No. 09-347

IN THE
Supreme Court of the United States

NORA DUTKA, AS GUARDIAN FOR THE ESTATE OF T.M., A MINOR, AND THE ESTATE OF J.M., A MINOR,
Petitioner,
v.
AIG LIFE INSURANCE COMPANY,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent AIG Life Insurance Company (AIG) is the claims administrator for an accidental death policy offered under an employee benefits plan covered by ERISA. The plan documents delegate discretion to AIG to interpret and apply the exclusions to the policy. AIG denied petitioner's claim for benefits arising out of the death of her former husband under an exclusion to the policy for accidental death caused by the use of drugs. Uncontroverted expert testimony demonstrated that the decedent crashed his airplane because he was impaired by the use of cocaine and a prescription narcotic. The question presented is:

Whether the district court and court of appeals erred by upholding AIG's factual determination that the decedent was under the influence of drugs and that his drug use caused his death.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent AIG Life Insurance Company states that it is wholly owned by its parent company American International Group, Inc., which is a publicly held company.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner presents the question of what standard of review courts must apply to factual determinations made by an ERISA administrator "absent an express discretion clause in an ERISA governed insurance plan." Pet. i. This case, however, does not present that question. The plan documents here in fact grant discretion to the administrator to determine eligibility for benefits. This case also presents a poor vehicle for review because the outcome would be the same regardless of the standard applied. For these reasons, the Court should deny the petition.

STATEMENT

I. BACKGROUND

This case arises from the death of Istvan Macsai. Macsai was piloting a plane with two passengers near Cleveland, Texas. Pet. App. 2. Flying at a low altitude while scouting hunting sites, he failed to maintain adequate air speed and crashed, killing himself and his passengers. *Ibid.*

The National Transportation and Safety Board's (NTSB) investigation determined that pilot error had been the cause of the crash. Pet. App. 11. Neither weather nor poor visibility contributed to the crash, and there was no sign of mechanical malfunction. *Ibid.*

The Federal Aviation Administration (FAA) issued a forensic toxicology report. Pet. App. 11. Cocaine was detected in Macsai's urine, and a narcotic known as propoxyphene was detected in Macsai's blood and urine. Pet. App. 5, 11.

Macsai's ex-wife, Nora Dutka (petitioner here), claimed benefits on behalf of her minor children under an accidental death policy Macsai had enrolled in through his employer, Continental Airlines. Pet. App. 2. The policy was part of a comprehensive welfare benefit plan offered by Continental. C.A. App. 556, 705. The plan is governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.* Pet. App. 8.

The plan identifies Continental as the plan administrator and respondent AIG Life Insurance Company (AIG) as the claims administrator for the accidental death policy. C.A. App. 556, 562, 565. As the claims administrator, AIG is responsible for processing claims and administering benefits under the plan's terms. *Id.* at 556. In the Summary Plan Description, Continental delegated full and final discretionary

authority to AIG for making the benefits determinations at issue in this case: "All decisions concerning exclusions and limitations under the plan shall be in the sole discretion of the insurance company." *Id.* at 713.

The accidental death policy contains an exclusion, providing that it "does not cover any loss caused in whole or in part by, or resulting in whole or in part from * * * the Insured Person being under the influence of drugs or intoxicants, unless taken under the advice of a Physician." Pet. App. 8-9.

After Dutka submitted her claim for accidental death benefits, AIG forwarded the claim documentation to Dr. Gary Lage, an expert in forensic toxicology. Pet. App. 11. Dr. Lage concluded with a "reasonable degree of scientific certainty, that [Macsai] had recently illegally used cocaine, had used alcohol, and had taken the prescription drug propoxyphene within a few hours of his death." *Id.* at 11-12. Dr. Lage found no evidence that the drug had been prescribed, and Dutka never produced evidence to the contrary. *Id.* at 12. Dr. Lage declared that ingestion of cocaine and propoxyphene was inconsistent with the safe operation of an aircraft. *Ibid.* Dutka did not submit an expert report to challenge or rebut Dr. Lage's conclusions. *Ibid.*

AIG denied Dutka's claim for benefits under the policy exclusion for accidents caused by drugs. Pet. App. 2, 8. AIG's ERISA Appeals Committee affirmed the denial. Pet. App. 8.

II. PROCEEDINGS BELOW

A. The District Court's Ruling

Dutka filed suit in the District Court for the Southern District of Texas under ERISA, which provides a cause of action "to recover benefits due to [a beneficiary] under the terms of his plan." 29 U.S.C. § 1132(a)(1)(B). Dutka argued that her claim is not barred by the policy

exclusion because Macsai was not under the influence of drugs at the time of the crash and that any such influence was not the cause of the crash. Pet. App. 9. Addressing cross-motions for summary judgment, Judge Keith Ellison granted AIG's motion and denied Dutka's. *Id.* at 8-16.

The district court observed that "[i]n the Fifth Circuit, the standard of review for actions challenging benefits determinations depends on whether a court is asked to review an issue of plan interpretation or an administrator's factual determination." Pet. App. 13. Factual determinations, like the ones at issue here, are reviewed under an abuse of discretion standard, "regardless of what other provisions are found in the plan at issue." *Id.* at 13-14 (citing *Pierre* v. *Connecticut Gen. Life Ins. Co.*, 932 F.2d 1552, 1558, 1562 (5th Cir. 1991)).

The district court summarily concluded that AIG did not abuse its discretion:

> Although denying benefits to minor beneficiaries is never easy, the record in this case admits of no other decision. There is no dispute that cocaine and a prescription drug for which Decedent apparently had no prescription were found in Decedent's system. Plaintiff offered no expert report to counter that of Defendant.

Pet. App. 15. Moreover, "the language of the exclusion did not refer to 'intoxication,' only 'under the influence.'" *Ibid.* Consequently, while there was no direct proof of causation, the district court concluded that the "uncontroverted evidence" supported the reasonableness of AIG's conclusion that "the drugs in Decedent's system were a cause of the fatal crash." *Ibid.*

B. The Court of Appeals' Ruling

The Court of Appeals for the Fifth Circuit affirmed. Pet. App. 1-7.

Judge Higginbotham, writing for the court, agreed that the abuse of discretion standard applied to AIG's factual finding that the airplane crash was caused at least in part by Macsai's drug use. Pet. App. 3. The court of appeals noted that "the parties here contest the existence of a discretion clause in the plan." *Ibid.* But the court explained that under the Fifth Circuit's decision in *Pierre*, *supra*, "a district court rejects an administrator's factual determinations in the course of a benefits review only upon the showing of an abuse of discretion" "with or without a discretion clause." Pet. App. 3, 6 n.2. The court therefore had no occasion to determine whether Continental's grant of discretionary authority to AIG in the Summary Plan Description would itself require abuse of discretion review. *Id.* at 3, 6-7 n.4.

Reviewing the evidence before the district court, the court of appeals concluded that "the plan administrator did not abuse its discretion in finding that the crash was caused by the pilot's intoxication." Pet. App. 4. While the evidence was of necessity not conclusive as to the drugs in Mascai's blood "*at the time of accident*"—the FAA did not run its toxicology report until fifty days later—Dr. Lage's reports "conclusively show that the decedent had a therapeutic dose of the narcotic Propoxyphene in his body at the time of his death." *Id.* at 4, 5. Moreover, the FAA report "disclose[d] the presence of chemicals in the decedent's body consistent with the use of multiple drugs around the time of the accident." *Id.* at 5. Thus, "the evidence is consistent with" Dr. Lage's conclusion that Mascai had used cocaine and alcohol shortly before his death. *Ibid.*

While the court of appeals "agree[d] with the district court that there was no *direct* proof that the drugs caused the crash," it observed that "in such a case there rarely is—the evidence is circumstantial." Pet. App. 6. And here the circumstantial evidence was strong. "In

good visual meteorological conditions and with no evidence of mechanical failure, as the NTSB report found in this case, the failure to maintain airspeed at low altitude is a fundamental piloting error making it reasonable to conclude that that the accident resulted in part from the pilot being under the influence of drugs." *Ibid.*

Dutka did not seek rehearing en banc. This petition followed.

REASONS FOR DENYING THE PETITION

The petitioner asks this Court to resolve the standard of review that applies to an ERISA administrator's factual determinations, absent a clause in the plan granting discretion to the administrator. Pet. i. This case presents an especially poor vehicle for deciding that issue. Here, the plan documents expressly grant discretionary authority to AIG to determine whether Dutka is eligible for the benefits she seeks. While Dutka argued below that the discretionary clause is not binding for various reasons, neither of the lower courts reached the issue due to the Fifth Circuit's rule that deferential review applies regardless of the existence of a discretionary clause. Thus, in order to even reach the question presented, this Court would need to decide, in the first instance, whether a valid discretionary clause governs this case. That would be inconsistent with this Court's role as a court of review, not first view. Even more importantly, it is highly unlikely that the Court could reach the question presented, in light of the plan documents' plain language granting discretion to AIG. If this Court wishes to resolve the standard of review applicable to an administrator's factual findings in the absence of a discretionary clause, it should await a petition that squarely presents that issue.

This case is a poor vehicle for an additional reason. AIG's decision to deny benefits would be affirmed under either a *de novo* or an abuse of discretion standard. Uncontroverted expert testimony, from both the FAA and a private expert, showed the presence of illegal drugs in Mascai's body. The NTSB report reflected that the crash was caused by an otherwise unexplained fundamental piloting error. As the district court put it, "the record in this case admits of no other decision" than that reached by AIG. This Court ought not grant review in a case where the outcome is the same regardless of which test applies.

I. THIS CASE DOES NOT AFFORD AN OPPORTUNITY TO ADDRESS THE QUESTION PRESENTED IN THE PETITION

The petition presents the following question: "Whether, *absent an express discretion clause in an ERISA governed insurance plan*, the factual determinations of the administrator are subject to *de novo* review by the courts." Pet. i (emphasis added). Dutka asserts that a circuit split exists on that question. But, by its terms, the question presented does not apply to a claim governed by a discretionary grant of authority to the administrator. Such a discretionary clause exists here. Consequently, this case presents an exceptionally poor vehicle for this Court to resolve the question presented. Indeed, the Court likely could not reach the question at all.

A. The Existence of a Discretionary Clause Necessitates Deferential Review of a Plan Administrator's Benefit Determinations

Although Dutka argues for *de novo* review of factual determinations in the absence of a discretionary clause, there is no dispute that a valid discretionary clause requires courts to apply an abuse of discretion standard.

This Court first addressed the standard of review for ERISA claims in *Firestone Tire and Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989). The relevant dispute was whether Firestone, acting as administrator of its ERISA plan, had properly interpreted the plan term "reduction in work force" in denying termination benefits to former employees. *Id.* at 106-108. The Court granted certiorari to determine the appropriate standard by which courts would review an administrator's interpretation of plan terms in an action under 29 U.S.C. § 1132(a)(1)(B). *Id.* at 108.

At the outset of its analysis, the Court cautioned that "[t]he discussion which follows is limited to the appropriate standard of review in § 1132(a)(1)(B) actions challenging denial of benefits *based on plan interpretations*." *Firestone*, 489 U.S. at 108 (emphasis added). The Court rejected the majority view of the lower courts that arbitrary and capricious review applied to an administrator's plan interpretation. *Id.* at 109. The Court disagreed with lower courts' analogy to the Labor Management Relations Act, concluding that "[a] comparison of the LMRA and ERISA * * * shows that the *wholesale* importation of the arbitrary and capricious standard into ERISA is unwarranted." *Ibid.* Instead, relying on the purpose of ERISA, principles of trust law, and the fact that courts routinely interpret contracts as a matter of law, the Court determined that *de novo* review should apply to matters of plan interpretation. *Id.* at 110-115.

The Court carefully noted, however, that "trust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers." *Id.* at 111. Therefore, in stating its holding, the Court made clear that deferential review would apply when a plan grants discretionary authority to the plan administrator: "[W]e hold that a denial of benefits

challenged under § 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administor or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115.

In *Metropolitan Life Insurance Co.* v. *Glenn*, 128 S.Ct. 2343 (2008), this Court reaffirmed that abuse of discretion review applies when the administrator has discretionary authority to determine whether an employee's claim for benefits is valid. *Id.* at 2348. The Court went on to hold that this deferential standard applies even when the claims administrator is also the payor of benefits under the policy, *id.* at 2350, although this conflict of interest may be a "factor" in assessing whether to uphold an administrator's determinations. *Id.* at 2351.[1]

Dutka asserts a circuit split regarding whether, absent a clause granting discretion to the administrator, *Firestone*'s *de novo* standard applies not just to plan interpretation, but also to an administrator's factual determinations. See, *e.g.*, *Pierre* v. *Connecticut Gen. Life Ins. Co.*, 502 U.S. 973 (1991) (White, J., dissenting from denial of certiorari). But Dutka does not dispute that deferential review applies when the plan grants discretionary authority to the administrator. Nor, in light of this Court's clear guidance, is there any division among the circuits on that issue.

B. The Plan Documents Here Delegate Discretionary Authority to AIG to Determine Eligibility for Benefits

At every stage of this case, AIG has argued that deferential review is appropriate because plan documents

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[1] The petition does not present any questions relating to the court of appeals' application of *Metropolitan Life*. See Pet. App. 7 n.6.

delegate discretionary authority to AIG, as the claims administrator, to determine eligibility for benefits.

The plan documents identify Continental Airlines as the plan administrator and AIG as the claims administrator for the accidental death policy. C.A. App. 556, 562, 565. As the plan administrator, Continental is a "named fiduciary" under ERISA. See 29 U.S.C. § 1102(a)(2). The plan documents grant Continental's benefits committee the "authority and discretion to interpret the plan and finally resolve any questions regarding the application of the provisions of the plan." C.A. App. 556.

As authorized by ERISA, Continental delegated some of its discretionary authority to interpret and apply the plan to AIG. See 29 U.S.C. § 1105(c)(1). The plan documents provide that AIG is responsible for processing claims and administering benefits under the plan's terms. C.A. App. 556, 565. The Summary Plan Description issued by Continental expressly declares that "[a]ll decisions concerning exclusions and limitations under the plan shall be in the sole discretion of the insurance company." *Id.* at 713. This delegation grants AIG the discretion to make precisely the determination at issue in this case: whether Macsai's death falls within the policy exclusion for accidents caused by drug use.

Under the principles of *Firestone* and *Metropolitan Life*, there can be no serious dispute that AIG's discretionary authority to determine benefits eligibility requires application of an abuse of discretion standard. As then-Judge McConnell accurately summarized the case law: "If a plan administrator has been allotted discretionary authority"—as Continental has here—"the decisions of both it *and its agents* are entitled to judicial deference." *Geddes* v. *United Staffing Alliance Employee Med. Plan*, 469 F.3d 919, 927 (10th Cir. 2006) (emphasis added). Thus, courts have consistently applied

abuse of discretion review when a plan administrator delegates its discretion to another, such as a claims administrator like AIG. See, *e.g.*, *id.* at 923-927 (named fiduciary's delegation of discretionary authority to insurance company as claims administrator warranted deferential standard of review); *Terry* v. *Bayer Corp.*, 145 F.3d 28, 37-38 (1st Cir. 1998) (named fiduciary's delegation of discretionary authority to benefits committee warranted deferential review); *Chevron Chem. Co.* v. *Oil, Chem. & Atomic Workers Local Union 4-447*, 47 F.3d 139, 143-144 (5th Cir. 1995) (named fiduciary's delegation of discretion to Review Authority warranted deferential standard of review); *Madden* v. *ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279, 1283-1285 (9th Cir. 1990) (named fiduciary's delegation of discretionary authority to insurance company as claims administrator warranted deferential standard of review).

C. The Existence of a Discretionary Clause Makes This Case a Poor Vehicle for Deciding the Question Presented

The courts below had no occasion to decide whether the discretionary clause requires deferential review because Fifth Circuit precedent dictates abuse of discretion review of factual determinations regardless of the existence of a discretionary clause. See Pet. App. 3 (noting that parties "contest the existence of a discretion clause in the plan," but finding no need to resolve the dispute); *id.* at 6-7 n.4. This Court, however, would have to decide whether the discretionary clause is binding in order to reach the question presented in the petition.

The petition hints at a variety of arguments as to why the discretionary clause should not require deferential

review. Pet. 3.[2] This Court would need to consider those arguments in the first instance, without the benefit of any lower court analysis, and resolve them in Dutka's favor in order to reach the question presented in the petition. That would be inconsistent with this Court's role as a court of "final review, not first view." *F.C.C.* v. *Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1809 (2009). This Court should not grant certiorari to resolve a circuit split on the question presented when it would first have to resolve a logically antecedent issue outside the scope of that question, which has never been decided below, and regarding which no division of authority has been alleged.

More importantly, for the reasons set forth *supra*, at 7-11, this Court would likely conclude that Continental's delegation of discretionary authority to AIG to process claims and interpret policy exclusions is valid and binding in this case. In that case, abuse of discretion review would indisputably apply. That outcome would make a grant of certiorari a futile act, as the Court would be unable to reach the question presented.

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[2] For instance, Dutka notes that the insurance policy itself does not contain a discretionary clause. Pet. 3. But that is not surprising since the policy's role is to set forth the scope of coverage, while plan documents such as the Summary Plan Description allocate discretion between the named fiduciary (Continental) and the claims administrator (AIG). Nor, as Dutka implies, does the Summary Plan Description "conflict" with other plan documents. See *ibid.* The plan itself is not in the record, and there is no reason to believe that it conflicts with the Summary Plan Description. And to the extent the insurance policy is properly considered a "plan document," it simply does not address the issue of AIG's discretion; it does not "conflict" with the Summary Plan Description's delegation of discretionary authority to AIG. Finally, Dutka's unfounded assertions about the procedural and evidentiary provenance of the Summary Plan Description only underscore the unworthiness of this case for certiorari. See *ibid.*

If the Court wishes to resolve the standard of review for factual determinations absent a discretionary clause, it should await a case involving a plan that does not contain such a clause. In the meantime, there appears to be no great urgency to address the issue. According to petitioner, only the Fifth Circuit applies deferential review to factual determinations in the absence of a discretionary clause. And, as this Court has recognized, the "lion's share" of ERISA plans grant discretionary authority to the administrator. *Metropolitan Life*, 128 S.Ct. at 2350. Thus, the alleged circuit split appears to be affecting only a small fraction of beneficiaries in one circuit—those who seek to challenge factual determinations under the minority of plans that do not grant discretion to the administrator. Furthermore, while this Court awaits an appropriate vehicle to address the question presented, the Fifth Circuit may well grant a petition for rehearing en banc and bring its views into line with the majority of the courts of appeals.

II. This Case Presents a Poor Vehicle Because the Outcome Would Be the Same under Petitioner's Standard of Review

This case is not an appropriate vehicle for addressing the standard for reviewing factual determinations for an additional reason: the standard of review proffered by petitioner would not alter the outcome. AIG's denial of benefits is correct even under *de novo* review.

The question before AIG was whether Macsai's death was "caused in whole or in part by * * * the Insured Person being under the influence of drugs or intoxicants, unless taken under the advice of a Physician." Pet. App. 8-9. The preponderance of evidence in the record supports AIG's conclusion that Macsai was at least "under the influence" of drugs and that his drug use was at least a "part[ial]" cause of the accident.

The expert reports of the FAA and Dr. Lage were wholly "uncontroverted" by Dutka. Pet. App. 15. The FAA toxicology report stated that both cocaine and a prescription narcotic were found in Macsai's body fifty days after the accident. *Id.* at 5, 11. Dr. Lage testified without contradiction that these results proved to "a reasonable degree of scientific certainty, that [Macsai] had recently illegally used cocaine * * * and had taken the prescription drug propoxyphene within a few hours of his death." *Id.* at 11-12. Dr. Lage concluded, again without contradiction, that the ingestion of cocaine and propoxyphene would have impaired Macsai's ability to operate the aircraft. *Id.* at 12.

When the circumstantial evidence from the NTSB report is added to the uncontroverted evidence that Macsai was impaired by drug use at the time of the crash, AIG's conclusion regarding causation is amply supported. Visibility and weather were good. Pet. App. 15. There was no sign of mechanical failure. *Ibid.* Yet Macsai committed a fundamental piloting error, for which Dutka provided no alternate explanation. *Ibid.*

Given this uncontested record, AIG's determination that Macsai's accident falls with the policy exclusion would be sustained under *de novo* review. Dutka certainly does not cite any cases reversing an administrator's factual determination on similar facts under *de novo* review. The dispute over the standard of review is merely academic in this case.

Because the court of appeals' decision is correct regardless of the standard of review, this case does not present a suitable vehicle for resolving the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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