No. 21-6982

In the Supreme Court of The United States

ROBERT STANLEY GORDON,
Petitioner,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Respondent.

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

BRIEF IN OPPOSITION

Ronald K. Alberts
Counsel of Record
Rebecca A. Hull
Gordon Rees Scully
Mansukhani, LLP
275 Battery Street
Suite 2000
San Francisco, California 94111
415-986-5900
ralberts@grsm.com

Counsel for Respondent

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTIONS PRESENTED

Respondent Metropolitan Life Insurance Company (hereafter "MetLife") rejects Petitioner Robert Gordon's (hereafter "Gordon") statement of the questions assertedly presented by his Petition.

Gordon posits that there are two issues presented for potential review: (1) whether employee benefits "can be denied after years of concealment," and (2) the impact of a "conflict of interest . . . when a defendant retains custody of evidence against them."

MetLife disagrees. The questions presented for potential merits briefing are:

1. Whether the Court of Appeals for the Ninth Circuit properly upheld the decision of the United States District Court for the Northern District of California, which had determined on *de novo* review that Gordon's claim for long term disability benefits was not supported by the record that was before the District Court.

2. Whether the Court of Appeals for the Ninth Circuit correctly rejected Gordon's attempt to raise for the first time on appeal matters that were said to call into question the decision of the District Court.

CORPORATE DISCLOSURE STATEMENT

Respondent Metropolitan Life Insurance Company, a New York corporation with its principal place of business in New York, is a wholly owned subsidiary of MetLife, Inc., a publicly-held Delaware corporation with its principal place of business in New York.

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JURISDICTION

Respondent MetLife agrees that this Court has jurisdiction, and that Petitioner Gordon's filing was timely.

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STATUTES AND REGULATIONS

The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. section 1001, *et seq.*

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STATEMENT

Introduction. The factual and legal points underpinning the lower courts' decisions and orders, challenged in the Petition, are straightforward. They were correctly resolved by the courts below, and do not require further consideration by this Court. The District Court's 25-page dispositive opinion (Appendix D to the Petition, hereafter "Opinion") sets forth the relevant facts in detail.

As the Opinion explains, Gordon held a sedentary job as a programmer at Borland Software Corporation, working full time for about ten years despite complaints of occasional back or shoulder pain. He left work on April 18, 2002 after an interpersonal dispute with a supervisor stemming from his unhappiness with a change in management. He took a short workers' compensation leave and was treated for the emotional distress he reportedly experienced.

By April 26, however, Gordon was released to full time work with no medical restrictions. Opinion, 8:10-16. Ultimately, he was released to work by three different doctors. *See* Opinion, 10:6-8. On May 1, 2002 after his return to work, Gordon met with Borland managers and was told that he was being put on a performance improvement program. He stormed out of the meeting and Borland issued a letter the same day, terminating his employment. *See* Opinion, 3:11-14. The letter also informed him that his participation in and coverage under the Borland Corporation Long Term Disability Plan ("the Plan"), an ERISA-regulated employee welfare benefit plan, was terminating as of May 1, 2002, concurrent with the termination of employment.

More than seven years later, on October 22, 2009, Gordon first made his claim for LTD benefits to MetLife, the claims administrator of the Plan. He asserted that he was, and had been, totally disabled continuously from April 18, 2002 onward. He sought LTD benefits retroactively and for the future.

Initially, MetLife had been unable to confirm that Gordon was a Plan participant on the date he alleged that he became disabled, and denied the claim for lack of eligibility. Following a voluntary remand in the District Court to permit Gordon to supplement his showing in support of Plan participation, MetLife proceeded with a merits evaluation. After a protracted review of Gordon's records and after seeking input from independent physician consultants, however, MetLife determined that the records did not support that he had become "disabled" as that term is defined by the Plan, while

he was a Plan participant. As such, he was found not eligible for Plan benefits.[1]

The proceedings below. Suit was initiated in 2010, by an attorney who represented Gordon throughout the District Court proceedings. In the litigation, Gordon presented extensive arguments and evidence in support of his position, discussed in detail in the Opinion.

The District Court carefully analyzed the records that were before it. On cross-motions for judgment under Fed. R. Civ. Pro. 52, the court on *de novo* review found in favor of MetLife. Gordon's motion was denied, because the District Court determined that under the evidence he did not meet the Plan's definition of "disabled" while he was a participant of the Plan. *See* Opinion, 2:11-19.

Before the Ninth Circuit, representing himself, Gordon argued that documents were "missing" from the District Court's record, and sought to have them considered by the appellate court. He then appended documents to his opening brief and argued that if these "missing" documents were considered, the District Court's decision would be reversed because the documents showed that he should receive benefits under the Plan.

As MetLife demonstrated in its answering brief to the Ninth Circuit, however: (1) the "missing"

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[1] Gordon appealed MetLife's merits decision, and his appeal remained open and pending when he asked the District Court to reopen and decide the litigation claim, which it did. *See* Opinion, 4:5-12.

documents were ones that never were provided to MetLife in support of the claim, or to the District Court in support of Gordon's litigation arguments, and thus could not be considered on appeal, and (2) based on the content of the documents, they would have changed nothing even if considered.

The lower courts meticulously evaluated and carefully considered Gordon's arguments, rejecting each of them based upon Plan requirements that Gordon be "disabled," as the term is defined in the Plan, while he was a Plan participant. Sitting as finder of fact under Rule 52, the District Court found that Gordon failed to prove that he was "disabled" while he was a Plan participant. As such, he was not eligible for Plan benefits. Order, 5:9-16.

The Ninth Circuit, in its Memorandum (Appendix E to Petition), affirmed the District Court in all respects. The Memorandum held that the District Court's *de novo* analysis could be reversed only if the District Court committed "clear error," citing *Silver v. Executive Car Leasing Long-Term Disability Plan*, 466 F.3d 727, 732-33 (9th Cir. 2006). As such, and because the District Court decision was supported by the record, the Ninth Circuit affirmed. *Id.*, pp. 1-2. The Memorandum expressly rejected Gordon's attempt to base his appeal arguments on matters not raised in the District Court, including his new assertion that "the administrative record is incomplete" [citing *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009) (*per curiam*)]. *Id.*

Gordon sought a rehearing before the Ninth Circuit, which was denied. (Appendix B to Petition)

In his petition seeking rehearing, he conceded that it was "certainly true" that the record before the District Court supported the District Court's *de novo* determination that he was not entitled to benefits under the Plan. He again argued, however, that the record is "incomplete" and that on a "complete" record he would be entitled to benefits.

The Petition. The Petition frames the issues as the propriety of denial of benefits from an ERISA-regulated benefit plan "after years of plan concealment" and questions about "a defendant retain[ing] custody of evidence against them." (Petition, "Questions Presented") Those points are not persuasively discussed in the Petition.[2]

Gordon's "Reasons for Granting the Petition" focus on arguments about OCR searchability of documents filed with a court, completeness of the administrative record, Borland's alleged motivations for terminating his employment, and MetLife's alleged failure to provide Gordon's attorney with documents that he requested.

Gordon's Statement of the Case theorizes that MetLife ignored documents that Gordon believes

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[2] In addition, the Petition improperly appends "Supplemental Excerpts of Record" consisting of some 48 pages of documents. Most were not before the District Court, some were offered for the first time in the Ninth Circuit and some never were presented to any court until attached to Gordon's Petition (this is shown by presence or absence of efiling identifiers at the tops of the pages, indicating where – or whether – a document previously was presented in a lower court).

should have been considered. He contends that MetLife's role as the insurer of LTD benefits offered under the Plan was "concealed" by Borland, although he does not articulate what impact that assertedly had. His arguments also fail to consider two points.

First, the District Court's decision was made *de novo* from the record; it did not turn on what Gordon speculates were MetLife's actions or motives. He implies that the District Court's conclusions were inaccurate because of an allegedly incomplete record. If Gordon believed that to be the case, however, the filings in the District Court would have reflected that concern. He did not make this argument in the District Court, and it thus was not considered by the Ninth Circuit.[3]

Second, Gordon's argument that Borland[4] "concealed" the identity of the Plan's insurer,

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[3] Nothing supports that Gordon ever argued to the District Court that anything was "missing" from the record or that the record was in some manner "incomplete," nor did he seek relief in the District Court in the form of an order that the record be supplemented with "missing" materials. Such points logically would have been raised in his 2019 motion for judgment under Rule 52 (District Court ECF 86, 90). His filings, however, do not mention such subjects, or proffer materials for the District Court's consideration, or seek related relief.

[4] Gordon's extra-record submissions in the Ninth Circuit included an internal Borland memorandum signed by David Schwartz, a Human Resources professional who had met with Gordon about the dispute with the supervisor (not about benefits), and a Form 5500 for the Plan, signed by Mr. Schwartz on behalf of Borland, the Plan Administrator. Gordon's argument pieces those disparate facts together to forge an argument that the Plan Administrator improperly

MetLife, is unsupported and also irrelevant. The Opinion shows that, notwithstanding a delay of ***more than seven years*** from the date Gordon ceased to be a Plan participant to the date he made a claim, ***his claim was decided on the merits without regard to the delay***. The Petition suggests that benefits are owed to Gordon because he did not know what company insured the Plan's benefits. The argument is not logical. The merits-based denial of his claim, following MetLife's grant of his appeal on issue of whether he was a Plan participant, was based on his medical records and his occupation – it had nothing to do with an asserted delay in submission of his claim, for whatever reason.

As part of the "concealment" argument, Gordon also says that his attorney asked for the record of the claim, asserting that the requests were "denied" or documents were "withheld." (Petition, p. 10)[5] That is not consistent with the record. As MetLife's answering brief showed the Ninth Circuit, when Gordon made the argument below, that this is

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failed to spontaneously mention to him during their meeting that MetLife was the new insurer for LTD benefits and thereby "concealed" the information.

[5] The Petition claims records requests were "refused," but the referenced pages show only that documents were ***requested***. The record shows that copies of the record were provided to Gordon on multiple occasions [*e.g.*, Administrative Record ["AR"], at page 4 (entries December 16 and 18, 2009, showing the file was printed and sent to Gordon's counsel); AR 1096 (letter from Gordon's counsel to MetLife, December 21, 2009, thanking MetLife for providing file; AR 211 (entry December 26, 2012, noting file sent to Gordon's attorney by FedEx); AR 773 (transmittal letter December 26, 2012)].

a point that would and should have been raised by Gordon's attorney in the District Court, and would have been addressed in the Opinion if he had done so. Neither of those things happened, because no records to which Gordon was entitled were "denied" or "withheld." His attempt to make that argument to the Ninth Circuit, without having raised it in the District Court, was properly rejected.

The "record on appeal is generally limited to 'the original papers and exhibits filed in the district court.'" *Barcamerica Int'l USA Trust v. Tyfield Importers, Inc.*, 289 F.3d 589, 594 (9th Cir. 2002). Documents not filed with a district court "are not part of the clerk's record and cannot be part of the appeal." *Kirshner v. Uniden Corp.*, 842 F.2d 1074, 1077 (9th Cir. 1988); *Lowry v. Barnhart*, 329 F.3d 1019, 1025-26 (9th Cir. 2003). Fed. R. App. P. 10(e) permits "correction or modification of the record" in limited circumstances, but none of those circumstances pertained because Gordon did not seek to bring before the Ninth Circuit matters that were "omitted or misstated in the record by error or accident."

Gordon's attempt to go outside the record was substantively, as well as procedurally, improper. He offered in the Ninth Circuit documents and alleged facts that were never presented to the District Court, seeking reversal based on matters of which the District Court was unaware. In the Ninth Circuit, a district court's *de novo* review under ERISA – the standard applied here – is limited to the administrative record of the claim unless "circumstances clearly establish that additional

evidence is necessary to conduct an adequate *de novo* review." *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1090 (9th Cir. 1999) (quoting *Mongeluzo v. Baxter Travenol Long Term Disability Benefit Plan*, 46 F.3d 938, 944 (9th Cir. 1995).). *See also Montour v. Hartford Life & Accident*, 588 F.3d 623, 632 (9th Cir. 2009) (the "administrative record" of a claim consists of the "papers the insurer had when it denied the claim"). Gordon's attempt to go outside the actual record thus was properly rejected.

Finally, Gordon's arguments about searchability of PDF records misses the mark. He made that argument to the Ninth Circuit and, in response, MetLife demonstrated that the documents he was complaining about were ones that ***his attorney*** submitted to MetLife. That is, whatever problem he perceives originated with him, and is not a basis for relief as against MetLife.

REASONS FOR DENYING THE WRIT

Gordon would have this Court put on blinders, ignore the long history of ERISA jurisprudence and federal civil procedure tenets, defy common sense and the plain language of the Plan, and engage in contortions that the law does not allow.

This Court, should resist that invitation and should decline issue a writ.

- The result in the District Court was, as the Ninth Circuit found, the product of

a *de novo* review, and was consistent with and supported by the record. As such, it properly was upheld on appeal under Ninth Circuit law.

- Gordon's attempt to rely on appeal on documents and factual assertions that were not before the District Court was unfounded and contrary to applicable procedural standards, and properly was rejected by the Ninth Circuit.

- Gordon's contention that the record was incomplete was unfounded and, in addition, was required to be made in the first instance to the District Court. As it was not, the Ninth Circuit properly rejected it.

- Gordon's arguments regarding the ability to conduct an OCR search of the record are misplaced, both because the matters of which he complains originated with him, and because there is no potential relief as against MetLife.

The lower courts correctly applied the law, and there is no reason for this Court to involve itself in the dispute via a writ.

CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be denied.

February 28, 2022

Respectfully submitted,

Ronald K. Alberts
Counsel of Record
Rebecca A. Hull
Gordon Rees Scully
Mansukhani, LLP
275 Battery Street,
Suite 2000
San Francisco, California
94111

Counsel for Respondent