No. 19-980

In the Supreme Court of the United States

ARIANA M.,
PETITIONER,

v.

HUMANA HEALTH PLAN OF TEXAS, INC.,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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The fee question presented in this case is of exceptional importance to ERISA plan participants and beneficiaries, whose "ready access" to courts is a primary goal of the statute. 29 U.S.C. 1001(b). Congress included a fee-shifting provision in ERISA Section 502(g)(1), 29 U.S.C. 1132(g)(1) because of a well-justified "concern that attorney's fees might present a barrier to maintenance of suits for small claims." *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985). See also *Hooper v. Demco, Inc.*, 37 F.3d 287, 291 (7th Cir. 1994) (noting that Section 502(g)(1) is designed "[t]o encourage aggrieved parties to seek redress under ERISA"). And this Court in *Hardt v. Reliance Standard Life Insurance Co.*, 560 U.S. 242 (2010), held that an applicant for fees need not be a "prevailing party," so long as they have achieved "some success on the merits." *Id.* at 256.

Here, the Fifth Circuit, in direct conflict with a decision from the First Circuit, held that, because Petitioner lost her claim for benefits, her en banc victory in changing the law and reviving her claim did not constitute sufficient success to warrant a fee award. Pet. App. 1a-6a. In so doing, the Fifth Circuit not only exacerbated and deepened the longstanding confusion in the lower courts on the meaning of *Hardt*'s "some success" standard, the court also sent out a chilling signal to ERISA benefit claimants and their lawyers that little or nothing short of a total victory on a claim for benefits will justify an award of fees, contrary to the promise in Section 502(g)(1), and this Court's holding in *Hardt.* As explained in Petitioner's opening brief and below, this decision warrants review.

I. THE DECISION BELOW CONFLICTS WITH THE FIRST CIRCUIT'S DECISION IN *GROSS*

Contrary to Respondent's contention, the decision in this case is directly at odds, in all relevant particulars, with the *Gross* decision from the First Circuit.

The First Circuit in *Gross* held that an ERISA plan participant was eligible for a fee award under *Hardt* based on her success in obtaining a favorable decision on appeal overturning prior circuit precedent with regard to the appropriate standard of review applicable to her claim for disability benefits, and remanding for further development of the record before the claims administrator in order to allow the district court to consider the claim as a de novo matter. *Gross v. Sun Life Assur. Co. of Canada,* 763 F.3d, 73, 76-77 (1st Cir. 2014). In obtaining a favorable en banc ruling from the Fifth Circuit overturning longstanding Fifth Circuit precedent and remanding to the district court for de novo consideration of her benefit claim, the Petitioner likewise "secured a ruling on the standard of review that improved her likelihood of success on the merits of her claim and will impact all similar future claims." 763 F.3d at 780.

Respondent insists that *Gross* is nevertheless distinguishable because the First Circuit ordered the case sent back to the plan administrator, rather than remanding to the district court for further evaluation of the claim as the Fifth Circuit did in this case. Opp. 16-17, 20. This is a distinction without a difference. In fact, in holding that Gross had achieved more than a "minimal or 'purely procedural victory,'" and was therefore eligible for fees under ERISA, the First Circuit observed that "a remand for a second look at her benefits determination is often the best outcome a

claimant can reasonably hope for from the courts." *Id.* at 78-79. This is as true of a remand to the district court as of a remand to the claims administrator because both give the claimant a chance to have her claim "reevaluated fairly and fully." *Gross*, 763 F.2d at 78 (citing 29 U.S.C. 1132(2)).

Respondent protests that, unlike in this case, the remand in *Gross* reflected the First Circuit's view that there was sufficient merit to plaintiff's claim to warrant further review. Opp. 18-19. But Petitioner also obtained a remand for further review of her claim by the district court, something that would not have been necessary if the Fifth Circuit considered it clear that her claim lacked substance, as three of the dissenting judges in the Fifth Circuit urged. Pet. App. 92a-94a.

Furthermore, Respondent contends, the Plaintiff in *Gross* had "successfully challenged defendant's interpretation of a discretionary clause in the insurance policy." Opp. 18. Respondent cannot explain, however, how this successful challenge based on particular plan language is of greater significance than Petitioner's successful challenge to deferential review based on Texas insurance law that bans discretionary clauses in all insurance policies in that State, and on the Fifth Circuit's interpretation of this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

Respondent next contends that the First Circuit's holding in *Gross* turned on the court's conclusion that the administrator failed to consider all the evidence. It did not. As explained in Petitioner's opening brief, although the appellate court in *Gross* faulted the administrator, Humana, for failing to provide its reviewing doctor important background information about its surveillance of the claimant,

it also faulted the claimant for failing to submit a statement from her doctor explaining her activity on the surveillance video. 763 F.3d at 76. More importantly, the First Circuit's explained that it "expressly refrained from expressing any view on the ultimate merits of [the] claim." *Id.* at 79.

That the First Circuit's fee decision did not turn on any such finding of procedural or substantive deficiencies in the administrator's consideration of Gross's claim is made even more clear by the majority's disagreement with the dissent. The dissenting judge acknowledged that that an ERISA claimant "may" be entitled to fees without an award of benefits "where a court has explicitly found a violation of ERISA's substantive or procedural components," but clearly did not think *Gross* presented such a case, insisting "that Supreme Court precedent does not allow a more inclusive reach for section 1132(g)(1)." 763 F.3d at 79. See also *id.* at 87-88 (Selna, J., dissenting). The majority, on the other hand, concluded that it was enough that the plaintiff obtained a "ruling on the standard of review that altered the dynamic between Sun Life and Gross in the subsequent proceedings" *id.* at 79, and that "improved her likelihood of success on the merits and will impact similar future claims." *Id.* at 80. The court concluded, quite correctly, that this qualifies as "some concrete gain for the claimant," *id.* at 80, while the dissent disagreed that either the "favorable decision on the standard of review" or the renewed chance for the claimant to make her case "bespeaks some merits success." *Id.* at 86-87 (Selna, J., dissenting).

Indeed, the court flatly disagreed with the dissent's suggestion that it would not have concluded that Gross achieved "some success on the merits" had the court "applied the de novo standard of review [itself], and decided that she is not entitled to benefits." *Ibid.* ("That contention

is wrong."). Even then, the First Circuit explained, it "would have found [Gross] eligible for a fee award based on the success she did achieve." *Ibid*.

As in *Gross*, Petitioner convinced an appellate court to overturn its precedent on ERISA benefit claims and, in so doing, "secured a ruling on the standard of review that improved her likelihood of success on the merits of her claim and will impact all similar future claims." 763 F.3d at 780. If anything, Petitioner's victory in this regard is more impressive than Gross's; she convinced the Fifth Circuit to grant en banc reconsideration and reverse a panel decision agreeing with the district court and Humana that it was entitled to arbitrary and capricious review, rather than de novo consideration, of its denial of Petitioner's benefit claim. Pet. App. 49a-95a. As the court in *Gross* put it, any subsequent "failure to achieve an award of benefits" by Petitioner does "not convert [her] substantial success on that claim into failure [on the merits] or trivial success." *Gross*, 763 F.3d at 81 (internal quotation marks and citation omitted).

It is thus abundantly clear that, had Petitioner's case been decided in the First Circuit, she would have been eligible for an award of fees under ERISA's fee-shifting provision. The conflict between the two circuit decisions is therefore direct and ripe for review.

II. LOWER COURT DECISIONS REFLECT CONTINUING CONFUSION CONCERNING THE MEANING OF *HARDT*'S "SOME SUCCESS ON THE MERITS" STANDARD

The disparity between the First and Fifth Circuit decisions reflects confusion around a broader question that

has and continues to confound the courts in a variety of ERISA settings: "what outcome, short of a receipt of benefits, constitutes the requisite success under *Hardt*?" *Gross*, 763 F.3d at 80. Regardless of the exact context, in all cases where the claimant did not achieve a court-mandated award of benefits, this question "remains the same." *Ibid.*

Although most courts have concluded that such a remand is sufficient success, at least in some circumstances, to qualify a claimant for a fee award regardless of the outcome of the remand, a number of others have concluded that claimants are not eligible until the merits of their claims have been decided. *McCollum v. Life Ins. Co. of N.A.*, No. 10-11471, 2013 WL 308978, at *1 (E.D. Mich. 2013); *Yates v. Bechtel Jacobs Co., LLC*, No. 3:09-CV-51, 2011 WL 2462840, at *2 (E.D. Tenn. 2011); *Dickens v. Aetna Life Ins. Co.,* No. 2:10–cv–00088, 2011 WL 1258854, at *5 (W.D.W. Va. 2011); *Christof v. Ohio N. Univ. Emp. Benefit Plan,* No. 3:09CV540, 2010 WL 3958735, at *2 (N.D. Ohio 2010).

Respondent asserts that there is no confusion in the lower courts and that any disparate results simply stem from "the discretionary nature of a fee award under § 1132(g)(1)." Opp. 22-23. However, such discretionary considerations primarily come into play once a court has made the threshold determination that a fee claimant has achieved "some success on the merits" within the meaning of *Hardt*. Once a claimant has achieved sufficient success to be eligible for fees, courts generally account for these considerations by applying some variant of a multi-factor test. See *Hardt*, 560 U.S. at 255 & n.8 (noting that while "these factors * * * are not required for channeling a court's discretion when awarding fees under this section," the Court would not "foreclose the possibility that once a claimant has satisfied [the "some success on the merits"]

requirement, and thus becomes eligible for a fees award," a court could consider the multi-factor test). That test is not at issue here.

Respondent also insists that the decisions in some of these cases, such as *Yates* and *Dickens*, are consistent with cases such as *Gross* because those courts "only preliminarily" denied the attorney's fees pending the administrator's decision on the merits. Opp. 24-25. But that is precisely the point. The court in *Yates* concluded that the fee petition was "not ripe" because "[t]hough the Plaintiff may be entitled to attorney's fees if he prevails on the underlying ERISA claim, * * * the remand decision in this case, without more, does not qualify as success on the merits." 2011 WL 2462840, at *2. See also *Dickens*, 2011 WL 1258854, at *5-*6 (concluding that a fee award was "not warranted at this time" because the court's remand was a "a purely procedural victory."). These decisions, like the decision in this case, conflict directly with decisions such as *Gross*, where courts have held that they may award fees without awaiting a determination on the merits of a benefits, and others that have held that a remand, without more, is sufficient success on the merits to make a claimant eligible for fees. *E.g.*, *Olds v. Retirement Plan of International Paper Co.,* No. 09–0192–WS–N, 2011 WL 2160264, at *2-*3 (S.D. Ala. 2011).

This confusion in the lower courts has the effect of requiring ERISA litigants in some parts of the country to prevail before being awarded fees. This misapplication of *Hardt* calls out for review by this Court.

III. DESPITE BEING UNPUBLISHED, THE CASE PRESENTS AN EXCELLENT VEHICLE FOR CLARIFYING THE QUANTUM OF SUCCESS NECESSARY FOR AN AWARD OF FEES UNDER *HARDT*

Respondent argues that because the decision in this case is unpublished, it presents a poor vehicle for resolving the fee issue with which the Fifth Circuit and many others have grappled. These vehicle problems are exacerbated, in Respondent's view, by the fact that the split is of recent vintage and is between only two circuits. While this is true, it does not account for the fact that the split is a reflection of deeper and more abiding confusion on the issue in lower courts, as explained above, which have come up with varying and often irreconcilable tests for "success" under *Hardt.*

Furthermore, whatever issues are presented by the unpublished status of the decision below is more than offset by the stark presentation of the fee issue given Petitioner's undeniable achievement before the en banc Fifth Circuit. Although Respondent attempts to minimize the obvious significance of Petitioner's hard-fought victory, Opp. 28, the fact remains that the en banc Fifth Circuit, over a strenuous dissent, overturned its own decades-old decision in *Pierre v. Connecticut General Life Insurance Co./ Life Insurance Co. of North America*, 932 F.2d 1552 (5th Cir. 1991), and adopted a participant-friendly standard of review. Pet. App 49a-95a.

In the end, Respondent is left with the circular argument that Petitioner's victory before the en banc Fifth Cir-

cuit was trivial because she did not win her claim for benefits on remand. See Opp. 13 (citing the district court's decision, Pet. App. 45a-46a, denying Petitioner's claim for fees because it concluded she was not entitled to benefits). In fact, this is the "prevailing party" standard that this Court rejected in *Hardt*.

More to the point, this case presents an issue of great importance to plan participants and beneficiaries, whose access to the courts was an issue of significant concern to Congress in enacting ERISA. 29 U.S.C. 1001(b). As explained more fully in Petitioner's opening brief, Congress's concern was well-founded, as even under ERISA's protective statutory scheme, many plan participants and beneficiaries, especially those with small healthcare claims, have difficulty finding representation to assert and vindicate their claims for benefits. If allowed to stand, the Fifth Circuit's erroneous decision concluding that Petitioner was not entitled to attorney's fees despite her success before the en banc Fifth Circuit, will make a bad situation worse.

IV. PETITIONER'S REQUEST FOR ATTORNEY'S FEES WAS IMPROPERLY DENIED

In her Petition for Certiorari, Petitioner explained at length why the Fifth Circuit improperly concluded that she was ineligible for attorney's fees under *Hardt*. Pet. 11-15. She will not repeat those arguments here. Suffice it to say that the Supreme Court in *Hardt* only ruled out fee awards under 29 U.S.C. 1132(g)(1) where the claimant achieved a "trivial success on the merits" or a "purely procedural victory," 560 U.S. at 252, 256, and Petitioner's success before the en banc Fifth Circuit was neither. The court of appeals' holding that Petitioner was nevertheless ineligible for fees here cannot be squared with the statutory text or purposes, or

with the trust-law underpinnings of ERISA. The reasoning of the First Circuit in *Gross*, on the other hand, is persuasive, and that court's conclusion that a plaintiff's success in obtaining a favorable appellate decision on the standard of review made her eligible for attorney's fees is correct.

One additional point is worth noting. This Court's decision in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983), offers little guidance in resolving this case, despite *Hardt*'s adoption of the "interpretive approach" employed in that case. 560 U.S. at 254. In *Ruckelshaus*, this Court held that two plaintiffs were not entitled to fees under a similar fee-shifting provision in the Clean Air Act for launching an unsuccessful challenge to emission standards for coal-fired power plants. 463 U.S. at 681-85. Unlike in this case, the plaintiffs never obtained a favorable decision, much less one before an en banc court of appeals establishing new precedent. Thus, this Court's rejection in *Ruckelshaus* of "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.* at 685 (emphasis added), has no relevance here.

Petitioner was far from "wholly unsuccessful" for the reasons explained above. Nor did the en banc Fifth Circuit, in remanding the case to the district court for de novo consideration, conclude that Petitioner had wrongly charged Humana in asserting a claim for medical benefits under her ERISA plan or that her suit was meritless or brought in bad faith. While the district court ultimately concluded that the record did not support coverage of her claim, that does not mean that she was not eligible for fees under ERISA's fee-shifting provision, designed as it is to allow ERISA claimants access to lawyers and to courts. Indeed, as one court quite rightly put it, the "favorable slant toward ERISA

plaintiffs" in the court's consideration of fee awards "is necessary to prevent the chilling of suits brought in good faith." *Salovaara v. Eckert,* 222 F.3d 19, 28 (2d Cir. 2000) (internal quotation marks omitted).

The Fifth Circuit's en banc decision on the applicable standard of review was not only a success for Petitioner, who got the chance to have her claim reviewed de novo in the district court, but also for "the millions of Fifth Circuit residents who rely on ERISA plans for their medical care and retirement security." See App., *infra*, 118a (Costa, J., specially concurring). This is enough to constitute "some degree of success on the merits" so as to make Petitioner eligible to obtain attorney's fees under ERISA Section 502(g)(1). The Fifth Circuit's holding to the contrary was in error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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