IN THE

Supreme Court of the United States

GLEN MULREADY, in his official capacity as Insurance Commissioner of Oklahoma, and OKLAHOMA INSURANCE DEPARTMENT,

Applicants,

v.

PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION,

Respondent.

Application to the Hon. Neil M. Gorsuch for an Extension of Time Within Which to File to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Pursuant to Rule 13.5, Oklahoma Insurance Commissioner Glen Mulready and the Oklahoma Insurance Department ("Applicants") respectfully request that the time to file their petition for a writ of certiorari in this matter be extended for 30 days, up to and including April 10, 2024. Absent an extension of time, the petition for a writ of certiorari would be due on March 11, 2024.

In support of this request, Applicants state as follows:

1. The U.S. Court of Appeals for the Tenth Circuit rendered its decision on August 15, 2023 (Exhibit 1). The Tenth Circuit declined to rehear the case *en banc* on December 12, 2023 (Exhibit 2). This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1).

2. This case concerns the States' authority to regulate pharmacy benefit managers ("PBMs"), multibillion-dollar corporate middlemen in the pharmacy world. In 2019, the Oklahoma Legislature unanimously enacted the Patient's Right to Pharmacy Choice Act, 36 Okla. Stat. §§ 6958 *et seq.*, to "establish minimum and uniform access to a provider and standards and prohibitions on restrictions of a patient's right to choose a pharmacy provider," *id.* § 6959. Four provisions of that Act are at issue in this case: (1) the "Access Standards" provision, which requires PBMs to follow geographic rules to ensure that rural patients have access to in-network pharmacies, *id.* § 6961(A)-(B); (2) the "Discount Prohibition," which bars PBMs from steering patients through incentives, *id.* § 6963(E); (3) the "Probation Prohibition," which prohibits PBMs from penalizing a pharmacy because its pharmacist is on probation but allowed

to work under the Oklahoma State Board of Pharmacy rules, *id.* § 6962(B)(5); and (4) the "Any Willing Provider Provision," under which a PBM cannot exclude any pharmacy from a preferred network that is willing to accept the PBM's terms and conditions, *id.* § 6962(B)(4). The Act regulates only PBMs; it does not regulate health plans or fiduciaries to health plans.

3. Shortly after the Act was passed, respondent Pharmaceutical Care Management Association ("PCMA"), a trade association representing the largest PBMs in the country, sued to invalidate it, arguing that the Act is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and Medicare Part D, 42 U.S.C. § 1395w-101 *et seq.* The district court rejected an injunction for the vast majority of PCMA's claims, which "conflate[d] PBMs with ERISA plans." Dist. Ct. Dkt. 48 at 7. PCMA sought emergency relief from the Tenth Circuit, which was denied, and the Act took effect.

4. In the interim, this Court decided *Rutledge v. Pharmaceutical Care Management Association*, 592 U.S. 80 (2020), holding that PBM regulations in Arkansas had "neither an impermissible connection with nor reference to ERISA," *id.* at 83, and thus were not preempted. After *Rutledge*, the district court granted summary judgment to the Applicants on nearly all of PCMA's claims. *See* Dist. Ct. Dkts. 111, 112.

5. The Tenth Circuit reversed. First, the court held that Medicare Part D preempts the Any Willing Provider provision. In the court's view, Part D's preemption clause "precludes States from regulating Part D plans" *in any way* "except for licensing

and plan solvency." Ex. 1 at 45. In so holding, the Tenth Circuit created a circuit split: By the court's own admission, its "sweeping" view of Part D preemption "disagree[s] with the fastidious approach" the Eighth Circuit took in *PCMA v. Webbi*, 18 F.4th 956 (8th Cir. 2021). Ex. 1 at 45, 49.

6. The Tenth Circuit also held that ERISA preempted each of the four appealed provisions. Even though ERISA is silent as to PBMs and the topics regulated by Oklahoma, the court concluded that the Access Standards, Discount Prohibition, and Any Willing Provider provisions are all preempted because (in its view) they all govern a central matter of plan administration. Ex. 1 at 28, 33. The court reached that surprising conclusion notwithstanding *Rutledge*, which the court largely cast aside in favor of two out-of-circuit cases dating back a quarter-century. *See* Ex. 1 at 25 ("We agree with PCMA and with the reasoning from cases from the Fifth and Sixth Circuits."). As to the Probation Prohibition, the court held that it was preempted on the ground that it "eliminates the choice of one method of structuring benefits," thus limiting "ERISA plans that choose to [hire a PBM]." Ex. 1 at 40 (quotations omitted).

7. In broadly applying ERISA preemption, the Tenth Circuit declined even to analyze the ERISA "savings clause," which mandates that "nothing" in ERISA's preemption clause "shall be construed to exempt or relieve any person from any law of any State which regulates insurance." 29 U.S.C. § 1144(b)(2)(A). Both the United States—who appeared as an *amicus curiae* at the panel's request—and Applicants argued that this clause would save the four challenged provisions from ERISA preemption.

Indeed, Applicants repeatedly invoked the clause in response to PCMA's motions. Yet the panel puzzlingly held that Applicants had waived the argument, even though it was PCMA's burden to show preemption. Ex. 1 at 41.

8. The Tenth Circuit's preemption holdings cannot be reconciled with the text of the relevant statutes or this Court's recent decision in *Rutledge*. *Rutledge* held that ERISA preempts only those State "laws that require providers to structure benefit plans in particular ways" or "requir[e] payment of specific benefits." 592 U.S. 80, 86-87. None of the provisions at issue here comes close to mandating any benefit plan structure or the payment of any particular benefit. The decision below also conflicts with the long-held understanding that stretching ERISA to preempt state laws in areas of "traditionally state-regulated substantive law … where ERISA has nothing to say" would be "unsettling," to say the least. *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr.*, 519 U.S. 316, 330 (1997). If that were not enough, the Tenth Circuit expressly contradicted the Eighth Circuit's post-*Rutledge* rejection of preemption for "two North Dakota laws that resemble the Probation Prohibition." Ex. 1 at 37-40.

9. The time to file a petition for a writ of certiorari should be extended for 30 days because of the complexity of the case, which involves preemption under ERISA and Medicare Part D, and because of conflicts with the schedules of Applicants' counsel. Most significant at present, Applicants' current counsel of record, the undersigned, is expecting a new child on or around March 13, 2024, which is just two days after the certiorari petition is currently due. Said counsel has worked on this case

since its inception in 2019 and will be heavily involved with the petition for certiorari. Counsel for Applicants also have a reply due in the Western District of Oklahoma on March 1, 2024, in *Oklahoma v. HHS et al.*, No. 5:23-cv-1052-HE; a Tenth Circuit oral argument to be held on March 20, 2024, in *Fowler v. Stitt*, No. 23-5080 (10th Cir.); a trial on the competency of a death-row inmate starting on March 25, 2024, as ordered in *Ryder v. Oklahoma*, No. D-2000-886 (Okla. Crim. App.); and an opening merits brief in this Court that is due by April 8, 2024, in *Glossip v. Oklahoma*, No. 22-7466.

10. For the foregoing reasons, Applicants request that an extension of time to and including April 10, 2024, be granted within which they may file a petition for a writ of certiorari.

Respectfully submitted,

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