No. 14-487

IN THE
Supreme Court of the United States

THE RAWLINGS COMPANY, LLC, OXFORD HEALTH PLANS (NY), INC. AND UNITEDHEALTH GROUP INCORPORATED,

Petitioners,

v.

MEGAN WURTZ, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICA'S HEALTH INSURANCE PLANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state-law action by ERISA plan participants challenging a plan reimbursement provision is completely preempted by ERISA § 502(a)'s exclusive scheme for enforcing and clarifying plan terms.

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community. Many Chamber members provide health benefits to employees and arrange for the provision of health care services through employee welfare benefit plans regulated under ERISA. The ability of its members to purchase affordable health care coverage for the benefit of their employees is of vital importance to them, their employees, and the employees' dependents, and to the Chamber.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amici*, their members, or their counsel made such a monetary contribution. Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief, and letters consenting to the filing of this brief have been filed with the Clerk.

America's Health Insurance Plans ("AHIP") is a national trade association representing companies that provide or administer health insurance benefits to more than 200 million Americans, including participants and beneficiaries in employee benefit plans governed by ERISA. Its members offer a wide range of insurance and health coverage options to consumers, employers of all sizes, and governmental purchasers nationwide providing AHIP with a unique understanding of how the Nation's health care and health insurance processes work. AHIP advocates for public policies that expand access to affordable healthcare coverage for all Americans through a competitive marketplace that fosters choice, quality, and innovation.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an exceptionally important issue concerning the "carefully integrated civil enforcement scheme that is one of the essential tools for accomplishing the stated purposes of ERISA," *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (internal quotation marks omitted). As this Court has explained, § 502(a) of ERISA supplies "the exclusive remedy for rights guaranteed under ERISA." *Id.* at 144. "[A]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004). Any state law claim falling within § 502(a)'s scope is

"completely preempted . . . and removable to federal court." *Id.* at 214.

ERISA's exclusive federal enforcement scheme represents a "careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Id.* at 215 (internal quotation marks omitted). That balance is critically important to the nation's ERISA plans, the employers that sponsor them, and plan participants and beneficiaries. As this Court has recognized, Congress sought in ERISA to "induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards." *Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (internal quotation marked omitted).

The court of appeals' decision subverts that statutory purpose, both in its substantive holding and by precipitating a circuit split that undermines nationwide remedial uniformity. The issue presented is whether ERISA § 502(a) completely preempts state law claims by ERISA plan participants invoking state anti-subrogation laws to invalidate plan provisions that require reimbursement of medical benefits. The Third, Fourth, and Fifth Circuits have answered that question in the affirmative, reasoning that such suits seek to recover or retain plan benefits, and thus are completely preempted by § 502(a)(1)(B). The Second Circuit rejected this reasoning, holding that the state law claims are "independent" of plan terms and therefore are not completely preempted. As a result,

the Second Circuit allowed respondents to pursue their state law claims seeking a declaratory judgment, compensatory and punitive damages, restitution, and attorney fees.

As a result of the decision below, ERISA plans that exercise their rights under plan reimbursement provisions now face differing remedial schemes—including the prospect of punitive damages and other remedies precluded under ERISA—depending on where they are sued. This loss of uniformity is antithetical to ERISA's structure and purpose. The damage to Congress's uniform remedial system would be bad enough if it were limited to the context of reimbursement provisions, which are key to plan affordability and solvency. But the Second Circuit's reasoning sweeps more broadly, allowing plaintiffs to pursue state law claims to mandate, alter, or invalidate *any* ERISA plan term, bypassing ERISA's carefully crafted remedial restrictions, so long as the claim is predicated on a purportedly "independent" state insurance regulation.

The decision below not only conflicts with the decisions of the Third, Fourth, and Fifth Circuits, but is also fundamentally inconsistent with this Court's ERISA jurisprudence. This Court's decisions in *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999), and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), establish that claims seeking to modify or invalidate plan terms on the basis of a state insurance regulation are properly raised under § 502(a). And the Court's decisions in *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013) and *Sereboff v. Mid Atl. Med. Servs.*, 547 U.S. 356 (2006),

hold that ERISA plans may bring suit under § 502(a) to enforce their plan reimbursement rights as plaintiffs, with no suggestion that a different remedial scheme would apply to a suit brought by plan participants resisting enforcement of those same rights.

Finally, the decision below presents an important and recurring issue affecting the administration and viability of employee benefit plans on which millions of Americans rely. The decision discourages the exercise of plan reimbursement rights by introducing significant uncertainty over the remedial scheme that will govern disputes over those rights, and subjecting plans to the prospect of punitive damages and other remedies unavailable under ERISA if they do not prevail. In addition to raising the cost of exercising reimbursement rights, the decision will encourage more litigation by spurring a race to the courthouse as plans and participants seek to secure their preferred remedial scheme. And because the Second Circuit's reasoning could be read to extend well beyond the reimbursement context, an even broader array of potential claims that were subject to a predictable remedial scheme could now be subject to a variety of new state law remedies. Plan participants and beneficiaries would ultimately pay the price for these developments in the form of higher premiums, reduced benefits, or a shrinking number of available plans.

For all of these reasons, the Court should grant review.

ARGUMENT

I. This Court's Review Is Necessary To Restore ERISA's Uniform Remedial System.

A. ERISA's Exclusive Federal Remedial Regime Is Central To The Statute's Objectives.

Congress enacted ERISA to "provide a uniform regulatory regime over employee benefit plans." *Davila*, 542 U.S. at 208. Rather than mandate the provision of any particular benefits, Congress sought to "induc[e] employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred." *Conkright*, 559 U.S. at 517 (internal quotation marks omitted). Congress thus set out "to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Id.* (internal quotation marks and alterations omitted).

Two "expansive pre-emption provisions" advance the goal of uniformity and "ensure that employee benefit plan regulation [is] exclusively a federal concern." *Davila*, 542 U.S. at 208 (internal quotation marks omitted).

First, ERISA § 514 expressly preempts "any and all State laws insofar as they . . . relate to any employee benefit plan." 29 U.S.C. § 1144(a). At the same time, however, ERISA saves from such

preemption "any law of any State which regulates insurance, banking, or securities." *Id.* § 1144(b)(2)(A). In this way, ERISA, leaves some space for substantive state regulation of insurance coverage provided to ERISA plans. *See Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732, 746-47 (1985).

Second, ERISA § 502(a) channels litigation over "rights and obligations under ERISA-regulated plans" into a "comprehensive civil enforcement scheme" consisting of "six carefully integrated" enforcement provisions. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 56 (1987) (internal quotation marks omitted). These provisions "represent[] 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." *Id.* at 54.

Under ERISA § 502(a)(1)(B), the provision at issue in this case, a plan participant or beneficiary may sue "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)(1)(B). Before suing under this provision, the participant must first exhaust internal plan review procedures. *See Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013). In addition, the participant is ineligible for remedies, such as punitive damages, that are "beyond those authorized under ERISA." *Davila*, 542 U.S. at 215.

This Court has emphasized that "[t]he limited remedies available under ERISA are an inherent

part of the careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Id.* (internal quotation marks omitted). ERISA's "carefully crafted and detailed enforcement scheme provides strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (internal quotation marks omitted). Accordingly, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." *Davila*, 542 U.S. at 209.

Furthermore, § 502(a) has such "extraordinary preemptive power" that it converts any state law claim falling within its scope into a federal § 502(a) action removable to federal court. *Id.* In other words, any claim that *can* be brought under § 502(a) *must* be brought under § 502(a), unless "the complained-of actions violate legal duties that arise independently of ERISA or the terms of the employee benefit plans at issue." *Id.* at 212.

B. The Decision Below Undermines ERISA's Uniform Federal Remedial Scheme.

The Second Circuit's decision in this case has split the circuits and fractured ERISA's nationwide remedial structure. If this split is not addressed, suits challenging the exercise of reimbursement

rights under ERISA plans in the Second Circuit could now proceed under state law, with plaintiffs potentially entitled to the full panoply of state law remedies and excused from requirements such as exhaustion of administrative remedies. In the Third, Fourth, and Fifth Circuits, the opposite is true: the identical suit must be brought under § 502(a)(1)(B), with plaintiffs limited to the remedies available under ERISA.[2]

This divergence affects not only remedies, but potentially also outcomes. In this case, for example, the district court found that respondents did not exhaust the administrative remedies under their plans. Pet. App. 73a-75a. The district court also found that respondents failed to allege that petitioners qualify as proper defendants under Second Circuit precedent interpreting ERISA § 502(a)(1)(B). Pet. App. 76a-77a. These failures would doom a suit brought under § 502(a)(1)(B), but may pose no obstacle to the same suit brought under state law.

On numerous occasions, this Court has granted review to eliminate similar distortions in ERISA's uniform regulatory structure, recognizing

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[2] *See Levine v. United Healthcare Corp.*, 402 F.3d 156, 163 (3d Cir. 2005); *Arana v. Ochsner Health Plan*, 338 F.3d 433, 438 (5th Cir. 2003) (en banc); *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278, 291-92 (4th Cir. 2003). In *Arana*, Chief Judge King wrote for a unanimous Fifth Circuit sitting *en banc* to reverse a panel decision he had joined, which had concluded that the plaintiffs' claims in that case were not completely preempted.

the danger to the statute's principal objectives. In *Conkright*, for example, the Court reviewed and reversed a decision that "increased litigation costs" and threatened "the careful balancing of interests that ERISA represents," including "the interests of efficiency, predictability, and uniformity." 559 U.S. at 517-21 (internal quotation marks omitted). And the Court has stepped in repeatedly in recent years to restore uniformity with respect to § 502(a)'s civil enforcement provisions. *See, e.g.*, *McCutchen*, 133 S. Ct. at 1544; *Cigna Corp. v. Amara*, 131 S. Ct. 1866, 1876 (2011); *Sereboff*, 547 U.S. at 361. This Court's intervention is needed again to resolve the conflict and confusion sown by the decision below over the scope of § 502(a)(1)(B).

II. The Decision Below Conflicts With This Court's ERISA Jurisprudence.

The Second Circuit's decision also warrants review because its holding is fundamentally at odds with this Court's precedents.

1. As explained above, § 502(a)(1)(B) is the exclusive vehicle by which a plaintiff may "recover benefits due to him under the terms of his [ERISA] plan" or "enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). The Second Circuit ruled that respondents' claims fall outside the scope of this provision because they invoke rights under a state insurance law, not the terms of the plan. *See, e.g.*, Pet. App. 19a, 22a ("Plaintiffs' claims do not derive from their plans or require investigation into the terms of their plans; rather they derive from [state insurance law]."). This formalistic distinction

ignores the reality, recognized by this Court, that plan terms are not "enforce[d]" in a vacuum and must be construed in light of applicable law.

As this Court recently explained, although § 502(a)(1)(B) "speaks of 'enforc[ing]' the 'terms of the plan,'" it "allows a court to look outside the plan's written language in deciding what those terms are, *i.e.*, what the language means." *Amara*, 131 S. Ct. at 1877 (quoting 29 U.S.C. § 1132(a)(1)(B)); *see also McCutchen*, 133 S. Ct. at 1549 ("[C]ourts must often look outside the plan's written language to decide what an agreement means.") (internal quotation marks omitted). Indeed, the Court has observed that a state anti-subrogation law similar to the one at issue here "directly controls the terms of insurance contracts by invalidating any subrogation provisions that they contain." *FMC Corp. v. Holliday*, 498 U.S. 52, 61 (1990).

This Court has interpreted the scope of complete preemption under § 502(a)(1)(B) in cases involving state insurance laws saved from express preemption under § 514(a) in a manner that reflects this view of plan interpretation. In *UNUM*, the plaintiff invoked a state notice-prejudice rule in a suit to recover disability benefits under an ERISA plan. While that rule was "independent" of the plan in the narrow sense of that term adopted by the Second Circuit, *see* Pet. App. 16a, 19a—that is, it arose from an authority outside of the plan itself—the Court in *UNUM* understood the rule to "effectively create[] a mandatory contract term" modifying the plan's notification timeliness requirement. 526 U.S. at 374 (internal quotation

marks omitted). Consistent with that understanding, the Court recognized that the plaintiff had properly brought a claim in federal court "under § 502(a)(1)(B) 'to recover benefits due . . . under the terms of his plan.'" *Id.* at 377. The saved state law "supplied the relevant rule of decision for th[e] § 502(a) suit." *Id.*

Similarly, in *Rush Prudential,* a suit to enforce a state law providing for independent review of coverage decisions and to obtain denied benefits was successfully removed to federal court under § 502(a). 536 U.S. at 362-63. The Court described the law, which it held to be saved from express preemption under § 514, as one of many statutes "regulating the substantive terms of insurance contracts" through "the imposition of standard policy terms." *Id.* at 387 (internal quotation marks omitted). Addressing the argument that a suit to enforce the state law would not be completely preempted because it "would not require interpretation of the terms of an ERISA plan," the Court responded that "a suit to compel compliance with [the saved state law] in the context of an ERISA plan would seem to be akin to a suit to compel compliance with the terms of a plan under [ERISA § 502(a)(3)]." *Id.* at 362 & n.2. "Alternatively, the proper course may have been to bring a suit to recover benefits due, alleging that the denial was improper in the absence of compliance with [the state law]." *Id.* at 362 n.2. Regardless, the Court recognized that § 502(a) was the proper vehicle for ensuring the plan's compliance with state insurance law.

In short, these cases establish that "when an ERISA plan includes an insurance policy, the requirements imposed by state insurance law become plan terms for purposes of a claim for benefits under § 1132(a)(1)(B)." *Larson v. United HealthCare Ins. Co.*, 723 F.3d 905, 912 (7th Cir. 2013). Like the plaintiffs in *UNUM* and *Rush Prudential*, respondents here seek to invoke a saved state insurance regulation to modify or invalidate the terms of their ERISA plans. Like the plaintiffs in *UNUM* and *Rush Prudential*, they must do so under § 502(a)(1)(B), with its "predictable set of liabilities" and "uniform regime of ultimate remedial orders and awards." *Conkright*, 559 U.S. at 517 (internal quotation marks omitted).[3]

2. The Second Circuit based its holding on a mistaken premise that claims invoking state insurance laws saved from express preemption under § 514 cannot be completely preempted where the claims do not "expand" the remedies available under ERISA. Pet. App. 17a-18a.

As an initial matter, respondents' claims *do* request remedies beyond those available under ERISA, including punitive damages and disgorgement. *See* Pet. App. 115a-116a. Moreover,

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[3] In support of its contrary holding, the Second Circuit cited several federal appellate decisions "declin[ing] to expand complete preemption doctrine to allow removal of state law claims into federal court simply because they implicate ERISA benefits." Pet. App. 21a. The cited cases are inapposite because none involved a claim invoking state law to mandate, alter, or invalidate an ERISA plan provision.

in *Davila*, this Court addressed and rejected the assertion that "ERISA § 502(a) completely pre-empts a state cause of action only if the cause of action would be pre-empted under ERISA § 514(a)." 542 U.S. at 214 n.4 (citing *Ingersoll-Rand*, 498 U.S. at 142). Clarifying that express preemption and complete preemption are two separate inquiries, the Court explained that "a state cause of action that provides *an alternative remedy* to those provided by the ERISA civil enforcement mechanism conflicts with Congress' clear intent to make the ERISA mechanism exclusive." *Id.* (emphasis added); *see also id.* at 209 (state law claims that "duplicate[]" or "supplant[]" § 502(a) are completely preempted).

Here, respondents seek access to an alternative state remedial scheme even though, as *UNUM* and *Rush Prudential* confirm, ERISA's federal remedial scheme was available to them. Thus, while the substantive state insurance regulation may provide the relevant rule of decision, respondents' state law claims are completely preempted and must be pursued under § 502(a), whether they "expand" the remedies available under ERISA or not.

3. The decision below also departs from two recent decisions of this Court concerning enforcement of ERISA plan reimbursement provisions. *McCutchen*, 133 S. Ct. at 1546, and *Sereboff*, 547 U.S. at 369, hold that ERISA plans may bring suit under § 502(a) to enforce their plan reimbursement rights. Such suits would continue to proceed under § 502(a) even where the participant raises equitable defenses or invokes a state anti-

subrogation law. It makes no sense to conclude, as the Second Circuit did, that Congress intended to require suits to *enforce* reimbursement provisions to proceed under a uniform federal remedial scheme, but intended to require or permit suits to *prohibit enforcement* of such provisions to proceed under a multitude of different state remedial schemes.

4. Respondents' claims easily satisfy the two-part test for complete preemption applied in *Davila*. *See* 542 U.S. at 210. First, there is no question that respondents, "at some point in time, could have brought [their] claim[s] under ERISA § 502(a)(1)(B)." *Id.* Respondents seek to recover benefits, and to enforce their right to retain benefits, under the plan's reimbursement terms as "interpreted in light of state insurance rules," *Amara*, 131 S. Ct. at 1877. *See* Pet. App. 112a-115a. As *UNUM* and *Rush Prudential* establish, such claims are properly raised under § 502(a)(1)(B).[4]

Second, respondents' claims do not implicate any "independent legal duty." *Davila*, 542 U.S. at 210. Under this prong, the question is whether the "duties imposed by [the saved state law] . . . arise independently of ERISA or the plan terms." *Id.* at 212. The answer here is clearly no. Resolution of this case requires "deciding what [respondents'

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[4] The Second Circuit concluded otherwise because, in its view, "the terms of plaintiffs' ERISA plans are irrelevant to their claims." Pet. App. 16a. But that is not so. The whole point of respondents' claims is to establish that petitioners are prohibited from exercising their reimbursement rights under the clear and express terms of their ERISA plans.

ERISA plan] terms are," *Amara*, 131 S. Ct. at 1877, in light of a state anti-subrogation law that "directly controls the terms of insurance contracts," *FMC Corp.*, 498 U.S. at 61. Petitioners' reimbursement rights and obligations are thus not "independent" of ERISA or the plan terms in any meaningful sense.[5]

III. This Case Presents An Important and Recurring Issue Affecting The Viability Of Employee Benefit Plans Covering Millions of Americans.

This case presents an important and recurring issue of federal law. Reimbursement provisions like those challenged here are common in ERISA plans nationwide and play a key role in preserving the affordability of those plans. If allowed to stand, the Second Circuit's holding—that plaintiffs may sue to invalidate such provisions under state law, with the full range of state law remedies available to them—will result in additional uncertainty and costs for the

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[5] The court analogized the circumstances here to *Stevenson v. Bank of New York Co.*, 609 F.3d 56 (2d Cir. 2010). *See* Pet. App. 18a-19a. The facts in *Stevenson*, however, differ markedly from those presented here. *Stevenson* involved claims that an employer reneged on an alleged promise to maintain an employee's pension and benefits while the employee was on inactive status. The employee sought damages "payable from [the employer's] own assets, not from the plans themselves." *Id.* at 61. Moreover, if the employee prevailed, "the operation of [the employer's] benefit plans would need to be referenced in order to establish the extent of [the employee's] damages, but the actual administration and funding of those plans would be unaffected." *Id.* In short, *Stevenson* bears little resemblance to this case.

ERISA plans on which millions of Americans rely. The impact of the Second Circuit's decision is likely to extend beyond anti-subrogation provisions, because the court's reasoning could apply to suits invoking state insurance laws to mandate, alter, or invalidate plan terms outside the reimbursement context.

1. Approximately 169 million Americans receive health insurance through employment-based benefit plans, which are regulated by ERISA. *See* Jessica C. Smith & Carla Medalia, United States Census Bureau, *Health Insurance Coverage in the United States: 2013* at 2 (Sept. 2014).[6] Fifty-five percent of all U.S. firms offered health benefits in 2014, covering over half of all non-elderly Americans. *See* Kaiser Family Foundation & Health Research & Educational Trust, *Employer Health Benefits: 2014 Annual Survey* at 35, 66 n.1 (Sept. 10, 2014).[7] In enacting ERISA, Congress recognized that "the continued well-being and security of millions of employees and their dependents are directly affected by these plans." 29 U.S.C. § 1001(a).

Reimbursement provisions are critically important to the affordability and financial stability of ERISA plans. It has been estimated that over $1 billion is recovered annually under such provisions. Br. of Amicus Curiae America's Health Ins. Plans,

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[6] *Available at* http://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-250.pdf.

[7] *Available at* http://kff.org/health-costs/report/2014-employer-health-benefits-survey/.

Inc. *et al.* in Support of Respondent, *Sereboff*, 547 U.S. 356 (No. 05-260), 2006 WL 460877 (Feb. 23, 2006), at *3 n.3. These cost savings "inur[e] to the benefit of all participants and beneficiaries by reducing the total cost of the Plan." *Zurich Am. Ins. Co. v. O'Hara*, 604 F.3d 1232, 1237-38 (11th Cir. 2010); *see also Cutting v. Jerome Foods, Inc.*, 993 F.2d 1293, 1297 (7th Cir. 1993) (Posner, J.) ("Without subrogation, . . . [the insured] pays more for the insurance . . . ."); Jeffrey A. Greenblatt, *Insurance and Subrogation: Where the Pie Isn't Big Enough, Who Eats Last?*, 64 U. Chi. L. Rev. 1337, 1355 (1997) (illustrating the impact of subrogation on premiums). The significance of ERISA reimbursement provisions explains the frequency with which their enforcement is litigated in federal courts nationwide. This Court alone has decided no fewer than four such cases.[8]

Many states, however, have enacted laws that could potentially limit or invalidate ERISA plan reimbursement provisions.[9] Four circuit courts have already addressed the question whether ERISA

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[8] *McCutchen*, 133 S. Ct. 1537; *Sereboff*, 547 U.S. 356; *Knudson*, 534 U.S. 204; *FMC Corp.*, 498 U.S. 52.

[9] *See, e.g.*, Colo. Rev. Stat. § 10-1-135(3); Conn. Gen. Stat. § 52-225c; Ga. Code Ann. 33-24-56.1(b); 770 Ill. Comp. Stat. 23/50; I.C. § 34-51-2-19; Kan. Admin. Regs. § 40-1-20; La. Rev. Stat. Ann. § 22:663; Me. Rev. Stat. Ann. tit. 24-A, § 2836; Md. Code Ann., Health-Gen. § 19-701(f); Mont. Code Ann. § 33-30-1102(4); N.J. Stat. Ann. § 2A:15-97; N.Y. Gen. Oblig. Law § 5-335; 11 N.C. Admin. Code 12.0319; Or. Rev. Stat. § 742.544; 75 Pa. Cons. Stat. § 1720; S.C. Code Ann. § 38-71-190; Tex. Civ. Prac. & Remedies Code Ann. ch. 140; Va. Code Ann. § 38.2-3405(a).

completely preempts such statutes, as have multiple district courts in at least three other circuits, all of which have found complete preemption, as far as *amici* are aware. *See* Pet. 24 (citing cases). There is every reason to expect continued litigation until this Court intervenes to resolve the issue.

2. If left intact, the Second Circuit's holding that suits to alter or invalidate plan reimbursement provisions may proceed under state law will harm employee benefit plans. The decision discourages plans from exercising their reimbursement rights by introducing significant uncertainty over the remedial scheme that will govern disputes over those rights. For example, large plans with members in many states are now subject to a federal remedial scheme when defending enforcement of reimbursement provisions against some participants, and state remedial schemes when defending enforcement of the same provisions against others. If broadly adopted, the Second Circuit rule would subject plans to a different remedial regime in every state. Such disuniformity is precisely contrary to a central objective of ERISA.

The decision further discourages the enforcement of reimbursement provisions by subjecting plans to the prospect of punitive damages and other remedies unavailable under ERISA if state insurance laws are found to invalidate those provisions. Even where there is a genuine question as to whether state law permits enforcement of such provisions, plans may choose not to risk punitive damages. They will face increased costs, in the form of reduced reimbursement or increased monetary

awards under state law, no matter what choice they make.

In addition to raising the costs associated with enforcing plan reimbursement provisions, the decision below may have the perverse effect of incentivizing plans operating in the Second Circuit to engage in litigation they might have otherwise forgone. That is because plans are permitted to bring suit under ERISA's federal remedy in § 502(a)(3) to enforce plan reimbursement provisions as plaintiffs, *see McCutchen*, 133 S. Ct. 1537; *Sereboff*, 547 U.S. 356, and thus can assure a federal forum by beating the plan member to the courthouse.

Increasing litigation risk, uncertainty, and cost in these ways has serious consequences for plan participants. To compensate for higher costs or reduced recovery of benefits, employers may have to take a variety of steps including eliminating or reducing benefits, increasing premiums or employee cost-sharing, or giving fewer raises or reducing wages. Rising costs also inevitably reduce the number of employers willing to offer employee benefit plans. Such results are fundamentally inconsistent with ERISA's goal "to create a system that is not so complex that administrative costs, or litigation expenses, unduly discourage employers from offering ERISA plans in the first place." *Conkright*, 559 U.S. at 517 (internal quotation marks and alterations omitted).

3. The harmful effects of the decision below may be magnified by ERISA's expansive venue provision. That provision permits actions under § 502(a) to be brought "in the district where the plan

is administered, where the breach took place, or where a defendant resides *or may be found*." 29 U.S.C. § 1132(e) (emphasis added). Some courts interpret that to mean that a plan may be sued in any district with which it has minimum contacts. *See Waeltz v. Delta Pilots Retirement Plan*, 301 F.3d 804, 809 (7th Cir. 2002); *I.A.M. Nat'l Pension Fund v. Wakefield Indus., Inc.*, 699 F.2d 1254, 1257 (D.C. Cir. 1983). Unless this Court steps in, plan participants from states with anti-subrogation laws who seek to resist enforcement of plan reimbursement rights could flock to the Second Circuit, arguing that the plan has minimum contacts in an effort to access state remedies preempted in other jurisdictions.

4. The harmful effects of the decision below will also be felt well beyond the reimbursement context. Plaintiffs will no doubt employ the Second Circuit's reasoning to bring state law claims invoking state insurance regulations to mandate, alter, or invalidate *any* plan terms, not merely reimbursement provisions. For years, these claims have been litigated in federal court under § 502(a) with the saved state law serving as the rule of decision, a practice that has been deemed proper by this Court. *See UNUM*, 526 U.S. at 377; *Rush Prudential*, 536 U.S. at 362-63 & n.2.

In the Second Circuit, such claims now could be brought in state court. This means that, for an even broader array of potential claims—arising from benefit mandates, notice provisions, independent review requirements, and many other state insurance regulations—plans that once could rely on a predictable remedial system could now be subject

to a variety of new state law remedies depending on where they are sued. That result sows confusion and uncertainty. It endangers ERISA plans, plan participants, and their beneficiaries. It was never intended by Congress. This Court should intervene to stop it.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition for writ of certiorari, the Court should grant the petition.

Respectfully submitted,

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