No. ____

IN THE

Supreme Court of the United States

MICHAEL D. ELLIS,
Petitioner,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

SHAWN E. MCDERMOTT
TIMOTHY M. GARVEY
McDermott Law, LLC
4600 S. Ulster Street
Suite 800
Denver, CO 80237
(303) 964-1800

MATTHEW W.H. WESSLER
JONATHAN E. TAYLOR
Counsel of Record
Gupta Wessler PLLC
1900 L Street NW
Suite 312
Washington, DC 20036
(202) 888-1741
jon@guptawessler.com

Counsel for Petitioner

January 8, 2021

QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974, or ERISA, expressly saves certain state laws from preemption. For those state laws that are saved, federal courts must often decide *which* state's law to apply.

The question presented is: What is the correct test to apply in deciding whether an otherwise applicable state law—here, a state law prohibiting discretion-conferring provisions in insurance contracts—can be displaced by an ERISA plan's choice-of-law clause?

PARTIES TO THE PROCEEDING

Petitioner Michael Ellis was the plaintiff in the district court and the appellee in the court of appeals.

Respondent Liberty Life Assurance Company of Boston was the defendant in the district court and the appellant in the court of appeals.

RELATED PROCEEDINGS

This case arises out of the following proceedings:

- *Ellis v. Liberty Life Assurance Co. of Boston*, No. 15-cv-90 (D. Colo.) (memorandum opinion and order, issued September 18, 2018; memorandum opinion and order granting motion for reconsideration and entering final judgment, issued January 15, 2019);
- *Ellis v. Liberty Life Assurance Co. of Boston*, No. 19-1074 (10th Cir.) (opinion reversing the district court's judgment, issued May 13, 2020; order denying petition for rehearing, issued August 11, 2020).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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INTRODUCTION

When Congress enacted ERISA, it struck a balance. On the one hand, Congress introduced a broad preemption provision. But, on the other, it also included a saving clause that "reclaims a substantial amount of ground" by leaving in place state regulations of "insurance, banking, or securities." *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (discussing 29 U.S.C. § 1144(b)(2)(A)).

As this Court has repeatedly emphasized, "the inevitable result of the congressional decision" permitting "varying [state] insurance regulations" to apply to ERISA plans is that it "creates disuniformities for national plans that enter into local markets to purchase insurance." *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 376 n.6 (1999). That is by design. Congress's scheme would be thwarted if "insurers could displace any state regulation simply by inserting a contrary term in plan documents." *Id.* at 376; *see also Rush Prudential*, 536 U.S. at 385 n.16.

For those state laws that are saved from preemption, courts often face a question: *Which* state's law applies? This question comes up most frequently when the insurer has added a clause to the plan specifying that the law of a particular state will govern, and there is a conflict between the law of that state and the state law that would otherwise apply. ERISA is silent on this question, and the circuits have adopted conflicting tests in an attempt to fill the void.

The Sixth Circuit follows the standard approach for resolving choice-of-law questions under federal common law, applying the ready-made test from the Restatement (Second) of Conflict of Laws. *See DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden*, 448 F.3d 918 (6th Cir. 2006). Under this test, courts will usually give effect to the plan's choice-of-law clause, but not if doing so would be contrary to a fundamental policy of the state whose law

would otherwise apply, and that state has a materially greater interest in the particular issue at hand. *Id.* at 924.

The Eighth, Ninth, and Eleventh Circuits, by contrast, have adopted a different test. Although they consistently use the Restatement to resolve other choice-of-law issues under federal common law, these circuits have devised a separate rule for ERISA. They hold that an ERISA plan's choice-of-law provision controls unless it is unreasonable or fundamentally unfair. *See Brake v. Hutchinson Tech. Inc.*, 774 F.3d 1193, 1197 (8th Cir. 2014); *Wang Labs. v. Kagan*, 990 F.2d 1126, 1128–29 (9th Cir. 1993); *Buce v. Allianz Life Ins. Co.*, 247 F.3d 1133, 1149 (11th Cir. 2001). And the Fifth Circuit, in discussing the circuit split, has noted a third possibility, also rooted in reasonableness.

The Tenth Circuit in this case rejected these "three circuit approaches" as "inadequate," and minted a fourth approach. App. 27a. Believing that "ERISA policy" would be "best effectuated if a plan administrator is subject to only one legal regime," the court devised its own test as a matter of federal common law—applying a plan's choice-of-law clause so long as there is "a legitimate connection to the State whose law is chosen." App. 27a, 33a.

That holding warrants this Court's review. A circuit conflict on an ERISA question is reason enough to grant review. But certiorari is especially warranted here given the importance of the underlying dispute: the standard of judicial review for benefits determinations. The default standard is de novo, *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), but discretion-conferring clauses have proliferated in recent years. These clauses have been subject to much abuse, prompting roughly half the states to outlaw their use in insurance contracts. The decision below hands insurers an easy way to avoid these laws, and thus to secure discretionary review in court.

And wrongly so. ERISA does not require "a uniformly lenient regime of reviewing benefit determinations." *Rush Prudential*, 536 U.S. at 385. As Judge O'Scannlain has noted, moreover, state laws banning discretionary clauses in insurance policies—which have universally been upheld against preemption challenges—do not "'impose burdens on plan administration' due to disuniformity *at all*." *Standard Ins. Co. v. Morrison*, 584 F.3d 837, 849 (9th Cir. 2009), *cert. denied*, 560 U.S. 904 (2010). So the justification for the Tenth Circuit's rule is simply nonexistent here.

More broadly, the Tenth Circuit's rule is inconsistent with the principle that "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under [our] Constitution." *Rodriguez v. FDIC*, 140 S. Ct. 713, 717 (2020). The rule is predicated on a desire to help insurers avoid "regulation by a variety of states." App. 27a. Yet it applies only to those state laws that Congress has *saved* from preemption (else there would be no need to choose between competing states). For these laws, Congress has tolerated—even invited—differences among the states. The decision below nullifies that legislative judgment.

But putting aside the merits of this dispute, there must at least be a single *federal* choice-of-law rule. Indeed, the very policy rationale for the Tenth Circuit's rule—that insurers should be subject to only one legal regime—cannot be realized if the three-way circuit split persists.

Finally, this case is an ideal vehicle to resolve that split. The district court applied the test from the Restatement, held that Colorado's ban on discretionary clauses applies, engaged in de novo review, and entered judgment for the petitioner. On appeal, the Tenth Circuit fashioned its own test, applied Pennsylvania law, reviewed for an abuse of discretion, and reversed. The petition thus presents the question as cleanly as possible. This Court should grant it.

OPINIONS BELOW

The Tenth Circuit's decision is reported at 958 F.3d 1271 and reproduced at 3a. The district court's decision is reported at 405 F. Supp. 3d 912 and reproduced at 47a.

JURISDICTION

The court of appeals entered judgment on May 13, 2020 and denied a timely petition for rehearing en banc on August 11, 2020. App. 1a, 3a. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

ERISA's preemption clause provides, in relevant part: "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." 29 U.S.C. § 1144(a).

ERISA's saving clause provides, in relevant part: "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." *Id.* § 1144(b)(2)(A).

ERISA's civil-enforcement provision authorizes a plan participant to bring suit "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." *Id.* § 1132(a)(1)(B).

A Colorado statute provides, in relevant part: "An insurance policy, insurance contract, or plan that is issued in this state and that offers health or disability benefits shall not contain a provision purporting to reserve discretion to the insurer, plan administrator, or claim administrator to interpret the terms of the policy, contract, or plan or to determine eligibility for benefits. If

an insurance policy, contract, or plan contains such a provision, the provision is void. . . . As used in this section, 'issued in this state' refers to every health and disability insurance policy, insurance contract, insurance certificate, and insurance agreement existing, offered, issued, delivered, or renewed in the state of Colorado or providing health or disability benefits to a resident or domiciliary of the state of Colorado and every employee benefit plan covering a resident or domiciliary of the state of Colorado, whether or not on behalf of an employer located or domiciled in Colorado, on or after August 5, 2008, notwithstanding any contractual or statutory choice-of-law provision to the contrary." C.R.S. § 10-3-1116(2) & (8).

STATEMENT

A. Statutory background

Congress enacted ERISA to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . by establishing standards of conduct, responsibility, and obligation for fiduciaries," and "by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

ERISA achieves these objectives through a variety of integrated provisions, two of which are relevant here. The first is ERISA's preemption regime, which includes both a preemption clause and a saving clause. The second is its judicial-review mechanism for benefits determinations.

1. ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. *Id.* § 1144(a). This Court has "observed repeatedly that this broadly worded provision is 'clearly expansive.'" *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001) (citation omitted); *see also Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 947 (2016) (Thomas, J.,

concurring) ("[ERISA] may [have] the most expansive express pre-emption provision in any federal statute.").

But immediately after this provision is a saving clause. It reads: "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). By "return[ing] to the States the power to enforce those state laws that regulate insurance," *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990), this clause "reclaims a substantial amount of ground" for state regulation, *Rush Prudential*, 536 U.S. at 364.

To give effect to ERISA's saving clause, this Court has consistently refused to interpret it in a way that would allow "insurers [to] displace any state regulation simply by inserting a contrary term in plan documents," because that "would virtually read the saving clause out of ERISA." *UNUM*, 526 U.S. at 376 (cleaned up); *see also Rush Prudential*, 536 U.S. at 385 n.16; *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741, 747 (1985). This Court has held to that view even though it has "recognize[d] that applying the States' varying insurance regulations creates disuniformities for national plans that enter into local markets to purchase insurance." *UNUM*, 526 U.S. at 376 n.6 (cleaned up). "[S]uch disuniformities are the inevitable result of the congressional decision to 'save' local insurance regulation." *Id.* (cleaned up).[1]

2. ERISA also contains a comprehensive enforcement regime. As part of that regime, "a person denied benefits under an employee benefit plan [may] challenge that

[1] This Court has recently reiterated that, even for state laws that do not fall within the saving clause, "not every state law that affects an ERISA plan or causes some disuniformity in plan administration" is covered by ERISA's express preemption provision. *Rutledge v. Pharm. Care Mgmt. Assoc.*, 141 S. Ct. 474, 480 (2020).

denial in federal court," *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 108 (2008), "to recover benefits due to him under the terms of his plan," 29 U.S.C. § 1132(a)(1)(B).

Because "ERISA does not set out the appropriate standard of review for [such] actions," this Court has had to fill the gap. *Firestone*, 489 U.S. at 109. In *Firestone*, the Court held that "a denial of benefits challenged under 29 U.S.C. § 1132(a)(1)(B) must be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115. Under this rule, if an ERISA plan has a valid discretionary clause, the administrator's decisions will be reviewed by a court only for an abuse of discretion. But if it does not, they will be reviewed de novo.

3. Plan sponsors and insurers responded predictably to *Firestone*. Almost immediately, they "began including [discretionary] provisions in most employee benefit plans, typically saying the insurer or plan administrator would exercise discretionary judgment in interpreting a plan or deciding whether to pay benefits." *Fontaine v. Metro. Life Ins. Co.*, 800 F.3d 883, 885 (7th Cir. 2015). Before long, these provisions became a common feature of many plans.[2]

But some insurers then used them in dubious ways, so "discretionary clauses [became] the subject of much controversy" and legislative focus. *Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, Plan No.*

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[2] *See also* Maria O'Brien Hylton, *Post-*Firestone *Skirmishes: The Patient Protection and Affordable Care Act, Discretionary Clauses, & Judicial Review of ERISA Plan Administrator Decisions*, 2 Wm. & Mary Pol'y Rev. 1, 2 (2010) ("[F]ollowing *Firestone*, employee benefit plan administrators in all fifty states quickly inserted discretionary clauses into governing plan documents, which has led many state[s] . . . to attempt to limit or ban the use of these clauses.").

625, 856 F.3d 686, 692 (9th Cir. 2017). By the early 2000s, the National Association of Insurance Commissioners (or NAIC) started calling for states to ban or limit the use of discretionary clauses in insurance contracts, drafting a model law to this effect. NAIC "argu[ed] that a ban on such clauses would mitigate the conflict of interest present when the claims adjudicator also pays the benefit," and would prevent "insurers [from] engaging in inappropriate claim practices and relying on the discretionary clause as a shield." *Standard Ins.*, 584 F.3d at 840.

In the mid-2000s, a wave of states began following NAIC's recommendation to ban the use of discretionary clauses in insurance contracts. The catalyzing event was the behavior of "one particular insurer, Unum–Provident Corp., which boosted its profits by repeatedly denying benefits claims it knew to be valid." *Saffon v. Wells Fargo & Co. Long Term Disability Plan*, 522 F.3d 863, 867 (9th Cir. 2008). Of particular concern to many states, "internal memos revealed that the company's senior officers relied on ERISA's deferential standard of review to avoid detection and liability." *Id.*; *see* John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials under ERISA*, 101 Nw. U. L. Rev. 1315, 1316 (2007) (describing Unum–Provident's behavior); *Orzechowski*, 856 F.3d at 692 ("In response to a particularly notorious example of an insurer who had used discretionary clauses to boost its profits by intentionally denying valid claims, a number of states acted . . . to ban or limit discretionary clauses."). Banning the use of discretionary clauses in insurance contracts was seen by many states as necessary to curb such misconduct.

Colorado is one such state. In 2008, it enacted a law that provides: "An insurance policy, insurance contract, or plan that is issued in this state and that offers health or

disability benefits shall not contain a provision purporting to reserve discretion to the insurer, plan administrator, or claim administrator to interpret the terms of the policy, contract, or plan or to determine eligibility for benefits." C.R.S. § 10-3-1116(2).

Under this statute, if an insurance policy is issued in Colorado that offers health or disability benefits, it may not contain a discretionary clause. And that is true "notwithstanding any contractual or statutory choice-of-law provision to the contrary." *Id.* § 10-3-1116(8).[3]

4. The "tug-of-war over employee benefits" between states and insurers did not end there. *Fontaine*, 800 F.3d at 885. Insurance companies responded in two ways. First, they challenged the laws on preemption grounds. But courts "roundly rejected" these challenges. *Weisner v. Liberty Life Assurance Co. of Boston*, 192 F. Supp. 3d 601, 611 (D. Md. 2016). The federal circuits uniformly held that state bans on discretionary clauses in insurance contracts fall within ERISA's saving clause, and this Court declined to grant certiorari. *See Fontaine*, 800 F.3d at 886–87 ("We agree with . . . the Ninth and Sixth Circuits, which have both held that such state laws prohibiting discretionary

[3] In 2020, Colorado's legislature unanimously clarified that, under this statute, "[i]f an insurance policy, contract, or plan contains such a provision, the provision is void." C.R.S. § 10-3-1116(2). It further clarified that, "[a]s used in this section, 'issued in this state' refers to every health and disability insurance policy, insurance contract, insurance certificate, and insurance agreement existing, offered, issued, delivered, or renewed in the state of Colorado or providing health or disability benefits to a resident or domiciliary of the state of Colorado and every employee benefit plan covering a resident or domiciliary of the state of Colorado, whether or not on behalf of an employer located or domiciled in Colorado, on or after August 5, 2008, notwithstanding any contractual or statutory choice-of-law provision to the contrary." C.R.S. § 10-3-1116(8).

clauses in insurance contracts are not preempted by ERISA."); *Orzechowski*, 856 F.3d at 692–95; *Am. Council of Life Insurers v. Ross*, 558 F.3d 600, 604–07 (6th Cir. 2009); *Standard Ins.*, 584 F.3d 837, *cert. denied*, 560 U.S. 904.

Second, in a parallel effort to avoid the effect of the new state laws, many insurers and plan sponsors turned to choice-of-law provisions. They hoped that, by specifying that the plan would be governed by the law of a state that did *not* ban discretionary clauses, they could exempt themselves from state bans that would otherwise apply, and thus achieve a uniformly favorable standard of review.

B. Factual background

The plan in this case is a representative example. Respondent Liberty Life Assurance Company of Boston issued a disability-insurance policy to the employees of Comcast Corporation. It includes a provision stating that "Liberty shall possess the authority, in its sole discretion, to construe the terms of this policy and to determine benefit eligibility hereunder." App. 13a. It also includes a provision stating that the law of Pennsylvania—which does not have a statute regulating discretionary clauses—would govern the plan. App. 13a–14a.

Petitioner Michael Ellis was a Comcast employee from 1994 to 2012. During this time, he lived and worked in Colorado; he was issued his disability-insurance policy in Colorado; and he paid his premiums in Colorado.

And then he became disabled in Colorado. In early 2012, he spent four days in an ICU with blood clots in both lungs, and his heart stopped beating for 24 seconds. He tried to recover at home for several weeks and return to work. But his continuing health problems and cognitive impairment prevented him from accomplishing even the most basic tasks. Ellis, his doctors, and Comcast agreed

that he could no longer work, and after being back on the job for just a few days, he was placed on medical leave.

Shortly thereafter, Ellis applied for disability benefits, and Liberty approved the claim. It paid disability benefits to him for almost two years—first short-term disability benefits and then long-term benefits. But, at the end of 2013, Liberty suddenly cut off his benefits, claiming that he was no longer disabled. Even though Ellis has been unable to work ever since then, Liberty has not paid him any disability benefits in seven years.

C. Procedural background

After Ellis exhausted his administrative remedies and Liberty upheld its termination of benefits, he filed suit in district court in Colorado under 29 U.S.C. § 1132(a)(1).

1. At first, the district court concluded that it should apply discretionary review, and it upheld the termination under this standard. App. 80a. But on reconsideration, the court held that Colorado's law applies, exercised de novo review, and entered judgment for Ellis. App. 55a–56a.

In reaching this conclusion, the court explained that Colorado prohibits the use of discretionary clauses in any insurance policy for disability benefits issued in the state. App. 70a (discussing C.R.S. § 10-3-1116(2)). The court agreed with Ellis that "the Policy was in fact issued to him as a Comcast employee in Colorado and that Liberty has failed to cite any authority to support the argument that it can exempt itself from Colorado's statutory insurance regulations by electing to be governed by the laws of another state." App. 70a.

Applying the choice-of-law test set forth in section 187 of the Restatement (Second) of Conflict of Law, the district court concluded that Colorado's statute applies. App. 70a. The court also rejected Liberty's argument that

ERISA preempted Colorado's statute, joining the many other federal courts that have held that such laws are saved from preemption. App. 71a.

Turning to the merits, the district court concluded that Liberty's decision to terminate benefits was not supported by the evidence. "Ellis's treatment providers were all in agreement that he suffered from some degree of cognitive impairment after experiencing significant health issues in [early] 2012." App. 52a. The court further noted that the "[r]esults from clandestine surveillance conducted of Mr. Ellis on behalf of Liberty over several days were consistent with these assessments in that they showed minimal activity where Mr. Ellis was once driven by someone else and walked slowly using a cane." App. 52a.

2. On appeal, Liberty dropped its preemption defense. It repackaged the same arguments, however, in support of its claim that the plan's choice-of-law clause should have preemptive effect—allowing it to nullify a validly enacted state law regulating conduct within its own borders.

The Tenth Circuit sided with Liberty. "The central issue on appeal," the court explained, "is what standard of review the district court should have applied." App. 5a. The court held that federal law governs that issue; that "federal law should incorporate a state rule of decision to resolve the question"; and that "the choice of *which* state's law to incorporate is a matter of federal law." App. 15a. In these respects, the court broke no new ground.

But then it turned to the choice-of-law question. The court observed that the "[o]ther circuits have identified three possible approaches" for deciding "whether to give effect to a policy's choice-of-law provision," two of which have been adopted. App. 23a. The court noted that the Eighth, Ninth, and Eleventh Circuits have held that "the choice-of-law provision in an ERISA plan should be

followed if 'not unreasonable or fundamentally unfair.'" *Id.* (quoting *Wang Labs.*, 990 F.2d at 1128–29). But "[t]he Sixth Circuit has adopted a different approach, applying the test set out in Section 187 of the Restatement (Second) of Conflict of Laws for when a contractual choice-of-law provision should be enforced." App. 24a (citing *Durden*, 448 F.3d at 922). The Fifth Circuit has identified a third option. App. 26a (discussing *Jimenez v. Sun Life Assur. Co.*, 486 F. App'x 398, 408 (5th Cir. 2012)).

The Tenth Circuit rejected each of these approaches. It said that the "three circuit approaches" are "inadequate because they overlook the uniformity and efficiency objectives central to ERISA." App. 27a. Believing that "ERISA policy is best effectuated if a plan administrator is subject to only one legal regime"—rather than having to comply with "regulation by a variety of states"—the Tenth Circuit announced a new rule that no court before had adopted or even articulated. App. 27a. It held that, "if the plan has a legitimate connection to the State whose law is chosen" by the plan, "ERISA's interest in efficiency and uniformity, as well as its recognition of the primacy of plan documents, compels the conclusion that the selected law should govern whether a discretion-granting provision is enforceable." App. 33a. The court thus concluded that the law of Pennsylvania governs that question. App. 5a.

Applying Pennsylvania law, the court determined that Liberty did not abuse its discretion in terminating Ellis's disability benefits. The court conceded that "some of the criticism [of Liberty's decision-making] has weight," but it declined to find an abuse of discretion. App. 43a. The "existence of evidence supporting Ellis's claim does not render a denial of benefits unreasonable." App. 46a.

3. Ellis timely filed a petition for rehearing en banc, which was denied on August 11, 2020. App. 1a.

REASONS FOR GRANTING THE PETITION

I. The decision below creates a three-way circuit split for deciding when an ERISA plan's choice-of-law clause may displace a valid state law.

A. Even before the decision below, there was an acknowledged circuit split on how to resolve conflict-of-law questions under ERISA. As the Fifth Circuit noted in 2012, "our sister circuits have applied two different tests in deciding whether to enforce an ERISA plan's residual choice of law clause." *Jiminez*, 486 F. App'x at 407.

But now the split is even worse. The Tenth Circuit below expressly rejected both of these tests and created an entirely new test. As a result, there is now a three-way conflict between (1) the Sixth Circuit, (2) the Eighth, Ninth, and Eleventh Circuits, and (3) the Tenth Circuit.

Test #1: follow the Restatement. The Sixth Circuit has explained that, "[i]n determining which state's law applies in an ERISA case, [the] 'analysis is governed by the choice of law principles derived from federal common law.'" *Durden*, 448 F.3d at 922. The court has further explained that the default rule of federal common law is to follow the Restatement (Second) of Conflicts of Law. *See id.* ("'In the absence of any established body of federal choice of law rules, we begin with the Restatement (Second) of Conflicts of Law.'"). Seeing nothing in the text of ERISA to justify a departure from this default rule, and expressing unease with crafting "a different set of federal common law choice of law rules for every distinct underlying federal issue," the Sixth Circuit has decided to adhere to the general approach. *Id.* at 922–23. It therefore "applie[s] the Restatement (Second) of Conflict of Laws to decide whether to give effect to a choice of law provisions in an ERISA plan." *Jiminez*, 486 F. App'x at 407; *see also Med. Mut. Of Ohio v. deSoto*, 245 F.3d 561, 570 (6th Cir.

2001) (applying the Restatement (Second) of Conflict of Laws to decide choice-of-law question under ERISA).

This means that, if a plan has a choice-of-law clause, the Sixth Circuit will "look to [Restatement] section 187 to determine whether that choice is effective." *Durden*, 448 F.3d at 923. Under section 187, a court will generally give effect to a choice-of-law clause. But it will not do so if the state whose law would otherwise apply (1) would not have authorized the parties to resolve the particular issue by contract, (2) has a fundamental state policy that would be contravened by applying the choice-of-law clause, and (3) has a materially greater interest in the issue than the state specified in the clause. *Id.*; *see* Restatement (Second) Conflict of Laws § 187 & cmt. c (1971).

Under section 187's framework, the Sixth Circuit has declined to enforce a choice-of-law clause in an ERISA plan when these three conditions are met. In *Durden*, the dispute was about which of two claimants was entitled to benefits as the decedent's surviving spouse, and it turned on the validity of a marriage that "was solemnized in Ohio" between two people who had "lived in Ohio the entire time they were living together as husband and wife." 448 F.3d at 925. Applying section 187's test, the Sixth Circuit held that the marriage's validity would be decided under Ohio law notwithstanding the fact that the plan had a choice-of-law clause that listed Michigan (where the employer was headquartered) as the governing jurisdiction. *Id.* at 927.

Test #2: Ask whether the choice-of-law clause is unreasonable or fundamentally unfair. The Eighth, Ninth, and Eleventh Circuits take a different approach. Like the Sixth Circuit, they agree that "[f]ederal common law applies to choice-of-law determinations in cases based on federal question jurisdiction," such as ERISA. *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1297 (9th Cir.

1997). They further agree that the general rule is that "[f]ederal common law follows the approach of the Restatement (Second) of Conflicts of Laws." *See, e.g.*, *id.*; *Chau Kieu Nguyen v. JP Morgan Chase Bank, NA*, 709 F.3d 1342, 1345 (11th Cir. 2013) (same); *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006) (same). And when these circuits have been called upon to resolve other choice-of-law disputes under federal common law, at least one of them has applied what it referred to as the "persuasive" and "sound reasoning of section 187" of the Restatement. *See Flores v. Am. Seafoods Co.*, 335 F.3d 904, 919 (9th Cir. 2003) ("Federal common law follows the approach of the Restatement (Second) of Conflicts of Laws. The principles governing analysis of choice-of-law provisions appear in [section 187].").

Yet, without so much as mentioning this line of cases, these circuits have adopted a different test under ERISA. The first to do so was the Ninth Circuit, which articulated the new rule like so: "Where a choice of law is made by an ERISA contract, it should be followed, if not unreasonable or fundamentally unfair." *Wang Labs.*, 990 F.2d at 1128–29. The Ninth Circuit cited no authority for this rule, nor did it explain where the rule came from. And although it went on to analyze the fairness of applying the choice-of-law clause by discussing this Court's decision in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), that case involved neither a choice-of-law question nor ERISA. The Eighth and Eleventh Circuits later followed suit, but they did not provide much additional explanation in doing so. *See Bruce*, 247 F.3d at 1149; *Brake*, 774 F.3d at 1197.

The Eighth Circuit's decision in *Brake* is particularly notable because it involves the same issue as this case: whether to apply the law of the state that would ordinarily govern the parties' dispute, which forbids discretionary-

review provisions, or the law of the state listed in the plan's choice-of-law clause. When faced with that question, the Eighth Circuit simply quoted the Ninth Circuit's test, determined that applying the choice-of-law clause would not be unreasonable or fundamentally unfair, and then reviewed for an abuse of discretion. 774 F.3d at 1197–98; *see also Fenberg v. Cowden Auto. Long Term Disability Plan*, 259 F. App'x 958 (9th Cir. 2007) (applying same test and reaching same conclusion on same issue).

Test #3: Ask only whether the plan has a legitimate connection to the state in the choice-of-law clause. The Tenth Circuit below expressly rejected both of these tests. It also rejected a third possible test, which was identified (but not adopted) by the Fifth Circuit, and asks whether "the party hoping to avoid enforcement clearly showed 'that the [choice-of-law] clause [was] unreasonable.'" App. 26a (quoting *Jiminez*, 486 F. App'x at 408).

"In our view," said the Tenth Circuit, "the above three circuit approaches, all of which sound primarily in reasonableness, are inadequate because they overlook the uniformity and efficiency objectives central to ERISA." App. 27a. So rather than follow one of the pre-existing tests, the court fashioned its own. Under that test, which had never before been articulated, a court must ask only whether "the plan has a legitimate connection to the State whose law is chosen." App. 33a. If the answer is yes—as it will be in nearly every case—that is the end of the inquiry.

B. As a result of this decision, there is now a three-way conflict involving five circuits. This conflict is real: The difference between the governing rules is substantive, not semantic, and will yield divergent outcomes in many cases.

Take *Durden*, for example. The Sixth Circuit applied the Restatement and declined to enforce the plan's choice-of-law clause—even though it acknowledged that "[t]here

was a reasonable basis to choose to apply Michigan law," and even though there was no argument that applying Michigan law would have been unreasonable or unfair. 448 F.3d 924. Under the other two tests, then, the clause would have been enforced. But not under the test set forth in section 187 of the Restatement. So that case would come out differently if a different test had been applied.

The same is true here. Although the Tenth Circuit did not analyze the conflict-of-law question by using the test found in section 187 of the Restatement, the district court did so and concluded that Colorado's statute applies. That conclusion is correct: The plain text of the statute covers the plan (and the insuring policy issued by Liberty) and forbids this clause; the statute expresses a fundamental state policy; and Colorado has a significantly greater interest in the question than Pennsylvania.

And that will usually be the case where, as here, a plan participant lives and works in a state that bans discretion-conferring clauses. So with respect to the particular issue here—one of the most important and frequently recurring questions of state law in ERISA litigation—the decision of which test to apply could not be more important. It will likely be the difference between a court applying de novo review and discretionary review—a choice that is itself often outcome-determinative of the disposition of a case.[4]

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[4] Even when applying the *same* test, courts have at times reached conflicting outcomes on the enforceability of state laws prohibiting discretionary clauses. *Compare Snyder v. Unum Life Ins. Co. of Am.*, No. 13-7522, 2014 WL 7734715, *10 (C.D. Cal. Oct. 28, 2014), (conducting the Ninth Circuit's test and applying California's law notwithstanding contrary choice-of-law clause in ERISA plan); *with Brooks v. Liberty Life Assurance Co. of Boston*, No. 17-817, 2018 WL 11248034 (E.D. Ark. July 19, 2018) (assessing similar question under the same test and disagreeing with *Snyder*).

A hypothetical hammers home the point. Imagine two employees: one who works for Comcast in Detroit, and one who works for Comcast in Denver. Both employees are issued a disability-insurance policy in their home state and become disabled. Both have their claims denied and sue in their local federal district. And both argue for de novo review by pointing to the law of their state prohibiting discretionary clauses in insurance contracts. *See* Mich. Admin. Code R. 500.2202; *Ross*, 558 F.3d 600 (holding that this law is saved from preemption). Under the current state of the law, the Detroit employee would likely receive de novo review (by virtue of the Sixth Circuit's decision in *Durden*), while the Denver employee would have to surmount the abuse-of-discretion standard (by virtue of the decision below). That is a textbook example of a circuit conflict.

II. The question presented is important, and this case presents an ideal vehicle to answer it.

A. A three-way circuit conflict on a question of federal law is undesirable under any circumstances. But it is truly untenable here because the question is of considerable national importance to employers and employees alike.

This Court routinely grants certiorari to resolve circuit conflicts in cases under ERISA, and this case is no less deserving. If anything, the fractured 1-3-1 methodological conflict here is even more in need of resolution by this Court than the shallow two-way splits that often prompt a grant of certiorari in ERISA cases. *See, e.g.*, *Rutledge*, 141 S. Ct. 474 (2020) (2-1 conflict); *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2018) (1-1 conflict); *Ret. Plans Comm. of IBM v. Jander*, 140 S. Ct. 592 (2018) (2-1 conflict); *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017) (2-2 conflict); *Gobeille v. Liberty Mut.*

Ins. Co., 136 S. Ct. 936 (2016) (1-1 conflict); *Tibble v. Edison Int'l*, 135 S. Ct. 1823 (2015) (2-1 conflict).

Moreover, there are significant costs to allowing the conflict to persist. The Tenth Circuit itself justified its rule because it believed that a "clear, uniform rule enforcing an ERISA plan's choice of law is required" as a policy matter. App. 33a. Needless to say, that policy justification cannot be realized when there is a three-way circuit split. So even if this Court were inclined to endorse the Tenth Circuit's rule, it would be better to do so now rather than later. And if the Court were inclined to reject the rule, it would be even more paramount to grant certiorari now. Leaving the decision below in place would mean that there would be state laws, embodying fundamental state policies, that would be deprived of the effect they would otherwise have, while employees would lose benefits they would otherwise receive. Either way, certiorari is warranted.

It is also warranted because the choice-of-law question here implicates an issue that is independently important and frequently recurring. Over the years, this Court has granted several cases that address, in one way or another, the standard of review that is to be applied in challenges to benefits determinations brought under ERISA. *See, e.g.*, *Firestone*, 489 U.S. 101; *Conkright v. Frommert*, 559 U.S. 506 (2010); *Glenn*, 554 U.S. 105. Although this Court has not yet decided a case involving a state prohibition on discretionary clauses, those prohibitions have been the focus of much litigation in the circuits over the last decade, because "[t]he national trend is to ban such clauses." *Flaaen v. Principal Life Ins. Co.*, 226 F. Supp. 3d 1162, 1168 (W.D. Wash. 2016). It is no coincidence that the last two circuits to decide the question presented (the Eighth and Tenth Circuits) have done so in the context of a dispute over whether to apply a state ban on discretionary

clauses. *See also Fenberg*, 259 F. App'x 958 (Ninth Circuit decision confronting same question in same context). Nor is it a coincidence that these state bans have also spawned numerous preemption challenges in recent years (and a petition for certiorari). The circuits have all agreed on the answer, and this Court accordingly denied certiorari, but their very existence speaks to the importance of the issue.

The time is ripe for this Court's intervention. There is a direct and mature circuit conflict that is only deepening and multiplying as more circuits confront the question. As the conflict grows, discretionary clauses and choice-of-law clauses continue to proliferate in ERISA plans, as do state laws prohibiting their use in insurance contracts.

The result is massive uncertainty. For those that sponsor, insure, or administer multistate plans, they now have to navigate two layers of geographic variation. Their obligation to comply with various state insurance laws now turns not only on the geographic borders of *those states* (the inevitable effect of ERISA's saving clause), but also on the geographic borders of the federal circuit in which subsequent litigation happens to be brought (the entirely avoidable effect of a circuit conflict). For the beneficiaries of such plans, their right to receive the protections given to them by their own state's elected leaders will likewise turn on the happenstance of how the federal circuits are drawn. And for federal courts in jurisdictions that have not yet answered the question presented, they will have to choose which of the three tests to adopt, or whether to devise yet another. That is an intolerable state of affairs for all involved, and this Court should put an end to it.

B. This case presents the optimal vehicle in which to do so. The question presented is purely legal. The opinion below, though incorrect, provides a thorough summary of the case law and a lengthy explanation of its reasoning.

And the answer to the question presented is outcome-determinative—not just of the choice-of-law question in the case, or even the standard of review that flows from it, but of the ultimate disposition of the litigation.

The proof of that is in the decisions below. The district court, after initially entering judgment for Liberty on discretionary review, reconsidered and reversed course. It applied the test from section 187 of the Restatement (the Sixth Circuit's approach), enforced Colorado's statute, engaged in de novo review, and entered judgment for Ellis. On appeal, the Tenth Circuit did the opposite. It did not apply the Restatement's test or disagree with the district court's conclusion under it, nor did it engage in de novo review. Instead, the Tenth Circuit fashioned its own test and then reached a diametrically different conclusion than the district court at every step: It concluded that Pennsylvania law controls, refused to apply Colorado's statue to a Colorado resident, reviewed only for an abuse of discretion, reversed the district court's judgment, and remanded with instructions to enter judgment in favor of Liberty. It is hard to imagine a petition that presents the question more cleanly than this one.

In addition, this petition gives this Court flexibility to answer the question presented either narrowly or broadly. The Court could lay down a test that would apply to all conflicts between choice-of-law clauses in ERISA plans and the state law that would otherwise govern. Or, if it wanted, the Court could simply decide the question presented as applied to state laws barring discretionary review in insurance contracts. Either decision would give much-needed guidance to lower courts and resolve a circuit split on an important question of federal law.

III. The decision below contravenes this Court's cases and the text and structure of ERISA.

Finally, this Court should grant certiorari because the decision below is wrong. "Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez*, 140 S. Ct. at 717 (citing Art. I, § 1; Amdt. 10). Although common lawmaking is authorized to fill gaps under ERISA, *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987), the exercise of that authority must be consistent with the statute that Congress wrote. It is *the statute* that is the "prime repository of federal policy and [the] starting point for federal common law." *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 69 (1966). A judge-made rule may not "contradict an explicit federal statutory provision." *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

Yet that is exactly what the Tenth Circuit's rule does. It is explicitly motivated by a desire to help insurers avoid "patchwork regulation by a variety of states." App. 27a. That rationale, however, has no force for state laws that fall within ERISA's saving clause. Just the opposite: For these laws, Congress specifically wanted "varying [state] regulations" to be able to apply to ERISA plans—even though the "inevitable result" would be to "create[] disuniformities for national plans that enter into local markets to purchase insurance." *UNUM*, 526 U.S. at 376 n.6. The Tenth Circuit's rule directly contradicts that legislative goal. In crafting a rule designed solely so that "insurers could displace any state regulation simply by inserting a contrary term in plan documents," the Tenth Circuit "read the saving clause out of ERISA." *Id.* at 376 (cleaned up); *see also Rush Prudential*, 536 U.S. at 385

n.16 ("[I]nsurance regulation is not preempted merely because it conflicts with substantive plan terms."). And in doing so, it also violated this Court's decision in *UNUM*, which rejected the very interpretation of ERISA that the Tenth Circuit adopted below: that the statute imposes a "need for uniform interpretation and enforcement of plan provisions in those areas where state law is not preempted." App. 29a; *see UNUM*, 526 U.S. at 376.

The Tenth Circuit's rule is particularly indefensible as applied to this case. Colorado's statute expressly forbids the use of Liberty's discretionary clause, and it does so "notwithstanding any contractual or statutory choice-of-law provision to the contrary." C.R.S. § 10-3-1116(8). Such state laws have been universally upheld in preemption challenges. One reason for that, as Judge O'Scannlain has noted, is that these laws do not "'impose burdens on plan administration' due to disuniformity *at all*." *Standard Ins.*, 584 F.3d at 849 (emphasis added). The Tenth Circuit below offered no counter to this point. It did not explain how the application of these state laws—which affect only the standard applied by a reviewing court *after* a benefits decision had been made, not the decision itself—would interfere with the plan administrator's "interpretation and enforcement of plan provisions." App. 29a–30a. Nor could it have. *See Ross*, 558 F.3d at 608 (explaining that such laws "at most may affect the standard of judicial review if, and when, such a claim is brought before a court").

Nor is the Ninth Circuit's test correct. That test, which allows a plan's choice-of-law clause to displace the law of the state that would otherwise govern as long as the clause is "not unreasonable or fundamentally unfair," rests on a faulty analogy to forum-selection clauses. *See Wang Labs.*, 990 F.2d at 1128–29 (discussing *Carnival Cruise Lines*,

499 U.S. 585). As the Fifth Circuit has pointed out, forum-selection clauses and choice-of-law clauses are different in a critical respect: "Unlike arbitration and forum selection clauses, which dictate where a dispute will be heard, choice-of-law provisions dictate the law that will decide the dispute, and thus create more tension with a state's power to regulate conduct within its borders." *Cardoni v. Prosperity Bank*, 805 F.3d 573, 580 (5th Cir. 2015). The Ninth Circuit's test fails to appreciate this distinction.

The Restatement's test, by contrast, appropriately takes this concern into account. *See* Restatement (Second) of Conflict of Laws § 187(2) cmt. g ("Fulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interests and for state regulation."). And courts have familiarity with this test because it has been around for half a century. They apply it in other contexts under federal common law, and in the many diversity cases where the forum state follows the test. *See, e.g.*, *DCS Sanitation Mgmt., Inc. v. Castillo*, 435 F.3d 892, 895–96 (8th Cir. 2006). There is no reason to cast aside this background rule and to craft a special judge-made law just for ERISA cases. To the contrary, ERISA's saving clause requires adherence to the ordinary rule of federal common law. By disregarding that ordinary rule and devising a test of its own, based on what it took to be good policy, the Tenth Circuit strayed well beyond its proper role as a federal court. This Court should step in.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

MATTHEW W.H. WESSLER
JONATHAN E. TAYLOR
Counsel of Record
Gupta Wessler PLLC
1900 L Street NW, Suite 312
Washington, DC 20036
(202) 888-1741
jon@guptawessler.com

SHAWN E. MCDERMOTT
TIMOTHY M. GARVEY
McDermott Law, LLC
4600 S. Ulster Street
Suite 800
Denver, CO 80237
(303) 964-1800

January 8, 2021 *Counsel for Petitioner*