No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The familiar express preemption provision in the Employee Retirement Income Security Act of 1974 ("ERISA") outlaws any state laws that "relate to" an employee benefit plan governed by ERISA. 29 U.S.C. § 1144(a). Under this Court's long-standing precedent, state laws impermissibly "relate to" an ERISA plan when they make a "reference to" or have a "connection with" the plan. *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97 (1983). Additionally, ERISA's preemptive scope is still greater because of the exclusive nature of its enforcement scheme. *See* 29 U.S.C. § 1132(a). Rejecting both express preemption and conflict preemption under ERISA's enforcement regime, the Ninth Circuit held, below, that ERISA does not preempt state-law claims alleging that an insurer, through supposedly false representations about an ERISA plan's prospective terms, induced an employer to establish the plan. Its decision exacerbates existing conflicts among the Circuits on the extent to which ERISA preempts state-law claims involving representations about an ERISA plan, on the scope of the "reference to" prong of ERISA express preemption, and on whether there is a presumption against preemption in express-preemption situations.

The Question Presented is:

Does ERISA preempt state-law claims alleging that an insurer's misrepresentations about an ERISA plan's terms induced an employer to create the plan, either because the claims have a reference to or connection with – and therefore "relate to" – an ERISA plan or because the claims fall within the scope of an ERISA enforcement remedy?

PARTIES TO PROCEEDING AND RELATED CASES

Petitioners are Caring For Montanans, Inc., formerly known as Blue Cross and Blue Shield of Montana, Inc., and Health Care Service Corporation. They were the Defendants-Appellees below.

Respondents are The Depot, Inc., Union Club Bar, Inc., and Trail Head, Inc. They were the Plaintiffs-Appellants below.

District of Montana, No. 9:16-cv-00074-DLC
Depot, Inc., et al. v. Caring For Montanans, Inc., et al., Judgment entered June 23, 2017

District of Montana, No. 9:19-cv-00113-DWM
Depot, Inc., et al. v. Caring For Montanans, Inc., et al., Notice of Removal filed July 3, 2019

Ninth Circuit Court of Appeals, No 17-35597
Depot, Inc., et al. v. Caring For Montanans, Inc., et al., Opinion and Judgment entered February 6, 2019; Petition for Rehearing or Rehearing *En Banc* denied March 15, 2019; Mandate entered March 25, 2019

U.S. Supreme Court, No. 18A1247
Depot, Inc, et al. v. Caring For Montanans, Inc., et al., Application for Extension of Time granted May 31, 2019

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state as follows:

Caring For Montanans, Inc. is a Montana Non-Profit Corporation with no parent company, and no publicly held corporation owns more than 10% of its stock.

Health Care Service Corporation is an Illinois Mutual Legal Reserve Company doing business in Montana through its unincorporated division Blue Cross Blue Shield of Montana, and no publicly held corporation owns more than 10% of Health Care Service Corporation's stock.

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The February 6, 2019 opinion of the U.S. Court of Appeals for the Ninth Circuit is reported at 915 F.3d 643 (9th Cir. 2019) and reproduced in Petitioners' Appendix ("Pet. App.") at 1a-43a. Of the two relevant opinions of the U.S. District Court for the District of Montana, one is unreported (but appears at 2017 U.S. Dist. LEXIS 97531 (D. Mont. June 23, 2017)) and is reproduced at Pet. App. 44a-52a; the other is also unreported (but appears at 2017 U.S. Dist. LEXIS 220835 (D. Mont. Feb. 14, 2017)) and is reproduced at Pet. App. 53a-68a.

STATEMENT OF JURISDICTION

Petitioners seek review of the portion of the Ninth Circuit's February 6, 2019 decision that reversed the district court's dismissal of state-law claims as preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq*. Petitioners timely sought panel rehearing and rehearing *en banc* of the Ninth Circuit's decision, which the Ninth Circuit denied on March 15, 2019. *See* Pet. App. 69a-70a. Upon timely application filed by all parties collectively, Justice Kagan extended the time for filing a petition for certiorari to and including July 15, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

ERISA's express preemption provision, 29 U.S.C. § 1144(a), provides:

> Except as provided in subsection (b) of this section, the provisions of this title and title IV

> shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. This section shall take effect on January 1, 1975.

ERISA's civil enforcement provision, 29 U.S.C. § 1132(a)(3), provides:

> A civil action may be brought . . . by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan[.]

STATEMENT OF THE CASE

Respondents The Depot, Inc., Union Club Bar, Inc., and Trail Head, Inc. (collectively "Plaintiffs") sued Petitioners Caring For Montanans, Inc. ("CFM") and Health Care Service Corporation ("HCSC") (collectively "Defendants") in federal court in Montana, asserting violations of ERISA and state law. The Ninth Circuit described the underlying factual allegations in the lawsuit as follows:

> Plaintiffs are three small employers in Montana who are members of the Montana Chamber of Commerce. Defendants are health insurance companies that [from 2006 to 2014] marketed fully insured health insurance plans to the Chamber's members branded "Chamber Choices" . . . and did so based on [D]efendants' representations that the monthly premiums

> would reflect only the cost of providing benefits. But according to [P]laintiffs, these representations were false – [D]efendants padded the premiums with hidden surcharges, which they used to pay kickbacks to the Chamber and to buy unauthorized insurance products.

Pet. App. 4a.[1] CFM, during the majority of the period relevant to the case, constituted "Blue Cross and Blue Shield of Montana ('BCBSMT')"; HCSC "purchased the health insurance business of BCBSMT in July 2013." *Id.* at 5a.

As also described by the Ninth Circuit, "[a]ll parties agree[d] that each Chamber Choices plan constituted an 'employee welfare benefit plan' subject to ERISA." *Id.* at 6a (quoting 29 U.S.C. § 1002(1)). In addition, Plaintiffs averred that Montana regulators had fined CFM in 2014 supposedly "for illegal insurance practices under Montana law, including billing in excess of the actual medical premium and paying kickbacks to the Chamber." *Id.* at 8a.

In the first amended complaint (the operative pleading), Plaintiffs raised two ERISA claims – one alleging Defendants were fiduciaries that breached their duties, and a second against Defendants as

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[1] When the case arrived in the Ninth Circuit, it was after the district court dismissed the operative pleading pursuant to Fed. R. Civ. P. 12(b)(6). Thus, the district court and the Ninth Circuit assumed Plaintiffs' allegations to be true. *See* Pet. App. 5a n.1, 46a, 55a-56a. Nonetheless, for the record, Defendants strenuously disagree with Plaintiffs' description of Defendants' conduct and Plaintiffs' understanding of the insurance they purchased and categorically deny that Defendants engaged in any wrongdoing.

"part[ies] in interest" (29 U.S.C. § 1002(14)) that facilitated "a prohibited transaction." Pet. App. 9a. With respect to the second ERISA claim, there was no dispute that "[e]ach [D]efendant is a 'party in interest' – which ERISA defines as 'a person providing services to [a] plan,' 29 U.S.C. § 1002(14)(B) – because they provide underwriting and claim-adjudication services to the plans" (Pet. App. 25a); and as to the prohibited transaction Defendants supposedly facilitated, ERISA "prohibit[s] [a] transaction for 'services' between plan fiduciaries ([P]laintiffs) and parties in interest ([D]efendants) for which 'more than reasonable compensation is paid.'" *Id.* at 26a (quoting 29 U.S.C. §§ 1106(a)(1)(C), 1108(b)(2)); *see generally Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 246, 250-51 (2000). Aside from the ERISA claims, Plaintiffs in the amended complaint raised several state-law claims: "for fraudulent inducement, constructive fraud, negligent misrepresentation, unjust enrichment, and unfair trade practices." Pet. App. 9a.

The district court dismissed all of the claims in the amended complaint (*see id.* at 52a, 68a); indeed, it had dismissed virtually the same claims when stated in the original complaint as well, but authorized repleading, which led to the amended complaint. *See id.* at 56a-68a. On both occasions, the district court held that Defendants were not ERISA fiduciaries, that relief against them as ERISA parties in interest was unavailable under ERISA's enforcement scheme, and that ERISA preempted the state-law claims. *See id.* at 46a-52a, 56a-68a. On the state-law claims, the district court alternatively held that Plaintiffs' "allegations of fraud" failed "the heightened pleading standard re-

quired under Federal Rule of Civil Procedure 9(b)." *Id.* at 52a n.2.

On appeal, the Ninth Circuit affirmed the dismissal of the ERISA claims. With respect to the ERISA fiduciary-breach claim, the Ninth Circuit (like the district court) concluded that "[D]efendants were not acting as fiduciaries when taking the action subject to [P]laintiffs' complaint," and therefore could not have breached any fiduciary duties. *Id.* at 11a-12a. As to the ERISA party-in-interest claim, the Ninth Circuit (also like the district court) held that Plaintiffs' allegations fit the mold of a claim against Defendants for "prohibited interested-party transactions" (*id.* at 11a), but it then determined that the claim was irremediable, because Plaintiffs were "not seeking [the] 'appropriate equitable relief'" that ERISA authorizes. *Id.* at 35a (quoting 29 U.S.C. § 1132(a)(3)). Specifically, the Ninth Circuit held that Plaintiffs needed to, but did not, allege the existence of "a 'specific fund' to which they are entitled." *Id.* at 30a (citing *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 658 (2016)).

The Ninth Circuit, however, reversed the district court's dismissal of the state-law claims as preempted by ERISA. In so doing, it addressed initially ERISA's express preemption provision, which provides in relevant part that "ERISA expressly preempts 'any and all State laws insofar as they may now or hereafter relate to an [ERISA] plan.'" *Id.* at 36a (quoting 29 U.S.C. § 1144(a)). It then turned to "'conflict' preemption based on 29 U.S.C. § 1132(a)," which is ERISA's civil enforcement provision. *Id.* at 35a; *see generally Aetna Health Inc. v. Davila*, 542 U.S. 200, 217 (2004).

On express preemption, the Ninth Circuit proceeded 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.'" Pet. App. 37a (quoting *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943, 946 (2016), quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)). It likewise acknowledged at the start "two categories" of express preemption under ERISA: "claims that have a 'reference to' an ERISA plan, and claims that have 'an impermissible "connection with"' an ERISA plan." *Id.* at 36a (quoting *Gobeille*, 136 S. Ct. at 943).

The Ninth Circuit said the state-law claims made no "reference to" ERISA plans because the claims were "not premised or dependent on the existence of an ERISA plan." *Id.* at 36a-37a. In reaching that conclusion, the Ninth Circuit read all of the state-law claims as focused on "alleged misrepresentations occurr[ing] *prior to* any plan's existence." *Id.* at 37a (emphasis added). That is, "[e]ach of the claims [wa]s based on [D]efendants' alleged misrepresentations to plaintiffs that the premiums charged reflected the actual medical premium amount." *Id.* at 35a.

With respect to the '"connection with' prong" of express preemption, the Ninth Circuit said the relevant inquiry is whether the state law at issue '"'governs a central matter of plan administration'" or 'interferes with nationally uniform plan administration'" (*id.* at 37a (quoting *Gobeille*, 136 S. Ct. at 943, quoting *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001)), as well as whether the state law '"bears on an ERISA-

regulated relationship.'" *Id.* (quoting *Or. Teamsters Emp'rs Tr. v. Hillsboro Garbage Disposal, Inc.*, 800 F.3d 1151, 1156 (9th Cir. 2015)). Finding none of those tests here satisfied, the Ninth Circuit determined that "[p]reventing sellers of goods and services, including benefit plans, from misrepresenting the contents of their wares is certainly an area of traditional state regulation . . . quite remote from the areas with which ERISA is expressly concerned – reporting, disclosure, fiduciary responsibility, and the like." *Id.* (internal quotation marks and citation omitted). It also ruled that the state-law claims do not "'bear[] on an ERISA regulated relationship'" because the claims, as construed by the Ninth Circuit, are "premised on [D]efendants' misrepresentations *in negotiations*" – *i.e.*, "the claims allege that [D]efendants misrepresented the composition of the premiums in a way that induced [P]laintiffs to subscribe to Chamber Choices plans." *Id.* at 38a-39a (quoting *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1219 (2000)) (emphasis added). Given that the relevant conduct occurred "before plaintiffs ever agreed to subscribe to a plan," "no [ERISA-governed] relationship existed when the misrepresentations were made." *Id.* at 39a.

On conflict preemption stemming from ERISA's enforcement regime, the Ninth Circuit noted that "ERISA articulates 'a comprehensive civil enforcement scheme' in 29 U.S.C. § 1132(a) that is designed 'to provide a uniform regulatory regime over employee benefit plans"; "'[a]s a result, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy

exclusive' and is therefore barred by conflict preemption." *Id.* at 39a-40a (quoting *Aetna*, 520 U.S. at 208, 209). Still, as the Ninth Circuit saw it, "a state-law claim is not [conflict] preempted if it reflects an 'attempt to remedy [a] violation of a legal duty independent of ERISA.'" *Id.* at 40a (quoting *Aetna*, 542 U.S. at 214).

There was no conflict preemption, in the Ninth Circuit's view, because "the duties implicated in plaintiffs' state-law claims do not derive from ERISA; indeed, ERISA does not purport to govern negotiations between insurance companies and employers." *Id.* Further, the Ninth Circuit deemed ERISA "not [to] have an enforcement mechanism that regulates misrepresentations by insurance companies." *Id.* The Ninth Circuit found no ERISA enforcement remedy to exist, notwithstanding its earlier holding that Plaintiffs' factual allegations fit ERISA's remedy against a party in interest for participating in a (prohibited) service contract with unreasonable compensation terms. *See supra* p. 5. Distinguishing that part of its decision, the Ninth Circuit said that "[t]he actual amount of premiums – and whether that amount was 'reasonable compensation' under ERISA – is irrelevant to [P]laintiffs' state-law claims," since they (as construed by the Ninth Circuit) focus on the "composition" of the premiums not the overall price level. Pet. App. 39a.

Last, though finding none of the state-law claims to be preempted, the Ninth Circuit nonetheless affirmed the dismissal of the "fraudulent inducement and constructive fraud" claims as not meeting "Rule 9(b)'s particularity requirement." *Id.* at 41a; *see* Fed. R. Civ.

P. 9(b) (a party "alleging fraud or mistake . . . must state with particularity the circumstances constituting fraud or mistake"). In that respect, the Ninth Circuit transformed the district court's dismissal "with prejudice" to one without prejudice, "so that plaintiffs may amend their complaint to state the fraud allegations with greater particularity." Pet. App. 43a. The Ninth Circuit also invited the district court to consider, on remand, whether "to exercise supplemental jurisdiction over the state-law claims and allow plaintiffs to bring them in state court." *Id.*[2]

Since the Ninth Circuit's decision, the district court, on remand and upon the prompting of the parties, stayed a determination as to whether to retain jurisdiction until this Court resolves any petitions for certiorari filed in the case. *See Depot, Inc. v. Caring for Montanans, Inc.*, No. 9:16-cv-00074-DLC, ECF #67, at 1 (May 7, 2019). Yet, though Plaintiffs sought and received the stay of the district court's proceedings,

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[2] Though overtly addressed to the "fraudulent inducement and constructive fraud" claims (Pet. App. 41a), the Ninth Circuit's Rule 9(b) determination is also amenable to a reading that not just those claims, but all of the state-law claims, should be dismissed for lack of pleading with particularity. The Ninth Circuit read "each" of the state-law claims as focused on "misrepresentations" (*id.* at 35a), and, in fact, the district court's alternative holding of failure to plead with particularity extended to all of the claims insofar as they were founded on "fraud." *Id.* at 52a n.2. Assuming the bent of the Ninth Circuit's decision is that all of the state-law claims are dismissable for lack of particularized pleading, its decision still transformed the district court's with-prejudice dismissal on preemption grounds to a without-prejudice dismissal on Rule 9(b) grounds, making it a final judgment adverse to Defendants.

they – along with plan participants – recently served on Defendants a pleading filed in state court raising similar state-law claims and based on the same alleged misrepresentations. Defendants have now removed that case to federal court, based on the participant claims involving their ERISA plans. *See Depot, Inc. v. Caring for Montanans, Inc.*, No. 9:19-cv-00113-DWM, ECF #1 (July 3, 2019).

REASONS FOR GRANTING THE PETITION

The Petition squarely fits the Court's criteria for certiorari because: (1) the Circuits are split on legal matters central to the Petition; (2) the decision below conflicts with this Court's precedents; and (3) the Question Presented is of substantial importance. For these reasons, the Court should grant the Petition.

I. THE CIRCUITS ARE SPLIT ON A SLEW OF PREEMPTION MATTERS CENTRAL TO THE PETITION

The Ninth Circuit's holding that ERISA does not preempt Plaintiffs' state-law claims falls on the fault line of several significant splits among the Circuits concerning the scope of and tests for ERISA preemption.

A. The Circuits are split on whether ERISA preempts an employer's state-law claims that an insurer, through misrepresentations, induced the creation of an ERISA plan. The Ninth Circuit below, of course, held that ERISA does not preempt such claims. The Tenth Circuit is in alignment with the Ninth Circuit. *See Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 989-92 (10th Cir. 1999).

Both the Ninth and Tenth Circuits, for their holdings of non-preemption, rely heavily on the notion that state-law claims regarding misrepresentations inducing the establishment of an ERISA plan supposedly involve "pre-plan conduct." *Id.* at 991; Pet. App. 37a, 39a. Building on that point, they then emphasize that, because pre-plan conduct is the focus, the state-law claims cannot concern "principal ERISA entities." *Woodworker's*, 170 F.3d at 991; *accord* Pet. App. 37a-38a. The Tenth Circuit defines the principal ERISA parties as "the employer, the plan, the beneficiaries, and the fiduciaries"; notwithstanding that the employer is the entity bringing the state-law claim, it is dispositive for the Tenth Circuit that the insurer on the other side of the controversy is, in its "pre-plan status," "an outside party" (even if it might "later" become a fiduciary). *Woodworker's*, 170 F.3d at 991. For its part, the Ninth Circuit says the principal ERISA entities can include "a fiduciary and a party in interest," but it sees state-law employer claims against insurers regarding pre-plan representations as not concerning these parties' activities "while . . . operating" as a fiduciary (in the case of the employer) or a service-provider (in the case of the insurer). Pet. App. 38a. Both Circuits, in this context and others, have made it a key test for ERISA preemption of state-law claims that the allegations "affect[] the relations between ERISA entities, as such." *Woodworker's*, 170 F.3d at 991; *accord* Pet. App. 37a-38a.

On the other hand, several other Circuits – the Fifth, Sixth, Eleventh, and arguably the Eighth – have held that ERISA *does* preempt an employer's state-law claims that an insurer's misrepresentations induced establishment of an ERISA plan. The relevant Fifth

Circuit decision is *Reliable Home Health Care, Inc. v. Union Central Insurance Co.*, 295 F.3d 505 (5th Cir. 2002). There, an employer (Reliable) sued under state law an agent of an insurer, alleging that he "fraudulently induced Reliable to pay premiums to [the insurer] based on Reliable's belief, caused by [the agent], that [the insurer] had expertise in the executive benefit market which was false." *Id.* at 515. Finding the state-law claims to be preempted under ERISA's express preemption provision, the Fifth Circuit said: "The claims concern the creation, operation, and subsequent failure of the Plan and are therefore directly 'related to' the Plan making it subject to preemption." *Id.*

Likewise, the Sixth Circuit in *Lion's Volunteer Blind Industries, Inc. v. Automated Group Administration, Inc.*, 195 F.3d 803 (6th Cir. 1999), held that ERISA preempted an employer's "state law misrepresentation claim" against insurers of its "employee group health insurance." *Id.* at 805. More specifically, the employer alleged that the insurers had "solicited" the employer to "change" from its existing plan to one that they offered, based on false "assurances" by the insurers that "all employees and dependents covered under the [former] plan would be equally covered under the [new] plan." *Id.* The Sixth Circuit said that the "state law claim is sufficiently 'related to' the subject matter regulated by ERISA to be preempted"; it highlighted that the claim "would require proof of the existence of the ERISA plan." *Id.* at 809 (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990)). The Sixth Circuit expressly rejected a rule that would "prohibit[] preemption 'because the misrepresentation claim by plaintiffs [. . .] took place before the plan

came into existence.'" *Id.* at 807-08 (second alteration in original) (quoting lower court's ruling).

The Eleventh Circuit ruled similarly in *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207 (11th Cir. 1999). There, an employer known as "Simply Fashion" provided its employees with, among other ERISA benefits, a life-insurance plan. Simply Fashion switched group life insurance policies and insurers, based on representations that the new insurer "would provide Simply Fashion a replacement policy at the same premium as the prior insurer" and with an additional "portability feature." *Id.* at 1210. When an employee later was denied benefits in circumstances under which Simply Fashion apparently assumed there was coverage, Simply Fashion (along with the beneficiary) sued the insurer under state law, including for "fraud" and "fraud in the inducement." *Id.* at 1211. The Eleventh Circuit held that these claims were "[d]efensively preempt[ed]." *Id.* at 1215. It stated: "It has long been settled that claims such as Simply Fashion's 'relate to' an ERISA plan." *Id.* (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47-48 (1987), for the proposition that "state-law bad faith, breach of contract, and fraud claims are all preempted under [29 U.S.C.] § 1144(a)"). Like the Sixth Circuit, the Eleventh Circuit refused to find relevant that "the complaint alleges pre-policy fraud," "doubt[ing]" that ERISA preemption "can be so cleanly switched on and off." *Id.* at 1213 n.3.

To be sure, the situation in the Eleventh Circuit gets more complicated, because the Circuit has nevertheless rejected *complete preemption* of employer misrepresentation claims against insurers. *See id.* at 1212 ("The claims in this complaint that are not su-

perpreempted are those brought by Simply Fashion."); *cf. Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1290 (11th Cir. 2005) (rejecting complete preemption of participant's state-law misrepresentation claim against insurer). However, complete preemption allows for the removal of state-law claims to federal court, and – as a jurisdictional concept – is narrower than defensive preemption that simply provides "an affirmative defense to certain state-law claims." *Butero*, 174 F.3d at 1212. The Ninth Circuit below addressed solely defensive preemption, and therefore it is *Butero*'s holding on defensive preemption that matters and that enlarges the Circuit split on the Question Presented.[3]

Finally, the relevant decisions in the Eighth Circuit are mixed. In *Consolidated Beef Industries, Inc. v. New York Life Insurance Co.*, 949 F.2d 960 (8th Cir. 1991), the Eighth Circuit – albeit in dictum – stated that an employer's state-law claims involving "misrepresentation in [an insurer's] sale of [a] § 401(k) program . . . relate to the employee benefit plan" and, therefore, are subject to preemption, notwithstanding the employer's assertion that the claims "arose pre-

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[3] In its decision below, the Ninth Circuit misread the Eleventh Circuit's *Cotton* decision, saying the decision "find[s] no conflict preemption where the plaintiffs sought 'damages based on fraud in the sale of insurance policies.'" Pet. App. 40a (quoting *Cotton*, 402 F.3d at 1290). In reality, the decision deals solely with *complete* preemption, not "conflict" – or any other form of – ERISA preemption that supports dismissal of a state-law claim based on a preemption defense. This Court has recognized the difference between, and has established different elements for, complete preemption under ERISA and the preemption defense that a claim conflicts with ERISA's enforcement scheme. *See infra* p. 30.

plan." *Id.* at 964. Then, in *Wilson v. Zoeller*, 114 F.3d 713 (8th Cir. 1997), the Eighth Circuit appeared to disavow the *Consolidated Beef* dictum in a footnote (*see id.* at 721 n.4), but in the context of a participant's claim not directly against the insurer and in a case properly considered a complete-preemption decision wrongly employing defensive-preemption terminology. *See Tovey v. Prudential Ins. Co. of Am.*, 42 F. Supp. 2d 919, 921 n.1 (W.D. Mo. 1999) (noting *Wilson*'s error and respecting its "final determination[]" but not its "analysis"). At this juncture, courts in the Eighth Circuit cite both *Consolidated Beef* and *Wilson* and have implemented a standard whereby state-law misrepresentation claims against insurers will not escape ERISA preemption unless they "concern pre-Plan misconduct unrelated to running the Plan." *Keokuk Area Hosp., Inc. v. Two Rivers Ins. Co.*, 228 F. Supp. 3d 892, 898 (S.D. Iowa 2017).

The Ninth Circuit, in its decision below, did not reference the contrary precedents from other Circuits; rather, it cited *Wilson* and *National Security Systems, Inc. v. Iola*, 700 F.3d 65, 84-85 (3d Cir. 2012), with *Iola* being a decision "collect[ing] cases" holding (and itself finding) that ERISA does not preempt participant misrepresentation claims against *independent insurance agents* who "'induce participation in an ERISA plan.'" Pet. App. 37a (quoting *Iola*, 700 F.3d at 84-85). Independent insurance agents are brokers typically acting as "'agents of the insured, not the insurer.'" *Morstein v. Nat'l Ins. Servs.*, 93 F.3d 715, 717 n.2 (11th Cir. 1996) (*en banc*) (quoting Georgia statute). But the Circuits that have found preemption of employer claims against insurers (as well as against "mere employees of insurance companies") have themselves

distinguished the independent-insurance-agent cases. *Butero*, 174 F.3d at 1213 n.2; *accord Morstein*, 93 F.3d at 723 n.11; *see also Moore v. Apple Cent., LLC*, 893 F.3d 573, 578 (8th Cir. 2018) (describing *Wilson* as involving an "independent insurance agent"); *Hobson v. Robinson*, 75 F. App'x 949, 954 n.9 (5th Cir. 2003) (contrasting independent-insurance-agent cases with *Reliable Home Health*).[4]

In sum, on the issue of whether ERISA preempts an employer's claims asserting insurer misrepresentations that induce the creation of an ERISA plan – *i.e.*, the topic at the heart of this Petition – the Ninth and Tenth Circuits are aligned against preemption, while the Fifth, Sixth, and Eleventh Circuits (and perhaps

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[4] There are sound reasons for distinguishing misrepresentation claims against insurers directly (and their immediate employees) from claims against independent insurance agents. Claims against the latter are more readily divorced from the running of the plan, as independent insurance agents "ha[ve] no control over the payment of benefits or a determination of [a participant's] rights under the plan." *Morstein*, 93 F.3d at 723. Translating the distinction to this case, unlike with a claim against an independent insurance agent (whose relationship with the employer seemingly ends once a plan is created), the alleged misrepresentation perpetrated by Defendants led to Defendants providing benefits Plaintiffs say they did not want and to Defendants supposedly collecting premiums throughout the term of the ERISA plan for purposes other than the provision of medical benefits. *See supra* pp. 2-3. It is also worth noting that the Third Circuit, which had held in *Iola* that a participant's misrepresentation claim against an independent insurance agent was not preempted, has since found a similar claim directly against an insurer to be preempted. *See Menkes v. Prudential Ins. Co. of Am.*, 762 F.3d 285, 294-96 (3d Cir. 2014).

the Eighth) favor preemption. To resolve that conflict, the Court should grant the Petition.

B. The Petition implicates a second conflict among the Circuits – namely, over the extent to which the "reference to" prong of ERISA express-preemption analysis encompasses state laws and claims that do not overtly mention plans governed by ERISA. This same Circuit split is presented by another petition currently pending in this Court (No. 18-540), and, in that case, the Court has requested the views of the Solicitor General. *See Rutledge v. Pharm. Care Mgmt. Ass'n*, 139 S. Ct. 1594 (2019).

The Circuit split regarding the scope of the "reference to" analysis has its lineage in this Court's 1980's and 1990's ERISA preemption jurisprudence. Having established in *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97 (1983), the "reference to" (as well as the "connection with") tests for determining when a state law will "relate to" an ERISA plan under ERISA's preemption provision (29 U.S.C. § 1144(a)), the Court soon thereafter determined that a state law *expressly* mentioning ERISA plans in its text satisfies the "reference to" standard. *See Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 828 (1988) (state law barring "the garnishment of 'funds or benefits of [an] . . . employee benefit plan or program subject to . . . [ERISA]'") (quoting Ga. Code Ann. § 18-4-22.1 (1982)) (alterations in original).

The Court also, at about this time, held – in what has sometimes been called its "implicit reference" jurisprudence (*Pharm. Care Mgmt. Ass'n v. Rutledge*, 891 F.3d 1109, 1112 (8th Cir. 2018)) – that state statutes and causes of action more generic in terms

reference ERISA plans if the statute's or cause of action's operation in the circumstances is "'premised on' the existence of an ERISA-covered pension plan." *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 131 (1992) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990)); *see also FMC Corp v. Holliday*, 498 U.S. 52, 59 (1990). The state law that the Court found to be preempted in *Greater Washington Board of Trade*, for instance, made no express mention of ERISA, but instead mandated a level of health benefits by employers for individuals temporarily on worker's compensation "measured by reference to 'the existing health insurance coverage' provided by the employer." 506 U.S. at 130 (quoting D.C. Code Ann. § 36-307(a-1) (1992)). Thus, both state laws that "are 'specifically designed to affect employee benefit plans,'" *Ingersoll-Rand*, 498 U.S. at 140 (quoting *Mackey*, 486 U.S. at 829), and those that "'indirectly'" regulate ERISA plans can have a reference to ERISA plans. *Greater Wash. Bd. of Trade*, 506 U.S. at 131 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981)).

Then, in 1995, the Court decided *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), where the Court instructed the lower courts to eschew an "uncritical literalism" when construing § 1144(a)'s "relate to" language. *Id.* at 656. The Court followed *Travelers* with *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 519 U.S. 316 (1997). *Dillingham* found that a state law regarding wages under apprenticeship programs did not reference ERISA plans; in so doing, the Court restated the "reference to" prong of the express-preemption analysis

as follows: "Where a State's law acts immediately and exclusively upon ERISA plans, as in *Mackey*, or where the existence of ERISA plans is essential to the law's operation, as in *Greater Washington Bd. of Trade* and *Ingersoll-Rand*, that 'reference' will result in pre-emption." *Id.* at 325.

In the wake of *Travelers* and *Dillingham*, many Circuits have voiced the view that *Travelers* and *Dillingham* narrowed, even "greatly narrowed," the scope of express preemption under ERISA. *Hattem v. Schwarzenegger*, 449 F.3d 423, 430 (2d Cir. 2006); *see Golden Gate Rest. Ass'n v. City & Cty. of S.F.*, 546 F.3d 639, 654 (9th Cir. 2008); *Greenbrier Hotel Corp. v. Unite Here Health*, 719 F. App'x 168, 177-78 (4th Cir. 2018). And it is in instances in which state law may make an *implicit* reference to ERISA plans that lower courts have particularly shown reluctance to find state law to be preempted. Indeed, as delineated in the *Rutledge* petition currently pending in this Court, some Circuits appear to have retreated to an approach whereby, in effect, only state laws or causes of action that make an express reference to ERISA plans (such as in *Mackey*) are candidates for preemption under the "reference to" prong. *See Rutledge v. Pharm. Care Mgmt. Ass'n*, No. 18-540 (U.S.), Pet. for Cert. at 16-21, 25-30 (Oct. 22, 2018); *e.g.*, *Pharm. Care Mgmt. Ass'n v. Dist. of Columbia*, 613 F.3d 179, 189-90 (D.C. Cir. 2010); *Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 303-04 (1st Cir. 2005); *see generally Greenbrier Hotel Corp.*, 719 F. App'x at 177-78, 179 (describing *Travelers* and *Dillingham* as "signal[ling] the abandonment of the criteria for evaluating ERISA preemption used in [earlier] cases" and criticizing

lower court for using "now-defunct pre-*Travelers* preemption analysis").

At the vanguard in winnowing the "reference to" prong is the Ninth Circuit. Post-*Travelers*, in the Ninth Circuit, even a state law expressly mentioning ERISA plans – let alone one implicitly regulating them – might not be preempted. The standard in the Ninth Circuit is that "a statute 'refers to' an ERISA plan and is preempted if it mentions or alludes to ERISA plans, *and* has some effect on the referenced plans." *WSB Elec., Inc. v. Curry*, 88 F.3d 788, 793 (9th Cir. 1996). To that end, a panel in the Ninth Circuit recently held that a Nevada law did not reference ERISA plans, and therefore survived preemption, even though the Nevada law "expressly identif[ies] ERISA plans *and* appl[ies] directly to the trusts that administer them." *Bd. of Trs. of the Glazing Health & Welfare Tr. v. Chambers*, 903 F.3d 829, 853 (9th Cir. 2018). While the Ninth Circuit has now vacated that decision for rehearing *en banc* (*see* 923 F.3d 1162, 1163 (9th Cir. 2019)), suggesting possible reassessment by the Ninth Circuit of its "reference to" jurisprudence, the panel's initial decision reflects the near non-existence of "reference to" ERISA preemption currently within the Circuit.[5]

At the other end of the spectrum is the Eighth Circuit, which recently in *Rutledge* and in *Rutledge*'s predecessor decision, *Pharmaceutical Care Management Ass'n v. Gerhart*, 852 F.3d 722 (8th Cir. 2017),

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[5] In the event the Ninth Circuit decides the *en banc* proceeding in *Chambers* in a way that may affect this Petition, Petitioners will promptly notify the Court of the development.

reinvigorated the implicit reference analysis. Bucking the post-*Travelers* trend, it found to be preempted Iowa and Arkansas laws "govern[ing] the conduct of pharmacy benefits managers ['PBMs']" that provide services to ERISA and non-ERISA plans. *Rutledge*, 891 F.3d at 1111. These laws "implicitly referred to ERISA by regulating the conduct of PBMs administering or managing pharmacy benefits." *Id.* at 1112. The Eighth Circuit specifically rejected the argument that its "'implicit reference' analysis is . . . inconsistent with Supreme Court precedent." *Id.*; *but see Pharm. Care Mgmt. Ass'n v. Tufte*, 326 F. Supp. 3d 873, 884, 883 (D.N.D. 2018) (rejecting *Rutledge* and *Gerhart*'s "'implicit' reference" analysis insofar as it requires preemption of "a general state-law provision broad enough to encompass ERISA plans within its scope").

All of this comes to a head in the area of state-law misrepresentation claims. Under an implicit reference analysis consistent with *Rutledge* and at least the pre-*Travelers* decisions of this Court, one would assume that a state-law cause of action, even if applicable in ERISA and non-ERISA situations alike, implicitly references an ERISA plan when used to sustain liability for inducing the establishment of *an ERISA plan.* Under a traditional fraudulent-inducement cause of action (and, here, one of Plaintiffs' claims was, in fact, styled fraudulent inducement), "[n]o legal effect flows from . . . a fraudulent misrepresentation unless it induces action by the recipient, that is, unless he manifests his assent *to the contract* in reliance on it." Restatement (Second) of Contracts § 164 cmt. c (Am. Law Inst. 1981) (emphasis added). With the contract, in the ERISA situation, being the ERISA plan itself, and assent to the contract being necessary for liability,

it would seem that a state-law claim of this sort inescapably qualifies as a "cause of action [that] makes specific reference to, and indeed is premised on, the existence of [an ERISA] plan." *Ingersoll-Rand*, 498 U.S. at 140.

True to that thinking, some Circuits have invoked what can be characterized as an implicit reference theory to preempt one form or another of state-law misrepresentation claims, and not just pre-*Travelers*. *E.g.*, *Menkes*, 762 F.3d at 295 (where claim asserted that insurer misrepresented scope of a coverage exclusion to induce participation in ERISA plan, claim "involves reference to the war exclusion, which is part of the policy"); *Hall v. Blue Cross/Blue Shield*, 134 F.3d 1063, 1065 (11th Cir. 1998) (rejecting argument that participant's "fraudulent inducement claims are entirely independent of the existence of Blue Cross's plan because she can prove her case in state court without ever referencing the plan's terms and provisions"). Yet, the Ninth Circuit here had "little difficulty" finding that Plaintiffs' state-law claims, which it described as involving misrepresentations inducing Plaintiffs to "agree[] to subscribe *to a plan*," made no "impermissible 'reference to' an ERISA plan." Pet. App. 39a, 37a (emphasis added). Fairly read, and contrary to sister Circuit decisions that robustly construe the implicit reference rubric, the Ninth Circuit's decision deems it insufficient that a state-law cause of action will require proof of the existence of an ERISA plan for the claim's success. *Accord Airparts Co. v. Custom Benefit Servs. of Austin, Inc.*, 28 F.3d 1062, 1065 (10th Cir. 1994) (preemption requires that state-law cause of action "refer specifically to ERISA plans and apply solely to them") (cited in *Woodworker's*, 170

F.3d at 990); *see supra* pp. 10-11 (noting Tenth Circuit's alignment with Ninth Circuit on employer misrepresentation claims against insurers).[6]

At this point, then, there is no unanimity or consistency regarding the implementation of the "reference to" prong, especially the implicit reference standard. Did *Travelers* and *Dillingham* severely limit the reference prohibition? Does implicit reference still exist as a viable preemption theory? If implicit reference remains a viable theory, does a state-law claim impermissibly reference ERISA plans when it alleges wrongdoing in the creation of an ERISA plan? This case offers the Court the opportunity to rectify the Circuits' division on those ERISA preemption issues.

C. The Petition also involves a third area of conflict among the Circuits: whether to apply a presumption against preemption in express-preemption situations. Some Circuits apply a presumption (as the Ninth Circuit did here), others do not. As with the Circuit conflict on the implicit reference standard, a brief review of this Court's relevant jurisprudence is a necessary starting point to illustrate the Circuits' division

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[6] This is not to say that the Ninth Circuit has always spoken with one voice regarding the "reference to" prong, even in misrepresentation situations. In *Wise v. Verizon Commc'ns Inc.*, 600 F.3d 1180 (9th Cir. 2010), the Ninth Circuit found a participant's state-law misrepresentation, fraud, and negligence claims against her employer impermissibly "reference[d] an ERISA plan," because "all depend on the existence of an ERISA-covered plan to demonstrate that Wise suffered damages." *Id.* at 1191. Any incongruity in the Ninth Circuit's case law, being accompanied anyway by a Circuit split, only further amplifies the need for this Court's direction.

on anti-preemption presumptions under express preemption provisions.

In *Travelers*, the Court, unquestionably, adopted a presumption against preemption when applying ERISA's express preemption provision. *See Travelers*, 514 U.S. at 654-55. However, by the mid-2010s, in concurring and dissenting opinions, five Justices had registered dissatisfaction with applying a presumption against preemption in express-preemption cases. *See CTS Corp. v. Waldburger*, 573 U.S. 1, 19-20 (2014) (Scalia, J., concurring, and joined by Roberts, C.J., and Thomas and Alito, J.J.) ("I remain convinced that '[t]he proper rule of construction for express pre-emption provisions is . . . the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning.'") (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 548 (1992) (Scalia, J., concurring in judgment and dissenting in part)); *see also Ariz. v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 21 (2013) (Kennedy, J., concurring).

Then, in *Gobeille v. Liberty Mutual Insurance Co.*, 136 S. Ct. 936, 943 (2016), the Court indicated the fading of the presumption in the ERISA context. In finding the state law in *Gobeille* to be preempted under ERISA's express preemption section, the Court summarized the basic preemption principles at the start of its decision, but there omitted any mention of a presumption against preemption. *See id.* at 943. When the Court did mention a presumption against preemption, it was at the close of its opinion to question the existence of a presumption altogether and to reject the application of a presumption in the circumstances of the case. *See id.* at 946 ("*Any* presumption against

pre-emption, *whatever* its force in other instances, cannot validate a state law that enters a fundamental area of ERISA regulation and thereby counters the federal purpose in the way this state law does.") (emphasis added). Justice Thomas, in a concurrence, criticized the *Travelers* framework and noted that "our interpretation of ERISA's express pre-emption provision has become increasingly difficult to reconcile with our pre-emption jurisprudence." *Id.* at 948 (Thomas, J., concurring).

Ultimately, in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016), the Court came full circle and formally rejected application of a presumption in express-preemption cases, implying, as well, no exception for ERISA cases. There, the Court considered whether Puerto Rico fit the definition of a "State" in the express preemption provision in the Bankruptcy Code, 11 U.S.C. § 903(1). *Puerto Rico*, 136 S. Ct. at 1942. Describing the governing preemption principles, the Court stated:

> The plain text of the Bankruptcy Code begins and ends our analysis. Resolving whether Puerto Rico is a "State" for purposes of the preemption provision begins "with the language of the statute itself," and that "is also where the inquiry should end," for "the statute's language is plain." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989). And because the statute "contains an express pre-emption clause," we do not invoke any presumption against preemption but instead "focus on the plain wording of the clause, which necessarily contains the

> best evidence of Congress' pre-emptive intent." *Chamber of Commerce of United States of America v. Whiting*, 563 U.S. 582, 594, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011) (internal quotation marks omitted); *see also Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. ___, ___, 136 S. Ct. 936, 194 L. Ed. 2d 20 (2016).

Puerto Rico, 136 S. Ct. at 1946. Tellingly, the Court expressly cited *Gobeille* – plainly an ERISA case – to support *Puerto Rico*'s rule that no presumption against preemption obtained.

Notwithstanding *Puerto Rico*'s rejection of a presumption against express preemption – and citation to *Gobeille* in the process – the Ninth Circuit, below, still applied a presumption against preemption under ERISA's preemption provision, though it did give a nod to *Gobeille* and temper the presumption slightly. Pet. App. 37a (saying presumption applies "unless" the state law "amounts to 'a direct regulation of a fundamental ERISA function'") (quoting *Gobeille*, 136 S. Ct. at 946).[7] The Ninth Circuit is not alone, for the Third Circuit too has not read *Puerto Rico* to foreclose a pre-

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[7] The tempering did not assist Defendants, as the Ninth Circuit's decision reflects that it did not think Plaintiffs' state-law claims threatened direct regulation of a fundamental ERISA function. The Ninth Circuit was erroneous in that thinking. Plaintiffs' state-law claims challenge the provision of benefits by Defendants (alleging that the supposed misrepresentations led to the provision of unwanted and unauthorized, and thus *too many*, benefits), the substantive benefit terms of the plan, and the plan's financial relationship with the service-provider that is key to the plan's existence and administration. These are matters at the core of an ERISA plan's operation.

sumption against preemption in express-preemption situations. Rather, in *Lupian v. Joseph Cory Holdings LLC*, 905 F.3d 127, 131 n.5 (3d Cir. 2018), it "determined that, because [the *Puerto Rico*] decision, dealing with a Bankruptcy Code provision, did not address claims involving areas historically regulated by states, we . . . continue to apply the presumption against preemption to express preemption claims."

But three other Circuits, relying on *Puerto Rico*, now "apply no presumption against pre-emption" when "determining the meaning of an express pre-emption provision." *Watson v. Air Methods Corp.*, 870 F.3d 812, 817 (8th Cir. 2017); *accord Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 762 n.1 (4th Cir. 2018); *Eaglemed LLC v. Cox*, 868 F.3d 893, 903 (10th Cir. 2017).

The Circuits, consequently, are "not . . . in full accord" on whether a presumption against preemption exists where a statute contains an express preemption provision, which ERISA does. *Cheatham*, 910 F.3d at 762. The Court should grant the Petition to bring a conclusion to "the great preemption presumption wars." *Id.*[8]

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[8] As on the implicit reference issue, *see supra* p. 23 n.6, there also is inconsistency in the Ninth Circuit on the presumption-against-preemption issue. *See Atay v. Cty. of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) ("'we do not invoke any presumption against preemption'" because "the intent of a statutory provision [*i.e.*, the Plant Protection Act, 7 U.S.C. § 7756(b)] that speaks expressly to the question of preemption is at issue") (quoting *Puerto Rico*, 136 S. Ct. at 1938). Once more, the division within the Circuit, when transmogrified onto the split otherwise existing among the various Circuits, only makes more acute the need for this Court to bring order.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS

Certiorari is warranted because the Ninth Circuit's decision deviates from this Court's precedents. First of all, the Ninth Circuit's decision is contrary to two cases in which this Court found state common-law causes of action preempted by ERISA – namely, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), and *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987). Those decisions emphasize that a generally-applicable state-law cause of action is preempted if, "in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists." *Ingersoll-Rand*, 498 U.S. at 140. In *Pilot Life*, one of the state-law claims was even styled "'Fraud in the Inducement.'" *Pilot Life*, 481 U.S. at 43 (quoting complaint in case).

Breaching *Ingersoll-Rand* and *Pilot Life*, the Ninth Circuit here found Plaintiffs' state-law fraudulent-inducement claim, and other similar claims, to survive ERISA's express preemption provision. It is unavoidable that Plaintiffs, in order to prevail on their claims, have to plead the existence of an ERISA plan, because the only thing that could have been induced was the creation of an ERISA plan. It makes a mockery of ERISA's plain language to reason, as the Ninth Circuit did, that claims alleging a plan to have been born in sin – *i.e.*, through misrepresentations – do not "relate to" the plan. While Defendants are certainly cognizant that § 1144(a)'s key phrase should not be interpreted too literally, *see supra* p. 18, there is no sound reading of "relate to" – or, for that matter, "reference to" or "connection with" – that results in a claim "premised on" the existence of an ERISA plan being unrelated to

the plan. *Ingersoll-Rand*, 498 U.S. at 140. "There simply is *no* cause of action if there is no plan." *Id.*

Next, the Ninth Circuit's decision contravenes *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004). The Court there confirmed that ERISA's enforcement regime, under "ordinary principles of conflict preemption," preempts a state-law claim providing "a separate vehicle . . . outside of, or in addition to, ERISA's remedial scheme" for a grievance within the ERISA's enforcement scheme's ambit. *Id.* at 217-18. Put differently, "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore preempted." *Id.* at 209.

In this case, the Ninth Circuit correctly held (in the first part of its decision) that Plaintiffs' allegations nicely fit the rather complicated ERISA enforcement remedy available to fiduciaries against parties in interest who have participated in a prohibited transaction, with the prohibited transaction being an alleged service-provider contract with unreasonable terms. *See supra* pp. 4-5. The applicability of that remedy should have meant, under *Aetna*, the supersession of Plaintiffs' state-law claims, all of which arose from the same facts and occurrences as the ERISA claim. That is so, despite there being no relief, monetary or otherwise, currently available under "the prohibited interest-party transactions" remedy. Pet. App. 11a; *see Aetna*, 542 U.S. at 214-15; *Pilot Life*, 481 U.S. at 55.

The Ninth Circuit found alternative state-law remedies available by, somehow, viewing the state-law

claims as focused on pre-plan conduct that purportedly was not contested in the ERISA claim. The distinction was manufactured, given that the entire complaint was based on the same set of facts. And the state-law claims cannot avoid displacement by labeling them as being brought in an "employer" capacity before Plaintiffs became ERISA fiduciaries (which occurred upon commencement of the ERISA plans). *See* Pet. App. 40a. *Aetna* speaks of state-law claims being supplanted simply if they are "separate vehicle[s]" outside of ERISA for the same wrong; it does not say that alternative state-law remedies must be identical in content, form, and party status. *Aetna*, 542 U.S. at 217. While that might be necessary for *complete* preemption, to commandeer a plaintiff's state-law case to federal court, it is defensive preemption, again, that is at issue in this case. The Ninth Circuit got mixed up and transferred the requirements for complete preemption (including the independent-legal-duty element, *see id.* at 210; Pet. App. 40a), failing to notice that this Court's defensive-preemption discussion came in a different part of the *Aetna* decision and detailed different standards than the complete-preemption discussion. *Compare* 542 U.S. at 210-14 (complete-preemption discussion) *with id.* at 217 (defensive-preemption discussion).[9]

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[9] Though neither a state-law claim nor relief under the applicable ERISA claim is here available, it would not be right to say that the situation ended up being remedy-less. If Plaintiffs' allegations are assumed to be true, the Montana Insurance Commissioner imposed a fine on CFM for insurance violations. *See supra* p. 3. While Defendants do not concede that the Commissioner would have any jurisdiction to remedy infractions associated with ERISA plans, they will concede that, because of

And finally, the Ninth Circuit's decision conflicts with *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016), where, as noted earlier, the Court rejected application of a presumption against preemption in express-preemption settings. *See supra* pp. 25-26. Not taking "no" for an answer, the Ninth Circuit still applied a presumption against express preemption under ERISA.

III. THE QUESTION PRESENTED IS IMPORTANT

A final reason for the Court to afford review is that the Question Presented is an important one. Resolving the extent to which ERISA preempts an employer's misrepresentation claim against an insurer, when the claim affects the formation of an ERISA plan, is important doctrinally for the development of the law and practically for employers, participants, and insurers associated with ERISA plans.

As a doctrinal matter, ERISA is a "'landmark'" federal statute governing private employers' provision of

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ERISA's insurance savings clause, *see* 29 U.S.C. § 1144(b)(2)(A), substantive state insurance regulations are applicable to their conduct in ERISA situations and can be enforced through ERISA's exclusive remedies. *See UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 376-77 & n.7 (1999). In all events, however, enforcement through alternative, state common-law remedies is forbidden under *Aetna*. *See generally Aetna*, 542 U.S. at 215 (unavailability of relief under ERISA's "limited remedies," accompanied by preemption of state-law remedies, is "an inherent part of the careful balancing between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans") (internal quotation marks and citation omitted).

pension and health benefits for the Nation's workforce. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quoting S. Rep. No. 93-127, at 36 (1973)). In turn, ERISA's preemption provision is the statute's "'crowning achievement,'" intended to "'reserv[e] to Federal authority the sole power to regulate the field of employee benefit plans.'" *Shaw v. Delta Air Lines*, 463 U.S. 85, 99 (1983) (quoting 120 Cong. Rec. 29,197 (1974)). Nevertheless, forty-five years after ERISA's enactment, the lower courts are, respectfully, in disarray regarding the tests for and scope of ERISA preemption. They describe the area in alarming terms – a "morass," a "quagmire," a "veritable Sargasso Sea of obfuscation." *Self-Ins. Inst. of Am., Inc. v. Snyder*, 827 F.3d 549, 553 (6th Cir. 2016) (quagmire); *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 460 (3d Cir. 2003) (Becker, J., concurring) (quagmire); *Rutledge v. Seyfarth, Shaw, Fairweather & Geraldson*, 201 F.3d 1212, 1223 (9th Cir. 2000) (Saragasso Sea remark); *Morstein v. National Ins. Servs.*, 93 F.3d 715, 718 (11th Cir. 1996) (*en banc*) (morass); *Rudel v. Haw. Mgmt. All. Ass'n*, No. 15-539, 2017 U.S. Dist. LEXIS 180132 (D. Haw. Oct. 31, 2017) (morass); *Temple Hosp. Corp. v. Gomez*, No. 2:14-cv-01342, 2014 U.S. Dist. LEXIS 33166, at *8 (C.D. Cal. Mar. 11, 2014) (morass).

Travelers and *Dillingham* – while perhaps intended to bring order to and to re-ground ERISA preemption case law – have, over time, actually created additional uncertainty. The lower courts now divide, as noted, over the extent to which the pre-*Travelers* precedents remain guideposts in the post-*Travelers* era, and the existence of a whole category of ERISA preemption – implicit reference – currently is clouded. And now, with *Travelers*' emphasis on the existence of a pre-

sumption against preemption under ERISA's express preemption provision, but *Franklin*'s recent disavowal of a presumption against preemption in express-preemption situations (presaged in *Gobeille*), a new point of confusion about a basic building block in the preemption analysis has surfaced. Nearly ten years *after* the *Travelers* decision, Judge Becker lamented that determining whether ERISA preempts a particular state law remained a "judicial snipe hunt" in which "we are no closer to success today than we were a decade ago." *DiFelice*, 346 F.3d at 460 (Becker, J., concurring).

In this important area of the law, the Court should intervene to try to settle some of the doctrinal confusion. Moreover, this case particularly offers the Court a chance to get to the heart of many of the dilemmas plaguing the area. In the context of the preemption of state-law misrepresentation claims, not only present are the quandaries regarding the treatment of the Court's older ERISA precedents, the scope of the "reference to" prong, and the presumption against preemption, but also surfacing are queries as to whether a fact pattern's commencement in "pre-plan" events immunizes a state-law claim from preemption, whether preemption depends on the involvement in the case of so-called ERISA entities (and just whom those entities are), and whether ERISA causes of action against service-providers trump state-law claims.

Aside from the doctrinal significance of this case, its proper resolution is of substantial practical importance to employers, ERISA participants, and insurers alike. Nearly 40% of all individuals covered nationally by employer-sponsored health benefit plans

are in *insured* plans (as opposed to ones self-funded by employers).[10] Whether alleged misconduct associated with the creation of those plans is remediable exclusively through federal law or, instead, is subject to state-law remedies has substantial consequences for the contracting parties (*i.e.*, the employer and insurer) and the participants on whose behalf the plan is established: At a minimum, the determination of which legal regime applies contours the employers' and insurers' course of negotiations and the insurers' subsequent plan administration, the parties' disclosures, and the participants' expectations. And ultimately, preemption is a two-edged sword, as, absent preemption of claims associated with pre-plan representations, an insurer too should have state-law remedies against employers (and even participants) whose representations falsely induce the insurance relationship. Accordingly, hanging in the balance here is the scope and uniformity of remedies for each of the professed ERISA entities.[11]

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[10] *See* Henry J. Kaiser Family Foundation, *2018 Employer Health Benefits Survey* § 10 (Oct. 3, 2018), https://www.kff.org/report-section/2018-employer-health-benefits-survey-section-10-plan-funding.

[11] If the Court is not inclined to grant the Petition immediately, it may wish to hold the Petition until resolution of the petition in *Rutledge v. Pharmaceutical Care Management Ass'n*, No. 18-540, which also involves ERISA preemption. *See supra* pp. 17, 19.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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