No. 11-1155

IN THE
Supreme Court of the United States

BLUE CROSS AND BLUE SHIELD
OF MONTANA, INC.,

Petitioner,

v.

DALE FOSSEN, *et al.*,

Respondents.

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

In reviewing the opposition of Respondents Dale, Larry, and Marlowe Fossen ("the Fossens"), it is important to recognize what is, and is not, at issue in this petition. The petition concerns *only* the Fossens' claims under Montana's unfair-insurance-practices statute and Montana's common law of contracts. Separately, in the conditional cross-petition, the Fossens seek review of the Ninth Circuit's ruling on their Little HIPAA law claims. The Fossens misguidedly interchange the ERISA provisions, the lower-court reasoning, and the lower-court *amici* briefs on the two sets of claims in order to oppose certiorari here – and, in particular, to try to distinguish the Circuit cases with which the Ninth Circuit's decision (on the unfair-insurance-practices and contract claims) conflicts. In the end, the Fossens' conflation of the two sets of claims is an obvious error; and, in any event, even treating their arguments as if properly aimed at the right claims, none is persuasive on the merits.

ARGUMENT

A. There Is a Circuit Split on the Question Presented

1. This Controversy Is Not Meaningfully Distinguished from the Other Circuit Cases Merely Because It Involves Premiums

The Fossens do not dispute that, at least (to use their term) "broadly" speaking, the Ninth Circuit's decision conflicts with the decisions of other Circuits

on the question Petitioner Blue Cross and Blue Shield of Montana, Inc. ("BCBSMT") presents in the petition. Opp. at 6. That is, on the Montana unfair-insurance-practices and contract claims, the Ninth Circuit held – contrary to the Fourth, Sixth, Seventh, and Eighth Circuits, but in line with an arguably dated decision of the Third Circuit (*PAS v. Travelers Insurance Co.*, 7 F.3d 349 (3d Cir. 1993)) – that a state-law remedy can be used to enforce a substantive state-law insurance standard saved from ERISA preemption. *See* Pet. at 17-20 (listing conflicting cases). But the Fossens try to avoid the Circuit split by contending that this case falls into a special category: "the [other Circuits'] cases . . . all had to do with ERISA *benefits* or *plan terms*, not with premium regulation." Opp. at 10 (emphasis in original).

The short answer is that the Ninth Circuit nowhere invoked the supposed distinction between premium disputes and other ERISA cases that the Fossens currently create. Rather, the Court of Appeals straightforwardly relied on *PAS* – a benefits case and one that itself notes the Circuit split BCBSMT here identifies, *see* 7 F.3d at 356 – for the finding that the unfair-insurance-practices and contract claims "are not conflict preempted." Pet. App. 22a. The Ninth Circuit also reviewed at length the general jurisprudence setting forth the standards for determining when there is "'preemption due to a "conflict" with ERISA's exclusive remedial scheme set forth in [ERISA § 502(a),] 29 U.S.C. § 1132(a),'" and then – when dealing with the unfair-insurance-practices and contract claims – stated the reasons why it deemed

those claims to avoid preemption (and none of the reasons had to do with this case involving premiums). Still further, to support its ruling against conflict preemption, the Ninth Circuit cited its own earlier precedent in *Elliot v. Fortis Benefits Ins. Co.*, 337 F.3d 1138 (9th Cir. 2003); *Elliot* did not concern premiums, with the bulk of the *Elliot* decision being a lengthy discussion of *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), and *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), and the panel's perceptions on the scope of those rulings. *See Elliot*, 337 F.3d at 1143-48.

Accordingly, subsequent courts reading the Ninth Circuit's decision on the unfair-insurance-practices and contract claims will not view it as cabined to the premium setting. They will see the decision as the Ninth Circuit intended it: as agreeing with the Third Circuit (and the Third Circuit alone) that "federal law does not preempt a claim for relief" when the claim purportedly seeks relief "consistent with ERISA's enforcement scheme" and when the substantive standards of the saved state insurance law and of ERISA "are not identical in scope." Pet. App. at 3a, 22a.

Moreover, there would be no logic for treating (as the Fossens do) premium and benefits cases distinctly, for benefits cannot be divorced from the premiums charged to obtain them. For instance, one way discrimination against individuals based on health status-related factors can occur would be to charge everyone in a relevant group the same premium, but then offer a greater array of benefits to the healthy in the group. Alternatively, the same

discrimination would exist if identical benefits were offered to everyone in the group, but the healthy were then charged less for premiums to obtain those benefits. As a result, ERISA's HIPAA provisions, the Montana Little HIPAA law, and even the unfair-insurance-practices statute all outlaw certain discrimination *both* in benefits (or eligibility for benefits) and in premiums, so as to prevent schemes for circumvention. *See* ERISA § 702(a), (b), 29 U.S.C. § 1182(a), (b); Mont. Code Ann. § 33-22-526(1), (2); *id.* § 33-18-206(2). Because ERISA benefits and premiums are integrally connected, the Circuit precedents associated with them are properly compared with one another.

Nor does the Fossens' assertion that premium cases are different from matters involving *plan terms* withstand scrutiny. The Fossens concede that the other Circuit decisions found that saved state-law insurance standards are imputed into an ERISA plan's terms and are, on this basis, enforceable solely via ERISA (except for *PAS*, which found oppositely). *See* Opp. at 6, 10, 11. Hence, in order to get rid of the conflicting Circuit decisions, the Fossens are relegated to asserting that premium matters – in particular, saved state-law insurance standards regulating premiums – are not part of the ERISA plan. *See id.* at 13-15.

There are several problems with this assertion, foremost among which is that the Fossens have argued exactly to the opposite since the start of this case. Their own complaint asserts a breach-of-contract claim on the grounds that Montana law requires incorporation into the insurance policy the

Montana Little HIPAA law and the unfair-insurance-practices statute, making a violation of those laws a breach of contract. *See* C.A. Exc. of Rec., Vol. 2, at 284-85.

It is also, as a matter of ERISA jurisprudence, familiar territory that ERISA plans incorporate all saved state insurance laws. As the Seventh Circuit has put it in the ERISA context, "'existing and valid statutory provisions enter into and form a part of all contracts of insurance to which they are applicable, and, together with settled judicial constructions thereof, become a part of the contract as much as if they were actually incorporated therein.'" *Plumb v. Fluid Pump Serv.*, 124 F.3d 849, 861 (7th Cir. 1997) (quoting 2 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* 3d § 19:1, at 19-2 to 19-4 (1996)); *see Rush Prudential*, 536 U.S. at 362 n.2 ("a suit to compel compliance with § 4-10 [*i.e.*, a saved state insurance law] in the context of an ERISA plan would seem to be akin to a suit to compel compliance *with the terms of a plan* under 29 U.S.C. § 1132(a)(3)") (emphasis added). Thus, once the Ninth Circuit determined that the substantive standards of the Montana unfair-insurance-practices statute were saved from preemption, those standards were (as a matter of ERISA law) incorporated into the ERISA plan. And it then follows that breach of those standards constitutes a violation of the ERISA plan's terms, which (in turn) the majority of the Circuits say is actionable solely

through ERISA, but the Ninth Circuit and the Third Circuit say otherwise.[1]

2. ERISA's HIPAA Provisions Are Irrelevant to the State-Law Claims at Issue in the Petition and Therefore Provide No Basis for Distinguishing the Various Circuit Precedents

The Fossens next seek to distinguish the conflicting Circuit precedents from the Ninth Circuit's decision on the theory that none of the other Circuits' decisions touched on ERISA's HIPAA provisions, most notably ERISA § 731. Section 731, in the portion on which the Fossens focus, states that ERISA's HIPAA provisions "shall not be construed to supersede any provision of State law which establishes, implements, or continues in effect any standard or requirement *solely relating to* health

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[1] The Fossens then take a swipe generally at the rule that saved state-law insurance standards automatically become part of the ERISA plan's terms and enforceable solely through ERISA, contending that such a rule "radically federalize[s]" the area of insurance by making "[e]very violation of insurance law affecting an ERISA insured . . . subject to preemption" and "removable from state courts." Opp. at 9, 14. Irrespective of the merits of the rule, it is the one applied by a majority of the Circuit decisions, but not by the Ninth Circuit and *PAS*, which results in a Circuit conflict bolstering the certworthiness of the petition. In any event, it was Congress that federalized insurance regulation in the context of ERISA plans, by including a broad preemption provision in ERISA that does not tolerate enforcement mechanisms alternate to ERISA's remedies. *See infra* pp. 9-10.

insurance issuers in connection with group health insurance coverage except to the extent that such standard or requirement prevents the application of a requirement of this part." ERISA § 731(a)(1), 29 U.S.C. § 1191(a)(1) (emphasis added). As the emphasized language denotes, § 731 has relevance only with regard to a state law "solely" relating to insurers of group health plans.

Section 731 is a red herring for this petition. The only claims in the Fossens' complaint at issue in this petition are the unfair-insurance-practices and contract claims. Those are the only claims as to which the Ninth Circuit found state-law remedies available to enforce saved state insurance standards. The Montana unfair-insurance-practices statute prohibits certain "discrimination" in premiums or benefits under "any policy or contract of disability insurance." Mont. Code Ann. § 33-18-206(2). Another subsection of the state statute prohibits the same discrimination in the context of life insurance. *See id.* § 33-18-206(1). In light of its terms associated with disability and life insurance, and because the statute is not limited to group plans but likewise has application for individual policies, the Montana unfair-insurance-practices statute is not a state law *solely* relating to issuers of *group health* plans. Even more plainly, Montana's common law of contracts (the source for the other state-law claim at issue in this petition) cannot possibly be said to relate solely to issuers of group health insurance.

And the Ninth Circuit never saw § 731 as relevant to the unfair-insurance-practices and contract claims. Nowhere in that part of its decision did the

Court of Appeals even make reference to § 731. Instead, the Ninth Circuit, again, found only that state-law remedies were available because they would provide a form of relief (restitution) that the court viewed as consistent with ERISA and because the substantive anti-discrimination standard adopted in the unfair-insurance-practices statute was not duplicated in ERISA. The Fossens' invocation of § 731 is, therefore, another example of an attempt by them to dispense with conflicting Circuit decisions on a basis nowhere relied upon by the Ninth Circuit or apparent to a reader of the decision.

Additionally, the *amicus* brief of the Department of Labor ("DOL") in the Ninth Circuit is not helpful to the Fossens on § 731. The Fossens quote language from that brief (*see* Opp. at 12-13) as if the DOL somehow supported the Fossens' position that § 731 allows for state-law enforcement of the unfair-insurance-practices statute. But the DOL argued only that *the Montana Little HIPAA law* claims were enforceable under state law because of § 731 (a position ultimately rejected by the Ninth Circuit). To the extent the DOL spoke to the unfair-insurance-practices and contract claims, it supported BCBSMT's position. In a footnote in its *amicus* brief, the DOL asserted it was "unclear" that the unfair-insurance-practices statute's substantive anti-discrimination standard qualified as "an insurance regulation within the meaning of ERISA section 514(b)" (let alone that its alleged remedy too would qualify); and the DOL said that the statute "appears, by its terms, to be directed at disability

insurance and not at health insurance." Resp. App. 15-16 n.4.[2]

Even if § 731 had some pertinence to the unfair-insurance-practices and contract claims, it would not affect the question presented in this petition, due to another part of § 731 nowhere mentioned by the Fossens. The question presented focuses on whether ERISA's *remedies* are the exclusive means of enforcement for saved state insurance laws. Notwithstanding subsection (a) of § 731, which states general preemption principles regarding a state HIPAA "standard" or "requirement" (ERISA § 731(a)(1), 29 U.S.C. § 1191(a)(1)), subsection (b) – entitled "Continued preemption with respect to group health plans" – then confirms that "[n]othing in this part shall be construed to affect or modify the provisions of section 514 with respect to group health plans." *Id.* § 731(a)(2), 29 U.S.C. § 1191(a)(2). The notion that ERISA's remedies are exclusive is a central part of the Court's ERISA § 514 jurisprudence. *See Pilot Life*, 481 U.S. at 57 ("Considering . . . the clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive, we conclude that Dedeaux's state law suit . . . is not saved by § 514(b)(2)(A), and therefore *is pre-empted by § 514(a).*") (emphasis added); *see also N.Y. State Conf. of Blue Cross &*

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[2] The Fossens note that, under Montana law, the reference to "disability benefits" in the unfair-insurance-practices statute encompasses, among other things, health benefits. *See* Opp. at 3 (citing Mont. Code Ann. § 33-1-207). The Ninth Circuit agreed. *See* Pet. App. 5a.

Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 658 (1995) ("we have held that state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption"). Even, then, if the substantive standards of the Montana unfair-insurance-practices law were subject to the saving power of § 731, nothing in § 731 disturbs the usual § 514 rule that ERISA preempts state-law remedies, including remedies associated with otherwise saved state laws.

B. The Court of Appeals' Decision Is Contrary to This Court's Decisions

The Fossens do not contest, at least as a general matter, that a decision finding state-law remedies to apply to enforce saved state insurance laws is contrary to a train of this Court's precedents, including *Pilot Life* and *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004). *See* Pet. at 32 (listing decisions). However, they contend, again, that a special rule should apply in this situation, because the case involves premiums and because § 731 purportedly applies and has added saving power. For the same reasons that those factors do not distinguish this matter from the other Circuits' decisions involving the exclusivity of ERISA's remedies, they do not provide a basis for disregarding this Court's applicable cases. Decisions like *Pilot Life* and *Davila* nowhere by their terms except a case that deals with the premiums associated with the provision of benefits; they deal (as does this case) with the enforcement of *plan terms*; and, while § 731 was irrelevant in this Court's

decisions, it also has no bearing on the Fossens' unfair-insurance-practices and contract claims.

The Fossens additionally have no credible response to BCBSMT's showing that the Ninth Circuit disregarded this Court's fine, but significant, distinction regarding legal and equitable restitution, with the former being unallowable under ERISA, and the latter being permissible. *See* Pet. at 27-31. In finding the relief sought under the unfair-insurance-practices and contract claims to be consonant with ERISA (thereby, in its view, providing a basis for rescuing those claims from preemption), the Ninth Circuit said simply that ERISA allows for "restitution," and it saw the Fossens as seeking restitution. Pet. App. at 22a. But the Ninth Circuit failed to appreciate that the type of restitution the Fossens' ostensibly seek – namely, the mere return of moneys BCBSMT earlier received from the Fossens but nowhere now existing in a separate, segregated fund – is not a form of restitution authorized in ERISA, under decisions such as *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213-14 (2002), and *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356, 362-63 (2006). Defending the Ninth Circuit, the Fossens broadly assert that "[d]isgorgement . . . of ill-gotten gains" is an allowable equitable remedy. Opp. at 17. The Fossens, in effect, miss the point, nowhere recognizing that – under *Great-West* and *Sereboff* – money must (at a minimum) be held in a segregated fund to be recoverable under ERISA.

The Fossens do make an attempt to stretch the Court's very recent decision in *CIGNA Corp. v.*

Amara, 131 S. Ct. 1866 (2011), so as to allow for all forms of monetary relief in ERISA cases (in order, again, to prop up the Ninth Circuit's finding that the restitution sought by the Fossens is harmonious with ERISA). Yet, the most *CIGNA* said is that the remedy of "surcharge" against a fiduciary may be authorized under ERISA. *Id.* at 1880. Even on that front, the lower courts are already divided on whether the Court's statement in *CIGNA* was holding or dictum. *Compare DeFazio v. Hollister, Inc.*, No. CIV. 2:04-1358, 2012 U.S. Dist. LEXIS 49063, at *97 (E.D. Cal. Apr. 6, 2012) (statement is dictum) *with Guerra-Delgado v. Popular, Inc.*, No. 11-1535, 2012 U.S. Dist. LEXIS 44432, at *17 (D.P.R. Mar. 29, 2012) (statement is holding). The Fossens seek to take a narrow statement that may even have been dictum and turn it, wrongly, into a license for the "expansive fashioning of 'make-whole' relief in equity under [ERISA] § 502." Opp. at 16.[3]

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[3] BCBSMT in its petition further buttressed the case for certiorari by noting the legal and practical importance of the question presented. *See* Pet. at 31-34. The Fossens nowhere address BCBSMT's contentions that the question presented is doctrinally significant, implicates important forum-shopping considerations, and takes on added importance in light of the many invitations to state regulation in the health-insurance arena under the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010). BCBSMT therefore stands on its presentation in the petition on these matters.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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