DOBBS V EMPLOYEE BENEFITS: MAJOR QUESTIONS LEFT AFTER THE LANDMARK DECISION

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I. INTRODUCTION

On Monday, May 2, 2022, Politico released a report that it had obtained a copy of a draft opinion in the *Dobbs* case; an unprecedented event that shattered the Supreme Court's long-held traditions of secrecy and confidentiality.[1] The leaked Supreme Court draft opinion of *Dobbs v. Jackson Women's Health Organization*, authored by the conservative-leaning Justice Samuel Alito, highlighted the Court's willingness to overturn the long-held precedent established in *Roe*

[1] Chad G. Marzen & Michael Conklin, *Information Leaking and the United States Supreme Court*, BYU J. OF PUB. L., (forthcoming) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4132816. (on file with SSRN).

v. Wade.[2] On June 24, 2022, the majority released a ruling that overturned the longstanding precedent of a right to an abortion, forever changing the landscape of abortion rights in the United States.[3] The decision reversed national and uniform federal protection of abortion rights and instead gave the power to the states and their elected state representatives to decide the protections and limitations of abortion laws.[4] While a win for pro-lifers, the opinion in *Dobbs* has formulated major questions and left scholars, judges, and individuals with few answers.

One of the major questions is how the *Dobbs* decision impacts companies, employers, employees, and employee benefits. Employee benefits are often described as the extra benefits or "perks" that an employer voluntarily provides to its employees.[5] Benefits include pensions, severance pay, paid vacation time, and medical care or coverage.[6] Benefits are often provided by employers through employee benefit plans, which are separated under pension plans or welfare plans.[7] In 1974, Congress passed the Employee Retirement Income Security Act of 1974 (ERISA) to govern employee benefits plans.[8] ERISA was enacted by Congress to prevent the 'great personal tragedy' suffered by employees through the loss of pensions or benefits.[9] Congress wanted to protect employees while also favoring plan sponsors and administrators by promoting uniformity of law and reducing the administrative burden of companies having to comply with multiple laws.[10] Since its passing, ERISA has been amended numerous times by Congress and interpreted differently by the Supreme Court, yet private employers, insurance companies, and federal courts continue to rely on ERISA's guidelines when administering and ruling on employee benefit plans.

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[2] Justice Samuel Alito, *1st Draft S.Ct. No. 19-1392, Dobbs v. Jackson Women's Health Org.*, POLITICO (Feb. 10, 2022).
[3] Dobbs v. Jackson Women's Health Org., 141 S. Ct. 2619 (2021).
[4] *Id*. at 2259.
[5] Kathryn L. Moore, UNDERSTANDING EMPLOYEE BENEFIT LAW 3 (2nd ed. 2020) (explaining some employee benefits are mandated by law, including Social Security, Medicare, and unemployment insurance).
[6] *Id*.
[7] ERISA §§ 3(1) & (2).
[8] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in part at 29 U.S.C. ch. 18).
[9] Nachman Corp. v. Pension Benefit Guaranty Corp., 466 U.S. 359, 374 (1980).
[10] Moore, *supra* note 5, at 11.

The issue surrounding employers and state abortion laws reached a boiling point when the Texas Attorney General announced that he would prosecute corporations that pay for employees to travel interstate to access abortion care.[11] Before the overturning of *Roe*, it was common for private employers and companies to cover abortion and abortion-related services to their employees through medical benefits. After the *Dobbs* decision, dozens of American companies including Disney, Apple, JP Morgan Chase, Adidas, and Airbnb guaranteed abortion benefits for their employees.[12] Thus, it is inevitable that conflicting policies on abortion-related employee benefits and state abortion laws will meet. The likelihood of a clash is heightened by abortion laws like Texas Senate Bill 8, which grants any person the civil right to take legal action against individuals or companies that violate the law.[13] It is only a matter of time before a state or private individual sues a company or plan, which will then rely on ERISA as a defense.[14] While companies and employers are likely to have some protection under ERISA against expanding state abortion laws, the extent and the outcome of how the Supreme Court would rule on the matter is clouded with issues and potential uncertainties with ERISA, its preemption clauses, and agency powers.

To protect ERISA and its congressional intent from various state laws, Congress included an express preemption clause that expressly supersedes state laws related to an employee benefit plan.[15] The Supreme Court has also referenced and found implied preemption in several ERISA preemption cases as well.[16] The preemption doctrine is based on the Supremacy Clause, which

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[11] Bevan Hurley, *Texas Attorney General Wants to Prosecute Companies That Help Women Access Abortions*, INDEPENDENT (Jun. 29, 2022), https://www.independent.co.uk/news/world/americas/us-politics/roe-v-wade-texas-attorney-general-abortions-b2112084.html [https://perma.cc/6VTS-EK5T].
[12] *Id*.
[13] 2021 Tex. Gen. Laws 62.
[14] Daniel Wiessner, *Legal Clashes Await U.S. Companies Covering Workers' Abortion Costs*, REUTERS (June 27, 2022), https://www.reuters.com/world/us/legal-clashes-await-us-companies-covering-workers-abortion-costs-2022-06-26/ [https://perma.cc/9FZE-HZHU] (arguing that it is likely only a matter of time before companies face lawsuits from states or anti-abortion campaigners claiming that abortion-related payments violate state bans on facilitating or aiding and abetting abortions).
[15] ERISA § 514.
[16] Moore, *supra* note 5, at 315.

holds that the "Constitution, and the Laws of the United States … shall be the supreme Law of the Land."[17] Both ERISA's express and implied preemption have been referenced and used by courts since its passing to preempt state laws that attempted to regulate employee benefit plans.[18] Legal scholars and attorneys argue that ERISA's preemption could be used by federal courts to strike down unfavorable abortion laws that relate to an employee benefit plan.[19] While potentially viable, there remain numerous issues and questions with both the *Dobbs* decision and recent precedent surrounding the power of regulatory agencies.

In a recent landmark Supreme Court case *West Virginia v. EPA*, the majority held that Congress must provide clear direction to the EPA agency, rather than a broad delegation of power, for the agency to regulate greenhouse gas emissions.[20] This strikes a shift in administrative agency power from a broad delegation of power under *Chevron* to a more limited range through an emerging doctrine known as the major questions doctrine.[21] The major questions doctrine holds that courts should not defer to agencies on matters of "vast economic or political significance" unless the U.S. Congress has explicitly given the agencies the authority to act in those situations.[22] *West Virginia* was the first Supreme Court decision where the major questions doctrine was cited and invoked by a majority of the Justices.[23] ERISA and employee benefit plans are regulated and overseen by an ERISA Advisory Council under the Department of Labor (DOL) division known

[17] U.S. CONST. art. VI, cl. 2.
[18] Moore, *supra* note 5, at 314-15.
[19] René Thorne, Michael Holzapfel, & Darran E. St. Ange, *Novel ERISA Preemption Questions Presented by U.S. Supreme Court's Dobbs Decision*, JACKSON LEWIS (June 30, 2022), https://www.jacksonlewis.com/publication/novel-erisa-preemption-questions-presented-us-supreme-court-s-dobbs-decision [https://perma.cc/65MP-ZLDH].
[20] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).
[21] *The Major Questions Doctrine*, CONGRESSIONAL RESEARCH SERVICE (Nov. 2, 2022), https://crsreports.congress.gov/product/pdf/IF/IF12077 [https://perma.cc/5KAM-TZJH].
[22] *Id*.
[23] Hogan Lovells, Stephanie Fishman, Rob Matsick, & Amy Roma, *Summary of West Virginia v. EPA and its potential impact on NRC and other federal agencies*, JDSUPRA (July 25, 2022), https://www.jdsupra.com/legalnews/summary-of-west-virginia-v-epa-and-its-6630404/ [https://perma.cc/VXQ7-3275].

as the Employee Benefits Security Administration (EBSA).[24] If the DOL or EBSA attempted to interpret ERISA in a manner that could be used to preempt an abortion state law, it is likely that the major questions doctrine would be found to apply, and would likely limit the agency's abilities of rulemaking and guidance on the subject and issues between ERISA and state abortion laws.

The decision in *West Virginia* signals a shift in the trust that the Supreme Court has for administrative agencies and could lead to further usage of the major questions doctrine to reject agency claims of regulatory authority.[25] With little to no judicial precedent for courts to rely on regarding preemption under ERISA and state abortion laws, and with no administrative agency ability to interpret or clarify whether ERISA can be used to preempt state abortion laws, federal courts are left dealing with a complex and undefined issue. If EBSA or the DOL were to enter the debate, the Supreme Court could easily minimize any administrative agency action or interpretation through the major questions doctrine.

The *Dobbs* decision has led to a substantial change in individual rights and has created a gray area with employee benefit plans. Little precedent is available as to whether companies and corporations can be held accountable under state abortion laws for providing abortion benefits.[26] The *Dobbs* decision compounds an already complex area of law and calls into question industry-wide corporate employee benefit plans. Further complicating the matter, a recent shift of the Supreme Court majority to the major questions doctrine potentially inhibits EBSA and agencies from issuing guidance or interpretations to clear up the uncertainties and complexities, which in turn can lead to turmoil for companies and employee benefit plans, courts, and employees.

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[24] *ERISA Advisory Council*, U.S. DEPARTMENT OF LABOR, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council [https://perma.cc/2SFW-EASP].
[25] *The Major Questions Doctrine*, *supra* note 21.
[26] Gregory L. Ash, Laura L. Fischer, *Issue Spotting for Health Plans after Dobbs*, SPENCERFANE (July 7, 2022), https://www.spencerfane.com/publication/issue-spotting-for-health-plans-after-dobbs-more-questions-than-answers/ [https://perma.cc/7XKN-ATXA] (noting that there are more questions at this point than answers).

II. BACKGROUND

ERISA covers several fields, but this note will only highlight the portions that are relevant to medical employee benefits. As discussed above, employee benefits are the extra benefits or "perks" that an employer voluntarily provides to its employees.[27] The benefits are provided by employers through employee benefit plans, which can be separated into either pension plans or welfare plans.[28] Employee benefit plans are then controlled and administered by fiduciaries.[29] ERISA § 3(21)(A) defines a fiduciary as a person who exercises discretion or control with respect to the plan or its assets.[30] Fiduciary status may arise in one of two ways; either as being named a fiduciary under the plan document or qualifying as a fiduciary under ERISA's functional definition.[31] Fiduciaries have multiple duties and have the authority to control and manage the operation and administration of the plan.[32] The fiduciaries of a plan would be the individuals being sued under state abortion laws and are the individuals who face the most risk when it comes to employee benefit plans.[33]

A. EMPLOYEE BENEFIT PLANS AND ERISA

1. HISTORY OF EMPLOYEE BENEFITS

The rise in employee benefits traces back to the beginning of the Industrial Revolution, but benefits have continued to modernize with the workforce into the 21st Century.[34] While some

[27] Moore, *supra* note 5.
[28] ERISA §§ 3(1) & (2).
[29] 29 U.S.C. § 1102(21).
[30] The four main identified ways in which a person may become a fiduciary is (1) if they exercise any discretionary authority or discretionary control to the management of the plan, (2) if they exercise any authority or control with respect to the management or disposition of the plan's assets, (3) if they render investment advice, or (4) if they have any discretionary authority or discretionary responsibility in the administration of the plan. ERISA § 3(21)(A)(i-iii).
[31] ERISA permits, but does not require, an employer to serve as the named fiduciary or the plan administrator with respect to a plan. Often plan sponsors hire third parties to administer plans, and whether the third party qualifies as a plan fiduciary depends on the level of discretionary authority or control granted to them. Moore, *supra* note 5, at 190-198.
[32] 29 U.S.C. § 1102(a)(1).
[33] Moore, *supra* note 5, at 314-15.
[34] *The History of Benefits*, WORKPLACE CONSULTANTS, http://workplaceconsultants.net/commentary/retirementtsunami/the-history-of-benefits/ [https://perma.cc/P5CQ-VQJM].

benefits are mandatory through the law, employers voluntarily offer other employee benefits for several reasons.[35] These reasons include the ability to attract and retain qualified employees, create good employee morale, increase productivity, or receive favorable tax treatment.[36] With the rise of employee benefits, so too have employee benefit plans become more common in the workplace.[37] Plans can be unique and offer different services depending on what the employer is willing to provide or cover.[38] Today, plans and benefits are regulated and governed under ERISA and several federal statutes and agencies.[39]

Before the enactment of ERISA, employee benefit plans were regulated and governed through the Welfare and Pension Plans Disclosure Act (WPPD) and federal income tax and labor laws.[40] Notable events in the early 1960s began to publicly highlight the shortcomings of the federal laws and their failure to provide adequate protection to employee benefit plan participants and beneficiaries.[41] After more than a decade of committee hearings, reports, and studies on the problems with the existing federal and state regulation of plans, Congress drafted and passed ERISA, which was then signed and enacted into law on Labor Day in September 1974.[42] ERISA has four main titles each administered and regulated by separate entities of the federal

[35] Mandatory benefits include benefits like Social Security, Medicare, unemployment insurance, and workers compensation. *Mandatory Benefits,* SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-glossary/pages/mandatory-benefits.aspx [https://perma.cc/FXF6-A8TU].
[36] Moore, *supra* note 5, at 4.
[37] Stephen Miller, *Employees Are More Likely to Stay If They Like Their Health Plan*, SHRM (Feb. 14, 2018), https://www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/health-benefits-foster-retention.aspx [https://perma.cc/E6XA-C3SB].
[38] General plans include health insurance, dental and vision insurance, disability insurance, and life insurance. *Employee benefits: Examples of the Most Common Employee Perks*, INDEED, https://www.indeed.com/career-advice/pay-salary/most-common-employee-perks [https://perma.cc/K8U9-JKBR].
[39] ERISA contains four separate titles and is administered by four different administrative agencies. Moore, *supra* note 5, at 12.
[40] Federal income tax laws regulated pension plans, whereas labor laws and the WPPD were aimed directly and exclusively at benefit plans. For the most part however, employee benefit plans were regulated by state common law prior to ERISA. Moore, *supra* note 5, at 6-7.
[41] An example often cited is the closing of the Studebaker automobile plant in 1963, in which thousands of employees received only 15% of their promised vested benefits, and thousands more received no benefits when the plant closed. The failure of the Studebaker plant to ensure proper plan funding is viewed as one of the primary motivating events for the enactment of ERISA. Moore, *supra* note 5, at 8-9.
[42] *History of EBSA and ERISA*, DEPARTMENT OF LABOR, https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa [https://perma.cc/E5AZ-875W].

government.[43] Title I of ERISA contains the relevant portions for employee benefits and is administered by the U.S. Department of Labor, more specifically the Employee Benefits Security Administration (EBSA).[44] Along with being governed by statutes and regulated by EBSA, courts and legal scholars have also debated the abilities and limitations of ERISA. The Supreme Court alone has handled over 400 ERISA-related cases since 1974, averaging just under nine ERISA cases a year.[45] Since its enactment, ERISA has also been amended substantially through legislation numerous times.[46] These amendments have increased the power of ERISA over the years, as well as the responsibility and roles of EBSA and the Department of Labor.[47]

2. HEALTHCARE EMPLOYEE BENEFIT PLANS

The United States has a unique approach to health care, as it relies principally on voluntary employment-based health insurance instead of a mandatory universal national healthcare system.[48] Employers are not forced by law to provide coverage or offer healthcare plans to their employees, however, larger employers may be taxed for failing to do so.[49] The Affordable Care Act (ACA) imposes an excise tax on employers with at least 50 full-time employees who fail to offer their employees the opportunity to enroll in affordable "minimum essential coverage" under an eligible employer-sponsor healthcare plan.[50] However, if the employer is willing to pay the fees for not

[43] Moore, *supra* note 5, at 12.
[44] The other titles are not relevant to the issue of employee benefits; but rather they deal with taxes and the IRS, jurisdictional matters, and insurance of defined benefit pension plans. *History of EBSA and ERISA supra* note 43.
[45] A narrowed search on Lexis Nexis pulls up 425 cases decided by the Supreme Court that included the term "ERISA" since the date of 1/1/1974. Dividing 425 cases by 49 years (number of years since 1974 to the present) adds up to 8.67 Supreme Court cases annually. *ERISA Cases,* LEXIS NEXIS, (Jan. 2, 2023) [https://perma.cc/S88C-7STE].
[46] Michael S. Sirkin, *The 20 Year History of ERISA*, 68 ST. JOHN'S L. REV. 321, 323 (1994).
[47] *History of EBSA and ERISA*, *supra* note 43.
[48] Moore, *supra* note 5.
[49] Moore, *supra* note 5, at 98.
[50] The ACA does not give employees the right to health insurance; rather it is used as a tool to provide an incentive for employers to offer their employees affordable health care. *Id*.

providing coverage, it has no legal obligation to provide health insurance or benefits to the employee.[51]

Employers and companies that provide healthcare benefits and insurance to their employees are required to follow the rules and regulations set out in ERISA. ERISA requires that all employee benefit plans be established and maintained pursuant to a written instrument.[52] In addition, ERISA requires that plan documents contain four specific features.[53] Discussions surrounding one of these four requirements, ERISA § 402(b), have increased as of late.[54] ERISA § 402(b) contains a plan amendment procedure that generally allows employers the ability to amend an employee benefit plan at any time if there is a procedure set in place for amending that plan.[55] The use of the plan amendment procedure was discussed after the *Dobbs* decision as a tool for employers to amend or clarify the plan's term on abortions to protect from potential lawsuits or penalties.[56]

Another provision being discussed after *Dobbs* is § 510 of ERISA, which prohibits employers from interfering with employees' rights.[57] ERISA § 510 could arguably be used as a tool to protect an employee's right to travel out of state to receive an abortion in a state where it is legal.[58] Finally, ERISA § 502(a)(3) authorizes a plan participant, beneficiary, or fiduciary to bring

[51] The current 'No Offer Penalty' remains around $3,860 per employee. Amy Carst, *Should You Be Getting Health Insurance From Your Employer*, U.S. NEWS (February 27, 2020), https://lawyers.usnews.com/legal-advice/employee-health-insurance/290 [https://perma.cc/8GPK-L9QE].
[52] ERISA § 402(a)(1).
[53] These features include a procedure for establishing and carrying out a funding policy and method consistent with the plan; a description of a plan procedure for allocating responsibilities for the operation and administration of the plan; a procedure for amending the plan and identifying who has the authority to amend the plan; and the basis on which payments are made to and from the plan. ERISA § 402(b).
[54] Ash & Fisher, *supra* note 26.
[55] Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995); *see* also ERISA § 401(a).
[56] Ash & Fisher, *supra* note 26.
[57] ERISA § 510 applies to employees' rights under both pension and welfare benefit plans, and is enforced through ERISA's general enforcement provision, ERISA § 502. The purpose behind ERISA § 510 was to protect employees from being harassed or prevented by their employers from obtaining ERISA-protected benefits. Kowalski v. L&F Prods., 82 F.3d 1283, 1287 (3d Cir. 1996).
[58] There are several other constitutional protections set in place that protect an individual's right to travel ("The constitutional right to travel from one State to another . . . has been firmly established and repeatedly recognized." United States v. Guest, 383 U.S. 745, 757 (1966)).

a suit "to enjoin any act or practice which violates any provision of this subtitle or the terms of the plan, or to obtain other appropriate equitable relief (i) to redress such violations, or (ii) to enforce any provision of this subtitle, or the terms of the plan."[59] The Supreme Court has described section 502(a)(3) as a "catchall provision" or as a "safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy."[60] This clause does not limit whom it can be brought against in terms of defendants.[61] An employer or plan fiduciary could potentially file a lawsuit under section 502(a)(3) against a state official where the state law would require the employer or fiduciary to do something contrary to the plan, such as subjecting a plan paying for out-of-state abortion benefits to criminal or civil liability.[62]

3. FINANCING EMPLOYEE BENEFIT PLANS

How employers finance their health plans significantly impacts the plan under ERISA and the ACA.[63] Employers typically finance their employee health benefit plans in one of two fundamentally different ways.[64] The first is through the purchase of insurance and coverage from an insurance company.[65] The second is by the employer directly paying for the employee's health care claims and coverage.[66] The importance of the funding, particularly which financial option is used, plays a substantial role in the plan's regulation under ERISA and the ACA. Below the two types of funding options are discussed further in detail.

[59] Moore, *supra* note 5, at 282.
[60] Varity Corp. v. Howe, 516 U.S. 489, 512 (1996).
[61] Harris Tr. & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 246 (2000).
[62] This is because forcing a fiduciary to act against the plan violates ERISA. Moore, *supra* note 5, at 186.
[63] Moore, *supra* note 5, at 335.
[64] *Id*. at 67.
[65] Better known as fully insured plans because they are fully insured by third-party insurance companies. *Id.*
[66] So-called self-funded plans because they are "self" funded directly by the employer. *Id*.

a. SELF-FUNDED PLANS

Under a self-funded plan, the employer acts as its own insurer and assumes direct financial responsibility for the costs of the covered individuals' medical claims.[67] Having a self-funded plan means that rather than paying premiums to an insurance company, the employer directly pays the cost of health care claims to providers, but also bears the risk of unexpectedly large claims that may arise.[68] Sixty-four percent of total covered workers, including 21% of covered workers in small companies and 82% in large companies, are enrolled in self-funded plans.[69] While the ACA provides numerous incentives for employers to use self-funded plans, not all employers can afford to bear the risk that is associated with a self-funded plan.[70] To protect themselves financially, small employers have turned to the idea of stop-loss insurance.[71] Stop-loss insurance allows employers with self-funded plans to purchase insurance, or "reinsurance", that covers the plan's losses.[72] The insurance covers costs above a stated level, either at a specific point[73] or at an aggregate point.[74] Stop-loss insurance has been described as blurring the line between fully-insured and self-funded plans.[75] Because of this, as well as the fact that some employers exploit the legal distinction between self-funded plans and fully-insured plans, states have begun to enact laws that ban or regulate stop-loss insurance policies.[76]

[67] Self-insured plans are just that; plans that are handed directly by the employer and paid for by the employer for their employees. *Id*. at 68.
[68] *Id*.
[69] *2021 Employer Health Benefits Survey*, KFF (Nov. 10, 2021), https://www.kff.org/report-section/ehbs-2021-summary-of-findings/ [https://perma.cc/YGR2-8U56].
[70] The ACA continues to provide a few benefits and incentives for employers under a self-funded plan, including several consumer protection regulations. Another example of the protection that the ACA provides self-funded employers is the "community rating" standard used to calculate premiums. Moore, *supra* note 5, at 68.
[71] *Id*. at 71.
[72] *Id*.
[73] A specific attachment point applies to each individual employee and is typically a dollar amount. *Id*.
[74] An aggregate attachment point refers to the total claims made and is typically expressed as a percentage of the self-insured plan. Moore, *supra* note 5, at 71.
[75] Stop-loss insurance operates like how fully-insured plans work. Consequently, if the stop-loss policy's attachment point is low enough, the stop-loss would resemble a regular fully-insured insurance plan. Jost & 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, 546 (2013).
[76] Moore, *supra* note 5, at 68.

b. FULLY-INSURED PLANS

In a fully-insured plan, an employer hires and works with an insurance company, pays the premium to the insurance company, and the insurer then assumes financial responsibility for the costs of the covered employees' medical claims.[77] The insurance company is the one that bears the risk for any covered claims made by the employees and their dependents.[78] Small employers are much more likely to provide coverage through a fully-insured plan than larger employers.[79] This is the case even with the recent incentives provided by the ACA to increase the number of small employers under self-funded plans.[80]

B. PREEMPTION UNDER ERISA

In the second section of ERISA, Congress announced its findings and declaration of policy for its enactment.[81] On several occasions, the Supreme Court has referred to Congress' purposes and findings in enacting ERISA, which it claims, "is to protect plan participants and beneficiaries"[82] and to promote uniformity of law and reduce the administrative burden of having to comply with multiple laws.[83] To protect the uniformity of ERISA and its Congressional purposes, Congress enacted an express preemption provision in Section 514 of ERISA, which "supersedes" all state laws that relate to an employee benefit plan.[84] The Supreme Court has found and referred to the implied preemption principle in several ERISA preemption cases as well.[85] The preemption doctrine is based on the Supremacy Clause, which holds that the "Constitution, and

[77] *Id*.
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] 29 U.S.C. 1001.
[82] Boggs v Boggs, 520 U.S. 833, 845 (1997) (which held that state law was preempted under conventional conflict principles).
[83] Moore, *supra* note 5, at 11.
[84] ERISA § 514.
[85] *See* Boggs v Boggs, 520 U.S. 833, 841 (1997); *see also* Egelhoff v. Egelhoff, 532 U.S. 141, 153.

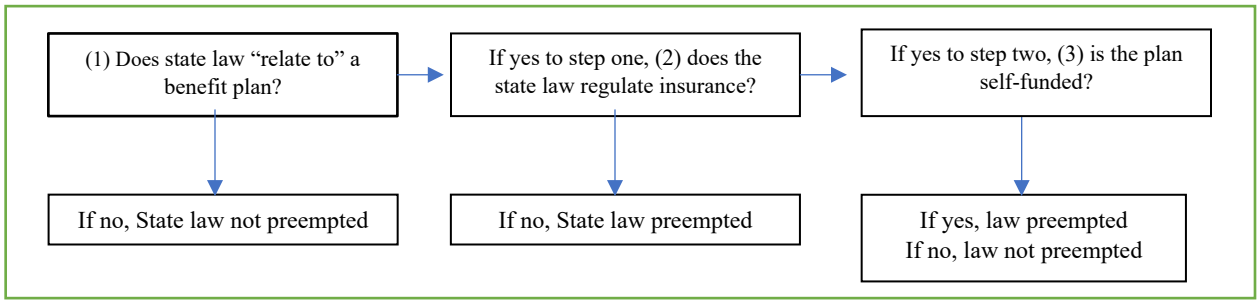
the Laws of the United States … shall be the supreme Law of the Land."[86] In the context of state abortion laws, the issue of preemption would arise when a plaintiff sued a defendant (likely a company or plan fiduciary), alleging that the defendant violated the state's abortion law.[87] The defendant would then remove the case to federal court on the grounds of ERISA preemption, to which the plaintiff would bring a motion to remand.[88] It is thus important to understand how the courts analyze ERISA preemption cases to comprehend whether a state abortion law would be preempted.

1. EXPRESS PREEMPTION

ERISA § 514 contains a three-part express preemption provision that has been heavily litigated, often causing legal scholars to view express preemption as complex and difficult. ERISA § 514(a) starts with the question of whether a state law "relates to an employee benefit plan."[89] If it does, then the state law is preempted under ERISA's preemption provision § 514(a).[90] If the state law is found preempted under ERISA § 514(a), the second step in the preemption analysis turns to the "saving clause" question. Section 514(b)(2)(A) of ERISA states that "except as provided in the [deemer clause], nothing in [ERISA] shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities."[91] Thus, state law is "saved" under the saving clause if it regulates insurance, banking, or securities, even if it relates to an employee benefit plan.[92] ERISA includes a 'deemer clause' that exempts the saving

[86] U.S. CONST. art. VI, cl. 2.
[87] As described like the example state law example. Moore, *supra* note 5, at 317.
[88] The federal court would then decide whether the state law claims are completely preempted by ERISA law. If the federal court finds that ERISA completely preempts the state law claims, then the federal court has jurisdiction to decide the case. The court can then analyze the plaintiff's state law claim, determine if it is preempted by ERISA, and then determine whether the plaintiff has an affirmative cause of action and remedy under ERISA. Moore, *supra* note 5, at 316-17.
If the state law claims are not completely preempted, then the state court must decide whether the plaintiffs state law claim is preempted by section 514, and if it is, then the plaintiffs state law cause of action must be dismissed. Moore, *supra* note 5, at 317.
[89] 29 U.S.C.S. § 1144(a).
[90] If the state law does not relate to an employee benefit plan, then it is not preempted. Moore, *supra* note 5, at 318.
[91] ERISA § 514(b)(2)(A).
[92] A state law that does not regulate insurance is held to be preempted under ERISA. Moore, *supra* note 5, at 331.

clause, allowing the analysis to proceed to the final question of whether the employee benefit plan is self-funded or fully funded.[93] If it is not self-funded, then the 'deemer clause' does not apply and the state law is not preempted.[94] Below is an illustration of the three-step process under ERISA's express preemption clause.



a. "RELATES TO AN EMPLOYEE BENEFIT PLAN" CLAUSE

Step one of ERISA's express preemption is often described as the heart of the ERISA preemption inquiry.[95] The term "relates to" is not defined by ERISA, rather the Supreme Court has focused on defining the meaning of the term through case law.[96] Recent precedent from the 2020 Supreme Court decision in *Rutledge* reconfirms the majority rule established in *Shaw v. Delta Air Lines* that "[a] state law relates to an ERISA plan if it has a connection with or reference to such a plan."[97] Thus, when inquiring whether a state law "relates to" an employee benefit, the Court focuses on whether the state law has a (1) connection with, or (2) reference to such a plan.[98]

In deciding whether a state law has a "connection with" a benefit plan, the Court first noted in *FMC v. Holiday* that a state law had a "connection with" benefit plans where a "patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation," and that the preemption clause applied "to ensure that benefit plans will be governed by only a

[93] *Id.* at 319 (2020).
[94] *Id.*
[95] *Id.* at 320.
[96] *Id.* at 319 n. 39 for list of cases.
[97] Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474 (2020) (quoting Egelhoff v. Egelhoff, 532 U. S. 141, 147 (2001)).
[98] Moore, *supra* note 5, at 321.

single set of regulations."[99] However, the Court cut back and limited this definition of the term "relate to" in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co*.[100] In *Travelers*, the Court declared that it should begin a preemption analysis in an ERISA case with a presumption against preemption.[101] The Court then looked to the objectives of the ERISA statute as a guide, and noted that "[t]he basic thrust of the pre-emption clause, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."[102] In summary, according to its recent precedent in *Rutledge*, the Court must ask whether a state law "governs a central matter of plan administration or interferes with nationally uniform plan administration" and if it does, the Court should find that the state law "relates to" an employee benefit plan.[103]

The narrower "reference to" prong has been interpreted by the Court to find that a state law has an impermissible reference to an employee benefit plan if it acts immediately and exclusively on the plan or if the existence of a plan is essential to the law's operation.[104] In essence, if a state law expressly references ERISA plans or refers to employee benefit plans, it is likely to be found preempted under the "reference to" prong.[105] If the Court determines that a state law "relates to" an employee benefit plan, either through a connection with or reference to such a plan, it assumes the law is preempted and proceeds to analyze the saving clause and whether the law regulates insurance, banking, or securities.[106]

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[99] 498 U.S. 52, 59-60 (1990).
[100] 514 U.S. 645, 656 (1995).
[101] *Id*. at 654-55.
[102] *Id*. at 657.
[103] Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474, 480 (2020). However, it is important to note that what "amounts to interfering with uniform plan administration" has yet to be defined by the courts.
[104] Moore, *supra* note 5, at 322 n. 51.
[105] Moore, *supra* note 5, at 332.
[106] *Id*. at 318.

b. THE SAVING CLAUSE

The saving clause of Section 514(b)(2)(A) provides an express exception to the general preemption provision discussed above; it "saves" from preemption state laws that regulate insurance, banking, or securities.[107] The issue of whether a state law regulates banking or securities rarely arises, especially in the case of employee healthcare benefits.[108] Thus, the focus of the analysis tends to be on whether a state is regulating insurance.[109] At the time of its enactment, Congress kept with the current trend of states, rather than the federal government, handling and managing the regulation of insurance.[110] The Court first addressed the question of whether a state law regulated insurance for purposes of the saving clause in *Metropolitan Life Insurance Company v. Massachusetts*, where it created a three-factor test to determine whether a state law regulated insurance.[111] The current test used today for determining whether a state law regulates insurance under the saving clause derives from *Kentucky Association of Health Plans v. Miller*.[112] Under the *Miller* test, a state law regulates insurance if it: (1) is "specifically directed towards entities engaged in insurance" and (2) substantially affect[s] the risk pooling arrangement between the insurer and the insured."[113] The Court found that the first requirement is met if the state law is "specifically directed toward" the insurance industry.[114] As with the second prong, in *Miller*, the Court ruled that the statute substantially affected the types of risk pooling arrangements that insurers could offer because it increased the number of healthcare providers from whom insured individuals could receive health services.[115]

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[107] *Id*. at 69.
[108] *Id*. at 331.
[109] *Id*. (noting that whether a state regulates insurance is frequently the more litigated issue with employee benefits).
[110] *Id*. at 70.
[111] 471 U.S. 724, 742-43 (1985).
[112] 538 U.S. 329 (2003).
[113] *Id*. at 341-42.
[114] *Id*. at 335.
[115] Moore, *supra* note 5, at 332.

c. THE DEEMER CLAUSE

ERISA § 514(b)(2)(B), better known as the "deemer clause", restricts states from trying to pass a state law under the protection of the saving clause unless it truly engages in the business of regulating insurance. In one of the few cases in which the Supreme Court has addressed the deemer clause, the Court stated "We read the deemer clause to exempt self-funded ERISA plans from state laws that 'regulate insurance' within the meaning of the saving clause."[116] The Supreme Court has thus interpreted the deemer clause to create a dichotomy between self-funded plans and fully-insured plans.[117] Under its current reading of the deemer clause, ERISA preempts state laws regulating insurance concerning self-funded plans, but insurance plans are subject to indirect state insurance regulation.[118] The Supreme Court's ruling on the deemer clause shows that while states can regulate health insurers through the saving clause, states cannot directly regulate self-insured plans. The saving clause together with the deemer clause precedent creates an incentive for employers to self-fund or self-insure their employee benefit plans.[119]

d. GENERALLY APPLICABLE CRIMINAL LAW

ERISA's express preemption contains a little-known and used exception that would be relevant to criminal state abortion laws and potentially be used to shield state laws from preemption. ERISA § 514(b)(4) states that express preemption "shall not apply to any generally applicable criminal law of a State." However, ERISA does not define "generally applicable criminal law," and there is almost no legislative history and very little case law interpreting this

[116] FMC v. Holliday, 471 U.S. 52, 61 (1990).
[117] Moore, *supra* note 5, at 335.
[118] Insured plans are subject to indirect state insurance regulation because insurance companies are subject to state insurance regulation. *See FMC,* 471 U.S. at 61.
[119] If an employer elected to self-fund its employee health benefit plan, the plan would be subject to little substantive regulation under ERISA. Moore, *supra* note 5, at 335.

language.[120] The DOL has not dealt extensively with the "generally applicable criminal laws" clause but has issued guidance that suggests that states could enforce criminal laws against plans and administrators, so long as the laws do not specifically target plans.[121] Courts' precedent on the matter holds that "generally applicable criminal laws" are those that apply to all persons in the state, such as laws against larceny and embezzlement.[122] Conversely, a law that purports to specifically impose criminal sanctions on an employee benefit plan or its administrator is not a "generally applicable" criminal law.[123] Uncertainty remains as to what role this exception would play concerning employee benefit plans and criminal state abortion laws.[124]

2. IMPLIED PREEMPTION

Implied preemption has been recognized in two main circumstances; the first is where the court finds that a federal statute so wholly occupies a particular field that there is no room left for state action, and the second is when state laws are found to "actually conflict" with federal law or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[125] The use of implied preemption under ERISA adds another layer that states are required to overcome after express preemption. Even if the state law was saved from express preemption, the state law could fall and be found preempted under the implied preemption doctrine. The Supreme Court has set a precedent that makes this clear; even laws that are not explicitly preempted may be impliedly preempted.[126]

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[120] Thomas C. Hardy, Harneet Kaur, *'Generally applicable criminal law': ERISA's little-known exception to preemption and its impact in a post-Roe world*, REUTERS (August 26, 2022) https://www.reuters.com/legal/litigation/generally-applicable-criminal-law-erisas-little-known-exception-preemption-its-2022-08-26/ [https://perma.cc/75ZU-S9KC].
[121] *Id*.
[122] *Id*.
[123] *Id.*
[124] Thorne, Holzapfel, & St. Ange, *supra* note 19.
[125] Known as Field Preemption and Conflict Preemption respectively. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).
[126] *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990); Boggs v. Boggs, 520 U.S. 833, 841 (1997).

C. MAJOR QUESTIONS DOCTRINE

Under *Chevron* deference, when determining whether a court should grant deference to a government agency's interpretation of a statute, courts first ask whether Congress has directly addressed the issue.[127] If it has not, then the agency's interpretation is found valid if it is a reasonable interpretation of the statute.[128] Considered one of the most important principles in administrative law, the *Chevron* deference is a cornerstone to both administrative agency law and power.[129] Yet in recent years, *Chevron* has faced massive erosion from a changing Court and a newly coined doctrine.

In *West Virginia v. EPA*, the Supreme Court officially opined for the first time in a majority opinion on the major questions doctrine.[130] The majority held in *West Virginia* that Congress must provide clear direction to the EPA agency, rather than a broad delegation of power, for the agency to regulate greenhouse gas emissions.[131] In *West Virginia*, the Court cited its decisions in *Utility Air Regulatory Group v. Environmental Protection Agency (EPA)* and *National Federation of Independent Business v. Occupational Safety and Health Administration*, where the Court noted that even though the regulatory assertions in these cases had a colorable textual basis, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue,[132] made it very unlikely that Congress had done so.[133] A year before the *West Virginia* case, the Court ruled against the CDC's eviction moratorium, stating that it was of major national significance and required a clear statutory basis

[127] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842 (1984).
[128] *Id*. at 843.
[129] *Chevron Deference in the Courts of Appeals*, CONGRESSIONAL RESEARCH SERVICE (Jun. 8, 2023), https://crsreports.congress.gov/product/pdf/LSB/LSB10976 [https://perma.cc/Y4FR-C6N3].
[130] *The Major Questions Doctrine*, *supra* note 21.
[131] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).
[132] *Id*. at 2609 (quoting Brown & Williamson, 529 U. S. 120, 133 (2000)).
[133] *See* West Virginia, 142 S. Ct. at 2609.

because the agency's action covered 80% or more of the nation; created an estimated economic impact of tens of billions of dollars; and interfered in an area of law that was a particular domain of state law.[134] Much like ERISA's preemption, the major questions doctrine focuses on legislative intent and the Congressional purpose(s) of the statute.[135] However, the decision in *West Virginia* highlights other points that the Court analyzes in a major questions doctrine analysis, with the majority noting that the Court also "typically greets" assertions of "extravagant statutory power over the national economy" with "skepticism."[136] Even though the major questions doctrine is considered a novel doctrine, the Supreme Court has continued to build precedent around it, lending it weight and meaning.[137]

The origins of the doctrine can be traced back to 1994 in *MCI Telecommunications Corp. v. American Telephone & Telegraph Co*,[138] and then again six years later in *FDA v. Brown & Williamson*.[139] After the decision in *Brown & Williamson*, the major questions doctrine fell dormant until a Supreme Court decision fourteen years later in *Utility Air Regulatory Group v. Environmental Protection Agency (EPA)*.[140] After the decision in *Utility Air*, the major questions doctrine has gained increased attention. In several recent opinions, the Supreme Court has placed an increased amount of emphasis on the major questions doctrine when evaluating agency

[134] *The Major Questions Doctrine*, *supra* note 21.
[135] Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to "clear congressional authorization" for the authority it claims. West Virginia, 142 S. Ct. at 2595.
[136] *Id.* at 2609.
[137] *The Major Questions Doctrine*, *supra* note 21.
[138] Where the Court concluded that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994).
[139] Where the Court affirmed the *MCI Telecommunications* precedent and further noted that in this case it was confident "that Congress could not have intended to delegate a decision of such economic and political significance to an agency…", and that Congress had then "directly spoken to the issue and precluded the FDA from regulating tobacco products." Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000).
[140] In *Utility Air*, The Court cited to both *Brown & Williamson* and *MCI Telecommunications*, noting that in circumstances where an agency's interpretation impacts "a significant portion of the American economy," Courts must be wary to endorse such an interpretation without clear direction by Congress. Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014).

power.[141] The 2014 opinion in *Utility Air* bundled and smoothed together the standards set out by the Court in *MCI Telecommunications* and *Brown & Williamson*, [142] yet it also has been used by the ideologically shifting Court as a launch board for the major questions doctrine to place strict limitations on agency powers.[143]

The major questions doctrine would no doubt have a direct role should EBSA release guidance or attempt to interpret ERISA in a manner that would preempt state abortion laws. While the major questions doctrine remains a novel doctrine, much of the precedent surrounding it points to a strong likelihood of its involvement in this issue, as the issue of abortion and regulation of abortion laws would likely concern an issue of "vast economic and political significance."[144] I believe that the debate and analysis would center around the second portion of the doctrine; whether there is too broad of a delegation of power to ERISA and the DOL, and whether Congress specifically allows the DOL to interpret ERISA to overrule state abortion laws.

III. STATEMENT OF THE CASE

After the reversal of *Roe v. Wade* and the overturning of the Constitutional protection of the right to have an abortion, numerous abortion laws have been enacted in states across the nation. The enactment of abortion laws creates a complex issue for employers, employees, and employee benefit plans, as it is common for medical benefit plans to cover abortion-related benefits.

[141] *See generally* Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021); Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661 (2022).
[142] The Supreme Court has rejected agency claims of regulatory authority when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency with authority over the issue. Utility Air, 573 U.S. at 324.
[143] Majority in *West Virginia* citing to precedent established in *Utility Air* that the Government must point to "clear congressional authorization" to regulate in that manner; that under the major questions doctrine, courts expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance; and that separation of powers principles and a practical understanding of legislative intent makes the Court "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. West Virginia v. EPA, 142 S. Ct. 2587, 2596-2609 (2022).
[144] According to the majority in *Dobbs*, the issue of abortion and the decision in Roe "sparked a national controversy that has embittered our political culture for a half century." The dissent further noted that "pregnancies continue to have enormous physical, social, and economic consequences." Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022).

Numerous legal scholars have turned to EBSA and DOL to interpret ERISA as a potential defense for companies and fiduciaries facing lawsuits for violating state abortion laws. While the courts have consistently applied ERISA's express and implied preemption against state laws, there is little precedent established as to whether state abortion laws would survive ERISA's express and/or implied preemption. The *Dobbs* decision has created a gray area in an already extremely complex field of law that could lead to substantial problems or turmoil for companies.

The Employee Benefits Security Administration (EBSA) which oversees and regulates ERISA, could potentially release guidance on the matter or attempt to interpret ERISA to preempt state abortion laws, but recent Supreme Court precedent calls into question the agency's power to do so.[145] In *West Virginia v. EPA*, the Court held that agency claims of regulatory authority are rejected when (1) the underlying claim of authority concerns an issue of "vast 'economic and political significance,'" and (2) Congress has not clearly empowered the agency with authority over the issue.[146] This decision ushers in a period of limited agency power under the major questions doctrine. If EBSA released guidance to clarify whether state abortion laws interfere with ERISA or if EBSA attempted to regulate or preempt state abortion laws, the Supreme Court could find that EBSA overstepped its powers. Whether ERISA preempts state abortion laws could be viewed as an issue of vast economic and political significance. Yet with the novelty of the major questions doctrine, it is unknown whether the Court would find that Congress empowered EBSA with authority to decide such matters.

[145] West Virginia, 142 S. Ct. at 2609.
[146] *Id*.

IV. ANALYSIS

A. ERISA AND STATE ABORTION LAWS

Until June 24, 2022, the consideration of federal courts using ERISA's preemption over state anti-abortion laws was a non-existent issue as abortion was a protected reproductive right under the precedents set in *Roe* and *Casey*.[147] After the release of the decision in *Dobbs* however, the applicability of using ERISA's preemption as a defense has become a realistic tactic to protect both plans and companies from potential lawsuits.[148] While courts could find that ERISA preempts every single state abortion law under implied preemption, I believe that it is extremely unlikely that it would do so.[149] While several state abortion laws are similar, many of them vary and encompass different requirements and limitations on abortions.[150] Thus, this note will divide abortion laws into three main sections of laws that states have passed: traditional abortion laws, laws that regulate insurance companies, and 'unique' abortion laws.[151]

1. TRADITIONAL STATE ABORTION LAWS

Traditional abortion laws are state laws that make receiving or providing an abortion an illegal action and assign some form of civil or criminal punishment. While the scope and restrictions of the state laws may vary, 44 states have some form of prohibition on abortions after a certain point in pregnancy, with 12 states completely banning abortion, 9 states banning abortion at 22 weeks pregnant, and 14 states imposing a ban at viability.[152] Traditional abortion laws differ

[147] *See* Roe v. Wade, 410 U.S. 113, (1973); Planned Parenthood v. Casey, 505 U.S. 833, (1992).
[148] *See* Dobbs, 142 S. Ct. at 2619.
[149] No two states have the same abortion laws, although a few states have similar and "copycat" abortion laws. For a more comprehensive understanding, *see State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INSTITUTE (Nov. 1, 2022). https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions [https://perma.cc/M7TU-LJKZ].
[150] *Id*.
[151] For efficiency and efficacy, this note divides abortion laws into three simplistic groupings, with 'unique' abortion laws being further divided into several different minority types of 'unique' abortion laws.
[152] Viability is the point at which a fetus can survive outside the uterus, and it is determined based on the fetus's developmental progress and may vary by pregnancy. *State Bans on Abortion Throughout Pregnancy*, *supra* note 149.

from those of insurance and 'unique' abortion laws because the traditional laws only regulate doctors and abortions in that state and because they directly prohibit women from obtaining or doctors from performing an abortion.[153]

Traditional abortion laws are not likely to be preempted under section 514 of ERISA.[154] As in *Travelers*, courts would likely have a presumption against preemption when conducting an ERISA analysis into a traditional state abortion law.[155] Under the first prong of ERISA's express preemption, a court would have difficulty finding that state laws that exclusively relate to banning an individual from receiving an in-state abortion "relate to" an employee benefit plan.[156] Traditional abortion laws do not expressly reference ERISA plans or employee benefit plans, nor do the laws govern a central matter of plan administration or interfere with a national uniform plan administration. Further, it is unlikely that a traditional state abortion law and ERISA would directly conflict with the other making it extremely difficult for a court to find that a traditional state abortion law would relate to an employee benefit plan.[157]

I believe that the lack of an objective test could lead to ambiguity and circuit splits depending on the circuit or makeup of the court. One court could find a traditional state abortion law preempted through implied preemption, while another could find that it is not preempted and well within the state's right to regulate. A judge could find that subjecting fiduciaries, plan administrators, or employers to the burden of complying with multiple conflicting laws frustrates the Congressional intent of having one uniform statute. While doubtful, I believe it is possible a court could also find that a traditional state abortion law interferes with the administration of a

[153] As opposed to insurance laws which regulate insurance companies, or 'unique' abortion laws which require reporting, allow for any individuals to enforce the law through civil suits, or target out of state abortions.
[154] ERISA § 514.
[155] *Travelers*, 514 U.S. 645, 656 (1995).
[156] ERISA § 514(a).
[157] As best highlighted in Egelhoff. Egelhoff v. Egelhoff, 532 U. S. 141, 152 (2001).

nationally uniformed plan. Determining the federal law's objectives and whether a conflict exists between the law and state law is difficult and subjective and has caused issues for judges in past decisions.[158]

Finally, if a court reached the opinion that the law was expressly preempted, it would have to analyze whether the law would fall under the exception of being a "generally applicable criminal law." As mentioned, the application of the exception in this setting would be uncharted territory. Yet, I find it unlikely that this exception would apply, as the law would not apply uniformly to all persons in the state but solely to women and doctors. Men cannot have abortions. While some doctors are men, not all men are doctors. Thus, there would be a section of the state populace that a traditional abortion law would not apply to; meaning that the law is not "generally applicable" and therefore not protected under the exception.

As discussed, it is highly unlikely that a court would find a traditional state abortion law expressly preempted, and unlikely that a court would find that implied preemption applied. This does not mean though that all courts would necessarily rule in this way; the lack of precedent on the matter surely invites discussion and discretion. The discrepancy that exists regarding ERISA's preemption leaves open an opportunity and the ability for EBSA to clarify the confusion on the matter either through adjudication or the rulemaking process. Doing so, however, could call into issue the major questions doctrine and the agency's authority to issue rules or adjudication on the matter. The Supreme Court could rule that Congress did not delegate this authority and that unless Congress specifically allows the Department of Labor to overrule abortion protection, preemption would not apply. Until the Court issues a redline rule for ERISA preemption on this matter, there

[158] Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 44-45 (1996) (noting that "judges complain… about implied preemption… for it is difficult to discern when Congress has occupied a field and what the scope of that field is, or when state law is an obstacle to some congressional goal.").

remains a chance that confusing or conflicting judicial decisions may result in several different outcomes depending on the court.

2. STATE ABORTION LAWS REGULATING INSURANCE

Numerous states have enacted laws that regulate insurance coverage of abortion. 25 states restrict abortion coverage in plans offered through health insurance exchanges, 22 restrict abortion coverage in health insurance plans for public employees, and 11 states have laws in effect restricting insurance coverage of abortion in all private insurance plans written in the state.[159] State abortion laws regulating in-state insurers and their ability to limit those insurers' policies on abortion fall within the protected exemptions established in ERISA's express preemption, even if the regulation "relates to" employee benefit plans. [160]

Applying the first step in an ERISA express preemption analysis starts with the question of whether a state law relates to an employee benefit plan.[161] Simple licensing laws for insurance agents would not relate to employee benefit plans, but laws that directly prohibit abortion coverage or limit coverage of abortion to certain circumstances would relate to an employee benefit plan.[162] If the law does not relate to an employee benefit plan, then it faces no preemption but, if it does, then it is preempted unless otherwise saved under ERISA's saving clause. Supreme Court precedent holds that states have the power and protection under ERISA's saving clause to tell the insurers in their state what they must or must not include in the insurer's policies sold in that state.[163] As shown in *Metro. Life*, states can require health insurance policies and benefit plans to provide certain coverage or benefits to cover a specified illness or procedure without having the

[159] *Regulating Insurance Coverage of Abortion*, GUTTMACHER INSTITUTE (Jan. 1, 2023), https://www.guttmacher.org/state-policy/explore/regulating-insurance-coverage-abortion [https://perma.cc/T8UT-KGRC].
[160] ERISA § 514(b)(2)(B).
[161] ERISA § 514(a).
[162] ERISA § 514(b)(2)(B).
[163] Kentucky Association of Health Plans v. Miller 329, 335 (2003).

mandated benefits law preempted under ERISA.[164] Therefore, with the ability to require coverage, it follows that states also can exclude abortion benefits from insurance policies.

Insurance laws regulating abortions are also not likely to be preempted by ERISA under implied preemption for two reasons. First, Congress clearly intended to leave room for state action and allow the states to be able to regulate insurance companies within their state, as seen with the inclusion of the saving clause. Second, state insurance laws do not "actually conflict" with federal law or stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. States can bar insurance companies from covering abortion rights and will likely continue to do so under the protection of the saving clause of ERISA.

Anti-abortion insurance laws only cover a slim majority of companies and workers; those who have fully insured plans.[165] Self-insured plans, which make up more than a majority of the plans for covered employees, do not deal with insurance companies and thus are not impacted by insurance laws.[166] The "deemer" clause found in Section 514(b)(2)(B) of ERISA further cements the protection of self-funded plans and their freedom from substantive regulation from states that attempt to classify them under the scrutiny of state insurance laws.[167] This then means that states cannot rely on the saving clause if the state law is found to "relate to" benefit plans.[168] States are also unlikely to find the protection to regulate self-funded plans under the "generally applicable criminal law" exception, as precedent holds that a law that purports to specifically impose criminal sanctions on an employee benefit plan or its administrator is not a "generally applicable" criminal

[164] 471 U.S. 724, 728 (1985).
[165] Moore, *supra* note 5, at 334.
[166] Some self-funded plans use stop-loss insurance, which some scholars call "blur[ing] the distinction between fully-insured and self-funded plans." *Id.* at 319. Several states have enacted laws to prevent employers from taking advantage of the legal distinction between a fully insured and a self-funded plan, by either banning or regulating the sale of stop-loss insurance. Jost & Holl, *supra* note 75.
[167] ERISA § 514(b)(2)(A).
[168] Moore, *supra* note 5, at 334.

law.[169] Thus, while it is well within a state's power to regulate insurance companies and therefore fully-insured plans, a state is limited in its ability to regulate abortion in self-funded plans that relate to employee benefit plans.

1. 'UNIQUE' ABORTION LAWS

Before the release of the *Dobbs* decision, state lawmakers were required to find ways around the protections set in *Roe*.[170] This in turn led to 'unique' abortion laws, ideas, and regulations that are still in place after the recent decision regarding abortion protections.[171] Following the *Dobbs* decision, states have the freedom to regulate abortions as they see fit, provided that their regulations do not contravene federal law.[172] Some states have begun to adopt and pass 'unique' abortion laws after the *Dobbs* decision, which has raised questions about how these state laws impact individuals and thus employee benefit plans.[173] This note divides unique abortion laws into three main categories: aiding and abetting, reporting, and abortion bounty hunter laws.

a. AIDING AND ABETTING ABORTION LAWS

According to Section 171.208 of Texas Senate Bill 8, a civil suit may be brought against any individual who knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through

[169] Hardy & Kaur, *supra* note 120.
[170] Roe says abortions may not be restricted at all during the first three months and in the second three months may be regulated only for the mother's health. Roe v. Wade, 410 U.S. 113, 164 (1973).
[171] McCammon Sarah, *Two months after the Dobbs ruling, new abortion bans are taking hold*, NPR (Aug. 23, 2022), https://www.npr.org/2022/08/23/1118846811/two-months-after-the-dobbs-ruling-new-abortion-bans-are-taking-hold [https://perma.cc/5MPW-JLZU].
[172]The Supremacy Clause holds that the "Constitution, and the Laws of the United States … shall be the supreme Law of the Land," thus states cannot make laws that directly conflict with federal laws or regulations without facing the possibility of being struck down through preemption. U.S. CONST. art. VI, cl. 2.
[173] Meryl J. Chertoff, *The Right to Travel to Seek an Abortion in a Post-Dobbs World,* THE HILL (Jun. 25, 2022), https://thehill.com/opinion/judiciary/3536720-the-right-to-travel-to-seek-an-abortion-in-a-post-dobbs-world/ [https://perma.cc/7GDG-LPKY].

insurance or otherwise.[174] A bill that was recently introduced in Missouri was similar to S.B. 8 and would allow prosecution not only for a person who aids another to obtain an abortion in Missouri but also who aids another to travel to a state in which abortion is legal.[175] Aiding and abetting laws could thus best be described as a law that makes any act of assisting a person in obtaining an abortion through payment, travel, advising, or other means, and potentially be subject to civil or criminal liability for doing so. The idea of aiding-and-abetting laws in both a civil and criminal setting is not new, but its applicability and usage as a type of state abortion law have increased recently.[176] The issue of whether a company can be held liable for aiding and abetting an employee's abortion has come to the forefront, especially with states threatening to limit companies that assist or cover abortion benefits for their employees.[177] I believe it is likely that a company may seek to rely on ERISA as a defense against a state law claim for aiding and abetting an employee's abortion.

Whether a company is subject to ERISA express preemption falls squarely under the 'relates to' prong.[178] The first prong of ERISA § 514(a) holds that if a state law "relates to" an employee benefit plan, then it is preempted.[179] The Court's precedent holds that a state law relates to an ERISA plan if it has a connection with or reference to such a plan, with the Court also valuing congressional intent and the state law's impact on ERISA.[180] While the Court has found that aiding-and-abetting laws are constitutional,[181] a court might struggle to find the same outcome with its applicability against an employer or plan fiduciary. First, aiding-and-abetting laws directly impact the governing "of a central matter of plan administration," as it forces an ERISA plan to

[174] TEX. HEALTH & SAFETY CODE ANN. § 171.201-.212 (West 2022).
[175] Chertoff, *supra* note 173.
[176] *Id*.
[177] Hurley, *supra* note 11.
[178] ERISA § 514(a).
[179] *Id*.
[180] Moore, *supra* note 5, at 320-27.
[181] *See* United States v. Hodorowicz, 105 F.2d 218 (1939).

adopt a certain scheme of substantive coverage and requires that providers structure benefit plans in a particular way.[182] Further, the state law would directly interfere with the employee's nationally uniform plan administration, as discussed in *Rutledge*.[183] If a court were to find that the law related to employee benefit plans, I believe that a court would find that the plan was not protected under the saving clause. Most, if not all, state aiding and abetting abortion laws would not fall under the saving clause, as the laws are not directed at insurance companies as discussed in the above analysis. It is unlikely then that a state aiding and abetting abortion law would survive an ERISA express challenge if raised as a defense.

Even though state aiding-and-abetting abortion laws likely face express preemption, an argument for applying the "generally applicable criminal law" exception holds weight. Aiding-and-abetting laws apply uniformly to any individual who assists a person in obtaining an abortion, whether the person is male, female, old, or young. While court precedent holds that a state law that purports to specifically impose criminal sanctions on an employee benefit plan or its administrator is not a "generally applicable" criminal law,[184] an argument could be made that general aiding-and-abetting state laws do not specifically target employee benefit plans or administrators. I believe that an aiding-and-abetting criminal state law found expressly preempted would likely be protected under the "generally applicable criminal law" exception, but a civil state law would likely be found by a court as expressly preempted.

There does remain the possibility that a court does not find that a state aiding-and-abetting law is preempted under express but does find it preempted under implied preemption. The law could be viewed as frustrating Congress' purpose and intent of uniformity of law and increasing

[182] Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474, 480 (2020).
[183] 141 S. Ct. 474, 480 (2020).
[184] Hardy & Kaur, *supra* note 120.

the administrative burden of companies by forcing them to comply with multiple laws. The Supreme Court has found that laws that are not explicitly preempted may be impliedly preempted.[185] Yet, a court might be hesitant to enhance the power of ERISA's implied preemption so greatly. Preempting a generic aiding-and-abetting state abortion law would drastically enhance the power of ERISA far beyond the means of what Congress intended. An express preemption clause already exists within the statute, showing that while Congress intended ERISA to have preemption powers, Congress also intended for such preemption powers to be limited to certain means.[186] Thus, a court could potentially find a state abortion law preempted under implied preemption, but it is unlikely a court would do so.

b. REPORTING LAWS

State abortion reporting laws are currently the most common abortion regulation laws.[187] 46 states and the District of Columbia require hospitals, facilities, and physicians providing abortions to submit regular and confidential reports to the state; 28 states require providers to report post-abortion complications; 16 states require providers to give some information about the patient's reason for seeking the procedure, and 8 states require providers to indicate the method of payment, such as insurance or self-pay, for the procedure.[188] Abortion reporting laws can be civil or criminal and range from those that require everyone to report abortions to those laws that only require doctors or clinics to report abortion information.[189] A great example of a reporting law is that of Minnesota, which requires three separate forms to be submitted with the state's reporting

[185] *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990); Boggs v. Boggs, 520 U.S. 833, 841 (1997).
[186] Moore, *supra* note 5, at 318.
[187] The majority of state laws reporting requirements focus and are directed to doctors or abortion clinics. *Abortion Reporting Requirements*, GUTTMACHER INSTITUTE (Nov. 1, 2022), https://www.guttmacher.org/state-policy/explore/abortion-reporting-requirements [https://perma.cc/7REA-S9NT].
[188] *Id*.
[189] *Id.*

system to comply with the statutory requirements.[190] The depth of reporting laws means that there is a large variety and differences among the states. Under ERISA's express preemption, laws that 'relate to' self-funded employee benefit plans that are not directed at insurance are ruled preempted.[191] Likely, most state abortion reporting laws would not be found to 'relate to' employee benefit plans. If the reporting law does relate to an employee benefit plan, the analysis then moves forward to the second prong. If the state abortion reporting law regulates insurance, then it is saved under ERISA's saving clause.[192] However, if the employee benefit plan is self-funded, then the state law is preempted under the "deemer" clause.[193] The issue then of whether an employee benefit plan is self-funded significantly impacts the outcome of whether a state law is preempted and has recently been the focus of the Supreme Court.

The Supreme Court recently analyzed the issue of reporting laws regulating self-funded plans in *Gobeille v. Liberty Mutual*, where it analyzed whether a Vermont law requiring all healthcare funders (including those of self-insured plans) to share healthcare cost information with the state was preempted.[194] The Supreme Court found that preemption of the Vermont law was necessary to prevent the imposition of the novel, inconsistent, and burdensome reporting requirements on employee benefit plans.[195] The Court found that the state reporting statute imposed duties that were inconsistent with the central design of ERISA; to provide a single uniform national scheme for the administration of ERISA plans without interference from the laws of several states.[196] The Minnesota reporting law does question how the individual paid (either

[190] *Abortion Reporting System*, MINNESOTA DEPARTMENT OF HEALTH (10/03/2022), https://www.health.state.mn.us/data/mchs/pubs/abrpt/reporting.html [https://perma.cc/S6HA-BMAY] (discussing the forms as well as the timeline required to file them).
[191] Moore, *supra* note 5, at 318.
[192] *Id*. at 331.
[193] *Id*. at 334.
[194] Gobeille v. Liberty Mut. Ins. Co., 577 U.S. 312, 315 (2016).
[195] *Id*.
[196] *Id*.

through private coverage, public assistance health coverage, or self-pay), as well as the type of health coverage the individual is using (fee for service plan, Capitated Private plan, other/unknown), but does not require the healthcare funders to disclose nor does it require as much detail as that of the Vermont law.[197] While a majority of state abortion reporting laws like Minnesota's do not relate to employee benefit plans, the minority of state laws like Vermont's that do would likely fall under the precedent set by the Supreme Court in *Gobeille*.

c. BOUNTY HUNTER LAWS

In recent years, bounty hunter abortion laws have gained traction in states looking to create "an abortion-free state."[198] Bounty hunter laws are like aiding-and-abetting abortion laws but have several distinct features, as these laws allow private citizens to file a civil lawsuit against anyone who knowingly "aids or abets" an abortion, and if successful, the plaintiff(s) are awarded at least $10,000 in damages from the defendants.[199] The more well-known example of an anti-abortion bounty hunter law is Texas' Senate Bill 8 (S.B. 8). 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, or around six weeks of pregnancy.[200] The law relies on private citizens to enforce it rather than the Texas government.[201] S.B. 8 was passed before the *Dobbs* decisions and was used by Texas and other states as a way around the precedent set in *Roe*.[202] The bill survived numerous federal challenges from the Biden

[197] *Abortion Reporting System, supra* note 187 (discussing the forms as well as the timeline required to file them).
[198] Emma Bowman, *Whole Woman's Health v. Jackson: One Texas Law's Procedural Peculiarities and Its Monolithic Threat to Abortion Access*, NPR (Jul 11, 2022), https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law [https://perma.cc/Q9L4-E8WJ].
[199] *Id*.
[200] Section 171.204 prohibits the performance or aiding performance of an abortion by a physician after the detection of a fetal heartbeat; Section 171.208 imposes civil liability for violating section 171.204 and provides private individuals with a right to sue an individual who violates this law. TEX. HEALTH & SAFETY CODE ANN. § 171.201-.212 (West 2022).
[201] Bowman, *supra* note 198.
[202] § 171.201-.212 *supra* note 200.

administration in court, prompting several conservative states to adopt similar "copycat-like" laws both before and after the *Dobbs* decision.[203]

Several issues arise between ERISA and these types of laws. In addition to the issues discussed previously with aiding-and-abetting laws, S.B. 8 does not limit citizens' ability to sue an individual for getting an abortion out of state, or an employer who has a benefits plan that provides for out-of-state abortions.[204] There has been little opportunity for the courts to test the law's civil enforcement mechanism, although that is likely to change. Recently though, the conversation around the subject heated up, with the Texas Attorney General stating that he is planning to prosecute corporations that pay for employees to travel interstate to access abortion care.[205] The conversation around this issue has led to questions about whether such an action is legally viable.

The likelihood of the application of express preemption increases significantly under bounty hunter laws, as they directly relate to both an ERISA plan and its fiduciaries. The Court has held that a state law that expanded liability standards against fiduciaries was preempted under ERISA,[206] and bounty hunter laws arguably do the same thing by allowing private citizens to file a lawsuit against anyone who knowingly "aids or abets" an abortion whether in-state or out.[207] The bounty hunter laws directly impact the governing "of a central matter of plan administration," as they force an ERISA plan to adopt a certain scheme of substantive coverage both in-state and out-of-state.[208] This in turn then requires that providers structure benefit plans in a particular way, which is directly in opposition to the recent Supreme Court precedent set in *Rutledge*.[209] Since

[203] Bowman, supra note 198.
[204] *Id*.
[205] Hurley, supra note 11.
[206] Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 144 (1990) (where the Court found that the state law that expanded liability and damages was preempted).
[207] Bowman, supra note 198.
[208] TEX. HEALTH & SAFETY CODE ANN. § 171.201-.212 (West 2022).
[209] Rutledge v. Pharm. Care Mgmt. Ass'n, 141 S. Ct. 474, 480 (2020).

bounty hunter laws directly relate to an employee benefit plan, the next step requires a court to examine whether the state law regulates insurance. Neither S.B. 8 nor any of the other bounty-hunter laws make any mention of regulating insurance, meaning that the saving clause will not apply. Texas S.B. 8 and other bounty-hunting laws are likely then to be found expressly preempted under ERISA.

The main difference between aiding-and-abetting laws and bounty-hunter laws is the fact that bounty-hunter laws are typically civil, whereas aiding-and-abetting laws can be both criminal and civil. As discussed above, criminal aiding and abetting state abortion laws are protected under the "generally applicable criminal law" exception. Bounty hunter laws do not get this same protection. While criminal aiding-and-abetting state laws are saved from preemption under the "generally applicable criminal law" exception, the bounty hunter laws have nothing to save them should a court find these laws expressly preempted.

B. MAJOR QUESTIONS DOCTRINE

Before the introduction of the major questions doctrine, the DOL and EBSA could have potentially interpreted ERISA under *Chevron* to preempt state abortion laws that disrupt ERISA's goal of providing a single uniform national scheme for the administration of ERISA plans. But the introduction and strengthening of the major questions doctrine by the majority in the Supreme Court highlights the beginning of a new era of limitations of agency power, and likely limits the DOL and EBSA from making such broad interpretations. If the agencies were to boldly make such interpretations, it could in turn erase the analyses of state abortion laws discussed above and lead to ERISA's express and implied preemption powers being severely limited in the future. The lack of precedent with the doctrine in this area of law leaves many questions unknown, yet some

analysis can be projected as to how the Court might rule on the matter should it be presented with the issue.

The major questions doctrine holds that courts should not defer to agencies on matters of "vast economic or political significance" unless the U.S. Congress has explicitly given the agencies the authority to act in those situations.[210] The issue of state abortion laws and regulation no doubt concerns an issue of "vast economic and political significance." Several textualists and originalists could make an argument that Congress did not explicitly give EBSA and the DOL the ability to overrule state abortion laws, arguing that the interpretation lends to too broad of a delegation. It is more likely that the Court would not completely strike ERISA's preemption powers but, instead, strictly limit ERISA's implied preemption powers and how the DOL can interpret them in the future. There is also the possibility that the Court could take another route, whether that be by completely avoiding the issue altogether or continuing the trend of strengthening ERISA's preemption from the *Rutledge* decision. How the Court would rule using the major questions doctrine first depends on whether (1) it is a matter of vast economic or political significance, and (2) whether the Court finds that Congress has explicitly given the DOL and EBSA the authority to overrule state abortion laws.

1. A MATTER OF VAST ECONOMIC OR POLITICAL SIGNIFICANCE

The novelty of the major questions doctrine raises several questions and issues. The Court has not clearly explained when an agency's action will raise a question so significant that the major questions doctrine should apply, nor has the Court specified what legislative acts could constitute clear congressional authorization.[211] While there is no clear red line as to how the Court would apply the doctrine, recent precedent could lend some weight to the matter. In *National Federation*

[210] West Virginia v. EPA, 142 S. Ct. 2587, 2596-2609 (2022).
[211] *The Major Questions Doctrine*, *supra* note 21.

of Independent Business v. OSHA, the Court considered OSHA's emergency temporary standard to be of major economic and political significance because, in its estimation, "it seriously intruded upon the lives of more than 80 million people."[212] In *Alabama Ass'n of Realtors*, the Court found that the CDC eviction moratorium was of major national significance because it covered 80% or more of the nation, had an economic impact affecting billions of dollars, and intruded into an area that is the particular domain of state law.[213]

Based on this recent precedent discussed above set by the Court relating to what classifies as a major economic or political significance, it is likely that the issue surrounding state abortion laws would involve a matter of vast economic or political significance. Over a hundred million women live in the United States.[214] Abortions have a significant impact on both the United States and individual states' economies.[215] As noted by the majority decision in *Dobbs*, the issue of abortion and the decision in *Roe* "sparked a national controversy that has embittered our political culture for a half-century."[216] That same decision noted that the "authority to regulate abortion must be returned to the people and their elected representatives," identifying it a state issue, not a federal government issue.[217] I believe the Court would likely find the matter of adjudicating or interpreting ERISA's preemption to preempt state abortion laws qualifies as a "matter of vast economic or political significance."

[212] Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 665 (2022).
[213] Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2489 (2021).
[214] *Quick Facts*, UNITED STATES CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045221 [https://perma.cc/9BER-97TY].
[215] Lisa Intrabartola, *The Economic Consequences of Restricting Abortion Rights,* RUTGERS (May 4, 2022), https://www.rutgers.edu/news/economic-consequences-restricting-abortion-rights [https://perma.cc/MLG8-Z6VN].
[216] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022).
[217] *Id*. at 2279.

2. CONGRESSIONAL INTENT

The Supreme Court has consistently referred to, and relied upon, Congress's purposes and intent in enacting ERISA when deciding whether state law will be found expressly preempted.[218] The major questions doctrine also focuses on Congressional intent, and whether Congress has explicitly given an agency the authority to act in a specific situation.[219] Since ERISA is regulated and maintained by EBSA as an extension of the DOL, ERISA would be viewed as an extension of agency power.[220] It is likely the Court would first turn to ERISA's enactment and Congress's intent at the time when deciding whether ERISA has the power to preempt state abortion laws.

At the release of the decision in *Roe*, only six states and Washington, D.C. had legalized abortions.[221] Little over a year after the release of the *Roe* decision, ERISA was signed into law. During this period, abortion was a highly controversial and debated topic,[222] yet there is no mention of abortion in either the 1974 ERISA bill or in the debate on the bill.[223] The fact that abortion was not discussed or mentioned surrounding the signed bill could be attributed to the fact that the issue of abortion was moot after the *Roe* decision, but this could be flawed reasoning. The bill was introduced on January 3rd, 1973, two weeks before the *Roe* decision was released and when abortion was still illegal or limited in a majority of states.[224] As ERISA's express preemption was an included clause in the introduced bill, Congress could have discussed or limited its ability to preempt the several state abortion laws that existed at the time.[225] The issues surrounding

[218] Moore, *supra* note 5, at 10.
[219] West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).
[220] *ERISA Advisory Council*, *supra* note 24.
[221] *Historical Abortion Law Timeline: 1850 to Today,* PLANNED PARENTHOOD, https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today [https://perma.cc/Q7EK-7236].
[222] Treva B. Lindsey, *A concise history of the US abortion debate*, OHIO STATE NEWS (Jun 18, 2019), https://news.osu.edu/a-concise-history-of-the-us-abortion-debate/ [https://perma.cc/9CAD-TLH3].
[223] Employee Retirement Income Security Act, H.R. 2, 93rd Cong. (1974).
[224] *Id*.
[225] This idea is further strengthened by the amount of research and time put into ERISA and the issues surrounding benefit plans. *See supra* note 42.

abortions were still prevalent after the *Roe* decision but before the signing of ERISA; the 93rd Congress introduced several bills relating to abortion, including an amended act that was passed and signed into law that contained a clause limiting funds toward abortions.[226] Yet, it remains unclear as to whether Congress explicitly gave DOL the authority to interpret or use ERISA as a preemption tool against state abortion laws.

The precedent set in *West Virginia* requires that the agency point to "clear congressional authorization" for the authority it claims.[227] Since the decision in *Roe*, Congress has enacted several laws relating to the issue of abortion, none however outright banning or legalizing the right to an abortion.[228] ERISA has been amended several times by Congress since its passing,[229] yet no discussions surrounding the amendments lend weight to whether ERISA can preempt state abortion laws. Much of ERISA's preemption powers stem from the precedent set by the Supreme Court and the DOL, not from amendments to ERISA by Congress. If the Court were to require the Government to point to "clear congressional authorization" beyond its express preemption powers from Congress to preempt state abortion laws, it would likely fail to do so.

The DOL and EBSA attempting to interpret ERISA to preempt state abortion laws would likely fall under a major questions doctrine analysis because (1) it is a matter of vast economic or political significance, and (2) it is disputed if Congress has explicitly given the DOL and EBSA the authority to overrule state abortion laws. The outcome of the Court's decision in such a case would depend on several factors, like the make-up of the bench, how far the Court is willing to

[226] H.R.7824 was passed to amend the Economic Opportunity Act of 1964. It specifically mentioned that "No funds made available by the Corporation under this title, either by grant or contract, may be used…. to provide legal assistance with respect to any proceeding or litigation which seeks to procure a nontherapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution." H.R. 7824, 93rd Cong. (1974).
[227] West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022).
[228] *Laws Enacted By Congress*, ABORTION – WITHOUT THE RHETORIC, https://abortion.info/laws/laws-enacted-by-congress/ [https://perma.cc/D7J3-PEMY].
[229] *See Amendments: To ERISA*, CONGRESS.GOV, https://www.congress.gov/bill/93rd-congress/house-bill/2/related-bills [https://perma.cc/BUD8-589P].

limit agency power, the state law being challenged, and how the Court will value stare decisis. However, I believe that there is another path that the Court could take that would not require it to overturn precedent on ERISA's express or implied preemption. The Court in a previous decision noted that when interpreting ERISA's preemption, "courts may have to take account of competing congressional purposes."[230] This means that the Court could simply conduct a balancing test between any secondary congressional purpose and that of ERISA's preemption purpose over the state abortion law. The Court could find that while the Congressional purpose behind ERISA's preemption of the law weighs heavily, it does not outweigh the secondary congressional purpose, whatever that may be. This would allow the Court an easy out by providing the ability to protect its recent decision in *Dobbs* without having to overturn its recent precedent in ERISA preemption cases.

V. CONCLUSION

The *Dobbs* opinion has formulated major questions that have left scholars, judges, and individuals with few answers. While it is likely that most of the traditional and insurance state abortion laws would survive ERISA preemption, I believe that most of the 'unique' state abortion laws would not. With several diverse state abortion laws, it becomes difficult to administer an employee benefit plan uniformly throughout the various states. Yet, recent changes in administrative agency law have left EBSA and the DOL in a stark position to attempt to uphold the uniformity of plans and challenge the disruption.

The rise of the major questions doctrine limits agencies from issuing guidance or broadly interpreting ERISA to preempt state abortion laws. The Court would likely rule against the DOL and EBSA because it would find under the major questions doctrine that the issue is a matter of

[230] Varity Corp. v. Howe, 516 U.S. 489, 497 (1996).

vast economic and political significance and that Congress did not expressly give the DOL and EBSA the power to overrule state abortion laws. The majority would look to the Congressional history of ERISA preemption, find no mention of state abortion laws, and likely find that the agency exceeded its delegated authority over a 'historical' state power and issue. In the words of Justice Alito in the majority opinion in *Dobbs*, the "[right to] regulate abortion must be returned to the people and their elected representatives," not administrative agencies.[231] Unfortunately, this signals the unlikelihood of resolving the major question for ERISA created by the landmark decision and finding a solution to the rising dis-uniformity of administering multi-state employee benefit plans.

[231] Dobbs, 142 S. Ct. at 2279.