No. 20-683

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

SUPPLEMENTAL BRIEF FOR PETITIONERS

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In its decision in *Rutledge* v. *Pharmaceutical Care Management Association* issued last week, this Court rejected the Eighth Circuit's mistaken approach to "reference to" preemption under the Employee Retirement Income Security Act of 1974. *See* --- S. Ct. ---, ---, 2020 WL 7250098, at *4 (Dec. 10, 2020). In that case, the Eighth Circuit had held that ERISA preempts an Arkansas law simply because that law regulates pharmacy benefit managers (PBMs) serving plans that "'include'" ERISA plans. *Pharm. Care Mgmt. Ass'n* v. *Rutledge*, 891 F.3d 1109, 1112 (8th Cir. 2018) (quoting *Pharm. Care Mgmt. Ass'n* v. *Gerhart*, 852 F.3d 722, 729 (8th Cir. 2016)). This Court disagreed. It held, unanimously, that because Arkansas's law "regulates PBMs whether or not the plans they service fall within ERISA's coverage," the law did not make a forbidden "refer[ence] to" ERISA. *Rutledge*, --- S. Ct. at ---, 2020 WL 7250098, at *4.

The Eighth Circuit's judgment here was premised on the same erroneous view of "reference to" preemption. Applying its decisions in *Rutledge* and *Gerhart*, the Eighth Circuit held that two North Dakota laws made a prohibited "reference to" ERISA simply because those laws regulate PBMs serving "'[t]hird-party payer[s]'"—a definition that necessarily "includes ERISA plans." Pet. App. 5a-6a (quoting N.D. Cent. Code § 19-03.6-01(6)).

Yet, like the Arkansas law at issue in *Rutledge*, North Dakota's laws are agnostic to ERISA's coverage. They regulate PBMs providing services to *any* "'organization other than the patient or health care provider involved in the financing of personal health services,'" including *non*-ERISA plans. Pet. App. 6a

(quoting N.D. Cent. Code § 19-03.6-01(6)). As a result, North Dakota's laws do not make a prohibited "reference to" ERISA.

Because the Eighth Circuit's judgment was premised entirely on its erroneous view of "reference to" preemption, Pet. App. 6a, 10a, this Court should set aside that judgment. More specifically, it should grant North Dakota's petition for a writ of certiorari, vacate the Eighth Circuit's judgment, and remand for further consideration in light of this Court's decision in *Rutledge*.

A. *Rutledge* Rejected the Eighth Circuit's Mistaken View that a State Law Refers to ERISA Simply Because It Regulates Entities Serving Plans that "Include" ERISA Plans.

In *Rutledge*, this Court considered whether ERISA preempts Act 900, an Arkansas law that "regulates the prices at which [PBMs] reimburse pharmacies for the cost of drugs covered by prescription-drug plans." --- S. Ct. at ---, 2020 WL 7250098, at *2. As is relevant here, the Eighth Circuit had held that, under its decision in *Gerhart*, Act 900 "made 'implicit reference' to ERISA by regulating PBMs that administer benefits for ERISA plans." *Id.* at ---, 2020 WL 7250098, at *3 (quoting *Gerhart*, 852 F.3d at 729). For this and other reasons, the Eighth Circuit held that ERISA preempted Act 900. *Id.*

This Court rejected the Eighth Circuit's approach to "reference to" preemption. As the Court explained, "[a] law refers to ERISA if it 'acts immediately and exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's operation.'" *Id.* at ---, 2020 WL 7250098, at *4 (quoting *Gobeille*

v. *Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016), which, in turn, quotes *Cal. Div. of Labor Standards Enf't* v. *Dillingham Constr., N.A.*, 519 U.S. 316, 325 (1997) (ellipsis omitted)). Act 900 does neither.

First, Act 900 does "not act immediately and exclusively upon ERISA plans because it applies to PBMs whether or not they manage an ERISA plan." *Id.* And Act 900 "does not directly regulate health benefit plans at all, ERISA or otherwise." *Id.* "It affects plans only insofar as PBMs may pass along higher pharmacy rates to plans with which they contract." *Id.*

Second, ERISA plans are "not essential to Act 900's operation." *Id.* "Act 900 defines a PBM as any 'entity that administers or manages a pharmacy benefits plan or program,' and it defines a 'pharmacy benefits plan or program,' in turn, as any 'plan or program that pays for, reimburses, covers the cost of, or otherwise provides for pharmacist services to individuals who reside in or are employed in [Arkansas].'" *Id.* (quoting Ark. Code Ann. § 17-92-507(a)(7), (9)) (alteration in original). Thus, "[u]nder those provisions, Act 900 regulates PBMs whether or not the plans they service fall within ERISA's coverage." *Id.*

B. Because the Judgment Here Was Premised on the Eighth Circuit's Mistaken Understanding of "Reference To" Preemption, this Court Should Grant the Petition, Vacate the Judgment, and Remand for Further Consideration in Light of *Rutledge*.

As North Dakota explained in its petition for a writ of certiorari, "[a] reversal in *Rutledge* would knock out the lynchpin of the Eighth Circuit's judg-

ment here." Pet. 24. Because of its prior holdings in *Rutledge* and *Gerhart*, the Eighth Circuit held that North Dakota's laws make an implicit "reference to ERISA plans," and that holding was the predicate for "invalidating North Dakota's laws in their entirety." *Id.*

It is impossible to reconcile the Eighth Circuit's judgment in this case with this Court's decision in *Rutledge*. Anticipating the two-part framework that this Court applied in *Rutledge*, North Dakota explained that its laws are not preempted under either prong of this Court's "reference to" jurisprudence. Pet. 13-17.

First, North Dakota's laws do "not act immediately and exclusively upon ERISA plans." *Rutledge*, --- S. Ct. at ---, 2020 WL 7250098, at *4. Similar to the Arkansas law at issue in *Rutledge*, North Dakota's laws impose obligations on PBMs that provide services to "third-party payer[s]," *see* Pet. 13-14—a term that is defined to include *any* "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(6). As a result, North Dakota's laws apply to "PBMs whether or not they manage an ERISA plan." *Rutledge*, --- S. Ct. at ---, 2020 WL 7250098, at *4.

Second, ERISA plans are "not essential" to the "operation" of North Dakota's laws. *Id.* As North Dakota explained, the obligations under its laws do not "vary depending on the existence of an ERISA plan." Pet. 15. And just like the Arkansas law at issue in *Rutledge*, North Dakota's laws "regulate[ ] PBMs whether or not the plans they service fall within

ERISA's coverage," --- S. Ct. at ---, 2020 WL 7250098, at *4. *See* Pet. 17.

Under these circumstances, this Court should grant North Dakota's petition, vacate the Eighth Circuit's judgment, and remand for further consideration in light of this Court's decision in *Rutledge*. The Eighth Circuit's judgment was plainly infected by its prior decision in *Rutledge*, Pet. App. 6a-7a—a decision that this Court has now overruled, *Rutledge*, --- S. Ct. at ---, 2020 WL 7250098, at *4.

C. The Court Need Not Address the Eighth Circuit's Second Erroneous Holding—That a Finding of ERISA Preemption Invalidates a State Law in Its "Entirety"—Because an Order Vacating and Remanding in Light of *Rutledge* Will Have the Effect of Setting Aside Both Aspects of the Judgment.

In its petition, North Dakota identified a second error in the Eighth Circuit's judgment—that a finding of preemption under ERISA invalidates a State law in "'its entirety,'" even as applied to *non*-ERISA plans. Pet. 25-32 (quoting Pet. App. 10a). Because of this holding, the Eighth Circuit remanded the case to the district court "with directions to enter judgment in favor" of the Respondent on all of its claims, including its claims of preemption under Medicare Part D. *See* Pet. App. 10a.

That second holding was just as incorrect as the first. Beginning in *Shaw* v. *Delta Air Lines, Inc.*, this Court emphasized the limited remedy that ERISA affords: "Of 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 add-

ed). As North Dakota explained, that outcome is compelled by ERISA's text, *see* Pet. 25-26, and it is confirmed by other decisions of this Court, *id.* at 26, and every other court of appeals to consider the issue, *id.* at 27-29.

In the end, though, this Court does not need to reach this second issue. The Eighth Circuit's mistaken view of "reference to" preemption was the predicate for its erroneous holding on the scope of the remedy that ERISA affords. *See* Pet. App. 10a; *see also* Pet. 31 (explaining that the Eighth Circuit did not decline to reach the Respondent's Medicare Part D arguments for any other valid reason).

If this Court vacates the Eighth Circuit's judgment and remands for further consideration in light of this Court's decision in *Rutledge*, the Eighth Circuit would be free to reconsider its erroneous view that ERISA preempts a State law in its "entirety," Pet. App. 10a—and it would need to do so only if it finds on remand that ERISA still preempts North Dakota's laws. *See O'Connor* v. *Donaldson*, 422 U.S. 563, 577 n. 12 (1975) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case."). Moreover, the Eighth Circuit's prior, erroneous view—that ERISA preempts State laws in their "entirety," Pet. App. 10a—would not bind future panels unless that holding is expressly reaffirmed after the benefit of briefing on that topic. *See Glover* v. *McDonnell Douglas Corp.*, 12 F.3d 845, 848 n.3 (8th Cir. 1994) (holding that an opinion of the court of appeals that has been vacated by this Court "lacks precedential value in future cases"); *Landrum*

v. *Moats*, 576 F.2d 1320, 1324 (8th Cir. 1978) (explaining that a decision that "was vacated" by the Supreme Court "no longer stands as binding precedent").

As a result, this Court can set aside both aspects of the Eighth Circuit's judgment simply by vacating and remanding for further consideration in light of this Court's decision in *Rutledge*. That relief is plainly warranted here.

Conclusion

The petition for a writ of certiorari should be granted, the judgment of the Eighth Circuit should be vacated, and the case should be remanded for further consideration in light of *Rutledge* v. *Pharmaceutical Care Management Association*, --- S. Ct. ---, 2020 WL 7250098 (Dec. 10, 2020).

Respectfully submitted.

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December 18, 2020