No. 19-980

IN THE
Supreme Court of the United States

ARIANA M.,

Petitioner,

v.

HUMANA HEALTH PLAN OF TEXAS, INC.,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit properly affirmed the denial of Petitioner's request for attorney's fees under 29 U.S.C. § 1132(g)(1) after the district court, exercising its statutory discretion, determined that Petitioner failed to achieve "some success *on the merits*" of her ERISA claim against Respondent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

To be eligible for an award of attorney's fees under ERISA's fee-shifting provision, 29 U.S.C. § 1132(g)(1), a party must demonstrate that she has achieved at least "some degree of success on the merits" of her claims. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255 (2010). In an unpublished opinion, the Fifth Circuit affirmed the district court's discretionary decision that Petitioner did not satisfy that standard in this case: she failed to demonstrate that Humana's review of her claims was procedurally deficient in any way, and her substantive claims for benefits did not survive summary judgment. No basis existed, under this Court's precedent, to force Humana to pay her attorney's fees: "Put simply, ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983).

Petitioner argues this Court's review is necessary because the decision below "conflicts" with the First Circuit's decision in *Gross v. Sun Life Assurance Co.*, 763 F.3d 73 (1st Cir. 2014). But no "split" exists. The First Circuit exercised its discretion to award attorney's fees in that case because the plaintiff successfully challenged the plan administrator's initial review of her benefits claim, and obtained a remand to the plan administrator under a less deferential standard of review. In this case, by contrast, Petitioner did not obtain a remand to the plan administrator, nor did she successfully identify any deficiency in Humana's initial benefits determination (which the Fifth Circuit affirmed). The "success on the merits" identified by the First Circuit

in *Gross* is thus absent in this case, as the Fifth Circuit expressly recognized in its own opinion.

Even if there were a conflict, this case would present a particularly poor vehicle for resolving it. The unpublished decision below is fact-bound and does not bind any future panel or district judge in the Fifth Circuit (let alone any court outside that circuit). It therefore serves as no obstacle to future claimants. The purported split is shallow and recent, consisting solely of one 2014 decision in the First Circuit and the decision below. The issue has not matured in the lower courts, which have yet to acknowledge—much less address—any tension between the two decisions. And as the Fifth Circuit recognized, any procedural "success" claimed by Petitioner in challenging outdated precedent on the standard of review had no effect on the merits of Petitioner's claims, particularly given the lack of a developed administrative record.

Accordingly, the Court should deny this split-less, fact-bound petition. If any confusion or conflict develops in the lower courts, which is unlikely, this Court will doubtless confront better vehicles to resolve it.

STATEMENT OF THE CASE

A. Legal Background

The statutory provision at issue, 29 U.S.C. § 1132(g)(1), provides that a court, "in its discretion," "may allow a reasonable attorney's fee and costs of action to either party" in an ERISA action brought "by a participant, beneficiary, or fiduciary." As Petitioner concedes (at Pet. 2), an award of attorney's fees under § 1132(g)(1) is *discretionary*. The immediately-succeeding provision, by contrast, *requires* a fee award in certain actions brought by an ERISA fiduciary. *See* 29 U.S.C. § 1132(g)(2) (the court "shall award"

attorney's fees to an ERISA fiduciary who obtains "a judgment in favor of the plan" in an employer-contribution action).

1. This Court addressed the standards applicable to a discretionary award of attorney's fees under § 1132(g)(1) in *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242 (2010).

The plaintiff in *Hardt* secured an order remanding her claims to the benefits plan administrator for reconsideration. The administrator had ignored "compelling evidence" in the record that plaintiff was totally disabled (and thus eligible for benefits). *Id.* at 248. The district court warned that, if the defendant-administrator failed to "adequately consider all the evidence" within 30 days, "judgment will be issued in favor of Ms. Hardt." *Id.* The defendant-administrator reevaluated plaintiff's claim, ultimately reversing its decision and paying plaintiff $52,250 in past-due benefits. *Id.* at 249.

The question presented in *Hardt* was whether plaintiff's success in forcing the plan administrator to reevaluate her claim was sufficient to warrant a discretionary award of attorney's fees under § 1132(g)(1), even though the court itself had not ruled on the merits of the claim. This Court held that it was, under the circumstances, because plaintiff had achieved at least "some success" on the merits of her claim. *Id.* at 252–56. As the Court noted, plaintiff "persuaded the District Court to find that 'the plan administrator has failed to comply with the ERISA guidelines,'" and secured an order requiring the administrator to conduct a "full and fair review" of her claims on remand. *Id.* at 255–56. "These facts establish that Hardt has achieved far more than 'trivial success on the merits' or a 'purely procedural

victory,'" and thus supported a discretionary award under § 1132(g)(1). *Id.* at 256.

In so holding, this Court rejected defendant's contention that fees were available only to "prevailing parties," *i.e.*, parties that obtained "an enforceable judgment on the merits" or a "court-ordered consent decree." *Id.* at 250–52. As the Court explained, the plain language of § 1132(g)(1) does not limit fee awards to prevailing parties, but rather "expressly grants district courts 'discretion' to award attorney's fees 'to either party.'" *Id.* at 251–52; *see also id.* at 252 (contrasting § 1132(g)(1)'s discretionary language with the mandatory language of the neighboring provision).

At the same time, however, this Court emphasized that the discretion conferred by § 1132(g)(1) is not unlimited. Rather, the "bedrock principle" when considering a request for statutory attorney's fees is the so-called "'American Rule': Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Id.* at 252–53.

Although the plain language of § 1132(g)(1) did not limit fee awards to "prevailing parties," Congress also "failed to indicate clearly in § 1132(g)(1) that it meant to abandon historic fee-shifting principles and intuitive notions of fairness." *Id.* at 255. "Accordingly," this Court held that "a fees claimant must show 'some degree of success on the merits' before a court may award attorney's fees under § 1132(g)(1)." *Id.* "'[T]rivial success on the merits' or a 'purely procedural victory'" does not satisfy this standard. *Id.* Rather, fees may be awarded only if "the court can fairly call the *outcome* of the litigation some success on the merits without conducting a lengthy inquiry into the question whether a particular

party's success was 'substantial' or occurred on a 'central issue.'" *Id.* (emphasis added).

2. *Hardt* adopted the "some success on the merits" standard from this Court's prior decision in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), which addressed a similar fee-shifting provision in the Clean Air Act. *See Hardt*, 560 U.S. at 254 (applying "the interpretive approach we employed in *Ruckelshaus* to § 1132(g)(1)").

Like *Hardt*, the statute at issue in *Ruckelshaus* did not limit the award of attorney's fees to "prevailing parties," but rather permitted the court to award fees when "appropriate." 463 U.S. at 681–82, 688. Latching onto that language, the D.C. Circuit awarded attorney's fees to two environmental organizations that unsuccessfully challenged the EPA's emission standards for coal-burning power plants. *Id.* at 681–82. The court based its award on plaintiff's "contributions" to the "goals" of the Clean Air Act, even though it had rejected each of plaintiffs' substantive claims on the merits. *Id.*

This Court reversed, holding that the statute did not permit an award of attorney's fees "absent some degree of success on the merits by the claimant." *Id.* at 694. Although the Court agreed with plaintiffs that Congress intended to "expand the class of parties eligible for fee awards" beyond just "prevailing parties," the Court explained that the statutory language still must be "read in light of the historic principles of fee-shifting in this and other countries." *Id.* at 681–82, 688.

That precedent "reflect[s] one consistent, established rule: a successful party need not pay its unsuccessful adversary's fees." *Id.* at 685. "The uniform acceptance of this rule reflects, at least in part, intuitive notions of fairness to litigants. Put

simply, ordinary conceptions of just returns reject the idea that a party who wrongly charges someone with violations of the law should be able to force that defendant to pay the costs of the wholly unsuccessful suit against it." *Id.*

* * *

Hardt and *Ruckelshaus* "la[y] down the proper markers to guide a court in exercising the discretion that § 1132(g)(1) grants." *Hardt*, 560 U.S. at 255. A court may award attorney's fees under § 1132(g)(1) if the claimant achieved at least "some degree of success *on the merits*" of its claims against the defendant. *Id.* at 255–56 (emphasis added). But fees are not available if the party obtained only "trivial success on the merits" or a "purely procedural victory." *Id.* at 256. The defendant's "reward" for successfully "refuting each charge against it" cannot be "a second lawyer's bill—this one payable to those who wrongly accused it of violating the law." *Ruckelshaus*, 463 U.S. at 692.

B. Petitioner's Claims

The fee request at issue in this case arises from Petitioner's unsuccessful challenge to an ERISA benefits determination made by Respondent Humana Health Plan of Texas.

As described below, both the district court and the Fifth Circuit have twice determined that Petitioner's claims fail on the merits, as the services requested by Petitioner were not "medically necessary" and Humana fully complied with ERISA's procedural requirements. Petitioner nonetheless sought attorney's fees under § 1132(g)(1), arguing that an interlocutory ruling on the standard of judicial review that applies to ERISA benefits determinations constituted "some success on the merits" under *Hardt*. Because that ruling was unrelated to the merits of

Petitioner's ERISA claims and did not affect the outcome of this case, the Fifth Circuit properly affirmed the district court's discretionary decision to deny attorney's fees.

1. During the period at issue in this case, Petitioner Ariana M. was a minor eligible for benefits under her father's group health plan. Pet. App. 8a. Respondent Humana administered the plan. *Ibid.*

In 2013, Petitioner sought treatment for an eating disorder. *Id.* at 16a. She entered "partial hospitalization" at an out-of-state residential treatment center in Utah, meaning that she boarded there seven days a week but spent some extended weekends at home in Texas. *Ibid.* Petitioner was to be supervised a minimum of five hours a day, and participated in group therapy sessions and guided activities with other patients. *Id.* at 17a. The treatment center "estimat[ed] that her treatment would take 30 days." *Ibid.*

Under the terms of the plan, Petitioner was eligible for partial hospitalization or treatment at a residential center for children and adolescents so long as such services were "medically necessary," up to a maximum of 90 days. Pet. App. 9a–11a. Humana used a set of clinical criteria, known as the "Mihalik factors," "to assess the medical necessity of partial hospitalization in treating mental illness." *Id.* at 12a. Humana initially agreed to cover nine days of partial hospitalization based on those factors, but Petitioner requested several extensions. *Id.* at 18a–23a. Humana afforded Petitioner an administrative appeals process and ultimately agreed to cover partial hospitalization at the residential treatment center in Utah from April 14 to June 4, 2013, a total of 49 days. *Id.* at 27a.

2. On June 4, 2013, Humana reviewed an additional extension request and determined that partial hospitalization was no longer medically necessary. Pet. App. 23a–24a. An independent medical reviewer concurred in that assessment. *Id.* at 25a–27a.

As part of its own review process, Humana first submitted the claim to a board-certified psychiatrist, Dr. Prabhu, who reviewed the medical record and spoke with Petitioner's treating physician. *Id.* at 23a–24a. Dr. Prabhu concluded that partial hospitalization was no longer medically necessary because Petitioner had returned to her "baseline behaviors," "did not appear to be an imminent danger to herself or others," and "was not progressing in treatment" at the residential center. *Id.* at 24a. He also noted that several outpatient providers "specializing in eating disorder treatment" were available "near [Petitioner's] home." *Ibid.* On that basis, Humana denied Petitioner's claim to extend partial hospitalization "because her risk of relapse behaviors could be treated at the next level of care, an intensive outpatient program." *Ibid.*

Humana's decision was appealed through the administrative appeals process contained in the policy, which required an independent review of the claim. *Id.* at 19a, 24a. Humana submitted the claim to an independent third party, Advanced Medical Reviews. *Id.* at 24a. Another board-certified psychiatrist, Dr. Hartman, examined the record and spoke with Petitioner's treating physician. *Id.* at 24a–25a. Dr. Hartman "walked through each Mihalik criterion" and concluded that partial hospitalization was no longer medically necessary because, *inter alia*, Petitioner "[was] not a danger to self or others," she "[was] medically stable," and her treatment plan was "not appropriate to [her] condition." *Id.* at 25a–27a.

Based on Dr. Hartman's independent evaluation, Humana denied Petitioner's administrative appeal on June 12, 2013. Pet. App. 27a. Despite that decision, Petitioner elected not to enter outpatient treatment and remained at the residential treatment center until September 18, another 106 days. *Ibid.*

3. More than a year after she left the residential treatment center in Utah, Petitioner sued Humana under ERISA. Pet. App. 27a. Petitioner alleged that Humana wrongfully denied coverage for the additional 106 days she spent in partial hospitalization. *Id.* at 27a–28a.

Shortly after filing the complaint, Petitioner filed a "motion to determine standard of review." *See* ECF No. 13, *Ariana M. v. Humana Health Plan*, No. 4:14-cv-03206 (S.D. Tex. Feb. 12, 2015). Petitioner argued that Texas law banned insurers from relying upon "discretionary clauses" in health insurance policies, which conferred discretion on the plan administrators to make coverage determinations and typically triggered "arbitrary or capricious" review in court. In the absence of such a clause, Petitioner argued that de novo review applied to ERISA benefits determinations.

In response, Humana disclaimed any reliance on "discretionary clause" language in its policy, and "consent[ed] to a de novo standard of review for purposes of this case." *See* ECF No. 19 at 2. At that time, binding Fifth Circuit precedent provided that a court conducting "de novo review" of an ERISA benefits determination reviewed the administrator's construction of plan terms de novo, and its factual determinations for abuse of discretion. *Id.* at 2–3; *see also* Pet. App. 98a; *Pierre v. Conn. Gen. Life. Ins. Co.*, 932 F.2d 1552 (5th Cir. 1991). Based on Humana's "consent," the district court granted Petitioner's

motion and agreed to apply "de novo review" under *Pierre*. *See* ECF No. 20 at 1-2.

In December 2015, Humana moved for summary judgment on Petitioner's claims, arguing that the denial of coverage "was reasonable and based on substantial evidence," and that it fully complied with ERISA's procedural requirements. *See* ECF No. 39 at 1. Notably, Humana expressly argued that its benefits decision should be affirmed even under a *pure* de novo standard (*i.e.*, "even if its factual determinations [were also] reviewed . . . de novo"), because the record was "replete with evidence that Plaintiff was at a place in her treatment where a less-intensive treatment option was appropriate" and continued partial hospitalization was "not medically necessary." *Id.* at 18.

The district court granted Humana's motion for summary judgment, holding that Humana fully complied with ERISA's procedural requirements and that the administrative record supported Humana's benefits determination. *See* ECF No. 52 at 8–14. The court expressly noted that *both* board-certified psychiatrists who had reviewed Petitioner's medical files had found that she "failed to meet several prerequisites" for continued partial hospitalization under the plan. *Id.* at 12.

4. Petitioner appealed the district court's ruling to the Fifth Circuit, which affirmed the entry of summary judgment in Humana's favor. *See* Pet. App. 96a–112a. The court held that Humana properly applied the "Mihalik criteria" to determine medical necessity, and that substantial evidence in the record supported its determination that "continued partial hospitalization was not medically necessary" because "Plaintiff could be treated with a less costly, equally effective outpatient treatment." *Id.* at 108a–112a.

In a special concurrence, all three panel members noted that the court's precedent on the standard of review applicable to ERISA benefits determinations had become outdated. *See* Pet. App. 113a–118a. Since the Fifth Circuit's early decision in *Pierre*, every other circuit to address the issue had concluded that de novo review applied to both legal and factual determinations. *Id.* at 114a. Although the panel (as well as the district court and the parties) remained bound by *Pierre*, the panel suggested this "lopsided split . . . crie[d] out for resolution." *Id.* at 118a.

The full court heeded the panel's invitation and granted en banc review to "reconsider" its prior decision in *Pierre*. Pet. App. 49a–94a. Noting the unanimous view of the other circuits, the en banc court abandoned its "bifurcated standard of review" for ERISA benefits determinations and held that de novo review also applies "when the denial is based on a factual determination." *Id.* at 63a, 66a. Far from representing a "ground-breaking decision" (Pet. 4), the en banc court simply aligned Fifth Circuit precedent with that of every other circuit. Pet. App. 50a–51a, 56a–66a.

The en banc court did not rest its ruling on any purported error made by Humana or the district court. Nor did it indicate the outcome would likely differ under the prevailing standard of review. To the contrary, the en banc court made clear that it expressed "no opinion" on the merits of Petitioner's ERISA claims: "A different standard of review will sometimes lead to a different outcome, but there will also be many cases in which the result would be the same with deference or without it. We give no opinion on which is the case here." Pet. App. 69a.

Judge Elrod's dissent lamented that remanding the case to the district court was a "waste of judicial

resources." *Id.* at 92a. Even under a pure de novo standard, she and two other judges contended, "there is no genuine issue of material fact . . . that the plan administrator did not err in declining to cover Ariana's additional partial hospitalization." *Id.*

5. On remand, the district court applied the pure de novo standard and again concluded that Petitioner's ERISA claims failed on the merits. *See* Pet. App. 7a–45a. As the court explained, the change in the standard of review did not affect the outcome of the case because "[a] de novo review of the administrative record reveals that Ariana M.'s continued partial hospitalization was not medically necessary after June 4, 2013, after she had been covered for 49 days." *Id.* at 8a, 46a.

The district court specifically found that, by the time Humana recommended outpatient care rather than extended partial hospitalization, Petitioner was "physically healthy," her weight was "steady," and "[s]he had no acute medical complications from her disorder" that might warrant partial hospitalization. *Id.* at 37a–45a. Humana had also "provided Ariana M. a full review" of her claims and "followed the independent reviewers' recommendations," even when doing so resulted in continued partial hospitalization beyond the original, nine-day term. *Id.* at 36a–37a. Based upon its own review of the record, the district court thus again entered summary judgment in Humana's favor. *Id.* at 46a.

On remand, the district court also denied Petitioner's request for a discretionary award of attorney's fees under § 1132(g)(1). *Id.* at 45a–46a. Following the en banc court's order, Petitioner filed a motion seeking over $139,000 in fees for work on the Fifth Circuit appeal alone. *See* ECF No. 77 at 8. Petitioner asserted she was "entitle[d]" to such fees

because she obtained a "significant legal victory" in the Fifth Circuit, "[e]ven though the merits of the underlying case are not yet determined." *Id.* at 3, 7. The amount requested for the appeal—which included hourly rates as high as $700 for her counsel (*see* ECF 77, Ex. 1 at 3–4)—substantially exceeded the amount of benefits in dispute. *See* Pet. 17 (acknowledging amount in dispute is "less than $100,000"). Humana elected not to seek attorney's fees from Petitioner, even though it had prevailed on every claim asserted in Petitioner's complaint and § 1132(g)(1) expressly authorized the court to award fees to "either party."

Applying this Court's decision in *Hardt*, the district court held that attorney's fees were not warranted in this case because Petitioner had not achieved any success *on the merits* of her claims against Humana. Pet. App. 45a–46a. The en banc order itself, the court noted, expressly declined to address the merits of Petitioner's claims. *Id.* at 45a. And the change in the standard of review did not strengthen Petitioner's claims on the merits, given the court's conclusion that she could not "succeed in showing that Humana denied her benefits owed under her plan" under either standard. *Id.* at 45a–46a.

6. Petitioner appealed the district court's merits and fee rulings. In an unpublished opinion, the Fifth Circuit affirmed both rulings. *See* Pet. App. 1a–6a.

On the merits of Petitioner's claims, the Fifth Circuit agreed with the district court that "Humana did not err in finding that the final 106 days of Ariana's partial hospitalization were medically unnecessary." *Id.* at 4a. The district court thus "correctly entered judgment for Humana." *Ibid.* Petitioner has not sought review of that ruling.

The Fifth Circuit also held the district court did not abuse its discretion in denying Petitioner's request for

attorney's fees under § 1132(g)(1). *See* Pet. App. 4a–6a. The district court correctly "described and applied the 'some success on the merits' standard from *Hardt*," and determined the remand order was "a procedural success" rather than "success *on the merits* of Ariana's benefits claim." *Id.* at 5a (emphasis added). The en banc court's specific statement declining to comment on the merits of Petitioner's claims supported the district court's analysis. *Ibid.*

In so holding, the Fifth Circuit expressly distinguished the First Circuit's decision in *Gross*, in which the court had awarded fees to an ERISA plaintiff who successfully obtained a remand *to the plan administrator* for reconsideration of her claims. *Id.* at 5a–6a. In *Gross*, the Fifth Circuit noted, the court had specifically "'faulted'" the plan administrator for "'failing to provide its independent medical consultant with important background about [plaintiff's] circumstances'" and "'disregarding the consultant's observation' that the plaintiff should be reexamined," which necessitated further administrative review. *Ibid.* (quoting *Gross*, 763 F.3d at 76).

In this case, by contrast, "the en banc court passed no judgment on the process Humana used to evaluate Ariana's claim or whether Humana had failed to provide its independent reviewers with sufficient evidence." Pet. App. 6a. "Even if the First Circuit was correct in finding 'some success on the merits' in *Gross*," the court concluded, "Ariana's case is distinguishable." *Ibid.*

The Fifth Circuit's unpublished opinion affirming the denial of Petitioner's request for discretionary attorney's fees is the subject of the Petition.

REASONS TO DENY THE PETITION

I. The Nascent Split Alleged by Petitioner Is Illusory Because the Decision Below Does Not Conflict with the First Circuit's Decision in *Gross*.

Both the decision below and the First Circuit's decision in *Gross* reflect straight-forward applications of this Court's decisions in *Hardt* and *Ruckelshaus*.

The First Circuit awarded attorney's fees in *Gross* because the claimant successfully obtained a remand *to the plan administrator* for a "reevaluation" of her claim, under a less deferential standard of review. 763 F.3d at 77–81. In doing so, the First Circuit expressly noted (as this Court had in *Hardt*) that the "substance of the claim" was "a central concern" in its decision to remand: the plan administrator had not "fairly examined" the evidence "during the original administrative process." *Id.* at 78. The court thus remanded plaintiff's claims to the administrator for a second look.

The Fifth Circuit affirmed the denial of attorney's fees in this case because, unlike the claimants in *Hardt* and *Gross*, Petitioner did not achieve *any* success on the merits of her claims against Humana. Petitioner did not obtain a remand to the plan administrator for a reassessment of her claims, nor did she succeed in demonstrating that Humana had not fairly evaluated her entitlement to benefits in the first instance. To the contrary, both the district court and the Fifth Court panel decisions rejected Petitioner's claims on the merits (twice). Petitioner's request for attorney's fees thus mirrored the request rejected by this Court in *Ruckelshaus*, in which the party "who wrongly charges someone with violations of the law" attempts "to force that defendant to pay

the costs of the wholly unsuccessful suit against it." *Ruckelshaus*, 463 U.S. at 685.

Petitioner focuses solely on the disparate *results* in these two cases. The Petition asserts that the denial of fees in this case places the Fifth Circuit "directly at odds" with the First Circuit, allegedly creating a new and shallow 1-1 split. Pet. 6. That is wrong. In both cases the courts carefully evaluated the record, exercised their statutory discretion, and determined whether the claimant had achieved at least some success *on the merits of her claims* against the defendant, as this Court instructed in *Hardt*. Rather than presenting any "square conflict" (Pet. 5), the results in these cases reflect harmonious application of the same legal principles to different factual circumstances.

A. The Plaintiff in *Gross* Successfully Challenged the Plan Administrator's Initial Benefits Determination.

In *Gross*, the First Circuit awarded attorney's fees to an ERISA plaintiff who successfully obtained a remand to the plan administrator for reassessment of her claim. *See* 763 F.3d at 80–81. The court acknowledged that the record of the administrator's determination was "inadequate" to allow the court to make a "full and fair assessment" of whether plaintiff was ultimately entitled to benefits. *Id.* at 76. The court therefore could not meaningfully review plaintiff's claim on the merits. *Id*. But the court held that a discretionary award of attorney's fees under § 1132(g)(1) was nonetheless appropriate, for two reasons. *See id.* at 76–81.

First, the court explained that an order remanding a claim *to the plan administrator* for reconsideration generally constitutes at least "some success on the merits," because it reflects the court's judgment that

the plaintiff's substantive claim is "sufficiently meritorious that it must be evaluated fairly and fully" on remand. *Id.* at 77–78.

Cataloging a line of lower-court decisions applying *Hardt*, the First Circuit explained that "a remand to the plan administrator for review of a claimant's entitlement to benefits" is generally "sufficient success on the merits to establish eligibility for fees" because it "commonly results from a substantive review of the evidence – *i.e.*, the court considers *the merits* of the case and reaches its conclusion on that basis." *Id.* at 77–78 (collecting cases). Courts thus generally "treat such a remand as sufficient 'success' under *Hardt* based on the two positive outcomes inherent in such an order: (1) a finding that the administrative assessment of the claim was in some way deficient, and (2) the plaintiff's renewed opportunity to obtain benefits or compensation." *Id.* at 78.

Such was the case in *Gross* itself. The court held that the plan administrator's initial assessment of plaintiff's claim was deficient, "fault[ing]" the defendant "for failing to provide its independent medical consultant with important background about Gross's circumstances" and "[relying] on medical judgments it knew were reached with incomplete information." *Id.* at 76, 83. These issues, the court noted, raised "a legitimate question" about whether the plan administrator had made a "bona fide effort" to determine plaintiff's eligibility for benefits. *Id.* at 76; *see also Gross v. Sun Life Assurance Co.*, 734 F.3d 1, 22 (1st Cir. 2013) (addressing the merits of plaintiff's claims, prior to her fee request).

The plaintiff had also presented "sufficient medical evidence that, if credited, is adequate to prove her entitlement to disability benefits." 763 F.3d at 78. On

that basis, the court remanded plaintiff's claims with instructions to "render a new decision that includes reconsideration of . . . evidence that was not fairly examined during the original administrative process." *Id.* The "substance" of plaintiff's claims, the First Circuit noted, was thus "a central concern" in its remand order. *Id.*

Second, the First Circuit explained that it did not have to rely on the remand order, "without more," to justify a fee award under *Hardt* because plaintiff had obtained "more than merely a second chance for 'a full and fair review' of her claim by the plan administrator." *Id.* at 79. Plaintiff had also successfully challenged defendant's interpretation of a discretionary clause in the insurance policy, which defendant had previously used to "insulat[e]" its benefits determinations from "full judicial review." *Id.*

During the proceedings below, defendant had relied on specific policy language (requiring "proof of disability 'satisfactory to us'") to argue that the plan conferred "discretionary authority" on the administrator to determine eligibility for benefits. *See Gross*, 734 F.3d at 4, 11–12. If a plan confers such "discretionary authority" on an administrator, then courts in the First Circuit apply "a deferential 'arbitrary and capricious' or 'abuse of discretion' standard" to benefits determinations made by the administrator. *Id.* at 11.

The plaintiff challenged defendant's interpretation of the policy language on appeal, arguing that the "satisfactory to us" language did *not* confer discretionary authority on the defendant (and thus did not trigger deferential review in the courts). 763 F.3d at 75. The First Circuit agreed, holding that the policy language was "inadequate to confer the

discretionary authority that would trigger deferential review of the insurer's benefits decision." *Id.*

That ruling, the court explained, constituted at least "some success" on the merits of plaintiff's claims because it "altered the dynamic between [the parties] in the subsequent proceedings" on remand. *Id.* at 79. By removing the security blanket of the discretionary clause, plaintiff forced the defendant to make a decision on remand that "will no longer be insulated from full judicial review." *Id.*

Applying *Hardt*, the First Circuit concluded that this "combination" of the remand to the plan administrator and less deferential standard of review under the policy constituted at least "some success" on the merits: "As we have explained, the remand for reconsideration of her entitlement to benefits, in combination with a less deferential standard of review, means that Gross already has achieved the success that makes her eligible for fees." *Id.* at 81.

B. Petitioner Did Not Achieve Any Success in Challenging Humana's Initial Benefits Determination.

As the Fifth Circuit recognized in the decision below, the denial of Petitioner's request for attorney's fees in this case does not "conflict" with *Gross* because Petitioner did not achieve any success *on the merits* of her claim against Humana. Pet. App. 5a–6a. Both courts faithfully followed the same "some success on the merits" standard drawn from this Court's decision in *Hardt*, but they applied that principle in much different circumstances. As explained below, those case-specific circumstances—rather than any difference in the legal standard or rule of decision—account for the differing outcomes in the two cases.

Unlike the plaintiff in *Gross*, Petitioner did not achieve either type of "success" described in the First Circuit's opinion. Petitioner did not obtain a remand to the plan administrator for reconsideration of her claim, nor did she successfully demonstrate that Humana failed to properly consider all of the evidence in the first instance. Accordingly, neither of the "two positive outcomes inherent in" the remand order at issue in *Gross* is present in this case. *See Gross*, 763 F.3d at 78.

And unlike the defendant in *Gross*, Humana did not rely on the language of a discretionary clause to resist "full judicial review" of its benefit determination. To the contrary, Humana disclaimed any reliance on a discretionary clause at the beginning of the case, and consistently argued that its benefit determination should be affirmed on summary judgment under *any* standard. *See* ECF No. 19 at 2; ECF No. 39 at 18–20. The Fifth Circuit's subsequent decision to align its precedent on the standard of review with that of the other circuits therefore did not "alter the dynamic between the parties," as Humana had consistently (and correctly) argued that Petitioner's claims failed even under a de novo standard. *Cf. Gross*, 763 F.3d at 79. Both the district court and the Fifth Circuit agreed, rejecting Petitioner's claims on the merits.

Petitioner attempts to gloss over these distinctions, asserting the decisions "squarely conflict" because they both involved "remands" following "favorable decisions on the standard of review." Pet. 5–11. That argument, however, ignores not only the obvious factual and legal differences described above, but also the discretionary nature of fee awards under § 1132(g)(1).

As the Fifth Circuit emphasized in affirming the denial of Petitioner's fee request, the "favorable

decision" at issue in this case was unrelated to the merits of Petitioner's claims. Pet. App. 5a. In remanding the case to the district court, the en banc panel expressed "no opinion" on the merits of the claims, noting that in "many cases . . . the result would be the same" under either standard of review. Pet. App. 5a, 69a; *see also* Pet. for En Banc Reh'g at 1 (seeking en banc rehearing solely on standard of review issues). The en banc court also "passed no judgment on the process Humana used to evaluate [Petitioner's] claim or whether Humana had failed to provide its independent reviewers with sufficient evidence." Pet. App. 6a. Instead, the court simply aligned its own precedent with that of the other circuits and left "application of the de novo standard to the able district court in the first instance." *Id.* at 69a.

That language stands in stark contrast to the remand order at issue in *Gross*, which the First Circuit acknowledged was inexorably intertwined with the "substance" of plaintiff's claims. *See Gross*, 763 F.3d at 78. The First Circuit remanded plaintiff's claims to the administrator only after finding that the defendant (1) failed to provide independent reviewers with "important" medical information; (2) "relied on medical judgments it knew were reached with incomplete information"; and (3) "insulated" its decisions from "full judicial review" by relying upon a discretionary clause, which did *not* confer the authority that defendant claimed. *Id.* at 76, 79, 83. Far from passing "no judgment" on defendant's administrative review process, the remand order in *Gross* thus "reflect[ed] the court's judgment that the plaintiff's claim is sufficiently meritorious that it must be evaluated fairly and fully." *Id.* at 78.

In light of the court's findings, it is not difficult to understand the First Circuit's reasons for awarding a

discretionary attorney's fee to plaintiff under § 1132(g)(1). The court concluded that plaintiff had achieved at least "some success" on the merits of her claims by showing numerous errors in the plan administrator's initial benefits determination and forcing the administrator to provide the "full and fair" review denied to her in the first instance.

It is equally clear, in the absence of any equivalent findings, why the Fifth Circuit affirmed the denial of Petitioner's request for a discretionary fee award in this case. Petitioner had not demonstrated any flaws in Humana's administrative review process, nor had she identified any evidence in the record demonstrating that she was entitled to benefits. *See* Pet. App. 5a–6a. Petitioner's sole "victory" resulted in a second grant of summary judgment against her on remand, without any need for further administrative review of the merits of her claims.

The Fifth Circuit's decision affirming the district court's exercise of discretion in this case does not conflict with the First Circuit's discretionary determination in *Gross*. Both courts applied the same principles under *Hardt*, but they did so under much different circumstances.

II. Petitioner Fails to Demonstrate Any "Confusion" in the Lower Courts' Application of *Hardt*.

Petitioner similarly misconstrues the lower courts' application of *Hardt* in other ERISA cases. Petitioner asserts that the Fifth Circuit's decision "exemplifies and exacerbates" lingering "confusion" in the lower courts regarding "what, short of some award of benefits," is sufficient to justify an award of attorney's fees under *Hardt*. Pet. 5. As with the purported circuit "conflict," however, any such "confusion" is greatly exaggerated and dissipates quickly when the

discretionary nature of a fee award under § 1132(g)(1) is considered.

As evidence of purported "confusion," Petitioner cites five post-*Hardt* cases generally involving "remands."[1] *See* Pet. 9–11. In three of those cases, the court awarded attorney's fees against the ERISA plan administrator. Pet. 10. In the other two cases, the court did not. Pet. 11. From this, Petitioner concludes that *Hardt* "has engendered . . . deep and abiding [confusion and tension]" in the lower courts, and that the Fifth Circuit's decision simply adds to this "disarray." Pet. 11.

This characterization of the lower courts' fee-award decisions is mistaken. Petitioner operates from the erroneous premise that all ERISA cases involving a "remand" are created equal. As the discussion in Section I above makes clear, however, they are not. The question in any individual case is not whether the plaintiff obtained a "remand," or some other "favorable decision." Pet. 7. Rather, as the First Circuit recognized in *Gross*, the question is "whether the *particular circumstances of the remand* in this case satisfy the *Hardt* standard." 763 F.3d at 77 (emphasis added).

In all three cases cited in the Petition in which the court awarded fees, plaintiffs obtained either a remand to the plan administrator for a reassessment

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[1] A sixth case, the Ninth Circuit's unpublished decision in *Flom v. Holly Corp.*, 276 F. App'x 615 (9th Cir. 2008), pre-dates *Hardt*, and thus could not possibly reflect the "confusion and tension that the *Hardt* decision has engendered in the lower courts." Pet. 11. In any event, *Flom* is consistent with the other cases discussed above: the court awarded fees because the plaintiff successfully obtained a remand *to the plan administrator*, which reversed its decision and "reinstated Flom's benefits." 276 F. App'x at 617.

of their claims, or an award of benefits from the administrator following a successful appeal. *See McKay v. Reliance Standard Ins. Co.*, 428 F. App'x 537, 547 (6th Cir. 2011) (affirming fee award because plaintiff "was just like the *Hardt* claimant in that he 'persuaded the District Court to find that the plan administrator … failed to comply with the ERISA guidelines' and that, as a result, he 'did not get the kind of review to which he was entitled'"); *Koehler v. Aetna Health, Inc.*, 915 F. Supp. 2d 789, 797 (N.D. Tex. 2013) (awarding attorney's fees to claimant who accepted settlement offer from administrator following Fifth Circuit's finding that administrator had "violated ERISA regulations" and acted in "bad faith"); *Dwinnel v. Fed. Express Long Term Disability Plan*, No. 3:14-cv-01439, 2017 U.S. Dist. LEXIS 57828, at *2–4 (D. Conn. Apr. 14, 2017) (awarding attorney's fees following remand to plan administrator to conduct a sufficient vocational analysis after failing to do so in the first instance).

In each of these three cases, the court exercised its discretion to award attorney's fees under § 1132(g)(1) after finding that the remand order (or settlement) constituted at least some success on the merits of plaintiff's claims. These cases are thus entirely consistent with *Hardt*, which authorized that very inquiry. *See Hardt*, 560 U.S. at 245 (holding claimant must achieve at least "some degree of success on the merits").

In the two cases cited in the Petition in which the court denied attorney's fees, it did so only *preliminarily*, because the court was not yet prepared to decide whether the particular remand at issue reflected "some success on the merits" or merely a "procedural victory." *See Yates v. Bechtel Jacobs Co.*, No. 3:09-CV-51, 2011 U.S. Dist. LEXIS 66820, at *3, *6 (E.D. Tenn. May 5, 2011) (denying plaintiff's

request for attorney's fees without prejudice because the request was "not ripe"); *Dickens v. Aetna Life Ins. Co.*, No. 2:10-cv-00088, 2011 U.S. Dist. LEXIS 32595, at *17 (S.D. W.Va. Mar. 28, 2011) (holding attorney's fees "are not warranted at this time").

Rather than indicating the lower courts are hopelessly confused, these cases illustrate the courts correctly understand that § 1132(g)(1) renders fee awards *discretionary*. That follows directly from *Hardt*, and is plainly at odds with Petitioner's preferred test. An ERISA plaintiff is not automatically entitled to attorney's fees the minute she obtains a "remand" (although the Petition certainly implies as much). Instead, before exercising its discretion to award fees, the court must carefully consider whether it "can fairly call the outcome of the litigation some success on the merits," as opposed to a "trivial success on the merits" or a "purely procedural victory." *Hardt*, 560 U.S. at 255.

The decisions cited in the Petition make clear that the lower courts understand and apply this requirement. The Petition, with its heavy reliance on generic, superficial descriptors like "remand" and "standard of review," appears to overlook the fact-bound nature of this inquiry.

III. This Case Is a Poor Vehicle.

Even if the First and Fifth Circuits were newly divided on the proper application of this Court's decision in *Hardt*, which they are not, this case would present a particularly poor vehicle for resolving that shallowest of conflicts.

As Petitioner concedes, the decision below is unpublished, and thus "lacks precedential value." Pet. 1, 6. Although Petitioner claims the decision "will greatly impact plan participants and beneficiaries

throughout the Fifth Circuit and perhaps beyond" (Pet. 7), the fact remains that the decision below does not even bind future panels within the Fifth Circuit—let alone any court "beyond" the Fifth Circuit. *See Ballard v. Burton*, 444 F.3d 391, 401 n. 7 (5th Cir. 2006) (unpublished opinions issued after January 1, 1996, are not "controlling precedent"). The decision below thus serves as no obstacle to discretionary fee awards in future cases, particularly given the fact-intensive nature of such awards under *Hardt*.

The purported "conflict" asserted in the Petition is also shallow and recent. By Petitioner's own count, the "split" consists of one First Circuit opinion that is less than six years old, and the Fifth Circuit's unpublished decision in this case. The Petition does not even identify any court of appeals decision in tension with *Gross*, or any criticism of the Fifth Circuit's recent decision.

No court has yet acknowledged a split; to the contrary, the Fifth Circuit expressly distinguished *Gross*, explaining that the plaintiff in that case achieved at least some success on the merits by demonstrating the defendant's administrative review process was fatally flawed. Pet. App. 5a–6a. If the decision below actually conflicted with *Gross*, the lower courts have not yet had an opportunity to examine that conflict, weigh in for or against the decision below, or bring the key issues into sharper focus.

Given the obvious factual differences between the two cases and their recent vintage, the Petition does not present the type of clean, well-developed split calling out for resolution by this Court. Declining review now will—at a minimum—allow the stakes and any differences in the courts' application of *Hardt* to mature and inform any review this Court might

eventually deem necessary. More likely by far, however, would be the realization that no outcome-determinative split or disuniformity exists at all in this fact-intensive area of ERISA attorney fee law.

Finally, if this Court were to grant certiorari, it would likely discover that Petitioner's purported "victory" before the Fifth Circuit on the standard of review was not nearly as "significant" as the Petition—and the Question Presented—claims. *See* Pet. i, 8, 12.

The Petition goes to great lengths to cast the en banc order in this case in the same mold as the remand orders at issue in *Hardt* and *Gross*, asserting that it granted Petitioner "full judicial review of her claim for the first time" and "increased the likelihood of a favorable benefits determination." Pet. 8–9, 12. But at oral argument, the Fifth Circuit panel below threw cold water on any such notion, explaining that the state of the record in this case rendered the standard of review effectively irrelevant to Petitioner's claims.[2]

As Petitioner conceded at oral argument, judicial review of an ERISA benefits determination is limited to the administrative record before the plan administrator. *See* Oral Argument at 1:38–1:45; *see also Vega v. Nat'l Life Ins. Servs. Co.*, 188 F.3d 287, 299–300 (5th Cir. 1999), *overruled on other grounds by Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008). Indeed, the Fifth Circuit reaffirmed that very principle in the same en banc opinion remanding

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[2] An audio recording of oral argument is available at: http://www.ca5.uscourts.gov/OralArgRecordings/18/18-20700_8-5-2019.mp3 (last visited May 13, 2020). Judge Elrod's en banc dissent expressed similar concerns regarding the viability of Petitioner's claims, even under the standard of review Petitioner advanced below and now trumpets. *See* Pet. App. 92a.

Petitioner's claims to the district court. *See* Pet. App. 66a–68a.

But as Petitioner also conceded at oral argument, much of the medical evidence upon which Petitioner relied to challenge Humana's benefits determination was not a part of the administrative record. *See* Oral Argument at 1:38–3:20, 33:42–34:06; *see also* Pet. App. 31a–33a (granting Humana's motion to strike materials "outside the administrative record"). The administrative record here contains no medical records or other evidence submitted by Petitioner, because Petitioner submitted none to the plan administrator. As a result, the record contains only those materials upon which Humana relied to support its benefits determination.

As the Fifth Circuit recognized, that left very little for the court to review—regardless of the standard of review to be applied. Far from constituting a "significant victory" on the merits, the en banc order in this case had no effect on the merits of Petitioner's claims, given Petitioner's failure to build a record. If this Court were to grant certiorari, it would thus confront a very different question than that described in the Petition.

IV. Petitioner's Request for Attorney's Fees Was Properly Denied.

The structure and text of ERISA, as well as the precedents of this Court, confirm that the Fifth Circuit properly affirmed the district court's discretionary decision to deny Petitioner's request for attorney's fees. Like many other fee-shifting provisions, § 1132(g)(1) grants *discretion* to district judges to award attorney's fees based on the facts of the particular case. But it does not *require* fee awards, in contrast to its neighboring provision in subsection (g)(2). Nothing in the structure or text of § 1132(g)(1)

supports Petitioner's contention that a party is "entitled" to fees any time it obtains a "remand," or achieves some other "legal victory." Pet. 16–17.

This Court examined the scope of this discretion in *Hardt*, holding that a court must first determine that it "can fairly call the outcome of the litigation some success on the merits" of a party's claims before awarding fees under § 1132(g)(1). 560 U.S. at 255. Both the Fifth Circuit and the district court properly concluded that Petitioner cannot satisfy that standard in this case, because she did not achieve any success on the merits of her claims against Humana. Indeed, the Petition essentially admits as much, acknowledging that "[i]n the end, the change in the standard of review was not deemed to make a difference in the outcome of the benefits claim." Pet. 17.

Petitioner asserts that she is nonetheless entitled to a fee award because she obtained a change in the standard of review applied by the Fifth Circuit—even if that change was not spurred by Humana's actions and made no difference in her particular case. *Ibid.* That argument finds no support in this Court's precedent.

In both *Hardt* and *Ruckelshaus*, this Court emphasized that the starting point in any discussion of fee-shifting is "the bedrock principle known as the 'American Rule': Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." *Hardt*, 560 U.S. at 252–53; *see also Ruckelshaus*, 463 U.S. at 683–84. Fee-shifting statutes like the one at issue in this case may "deviat[e]" from that Rule, but they do not completely "abandon" it. *Hardt*, 560 U.S. at 254–55. Rather, "a fees claimant must show some degree of success on the merits before a court may award attorney's fees under

§ 1132(g)(1)." *Id.* at 255. Otherwise, "a party who wrongly charges someone with violations of the law [would] be able to force the defendant to pay the costs of the wholly unsuccessful suit against it." *Ruckelshaus*, 463 U.S. at 685.

In this case, Petitioner charged Humana with wrongfully denying medical benefits under ERISA, but failed at every turn to demonstrate that Humana violated the law. In multiple rounds of briefing, Petitioner failed to persuade any court that Humana had "failed to comply with ERISA guidelines," or based its benefits determination on "incomplete information," or provided Petitioner with anything less than the "full and fair review" to which she was entitled. *Cf. Hardt*, 560 U.S. at 247–48, 255–56.

As both the Fifth Circuit and the district court properly recognized, Petitioner never demonstrated any merit to her claims that Humana wrongfully denied medical benefits in violation of ERISA. Accordingly, under this Court's clear precedent, Petitioner was not entitled to fee-shifting under § 1132(g)(1).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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