No. 06-1458

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, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a benefit denial under a medical plan governed by the Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq*., should be reviewed under a deferential standard of review where the plan grants the named fiduciary discretionary authority to decide benefit claims, but a non-fiduciary agent with no discretionary authority makes the final benefit decision.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition should be held pending this Court's decision in *MetLife* v. *Glenn*, No. 06-923 (argued Apr. 23, 2008), and then disposed of accordingly. In the alternative, the petition should be denied.

STATEMENT

1. The Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1001 *et seq.*, was enacted to "protect * * * the interests of participants in employee benefit plans and their beneficiaries * * * by establishing standards of conduct, responsibility, and obligation for fiduciaries of [those] plans" and to "provide[] for appro-

priate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b). ERISA protects the interests of plan participants and beneficiaries by requiring each plan to "provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan." 29 U.S.C. 1102(a)(1). ERISA, like traditional trust law, imposes strict duties of loyalty, prudence, and care on fiduciaries. 29 U.S.C. 1104(a)(1)(A) and (B).

Those strict fiduciary duties apply not only to named fiduciaries, but to any others who serve as fiduciaries. For example, a plan may authorize a named fiduciary to "designate persons other than named fiduciaries to carry out fiduciary responsibilities." 29 U.S.C. 1105(c)(1)(B). Such persons are themselves considered fiduciaries with respect to the plan. 29 U.S.C. 1102(21)(A) (final sentence). In addition, those not named as fiduciaries in the plan or designated by the named fiduciary are nonetheless considered fiduciaries if, *inter alia*, they "ha[ve] any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. 1002(21)(A)(iii).

ERISA authorizes a plan participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan." 29 U.S.C. 1132(a)(1)(B). In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), this Court considered the appropriate standard of review in a suit for benefits. *Id.* at 108. Noting that Congress did not specify a standard, the Court turned to the purposes of ERISA and its basis in trust law. *Id.* at 108-115. The Court observed that "settled principles of trust law * * * point to *de novo* review of benefit eligibility determinations based on plan interpretations." *Id.*

at 112. But the Court also noted that "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers," and in that situation a trustee's actions "will not be disturbed if reasonable." *Id.* at 111. The Court thus concluded "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 administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," in which case abuse-of-discretion review applies. *Id.* at 115.

2. a. In June 2002, petitioners' son Andrew suffered a severe spinal cord injury during a trip to Lake Powell, Utah. He was taken by air ambulance to St. Mary's Hospital in Grand Junction, Colorado, where he underwent spinal cord surgery. He remained in intensive care for two weeks, with a halo device screwed to his skull to prevent his spinal cord from moving. Pet. App. 2a-3a.

Andrew was then transferred to Primary Children's Hospital in Salt Lake City, Utah. He arrived wearing the halo apparatus, catheterized, attached to an intravenous drip, and with splints on his arms and legs. Andrew's primary treating physician recommended two months of in-patient treatment, which included pain control, bowel and bladder treatment, medication for infectious disease, and rehabilitation. That treatment, according to Andrew's doctor, was medically necessary and typical for patients in Andrew's condition. Andrew remained at Primary Children's Hospital for approximately two months. Pet. App. 3a.

b. At the time of his accident, Andrew was a covered dependent under the United Staffing Alliance Employee Medical Plan (Plan), an ERISA health benefit plan sponsored by his father's employer, respondent U.S.A.

United Staffing Alliance, L.L.C. (United Staffing). Pet. App. 3a-4a.

The Plan designated United Staffing as named fiduciary and plan administrator, and it provided that United Staffing would engage an independent third-party administrator to review claims and administer benefits. Pet. App. 4a. United Staffing chose Everest Administrators (Everest) as its third-party administrator. *Ibid.* Everest, in turn, utilized Intracorp, another third-party administrator, to make medical necessity determinations. *Id.* at 38a; Pet. C.A. Br. 7.

Although the Plan authorized use of a third-party claims administrator, it stated that United Staffing "will have the responsibility to make all final determinations regarding claims for benefits under the Plan, and will have the right to interpret the terms and provisions of the Plan." Pet. App. 46a. Further, United Staffing's contract with Everest stated that Everest "shall not be deemed a plan 'fiduciary' as defined in ERISA"; that Everest's "services shall not include any power to make decisions regarding Plan policy, * * * but shall be confined to ministerial functions"; and that Everest "shall have no final discretionary control over Plan management." *Id.* at 30a-31a (Holloway, J., dissenting).

Petitioners submitted a claim for Andrew's treatment at Primary Children's Hospital. Pet. App. 4a. Everest had Intracorp make a medical necessity determination regarding the claim, and then denied the claim. *Ibid.*; Pet. C.A. Br. 7. On a standard claim denial form, Everest stated that the claim was denied because it was for in-patient rehabilitation, and the Plan imposed a $2500 yearly cap on that type of care. Pet. App. 4a, 41a. As a result, the Plan paid only a small portion of the $99,432 cost of Andrew's stay. *Id.* at 4a, 40a-41a.

Petitioners received a letter that appeared to be from both Everest and Intracorp inviting them to appeal the benefit denial by contacting an appeals coordinator at Intracorp. Pet. App. 41a-42a. Petitioners sent an appeal letter to Intracorp. *Id.* at 42a. Everest later sent a letter to petitioners' attorney denying petitioner's "request for reconsideration" because, although Everest "completely agree[d] that the rehabilitation care was medically necessary," "[l]imits on long-term rehabilitation care are almost universal." *Id.* at 4a-5a, 41a-43a.[1]

3. Petitioners filed suit under 29 U.S.C. 1132(a)(1)(B), and the district court reversed the benefit denial. Pet. App. 35a-65a. The court determined that the benefit denial should be reviewed *de novo*, rather than under a deferential standard of review. *Id.* at 43a-53a. Relying on *Firestone*, the court explained that, "[t]o be entitled to deferential review, not only must the administrator be given discretion by the plan, but the administrator's decision in a given case must be a valid exercise of that discretion." *Id.* at 44a (internal quotation marks omitted).

Here, the court explained, neither United Staffing nor Everest exercised any discretion in denying the claim. Pet. App. 43a-53a. The court noted that the United Staffing-Everest contract stated, and "all parties agreed," "that Everest * * * was not a fiduciary and

[1] The Plan also paid less than half of the cost of Andrew's treatment at St. Mary's Hospital, based on Everest's view that the "usual and customary amount" that the Plan would pay for out-of-network treatment was the same as the rate it negotiated with in-network doctors. Pet. App. 4a, 17a-18a. The district court overturned that ruling on *de novo* review as contrary to industry practice and unreasonable. *Id.* at 54a-59a. The court of appeals affirmed under arbitrary-and-capricious review, *id.* at 17a-21a, and that claim is not at issue here.

had no fiduciary duties to [petitioners]." *Id.* at 45a. The court then found that "there is no evidence that United Staffing ever reviewed any of [petitioners'] claims." *Ibid.* Indeed, United Staffing's owner testified that United Staffing "[n]ever ha[s]" "s[at] down and review[ed] a claim from a plan participant to determine whether the claim is going to be covered," because that is "Everest's responsibility." *Id.* at 39a.

Utilizing *de novo* review, the district court determined that United Staffing erred in concluding that the entire stay at Primary Children's Hospital was for rehabilitative purposes. Pet. App. 59a-62a. The court explained that Everest "did not review the medical records and instead simply relied upon billing codes on invoices to determine whether to pay benefits," and it concluded, based on the testimony of Andrew's treating physician, that most of the care at Primary Children's Hospital was medically necessary and not rehabilitative. *Id.* at 61a-62a.

4. The court of appeals reversed. Pet. App. 1a-24a. It held that the benefit denial was subject to deferential review, reasoning that "[t]o qualify their decisions for deferential review, *Firestone* requires only that ERISA health plan administrators and fiduciaries reserve discretionary authority to themselves in the plan document," and United Staffing did that here. *Id.* at 6a, 9a. In the court of appeals' view, the district court erred in holding that "United Staffing's delegation of authority to an independent claims agency * * * constitutes a failure to exercise administrative discretion, triggering *de novo* review," *id.* at 7a, because "*Firestone* does not limit the parties to whom a fiduciary may delegate its authority," *id.* at 10a. The court reasoned that "[d]ecisions made by an independent, non-fiduciary third party

at the behest of the fiduciary plan administrator are entitled to *Firestone* deference because third parties act only as agents of the fiduciary," so that "decisions made by third parties are decisions made by the fiduciary." *Id*. at 14a.

In this case, the court stated, "Everest made a benefits determination according to the procedures of the Plan, which United, as the Plan fiduciary, then accepted." Pet. App. 12a. "Thus," the court concluded, "discretion was exercised by some combination of the fiduciary and its agent." *Ibid*.

Judge Holloway dissented. Pet. App. 24a-34a. He agreed with the majority both that a named fiduciary may designate an agent "to carry out ministerial functions" and that it "may designate another fiduciary to perform discretionary duties." *Id.* at 28a. But, he observed, "to be entitled to deferential review, the administrator must actually exercise the discretion granted by the plan," and here, "[n]o party exercised th[at] discretion." *Id.* at 25a-26a. Judge Holloway also noted that the district court would be free on remand to consider an alternative basis petitioners had advanced for *de novo* review—that respondents had not followed applicable procedures governing the review of ERISA benefit claims. *Id.* at 33a n.4.

DISCUSSION

The petition is premised on the view that the court of appeals held that a benefit denial by a third-party administrator that was not granted and did not exercise any discretionary authority is subject to deferential judicial review under ERISA. If the decision below is read in that way, the court of appeals erred, because both *Firestone* and settled principles of trust law estab-

lish that *de novo* review is appropriate where no party has actually exercised discretion. To the extent the court of appeals held otherwise, it created disagreement in the circuits, because several courts of appeals have recognized that deferential review is appropriate only when a party has discretionary authority *and* actually exercises that authority.

However, the court of appeals also suggested that deferential review is appropriate because United Staffing *did* exercise its discretionary authority. See Pet. App. 12a. The undisputed factual record provides little, if any, support for such a factual finding. Nonetheless, if the decision is read in that way, it would be consistent with *Firestone*, trust law principles, and the decisions of the other courts of appeals.

Although petitioners' reading of the court of appeals' opinion is likely correct, plenary review is not warranted. There is at least some ambiguity in the opinion, and if interpreted as petitioners propose it would create an intracircuit conflict that the Tenth Circuit should be given an opportunity to resolve. Moreover, *de novo* review may ultimately be warranted in any event due to United Staffing's apparent failure to provide a full and fair review of petitioners' claim, as required by ERISA, its implementing regulations, and the Plan.

Although this case does not warrant plenary review, this Court should hold the petition pending its decision in *MetLife* v. *Glenn*, No. 06-923 (argued Apr. 23, 2008), in which the Court is considering the framework of judicial review under *Firestone*.

A. If Interpreted As Petitioners Suggest, The Decision Below Would Be Erroneous And Create A Circuit Conflict

1. The petition characterizes the decision below as holding that a ministerial decision by a non-fiduciary is subject to a deferential standard of review. Pet. 8-13. Although the opinion is not free from ambiguity, in the government's view, petitioners' is the best reading of the opinion.

The court of appeals stated that, "[t]o qualify their decisions for deferential review, *Firestone* requires only that ERISA health plan administrators and fiduciaries reserve discretionary authority to themselves in the plan document." Pet. App. 9a. It noted that, under trust law, a fiduciary may delegate its authority to an agent who is not a fiduciary, and when it does so, the fiduciary remains liable for the actions of its agent. *Id.* at 9a-11a. In the court's view, because "decisions made by third parties are decisions made by the fiduciary" "[f]or purposes of liability," "[i]f a plan administrator has been allotted discretionary authority in the plan document, the decisions of both it and its agents are entitled to judicial deference." *Id.* at 14a; see *ibid.* ("Decisions made by an independent, non-fiduciary third party at the behest of the fiduciary plan administrator are entitled to *Firestone* deference because the third parties act only as agents of the fiduciary."). The court thus appeared to adopt the following syllogism: (1) decisions of a fiduciary with discretionary authority are subject to deferential review; (2) decisions by an agent of a fiduciary are decisions of the fiduciary for liability purposes; and therefore (3) decisions by an agent who exercises no discretion are subject to deferential review.

2. If the decision below is interpreted in that manner, the court of appeals erred. The syllogism fails to account for the need for discretionary authority to be exercised in order for deferential review to be appropriate.

In *Firestone*, this Court articulated a framework for judicial review of benefit denials. Observing that ERISA "does not set out the appropriate standard of review for [such] actions," the Court turned to trust law and concluded that a benefit denial should 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," in which case abuse-of-discretion review applies. 489 U.S. at 109-111, 115.[2]

Firestone makes clear that a deferential standard of review applies only when the plan confers discretionary authority on the plan administrator *and* the administrator exercises that authority. The Court recognized that if the settlor of a trust expressly confers discretionary authority on a trustee, the trustee's actions are reviewed for an abuse of discretion, so long as the trustee "*exercises* discretionary powers." 489 U.S. at 111 (emphasis added). And the Court rejected the argument that all decisions of an administrator that is a fiduciary are inherently discretionary, concluding instead that the administrator's decision receives deference only if the plan

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[2] The Tenth Circuit in this case referred to deferential review as "arbitrary and capricious" review. See, *e.g.*, Pet. App. 6a, 23a. As the United States explains in its amicus brief in *MetLife* (at 29 n.3), however, that standard of review and other principles drawn from judicial review of federal agency actions are inapposite in the ERISA context. Rather, deferential review is appropriately conducted by applying a general standard of reasonableness.

expressly conferred discretionary authority and the administrator exercised that authority. *Id.* at 112-113.

Settled principles of trust law confirm that a trustee's decision is reviewed *de novo* when the trustee has discretionary authority under the terms of the trust but does not exercise that authority. As the Second Restatement of Trusts explains, "[t]he court will control the trustee in the exercise of a power where its exercise is left to the judgment of the trustee and he fails to use his judgment." Restatement (Second) of Trusts § 187 cmt. h at 405 (1959) (Second Restatement); accord Restatement (Third) of Trusts § 87 cmt. c at 244 (2007) (Third Restatement). "[W]here a trustee has discretion whether or not to make any payments to a particular beneficiary, the court will interpose if the trustee * * * fails to exercise that discretion," Third Restatement § 50 cmt. b at 261, by, for example, "refus[ing] to inquire into the circumstances of the beneficiary," 3 Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 187.3 at 41 (4th ed. 1988) (Scott & Fratcher). Under those circumstances, a court may make its own judgment and order payment, Third Restatement § 50 cmt. b at 261, "even though what is done by the trustee or what he fails to do would have been proper if he had used his judgment," because "[w]here he does not use his judgment, he has not acted in the state of mind * * * contemplated by the settlor," Scott & Fratcher § 187.3 at 40-41.

3. Application of those principles to this case demonstrates that the court of appeals erred to the extent it held that deference is due a non-discretionary decision by a non-fiduciary. Under *Firestone* and settled principles of trust law, a non-discretionary decision is reviewed *de novo*, because when a trustee has not exercised his judgment, he has made no judgment call to

which a court might defer. See Pet. App. 29a (Holloway, J., dissenting).

Contrary to the court of appeals' statement (Pet. App. 9a), it is not enough for a settlor simply to confer discretionary authority on a plan administrator. Rather, discretionary authority must actually be exercised in making the benefit determination. See Second Restatement § 187 cmt. h at 405; Third Restatement § 50 cmt. b at 261, § 87 cmt. c at 244.

Those principles apply both to decisions made by a named fiduciary and decisions made by agents of a named fiduciary. The court of appeals correctly recognized that a named fiduciary may delegate both fiduciary responsibilities and ministerial functions to a third party. Pet. App. 9a-11a; see Second Restatement § 171 cmt. d at 374-375; Third Restatement § 171 cmt. f at 143-144, § 227 cmt. j at 38-40. But that proposition does not change the general rule that courts properly defer only when the fiduciary or its agent actually exercises properly delegated discretionary authority. Contrary to the court of appeals' minor premise (Pet. App. 14a), it is not enough that United Staffing, like any principal, was liable for the acts of its agent, Everest. The benefit denial must be based on an actual exercise of discretionary *judgment*. Where, as here, the named fiduciary delegated only ministerial (non-discretionary) tasks to a third party, and the third party performed only those tasks, there is no exercise of discretionary judgment to which a court could defer.

United Staffing erroneously suggests (Br. in Opp. 4-6) that ERISA mandates deferential review because 29 U.S.C. 1105(c)(1)(B) expressly authorizes a named fiduciary to delegate fiduciary responsibilities to a third party. Section 1105(c)(1)(B) does not address the stan-

dard of review in a suit for benefits, and, in any event, the delegation in this case is not of the type contemplated by that section, because the parties agreed (and the undisputed facts confirm) that United Staffing delegated only ministerial functions to Everest. See Pet. App. 8a n.1; *id.* at 30a (Holloway, J., dissenting); *id.* at 45a.

United Staffing also errs in contending (Br. in Opp. 4) that Section 1105(c)(1) permits delegation of fiduciary responsibilities to a non-fiduciary. If a claims administrator exercises discretion, it is, *by definition*, a fiduciary under ERISA, see 29 U.S.C. 1002(21)(A); Pet. App. 26a n.1 (Holloway, J., dissenting), and is subject to ERISA's strict duties of loyalty, care, and prudence, see 29 U.S.C. 1104(a)(1)(A) and (B). In return, courts review the administrator's decisions deferentially. Here, the court of appeals erred to the extent it gave deference to a third-party administrator that did *not* exercise discretion and was *not* subject to ERISA's strict fiduciary duties.

4. To the extent the Tenth Circuit's decision is read as petitioners suggest, it creates disagreement in the courts of appeals, because several circuits have correctly held that a benefit decision is reviewed *de novo* when no discretion was exercised in making the decision. For example, a number of courts have held that *de novo* review applies when a fiduciary had discretionary authority but failed to delegate (or properly delegate) that authority to the decisionmaker. See, *e.g.*, *Shane* v. *Albertson's Inc.*, 504 F.3d 1166, 1170-1171 (9th Cir. 2007); *Sanford* v. *Harvard Indus.*, 262 F.3d 590, 596-597 (6th Cir. 2001); *Rodriguez-Abreu* v. *Chase Manhattan Bank, N.A.*, 986 F.2d 580, 583-584 (1st Cir. 1993). In addition, as the court of appeals recognized (Pet. App. 13a), the

Eleventh Circuit has held that *de novo* review applies when an agent performs entirely administrative functions and does not exercise any discretionary authority in determining plan benefits. See *Baker* v. *Big Star Div. of the Grand Union Co.*, 893 F.2d 288, 290-292 (1989). In that case, the named fiduciary delegated the initial benefit decisions to a third-party administrator, limited the third-party administrator to non-discretionary decisions, and reserved final decisionmaking authority. *Ibid.* Because the decisionmaker did not exercise any discretionary authority, no deference was due. *Id.* at 291-292.[3]

If read as petitioners urge, the decision below would conflict with *Baker* and be in significant tension with *Shane*, *Sanford*, and *Rodriguez-Abreu.* In each of those cases, as in this case, there was no delegation of fiduciary responsibility over benefits determinations to the party that decided the claim, and as a result, the decisionmaker lacked discretionary authority. See, *e.g.*, *Shane*, 504 F.3d at 1170-1171; *Sanford*, 262 F.3d at 596;

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[3] Contrary to United Staffing's contention (Br. in Opp. 8), the Eleventh Circuit has not abandoned the reasoning of *Baker*, and other courts have not deemed it an "anomaly." The Eleventh Circuit's decision in *Kirwan* v. *Marriott Corp.*, 10 F.3d 784, 789 (1994), concerned a plan that failed to confer discretionary authority on the administrator. The other cases cited by United Staffing either agree with *Baker* or address different issues. See *Briscoe* v. *Fine*, 444 F.3d 478, 489-490 (6th Cir. 2006) (agreeing with *Baker* that third-party administrator without discretionary authority was not a fiduciary); *Bouboulis* v. *Transport Workers Union of Am.*, 442 F.3d 55, 65 (2d Cir. 2006) (in contrast to *Baker*, plan administrator granted discretionary authority under plan was a fiduciary); *Brown* v. *Blue Cross & Blue Shield*, 898 F.2d 1556, 1562-1563 (11th Cir. 1990) (addressing how to weigh conflict of interest in abuse-of-discretion review, an issue not raised in *Baker*), cert. denied, 498 U.S. 1040 (1991).

Rodriguez-Abreu, 986 F.2d at 584; *Baker*, 893 F.2d at 290-292. But while those courts applied *de novo* review, the court below did not, stating instead that deference is due simply because the named fiduciary has discretionary authority.[4]

B. Under Another Possible Interpretation, The Decision Below Would Be Limited To Its Facts

Although petitioners appear to have the better reading of the decision below, there is one statement in the opinion that creates ambiguity and suggests that the opinion could be read to hold that deferential review is appropriate because United Staffing actually exercised discretion. In justifying deferential review, the court of appeals noted its prior decision in *Gilbertson* v. *Allied Signal Inc.*, 328 F.3d 625 (10th Cir. 2003), which "held that a plan administrator must actually exercise the discretion the *Firestone* language confers in order to enjoy deferential review of its decisions." Pet. App. 7a. The court then later distinguished *Gilbertson* on the ground that it involved a claim that was "deemed denied" because a plan administrator failed to review it, where as here, "Everest made a benefits determination according to the procedures of the Plan, which United, as the Plan fiduciary, then accepted." *Id.* at 12a. "Thus," the court

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[4] Petitioners also contend (Pet. 12-13) that the decision below conflicts with *Madden* v. *ITT Long Term Disability Plan for Salaried Employees*, 914 F.2d 1279 (9th Cir. 1990), cert. denied, 498 U.S. 1087 (1991). That case does not present a square conflict because there the named fiduciary properly delegated fiduciary authority to an agent who exercised that authority, making deferential review appropriate, *id.* at 1283-1285, and here there was no such delegation. *Madden* does, however, repeat the general rule that deferential review is appropriate only when an agent actually exercised properly delegated discretionary authority. *Ibid.*

stated, "unlike in *Gilbertson*, discretion was exercised by some combination of the fiduciary and its agent." *Ibid.* To the extent that the court of appeals held that deferential review applied because United Staffing, which had been granted discretionary authority under the Plan, *id.* at 4a, 6a-7a, actually exercised that authority in this case, the decision below would not state an erroneous legal principle or conflict with *Firestone* or the decisions of other circuits.

Although such a holding would reflect a correct statement of law, it would be difficult to sustain on the undisputed facts of this case. The district court concluded that neither Everest nor United Staffing actually exercised discretion. It noted that the contract between United Staffing and Everest explicitly stated (and all parties agreed) that Everest was not a fiduciary and could perform only ministerial functions. Pet. App. 45a; see *id.* at 30a-31a (Holloway, J., dissenting). Accordingly, Everest did not have any discretion to exercise. The deposition testimony of an Everest official confirmed that it was "not the case" that Everest made "some sort of judgment decision" in denying benefits; instead, Everest decided whether to pay benefits by reading the numerical code used by the hospital on its bill and comparing that billing code to the schedule of benefits in the plan. *Id.* at 59a-60a; see *id.* at 31a-33a (Holloway, J., dissenting).

The district court also concluded that United Staffing failed to exercise the discretion it actually possessed in denying benefits, noting that "there is no evidence that United Staffing ever reviewed any of [petitioners'] claims." Pet. App. 45a. The court also recounted the testimony of United Staffing's owner, who agreed that "United Staffing never sits down and reviews a claim";

that United Staffing has never been involved in the appeal process for any claim; and that United Staffing did not know "any of the specifics" about petitioners' claims. *Id.* at 51a; see *id.* at 38a-39a. Finding "no evidence suggesting that the Plan Administrator here (United Staffing) actually made the decision to deny [petitioners'] claim," the district court concluded that there was no exercise of discretion to which a reviewing court could defer. *Id.* at 45a, 51a-53a.

The court of appeals did not discuss in any detail these assessments of the record or the conclusions the district court drew based on them. Instead, it stated simply that United Staffing "accepted" Everest's benefit determination and, "[t]hus," that "discretion was exercised by some combination of the fiduciary and its agent." Pet. App. 12a. That statement does not necessarily mean that the court of appeals concluded that United Staffing actually exercised discretion by reviewing the facts of petitioners' claim and interpreting and applying the Plan's terms. The word "accepted" is consistent with the quite different understanding—strongly supported by the record—that United Staffing passively acceded to Everest's determination, with no independent analysis. Other portions of the court of appeals' opinion suggest that the court believed that the mere acceptance of Everest's determination by United Staffing could be regarded as discretionary because United Staffing was a fiduciary vested with discretionary authority and had made a discretionary decision to delegate authority—albeit only ministerial authority—to Everest. See *id.* at 9a, 11a-12a. As explained above, that is incorrect, because in that event discretionary judgment would not actually have been exercised by *anyone* with respect to petitioners' particular claim.

In sum, to the extent that the court of appeals meant to say that United Staffing actually *did* exercise discretion in the relevant sense—by reviewing the facts of petitioners' claim and interpreting and applying the Plan's terms to that claim—such a holding would appear to have little (if any) support in the record. See *id.* at 28a n.3 (Holloway, J., dissenting). Nonetheless, any error in such a conclusion would be fact-bound error that would be limited to this particular case and would not warrant this Court's review. See Sup. Ct. R. 10; *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

C. The Question Presented Does Not Warrant Plenary Review At This Time

If the decision below is interpreted as petitioners contend, that decision, as explained above, would be incorrect, contrary to this Court's decision in *Firestone*, in conflict with the Eleventh Circuit's decision in *Baker*, and in substantial tension with decisions of several other courts of appeals. Nonetheless, plenary review is unwarranted for two reasons.

1. As the court of appeals noted (Pet. App. 7a), it previously held in *Gilbertson* that the decision of an administrator who had discretionary authority but did not exercise that authority should be reviewed *de novo*. In particular, the *Gilbertson* court stated that "*Firestone* establishes *de novo* review as the default standard for reviewing ERISA claims, with deferential review only in those instances where an administrator's decision is an exercise of 'a discretion vested in them by the instrument under which they act.'" 328 F.3d at 631 (quoting *Firestone*, 489 U.S. at 111). "Therefore," the court stated, "to be entitled to deferential review, not only must the administrator be given discretion by the plan,

but the administrator's decision in a given case must be a valid exercise of that discretion." *Ibid.*

Although the court of appeals attempted to distinguish *Gilbertson*, Pet. App. 7a-14a, the decision below appears to be in substantial tension with that case if read as petitioners contend. It would be appropriate for this Court to allow the Tenth Circuit to reconcile those two decisions, especially if subsequent decisions undermine the correctness of petitioners' reading and thus the tension between *Gilbertson* and the decision below. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). If it does so, any circuit conflict may abate, because the decision below is the only court of appeals decision that appears to have announced a rule of deference in these circumstances.

2. Furthermore, resolution of the question presented may not ultimately affect the standard of review in this case. Petitioners argued below that *de novo* review is appropriate for the additional reason that United Staffing failed to provide a full and fair review of their claim. Pet. Summ. J. Mem. 11-17; Pet. C.A. Br. 8-9, 17 n.9, 24-28. Although neither the district court nor the court of appeals addressed that argument, Pet. App. 52a-53a; *id.* at 33a n.4 (Holloway, J., dissenting), it appears to have considerable merit.

The undisputed factual record reveals a clear failure to provide the full and fair review mandated by ERISA, the Secretary of Labor's regulations, and the Plan. ERISA requires every plan to "provide adequate notice in writing" of any benefit denial, "setting forth the specific reasons for such denial," and to "afford a reasonable opportunity * * * for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U.S.C. 1133. The Secretary of Labor has

promulgated detailed regulations setting out the minimum procedures necessary for that full and fair review. See 29 C.F.R. 2560.503-1(g), (h), and (j). They require, *inter alia*, that a plan "[p]rovide for a review that does not afford deference to the initial adverse benefit determination and that is conducted by an appropriate named fiduciary of the plan who is neither the individual who made the benefit determination * * * nor the subordinate of such individual." 29 C.F.R. 2650.503-1(h)(3)(ii).[5] To implement those requirements, the Plan mandates "*written* notice of any claim that is denied," and it provides that United Staffing "will have the responsibility to make all final determinations regarding the claims for benefits under the Plan." Pet. App. 38a.

Despite the requirement under ERISA, the Secretary's regulations, and the Plan that any appeal be reviewed by a named fiduciary, United Staffing (the named fiduciary) acknowledged that it never reviewed Everest's denial of benefits, and that its standard practice was not to review *any* benefit denials. Pet. App. 51a-52a. The courts of appeals have recognized that *de novo* review is appropriate when the named fiduciary fails substantially to provide the full and fair review required by ERISA and the Secretary's claims regulations, because the named fiduciary's actions—even when granted discretion to interpret the plan and make bene-

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[5] That regulation applies to "claims filed on or after the first day of the first plan year beginning on or after July 1, 2002, but in no event later than January 1, 2003." 66 Fed. Reg. 35,886 (2001). It is unclear whether the claim at issue here was filed during a plan year beginning on or after July 1, 2002. In any event, the previous version of the regulation also contained the requirement of full and fair review by "an appropriate named fiduciary or to a person designated by such fiduciary." 29 C.F.R. 2560.503-1(g)(1) (2000).

fit determinations—must be within the limits of the governing law, ERISA, which mandates a full and fair review. See, *e.g.*, *Abatie* v. *Alta Health & Life Ins. Co.*, 458 F.3d 955, 971-972 (9th Cir. 2006). Indeed, the Tenth Circuit adopted that principle in *Gilbertson*. 328 F.3d at 635.

Although this issue appears to have been adequately raised on appeal (see p. 19, *supra*), the court of appeals did not address it, and the court remanded to the district court for reconsideration under a deferential standard of review. See Pet. App. 23a. Judge Holloway, however, expressed the view that the district court would be free to address the full-and-fair-review issue on remand. *Id.* at 33a n.4. Judge Holloway's view that the issue remains open on remand is consistent with the fact that the majority reversed the district court's grant of summary judgment in favor of petitioners, which had been entered on the separate ground at issue in the question presented without reaching petitioners' alternative argument concerning respondents' failure to follow the required claims procedures. See Pet. App. 52a-53a.

D. The Petition Should Be Held Pending The Decision In *MetLife* v. *Glenn*

In *MetLife* v. *Glenn*, No. 06-923 (argued Apr. 23, 2008), this Court is currently considering the appropriate standard of review when a plan confers discretionary authority on an administrator who is operating under a conflict of interest. Petitioners have not argued that *de novo* review is appropriate on that basis. See Pet. C.A. Br. 12 n.5. Nonetheless, to the extent that the Court in *MetLife* refines the framework for judicial review of benefit denials under *Firestone*, further consideration of

this case in light of the decision in *MetLife* would be appropriate. The Court therefore should hold the petition pending its decision in *MetLife*. If this Court then vacates and remands the court of appeals' decision in this case, the court of appeals would be free on remand to reconsider its decision in light of views of the Secretary of Labor expressed herein, which it has not previously solicited or considered. The court of appeals could also clarify the precise basis for its decision and take into account petitioners' argument concerning respondents' failure to follow applicable claims procedures, which may have substantially contributed to the apparent failure by United Staffing to exercise any discretion in reviewing petitioners' claim.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *MetLife* v. *Glenn*, No. 06-923, and then disposed of accordingly. In the alternative, the petition should be denied.

Respectfully submitted.

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