

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ALFRED GOBEILLE, IN HIS :

4 OFFICIAL CAPACITY AS CHAIR :

5 OF THE VERMONT GREEN MOUNTAIN :

6 CARE BOARD, :

7 Petitioner : No. 14-181

8 v. :

9 LIBERTY MUTUAL INSURANCE :

10 COMPANY. :

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12 Washington, D.C.

13 Wednesday, December 2, 2015

14

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 10:03 a.m.

18 APPEARANCES:

19 BRIDGET C. ASAY, ESQ., Vermont Solicitor General,
20 Montpelier, Vt.; on behalf of Petitioner.

21 JOHN F. BASH, ESQ., Assistant to the Solicitor General,
22 Department of Justice, Washington, D.C.; for United
23 States, as amicus curiae, supporting Petitioner.

24 SETH P. WAXMAN, ESQ., Washington, D.C.; on behalf of
25 Respondent.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 14-181, Gobeille v. Liberty Mutual Insurance Company.

Ms. Asay.

ORAL ARGUMENT OF BRIDGET C. ASAY

ON BEHALF OF THE PETITIONER

MS. ASAY: Mr. Chief Justice, and may it please the Court:

Under -- under the principles this Court adopted in Travelers, Vermont's collection of health care data is not preempted. The database statute does not affect ERISA plans in any way that undermines ERISA's core objectives, does not require plans to offer benefits, affect the financing or fiduciary standards for plans, or change the way the plans administer benefits to their members.

Vermont is merely collecting standardized data that Blue Cross necessarily generates and already provides to the State for itself and other entities.

JUSTICE KENNEDY: And it hasn't been argued by Liberty, and we can ask them about that, that this is burdensome, that it might be different from State to State and so forth, and it may be that this sounds more

1 in conflict preemption than statutory preemption. But
2 can you just answer a few questions?

3 Does this apply to people that are not
4 residents in Vermont but that have been treated in
5 Vermont?

6 And does it also apply to people that are
7 outside of -- that are Vermonters but are treated
8 outside Vermont?

9 I mean, what -- who is the universe to whom
10 these -- this applies?

11 And it seems to me that that would be
12 difficult for plans to -- to figure out.

13 MS. ASAY: As implemented by the board, Your
14 Honor, the -- the database requirements apply to
15 Vermonters receiving health care services from a covered
16 insurer regardless of their location, so both inside
17 Vermont and outside Vermont, if it's paid for by a
18 covered insurer. It does not -- the board has chosen
19 not to require data from non-Vermont residents receiving
20 care in Vermont.

21 With respect to the -- to the burden and
22 with respect to the burden issue --

23 JUSTICE SCALIA: You say it's chosen to.
24 Does the statute authorize it to?

25 MS. ASAY: The statute authorizes it to do

1 either, Your Honor.

2 JUSTICE SCALIA: We -- we -- we ought to
3 consider that, don't you think?

4 MS. ASAY: I don't -- I don't believe so,
5 Your Honor, because the -- the program that has been
6 challenged here by Liberty Mutual is the program as it
7 has been implemented by the board, and that -- that is
8 how it has been implemented.

9 And this kind of generally applicable health
10 care regulation is not preempted for the reasons that
11 this Court has expressed in a series of decisions,
12 including *Travelers*, *De Buono*, *Mackey*, and *Dillingham*.

13 JUSTICE GINSBURG: What of the point that
14 Justice Kennedy suggested, that -- that States can have
15 different reporting requirements? So it's a little bit
16 like *Egelhoff* in that respect, that if there were
17 uniform requirements, that would be less burdensome, but
18 if each State has its own specifications, then that
19 becomes burdensome and costly.

20 MS. ASAY: Your Honor, two responses to
21 that. The first is that there is simply no evidence in
22 this record that there is any cognizable burden on the
23 third-party administrators who are health care insurers
24 who generate this data and are providing it already in
25 their capacity as insurers.

1 Second, certainly some States may choose to
2 do these programs differently, but as several of the
3 amicus briefs explain, including the brief from the
4 National Association of Health Data Organizations, these
5 are carefully designed programs that track the
6 electronic transaction rule under HIPAA that provides
7 national standards for electronic claims transactions.

8 JUSTICE KENNEDY: Suppose States had
9 different reporting requirements and the plan showed --
10 they haven't -- I don't think showed, but suppose they
11 showed that this was burdensome. Does that affect the
12 analysis of the preemption question?

13 MS. ASAY: Only in this way, Your Honor: I
14 think that the Court's holding in Travelers can be
15 distilled to basically three questions. The first
16 question is:

17 Does the plan -- does the State law
18 specifically and directly regulate ERISA plans only?
19 That's not at issue in this case. It does not.

20 The second question is whether the State is
21 regulating in an area that Congress reserved to the
22 States or is regulating in an area with which ERISA is
23 principally concerned. And here the State is engaging
24 in classic health care regulation, so on that question
25 the answer is no.

1 And then Travelers leaves open --

2 JUSTICE SCALIA: Excuse me. You could say
3 that it's engaged in health care regulation. You could
4 also say it's -- it is engaged in data collection. And
5 if you say the latter, that is something that -- that
6 ERISA covers.

7 MS. ASAY: Your Honor, ERISA governs plan
8 financial reporting and plan disclosures to the members.
9 It -- primarily the reporting requirements that ERISA
10 sets out are about the plan finances: actuarial
11 statements, statements of audited financial statements,
12 information about how the plan is -- about the -- the
13 degree of the plan's financial soundness. And nothing
14 that Vermont is doing has anything to do --

15 JUSTICE ALITO: Is that still true --

16 CHIEF JUSTICE ROBERTS: Well --

17 JUSTICE ALITO: -- after the Affordable Care
18 Act? Doesn't the Affordable Care Act include in ERISA a
19 section authorizing the Secretary to gather information
20 from plans for the purpose of improving health outcomes?

21 MS. ASAY: Yes. The Affordable Care Act
22 made a technical amendment to ERISA, which in turn
23 incorporated the Act's amendments to the Public Health
24 Services Act. Those do not change the test for ERISA
25 preemption. They're not part of the plan's annual

1 reporting to the Department of Labor.

2 There's a couple of reasons for that. One
3 is that the Affordable Care Act itself has a -- has a --
4 an -- almost an anti-preemption provision, a provision
5 that says that the Affordable Care Act only prevents
6 those State laws that prevent the application of the
7 Act.

8 Part 7 of ERISA also, which has those
9 amendments in it, is not part of ERISA as it was
10 originally passed. That was added by HIPAA. And Part 7
11 itself has a provision that says it does not --

12 JUSTICE ALITO: But why does it matter --

13 MS. ASAY: -- affect the --

14 JUSTICE ALITO: -- why does it matter
15 whether it was in ERISA as originally passed? It is in
16 ERISA now. And it is true that there is sort of an
17 anti-preemption provision, but there is also a provision
18 in the Affordable Care Act that says that the -- the
19 provisions that are added have no effect on the ERISA
20 preemption provision.

21 MS. ASAY: That's right, Your Honor.

22 JUSTICE ALITO: So what do you make of that?

23 MS. ASAY: What I make of that is that it
24 does not change the test for preemption either way. And
25 when -- when Congress passed the Affordable Care Act,

1 Travelers had been on the books for years. The
2 standards set forth in Travelers, which reserved, to the
3 State's, health care regulation, was understood by -- by
4 Traveler -- was understood by Congress, and it was not
5 changed.

6 And this program that -- that Vermont has
7 adopted is a classic health care regulation. The
8 data --

9 JUSTICE BREYER: It is health care
10 regulation. Vermont also has laws that govern
11 fiduciaries. So could they have a statute which says
12 all fiduciaries, including fiduciaries -- ERISA
13 fiduciaries must report -- fill out the following forms
14 about how they -- how they invest their money.

15 Can they do that?

16 MS. ASAY: They could -- they could have a
17 standard for --

18 JUSTICE BREYER: No, no, no. Can they do
19 just what I said? Is -- or is that preempted?

20 MS. ASAY: It would be preempted --

21 JUSTICE BREYER: Correct.

22 MS. ASAY: -- as applied to the ERISA plan.

23 JUSTICE BREYER: Now, suppose, instead of
24 that, what they say is, what we would like is that all
25 fiduciaries of ERISA plans send us each month a report

1 of all of the benefits under the retirement plan that
2 they have paid to any member.

3 Can they do that?

4 MS. ASAY: Your Honor, I think the answer to
5 that probably depends on the area in which the State is
6 regulating.

7 JUSTICE BREYER: So what they're doing is
8 they have their -- their Secretary of Health and Human
9 Services that would like to know how wealthy or poor the
10 workers are. So that's why they do it.

11 MS. ASAY: I think that would prevent a very
12 close question.

13 JUSTICE BREYER: You think that's a close
14 question?

15 MS. ASAY: That is a close question.

16 JUSTICE BREYER: In other words, they can --
17 gee, I see case after case here that says that reporting
18 requirements are a central function. You know, I --
19 you've read them just as well as I. And -- and it seems
20 to me surprising that they can do that.

21 Isn't that the job of the Labor Department.

22 MS. ASAY: I think that is primarily the job
23 of the Labor Department. And I -- I say that it --

24 JUSTICE BREYER: Because obviously, my
25 question -- it's a good answer, because you're saying

1 I'm not getting anywhere with this line of -- because
2 you're -- because I'm going to say what about health
3 care. That's the next question.

4 My actual question I'm driving at is this:
5 You should have the information. I have no doubt about
6 that. But the question is whether you have to go to the
7 Labor Department first or HHS and say, we want uniform
8 rules here, or whether they have to come to you when the
9 rules of 50 States turn out to be a mess.

10 And you -- you -- you say you want to go
11 first and let them come after me, and I think the other
12 side says no. If you want to do what you want to do, go
13 to the Labor Department, get a national rule that gives
14 you large range to get what you want.

15 MS. ASAY: And --

16 JUSTICE BREYER: And I don't know the answer
17 to that question. That's why I ask it.

18 MS. ASAY: And, Your Honor, the answer to
19 that question is that, because this is classic health
20 care regulation for which States are responsible --
21 insurance rate review, budget review, health care
22 research -- it is an area in which States are permitted
23 to regulate. And they're permitted to regulate even
24 slightly differently from State to State.

25 And as the Department of Labor, the Federal

1 government agrees with us that this is an area that
2 ERISA leaves to the States, even though it involves data
3 collection, because ERISA cannot possibly have been
4 intended to sweep away all collection of information
5 from plans by States. Congress adopted a deliberately
6 expansive definition of a welfare benefit plan and ERISA
7 that includes, not just the direct provision of medical
8 care, but also day care centers, apprenticeship
9 programs, prepaid legal services. These are all areas
10 in which when plans would act, they would necessarily be
11 providing information to States.

12 JUSTICE ALITO: I -- I see that -- I -- I
13 see that argument as to ERISA as originally enacted, but
14 I am very troubled by the fact that it now authorizes
15 the collection of data for the purpose of improving
16 health outcomes -- health care outcomes. I -- I don't
17 see how that -- unless the anti-preemption provision
18 saves the day, I don't see how that does not undermine
19 your principal argument, which is that ERISA may preempt
20 reporting of financial data and that sort of thing, but
21 it doesn't preempt the collection of data regarding
22 health care.

23 MS. ASAY: Your Honor, the -- the scope of
24 ERISA's preemption provision in 1144 is governed by what
25 Congress intended when it passed ERISA in 1974. And the

1 later amendments to ERISA regarding group health plans
2 include the language that says, "does not affect or
3 modify that standard." And so this Court, when it is
4 considering the scope of the -- of the areas that
5 Congress left to the States in 1974 --

6 JUSTICE ALITO: I really don't see how that
7 can possibly be. If Congress enacted an amendment
8 tomorrow that says one of the core purposes of ERISA is
9 to collect health care information, and here is a --
10 here is the health care collecting requirement, you
11 would say, well, that's not preempted, because that
12 wasn't the purpose when they enacted the preemption
13 provision, originally.

14 MS. ASAY: I would certainly say that was
15 not preempted if it was added to Part 7, which says that
16 Part 7 does not affect the test for ERISA preemption in
17 1144.

18 JUSTICE SCALIA: Well, saying it doesn't
19 affect the test is quite different from saying that --
20 that -- that nothing changes. The test remains the
21 same, but now, that test is applied to collection,
22 which -- which the Labor Department is itself
23 conducting, or is itself authorized to conduct. That's
24 not changing the test. It's simply -- it's simply
25 changing the facts to which the test has been applied --

1 or the law to which the test has been applied.

2 MS. ASAY: It would change the test, Your
3 Honor, because if ERISA was now considered to have a
4 broader, expansive scope that intruded into health care,
5 that would change this Court's settled precedent in
6 Travelers and De Buono. And again, Congress --

7 JUSTICE SCALIA: Well, that doesn't change
8 the test. Our test would still be the same whether it's
9 a core function of ERISA or not, and -- and it has made
10 it a core function of ERISA.

11 MS. ASAY: It has not made it a core
12 function of ERISA. It has -- there were -- it's the
13 Affordable Care Act's amendment to ERISA, and again,
14 there's also in addition to Part 7's preemption
15 language, there is the Affordable Care Act's
16 anti-preemption language, and to think that when
17 Congress passed the Affordable Care Act, which
18 contemplated a robust Federal-State partnership in
19 health experimentation, which included language that
20 authorized the Department of Health and Human Services
21 to provide Medicare --

22 JUSTICE BREYER: But this is no problem for
23 you. All you have to do is go to DOL or HHS. The State
24 representative says, this is what we want to do, will
25 you please promulgate a regulation. -- you can do it

1 maybe in 90 days or 120 days -- which says that this and
2 similar things are fine. And in our opinion, it is
3 not -- it is not preempted. I think you could do that.
4 That's my opinion. I may be the only one who thinks
5 that. So I -- I think it's just a question of which
6 forms you have to go through.

7 But if we take you and say, I'm going to ask
8 -- I'm really asking the government this question,
9 because I don't see why they're on your side, and
10 they'll have an answer to that. See, I want to find
11 out. But what I want to find out is this: The factor I
12 saw was 93 million people have these plans. And if 93
13 million people have these plans, there can be 50 States
14 with 50 different sets of regulations imposing a huge
15 financial burden upon health care.

16 And were that to happen, suddenly all the
17 people we're trying to help under this plan will find
18 themselves much worse off, and purely for bureaucratic
19 reasons. If I take their side of it, I can have some
20 assurance that the purpose of Congress in these statutes
21 will be fulfilled, because there will not be
22 unnecessary, conflicting reporting requirements, which
23 sound like nothing, but they're very expensive to -- to
24 actually implement.

25 Now, that's my basic problem. The same

1 question for you, for the government, and for the other
2 side, but the other side will agree with the way I put
3 the question.

4 MS. ASAY: And if I may try responding this
5 way, Your Honor. The -- the notion that it's more
6 efficient for the Department of Labor to collect a
7 subset of standardized --

8 JUSTICE BREYER: You're not going to collect
9 anything. All they're going to say is in our reg, you
10 have permission to go and impose these requirements.
11 But by having to go to them first, we prevent the
12 conflicting requirements of 50 different systems.

13 MS. ASAY: And it's possible that they may
14 be able to do that. I'm not sure where that authority
15 would come from --

16 JUSTICE SCALIA: It -- it -- it isn't clear
17 that they're able to do that, is it?

18 MS. ASAY: No.

19 JUSTICE SCALIA: It isn't clear that a
20 Federal agency can eliminate preemption by simply
21 saying, okay, you can go ahead and do it.

22 JUSTICE BREYER: I'm only asking. My
23 point --

24 JUSTICE SCALIA: Even though it's otherwise
25 preempted under the statute, we say it's okay. I -- I

1 think that's not a -- not a -- not a clear -- a clear
2 question.

3 MS. ASAY: It's -- I think it's not clear
4 that they can do that. And again, I think the question
5 for the Court is not what the Department of Labor can
6 do, but what Congress reserved to the States.

7 JUSTICE KENNEDY: I -- I know your time is
8 running up, but consider two cases. Case one: Vermont
9 is the only State that requires this. Case two: 50
10 states requirement -- require this and it's all
11 different and it's burdensome.

12 Same preemption analysis?

13 MS. ASAY: Yes, Your Honor, same preemption
14 analysis as in Travelers and De Buono and Mackey.

15 JUSTICE KENNEDY: And same result?

16 MS. ASAY: Yes, Your Honor, same result. As
17 in Mackey, where this Court held that State garnishment
18 litigation procedures as applied to the very benefits
19 that the plan was paying out were permissible. Clearly,
20 those were going to vary State by State, and involve the
21 plans in State-by-State regulation.

22 JUSTICE SOTOMAYOR: On rebuttal, because I
23 don't want to eat up more of your time, would you go
24 through the -- through more careful -- more slowly, the
25 fact that this information is all electronic, all of it

1 already set out in the HIPAA regulations. And so it's
2 just a question of -- and -- and now, all reporting is
3 being done in one system, ICD-10, right? Everybody has
4 to use the one computer system.

5 MS. ASAY: I am not actually familiar with
6 that, but I will -- if I may reserve my remaining time.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 MS. ASAY: Thank you.

9 CHIEF JUSTICE ROBERTS: Mr. Bash.

10 ORAL ARGUMENT OF JOHN F. BASH
11 FOR UNITED STATES, AS AMICUS CURIAE,
12 SUPPORTING THE PETITIONER

13 MR. BASH: Mr. Chief Justice, and may it
14 please the Court:

15 I would like to start, if I could, with
16 Justice Breyer's questions, and then hopefully I can
17 move on to Justice Alito's questions about the ACA and
18 Justice Kennedy's questions about the burden here. Let
19 me set out how we see the interaction of the preemption
20 framework and recordkeeping requirements, and then turn
21 to what I think DOL's role is here.

22 Both sides agree, essentially, that ERISA
23 plans can be subject to some reporting requirements,
24 probably many reporting requirements, incident to State
25 laws in other substantive fields. So, for example, the

1 Solicitor General gave the example of day care centers.
2 ERISA plans can run day care centers. I don't think
3 anyone doubts that you can have all sorts of reporting
4 requirements to make sure the staff is trained, the
5 facilities are safe. And so forth.

6 This Court's case in De Buono upheld a tax
7 imposed on employer contributions to an ERISA medical
8 benefit plan that provided the medical benefits
9 directly. And we told the Court at the time that that
10 tax had all sorts of reporting requirements. So
11 essentially, the question is here, where to draw the
12 line between reporting requirements that are permissible
13 and those that are nonpermissible.

14 As I take Respondent's view, it's that
15 they're -- it's certain information that is so core to
16 the plan that you simply can't have State law reporting
17 requirements about that information.

18 I don't think that can be right. Take, for
19 example, real property held in trust by a pension plan.
20 DOL requires reporting on that. Obviously, you need to
21 know the assets the pension plan has, but certainly a
22 State taxing authority can require reporting about that
23 same information to assess a property tax.

24 The same was true with the tax in De Buono.
25 The same is true, by the way, in Dillingham. That was a

1 case about an ERISA-run apprentice program. And
2 California law said, you either follow our standards for
3 apprenticeship, or you have to pay a higher wage. I
4 mean, that was as core as you get. It was literally the
5 way the apprenticeship program was set up.

6 So I don't think the test can be whether the
7 information is, in some sense, core to ERISA. I think
8 the test has to be, is this reporting requirement
9 incident to a law in the field governed by ERISA, --
10 vesting, funding, fiduciary duties and so forth -- or is
11 it incident to a law in health care, or in day care
12 center regulation?

13 Here, I don't think anyone disputes: This
14 information is used for hospital budget review, for
15 health insurance rate review, for medical research.
16 There's no question that it's incident to classic State
17 health care regulation.

18 JUSTICE KAGAN: Why isn't there also a
19 requirement that the law just not be burdensome over a
20 certain level?

21 MR. BASH: It -- it is, Justice Kagan. And
22 I -- I think I cut short my test.

23 The first inquiry is: Is this incident to a
24 field that ERISA doesn't govern? I think that's
25 satisfied here.

1 But then there's still another question
2 under Travelers, which looked to both purpose and
3 effects of whether the effect of the law is so
4 burdensome that effectively frustrates or impedes the
5 design of ERISA plans or the administration of ERISA
6 plans. And I think a law like this that imposes
7 reporting requirements on a claim could theoretically be
8 that burdensome. And so when --

9 JUSTICE KENNEDY: How is that any different
10 than conflict preemption? How does that give any
11 special effect to the statute here? I mean, you could
12 make that argument if there was no preemption provision.

13 MR. BASH: Well, I -- I think the way it's
14 different than conflict preemption, or at least one way,
15 is that if it actually is in the core field governed by
16 ERISA, I mean, if the State said, we just want to make
17 sure these pension plans are well-funded, so we're going
18 to ask for reports incident to that role, it would be
19 preempted even if the requirements weren't particularly
20 burdensome.

21 I mean, the Court has never held that in a
22 specific case, but I think the Court's analysis leans
23 towards that direction. So it could either be within
24 the preempted field, in which case it relates to ERISA
25 plans and it's out, or it could be so burdensome that it

1 effectively frustrates the purpose of a uniform ERISA --

2 JUSTICE SCALIA: The former sounds to me
3 like standard field preemption and the latter like
4 standard conflict preemption.

5 MR. BASH: Well, I think there have been --

6 JUSTICE SCALIA: Is that what you're saying?

7 MR. BASH: There have been some well-written
8 separate opinions in this area that --

9 JUSTICE SCALIA: I know that.

10 (Laughter.)

11 MR. BASH: I don't think -- I don't think --
12 and here's what I would say about that: I mean, I know
13 your opinion and the opinion of a few other justices
14 have suggested we should shift to field preemption. I
15 think if the Court were to say what we've been doing all
16 along is field preemption, and it makes more sense
17 doctrinally to classify it that way, from the Department
18 of Labor's perspective, that would be fine.

19 I think we would be a little bit concerned
20 if the Court signaled to lower courts in its opinion
21 that it was marking a big shift in its jurisprudence
22 that could destabilize the law. We think --

23 JUSTICE BREYER: Why aren't you on the other
24 side of the case? That is, I was fine with you until I
25 read a few of these amicus briefs, and then suddenly I

1 saw 93 million people. And there are associations all
2 over the place that are worried about this problem. And
3 they have a big chart where they show the possibilities
4 of -- of conflict. You yourself are worried about
5 conflict. Conflict among States in requirements means
6 money. A lot of money. That's what they say, and
7 that's plausible.

8 So what I want to know is: What do you all
9 propose to do about that in the U.S. government? One
10 thing to do about it -- and I've looked up the regs, so
11 maybe Justice Scalia disagrees, but I'm talking about
12 what I think. All right?

13 The -- the -- it seems like they would have
14 authority to issue regs either way; blocking, or getting
15 permission first. That's where I ended up, and that's
16 what I wanted your view about. You see what I'm saying?

17 MR. BASH: I see what you're saying.
18 There's two pieces there, whether this actually has a
19 burden and what we could do about it if there was. I
20 didn't mean to suggest we think it has a burden.

21 It's the view of the Department of Justice
22 that the significant burden has not been shown -- the
23 Department of Labor that the significant burden has not
24 been shown here. So that starting premise, we do not
25 agree with that. All I'm saying is that if a party

1 could show that burden, that would raise a substantial
2 preemption question and would be highly relevant to the
3 preemption analysis.

4 JUSTICE KAGAN: Then why hasn't that burden
5 been shown?

6 MR. BASH: Respondent submitted nothing
7 below. I mean, really. They submitted an Internet fax
8 sheet --

9 JUSTICE KAGAN: There's something very
10 intuitive about their argument, and it's -- it's
11 essentially what Justice Kennedy said. It's -- it's
12 when 50 States devise 50 different requirements for
13 this, different formatting, different particular
14 information requested, that just all adds up to a lot of
15 hassle, which all adds up to a lot of money.

16 MR. BASH: Two points. I mean, first it
17 seems far less burdensome than State laws this Court has
18 already upheld, or that State laws that I think most
19 people would agree have to be upheld.

20 I mean, the tax -- or the surcharge in
21 Travelers -- that was the case where you bought
22 commercial insurance, you had to pay a surcharge up to
23 24 percent more on medical purchases, that's
24 unbelievably burdensome, and surely had reporting
25 requirements associated with it. And having to pay

1 vastly different surcharges in 50 States could be
2 burdensome too.

3 What this Court's precedents have said,
4 including Travelers and Dillingham and De Buono is that
5 a mere burden is not enough. What has to be shown is
6 that it interferes with the administration of benefits.

7 So in Egelhoff --

8 CHIEF JUSTICE ROBERTS: Well, but a
9 consistent theme in our cases, when you say a mere
10 burden is not enough, is that the government wants
11 employers to, one, set things up -- they don't have to
12 -- and two, they want the money to go to benefits, not
13 to go to administrative and bureaucracy expenses.

14 Is it your view in analyzing this question,
15 do we look at what would happen if 50 States adopted
16 different programs, or do we look at just Vermont
17 because Vermont happens to be first?

18 MR. BASH: The former. Our view is you have
19 to contemplate the 50 States would adopt different
20 regimes?

21 CHIEF JUSTICE ROBERTS: Yeah, I think that's
22 right. So you don't think 50 different regimes of
23 reporting is going to require a significant diversion of
24 money away from benefits to administration?

25 MR. BASH: Not -- not on this record. Mr.

1 Chief Justice, recall --

2 CHIEF JUSTICE ROBERTS: What kind of a
3 record do you need to show that?

4 MR. BASH: Well --

5 CHIEF JUSTICE ROBERTS: Of course you can't
6 have a record of what 50 States are doing if it's a
7 hypothetical question.

8 MR. BASH: Well, I think there's a couple
9 ways Respondent could have made the showing here. I
10 mean, at minimum, Respondent could have had its own
11 third-party administrator come in and say these
12 reporting requirements are burdensome; this is what
13 we've had to do. We've had to change the way we process
14 claims because they're so burdensome. I suspect they
15 could not have made that showing --

16 JUSTICE BREYER: But you have pages 26 and
17 27 of the Blue Cross Blue Shield brief. And there they
18 have a big chart, and there are all these organizations
19 out there that are trying, like the Uniform Law
20 Commissioners, to create uniformity. That's why I say
21 that's why I'm puzzled as to what to do.

22 Am I supposed to write an opinion that says
23 even though Blue Cross Blue Shield feels it's a big mess
24 and trying to straighten it out, they didn't make the
25 right record in the Vermont trial court? How do I write

1 that opinion?

2 MR. BASH: Going to the -- the chart point,
3 I mean, the chart actually doesn't show conflicting
4 requirements. Most of the counterpoints they have is
5 like not required. I don't think there are conflicting
6 requirements.

7 And even if you look at the end of the Blue
8 Cross Blue Shield brief, they never actually say this
9 is --

10 JUSTICE BREYER: I mean, I'm serious. How
11 do I write the opinion? I suppose it could happen, but
12 it hasn't happened yet. How do I write the opinion?

13 MR. BASH: I think -- I think the opinion is
14 written like this: One, this is a reporting requirement
15 incident to a field that is not governed by ERISA,
16 health care regulation. It's presumptively valid, but
17 we're going to look and see if Respondent has made a
18 showing that it's so burdensome, it fundamentally
19 changes the way plans are administered or designed.
20 Respondent has not made that showing here. That is how
21 the opinion is written.

22 I mean, this Court has never actually said
23 that a burden is so bad that it's preempted, even if it
24 operates in a field outside of ERISA. It has suggested
25 in dicta that it's possible, but that is inherently a

1 factual determination, and it's hard to see how the
2 Court could reach that conclusion without some factual
3 showing --

4 CHIEF JUSTICE ROBERTS: So we go through at
5 one point -- all of a sudden there -- the 11th State
6 that does this, and it's the 11 different things, we say
7 is that a burden? Is that a sufficient burden? We say
8 no. But then when 30 States do it, maybe it's a
9 different answer. That seems like a very odd preemption
10 analysis.

11 MR. BASH: Well, I -- I don't think it
12 should turn on that, Mr. Chief Justice. I do think it's
13 appropriate for a court to consider what if 50 States
14 impose different requirements like this. But just like
15 50 different States might have different requirements
16 for daycare centers, or for prepaid legal services,
17 that, I don't think, is the sort of burden --

18 CHIEF JUSTICE ROBERTS: Well, but this goes
19 to basic, very comprehensive reporting of data. It's
20 not simply, well, if you run a daycare center, you have
21 to comply with the rules about daycare centers. Of
22 course you do. It's quite different.

23 One of the things ERISA plans do is report
24 data and compile data. And it seems to me that the
25 analysis that says, well, daycare centers you can. That

1 seems a little bit off basis.

2 MR. BASH: May I respond, Mr. Chief Justice?

3 CHIEF JUSTICE ROBERTS: No.

4 Of course you can.

5 (Laughter.)

6 CHIEF JUSTICE ROBERTS: Please.

7 MR. BASH: I think that the -- I'll try to
8 do it in two sentences.

9 I think that the burden here is far less
10 substantial than the burden of complying with State
11 apprenticeship regulations for the way you designed the
12 program in Dillingham. Here, most self-insured plans
13 use third-party administrators. And often those
14 third-party administrators are insurance companies that
15 already have the infrastructure in place for reporting
16 requirements as applied to them which cannot be
17 preempted under ERISA.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Waxman.

20 ORAL ARGUMENT OF SETH P. WAXMAN

21 ON BEHALF OF THE RESPONDENT

22 MR. WAXMAN: Mr. Chief Justice, and may it
23 please the Court:

24 A signal goal of ERISA enacted in 1974 was
25 to foster employee benefit plans that could operate

1 nationally under nationally uniform rules of
2 administration, first and foremost, rules about
3 recordkeeping and reporting.

4 Now, of course ERISA plans, like other
5 regular businesses, are subject to ancillary regulation
6 like maintaining a safe workplace, paying minimum wage
7 and prevailing wage laws, paying their State real estate
8 taxes on their headquarters, and if they choose to run a
9 hospital, run a law firm for their legal services,
10 benefit program, run a childcare center, they are
11 subject to local regulation like other providers of
12 those local services.

13 But in every single case in this Court, and
14 every lower court decision that I have found in which
15 courts have upheld, State by State, reporting
16 requirements, it has always been incident to a
17 substantive obligation that the State could impose. And
18 no one contends that Vermont could impose substantive
19 regulations on the claims that Liberty Mutual pays under
20 its employment plan.

21 Now, I want to go to the point of --

22 JUSTICE KAGAN: Mr. Waxman, why was it that
23 you introduced absolutely no evidence of burden in the
24 lower courts here?

25 MR. WAXMAN: That is not true, Justice

1 Kagan. What -- we did not introduce any evidence about
2 what it would cost us in dollars and cents to have Blue
3 Cross Blue Shield comply with the Vermont request that
4 is the subject to the subpoena. But we did introduce
5 substantial evidence in the record below, and -- and
6 some of it is included in the Joint Appendix, and all
7 the pages that are extra long folded in, about what it
8 is that we have to do, both in Vermont and in the then
9 15 other States that imposed very, very different
10 reporting obligations.

11 So we didn't put a dollars and cents in, but
12 we did make the lower court, the district court, on its
13 request, very aware of this very substantial burden.

14 And Congress, in determining -- in -- in
15 deciding to, in exchange for blanket Federal regulation
16 of these fostered national plans, to grant a very broad
17 preemption provision that says this is going to be
18 Federal regulation --

19 JUSTICE BREYER: What about the converse --

20 MR. WAXMAN: -- not State regulation.

21 JUSTICE BREYER: What about the converse?

22 What about the converse point for you that I was making
23 before? The number that jumped out from the page is the
24 93 million people this affects. Now, that's a huge
25 number, and therefore the risk of conflicting

1 regulations is serious --

2 MR. WAXMAN: It's --

3 JUSTICE BREYER: -- in raising costs.

4 That's for you. But they say it hasn't been shown
5 yet --

6 MR. WAXMAN: Well, that --

7 JUSTICE BREYER: -- so I ask you: If it
8 does come about, if it should come about and you lost
9 this case, why can't your clients go right to the
10 Department of Labor, whose regulations I've read, or
11 possibly ACCA, and say, we want you to impose a uniform
12 national data collection system or the equivalent, put
13 limits, and then preempt the conflicting State limits?

14 Now, it may be other members of the Court do
15 not agree with this approach, but I've written a case,
16 MetroMedia, where I think the agencies have a lot of
17 power there, and I think they have more capacity to
18 decide this kind of thing than a group of judges.

19 So what about that for you?

20 MR. WAXMAN: Justice Breyer, a couple of
21 points:

22 First, in the lower court and in this Court,
23 neither party on the other side has disputed what I
24 think is the self-evident proposition, that the
25 Department of Labor and now the Department of Labor and

1 the Department of Health and Human Services, absolutely
2 have the statutory authority under ERISA to impose the
3 kind of recordkeeping and reporting requirements that
4 Vermont and now 17 or 19 other States do. They have
5 never disavowed that. The -- the SG's brief at both the
6 invitation stage and the merits stage sort of coyly
7 suggests that that's right, and --

8 JUSTICE KAGAN: Well, that sounds like a
9 one-size-fits-all solution, and there's some value to
10 States being able to think about their own health care
11 needs.

12 MR. WAXMAN: Of course.

13 JUSTICE KAGAN: And to think about what
14 things they want.

15 So I mean, just again, let's go back to this
16 burden because it is a very intuitive idea that you have
17 on your side: 50 different States; that's a lot of
18 money. But I guess I wonder why it is a lot of money.
19 I mean, as I understand what's going on here, that all
20 the data that's being requested is data that Blue Cross
21 Blue Shield generates anyway. That all the data that's
22 being requested is data that Blue Cross Blue Shield
23 reports for other people. That really this is a
24 formatting question, even with respect to the wide
25 variety of States, that the States have started getting

1 their formatting more uniform.

2 So I -- I mean, you know, it's -- you can
3 say it's 93 million people, but, you know, in the end
4 what's the cost?

5 MR. WAXMAN: Oh.

6 JUSTICE KAGAN: And why don't you have it in
7 the record?

8 MR. WAXMAN: Okay. I -- there is not a --
9 with respect to burden, Congress, in enacting the
10 preemption provision and their -- we -- we've cited to
11 the Court place after place in the conference reports,
12 the House reports, the statements of the sponsors, the
13 recognition in -- in repealing the Disclosure Act, which
14 set a reporting -- a national reporting floor and
15 allowed the States to add onto it and record evidence
16 before Congress that small plans were spending up to
17 40 percent of their entire assets on State reporting.
18 Congress made the determination that this Court has
19 reflected in many, many of its decisions, including
20 Egelhoff, that the very fact that there could be 50
21 different State regulations is the burden that the
22 preemption provision is designed to address.

23 And the notion -- and that --

24 JUSTICE GINSBURG: Well, we know -- we know,
25 Mr. Waxman, that Blue -- Blue Cross is providing this

1 information with respect to individuals that its own
2 plans insure, and we're told that it is providing the
3 information for other self-insured ERISA plans who
4 didn't make this objection. So do we know at least what
5 is the burden of providing that information for the
6 other self-insured ERISA plans that Blue Cross is -- is
7 providing the information for?

8 MR. WAXMAN: Justice Ginsburg, the Blue
9 Cross Blue Shield Association has actually filed a brief
10 in its -- in this case, and it explains at great detail,
11 as does the brief of the multi-employer plans, which
12 like Liberty Mutual operate in 50 States, about the
13 burden, about the fact that Blue Cross Blue Shield
14 doesn't have all this information in the normal course,
15 the multi-employer plans don't have it, and Blue Cross
16 Blue Shield, as a third-party administrator, has told
17 this Court just exactly how burdensome and how expensive
18 it is.

19 Of course they could do it for Liberty
20 Mutual in Vermont. The only question is how much it's
21 going to cost and how much they're going to charge.

22 But look, for example, at since this --
23 since this litigation began, the Commonwealth of
24 Massachusetts has now told Liberty Mutual that it wants
25 reporting under its APCD statute. And as we recount at

1 page 36 of our brief, their regulations require, among
2 other things, the premiums the plan charges, its
3 actuarial assumptions, the summary of its plan designs,
4 the plan's reserves, its surplus, its provider payments,
5 its provider levels, and information about medical
6 procedures whose claims are denied. And the chart that
7 we submitted in the district court reflects the wide
8 variation in States.

9 There is -- the -- the burden that Congress
10 foresaw is coming to play before our very eyes as
11 States -- more and more States adopt these mandatory
12 plans.

13 CHIEF JUSTICE ROBERTS: Is that information,
14 the -- the -- the laundry list you went through, is that
15 already available at Blue Cross Blue Shield and being
16 reported somewhere else?

17 MR. WAXMAN: No, it is not. Absolutely not.
18 And the Blue Cross Blue Shield Association amicus brief
19 reports that. The multi-employer plan brief reports
20 that they only -- that their plans generally have about
21 70 to 80 percent of the information that's required by
22 any one of these States. And to go to -- I think it was
23 Justice Breyer's hypothetical -- look, the same rules
24 that apply here are going to apply to pension plans.
25 And the State of Vermont, like many other States now, is

1 concerned not just about health care costs and
2 delivering good health care outcomes, but it's concerned
3 about the financial well-being of its senior citizens.
4 And in fact, they've asked the Department of Labor to
5 permit State -- States to operate their own ERISA
6 pension plans for their residents.

7 Now, they could pass a database statute that
8 says, we're really concerned about whether elderly, you
9 know, Vermonters are going to have enough money in their
10 elder years, and we know that 93 million people are
11 covered by employer pension plans, and we just want you
12 to report -- you can pay whatever you want, but we want
13 you to keep records and report to us about what your
14 plan is and how much money people are going to have when
15 they retire. Every single dollar --

16 JUSTICE BREYER: Why can't you do this?

17 MR. WAXMAN: Well, every --

18 JUSTICE BREYER: Why can't you -- why can't
19 you simply go -- and the statute says, 1143(a)(1) -- the
20 statute says that the Secretary of Labor and the
21 authorities -- broad in these -- has authority to
22 undertake surveys and collect, compile, analyze, publish
23 data information and statistics on welfare plans. Okay?
24 That's ERISA welfare plans.

25 So you go to them.

1 MR. WAXMAN: Well --

2 JUSTICE BREYER: And you say, DOL, we want
3 you to promulgate a reg that says you will collect some
4 of this information, but even if you collect -- don't
5 collect it all, you let the States collect the rest.

6 MR. WAXMAN: Just --

7 JUSTICE BREYER: Now, they can prevent it
8 from being burdensome.

9 MR. WAXMAN: Justice Breyer, I know how
10 exciting it is to get in the middle of a jurisprudential
11 debate between you and Justice Scalia.

12 JUSTICE BREYER: But this --

13 MR. WAXMAN: I --

14 JUSTICE BREYER: I don't see -- this is not
15 -- go ahead.

16 MR. WAXMAN: I'm -- my -- my fingers are
17 tingling at the prospect. I am not sure --

18 (Laughter.)

19 MR. WAXMAN: I am not sure that the
20 Department of Labor has the regulatory authority to
21 essentially excuse the preemption provision, but -- and
22 you don't have to just go to the provision of ERISA that
23 you quoted -- in 1024(a)(2)(B) of ERISA, it authorizes
24 the Secretary of Labor to require the production of,
25 quote, "any information or data from an ERISA plan where

1 he finds that such data or information is necessary to
2 carry out the purposes of this subchapter." And
3 advertent to Justice Alito's comments, in the ACCA, the
4 Secretary has the authority to require the production
5 of -- from plans of, quote, "any other information as
6 determined appropriate by the Secretary."

7 So the notion that preemption here is sort
8 of like an -- operates like an accordion -- if the
9 Department of Labor has the authority to get it but
10 hasn't chosen to exercise, it's not preempted; but if
11 they did promulgate a regulation, either of your color
12 or Justice Scalia's color, that it would be preempted --
13 is a crazy -- is a crazy notion.

14 JUSTICE BREYER: You might think this is not
15 sane, but what I'm -- the way I'm seeing it here is
16 there are two competing problems. One is they should be
17 able to get information like this in the States.

18 But two, there is a problem of burden.

19 And I think there are probably 100 or 200
20 people in Department of Labor and HHS that could write
21 regs that reconcile those problems and allow both. But
22 I can't, because I'm a judge.

23 So what I'm trying to figure out is how to
24 interpret this statute in a way that achieves those
25 objectives.

1 MR. WAXMAN: How to interpret this statute
2 as to say that in exchange for blanket Federal
3 regulation of these plans, now augmented in the context
4 of health care plans by the Affordable Care Act, the --
5 by the Federal government, the States are preempted from
6 regulating the core functions of what an ERISA plan
7 does. And there is nothing more core than the payment
8 of benefits.

9 If the State is attempting to regulate,
10 whether it's by substantively regulating or imposing a
11 recordkeeping or reporting obligation about the very
12 activity that defines it as an -- as an ERISA plan, the
13 payment of benefits, that State law necessarily relates
14 to, because it has a connection with, an ERISA plan.

15 And frankly, it's pretty ironic that the
16 Petitioner and the government claim on the one hand that
17 it is so important to get this information from these
18 plans because 60 percent of all citizens in the
19 United States get their health care from these
20 self-funded plans, and yet requiring them to keep the
21 particular records that the State wants and to report it
22 on a quarterly, annually, or monthly basis, has no
23 relation to or connection with the plan. I don't
24 understand how both of those thoughts can inhere at the
25 same time.

1 JUSTICE KAGAN: Mr. Waxman, I guess I just
2 don't understand this argument. I -- I -- I mean, I --
3 I understand completely that there should be some
4 restriction on overly burdensome State regulations of
5 whatever kind. You know, it could be taxes, it could be
6 day care, it could be anything. Right? But why is it
7 that this regulation falls in a different category than
8 taxes or childcare or anything else? Because the State
9 here clearly is not attempting to, and is not
10 regulating, payment of benefits. It's doing something
11 that has an effect on your operations, no doubt, but the
12 State is operating in a completely separate area for
13 completely separate purposes in a way that does not
14 trump or conflict with, or anything else, the choices
15 that ERISA has made as to payment of benefits.

16 MR. WAXMAN: Okay. I -- I want to -- I want
17 to come to the end and dispute that premise that you --
18 the end of your question. But if the -- if you look at
19 this Court's cases that have set about to evaluate the
20 burden, or at least included, as in the last section of
21 Travelers, a section that says of course if this were
22 terribly burdensome there might be another question,
23 those are cases -- and it's Travelers, Dillingham, and
24 De Buono. We all agree on that -- those were all cases
25 in which there was a burden being placed on an entity

1 that wasn't -- in Travelers it was hospitals; in
2 De Buono it was hospitals; in Dillingham it was
3 apprenticeship programs, all of which affected the price
4 that ERISA plans might have to pay to get benefits or
5 services from those kinds of providers.

6 And so it took several sentences in each of
7 those -- several paragraphs in each of those opinions
8 even to explain how putting a tax on the non-Blue Cross
9 insurance plans in Travelers, or respecting the
10 prevailing wage rate in California, actually had an
11 effect on any ERISA plan anyway, because they weren't
12 regulation of the plans, per se. They were indirect
13 regulations. And when the regulation is indirect, that
14 is, it is not a regulation that is directed at the very
15 activity that makes the plan an ERISA plan, you do look
16 at burden. And indirect regulation obviously can occur.
17 But if -- as this Court explained in the last section of
18 Travelers, if it's too burdensome, it might be
19 preempted.

20 But where the regulation is direct, where
21 the State is requiring reporting because the self --
22 because the self-insured plan is engaged in the very
23 activity that brings it under ERISA that qualifies it as
24 an ERISA plan, that obviously relates to and has a
25 connection with the plan, and is preempted.

1 JUSTICE GINSBURG: You're -- you're saying
2 that the State simply cannot have an all -- all-payer
3 database, that that's out because ERISA precludes it,
4 even though it's going to leave a big hole in the
5 information that the State has about that health care
6 being given to its citizens,

7 MR. WAXMAN: I don't think that that's at
8 all the case, Justice Ginsburg, and I don't want to be
9 misunderstood about this.

10 The State of Vermont, just to take one
11 example: The database statute authorizes the relevant
12 Secretary to obtain this information from everybody, not
13 only who pays for health care in Vermont, but the
14 hospitals and clinics that provide it. But the
15 Secretary, the executive official has chosen not to
16 require that information from hospitals and clinics and
17 doctors in Vermont.

18 There is also no doubt that if all-payer
19 claims databases so badly need the information from
20 self-funded plans, and it turns out that the self-funded
21 plan -- a significant number of self-funded plans say
22 no, that's preempted, the Federal government has all the
23 authority it needs to get that information and require
24 that that information be provided, either to the
25 Secretary and then to the States, or directly to the

1 States.

2 And in fact, they can do what often happens
3 in areas of field preemption and express preemption,
4 which is to make it worth the plan's while. You know?
5 They can offer all sorts of benefits to self-employed
6 plans to provide this information if it's so important.

7 What's interesting when we're talking about
8 what is or isn't in the record in this case, is no
9 explanation whatsoever from the State of Vermont at any
10 stage as to why they haven't requested the actual
11 providers of these health care services to provide the
12 information and that it is inadequate. I mean, the --
13 the -- the only exchange I can recall is in the Second
14 Circuit oral argument transcript, which is recorded and
15 discussed in Judge -- Judge Straub's dissenting opinion,
16 the State was asked, you know, look, how important is it
17 to get the -- the -- the district judge -- I think it
18 was the district judge --

19 JUSTICE KENNEDY: Well -- well, as -- as
20 you're explaining this, it just seems to me it's much
21 easier to ask the plan provider than to ask 15 doctors
22 in -- in -- in one small town, and 50 others, and all
23 the patients --

24 MR. WAXMAN: You know --

25 JUSTICE KENNEDY: -- unless I misunderstand

1 your point --

2 MR. WAXMAN: No, you're not.

3 JUSTICE KENNEDY: -- it seems to me it's
4 much -- much easier.

5 MR. WAXMAN: It -- perhaps it's easier, but
6 here's the point. And this is the insight of the ERISA
7 preemption provision: The hospitals in Vermont, the
8 clinics in Vermont, the medical practices in Vermont are
9 not subject to varying regulation in 50 different
10 States. They operate locally. They're subject to State
11 regulation.

12 Here, we're talking about plans that
13 Congress wanted to encourage that would do something
14 new, that would provide health care benefits and other
15 employee benefits on a national basis, and in order to
16 foster that, to subject them to a single set of
17 reporting, recordkeeping, and regulatory obligations.

18 And that, it seems to me, is the insight of
19 ERISA. And it was the -- the bargain that ERISA plainly
20 struck.

21 I -- I simply noted in response to
22 Justice Ginsburg's question that the State statute gives
23 them the authority to do it. There aren't that many
24 hospitals in Vermont. They already have all the
25 information about what services are or aren't being

1 provided.

2 The State could have said, no, no, no. We
3 absolutely can't get by without this. But the
4 representation at oral argument in front of the judge,
5 which has also been transcribed and is in the record,
6 the State -- the lawyer representing the State -- the
7 judge was sort of trying to settle this case and said,
8 you know, how much do you really need this information?
9 And the response was, we don't really need it. This is
10 just a couple of employees. This is just one plan. But
11 there's a principle here.

12 And we agree with that. And we also agree
13 with the representations of my friends on the other side
14 that the question for this Court -- it has to take
15 account of the possibility, which is the emerging
16 reality, that all 50 States and the District of Columbia
17 and Puerto Rico will have their own mandatory all-payer
18 claims databases that will require different things.

19 And if I can just anticipate Justice
20 Sotomayor's question reserved for rebuttal to -- to the
21 State of Vermont, our brief explains, and the Blue Cross
22 Blue Shield brief also explains, how there are -- of the
23 hundreds of data fields that Vermont alone requires,
24 there are dozens of them as to which there is no ICD --
25 whatever the -- the -- the agreed national format is.

1 There are dozens and dozens of them as to which there is
2 no HIPAA standard, no HIPAA guarantee of
3 confidentiality. And this is just one State. If you
4 look, as I said, at the Massachusetts APCD statute,
5 which is the only other State that's actually come to
6 Liberty Mutual so far, and look at our discussion of it
7 on Page 36, the stuff that they are asking for is so
8 obviously critical to what the plan does.

9 JUSTICE GINSBURG: But this is -- this
10 information is provided by Blue Cross for some
11 self-insured plans, right?

12 MR. WAXMAN: I believe that -- I believe
13 that the record shows that Blue Cross Blue Shield
14 provides this information to Vermont, not only on behalf
15 of itself as an insurer, but also some other --

16 JUSTICE GINSBURG: And do we know -- do we
17 know what costs Blue Shield then passes on to those
18 other self-insured plans?

19 MR. WAXMAN: We don't know it. We were not
20 able to get it from Blue Cross at the time the case was
21 before the district judge.

22 But in any event, as the Chief Justice's
23 question suggests, the -- this issue doesn't end at
24 Vermont. It -- it has to take account of a burden that
25 Congress was very, very aware of, it was very cognizant

1 of the regime under the Repeal Disclosure Act, and the
2 costs of plans that are trying to be national plans
3 complying with 50 different State regulations.

4 And I really commend to the Court the amicus
5 brief filed by the multi-employer plans in this case.
6 These are plans that are essentially union-sponsored
7 plans. They are not fancy plans. Every dollar that
8 they have to spend comply -- gathering the data that
9 each State -- that different States say they have to
10 have comes directly out of the benefits that they can
11 pay. Just as if -- if Vermont decides next week, if it
12 wins this case, that it wants to get information about
13 pension plans, and how they're being administered, and
14 what benefits are being provided and not provided, those
15 are all 100 percent self-funded plans. If my employer
16 has to provide all that information, that is coming out
17 of my 401(k) benefits.

18 JUSTICE KAGAN: Mr. Waxman, could a State
19 pass a tax law that requires information about -- about
20 pension disbursements, about claim payments, about
21 assets held in trust? Could a State do that?

22 MR. WAXMAN: I don't think that a State --
23 when you're saying requested information or imposing a
24 tax?

25 JUSTICE KAGAN: A tax law that requires

1 information of various kinds.

2 MR. WAXMAN: I don't think a -- I don't
3 think a State can impose a tax on benefits that are --

4 JUSTICE KAGAN: Not impose a tax, that
5 requires information in order to ensure that the State
6 is taxing the right things.

7 MR. WAXMAN: In other words, we want to tax
8 the benefits that you're getting --

9 JUSTICE KAGAN: Do you think that a State
10 tax law can't require any information about any of the
11 things that ERISA does, that the plans do, pension
12 disbursements, assets, claim payments, nothing?

13 MR. WAXMAN: I -- I think not. I think that
14 the State -- I mean, I don't think this case turns on
15 it, but thinking about it, if the State could say, look,
16 we just want to know all the benefits that you pay every
17 one of our residents, I think that would be preempted.

18 As I say, that's -- that's not what's going
19 on here. And even if I'm wrong about it, it seems to me
20 that this is quite different. You know, there is a lot
21 of discussion on the other side of, you know, this just
22 requires the press of a button and all the information
23 goes.

24 And our brief goes on for pages and pages,
25 and the other amici -- amicus briefs show how that is so

1 far from true. In order to comply with these, it's not
2 just a question of saying, oh, yes, we paid Seth Waxman
3 \$300 in benefits last year. This requires that we keep
4 records that we don't keep, and that we display them and
5 provide information in ways that we don't, and that
6 differ from one State to another. And for those
7 reasons, unless the Court has questions, I will submit
8 that the judgment should be affirmed.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 Ms. Asay, you have three minutes remaining.

11 REBUTTAL ARGUMENT OF BRIDGET C. ASAY

12 ON BEHALF OF THE PETITIONER

13 MS. ASAY: Thank you.

14 I'd like to begin with Justice Sotomayor's
15 question about the standardized data, because I think
16 that ties in nicely with many questions from the Court
17 about the question of burden.

18 So the way that electronic claims
19 transactions work is not something that the State of
20 Vermont invented. It's part of HIPAA. It's a Federal
21 regulation called the Electronic Transaction Rule, and
22 it sets standardized coding and formatting requirements
23 for the transaction between the payer and the provider.

24 And we -- we don't even have to look to the
25 regulation for that, although that's in 45 C.F.R. Part

1 160, but it's actually in the record at Joint
2 Appendix 66. This is the agreement between Blue Cross
3 and Liberty Mutual, which says that Blue Cross shall be
4 capable of transmitting electronic data for which
5 transaction standards have been promulgated in
6 compliance with HIPAA Electronic Transactions Rule and
7 shall, to the extent possible, transmit electronic data
8 in accordance with that rule.

9 That is how third-party administrators work,
10 and that is why self-insured plans nearly always have a
11 third-party administrator, which is typically a health
12 insurer to process claims, because although it may look
13 on the surface as though these reporting requirements
14 and the -- the data collection seems very complicated,
15 it's complicated not because of anything Vermont has
16 done. It's because there is the standardized national
17 standard for how this data is collected, which is fairly
18 specific, fairly detailed, and they're already doing it.

19 And it is generating a pool of tremendously
20 helpful data that has incredible potential to help
21 States and the Federal government figure out ways to
22 bend the cost curve and improve the provision of health
23 care delivery to everyone in the country.

24 The Affordable Care Act expressly
25 contemplated that States would do this kind of

1 experimentation. It authorized the Federal government
2 to provide Medicare claims data to the States. It
3 authorized -- it created the Center for Medicare and
4 Medicaid Innovation, which then authorized States to
5 experiment, to develop new models for delivery, which
6 then need to be tested and evaluated. And the
7 United States has explained in its brief that those
8 programs depend upon the collection of all-payer data,
9 which is something only the States are doing.

10 The promise here is enormous, and the
11 fact -- and the loss of this data to the plans would be
12 tremendous. I would like to address briefly one issue
13 that my friend raised, which is the question of provider
14 data. Vermont does, in fact, collect provider data, and
15 we've collected it for a very long time. It's called
16 hospital discharge data, and it was one of the first
17 data sets that researchers looked to. But it's not as
18 helpful as all-payer data, and here's why.

19 Hospitals don't have information that tracks
20 care across an episode of care. If someone has their
21 knee replaced, it starts with the doctor's visit, their
22 surgery. There's an anesthesiologist. There's a stay
23 at a rehab facility. There's follow-up physical
24 therapy. And if you're trying to compare outcomes and
25 costs for a procedure like that, it's the payer, the

1 centralized payer, as Justice Kennedy said, who has all
2 that information. There's only a few of them. That is
3 the real power of the data, and it's not in the hospital
4 data.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 The case is submitted.

8 (Whereupon, at 11:01 a.m., the case in the
9 above-entitled matter was submitted.)

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<p style="text-align: center;">A</p> <p>a.m 1:17 3:2 53:8 able 16:14,17 33:10 39:17 47:20 above-entitled 1:15 53:9 absolutely 30:23 33:1 36:17 46:3 ACA 18:17 ACCA 32:11 39:3 accordion 39:8 account 46:15 47:24 achieves 39:24 act 7:18,18,21,24 8:3,5,7,18,25 12:10 14:17 34:13 40:4 48:1 51:24 Act's 7:23 14:13,15 activity 40:12 42:15,23 actual 11:4 44:10 actuarial 7:10 36:3 add 34:15 added 8:10,19 13:15 addition 14:14 address 34:22 52:12 adds 24:14,15 administer 3:17 administered 27:19 48:13 administration 21:5 25:6,24 30:2 administrative 25:13 administrator 26:11 35:16 51:11 administrators 5:23 29:13,14 51:9 adopt 25:19 36:11 adopted 3:12 9:7 12:5 25:15 adverting 39:3</p>	<p>affect 3:14,16 6:11 8:13 13:2,16,19 affirmed 50:8 Affordable 7:17,18 7:21 8:3,5,18,25 14:13,15,17 40:4 51:24 agencies 32:16 agency 16:20 agree 16:2 18:22 23:25 24:19 32:15 41:24 46:12,12 agreed 46:25 agreement 51:2 agrees 12:1 ahead 16:21 38:15 ALFRED 1:3 ALITO 7:15,17 8:12,14,22 12:12 13:6 Alito's 18:17 39:3 all-payer 43:2,18 46:17 52:8,18 allow 39:21 allowed 34:15 amendment 7:22 13:7 14:13 amendments 7:23 8:9 13:1 amici 49:25 amicus 1:23 2:7 6:3 18:11 22:25 36:18 48:4 49:25 analysis 6:12 17:12 17:14 21:22 24:3 28:10,25 analyze 37:22 analyzing 25:14 ancillary 30:5 anesthesiologist 52:22 annual 7:25 annually 40:22 answer 4:2 6:25 10:4,25 11:16,18 15:10 28:9</p>	<p>anti-preemption 8:4,17 12:17 14:16 anticipate 46:19 anyway 33:21 42:11 APCD 35:25 47:4 APPEARANCES 1:18 Appendix 31:6 51:2 applicable 5:9 application 8:6 applied 9:22 13:21 13:25 14:1 17:18 29:16 applies 4:10 apply 4:3,6,14 36:24,24 apprentice 20:1 apprenticeship 12:8 20:3,5 29:11 42:3 approach 32:15 appropriate 28:13 39:6 area 6:21,22 10:5 11:22 12:1 22:8 41:12 areas 12:9 13:4 44:3 argued 3:22 argument 1:16 2:2 2:5,9,12 3:3,7 12:13,19 18:10 21:12 24:10 29:20 41:2 44:14 46:4 50:11 Asay 1:19 2:3,13 3:6,7,9 4:13,25 5:4,20 6:13 7:7,21 8:13,21,23 9:16 9:20,22 10:4,11 10:15,22 11:15,18 12:23 13:14 14:2 14:11 16:4,13,18</p>	<p>17:3,13,16 18:5,8 50:10,11,13 asked 37:4 44:16 asking 15:8 16:22 47:7 assess 19:23 assets 19:21 34:17 48:21 49:12 Assistant 1:21 associated 24:25 Association 6:4 35:9 36:18 associations 23:1 assumptions 36:3 assurance 15:20 attempting 40:9 41:9 audited 7:11 augmented 40:3 authorities 37:21 authority 16:14 19:22 23:14 33:2 37:21 38:20 39:4 39:9 43:23 45:23 authorize 4:24 authorized 13:23 14:20 52:1,3,4 authorizes 4:25 12:14 38:23 43:11 authorizing 7:19 available 36:15 aware 31:13 47:25</p> <p style="text-align: center;">B</p> <p>back 33:15 bad 27:23 badly 43:19 bargain 45:19 Bash 1:21 2:6 18:9 18:10,13 20:21 21:13 22:5,7,11 23:17 24:6,16 25:18,25 26:4,8 27:2,13 28:11 29:2,7 basic 15:25 28:19</p>	<p>basically 6:15 basis 29:1 40:22 45:15 began 35:23 behalf 1:20,24 2:4 2:11,14 3:8 29:21 47:14 50:12 believe 5:4 47:12 47:12 bend 51:22 benefit 12:6 19:8 29:25 30:10 benefits 3:16,18 10:1 17:18 19:8 25:6,12,24 40:8 40:13 41:10,15 42:4 44:5 45:14 45:15 48:10,14,17 49:3,8,16 50:3 big 22:21 23:3 26:18,23 43:4 bit 5:15 22:19 29:1 blanket 31:15 40:2 blocking 23:14 Blue 3:20 26:17,17 26:23,23 27:7,8 31:2,3 33:20,21 33:22,22 34:25,25 35:6,8,9,13,13,15 35:16 36:15,15,18 36:18 46:21,22 47:10,13,13,17,20 51:2,3 board 1:6 4:13,18 5:7 books 9:1 bought 24:21 Breyer 9:9,18,21 9:23 10:7,13,16 10:24 11:16 14:22 16:8,22 22:23 26:16 27:10 31:19 31:21 32:3,7,20 37:16,18 38:2,7,9 38:12,14 39:14 Breyer's 18:16</p>
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