

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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LESLIE RUTLEDGE, ATTORNEY GENERAL )  
OF ARKANSAS, )  
  Petitioner, )  
  v. ) No. 18-540  
PHARMACEUTICAL CARE MANAGEMENT )  
ASSOCIATION, )  
  Respondent. )  
- - - - -

Pages: 1 through 71  
Place: Washington, D.C.  
Date: October 6, 2020

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3   LESLIE RUTLEDGE, ATTORNEY GENERAL   )  
4   OF ARKANSAS,                            )  
5                                    Petitioner,                    )  
6                                    v.                                ) No. 18-540  
7   PHARMACEUTICAL CARE MANAGEMENT    )  
8   ASSOCIATION,                            )  
9                                    Respondent.                    )  
10   - - - - -  
11                                    Washington, D.C.  
12                                    Tuesday, October 6, 2020  
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14                                    The above-entitled matter came on for  
15   oral argument before the Supreme Court of the  
16   United States at 10:00 a.m.  
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1 APPEARANCES:  
2  
3 NICHOLAS J. BRONNI, Solicitor General,  
4 Little Rock, Arkansas;  
5 on behalf of the Petitioner.  
6 FREDERICK LIU, Assistant to the Solicitor General,  
7 Department of Justice, Washington, D.C.;  
8 for the United States, as amicus curiae,  
9 supporting the Petitioner.  
10 SETH P. WAXMAN, ESQUIRE, Washington, D.C.;  
11 on behalf of the Respondent.  
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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 18-540,  
5 Rutledge versus Pharmaceutical Care Management  
6 Association.

7 General Bronni.

8 ORAL ARGUMENT OF NICHOLAS J. BRONNI

9 ON BEHALF OF THE PETITIONER

10 MR. BRONNI: Thank you, Mr. Chief  
11 Justice, and may it please the Court:

12 Pharmacy Benefit Managers are drug  
13 middlemen that reimburse pharmacists for the  
14 cost of prescription drugs. Those  
15 reimbursements are frequently below a  
16 pharmacist's cost. That drives pharmacists out  
17 of business, and it has left many communities  
18 without a pharmacist.

19 Act 900 responded to that practice by  
20 regulating what PBMs pay pharmacists. That  
21 response isn't preempted for three reasons. It  
22 doesn't regulate benefits, it doesn't regulate  
23 plan administration, and it doesn't regulate --  
24 or discriminate against ERISA entities.

25 First, Act 900 does not regulate

1 benefits. Instead, it regulates the price of  
2 drugs that a plan has already decided to cover.  
3 That's rate regulation, and under Travelers,  
4 that's not preempted, and that's because cost  
5 differences don't force plans to behave  
6 differently in different states and thus don't  
7 interfere with uniform administration.

8           Second, ERISA doesn't preempt laws  
9 that implement or enforce rate regulation.  
10 Indeed, absent enforcement, there's no  
11 regulation. And Respondent doesn't dispute that  
12 Act 900's enforcement mechanisms implement  
13 Arkansas's rate regulation. Nor, for that  
14 matter, do those mechanisms regulate plan  
15 administration. Rather, they regulate PBM  
16 reimbursement practices, and plans don't control  
17 those practices. Instead, those practices are  
18 governed by PBM pharmacy contracts that aren't  
19 even shared with plans. And it therefore defies  
20 common sense to suggest that Act 900 regulates  
21 plan administration. There is no "connection  
22 with" problem.

23           Third, Act 900 does not refer to  
24 ERISA. Under Dillingham, only laws that treat  
25 ERISA plans differently contain a prohibited

1 reference and are preempted. Respondent doesn't  
2 even attempt to argue that's true here. Nor  
3 could it, since Act 900 applies to PBMs that  
4 work for both ERISA and non-ERISA entities.

5 This Court should reverse the judgment  
6 below.

7 CHIEF JUSTICE ROBERTS: Counsel, your  
8 basic point, it seems to me, is that the law  
9 regulates drug prices. That's certainly the --  
10 the purpose of it. But it doesn't say anything  
11 about drug prices. Instead, it talks about what  
12 plans have to pay for benefits, the methodology  
13 of determining the amount to be paid, the timing  
14 and procedures for updating payment schedules,  
15 the dispute resolution processes, remedies. It  
16 has things like the authorizing, declining to  
17 dispense.

18 I -- I mean, at the end of the day,  
19 all this might have an impact on drug prices,  
20 but it seems to me that it's very different, and  
21 those differences really do go to what ERISA is  
22 trying to regulate.

23 MR. BRONNI: Well, Your Honor, I -- I  
24 think, at the end of the day, the one thing that  
25 affects plans and, in fact, the only way in

1 which the -- our law actually affects plans is  
2 it might alter the -- what plans ultimately pay.

3 Our law does not apply directly to  
4 plans. Our law is directed at PBMs and -- and  
5 what PBMs pay pharmacies. So, in -- in that  
6 sense, the only effect on a plan or the only  
7 effect that a plan might see might be the  
8 possibility that, at the end of the day, it  
9 might pay a little bit more, but that's the same  
10 thing that was true in Travelers.

11 In Travelers, when New York regulated  
12 what commercial insurers were paying hospitals  
13 with the surcharges, this Court acknowledged  
14 that -- that the odds were that those surcharges  
15 would be passed on to the plans, and that might  
16 affect how the -- the -- the benefits packages  
17 that the plans might choose to offer, it might  
18 influence their choice of administrator, but  
19 what the -- the Court emphasized is, at the end  
20 of the day, that that's just cost and it might  
21 influence shopping decisions, but, ultimately,  
22 what's important is it's not dictating  
23 substantive plan decision-making.

24 And the same thing is true here. We  
25 haven't dictated how plans resolve anything. We



1 haven't dictated plan decision-making about what  
2 to provide or how to provide it or anything like  
3 that.

4 All of the mechanisms that Your Honor  
5 referred to really are mechanisms that are --  
6 are PBM mechanisms. The plans don't have any  
7 insight into any of that stuff. And -- and,  
8 again, from a plan's perspective, the only  
9 impact would be on prices, just like as -- as  
10 was true in Travelers.

11 CHIEF JUSTICE ROBERTS: Thank you,  
12 counsel.

13 Justice Thomas.

14 JUSTICE THOMAS: Following up on the  
15 Chief Justice's question, it seems that if  
16 the -- the pharmacy wins its appeal, that it has  
17 to rebill. And that seems that there's -- then  
18 it determines when the copay is -- determination  
19 is made final.

20 So that seems to be something, the  
21 copay determination, that you would normally  
22 expect the plan to -- to decide. So isn't that  
23 something central to the plan?

24 MR. BRONNI: So, Your Honor, it -- it  
25 actually doesn't affect things like copay. And,

1 in fact, copay would be a flat fee, for  
2 instance, that the -- the beneficiary would pay.  
3 And the only adjustment that's made as a result  
4 of their reimbursement appeal, which, by the  
5 way, happens now, the only adjustment that's  
6 made as a result of that would be the adjustment  
7 of what the PBM owes the pharmacy.

8 I don't disagree, Your Honor, that in  
9 a small number of cases, there might be some  
10 downstream impact on what the beneficiary owes.  
11 In a copay situation that -- which is 81 percent  
12 of situations, that's not true because the copay  
13 is a flat fee and that's never going to change.

14 But, in those cases where we're  
15 talking about something like a high deductible  
16 plan or a -- a coinsurance plan, there might be  
17 an effect downstream on the dollar amount the  
18 beneficiary pays, but what's important from an  
19 ERISA perspective is that what the plan promised  
20 the beneficiary, which is the -- the applicable  
21 rate of coverage, which is the -- the  
22 coinsurance rate or you will get your drug minus  
23 this copayment, none of -- none of that changes.

24 Act 900 doesn't impact any of that.  
25 And that really underscores that -- that we

1 haven't regulated central plan administration.  
2 The same thing would be true, frankly, today.  
3 Drug prices float up and down. They represent  
4 that they are continuously adjusting the MAC  
5 list every day to reflect market prices.

6 So that means that -- that today a  
7 beneficiary who's under, let's say, a  
8 coinsurance plan might pay one price for a drug  
9 at the counter and might pay something else the  
10 next day just because the price has changed it,  
11 but it doesn't mean that -- that the benefit has  
12 changed because the benefit is -- is not the MAC  
13 price. The benefit is what the plan ultimately  
14 promises.

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Breyer.

18 JUSTICE BREYER: In a state where  
19 every plan that pays for health is an ERISA  
20 plan, suppose the state passes a law like 900,  
21 or, simply, more simply, passes a law that says  
22 all insurance plans must pay druggists at least  
23 X or no -- or no insurance plan can pay more  
24 than Y or something like that, regulating the  
25 price that they're going to have to pay the

1 plan.

2 State A, all the plans and only the  
3 plans are ERISA plans. State B, none of the  
4 plans are ERISA plans. And State C is Arkansas,  
5 where I don't know what the percentages are, but  
6 you can tell me. Does that matter?

7 MR. BRONNI: It -- it -- it doesn't,  
8 Your Honor, because what Arkansas's law actually  
9 regulates here is -- is the price that the PBM  
10 play -- pays the pharmacy. And because what  
11 we're not talking about here is -- it's not a  
12 matter of central plan administration, as this  
13 Court explained in Travelers, the amount that a  
14 service provider is paid, it really doesn't  
15 matter at the end of the day whether the -- the  
16 law applied to PBMs that -- in other words, it  
17 doesn't matter what the scenario is.

18 JUSTICE BREYER: Okay. Well, imagine  
19 what the law says in State A, where every  
20 insurance plan is an ERISA plan. Every ERISA  
21 plan in this state must pay a druggist for  
22 aspirin no more -- no less than \$3.20.

23 Preempted?

24 MR. BRONNI: Again, Your Honor,  
25 because it's regulated --

1 JUSTICE BREYER: Because every ERISA  
2 plan must do that, and that's what they're in.

3 MR. BRONNI: Well, I -- if it  
4 specifically refers to ERISA plans, then --

5 JUSTICE BREYER: No, it doesn't. It  
6 just says a plan of Type A, which all happen to  
7 be ERISA plans.

8 MR. BRONNI: I -- it -- I guess it  
9 would depend on the scenario, but if it -- if --  
10 if it were exclusively an application to ERISA  
11 plans as a result of they're the only ones who  
12 set the definition, then, Your Honor, we would  
13 potentially have a -- a reference to problem,  
14 but, again, that -- that's not the issue here  
15 because our law doesn't apply exclusively to  
16 ERISA plans, as --

17 JUSTICE BREYER: And what's --

18 MR. BRONNI: -- what I think Your  
19 Honor's --

20 JUSTICE BREYER: -- the percentage?

21 MR. BRONNI: I -- so I'm not -- the --  
22 the record doesn't reflect what the percentage  
23 is that's backed ultimately by an ERISA plan,  
24 but I -- we do know that it's not all of them.  
25 In fact, PCMA brought a Medicare Part D claim

1 and was able to prevail on that claim in the  
2 Eighth Circuit, which would underscore that  
3 they're not all -- all ERISA plans.

4 Also, there are people who -- who  
5 purchase commercial insurance on the ACA  
6 exchange in Arkansas, and, obviously, a PBM that  
7 works for a commercial insurer that was  
8 purchased under the ACA exchange would also be  
9 covered by our law.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Justice Alito?

13 JUSTICE ALITO: What we have to do in  
14 this case is to interpret and apply a federal  
15 statute, and what that statute says is that it  
16 preempts "any and all state laws insofar as they  
17 may relate to any employee benefit plan covered  
18 by ERISA."

19 Today, when we interpret statutes,  
20 what we generally do is to ask what they would  
21 have been under -- what -- what the language  
22 would have been understood to mean at the time  
23 of enactment, and we have moved away from  
24 interpreting statutes in light of the purposes  
25 that they are thought to serve.

1           So, if we were to take that approach  
2 here, wouldn't that lead to the conclusion that  
3 -- that this law is preempted?

4           MR. BRONNI: No, Your Honor, because,  
5 when Congress used the phrase "relate to," it  
6 could not possibly have meant anything and  
7 everything that possibly relates in some sense  
8 to an ERISA plan.

9           I think, as Justice Scalia famously  
10 explained, joined by Justice Ginsburg, that as  
11 every curbstone philosopher knows, everything is  
12 ultimately related to something -- to everything  
13 else. And that -- that really means there would  
14 be no limiting principle, and that would present  
15 serious constitutional concerns.

16           So I think, given that, what this  
17 Court has historically done when it's had  
18 language like -- that's as broad as that that  
19 would present problems or as broad as it is  
20 here, it looks to the overall structure of the  
21 statute, so the overall purposes of ERISA, what  
22 is ERISA concerned with, what does it  
23 specifically address, and what do we know were  
24 Congress's goal based on -- goals based on the  
25 statute.

1 JUSTICE ALITO: Well, that is --

2 MR. BRONNI: But, here --

3 JUSTICE ALITO: -- an interpretation.

4 That is the purpose of interpretation. And  
5 maybe we don't have an alternative, but, if we  
6 follow our -- the -- the way we generally  
7 interpret statutes in this case, you would be in  
8 a lot of trouble, wouldn't you?

9 MR. BRONNI: I don't think so, Your  
10 Honor, because I think, ultimately, at the end  
11 of the day, that -- that you have to interpret  
12 that -- that language in light of the remainder  
13 of ERISA and what ERISA actually is concerned  
14 with, which is the plan beneficiary relationship  
15 and -- and the things that are specifically  
16 listed in ERISA that are designed to ensure  
17 benefits are more secure, and Act 900 in no way  
18 regulates the plan beneficiary relationship.

19 JUSTICE ALITO: Thank you, counsel.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Sotomayor?

22 JUSTICE SOTOMAYOR: Counsel, I want to  
23 follow up a little bit on Justice Breyer's  
24 question.

25 What I am interested in is a -- a



1 different scenario than this law, but, if we --  
2 if we rule in your favor, I'm not sure what the  
3 distinguishing factor might be between this law  
4 and -- between your law and the hypothetical I'm  
5 going to pose.

6 Let's say a state decides we're going  
7 to have three tiers of drug -- of drugs. For  
8 Tier A, the plans -- everybody's going to pay --  
9 all PBMs are going to pay \$100; for Tier B  
10 drugs, \$200; and for Tier C drugs, \$1,000.

11 And let's say a plan -- or let's say  
12 just about every plan decides that the price of  
13 Tier C drugs was so high that the plan simply  
14 could not afford to provide those drugs to its  
15 participants.

16 That is affecting the beneficiaries  
17 and what they get. And it's affecting, at least  
18 for those who -- who are not on fixed co-pays  
19 but on percentage co-pays, your fixed ones, I'm  
20 assuming is when you pay 5, 10, 15, or \$20 for  
21 each drug, as opposed to one that says, we'll  
22 pay 80 percent and you pay 20.

23 Beneficiaries are being directly  
24 affected and plans are being affected quite  
25 directly because they're being locked out of --

1 of any market whatsoever for a cheaper drug.

2 Why wouldn't that second scenario be  
3 preempted?

4 MR. BRONNI: As a broad principle, the  
5 same rule generally would apply, which is that  
6 -- that costs mere -- merely influence the  
7 decision, and that's not sufficient for  
8 preemption.

9 But what I would add is the honor --  
10 the -- the scenario I think Your Honor is posing  
11 would be addressable under what Travelers said,  
12 that if you had a rate regulation that it was,  
13 in fact, so onerous that it dictated substantive  
14 plan decision-making, sort of the scenario Your  
15 Honor has posed where it's \$1,000 for a drug, if  
16 it's true that that's, in fact, so onerous that  
17 it's dictating the terms of the substantive  
18 decision-making of the plan, who's a  
19 beneficiary, what's covered, it's that kind of  
20 -- of law, then that could be preempted under  
21 Travelers. Travelers left open that possibility  
22 to ensure things like that didn't happen.

23 But that's not this case. This case,  
24 obviously, they haven't made an argument that --  
25 that our drug regulation is so onerous that it

1 would dictate their substantive decision-making.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Kagan.

5 JUSTICE KAGAN: General, I had  
6 understood the argument in your briefs to extend  
7 further than the SG's argument. The SG spends a  
8 good deal of time talking about the distinction  
9 between regulating PBMs and regulating plans.  
10 So, if the plan managed prescription drug  
11 benefits itself, the SG says that would be a  
12 different question and we shouldn't reach that  
13 question.

14 I had thought that your argument  
15 really made that distinction irrelevant, but,  
16 when you spoke -- when you answered the Chief's  
17 question, you said, well, our law is directed to  
18 PBMs, not plans.

19 So I guess what I want to ask you is,  
20 were we to rule in your favor, should we write  
21 an opinion that really makes that critical, or  
22 should we write an opinion that -- that makes it  
23 essentially irrelevant?

24 MR. BRONNI: I think the easier  
25 approach, Your Honor, and the -- the way I

1 answered -- or I think the easier approach would  
2 -- would essentially be that this case is -- is  
3 basically Travelers, because, in Travelers, it  
4 was the commercial insurers that were being  
5 charged the surcharges, and the way the Court  
6 analyzed it was to say that -- that the only  
7 potential impact on the plans was that it might  
8 potentially be passed along to the plans and  
9 that might influence decisions.

10           That same framework applies here  
11 because we're -- we're -- the rate regulation  
12 applies to the PBM paying the pharmacy and it's  
13 possible that the plans not require it, but it's  
14 possible the plans might choose to or the PBMs  
15 might choose to pass that on to the plans. So I  
16 think the Court could resolve this case entirely  
17 on that basis.

18           My -- my point, however, was that, at  
19 the end of the day, it -- I guess it really  
20 doesn't -- it wouldn't make a substantive  
21 difference in a lot of cases. It's just that  
22 this one -- it illustrates the point that this  
23 case looks exactly like Travelers.

24           JUSTICE KAGAN: Thank -- thank you,  
25 General.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Gorsuch.

3 JUSTICE GORSUCH: Counsel, your  
4 friends on the other side are going to argue  
5 that this is -- this case is less like Travelers  
6 than it is like, I -- I -- I think you pronounce  
7 it Gobeille, but you can tell me, where Vermont  
8 tried to regulate reporting requirements for all  
9 kinds of healthcare plans, including ERISA  
10 plans, and that it just incidentally affected  
11 ERISA plans.

12 Of course, we held that -- that  
13 preempted there, and -- and counsel's going to  
14 get up and tell us that this is exactly like  
15 that -- that case or very close to it because it  
16 affects drug prices all healthcare plans have to  
17 pay.

18 Would you care to respond to that now?

19 MR. BRONNI: Sure, Your Honor. I --  
20 this case is -- is very different from -- from  
21 Gobeille. And I -- I think the -- the -- the  
22 critical difference is that Gobeille ultimately  
23 was about a statute that regulated a fundamental  
24 ERISA function. I think the language this Court  
25 used was that it was a direct regulation of a

1 fundamental ERISA function, which is  
2 recordkeeping and reporting that's specifically  
3 listed and detailed in ERISA and the Department  
4 of Labor has additional power to -- to issue  
5 additional regulations under.

6 And because that was a specific ERISA  
7 function that's specifically listed in ERISA,  
8 what this Court said is that Congress couldn't  
9 regulate it --

10 JUSTICE GORSUCH: I guess my  
11 question --

12 MR. BRONNI: -- or that you -- that  
13 they couldn't regulate it.

14 JUSTICE GORSUCH: -- I guess my  
15 question, counsel, is if -- if reporting relates  
16 to health plans, why wouldn't the payment for --  
17 for drugs? That would seem to be one of the  
18 central functions of a healthcare plan.

19 MR. BRONNI: I would agree with that,  
20 Your Honor, but I think the difference is that  
21 -- that in Gobeille, Congress specifically spoke  
22 and imposed specific requirements for reporting  
23 and recordkeeping. There are -- are no ERISA  
24 provisions that govern a dispute between what a  
25 -- a -- a third-party administrator pays a -- a

1 service provider or even what a plan would pay a  
2 service provider.

3           Instead, those things are generally  
4 left to the states to regulate. And, in fact,  
5 the PBM-pharmacy contract, for instance, those  
6 are ordinary state law contracts that are  
7 ordinarily subject to -- to state law  
8 enforcement mechanisms. If there was a dispute  
9 under that --

10           JUSTICE GORSUCH: Thank you -- thank  
11 you, counsel.

12           CHIEF JUSTICE ROBERTS: Justice  
13 Kavanaugh.

14           JUSTICE KAVANAUGH: Thank you, Chief  
15 Justice.

16           And good morning, General Bronni.

17           Picking up on questions Justice Alito  
18 and Justice Sotomayor asked, the other side  
19 argues that Act 900 will have a clear negative  
20 effect on plan beneficiaries who are Arkansas  
21 workers and that, if so, it must relate to ERISA  
22 plans.

23           Do you agree or disagree with the  
24 premise that this will have an effect on plan  
25 beneficiaries?

1                   MR. BRONNI: I disagree with that,  
2 Your Honor.

3                   JUSTICE KAVANAUGH: And can you  
4 explain that?

5                   MR. BRONNI: So there -- ultimately,  
6 what we've regulated is, again, the price the  
7 PBM pays the pharmacy. And what we're talking  
8 about in -- that's being regulated there really  
9 is -- is the margin. We are requiring, I guess  
10 you could say, PBMs to reallocate some of that  
11 margin back to -- to local pharmacies in order  
12 to ensure that they can remain in business and  
13 so that small-town, independent rural pharmacies  
14 across our state, people in those communities  
15 retain access to pharmacies, because, when a  
16 small-town pharmacy closes in Hampton or  
17 Gillette, Arkansas, it might be 30 miles to get  
18 a drug, it might be 30 miles to get an  
19 immunization. So we're -- we're protecting  
20 those individuals in those communities.

21                   But I -- I also think that the  
22 decision by the PBM, there's -- there's no  
23 requirement that the PBM pass on any cost  
24 increases that might come along with that to the  
25 plan. That's entirely up to the PBM's business



1 decision. It can decide not to pass those  
2 along, and if -- if their representation below  
3 that they compete competitively based on price  
4 is true, then it may be true that some PBMs  
5 choose to pass on those costs, some do not.

6 But, ultimately, that's up to the  
7 PBMs. That's not a product of anything that  
8 Arkansas has done. And it might influence plan  
9 decision-making, but -- but you can't guarantee  
10 that that's going to be the case any more than  
11 that was the case in Travelers.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: Counsel, why  
14 don't you take a minute to wrap up.

15 MR. BRONNI: Thank you, Mr. Chief  
16 Justice.

17 At the end of the day, ERISA doesn't  
18 preempt state rate regulation, and Act 900 is  
19 state rate regulation. Indeed, to put an even  
20 finer point on it, this case is Travelers.

21 All the provisions at issue here  
22 regulate rates or, at a minimum, they all  
23 implement or enforce Arkansas's rate regulation.  
24 And Respondent doesn't dispute that. And to the  
25 extent that Respondent relies on the complexity

1 of the PBM pharmacy reimbursement process, that  
2 also doesn't change the analysis.

3 Indeed, to the extent that process is  
4 complex, it's not a result of Arkansas's rate  
5 regulation but how PBMs have chosen to structure  
6 the market. It's the PBMs that developed the  
7 system that uses continuously updated MAC lists  
8 and reimbursement appeals to set prices.

9 And all that Arkansas has done is  
10 impose a rate regulatory rule of decision on top  
11 of the system that the PBMs themselves designed.  
12 And for the same reason that New York's rate  
13 regulatory rule of decision wasn't preempted in  
14 Travelers, Arkansas's isn't preempted here.

15 Thank you, Mr. Chief Justice.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Mr. Liu.

19 ORAL ARGUMENT OF FREDERICK LIU  
20 FOR THE UNITED STATES, AS AMICUS CURIAE,  
21 SUPPORTING THE PETITIONER

22 MR. LIU: Mr. Chief Justice, and may  
23 it please the Court:

24 The key question in this case is  
25 whether the Arkansas law directly regulates a

1 central matter of plan administration. If it  
2 does, then the law has an impermissible  
3 connection with ERISA plans. If it does not,  
4 then there is no impermissible connection and no  
5 ERISA preemption.

6 Here, the Arkansas law directly  
7 regulates the relationship between PBMs and  
8 pharmacies, namely, the PBMs' method of  
9 reimbursing pharmacies for prescription drugs.

10 So the question becomes, is pharmacy  
11 reimbursement a central matter of plan  
12 administration? The answer is no. From the  
13 plan's perspective, pharmacy reimbursement is  
14 simply a matter of cost.

15 And as this Court's decisions in  
16 Travelers and De Buono make clear, cost isn't a  
17 central matter of plan administration. Indeed,  
18 in Travelers, this Court upheld a state law that  
19 regulated the method for reimbursing hospitals.  
20 The state law here, which regulates the method  
21 for reimbursing pharmacies, can't be  
22 distinguished. The court of appeals' judgment  
23 should therefore be reversed.

24 CHIEF JUSTICE ROBERTS: Counsel, I --  
25 I want to focus -- I think it's on the same

1 question that Justice Kagan asked your -- your  
2 friend. Much of your brief focuses on the fact  
3 that the regulation here is directed to a third  
4 party rather than a plan. And then, at the very  
5 end, I think you say, well, it doesn't really  
6 make that much of a difference.

7 So is your approach focusing on who is  
8 being regulated or what is being regulated?

9 MR. LIU: It is focused on what is  
10 being regulated. As I said at the outset, our  
11 test is, does the state law directly regulate a  
12 central matter of plan administration?

13 Now you're right, Mr. Chief Justice,  
14 that we devoted a portion of our brief to  
15 refuting what we understood to be Respondent's  
16 only way of distinguishing Travelers, which was  
17 to say that the law in Travelers fell on  
18 insurers and not plans themselves, whereas the  
19 law here does.

20 And our response to that argument was  
21 twofold: first, to say that that's just a  
22 misreading of the state law here, it doesn't  
23 apply directly to plans, but, more importantly,  
24 secondly, that even if it did, it wouldn't  
25 matter because, at the end of the day, pharmacy

1 reimbursement just isn't a central matter of  
2 plan administration.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas.

6 JUSTICE THOMAS: Chief, I have no  
7 questions. He addressed my concerns.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Breyer.

10 JUSTICE BREYER: Same. I have no  
11 addition. Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Alito.

13 JUSTICE ALITO: Justices Scalia and  
14 Ginsburg suggested that it would be preferable  
15 if we reformulated our cases -- our  
16 jurisprudence on ERISA preemption and asked  
17 whether a state law occupy -- fell within the --  
18 a -- the field that ERISA preempts.

19 Do you recommend that we take that  
20 approach? Would it work?

21 MR. LIU: I think it would work,  
22 Justice Alito. We would be -- we have no  
23 objection at all if the Court took a more  
24 text-based approach to ERISA preemption.

25 If you look at page 1A of the

1 statutory appendix of the blue brief, you'll see  
2 the text of the preemption provision. And I  
3 think the key language here is actually not  
4 "relates to." If you look at the text, it says:  
5 "The provisions of this subchapter and  
6 subchapter 3 shall supersede any and all state  
7 laws insofar as they may now or hereafter relate  
8 to any employment benefit plan."

9           The operative language is actually  
10 what comes before the "supersede," "the  
11 provisions of this subchapter and subchapter 3  
12 shall supersede."

13           The "relates to" language, I think,  
14 just makes clear that when a law falls within  
15 the field described by the -- the language  
16 before "supersede," you don't strike down the  
17 entire law, but, rather, you strike it down only  
18 as applied, in other words, as it relates to any  
19 ERISA benefit plan --

20           JUSTICE ALITO: And how would you --

21           MR. LIU: -- not that you --

22           JUSTICE ALITO: -- how would you  
23 define the field?

24           MR. LIU: The field would be defined  
25 by the text of the preemption clause. So the

1 provisions of this subchapter and subchapter 3.  
2 That's the field the text marks out.

3           And I think, tellingly, there's really  
4 no way Respondent can prevail under that text  
5 because there's no provision in this subchapter  
6 or subchapter 3 that speaks to pharmacy  
7 reimbursement rates.

8           This is -- is a huge contrast with the  
9 Gobeille case, where there's an entire part of  
10 the ERISA statute that addresses the reporting  
11 and disclosure of plan information. So, if the  
12 Court were to take a text-based -- a more  
13 text-based approach, I think that's an -- an  
14 even steeper hill for Respondent to climb.

15           JUSTICE ALITO: Well, what you've just  
16 mentioned sounds more like conflict preemption  
17 to me than field preemption, or did I  
18 misunderstand what you said?

19           MR. LIU: No, I think -- I think the  
20 provisions of this subchapter and subchapter 3  
21 mark out the field. There may be cases, as was  
22 the case in Gobeille, where the state law  
23 reporting requirements were actually consistent  
24 with and supplemented the -- the federal regime.

25           So you wouldn't have strictly speaking

1 any conflict preemption, but we would still say  
2 that the state law fell within the field  
3 occupied by "the provisions of this subchapter  
4 and subchapter 3."

5 JUSTICE ALITO: All right. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Sotomayor.

8 JUSTICE SOTOMAYOR: Counsel, what  
9 benefits would exist by our resolving the  
10 theoretical disputes among our colleagues?  
11 Because Justice Alito pointed to Justices Scalia  
12 and Ginsburg's views, but there were others  
13 expressed by many of my colleagues.

14 And a number of amici point out that  
15 despite the differences, the outcomes would  
16 still remain the same. So is there a reason why  
17 we should go down one path now as opposed to  
18 another?

19 MR. LIU: I don't think there's a  
20 strong reason to do so here, Justice Sotomayor,  
21 because we think this is a pretty  
22 straightforward case even under existing  
23 precedent.

24 If you look at all the cases this  
25 Court has found a state law to have an



1 impermissible connection with ERISA plans, there  
2 are eight of them. Seven involved state laws  
3 regulating the plan participant or beneficiary  
4 relationship by regulating what healthcare  
5 services are covered, who counts as a  
6 beneficiary, how benefits are calculated, and  
7 how participants can enforce their own rights  
8 under the plan.

9           Then there was an eighth case,  
10 Gobeille, which involved a function that ERISA  
11 itself addressed. This case falls within  
12 neither of those categories. It's not a case  
13 involving a state law regulating the plan  
14 participant or beneficiary relationship, and  
15 it's not a state law that regulates a function  
16 that ERISA specifically addresses.

17           So even if this Court were to leave  
18 its existing precedent in place, we think this  
19 is a pretty straightforward case.

20           JUSTICE SOTOMAYOR: Thank you,  
21 counsel.

22           CHIEF JUSTICE ROBERTS: Justice Kagan.

23           JUSTICE KAGAN: Mr. Liu, one of the  
24 main drivers of ERISA's preemption provision was  
25 a concern about uniformity. And, here, we have

1 45 different states that have passed all kinds  
2 of laws with respect to these PBMs.

3 And I'm wondering why that doesn't  
4 raise exactly the specter that the drafters of  
5 ERISA were concerned about, where the PBMs, you  
6 know, are trying to do 45 different things in 45  
7 different states in a -- in a -- in a way that  
8 really does affect plan administration.

9 MR. LIU: Well, Justice Kagan, this  
10 Court recognized in Egelhoff on page 150 that  
11 all state laws create some potential for the  
12 lack of uniformity. And so the question has to  
13 be, is the lack of uniformity in an area that  
14 ERISA cares about?

15 And I think this just goes back to the  
16 question I set forth at the outset. If -- if  
17 the law regulates the central matter of plan  
18 administration, then that's an area that ERISA  
19 cares about, and uni -- and disuniformity in  
20 that area is going to be a good reason for ERISA  
21 preemption.

22 But, if we're talking about an area of  
23 traditional state regulation that is beyond any  
24 central matter of plan administration, then I  
25 think those uniformity concerns go away.

1           After about -- if it were otherwise,  
2     you know, preemption would -- would seriously  
3     run its course, as I think this Court has said.  
4     All state laws carry the potential for  
5     uniformity. The point is, if this uniformity  
6     were enough, all state laws would preempt it.

7           I just do want to add, though, that  
8     this isn't -- you know, when we talk about PBM  
9     pharmacy reimbursements, it's not like this was  
10    an area that was marked by pristine uniformity.  
11    You know, whether there's preemptions here or  
12    not, there's going to be a lack of uniformity in  
13    cost, and that's by design. As the record  
14    shows, Joint Appendix pages 320, 321, PBMs  
15    maintain hundreds of MAC lists, varying by plan,  
16    coverage, and pharmacy. So, yes, if there's no  
17    preemption here, it's going to add one more  
18    variable to that list, but PBMs already tailor  
19    their MAC list to a lot of different variables.

20           And even if the --

21           JUSTICE KAGAN: Thank you, counsel.

22           CHIEF JUSTICE ROBERTS: Justice  
23     Gorsuch.

24           JUSTICE GORSUCH: No questions. Thank  
25     you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh.

3 JUSTICE KAVANAUGH: Thank you, Mr.  
4 Chief Justice.

5 And good morning, Mr. Liu.

6 You said at the outset that cost is  
7 not a central matter of plan administration.  
8 And I think, when you zoom out, that statement  
9 suggests something's gone awry here in the  
10 jurisprudence because costs will directly affect  
11 the benefits paid to beneficiaries, and the goal  
12 of ERISA, after all, was to protect American  
13 workers, including, it would seem, against state  
14 regulation that would perhaps favor state  
15 businesses over state workers.

16 So why shouldn't ERISA care about  
17 costs that are going to be increased and thereby  
18 passed on in the form of lower benefits or worse  
19 benefits to, here, Arkansas workers?

20 MR. LIU: Well, I think Travelers  
21 already answered this question. We had the same  
22 issue in Travelers, as the Court recognized on  
23 page 659. The surcharges there were going to be  
24 passed along to plans and their beneficiaries  
25 eventually.

1           And I think the reason why Travelers  
2 didn't think that was enough to trigger ERISA  
3 preemptions was because increased costs actually  
4 don't affect the basic bargain between the plans  
5 on the one hand and the participants and the  
6 beneficiaries on the other.

7           I totally agree that ERISA was enacted  
8 to protect that relationship, but increased  
9 costs don't affect the terms of that  
10 relationship.

11           You take the example of the  
12 coinsurance. Yes, it's true that if costs go  
13 up, the dollar and cents amount you'd have to  
14 pay in coinsurance would go up too. But that  
15 was also true in Travelers. I mean, the very  
16 first line of Travelers said that the surcharges  
17 were assessed on the patients themselves.

18           So the idea that there might be some  
19 cost-sharing arrangement between the patients  
20 there and the insurers was -- was right before  
21 the Court, and -- and -- and it didn't make a  
22 difference.

23           I think you have to ask in all these  
24 cases, what is being regulated? And if it's not  
25 the plan-participant relationship itself, which

1 I agree is central to what ERISA cares about,  
2 then there is no preemption.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Mr. Liu, you  
5 have some time left. Why don't you take up to  
6 three minutes.

7 MR. LIU: Thank you.

8 Well, I just want to address some of  
9 the -- some of the questions that -- that came  
10 up. I -- I think, you know, Mr. Chief Justice,  
11 you asked about -- about whether this is  
12 different from a rate regulation.

13 And I think it's important to  
14 emphasize that all the provisions here do form a  
15 package. They're all an aid of the same goal,  
16 which is regulating rates.

17 I mean, just -- just think about the  
18 -- the regime in Travelers. The regime in  
19 Travelers was actually more onerous than the  
20 regime here because, there, the state, in a  
21 pretty heavy-handed way, was dictating exactly  
22 what the hospitals had to be reimbursed. It was  
23 a ERG rate, plus a certain surcharge.

24 What Arkansas has -- has done here is  
25 actually more market-based and more flexible.

1     Instead of saying every time prescription X is  
2     -- is filled, you must pay X amount of dollars,  
3     it's saying what the reimbursement amount is can  
4     vary from pharmacy to pharmacy depending on the  
5     pharmacy acquisition cost. And the way to make  
6     that market-based approach work is to create a  
7     mechanism where the plan -- where the PBMs and  
8     the pharmacies can work out the reimbursement  
9     rate.

10                 That is a less restrictive approach  
11     than the regime that was before this Court in  
12     Travelers. And I think it would be strange if a  
13     less restrictive approach was found to have a  
14     greater connection with ERISA plans.

15                 I'd also add that Travelers rejected  
16     any distinction between a purely economic rate  
17     regulation and regulations that may affect  
18     procedures. Red -- Travelers itself discussed  
19     quality standards and workplace regulations.

20                 Such laws would surely have an effect  
21     on a PBM's procedures, but the Court went out of  
22     its way to say: Look, we can't draw any  
23     principled line between rate regulation on the  
24     one hand and all sorts of other laws on the  
25     other that have an effect on cost.

1                   I guess I'd just like to end by  
2                   emphasizing that Travelers really does decide  
3                   this case by making clear that how a provider is  
4                   reimbursed is not a central matter of plan  
5                   administration. Respondent attempts to  
6                   distinguish Travelers, but each of those  
7                   arguments is answered by Travelers itself.

8                   And really what Respondent's argument  
9                   amounts to is a request that this Court cut back  
10                  on or overrule Travelers. This Court should  
11                  reject that request, which would remove one of  
12                  the few principled limits on ERISA preemption,  
13                  expand the scope of its preemption clause to its  
14                  broadest point ever, and open the door to all  
15                  sorts of new ERISA preemption claims --

16                  CHIEF JUSTICE ROBERTS: Thank you,  
17                  counsel.

18                  MR. LIU: -- and open --

19                  CHIEF JUSTICE ROBERTS: Thank you,  
20                  counsel.

21                  Mr. Waxman.

22                  ORAL ARGUMENT OF SETH P. WAXMAN  
23                  ON BEHALF OF THE RESPONDENT

24                  MR. WAXMAN: Mr. Chief Justice, and  
25                  may it please the Court:



1           Act 900 directly compels ERISA plan  
2 administrators to comply with state-specific  
3 rules and procedures in administering their  
4 benefits programs. In doing so, it adds to a  
5 thicket of varying state laws that make uniform  
6 plan administration impossible.

7           Now Arkansas says it can dictate how  
8 plans should be administered as a means of  
9 so-called rate regulation, but state regulation  
10 of ERISA plans as a means to some other end,  
11 whether it's rate regulation or otherwise, has  
12 never been permitted.

13           None of the cases Arkansas or the SG  
14 cites involve laws directing plan administrators  
15 to do anything. Extending those holdings to a  
16 law like this, which directly regulates plan  
17 administration, would breach a critical line.

18           Travelers neither dictates nor even  
19 suggests otherwise. The law there regulated a  
20 healthcare provider by requiring it to impose a  
21 surcharge on patients. As this Court explained  
22 and as reiterated in haec verba in Dillingham,  
23 the New York law "did not bind plan  
24 administrators to any particular choice and thus  
25 function as a regulation of the ERISA plan

1     itself. Nor did the indirect influence of the  
2     surcharge preclude uniform administration or  
3     provision of a uniform interstate benefit  
4     package."

5             Act 900 does bind plan administrators  
6     to particular choices and, in the welter of  
7     varying state laws, makes uniform national plan  
8     administration impossible.

9             Preemption applies whether the plan  
10    administers the benefits itself or, as most are  
11    required to do, engages a PBM to do so on its  
12    behalf.

13            This Court has never distinguished  
14    between plan administration and third-party  
15    administration. That distinction made no  
16    difference in *Gobeille*, and it would have  
17    destructive effects on the foundational purpose  
18    of ERISA. This Court --

19            CHIEF JUSTICE ROBERTS: Mr. Waxman,  
20    the -- the main effect of the state law here is  
21    on -- on what pharmacists get for -- for selling  
22    drugs, and it's also the clear purpose of the  
23    law.

24            Why don't -- shouldn't we look at that  
25    underlying reality, rather than the mechanics

1 that the state imposes to achieve it?

2 MR. WAXMAN: Mr. Chief Justice, I  
3 think the answer is no, and I think the question  
4 that you asked my friend, General Bronni,  
5 provides the answer.

6 You can look in -- it would be one  
7 thing if Arkansas said that pharmacies, you know  
8 -- you know, may or must receive X number of  
9 dollars for Y drug.

10 If that -- if that were what the law  
11 said, and this is in many, many ways not,  
12 whether or not it would be preempted would  
13 require this Court to decide the two questions  
14 that it reserved in Travelers itself.

15 The first, which is the last sentence  
16 of Footnote 4, explain that the Court did not  
17 address the surcharge statute insofar as it  
18 applied to self-insured plans.

19 And the second, as my friend  
20 mentioned, is that if the state law produced  
21 economic effects as to force the ERISA plan to  
22 adopt a certain scheme of coverage, it would,  
23 indeed, be preempted.

24 CHIEF JUSTICE ROBERTS: Well, it's not  
25 the --

1 MR. WAXMAN: Here, as Your Honor --

2 CHIEF JUSTICE ROBERTS: -- it's not  
3 the state -- state or the pharmacy's fault that  
4 the PBMs have such byzantine procedures that  
5 affect drug prices.

6 MR. WAXMAN: Nobody is saying that  
7 it's anybody's fault. The fact of the matter is  
8 that if you look through Act 900, you will look  
9 in vain to find a single substantive provision  
10 that just says pharmacies can charge this  
11 amount.

12 What the Act does is essentially four  
13 things. It requires regular updates to MAC  
14 lists on a -- on a -- on a -- a formula that is  
15 almost impossible to comply with, but, in the  
16 context of 40 other states which have different  
17 schedules, different triggers --

18 CHIEF JUSTICE ROBERTS: Well, counsel,  
19 you've got one out of four in. Could you very  
20 briefly just say --

21 MR. WAXMAN: Yes.

22 CHIEF JUSTICE ROBERTS: -- what the  
23 other three are?

24 MR. WAXMAN: Yes. The varying  
25 appellate -- the varying different appeal

1 procedures with different rules of decision, a  
2 widely varying set of remedies that plan  
3 administrators have to provide, and, of course,  
4 the various states with different  
5 decline-to-dispense provisions, which directly  
6 deprive beneficiaries of a promised benefit.

7 And it's all of those procedures that  
8 go to what is, indeed, a central matter of plan  
9 administration and certainly makes it impossible  
10 to have a national uniform plan administration.

11 CHIEF JUSTICE ROBERTS: Counsel, I'm  
12 sorry, I was looking at the wrong time  
13 allocation. We have a little more time.

14 The -- the PBMs really do two things.  
15 The -- the -- the first is set the cost to  
16 pharmacies, and the state says that's not  
17 regulated. And -- but the second is to  
18 determine coverage. I mean, that's not  
19 preempted. But the second is to determine  
20 coverage, which they say is.

21 Anything wrong with looking at it that  
22 way?

23 MR. WAXMAN: Well, I think it  
24 oversimplifies it to the point of distortion.  
25 What -- this is directed at -- at plans and plan

1 administrators that use MAC lists as part of  
2 their methodology for determining what benefits  
3 will be provided to which employees for which  
4 drugs in which pharmacies.

5 And it's the interference with the  
6 application of that methodology upon which the  
7 entire plan is designed that makes this so --  
8 you know, so preempted.

9 If -- if I may just refer the Court to  
10 the Court's opinion -- and this is -- this is  
11 Egelhoff quoting Fort Halifax -- "state  
12 regulations affecting an -- an ERISA plan's  
13 system for providing -- processing claims and  
14 paying benefits impose precisely the burden that  
15 ERISA preemption was intended to avoid."

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 MR. WAXMAN: And that is what the --

19 CHIEF JUSTICE ROBERTS: Justice  
20 Thomas.

21 JUSTICE THOMAS: Thank you, Chief  
22 Justice.

23 Mr. Waxman, I was intrigued by  
24 Mr. Liu's answer to Justice Kagan's question  
25 about uniformity. Would you take some time --

1 you seem to suggest that it's just one more item  
2 of disuniformity and/or lack of uniformity. And  
3 I'd like you to comment on his answer, somewhat  
4 at length, if -- if you don't mind.

5 MR. WAXMAN: Certainly. First off, I  
6 -- I -- I commend the Court to the amicus brief  
7 filed by J.B. Hunt Company, which is an Arkansas  
8 employer that employs -- employ -- that employs  
9 drivers all over the country. It has a pretty  
10 good explication of how impossible uniform plan  
11 administration would be.

12 But just to reiterate and expand a  
13 little bit on the four points that I identified  
14 for the Chief Justice, so Arkansas requires  
15 regular updates to a MAC list according to a  
16 sort of byzantine schedule.

17 There are 40 other states that require  
18 updates but on different schedules with  
19 different triggers for updates and different  
20 substantive requirements for the updates. So  
21 plans have to have different state-by-state MAC  
22 lists.

23 There are 37 states, including  
24 Arkansas, that require appeal procedures, but  
25 they are all different. Eight states specify

1 the particular rule of decision, as Arkansas  
2 does, but they apply different standards and  
3 with different effects. And so multi-state plan  
4 standards and procedures for appeals will vary  
5 state by state.

6 Third, the remedies following the  
7 appeal procedure vary widely. Some states  
8 require revision to the MAC lists. Some states  
9 require notice to other pharmacies. Some  
10 states, like Arkansas, allow the pharmacy to  
11 reverse and rebill, but -- rebill, but other  
12 states allow all pharmacies that pay that MAC  
13 price to reverse and rebill.

14 There are four states, including  
15 Arkansas, that have decline-to-dispense  
16 provisions, but they have different conditions  
17 for declining. And so employees of the same  
18 company will have unequal benefits from state to  
19 state.

20 JUSTICE THOMAS: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Breyer.

23 JUSTICE BREYER: Thank you.

24 Mr. Waxman, I'd like your -- your  
25 views on a more general question. The words



1 here in the statute are "relate to." Everything  
2 does relate to everyone -- everything else.

3 So what kind of "relate to"? And,  
4 obviously, the Court struggled with that. What  
5 about a state setting prices, high prices or low  
6 prices, of hospital services, of pencils, of  
7 orange juice? They all relate to cost. So we  
8 got out of that one by saying: Well, even the  
9 hospital services, even that, just raising  
10 prices isn't a close enough relation. Hmm,  
11 that's interesting.

12 Now you put that on -- you've taken an  
13 aspect of that. You said, well, no, it's the  
14 procedures that you use in order to decide what  
15 the prices are that's the problem. But every  
16 form of rate regulation involves procedures.  
17 They all do.

18 And, therefore, we're going to get  
19 into the same business. How much procedure is  
20 too much? How much is too little? What kind of  
21 procedures? Wouldn't it be simpler to read that  
22 word "relate to" that we'd have to go back on  
23 language and say what it means is ordinary  
24 principles of preemption.

25 They're complicated enough. But, I

1 mean, my goodness, to add a special group of  
2 words over in the ERISA section just makes life  
3 much more complex.

4 MR. WAXMAN: In other words, let's --

5 JUSTICE BREYER: Ordinary principles,  
6 why not.

7 MR. WAXMAN: So ordinary -- is that  
8 your -- am I -- are you asking me to define?

9 JUSTICE BREYER: Yes, I want to know  
10 what your actual view is on that, because we --

11 MR. WAXMAN: Okay.

12 JUSTICE BREYER: -- presented that in  
13 several cases --

14 MR. WAXMAN: So this -- this -- this  
15 --

16 JUSTICE BREYER: And you have  
17 experience. I want to know.

18 MR. WAXMAN: -- this Court -- this  
19 Court has evolved a very particular and, I  
20 think, widely applied standard for what "relates  
21 to" mean. It says on the one hand if it refers  
22 to and on the other hand if it is -- if it  
23 concerns.

24 And as to the latter, which is what  
25 we've been talking about, this Court has said it

1 will be preempted if it does either of two  
2 things: either the state law governs a central  
3 matter of plan administration, or it interferes  
4 with nationally uniform plan administration.

5 Now, again, I'll -- just one more  
6 sentence to answer your question. The  
7 difference isn't how many procedures it dictates  
8 or doesn't. The difference, as I pointed out  
9 when -- in quoting both Travelers and  
10 Dillingham, is whether or not the law is  
11 directed at plan administrators or directed at  
12 third parties.

13 And in -- in the -- in this case, if  
14 the test is whether or not it binds -- "binds"  
15 plan administrators to any particular choice  
16 and, thus, functions as a regulation of the  
17 ERISA plan itself, that is the -- that is the  
18 very characterization of what this law does.

19 JUSTICE BREYER: Yeah.

20 MR. WAXMAN: It binds ERISA plans to  
21 any number of choices --

22 JUSTICE BREYER: And so does price --

23 MR. WAXMAN: -- which I articulated.

24 JUSTICE BREYER: -- fixing. So does  
25 price fixing. So does, in fact, any system of

1 regulating to apply price -- prices. They're  
2 all the same.

3 MR. WAXMAN: So, you know, price --  
4 price fixing is the subject of another federal  
5 statute, and ERISA plans, I -- I don't think  
6 that there is an exemption from the Sherman Act  
7 or the Clayton Act or --

8 JUSTICE BREYER: No, no, no, no, no,  
9 you -- you -- forget that question, because I --  
10 I -- I can't -- I don't have time and I can't be  
11 clear enough.

12 Go ahead. I -- I -- I see your point.

13 CHIEF JUSTICE ROBERTS: Justice Alito.

14 JUSTICE ALITO: Mr. Waxman, you were  
15 stressing how complicated it would be for a --  
16 for PBMs to comply with laws like the Arkansas  
17 law and similar laws in all the states, but it  
18 struck me that what they do, even without a law  
19 like Arkansas's, is extremely complicated.

20 And it requires, I'm sure, pretty  
21 complicated computer programs, and -- and that's  
22 why, apparently, there are so few of these PBMs.  
23 It requires a pretty sophisticated entity to  
24 deal with this situation at all.

25 So, in light of that, why would it be

1 so difficult and costly and burdensome for the  
2 PBMs to deal with a variety of different state  
3 laws?

4 MR. WAXMAN: Well, I -- you're --  
5 you're quite right, Justice Alito, that, you  
6 know, as the D.C. Circuit pointed out in its  
7 PCMA decision, which both parties -- all parties  
8 are citing, the -- the -- this complexity of  
9 providing American workers with pharmacy  
10 benefits is tremendous, and that's why, as a  
11 practical matter, they have to use third-party  
12 administrators to do this.

13 The fact that they have third-party  
14 administrators which allow them to provide these  
15 kind of benefits on a price-efficient basis  
16 doesn't mean that -- that ERISA permits every  
17 individual state to add additional levels of  
18 complexity.

19 And if you just look at just the  
20 requirements for the 40 different tests and  
21 schedules for updating MAC lists and what price  
22 consequences to plans and beneficiaries every  
23 update to the MAC list has, it's -- it's an  
24 immense complication, and it affects the  
25 benefits that beneficiaries receive.

1                   Similarly, the remedies that vary from  
2 one state or other imposing on plans that vary  
3 often are natural -- national plans mean that  
4 employees of the same company will have unequal  
5 benefits from one state to another and plans  
6 will have to have -- either plans themselves or  
7 using the third-party administrators that they  
8 have appointed as agents to administer the plan  
9 on their behalf, different procedures and  
10 different remedies and different update  
11 schedules in every different state, which  
12 themselves frequently change, and many, many of  
13 these requirements will turn -- will require the  
14 plans to either change their summary plan of  
15 benefits, their explanation of benefits when it  
16 turns out that the beneficiary has to pay more  
17 in Mississippi because of some requirement that  
18 applies after an appeal procedure, or to tell  
19 people, for example, look, you're a driver for  
20 J.B. Hunt, but, if you try to fill your  
21 prescription in Arkansas, even though we have  
22 promised you that you can fill that prescription  
23 at this pharmacy with this coinsurance or copay  
24 obligation, you have to understand that that  
25 pharmacy has the right to refuse to give you

1 that benefit.

2 JUSTICE ALITO: And you said that this  
3 -- that these laws affect the benefits that  
4 employees get, but do we know whether that is,  
5 in fact, true? Do we know -- assuming that they  
6 increase the costs for the PBMs, do we know  
7 that -- how much of that increase in costs is --  
8 is passed on to plans and beneficiaries and how  
9 much is absorbed by the PBMs?

10 MR. WAXMAN: So we don't have specific  
11 data on this, but we know the following. First  
12 of all, as I think both of my friends on the  
13 other side acknowledged, you know, one way or  
14 the other, in the very short term or the long  
15 term, this is going to cost plans more to  
16 administer and, therefore, is going to affect  
17 the -- the munificence of the benefits -- the  
18 pharmacy benefits that plans feel that they can  
19 afford.

20 Second of all, in terms of the  
21 decline-to-dispense provision, that is an  
22 immediate and obvious derogation of the  
23 beneficiary's promised rights under the plan.

24 JUSTICE ALITO: Thank you.

25 MR. WAXMAN: And I think that --

1 JUSTICE ALITO: Thank you, Mr. Waxman.

2 MR. WAXMAN: Yeah.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Sotomayor.

5 JUSTICE SOTOMAYOR: Counsel, following  
6 up a little bit on Justice Alito's question and  
7 -- and turning it a bit on its head, the SG had  
8 made an awful lot in his brief about the fact  
9 that this enforcement mechanism fell on the PBMs  
10 rather than the plan.

11 But as was pointed out in Gobeille, we  
12 came to a different conclusion on a reporting  
13 requirement. But would a ruling in this case in  
14 favor of Petitioners have plans reconsider  
15 whether they're going to use PBMs at all?

16 MR. WAXMAN: Well, I think --

17 JUSTICE SOTOMAYOR: Could they  
18 reconsider it, if they thought it -- this --  
19 this was just too onerous?

20 MR. WAXMAN: I -- I think, as a  
21 practical matter, yes, they definitely would  
22 reconsider. And -- and I think that points out  
23 the reason why in Gobeille the Court found  
24 complete -- of no moment whatsoever that the  
25 Vermont state law in Gobeille didn't even apply



1 to the plan or the plan sponsor.

2 If it wasn't for the fact that they  
3 used a third-party administrator, the law would  
4 have no application to them. And the reason for  
5 that is that -- I mean, just look at what would  
6 happen if all of these state laws applying all  
7 these procedures and rule -- substantive rules  
8 applied to national plans.

9 JUSTICE SOTOMAYOR: All -- all right.  
10 So --

11 MR. WAXMAN: Of course, they would --

12 JUSTICE SOTOMAYOR: Counsel, I'm sorry  
13 to interrupt you, but we do have limited time.

14 What I want to do is let's simplify  
15 the law. Anyone who pays pharmacies, whether  
16 it's PBMs or the plans themselves, but anyone  
17 has to do the pricing in this way. And they  
18 don't differentiate between plans, they don't  
19 differentiate between being a PBM or not or a  
20 non-ERISA plan or not; they just say pharmacies  
21 have to be paid at cost plus or whatever, at  
22 minimum, okay?

23 What -- how would their arguments  
24 change and how would your arguments change?

25 MR. WAXMAN: So I think if -- if the

1 law simply said pharmacies can charge X price  
2 for Y drugs --

3 JUSTICE SOTOMAYOR: Exactly.

4 MR. WAXMAN: -- that -- that would be  
5 the situation in Travelers, but unlike the  
6 situation in Travelers, which addressed a charge  
7 placed on patients which then had implications  
8 for insurance companies, not ERISA plans, it  
9 would -- that -- that type of law would  
10 implicate the questions reserved in note 4 and  
11 Roman numeral III of Travelers.

12 But this law, as -- as I think we've  
13 talk about, doesn't do -- doesn't do that. It  
14 doesn't direct -- it isn't directed at  
15 pharmacies. It's directed at plan  
16 administrators.

17 And it doesn't just apply a price  
18 standard. It prohibits the use of a methodology  
19 that the plans have adopted in order to figure  
20 out what benefits they can provide at which  
21 pharmacies for which drugs.

22 And it lays on a -- you know, multiple  
23 procedures that they have to follow. And those  
24 -- those additional costs, both in terms of  
25 reimbursement obligations and plan

1 administration, would manifestly affect how much  
2 -- how munificent the pharmacy benefits that a  
3 plan could offer would be.

4 JUSTICE SOTOMAYOR: Thank you,  
5 counsel.

6 CHIEF JUSTICE ROBERTS: Justice Kagan.

7 JUSTICE KAGAN: Mr. Waxman, both your  
8 friends on the other side place a great deal of  
9 emphasis on the distinction between claims  
10 processing and, on the other hand, the  
11 reimbursement process.

12 And they say, basically, if you look  
13 at our cases, in particular Travelers, we have  
14 made that distinction time and time again, that  
15 the reimbursement process is a process that  
16 involves the relationship between the plan and  
17 the provider, and ERISA preemption doesn't care  
18 about that.

19 The only thing ERISA preemption cares  
20 about is the relationship between the plan and  
21 the beneficiary, such as in the claims  
22 processing sphere. So why isn't that the way to  
23 look at this?

24 MR. WAXMAN: So I think, you know,  
25 this Court has said, has acknowledged in many

1 cases -- and I -- I gave you the quote from  
2 Egelhoff and Fort Halifax -- that how plans  
3 manage, calculate, and pay for benefits and how  
4 sponsors design plans is the central matter of  
5 -- of ERISA plan administration.

6 And it is important, it is critical  
7 that this Court maintain the line that it has  
8 always maintained between the potential  
9 preemption of a law that is directed at  
10 third-party providers of health benefits, as was  
11 the case in Travelers, on the one hand, and, as  
12 this Court -- Court pointed out, underscored in  
13 Travelers and Dillingham, a law that "binds  
14 administrators to particular choices and thus  
15 functions as a regulation of the plan itself."

16 And that's the distinction we're  
17 asking this Court to adhere to.

18 I'm sorry, did I -- did I answer your  
19 question? Hello?

20 CHIEF JUSTICE ROBERTS: Justice  
21 Gorsuch.

22 JUSTICE GORSUCH: Good morning,  
23 Mr. Waxman.

24 MR. WAXMAN: Good morning, Justice  
25 Gorsuch.

1 JUSTICE GORSUCH: If -- if ERISA  
2 preempts the law here, should we worry that it  
3 also preempts other sorts of general regulations  
4 about other kinds of benefits? This follows up  
5 on Justice Kagan's line of questioning.

6 Some -- some plans, of course, provide  
7 daycare benefits, death benefits, all -- all  
8 sorts of other kinds of benefits. Where would  
9 you have us draw the line if -- if -- if  
10 preemption occurs here? Why not there?

11 MR. WAXMAN: Yeah, I think -- I think  
12 I'll give -- I'm going to give you a variant of  
13 the answer that I just gave Justice Kagan.

14 A state law that says, okay, you know,  
15 you know, healthcare -- you know, child care  
16 providers, nursery schools, and things, daycare  
17 providers, have to follow the -- all the  
18 following safety procedures, which makes it more  
19 expensive. They have to charge plans more.

20 That's Travelers. That is a state  
21 obligation or a state regulation imposed on  
22 somebody who is providing healthcare or life  
23 care products or services. And the fact that,  
24 you know, some hospitals charge more than other  
25 hospitals has been thought, at least in the

1 Travelers context subject to the two reserved  
2 questions in Travelers, not to implicate  
3 preemption.

4           But when the state law says to the  
5 plan and the plan administrators, you know, if  
6 you have -- if you're providing death benefits,  
7 you have to use the following procedures and you  
8 have to update these lists, and you have to  
9 allocate benefits between the plan and the plan  
10 beneficiary, and you have to let the plan  
11 beneficiary know that some funeral homes may  
12 refuse the services that we have assured you  
13 they will provide under the contract terms, that  
14 would be preempted.

15           JUSTICE GORSUCH: Okay. Along similar  
16 but different lines, what do we do with the fact  
17 that there are plenty of ERISA plans that  
18 operate without pharmacy benefit managers, there  
19 are plenty of pharmacy benefit managers that  
20 provide services to non-ERISA plans, and, of  
21 course, your clients here are, as I understand  
22 it, all pharmacy benefit managers and no ERISA  
23 plans.

24           We -- we don't have an ERISA plan  
25 that's actually complaining about this before

1 us, as I understand it.

2 MR. WAXMAN: Yes, that's right. I  
3 mean, there are -- there are amicus briefs filed  
4 by sponsors of ERISA plans, but the plaintiff in  
5 this case and therefore the Respondent here is  
6 the -- the Pharmacy Benefit Manager Association.

7 First of all, I would say that it is  
8 -- it is not -- it is -- it's important to  
9 underscore, as everybody recognizes, that well  
10 over 95 percent of employ -- of ERISA plans are,  
11 in fact, required, in order to provide this  
12 otherwise expensive benefit, to use third-party  
13 administrators.

14 And a rule that distinguished between  
15 the application depending on whether you use  
16 this third-party administrator would have very  
17 grievous effects on the plan's -- ERISA plan's  
18 willingness to provide this benefit, which of  
19 course is directed at the single most expensive  
20 aspect of the healthcare services.

21 And so I -- I don't know if I've  
22 answered your question. I may have talked  
23 myself through remembering what the question  
24 was, but if I haven't, please give me another  
25 chance.

1 JUSTICE GORSUCH: Thank you, counsel.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Thank you, Chief  
5 Justice, and welcome, Mr. Waxman.

6 MR. WAXMAN: Thank you.

7 JUSTICE KAVANAUGH: The --

8 MR. WAXMAN: -- Justice Kavanaugh.

9 JUSTICE KAVANAUGH: The basic music or  
10 theme from the other side, as I understand it,  
11 is that ERISA focuses on the relationship  
12 between plans and beneficiaries and is not as  
13 concerned about the economic relationship  
14 between plans and pharmacies or healthcare  
15 providers, even though, as Justice Breyer  
16 rightly said, state laws affecting that  
17 relationship would undoubtedly affect benefits.

18 What's wrong with that picture that  
19 the other side has drawn, if I have it correct?

20 MR. WAXMAN: So, I think -- I think  
21 that -- what's wrong with it is that it  
22 misunderstands the direct regulatory effect that  
23 the Arkansas law has on the plans, the design of  
24 the plan and how plans go about managing,  
25 calculating, and paying for benefits.



1           And that's -- that's the problem here.  
2           It's -- it's the direct -- it's the fact that  
3           the law is directed at plan administration.  
4           And, in fact, directed at, in this regard, as,  
5           you know, again to quote this Court, the plan's  
6           system for processing claims and paying  
7           benefits.

8           I mean, the -- the -- the Act 900  
9           dictates detailed terms on which PBMs on behalf  
10          of plans are allowed to design and manage  
11          networks and reimbursement systems in a  
12          nationally uniformed way.

13          And that's the -- that is the -- the  
14          ERISA preemption -- the Section 514(a) vice.

15          JUSTICE KAVANAUGH: And a wrap-up  
16          question. If -- how would you have us write the  
17          opinion with respect to Travelers. Obviously  
18          the other side has put heavy emphasis on  
19          Travelers and you would say Travelers does not  
20          apply here and does not control here, because --  
21          and I'll just leave you to fill in the blank  
22          there.

23          MR. WAXMAN: So I'll -- you know,  
24          Travelers does not apply here because, by its  
25          terms, Travelers -- Traveler -- Travelers was

1 predicated on the correct conclusion that the  
2 New York surcharge law, which required hospitals  
3 to -- to impose certain charges on patients,  
4 "did not bind plan administrators to any  
5 particular choice and thus function as a  
6 regulation of the ERISA plan itself, nor did the  
7 indirect influence of the surcharge preclude  
8 uniform administrative practice for the  
9 provision of a uniform interstate benefit  
10 package."

11                   And those two -- those two aspects of  
12 -- of the plan in Travelers and this Court's  
13 decision in Travelers and Dillingham provide the  
14 very distinction that ought to be underscored  
15 here, I respectfully suggest.

16                   JUSTICE KAVANAUGH: Thank you, Mr.  
17 Waxman.

18                   CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20                   We have several minutes left, if any  
21 of the justices have further questions.

22                   Okay. If not, Mr. Waxman, why don't  
23 you take up to three minutes.

24                   MR. WAXMAN: Thank you, Mr. Chief  
25 Justice.

1           I don't -- I think I've pretty much  
2 covered what I -- what I wanted to say. I -- I  
3 think that the -- because Act 900 makes uniform  
4 plan administration impossible, and because it  
5 directly binds administrators -- plan  
6 administrators to particular choices and, thus,  
7 functions as a regulation of the ERISA plan  
8 itself, it lies in the heartland of what  
9 Section 514(a) sought to protect.

10           And for that reason, the judgment  
11 should be affirmed.

12           JUSTICE KAGAN: If -- if I could, Mr.  
13 Waxman, you've used that terminology quite a  
14 bit, binding administrators to particular  
15 choices.

16           And I guess I would just like to  
17 understand particularly what you mean by that.  
18 Which choices does it bind administrators to and  
19 how?

20           MR. WAXMAN: Well, thank you, Justice  
21 Kagan. It binds them, number one, to not use  
22 the methodology that is reflected in the -- the  
23 MAC list, upon which the plans, benefits, and  
24 scope have been predicated.

25           It binds them to a particular schedule

1 of updating MAC lists, that is, that varies  
2 widely across the country. It binds them to a  
3 particular appellate process with a particular  
4 rule of decision that varies widely across the  
5 country.

6 It binds them to apply particular  
7 remedies in the event that the appellate process  
8 satisfies the rule of decision. And it binds  
9 them to inform their beneficiaries that,  
10 notwithstanding the promise that the beneficiary  
11 can go to pharmacy X and receive drug Y, with  
12 the following coinsurance terms, in fact, the  
13 pharmacy now has the right under state law to  
14 deprive the beneficiary of that promised  
15 benefit.

16 JUSTICE KAGAN: Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Mr. Bronni, you have three minutes for  
20 rebuttal.

21 REBUTTAL ARGUMENT OF NICHOLAS J. BRONNI  
22 ON BEHALF OF THE PETITIONER

23 MR. BRONNI: Thank you, Mr. Chief  
24 Justice.

25 I -- I think what I'd like to start

1 with is -- is perhaps clarifying my -- my answer  
2 to a question that Justice Kagan asked me, which  
3 is about really where the focus of our argument  
4 is and -- and it's the same as the government's.

5           Really our point is that Act 900  
6 doesn't regulate central plan administration.  
7 And to pick up on -- on Mr. Waxman's last  
8 answer. When -- when the Court talks about  
9 central plan administration and binding plans to  
10 things, really what it's talking about is -- is  
11 binding plans to decisions about who's a  
12 beneficiary, what's the benefit, what's the  
13 degree of coverage that's the copay, coinsurance  
14 rate, et cetera, and how those things are  
15 determined.

16           It -- it's not rates. It's not what a  
17 third-party administrator pays for service  
18 provider. And the fact that that's what we're  
19 talking about here really makes this case  
20 exactly like Travelers, and makes this an easier  
21 case because Travelers has already addressed  
22 that issue.

23           In terms of attempting to distinguish  
24 Travelers, I -- what I understand Mr. Waxman to  
25 be saying is, well, it -- it's somehow different

1 because somebody different is being regulated or  
2 the surcharges are being -- or the -- the rate  
3 regulation is being applied somewhere else, but  
4 in reality, in both -- in -- in Travelers, the  
5 surcharges were -- were paid based on the  
6 commercial insurer that was being used.

7           If you were using a non-Blue, you paid  
8 the surcharges. Here it's the same principle.  
9 If you're using a PBM, the PBM uses a MAC list,  
10 you play these rates. So they're really not  
11 distinguishable.

12           On the uniformity point, I -- really,  
13 I don't see a lot of -- there -- there's a lot  
14 more uniformity than disuniformity here. But at  
15 the end of the day what's most relevant is that  
16 it's not disuniformity with respect to core plan  
17 administration, and Mr. Waxman didn't point to  
18 any disuniformity with respect to core plan  
19 administration.

20           And -- and this Court has never said  
21 that disuniformity in the abstract is a problem,  
22 because obviously that can't be true because  
23 ERISA wasn't intended to create an entirely  
24 isolated or insulated universe immune from  
25 ordinary state market regulation.

1           The -- another point that came up was  
2           the decline to dispense provision. Frankly,  
3           that -- that's inherent in rate regulation as we  
4           explain in the brief, but it also operates like  
5           any number of other ordinary state regulations  
6           that even PCMA doesn't claim or preempt it like,  
7           for instance, in Arkansas, a -- a pharmacist who  
8           has a moral objection to prescribing a  
9           particular medication may decline to dispense  
10          that medication.

11           And even PCMA doesn't claim that those  
12          laws would be preempted, even though it would  
13          have the same effect.

14           And -- and, lastly, to -- to end on a  
15          question that Justice Gorsuch asked, which is  
16          about the limiting principle, I think that's  
17          really the problem with PCMA's argument.  
18          There's no limiting principle.

19           If you accept their position that  
20          cost -- anytime a regulation imposes cost, that  
21          can lead to preemption because it might affect  
22          the benefits calculation, that really has no  
23          limiting principle.

24           You would, frankly, preempt things  
25          like state minimum wage laws that have exactly

1 that same effect. So we would ask that this  
2 Court reverse the judgment below.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel. The case is submitted.

5 (Whereupon, at 11:12 a.m., the case  
6 was submitted.)

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