No. 20-953

IN THE

Supreme Court of the United States

MICHAEL D. ELLIS,
Petitioner,

v.

LIBERTY LIFE ASSURANCE COMPANY OF BOSTON, a New Hampshire corporation,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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April 8, 2021

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INTRODUCTION

The fundamental case for granting certiorari is largely unchallenged by Liberty. The Tenth Circuit confronted a preexisting circuit split on an ERISA question, found the conflicting approaches to be "inadequate" as a matter of "policy," and plucked a new rule out of thin air. By the court's own admission, it did so to hand insurers a way to avoid "patchwork regulation by a variety of states"—even though its rule applies only to state laws that fall within ERISA's saving clause, where Congress wanted "varying insurance regulations" to be able to apply to ERISA plans. *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 376 n.6 (1999). And the court did so, further, in a case where the underlying dispute—the standard of judicial review for benefits determinations—has been the subject of multiple decisions of this Court and is of independent importance.

The result is a clear multi-circuit split. And it is a split that affects outcomes: As we explained in the petition (at 17–18), the Sixth Circuit's decision in *DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918 (6th Cir. 2006), would have come out the other way under the Tenth Circuit's test. We also explained that the district court below applied the Sixth Circuit's test, held that Colorado's ban on discretionary clauses governs, engaged in de novo review, and ruled for Ellis. The Tenth Circuit then made up its own test and disagreed at every step.

Liberty does not deny any of this. It concedes that the Sixth Circuit applies a "different test" and that there is "disagreement between the circuits." BIO 12. It concedes that the issue is recurring, even in the specific context of state laws banning discretionary clauses, with multiple circuits having decided that "precise issue." BIO 18. It also concedes that the district court below, which applied the Sixth Circuit's test, reached the opposite conclusion as the

Tenth Circuit, which did not apply that test. Nor does Liberty dispute that the Tenth Circuit's test would have flipped the outcome in *Durden* if the Sixth Circuit applied it. And Liberty even takes sides on the dispute in that case, aligning itself with the "dissenting opinion." BIO 24.

So why would certiorari be unwarranted here? Liberty gives three reasons. The first two—about the question's importance and the suitability of this case as a vehicle—are really the same reason. Both are predicated on Liberty's belief that it would prevail even under the Sixth Circuit's test, so little is at stake. But that is wrong. The only court in this case that actually applied the Sixth Circuit's test rejected Liberty's argument. Although the Tenth Circuit reversed, it did so not because it disagreed with the district court's application of the Sixth Circuit's test, but because it felt the need to create a different test altogether. There is nothing preventing this Court from deciding whether *that* holding was correct, and to thereby resolve the circuit conflict and bring uniformity to the law.

In any event, Liberty's prediction about how the Tenth Circuit would have decided the question under the Sixth Circuit's test is mistaken. Under the principles laid out in the Restatement (Second) of Conflict of Laws, Colorado's statutory bar on discretionary clauses applies to this case and may not be displaced by a plan's choice-of-law clause.

Finally, Liberty argues the merits. It doesn't say much about why the Restatement supplies the wrong test, or why the Tenth Circuit was justified in creating its own. Instead, Liberty defends the decision below as consistent with ERISA because it does not allow insurers to nullify a non-preempted state law by contract. But that is exactly what it does. It is time for this Court to step in, resolve the circuit conflict, and ensure that federal common law is used to carry out Congress's scheme—not contradict it.

ARGUMENT

I. Liberty fails to diminish the split's significance.

Liberty does not deny the existence of the split. To the contrary, it acknowledges that there is a "disagreement between the circuits," and that the Sixth Circuit applies a "different test than the other circuits." BIO 12. Liberty also acknowledges that these different circuit tests can lead to different outcomes, at least in some cases. The Sixth Circuit's decision in *Durden* is itself an example of that, and Liberty does not contend otherwise.

Rather than deny the split, Liberty tries to downplay it. It does so in three ways, none of which is persuasive.

First, Liberty claims that the Tenth Circuit's test is "nearly identical" to the test that has been adopted by the Eighth, Ninth, and Eleventh Circuits, so there is no three-way split, just a two-way split. BIO 13. But the Tenth Circuit did not see it that way. The reason that it felt the need to blaze its own trail is that it found the existing tests to be "inadequate." App. 27a. Regardless, even if Liberty were right in this respect, that would hardly offer a reason to deny review. This Court routinely grants certiorari to resolve two-way splits under ERISA. *See* Pet. 19–20 (citing cases). It should do the same here.

Second, Liberty attempts to diminish the significance of the split, arguing that the Sixth Circuit's test yields a different outcome only in "unusual circumstances." BIO 15. Liberty bases this assertion on its reading of the "first prong of the Restatement test" in section 187, *id.*, which asks whether "the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Restatement (Second) Conflict of Laws § 187(1) (1971). Liberty argues that "the forum state's law is irrelevant" in answering this question

"because the test is whether *ERISA* permits the parties to resolve the particular issue," not state law. BIO 17. Liberty says that there is no "support" for the proposition that "courts would look to the forum state's law" under any circumstances in addressing this question. *Id.*

That assertion is easily refuted. Comment c to section 187, which we cited in the petition (at 15), provides: "Whether the parties could have determined a particular issue by explicit agreement directed to that issue is a question to be determined by the local law of the state selected by application of the rule of § 188." Restatement (Second) Conflict of Laws § 187 & cmt. c (1971). Section 188, in turn, sets forth a multi-factor test for determining which state's law would apply in the absence of a choice-of-law clause, and it provides that the listed factors "are to be evaluated according to their relative importance with respect to the particular issue." *Id.* § 188(2). Under this test, courts will apply "the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties." *Id.* §188(1). When it comes to the issue in this case, there is no contest: Colorado has an undeniably strong interest in enforcing a Colorado statute that expressly prohibits discretionary clauses to protect a Colorado resident who worked in Colorado, paid premiums in Colorado, and was injured in Colorado. On the other side of the ledger, the Pennsylvania legislature was silent on this question.

This is not to say that whether ERISA permits the parties to resolve the particular issue is irrelevant. Of course not. Because federal law applies in every state, if the threshold question is to be decided under a particular state's law, that necessarily encompasses federal law. But there is no basis for arguing, as Liberty does, that *only* federal law may be considered in answering that question.

Third, Liberty tries to get mileage out of the fact that three circuits—the Eighth, Ninth, and Tenth Circuits—have applied choice-of-law tests to a state discretionary-clause ban, and they reached the same conclusion. BIO 18. But the recurring nature of this question, even in this particular context, just points to the importance of the issue. Equally important, the test that the Tenth Circuit saw fit to create in this case, like the test applied by the two other circuits in those cases, is not limited to ERISA choice-of-law questions concerning the applicability of state bans on discretionary clauses. Those tests apply to *all* choice-of-law questions under ERISA. Nor is the Sixth Circuit's test limited to the particular kind of clause at issue in that case. The conflict among the circuits, rather, is broader: It concerns the correct methodology to apply to any choice-of-law question under ERISA, irrespective of the particular dispute in the case. That methodological disagreement cries out for resolution by this Court.

II. This case squarely presents the Court with an opportunity to resolve the split.

Liberty devotes much of its opposition to arguing that this case does not present the Court with an opportunity to resolve this split because "the full *Durden*/Restatement analysis would not affect the outcome of this case." BIO 19–24. That is wrong for two independent reasons.

It is wrong, first of all, because the Tenth Circuit did not apply the *Durden*/Restatement analysis or suggest that the district court's application of that analysis was incorrect. Instead, the Tenth Circuit reversed the district court's judgment based entirely on its determination that this was not the correct test to apply *at all*. So the petition cleanly presents this Court with an opportunity to resolve the three-way conflict and decide the applicable test for deciding choice-of-law questions under ERISA. Contrary

to Liberty's assertion (at 12), doing so here would not be "advisory." If this Court agreed that the Restatement provides the proper test, as the Sixth Circuit has held, it could reverse the Tenth Circuit's judgment and remand for application of the correct test in the first instance.

Second, Liberty's belief that it would prevail under the Sixth Circuit's test is premised on a misreading of the Restatement. Liberty posits that "Sections 187 and 192 function together to confirm that the employer's home state law *always* applies." BIO 20 (emphasis added). But, as just noted, this reading of section 187 is contradicted by comment c, which leaves no doubt that the employer's home state law will not "always" apply. This case is a perfect example. Again, the balance of interests between the two competing states on the particular question here could not be more disproportionate. Colorado's legislature enacted a statute that, by its own express terms, covers the contract in this case and forbids enforcement of the discretionary clause notwithstanding the plan's choice-of-law provision. *See* Pet. 5. It is hard to imagine a clearer expression of a state interest than that. And Colorado's interest is especially strong because this case was brought by one of *its* residents, after working, paying premiums, and being disabled in *its* state. Pennsylvania's interest, by contrast, is scant. Its legislature has said nothing about this particular issue; it has simply declined to legislate.[1]

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[1] Liberty asserts (at 28) that this Court should not consider the applicability of the clarifying amendment to Colorado's law because the Tenth Circuit did not do so below. But the clarifying amendment is unambiguous, and the Tenth Circuit's analysis did not turn on the meaning of the statute. The Tenth Circuit would have decided the case the same way regardless, which only highlights the problems with its test. At any rate, to resolve the split, this Court need not consider any issue "not analyzed by" the Tenth Circuit, including application of the Restatement. BIO 28. Nor, for similar reasons, is Liberty's waiver

Nor does section 192 of the Restatement provide that "the employer's home state law *always* applies." BIO 20. That section sets forth a general rule that disputes under an insurance policy are to be decided by "the local law of the state where the insured was domiciled . . . unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied." Restatement (Second) Conflict of Laws § 192. The section then includes a comment saying that, for group insurance policies, the general rule is that the "rights against the insurer are usually governed by the law which governs the master policy," "at least as to most issues." *Id.* cmt. h. But neither of these rules is absolute. Nor do they do away with the basic roadmap for a choice-of-law analysis, which includes an analysis of which state has a greater interest (a prevailing concern embodied in both sections 187 and 188).

Indeed, far from overriding that approach, section 192 expressly incorporates it. The section's text requires a balancing of interests guided by the principles in section 6, one of which is that a court "will follow a statutory directive of its own state on choice of law." *Id.* § 6(1). Section 192 thus does not in any way preclude application of Colorado law to the dispute here, where Colorado's legislature expressed a strong desire to target a particular concern affecting its own residents, and to do so "notwithstanding any contractual or statutory choice-of-law provision to the contrary." C.R.S. § 10-3-1116(2) & (8).

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argument a barrier to review. It is Liberty—not the petitioner—who is asking this Court to "review what the court below did not decide." BIO 15. All that the petition is asking the Court to decide is whether the Tenth Circuit applied the correct test. The application of that test could then be—but need not be—decided by this Court if it so chose.

III. Liberty's merits arguments only underscore the need for this Court's review.

On the merits, Liberty has little to say about why the Restatement's test—the default approach for deciding choice-of-law questions under federal common law—is the wrong test here. Liberty includes a passing criticism, in the course of embracing the Sixth Circuit's dissent (at 24), that the test is insufficiently rigid and should instead defer to the plan terms no matter what state law has to say.

But the Restatement's flexibility is a feature, not a bug. It allows courts to take into consideration a state's sovereign interests over a particular issue. And for good reason: "Fulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interests and for state regulation." Restatement (Second) of Conflict of Laws § 187 cmt. g (1971). That is all the more true where, as here, the state regulation at issue is one that Congress specifically wanted to remain in effect. By eschewing this test and the flexibility built into it, then, the Tenth Circuit did not just disrespect the prerogatives of *state* legislatures, but the prerogative of the *federal* legislature as well. Just as bad, it did so under the banner of federal common law, which is supposed to be used only to effectuate congressional intent, out of recognition of the fact that it is the people's representatives who are given primarily lawmaking powers, not Article III judges.

Liberty insists that "the Tenth Circuit's decision does not implicate the saving clause" that Congress wrote into ERISA, nor this Court's decision in *UNUM*, because the Tenth Circuit's test does not allow insurers to "displace any state regulation simply by inserting a contrary term in plan documents." BIO 27. But that is exactly what it does. The only reason that the Tenth Circuit held that

Colorado's statute has no effect in this case is because of the plan's choice-of-law provision. In doing so, the Tenth Circuit effectively "read the saving clause out of ERISA." *UNUM*, 526 U.S. at 376 (cleaned up).

In a final effort to avoid review, Liberty claims that a 1937 decision of this Court speaks directly to the choice-of-law question here. It even goes so far as to say that our position "contravenes" that case. Pet. 25–26 (discussing *Boseman v. Conn. Gen. Life Ins. Co.*, 301 U.S. 196 (1937)). But that case has no bearing on the question presented. It was decided a year before *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and decades before ERISA. The Court applied general common law to reach a conclusion about state law that it acknowledged was contrary to the courts of that state. *Boseman*, 301 U.S. at 203–04. The decision has no applicability to this case, involving a Colorado statute that expressly forbids the discretionary provision that is at issue, and the only question is what the proper test is under ERISA for determining whether a choice-of-law clause may displace that law. What controls that question is not a pre-ERISA, pre-*Erie* case that applies general common law, but Congress's decision to add a saving clause in ERISA, and the Colorado legislature's decision to enact a broad statute prohibiting discretionary clauses. The decision below is directly at odds with these legislative judgments. This Court should not let it stand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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