending on the particular legal context" in which the common-law test is applied. *Id.*

b. Although it exercised de novo review, the Sixth Circuit did not disturb the district court's finding that the degree of control exercised by American Family's managers "was inconsistent with independent contractor status." Pet. App. 11a (citation omitted). It also accepted the district court's findings on ten of the

twelve common-law factors. *Id.* 15a n.4. It disagreed only with the district court's determinations that the "skill" factor counted "slightly in favor of employee status" and that the "hiring and paying of assistants" factor was "neutral." *Id.* 15a-18a. Instead, the Sixth Circuit determined, based on its own assessment of the evidence, that both factors "favored independent-contractor status." *Id.* 15a.

c. The Sixth Circuit also disagreed with the district court's overall weighing of the factors and other relevant circumstances. Pet. App. 18a-22a. It returned to the premise that the weight of specific common-law factors can differ depending on the statute in which the word "employee" appears. *Id.* 18a. Although the court recognized that the hiring party's right to control the work is the "crux" of the traditional common-law test, *id.* 11a (citation omitted), it held that "control and supervision is less important in an ERISA context," *id.* 18a (citation omitted). Instead, "[b]ecause ERISA cases focus on the financial benefits that a company should have provided," the court believed that "the *financial structure* of the company-agent relationship guides the inquiry." *Id.* 18a-20a.

Here, the Sixth Circuit concluded that the factors it deemed most relevant to "financial structure" (such as the agents' method of pay and tax treatment) favored independent-contractor status. Pet. App. 19a-20a. Accordingly, based on its recasting of the common-law test—and on its revision of the district court's findings on two specific factors—the Sixth Circuit held that petitioners were independent contractors. *Id.* 22a.

d. Judge Clay dissented. Pet. App. 23a-37a. He agreed with the circuits that have held that findings on "[t]he existence and degree of each *Darden* factor"

should be reviewed for clear error. *Id.* 27a-28a (brackets and citation omitted). He also argued that even under a de novo standard, the majority erred in disturbing the district court's findings on the "skill" and "assistants" factors. *Id.* 29a-33a. And he explained that the majority was wrong to hold that the hiring party's control is less significant under ERISA than under other statutes that incorporate the common-law test. *Id.* 33a-37a.

4. The Sixth Circuit denied rehearing en banc. Pet. App. 90a-91a.

REASONS FOR GRANTING THE WRIT

This case presents two recurring and important questions about how courts should decide whether a worker qualifies as an "employee" under the many federal statutes that incorporate the common-law test for employment status. On each question, the Sixth Circuit split with other circuits and contradicted this Court's precedent.

I. This Court should decide the proper standard of review for a district court's determination of employment status under the common-law test.

A. The courts of appeals are divided.

The courts of appeals have long used two different standards to review a district court's determination of employment status under the common-law test. *See Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1493-94 & nn. 8-10 (11th Cir. 1993) (noting the split). The Sixth Circuit has now broadened that recognized conflict by staking out a third position.

1. The Fourth, Seventh, Ninth, and Tenth Circuits review a district court's ultimate determination of

employment status under the clear-error standard in Federal Rule of Civil Procedure 52(a)(6).

The Fourth Circuit holds that "[t]he determination of an individual's employment status is a question of fact" reviewed for clear error. *Eren v. Comm'r*, 180 F.3d 594, 596 (4th Cir. 1999); *see, e.g.*, *Weber v. Comm'r*, 60 F.3d 1104, 1110 (4th Cir. 1995) (adopting the Tax Court's statement that "[w]hether the employer-employee relationship exists in a particular situation is a factual question").

The Seventh Circuit likewise applies the "clear error" standard. *Cent. States, Se. & Sw. Areas Pension Fund v. Nagy*, 714 F.3d 545, 551-52 (7th Cir. 2013). It has specifically rejected de novo review, holding that so long as the district court applied the correct legal test, its finding of employment status is subject to "the clear error rule." *Worth v. Tyer*, 276 F.3d 249, 262-63 (7th Cir. 2001); *see Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 380-81 (7th Cir. 1991).

The Ninth Circuit holds that a trial court's "determination of an employer-employee relationship" is subject to the "clearly erroneous standard of review" because it is "predominantly one of fact and does not involve constitutional issues." *Prof'l & Exec. Leasing, Inc. v. Comm'r*, 862 F.2d 751, 753 (9th Cir. 1988); *see Chin v. United States*, 57 F.3d 722, 725 (9th Cir. 1995).

Similarly, the Tenth Circuit has repeatedly held that "[t]he determination of whether an individual is an employee for purposes of ERISA is a question of fact, reviewable under the clearly erroneous standard." *Hockett v. Sun Co.*, 109 F.3d 1515, 1525-26 (10th Cir. 1997); *see Roth v. Am. Hosp. Supply Corp.*, 965 F.2d

862, 865 (10th Cir. 1992); *see also Marvel v. United States*, 719 F.2d 1507, 1515 (10th Cir. 1983).

2. The Second and Eighth Circuits apply a hybrid standard. As the Second Circuit explained, it reviews subsidiary findings on "the presence or absence" of the common-law factors for clear error, but reviews the "ultimate determination" of employment status de novo. *Aymes v. Bonelli*, 980 F.2d 857, 860-61 (2d Cir. 1992). The Eighth Circuit uses the same approach, reviewing findings on the "existence and degree of each factor" for clear error and "the ultimate conclusion of employment status" de novo. *Berger Transfer & Storage v. Cent. States, Se. & Sw. Areas Pension Fund*, 85 F.3d 1374, 1377-78 (8th Cir. 1996); *see, e.g.*, *Schwieger v. Farm Bureau Ins. Co.*, 207 F.3d 480, 484 (8th Cir. 2000).[1]

3. The Sixth Circuit's decision takes a third position in this longstanding circuit split. Expressly

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[1] The Sixth Circuit believed that the Fifth and Tenth Circuits also apply this hybrid standard. Pet. App. 13a. But it cited decisions involving the Fair Labor Standards Act (FLSA), which is the rare statute in which Congress clearly departed from the common law by defining "employee" in unusually broad terms. *See Darden*, 503 U.S. at 325-26 (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947)). Courts thus use a somewhat different multifactor test to decide a worker's employment status under the FLSA. *See, e.g.*, *Dole v. Snell*, 875 F.2d 802, 805 (10th Cir. 1989). The Tenth Circuit reviews the application of that FLSA-specific test using the hybrid standard, *see id.*, but reviews the application of the common-law test only for clear-error, *see supra* pp. 12-13. And although the Fifth Circuit has cited its FLSA precedents with approval in common-law cases, *see, e.g.*, *Breaux & Daigle, Inc. v. United States*, 900 F.2d 49, 51 (5th Cir. 1990), it has not definitively adopted the hybrid standard in this context.

rejecting the decisions of its "sister circuits," the panel majority held that both the ultimate determination of employment status and subsidiary findings on the common-law factors must be reviewed de novo. Pet. App. 13a-14a. And the full Sixth Circuit then cemented the conflict by denying rehearing en banc. *Id.* 90a-91a.

B. This Court should resolve the circuit conflict.

1. This Court routinely grants certiorari to resolve standard-of-review questions like the one presented here. *See, e.g.*, *Monasky v. Taglieri*, No. 18-935 (cert. granted June 10, 2019); *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018); *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016); *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318 (2015); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559 (2014).

The Court's close attention to these issues reflects their importance. The standard of review often "determines the outcome" of an appeal. Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1391 (1995). Even when it does not, the standard of review is "critically important" in "allocating authority between trial courts . . . and the appellate bench." Harry T. Edwards & Linda A. Elliot, *Federal Courts Standards of Review*, at v (2007). Applying the proper standard ensures the efficient allocation of judicial resources by giving the tribunal best suited to answer a particular question primary responsibility for answering it. *See U.S. Bank*, 138 S. Ct. at 966-67.

2. The standard-of-review question presented here is unusually important because of the frequency with

which courts adjudicate disputes about employment status and the weighty consequences those decisions carry. To take just a few examples, whether a worker is a common-law employee determines whether her pension is guaranteed by ERISA, *see Darden*, 503 U.S. at 322-23; whether she is protected from discrimination based on race, sex, religion, disability, and age, *see, e.g.*, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 444-51 (2003); and her rights and obligations under various tax laws, *see, e.g.*, *Eren*, 180 F.3d at 595-96; *Weber*, 60 F.3d at 1105. Employment status also has important consequences under other statutes, including the Copyright Act, *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737-41 (1989); the Federal Employers' Liability Act, *see Baker v. Tex. & P. Ry. Co.*, 359 U.S. 227, 227-28 (1959) (per curiam); and the Federal Tort Claims Act, *see Creel v. United States*, 598 F.3d 210, 213 (5th Cir. 2010).[2]

Disputes about the proper classification of workers under these statutes are becoming more and more common as companies increasingly adopt non-traditional work arrangements or otherwise seek to classify workers as independent contractors. "The use of independent contracting has grown dramatically

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[2] A worker's status is sometimes decided by a jury rather than the judge. *See, e.g.*, *Baker*, 359 U.S. at 227-29. But "[t]he general rule in ERISA cases is that there is no right to a jury trial." *McDougall v. Pioneer Ranch Ltd. P'ship*, 494 F.3d 571, 576 (7th Cir. 2007). A jury trial is likewise unavailable in the Tax Court (which is treated like a district court for standard-of-review purposes). 26 U.S.C. §§ 7459(a), 7482(a). And district judges often decide the question under other statues, either because a jury trial is not available or because the parties opt for a bench trial. *See, e.g.*, *Schwieger*, 207 F.3d at 482; *Knight*, 950 F.2d at 377.

over the past decade, with one estimate suggesting it has increased by almost 40%." David Weil, *Lots of Employees Get Misclassified as Contractors*, Harv. Bus. Rev. (July 5, 2017), https://perma.cc/7958-SEYQ. But many of those purported independent-contractor arrangements are at least arguably "misclassification[s]" subject to legal challenge by workers or regulators. *Id.* A recent Treasury Department report, for example, determined that "[t]he misclassification of employees as independent contractors is a nationwide problem which affects millions of workers." Treasury Inspector Gen. for Tax Admin., *Additional Actions Are Needed To Make the Worker Misclassification Initiative with the Department of Labor a Success* 1 (Feb. 20, 2018), https://perma.cc/L9XS-33DA.

3. Although specific classification disputes often pit workers against businesses, both groups have a shared interest in the proper resolution of the question presented. In this case, appropriately deferential review happens to favor the workers because they prevailed at trial. But in the aggregate, deference to the court that conducts the fact-intensive inquiry into the parties' relationship does not systematically favor either side. And businesses and workers alike have a strong interest in eliminating the confusion and uncertainty spawned by a three-way circuit split on a threshold issue that arises in each of the (many) appeals in which a district court's finding of employment status is at issue.

C. This case is an ideal vehicle for deciding the question presented.

This case offers a perfect opportunity to resolve the circuit split. The district court's finding that

petitioners are employees was the "sole issue" before the Sixth Circuit. Pet. App. 3a. Both the majority and the dissent squarely addressed the standard of review, analyzing the issue at length. *Id.* 8a-15a, 25a-29a.

Nor can there be any doubt that the majority's use of a de novo standard was outcome determinative. Under clear-error review, a finding must be upheld if it is "plausible in light of the record viewed in its entirety," even if the court of appeals "would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Here, the district court's finding that petitioners were employees was far more than "plausible." It rested on the court's painstaking review of the trial record, reflected in detailed findings of fact. Pet. App. 38a-89a. It accorded with the unanimous verdict of an advisory jury. *Id.* 42a. Judge Clay would have upheld it even under a de novo standard. *Id.* 29a-37a. And the majority itself acknowledged that this was a close case, noting that petitioners had "presented significant evidence to support their claim that American Family treats them more like employees" than independent contractors. *Id.* 5a-6a.

Given that evidence, the majority could reverse only by reviewing de novo both the district court's ultimate finding of employment status and its subsidiary findings on the common-law factors. Had American Family's appeal been heard in the Second, Fourth, Seventh, Eighth, Ninth, or Tenth Circuits, the result would have been different.

D. The Sixth Circuit's de novo standard is wrong.

Although the circuit split on this important question would provide ample reason to grant review

even if the Sixth Circuit's holding were correct, it is wrong to boot. A finding that a particular worker is an employee (or an independent contractor) is a deeply fact-intensive and case-specific determination that should be reviewed only for clear error. At minimum, clear-error review should apply to the even more factbound findings on specific common-law factors.

1. The question whether a worker is an employee or an independent contractor is neither a pure question of law nor a pure question of historical fact. Instead, it is a textbook "mixed question" of law and fact because it asks "whether the historical facts found satisfy the legal test" for employee status. *U.S. Bank*, 138 S. Ct. at 966.

As this Court recently reiterated, "the standard of review for a mixed question" depends "on whether answering it entails primarily legal or factual work." *U.S. Bank*, 138 S. Ct. at 967. De novo review is appropriate if resolving the question "involves developing auxiliary legal principles of use in other cases." *Id.* But clear-error review applies if the question "immerse[s] courts in case-specific factual issues," compelling them to "marshal and weigh evidence" or to "make credibility judgments." *Id.* For example, the clear-error standard applies to a determination that a transaction was conducted at arms' length, *id.* at 969, and to the similarly factbound conclusion that a transfer meets the legal standard for a gift, *Comm'r v. Duberstein*, 363 U.S. 278, 289-91 (1960).

This approach to reviewing mixed questions reflects "the respective institutional advantages of trial and appellate courts." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991). Appellate courts are best-suited to resolve questions that "contribute to the

clarity of legal doctrine." *Id.* But a second round of de novo consideration imposes added costs on judges and litigants alike, and it cannot pay its way when an appellate court's application of a legal standard to particular facts "will not much clarify legal principles or provide guidance to other courts resolving other disputes." *U.S. Bank*, 138 S. Ct. at 968. Instead, such case-specific findings are best made by the trial court, which "has both the closest and the deepest understanding of the record." *Id.*[3]

2. The common-law test for employment status is a classic example of a mixed question that calls for deference to the trier of fact. It contains "no shorthand formula or magic phrase that can be applied to find the answer." *Darden*, 503 U.S. at 324 (citation omitted). Instead, "all of the incidents of the relationship"—including at least a dozen different factors—"must be assessed and weighed with no one factor being decisive." *Id.* (citation omitted).

Like the mixed questions in *U.S. Bank* and *Duberstein*, therefore, the common-law test requires a court to "take[] a raft of case-specific historical facts," "consider[] them as a whole," and "balance[] them one against another." *U.S. Bank*, 138 S. Ct. at 968. This case provides a vivid illustration. After hearing twelve days' worth of evidence, the district court thoroughly considered the facts relevant to the common-law factors

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[3] A different rule governs in "the constitutional realm," where this Court has sometimes required de novo review "even when answering a mixed question primarily involves plunging into a factual record." *U.S. Bank*, 138 S. Ct. at 967 n.4; *see, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (reasonable suspicion and probable cause). But the common-law test for employment status does not implicate any constitutional issues.

and concluded that those factors pulled in different directions with varying strength. Pet. App. 71a-84a. It then weighed those factors—and all of the other relevant circumstances—to reach the case-specific conclusion that petitioners were employees. *Id.* 87a.

The district court, as the trier of fact, was in the best position to weigh the evidence and make that determination. And the case-specific nature of the inquiry means that de novo review would yield little benefit, because a decision applying the common-law test to the totality of the circumstances in one case provides scant guidance for the next. Here, for example, the district court determined only that these particular workers for this particular company were employees; it was careful to emphasize that its decision did not establish any general rule—or even extend to other insurance agents. Pet. App. 87a.[4]

3. Although this Court has not squarely decided the question presented, it has assumed that a district court's "finding of employment" under the common-law test may be set aside only if it is "clearly erroneous." *Kelley v. S. Pac. Co.*, 419 U.S. 318, 322-23 (1974). And in two closely analogous contexts, the Court has held that the fact-intensive nature of the common-law inquiry mandates deference to the decisionmaker closest to the facts.

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[4] The Sixth Circuit appeared to assume that de novo appellate decisions could provide guidance in future cases because courts of appeals can announce statute-specific modifications to the substance of the common-law test. Pet. App. 15a. But that premise is flatly inconsistent with *Darden.* In fact, that aspect of the Sixth Circuit's decision was a serious additional error that independently warrants this Court's review. *See infra* Part II.

First, when the question of employment status arises in case to be tried by a jury, this Court has deemed it "perfectly plain" that the common-law test "contains factual elements such as to make it [a question] for the jury," not the judge. *Baker*, 359 U.S. at 228; *see Ward v. Atlantic Coast Line R.R.*, 362 U.S. 396, 399-400 (1959) (per curiam). Like any other jury finding, a jury's determination of employment status may be set aside only if a reviewing court concludes that "reasonable men could not reach differing conclusions on the issue." *Baker*, 359 U.S. at 228.

Second, the Court has held that a finding of employment status by the National Labor Relations Board may not be set aside even if the reviewing court "would, as an original matter, decide the case the other way." *NLRB v. United Ins. Co.*, 390 U.S. 254, 260 (1968). Instead, the Board's finding is reviewed under the same deferential standard that governs agency findings of fact. *Id.* (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

This Court has thus already held that when a jury or an administrative agency applies the common-law test, its finding of employment status should be treated as the equivalent of a factual finding and reviewed deferentially. There is no reason to treat district-court determinations of employment status any differently.

4. Even if a district court's ultimate finding of employment status could be reviewed de novo, clear-error review should at minimum apply to its subsidiary findings on the common-law factors. Those factors include matters such as the "skill required" for the work, the "source of the instrumentalities and tools," and the "extent of the hired party's discretion

over when and how long to work." *Darden*, 503 U.S. at 323 (citation omitted). In analyzing those factors, the district court must make findings of historical fact, draw related inferences, and then assess the extent to which, under the circumstances of the case, each factor bears on "the hiring party's right to control the manner and means" by which the work is done. *Id.* (citation omitted). "Just to describe that inquiry is to indicate where it (primarily) belongs: in the court that has presided over the presentation of evidence" and "has heard all the witnesses." *U.S. Bank*, 138 S. Ct. at 968.

The Sixth Circuit nonetheless held that de novo review is required because it believed that each common-law factor is "a 'legal standard' that the district court is applying to the facts." Pet. App. 14a (citation omitted). But even if that characterization is correct, the Sixth Circuit went astray in holding that it mandates de novo review. To say that the common-law factors require the application of law to facts is just to say that they are mixed questions. *U.S. Bank*, 138 S. Ct. at 966. And this Court has repeatedly instructed that "mixed questions" should be subject to "deferential review" where, as here, "the district court is 'better positioned' than the appellate court to decide the issue." *Salve Regina*, 499 U.S. at 233; *see U.S. Bank*, 138 S. Ct. at 967-69.

II. This Court should decide whether the common-law test for employment status is subject to statute-specific modifications.

Apart from the standard of review, the other critical pillar of the Sixth Circuit's decision was its holding that specific common-law factors "may carry more or less weight depending on the particular legal

context in which the independent-contractor relationship is being determined." Pet. App. 15a. Based on that premise, the court held that "control and supervision is less important in an ERISA context" than under other statutes. *Id.* 18a (citation omitted). That statute-specific approach flouts this Court's decision in *Darden*—which was itself an ERISA case. It also conflicts with decisions of other courts of appeals, which apply the same traditional test regardless of statutory context.

The question whether courts may make statute-specific modifications to the common-law test is encompassed within the first question presented, because the Sixth Circuit's approval of such modifications was part of its justification for de novo review. Pet. App. 15a. But that aspect of the Sixth Circuit's decision also seriously distorted the *substance* of the common-law test—and created another circuit split in the process. The resulting conflict and uncertainty independently call for this Court's intervention.

A. *Darden* forecloses the Sixth Circuit's ERISA-specific approach.

1. In *Darden*, this Court emphatically disapproved the notion that the common-law test can be modified for ERISA-specific reasons. The Fourth Circuit had made such a modification because it found the traditional common-law test inconsistent with the "'declared policy and purposes' of ERISA." 503 U.S. at 321 (citation omitted). This Court rejected that approach, explaining that in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989), it had definitively "abandon[ed]" its occasional prior practice of attempting to construe the term "employee" based on

"'the mischief to be corrected and the end to be attained'" by the particular statute in which that term appears. *Darden*, 503 U.S. at 325 (citation omitted). Instead, the Court relied on the familiar interpretive principle that when Congress "uses terms that have accumulated settled meaning under the common law," it incorporates "the established meaning of these terms." *Id.* at 322 (citation and ellipsis omitted). Based on that principle, the Court held that by using the word "employee" in ERISA, Congress incorporated the "common-law test for determining who qualifies as an 'employee.'" *Id.* at 323.

By definition, the meaning of that test is "settled" and "established" by the common law. *Darden*, 503 U.S. at 322 (citation omitted). As with any multifactor test, particular factors may carry more or less weight depending on the *factual* circumstances of each case. *See id.* at 324. But the test's *legal* content was fixed by the common law—it does not vary depending on the statute in which the term "employee" appears. The whole point of this Court's decision in *Darden* was that courts should get out of the business of inventing bespoke tests for employee status, and should instead presume that Congress incorporated that term's settled common-law meaning. *Id.* at 324-25.

2. Here, the Sixth Circuit did precisely what *Darden* forbids. It acknowledged that the "crux" of the traditional common-law test is "the hiring party's right to control the manner and means by which the product is accomplished." Pet. App. 11a (citation omitted); *see, e.g.*, *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003); *Darden*, 503 U.S. at 323-24. Yet the Sixth Circuit held that "control and supervision is less important in an ERISA context, where a

court is determining whether an employer has assumed financial responsibility for a person's pension status." Pet. App. 18a-19a (citation omitted). "Because ERISA cases focus on the financial benefits that a company should have provided," the court believed that "the *financial structure* of the [parties'] relationship guides the inquiry." *Id.* 19a.

Like the Fourth Circuit in *Darden*, therefore, the Sixth Circuit adopted an ERISA-specific test for employee status based on its views about the "'policy and purposes' of ERISA." *Darden*, 503 U.S. at 321 (citation omitted). Indeed, the Sixth Circuit has candidly acknowledged that its approach means that the common-law test could "produce disparate results" under different statutes—for example, deeming the same worker "an independent contractor for copyright purposes" but "an employee for ERISA qualification." *Ware v. United States*, 67 F.3d 574, 578 & n.5 (6th Cir. 1995); *see* Pet. App. 15a. The Sixth Circuit did not even try to square that result with *Darden*. Indeed, the only authority the Sixth Circuit cited for its statute-specific approach was dicta from its own prior decision in *Ware*, which was written by the author of the majority opinion in this case. Pet. App. 15a, 18a-19a.

B. The Sixth Circuit's approach conflicts with the decisions of other courts of appeals.

Unsurprisingly, post-*Darden* decisions by other courts of appeals have uniformly rejected the idea that the common-law test is subject to statute-specific modifications. And in the ERISA context, those courts have consistently adhered to the traditional common-law inquiry in which the hiring party's control—not

"financial structure"—is the touchstone. The Sixth Circuit's holding flatly contradicts those decisions.

1. Consistent with *Darden*, other courts of appeals have recognized that the traditional "common law definition of 'employee' is controlling, regardless of the purposes or corrective goals of the statute." *Roth v. Am. Hosp. Supply Corp.*, 965 F.2d 862, 866 (10th Cir. 1992); *see, e.g.*, *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105-06 (8th Cir. 1994). Other courts of appeals therefore hold that the term "employee" must be construed "identically" across *all* the statutes that incorporate the common-law test. *Sacchi v. IHC Health Servs., Inc.*, 918 F.3d 1155, 1158 n.1 (10th Cir. 2019). For example, in a case involving claims under both ERISA and the Americans with Disabilities Act, the First Circuit applied "the same common law agency standards" under both statutes. *Dykes v. DePuy*, 140 F.3d 31, 38 (1st Cir. 1998); *see, e.g.*, *Barnhart v. N.Y. Life Ins. Co.*, 141 F.3d 1310, 1312-13 (9th Cir. 1998) (applying the same test under both ERISA and the Age Discrimination in Employment Act); *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 634 (1st Cir. 1996) (same).

2. In the ERISA context, moreover, other courts of appeals adhere to the traditional version of the common-law test, in which hiring party's "degree of control and supervision" is the "pivotal issue," *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488, 1493 (11th Cir. 1993), and "the most important" consideration, *Mazzei v. Rock N Around Trucking, Inc.*, 246 F.3d 956, 963 (7th Cir. 2001) (citation omitted). Indeed, other courts recognize that in ERISA cases, as in other contexts, the purpose of examining the common-law factors "is to determine the extent to which the hiring party controls 'the manner and means by which the

product is accomplished.'" *Barnhart*, 141 F.3d at 1312 (citation omitted); *see, e.g.*, *Hockett v. Sun Co.*, 109 F.3d 1515, 1526 (10th Cir. 1997); *Hillstrom v. Kenefick*, 484 F.3d 519, 529 (8th Cir. 2007); *Berger Transfer & Storage v. Cent. States, Se. & Sw. Areas Pension Fund*, 85 F.3d 1374, 1378 (8th Cir. 1996). Those decisions squarely conflict with the Sixth Circuit's holding that "control and supervision is less important in an ERISA context." Pet. App. 18a (citation omitted).

C. The Court should resolve the conflict created by the Sixth Circuit's decision.

This Court should resolve the conflict created by the Sixth Circuit's holding that courts may make statute-specific modifications to the common-law test—and that the traditional touchstone of control is less important in ERISA cases. That question arises even more often than the first question presented because it goes to the heart of the substantive standard for employee status. It is thus relevant in *every* case in which employment status is disputed—including those where the initial determination of employment status is made by a jury or administrative agency rather than a court.

The circuit split on the meaning of the common-law test is particularly troubling because it affects primary conduct. As this case shows, the Sixth Circuit's ERISA-specific test excludes some workers who would qualify under the traditional control-focused inquiry—and who thus would be covered by ERISA in other circuits. It also *includes* some workers who would not qualify as employees under the traditional common-law test, but whose pay structure

and other financial circumstances favor employee status. *Cf. Ware*, 67 F.3d at 578 n.5.

Because of the Sixth Circuit's decision, therefore, the ERISA rights and obligations of workers and businesses depend on the happenstance of geography. And that conflict is especially intolerable because many employers operate in multiple circuits, and workers who live in one circuit may have their ERISA status adjudicated in another—here, for example, petitioners represent a nationwide class. Pet. App. 3a.

III. If the Court does not grant plenary review, it should hold this petition pending its decision in *Monasky*.

This Court recently granted certiorari to decide the standard of review for a district court's determination of a child's habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction. *See Monaksy v. Taglieri*, No. 18-935 (cert. granted June 10, 2019). The Court's decision on that question will not resolve the entrenched conflict on the distinct standard-of-review question presented here (and it will have no bearing on the second question presented). The Court should therefore grant plenary review notwithstanding the pendency of another standard-of-review issue, as it has done twice in the recent past.[5]

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[5] *See U.S. Bank Nat'l Ass'n v. Village at Lakeridge*, 137 S. Ct. 1372 (2017) (granting certiorari despite the pendency of *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017)); *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 134 S. Ct. 1761 (2014) (same with respect to *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559 (2014)).

If, however, the Court does not grant plenary review, it should at minimum hold this petition pending its decision in *Monasky*. The Court's analysis of the standard-of-review question presented there may shed additional light on the proper approach to the first question presented in this case. After issuing a decision in *Monasky*, the Court could either grant plenary review or vacate and remand to allow the Sixth Circuit to reconsider this case light of the Court's decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Charles J. Crueger
Erin K. Dickinson
CRUEGER DICKINSON LLC
4532 North Oakland Avenue
Whitefish Bay, WI 53211

Edward A. Wallace
Kara A. Elgersma
WEXLER WALLACE LLP
55 West Monroe Street, Suite 3300
Chicago, IL 60603

Brian H. Fletcher
Counsel of Record
Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-3345
bfletcher@law.stanford.edu

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