No. 09-____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), this Court held that the standard under which a federal court will review an ERISA plan benefits determination is determined by whether the plan grants its administrator discretion in making such determinations. When the plan includes a so-called "discretionary clause," the federal courts review the administrator's determinations deferentially; when the plan does not grant such discretion, the federal court standard of review is *de novo*.

Two Terms ago, in *Metro. Life Ins. Co. v. Glenn*, the Court, applying *Firestone*, cautioned that "a rule that in practice could bring about near universal review by judges *de novo*" of ERISA benefits decisions would be contrary to congressional intent. 128 S. Ct. 2343, 2350-51 (2008).

The questions presented in this case are:

1. Whether a state rule banning discretionary clauses, with the sole purpose and sole effect of dictating universal *de novo* review by the federal courts of ERISA benefits decisions, is preempted by ERISA.

2. Whether this Court's opinion in *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), authorizes the states to eliminate the option of a deferential federal court standard of review that Congress made available to the creators of ERISA plans.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Ninth Circuit were Petitioner Standard Insurance Company and John Morrison, State Auditor, ex officio Commissioner of Insurance. Respondent Monica Lindeen is now Montana's State Auditor, ex officio Commissioner of Insurance.

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INTRODUCTION

The decision below dramatically alters ERISA's carefully calibrated civil remedies scheme by granting state insurance regulators *carte blanche* to dictate the federal court standard of review in ERISA benefits cases. In particular, the decision below permits states to mandate *de novo* review, in the face of (1) this Court's express recognition that any "rule that in practice could bring about near universal review by judges *de novo*" would be contrary to congressional intent, *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343, 2350-51 (2008); (2) the exclusively federal nature of, and corresponding absence of state authority over, ERISA's comprehensive remedial scheme; and (3) the importance of the availability of a deferential standard of review, as an incentive for employers to voluntarily create ERISA plans, in the careful remedial balance struck by Congress, *see id.* at 2353 (Roberts, C.J., concurring in part and in the judgment)).

The Montana ban on discretionary clauses at issue here effectively imposes a system of mandatory *de novo* review for all insurance benefit determinations under ERISA plans. The Ninth Circuit recognized that "Congress would prefer a system in which many if not most cases were reviewed for an abuse of discretion," Pet. App. 19a, yet nonetheless held that ERISA does not preempt this policy. However, because Montana's ban contravenes Congress' intent to avoid universal *de novo* review—and significantly alters the carefully calibrated balance of ERISA's civil enforcement scheme—it runs afoul of the "extraordinary pre-

emptive power," *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987), of ERISA's comprehensive scheme of civil remedies, which preempts any State law "that duplicates, supplements, or supplants" ERISA's civil enforcement scheme. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004). This issue, moreover, affects a massive number of cases, as there are nearly two million ERISA benefits denials annually that are potentially subject to challenge in federal court; numerous states have already adopted laws or policies banning discretionary clauses; and the decision below is an open invitation to additional states to adopt such bans.

Furthermore, this Court's review is necessary to resolve the tension 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. The two circuit courts to consider the question presented have both erred by reading *Rush Prudential*'s narrow, five-four decision as broadly authorizing states to eliminate the deferential federal court standard of review that Congress made available to the creators of ERISA plans. Absent this Court's intervention and correction, the same understandable but overbroad reading of *Rush Prudential* is likely to continue to hold sway in the lower courts.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 584 F.3d 837 (9th Cir. 2009).

JURISDICTION

The court of appeals issued its decision on October 27, 2009. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

ERISA § 502(a) states, in part:

"(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 . . . ." 29 U.S.C. § 1132(a).

ERISA § 514 states, in part:

"Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. . . .

Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144.

STATEMENT OF FACTS

Under the "common law of rights and obligations" generated pursuant to ERISA, federal courts review ERISA benefits determinations deferentially, so long as the ERISA plan—as is commonly the case—gives the plan administrator discretion to interpret its terms in making benefit determinations. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). Absent a clause conferring such discretion—a so-called "discretionary clause"—claims are reviewed *de novo*. *Id.* at 115. Under the deferential standard, a plan administrator's decision will be upheld so long as it is not an abuse of discretion. *See id.* at 111. Most ERISA plans take advantage of this option by including discretionary clauses, *see* Roy F. Harman III, *The Debate over Deference in the ERISA Setting – Judicial Review of Decisions by Conflicted Fiduciaries*, 54 S.D. L. Rev. 1, 21 (2009), and accordingly most ERISA claims are reviewed by the federal courts for abuse of discretion.

The deferential review associated with discretionary clauses in ERISA-governed insurance policies has made such clauses the subject of a campaign by state insurance commissioners who consider this aspect of the ERISA remedial regime unfair. Specifically, the National Association of Insurance Commissioners ("NAIC"), in an effort to ensure *de novo* review, adopted a model act prohibiting discretionary clauses in medical insurance contracts, *see* 1 Proc. of the Nat'l Ass'n of Ins. Comm'rs 4, 12-13 (2002), and has since expanded that policy to include disability insurance policies. Numerous states have followed the NAIC in adopting bans on discretionary clauses, and thereby

purporting to control the federal court standard of review of benefits determinations under ERISA-governed policies. *See infra* n.2.

In 2005, John Morrison, the Insurance Commissioner for the State of Montana, effectively banned discretionary clauses in ERISA insured employee benefits plans by instituting a formal practice to disapprove policies with such clauses. ER-93.[1] Morrison "advised insurance companies writing insured ERISA policies in Montana that forms containing 'discretionary clauses' would not be approved." ER-75. This ban on discretionary clauses is aimed at "ERISA insurance contracts" and its stated purpose is to "require *de novo* court review." ER-88, 89-91, 93.

Petitioner Standard Insurance Company ("Standard") issues and administers benefits plans for employers and offers group and individual disability and disability income insurance. Based on Montana's formal practice, Morrison denied approval of discretionary language submitted by Standard. ER-93.

On September 26, 2006, Standard filed a Complaint in the United States District Court for the District of Montana, seeking declaratory and injunctive relief against Morrison's practice of disapproving discretionary clauses. The Complaint alleged that Montana's ban on discretionary clauses is preempted both because it impermissibly interferes with ERISA's civil enforcement scheme within the meaning of section 502 of ERISA, 29 U.S.C. § 1132,

[1] "ER" refers to the Ninth Circuit Excerpts of Record.

and under ERISA's express preemption provision, 29 U.S.C. § 1144.

On cross-motions for summary judgment, the District Court granted summary judgment in favor of Morrison. With respect to Standard's argument that Montana's ban conflicted with ERISA's remedial scheme by purporting to dictate the federal court standard of review, the court held that "[t]here is no law granting Standard a right to a particular standard of review," and therefore Montana's policy requiring *de novo* review in federal ERISA cases "does not implicate ERISA's enforcement scheme at all." Pet. App. 41a. Accordingly, the court held that Montana's ban was beyond the reach of ERISA § 502(a)'s "preemptive force." *Id.* at 47a. With respect to the express preemption argument, the court held that the ban was within the so-called "saving clause" that exempts from express preemption state laws that regulate "insurance, banking, or securities." 29 U.S.C. §1144(b)(2)(A).

On October 27, 2009, the Court of Appeals for the Ninth Circuit affirmed. In addressing Standard's argument that Montana's attempt to dictate a *de novo* federal standard of review conflicted with ERISA's remedial scheme, the Ninth Circuit recognized that this Court's cases "suggest that Congress would prefer a system in which many if not most cases were reviewed for an abuse of discretion." *Id.* at 19a. The opinion also mentioned this Court's concerns about "'near universal review by judges de novo,'" and doubts that "'Congress intended such [a] system.'" *Id.* at 17a (quoting *Glenn*, 128 S. Ct. at 2350 (2008)). Nonetheless, the Ninth Circuit concluded that this Court's "refusal to create a system of

universal de novo review" did not mean that a state could not require such a system through insurance regulation. *Id.* at 18a.

In so holding, the Ninth Circuit relied heavily on language in *Rush Prudential*, which it read as permitting states to "'eliminate whatever may have remained of a plan sponsor's option to minimize scrutiny of benefit denials.'" *Id.* at 19a (quoting *Rush Prudential*, 536 U.S. at 387). So long as a state does not create a new state-law cause of action or authorize an additional remedy, the court held, state regulation aimed at dictating the federal court standard of review is consistent with ERISA.

As to the express preemption argument, the court held that the ban regulates insurance companies, and was therefore within the "saving clause" of 29 U.S.C. §1144(b)(2)(A). *Id.* at 5a-14a.

REASONS FOR GRANTING THE WRIT

In *Glenn*, this Court recognized the extraordinary burden that routine *de novo* review of ERISA benefits denials would impose on the federal courts—pointedly comparing the "1.9 million beneficiaries of ERISA plans [who] have health care claims denied each year" with the 257,507 "total civil filings in federal court in 2007," *id.* at 2350—and determined that Congress could not have intended a system of "near universal review by judges *de novo—i.e.*, without deference—of the lion's share of ERISA plan claims denials." *Id.*

Likewise, this Court has repeatedly made clear that attempts to add to or enhance ERISA remedies are preempted because they interfere with ERISA's "careful balancing of the need for prompt and fair

claims settlement procedures against the public interest in encouraging the formation of employee benefit plans.'" *Davila*, 542 U.S. at 209 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 47, 54 (1987)). As the Chief Justice recently emphasized, the ability to confer discretionary authority on administrators so that courts "may review [their decisions] only for an abuse of discretion" is an important part of that balance. *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 128 S.Ct. 1020, 1027 (2008) (Roberts, C.J., concurring in part and in the judgment).

The decision below merits review because it deeply undermines both of these foundational principles of the ERISA remedial scheme by authorizing Montana—and the numerous other states that have banned (or are considering banning) discretionary clauses—to dictate a *de novo* standard of review in federal court in ERISA insured benefits cases. The Ninth Circuit's decision thereby permits state law (1) to override Congress' intention *not* to have "near universal review by judges *de novo*," *Glenn*, 128 S. Ct. at 2350, and (2) to distort ERISA's careful balancing of the interest in ensuring adequate remedies and the competing interest in encouraging the creation of employee benefit plans. Moreover, the Ninth Circuit's decision highlights a significant tension between *Glenn* and certain broad dicta in *Rush Prudential* that the Ninth Circuit erroneously viewed as compelling its holding—a tension that can only be resolved by this Court.

I. THE DECISION BELOW REVOLUTIONIZES ERISA'S REMEDIAL SCHEME BY PERMITTING STATE REGULATORS TO DICTATE, CONTRARY TO CONGRESSIONAL INTENT, UNIFORM *DE NOVO* FEDERAL COURT REVIEW

A. The Extraordinary Preemptive Force Of ERISA's Civil Enforcement Scheme Invalidates Any State Law That Purports To Affect Or Enhance ERISA Remedies

This Court has repeatedly emphasized the carefully calibrated and exclusively federal nature of the ERISA remedial scheme. ERISA § 502(a) "set[s] forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans.'" *Davila*, 542 U.S. at 209 (quoting *Pilot Life*, 481 U.S. at 54). To protect this careful balance, § 502(a) preempts any state law "that duplicates, supplements, or supplants" ERISA's civil enforcement scheme. *Id.*; *see* 29 U.S.C. § 1132(a).

In particular, based on the "overpowering federal policy" embodied in the civil enforcement provisions of § 502(a), *Rush Prudential*, 536 U.S. at 375, and the "clear congressional intent to make the ERISA remedy exclusive," *Davila*, 542 U.S. at 209, § 502(a) preempts not only state laws that hinder or interfere with ERISA remedies but, equally, those that *supplement* or *enhance* ERISA remedies. *E.g., Pilot Life*, 481 U.S. at 56. Because ERISA's civil enforcement remedies were designed with "deliberate care" to strike a "balancing of policies," *id.* at 54,

enhancing those remedies conflicts with ERISA just as much as would hindering them. Accordingly, this Court has repeatedly warned against "tamper[ing] with an enforcement scheme crafted with such evident care as the one in ERISA" by attempting to enhance that enforcement scheme. *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985).

B. Montana's Attempt To Dictate *De Novo* Federal Court Review Of ERISA Benefits Denials Conflicts With ERISA's Carefully Calibrated And Exclusively Federal Remedial Scheme

Montana's ban on discretionary clauses is overtly aimed at dictating the federal courts' standard of review for claims seeking a remedy for the denial of ERISA insured benefits. The policy itself makes clear that it is aimed at "ERISA insurance contracts" and its stated purpose is to "require *de novo* court review." ER-88, 89-91, 93. Indeed, it is only in ERISA plans that discretionary clauses—or a ban on such clauses—have any significance. COUCH ON INSURANCE § 180:3 (2008). Thus, as the court below recognized, Montana's ban on discretionary clauses is indistinguishable from an express requirement of *de novo* review in the federal courts—*i.e.*, its *only* effect is on the federal court ERISA remedy.

This imposition on federal courts of *de novo* review for all plan insured benefit determinations necessarily enhances the remedy available under ERISA, and is thereby preempted under this Court's cases. As noted earlier, *Firestone* held that the trust-like nature of ERISA plans produced a two-track standard of review for decisions of ERISA administrators: *de novo* review for administrators

who are not granted discretionary authority by the terms of the plan, and deferential review for administrators who are granted such discretionary authority. 489 U.S. at 954. A high percentage of ERISA plans grant such discretionary authority and, as a result, a high percentage of ERISA benefits claims are governed by a deferential standard of review under *Firestone*. *See, e.g., Glenn*, 128 S. Ct. at 2350. Montana's ban on discretionary clauses would broadly eliminate deferential review, and require *de novo* review in its place. This state-law effort to dictate the federal standard of review conflicts with the comprehensive ERISA remedial scheme in at least two ways.

1. First, by purporting to require *de novo* review in all ERISA insured benefit cases, the Montana policy conflicts with what this Court in *Glenn* confirmed was congressional intent *not* to have "near universal review by judges *de novo*" of ERISA benefits denials. *Glenn*, 128 S. Ct. at 2350. In *Glenn*, the Court held that a plan administrator's dual role—deciding whether an employee is eligible for benefits and paying those benefits—can create a conflict of interest that should be taken into account as a factor in whether there is an abuse of the administrator's discretion. However, the Court made clear that any standard that would effectively produce "near universal review by judges *de novo*" would be unacceptable:

> Nor would we 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. Had Congress intended such a system of review, we believe it would not have left to the courts the development of review standards but would have said more on the subject.

Id. (internal citation omitted). The Court intimated that such widespread *de novo* review would not only be contrary to congressional intent, but would threaten to swamp the federal courts with claims. *See id.* (contrasting annual 1.9 million ERISA beneficiaries with health care claim denials with much smaller number of total civil filings in federal court in 2007). Indeed, the Ninth Circuit conceded that *Firestone* and *Glenn* indicate that "Congress would prefer a system in which many if not most cases were reviewed for an abuse of discretion." Pet. App. at 19a.

2. Moreover, Montana's ban, while masquerading as regulation of insurance, in fact has the sole effect (and sole purpose) of changing the nature of federal ERISA remedies to enhance plaintiffs' chances of success. As such, it necessarily interferes with Congress' "'careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans.'" *Davila*, 542 U.S. at 209 (quoting *Pilot Life*, 481 U.S. at 54).

Firestone established that the ERISA remedial scheme—while not *requiring* abuse of discretion review—gave employers the *option* of vesting plan administrators with trustee-like discretionary authority that would be reviewable only for abuse of that discretion. 489 U.S. at 111. The Ninth Circuit glossed over the importance of this option, reasoning

that by dictating *de novo* review, the Montana ban "merely forces ERISA suits to proceed with their default standard of review." Pet. App. 16a (quoting *Davila*, 542 U.S. at 209). However, the use of *de novo* review as a default when the plan creator *chooses* not to include a discretionary clause does not disturb the ERISA remedial balance because it does not affect the plan creator's incentive to create a plan; in contrast, a state law ban that eliminates the plan creator's option and *compels de novo* review clearly does affect those incentives.

As the Chief Justice emphasized in *Glenn*, the availability of deferential review under ERISA is an important part of ERISA's remedial balance that "encourages employers to provide medical and retirement benefits to their employees through ERISA-governed plans—something they are not required to do." *Glenn*, 128 S. Ct. at 2353 (Roberts, C.J., concurring in part and in the judgment).

The Chief Justice made the same point in another recent case, making clear—by citing *Davila*, which applied § 502(a) preemption—that the availability of deferential review is an integral part of the ERISA remedial scheme's "careful balancing" between ensuring effective remedies and encouraging the creation of ERISA plans:

> Among [ERISA's] safeguards is the requirement . . . that a participant exhaust the administrative remedies mandated by ERISA § 503. . . . Equally significant, this Court has held that ERISA plans may grant administrators and fiduciaries discretion in determining benefit eligibility and the meaning of

> plan terms, decisions that courts may review only for an abuse of discretion. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).
>
> These safeguards encourage employers and others to undertake the voluntary step of providing medical and retirement benefits to plan participants, *see Aetna Health Inc. v. Davila*, 542 U.S. 200, 215 (2004), and have no doubt engendered substantial reliance interests on the part of plans and fiduciaries.

LaRue, 128 S.Ct. at 1027 (Roberts, C.J., concurring in part and in the judgment).

In addition to lowering the bar to challenges to ERISA claims denials, near-universal *de novo* review alters ERISA's remedial balance in another way that is likely to deter the creation of ERISA benefit plans: *de novo* review is likely to lead to far more complex and costly litigation than does abuse of discretion review, which can often be limited to the record before the plan administrator. Such a consequence is directly contrary to Congress' "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

Finally, the fact that the Montana ban regulates federal court remedial procedures—rather than insurance risk pooling—also establishes that it is not properly subject to the saving clause that exempts state insurance regulation from express preemption pursuant to 29 U.S.C. § 1144. In any event, the

saving clause is inapplicable to preemption pursuant to § 502 of ERISA. *See Davila*, 542 U.S. at 217-18.

In short, the ban on discretionary clauses adopted by Montana and multiple other states, and authorized by the decision below, alters fundamental aspects of the "careful balancing" of concerns, *Davila*, 542 U.S. at 209, that is manifested in ERISA's comprehensive scheme of civil remedies.

II. THE DECISION BELOW HIGHLIGHTS A TENSION BETWEEN THIS COURT'S DECISIONS IN *GLENN* AND *RUSH PRUDENTIAL* THAT REQUIRES THIS COURT'S RESOLUTION

The Ninth Circuit approved Montana's ban on discretionary clauses despite recognizing that *Firestone* and *Glenn* "suggest that Congress would prefer a system in which many if not most cases were reviewed for an abuse of discretion." Pet. App. 19a. It reached this seemingly paradoxical holding in large part because it interpreted *Rush Prudential* as establishing "that it was perfectly appropriate for the state to 'eliminate whatever may have remained of a plan sponsor's option to minimize scrutiny of benefit denials.'" *Id.* at 19a (quoting *Rush Prudential*, 536 U.S. at 387).

In short, the court below perceived a conflict between what *Glenn* identified as congressional intent and what the Ninth Circuit read *Rush Prudential* as holding—and it resolved that conflict in favor of what it believed to be the holding of *Rush Prudential*. The only other federal circuit to address a state ban on discretionary clauses likewise relied heavily on *Rush Prudential* in upholding the ban

against a contention of ERISA § 502 preemption. *Am. Council of Life Insurers v. Ross*, 558 F.3d 600, 607-08 (6th Cir. 2009). Thus, there is significant tension—if not an outright conflict—between *Glenn* and the Ninth Circuit's interpretation of *Rush Prudential*.

This reading of *Rush Prudential*, moreover, is understandable but wrong. It is understandable—and therefore an error likely to be repeated by other lower courts—because *Rush Prudential* does contain language that, at least in a vacuum, supports the Ninth Circuit's interpretation, including much of the language quoted in the opinion below. *See* Pet. App. 18a-21a.

That interpretation is nonetheless erroneous—both as an interpretation of *Rush Prudential* itself, and, in particular, in light of *Glenn*. *Rush Prudential* addressed an Illinois law that required all HMOs (including those contracting with ERISA plans) to provide a second opinion by an independent doctor in the event the HMO and the patient's primary care physician disagreed about the medical necessity of a particular covered service. This Court held that the Illinois law was not preempted, rejecting, among other things, the argument that the law interfered with ERISA's remedial scheme by providing what was effectively *de novo* review of the HMO's determination as to medical necessity. 536 U.S. at 386.

Notwithstanding the broad language quoted by the Ninth Circuit, *Rush Prudential*'s holding was limited to the narrow "medical necessity" context it addressed. Indeed, *Rush Prudential* expressly disclaimed any suggestion that a state's effort to more broadly require *de novo* review (as Montana has

done here) would be permissible: "We do not mean to imply that States are free to create other forms of binding arbitration to provide *de novo* review of any terms of insurance contracts." 536 U.S. at 386 n.17. Moreover, this Court's opinion relied substantially on the Illinois law's focus on medical necessity judgments, which the Court described as giving the law "a closer resemblance to second-opinion requirements than to arbitration schemes." 536 U.S. at 386. And the Court further noted that its decision "rests in part" on the fact that the Illinois law involved "decisions that are so heavily imbued with expert medical judgments," *id.* at 386 n.17, and emphasized that "regulating insurance tied to what is medically necessary is probably inseparable from enforcing the quintessentially state-law standards of reasonable medical care," *id.* at 387. In interpreting *Rush Prudential*'s narrow, five-four decision as broadly approving state laws requiring *de novo* review, the Ninth Circuit erroneously ignored these multiple statements limiting *Rush Prudential* to its particular context.

Moreover, even aside from these express limitations set forth in *Rush Prudential* itself, the Ninth Circuit erred by failing to recognize that *Glenn*'s explication of congressional intent rendered untenable—or, at least, of dubious vitality—any interpretation of *Rush Prudential* as broadly authorizing state imposition of a *de novo* standard of review.

The clear tension—if not outright conflict—between *Glenn* and the broad interpretation of *Rush Prudential* adopted in the lower courts further necessitates this Court's review.

III. THE ISSUE PRESENTED REQUIRES PROMPT RESOLUTION BY THIS COURT

Notwithstanding the absence of a split among the circuits at this time, the issues presented require this Court's intervention. First, the decision below (and the similar decision by the Sixth Circuit) has dramatic and immediate consequences that will not await further percolation of the issues in the lower courts. At least a dozen states—and perhaps as many as twenty-two—have already prohibited discretionary clauses in health care and/or disability insurance policies, and the NAIC has promulgated a model act barring such discretionary clauses.[2] The majority of these states have acted within the last five years, and other states are currently considering legislation on this issue. *See, e.g.*, Insurance Journal, Ban of

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[2] *See Texas Advocate Seeks Ban on Insurers' Blanket Clauses*, Dallas Morning News (Dec. 17, 2009) ("Twenty-two states have banned the practice, either through state law or new regulations."); *see also* Me. Rev. Stat. Ann. tit. 24-A § 4303; Ill. Admin. Code tit. 50, § 2001.3; Mich. Admin. Code § 500.2201-2202; N.J. Admin. Code § 11:4-58 (2007); Notice, Cal. Dep't of Ins., Notice to Withdraw Approval and Order for Information (Feb. 27, 2004), *available at* www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commiss-opinion/upload/Notice-February-27-2004.pdf; Commissioner's Memorandum 2004-13H from the Hawaii Dep't of Ins. On Discretionary Clauses in HMSA's Agreement for Group Health Plan and Guide to Benefits (Dec. 8, 2004), *available at* http://hawaii.gov/dcca/ areas/ins/commissioners_memo; Bulletin 103 - Full and Final Discretion Clauses in Group Health Contracts (Ind. Dep't of Ins. June 8, 2001), *available at* http://www.in.gov/idoi/lookAtTheLaw-/pdfs/Bulletin103.pdf; Circular Letter No. 14 (State of N.Y. Ins. Dep't June 29, 2006), *available at* www.ins.state.ny.us/cl06_14.htm; Idaho Dep't of Insurance Rule IDAPA 18.01.29; Wash. Admin. Code § 284-44-015; Wyo. Stat. § 26-13-301; S. Dak. Admin Code § 20:06:52:02.

Discretionary Clauses in Insurance Contracts Sought in Texas (Nov. 30, 2009), *available at* http://www.insurancejournal.com/news/southcentral/2009/11/30/105624.htm. Moreover, some of the new state legislation does not stop at discretionary clauses, but rather further purports to alter available remedies. *See* Colo. Rev. Stat. 10-3-1116(3) (requiring all health and disability benefits policies issued in Colorado to provide that claimants "shall be entitled to have his or her claim reviewed de novo in any court with jurisdiction *and to a trial by jury*") (emphasis added).

This move to require *de novo* review works major changes in federal court challenges to ERISA benefit claim decisions. To begin with, creating a *de novo* standard would change the outcome of any number of close cases by eliminating the deference usually given to the decision of the claims administrator. *See, e.g.*, Scott J. Macey, *Plans and Claims Administration Post*-LaRue *and* MetLife, 25 Journal of Compensation and Benefits 6 (May/June 2009) (banning discretionary clauses "could have profound implications for the consideration and outcome of court challenges of benefit claim decisions made under insured plans"). And the lower standard could well lead to more frequent filing of such claims. Also, whereas the deferential standard of review promotes uniform administration of plans across the country, based on courts' affirming reasonable factual determinations and contract interpretations, a *de novo* standard will create disuniformity, in conflict with Congress' intent in creating a national ERISA scheme.

Furthermore, the mandatory *de novo* standard will make cases far more complicated and costly, by permitting wide-ranging discovery instead of limiting review to the administrative record—a limitation that normally applies in cases applying a deferential standard of review. *See, e.g., Abatie v. Alta Health & Life Ins. Co*, 458 F.3d 955, 969-71 (9th Cir. 2006) (en banc) (contrasting deferential and *de novo* review with regard to consideration of evidence outside administrative record); *Vega v. Nat'l Life Services*, 188 F.3d 287, 299 (5th Cir 1999) (limiting use of evidence outside the record in cases with discretionary clauses). The use of evidence outside the administrative record opens the door to expensive discovery, expert testimony, and other costs. *See, e.g., Semien v. Life Ins. Co. of N. Am.*, 436 F.3d 805, 815-16 (7th Cir. 2006) (requiring *de novo* review would "move toward a costly system in which Article III courts conduct wholesale reevaluations of ERISA claims"); Joshua Foster, *ERISA, Trust Law, and the Appropriate Standard of Review: A De Novo Review of Why the Elimination of Discretionary Clauses Would Be an Abuse of Discretion*, 82 St. John's L. Rev. 735, 739 (2008) (mandating *de novo* review "has the practical effect of significantly adding to the costs on all sides associated with litigating ERISA claims, while providing only marginal improvements to the safeguarding of policy-holder's rights"). Thus, "[p]ermitting district courts to consider evidence not presented to the plan administrator would seriously impair ERISA's efficiency goals." *Stanley v. Metro. Life Ins. Co.*, 312 F. Supp. 2d 786, 790 (E.D. Va. 2004) (internal quotation marks omitted).

In short, allowing states to mandate *de novo* review—an invitation the states have increasingly

accepted—adds to plan costs and the burden on the federal courts. Moreover, these increased costs have an immediate effect in discouraging employers from creating benefits plans for their employees—an effect that will not await further development of case law in the lower courts.

Equally important, further percolation is unlikely to resolve the perceived tension between *Glenn* and *Rush Prudential* that led the Ninth Circuit to approve the Montana ban in the face of what it recognized to be congressional intent. Absent this Court's resolution of the issue, the lower courts are likely to continue to attach unwarranted significance to the broad dicta in *Rush Prudential* that the Ninth and Sixth Circuits have found persuasive.

For all of these reasons, this Court's intervention is necessary.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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