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Pro-Choice Plans

*Brendan S. Maher**

Abstract

After Dobbs v. Jackson Women's Health Organization*, the United States Constitution may no longer protect abortion, but a surprising federal statute does. That statute is called the Employee Retirement Income Security Act of 1974 ("ERISA"), and it has long been one of the most powerful preemptive statutes in the entire United States Code.*

*ERISA regulates "employee benefit plans," which are the vehicle by which approximately 155 million people receive their health insurance. Plans are thus a major private payer for health benefits—and therefore abortions. While many post-*Dobbs *anti-abortion laws directly bar abortion by making either the receipt or provision of abortion illegal, other anti-abortion laws target activities thought to facilitate abortion, most notably paying for abortions. Some of these laws, or proposed laws, attempt to punish paying for out-of-state abortions, i.e., paying for abortions in a state where abortions are legal.*

*ERISA says otherwise. If the plan covers abortion as a benefit, ERISA preempts laws purporting to bar plans in states where abortion is banned from paying for out-of-state abortions. It likewise preempts laws attempting to obligate plans to "report" on pending or completed abortions obtained by plan members. For the first time in the scholarly literature, this Article explains how and why that is the case—and thus the underappreciated importance of ERISA in the post-*Dobbs *world.*

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* Professor of Law and Director, Health Law, Policy & Management Program, Texas A&M University School of Law. Stanford A.B.; Harvard J.D. This Article draws in part upon my experience litigating ERISA matters before the United States Supreme Court, including *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312 (2016) (representing Gobeille); *Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan*, 577 U.S. 136 (2016) (representing Montanile); *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99 (2013) (representing Heimeshoff); *US Airways, Inc. v. McCutchen*, 569 U.S. 88 (2013) (representing McCutchen); *Conkright v. Frommert*, 559 U.S. 506 (2010) (representing Frommert); and *LaRue v. DeWolff, Boberg & Assocs.*, Inc., 552 U.S. 248 (2008) (representing LaRue). I would also like to thank Professors Dana Muir, Elizabeth McCuskey, Erin Fuse Brown, Daniel Schwarcz, Amy Monahan, Mark Hall, and Norman Stein for comments on earlier drafts. All errors are mine.

Introduction

In June 2022, in *Dobbs v. Jackson Women's Health Organization*,[1] the Supreme Court overruled *Roe v. Wade* and *Planned Parenthood v. Casey* and ended the constitutional right to abortion in the United States.[2] But that the federal constitution does not protect abortion does not mean that federal *statutes* do not.

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1 142 S. Ct. 2228 (2022).

2 *Id.* at 2242 (overruling Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)).

While other commentators have focused on statutes such as the Food, Drug, and Cosmetic Act[3] or the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),[4] this Article argues that the dull-sounding Employee Retirement Income Security Act of 1974 ("ERISA")[5] meaningfully protects the ability of a woman in an anti-abortion state to get an abortion in a pro-choice state.[6] Put more bluntly, under current precedents, an employee who resides in State A, where abortion is banned, who wishes to get an out-of-state abortion paid for by her employee benefit plan can—and State A cannot prevent the plan from paying for it. The plan, however, must be a "pro-choice plan," namely, it must provide—as many already do—for abortion as a benefit. This Article accordingly explains and analyzes, for the first time in the scholarly literature, the ERISA-fueled power of pro-choice plans.

* * *

As with all matters involving ERISA, considerable background explanation is necessary. After *Dobbs*, anti-abortion advocates have urged state legislatures to act aggressively, suggesting that they pass a variety of laws, both civil and criminal, that target abortion.[7] The scope of such enacted or proposed laws has been broad in a variety of ways, including—in addition to the baseline of making the procurement or provision of abortion illegal—imposing criminal or civil liability upon any party who aids, by paying for or otherwise, a woman seeking an abortion, even outside the state.[8] Because abortion is a

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3 21 U.S.C. §§ 301–399i.

4 Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

5 Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 U.S.C. and 29 U.S.C.).

6 *See, e.g.*, David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 Colum. L. Rev. 1, 42–80. The authors recognize but do not analyze the possibility of ERISA preemption. *Id.* at 71 n.394.

7 In addition to "trigger laws" that revive pre-*Roe* laws prohibiting abortion, various new anti-abortion laws are being proposed by anti-abortion advocates, including laws that target out-of-state abortions. *See, e.g.*, Caroline Kitchener & Devlin Barrett, *Antiabortion Lawmakers Want to Block Patients From Crossing State Lines*, Wash. Post (June 30, 2022, 8:30 AM), https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines [https://perma.cc/9MM6-37X8] (describing efforts of anti-abortion advocates).

8 For example, a Texas law enacted before *Dobbs*, S.B. 8, imposes civil liability for certain abortions provided by Texas-licensed physicians. *See* Tex. Health & Safety Code Ann. §§ 171.201–.212 (West 2022). Because many physicians are dual-licensed, the law on its face imposes civil liability on a dual-licensed Texas/New York physician who performs an abortion in

medical procedure, however, that means employee benefit plans—which pay for the medical care of approximately 155 million people—are directly in the line of fire of such laws.[9]

But employee benefit plans are unlike other private actors in an important way: the regulation of such plans is handled entirely and exclusively by ERISA. Not only did Congress *extensively* spell out how employee benefit plans should be operated, but it also made clear that the *only* regulator of such plans was and is the federal government.[10] Thus, for any subject in which one hears the matter has allegedly been "returned" to the states, one must check to see what constraints ERISA imposes on said states. ERISA covers vast regulatory ground and preempts an *enormous* swath of state law—even state law one might not think, at first glance, has anything to do with employee benefits.[11] This includes some state law on abortion, or so this Article argues.

Part I accordingly explains the relevant substantive and preemptive particulars of ERISA. ERISA is at once notoriously tedious and punishingly complex, but a start-to-finish mastery of the statute is unnecessary. Of chief concern here are two things.

The first is ERISA basics—namely what an employee benefit "plan" is; what the obligations of the "fiduciaries" who administer the plan for the benefit of "participants" and "beneficiaries" are; and how ERISA regulation is supposed to work generally.[12] Central to the entire ERISA regulatory scheme is the written plan. With virtually no exceptions, if the plan's terms promise something, such as an abortion benefit, the beneficiaries must receive it and the fiduciaries must deliver it. This Article will also explain how ERISA plans are practically set up; this will matter because ERISA distinguishes in an important way between the plan as an entity and third parties who serve the plan, such as insurers.

New York. *See* Kitchener & Barrett, *supra* note 7 (describing ongoing efforts to prevent traveling across state lines to obtain an abortion).

9 Gary Claxton, Matthew Rae, Gregory Young & Nisha Kurani, Heidi Whitmore, Jason Kerns, Jackie Cifuentes, Greg Shmavonian & Anthony Damico, Employer Health Benefits: 2021 Annual Survey 6 (Kaiser Fam. Found. ed., 2021), https://files.kff.org/attachment/Report-Employer-Health-Benefits-2021-Annual-Survey.pdf [https://perma.cc/TUY4-GVKF] (supplying estimate).

10 *See infra* Section I.B.

11 *See infra* Section I.B.

12 *See infra* Section I.A.

The second is the structure and content of ERISA preemption, i.e., when ERISA trumps state law.[13] ERISA preemption comes in express and implied varieties and can nullify both civil and criminal laws. Express preemption occurs with respect to civil law if the law "relate[s] to" employee benefit plans; if it is not "saved" as an insurance law; and if the law does not attempt to regulate a plan as an insurer.[14] Express preemption with regard to criminal law is the same, except with one additional inquiry: whether the challenged law is a "generally applicable criminal law."[15] If it is not, it is preempted. If it is, it is saved from express preemption. Importantly, both civil and criminal laws that avoid express preemption—even saved insurance law and saved criminal law—are nonetheless subject to implied preemption. Implied preemption is when a state law conflicts with ERISA's provisions or otherwise frustrates its purposes.[16]

ERISA preemption exists to protect the integrity of the substantive regulation Congress enacted with respect to the operation of benefit plans. In Part II, with ERISA's substantive particulars in mind, this Article analyzes ERISA preemption with respect to four categories of anti-abortion laws: (1) laws that directly prohibit obtaining or performing an abortion ("direct laws"), (2) laws that prevent insurers from covering abortion ("insurance laws"), (3) laws that require parties to report about a pending or completed abortion ("reporting laws"), and (4) laws that bar facilitating abortion through payment or otherwise ("aiding and abetting laws").[17] In each category, this Article considers both civil and criminal versions of those laws. It concludes that while the case for preempting direct laws and insurance laws is hopeless, the case for preempting reporting laws and aiding and abetting laws against plans is quite strong. In essence, the latter two categories contain laws that interfere with the plan's core functions and its ability to follow the written plan's terms; the first two categories do not.

This Article closes in Part III by briefly examining how pro-choice plans might protect their independence and beneficiaries using litigation.[18] Because anti-abortion laws come in both "traditional," i.e., state-enforced, and "bounty," i.e., privately enforced, forms, a plan's

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13 *See infra* Section I.B.

14 29 U.S.C. § 1144(a)–(b).

15 *Id.*§ 1144(b)(4).

16 *See infra* Section I.B.2.

17 *See infra* Part II.

18 *See infra* Part III.

litigation options with respect to opposing anti-abortion laws will vary. Pro-choice plans may benefit from immediately seeking relief in court—and probably federal court—against state-enforced anti-abortion laws that interfere with their ability to deliver abortion benefits according to plan terms. Plans should also be prepared to file reactive actions in federal court seeking fees with respect to any bounty hunters who sue them in state court on the basis of laws ERISA substantively preempts.

A final note. This Article examines how ERISA might affect or protect a woman's ability to obtain an abortion. To say this Article considers complicated and controversial issues for which details will very much matter is to state the obvious. The goal here is only to lay out a framework that will be of use to lawmakers, scholars, and observers regarding the regulatory path forward in a post-*Dobbs* world.

I. ERISA: Substance and Preemption

Below, this Article explains the relevant specifics regarding ERISA's substantive and preemptive dimensions. Before doing so, a quick word about ERISA's *practical* importance: roughly 155 million Americans receive health insurance coverage through the workplace, and most of those policies are governed by ERISA.[19] That coverage is heavily subsidized via federal tax breaks; the most recent estimate by the Department of the Treasury is that the tax expenditure associated with the provision of employment-based health insurance is on the order of $220 billion.[20]

A. *ERISA Substantive Particulars*

ERISA is complicated. For most that is unpleasant, for others, intoxicating. Here we may avoid severe unpleasantness with only a short and simple recitation of ERISA's non-preemption basics before diving into preemption in admittedly excruciating detail.

ERISA was enacted as a pension statute but also regulates—for virtually all employers—health or other workplace benefits they may offer.[21] "Benefits" are really nothing more than benefit promises, i.e.,

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19 *See* Claxton et al., *supra* note 9, at 6.

20 U.S. Dep't of Treasury, Tax Expenditures tbl.1 (2021), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2023.pdf [https://perma.cc/6YHW-7VEG] (providing estimate on line 122).

21 *See* 29 U.S.C. § 1003(a) (scope of employers covered); *id.* § 1101(a) (scope of plans covered). ERISA does not cover, for example, plans offered by government or church employers. *Id.* § 1003(b)(1)–(2).

nonwage compensation the employer has promised to provide to the employee, whether in the form of retirement income, health care, or disability insurance.[22]

At the center of all such benefit promises is what ERISA calls a "plan."[23] Conceptually, a plan is the formal expression of the benefit promise an employer makes to its employees about what the employees are getting in the form of, say, health benefits.[24] ERISA requires that a plan be embodied in a "written instrument," namely a document or set of documents that contain the "plan terms" that legally define the benefit promise.[25] In addition, the plan is also the quasi-entity that may sue or be sued when there are disputes about whether the plan terms—or ERISA's provisions generally—are being followed.[26] The plan is operated by "fiduciaries," who have multiple duties they owe, as well as appropriate power to run the plan.[27] The actual text of ERISA regarding fiduciary duties is instructive:

> (a) Prudent man standard of care
>
> (1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use . . .
>
> * * *
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].[28]

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22 Brendan S. Maher, *Regulating Employment-Based Anything*, 100 MINN. L. REV. 1257, 1269 (2016).

23 29 U.S.C. § 1002(1)–(3).

24 Maher, *supra* note 22, at 1268 (explaining what a plan is).

25 29 U.S.C. § 1102(a)(1).

26 *Id.* § 1132(d).

27 *Id.* § 1002(21) (fiduciary definition); *id.* § 1102 ("named fiduciary" in charge of plan); *id.* § 1104(a) (fiduciary duties); *see also* Dana Muir, *ERISA and Investment Issues*, 65 OHIO ST. L.J. 199, 217 (2004) (describing generally ERISA's extensive fiduciary obligations).

28 29 U.S.C. § 1104(a)(1).

Several things about this provision are important. As a starting point, a fiduciary must only and always act "*solely* in the interest of the participants and beneficiaries" of the plan.[29] Participants and beneficiaries are who intuition suggests they are: the employees (participants) and their families (beneficiaries) to whom the benefit promise was made.[30]

While acting in furtherance of the beneficiaries' interests, there are three specific things fiduciaries must do. First, they must act for the "*exclusive* purpose" of "*providing benefits*" to beneficiaries and keeping the administrative costs reasonable in connection with doing so; fiduciaries cannot use or withhold plan funds for their own use or benefit, for the employer's use or benefit, or for the benefit of nonbeneficiaries.[31] This duty is commonly referred to as the duty of loyalty.[32] Second, fiduciaries must act prudently, i.e., they must act with the care and skill that a prudent person would demonstrate in like circumstances.[33] Fiduciaries thus must not only be loyal, they must also do their best to exercise wise and reasoned judgment on behalf of their beneficiaries. Third, fiduciaries *must* follow the terms of the plan, unless doing so would violate ERISA itself.[34] There are no other exceptions to this duty. If the plan says something, and ERISA does not prohibit it, a fiduciary must do it.[35]

Such makes sense given ERISA's origins. The statute was enacted in the aftermath of several high-profile pension failures that left retirees jilted.[36] By requiring the plan be in writing, that it be run by people with duties to act wisely and in the best interest of the plan beneficiaries, and that fiduciaries follow the plan terms, Congress intended that employees and their beneficiaries would know and get what they were entitled to with little risk of eleventh-hour rug-pulling.[37]

Importantly, for the most part ERISA leaves to employers and employees the power to negotiate the terms of the benefit promise,

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29 *Id.* (emphasis added).

30 *Id.* § 1002(6)–(8). For the purposes of this Article, there is little difference between participants and beneficiaries. Unless context indicates otherwise, either means both.

31 *See id.* § 1104(a)(1)(A) (emphasis added).

32 *E.g.*, Berlin v. Mich. Bell Tel. Co., 858 F.2d 1154, 1162 (6th Cir. 1988).

33 29 U.S.C. § 1104(a)(1)(B).

34 *Id.* § 1104(a)(1)(D).

35 *Id.*

36 *E.g.*, Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 WASH. U. L. REV. 433, 440 n.29 (2010) (explaining why ERISA was enacted).

37 *Id.* at 451–53.

i.e., the terms of the plan.[38] While there are some things ERISA says a plan *must* do, or must *not* do, the remaining terms of the benefit promise are left to negotiation.[39] ERISA's focus, rather than regulation of the content of the benefit promise, is instead to ensure that whatever the terms of the promise made, *those terms* will be clear and lived up to.[40] ERISA famously does not require that employers offer a plan at all.[41] If they do, then they have to abide by the terms they agreed to. But they do not have to make such a bargain in the first place.[42] Understanding the foregoing basics matters not only so an unfamiliar reader may understand ERISA's jargon and cast of characters, but also because ERISA's design and intent matter with regard to how the judiciary has defined and will define the scope of ERISA preemption.

B. *ERISA Preemption Particulars*

ERISA preemption is infamously challenging.[43] Yet the general structure of ERISA preemption is clear—even if the boundaries are not.

As a general matter, federal preemption of state law can be express or implied.[44] Express preemption is when Congress specifically says that certain state laws are preempted.[45] Implied preemption is

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38 *See* Peter J. Wiedenbeck, ERISA: Principles of Employee Benefit Law 11–14 (2010) (discussing how ERISA permits most terms of the plan to be determined by negotiation between employer and employees).

39 One example of what an ERISA plan cannot do is include an exculpatory clause for a breach of fiduciary duty. *See, e.g.*, 29 U.S.C § 1110(a). One example of something a plan must do is include a procedure for amending the plan. *See id.* § 1102(b)(3).

40 *See, id.* § 1102(a)(1) (requiring plan to be in writing); *id.* § 1102(b)(4) (requiring plan to "specify the basis on which payments are made to and from the plan"); *id.* § 1104(a)(1)(D) (requiring fiduciary to follow the terms of the plan); *id.* § 1132(a)(1)(B) (providing cause of action to enforce the terms of the plan); *id.* § 1132(a)(3) (providing cause of action to enjoin any act or practice that violates the plan).

41 *See ERISA*, U.S. Dep't of Lab., https://www.dol.gov/general/topic/health-plans/erisa [https://perma.cc/4P7M-FQAY].

42 The Patient Protection and Affordable Care Act of 2010 ("ACA"), Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C, and 42 U.S.C.), changed that somewhat. Large employers are not required to offer a health plan but owe significant tax penalties if they do not. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 720 (2014) (explaining employer penalties). Prior to the ACA, an employer faced no penalty for not offering a plan.

43 *See, e.g.*, Erin C. Fuse Brown & Elizabeth Y. McCuskey, *Federalism, ERISA, and State Single-Payer Health Care*, 168 U. Pa. L. Rev. 389, 416–17 (2020) (describing ERISA preemption as "forcefully-worded and inscrutable").

44 Thomas W. Merrill, *Preemption and Institutional Choice*, 102 Nw. U. L. Rev. 727, 738 (2008).

45 *Id.* (describing express preemption).

when—independent of what Congress specifically said regarding preemption—judges preempt state law on the theory that those state laws would, if left standing, conflict with or frustrate Congress's aims in enacting the federal statute in question.[46]

ERISA's express preemption provision is codified at 29 U.S.C. § 1144. However, ERISA also impliedly preempts state law. What this means, and what state regulators may forget at their peril, is that even if a state law satisfies ERISA's express preemption provision, it can still fall to implied preemption. Merely because State Law A falls outside those laws Congress expressly said were preempted does *not* mean the state law survives. To survive, it must *also* pass the Supreme Court's test with respect to implied preemption.

1. ERISA Express Preemption

The steps of express preemption analysis under ERISA are laid out in 29 U.S.C. § 1144. As to *Dobbs*-inspired regulations, ERISA express preemption has four steps: (1) does the state law in question "relate to" employee benefit plans,[47] (2) if so, is the law saved from preemption as a law that regulates insurance,[48] and (3) if so, is the law preempted because it attempts to directly regulate an employer benefit plan as an insurer?[49] If, under that analysis, the state law is preempted, then one must ask a fourth question: (4) is the state law a "generally applicable criminal law"?[50] If it is, it is exempt from express preemption. Each step is considered in more detail below.

a. "Relate to" Clause

Step one in the express preemption inquiry is to ask whether the state law in question "relate[s] to" employee benefit plans.[51] If it does, it is preempted.[52] The Supreme Court has held there are two ways state law can "relate to" employee benefit plans.

The first way state law can "relate to" employee benefit plans is for the law to have a "reference to" employee benefit plans "immediately and exclusively."[53] That is a hard test to meet. The Court has

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46 *Id.* at 739–40 (describing implied preemption).

47 29 U.S.C. § 1144(a).

48 *Id.* § 1144(b)(2)(A).

49 *Id.* § 1144(b)(2)(B).

50 *Id.* § 1144(b)(4).

51 *Id.* § 1144(a).

52 *Id.*

53 Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 319–20 (2016) (quoting Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997)).

made clear that a statute must do more than mention employee benefit plans; the law in question must either mention and *only* regulate employee benefit plans, or the law must make no sense other than as an effort to regulate employee benefit plans.[54]

The second way to transgress the "relate to" inquiry is more capacious. Here, one asks if the state law has a "connection with" employee benefit plans.[55] Although the contours of this inquiry are less clear, the Court has made several salient points about which laws have a "connection with" benefit plans. Broadly speaking, laws that "govern[] . . . a central matter of plan administration" or "interfere[] with nationally uniform plan administration" are preempted.[56] What qualifies as a central matter of administration or constitutes interference with uniform plan administration is not settled. But the Court has held that (1) state laws that mandate benefits[57] and (2) state laws that require plan reporting[58] so qualify. In addition, the Court has explained that even laws that only indirectly inflict costs upon plans are preempted if the indirect costs imposed are so acute that they functionally "force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers."[59]

If a state law neither has a reference to nor a connection with employee benefit plans, then it does not "relate to" plans, and is not expressly preempted. One must move to the implied preemption inquiry below. If, however, a state law does "relate to" employee benefit plans, one must proceed to the next steps of the express preemption inquiry. In ERISA parlance, those two steps involve provisions that are commonly called the "savings clause" and the "deemer clause."[60]

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54 *Id.*; *see also Dillingham*, 519 U.S. at 325 (explaining preemption occurs when "the existence of ERISA plans is essential to the law's operation"); *see also* Amy B. Monahan, *Pay or Play Laws, ERISA Preemption, and Potential Lessons from Massachusetts*, 55 U. KAN. L. REV. 1203, 1207–08 (2007) (explaining the "reference to" inquiry generally).

55 *Gobeille*, 577 U.S. at 320.

56 *Id.* (quoting Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001)).

57 Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474, 480 (2020); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983).

58 *Gobeille*, 577 U.S. at 326–27.

59 *Id.* at 320 (quoting N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995) (noting that laws that indirectly impose coercive burdens could be preempted)).

60 The "savings clause" is located at 29 U.S.C. § 1144(b)(2)(A). The "deemer clause" is located at 29 U.S.C. § 1144(b)(2)(B).

b. Savings Clause

ERISA explicitly saves from preemption state laws that regulate insurance, banking, or securities.[61] Only the first (insurance) seems relevant here—and the Supreme Court has announced a test for determining whether a challenged state law regulates insurance. In *Kentucky Ass'n of Health Plans v. Miller*,[62] the Court held that an insured law is saved if it is "specifically directed toward entities engaged in insurance" and if it "substantially affect[s] the risk pooling arrangement between the insurer and the insured."[63] The first requirement is fairly straightforward and is met if the law is targeted at insurers.[64] The second requirement is a bit less clear but has been read by the courts of appeals to be met if the law in question regulates risk such that it "alter[s] 'the scope of permissible bargains between insurers and insureds.'"[65] The classic example of insurance laws saved under ERISA are the "mandated benefits" laws, where a state has required that any insurance policies sold in the state must cover certain categories of care.[66]

c. Deemer Clause

Understanding the deemer clause requires some familiarity with how ERISA plans are structured in practice. An employer who makes a health care promise to its employees can back that promise in one of two ways. The first is to engage a health insurer to write a group policy that covers the employees; plans that do this are commonly called "insured plans."[67] The second way is to back the benefits promise with general firm resources, that is, to "self-fund" or "self-insure" the offered health benefits.[68] For large companies with significant resources,

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61 *Id.* § 1144(b)(2)(A).

62 538 U.S. 329 (2003).

63 *Id.* at 342.

64 *Id.* at 334.

65 *See, e.g.*, Fontaine v. Metro. Life Ins. Co., 800 F.3d 883, 888 (7th Cir. 2015) (quoting *Kentucky Ass'n,* 538 U.S. at 338–39).

66 Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 738–47 (1985) (holding mandated benefits law to be saved insurance law).

67 Brendan S. Maher, *The Affordable Care Act, Remedy, and Litigation Reform*, 63 AM. U. L. REV. 649, 654 (2014) (explaining the difference between insured and self-insured plans).

68 *Id.* Some plans entirely self-insure; some self-insure for some benefits and insure for others; some plans insure for all benefits, i.e., "fully insured" plans. *Many* beneficiaries are covered by an employer that self-insures in part; only nineteen percent of plan participants—at employers with over 100 plan participants—are covered by "fully insured plans." CONSTANTIJN W.A. PANIS & MEGAN YERETSIAN, SELF-INSURED HEALTH BENEFIT PLANS 2022: BASED ON FILINGS THROUGH 2019, at 20 (2021), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/

this can be financially attractive because it dispenses with the costly insurance company middleman, and company resources are significant enough that a promise to pay for its employees' health care poses little financial risk to the company.[69] No matter how costly employee health care ends up being, large companies—like Facebook or Exxon Mobil—will be able to pay. Small employers, on the other hand, could face financial ruin if they promise to pay their employees' medical bills. Because of a product called stop-loss insurance, however, even small businesses can technically be self-insured under ERISA.[70] Stop-loss insurance is a form of reinsurance. A company promises to pay its employees' health benefits, but then purchases stop-loss insurance from an insurer, which is simply a deal that, once the company pays out above a certain amount on health claims to its employees, the stop-loss insurer will reimburse the company for any claim payouts above that point.[71]

Because of the deemer clause, the insure versus self-insure choice that an employer makes has a practical effect that very much matters in regulatory terms. The deemer clause provides that states cannot use "saved" state insurance law to regulate *plans* through the stratagem of "deeming" the plans to be engaged in the business of insurance and thus subject to the state's saved laws.[72] Because employee benefit plans that offer health benefits are, in conceptual terms, most certainly engaging in insurance, the deemer clause was necessary to insure that the savings clause could not be used by aggressive states to render preemption a nullity. In two cases on the issue, the Supreme Court has made clear that, while states can regulate health insurers—including health insurers who sell policies to plans—through their saved powers, states *cannot* directly regulate self-insured plans because of the deemer clause.[73] Whether or not a plan is self-insured therefore *significantly* affects the degree to which a state can regulate

statistics/retirement-bulletins/annual-report-on-self-insured-group-health-plans-2022-appendix-b.pdf [https://perma.cc/PZ2K-HP3D].

69 *See* Maher, *supra* note 67, at 654.

70 *See generally* Am. Med. Sec., Inc. v. Bartlett, 111 F.3d 358, 361–62 (4th Cir. 1997) (discussing stop-loss insurance).

71 *Id.*

72 *See* 29 U.S.C. § 1144(b)(2)(B); *see also* Timothy Stoltzfus Jost & Mark A. Hall, *Self-Insurance for Small Employers Under the Affordable Care Act: Federal and State Regulatory Options*, 68 N.Y.U. Ann. Surv. Am. L. 539, 560 (2013) (explaining that the "deemer clause simply expresses the technical limitation that states may not regard employers as insurers, even if they happen to bear their own insurance risk.").

73 FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990) (concluding that the deemer clause exempts self-funded plans from saved state insurance law); Metro. Life Ins. Co. v. Massachusetts,

a plan. For insured plans, states can regulate the plan's insurer. For self-insured plans, they cannot regulate what the plan does, unless the law in question does not "relate to" employee benefit plans in the first instance.

d. Generally Applicable Criminal Law

There is a final aspect of express preemption under ERISA that is rarely litigated and that the Supreme Court has never considered: the "generally applicable criminal law" exception.[74] This exemption is exactly what it sounds like: even if a state law *would* be preempted by operation of the other three provisions mentioned above, if that law is a generally applicable criminal law, it is saved from preemption.

Precisely what qualifies as a "generally applicable criminal law" is not settled, and the legislative history on the subject is not particularly revealing. One issue is what exactly counts as a "criminal" law. Do *only* classic criminal laws—i.e., laws that specifically identify themselves as criminal prohibitions with criminal sanctions like imprisonment or other penalties—qualify? Or do civil laws that *operate* similarly to criminal laws—insofar as their chief purpose is punitive rather than regulatory—also qualify? This Article will assume for convenience's sake that only the former qualifies.

A second issue is what "generally applicable" means. There is little question that a state criminal law that *exclusively* criminalizes behavior committed by employee benefit plans—e.g., "any employee benefit plan in this state that fails to cover mental health is subject to criminal penalties"—is not on its face a "generally applicable criminal law" and thus is not saved from preemption.[75] On the other end of the spectrum, there is little question that generic criminal laws prohibiting theft or embezzlement *are* generally applicable; one cannot steal from an ERISA plan and claim the state cannot prosecute under those

471 U.S. 724, 747 (1985) (holding that saved state insurance laws can govern insurers used by insured plans).

74 29 U.S.C. § 1144(b)(4). In 1989, the Court resolved a case on grounds that did not require it to consider whether the Massachusetts law in question, regarding prompt payment of compensation to workers, qualified as a generally applicable criminal law. Massachusetts v. Morash, 490 U.S. 107, 121 n.18 (1989). The Massachusetts Supreme Court had held that the law did *not* qualify as a generally applicable criminal law. *See infra* note 79.

75 *E.g.*, Trs. of Sheet Metal Workers' Int'l Ass'n Prod. Workers' Welfare Fund (New York) v. Aberdeen Blower & Sheet Metal Workers, Inc., 559 F. Supp. 561, 563 (E.D.N.Y. 1983) (holding that criminal "laws aimed specifically at benefit plans" are not generally applicable); *see also* U.S. Dep't of Labor, Pension & Welfare Benefits Admin., Opinion Letter (May 31, 1979) (opining that Massachusetts law that attached criminal penalties to plan asset embezzlement and delinquent pension contributions was not generally applicable criminal law).

laws.[76] Uncertainty arises over the in-between cases where a statute is not so general as the latter but not so specific as the former.

If laws generally criminalizing theft are not preempted while laws specifically criminalizing stealing by a plan are, what about a law that specifically criminalizes withholding or converting any type of compensation from employees? That law would criminalize both withholding wages (which has nothing to do with plans) and withholding contributions to pension plans (which does). While the Department of Labor has taken the position that true exclusivity is not required—criminal laws that "apply primarily"[77] to employee benefit plans are also preempted—what "apply primarily" means is not settled.[78] Most courts, including the Ninth Circuit, to have considered non-benefit-plan-exclusive criminal laws have concluded that criminal laws that *deliberately* encompass what might be called benefit-plan-related misconduct—such as when "benefits" or "plans" are among the things referenced in the statute—are *not* generally applicable, even if such laws *also* encompass (and perhaps more commonly apply to) employment-related conduct that has nothing to do with a benefit plan.[79] The implicit reasoning in these decisions appears to be that if a state legislature reveals some desire to criminalize plan-related conduct and en-

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76 *See Aberdeen*, 559 F. Supp. at 563 ("Congress did not wish to supersede criminal laws applying in general terms to conduct such as larceny or embezzlement.").

77 *See* U.S. Dep't of Labor, Pension & Welfare Benefits Admin., Opinion Letter (Feb. 10, 1989). At issue was a Utah law that criminally barred "third party purchasers" of pharmaceutical services from imposing certain conditions upon pharmacy patients. *Id.* Labor concluded the law was *not* generally applicable because such "third party purchasers" included employee benefit plans. *Id.* Labor did not speculate about the percentage of those third-party purchasers who were employee benefit plans, but as a practical matter, a very large percentage were.

78 *See, e.g.*, U.S. Dep't of Labor, Pension & Welfare Benefits Admin., Opinion Letter (Jan. 17, 1984) (concluding that a state law which criminalized high rates of interest on certain consumer loans and reached some loans a plan might make to plan participants *was* generally applicable because the law was "not intended to apply specifically to an activity related to employee benefit plans").

79 *See, e.g.*, Aloha Airlines, Inc. v. Ahue, 12 F.3d 1498, 1506 (9th Cir. 1993) (finding law criminalizing employee compensation withholding not generally applicable even though it reached withholdings unrelated to pension plans); Commonwealth v. Morash, 522 N.E.2d 409, 416 (Mass. 1988), *rev'd on other grounds*, 490 U.S. 107 (1989) (finding wage law criminalizing improper withholding of compensation to discharged employees not generally applicable because it sometimes reached plans); *Aberdeen*, 559 F. Supp. at 563 (finding New York law criminalizing withholding of various forms of employee compensation, including wage withholding and pension withholding, to be not generally applicable criminal law); Blue Cross & Blue Shield of Ala. v. Peacock's Apothecary, Inc., 567 F. Supp. 1258, 1276 (N.D. Ala. 1983) (finding state pharmacy pricing law that imposed criminal penalties not generally applicable because it targeted pharmacists). One commentator has criticized this approach as being too preemption friendly. *See* Albert Feuer, *When Do State Laws Determine ERISA Plan Benefit Rights?*, 47 J. MARSHALL L. REV. 145, 306–13 (2013).

acts a law for that purpose, the deliberate effort to penalize plans (even if that law reaches other types of nonplan misconduct) is sufficient to make that law not generally applicable.[80]

Whether the Supreme Court will share that view is another matter. But one might imagine the following spectrum of interpretations—in order of preemptive breadth—of "generally applicable criminal law": (1) all criminal law is generally applicable except for law that exclusively criminalizes plan-related conduct, (2) all criminal law is generally applicable except for law that exclusively or mostly criminalizes plan-related conduct, (3) any criminal law motivated by a state's desire to deliberately criminalize some brand of plan-related conduct is not generally applicable, even if the law in question mostly criminalizes nonplan-related conduct, and (4) any law that even incidentally reaches plans is not generally applicable criminal law, unless the law in question is a classic and generic criminal law, such as standard laws against larceny, theft, embezzlement, or fraud.

2. *ERISA Implied Preemption*

Laws that fall outside of ERISA's express preemption provision are not free from additional preemptive scrutiny. While Congress wrote an explicit preemption provision into ERISA—and a very broad one at that—the Supreme Court has made clear that even laws that are not explicitly preempted may be impliedly preempted.[81] Indeed, the Court has specifically said that implied preemption can defeat not only state laws that do not relate to employee benefit plans at all, but also state laws that are *saved* by the insurance savings clause.[82] While the Court has not had occasion to specifically say that "generally applicable criminal laws" can be impliedly preempted, that provision by its terms only says it operates to save such laws from ERISA's *express* preemption reach.[83] The statute does not say, nor does any

80 *See supra* note 79.

81 *E.g.*, Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) (holding the challenged state law would be impliedly preempted "[e]ven if there were no express pre-emption in this case"); Boggs v. Boggs, 520 U.S. 833, 841 (1997) (finding implied preemption without even considering express preemption).

82 Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 377 (2002) (explaining that even saved insured law would fall if impliedly preempted); Aetna Health Inc. v. Davila, 542 U.S. 200, 217–18 (2004) (rejecting argument that saved insurance law could not be preempted because even saved law is subject to implied preemption when such law conflicts with congressional purpose).

83 29 U.S.C. § 1144(b)(4).

Supreme Court ERISA opinion remotely suggest, that saved criminal law is not subject to implied preemption.[84]

While implied preemption is a powerful and independent basis upon which to nullify state law, the Court's work demarcating the contents and boundaries of implied preemption has not been a masterclass in precision. The Court's implied preemption analysis customarily begins with the observation that state laws that "conflict[] with the provisions of ERISA or operate[] to frustrate its objects" are preempted.[85] Noting that language and comprehending what it means, however, are two different things. For starters, understanding what "frustrate[s] the objects" of ERISA requires understanding exactly what the Court believes ERISA's objects are; what one should do when ERISA's various objects conflict and state law furthers one but undermines another; and what constitutes state law "frustration" of any given ERISA object. That is not an easy task. One fruitful approach, based on the perhaps naïve idea that the future will be like the past, is to review what the Court has said about implied preemption and attempt to extract from those opinions categories of state law the Court is skeptical of. Two such categories appear in the Court's decisions and ruminations.

First, the Court has made *very* clear that state law that expands either the causes of action or the damages available against a plan or misbehaving fiduciary are impliedly preempted. In the view of the Court, Congress's decision to carefully enumerate ERISA's remedies in 29 U.S.C. § 1132 precludes any additional state remedies or damages, even if supplemental remedies and damages might increase the likelihood that fiduciaries will refrain from improper conduct.[86] As the Court has repeatedly explained, it believes Congress made a careful balancing decision to include some remedies and not others.[87] Additional remedies or stricter liability standards that might deter misconduct could also undermine plan creation in the first instance or make it more difficult to attract competent fiduciaries—and there is no

84 Outside of the ERISA context, the Court has more than once held that saved law is not exempt from implied preemption. *See Rush Prudential*, 536 U.S. at 375 (citing cases where laws saved by earlier federal statutes were nonetheless impliedly preempted).

85 *Boggs*, 520 U.S. at 841.

86 *Davila*, 542 U.S. at 209; *cf.* Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985) (holding that ERISA itself did not permit "extracontractual damages" in a case where petitioner did not even appeal the lower courts' holdings that her state-law claims seeking such extracontractual damages were preempted).

87 *See, e.g.*, *Russell*, 473 U.S. at 146 (noting significance of careful congressional balancing); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987) (same); *Ingersoll-Rand*, 498 U.S. at 144 (same).

question, according to the Court, that Congress was highly concerned about the latter.[88]

Accordingly, even vanilla state law relating to the causes of action and damages available in tort and contractual breach settings are impliedly preempted by ERISA—irrespective of whether such laws "relate to" employee benefit plans in the first instance, although they very well may. As the Court itself put it: state law that expands fiduciary liability or adds damages "patently violates ERISA's policy of inducing employers to offer benefits by assuring a predictable set of liabilities, under uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred."[89] That is why even saved state insurance law—namely, even law that Congress specifically declared as saved from preemption—that expands causes of action, creates new liability standards, or enhances relief in the insurance context can be impliedly preempted.[90]

Second, the Court has held that certain state laws that conflict with ERISA's provisions and necessarily disrupt the clarity and uniformity of plan administration may be impliedly preempted. For example, in the case of *Boggs v. Boggs*,[91] at issue was a Louisiana community property law that entitled the decedent's children to receive a portion of the survivor's annuity due to the decedent's surviving wife.[92] The Court explained that it did not even need to reach whether the community property law in question "relate[d] to" employee benefit plans.[93] It instead based its ruling entirely on implied preemption grounds, finding the Louisiana law was impliedly preempted because it created a right in nonparticipants that directly contravened a plan participant's statutory entitlements under ERISA and upset the administrative scheme Congress intended.[94]

* * *

As explained above, ERISA treats civil and criminal laws similarly but with one key difference. Civil laws are (1) expressly preempted if they relate to employee benefit plans and are not saved insurance laws, (2) expressly preempted if they are saved insurance laws but directly regulate employee benefit plans as insurers, or

88 *See infra* notes 234–36.

89 *Rush Prudential*, 536 U.S. at 379 (discussing *Pilot Life* and *Ingersoll-Rand*).

90 *See Davila*, 542 U.S. at 209–11.

91 520 U.S. 833 (1997).

92 *Id.* at 836–38.

93 *Id.* at 841.

94 *See id.* at 852–54.

(3) impliedly preempted if they "conflict[] with the provisions of ERISA or operate[] to frustrate its objects."[95] Criminal laws follow the same structure, with one additional protection against preemption: laws that are "generally applicable criminal law" are saved from express preemption.[96] Even saved criminal laws, however, are subject to implied preemption.

II. ERISA and Abortion

One of the complexities with the ERISA preemption regime is that the result—preemption or no—depends greatly on what the state law does and how it is written. It is simply not the case that ERISA preempts all state laws relating to abortion or, conversely, that ERISA preempts no state laws relating to abortion. It will preempt some and not others, depending on what the law does and how it is written. Because it is a fool's errand to endlessly speculate about every single possible state law regarding abortion, this Article attempts to very roughly group state laws in certain categories so as to make the preemption analysis offered here more targeted.

Accordingly, the analysis below considers the preemptive effect ERISA may exert on laws categorized as (1) direct laws, (2) insurance laws, (3) reporting laws, and (4) aiding and abetting laws. Both criminal and civil laws are considered. Criminal laws make the proscribed conduct a crime subject to imprisonment or criminal fines. Civil laws are regulations whose violations create civil liability in the form of civil fines or other noncriminal relief obtainable by state regulators. Alternatively, civil laws may authorize private parties to bring lawsuits seeking injunctive or monetary relief against the civil violator.[97]

One other assumption bears mentioning. The analysis herein assumes the plan by its terms provides—either plainly or in the good-faith interpretation of the fiduciary charged with administering the plan—for abortion benefits, whether specifically or because of general language covering abortions.[98] It is a simple matter to amend a plan to

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95 *Id.* at 841.

96 29 U.S.C. § 11449(b)(4).

97 Texas's S.B. 8, the "abortion bounty" law, is an example of the latter. *See* Tex. Health & Safety Code Ann. §§ 171.201–.212 (West 2022) (authorizing private individuals to bring suit against parties who perform or aid in the performance of abortions).

98 Determining precisely how many plans cover abortion, even prior to *Dobbs*, was and is not straightforward; *cf.* Megan Messerly, *Will Health Insurers Continue to Cover Abortion Now That Roe Has Been Overturned?*, Politico (July 5, 2022, 10:37 AM), https://www.politico.com/news/2022/06/27/will-health-insurers-continue-to-cover-abortion-now-that-roe-has-been-overturned-00041117 [https://perma.cc/HGH3-CMR2] (reporting lack of current information availa-

cover such things—including paying for travel associated with getting an abortion—but that requires, of course, that those in charge of the plan wish to do so.[99] It is also, however, a simple matter to amend a plan to *not* cover such things. Not all employers, certainly, will choose to cover abortion—some for religious reasons and others for political reasons. What follows is about those plans that have chosen to.

A. Direct Laws

Various states have enacted or are likely to enact "direct" anti-abortion laws, i.e., laws that impose civil or criminal liability for getting or providing an abortion.[100] These laws—laws that directly regulate the conduct of pregnant women and doctors—have, at first glance, no intersection with the sort of plan activity that ERISA regulates. It is thus hard to see how such laws would be preempted either expressly or implicitly by ERISA.[101]

Given such direct laws, that plans may permissibly pay for abortions—as argued below—does not mean that there will actually be any abortion providers in a given state. Thus, to the extent a plan covers abortion as a benefit, in most practical circumstances what that

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ble on the number of plans that cover abortion). *Insured* plans' ability to cover abortion largely turned on state level insurance regulation about when or if insurance policies in that state had to cover or not cover abortion across various circumstances; states differed on those specifics. *See id.* As for *self-insured* plans, there was little comprehensive evidence regarding abortion coverage. *See id.* Nonetheless, plausible reports indicated many plans in fact covered abortion as a benefit in the years before *Dobbs*. *See Guttmacher Institute Memo on Insurance Coverage of Abortion*, GUTTMACHER INST. (Sept. 18, 2009), https://www.guttmacher.org/article/2009/07/guttmacher-institute-memo-insurance-coverage-abortion [https://perma.cc/7GN4-NBWE] (concluding that most employer plans probably covered abortion).

99 29 U.S.C. § 1102(b) (requiring plan amendment procedures). Sometimes plans contain generic language that asserts the plan will comply with state law. The analysis offered in this Article assumes no such provision exists in pro-choice plans.

100 *See, e.g.*, *Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (Jan. 6, 2023, 10:30 AM), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/FVU4-JRR2] (tracking post-*Dobbs* abortion legality in all fifty states and noting bans in multiple states).

101 In the case where the plan is a health maintenance organization ("HMO"), and a doctor performing the abortion is acting both as a plan fiduciary and a treating physician, one may wonder whether some of the preemption arguments made here in Part II could apply. But that seems unlikely, because any such arguments must acknowledge the Supreme Court's holding in *Pegram v. Herdrich*, 530 U.S. 211 (2000), regarding ERISA's treatment of physicians making "mixed" treatment and eligibility decisions. The Court is skeptical of reading ERISA to govern actions, like wielding a scalpel, that are far removed from the traditional actions of a trustee, namely shepherding assets or paying out money. *See id.* at 231. In any event, this Article leaves that for separate treatment by others.

will mean is that the plan will be paying for beneficiaries to get out-of-state abortions.[102]

B. Insurance Laws

One area of law that unquestionably bears on employee benefit plans is an area that ERISA's draftsmen explicitly preserved state prerogative on: insurance.[103] Because insurance regulation was deliberately reserved to the states, in practice that means there are two reasons why state-level insurance regulation is rarely disturbed by ERISA.

First, many insurance regulations—e.g., those that involve obtaining a broker's license—do not at all "relate to" employee benefit plans and therefore are not preempted in the first instance. Second, other laws may very well arguably "relate to" employee benefit plans, but are saved by the savings clause as such laws are quite obviously specifically targeted at insurers and unquestionably regulate the risk-pooling arrangement in such a way as to affect the range of permissible insurance bargains.[104] While there are some gray areas regarding when those two prongs are satisfied, one area in which states are on solid ground is with respect to mandated benefits laws.[105]

There is little question, in other words, that states can tell their in-state insurers what they must or must not include in any policies sold in the state, subject—in certain circumstances—to other federal statutes like the Patient Protection and Affordable Care Act ("ACA").[106] Indeed, a state law barring insurance coverage of abortion is in essence the mirror image of a mandated-benefits law, and mandated-benefits laws are *the* classic example of saved insurance law. And while saved insurance laws are subject to *implied* preemption, it is impossible to imagine the Court finding that a state's insurance law barring abortion coverage by its in-state insurers is impliedly preempted.

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102 Anti-abortion states may have limited exceptions, such as for ectopic pregnancy or rape, in which case the plan could pay for an in-state abortion. But in that case, there is no conflict between state law and the plan. Federal law other than ERISA may well require—on federal lands or in federally funded hospitals in the state—that abortions be provided in some circumstances that state law bars, thus creating the possibility of an abortion actually being performed in state that a plan could then plausibly pay for in facial violation of state law. This Article does not consider that possibility in any detail but presumes a plan could not be sanctioned civilly or criminally for paying for an abortion in such circumstances.

103 *See* 29 U.S.C. § 1144(b)(2)(A).

104 Kentucky Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329, 342 (2003) (setting the test for saved insurance law).

105 *See supra* note 66 and accompanying text.

106 The ACA does not require coverage of abortion. 42 U.S.C. § 18023(b)(1).

Such laws are squarely in the heartland of state insurance regulation that the courts have left undisturbed and do not view as in any way as discordant with ERISA's overall purpose. If a state prohibits in-state insurers from covering abortion, ERISA—and the ACA—do not preempt that law.

Note, however, an important caveat: the above analysis does not apply to *self-insured* plans—which can cover whatever they choose, including abortions—paying for out-of-state abortions. While *other* laws the state may enact could arguably reach *self-insured* plans (although probably not, as discussed in Section II.D), *saved insurance laws* cannot.

Consider first a pure self-insured plan, i.e., a plan that pays the promised benefits directly out of its own monies without the involvement of an insurer. Whether the plan is located in state or out, nothing that plan does in connection with paying for benefits can be reached by saved insurance laws because saved insurance laws cannot regulate plans and no insurer is involved that could be regulated. That is the express *raison d'etre* of the deemer clause.[107] Thus any law purporting to limit what a self-insured plan could or could not do must rely on not triggering the "relate to" clause or, alternatively, on qualifying as a generally applicable criminal law. Accordingly, the relevant analysis for self-insured plans is whether a state, through either a not-related-to-plans civil law or a generally applicable criminal law, would be able to directly bar a self-insured plan from offering an abortion benefit.[108] As explained in Section II.D, that is unlikely. Note also that this analysis applies to *partially* self-insured plans, i.e., plans that use an in-state insurer for all non-abortion coverage, but simply self-fund for out-of-state abortion coverage. An otherwise insured plan's decision to self-fund out-of-state abortion would be beyond the reach of a state's saved insurance law.[109]

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107 *See* FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990).

108 Any civil law purporting to limit what a self-insured plan could offer as a benefit would by definition involve a central matter of plan administration and interfere with national uniformity by making it impossible to offer an abortion as a benefit in State X—which would transgress the "relate to" clause and could not be saved because of the deemer clause. *See supra* note 56 and accompanying text. The relevant question is whether states can do so via generally applicable criminal law and in a way that survives implied preemption. *See infra* Part II.D.

109 Nor is the provision of abortion, compared to other health care services, particularly costly for an employer to bear. *See* Alina Salganicoff, Laurie Sobel & Amrutha Ramaswamy, *Coverage for Abortion Services in Medicaid, Marketplace Plans and Private Plans*, KFF.ORG (June 24, 2019), https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans/ [https://perma.cc/4KWM-HXE2] (describing cost of abortion).

If both self-insured and partially self-insured plans are beyond the reach of saved insurance laws, what of a third possibility—a plan that uses an in-state insurer for non-abortion coverage but an out-of-state insurer for abortion coverage out of state? Here the analysis is a little bit trickier. Because no part of that out-of-state insurance arrangement applies to in-state conduct—the insurance deal covers only abortions in states where abortion is legal and thus not in the anti-abortion home state—there are constitutional issues that might limit the state's power to regulate insurers outside the state, even before we consider ERISA.[110]

As a baseline matter, State A authorities have no constitutional power to regulate what an insurance company in State B covers in a State B policy that it sells to State B residents.[111] Whether and the degree to which that changes if a resident of State A purchases a policy in State B that only applies to and covers events in State B is not entirely settled.[112] Moreover, that question—and extraterritorial reach generally—is a complex one that this Article does *not* attempt to comprehensively treat or decisively resolve. Instead, it makes the following brief observations about a potential approach plans that wish to use out-of-state insurers might examine further.

Several old Supreme Court decisions have held that the state has no constitutional power to regulate insurance contracts issued by out-of-state insurers covering events outside the state, even where the purchaser or some other policy beneficiary resided in state.[113] The leading

110 For the uninitiated, the general rule in insurance regulation, with some exceptions, is that only insurers licensed by the state can sell insurance covering events within the state. Companies that hold themselves out as national insurance companies in truth consist of numerous subsidiaries; the overall parent enterprise shares administrative and executive costs while writing policies in multiple states through the state-licensed subsidiaries. *Cf.* Daniel Schwarcz, *A Critical Take on Group Regulation of Insurers in the United States*, 5 U.C. IRVINE L. REV. 537, 543–44 (2015) (explaining national insurers).

111 *See generally* Jonathan R. Macey & Geoffrey P. Miller, *The McCarran-Ferguson Act of 1945: Reconceiving the Federal Role of Insurance Regulation*, 68 N.Y.U. L. REV. 13, 33–38 (1993) (discussing constitutional limits on power of states to regulate insurance contracts chiefly involving events outside state borders).

112 *Id.* (considering Supreme Court decisions on cross-border insurance regulation involving an in-state resident). The reader should also note that sometimes state law itself constrains its reach regarding acts occurring in whole or in part in other jurisdictions. *Cf.* TEX. PENAL CODE § 1.04 (limiting criminal liability somewhat depending on whether the offense is unlawful in the other state).

113 *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897) (holding Louisiana was constitutionally barred from prohibiting the purchase of out-of-state insurance contracts even though the purchasing firm was located in Louisiana and mailed documentation and payment from Louisiana); N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 376–77 (1918) (finding contract made by Missouri resident with New York insurance corporation constitutionally not subject to Missouri

insurance treatise, citing those decisions and others, likewise explains that "a state cannot constitutionally prescribe the terms, or control the construction and effect, of contracts made and to be performed beyond the borders of the state."[114]

Assuming the older decisions are still valid,[115] they are not entirely clear on what facts conclusively determine when a contract is "made" beyond the borders of the state, but nonetheless offer some guidance. In one case, the Court held—over the dissent of Justice Brandeis—that Missouri law could not apply because the contract was "made" outside the state, namely in the state of the counter-party New York, even though the insured undertook many of the acts in connection with forming the contract within Missouri.[116] In another case, the Court unanimously held Texas law could not apply because the insurance contract was both entirely made and assigned to the plaintiff while he was physically outside of Texas (in Mexico).[117]

While the question of where the contract is made might not be per se dispositive under modern constitutional doctrine, it seems likely that employers offering insured benefit plans could avoid the state's insurance power by creating a *secondary* plan sited in a legal abortion state, with a third-party administrator in that state serving as the fiduciary, that offers to the company's employees abortion benefits entirely and exclusively collectible in that state. That secondary plan would then secure abortion coverage from an insurer in that state. ERISA itself, as explained above, permits an employee benefit

law); Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930) (finding, as a constitutional matter, that Texas law did not apply to insurance contract made in Mexico with Mexico insurer covering events outside of Texas).

114 1 Steven Plitt, Daniel Maldonado, Joshua D. Rogers & Jordan R. Plitt, Couch on Insurance § 3:25 (3d. ed. 2022).

115 Some may speculate that those decisions, written before substantive due process was abandoned as a constitutional constraint, might not be good law. Yet even more modern forms of constitutional analysis seem unlikely to *entirely* abrogate those decisions so as to justify a finding, for example, that New York has the constitutional power to prohibit a New York resident from contracting with a Florida insurer to insure his summer home in Miami—particularly if the New York resident *does so while in Florida* and the Florida insurer does not otherwise have any nexus with New York. *But see* Allstate Ins. Co. v. Hague, 449 U.S. 302, 310–11 (1981) (describing *Dick* and similar cases as standing for "the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional" while leaving unsettled how much more contact is necessary). A plan could address such uncertainty by self-insuring or seeking declaratory relief that any state law purporting to bar use of an out-of-state policy—whether via the configuration here suggested or otherwise—violates the Constitution or ERISA.

116 *Dodge*, 246 U.S. at 379 (Brandeis, J., dissenting).

117 *Dick*, 281 U.S. at 408.

plan to structure benefit offerings as it sees fit, including by creating a secondary out-of-state plan.[118] Under this configuration, no abortion benefit is being offered through any insurance entity evidently subject to the state's insurance power.

In sum, while a state is well within its ERISA-saved power to aggressively regulate what its in-state insurers may do, the state's power to regulate self-insured plans (and likely plans carefully contracting with out-of-state insurers) is severely limited. A state's ability to curtail out-of-state abortion benefits rests entirely on its ability to utilize either civil laws that do not "relate to" plans or criminal laws that are generally applicable—and only if those laws *also* survive implied preemption.

C. *Reporting Laws*

Another set of laws states might enact or have enacted are "reporting" laws, i.e., laws that require someone with knowledge of a pending or completed abortion to report that information to state authorities.[119] To keep the analysis somewhat structured, this Article separately considers (1) express preemption regarding civil reporting laws, (2) implied preemption regarding civil reporting laws, (3) express preemption regarding criminal reporting laws, and (4) implied preemption regarding criminal reporting laws.

1. *Civil Reporting Laws and Express Preemption*

One of the Supreme Court's more recent ERISA cases considers the statute's preemption of state reporting requirements. In 2016, in *Gobeille v. Liberty Mutual Insurance Co.*,[120] the Supreme Court considered whether to find preempted a Vermont law requiring all health care payers—including self-insured plans—to share health care cost information with the state, which was building an all-payer claims database.[121] Liberty Mutual challenged the law on ERISA preemption

118 *See supra* Section I.A.

119 Numerous states have reporting laws obligating physicians to submit abortion reports to the states. *See, e.g.*, *Abortion Reporting Requirements*, GUTTMACHER INST. (Jan. 1, 2023), https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements [https://perma.cc/F7WF-KN3P] (describing reporting requirements across states). Such laws could be amended to impose reporting requirements on parties beyond physicians, which is precisely what is considered here insofar as such laws reach plans. Note that this Article does *not* consider whether HIPAA privacy protections that may reach plan actors holding certain information would independently constrain state law. It only considers ERISA's preemptive effect here.

120 577 U.S. 312 (2016).

121 *Id.* at 315.

grounds, arguing that such a law was "relate[d] to" employee benefits plans and could not, even by dint of the savings clause, be applied to Liberty Mutual, which ran a self-insured plan.[122]

The Court agreed. It concluded that Vermont's reporting law—even though that law was not intended to gather information to police fiduciary misconduct, to ensure claims were being paid, or to assess insurer solvency—intruded upon a central matter of plan administration: plan reporting.[123] Allowing states to impose additional reporting requirements beyond what ERISA itself required would create the very disuniformity in plan administration that ERISA intended to avoid; instead of one reporting obligation, plans operating across the nation could face fifty-one reporting obligations.[124] Accordingly, the Court held that Vermont's law both governed a central matter of plan administration and interfered with national uniform plan administration, and thus the law had an impermissible "connection with" employee benefit plans.[125] The Court did not need to consider whether the law could be saved under the savings clause, as Liberty Mutual was a self-insured plan, which meant the deemer clause would moot the relevance of a saved law.[126] Vermont's law was preempted.

It is hard to see why the *Gobeille* reasoning would not apply to a civil reporting law pertaining to abortion. Self-insured plans are one of several individuals, e.g., the pregnant woman, her doctor, or entities, e.g., a credit card company, a pharmacy, a laboratory, the doctor's employer, that could or would possess such information.[127] While the reporting law would still govern those other entities, with respect to the self-insured plan, the law would be preempted.[128]

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122 *Id.* at 318–19.

123 *Id.* at 320–23. Because there were fewer than 200 people in Liberty Mutual's plan, it did not have to report information under Vermont's law. *Id.* at 317. But Liberty Mutual used Blue Cross as a third-party administrator for its plan, i.e., as an agent to accept or deny claims, and Blue Cross was subject to the mandatory reporting requirements of Vermont's law. *Id.* at 317–18. Thus, technically at issue was Liberty Mutual's ability to order Blue Cross to not comply with Vermont law. If the law was preempted, Liberty Mutual had that ability. If it was not, Liberty Mutual did not.

124 *Id.* at 323–24 (holding that reporting requirements are to be imposed by federal authorities rather than "the separate States").

125 *Id.* at 326–27.

126 *Id.* at 317.

127 This Article does not analyze whether HIPAA would constrain reporting obligations directed at other persons or entities—or, for that matter, benefit plans.

128 *See Gobielle*, 577 U.S. at 317, 324. But what of insured plans? Could a state require the in-state insurer used by a plan to report on sought or completed abortions? First, it seems questionable that a reporting law directed at in-state insurers would be "saved" under the savings clause; at first glance it would not affect the risk-pooling arrangement between insureds and

2. *Civil Reporting Laws and Implied Preemption*

Since the state cannot reach self-insured plans with civil reporting requirements and will likely not need to reach in-state insurers with civil reporting requirements because the state will simply ban in-state insurers from covering abortion, as discussed in Part II.B., this Article need not consider whether implied preemption will block civil reporting laws.

3. *Criminal Reporting Laws and Express Preemption*

Gobeille provides good reason to conclude that abortion-reporting civil laws that reach self-insured plans are preempted. But what if the reporting obligation in question arose from a state *criminal* statute, where the failure to abide by the same reporting requirements is punishable by imprisonment or criminal fines? The answer would be the same as before—the law would be preempted—*unless* that law qualified as a "generally applicable criminal law."[129] If it did, the deemer clause would *not* protect self-insured plans. The deemer clause only protects self-insured plans against saved *insurance* laws, not saved *criminal* laws.[130] Only implied preemption could nullify a generally applicable criminal law that imposed an abortion-reporting obligation upon a self-insured plan.[131]

Given that, the specifics of the criminal law that allegedly imposes a reporting requirement upon a plan will matter. As explained above, there is little question that a law that exclusively targets employee benefit plans, e.g., "any benefit plan by an employer offered in this state must report a pending or completed abortion or face the following criminal penalties," would *not* be a generally applicable criminal law, and would be preempted.[132] In addition, existing case law suggests that an abortion-reporting criminal law that deliberately targeted employee benefit plans or plan-related activity—even if that law also targeted nonplan actors and nonplan activity—would be

insurers. *See supra* note 104 and accompanying text. But more importantly, it likely will not matter because a state could simply directly bar its insurers from covering abortion, in which case there would be nothing for insurers to report. *See supra* Part II.B. Finally, to the extent a state tried to impose a reporting requirement on in-state insurance entities serving as third party administrators—rather than insurers—for plans, that is essentially the *Gobielle* fact pattern that was preempted. *See supra* note 123.

129 29 U.S.C. § 1144(b)(4).

130 *See id.* § 1144(b)(2)(B).

131 *See infra* Section II.C.4.

132 *See supra* Section I.B.1.d.

found by many courts to be *not* a generally applicable criminal law.[133] That said, the Supreme Court has said nothing on the subject, and so it is difficult to speak confidently about what view of "generally applicable criminal law" it might adopt.[134]

Consider for a moment one wrinkle with regard to criminal reporting requirements. Assume the existence in State A of a generic, longstanding criminal law that makes failure to report a felony to the appropriate state authorities a crime.[135] Assume further that State A, post-*Dobbs*, has made receiving or providing an abortion a felony. Assume finally that Large Employer Plan A is located in State A but has contracted with two insurers: an in-state insurer who covers care for employees who seek care in state and an out-of-state insurer who covers care for employees who find themselves in State Y, where abortion is legal. Even if some fiduciary of the plan becomes aware, when or after the employee seeks reimbursement,[136] that the employee sought or obtained an out-of-state abortion, it is not clear how a generic felony reporting law would be triggered. Abortion is not a felony in State Y. Nor should the act of *leaving* State A to obtain an abortion in State Y be a felony, given that—for now—the right to travel is protected by the United States Constitution.[137] What felony is there for Large Employer Plan A to report?

That said, assume for the sake of argument that a state can construct a generally applicable criminal law—or read into the state's existing generic criminal law—some sort of obligation to report, in some practically meaningful set of circumstances, a pending or completed abortion. In that case, a plan's only recourse under ERISA would be implied preemption.

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133 *See supra* note 79.

134 *See supra* Section I.B.1.d. Cynics might say "the majority will adopt any view that allows them to uphold an anti-abortion law." Perhaps. But perhaps not. Hence this Article.

135 Texas, for example, makes it a misdemeanor to not report a felony. TEX. PENAL CODE ANN. § 38.171 (West 2022).

136 It also might not ever become aware; the entirety of the reimbursement process might be outsourced to the insurer, with the in-plan fiduciary only reviewing summary cost information.

137 *See* Bigelow v. Virginia, 421 U.S. 809, 824 (1975) (explaining that Virginia could not "prevent its residents from traveling to New York to obtain" an abortion); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (expressing view that a state cannot bar a resident's interstate journey to obtain abortions because of "the constitutional right to interstate travel"); *see generally* Seth F. Kreimer, *"But Whoever Treasures Freedom . . . ": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 913 (1993); Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992). Resolution of those constitutional complexities is, as they say, beyond the scope of this Article.

4. *Criminal Reporting Laws and Implied Preemption*

There is more than one reason to think the Court might be sufficiently concerned about applying a criminal reporting requirement to an employee benefit plan that it would find such law to be impliedly preempted.

First, because ERISA itself imposes multiple reporting requirements upon plans, the Court made clear in *Gobeille* that it considers reporting to be a "central matter of plan administration."[138] The Court has routinely explained that once ERISA affirmatively imposes obligations in a particular area, any state requirements that expand those obligations need to be carefully scrutinized because such requirements by definition make plan administration disuniform and more costly.[139] And in the Court's oft-expressed view, administrative uniformity and predictable costs for benefit plans were chief reasons Congress enacted ERISA.[140]

Second, the Court will be necessarily concerned about the consequences of permitting a criminal reporting requirement to govern plans when a civil reporting requirement could not. Consider Vermont's scheme in *Gobeille*. Vermont imposed general reporting obligations on virtually anyone who might have held health care cost or utilization information, of which self-insured plans were one small part.[141] While Vermont did not make failure to comply a crime, if Vermont *had* done so, would the Court have ruled differently and permitted Vermont to gather the information from self-insured plans? Merely by the simple expedient of attaching modest criminal penalties to a failure to report? While *Gobeille* involved express preemption, the reasons the Court was hostile to Vermont's law are exactly the types of reasons that justify implied preemption, i.e., a concern that allowing states to do things that interfere with central plan functions would allow states to gut the national administrative uniformity that Congress enacted ERISA to accomplish.

Third, the Court has routinely expressed distaste for any state law, or indeed any legal standard, that (1) would expand a fiduciary's potential liability for wrongdoing or (2) would increase the cost of

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138 Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 323 (2016) (quoting Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001)).

139 *Id.* (collecting cases).

140 *See, e.g.*, *Egelhoff*, 532 U.S. at 148 (stating a "principal goal[] of ERISA" is to provide "a uniform administrative scheme" (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9 (1987))); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) (same); *Fort Halifax Packing Co.*, 482 U.S. at 9 (same).

141 *Gobeille*, 577 U.S. at 315–16.

liability.[142] State laws that do *that*—as opposed to state-mandated laws that create disuniformity by requiring more types of coverage to be included—are viewed by the Court as creating a particularly volatile species of disuniformity and as having a heightened chilling effect upon the willingness both of employers to offer plans and of competent people to serve as administrators.[143] That concern—particularly when violation of the reporting law comes with criminal exposure—could also motivate the Court to find such reporting requirements impliedly preempted.

Finally, state actors will have *other* means to prohibit abortion in their states: namely via direct prohibitions regarding the receiving or provision of abortion and by barring in-state insurers from covering it.[144] Reporting requirements largely motivated by a state's desire to learn about out-of-state conduct that would require the Court to give *all* states an expansive new tool to regulate plans might strike even otherwise sympathetic members of the Court as an unnecessary extravagance.

D. Aiding and Abetting Laws

Aiding and abetting laws are those laws that make any act of assisting a person in obtaining an abortion—whether though payment, travel, advising, or other facilitation—subject to either criminal or civil liability. These laws can come in a variety of forms, from simply being a new application of existing aiding and abetting laws, or being new, more specific laws that provide different or stronger penalties for those who aid and abet abortions—including out-of-state abortions.[145]

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142 *See, e.g.*, Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987) (quoting legislative history to illustrate that the goal of ERISA preemption was to "help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws"); Aetna Health Inc. v. Davila, 542 U.S. 200, 214–15 (2004) (noting that various preempted state laws expanding bases for liability or relief all share the similarity of undermining ERISA's intent); *Ingersoll-Rand*, 498 U.S. at 142 (noting particular concern with states developing "different substantive standards applicable to the same employer conduct, requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction"); *see also infra* notes 250–51 (discussing the Court's decades-long distaste for legal rules, in the preemption setting or otherwise, that make liability for fiduciaries more common, more costly, or more volatile).

143 *See Ingersoll-Rand*, 498 U.S. at 142.

144 *See supra* Sections II.A–.B.

145 *See, e.g.*, Meryl J. Chertoff, *The Right to Travel to Seek an Abortion in a Post-*Dobbs *World*, THE HILL (June 25, 2022, 12:00 PM), https://thehill.com/opinion/judiciary/3536720-the-right-to-travel-to-seek-an-abortion-in-a-post-dobbs-world [https://perma.cc/FAD4-RJK9] (describing pending effort by Missouri legislators to enact law that explicitly punishes people for paying for out-of-state abortions)*; see also supra* note 8.

Here, for reasons that will become clear, let us begin with criminal versions of aiding and abetting laws and use as an example of an aiding and abetting law one that criminalizes *paying* for an abortion. That is the central way benefit plans would be involved. To the extent paying for an abortion is protected by preemption, one can assume that other things plans do that are entwined with paying for abortion—such as paying for travel to an abortion-permitting state or supplying information about the plan's out-of-state abortion benefit—would likewise be protected.[146]

1. *Criminal Aiding and Abetting Laws and Express Preemption*

The first question is whether an aiding and abetting criminal law "relate[s] to" employee benefit plans. Such laws would, to the extent they criminalize paying for abortion, functionally operate to mandate benefit structure in the enacting state and thus impermissibly "govern[] . . . a central matter of plan administration," i.e., benefit construction and delivery, and "interfere[] with nationally uniform plan administration."[147] Such a law would accordingly be preempted unless it was saved by the insurance savings clause or the "generally applicable criminal law" clause.[148] Before considering those two clauses, however, pause to consider a potential counterargument involving a Supreme Court decision that, while in the civil context, might justify a conclusion that an aiding and abetting law would *not* "relate to" employee benefit plans.

The case is *Mackey v. Lanier Collection Agency & Service, Inc.*[149] and involved in pertinent part the question of whether Georgia's general garnishment laws were preempted by ERISA.[150] Respondent Lanier secured judgments against twenty-three individual participants in an employee benefit plan that provided vacation and holiday benefits.[151] Because it provided those types of benefits, it was a welfare plan rather than a pension plan.[152] Pension benefits are by statutory command inalienable; welfare benefits are not.[153]

146 Recall that restrictions on paying for travel or providing information may infringe on the constitutional right to travel and the First Amendment, respectively. *See supra* note 137.

147 Egelhoff v. Egelhoff, 532 U.S. 141, 148 (2001); *see supra* Part I.B.1.a.

148 29 U.S.C. § 1144(b)(2)(A), (b)(4).

149 486 U.S. 825 (1988).

150 *Id.* at 827.

151 *Id.*

152 *Id.* at 827 n.1.

153 *Id.* at 836.

To collect, Lanier filed an action in state court to garnish those employees' benefit payments.[154] The plan—and the United States—argued that such actions were preempted by ERISA on the theory that Lanier's garnishment suit sought to force the plan to pay out monies to someone other than beneficiaries, i.e., to Lanier.[155] Such actions, according to the plan, squarely conflicted with what ERISA requires of fiduciaries.[156]

The Court disagreed. In a 5–4 decision, the Court held that state garnishment laws were not preempted, "even when those mechanisms prevent plan participants from receiving their benefits."[157] In the view of the majority, there was no dispute that plans could be sued for doing improper things that had nothing do with beneficiaries—e.g., if the plan failed to pay rent on a lease or failed to pay plan attorneys their fees—and for which there was likewise no dispute that plans were subject to state enforcement mechanisms with respect to judgments obtained as a result of those improper acts.[158] That individual *beneficiaries* might themselves do something to subject themselves to liability—such as not pay a debt—that resulted in a judgment did not, in the view of the Court, somehow mean that the same enforcement procedures that were not preempted when used to collect against a plan for its own shortcomings were somehow preempted when used to collect against beneficiaries.[159] Put more bluntly, plans that misbehave as entities with respect to third parties can be sued, lose, and be subject to state enforcement procedures regarding collecting on such judgments. Those laws are not suddenly preempted when the same enforcement procedures are being used to collect against a beneficiary merely because the plan holds the money. In addition, because ERISA *does* specifically bar the alienation—and thus garnishment—of pension benefits, the Court reasoned that preempting garnishment of welfare benefits would render that pension alienation provision of ERISA redundant.[160]

A critic might argue that *Mackey* governs here. Aiding and abetting laws that bar paying for abortion are general laws that do not relate to employee benefit plans in the same way the general garnish-

154 *Id.* at 827–28.

155 *Id.* at 834–35.

156 *Id.*

157 *Id.* at 831–32.

158 *See id.* at 833–34.

159 *Id.* at 835–36.

160 *Id.* at 837.

ment laws do not relate to employee benefit plans. Both merely affect where a plan can send money, i.e., not to the beneficiary.

The problem with that argument is how the case law has since developed. Importantly, *Mackey*'s reach is constrained by *Egelhoff v. Egelhoff*.[161] At issue in *Egelhoff* was a Washington statute that provided that the "designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce."[162] The Court held it was preempted by ERISA.[163]

David Egelhoff, deceased, was a plan participant in a Boeing plan.[164] He was married to Donna Rae Egelhoff and had designated her as the beneficiary of his life insurance plan benefits.[165] David and Donna divorced, and David died two months later in an accident—without having removed Donna as his beneficiary.[166] A dispute ensued between David's children from a previous marriage—who would inherit the insurance proceeds in the absence of a spousal beneficiary—and the divorced wife Donna.[167]

The Supreme Court found the Washington statute preempted on the grounds that the Washington statute had "a connection with" employee benefit plans.[168] According to the Court, the Washington statute both governed a central matter of plan administration *and* interfered with the national administration of benefits.[169]

Because the Washington statute required that administrators "must pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan documents," it "implicate[d] an area of core ERISA concern" and contravened, inter alia, "ERISA's commands that a plan shall 'specify the basis on which payments are made to and from the plan' and that the fiduciary shall administer the plan 'in accordance with the documents and instruments governing the plan.' "[170] In addition, the Washington statute "interfere[d] with nationally uniform plan administration" because:

> Plan administrators cannot make payments simply by identifying the beneficiary specified by the plan documents. In-

161 532 U.S. 141 (2001).
162 *Id.* at 143.
163 *Id.*
164 *Id.* at 144.
165 *Id.*
166 *Id.*
167 *Id.* at 144–45.
168 *Id.* at 147.
169 *Id.* at 148.
170 *Id.* at 147 (citations omitted) (quoting 29 U.S.C. § 1144(b)(4), (a)(1)(D)).

> stead they must familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been "revoked" by operation of law. And in this context the burden is exacerbated by the choice-of-law problems that may confront an administrator when the employer is located in one State, the plan participant lives in another, and the participant's former spouse lives in a third. In such a situation, administrators might find that plan payments are subject to conflicting legal obligations.[171]

While the majority did not, interestingly, even mention *Mackey*, there is a fairly straightforward way to distinguish the cases, along two dimensions.[172]

First, *Mackey* involved the ability of someone already holding an underlying judgment to prevent the plan from paying a beneficiary by executing that judgment against the plan.[173] The plan did not have to "figure out" anything; the relevant liability had already been litigated and fixed.[174] *Egelhoff*, in contrast, involved passive state law that by its very existence required plan administrators to understand it before they ever wrote a check—and that burden was sufficiently disruptive to render the statute preempted.[175]

It goes almost without saying that similar if not more acute disuniformity costs would arise in the abortion benefit setting involving criminal law. Anti-abortion State A might only criminalize abortion in certain circumstances—e.g., only after six weeks generally, but up to fifteen weeks if the result of a reported rape, and at any time if the life of the mother was at risk—while anti-abortion State B might choose different circumstances—e.g., up to fifteen weeks generally, but no rape exception afterward, and no statement in the law about any other exceptions. Much like in *Egelhoff*, an employer operating in multiple states would have to figure out, with respect to a beneficiary who traveled to a state where abortion was legal, whether the beneficiary was from State A or B, and then whether under that state's law the obtained abortion was illegal, *all to figure out whether the administrator's compliance with the plan, and thus ERISA, by paying owed benefits to the beneficiary was a crime.* No similar administrative risk is present in the garnishment context; the administrative burden is functionally ex-

171 *Id.* at 148–49.

172 The dissent did, but only in passing. *Id.* at 157–58 (Breyer, J., dissenting).

173 Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 827 (1988).

174 *See id.*

175 *See Egelhoff* 532 U.S. at 147–50 (majority opinion).

post, liquidated, and readily ascertainable.[176] Even there, four dissenting Supreme Court justices and the United States thought *general garnishment statutes* did not apply to ERISA plans—that is how powerful ERISA's preemptive force is.[177]

Second, while garnishment laws do affect who gets paid, they do not in any way bear on the size, structure, or type of benefits a plan may offer. They are thus in no way analogous to a mandated benefit law—which is unquestionably a law that "relates to" employee benefit plans and survives only because it is saved.[178] Aiding and abetting laws very much would, as mentioned at the beginning of this discussion, functionally mandate benefit offerings by barring the offer of abortion benefits. Finally, as the Court explained in *Gobeille*, sometimes general laws that do not otherwise directly relate to employee benefit plans might constructively do so by imposing costs so acute that such laws "force an ERISA plan to adopt a certain scheme of substantive coverage."[179] We are here considering a law making it criminal to pay abortion benefits; it is hard to imagine a more coercive way "to force an ERISA plan to adopt a certain scheme of substantive coverage."[180]

Because such a law would relate to employee benefit plans, the next question is whether it would be saved by the insurance savings clause. At first glance it appears that some if not all iterations of aiding and abetting laws, such as generic versions of such laws currently on the books in many states, would *not* qualify as saved insurance law because, inter alia, they would not be specifically directed at insurers.[181] Yet that issue need not detain us, because the state could at any time enact a classically saved insurance law that barred in-state insurers from covering abortion,[182] thus achieving the same result. Importantly, however, neither a general aiding and abetting law nor a saved no-abortion-may-be-covered insurance law would reach plans that

176 Garnishment also does not destroy the benefit; the participant is still in some sense receiving it—in the form of a reduced debt to the creditor. An abortion payment prohibition, in contrast, destroys a benefit the plan promised.

177 *See* Mackey v. Lanier Collection Agency & Serv., Inc., 486 U.S. 825, 841 (1988) (Kennedy, J., dissenting).

178 *See* Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 738–47 (1985).

179 Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 320 (2016) (quoting N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995)).

180 N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995).

181 *See supra* note 63 and accompanying text. The insurance clause only saves laws specifically directed at insurers; the criminal clause only saves "generally applicable" criminal laws. Locating an abetting law that satisfies both conditions may be challenging.

182 *See supra* Section II.B.

self-insured with respect to abortion.[183] The former would be preempted under the "relate to" clause and the latter under the deemer clause.[184]

The only way to reach such plans would be through the criminal clause, i.e., through a generally applicable criminal law that barred paying for abortion. Although—as the foregoing explanation emphasizes—doing so might not be so straightforward as one might think, if we assume a state finds a way to craft such a law, then the only refuge for plans would be implied preemption.

2. *Criminal Aiding and Abetting Laws and Implied Preemption*

If we assume the existence of a generally applicable law that criminalizes the aiding and abetting of abortion, and thus *paying* for abortion, the immediate challenge such a law would face is that it would strictly conflict with the provisions of ERISA—one of the Supreme Court's two bases for finding implied preemption.[185]

Recall that ERISA plans are run and administered by fiduciaries, who have a variety of duties and obligations they must comply with.[186] One of those obligations is that fiduciaries *must* follow the terms of the plan, unless following those terms would itself be a violation of ERISA.[187] A fiduciary, in short, is not free to disregard plan terms. And while fiduciaries have considerable latitude with respect to interpreting the plan, there is no question *at all* that, when a plan requires something, ERISA requires the fiduciary to do it.

The Court has readily found state law preempted because the state law would have required the fiduciary to do something contrary to the plan's terms and has taken pains to warn against disregarding the plan's commands:

> ERISA requires "[e]very employee benefit plan [to] be established and maintained pursuant to a written instrument," 29 U.S.C. § 1102(a)(1), "specify[ing] the basis on which payments are made to and from the plan," § 1102(b)(4). The plan administrator is obliged to act "in accordance with the documents and instruments governing the plan insofar as

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183 Nor would such laws likely reach an employer's secondary plan, sited out-of-state, who engages out-of-state insurers for abortion coverage in that other state. *See supra* Part II.B; notes 108–115 and accompanying text.

184 *See supra* Section II.B.

185 Boggs v. Boggs, 520 U.S. 833, 841 (1997); *see also supra* notes 91–94 and accompanying text.

186 *See supra* Part I.A (discussing duties of ERISA fiduciaries).

187 29 U.S.C. § 1104(a)(1)(D); *see also supra* Section I.A.

> such documents and instruments are consistent with the provisions of [Title I] and [Title IV] of [ERISA]," § 1104(a)(1)(D), and ERISA provides no exemption from this duty when it comes time to pay benefits.[188]

The Court's clarity on this point—as well as its many admonitions that ERISA is first and foremost concerned with reliance on and fidelity to the plan[189]—means there is a direct clash between ERISA and aiding and abetting criminal law that seeks to bar plans from paying for out-of-state abortions. As mentioned in the beginning of Part II, this Article only concerns itself with those plans which affirmatively cover abortion as a benefit.[190] In such a case—where a state threatens criminal penalties against the plan on the theory that the plan was aiding and abetting abortion[191]—would ERISA impliedly preempt the relevant criminal statutes? There is very good reason to think so.

First, as noted above, the Court has vigorously emphasized that plan fidelity is at the center of ERISA regulation. That is not only because the Court believes a chief "purpose" of ERISA is to ensure plan fidelity—although the Court does most certainly believe that.[192] It is because ERISA says so *explicitly*. ERISA's own provisions (1) provide that the plan must "specify the basis on which payments are made . . . from the plan," (2) command that the plan must be followed, with no exceptions other than when doing so would violate ERISA, and (3) create two causes of action to ensure that fiduciaries follow the plan terms and no one else interferes with the plan.[193]

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188 Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 300 (2009).

189 *See, e.g.*, *id.*; Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83 (1995) (explaining that ERISA's statutory scheme "is built around reliance on the face of written plan documents"); US Airways, Inc. v. McCutchen, 569 U.S. 88, 100–01 (2013) (observing that because "ERISA's principal function [is] to 'protect contractually defined benefits' . . . [t]he plan, in short, is at the center of ERISA" (quoting Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985))); Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99, 108 (2013) (describing crucial importance of following plan terms).

190 *See supra* notes 98–99 and accompanying text.

191 *Cf.* Will Maddox, *Conservative Texas Legislators Threaten Large Law Firm for Covering Costs of Employee Abortions*, D MAG. (July 11, 2022, 3:36 PM), https://www.dmagazine.com/healthcare-business/2022/07/conservative-legislators-threaten-sidley-austins-north-texas-leader-for-reproductive-health-support/ [https://perma.cc/4MVW-C4P6] (describing letter sent by conservative Texas state legislators that legally threatened law firm Sidley Austin in connection with paying for abortions).

192 *See supra* note 189.

193 29 U.S.C. § 1102(b)(4) (plan must "specify the basis on which payments are made to and from the plan."); *id.* § 1104(a)(1)(D) (fiduciary must follow the terms of the plan); *id.* § 1132(a)(1)(B) (providing cause of action that a beneficiary may bring against the plan to enforce the terms of the plan); *id.* § 1132(a)(3) (providing cause of action allowing the enjoining of "any act or practice" that violates the plan). Indeed, the Supreme Court has specifically held that

Surely a state law that criminalizes the act of following ERISA's explicit commands should be impliedly preempted. A fiduciary is in an impossible position—to pay for the benefits would violate state law, whereas to not pay would violate the plan terms, and thus ERISA itself, and subject the plan to suit under ERISA's own enforcement provisions.[194] The unavoidable reality is that state law would be converting the definitionally fundamental act of administering a plan according to its terms *into a crime*.

To say that would have a profound chilling effect on the willingness of employers to offer plans and of fiduciaries to serve is to put it mildly. As argued in Part II.C, in the reporting context, multi-state employers' plan administrators would face a nightmare scenario: having to master the various anti-abortion states' differing exceptions to criminal liability to determine whether a specific beneficiary obtained a lawful abortion or not—and thus whether the administrator was committing a *felony* by paying for it.[195] Nor is aiding and abetting criminal liability, and thus the administrative burden, conceptually limited to abortion; it could reach *any* benefit payment for *any* procedure—e.g., treatments derived from the unethical treatment of animals—a given state wished to criminalize at *any* time.

Consider again *Egelhoff*. Although *Egelhoff* was an express preemption case, the Court's rationale applies with similar force in the implied preemption context.[196] *Egelhoff* involved a state statute that governed beneficiaries.[197] Following the statute to determine whom to pay would have meant plan fiduciaries would have had to derogate the plan. As Justice Thomas, writing for the majority, explained:

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section 1132(a)(3) claims "admit[] of no limit . . . on the universe of possible defendants" against which they can be brought. Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 246 (2000).

194 *See* 29 U.S.C. §§ 1104(a)(1)(D), 1132(a)(1)(B).

195 *See supra* Part II.C.4 (discussing the administrative burden of figuring out whether a specific beneficiary obtained an abortion that violated the anti-abortion laws of a specific state).

196 *Compare* Egelhoff v. Egelhoff, 532 U.S. 141, 147 (2001) (explaining that in determining express preemption "we look both to 'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans" (quoting Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997))), *with* Boggs v. Boggs, 520 U.S. 833, 841 (1997) (explaining that in determining implied preemption the Court asks whether the state law "conflicts with the provisions of ERISA or operates to frustrate its objects"). *Cf.* Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474, 485 (2020) (Thomas, J., concurring) (observing that the Court's findings of both express and implied preemption share a commonality of involving "matter[s] explicitly addressed by ERISA['s] provisions").

197 *Egelhoff*, 532 U.S. at 147.

> [U]nder the text of ERISA, the fiduciary "shall" administer the plan "in accordance with the documents and instruments governing the plan," 29 U.S.C. § 1104(a)(1)(D). The Washington statute conflicts with this command because under this statute, the only way the fiduciary can administer the plan according to its terms is to change the very terms he is supposed to follow.[198]

Importantly, the Washington statute at issue—the one the Court found preempted because it conflicted with the terms of the plan—*contained an opt-out provision*.[199] The Washington statute permitted any instrument governing asset distribution to be exempt from the statute as long as the instrument said so.[200] This did not at all move the Court, which wrote:

> Even though the Washington statute's cancellation of private choice may itself be trumped by specific language in the plan documents, the statute does "dictate the choice[s] facing ERISA plans" with respect to matters of plan administration. Plan administrators must either follow Washington's beneficiary designation scheme or alter the terms of their plan so as to indicate that they will not follow it. The statute is not any less of a regulation of the terms of ERISA plans simply because there are two ways of complying with it. . . . [If the law is not preempted, plan administrators] must maintain a familiarity with the laws of all 50 States so that they can update their plans as necessary to satisfy the opt-out requirements of other, similar statutes. They also must be attentive to changes in the interpretations of those statutes by state courts. This "tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction" is exactly the burden ERISA seeks to eliminate.[201]

Aiding and abetting laws—which of course contain no opt out provisions—pose precisely the same burden with regard to abortion benefits, and do so more acutely, coming as they do not with mere civil liability but with the possibility of jail time for individual administrators.

Nor is the Court's sometimes mentioned solicitude for "traditional" state regulation likely to do much work in the plan-derogating

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198 *Id.* at 151 n.4.

199 *Id.* at 150.

200 *See id.*

201 *Id.* at 150–51 (citation omitted) (first quoting *Dillingham*, 519 U.S. at 334; and then quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990)).

context. Although the Court did, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,[202] note a "presumption" against preemption in areas of traditional state regulation,[203] it has since made clear such a presumption matters little when a state attempts to interfere with the internal workings of a plan. In *Egelhoff*, for example, the Court was unmoved by such a presumption, explaining that "we have not hesitated to find [a traditional state field like] family law pre-empted when it conflicts with ERISA or relates to ERISA plans."[204]

That quote from *Egelhoff* was referring to the implied preemption case of *Boggs*, which is further instructive on the point. At issue in *Boggs* was a conflict between Louisiana's community property laws and ERISA.[205] The majority opinion took pains to specifically acknowledge the importance of community property laws in states' regulatory schemes:

> This case lies at the intersection of ERISA pension law and state community property law. None can dispute the central role community property laws play in the nine community property States. It is more than a property regime. It is a commitment to the equality of husband and wife and reflects the real partnership inherent in the marital relationship. State community property laws, many of ancient lineage, "must have continued to exist through such lengths of time because of their manifold excellences and are not lightly to be abrogated or tossed aside." The community property regime in Louisiana dates from 1808 when the territorial legislature of Orleans drafted a civil code that adopted Spanish principles of community property. Louisiana's community property laws, and the community property regimes enacted in other States, implement policies and values lying within the traditional domain of the States. These considerations inform our pre-emption analysis.[206]

Yet the Court nonetheless concluded that community property law in *Boggs* was impliedly preempted because it permitted benefit distributions contrary to those contemplated by ERISA.[207] Put differently,

202 514 U.S. 645 (1995).

203 *Id.* at 654–55 (mentioning presumption against preemption in "fields of traditional state regulation").

204 *Egelhoff*, 532 U.S. at 151.

205 Boggs v. Boggs, 520 U.S. 833, 836 (1997).

206 *Id.* at 839–40 (citations omitted) (quoting 1 William Q. de Funiak, Principles of Community Property 11, 85–89 (1943)).

207 *Id.* at 836.

even an area of law traditionally handled by the states—and unquestionably an important vehicle for a state's expression of its values—did not suffice to save state law from implied preemption when it commanded a result different than what ERISA contemplated.

The details of *Boggs,* while a little involved, provide further evidence still for the Court's appetite for preemption, even in "traditional" areas of state regulation. Specifically, one of the relevant ERISA provisions at issue in *Boggs* that motivated the Court's implied preemption holding was actually a *permissive* provision.[208]

The *Boggs* dispute was between the sons of participant Isaac Boggs and his second wife Sandra.[209] Isaac had been married to Dorothy, and they had had three sons.[210] Dorothy died and willed some of her community property interest, which logically included Isaac's retirement benefits, to the sons.[211] Isaac remarried Sandra and then died.[212] The sons claimed that Dorothy's testamentary transfer of her community property interest entitled them to a portion of Isaac's retirement benefits; Sandra objected, on the grounds that ERISA said otherwise.[213]

One of Isaac's retirement benefits at issue was a monthly annuity from a defined benefit plan.[214] Such annuities are required by ERISA to go to the surviving spouse *unless* the spouse and employee-participant elect to take the benefit in a different form and designate a different beneficiary.[215] Sandra and Isaac never elected to do so.[216] The Court ruled that Louisiana's community property laws thus directly conflicted with ERISA's provisions governing the distribution of a survivor's annuity.[217] Yet while ERISA does directly require as a default that the surviving spouse receive an annuity, that provision, as the Court recognized, permits the participant and the spouse to agree in writing to modify the form of the benefit and assign that benefit to someone else.[218] Had Sandra and Isaac done so—had they in effect rewritten the plan benefit so someone else would receive it—there is

208 *Id.* at 842 (citing 29 U.S.C. § 1055(a)).
209 *Id.* at 836.
210 *Id.*
211 *Id.* at 836–37.
212 *Id.* at 836.
213 *Id.* at 837.
214 *Id.* at 836.
215 *Id.* at 842 (reviewing how 29 U.S.C. § 1055 operates).
216 *Id.*
217 *Id.* at 843–44.
218 *Id.* at 842 (noting how a spouse can, but here did not, consent to designation of a different beneficiary under 29 U.S.C. § 1055).

no indication that the Court would have found *that election* preempted. The most accurate way to read *Boggs* is thus as a signal about what happens when state law interferes with what ERISA requires *or permits* a plan to provide for with regard to the basis on which benefits get paid. What happens is the state law gets preempted.

Finally, as mentioned in Section II.C, the Court has sharply disapproved of any state law that expands the liability or consequences associated with engaging in plan-related behavior by fiduciaries.[219] If state law regarding remedies for tort and contractual breach for *violating* the plan's terms are sufficiently threatening to ERISA's purposes to justify preemption,[220] that criminal penalties for *following* the plan would not likewise trigger implied preemption would be profoundly surprising.

It is here a skeptical reader may demand a pause, to consider a counterargument grounded in a common-sense appeal to some natural limit on ERISA preemption. An objector might say that the reasoning here suggests that employers could write *any benefit* into the plan and immunize themselves from state criminal law. Could a plan promise to give terminally ill plan participants heroin? Depressed participants MDMA or LSD? Recently divorced participants prostitutes? Put more bluntly, the argument goes, Congress surely cannot have intended that merely writing something into a plan amounts to a get-out-of-state-law-free card.

Certainly, the objection has intuitive appeal. But it that does not mean it is persuasive. First, remember that plans are exempt from state law, not federal law.[221] No plan could promise to pay for a benefit that is illegal under federal law.[222]

Second, that interpreting ERISA a certain way might lead to an odd place—a place where laws we *think* a state should be free to enforce are nonetheless not enforceable because of ERISA—is not nearly enough to reject that interpretation of ERISA. As discussed throughout this Article, ERISA already bars states from enforcing their own law of remedies, damages, and property with respect to plan-related conduct. That is a very odd fact, but it is indisputably so.

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219 *See supra* notes 142–43 and accompanying text.

220 *See* Aetna Health Inc. v. Davila, 542 U.S. 200, 217–18 (2004); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 43, 54 (1987); *see also infra* note 250 (describing the many ERISA contexts, preemption or otherwise, in which the Court has rejected legal rules that would increase the chance of or costs associated with a fiduciary bearing liability for misconduct).

221 29 U.S.C. § 1144(e).

222 *Id.* § 1144(d).

Third, the intuitive appeal of the notion that "by George, it simply cannot be that states cannot enforce their criminal laws!" is diminished considerably when examined more carefully. As a matter of constitutional interpretation, the Supremacy Clause does not differentiate in the kinds of state law that are preemptible—federal law preempts state civil and criminal laws alike.[223] As a matter of statutory interpretation, it must be the case that ERISA means states cannot enforce *some* of their criminal laws, or otherwise there would be no need to have included a "generally applicable criminal law" exception.[224] And it *also* must be the case that the "generally applicable criminal law" exception does not give states free rein to do whatever they want criminally, because *that* would mean that generally applicable criminal laws can never be *impliedly* preempted by ERISA. There is no hint of that in the ERISA case law, and it cannot practically be the case, as it would allow states to use criminal law to gut ERISA's express preemption provisions.[225]

Most importantly, however, the intuition is a mischaracterization. States *can* enforce their criminal laws against the people who do the thing they wish to bar: against women who receive abortions and against doctors who perform them. Those individuals, and that conduct, are not protected by ERISA, because nothing there—to put it informally—involves plan actors doing plan things.

In contrast, the fiduciaries who must abide by both ERISA and the plan are, conceptually speaking, modern-day trustees. The classic act of a trustee is to pay money pursuant to the terms of the trust.[226] ERISA intended, among other things, to ensure that the central conditions upon which trust payments were made would solely be defined by federal law. Given all the *other* tools states have at their disposal to prescribe abortion-related conduct—including subjecting nonplan financiers of abortion to criminal aiding and abetting laws—there is no

223 *See, e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 326 (2015) (explaining that "a court may not convict a criminal defendant of violating a state law that federal law prohibits" nor may a court "hold a civil defendant liable under state law for conduct federal law requires"); Mutual Pharm. Co. v. Bartlett, 570 U.S. 472, 476 (2013) (preempting state civil law); Pennsylvania v. Nelson, 350 U.S. 497, 499, 509 (1956) (preempting state criminal law).

224 *See* 29 U.S.C. § 1144(b)(4).

225 *See supra* Section II.C.4.

226 In the words of the Court, "[T]he common law trustee's most defining concern historically has been the payment of money in the interest of the beneficiary." Pegram v. Herdrich, 530 U.S. 211, 231 (2000) (citing George Gleason Bogert & George Taylor Bogert, Law of Trusts and Trustees §§ 551, 741-747, 751-775, 781-799 (rev.2d ed. 1980); 2A Austin Wakeman Scott & William Franklin Fratcher (4th ed. 1987) §§ 176, 181; 3 *id.*, §§ 188-193; 3A *id.*, § 232.).

reason to be aghast at the conclusion that ERISA bars this specific intrusion into plan affairs. To the extent one is unhappy with that outcome, one should prevail upon Congress to amend ERISA, not ask the courts to jettison longstanding precedent about what ERISA regulates and thus what it preempts.[227]

Finally, it is important to note that, in describing ERISA's implied preemption, the Court has explained that state laws that either "conflict[]" with ERISA *or* "frustrate its objects" are preempted.[228] Establishing conflict is more straightforward because one only need identify the ERISA provision or provisions that the state law conflicts with and declare victory. Determining what qualifies as frustrating ERISA's objects is more nebulous,[229] not only because the Court has claimed that ERISA has more than one object, but also because—to the extent ERISA had and has multiple objectives—sometimes they conflict, and it is not clear *which* ERISA objective should be prioritized if a challenged state law furthers one objective but undermines another.[230]

The classic example of this preemption conundrum involves state laws that protect beneficiary interests but make it more likely that a fiduciary will be held liable or pay more significant damages. The Court has explained that Congress wished to protect beneficiary interests but also did not want a liability regime so expansive that employers would not want to offer plans.[231] In navigating between those two objectives, the Court has often, although not always, prioritized em-

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227 If one wants to argue that the Court's reference in *Boggs* to "conflicts with specific provisions of ERISA," *Boggs v. Boggs*, 520 U.S. 833, 859 (1997), as a trigger for implied preemption in actuality only refers to those situations where the conflict is with those ERISA provisions that impose a *substantive* requirement—e.g., the barring of anti-alienation clauses—then one must ignore that the Court has *repeatedly* made clear that the statutory provision that requires complying with the plan is *itself* one of ERISA's most important provisions. *See, e.g.*, US Airways, Inc. v. McCutchen, 569 U.S. 88, 100–01 (2013) (explaining the necessity of following the plan and citing many cases holding that to be one of ERISA's central purposes).

228 *Boggs*, 520 U.S. at 841.

229 In fairness to the Court, obstacle preemption is a feature of preemption doctrine generally; it is not something the Court invented solely for ERISA. *See* Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (discussing obstacle preemption).

230 Scholars have long criticized the courts for not ordering and prioritizing ERISA's various objectives properly. *See, e.g.*, John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 S. Ct. Rev. 207, 221–22 (arguing that judicial interpretation of ERISA has run counter to the statute's objective of preventing fiduciary misconduct); Andrew Stumpff, *Darkness at Noon: Judicial Interpretation May Have Made Things Worse for Benefit Plan Participants Under ERISA Than Had the Statute Never Been Enacted*, 23 St. Thomas L. Rev. 221, 222–25 (2011) (arguing ERISA's chief purpose of protecting beneficiaries has been disregarded by courts in favor of lesser concerns).

231 *See infra* notes 234–36.

ployer interests—i.e., predictability and administrability—over ensuring beneficiaries have the legal tools to police the plan. The reason *this* seems like an easier case—namely finding preempted criminal laws that subject plans to criminal liability for paying for abortions the plan instrument requires be paid for—is because virtually every "object" of ERISA the Court has *ever* articulated lines up in favor of preemption:

- Does preemption here ensure plan participants receive what they were promised?[232] Yes.
- Does preemption here ensure that the benefit delivery will be uniform across states?[233] Yes.
- Does preemption here prevent the plan from being derogated?[234] Yes.
- Does preemption here ensure that fiduciaries will be able to determine from the four corners of the plan what their obligations are?[235] Yes.
- Does holding otherwise here subject plans and fiduciaries to costly, burdensome, unpredictable, and chilling liability?[236] Yes.
- Could Congress easily fix the matter by making abortion illegal federally or by providing that abortion laws are not preempted by ERISA?[237] Yes.

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232 *E.g.*, Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (explaining one of ERISA's chief purposes is to "protect contractually defined benefits").

233 *E.g.*, Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 11 (1987) (observing that ERISA was specifically intended to "afford employers the advantages of a uniform set of administrative procedures").

234 *E.g.*, Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99, 108 (2013) (explaining that abiding by the written terms of the plan is "the linchpin of 'a system'" that keeps costs sufficiently low so employers are not "unduly discourage[d] . . . from offering [ERISA] plans in the first place" (quoting Variety Corp. v. Howe, 516 U.S. 489, 497 (1996))).

235 *E.g.*, Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 555 U.S. 285, 302–03 (2009) (emphasizing that *Boggs* and *Egelhoff* involved laws that were preempted because such laws "blur[red] the bright-line requirement to follow plan documents in distributing benefits" and thus "undermine[d] the congressional goal of minimiz[ing] the administrative and financial burden[s] on plan administrators" (internal quotations marks omitted) (quoting Egelhoff v. Egelhoff, 532 U.S. 141, 143 (148))).

236 *E.g.*, Conkright v. Frommert, 559 U.S. 506, 517 (2010) (reiterating that one of ERISA's central objectives was to ensure employers would offer benefits by assuring predictable liabilities, "uniform standards of primary conduct and a uniform regime of ultimate remedial orders and awards when a violation has occurred" (quoting Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 379 (2002))).

237 *Cf.* Montanile v. Bd. of Trs. of Nat'l Elevator Indus. Health Benefit Plan, 577 U.S. 136, 150 (2016) (advising litigant unhappy with the scope of relief under ERISA that Congress could have easily written the statute differently but chose not to).

All that said, a Court bold enough to overturn *Roe* may find a course shift in ERISA a comparatively minor task. But a fair reading of the pertinent ERISA jurisprudence to date suggests aiding and abetting laws face a major implied preemption hurdle.

3. *Civil Aiding and Abetting Laws and Preemption*

For much the same reasons expressed above regarding criminal aiding and abetting laws, civil aiding and abetting laws face serious hurdles to survive preemption: Such laws "relate to" employee benefit plans and cannot, with respect to plans, be saved by the savings clause.[238]

III. Pro-Choice Plans in Litigation

Part III shares some brief thoughts about what potential court battles between anti-abortion states and plans might look like—that is, between those plans that choose to provide an out-of-state abortion benefit and those states that pass laws that attempt to stop them from doing so via the imposition of either civil or criminal liability.

As explained below, there is an important procedural difference between laws enforced by state officials, namely all criminal laws and many civil laws, and laws enforced by private individuals, i.e., "bounty hunter" laws. As a result, where and how a plan might seek to obtain certainty regarding anti-abortion laws will differ depending on which type of law the plan fears being subject to.

A. *Traditional Anti-Abortion Laws*

To the extent a "traditional" state law—i.e., a criminal or civil law enforced by state officials—would render a plan paying for out-of-state abortion benefits subject to criminal or civil liability, the plan has a comfortable remedy: an action brought under 29 U.S.C. § 1132(a)(3). An (a)(3) claim is a remedy that plan fiduciaries may use "to enjoin any act or practice which violates any provision of [ERISA] or the terms of the plan, or . . . to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [ERISA] or the terms of the plan."[239]

Unlike other remedies in ERISA, the (a)(3) remedy, importantly, is not limited in terms of defendants against whom it can be

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238 *See supra* Sections II.D.1–.2.

239 29 U.S.C. § 1132(a)(3).

brought.[240] Such a remedy is appropriate where a plan fiduciary is concerned that a state law would require her to do something contrary to the plan and thus ERISA; in that instance, the fiduciary can seek a declaratory judgment that the state law is unenforceable on preemption grounds.[241] With respect to traditional state laws, then, a plan's path is straightforward: file suit seeking relief against state officials under (a)(3) in federal court.

B. *Bounty Hunter Anti-Abortion Laws*

Bounty hunter anti-abortion laws are those laws similar to Texas's well-known Senate Bill 8 ("S.B. 8") law. S.B. 8 subjects to civil liability any person who performs or aids an abortion performed by a Texas-licensed physician, or intends to perform or aid such an abortion, after the existence of a "fetal heartbeat."[242]

The law contained several features which critics believed were intended to—even in a world where *Roe* was still good law—drive abortion providers out of the state.[243] Specifically, the law was enforceable only by private individuals, as opposed to state officials,[244] and was heavily tilted in favor of plaintiffs—e.g., awarding at least $10,000 in damages for every abortion a defendant performed or aided; entitling the plaintiff but not the defendant to attorneys' fees; and meaningfully limiting the defenses a defendant could assert.[245] When abortion providers sought to enjoin application of the law prior to it going into ef-

240 *Id.*; *see also* Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 246 (2000) (noting that (a)(3) claims contain no textual limit against whom they can be brought).

241 *E.g.*, Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 27 n.31 (1983) (noting plan seeking to enjoin state law can bring claim under (a)(3)). For example, in *Gobeille*, Liberty Mutual filed suit in federal court against Vermont seeking declaratory relief under section 1132(a)(3). Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 318 (2016).

242 TEX. HEALTH & SAFETY CODE ANN. §§ 171.201-.212 (West 2022). Section 171.201 defines "physician" as a Texas-licensed physician; section 171.204 prohibits performance of an abortion by a physician after detection of a fetal heartbeat; and section 171.208 imposes civil liability for violating or for aiding and abetting a violation of section 171.204 and provides private individuals with a right to sue. *Id.* §§ 171.201, .204, .208.

243 *See, e.g.*, Katrina Morris, Recent Case Development, Whole Woman's Health v. Jackson*: One Texas Law's Procedural Peculiarities and Its Monolithic Threat to Abortion Access*, 48 AM. J.L. & MED. 158, 159–163 (2022) (expressing alarm over likely effects of the law).

244 TEX. HEALTH & SAFETY § 171.208(h) (barring state officials from bringing suit).

245 *Id.* § 171.208(b)(2) (awarding statutory damages of at least $10,000 for each violation); *id.* § 171.208(b)(3) (noting a successful plaintiff "shall" receive costs and attorneys' fees); *id.* § 171.208(e)(4) (invalidating various defenses); *id.* § 171.208(i) (prohibiting the defendant from receiving any award of attorneys' fees and costs in the event of a successful defense).

fect, the Supreme Court held that such a pre-enforcement challenge was largely impermissible.[246]

The result is that those subject to liability under S.B. 8, and similar laws other states might adopt,[247] are subject to voluminous lawsuits by private citizens for aiding or performing abortions. Unlike a result against the state, a successful result against one citizen would not prevent a future citizen from bringing suit based on essentially identical facts but for a different abortion. And because the law bars courts from awarding fees to a successful defendant, there is no judicial means to deter baseless or frivolous suits.[248] Moreover, although S.B. 8 limited itself to abortions performed by Texas-licensed physicians: (1) some Texas physicians are dual-licensed and thus could perform abortions out of state and (2) the law could be amended so as to potentially reach more out-of-state abortions.[249] Even after *Dobbs*, S.B. 8 and similar laws accordingly pose a potential liability threat to plans who pay for out-of-state abortions.

Yet if a bounty hunter attempts to sue an in-state plan for paying for an out-of-state abortion, such a suit is likely to fare poorly. For the reasons explained in Section II.D, a self-insured ERISA plan that pays out benefits in accordance with the plan's terms is very likely to be able to persuade a court that, under ERISA, the bounty law is substantively preempted. If anything, the case for substantive preemption with respect to bounty hunter suits is even *stronger* than it is with respect to traditional state law that interferes with plan operations. That is because bounty hunter laws not only increase the bases for, likelihood of, and damages recoverable in actions against fiduciaries administering the plan—something the Court is extraordinarily skeptical of, in any context regarding virtually any type of legal rule[250]—

246 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 530–34 (2021).

247 *See, e.g.*, Matt Ford, *Texas's Abortion Bounty Law Is Inspiring Republican Lawmakers Around the Country*, NEW REPUBLIC (Mar. 11, 2022), https://newrepublic.com/article/165710/texas-bounty-law-abortion-desantis [https://perma.cc/C5B7-GT7N] (reporting on efforts by anti-abortion advocates to craft laws similar to or more aggressive than S.B. 8).

248 TEX. HEALTH & SAFETY § 171.208(i) (awarding costs and attorneys' fees against plaintiff not permitted).

249 *See* Morris, *supra* note 243, at 161–63.

250 For example, in *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 148 (1985), the Court rejected the idea that ERISA itself permitted an award of extracontractual damages. In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 57 (1987), and *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 145 (1990), the Court found state law that expanded liability and damages to be preempted. In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111, 115 (1989), the Court held that a plan can award itself the power to interpret whether benefits are owed, and courts must defer to any such plan interpretation. In *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 379 (2002), and *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004), the Court explained that state law

such laws do so in perhaps the way *most* disruptive to the scheme of regulation Congress enacted with respect to employee benefit plans.

Disruptiveness matters to the Court because regulatory volatility—whatever the underlying substantive rule—further reduces the likelihood that employers will offer plans and that competent fiduciaries will serve.[251] A bounty hunter law is much more disruptive to plan affairs, for example, than regulatory power traditionally wielded by state authorities. State regulators, whatever their flaws, nonetheless possess some institutional measure of expertise, knowledge, judgment, and predictability. They are unlikely to pursue, for example, actors for whom they have no reasonable belief are actually violating state law, and they are likely to seek to gather information pertaining to said violation prior to acting. They are not likely, in short, to file lawsuits willy-nilly against plans. That means, merely as a practical matter, there is a natural constraint on how disruptive state enforcement will be.

While that will generally not save state law from being preempted, it is an important contrast between traditional state law and bounty hunter laws. Bounty hunter laws involve private citizens who lack any formal or prudential constraints. With regard to the Texas abortion bounty law, for example, civil liability and thus the right to sue against a plan would only lie with respect to an abortion (1) performed after six weeks (2) by a Texas-licensed physician (3) in a nonemergency for which (4) the plan, as opposed to someone else, actually paid.[252] That private citizens sincerely motivated by anti-abor-

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remedies that supplemented the available relief under ERISA would be preempted even if they were saved laws. In *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008), the Court held that even in the face of a financial conflict of interest on the part of the plan administrator reviewing benefits, courts must still defer to the plan administrator's interpretation with regard to whether such benefits were owed. In *Conkright v. Frommert*, 559 U.S. 506, 513 (2010), the Court held that even after an administrator denied benefits arbitrarily and capriciously, the same administrator was still entitled to judicial deference on its second attempt to interpret the plan. In *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 105–06 (2013), the Court ruled ERISA did not bar plans from shortening the statute of limitations against them via a provision in the plan. *See supra* notes 142 and 220 and accompanying text.

251 *See, e.g.*, Brendan S. Maher & Peter K. Stris, *ERISA & Uncertainty*, 88 Wash. U. L. Rev. 433, 464–74 (2010) (arguing that the Court's decades-long effort to limit the circumstances in which relief is available against fiduciaries, and reduce the damages recoverable in those circumstances, is motivated by a concern that employers will not offer benefits if doing so becomes too uncertain and volatile); *see also supra* note 250.

252 Liability is triggered if an abortion is performed after a fetal heartbeat, which is roughly six weeks. Tex. Health & Safety § 171.201(1); Kaitlin Sullivan, *'Heartbeat Bills': Is There a Fetal Heartbeat at Six Weeks of Pregnancy?*, NBC News (May 3, 2022, 5:39 PM), https://www.nbcnews.com/health/womens-health/heartbeat-bills-called-fetal-heartbeat-six-weeks-preg-

tion concern are likely to carefully confirm the foregoing predicates before bringing suit against a plan seems slim. And because S.B. 8 bars the imposition of costs against such litigants, there is little deterrent in the law itself against the filing of speculative, frivolous, or harassing suits by persons with questionable intent.[253] Yet litigation is costly for plans, even against nonmeritorious suits.

One can thus imagine a plausible argument that—even to the extent a court might be generally sympathetic to the idea that a state does have the power to bar plans from paying for abortions—permitting the state to exercise that power in the form of a bounty hunter scheme is unnecessarily disruptive to plan affairs in a way that alternative enforcement approaches would not be. Put differently, sometimes the state's choice of enforcement mechanism might be so potentially costly to plan affairs that the enforcement mechanism is preempted, even if the underlying substantive rule is still within a state's right to enact.

C. Forum

Whether a case proceeds in federal or state court plays a significant role in litigation strategy. Plans may prefer to have their ERISA disputes about state anti-abortion laws heard in federal courts for a variety of reasons—most notably the belief that a federal judge may be more sympathetic to finding preemption. In traditional circumstances, if a plan as plaintiff brings an (a)(3) claim for equitable relief, it can have that dispute adjudicated in federal court under ERISA's exclusive federal jurisdiction provision—and under federal question jurisdiction generally.[254] But a plan cannot initiate a suit against a bounty hunter because it does not know who the bounty hunter is until a suit is filed.

In contrast, suits initiated by bounty hunters present a significant jurisdictional challenge to plan defendants who prefer federal court. It is unlikely that a bounty hunter suit would satisfy complete diversity, as the bounty hunter will often be a State X citizen bringing a State X

nancy-rcna24435 [https://perma.cc/U8KY-DC9Z] (discussing how a heartbeat is discoverable at roughly six weeks). Only abortions performed by Texas-licensed physicians are defined as violations. TEX. HEALTH & SAFETY §§ 171.201(4), .204. Abortions required because of a medical emergency are exempt. *Id.* § 171.205. And a plan that did not pay for the abortion in question has not aided anything. Other laws might have different requirements or exceptions, and Texas could of course change its law. But that simply makes the opportunity for chaos more likely, not less.

253 TEX. HEALTH & SAFETY § 171.208(i).

254 29 U.S.C. § 1132(e)(1) (providing for exclusive federal jurisdiction over (a)(3) actions).

cause of action against a plan or fiduciary located in State X.[255] And although the outcome effectively turns on the federal question of ERISA preemption, in bounty-hunter-initiated suits the plan would be raising that issue as a *defense*, and thus the well-pleaded complaint rule would bar removal.[256] So, in such cases, the only option for removing the matter to federal court would be through a doctrine called complete preemption. Complete preemption—as opposed to ordinary, substantive preemption—is a jurisdictional doctrine that governs the forum in which certain disputes take place; it allows a defendant to evade the well-pleaded complaint rule, which provides that a federal defense or counterclaim is insufficient to invoke federal question jurisdiction.[257]

The particulars of complete preemption are not straightforward, but as I have written at punishing length elsewhere, the case for complete preemption with respect to bounty hunter claims against plans is not an easy one to make.[258] So if we assume for the sake of argument that a complete preemption argument against bounty hunters will fail, then plans will face them in state court. Yet a plan litigating in state court against a bounty hunter creates an interesting set of circumstances.

First, the substantive preemption arguments made above apply with just as much force in state court, and a state court is as formally obligated to preempt state law when federal law requires it as a federal court is.[259] Second, however, while the plan can assert a defense of preemption in state court, it can *also* file an action in federal court seeking relief under (a)(3) against the bounty hunter. Because (a)(3)

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255 *See* 28 U.S.C. §§ 1332 (establishing requirements for diversity jurisdiction), 1441(b) (limiting removal based on diversity).

256 *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 154 (1908) (holding that a federal defense does not confer federal question jurisdiction).

257 Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63–64 (1987) (explaining how complete preemption allows one to sidestep the well-pleaded complaint rule).

258 ERISA completely preempts some causes of action but not others. *Compare id.* at 66 (finding benefits claim completely preempted), *with* Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, 24–25 (1983) (finding claim by state tax authority against plan not completely preempted). For an extended analysis of whether ERISA completely preempts bounty hunter claims against plans, see generally Brendan S. Maher, *Abortion Bounties, Plans, and Complete Preemption*, *in* NEW YORK UNIVERSITY REVIEW OF EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION–2022 (David Pratt ed., LexisNexis Matthew Bender 2022) (concluding that the case for complete preemption against bounty hunters is weak).

259 *See, e.g.,* Testa v. Katt, 330 U.S. 386, 390–91 (1947) (asserting state courts are obligated to enforce federal laws).

is a remedy of exclusive jurisdiction,[260] a plan can *only* file in federal court—and it would be wise to do so.

Depending on what the rules for parallel proceedings are in state court, it is not clear which action will be stayed; the federal action might proceed.[261] In any event, a plan hit with a bounty suit in state court that immediately files an (a)(3) claim in federal court could benefit in two ways. First, as noted, the plan may—pursuant to the relevant rules regarding parallel proceedings—end up obtaining a stay of the state court action and proceed in a forum it likely believes favors it. Second, even assuming the federal action is stayed, if the plan prevails on its substantive defense in state court, then once that state action is complete, under issue preclusion it can immediately move for fees against the bounty hunter in federal court—the same reason it won its defense against the suit would be why its (a)(3) claim would win.[262] And a state rule, like S.B. 8, barring the award of fees against a bounty hunter directly conflicts with ERISA's fee-awarding provision, which permits the judge to award fees to either party.[263] There is thus no doubt that ERISA's fee provisions would govern, under which a plan could seek fees from the bounty hunter. The court is not obligated to award fees, but it could.[264] This would provide a legitimate deterrent to plaintiffs seeking to sue plans based on preempted law.

If the plan loses in state court—that is, if the state court concludes the plan's preemption defense fails and the state law on the merits subjects the plan to civil liability—then admittedly the plan must appeal up the state appellate chain until it secures reversal in the state courts or until the Supreme Court says otherwise. In that instance—absent a stay—the plan would have to stop paying for abortion in the interim and might have to pay statutory fees plus attorneys' fees under state law. The ERISA provision that provides for fees only applies to actions brought under ERISA; it does not explicitly apply to a defense that mirrors an (a)(3) claim.[265]

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260 29 U.S.C. § 1132(e)(1).

261 While the first-filed rule often applies, how individual states handle parallel proceedings varies across states and depends in part on the nature and circumstances of the parallel actions filed. *See generally* James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769 (1999) (offering a comprehensive treatment of parallel litigation).

262 Claim preclusion would not prevent the plan from doing so because the plan was jurisdictionally prohibited under section 1132(e) from bringing its (a)(3) claim in the first suit. RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. c (AM. L. INST. 1982).

263 29 U.S.C. § 1132(g)(1) (authorizing court to award fees to either party).

264 *Id.* (establishing fee award is discretionary).

265 *Id.* (tying fee award to the bringing of an ERISA "action").

That possibility is why, however, a plan might be well served by promptly commencing an action against traditional state-enforced anti-abortion laws in either federal or state court.[266] The preemptive issues in the case against the state are going to be similar to those against a bounty hunter. A win against a state on preemption grounds in either federal or state court will be, at a minimum, persuasive authority with respect to a defense asserted against a bounty hunter.

Conclusion

Dobbs overturned *Roe* and abolished the constitutional right to abortion in the United States. It did not, however, abolish decades of understanding about how ERISA sharply limits the ability of states to interfere with benefit plans. Given those two things, the argument made by this Article is straightforward—while State X can prohibit the provision of abortion within its borders, it cannot prevent in-state plans from paying for abortion for State X residents in another state where abortion is legal. Nor can a state require that the plan "report" on what it is doing with respect to abortions it pays for. State efforts to do so would be preempted by ERISA.

While not a resurrection of *Roe*, that is no small matter practically. Employee benefit plans cover roughly 155 million people in all fifty states and are thus, in both theory and practice, a major payer for abortions. They are accordingly an extremely convenient target for anti-abortion advocates in State X seeking to practically inhibit residents of State X from obtaining out-of-state abortions. If those plans choose to cover abortion, however, anti-abortion advocates will need to pursue a different path—or change federal law.

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266 *See supra* Section III.A. In state court, the plan could simply bring a state law action seeking a declaratory judgment against the state. In that instance, however, the plan would not have the advantage of bringing an (a)(3) claim.