No. 18-4098

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LYN M.; DAVID M., AS LEGAL GUARDIANS OF L.M., A MINOR,
Plaintiffs-Appellants
v.
PREMERA BLUE CROSS; MICROSOFT CORPORATION WELFARE PLAN,
Defendants-Appellees

On appeal from the United States District Court for the District of Utah,
Case No. 2:17-cv-01152, District Judge Bruce S. Jenkins

BRIEF OF *AMICUS CURIAE* AMERICAN BENEFITS COUNCIL IN SUPPORT OF APPELLEE'S PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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September 11, 2020

CORPORATE DISCLOSURE STATEMENT

Amicus Curiae American Benefits Council has no parent corporation. It has no stock and, therefore, no publicly held company owns 10% or more of its stock.

September 11, 2020

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STATEMENT OF THE *AMICUS CURIAE*

The American Benefits Council ("Council") is dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers – over 220 of the world's largest corporations – than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes on employee benefit matters. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

This case is of significant interest to the Council because the deferential standard of judicial review for benefit claims that is authorized for employee benefit plans subject to the Employee Retirement Income Security Act ("ERISA"), including those offered to many millions of Americans by Council members, is vital to efficiency, predictability, and uniformity in plan administration. The new disclosure requirement imposed by the panel majority to obtain the deferential standard of review not only goes above what is required by ERISA and its implementing regulations and conflicts with other case law, but also threatens to erode uniform plan administration for multistate and national employers, to the detriment of both plans and participants.

STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

The Council states that: (1) a party's counsel did not author this brief in whole or in part; (2) a party or party's counsel did not contribute money that was intended to fund preparing or submitting this brief; and (3) no person – other than the Council, its members, or its counsel – contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

In a nationally unprecedented ruling, the panel majority held that, under ERISA, a deferential standard of review on judicial review of a benefits claim applies only where a plan administrator has disclosed "its reservation of discretionary authority." Slip Op. 11. The majority's requirement is counter to ERISA itself, the precedents addressing ERISA's standard of review, and Department of Labor ("DOL") regulations. Furthermore, the majority's rule undermines the important interests that the standard of review protects: "efficiency, predictability, and uniformity." *Conkright v. Frommert*, 559 U.S. 506, 518 (2010). Instead, it adds complicated preliminary issues concerning participant notice to benefits litigation, invites disparate merits rulings based on participants' respective circumstances regarding disclosure, and discourages the streamlined documentation that ERISA contemplates. For these reasons, the Council urges the

Court to grant Appellee Premera Blue Cross's petition for panel rehearing and rehearing *en banc*.[1]

ARGUMENT

I. THE MAJORITY'S REQUIREMENT OF DISCLOSURE OF DISCRETIONARY LANGUAGE TO MAKE THE LANGUAGE EFFECTIVE CONTRADICTS THE STATUTE, CASE LAW, AND FEDERAL REGULATIONS

A. *The Statute*. ERISA spells out in detail the requirements for what an ERISA plan and its administrators must disclose to beneficiaries and when they must make disclosures; yet, nowhere does ERISA require affirmative disclosure of discretionary language to beneficiaries for the language to be effective in court. Given that ERISA is a "'comprehensive and reticulated statute,'" *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980)), and Congress, therefore, cannot be deemed to have intended more requirements when it addressed a topic in ERISA and expressly provided only certain mandates, *see id.* at 254, the majority's expansion of disclosure obligations violates the statute itself.

"ERISA's reporting, disclosure, and recordkeeping requirements for welfare benefit plans are extensive." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 944

[1] The Council limits its brief to the first basis on which Appellee seeks rehearing (namely, the majority's disclosure requirement regarding discretionary language), though it also supports Appellee's other grounds for rehearing.

(2016). Most notably, Congress has carefully delineated the content and timing for disclosure of "summary plan descriptions," or "SPDs," which are the key documents "provide[d to] participants." *CIGNA Corp. v. Amara*, 563 U.S. 421, 437 (2011). The ERISA section addressing SPDs lists at least ten separate, specific matters that must be included, none of which relates to the discretionary language in a plan. *See* 29 U.S.C. § 1022(b). ERISA also establishes the instances upon which an ERISA-plan administrator affirmatively must disclose an SPD to participants, nowhere stating disclosure must occur to secure a deferential review standard. *See id.* § 1024(b)(1).

Moreover, ERISA insists that the SPD be a "clear, simple communication." *CIGNA Corp*., 563 U.S. at 437. An SPD "shall be written in a manner calculated to be understood by the average plan participant and . . . reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). The SPD's aims are "simplicity and comprehensibility," not the description of "plan terms in the language of lawyers." *CIGNA Corp.*, 563 U.S. at 437.[2]

[2] Pursuant to a provision in the Affordable Care Act that Congress incorporated into ERISA, plan administrators must also provide a "summary of benefits and coverage," or "SBC," that "accurately describes the benefits and coverage under the applicable plan." 42 U.S.C. § 300gg-15(a), (d)(1); *see* 29 U.S.C. § 1185d. In that statutory provision too, there is no requirement to describe or disclose discretionary language relevant to benefits disputes.

Aside from what to disclose in, and when to disclose, an SPD (or SBC), ERISA itself instructs when and how a plan administrator shall disclose the ERISA plan itself, which here was the document containing the discretionary language. The plan administrator must make "instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator"; and "the administrator shall, upon written request of any participant or beneficiary, furnish a copy of [such instruments]." 29 U.S.C. § 1024(b)(2), (4). ERISA makes no mention of providing a copy of the plan in any other instance.

The upshot of all of this is that ERISA carefully describes what shall be included in documents to be supplied to participants and when to supply those documents. Nowhere in *any* of these statutory provisions is there a mandate to include discretionary language or to disclose that information before invoking it on judicial review of a benefits claim. What is worse is that the majority's new disclosure requirement transforms SPDs into something Congress never intended them to be. Absent a plan administrator affirmatively disclosing the ERISA plan itself to the participant (when otherwise not required to do so), the majority's view necessitates inclusion of notice of the existence of discretionary language in the SPD. *See* Slip Op. 8-9. Not only is the consequence the infiltration of "lawyer[ly]" language into a document that ERISA says should be designed for

average participants, *CIGNA Corp.*, 563 U.S. at 437, but inclusion of discretionary language burdens SPDs with materials designed to protect the rights *of the plan* (*i.e.*, secure it a favorable standard of review), when an SPD's purpose is to inform participants of "*their* rights and obligations under the plan." 29 U.S.C. § 1022(a) (emphasis added).

B. ***Case Law*.** The majority's requirement for disclosure of discretionary language to secure operation of a deferential standard of review conflicts with the Supreme Court's three decisions addressing the standard of review for benefits claims under ERISA. None countenances such a disclosure requirement.

The first decision is *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), which inaugurated the deferential standard of review when discretionary language exists. Without naming, or even alluding to, any further requirements, *Firestone* states straightforwardly that "a deferential standard of review [is] appropriate when a trustee exercises discretionary powers." *Id.* at 111. The Court said that application of a deferential standard "'depends upon the terms of the trust,'" whereas the majority here found that application depends not on the trust's terms but on *notification to participants* of the trust's terms. *Id.* (quoting 3 W. Fratcher, *Scott on Trusts* § 187, p. 14 (4th ed. 1988)).[3]

[3] Trust law, which *Firestone* indicates can "guide" the "determin[ation of] the appropriate standard of review," is still another source of authority that nowhere contemplates notification to a beneficiary of discretionary language before

Next, in *Metropolitan Life Insurance Co. v. Glenn*, 554 U.S. 105 (2008), the Court considered whether to adjust the terms of the standard of review, including suspending it altogether in favor of *de novo* review, where a plan administrator labors under a conflict of interest. The Court rejected that option, not wishing to freight ERISA cases with preliminary proceedings over the existence of a conflict to determine the appropriate standard of review. The Court said: "[S]pecial procedural rules would create further complexity, adding time and expense to a process that may already be too costly for many of those who seek redress." *Id.* at 116-17. Breaching that directive, the majority here made operation of the standard of review depend on a precursor procedural issue: whether the participant received adequate notice of the plan's discretionary language.

Then comes *Conkright v. Frommert*, 559 U.S. 506 (2010). There, the lower court held "that a court need not apply a deferential standard where the administrator ha[s] previously construed the same [plan] terms and [the reviewing court] found such a construction to have violated ERISA." *Id.* at 512-13 (internal quotation marks and citation omitted). Rebuking the lower court, and after listing

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deferential review operates. 489 U.S. at 111. In the typical trust authorities the Supreme Court cites, there is no reference to any requirement of disclosure of discretionary language in order for a court to review the trustee's decision-making deferentially. *See, e.g.*, Restatement (Second) of Trusts § 187 (Am. Law Inst. 1959); *accord* Mark L. Ascher, et al., *Scott and Ascher on Trusts* § 18.1 (5th ed. 2006).

the important advantages of deferential review, the Supreme Court held that the deferential standard is not "susceptible to ad hoc exceptions." *Id.* at 513.

Based on the Supreme Court precedent, as well as "ERISA contain[ing] no such edict," the Second Circuit – the only Circuit squarely to have addressed the issue, other than the panel in this case – has rejected the notion that "a plan administrator must actually notify a participant of its reservation of discretion" in order for a court to "utilize[] the arbitrary and capricious standard of review." *Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654, 659, 660 (2d Cir. 2013). This Court has always been loath to trigger a Circuit split, and especially should be hesitant to do so when the other Circuit's decision was persuasive enough to garner the following of a Judge on this Circuit's panel. *See United States v. Thomas*, 939 F.3d 1121, 1130-31 (10th Cir. 2019) (citing long string of cases for proposition that the Circuit "should not create a circuit split merely because [the Circuit] think[s] the contrary arguments are marginally better").[4]

[4] District courts in other Circuits have followed *Thurber*. *E.g.*, *Murphy v. Int'l Painters & Allied Trades Indus. Pension Fund*, No. 3:13-cv-28760, 2015 U.S. Dist. LEXIS 132884, at *24-*25 (S.D. W. Va. Apr. 6, 2015); *McDonough v. Aetna Life Ins. Co.*, No. 11-11167, 2014 U.S. Dist. LEXIS 19863, at *29-*34 (D. Mass. Feb. 19, 2014), *aff'd in part & vacated in part*, 783 F.3d 374 (1st Cir. 2015). While the majority here implied that the First Circuit previously had adopted the majority's rule (*see* Slip Op. 7, 10), a close analysis of the First Circuit decisions shows that when mentioning a need for "adequate notice" of a reservation of discretion, the First Circuit simply meant the reservation must be "sufficiently clear" to be understood as reserving discretion (*i.e.*, to announce a norm), not that a plan administrator also has an affirmative disclosure obligation. *Stephanie C. v.*

C. *DOL Regulations*. The Supreme Court has stated that plan administrators must "provid[e] complete and accurate summaries of plan terms in the manner required by ERISA and its implementing regulations," but the regulations regarding these summaries no more require the disclosure of discretionary language than ERISA does, which is to say, not at all. *CIGNA Corp.*, 563 U.S. at 438; *see, e.g.*, 29 C.F.R. § 2520.102-3 (SPD requirements); *id.* § 2590.715-2715 (SBC requirements).

Separately, the DOL has issued detailed regulations regarding "reasonable claims procedures" for plan administrators to follow when adjudicating benefits claims. *See* 29 C.F.R. § 2560.503-1(b). Certainly, one would assume that – if there were to be a notice requirement regarding discretionary language to affect court review of benefits claims – the DOL would have included it here. Once more, the majority's disclosure rule is conspicuously missing. In fact, in these regulations, the DOL did address when, in its view, a plan administrator should forfeit a deferential standard of review in court, but never mentioned forfeiture due

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Blue Cross Blue Shield of Mass. HMO Blue, Inc., 813 F.3d 420, 427 (1st Cir. 2016) (citing *McDonough*, 783 F.3d at 379). Additionally, contrary to the majority here, *Thurber* and the district court precedents have concluded it is a misreading of *Herzberger v. Standard Insurance Co.*, 205 F.3d 327 (7th Cir. 2000), to say the Seventh Circuit somehow required disclosure of discretionary language to secure a deferential review standard. *See McDonough*, 2014 U.S. Dist. LEXIS 19863, at *30-*31 (citing *Thurber*, 712 F.3d at 659).

to lack of disclosure of discretionary language. *See* 81 Fed. Reg. 92316, 92327-28 (Dec. 19, 2016).

II. THE MAJORITY'S REQUIREMENT VITIATES THE INTERESTS THAT THE STANDARD OF REVIEW IS DESIGNED TO PROTECT

There is good reason why the majority's requirement of disclosure of discretionary language for a deferential standard of review to operate has not previously made an appearance in the relevant sources and authorities: it is diametrically contrary to the interests that the standard of review protects. These interests are "efficiency, predictability, and uniformity." *Conkright* 559 U.S. at 518.

The majority's requirement undermines efficiency because it "interject[s] additional issues into ERISA litigation," simply to determine the standard of review. *Id.* at 519. Did the SPD contain the discretionary language? If not, was the plan document disclosed? When was the plan document disclosed? Was the description in the SPD (or was the discretionary language in the plan) sufficient for the plaintiff to understand the reservation of discretion? Must the plaintiff *actually* have read the disclosed materials, or was it enough merely that he or she had been sent them? All of these questions will arise in *every* case now as a precursor to determining the standard of review, which itself is a precursor to litigation on the merits.

The majority's view similarly undermines predictability because the same court addressing similar benefit disputes involving two different participants could reach different results, depending on the disclosure circumstances for each participant. *See id.* at 517. For instance, if the SPD was silent, but the plan administrator timely disclosed the plan itself (with the discretionary language) to one participant but not another, a court would apply a deferential standard in the former instance but *de novo* in the latter, which could lead to different final results. The inconsistent outcomes would substantially degrade predictability in plan benefits and their administration, which is essential to plans and participants.

As to uniformity, this Circuit would more readily apply *de novo* review because of its new, stringent notice criterion for operation of deferential review, whereas others (especially the Second, pursuant to *Thurber*) would defer to the plan administrator's decision-making. "[F]ailing to defer to the Plan Administrator . . . could well cause the Plan to be subject to different interpretations in [Utah] and New York." *Id.* at 520. The resulting dis-uniformity in plan administration "undermine[s] the congressional goal of minimizing the administrative and financial burdens on plan administrators – burdens ultimately borne by the beneficiaries." *Egelhoff v. Egelhoff*, 532 U.S. 141, 149-50 (2001) (internal quotation marks and citation omitted).

CONCLUSION

The Court should grant Appellee's petition for panel rehearing and rehearing *en banc*.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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