No. 20-1106

In the Supreme Court of the United States

JANE DOE, PETITIONER

v.

HARVARD PILGRIM HEALTH CARE, INC., AND THE HARVARD PILGRIM PPO PLAN MASSACHUSETTS, GROUP POLICY NUMBER 0588660000.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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As Judge Easterbrook wrote over a decade ago, ERISA *de novo* benefits cases are procedurally no different from state-law insurance disputes. *Krolnik* v. *Prudential Ins. Co. of Am.*, 570 F.3d 841, 843 (7th Cir. 2009). If there is a disputed fact question over coverage, summary judgment must be denied. And if coverage turns on competing experts, "a trial," where those experts may be examined, "is essential." *Id.* at 844.

That is the longstanding majority rule. The First and Sixth Circuits, however, have created special rules for ERISA cases—granting summary judgment where fact disputes remain and precluding any evidence (including live testimony) that wasn't before the plan administrator.

The circuit splits are widely acknowledged; the opposing positions are entrenched and well-ventilated; and the frequently recurring questions presented were outcome determinative here. The difference between granting summary judgment and conducting a bench trial with live testimony is of obvious importance. The ERISA-only procedural rules employed by two circuits have no justification. And the persisting circuit splits prohibit the type of national uniform benefits administration that this Court has repeatedly described as a principal goal of ERISA. The petition checks every box for plenary review.

Respondents oppose the petition for two reasons. First, they assert that "[a]s to both questions presented, Doe overstates the existence and the importance of divergence among the circuits." Opp. 2. As explained *infra* pp. 2-8, that is demonstrably incorrect.

Second, respondents insist that the questions presented were neither preserved nor outcome determinative in this case. Opp. 1-2. As explained *infra* pp. 8-11, those arguments are not only wrong—but frivolous.

Tellingly, respondents do not offer a single reason why the First and Sixth Circuits should be allowed to eschew the normal operation of the Federal Rules in favor of their judge-made, ERISA-specific procedures. Respondents indeed do not even try to defend the First Circuit's decision below on the merits. That's presumably because, as the petition explained, that decision is indefensible. Pet. 18, 31. This Court should grant the writ and reverse.

A. The Courts of Appeals Are Intractably Split Over Both Questions Presented

1. The circuits are intractably divided over the first question presented: whether, on *de novo* consideration of an ERISA benefits claim, summary judgment must be denied if genuine fact disputes remain. Pet. 3-4, 13-16.

a. Virtually all circuits apply Rule 56 as written—*i.e.*, summary judgment must be denied when a "genuine dispute as to any material fact" remains. Fed. R. Civ. P. 56(a); see Pet. 14-15 (discussing cases from ten circuits). Two circuits, however, have "set aside Rule 56" in ERISA litigation. Opp. 15; see Pet. 11-13, 16 (discussing First and Sixth Circuit cases). Respondents themselves admit that "the First Circuit" does so: "ERISA de novo benefits claims are nominally decided at summary judgment under a standard that departs from Rule 56 by permitting courts to weigh the evidence and resolve any factual disputes at that stage . . . ." Opp. 19; see also *Wilkins* v. *Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 619 (6th Cir. 1998) ("the summary judgment procedures set forth in Rule 56 are inapposite to ERISA actions").

Respondents thus acknowledge that this question has divided the circuits (*e.g.*, Opp. 22), and they do not suggest that the split might resolve itself with further percolation. Nor could they. For over 15 years, the First and Sixth Circuits have reaffirmed their minority position in the face of direct criticism. See, *e.g.*, *Patton* v. *MFS/Sun Life Fin. Distributors, Inc.*, 480 F.3d 478, 484 n.3 (7th Cir. 2007) (rejecting the First Circuit's "far-reaching approach to appeals of summary judgment in ERISA cases" as "potentially misleading").

b. Instead, respondents insist that this circuit split has "no practical impact." Opp. 16; see Opp. 18-24. Not so.

It should hardly require explanation that applying summary judgment rules at summary judgment matters. That's why both Rule 56 *and* Rule 52 exist—different stages of the litigation warrant different procedures. As *Kearney* v. *Standard Insurance Co.* explained, Rule 52's requirement "of finding the facts 'specially'" affects the judge's deliberative process, so courts can't just skip that step in ERISA cases. 175 F.3d 1084, 1095 (9th Cir. 1999)

(en banc); see 9C Arthur R. Miller, *Fed. Practice & Procedure* § 2571 (3d ed.) (explaining importance of Rule 52 procedures); Pet. 17.

Respondents' attempts to distinguish other decisions (Opp. 20-22) confirm this principle. They say those courts erred by essentially deferring to the plan, but that is petitioner's point. Without taking the steps prescribed by the Federal Rules, courts might effectively, even if unintentionally, defer to the plan's determination. Cf. C.A. Reply Br. 3, 9-10, 22 (arguing that the district court committed this exact error).[1]

The importance of the first question presented, moreover, is inextricably linked to the second question presented. Pet. 17-18. Respondents apparently agree, saying themselves that "[w]here district courts exercise discretion to consider evidence outside the administrative record . . . summary judgment might or might not be appropriate." Opp. 24.

Respondents thus refute their own argument that applying normal summary judgment rules would be an "empty formality." *Ibid.* This case, like countless other ERISA benefits claims (and like state insurance cases), features obvious fact disputes resulting from dueling medical reports. The district court and First Circuit admitted as much. Pet. 11-12. In such circumstances, it is critical to take testimony or other evidence. *E.g.*, *Krolnik*, 570 F.3d at 844. But it is only through trial that parties can present that evidence. By ending the inquiry at summary judgment, the First and Sixth Circuits prevent parties from ever reaching that "essential" step. *Ibid.*

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[1] Respondents (at 19-20) highlight dicta in *Patton*, but *Patton* did not explore the importance of courts applying Rule 52 (as *Kearney* did) because it reversed on the denial of new evidence, *i.e.*, the second question presented here. 480 F.3d at 484-485.

The Federal Rules of Civil Procedure (and ERISA) demand uniformity and faithful adherence to the well-settled and uncontroversial scheme set forth in Rules 56 and 52. It is untenable to have two circuits simply discard those rules for certain kinds of cases.

2. The circuits are also deeply split over the second question presented: whether, on *de novo* consideration of an ERISA benefits claim and absent a challenge to the plan's procedures, a district court has discretion to consider evidence that was not part of the record before the plan administrator. Pet. 19-29.

Respondents insist (Opp. 26-31) that "[t]here is no deep or important circuit split regarding extra-record evidence" because "the vast majority—including the First Circuit—have coalesced around the principle that district courts have discretion to determine, on a case-by-case basis, whether to admit new evidence." Opp. 26 (formatting omitted). That is wrong.

a. The new evidence in this case was testimony from several of the doctors who had opined in writing on the medical necessity of petitioner's treatment. D. Ct. Doc. 100 ("Hearing Motion"). It is obvious that their testimony was imperative—the district court expressly identified material, disputed fact questions about their written opinions. See, *e.g.*, Pet. 11 (noting that "the court found it 'unclear what internal criteria Dr. Krikorian considered in arriving at her conclusions regarding medical necessity, whether they differ from [respondents'] and to what degree'") (quoting Pet. App. 45a). Live testimony would have allowed the doctors to answer these questions.

The courts below did not reject petitioner's request because they determined the evidence would be unnecessary or unhelpful in this particular case, but rather because petitioner could not satisfy the First Circuit's narrow rule requiring a procedural challenge to expand the

record. As respondents themselves described it in their briefing to the court of appeals: "long-standing First Circuit law, echoed in *Doe I*, limits the administrative record for the district court's *de novo* review of an ERISA case to the record that was before the administrator . . . even where the administrative record includes conflicting opinions by medical professionals." C.A. Appellee's Br. 32.

The decision below reflected and entrenched that outlier position. It noted that the district court did "exactly what the law called for" in confining "the record [to] everything compiled by or submitted to" the administrator. Pet. App. 9a-10a. And although the court allowed that "some very good reason" could justify supplementing the record, it made clear that a "very good reason" must be a procedural challenge. *Id.* at 10a (explaining that petitioner "offer[ed] no good reason" because she did not assert, *e.g.*, that respondents' "process of decision-making was unlawful or that the administrator exhibited a conflict of interest").

The First Circuit was similarly clear that the district court lacked discretion to entertain the types of requests to resolve factual disputes that suffice in other circuits. Petitioner pressed *Krolnik*'s holding that district courts should "'take[] evidence (if there is a dispute about a material fact).'" C.A. Appellant's Br. 24 (quoting 570 F.3d at 843); see *id.* at 27 (requesting "Rule 52 hearing" to resolve "factual disputes" in administrative record), 55-57. And she argued that "a hearing would have assisted the district court here in appreciating the complexity of the medical issues presented given the conflicting evidence in the Record." C.A. Appellant's Reply Br. 4; see *id.* at 22-23.

The First Circuit rejected these arguments, holding that petitioner "offer[ed] no good reason for" considering additional evidence. Pet. App. 10a. Rather, wanting "the

various experts [to] testify and be subject to cross-examination" was "long ago rejected" in *Orndorf* v. *Paul Revere Life Insurance Co.*, 404 F.3d 510 (1st Cir. 2005). Pet. App. 10a. Quoting *Orndorf*, the First Circuit emphasized its categorical bar: "[J]udicial review does not 'warrant calling as witnesses those persons whose opinions and diagnosis or expert testimony and reports are in the administrative record[.]'" *Ibid.*

The district court, moreover, gave no justification whatsoever for denying the hearing; its order was an unexplained, one-sentence docket entry. Pet. App. 52a. The only reason an explanation was unnecessary was the First Circuit's categorical rule. Cf. *Gross* v. *Sun Life Assurance Co. of Canada*, 880 F.3d 1, 21-22 (1st Cir. 2018) (under abuse-of-discretion review, vacating and remanding because the court "did not explain its reasoning"); *Patton*, 480 F.3d at 491-492. That the district court did not in fact exercise any discretion confirms that the First Circuit does not permit discretion here.

b. Only the First and Sixth Circuits require a successful procedural challenge to unlock the trial court's discretion to consider evidence outside the administrative record. No other circuit (with the possible exception of the Fifth, which has created its own idiosyncratic rule) limits district court discretion so dramatically. Pet. 20-28 (discussing nine circuits' approaches).

Thus, in virtually every other circuit, petitioner would have been permitted to introduce the testimony she proffered because it would help resolve conflicting medical evidence in the paper record. See, *e.g.*, *Krolnik*, 570 F.3d at 844 ("[A]t trial Krolnik would be free to offer medical evidence of his own and cross-examine the physicians who produced the reports that underlie Prudential's decision."); *Quesinberry* v. *Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1027 (4th Cir. 1993) (affirming hearing "live expert

medical testimony" because it "could facilitate the understanding of complex medical terminology and causation"); *Feibusch* v. *Integrated Device Tech., Inc. Emp. Ben. Plan*, 463 F.3d 880, 886 (9th Cir. 2006) (advising district court "to consider additional evidence and perhaps oral testimony" in light of "significant differences" among "evaluators in the administrative record"); Pet. 20-27 (cataloguing numerous other examples respondents ignore).

Put simply, the circuit split on the second question is square and outcome determinative here.

B. This Case Is An Ideal Vehicle To Resolve Both Questions Presented

1. On the first question, respondents assert that petitioner "waived the argument that this case could not be decided at summary judgment." Opp. 16 (formatting removed). Respondents also assert that "further review would not change the result." Opp. 24 (formatting removed). Neither is true.

a. Respondents' waiver argument is wrong for at least three independent reasons.

First, the relevant argument was pressed by petitioner before the district court and court of appeals.

In the district court, petitioner urged the judge to follow the Rule 52 bench-trial procedures employed by the Seventh Circuit in *Krolnik* and the Ninth Circuit in *Kearney*. See Hearing Motion at 3-6. And she explained that a bench trial with live testimony was necessary because the paper record "in this case contains conflicting factual determinations rendered by the experts whose conclusions formed the basis of" the administrator's decision. *Id.* at 9-10; see, *e.g.*, *id.* at 11-12.

Petitioner told the First Circuit the same thing. She explained that *Krolnik* and *Kearney* articulate the course the district court should have taken, *i.e.*, a Rule 52 bench trial. C.A. Appellant's Br. 22-25. In fact, a heading in her

brief—in bold-faced, all-caps text—argued that "district courts should conduct de novo reviews in ERISA benefit denial cases pursuant to Fed. R. Civ. P. 52." *Id.* at 28 (formatting removed).

Indeed, before the First Circuit, respondents acknowledged that petitioner made the exact argument they now say she omitted. They noted "the argument proposed by Doe that summary judgment is inappropriate when the record includes conflicting medical opinions," and stated that "her argument is that in an ERISA benefits case a district court should not make findings of fact or resolve conflicts in the evidence on summary judgment." C.A. Appellees' Br. 18, 19.

Second, the First Circuit unquestionably decided the first question presented. Respondents concede, as they must, that the First Circuit explicitly jettisoned Rule 56's standard. See Opp. 15-16, 19. It held: "'[I]n the ERISA context, the burdens and presumptions normally attendant to summary judgment practice do not apply.'" Pet. App. 4a (citation omitted). And it approved "the district court implicitly agree[ing] more with [respondents'] experts than with [petitioner's]." *Id.* at 9a. That holding is thus ripe for review. See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (this Court reviews issues pressed *or* passed upon).

Finally, this Court (and the courts of appeals) generally do not find waiver when it would have been futile to raise an argument. See, *e.g.*, *Blonder-Tongue Labs, Inc.* v. *Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971); *In re Micron Tech., Inc.*, 875 F.3d 1091, 1097-1098 (Fed. Cir. 2017) (collecting cases). So given the First Circuit's longstanding rule that usual summary judgment standards do not govern benefits claims, petitioner needed nothing more to preserve this issue.

b. Respondents are also flatly wrong to assert that "further review would not change the result" on the first question. Opp. 24 (formatting omitted). This case obviously "would have survived summary judgment." *Ibid.* The First Circuit said the "case is not an easy one." Pet. App. 14a. And it acknowledged dueling expert reports (ten doctors weighed in). See *id.* at 8a-9a. But under the First Circuit's special rule, the district court was permitted to "agree[] more with Harvard Pilgrim's experts than with Doe's." *Id.* at 9a. That, of course, is exactly what Rule 56 prohibits.

2. On the second question, respondents rehash the same two baseless vehicle arguments. Opp. 31-32. According to respondents, "[t]he issue is arguably waived," and "the outcome would not change under any other circuit's approach." Opp. 31.

a. The waiver argument is spurious. Respondents say petitioner "never sought to introduce new evidence" except "live testimony of medical experts." *Ibid.* But live testimony *is* evidence, and in respondents' own assessment, petitioner asked "for an evidentiary hearing to expand the administrative record to include testimony of eight physicians." C.A. Appellees' Br. 29; see also *id.* at 31.

Respondents now say that petitioner told the district court that the hearing "would '*not* be a vehicle for introducing new evidence.'" Opp. 31 (quoting Hearing Motion at 12). That is grossly misleading. In context, petitioner obviously meant there would be no new experts or reports or the like. The very pages quoted by respondents make clear that petitioner was arguing forcefully that live testimony from the doctors was necessary to "understand[] the basis for each expert's determination," "determin[e] the weight to be given to each report," and "assess the appropriate weight and credibility to give their opinions and to make findings of fact." Hearing Motion at 10-12.

b. Respondents' "not outcome determinative" assertion is equally frivolous. As explained *supra* pp. 5-7, the First Circuit made clear that the district court could not hear live testimony from the medical experts because petitioner had not asserted a procedural challenge. This was true even though, contrary to respondents' unsupported assertion that live testimony would be "duplicative" (Opp. 32), the courts below effectively admitted that the requested testimony would have mattered. See, *e.g.*, Pet. 11-12; Pet. App. 8a-9a. The district court expressly found that key questions about the key issue from petitioner's key expert remained "unclear." Pet. App. 45a; see *id.* at 8a (calling record "[un]developed" on crucial question).[2]

That's exactly when other courts permit witness testimony. *E.g.*, *Quesinberry*, 987 F.2d at 1027 (affirming hearing "live expert medical testimony" because it "could facilitate the understanding of complex medical terminology"). But the First Circuit's narrow rule meant that petitioner was forbidden from using live testimony to elucidate significant disputes between the medical experts' opinions—testimony that district courts clearly would have discretion to admit under other circuits' approaches.[3]

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[2] That respondents spend pages disputing the facts only confirms that fact disputes remain.

[3] Respondents suggest that conducting the hearing would have been "impossible" because the independent OPP reviewer was unavailable. Opp. 32. Neither court below even addressed the point. It is plainly incorrect anyhow—the hearing would have been meaningful even if only some of the experts were examined. This argument, moreover, reflects respondents' fundamental misconception of the court's role in *de novo* benefits cases. Respondents are essentially arguing that it is impossible for the court to resolve any question the reports themselves leave unanswered. That's hardly the type of "independent *decision* . . . that *Firestone* contemplates." *Krolnik*, 570 F.3d at 843.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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