No. ________

In The
Supreme Court of the United States

MICHAEL GEDDES AND KARI GEDDES, INDIVIDUALLY AND AS PARENTS AND GUARDIANS OF ANDREW GEDDES, A MINOR CHILD,

Petitioners,

v.

UNITED STAFFING ALLIANCE EMPLOYEE MEDICAL PLAN; U.S.A. UNITED STAFFING ALLIANCE, L.L.C., A LIMITED LIABILITY COMPANY, AND EVEREST ADMINISTRATORS, INC.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Tenth Circuit correctly rule that the decision to deny the Geddeses' claim for medical benefits was entitled to ERISA abuse of discretion review where it also ruled that the entity that made that decision was not a fiduciary, and is not even subject to suit under ERISA?

LIST OF ALL PARTIES

All parties to the proceeding in the Tenth Circuit Court of Appeals appear in the caption of the case. There are no parents or subsidiaries whose disclosure is required under Rule 29.6.

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STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its judgment on November 15, 2006. Petitioners timely filed their Petition for Rehearing En Banc, which was denied on February 1, 2007. (App., *infra*, 68a). The Court has jurisdiction pursuant to 29 U.S.C. § 1254(1) (2000).

STATUTES INVOLVED

29 U.S.C. 1002(21):

For purposes of this subchapter:

* * *

(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent

(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys

or other property of such plan, or has any authority or responsibility to do so, or

(iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105 (c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a–1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

29 U.S.C. § 1105(c)

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures

(A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and

(B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104 (a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102 (c)(3) of this title.

29 U.S.C. 1132(a)(1)(b):

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section,

or

(B) 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.

STATEMENT OF THE CASE
FACTUAL BACKGROUND

Andrew Geddes, a Utah teenager, badly damaged his spinal cord after diving into shallow water at Lake Powell in the summer of 2002. (App., *infra*, 2a). An air ambulance transported Andrew from Lake Powell to St. Mary's Hospital in Grand Junction, Colorado, where physicians determined he had severely injured his neck and spinal column. (App., *infra*, 2a). He suffered paralysis in all of his limbs and was placed in intensive care. (App., *infra*, 2a).

On July 1, 2002, Andrew underwent surgery to repair his spine. (App., *infra*, 3a). Following the operation, Andrew remained in the intensive care unit with a halo device screwed to his skull to prevent his repaired spinal chord from slipping. (App., *infra*, 3a). He received nourishment intravenously until he left St. Mary's for Primary Children's Hospital in Salt Lake City, Utah, on July 15, 2002. (App., *infra*, 3a).

Due to his fragile condition, Andrew's physicians at St. Mary's recommended he be transferred to Primary Children's Hospital by helicopter. (App., *infra*, 3a). But his parents' health plan, United Staffing Alliance—Defendants here—denied coverage for this mode of transport. (App., *infra*, 3a). Andrew was taken the five hours from Grand Junction to Salt Lake City by ground ambulance, and once at Primary Children's, was admitted to the neuroscience ward. (App., *infra*, 3a).

For the next two months, Andrew received in-patient

care at Primary Children's Hospital. (App., *infra*, 3a). He arrived still wearing the halo apparatus, catheterized, attached to an intravenous drip, and with splints on his arms and both legs. (App., *infra*, 3a). Andrew's primary treating physician at Primary Children's, Dr. Terese Such-Neibar, diagnosed Andrew with a "C-4 asia class C spinal" injury complicated by a urinary tract infection. (App., *infra*, 3a). She recommended two months of rehabilitation, bowel and bladder treatment, medication for infectious disease, and pain control. (App., *infra*, 3a). Hospital personnel also provided Andrew with respiratory and radiological treatment until his discharge on September 10, 2002. (App., *infra*, 3a).

Andrew was eligible for healthcare coverage under the United Staffing Alliance Employee Medical Plan (the "Plan"), in which he participated as a dependent through his father's employer. (App., *infra*, 3a-4a). The Plan is an employee welfare benefit plan as defined by the Employee Retirement Income Security Act of 1974, "ERISA," 29 U.S.C. §§ 1001-1461. (App., *infra*, 4a). The Plan's terms are defined in the Master Plan Description. (App., *infra*, 4a). The Plan names United Staffing as both fiduciary and administrator and provides that as the fiduciary, United Staffing will engage an independent third party to review members' claims and administer all benefits. (App., *infra*, 4a). United Staffing retained Everest Administrators, Inc. as the third party claims administrator. (App., *infra*, 4a). Importantly, the Plan explicitly reserves to United Staffing the right to make all final decisions about benefits paid under its terms, as well as the authority to interpret disputed Plan provisions. (App., *infra*, 4a). The contract between United Staffing and Everest stated,

> The Contract Administrator [Everest] shall not be deemed a Plan "fiduciary" as defined in ERISA. [Everest's] services shall not include any power to make decisions regarding Plan

> policy, interpretations, practices or procedures, but shall be confined to ministerial functions such as those described by the U.S. Department of Labor in its Regulations Section 2509.75-8, D-2. . . . [Everest] shall have no final discretionary control over Plan management, including disposition of Plan assets and Plan administration. [Everest's] services hereunder shall be subject to review, modification, or reversal by the Plan Sponsor and/or Plan Administrator.

(App., *infra*, 30a-31a). The Plan ultimately covered less than half of the cost of Andrew's treatment at St. Mary's Hospital. (App., *infra*, 4a). The district court reversed this decision and ordered the Plan to pay for all of the St. Mary's treatment. (App., *infra*, 58a-59a). The Tenth Circuit affirmed this decision, and it is not at issue in this Petition for Certiorari. (App., *infra*, 21a).

United Staffing denied virtually all of the Geddeses' claims arising out of Andrew's stay at Primary Children's Hospital in Salt Lake City. The Plan contended that Andrew's treatment there amounted to rehabilitation, for which the Plan imposed a $2,500 cap. (App., *infra*, 4a).

It was undisputed in the district court that Everest made all decisions regarding benefit claims. United Staffing did not participate at all in the Plan's adjudication of such claims. (App., *infra*, 38a-39a).

The district court reversed the Plan's decision as to the Primary Children's Hospital claims and ordered those claims covered. In so doing, it applied de novo review to the Plan's denial of the Geddeses' claim for benefits. The court held that because Everest was not a fiduciary and was not granted

discretion under the Plan, there was not exercise of ERISA discretion to which it was obligated to defer. (App., *infra*, 52a).

The Tenth Circuit Court of Appeals reversed the district court's decision regarding the appropriate standard of review. It held that the decisions of a third party claims administrator, made at the behest of a plan fiduciary, are exercises of ERISA discretion and entitled to discretionary review. Oddly, the Tenth Circuit also ruled that although Everest's decision were entitled to ERISA deference, Everest itself was a non-fiduciary and owed no duties to the Geddeses, and that, for this reason, the Geddeses had no recourse against it for benefits under ERISA.

The Geddeses petitioned for *en banc* rehearing of the standard of review issue. The court denied the petition.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT'S DECISION CREATES A CONFLICT AMONG THE CIRCUITS REGARDING THE CORRECT STANDARD OF REVIEW FOR BENEFITS DETERMINATIONS RENDERED BY NON-FIDUCIARIES.

The Tenth Circuit held that the decisions of Everest, the Plan's claims administrator, were entitled to ERISA deference while holding at the same time that the claims administrator could not be sued under ERISA because it was a non-fiduciary. This extraordinary decision creates a conflict among the circuits regarding the appropriate standard review under ERISA for decisions made by non-fiduciaries. The Tenth Circuit explicitly recognized that its decision conflicts with the precedent of at least one other circuit.

> Although the Geddeses refer us to no cases adopting a contrary interpretation, we are aware of ***at least one circuit that disagrees with our conclusion***. In *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288 (11th Cir. 1990), the Eleventh Circuit held that in order to qualify for *Firestone* deference, an ERISA plan administrator that delegates its authority must do so only to other fiduciaries.

(emphasis added). The Tenth Circuit disagreed with the Eleventh Circuit and held that a discretionary authority may be delegated to non-fiduciaries.

In *Baker*, the plaintiff, Baker, claimed that he had been wrongfully denied long term disability benefits under an ERISA-governed employee benefit plan. *Baker*, 893 F.2d at 289. Connecticut General Life Insurance Company ("Connecticut General"), the "administrator" of the disability plan and a *non-fiduciary*, was the party that made the ultimate decision to deny Baker's claim for benefits. *Id*. at 289-90. After finding that Connecticut General was not a fiduciary, the court applied this Court's decision in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) to determine the correct standard of review for Connecticut General's decision to deny benefits.

The Eleventh Circuit began its analysis by quoting *Firestone*: "'a denial of benefits challenged under [29 U.S.C.] § 1132(a)(1)(B) is to 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." *Baker*, 893 F.2d at 290-91 (quoting *Firestone*, 109 S.Ct. at 956) (alterations and italics in original). The Eleventh Circuit read this language to plainly state that,

> A court must exercise *de novo* review unless (1) the plan *fiduciary* has "discretionary authority to determine eligibility for benefits or to construe the terms of the plan"; or (2) the plan *administrator* has "discretionary authority to determine eligibility for benefits or to construe the terms of the plan."

Id. at 291 (italics in original).

The court next recognized that under ERISA, "an administrator with discretionary authority *is* a fiduciary" by definition. *Id*. (citing *Firestone*, 109 S.Ct. at 955) (emphasis in original). Presumably, the language in *Firestone* upon which the Eleventh Circuit relied in reaching this conclusion is as follows:

> Firestone concludes that an ERISA plan administrator, fiduciary, or trustee is empowered to exercise all his authority in a discretionary manner subject only to review for arbitrariness and capriciousness. But the provisions relied upon so heavily by Firestone do not characterize a fiduciary as one who exercises entirely discretionary authority or control. Rather, ***one is a fiduciary to the extent he exercises any discretionary authority or control***.

Firestone, 489 U.S. at 113 (emphasis added); *see also* 29 U.S.C. § 1105(c)(1)(B) ("A person is a fiduciary with respect to a plan to the extent (i) he exercises *any* discretionary authority or discretionary control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan."). Applying this logic, the Eleventh Circuit

reasoned that the converse must also be true. Specifically, "[O]ne who is *not* a fiduciary is also not 'an administrator with discretionary authority.'" *Baker*, 893 F.2d at 291. The court then concluded that because Connecticut General was not a fiduciary, it did not exercise discretionary authority, and, for this reason, its decisions were not entitled to deferential review. *Id*.

Thus, the Eleventh Circuit essentially held that it is a logical impossibility under *Firestone* to conclude that a non-fiduciary administrator's decisions should be afforded abuse of discretion review, because a non-fiduciary, by definition, does not exercise discretion.

The instant case is factually indistinguishable from *Baker*. The Geddeses sued claiming they were wrongfully denied medical benefits under an employee benefit plan governed by ERISA. Everest, like Connecticut General, made all determinations regarding the disposition of Plan benefits, even though the contract between Everest and United Staffing specifically stated that Everest was *not* a fiduciary and did *not* have discretion. Moreover, just as the court in *Baker* found that Connecticut General was not a fiduciary, the Tenth Circuit held that Everest was not a fiduciary and hence not subject to suit under ERISA.

Despite the factual similarity between the two cases, the Tenth Circuit held that Everest's decisions were entitled to *Firestone* deference. In reaching this holding, the court relied upon 29 U.S.C. § 1105(c)(1) (2006) of ERISA, which states,

> c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

> (1) The instrument under which a plan is maintained may expressly provide for procedures
>
> (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and
>
> (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

The court interpreted this language to mean that plan fiduciaries can delegate fiduciary functions and authority to non-fiduciaries, and that the decisions made by the non-fiduciaries are entitled to abuse of discretion review.[1] The court held that this is so even though applicable Plan documents stated that Everest did not have discretionary authority to administer the plan or interpret its terms. The court held, "Decisions made by an independent, non-fiduciary third party at the behest of the fiduciary plan administrator are entitled to *Firestone* deference." (App., *infra*, 14a).

The Tenth Circuit's holding in this case is completely at odds with the Eleventh Circuit's holding in *Baker*. Under *Baker*, abuse of discretion review is triggered only when a

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[1] The Tenth Circuit also engaged in a lengthy discussion of trust law. The thrust of its discussion was the notion that "while a fiduciary may not delegate the entire administration of his trust absent specific authorizing language in the trust instrument, a fiduciary may delegate the performance of certain tasks." (quoting Restatement (Second) Trusts § 171 cmt. J). Relying upon this language from the Restatement, the court concluded that it was permissible for United Staffing to delegate certain tasks to Everest, a notion with which the Geddeses have never disagreed. Instead, the Geddeses contend that the relevant question is whether the tasks Everest performed involved an exercise of ERISA discretion.

delegation from a fiduciary to an independent third party includes a delegation of discretion—thereby making that third party himself a fiduciary to the extent he exercises that discretion. Under the Tenth Circuit's holding in this case, abuse of discretion review is triggered regardless of whether discretion is delegated to the independent third-party; all that matters is that the delegating fiduciary has discretionary authority.

The Tenth Circuit decision in the instant case also conflicts with the approach the Ninth Circuit Court of Appeals. In *Madden v. ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279 (9th Cir. 1990), that court stated,

> [W]here (1) the ERISA plan expressly gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan and (2) pursuant to ERISA . . . a named fiduciary ***properly designates another fiduciary, delegating its discretionary authority***, the 'arbitrary and capricious' standard of review . . . applies to the designated ERISA-fiduciary as well as to the named fiduciary.

Id. at 1283-84 (emphasis added).

The Tenth Circuit's decision creates a conflict among the circuits. For this reason, the Court should grant the Geddeses' Petition in order to resolve the conflict.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF THE ERISA STATUTE AND THIS COURT'S HOLDING IN *FIRESTONE*.

The Tenth Circuit's conclusion that a non-fiduciary third-party claims administrator who has explicitly been denied discretion can exercise ERISA discretion sufficient to trigger arbitrary and capricious review conflicts with ERISA and this Court's *Firestone* decision. 29 U.S.C. § 1002(21) or ERISA provides a functional definition of "fiduciary." That provision, in relevant part, states,

> (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent
>
> * * *
>
> (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. ***Such term includes any person designated under section 1105(c)(1)(B) of this title***.

(Emphasis added). Thus, one is a fiduciary under ERISA to the extent that he is designated by a named fiduciary "to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan." 29 U.S.C. § 1105(c)(1)(B).

The Tenth Circuit's holding directly contradicts the plain language of this statute. The crux of the court's holding is that Section 1105(c)(1)(B) permits and "endorses" a named fiduciary's delegation of authority to a *non*-fiduciary. (App., *infra*, 8a-9a). The statute supports no such thing. Instead, Section 1002(21) states that anyone delegated fiduciary responsibilities pursuant to Section 1105(c)(1)(B) is himself,

de facto, a fiduciary. Thus, while it is true that United Staffing could have delegated authority to Everest under Section 1105(c)(1)(B), such a delegation would have made Everest a fiduciary, and the court specifically found that Everest is not a fiduciary.

Stated another way, under the statute, the Tenth Circuit could have found one of the following: (1) that Everest was delegated authority pursuant to Section 1105(c)(1)(B), and became a fiduciary because of that delegation pursuant to Section 1002(21); or (2) that Everest was a non-fiduciary and hence not delegated authority pursuant to Section 1105(c)(1)(B). Problematically, the Tenth Circuit instead found that Everest was delegated authority under Section 1105(c)(1)(B), but then found that Everest was *not* a fiduciary. This reading of ERISA requires one to completely ignore the plain language of Section 1002(21), which specifically states that the term "fiduciary" ***includes any person designated under section 1105(c)(1)(B) of this title***. The Tenth Circuit's interpretation is, thus, impermissible and conflicts with the plain language of the ERISA statute.[2] *See Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995) (statutes should not be read as a "serious of unrelated and isolated provisions."); *Smith v. U.S.*, 508 U.S. 223, 233,

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[2] The Tenth Circuit's error appears to fueled, at least in part, by its implicit failure to recognize that ERISA contemplates the existence of both named and unnamed fiduciaries. Although its does not explicitly say so, the court's decision appears to presume that one must either be a named fiduciary or a non-fiduciary. It is well-established, however, that "ERISA contemplates the existence of both named and unnamed fiduciaries." *Maez v. Mountain States Telephone & Telegraph, Inc.*, 54 F.3d 1488, 1498 (10th Cir. 1995); *see also Glanton ex rel. ALCOA Prescription Drug Plan v. AdvancePCS Inc.*, 465 F.3d 1123, 1124 (9th Cir. 2006) (stating that section [1002(21)] of ERISA makes no distinction between named and unnamed fiduciaries.).

113 S.Ct. 2050, 124 L. Ed. 2d 138 (1993) ("Statutory construction . . . is a holistic endeavor." (citation omitted)).

Moreover, both Section 1002(21) and *Firestone* state that one is a fiduciary to the extent he exercises discretionary authority. *See Firestone*, 489 U.S. at 113 ("[O]ne is a fiduciary to the extent he exercises any discretionary authority or control."). Thus, if one is a non-fiduciary, he does not exercise discretion. The Tenth Circuit's decision conflicts with Firestone and Section 1002(21) because it takes the position that a third-party claims administrator like Everest can exercise discretionary authority while still remaining a non-fiduciary—an impossibility under ERISA and *Firestone*.

The Tenth Circuit held that Everest was not a fiduciary. In light of this finding, the Tenth Circuit was likewise compelled to find that no delegation of fiduciary authority occurred pursuant to 29 U.S.C. § 1105(c)(1)(B), that Everest did not exercise discretion, and that its decisions were subject to *de novo* review. Because the Tenth Circuit's decision conflicts with both Firestone and ERISA itself, the Court should grant this Petition.

III. THE TERMS "FIDUCIARY" AND "NON-FIDUCIARY" ARE NOT MERE LABELS; INSTEAD, THE DISTINCTION BETWEEN THE TWO GOES TO THE VERY HEART OF ERISA.

The Tenth Circuit's conclusion that a non-fiduciary, not subject to suit under ERISA, can exercise *Firestone* discretion is of no small import and moves beyond mere questions of semantics and labels (i.e. fiduciary vs. non-fiduciary). The question presented by this Petition goes to the very heart of ERISA's purposes. One of ERISA's stated purposes is "protecting . . . the interests of participants in employee benefit plans and their beneficiaries, by . . .

establishing standards of conduct, responsibility, and obligation for *fiduciaries* of employee benefit plans. . . ." 29 U.S.C. § 1001(b). The statute's use of the term "fiduciary" is significant because, as this Court has recognized, ERISA is rooted in trust law. In fact, the Court's decision in *Firestone* was founded upon trust law principles. *See Firestone*, 489 U.S. at 110-15. These principles recognize that a fiduciary owes duties to the beneficiaries of the trust. *See* Restatement (Second) Trusts § 169-185 (noting that a trustee is a fiduciary and setting forth the various duties of the trustee as fiduciary). In the instant case, the Tenth Circuit held that because Everest was a non-fiduciary, it did not owe any duties to the trust's beneficiaries. (App. *infra*, 23a).

Because a fiduciary's decisions are governed by the duties he owes to the beneficiary's of the plan, it is logical that a Court should be required to defer to his discretion. Certainly, this notion was the driving force behind the Court's decision in *Firestone*—that the courts should defer to the duty-laden decision-making of an ERISA fiduciary. This construction of ERISA also makes sense in light of the Court's statement that one is a fiduciary to the extent he exercises discretion, because an exercise of discretion should trigger the fiduciary duties that temper the exercise of that discretion. In this regard, the exercise of discretion under ERISA is very much a give and take. When one exercises discretion, he becomes a fiduciary and must take upon himself fiduciary duties as to the matters with the scope of his discretion. In return, the courts will only interfere with his decision-making if his decisions are arbitrary and capricious.

The Tenth Circuit's decision undermines ERISA, and it ignores these bedrock principles of trust law. Its reasoning renders the term "fiduciary" a hollow term, because it gives deference to the decisions of non-fiduciaries, who owe no

duties to plan beneficiaries and thus have not earned that deference.

The results of such an approach are startling and antithetical to the very purposes of ERISA. The Tenth Circuit has created a scheme under which a non-fiduciary, who cannot even be hailed into court to answer for its decisions, is nonetheless given deference in its decision-making. The instant case provides a poignant example of the results of such non-fiduciary decision-making. Judge Holloway, who dissented from the decision, effectively summarized Everest's "administration" of the Geddeses' claims,

> This is, so far as I can determine, the best description available of how the claims for care at Primary Children's Hospital were handled. The hospital chose to use the numerical code for rehabilitative services rather than the code for services connected with hospitalization for most of the services provided. Rehabilitative services were limited under the plan to $2,500.00. Everest read the codes used by the hospital and mechanically applied the limitation stated in the plan. This is the "exercise of discretion" to which, the majority holds, deference is required.

(App., infra, 33a). Decisions like the one rendered by Everest in this case, which give slight, if any, consideration to beneficiaries' claims do not serve ERISA's stated purposes of "protecting the interests of participants in employee benefit plans and their beneficiaries, by . . . establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans." Under the Tenth Circuit's holding, beneficiaries like the Geddeses', whose claims were not reviewed by anyone who owes fiduciary duties, can only

challenge such decisions if they are arbitrary and capricious. Because the conflict that now exists between the circuits regarding the proper standard of review for ERISA benefits decision made by non-fiduciaries is of great importance, this Court should grant the Geddeses' Petition for Certiorari to resolve the conflict.

As a final note, the conflict among the Tenth, Eleventh and Ninth Circuits creates a situation where litigants under the same benefits plan will be litigating under very different standards of review and where employers with multi-state benefits plans will be subject to inconsistent standards. The situation created by the Tenth Circuit's decision thus defeats one of ERISA's primary objectives—"to provide a uniform regulatory regime." *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004); *see also Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002) (recognizing "ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards").

Because the Tenth Circuit decision and the conflict it creates are of considerable importance, this Court should grant the Geddeses' Petition for Certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted, April ___, 2007.

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