No. 20-___

IN THE

Supreme Court of the United States

DIRK WILKE, in his official capacity as interim State Health Officer of North Dakota, *et al.*,

Petitioners,

v.

PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

HOWARD R. RUBIN
ROBERT T. SMITH
Counsel of Record
TIMOTHY H. GRAY
KATTEN MUCHIN ROSENMAN LLP
2900 K Street, NW
Washington, DC 20007
robert.smith1@katten.com
202-625-3500

WAYNE STENEHJEM
Attorney General of North Dakota
MATTHEW SAGSVEEN
Solicitor General
JAMES NICOLAI
Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL OF NORTH DAKOTA
500 North 9th Street
Bismarck, ND 58501

Counsel for Petitioners

Questions Presented

In *Rutledge* v. *Pharmaceutical Care Management Association*, No. 18-540 (U.S.), this Court granted a writ of certiorari to decide whether the Employee Retirement Income Security Act of 1974 preempts an Arkansas law that regulates the rates that pharmacy benefit managers (PBMs) reimburse pharmacies for dispensing generic drugs. In that case, the Eighth Circuit had held that Arkansas's law made a prohibited "reference to" ERISA plans and had a forbidden "connection with" such plans.

In this case, Respondent sought to enjoin two North Dakota laws that regulate, among other things, certain fees that PBMs charge pharmacies, which drugs pharmacists are allowed to dispense, and what pharmacists are allowed to say to their patients. These laws apply the same standards regardless of whether PBMs are providing services to an ERISA or non-ERISA plan.

In ruling in Respondent's favor, the Eighth Circuit applied its decision in *Rutledge* to do two things. First, it held that, under *Rutledge*'s logic, North Dakota's laws make an impermissible "reference to" ERISA plans because they apply to PBMs serving plans that "include[ ]" ERISA plans. Second, the court held that a finding of preemption under ERISA nullifies a State law "in its entirety"—even as applied to non-ERISA plans. Because of the first holding, the Eighth Circuit elected not to decide whether North Dakota's laws also had a forbidden "connection with" ERISA plans. And because of the second holding, the Eighth Circuit stated that it did not reach

Respondent's separate claims of preemption under Medicare Part D.

The questions presented are:

1. Whether, contrary to decisions of this Court and every other court of appeals that has addressed the issue, ERISA preempts a State law simply because it is broad enough to "include[ ]" ERISA plans among those affected by the law.

2. Whether, contrary to the text of ERISA and decisions of this Court and every other court of appeals to consider the issue, ERISA preempts a State law "in its entirety"—even as that law applies to non-ERISA plans.

Parties to the Proceeding

The petitioners are Dirk Wilke, in his official capacity as the interim State Health Officer of North Dakota; Mark J. Hardy, in his official capacity as the Executive Director of the North Dakota Board of Pharmacy; Gayle D. Ziegler, in her official capacity as the President of the North Dakota Board of Pharmacy; and Wayne Stenehjem, in his official capacity as the Attorney General of North Dakota. Mr. Wilke is automatically substituted for Mylynn Tufte, who was a party to the proceeding below but resigned as State Health Officer of North Dakota. *See* Sup. Ct. R. 35.3. In addition, Ms. Ziegler is automatically substituted for Steven P. Irsfeld, who was also a party to the proceeding below but is no longer President of the North Dakota Board of Pharmacy. *Id.*

The respondent is the Pharmaceutical Care Management Association, a trade association of pharmacy benefit managers.

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Introduction

The Employee Retirement Income Security Act of 1974 regulates employee benefit plans, but it includes two important limitations. First, ERISA only regulates the "*administration* of plan benefits"—"by imposing reporting and disclosure mandates, 29 U.S.C. §§ 1021-1031, participation and vesting requirements, 29 U.S.C. §§ 1051-1061, funding standards, 29 U.S.C. §§ 1081-1086, and fiduciary responsibilities for plan administrators, 29 U.S.C. §§ 1101-1114." *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 651 (1995) (internal citations altered) (emphasis added). Second, Section 1003(a) of Title 29 limits ERISA's coverage to plans that are "established or maintained" by an "employer" or "employee organization," 29 U.S.C. § 1003(a), and Section 1003(b) exempts certain plans from ERISA's reach, including "governmental" and "church" plans, *id.* § 1003(b).

ERISA also includes a preemption clause that mirrors the Act's substantive limitations. That clause first demarcates the limited field of law entitled to supremacy—"the provisions of this subchapter and subchapter III," *id.* § 1144(a), which regulate plan administration, *id.* §§ 1001-1191c, and plan termination insurance, *id.* §§ 1301-1461, respectively. The preemption clause then specifies that this field "shall supersede any and all State laws," but only insofar as those laws "relate to any employee benefit plan described in section 1003(a) of this title

and not exempt under section 1003(b) of this title." *Id.* § 1144(a).[1]

This Court has enforced these two limitations on the scope of ERISA's preemptive reach. In *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A., Inc.*, for example, the Court held that ERISA does not preempt State law simply because it includes ERISA plans among those affected by the law. 519 U.S. 316, 325-28 (1997). And in *Shaw* v. *Delta Air Lines, Inc.*, the Court recognized that, "[o]f course, [ERISA] pre-empts state laws *only* insofar as they relate to plans covered by ERISA." 463 U.S. 85, 97 n.17 (1983) (emphasis added).

In this case, however, the Eighth Circuit jettisoned ERISA's limitations, causing it, mistakenly, to strike down two North Dakota laws that regulate pharmacy benefit managers (PBMs). First, the Eighth Circuit held that ERISA preempted North Dakota's laws simply because they regulate PBMs serving plans that would "include[ ]" ERISA plans. Pet. App. 6a. Second, the court of appeals held that its finding of preemption under ERISA invalidated North Dakota's laws "in [their] entirety"—even as applied to non-ERISA plans. Pet. App. 10a. In the process, the Eighth Circuit not only contradicted decisions of this Court, but it also split from every other court of appeals to consider these issues.

Unless corrected, the Eighth Circuit's decision threatens to usher in limitless preemption under ERISA. New plaintiffs will step forward with claims

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[1] ERISA also includes a clause that saves certain State laws from preemption, 29 U.S.C. § 1144(b), but that clause is not relevant here.

that ERISA plans are islands to themselves, not subject to any generally applicable State law, simply because those laws "include" ERISA plans within their coverage. And plaintiffs will use ERISA to invalidate State laws even as applied to non-ERISA plans, invading the sovereignty of the States to regulate in areas where ERISA has nothing to say. The time for this Court's intervention is now.

Fortunately, this Court has already agreed to review the first of these issues in *Rutledge* v. *Pharmaceutical Care Management Association*, No. 18-540 (U.S.). That case, like this one, involves a State law that regulates PBMs. And there, like here, the Eighth Circuit invalidated a State law simply because it regulated PBMs serving plans that would "'include'" ERISA plans. *Pharm. Care Mgmt. Ass'n* v. *Rutledge*, 891 F.3d 1109, 1112 (8th Cir. 2018) (citation omitted), *cert. granted*, 140 S. Ct. 812 (2020).

If this Court reverses the judgment of the Eighth Circuit in *Rutledge*, then that outcome will compel vacatur here. The Eighth Circuit's errant finding of a "reference to" ERISA plans was the sole basis for its decision to invalidate North Dakota's laws in their entirety. *See* Pet. App. 10a.

As a result, this Court should hold the petition here pending its decision in *Rutledge*. If the Court reverses in *Rutledge*, then it should grant the petition here, vacate the Eighth Circuit's judgment, and remand for further proceedings consistent with the Court's decision in *Rutledge*. But even if this Court affirms in *Rutledge*, it should still grant the petition here to reaffirm that ERISA preempts State law only as applied to ERISA plans.

Opinions Below

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 968 F.3d 901. The district court's order granting in part and denying in part the parties' cross-motions for summary judgment (Pet. App. 11a-55a) is reported at 326 F. Supp. 3d 873. The district court's order denying a motion for a preliminary injunction (Pet. App. 56a-99a) is reported at 297 F. Supp. 3d 964.

Jurisdiction

The judgment of the court of appeals was entered on August 7, 2020. A timely filed petition for rehearing and rehearing en banc was denied on September 2, 2020. Pet. App. 100a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Supremacy Clause of the Constitution of the United States provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

The Employee Retirement Income Security Act of 1974 includes an express preemption clause, which provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a).

The North Dakota laws that have been challenged in this litigation, N.D. Cent. Code §§ 19-02.1-16.1 and 19-02.1-16.2, are set forth at Pet. App. 101a-105a. These laws impose a variety of obligations on "pharmacy benefit managers" and, as such, incorporate two definitions relevant to the issues raised here:

> "Pharmacy benefits manager" means a person that performs pharmacy benefits management and includes any other person acting for such person under a contractual or employment relationship in the performance of pharmacy benefits management for a managed care company, nonprofit hospital or medical service organization, insurance company, third-party payer, or health program administered by a state agency.
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> "Third-party payer" means an organization other than the patient or health care provider

> involved in the financing of personal health services.

N.D. Cent. Code § 19-03.6-01(4), (6). Section 19-03.6-01 is set forth in full at Pet. App. 106a-107a.

Statement

This case involves a challenge to two North Dakota laws, N.D. Cent. Code §§ 19-02.1-16.1 and 19-02.1-16.2. Even divorced from the weighty claims of ERISA preemption at issue here, these laws are incredibly important: They regulate the relationship between pharmacies and PBMs.

1. PBMs are prescription-drug middlemen. They contract with health insurers and plans to provide insureds and beneficiaries with access to pharmaceutical products and services. *See* Pet. App. 12a-13a. PBMs contract separately with pharmacies to provide these products and services. *See id.*

In recent years, PBMs have profoundly affected the practice of pharmacy and the relationship between pharmacists and their patients. Because the three largest PBMs control access to prescription-drug coverage for eighty to ninety percent of Americans, pharmacies have limited bargaining power when negotiating with PBMs. App'x of Appellees 4, 36-37, *PCMA* v. *Tufte*, No. 18-2926 (8th Cir. Jan. 29, 2019) (N.D. App'x). If pharmacies want access to these patients, they must generally accept one-sided contracts that typically grant PBMs unilateral authority to dictate the amount of reimbursement paid to pharmacies for generic drugs, require pharmacies to fill and dispense prescriptions regardless of the amount the pharmacy is reimbursed, and even limit

which drugs pharmacists may dispense and what they may say to their patients. *Id.* at 26-32, 37-40.

In the opinion of many States, North Dakota among them, PBM practices have had a negative effect on the safe and efficient delivery of prescription drugs. For example, in an effort to maximize their own profits, PBMs have barred pharmacists from informing patients in situations where the patient could pay less out of pocket for a prescription drug than that patient would pay if the claim were processed through the PBM. *Id.* at 27, 38-40. As another example, PBMs have prevented pharmacists from dispensing certain prescription drugs, even though pharmacists are licensed to do so, in order to steer patients to PBM-owned, specialty pharmacies. *Id.* at 26-27, 40.

As a result, nearly all States and the District of Columbia have enacted laws regulating PBMs. Br. of California, 44 Other States, and the District of Columbia as *Amici Curiae* in Support of Petitioner 12, *Rutledge* v. *Pharm. Care Mgmt. Ass'n*, No. 18-540 (U.S. Mar. 2, 2020).

2. In 2017, North Dakota enacted the two laws at issue here, N.D. Cent. Code §§ 19-02.1-16.1 and 19-02.1-16.2.

North Dakota's laws reassert the State's role in regulating the dispensing of prescription drugs by authorizing pharmacies to fill a prescription that is otherwise covered by an insurer or plan if the pharmacy is authorized to do so under its State and federal licenses. N.D. Cent. Code § 19-02.1-16.2(5); *see id.* §§ 19-02.1-16.1(11), 19-02.1-16.2(4) (preventing PBMs from imposing accreditation standards that

are "inconsistent with, more stringent than, or in addition to the federal and state requirements for licensure as a pharmacy"). Other provisions authorize a "pharmacy or pharmacist to mail or deliver drugs to a patient as an ancillary service of a pharmacy," *id.* § 19-02.1-16.1(8), and to charge the patient a fee if the patient requests this service, *id.* § 19-02.1-16.1(9). These provisions supersede provisions of PBM contracts with pharmacies that had effectively overridden State licensing and practice standards.

North Dakota's laws also allow pharmacists to provide "relevant information to a patient if the patient is acquiring prescription drugs," including "the cost and clinical efficacy of a more affordable alternative drug if one is available." *Id.* § 19-02.1-16.1(7). This provision overrides gag clauses included in PBM contracts that prevent pharmacists from alerting patients in situations where they could save money by paying out of pocket because the PBM charges a co-payment that exceeds the pharmacist's price for the medication. N.D. App'x 27, 38-40; *see also* Robert Pear, *Why Your Pharmacist Can't Tell You That $20 Prescription Could Cost Only $8*, N.Y. Times, Feb. 24, 2018.[2]

Still other provisions regulate the ability of PBMs to impose undisclosed fees, N.D. Cent. Code § 19-02.1-16.1(2); prevent PBMs from clawing back from pharmacies copayments that had been adjudicated, *id.* § 19-02.1-16.1(4); require PBMs to disclose information about their networks so that pharmacists can make an informed decision before contracting with a

[2] https://www.nytimes.com/2018/02/24/us/politics/pharmacy-benefit-managers-gag-clauses.html.

PBM, *id.* § 19-02.1-16.1(10); prohibit PBMs from having ownership interests in mail-order specialty pharmacies and patient assistance programs run by pharmaceutical companies, unless the PBM agrees to avoid transactions that would benefit the PBM at the expense of a plan or insurer, *id.* § 19-02.1-16.2(3); and require PBMs to use nationally recognized metrics before imposing fees based on performance, *id.* § 19-02.1-16.1(3). These provisions provide for transparency and prevent the use of arbitrary performance metrics that proved difficult, if not impossible, for pharmacies to satisfy. N.D. App'x 29-30, 38.[3]

Finally, the laws include two provisions that permit, but do not require, certain disclosures to "plan sponsors." One provision permits pharmacists to disclose to patients and plan sponsors information regarding the reimbursement that a PBM paid the pharmacy. N.D. Cent. Code § 19-02.1-16.1(5). The other provision provides that, "[i]f requested by a plan sponsor," a PBM with an ownership interest in a pharmacy must disclose to the plan sponsor "any difference between the amount paid to [the] pharmacy and the amount charged to the plan sponsor." *Id.* § 19-02.1-16.2(2).[4]

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[3] PCMA did not challenge a separate provision of N.D. Cent. Code § 19-02.1-16.1(4) that precludes PBMs from charging a patient a copayment that exceeds the cost of the medication. *See* PCMA App'x 18.

[4] The term "plan sponsors" means "the employer in the case of an employee benefit plan established or maintained by a single employer, or the employee organization in the case of a plan established or maintained by an employee organization, an association, joint board of trustees, committee, or other similar group that establishes or maintains the plan." N.D. Cent. Code

3. Shortly before North Dakota's laws went into effect, Respondent—the Pharmaceutical Care Management Association (PCMA), a trade association of PBMs—sued the Petitioners in the District of North Dakota alleging that ERISA and Medicare Part D preempt N.D. Cent. Code §§ 19-02.1-16.1 and 19-02.1-16.2. App'x of Appellant 1-23, *PCMA* v. *Tufte*, No. 18-2926 (8th Cir. Dec. 4, 2018) (PCMA App'x). PCMA sought a declaration and injunction that would prevent North Dakota from enforcing these laws. *Id.* After the district court denied PCMA's motion for a preliminary injunction, Pet. App. 56a-99a, the parties cross-moved for summary judgment.

The district court held that PCMA's claims of preemption failed as to all but one of the laws' provisions. Pet. App. 17a, 19a-55a. The court held this single provision, N.D. Cent. Code § 19-02.1-16.2(2), preempted solely as applied to Medicare Part D plans under 42 U.S.C. §§ 1395w-26(b)(3), 1395w-112(g). *See* Pet. App. 53a-54a. The district court rejected the balance of PCMA's claims, including all of PCMA's ERISA claims. As a result, the district court entered a partial judgment in favor of PCMA, declaring N.D. Cent. Code § 19-02.1-16.2(2) preempted as applied to Medicare Part D plans, and it entered a partial judgment in favor of the State on all of PCMA's remaining claims. *See* Pet. App. 55a.

4. PCMA appealed the portion of the district court's judgment denying its claims of preemption under ERISA and Medicare Part D. North Dakota elected not to cross-appeal the portion of the judg-

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§ 19-03.6-01(5). North Dakota's laws do not impose any obligations on plan sponsors. *See id.* §§ 19-02.1-16.1 & 19-02.1-16.2.

ment declaring N.D. Cent. Code § 19-02.1-16.2(2) preempted solely as applied to Medicare Part D plans.

The Eighth Circuit reversed the portion of the judgment that PCMA had appealed, holding that North Dakota's laws made an impermissible "reference to" ERISA plans because the laws regulate PBMs serving "third-party payers," which would "include[ ] ERISA plans." Pet. App. 6a. The court of appeals also noted that the laws mention "[p]lan sponsor[s]," which, "depending on their functions, may qualify as ERISA fiduciaries." *Id.* According to the Eighth Circuit, two of its prior cases "dictate that regulating by implicit reference to ERISA plans results in preemption": *PCMA* v. *Rutledge*, 891 F.3d 1109 (8th Cir. 2018), *cert. granted*, 140 S. Ct. 812 (2020), and *PCMA* v. *Gerhart*, 852 F.3d 722 (8th Cir. 2017). Pet. App. 6a.

Having held that North Dakota's laws were preempted by ERISA, the court of appeals then needed to confront PCMA's separate claims of preemption under Medicare Part D using the distinct standard that governs those claims. *See* 42 U.S.C. §§ 1395w-26(b)(3), 1395w-112(g). But the court of appeals never decided whether Medicare Part D preempted the dozen provisions of North Dakota's laws on which PCMA had lost in the district court. Instead, the Eighth Circuit held that "*Gerhart* and *Rutledge* dictate that ERISA preempts the North Dakota legislation in its entirety." Pet. App. 10a. As a result, the court of appeals remanded the case to the district court "with directions to enter judgment in favor of PCMA" on all claims. *Id.*

Reasons for Granting the Writ

The Eighth Circuit has radically expanded the scope of preemption under ERISA in two ways that are worthy of this Court's intervention. First, the court of appeals held that, under its prior decision in *Rutledge*, North Dakota's laws make a prohibited "reference to" ERISA plans because those laws regulate PBMs serving plans that would "include[ ]" ERISA plans. Pet. App. 6a. Second, the court held that a finding of preemption under ERISA nullifies the effect of a State law "in its entirety"—even as that law applies to non-ERISA plans. Pet. App. 10a. As explained below, each of these holdings is contrary to decisions of this Court and the text of ERISA, and each conflicts with the decisions of every other court of appeals that has addressed these issues.

I. The Court Should Reverse the Eighth Circuit's Erroneous Reference-To Holding in *Rutledge* v. *PCMA* and then Apply that Decision to Set Aside the Same Flawed Holding at Issue Here.

In *Rutledge* and here, the Eighth Circuit held that ERISA preempts a State law if it "includes" ERISA plans among those affected by the law. Pet. App. 6a; *accord Rutledge*, 891 F.3d at 1112 (quoting *Gerhart*, 852 F.3d at 729). As explained below, that holding is contrary to decisions of this Court and the text of ERISA; it would exacerbate a circuit split; and it is contrary to the views of the United States, forty-six States, and the District of Columbia. Just as critically, the Eighth Circuit's decision is limitless. For example, it would invalidate generally applicable State laws bearing upon health care—an area of tra-

ditional State concern—simply because those laws would "include[ ]" ERISA plans among those affected by the law.

Because this Court has already heard oral argument in *Rutledge*, it should hold this petition and correct the Eighth Circuit's flawed approach to "reference to" preemption there. It should then grant the petition here, vacate the Eighth Circuit's judgment, and remand for reconsideration in light of *Rutledge*. But if, for whatever reason, the Court declines to reach the reference-to issue in *Rutledge*, then it should grant the petition to resolve it here.

A. Under this Court's Precedents, North Dakota's Laws Do Not Make a "Reference To" ERISA Plans Simply Because ERISA Plans are "Include[d]" Among Those Plans Affected By the Laws.

A State law makes a prohibited "reference to" ERISA plans if (1) it "acts immediately and exclusively upon ERISA plans" or (2) "the existence of ERISA plans is essential to the law's operation." *Dillingham*, 519 U.S. at 325. Neither test is satisfied here.

1. North Dakota's laws do not "act[ ] immediately and exclusively upon ERISA plans." *Id.* Those laws impose obligations on PBMs and "third-party payers," but neither term is limited exclusively to ERISA plans. *See* N.D. Cent. Code § 19-03.6-01(4), (6). Rather, a PBM is defined to mean "a person that performs pharmacy benefits management and includes any other person acting for such person under a contractual or employment relationship in the performance of pharmacy benefits management for a man-

aged care company, nonprofit hospital or medical service organization, insurance company, third-party payer, or health program administered by a state agency." N.D. Cent. Code § 19-03.6-01(4). And a "third-party payer" is defined to mean "an organization other than the patient or health care provider involved in the financing of personal health services." *Id.* § 19-03.6-01(6). As the district court correctly observed: "It is conceivable that a 'pharmacy benefits manager' could provide services to an insurance plan, and that the insurance plan could be subject to ERISA. But that is one outcome of many, and more importantly, one not expressed in the legislation's language." Pet. App. 25a.

In addition, two provisions of North Dakota's laws refer to "plan sponsors," but they do not impose any obligations upon them. Rather, they allow, but do not require, PBMs and pharmacies to make certain disclosures to "plan sponsors." N.D. Cent. Code §§ 19-02.1-16.1(5) & 19-02.1-16.2(2). Moreover, the definition of "plan sponsors" is not limited to ERISA-covered entities; it extends to any "employer," "employee organization," or "similar group that establishes or maintains the plan." *Id.* § 19-03.6-01(5). As a result, North Dakota's definition would embrace governmental and church employers that sponsor plans—plans that are exempt from regulation under ERISA. 29 U.S.C. § 1003(b).

North Dakota's laws are therefore indifferent to ERISA's coverage. They encompass not just ERISA plans, but also any person or entity, other than a provider or a patient, "involved in the financing of personal health services." N.D. Cent. Code § 19-03.6-01(6). That definition embraces a variety of non-

ERISA plans, including plans sold in the individual health insurance market, plans sponsored by State and local governments, and Medicare Part D plans. *See id.* In short, because North Dakota's laws impose obligations on PBMs and third-party payers, regardless of whether those entities provide services to, or are, ERISA plans, North Dakota's laws do not "act[ ] immediately and exclusively upon ERISA plans." *Dillingham*, 519 U.S. at 325.

2. The "existence of ERISA plans" is not "essential" to the "operation" of North Dakota's laws. *Id.* As this Court has explained over the course of three opinions, that standard is satisfied only where a State law imposes obligations that vary depending on the existence of an ERISA plan or where a State premises a cause of action on the existence of an ERISA plan—two situations that are missing here.

In *Greater Washington Board of Trade* v. *District of Columbia*, this Court deemed a District of Columbia law preempted that required "employers who provide health insurance for their employees to provide equivalent health insurance coverage for injured employees eligible for workers' compensation benefits." 506 U.S. 125, 126-27 (1992). The Court found a prohibited reference to ERISA for this precise reason—because the law imposed substantive "*requirements*" that were "*measured by reference* to" the *benefits* that were provided by an employer-sponsored health program. *Id.* (emphasis added). Thus, as this Court later explained in *Dillingham*, the D.C. law's "reference" to employer-sponsored benefits was "essential" to that law's operation because that reference defined the law's substantive "requirements." 519 U.S. at 324-35.

Similarly, in *FMC Corp.* v. *Holliday*, this Court considered a State anti-subrogation law that prohibited benefit plans from reducing their benefits on account of a tort recovery. 498 U.S. 52, 55 (1990). Notably, the challenged law accomplished this outcome by deeming plans "'to contain a provision that all benefits provided therein shall be in excess of and not in duplication of any valid'" recovery. *Id.* at 55 n.2 (quoting 75 Pa. Cons. Stat. § 1719(a) (1987)). The Court explained that the anti-subrogation law applied broadly to "'benefits payable'" by all plans (*i.e.*, "'[a]ny program, group contract or other arrangement for payment of benefits'"), which "'includ[e], *but [are] not limited to*,' *non*-ERISA plans (*i.e.*, "'a hospital plan corporation or a professional health service corporation'"). *Id.* at 59 (quoting 75 Pa. Cons. Stat. § 1719(a), (b) (1987)) (alterations and emphasis in original); *see also id.* at 55 n.2. As a result, the anti-subrogation law regulated ERISA and non-ERISA plans. *Id.* at 59 (citing 75 Pa. Cons. Stat. § 1719 (1987)). The Court held that the anti-subrogation law was preempted as applied to ERISA plans because the law's requirements were measured by "'reference' to" the "'benefits . . . paid or payable'" by those plans. *Id.* at 59 (quoting 75 Pa. Cons. Stat. § 1720 (1987)) (alteration in original).

Finally, in *Ingersoll-Rand Co.* v. *McClendon*, this Court deemed preempted a Texas "common-law claim that an employee was unlawfully discharged to prevent his attainment of benefits under a plan covered by ERISA." 498 U.S. 133, 135 (1990). The Court found this cause of action preempted because, under State law, "there simply is *no* cause of action if there is no plan." *Id.* at 140. Again, as the Court later

explained in *Dillingham*, there was a prohibited reference to ERISA plans because Texas law premised a cause of action "on the existence of an ERISA plan." 519 U.S. at 325 (citing *Ingersoll-Rand*, 498 U.S. at 140).

No comparable State-law requirement exists here. Under North Dakota's laws, a PBM's or third-party payer's obligations do not vary depending on the nature of the plan that it serves. N.D. Cent. Code §§ 19-02.1-16.1 & 19-02.1-16.2. And North Dakota's laws do not premise a cause of action "on the existence of an ERISA plan." *Dillingham*, 519 U.S. at 325.

3. This Court's decisions in *Dillingham* and *Travelers* confirm that there is no "reference to" preemption here.

In *Dillingham*, this Court considered a California law that provided that public works contractors could pay an apprenticeship wage to apprentices in programs that met certain standards. 519 U.S. at 319. A contractor who did not meet those standards argued that California's law made a prohibited reference to ERISA because the law referred to a "joint apprenticeship committee," and those committees *included* ERISA-regulated welfare benefit plans. 519 U.S. at 325-28. This Court disagreed.

Because the apprenticeship programs that California regulated "need not necessarily be ERISA plans," *id.* at 325, the Court held that California's law did not make a prohibited "reference to ERISA plans," *id.* at 328. Rather, the law "'function[ed] irrespective of . . . the existence of an ERISA plan,'" and it was therefore "indifferent" to "ERISA coverage." *Id.* (quoting *Ingersoll-Rand*, 498 U.S. at 139).

This Court reached a similar holding in *Travelers*. In that case, the Court considered a New York law that imposed surcharges on the rates that insurers and HMOs reimbursed hospitals for inpatient services, *including* insurers and HMOs acting as administrators on behalf of ERISA plans. *Travelers*, 514 U.S. at 649-50; N.Y. Pub. Health Law § 2807-c(1)(b) (1992) (regulating reimbursements through references to entities that would include ERISA plans and administrators—*e.g.*, "self-insured fund" or "commercial insurer"); *id.* § 2807-c(2-a)(a) (1992) (regulating the same for HMOs). The Court held that this law did not make a prohibited reference to ERISA. *Travelers*, 514 U.S. at 656. Rather, the law applied "regardless of whether the commercial coverage or membership, respectively, is ultimately secured by an ERISA plan, private purchase, or otherwise." *Id.*

North Dakota's laws are not meaningfully distinguishable. Because they are indifferent as to whether a plan falls within ERISA's coverage, they do not make a "reference to" ERISA plans.

4. In reaching a contrary result, the Eighth Circuit reasoned North Dakota's laws regulate PBMs serving plans that would "include[ ]" ERISA plans. Pet. App. 6a. But that holding cannot be reconciled with *Dillingham* and *Travelers*. Each of those decisions rejected the view that reference-to preemption is triggered simply because a law includes ERISA plans among those plans affected by the law.

Moreover, if preemption were triggered anytime a State law "include[d] ERISA plans" among those affected, Pet. App. 6a, then there would be no point in asking whether a State law "acts immediately and *exclusively* upon ERISA plans," *Dillingham*, 519 U.S.

at 325 (emphasis added). The Eighth Circuit's holding would eviscerate one of the two tests that this Court uses to measure reference-to preemption.

Equally important, the Eighth Circuit's approach has no grounding in ERISA's text. The subject of ERISA's preemption clause is "the provisions" of ERISA governing plan administration and plan termination insurance, which "shall supersede" (the verb) "any and all State laws" (the object) to the extent that those laws relate to a plan subject to regulation under ERISA. 29 U.S.C. § 1144(a). Thus, ERISA's preemption clause operates as a form of field preemption, superseding State laws that overlap with ERISA's "provisions" governing plan administration. *Id.* ERISA does not disturb generally applicable laws that might otherwise affect ERISA plans—"such as medical-care quality standards or hospital workplace regulations," *Dillingham*, 519 U.S. at 329—simply because those laws "include" ERISA plans among those affected. North Dakota's laws, which largely regulate pharmacy practice standards, are no different.

Lastly, if preemption is triggered by the mere inclusion of ERISA plans among those affected by State laws, then it would produce results that "'no sensible person could have intended.'" *Gobeille* v. *Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016) (quoting *Dillingham*, 519 U.S. at 336 (Scalia, J., concurring)). In that world, ERISA would preempt State laws regulating the service providers that ERISA plans hire, because those laws would "include" ERISA plans among those affected. By way of example, ERISA would preempt State laws regulating the licensing standards that govern the professionals

that a plan might employ. Yet no one would seriously contend that an ERISA plan could hire an unlicensed physician to provide medical care to its beneficiaries or an unlicensed attorney to provide legal advice to the plan. Moreover, ERISA does not purport to regulate third-party providers who supply ERISA plans with goods and services—unless those providers are acting as ERISA fiduciaries. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 262 (1993) (explaining that third-party service providers are liable under ERISA only if "they cross the line from adviser to fiduciary"); *see also Pegram* v. *Herdrich,* 530 U.S. 211, 231, 236 (2000) (holding that the physician of an HMO who provided care to an ERISA beneficiary was not a fiduciary and was not liable under ERISA, but was answerable under a State malpractice action). Notably, PCMA has argued that PBMs are not fiduciaries and are not subject to regulation under ERISA. Br. of PCMA *et al.* as *Amici Curiae* 11-13, *Doe* v. *Express Scripts, Inc.,* No. 18-346 (2d Cir. June 20, 2018) (2018 WL 3185904). Yet the Eighth Circuit's approach would reward service providers like PBMs with a windfall—the preemption of State law without any meaningful regulation under ERISA. That idea—that ERISA would preempt State laws where ERISA does not regulate—is an affront to State sovereignty.

B. The Eighth Circuit's Decision Deepened a Split Between Itself and Every Other Circuit and is Contrary to the Views of the United States, Forty-Six States, and the District of Columbia on an Issue of Far-Reaching Importance.

The Eighth Circuit acknowledged that reaffirming *Rutledge*'s reference-to holding exacerbated a two-to-one split between itself and decisions of the D.C. and First Circuits. Pet. App. 8a (citing *PCMA* v. *District of Columbia*, 613 F.3d 179, 189-90 (D.C. Cir. 2010); *PCMA* v. *Rowe*, 429 F.3d 294, 304 (1st Cir. 2005)); *see also* Br. for U.S. as *Amicus Curiae* Supporting Petitioner 15-17, *Rutledge* v. *PCMA*, No. 18-540 (U.S. Dec. 4, 2019) (recognizing the existence of this split). Yet those cases are limited to laws regulating PBMs. In reality, the split is much deeper.

After including cases outside the context of PBM regulation, the Eighth Circuit's reference-to holding conflicts with decisions of the First, Second, Fifth, Seventh, Ninth, and D.C. Circuits. Each of these courts has rejected the view that a State law makes a prohibited "reference to" ERISA plans simply because it "includes" ERISA plans among those affected. *Bd. of Trustees of Glazing Health & Welfare Tr.* v. *Chambers*, 903 F.3d 829, 852, 854 (9th Cir. 2018) (declining to find a prohibited reference to ERISA plans where a Nevada law was "inclusive" of "'any other plan'"), *vacated on other grounds*, 941 F.3d 1195 (9th Cir. 2019); *PCMA* v. *District of Columbia*, 613 F.3d at 189-90 (rejecting the view that a PBM law had a prohibited reference to ERISA plans because it regulated PBMs providing services to plans that included ERISA plans); *Golden Gate Rest. Ass'n*

v. *City & Cty. of San Francisco*, 546 F.3d 639, 657-59 (9th Cir. 2008) (rejecting a reference-to challenge to an ordinance that applied to ERISA and non-ERISA plans); *La. Health Serv. & Indem. Co.* v. *Rapides Healthcare Sys.*, 461 F.3d 529, 536 (5th Cir. 2006) ("A law does not refer to an ERISA plan if it applies neutrally to ERISA plans and other types of plans."); *Hattem* v. *Schwarzenegger*, 449 F.3d 423, 433-35 (2d Cir. 2006) (rejecting a challenge to a California law that applied to ERISA and non-ERISA plans); *Rowe*, 429 F.3d at 304 (rejecting a challenge to a PBM law that applied "regardless of whether PBMs are serving ERISA plans"); *Plumbing Indus. Bd., Plumbing Local Union No. 1* v. *E. W. Howell Co.*, 126 F.3d 61, 68 (2d Cir. 1997) (rejecting a challenge to a State law that applied "primarily" to ERISA plans because it did not apply exclusively to those plans); *Safeco Life Ins. Co.* v. *Musser*, 65 F.3d 647, 653 (7th Cir. 1995) (rejecting a challenge to a State insurance law that applied "without regard to whether such insurance is purchased for an ERISA plan"); *see also Metro. Life Ins. Co.* v. *Johnson*, 297 F.3d 558, 564 (7th Cir. 2002) (rejecting a challenge to a State-law doctrine that "applies generally to life insurance policy beneficiary designations" and therefore "does not have 'reference to' an ERISA plan for purposes of preemption").[5]

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[5] The Eighth Circuit's holding also conflicts with a prior decision of that court, *Boyle* v. *Anderson*, 68 F.3d 1093 (8th Cir. 1995), but the court refused to resolve this conflict when it denied North Dakota's petition for rehearing en banc. In *Boyle*, the Eighth Circuit considered a State law that allowed providers to pass a tax through to "third-party purchasers," including "self-insured employee health plans." 68 F.3d at 1098. Although these provisions were broad enough to include ERISA plans, there was no forbidden reference to ERISA, because the law did

In addition, the Eighth Circuit's decision is contrary to the views of the United States, forty-six States, and the District of Columbia. The United States, for instance, has said that the approach taken by the Eighth Circuit "cannot be squared" with *Dillingham* and *Travelers*. Br. for U.S. as *Amicus Curiae* Supporting Petitioner 15, *Rutledge* v. *PCMA,* No. 18-540 (U.S. Mar. 2, 2020). Nearly all States and the District of Columbia have been similarly critical. Br. for Petitioner (Arkansas) 48-51, *Rutledge* v. *PCMA,* No. 18-540 (U.S. Feb. 24, 2020); Br. for California, 44 Other States, and the District of Columbia as *Amici Curiae* in Support of Petitioner 24-25, *Rutledge* v. *PCMA,* No. 18-540 (U.S. Mar. 2, 2020).

C. A Reversal in *Rutledge* Would Warrant Vacatur Here, But if the Court Declines to Reach the Reference-To Issue There, this Case is an Ideal Vehicle to Resolve that Issue.

Given the exceptional importance of the Eighth Circuit's unprecedented reference-to holding, this Court should address that holding in *Rutledge*, and the Court should repudiate it. As explained above, the Eighth Circuit's holding departs from prior precedents of this Court and the text of ERISA, and it

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"not explicitly refer to ERISA plans, nor [did it] single out ERISA [plans] for different treatment." *Id.* at 1101. Rather, the pass-through tax "applie[d] to all third-party purchasers." *Id.* It was therefore "a statute of general application," which "'can be distinguished from statutes that actually or implicitly refer to ERISA plans.'" *Id.* (quoting *Ark. Blue Cross & Blue Shield* v. *St. Mary's Hosp., Inc.*, 947 F.2d 1341, 1345 n.3 (8th Cir. 1991)).

would radically expand the scope of ERISA preemption.

A reversal in *Rutledge* would knock out the lynchpin of the Eighth Circuit's judgment here. Because of its prior holding in *Rutledge*, the Eighth Circuit held that North Dakota's laws had a prohibited reference to ERISA plans, and that holding served as the sole basis for invalidating North Dakota's laws in their entirety. Pet. App. 6a, 10a.

Alternatively, if this Court declines to reach the Eighth Circuit's reference-to holding in *Rutledge*—for example, if it affirms the Eighth Circuit's judgment in *Rutledge* on the connection-with prong and declines to reach the reference-to prong—then this case would be an ideal vehicle for addressing the scope of reference-to preemption under ERISA. As noted above, this case turns exclusively on the Eighth Circuit's flawed reference-to analysis. *Id.*

Moreover, there is no obvious, alternative ground for affirmance here under the connection-with prong. Whereas the law at issue in *Rutledge* regulates the rates that PBMs pay for prescription drugs—and fits comfortably within this Court's connection-with jurisprudence, *see Travelers*, 514 U.S. at 659-60—the laws at issue here are a step farther removed from plan administration. North Dakota's laws largely dictate what services pharmacists can provide within that State and regulate the relationship between PBMs and pharmacies. As this Court has recognized, "if ERISA were concerned with any state action—such as medical-care quality standards or hospital workplace regulations—that increased costs of providing certain benefits, and thereby potentially affected the choices made by ERISA plans, [the

Court] could scarcely see the end of ERISA's pre-emptive reach, and the words 'relate to' would limit nothing." *Dillingham,* 519 U.S. at 329.

II. Even if this Court Affirms in *Rutledge*, the Court's Immediate Intervention is Necessary to Set Aside the Eighth Circuit's Troubling Holding that ERISA Preempts a State Law in Its Entirety—Even as Applied to Non-ERISA Plans.

This petition presents a second question equally worthy of this Court's attention that is not at issue in *Rutledge*: whether ERISA preempts a State law in its entirety—even as applied to non-ERISA plans. In reaching that holding, the Eighth Circuit departed from numerous decisions of this Court and ERISA's text, and it split from every other court of appeals to address this issue.

A. The Eighth Circuit's Holding Conflicts with the Text of ERISA and Numerous Decisions of this Court on an Issue of Exceptional Importance.

There is no support for the Eighth Circuit's holding that ERISA preempts a State law in "its entirety." Pet. App. 10a. The text of ERISA does not permit this outcome, and this Court has repeatedly rejected such an approach.

1. The reach of ERISA's preemption clause is limited to those State laws that "relate to" plans that are regulated by ERISA:

> [T]he provisions of this subchapter and subchapter III shall supersede any and all

> State laws insofar as they may now or hereafter relate to any *employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.*

29 U.S.C. § 1144(a) (emphasis added). Section 1003(a) defines an ERISA plan as "any employee benefit plan if it is established or maintained" by an "employer" or "employee organization" such as a union. *Id.* § 1003(a). And Section 1003(b) includes exemptions for, among other plans, a "governmental plan," "church plan," and plan that "is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." *Id.* § 1003(b). Thus, ERISA may preempt a State law only insofar as that law "relate[s] to" an employee benefit plan that is subject to regulation under ERISA. *Id.* § 1144(a).

2. Adhering to ERISA's plain text, this Court has held that ERISA "pre-empts state laws *only* insofar as they relate to plans covered by ERISA." *Shaw*, 463 U.S. at 98 (emphasis added). And the Court reaffirmed this principle in its most recent decision on the scope of ERISA preemption, holding that a Vermont law was preempted only "as applied to ERISA plans." *Gobeille*, 136 S. Ct. at 947; *accord Greater Wash. Bd. of Trade*, 506 U.S. at 131 n.3 (noting that the Court's finding of ERISA preemption did not extend to "plans that are exempt from ERISA regulation, such as 'governmental' or 'church' plans"); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 526 (1981) (holding that a New Jersey law was preempted only "insofar as it bears on pension plans governed by ERISA").

3. In addition to departing from ERISA's text and precedents of this Court, the Eighth Circuit's holding is "'unsettling,'" because it would result in the preemption of "traditionally state-regulated substantive law in those areas where ERISA has nothing to say." *Dillingham,* 519 U.S. at 330 (quoting *Travelers,* 514 U.S. at 665). The North Dakota laws at issue here illustrate why this is so. Those laws regulate the relationship between pharmacies and PBMs, and they affect the services that pharmacists may provide to patients within the State. The Eighth Circuit's blanket finding of preemption means North Dakota cannot enforce its laws even as they apply to *State*-sponsored health plans, which are beyond ERISA's coverage. 29 U.S.C. § 1003(b) (excluding "governmental plan[s]" from ERISA's coverage). Such an approach would result in a windfall for successful ERISA plaintiffs—the invalidation of State laws as applied to plans not subject to regulation by ERISA—and it is offensive to State sovereignty because it would result in the preemption of State laws in areas where ERISA does not regulate.

B. The Eighth Circuit's Holding Splits from the Decisions of Every Other Circuit that has Addressed this Issue.

The Eighth Circuit's holding also created a split between that court and every other court of appeals to address this issue. Indeed, at least six other courts of appeals have come out the other way.

In *NGS American, Inc.* v. *Barnes*, for example, the Fifth Circuit considered a lawsuit filed by the sponsor of an ERISA plan and its third-party administrator. 998 F.2d 296 (5th Cir. 1993). The plaintiffs

claimed that ERISA preempted a provision of the Texas Insurance Code that regulated the administrators of insurance plans. *Id.* at 297. The Fifth Circuit agreed that ERISA preempted the provision, but only "as applied to third-party administrators of ERISA-governed insurance plans in their capacity as third party-administrators of ERISA-governed insurance plans." *Id.* at 300. The court then clarified that its "holding does not preclude the Texas Commissioner of Insurance from enforcing the article against third-party administrators of non-ERISA governed insurance plans, or against third-party administrators of both ERISA and non-ERISA governed plans in their capacity as administrators of non-ERISA governed plans." *Id.*; *accord CIGNA Healthplan of La., Inc.* v. *State of Louisiana ex rel. Ieyoub*, 82 F.3d 642, 647 (5th Cir. 1996) (holding that ERISA preempted a Louisiana any-willing-provider statute only "insofar as it relates to third party administrators and health care plans that provide services to ERISA-qualified benefit plans").

As another example, in *California Hospital Association* v. *Henning*, the Ninth Circuit avoided deciding a question of ERISA preemption because it concluded that the plaintiffs' plans were not ERISA plans. 770 F.2d 856, 858 (9th Cir. 1985), *amended by* 783 F.2d 946 (9th Cir. 1986). As the court explained, if a plan does not "fall within" ERISA, it is "not affected by ERISA's preemption provision." *Id.*; *accord Hewlett-Packard Co.* v. *Barnes*, 571 F.2d 502, 504 (9th Cir. 1978) (per curiam) (explaining that "ERISA only preempts [a California law] as applied to employee benefit plans," and that it did not extend to

HMOs that were not acting as "employee benefit plans").

Four other courts of appeals have reached similar conclusions. *PCMA* v. *District of Columbia*, 613 F.3d at 182 (holding that provisions of a D.C. law were preempted only "insofar as they apply to a [PBM] under contract with an employee benefit plan" subject to regulation under ERISA); *Blue Cross & Blue Shield of Alabama, Inc.* v. *Nielsen*, 116 F.3d 1406, 1412 (11th Cir. 1997) (holding that ERISA would not preempt an Alabama law as applied to "plans that do not fall within the scope of ERISA," which are instead "governed by state law free of ERISA"); *St. Francis Reg'l Med. Ctr.* v. *Blue Cross & Blue Shield of Kansas, Inc.*, 49 F.3d 1460, 1463-64 (10th Cir. 1995) (holding that ERISA preempted a Kansas law only as applied to "employee benefit plans covered by ERISA"); *Stone & Webster Eng'g Corp.* v. *Ilsley*, 690 F.2d 323, 330 (2d Cir. 1982) (holding that ERISA preempted a Connecticut law only "insofar as it affects employee benefits plans covered by ERISA"), *aff'd sub nom. Arcudi* v. *Stone & Webster Eng'g Corp.*, 463 U.S. 1220 (1983).

Thus, the Second, Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits have each held that ERISA preempts State laws only as applied to ERISA plans. In contrast, the Eighth Circuit held that ERISA preempts State laws in their "entirety." Pet. App. 10a.[6]

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[6] The Eighth Circuit's holding also conflicts with a prior ruling of that court, *Prudential Ins. Co. of Am.* v. *Nat'l Park Med. Ctr., Inc.*, 413 F.3d 897 (8th Cir. 2005), but the court declined to address this conflict when it denied North Dakota's petition for rehearing en banc. In *Prudential*, the Eighth Circuit dissolved

C. To the Extent that a Decision in *Rutledge* Does Not Already Compel Vacatur of the Judgment Here, this Case is an Ideal Vehicle for Resolving the Scope of ERISA Preemption.

If this Court's decision in *Rutledge* does not already compel vacatur of the judgment here, then this case would afford the Court an excellent opportunity to resolve a circuit split and reaffirm that ERISA preempts State laws only as applied to ERISA plans. That issue is cleanly presented here.

In the district court, PCMA challenged thirteen provisions of North Dakota's laws, claiming they were preempted by ERISA and Medicare Part D. *See* PCMA App'x 1-23 (Compl.). Preemption under Medicare Part D turns largely on whether State law overlaps with a Part D standard, and Medicare Part D preempts overlapping State law only as applied to Part D plans. *See* 42 U.S.C. §§ 1395w-26(b)(3), 1395w-112(g). The district court held that Medicare Part D preempted only one of the thirteen provisions that PCMA challenged—specifically, N.D. Cent. Code § 19-02.1-16.2(2). Pet. App. 53a-55a.[7]

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an injunction that "covered non-ERISA plans" because "ERISA could not preempt a [State law] as applied to those plans." *Id.* at 913 n.10.

[7] The district court held that N.D. Cent. Code § 19-02.1-16.2(2) was severable from the balance of North Dakota's laws under North Dakota's severability clause, N.D. Cent. Code § 1-02-20, and preempted solely as applied to Medicare Part D plans. *See* Pet App. 53a-54a. PCMA did not dispute the application of North Dakota's severability clause. *See id.*

On appeal, PCMA argued that Medicare Part D preempted the dozen provisions on which it had lost in the district court, Corrected Br. of Appellant 26-70, *PCMA* v. *Tufte*, No. 18-2926 (8th Cir. Mar. 27, 2019), but the Eighth Circuit declined to address these arguments. Instead, the court of appeals held ERISA preempted North Dakota's laws "in [their] entirety." Pet. App. 10a.

The Eighth Circuit did not decline to reach PCMA's Medicare Part D arguments for any other valid reason. Although the Eighth Circuit noted that "North Dakota [did] not cross-appeal the district court's determination that Medicare Part D preempts North Dakota Century Code section 19-02.1-16.2(2)," Pet. App. 10a, that only relieved the court of appeals of its obligation to review the validity of that specific provision. North Dakota was under no obligation to file a cross-appeal to defend the portions of the judgment on which it had prevailed. *See Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 333 (1980). Thus, the Eighth Circuit was still under an obligation to review the portion of the district court's judgment that PCMA appealed. And that judgment held that Medicare Part D did not preempt twelve of the thirteen provisions that PCMA challenged in the district court. *See* Pet. App. 33a-55a; *see also* PCMA App'x 42-44 (listing the thirteen provisions that PCMA challenged under Medicare Part D).

The Eighth Circuit's decision therefore cleanly presents the question whether ERISA preempts State laws in their "entirety"—even as applied to non-ERISA plans. Pet. App. 10a. This Court can avoid that question only if it reverses in *Rutledge* and vacates the judgment here.

Accordingly, to the extent that this Court affirms in *Rutledge*, it should still grant the petition here to reaffirm that ERISA preempts State laws only as applied to ERISA plans. Indeed, because the Eighth Circuit was so wrong here, and because the issue is so important, this Court should summarily reverse this portion of the Eighth Circuit's judgment if this Court's decision in *Rutledge* does not already resolve this petition. In this circumstance, the Court would then remand for reconsideration of PCMA's separate claims of preemption under Medicare Part D.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted.

HOWARD R. RUBIN
ROBERT T. SMITH
Counsel of Record
TIMOTHY H. GRAY
KATTEN MUCHIN
ROSENMAN LLP
2900 K Street, NW
Washington, DC 20007
robert.smith1@katten.com
202-625-3500

WAYNE STENEHJEM
Attorney General
of North Dakota
MATTHEW SAGSVEEN
Solicitor General
JAMES NICOLAI
Deputy Solicitor General
OFFICE OF THE
ATTORNEY GENERAL
OF NORTH DAKOTA
500 North 9th Street
Bismarck, ND 58501

Counsel for Petitioners

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