No.

IN THE

Supreme Court of the United States

AETNA HEALTH INC.,

Petitioner,

v.

JUAN DAVILA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), as construed by this Court in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), and its progeny, completely preempts state-law claims by ERISA plan participants or beneficiaries who assert that a managed care company tortiously "failed to cover" (*i.e.*, pay for) medical care.

PARTIES TO THE PROCEEDINGS

Petitioner Aetna Health Inc. is the successor to Aetna U.S. Healthcare Inc. and Aetna U.S. Healthcare of North Texas Inc., both of which merged into Aetna Health Inc. In addition to the parties named in the caption, the following individuals and entities were parties in the consolidated cases below and are respondents in this Court. The following parties were plaintiffs-appellants below: Robert Roark; Robert Roark, on behalf of the estate of Gwen Roark. The following party was a plaintiff-appellant-cross-appellee in the court below: Ruby R. Calad. The following party was a plaintiff-cross-appellee in the court below: Walter Patrick Thorn. The following parties were defendants-appellees in the court below: Humana, Inc.; Humana Health Plan of Texas, Inc., d/b/a Humana Health Plan of Texas (Dallas), d/b/a Humana Health Plan of Texas (San Antonio), d/b/a Humana Health Plan of Texas (Corpus Christi); Humana HMO Texas, Inc.; Cigna Healthcare of Texas, Inc., d/b/a Cigna Corporation.

RULE 29.6 STATEMENT

Petitioner's parent company is Aetna Inc., a publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Aetna Health Inc. (as successor to Aetna U.S. Healthcare of North Texas Inc. and Aetna U.S. Healthcare Inc., which were defendants below) respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, at 1a-29a) is reported at 307 F.3d 298 (5th Cir. 2002). The opinion and order of the United States District Court for the Northern District of Texas denying respondent Davila's motion to remand and dismissing the complaint with prejudice (App., *infra*, at 30a-35a) is unreported.

JURISDICTION

The district court had federal question jurisdiction over the plaintiffs' claims pursuant to 28 U.S.C. § 1331 and the complete preemption effected by 29 U.S.C. § 1132. The court of appeals had jurisdiction to review the final judgments of the district court pursuant to 28 U.S.C. § 1291. The judgment of the court of appeals was entered on September 17, 2002. The court of appeals denied Aetna's petition for rehearing and suggestion for rehearing en banc on April 15, 2003. App., *infra*, at 37a-39a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This proceeding draws into question the constitutionality of a state statute under the Supremacy Clause of the Constitution, and the notification required by this Court's Rule 29.4(c) has been transmitted to the Attorney General of Texas. Although the courts

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[1] A petition seeking review of a different aspect of the same consolidated judgment is pending as No. 02-1826.

below did not certify this issue pursuant to 28 U.S.C. § 2403(a), the Attorney General participated as *amicus curiae* in the court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution, U.S. Const. art. VI, cl. 2, and the pertinent provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), and the Texas Health Care Liability Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 88.001-.003 ("THCLA"), are set forth in the Appendix, *infra*, at 41a-63a.

STATEMENT OF THE CASE

1. Petitioner Aetna Health Inc. ("Aetna") operates a federally qualified health maintenance organization ("HMO"), which provides health services to its subscribers on a prepaid basis. Aetna contracts with employers and others to administer benefits available under plans established pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

Respondent Juan Davila receives health care benefits through an ERISA plan provided by his employer, Monitronics International, Inc. Aetna insures and administers benefits for the Monitronics Plan, including precertifying, on the plan's behalf, whether coverage is available under the terms of the plan that require a particular service or prescription drug to be "medically necessary" in order to be covered. The "Certificate of Coverage" for the Monitronics Plan expressly states that "*[f]or the purpose of coverage*, HMO [Aetna] may determine whether any benefit provided under the Certificate is Medically Necessary." App., *infra*, at 122a (emphasis added; boldface omitted)). The Certificate further emphasizes, in bold print, that "**THIS CERTIFICATE APPLIES TO COVERAGE ONLY AND DOES NOT RESTRICT**

A MEMBER'S ABILITY TO RECEIVE HEALTH CARE SERVICES THAT ARE NOT, OR MIGHT NOT BE, COVERED BENEFITS UNDER THIS CERTIFICATE." *Id.* at 107a. In other words, under the terms of the plan Aetna decides only whether the Monitronics Plan "covers" (*i.e.*, will pay for) a proposed treatment or service, not whether a participant or beneficiary actually receives that treatment or service.

2. In April 2000, Davila visited his primary care physician, Dr. Joseph Lopez, for treatment of discomfort associated with Davila's arthritis. Dr. Lopez prescribed the painkiller "Vioxx" to alleviate that discomfort. App., *infra*, at 4a. Under the terms of Davila's benefits plan, however, participants were ordinarily required to try an analogous but less expensive medication before Aetna could authorize payment for Vioxx. *Id.* at 4a-5a. On May 10, 2000, Aetna issued a benefits determination that so advised Dr. Lopez. Aetna's letter noted that as part of its "utilization review program," Davila's "benefit design require[d] precertification for" Vioxx. The letter also outlined the circumstances in which such precertification would be granted—none of which was then applicable to Davila. *Id.* at 80a.[2] "Based on the review of information submitted to us," the letter stated, "your request to authorize payment for the Formulary excluded medication has been denied." *Id.*

Aetna's benefits determination further noted that if Dr. Lopez or Davila wished "to take exception to this decision," either could "file a formal grievance with the HMO." App., *infra*, at 81a. The letter went on to advise Dr. Lopez of his statutory "right to review by an Independent Review Organi-

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[2] The letter specified that contraindication of other medications would have been a ground for precertification. App., *infra*, at 80a. There is neither allegation nor evidence in the record that Davila's physician asserted this ground.

zation (IRO) of adverse coverage determinations based on medical necessity," including the right to expedited IRO review if Davila's condition was life-threatening. *Id. See generally Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002) (discussing interaction between state laws providing IRO rights and ERISA).

Davila and Dr. Lopez did not exercise any of the remedies outlined in Aetna's benefits determination. Nor did Davila seek relief under Section 502 of ERISA, which entitles an ERISA plan participant or beneficiary to bring an action "to recover benefits due to him under the terms of his plan" or "to enforce his rights under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). Instead, Davila began taking a different medication covered by Monitronics' ERISA plan. Several weeks later, Davila was diagnosed with bleeding ulcers, which required in-patient hospital care. App., *infra*, at 5a. Davila contended that this condition was caused by Aetna's determination that Davila's plan did not immediately cover a more expensive painkiller with a lower level of gastrointestinal toxicity. *Id.* at 4a-5a, 68a-69a.

3. Davila sued Aetna (then known as Aetna U.S. Healthcare of North Texas Inc. and its corporate parent Aetna U.S. Healthcare Inc.) in Texas state court under the Texas Health Care Liability Act ("THCLA"), TEX. CIV. PRAC. & REM. CODE ANN. §§ 88.001-.003. App., *infra*, at 68a-71a. Davila sought compensatory and punitive damages, alleging that Aetna had created a likelihood of substandard care by using a formulary (a list of prescription drugs) with progressive steps of drug coverage, and had acted negligently in its decision not to cover Vioxx from the beginning. *Id.* at 5a, 31a, 70a. The complaint averred that, despite Dr. Lopez's recommendations, petitioner "refused to provide Vioxx" (*id.* at 65a), and that accordingly it "failed to use ordinary care in influencing, controlling, participating in and making healthcare treatment decisions regarding [him] through its adher-

ence to its prescription drug formulary policies." *Id.* at 68a-69a. With his complaint, Davila submitted an affidavit from Dr. Lopez, copies of medical studies concerning Vioxx's gastrointestinal toxicity, and a copy of Aetna's letter denying precertification for Vioxx.

Aetna removed the action to the U.S. District Court for the Northern District of Texas, asserting that Davila's claims are completely preempted by ERISA and thus removable under *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 64-66 (1987). App., *infra*, at 30a-31a, 82a-91a. Davila moved to remand, alleging a lack of subject matter jurisdiction. The district court held that under *Metropolitan Life*, Davila's claims must be recharacterized as stating federal questions under ERISA:

> What Plaintiff really challenges * * * is Defendants' determination regarding which particular drugs are covered under the plan and the circumstances of that coverage. The Court concludes that, distilled to its essence, Plaintiff's claim against Defendants concerns the administration of benefits under the plan * * *. As a result, his state-law claim is completely preempted by ERISA, federal-question jurisdiction exists, and removal was proper.

Id. at 34a. Because Davila declined to plead a claim under ERISA, the court dismissed Davila's complaint with prejudice for failure to state a claim upon which relief could be granted. *Id.* at 34a-35a.

4. A panel of the Fifth Circuit consolidated Davila's appeal with several other removed ERISA actions, including those of respondents Calad, Roark, and Thorn, and reversed.[3]

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[3] Calad, Roark, and Thorn are deemed respondents under this Court's Rule 12.6.

App., *infra*, at 1a-29a. The court recognized that federal courts have removal jurisdiction over state-law claims that are completely preempted by ERISA. It read the rule in *Metropolitan Life*, *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), and related cases, however, to be "a narrow one," stating that a claim is completely preempted by ERISA only if it "duplicates * * * an ERISA § 502(a) remedy." App., *infra*, at 9a, 20a. The court of appeals declined to make any inquiry into "whether the state law conflicts with or frustrates a congressional purpose." *Id.* at 9a. Instead, it confined its analysis to whether the THCLA "duplicate[d]" any of the nine causes of action enumerated in Section 502(a), stating that only "[i]f [respondents] could have brought their claims under ERISA § 502(a)" would their claims be completely preempted. *Id.*

The court proceeded to analyze whether respondents "could have asserted a claim that falls within" any of the various subsections of Section 502(a). App., *infra*, at 10a. The court did not examine whether the cause of action or the remedy created by THCLA *supplemented* the exclusive remedial scheme set out in Section 502(a), but only whether respondents' claims under that statute "duplicate[d]" one of the rights of action in the federal scheme. *Id.* at 9a; *see id.* at 20a (stating that "essentially, the test employed for 'complete preemption'" is that "States may not *duplicate* the causes of action listed in § 502(a)" (emphasis added)).

The court of appeals determined first that the THCLA claim did not precisely duplicate a beneficiary's right of action to secure compliance with the terms of the ERISA plan. App., *infra*, at 10a. Although Section 502(a)(3) allows a beneficiary to sue "to enforce any provisions of [ERISA] or the terms of the plan," the court of appeals held that the THCLA claims did not duplicate such a claim, because the state law made available a form of *relief*—"damages claims"—that ERISA does not. *See* App., *infra*, at 10a. The

court's analysis, which rested entirely on the unavailability of damages under ERISA, was confined to a single sentence: "Section 502(a)(3) indicates equitable remedies are generally available under ERISA; it includes only those categories of relief that were typically available in equity, *not the damages claims Calad and Davila bring*." *Id.* (emphasis added) (citation and internal quotation marks omitted).

The court of appeals applied the same duplication analysis, and used a similarly formal distinction between "contract" and "tort," to conclude that the THCLA claims did not precisely overlap with Section 502(a)(1)(B). App., *infra*, at 15a-20a. The court reasoned: "Section 502(a)(1)(B), we have held, creates a cause of action for breach of contract * * *. By contrast, Calad and Davila assert tort claims * * *." *Id.* at 16a. Because Davila was asserting a cause of action sounding in tort, the court reasoned, his action could not precisely "duplicate" a claim under Section 502(a)(1)(B). *See id.* at 16a-17a. Similarly, the court concluded that removal of respondent Roark's original complaint had been proper because that "complaint stated at least one cause of action completely preempted by § 502(a)": "Count Six of [that] original complaint alleges breach of contract." *Id.* at 22a, 23a. The court relied on this contract/tort distinction to distinguish an earlier circuit precedent—which it described as "on point," and in which the court had *upheld* removal based on complete preemption. *Id.* at 16a (citing *Dowden v. Blue Cross & Blue Shield, Inc.*, 126 F.3d 641 (5th Cir. 1997) (per curiam)); *see Dowden*, 126 F.3d at 643.[4] For the court

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[4] "Like Calad and Davila," the court acknowledged, "Dowden claimed she was denied medically necessary treatment. But Dowden asserted a contract claim for contract damages; Calad and Davila assert a tort claim for tort damages. Calad and Davila are not seeking reimbursement for benefits denied them * * *." App., *infra*, at 17a.

of appeals, the distinction between contract and tort began and ended the analysis of whether respondents' claim "duplicate[d]" one under Section 502(a)(1)(B).

Having concluded that the state-law claims did not perfectly overlap with the causes of action included in Section 502(a), the court finally addressed this Court's decision in *Pilot Life* and Aetna's argument that the THCLA impermissibly supplemented Section 502(a)'s set of remedies. The Fifth Circuit conceded that "*Pilot Life* includes some expansive language that arguably support[ed]" preemption in this case. App., *infra*, at 19a. The panel concluded, however, that "the Supreme Court's most recent word on the matter, [*Rush Prudential*], indicates *Pilot Life* does not sweep so broadly." *Id.* The court reiterated that it would demand precise replication of a Section 502(a) cause of action before it would find complete preemption: under *Rush Prudential*, it concluded, the "narrow" rule of complete preemption applies only if States "duplicate the causes of action listed in ERISA § 502(a)." *Id.* at 20a.

The court also concluded that Davila's cause of action did not precisely replicate a claim that could be brought under ERISA § 502(a)(2). App., *infra*, at 12a-15a. The panel relied heavily on *Pegram v. Herdrich*, 530 U.S. 211 (2000), for the proposition that Davila could not sue his HMO under Section 502(a)(2). *See id.* at 12a-14a. In *Pegram*, this Court held that HMO patients cannot sue physician-owned HMOs for breach of fiduciary duty under Section 502(a)(2) based on it called "mixed eligibility and treatment decisions" by a treating physician. 530 U.S. at 228-31. Although the Fifth Circuit conceded that "*Pegram* did not decide the precise question before us," the court concluded nonetheless that "its holding is broad enough to apply here." App., *infra*, at 12a.

In light of its conclusion that Davila's claims did not precisely duplicate causes of action that could be brought under Sections 502(a)(3), 502(a)(2), or 502(a)(1)(B), the court

held that Davila's claims are not completely preempted and thus do not arise under federal law, as necessary to confer removal jurisdiction. The court therefore reversed the denial of Davila's remand motion. *See* App., *infra*, at 20a, 29a.

REASONS FOR GRANTING THE WRIT

By categorically exempting state tort actions from complete preemption, the Fifth Circuit's decision has created a conflict among the circuits that, if allowed to stand, will lead to the development of conflicting and overlapping state remedial schemes for ERISA benefits determinations. The decision below is in direct conflict with this Court's decision in *Pilot Life*, which unambiguously held that a tort claim that supplements the remedies provided by ERISA § 502 is indeed completely preempted, and with an unbroken string of this Court's subsequent decisions—all but one unanimous—that have consistently reaffirmed *Pilot Life*.

The Fifth Circuit, evidently influenced by this Court's analysis of "mixed" treatment and eligibility decisions in *Pegram v. Herdrich*, 530 U.S. 211 (2000), thought that *Pilot Life* can no longer be relied upon as resolving the very issue on which this Court ruled in that case: that a state tort action for damages represents an alternative enforcement scheme preempted by ERISA § 502(a). But *Pegram* was not a preemption ruling at all, as this Court itself noted (*id.* at 236-37), and this Court certainly did not so much as suggest that its analysis of the distinct issue in that case required reconsideration of *Pilot Life* and its progeny. Indeed, not only does the decision below usurp this Court's sole authority to overrule or modify its own decisions, it also diverges from the run of sister-circuit cases that recognize that the *Pilot Life* rule is alive and well. The decision below, by eliding binding precedent that is faithfully followed in a majority of other courts of appeals, has created a conflict on an important issue that is ripe for resolution by this Court.

I. The Fifth Circuit's Decision Conflicts Directly With An Unbroken Sequence Of Decisions By This Court

ERISA is a "'comprehensive and reticulated statute'" that sets out an exclusive, nationally uniform framework for regulating the administration of employee benefit plans. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 251 (1993) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980)). A critical element of that finely balanced regulatory scheme is the remedial provision, ERISA § 502(a), which provides the full array of remedies that Congress deemed appropriate for plans and their participants and beneficiaries. As this Court repeatedly has held, the rights of action that Section 502(a) provides are exclusive in every way, and the harmony of the statutory scheme forecloses any effort by States either to add to or to detract from the causes of action provided by Section 502(a).

1. Sixteen years ago in *Pilot Life*, this Court first confirmed the exclusivity of Section 502(a) and the impermissibility of state attempts to supplement it. When the Pilot Life Insurance Company terminated an insured's disability benefits purportedly guaranteed under an ERISA plan, the insured filed suit not under ERISA § 502(a), but under Mississippi tort law. 481 U.S. at 43. As in this case, the plaintiff contended that the insurer's benefits decision failed to comport with a state standard of reasonableness and gave rise to liability for the tort of "bad faith." *See id.* at 43, 49-50. And as in this case, the Fifth Circuit held that his tort action was not preempted by ERISA. *See id.* at 44.

This Court unanimously reversed, rejecting the plaintiff's argument that his cause of action for bad faith was saved from preemption by ERISA § 514(b)(2)(A) as a permissible regulation of insurance. The Court reached that conclusion by examining the entire ERISA statutory framework and the role that Section 502(a)'s carefully enumerated remedies play within it. 481 U.S. at 51-52. As the Court

recognized, the structural integrity of ERISA depends upon the exclusivity of Section 502(a)'s enforcement remedies:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted * * * provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."

Id. at 54 (quoting *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)) (alteration and emphasis in original). The Mississippi common law action for bad faith—which, for example, permits recovery of punitive damages where ERISA does not—would have upset this balance if applied to a benefits decision under ERISA. *See id.* at 50, 54. With this factor weighing heavily, the Court held the tort claim preempted. *Id.* at 57.

That same day, in another unanimous decision, *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), this Court held that Section 502(a)'s preemptive power is sufficient to confer federal jurisdiction over all claims within its ambit, including claims pleaded exclusively under state law. Taylor asserted that he was disabled, and when his disability insurer denied his claims for benefits, he sued in state court, asserting contract and tort claims under Michigan law. The defendants removed the action to federal court, where they

prevailed on the merits. The court of appeals ordered a remand to state court on the ground that the suit presented no federal question. *Id.* at 61-62. This Court unanimously reversed that holding. *Pilot Life* had established that "a suit by a beneficiary to recover benefits from a covered plan" necessarily "falls directly under § 502(a)(1)(B) of ERISA, which provides an exclusive federal cause of action for resolution of such disputes." *Id.* at 62-63 (citing *Pilot Life*, 481 U.S. at 56). Taylor had sought an award of benefits *and* damages arising from their denial; ERISA therefore plainly preempted his Michigan law claims under *Pilot Life*. *Id.*

Moreover, this Court held, *Pilot Life* preemption was sufficient to confer removal jurisdiction. Section 502(a) preempts so completely and so strongly that it sweeps into federal court any action within its ambit; because it has displaced any parallel state cause of action, any suit touching the same subject matter becomes a Section 502(a) claim. Taylor's complaint had pleaded only state-law causes of action; the Court held, however, that because those claims were within the scope of Section 502(a), they were "necessarily federal in character" and sufficient to invoke federal "arising under" jurisdiction. *Metropolitan Life*, 481 U.S. at 67.

Taken together, *Pilot Life* and *Metropolitan Life* unambiguously refute both the "duplication" analysis and the contract/tort distinction on which the Fifth Circuit sought to rest its holding in this case. Both decisions confirm that *all supplemental state remedies* for allegedly improper benefits administration—not just "duplicative" ones, and certainly not just those that are styled "contract" remedies or seek equitable relief—alter the balance that Congress established in Section 502(a).

First, these decisions spell out that Section 502(a) *as a whole* has preemptive force, independent of any of its individual causes of action, because Congress intended it to be exclusive. *Metropolitan Life*, 481 U.S. at 63; *Pilot Life*, 481

U.S. at 57. Allowing States to add to or vary Section 502(a)'s careful balance conflicts with that congressional purpose. *Pilot Life*, 481 U.S. at 54. The court of appeals disregarded this aspect of *Pilot Life* and *Metropolitan Life*, *see* App., *infra*, at 9a (stating that "[w]e do not ask whether the state law conflicts with or frustrates a federal purpose"), and instead focused only on duplication of the individual causes of action. The basis for the preemption holding of *Pilot Life* and *Metropolitan Life*, however, was the exclusivity of Section 502(a) *as a whole*.

Second, by their very facts, both decisions make crystal clear that state-law tort claims enjoy no exemption from complete preemption under Section 502(a). In *both cases*, the Court unanimously held that ERISA completely preempted *state-law tort claims*. *Pilot Life*, 481 U.S. at 48-49 (discussing the Mississippi tort of bad faith), *see Metropolitan Life*, 481 U.S. at 61-62. Indeed, here as in *Pilot Life*, tort actions seek to import state-law standards of reasonableness and adequacy into a benefits adjudication. *See, e.g.*, *Pilot Life*, 481 U.S. at 49-50 (citing Mississippi cases that demonstrate that the bad faith tort applies when the failure to perform on a contract is done without a reasonable basis); App., *infra*, at 17a (noting Davila's reliance on the Texas standard of "'ordinary care'"). It was precisely this importation of individual States' common law of reasonableness into the employee benefits context, where uniformity is paramount, that *Pilot Life* forbade. *Pilot Life*, 481 U.S. at 56 ("The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop * * * would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws."). The rule announced in the decision below—categorically immunizing tort claims from complete preemption—cannot coexist with the holding of either *Pilot Life* or *Metropolitan Life*.

Finally, these decisions confirm the inappropriateness of the Fifth Circuit's focus on the *form of relief* available under a state cause of action as a basis for holding the state claim not "duplicative" and therefore not preempted. In particular, *Pilot Life* expressly rejected the notion that Congress could have left ERISA participants and beneficiaries "free to obtain remedies under state law that Congress rejected in ERISA." 481 U.S. at 54. Indeed, drawing on the analogous context of the Labor-Management Relations Act, which also gives rise to complete preemption, *Pilot Life* noted that Congress used the LMRA as a model for ERISA knowing full well "that the powerful pre-emptive force of § 301 of the LMRA displaced all state actions for violation of contracts between an employer and a labor organization, *even when the state action purported to authorize a remedy unavailable under the federal provision*." *Id.* at 55 (emphasis added). By focusing on the availability of *damages* under the THCLA, the Fifth Circuit directly undercut this core holding.

2. This Court has never departed from—and indeed has repeatedly reaffirmed—the analysis it adopted in *Pilot Life* and *Metropolitan Life*. For example, three years after those decisions, in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990), the plaintiff alleged that he had been terminated to prevent his pension benefits from vesting. He filed suit in Texas state court, alleging that his employer had tortiously violated the state-law duty of good faith and fair dealing, as well as claims for wrongful discharge and breach of contract. *McClendon v. Ingersoll-Rand Co.*, 779 S.W.2d 69, 69-70 & n.1 (Tex. 1989). The Texas Supreme Court allowed his action to go forward, noting that he was seeking compensatory and punitive damages rather than the recovery of pension benefits that ERISA would have permitted him. *Id.* at 71 n.3.

As in *Pilot Life* and *Metropolitan Life*, this Court unanimously concluded that the state-law claims were completely preempted by Section 502(a)'s exclusivity. *Ingersoll-Rand*,

498 U.S. at 144-45. Because the plaintiff's right to benefits was guaranteed by ERISA, this Court concluded that his exclusive avenue of redress was Section 502. *Id.* at 145. That the plaintiff had claimed to be seeking relief in tort and contract damages, rather than in the equitable recovery of pension benefits that ERISA affords, did not matter, the Court held; the conflict was with the exclusivity of the ERISA causes of action. *Id.*

Ingersoll-Rand compellingly reinforces the conclusion that the decision below cannot be reconciled with this Court's precedents. For example, the court of appeals reasoned that "[b]ecause the THCLA does not provide an action for collecting benefits, it is not preempted by § 502(a)(1)(B) under *Pilot Life*." App., *infra*, at 20a. Virtually identical reasoning had been adopted by the Texas Supreme Court in *Ingersoll-Rand*. That court had reasoned that complete preemption did not apply because the plaintiff "was '*not* seeking lost * * * *benefits* but [was] instead seeking lost future wages, mental anguish and punitive damages * * *.'" *Ingersoll-Rand*, 498 U.S. at 136 (quoting *McClendon*, 779 S.W.2d at 71 n.3) (emphases and second alteration in original). This Court squarely disagreed, holding that "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek * * * 'benefits.'" 498 U.S. at 145. As this Court put it, "it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of * * * benefits." *Id.*

The Fifth Circuit gave only the most cursory attention to *Ingersoll-Rand*: The court merely stated in passing that this Court's most recent decision under ERISA § 502(a)—*Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002)—had "explained" that *Ingersoll-Rand* simply applied a "duplication" test. *See* App., *infra*, at 19a-20a. But even the language that the Fifth Circuit quoted from *Rush Prudential* to support that assertion made clear that any state law that *adds* remedies such as money damages, or any law that provides a

state (rather than federal forum) for benefit disputes, is preempted (*id.* at 19a-20a)—precisely the rule that the Fifth Circuit disregarded in this case.[5]

Directly contrary to the Fifth Circuit's reading, this Court's decision in *Rush Prudential* expressly adhered to and reaffirmed the teaching of *Pilot Life*. *Rush Prudential* considered a claim by a plaintiff who had sought coverage from her HMO for an "unconventional treatment." 536 U.S. at 360. When the HMO denied coverage and instead proposed to cover a more standard treatment, the plaintiff sued in state court to demand an independent medical review, as guaranteed by a state statute, and payment for the unconventional procedure. The Seventh Circuit held that the case was properly removed to federal court, because this Court's precedents required that the state suit be recharacterized as an action under ERISA § 502(a). *See Moran v. Rush Prudential HMO, Inc.*, 230 F.3d 959, 967 (7th Cir. 2000), *aff'd*, 536

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[5] In the language from *Rush Prudential* on which the Fifth Circuit relied, this Court explained that the state law at issue in *Ingersoll-Rand* had "'duplicated the elements of a claim available under ERISA'" because "'it converted the remedy from an equitable one under § [502(a)(3)] (available exclusively in federal district courts) into a legal one for money damages (available in a state tribunal).'" App., *infra*, at 19a-20a (quoting *Rush Prudential*, 536 U.S. at 379). That passage makes clear that this Court was not using "duplication" in the narrow sense adopted by the Fifth Circuit—*i.e.*, permitting preemption only of state claims that replicate the contractual-type remedies provided by ERISA. Not surprisingly, the Court in *Rush Prudential* took particular pains to reaffirm *Ingersoll-Rand*, which most directly illustrates the conflict between the decision below and this Court's cases. *Rush Prudential*, 536 U.S. at 379, 380 (observing that the Texas law invalidated in *Ingersoll-Rand* had "patently violate[d]" the uniformity mandated by Section 502(a) and "exemplified" the "sort of additional claim or remedy" that ERISA completely preempts).

U.S. 355 (2002). The Seventh Circuit ruled, however, that the state statute requiring an independent medical review was not preempted, and could be enforced *in federal court only* in an action under ERISA § 502(a).

In affirming that conclusion, this Court agreed that "medical necessity" determinations of the type at issue here are ERISA benefit determinations. See *Rush Prudential*, 536 U.S. at 361, 365 (stating that the Illinois law allowing independent review of "medical necessity" determinations added "an extra layer of review for certain benefit denials"). In fact, all nine Members of the Court agreed that if the independent review statute had created an additional *claim* or an additional *remedy*, it would have been preempted under *Pilot Life* and its progeny. *See id.* at 379-80 ("[T]he state statute does not enlarge the claim for benefits beyond the benefits available in any action brought under § [502(a)]. And * * * the relief ultimately available would still be what ERISA authorizes in a suit for benefits under § [502(a)]. This case therefore does not involve the sort of additional claim or remedy exemplified in *Pilot Life*, [*Metropolitan Life*], and *Ingersoll-Rand* * * *." (footnote omitted)); *id.* at 388 (Thomas, J., dissenting) (citing *Pilot Life* for the proposition that, "as the Court concedes," a state-law claim is preempted "if it supplements the remedies provided by ERISA"). *Rush Prudential* turned not on any disagreement over the vitality of *Pilot Life*'s prohibition on benefits adjudications that supplement Section 502(a), but on the majority's determination that the independent review provision was sufficiently different from arbitration or adjudication that it *was not* an alternative means of determining entitlement to benefits that would be forbidden under *Pilot Life*. *See id.* at 381-82. And notably, *no* Member of this Court questioned the Seventh Circuit's holding that the case was properly removed from the state courts.

3. Most recently, in *Beneficial National Bank v. Anderson*, 123 S. Ct. 2058 (2003), the Court once again endorsed the principle of *Metropolitan Life*. Explaining that the principle of complete preemption applies *whenever* Congress creates an exclusively federal right of action, the Court held that claims for usury necessarily arise under the National Bank Act and are removable to federal court. *Id.* at 2063-64. Although the plaintiff pleaded state law usury claims that apparently could not survive on their merits once recharacterized as federal (*see id.* at 2063), the Court nonetheless upheld removal. And the Court took pains to reaffirm its adherence to the rule announced in *Metropolitan Life*—and on this point, it was once again unanimous. *See id.* at 2062-63, 2064 (opinion for the Court); *id.* at 2067 n.1 (Scalia, J., dissenting).

Beneficial confirms that the panel below erred in focusing so narrowly on whether a state cause of action "duplicates," in some ill-defined but narrow sense, a federal one. Confining the inquiry to duplication would rob the "complete preemption" doctrine of all of its force. Completely preemptive federal statutes "supersede both the substantive and the remedial provisions" of state law. *Beneficial*, 123 S. Ct. at 2064. The essence of the complete preemption doctrine is that states may not create a path around the exclusively federal *remedial* scheme simply by inventing a cause of action whose elements bear some substantive difference from the federal law—but which still regulates the same subject matter. Yet the approach taken by the Fifth Circuit in this case would allow States to create a path around the exclusively federal remedial scheme without even creating a substantive difference at all, but simply by *allowing a different remedy*. *See* App., *infra*, at 10a (holding that Section 502(a)(3) did not preempt the THCLA claims because it allows only equitable relief, "not the damages claims Calad and Davila bring"). *Beneficial* confirms that the key question is not how the state-law claim is articulated, but whether the conduct it challenges

is the subject of such an exclusively federal remedial scheme. Here, the challenged conduct—coverage pre-approval—clearly is a benefits-administration decision, subject to the exclusively federal remedial scheme of Section 502(a).

From *Pilot Life* through *Rush Prudential* and now *Beneficial*, the Court's decisions have consistently adhered to a set of three principles. First, ERISA's remedial provisions are exclusive; because Congress carefully weighed which rights of action to include and which to omit, any right of action *not* included must be deemed to have been *excluded*. *Pilot Life*, 481 U.S. at 54; *see Rush Prudential*, 536 U.S. at 378-79; *Ingersoll-Rand*, 498 U.S. at 144-45. Second, the policy choice embodied in Section 502(a)'s balanced set of remedies is binding on the States, which may not add to, subtract from, vary, or replicate any of these rights of action. Attempts to add a supplementary right of action are preempted. *Rush Prudential*, 536 U.S. at 379-80; *Pilot Life*, 481 U.S. at 56. Third, the complete preemption of a state cause of action turns not on the manner in which it is pleaded (tort, contract, or otherwise) or on the relief it seeks (at law or in equity), but on whether it interferes with the administration of benefits under an ERISA plan. *Pilot Life*, 481 U.S. at 51-52. Because the Fifth Circuit's decision runs directly contrary to each and every one of these principles, review by this Court is warranted to correct the Fifth Circuit's plain departure from this Court's precedents.

II. Other Federal Courts Have Continued To Apply *Pilot Life*'s Holding That Alternative Enforcement Mechanisms Are Completely Preempted

As the majority of courts of appeals have recognized, *Pilot Life* and *Metropolitan Life* foreclosed ERISA plan participants from invoking or inventing alternative state-law claims for denial of benefits by mere artful pleading. Further, those courts of appeals have adhered to those precedents without—as did the court below—reading into this Court's

more recent cases an intent to retreat from the complete preemption doctrine.

1. In *Marks v. Watters*, 322 F.3d 316, 327 (4th Cir. 2003), for example, the Fourth Circuit reaffirmed that plaintiffs may not circumvent Section 502(a)'s exclusivity by bringing state-law claims relating to benefits administration—however cleverly those claims might be characterized. *Marks* arose when an ERISA plan beneficiary checked out of the mental hospital where his insurer had approved psychiatric care, and then killed his family and himself. *Id.* at 320-21. The decedents' estates sued the insurer, alleging medical malpractice, negligence, and other state-law claims. *Id.* at 318. They contended that the plan administrator had committed negligence by causing the hospital to discharge the patient prematurely, or by referring him (allegedly based on cost) to a less desirable facility. *Id.* at 327. They argued, as did the Fifth Circuit in this case, that ERISA does not preempt state-law claims based on insurers' mixed decisions of plan administration and patient treatment—a category drawn from this Court's opinion in *Pegram*. *See id.* at 318, 322.

The Fourth Circuit rejected the contention that mixed eligibility and treatment decisions are categorically exempt from Section 502(a)(1)'s exclusive remedial provision. Preemption is determined by the substance of the claim, the court wrote, and the plaintiffs' claims were at their core claims about benefits administration. The court elaborated:

> Claims challenging the administration of an employee welfare benefit plan fall squarely within the scope of § 502(a) of ERISA. Such claims include allegations that a plan benefit was denied based on noncompliance with the terms of a plan or allegations that an ERISA fiduciary breached a duty to a plaintiff by improperly denying a benefit based solely on financial motivations. The core allegation underlying a § 502(a) claim is that a plan participant

> or beneficiary was denied a benefit to which the participant or beneficiary was entitled under an ERISA plan or that *the manner of administering the benefits caused the participants or beneficiaries some injury*. These are precisely the types of claims that plaintiffs are making * * * .

Marks, 322 F.3d at 326 (emphasis added). Thus, the *Marks* plaintiffs, like Davila, sought to engraft a state law duty of care—enforceable through money damages—onto the administration of an ERISA plan. Yet confronted with comparable facts, the Fourth Circuit reached precisely the opposite result.

Similarly, in *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266 (3d Cir. 2001), the Third Circuit made clear that Section 502(a) provides the sole means of challenging "core managed care practices," even when, as here, those practices consist of allegedly "mixed" decisions that rely on medical judgments as predicates for a coverage decision. *Id.* at 274-75. The plaintiff in *Pryzbowski* sought to challenge her insurer's delay in pre-approving a surgical procedure, a delay that resulted from the HMO's preference for the use of in-network specialists. *Id.* at 273. She asserted claims sounding in tort, including negligence and bad faith. *Id.* at 270. The Third Circuit noted that the plaintiff's claim fell somewhere in between a claim challenging only a benefits determination, such as a refusal to approve services not covered by the plan, and one challenging the quality of medical care by a treating physician. *Id.* at 273. The court noted, however, that the insurer (like Aetna) did not itself provide the medical services, and that notwithstanding the medical component to its coverage decisions, those decisions necessarily fell "squarely within administrative function." *Id.* at 274. Thus, although the damages the plaintiff sought were not available under Section 502, that provision represented her exclusive means

of challenging a decision relating to benefit administration. *See id.* at 273-75.

In *Hotz v. Blue Cross & Blue Shield of Massachusetts, Inc.*, 292 F.3d 57 (1st Cir. 2002), the First Circuit also recently reaffirmed that an attack on a pre-approval decision is completely preempted, irrespective of how the claim is characterized. The plaintiff in *Hotz* brought suit under a state unfair-claim-settlement statute to challenge her insurer's allegedly unreasonable delay in the approval of a recommended procedure—a delay that allegedly caused the plaintiff's cancer to worsen. *Id.* at 58. The court reexamined and adhered to its prior precedent, which had held that state-law tort claims challenging a utilization review decision are completely preempted by ERISA. *Id.* at 60 (citing *Danca v. Private Health Care Sys., Inc.*, 185 F.3d 1 (1st Cir. 1999)). The critical inquiry, the *Hotz* court held, is whether the claim "challenged 'the process used to assess a participant's claim for a benefit payment under the plan.'" *Id.* (quoting *Danca*, 185 F.3d at 6). Such claims—including claims sounding in tort for money damages—fall "within the ambit" of ERISA's exclusive remedial provision and are completely preempted. *Id.*; *see id.* at 58 n.1 (describing the cause of action for damages and attorney's fees). Despite any alleged "shift of emphasis by the Supreme Court," the First Circuit held, *id.* at 61 (citing *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358 (1999)), a state action for damages and attorney's fees was precisely within the scope of the *Pilot Life* rule and thus completely preempted. *Id.*

Notably, *Hotz* significantly postdated this Court's decision in *Pegram*, on which the Fifth Circuit based its distinction of this Court's complete preemption cases. Yet the *Hotz* court was not distracted, as was the court below, by *Pegram*'s elaboration—outside the preemption context—of the distinction among treatment decisions, eligibility decisions, and mixed decisions by treating physicians. In the case on

which the *Hotz* court principally relied, the First Circuit had previously anticipated the development of that taxonomy and dismissed it as irrelevant to the scope of complete preemption under ERISA. Considering state-law tort claims brought against an insurer for routing a mental patient to a less expensive and allegedly inferior hospital, the First Circuit "recognize[d] that the allegedly negligent decisionmaking and consultation at issue [might] be characterized as medical in nature," but held that "this fact alone d[id] not remove the state causes of actions [*sic*] from the scope of § 502(a)." *Danca*, 185 F.3d at 5-6. Rather, the conduct at issue, which the court termed "quasi-medical," fell squarely within the scope of the *Pilot Life* preemption doctrine. *Id.* at 6. Thus, unlike the court below, the *Danca* court recognized that a plaintiff cannot circumvent the limitations of Section 502(a) merely by characterizing a claim for benefits as a "mixed decision."

Like *Pryzbowski*—which the First Circuit cited with approval, *see Hotz*, 292 F.3d at 60—*Hotz* cannot be reconciled with the decision below. The *Hotz* court correctly deemed the central inquiry in the preemption analysis to be whether the claim "challenged 'the process used to assess a participant's claim for a benefit payment under the plan.'" *Id.* (quoting *Danca*, 185 F.3d at 6). Davila's claim falls squarely within that category, as he alleges injury arising out of the use of the "step plan" to evaluate and pre-approve claims for prescription drug coverage. Yet the Fifth Circuit's incorrect analysis led it to reach a holding inconsistent with those of its sister circuits.

On similar facts, the Eighth Circuit has also consistently held that decisions about the levels of care that will be authorized under an ERISA plan are benefits administration questions, even though they may contain an element of medical judgment. Indeed, the Eighth Circuit "has expressly declined invitations to either expand or contract the *Pilot Life*

doctrine that ERISA's civil enforcement remedies preempt conflicting or competing state law judicial remedies," *Fink v. Dakotacare*, 324 F.3d 685, 689 (8th Cir. 2003), and has consistently held that all attempts to plead medical malpractice, breach of fiduciary duty, or similar tort claims to challenge "mixed" coverage and treatment decisions are completely preempted by ERISA.

The Eighth Circuit's decision in *Thompson v. Gencare Health Systems, Inc.*, 202 F.3d 1072 (8th Cir. 2000) (per curiam), is emblematic. Just as Davila alleged negligence stemming from the refusal to prescribe a more suitable, less toxic anti-arthritis drug at the outset of treatment, so Thompson alleged malpractice from the refusal to authorize a more suitable, more aggressive course of treatment. The Eighth Circuit rejected the plaintiff's contention that ERISA leaves room for state-law tort regulation, and it noted that the "patient and her treating physicians retained the ultimate decision-making authority regarding her medical care. If she disagreed with Gencare's pre-certification decisions, ERISA afforded her a timely equitable remedy to review Gencare's interpretation of the plan, a remedy she did not pursue." *Id.* at 1074. And that remedy remains exclusive under the *Pilot Life* line of cases. *Id.* at 1073. Numerous other cases in the Eighth Circuit stand for the same proposition. *See, e.g.*, *Howard v. Coventry Health Care, of Iowa, Inc.*, 293 F.3d 442, 446 (8th Cir. 2002) (per curiam); *Hull v. Fallon*, 188 F.3d 939, 942-43 (8th Cir. 1999) (holding completely preempted a medical malpractice claim against a health plan administrator who allegedly made an improper determination that a thallium stress test was not "medically necessary" under the plan's definition); *Painter v. Golden Rule Ins. Co.*, 121 F.3d 436, 438-40 (8th Cir. 1997) (holding completely preempted a breach of fiduciary duty claim against a plan whose administrator refused to precertify experimental cancer coverage).

Rounding out the circuits adhering to the majority view, the Tenth Circuit likewise has rejected the notion that subsequent authority has undermined *Pilot Life* or its progeny so as to permit plan beneficiaries to sue in tort. In a recent decision, that court adhered to its prior precedent holding that a state tort action for bad faith was an impermissible attempt to obtain remedies precluded by Section 502(a), and therefore ruled that such an action was completely preempted. *Conover v. Aetna U.S. Healthcare, Inc.*, 320 F.3d 1076, 1079-80 (10th Cir. 2003) (citing *Gaylor v. John Hancock Mut. Life Ins. Co.*, 112 F.3d 460, 466 (10th Cir. 1997)); *see also Cannon v. Group Health Serv. of Okla., Inc.*, 77 F.3d 1270, 1272-75 (10th Cir. 1996) (holding completely preempted a claim against a managed care company for allegedly negligent "refus[al] to authorize" medical treatment). Indeed, quite unlike the court below, the Tenth Circuit observed that this Court's *Rush Prudential* opinion had "*reaffirmed* this portion of the *Pilot Life* decision." *Conover*, 320 F.3d at 1078 n.2 (emphasis added).[6]

[6] While several courts of appeals—unlike the decision below—have expressly reaffirmed the vitality of *Pilot Life* since this Court's decision in *Pegram*, the decisions applying *Pilot Life* in analogous circumstances before *Pegram* are legion. In *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1485 (7th Cir. 1996), for example, the plaintiff's heath insurer approved only a knee replacement, without the associated physical therapy. Jass underwent the therapy but did not undergo rehabilitation; she promptly sued in state court asserting that the insurer's negligence caused the resulting scarring. Although there was certainly a medical aspect to the decision not to approve the therapy, the claim against the HMO was "in effect a claim for denial of benefits." *Id.* at 1489. The court accordingly held that the claim was completely preempted. *Accord Parrino v. FHP, Inc.*, 146 F.3d 699, 702-03 (9th Cir. 1998); *Tolton v. Am. Biodyne, Inc.*, 48 F.3d 937, 940-41 (6th Cir. 1995).

2. Although the weight of circuit authority continues to hold that Section 502(a) completely preempts participants' and beneficiaries' attempts to challenge benefits determinations by bringing tort actions, the instant case is not the only decision that diverges from the majority rule on this point. In an opinion rendered after the decision below, the Second Circuit broadened the circuit split that this case presents by substantially agreeing with the Fifth Circuit. In *Cicio v. Doe*, 321 F.3d 83 (2d Cir. 2003), as in this case, the Second Circuit considered an HMO's decision to approve a treatment less elaborate than the course sought by the patient and his treating physician. *See id.* at 88. The plaintiff and his physician sought a double stem-cell transplant to treat the patient's multiple myeloma; the patient's HMO refused to pay for the double transplant, as an "experimental/investigational" treatment that was not covered by the plaintiff's plan. *Id.* (The HMO offered a less expensive alternative.) Upholding state-law claims for medical malpractice, *id.* at 90, a divided panel of the Second Circuit held that although the HMO's conduct involved an aspect of benefits administration, the simultaneous presence of a medical component subjected the HMO's decision to regulation under state law. *See id.* at 103.

Expressly disagreeing with the Third Circuit, *see id.* (rejecting *Pryzbowski*, 245 F.3d at 279), and following the same course as the court below, *Cicio* relied on the "mixed eligibility and treatment decision" formulation from *Pegram* and held that state claims challenging such decisions are not preempted by ERISA. *Id.* at 104. The court also stated that "nothing in ERISA suggests that Congress intended any displacement of 'the quintessentially state-law standards of reasonable medical care.'" *Id.* at 103 (quoting *Rush Prudential*, 536 U.S. at 387). This assertion is precisely contrary to *Ingersoll-Rand* (a decision that, as noted, the *Rush Prudential* Court took pains to approve), which teaches that the comprehensiveness of ERISA's *remedial* provision points to just such a displacement by Section 502(a). *Ingersoll-Rand*, 498

U.S. at 144 ("It is clear to us that the exclusive remedy provided by § 502(a) is precisely the kind of special feature that warrant[s] pre-emption in this case." (alteration in original; internal quotation marks omitted)). Thus, the Second Circuit has exacerbated the circuit split over the current vitality of *Pilot Life* and its progeny.

Dissenting in *Cicio*, Judge Calabresi pointed out a number of analytical errors that recur both in the majority opinion in *Cicio* and in the Fifth Circuit decision in this case. For Judge Calabresi, it was not even necessary to decide whether *Rush Prudential* had somehow narrowed the scope of *Pilot Life*. *See Cicio*, 321 F.3d at 108 & n.2 (Calabresi, J., dissenting in part). Because the insurer's challenged decision was plainly one of coverage, even if it could be viewed as incorporating aspects of "medical judgment," it was plainly preempted. *Id.* at 108-09. Noting that "*Pegram*, of course, was not a preemption decision," Judge Calabresi also pointed out that "coverage decisions * * * can be made for any number of reasons, medical and non-medical." *Id.* at 109 & n.4. "Even accepting [a] more limited * * * scope of preemption," Judge Calabresi explained that the analysis was unchanged:

> The answer lies in whether the suit, in its essence, is to obtain relief for the violation of rights under the terms of the ERISA plan, in which case the state action is preempted, or whether it is a suit for malpractice *against a doctor* (or the doctor's employer) as to which the existence of ERISA coverage is only incidental. To put it another way, if ERISA were not there, would this suit essentially be against an insurance provider for negligently failing to give the coverage contracted for, or would the suit be against a medical care provider for negligent failure to treat? Because I think the current suit is clearly of the first sort, I regretfully conclude that it is barred.

Id. at 108 (emphasis added). Judge Calabresi correctly focused on whether "the suit, in its essence," was one based on the violation of rights under an ERISA plan, not—as did the court below—on whether the formal elements of the state-law claims are *identical* to the elements of an ERISA claim.

Although Judge Calabresi was in dissent, his analysis is consistent with that employed by a majority of the courts of appeals. The weight of authority holds that state tort claims may be preempted by ERISA, and that this Court's recent decisions countenance no retreat from this core holding of *Pilot Life* and its progeny. The decision below and the majority opinion in *Cicio* erroneously diverge from that consensus. Because the Fifth Circuit (in this case) and the Second Circuit (in *Cicio*) both have declined to reconsider the question *en banc*,[7] only this Court's intervention can restore uniformity to this important area of federal law.

III. The Circuit Split On This Issue Is Firmly Entrenched, And This Court's Review Is Warranted To Resolve A Question Of Considerable National Significance

The issue presented by this case is a significant and recurring one. Millions of Americans receive medical insurance through employer-provided health plans governed by ERISA, and many of those health plans rely on HMOs as a means of providing cost-effective care. Indeed, as this Court recognized in *Pegram*, the very reason for HMOs' existence is to maximize the cost-efficiency of the health care services provided to their members. Cost-efficiency necessarily involves the institution of cost-management policies like the one at issue in this case, which holds certain more expensive prescription medications in reserve and gives more readily

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[7] *See* App., *infra*, at 36a; Order, *Cicio v. Doe*, No. 01-9248 (2d Cir. Apr. 21, 2003).

accessible medications a chance to work. *E.g.*, *Pryzbowski*, 245 F.3d at 274-75. Disputes over benefits are therefore frequent, and Congress, after extensive study and with considerable care, constructed an elaborate framework by which to ensure uniform treatment of these disputes by ERISA plans.

The decision below clearly flouts that framework, to say nothing of numerous decisions of this Court. Indeed, even if the Fifth Circuit were correct in perceiving a shift in this Court's preemption jurisprudence (and it is not), its failure to abide by *Pilot Life*, *Metropolitan Life*, and *Ingersoll-Rand* would itself be grounds for this Court's intervention. This Court has previously rebuked the Fifth Circuit for failure to accord due weight to the governing precedents of this Court, stating unambiguously:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477, 484 (1989); *accord, e.g.*, *id.* at 486 (Stevens, J., dissenting); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997); *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In the circumstances of this case, the Fifth Circuit's plain refusal to follow controlling authority could appropriately be remedied by summary reversal.

In any event, the issue presented by this case is ripe for this Court's intervention, whether plenary or summary. The divide among the circuits over the proper interpretation of a far-reaching federal statute—and this Court's construction of it—has sufficiently calcified that this Court's resolution of the issue is necessary. The paramount objective of ERISA is a uniform federal body of benefits law. The persistence of the blinkered approach to Section 502(a) preemption that this

case exemplifies frustrates that objective and warrants this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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