No. 25-1142

In the Supreme Court of the United States

MARK ZAVISLAK,

Petitioner,

v.

NETFLIX, INC.,

Respondent.

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

PETITIONER'S REPLY AND SUPPLEMENTAL BRIEF

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I. New Fourth Circuit Decision in *Kelly* Confirms 9-1 Split on General Interpretation of § 1024(b)(4) and Widens Split on Administration Contracts.

Just weeks ago, the Fourth Circuit issued a published opinion that refutes Netflix's key arguments against certiorari. *See Kelly v. Altria Client Servs., LLC*, Nos. 25-1350, 25-2080, 2026 WL 2293854, ___ F.4th ___ (4th Cir. Aug. 10, 2026), *rev'g in part* No. 3:23-cv-725, 2025 WL 918363 (E.D. Va. Mar. 26, 2025). *Kelly* confirms the Fourth Circuit's position on the entrenched 9-1 circuit divide over the meaning of ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), widens the circuit split specific to administration contracts to 3-1, and exposes the erroneous assertions made in Netflix's brief in opposition.

A. *Kelly* Undermines Netflix's Erroneous No-Split Thesis.

Netflix's chief argument to avoid certiorari is the claim that "[t]he petition erroneously alleges a circuit split over the interpretation of ERISA Section 104" and that "[t]here is no division among the courts of appeals." Opp. 6. To support this dubious assertion, Netflix claims that all circuits are "virtually indistinguishable" from *Hughes Salaried Retirees Action Comm. v. Adm'r of Hughes Non-Bargaining Ret. Plan*, 72 F.3d 686 (9th Cir. 1995), going so far as to accuse Petitioner of "erroneously suggest[ing]" that Fourth Circuit precedent is in conflict with *Hughes*. Opp. 9; *see Faircloth v. Lundy Packing Co.*, 91 F.3d 648 (4th Cir. 1996).

Unfortunately this approach cannot be reconciled with the circuit case law, the decision below, or even

Netflix's prior arguments. In its briefing on appeal, Netflix successfully urged the Ninth Circuit to discard out-of-circuit authority by insisting the very split it now denies. Answering Br. for Appellees, 9th Cir. Dkt. 34.1 [24-4156] at 28 ("Circuits differ in how broadly they interpret the scope of Section 104's disclosure obligations."). The court accepted Netflix's argument, explicitly rejecting Petitioner's position in part because "Zavislak bases his reading of Section 104 largely on out-of-circuit decisions that interpret Section 104 to mandate broad disclosure." Pet. App. 5a n.2. Similarly, the reasoning in *Hughes* has been rejected by other circuits. Indeed *Faircloth* itself expressly rejected the Ninth Circuit's atextual approach as "unpersuasive" and "unsupported by the statutory language." 91 F.3d at 654; *see* Pet. 6, 8–9 & n.3; *see also M.S. v. Premera Blue Cross*, 118 F.4th 1248, 1268 n.15 (10th Cir. 2024) (similarly rejecting as neither "persuasive" nor "instructive" the Ninth Circuit's application of the *Hughes* test via *Shaver v. Operating Eng'rs Local 428 Pension Trust Fund*, 332 F.3d 1198 (9th Cir. 2003), to plan contracts in *Hively v. BBA Aviation Benefit Plan*, 331 F. App'x 510, 511 (9th Cir. 2009); *but see* Opp. 15 n.6).[1]

Kelly erased any doubt that Netflix's position is meritless. In *Kelly*, the district court mirrored the

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[1] Netflix's statement at Opp. 15 n.6 is a non sequitur, first because the "three-sentence analysis in an unpublished order" that *Premera* rejected was Ninth Circuit jurisprudence. 118 F.4th at 1268 n.15. Second, the case *Premera* was citing was *Hively*, which had applied *Shaver*. 331 F. App'x at 511. *Shaver* is the progeny of *Hughes*. *See* 332 F.3d at 1202. Netflix's own briefing recognizes this. See Opp. 5, 20. Third, *Premera* plainly holds that administration agreements come within the disclosure ambit of § 1024(b)(4). 118 F.4th at 1267–68.

reasoning of the Ninth Circuit below. *Compare Kelly* (district court), 2025 WL 918363, at *16–17, slip op. at 38–39 (citing *Hughes* and exempting the administration agreement because it did not explain "where he stands with respect to the plan—what benefits he may be entitled to" and "regulates the relationship between [sponsor and TPA]—*not* the relationship between Plaintiff and [sponsor]"), *with* Pet. App. 4a (citing *Hughes* and exempting administration agreements because they did not govern "the actual benefits to which Plan participants are entitled or the processes Plan participants must undergo to obtain those benefits" and "govern only the relationships between Netflix and the third parties providing various claims-related services").

The Fourth Circuit unanimously reversed. *Kelly*, 2026 WL 2293854, at *10, slip op. at 20. Grounding its decision in the plain text and ordinary meaning of "contracts … under which the plan is operated," the court held that any contract governing a plan's operational process must be disclosed—even if purely ministerial and regardless of whether it defines benefit rights. *Id.* at *9, slip op. at 18–19. Reaffirming *Faircloth*'s textual standard, the Fourth Circuit once again rejected the core logic of *Hughes* and confirmed once again that § 1024(b)(4) cannot be restricted to documents that "provide information about the plan and benefits." *Id.* at *9, slip op. at 19.

B. *Kelly* Confirms Exceptional National Importance.

Kelly also dismantles Netflix's claims that this issue lacks practical importance. *Compare id.*, with Opp. 1–2, 17–18. Five circuit decisions have now addressed the Question Presented—*three in the last two years alone*—with every one outside the Ninth

Circuit requiring disclosure of governing contracts under § 1024(b)(4) regardless of whether they describe benefits. Moreover, because *Kelly* mandated furnishment of an administration contract involving directed ministerial recordkeeping, Netflix cannot dismiss sister-circuit precedent as confined to individual benefit denials.

The issue is also urgent. As *Kelly* itself illustrates, *Hughes* is having a deleterious effect on participant rights and district court decisions outside the Ninth Circuit. District courts are reading *Hughes* to exempt administration contracts from disclosure, ignoring the plain text of § 1024(b)(4) and even their own circuit precedent. Denying certiorari and leaving *Hughes* undisturbed would only perpetuate the current confusion and invite lower courts to continue to craft atextual carveouts to deny valid § 1024(b)(4) claims. Only the Court's review can restore uniformity to ERISA's fundamental disclosure regime.

II. The Unpublished Nature of the Decision Below Weighs in Favor of Review, Not Against.

Netflix argues that the court of appeals' unpublished memorandum disposition establishes no new circuit law and is therefore unworthy of review. Opp. 1, 6–7, 13, 15. That argument is contrary to settled practice and misapprehends the structure of Ninth Circuit jurisprudence.

As an initial matter, neither Supreme Court Rule 10 nor the Court's practice limits or disfavors certiorari to unpublished decisions. To the contrary, the Court routinely grants certiorari to review unpublished decisions, and it frequently reverses. *See* Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. Rev. 808, 820 & n.59 (2018) (collecting cases).

More fundamentally, that the decision below is unpublished is a compelling reason *for* certiorari, not against it. Under Ninth Circuit Rule 36-2, a disposition is published if it "[e]stablishes, alters, modifies or clarifies a rule of federal law." 9th Cir. R. 36-2(a). A panel's straightforward application of binding circuit precedent does not warrant publication. Here, the court below was strictly bound by *Hughes*, 72 F.3d 686, which was decided *en banc*. The three-judge panel was required to apply *Hughes*'s atextual information test and affirm the withholding of governing contracts. Pet. App. 4a–5a. The only mechanism below to challenge and overturn *Hughes* was to petition the court for rehearing *en banc*. Petitioner did so. *See* Pet. App. 95a–96a.

Netflix's suggestion that "further percolation is necessary," Opp. 16, misses the mark. This case *is* that further percolation. The Ninth Circuit has previously exempted claims administration agreements from disclosure under § 1024(b)(4). *See Hively*, 331 F. App'x at 511. The court of appeals denied rehearing en banc below without calling for a vote. Pet. App. 96a. Both Netflix and the district court cited *Hughes* and *Hively* in support. Pet. App. 5a, 62a–63a, 72a. Because the Ninth Circuit is the sole outlier bound by *Hughes*—reflexively discounting sister-circuit authority for "interpret[ing] Section 104 to mandate broad disclosure," Pet. App. 5a n.2—it is highly improbable that any future panel would depart from *Hughes*.[2] Accordingly, any case reaching the Court to

[2] The Ninth Circuit already passed on two opportunities to wrestle with conflicting precedent from other circuits. *Mondry v. Am. Fam. Life Ins. Co.*, 557 F.3d 781 (7th Cir. 2009) was published before *Hively*, 331 F. App'x 510. *Premera*, 118 F.4th 1248,

resolve this mature split caused by the Ninth Circuit will inevitably arrive unpublished. This petition is the Court's vehicle to resolve the split.

III. The Decision Below Rests on the Wrong Legal Standard.

A. Clear-Error Deference Does Not Apply.

Netflix seeks to insulate the decision below by asserting that the district court made factual findings that the four Claims Administration Agreements (CAAs) governed only vendor terms and were duplicative of produced summaries, which the Ninth Circuit reviewed for clear error. Opp. 3, 6–7, 16.

Netflix is mistaken. A finding of fact based on the application of the wrong legal standard cannot stand. *See Abbott v. Perez*, 585 U. S. 579, 607 (2018) ("An appellate cour[t has] power to correct errors of law, including those that … infect … a finding of fact that is predicated on a misunderstanding of the governing rule of law." (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984))); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

Here, the district court evaluated the CAAs exclusively through the lens of *Hughes*'s atextual information test, and incorrectly asked whether the agreements provided participants with descriptions of benefit entitlements rather than whether they were contracts under which the plan was operated. Because the Ninth Circuit found no error in the district court's legal analysis, it proceeded to review the

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was also published before the decision under review. The Ninth Circuit did not address either case.

application of the wrong legal standard and unsurprisingly found no clear error. The Question Presented is the proper legal test, not the resolution of any factual findings.

B. Under the Correct Legal Test, Disclosure Was Required as a Matter of Law.

Netflix does not argue that applying *Hughes*'s atextual gloss instead of § 1024(b)(4)'s plain meaning was harmless error. Indeed it cannot.[3] Under the standard applied by every other circuit to evaluate claims administration agreements, the Petitioner was entitled to judgment as a matter of law.

Under the correct statutory standard, whether a contract is one "under which the plan is operated" turns on its structural and operational role in governing plan processes, namely, defining administrative roles, settling relationships with claims administrators, or delegating claims and appeals processing. *See Mondry*, 557 F.3d at 796; *Premera*, 118 F.4th at 1267; *Kelly*, 2026 WL 2293854, at *9, slip op. at 19. The documents below easily satisfy this standard. As the Ninth Circuit expressly recognized, "the four CAAs govern … the relationship between Netflix and the third parties providing various claims-related services." Pet. App. 4a. Because those contracts establish the machinery by which the Plan's claims and appeals are adjudicated, they "govern[] some part of the plan's process," *Kelly*, 2026 WL 2293854, at *9, slip op. at 19, and are disclosable as a matter of law.

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[3] Tellingly, in arguing that the decision below is correct, Netflix's two-page discussion cites no supporting case outside the Ninth Circuit. Opp. at 18–20.

Netflix's focus on summaries and benefit information is misdirected. Under the majority view, a governing contract must be disclosed regardless of whether it sets out benefit formulas or contains information available elsewhere. *See, e.g.*, *Mondry*, 557 F.3d at 796 (holding contracts disclosable even though they did not define participant benefits); *Premera*, 118 F.4th at 1267 & n.14 (mandating disclosure based on the contract's operational role regardless of its specific contents). Nor does ERISA § 503, 29 U.S.C. § 1133, provide a basis to withhold governing documents. While regulations promulgated under § 1133 require an adverse benefit determination to trigger access to information about that specific claim, § 1024(b)(4) grants any participant the independent right to inspect any of the plan's governing documents at any time.

There is no vehicle impediment, and the split is clear and outcome-determinative. Under the correct, plain reading of § 1024(b)(4) widely adopted across the other circuits, there is no genuine dispute that the four administration contracts must be furnished upon request, and Petitioner was entitled to judgment in his favor.

Conclusion

The petition should be granted.

Respectfully submitted,

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