No. 22A-___

In the Supreme Court of the United States

PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION,

Applicant,

v.

NIZAR WEHBI, et al.,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

TO THE HONORABLE BRETT M. KAVANAUGH, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE EIGHTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, applicant Pharmaceutical Care Management Association (PCMA) respectfully requests a 60-day extension of time, to and including July 11, 2022, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The Eighth Circuit denied a timely request for rehearing on February 11, 2022. Unless extended, the time to file a petition for a writ of certiorari will expire on May 12, 2022. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). Copies of the lower court's opinion and its order denying rehearing are attached.

1. This case arises against the backdrop of increasing efforts by the States to regulate the design of health benefits, including those that are covered by the Employee Retirement Income Security Act of 1974 (ERISA). In 2017, North Dakota adopted two identical statutory provisions within a broader suite of regulations that attempt to govern the relationships among welfare benefits plans, the pharmacy benefit managers (PBM) those plans

retain to administer their prescription drug benefits, pharmacies, and patients. In particular, North Dakota Century Code §§ 19-02.1-16.1(11) and -16.2(4) specify that no plan or PBM may "require pharmacy accreditation standards or recertification requirements to participate in a network" if those standards or requirements are "inconsistent with, more stringent than, or in addition to the federal and state requirements for licensure as a pharmacy in this state." In this way, they dictate the terms that plans (or their PBMs on their behalves) are permitted to use in the design of their provider networks.

2. PCMA sued the State Health Officer of North Dakota and other state officials, challenging several elements of Sections 16.1 and 16.2 as preempted as applied to plans covered by ERISA or offered under the Medicare Part D program. C.A. App. 17-22. At summary judgment, the district court rejected PCMA's claims in relevant part. Ca. Add. 16-37. In initial appellate proceedings, the Eighth Circuit reversed the district court. *PCMA v. Tufte*, 968 F.3d 901 (8th Cir. 2020). This Court subsequently granted North Dakota's petition for a writ of certiorari, vacated the Eighth Circuit's judgment, and remanded for further proceedings in light of *Rutledge v. PCMA*, 141 S. Ct. 474 (2020).

The parties re-briefed and reargued the appeal, and the Eighth Circuit performed an about-face on the merits. Relevant here, the panel concluded that the prohibition on use of accreditation standards contained in Sections 16.1(11) and 16.2(4) is not preempted by ERISA. Slip op. 9. The court held that state laws that "limit the accreditation requirements that a PBM may impose on pharmacies as a condition for participation in [a provider] network" regulate only "a noncentral matter of plan administration with *de minimis* economic effects." Slip Op. 9-10. Despite acknowledging that the provisions will require plans "to maintain different accreditation requirements in different states," the panel concluded that this "disuniformity" did not warrant preemption. Slip Op. 10.

3. A prescription drug benefit has multiple elements, including (1) the drugs that are covered, (2) the network of pharmacies from which participants can receive drugs covered under the benefit, and (3) the amounts that participants must pay as copays, co-insurance, and premiums. As anyone who has compared prescription drug coverage knows well, the size and nature of the network—the quantity, types, identities, and locations of the pharmacies where participants can purchase covered drugs—is an essential component of the benefit. And network design varies substantially from plan to plan; a prescription drug plan that offers a broad pharmacy network is a different (and typically more expensive) benefit compared with one that offers a narrower network at lower cost.

Because Sections 16.1(11) and 16.2(4) straightforwardly "bind plan administrators to [a] particular choice" concerning the design of provider networks (*Rutledge v. PCMA*, 141 S. Ct. 474, 480 (2020)) and thereby "prohibit employers from structuring [employee benefits] in a [particular] manner" (*Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)), they are preempted by ERISA. This Court has held repeatedly that employers have "large leeway" under ERISA to "design . . . [benefit] plans as they see fit" and that state governments may not dictate benefit design (*Black & Decker v. Nord*, 538 U.S. 822, 833 (2003)), as do the provisions here.

The Eighth Circuit's contrary decision conflicts with *Cigna Healthplan v. Louisiana*, 82 F.3d 642 (5th Cir. 1996). In that case, the Fifth Circuit held that a Louisiana law requiring plans to accept as "preferred provider[s]" any "licensed provider . . . who agrees to the terms and conditions of the preferred provider contract" is preempted by ERISA. *Id.* at 645. In particular, it concluded that such laws require plans to adopt "a certain structure" for benefits. *Id.* at 648. In other words, "a structure that includes every willing, licensed provider" within the plan's network regulates benefit design and is preempted by ERISA. *Id.*

The Eighth Circuit's decision below is also in considerable tension with *Kentucky Association of Health Plans v. Miller*, 538 U.S. 329 (2003). There, this Court addressed a similar Kentucky "any willing provider" law, which required plans to admit into their networks any "provider who is willing and able to meet [the] terms" for network membership. *Id.* at 335. In prior proceedings in the case, the Sixth Circuit had held that ERISA preempted the law because it regulated the "structure" of plan benefits "by increasing the potential providers" in the plan's network. *Kentucky Association of Health Plans v. Nichols*, 227 F.3d 352, 363 (6th Cir. 2000). This Court implicitly agreed with that holding as a logical prerequisite to its subsequent holding that the Kentucky law was saved from preemption by ERISA's Saving Clause. *Miller*, 538 U.S. at 335. That clause applies only if the state regulation under consideration otherwise falls within ERISA's broad preemptive scope.

The question whether laws like Sections 16.1(11) and 16.2(4) are preempted by ERISA is a matter of great practical importance. ERISA's express preemption provision was intended to ensure nationally uniform standards so as to reduce administrative burdens and encourage the provision of employer benefits. Laws like North Dakota's prohibit plans from using basic safety and quality standards in the design of their networks, whether pharmacy or medical networks. Allowing such laws to stand will mean that multistate plans have to design provider networks that vary from State to State, ballooning the burdens and costs. And contrary to the Eighth Circuit's holding, nothing this Court said in *Rutledge* permits such intrusive state regulation of benefit design.

4. PCMA has not yet determined whether to file a petition for a writ of certiorari in this case. Additional time is needed to make a final determination, which requires coordination and consultation among PCMA's many member companies, including in connection with other litigation pending in the lower courts.

Additional time is also needed for preparing and printing a petition in the event that PCMA authorizes the filing. Undersigned counsel has several other matters with proximate due dates, including a supplemental brief due April 29, 2022, in *Chamber of Commerce v. Franchot*, No. 21-cv-410 (D. Md.); a reply brief due May 6, 2022, in *Jordan v. Mirra*, No. 14-cv-1485 (D. Del.); a reply brief due May 16, 2022, in *Greiber v. NCAA*, No. 2021-9616 (N.Y. App. Div.); a summary judgment opposition and reply brief due June 15, 2022, in *Medical Imaging & Technology Alliance v. Library of Congress*, No. 22-cv-499 (D.D.C.); a petition for a writ of certiorari due June 15, 2022 in *Ruiz v. Massachusetts*, No. 2020-P-775 (Mass.); and an answering brief due June 16, 2022, in *Plutzer v. Bankers Trust Co. of South Dakota*, No. 22-561 (2d Cir.).

For the foregoing reasons, the application for a 60-day extension of time, to and including July 11, 2022, within which to file a petition for a writ of certiorari in this case should be granted.

April 25, 2022

Respectfully submitted.

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