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

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, petitioners Walid Jammal, et al., respectfully petition for rehearing of the Court's December 9, 2019 order denying their petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

Petitioners submit this petition for rehearing to give this Court a further opportunity to consider whether to hold the petition for certiorari in this case pending its decision in *Monasky v. Taglieri*, No. 18-935 (cert. granted June 10, 2019). In *Monasky*, this Court granted review to resolve a three-way circuit split over the proper standard of review of a district court's determination of habitual residence under the Hague Convention. This case presents a closely analogous issue that is subject to a similar circuit conflict: namely, a three-way circuit split over the proper standard of review of a district court's determination of employee status under the Employee Retirement Income Security Act of 1974 (ERISA). Pet. 11-22. The panel majority acknowledged that other circuits treat these "as factual matters subject to review for clear error," but disagreed with its "sister circuits' jurisprudence" to determine de novo whether an employee relationship existed. Pet. App. 10a-15a. The panel indicated that de novo review was appropriate to determine if the employer had "'assumed responsibility'" for a person's pension. Pet. App. 15a, 18a-19a. The district court found, however, that respondents had assumed responsibility for the agent's pension; the company funded and "automatically enrolled" all agents into a company-sponsored "pension plan." Pet. App. 82a-83a. The majority, however, never mentioned this finding in denying ERISA protection to the agents' pension plan.

Petitioners submit that the subsequent oral argument in *Monasky* (held on December 11, 2019, just two days after the Court denied the petition for certiorari in this case) is an intervening development that suggests that a hold is appropriate because the petition in this case presents a question "that will be—or might be—affected by [the Court's] decision" in *Monasky*. Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(E) (11th ed. 2019); *see also* Sup. Ct. R. 44.2. Indeed, the Court's decision in *Monasky* may have a material effect on the outcome of this case, which affects pensioners whose retirement income is at stake.

At the argument in *Monasky*, several Justices raised apparent concerns with the petitioner's arguments in favor of de novo review. For example, the petitioner had argued that district courts need "guidance from appellate courts setting forth clear legal principles." Tr. 13, *Monasky v. Taglieri*, No. 18-935. But Justice Ginsburg responded that the history of the Hague Convention showed that there should be no "rigid test," but rather a test based on a "totality of the circumstances." *Id.* at 14. Under that test, "no one factor should be considered controlling. You just take all the factors and a district judge should weigh those and come to a conclusion." *Id.*

Justice Alito stated that he was "puzzled" by the petitioner's arguments for de novo review because the petitioner claimed that the habitual residence determination turned on whether there was an agreement between the parents, which Justice Alito characterized as "a question of fact." *Id.* at 12-13.

Justice Kavanaugh questioned whether "de novo review necessarily prolong[s] the matter" because it "push[es] everything into the court of appeals then, rearguing everything that's already been decided by the

district court without any deference, so people will take appeals much more readily." *Id.* at 16.

The Justices' questions in *Monasky* overlap entirely with issues presented in this case. As to Justice Ginsburg's comments, Supreme Court precedent is clear that employment status under ERISA is determined by "weighing" a number of "factors relevant" to the "hiring party's right to control the manner and means by which the product is accomplished," with "no one factor being decisive." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1991). Petitioners, respondents, the panel majority, the panel dissent, and the district court all agreed on that basic point. *See* Pet. 3-6; BIO 3-4; Pet. App. 10a-11a, 23a, 43a-44a.

Similar to Justice Kavanaugh's comments, petitioners in this case have argued that de novo review is inappropriate because a "second round" full review of employment status "add[s] costs on judges and litigants alike." Pet. 19. And similar to the petitioner in *Monasky*, respondents here have argued that de novo review is appropriate to "foster predictability" in the law. BIO 24.

As to Justice Alito's comments, the panel majority's application of de novo review prompted a dissent and openly departed from the law in several "sister circuit[s]." Pet. App. 13a, 25a-29a; *see also* Pet. 11-14 (demonstrating that the panel majority's decision broke from the law in the Second, Fourth, Seventh, Eighth, Ninth, and Tenth Circuits). The panel's decision also was wrong, as these questions are fact-intensive and case-specific and should therefore be reviewed deferentially for clear error. *See* Pet. 17-22.

Petitioners appreciate that the Justices' questions at the *Monasky* argument do not necessarily reflect their positions in that case, let alone reflect the Court's eventual opinion. Nevertheless, the petitions in both cases present the same question of the proper standard of appellate

review of district court findings. Indeed, the petitioners in *Monasky*, like respondents here and the panel majority below, claim de novo review is necessary to foster predictability through "clear legal principles." Tr. 13-14, 16; BIO 24; Pet. 15a (stating de novo review is appropriate because "certain factors may carry more or less weight depending on the particular legal context"). The Court's questions at the *Monasky* argument strongly suggest that the Court's opinion in *Monasky* will address this issue in a manner that would prove instructive to the divided Sixth Circuit panel in this case.

The Sixth Circuit's decision binds a certified class of 7,000 agents and wipes away any protections for their company-sponsored pension plan under ERISA, overturns the findings of the district court and advisory jury after a 12-day trial, triggered a dissent, and parted from the law in six other Circuits. Thus, petitioners respectfully request that the Sixth Circuit be given the opportunity to correct its erroneous decision in light of the Court's opinion in *Monasky*.

CONCLUSION

The petition for rehearing should be granted. The Court should hold the petition for certiorari in this case pending the Court's decision in *Monasky*, and it should then grant the petition, vacate the Sixth Circuit's judgment, and remand this case for further proceedings consistent with the Court's decision in *Monasky*.

Respectfully submitted,

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January 2, 2019

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

/s/ Charles J. Crueger

Charles J. Crueger