IN THE UTAH SUPREME COURT

BRENDA BOURGEOIS, an individual; and BRENDA BOURGEOIS, as Personal Representative for the Estate of Brandon P. Bourgeois, Plaintiffs/Appellees, v. RESOURCE MANAGEMENT, INC., a Utah corporation; HORIZON REALTY ADVISORS, a Washington limited liability company; ERIC LAGERQUIST, an individual; and JOHN DOES I-V, Defendants/Appellants.	**SUPPLEMENTAL BRIEF OF APPELLANTS RESOURCE MANAGEMENT, INC., HORIZON REALTY ADVISORS, AND ERIC LAGERQUIST** **No. 20200883-SC** District Ct. No. 190401209 On appeal from the Fourth Judicial District Court, Utah County The Honorable Derek P. Pullan

ON INTERLOCUTORY APPEAL

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INTRODUCTION

Federal district courts have exclusive jurisdiction over certain civil actions brought by participants or beneficiaries under ERISA. But the plaintiff in this matter, Ms. Bourgeois, asserts she is not a participant or beneficiary for purposes of ERISA, and she has not pleaded any claim under ERISA's statutory scheme. Accordingly, there would ordinarily be no question as to a Utah state court's jurisdiction over her state law claims.

Congress may, however, so completely preempt a particular area of law that "any civil complaint raising this select group of claims is necessarily federal in character" for purposes of removal to federal court. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63–64 (1987). ERISA's civil enforcement scheme carries this extraordinary preemptive power, at least as to some of its remedies. Thus, under the complete preemption doctrine, certain state law claims preempted by ERISA are converted in federal ones for purposes of the well-pleaded complaint rule and are thus removable to federal court.

The Supreme Court has recognized other preemption doctrines as well. Each doctrine is defined by the extent to which federal law has displaced state regulatory authority, and each has a distinct application. Complete preemption operates as an exception to the well-pleaded complaint rule; it thus provides a jurisdictional basis for removing state law claims to federal court. Ordinary preemption (i.e., field, conflict, or express preemption) may be asserted as a defense to state law claims. *Garmon* preemption applies in the field of labor law, and it displaces state court subject matter jurisdiction to determine preemption and to adjudicate arguably preempted claims.

Referencing this aspect of *Garmon* preemption, this Court stated that "complete preemption is a challenge to [this Court's] subject matter jurisdiction, which cannot be waived." *10/29/21 Supplemental Briefing Order*, at 3. The parties were thus asked to address the issue. The Court's question is whether, if complete preemption applies, "the Court lacks subject matter jurisdiction to hear this case." *12/03/21 Revised Supplemental Briefing Order*, at 1–2. Or, in other words, whether "the Court must first determine whether Plaintiffs' claims are completely preempted" before addressing whether those claims "are expressly preempted by ERISA, under 29 U.S.C. section 1144(a)." *Id.* at 2.

To both questions, the answer is no. This Court may dismiss claims as expressly preempted regardless of whether those claims are also completely preempted. This is true for three reasons. ***First***, complete preemption operates solely as an exception to the well-pleaded complaint rule for purposes of removal and federal question jurisdiction. It is not a substantive rule governing adjudication of state law claims in state courts.

Second, ordinary (conflict) preemption does operate as a substantive rule in state courts. And the implied preemptive power of ERISA's civil enforcement scheme may arguably be of such force that, as with *Garmon* preemption, it displaces state court jurisdiction to adjudicate conflicting state law claims. But even assuming ERISA's civil enforcement scheme carries such unusual preemptive power, it would not displace state court jurisdiction to dismiss state law claims on other preemption grounds.

Preemption, in any form, depends on congressional intent. Such intent may be inferred based on a conflict with, or invasion of a field of, federal law. *Garmon* preemption displaces state court jurisdiction to determine preemption and to adjudicate arguably preempted claims because, in that labor-law context, doing so conflicts with, or invades a field of, federal law. But under ERISA, state court dismissal of state law claims on express preemption grounds does not conflict with, invade, or assail *any aspect* of ERISA's statutory framework. Moreover, only *substantive* adjudication of state law claims conflicts with, or invades, federal law, and there is no basis for inferring that *Garmon* preemption, or preemption under ERISA, would extend any further.

This conclusion aligns with Supreme Court precedent as well as ERISA's overarching framework. Twice, the Supreme Court has resolved state-court litigation on express preemption grounds, in decisions indicating state courts have jurisdiction to do so *regardless* of whether the claims are also completely or otherwise preempted. Indeed, consistent with ERISA's statutory framework, state courts not only can but *should* dismiss expressly preempted claims on that basis—rather than first, in every case, painstakingly discerning ERISA law as to the type and availability of any ERISA claim. That practice would be antithetical to Congress's intent, as Congress placed the development and application of ERISA law primarily in the hands of federal courts.

Third, all of Ms. Bourgeois's claims seek benefits under an ERISA-governed benefit plan, and this Court has concurrent jurisdiction to adjudicate any such claims brought under ERISA. As other courts have concluded, if a state court would have jurisdiction to adjudicate the plaintiff's exclusive federal claim, the state court's jurisdiction to adjudicate the preempted state law claim is not displaced.

Accordingly, this Court can and should dismiss Ms. Bourgeois's claims as expressly preempted, regardless of whether her claims are also otherwise preempted.

ARGUMENT

I. ERISA's Complete Preemption Doctrine Is a Rule of Federal Jurisdiction; It Does Not Displace State Court Jurisdiction to Adjudicate State Law Claims.

A. Utah Courts Have Jurisdiction to Address Federal Questions Unless That Jurisdiction Is Affirmatively Withdrawn.

Utah district courts are courts of general jurisdiction. *See* UTAH CONST. art. VIII, § 5; UTAH CODE § 78A-5-102(2). That jurisdiction includes authority to adjudicate questions of state and federal law. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) ("[S]tate courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States.").

State court authority is, however, "subject … to limitations imposed by the Supremacy Clause." *Id.* Under that Clause, Congress may strip state courts of jurisdiction to adjudicate federal claims, but only by affirmatively withdrawing that authority. *Id.* at 459. Before finding such a withdrawal, a court must identify an "explicit statutory directive, an unmistakable implication from legislative history, or a clear incompatibility between state-court jurisdiction and federal interests." *Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1351 (2020) (citation and internal quotation marks omitted). Otherwise, the "presumption in favor of concurrent state court jurisdiction over federal claims" will not be overcome. *Id.* (citation and internal quotation marks omitted).

B. Congress Expressly Withdrew State Courts' Jurisdiction Over Several Claims Brought Under ERISA.

As part of ERISA's civil enforcement scheme, Congress affirmatively withdrew state courts' concurrent jurisdiction over many claims brought under ERISA. Pursuant to

29 U.S.C. section 1132(e)(1), federal district courts "have exclusive jurisdiction of civil actions under this subchapter brought by," among others, "a participant" or "beneficiary."

But there is an exception. State courts maintain "concurrent jurisdiction of actions" brought under 29 U.S.C. section 1132(a)(1)(B), which are civil actions by "participant[s]" or "beneficiar[ies]" to recover benefits due to them, to enforce their rights, or to clarify their rights to future benefits, "under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B), (e)(1). Such claims typically involve general principles of contract law, with which state courts have "substantial experience." *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1500 n.2 (9th Cir. 1984). Congress thus reserved state court authority to adjudicate these claims. *Id.*

C. Still, Claims Subject to Federal Court Jurisdiction Usually Must Be Pleaded as Such.

Federal district courts thus have jurisdiction—often exclusive, but sometimes concurrent—over all claims brought under ERISA. All such actions "aris[e] under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, and therefore all are subject to removal, under section 1331 and/or 29 U.S.C. section 1132(e)(1), as "action[s] … [over] which [federal] district courts … have original jurisdiction," 28 U.S.C. § 1441(a); *see also* 29 U.S.C. § 1132(f) (providing that federal district courts "have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a)").

But if a plaintiff does not plead a federal claim, then, absent diversity jurisdiction, a federal court generally lacks jurisdiction over the matter. *See Beneficial Nat'l Bank v.*

Anderson, 539 U.S. 1, 6 (2003). Under the well-pleaded complaint rule, "the plaintiff [is] the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 & n.7 (1987) (citing cases). A federal court's "[j]urisdiction may not be sustained on a theory that the plaintiff has not advanced." *Id.* at 392 n.7 (citation and internal quotation marks omitted).

D. Under the Complete Preemption Doctrine, State Law Claims May Be Deemed Federal Claims for Purposes of *Removal* to Federal Court.

Yet, the well-pleaded complaint rule comes with a caveat—the Supreme Court's "complete preemption" doctrine. Under the Supremacy Clause, "federal law is supreme in case of a conflict with state law." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1479 (2018). When a conflict occurs, federal law displaces (i.e., preempts) state law. *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019). The Supreme Court has "identified three different types of preemption—conflict, express, and field." *Murphy*, 138 S. Ct. at 1480 (citation and internal quotation marks omitted). "[A]ll of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and … the federal law takes precedence and the state law is preempted." *Id.* These three types of preemption—which constitute "ordinary" or "ordinary defensive" preemption—may be raised as a defense to state law claims. *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272–73 & n.7 (2d Cir. 2005).

But the Supreme Court has also held that Congress may so completely preempt state law in a particular area "that any civil complaint raising this select group of claims is necessarily federal in character." *Taylor*, 481 U.S. at 63–64. In other words, a federal law may have such "extraordinary pre-emptive power" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Id.* at 65. "Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state-law claim is considered, from its inception, a federal claim, and therefore arises under federal law." *Caterpillar*, 482 U.S. at 393. Thus, contrary to the well-pleaded complaint rule, the preemption defense permits removal; solely for this purpose, the state law claim is treated as a federal one. *See id.*

Complete preemption thus provides a jurisdictional basis for federal court removal and adjudication. "Because complete preemption operates to create federal subject-matter jurisdiction," it is sometimes referred to as "'jurisdictional' preemption," *see, e.g.*, *Sullivan*, 424 F.3d at 272 n.5, or even as a jurisdictional doctrine masquerading as "preemption," *see, e.g.*, *Lister v. Stark*, 890 F.2d 941, 943 n.1 (7th Cir. 1989).

E. The Complete Preemption Doctrine Is Not, However, Based on Congressional Intent to Displace State Court Jurisdiction.

Because complete preemption supplies a basis for federal court jurisdiction, courts sometimes assume the doctrine reflects congressional intent to also displace state court jurisdiction. *See, e.g.*, *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Tr. Fund*, 538 F.3d 594, 596 (7th Cir. 2008) (characterizing complete preemption as conferring "exclusive federal jurisdiction," when discussing whether claims were completely preempted under 29 U.S.C. section 1132(a)(1)(B), over which state courts have concurrent jurisdiction); *Wayne v. DHL Worldwide Express*, 294 F.3d

1179, 1183 (9th Cir. 2002) (observing that "complete preemption occurs … when Congress intends … to transfer jurisdiction … from state to federal court").

But that is not the case. The Supreme Court has characterized its complete preemption doctrine as having been applied in three circumstances: with respect to the Labor Management Relations Act (LMRA), ERISA, and the National Bank Act. *Anderson*, 539 U.S. at 8, 11. The doctrine operates much the same way in each context: a federal statute provides the exclusive cause of action as well as attendant procedures and remedies; the federal statute "completely pre-empts the state-law cause of action"; and the state law cause of action is therefore deemed a claim under federal law and is removable on that basis. *Id.*; *see also Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009) ("Under [the] complete preemption doctrine," a state law claim "may be recast as a federal claim … making its removal … proper on the basis of federal question jurisdiction." (brackets, citation, and internal quotation marks omitted)).

The complete preemption doctrine thus creates a basis for removal based on federal question jurisdiction; it does not turn on, create, or necessarily result in exclusive federal jurisdiction over the claims at issue. Indeed, when the Supreme Court first applied the complete preemption doctrine to ERISA, it was determining whether the plaintiff's state law claims were converted into a federal claim for benefits under 29 U.S.C. section 1132(a)(1)(B), *Taylor*, 481 U.S. at 62–67—a claim over which state courts have concurrent jurisdiction. Moreover, the Supreme Court relied on Congress's "clear" intent "to make [section] (a)(1)(B) suits … federal questions for the purposes of federal court jurisdiction in *like manner* as § 301" of the LMRA. *Id.* at 66 (emphasis added). And state courts have concurrent jurisdiction to adjudicate section 301 claims. *United Steelworkers of Am., AFL-CIO-CLC v. Rawson*, 495 U.S. 362, 368 (1990).

The complete preemption doctrine is thus not premised on congressional intent to divest state courts of jurisdiction, and it does not carry any inherent jurisdiction-transferring authority. The doctrine simply provides defendants the *option* to remove state law claims to a federal forum, if the defendant wishes to do so.[1]

F. Another Type of Preemption—*Garmon* Preemption—Always Displaces State Court Jurisdiction.

While complete preemption operates as a rule of federal jurisdiction, other preemption doctrines operate as substantive rules in state court adjudications. Ordinary preemption, as noted above, may be raised as a defense to state law claims. Another type of preemption—*Garmon* preemption—also operates as a substantive rule in state court. As explained below, *Garmon* preemption displaces state court jurisdiction to determine preemption and to adjudicate arguably preempted state law claims.

In *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, the Supreme Court concluded that the National Labor Relations Board (the Board) has "primary" jurisdiction to determine whether a given activity is "subject to § 7 or § 8" of the National Labor Relations Act (NLRA). 359 U.S. 236, 244–45 (1959). Congress also

[1] Indeed, a defendant has no obligation to remove a case if complete preemption applies to some claims, and the defendant may not wish to do so. Removal simply changes the forum. Removed claims *remain* state law claims subject to dismissal as preempted in federal court, just as the claims are subject to dismissal on express or conflict preemption grounds in state court. And a defendant may have any number of strategic or practical reasons for electing to remain in state court and raise its preemption defenses there.

reserved to the Board "primary interpretation and application of its rules." *Id.* at 242 (citation and internal quotation marks omitted). States and "federal courts must [thus] defer to the [Board's] exclusive competence" in this area. *Id.* at 245. And absent a "clear determination" by the Board "that an activity is neither protected nor prohibited," or "compelling precedent applied to essentially undisputed facts, it is not for [courts] to decide whether such activities are subject to state jurisdiction." *Id.* at 246.

As to all such arguably regulated activity, unless a Board adjudication provides otherwise, both the state's "power" to regulate as well as its "jurisdiction" is displaced. *Id.* at 239–46. References to both appear throughout the Supreme Court's opinion.[2] The matter had also been presented as a question of "jurisdiction"[3]—a term used in prior cases addressing the States' and the Board's respective spheres of authority.[4]

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[2] *See, e.g.*, *Garmon*, 359 U.S. at 239 (characterizing the issue as "whether the California court had *jurisdiction* to award damages arising out of … activity … it could not enjoin" (emphasis added)); *id.* at 244 (identifying instances in which "Congress had [not] deprived the States of the *power* to act" (emphasis added)); *id.* at 245 ("What is outside the scope of this Court's authority cannot remain within a State's *power* and state *jurisdiction* too must yield …." (emphases added)); *id.* ("If the Board decides" conduct is subject to section 7 or section 8, "the States are ousted of all *jurisdiction*." (emphasis added)); *id.* at 246 ("Since the … Board has not adjudicated the status of the conduct …, the State's *jurisdiction* is displaced." (emphasis added)).

[3] *See, e.g.*, *Garmon v. San Diego Bldg. Trades Council*, 320 P.2d 473, 477 (Cal. 1958) (observing that "limitations" on state court "*jurisdiction*" to grant "equitable relief in the solution of labor disputes" did not foreclose "*jurisdiction* in an action for damages resulting from the tortious conduct of those engaged in the dispute" (emphases added)); *id.* at 488 (Traynor, J., dissenting) ("[T]he trial court was without *jurisdiction* to issue an injunction" and was also "without *jurisdiction* to award damages." (emphases added)).

[4] *See, e.g.*, *Loc. No. 438 Const. & Gen. Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542, 546–47 (1963) ("[T]he state court had no *jurisdiction* to issue an injunction or to adjudicate this controversy, which lay within the exclusive powers of the … Board." (emphasis added)); *United Const. Workers, Affiliated with United Mine Workers of Am. v.*

The nature of the Supreme Court's language in *Garmon* thus gave rise to a follow-up question: whether *Garmon* preemption is unlike ordinary preemption, which operates as an affirmative defense to state law claims, and instead entails unwaivable displacement of state courts' subject matter jurisdiction to adjudicate. *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, s, 381–82 (1986); *also id.* at 388–89 ("[T]he question is whether *Garmon* pre-emption is a waivable affirmative defense such that a state court may adjudicate an otherwise pre-empted claim if the *Garmon* defense is not timely raised or whether *Garmon* pre-emption is a nonwaivable foreclosure of the state court's very jurisdiction to adjudicate."). The Supreme Court answered that *Garmon* preemption displaces state court jurisdiction.

"A claim of *Garmon* pre-emption is a claim that the state court has no power to adjudicate the subject matter of the case, and when a claim of *Garmon* pre-emption is raised, it must be considered and resolved by the state court." *Id.* at 393. "[W]hen a state proceeding or regulation is claimed to be pre-empted by the NLRA under *Garmon*, the issue is a choice-of-forum rather than a choice-of-law question. As such, it is a question whether the State or the Board has jurisdiction over the dispute." *Id.* at 391. "If there is pre-emption under *Garmon*, then state jurisdiction is extinguished." *Id.*

Laburnum Const. Corp., 347 U.S. 656, 658–59, 669 (1954) (addressing whether the "Board [has] exclusive jurisdiction," considering the implications "[i]f Virginia is denied *jurisdiction*," and sustaining the Virginia court's "*jurisdiction*" (emphases added)). As used in these contexts, the term "jurisdiction" often appears to mean the states' sphere of regulatory authority. *See also supra* nn. 2–3; *United Const. Workers, Affiliated with United Mine Workers of Am.*, 347 U.S. at 664 n.5 ("The cases relied upon to exclude state *jurisdiction* are those where a conflict with federal control has been made clear." (emphasis added) (citing cases)).

With respect to the doctrine's implications in other contexts, the Supreme Court provided little guidance. *See id.* at 391 n.9. Whether a particular type of preemption displaces state court jurisdiction depends on whether Congress so intended. *Id.* The evidence of intent giving rise to that conclusion with respect to *Garmon* was, according to the Supreme Court, simply "delineated in [the Court's] prior decisions."[5] *Id.*

G. ERISA's Complete Preemption Doctrine Does Not, However, Operate as a Substantive, Jurisdiction-Displacing Rule in State Court.

In light of the above precedents, state courts have faced questions whether complete preemption under ERISA also operates as a substantive rule in state court; and if so, whether it is a nonwaivable, jurisdiction-displacing doctrine. Many state courts have walked partially or wholly down this path. Several have applied the complete preemption doctrine as a substantive rule of adjudication to state law claims in state court, usually by asking whether the state law claims must be deemed a federal claim and dismissed, due to exclusive federal court jurisdiction.[6]

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[5] Of course, the four concurring justices had a bit of a field day with that. *Id.* at 400–03 (Rehnquist, J., concurring) (noting that "Congress has never said a word about pre-emption of state-court jurisdiction" in this context and opining that the Court had no foundation for its determination other than "conflicting indications of congressional will" (citation and internal quotation marks omitted)); *see also id.* at 402 (observing that "jurisdiction" "is a verbal coat of many colors" and suggesting the Court treated the term as though it carried only one meaning (citation and internal quotation marks omitted)).

[6] *See, e.g.*, *FMS Nephrology Partners N. Cent. Ind. Dialysis Ctrs., LLC v. Meritain Health, Inc.*, 144 N.E.3d 692, 699–701 (Ind. 2020) (determining state law claims were not completely preempted); *Johnson v. Lou Fusz Auto. Network, Inc.*, 519 S.W.3d 450, 456–60 (Mo. Ct. App. 2017) (determining state law claims were completely preempted and within the exclusive jurisdiction of federal courts); *Turner ex rel. Turner v. Turner*, 672 S.E.2d 242, 248–52 (W. Va. 2008) (same); *Asbestos Workers Loc. Union No. 42 Welfare Fund v. Brewster*, 940 A.2d 935, 939–43 (Del. 2007) (same); *Totten v. Hill*, 64

But the Supreme Court has not defined ERISA's complete preemption doctrine as a rule with substantive application in state courts. Rather, it has defined the doctrine as an exception to the well-pleaded complaint rule for purposes of removal: "In [*Taylor*], we … conclu[ded] that the pre-emptive effect of § 502(a) was so complete that an ERISA pre-emption defense provides a sufficient basis for removal of a cause of action to the federal forum notwithstanding the traditional limitation imposed by the 'well-pleaded complaint' rule."[7] *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 144–45 (1990) (citation omitted).

Cal. Rptr. 3d 357, 365 (Cal. Ct. App. 2007) (opining that the complete preemption doctrine "effectively divests state courts of subject matter jurisdiction over those state law claims to which it applies" and concluding that "the trial court lacked subject matter jurisdiction" on that basis); *Reeds v. Walker*, 157 P.3d 100, 109 & n.34, 111–12 (Okla. 2006) (opining that there was "no reason why [the complete preemption doctrine] cannot be invoked in a state-court appellate proceeding to analyze federal question jurisdiction, which, if exclusive, would divest the state courts of subject matter jurisdiction" (citation omitted)); *Bishop v. Burgard*, 764 N.E.2d 24, 30–32 (Ill. 2002) (determining state court action was not completely preempted).

[7] *See also, e.g.*, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004) ("There is an exception … to the well-pleaded complaint rule. When a federal statute wholly displaces the state-law cause of action through complete pre-emption, the state claim can be removed." (brackets, citation, and internal quotation marks omitted)); *id.* at 209 (observing that "the ERISA civil enforcement mechanism … [has] such extraordinary pre-emptive power that it converts [a state law] complaint into one stating a federal claim for purposes of the well-pleaded complaint rule," and "causes of action within the scope … § 502(a) are [thus] removable to federal court" (brackets, citation, and internal quotation marks omitted)); *id.* at 214 (holding that "respondents' state causes of action … are … completely pre-empted by ERISA § 502 and removable to federal district court"); *Taylor*, 481 U.S. at 66 (opining that "Congress has clearly manifested an intent to make causes of action within the scope of … § 502(a) removable to federal court"); *id.* at 67–68 (Brennan, J., concurring) (observing that "removal jurisdiction exists when, as here, Congress has clearly manifested an intent to make causes of action removable" (ellipsis and emphases omitted) (citation and internal quotation marks omitted)).

The Supreme Court also *does not apply* ERISA's complete preemption doctrine as substantively governing state court litigation. Twice, when reviewing decisions arising out of state court adjudications, the Supreme Court has concluded ERISA's express preemption provision required dismissal of state law claims; and in neither case did the Supreme Court suggest the complete preemption doctrine must first be evaluated to determine subject matter jurisdiction.

The more recent decision, *Egelhoff v. Egelhoff ex rel. Breiner*, arrived in the Supreme Court via state court litigation in Washington. 532 U.S. 141, 144 (2001). A dispute had arisen because when Ms. Egelhoff's ex-husband passed away, shortly after their divorce, Ms. Egelhoff was still listed as the beneficiary on his life insurance policy and pension plan. *Id.* Mr. Egelhoff's children—his statutory heirs under state law—sued Ms. Egelhoff in state court over the life insurance and pension plan benefits, based on a state law that revoked Ms. Egelhoff's status as a beneficiary at the time of divorce. *Id.* The Washington Supreme Court ultimately held the state law was not sufficiently connected to an ERISA plan to compel preemption. *Id.*

The Supreme Court granted review, and Ms. Egelhoff challenged the Washington Supreme Court's ruling on two grounds: express preemption, under 29 U.S.C. section 1144(a), and ordinary preemption, "under traditional principles of conflict pre-emption." *Id.* at 146. The Supreme Court addressed only the former. *Id.* ("Because we conclude that the statute is expressly pre-empted by ERISA, we address only the first argument."). And even though *Egelhoff* was issued more than a decade after the Supreme Court applied the complete preemption doctrine to ERISA in *Taylor*, the Supreme Court never raised the question of complete preemption nor suggested the doctrine might apply or must be evaluated.[8]

An earlier case, *Ingersoll-Rand Co. v. McClendon*, also arrived in the Supreme Court via state court litigation. 498 U.S. 133, 136 (1990). McClendon sued his former employer in Texas state court, alleging he was fired shortly before his pension would have vested, due to "the company's desire to avoid making contributions to his pension fund." *Id.* at 135–36. McClendon sought "damages under … tort and contract theories" but did "not assert any cause of action under ERISA." *Id.* at 136. The Texas Supreme Court concluded McClendon's claims were not preempted by ERISA because he "was not seeking lost pension benefits" but was seeking "lost future wages, mental anguish and punitive damages as a result of the wrongful discharge." *Id.* (emphasis omitted) (citation and internal quotation marks omitted).

The Supreme Court granted review and considered three ERISA provisions "of particular relevance": ERISA's express preemption provision, 29 U.S.C. section 1144(a); ERISA's "carefully integrated civil enforcement scheme," 29 U.S.C. section 1132(a); and "29 U.S.C. [section] 1140, which proscribes interference with rights protected by ERISA." *McClendon*, 498 U.S. at 137 (citation and internal quotation marks omitted).

[8] If the Supreme Court had run through a complete preemption analysis, it might have concluded, at least with respect to the pension plan, that the children were "beneficiaries" making a claim for benefits under 29 U.S.C. section 1132(a)(1)(B). *See Egelhoff*, 532 U.S. at 155 (Breyer, J., dissenting) (noting the children "were identified as recipients in the pension plan documents should the initial designation to [Egelhoff] become invalid"). But the Supreme Court did not address that issue nor indicate it was relevant to the disposition of the case on express preemption grounds.

The Supreme Court framed its inquiry as "whether these provisions, singly or in combination, pre-empt the cause of action at issue in this case." *Id.* The Supreme Court concluded that "[r]egardless of the avenue we follow—whether explicit or implied pre-emption—this state-law cause of action cannot be sustained." *Id.* at 138.

McClendon was decided post-*Taylor*, and in its opinion, the Supreme Court referenced *Taylor's* application of the complete preemption doctrine to ERISA. *Id.* at 144–45. But as in *Egelhoff*, the Supreme Court never suggested the complete preemption doctrine must be evaluated. Instead, the Supreme Court first concluded McClendon's state law claims were expressly preempted. *Id.* at 138–42. The Supreme Court then applied a traditional (conflict) preemption analysis and determined the claims were also preempted on that basis. *Id.* at 142. McClendon had a cause of action under 29 U.S.C. section 1132(a)(3), which functions as "the exclusive remedy for vindicating § 510-protected rights." *Id.* at 145. The relief McClendon requested was also "well within the power of federal courts to provide." *Id.* Accordingly, "[e]ven if there were no express pre-emption …, the Texas cause of action would be pre-empted because it conflicts directly with an ERISA cause of action." *Id.* at 142.

Thus, in *McClendon*, the state law claims would have been removable as completely preempted. But the claims were not removed; and when the Supreme Court reviewed the Texas Supreme Court's adjudication of those claims, it did not consider the complete preemption doctrine. Instead, the Supreme Court determined the claims were expressly preempted and also barred under traditional notions of conflict preemption.

Accordingly, both *Egelhoff* and *McClendon* demonstrate that complete preemption operates as an exception to the well pleaded complaint rule, in determining whether state law claims may be removed to federal court based on federal question jurisdiction. Contrary to state court rulings holding otherwise, *supra* n.6, the doctrine does not substantively govern state court adjudications of state law claims. It thus does not displace jurisdiction to adjudicate those claims. Rather, as explained above, complete preemption simply provides the defendant an opportunity to remove the case to federal court, to be adjudicated in that forum, if the defendant wishes.

II. Even If ERISA Otherwise Preempted State Court Jurisdiction to Adjudicate Conflicting State Law Claims, State Courts Could Still Dismiss Those Claims as Expressly Preempted.

Still, there is a jurisdictional wrinkle here. As explained above, *McClendon* dispels the notion that complete preemption applies as a jurisdiction-displacing doctrine in state court adjudications. State law claims removable to federal court under that doctrine are not repackaged as federal claims for purposes of *state court* litigation. Rather, they remain state law claims subject to dismissal if preempted by ERISA, under traditional preemption principles.[9]

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[9] Complete preemption may nevertheless be relevant in that context. The exclusivity of ERISA's civil enforcement scheme may inform an express preemption analysis or provide the basis for a conflict preemption defense. *See, e.g.*, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52–57 (1987) (observing that ERISA's civil enforcement provisions were "intended to be exclusive" when determining whether a state law claim was expressly preempted). Because complete preemption is premised on the exclusivity of claims available under ERISA's civil enforcement scheme, that body of law can be helpful in determining ordinary preemption. *See Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1281 (11th Cir. 2005) ("Although we address complete preemption in this Part, we will also discuss several defensive preemption cases. These cases are helpful

But *McClendon* also leaves open the possibility that, even under more traditional preemption principles, ERISA's civil enforcement scheme might, like *Garmon* preemption, displace state court jurisdiction to adjudicate conflicting state law claims.

A. The Supreme Court Has Not Resolved Whether ERISA's Civil Enforcement Scheme Displaces State Court Jurisdiction to Adjudicate Conflicting State Law Claims.

When discussing whether McClendon's claims were barred under traditional principles of conflict preemption, the Supreme Court noted that federal courts have exclusive jurisdiction over certain claims brought under ERISA's civil enforcement scheme. *McClendon*, 498 U.S. at 143. And, as noted above, McClendon could have brought one of those claims. *Id.* at 144–45. McClendon's state law claims were thus preempted because they conflicted with that aspect of ERISA. *Id.*

The Supreme Court, however, couched its ruling in language that originated in *Garmon*—language that, the Supreme Court separately held, referenced displacement of state court subject matter jurisdiction: "[W]e hold that 'when it is clear or may fairly be assumed that the activities which a State purports to regulate are protected' by § 510 of

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because claims that are completely preempted are also defensively preempted."). Indeed, nearly every state law claim that is completely preempted will also be expressly preempted. *Id.* at 1281 n.14; *see also id.* ("Defensive preemption may not be a prerequisite for complete preemption, but they usually co-exist. Naturally, if a claim were for the recovery or clarification of benefits under an ERISA plan, then the claim will 'relate to' the plan." (citation and internal quotation marks omitted)).

Appellants thus discussed complete preemption and case law applying it in their merits briefing, as relevant in demonstrating Ms. Bourgeois's claims are expressly preempted. But Appellants recognize it would have been helpful to the Court had Appellants been clearer in their briefing as to role the doctrine and its interpreting case law played in Appellants' briefing—as informative on the issue of express preemption.

ERISA, 'due regard for the federal enactment requires that state jurisdiction must yield.'" *Id.* at 145 (brackets omitted) (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 409 n.8 (1988) (quoting *Garmon*, 359 U.S. at 244)); *see also Davis*, 476 U.S. at 389 (quoting this language in *Garmon* and concluding that *Garmon* preemption displaces state court subject matter jurisdiction to adjudicate preempted state law claims).

Thus, when ruling on conflict preemption under ERISA, *McClendon* references the *Garmon* preemption standard. But application of *Garmon*-like preemption is a big leap from traditional conflict preemption analysis. And the Supreme Court does not indicate what that reference means. The "may fairly be assumed" language the Supreme Court quoted seems to be a reference to preemption of claims "arguably" covered by federal law, which is the standard in *Garmon* but not a standard that has been applied (or would make sense to apply) to ERISA. The Supreme Court also did not walk through any analysis of whether, unlike traditional applications of preemption, Congress intended ERISA's provisions to displace state court jurisdiction. And *McClendon* did not direct that the Texas litigation, on remand, be dismissed for lack of subject matter jurisdiction.

Still, *McClendon* might arguably be read as suggesting the implied preemptive power of ERISA's civil enforcement scheme is so strong it operates like *Garmon* preemption—meaning that when a state law claim is preempted because it conflicts with ERISA's civil enforcement scheme, state court subject matter jurisdiction to adjudicate the state law claim is displaced. That is unclear, however, as the Supreme Court did not continue with that line of reasoning in *Egelhoff*—but simply disposed of the matter on express preemption grounds, without addressing the conflict preemption question.

B. But Even If That Were the Case, This Court Still Would Have Authority to Dismiss Those Claims as Expressly Preempted.

Fortunately, this Court need not attempt to make sense of that aspect of *McClendon* because it is of no effect here. Even *if* ERISA's civil enforcement mechanism carried jurisdiction-displacing power with respect to state law claims that conflict with a federal claim available under ERISA, this Court *still* would have jurisdiction to dismiss the claims as expressly preempted. Indeed, that is precisely what happened in *McClendon*. That is also the approach suggested in *Egelhoff*, in which the Supreme Court held the claims were expressly preempted without addressing conflict preemption.

That approach is also consistent with Supreme Court precedent regarding *Garmon*. *Garmon* preemption displaces state court jurisdiction (a) to determine whether arguably regulated activity is prohibited or protected by federal law, and (b) to adjudicate claims with respect to arguably protected or prohibited activity. *Garmon*, 359 U.S. at 242–47; *Davis*, 476 U.S. at 387–93. The exercise of jurisdiction in those respects would conflict with, or invade the field of, federal law, as "Congress has created … a uniform body of laws" and vested the Board with "exclusive jurisdiction over administration [thereof]." *Davis*, 476 U.S. at 393 n.11. "Enactment of such exclusive jurisdiction must, by operation of the Supremacy Clause, pre-empt conflicting state-court jurisdiction." *Id.*

ERISA's statutory framework is different. It leaves intact state court jurisdiction to determine the scope of preemption. Congress outlined the express preemption inquiry in 29 U.S.C. section 1144(a). And state courts unquestionably have jurisdiction to determine the effect of that provision with respect to state law—the only question being whether such authority is displaced if the state law claim conflicts with a claim available under ERISA. But there is no basis for concluding Congress affirmatively withdrew state court jurisdiction in that context—i.e., for inferring Congress intended to displace state court jurisdiction to determine express preemption *only* when (a state court concludes) the state law claim is impliedly preempted under the Supreme Court's conflict preemption doctrine. *See McClendon*, 498 U.S. at 137–38 (observing that preemption is a matter of congressional intent). As explained above, state courts presumptively retain jurisdiction to address federal questions; and that presumption has not been overcome here.

In addition, Supreme Court precedent suggests that when federal law preempts jurisdiction to adjudicate state law claims, only jurisdiction to *substantively* adjudicate the claims is displaced. The premise of such displacement is that adjudication would interfere with the federal framework; i.e., conflict with, or invade the field of, federal law. *See Davis*, 476 U.S. at 387–93. Given that interference, it can be inferred Congress intended to displace jurisdiction to adjudicate—to the extent it would interfere with federal law. *See id.* But nothing about state court dismissal of state law claims as expressly preempted conflicts with, assails, or invades any aspect of ERISA's statutory framework.

Indeed, it follows from ERISA's statutory scheme that state courts *should* dismiss on express preemption grounds without, in every case, first walking painstakingly through ERISA law to determine the type and availability of any federal claim that might be brought. Whether a claim is available under ERISA may, of course, be relevant to the express preemption analysis, *see supra* n.9, just as it is relevant to a conflict preemption analysis, *see McClendon*, 498 U.S. at 484–86. But ERISA's express preemption provision casts a wide net. And it may often be applied without answering the frequently complex question whether a claim is available under ERISA. Answering such questions could require fleshing out a great deal of ERISA law, the development of which (and often the application of which) Congress has left to federal courts.[10] Accordingly, this Court can, and should, hold Ms. Bourgeois's claims are expressly preempted, regardless of whether her claims are also otherwise preempted.

III. Moreover, Because Ms. Bourgeois's Claims Seek Benefits Under an ERISA-Governed Benefit Plan, This Court's Jurisdiction Is Not Displaced.

There is another basis for reaching that conclusion. Absent clear guidance from the Supreme Court, courts have struggled to understand when Congress's intent to preempt state law includes intent to displace state court jurisdiction. On the question of whether preemption under ERISA is jurisdiction-displacing, courts have come to a range of conclusions.[11] One line of reasoning focuses on the Supreme Court's choice of law versus choice of forum distinction with respect to *Garmon* preemption: "[W]hen a state proceeding or regulation is claimed to be pre-empted by the NLRA under *Garmon*, the

[10] This approach also properly leaves the burden on the plaintiff to determine whether she has a claim under ERISA. A defendant should not have to undertake that effort on the plaintiff's behalf—to investigate, discern, and outline any potential claim the plaintiff might have under ERISA—to obtain dismissal on the ground that the plaintiff's state law claims are expressly preempted.

[11] *Compare supra* n.6 (citing cases), *with Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003) (observing that many courts "have concluded that the defense of ERISA preemption in a benefits-due action may be waived if not timely raised" (citing cases)), and *Providence Hosp. v. Nat'l Lab. Union Health & Welfare Fund*, 412 N.W.2d 690, 694 (Mich. Ct. App. 1987) (concluding express preemption is a nonwaivable matter of subject matter jurisdiction, as to state law claim that could be restated as a claim for benefits under 29 U.S.C. section 1132(a)(1)(B)); *see also Baker Hosp. v. Isaac*, 391 S.E.2d 549, 551 (S.C. 1990) (appearing to reach the same conclusion as *Providence Hospital*).

issue is choice-of-forum rather than a choice-of-law question. As such, it is a question whether the State or the Board has jurisdiction over the dispute." *Davis*, 476 U.S. at 391. "If there is pre-emption under *Garmon*, then state jurisdiction is extinguished." *Id.*

Based on this language, many courts have held that when state action is preempted by federal law, but state courts have jurisdiction to apply that federal law, jurisdiction to adjudicate the state law claims is not displaced. *See, e.g.*, *Wolf v. Reliance Standard Life Ins. Co.*, 71 F.3d 444, 448 (1st Cir. 1995) (observing that "[i]t is instructive, though not necessarily dispositive, that ERISA … is a choice of law rather than a choice of forum statute"); *see also id.* at 449 ("ERISA preemption in a benefits-due action is waivable, not jurisdictional, because it concerns the choice of … law but does not implicate the power of the forum to adjudicate the dispute." (citing cases)); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003) (same); *Gorman v. Life Ins. Co. of N. Am.*, 811 S.W.2d 542, 545–46 (Tex. 1991) (same); *Hughes v. Blue Cross of N. California*, 215 Cal. App. 3d 832, 849, 263 Cal. Rptr. 850 (Ct. App. 1989) (same); *see also Saks*, 316 F.3d at 349 (observing that numerous courts "have concluded that the defense of ERISA preemption in a benefits-due action may be waived if not timely raised" (citing cases)).[12]

Under this approach, this Court retains subject matter jurisdiction regardless of whether Ms. Bourgeois might have sued under ERISA's civil enforcement scheme. As

[12] It is not clear how this distinction ties back to the question of congressional intent—*i.e.*, how it may be inferred that Congress intends to displace state court jurisdiction over a *state* law claim depending on whether Congress intends state courts to have concurrent jurisdiction to adjudicate the *federal* claim. But, left with little guidance, this is the way several courts have attempted to make sense of *Garmon*, as construed in *Davis*.

explained below, all of Ms. Bourgeois's claims seek benefits under an ERISA-governed benefit plan. And state courts have concurrent jurisdiction to adjudicate such claims.[13]

All of Ms. Bourgeois's claims seek as damages the benefits she allegedly would have received under Horizon's ERISA-governed benefit plan, but for the conduct of which she complains. Aplt. Br. at 2, 8–9, 11, 40–42; Aplt. Reply Br. at 13. Some of Ms. Bourgeois's claims seek those benefits based on state common law regarding negligent misrepresentation, concealment, or vicarious liability, and those claims appear to be based on a breach of fiduciary duty theory. *See* Aplt. Br. at 37–38, 40. Ms. Bourgeois's other claims allege breach of contract, where the only contract (or promise) at issue is the contract (or promise) provided by Horizon's benefit plan. Aplt. Br. at 9; Aplt. Reply Br. at 20–21. But regardless of the underlying theories, all of Ms. Bourgeois's claims are essentially claims for benefits under the terms of an ERISA-governed benefit plan.[14]

Accordingly, even *if* Ms. Bourgeois had standing as a participant or beneficiary to bring a claim under ERISA, this Court would have concurrent jurisdiction over any claims she pursued seeking benefits under the terms of Horizon's benefit plan. Accordingly, any preemption that follows from ERISA's civil enforcement framework

[13] For the same reason, this Court would have jurisdiction to dismiss Ms. Bourgeois's claims as expressly preempted even if complete preemption were a jurisdiction-displacing doctrine.

[14] *Cf. Hogan v. Jacobson*, 823 F.3d 872, 879 (6th Cir. 2016) (concluding that "[a] claim is within the scope of § 1132(a)(1)(B)" for complete preemption purposes if "(1) the plaintiff complains about the denial of benefits to which he is entitled only because of the terms of an ERISA-regulated employee benefit plan; and (2) the plaintiff does not allege the violation of any legal duty … independent of ERISA or the plan terms" (citation and internal quotation marks omitted)).

would not displace this Court's subject matter jurisdiction.[15] And, for the reasons set forth above, this Court should dismiss those claims as expressly preempted under 29 U.S.C. section 1144(a).

CONCLUSION

For the forgoing reasons, Appellants respectfully request that this Court reverse the district court's ruling and grant summary judgment dismissing all of Ms. Bourgeois's claims.

DATED this 20th day of December, 2021.

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[15] If Ms. Bourgoeis's allegations were construed as giving rise to a different type of ERISA claim, this Court would lack jurisdiction over the federal claim. Under the above approach, *all types* of ERISA preemption would then be nonwaivable. But neither *McClendon* nor *Egelhoff* suggests express preemption is jurisdictional based on a parsing of potential ERISA claims. Expressly preempted claims are dismissed on the merits.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the Utah Supreme Court's twenty-five page limit, as provided in the Court's October 29, 2021 Supplemental Briefing Order.

2. This brief complies with Utah Rule of Appellate Procedure 21(g) governing public and private records.

DATED this 20th day of December, 2021.

RAY QUINNEY & NEBEKER P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2021, true and correct copies of **SUPPLEMENTAL BRIEF OF APPELLANTS RESOURCE MANAGEMENT, INC., HORIZON REALTY ADVISORS, AND ERIC LAGERQUIST** were sent via email to the following:

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