No. 09-885

IN THE

Supreme Court of the United States

STANDARD INSURANCE COMPANY,
Petitioner,

v.

MONICA LINDEEN, State Auditor,
ex officio Commissioner of Insurance,
Respondent.

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

BRIEF IN OPPOSITION

JAMES G. HUNT
(Counsel of Record)
DIX, HUNT & MCDONALD
310 Broadway
Helena, MT 59601
(406) 442-8552
jhunt@dhmlaw.com

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Counsel for Respondent

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QUESTION PRESENTED

Whether a state insurance commissioner's disapproval of insurance policies containing clauses that purport to grant discretion to insurers is saved from preemption by 29 U.S.C. § 1144(b)(2)(A) of the Employee Retirement Income Security Act of 1974 (ERISA).

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OPINIONS BELOW

The opinion of the court of appeals is reported at 584 F.3d 837 (9th Cir. 2009). The decision of the district court is reported at 557 F.Supp. 1142.

JURISDICTION

The court of appeals issued its opinion on October 27, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

Montana law requires its commissioner of insurance to "disapprove any [insurance] form . . . if the form . . . contains . . . any inconsistent, ambiguous, or misleading clauses or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract . . . ." Mont. Code Ann. § 33-1-502. John Morrison, Montana's State Auditor (and insurance commissioner) prior to the current incumbent, exercised his authority under the foregoing statute in 2005. He disapproved any insurance contract containing a discretionary clause because he viewed such clauses as unlawful under Montana insurance law. The current commissioner, Monica Lindeen, has continued this practice. Standard has

challenged the Montana insurance commissioner's actions. To be sure, the inclusion of such clauses in insurance policies that purport to give discretion to interpret the policy and determine eligibility to receive benefits triggers a deferential standard of court review that is "a feature of judicial review highly prized by benefit plans." *Rush Prudential HMO, Inc. v. Moran,* 536 U.S. 355, 384 (2002). Nonetheless, as this Court made clear in *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101 (1989), deferential review is not mandated by ERISA. Indeed, the default and "regular" standard of adjudicating ERISA claims is the *de novo* standard, which is "consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA." *Id.* at 112.

In addition to its challenge here, Standard also challenged the commissioner's disapproval of discretionary clauses in state district court arguing its clause was not illegal under Montana insurance law. The state district court judge disagreed, holding that "[o]n its face, Standard's discretionary clause is ambiguous and inconsistent. Therefore, the Court concludes that Morrison was correct in determining that Standard's discretionary clause violates Section 33-1-502(2), MCA." *Standard v. Morrison*, First Judicial District Court of Montana, 2008 Mont. Dist. LEXIS 681, pp. 12-13. Standard's clause was typical of other discretionary clauses. *Id.,* pp. 4-5. By failing to appeal this decision to the

Montana Supreme Court, Standard has conceded Montana insurance law, specifically Mont. Code Ann. § 33-1-502(2), required Morrison to prohibit discretionary clauses and therefore prohibit the sale of policies in the State of Montana that include discretionary clauses.

The question presented is whether Montana's prohibition of discretionary clauses is saved from ERISA preemption by 29 U.S.C. § 1144(b)(2)(A). Two circuits have directly addressed this issue. In addition to the Ninth Circuit Court of Appeals, the Sixth Circuit Court of Appeals independently determined that the power of the states to regulate insurance permits the exclusion of policies containing discretionary clauses. *American Council of Life Insurers v. Ross*, 558 F.3d 600 (6th Cir. 2009). No effort was made to petition for certiorari from the Sixth Circuit ruling even though one of the parties in *Ross*, the American Council of Life Insurers, has filed an amicus brief in support of Standard. The Tenth Circuit is also in accord with both the Sixth and Ninth Circuits. In *Hancock v. Metropolitan Life Ins. Co.*, 590 F.3d 1141 (10th Cir. 2009), the Tenth Circuit agreed that a state's blanket prohibition on the use of discretion-granting clauses is permitted. But the Utah rule specifically at issue in *Hancock* inexplicably provided that plans governed by ERISA were exempted. Thus, there is no conflict between the three circuits that have addressed the issue.

In the lower courts, including the district court, Standard argued the commissioner's practice of denying approval to insurance forms with discretionary clauses was preempted by ERISA because it failed to satisfy the two-part test set forth in *Kentucky Ass'n of Health Plans, Inc. v. Miller,* 538 U.S. 329 (2003). However, that argument was soundly rejected. The Ninth Circuit found the actions taken by Morrison fell squarely within this Court's prior jurisprudence relating to the operation of ERISA's savings clause. Standard, recognizing the futility of that argument, has now all but abandoned its attempt to show Morrison's disapproval of discretionary clauses fails the *Kentucky Ass'n* test.

Instead, Standard now focuses almost entirely on whether Morrison's practice conflicts with ERISA's exclusive remedial scheme for insureds who have been denied benefits. 29 U.S.C. § 1132(a). Standard makes the novel argument that the standard of review of a benefit denial claim is an ERISA remedy, totally ignoring ERISA's carefully reticulated civil enforcement provisions, while at the same time disregarding the underpinnings of *Firestone* as well as *Rush Prudential.*

It is axiomatic that the insurance commissioner from the State of Montana does not have the power to impose a particular standard of review upon the federal courts. However, Montana's insurance commissioner has the authority to regulate

insurance in the state of Montana. Not only did Congress make this a key part of ERISA, 29 U.S.C. § 1144(b)(2)(A), but this Court has consistently recognized that authority since *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985).

ARGUMENT

I. BECAUSE THE TWO COURTS OF APPEALS THAT HAVE DECIDED THIS ISSUE BOTH CONCLUDED THAT ERISA DOES NOT PREEMPT A STATE PROHIBITION OF DISCRETIONARY CLAUSES IN INSURANCE POLICIES, THERE IS NO CONFLICT IN THE COURTS OF APPEALS AND THIS COURT'S REVIEW IS NOT WARRANTED.

Both federal courts that expressly looked at this issue held the disapproval of discretionary clauses is saved from ERISA preemption. The only two circuit courts of appeal that have addressed this issue -- the Ninth and Sixth Circuit Courts -- issued unanimous decisions affirming the federal district court decisions. The Tenth Circuit has also endorsed the power of the states to prohibit discretion-granting language in insurance policies that happen to be subject to ERISA.

Significantly, Standard does not even argue the existence of a conflict between the Circuits. Rather, it maintains there is a conflict between "Glenn and *certain language* in *Rush Prudential*

HMO, Inc. v. Moran, 536 U.S. 355 (2002), which the Ninth Circuit perceived as requiring a result that it recognized as likely contrary to congressional intent." Pet.Cert. p. 2 [emphasis supplied]. According to Standard, both the Ninth and Sixth Circuits, as well as the two federal district courts, erred by reading *Rush Prudential* as giving states the power to "eliminate the deferential federal court standard of review that Congress made available to the creators of ERISA plans." *Id.*

However, the Ninth and Sixth Circuits read *Rush Prudential* correctly, focusing on the regulation of insurance. Standard's reading of *Rush Prudential* would eviscerate ERISA's savings clause, effectively reading it out of the statute. Instead, federal courts holding a state's prohibition of discretionary clauses in insurance policies is the regulation of insurance and therefore saved from preemption are following existing decisions of this Court. A conflict will be created only if another federal court erroneously holds that when a state prohibits discretionary clauses, the state's action is not the regulation of insurance.

There is also no conflict between *Metro. Life Ins. Co. v. Glenn*, 128 S.Ct. 2343 (2008) and *Rush Prudential.* In fact, *Glenn* is entirely consistent with *Rush Prudential*, *Firestone*, and other cases decided by this Court. *Ross* recognized this consistency:

> Finally, we observe that *Glenn* provides further support for holding that Michigan's law is not preempted by ERISA. There, the Court reiterated that a conflict of interest exists when the same insurer is responsible for examining and paying a benefits claim. *Glenn*, 128 S. Ct. at 2348. In view of that conflict, *Glenn* determined that courts, in reviewing a benefits decision by an insurer who has discretion over assessing and paying benefits, may consider that conflict as a factor in deciding whether the plan administrator's decision amounts to an abuse of discretion. *Id.* at 2351. If, as *Glenn* reaffirms, there is a conflict of interest when the same plan administrator decides the merits of a benefits plan and pays that claim, and if, as *Glenn* also holds, it is consistent with ERISA to account for that conflict of interest in reviewing a plan administrator's decision, it is difficult to understand why a State should not be allowed to eliminate the potential for such a conflict of interest by prohibiting discretionary clauses in the first place.

Ross, 558 F.3d at 609.

Thus, there is no inconsistency between *Glenn* and any other ruling of this Court including *Rush Prudential*. *Glenn* does not change the fact that courts must continue to "balance ERISA's preemptive scope with its "antiphonal" acceptance of state insurance regulation." *Standard v. Morrison*, 584 F.3d 837, 847 (9th Cir. 2009). (quoting *Rush Prudential*, 536 U.S. at 364). When considering this balance, this Court recognized that "[d]eferential review . . . is not a settled given," *Rush Prudential*, 536 U.S. at 385-86, but the specific text found in ERISA is more powerful than the common law created standard of review. "Whatever the standards for reviewing benefit denials may be, they cannot conflict with anything in the text of the statute, which we have read to require a uniform judicial regime of categories of relief and standards of primary conduct, not a uniformly lenient regime of reviewing benefit determinations." *Morrison,* 584 F.3d at 848 (quoting *Rush Prudential*, 536 U.S. at 385). Accordingly, this Court has continued to permit states to regulate insurance pursuant to their savings clause powers. See, e.g., *Kentucky Ass'n*, 538 U.S. at 329; *Rush Prudential*, 536 U.S. at 355; *UNUM Life Insurance Company of America v. Ward*, 526 U.S. 358 (1999); *Metro. Life*, 471 U.S. at 724. Simply because *Glenn* and *Firestone* did not "create a system of universal *de novo* review does not necessarily mean that states are categorically forbidden from issuing insurance regulations with such effect." *Morrison,* 584 F.3d at 848. "Firestone

Tire's explicit acceptance of the *de novo* standard, coupled with Glenn's acknowledgment that the conflict of interest could prove 'of great importance' in some cases, 128 S. Ct. at 2351, indicates that highly deferential review is not a cornerstone of the ERISA system." *Id.* at 847-848.

Standard takes out of context *Glenn's* observations about the number of health care claims denied each year and the number of federal court filings each year arguing that "*Glenn* recognized the extraordinary burden that routine *de novo* review of ERISA benefits denials would impose on federal courts." Pet.Cert., p. 7. However, *Glenn* made this observation in the context of refusing to "overturn Firestone by adopting a rule that in practice could bring about near universal review by judges *de novo* – i.e., without deference – of the lion's share of ERISA plan claims denials." *Glenn,* 128 S.Ct. at 2350.

Firestone also explicitly rejected Standard's "burden" argument:

> Firestone and its *amici* also assert that a *de novo* standard would contravene the spirit of ERISA because it would impose much higher administrative and litigation costs and therefore discourage employers from creating benefit plans. See, e. g., Brief for American Council of Life Insurance et al. as *Amici Curiae* 10-11. Because even under the arbitrary

> and capricious standard an employer's denial of benefits could be subject to judicial review, the assumption seems to be that a *de novo* standard would encourage more litigation by employees, participants, and beneficiaries who wish to assert their right to benefits. Neither general principles of trust law nor a concern for impartial decisionmaking, however, forecloses parties from agreeing upon a narrower standard of review. Moreover, as to both funded and unfunded plans, the threat of increased litigation is not sufficient to outweigh the reasons for a *de novo* standard that we have already explained.

Firestone, 489 U.S. at 114-115.

Accordingly, in the absence of any conflict amongst the Circuits or between the ruling below and prior rulings of this Court, the settled law regarding the operation of ERISA's savings clause mandates denial of the petition for a writ of certiorari.

II. STATE DISAPPROVAL OF INSURANCE POLICIES CONTAINING DISCRETIONARY CLAUSES IS THE REGULATION OF INSURANCE AND THEREFORE CONSISTENT WITH CONGRESSIONAL INTENT AS EXPLAINED BY THIS COURT IN KENTUCKY ASS'N AND RUSH PRUDENTIAL

Almost in passing, Standard argues that a state's requirement of what can and cannot be included in a policy of insurance sold in that state is not the regulation of insurance. Clearly, Standard has chosen to focus its arguments elsewhere because it knows it cannot prevail on this issue. Nonetheless, that issue is at the core of this case. Because Morrison's actions constituted the regulation of insurance, Montana's prohibition of discretionary clauses is saved from preemption.

A look at this Court's apposite decisions shows Standard's argument is incorrect. In addition to *Massachusetts*, *Rush Prudential* directly answered this question when it held that a state law imposing independent review of health benefit decisions, even if the independent review trumped the plan's discretionary clause, did not conflict with ERISA:

> While the statute designed to do this undeniably eliminates whatever may have remained of a plan sponsor's option to minimize scrutiny of benefit denials, this effect of eliminating an

> insurer's autonomy to guarantee terms congenial to its own interests is the stuff of garden variety insurance regulation through the imposition of standard policy terms.

Rush Prudential, 536 U.S. at 387.

After *Rush Prudential, Kentucky Ass'n*, further reinforced the power of the states to regulate insurance. It also simplified the rule to determine whether the regulation fits within the savings clause by articulating a two-part test: "First, the state law must be specifically directed toward entities engaged in insurance." *Kentucky Ass'n,* 538 U.S.. at 342. Second, it "must substantially affect the risk pooling arrangement between the insurer and the insured." *Id.* Both Montana and Michigan's prohibition of discretionary clauses were found to have squarely passed that test.

Morrison's action satisfies the first part of the *Kentucky Ass'n* test. Montana's Insurance Commissioner's power to approve or disapprove insurance policies for sale in the state of Montana and determine how and whether an insurer will pay benefits to a participant exists pursuant to the statutory insurance code, specifically MCA §§ 33-1-501 and 33-1-502. Therefore, Morrison's action is directed toward the insurance industry. *Kentucky Ass'n,* 538 U.S. at 334-35. The Sixth Circuit, as well as the Ninth Circuit, stated the obvious when

addressing the first part of the test: "[g]iven that the rules impose conditions only on an insurer's right to engage in the business of insurance in [the state,] . . . the rules are directed toward entities engaged in the business of insurance." *Ross,* 558 F.3d at 605; *see also Morrison,* 584 F.3d at 842.

The second *Kentucky Ass'n* factor, that "the state law must substantially affect the risk pooling arrangement between the insurer and the insured," is clearly met here as well. The Court defined "risk pooling" as altering "the scope of permissible bargains between insurers and insureds" and found:

> We have never held that state laws must alter or control the actual terms of insurance policies to be deemed "laws . . . which regulate insurance" under § 1144(b)(2)(A); it suffices that they substantially affect the risk pooling arrangement between insurer and insured. By expanding the number of providers from whom an insured may receive health services, AWP laws alter the scope of permissible bargains between insurers and insureds in a manner similar to the mandated-benefit laws we upheld in *Metropolitan Life*, the notice-prejudice rule we sustained in UNUM, and the independent-review provisions we approved in *Rush Prudential.*

Kentucky Ass'n, 538 U.S. at 338-339.

The Sixth Circuit found Michigan's prohibition of discretionary clauses affected risk pooling because a plan administrator no longer could have "unfettered discretionary authority to determine benefit eligibility or to construe ambiguous terms of a plan." *Ross*, 558 F.3d at 607. The Ninth Circuit similarly recognized:

> consumers can be reasonably sure of claim acceptance only when an improperly balking insurer can be called to answer for its decision in court. By removing the benefit of a deferential standard of review from insurers, it is likely that the Commissioner's practice will lead to a greater number of claims being paid. More losses will thus be covered, increasing the benefit of risk pooling for consumers.

Morrison, 584 F.3d at 845.

When the Montana Insurance Commissioner disapproved insurance policies containing discretionary clauses, his actions fell squarely within the requirements of *Kentucky Ass'n*, along with the prior savings clauses cases that have been adjudicated by this Court. There exists no reason to unsettle a settled issue.

III. STATE DISAPPROVAL OF INSURANCE POLICIES CONTAINING DISCRETIONARY CLAUSES DOES NOT CHANGE ERISA REMEDIES NOR DOES IT DICTATE A STANDARD OF REVIEW TO FEDERAL COURTS.

Standard argues a state's disapproval of discretionary clauses changes ERISA remedies and dictates *de novo* review to federal courts. Neither argument is correct.

A. STATE DISAPPROVAL OF INSURANCE POLICIES CONTAINING DISCRETIONARY CLAUSES DOES NOT AFFECT ERISA REMEDIES.

Relying mainly upon *Aetna Health v. Davila*, 542 U.S. 200 (2004), Standard argues the disapproval of discretionary clauses "duplicates, supplements, or supplants" ERISA's remedial scheme. The identical argument was soundly rejected in *Rush Prudential,* and both the Sixth and Ninth Circuits adopted *Rush Prudential's* rationale. *Morrison,* 584 F.3d at 846-847; *Ross,* 558 F.3d at 608-609.

The issue in *Davila* (whether a denial of ERISA benefits could be challenged under state law under the guise of a suit for medical negligence), is completely unrelated to the issue here (whether the state law regulated insurance within the meaning of ERISA's savings clause). The disapproval of discretionary clauses creates no additional remedies

or enforcement mechanisms. Rather, it simply results in application in the default standard of review in ERISA cases as explicated by *Firestone.* Therefore, "it cannot be said to 'duplicate[ ],' 'supplement[ ],' or "supplant[ ]' the ERISA remedy." *Morrison,* 584 F.3d at 846 (quoting *Davila,* 542 U.S. at 209). "[T]he practice is distinguishable from cases in which a state attempts to meld a new remedy to the ERISA framework." *Id.* Indeed, an insured is generally limited to bringing suit under ERISA § 502(a)(1)(B) in order to challenge a benefit denial, regardless of whether the insurance policy has a discretionary clause. Significantly, in contrast to the savings clause, "the plain language of ERISA provides nothing about the standard of review in cases brought under the statute's civil enforcement provisions." *Ross,* 558 F.3d at 608. Disapproving discretionary clauses does not "conflict with ERISA's civil enforcement provisions or its policy favoring a uniform set of rules" in light of "*Glenn's* positive citations of principles announced in *Firestone* and *Rush Prudential,* and its decision in *Rush Prudential.*" *Id.* Accordingly, the Sixth Circuit was "guided by the Supreme Court's rejection of a similar argument in *Rush Prudential.* There, the Supreme Court held that a state statute mandating that benefit denials are subject to *de novo* review did not conflict with ERISA." *Id.*

Significantly, *Glenn* did not reject *de novo* review in ERISA policies. *Glenn*, 128 U.S. at

2350-51. *Glenn* merely reaffirmed *Firestone's* allowance of a deferential standard of review as an exception to the default *de novo* standard subject to the insurance policy's inclusion of a provision giving deference to the insurer's determination. *Glenn* did not affect the right of states to dictate what can or cannot permissibly be included in a policy sold within a particular state. Thus, *Glenn* offers no support to Petitioner's argument.

B. MONTANA'S BAN ON INSURANCE POLICIES CONTAINING DISCRETION-GRANTING LANGUAGE DOES NOT DICTATE A STANDARD OF REVIEW TO FEDERAL COURTS

Standard argues Morrison's action is an attempt to usurp the power of federal courts and dictate what standard of review should be adopted. That argument makes no legal sense. Neither constitutional nor statutory law gives any state insurance commissioner the power to dictate a standard of review to federal courts. Therefore, Montana's prohibition of discretionary clauses cannot, as a matter of law, "dictate" a standard of review.

Courts have recognized that the regulation of insurance is directed at the relationship between insurance companies and insureds, and not at the courts even though it may affect the standard of review. For example, "[T]he [notice-prejudice] rule

dictates the terms of the relationship between the insurer and the insured, and consequently, is integral to that relationship." *Ross,* 558 F.3d at 608 (quoting *UNUM*, 526 U.S. at 374-375). Prohibiting plan administrators from exercising discretionary authority in this manner "dictates to the insurance company the conditions under which it must pay for the risk it has assumed." *Kentucky Ass'n*, 538 U.S. at 339 n.3.

The Sixth Circuit expressly rejected Standard's argument that if a state can remove discretionary clauses, "it will be allowed to dictate the standard of review for all ERISA benefits claims." *Ross,* 558 F.3d at 609. *Ross* recognized the state insurance commissioner's action merely regulates the content of insurance policies and empowers a state to "remove a potential conflict of interest." *Id.*

The Ninth Circuit also rejected this argument, recognizing the disapproval of insurance policies containing discretionary clauses simply dictates the conditions under which insurance company must pay for the risk it has assumed. *Morrison,* 584 F.3d at 845. Put another way, the disapproval of discretionary clauses "is directed at the elimination of insurer advantage, a goal which the Supreme Court has identified as central to any reasonable understanding of the savings clause." *Id.* at 848.

Morrison's disapproval of insurance policies incorporating discretionary clauses did nothing more

than "dictate" to insurance companies the terms of the relationship between insurer and insured pursuant to Montana law.

CONCLUSION

There is no conflict between rulings of the federal courts of appeals in the various circuits, nor is there tension with decisions rendered previously by this Court. Standard's petition is aimed at trying to disturb well-settled law without any substantial justification. Therefore, Standard's Petition for a Writ of Certorari should be denied.

Respectfully submitted this 15th day of April, 2010.

James G. Hunt
Dix, Hunt & McDonald
310 Broadway
Helena, MT 59601
(406) 442-8552
jhunt@dhmlaw.com

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