No. 14-181

IN THE

Supreme Court of the United States

ALFRED GOBEILLE, in his official capacity as chair of the Vermont Green Mountain Care Board,
Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent.

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

SUPPLEMENTAL BRIEF FOR RESPONDENT

ANDREW C. LIAZOS
MCDERMOTT WILL & EMERY LLP
28 State Street
Boston, MA 02109

M. MILLER BAKER
MCDERMOTT WILL & EMERY LLP
500 North Capitol St., NW
Washington, DC 20001

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
MATTHEW THOME
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

IN THE

Supreme Court of the United States

No. 14-181

ALFRED GOBEILLE, in his official capacity as chair of the Vermont Green Mountain Care Board,
Petitioner,

v.

LIBERTY MUTUAL INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

As the Brief for the United States makes clear, further review of the decision below is unwarranted. The court of appeals' decision—which held that ERISA preempts Vermont legislation and implementing regulations that, as applied in this case, would have compelled reporting to the State data about claims paid under the terms of ERISA plans—does not directly conflict with any decision of this Court or any other court of appeals.[1] *See* U.S. Br. 18-21; *see also* Br. in Opp. 24-

[1] The United States does argue (Br. 16-17) that the court of appeals erred in holding the Vermont reporting requirements preempted by ERISA, but appears to base its disagreement, at least in part, on a supposed lack of *factual* support for the court of

29. Further, the decision below is the first court of appeals decision to address such a reporting regime; because States within other circuits have enacted similar legislation, it is unlikely to be the last. *See* U.S. Br. 23. As the United States correctly observes, "further percolation of the question presented among the courts of appeals is likely to prove helpful to the Court" by "furnishing the perspective of other courts of appeals on the legal issue" and by potentially furnishing the Court "with more information to assess the impact of similar reporting requirements on the administration of ERISA plans generally." *Id.* For those reasons, the petition for a writ of certiorari should be denied.[2]

---

appeals' decision, and the United States acknowledges that "the decision below does not purport to rest on a significant expansion of ERISA preemption principles" (*id.* at 19; *see also id.* at 15-16). For the reasons discussed in Respondent's Brief in Opposition, however, the court of appeals' decision reflects a proper application of the ERISA preemption principles in this Court's decisions and is correct. Br. in Opp. 14-24.

[2] The United States incorrectly argues (U.S. Br. 9-11) that this Court has jurisdiction because petitioner Gobeille, the Chair of the Vermont Green Mountain Care Board, was supposedly an appropriate party to petition for certiorari in this case. The subpoena that Liberty Mutual seeks to enjoin in this case was issued not by petitioner, but by the Commissioner of the Vermont Department of Financial Regulation (the "Commissioner") pursuant to a Vermont statute (8 V.S.A. § 13(a)) that continues to grant the Commissioner the authority to issue and enforce such subpoenas to this day. *See* Br. in Opp. 3a-4a (subpoena); *see also id.* at 2 n.1 (noting that the Vermont Department of Financial Regulation was formerly known as the Vermont Department of Banking, Insurance, Securities and Health Care Administration). Because the Commissioner continues to have the authority to enforce the subpoena at issue, the Commissioner's duties have not been transferred to petitioner, and automatic substitution under S. Ct. R. 35.3 has not occurred. Although the United States argues that

Review should be denied for an additional reason: The United States has disclosed that the Secretary of Labor (the Secretary), "in aid of his authority to ensure compliance with ERISA's fiduciary standards and claims-processing rules," is "currently considering undertaking a rulemaking to require health plans to report more detailed information about the cost of benefits, utilization of medical services, and plan administration." U.S. Br. 3 n.1. Although the specifics of this potential rulemaking are unclear, as described by the United States the rulemaking under consideration by the Secretary could impose on ERISA plans reporting requirements of the same type at issue in this case—reporting on the use of medical services by participants in ERISA plans. The possibility that such a rulemaking may occur in the near future weighs against review of the court of appeals' decision.

First, the potential rulemaking raises the possibility that ERISA plans will soon be subject to federal reporting requirements that overlap with the Vermont reporting regime at issue. Under such circumstances, the Vermont regime would almost certainly be preempted. Even in the absence of a direct conflict, a decision by the Secretary to impose such reporting requirements on

---

petitioner is now "the state official who seeks to enforce the respondent's compliance with [the reporting] requirements with respect to the subpoena in this case," U.S. Br. 10, there is no support in the record for the proposition that petitioner can enforce a subpoena issued under Title 8. Even if petitioner is the state official who will enforce Vermont's reporting requirements in the future pursuant to his own subpoena power under Title 18 of the Vermont Statutes, U.S. Br. 10-11, that shows only that the petitioner had an interest that might have justified intervention in the court of appeals, not that petitioner was automatically substituted for the Commissioner.

ERISA plans would make clear that the state reporting requirements at issue here are not "generally applicable laws regulating areas where ERISA has nothing to say," *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147-148 (2001) (internal quotation marks omitted), but instead implicate a core area of ERISA concern reserved for exclusive federal regulation and should thus be preempted. At a minimum, the United States' note suggests the federal regulatory background to the preemption issue raised by this case may be about to shift. Under these circumstances, the Court would benefit from waiting until any new federal reporting requirements with respect to ERISA plans are settled before addressing whether state reporting requirements like those at issue here are preempted by ERISA.

Second, the rulemaking envisioned by the Secretary undermines petitioner's argument that the preemption issue in this case is so important that it requires this Court's immediate review (even in the absence of a conflict among the circuits). If the Secretary does require ERISA plans to report "more detailed information" about health-care benefits that they deliver, States will have no need to obtain that same information from ERISA plans. States could request such data from the Secretary, rather than imposing reporting requirements directly on ERISA plans, and could thus avoid the preemption issues presented by this case.[3] Any rulemaking would be subject to notice and comment, and Vermont and other States seeking claims data from ERISA plans would be free to comment on the kinds of

[3] As the United States notes, the federal Centers for Medicare and Medicaid Services already provide Medicare claims data to Vermont for use in its database. U.S. Br. 18 n.7.

information that should be subject to federal ERISA reporting requirements, including advocating for federal reporting of the same information Vermont currently seeks. Employers could also provide comments on the kinds of uniform reporting rules that should be developed to reduce administrative burdens and protect the confidentiality of plan participants. Whether the Secretary will impose federal reporting requirements, what the scope of those requirements will be, and how States will react to and use the federal reporting requirements when developing their own claims databases are all questions that should be resolved before this Court addresses the preemptive effect of ERISA on state reporting regimes like those at issue here.

Finally, the United States' explanation of the Secretary's authority for the potential rulemaking itself illustrates why the court of appeals properly concluded that ERISA preempts the Vermont reporting requirements at issue. The United States acknowledges (at 3 n.1) that the Secretary's potential rulemaking and imposition of reporting requirements would be done in aid of the Secretary's "authority to ensure compliance with ERISA's fiduciary standards." The United States' description of the potential rulemaking as in aid of ERISA's fiduciary standards thus confirms—contrary to petitioner's assertion that Vermont's reporting requirements are unrelated to ERISA's principal concerns and thus are not preempted[4]—that there is a relationship between a requirement that an ERISA plan report on the use of medical services by plan par-

[4] *See, e.g.*, Pet. 20 ("Vermont's health care database … is unrelated to ERISA's core concern with plan administrators' fiduciary responsibilities to beneficiaries.").

ticipants and the core concerns of ERISA. Because such reporting requirements have a clear "connection with" an ERISA plan, *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983), they fall within the realm of exclusive federal authority, and any attempt by the States to impose such requirements are preempted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ANDREW C. LIAZOS
MCDERMOTT WILL & EMERY LLP
28 State Street
Boston, MA 02109

M. MILLER BAKER
MCDERMOTT WILL & EMERY LLP
500 North Capitol St., NW
Washington, DC 20001

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
MATTHEW THOME
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

Counsel for Respondent Liberty Mutual Insurance Company

JUNE 2015