No. 21-1376

In The
Supreme Court of the United States

MARY ALEXANDRE,

Petitioner,

V.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,

Respondent.

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

REPLY BRIEF OF PETITIONER

AMIEL Z. WEINSTOCK
c/o AZW Law, PC
155 Gardner Road
Brookline, MA 02445
Telephone: (617) 651-4771
Telecopier: (617) 977-9717
E-Mail: amiel@azwlaw.com

LAWRENCE R. METSCH
Counsel of Record
FBN 133162
c/o Metschlaw, P.A.
3900 Flamewood Lane
Hollywood, FL 33021
Telephone: (305) 792-2540
Telecopier: (305) 792-2541
E-Mail: l.metsch@metsch.com

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

> I. A policy insuring against accidental death, covered by the Employee Retirement Income Security Act of 1974, excludes coverage for the insured's suicide. When the insured's state of mind is contested should the trial court apply presumptions against suicide and in favor of an accident?

Petitioner Mary Alexandre contends that the First Circuit's adherence, in *Alexandre v. National Union Fire Insurance Company,* 22 F. 4th 261 (1st Cir. 2022), to the decision in *Wickman v. Northwestern National Insurance Company,* 908 F. 2d 1077 (1st Cir.), *cert. denied,* 498 U.S. 1013 (1990), establishes a "circuit split" with the decision in *Horton v. Reliance Standard Life Insurance Company,* 141 F. 3d 1038 (11th Cir. 1998). Respondent National Union Fire Insurance Company of Pittsburgh, PA ("NUFIC"), contends that no such "circuit split" exists.

NUFIC's contention flies in the face of the First Circuit's confirmation, in this case, of the existence of a "circuit split" with the Eleventh Circuit's *Horton* decision. Judge Katzmann's opinion for the Court of Appeals in this case observed:

> As a specific- and pertinent- example concerning plan interpretation, various circuits have added to the federal common law on ERISA by formulating approaches for construing the term "accident" when left otherwise undefined in AD & D insurance policies.

> For example, in the First Circuit, our precedent in *Wickman* provides the analytical framework for interpreting the term "accident"... Under *Wickman*, for an insured's death to qualify as a covered "accident", "the beneficiary must demonstrate that the insured did not expect an injury similar in type or kind and that the suppositions underlying this expectation were reasonable," from the perspective of the insured... If "the evidence [is] insufficient to accurately determine the insured's subjective expectation, the fact-finder should then engage in an objective analysis of the insured's expectations."
>
> In the Eleventh Circuit, the aforementioned *Horton* case supplies a different approach for construing the term "accident" in ERISA-covered policies... There, the Eleventh Circuit announced that "when the evidence is inconclusive as to whether [a] deceased died by accidental or intentional means," it is "appropriate" to use "the legal presumptions against suicide and in favor of accidental death" to determine insurance benefit eligibility... The court affirmed that- at least in the Eleventh Circuit- "[t]hese presumptions are properly part of the pertinent federal common law" governing ERISA. (citations omitted)

22 F. 4th at 268-269.

Ms. Alexandre's undersigned attorneys cannot improve on Judge Katzmann's analysis. Moreover, there exists a second juridical conflict which renders this case worthy of the Court's plenary review- one between the First Circuit's decisions in *Wickman* and *Alexandre* and the Court's decision in *Dick v. New York Life Insurance Company,* 359 U.S. 437 (1959).[1]

In *Dick,* a diversity action implicating North Dakota's substantive law, the insured, Mr. William Dick, died after suffering two blasts from his shotgun. The insurance company denied accidental death benefits on the basis of the policy's suicide exclusion from coverage. The District Judge submitted the accidental death/suicide question to the jury, which returned a verdict for the plaintiff–widow-beneficiary. The insurance company's motion to set aside the jury's verdict was denied and it appealed. The Eighth Circuit reversed. *New York Life Insurance Company v. Dick,* 252 F. 2d 43 (8th Cir. 1958). Judge Sanborn's opinion for the Court of Appeals concluded:

> Our conclusion is that the infliction of two wounds in succession, one in the left side in close proximity to the heart, and the other in the head, cannot be reconciled with any reasonable theory of accident, and that, under the evidence, the question whether the death was accidental was not a question of fact for the jury... (citations omitted)

252 F. 2d at 47.

---

[1] The Court's decision in *Dick* was cited in Ms. Alexandre's petition, pp. 7-8. However, the *Dick* decision is absent from NUFIC's brief in opposition.

The Court granted certiorari and reversed. Chief Justice Warren's opinion for the Court reasoned:

> In our view, the Court of Appeals improperly reversed the judgment of the District Court. It committed its basic error in resolving a factual dispute in favor of respondent that the shotgun would not fire unless someone or something pulled the triggers. Petitioner's evidence on this score, despite the "tests" performed by the sheriff, could support a jury conclusion that the gun might have fired accidentally from other causes. Once an accidental discharge is possible, a jury could rationally conceive of a number of explanations of accidental death which were consistent with evidence which the jury might well have believed showed the overwhelming improbability of suicide. The record indisputably shows lack of motive- in fact there is affirmative evidence from which the jury could infer that Dick was a most unlikely suicide prospect. He was relatively healthy, financially secure, happily married, well liked, and apparently emotionally stable. He left nothing behind to indicate that he had committed suicide and nothing in his conduct before death indicated an intention to destroy himself. The timing of the death, while in the midst of normal chores and immediately preceding a planning appointment with neighbors, militates against such a conclusion. Dick's presence in the shed and the accessability of

> the gun are explicable in view of the fact that dogs had previously attacked his sheep and the fact that the door in the shed provided a convenient exit to the adjoining fields. And a jury could well believe it improbable that a man would not even bother to remove his bulkly gloves, or thick jacket, when he intended to commit suicide even though those articles of clothing made it difficult to turn the gun on himself.
>
> *In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide... Under the Erie rule, presumptions (and their effects) and burden of proof are "substantive" and hence respondent was required to shoulder the burden during the instant trial...* After all the evidence was in, the district judge, who was intimately concerned with the trial and who has a first-hand knowledge of the applicable state principles, believed that the case should go to the jury. Under all the circumstances, we believe that he was correct and that reasonable men could conclude that the respondent failed to satisfy its burden of showing that death resulted from suicide. (Citations and footnote omitted, emphasis supplied)

359 U.S. at 446-447.

Ms. Alexandre's husband, Mr. Marzuq Muhammad, resembled Mr. William Dick in several

aspects. Each was happily married, the father of children, financially secure, in good health and respected in the community. Neither left a suicide note.

In light of the Court's acceptance, in *Dick,* of North Dakota's presumptions against suicide and in favor of accidental death, Ms. Alexandre should have been afforded the Eleventh Circuit's *Horton* presumptions against suicide and in favor of accidental death. But, post-transfer, Ms. Alexandre was denied those presumptions due to the First Circuit's adherence to the *Wickman* approach.

Because this case presents the Court with the opportunity to put to rest the First Circuit's outlier rejection of the presumptions against suicide and in favor of accidental death in ERISA cases, Ms. Alexandre's petition for a Writ of Certiorari should be granted.

II. A civil action based on federal law is transferred pursuant to 28 U.S.C. § 1404(a). Should the transferee court construe the underlying constitutional provisions(s), statute(s) or regulation(s) in accordance with the pronouncements of the U.S. Court of Appeals overseeing the transferor court or transferee court?

The Court, in *Van Dusen v. Barrack*, 376 U.S. 612 (1964), a diversity of citizenship case, held that, following a transfer under 28 U.S.C. § 1404(a) which had been requested by the defendant, the transferee

court should apply the substantive law of the state of the transferor court. Similarly, in *Ferens v. John Deere Co.,* 494 U.S. 516 (1990), also a diversity of citizenship case, the Court ruled that, subsequent to a transfer under 28 U.S.C. § 1404(a) that had been requested by the plaintiff, the transferee court should apply the substantive law of the state of the transferor court.

The Court has yet to speak to the post-transfer substantive principles governing civil actions based on federal law, such as this ERISA matter. That silence has made it possible for the United States Courts of Appeals to arrive at a consensus that the pronouncements of the Court of Appeals overseeing the transferee court (rather than the transferor court) should guide the transferee court in construing the underlying federal constitutional provisions, statutes or regulations. *See, e.g., AER Advisors, Inc. v. Fidelity Brokerage Services, LLC,* 921 F. 3d 282 (1st Cir. 2019), *cert. denied,* ___ U.S. ____, 140 S. Ct. 1105 (2020).

Ms. Alexandre's petition for a Writ of Certiorari, if granted, would provide the Court with a vehicle for resolving the inconsistent post-transfer treatment of diversity of citizenship and federal question cases.

CONCLUSION

Ms. Alexandre's petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAWRENCE R. METSCH
Counsel of Record
c/o Metschlaw, P.A.
3900 Flamewood Lane
Hollywood, FL 33021
Telephone: (305) 792-2540
Telecopier: (305) 792-2541
E-Mail: : l.metsch@metsch.com

AMIEL Z. WEINSTOCK
c/o AZW Law, PC
155 Gardner Road
Brookline, MA 02445
Telephone: (617) 651-4771
Telecopier: (617) 977-9717
E-Mail: amiel@azwlaw.com