No. 17-416

IN THE
# Supreme Court of the United States

AETNA LIFE INSURANCE COMPANY,

*Petitioner,*

*v.*

SALVATORE ARNONE,

*Respondent.*

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

## REPLY BRIEF FOR PETITIONER

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## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are named in the caption. Pursuant to this Court's Rule 29.6, petitioner Aetna Life Insurance Company is a wholly owned subsidiary of Aetna Inc. Aetna Inc. is a publicly traded corporation that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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## REPLY BRIEF FOR PETITIONER

The "integrated enforcement mechanism" found at § 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") completely preempts any state law that "duplicates, supplements, or supplants" ERISA's civil enforcement remedy and conflicts with "the clear congressional intent to make the ERISA remedy exclusive." *Aetna Health Inc.* v. *Davila*, 542 U.S. 200, 208-09 (2004). Nonetheless, Arnone argues that ERISA complete preemption is "wholly irrelevant" (Opp. 14) in two circumstances that he claims apply here: when an ERISA plan participant seeks benefits under § 502(a) and later invokes a state's anti-subrogation law at the summary-judgment stage; and when the state's anti-subrogation law is a "rule of decision" that falls within the savings clause of ERISA's express preemption provision, § 514. Accepting either argument would drain § 502(a) of its complete preemptive effect and upend ERISA's comprehensive legislative scheme.

There is no support for Arnone's contention that when a plan participant sues for benefits under § 502(a) and later seeks summary judgment based on state law, this procedural sequencing removes the state anti-subrogation law from the realm of "state-law *claims*" and places it in the realm of "state-law *rules of decision*." Opp. 14. On the contrary, other courts have rejected similar procedural sophistry, and rightly so: "ERISA's complete dominion over a plan participant's claim to recover a benefit due under a lawful application of plan terms is not affected by the fortuity of *when* a plan term was misapplied to diminish the benefit." *Singh* v. *Prudential Health Care Plan, Inc.*, 335 F.3d 278, 291 (4th Cir. 2003).

There is similarly no basis for Arnone's assertion that complete preemption under § 502(a) is "irrelevant" if a state anti-subrogation law falls within § 514's savings clause, which saves from express preemption any state law that "regulates insurance," 29 U.S.C. § 1144(b)(2)(A). Indeed, this Court has held otherwise. Section 514 must be interpreted "in light of the congressional intent to create an exclusive federal remedy in ERISA § 502(a)," and "even a state law that can arguably be characterized as 'regulating insurance'" within § 514's savings clause "will be preempted" if it conflicts with § 502(a). *Davila*, 542 U.S. at 217-18.

The Second Circuit departed from this Court's precedents and the decisions of at least three other circuits by allowing Arnone to invoke New York General Obligations Law § 5-335 ("Section 5-335") to *directly determine*—not "indirectly regulate," *see* Opp. ii—the amount of benefits he was due under ERISA § 502(a). Arnone does not deny that when Aetna argued that "giving section 5-335 any effect here would be 'entirely inconsistent with ERISA's core congressional goal of uniformity of plan administration,'" the Second Circuit held unequivocally that "[t]his argument is flatly foreclosed . . . by our recent holding in *Wurtz v. Rawlings Co.*, 761 F.3d 232 (2d Cir. 2014)." Pet. App. 18a. It therefore blinks reality for Arnone to assert that the complete-preemption issue in *Wurtz* is "found nowhere in the Second Circuit's decision here." Opp. i.

In fact, the decision below dramatically extends *Wurtz* to cases where, as here, a participant expressly seeks benefits under § 502(a) itself. There should be no question that § 502(a) completely preempts state anti-subrogation laws in these circumstances. Yet

even here, the Second Circuit now allows state law to dictate the level of ERISA benefits.

The Second Circuit's judgment conflicts squarely with decisions of at least three other circuits that have found state anti-subrogation and anti-reimbursement laws completely preempted. Indeed, courts have acknowledged the circuit split, which has grown more pronounced after *Davila*. Arnone argues that those other circuits are not really in conflict because they "faithfully ha[ve] applied the *Davila* framework," Opp. 13, but that in no way suggests that those circuits have disavowed their earlier decisions finding complete preemption in analogous circumstances. On the contrary, those earlier decisions plainly satisfy *Davila*'s test for complete preemption because there, as here, there was no legal duty or tort-law relationship between the insurer and insured that was "independent" of the ERISA plan. *Davila*, 542 U.S. at 214.

The Second Circuit also interpreted the ERISA plan's Connecticut choice-of-law provision, contrary to decisions of other circuits, to allow application of New York substantive law governing benefits. Arnone argues that those conflicting decisions merely reflect state-law preferences for honoring "a fundamental policy of a state," Opp. 16, or construing ambiguous terms against the drafter, *id.* at 17. But in treating the interpretation of an ERISA plan as a state-law matter, Arnone and the Second Circuit again run afoul of ERISA's federal policy favoring "a uniform regulatory regime over employee benefit plans." *Davila*, 542 U.S. at 208.

This case is an excellent vehicle to resolve these important federal questions and uphold ERISA's "comprehensive legislative scheme." *Davila*, 542 U.S.

at 208 (citation omitted). The petition should be granted.

## I. THIS CASE SQUARELY PRESENTS AN ENTRENCHED CIRCUIT SPLIT ON ERISA COMPLETE PREEMPTION

**A.** Arnone suggests that ERISA complete preemption applies only when a plan participant brings a "state-law claim." Opp. 2. He argues that it does not apply here because he sued for benefits under ERISA § 502 and only later invoked Section 5-335 at summary judgment. Opp. 4, 8. Arnone errs. It does not matter *when* a plan participant invokes state law to determine the amount of ERISA benefits due. *See Singh*, 335 F.3d at 291. No matter "[w]hen section 5-335 is applied, it effectively bars an insurer from reducing benefits owed to an insured by the amounts the insured receives from a personal injury settlement." Pet. App. 3a. Section 5-335 therefore "duplicates, supplements, or supplants the ERISA civil enforcement remedy," *Davila*, 542 U.S. 209, and is completely preempted by § 502.

Arnone nonetheless asserts that Section 5-335 is merely a "rule of decision determining the insurer's liability." Opp. 8. But he cannot deny that the "liability" that Section 5-335 "determin[es]" is the amount of benefits due—a matter falling *exclusively* within § 502. *See Davila*, 542 U.S. at 216 ("Congress' intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA § 502(a) remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim."). Far from being a mere "state procedural imposition," *Rush Prudential HMO, Inc.* v. *Moran*, 536 U.S. 355, 381 (2002), Section 5-335 directly

regulates the level of benefits that an insurer owes a plan participant by prohibiting offsets for amounts that the participant recovered from a tort settlement. Arnone concedes as much in recounting the Second Circuit's holding that Section 5-335 determined the "sums to which he was entitled under the benefits plan." Opp. 4.

Section 5-335 bears little resemblance to the California notice-prejudice rule sustained in *UNUM Life Insurance Co. of America* v. *Ward*, 526 U.S. 358 (1999). That rule required insurers defending against a claim for benefits based on an insured's failure to give timely notice to "show actual prejudice, not the mere possibility of prejudice." *Id.* at 367 (citation omitted). Because the notice-prejudice rule regulated the insurance relationship "before an insurer's contractual obligation arises," it "supplied the relevant rule of decision," rather than directly regulating the level of benefits. *Id.* at 369, 377. In those circumstances, the Court concluded, the issue of § 502(a)'s preemptive force was "not implicated." *Id.* at 376. Here, in contrast, Section 5-335 directly regulates ERISA benefits by barring subrogation offsets after the contractual obligation arises.

Arnone further argues that complete preemption under ERISA § 502 is "wholly irrelevant" because Section 5-335 is a law that regulates insurance within the meaning of ERISA § 514's savings clause. Opp. 14. But Arnone turns *Davila*'s complete-preemption analysis on its head. As this Court has held, "[t]he existence of a comprehensive remedial scheme," such as § 502(a), "can demonstrate an 'overpowering federal policy' that determines the interpretation of a statutory provision designed to save state law from being pre-empted." *Davila*, 542 U.S. at 216-17 (citation

omitted). Under "ordinary principles of conflict pre-emption," "even a state law that can arguably be characterized as 'regulating insurance' will be pre-empted" if it disrupts the ERISA civil enforcement remedy. *Id.* at 217-18; *accord Barber* v. *Unum Life Ins. Co. of Am.*, 383 F.3d 134, 141 (3d Cir. 2004) ("[E]ven if [the Pennsylvania statute at issue] were found to 'regulate insurance' under the saving clause, it would still be preempted because the punitive damages remedy supplements ERISA's exclusive remedial scheme."). Section 514's savings clause cannot be read to swallow ERISA's exclusive civil enforcement remedy.

The decisions on which Arnone principally relies—*UNUM* and *FMC Corp.* v. *Holliday*, 498 U.S. 52 (1990)—are not to the contrary. In *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41 (1987), which predates both *UNUM* and *FMC*, this Court held that the state-law claim at issue was not rescued from preemption by the savings clause in § 514 because of "the clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive." *Id.* at 57. The Court reaffirmed *Pilot Life* in *Davila* and rejected the same argument that Arnone makes here—"that the [state law] is a law that regulates insurance, and hence that ERISA § 514(b)(2)(A) saves their causes of action from pre-emption." 542 U.S. at 216. The Court made clear that § 514's savings clause "*must* be interpreted" in light of § 502(a)'s exclusive purpose. *Id.* at 217 (emphasis added).

The Second Circuit disregarded these principles, holding that Aetna's complete-preemption argument was foreclosed by *Wurtz*. *Wurtz* held that Section 5-335 "is saved from express preemption under ERISA § 514 as a law that regulates insurance." 761 F.3d at

241. The Second Circuit therefore erroneously construed ERISA's savings clause to override Congress's "intent to create an exclusive federal remedy in ERISA § 502(a)." *Davila*, 542 U.S. at 217; *see also* Pet. App. 18a-19a (discussing *Wurtz*'s express-preemption holding).

**B.** As a result of these errors, the Second Circuit is in direct conflict with the Third, Fourth, and Fifth Circuits. *See Wirth* v. *Aetna U.S. Healthcare*, 469 F.3d 305 (3d Cir. 2006); *Levine* v. *United Healthcare Corp.*, 402 F.3d 156 (3d Cir. 2005); *Arana* v. *Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003) (en banc); *Singh*, 335 F.3d 278. Arnone denies the existence of a split, but the Second Circuit in *Wurtz* recognized the "tension" between its opinion and those of its sister circuits. 761 F.3d at 243. Other courts too have acknowledged the split. *See, e.g.*, *Helfrich* v. *Blue Cross & Blue Shield Ass'n*, 804 F.3d 1090, 1106 (10th Cir. 2015); *Roche* v. *Aetna, Inc.*, 167 F. Supp. 3d 700, 710 n.10 (D.N.J. 2016); *Noetzel* v. *Haw. Med. Servs. Ass'n*, 183 F. Supp. 3d 1094, 1107 (D. Haw. 2016).

In arguing that there is no split, Arnone fails to quote the relevant passages from these conflicting decisions. In *Singh*, the plaintiffs sought, among other things, a declaratory judgment that a state anti-subrogation law prohibited the subrogation provision in their ERISA plans. 335 F.3d at 281. The Fourth Circuit phrased the question presented as whether this and other state-law claims were "within the scope of ERISA's exclusive remedial scheme set forth in § 502(a)" and therefore "completely preempted." *Id.* at 282-83. The court held that they were. *Id.* at 291.

In *Arana*, the plaintiff likewise sought a declaratory judgment that a state anti-subrogation law prevented his insurer from exercising its subrogation and

reimbursement rights. 338 F.3d at 434. The en banc Fifth Circuit concluded that "[t]his claim [was] completely preempted because it [fell] within the scope of ERISA § 502(a)(1)(B)." *Id.* at 437.

In *Levine*, the defendant insurers initially sought reimbursement from the plaintiff insureds under a reimbursement and subrogation provision in their plans. 402 F.3d at 160. The plaintiffs settled, but after an intervening change in state law purported to make those clauses unlawful, the plaintiffs sued for unjust enrichment. *Ibid.* The Third Circuit "agree[d] with the reasoning of the Courts of Appeal for the Fourth and Fifth Circuits" in *Singh* and *Arana* and held that "[w]here, as here, plaintiffs claim that their ERISA plan wrongfully sought reimbursement of previously paid health benefits," the claim is completely preempted. *Id.* at 163.

In each of these decisions, the court of appeals properly applied § 502 to preempt state-law anti-subrogation claims that allegedly regulated insurance within the scope of ERISA's savings clause. There is no doubt that those decisions remain good law after *Davila*. *See* Pet. 21-23 (citing cases). Meanwhile, the Second Circuit continues to adhere to—and extend—its conflicting holding in *Wurtz*. *See* Pet. App. 18a-20a; *McCulloch Orthopaedic Surgical Servs., PLLC* v. *Aetna Inc.*, 857 F.3d 141, 149-50 (2d Cir. 2017).

Arnone insists that *Singh*, *Arana*, and *Levine* should be reconsidered in light of *Davila*'s requirement that "there is no other independent legal duty that is implicated by a defendant's actions." 542 U.S. at 210; *see* Opp. 12-14. But even if these decisions are newly "evaluated in light of the *Davila* test," Lee T. Polk, 2 *ERISA Practice and Litigation* § 11:46 (West 2014), it leads to the same result. Arnone identifies

no legal duties in those cases that did not derive from the "particular rights and obligations established by the benefit plans," rather than from any legal relationship outside the ERISA context. *Davila*, 542 U.S. at 213. Likewise, Arnone identifies no relationship with Aetna outside the ERISA context that New York could "independently" regulate. Pet. 20.

Arnone cites several pre-*Davila* decisions that "generally saved" state anti-subrogation laws from ERISA preemption under § 514. Opp. 10. But those decisions discussed only *express* preemption and failed to consider *complete* preemption under § 502, as *Davila* requires. 542 U.S. at 217. Moreover, even if those decisions were relevant here, an entrenched circuit split would remain.

## II. THE SECOND CIRCUIT'S CHOICE-OF-LAW RULING CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND ERISA'S POLICY OF UNIFORM BENEFITS ADMINISTRATION

The Second Circuit refused to interpret the ERISA plan's choice-of-law provision to require that the plan be governed by the substantive law of Connecticut. Pet. App. 22a-23a. Arnone argues that Aetna has not identified how the provision should be construed under Connecticut law. *See* Opp. 15. It cannot be denied, however, that the Second Circuit applied Section 5-355 only because it refused to apply Connecticut's substantive law.

Similarly, Arnone argues that the application of Section 5-335 does not involve the "construction" of his ERISA plan. Opp. 15-16. The Fifth and Sixth Circuits disagree. Both circuits have held that the word "construed" in choice-of-law provisions means "governed by" the substantive law of that jurisdiction, not simply

"interpreted" under that jurisdiction's contract interpretation principles. Pet. 27-28 (discussing *Kipin Indus., Inc.* v. *Van Deilen Int'l, Inc.*, 182 F.3d 490 (6th Cir. 1999), and *C. A. May Marine Supply Co.* v. *Brunswick Corp.*, 557 F.2d 1163 (5th Cir. 1977)).

Arnone attempts to distinguish *Kipin* and *C. A. May* as merely reflecting state-law policies of contract interpretation—such as honoring a state's "fundamental policy" or construing contractual ambiguities against the drafter. Opp. 16-17. But he does not deny that the construction of an ERISA plan is a matter of "federal common law." Opp. 16. As the Second Circuit itself has held, courts may look to state law as a guide to developing federal common law, but "only if the state law is consistent with the policies underlying the federal statute in question." *Critchlow* v. *First UNUM Life Ins. Co. of Am.*, 378 F.3d 246, 256 (2d Cir. 2004) (quotation marks omitted). Here, the relevant policy is ERISA's "uniform regulatory regime over employee benefit plans," *Davila*, 542 U.S. at 208, and it was wholly ignored by the Second Circuit.

## III. This Case Is An Excellent Vehicle To Resolve Important Federal Questions That Have Divided The Circuits

This case cleanly presents a substantial question of federal law concerning whether ERISA completely preempts state laws that prohibit insurers from offsetting benefits by amounts that participants recover through tort settlements. The Second Circuit resolved that question by applying *Wurtz* to prohibit such offsets. Pet. App. 18a. Thus, the Second Circuit reaffirmed an acknowledged circuit split between *Wurtz* and precedential decisions of at least three other circuits that have interpreted ERISA § 502's preemptive

effect "as encompassing suits disputing a plan's reimbursement efforts." *Helfrich*, 804 F.3d at 1106 (citing decisions).

Indeed, the Second Circuit's decision extended *Wurtz* to claims for benefits brought under ERISA § 502—the very provision giving rise to ERISA's complete preemption. This case is therefore a more compelling vehicle than *Wurtz* for resolving whether ERISA § 502 completely preempts state anti-subrogation and anti-reimbursement laws. Arnone does not dispute that if Section 5-335 is preempted, Aetna will be entitled to judgment. Pet. 34.

The Second Circuit's choice-of-law holding further departs from ERISA's policy of uniform benefits administration, and provides another ground on which to grant review. By narrowly construing the ERISA plan's choice-of-law provision without regard to ERISA's underlying policy, the Second Circuit frustrated one of the primary means that insurers have to provide for uniform benefits through contractual choice-of-law provisions.

The questions presented are fundamentally important to employers, plan administrators, and plan beneficiaries. Congress enacted ERISA as an incentive for "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* v. *Frommert*, 559 U.S. 506, 517 (2010) (quoting *Rush Prudential*, 536 U.S. at 379). But the "uniformity" on which ERISA depends is "impossible . . . if plans are subject to different legal obligations in different States." *Egelhoff* v. *Egelhoff ex rel. Breiner*, 532 U.S. 141, 148 (2001). State laws that interfere with an ERISA plan administrator's right to

reimbursement or subrogation directly affect the calculation of benefit levels. *See FMC Corp.*, 498 U.S. at 60. Left uncorrected, the Second Circuit's judgment will lead to unfair and arbitrary variations in the benefits due to different employees in different states.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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