No. 14-487

IN THE

Supreme Court of the United States

THE RAWLINGS COMPANY, LLC, OXFORD HEALTH PLANS (NY), INC., AND UNITEDHEALTH GROUP INCORPORATED,

Petitioners,

v.

MEGAN WURTZ, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Third, Fourth, and Fifth Circuits have squarely held that a claim by a participant in an ERISA-governed health plan, asserting that a state anti-subrogation law trumps her plan's reimbursement provision, must proceed under—and is thus completely preempted by—ERISA's exclusive remedial scheme. Pet. 14-17. The Second Circuit below acknowledged and rejected those precedents, App. 20a, in a decision that also conflicts with *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004), and other precedents of this Court. Pet. 19-23.

Respondents do not deny the existing circuit conflict. They instead hypothesize that the conflict might someday resolve itself in light of this Court's now-decade-old decision in *Davila*. But the Third Circuit decision *already* post-dates *Davila*, and has been since reaffirmed. The Fourth Circuit has continued to apply its pre-*Davila* complete-preemption standards after *Davila*. And the Fifth Circuit likewise has reaffirmed its holding since *Davila*.

These circuits have not reversed themselves since *Davila* because *Davila* does not undermine, but *confirms*, the complete preemption of claims like respondents'. Respondents, like the Second Circuit, simply misconstrue *Davila* and other relevant precedents. Those precedents make clear that "saved" state insurance regulations are effectively incorporated into ERISA plans' terms, and thus a claim asserting rights or defenses under such a regulation is effectively a claim to enforce plan terms as modified by state law. The claim accordingly must proceed under ERISA's exclusive remedial mechanism for enforcing plan terms.

Allowing—indeed, *requiring*—such claims instead to proceed under distinct state remedial schemes will have substantial adverse consequences for ERISA plan administration. As in New York, state-law remedial schemes typically do not require exhaustion, a crucial mechanism required under ERISA to avoid needless litigation and reduce plan costs. State law also may provide monetary remedies unavailable under ERISA, like the punitive damages sought here. The Second Circuit's holding also results in an untenable remedial structure whereby participants invoking a saved state law to *invalidate* a plan reimbursement provision may employ a state-law cause of action lacking ERISA's procedural protections and remedial limitations, while a plan or insurer seeking to *enforce* the same plan provision must proceed under ERISA and its limited remedial scheme, *see Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006).

The conflict on the question presented persists, and it very much matters to the sound administration of ERISA plans. Certiorari should be granted.

A. The Acknowledged Circuit Conflict Will Not Resolve Itself

Respondents concede the existing circuit conflict but suggest the Third, Fourth, and Fifth Circuits might one day overrule themselves in light of *Davila*. That suggestion is as meritless as it sounds.

1. All three circuits have had ample opportunity to consider whether *Davila* undermines their decisions. None has cast doubt on its precedents. Indeed, respondents admit (at 10-11) that the Third Circuit's decision in *Levine v. United Healthcare Corp.*, 402 F.3d 156 (3d Cir. 2005), was decided a

year *after Davila*, and was later reaffirmed in *Wirth v. Aetna U.S. Healthcare*, 469 F.3d 305, 308-09 (3d Cir. 2006). Respondents admit that "*Wirth* viewed *Levine* as controlling and did not cite *Davila*." Opp. 11. Exactly—the *Levine/Wirth* rule *is* controlling in the Third Circuit after *Davila*. *See Mallon v. Trover Solutions, Inc.*, 2014 WL 2532404, at *5-6 (E.D. Pa. 2014) (*Levine* and *Wirth* "leave[] little doubt that subrogation disputes are claims for benefits due").

The same is true for the rule enunciated by the unanimous en banc Fifth Circuit in *Arana v. Ochsner Health Plan*, 338 F.3d 433 (5th Cir. 2003). That decision was recently cited by a Fifth Circuit panel, along with *Davila*, as governing the complete-preemption inquiry. *Clayton v. ConocoPhillips Co.*, 722 F.3d 279, 285 (5th Cir. 2013). District courts follow *Arana* as binding precedent. *See*, *e.g.*, *Meyers v. La. Health Servs. & Indem. Co.*, 2014 WL 6959257, at *4 (E.D. La. Dec. 4, 2014).

And *Singh v. Prudential Health Care Plan, Inc.*, 335 F.3d 278 (4th Cir. 2003), likewise continues to govern complete-preemption analysis in the Fourth Circuit. *See*, *e.g.*, *Feldman's Med. Ctr. Pharm., Inc. v. Carefirst, Inc.*, 902 F. Supp. 2d 771, 782 n.31 (D. Md. 2012); *Holley v. Harper*, 2007 WL 580573, at *4 (S.D. W. Va. 2007). Recent Fourth Circuit decisions have confirmed that pre- and post-*Davila* complete-preemption standards are identical: "Since *Davila*, the Fourth Circuit [has] continued to apply the three-part" complete-preemption standard adopted in *Sonoco Products Co. v. Physicians Health Plan, Inc.*, 338 F.3d 366, 372 (4th Cir. 2003), which was decided contemporaneously with *Singh*. *Feldman's*, 902 F. Supp. 2d at 779 n.22; *see Moon v. BWX Techs., Inc.*, 498 F. App'x 268, 273 (4th Cir. 2012); *Deem v.*

BB&T Corp., 279 F. App'x 283, 284 (4th Cir. 2008); *see also Kuthy v. Mansheim*, 124 F. App'x 756, 757 (4th Cir. 2004) (applying *Sonoco* and *Davila* standards as interchangeable).

2. It is unsurprising that none of the circuits has identified any inconsistency between their decisions and *Davila*. Respondents' position presupposes that *Davila narrowed* preexisting complete-preemption standards, requiring the circuits to revisit their analyses. But quite the opposite is true: *Davila* reaffirmed preexisting, *broad* complete-preemption standards. As Justice Ginsburg observed in her concurrence, *Davila* was "consistent with [the Court's] governing case law on ERISA's preemptive scope," which had already established "an encompassing interpretation of ERISA's preemptive force." 542 U.S. at 222. *Davila* thus is understood to have "entrenched a broad understanding of preemption." *Leading Cases*, 118 Harv. L. Rev. 456, 461 (2004). Respondents cannot explain how *Davila*'s reaffirmation of a *broad* complete-preemption rule could cause circuits to *narrow* their pre-*Davila* precedents.

3. In fact, the pre-*Davila* decisions applied the *same test* from *Davila* that respondents seek to invoke, i.e., whether the state-law claim implicates a "legal duty" that is "independent" of ERISA plan terms, including plan terms "read in conjunction with state law." *Arana*, 338 F.3d at 438; *see Davila*, 542 U.S. at 210; *infra* at 6-8 (discussing "independent legal duty" test). Consistent with that analysis, each decision found complete preemption because the state-law claim asserted a duty that was *not* independent of the plan terms, as modified by state insurance law. *See Levine*, 402 F.3d at 163 ("Although the Insureds have attempted to characterize their

claim as one looking only at state law, the essence of the claim concerns an ERISA plan."); *Singh*, 335 F.3d at 291 (state-law claims "cannot be resolved without passing on the validity of the subrogation term of [Singh's] ERISA plan"); *Arana*, 338 F.3d at 438-39 (state-law claim sought "benefits premised on an ERISA plan read in conjunction with state law"). Because the decisions in substance all applied the test articulated in *Davila*, *Davila* does not undermine but *reinforces* those decisions.

4. The Second Circuit's decision was also not based solely on the "independent legal duty" standard that respondents wrongly believe was invented in *Davila*. The Second Circuit additionally held that respondents' claims cannot "be construed as colorable claims for benefits under § 502(a)(1)(B)," App. 16a, meaning that a plaintiff challenging her ERISA plan's reimbursement provision under a state anti-subrogation law cannot bring that claim under § 502(a)(1)(B). Respondents do not dispute that the Third, Fourth, and Fifth Circuits reject that conclusion. Opp. 9-11.

Even more important is the extraordinary breadth of the rule the Second Circuit applied to reach that conclusion. According to the Second Circuit, a suit to enforce a "saved" state insurance regulation that does not itself supplement ERISA remedies *categorically* cannot be completely preempted by § 502(a). Pet. 12. Respondents deny that the Second Circuit spoke so broadly (Opp. 12), but the opinion is unambiguous: this Court, said the Second Circuit, "has held that state statutes regulating insurance that nonetheless affect ERISA benefits are not expressly preempted, with no hint that claims under these statutes might still be completely preempted."

App. 18a. The Fifth Circuit correctly rejected that reasoning (Pet. 16-17), a conflict that itself warrants this Court's review.

B. The Decision Below Conflicts With This Court's Decisions

The decision below is also irreconcilable with this Court's precedents. Pet. 19-23.

1. Respondents barely attempt to defend the Second Circuit's holding that they could not have brought their claims under § 502(a). Respondents' suit is substantively identical to those in *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999), and *Rush Prudential HMO Inc. v. Moran*, 536 U.S. 355 (2002), which asserted § 502(a) claims seeking to apply state insurance regulations to alter or invalidate ERISA-governed plan terms. Pet. 20-22. In such cases, § 502(a) supplies the proper cause of action, while the saved state insurance regulation "supplie[s] the relevant rule of decision." *UNUM*, 526 U.S. at 377. All respondents can say is that their suit "involves no disagreement" over the plan terms themselves, because those terms explicitly authorize reimbursement. Opp. 20. But the same was true in both *UNUM* and *Rush Prudential*, in which the plaintiffs contended that they were entitled to benefits under state insurance regulations *despite* plan terms to the contrary. *UNUM*, 526 U.S. at 363-64; *Rush Prudential*, 536 U.S. at 361-62. Section 502(a) nevertheless supplied the vehicle—which is necessarily the *exclusive* vehicle—for those actions.

Respondents' real argument is that their suit evades complete preemption because it is ostensibly based on an "independent legal duty," *Davila*, 542 U.S. at 210—i.e., New York's anti-subrogation law.

Opp. 20-23. That contention misreads *Davila*, and is refuted by this Court's other precedents.

The rule enunciated in *Davila* is that a state-law claim is not completely preempted if it is "entirely independent of the *federally regulated contract itself*." *Davila*, 542 U.S. at 213 (emphasis added). Respondents' claims obviously are not "entirely independent" of their ERISA plans, because the whole point of those claims is to establish that the *plans' reimbursement provisions* are overridden by the state anti-subrogation law. Pet. 22. As the Seventh Circuit has recognized, when "an ERISA plan includes an insurance policy, the requirements imposed by state insurance law *become* plan terms for purposes of a claim for benefits under [§ 502(a)(1)(B)]." *Larson v. United HealthCare Ins. Co.*, 723 F.3d 905, 912 (7th Cir. 2013) (emphasis added).

Respondents nevertheless contend that the plan terms are "immaterial" to their state-law claims because those claims challenge reimbursement as "unlawful under N.Y. GOL § 5-335 regardless of whether the insurance plans actually contain a subrogation clause." Opp. 23. But the terms are not "immaterial" at all—they are in fact *necessary* to respondents' claims, which only exist *because of* the reimbursement provisions. Absent those provisions, petitioners could not seek reimbursement, and respondents would have no basis for suit. Respondents' claims thus do not merely target "petitioners' *conduct*" (*id.*), but instead the express terms of their ERISA plans authorizing reimbursement. Respond-

ents' claims accordingly are not independent of those plan terms.[1]

That conclusion is confirmed by *UNUM* and *Rush Prudential*, both of which were § 502(a) suits seeking to alter or invalidate a plan term by enforcing a state insurance regulation. Pet. 20-21. Respondents argue that these cases do not matter because they involved § 502(a)(1)(B) claims rather than completely-preempted state-law causes of action, so they did not have reason to consider whether the "state laws at issue imposed an independent duty." Opp. 24. But *Rush Prudential* did involve completely-preempted state-law causes of action. 536 U.S. at 362-64 & n.2. More generally, § 502(a)(1)(B) only allows plaintiffs to enforce plan terms, so the § 502(a)(1)(B) claims in both cases *necessarily* involved duties that were not "entirely independent" of the plan. *Davila*, 542 U.S. at 213. This Court made exactly that point in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), observing that *UNUM* "interpreted" the "insurance terms of an ERISA-governed plan … in light of state insurance rules." *Id.* at 1877.

2. The decision below also conflicts with *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013), and *Sereboff*, 547 U.S. 356, which allow (and thus require) ERISA plans to enforce the terms of reimbursement and subrogation clauses under

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[1] Respondents' reliance on precedents construing § 301 of the Labor Management Relations Act is misplaced for the same reason. As respondents recognize, those cases hold that a claim is "independent of the contract" only where it "does not require interpretation of [the] contract's terms." Opp. 20-21. Respondents' claims here do require interpretation of their ERISA plans' terms as modified by the saved state insurance law.

§ 502(a)(3). Opp. 26. On respondents' view, the question whether ERISA's uniform remedial scheme applies depends entirely on who gets to the courthouse first. Pet. 23. Respondents suggest that this pointless dichotomy merely reflects the difference between a suit to enforce plan terms and a suit to enforce state law (Opp. 26), but they miss the point: the actions *both* seek to determine whether the reimbursement provision can be enforced consistent with a saved state anti-subrogation law. If an action to *enforce* a reimbursement provision despite such a state law must proceed under § 502(a), then it follows that an action to *resist* enforcement of the same provision because of the same state law likewise must proceed under § 502(a).

C. The Question Presented Is A Recurring Issue Of National Importance, And This Case Presents An Ideal Vehicle For Resolving It

This case presents an ideal vehicle through which to resolve a recurring question of national importance. Pet. 23-27. Respondents' contentions to the contrary are meritless.

1. Respondents say the question here is unimportant because under *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), state anti-subrogation statutes are all saved from express preemption, and thus insurers will rarely if ever attempt to enforce plan reimbursement or subrogation rights. Opp. 13. But the complete-preemption question here has arisen in four circuits since *Holliday*, and in numerous district courts in other circuits as well. Pet. 24. Nor is it at all clear under *Holliday* whether a given state anti-subrogation law is actually saved from preemption

—numerous courts have found preemption of state anti-subrogation statutes since *Holliday*, *see*, *e.g.*, *Levine*, 402 F.3d at 164-66; *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1356 n.6 (11th Cir. 1998); *Humana Health Plans, Inc. v. Powell*, 603 F. Supp. 2d 956, 957-58 (W.D. Ky. 2009), including a different anti-subrogation law in the Second Circuit, *Bonsanti v. Newman*, 2006 WL 413011, at *3 (Conn. Super. Ct. 2006).

What is more, the Second Circuit's decision is not limited to the anti-subrogation context, but applies by its express terms to *all* claims that "are based on a [non-remedial] state law that regulates insurance." App. 17a. Respondents assert that the court's opinion "cannot plausibly be read" so broadly (Opp. 12), but the opinion says what it says, *see supra* at 5. If allowed to stand, that holding would radically undermine ERISA's uniform remedial scheme. Pet. 25-26.

2. Respondents also err in contending that this case is a poor vehicle for resolving the question presented.

Respondents first argue that certiorari is unwarranted because this Court normally awaits a final judgment before granting review. Opp. 14. But there *was* a final judgment below—the district court dismissed the complaint. App. 77a. The Second Circuit reversed and remanded for further proceedings, but this Court routinely grants certiorari in those circumstances. *See*, *e.g.*, *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

Respondents also say that this "litigation will continue regardless of how this Court rules." Opp.

14. Wrong again. The district court has already dismissed the complaint based on a finding of complete preemption, holding that respondents could not state a § 502(a)(1)(B) claim because (as relevant) they did not (i) exhaust administrative remedies, or (ii) allege that petitioners were plan administrators or fiduciaries, as the Second Circuit requires. App. 73a-77a. The Second Circuit reversed the district court's complete-preemption determination, but if this Court reaffirms that complete-preemption holding, the complaint will necessarily again be dismissed. Respondents do not argue otherwise, but suggest that the Second Circuit may later reverse the district court on exhaustion grounds (they do not mention the district court's alternative ground for dismissal). Opp. 17. But even if that is so—which it is not[2]—the vague possibility that the Second Circuit might someday find that respondents have a viable claim *under § 502(a)* is no reason to avoid deciding whether § 502(a) provides the *only* vehicle for their claim.

Moreover, dismissal would be required because respondents failed to attempt to amend their complaints rather than appealing their dismissal. Pet. 27. Respondents say the district court would have discretion not to dismiss in these circumstances (Opp. 17 n.2), but *Davila* strongly suggests the oppo-

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[2] Respondents do not allege a "statutory ERISA violation" (Opp. 17); they seek to enforce plan terms under § 502(a), so exhaustion is required. *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 134 S. Ct. 604, 610 (2013). Respondents' assertion (at 17) that exhaustion would have been futile is baseless, as petitioners have explained (Pet. 10 n.2) and respondents have not answered.

site, 542 U.S. at 221 n.7, and respondents in any event fail to explain why dismissal would not be warranted.

Finally, it is untrue that "other issues already being litigated on remand may render the question presented irrelevant to the outcome of this case." Opp. 15. It is irrelevant that only Ms. Burnovski's declaratory judgment claim (also available under ERISA) remains (Opp. 15-16), because a complete-preemption finding would result in dismissal of respondents' entire complaint. Regardless, respondents admit that the district court refused to dismiss Ms. Wurtz's class-wide claims for monetary (including punitive) damages. Opp. 15. Respondents posit that these damages claims may be dismissed at summary judgment (Opp. 16), but they will certainly oppose that outcome. And the more fundamental point is that Congress sought to preclude subjecting ERISA plans to litigation over such issues in the first place.[3]

This Court should grant certiorari and hold that respondents' claims can be brought, if at all, only under § 502(a).

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[3] If the Court grants certiorari, petitioners will move the district court for a stay of further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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