

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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Place: Washington, D.C.

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1 IN THE SUPREME COURT OF THE UNITED STATES
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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
13
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	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	NICHOLAS J. BRONNI, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	FREDERICK LIU, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioner	25
9	ORAL ARGUMENT OF:	
10	SETH P. WAXMAN, ESQ.	
11	On behalf of the Respondent	40
12	REBUTTAL ARGUMENT OF:	
13	NICHOLAS J. BRONNI, ESQ.	
14	On behalf of the Petitioner	68
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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.

16 Rather, they regulate PBM
17 reimbursement practices, and plans don't control
18 those practices. Instead, those practices are
19 governed by PBM pharmacy contracts that aren't
20 even shared with plans. And it therefore defies
21 common sense to suggest that Act 900 regulates
22 plan administration. There is no "connection
23 with" problem.

24 Third, Act 900 does not refer to
25 ERISA. Under Dillingham, only laws that treat

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

6 This Court should reverse the judgment
7 below.

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

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

24 MR. BRONNI: Well, Your Honor, I -- I
25 think, at the end of the day, the one thing that

1 affects plans and, in fact, the only way in
2 which the -- our law actually affects plans is
3 it might alter the -- what plans ultimately pay.

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

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

25 And the same thing is true here. We

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

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

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Justice Thomas.

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

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

25 MR. BRONNI: So, Your Honor, it -- it

1 actually doesn't affect things like copay. And,
2 in fact, copay would be a flat fee, for
3 instance, that the -- the beneficiary would pay.
4 And the only adjustment that's made as a result
5 of their reimbursement appeal, which, by the
6 way, happens now, the only adjustment that's
7 made as a result of that would be the adjustment
8 of what the PBM owes the pharmacy.

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

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

25 Act 900 doesn't impact any of that.

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

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

16 JUSTICE THOMAS: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer.

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

1 price that they're going to have to pay the
2 plan.

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

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

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

24 Preempted?

25 MR. BRONNI: Again, Your Honor,

1 because it's regulated --

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

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

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

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

18 JUSTICE BREYER: And what's --

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

21 JUSTICE BREYER: -- the percentage?

22 MR. BRONNI: I -- so I'm not -- the --
23 the record doesn't reflect what the percentage
24 is that's backed ultimately by an ERISA plan,
25 but I -- we do know that it's not all of them.

1 In fact, PCMA brought a Medicare Part D claim
2 and was able to prevail on that claim in the
3 Eighth Circuit, which would underscore that
4 they're not all -- all ERISA plans.

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

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Alito?

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

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

1 that they are thought to serve.

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

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

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

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

1 statute.

2 JUSTICE ALITO: Well, that is --

3 MR. BRONNI: But, here --

4 JUSTICE ALITO: -- an interpretation.

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

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

20 JUSTICE ALITO: Thank you, counsel.

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

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

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

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

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

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

24 Beneficiaries are being directly
25 affected and plans are being affected quite

1 directly because they're being blocked out of --
2 of any market whatsoever for a cheaper drug.

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

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

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

24 But that's not this case. This case,
25 obviously, they haven't made an argument that --

1 that our drug regulation is so onerous that it
2 would dictate their substantive decision-making.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Kagan.

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

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

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

25 MR. BRONNI: I think the easier

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

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

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

25 JUSTICE KAGAN: Thank -- thank you,

1 General.

2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch.

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

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

19 Would you care to respond to that now?

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

1 language this Court used was that it was a
2 direct regulation of a fundamental ERISA
3 function, which is recordkeeping and reporting
4 that's specifically listed and detailed in ERISA
5 and the Department of Labor has additional power
6 to -- to issue additional regulations under.

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

11 JUSTICE GORSUCH: I guess my
12 question --

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

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

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

1 -- a -- a third-party administrator pays a -- a
2 service provider or even what a plan would pay a
3 service provider.

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

10 JUSTICE GORSUCH: Thank --

11 MR. BRONNI: -- dispute under that --

12 JUSTICE GORSUCH: -- thank you,
13 counsel.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you, Chief
17 Justice.

18 And good morning, General Bronni.

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

25 Do you agree or disagree with the

1 premise that this will have an effect on plan
2 beneficiaries?

3 MR. BRONNI: I disagree with that,
4 Your Honor.

5 JUSTICE KAVANAUGH: And can you
6 explain that?

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

23 But I -- I also think that the
24 decision by the PBM, there's -- there's no
25 requirement that the PBM pass on any cost

1 increases that might come along with that to the
2 plan. That's entirely up to the PBM's business
3 decision. It can decide not to pass those
4 along, and if -- if their representation below
5 that they compete competitively based on price
6 is true, then it may be true that some PBMs
7 choose to pass on those costs, some do not.

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

14 JUSTICE KAVANAUGH: Thank you.

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

17 MR. BRONNI: Thank you, Mr. Chief
18 Justice.

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

23 All the provisions at issue here
24 regulate rates or, at a minimum, they all
25 implement or enforce Arkansas's rate regulation.

1 And Respondent doesn't dispute that. And to the
2 extent that Respondent relies on the complexity
3 of the PBM pharmacy reimbursement process, that
4 also doesn't change the analysis.

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

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

17 Thank you, Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Mr. Liu.

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

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

1 The key question in this case is
2 whether the Arkansas law directly regulates a
3 central matter of plan administration. If it
4 does, then the law has an impermissible
5 connection with ERISA plans. But, if it does
6 not, then there is no impermissible connection
7 and no ERISA preemption.

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

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

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

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

9 So is your approach focusing on who is
10 being regulated or what is being regulated?

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

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

22 And our response to that argument was
23 twofold: first, to say that that's just a
24 misreading of the state law here, it doesn't
25 apply directly to plans, but, more importantly,

1 secondly, that even if it did, it wouldn't
2 matter because, at the end of the day, pharmacy
3 reimbursement just isn't a central matter of
4 plan administration.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas.

8 JUSTICE THOMAS: Chief, I have no
9 questions. He addressed my concerns.

10 CHIEF JUSTICE ROBERTS: Justice
11 Breyer.

12 JUSTICE BREYER: Same. I have no
13 addition. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice Alito.

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

21 Do you recommend that we take that
22 approach? Would it work?

23 MR. LIU: I think it would work,
24 Justice Alito. We would be -- we have no
25 objection at all if the Court took a more

1 text-based approach to ERISA preemption.

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

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

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

22 JUSTICE ALITO: And how would you --

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

24 JUSTICE ALITO: -- how would you
25 define the field?

1 MR. LIU: The field would be defined
2 by the text of the preemption clause, so the
3 provisions of this subchapter and subchapter 3.
4 That's the field the text marks out.

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

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

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

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

1 with and supplemented the -- the federal regime.

2 So you wouldn't have, strictly
3 speaking, any conflict preemption, but we would
4 still say that the state law fell within the
5 field occupied by "the provisions of this
6 subchapter and subchapter 3."

7 JUSTICE ALITO: All right. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor.

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

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

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

1 If you look at all the cases this
2 Court has found a state law to have an
3 impermissible connection with ERISA plans, there
4 are eight of them. Seven involved state laws
5 regulating the plan-participant or beneficiary
6 relationship by regulating what healthcare
7 services are covered, who counts as a
8 beneficiary, how benefits are calculated, and
9 how participants can enforce their own rights
10 under the plan.

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

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

22 JUSTICE SOTOMAYOR: Thank you,
23 counsel.

24 CHIEF JUSTICE ROBERTS: Justice Kagan.

25 JUSTICE KAGAN: Mr. Liu, one of the

1 main drivers of ERISA's preemption provision was
2 a concern about uniformity. And, here, we have
3 45 different states that have passed all kinds
4 of laws with respect to these PBMs.

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

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

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

24 But, if we're talking about an area of
25 traditional state regulation that is beyond any

1 central matter of plan administration, then I
2 think those uniformity concerns go away.

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

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

22 And even if the --

23 JUSTICE KAGAN: Thank you, counsel.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch.

1 JUSTICE GORSUCH: No questions. Thank
2 you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh.

5 JUSTICE KAVANAUGH: Thank you, Mr.
6 Chief Justice.

7 And good morning, Mr. Liu.

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

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

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

1 passed along to plans and their ben- --
2 beneficiaries eventually.

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

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

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

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

25 I think you have to ask in all these

1 cases, what is being regulated? And if it's not
2 the plan-participant relationship itself, which
3 I agree is central to what ERISA cares about,
4 then there is no preemption.

5 JUSTICE KAVANAUGH: Thank you.

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

9 MR. LIU: Thank you.

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

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

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

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

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

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

22 Such laws would surely have an effect
23 on a PBM's procedures, but the Court went out of
24 its way to say: Look, we can't draw any
25 principled line between rate regulation on the

1 one hand and all sorts of other laws on the
2 other that have an effect on cost.

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

10 And, really, what Respondent's
11 argument amounts to is a request that this Court
12 cut back on or overrule Travelers. This Court
13 should reject that request, which would remove
14 one of the few principled limits on ERISA
15 preemption, expand the scope of its preemption
16 clause to its broadest point ever, and open the
17 door to all sorts of new ERISA preemption claims
18 --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. LIU: -- and open --

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Waxman.

25

1 ORAL ARGUMENT OF SETH P. WAXMAN
2 ON BEHALF OF THE RESPONDENT

3 MR. WAXMAN: Mr. Chief Justice, and
4 may it please the Court:

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

11 Now Arkansas says it can dictate how
12 plans should be administered as a means of
13 so-called rate regulation. But state regulation
14 of ERISA plans as a means to some other end,
15 whether it's rate regulation or otherwise, has
16 never been permitted.

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

22 Travelers neither dictates nor even
23 suggests otherwise. The law there regulated a
24 healthcare provider by requiring it to impose a
25 surcharge on patients. As this Court explained

1 and as reiterated in haec verba in Dillingham,
2 the New York law "did not bind plan
3 administrators to any particular choice and thus
4 function as a regulation of the ERISA plan
5 itself. Nor did the indirect influence of a
6 surcharge preclude uniform administration or
7 provision of a uniform interstate benefit
8 package."

9 Act 900 does bind plan administrators
10 to particular choices and, in the welter of
11 varying state laws, makes uniform national plan
12 administration impossible.

13 Preemption applies whether the plan
14 administers the benefits itself or, as most are
15 required to do, engages a PBM to do so on its
16 behalf.

17 This Court has never distinguished
18 between plan administration and third-party
19 administration. That distinction made no
20 difference in Gobeille, and it would have
21 destructive effects on the foundational purpose
22 of ERISA. This Court --

23 CHIEF JUSTICE ROBERTS: Mr. Waxman,
24 the -- the main effect of the state law here is
25 on -- on what pharmacists get for -- for selling

1 drugs, and it's also the clear purpose of the
2 law.

3 Why don't -- shouldn't we look at that
4 underlying reality rather than the mechanics
5 that the state imposes to achieve it?

6 MR. WAXMAN: Mr. Chief Justice, I
7 think the answer is no, and I think the question
8 that you asked my friend, General Bronni,
9 provides the answer.

10 You can look in -- it would be one
11 thing if Arkansas said that pharmacies, you know
12 -- you know, may or must receive X number of
13 dollars for Y drug.

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

19 The first, which is the last sentence
20 of Footnote 4, explain that the Court did not
21 address the surcharge statute insofar as it
22 applied to self-insured plans.

23 And the second, as my friend
24 mentioned, is that if the state law produced
25 economic effects as to force the ERISA plan to

1 adopt a certain scheme of coverage, it would,
2 indeed, be preempted.

3 CHIEF JUSTICE ROBERTS: Well, it's not
4 the --

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

6 CHIEF JUSTICE ROBERTS: -- it's not
7 the state -- state or the pharmacy's fault that
8 the PBMs have such byzantine procedures that
9 affect drug prices.

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

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

22 CHIEF JUSTICE ROBERTS: Well, counsel,
23 you got one out of four in. Could you very
24 briefly just say --

25 MR. WAXMAN: Yes.

1 CHIEF JUSTICE ROBERTS: -- what the
2 other three are?

3 MR. WAXMAN: Yes. The varying
4 appellate -- the varying different appeal
5 procedures with different rules of decision, a
6 widely varying set of remedies that plan
7 administrators have to provide, and, of course,
8 the various states with different
9 decline-to-dispense provisions, which directly
10 deprive beneficiaries of a promised benefit.

11 And it's all of those procedures that
12 go to what is, indeed, a central matter of plan
13 administration and certainly makes it impossible
14 to have a national uniform plan administration.

15 CHIEF JUSTICE ROBERTS: Counsel, I'm
16 sorry, I was looking at the wrong time
17 allocation. We have a little more time.

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

25 Anything wrong with looking at it that

1 way?

2 MR. WAXMAN: Well, I think it
3 oversimplifies it to the point of distortion.
4 What -- this is directed at -- at plans and plan
5 administrators that use MAC lists as part of
6 their methodology for determining what benefits
7 will be provided to which employees for which
8 drugs in which pharmacies.

9 And it's the interference with the
10 application of that methodology upon which the
11 entire plan is designed that makes this so --
12 you know, so preempted.

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

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Thomas.

25 JUSTICE THOMAS: Thank you, Chief

1 Justice.

2 Mr. Waxman, I was intrigued by
3 Mr. Liu's answer to Justice Kagan's question
4 about uniformity. Would you take some time --
5 you seem to suggest that it's just one more item
6 of disuniformity and/or lack of uniformity. And
7 I'd like you to comment on his answer, somewhat
8 at length, if -- if you don't mind.

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

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

21 There are 40 other states that require
22 updates but on different schedules with
23 different triggers for updates and different
24 substantive requirements for the updates. So
25 plans have to have different state-by-state MAC

1 lists.

2 There are 37 states, including
3 Arkansas, that require appeal procedures, but
4 they are all different. Eight states specify
5 the particular rule of decision, as Arkansas
6 does, but they apply different standards and
7 with different effects. And so multi-state plan
8 standards and procedures for appeals will vary
9 state by state.

10 Third, the remedies following the
11 appeal procedure vary widely. Some states
12 require revision to the MAC list. Some states
13 require notice to other pharmacies. Some
14 states, like Arkansas, allow the pharmacy to
15 reverse and rebill, but -- rebill, but other
16 states allow all pharmacies that paid that MAC
17 price to reverse and rebill.

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

24 JUSTICE THOMAS: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer.

2 JUSTICE BREYER: Thank you.

3 Mr. Waxman, I'd like your -- your
4 views on a more general question. The words
5 here in the statute are "relate to." Everything
6 does relate to everyone -- everything else.

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

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

22 And, therefore, we're going to get
23 into the same business. How much procedure is
24 too much? How much is too little? What kind of
25 procedures? Wouldn't it be simpler to read that

1 word "relate to" that we'd have to go back on
2 language and say what it means is ordinary
3 principles of preemption.

4 They're complicated enough. But, I
5 mean, my goodness, to add a special group of
6 words over in the ERISA section just makes life
7 much more complex.

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

9 JUSTICE BREYER: Ordinary principles,
10 why not.

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

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

15 MR. WAXMAN: Okay.

16 JUSTICE BREYER: -- presented that in
17 several cases --

18 MR. WAXMAN: So this -- this -- this
19 --

20 JUSTICE BREYER: -- and you have
21 experience. I want to know.

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

1 to and on the other hand if it is -- if it
2 concerns.

3 And as to the latter, which is what
4 we've been talking about, this Court has said it
5 will be preempted if it does either of two
6 things: either the state law governs a central
7 matter of plan administration, or it interferes
8 with nationally uniform plan administration.

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

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

23 JUSTICE BREYER: Yeah.

24 MR. WAXMAN: It binds ERISA plans to
25 any number of choices --

1 JUSTICE BREYER: And so does price --

2 MR. WAXMAN: -- which I articulated --

3 JUSTICE BREYER: -- fixing.

4 MR. WAXMAN: -- to the Chief Justice.

5 JUSTICE BREYER: So does price fixing.

6 So does, in fact, any system of regulating to

7 apply price -- prices. They're all the same.

8 MR. WAXMAN: So, you know, price --
9 price fixing is the subject of another federal
10 statute, and ERISA plans, I -- I don't think
11 that there is an exemption from the Sherman Act
12 or the Clayton Act or --

13 JUSTICE BREYER: No, no, no, no, no,
14 you -- you -- forget that question, because I --
15 I -- I can't -- I don't have time and I can't be
16 clear enough.

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

18 CHIEF JUSTICE ROBERTS: Justice Alito.

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

25 And it requires, I'm sure, pretty

1 complicated computer programs, and -- and that's
2 why, apparently, there are so few of these PBMs.
3 It requires a pretty sophisticated entity to
4 deal with this situation at all.

5 So, in light of that, why would it be
6 so difficult and costly and burdensome for the
7 PBMs to deal with a variety of different state
8 laws?

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

18 The fact that they have third-party
19 administrators which allow them to provide these
20 kind of benefits on a price-efficient basis
21 doesn't mean that -- that ERISA permits every
22 individual state to add additional levels of
23 complexity.

24 And if you just look at just the
25 requirements for the 40 different tests and

1 schedules for updating MAC lists and what price
2 consequences to plans and beneficiaries every
3 update to the MAC list has, it's -- it's an
4 immense complication, and it affects the
5 benefits that beneficiaries receive.

6 Similarly, the remedies that vary from
7 one state or other imposing on plans that very
8 often are natural -- national plans mean that
9 employees of the same company will have unequal
10 benefits from one state to another and plans
11 will have to have -- either plans themselves or
12 using the third-party administrators that they
13 have appointed as agents to administer the plan
14 on their behalf -- different procedures and
15 different remedies and different update
16 schedules in every different state, which
17 themselves frequently change.

18 And many, many of these requirements
19 will turn -- will require the plans to either
20 change their summary plan of benefits, their
21 explanation of benefits when it turns out that
22 the beneficiary has to pay more in Mississippi
23 because of some requirement that applies after
24 an appeal procedure, or to tell people, for
25 example, look, you're a driver for J.B. Hunt,

1 but, if you try to fill your prescription in
2 Arkansas, even though we have promised you that
3 you can fill that prescription at this pharmacy
4 with this coinsurance or copay obligation, you
5 have to understand that that pharmacy has the
6 right to refuse to give you that benefit.

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

15 MR. WAXMAN: So we don't have specific
16 data on this, but we know the following.

17 First of all, as I think both of my
18 friends on the other side acknowledged, you
19 know, one way or the other, in the very short
20 term or the long term, this is going to cost
21 plans more to administer and, therefore, is
22 going to affect the -- the munificence of the
23 benefits -- the pharmacy benefits that plans
24 feel that they can afford.

25 Second of all, in terms of the

1 decline-to-dispense provision, that is an
2 immediate and obvious derogation of the
3 beneficiary's promised rights under the plan.

4 JUSTICE ALITO: Thank you.

5 MR. WAXMAN: And I think that --

6 JUSTICE ALITO: Thank you, Mr. Waxman.

7 MR. WAXMAN: Yeah.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor.

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

16 But, as was pointed out in Gobeille,
17 we came to a different conclusion on a reporting
18 requirement. But would a ruling in this case in
19 favor of Petitioners have plans reconsider
20 whether they're going to use PBMs at all?

21 MR. WAXMAN: Well, I think --

22 JUSTICE SOTOMAYOR: Could they
23 reconsider it if they thought it -- this -- this
24 was just too onerous?

25 MR. WAXMAN: I -- I think, as a

1 practical matter, yes, they definitely would
2 reconsider. And -- and I think that points out
3 the reason why, in Gobeille, the Court found
4 complete -- of no moment whatsoever that the
5 Vermont state law in Gobeille didn't even apply
6 to the plan or the plan sponsor.

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

14 JUSTICE SOTOMAYOR: All -- all right.
15 So --

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

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

19 What I want to do is let's simplify
20 the law. Anyone who pays pharmacies, whether
21 it's PBMs or the plans themselves, but anyone
22 has to do the pricing in this way, and they
23 don't differentiate between plans, they don't
24 differentiate between being a PBM or not or a
25 non-ERISA plan or not. They just say pharmacies

1 have to be paid at cost plus or whatever, at
2 minimum, okay?

3 What -- how would their arguments
4 change and how would your arguments change?

5 MR. WAXMAN: So I think if -- if the
6 law simply said pharmacies can charge X price
7 for Y drugs --

8 JUSTICE SOTOMAYOR: Exactly.

9 MR. WAXMAN: -- that -- that would be
10 the situation in Travelers. But, unlike the
11 situation in Travelers, which addressed a charge
12 placed on patients which then had implications
13 for insurance companies, not ERISA plans, it
14 would -- that -- that type of law would
15 implicate the questions reserved in Note 4 and
16 Roman numeral III of Travelers.

17 But this law, as -- as I think we've
18 talked about, doesn't do -- doesn't do that. It
19 doesn't direct -- it isn't directed at
20 pharmacies. It's directed at plan
21 administrators.

22 And it doesn't just apply a price
23 standard. It prohibits the use of a methodology
24 that the plans have adopted in order to figure
25 out what benefits they can provide at which

1 pharmacies for which drugs.

2 And it lays on a -- you know, multiple
3 procedures that they have to follow. And those
4 -- those additional costs, both in terms of
5 reimbursement obligations and plan
6 administration, would manifestly affect how much
7 -- how munificent the pharmacy benefits that a
8 plan could offer would be.

9 JUSTICE SOTOMAYOR: Thank you,
10 counsel.

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

12 JUSTICE KAGAN: Mr. Waxman, both your
13 friends on the other side place a great deal of
14 emphasis on the distinction between claims
15 processing and, on the other hand, the
16 reimbursement process.

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

24 The only thing ERISA preemption cares
25 about is the relationship between the plan and

1 the beneficiary, such as in the claims
2 processing sphere. So why isn't that the way to
3 look at this?

4 MR. WAXMAN: So I think, you know,
5 this Court has said -- has acknowledged in many
6 cases -- and I -- I gave you the quote from
7 Egelhoff and Fort Halifax -- that how plans
8 manage, calculate, and pay for benefits and how
9 sponsors design plans is the central matter of
10 -- of ERISA plan administration.

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

21 And that's the distinction we're
22 asking this Court to adhere to.

23 I'm sorry, did I -- did I answer your
24 question? Hello?

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch.

2 JUSTICE GORSUCH: Good morning,
3 Mr. Waxman.

4 MR. WAXMAN: Good morning, Justice
5 Gorsuch.

6 JUSTICE GORSUCH: If -- if ERISA
7 preempts the law here, should we worry that it
8 also preempts other sorts of general regulations
9 about other kinds of benefits? This follows up
10 on Justice Kagan's line of questioning.

11 Some -- some plans, of course, provide
12 daycare benefits, death benefits, all -- all --
13 all sorts of other kinds of benefits. Where
14 would you have us draw the line if -- if -- if
15 preemption occurs here? Why not there?

16 MR. WAXMAN: Yeah, I think -- I think
17 I'll -- I'll give -- I'm going to give you a
18 variant of the answer that I just gave Justice
19 Kagan.

20 A state law that says, okay, you know
21 -- you know, healthcare for -- you know, child
22 care providers, nursery schools and things,
23 daycare providers, have to follow the -- all the
24 following safety procedures, which makes it more
25 expensive. They have to charge plans more.

1 That's Travelers. That is a state
2 obligation or a state regulation imposed on
3 somebody who is providing healthcare or life
4 care products or services. And the fact that,
5 you know, some hospitals charge more than other
6 hospitals has been thought, at least in the
7 Travelers context subject to the two reserved
8 questions in Travelers, not to implicate
9 preemption.

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

21 JUSTICE GORSUCH: Okay. Along similar
22 but different lines, what do we do with the fact
23 that there are plenty of ERISA plans that
24 operate without pharmacy benefit managers, there
25 are plenty of pharmacy benefit managers that

1 provide services to non-ERISA plans, and, of
2 course, your clients here are, as I understand
3 it, all pharmacy benefit managers and no ERISA
4 plans. We -- we don't have an -- an ERISA plan
5 that's actually complaining about this before
6 us, as I understand it.

7 MR. WAXMAN: Yes, that's right. I
8 mean, there are -- there are amicus briefs filed
9 by sponsors of ERISA plans, but the plaintiff in
10 this case and therefore the Respondent here is
11 the -- the Pharmacy Benefit Manager Association.

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

19 And a rule that distinguished between
20 the application depending on whether you use
21 this third-party administrator would have very
22 grievous effects on the plans' -- ERISA plans'
23 willingness to provide this benefit, which, of
24 course, is directed at the single most expensive
25 aspect of the healthcare services.

1 And so I -- I don't know if I've
2 answered your question. I may have talked
3 myself through remembering what the question
4 was, but, if I haven't, please give me another
5 chance.

6 JUSTICE GORSUCH: Thank you, counsel.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh.

9 JUSTICE KAVANAUGH: Thank you, Chief
10 Justice.

11 And welcome, Mr. Waxman.

12 MR. WAXMAN: Thank you --

13 JUSTICE KAVANAUGH: The --

14 MR. WAXMAN: -- Justice Kavanaugh.

15 JUSTICE KAVANAUGH: -- the basic music
16 or theme from the other side, as I understand
17 it, is that ERISA focuses on the relationship
18 between plans and beneficiaries and is not as
19 concerned about the economic relationship
20 between plans and pharmacies or healthcare
21 providers, even though, as Justice Breyer
22 rightly said, state laws affecting that
23 relationship would undoubtedly affect benefits.

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

1 MR. WAXMAN: So I think -- I think
2 that what's wrong with it is that it
3 misunderstands the direct regulatory effect that
4 the Arkansas law has on the plans, the design of
5 the plan, and how plans go about managing,
6 calculating, and paying for benefits.

7 And that's -- that's the problem here.
8 It's -- it's the direct -- it's the fact that
9 the law is directed at plan administration and,
10 in fact, directed at, in this regard, as, you
11 know, again, to quote this Court, the plan's
12 system for processing claims and paying
13 benefits.

14 I mean, the -- the -- the Act 900
15 dictates detailed terms on which PBMs, on behalf
16 of plans, are allowed to design and manage
17 networks and reimbursement systems in a
18 nationally uniform way.

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

21 JUSTICE KAVANAUGH: Okay. And a
22 wrap-up question. If -- how would you have us
23 write the opinion with respect to Travelers?
24 Obviously, the other side has put heavy emphasis
25 on Travelers, and you would say Travelers does

1 not apply here and does not control here because
2 -- and I'll just leave you to fill in the blank
3 there.

4 MR. WAXMAN: So I'll -- you know,
5 Travelers does not apply here because, by its
6 terms, Travelers -- Traveler -- Travelers was
7 predicated on the correct conclusion that the
8 New York surcharge law, which required hospitals
9 to -- to impose certain charges on patients,
10 "did not bind plan administrators to any
11 particular choice and thus function as a
12 regulation of the ERISA plan itself, nor did the
13 indirect influence of the surcharge preclude
14 uniform administrative practice for the
15 provision of a uniform interstate benefit
16 package."

17 And those two -- those two aspects of
18 -- of the plan in Travelers and this Court's
19 decision in Travelers and Dillingham provide the
20 very distinction that ought to be underscored
21 here, I respectfully suggest.

22 JUSTICE KAVANAUGH: Thank you, Mr.
23 Waxman.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 We have several minutes left, if any
2 of the Justices have further questions.

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

5 MR. WAXMAN: Thank you, Mr. Chief
6 Justice.

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

16 And for that reason, the judgment
17 should be affirmed.

18 JUSTICE KAGAN: If -- if I could, Mr.
19 Waxman, you've used that terminology quite a
20 bit, binding administrators to particular
21 choices. And I guess I would just like to
22 understand particularly what you mean by that.
23 Which choices does it bind administrators to and
24 how?

25 MR. WAXMAN: Well, thank you, Justice

1 Kagan. It binds them, number one, to not use
2 the methodology that is reflected in the MAC --
3 the MAC list, upon which the plans, benefits,
4 and scope have been predicated.

5 It binds them to a particular schedule
6 of updating MAC lists, that is, that varies
7 widely across the country. It binds them to a
8 particular appellate process with a particular
9 rule of decision that varies widely across the
10 country. It binds them to apply particular
11 remedies in the event that the appellate process
12 satisfies the rule of decision. And it binds
13 them to inform their beneficiaries that,
14 notwithstanding the promise that the beneficiary
15 can go to pharmacy X and receive drug Y, with
16 the following coinsurance terms, in fact, the
17 pharmacy now has the right under state law to
18 deprive the beneficiary of that promised
19 benefit.

20 JUSTICE KAGAN: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Mr. Bronni, you have three minutes for
24 rebuttal.

25

1 REBUTTAL ARGUMENT OF NICHOLAS J. BRONNI
2 ON BEHALF OF THE PETITIONER

3 MR. BRONNI: Thank you, Mr. Chief
4 Justice.

5 I -- I think what I'd like to start
6 with is -- is perhaps clarifying my -- my answer
7 to a question that Justice Kagan asked me, which
8 is about really where the focus of our argument
9 is, and -- and it -- it's the same as the
10 government's.

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

22 It -- it's not rates. It's not what a
23 third-party administrator pays for a service
24 provider. And the fact that that's what we're
25 talking about here really makes this case

1 exactly like Travelers, and makes this an easier
2 case because Travelers has already addressed
3 that issue.

4 In terms of attempting to distinguish
5 Travelers, I -- what I understand Mr. Waxman to
6 be saying is, well, it -- it's somehow different
7 because somebody different is being regulated or
8 the surcharges are being -- or the -- the rate
9 regulation is being applied somewhere else.
10 But, in reality, in both -- in -- in Travelers,
11 surcharges were -- were paid based on the
12 commercial insurer that was being used. If you
13 were using a non-Blue, you paid the surcharges.

14 Here, it's the same principle. If
15 you're using a PBM, the PBM uses a MAC list, you
16 pay these rates. So they're really not
17 distinguishable.

18 On the uniformity point, I -- really,
19 I don't see a lot of -- there -- there's a lot
20 more uniformity than disuniformity here. But,
21 at the end of the day, what's most relevant is
22 that it's not disuniformity with respect to core
23 plan administration, and Mr. Waxman didn't point
24 to any disuniformity with respect to core plan
25 administration.

1 And -- and this Court has never said
2 that disuniformity in the abstract is a problem,
3 because, obviously, that can't be true because
4 ERISA wasn't intended to create an entirely
5 isolated or insulated universe immune from
6 ordinary state market regulation.

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

17 And even PCMA doesn't claim that those
18 laws would be preempted, even though it would
19 have the same effect.

20 And -- and, lastly, to -- to end on a
21 question that Justice Gorsuch asked, which is
22 about the limiting principle, I think that's
23 really the problem with PCMA's argument.
24 There's no limiting principle.

25 If you accept their position that

1 cost -- anytime a regulation imposes cost, that
2 can lead to preemption because it might affect
3 the benefits calculation, that really has no
4 limiting principle.

5 You would, frankly, preempt things
6 like state minimum wage laws that have exactly
7 that same effect. So we would ask that this
8 Court reverse the judgment below.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel. The case is submitted.

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

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Official - Subject to Final Review

\$	5	alter ^[1] 7:3	Assistant ^[1] 2:6
\$1,000 ^[2] 16:11 17:16	acquisition ^[1] 38:7	alternative ^[1] 15:6	ASSOCIATION ^[3] 1:8 4:6 62:11
\$100 ^[1] 16:10	across ^[3] 23:16 67:7,9	American ^[2] 35:14 52:14	assuming ^[2] 16:21 54:10
\$20 ^[1] 16:21	Act ^[19] 4:19,25 5:12,21,24 6:4 9:25 15:18 22:21 24:20 40:5 41:9 43:12,16 51:11,12 64:14 66:9 68:11	amici ^[1] 31:16	assured ^[1] 61:18
\$200 ^[1] 16:11	actual ^[1] 49:14	amicus ^[5] 2:8 3:7 25:22 46:10 62:8	attempt ^[1] 6:3
\$3.20 ^[1] 11:23	actually ^[11] 7:2 9:1 11:9 15:14 29:5,11 30:25 36:5 37:21 38:2 62:5	among ^[1] 31:12	attempting ^[1] 69:4
1	add ^[6] 17:10 34:9,19 38:17 49:5 52:22	amount ^[7] 6:14 9:18 11:14 36:15 38:4,5 43:15	attempts ^[1] 39:7
10 ^[1] 16:21	addition ^[1] 28:13	amounts ^[1] 39:11	ATTORNEY ^[1] 1:3
10:00 ^[2] 1:16 4:2	additional ^[4] 21:5,6 52:22 58:4	analysis ^[1] 25:4	authorizing ^[1] 6:17
11:12 ^[1] 71:11	address ^[3] 14:24 37:10 42:21	analyzed ^[1] 19:7	avoid ^[1] 45:19
15 ^[1] 16:21	addressable ^[1] 17:12	and/or ^[1] 46:6	away ^[2] 13:24 34:2
150 ^[1] 33:12	addressed ^[4] 28:9 32:13 57:11 69:2	another ^[5] 31:20 51:9 53:10 63:4 70:7	awful ^[1] 55:13
18-540 ^[1] 4:4	addresses ^[2] 30:12 32:18	answer ^[10] 26:14 42:7,9 46:3,7 50:10 59:23 60:18 68:6,14	awry ^[1] 35:11
1A ^[1] 29:2	adds ^[1] 40:8	answered ^[5] 18:17 19:2 35:23 39:9 63:2	B
2	adhere ^[1] 59:22	anybody's ^[1] 43:11	back ^[4] 23:13 33:17 39:12 49:1
20 ^[1] 16:23	adjusting ^[1] 10:5	anytime ^[1] 71:1	backed ^[1] 12:24
2020 ^[1] 1:12	adjustment ^[3] 9:4,6,7	apparently ^[1] 52:2	bargain ^[1] 36:6
25 ^[1] 3:8	administer ^[2] 53:13 54:21	appeal ^[6] 8:17 9:5 44:4 47:3,11 53:24	based ^[4] 14:25,25 24:5 69:11
3	administered ^[1] 40:12	appeals ^[2] 25:10 47:8	basic ^[3] 6:9 36:6 63:15
3 ^[6] 29:8,13 30:3,8,22 31:6	administering ^[1] 40:7	appeals' ^[1] 26:24	basically ^[2] 19:4 58:17
30 ^[2] 23:19,20	administers ^[1] 41:14	APPEARANCES ^[1] 2:1	basis ^[2] 19:18 52:20
320 ^[1] 34:16	administration ^[35] 4:23 5:7,15, 22 10:2 11:13 26:3,14,19 27:14 28:4 33:10,20 34:1 35:9 39:7 40:10,21 41:6,12,18,19 44:13,14 46:15 50:7,8 58:6 59:10 64:9 66:10 68:13,15 69:23,25	appellate ^[3] 44:4 67:8,11	becomes ^[1] 26:12
321 ^[1] 34:16	administrative ^[1] 65:14	appendix ^[2] 29:3 34:16	behalf ^[11] 2:5,11 3:4,11,14 4:9 40:2 41:16 53:14 64:15 68:2
37 ^[1] 47:2	administrator ^[5] 7:19 22:1 56:8 62:21 68:23	application ^[4] 12:11 45:10 56:9 62:20	behave ^[1] 5:5
4	administrators ^[20] 40:6,18 41:3, 9 44:7 45:5 50:15,19 52:17,19 53:12 57:21 59:19 61:11 62:18 65:10 66:11,12,20,23	applied ^[6] 11:17 29:20 42:22 49:24 56:13 69:9	below ^[4] 4:15 6:7 24:4 71:8
4 ^[3] 3:4 42:20 57:15	adopt ^[1] 43:1	applies ^[5] 6:4 19:11,13 41:13 53:23	ben ^[1] 36:1
40 ^[4] 3:11 43:20 46:21 52:25	adopted ^[1] 57:24	apply ^[12] 7:4 12:16 13:15 17:6 27:25 47:6 51:7 56:5 57:22 65:1,5 67:10	beneficiaries ^[13] 16:17,24 22:22 23:2 35:13 36:2,8 44:10 53:2,5 54:13 63:18 67:13
45 ^[3] 33:3,8,8	affect ^[13] 7:17 9:1 33:10 35:12 36:6,11 38:19 43:9 54:8,22 58:6 63:23 71:2	applying ^[1] 56:11	beneficiary ^[16] 9:3,11,19,21 10:8 17:20 32:5,8,16 53:22 59:1 61:16, 17 67:14,18 68:18
5	affected ^[3] 16:25,25 20:11	appointed ^[1] 53:13	beneficiary's ^[1] 55:3
5 ^[1] 16:21	affecting ^[4] 16:17,18 45:16 63:22	approach ^[10] 14:2 19:1,2 27:9 28:22 29:1 30:15 38:8,12,15	Benefit ^[19] 4:12 10:12,13,14 13:18 29:10,21 41:7 44:10 54:6 61:23,24 62:3,11,17,23 65:15 67:19 68:19
514(a) ^[2] 64:20 66:15	affects ^[4] 7:1,2 20:17 53:4	area ^[5] 33:15,20,22,24 34:12	benefits ^[40] 4:22 5:1 6:13 7:17 15:18 18:12 31:11 32:8 35:13,20, 21 40:8 41:14 45:6,18 47:22 52:15,20 53:5,10,20,21 54:8,23,23 57:25 58:7 59:8,15 60:9,12,12,13 61:12,15 63:23 64:6,13 67:3 71:3
6	affirmed ^[1] 66:17	aren't ^[1] 5:19	between ^[20] 16:4,5 18:10 21:25 26:9 36:6,21 38:18,25 41:18 56:23,24 58:14,21,25 59:13 61:15 62:19 63:18,20
6 ^[1] 1:12	afford ^[2] 16:15 54:24	argue ^[2] 6:3 20:5	beyond ^[1] 33:25
659 ^[1] 35:25	agents ^[1] 53:13	argues ^[1] 22:21	bind ^[4] 41:2,9 65:10 66:23
68 ^[1] 3:14	agree ^[4] 21:20 22:25 36:9 37:3	argument ^[18] 1:15 3:2,5,9,12 4:4, 8 17:25 18:7,8,15 25:21 27:22 39:11 40:1 68:1,8 70:23	binding ^[3] 66:20 68:16,17
8	ahead ^[1] 51:17	arguments ^[3] 39:9 57:3,4	binds ^[10] 50:18,18,24 59:18 66:11 67:1,5,7,10,12
80 ^[1] 16:23	aid ^[1] 37:17	ARKANSAS ^[25] 1:4 2:4 11:5 13:7 22:22 23:19 24:10 25:11 26:2,8 35:21 38:1 40:11,17 42:11 46:11, 18 47:3,5,14,19 51:21 54:2 64:4 70:13	bit ^[6] 7:10 15:24 46:17 55:11,12 66:20
81 ^[1] 9:12	Alito ^[20] 13:13,14 15:2,4,20 22:19 28:14,15,24 29:22,24 30:17 31:7, 13 51:18,19 52:10 54:7 55:4,6	Arkansas's ^[6] 5:13 11:9 24:25 25:6,16 51:24	blank ^[1] 65:2
9	Alito's ^[1] 55:11	arrangement ^[1] 36:21	blocked ^[1] 17:1
900 ^[16] 4:19,25 5:21,24 6:4 9:25 10:21 15:18 22:21 24:20 40:5 41:9 43:12 64:14 66:9 68:12	allocate ^[1] 61:15	articulated ^[1] 51:2	blue ^[1] 29:3
10:21 15:18 22:21 24:20 40:5 41:9 43:12 64:14 66:9 68:12	allocation ^[1] 44:17	aspect ^[2] 48:17 62:25	both ^[7] 6:5 50:13 52:12 54:17 58:4,12 69:10
900's ^[1] 5:12	allow ^[3] 47:14,16 52:19	aspects ^[1] 65:17	breach ^[1] 40:21
95 ^[1] 62:15	allowed ^[1] 64:16	aspirin ^[1] 11:23	Breyer ^[21] 10:18,19 11:19 12:2,6, 18,21 28:11,12 48:1,2 49:9,13,16,
A	almost ^[1] 43:19	assessed ^[1] 36:19	
a.m ^[3] 1:16 4:2 71:11	already ^[4] 5:2 34:20 35:23 69:2		
able ^[1] 13:2			
above-entitled ^[1] 1:14			
absent ^[1] 5:10			
absorbed ^[1] 54:14			
abstract ^[1] 70:2			
ACA ^[2] 13:6,9			
accept ^[1] 70:25			
access ^[1] 23:17			
according ^[1] 46:19			
achieve ^[1] 42:5			
acknowledged ^[3] 7:14 54:18 59:			

Official - Subject to Final Review

<p>20 50:23 51:1,3,5,13 63:21 Breyer's ^[1] 15:24 brief ^[6] 27:4,16 29:3 46:10 55:13 70:10 briefly ^[1] 43:24 briefs ^[2] 18:7 62:8 broad ^[3] 14:19,20 17:5 broadest ^[1] 39:16 BRONNI ^[3] 2:3 3:3,13 4:7,8,10 6:24 8:25 11:8,25 12:4,9,19,22 14:5 15:3,10 17:5 18:25 20:20 21:13, 20 22:11,18 23:3,7 24:17 42:8 67:23 68:1,3 brought ^[1] 13:1 Buono ^[1] 26:18 burden ^[1] 45:18 burdensome ^[1] 52:6 business ^[4] 4:17 23:14 24:2 48:23 businesses ^[1] 35:17 byzantine ^[2] 43:8 46:20</p> <hr/> <p style="text-align: center;">C</p> <p>calculate ^[1] 59:8 calculated ^[1] 32:8 calculating ^[1] 64:6 calculation ^[1] 71:3 came ^[4] 1:14 37:11 55:17 70:7 CARE ^[7] 1:7 4:5 20:19 35:18 58:22 60:22 61:4 cares ^[4] 33:16,21 37:3 58:24 carry ^[1] 34:6 Case ^[3] 4:4 13:15 15:8 17:24,24 19:3,17,24 20:6,16,21 24:12,13,22 26:1 30:11,24 31:24 32:11,13,14, 21 39:5 50:17 55:18 59:16 62:10 68:25 69:2 71:10,11 cases ^[1] 9:10,15 19:22 28:17 30:23 32:1 37:1 40:17 49:17 58:18 59:6 categories ^[1] 32:14 central ^[19] 8:24 10:2 11:13 21:19 26:3,13,19 27:14 28:3 33:19 34:1 35:9 37:3 39:6 44:12 50:6 59:9 68:12,15 cents ^[1] 36:15 certain ^[3] 37:25 43:1 65:9 certainly ^[3] 6:10 44:13 46:9 cetera ^[1] 68:20 chance ^[1] 63:5 change ^[6] 9:14 25:4 53:17,20 57:4,4 changed ^[2] 10:11,13 changes ^[1] 9:24 characterization ^[1] 50:22 charge ^[5] 43:14 57:6,11 60:25 61:5 charged ^[1] 19:6 charges ^[1] 65:9 cheaper ^[1] 17:2 CHIEF ^[57] 4:3,10 6:8 8:12,16 10:17 13:11 15:21 18:3 20:2 22:14, 16 24:15,17 25:17,18,24 27:1,15 28:5,8,10,14 31:8 32:24 34:24 35:</p>	<p>3,6 37:6,12 39:19,22 40:3 41:23 42:6 43:3,6,22 44:1,15 45:20,23, 25 46:18 47:25 51:4,18 55:8 58:11 59:25 63:7,9 65:24 66:5 67:21 68:3 71:9 Chief's ^[1] 18:17 child ^[1] 60:21 choice ^[4] 7:19 41:3 50:19 65:11 choices ^[6] 41:10 50:25 59:19 66:12,21,23 choose ^[4] 7:18 19:15,16 24:7 chosen ^[1] 25:7 Circuit ^[2] 13:3 52:11 cites ^[1] 40:18 citing ^[1] 52:13 claim ^[4] 13:1,2 70:12,17 claims ^[5] 39:17 45:17 58:14 59:1 64:12 clarifying ^[1] 68:6 clause ^[2] 30:2 39:16 Clayton ^[1] 51:12 clear ^[6] 22:21 26:18 29:16 39:5 42:1 51:16 clients ^[1] 62:2 climb ^[1] 30:16 close ^[2] 20:16 48:14 closes ^[1] 23:18 co-pays ^[2] 16:19,20 coin ^[1] 59:17 coinsurance ^[8] 9:17,23 10:9 36:14,16 54:4 67:16 68:20 colleagues ^[2] 31:12,15 come ^[2] 13:5 24:1 comes ^[1] 29:12 commend ^[1] 46:10 comment ^[1] 46:7 commercial ^[5] 7:13 13:6,8 19:5 69:12 common ^[1] 5:21 communities ^[3] 4:17 23:16,22 companies ^[1] 57:13 Company ^[3] 46:11 47:22 53:9 compels ^[1] 40:5 compete ^[1] 24:5 competitively ^[1] 24:5 complaining ^[1] 62:5 complete ^[1] 56:4 complex ^[2] 25:6 49:7 complexity ^[3] 25:2 52:13,23 complicated ^[4] 49:4 51:20,24 52:1 complication ^[1] 53:4 comply ^[3] 40:6 43:19 51:21 computer ^[1] 52:1 concern ^[1] 33:2 concerned ^[4] 14:23 15:14 33:7 63:19 concerns ^[4] 14:16 28:9 34:2 50:2 conclusion ^[3] 14:3 55:17 65:7 conditions ^[1] 47:20 conflict ^[2] 30:18 31:3 Congress ^[3] 14:6 21:9,22 Congress's ^[1] 14:25 connection ^[5] 5:22 26:5,6 32:3</p>	<p>38:16 consequences ^[1] 53:2 consistent ^[1] 30:25 constitutional ^[1] 14:16 contain ^[1] 6:1 context ^[2] 43:20 61:7 continuously ^[2] 10:5 25:9 contract ^[2] 22:6 61:19 contracts ^[2] 5:19 22:7 contrast ^[1] 30:10 control ^[2] 5:17 65:1 copay ^[8] 8:19,22 9:1,2,12,13 54:4 68:20 copayment ^[1] 9:24 core ^[2] 69:22,24 correct ^[2] 63:25 65:7 cost ^[17] 4:14,16 5:4 7:21 23:25 26:16,18 34:15 35:8 38:7 39:2 44:19 48:11 54:20 57:1 71:1,1 cost-sharing ^[1] 36:21 costly ^[1] 52:6 costs ^[10] 17:7 24:7 35:12,19 36:5, 11,14 54:11,12 58:4 couldn't ^[2] 21:9,14 Counsel ^[28] 6:8 8:13 13:12 15:20, 23 18:4 20:4 21:16 22:13 24:15 25:19 27:1 28:6 31:10 32:23 34:23 39:20,23 43:22 44:15 45:21 55:10 56:17 58:10 63:6 65:25 67:22 71:10 counsel's ^[1] 20:14 counter ^[1] 10:10 country ^[3] 46:13 67:7,10 counts ^[1] 32:7 course ^[7] 20:13 34:5 44:7 56:16 60:11 62:2,24 COURT ^[47] 1:1,15 4:11 6:6 7:14, 20 11:14 14:18 19:6,17 21:1,9 25:25 26:20,24 28:25 30:14 32:2,19 33:12 34:5 35:24 36:23 38:13,23 39:11,12 40:4,25 41:17,22 42:17, 20 45:13 46:10 49:22,23 50:4 56:3 59:5,12,17,22 64:11 68:14 70:1 71:8 Court's ^[4] 26:17 45:14 48:8 65:18 cover ^[1] 5:2 coverage ^[6] 9:22 34:18 43:1 44:22,24 68:19 covered ^[5] 13:10,18 17:20 32:7 66:8 create ^[3] 33:13 38:8 70:4 critical ^[4] 18:22 20:23 40:21 59:11 curbstone ^[1] 14:12 curiae ^[3] 2:8 3:8 25:22 cut ^[1] 39:12</p> <hr/> <p style="text-align: center;">D</p> <p>D.C ^[4] 1:11 2:7,10 52:11 data ^[1] 54:16 day ^[12] 6:19,25 7:9,21 10:6,11 11:16 15:12 19:20 24:19 28:2 69:21 daycare ^[2] 60:12,23 De ^[1] 26:18</p>	<p>deal ^[4] 18:9 52:4,7 58:13 death ^[2] 60:12 61:12 decide ^[5] 8:23 24:3 39:4 42:17 48:18 decided ^[1] 5:2 decides ^[2] 16:7,13 decision ^[11] 17:8 23:24 24:3 25:12,15 44:5 47:5 52:12 65:19 67:9, 12 decision-making ^[6] 7:24 8:2 17:15,19 18:2 24:11 decisions ^[4] 7:22 19:10 26:17 68:18 decline ^[1] 70:15 decline-to-dispense ^[4] 44:9 47:19 55:1 70:8 declining ^[2] 6:17 47:21 deductible ^[1] 9:16 defies ^[1] 5:20 define ^[2] 29:25 49:12 defined ^[1] 30:1 definitely ^[1] 56:1 definition ^[1] 12:13 degree ^[1] 68:19 Department ^[2] 2:7 21:5 depend ^[1] 12:10 depending ^[2] 38:6 62:20 deprive ^[2] 44:10 67:18 derogation ^[1] 55:2 described ^[1] 29:17 design ^[4] 34:15 59:9 64:4,16 designed ^[3] 15:17 25:13 45:11 despite ^[1] 31:17 destructive ^[1] 41:21 detailed ^[2] 21:4 64:15 determination ^[2] 8:19,22 determine ^[2] 44:22,23 determined ^[1] 68:21 determines ^[1] 8:19 determining ^[2] 6:14 45:6 developed ^[1] 25:8 devoted ^[1] 27:16 dictate ^[2] 18:2 40:11 dictated ^[3] 8:1,2 17:14 dictates ^[3] 40:22 50:11 64:15 dictating ^[3] 7:23 17:18 37:23 difference ^[8] 19:22 20:23 21:21 27:8 36:24 41:20 50:11,12 differences ^[3] 5:5 6:22 31:17 different ^[33] 5:6 6:21 16:2 18:13 20:21 33:3,8,9 34:21 37:14 43:20, 21 44:4,5,8 46:22,23,23,25 47:4,6, 7,20 52:7,25 53:14,15,15,16 55:17 61:22 69:6,7 differentiate ^[2] 56:23,24 differently ^[2] 5:6 6:1 difficult ^[1] 52:6 Dillingham ^[5] 5:25 41:1 50:14 59:18 65:19 direct ^[4] 21:2 57:19 64:3,8 directed ^[12] 7:5 18:18 27:5 45:4 50:15,15 57:19,20 59:14 62:24 64:9,10 directing ^[1] 40:18</p>
--	---	--	---

Official - Subject to Final Review

<p>directly ^[12] 7:4 16:24 17:1 26:2,8 27:13,25 35:12 40:5,20 44:9 66:11</p> <p>disagree ^[3] 9:9 22:25 23:3</p> <p>disclosure ^[1] 30:13</p> <p>discriminate ^[1] 4:24</p> <p>discussed ^[1] 38:20</p> <p>dispense ^[2] 6:18 70:16</p> <p>dispute ^[5] 5:11 6:16 21:25 22:11 25:1</p> <p>disputes ^[1] 31:12</p> <p>distinction ^[8] 18:9,16 38:18 41:19 58:14,19 59:21 65:20</p> <p>distinguish ^[2] 39:8 69:4</p> <p>distinguishable ^[1] 69:17</p> <p>distinguished ^[3] 26:24 41:17 62:19</p> <p>distinguishing ^[2] 16:4 27:18</p> <p>distortion ^[1] 45:3</p> <p>disuniformity ^[6] 33:21 46:6 69:20,22,24 70:2</p> <p>doing ^[1] 40:8</p> <p>dollar ^[2] 9:18 36:15</p> <p>dollars ^[2] 38:4 42:13</p> <p>done ^[4] 14:18 24:10 25:11 38:1</p> <p>door ^[1] 39:17</p> <p>down ^[4] 10:4 29:18,19 31:19</p> <p>downstream ^[2] 9:11,18</p> <p>drafters ^[1] 33:6</p> <p>draw ^[2] 38:24 60:14</p> <p>drawn ^[1] 63:25</p> <p>driver ^[1] 53:25</p> <p>drivers ^[2] 33:1 46:13</p> <p>drives ^[1] 4:16</p> <p>drug ^[18] 4:12 6:10,12,20 9:23 10:4,9 16:8,22 17:2,16 18:1,11 20:17 23:20 42:13 43:9 67:15</p> <p>druggist ^[1] 11:22</p> <p>druggists ^[1] 10:23</p> <p>drugs ^[13] 4:14 5:2 16:8,11,11,14,15 21:18 26:11 42:1 45:8 57:7 58:1</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[2] 16:22 39:8</p> <p>easier ^[3] 18:25 19:2 69:1</p> <p>economic ^[3] 38:18 42:25 63:19</p> <p>effect ^[11] 7:7,8 9:18 22:22 23:1 38:22 39:2 41:24 64:3 70:19 71:7</p> <p>effects ^[4] 41:21 42:25 47:7 62:22</p> <p>Egelhoff ^[3] 33:12 45:15 59:7</p> <p>eight ^[2] 32:4 47:4</p> <p>Eighth ^[2] 13:3 32:11</p> <p>either ^[4] 50:5,6 53:11,19</p> <p>emphasis ^[2] 58:14 64:24</p> <p>emphasized ^[1] 37:16</p> <p>emphasizing ^[1] 7:20</p> <p>emphasizing ^[1] 39:4</p> <p>employ ^[2] 46:12 62:15</p> <p>employee ^[1] 13:18</p> <p>employees ^[4] 45:7 47:21 53:9 54:9</p> <p>employer ^[1] 46:12</p> <p>employment ^[1] 29:10</p>	<p>employs ^[2] 46:12,12</p> <p>enacted ^[1] 36:9</p> <p>enactment ^[1] 13:24</p> <p>end ^[14] 6:19,25 7:9,20 11:16 15:11 19:20 24:19 27:7 28:2 39:3 40:14 69:21 70:20</p> <p>enforce ^[3] 5:9 24:25 32:9</p> <p>enforcement ^[4] 5:10,12 22:9 55:14</p> <p>engages ^[1] 41:15</p> <p>enough ^[5] 34:8 36:4 48:14 49:4 51:16</p> <p>ensure ^[3] 15:17 17:23 23:14</p> <p>entire ^[3] 29:19 30:11 45:11</p> <p>entirely ^[3] 19:17 24:2 70:4</p> <p>entities ^[2] 4:24 6:5</p> <p>entity ^[1] 52:3</p> <p>ERG ^[1] 37:25</p> <p>ERISA ^[86] 4:24 5:8,25 6:1,5,22 9:20 10:20 11:4,5,21,21 12:2,5,8,12,17,24 13:4,19 14:9,22,23 15:14,14,17 20:10,12,25 21:2,4,7,8,24 22:23 24:19 26:5,7 28:18,20 29:1,21 30:12 32:3,12,18 33:7,16,20,22 35:14,18 36:4,9 37:3 38:16 39:14,17 40:5,14 41:4,22 42:25 45:16,19 49:6 50:21,24 51:10 52:21 57:13 58:22,24 59:10 60:6 61:23 62:3,4,9,15,22 63:17 64:20 65:12 66:13 70:4</p> <p>ERISA's ^[1] 33:1</p> <p>ESQ ^[4] 3:3,6,10,13</p> <p>ESQUIRE ^[1] 2:10</p> <p>essentially ^[3] 18:24 19:3 43:16</p> <p>et ^[1] 68:20</p> <p>even ^[19] 5:20 6:3 22:2 24:21 28:1 30:16 31:24 32:19 34:22 40:22 48:12,13 51:23 54:2 56:5 63:21 70:12,17,18</p> <p>event ^[1] 67:11</p> <p>eventually ^[1] 36:2</p> <p>everybody ^[1] 62:14</p> <p>everybody's ^[1] 16:9</p> <p>everyone ^[1] 48:6</p> <p>everything ^[5] 14:8,12,13 48:5,6</p> <p>evolved ^[1] 49:23</p> <p>exactly ^[7] 19:24 20:15 33:6 37:23 57:8 69:1 71:6</p> <p>example ^[2] 36:13 53:25</p> <p>exchange ^[2] 13:7,9</p> <p>exclusively ^[2] 12:11,17</p> <p>exemption ^[1] 51:11</p> <p>exist ^[1] 31:11</p> <p>existing ^[2] 31:24 32:20</p> <p>expand ^[2] 39:15 46:16</p> <p>expect ^[1] 8:23</p> <p>expensive ^[3] 60:25 62:17,24</p> <p>experience ^[1] 49:21</p> <p>explain ^[3] 23:6 42:20 70:10</p> <p>explained ^[3] 11:14 14:11 40:25</p> <p>explanation ^[1] 53:21</p> <p>explication ^[1] 46:14</p> <p>expressed ^[1] 31:15</p> <p>extend ^[1] 18:7</p>	<p>Extending ^[1] 40:19</p> <p>extent ^[2] 25:2,5</p> <p>extremely ^[1] 51:24</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact ^[20] 7:1 9:2 13:1 17:14,17 22:5 27:4 43:11 51:6 52:18 54:10 55:13 56:7 61:4,22 62:16 64:8,10 67:16 68:24</p> <p>factor ^[1] 16:4</p> <p>falls ^[2] 29:16 32:13</p> <p>famously ^[1] 14:10</p> <p>fault ^[2] 43:7,11</p> <p>favor ^[4] 16:3 18:21 35:16 55:19</p> <p>federal ^[3] 13:15 31:1 51:9</p> <p>fee ^[2] 9:2,14</p> <p>feel ^[1] 54:24</p> <p>fell ^[4] 27:19 28:19 31:4 55:14</p> <p>few ^[2] 39:14 52:2</p> <p>field ^[8] 28:20 29:17,25 30:1,4,19,23 31:5</p> <p>figure ^[1] 57:24</p> <p>filed ^[2] 46:11 62:8</p> <p>fill ^[3] 54:1,3 65:2</p> <p>filled ^[1] 38:4</p> <p>final ^[1] 8:20</p> <p>find ^[1] 43:13</p> <p>finer ^[1] 24:22</p> <p>first ^[9] 4:4,25 27:23 36:18 42:19 44:19 46:9 54:17 62:12</p> <p>fixed ^[2] 16:19,20</p> <p>fixing ^[3] 51:3,5,9</p> <p>flat ^[2] 9:2,14</p> <p>flexible ^[1] 38:2</p> <p>float ^[1] 10:4</p> <p>focus ^[2] 27:2 68:8</p> <p>focused ^[1] 27:11</p> <p>focuses ^[2] 27:4 63:17</p> <p>focusing ^[1] 27:9</p> <p>follow ^[4] 15:7,24 58:3 60:23</p> <p>Following ^[7] 8:15 47:10 54:16 55:10 60:24 61:13 67:16</p> <p>follows ^[1] 60:9</p> <p>Footnote ^[1] 42:20</p> <p>force ^[2] 5:5 42:25</p> <p>forget ^[1] 51:14</p> <p>form ^[3] 35:20 37:16 48:20</p> <p>formula ^[1] 43:18</p> <p>Fort ^[2] 45:15 59:7</p> <p>forth ^[1] 33:18</p> <p>found ^[3] 32:2 38:15 56:3</p> <p>foundational ^[1] 41:21</p> <p>four ^[4] 43:16,23 46:17 47:18</p> <p>framework ^[1] 19:11</p> <p>frankly ^[3] 10:3 70:8 71:5</p> <p>FREDERICK ^[3] 2:6 3:6 25:21</p> <p>frequently ^[2] 4:15 53:17</p> <p>friend ^[3] 27:4 42:8,23</p> <p>friends ^[3] 20:5 54:18 58:13</p> <p>function ^[7] 20:25 21:3,8 32:12,18 41:4 65:11</p> <p>functions ^[4] 21:19 50:20 59:20 66:13</p> <p>fundamental ^[2] 20:25 21:2</p>	<p>funeral ^[1] 61:17</p> <p>further ^[2] 18:8 66:2</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gave ^[2] 59:6 60:18</p> <p>GENERAL ^[10] 1:3 2:3,6 4:7 18:6 20:1 22:18 42:8 48:4 60:8</p> <p>generally ^[4] 13:21 15:7 17:6 22:4</p> <p>Gillette ^[1] 23:19</p> <p>Ginsburg ^[2] 14:11 28:16</p> <p>Ginsburg's ^[1] 31:14</p> <p>give ^[4] 54:6 60:17,17 63:4</p> <p>given ^[1] 14:17</p> <p>goal ^[3] 14:25 35:13 37:17</p> <p>goals ^[1] 14:25</p> <p>Gobeille ^[11] 20:8,22,23 21:22 30:11,24 32:12 41:20 55:16 56:3,5</p> <p>goodness ^[1] 49:5</p> <p>Gorsuch ^[15] 20:3,4 21:11,15 22:10,12 34:25 35:1 60:1,2,5,6 61:21 63:6 70:21</p> <p>got ^[2] 43:23 48:12</p> <p>govern ^[1] 21:25</p> <p>governed ^[1] 5:19</p> <p>government's ^[1] 68:10</p> <p>governs ^[1] 50:6</p> <p>great ^[1] 58:13</p> <p>greater ^[1] 38:16</p> <p>grievous ^[1] 62:22</p> <p>group ^[1] 49:5</p> <p>guarantee ^[1] 24:11</p> <p>guess ^[8] 12:9 18:20 19:20 21:11,15 23:11 39:3 66:21</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>haec ^[1] 41:1</p> <p>Halifax ^[2] 45:15 59:7</p> <p>Hampton ^[1] 23:18</p> <p>hand ^[6] 36:7 39:1 49:25 50:1 58:15 59:16</p> <p>happen ^[3] 12:7 17:23 56:11</p> <p>happens ^[1] 9:6</p> <p>head ^[1] 55:12</p> <p>health ^[3] 10:20 21:17 59:15</p> <p>healthcare ^[9] 20:10,17 21:19 32:6 40:24 60:21 61:3 62:25 63:20</p> <p>hear ^[1] 4:3</p> <p>heartland ^[1] 66:14</p> <p>heavy ^[1] 64:24</p> <p>heavy-handed ^[1] 37:23</p> <p>held ^[1] 20:13</p> <p>Hello ^[1] 59:24</p> <p>hereafter ^[1] 29:9</p> <p>high ^[3] 9:16 16:14 48:9</p> <p>hill ^[1] 30:16</p> <p>historically ^[1] 14:18</p> <p>Hmm ^[1] 48:14</p> <p>holdings ^[1] 40:19</p> <p>homes ^[1] 61:17</p> <p>Honor ^[17] 6:24 8:5,25 9:9 11:9,25 12:13 14:5 15:11 17:10,11,16 19:1 20:20 21:21 23:4 43:5</p> <p>Honor's ^[1] 12:20</p> <p>hospital ^[2] 48:10,13</p>
--	---	--	---

Official - Subject to Final Review

<p>hospitals [6] 7:13 26:21 37:24 61:5,6 65:8</p> <p>however [1] 19:19</p> <p>huge [1] 30:10</p> <p>hundreds [1] 34:17</p> <p>Hunt [2] 46:11 53:25</p> <p>hypothetical [1] 16:5</p> <hr/> <p style="text-align: center;">I</p> <p>idea [1] 36:20</p> <p>identified [1] 46:17</p> <p>Ill [1] 57:16</p> <p>illustrates [1] 19:23</p> <p>imagine [1] 11:19</p> <p>immediate [1] 55:2</p> <p>immense [1] 53:4</p> <p>immune [1] 70:5</p> <p>immunization [1] 23:21</p> <p>impact [5] 6:20 8:10 9:11,25 19:8</p> <p>impermissible [3] 26:4,6 32:3</p> <p>implement [3] 5:9,12 24:25</p> <p>implicate [2] 57:15 61:8</p> <p>implications [1] 57:12</p> <p>important [5] 7:23 9:19 37:15 59:11 62:13</p> <p>importantly [1] 27:25</p> <p>impose [4] 25:12 40:24 45:18 65:9</p> <p>imposed [2] 21:23 61:2</p> <p>imposes [2] 42:5 71:1</p> <p>imposing [1] 53:7</p> <p>impossible [6] 40:10 41:12 43:19 44:13 46:14 66:10</p> <p>incidentally [1] 20:11</p> <p>including [4] 20:10 35:15 47:2,18</p> <p>increase [2] 54:11,12</p> <p>increased [3] 35:19 36:5,10</p> <p>increases [1] 24:1</p> <p>Indeed [5] 5:10 24:21 25:5 26:19 43:2 44:12</p> <p>independent [1] 23:15</p> <p>indirect [2] 41:5 65:13</p> <p>individual [1] 52:22</p> <p>individuals [1] 23:22</p> <p>influence [7] 7:19,22 17:7 19:10 24:10 41:5 65:13</p> <p>inform [1] 67:13</p> <p>information [1] 30:13</p> <p>inherent [1] 70:9</p> <p>insight [1] 8:8</p> <p>insofar [3] 13:17 29:9 42:21</p> <p>instance [3] 9:3 22:6 70:13</p> <p>Instead [5] 5:1,18 6:12 22:4 38:3</p> <p>insulated [1] 70:5</p> <p>insurance [5] 10:23,24 11:21 13:6 57:13</p> <p>insurer [2] 13:8 69:12</p> <p>insurers [4] 7:13 19:5 27:20 36:22</p> <p>intended [2] 45:19 70:4</p> <p>interested [1] 16:1</p> <p>interesting [1] 48:15</p> <p>interfere [1] 5:7</p> <p>interference [1] 45:9</p> <p>interferes [1] 50:7</p> <p>interpret [4] 13:15,20 15:8,12</p>	<p>interpretation [2] 15:4,5</p> <p>interpreting [1] 13:25</p> <p>interrupt [1] 56:18</p> <p>interstate [2] 41:7 65:15</p> <p>intrigued [1] 46:2</p> <p>involve [1] 40:18</p> <p>involved [2] 32:4,12</p> <p>involves [2] 48:20 58:21</p> <p>involving [1] 32:15</p> <p>irrelevant [2] 18:16,24</p> <p>isn't [10] 4:21 8:23 25:16 26:18 28:3 34:10 48:14 50:11 57:19 59:2</p> <p>isolated [1] 70:5</p> <p>issue [5] 12:16 21:6 24:23 35:24 69:3</p> <p>item [1] 46:5</p> <p>itself [12] 18:12 32:13 37:2 38:20 39:9 41:5,14 42:18 50:21 59:20 65:12 66:14</p> <hr/> <p style="text-align: center;">J</p> <p>J.B [2] 46:11 53:25</p> <p>joined [1] 14:11</p> <p>Joint [1] 34:16</p> <p>judgment [4] 6:6 26:24 66:16 71:8</p> <p>juice [1] 48:11</p> <p>jurisprudence [2] 28:18 35:12</p> <p>Justice [169] 2:7 4:3,11 6:8 8:12,14,15 10:16,17,17,19 11:19 12:2,6,18,21 13:11,13,14 14:10,11 15:2,4,20,21,21,23,24 18:3,5,6 19:25 20:2,2,4 21:11,15 22:10,12,14,14,16,17,19,20 23:5 24:14,15,18 25:17,18,24 27:1,3,15 28:5,7,8,10,10,12,14,14,15,24 29:22,24 30:17 31:7,8,8,10,13,22 32:22,24,24,25 33:11 34:23,24,24 35:1,3,3,5,6 37:5,6,12 39:19,22 40:3 41:23 42:6 43:3,6,22 44:1,15 45:20,23,23,25 46:1,3,18 47:24,25,25 48:2 49:9,13,16,20 50:23 51:1,3,4,5,13,18,18,19 52:10 54:7 55:4,6,8,8,10,11,22 56:14,17 57:8 58:9,11,11,12 59:25,25 60:2,4,6,10,18 61:21 63:6,7,7,9,10,13,14,15,21 64:21 65:22,24 66:6,18,25 67:20,21 68:4,7 70:21 71:9</p> <p>Justice's [1] 8:16</p> <p>Justices [3] 28:15 31:13 66:2</p> <hr/> <p style="text-align: center;">K</p> <p>Kagan [15] 18:5,6 19:25 27:3 32:24,25 33:11 34:23 58:11,12 60:19 66:18 67:1,20 68:7</p> <p>Kagan's [2] 46:3 60:10</p> <p>Kavanaugh [14] 22:15,16 23:5 24:14 35:4,5 37:5 63:8,9,13,14,15 64:21 65:22</p> <p>key [2] 26:1 29:5</p> <p>kind [4] 17:20 48:7,24 52:20</p> <p>kinds [4] 20:10 33:3 60:9,13</p> <p>knows [1] 14:12</p> <hr/> <p style="text-align: center;">L</p> <p>Labor [1] 21:5</p> <p>lack [4] 33:14,15 34:14 46:6</p>	<p>language [9] 13:22 14:19 15:13 21:1 29:5,11,15,17 49:2</p> <p>last [2] 42:19 68:14</p> <p>lastly [1] 70:20</p> <p>latter [1] 50:3</p> <p>law [64] 6:9 7:2,4,5 10:21,22 11:9,17,20 12:16 13:10 14:4 16:2,4,5 17:21 18:18 22:7,8 26:2,4,8,20,22 27:13,19,21,24 28:19 29:16,19 30:24 31:4 32:2,15,17 33:19 40:20,23 41:2,24 42:2,14,24 50:6,14,22 51:22,23 56:5,8,20 57:6,14,17 59:14,18 60:7,20 61:10 64:4,9 65:8 67:17</p> <p>laws [22] 5:8,25 13:17 29:9 32:4 33:4,13 34:6,8 38:22 39:1 40:9,18 41:11 51:21,22 52:8 54:8 56:11 63:22 70:18 71:6</p> <p>lays [1] 58:2</p> <p>lead [2] 14:3 71:2</p> <p>least [3] 10:23 16:18 61:6</p> <p>leave [2] 32:19 65:2</p> <p>left [5] 4:17 17:22 22:5 37:7 66:1</p> <p>length [1] 46:8</p> <p>LESLIE [1] 1:3</p> <p>less [4] 11:23 20:6 38:12,15</p> <p>levels [1] 52:22</p> <p>lies [1] 66:14</p> <p>life [2] 49:6 61:3</p> <p>light [3] 13:25 15:13 52:5</p> <p>limited [1] 56:18</p> <p>limiting [4] 14:15 70:22,24 71:4</p> <p>limits [1] 39:14</p> <p>line [6] 36:18 38:25 40:21 59:12 60:10,14</p> <p>lines [1] 61:22</p> <p>list [8] 10:6 34:20,21 46:19 47:12 53:3 67:3 69:15</p> <p>listed [3] 15:17 21:4,8</p> <p>lists [8] 25:9 34:17 43:18 45:5 47:1 53:1 61:14 67:6</p> <p>Little [7] 2:4 7:10 15:24 44:17 46:17 48:24 55:11</p> <p>LIU [18] 2:6 3:6 25:20,21,24 27:11 28:23 29:23 30:1,21 31:21 32:25 33:11 35:7,22 37:6,9 39:21</p> <p>Liu's [1] 46:3</p> <p>local [1] 23:13</p> <p>long [1] 54:20</p> <p>look [13] 29:2,6 32:1 38:24 42:3,10 43:12,12 52:24 53:25 56:10 58:17 59:3</p> <p>looking [2] 44:16,25</p> <p>looks [2] 14:21 19:24</p> <p>lot [6] 15:9 19:22 34:21 55:13 69:19,19</p> <p>low [1] 48:10</p> <p>lower [1] 35:20</p> <hr/> <p style="text-align: center;">M</p> <p>MAC [17] 10:5,14 25:9 34:17,21 43:17 45:5 46:19,25 47:12,16 53:1,3 67:2,3,6 69:15</p> <p>made [8] 8:20 9:4,7 17:25 18:16 41:19 55:13 58:19</p> <p>main [2] 33:1 41:24</p> <p>maintain [2] 34:17 59:12</p> <p>maintained [1] 59:13</p> <p>manage [2] 59:8 64:16</p> <p>managed [1] 18:11</p> <p>MANAGEMENT [2] 1:7 4:5</p> <p>Manager [1] 62:11</p> <p>Managers [4] 4:12 61:24,25 62:3</p> <p>managing [1] 64:5</p> <p>manifestly [1] 58:6</p> <p>many [8] 4:17 31:15 42:15,15 50:11 53:18,18 59:5</p> <p>margin [2] 23:11,13</p> <p>mark [1] 30:23</p> <p>marked [1] 34:12</p> <p>market [4] 10:6 17:2 25:8 70:6</p> <p>market-based [2] 38:2,8</p> <p>marks [1] 30:4</p> <p>matter [23] 1:14 5:14 11:7,13,16,18 26:3,13,16,19 27:14 28:2,3 33:19 34:1 35:9 39:6 43:11 44:12 50:7 52:16 56:1 59:9</p> <p>mean [14] 6:19 10:12 13:23 36:17 37:19 44:22 49:5,25 52:21 53:8 56:10 62:8 64:14 66:22</p> <p>means [5] 10:7 14:14 40:12,14 49:2</p> <p>meant [1] 14:7</p> <p>mechanics [1] 42:4</p> <p>mechanism [2] 38:9 55:14</p> <p>mechanisms [6] 5:12,14 8:5,6,7 22:9</p> <p>Medicare [1] 13:1</p> <p>medication [2] 70:15,16</p> <p>mentioned [2] 30:18 42:24</p> <p>mere [1] 17:7</p> <p>merely [1] 17:7</p> <p>method [3] 26:10,21,22</p> <p>methodology [5] 6:13 45:6,10 57:23 67:2</p> <p>middlemen [1] 4:13</p> <p>might [24] 6:20 7:3,8,8,10,16,18,18,21 9:10,17 10:9,10 16:4 19:8,10,15,16 23:19,20 24:1,10 36:20 71:2</p> <p>miles [2] 23:19,20</p> <p>mind [1] 46:8</p> <p>minimum [3] 24:24 57:2 71:6</p> <p>minus [1] 9:23</p> <p>minute [1] 24:16</p> <p>minutes [4] 37:8 66:1,4 67:23</p> <p>misreading [1] 27:24</p> <p>Mississippi [1] 53:22</p> <p>misunderstand [1] 30:20</p> <p>misunderstands [1] 64:3</p> <p>moment [1] 56:4</p> <p>moral [1] 70:14</p> <p>morning [5] 4:4 22:18 35:7 60:2,4</p> <p>most [3] 41:14 62:24 69:21</p> <p>moved [1] 13:24</p> <p>Much [10] 27:4,8 48:23,24,24 49:7 54:12,14 58:6 66:7</p> <p>multi-state [1] 47:7</p>
--	---	--

Official - Subject to Final Review

<p>multiple ^[1] 58:2 munificence ^[1] 54:22 munificent ^[1] 58:7 music ^[1] 63:15 must ^[6] 10:23 11:22 12:3 22:23 38:4 42:12 myself ^[1] 63:3</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>namely ^[1] 26:10 national ^[4] 41:11 44:14 53:8 56:13 nationally ^[2] 50:8 64:18 natural ^[1] 53:8 negative ^[1] 22:21 neither ^[2] 32:14 40:22 networks ^[1] 64:17 never ^[4] 9:14 40:16 41:17 70:1 New ^[5] 7:12 25:14 39:17 41:2 65:8 next ^[1] 10:11 NICHOLAS ^[5] 2:3 3:3,13 4:8 68:1 Nobody ^[1] 43:10 non-Blue ^[1] 69:13 non-ERISA ^[3] 6:5 56:25 62:1 none ^[4] 9:24,24 11:4 40:17 Nor ^[5] 5:13 6:3 40:22 41:5 65:12 normally ^[1] 8:22 Note ^[1] 57:15 notice ^[1] 47:13 notwithstanding ^[1] 67:14 number ^[6] 9:10 31:16 42:12 50:25 67:1 70:11 numeral ^[1] 57:16 nursery ^[1] 60:22</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>objection ^[2] 28:25 70:14 obligation ^[2] 54:4 61:2 obligations ^[1] 58:5 obvious ^[1] 55:2 obviously ^[5] 13:7 17:25 48:8 64:24 70:3 occupied ^[1] 31:5 occupy ^[1] 28:19 occurs ^[1] 60:15 October ^[1] 1:12 odds ^[1] 7:15 offer ^[2] 7:18 58:8 often ^[1] 53:8 Okay ^[7] 11:19 49:15 57:2 60:20 61:21 64:21 66:3 one ^[22] 6:25 10:9 16:22 19:23 21:18 31:19 32:25 34:19 36:7 39:1,14 42:10 43:23 46:5 48:12 49:25 50:9 53:7,10 54:19 59:16 67:1 onerous ^[5] 17:14,17 18:1 37:21 55:24 ones ^[2] 12:12 16:20 only ^[13] 5:25 7:1,7,8 8:9 9:4,6 11:3 12:12 19:7 27:18 29:19 58:24 open ^[3] 17:22 39:16,21 operate ^[1] 61:24 operates ^[1] 70:10</p>	<p>operative ^[1] 29:11 opinion ^[4] 18:22,23 45:14 64:23 opposed ^[2] 16:22 31:19 oral ^[7] 1:15 3:2,5,9 4:8 25:21 40:1 orange ^[1] 48:11 order ^[4] 23:13 48:18 57:24 62:16 ordinarily ^[1] 22:8 ordinary ^[6] 22:7 49:2,9,11 70:6,11 other ^[28] 11:17 20:5 22:20 29:20 36:8 39:1,2 40:14 43:20 44:2 46:21 47:13,15 49:8 50:1 53:7 54:18,19 58:13,15 60:8,9,13 61:5 63:16,25 64:24 70:11 others ^[1] 31:14 otherwise ^[4] 34:3 40:15,23 62:17 ought ^[1] 65:20 out ^[17] 4:16 17:1 30:4,23 31:16 35:10 38:10,23 43:23 48:12 50:12 52:11 53:21 55:16 56:2 57:25 59:17 outcomes ^[1] 31:17 outset ^[3] 27:12 33:18 35:8 over ^[4] 35:17 46:13 49:6 62:15 overall ^[2] 14:21,22 overrule ^[1] 39:12 oversimplifies ^[1] 45:3 owes ^[2] 9:8,11 own ^[1] 32:9</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>package ^[3] 37:17 41:8 65:16 packages ^[1] 7:17 PAGE ^[4] 3:2 29:2 33:12 35:25 pages ^[1] 34:16 paid ^[7] 6:14 11:15 35:13 47:16 57:1 69:11,13 Part ^[3] 13:1 30:11 45:5 participants ^[3] 16:16 32:9 36:7 particular ^[15] 41:3,10 47:5 49:23 50:19 58:18 59:19 65:11 66:12,20 67:5,8,8,10 70:15 particularly ^[1] 66:22 parties ^[3] 50:16 52:12,12 party ^[1] 27:6 pass ^[4] 19:16 23:25 24:3,7 passed ^[6] 7:16 19:9 33:3 35:20 36:1 54:13 passes ^[2] 10:21,22 path ^[1] 31:19 patients ^[5] 36:19,21 40:25 57:12 65:9 pay ^[24] 4:20 6:13 7:3,6,10 9:3 10:9,10,23,24 11:1,22 16:9,10,21,23,23 20:18 22:2 36:16 38:4 53:22 59:8 69:16 paying ^[5] 7:13 19:13 45:18 64:6,12 payment ^[2] 6:15 21:17 pays ^[7] 9:19 10:20 11:11 22:1 23:9 56:20 68:23 PBM ^[16] 5:16,19 8:7 9:8 11:10 13:7 19:13 23:9,24,25 25:3 34:10 41:15 56:24 69:15,15 PBM's ^[2] 24:2 38:23</p>	<p>PBM-pharmacy ^[1] 22:6 PBMs ^[32] 4:20 6:4 7:5,6 11:17 16:10 18:10,19 19:15 23:12 24:6,9 25:7,8,13 26:9 33:4,7 34:16,20 38:9 43:8 44:18 51:21 52:2,7 54:11,14 55:14,20 56:21 64:15 PBMs' ^[1] 26:10 PCMA ^[4] 13:1 52:12 70:12,17 PCMA's ^[1] 70:23 pencils ^[1] 48:10 people ^[3] 13:5 23:16 53:24 percent ^[3] 9:12 16:23 62:15 percentage ^[3] 12:21,23 16:20 percentages ^[1] 11:6 perhaps ^[2] 35:16 68:6 permits ^[1] 52:21 permitted ^[1] 40:16 perspective ^[3] 8:9 9:20 26:15 Petitioner ^[9] 1:5 2:5,9 3:4,8,14 4:9 25:23 68:2 Petitioners ^[1] 55:19 PHARMACEUTICAL ^[2] 1:7 4:5 pharmacies ^[20] 7:6 23:13,15,17 26:10,11,23 38:10 42:11 43:14 44:20 45:8 47:13,16 56:20,25 57:6,20 58:1 63:20 pharmacist ^[2] 4:18 70:14 pharmacist's ^[1] 4:16 pharmacists ^[4] 4:13,16,20 41:25 Pharmacy ^[30] 4:12 5:19 8:17 9:8 11:11 19:13 23:9,18 25:3 26:12,15 28:2 30:8 34:11,18 38:6,6,7 47:14 52:14 54:3,5,23 58:7 61:24,25 62:3,11 67:15,17 pharmacy's ^[1] 43:7 philosopher ^[1] 14:12 phrase ^[1] 14:6 pick ^[1] 68:13 Picking ^[1] 22:19 picture ^[1] 63:24 place ^[2] 32:20 58:13 placed ^[1] 57:12 plaintiff ^[1] 62:9 plan ^[113] 4:23 5:2,14,22 7:7,8,24 8:2,23,24 9:17,17,20 10:2,9,14,20,21,24 11:2,13,21,21,22 12:3,7,24 13:18 14:9 16:12,13,14 17:15,19 18:11 21:19 22:2,22 23:1 24:2,10 26:3,13,19 27:6,14 28:4 29:10,21 30:13 32:10 33:10,19 34:1,17 35:9 38:9 39:6 40:5,10,18,20 41:2,4,9,11,13,18 42:25 44:6,12,14 45:4,11 46:14 47:7 50:7,8,15,19,21 53:13,20 55:3,15 56:6,6,25 57:20 58:5,8,21,25 59:10,20 61:11,11,15,15,16 62:4 64:5,9 65:10,12,18 66:10,11,13 68:12,15 69:23,24 plan's ^[4] 8:9 26:15 45:16 64:11 plan-beneficiary ^[2] 15:15,19 plan-participant ^[3] 32:5,16 37:2 plans ^[85] 5:5,17,20 6:1,13 7:1,2,3,5,16,18 8:1,7 10:23 11:3,4,4,5,5 12:5,8,12,17 13:4 16:9,25 18:10,19 19:8,9,14,15,16 20:10,11,12,17</p>	<p>21:17 22:24 26:5 27:20,25 32:3 36:1,6 38:16 40:12,14 42:22 45:4 46:25 50:24 51:10 53:2,7,8,10,11,19 54:13,21,23 55:19 56:13,21,23 57:13,24 59:7,9 60:11,25 61:23 62:1,4,9,15 63:18,20 64:4,5,16 67:3 68:16,17 plans' ^[1] 62:22,22 play ^[1] 11:11 please ^[4] 4:11 25:25 40:4 63:4 plenty ^[2] 61:23,25 plus ^[2] 37:25 57:1 point ^[13] 6:9 19:19,23 24:22 31:16 34:7 39:16 45:3 51:17 68:11 69:18,23 70:7 pointed ^[5] 31:13 50:12 52:11 55:16 59:17 points ^[2] 46:17 56:2 portion ^[1] 27:16 pose ^[1] 16:6 posed ^[1] 17:16 posing ^[1] 17:11 position ^[1] 70:25 possibility ^[2] 7:9 17:22 possible ^[2] 19:14,15 possibly ^[2] 14:7,8 potential ^[4] 19:8 33:13 34:6 59:13 potentially ^[2] 12:14 19:9 power ^[1] 21:5 practical ^[2] 52:16 56:1 practice ^[2] 4:19 65:14 practices ^[3] 5:17,18,18 precedent ^[2] 31:25 32:20 precisely ^[1] 45:18 preclude ^[2] 41:6 65:13 predicated ^[2] 65:7 67:4 preempt ^[5] 5:8 24:20 34:8 70:13 71:5 preempted ^[17] 4:21 5:4 6:2 11:24 14:4 17:4,21 20:14 25:15,16 42:16 43:2 44:23 45:12 50:5 61:20 70:18 preemption ^[28] 17:9 26:7 28:18 29:1,4 30:2,18,19 31:3 33:1,23 34:4,19 36:5 37:4 39:15,15,17 41:13 45:19 49:3 58:22,24 59:14 60:15 61:9 64:20 71:2 preemptions ^[1] 34:13 preemptive ^[4] 13:17 28:20 60:7,8 preferable ^[1] 28:16 premise ^[1] 23:1 prescribing ^[1] 70:15 prescription ^[6] 4:14 18:11 26:11 38:3 54:1,3 present ^[2] 14:16,20 presented ^[1] 49:16 pretty ^[7] 31:23 32:21 37:23 46:13 51:25 52:3 66:7 prevail ^[2] 13:2 30:6 price ^[18] 5:1 10:9,11,14 11:1,10 16:13 23:8 24:5 47:17 51:1,5,7,8,9 53:1 57:6,22 price-efficient ^[1] 52:20</p>
---	--	---	--

Official - Subject to Final Review

<p>prices ^[15] 6:10,12,20 8:10 10:4,6 20:17 25:10 43:9 48:9,9,10,14,19 51:7</p> <p>pricing ^[1] 56:22</p> <p>principle ^[6] 14:15 17:5 69:14 70:22,24 71:4</p> <p>principled ^[2] 38:25 39:14</p> <p>principles ^[2] 49:3,9</p> <p>pristine ^[1] 34:12</p> <p>problem ^[6] 5:23 12:15 48:19 64:7 70:2,23</p> <p>problems ^[1] 14:20</p> <p>procedure ^[3] 47:11 48:23 53:24</p> <p>procedures ^[18] 6:15 38:20,23 40:7 43:8 44:5,11 47:3,8 48:18,20,25 50:11 53:14 56:12 58:3 60:24 61:13</p> <p>process ^[7] 25:3,5 58:16,20,20 67:8,11</p> <p>processes ^[1] 6:16</p> <p>processing ^[4] 45:17 58:15 59:2 64:12</p> <p>produced ^[1] 42:24</p> <p>product ^[1] 24:9</p> <p>products ^[1] 61:4</p> <p>programs ^[2] 40:8 52:1</p> <p>prohibited ^[1] 6:1</p> <p>prohibits ^[1] 57:23</p> <p>promise ^[1] 67:14</p> <p>promised ^[5] 9:20 44:10 54:2 55:3 67:18</p> <p>promises ^[1] 10:15</p> <p>pronounce ^[1] 20:7</p> <p>protect ^[3] 35:14 36:10 66:15</p> <p>protecting ^[1] 23:21</p> <p>provide ^[12] 8:3,3 16:15 44:7 52:19 57:25 60:11 61:19 62:1,16,23 65:19</p> <p>provided ^[1] 45:7</p> <p>provider ^[7] 11:15 22:2,3 39:5 40:24 58:22 68:24</p> <p>providers ^[4] 59:15 60:22,23 63:21</p> <p>provides ^[1] 42:9</p> <p>providing ^[4] 45:17 52:14 61:3,12</p> <p>provision ^[8] 29:4 30:7 33:1 41:7 43:13 55:1 65:15 70:8</p> <p>provisions ^[10] 21:25 24:23 29:7,13 30:3,22 31:5 37:16 44:9 47:20</p> <p>purchase ^[1] 13:6</p> <p>purchased ^[1] 13:9</p> <p>purely ^[1] 38:18</p> <p>purpose ^[4] 6:11 15:5 41:21 42:1</p> <p>purposes ^[2] 13:25 14:22</p> <p>put ^[3] 24:21 48:16 64:24</p> <hr/> <p style="text-align: center;">Q</p> <p>quality ^[1] 38:21</p> <p>question ^[25] 8:16 15:25 18:13,14,18 21:12,16 26:1,12 27:3 33:14,18 35:23 42:7 46:3 48:4 50:10 51:14 55:11 59:24 63:2,3 64:22 68:7 70:21</p> <p>questioning ^[1] 60:10</p>	<p>questions ^[8] 22:19 28:9 35:1 37:11 42:17 57:15 61:8 66:2</p> <p>quite ^[3] 16:25 52:10 66:19</p> <p>quote ^[2] 59:6 64:11</p> <p>quoting ^[2] 45:15 50:13</p> <hr/> <p style="text-align: center;">R</p> <p>raise ^[1] 33:6</p> <p>raising ^[1] 48:13</p> <p>rate ^[24] 5:3,9,13 9:22,23 17:13 19:12 24:20,21,25 25:6,12,14 37:14,25 38:11,18,25 40:13,15 48:20 68:20 69:8 70:9</p> <p>rates ^[5] 24:24 30:9 37:18 68:22 69:16</p> <p>Rather ^[5] 5:16 27:6 29:19 42:4 55:15</p> <p>reach ^[1] 18:13</p> <p>read ^[1] 48:25</p> <p>reality ^[2] 42:4 69:10</p> <p>reallocate ^[1] 23:12</p> <p>really ^[23] 6:22 8:6 10:1 11:15 14:14 18:16,22 19:20 23:10 27:7 30:5 33:10 39:4,10 44:18 68:8,11,16,25 69:16,18 70:23 71:3</p> <p>reason ^[8] 25:14 31:18,22 33:22 36:3 56:3,9 66:16</p> <p>reasons ^[1] 4:21</p> <p>rebill ^[4] 8:18 47:15,15,17</p> <p>REBUTTAL ^[3] 3:12 67:24 68:1</p> <p>receive ^[3] 42:12 53:5 67:15</p> <p>recognized ^[2] 33:12 35:24</p> <p>recognizes ^[1] 62:14</p> <p>recommend ^[1] 28:21</p> <p>reconsider ^[3] 55:19,23 56:2</p> <p>record ^[2] 12:23 34:15</p> <p>recordkeeping ^[2] 21:3,24</p> <p>Red ^[1] 38:20</p> <p>refer ^[2] 5:24 45:13</p> <p>reference ^[2] 6:2 12:14</p> <p>referred ^[1] 8:6</p> <p>refers ^[2] 12:5 49:25</p> <p>reflect ^[2] 10:6 12:23</p> <p>reflected ^[1] 67:2</p> <p>reformulated ^[1] 28:17</p> <p>refuse ^[2] 54:6 61:18</p> <p>refuting ^[1] 27:17</p> <p>regard ^[1] 64:10</p> <p>regime ^[5] 31:1 37:20,20,22 38:13</p> <p>regular ^[2] 43:17 46:19</p> <p>regulate ^[14] 4:22,22,23,25 5:14,16 6:23 20:9 21:10,14 22:5 24:24 27:13 68:12</p> <p>regulated ^[14] 7:12 10:2 12:1 20:24 23:8,10 26:21 27:10,10,12 37:1 40:23 44:21 69:7</p> <p>regulates ^[11] 5:1,21 6:10 11:10 15:19 26:2,9,22 32:17 33:19 40:20</p> <p>regulating ^[9] 4:20 10:25 18:10,10 32:5,6,15 37:18 51:6</p> <p>regulation ^[32] 5:3,9,11,13 17:13 18:1 19:12 21:2 24:20,21,25 25:7 27:5 33:25 35:16 37:14 38:19,25</p>	<p>40:13,13,15 41:4 48:20 50:20 59:20 61:2 65:12 66:13 69:9 70:6,9 71:1</p> <p>regulations ^[6] 21:6 38:19,21 45:16 60:8 70:12</p> <p>regulatory ^[3] 25:12,15 64:3</p> <p>reimburse ^[1] 4:13</p> <p>reimbursed ^[2] 37:24 39:6</p> <p>reimbursement ^[14] 5:17 9:5 25:3,10 26:13,15 28:3 30:9 38:5,10 58:5,16,20 64:17</p> <p>reimbursements ^[2] 4:15 34:11</p> <p>reimbursing ^[3] 26:11,21,23</p> <p>reiterate ^[1] 46:16</p> <p>reiterated ^[1] 41:1</p> <p>reject ^[1] 39:13</p> <p>rejected ^[1] 38:17</p> <p>relate ^[9] 13:18 14:6 22:23 29:9 48:5,6,7,11 49:1</p> <p>related ^[1] 14:13</p> <p>relates ^[6] 14:8 21:16 29:6,15,20 49:24</p> <p>relation ^[1] 48:14</p> <p>relationship ^[13] 15:15,19 26:9 32:6,16 36:10,12 37:2 58:21,25 63:17,19,23</p> <p>relevant ^[1] 69:21</p> <p>relies ^[1] 25:2</p> <p>remain ^[2] 23:14 31:18</p> <p>remainder ^[1] 15:13</p> <p>remedies ^[6] 6:16 44:6 47:10 53:6,15 67:11</p> <p>remembering ^[1] 63:3</p> <p>remove ^[1] 39:13</p> <p>reporting ^[7] 20:9 21:3,16,23 30:12,25 55:17</p> <p>represent ^[1] 10:4</p> <p>representation ^[1] 24:4</p> <p>request ^[2] 39:11,13</p> <p>require ^[7] 19:14 42:17 46:21 47:3,12,13 53:19</p> <p>required ^[3] 41:15 62:16 65:8</p> <p>requirement ^[3] 23:25 53:23 55:18</p> <p>requirements ^[6] 20:9 21:23 30:25 46:24 52:25 53:18</p> <p>requires ^[4] 43:17 46:18 51:25 52:3</p> <p>requiring ^[2] 23:11 40:24</p> <p>reserved ^[3] 42:18 57:15 61:7</p> <p>resolution ^[1] 6:16</p> <p>resolve ^[2] 8:1 19:17</p> <p>resolving ^[1] 31:11</p> <p>respect ^[4] 33:4 64:23 69:22,24</p> <p>respectfully ^[1] 65:21</p> <p>respond ^[1] 20:19</p> <p>responded ^[1] 4:19</p> <p>Respondent ^[12] 1:9 2:11 3:11 5:11 6:2 25:1,2 30:6,16 39:7 40:2 62:10</p> <p>Respondent's ^[2] 27:17 39:10</p> <p>response ^[2] 4:21 27:22</p> <p>restrictive ^[2] 38:12,15</p> <p>result ^[4] 9:4,7 12:12 25:6</p>	<p>retain ^[1] 23:17</p> <p>reverse ^[4] 6:6 47:15,17 71:8</p> <p>reversed ^[1] 26:25</p> <p>revision ^[1] 47:12</p> <p>rightly ^[1] 63:22</p> <p>rights ^[2] 32:9 55:3</p> <p>rim ^[1] 14:15</p> <p>ROBERTS ^[39] 4:3 6:8 8:12 10:17 13:11 15:21 18:3 20:2 22:14 24:15 25:18 27:1 28:5,10,14 31:8 32:24 34:24 35:3 37:6 39:19,22 41:23 43:3,6,22 44:1,15 45:20,23 47:25 51:18 55:8 58:11 59:25 63:7 65:24 67:21 71:9</p> <p>Rock ^[1] 2:4</p> <p>Roman ^[1] 57:16</p> <p>rule ^[10] 16:3 17:6 18:21 25:12,15 47:5 56:12 62:19 67:9,12</p> <p>rules ^[3] 40:7 44:5 56:12</p> <p>ruling ^[1] 55:18</p> <p>run ^[1] 34:5</p> <p>rural ^[1] 23:15</p> <p>RUTLEDGE ^[2] 1:3 4:5</p> <hr/> <p style="text-align: center;">S</p> <p>safety ^[1] 60:24</p> <p>same ^[19] 7:11,25 10:3 17:6 19:11 25:14 27:2 28:12 31:18 35:23 37:17 47:21 48:23 51:7 53:9 68:9 69:14 70:19 71:7</p> <p>satisfies ^[1] 67:12</p> <p>saying ^[5] 38:3,5 43:10 48:12 69:6</p> <p>says ^[13] 10:22 11:20 12:7 13:16 16:22 18:12 29:6 40:11 43:14 44:20 49:25 60:20 61:10</p> <p>Scalia ^[3] 14:10 28:15 31:13</p> <p>scenario ^[6] 11:18 12:10 16:2 17:3,11,15</p> <p>schedule ^[2] 46:20 67:5</p> <p>schedules ^[5] 6:15 43:21 46:22 53:1,16</p> <p>scheme ^[1] 43:1</p> <p>schools ^[1] 60:22</p> <p>scope ^[2] 39:15 67:4</p> <p>Second ^[6] 5:8 17:3 42:23 44:21,23 54:25</p> <p>secondly ^[1] 28:1</p> <p>section ^[3] 49:6 64:20 66:15</p> <p>secure ^[1] 15:18</p> <p>see ^[4] 7:8 29:3 51:17 69:19</p> <p>seem ^[3] 21:18 35:15 46:5</p> <p>seems ^[5] 6:9,21 8:16,18,21</p> <p>self-insured ^[1] 42:22</p> <p>selling ^[1] 41:25</p> <p>sense ^[3] 5:21 7:7 14:8</p> <p>sentence ^[2] 42:19 50:10</p> <p>serious ^[1] 14:16</p> <p>seriously ^[1] 34:4</p> <p>serve ^[1] 14:1</p> <p>service ^[4] 11:15 22:2,3 68:23</p> <p>services ^[7] 32:7 48:10,13 61:4,18 62:1,25</p> <p>set ^[5] 12:13 25:10 33:18 44:6,19</p> <p>SETH ^[3] 2:10 3:10 40:1</p>
---	---	---	--

Official - Subject to Final Review

<p>setting ^[1] 48:9 Seven ^[1] 32:4 several ^[2] 49:17 66:1 SG ^[4] 18:8,12 40:17 55:12 SG's ^[1] 18:8 shall ^[2] 29:8,14 shared ^[1] 5:20 Sherman ^[1] 51:11 shopping ^[1] 7:22 short ^[1] 54:19 shouldn't ^[3] 18:13 35:18 42:3 shows ^[1] 34:16 side ^[7] 20:5 22:20 54:18 58:13 63:16,25 64:24 similar ^[2] 51:22 61:21 Similarly ^[1] 53:6 simpler ^[1] 48:25 simplify ^[1] 56:19 simply ^[5] 10:22,22 16:14 26:16 57:6 since ^[1] 6:4 single ^[2] 43:13 62:24 situation ^[4] 9:12 52:4 57:10,11 situations ^[1] 9:13 small ^[1] 9:10 small-town ^[2] 23:15,18 so-called ^[1] 40:13 Solicitor ^[2] 2:3,6 somebody ^[2] 61:3 69:7 somehow ^[1] 69:6 something's ^[1] 35:11 somewhat ^[1] 46:7 somewhere ^[1] 69:9 sophisticated ^[1] 52:3 sorry ^[3] 44:16 56:17 59:23 sort ^[2] 17:15 46:20 sorts ^[4] 39:1,17 60:8,13 Sotomayor ^[14] 15:22,23 22:20 31:9,10,22 32:22 55:9,10,22 56:14,17 57:8 58:9 sought ^[1] 66:15 sounds ^[1] 30:18 speaking ^[1] 31:3 speaks ^[1] 30:8 special ^[1] 49:5 specific ^[3] 21:7,23 54:15 specifically ^[7] 12:5 14:24 15:16 21:4,8,22 32:18 specify ^[1] 47:4 specter ^[1] 33:6 spends ^[1] 18:8 sphere ^[1] 59:2 spoke ^[2] 18:17 21:22 sponsor ^[1] 56:6 sponsors ^[2] 59:9 62:9 standard ^[2] 49:24 57:23 standards ^[3] 38:21 47:6,8 start ^[1] 68:5 state ^[66] 10:19,21 11:3,4,5,20,22 13:17 16:7 22:7,8 23:16 24:20,21 26:20,22 27:13,24 28:19 29:8 30:24 31:4 32:2,4,15,17 33:13,25 34:6,8 35:15,16,17 37:22 40:9,13 41:11,24 42:5,24 43:7,7 44:20 45:15</p>	<p>47:9,9,22,23 48:9 50:6 52:7,22 53:7,10,16 56:5,11 60:20 61:1,2,10 63:22 67:17 70:6,11 71:6 state-by-state ^[1] 46:25 state-specific ^[1] 40:6 statement ^[1] 35:10 STATES ^[20] 1:1,16 2:8 3:7 5:6 22:5 25:22 33:3,9 43:20 44:8 46:21 47:2,4,11,12,14,16,18 51:22 statute ^[9] 13:16,16 14:22 15:1 20:24 30:12 42:21 48:5 51:10 statutes ^[3] 13:20,25 15:8 statutory ^[1] 29:3 steeper ^[1] 30:16 still ^[2] 31:4,18 straightforward ^[2] 31:24 32:21 strange ^[1] 38:14 stressing ^[1] 51:20 strictly ^[1] 31:2 strike ^[2] 29:18,19 strong ^[1] 31:22 struck ^[1] 51:23 structure ^[2] 14:21 25:7 struggled ^[1] 48:8 stuff ^[1] 8:8 subchapter ^[12] 29:7,8,13,13 30:3,3,7,8,22,22 31:6,6 subject ^[3] 22:8 51:9 61:7 submitted ^[2] 71:10,12 substantive ^[8] 7:24 17:14,18 18:2 19:21 43:13 46:24 56:12 sufficient ^[1] 17:8 suggest ^[3] 5:21 46:5 65:21 suggested ^[1] 28:16 suggests ^[2] 35:11 40:23 summary ^[1] 53:20 supersede ^[4] 29:8,12,14,18 supplemented ^[1] 31:1 supporting ^[3] 2:9 3:8 25:23 suppose ^[1] 10:21 SUPREME ^[2] 1:1,15 surcharge ^[6] 37:25 40:25 41:6 42:21 65:8,13 surcharges ^[8] 7:14,15 19:6 35:25 36:18 69:8,11,13 surely ^[1] 38:22 system ^[5] 25:9,13 45:17 51:6 64:12 systems ^[1] 64:17</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tailor ^[1] 34:20 talked ^[2] 57:18 63:2 talks ^[2] 6:12 68:15 tellingly ^[1] 30:5 term ^[2] 54:20,20 terminology ^[1] 66:19 terms ^[9] 17:18 36:11 54:25 58:4 61:19 64:15 65:6 67:16 69:4 test ^[2] 27:13 50:18 tests ^[1] 52:25 text ^[5] 29:4,6 30:2,4,6 text-based ^[3] 29:1 30:14,15 theme ^[1] 63:16</p>	<p>themselves ^[6] 25:13 27:20 36:19 53:11,17 56:21 theoretical ^[1] 31:12 there's ^[13] 5:10 8:18 23:24,24 30:5,7,11 31:21 34:13,14,18 69:19 70:24 thereby ^[1] 35:19 therefore ^[5] 5:20 26:25 48:22 54:21 62:10 thicket ^[1] 40:9 Third ^[4] 5:24 27:5 47:10 50:16 third-party ^[10] 22:1 41:18 52:16,18 53:12 56:8 59:15 62:17,21 68:23 Thomas ^[8] 8:14,15 10:16 28:7,8 45:24,25 47:24 though ^[4] 34:9 54:2 63:21 70:18 three ^[6] 4:21 16:8 37:8 44:2 66:4 67:23 Tier ^[4] 16:9,10,11,14 tiers ^[1] 16:8 timing ^[1] 6:14 today ^[3] 10:3,7 13:20 took ^[1] 28:25 top ^[1] 25:12 totally ^[1] 36:9 traditional ^[1] 33:25 Traveler ^[1] 65:6 Travelers ^[57] 5:3 7:11,12 8:11 11:14 17:12,22,22 19:4,4,24 20:6 24:13,22 25:16 26:18,20 27:18,19 35:22,24 36:3,17,18 37:20,21 38:14,17,20 39:4,8,9,12 40:22 42:18 50:13 57:10,11,16 58:18 59:16,18 61:1,7,8 64:23,25,25 65:5,6,6,18,19 69:1,2,5,10 treat ^[1] 5:25 tremendous ^[1] 52:15 tried ^[1] 20:9 trigger ^[1] 36:4 triggers ^[2] 43:21 46:23 trouble ^[1] 15:9 true ^[13] 6:3 7:11,25 8:11 9:13 10:3 17:17 24:6,6 36:14,17 54:10 70:3 try ^[1] 54:1 trying ^[2] 6:23 33:8 Tuesday ^[1] 1:12 turn ^[1] 53:19 turning ^[1] 55:12 turns ^[1] 53:21 two ^[6] 42:17 44:18 50:5 61:7 65:17,17 twofold ^[1] 27:23 Type ^[2] 12:7 57:14</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately ^[9] 7:3,22 10:15 12:24 14:13 15:11 20:24 23:7 24:8 under ^[15] 5:3,25 10:8 13:9,22 17:12,21 21:6 22:11 30:6 31:24 32:10 55:3 61:19 67:17 underlying ^[1] 42:4 underscore ^[2] 13:3 62:14</p>	<p>underscored ^[2] 59:17 65:20 underscores ^[1] 10:1 understand ^[6] 54:5 62:2,6 63:16 66:22 69:5 understood ^[3] 13:23 18:7 27:17 undoubtedly ^[1] 63:23 unequal ^[2] 47:22 53:9 uni ^[1] 33:21 uniform ^[12] 5:7 40:9 41:6,7,11 44:14 46:14 50:8 64:18 65:14,15 66:9 uniformity ^[12] 33:2,14,15 34:2,7,7,12,14 46:4,6 69:18,20 UNITED ^[5] 1:1,16 2:8 3:7 25:22 universe ^[1] 70:5 unlike ^[1] 57:10 up ^[17] 8:15 10:4 15:24 20:15 22:19 24:2,8,16 36:15,16 37:7,12 55:11 60:9 66:4 68:13 70:7 update ^[3] 53:3,15 61:14 updated ^[1] 25:9 updates ^[5] 43:17 46:19,22,23,24 updating ^[3] 6:15 53:1 67:6 upheld ^[1] 26:20 uses ^[2] 25:9 69:15 using ^[3] 53:12 69:13,15</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vain ^[1] 43:13 variable ^[1] 34:20 variables ^[1] 34:21 variant ^[1] 60:18 varies ^[2] 67:6,9 variety ^[1] 52:7 various ^[1] 44:8 vary ^[4] 38:6 47:8,11 53:6 varying ^[6] 34:17 40:9 41:11 44:3,4,6 verba ^[1] 41:1 Vermont ^[2] 20:8 56:5 versus ^[1] 4:5 vice ^[1] 64:20 view ^[1] 49:14 views ^[2] 31:14 48:4</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wage ^[1] 71:6 wanted ^[1] 66:8 Washington ^[3] 1:11 2:7,10 WAXMAN ^[54] 2:10 3:10 39:24 40:1,3 41:23 42:6 43:5,10,25 44:3 45:2,22 46:2,9 48:3 49:8,11,15,18,22 50:24 51:2,4,8,19 52:9 54:15 55:5,6,7,21,25 56:16 57:5,9 58:12 59:4 60:3,4,16 62:7 63:11,12,14 64:1 65:4,23 66:3,5,19,25 69:5,23 Waxman's ^[1] 68:14 way ^[17] 7:1 9:6 15:7,18 19:1,6 27:18 30:6 33:9 37:23 38:7,24 45:1 54:19 56:22 59:2 64:18 ways ^[1] 42:15 welcome ^[1] 63:11 welter ^[1] 41:10 whatever ^[1] 57:1</p>
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Official - Subject to Final Review

whatsoever ^[2] 17:2 56:4
whereas ^[1] 27:20
Whereupon ^[1] 71:11
whether ^[14] 11:16 26:2 28:19 34:13 37:13 40:15 41:13 42:16 50:14, 18 54:9 55:20 56:20 62:20
who's ^[3] 10:8 17:19 68:18
widely ^[5] 44:6 47:11 49:24 67:7,9
will ^[14] 9:23 22:21 23:1 35:12 43:12 45:7 47:8,22 50:5 53:9,11,19, 19 61:19
willingness ^[1] 62:23
wins ^[1] 8:17
within ^[4] 28:19 29:16 31:4 32:13
without ^[3] 4:18 51:23 61:24
wondering ^[1] 33:5
word ^[1] 49:1
words ^[5] 11:17 29:20 48:4 49:6,8
work ^[5] 6:5 28:22,23 38:8,10
workers ^[5] 22:23 35:15,17,21 52:14
workplace ^[1] 38:21
works ^[1] 13:8
worry ^[1] 60:7
worse ^[1] 35:20
wrap ^[1] 24:16
wrap-up ^[1] 64:22
write ^[3] 18:21,23 64:23

Y

York ^[3] 7:12 41:2 65:8
York's ^[1] 25:14

Z

zoom ^[1] 35:10