No. 20-953

IN THE

Supreme Court of the United States

MICHAEL D. ELLIS,

Petitioner,

v.

LIBERTY LIFE ASSURANCE COMPANY OF BOSTON,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court needs to clarify any further whether a forum court can ignore an ERISA plan's choice of law provision that selects the plan sponsor's home state in an action by a participant seeking benefits under the terms of the plan, when (1) all circuit courts have adopted tests that presume application of the choice of law provision absent unusual circumstances not present here; (2) the minor, insignificant distinctions in the circuits' tests would make no difference to the outcome here; and (3) the Tenth Circuit reached the correct result by honoring the plan's choice of law provision which promotes ERISA's underlying interests, including those interests recognized by the insurance saving clause.

LIST OF PARTIES

The caption of the case contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT UNDER RULE 29.6

Respondent Lincoln Life Assurance Company of Boston (f/k/a Liberty Life Assurance Company of Boston) ("Liberty") states that it is a wholly owned subsidiary of The Lincoln National Life Insurance Company, which is a wholly owned subsidiary of the following publicly traded corporation: Lincoln National Corporation.

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INTRODUCTION

In this case, a Pennsylvania employer elected to have its ERISA long-term disability ("LTD") plan governed by Pennsylvania law, to the extent not otherwise preempted by ERISA. Consistent with Pennsylvania law, the plan conferred discretion on Liberty, the claim administrator. But Ellis filed a lawsuit seeking plan benefits in Colorado, which has a statute banning discretionary language. Ellis argued that because he chose to file his lawsuit in Colorado, the Colorado statute wrote the discretionary language out of the Pennsylvania-governed plan. Ellis's argument, which the Tenth Circuit correctly rejected, violates all existing circuit authority and undermines the purposes of ERISA.

All the Circuit Courts to consider the issue have adopted tests that presume enforcing an ERISA plan's choice of law clause, absent unusual circumstances not present here. Circuit courts have uniformly honored the plan's choice of law provision where, as here, an employee's home state bans discretionary language, but the employer has chosen that its plan will be governed by the laws of its own home state that does not ban discretionary language.

The minor distinctions between the circuits' tests, which become relevant only under unusual circumstances, would make no difference to the outcome here. As such, this case is a poor vehicle to resolve those insignificant differences.

Not only is there no meaningful circuit split, the current state of the law fully promotes ERISA's goals of efficiency and predictability. Under existing authority, administrators and participants can easily determine (1) which state's law will apply to a participant's lawsuit for benefits (to the extent state law is not preempted by ERISA) and (2) what the standard of review will be because it will be consistent for every participant, no matter where they happen to live or file a lawsuit. This is precisely the framework that will sustain a robust system of employer-provided benefits. The Tenth Circuit correctly upheld the plan language in accordance with the existing authority from other circuits and fulfilling the purposes of ERISA.

Nor does applying the plan's chosen state law violate, or even implicate ERISA's saving clause. The choice of law provision simply dictates which state's laws (to the extent not preempted by ERISA, whether by virtue of the saving clause or otherwise) govern claims under this plan. In doing so, the choice of law provision both provides consistency and predictability as well as fulfills ERISA's desire to preserve state insurance laws.

There is no reason to accept certiorari in this case because the system is already working as intended.

STATEMENT OF THE CASE

I. Statutory Background.

There is no law requiring employers to provide disability benefits to their employees. To encourage employers to offer welfare benefits, such as disability benefits, Congress enacted The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq*. ERISA does not regulate the content of plans; rather, employers are free to provide as many or as few benefits as they wish. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985).

"The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004).[1] Accordingly, when disputes arise regarding an employee's entitlement to benefits, Section 1132 of ERISA completely preempts the field and provides a participant's exclusive remedy for such claims. 29 U.S.C. § 1132(a). This exclusive enforcement scheme avoids the inefficiencies that a "patchwork scheme of regulation" would cause and ensuring that benefit plans "will be governed by only a single set of regulations." *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987).

The hallmark of ERISA's exclusive enforcement scheme is that it requires "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Davila*, 542 U.S. at 215 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 55 (1987)). ERISA accomplishes

1. This implicates two types of preemption. First, ERISA's express preemption provision states that the statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," subject to several exceptions. 29 U.S.C. § 1144(a). Second, "[t]he preemptive force of [ERISA's civil remedies provision] is still stronger," and is subject to no exceptions. *Davila*, 542 U.S. at 209, 217 ("even a state law that can arguably be characterized as 'regulating insurance' will be preempted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme.").

this by requiring administrators and courts to strictly adhere to the terms of the plan. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 300 (2009). A participant's "claim therefore stands or falls by the terms of the plan, a straightforward rule of hewing to the directives of the plan documents that lets employers establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits." *Id.* (internal citations and quotations omitted). In holding, under similar circumstances, that courts must honor plan terms[2] as long as they are reasonable, this Court noted that adherence to the terms of the plan is the "linchpin of 'a system that is [not] so complex that administrative costs, or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place.'" *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 108 (2013) (*quoting Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)).

"Although it is a comprehensive and reticulated statute, ERISA does not set out the appropriate standard of review for actions under § 1132(a)(1)(B) challenging benefit eligibility determinations." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108–09 (1989). But

2. The duty to strictly enforce the plan's terms runs to the plan as a whole. Thus, when considering how a fiduciary carries out this duty, ERISA does not "favor payment over nonpayment"; rather, it "recognizes the need to preserve assets to satisfy future, as well as present, claims and requires a trustee to take impartial account of the interests of all beneficiaries." *Varity Corp. v. Howe*, 516 U.S. 489, 514 (1996); *see also Conkright v. Frommert*, 590 U.S. 506, 520 (2010) (administrators "have a duty to all beneficiaries to preserve limited plan assets . . . [and should] prevent . . . windfalls for particular employees").

because the plan is "the center of ERISA,"[3] the plan sponsor (the employer) can adopt a plan term that provides discretionary authority to an administrator. In that instance, courts cannot ignore such plan language but must instead defer to the administrator's decision, and overturn only for abuse of discretion. *Firestone*, 489 U.S. at 109. Courts respect the plan sponsor's choice to delegate primary interpretative authority to the claims administrator.

As this Court has previously explained:

> Congress enacted ERISA to ensure that employees would receive the benefits they had earned, but Congress did not require employers to establish benefit plans in the first place. . . . ERISA induces employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred.
>
> *Firestone* deference protects these interests and, by permitting an employer to grant primary interpretive authority over an ERISA plan to the plan administrator, preserves the careful balancing on which ERISA is based. ***Deference promotes efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation. It also promotes predictability, as an employer can rely on the***

3. *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 101 (2013).

> ***expertise of the plan administrator rather than worry about unexpected and inaccurate plan interpretations that might result from de novo judicial review*.**

Conkright, 559 U.S. at 516–18 (emphasis added).

To further avoid inconsistency and "a patchwork of different interpretations," national employers may adopt a plan that includes a term electing the law of the state where the employer is based, to govern any issue not otherwise preempted by ERISA. This practice, which lends certainty and consistency to benefit decisions, long-predates ERISA. *See, e.g.*, *Boseman v. Connecticut Gen. Life Ins. Co.*, 301 U.S. 196, (1937).[4] Because ERISA does not always preempt state laws regulating insurance, choice of law provisions have the added benefit of easily clarifying which state's "saved" insurance laws, apply to a given benefits dispute.

Despite the cardinal benefits of discretion and consistency, some states have enacted legislation to ban discretionary language in group insurance policies[5] that fund benefit plans. As described in the following section, Colorado, the state where Ellis chose to file a lawsuit, for instance, enacted a statute banning discretionary

4. Ellis suggests that choice of law provisions in group insurance policies were the industry's reaction to states banning discretionary clauses. This is demonstrably false. *Boseman* illustrates that choice of law provisions in group policies date back nearly a century.

5. ERISA preemption prevents states from altering the terms of self-funded plans. 29 U.S.C. § 1144(a), (b)(2).

language in any disability "insurance policy, insurance contract, or plan that is ***issued in this state*** . . . ." (emphasis added). But the plan sponsor, Comcast, adopted a plan term expressly choosing the laws of its home state, Pennsylvania, to the extent not preempted by ERISA.[6] Pennsylvania does not ban discretionary clauses.

As explained below, there is no test adopted by any circuit that allows Colorado's statute to rewrite the Pennsylvania plan. Nor does ERISA's saving clause require applying multiple states' regulations to a single ERISA plan—particularly one that has elected to be governed by one state's laws.

II. Factual Background.

Comcast established an employee welfare benefits plan for its employees. (App. 6a.) As part of its plan, Comcast offered long-term disability ("LTD") coverage to its employees. To fund that aspect of its plan, Comcast applied for a group LTD insurance policy from Liberty. Liberty issued Comcast a group policy effective June 1, 2005 (the "Group Policy"). (*Id.*; App. 48a.) Comcast and Liberty agreed that, to the extent not preempted by ERISA, the Group Policy would be governed by the laws of Pennsylvania, Comcast's home state. (App. 14a, 33a.) The Group Policy confers discretion on Liberty. (App. 13a.)

6. Although these statutes can raise preemption issues, depending on the specific language, Liberty is not relying on preemption here.

Ellis, a Comcast employee, stopped working on February 12, 2012 and submitted a claim to Liberty. (App. 6a.) According to Ellis, he suffered a hypoxic brain injury causing cognitive impairment when his heart stopped for 24 seconds while being treated in the hospital for a pulmonary embolism. (App. 6a-7a.) Although the medical evidence demonstrated that it was unlikely "a 24-second heart stoppage could cause cerebral hypoxia or neurological injury," Liberty gave Ellis the benefit of the doubt and approved his claim. (App. 8a.) Liberty's ongoing investigation, however, revealed that Ellis had stopped supporting his claim with treating physicians and instead relied almost entirely on a neuropsychologist hired by Ellis's attorney. (App. 38a-41a.) Through a vendor, Liberty retained an independent neuropsychologist to conduct neuropsychological testing, which revealed that Ellis did not have cognitive impairment and was exaggerating his symptoms. (App. 42a-43a.) Liberty concluded that Ellis had not satisfied his burden of proof and terminated benefits. (App. 9a-10a.) Through counsel, Ellis appealed. Liberty then asked a separate board-certified neuropsychologist to review the records and testing. (App. 10a-11a.) This neuropsychologist agreed that the records did not support cognitive impairment. (App. 11a.) Accordingly, Liberty upheld its decision on appeal. (*Id.*)

III. Procedural Background.

Ellis filed this lawsuit in the District of Colorado. The district court initially sided with Liberty, finding (1) that discretionary review applied because Liberty issued the Group Policy to Comcast before Colorado's discretionary ban took effect[7] and (2) upheld Liberty's claim decision under that deferential standard. (App. 72a-73a, 79a.) Ellis moved for reconsideration, arguing that an SPD that post-dated enactment of Colorado's statutory ban[8] brought the Group Policy within the statute's purview. (App. 49a.) The district court agreed and applied a de novo review, ultimately determining that Liberty's decision was not supported by a preponderance of the evidence[9] and finding in favor of Ellis.

7. Although the district court correctly found that the Colorado statute did not apply because the Group Policy predated it, the district court erroneously struck the choice of law provision from the Group Policy. (App. 70a.) The district court incorrectly applied a Colorado case, which, in turn, incorrectly called for only part of the test set forth in the Restatement (Second) Conflicts of Law § 187. (App. 70a-71a (relying on *Hansen v. GAB Bus. Servs., Inc.*, 876 P.2d 112, 113 (Colo. App. 1994).) As set forth in Section I.A, below, in ERISA cases, conflicts of law are resolved by federal common law, not by applying the substantive law of the forum state. As further set forth in Section I.A, Section 187 contains a threshold test (whether ERISA permits the parties to resolve the particular issue by contract) that the district court never applied. (*Id.*)

8. The SPD was not prepared by Liberty and had no impact on Liberty's obligations, which were governed solely by the Group Policy. (App. 50a.)

9. In doing so, the district court impermissibly flipped the burden of proof. It is always the claimant's burden to prove entitlement to benefits; Liberty had no obligation to disprove Ellis's claim. *See, e.g.*, *Rasenack ex rel. Tribolet v. AIG Life Ins. Co.*, 585 F.3d 1311, 1324 (10th Cir. 2009); *see also Hancock v. Metropolitan Life Ins. Co.*, 590 F.3d 1141, 1155 (10th Cir. 2009)

Liberty appealed to the Tenth Circuit, arguing that the court erroneously failed to honor the Group Policy's choice of law provision, which required application of Pennsylvania law, not Colorado law. Liberty further argued that the Colorado statute did not apply on its face because the Group Policy was not issued in Colorado and, beyond that, was issued before the discretionary ban took effect in 2008. Finally, Liberty argued that its decision would withstand any standard of review. (App. 4a-5a.) The Tenth Circuit agreed with Liberty, finding that the Group Policy's choice of law provision was effective because the state chosen (the state where Comcast is headquartered) had a "legitimate connection" to the plan. (App. 33a.) After determining that discretionary review should apply, the Tenth Circuit painstakingly reviewed the administrative record and upheld Liberty's decision. (App. 35a-46a.) Specifically, the court explained:

> Liberty relied on two expert neuropsychologists, . . . who both concluded that there was insufficient evidence from Ellis's medical records and test data to support his claim of cognitive deficits. Because the record shows Liberty and the experts it retained considered all the pertinent evidence submitted by Ellis and that Liberty reasonably gave less weight to much of Ellis's evidence, we cannot say that Liberty abused its discretion in denying Ellis's claim for benefits.

(App. 46a.)

While the parties were awaiting the Tenth Circuit's decision, anticipating he would not prevail on appeal, Ellis and his attorney lobbied the Colorado Legislature to modify the discretionary ban so that it retroactively rewrites the definition of a policy "issued in [Colorado]" to include:

> every health and disability insurance policy, insurance contract, insurance certificate, and insurance agreement existing, offered, issued, delivered, or renewed in the state of Colorado or providing health or disability benefits to a resident or domiciliary of the state of Colorado and every employee benefit plan covering a resident or domiciliary of the state of Colorado, whether or not on behalf of an employer located or domiciled in Colorado, on or after August 5, 2008, notwithstanding any contractual or statutory choice-of-law provision to the contrary.

C.R.S. § 10-3-1116(8).[10] Because the amendment only took effect on September 14, 2020, no lower court ever analyzed it in this case. Ellis petitioned for an en banc rehearing, but the Tenth Circuit denied his request without analysis. (App. 1a.) To date, no lower court has assessed the impact of Ellis's legislative efforts.

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10. Although Ellis's sponsored amendment purports to be retroactive, the District of Colorado (as affirmed by the Tenth Circuit) has already held that the Colorado Constitution bars the retroactive application of the discretionary ban statute. *McClenahan v. Metropolitan Life Insurance Co.*, 621 F. Supp. 2d 1135 (D. Colo. 2009), aff'd, 416 Fed.Appx. 693 (10th Cir. 2011) (statute only applied to insurance policies issued after 2008).

REASONS FOR DENYING THE PETITION

There is no circuit split for this Court to resolve. All circuits apply tests that presume applying a choice of law clause absent unusual circumstances. And when, as here, a plan elects to be governed by its home state law, the circuit courts have uniformly refused to ignore a valid choice of law provision just because a forum state bans discretionary clauses. Although the Sixth Circuit applies a slightly different test than the other circuits when unusual circumstances do occur, applying that test here would not change the outcome. This case is thus a poor vehicle to resolve what is, at most, a minor disagreement between the circuits. Accordingly, there is no circuit split to resolve and accepting certiorari to clarify what test courts should use in analyzing ERISA choice of law provisions would not change the result in this case. Any opinion would be advisory. The existing circuit authority fulfills ERISA's goals and should not be disturbed.

Moreover, Ellis makes arguments that he never made below: that Restatement Section 187 should govern the choice of law analysis and that honoring the employer's chosen law somehow violates ERISA's saving clause. Not only would neither of these arguments affect the Tenth Circuit's decision, they have the added drawback of raising issues not litigated below.

I. There Is No Circuit Split That Would Affect The Outcome Of This Case Or Any Case Like It.

A. All Circuits Enforce an ERISA Plan's Choice of Law Clause Absent Unusual Circumstances Not Present Here.

Four circuits—the Eighth, Ninth, Tenth and Eleventh—have adopted nearly identical tests when deciding whether to honor a choice of law provision in an ERISA plan. The Eighth, Ninth and Eleventh Circuits enforce the choice of law provision "if not unreasonable or fundamentally unfair." *Brake v. Hutchinson Tech. Inc. Group Disability Income Ins. Plan*, 774 F.3d 1193 (8th Cir. 2014); *Wang Laboratories, Inc. v. Kagan*, 990 F.2d 1126, 1128–29 (9th Cir. 1993); *Buce v. Allianz Life Ins. Co.,* 247 F.3d 1133, 1149 (11th Cir. 2001). In this case, the Tenth Circuit held that if "the plan has a legitimate connection to the State whose law is chosen," then "the selected law should govern whether a discretion-granting provision is enforceable." *Ellis v. Liberty Life Assurance Co. of Boston*, 958 F.3d 1271, 1288 (10th Cir. 2020). While the tests use slightly different language, they do not meaningfully differ. The panel below simply focused the "reasonableness" inquiry on the plan's connection to the chosen state. *Ellis*, 958 F.3d at 1288. In practice, finding that the plan has "a legitimate connection to the State whose law is chosen" would ordinarily compel a finding that the provision was reasonable. This is particularly true where, as here, the chosen law is the state where the plan sponsor is based.

Additionally, the Fifth Circuit has twice enforced a plan's choice of law provision in cases against a claim administrator for plan benefits. *Singletary v. United Parcel Serv., Inc.*, 828 F.3d 342, 351 (5th Cir. 2016) (claimant did not meet burden to establish that choice of law provision was invalid, rejecting argument "that because the defendants have chosen to insure [citizens of the forum state], they should be subject to its laws"); *Jimenez v. Sun Life Assur. Co. of Canada*, 486 Fed. Appx. 398, 407–08 (5th Cir. 2012)(claimant did not meet burden to invalidate choice of law provision selecting state where employer was based, even when claimant lived and worked in forum state).[11]

The Second Circuit has also enforced a plan's choice of law provision in a case in which a plaintiff sought to recover long-term disability benefits because "the policy on its face elects Pennsylvania law as controlling its interpretation and stipulates that it is to be delivered in Pennsylvania." *Greenberg v. Aetna Life Ins. Co.*, 421 Fed. Appx. 124, 125 (2d Cir. 2011). In so holding, the Second Circuit did not adopt any test that conflicts with the "reasonableness/ legitimate connection" test.

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11. *Jimenez* is unpublished, but its reasoning was subsequently incorporated in to *Singletary*, which is binding Fifth Circuit authority. In both cases, the Fifth Circuit declined to decide ***which*** test should apply in assessing the validity of an ERISA plan's choice of law provision; however, all three options articulated in the respective opinions begin with the presumption that the plan's choice of law will be enforced unless the participant suing for plan benefits establishes some unusual circumstance. *See, Jimenez,* 486 Fed. Appx. at 408; *Singletary*, 828 F.3d at 351. Tellingly, both courts determined the plan's chosen law was valid under any test in garden-variety cases in which a plan participant has sued the claim administrator arguing entitlement to benefits under the terms of the plan.

Citing extensively to *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918 (6th Cir. 2006), Ellis tries to manufacture a non-existent circuit split. Specifically, he claims that in *Durden*, the Sixth Circuit applied a test set forth in the Restatement (Second) of Conflicts of Laws, Section 187,[12] to reject the plan's choice of law provision, inferring that the Sixth Circuit's test would produce a different result here.[13] But Ellis is wrong. The Sixth Circuit in *Durden*, like all of the other circuits, adopted a test that presumes the parties' choice of law provision is effective, absent unusual circumstances. Ellis's argument would require courts to ignore the very first prong of the Restatement Test.

Under Section 187, the first inquiry is whether "the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Restatement (2d) Conflicts of Law § 187(1). To determine whether the particular issue could be resolved by an explicit provision in the plan, the Sixth Circuit looked to ERISA and determined under the unique facts of that case (an interpleader where the court had to determine which competing claimant was a "surviving spouse"), that the parties could not have resolved the issue by an explicit provision in the plan. The court stated:

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12. For brevity, Liberty will refer to the Restatement (Second) of the Conflicts of Law as "the Restatement."

13. This is a completely new argument. Ellis never argued that Restatement Section 187 should govern his claim; nor did he even cite to *Durden* until his petition for rehearing en banc, where he only mentioned it in passing as evidence of a circuit split. The entire argument is thus not suitable for review in this Court. *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233 (1954) ("we will not undertake to review what the court below did not decide").

> ERISA provides that the terms of a plan alone cannot prevent survivor's benefits from being paid to the surviving spouse. While plan documents may designate someone other than the surviving spouse to receive such benefits if the spouse has signed a written, notarized consent form, the parties to the plan alone do not have the power to grant survivor's benefits to anyone who is not the surviving spouse under applicable law. ***Therefore, [under ERISA] the parties to the Plan could not have resolved the issue of which claimant is entitled to [the] survivor's benefits by explicit provision in the contract***.

Durden, 448 F.3d at 923-24 (internal citations omitted) (emphasis added).[14]

Accordingly, under Restatement Section 187, if ERISA does permit the parties to resolve the particular issue "then the choice of law provision is enforceable. ***Under such circumstances there are no exceptions***." *Id.* at 923 (emphasis added).[15]

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14. ERISA requires that pension benefits must be paid to a surviving spouse absent an express written waiver by the surviving spouse. 29 U.S.C. §1055(a).

15. This echoes the Court's admonition in *Kennedy* "[t]he plan administrator is obliged to act in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with [ERISA] and ERISA provides no exemption from this duty when it comes time to pay benefits." 555 U.S. at 300.

Ellis simply assumes, without analysis or support, that when applying the first prong of Section 187, courts would look to the forum state's law in determining whether the parties could resolve the particular issue by virtue of the plan's terms. But the forum state's law is irrelevant[16] because the test is whether ***ERISA*** permits the parties to resolve the particular issue. *See Durden*, 448 F.3d at 923-34; *see also Pilot Life*, 481 U.S. at 56 (by enacting ERISA, Congress "intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans").

Decades of jurisprudence enforcing discretionary language, extolling its benefits, and clarifying the parameters of discretionary review, demonstrate that ERISA does, in fact, permit the parties to resolve the standard of review. *Firestone*, 489 U.S. at 111-13; *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008); *Conkright*, 559 U.S. 506, 511-13. There are, then, "no exceptions" and every choice of law provision is effective when analyzing whether the court will honor the discretionary grant. The Sixth Circuit test, then, is actually more deferential than the "reasonableness/legitimate connection" tests described above as applied to discretionary clauses. The Court thus need not analyze the Restatement any further.

16. It would be completely circular to look to the law of the state where the participant decides to file suit, which has a discretionary ban, to determine whether the plan's grant of discretion would be permitted. In every case, the forum state's law would automatically control, giving Colorado an easy end-run around a valid plan term.

In sum, all the circuits to have addressed the issue presume that the ERISA plan's choice of law provision is effective. Under any and all of these tests, the choice of law clause here was enforceable. There is no circuit split that would make a difference in this case.

B. The Minor Distinctions in the Circuits' Tests Would Make No Difference to the Outcome Here.

1. Every Circuit to Consider the Applicability of a Plan's Discretionary Clause Has Honored a Plan Sponsor's Choice of its Home State's Law That Does Not Ban Discretionary Clauses.

Three circuits—the Eighth, Ninth, and Tenth—have decided the precise issue presented here: whether a benefit decision is reviewed for an abuse of discretion where (1) the plan confers discretion, (2) the forum state bans discretionary clauses, and (3) the ERISA plan contains a choice of law provision selecting the law of a state that does not ban discretionary clauses. *Brake*, 774 F.3d at 1197; *Fenberg v. Cowden Auto. Long Term Disability Plan*, 259 Fed. Appx. 958, 959 (9th Cir. 2007);[17] *Ellis*, 958 F.3d at 1288-89. Those circuits have uniformly enforced choice of law provisions and applied discretionary review. *Id.*

17. Though *Fenberg* is unpublished, it reiterates—specifically in the discretionary clause context—the binding Ninth Circuit authority on enforcing choice of law provisions in ERISA plans. *Wang*, 990 F.2d at 1128–29. In *Wang*, the Ninth Circuit unambiguously stated that choice of law provisions should be enforced so long as they are "not unreasonable or fundamentally unfair." *Id.*

As explained above, these circuits all applied a virtually identical "reasonableness/legitimate connections" test. Thus, under the specific discretionary review question at issue here, the law is uniform and there is nothing for this Court to resolve.

2. Applying the *Durden* Restatement Test Would Result in Application of the Choice of Law Clause Here.

But even indulging Ellis's argument and actually performing the full *Durden*/Restatement analysis would not affect the outcome of this case. Importantly, *Durden* involved unusual circumstances that simply have no application here. Unlike any of the cases discussed above, *Durden* did not involve a participant's claim for benefits against a claim administrator and did not hinge on interpreting and applying plan terms. As explained, *Durden* was an interpleader action. The court was not tasked with deciding whether a surviving spouse was entitled to benefits under the terms of an ERISA pension plan. Instead, the issue was which state's law would apply to determine which of two claimants simultaneously married to the decedent was a "surviving spouse" entitled to pension benefits. Adding further complexity to the case, neither marriage had any connection to the employer's home state (Michigan), which was selected by the plan's choice of law provision.[18] *Durden*, 448 F.3d at 922-23. With this extraordinary factual background, the Sixth Circuit looked to Restatement Section 187 to determine

18. One of the participant's wives lived in Tennessee and the other lived in Ohio, which is where the participant died. Neither of the marriages had any connection to Michigan. *Id.* at 921.

which of the simultaneous marriages produced the legally-recognized "surviving spouse." The seemingly-variant outcome in that case was not the result of a different test, but rather because the court's analysis centered on what amounted to a state family law dispute between two beneficiaries in which the plan was only a nominal party (having conceded that benefits were due under the plan terms, but being unsure whom to pay). *Id.* at 923. The court acknowledged that this was "one of the rare cases" in which a court may not enforce a choice of law provision in an ERISA plan. *Id.* at 927.

Moreover, as explained, the *Durden* court had to advance beyond the first step of Restatement Section 187 (whether the parties could have resolved the particular issue), because ERISA did, in fact, bar the parties to the plan from resolving the matter at issue (which beneficiary is the surviving spouse) with a specific plan provision. *Id.*at 923-24. Accordingly, the court went on to assess the remainder of Section 187. Again, that step is not necessary when the "particular issue" is one the parties can resolve by the terms of the plan, such as discretionary review. But proceeding with the (unnecessary) *Durden* analysis would yield the same result here. As explained below, when a court is tasked with determining whether a participant is entitled to benefits under the terms of a group disability policy, Restatement Sections 187 and 192 function together to confirm that the employer's home state law always applies by operation of the choice of law provision or because it is the law of the employer's home state.

In proceeding with the additional test that is not necessary in this case, the *Durden* court reaffirmed that even where ERISA does not permit the parties to resolve the issue, "[a] choice of law provision is usually still given effect." *Id.* at 924. Restatement Section 187(2)(b),[19] articulates a narrow exception stating that a choice of law provision will not be effective when "(1) it would be contrary to a fundamental policy of the state whose law would otherwise be applied; and (2) the state whose law would otherwise be applied has a materially greater interest in the particular issue under consideration than the state named in the choice of law provision." *Id.*

Given the issue presented in *Durden*, the court explained that in the absence of a choice of law provision, it "would look to section 283 of the Restatement which governs the law applicable to determining the validity of a marriage." *Id.* Here, again, this case diverges from *Durden*. When determining what state law to apply to a group policy (absent a choice of law provision), the Sixth Circuit has advised that Restatement Section 192, comment h governs the conflicts of laws analysis "where the master policy controls the rights of the insured." *Med. Mut. of Ohio v. deSoto*, 245 F.3d 561, 572 (6th Cir. 2001).[20]

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19. There is another exception in 187(2)(a) for when the chosen state law does not have a substantial relationship to the parties or transaction, which "clearly does not apply" when the parties chose the law of the state where the employer is headquartered (as in this case and in *Durden*). *Id.*

20. The *DeSoto* court ultimately did not apply Restatement Section 192 because of the "unique circumstances of [the] case"; the insurance certificate, not the master policy, was the operative contract. *Id.* at 571-72. "If this suit were premised upon the contract between [the insurer and the employer]—that is, the master policy—as is generally the case, we might well reach a different conclusion." *Id.* at 572. Here, there is no dispute that the Group Policy governs Ellis's claim.

Comment h to Restatement Section 192 confirms that, for group insurance policies, (1) choice of law provisions are likely to be enforced and (2) even absent a choice of law provision, the controlling law is generally the law where the employer is based:

> In the case of group [disability] insurance, rights against the insurer are usually governed by the law which governs the master policy. This is because it is desirable that each individual insured should enjoy the same privileges and protection. So where an employer arranges for group [disability] insurance for its employees, the rights of a particular employee against the insurer will usually be determined, in the absence of an effective choice-of-law clause and at least as to most issues, ***not by the local law of the state where the employee was domiciled and received his certificate but rather by the law governing*** the master policy with respect to that issue. This will usually be ***the state where the employer has his principal place of business***.

The Sixth Circuit has also recognized that beneficiary-versus-beneficiary cases (like *Durden*), which often turn on ancillary family or property law questions, are governed by different choice of law rules than participant-versus-claim administrator or insured-versus-insurer cases, in which the primary issue is "the operation of the insurance contract terms." *Travelers Ins. Co. v. Fields*, 451 F.2d 1292, 1296–97 (6th Cir. 1971); *see also id.* at 1296 n.4 (citing to Section 192 to explain that the policy's choice of law provision would likely be enforced if the case was an insured-versus-insurer case rather than a dispute between beneficiaries).

> Choice-of-law provisions contained in group life insurance policies are more likely to be given effect than in the case of ordinary life insurance. This is because the organization or individual which procures the master policy will usually have a stronger bargaining position than an individual insured with the result that the choice-of-law provision is less likely to have a "take-it-or-leave-it" character.

Restatement (Second) of Conflict of Laws § 192, cmt. h, l[21] (1971) (emphasis added).[22]

Application of Section 192 thus demonstrates that Pennsylvania law would apply either because the choice of law provision is enforceable or because Pennsylvania is where Ellis's employer is based. This moots the remainder of the 187(2)(b) analysis because the second and third steps of the analysis would require comparing Pennsylvania law to Pennsylvania law.

Ellis makes another analytical error on this prong by (again) assuming that Colorado's "law would otherwise be

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21. Comment h refers specifically to group life insurance policies and comment l extends it to disability insurance.

22. As Comment h highlights, the master policy typically controls inquiries into whether a claimant is entitled to benefits. A certificate is merely a document provided to an insured summarizing the terms of coverage, but not independently providing coverage. *See, e.g.*, *Boseman*, 301 U.S. at 198-99, 203 (a certificate "served merely as evidence of the insurance of the employee. [The employee's] rights and [the insurer's] liability would have been the same" even if no certificate was ever issued because the group policy sets forth the terms of coverage).

applied" if the choice of law provision is invalidated. This is wrong because under Restatement Section 192, the law of the state where the employer is based is the law that will "otherwise apply" if the choice-of-law provision is invalidated. The analysis could, potentially, proceed if the choice of law provision elected the law of some state with no connection to the employer. But whenever a group policy elects the law of the employer's home state, that state's law will apply. Applying *Durden* and the Restatement[23] makes no difference to the result here because Pennsylvania law would apply—either because the choice of law provision is enforceable or because Comcast is based in Pennsylvania.[24]

23. For the purposes of this brief, Liberty assumes the Sixth Circuit would use the *Durden* analysis in a participant-versus-claim administrator case over entitlement to plan benefits. But it is worth noting that *Durden* preceded this Court's holding in *Heimeshoff*, 571 U.S. at 109–10 (2013), that because "the plan is at the center of ERISA," plan terms (in that case, a contractual limitations period) will be upheld if they are reasonable. Indeed, even under the unique *Durden* fact pattern, the dissenting opinion advocated a much simpler test honoring the parties' chosen plan term, similar to *Heimeshoff* and all of the other circuit cases discussed above. *Durden*, 448 F.3d at 292 (Merritt, J., dissenting) (Restatement analysis is "overly complex and convoluted and . . . impair[s] the explicit obligations concerning the governing law that the parties themselves wrote into their contract").

24. To be clear, Liberty's only purpose in even engaging in what the *Durden* dissent characterized as an "overly complex and convoluted" Restatement analysis, is to illustrate that applying such analysis to this set of facts, would not change the outcome. And thus, there is no circuit split. There is no reason or need for this Court to clarify the proper mode of analysis in a disparate fact pattern that the *Durden* majority itself characterized as the "rare case." But even if there was, this case would not be a suitable vehicle to do so.

C. There Is No Confusion Among The Circuits As To The Applicable Standard of Review Where The Plan Sponsor Chooses The Law Of Its Home State And That Home State Does Not Ban Discretionary Clauses.

Ellis imagines chaos and confusion on the part of beneficiaries who live in states that ban discretion because these beneficiaries will not know what standard of review courts will apply if they sue for ERISA-governed benefits in light of the supposedly different tests employed by the circuits. There is no risk of such confusion (even assuming claimants are aware of standards of review and discretionary bans when submitting their claims). In this type of lawsuit, courts uniformly honor choice of law provisions that elect the choice of law where the employer is headquartered—because it is not unreasonable or fundamentally unfair, because the plan has a legitimate connection to the state, or because Restatement Section 187 or 192 apply. The different verbiage used by the circuits is a distinction without a difference—under any test, Colorado's legislature cannot change the terms of this Pennsylvania group policy issued to a Pennsylvania employer that complies with Pennsylvania insurance law (which does not ban discretionary clauses). The law already provides certainty on this point.

II. Ellis's Proffered Rule Contravenes Established Precedent From This Court.

More than eight decades ago (before ERISA and before the current Restatement) this Court recognized that when a group insurance policy covers a group of employees, the rights of those employees against that insurer are governed by the law of the state where the employer is headquartered—particularly when the group policy expressly elects that law. *Boseman*, 301 U.S. 196 at 200. The policy in *Boseman*, like the Group Policy here, offered disability benefits to the employees of a Pennsylvania-based employer. *Id.* at 198. Also echoing the Group Policy here, the *Boseman* policy stated that it was "issued and delivered in the Commonwealth of Pennsylvania and is governed by the laws of that Commonwealth." *Id.* at 200. The plaintiff, a Texas resident, applied for disability benefits, but failed to give notice during the policy's 60-day notice period, a permissible period under Pennsylvania law. *Id.* at 198. Texas, however, had a statute voiding any notice period less than 90 days. *Id.* The plaintiff argued that Texas law governed his rights against the insurer under the policy because he resided in Texas and received his insurance certificate there. *Id.* at 203. The Court disagreed, concluding that Pennsylvania, not Texas, law governed the policy not only because the policy was issued and delivered in Pennsylvania and elected Pennsylvania law, "but also by the purpose of the parties to the contract that everywhere it shall have the same meaning and give the same protection, and that inequalities and confusion liable to result from applications of diverse state laws shall be avoided." *Id.* at 206.

Boseman is consistent with ERISA and with the Restatement: Pennsylvania law governs the parties' dispute. Ellis's argument utterly fails to account for and thus contravenes *Boseman*—another reason the Court should deny his petition for certiorari.

III. The Tenth Circuit's Decision Does Not Implicate The Saving Clause Or State Regulation Issues.

Ellis argues that the Tenth Circuit's decision impermissibly infringes on states' rights to regulate insurance as preserved in ERISA's saving clause. It does not. The cases invariably honoring a plan's choice of law election in participant-versus-claim administrator disputes simply decide which state's law (to the extent not preempted by ERISA due to the saving clause or otherwise), applies to the plan. The parties to the plan did not "displace any state regulation simply by inserting a contrary term in plan documents."[25] (Petition, at 6.) Although *Unum Life Insurance Company v. Ward*, 526 U.S. 358 (1999) provides a helpful sound bite for Ellis, it is wholly irrelevant to the issue here. *Ward* was not a choice of law case. The parties agreed that California's state insurance regulations would apply to the plan to the extent they were not preempted; the Court was instead tasked with determining whether California's notice-prejudice rule was a law regulating insurance that was "saved" from preemption.

Here, the dispute is not about whether a state law can be "saved," it is a dispute over which state's law applies when a sophisticated national employer agreed that its insurance-funded ERISA benefit plan would be subject to regulation by the state where the employer was headquartered, to the extent not otherwise preempted by ERISA. This is not, as Ellis portrays, an issue of

25. Indeed, what Ellis wants is to give every state the ability to "displace any [other] state regulation simply by inserting a contrary term in" its own regulatory scheme.

a federal court usurping state power that has been expressly preserved in the saving clause. Rather, it is an issue of whether a court sitting in a state that bans discretionary clauses, can alter the terms of an insurance contract funding an employee benefit plan (1) between a foreign insurer and a foreign employer; (2) delivered to the employer in the state where the employer is based; and (3) expressly electing the law of the state where the policy was delivered and where the employer is based.[26]

26. The Colorado statute that existed throughout this litigation expressly governed only policies "issued in [Colorado]," which the Group Policy was not. C.R.S. § 10-3-1116(2); *Boseman*, 301 U.S. at 198-99, 203 (policy is issued where the group policy issued, not where each certificate is issued because a certificate "served merely as evidence of the insurance of the employee. [The employee's] rights and [the insurer's] liability would have been the same" even if no certificate was ever issued). The fact that the version of the statute actually in effect during the relevant time frame, does not, by its terms, apply to the Group Policy at issue (which was not "issued in Colorado") provides yet another reason why the result here would not change regardless of the choice of law analysis.

Moreover, as explained above, anticipating he would lose the appeal, Ellis lobbied the state legislature to expand the statutory definition of "issued" beyond recognition and retroactive for a 12 year period. (Response to Ellis's Petition for Rehearing, at 10.) Because the statutory amendment post-dated the panel's decision, the new statutory language was not analyzed by the lower courts in this case and is not appropriate to consider here in the first instance. *Walters v. City of St. Louis, Mo.*, 347 U.S. 231, 233 (1954) ("we will not undertake to review what the court below did not decide"). It is worth noting, however, that the amended statute is constitutionally problematic because it allows Colorado to meddle in the terms of a contract formed in and under the laws of another state. *See, e.g.*, *New York Life Ins. Co. v. Head*, 234 U.S. 149, 163-64 (1914) (licensing a foreign insurer to conduct business in a State

Ellis attempts to frame the saving clause and ERISA's desire to avoid a patchwork of different regulations as inherently at odds. But there is no tension between the saving clause and national consistency. ERISA law can both preserve the right of a state to regulate insurance and ensure consistency by determining which state's "saved" insurance law applies to disputes concerning employees' entitlement to benefits under the terms of the plan. The choice of law cases are thus entirely in line with ERISA's goal of consistency as well as with the purpose of preserving the ability of a state to regulate insurers that issue policies subject to that state's law.

CONCLUSION

Discretionary review fulfills the purposes of ERISA, as does honoring the plan sponsor's decision to have the plan governed by the laws of the state where it is based when participants sue for plan benefits. The circuits unanimously recognize choice of law provisions accomplishing those things. Moreover, the plan will still be subject to state regulation as contemplated by the

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does not "extend[] state power so as to cause it to embrace subjects wholly beyond its legitimate authority," that is, "the domestic concerns of other States."); *cf BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570–72 (1996) ("one State's power to impose burdens on the interstate market . . . is . . . constrained by the need to respect the interests of other States"). Additionally, the amended statute purports to apply 12 years retroactively and retroactive application of the original statute was already determined to violate the Colorado Constitution. *McClenahan,* 621 F. Supp. 2d at 1142-43; *see also E. Enterprises v. Apfel*, 524 U.S. 498, 528–29, 118 S. Ct. 2131, 2149, 141 L. Ed. 2d 451 (1998) (retroactive statutes may violate the federal constitution).

savings clause, but without having the increased expense and uncertainty of multiple states regulating the same plan. The Court should deny the petition for certiorari because there is no circuit split or important issue to be resolved and the Tenth Circuit's decision would stand under any test.

Respectfully submitted this 18th day of March 2021.

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