No. 23-1213

In the Supreme Court of the United States

GLEN MULREADY, *in his official capacity as Insurance Commissioner of Oklahoma*; OKLAHOMA INSURANCE DEPARTMENT,

Petitioners,

v.

PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION,

Respondent.

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

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

The United States' brief of May 27, 2025, confirms what the brief in opposition demonstrated: No further review is warranted of either question presented in the petition for a writ of certiorari.

1. Oklahoma contends that the decision in this case conflicts with *Rutledge* v. *PCMA*, 592 U.S. 80 (2020), and *PCMA* v. *Wehbi*, 18 F.4th 956 (8th Cir. 2021). The United States agrees with respondent that that position as "unsound." See U.S. Br. 10. The decision below, according to the United States, "faithfully adhered" to *Rutledge* and "does not necessarily indicate [a] divergence of approach" from that of any other court of appeals on the question of ERISA preemption. *Ibid.*

In support of this position, the United States' brief aligns almost entirely with the merits of our ERISA preemption argument. First, the United States agrees that a state law that requires plan sponsors to structure their provider networks in state-specific ways regulates benefit design and is therefore preempted by ERISA. U.S. Br. 12-13. Second, it recognizes that "[t]he challenged provisions of Oklahoma's 2019 law would impede * * * network design" decisions that favor mail-order or preferred-pharmacy networks. *Ibid.* Finally, the United States agrees that states may not sidestep ERISA preemption by purporting to regulate "only third parties with whom [ERISA-covered] plans contract." *Id.* at 13. That is because "a state law that forbids PBMs from adopting common network design choices and cost-sharing arrangements may 'function as a regulation of an ERISA plan itself.'" *Id.* at 14 (quoting *PCMA* v. *District of Columbia*, 613 F.3d 179, 188 (D.C. Cir. 2010)).

The United States takes a different approach with respect to Oklahoma's ban on plans' consideration of pharmacists' probation status in designing their provider networks. As it did in its brief before the Tenth Circuit,

the United States asserts (at 15) that this provision "appears to have only a modest impact on the structure and design of plan benefits" and "limit[s] a plan's choices about how to design a pharmacy network only to [a] limited extent." But as the Tenth Circuit rightly held, that is not what the evidence in this case shows.

Nor is there any "footing" in either ERISA's text or this Court's cases "for a *de minimis* test" that would exempt purportedly minor regulations of plan design from ERISA's broad and express preemptive reach. Pet. App. 36. And in all events, the United States agrees (at 15) that "the question whether the probation-status provision is preempted is not sufficiently important to warrant this Court's review in its own right."

The United States also agrees (at 18) that there is no firm division of authority on the probation-status provision. The Eighth Circuit's decision in *Wehbi* concerned North Dakota's accreditation-standards provision, whereas the Tenth Circuit's reasoning here concerned Oklahoma's probation-status provision. There are meaningful differences between the two laws and their impacts on plans and plan design. See *ibid.*; BIO 23-24. And regardless of whether there is any tension between the Eighth Circuit's reasoning in *Wehbi* and the Tenth Circuit's reasoning below, "the Tenth Circuit here stated that it would have reached the same conclusion even using what it called 'a *de minimis* test' derived from *Wehbi*." U.S. Br. 18 (quoting Pet. App. 37).

The United States aligns yet further with respondent when it observes that "[t]his case would * * * be a sub-optimal vehicle for addressing ERISA preemption." As the brief in opposition noted, and as the United States now reiterates, the Tenth Circuit held that Oklahoma "'did not preserve a savings-clause argument,'" and it therefore "declined to address" that issue. U.S. Br. 19 (quoting Pet. App. 39). Thus, if the Court were to grant

certiorari, it "would be addressing only half the equation." *Id.* at 20.

Against this backdrop, the United States ultimately agrees, consistent with the brief in opposition, that the first question presented is unworthy of the Court's attention at this time.

2. The United States comes to the same conclusion with respect to the Medicare preemption question, reasoning that the holding below "is correct and does not warrant further review." U.S. Br. 11.

The United States first defends the Tenth Circuit's Medicare preemption decision on its merits, demonstrating the inconsistency of Oklahoma's any-willing-provider law with the standards adopted by the Centers for Medicare and Medicaid Services (CMS) on the same topic. U.S. Br. 20-21. As the United States explains, CMS has promulgated regulations that apply an any-willing-provider rule to each Medicare Part D plan's *standard* pharmacy network, while allowing plan sponsors to maintain plan-curated *preferred* networks. *Id.* at 21. Oklahoma's law purports to override that federally mandated approach. *Ibid.* This, the Medicare statute's express preemption clause does not permit.

The United States further agrees with respondent that the Tenth Circuit's general analytical approach to Medicare preemption is consistent with the one adopted by the Eighth Circuit in *Wehbi*. U.S. Br. 21-22. And it likewise notes that, even if there were some theoretical daylight between the tests adopted by the two courts, the Tenth Circuit in this case "would have reached the same result 'even under Oklahoma's narrower approach.'" *Id.* at 22 (quoting Pet. App. 49).

Respondents concur with the United States that, because the Eighth and Tenth Circuits both would hold that Oklahoma's any-willing-provider provision is pre-

empted as applied the Part D plans, and because "any arguable tension between the two circuits regarding the scope of Part D preemption is recent and shallow" in any event, "[n]o further review is warranted." *Ibid.*

Respectfully submitted.

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