No. 18-540

In The Supreme Court of the United States

LESLIE RUTLEDGE, in her official capacity as Attorney General of Arkansas,

Petitioner,

v.

PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE, J.B. HUNT TRANSPORT SERVICES, INC., IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

J.B. Hunt Transport Services, Inc. ("J.B. Hunt") is a transportation company headquartered in Lowell, Arkansas. It is the fourth largest company in Arkansas. It is a Fortune 500 company, a component of the Dow Jones Transportation Average, and one of the largest transportation logistics companies in North America. The company through its operating entity, J.B. Hunt Transport, Inc., has over 27,000 employees, 12,000 trucks, and over 100,000 trailers and containers.

The company provides safe and reliable transportation services to a diverse group of customers throughout the continental United States, Canada and Mexico. Utilizing an integrated, multimodal approach, J.B. Hunt provides capacity-oriented solutions centered on delivering customer value and industry-leading service. *See generally* https://www.jbhunt.com/company.

The company was incorporated in Arkansas on August 10, 1961, and has been a publicly-held company since its initial public offering in 1983. Its service offerings include transportation of full truckload

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[1] Counsel of Record for Amicus Curiae certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the Amicus Curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. Counsel for Petitioner and Respondent consent to the filing of this brief.

containerizable freight, which it directly transports utilizing company-controlled revenue equipment and company drivers or independent contractors. The company also has arrangements with most major North American rail carriers to transport truckload freight in containers and trailers.

J.B. Hunt has established and currently maintains an employee welfare benefit plan (the "Plan"), which is governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 ("ERISA"). The Plan covers J.B. Hunt's eligible employees and their eligible dependents (collectively, the Plan's "Members"). *See id.* § 1002(7), (8) (defining "participants" and "beneficiaries"). The Plan's total membership is approximately 33,000. Of those members, 6,500 (approximately 20%) reside in Arkansas.

One of the benefits offered through the Plan are prescription drug benefits. Under the Plan, approximately two-thirds of the Plan Members (22,000) have a co-insurance benefit; and one-third of the Plan Members (11,000) have a flat copay benefit. In 2019, a nationwide total of 21,950 Plan Members filled 246,111 prescriptions across the United States for a total Plan cost of $27,241,546. In that same year, 4,710 Plan Members filled approximately 46,280 prescriptions in Arkansas for a total Plan cost of $1,914,777. Of these prescriptions, 25,484 (55%) of the prescriptions had a co-insurance cost share for the Plan Member and

20,796 (45%) had a flat copay cost share for the Plan Member.

To help manage the cost of these benefits, and specifically, to provide them at the best cost to the Plan and its Members, the company has retained a Pharmacy Benefits Manager ("PBM"), Express Scripts, which, as noted on page 2 of Petitioner's Brief, is one of the three largest PBMs. Express Scripts has approximately 27,000 employees. Over 100 million people obtain PBM benefits through Express Scripts. Express Scripts saved its clients $50 billion in 2019. *See* https://www.express-scripts.com/corporate/about. Express Scripts' ability to achieve costs savings through market power provides an attractive advantage to the Plan, its Members, and its sponsor, J.B. Hunt.

J.B. Hunt is the sponsor of a multi-state ERISA plan, and its Members regularly travel through multiple states and fill their prescriptions while they are on the road. J.B. Hunt's experience illustrates the real-word consequences when states try to regulate employee benefit plans. In essence, Arkansas has attempted to restrict the Plan's ability to provide low-cost pharmacy and drug benefits to the Plan's Members. Members' co-insurance is calculated based on the pharmacy's reimbursement, so when Act 900 entitles a pharmacy to submit a higher reimbursement, this will result in the Member having to pay a higher co-insurance share. In this way, Act 900 has a direct (detrimental) impact to the benefit promised to participants by the Plan.

J.B. Hunt estimates that pharmacy reimbursements for J.B. Hunt Plan Members ***in Arkansas alone*** would have increased by at least **$800,000** between 2015 and 2019 if Act 900 was in effect.[2] This does not count losses to the Plan itself.[3] This is a conservative estimate because the law ties to a pharmacy's invoice price and not known pricing benchmarks or even the pharmacy's actual acquisition cost (net of post-purchase discounts). In other words, if it was not preempted, Act 900 would have cost the Members of this ERISA-regulated Plan at least **$800,000**.[4] Act 900

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[2] J.B. Hunt asked Express Scripts to estimate the impact to pharmacy reimbursements on J.B. Hunt's plan between 2015 to 2019 in Arkansas. Express Scripts prepared this estimate using J.B. Hunt's actual Arkansas utilization data from that timeframe and National Average Drug Acquisition Cost ("NADAC") benchmark data, often referenced by pharmacies. These increased reimbursement amounts likely represent just the "tip of the iceberg" in increased plan costs for J.B. Hunt because under Act 900, the pharmacy "drives" the higher reimbursements. J.B. Hunt cannot foresee what Arkansas pharmacies will submit as their invoice costs to seek higher reimbursements; but in the absence of ERISA preemption, it is clear that Act 900 will enable Arkansas pharmacies to seek higher reimbursements, which in turn will result in increased plan costs for J.B. Hunt.

[3] If the Eighth Circuit's decision is reversed, increases in pharmacy reimbursements will be experienced by both J.B. Hunt's Members and the Plan. As previously explained, for a member with a co-insurance benefit, the pharmacy's charge is what is used to calculate the co-insurance share.

[4] A rough extrapolation from this is that if all 40 PBM-Act states had simultaneously enacted laws identical to Act 900 in 2015, the loss could be upwards of $32 million dollars ***to the Members of this Plan alone***. Of course, not all state PBM laws were enacted simultaneously, not all PBM laws are identical, and Arkansas is a smaller state.

thus has a ***direct*** economic effect on this ***self-funded*** Plan. *Cf. N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 659-60 (1995) (holding that a state law that required hospitals to impose a surcharge on patients' bills covered by insurers was not preempted by ERISA because it had an "indirect economic effect" on the choices made by consumers of insurance, including ERISA plans).

More seriously, Arkansas has purported to regulate ***the ERISA Plan itself***. Arkansas is not alone. As noted in Petitioner's brief, p.9, 40 states have enacted or are in the process of enacting similar laws. These laws subject not only J.B. Hunt, but the Plan and its Members, to a patchwork of onerous and often conflicting state mandates, prohibitions, and penalties. It is this precise type of inconsistent state regulation that Congress prohibited by enacting ERISA.

SUMMARY OF THE ARGUMENT

By attempting to give pharmacies ultimate control with respect to maximum allowable cost ("MAC") lists, Act 900 has the effect of depleting the Plan's assets and increasing the cost to Plans Members, for example, through increased co-insurance and increased contributions (through payroll deductions) to replenish depleted Plan assets. While J.B. Hunt appreciates Arkansas' concerns about whether PBMs pass on savings to benefit plans, J.B. Hunt is equally confident that its thoroughly vetted decision to use PBM-generated

benefits is delivering massive savings to the Plan and its Members.

Among other things, Act 900 impermissibly:

- Purports to subject both J.B. Hunt and the Plan to state regulation and supervision;
- Negates the terms of the Plan, and renders promised benefits illusory, for example, by allowing pharmacists to dictate drug prices or decline to dispense;
- Increases the costs to the Members by altering their coinsurance obligations;
- Increases costs to the Plan by requiring it to comply with state-mandated reimbursement rules, with the increased costs being passed on to the Plan;
- Requires the constant updating and redrafting of ERISA-required documents like summary plan descriptions and summaries of material modifications;
- Compounds risk of error and liability, both civil and criminal, to J.B. Hunt, the Members, and the Plan, and thus discourages the provision of prescription drug benefits;
- Creates significant inefficiency and uncertainty because the Plan potentially has to comply with multiple and often conflicting state laws;

- Negates ERISA's express goal of providing a national uniform regulatory scheme for benefit plans.

Arkansas professes to pursue laudable goals, but whatever the intentions that underlie Act 900, the effect—direct and indirect—that the law has on federally regulated benefit plans is intolerable. The Eighth Circuit correctly held that Act 900 is preempted by ERISA. *Pharm. Care Mgmt. Ass'n v. Rutledge*, 891 F.3d 1109 (8th Cir. 2018); *accord Pharm. Care Mgmt. Ass'n v. Gerhart*, 852 F.3d 722 (8th Cir. 2017). This Court should affirm.

ARGUMENT

Arkansas, like many other states, perceives that there is a problem. According to Arkansas, smaller pharmacies and rural pharmacies, which have less bargaining power, are struggling or disappearing, so Arkansas has decided to do something about it. Arkansas says that PBMs are the root cause of the alleged problem because their bargaining power allows them to deliver prescription benefits to customers at far lower prices, and smaller pharmacies must "take it or leave it." Arkansas has therefore enacted legislation, Act 900, to give smaller pharmacies the upper hand in their interactions with PBMs.

There is another perspective. The massive cost savings that PBMs can deliver are highly advantageous and attractive to federally-regulated employee

benefit plans and their members. When Congress enacted ERISA, it freed employers to structure plans however they desire, subject to comprehensive federal rather than state regulation. That includes the right to deliver low-cost pharmacy benefits to plan members through third-party administrators like PBMs. Under ERISA, the statutory mission is to deliver pharmacy benefits at the lowest cost to the Plan and its Members. The Plan's funds are to be used for that purpose and in that manner; they are not to be siphoned away under state law to reinvigorate certain segments of the pharmacy industry.

Petitioner's Brief, p.2, explains the significance and prevalence of PBMs, noting that "over 266 million Americans—roughly 80% of the population—get their prescription drugs through one." (citing *Examining the Drug Supply Chain: Hearing Before the Subcomm. on Health of the H. Comm. on Energy & Commerce*, 115th Cong. 77 (statement of Mark Merritt, President, Pharmaceutical Care Management Association)). Petitioner's Brief, p.8, proceeds to explain the reimbursement process and says there is "[l]ittle data" on the spreads or administrative fees PBMs charge private plans like J.B. Hunt's. J.B. Hunt, as sponsor, administrator, and a fiduciary of its Plan, carefully monitors the financial condition of the Plan, and has determined that the Plan has recognized considerable savings by using its PBM. These savings are not only recognized by the Plan itself, but also by the Members, for example, through lower co-insurance and lower contributions (through payroll deductions) to the Plan.

I. Act 900 has a Direct and Adverse Economic Effect on this Self-Funded Plan.

Arkansas has made a policy decision to protect the profits of independent pharmacies and rural pharmacies by effectively bestowing the right to reverse and rebill reimbursements they consider unacceptable for prescription drugs. Implicit in that policy decision is that the interests of those pharmacies are more important than the financial interests of federally regulated benefit plans like the J.B. Hunt Plan and its Members. Arkansas has codified this policy choice in Act 900. In doing so, Arkansas has effectively established restrictions upon the Plan—that would not exist but-for Act 900. Arkansas is thus directly and impermissibly regulating the J.B. Hunt Plan, for example, by requiring certain appeal procedures, by requiring reversal and rebilling, and even by allowing pharmacies to decline to dispense covered drugs to Plan Members. Such regulation is preempted by ERISA. The efforts by states to control drug pricing have a negative financial impact on the Plan and its Members. While some laws are expressly directed at employee benefit plans, others purport to regulate PBMs alone. However, with each new PBM law the burden ultimately falls to the benefit plans, because the PBMs pass on their costs through increased fees and charges. This ultimately results in less money available in the plans to provide benefits to their members. It also reduces predictability and ease of administration for those who administer benefit plans—like J.B. Hunt.

The protection of the financial soundness of benefit plans like this one is one of the fundamental goals of ERISA, as evidenced by the Congressional finding:

> that despite the enormous growth in [benefit] plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, ***the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered***; that owing to the termination of plans ***before requisite funds have been accumulated***, employees and their beneficiaries ***have been deprived of anticipated benefits***; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans ***and their financial soundness***.

29 U.S.C. § 1001(a) (emphasis added).

ERISA provides a comprehensive federal system for regulating and protecting benefit plans like the one in question. Under ERISA, J.B. Hunt is an "employer" directly engaged in Commerce, and in Industries and Activities that Affect Commerce. *Id.* § 1002(5), (11), (12). It is a private sector employer. It is the sponsor, administrator, and a fiduciary of the Plan. *Id.* § 1002(16), (21)(A). ERISA articulates duties,

standards of conduct, and liabilities, for the Plan's fiduciaries. *Id.* §§ 1104(a), 1105, 1109(a). Federal civil actions can be brought against the Plan's fiduciaries. *Id.* § 1132(a)(2), 1132(a)(3). Federal civil actions can also be maintained for the recovery of benefits, including prescription drug benefits, or for equitable and injunctive relief involving the terms of ERISA and Plan. *Id.* § 1132(a)(1)(B), 1132(a)(3).

The Plan is an "employee welfare benefit plan" and an "employee benefit plan" under ERISA. *Id.* § 1002(1), (3). The Plan is governed by ERISA. *Id.* § 1003(a)(1). The Plan is self-funded, through the contributions of J.B. Hunt and participating Plan Members. *See*, *e.g.*, *FMC Corp. v. Holliday*, 498 U.S. 52, 54 (1990) (explaining that "[t]he Plan is self-funded; it does not purchase an insurance policy from any insurance company in order to satisfy its obligations to its participants"). The Plan cannot be deemed to be in the business of insurance. 29 U.S.C. § 1144(b)(2)(B). Consequently, "[s]tate laws" are preempted to the extent they "relate to" the Plan. *Id.* § 1144(a), (c). State laws are not saved from preemption in this self-funded context. *Id.* § 1144(b)(2)(B).

The Plan's funds are assets of the Plan and are deemed to be held in trust. *Id.* § 1103(a). *But see* ERISA Tech. Rel. 92-01, 57 Fed. Reg. 23,272 (outlining non-enforcement policy if certain conditions are satisfied). The funds can only be used to provide benefits to Plan Members and to defray reasonable expenses in administering the Plan. 29 U.S.C. §§ 1103(c), 1104(a)(1)(A).

Fiduciaries of the Plan can be liable for causing losses to the Plan. *Id.* §§ 1105, 1109(a), 1132(a)(2).

The fiduciaries of this Plan, including J.B. Hunt, are charged with the responsibility of ensuring that prescription drug benefits are provided at the lowest possible cost to the Plan and its Members. J.B. Hunt could have structured its Plan in a way that gave preference to the smaller pharmacies Arkansas desires to protect. J.B. Hunt instead opted, as ERISA appears to require, to maximize benefits to its Members by employing a PBM, and the Plan and its Members have realized significant cost savings as a result. That choice must be respected, and cannot be regulated or overridden by the State of Arkansas or any other state.

From J.B. Hunt's perspective, Act 900 has little if any resemblance to the New York law that required hospitals to add a surcharge to the bill for patients covered by commercial insurers, but not for patients covered by Blue Cross Blue Shield insurers, which was at issue in *Travelers*, 514 U.S. at 658-60. Act 900 has a direct and adverse economic effect on this self-funded Plan and its Members and is therefore preempted. *See id.*; 29 U.S.C. § 1144(a).

II. Act 900 *Expressly* Purports to Regulate the Federally-Regulated J.B. Hunt Plan and the Benefits it Provides to its Members.

In Arkansas, a "'[p]harmacy benefits ***plan or program***' means a ***plan or program*** that pays for,

reimburses, covers the cost of, or otherwise provides for pharmacist services to individuals who reside in or are employed in this state." Ark. Code Ann. § 17-92-507(a)(9) (emphasis added). A private sector plan that was established by an employer or an employee organization falls within this state definition, but also falls squarely within ERISA's ***federal*** definition of an "employee welfare benefit plan."[5]

In Arkansas, a "'[p]harmacy benefits manager' means an ***entity*** that ***administers or manages*** a pharmacy benefits ***plan or program***. . . ." Ark. Code Ann. § 17-92-507(a)(7) (emphasis added). J.B. Hunt is arguably an "entity" that "administers" and "manages" its pharmacy benefits plan or program. *See*, *e.g.*, 29 U.S.C. §§ 1002(16), 1002(21)(A)(i), 1002(21)(A)(iii).[6] This is true even though a PBM has some administrative and management functions, and it would be true even if J.B. Hunt did not utilize a PBM. Act 900 purports to require J.B. Hunt to obtain a license: "A person or organization shall not establish or operate as a pharmacy benefits manager in Arkansas ***for health***

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[5] 29 U.S.C. § 1002(1) ("The terms 'employee welfare benefit plan' and 'welfare plan' mean any ***plan,*** *fund,* ***or program*** which was . . . established or maintained by an employer . . . to the extent that such ***plan,*** *fund,* ***or program*** was established or is maintained for the purpose of providing for its participants or their beneficiaries, . . . ***medical*** . . . care or benefits, or benefits in the event of ***sickness***. . . ." (emphasis added)).

[6] ERISA imposes several "administrative" and "management" requirements on J.B. Hunt as the Plan's sponsor, administrator, and fiduciary. *See*, *e.g.*, 29 U.S.C. §§ 1021, 1024, 1025, 1102, 1103, 1104, 1132(c), 1161(a), 1166.

benefit plans without obtaining a license from the Insurance Commissioner under this subchapter." Ark. Code Ann. § 23-92-504(a)(1) (emphasis added).

Arkansas purports to regulate "Pharmacy Benefits Plans." Much of the way this regulation is accomplished is articulated in Petitioner's Brief. For example, Arkansas imposes various requirements for the Plan's "Maximum Allowable Cost List" ("MAC" list) for drugs. Ark. Code Ann. § 17-92-507(b)(1), (c). This list must include data used by the Plan's PBM to establish reimbursement rates to a pharmacist or pharmacy for pharmacist services. *See id*.

Act 900 purports to regulate the prescription drug benefits the Plan provides. Before the Plan's PBM "places or continues a particular drug on a [MAC] List, the drug . . . [s]hall be available for purchase by each pharmacy in the state from national or regional wholesalers operating in Arkansas. . . ." *Id.* § 17-92-507(b)(2).

Although ERISA establishes its own claim and appeal requirements for the Plan, 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1, Act 900 purports to impose its own state appeal requirements. The Plan's PBM must "[p]rovide a reasonable administrative appeal procedure to allow pharmacies to challenge [MAC lists] and reimbursements made under a [MAC list] for a specific drug or drugs. . . ." Ark. Code Ann. § 17-92-507(c)(4)(A)(i). The appeal requirement is specific to ERISA plans like the J.B. Hunt Plan:

The reasonable administrative appeal procedure shall include the following:

> (a) A dedicated telephone number and email address or website for the purpose of submitting administrative appeals;
>
> (b) The ability to submit an administrative appeal directly to the pharmacy benefits manager ***regarding the pharmacy benefits plan or program*** or through a pharmacy service administrative organization; and
>
> (c) No less than seven (7) business days to file an administrative appeal.

Id. § 17-92-507(c)(4)(A)(ii) (emphasis added). Thus, even if the Plan's PBM reimburses an Arkansas pharmacy according to the established MAC list, the pharmacy has the right to challenge the reimbursement. In response to the appeal, the PBM must either:

> provide the challenging pharmacy or pharmacist the National Drug Code and the name of the national or regional pharmaceutical wholesalers operating in Arkansas that have the drug currently in stock at a price below the [MAC] list; or
>
> . . . [i]f the National Drug Code provided by the pharmacy benefits manager is not available below the pharmacy acquisition cost from the pharmaceutical wholesaler from whom the pharmacy or pharmacist purchases the majority of prescription drugs for resale, then the pharmacy benefits manager shall adjust the [MAC] list above the challenging

> pharmacy's pharmacy acquisition cost ***and permit the pharmacy to reverse and rebill each claim affected by the inability to procure the drug at a cost that is equal to or less than the previously challenged maximum allowable cost***.

Id. § 17-92-507(c)(4)(C)(ii)-(iii) (emphasis added). As noted in Petitioner's Brief, p.6, this rebilled claim will be passed on to the ERISA Plan. *Id*. This will also require the Plan to recalculate the Member's co-insurance payment (which will logically increase) and notify the Member of the increase. Thus, the Plan must effectively pay prescription drug benefits under state-mandated rules.

Regardless of the terms of the PBM's agreement with the Plan, Arkansas mandates that the PBM "shall not reimburse a pharmacy or pharmacist in the state an amount less than the amount that the pharmacy benefits manager reimburses a pharmacy benefits manager affiliate[, *id.* § 17-92-507(a)(8),] for providing the same pharmacist services." *Id.* § 17-92-507(d)(1). Again, Arkansas purports to govern the Plan's claims-processing and reimbursement practices.

Act 900 permits pharmacies to deny prescription drug benefits to Plan Members even if they have promised the Plan and the Members that they would do so. Under Act 900, "[a] pharmacy or pharmacist may decline to provide the pharmacist services to a ***patient*** [*i.e.*, and Plan Member] or pharmacy benefits manager if, as a result of a [MAC] List, a pharmacy or pharmacist is to be paid less than the pharmacy acquisition

cost of the pharmacy providing pharmacist services." *Id.* § 17-92-507(e) (emphasis added). Thus, if a pharmacy is in-network (*i.e.*, contracted) with the Plan, Arkansas overrides the Plan's network contract and permits the pharmacy to deny services to the Member. The Plan collapses because the network and Plan's benefit design that the sponsor has deliberately established for the benefit of its Members becomes irrelevant.

Most ominous, in Arkansas, "a violation of this section is a deceptive and unconscionable trade practice under the Deceptive Trade Practices Act, § 4-88-101 *et seq.*, and a prohibited practice under the Arkansas Pharmacy Benefits Manager Licensure Act, § 23-92-501 *et seq.*, and the Trade Practices Act, § 23-66-201 *et seq.*" *Id.* § 17-92-507(g)(1). The Pharmacy Benefits Manager Licensure Act purports to apply to "health benefit plans." *Id.* § 23-92-510. The Deceptive Trade Practices Act contains civil, injunctive, and criminal penalties. *Id.* §§ 4-88-103, 104, 113.

These punitive statutes would ostensibly apply not only to the Plan's PBM, but to its sponsor, administrator, and/or fiduciaries if they participate in a violation. For example, what if an in-network provider reverses and rebills a claim and J.B. Hunt—as a Plan fiduciary charged with conserving Plan assets—instructs Express Scripts to pay the claim at the Plan rate and not the rebilled rate. Has J.B. Hunt committed, participated in, or aided and abetted a violation of the aforementioned state laws? By operating its ERISA Plan *in accordance with federal standards*, J.B.

Hunt is under the constant threat of incurring civil and criminal penalties *under state law*.

Although Arkansas suggests that it is pursuing a noble goal in protecting local pharmacies, which may in some circumstances be less efficient than larger pharmacy chains, in doing so it has largely overlooked the fact that is has *expressly* purported to regulate one of the largest private sector employee benefit plans in the state, and the United States, for that matter. That effort is preempted by ERISA.

III. Arkansas is One of Several States that Purport to Regulate ERISA-Regulated Plans, Thus Subjecting the Plans to a Patchwork of Complex and Often Inconsistent Regulations, All of Which Are Preempted by ERISA.

ERISA preemption is discussed in Respondent's Brief, pp.1-2, 21-22. Of particular significance to J.B. Hunt and the Members is this Court's holding that "One of the principal goals of ERISA [was] to enable employers 'to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.'" *Egelhoff v. Egelhoff*, 532 U.S. 141, 148 (2001) (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)). This Court has recognized that "[r]equiring ERISA administrators to master the relevant laws of 50 states . . . would undermine the congressional goal of 'minimiz[ing] the administrative and financial

burden[s]' on plan administrators—burdens ultimately borne by the beneficiaries." *Gobeille v. Liberty Mut. Ins. Co.*, 136 S.Ct. 936, 944 (2016) (quoting *Egelhoff*, 532 U.S. at 149-50; *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 142 (1990)). ERISA preemption protects benefit plans "'by eliminating the threat of conflicting and inconsistent State and local regulation.'" *Shaw*, 463 U.S. at 99 (1983). A state law is thus preempted if it "'governs . . . a central matter of plan administration' or 'interferes with nationally uniform plan administration.'" *Gobeille*, 136 S.Ct. at 943.

As noted in Petitioner's Brief, p.9, "40 States and counting have enacted legislation regulating" PBM reimbursement practices. Many of these laws are conflicting. Regardless, they subject the J.B. Hunt Plan to a multiplicity of laws in various states, which is one of the things Congress expressly sought to prohibit through ERISA.

For example, if an over-the-road truck driver for J.B. Hunt maintains two separate residences in Arkansas and California, which state PBM law applies? Many Arkansas communities straddle border states (*e.g.*, West Memphis, Texarkana, Ft. Smith, Rogers). What if a J.B. Hunt employee resides in a border state but fills prescriptions across the border in Arkansas—or vice-versa? What if a Minnesota-based over-the-road truck driver needs to fill a prescription while passing through Arkansas, and now the Plan has to process and pay the claim under two different sets of laws?

Plan Members are able to fill prescriptions in every state. These employees—especially over-the-road truck drivers—often have to fill their own prescriptions in several states. With 40 states "and counting" having enacted PBM laws, this makes it virtually impossible for J.B. Hunt to administer its Plan in a uniform manner on a nationwide basis, and in a way that affects the Members equally.

The following are ***examples*** of some of the complex and often conflicting state laws that confront the Plan, its sponsor/administrator/fiduciaries, its Members, and its PBM. For the sake of brevity, the examples cited are statutes that expressly mention or are expressly directed at ERISA-regulated plans.

Disclosure/Transparency: This includes requirements like reporting of rebates, reimbursement amounts, fees received, etc. For example, some states regulate specific required disclosures that a PBM must make to an ERISA plan sponsor. *See*, *e.g.*, La. Stat. Ann. §§ 22:1657, 22:1657.1, 22:976; Minn. Stat. Ann. § 62W.06. Other states only provide for differing disclosure requirements to be made by the PBM to the state itself. *See*, *e.g.*, Vt. Stat. Ann. tit. 18, §§ 9471, 9472.

MAC lists: These include state requirements relating to MAC lists. There is a fair amount of variability among the states, including the frequency for which the MAC lists must be updated, timelines for pharmacy appeal and PBM adjudication, the ratings of the drugs that may be included, etc. *See*, *e.g.*, Ga. Code Ann. § 33-64-9; Kan. Stat. Ann. § 40-3830; Mont. Code

Ann. § 33-22-172; Ohio Rev. Code Ann. § 3959.111. For example, Arkansas requires that the J.B. Hunt Plan's PBM must:

> [u]pdate its [MAC] List on a timely basis, but in no event longer than seven (7) calendar days from an increase of ten percent (10%) or more in the pharmacy acquisition cost from sixty percent (60%) or more of the pharmaceutical wholesalers doing business in the state or a change in the methodology on which the [MAC] List is based or in the value of a variable involved in the methodology;
>
> . . . [p]rovide a process for each pharmacy subject to the [MAC] List to receive prompt notification of an update to the [MAC] List; and
>
> . . . [p]rovide a reasonable administrative appeal procedure to allow pharmacies to challenge maximum allowable costs and reimbursements made under a maximum allowable cost for a specific drug or drugs. . . .

Ark. Code Ann. § 17-92-507(c)(2)-(4). Having to update, disclose, and revise (per individual pharmacy appeals), MAC lists in accordance with the requirements of 40+ states makes it virtually impossible to administer the Plan, let alone on a national uniform basis.

Mail-Order: These state laws are all restrictions on the use of a PBM's—and its ERISA-regulated plans'—mail order business. There are a number of such laws that are plainly directed at benefit plans. *See*, *e.g.*, Ga. Code Ann. §§ 33-30-4.3, 33-64-10, 33-64-11; Miss. Code. Ann. § 83-9-6; N.C. Gen. Stat. Ann.

§ 58-51-37(c)(6); N.D. Cent. Code Ann. § 19-02.1-16.4; N.H. Rev. Stat. Ann. § 420-J:7-b (VIII). For example, in North Dakota, if a prescription is provided through delivery or mail order, specific refill requirements must be met, while other states do not impose such requirements. N.D. Cent. Code Ann. § 19-02.1-16.4. This directly affects the way Plan Members purchase and receive their prescription drugs, often in bulk and at volume discounts, on a mail order basis.

Prompt Pay: These include state laws that are broadly applicable, not just on pharmacy claims. *See*, *e.g.*, Iowa Admin. Code r. 191-59.3(510B); Miss. Code Ann. § 73-21-155. The number of days provided by statute in which claims must be paid varies among states, and, to add to the legal patchwork, some states have different deadlines based on whether the claim was made electronically or by other means. For example, Georgia provides a 15-day deadline for electronic claims and a 30-day deadline for paper claims. Ga. Code Ann. § 33-24-59.14. Iowa provides for a 20-day deadline for electronic claims and a 30-day deadline for other claims. Iowa Admin. Code r. 191-59.3(510B). These laws directly conflict with the way ERISA *uniformly* mandates that claims must be processed, adjudicated, and paid or denied. *See* 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1 (articulating timeframes for deciding claims and appeals).

Specialty: These include state laws which apply to specialty pharmacy or specialty drugs. Some of these expressly apply to benefit plans. *See*, *e.g.*, Del. Code Ann. tit. 18, § 3580.

Penalties: These include state laws that create state penalties for violations of the state acts, some of which are broad enough to apply to ERISA-regulated plans, their sponsors, administrators, fiduciaries, etc. Minn. Stat. Ann. § 62W.06 (Subd. 3); Vt. Stat. Ann. tit. 18, § 9474(e); Mo. Rev. Stat. § 376.387(6); Ga. Code Ann. § 33-64-9(h); N.D. Cent. Code Ann. § 26.1-36-12.2(5). For example, Oklahoma's PBM Act prohibits the J.B. Hunt Plan's PBM—and thus the Plan itself—from issuing Plan ID cards with the name of any pharmacy, hospital, or other provider unless all pharmacies, hospitals, and providers in the network are also listed. Okla. Stat. Ann. tit. 36, § 6961(D). There are penalties if this provision, or other provisions in the Act, are violated. Okla. Stat. Ann. tit. 36, §§ 6965, 6966. What if an Arkansas-based J.B. Hunt driver needs to refill a critically-needed prescription late at night on Interstate 40 in Oklahoma and presents a pharmacy ID card with only one pharmacy chain named in the card? Should the Plan issue uniform cards nationwide to comply with Oklahoma's mandate?

This illustrates the punitive consequences a multistate plan sponsor could face if it fails to adjust its plan's terms and procedures to comply with every state's unique regime. The aforementioned examples demonstrate how PBM laws like Act 900 frustrate ERISA's goal of establishing a "uniform administrative scheme" for the Plan. *Egelhoff*, 532 U.S. at 148.

IV. Act 900 Improperly Affects Plan *Design*.

Not only does Act 900 have a *direct* economic effect on the Plan, it also affects this Plan's *design* in at least four respects.

First, as explained in Respondent's Brief, pp.15-17, Act 900 overrides and nullifies the way ERISA plans, including this Plan, were designed. Many of the pertinent Plan provisions are either permitted or mandated by ERISA. *See Shaw*, 463 U.S. at 97 (holding that ERISA preempts state laws that prohibit employers from structuring their plans certain ways).

Second, Act 900 affects the design of the Plan's documents. ERISA requires that all benefit plans be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a). Generally, the written terms of the plan are controlling. *See*, *e.g.*, 29 U.S.C. §§ 1104(a)(1)(D), 1132(a)(1)(B), 1132(a)(3). Does the Plan document need to include provisions regarding pricing, appeals, penalties, etc. so that it conforms with Act 900? If so, then presumably the Plan's document must include provisions covering the laws of all 40+ PBM states.

ERISA also requires J.B. Hunt to design, draft, and distribute summary plan descriptions ("SPDs"). 29 U.S.C. §§ 1021(a)(1), 1022(a), 1024(b). SPDs must "be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). This

would presumably include the fact that Members might not receive certain benefits promised under the Plan (*i.e.*, their benefits might be illusory) in light of Act 900's decline-to-dispense provision. This Court has cautioned against including unnecessary legalese or overcomplicated descriptions because it diminishes the utility of SPDs. *CIGNA Corp. v. Amara*, 563 U.S. 421, 437 (2011). Things like imprecise language, representations, and omissions in SPDs have become a fertile source of litigation. *See generally* M. R. Bosau, "Defining the Parameters: When an ERISA Summary Plan Description Trumps the Corresponding Plan Document," Megan R. Bosau, *Defining the Parameters: When an ERISA Summary Plan Description Trumps the Corresponding Plan Document*, 7 DePaul Bus. & Com. L.J. 521-53 (2009). However, legalese and overcomplication are inevitable consequences in designing and drafting SPDs and plan documents that must comply with the laws of 40+ states, especially when those laws conflict.

ERISA also requires J.B. Hunt to draft and distribute to the Members a summary of material modification ("SMM") any time there is a material modification (favorable or unfavorable) to the Plan, but the deadline is generally shortened to 60 days for a material reduction of benefits in group health plans like this Plan. *See* 29 U.S.C. §§ 1022(a), 1024(b)(1)(B); 29 CFR § 2520.104b-3(d). Act 900 (*e.g.*, its decline-to-dispense provisions) would materially reduce the prescription drug benefits available to Plan Members. Over-the-road truck drivers and other employees often have to

fill their prescriptions in several states, so a benefit modification in ***any*** state could affect those employees. Again, with the rapid-fire enactment and amendment of PBM laws by various states, J.B. Hunt would have to master those changes and draft and distribute SMMs at a frenzied and almost unmanageable pace. Liability may extend to those who violate ERISA's requirements for plan documents, SPDs, SMMs, and other mandates. *See*, *e.g.*, 29 U.S.C. §§ 1131, 1132(a)(2), (3), (5).

Finally, Act 900 has a more fundamental effect on plan design—whether to provide prescription drug benefits in the first place, and if so, how to pay for them. Considering the adverse economic effects—and the risk of potential civil and criminal liability resulting from Act 900 and similar laws, should J.B. Hunt require the Plan Members to pay a greater share of the cost of their prescription drugs? Or should J.B. Hunt simply eliminate prescription drug benefits altogether? *See Conkright v. Frommert*, 559 U.S. 506, 517 (2010) (noting that complex administrative costs could discourage employers from providing benefits). These are the very real questions that plan sponsors are currently confronting as they draft and amend their ERISA benefit plans in the wake of oppressive and conflicting state regulation.

CONCLUSION

There are numerous ways states like Arkansas can promote the finances of certain pharmacies. Directly or indirectly regulating federally regulated benefit plans is not an option. The Eighth Circuit correctly held that Arkansas' PBM laws are preempted by ERISA. This Court should affirm the decision.

Respectfully submitted,

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