No. _____

In The Supreme Court of the United States

ESTATE OF DAVID MAURICE, JR.
AND STACEY MAURICE,

Petitioners,

v.

LIFE INSURANCE COMPANY
OF NORTH AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The following question is presented:

Whether the court below erred by refusing to apply *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003) to determine whether the California "proximate cause" standard for accidental loss insurance policies was saved from ERISA preemption under 29 U.S.C. § 1144(b)(2)(A) and instead relying on an older Ninth Circuit decision which, in direct conflict with *Miller*, holds that all state laws of insurance policy interpretation are automatically preempted.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14(1)(b), all the parties appearing and before the Ninth Circuit are contained in the caption.

RELATED CASES

Estate of Maurice v. Life Ins. Co. of N. Am., No. 5:16-CV-02610-CAS(SPx), United States District Court for the Central District of California. Judgment entered on June 15, 2018.

Estate of Maurice v. Life Ins. Co. of N. Am., Nos. 18-55944, 18-55981, 18-56558, United States Court of Appeals for the Ninth Circuit. Judgment entered on February 5, 2020, petition for rehearing denied on April 17, 2020.

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OTHER AUTHORITIES:

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals is reported at *Estate of Maurice v. Life Ins. Co. of N. Am.*, 792 F. App'x 499 (9th Cir. 2020) and is reprinted in the Appendix to the Petition ("Pet. App.") at 1. The order denying panel rehearing and rehearing *en banc* is reported at *Estate of Maurice v. Life Ins. Co. of N. Am.*, Nos. 18-55944, 18-55981, 18-56558, 2020 U.S. App. LEXIS 12575 (9th Cir. 2020) and is reprinted at Pet. App. 35. The decision of the trial court below is *Estate of Maurice v. Life Ins. Co. of N. Am.*, No. 5:16-CV-02610-CAS(SPx), 2018 U.S. Dist. LEXIS 93807 (C.D. Cal. 2018) and is reprinted at Pet. App. 5.

JURISDICTION

The Court of Appeals for the Ninth Circuit issued its opinion on February 5, 2020. (Pet. App. 1). The Court of Appeals entered its order denying rehearing and rehearing *en banc* on April 17, 2020. (Pet. App. 35). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case turns on the interpretation of ERISA's saving clause, 29 U.S.C. § 1144(b)(2)(A), which states:

> Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any

State which regulates insurance, banking, or securities.

STATEMENT OF THE CASE

District Court Jurisdiction

The court of first instance, the United States District Court for the Central District of California, had jurisdiction of this matter pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e).

Statement of Facts

In 2008, David Maurice cut his foot on some broken glass in a swimming pool. The cut never healed and became infected. David's infection spread, which required a 2009 amputation of David's big toe and a 2011 amputation of part of his left foot. In spite of extensive treatment the wound would still not heal and in 2015, his lower left leg was amputated. David died shortly afterward, leaving his widow, Stacey Maurice, to prosecute his claim. (Pet. App. 9-14).

Due to his employment David was covered by two Accidental Death & Dismemberment ("AD&D") policies issued by Life Insurance Company of America ("LINA") under which a leg amputation is a covered loss. The policies' language provided coverage only where the loss resulted from an accident "directly and independently of all other causes." (Pet. App. 7). LINA denied coverage for David's amputation because it

contended his pre-existing diabetes was a contributing factor and, as such, the cuts on his foot were not the sole and direct cause of the loss. (Pet. App. 15-17).

LINA's use of the policies' language to deny Ms. Maurice's claim violated both federal law and California law. The federal courts have long recognized that, if the "directly and independently" language were strictly enforced "a claimant would have to be in perfect health at the time of his most recent injury before the policy would benefit him." *Adkins v. Reliance Standard Life Ins. Co.*, 917 F.2d 794, 796 (4th Cir. 1990). As such, *McClure v. Life Ins. Co. of N. Am.*, 84 F.3d 1129, 1135 (9th Cir. 1996) held that federal common law required coverage under an AD&D policy unless a pre-existing disease "substantially contributed" to the loss.

LINA's policy language was also inconsistent with California law, which is more favorable to the insured than the federal standard. Under well-established California law, coverage is required where the accident is the "proximate cause" of the loss. *Slobojan v. Western Travelers Life Ins. Co.*, 70 Cal.2d 432, 442 (1969). However, in *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1140 (9th Cir. 1990), the Ninth Circuit held that all state rules of insurance policy interpretation were preempted by ERISA. Since then, courts in that Circuit have mechanically held state laws of insurance policy interpretation preempted without regard for this Court's saving clause analysis.

Lower Court Decisions.

The district court decision.

At trial Ms. Maurice briefed both the federal "substantial contribution" and the California "proximate cause" standards to the court and argued that she would prevail under either standard. However, she also argued that the California rule should govern as it was saved from preemption under this Court's test from *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341-42 (2003) as a law regulating insurance.

The district court did not perform the analysis required under *Miller*, holding instead, consistent with *Evans*, that "state laws of insurance policy interpretation do not qualify for the saving clause exception and are preempted." (Pet. App. 18-19 (quoting from *Evans*, 916 F.2d at 1440)). As such, the court applied *McClure's* rule and determined that David's diabetes did not "substantially contribute" to the amputation. (Pet. App. 29-30).

The Ninth Circuit decision.

LINA appealed from the district court's decision, arguing that under *McClure* David's pre-existing diabetes "substantially contributed" to the need for the amputation. Ms. Maurice argued that the district court had correctly determined that the diabetes was not a substantial factor in the loss. However, she also argued that under this Court's saving clause analysis in *Miller* the California rule requiring the proximate cause test

was a law regulating insurance and, as such, was saved from preemption.

The Ninth Circuit rejected Ms. Maurice's saving clause argument without applying *Miller*, holding that under *Evans* all state laws of insurance policy interpretation were automatically preempted and that, under ERISA, insurance policies were interpreted under a uniform body of federal law:

> We disagree that recent Supreme Court cases call *Evans* into question. The Supreme Court has never questioned that uniform rules of policy interpretation are an essential part of the "federal common law of rights and obligations under ERISA-regulated plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987).

(Pet. App. 3-4).[1] In other words, the Ninth Circuit did not apply the *Miller* test to determine whether the rule from *Slobojan* constituted insurance regulation saved from preemption. Instead, the Ninth Circuit held that under *Evans*, because the California rule involved

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[1] In actuality, *Pilot Life* provides no support for the proposition that state rules of policy interpretation must be preempted in order to ensure uniformity. *Pilot Life* was not even about a state rule of policy interpretation, rather the issue there was whether a state *remedial* statute was preempted. And the Court's answer did not turn on the scope of the saving clause, but rather "that the civil enforcement provisions of ERISA § 502(a) [29 U.S.C. § 1132(a)] be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits. . . ." *Pilot Life*, 481 U.S. at 52. The question of whether ERISA's remedies are exclusive has been repeatedly upheld by this Court, *e.g. Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144 (1990) and is not at issue here.

insurance policy interpretation, it was automatically preempted with no further analysis.

Rather than California law, the Ninth Circuit applied the federal common law standard from *McClure*. It determined that the district court's decision that David's diabetes did not substantially contribute to his amputation was clearly erroneous. (Pet. App. 2).

REASONS FOR GRANTING THE PETITION

I. Introduction and summary of argument.

When Congress enacted ERISA[2] it included a broad provision that preempted all state laws that relate to ERISA benefit plans. It was not Congress' intent, however, to nullify state insurance law so it also included a "saving clause" which excluded state laws regulating insurance from this preemption.

In *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437 (9th Cir. 1990), the Ninth Circuit determined that, in aid of uniform regulation of ERISA plans, state rules of insurance policy interpretation were not within the saving clause but were automatically preempted. A number of other circuits, including the First, Seventh, Tenth and Fifth Circuits took a similar position. This is in spite of the fact that this Court has repeatedly held that the lack of uniformity resulting from proper

[2] The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq*.

application of the saving clause was Congress' intended result.

The automatic preemption of laws involving insurance policy interpretation should have been called into question when this Court, in *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999), held that a state law regulating the interpretation of insurance policies–the very type of law that *Evans* held was preempted–was saved from preemption. In fact, *Ward* was later interpreted by this Court as standing for the proposition that it is perfectly acceptable for courts to utilize state insurance law in interpreting ERISA governed insurance policies.

This Court's saving clause jurisprudence was further refined in *Kentucky Ass'n of Health Plans v. Miller*, 538 U.S. 329 (2003), which created a simple and functional test for determining which state laws fit within the saving clause. The *Miller* analysis not only makes no mention of the *Evans* distinction for state laws of policy interpretation but its saving clause analysis is completely inconsistent with *Evans*. Rather than automatically excluding laws that control the meaning of insurance policies, under the *Miller* test this Court and other courts have repeatedly held that a state law's impact on the terms of the policy *is a key reason why it is saved from preemption.*

Nonetheless, *Evans* and the other circuit decisions which automatically preempt state rules of insurance policy interpretation remain good law and continue to be cited and followed as good law. This has necessarily

led to a split in the circuits as the Ninth Circuit, Tenth Circuit, and perhaps also the Fourth Circuit continue to invoke the automatic exclusion rule while other circuits, such as the Fifth, Sixth, and Eighth, have all held that state laws which control policy terms are saved from preemption.

There is also tremendous confusion in the Ninth Circuit since it continues to ignore *Miller* and hold that if a state law governs the interpretation of an insurance policy it cannot be saved from preemption. Worse, a great many district courts in that circuit mechanically apply *Evans*, ignoring *Miller* and this Court's saving clause analysis. As a result, in this important body of law which governs the manner in which a majority of Americans receive their health, retirement and insurance benefits, litigants in the Ninth Circuit are routinely denied their right to rely on state insurance law in complete disregard of the dictates of Congress and this Court.

There is no logical reason why this confusion should exist as the issues at play here are not complicated. Congress intended that state laws regulating insurance should govern the interpretation of insured ERISA plans and in *Miller* this Court created a test, simple to apply in practice, for determining which state laws fit within the saving clause. This Court should provide clarity to this unfortunately unsettled area of the law by taking this opportunity to mandate that its *Miller* test applies to *all* state laws that regulate insurance.

II. The Ninth Circuit and a number of other circuits fashioned a rule that state laws of insurance policy interpretation are not within ERISA's saving clause.

A. In *Evans*, the Ninth Circuit held that state rules of policy interpretation are not saved from preemption.

ERISA contains a broad preemption clause which preempts all state laws that "relate to" employee benefit plans. 29 U.S.C. § 1144(a). However, Congress did not intend ERISA to supplant traditional state regulation of insurance. As such, it included a "saving clause," 29 U.S.C. § 1144(b)(2)(A), stating that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance." This saving clause "saves" any state law which regulates insurance from preemption even where it relates to a plan pursuant to 29 U.S.C. § 1144(a).[3]

In *Evans*, the Ninth Circuit held that, due to the need for uniform interpretation of ERISA plans, the saving clause did not apply to state rules of insurance policy interpretation:

> In *Kanne*, we held that state laws of insurance policy interpretation do not qualify for the saving clause exception and are preempted. If we were to preserve 50 different state laws of insurance policy interpretation as federal

[3] ERISA also contains a "deemer clause" (29 U.S.C. § 1144(b)(2)(B)) which restricts the application of the saving clause to insured, as opposed to self-funded, plans. *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

> common law, we would in effect add an item to the saving clause which we have already said that Congress did not mean to include.

Evans, 916 F.2d at 1440.[4] As a result, the *Evans* Court, following First Circuit authority, held that all state rules of insurance policy interpretation were uniformly preempted. "In sum, we agree with the conclusion of the First Circuit in *Sampson v. Mutual Benefit Life Insurance Co.*, 863 F.2d 108, 109-110 (1st Cir. 1988) that the interpretation of an ERISA insurance policy is 'governed by a *uniform* body of federal law.' (emphasis added)." *Evans*, 916 F.2d at 1441.

The Ninth and First Circuits were not alone in fashioning a rule that all state laws involving insurance contract interpretation were automatically preempted. In the Seventh Circuit, *Hammond v. Fid. & Guar. Life Ins. Co.*, 965 F.2d 428, 430 (7th Cir. 1992) held that "[w]e cannot imagine any rational basis for the proposition that state rules of contract interpretation 'regulate insurance' within the meaning of § 1144(b)(2)." In *Thibodeaux v. Cont'l Cas. Ins. Co.*, 138 F.3d 593, 596 (5th Cir. 1998), the Fifth Circuit, citing to *Hammond*, ruled that "like the other circuits that have addressed this issue, [we] agree that ERISA preempts state laws governing insurance policy interpretation."

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[4] *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), on which *Evans* relies, did not hold that all state laws of contract interpretation were preempted; rather, it distinguished between statutory and common law. "Accordingly, we conclude that California's *common law* of contract interpretation is not a law that 'regulates insurance,' and therefore is not saved from preemption." *Id.* at 494 (emphasis added).

And in *Blair v. Metro. Life Ins. Co.*, 974 F.2d 1219, 1221-22 (10th Cir. 1992) the Court announced it would "apply federal common law" to resolve an ambiguity in the policy.

Other circuits took a more nuanced view. The Sixth and Eighth Circuits, in *McMahan v. New England Mut. Life Ins. Co.*, 888 F.2d 426, 429 (6th Cir. 1989) and *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153 (8th Cir. 1990), both held that the state law rule that insurance policies ambiguities be construed against the drafter were not saved from preemption. In both cases, though, the courts did so because the laws were not "insurance regulation" as such but represented state laws of general application. In other words, these courts did not exclude an entire category of laws from the saving clause, but examined the specific law to determine whether it was "nothing more than a specific application of general state contract principles and was not specifically designed for the insurance industry." *Brewer*, 921 F.2d at 153.

B. In *McClure*, the Ninth Circuit applied *Evans* to preempt the California rule that accidental loss policies were governed by the "proximate cause" standard.

It is well-established in California that, notwithstanding the policy language, an accidental loss will be covered by an AD&D policy, regardless of intervening causes, when the accident is the proximate cause of the

loss. "[T]he presence of preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause." *Brooks v. Metro. Life Ins. Co.*, 27 Cal.2d 305, 309-10 (1945).

This rule has been consistently applied in California. In *Slobojan v. Western Travelers Life Ins. Co.*, 70 Cal.2d 432 (1969), the California Supreme Court held that, regardless of a pre-existing illness which contributed to the death, coverage under an AD&D policy existed if the accident was either the prime cause of death or triggered the events that resulted in death.

> [T]he correct rule is that the presence of preexisting disease or infirmity will not relieve the insurer from liability if the accident is the proximate cause of death; and that recovery may be had even though a diseased or infirm condition appears to actually contribute to cause the death if the accident sets in progress the chain of events leading directly to death, or if it is the prime or moving cause.

Slobojan, 70 Cal.2d at 443 (citation and attribution omitted).

However, in *McClure*, the Ninth Circuit refused to apply the California rule; in fact it refused to even consider whether the rule met this Court's then-existing

saving clause analysis. Instead, following *Evans*, the Ninth Circuit held that state rules regarding the interpretation of insurance policies were not within the saving clause:

> Under ERISA, state law does not control the construction of the LINA policy. ERISA preempts state common-law rules related to employee benefit plans. 29 U.S.C. § 1144(a); *Evans v. Safeco Life Ins. Co.* 916 F.2d 1437, 1439 (9th Cir.1990). While ERISA's "savings" clause exempts from preemption "any law of any state which regulates insurance," 29 U.S.C. § 1144(b)(2)(A), "state laws of insurance policy interpretation do not qualify for the saving clause exception and are preempted." *Evans*, 916 F.2d at 1440.

McClure, 84 F.3d at 1133. After determining that federal common law rather than California law applied, the *McClure* Court noted the standard set by the Fourth Circuit in *Adkins v. Reliance Standard Life Ins. Co.*, 917 F.2d 794, 797 (4th Cir. 1990) that an accidental loss would be covered unless a pre-existing condition "substantially contributed" to the loss. *McClure*, 84 F.3d at 1135. *McClure* adopted a modified version of the *Adkins* rule, holding that if "the exclusionary language . . . is conspicuous it would bar recovery if a preexisting condition substantially contributed to the disability" and otherwise the "proximate cause" standard would govern. *McClure*, 84 F.3d at 1136.

III. This Court expanded the scope of the saving clause with a holding and analysis that were inconsistent with *Evans* and similar cases.

A. In *Ward*, this Court held that a California rule of policy interpretation was saved from preemption, a result directly contrary with *Evans*.

Since *Evans*, *Hammond*, *Sampson* and the cases following them were handed down, this Court expanded the scope of ERISA's saving clause, creating an analysis that is entirely inconsistent with the holding of these cases that would preempt all state cases involving insurance policy interpretation. The first expansion, in *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358 (1999), involved the California "notice/prejudice" rule, which prevents an insurer from relying on a policy provision requiring timely notice of a claim without a showing of prejudice:

> "[A] defense based on an insured's failure to give timely notice [of a claim] requires the insurer to prove that it suffered actual prejudice. Prejudice is not presumed from delayed notice alone. The insurer must show actual prejudice, not the mere possibility of prejudice." *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal. App. 4th 715, 760-761, 15 Cal. Rptr. 2d 815, 845 (1st Dist. 1993) (citations omitted).

Ward, 526 U.S. at 367.

This notice prejudice rule is obviously a state law involving contract interpretation, as the *Ward* Court noted it forms "'an integral part of the policy relationship between the insurer and the insured.'" *Ward*, 526 U.S. at 374 (citing to *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 743 (1985)). According to *Ward*, "California's rule changes the bargain between insurer and insured; it 'effectively creates a mandatory contract term' that requires the insurer to prove prejudice before enforcing a timeliness-of-claim provision." *Ward*, 526 U.S. at 374 (quoting from *Cisneros v. UNUM Life Ins. Co.*, 134 F.3d 939, 946 (9th Cir. 1998)). As such, under *Evans*, the notice/prejudice rule is a state law of contract interpretation subject to automatic preemption.[5]

Instead of adopting this rule of automatic preemption, the *Ward* Court used a two-prong test for determining whether the state rule was within the "saving clause." The first prong was a common sense look at whether the rule, on its face, appeared to be insurance regulation. The second prong examined the three McCarran-Ferguson factors as a "guidepost" to check on the accuracy of this common sense analysis. *Ward*, 526 U.S. at 369.

Prior to *Ward*, the most significant of these three McCarran-Ferguson factors was "whether the practice has the effect of transferring or spreading a policyholder's risk," *Ward*, 526 U.S. at 367 (attribution

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[5] Oddly, the *Cisneros* Court held the notice/prejudice rule was saved from preemption without a mention of *Evans*.

omitted),[6] which was considered an "indispensable characteristic of insurance." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 127 (1982) (attribution omitted). In spite of this, *Ward* held that the California notice prejudice rule was saved without deciding it had this risk-spreading function "because the remaining McCarran-Ferguson factors, verifying the commonsense view, are securely satisfied." *Ward*, 526 U.S. at 374.

The stark contrast between *Ward* and the *Evans* rule of automatic preemption of state rules of insurance policy interpretation was later illustrated by *CIGNA Corp. v. Amara*, 563 U.S. 421, 436 (2011), which interpreted *Ward* as holding that state insurance law can be utilized in the interpretation of ERISA governed insurance policies:

> The provision [empowering the Court to enforce the plan] allows a court to look outside the plan's written language in deciding what those terms are, i.e., what the language means. See *UNUM Life Ins. Co. of America v. Ward*, 526 U.S. 358, 377-379, 119 S.Ct. 1380, 143 L.Ed.2d 462 (1999) (permitting the insurance terms of an ERISA-governed plan to be interpreted in light of state insurance rules).

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[6] The other two McCarran-Ferguson factors are "whether the practice is an integral part of the policy relationship between the insurer and the insured" and "whether the practice is limited to entities within the insurance industry." *Ward*, 526 U.S. at 367 (citation and attribution omitted).

It is difficult to see, then, how anyone can conclude, after *Ward*, that state rules of insurance policy interpretation are uniformly preempted by ERISA.

B. In *Rush Prudential*, this Court held that a law creating a mandatory contractual term was saved from preemption.

Shortly after *Ward*, this Court determined that another state law involving contract interpretation was saved from production. That case, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), involved a state law that required health maintenance organizations to provide for independent review of denied claims. This Court reviewed the Seventh Circuit's decision that the law was saved from preemption.

Rush Prudential was not, strictly speaking, a saving clause case, as the main issues were whether an HMO was an insurer, which would have made the saving clause ineffective due to ERISA's deemer clause, and whether the state law created an alternative enforcement mechanism that would have mandated preemption under *Pilot Life's* and *Ingersoll-Rand's* holding that the enforcement provisions of 29 U.S.C. § 1132(a) were exclusive.

That being said, the *Rush Prudential* Court approved the Seventh Circuit's decision that the state law regulated insurance because "the independent review requirement [was] little different from a state-mandated contractual term of the sort this Court had held to survive ERISA preemption." *Rush Prudential*,

536 U.S. at 364. The *Rush Prudential* Court noted that the lower court cited to *Ward* for this proposition that a state law creating mandatory insurance policy terms would typically be saved as insurance regulation, *id*., which, again, is entirely inconsistent with *Evans*.

C. In *Miller*, this Court refined its saving clause analysis and made it even more clearly inconsistent with *Evans*.

1. In *Miller*, this Court created a simple and functional test for which state laws were within the saving clause.

This Court's most recent expansion of ERISA's saving clause came in *Kentucky Ass'n of Health Plans v. Miller*, 538 U.S. 329 (2003). *Miller* involved a challenge by HMOs to a Kentucky "any willing provider" ("AWP") law which required health plans to accept as "in-network" any physician willing to abide by the plan's conditions, rates, and quality of care. *Id.* at 331.

In the course of determining that this AWP law was not preempted, *Miller* created a new test for whether a state law constituted "insurance regulation" fitting within the saving clause. The *Miller* test is two-part, first, whether the state law is "specifically directed" at insurers and, second, whether it substantially impacts the allocation of risk between insurer and insured:

> Today we make a clean break from the McCarran-Ferguson factors and hold that for a state law to be deemed a "law . . . which regulates

> insurance" under § 1144(b)(2)(A), it must satisfy two requirements. First, the state law must be specifically directed toward entities engaged in insurance. Second, as explained above, the state law must substantially affect the risk pooling arrangement between the insurer and the insured.

Miller, 538 U.S. at 341-42 (citations omitted). This *Miller* test is both simple and functional. It is simple in that it discarded the amorphous McCarran-Ferguson factors as well as the uncertainty over which of them had to be met in favor of a concrete and uncomplicated test. And it is functional because it separates out those state laws about which a court could readily say "we can find no sense in concluding that this particular state law does not regulate insurance when it so clearly does." *Cisneros*, 134 F.3d at 946.

2. Nothing in *Miller* supports the *Evans* rule of automatic preemption of laws of insurance policy interpretation.

There is nothing in *Miller* or its saving clause analysis which supports the *Evans* rule that state laws of insurance policy interpretation are automatically preempted. To the contrary, the *Miller* Court clearly endorsed prior decisions, including *Ward*, which had held state laws respecting the interpretation of insurance policies saved from preemption. In fact, at this point, it was so well-established that laws interpreting insurance policies could be saved from preemption that

the HMOs in *Miller* argued that the AWP laws were not "directed toward entities engaged in insurance" because they did not "control the actual terms of insurance policies":

> Petitioners claim that the AWP laws do not regulate insurers with respect to an insurance practice because, unlike the state laws we held saved from pre-emption in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985), *UNUM* [*i.e. Ward*] and *Rush Prudential*, they do not control the actual terms of insurance policies.

Miller, 538 U.S. at 337.[7] The HMOs made the same argument with respect to the second prong of the *Miller* test, that the state laws did not "substantially affect the risk pooling arrangement . . . since they do not alter or affect the terms of insurance policies." *Miller*, 538 U.S. at 338. This Court held it was *possible* for a law that did involve insurance policy interpretation to still be saved from preemption:

> We have never held that state laws must alter or control the actual terms of insurance policies to be deemed "laws . . . which regulate insurance" under § 1144(b)(2)(A); it suffices that they substantially affect the risk pooling arrangement between insurer and insured.

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[7] This petition had been assuming that *Evans* had been correctly decided but eroded by the later decisions of *Ward* and *Miller*. But *Miller's* citation to *Metropolitan Life*, a decision which predates *Evans*, as holding that a state law controlling the terms of insurance policies was saved from preemption, gives reason to believe that *Evans* was wrongly decided from the onset.

Miller, 538 U.S. at 338. Ms. Maurice submits this is hardly a ringing endorsement for *Evans'* notion that only laws that *do not* control the terms of insurance policies may be saved from preemption.

IV. Inconsistent regulation of ERISA plans was Congress' intended result when it saved state laws regulating insurance from preemption.

In the decision below, the Ninth Circuit held it was necessary to automatically preempt the California law interpreting AD&D policies to ensure "uniform rules of policy interpretation." (Pet. App. 4). In doing so, the Court failed to recognize that with respect to insured plans Congress *intended* that there be some lack of uniform regulation in how they are administered from state to state.

As noted above, ERISA contains a broad preemption provision in 29 U.S.C. § 1144(a), but also an equally broad provision saving state insurance law from preemption in 29 U.S.C. § 1144(b)(2)(A). In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985), this Court commented somewhat wryly on the breadth of both provisions, noting that "[w]hile Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time."

Metropolitan Life determined that, as broad as the saving clause was, the presumption "that the ordinary meaning of that language accurately expresses the

legislative purpose" required it to construe the statute as written:

> We therefore decline to impose any limitation on the saving clause beyond those Congress imposed in the clause itself and in the "deemer clause" which modifies it. If a state law "regulates insurance," as mandated-benefit laws do, it is not pre-empted.

Id. at 741.

Because of the acknowledged breadth of the saving clause, the *Metropolitan Life* Court recognized that the disunity with which the Ninth Circuit was concerned was actually intended by Congress:

> We also are aware that [the insurer's] construction of the statute would eliminate some of the disuniformities currently facing national plans that enter into local markets to purchase insurance. Such disuniformities, however, are the inevitable result of the congressional decision to "save" local insurance regulation.

Id. at 747. As a result, any concerns about the lack of uniform rules of policy interpretation caused by insurers having to comply with differing state insurance laws should be put to Congress rather than the courts. "Arguments as to the wisdom of these policy choices must be directed at Congress." *Id*.

This Court followed *Metropolitan Life* in *Rush Prudential*, which also noted that Congress issued a broad preemption provision but "a saving clause then

reclaims a substantial amount of ground." *Rush Prudential*, 536 U.S. at 364. Like *Metropolitan Life*, *Rush Prudential* decided to take Congress at its word, emphasizing that the broad police powers of the state should not be undercut unless it was clear this was Congress' intent:

> In trying to extrapolate congressional intent in a case like this, when congressional language seems simultaneously to preempt everything and hardly anything, we have no choice but to temper the assumption that the ordinary meaning accurately expresses the legislative purpose, with the qualification that the historic police powers of the States were not meant to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Rush Prudential, 536 U.S. at 365 (citations and attributions omitted). *See also N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995) ("we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law.").

Further, the Ninth Circuit's insistence that insurance policies be interpreted by a uniform body of federal law fails to note that federal common law in this area is hardly uniform. The *McClure* standard for AD&D policies, "substantial contribution" if the policy's definition of accidental loss is conspicuous and

"proximate cause" if it is not, differs from the standard in any other circuit. The Fourth and Eleventh Circuits have adopted a pure "substantial contribution" test,[8] while the Sixth and Tenth Circuits permit insurers to apply the language of the policies that the loss result "directly and independently" from the accident.[9] So, interpreting insurance policies under federal common law is no guarantee it will be "uniform."

V. The current lack of clarity as to the application of *Miller's* saving clause analysis has resulted in a split in the circuits, as well as *Miller* being flouted in the Ninth Circuit.

A. The continuing vitality of *Evans* and *Hammond* has resulted in a split in the circuits as to whether the *Miller* saving clause analysis applies to state laws of insurance policy interpretation.

1. Beyond the Ninth Circuit, the Tenth and perhaps the Fourth disregard *Miller* to hold state laws regarding insurance policy interpretation automatically preempted.

Courts in the Ninth Circuit, as shown by the decision below, refuse to apply the *Miller* test to state laws

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[8] *Dixon v. Life Ins. Co. of N. Am.*, 389 F.3d 1179, 1184 (11th Cir. 2004) and *Adkins*, 917 F.2d at 797.

[9] *Pirkheim v. First Unum Life Ins.*, 229 F.3d 1008, 1010 (10th Cir. 2000) and *Criss v. Hartford Accident & Indem. Co.*, No. 91-2092, 1992 U.S. App. LEXIS 13288, at *13 (6th Cir. 1992).

of insurance policy interpretation. There is similar confusion in other circuits as to *Miller's* application in these circumstances. This has resulted in a split among the circuits as to whether older authority, like *Evans* and *Hammond* and their holdings that state rules of insurance policy interpretation are not saved from preemption, survives *Ward* and *Miller*.

For example, in *Miller v. Monumental Life Ins. Co.*, 502 F.3d 1245, 1249 (10th Cir. 2007), the Court, citing to *Hammond*, 965 F.2d at 430, held that "[l]ike the Seventh Circuit, '[w]e cannot imagine any rational basis for the proposition that state rules of contract interpretation 'regulate insurance' within the meaning of § 1144(b)(2).'" The Court acknowledged *Miller* but held, contrary to this Court's holding in *Ward*, that it was impossible for state laws of insurance contract interpretation to pass its saving clause analysis:

> Rules of contract interpretation "force the insurer to bear the legal risks associated with unclear policy language." *Hammond*, 965 F.2d at 430. Shifting legal risk is, however, "a far cry from . . . transferring or spreading a policyholder's risk." *Id.* (internal quotation marks omitted). Thus, the rules of contract interpretation at issue do not satisfy the first prong of the *Miller* inquiry.

Monumental Life, 502 F.3d at 1249. Citing to numerous pre-*Ward* decisions such as *Evans*, *Blair*, and *Thibodeaux*, the *Monumental Life* Court concluded that "[o]ur decision to apply federal common law is consistent with our precedent, and that of the vast

majority of other circuits." *Id.* Other courts in the Tenth Circuit agree. "This Court has held that 'federal common law, governed by principles of trust law,' governs the interpretation of an ERISA plan." *Foster v. PPG Indus.*, 693 F.3d 1226, 1237 (10th Cir. 2012) (quoting from *Blair*, 974 F.2d at 1222 and *Monumental Life*, 502 F.2d at 1249). *See also Brimer v. Life Ins. Co. of N. Am.*, 462 F. App'x 804, 812 (10th Cir. 2012) ("The interpretation of the undefined terms of an ERISA plan is governed by federal common law.").

In *Johnson v. Am. United Life Ins. Co.*, 716 F.3d 813, 827 (4th Cir. 2013), the Fourth Circuit recognized the confusion on this issue caused by the continuing vitality of pre-*Miller* cases coupled with the more recent holding of *Monumental Life*. In *Johnson*, the issue was whether a North Carolina statute was saved from preemption. The statute, N.C. Gen. Stat. § 58-3-30, redefined accidental loss policies to essentially prohibit "accidental means" policies:

> "Accident", "accidental injury", and "accidental means" shall be defined to imply "result" language and shall not include words that establish an accidental means test.

N.C. Gen. Stat. § 58-3-30(b).[10] This state law, which redefines terms within AD&D policies to eliminate

[10] The distinction between "accidental result," which requires an unintended result, and "accidental means," which also requires an accidental cause, has been a long standing source of confusion. "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian

"accidental means" language, clearly meets the *Miller* test as it is "specifically directed" toward insurers and changes the meaning of certain policies in the insured's favor. *Miller*, 538 U.S. at 341-42.

Regardless that the North Carolina law squarely fit the *Miller* analysis, the insurer was able to point to a significant body of case law holding that all state laws of insurance policy interpretation were automatically preempted:

> AUL's position relies on a well-established line of decisions from our sister circuits embracing the notion that "[r]ules of contract interpretation force the insurer to bear the legal risks associated with unclear policy language," but that "[s]hifting legal risk is . . . [much different than] transferring or spreading a policyholder's risk."

Johnson, 716 F.3d at 827 (quoting from *Monumental Life*, 502 F.3d at 1249).

Given the uncertainty of the law and the state of the record, the *Johnson* Court declined to decide the saving clause issue. "The preemption question in this case is not easily answered, and we are especially loathe to wade into this issue in light of the fact that it was not well-developed by the parties below." *Johnson*, 716 F.3d at 827.[11]

Bog." *Landress v. Phx. Mut. Life Ins.*, 291 U.S. 491, 499 (1934) (Justice Cardozo, dissenting).

[11] Given the complexity and constantly changing nature of this area of the law it is hardly surprising that there is a

2. Numerous other circuits apply this Court's saving clause analysis to save state laws of insurance policy interpretation.

While the Ninth and Tenth Circuits continue to apply the rule that state laws of insurance policy interpretation never fit within the saving clause and the Fourth Circuit remains on the fence, courts in other circuits have had no difficulty construing this Court's saving clause analysis to apply to these laws. Significantly, where *Evans* would hold a state law preempted because it controlled the meaning of insurance policies, most other circuits take the position that the state law is saved from preemption for this very reason.

For example, *Med. Mut. v. DeSoto*, 245 F.3d 561, 569 (6th Cir. 2001) held that a California anti-subrogation law, Cal. Civ. Code § 3333.1, was saved from preemption. Quoting from *FMC Corp.*, which involved a Pennsylvania anti-subrogation law, the *DeSoto* Court decided the law fit within ERISA's saving clause *because* it changed the meaning of the insurance policy at issue:

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significant amount of intra-circuit inconstancy, coupled with the inter-circuit inconsistency detailed above. So, although *Johnson* is the Fourth Circuit's latest word on this issue, it had previously, in *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278, 286 (4th Cir. 2003), applied *Miller* to determine that a state anti-subrogation law was saved from preemption. And in the Ninth Circuit two pre-*Ward* decisions, *Wash. Physicians Serv. Ass'n v. Gregoire*, 147 F.3d 1039 (9th Cir. 1998) and *Cisneros* upheld laws relating to insurance policy interpretation even before the saving clause expansion in *Ward* and *Miller*. Neither decision cited to *Evans*.

> "There is no dispute that the Pennsylvania law falls within ERISA's insurance saving clause. . . . Section 1720 directly controls the terms of insurance contracts by invalidating any subrogation provisions they contain. . . . It does not merely have an impact on the insurance industry; it is aimed at it." *FMC*, 498 U.S. at 61.

DeSoto, 245 F.3d at 573-74.

Similarly, *Ben. Recovery, Inc. v. Donelon*, 521 F.3d 326, 328 (5th Cir. 2008) involved the validity of "Directive 175," promulgated by the Louisiana Insurance Commissioner, which subordinated an insurer's right to recover its expenses from a third party unless the insured had been made whole. Like *DeSoto*, the *Ben. Recovery* Court reasoned that the *Miller* saving clause test was met because the Directive made certain policy terms unenforceable:

> In *Miller*, *id.* at 339, the Court read the second prong to apply whenever a law "alters the scope of permissible bargains between insurers and insureds." Directive 175 certainly alters the permissible bargains between insurers and insureds by telling them what bargains are acceptable. Accordingly, the Directive affects "risk pooling" and is therefore saved from Section 514 preemption.

Ben. Recovery, 521 F.3d at 331.

In the Eighth Circuit, *Express Scripts, Inc. v. Wenzel*, 262 F.3d 829, 831-32 (8th Cir. 2001) upheld a law requiring HMOs to give equal treatment to all

pharmacies that were able to meet their cost requirements. Again, *Wenzel* recognized the state law controlled the terms of insurance policies and upheld it for this reason. "Laws that affect the type of policy an insurer may issue or that mandate that a contract term be included within an insurance contract satisfy this factor." *Wenzel*, 262 F.3d at 838. *See also Prudential Ins. Co. of Am. v. Nat'l Park Med. Ctr., Inc.*, 413 F.3d 897, 910-11 (8th Cir. 2005) (holding that an Arkansas AWP law was saved from preemption under the *Miller* analysis.).

In *Johnson v. Conn. Gen. Life Ins. Co.*, 324 F. App'x 459 (6th Cir. 2009), the issue was whether Ohio Rev. Code § 3911.06, which limited an insurer's right to rescind a policy for misstatements in the application to those that were "fraudulently made," was saved from preemption. The *Johnson* Court held that the Ohio law was saved under *Miller* because it "alters the scope of permissible bargains by dictating the conditions under which the insurer may deny recovery for misrepresentations in the application for life insurance." *Johnson*, 324 F. App'x at 465.

B. Ninth Circuit courts have continued to mechanically follow *Evans*' holding that state laws of insurance policy interpretation are preempted without examining the *Miller* factors.

This Court's saving clause analysis is being largely ignored in the Ninth Circuit. In spite of the fact that the *Evans* holding that all state rules of insurance

policy interpretation are preempted is obviously contrary to *Miller* and its progeny, it is still being cited as good law by the Ninth Circuit. This goes well beyond the present case where the Court, citing to *Evans*, refused to apply the *Miller* test to the state law at issue, holding that ERISA required insurance policies to be interpreted under uniform federal law. (Pet. App. 3-4).

For example, in an unpublished opinion the Ninth Circuit affirmed a district court case holding that "Nevada state law does not govern the interpretation of the term 'total disability' in Standard Insurance's long term disability policy." *Buchanan v. Standard Ins. Co.*, No. 05-16651, 2007 U.S. App. LEXIS 24526, 2007 WL 2988756, at *1 (9th Cir. 2007). Rather, "[t]he interpretation of terms in an ERISA insurance policy is governed by federal common law, not state law." *Id.*

Similarly, in *Dowdy v. Metro. Life Ins. Co.*, 890 F.3d 802 (9th Cir. 2018), when determining an accidental loss case similar to the present, the Ninth Circuit reaffirmed the rule from *Evans* that, under ERISA, insurance policies are governed by uniform federal common law and not state law. "When making such a determination under ERISA, the Court has generally applied federal common law to questions of insurance policy interpretation." *Dowdy*, 890 F.3d at 807.[12] *See also Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1125 (9th Cir. 2002) ("When faced with questions of insurance policy

[12] The *Dowdy* Court recognized, in a footnote, that *Miller* might require a different result, but held that this argument was waived by plaintiff's failure to raise it at the district court. *Dowdy*, 890 F.3d at 807, n. 1.

interpretation under ERISA, federal courts apply federal common law."). The Ninth Circuit has never repudiated or narrowed *Evans'* holding.[13]

Not surprisingly, then, numerous district courts continue to mechanically apply *Evans*, holding state laws of insurance policy interpretation preempted with no attempt to determine whether they fit within the scope of ERISA's saving clause as defined by *Miller*. For example, in *Brady v. United of Omaha Life Ins. Co.*, 902 F. Supp. 2d 1274, 1282 (N.D. Cal. 2012), the plaintiff contended that California law defining "total disability" should apply. The Court disagreed, holding that "her interpretation runs contrary to the Ninth Circuit's holding that 'the interpretation of ERISA insurance policies is governed by a uniform federal common law.'" *Brady*, 902 F. Supp. 2d at 1282 (quoting from *Evans*, 916 F.2d at 1439). The *Brady* Court did not cite to *Miller* but rather to numerous unpublished district court opinions mechanically holding that the California definition of total disability was not saved from preemption, none of which cited to or attempted to apply *Miller*:

- *Finkelstein v. Guardian Life Ins. Co. of Am.*, No. C 07-01130 CRB, 2008 U.S. Dist. LEXIS 123258, at *21-22 (N.D. Cal. 2008)

[13] The Ninth Circuit has not altogether ignored *Miller*. For example, it has applied it to save state laws governing the standard for post-denial judicial review, which do not involve the interpretation of insurance policies, in *Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan*, 856 F.3d 686 (9th Cir. 2017) and *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009).

("Finkelstein's argument that California's definition of 'total disability' should apply here is unavailing. This case is governed by ERISA, so California's definition is inapplicable.");

- *Leick v. Hartford Life & Accident Ins. Co.*, No. 2:07-cv-49-GEB-DAD, 2008 U.S. Dist. LEXIS 80975, at *13-14 (E.D. Cal. 2008) ("'Under ERISA, state law does not control the construction of the [benefits] policy.' In contrast, 'the interpretation of ERISA insurance policies is governed by a uniform federal common law.' *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990).");
- *Tavor v. Aetna Life Ins. Co.*, No. CIV 05-2867-PHX-SMM, 2008 U.S. Dist. LEXIS 19899, at *22 (D. Ariz. 2008) ("Under ERISA, state law does not control the construction of the benefits policy.").

One significant case, *Francis v. Anacomp, Inc.*, No. 10cv467 BEN (BGS), 2011 U.S. Dist. LEXIS 103924, at *6 (S.D. Cal. 2011), involved the same issue as here, whether the California "proximate cause" rule from *Slobojan* should govern coverage under an ERISA AD&D policy or whether the federal common law "substantial contribution" standard from *McClure* applied. In that case, the *Miller* test was raised with the district court, which declined to use this Court's saving clause analysis because it believed it was bound by Ninth Circuit authority:

> Plaintiff argues that *McClure* should no longer apply and that the *Slobojan* rule should be saved from preemption under the

> more recent Supreme Court test from *Kentucky Association of Health Plans* [*Miller*]. It may be that the Ninth Circuit will hold differently in the future if it reconsiders the preemption question. But currently, *McClure* is controlling.

Francis, at *6.[14]

Other district courts in the Ninth Circuit continue to apply the *Evans* rule of automatic preemption of state laws of policy interpretation with no attempt to apply *Miller's* saving clause analysis. For example, in *Kaufman v. Unum Life Ins. Co. of Am.*, 834 F. Supp. 2d 1186 (D. Nev. 2011), the claimant once again contended that state law controlled the definition of "total disability" in an ERISA governed insurance policy. Citing to *Evans* and the unpublished *Buchanan*, the *Kaufman* Court held these state laws were automatically preempted:

> This case is governed by ERISA, and not by California state law. In an unpublished opinion, the Ninth Circuit affirmed a district court case holding that "Nevada state law does not

[14] At least one district court within the Ninth Circuit has recognized that *Evans'* rule of automatic preemption for state laws of insurance policy interpretation has been eroded by more recent decisions of this Court. *Anderson v. Continental Casualty Co.*, 258 F. Supp. 2d 1127 (E.D. Cal. 2003), which held the California common law "process of nature rule" was saved from preemption, declined to follow the *McClure* analysis. "Further, in determining whether a law regulated insurance, the Supreme Court's developing saving clause jurisprudence utilized factors which had no relation to the Ninth Circuit's interpretation/regulation distinction." *Anderson*, 258 F. Supp. 2d at 1130.

> govern the interpretation of the term 'total disability' in Standard Insurance's long term disability policy." *Buchanan v. Standard Ins. Co.*, No. 05-16651, 2007 U.S. App. LEXIS 24526, 2007 WL 2988756, at *1 (9th Cir. 2007). Rather, "[t]he interpretation of terms in an ERISA insurance policy is governed by federal common law, not state law." *Id.*

Kaufman, 834 F. Supp. 2d at 1191. The list of district courts in the Ninth Circuit that refuse to apply this Court's saving clause analysis goes on and on. *See, e.g.*, *Ramos v. United Omaha Life Ins. Co.*, No. C 12-3761 PJH, 2013 U.S. Dist. LEXIS 1043, at *20 (N.D. Cal. 2013) ("state laws of insurance policy interpretation do not qualify for the savings clause exception and are preempted."); *Hall v. Regence BlueCross BlueShield of Or./HMO Or.*, Civil No. 00-695-AS, 2001 U.S. Dist. LEXIS 9856, at *4 (D. Or. 2001) ("ERISA claims must be decided under contract principles contained in federal common law."); *Smith v. Hartford Life & Accident*, No. C 11-03495 LB, 2013 U.S. Dist. LEXIS 13868, at *52 (N.D. Cal. 2013) ("Accordingly, the Ninth Circuit has held that state laws of insurance policy interpretation do not qualify for the saving clause exception and are preempted."); *Goetz v. Life Ins. Co. of N. Am.*, 272 F. Supp. 3d 1225, 1233 (E.D. Wash. 2017) ("state laws of insurance policy interpretation do not qualify for the saving clause exception and are preempted.").

Petitioner submits that when this Court decides an issue of federal law it has the right to expect that the various lower courts will decide cases consistent with that decision. This is not happening here; rather,

courts within the Ninth Circuit are flouting this Court's authority.

CONCLUSION

It is clear that the courts of the Ninth Circuit as well as those of other circuits are in serious need of a reminder that the mandates of this Court should be followed. This Court should seize this opportunity to clarify that its saving clause analysis in *Miller* is to be followed and applies to *all* state laws that regulate insurance, regardless of whether they involve the issue of insurance policy interpretation. As such, Ms. Maurice respectfully requests that her petition for certiorari be granted.

Respectfully submitted,

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