No. 19-248

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

REPLY BRIEF FOR PETITIONERS

I. This Court should resolve the acknowledged circuit split on the standard of review.

In adopting and applying a de novo standard of review for employment-status determinations, the Sixth Circuit announced that it was rejecting the decisions of "[o]ther circuits" that have "explicitly considered this question." Pet. App. 13a. American Family (AmFam) now insists the Sixth Circuit did not actually do what it said it was doing. But AmFam cannot rewrite the decision below, and its other arguments likewise provide no reason to decline to resolve the acknowledged split on this recurring and increasingly important issue.

A. There is an entrenched split.

The petition described a clear three-way split: (1) four circuits review a finding of employment status for clear error; (2) two circuits review that ultimate finding de novo, but subsidiary findings on the common-law factors for clear error; and (3) the Sixth Circuit reviews both the ultimate and subsidiary findings de novo. Pet. 11-14. AmFam's blizzard of cases do not obscure that conflict.

1. AmFam claims that the Tenth, Ninth, Seventh, and Fourth Circuits have abandoned clear-error review. They have not.

Tenth Circuit. AmFam concedes (BIO 18-19 & n.4) that the Tenth Circuit has held that "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). AmFam insists that more recent decisions "recognize that review is de

novo." BIO 19. In fact, AmFam's lead case does just the opposite: It cites *Hockett* and reaffirms that "[w]hether a person is an employee is a question of fact which we review for clear error." *Shellito v. Comm'r*, 437 Fed. Appx. 665, 669 (10th Cir. 2011).

AmFam's other two cases (BIO 19) illustrate the twin errors that pervade its treatment of the split:

First, *Brackens v. Best Cabs, Inc.*, 146 Fed. Appx. 242 (10th Cir. 2005), did not even raise the question presented here because it was an appeal from a grant of summary judgment, not a bench trial. On summary judgment, the court's only function is to determine whether there is a "genuine issue" for the factfinder—it cannot "weigh the evidence" or make findings itself. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Accordingly, summary judgment is always reviewed de novo: "clear error review is never appropriate." *Teamsters Indus. Emps. Welfare Fund v. Rolls-Royce Motor Cars, Inc.*, 989 F.2d 132, 135 n.2 (3d Cir. 1993).[1]

Second, *Acosta v. Paragon Contractors Corp.*, 884 F.3d 1225 (10th Cir. 2018), arose under the Fair Labor Standards Act (FLSA). It is thus irrelevant because the FLSA does not incorporate "the common-law test at issue here." BIO 18 n.3; *see* Pet. 13 n.1.

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[1] *See* Harry T. Edwards & Linda A. Elliott, *Federal Courts Standards of Review* 40 (2007). In rare cases, parties use "the vehicle of a summary judgment motion" to ask a district judge to decide a case "as she would in a bench trial," and courts of appeals then apply bench-trial standards of review. *Id.* at 44. Neither *Brackens* nor AmFam's other decisions applying de novo review arose in that posture.

Ninth Circuit. Contrary to AmFam's implication (BIO 18-19 n.3), the Ninth Circuit has consistently adhered to the clear-error standard in decisions applying the common-law test. *See, e.g.*, *Rosenfeld v. Comm'r*, 537 Fed. Appx. 697, 698 (9th Cir. 2013); *Van Camp & Bennion v. United States*, 251 F.3d 862, 865 (9th Cir. 2001); *Chin v. United States*, 57 F.3d 722, 725 (9th Cir. 1995). It has also applied that standard outside the "tax context" (BIO 17). *See, e.g.*, *Frank Music Corp. v. MGM Inc.*, 886 F.2d 1545, 1555 (9th Cir. 1989) (Copyright Act).

AmFam's two purported counterexamples (BIO 16-17) do not undermine that precedent. One involved California law, *In re Brown*, 743 F.2d 664, 666-67 (9th Cir. 1984), and the other did not specifically address the standard of review for the common-law test, *JustMed, Inc. v. Byce*, 600 F.3d 1118, 1125-26 (9th Cir. 2010).

Seventh Circuit. AmFam concedes that the Seventh Circuit has applied the "clear error" standard. *Cent. States, Se. & Sw. Areas Pension Fund v. Nagy*, 714 F.3d 545, 552 (7th Cir. 2013). It asserts the court has since "criticized *Nagy*'s approach." BIO 18. But that criticism addressed only *Nagy*'s use of bench-trial standards in a summary-judgment case. *Chicago Reg'l Council v. Schal Bovis, Inc.*, 826 F.3d 397, 402-03 (7th Cir. 2016); *see supra* n.1. The Seventh Circuit has never questioned *Nagy*'s holding that when bench-trial standards apply (as they do here), a finding of employment status is reviewed for clear error. To the contrary, the Seventh Circuit has long held that it cannot disturb such a finding even when it would reach a different result "if [its] review were de novo." *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d

377, 381 (7th Cir. 1991). AmFam's counterexamples (BIO 16) are all summary-judgment cases.

Fourth Circuit. AmFam does not dispute that the Fourth Circuit has held that "[t]he determination of an individual's employment status is a question of fact." *Eren v. Comm'r*, 180 F.3d 594, 596 (4th Cir. 1999). It claims to have found four decisions applying de novo review (BIO 16), but they suffer from the same familiar defects. Two were summary-judgment cases. *Farlow v. Wachovia Bank of N.C.*, 259 F.3d 309 (4th Cir. 2001); *Cilecek v. Inova Health Sys. Servs.*, 115 F.3d 256 (4th Cir. 1997). The third involved the FLSA. *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298 (4th Cir. 2006). And the fourth was an unpublished decision in which no employment-status determination was made. *Keleher v. Dominion Insulation, Inc.*, 1992 WL 252508, at *3 (4th Cir. 1992).

2. AmFam asserts that the Sixth Circuit misunderstood its "sister circuits' jurisprudence" when it explicitly rejected the Second and Eighth Circuits' intermediate approach. Pet. App. 13a. Instead, AmFam maintains that those courts "use different words to describe the same type of plenary review that the Sixth Circuit endorsed." BIO 20. That is incorrect.

Second Circuit. In *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992), the Second Circuit held that findings on "the presence or absence of the [common-law] factors cannot be disturbed unless clearly erroneous." *Id.* at 861. Contrary to AmFam's assertion (BIO 21), the Second Circuit's review was entirely consistent with that deferential standard: It disturbed findings on the common-law factors only when the district court had "clearly" erred, and it considered factors on which the

court had not made findings only when the proper result was "clear." 980 F.2d at 862-64.

Eighth Circuit. AmFam similarly provides no reason to doubt that the Eighth Circuit meant what it said when it held that the "existence and degree of each factor is a question of fact." *Berger Transfer & Storage v. Cent. States, Se. & Sw. Areas Pension Fund*, 85 F.3d 1374, 1377-78 (8th Cir. 1996) (citation omitted). Indeed, in the only relevant decision AmFam identifies (BIO 21), the court did not overturn the district court's findings on any factor. *Schwieger v. Farm Bureau Ins. Co.*, 207 F.3d 480, 484-87 (8th Cir. 2000).

B. AmFam's vehicle arguments are meritless.

1. AmFam asserts that this case is a bad vehicle because the Sixth Circuit did not truly apply de novo review. On AmFam's telling, the Sixth Circuit merely held that the district court "applied the wrong legal standards in evaluating the first and eighth *Darden* factors"—a conclusion that could warrant a remand even under the clear-error standard. BIO 11-13; *see U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 965, 968 n.7 (2018). That account rewrites the Sixth Circuit's decision.

The Sixth Circuit explicitly stated that it disagreed with the district court's findings on the first and eighth factors because the court had "misapplied the legal standard to the facts"—not because it applied the wrong standard. Pet. App. 16a; *see id.* 15a ("incorrectly applied the legal standards"). The Sixth Circuit did so because it had held that it could determine the "correct application" de novo. *Id.* 15a.

After substituting its judgment for the district court's on those factors, moreover, the Sixth Circuit re-

weighed, de novo, *all* of the factors and other evidence bearing on petitioners' status—giving, for example, "more weight" to the parties' agreement and less weight to AmFam's pervasive control of agents' work. Pet. App. 18a-20a. Again, the Sixth Circuit could do that only because it had asserted the authority to "review de novo" the ultimate finding of employment status and the weight given to each factor. *Id.* 15a.

That would remain true even if (despite what it said) the Sixth Circuit had identified some legal error. It is "elementary" that if a court of appeals applying the clear-error standard determines that a finding was "infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution." *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982); *see Kelley v. S. Pac. Co.*, 419 U.S. 318, 332 (1974). A remand plainly would have been required here: The divided panel acknowledged that this was a close case, Pet. App. 5a-6a, 29a-37a, and even AmFam does not assert that the record allowed only one resolution of petitioners' employment status.[2]

2. AmFam is also wrong to assert that petitioners "invited" de novo review. BIO 23. Before the panel, petitioners acknowledged that circuit precedent established that the ultimate finding of employment status is reviewed de novo. Pet. C.A. Br. 30. The panel

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[2] Anticipating that obvious problem, AmFam faults petitioners for not "seek[ing] review" of the Sixth Circuit's failure to remand. BIO 12. But there was no need for a remand if, as the Sixth Circuit held, de novo review applies. Petitioners cannot be faulted for challenging what the Sixth Circuit actually did rather than what AmFam now wishes it had done.

cited the same authorities and confirmed that circuit precedent was "clear." Pet. App. 12a; *see id.* 8a. But with respect to subsidiary findings on the common-law factors (which circuit precedent had not addressed, *id.* 12a), petitioners urged the panel to apply clear-error review. *Id.*; Pet. C.A. Br. 30.

Petitioners then sought rehearing en banc, arguing that both the ultimate and subsidiary findings should be reviewed for clear error. En Banc Pet. 8-13. The Sixth Circuit denied the petition, and the panel stated that those arguments "were fully considered upon the original submission and decision of the case." Pet. App. 90a.

AmFam's objection thus reduces to a complaint that petitioners failed to make a (futile) request that the panel depart from circuit precedent. But this Court has rejected the suggestion that a party must "demand overruling" of precedent before this Court can "grant[] certiorari upon an issue decided by a lower court." *United States v. Williams*, 504 U.S. 36, 44 (1992). The Court thus routinely grants review despite similar vehicle objections. *See, e.g.*, BIO 7-8, *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945 (2018) (No. 17-21); BIO 11-15, *Leidos, Inc. v. Indiana Pub. Ret. Sys.*, 137 S. Ct. 1395 (2017) (No. 16-581); BIO 22, *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312 (2017) (No. 15-423).

3. Finally, AmFam asserts that "the district court committed legal error reversible under any standard of review." BIO 23. Petitioners, of course, disagree. But that is immaterial at this stage. The fact that a respondent might have alternative arguments on remand is no reason to deny certiorari where, as here, the decision below rests on a holding that warrants further review.

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

On the merits, AmFam principally contends that de novo review is needed for "predictability." BIO 24-25. Experience shows otherwise. When questions of employment status arise in jury cases (as they often do), the jury's application of the common-law test is reviewed under the usual highly deferential standard. *Baker v. Tex. & P. Ry. Co.*, 359 U.S. 227, 228 (1959); *see* Pet. 21. If that does not undermine predictability, neither would applying the *less* deferential clear-error standard to the same question.

AmFam asserts that "the common-law test has acquired its content from precedent." BIO 26. But the relevant question is whether de novo review would allow courts to develop "auxiliary legal principles of use in other cases." *U.S. Bank*, 138 S. Ct. at 967. It would not. The fact-intensive common-law test has remained unchanged for decades, steadfastly resisting the development of any "shorthand formula" or other auxiliary legal rules. *NLRB v. United Ins. Co.*, 390 U.S. 254, 258 (1968); *see Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (same).

Finally, AmFam's observation (BIO 25) that other courts have found other insurance agents to be independent contractors has no bearing on the proper standard of review. In any event, a worker's title does not dictate her status—indeed, some insurers classify their agents as employees. Laureen Regan & Sharon Tennyson, *Agent Discretion and the Choice of Insurance Marketing System*, 39 J. L. & Econ. 637, 640 (1996). AmFam cites decisions holding that other agents were independent contractors, but none of them involved "the same level and breadth of control" the district court found here. Pet. App. 87a.

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

The petition demonstrated that the Sixth Circuit flouted *Darden* and created a circuit split by devising an ERISA-specific version of the common-law test. Pet. 22-28. AmFam's three-page response does nothing to diminish the need for this Court's intervention.

1. AmFam does not dispute that ERISA and the other federal statutes that incorporate the common-law test incorporate the *same* test. Nor can AmFam deny that *Darden* forbids courts from modifying that traditional test based on their views about the "'policy and purposes' of ERISA." 503 U.S. at 321 (citation omitted); *see* Pet. 23-25.

Instead, AmFam asserts (BIO 28) that the "same" common-law test applies in the Sixth Circuit despite the court's ERISA-specific adjustments. That defies logic. The Sixth Circuit has made clear that its approach means that a single worker "could be an independent contractor for copyright purposes yet remain an employee for ERISA qualification." *Ware v. United States*, 67 F.3d 574, 578 & n.5 (6th Cir. 1995); *see* Pet. App. 15a. Two legal standards yielding different results on the same facts are not "the same test" (BIO 29).

Falling back, AmFam strives to downplay the extent to which the Sixth Circuit departed from *Darden* and the traditional common-law test, insisting that the court did not "subordinate[] the critical element of the right to control to other factors." BIO 29. But the linchpin of the Sixth Circuit's decision was its holding that "control and supervision is *less important* in an ERISA context" because other factors "carry

more weight." Pet. App. 18a-19a (citation omitted). That proposition was rejected by *Darden* but reiterated no fewer than four times by the Sixth Circuit. *Id.* 15a, 18a, 19a, 22a. And AmFam's current effort to minimize that holding is particularly unpersuasive because AmFam urged the Sixth Circuit to adopt it. AmFam C.A. Br. 28-29.

2. AmFam also fails to rebut the petition's showing that the Sixth Circuit's ERISA-specific test creates a circuit split. Pet. 26-27. AmFam concedes that other circuits treat control as the most important consideration (BIO 31), and it cites no other decision deeming control "less important" than other factors. AmFam also has no answer for the decisions holding that the term "employee" must be construed "identically" across statutes incorporating the common-law test. *Sacchi v. IHC Health Servs., Inc.*, 918 F.3d 1155, 1158 & n.1 (10th Cir. 2019).

AmFam asserts that other circuits "recognize that application of the common-law test can vary according to the context." BIO 30. But two of the three decisions it cites simply recognize that the common-law test takes account of *factual* circumstances, such as the "specific industry context." *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 413 (4th Cir. 2015); *see Alberty-Vélez v. Corporación de P.R. para la Difusión Pública*, 361 F.3d 1, 9 (1st Cir. 2004). It is an entirely different matter to hold that courts can modify the test based on "legal context," so that it produces different results on the same facts. Pet. App. 15a.

AmFam also relies on dicta in *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111 (2d Cir. 2000). But even if that dicta were treated as a holding, it would only deepen the circuit conflict.

Indeed, it would create a subsidiary split: *Eisenberg* suggested that factors such as "benefits" and "tax treatment" carry *more* weight in the "copyright context," *id.* at 115-16, but the Sixth Circuit reasoned that those factors have *less* weight "in the context of copyright." *Ware*, 67 F.3d at 578.

3. In short, the Sixth Circuit has departed from *Darden* and its sister circuits by adopting a special test for employment status under ERISA. As a result, the important legal rights and obligations of workers and employers differ depending on the happenstance of geography. Pet. 27-28. This Court should not tolerate such a conflict.

III. If the Court does not grant plenary review, it should hold this petition for *Monasky*.

The petition noted that this Court is considering another standard-of-review issue in *Monasky v. Taglieri*, No. 18-935 (cert. granted June 10, 2019). Pet. 28-29. AmFam agrees that "*Monasky* 'will not resolve' this case." BIO 32 (citation omitted). Accordingly, if the Court concludes that the questions presented warrant certiorari, the parties appear to agree that it should grant review now. But if the Court chooses not to grant plenary review, it should still hold this petition for *Monasky*. The Court's approach to the proper standard of review for the mixed question of law and fact in that case may further illustrate the errors in the Sixth Circuit's approach to the mixed question at issue here.

CONCLUSION

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

Respectfully submitted,

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