No. 06-1840

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RETAIL INDUSTRY LEADERS ASSOCIATION, et al.,

Plaintiff-Appellee,

v.

JAMES D. FIELDER, JR.,

Defendant-Appellant.

On Appeal From The United States District Court
For The District Of Maryland
The Honorable J. Frederick Motz
Civil No. 06-CV-00316-JFM

Brief For The Chamber of Commerce Of The United States Of America As *AMICUS CURIAE* In Support Of Appellee Retail Industry Leaders Association Supporting Affirmance

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STATEMENT OF INTEREST OF *AMICUS CURIAE**

The Chamber of Commerce of the United States of America (the "Chamber") submits this *amicus curiae* brief for the Court's consideration in support of Appellee Retail Industry Leaders Association ("RILA"). The Chamber respectfully requests that this Court affirm the decision of the United States District Court for the District of Maryland, holding that the Maryland Fair Share Health Care Fund Act, Md. Code Ann., Lab. & Empl. tit. §§ 8.5-101 to 8.5-107 (2006) ("Maryland Act" or "Act"), is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA").

Representing an underlying membership of more than 3,000,000 businesses, the Chamber serves as the principal voice of the American business community in the courts by regularly filing *amicus curiae* briefs and litigating as a party-plaintiff. The Chamber has filed *amicus curiae* briefs in a number of the leading ERISA cases decided by the Supreme Court. *See, e.g.*, *Sereboff v. Mid Atl. Med. Servs., Inc.*, 126 S. Ct. 1869 (2006); *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004); *Pegram v. Herdrich*, 530 U.S. 211 (2000); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

This case is of great legal and practical importance to the Chamber because many of its members rely on the consistency of a uniform federal law to regulate

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* The parties have granted consent to the filing of this *amicus curiae* brief. Letters of consent are on file with the Clerk of the Court.

health plan coverage in order to provide benefits to their employees who work in different states. If the decision of the United States District Court for the District of Maryland is reversed by this Court, then the Maryland Act will establish a template for state-by-state regulation of employer-sponsored health care plans. As a result, many of the Chamber's multi-state employer members will be subjected to substantive and procedural obligations that may vary widely from state to state. Allowing state-by-state mandates for health plan coverage enforced by the cudgels of fines, debarments and other penalties will result in some employers refusing to do business in states with health care benefit mandates—a result that will benefit no one. The Maryland Act therefore violates ERISA's most basic purpose, which is to encourage the formation of employer-sponsored health benefit plans by establishing a uniform federal body of law governing the provision of employee benefits.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons set forth below, the Chamber, as *amicus curiae*, respectfully urges this Court to affirm the District Court's holding that ERISA preempts the Maryland Act. The District Court correctly followed controlling Supreme Court precedent by ruling that the Act is a state-imposed health care mandate, violating ERISA's express preemption provision. J.A. 675. Requiring a large employer to provide health plan coverage to new classes of employees was found by the Court to be superseded by ERISA because the Act's mandates have a "connection with" an ERISA plan and, therefore, "relates to" an ERISA-regulated plan within the meaning of ERISA's broad preemption provision. J.A. 673.

The health care mandate created by the Maryland Act works as a "pay or play" system. Either the employer plays by providing a minimum level of health care plan benefits to its employees or it pays into Maryland's Medicaid system the minimum amount the state thinks the employer *should have* paid to provide its employees with such benefits. An employer with more than 10,000 employees in Maryland will be assessed a contribution amount for Maryland's Fair Share Fund calculated on the difference between 8% of the employer's payroll costs (6% of payroll for non-profit entities) and the amount the employer spends on health care insurance costs. J.A. 80-83. Failure to comply with the Act, subjects an employer to monetary fines and other penalties.

While the Maryland Act was passed into law for the sole purpose of ensuring that Wal-Mart increase its spending for employee health care benefits, nothing prevents the state of Maryland from amending the Act to cover a broader base of employers. J.A. 671.

Affirming the District Court's decision will preserve uniform federal regulation of employee benefit plans.

ARGUMENT

I. THE MARYLAND ACT IS PREEMPTED BY ERISA

A. The District Court Correctly Determined That The Act Is A State Law That Improperly Imposes An Employee Health Benefit Mandate.

Proponents of the Act have conjured up a series of phrases to distract attention from the Act's core requirement that employers provide employee health care benefits. Referring to the Act as an "economic incentive," "tax," or "payroll assessment," however, is, at best, misleading. These labels imply a law of general applicability where none exists. The Maryland Act was designed to force Wal-Mart to provide more employees with health care benefits. There is no possible "economic incentive" because Wal-Mart must either pay 8% of its payroll on health plan costs or pay the difference to Maryland Medicaid. Under either scenario, Wal-Mart must pay out 8% of its payroll. The true "economic incentive" for other Maryland employers is to avoid paying the 8% penalty by never employing more than 10,000 employees. The Maryland Act is also not a tax,

because only Wal-Mart is subject to it, nor does the Act generate revenue for a legitimate state purpose. J.A. 672. The Act is little more than the state of Maryland usurping federal authority through the guise of what it calls a "tax" so as to regulate the contents of Wal-Mart's medical benefit plans.

If the Maryland Act is upheld, every employer-sponsored health plan may become subject to state-by-state regulation. What is required of a Chamber member in Maryland may not even be an option for that same Chamber member doing business in Virginia. Although the states will, no doubt, mandate employers provide employees with medical plan benefits, the unintended consequence will be a disincentive to engage in interstate commerce. Congress enacted ERISA to encourage interstate commerce by stating medical benefit plans would be subject to uniform federal regulation.

Congress intentionally left the content of welfare plans largely unregulated. *See, e.g.*, 29 U.S.C. §§ 1052-54 and 1082. While, as a result, most insured medical, dental, disability or vision plans are subject to almost no content requirements, this does not mean that Congress left the content regulation of welfare plans up to the states. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983). Rather, by failing to prescribe content regulation for welfare plans Congress deliberately encouraged the creation of medical benefit plans and gave employers the choice over how to provide those benefits. "Nothing in ERISA requires employers to establish employee benefits plans. Nor does ERISA mandate what kind of benefits

employers must provide if they choose to have such a plan." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (citing *Shaw*, 463 U.S. at 91). State health care mandates which force employer-sponsored medical plans to cover certain people and pay a percent of payroll on health care violate this fundamental ERISA tenet and erase the right of employers to design and implement employee benefit plans that fit their own unique business models. The Maryland Act and other laws which mandate minimum benefits seek to eliminate the choice Congress made when it enacted ERISA. As a result, laws seeking to regulate the content of employee benefit plans have consistently been found to be preempted by ERISA. *See, e.g.*, *Boggs v. Boggs*, 520 U.S. 833, 841 (1997).

Indeed, whether a state can mandate health plan coverage was decided over 25 years ago by the Supreme Court. *See Standard Oil Co. of Cal. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981). In *Agsalud*, the question presented was whether Hawaii's Comprehensive Prepaid Health Care Act enacted in 1974 ("Hawaii Act") requiring employers to provide all employees with comprehensive prepaid health care plan coverage was preempted by ERISA. *Id.* at 763. In 1976, the Hawaii Act was amended to require employer-provided plans to cover the diagnosis and treatment of alcohol and drug abuse. *Standard Oil Co. of Cal. v. Agsalud*, 442 F. Supp. 695, 696 (N.D. Cal. 1977). The Hawaii Act, like the Maryland Act, included certain reporting requirements that differ from those in ERISA. *Id.*; *see also* Md. Code Ann., Lab. & Empl. tit. §§ 8.5-102 to 8.5-105

(Health Care Payroll Assessment).[1] In finding the Hawaii statute preempted, the Ninth Circuit explained:

> At the time ERISA was enacted, all private plans were voluntary as opposed to mandated by state law and ERISA itself does not require employers to provide plans. We cannot agree, however, with Hawaii's contention that Congress intended to exempt plans mandated by state statute from ERISA's coverage. Congress did distinguish between plans established or maintained by private employers for private employees and plans established or maintained by government entities for government employees. Such government plans are exempt. Private plans are not. The plans which Hawaii would require of private employers are not government plans. There is no express exemption from ERISA coverage for plans which state law requires private employers to provide their employees. The legislative

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[1] § 8.5-102. "This title applies to an employer with 10,000 or more employees in the state."

§ 8.5-103(a)(1):

> On January 1, 2007, and annually thereafter, an employer shall submit on a form and in a manner approved by the Secretary:
>
> (i) The number of employees of the employer in the state as of 1 day in the year immediately preceding the previous calendar year as determined by the employer on an annual basis;
>
> (ii) The amount spent by the employer in the year immediately preceding the previous calendar year on health insurance costs in the state; and
>
> (iii) The percentage of payroll that was spent by the employer in the year immediately preceding the previous calendar year on health insurance costs in the state. . . .

§ 8.5-105(b). "Failure to make the payment required under § 8.5-104 of this title shall result in the imposition by the Secretary of a civil penalty of $250,000."

> history convincingly demonstrates a broad congressional preemptive intent.

633 F.2d at 764 (internal citations omitted). The Supreme Court, in a Memorandum Opinion, affirmed.

The mandates of the Maryland Act are analytically indistinguishable from those that were addressed by the Supreme Court in *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129-31 (1992). There the Court expressly stated that laws requiring employers to provide benefits based upon state-mandated levels are preempted by ERISA. *Id.* at 126-27. In *Greater Washington Board*, the Court was asked whether the District of Columbia could require employers who provide health insurance for their employees to provide the same health insurance coverage for injured employees eligible for workers' compensation benefits. *Id.* Finding the D.C. law to be preempted, the Court observed:

> We have repeatedly stated that a law "relate[s] to" a covered employee benefit plan for purposes of § 514(a) "if it has a connection with or reference to such a plan." This reading is true to the ordinary meaning of "relate to," *see Black's Law Dictionary* 1288 (6th ed. 1990), and thus gives effect to the "deliberately expansive" language chosen by Congress. Under § 514(a), ERISA pre-empts any state law that refers to or has a connection with covered benefit plans (and that does not fall within a § 514(b) exception) "even if the law is not specifically designed to affect such plans, or the effect is only indirect," and even if the law is "consistent with ERISA's substantive requirements[.]"

> Section 2(c)(2) of the District's Equity Amendment Act specifically refers to welfare benefit plans regulated by ERISA and on that basis alone is pre-empted. The health insurance coverage that § 2(c)(2) requires employers to provide for eligible employees is measured by reference to "the existing health insurance coverage" provided by the employer and "shall be at the same benefit level."

Id. at 129-30 (internal citations and footnote omitted).

B. The District Court Properly Applied Settled ERISA Jurisprudence To Determine That The Maryland Act Is Preempted.

Congress enacted ERISA more than thirty years ago to supplant state-by-state regulation of employee benefits plans with a uniform federal scheme. *Shaw*, 463 U.S. at 85. ERISA's uniformity was intended to encourage employers to create employee benefits plans and to facilitate more interstate commerce. *See, e.g.*, 29 U.S.C. § 1001. The need for a single, federal scheme regulating health care plans is obvious. For example, without uniform federal interpretation, health care plans could be required to keep certain records in some states but not in others; to provide different benefits or different benefit levels in different states; to decide benefit claims in different ways; and to comply with differing standards of conduct in administering employee benefit programs. As Congress recognized, the inefficiency caused by a "patchwork" of state-by-state regulation could lead large, national employers with employee benefit plans to provide the lowest common denominator of benefits, discourage those employers from offering any employee benefit program at all, or encourage employers to cease doing business in states

with onerous health care requirements. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-11 (1987).

It is undisputed that Congress intended uniformity to be the cornerstone of employee benefit regulation. The inevitable results of state-by-state health care regulation expressly undermine the foundation upon which Congress constructed ERISA. A fundamental purpose of ERISA is to provide a unitary federal scheme so as to encourage the formation of employee benefit plans by avoiding multiple layers of regulation and thereby preventing conflicts between federal and state regulatory systems. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656-57 (1995).

And in order to cement the principles of uniform federal regulation ERISA's provisions were meant to supersede state laws so as:

> [T]o ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government . . . [and to prevent] the potential for conflict in substantive law . . . . requiring the tailoring of plans and employer conduct to the peculiarities of the law of each jurisdiction.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990).

To ensure the accomplishment of ERISA's primary goals of providing minimum standards and uniform federal regulation of employee benefit plans, Congress enacted a broad preemption clause. 29 U.S.C. § 1144(a). ERISA

expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" and broadly defines "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law." ERISA § 514(a) and (c), 29 U.S.C. § 1144(a) and (c).[2]

In *Shaw v. Delta Air Lines, Inc.*, the Supreme Court explained that there are two methods by which a state law can "relate to" an employee benefit plan for purposes of ERISA preemption: (1) if it has a "connection with" a plan; or (2) if the law "refers to" a plan. 463 U.S. at 96-97. The Supreme Court has elaborated on the "connection with" and "reference to" standards on more than one occasion.

> [T]o determine whether a state law has the forbidden connection, we look both to "the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," as well as to the nature of the effect of the state law on ERISA plans.

Egelhoff v. Egelhoff ex rel. Breiner, 532 U.S. 141, 147 (2001) (quoting *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997) (internal quotation marks omitted). As the Supreme Court further explained in *Dillingham,* a law "has a . . . reference to" a plan where the law "acts immediately and exclusively upon ERISA plans, . . . or where the existence of ERISA plans is essential to the law's operation." 519 U.S. at 325.

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[2] ERISA defines "state" as "a State, any political subdivision thereof, or any agency or instrumentality of either which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by ERISA." ERISA § 514(c)(2), 29 U.S.C. § 1144(c)(2).

C. The District Court Correctly Determined That The Maryland Act "Relates To" ERISA-Governed Employee Benefit Plans

The District Court here applied the Supreme Court's analysis in *Egelhoff* to determine that the Act met the "connection with" prong of the "relates to" standard and, therefore, found it unnecessary to engage in a "reference to" analysis. Specifically, the District Court focused on ERISA's primary objective of avoiding a "multiplicity of regulation" in favor of uniformity. J.A. 674. As discussed above, the elimination of patchwork state regulatory schemes and the creation of a uniform federal law to govern employee benefit plans have been repeatedly recognized as a driving force behind the enactment of ERISA and its sweeping preemption clause.

Consistent with the primary ERISA objective of uniformity so as to encourage the formation of employee benefit plans, the District Court recognized that the Maryland Act is precisely the type of state law Congress intended to preempt. The very first substantive provision of ERISA, 29 U.S.C. § 1001, titled "**CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY**," states in pertinent part:

> The Congress finds[:]
>
> [T]hat the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; . . . that they have become an important factor in commerce because of the interstate character of their activities, and

of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; . . . 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.

Congress's reluctance to amend ERISA's preemption clause is further evidence of its sweeping preemptive intent.[3] The few amendments Congress has made to ERISA's preemption provision are noteworthy for two reasons. First, the consistent message from these few amendments is that Congress intends the regulation of employee benefit plans to be uniform and, with only a few limited exceptions, to be exclusively a federal concern. Second, should Congress choose to exempt Maryland from ERISA's uniform regulation of health care plans, it surely knows how to do so.

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[3] Since the passage of ERISA in 1974, its preemption provision has only been amended five times. The first was to allow Hawaii to maintain its Prepaid Health Care Act. *See* 29 U.S.C. § 1144(b)(5). In enacting this amendment Congress considered and rejected an earlier version of this bill which would have eliminated ERISA preemption as to any state health care mandates. SF 1383, 95th Cong., 1st Sess. (1977). In 1999, Congress passed another change to ERISA preemption, permitting the state regulation of multiemployer welfare plans. *See* 29 U.S.C. § 1144(b)(6). State laws governing domestic relations orders were exempted from ERISA preemption in 1984 providing such orders were "qualified domestic relations orders." *Id.* § 1144(b)(7). Certain child support orders were exempted from ERISA preemption in 1993. *Id.* And in an attempt to help states deal with growing Medicaid costs, in 1986 Congress gave states the power to mandate that employer-sponsored health plans not include a provision requiring employees to exhaust Medicaid benefits prior to claiming benefits under an employer-sponsored plan. *Id.* § 1144(b)(8).

The District Court also determined that the second factor of the "connection with test"—the nature and effect of the state law on ERISA plans—is easily met when applied to the Act. This is because the nature and effect of the Act on ERISA plans is substantial, direct and purposeful.

The Maryland Act mandates the existence of an ERISA plan to accomplish its goal of requiring employers who employ more than 10,000 employees to spend a minimum amount of payroll on "health insurance costs." The Act, in pertinent part, states:

> An employer that is not organized as a nonprofit organization and does not spend up to 8% of the total wages paid to employees in the state on health insurance costs shall pay to the Secretary an amount equal to the difference between what the employer spends for health insurance costs and an amount equal to 8% of the total wages paid to employees in the state.

(Complaint, Exh. 1, p. 6).

A state law mandating a minimum level of contributions by an employer for "health insurance costs" clearly intrudes on ERISA's regulation of health care plans. To have ERISA regulation, there must be an "employee benefit plan." *Fort Halifax Packing Co.*, 482 U.S. at 12. A welfare plan under ERISA is broadly defined to include:

> [A]ny *plan, fund, or program* which was heretofore or is hereafter *established or maintained by an employer* or by an employee organization, or by both, 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, *through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness*, accident, disability, death. . . .

29 U.S.C. § 1002(1) (emphases added).

The Maryland Act functions solely by reference to an employer's expenditures for employer-provided health care. Employer-sponsored health insurance programs are, by definition, subject to ERISA regulation. *See* ERISA § 4(a), 29 U.S.C. § 1003(a); *Madonia v. Blue Cross & Blue Shield of Va.,* 11 F.3d 444, 447 (4th Cir. 1993).

While proponents of the Act have suggested a handful of creative approaches by which "health insurance costs" could potentially be made outside of an ERISA plan, the District Court properly dismissed these alternative as not grounded in reality. J.A. 678-80. In reality, each of the four employers currently affected by the Act, does, in fact, sponsor ERISA-governed medical plans.[4] It is contrary to common sense that these employers would willingly circumvent their already established method of providing health benefits to employees in order to comply with the Act in one of the few ways that have been expressly excluded from ERISA's regulatory reach.

[4] The Legislative History to the Maryland Act shows there are four employers in Maryland with more than 10,000 employees: Giant Food, Northrop Grumman Corp., Wal-Mart and Johns Hopkins University. Only Wal-Mart has health insurance costs low enough to be subject to the payroll assessment. J.A. 657.

The District Court examined each of the theoretical alternatives for complying with the Maryland Act that the Act's proponents suggest do not implicate an ERISA plan. As the District Court rightly determined, none of the proffered alternatives withstands scrutiny. The most extreme alternative suggested is that under the Maryland Act an employer is not required to expend any money to provide health benefits for its employees. Instead, an employer could simply choose the default mechanism of compliance and pay 8% of its payroll costs to the state of Maryland's Fair Share Fund as a tax. Aside from the impracticalities of this alternative noted in the District Court's opinion, the ability of an employer to "opt out" of providing health benefits through an ERISA plan does not save the Maryland Act from preemption. The Supreme Court dismissed the idea of alternative "non-ERISA" methods of compliance with state statutes in *Egelhoff*:

> We do not believe that the statute is saved from pre-emption simply because it is, at least in a broad sense, a default rule.
>
> * * *
>
> The statute is not any less of a regulation of the terms of ERISA plans simply because there are two ways of complying with it. Of course, simple noncompliance with the statute is not one of the options available to plan administrators.

Egelhoff, 532 U.S. at 150-51.

The only practical method of complying with the Act is for large employers to provide a state-mandated minimum level of health benefits through an ERISA governed plan. This was precisely the result intended by the General Assembly

when it passed the Act into law. J.A. 671. Thus, the Act was designed to affect the operation, administration, and funding of Wal-Mart's ERISA-regulated welfare plan. As a result, the Maryland Act violates at least two of the three categories of state laws that can be said to have a connection with an ERISA plan:

> First, Congress intended ERISA to preempt state laws that "mandate[] employee benefit structures or their administration." . . . Second, Congress intended to preempt state laws that bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself . . . . Third, in keeping with the purpose of ERISA's preemption clause, Congress intended to preempt "state laws providing alternate enforcement mechanisms" for employees to obtain ERISA plan benefits.

Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1468 (4th Cir. 1996) (quoting *Travelers*, 514 U.S. at 658) (internal citations omitted).

First, requiring an employer to provide health insurance coverage to employees equal to 8% of its payroll costs mandates a particular employee benefit plan structure. Second, the administration of the covered employer's plan is affected in at least three different ways: (1) it requires the plan to pay a certain level of benefits; (2) it requires a payment to the Fair Share Fund in the event those minimum benefit levels are not met; and (3) it requires ongoing reports to the State of Maryland as to the efforts made in connection with the 8% of payroll mandate. A failure to make timely reports to the State of Maryland results in a $250 per day penalty. A failure to make timely payments to the Fair Share Fund results in the

imposition of a civil penalty of $250,000. These statutory penalties operate to supplement ERISA's exclusive enforcement scheme by creating a remedy that was neither contemplated nor sanctioned by Congress. *See, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004) ("any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted").

Contrary to the fundamental purpose of ERISA, the Act literally commands employers: (1) to establish "Maryland specific" health care benefit levels; (2) to abide by "Maryland specific" health care administrative rules; and (3) creates a "Maryland specific" remedy for an employer's failure to comply with the unique health care scheme created by the Act. Each of these commands precludes employers from uniformly administering health care plans with multi-state applicability. Moreover, the burden to multi-state employers is compounded exponentially if each state is given free reign to enact its own version of the Maryland Act.

D. A Presumption Against Preemption Does Not Apply Where Congress Intends Federal Law To Govern Exclusively.

Prior to the passage of ERISA, states were free to regulate the terms of employer-provided health care plans. *Standard Oil Co.*, 633 F.2d at 764. Appellants and others who seek the reversal of the District Court's decision fall back upon this pre-ERISA power of the states. These parties ask the Court to rely upon a general "presumption against preemption" in fields of traditional state regulation in order to find that the Maryland Act is not preempted by ERISA. Although recognizing this general tenet of law, the Supreme Court has explained that the "presumption can be overcome where, as here, Congress has made clear its desire for pre-emption." *Egelhoff*, 532 U.S. at 151 ("we have not hesitated to find state family law pre-empted when it conflicts with ERISA or relates to ERISA plans"). State laws that attempt to regulate the content of employer health plans or mandate a minimum level of employer-sponsored health care spending fall squarely within the area of traditional state regulation ERISA was designed to preempt. "[D]iffering state regulations affecting an ERISA plan's 'system for processing claims and paying benefits' impose 'precisely the burden that ERISA pre-emption was intended to avoid.'" *Id.* at 150 (quoting *Fort Halifax Packing Co.*, 482 U.S. at 10). Thus the presumption against preemption does not apply in a case such as this where Congress has spoken clearly and mandated preemption.

While the Supreme Court took a more cautious approach to ERISA preemption starting with *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995), it in no way abandoned or overruled its earlier preemption decisions. In *Travelers*, the Court held that a New York law requiring hospitals to collect surcharges from patients covered by a commercial insurance company, but not from patients insured by a Blue Cross/Blue Shield plan, was not preempted. The Court explained that where federal law bars state action in fields of traditional state regulation, it has operated on "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 655 (internal quotation marks omitted). The *Travelers* court emphasized:

> The basic thrust of the [ERISA] preemption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans.
>
> Accordingly in *Shaw*, for example, we had no trouble finding that New York's "Human Rights Law, which prohibited employers from structuring their employee benefit plans in a manner that discriminated on the basis of pregnancy and New York's Disability Benefits Law, which required employers to pay employees specific benefits, clearly "related to" benefit plans. 463 U.S. at 97.
>
> [M]andates affecting coverage could have been honored only by varying the subjects of a plan's benefits whenever New York law might have applied, or by

> requiring every plan to provide all beneficiaries with a benefit demanded by New York law if New York law could have been said to require it for any one beneficiary . . . . In each of these cases, ERISA pre-empted state laws that mandated employee benefit structures or their administration. Elsewhere, we have held that state laws providing alternative enforcement mechanisms also relate to ERISA plans, triggering pre-emption.

Id. at 657-58 (internal citations and alternations omitted). By establishing employee benefit regulation as reserved to the federal government, Congress sought "to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries." *Ingersoll-Rand*, 498 U.S. at 142. Thus even under a more cautious approach to preemption, it is plain that the Maryland statute is preempted by ERISA.

Finally, even if the presumption against preemption advocated for by Appellants were apposite, *see* App. Br. 43-51, which is not the case, it should not control this case. As the Chamber and others have noted in other matters, the presumption is of relatively recent vintage, has been applied in an inconsistent fashion, suffers from a number of serious ambiguities, and is fundamentally at odds with central principles of preemption law—including the principle that Congress's *intent* determines the scope of express preemption. *See, e.g.*, Br. of the Product Liability Advisory Council, Inc. and the Chamber of Commerce of the

United States of America, *United States* v. *Locke*, Nos. 98-1701 and 98-1706, 1999 WL 966527, at *4-12; Chamber Br., *Geier* v. *American Honda Motor Co.*, No. 98-1811, 1999 WL 1049891, at *25-26. When faced with a clear congressional mandate, as is this Court in this case, a consistent approach in case law favoring preemption, and the common sense conclusions of the District Court, the only conclusion that can be drawn is that the presumption against preemption, especially in light of its doubtful provenance, should not be applied here.

II. CONCLUSION

The Maryland Act is neither a "tax" nor an "economic incentive." It is a classic form of legislative coercion intended to achieve a result which Congress expressly removed from the state's power. In enacting the Fair Share Act, the state of Maryland overstepped its authority by attempting to regulate an area of the law that Congress identified as an exclusively federal concern. As the District Court recognized, ERISA was enacted to ensure that employers who choose to offer pension or welfare benefits to their employees are subject to uniform regulation. Maryland's Fair Share Act attempts to circumvent this federal mandate by requiring employers to provide a minimum level of health insurance benefits. The Act also serves as precedent for other states considering similar measures. Accordingly, the Act runs afoul of more than three decades of Supreme Court jurisprudence.

For all of the foregoing reasons, the Chamber respectfully requests that this Court affirm the District Court's decision that Maryland's Fair Share Act is preempted by ERISA.

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Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1840 **Caption:** Retail Industry Leaders Ass'n v. James D. Fielder Jr.

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Attorney for Chamber of Commerce of the USA

Dated: 11/06/06

CERTIFICATE OF SERVICE

I certify that on this sixth day of November, 2006, I caused eight copies (including the original) of the attached Brief Of *Amicus Curiae* Chamber Of Commerce Of The United States of America In Support of Appellee Retail Industry Leaders Association Supporting Affirmance to be filed by priority overnight courier with the Clerk of this Court, at the following address:

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I further certify that I caused two copies of the Brief Of *Amicus Curiae* Chamber Of Commerce Of The United States of America In Support of Appellee Retail Industry Leaders Association Supporting Affirmance to be served by priority overnight courier on counsel for Appellant Fielder and upon Appellee Retail Industry Leaders Association at the following addresses:

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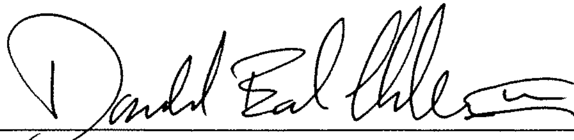

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