No. 05-1501

In the Supreme Court of the United States

JOHN J. KORESKO, ET AL., PETITIONERS

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HOWARD M. RADZELY
Solicitor of Labor

NATHANIEL I. SPILLER
Assistant Deputy Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the court of appeals correctly affirmed district court orders requiring petitioners to comply with administrative subpoenas issued under Section 504 of the Employee Retirement Income Security Act, 29 U.S.C. 1134.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is unreported. The orders and memoranda of the district court (Pet. App. 315a-323a, 341a-347a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2005. A petition for rehearing was denied on December 20, 2005 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on March 16, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, sets minimum standards for employee benefit plans. It defines an "employee benefit plan" to include, among other things, an employee welfare benefit plan. 29 U.S.C. 1002(3). An employee welfare benefit plan provides "benefits in the event of sickness, accident, disability, [or] death." 29 U.S.C. 1002(1). Such a plan must be "established or maintained by an employer or by an employee organization, or by both." *Ibid.*

A "multiple employer welfare arrangement" (MEWA) is "an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan)" that is established or maintained to provide welfare benefits to the employees of two or more employers. 29 U.S.C. 1002(40)(A). A MEWA may or may not be an ERISA plan, depending on whether it meets the requirement in 29 U.S.C. 1002(1) that it be "established or maintained by an employer or by an employee organization, or by both."

Even if a MEWA is not itself an ERISA plan, individual employers who subscribe to the MEWA may themselves establish ERISA plans. See, *e.g.*, *Gruber* v. *Hubbard Bert Karle Weber, Inc.*, 159 F.3d 780, 788-789 (3d Cir. 1998); Pension & Welfare Benefits Admin. Opinion No. 96-25A, 6 Pens. Plan Guide (CCH) ¶ 19,985B, at 22,493-17 (DOL Oct. 31, 1996). In such a case, "such plans and the relationship of [the MEWA] to each plan and the transactions involving the plans would be governed by the fiduciary standards of Part 4 of Title I of ERISA." *Id.* at 22,493-19; see 29 U.S.C. 1002(21)(A) (person is a fiduciary with respect to a plan to the extent

"he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets * * * or * * * he has any discretionary authority or discretionary responsibility in the administration of such plan"). The fiduciary standards require a fiduciary, among other things, to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. 1104(a)(1).

b. Section 504(a)(1) of ERISA authorizes the Secretary of Labor to "make an investigation" to determine whether any person has violated or is about to violate any ERISA requirement. 29 U.S.C. 1134(a)(1). In connection with an investigation, the Secretary may "require the submission of reports, books, and records, and the filing of data in support of any information required to be filed with the Secretary." *Ibid.* Section 504(c), 29 U.S.C. 1134(c), incorporates provisions of Sections 9 and 10 of the Federal Trade Commission Act, 15 U.S.C. 49, 50, which allow the agency to obtain district court enforcement of a subpoena. 15 U.S.C. 49. In any enforcement proceeding, a failure to obey a court order to produce documents may be punished as a contempt of court. 15 U.S.C. 49, 50.

2. a. Petitioner John J. Koresko V is an attorney and accountant who wrote the plan and trust documents for voluntary employee beneficiary associations connected with petitioners Delaware Valley Leagues and Regional Employer Assurance Leagues. Pet. App. 415a-416a. Those associations include employers who provide benefits. *Id.* at 416a. Petitioner Koresko and his law firm (petitioner Koresko & Associates) control the Delaware Valley and Regional Employer associations. *Id.* at

416a-417a. Petitioner PennMont Benefit Services, Inc., is a corporate affiliate of Koresko & Associates, with no employees or physical assets. *Id.* at 417a.

In January 2004, the Department of Labor issued subpoenas to petitioners in an investigation under ERISA. Pet. App. 343a. The subpoenas requested certain documents relating to the establishment, contractual relationships, operation, and finances of the Regional Employers' Assurance Leagues plans and trusts to determine whether any violations of ERISA had occurred or were about to occur. *Id.* at 482a. After petitioners failed to comply with the subpoenas, the Department brought an action in district court to enforce the subpoenas. The district court issued an order to show cause why petitioners should not comply with the subpoenas and scheduled a hearing. Petitioners objected to the subpoenas and issued their own subpoena to the Department's investigator, seeking to have her testify at the show cause hearing and produce documents relating to the Department's investigation. The Department moved to quash petitioners' subpoena. *Id.* at 344a.

b. After a hearing, the district court issued an order, dated May 11, 2004, granting general enforcement of the Department's subpoenas. Pet. App. 341a, 347a. The court reasoned that the affidavit submitted by the Department of Labor investigator met the standards for enforcement of an administrative subpoena, *i.e.*, that the inquiry be within the authority of the agency, the demand for production not be too indefinite, and the information sought be reasonably relevant to the authorized inquiry. *Id.* at 344a-345a; see, *e.g.*, *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950). The court also quashed petitioners' subpoena to the Department's investigator because petitioners failed to convince the

court that the Department was acting in bad faith or for an improper purpose. Pet. App. 346a-347a. The district court reserved judgment, however, on petitioners' claims that some of the documents were privileged. *Id.* at 347a.

c. In June 2004, the district court held a hearing on petitioners' asserted privileges and later reviewed a privilege log and documents that petitioners submitted. Pet. App. 316a-318a. In August 2004, the court issued a memorandum and order rejecting petitioners' claims of privileges, subject to clarification from the Department on which documents it sought. *Id.* at 315a-321a. Petitioners failed to comply with the court's orders and, in January 2005, March 2005, and April 2005, the district court issued orders finding petitioners in contempt and ordering them to pay the Department's costs and fees associated with the contempt proceedings. *Id.* at 3a, 16a-18a.

3. The court of appeals affirmed the district court's orders in an unpublished opinion. Pet. App. 1a-18a. The court of appeals concluded that the district court acted within its discretion in enforcing the subpoena and in rejecting petitioners' claims of privilege. *Id.* at 4a-11a. The court of appeals also affirmed the district court's contempt findings, *id.* at 12a-18a, and noted that petitioners did not challenge the merits of those findings. *Id.* at 14a; see *Chao* v. *Koresko*, No. Civ.A. 04-MC-74, 2006 WL 463495, at *1 (E.D. Pa. Feb. 23, 2006) (summarizing the history of case and ordering petitioner Koresko to be incarcerated until he produces the sub-

poenaed records and pays daily fines previously imposed).[1]

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The standards for issuing administrative subpoenas are well-established. Under this Court's precedents, an agency with broad subpoena authority, such as that granted by Section 504 of ERISA, 29 U.S.C. 1134, "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States* v. *Powell*, 379 U.S. 48, 57 (1964) (citation omitted). An agency is also generally not required to establish that a subpoenaed entity is covered by the statute authorizing the subpoena at issue. *Oklahoma Press Publ'g Co.* v. *Walling*, 327 U.S. 186, 200 (1946) (under Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49, district courts are called upon to enforce subpoenas "without express condition requiring showing of coverage"); *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943) (district court was not "authorized to decide the question of coverage itself"). Thus, an administrative subpoena will generally be upheld when it is "sufficiently limited in scope, relevant in

[1] Petitioners assert that the court of appeals has not acted on their motion to recall the mandate. Pet. 10. The court did act, however, denying that motion. See Order (Mar. 9, 2006). Petitioners also assert that petitioner Koresko has surrendered documents in electronic form and paid a contempt fine. Pet. 11. Their presumed interest in preventing the Department from using the documents presumably prevents this case from being moot. *Church of Scientology* v. *United States*, 506 U.S. 9, 13 (1992).

purpose, and specific in directive so that compliance will not be unreasonably burdensome." *Donovan* v. *Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (citation omitted); accord *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950).

Under those principles, the Department plainly had authority to issue the subpoenas at issue here. Petitioners themselves admitted their involvement in providing ERISA-covered benefits, and referred the district court to two cases in which one of their employer clients and several employees sued them for ERISA violations. Pet. App. 346a; see *Regional Employers' Assurance Leagues Voluntary Employees' Beneficiary Ass'n Trust* v. *Sidney Charles Mkts., Inc.*, 29 Employee Benefits Cas. (BNA) 2796 (E.D. Pa. Jan. 29, 2003) and *Sidney Charles Mkts., Inc.* v. *Penn-Mont Benefit Servs., Inc.*, Civ. No. 00-2134 (WGB) (D. N.J. Mar. 28, 2002) (C.A. App. 1322a-1343a), discussed at n.2, *infra*.

Petitioners incorrectly assert that the Seventh Circuit's decision in *Reich* v. *Great Lakes Indian Fish & Wildlife Commission*, 4 F.3d 490 (1993), requires the Department, at the subpoena enforcement stage, to establish its jurisdiction over the subpoenaed matter. Pet. 23-24 & n.20. In *Great Lakes*, the Seventh Circuit addressed a jurisdictional question in determining whether to enforce a subpoena under the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, because the question was "independent of any information that the subpoena might produce" and "a question purely of law." 4 F.3d at 491-492. The Seventh Circuit recognizes, however, that when a jurisdictional question is not independent, the agency can obtain enforcement of a subpoena without establishing its jurisdiction. See, *e.g.*, *EEOC* v. *Sidley Austin Brown & Wood*, 315 F.3d 696, 699-700 (2002).

Whether petitioners are subject to ERISA is not an independent question of law. Accordingly, the Department was entitled to enforcement of the subpoena to determine whether petitioners are subject to ERISA and whether they, or someone else connected with their benefit arrangements, are complying with the statute.

2. Petitioners thus have failed to establish any legal or factual basis for questioning the lower courts' authorization of the subpoenas in accordance with established precedents. Petitioners contend, however, that this case presents a question of first impression on whether Section 504 of ERISA, 29 U.S.C. 1134, has been modified by the Gramm-Leach-Bliley Act, 15 U.S.C. 6801 *et seq.*, the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, and common law. Pet. 11, 16-23. That argument is not properly before this Court because petitioners did not present it to the court of appeals and the court of appeals did not rule on it. See, *e.g.*, *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted). Neither has any other court of appeals ruled that the Secretary's subpoena authority under Section 504 has been altered, much less limited, by those subsequent laws, making this issue singularly unfit for this Court's review.

In any event, petitioners' argument is without merit. The Gramm-Leach-Bliley Act and Right to Financial Privacy Act of 1978 apply to customer records or information obtained from or disclosed by a "financial institution." 15 U.S.C. 6802; 12 U.S.C. 3402(2), 3405(2). Although, petitioners appear to argue that they are "fi-

nancial institution[s]" subject to those statutes, petitioners have not established that they are. See 15 U.S.C. 6827(4) ("financial institution" generally "means any institution engaged in the business of providing financial services to customers who maintain a credit, deposit, trust, or other financial account or relationship with the institution"); 12 U.S.C. 3401(1) ("'financial institution' means any office of a bank, savings bank, card issuer as defined in section 1602(n) of Title 15, industrial loan company, trust company, savings association, building and loan, or homestead association (including cooperative banks), credit union, or consumer finance institution"). Similarly, petitioners have not established that they are subject to the regulations that Section 264(c) of HIPAA, 110 Stat. 2033, directed the Secretary of Health and Human Services to promulgate to protect privacy of certain medical information. Those regulations apply to health plans, health care clearinghouses, and health care providers who transmit any health information in electronic form in connection with covered transactions. 45 C.F.R. 164.104(a). Petitioners have failed to establish that they fall into one of those covered categories. Finally, the Right to Financial Privacy Act of 1978 and the Gramm-Leach-Bliley Act and HIPAA regulations allow compliance with lawful administrative subpoenas. 12 U.S.C. 3405; 15 C.F.R. 6802(e)(8); 45 C.F.R. 164.512(f)(1)(ii)(C).

3. Petitioners also incorrectly argue that the Department knew it had no subpoena authority because it considers petitioners Regional Employers' Assurance Leagues (REAL VEBA) and Delaware Valley League (DVL) not to be ERISA plans. Pet. 12-13. When the subpoenas were issued, the Department did not know whether those multiple employer welfare plans were

ERISA plans, but even if they were not ERISA plans, as petitioners assert, the Department nonetheless has the authority to investigate them because the individual employers who subscribed to the MEWA may themselves establish ERISA plans, and the relationship between the MEWA and those employer plans would be governed by ERISA's fiduciary standards. See pp. 2-3, *supra*.[2]

4. Petitioners also assert (Pet. 15-16) that 29 U.S.C. 1134 limits the Secretary's subpoena authority in a pre-litigation setting to obtaining information that would have been reportable to the Secretary, and they further argue that the Department's regulations exempt petitioners from the reporting requirement. Section 1134, however, plainly does not limit the Secretary's authority. It permits the Secretary to require not just "the filing of data in support of any information required to be filed with the Secretary," but also "the submission of reports, books, and records." 29 U.S.C. 1134(a)(1). The authority to require submission of reports, books, and records is separate from the authority to require the filing of data in support of information required to be filed with the Secretary. See 29 U.S.C. 1134(a)(2) (separate authority to enter premises to inspect "books and records"). Section 1134 also incorporates the authority conferred by the Federal Trade Commission Act to require "the production of all such documentary evidence

[2] Petitioners rely on two district court decisions in the *Sidney Charles Markets* litigation for their assertion that neither the Regional Employers Assurance Leagues nor the Delaware Valley League was an ERISA plan, Pet. 13 & n.16, but the district court properly concluded that the Department was not bound by those decisions because it was not a party to that litigation and the cases were decided on motions to dismiss. Pet. App. 345a n.2.

relating to any matter under investigation." 15 U.S.C. 49 (incorporated by 29 U.S.C. 1134(c)).

5. Finally, petitioners assert the Department violated their common-law privacy rights and constitutional right to due process. Pet. 24-29. Their privacy claim is simply a reframing of their unsuccessful attempt to establish that certain documents were privileged. See Pet. App. 8a-11a (court of appeals' decision, finding no legal error in district court's rejection of privilege claims); *id.* at 315a-321a (district court decision rejecting privilege claims).[3] Insofar as petitioners challenge the district court's contempt findings, the fines and threatened incarceration were civil in nature, rather than criminal as petitioners assert (Pet. 26), because they were designed to compel compliance with the district court's order enforcing the subpoenas. See *International Union, UMWA* v. *Bagwell*, 512 U.S. 821, 827-829 (1994) (contempt sanctions are civil when they have that character and purpose); *Chao* v. *Koresko*, No. Civ.A. 04-MC-74, 2006 WL 463495, at *2 (E.D. Pa. Feb. 23, 2006) (fines imposed until petitioner Koresko complied with subpoenas; order for incarceration imposed until Koresko complied with subpoenas and paid fines after court "exhausted all other options").

Petitioners argue that the district court denied them due process in refusing to permit them to examine per-

[3] Petitioners incorrectly assert (Pet. 25) that the Department's conduct shows "a clear statement of intent" to disclose information to the Internal Revenue Service that the agency could not legitimately obtain. The Department made no such statement; it simply refused to agree to a court order prohibiting the Department from sharing information with other federal agencies. Pet. App. 94a-95a; see *Koresko*, 2006 WL 463495, at *2 (finding "no evidence" that the Secretary intends to give the documents to another governmental agency).

sonnel from the Department of Labor. Pet. 27-29. The court of appeals, however, correctly upheld the district court's conclusion that petitioners had failed to show that the Department was acting in bad faith or for an improper purpose. Pet. App. 6a-7a, 346a-347a. That fact-bound conclusion does not warrant this Court's plenary review.[4]

[4] Petitioners' inaccurately assert (Pet. 27) that this case creates a split in the courts of appeals on how a subpoenaed party demonstrates that the government sought a subpoena in bad faith. Contrary to their assertion, *United States* v. *Church of Scientology*, 933 F.2d 1074 (1st Cir. 1991) (Breyer, J.), does not hold that "some evidence" of bad faith is sufficient to trigger a right to cross-examine the government. The court specifically declined to address whether the agency in that case acted for an improper purpose. *Id.* at 1079. Petitioners also mistakenly rely on *United States* v. *Church of Scientology*, 520 F.2d 818 (9th Cir. 1975). In that case, the Ninth Circuit agreed with the government's suggestion, in response to a request for discovery against the government, to allow the person resisting an IRS summons to examine the agent who issued the summons at a hearing. *Id.* at 824. The Ninth Circuit's decision is consistent with the decision of the court below because in this case, petitioners sought the production of documents as well as testimony from the Department's investigator, Pet. App. 344a, the Department refused to provide that information, *ibid.*, the district court found no need for a hearing, *id.* at 346a, and the court of appeals found no abuse of the district court's discretion. *Id.* at 7a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

HOWARD M. RADZELY
Solicitor of Labor

NATHANIEL I. SPILLER
Assistant Deputy Solicitor

EDWARD D. SIEGER
Attorney
Department of Labor

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