No. 98-1971

In the Supreme Court of the United States

DANIEL ROBINSON, ET AL., PETITIONERS

v.

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP & PROFIT SHARING PLAN, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly reviewed a determination by the administrator of an employee benefit plan subject to the Employee Retirement Income Security Act (ERISA) that certain reductions in the sponsoring employer's workforce did not result in a partial termination of the plan under 26 U.S.C. 411(d)(3), when the court

   (a) construed the plan terms to grant sufficient discretion to the administrator to trigger an arbitrary and capricious standard of review of the administrator's determination;

   (b) applied an arbitrary and capricious standard to the administrator's determination; and

   (c) considered grounds for the determination on which the administrator had not relied.

2. Whether the court of appeals correctly applied a clearly erroneous standard of review to district court determinations, in granting summary judgment, concerning the number of employees and the time periods to be considered in assessing whether a partial termination occurred.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. The Sea Ray Employees' Stock Ownership & Profit Sharing Plan is an employer-funded, defined-contribution plan that is subject to the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, and is intended to qualify for favorable tax treatment under the Internal Revenue Code. Pet. App. 3, 22, 96. Under the Plan, employees begin to obtain a non-forfeitable or vested interest in the employer's

contributions after three years of service, and the employees fully vest after seven years of service. *Id.* at 3-4, 23; see 29 U.S.C. 1053(a)(2)(B).

Section 411(d)(3) of the Internal Revenue Code provides that in order for a plan to be qualified for favorable tax treatment, the plan must provide that, upon the plan's "termination or partial termination," "the rights of all affected employees to * * * the amounts credited to the employees' accounts, are non-forfeitable." 26 U.S.C. 411(d)(3); see also 26 U.S.C. 401(a)(7) (plan is not qualified for tax purposes "unless the plan * * * satisfies the requirements of section 411"). Accordingly, the Plan in this case provides that if it is terminated or partially terminated, the accounts of affected employees will become non-forfeitable as of the date of the termination. Pet. App. 4, 21 n.1, 100. The Plan also confers on its administrator, respondent Administrative Committee, all powers necessary to administer the plan, including: "(2) determining the appropriate allocations to Participant Accounts * * *; (3) determining the amount of benefits payable to a Participant (or Beneficiary) * * *; [and] (7) construing and interpreting the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the [Internal Revenue] Code." *Id.* at 7-8, 22, 44, 97-98.

2. Between March 1989 and July 1991, Sea Ray experienced serious declines in its business of selling sports boats, sports cruisers, and yachts. Pet. App. 4, 29, 65. The company laid off a number of employees at various plants from July 1989 through June 1991. *Id.* at 4, 30-39. For the fiscal year of July 1989 through June 1990, plan membership decreased from 3832 employees to 3060 employees. *Id.* at 4, 27-29. After November

1990, when Congress passed a luxury tax on high priced consumer goods, including private boats, sales of Sea Ray's boats further declined. *Id.* at 4-5, 60, 64-65. By the end of the fiscal year of July 1990 through June 1991, plan membership had diminished to 1968 participants, and 12 of the company's 13 plants had either decreased their workforce or closed altogether. *Id.* at 5, 29-30.

In June 1992, respondent Committee met twice to decide whether a partial termination had occurred between 1989 and 1991. Pet. App. 5-6, 24-25, 83-86. The Committee concluded that no partial termination had occurred, reasoning that "there were no facts or circumstances other than the layoff due to the cyclical business which would dictate a finding of Partial Termination." *Id.* at 6.

3. In August 1992, the Committee filed this action in district court seeking a declaratory judgment "that there has not been a partial termination of the Plan within the meaning of the Internal Revenue Code, ERISA and the terms of the Plan." Compl. ¶ 40. The district court conditionally certified two classes of defendants. Pet. App. 89-93. Class I, the petitioners in this case, includes former employee-participants in the Sea Ray plan whose employment ended between July 1989 and June 1991 and who were not fully vested at that time. *Id.* at 90-91. Class II, the Baldock respondents, includes other Sea Ray employee-participants who may be entitled under the Plan's terms to receive benefits forfeited by Class I participants if the Plan was not partially terminated. *Ibid.*

On the parties' cross motions for summary judgment, the magistrate judge recommended granting summary judgment to respondents. Pet. App. 20-88. The judge first rejected petitioners' contention that the court should review de novo the Committee's decision that there was no partial termination of the Plan. *Id.* at 45. The judge reasoned that under this Court's decision in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), a de novo standard of review applies only when the plan does not expressly grant the plan administrator discretion to determine eligibility for benefits or construe plan terms. Pet. App. 41. The judge found that because in this case the "Plan clearly grants the Committee the authority to interpret the term 'partial termination,'" the Committee's determination must be reviewed under an arbitrary and capricious standard. *Id.* at 45.

The judge further stated that, "[a]lthough a reasonableness inquiry is not usually very exacting, the complex nature of this case necessitates a more in-depth analysis of the Committee's decision than that normally required." Pet. App. 46. Accordingly, the judge extensively reviewed the relevant regulations and administrative and judicial decisions construing Section 411(d)(3) of the Internal Revenue Code, which governs plan terminations. *Id.* at 46-57. In particular, the judge observed that 26 C.F.R. 1.411(d)-2(b)(1) provides that "[w]hether or not a partial termination of a qualified plan occurs * * * shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees which have been previously covered by the plan." Pet. App. 46.

The judge then determined that "two separate events" had caused Sea Ray employees to be involuntarily excluded from the plan: a two-year downturn in the small boat industry, and a downturn in the large boat business caused by the luxury tax that was enacted in November 1990. Pet. App. 60-65. The judge accordingly concluded that he should separately calculate the percentages of plan participants who involuntarily left the Plan because of the layoffs for each of the two fiscal years involved, 1989-1990 and 1990-1991. *Id.* at 65.

The judge also rejected petitioners' assertion that he should include in his calculation of the percentages of participants who involuntarily left the Plan those employees who resigned from Sea Ray during the relevant time, on the theory that they were constructively discharged due to the economic downturn. The judge explained that a constructive discharge occurs "only when a reasonable person would find [working] conditions intolerable," Pet. App. 72 (internal quotation marks omitted), and that "[a]lthough it is probable that the economic conditions at Sea Ray were a factor in some, if not most, of the cases of employees leaving early, such consideration does not make the choice to leave involuntary," *id.* at 75. The judge therefore concluded that there was "insufficient evidence" to demonstrate that employees who claimed to have resigned in anticipation of layoffs were constructively discharged. *Ibid.* Based on those conclusions, the judge found that the percentage of participants involuntarily excluded from the Plan due to the economic downturn and luxury tax was 15.9% in 1989-1990; 27.9% in 1990-1991; and 36.7% for the entire two-year period. *Id.* at 80-82.

The judge also observed that, "generally, a percentage above 50 percent will be determinative of the occurrence of a partial termination"; "figures below 20 percent will only be significant if there is evidence of egregious abuse"; and "[p]ercentages between 20 percent and 50 percent will be significant only if combined with other factors." Pet. App. 76-77. The judge noted that in this case there was no suggestion that the layoffs impaired the Plan financially or that Sea Ray had improper or abusive motives in terminating employees.[1] *Id.* at 82-83. The judge concluded that the Committee's determination that there had not been a partial termination "was not arbitrary and capricious," but instead "was a reasonable interpretation of the Plan and of the cases and regulations concerning partial termination." *Id.* at 87.

The district court adopted the magistrate judge's recommendation. Pet. App. 17-19.

4. The court of appeals affirmed. Pet. App. 1-15. The court of appeals stated that its review of the district court's order granting summary judgment was de novo and that the court would draw all reasonable inferences in favor of the nonmoving party. *Id.* at 7. The court of appeals then determined that it would apply the arbitrary and capricious standard of review to the Committee's decision because the plan "clearly grants discretion to the Committee," and this discretion includes interpreting the plan term "partial termination." *Id.* at 9.

On the merits, the court of appeals rejected petitioners' contentions that the layoffs at Sea Ray "should be considered as one event" and that "former employees who left in anticipation of an involuntary layoff should count as constructive discharges." Pet. App. 12. The court saw "no occasion to disturb" what it termed "the factual findings of the district court." *Ibid.* The

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[1] The judge observed that an employer can abuse the plan or demonstrate bad faith by excluding participants to effect a reversion of contributions to the employer or to decrease the employer's contribution obligations to the plan. Pet. App. 83.

court of appeals explained that it "agree[d] that the economic downturn in 1989 and the federal luxury tax in 1990, while both leading to dire consequences at Sea Ray, stem from two independent factors." *Id.* at 12-13. The court of appeals further reasoned that, although "some former Sea Ray employees felt compelled to leave in light of the economic downturn, a showing of constructive discharge requires more than dissatisfaction with the economic conditions at work." *Id.* at 13. The court of appeals concluded that, "[g]iven [the Committee's] calculation of the percentage of terminations – both years were below 30 percent – and the absence of any damage to the Plan or improper motive for profit, the Committee was reasonable in concluding that the Plan had not been partially terminated." *Id.* at 15.

DISCUSSION

1. Petitioners argue (Pet. 9-21) that this Court should grant certiorari to consider (a) whether the Plan grants the Committee discretion to determine whether the Plan was partially terminated; (b) whether a *de novo* standard of review applies to the question of whether a partial termination occurred; and (c) whether the court of appeals improperly upheld the Committee's decision on grounds the Committee had not considered. None of those issues warrants this Court's review in the circumstances of this case.

a. In *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 115 (1989), this Court held "that a denial of benefits challenged under [29 U.S.C.] 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Courts of appeals generally have concluded that the *de novo* standard applies unless the plan clearly or expressly grants discretion, see, *e.g.*, *Lynd* v. *Reliance Standard Life Ins. Co.*, 94 F.3d 979, 981 (5th Cir. 1996); *Allison* v. *Dugan*, 951 F.2d 828, 832 (7th Cir. 1992); Pet. 9-10, although they have also recognized "that magic words (such as 'the committee has discretion to * * *') are unnecessary" to confer discretion. *Sisters of the Third Order of St. Francis* v. *SwedishAmerican Group Health Benefit Trust*, 901 F.2d 1369, 1371 (7th Cir. 1990); see also, *e.g.*, *Kinstler* v. *First Reliance Standard Life Ins. Co.*, 181 F.3d 243, 249 (2d Cir. 1999); *Wildbur* v. *ARCO Chem. Co.*, 974 F.2d 631, 636-637 (5th Cir. 1992); *Block* v. *Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992) (R. Ginsburg, J.).

Petitioners argue (Pet. 10) that those decisions conflict with *Hullett* v. *Towers, Perrin, Forster & Crosby, Inc.*, 38 F.3d 107, 114 (3d Cir. 1994), in which the Third Circuit stated that "[d]iscretionary powers need not be expressly granted; they may be implied by the plan's terms." That principle appears, however, merely to be another way of stating that the plan need not contain "magic words," such as "discretion is granted." See *Luby* v. *Teamsters Health, Welfare, & Pension Trust Funds*, 944 F.2d 1176, 1180 (3d Cir. 1991) ("no 'magic words,' such as "discretion is granted . . . [,] need be expressly stated") (internal quotation marks omitted).[2] In any event, even assuming a conflict on that issue existed, the decision below applies the more stringent

[2] Petitioners' reliance (Pet. 10) on *Snow* v. *Standard Insurance Co.*, 87 F.3d 327, 330 (9th Cir. 1996), is misplaced. *Snow* has been overruled by *Kearney* v. *Standard Insurance Co.*, 175 F.3d 1084, 1090 (9th Cir.) (en banc), cert. denied, 120 S. Ct. 398 (1999), in which the Ninth Circuit held that the administrator did not "unambiguously retain[]" discretion in plan language requiring "satisfactory proof" of disability. See also note 3, *infra*.

standard urged by petitioners. See Pet. App. 9 ("a plain reading of the [Sea Ray] Plan reveals that it clearly grants discretion to the Committee"). The court of appeals' fact-bound interpretation of the Plan language in this case therefore does not warrant further review.[3]

b. Petitioners also argue (Pet. 14-15) that the court of appeals erred in applying a deferential standard of review to the Committee's determination of whether a partial termination occurred. Although we agree with petitioners on this point, the issue does not merit this Court's review because, in our view, the Committee's determination was correct, even when viewed under a de novo standard of review.

i. Section 19 of the Plan provides that, "[i]f the Plan is terminated (or partially terminated)," employees im-

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[3] Contrary to petitioners' argument (Pet. 11-13), the decision below does not conflict with *Kirwan* v. *Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994). In *Kirwan*, the court of appeals held that plan provisions giving a fiduciary "authority to control and manage the operation and administration of the Plan," and authority to "promulgate such rules and regulations as deemed necessary and proper to interpret or administer the Plan," did not grant discretionary authority to determine whether the participant was eligible for benefits, especially when the fiduciary had not promulgated any rules or regulations. *Id.* at 788-789. *Kirwan* therefore did not decide the question presented here, *i.e.*, whether plan language allowing a fiduciary to construe and interpret plan terms gives the fiduciary discretion to construe the plan term "partial termination."

Petitioners also argue (Pet. 10-11 & n.3; Reply Br. 1-4) that the courts of appeals are divided on whether a plan administrator's authority to require "satisfactory" proof of entitlement to benefits confers discretionary authority. Similar language is not at issue here, however, and this Court recently denied review in *Standard Insurance Co.*, see note 2, *supra*, a case involving such language.

mediately vest in their accounts. Pet. App. 100. That provision was required by Section 411(d)(3) of the Internal Revenue Code in order for the Plan to receive favorable tax treatment. 26 U.S.C. 401(a)(7) and 411(d)(3); see also Comm. Br. in Opp. 3 ("Section 19 was included in the Plan in order to assure its favorable tax treatment."). Thus, when the Committee became concerned whether the significant number of layoffs had caused a partial termination, the Committee sought a judicial declaration that there was no partial termination under the Code. Compl. ¶ 40. In that situation, a court should accord no particular weight to the Committee's judgment on the issue. Rather, when a contract includes a provision required by statute, "the provision must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractors understood it." 3 Arthur Linton Corbin, *Corbin on Contracts* § 551, at 200-201 (1960); see also *Restatement (Second) of Trusts* § 187 cmt. a (1959) ("The exercise of a power is discretionary except to the extent to which its exercise is required by the terms of the trust or *by the principles of law applicable to the duties of trustees*.") (emphasis added).

Similarly, a rule that deferred to a plan administrator's interpretation of the Internal Revenue Code would be inconsistent with the requirement that substantial deference be accorded to the Commissioner's reasonable interpretation of the Code. See, *e.g.*, *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U.S. 382, 389-390 (1998); *Cottage Savs. Ass'n* v. *Commissioner*, 499 U.S. 554, 560-561 (1991). Here, the Department of the Treasury has promulgated specific regulations that provide that "[w]hether or not a partial termination of a qualified plan occurs * * * *shall be determined by the Commissioner* with regard to all the facts and circumstances in a particular case." 26 C.F.R. 1.411(d)-2(b)(1) (emphasis added). Thus, where a plan includes a partial termination provision to comply with the Internal Revenue Code, and the regulations implementing the relevant provision of the Code charge the Commissioner with the responsibility for determining when a partial termination occurs, there is no basis for deferring to the plan administrator's unilateral judgment on the issue. Cf. *Metropolitan Stevedore Co.* v. *Rambo*, 521 U.S. 121, 138 n.9 (1997) (explaining that principles of deference do not extend to administrative agencies that are not charged with administering the statute at issue).[4]

Indeed, a contrary rule, under which a court must accept any "reasonable" determination of the administrator whether a partial termination occurred under 26 U.S.C. 411(d)(3), would be unworkable. A judicial decision deferring to the administrator is not binding on the IRS if it is not a party to the suit. See Pet. App. 25 (noting Committee's recognition that "[a] court's determination as to whether a partial termination has occurred * * * would not be binding on the IRS unless the IRS had voluntarily joined the suit or the suit was an appeal of a final [decision] by the IRS."). Similarly, in any later litigation between the plan administrator and the IRS on the matter, a court would be required to

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[4] For the reasons stated in the text, this case is distinguishable from *Firestone*, which involved judicial review under 29 U.S.C. 1132(a)(1)(B) of a fiduciary's denial of a claim for benefits submitted to it in the ordinary course of plan administration. Here, respondent Committee unilaterally determined that the Sea Ray Plan had not partially terminated for purposes of Section 411(d)(3) of the Internal Revenue Code, and the Committee thereafter filed a declaratory judgment action to obtain court approval of its decision.

defer to the IRS's determination, as long as the agency's decision was reasonable, see *Atlantic Mut. Ins. Co.* v. *Commissioner*, 523 U.S. at 389-390; *Cottage Savs. Ass'n* v. *Commissioner*, 499 U.S. at 560-561, with no deference owed to any contrary conclusion reached by the plan administrator.

ii. As petitioners explain (Pet. 14-15), the court of appeals' adoption of a deferential standard of review conflicts with the decisions of other courts of appeals, which have reviewed de novo a plan administrator's determination whether a partial termination occurred. See *Weil* v. *Retirement Plan Admin. Comm.*, 913 F.2d 1045, 1048-1049 (2d Cir. 1990), vacated in part on other grounds, 933 F.2d 106 (2d Cir. 1991); *Sage* v. *Automation, Inc. Pension Plan & Trust*, 845 F.2d 885, 890 (10th Cir. 1988); *Bruch* v. *Firestone Tire & Rubber Co.*, 828 F.2d 134, 148-149 (3d Cir. 1987), aff'd in part and rev'd in part on other grounds, 489 U.S. 101 (1989); see also Pet. App. 10 (declining to adopt contrary decisions of other courts of appeals). That conflict may well warrant review of the proper standard of review of such determinations in an appropriate case.[5] We do not believe that review is warranted in this case, however,

[5] Respondents do not dispute that the court of appeals' decision conflicts with other appellate decisions, but they dismiss those decisions as "aberrational." Comm. Br. in Opp. 16; see also Baldock Br. in Opp. 21. Those decisions, however, comport with decisions of other courts of appeals on similar issues of statutory interpretation. See, *e.g.*, *Burrey* v. *Pacific Gas & Elec. Co.*, 159 F.3d 388, 391-392 (9th Cir. 1998) (meaning of plan that incorporates Code's definition of "leased employees" is a question of law reviewed de novo); *Spacek* v. *Maritime Ass'n, ILA Pension Plan*, 134 F.3d 283, 288 (5th Cir. 1998) (no deference owed to plan administrator's statutory interpretation); *Holt* v. *Winpisinger*, 811 F.2d 1532, 1536 (D.C. Cir. 1987) (whether individual is "employee" involves interpretation of ERISA and is therefore reviewed de novo).

because, in our view, the Committee correctly determined that no partial termination occurred, whether the Committee's determination is reviewed de novo or under an arbitrary and capricious standard of review.

Whether or not a partial termination has occurred depends on "all the facts and circumstances in a particular case." 26 C.F.R. 1.411(d)-2(b)(1). One significant factor is the percentage of plan participants dismissed in connection with a major corporate event. Pet. App. 76 (collecting cases). In this case, the percentage of participants involuntarily excluded from the Plan due to the economic downturn was 15.9% in 1989-1990, and due to the economic downturn and the luxury tax was 27.9% in 1990-1991. The total for the entire two-year period was 36.7%. *Id.* at 80-82. Those percentages, including the total over the two years, are generally below those that the Service has recognized as sufficient in themselves to constitute a partial termination, in the absence of any improper purpose, potential for abuse, or other relevant factors. See, *e.g.*, Rev. Rul. 81-27, 1981-1 C.B. 228 (58% reduction resulting from winding up of part of employer's business); Rev. Rul. 73-284, 1973-2 C.B. 139 (80% reduction resulting from change of business location); see also *Tipton & Kalmbach, Inc.* v. *Commissioner*, 83 T.C. 154, 160 (1984) (34% and 51% reduction in two successive plan years from adverse business conditions); see generally *Internal Revenue Manual*, Plan Terminations 7.7.2, at 12 (Apr. 20, 1999) ("There is no fixed turnover rate which determines whether a partial termination occurred, but the rate must be substantial.").

In addition, a partial termination may be indicated by the presence of an increased "potential for reversion" to the employer or "[t]he possibility for prohibited discrimination" as a result of the workforce reduction.

Internal Revenue Manual, Plan Termination, 7.7.2, at 13. Here, there are no allegations that the layoffs financially impaired the Plan, that the layoffs were designed to effect a reversion to the employer, or that the employer was otherwise motivated by an improper purpose. Pet. App. 82-83; cf. *In re Gulf Pension Litig.*, 764 F. Supp. 1149, 1170 (S.D. Tex. 1991) (noting "the increased potential for a reversion because of [employee] terminations, which occurred in an atmosphere in which Chevron was considering how to revert surplus Gulf Plan assets for its general corporate use"), aff'd on other grounds, 36 F.3d 1308, 1314 n.11 (5th Cir. 1994), cert. denied, 514 U.S. 1066 (1995). In these circumstances, we do not believe that the Committee's determination that the Plan had not partially terminated was erroneous, even when viewed de novo.

Indeed, despite their professions of deference, it appears that the courts below actually reviewed the Committee's determination to ensure that it complied with the Code and the IRS and judicial interpretations of the Code. See Pet. App. 10-12, 46-57, 62-64, 66-67, 70-71, 76-79; see also Pet. App. 98 (Committee required under Plan to interpret terms "consistent with the terms of * * * the Code"); compare *Borda* v. *Hardy, Lewis, Pollard & Page, P.C.*, 138 F.3d 1062, 1066 (6th Cir. 1998) (debate over use of de novo or arbitrary and capricious standard is "somewhat academic" because plan required administrator to interpret plan consistent with intent that plan be qualified under Code); *Kreis* v. *Charles O. Townley, M.D. & Assocs., P.C.*, 833 F.2d 74, 79 (6th Cir. 1987). Thus, despite the court of appeals' articulation of a deferential standard of review, it does not appear that the decision below departs significantly as a practical matter from other appellate decisions that have considered the partial termination issue based on the Internal Revenue Code. Accordingly, we do not believe that the standard of review of partial termination determinations warrants certiorari in the context of this case.

c. Petitioners argue (Pet. 20) that the court of appeals erred in relying on the percentage reduction in Sea Ray's workforce over two separate years when the Committee actually considered the percentage reduction over "[t]he total two year period." Pet. App. 85. Petitioners further argue (Pet. 18-20) that the courts of appeals are divided on whether a plan administrator's decision can be upheld under a de novo standard of review on grounds not relied upon by the administrator. Those contentions, however, do not warrant this Court's review.

The courts of appeals have reached "varied results" in determining whether a suit under 29 U.S.C. 1132(a)(1)(B) to challenge a plan administrator's denial of benefits should be decided solely on the record before the plan administrator. See *DeFelice* v. *American Int'l Life Assurance Co.*, 112 F.3d 61, 65 (2d Cir. 1997) (discussing decisions from other courts of appeals). That arguable conflict, however, is irrelevant here. Those courts of appeals that have limited the record under review to matters before the plan administrator have reasoned that parties should not circumvent the claims review procedure that ERISA requires plans to provide for the denial of benefits. See 29 U.S.C. 1133; 29 C.F.R. 2560.503-1; see, *e.g.*, *Vega* v. *National Life Ins. Servs., Inc.*, 188 F.3d 287, 300 (5th Cir. 1999) (en banc); *Perry* v. *Simplicity Eng'g*, 900 F.2d 963, 967 (6th Cir. 1990). That rationale does not apply to this case, because respondent Committee never considered a claim for benefits; the Act does not require that plans provide a procedure for determining whether a partial termination has occurred; and the participants who would be harmed by the Committee's no-partial-termination decision in this case did not have an opportunity to create an adequate record for review. Rather, the Committee unilaterally decided that no partial termination had occurred based on a record that the Committee alone developed. Pet. App. 24-25, 83-87.

There accordingly was no reason for the courts below to limit themselves to the record compiled by the Committee. Applying proper legal standards, the district court was free to decide the issue on any ground supported by the record before that court, and the court of appeals properly reviewed the case on the basis of that record. See *Doe* v. *Travelers Ins. Co.*, 167 F.3d 53, 57 (1st Cir. 1999) ("It is not clear that any single answer [on what the record under review should be] covers all of the variations in ERISA cases; the 'record' may depend on what has been decided, by whom, based on what kind of information, and also the standard of review and the relief sought."). Further review of this issue is therefore not warranted.[6]

2. Petitioners argue (Pet. 21-27) that the court of appeals improperly applied a clearly erroneous standard of review to issues the district court resolved on summary judgment. Although we agree that the court of appeals misstated the applicable standard of review, it does not appear that any error on this issue was outcome-determinative. For that reason, and because the proper standard of review is already clearly

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[6] For similar reasons, the conflict asserted by petitioners (Pet. 16-17) concerning whether a court must defer to a plan administrator's factual findings in benefit-denial suits is inapposite to this case, because the Committee did not establish any mechanism that permitted petitioners to develop a factual record.

established, further review on this question is not warranted.

On appeal from the district court's grant of summary judgment, the court of appeals stated that it "draws all reasonable inferences in favor of the non-moving party" (Pet. App. 7), but that it saw "no occasion to disturb the factual findings of the district court" with respect to whether one or two events caused Sea Ray's layoffs and whether employees who left in anticipation of layoffs should be viewed as constructively discharged, *id.* at 12. See also *id.* at 14 ("Finding no clear error by the district court, we also adopt the percentages [of reductions] generated by Class II."). The court of appeals' purported adoption of factual findings by the district court is inconsistent with the principle that a district court on summary judgment may not resolve factual disputes on a material issue of fact. Fed. R. Civ. P. 56(c); see also *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986).

We do not think, however, that the court of appeals' remarks affected its ultimate legal conclusion that no partial termination had occurred. The court of appeals also accepted petitioners' version of the facts and held that those facts did not amount to a constructive discharge of employees who voluntarily left Sea Ray. Thus, the court of appeals stated:

> [W]hile we do not dispute that some former Sea Ray employees felt compelled to leave in light of the economic downturn, a showing of constructive discharge requires more than dissatisfaction with the economic conditions at work. The record does not reflect that working conditions at Sea Ray were so difficult or unpleasant that a reasonable person in

> the employee's shoes would have felt compelled to resign.

Pet. App. 13 (citations and internal quotations marks omitted). Petitioners do not assert that they were constructively discharged as the court defined that term, or that the court of appeals' definition conflicts with the decision of any other court of appeals. Rather, petitioners complain (Pet. 25-26) that the court of appeals should not have applied that constructive discharge standard in determining which participants who voluntarily left the company should be counted in the reduction of participants under the partial termination test. Because there is no circuit conflict on that issue, further review is not warranted.

Petitioners similarly were not prejudiced by the court of appeals' suggestion that it deferred to the district court's factual finding that two distinct events caused the layoffs at Sea Ray. Pet. App. 13. The court of appeals held that it too "agree[d] that the economic downturn in 1989 and the federal luxury tax in 1990, while both leading to dire consequences at Sea Ray, stem from two independent factors." *Id.* at 12-13. Petitioners do not dispute that two separate events occurred or that dire consequences followed from each; instead, they argue (Pet. 25) that the court of appeals "ignored" their argument that the luxury tax did not justify treating all workforce reductions in the second plan year as attributable to the luxury tax, when some of the layoffs occurred before enactment of the luxury tax and other layoffs occurred at plants manufacturing boats not subject to the tax. That fact-bound contention, however, does not warrant this Court's attention, especially because the facts and circumstances in this case do not establish the existence of a partial termination, even if the two plan years are considered together. See pp. 13-14, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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