No. 19-77

IN THE
Supreme Court of the United States

CARING FOR MONTANANS, INC., ET AL.,
Petitioners,

v.

THE DEPOT, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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Pursuant to S. Ct. R. 15.8, Petitioners respectfully file this supplemental brief to call to the Court's attention a new decision that provides further support for granting the Petition. The decision is *Dialysis Newco, Inc. v. Community Health Systems Group Health Plan*, No. 18-40863, ___ F.3d ___, 2019 U.S. App. LEXIS 27418 (5th Cir. Sept. 11, 2019). The decision bears directly on whether there is a conflict among the circuits warranting this Court's review.

In the Petition, Petitioners noted that the Ninth Circuit's decision below conflicted materially in numerous ways with decisions of other circuits. One relevant circuit split Petitioners identified is over whether there is a presumption against preemption where a court is applying an express preemption provision. *See* Pet. 23-27. ERISA contains an express preemption provision, and the Ninth Circuit applied a presumption against preemption. *See id.* at 26; *see also* 29 U.S.C. § 1144(a). Petitioners explained that, in earlier times, under *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995) ("*Travelers*"), this Court had instructed a presumption against preemption with regard to ERISA's preemption provision, but that the Court in *Gobeille v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936 (2016), and even more plainly in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016) ("*Franklin*"), had directed the abandonment of a presumption against preemption in express-preemption cases, including under ERISA's express preemption provision. *See* Pet. 24-26 (relying on *Gobeille*, 136 S. Ct. at 943, 946; *id.* at 948 (Thomas, J.

concurring); and *Franklin*, 136 S. Ct. at 1946). Petitioners noted that several other circuits, in the wake of *Franklin*, had – contrary to the Ninth Circuit below – overtly rejected a presumption against preemption under various express preemption provisions (*see id.* at 27), and Petitioners therefore contend that the decision below conflicts with other circuits on the presumption-against-preemption issue.

The Fifth Circuit, with its decision in *Dialysis Newco*, has now markedly enhanced the circuit split on the existence of a presumption against preemption. Whereas, as outlined in the Petition, the relevant circuit division previously was on whether, generically, a presumption against preemption exists when an express preemption provision operates, the conflict now more specifically concerns whether there is a presumption against preemption *under ERISA's preemption provision*. Moreover, in triggering a further circuit split, the Fifth Circuit spoke in terms mirroring the analysis in the Petition showing that *Travelers* had been overtaken by *Gobeille* and *Franklin*.

In *Dialysis Newco*, the Fifth Circuit considered whether ERISA preempts a Tennessee law mandating that a health plan allow assignments of health benefits by patients to medical providers and that the plan include in its terms notice of the assignment right. The Fifth Circuit ruled in favor of preemption, notwithstanding an earlier Fifth Circuit decision that had found ERISA did not preempt a state law requiring that patients be permitted to direct health benefits payments to medical providers. The Fifth Circuit refused to "extend" its prior precedent, because the earlier case had been "built upon a starting presump-

tion against ERISA preemption" that "the Supreme Court appears to have walked back from." *Dialysis Newco*, 2019 U.S. App. LEXIS 27418, at *25, *27.

In addressing whether there is, anymore, a presumption against preemption under ERISA's express preemption provision, the Fifth Circuit readily noted that *Travelers* had "required" one. *Id.* at *25 (citing *Travelers*, 514 U.S. at 655). "However, the Supreme Court has since changed its position on the presumption against preemption where there is an express preemption clause." *Id.* at *25. Explaining the change, the Fifth Circuit stated:

> In *Gobeille*, an ERISA case, the majority's only mention of a presumption against preemption was to reject that any such presumption would control the outcome of the case. 136 S. Ct. at 946. Justice Thomas authored a separate concurrence observing that *Travelers* departed from the statutory text and has become difficult to reconcile with the Court's other preemption jurisprudence. *Id.* at 947-49 (Thomas, J., concurring). Only two Justices, writing in dissent, expressed support for *Travelers* and asserted that "[t]he presumption against preemption should thus apply full strength[.]" *Id.* at 954 (Ginsburg, J., dissenting). Then a few months later, a majority of the Supreme Court expressly held in *Puerto Rico v. Franklin California Tax-Free Trust*, a bankruptcy case, that "because the statute contains an express preemption clause, we do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause[.]" 136 S. Ct.

> 1938, 1946, 195 L. Ed. 2d 298 (2016) (citation and quotation marks omitted). *Franklin* then referenced *Gobeille* in a "see also" citation for that proposition. *Id.*

2019 U.S. App. LEXIS 27418, at *25-*26. The Fifth Circuit then stated that "ERISA similarly contains an express preemption clause, so *Franklin* would seem to direct that we should not apply a presumption against preemption in this case." *Id.* at *26.

The Fifth Circuit also rejected the argument that "*Franklin*'s language . . . should apply only to bankruptcy cases." *Id.* "Given that *Franklin* specifically references *Gobeille* – an ERISA case – when holding that there is no presumption of preemption when the statute contains an express preemption clause, we conclude that holding is applicable here." *Id.* at *27. Consistent with that conclusion, the Fifth Circuit remarked that other circuits had read *Franklin* "broadly"(*id.* at *26), citing decisions also cited by Petitioners. *Compare id.* at *27 *with* Pet. 27 & n.8. But the Fifth Circuit additionally noted that, in contrast to it and these other circuits, the Third Circuit would reach a different conclusion because it "declin[es] to apply *Franklin*" to matters "historically regulated by the states." *Dialysis Newco*, 2019 U.S. App. LEXIS 27418, at *27 (citing *Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018)); *see also* Pet. 27 (likewise noting that the Third Circuit falls on the side of the split still applying a presumption against preemption in express-preemption cases).

Accordingly, *Dialysis Newco* squarely implicates and exacerbates the circuit split identified in the Petition on whether there exists a presumption against

preemption: not only are the circuits divergent on whether a presumption against preemption applies in express-preemption cases generally, they now disagree directly on whether a presumption against preemption exists under ERISA's express preemption clause. The Ninth Circuit, below, straightforwardly applied a presumption against preemption in holding that Respondents' state-law claims are not preempted under ERISA's express preemption clause, *see* Pet. App. 37a, and the Fifth Circuit has now rejected a presumption against preemption under ERISA's express preemption clause.

Nor is this a circuit split that is going away. On the same day the Fifth Circuit issued *Dialysis Newco*, the Ninth Circuit – in finding no preemption under ERISA in another situation – relied on its decision at issue here, emphasizing again that "we begin with a "'starting presumption that Congress d[id] not intend to supplant . . . state laws regulating a subject of traditional state power" unless that power amounts to "a direct regulation of a fundamental ERISA function."'" *Rudel v. Haw. Mgmt. All. Ass'n*, Nos. 17-17395, 17-17460, ___ F.3d. ___, 2019 U.S. App. LEXIS 27371, at *24 (9th Cir. Sept. 11, 2019) (quoting *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 666 (9th Cir. 2019) (alterations in original), quoting *Gobeille*, 136 S. Ct. at 943). If anything, the circuit split threatens to become more unwieldy, with some circuits (like the Fifth Circuit after *Dialysis Newco*) rejecting across the board a presumption against preemption under express preemption clauses, including ERISA's; with other circuits (like the Third Circuit), in turn, applying a presumption against preemption, whenever the state law falls in an area of traditional state concern; and

still others (like the Ninth Circuit) sometimes rejecting a presumption against preemption, but applying it in ERISA contexts due to *Travelers*. *Compare* Pet. App. 37a (applying presumption against preemption under ERISA) *and Rudel*, 2019 U.S. App. LEXIS 27371, at *24 (same) *with Atay v. Cty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) (following *Franklin* outside of ERISA context); *see generally Pharm. Care Mgmt. Ass'n v. Rutledge*, 891 F.3d 1109, 1112-13 (8th Cir. 2018) (continuing to apply presumption against preemption under ERISA, though nonetheless finding state law preempted), *petition for cert. filed*, No. 18-540, *views of Solicitor Gen. requested*, 139 S. Ct. 1594 (2019).

Finally, the Ninth Circuit's presumption against preemption under ERISA's express preemption provision made a difference in this instance, resulting in this case being an ideal vehicle for resolving "the great preemption presumption wars." *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 (4th Cir. 2018). Because state laws are preempted under ERISA's preemption clause whenever they "provid[e] alternative enforcement mechanisms" to ERISA's remedies (*Travelers*, 514 U.S. at 658), the Ninth Circuit had to split hairs here to reject preemption: it stretched to conclude, wrongly, that ERISA's remedy for a fiduciary to sue an ERISA-plan service-provider for charging excessive fees was impertinent, because Respondents supposedly alleged just that Petitioners "misrepresented the composition" of the premiums, not that Petitioners obtained more than "'reasonable compensation' under ERISA." Pet. App. 39a (quoting 29 U.S.C. § 1108(b)(2)). Yet, very recently, in connection with a duplicate suit Respondents have filed (*see* Pet. 10), Petitioners contended that Respondents had no injury,

and thus lacked standing to sue, unless their real allegation is that the premiums were too high; Respondents answered by admitting that their grievance is over "paying excessive amounts in order to purchase health insurance" and that their "specific economic injury" is "illegal overcharges." *Depot, Inc. v. Caring for Montanans, Inc.*, No. 9:19-cv-00113-DWM, ECF #21 at 11-12 (D. Mont. Aug. 23, 2019). Under these circumstances, only a thumb on a scale preordaining preemption could rescue Respondents' state-law claims from the challenge that they are alternatives to ERISA's enforcement mechanism covering unreasonable service-provider compensation. *See* Pet. 3-4, 29.[1]

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[1] The dispute over whether a presumption against preemption exists also bears on one of the other circuit splits identified in the Petition – namely, the circuits' division over the situation-specific issue of whether ERISA preempts an employer's state-law claims that an insurer, through misrepresentations, induced the creation of an ERISA plan. *See* Pet. 10-17. The Ninth Circuit below relied on the presumption to find no preemption, as did the decision from the Eighth Circuit on which the Ninth Circuit principally relied. *See Wilson v. Zoellner*, 114 F.3d 713, 719-20 (8th Cir. 1997); Pet. App. 37a (Ninth Circuit relying on *Wilson* to find that misrepresentation claims involve "traditional state regulation" that is "remote" from ERISA's concerns) (internal quotation marks and citations omitted). In contrast, the decisions finding that ERISA preempts such employer claims do not mention any presumption against preemption. *See Reliable Home Health Care, Inc. v. Union Cent. Ins. Co.*, 295 F.3d 505 (5th Cir. 2002); *Lion's Volunteer Blind Indus., Inc. v. Automated Grp. Admin., Inc.*, 195 F.3d 803 (6th Cir. 1999); *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207 (11th Cir. 1999). Indeed, the Eighth Circuit prior to *Travelers* had found no preemption in the same situation, only to change direction in *Wilson* after *Travelers*, which suggests that the circuits' varying views of the *Travelers*-

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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induced presumption against preemption under ERISA bears some of the responsibility for the disparate circuit results on the preemption of employer state-law misrepresentation claims against insurers. *See Consol. Beef Indus., Inc. v. N.Y. Life Ins. Co.*, 949 F.2d 960, 964 (8th Cir. 1991).