NO. 25-5416

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MCKEE FOODS CORPORATION,

Plaintiff-Appellee,

v.

BFP INC.,

Defendant,

&

CARTER LAWRENCE, in his official capacity as COMMISSIONER OF THE TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Tennessee
(Case No. 21-cv-279) (District Judge Charles E. Atchley, Jr.)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE AND AFFIRMANCE

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September 5, 2025

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 25-5416 Case Name: McKee Foods Corp. v. BFP Inc., et al.

Name of counsel: Cory L. Andrews

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s/Cory L. Andrews

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide, including many in Tennessee. WLF promotes free enterprise, individual rights, limited government, and the rule of law. WLF often appears as an amicus curiae in cases affecting the private sector's ability to offer employee benefits under the Employee Retirement Income Security Act of 1974 (ERISA). *See, e.g., Thole v. U.S. Bank, N.A.*, 590 U.S. 538 (2020); *Amgen Inc. v. Harris*, 577 U.S. 308 (2016). WLF has a strong interest in ensuring that ERISA operates uniformly and efficiently, as Congress intended.

INTRODUCTION & SUMMARY OF ARGUMENT

McKee Foods, a Tennessee company that runs a self-funded ERISA plan for its 6,500 employees, isn't asking this Court to play legal philosopher or issue some grand advisory opinion. It's fighting a real-world battle—one in which Tennessee's Any Willing Pharmacy (AWP) Laws are forcing McKee to overhaul its prescription drug program, handcuffing its ability to protect plan participants, and jacking up costs. The district court

* All parties consented to WLF's filing this brief. No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission.

saw this suit for what it is—a concrete dispute, ripe for resolution, and squarely within ERISA's protective ambit. (RE 142, Page# 2209–14). That judgment should be affirmed.

Some 140 million Americans depend on an employee benefit plan for healthcare insurance, retirement pensions, and other crucial benefits. Congress enacted ERISA to encourage the formation of such plans by establishing a "uniform regulatory regime." *Aetna Health v. Davila*, 542 U.S. 200, 208 (2004). ERISA's broad preemption provision serves that goal by preventing a multi-state hodgepodge of state-law burdens that would "complicate the administration of nationwide plans" and produce "inefficiencies that employers might offset with decreased benefits." *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990).

As the district court rightly found, Tennessee's AWP Laws impose such burdens. They force McKee to choose between violating Tennessee law or violating its fiduciary duties under ERISA. Such conflicting federal and state duties are not merely inefficient; they are deeply unfair. They make it impossible for ERISA fiduciaries like McKee to comply with both state and federal law without risking enormous liability.

McKee has clear standing to bring this suit. As both plan sponsor and administrator, McKee is a fiduciary that exercises discretion over its plan. This discretion includes structuring benefits, selecting pharmacies, and monitoring network providers to safeguard plan assets and participants. By mandating broad network access and barring cost-saving measures, Tennessee's AWP Laws directly interfere with McKee's duties, necessitating this lawsuit.

This dispute is ripe for pre-enforcement relief. McKee need not violate the law or await penalties to challenge preempted state regulations. With a history of complaints against McKee and its pharmacy benefits manager (PBM), an enforcement mechanism open to public initiation, and the Commissioner's repeated statements that he intends to enforce the challenged laws against ERISA plans, McKee faces a credible threat of prosecution. The Eleventh Amendment offers no shield, as McKee seeks only prospective injunctive and declaratory relief to halt ongoing violations of federal law.

Denying standing here would leave fiduciaries like McKee powerless to shield their plans from state overreach, undermining ERISA's core

promise of uniformity. Nothing in this Court's vast ERISA caselaw supports that outcome.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND A JUSTICIABLE DISPUTE UNDER ERISA.

The Commissioner (at 18–21) contends that McKee is just a plan sponsor with no "pathway" to declaratory and equitable relief and no justiciable controversy. But that misreads both the law and the record. McKee's fiduciary role and ERISA's preemption clause open a clear path to the courthouse door, and this Court's ERISA precedents light the way. Because McKee "is a fiduciary and can bring an action under ERISA," the district court "had jurisdiction over the suit." *BlueCross BlueShield Tenn. v. Nicolopoulos*, 136 F.4th 681, 688–89 (6th Cir. 2025).

A. McKee is an ERISA fiduciary.

The Commissioner (at 18) insists that McKee cannot sue because it is a plan sponsor, not a fiduciary. But ERISA is concerned with functions, not labels. That is why this Court "take[s] a functional approach to ERISA fiduciary analysis." *Tiara Yachts, Inc. v. Blue Cross Blue Shield of Mich.*, 138 F.4th 457, 464 (6th Cir. 2025) (citing *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993)).

A party is an ERISA fiduciary if it exercises "any discretionary authority or discretionary control" over plan assets or plan management. 29 U.S.C. § 1002(21)(A). As this Court has repeatedly confirmed, an entity is an ERISA fiduciary if it "exercises any discretionary authority or discretionary control respecting management of such plan," "any authority or control respecting management or disposition of its assets," or "any discretionary authority or discretionary responsibility in the administration of such plan." *Briscoe v. Fine*, 444 F.3d 478, 488 (6th Cir. 2006). McKee easily fits the bill.

As both plan sponsor and administrator, McKee's role isn't that of some distant corporate bean-counter; it's the hands-on work of monitoring its own self-funded plan to keep it affordable and accessible for its employees. In administering the plan's benefits, McKee prudently selects and oversees network providers and enforces plan terms. McKee's discretionary control over its self-funded prescription drug program—structuring copays, selecting pharmacies, controlling costs—more than suffices. *Gobielle v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 317 (2016) ("Respondent, as the Plan sponsor, is both a fiduciary and plan

administrator."); *Tiara Yachts,* 138 F.4th at 471–72 (reinstating ERISA suit by plan sponsor seeking monetary and equitable relief).

The Commissioner (at 19) trivializes McKee's "right as plan sponsor" to "design and structure its ERISA plan in the manner it [deems] appropriate." But McKee's administration and management of its plan comes with a continuing duty to faithfully monitor the plan and ensure that PBMs and other network providers conserve plan assets while ensuring quality care for participants. First Am. Compl. ¶¶ 31, 56(d), 62 (RE 83, Page ID # 1073, 1081–82, 1083).

Those are not merely business decisions, they are fiduciary ones. *Hunter v. Caliber Sys., Inc.*, 220 F.3d 702, 718 (6th Cir. 2000) (ERISA plan sponsor acts "as a fiduciary in administering or managing the plan for the benefit of participants"). Indeed, this Court has roundly "rejected the notion that ERISA fiduciary duties . . . cannot account for external cost-saving opportunities." *Grand Traverse Band of Ottawa & Chippewa Indians v. Blue Cross Blue Shield of Mich.*, 2025 WL 2104569, at *4 (6th Cir. Jul. 28, 2025) (citing *Saginaw Chippewa Indian Tribe of Mich. v. Blue Cross Blue Shield of Mich.*, 748 F. App'x 12, 20–21 (6th Cir. 2018)).

Nor is that all. McKee has a fiduciary duty to exclude from its network any provider that engages in conduct that harms the plan or its participants. As the unrebutted declarations of Angela Sharps and Shawn Pellington show, Tennessee's AWP Laws interfere with McKee's fiduciary duties under ERISA because they would force McKee to deal with a pharmacy that McKee determined had committed fraud on plan participants. *See* Sharps Second Decl. (RE 45-1, Page ID # 435–36); Pellington Decl. (RE 139-1, Page ID # 2156–59 and 2161–73). Yes, Tennessee's laws impact plan design, but they also seriously impede the ability of plan fiduciaries like McKee to protect the plan and its participants. In fact, failure to address a network provider's wrongdoing could expose McKee to liability for inadequate monitoring. *Hughes v. Nw. Univ.*, 595 U.S. 170, (2022) (ERISA's duty of prudence requires a "context-specific inquiry" into the fiduciary's continuing "duty to monitor").

B. McKee is entitled to seek relief under § 502(a)(3).

The Commissioner's claim that McKee is "attempting to adjudicate claims for which ERISA provides no right of action" is not just wrong, it's risible. ERISA § 502(a)(3) authorizes "a participant, beneficiary, or fiduciary" to seek "appropriate equitable relief" to "redress . . . violations"

or "enforce any provisions" of ERISA or the plan. 29 U.S.C. § 1132(a)(3). ERISA fiduciaries may seek relief under § 502(a)(3) whenever "their rights and duties under ERISA are at issue." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 19–20 (1983). The Supreme Court has described this provision as a "catchall" for equitable relief when other ERISA remedies are inadequate. *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996). Among other things, this provision authorizes McKee "to bring a civil action to enjoin any act or practice which violates any provision of ERISA." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing 29 U.S.C. § 1132(a)(3)). That is this case.

Along with the Declaratory Judgment Act, 28 U.S.C. § 2201, ERISA § 502(a)(3) also authorizes McKee's request here for declaratory relief. *See Franchise Tax Bd.*, 463 U.S. at 26–27 ("Under § 502(a)(3)(B) of ERISA, a participant, beneficiary, or fiduciary of a plan covered by ERISA may bring a declaratory judgment action in federal court."); *Dakotas & W. Minn. Elec. Indus. Health & Welfare Fund ex rel. Stainbrook v. First Agency, Inc.*, 865 F.3d 1098, 1104 (8th Cir. 2017) (holding that a "declaratory judgment action is an equitable claim seeking remedies typically available in equity and therefore available under § 502(a)(3)"); *Cent. States, Se. & Sw. Areas*

Health & Welfare Fund v. First Agency, Inc., 848 F.Supp. 2d 805, 808 (W.D. Mich. 2012) (granting a declaratory judgment under § 502(a)(3)), *aff'd*, 756 F.3d 954, 961 (6th Cir. 2014).

Tennessee's AWP Laws, by dictating the network composition of McKee's plan and barring cost-saving incentives, "relate to" an ERISA plan. 29 U.S.C. § 1144(a). They prohibit copays that would steer participants to use trusted pharmacies, and they mandate network access to any pharmacy (even fraudsters) agreeing to plan terms. By forcing McKee to overhaul its prescription drug program in ways that increase costs and impede its ability to protect the plan and its participants, Tennessee imposes ongoing economic and administrative burdens that thwart ERISA's promise of uniformity. McKee, as a fiduciary managing its own self-funded plan, has a clear right (and an obligation) to seek injunctive and declaratory relief to prevent these intrusions and protect its employees (and their families).

None of this is new. For decades, this Court has adjudicated myriad suits by plaintiffs seeking the same declaratory and injunctive relief McKee seeks here. *See, e.g., Ky. Ass'n of Health Plans, Inc. v. Nichols*, 227 F.3d 352, 355 (6th Cir. 2000) (ERISA § 502(a)(3) suit by fiduciary seeking

a declaratory judgment that ERISA preempted state law and an injunction against its enforcement); *Thiokol Corp. v. Dep't of Treasury*, 987 F.2d 376, 377–78 (6th Cir. 1993) (reinstating ERISA plan sponsor's claims for declaratory and injunctive relief from state tax law); *Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550 (6th Cir. 1987) (suit by ERISA plan sponsor seeking a declaratory judgment that ERISA preempted a city tax and an injunction against its enforcement). The Commissioner fails to explain why McKee's suit is any less "justiciable" than those cases.

In fact, this Court has recognized a plaintiff's standing to seek declaratory and injunctive relief from a state law relating to ERISA even when the cause of action *does not* arise under ERISA's "civil enforcement" provision because the plaintiff is *not* an ERISA fiduciary. *Ass'n Bldrs. & Contrs. v. Perry*, 115 F.3d 386, 389 (6th Cir. 1997) (collecting cases and affirming plaintiff's standing to seek "injunctive and declaratory relief from state regulation based on federal question jurisdiction"). Try as he might, the Commissioner simply cannot overcome the enormous weight of precedent authorizing McKee's standing to seek injunctive and declaratory relief here.

C. The Commissioner mistakes how preemption works.

The Commissioner next argues (at 19–20) that enforcing state law doesn't "violate" ERISA under § 502(a)(3) because preemption springs from the Supremacy Clause, not ERISA's duties. But that is just so much wordplay. Preemption "is not a matter of semantics." *Wos v. EMA e rel. Johnson*, 568 U.S. 627, 636 (2013). And the Commissioner cannot escape preemption "by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Id.*

Contrary to the Commissioner, ERISA is a federal law that ousts contrary state laws, so the Supremacy Clause and ERISA work hand-in-glove. McKee need not sue "to vindicate enumerated rights or otherwise enforce individual-rights-creating limits on 'state action.'" (Comm'r Opening Br. at 19) Rather, as this Court explained 45 years ago, "[i]t is central to the statutory scheme that ERISA not be subject to state and local laws which might frustrate its goals." *Gen. Motors Corp. v. Buha*, 623 F.2d 455, 459 (6th Cir. 1980). "With the preemption of the field," Congress "round[ed] out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation." *Id.*

(quoting Rep. Dent, Chair, Subcomm. on Lab., H. Comm. on Educ. & Lab., at 120 Cong. Rec. 29197 (1974)).

Because ERISA's purpose is "to provide a uniform regulatory regime over employee benefit plans," the statute's preemption provisions are exceedingly broad. *Aetna*, 542 U.S. at 208. These include § 502(a)'s "integrated enforcement mechanism" which, along with § 514's preemption of any state law that "relates to" an ERISA plan, are "intended to ensure that employee benefit plan regulation would be 'exclusively a federal concern.'" *Id.* (quoting *Alessi v. Raybestos–Manhattan, Inc.*, 451 U.S. 504, 523 (1981)).

As shown above, Tennessee's AWP Laws put McKee to an impossible choice: violate Tennessee law or violate its fiduciary duties under ERISA. The Supremacy Clause, enshrined in Article VI, resolves such conflicts: federal law prevails anytime state law imposes a duty that conflicts with or frustrates federal law. ERISA § 514(a) leaves nothing to chance. It preempts "substantial areas of traditional state regulation . . . even if the state law exercises a traditional state power." *Gobielle*, 577 U.S. at 325 (cleaned up).

Simply put, there's nothing remotely novel about McKee's view of federal preemption. The Supreme Court has consistently held that ERISA allows fiduciaries to enjoin enforcement of state laws under § 514(a). *Shaw*, 463 U.S. at 96–97 (employers may seek "injunctions against enforcement of state laws they claim *are* pre-empted by ERISA, as well as declarations that those laws are pre-empted"); *Gobielle*, 577 U.S. at 318 (ERISA plan sought and received "an injunction forbidding Vermont from trying to acquire data about the Plan or its members").

Above all, the Commissioner's remarkable insistence (at 18) that McKee "may not couch its right to relief in the doctrine of federal preemption" simply cannot overcome legions of this Court's mine-run ERISA caselaw entertaining suits by plaintiffs seeking to enjoin enforcement of state or local laws that allegedly relate to ERISA. *See Nichols*, 227 F.3d at 355 (ERISA suit against a state official to enjoin enforcement of Kentucky's AWP Laws); *Perry*, 115 F.3d at 391–93 (suit against state official to enjoin enforcement of Michigan's wage law); *Thiokol*, 987 F.2d at 377–78 (ERISA suit against state official to enjoin enforcement of Michigan tax law); *Neusser*, 810 F.2d at 552 (suit against city tax commissioner to enjoin municipal income tax); *Mich. United Food*

& Com. Workers Unions, 767 F.2d 308, 309–10 (6th Cir. 1985) (suit against state official to enjoin Michigan insurance law); *Buha*, 623 F.2d at 459–463 (suit against state court judge to enjoin enforcement of a writ of garnishment served on an ERISA fiduciary). None of these cases accord with the Commissioner's anemic view of ERISA preemption and standing.

The Commissioner's go-to case, *Armstrong v. Exceptional Child Ctr.*, 575 U.S. 320 (2015), is a non-starter. It's not even an ERISA case. Unlike the implied cause of action under Medicaid that *Armstrong* rejected, ERISA preemption is explicitly enforceable through § 502(a)(3). Nor does McKee's ERISA-based challenge to Tennessee's AWP Laws ask the federal courts to apply a "judicially unadministrable" standard, as in *Armstrong*. 575 U.S. at 328. ERISA preemption under § 514(a) sets forth a simple rule with the force of law: state laws are preempted if they "relate to" ERISA plans. It is hard to imagine a more straightforward inquiry.

And *Armstrong*'s cooperative Medicaid scheme, administered by a federal agency, bears no resemblance to ERISA. Unlike in *Armstrong*, Federal courts can easily evaluate whether Tennessee's AWP Laws are preempted under § 514(a) without engaging in the sort of "judgment-

laden" review of the sort that prompted Congress not to permit private enforcement of § 30(A) of the Medicaid Act. *Id.*

In short, McKee's "suit for declaratory and injunctive relief falls within the [long] line of cases recognizing federal subject-matter jurisdiction over preemption-based challenges to state laws brought against state officials." *Chase Bank USA, NA v. City of Cleveland*, 695 F.3d 548, 558 (6th Cir. 2012).

D. McKee has standing to seek pre-enforcement relief.

McKee "need not wait to bring a pre-emption claim until confronted with numerous inconsistent obligations and encumbered with any ensuing costs." *Gobielle*, 577 U.S. at 324. McKee is not required, for instance, to pursue "arguably illegal activity . . . or expose itself to criminal liability before bringing suit to challenge" a state statute preempted by federal law. *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 144 (2d Cir. 2016); *accord NGS Am., Inc. v. Jefferson*, 218 F.3d 519, 529 (6th Cir. 2000) ("Challenging those regulations by violating them and then raising ERISA preemption as a defense in a state enforcement action would have risked breaking the law.").

In the pre-enforcement context, a plaintiff seeking prospective relief need demonstrate only an intention to engage in conduct "arguably affected with a constitutional interest, but proscribed by a statute," coupled with a credible threat of prosecution. *Yoder v. Bowen*, 2025 WL 2170165, at *3 (6th Cir. Jul. 31, 2025) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)).

At the pre-enforcement stage, McKee "need not prove conclusively that [its] intended course of conduct violates the [statute] but only that it is *arguably* proscribed by the statute." *Friends of George's Inc., v. Mulroy*, 108 F.4th 431, 437 (6th Cir. 2024) (emphasis in original). McKee has more than met that burden here.

McKee wishes to administer its ERISA plan in fidelity to its fiduciary duties and in accord with the plan's terms. Tennessee law now makes that illegal. This is no abstract grievance; it is a concrete impediment to McKee's administration of employee benefits under federal law, disrupting the careful balance Congress struck in ERISA. *See Nichols*, 227 F.3d at 363 (Kentucky's AWP laws "not only affect the benefits available by increasing the potential providers, they directly affect the administration of the plans").

The district court rightly found a credible threat of prosecution here. Plaintiffs show a credible threat of enforcement when they allege "'a subjective chill *and* point to some combination' of the following four factors: (1) 'a history of past enforcement'; (2) receipt of 'enforcement warning letters . . . regarding their specific conduct'; (3) 'an attribute of the challenged statute that makes enforcement easier or more likely, such as a provision allowing any member of the public to initiate an enforcement action'; and (4) whether the defendant has 'disavow[ed] enforcement of the challenged statute against a particular plaintiff.'" *Yoder*, 2025 WL 2170165, at *4 (quoting *McKay v. Federspiel*, 823 F.3d 862, 869 (6th Cir. 2016)). A plaintiff need not satisfy all these factors to establish a credible threat. McKee easily clears three of the four.

So far, at least, no fewer than four complaints have been lodged against McKee and its PBM—for purported violations of these very statutes. (RE 119-9; RE 120-1 at ¶ 5; RE 120-2 at ¶ 5; RE 122-1 at ¶¶ 4–8). Although "past enforcement is not necessary to establish a credible threat of enforcement," *Kareem v. Cuyahoga Cnty. Bd. of Elections*, 95 F.4th 1019, 1025 (6th Cir. 2024), these filings evince a tangible record of

targeted scrutiny, not mere happenstance, satisfying the first and second factors.

The third factor reinforces this conclusion: the AWP Laws invite public initiation of enforcement through complaints to the Tennessee Commissioner of Commerce and Insurance, a mechanism that increases the risk of enforcement and amplifies its immediacy. And the Commissioner continues to urge pharmacies to file online complaints "related to pharmacy benefits managers" on the Department's website. *See* Tenn. Dep't of Com. and Ins., Pharmacy Benefit Managers Complaint Form, https://tinyurl.com/2zk8eket. These attributes clearly "bolster" the credibility of enforcement. *Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 769 F.3d 447, 452 (6th Cir. 2014) (quoting *Susan B. Anthony List*, 573 U.S. at 164).

Most importantly, the Commissioner has not disavowed any intention of enforcing the law against McKee. Rather than assure McKee that Tennessee's AWP Laws do not reach its ERISA plan, the Commissioner has steadfastly affirmed his intent to apply these laws to all ERISA plans, issuing bulletins and letters that leave no room for ambiguity. (RE 119-3 (bulletin declaring enforcement against ERISA

plans under Public Chapter 569); RE 81-3 (letter reaffirming applicability); RE 81-4, PAGE ID# 19 (response to public comment reiterating coverage of ERISA plans). This persistent refusal to forswear action—against a backdrop of statutes targeting self-insured plans like McKee's—"make[s] enforcement more likely." *McKay*, 823 F.3d at 869.

That, along with the clearly adverse positions of the parties over two appeals, shows a credible threat of enforcement against McKee. *See, e.g., Mobil Oil Corp. v. Att'y Gen. of Va.*, 940 F.2d 73, 76 (4th Cir. 1991) ("The Attorney General has not, however, disclaimed any intention of exercising her enforcement authority.").

The gravamen of the Commissioner's argument is that unless McKee can show that the Commissioner will imminently enforce the AWP Laws against it, there is no dispute with the Commissioner. In other words, McKee should violate the law and wait to see what happens. The Commissioner knows the answer, but will not say; and until he does, there is no dispute. According to the Commissioner, McKee has only two options: risk penalties or comply with costly mandates, harming its employees. But Congress enacted ERISA to relieve McKee (and other plan fiduciaries) from ever having to face that grim choice.

Only one conclusion follows: "The district court did not err in assuming jurisdiction to ensure that the interests of [McKee and its plan participants] were not jeopardized by state interference with their federal rights." *Perry*, 115 F.3d at 389.

E. The Eleventh Amendment is no bar McKee's suit.

Invoking the "States' long-recognized immunity from suit," the Commissioner finally contends that "sovereign immunity" poses an "obstacle" to McKee's suit here. (Comm'r Opening Br. at 22, 28) But that contention finds no support in existing caselaw, and the Commissioner offers no argument for reversing that long-settled precedent.

While the Eleventh Amendment generally forecloses federal courts from entertaining suits against the States, U.S. Const. amend. XI, that rule has no purchase here. For more than a century, a well-known exception has existed for suits seeking only prospective injunctive or declaratory relief from state officials in their official capacities. *Cady v. Arenac County*, 574 F.3d 334, 344 (6th Cir. 2009); *see also Ex parte Young*, 209 U.S. 123, 159–60 (1908). This is just such a suit.

To determine whether this exception applies, the Court "need only conduct a straightforward inquiry into whether the complaint alleges an

ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (cleaned up). That inquiry "does not include an analysis of the merits of the claim." *Id.* at 646. Rather, a complaint alleging any ongoing violation of federal law usually suffices. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997).

Here, McKee has sued the Commissioner in his official capacity under § 514(a), which preempts any state law that relates to ERISA plans. 29 U.S.C. § 1144(a). McKee alleges that Tennessee's AWP Laws violate ERISA by upending Congress's goal of uniformity for employee benefit plans. First Am. Compl. ¶¶ 19, 58, 62 (RE 83, Page ID# 1070, 1082–83). And McKee seeks no monetary damages but requests only prospective injunctive and declaratory relief. *See* First Am. Compl. ¶¶ 52–63 (RE 83, Page ID# 1080–83). That is the end of the inquiry.

As this Court has explained, claims like McKee's—alleging ERISA preemption against state officials in their official capacities and seeking prospective declaratory and injunctive relief—are not barred by the Eleventh Amendment. *Thiokol*, 987 F.2d. at 382 ("We hold that neither the Eleventh Amendment nor the TIA bars plaintiffs from suing [state

defendants] in their official capacity for prospective declaratory and injunctive relief."); *see also Commonwealth Edison Co. v. Vega*, 174 F.3d 870, 871–72 (7th Cir. 1999) (ERISA claims for prospective and declaratory relief against state officials in their official capacities are not barred by the Eleventh Amendment); *CIGNA Healthplan of La., Inc. v. Louisiana ex rel. Ieyoub*, 82 F.3d 642, 644 n.1 (5th Cir. 1996) (same). To immunize state officials from such suits would make ERISA a dead letter.

II. ADOPTING THE COMMISSIONER'S VIEW WOULD DETER PLAN SPONSORSHIP AND UNDERMINE ERISA'S PURPOSE.

ERISA is not a general employee-benefit mandate. Employers need not offer benefit plans at all. Congress enacted ERISA to encourage employers to sponsor plans voluntarily. As the Supreme Court has recognized, ERISA represents a "'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans." *Aetna*, 542 U.S. at 215 (citation omitted). Congress did not want state law to become so onerous that employers would be dissuaded from providing benefits.

But the Commissioner's watered-down view of ERISA standing and preemption, if adopted on appeal, threatens to do just that. It would stretch ERISA to allow Tennessee to force ERISA fiduciaries to choose

between violating state law or violating their fiduciary duties under ERISA. The cost? Fewer plans, fewer employers willing to offer them, and fewer workers with access to healthcare benefits. That's not what Congress enacted. It's not what ERISA demands.

Research confirms that cost, complexity, and perceived legal risk are employers' leading barriers to offering employer-sponsored benefits. U.S. Gov't Accountability Off., *Private Pensions: Better Agency Coordination Could Help Small Employers Address Challenges to Plan Sponsorship*, GAO-12-326 (2012), https://perma.cc/KZK3-FVAD. An Aspen Institute forum report confirms that fear of litigation exposure discourages many employers from offering a plan. *See* The Aspen Inst. Fin. Sec. Program, *Rapid Change, Real Momentum* (May 22, 2023), https://perma.cc/7DMQ-TV68.

Indeed, it "makes little sense" for small employers to shoulder full fiduciary responsibility when "administrative costs and the burden of fiduciary liability" discourage many from sponsoring plans for their workers. John N. Friedman, *Building on What Works: A Proposal to Modernize Retirement Savings*, The Hamilton Project, Discussion Paper No. 2015-05, (June 2015), https://perma.cc/R2BA-D9N5. This chill on plan

sponsorship has a compounding effect. When employers see that their competitors are not offering benefit plans, they have less incentive to do so themselves. *Id*.

Adopting the Commissioner's position would amplify the challenges facing plan sponsors. If conduct that both ERISA and the plan expressly allow suddenly became a basis for state-law liability, employers will be drawn into costly litigation over routine plan decisions. That increased threat of litigation exposure may deter new sponsors and prompt existing ones to reconsider offering plans. Many employers—quite rationally—will walk away from offering plans. Who can blame them? Employees, in turn, would lose meaningful benefits.

Make no mistake, the Commissioner advances a radical view of ERISA that threatens to tip the balance against plan formation and integrity. Such an outcome is at odds with ERISA's core purpose. As the Supreme Court has explained, ERISA aims to not "discourage employers from offering [ERISA] plans in the first place." *Conkright v. Frommert*, 559 U.S. 506, 516 (2010). For this reason, courts should not adopt ERISA interpretations that "discourage employers from offering [ERISA] plans" by increasing complexity and litigation exposure. *Heimeshoff v. Hartford*

Life & Acc. Ins. Co., 571 U.S. 99, 108 (2013). Courts must be mindful of that objective when evaluating ERISA fiduciaries' standing as well as the scope of ERISA preemption.

Yes, ERISA protects employees. But it does not punish employers. *Perry*, 115 F.3d at 389 ("The interests of employers were considered and protected by Congress when it enacted ERISA."). This reflects the delicate balance calibrated by Congress: robust protection for plan participants, accompanied by reduced burdens and predictability for plan sponsors. *Varity Corp.*, 516 U.S. at 497. Upsetting ERISA's careful equilibrium without a clear congressional mandate risks unintended consequences injuring the very people ERISA is meant to help. Even for those employers who don't abandon their employee benefit plans altogether, increased uncertainty about liability exposure will raise the costs of plan sponsorship, both in terms of insurance and administrative complexity.

The Court should account for the real-world effects of accepting the Commissioner's unsupported litigating position in this appeal. Congress balanced trade-offs in crafting ERISA. The Commissioner would have the Court put that scale aside. But that approach risks reducing benefit

options and harming employees—the very people ERISA was meant to shield from state meddling.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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September 5, 2025

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,864 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(f) and Sixth Circuit Rule 32(b)(1).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that on September 5, 2025, I filed this brief with the Clerk of the United States Court of Appeals for the Sixth Circuit using the CM/ECF system, which will send notice to all registered CM/ECF users. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

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