No. 14-741

IN THE

# Supreme Court of the United States

SELF-INSURANCE INSTITUTE OF AMERICA, INC.,
*Petitioner,*

*v.*

RICK SNYDER, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF MICHIGAN; R. KEVIN CLINTON, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE OFFICE OF FINANCIAL AND INSURANCE REGULATION OF THE STATE OF MICHIGAN; AND ANDREW DILLON, IN HIS OFFICIAL CAPACITY AS TREASURER OF THE STATE OF MICHIGAN,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

## REPLY BRIEF


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## INTRODUCTION

Respondents' Brief in Opposition ("BIO") does not offer any response to SIIA's showing that the Michigan Act imposes direct, complex and burdensome requirements on ERISA plan fiduciaries arising solely from their administration of health care benefits for Michigan residents. Nor do respondents dispute that the requirements imposed by the Michigan Act inevitably will necessitate modifying the relationships between and among ERISA entities affected by the Act in ways that are not required by any other state. The payments required of ERISA plan fiduciaries by Michigan's tax collection scheme have to come from somewhere, giving ERISA fiduciaries no choice but to adjust the way they perform federally protected, core functions to accommodate the quarterly payment and reporting responsibilities that Michigan has foisted upon them to reduce the State's own tax collection burdens.

Instead of confronting the quagmire created by this Court's ERISA preemption precedents, respondents simply parrot the Sixth Circuit's rationale below and assert that the imposition of tax collection and reporting requirements that unequivocally "relate to" ERISA benefit plans in any literal sense are not preempted because the requirements do not "interfere with any of the core decisions an ERISA plan might make such as who is eligible under the plan, what types of healthcare benefits the plan must provide, or what amounts of benefits the plan must provide to a beneficiary." BIO at 1. But this "core decisions" concept has no foundation in the express language of Section 514(a) of ERISA, 29 U.S.C. § 1144(a), and, whatever significance it might have in a case where a

state law imposes truly untargeted, incidental burdens on ERISA plans, it improperly skews the analysis where, as here, ERISA plans have been targeted precisely because they perform program functions that states like Michigan wish to exploit for their own benefit.

Respondents' assertion that there is no circuit split is equally unpersuasive, because the "core decisions" concept squarely conflicts with the Second Circuit's decision in *Donegan n/k/a Gobeille* (No. 14-181, CVSG pending), where a divided panel of that court held that ERISA preempted a burdensome data reporting requirement that was equally independent of the "core decisions" that ERISA fiduciaries make. Even a cursory reading of the Second and Sixth Circuit decisions evinces a fundamental disagreement over the proper interpretation of the words "relate to" in Section 514(a) – a disagreement that that Sixth Circuit expressly acknowledged and that seven of Michigan's sister states highlight in support of their argument that this Court should grant the writ in *Gobeille*. Respondents claim that there is no circuit split because the Second Circuit would uphold the Michigan Act as a traditional exercise of state taxing power, but that speculative contention is meritless. State tax laws do not have blanket immunity from ERISA preemption, there is nothing "traditional" about the Michigan Act, and the Second Circuit decisions upon which respondents rely (*Hattem* and *Mount Sinai*) dealt with ERISA preemption challenges to laws that bear no resemblance to Michigan's tax scheme.

In sum, respondents fail to offer any persuasive reason why this Court should not grant the writ to answer the important, unresolved question whether Section 514(a) of

ERISA preempts laws that directly target ERISA plans with burdensome regulations to exploit their operations for state benefit, particularly as the issue is squarely before the Court on two pending petitions for certiorari. And unless and until this Court clarifies that ERISA prohibits targeted impositions like the Michigan Act, the divergent approaches taken by the courts of appeals will continue to threaten ERISA plans with onerous and conflicting state law duties that violate the letter and purpose of ERISA's express preemption mandate.

## REASONS FOR GRANTING THE PETITION

### I. Respondents Fail To Undermine The Conclusion That The Michigan Act And Its Implementing Regulations Target ERISA Fiduciaries With Substantial Burdens Solely Because Of The Federally Protected Functions They Perform.

Respondents do not dispute that the Michigan Act, Mich. Comp. Laws §§ 550.1731 *et seq.*, and its implementing regulations, Mich. Admin. Code r. 550.402-550.404 (2013), impose substantial tax payment, collection and reporting burdens on ERISA fiduciaries precisely because they handle large payment streams in the discharge of their federally protected responsibilities that Michigan now wishes to exploit for its own benefit. *See* Pet. at 4-12, 22-23. Respondents also do not dispute that the compliance burdens imposed by the Michigan Act will necessarily alter the relationships between ERISA-covered entities.[1] For

1. Although respondents cite the decision below for the proposition that the Michigan Act "'does not require a plan administrator to change how it administers the plan at all'" (BIO

example, Michigan's Treasury Department has instructed third party administrators that they are required to pay the state tax on paid healthcare claims (and find the funds to do that) regardless of whether they have any direct access to the bank accounts that are used to pay the claims or otherwise have funds sufficient to comply. *Taxes: Frequently Asked Questions,* Michigan Dep't of Treasury (2014), *available at* http://www.michigan.gov/taxes/0,4676,7-238-60726-274626--F,00.html (last visited May 5, 2015). In turn, this mandate and the reporting requirements imposed by the Michigan Act, including the requirement that ERISA plan administrators segregate healthcare beneficiaries by state of residence, force ERISA fiduciaries to revisit their relationships with plan entities and the beneficiaries that they serve in order to comply. *See* Pet. at 6-12, 27.

These features of the Michigan Act starkly distinguish this case from prior decisions that have rejected ERISA preemption challenges to tax regimes that impose only incidental burdens on ERISA plans that are unrelated to the performance of plan functions. Moreover, respondents' efforts to downplay the legal significance of the burdens imposed by the Michigan Act are unavailing. Respondents' assertion that the State's tax scheme is justified because

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at 10 (citing Pet. at App. 8a)), respondents' conception of "plan administration" is improperly limited to the processing and payment of benefits. BIO at 1, 5, 10-11. Relationships between plan sponsors and administrators are federally regulated elements of ERISA plans as are the methods by which sponsors and administrators make payments made to health care providers. Compliance with the Michigan Act forces ERISA fiduciaries to modify these aspects of their operations to pay the tax and conform to the detailed requirements of the Act.

Michigan is merely exercising the "traditional state power" to tax (BIO at 1) is nonsensical. Section 514(a) of ERISA is "clearly expansive," *Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2001) (citation and quotation omitted), and state tax laws are not immune from ERISA preemption. *See, e.g.*, 29 U.S.C. § 1144(b)(5)(B); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 815 n.11 (1997). Furthermore, putting aside that Section 514(a) of ERISA is an express preemption provision with a mandate that should not be constrained by any implied presumption against preemption, the Michigan Act is not entitled to any sort of historical deference. Respondents admit that the Michigan Act was promulgated in response to concerns recently expressed by the Centers for Medicare and Medicaid Services about the validity of Michigan's former Medicaid funding mechanism, which imposed a 6% tax on Medicaid managed-care organizations (BIO at 2). And, of course, the Act is a newly minted statute that is expressly framed with reference to ERISA plans. *See, e.g.*, Mich. Comp. Laws § 550.1732(h). In these aspects, Michigan's tax collection scheme is no more traditional than the Vermont data collection requirements that the Second Circuit properly struck down in *Donegan n/k/a Gobeille*.

Respondents' argument that the Michigan Act does not target ERISA fiduciaries for regulation in the ordinary sense of that word (BIO at 10, 15) is similarly flawed. Contrary to respondents' suggestion, there is no exception in Section 514(a) for laws that apply to a "'broad array of entities'" (BIO at 15). Respondents all but concede that ERISA plans were made subject to the Act because they conveniently handle large claim payment streams that Michigan wishes to exploit (*id.*), and there is no

purchase in the plain language of ERISA for the notion that states can saddle ERISA plans with obligations that frustrate the purposes of federal law as long as they impose similarly onerous burdens on non-ERISA entities that perform similar functions. Accordingly, this is not a case where the burdens imposed by state law are too entrenched, generalized, collateral or trivial to trigger ERISA preemption. *Compare, e.g., De Buono*, 520 U.S. at 820 (upholding state gross receipts tax that was imposed on income earned on patient services provided at hospitals, residential health care facilities, and diagnostic and treatment centers); *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997) (upholding state prevailing wage law that had only incidental effects on ERISA fiduciaries); *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988) (generally applicable state garnishment statute not preempted).

## II. Respondents' Contention That There Is No Split Between The Second And Sixth Circuits Is Meritless And Squarely Contradicts The Position Taken By Seven Of Michigan's Sister States In Support Of The Pending Petition in *Gobeille*, Docket No. 14-181.

Respondents' argument that "the [Sixth and Second Circuit] decisions do not conflict" (BIO at 7) is wrong. Even a cursory review of the court of appeals' decisions evinces a fundamental disagreement. The Sixth Circuit itself expressly stated that it "disagree[d] with [the Second Circuit's] literal approach to preemption," Pet. App. at 15a-16a, and endorsed the notion that ERISA preemption cannot be found unless a state law directly interferes with a plan "administrator's 'standard procedures to guide

processing of claims and disbursement of benefits.'" *Id.* at 9a. Not surprisingly, in support of the pending petition for certiorari in *Gobeille*, No. 14-181, Vermont and six of its sister states have argued that the Sixth Circuit's narrow view of ERISA preemption is correct and defines the circuit split. *See* Petition for Certiorari at 14, 19-21, 23, 31-33, *Gobeille v. Liberty Mut. Ins. Co.*, No. 14-181 (Aug. 13, 2014); Amicus Curiae Brief of New York *et al*. in Support of Petitioner at 3, 10-11 *Gobeille v. Liberty Mut. Ins. Co.*, No. 14-181 (Sept. 15, 2014).

Respondents' assertion that there is no split between the Second and Sixth circuits because "the Second Circuit would uphold a tax like Michigan's" (BIO at 9) is equally unfounded. There is no basis to conclude that the Second Circuit would deem Michigan's tax collection and reporting regime any less onerous than the Vermont data collection scheme that the Second Circuit struck down in *Donegan*. Moreover, contrary to respondents' position (BIO at 9-11), the Second Circuit's decisions in *Hattem v. Schwarzenegger*, 449 F.3d 423 (2d Cir. 2006) and *New England Health Care Employees Union v. Mount Sinai Hospital*, 65 F.3d 1024 (2d Cir. 1995) do not alter the analysis, because the laws at issue in those cases bear no resemblance to the Michigan Act. In *Hattem*, the Second Circuit upheld a California law that imposed a tax on investment earnings by non-profits against an ERISA preemption challenge, reasoning that the tax (i) was "one of general applicability"; (ii) did "not force trust fiduciaries to act in a certain manner"; and (iii) did not "contain[] provisions that expressly refer to ERISA or ERISA plans." *Hattem*, 449 F.3d at 431-32 (quotations and citation omitted). Similarly, in *Mount Sinai*, the Second Circuit rejected an ERISA preemption challenge to a Connecticut law that authorized all hospitals to impose a surcharge on

the bills of paying patients to subsidize uncompensated and undercompensated health care. *Mount Sinai*, 65 F.3d at 1030 (holding that "a law's indirect economic effect on ERISA plans, in and of itself, generally will not trigger ERISA preemption").[2]

SIIA's Petition acknowledges that state laws that affect only the external business environment in which ERISA plans choose to operate (*e.g.*, the state hospital tax at issue in *Travelers* and *Hattem*) or reach ERISA plans only because the plans share characteristics with the general business community at large (*e.g.*, the garnishment statute at issue in *Mackey*) are not preempted. Those laws, however, bear little resemblance to the Michigan Act, because the Michigan Act deliberately burdens ERISA plans with complex payment and reporting obligations that are designed to exploit the plans' necessary performance of federally protected functions for the State's benefit.

## III. The Court Should Grant Certiorari To Resolve The Question Whether ERISA Preempts State Laws That Deliberately Seek To Exploit The Operations Of ERISA Plans.

By limiting ERISA preemption to state laws that meddle directly with the inner workings of plan

2. Respondents' suggestion that this Court's decision in *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995) transformed the ERISA preemption analysis mandated by Section 514(a) from one of field preemption to conflict preemption is similarly flawed. While this case affords the Court an important opportunity to clarify the boundaries of the field of state law that is expressly preempted by ERISA, *Travelers* merely endorsed the principle that state laws that impose purely incidental burdens on ERISA plans when they elect to act as regulated health care service providers are not implicated.

administration and, specifically, the "processing of claims and the disbursement of benefits," Pet. App. at 10a (citation omitted), the Sixth Circuit's decision invites other states to follow Michigan's lead and adopt burdensome and potentially conflicting regulatory schemes that deliberately exploit for state benefit the federally protected functions that ERISA plans perform. Respondents do not advance any reason why this Court should not clarify the impact of Section 514(a) of ERISA on the Michigan Act and similarly disruptive laws.

As SIIA demonstrated in its Petition, the state laws that this Court has previously examined have either been preempted because they impermissibly have "a connection with" or "refer[] to" the operations of an ERISA plan such as the administration of benefits, or not preempted because, in conception, purpose and effect, their impact on ERISA plan operations is "tenuous, remote, or peripheral." Pet. at 17 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 100 n.21 (1983)). Granting review in this case would afford the Court an opportunity to close the gap in its decisions and definitively endorse a bright-line, but-for test that establishes that burdensome state regulatory regimes that target ERISA plans and administrators for regulation are indeed preempted. Unless and until the Court squarely addresses this issue, the divergent approaches adopted by the Sixth and Second Circuits will continue to generate confusion and threaten ERISA plans with a proliferation of cumbersome and conflicting state laws that graft costly mandates on their core functions. *See* Edward A. Zelinsky, *Gobeille v. Liberty Mutual: An Opportunity to Correct the Problems of ERISA Preemption*, 100 Cornell L. Rev. Online (forthcoming 2015), *available at* http://ssrn.com/abstract=2595589.

## CONCLUSION

For the reasons set forth herein, in the Petition, and in the briefs submitted by SIIA's supporting amici, the Court should grant SIIA's petition for a writ of certiorari.

Respectfully submitted,

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