No. 19-248

IN THE

Supreme Court of the United States

WALID JAMMAL, *et al.*,
Petitioners,

v.

AMERICAN FAMILY INSURANCE COMPANY, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

LAUREN S. KULEY
SCOTT W. COYLE
SQUIRE PATTON BOGGS (US) LLP
201 E. Fourth St.
Suite 1900
Cincinnati, OH 45202

GREGORY V. MERSOL
GILBERT BROSKY
BAKER & HOSTETLER LLP
Key Tower
127 Public Square
Suite 2000
Cleveland, OH 44114

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
JOSHUA M. KOPPEL
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

QUESTIONS PRESENTED

1. Whether a court of appeals should apply de novo review to correct errors in the legal standard applied by a district court in determining employment status under the common-law framework set forth in *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318, 323-324 (1992).

2. Whether application of the common-law test for employment status, under which a "nonexhaustive" set of factors "must be assessed and weighed with no one factor being decisive," *Darden*, 503 U.S. at 324, may vary based on statutory context.

CORPORATE DISCLOSURE STATEMENT

Respondents American Family Insurance Company, American Family Mutual Insurance Company, American Family Life Insurance Company, and American Standard Insurance Company of Wisconsin are subsidiaries of American Family Insurance Mutual Holding Company and AmFam Holdings Inc.

Respondents American Family Termination Benefits Plan, Retirement Plan for Employees of American Family Insurance Group, American Family 401k Plan, Group Life Plan, Group Health Plan, Group Dental Plan, Long Term Disability Plan, American Family Insurance Group Master Retirement Trust, 401k Plan Administrative Committee, and Committee of Employees and District Manager Retirement Plan are plans, or administrative committees of the plans, sponsored by American Family Mutual Insurance Company, S.I.

No publicly held company owns 10% or more of any respondent's stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

DOCKETED CASES

STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

INTRODUCTION

Plaintiffs bringing claims under the Employee Retirement Income Security Act of 1974 (ERISA) must prove that they are employees and not independent contractors. In *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318, 323-324 (1992), this Court held that ERISA incorporates the traditional, multifactor common-law test for determining employment status. Petitioners seek this Court's review of two aspects of the Sixth Circuit's straightforward application of that settled test to the facts of this case. First, petitioners challenge the standards of appellate review the Sixth Circuit applied in reviewing the district court's application of *Darden*. Second, petitioners seek review of the Sixth Circuit's application of the common-law test in the ERISA context.

Neither question warrants review. As to the first, petitioners claim a circuit split on the standard of review of a district court's employment-status determination. But the decision below does not implicate that alleged split because the Sixth Circuit merely corrected legal errors in the standards the district court applied in evaluating two *Darden* factors. And as this Court has recently reiterated, and petitioners do not dispute, determining the applicable "legal test" or "standard" is "a legal conclusion" that "an appellate panel reviews … without the slightest deference." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC* v. *Village at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018).

Nor is there any circuit split on the first question that would warrant this Court's attention, even in an appropriate case. All appellate courts agree that clear-error review applies to findings of historical fact underlying the district court's determination of employment

status. Courts likewise agree that de novo review applies to both the ultimate determination of employment status and to determinations regarding the individual factors under the common-law test. The only possible outliers—most of which arise in outdated decisions or very different contexts—are not consistently followed even in the circuits that announced them. And even if those outliers necessitated this Court's intervention, this case would be a poor vehicle because petitioners invited de novo review in the Sixth Circuit. Having lost under that standard, they now advocate a different one, but applying a different standard of review would not matter because the judgment below rested on the conclusion—which petitioners do not contest—that the district court applied the wrong legal principles. That legal error is reversible under any standard of review.

De novo review is also the correct standard, even if the district court had applied the correct legal framework. Unlike clear-error review, plenary review of employment determinations produces predictability and guidance. As the Court recognized in *Darden*, that stability enables companies to identify their employees and calculate their pension-fund obligations. 503 U.S. at 327. It also helps workers understand their rights. Indeed, decades of plenary review nationwide have produced doctrinal stability, with courts consistently finding insurance agents—including agents of respondent American Family itself—to be independent contractors, the status petitioners expressly agreed to in their own contracts.

As to the second question, petitioners claim the Sixth Circuit adopted an ERISA-specific test, contrary to *Darden* and the approach of other circuits. That is incorrect. The Sixth Circuit applied the same common-law test that this Court adopted in *Darden* and other

courts apply. Taking the statutory context into account in applying that test tracks the approach of other circuits, which recognize that the same test may apply differently in different contexts. There is no conflict warranting this Court's review.

STATEMENT

The dispute here turns on whether petitioners are employees or independent contractors under ERISA. Plaintiffs can invoke ERISA's protections only if they are "employee[s]." *Darden*, 503 U.S. at 321; *see* 29 U.S.C. §§ 1002(6), (7), 1132(a). Like every other court to address the issue, the Sixth Circuit held that American Family's insurance agents are not employees, but independent contractors under the federal common-law test. Pet. App. 3a.

A. Legal Background

ERISA does not spell out how to determine whether a worker is an employee. *See* 29 U.S.C. § 1002(6). In *Darden*, this Court held that ERISA incorporates common-law agency principles to guide the inquiry. Following its decision under the Copyright Act in *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730 (1989), the Court identified a nonexhaustive list of factors:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the re-

> lationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324 (quoting *Reid*, 490 U.S. at 751-752). The Court explained that this "common-law test contains no shorthand formula or magic phrase," and that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Id.* at 324 (quotation marks omitted).

In adopting the common-law test, the Court rejected the test that the Fourth Circuit had fashioned. *Darden*, 503 U.S. at 324-325. To advance what it perceived to be ERISA's purpose, the Fourth Circuit had construed "employee" to reach more broadly than it would under traditional agency-law principles. *Id.* at 321. But this Court explained that Congress had rejected similarly broad, purposive interpretations of the term "employee" that the Court had adopted in earlier cases. *Id.* at 324-325 (citing *NLRB* v. *Hearst Publ'ns, Inc.*, 322 U.S. 111 (1944), and *United States* v. *Silk*, 331 U.S. 704 (1947)). As a result, this Court admonished that courts should not use statutory purpose to "unmoor[] the term from the common law." *Id.* at 324. The Court also rejected arguments based on cases arising under the Fair Labor Standards Act (FLSA) because the FLSA's definition of "employee" "goes beyond its

ERISA counterpart." *Id.* at 325-326 (discussing *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722 (1947)).

Finally, this Court explained that the Fourth Circuit's test—which focused on the worker's expectations and bargaining power, *Darden*, 503 U.S. at 321—could not "furnish predictable results" and would thus "severely compromise" companies' ability to identify their employees and calculate their pension-fund obligations. *Id.* at 326-327. In contrast, the Court explained, the common-law test would permit categorical judgments about employment status because employers generally know the factual variables at play. *Id.* at 327. The common-law test also tracks the "difference between an employee and an independent contractor" as "reflected in [the Court's] precedents." *Id.*

B. Petitioners' Claims

Petitioners are former insurance agents for respondent American Family Insurance Company. Each petitioner signed a contract with American Family expressly acknowledging that he or she was "an independent contractor for all purposes" who retained "full control" over and "the right to exercise independent judgment" about, among other things, the "time, place and manner of soliciting insurance." Pet. App. 21a. Petitioners filed their tax returns as independent contractors and deducted their business expenses as self-employed business owners. Pet. App. 5a.

In 2013, petitioners brought this proposed class action. They alleged that American Family had misclassified them as independent contractors and thus deprived them of ERISA's protections. Pet. App. 3a-4a. After certifying a class over American Family's objection, the district court bifurcated the issues and tried the ques-

tion of petitioners' employment status before an advisory jury. Pet. App. 4a-5a; *see also* Pet. App. 5a (noting that ERISA plaintiffs "generally have no right to have their claims decided by a jury").

The advisory jury suggested that petitioners were employees. While acknowledging that it was "not bound" by the jury's determination, the district court ultimately agreed. Pet. App. 42a. The district court noted, however, that the *Darden* factors were "almost evenly split between favoring employee status and favoring independent contractor status." Pet. App. 83a. And the court recognized that its decision departed from the "nearly unanimous" consensus among courts that insurance agents are independent contractors. Pet. App. 88a. The court accordingly certified an interlocutory appeal. Pet. App. 89a.

C. The Court Of Appeals' Decision

The Sixth Circuit reversed, holding that petitioners were independent contractors. The court began by identifying the standards of review. It noted that three types of determinations under the common-law test are relevant: First, a court must determine the historical facts and circumstances of the parties' relationship. Second, the court must evaluate each common-law factor under *Darden* based on the historical facts. Finally, based on its evaluation of those factors, the court must make the ultimate determination of employment status. Pet. App. 12a.

The Sixth Circuit addressed the standard of review governing each question. The court explained that the district court's findings of historical fact are reviewed for clear error and that the ultimate determination of employment status is a question of law reviewed de no-

vo. Pet. App. 12a. There was no dispute between the parties on either point: Petitioners themselves maintained that the Sixth Circuit should review the ultimate determination de novo. Pet. C.A. Br. 30.

The court focused more attention on the standard for reviewing determinations of the individual *Darden* factors. Pet. App. 12a. The court of appeals held that it would "review de novo those determinations to the extent that they involve the application of a legal standard to a set of facts." Pet. App. 14a. The court explained that although the underlying factual findings are reviewed for clear error, "[e]ach *Darden* factor is … itself a 'legal standard'" to be applied to determine "'the legal meaning and weight that those facts should be given.'" *Id.* (emphasis removed). Accordingly, "a district court's conclusion relating to the existence and degree of each *Darden* factor" cannot be "entirely a question of fact." Pet. App. 13a-14a.

The court of appeals perceived a circuit conflict on the standard of review for evaluations of the individual *Darden* factors. For that proposition, however, both the court and the dissent relied almost exclusively on cases applying the distinct employment test that applies under the FLSA, not *Darden*'s common-law test. *See* Pet. App. 13a, 26a-28a; *infra* p. 23 n.7.

The court of appeals next concluded, without disturbing the district court's factual findings, that "the district court incorrectly applied the legal standards" governing the first and eighth *Darden* factors. Pet. App. 15a. Regarding the first factor—"the skill required of an agent," *id.*—the Sixth Circuit explained that the district court had incorrectly looked to American Family's preferred practice of seeking potential agents who were untrained, rather than the level of

specialized skill required of insurance agents generally. Pet. App. 16a. And regarding the eighth factor—"the hiring and paying of assistants," Pet. App. 15a—the court of appeals explained that the district court had erred by assigning neutral weight to that factor when that court had expressly found that petitioners "'had primary authority over hiring and paying their assistants.'" Pet. App. 18a.

Having corrected the legal errors in the district court's evaluation of the first and eighth *Darden* factors, the court of appeals went on to reweigh all the factors and make an ultimate determination of employment status. Pet. App. 18a-22a. The court recognized that the "'core issue'" under *Darden* is the "'hiring party's right to control the manner and means by which the product is accomplished,'" Pet. App. 11a, and explained that *Darden*'s right-to-control inquiry is "'a broad consideration that is embodied in many of the specific factors,'" Pet. App. 18a. In the "ERISA context, where a court is determining whether an employer has assumed responsibility for a person's pension status," the court continued, "the *Darden* factors that most pertain to [the] financial structure [of the company-agent relationship] … carry more weight." Pet. App. 18a-19a. The court identified factors "relating to the source of the instrumentalities and tools, the method of payment, the provision of employee benefits, and the agents' tax treatment" as "especially important in determining the parties' financial structure." Pet. App. 19a-20a. When those factors were properly weighed, the court held, "the entire mix of *Darden* factors favor[s] independent-contractor status." Pet. App. 20a.

The court of appeals also reasoned that the district court should have placed greater weight on the parties' agreement to structure their relationship to treat

agents as independent contractors. Pet. App. 20a-21a. The court of appeals recognized that "[t]he Agency Agreement … states in wholly unambiguous terms that agents are independent contractors who retain 'full control' over several facets of their business." Pet. App. 21a. That factor "further swung the balance in favor of independent-contractor status." Pet. App. 22a.

Judge Clay dissented. Pet. App. 23a-37a. He agreed that "the 'legal meaning' that the *Darden* factors should be given—*i.e.*, whether [petitioners] are employees or independent contractors for purposes of ERISA—and the 'legal weight' that the *Darden* factors should be given—*i.e.*, which factors should be relied upon more than others and when—are both undisputedly conclusions of law reviewed *de novo*." Pet. App. 28a. He maintained, though, that each *Darden* factor is a factual question reviewable only for clear error. Pet. App. 27a-28a. He also disagreed with the majority's analysis of the skill and hiring factors and its emphasis on financial structure. Pet. App. 29a-37a.

The Sixth Circuit denied rehearing en banc. Pet. App. 90a-91a.

REASONS FOR DENYING THE PETITION

I. CERTIORARI IS NOT WARRANTED ON THE STANDARDS-OF-REVIEW QUESTION

The court of appeals corrected two legal errors the district court made in applying *Darden* to the facts of this case—specifically, its understanding of the first and eighth factors for determining employment status. It is settled law, and petitioners do not dispute, that courts of appeals review the legal standards applied by district courts de novo. And courts of appeals regularly correct legal errors like those made by the district

court here on de novo review. Accordingly, there is no circuit split about the standard of review applied here.

Petitioners attempt to manufacture a circuit split on the standard for reviewing "a district court's finding that a worker is an employee." Pet. i. But any such split, even if it existed, would not be implicated here, where the court of appeals simply found that the district court had applied the wrong legal framework. In any event, petitioners' framing collapses what are in fact three distinct inquiries, and there is no certworthy split as to any. *See supra* pp. 6-7. The first is the standard of review of the district court's findings of historical fact. The second is the standard of review of the district court's evaluation of each common-law factor and its significance. The third is the standard of review of the district court's ultimate conclusion—after weighing all the common-law factors—whether a person is an employee or an independent contractor. Contrary to petitioners' submission, there is broad agreement across the courts of appeals as to the standard applicable to each of those three inquiries. Any disagreement arises only out of outdated decisions from other contexts that are not consistently followed by the courts that decided them. Moreover, this case is not a good vehicle to review any alleged split because the Sixth Circuit's decision corrected legal errors in the district court's analysis that petitioners do not even defend, and petitioners invited the Sixth Circuit to apply de novo review to the district court's employment determination. *See supra* p. 7. The Sixth Circuit was correct to review de novo the legal framework applied by the district court, and its decision does not warrant review.

A. Courts Uniformly Apply De Novo Review To Correct A District Court's Application Of An Erroneous Legal Standard

The decision below reflects a run-of-the-mill application of the principle that an appellate court should review de novo the legal standards applied by a district court and correct any legal errors the district court might have made. Specifically, the court of appeals held that the district court applied the wrong legal standards in evaluating the first and eighth *Darden* factors. *See* Pet. App. 16a-17a.

The district court thought that the first factor—"'the skill required,'" *Darden*, 503 U.S. at 323—looks to whether the hiring party sought out trained or untrained workers, and held that the factor weighed in favor of employee status because "American Family specifically sought out potential agents who were untrained," Pet. App. 74a. The Sixth Circuit held that the district court had misinterpreted that factor as a legal matter, because "[t]he skill inquiry centers on whether the skill is an independent discipline that 'could be' learned elsewhere," not on the practices of any particular hiring party. Pet. App. 16a; *see id.* ("[T]he underlying discipline of selling insurance remains the same regardless of American Family's hiring preferences."). Because "'the sale of insurance is a highly specialized field' that requires 'considerable training, education, and skill,'" the Sixth Circuit held that the first factor weighs "in favor of independent-contractor status." *Id.*

Similarly, the Sixth Circuit held that the district court had "inexplicably concluded" that the eighth *Darden* factor—"the hired party's role in hiring and paying assistants," *Darden*, 503 U.S. at 323-324—was "neutral" when the district court had expressly found

that petitioners "had primary authority over hiring and paying their assistants" and "were solely responsible for all 'staff compensation matters.'" Pet. App. 17a-18a. The court of appeals explained that assigning neutral weight to those facts was "contrary to *Darden*'s language" because, "[i]f the hired party has the 'primary authority over hiring and paying its own assistants,' the *Darden* factor … should weigh in favor of independent-contractor status." *Id.*

Each of these holdings involved a patently legal question: the inquiry required by the first *Darden* factor and the conclusion to be drawn from a particular finding on the eighth *Darden* factor. Having held that the district court applied the wrong legal standards in evaluating those factors, the Sixth Circuit then applied the correct legal standards to the historical facts found by the district court. Petitioners do not challenge the Sixth Circuit's interpretations of the first or eighth *Darden* factors. Nor do they seek review of the court of appeals' decision to apply the correct legal test in the first instance rather than remanding to the district court to do so. *See* Pet. App. 18a-22a (reweighing the *Darden* factors under the corrected interpretation).

Petitioners also do not claim any disagreement regarding the standard for reviewing the legal framework applied by the district court. Nor could they. As this Court recently explained in *Lakeridge*, determining the applicable "legal test" or "standard" is "a legal conclusion" that "an appellate panel reviews … without the slightest deference." 138 S. Ct. at 965. Thus, even where review is otherwise deferential, a court of appeals "should apply *de novo* review" if the lower court "misunderstood the nature of the [substantive] query." *Id.* at 968 n.7; *see also, e.g.*, *Chicago Reg'l Council of Carpenters Pension Fund* v. *Schal Bovis, Inc.*, 826

F.3d 397, 403 (7th Cir. 2016) (where "the district court committed legal error in its interpretation of the [applicable] doctrine," review "is necessarily *de novo*"); *Mariotti* v. *Mariotti Bldg. Prods., Inc.*, 714 F.3d 761, 765 (3d Cir. 2013) ("Whether the District Court applied the correct legal standard in deciding that Plaintiff was not an employee for purposes of Title VII presents a legal question. Accordingly, we exercise plenary review."). The Sixth Circuit's decision here did nothing more than correct the legal standard applied by the district court. There is no circuit split concerning the standard for reviewing the articulation of the correct legal standard, and no error below, so there is no need for review.

B. There Is No Certworthy Circuit Split Even On The Standard-Of-Review Questions Petitioners Set Forth

Petitioners' first question masks three distinct issues of appellate review: (1) review of findings of historical fact; (2) review of the district court's evaluation of the individual common-law factors; and (3) review of the district court's ultimate determination of employment status. As petitioners concede, every circuit to have addressed the first question has held that the district court's findings of historical fact are reviewed for clear error.[1] Contrary to petitioners' argument, there

[1] *See, e.g.*, *Holt* v. *Winpisinger*, 811 F.2d 1532, 1536 n.31 (D.C. Cir. 1987); *Langman Fabrics* v. *Graff Californiawear, Inc.*, 160 F.3d 106, 111 (2d Cir. 1998), *amended*, 169 F.3d 782; *Marco* v. *Accent Publ'g Co.*, 969 F.2d 1547, 1548 (3d Cir. 1992), *abrogated on other grounds as recognized in TD Bank* v. *Hill*, 928 F.3d 259, 278-279 (3d Cir. 2019); *Breaux & Daigle, Inc.* v. *United States*, 900 F.2d 49, 51 (5th Cir. 1990); Pet. App. 12a-14a; *Schwieger* v. *Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480, 484 (8th Cir. 2000); *JustMed, Inc.* v. *Byce*, 600 F.3d 1118, 1125 (9th Cir. 2010); *Roth* v. *American Hosp. Supply Corp.*, 965 F.2d 862, 865 (10th Cir. 1992).

is also no certworthy circuit conflict on either of the other questions.

1. Courts agree that the ultimate employment-status determination is reviewed de novo

There is widespread agreement among the courts of appeals that have considered the issue that the ultimate determination of employment status is reviewed de novo, whether under ERISA or under other statutes incorporating the common-law test.

For example, the Second Circuit reviews the ultimate determination of employment status de novo as a question of law. *See Eisenberg* v. *Advance Relocation & Storage, Inc.*, 237 F.3d 111, 115 (2d Cir. 2000) (Title VII); *Aymes* v. *Bonelli*, 980 F.2d 857, 860-861 (2d Cir. 1992) (Copyright Act). The Third Circuit "exercise[s] plenary review of the district court's application of the law of agency to the facts." *Marco* v. *Accent Publ'g Co.*, 969 F.2d 1547, 1548 (3d Cir. 1992) (Copyright Act), *abrogated on other grounds as recognized in TD Bank* v. *Hill*, 928 F.3d 259, 278-279 (3d Cir. 2019); *see EEOC* v. *Zippo Mfg. Co.*, 713 F.2d 32, 33 (3d Cir. 1983) (Age Discrimination in Employment Act (ADEA)). And the Fifth Circuit has held that "whether an individual is an employee or an independent contractor is a question of law" reviewed "*de novo*." *Penn* v. *Howe-Baker Eng'rs, Inc.*, 898 F.2d 1096, 1101-1102 (5th Cir. 1990) (ERISA).

The Eighth Circuit has likewise recognized that an appellate court "review[s] the ultimate question of employment status de novo." *Schwieger* v. *Farm Bureau Ins. Co. of Neb.*, 207 F.3d 480, 484 (8th Cir. 2000) (citations omitted) (Title VII); *see also Birchem* v. *Knights of Columbus*, 116 F.3d 310, 313 (8th Cir. 1997) (Ameri-

cans with Disabilities Act (ADA)); *Berger Transfer & Storage* v. *Central States, Se. & Sw. Areas Pension Fund*, 85 F.3d 1374, 1377-1378 (8th Cir. 1996) (ERISA). In reviewing employment determinations by the National Labor Relations Board, the Eleventh Circuit has distinguished between the Board's factual findings, which it reviews for substantial evidence, and its application of the common law of agency to those facts, which it reviews de novo. *See Crew One Prods., Inc.* v. *NLRB*, 811 F.3d 1305, 1310 (11th Cir. 2016). In doing so, the court has made clear that the ultimate determination of employment status is reviewed without deference. *Id.* at 1311-1314; *cf. Antenor* v. *D & S Farms*, 88 F.3d 925, 929 (11th Cir. 1996) ("A determination of employment status under the FLSA … is a question of law subject to our *de novo* review."). The D.C. Circuit has similarly held that "[t]he question whether an individual is an employee or an independent contractor … is a question of law," on which a district court warrants no deference. *Holt* v. *Winpisinger*, 811 F.2d 1532, 1536 & n.31 (D.C. Cir. 1987) (ERISA).[2]

Petitioners assert (at 11-13) that the Fourth, Seventh, and Ninth Circuits review the determination of employment status for clear error. That is incorrect: each of those courts reviews the ultimate employment-status determination de novo.

---

[2] While the First Circuit has not directly addressed the standard of appellate review, it has held that employment status is appropriately determined as a matter of law on a motion for summary judgment so long as there is no dispute over the historical facts. *See Casey* v. *Department of Health & Human Servs.*, 807 F.3d 395, 404 (1st Cir. 2015) (Title VII); *Camacho* v. *Puerto Rico Ports Auth.*, 369 F.3d 570, 573 (1st Cir. 2004) (ADEA); *Dykes* v. *DePuy, Inc.*, 140 F.3d 31, 39 (1st Cir. 1998) (ERISA and ADA).

In the Fourth Circuit, employment status "is 'a question of law'" reviewed de novo. *Farlow* v. *Wachovia Bank of N.C.*, 259 F.3d 309, 313 (4th Cir. 2001) (Title VII; quoting *Cilecek* v. *Inova Health Sys. Servs.*, 115 F.3d 256, 261-262 (4th Cir. 1997) (Title VII)); *Keleher* v. *Dominion Insulation, Inc.*, 1992 WL 252508, at *2-3 (4th Cir. Oct. 5, 1992) (per curiam) (table opinion) (ERISA); *cf. Schultz* v. *Capital Int'l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. 2006) ("The ultimate conclusion as to whether a worker is an employee or independent contractor under the FLSA presents a legal question that we review de novo.").

The Seventh Circuit recognizes that employment status is "a 'legal conclusion' which involves 'an application of the law to the facts,'" and thus is for a court to make. *EEOC* v. *North Knox Sch. Corp.*, 154 F.3d 744, 747 & n.1 (7th Cir. 1998) (ADEA; quoting *Knight* v. *United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 379 (7th Cir. 1991)). And its cases make clear that the Seventh Circuit determines employment status—applying the common law of agency to the historical facts—without deferring to the district court's determination. *See, e.g.*, *Levitin* v. *Northwest Cmty. Hosp.*, 923 F.3d 499, 501-503 (7th Cir. 2019) (Title VII); *Bridge* v. *New Holland Logansport, Inc.*, 815 F.3d 356, 361-363 (7th Cir. 2016) (ADEA); *Solon* v. *Kaplan*, 398 F.3d 629, 631-634 (7th Cir. 2005) (Title VII); *cf. Simpkins* v. *DuPage Hous. Auth.*, 893 F.3d 962, 965 (7th Cir. 2018) (holding, in FLSA case, that "'the determination of workers' status is a legal rather than a factual one,' meaning it is subject to de novo review").

The Ninth Circuit has also held that whether a worker is an employee or independent contractor is a conclusion of law reviewed de novo. *See JustMed, Inc.* v. *Byce*, 600 F.3d 1118, 1125 (9th Cir. 2010) (Copyright

Act, after a bench trial); *cf. In re Brown*, 743 F.2d 664, 666 (9th Cir. 1984) ("The primary issue on appeal concerns the question whether the facts, which are not disputed, indicate that drivers … were independent contractors or employees …. Therefore, *de novo* review is the appropriate standard on this issue." (California law)).

For their contrary claim about the Fourth and Ninth Circuits, petitioners cite (at 12) four dated tax cases. But as the more recent cases cited above show, neither court has followed those cases outside the unique tax context—indeed, the Fourth Circuit has not followed them at all. *Cf. Berger Transfer*, 85 F.3d at 1377 (in ERISA case, rejecting argument for clear-error review under older tax precedent because "the context in which [that tax case] arises limits its applicability to this case"). And even if there were intracircuit tension concerning the tax-specific standard, it would be for the Fourth and Ninth Circuits to resolve, not this Court. *See, e.g.*, *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).[3]

---

[3] The four tax cases also are unreasoned and unpersuasive on their own terms. For example, in *Weber* v. *Commissioner*, 60 F.3d 1104, 1105, 1110 (4th Cir. 1995) (per curiam), the court summarily affirmed and simply adopted the Tax Court's opinion, which stated that "[w]hether the employer-employee relationship exists in a particular situation is a factual question." That observation in a trial court's opinion cannot be considered a holding of the court of appeals on the standard of appellate review, particularly because the Fourth Circuit has elsewhere stated the opposite. *See Farlow*, 259 F.3d at 313 ("Resolution of factors as 'to whether an employment relationship or an independent contractor relationship was created' is 'a question of law.'"). *Eren* v. *Commissioner*, 180 F.3d 594, 596 (4th Cir. 1999), relies on *Weber*, and it has never been cited by the Fourth Circuit or any other court of appeals. In *Profes-*

For their claim about the Seventh Circuit, petitioners cite (at 12) cases that do not support, much less require, clear-error review. In *Worth* v. *Tyer*, 276 F.3d 249, 262 (7th Cir. 2001), the court reviewed for clear error because the dispute concerned only "the trial judge's view of the evidence, not … her view of the law." *Knight* makes clear that the employment-status determination is a "legal conclusion." 950 F.2d at 379. Review is "'more searching,'" the court explained, if the district court "commit[s] an error of law, including one that infects a so-called mixed finding of fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Id.* (quotation marks and brackets omitted). And in *Century States, Southeast & Southwest Areas Pension Fund* v. *Nagy*, 714 F.3d 545 (7th Cir. 2013), where the Seventh Circuit applied clear-error review, the court expressed discomfort with that standard and declined to reconsider it only because the parties had not asked it to do so and because the court would have reached the same result even under de novo review. *Id.* at 549 n.1. Indeed, the Seventh Circuit has subsequently criticized *Nagy*'s approach as "unique to our circuit," noted that it has been applied only narrowly, and refused to extend it. *Schal Bovis*, 826 F.3d at 402-403 & n.1. Given the Seventh Circuit's own criticism, the cases cited by petitioners do not warrant this Court's review.

Finally, petitioners rely on three Tenth Circuit decisions dating back more than twenty years that in-

---

sional & Executive Leasing, Inc. v. *Commissioner*, 862 F.2d 751, 753 (9th Cir. 1988), the court adopted clear-error review for the test set forth in *Silk*, 331 U.S. at 714-716. But *Silk* is not the common-law test at issue here. *Darden*, 503 U.S. at 324-325; *supra* pp. 4-5. And *Chin* v. *United States*, 57 F.3d 722, 725 (9th Cir. 1995), simply parrots *Professional & Executive Leasing*.

voked the clear-error standard.[4] Those decisions too do not warrant certiorari because more recent opinions of the Tenth Circuit recognize that review is de novo, at least when the lower court has committed an error of law, or even embrace de novo review entirely. *See Shellito* v. *Commissioner*, 437 F. App'x 665, 669 (10th Cir. 2011) ("[W]e review de novo the standards and tests governing the factual analysis, and the application of the law to the facts."); *Brackens* v. *Best Cabs, Inc.*, 146 F. App'x 242, 243-244 (10th Cir. 2005) (de novo review under Title VII); *cf. Acosta* v. *Paragon Contractors Corp.*, 884 F.3d 1225, 1235 (10th Cir. 2018) (de novo review under FLSA). Intervening to address outlier cases—which are not implicated by the decision below, and which the Tenth Circuit has indicated it will likely abandon when the occasion arises—is unnecessary.

2. Courts apply de novo review in evaluating the individual common-law factors

All of the courts of appeals that have addressed the issue also apply de novo review to a district court's conclusions regarding the individual common-law factors. That searching standard is evident in decisions explaining that the court of appeals exercises plenary review or applies the law to the record itself.[5] It is also evident

---

[4] *Hockett* v. *Sun Co., (R&M)*, 109 F.3d 1515, 1525-1527 (10th Cir. 1997) (ERISA); *Roth*, 965 F.2d at 865 (ERISA); *Marvel* v. *United States*, 719 F.2d 1507, 1515 (10th Cir. 1983) (tax).

[5] *See Marco*, 969 F.2d at 1548, 1550-1552 (3d Cir.) ("exercis[ing] plenary review of the district court's application of the law of agency to the facts"); *Penn*, 898 F.2d at 1101-1102 (5th Cir.) ("applying the common law of agency to the record"); *see also, e.g.*, *Farlow*, 259 F.3d at 313 (4th Cir.) (considering tendency and weight of common-law factors without deference); *North Knox Sch. Corp.*, 154 F.3d at 747 & n.1 (7th Cir.) (court of appeals

in appellate decisions applying the test in the first instance rather than remanding to the district court for new analysis.[6] That plenary review standard is consistent with the standard announced by the Sixth Circuit here. *See* Pet. App. 14a (court reviews determinations of the individual common-law factors de novo "to the extent that they involve the application of a legal standard to a set of facts").

Petitioners argue incorrectly that the Second and Eighth Circuits apply a "hybrid standard" to review determinations concerning the individual common-law factors for clear error. Pet. 13. In fact, those courts simply use different words to describe the same type of plenary review that the Sixth Circuit endorsed.

The Second Circuit has explained that it independently "review[s] each of the factors and consider[s]

"take[s] the factual record … and ask[s] whether it shows the [individuals] were independent contractors"); *Barnhart* v. *New York Life Ins. Co.*, 141 F.3d 1310, 1312-1314 (9th Cir. 1998) (conducting own "application of the common-law factors" to reach conclusion, "bolstered" by other courts' categorization of insurance agents, that the plaintiff was an independent contractor); *JustMed*, 600 F.3d at 1125-1128 (9th Cir.) ("[w]eighing the common law factors" itself to "conclude that the district court did not err in holding that [the plaintiff] was an employee").

[6] *See, e.g.*, *Holt*, 811 F.2d at 1536 n.31, 1538-1541 (D.C. Cir.); *Mayeske* v. *International Ass'n of Fire Fighters*, 905 F.2d 1548, 1555 (D.C. Cir. 1990); *Zippo Mfg.*, 713 F.2d at 33 (3d Cir.); *Alexander* v. *Rush N. Shore Med. Ctr.*, 101 F.3d 487, 493-494 (7th Cir. 1996) (remand not required because court of appeals could review the record itself to find plaintiff "an independent contractor as a matter of law"); *see also Crew One*, 811 F.3d at 1311-1314 (11th Cir.) (vacating NLRB decision after "discussing the five errors that the Board made when it applied the law to the facts," and "weigh[ing] all of the factors [itself to] conclude that the [workers were] independent contractors").

their relative importance." *Aymes*, 980 F.2d at 862. The court of appeals conducts that review even on factors the lower court has "not specifically address[ed]," allowing it to determine employment status in the first instance without remanding. *Id.* at 861-864; *see also Eisenberg*, 237 F.3d at 117-119 (reviewing factors to determine their legal significance). In other words, the court exercises full plenary review.

Petitioners seize on a statement in *Aymes*, 980 F.2d at 860-861, that "factual findings as to the presence or absence of the *Reid* factors cannot be disturbed unless clearly erroneous." But that statement makes clear only that the underlying "factual findings" are reviewed for clear error. *Id.* As the analysis in *Aymes* proves, *see id.* at 861-864, it does not mean that the court of appeals also defers to the conclusions the district court reaches based on those findings regarding the common-law factors and their legal significance.

The Eighth Circuit's decisions similarly confirm that it exercises plenary review over the district court's conclusions regarding the individual common-law factors. Thus, in *Schwieger* v. *Farm Bureau*, the court reviewed the historical facts and drew its own conclusions about the tendency and weight of each *Darden* factor. 207 F.3d at 484-487 (concluding, for example, that the first factor "weighs heavily in favor of independent contractor status" and the ninth and tenth factors "both count in favor of finding [plaintiff] to be an employee"). And in *Alford* v. *United States*, 116 F.3d 334, 337 (8th Cir. 1997), the Eighth Circuit rejected the district court's analysis and "conclude[d], after applying the law to the stipulated facts" itself, that the worker was an independent contractor.

Petitioners' claim (at 13) that the Eighth Circuit applies a "hybrid standard" relies on language from *Berger Transfer*, 85 F.3d at 1377-1378, that petitioners have plucked out of context. That language traces back to the Fifth Circuit's FLSA decision in *Brock* v. *Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1045, 1047-1054 (5th Cir. 1987), which made clear that "[t]he district court's analysis … is subject to plenary review … to ensure that the district court's understanding of the law is proper" and to determine whether its findings on the factors are relevant or irrelevant "as a matter of law." Indeed, *Brock* explained that only when "the proper legal standards" are applied to determine the common-law factors "can the inferences that reasonably and logically flow from the historical facts represent a correct application of law to fact." 814 F.2d at 1044-1045. And the Fifth Circuit has since confirmed that "the district court's legal analysis of the inferences to be drawn from those facts is subject to plenary review." *Breaux & Daigle, Inc.* v. *United States*, 900 F.2d 49, 51 (5th Cir. 1990) (citing *Brock*, 814 F.2d at 1044-1045).

In sum, the other courts of appeals conduct the same type of review as the Sixth Circuit. Petitioners' "hybrid test" amounts to nothing more than varying verbal formulations for the same standard of review. But the Court does not grant certiorari to "iron[] out minor linguistic discrepancies among the lower courts" when "those discrepancies are not outcome determinative." Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 96 (2006). And any such minor linguistic discrepancies are not implicated by the Sixth Circuit's decision here in any event, because all the Sixth Circuit did was apply de novo review to cor-

rect legal errors. This case implicates no split warranting the Court's review.[7]

C. This Case Is A Poor Vehicle

Even if there were a certworthy split about the standards of review, this case would be a poor vehicle for resolving it because petitioners invited the Sixth Circuit to apply de novo review, and the Sixth Circuit would have reversed anyway under any standard.

In their brief, petitioners told the Sixth Circuit that the court of appeals "reviews the [district court's] 'findings of fact for clear error but reviews de novo the district court's application of the legal standard to them.'" Pet. C.A. Br. 30 (brackets omitted); *see also id.* at 31 ("the Court accepts the findings of fact as true and reviews *de novo* whether the district court applied the correct legal standard to its fact findings"). They also asserted that the "'ultimate conclusion … is a question of law.'" *Id.* at 30 (quoting *Berger Transfer*, 85 F.3d at 1377-1378). The Sixth Circuit then applied the standard of review petitioners requested: It reviewed the legal standard applied by the district court de novo and found that legal standard to be erroneous. Petitioners cannot now complain that they would prefer clear-error review, hoping for a different result.

The case is also a poor vehicle because the district court committed legal error reversible under any standard of review. Even under clear-error review,

---

[7] The Sixth Circuit perceived a circuit split on the standard of review for determinations of the individual common-law factors. Yet all but one of the cases cited by the court of appeals applied the FLSA standard, not the common-law test, and thus evaluated a different set of factors under a standard not implicated here (as petitioners concede). Pet. App. 13a, 26a-28a; *see supra* p. 7.

applying the wrong legal test is reversible error. *See, e.g.*, *Lakeridge*, 138 S. Ct. at 968 & n.7. Here, as the Sixth Circuit explained, the district court applied the wrong legal standards in assessing two particular *Darden* factors. The district court did not ask the right question on the skills factor, Pet. App. 16a, and reached a conclusion "contrary to *Darden*'s language" on the hiring factor, Pet. App. 18a. Because those errors—which petitioners do not defend—amount to applications of the wrong legal standard, they are reversible even under review for clear error. *See Lakeridge*, 138 S. Ct. at 965, 968 n.7; *see also, e.g.*, *Schal Bovis*, 826 F.3d at 403.

D. De Novo Review Is The Correct Standard

This Court's precedents confirm that the courts of appeals are properly reviewing both the application of the individual *Darden* factors and the ultimate employment-status determination de novo. In *Darden*, the Court stressed the importance of predictability so that companies can identify their employees and calculate their pension-fund obligations. 503 U.S. at 327. And as *Lakeridge* confirms, de novo review is appropriate to foster predictability. *See* 138 S. Ct. at 967. By "requir[ing] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard," plenary review helps to "develop[] auxiliary legal principles of use in other cases." *Id.* "*[D]e novo* review tends to unify precedent and will come closer to providing … a defined set of rules which, in most instances, makes it possible to reach a correct determination beforehand." *Ornelas* v. *United States*, 517 U.S. 690, 697 (1996) (quotation marks omitted).

Clear-error review, in contrast, threatens confusion rather than predictability. On clear-error review,

courts may reach a "'range of permissible conclusions'" on similar facts, *Hockett* v. *Sun Co. (R&M)*, 109 F.3d 1515, 1527 (10th Cir. 1997), leaving companies and workers guessing over their rights and obligations. This case exemplifies such confusion. Unlike the district court here, other courts have consistently held that insurance agents—including American Family agents—are independent contractors under federal law. *E.g.*, Pet. App. 22a; *Murray* v. *Principal Fin. Grp., Inc.*, 613 F.3d 943, 944-945 (9th Cir. 2010) ("We, along with virtually every other Circuit to consider similar issues, have held that insurance agents are independent contractors and not employees for purposes of various federal employment statutes, including [ERISA], the [ADEA], and Title VII."); *Wortham* v. *American Family Ins. Grp.*, 385 F.3d 1139, 1140-1141 (8th Cir. 2004); *Moore* v. *American Family Mut. Ins. Co.*, 1991 WL 111878, at *1 (7th Cir. June 25, 1991) (table opinion). De novo review helps ensure those predictable, uniform results.

Petitioners gain no traction from *Lakeridge* and *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960). In both cases, the Court confronted substantive legal inquiries "about as factual sounding as any mixed question gets," and thus requiring "[p]recious little" "legal work." *Lakeridge*, 138 S. Ct. at 968. In *Lakeridge*, the question was whether a transaction was conducted at arm's length—unsurprisingly, an inquiry on which the Court has "never tried to elaborate." *Id.* And in *Duberstein*, the question was whether a property transfer was a "gift" under the tax laws. 363 U.S. at 279-280. Given that the statutory inquiry looked to the "colloquial" usage of the term, the Court reasoned that it could lay down no principles as a matter of law and

that precedent could provide only "maxims of experience." *Id.* at 285, 287.

The common-law test for employment status is unlike those inquiries. As cases from this Court and the courts of appeals confirm, the common-law test has acquired its content from precedent, not from general maxims of human experience. *See, e.g.*, *Darden*, 503 U.S. at 324, 327 (citing cases and the *Restatement (Second) of Agency* § 220(2) (1958), and noting that precedents reflect employee-contractor distinction); *Reid*, 490 U.S. at 752 ("[e]xamining the circumstances of this case in light of the[] [common-law] factors"). While de novo review in a case like *Lakeridge* would "not much clarify legal principles or provide guidance to other courts," 138 S. Ct. at 968, courts applying the common-law employment test often cite each other's and this Court's guidance.

De novo review is also the correct standard for review of the individual common-law factors. As the Sixth Circuit explained, these factors involve legal standards. Pet. App. 14a. And when a district court misapplies a legal standard—for instance, if it "misunderst[ands] the nature of the … query" or "devise[s] some novel … test"—then "an appellate court should apply *de novo* review." *Lakeridge*, 138 S. Ct. at 968 n.7. The Sixth Circuit's de novo review of the individual *Darden* factors "to the extent that they involve the application of a legal standard to a set of facts," Pet. App. 14a, follows that well-established rule.

Moreover, reviewing the *Darden* factors for clear error would frustrate de novo review of the ultimate employment-status determination. It would prevent appellate courts from addressing the proper significance of the individual factors before assessing how

they work together to produce a conclusion. A reviewing court cannot effectively weigh and draw an overall conclusion from common-law factors de novo if it is bound by the district court's conclusions on each of the individual factors except for those that are clearly erroneous. Effective de novo review of the ultimate conclusion of legal status thus requires allowing the appellate court to make its own evaluation of the significance and weight of the underlying factors.

Petitioners' cases (at 20) do not support, much less require, clear-error review. In *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318, 323 (1974), the Court stated that even if a determination of employment status were a "factual finding" subject to clear error review, it could still be set aside if the trial court "applied an erroneous legal standard." *Kelley* is uninformative as to the proper standard of review where a district court has applied the correct legal framework because *Kelley* was not such a case. Furthermore, *Kelley* confirms that reversal is warranted under any standard where, as here, the district court has applied the wrong legal framework.

In *Baker* v. *Texas & Pacific Railway Co.*, 359 U.S. 227 (1959) (per curiam), the Court held only that conflicting evidence presented a jury issue. *See id.* at 228-229 (describing conflicting evidence regarding the same historical facts); *see also Kelley*, 419 U.S. at 331. The question presented here does not concern how to resolve such evidentiary disputes. And in *Ward* v. *Atlantic Coast Line R.R. Co.*, 362 U.S. 396, 398-400 (1960) (per curiam), the Court held only that a jury making the employment-status determination should be properly instructed as to the relevant factors for its consideration. That says nothing about the proper

standard of review when a court makes that determination.

Finally, the statement in *NLRB* v. *United Insurance Co. of America*, 390 U.S. 254, 260 (1968), that a court may not "displace the Board's choice between two fairly conflicting views" is not incompatible with de novo review of district court determinations. How "principles of administrative law" apply in "equivocal circumstances," *Schwieger*, 207 F.3d at 487 n.4, is not at issue here. And that instruction, unique to the NLRB context, does not require courts to "defer to the Board's application of agency principles" anyway. *Atrium of Princeton, LLC* v. *NLRB*, 684 F.3d 1310, 1315 (D.C. Cir. 2012).

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioners claim (at 22-25) that the Sixth Circuit impermissibly applied a different employment test for the ERISA context, and that the Sixth Circuit's approach conflicts with those of the other courts of appeals. That is incorrect.

A. Petitioners Mischaracterize The Sixth Circuit's Approach

The Sixth Circuit applies the common-law test set forth in *Darden*. That test, even when tailored to the context of an ERISA case, is not a "statute-specific approach." Pet. 25. The common-law test remains the same test, assessing status under the same definition of "employee" and the same common-law factors, even when courts map it on to different circumstances or different statutory contexts.

Petitioners say (at 24) that the Sixth Circuit here subordinated the critical element of the right to control to other factors. But the Sixth Circuit said otherwise. The court explained that the right to control is the central inquiry, with "many of the specific [common-law] factors" helping answer it. Pet. App. 18a; *see also* Pet. App. 11a. Only in that context did the court find that factors relating to financial structure carry more weight. Pet. App. 19a. The right to control remains "[t]he most important consideration" under Sixth Circuit precedent. *Trustees of Resilient Floor Decorators Ins. Fund* v. *A & M Installations, Inc.*, 395 F.3d 244, 249 (6th Cir. 2005).

Petitioners' claim (at 23) that *Darden* prohibits calibrating the common-law test for the ERISA context is mistaken. The Court merely held that the test for determining employment status cannot be unmoored from the common law, rejecting the non-common-law test that the Fourth Circuit had fashioned from whole cloth based on its view of ERISA's purpose. 503 U.S. at 324-325. The Court nowhere suggested how to assign weight to the "nonexhaustive" factors under the correct common-law test, let alone held that courts must assign the same weight to those factors regardless of context. *Id.* To the contrary, the Court explained that "'all of the incidents of the relationship must be assessed and weighed with no one factor being decisive,'" and favorably cited an Internal Revenue Service bulletin listing "20 factors as guides … in various tax law contexts." *Id.*

Here, the Sixth Circuit applied the common-law test and weighed all the *Darden* factors given the particular circumstances of the case before it. The court did not adopt a non-common-law test, or add or subtract any factor from the common-law test, so as to cre-

ate a new test for the ERISA context. The court simply recognized that when "'determining whether an employer has assumed responsibility for a person's pension status'" under ERISA, "the *Darden* factors that most pertain to [the] financial structure" of the parties' relationship "carry more weight." Pet. App. 18a-19a. That in no way conflicts with *Darden*.

B. The Sixth Circuit's Application Of The Common-Law Test Does Not Conflict With That Of Any Other Court Of Appeals

Other circuits likewise recognize that application of the common-law test can vary according to context. *See, e.g.*, *Butler* v. *Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 413 (4th Cir. 2015) ("We also modified the *Darden* factors to make them more applicable to the specific industry context present in *Cilecek*."); *Alberty-Veléz* v. *Corporación de P.R. para la Difusión Pública*, 361 F.3d 1, 9 (1st Cir. 2004) (control "must be considered in light of the work performed and the industry at issue"). That may include tailoring the weight given to each of the common-law test's nonexhaustive factors in light of the statutory context. Even so, the test remains the same common-law test. None of petitioners' cases (at 26) holds otherwise.

To the contrary, for instance, the Second Circuit has placed varying emphasis on the factors in the context of the copyright and antidiscrimination laws. In copyright cases, "the benefits and tax treatment factors deserve special consideration." *Eisenberg*, 237 F.3d at 117. In antidiscrimination cases, by comparison, the Second Circuit has stated that courts "should instead place special weight on the extent to which the hiring party controls the 'manner and means' by which the

worker completes her assigned tasks." *Id.* (emphasis omitted).

Nor is there any disagreement about how to assess the right to control. Other courts of appeals—in the very cases petitioners cite (at 26-27)—agree with the Sixth Circuit that the right to control is the overarching question that the other common-law factors help assess. *See supra* p. 29; *Hillstrom* v. *Kenefick*, 484 F.3d 519, 529 (8th Cir. 2007) (assessing "right to control … by looking at the so-called 'other' *Darden* factors"); *Berger Transfer*, 85 F.3d at 1378 ("right to control" is assessed by "balanc[ing] the *Darden* factors on each side of the employee-independent contractor question"); *Barnhart* v. *New York Life Ins. Co.*, 141 F.3d 1310, 1312 (9th Cir. 1998) ("The purpose of the [*Darden*] test is to determine the extent to which the hiring party controls 'the manner and means by which the product is accomplished.'"); *Hockett*, 109 F.3d at 1526 ("courts evaluate all factors relevant to the hiring party's right to control"). Petitioners' selective quotations do not create a split.

Indeed, the Sixth Circuit's conclusion confirms the uniformity among the courts of appeals' modes of analysis. The district court recognized that its conclusion that petitioners were employees was at odds with the "nearly unanimous" prior case law "finding that insurance agents generally"—and American Family agents, in particular—"are to be classified as independent contractors." Pet. App. 88a. The Sixth Circuit's analysis and conclusion that petitioners were independent contractors, in contrast, is consistent with the conclusions of the other courts of appeals. *See* Pet. App. 22a (citing cases); *supra* p. 25.

III. HOLDING THIS PETITION FOR *MONASKY* WOULD BE POINTLESS

Holding this petition for *Monasky* v. *Taglieri*, No. 18-935, would serve no purpose. Both cases involve a standard of review. Beyond that, they have nothing to do with one another. As petitioners themselves concede (at 28), *Monasky* "will not resolve" this case: The question in *Monasky* is what standard of review applies to the determination of a child's habitual residence under the Hague Convention on the Civil Aspects of International Child Abduction—a question distinct from the common-law test that *Darden* incorporated under ERISA. Indeed, the briefing in *Monasky* advances Hague Convention-specific arguments for deciding the standard of review in that context. *See* Br. for Pet'r 19-26; Br. for Resp. 48-50; Br. for United States as Amicus Curiae 14-23, 29-32. There is no reason to hold this petition for *Monasky*.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

LAUREN S. KULEY
SCOTT W. COYLE
SQUIRE PATTON BOGGS (US) LLP
201 E. Fourth St.
Suite 1900
Cincinnati, OH 45202

GREGORY V. MERSOL
GILBERT BROSKY
BAKER & HOSTETLER LLP
Key Tower
127 Public Square
Suite 2000
Cleveland, OH 44114

SETH P. WAXMAN
Counsel of Record
CATHERINE M.A. CARROLL
JOSHUA M. KOPPEL
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

OCTOBER 2019